

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

**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-002806

EMSER TILE, LLC,

Respondent,

v.

JOHN D. CATTANO,

Appellant.

RECORD ON APPEAL

John D. Cattano, *pro se*
P.O. Box 106
Columbia, SC 29202
803-381-5850

Anthony D. Hoefler, Esq.
Levi, Wittenberg, Harritt, Hoefler & Davis, PA
P.O. Box 730
Sumter, SC 29151
803-773-8431
Attorney for Respondent

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MAR 24 2014

SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-40-05587

Emsler Tile, LLC

John D. Cattano

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

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ORDER INFORMATION

SC Court of Appeals

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
Emsler Tile, LLC	John D. Cattano	\$ 77,965.24
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

S. K...

Judge Code 2-26

Date 11-20-13

For Clerk of Court Office Use Only

This judgment was entered on the 20 day of NOV, 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this 20 day of NOV, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

Anthony D. Hoefler

ATTORNEY(S) FOR THE PLAINTIFF(S)

Pro Se

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Jeanette W. McBride

Request for Admission as to the balance due and contended that Defendant was entitled to an off-set of Fifty-Four Thousand Nine Hundred Ninety-Six and 62/100 (\$54,996.62) Dollars for credit erroneously applied to pre-acquisition debt.

The Affidavit of Plaintiff's employee, Patrick Lyle, in support of Plaintiff's Motion for Summary Judgment sets forth the e-mail and fax authorization for employees of Triton Stone Group of Charlotte, Inc., a business acquired by Congaree Triton Acquisitions, LLC, to apply credits to specific invoices. Under the law of this State, a creditor must apply payments as instructed by the debtor, but absent a written designation or instructions from the debtor, the creditor may apply payments in its own discretion. See Wardlaw v. Troy, 74 S.C. 368 (1906).

Defendant's Affidavit asserts that pre-acquisition liabilities were responsibilities of the Sellers in its Asset Purchase Agreement and that no employee of Congaree Triton Acquisitions, LLC, could authorize payment of pre-acquisition debt. However, in his Third-Party Complaint, Defendant alleges that he was pressured by the Sellers to make payments of pre-existing debt to vendors and did so despite not being obligated to do so under the Asset Purchase Agreement.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452 (2001) (internal citation omitted). Rule 56 of the South Carolina Rules of Civil Procedure provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. While the Court is required to review the record in the light most favorable to the non-movant, "a Court cannot ignore facts unfavorable to the party and [it] must determine whether a verdict for the party opposing the Motion would be reasonably possible under the facts." Bloom v. Revoira, 339 S.C. 417, 423 (2000) (internal citation omitted). Where a party makes no factual showing in

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opposition to a motion for summary judgment, the Court is required to grant summary judgment under Rule 56 if, under the facts presented, the movant is entitled to judgment as a matter of law. Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, "the nonmoving party must come forward with specific facts showing there is a genuine issue for trial and cannot simply rest on mere allegations or denials contained in the pleadings". Roland v. Heritage Litchfield, Inc., 372 S.C. 161, 165 (Ct. App. 2007).

The Defendant, having failed to provide any evidence to refute the actual or apparent authority of employees of Congaree Triton Acquisitions, LLC to apply credits to pre-acquisition debt or to provide evidence establishing any specific directions from Defendant as to how those credits should have been applied, has not shown that there remains a genuine issue as to any material fact. Accordingly, Plaintiff's Motion for Summary Judgment is hereby **GRANTED** for the following amounts: those claimed due in the Complaint in the amount of Fifty-Five Thousand Two Hundred Sixty-Four and 24/100 (\$55,264.24) Dollars; interest of 18% per annum from the date of the last invoice of October 22, 2011 to October 8, 2013 totaling Nineteen Thousand Five Hundred Eleven and 00/100 (\$19,511.00) Dollars; court costs of One Hundred Ninety and 00/100 (\$190.00) Dollars; and attorney's fees of Three Thousand and 00/100 (\$3,000) Dollars. The amounts come to a total judgment of Seventy-Seven Thousand Nine Hundred Sixty-Five and 24/100 (\$77,965.24) Dollars.

IT IS SO ORDERED.

Columbia, South Carolina
November 20, 2013



G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

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⑤

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Emser Tile, LLC)

Plaintiff(s))

vs.)

John D. Cattano)

Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2012-CP-0005587

Submitted By: Anthony D. Hoefler
Address: 207 N. Washington St.
P.O. Drawer 730 Sumter, S.C. 29151

SC Bar #: 2547
Telephone #: 803-773-8431
Fax #: 803-775-9011
Other:
E-mail: lwhhd@ftc-i.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case #, Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)

- Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Administrative Law/Relief: Reinstate Drv. License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Other (799)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Comm. (990), Employment Security Comm (991), Other (999)
Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature:

[Handwritten Signature]

Date: August 13, 2012

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Emser Tile, LLC)
)
)
Plaintiff,)
)
vs)
)
John D. Cattano)
)
Defendant.)

Non-Jury
Suit on Guaranty

COMPLAINT

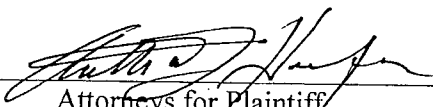
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2012 AUG 24 PM 5:08
RCSD
2012 AUG 16 AM 10:35
JENNIFER L. HARRISON
C.C.P. & G.S.

Plaintiff, complaining of the Defendant above named, alleges:

1. That, on information and belief, Defendant, John D. Cattano, is a resident of the County and State aforesaid and that the parties hereto are subject to the venue and jurisdiction of this Court.
2. That based upon the signed personal guarantee of Defendant, John D. Cattano, without which guarantee Plaintiff would not have extended credit and/or any other consideration, Plaintiff established an open account for Triton Stone Group of Charlotte a/k/a Congaree Triton Acquisitions, LLC, whereby the Corporation would be allowed to purchase on credit certain of its goods, wares and merchandise; a copy of said Guarantee being attached hereto and made a part hereof as if set forth herein in full.
3. That Triton Stone Group of Charlotte a/k/a Congaree Triton Acquisitions, LLC has filed for protection under Chapter 11 of the United States Bankruptcy Code, and is not a party to this action.
4. That, according to Plaintiff's books and records, the Defendant, John D. Cattano, is now indebted to Plaintiff in the amount of Fifty Five Thousand Two Hundred Sixty-Three and 24/100 (\$55,263.24) Dollars, all as appears by reference to the statement of account, a copy of which is attached hereto and made a part hereof as if set forth herein in full.
5. That said indebtedness is an account stated for a sum certain, that although duly demanded, no part of said account has been paid by cash, discount or otherwise, except that for which credit, if any due, has been given; and that said sum is now due and owing to the Plaintiff by the Defendant, John D. Cattano, plus interest at 18% on this indebtedness and attorneys' fees as provided in the said attached Guarantee.

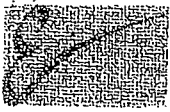
WHEREFORE, Plaintiff prays for judgment against Defendant, John D. Cattano, for the sums due as aforesaid, plus the costs and disbursements of this action.

LEVI, WITTENBERG, HARRITT, HOEFER & DAVIS

By 
Attorneys for Plaintiff
207 N. Washington Street
P. O. Drawer 730
Sumter, South Carolina
803 773 8431

June 27, 2012.

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2012 AUG 24 PM 1:09
RCSD



EMSER TILE, LLC

8431 Santa Monica Blvd. • Los Angeles, CA 90069-4294
Phone: (323) 650-2000 • Fax: (775) 522-7927

Application for Credit

2012 AUG 24 PM 1:09

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RCED

Which Emser branch do you wish to do business with? _____
To purchase on credit from Emser Tile, LLC, the following true and correct statement is submitted:

Firm Name Triton Stone Phone No. (704) 583-1328 Fax No. (704) 583-1329

Date Established 2011 Corporation Partnership _____ Limited Partnership _____ Individual _____

Number of Branches/stores 2 Please list addresses on a separate sheet (including Parent Co.)

