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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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.

PETITIONER GIBBS INTERNATIONAL, INC.'S BRIEF

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2. Whether the Court of Appeals' opinion conflicts with, and misapplies, existing precedent by re-drafting and interpreting the counterclaim to be for "intentional interference with contract" when the claim was expressly described as being for "tortious interference with economic interest" and it is undisputed that the claim nowhere alleges the required element of the intentional procurement of the breach of an existing contract.

3. Whether the Court of Appeals' opinion conflicts with, and misapplies, existing precedent because when "solely" looking at the allegations "on the face" of the pleading and reasonable inferences based "solely" on those allegations, necessary allegations are indisputably absent and the only way to save the claim was by an improper and unjustified amendment.

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5. Whether the Court of Appeals erred in refusing to affirm the circuit court's denial of the Harake Appellants' motion to amend their pleadings because the proposed amendment would result in undue delay and extreme prejudice to Petitioner caused by the inclusion of a brand new, completely unrelated claim when the case was to be ready for trial.

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STATEMENT OF THE CASE

On March 7, 2017, Gibbs International, Inc. ("Gibbs") initiated the underlying matter by filing its original complaint against Sarmad Harake ("Harake"); Eurosa, Inc. ("Eurosa"); and Katherine Harake ("K. Harake") (Harake and Eurosa collectively are the "Harake Appellants") and asserting claims regarding issues arising out of the business relationship between Gibbs and the Harake Appellants.[1] In the pleadings, Gibbs alleged that it entered into an agreement (the "Agreement") with the Harake Appellants whereby the Harake Appellants agreed, among other things, to identify and evaluate viable investment opportunities, make and manage investments, make capital contributions, and invest funds to support the work under the Agreement. (App'x pp. 233–248). However, the Harake Appellants breached the Agreement by, among other things, misappropriating money, failing to locate sufficient investment opportunities, failing to provide or locate additional capital, failing to properly manage the investments, and failing to manage Gibbs' money. (App'x pp. 234–242).

After filing the original complaint, Gibbs amended the complaint twice, with the Second Amended Complaint being filed on June 9, 2017. (App'x p. 249). Harake, Eurosa, and K. Harake answered the Second Amended Complaint. (App'x p. 287). Harake and Eurosa asserted counterclaims against Gibbs. (App'x p. 287). Thereafter, the parties engaged in extensive discovery.

In the course of discovery, Gibbs produced over 200,000 pages of records and the Harake Appellants produced over 30,000 pages. (App'x p. 676). The parties took sixteen (16) depositions, including evidentiary depositions of witnesses in Moscow, Mexico, California, and other locations. Included in that discovery was Gibbs' July 25, 2019 deposition of Harake. During his deposition,

[1] Katherine Harake was voluntarily dismissed from the litigation but brought back in as part of the third amended complaint. She is not a party to this appeal.

Harake testified that Gibbs refused to become financially involved with Paysend UK, an entity located in the United Kingdom that is not mentioned in Harake's original Answer and Counterclaim. (App'x pp. 287–316). He stated that other investors did not want Harake involved in Paysend UK while he was in a dispute with Gibbs. (App'x p. 649; 290:10–24). While agreeing to produce documentation regarding a loan, Harake stated, "Actually it will be part of . . . the next phase, because there's a big damage that you caused me." (App'x pp. 649–652; 290:10–293:23). When asked for the amount of his damages, Harake's counsel objected and instructed him not to answer the question on the ground that it related to information protected by the attorney work-product doctrine. (*Id.*).

As a result of information obtained in the course of discovery, Gibbs filed a Third Amended Complaint. (App'x pp. 454–485). On August 24, 2020, the Harake Appellants filed their Answer to the Third Amended Complaint and Amended Counterclaims asserting—for the first time—a new counterclaim for "tortious interference with economic interest." (App'x pp. 518–520, ¶¶ 191–204). This counterclaim was asserted three (3) years and five (5) months after the litigation was filed. At the time it was asserted (August 24, 2020), the governing scheduling order provided that discovery was to be complete by December 7, 2020. Expert identification was to be completed by January 2020 for Gibbs and February 2020 for the Harake Appellants, both of which had already passed. (App'x p. 227). Moreover, the scheduling order stated that the case was to be ready for trial on or before January 4, 2021. (App'x pp. 190–191).

The Harake Appellants' counterclaim for "tortious interference with economic interest" (the "Fourth Counterclaim") alleged that Gibbs, Eurosa, and another investor in a United States entity known as Paysend Processing came to an agreement on the capital investments Paysend Processing needed. (App'x pp. 518–520). The Harake Appellants alleged that Gibbs agreed to invest $1 million in Paysend Processing but, despite their purported agreement, Gibbs later refused

to invest more than $250,000 in the company. (App'x p. 518). They also alleged that Gibbs knew Harake was the appointed director of Paysend UK and had acquired a 100% interest in it. (App'x p. 519). The Harake Appellants further alleged that Gibbs had a meeting with a potential investor that caused the investor to renege on his investment. (App'x p. 519). The Harake Appellants further contended that Gibbs refused to allow another investor to buy it out of Paysend Processing or to transfer its investment in Paysend Processing to Paysend UK, which would have rolled the two entities into one. (App'x p. 519). The Harake Appellants stated Gibbs' unjustified refusal forced Harake to purchase the other investor's shares in Paysend Processing and to divest his shares of Paysend UK, and if Gibbs had agreed to combine Paysend Processing and Paysend UK, Eurosa would have owned 6.5% of the combined businesses. (App'x p. 519). They also alleged Gibbs' refusal to allow the other investor to buy Gibbs out of Paysend Processing or to roll Paysend Processing into Paysend UK led to Harake's interest in Paysend UK being diluted because he was unable to participate in the later rounds of investments made by other Paysend UK investors. (App'x p. 520).

The Harake Appellants' Third Amended Answer and Amended Counterclaims do not use the words "intentional procurement of a breach of an existing contract," "intentional interference," or "intentional" anywhere in the entire thirty-six (36) pages of the pleading. (App'x pp. 486–521). The factual basis for the counterclaim was entirely new and presented facts not previously addressed in Harake Appellants' prior counterclaims. By way of example, Paysend UK's name was not used a single time in the Harake Appellants' prior pleadings. (App'x pp. 287–316).

Gibbs filed a Motion to Dismiss in response to the Harake Appellants' Answer to the Third Amended Complaint and Amended Counterclaims. (App'x p. 522). A hearing was held on September 22, 2020. (App'x p. 653). On September 25, 2020, the circuit court entered a Form 4

Order (the "September 25 Order") directing the preparation of an order, among other things, dismissing the Harake Appellants' Fourth Counterclaim. (App'x p. 187).

The Harake Appellants filed a Motion to Alter or Amend on October 5, 2020. (App'x p. 622). The Motion to Alter or Amend included a request for leave to amend the Fourth Counterclaim pursuant to Rule 15, SCRCP. (App'x pp. 629–30). However, the Harake Appellants submitted no proposed pleading or restatement of any purported claim to the circuit court in support of its request for leave to file an amended pleading.

On November 18, 2020, the circuit court entered an order (the "November 18 Order") dismissing the Harake Appellants' counterclaim for "tortious interference with economic interest." (App'x p. 190). The circuit court also rejected the verbal request made at the hearing for the Harake Appellants to be allowed to amend their pleadings. The circuit court also noted that it would address the amendment issue if raised by way of subsequent motion. (App'x pp. 207–208).