Number of Employees 21 Office Address 11415 Granite St Suite B City Charlotte State NC Zip 28273

Billing Address SAME City _____ State _____ Zip Code _____

Type of Business: Department Store _____ Dealer/Distributor _____ General Contractor _____ Sub-Contractor _____

Other _____ Annual Gross Sales \$ _____ Co. Net Worth \$ _____ Monthly Credit Requirements \$ _____

Contractor's License No. _____ License in what Name _____

Pay Tax at Source: Yes _____ No (if no, please indicate resale # _____ and attach signed copy of resale card)

Federal ID # _____

Owner/Officers	Title	Residence Address	Telephone
1. <u>John Cattano</u>	<u>CFO</u>	<u>136 Lincoln St, Columbia, SC</u>	<u>29201</u>
2. <u>Carroll Campbell</u>	<u>CEO</u>	_____	_____
3. _____	_____	_____	_____
SS# 1. _____	SS# 2. _____	SS# 3. _____	_____

Bank References

Name	Complete Address	Checking Acct #	Telephone
1. <u>See attachment</u>	_____	_____	_____
2. _____	_____	_____	_____

Credit References (Please list 4 major Suppliers with whom you have an open account)

Name	Complete Address	Telephone No.	Facsimile No.
1. <u>See attachment</u>	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____
4. _____	_____	_____	_____

Have you applied for credit with us before? No When? _____ Under what name? _____

Your Account's Name Triton Stone

Does your Accountant supply you with periodic Financial Statements? Yes How Often? Quarterly

Will you make available current Financial Statements? _____ If yes, please attach most current Financial Statement

Loan History

Do you have any outstanding loans? Yes Name of Lending Co. Greenfield Commercial Credit
Loan Officers Name Stefania Odolesan Loan No. _____ Phone No. 248-723-8001
List any other loans on reverse side. Ever had a business failure? No If yes, list on a separate sheet. X 244

Personal References

Applicant's Driver's License SC Make & Year of Car 2006 Ford Expedition License Plate No. _____
List any Assets that are in your name: _____
Nearest relative not living with you Jesus Christ, Son of God Phone No. heaven
Address _____ City _____ State _____ Zip Code _____
Applicant's Spouse _____ SS# _____
Spouse Employment _____ Phone No. _____

The undersigned certifies that the above information is true and correct and agrees to pay for all goods purchased in compliance with the terms of the seller. Unless otherwise agreed to in writing, said terms are that all goods to be paid in full within 30 days from invoice date. Should default be made in payment when due, the balance plus 18% per annum on all unpaid sums together with actual attorney's fees and all costs as the seller may reasonably incur in the enforcement of the obligation is guaranteed by the undersigned. Both seller and buyer agree that Los Angeles County has proper jurisdiction over any and all litigation.

John D. Cattano _____
Print Name/Position
Congree Triton Acquisitions LLC
Full Name of Company
Signature X [Signature] Date _____

Personal Guaranty

(Personal guarantee must be handwritten and signed not typed or printed)

For and in consideration of any goods or materials provided to the above applicant on open account or otherwise by Emser Tile, LLC (of which is hereby acknowledged), we personally guarantee unconditional at all times unto you the payment of any and all indebtedness incurred with respect to Emser Tile, LLC, together with interest thereon, actual attorney's fees and all costs.

John D. Cattano _____
Print Name
Signature X [Signature] Guarantor Date 5/5/11

Print Name Guarantor Date

(Individual and Partnership must sign this Guaranty)

Authorization

To whom it may concern: This is to authorize your company to release any information regarding our (my) application for open account with Emser Tile, LLC.

Applicant's Name Congree Triton Acquisitions, LLC Signature X [Signature] Date 5/5/11

FOR OFFICE USE ONLY: PC: D W C N Other _____

Information verified by _____ Date _____ Maximum Credit Recommended \$ _____

Approved _____ Disapproved By _____ Date _____ Approved Credit Line \$ _____

Reason for disapproval _____ Credit No. _____

Remarks _____



STATE OF CALIFORNIA)
COUNTY LOS ANGELES)

AFFIDAVIT AND VERIFICATION

Personally appeared before me Judy Weinberg, who first being duly sworn on oath, states that he/she is the Corp CR mgr of Emser Tile, LLC,
(X) a corporation organized and doing business under the laws of the State of CALIFORNIA
() a partnership composed of _____
() a sole proprietor and/or trader doing business as _____
and that, as such she/he is duly authorized to make this Affidavit; that she/he has read the foregoing Complaint and that the allegations contained therein are true and correct; that she/he is familiar with the books and records of Emser Tile, LLC; that the attached documentation of indebtedness against John D. Cattano, is true and correct; that credit has been duly given for all payments and just and lawful offsets to which said account is entitled, as stated thereon, and the balance now due and owing is Fifty Five Thousand Two Hundred Sixty-Three and 24/100 (\$55,263.24) Dollars, with interest from September 22, 2011, until paid and that no part of said indebtedness has been paid by cash, discount or otherwise.

2012 AUG 24 PM 10:15
CLERK OF SUPERIOR COURT
LOS ANGELES COUNTY

Judy Weinberg

Sworn-to-before-me this _____
day of _____, _____.

Notary Public for _____

My Commission Expires: _____

See attached

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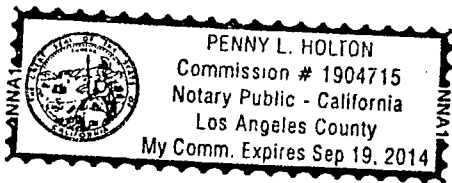
CALIFORNIA JURAT

State of California }
County of Los Angeles } ss.

Subscribed and sworn to (or affirmed) before me on
this 9 th day of August, 2012 by

Judy Weinberg

proved to me on the basis of satisfactory evidence
to be the person who appeared before me.



Penny L. Holton

2012 AUG 16 AM 10:35
RECEIVED
JULIA A. GIBSON
& G.S.

OPTIONAL

Description of Attached Document _____

Title or Type of Document: Affidavit and Verification

Document Date: no date Number of pages: 1

Signer (s) Other Than Named Above:

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Emser Tile, LLC
A/R Details with Aging

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Page - 2
Aging Date 01/05/12

Company: 00001 Emser Tile, LLC

Document		Invoice	Due Date										
Ty	Number	Customer PO	Branch	Item	Date	Check Date	Original Amount	Open Amount	Current	1 - 30	31 - 60	61 - 90	91 - 999
Customer:		375520 TRITON STONE - CHARLOTTE	Branch		Date		Phone Number: ()		Credit Manager	J	Credit Limit		
RU	397236		CLT	001	12/05/11	12/05/11	140.56-	140.56-				140.56-	
RI	2957417	FRITZ	CLT	001	06/16/11	07/16/11	2,286.00	2,286.00					
RI	2965615	3193	CLT	001	06/20/11	07/20/11	2,436.20	2,436.20					2,286.00
RI	2971894	3203	CLT	001	06/22/11	07/22/11	308.99	308.99					2,436.20
RI	2976665	3265	CLT	001	06/23/11	07/23/11	925.16	925.16					308.99
RI	2985404	STOCK	CLT	001	06/27/11	07/27/11	4,601.59	4,601.59					925.16
RI	2985418	3274	CLT	001	06/27/11	07/27/11	224.17	224.17					4,601.59
RI	2987918	3242	CLT	001	06/28/11	07/28/11	573.08	573.08					224.17
RI	2988298	3277	CLT	001	06/28/11	07/28/11	30.80	30.80					573.08
RI	2992240	3287	CLT	001	06/29/11	07/29/11	74.26	74.26					30.80
RI	2992650	3285	CLT	001	06/29/11	07/29/11	11.94	11.94					74.26
RI	2992931	3290	CLT	001	06/29/11	07/29/11	4,220.99	4,220.99					11.94
RI	2995814	3128	CLT	001	06/30/11	07/30/11	155.07	155.07					4,220.99
RI	2995818	3140	CLT	001	06/30/11	07/30/11	56.20	56.20					155.07
RI	2995871	3231	CLT	001	06/30/11	07/30/11	755.81	755.81					56.20
RI	2995892	3252	CLT	001	06/30/11	07/30/11	439.76	439.76					755.81
RI	3005479	3295	CLT	001	07/05/11	08/04/11	143.88	143.88					439.76
RI	3013709	3246	CLT	001	07/07/11	08/06/11	459.10	459.10					143.88
RI	3017023	3315	CLT	001	07/08/11	08/07/11	10.95	10.95					459.10
RI	3020568	3281	CLT	001	07/11/11	08/10/11	123.11	123.11					10.95
RI	3023997	3208	CLT	001	07/12/11	08/11/11	178.71	178.71					123.11
RI	3024038	3289	CLT	001	07/12/11	08/11/11	104.50	104.50					178.71
RI	3033843	3341	CLT	001	07/14/11	08/13/11	1,053.01	1,053.01					104.50
RI	3039960	3294	CLT	001	07/18/11	08/17/11	1,502.82	1,502.82					1,053.01
RI	3040626	3314	CLT	001	07/18/11	08/17/11	100.00	100.00					1,502.82
RI	3040643	3318	CLT	001	07/18/11	08/17/11	233.65	233.65					100.00
RI	3040656	3325	CLT	001	07/18/11	08/17/11	328.54	328.54					233.65
RI	3040892	3310	CLT	001	07/18/11	08/17/11	2,156.93	2,156.93					328.54
RI	3047629	3294	CLT	001	07/20/11	08/19/11	189.19	189.19					2,156.93
RI	3062888	3294	CLT	001	07/26/11	08/25/11	342.00	342.00					189.19
RI	3064327	3391	CLT	001	07/26/11	08/25/11	64.04	64.04					342.00
RI	3070760	3388	CLT	001	07/28/11	08/27/11	107.60	107.60					64.04
RI	3071069	3406	CLT	001	07/28/11	08/27/11	115.50	115.50					107.60
RI	3074497	3409	CLT	001	07/29/11	08/28/11	11.88	11.88					115.50
RI	3075016	3413	CLT	001	07/29/11	08/28/11	279.33	279.33					11.88
													279.33

(4)

Document		Invoice	Due Date										
Ty	Number	Customer PO	Branch	Item	Date	Check Date	Original Amount	Open Amount	Current	1 - 30	31 - 60	61 - 90	91 - 999
RI	3083043	3260	CLT	001	08/02/11	09/01/11	436.59	436.59					436.59
RI	3083397	3426	CLT	001	08/02/11	09/01/11	80.61	80.61					80.61
RI	3085151	3420	CLT	001	08/02/11	09/01/11	1,320.63	1,320.63					1,320.63
RI	3090835	3411	CLT	001	08/04/11	09/03/11	79.37	79.37					79.37
RI	3090936	3430	CLT	001	08/04/11	09/03/11	249.75	249.75					249.75
RI	3092176	3437	CLT	001	08/04/11	09/03/11	363.31	363.31					363.31
RI	3098148	3408	CLT	001	08/06/11	09/05/11	347.35	347.35					347.35
RI	3098158	3428	CLT	001	08/06/11	09/05/11	46.20	46.20					46.20
RI	3098201	3446	CLT	001	08/06/11	09/05/11	116.60	116.60					116.60
RI	3098799	3500	CLT	001	08/08/11	09/07/11	100.20	100.20					100.20
RI	3099024	3421	CLT	001	08/08/11	09/07/11	2,401.20	2,401.20					2,401.20
RI	3102603	3502	CLT	001	08/09/11	09/08/11	194.91	194.91					194.91
RI	3102605	3503	CLT	001	08/09/11	09/08/11	11.88	11.88					11.88
RI	3105855	3411	CLT	001	08/10/11	09/09/11	178.30	178.30					178.30
RI	3117845	3507	CLT	001	08/15/11	09/14/11	5,002.00	5,002.00					5,002.00
RI	3121744	3525	CLT	001	08/16/11	09/15/11	648.55	648.55					648.55
RI	3122150	3543	CLT	001	08/16/11	09/15/11	3,104.41	3,104.41					3,104.41
RI	3122203	3431	CLT	001	08/16/11	09/15/11	264.53	264.53					264.53
RI	3129630	3554	CLT	001	08/18/11	09/17/11	11.88	11.88					11.88
RI	3133385	3558	CLT	001	08/19/11	09/18/11	125.01	125.01					125.01
RI	3138940	3572	CLT	001	08/22/11	09/21/11	22.88	22.88					22.88
RM	3139937	3420	CLT	001	08/22/11	08/22/11	558.37	558.37					558.37
RI	3141780	3573	CLT	001	08/23/11	09/22/11	293.26	293.26					293.26
RI	3141831	3582	CLT	001	08/23/11	09/22/11	134.02	134.02					134.02
RI	3141835	3580	CLT	001	08/23/11	09/22/11	38.50	38.50					38.50
RI	3145178	3510	CLT	001	08/24/11	09/23/11	1,634.08	1,634.08					1,634.08
RI	3150004	3408	CLT	001	08/25/11	09/24/11	90.02	90.02					90.02
RI	3150008	3420	CLT	001	08/25/11	09/24/11	172.48	172.48					172.48
RI	3150013	3508	CLT	001	08/25/11	09/24/11	36.80	36.80					36.80
RI	3150030	3544	CLT	001	08/25/11	09/24/11	62.28	62.28					62.28
RI	3150042	3571	CLT	001	08/25/11	09/24/11	69.30	69.30					69.30
RI	3150057	3578	CLT	001	08/25/11	09/24/11	408.23	408.23					408.23
RI	3150108	3584	CLT	001	08/25/11	09/24/11	110.88	110.88					110.88
RI	3150238	3596	CLT	001	08/25/11	09/24/11	67.52	67.52					67.52
RI	3150241	3598	CLT	001	08/25/11	09/24/11	124.91	124.91					124.91
RI	3162781	3507	CLT	001	08/30/11	09/29/11	3,766.35	3,766.35					3,766.35
RI	3162963	3614	CLT	001	08/30/11	09/29/11	100.00	100.00					100.00

(15)

Document			Invoice		Due Date	Original Amount	Open Amount	Current	1 - 30	31 - 60	61 - 90	91 - 999
Ty	Number	Customer PO	Branch	Item	Date	Check Date						
RI	3163207	3507	CLT	001	08/30/11	09/29/11	959.58	959.58				
RI	3166889	3606	CLT	001	08/31/11	09/30/11	531.90	531.90				959.58
RI	3167611	3607	CLT	001	08/31/11	09/30/11	63.40	63.40				531.90
RM	3168488	3606	CLT	001	08/31/11	08/31/11	13.00	13.00				63.40
RI	3170575	3619	CLT	001	09/01/11	10/01/11	296.89	296.89				13.00
RI	3173996	3603	CLT	001	09/02/11	10/02/11	1,253.12	1,253.12				296.89
RI	3174017	3605	CLT	001	09/02/11	10/02/11	346.50	346.50				1,253.12
RI	3174044	3612	CLT	001	09/02/11	10/02/11	198.47	198.47				346.50
RI	3174426	3584	CLT	001	09/02/11	10/02/11	149.04	149.04				198.47
RI	3174453	3625	CLT	001	09/02/11	10/02/11	138.60	138.60				149.04
RI	3178342	3593	CLT	001	09/06/11	10/06/11	114.66	114.66				138.60
RI	3178367	3610	CLT	001	09/06/11	10/06/11	871.00	871.00				114.66
RI	3178482	3625	CLT	001	09/06/11	10/06/11	23.10	23.10				871.00
RI	3178686	3630	CLT	001	09/06/11	10/06/11	53.94	53.94				23.10
RI	3181536	3621	CLT	001	09/07/11	10/07/11	189.82	189.82				53.94
RI	3183570	3629	CLT	001	09/07/11	10/07/11	2,165.74	2,165.74			189.82	
RI	3194261	3642	CLT	001	09/12/11	10/12/11	245.57	245.57			2,165.74	
RI	3194262	3636	CLT	001	09/12/11	10/12/11	317.49	317.49			245.57	
RI	3194263	3633	CLT	001	09/12/11	10/12/11	30.94	30.94			317.49	
RI	3194289	3649	CLT	001	09/12/11	10/12/11	57.60	57.60			30.94	
RI	3199463	3645	CLT	001	09/13/11	10/13/11	98.18	98.18			57.60	
RM	3215775	3598	CLT	001	09/19/11	09/19/11	10.95	10.95			98.18	
RM	3215775	3598	CLT	002	09/19/11	10/19/11	10.95	10.95				10.95
RM	3215776	3633	CLT	001	09/19/11	09/19/11	30.94	30.94				
RM	3215776	3633	CLT	002	09/19/11	10/19/11	30.94	30.94				30.94
RI	3217649	3694	CLT	001	09/20/11	10/20/11	356.12	356.12				
RI	3221247	3669	CLT	001	09/21/11	10/21/11	90.10	90.10			356.12	
RI	3225557	3686	CLT	001	09/22/11	10/22/11	236.57	236.57			90.10	
RI	3225614	3657	CLT	001	09/22/11	10/22/11	313.04	313.04			236.57	
RI	3226315	3663	CLT	001	09/22/11	10/22/11	54.25	54.25			313.04	
Customer: 375520 TRITON STONE - CHARLOTTE						USD	55,263.24	55,263.24				
Customer: 450336 TRITON STONE - PORTSMOUTH										140.56	4,197.31	51,206.49
						Phone Number: ()						Credit Limit 7,500.00
Customer: 450336 TRITON STONE - PORTSMOUTH						USD	52,841.28	52,841.28				
Customer: 375520 TRITON STONE GROUP												
						Phone Number: ()						Credit Limit

91

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

EMSER TILE, LLC,)
Plaintiff,)
v.)
JOHN D. CATTANO,)
Defendant.)