The November 18 Order also found that the dismissal/striking of the Fourth Counterclaim was appropriate pursuant to Rule 12(f), SCRCP, because of Harake's refusal to answer certain deposition questions about his claim pursuant to an instruction not to answer by counsel. The circuit court concluded that because the Harake Appellants did not move for a protective order with regard to certain questions that related to what eventually became the Fourth Counterclaim, the counterclaim should be dismissed or stricken. (App'x pp. 208–209). Prior to the circuit court dismissing that counterclaim, Gibbs had given notice to the Harake Appellants that a protective order motion was necessary. Gibbs did so when it filed its motion to dismiss/strike, when it gave notice in open court during the hearing on September 22, 2020, and with the submission of the proposed order on this issue on November 2, 2020. (App'x pp. 208–209). 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. (App'x pp. 208–209).

The hearing on Gibbs' Motion to dismiss/strike was held on September 22nd and the 29-page Order dismissing the claim was entered on November 18, 2020. The Harake Appellants filed a Motion to Alter or Amend the circuit court's order, which was denied on November 30, 2020. The Harake Appellants filed a Notice of Appeal on December 17, 2020.

On November 13, 2024, the Court of Appeals issued an opinion reversing and remanding the circuit court's dismissal of the Harake Appellants' counterclaim for "tortious interference with economic interest." Gibbs filed its petition for a writ of certiorari on April 10, 2025. This Court granted Gibbs' petition on November 18, 2025.

INTRODUCTION TO ARGUMENTS

I. Overview of breaches of fiduciary duties and misappropriation of money and judicial re-drafting of a non-recognized claim.

This matter involves claims by Gibbs of shameful breaches of fiduciary duties and misappropriation of money, among other things, by the Harake Appellants, among others, resulting in millions of dollars of losses to Gibbs. The issue before the Court is whether the Court of Appeals erred in reversing the circuit court's order dismissing the Harake Appellants' counterclaim for "tortious interference with economic interest"—a claim that is not recognized under South Carolina law. Rather than simply affirming the dismissal of a cause of action that is not recognized under South Carolina law, the Court of Appeals re-drafted the Harake Appellants' cause of action to change it into a claim for intentional interference with existing contract. This blue-penciling conflicts with existing precedent by transforming the claim for "tortious interference with economic interest" into a purported claim for intentional interference with an existing contract.

If the Court of Appeals is permitted to re-draft the Harake Appellants' counterclaim, the result will be that a claimant can simply plead one of many unique and distinct business torts and then convert it at will to whatever other tort it chooses to suit the party's particular purpose at that moment. Such a result is plainly unfair to Gibbs, which is entitled to meaningful notice of the

claims asserted against it. The unfairness is exponentially unjustified when it takes place long after expert deadlines have passed and the case is to be ready for trial.

II. Evisceration of the distinction between business torts.

The Court of Appeals' opinion eviscerates the distinctions between individual business torts. The different claims are "individual" because they are unique and the legal elements are different. The opinion enables unbridled abuse of the pleading process knowing it does not matter how a claim is pled because it can be rescued in the end by judicial blue-penciling.

The error in redrafting the Harake Appellants' pleading was further compounded by the fact that the Court of Appeals decided that not only was the Harake Appellants' counterclaim one for intentional interference with contractual relations, but that the pleading supported such a claim. If the Court of Appeals is permitted to re-draft and craft its own interpretation of the Harake Appellants' counterclaim, then the Court of Appeals erred in refusing to affirm the dismissal of that claim because the pleading contains no allegation that Gibbs intentionally interfered with and procured the breach of an existing contract—a required, pivotal element of such a claim.

III. Indisputable prejudice arising from amendment by judicial blue-penciling.

The Court of Appeals also erred in refusing to address the merits of the circuit court's denial of the Harake Appellants' motion to amend their pleading. This Court should affirm the circuit court's denial of the Harake Appellants' motion to amend their pleading because to allow otherwise would run afoul of, and circumvent, decades of precedent prohibiting amendments that cause undue delay and prejudice—both of which undeniably exist in this case. *See Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 236, 754 S.E.2d 714, 719 (Ct. App. 2014) (stating that it is proper to deny a motion to amend a pleading that will result in prejudice and delay of the proceedings). This case also presents the opportunity for the Court to clarify *Skydive Myrtle Beach*

v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019), and explain that it does not overrule *Holland* and that the rule prohibiting prejudicial amendments is alive and well.

IV. The Harake Appellants' trampling of the scheduling order and extraordinary prejudice to Gibbs.

It is critical to note that the circuit court had issued a scheduling order that called for the disclosure of experts in January and February 2020, closed discovery in December 2020, and required the case to be ready for trial as of January 4, 2021. Despite the deadlines set forth in the scheduling order, the Harake Appellants asserted this new purported counterclaim—which interjected a brand-new allegation about an issue never previously raised in the pleadings and that would require additional international discovery and the retention and disclosure of new experts. Thus, this was no Rule 12(b)(6) dismissal of a claim at the outset of the litigation but, instead, the dismissal of an untimely counterclaim that was asserted entirely too late. The following are examples of the undue delay and extraordinary prejudice that will result if the counterclaim is allowed to proceed:

- Adding $22 million in new damages on a claim completely unrelated to prior claims;
- Requiring written discovery on the new issues after the appeal including, but not limited to, the service of international subpoenas, a very time consuming process;
- Requiring new experts to be located and identified after Harake and his witnesses are deposed on this new claim;
- Requiring motions to compel (based on prior experience) to obtain needed documents; and
- Returning the parties to the "starting gate" when they were in the "final turn."

These factors demonstrate prejudice and bar the Harake Appellants from pursuing the amended pleading at this stage of the case.

V. Futility: Independent ground justifying dismissal.

The Court of Appeals' opinion also overlooked the independent ground for dismissal that the claim is futile because, among other points raised in more detail below,

- 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 one entity to another.
- The exercise of a legal right by a party to a contract does not provide a basis for a claim of intentional interference with contract even if the exercise of the legal right causes another not to perform under a contract.
- No claim for intentional interference with contract can exist for an alleged breach by a party to the contract.
- The filing of litigation is not a basis for pursuing a claim for intentional interference with contract.

As a result, any amendment should be denied based on futility independent of the undeniable prejudice that exists.

VI. Violation of mandatory discovery obligations.

The Court of Appeals also erred in finding the dismissal/striking of the Fourth Counterclaim was also inappropriate due to the Harake Appellants' violation of a mandatory discovery obligation. Violation of mandatory discovery obligations provides the necessary foundation for imposing sanctions, and prejudice is "presumed" when mandatory duties are violated.

VII. The analytical framework and path forward.

Regarding the ultimate resolution of this appeal, Gibbs respectfully submits that the Court's analysis should be simple. The circuit court correctly dismissed the Harake Appellants' Fourth Counterclaim for "tortious interference with economic interest" on the ground that the claim has not been recognized under South Carolina law, as repeatedly admitted by the Harake Appellants. Since the unrecognized Fourth Counterclaim should have been dismissed, the next step is to determine whether the circuit court properly denied the Harake Appellants' request for leave to

amend their pleading. In considering whether the circuit court properly denied the Harake Appellants' request to amend their pleading, the Court should consider the undue delay in the Harake Appellants' decision to assert a new counterclaim, the prejudice created by such a late amendment, and the futility of asserting the new claim. The Harake Appellants' delayed assertion of their new purported claim causes extraordinary prejudice to Gibbs, and the assertion of this new claim is futile. Accordingly, the Court should affirm the circuit court's decision to deny the Harake Appellants' leave to file an amended pleading to assert a new counterclaim.

This process begs the question: how is a defendant to respond to a claim that has not been recognized under South Carolina law? If a party alleges a claim that has not been recognized, and courts are instructed to permit such claims to proceed under different legal theories, then is a defendant required to move to dismiss all possible claims that the claimant failed to allege properly, yet never mentioned in their pleading? The law should not require Gibbs to guess about the Harake Appellants' unstated intentions regarding their pleading. Neither should Gibbs be required to have moved to dismiss an unpled claim for intentional interference with contractual relations when the Harake Appellants unequivocally did not allege such a claim.

Moreover, if courts are permitted to revise pleadings to state new claims and alter the elements of a claim, parties like Gibbs have no way of knowing the elements of the claims being asserted against them, what evidence is relevant to dispute the claim, or the legal arguments available to defend against such claims. This places Gibbs and all similarly situated parties in a position of guessing what the claim being asserted *might* be, and the party asserting the claim is given a proverbial and prejudicial second, third, or fourth "bite at the apple" after filing an undeniably deficient pleading. The circuit court "got it right" and deserves this Court's support for dismissing a claim the Harake Appellants concede has never been recognized as a viable cause of action in this State. The underlying allegations do not support any recognized cause of action.

Gibbs respectfully requests that the Court of Appeals' opinion be reversed and that the circuit court's decision be affirmed.

STANDARD OF REVIEW

I. Rule 12(b)(6) Standard.

Rule 12(b)(6) permits dismissal of claims and counterclaims when the claimant fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. Dismissal is appropriate under Rule 12(b)(6) when the "facts alleged and inferences reasonably deducible therefrom" do not entitle the complainant to relief. *Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001).

In *Sloan Construction Company v. Southco Grassing, Inc.*, 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008), the court stated that "[t]he question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief." However, the court in *Sloan* considered whether the circuit court erred in dismissing the *entire action* pursuant to Rule 12(b)(6)—not one of several purported claims.

This case is distinguishable from *Sloan* because this appeal concerns the dismissal of one of four counterclaims—not the entire pleading. Consideration of this distinction is important, because if a litigant asserts multiple claims—including one admittedly unrecognized claim—circuit courts are placed in the inappropriate position of adopting the role as editor-in-chief, and re-drafter, of the pleading as it searches through multiple claims to divine whether an additional unpled claim is buried within the pleading.

II. Rule 12(f) Standard.

In ruling on a motion to strike, the court, in its discretion, must determine "whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what

has been pleaded." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). Where the pleaded cause of action does not exist under South Carolina law, it is appropriate to strike the claim. *Robinson v. Code*, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009).

III. Rule 15 Motion to Amend Standard.

The decision of whether to grant a motion to amend a pleading "is within the sound discretion of the trial court and will rarely be disturbed on appeal," and the circuit court's decision "will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997) (emphasis added). Denial of a motion to amend a pleading is within the circuit court's sound discretion and denial of such a motion is appropriate if the responding party would be prejudiced by the amendment. *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014). "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." *Id*. at 235, 754 S.E.2d at 719.

IV. Rule 37 Standard.

Courts review sanctions issued pursuant to Rule 37, SCRCP, for an abuse of discretion. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). The party appealing a sanction "carries the burden of proving an abuse of discretion occurred." *McNair v. Fairfield Cnty.*, 379 S.C. 462, 465–66, 665 S.E.2d 830, 832 (Ct. App. 2008).

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S DISMISSAL OF THE COUNTERCLAIM FOR "TORTIOUS INTERFERENCE WITH ECONOMIC INTEREST."

A. The error was in not affirming the dismissal of a claim never recognized as a viable cause of action in South Carolina.

A claim that is not recognized under South Carolina law should not be permitted to survive a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. *See Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007) (affirming the dismissal of a cause of action for intentional infliction of emotional distress based on bystander liability because the claim is not recognized under South Carolina law). Under Rule 12(b)(6), it is appropriate to dismiss a cause of action when a party fails to state facts sufficient to constitute a cause of action. Therefore, dismissal of such a purported claim is appropriate when a party's claim (or counterclaim) is premised on a cause of action that has not been recognized in South Carolina. Simply put, a party cannot state facts sufficient to constitute a cause of action when the cause of action asserted has not been recognized in the state where it is pled.

What would be expected of the circuit court when confronted with a claim everyone agrees has not been recognized under South Carolina law? Dismiss it. The circuit court was right and properly dismissed the unrecognized claim. Any other result places defendants in the untenable position of responding to a claim that has not been recognized in South Carolina and guessing as to the elements this state may decide are required to be pled to state such a claim. If the circuit court is required to (1) recognize a new claim and (2) decide the elements of such a claim, there is a substantial risk of different courts creating and considering different elements for the same cause of action.

In this case, the Harake Appellants themselves have repeatedly admitted the counterclaim they refer to as "tortious interference with economic interest" has not been recognized in South

Carolina. (App'x p. 95 n.4). As a result, the circuit court correctly found, among other things, that "the [F]ourth [C]ounterclaim for relief is dismissed because the claim that [the Harake Appellants] chose to assert is not recognized in South Carolina." (App'x p. 207). Accordingly, the Court of Appeals erred in reversing the circuit court's dismissal of the Harake Appellants' counterclaim and Gibbs respectfully requests that this Court affirm the dismissal of the Harake Appellants' counterclaim.

B. Judicial reinvention of a claim by re-drafting and adding an entire pivotal element of a claim is an error of law.

The Court of Appeals tried to salvage the counterclaim by re-drafting it into something that it plainly is not. 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); *see also Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) (stating that, in ruling on a motion to dismiss, a court must rely "solely on allegations set forth in the complaint"). The Court of Appeals' re-drafting of the counterclaim violates this established principle. *See Martin*, 2018 WL 11462188, at *1; *see also Peterson v. Burgess*, No. CIV.A. 7:14-141-TMC, 2015 WL 4644465, at *3 (D.S.C. Aug. 4, 2015) (stating that a "court may not rewrite a complaint to include claims that were never presented"); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Rather than affirming the dismissal of the Harake Appellants' unrecognized counterclaim for "tortious interference with economic interest," the Court of Appeals stepped into the shoes of the Harake Appellants and decided which claim they were alleging. In doing so, the Court of

Appeals violated the principle that "the plaintiff is the master of his own complaint." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 615, 879 S.E.2d 746, 757 (2022).

Gibbs, a counterclaim defendant, and others defending claims in similar situations should not be put in the position of responding to alterations in the pleadings by a court when an entire element of a cause of action is added by the court. The South Carolina Rules of Civil Procedure provide a method of amending pleadings (Rule 15, SCRCP), and the Court of Appeals should have affirmed the dismissal of the Harake Appellants' claim and then considered whether the circuit court properly denied the Harake Appellants' request to amend their pleading.