Suit on Guaranty

2012 OCT 10 AM 11:21
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

ANSWER, DEFENSES, AND DEMAND FOR JURY

Defendant John D. Cattano, pro sé at this time, answers the Complaint filed herein and states as follows:

1. The allegations contained in paragraph 1 of the Complaint are admitted.
2. The allegations contained in paragraph 2 of the Complaint are denied.
3. The allegations contained in paragraph 3 of the Complaint are denied, except that it is admitted that Congaree Triton Acquisitions, LLC is not a party hereto.
4. The allegations contained in paragraph 4 of the Complaint are denied, except that the defendant is without knowledge as to what the plaintiff's "book and records" may indicate.

5. The allegations contained in paragraph 5 of the plaintiff are denied.
6. The Defendant asserts that he is not indebted to Emser Tile, LLC for any amount.

AFFIRMATIVE DEFENSES

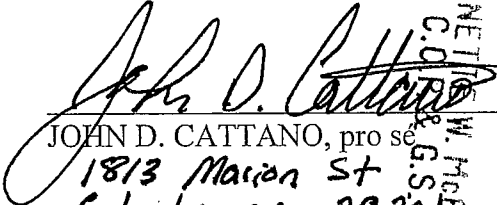
7. The Defendant affirmatively asserts the defense of OFFSET as he, or others on his behalf, has paid the plaintiff in excess of the amount sued for herein for services and materials provided to another entity and for which the defendant did not owe. As such, the defendant demands a set off for all amounts paid to the plaintiff for accounts which predated the defendant's purchase of Triton Stone Group of Charlotte, and otherwise demands a full refund for all amounts paid as such.

8. The Defendant further asserts that the indebtedness alleged and the Complaint is therefore owed by others and not the Defendant who will be brought in as third-party defendants in this case.

9. The Defendant reserves the right to assert all other applicable defenses including unclean hands, fraud, misrepresentation, statute of limitations, and any other defenses which may be shown by discovery or evidence.

10. THE DEFENDANT DEMANDS A TRIAL BY JURY IN THIS CASE.

Respectfully submitted,


JOHN D. CATTANO, pro se
1813 Marion St
Columbia, SC 2920
803-254-4500

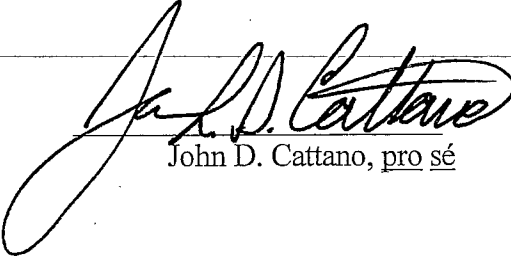
JEANETTE W. McBRIDE
C.O. R. & G.S.

2012 OCT 10 AM 11:21

RICHLAND COUNTY
FILED

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed this 10 day of October 2012, to: Anthony D. Hoefler, Levi, Wittenberg, Harritt, Hoefler & Davis, 207 N. Washington Street, Sumter, SC 29150.


John D. Cattano, pro se

rw/03

STATE OF SOUTH CAROLINA

COUNT OF RICHLAND

IN THE COURT OF COMMON PLEAS

EMSER TILE, LLC,

Plaintiff,

v.

Suit of Guaranty

JOHN D. CATTANO

Defendant/Third Party Complaint

v.

Triton Stone Group, LLC; Triton Partners Management Group; Joshua Kessler; Randy Mathis; Christian Jensen; Triton Stone Group New Orleans, LLC; Jack Jensen; Katie Peralta, Triton Stone Southaven, LLC; Transportation Consultants, Inc., and Frederico Gildemeister,

Suit for Indemnity, Fraud, Etc.

Third Party Defendants.

RICHLAND COUNTY
FILED
2012 OCT 22 PM 4:52
JEANETTE M. McBRIDE
C.C.P. & G.S.

INTRODUCTION

1. This case arises from extensive fraud, conspiracy, and abusive business practices. The management of two asset-selling corporations aggressively defrauded asset purchasers and others out of millions of dollars. Not stopping there, the fraudsters exploited their newfound business leverage over the purchasers to force, or try to force, the purchasers to pay millions of dollars of debts the purchasers did not owe, all for the benefit of the fraudsters.

2. The asset-purchaser third party plaintiff brings this action to establish these facts and seek appropriate restitution and other damages. Third Party plaintiff submits that the asset-seller defendants and the fraud defendants are liable for these debts and are liable to indemnify the asset-purchaser third party plaintiff for debts he was wrongly forced to pay.

PARTIES, VENUE, AND JURISDICTION

3. Congaree Triton Acquisitions, LLC (“Congaree”) is a South Carolina limited liability company.
4. Carroll A. Campbell III was the CEO of Congaree and had a substantial ownership interest in Congaree both personally and by virtue of his relationship with the Carroll A. Campbell Jr. Trust. Campbell was one of two managing members of Congaree and is a South Carolina resident.
5. Third Party Plaintiff John D. Cattano was the CFO of Congaree and had a substantial ownership interest in Congaree. Cattano was the second of two managing members of Congaree and is a South Carolina resident.
6. Congaree, Campbell, and Cattano are sometimes collectively referred to herein as “Asset-Purchaser Plaintiffs.”
7. Congaree purchased all alienable claims of Defendants Triton Stone of Myrtle Beach, Inc. and Triton Stone of Charlotte, Inc. and is therefore a successor in interest to these two Defendants to such claims.
8. Defendant Triton Stone of Myrtle Beach, Inc. was a South Carolina corporation with a principal place of business—to whatever extent the entity still does business—in Horry County.
9. Defendant Triton Stone of Charlotte, Inc. was a North Carolina corporation with a principal place of business—to whatever extent the entity still does business—in Mecklenburg County, North Carolina.
10. The Third Party Defendants are certain individuals and entities associated with the national Triton Stone franchise. Ostensibly, the Triton Stone franchise imports and sells natural stone products and associated items and provide associated services. Each of the individuals and entities listed above is connected with the fraud scheme and is a willing participant in that

FACTUAL ALLEGATIONS

11. In late 2010, Defendant Christian Jensen approached Third Party Plaintiff John Cattano about a business opportunity Cattano might be interested in.

12. Jensen and his family were—and remain—associated with the Triton Stone franchise, a collection of individuals and businesses that import and sell natural stone products and associated items and provide associated services.

13. Specifically, Jensen had connections with three Triton Stone distributorships, New Orleans, Charlotte, and Myrtle Beach.

14. Jensen explained to Cattano that his family owned the New Orleans distributorship, but that he was helping to manage two other distributorships in Charlotte and Myrtle Beach.

15. Jensen indicated to Cattano that Charlotte and Myrtle Beach had been run poorly by their owners, and so Jensen and two other individuals associated with the national Triton Stone franchisor, Joshua Kessler and Randy Mathis, were managing Charlotte and Myrtle Beach through an entity called the Triton Partners Management Group.

16. Kessler and Mathis were and remain intimately connected with various Triton Stone operations and entities, including Triton Stone Group LLC, the national franchisor. It is fair to say that Joshua Kessler is the “face” of Triton Stone nationally.

17. Jensen indicated to Cattano that the Triton Stone business model was highly profitable and sound and suggested Cattano purchase the Charlotte and Myrtle Beach operations.

18. Cattano was interested and contacted a friend, Plaintiff Carroll Campbell, who was also interested in being involved.

19. Cattano and Campbell began negotiating with Kessler, Mathis, Jensen, and others associated with the corporations that owned the Charlotte and Myrtle Beach operations, Triton Stone of Charlotte, Inc. and Triton Stone of Myrtle Beach, Inc.

20. During these negotiations, Kessler, Mathis, and Jensen provided Cattano and Campbell

with information about Triton Stone of Charlotte, Inc. and Triton Stone of Myrtle Beach, Inc.

21. Some of this information was financial information showing a healthy, profitable business operation. Based upon this financial information, the parties to the negotiation agreed upon a purchase price.

22. All involved in the negotiation eventually agreed upon an asset-purchase agreement (“APA”), which was executed on or about March 11, 2011. The APA is attached hereto as the only exhibit and is incorporated herein by reference.

23. The APA provides for an asset purchase whereby Congaree would purchase all of the assets of Triton Stone of Charlotte, Inc. and Triton Stone of Myrtle Beach, Inc. (with a few irrelevant, specific exceptions) and assume practically none of those corporations’ liabilities (also with a few irrelevant, specific exceptions). See APA at 1-4, Sections 1.01 and 1.02. The only liabilities assumed were a lease payment and insurance on an automobile, cell phone service for certain individuals, and healthcare insurance for those same individuals. See APA at 3-4, Section 1.02(b)(i – iv).