C. The Harake Appellants failed to state a claim for intentional interference with contractual relations.

To the extent the Court considers whether the Harake Appellants' pleading states a claim for intentional interference with contractual relations—a claim that is not set forth on the face of the pleadings—the Court should affirm the circuit court's dismissal on the ground that the Harake Appellants failed to state facts sufficient to constitute a cause of action.

Dismissal of a cause of action pursuant to Rule 12(b)(6), SCRCP, must be based "**solely on allegations set forth in the complaint**." *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (emphasis added). "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." *Id*. 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. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (stating legal conclusions pled in a complaint can be disregarded on a motion to dismiss); *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013) ("It is now well established that mere conclusory and speculative

allegations are not sufficient to withstand a motion to dismiss. As the Supreme Court has stated, to withstand a motion to dismiss, a complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))); *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd.*, 213 F.3d 175, 180 (4th Cir. 2000) (stating that although a court must "take the facts in the light most favorable to the plaintiff," a court "need not accept the legal conclusions drawn from the facts" and "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments" (emphasis added)).

"To establish intentional interference with a contractual relationship[,] the plaintiff must prove: (1) a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) the damage resulting therefrom." *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993) (emphasis added). In the case at hand, it is inescapable that—based "solely" on the allegations set forth in the pleading at issue—the Harake Appellants failed to state a claim for intentional interference with contractual relations. The Harake Appellants never—not once—use the word "intentional," much less the words "intentional procurement of a breach of contract," in their thirty-six-page pleading. Plain and simple, the required allegations absolutely are not present here.

Review of the Harake Appellants' Fourth Counterclaim demonstrates that it does not state a claim for intentional interference with a contractual relationship. The Harake Appellants' pleading references an agreement with Gibbs regarding capital investment in Paysend Processing—an alleged contract. (App'x pp. 518–19). Critically, the Paysend Processing contract cannot provide the basis for the claim because there can be no claim for intentional interference as to a contract to which the defendant is an alleged party. *See Callum v. CVS Health Corporation*, 137 F. Supp. 3d 817 (D.S.C. 2015); 30 S.C. Jur. Torts § 18.

While the Harake Appellants are not required to use "magic words" to state a claim, they are still required to allege facts supporting the pivotal, fundamental element of their claim—the intentional procurement of a breach of an existing contract. *See Kinard*, 315 S.C. at 240, 433 S.E.2d at 837 (listing the elements of a claim for intentional interference with a contractual relationship). Intentional procurement of a breach of an existing contract is not a "magic word." It is a substantive requirement, and the key element, to state a claim for intentional interference with contractual relations.

Review of the Harake Appellants' pleading—in particular paragraphs 193, 194, 197 and 198—demonstrates that the required allegation is not present. (App'x pp. 518–19). In fact, the pleading merely alleges that Gibbs—acting within its rights—simply chose not to transfer its own investment in Paysend Processing to another entity—Paysend UK. There is no allegation of deliberate, intentional malintent or that Gibbs had the obligation—contractual or otherwise—or any legal duty to sell its interest in Paysend Processing or allow its investment in Paysend Processing to be rolled into Paysend UK. Thus, even when reading all of the allegations in a light most favorable to the Harake Appellants, there is no assertion, either explicit or implicit, that Gibbs *intentionally* procured the breach of an existing contract. Again, the Harake Appellants never even stated the required element of the claim—"intentional procurement of the breach of an existing contract," or use the word "intentional," much less the words "intentional interference."

It is also important to note that despite the Harake Appellants' prior argument to the contrary, incorporating the other allegations in the complaint by reference into the claim at issue in this appeal is insufficient to save the claim. The fatal defect in this argument is that even a cursory review of the other allegations concerning Paysend UK establishes that those other allegations do nothing to further advance the claim at issue for these reasons:

1. The only new allegations in the other paragraphs of the counterclaim relating to Paysend UK that were not mentioned in the Fourth Counterclaim itself were:

a. "In November 2016, Counterclaim Plaintiffs Sarmad Harake and Eurosa, Inc. entered into loan agreements with International Holding AG for the principal amount of One Million Three Hundred Ninety Thousand ($1,390,000), which was in turn invested to acquire a 100% interest in Paysend UK." (App'x p. 512, ¶ 154)

b. Harake alleged in the Fourth Counterclaim that he was forced to divest his shares in Paysend UK and one of the paragraphs outside the body of the subject claim recites that he sold "his 1.16% interest in Paysend UK to that other investor in November 2018 for Two million Eighty-Five Thousand One Hundred Sixty-Seven and NO/100 dollars ($2,085,167)." (App'x pp. 512–513, ¶ 159)

c. "Counterclaim Plaintiffs then had to pay the other investor: One Hundred Forty-Nine Thousand Dollars and NO/100 ($149,000) for the expenses incurred by the other investor in Paysend and One Hundred Thirty-Six Thousand and Three Hundred ($136,300) related to the investor's Paysend shares." (App'x p. 513, ¶ 160)

2. There is nothing in these allegations that revives the claim as they merely provide some additional factual information. Nowhere—not once—do these allegations even bother to use the following words: "intentional procurement of the breach of an existing contract," "intentional interference," or "intentional".

3. None of the issues as to Paysend UK were addressed in Harake's original counterclaims.

4. Finally, "Paysend UK" is not even mentioned a single time in Harake's original counterclaims or in the rest of that 36-page answer.

As a result, the Court of Appeals erred in reversing the circuit court's dismissal of the Fourth Counterclaim.

II. THE COURT HAS THE AUTHORITY TO STRIKE A CLAIM NOT RECOGNIZED UNDER SOUTH CAROLINA LAW.

Motions to dismiss pursuant to Rule 12(b)(6) and motions to strike pursuant to Rule 12(f) are based on different grounds under the Rules. However, as stated by the court in *Robinson v. Code*, 384 S.C. 582, 585, 682 S.E. 2d 495, 496 (Ct. App. 2009), a motion to strike challenging the theory of recovery is "comparable" to a motion to dismiss. This comparison means that courts apply similar analytical frameworks when evaluating whether pleadings state viable legal claims.

However, there are differences in the court's analysis of a motion to strike. When ruling on motions to strike that challenge theories of recovery, "a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Id.* (quoting *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990)). This distinction emphasizes that the focus remains on legal viability rather than factual sufficiency, consistent with notice pleading principles. Significantly, the *Robinson* court also explained:

> [T]he matter of striking from a pleading is largely within the discretion of the trial judge. Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law.

Id. (emphasis added) (citation omitted).

In *Robinson*, the Court addressed a *tenant's duty* to notify, in writing, the landlord of a defective condition in order to trigger the private cause of action portion of Residential Landlord Tenant Act and affirmed the circuit court's order striking certain allegations because South Carolina "does not create a cause of action" for the alleged claim regarding the landlord's failure to provide smoke detectors. The mere fact that there was a statutory obstacle to the claim and no common law support of the claim does not mean the circuit court was divested of the power to strike a claim without recognition in South Carolina.

Again, the Harake Appellants have conceded that the claim they asserted in this case has not been recognized in South Carolina case law (or by statute, for that matter). (App'x p. 95 n.4). Thus, the circuit court was well within its authority to strike a claim never previously recognized under South Carolina common law by the Supreme Court or the Court of Appeals. Otherwise, a court could only strike a claim when there was a statutory obstacle to the claim, and there certainly is no such prohibition of the Court's power to strike a claim.