24. Every single vendor and supplier debt remained with Triton Stone of Charlotte, Inc. and Triton Stone of Myrtle Beach, Inc. At no point in time was Congaree legally obligated to pay any debt connected with the Triton Stone operations in Charlotte and Myrtle Beach which arose prior to March 11, 2011, the closing of the asset sale.

25. The parties contemplated that creditors of the sellers might present demands for payment of debts to Congaree—a perfectly reasonable expectation and a regular occurrence in asset sale transactions. Accordingly, the APA contained provisions for handling such situations, requiring the sellers to indemnify Congaree in the event Congaree was forced to make any payments on old debt and other pre-closing liabilities. See APA at 16-18, Section 6.02.

26. Further, the APA could not have been clearer that the sellers would indemnify Congaree in such circumstances. The sellers promised to do so in Section 6.02(a) of the APA. See AOA at

27. The APA called for a purchase price of approximately \$3 million, and according to the balance sheet provided by Kessler, Mathis, and Jensen, the value of the purchased assets on March 11, 2011, was \$3,028,086.75.

28. This was clearly a market-reasonable price for the assets purchased, and as the APA indicates, various methods of financing the purchase were employed, and another financier not listed in the APA is Greenfield Commercial Credit.

29. Congaree Triton Acquisitions, LLC then became a distributor under the Triton Stone franchise, as the parties had agreed, covering the territories of Charlotte and Myrtle Beach.

30. Not long after closing the asset purchase, faint warning signs began to emerge that something was wrong.

31. Unbeknownst to Cattano or Campbell, days before the asset purchase was closed, Joshua Kessler wrote approximately \$600,000 in checks to vendors owed funds by Triton Stone of Charlotte, Inc. on the corporate account. This action was absolutely forbidden by the APA and Kessler failed to disclose what he was doing, also despite a clear requirement to do so under multiple sections of the APA.

31. However, by the time vendors received the checks, Cattano and Campbell had opened a new bank account for Congaree Triton Acquisitions LLC.

32. Vendors began depositing the checks written by Kessler on the old corporate account, which was essentially empty, and the checks bounced. Cattano and Campbell confronted Kessler about what had happened, but Kessler demanded that Congaree write new checks or wire to the vendors. Cattano and Campbell explained to Kessler that Congaree was not obligated to do so because they had not assumed any liability on unpaid vendor invoices under the APA.

33. Kessler would not take no for an answer and demanded that Congaree make the payments to vendors. Kessler made clear to Cattano and Campbell that they would be put out of business if they did not make the payments. Kessler was in a position to make good on that, as he was and remains the national “face” of the Triton Stone franchise.

34. Cattano and Campbell, having no realistic alternatives, made a substantial portion of the \$600,000 payments despite not being obligated to do so under the APA.

35. This pattern repeated itself time and again. Sometimes Kessler would make the demand, sometimes Mathis or Jensen, often a combination of them. Time after time, Cattano and Campbell were forced through outright business extortion to pay debts they did not owe.

36. Even worse, because the Asset-Seller Defendants were managed and controlled by Kessler, Mathis, and Jensen (acting in concert, upon information and belief, with the other Third Defendants) at the time of sale, Kessler, Mathis, and Jensen had an obligation to disclose these unpaid debts to Plaintiffs. They did not.

37. Kessler, Mathis, and Jensen, along with the other Fraud Defendants, control practically the entire supply chain Congaree Triton Acquisitions depended upon to obtain products for sale.

38. Cattano and Campbell simply had no choice but to accede to their demands. Though the payments continued to drain Congaree of funds, it was a choice between a damaged business and a destroyed business. And Kessler and the other Third Party Defendants made it increasingly clear to Cattano and Campbell that any resistance would be met with even more abusive tactics.

39. In fact, Randy Mathis informed Campbell in July of 2011 that Congaree needed to obtain a capital infusion from outside sources so as to continue to pay these debts, debts that all involved knew Congaree did not owe. Mathis indicated that if Campbell could not find more investors, Triton Stone Group LLC—the national franchisor that Kessler and Mathis controlled—would swoop in under the franchise agreement and take control of all the assets of Congaree Triton Acquisitions LLC.

40. Kessler, Mathis, and Jensen, along with the other Fraud Defendants, were obsessed with forcing Congaree to pay these supplier debts because the suppliers in question would refuse to deal with the entire Triton supply chain unless the debts were paid, even if the debts were not technically owed by other members of the Triton supply chain.

41. The Third Party Defendants therefore benefitted greatly from their strong-arm tactics. Their supply chain was uninterrupted for materials they sold out of their own distributorships. Meanwhile, Congaree was saddled with paying old debt to the suppliers that Congaree did not owe.

42. In late July and early August of 2011, Cattano and Campbell saw how serious the Fraud Defendants were about carrying out their threats. First, a bit of background. From when it began operations in March of 2011, Congaree utilized the Port of New Orleans for international shipments of stone. The entire Triton network did, because the Jensen Family owns several logistics businesses in New Orleans in addition to owning Triton Stone New Orleans. The Jensen Family owns Transportation Consultants, Inc., which hauls stone over land, and Nola Yard, where the stone was stored.

43. By late July of 2011, the Third Party Defendants' forced draining of Congaree's assets was beginning to take a serious toll on Congaree's ability to continue to do business. Congaree was unable to make several payments on debts (debts it did not owe) as demanded by the Third Party Defendants.

44. To prove the seriousness of their threats, as a result of Congaree's failure to make these extorted payments, Jensen and others associated with Triton Stone New Orleans sequestered a shipment of four containers of stone bound for Congaree in Charlotte. The shipment is worth about \$60,000 and remains held by Jensen and the Third Defendants in New Orleans.

45. The Third Party Defendants made clear by their conduct that this practice would continue until Congaree came up with funds to pay these debts.

46. Congaree would have failed then, however Campbell and Cattano were able to switch port operations to the Port of Charleston where Jensen and the other Third Defendants could not interfere with the transport of goods bound for Congaree.

47. Around this same time period, as Cattano and Campbell continued to be inundated with old debt from Triton Stone of Charlotte, Inc. and Triton Stone of Myrtle Beach, Inc., they discovered that the financial materials provided to them to induce them into purchasing the business were horrendously inaccurate.

48. In trying to get an idea of how much old debt was out there for Triton Stone of Charlotte, Inc. and Triton Stone of Myrtle Beach, Inc., Cattano and Campbell found that a tremendous number of invoices and expenses had been left out of the accounting system and the materials that were used to induce the asset purchase.

49. In fact, the parties had agreed that the asset sale price would be 3.8 times figure as the EBIDTA⁵ for the 12 months immediately preceding the sale. Jensen, Mathis and Kessler provided financial materials indicating the profit margins for the preceding 12 months was approximately \$800,00, leading to a sale price of approximately \$3 million.

50. However, Cattano and Campbell, with their accountant Randy May, discovered that the \$800,000 was completely false and fabricated.

⁵ EBIDTA means "Earnings Before Interest, Taxes, Depreciation, and Amortization" and is a similar concept to "net profit."

51. The way Jensen, Mathis, and Kessler fabricated the figure was to simply not enter a large number of invoices and other expenses into the accounting system used by Triton Stone of Charlotte, Inc. and Triton Stone of Myrtle Beach, Inc.

52. Jensen, Mathis, and Kessler simply did not pay a number of invoices or enter them into the system so as to artificially inflate the EBIDTA figure. This, in turn, artificially inflated the sale price by a factor of 3.8 times the net effect of the fraud.

53. Based upon the invoices and other expenses not input into the system, or at least those that have been discovered by Cattano and Campbell thus far, the actual profit margin figure was not \$800,000 but about \$350,000.

54. Under the sale price calculation the parties had agreed to, the sale price should have actually been about \$1.3 million, not \$3 million.

55. After these issues were raised to Kessler and various other Fraud Defendants, none offered any sort of help or compensation. The same attitude of "pay what we tell you to pay or else" prevailed and prevails to this day.

56. Finally, in late October and into November of 2011, Congaree simply could not afford to make its legitimate debt service, pay its operating expenses, and continue to pay debts it did not owe.

57. It appears that from March of 2011 until November of 2011, Congaree paid somewhere in the neighborhood of \$1.8 million on debts it did not owe because of the strong-arm tactics of Kessler, Mathis, Jensen, and the remaining Third Party Defendants.

58. At present, Congaree faced demands for approximately \$2.6 million in pre-acquisition debt that it does not owe but which Kessler, Mathis, Jensen, and the remaining Third Defendants expected Congaree to pay.

59. The basic result is this. Third Party Plaintiff believed he was buying \$3 million of assets for \$3 million and were not assuming any old debts. Instead, as a result of the horrendously improper conduct of Kessler, Mathis, Jensen, and their co-conspirators, the reality is that Third Party Plaintiff also became saddled with claims of approximately \$4.4 million in illegitimate debt.