III. THE CIRCUIT COURT'S DENIAL OF THE HARAKE APPELLANTS' MOTION TO AMEND WAS PROPER AND WITHIN ITS DISCRETION.

Because the Court of Appeals reversed the dismissal of the Harake Appellants' counterclaim, it declined to rule on the circuit court's denial of the Harake Appellants' Motion to Amend pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999). As stated herein, the Court of Appeals erred in reversing the dismissal of the Harake Appellants' counterclaim; therefore, this Court should consider whether the circuit court abused its discretion in denying the motion to amend. The Court should affirm the circuit court because the Harake Appellants' untimely assertion of this new counterclaim will cause undue delay and prejudice to Gibbs.

A. Amendments are properly denied based on undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, and futility of the amendment, among other things.

A court may deny a motion to amend a pleading pursuant to Rule 15(a), SCRCP, based on "[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." *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*, 407 S.C. at 235, 754 S.E.2d at 719.

In *Holland*, the Court of Appeals affirmed the circuit court's denial of a plaintiff's motion to amend their pleadings, as the amendment would have prejudiced the defendant manufacturer because the moving party had the knowledge necessary to alert the admitted party to the existence of the issue, and the new claim would require additional depositions and the hiring of additional experts.

Similarly, in *Health Promotion Specialists, LLC v. South Carolina Board of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013), this Court held that the circuit court did not abuse its discretion in denying a motion to amend a pleading because the plaintiff's motion was untimely. There, the court considered the inexplicable delay between the filing of the original complaint and the plaintiff's motion to amend. The court affirmed the circuit court, which also found that "the amendment would unduly prejudice the [defendant] as it would be forced to defend against 'arguably new theories of the case when so much time ha[d] elapsed.'" *Id.* at 632, 743 S.E.2d at 812–13.

In *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), this Court distinguished *Health Promotion Specialists* from the facts and procedural history at issue in that case. Similar to *Health Promotion Specialists*, this case is entirely different from *Skydive*. First, *Skydive* holds that it is error to grant a Motion to Dismiss "without considering [a] request to amend the complaint." Here, as set forth in more detail in the next subsection of this brief, the Motion to Amend was considered twice—first at the September 22 hearing, and again in the written Motion to Amend contained in the Rule 59 motion filed on October 5, 2020. Gibbs' counsel even asked if the Harake Appellants were going to submit additional argument on that motion, and they said they would not unless the Court asked for it. (App'x p. 194). 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. The Harake Appellants had far more than an adequate opportunity (from September 22 until November 29) to try to amend and submit any additional filings they chose before the final order of dismissal was entered; however, they chose not to do so. *Skydive* simply holds that a party's request for leave to amend needs to be considered. *Skydive* does not mean that 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 or prejudice.

The Harake Appellants requested leave to amend pursuant to Rule 15(a) during the hearing on the Motion to Dismiss, (App'x p. 670 (stating "we would request that we be able to do that under Rule 15")), and again in their Motion to Alter or Amend, (App'x p. 630 (". . . the Harake Defendants request the opportunity to amend that counterclaim within 15 days as provided in Rule 15(a), SCRCP")). During the October 5, 2020 hearing on the Motion to Alter or Amend, the Harake Appellants unequivocally requested permission to amend under Rule 15. That Rule 15 Motion was subsequently denied. Thus, as established by *Holland* and *Skydive*, any consideration of the Harake Appellants' request for leave to amend must, necessarily, be judged under the Rule 15 standard. Very significantly, *Skydive* itself acknowledges that "'a proper reason' to deny a motion to amend could be 'bad faith, undue delay, or prejudice.'" *Id.* at 182, 826 S.E.2d at 588 (quoting *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C., 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988)). *Skydive* clearly does not overrule case law like *Holland*, establishing that undue delay and prejudice are proper grounds to deny an amendment.

B. The Harake Appellants' requested amendment is prejudicial to Gibbs.

1. The Harake Appellants should not be allowed to amend because doing so would be highly prejudicial to Gibbs.

As noted above, in *Holland*, 407 S.C. at 235–36, 754 S.E.2d at 719, amendment was denied because it was prejudicial since the moving party had the knowledge necessary to alert them to the existence of the issue, and the new claim would require additional depositions and the hiring of additional experts. The court also explained that "[p]rejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Id.* at 719; *see also Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

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

a. Additional delay will be necessary

First, Gibbs will have to serve written discovery; (based on prior experience and previous motions to compel that are in the record before this Court (App'x p. 379–389)) file additional motion(s) to compel to obtain complete responses and document productions; and depose Harake about this brand new claim. That examination will identify other witnesses who will have to be deposed, but Gibbs needs to be allowed to first depose Harake. Some witnesses identified will likely be in the United Kingdom, as that is Paysend UK's location. The examination will also identify other records that need to be produced and other third-party international subpoenas that need to be issued. The new claim would require additional discovery because it involves the following issues, among others, never previously raised in this case: the history and evolution of Paysend UK; Harake's involvement with and action as an alleged director of Paysend UK; Harake's alleged acquisition of an interest in Paysend UK; an alleged offer to buy Gibbs out of Paysend Processing or roll over its interest to Paysend UK; the alleged divestment of Harake's interest in Paysend UK; taking Paysend UK public and the related capital raise; complicated valuation issues and an economic analysis at different points in time of Paysend UK; alleged dilution of Harake's interest in Paysend UK; lending agreements with Harake for $1.39 million concerning his acquisition of an interest in Paysend UK; subpoenas to the foreign lender for all documentation concerning the loan, and subpoenas to Paysend UK. These issues just scratch the surface and arise out of only two of sixteen total pages of counterclaims asserted by Harake. None of these issues were addressed in Harake's original counterclaims.

Without the amendment, as noted above, very little additional time will be necessary to take the case to trial. Gibbs needs to depose Morris Gocial, a deposition to which Harake has

already agreed. Gibbs also has a pending motion to compel the continued deposition of Harake because he flatly, and unthinkably, refused to appear for continued examination about documents he produced after his deposition. (App'x pp. 382–383;446–447). The Harake Appellants have only requested one additional deposition.

b. A new claim was asserted.

Harake's "tortious interference with economic interest" 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 at least thirteen (13) months before the Fourth Counterclaim was asserted and was only waiting to file because he had not "finished calculating" the alleged damages. (App'x pp. 618–620; 650–651). Notably, however, that was no barrier to him proceeding with the claim at that moment, as claims are routinely filed before damages are finalized.

c. Additional expert identification.

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 but for this new claim only. The original expert deadlines passed in early 2020.

d. Extensive discovery has already taken place.

The equivalent of eighty-five banker's boxes of documents were produced by Gibbs alone. (App'x p. 676). Depositions of all experts and numerous others were taken.

e. Significant delay since the filing of the original claims.

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 manifestly unfair and highly prejudicial for Gibbs to have to defend a $22 million claim thrown in

after three and a half years of litigation, most of the depositions are taken, the expert deadline passed long ago, and the case was to appear on the trial roster.

The Harake Appellants were the architects of their late-stage amendment, and they should not be rewarded for their calculated, dilatory tactics with an unrelated claim being shoehorned in at this late stage. As noted above, the Harake Appellants were aware of this purported counterclaim for at least thirteen (13) months before asserting claims against Gibbs; however, 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 for such delay.

In spite of all the information that Harake had at the time of his deposition, Harake made no effort to move to amend to assert the claim in July 2019. No motion to amend was filed by Harake in August, September, October, November, or December of 2019. In December of 2019, after Harake finally produced documents showing K. Harake's improper use of Gibbs' money that was wrongfully transferred to her account, Harake still did not file a motion to amend. In January 2019, Harake consented to the amendment by Gibbs (though Harake breached the agreement shortly thereafter). Harake did not make his own motion to amend in January, February, March, April, May, June, or July 2020. Instead, the Harake Appellants waited until August 24, 2020 to file a claim about a situation they were well aware of in July 2019 at the time of Harake's deposition. This is a picture-perfect example of undue delay.

The Harake Appellants claim that there was nothing wrong with the delay and there was no undue prejudice because Gibbs amended its Complaint in August 2020. That is a completely misleading and inaccurate comparison. The First Amended Complaint was filed on May 3, 2017, adding claims as to K. Harake, among others. (App'x pp. 242–243). Discovery requests were served that same month seeking, among other things, bank records for accounts belonging to

Harake, K. Harake, and Eurosa. (App'x p. 524;343). Gibbs filed a Second Amended Complaint on June 9, 2017. (App'x pp. 249–286). After being threatened by the Harake Appellants and K. Harake with a claim under the South Carolina Frivolous Proceedings Act, Gibbs agreed to voluntarily withdraw its claim as to K. Harake so it could further investigate the claims. (App'x pp. 343–344; 347–348; 383; 387; 447; 451).

Both before and following that decision as to K. Harake, Gibbs diligently pursued the production of financial records of Harake, K. Harake, and Eurosa to determine if it could prove that funds were being inappropriately funneled to K. Harake and used inappropriately by her. (App'x pp. 343–349; 576, 582–585). In November 2018, after moving to compel, the Harake Appellants finally produced bank records of Harake and Eurosa. (App'x pp. 343–344). They did not produce the records requested as to the accounts of K. Harake in any form. (*Id*.). The Harake Appellants also did not produce the complete bank records, instead only producing heavily redacted statements from Harake's and Eurosa's accounts and nothing from K. Harake's accounts. (*Id*.). That same day, Gibbs moved to compel the complete production of unredacted financial records. (App'x pp. 317–320; 344). On April 19, 2019, the parties were informed that the circuit court ruled that Gibbs' motion to compel was granted and that Harake Appellants were required to produce all records in unredacted format, but the Harake Appellants still refused to produce the documents until the formal Order was entered in June 2019 (the "June 2019 Order"). (App'x p. 345). The language of the court's June 2019 Order provided:

> [T]he Court grants Plaintiff's Motion to Remove Redactions in Documents Produced by Sarmad Harake and Eurosa, Inc. and the unredacted documents should be produced within five days of this Order pursuant to the Confidentiality Order in place in this matter.

(App'x pp. 180–181). The June 2019 Order also provides:

> The Court notes that Gibbs can trace its funds to discover the accounts in which its funds were deposited and subpoena records of those accounts. Mrs. Harake's financial records could become

> discoverable if Plaintiff traces its funds to an account in Mrs. Harake's name.

(App'x pp. 343). The redacted bank records also did not paint a clear picture due to the redactions, among other things. First, what did Harake Appellants make efforts to redact in the set of documents produced with redactions? The redactions completely hid from Gibbs all transfers of Gibbs' money by Harake to his wife, K. Harake; these transfers totaled over $500,000. (App'x pp. 179–180; 343–344, 346–347; 576, 582). Harake testified that he decided himself which transactions were redacted. (App'x pp. 347; 635–635 at 19:2 – 21:10).

In addition, the unredacted Bank of America account records of Eurosa contained numerous online banking transfers with individual alphanumeric confirmation codes for each transaction that did not specify where Gibbs' money went. (App'x p. 345). These unredacted entries also contained some entries entitled "Customer Withdrawal Image" for some transactions that did not specify where Gibbs' money went. (*Id.*). Gibbs needed the unredacted records that were provided with the June 6, 2019 Production Set **and** the information as to what happened to the transactions labeled with alphanumeric codes and the Customer Withdrawal Images. (App'x pp. 347–349).

On July 25, 2019, Harake testified, conveniently, that he did not know where the money went for the transactions labeled with alphanumeric codes and/or Customer Withdrawal Images. (App'x pp. 346; 638–640, 642–644 at 149:18–150:9, 158:10–22; 160:2–14; 168:22–169:3). On August 1, 2019, Gibbs issued a subpoena to the Harakes' bank requesting information regarding the online banking transfers. (App'x p. 346). On August 9, the bank provided additional records that finally showed that over $500,000 of Gibbs' money was transferred from Eurosa's accounts to the savings account of K. Harake. (App'x p. 576; 345–346). This was after Harake testified he did not know where the money went and the records showed that he sent it to his wife.

Gibbs needed the bank records of K. Harake to determine where its money went from there and how it was used. These records still were not produced until December 2019. (App'x pp. 347–348). Just days after the production and confirmation that its money had been used inappropriately, Gibbs filed a motion to amend to assert additional claims. (App'x pp. 342–378). A hearing on the motion was originally scheduled for January 2020, then rescheduled to February 2020 at the request of the Harake Appellants. In February 2020, before the hearing, the parties reached an agreement allowing Gibbs to amend its complaint. Gibbs claimed that the Harake Appellants breached the agreement almost immediately, putting into motion another long process of negotiations.

Thus, it is nonsensical for Harake Appellants to argue that there is not any prejudice to Gibbs for its motion to amend in light of Gibbs' "recent" amendment. (App'x p. 630). Gibbs' motion to amend was filed in December 2019, just days after confirmation 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. (App'x p. 619; 651 at 292:3-5). 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. (App'x pp. 343, 347–348; 383, 387; 447, 451). The Harake Appellants were the architect of Gibbs' delayed amendment and their now late-stage amendment, and they should not be awarded 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 thirteen (13) months before asserting it 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.

In spite of knowing about the claim that Harake claims is worth in excess of $22 million, the Harake Appellants waited … and waited … and waited. Gibbs only learned of it during Harake's July 2019 deposition, and the Harake Appellants chose not to assert the claim until August 2020. Why would a party sit on a $22 million claim for such an extended amount of time? There is no good reason. Claims are routinely asserted before damages are finalized, so this was no excuse at all. The amendment should be denied due to undue delay alone.

Moreover, adding the untimely counterclaim was not excused simply because Gibbs amended its complaint. Gibbs' motion to amend its complaint was filed in December 2019—just days after a document production confirmed that its money had been used inappropriately. Conversely, Harake Appellants did not need more documents from Gibbs to assert their new claim—Harake admitted in his July 2019 deposition that he was just waiting to conclude "calculating" his damages before bringing the claim. (App'x pp. 619, 651). In stark contrast, Gibbs needed the bank records from Harake Appellants, which they had concealed through the discovery objection process. (App'x pp. 343, 347–348, 383, 387, 447, 451).

C. The Harake Appellants' proposed amendment is futile.

1. 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 one entity to another.