60. Needless to say, Third Party Plaintiff did not intend to pay \$3 million for a business whose net worth is *negative* \$3.1 million. (Assets worth \$1.3 million less debt claims of \$4.4 million.)

61. Third Party Defendants' entire plan was to lure Cattano (and others, including proposed creditor plaintiffs) into the Triton operation so that Third Party Defendants could extract funds from them to pay debts either directly incurred by or at their direction or to pay debts that stood in the way of Third Party Defendants other business interests with other Triton distributorships.

62. Despite the likelihood of severe retaliation by Third Party Defendants, Third Party Plaintiff had no option but to bring suit and seek all available remedies, including restitution and other damages and a declaration by this Court that Cattano is simple not responsible for debts predating the APA, as the APA clearly indicates.

63. As a result of the above-referenced conduct of Third Party Defendant, Congaree was forced into Chapter 11 Bankruptcy, which was later converted to Chapter 7. Cattano has lost all assets invested, and potential earnings.

64. The foregoing narrative details substantial wrongdoing by the Third Party Defendants. However, the Defendants, acting in concert, have damaged the Plaintiffs in a number of other ways.

65. The remainder of the factual allegations mostly detail smaller issues than the multi-million dollar fraud claims explained above. In that regard, Plaintiffs are mindful of the twin commands by the Rules of Civil Procedure to plead concisely and to give Defendants fair notice

66. Plaintiffs attempt to provide sufficient detail to satisfy the notice

requirement without bogging down this pleading with inordinate detail.

66. In the APA, the sellers made a number of false representations. In fact, just about every significant portion of the APA that requires the sellers to warrant the condition of the assets or make some other statement of fact as to the business is simply false.

67. In the APA, the sellers warranted that the assets sold were unencumbered. Upon information and belief, at least one creditor of the sellers claims that material from that creditor was encumbered. To the extent that creditor is correct, the sellers' warranty to the contrary is false.

68. The sellers represented that a crane at the North Carolina location was an asset of this business sold to Congaree. However, Josh Kessler later claimed that the crane in his personal property and demanded and received a number of rent payments on that crane. If the crane was Kessler's then the sellers lied when they represented that the crane belong to the business. If the crane was owned by the businesses, then Kessler lied to obtain rent payments. Either way, Plaintiff's take the position that the crane was an unencumbered asset identified as part of this asset sale transaction and title passed to Congaree when the purchase closed. Even if Kessler was the rightful owner, he know or should have known the crane was an asset identified as part of the assets sold and had an obligation to speak up and explain the crane was his. He did not, and he is now stopped from arguing the point.

69. Kessler has personally claimed that Congaree Triton Acquisitions LLC owes him debts as a result of expenses he incurred working for the sellers. He has forced Congaree to make some payments on these alleged debts. These debts are wholly invalid per the APA and, upon information and belief, many if not all of them do not reflect legitimate reimbursable business expenses.

70. Upon information and belief, Kessler and his co-conspirators, including but not limited to Gary Sena, have actively encouraged employees of Congaree to behave in a disloyal fashion and to breach their fiduciary duties to Congaree. In some cases, it appears certain now-former employees of Congaree did behave in a disloyal fashion and breach their fiduciary duties to Congaree at the instance of Kessler and his coconspirators.

71. Upon information and belief, these breaches include but are not limited to sharing confidential information with Kessler and his co-conspirators, stealing inventory, selling inventory at below-market value to straw buyers working with Kessler, and various other tactics aimed at undermining Congaree's business to enable Kessler and his conspirators to take it over.

72. Circumstantial evidence strongly suggests Kessler and his co-conspirators were working with allies previously employed by Congaree to steal inventory, presumably for sale in Triton Stone Virginia or perhaps elsewhere.

73. Triton Stone Group LLC signed an inventory buyback agreement with Congaree as part of the asset sale transaction to induce Congaree and Greenfield Commercial Credit, LLC into the transaction. The agreement provided that Triton Stone Group LLC would, upon demand, purchase inventory from Congaree at 80% cost. Congaree relied upon this agreement and as financial problems mounted, attempted to exercise their rights under the agreement and requested that Triton Stone Group LLC purchase \$1.5 million in inventory under the buyback agreement. Triton Stone Group LLC ignored Congaree's request entirely and breached the buyback agreement, causing a severe chain reaction of fiscal problems which tremendously damaged Congaree's business.

73. Triton Stone Group LLC attempted to purchase materials from a Congaree Triton Acquisition LLC's Receiver at 40 cents on the dollar, well below the 80% cost contractual floor that had already been agreed to. Upon information and belief, some of the Defendants made similar attempts to raid Congaree by using straw buyers to make purchases at well below market

74. Upon information and belief, Josh Kessler and his co-conspirators planned to extract as much wealth as possible from Plaintiffs to pay their old debts. As the financial condition of Congaree worsened, Kessler and his co-conspirators planned to use takeover provision in the franchise agreement to take Congaree over. Kessler and his co-conspirators took steps to do this, including attempting to obtain possession of Congaree property.

75. Triton Stone Group LLC is a franchisor and as such owed various duties to its franchisees. Fundamentally, Triton Stone Group LLC should help its franchisees succeed. However, in this case, and upon information and belief in others, Triton Stone Group LLC actually operated to do serious harm to its franchisees by fraudulently and extortionately extracting wealth from them for the benefit of Josh Kessler and his coconspirators.

76. Triton Stone Group LLC is a franchisor and as such owes various duties to its franchisees. Fundamentally, Triton Stone Group LLC should help its franchisees succeed. However, in this case, and upon information and belief in others, Triton Stone Group LLC actually operates to do serious harm to its franchisees by fraudulently and extortionately extracting wealth from them for the benefit of Josh Kessler and his coconspirators.

77. Kessler et al. have done just about everything conceivable to disrupt the business operations of Congaree since it became clear Congaree's ownership group was not going to roll over for Kessler's scheme. This has included tortuously interfering with Congaree's relationship with vendors, suppliers, customers, employees, etc. Kessler et al. have engaged in an enormous number of communications with vendors, suppliers customers, employees, etc. which were designed to damage Congaree's ability to function in the marketplace and either continue contacting with these entities or obtain contracts with them in the future.

78. Kessler et al. routinely disregard formalities with regard to operating their business entities. The complexity of the Triton system is apparently designed to shield its principals from personal liability while they execute fraud. The financial dealings within the Triton system are

extremely murky. Many of the various legal entities—LLCs, Incs., etc. are all run or owned by the same cast of characters: some combination of Kessler, Mathis, and Jensen. Under these circumstances, Plaintiffs seek to pierce the veil. Even if Kessler et al. observed all formalities and did not operate entities in a sham fashion, the corporate veil protects American commerce, not fraud, and should not be applied in this case.

79. Gary Sena and Triton Stone of Virginia LLC, operating at the direction of Josh Kessler upon information and belief, have pursued baseless criminal charges in Virginia against Plaintiffs Cattano and Campbell as a result of Cattano and Campbell stopping payment on post-dated checks to Fraud Defendants after their fraud became apparent. Stopping payment on a post-dated check is not a crime in Virginia, and even if it could be normally prosecuted as a crime, a victim of fraud has an absolute right to stop payment on checks procured with fraud.

**FOR A FIRST CAUSE OF ACTION
FRAUD**

80.

The foregoing actions constitute outright, aggressive, fraud committed by the Fraud Defendants.

81.

Representations made by the Third Party Defendants as to the finances of such Defendants were both false and material as described above.

82.

The Third Party Defendants knew these representations were false, or they acted with a reckless disregard as to their truth or falsity. The recipients of the representations had no idea they were false and had the right to rely on them and did so rely. Serious injury resulted.

83.

Third Party Plaintiff seeks all remedies available under the law, including punitive damages.

FOR A SECOND CAUSE OF ACTION

CONSTRUCTIVE FRAUD

84. In the event all elements of fraud are proven but for intent, Third Party Plaintiff seeks to assert a claim for constructive fraud and seek all remedies available under law, including punitive damages.

**FOR A THIRD CAUSE OF ACTION
FRAUDULENT CONCEALMENT**

85. The APA discloses the sort of relationship between Third Party Plaintiff and Third Party Defendants such that Third Defendants had a duty to disclose the unpaid invoices and other concealed expenses of the Defendants.

86. Third Party Defendants concealed and failed to disclose these facts in a fraudulent manner, constituting fraudulent concealment.

87. Third Party Plaintiff seeks all remedies available under the law, including punitive damages.

**FOR A FOURTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION**

88. The Third Party Defendants made false representations, described above, to Third Plaintiff and had pecuniary interests in doing so. These defendants owed a duty of care to Third Party Plaintiff to ensure the communication of truthful information. These defendants violated that duty by failing to exercise due care.

89. Third Party Plaintiff justifiably relied on these representations and suffered pecuniary losses as the proximate result of reliance on the representations.

90. Third Party Plaintiff seeks all remedies available under the law, including punitive damages.

FOR A FIFTH CAUSE OF ACTION

BREACH OF CONTRACT

91. The actions and omissions of Third Party Defendants, as described above, constitutes breach of contract and breach of the duty of good faith and fair dealing.

92. Third Party Plaintiff seeks all remedies available under the law

FOR A SIXTH CAUSE OF ACTION

BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT

93. The breach of contract and breach of the duty of good faith and fair dealing complained of in the prior cause of action were accompanied by fraudulent, dishonest acts as described herein.

94. The Third Party Plaintiff seeks all remedies available under the law, including punitive damages

**FOR A SEVENTH CAUSE OF ACTION
UNFAIR TRADE PRACTICES**

95. The conduct complained of herein is a complex scheme of fraud and business extortion obviously constituting unfair trade practice. If the activities in this case are not an unfair trade practice, then it is difficult to see what could be an unfair trade practices.

96. Not only has it caused serious pecuniary damage to Third Party Plaintiff, it directly affects the public interest because the Third Party Defendants, as explained above, are actively seeking further investors who will sink money into some aspect of the Triton operation only to have that money be used to pay unrelated debts.

97. Third Party Defendants' conduct is completely intentional and predatory.

98. Third Party Plaintiff seeks all remedies available under the law, including but not limited to treble damages, payment of attorney's fees, and punitive damages.

**FOR EIGHT CAUSE OF ACTION
INDEMNIFICATION**

99. Third Party Defendants and owe a contractual and equitable indemnification to Third Party Plaintiff as a result of the matters described herein.
Third Party Plaintiff seeks all remedies available under the law.

**FOR A NINTH CAUSE OF ACTION
CONVERSION**

100. By detaining the four containers described above in New Orleans, Defendants have committed conversion as to the property within those containers.

101. Third Party Plaintiff seeks all remedies available under the law.

**FOR A TENTH CAUSE OF ACTION
UNJUST ENRICHMENT**

102. Some or all of the Third Party Defendants have been unjustly enriched as a result of their conduct herein, including but not limited to forcing Third Party Plaintiff to pay on debts that arose under the Asset-Seller rather than Congaree.

103. Plaintiff seeks all remedies available under law.

FOR AN ELEVENTH CAUSE OF ACTION
INTENTIONAL INTERFERENCE WITH CONTRACTUAL
RELATIONS

104. Third Party Defendants have intentionally interfered with Plaintiffs' ability to make debt service payments to legitimate creditors.

105. In addition to the above-described matters, Third Party Defendants have caused serious damage to the contractual and business relationships of Third Party Plaintiff, including but not limited to the relationship with Greenfield Commercial Credit, a relationship that was in excellent shape until Third Party Defendants successfully strong-armed Plaintiffs out of enough money that Plaintiffs could no longer comply with their obligations to Greenfield.

106. Plaintiffs seek all remedies available under the law, including punitive damages.

FOR A TWELFTH CAUSE OF ACTION

CIVIL CONSPIRACY

107. In the event that Plaintiff is unable to state a claim for relief or survive summary judgment on the foregoing causes of action, Third Party Plaintiff asserts each of the facts above as facts in support of a cause of action for civil conspiracy. Special damages are all those damages pled above, including but not necessarily limited to \$1.7 million in overpayment for the assets, \$1.8 million in forced payments on debts not owed, and all damages to the business caused by this matter.

108. Some Third Party Defendants engaged in activities that are not in and of themselves tortious acts, but all were in furtherance of a conspiracy to defraud led by Josh Kessler. Plaintiff is not so interested in the name of the cause of action under which they recover as they are in a recovery, but to the extent the acts complained of herein do not legally relate to another theory of recovery, Plaintiffs submit them in support of their civil conspiracy claim.

**FOR A THIRTEENTH CAUSE OF ACTION
BREACH OF DUTY OF LOYALTY**

109. Certain of the Third Party Defendants owed duties of loyalty to the Third Party Plaintiff during the time they engaged in the improper acts described herein.

Plaintiff seeks all remedies available under the law, including punitive damages.

**FOR A FOURTEENTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY**

110. Certain of the Third Party Defendants owed fiduciary duties to the Plaintiff during the time they engaged in the improper acts described herein.

111. Plaintiff seeks all remedies available under the law, including punitive damages.

FOR A FIFTEENTH CAUSE OF ACTION

ABUSE OF PROCESS

112. Third Party Defendants Gary Sena and Triton Stone of Virginia LLC have willfully pursued baseless criminal charge against Plaintiffs as described above. The pursuit of these baseless charges was an improper act for which there was an improper motive: smearing Plaintiffs for collateral advantage in the marketplace.

113. Plaintiff seeks all recoveries available under law, including punitive damages.

SIXTEENTH CAUSE OF ACTION

MALICIOUS PROSECUTION

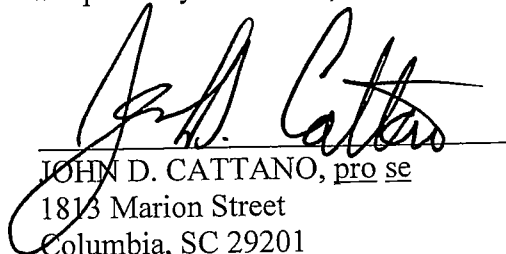
114. Defendants Gary Sena and Triton Stone of Virginia LLC have willfully pursued baseless criminal charge against Plaintiffs as described above. A matter before the Portsmouth police department was terminated in Third Party Plaintiff's favor. Third Party Defendants pursued this matter maliciously, knowing that the Third Party Plaintiff had committed no crime but seeking to smear Plaintiffs for collateral advantage in the marketplace.

115. Third Party Plaintiff seek all recoveries available under law, including punitive damages.

PRAYER FOR RELIEF

Wherefore, having fully pled the causes of action within the Third Party Complaint, the Third Party Plaintiff demand a jury trial on all issues triable by jury and pray for a judgment awarding all relief requested above or otherwise available under the causes of action pled.

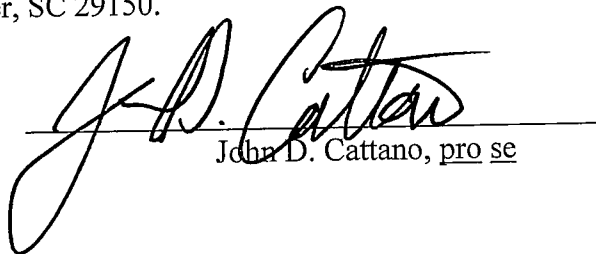
Respectfully submitted,



JOHN D. CATTANO, pro se
1813 Marion Street
Columbia, SC 29201
(803)254-4500

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed this ²² day of October, 2012, to: Anthony D. Hoefler, Esquire, Levi, Wittenberg, Harritt, Hoefler & Davis, 207 N. Washington Street, Sumter, SC 29150.



John D. Cattano, pro se

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Emser Tile, LLC)
)
Plaintiff,)
)
-vs-)
)
John D. Cattano,)
)
Defendant.)

C. A. 2012-CP-40-05587

REPLY

Plaintiff in Reply to the Defendant's Affirmative Defense of Off-Set, as contained in his Answer, alleges as follows.

1. That it denies each and every allegation of the Affirmative Defenses and specifically denies that the Defendant is entitled to any Off-Set or Recoupment or any Affirmative Relief whatsoever.

LEVI, WITTENBERG, HARRITT,
HOEFER & DAVIS, P. A.

By


Anthony D. Hoefer

Attorney for Plaintiff

P. O. Drawer 730

Sumter, S C 209151-0730

803-773-8431

October 26, 2012.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMONPLEAS
)
 COUNTY OF RICHLAND) CA #2012-CP-40-05587

Emser Tile, LLC)
)
 Plaintiff,)
)
 -vs-) PLAINTIFF'S REQUEST FOR
) ADMISSIONS TO DEFENDANT
 John D. Cattano)
)
 Defendant.)
)

TO: JOHN D. CATTANO, THE DEFENDANT APPEARING PRO SE:

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, the Plaintiff, by its undersigned attorneys, requests that Defendant make the following admissions of fact within the time provided by law after service hereof, such admissions being for the purpose of this action only.

YOU ARE REQUESTED TO ADMIT:

1. That, with reference with the Application for Credit, a copy of which is attached to Plaintiff's Complaint and also attached hereto as Exhibit I, the true signature of John D. Cattano is contained thereon. If you deny any or all of this paragraph, please specify in detail in what respect.