In addition to the above grounds for denying amendment, the proposed amendment is also futile. The Harake Appellants concede in the allegations of their own counterclaim that they would not have been damaged if Gibbs had agreed to allow other investors to buy Gibbs out of Paysend Processing or if Gibbs had agreed to roll Paysend Processing into Paysend UK. More specifically, the Harake Appellants allege:

> 198. Without justification, Counterclaim Defendant Gibbs refused for the other investor to buy Counterclaim Defendant Gibbs out of Paysend Processing or transfer its investment to Paysend UK so that the two entities could be rolled into one.

> 199. Thereafter, Counterclaim Plaintiff Sarmad Harake, personally and on behalf of Counterclaim Plaintiff Eurosa, was then forced to purchase the other investor's shares in PaySend Processing and to divest his shares in Paysend UK.
>
> 201. Had Counterclaim Defendant Gibbs agreed to roll Paysend Processing into Paysend UK, Counterclaim Plaintiff Eurosa would have owned 6.5% of the combined business, and its shares would be worth over $12 million today, given the current public value of Paysend UK.
>
> 202. Additionally, because Counterclaim Defendant Gibbs unjustifiably refused to allow the other investor to buy it out of Paysend Processing or to roll Paysend Processing into Paysend UK, Counterclaim Plaintiff Sarmad Harake's 100% interest in Paysend UK was diluted as he was unable to participate in the later rounds of investments made by the other investors in Paysend UK.
>
> 203. Counterclaim Plaintiff Sarmad Harake was diluted to a 1.16% interest in Paysend UK. Had Counterclaim Plaintiff Sarmad Harake been able to keep his founding shares, based on the public value of Paysend UK, those shares would have been worth over $10 million today.

(App'x pp. 519–520). Simply put, the Harake Appellants claim their damages were caused by Gibbs' alleged refusal to allow the other investor to buy Gibbs out or to agree for the shares of Paysend Processing to be rolled into Paysend UK. 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 its 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). If "there is no duty, the defendant is entitled to judgment as a matter of law." *Williams v. Preiss-Wal Pat III, LLC*, 17 F.Supp.3d 528, 535 (D.S.C. 2014).

More specifically, the Harake Appellants assert as part of their claim that Gibbs "refused to be bought out from the agreement or transfer its investment to Paysend UK so that the two entities could be rolled into one." (App'x p. 519). Gibbs had no legal duty, by way of contract or otherwise, to agree to be bought out or to transfer its investment to Paysend UK so the two entities could be rolled into one. The Harake Appellants have not asserted any claim against Gibbs that

Gibbs did agree to be bought out or to roll over its interest in Paysend Processing to Paysend UK. The lack of a duty to take this action entitles Gibbs to the affirmation of the circuit court's dismissal of the claim and denial of the motion to amend.

2. The exercise of a legal right by a party to a contract does not provide a basis for a claim of intentional interference with contract even if the exercise of the legal right causes another to not perform a contract.

In upholding the dismissal of a claim for intentional interference with contract, the Court in *Webb v. Elrod* concluded:

> The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party. The evidence presented by the Webbs does not create the inference that Mrs. Elrod acted in bad faith in contacting the third-party purchasers. Nor is there an inference that the purpose of her contact was to procure the breach of their contracts with the Webbs. We, therefore, hold as a matter of law the communications between Mrs. Elrod and the third-party purchasers were justified.

308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) (emphases added); *see also Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 812 S.E.2d 750 (Ct. App. 2018) (affirming the dismissal of a claim for intentional interference with contract because the defendant acted within its rights so there was no legal basis to show an intentional procurement of a breach of contract without justification).

The assertion and pursuit of legal rights does not provide a basis for a claim of intentional interference. *Santoro v. Schulthess,* 384 S.C. 250, 681 S.E.2d 897 (2010). Gibbs acted within its rights in declining to be bought out or to roll over its stock into Paysend UK. The Harake Appellants had no legal right to force Gibbs to be bought out or to the rollover, and as a result Gibbs is entitled to the dismissal of the claim for that reason as well.

3. No claim for intentional interference with contract can exist for an alleged breach by a party to the contract.

In *Gecy*, the court stated: "An action for tortious interference protects the property rights of the **parties to a contract** against unlawful interference by **third parties**." 422 S.C. at 520–21, 812 S.E.2d at 756 (emphases added). *See also Santoro*, 384 S.C. 250, 262, 681 S.E.2d 897, 903 (Ct. App. 2010) ("[T]o sustain a claim for intentional interference with business relations, the tortfeasor must be a 'stranger' to the business relationship at issue." (citing *Renden, Inc. v. Liberty Real Estate Ltd. P'ship III*, 444 S.E.2d 814, 818 (Ga. App. 1994))). Thus, a tortious interference with contractual relations claim does not lie for an alleged breach by a party to the contract.

The contract that they claim to have had in place was an alleged contract between Gibbs and the Harake Appellants regarding Paysend Processing: "Counterclaim defendant Gibbs, counterclaim plaintiff Eurosa, and the other investors in Paysend Processing had an agreement on the capital investments needed for Paysend Processing. As part of that agreement, Counterclaim defendant Gibbs agreed to invest $1 million." (App'x p. 518). That would involve an alleged breach of the purported agreement between the Harake Appellants, Gibbs, and another Paysend Processing investor named Abdul. The Harake Appellants also allege that Gibbs caused an investor in Paysend Processing to back out. (App'x p. 519). Again, that would involve an alleged breach of the purported agreement between the Harake Appellants, Gibbs, and Abdul. As a result, the Fourth Counterclaim arose out of the alleged agreement to which Gibbs was a party, requiring dismissal of the claim. Thus, the Harake Appellants' proposed amendment is futile and should not be allowed. It is also important to note that the Harake Appellants and the investor Abdul were allegedly involved with Paysend UK. As is noted in more detail below, it was Abdul who made the decision to "force" Harake out of Paysend UK. At the end of the day, there is no "stranger" to a breached contract here, as the same individuals were involved.

4. The filing of litigation is not a basis to pursue a claim for intentional interference with contract.

The reason that Harake testified an individual named Abdul "forced" him out of Paysend UK was because of this litigation between Gibbs and Harake. (App'x pp. 618–620; 648 at 289:6–25). Harake testified that he was forced out because Abdul indicated that he would be raising money and "the first question they ask you is 'Do you have any ongoing cases?'" (App'x pp. 618–620;649 at 290:12–16). Harake also testified Abdul said: "we don't want you involved because you have a case ongoing." (App'x p. 648 at 289:22-25 (emphasis added).

Case law is clear that the filing of litigation is not a basis for the type of claim the Harake Appellants have made in their Fourth Counterclaim for relief. For example, in *Pactiv, LLC v. Multisorb Technologies, Inc.*, a counterclaim was filed for tortious interference with business relations; the claim was thrown out and the court ruled:

> [T]he mere filing of a lawsuit cannot serve as a basis for a tortious interference claim when there has been no showing that the litigant knew or should have known the case was meritless or otherwise unjustified.

63 F.Supp. 3d 832, 842 (N.D. Ill. 2014). The bottom line is that Harake's theory of recovery is premised on him being "forced out" by this lawsuit, so the Fourth Counterclaim is futile and the circuit court's dismissal of the claim should be upheld. (App'x pp. 618–620; 648–649 at 289:1–290:25). Finally, no allegation has been made that Gibbs "knew or should have known the litigation was meritless or otherwise unjustified." *Pactiv*, 63 F.Supp. 3d at 842.

D. The Harake Appellants acted in bad faith.

Courts have routinely found that where "there has been no good explanation for undue delay in seeking amendment, motions to amend complaints, which were filed well into or after completion of the discovery process, and which would necessitate further expense and discovery on the part of the opposing party, or greatly modify the issues to be tried, have routinely been

denied." *Minor v. Northville Pub. Sch.*, 605 F.Supp. 1185, 1202 (E.D. Mich. 1985) (emphasis added). Additionally, delay in moving for leave to amend a pleading may be construed as bad faith and warrant denial of the motion. *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984).

Here, the Harake Appellants acted in bad faith in several ways. First, they waited inexcusably long to bring the Fourth Counterclaim, which they purport to be worth $22 million. Harake flatly admitted he knew about the claim before July 2019 and that he was just calculating his damages during his July 2019 deposition, wherein he testified about the claim until the examination was terminated by his counsel's instruction not to answer. (App'x pp. 618–620; 650–651 at 291:1 – 293:25). Thirteen months expired before he brought the claim.

Second, Harake personally directed the redaction of over $500,000 of transfers of Gibbs' money to his wife, K. Harake. (App'x pp. 346, 348; 635–637 at 19:2 – 21:10). These redactions hid the transfers from Harake to K. Harake. (App'x pp. 346–348). K. Harake continued refusing to produce her records even after an order was entered in June 2019, finally doing so in December 2019. (App'x pp. 317–320; 343, 347–349). Gibbs' "recent" amendment, which the Harake Appellants improperly attempt to use as justification for their late amendment, was attached to Gibbs' motion to amend in December 2019. (App'x pp. 342–378). Prior to December 2019, Gibbs made it clear that it wanted the records for that purpose and the Harake Appellants continued to refuse to produce the records in unredacted format. (App'x pp. 317–320; 343–344, 349). K. Harake refused to produce the records in any form. (App'x pp. 317–320; 343, 345, 347–349). The Harake Appellants also threatened a claim under the Frivolous Proceedings Act if Gibbs pursued a claim against K. Harake. (App'x pp. 343, 347–348; 383, 387; 447, 451). The Harake Appellants' bad faith is exemplified by the fact that Gibbs' discovery of more than $500,000 of hidden transfers to K. Harake and her subsequent, inappropriate use of that money drove the timing of Gibbs' amendment.

Third, the "recent" amendment is inconsequential because the Harake Appellants agreed to the filing of Gibbs' amendment.

Fourth, the delay was in bad faith because, in waiting to assert the Fourth Counterclaim, the Harake Appellants were doing nothing but playing the market in the hope that the value of Paysend UK would continue to rise. (App'x p. 650 at 291:3-5). This provided no legitimate basis for delay, however, as claims are routinely asserted before damages are finalized. Deliberate delay to try to manipulate market value and increase alleged damages is inappropriate.

Fifth, the new claim was both factually and legally independent of the Harake Appellants' other counterclaims. There were no prior allegations about Paysend UK. None.

Last, the inappropriate outcome if the Harake Appellants get their way is that they interject a $22 million counterclaim at the eleventh hour that is factually and legally independent of the other claims which will require additional discovery and re-opening the expert deadlines (as to the new claim only). This case had been pending for over four years when the Harake Appellants finally brought the Fourth Counterclaim. The new claim should have been bought long before then, and it is inappropriate to interject it at this late stage. As a result, the existence of bad faith by the Harake Appellants also justifies denial of the Motion to Amend.

IV. THE COURT OF APPEALS INCORRECTLY FOUND THE CIRCUIT COURT ERRED IN DISMISSING THE HARAKE APPELLANTS' COUNTERCLAIM FOR "TORTIOUS INTERFERENCE WITH ECONOMIC INTEREST" BASED ON THEIR VIOLATION OF THE DISCOVERY RULES.

The circuit court did not abuse its discretion in dismissing and/or striking the Fourth Counterclaim due to the Harake Appellants' violation of a mandatory discovery obligation. Specifically, the circuit court properly exercised its discretion and dismissed the Fourth Counterclaim because (1) the Harake Appellants did not file a motion for a protective order after Harake was instructed not to answer certain deposition questions about the Fourth Counterclaim, (App'x pp. 619–620; 651–652); (2) Gibbs gave the Harake Appellants' notice of the need to file

the required motion for a protective order, (App'x p. 524); and (3) Rule 30(j)(3), SCRCP, places a mandatory obligation on a party who is instructed not to answer a question to move for a protective order.[2]

The Harake Appellants were required under Rule 30(j)(3), SCRCP, to file a motion for a protective order. Violation of a court order is not required for sanctions to be imposed. *See Richardson on Behalf of 15th Circuit Drug Enf't 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 n.1, 362 S.E.2d 317, 318, n.1 (Ct. App. 1987). And prejudice is presumed where mandatory duties are violated. *Id.* Harake's refusal to answer deposition questions regarding the damages associated with the new counterclaim, coupled with the Harake Appellants' failure to comply with mandatory obligations over a period of three months, justify the dismissal/striking of the claim under Rules 12(b)(6), 12(f), and 37, SCRCP. *See* Rule 30(j)(9), SCRCP ("Violation of this rule may subject the violator to sanctions under Rule 37, SCRCP.").

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 and appellate courts of this State 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 "the intentional procurement of the breach of an existing contact," "intentional interference," "intentional," or similar language anywhere in its thirty-six-page Answer and Counterclaims. Their admission that the asserted claim was unrecognized, coupled with the

[2] The Court of Appeals correctly found the circuit court did not err in considering Gibbs' argument regarding sanctions under Rule 37, SCRCP, because such consultation would have been futile.

complete absence of any allegation of intentional conduct, made dismissal the appropriate and necessary result. It would be a great injustice to allow the Harake Appellants to file a claim they admit has never been recognized and then to re-draft it for them through the work of unsubstantiated inference.

This State recognizes certain individual business torts. Each of these torts has its own unique and independent characteristics. Relevant case law delineates those elements that must be pled (and ultimately proven). When intentional conduct is a required element of a claim, it is perfectly reasonable to expect it to be included in the pleading. The unfortunate result of the Court of Appeals' opinion in this appeal is that a claimant is not required to be concerned about what is actually pled with business torts (even when they admit it is not recognized under South Carolina law) and the courts will re-draft a business tort for the claimant and infer elements of the claim that are not pled.

The Harake Appellants argue that a Rule 12(b)(6) motion is to be treated the same at the outset of litigation as it is almost four years into the life of the case and when the case was subject to be ready for trial. That is nonsensical and why the outcome in *Skydive* and *Holland* are different. *Skydive* was at the outset of litigation when an amendment would not be prejudicial. In the case at hand, the operative scheduling order stated the case would be subject to trial as of January 4, 2021. (App'x p. 191). That date was not changed by subsequent order. The claim at issue asserted a brand-new claim involving brand-new facts that will require brand-new discovery, evidence, experts and increases the amount of alleged damages sought from $5,000,000 to $27,000,000. Plain and simple—the prejudice is extraordinary, and the *Holland* rule does not allow for an amendment under these circumstances.

For the foregoing reasons, Gibbs respectfully requests that this Court reverse the Court of Appeals and affirm the circuit court.

This 7th day of January, 2026.

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