2. That, with reference to the itemized Statement of Account attached to Plaintiff's Complaint, a copy of which is attached hereto as Exhibit II, someone who was duly authorized to act on behalf of Triton Stone Group of Charlotte, a/k/a Congaree Triton Acquisitions LLC, did order and receive the certain goods and merchandise as designated on the Statement of Account at the agreed upon prices shown on said Statement of Account. If you deny any or all of this paragraph, please specify in detail in what respect.

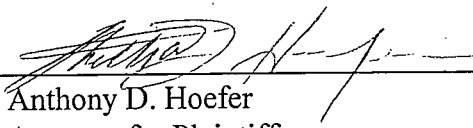
3. That, after giving all credit due, the balance due from Triton Stone Group of Charlotte, a/k/a Congaree-Triton Acquisitions, LLC, at the time it filed it's Petition in Bankruptcy was in the principal sum

of Fifty-Five Thousand Two Hundred Sixty-Three and 24/100. If you deny any or all of this paragraph, please specify in detail in what respect.

SHOULD A SWORN DENIAL OF THE REQUEST BE RECEIVED AND PLAINTIFF HEREAFTER PROVE THE GENUINENESS OF THE TRUTH OF THE MATTERS OF FACT SET FORTH ABOVE, PLAINTIFF WILL APPLY TO THE COURT FOR AN ORDER REQUIRING THE DEFENDANT TO PAY THE REASONABLE EXPENSES, INCLUDING COSTS OF DEPOSITIONS, TRAVEL EXPENSES, AND WITNESS FEES AND ATTORNEY FEES INCURRED IN MAKING SUCH PROOF AS SET FORTH UNDER RULES 36 AND 37, SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

This request is made in good faith; the subject hereof is genuinely relevant to this case, and evidence of the subject hereof is necessary to the establishment of my client's cause of action or defense.

LEVI, WITTENBERG, HARRITT,
HOEFER & DAVIS, P. A.

By 
Anthony D. Hoefer
Attorney for Plaintiff
Post Office Drawer 730
Sumter, South Carolina 29151-0730
803-773-8431 Phone
803-775-9011 Fax

January 22, 2013.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Emser Tile

PLANTIFF

VS.

John D. Cattano

DEFENDANT

CIVIL CASE NUMBER 2012-CP-40-05587

IN THE COURT OF COMMON PLEAS

DEFENDANT'S ANSWERS TO PLAINTIFF'S
REQUEST FOR ADMISSIONS

John D. Cattano, the Defendant appearing PRO SE', and given notice on March 7, 2013, to Plaintiff's Request for Admissions, does hereby make the following answers:

1. Admitted
2. Admitted
3. Denied. Congaree Triton Acquisitions, LLC made two payments to Plaintiff on April 12, 2012 and August 2, 2012, that totaled \$54,996.62 and were wrongfully applied towards pre-acquisition invoices that Congaree Triton Acquisitions, LLC was not responsible for paying. Therefore, the Plaintiff's demand of \$55,263.24 was set-off by the above pre-acquisition debt payments.

Defendant asserts that the amount owed to Plaintiff is \$266.62.

By John D. Cattano

John D. Cattano, Pro Se'
1813 Marion Street
Columbia, SC 29201
803-381-5850

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Emser Tile, LLC)

Case #2012-CP-40-05587

)
)
Plaintiff,)

-vs-)

)
)
PLAINTIFF'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS

John D. Cattano)

)
)
Defendant.)

TO: JOHN D. CATTANO, THE DEFENDANT ABOVE NAMED APPEARING PRO SE:

YOU WILL PLEASE TAKE NOTICE that pursuant to and subject to Rule 34 and 37 of the South Carolina Rules of Civil Procedure, you are requested to produce and permit Plaintiff herein, or persons acting on its behalf to inspect and copy any tangible things hereinafter designated, including writings, drawings, graphs, charts, photographs and any and all data compillations. This request shall be supplemented as information and documents become available to the Defendant through and including the time of trial. Production of the requested items shall be at the law office of Plaintiff's attorney, Anthony D. Hoefler, Esq., at 207 N. Washington Street (P.O. Drawer 730), Sumter, South Carolina 29151, at 10:00 A.M., no later than 30 days from the date of the service hereof.

DOCUMENTS TO BE PRODUCED ARE AS FOLLOWS:

1. Copies of all cancelled checks for any payments made to Congaree Triton Acquisition Limited LLC d/b/a Triton Stone which the Defendant contends were not credited to the account.
2. Copies of checks dated April 12, 2012 and August 2, 2012 referenced by the Defendant in Defendant's Answer to Request for Admissions dated March 7, 2013.

LEVI, WITTENBERG, HARRITT,
HOEFER & DAVIS, P. A.

By 

Anthony D. Hoefler
Attorney for Plaintiff
P.O. Drawer 730
Sumter, SC 29151-0730
803 773 8431

April 1, 2013.

May 8, 2013

Anthony B. Hoefler
Levi, Wittenberg, Harritt, Hoefler & Davis, PA
P.O. Box 730
Sumter, SC 29151-0730

Re: Emser Tile vs John D. Cattano
2012-CP-40-05587

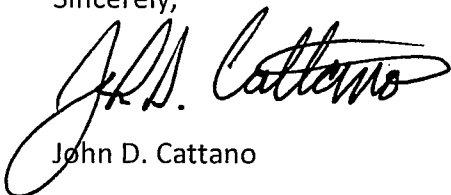
Dear Mr. Hoefler:

According to your letter dated April 25, 2013, requesting information related to payments and credits that were not properly applied to the account of Congaree Triton Acquisitions, LLC, included are the following:

- Carolina First Bank statement pages 1 and 5 dated April 30, 2011, supporting the claim that a payment was made to Emser Tile. The check was dated April 2, 2011, but it did not clear until April 15, 2011, and was posted electronically.
- In August 2011 there was a \$47,500 credit provided to Congaree Triton Acquisitions, LLC by Emser Tile and this was used to offset accounts payable owed to Emser Tile. However, of the \$47,500 credit, \$32,923.63 was applied to pre-acquisition debts that Congaree Triton Acquisitions, LLC was not responsible for paying, which were the responsibility of the previous owners. Information on the credit can be obtained from your client, and detailed information on this credit has been requested of the Congaree Triton Acquisitions, LLC bankruptcy estate trustee.

In conclusion, Congaree Triton Acquisitions, LLC was not responsible for paying any debts that occurred prior to March 11, 2011 (the date of acquisition), as clearly stated in the Asset Purchase Agreement. Any payments made to Emser Tile should have been applied to purchases made after March 11, 2011, which they clearly were not.

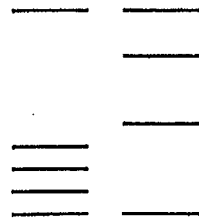
Sincerely,



John D. Cattano



7102619579 31 I



CONGAREE TRITON ACQUISITIONS LLC
 1813 MARION STREET
 COLUMBIA SC 29201

March 31, 2011 - April 30, 2011 Account Number 7102619579 Page 1 of 16
109 enclosures

ANALYSIS BUS CHK TREASURY SVC		Summary			7102619579
Previous Balance	+ Deposits Credits	- Checks Debits	- Service Charges	+ Interest Credits	New Balance
88,882.14	820,932.72	832,494.59	271.64	0.00	77,048.63

30 Days in Statement Period

Deposits

Date	Description	Amount
04-05	INCOMING WIRE TRANSFER GREENFIELD COMMERCIAL CREDIT	256,000.00
04-12	CUSTOMER DEPOSIT	55,892.53
04-13	INCOMING WIRE TRANSFER GREENFIELD COMMERCIAL CREDIT	185,000.00
04-20	INCOMING WIRE TRANSFER GREENFIELD COMMERCIAL CREDIT	239,000.00
04-25	ADP TX/FINCL SVC ADP - TAX 695035800508YGI	1,143.04
04-27	CONGAREE TRITON ACQUIS INCOMING WIRE TRANSFER GREENFIELD COMMERCIAL CREDIT	74,723.34
04-27	CUSTOMER DEPOSIT	9,173.81
<i>Total Deposits</i>		<i>\$820,932.72</i>

CONGAREE TRITON ACQUISITIONS LLC
1813 MARION STREET

Account Number 7102619579

Page 5 of 16

Described Debits (continued)

<i>Date</i>	<i>Description</i>	<i>Amount</i>
04-15	EMSER TILE BT0414 Triton Stone Group Cha	22,071.45 ←
04-15	AMERICAN EXPRESS ELEC REMIT NICHOLAS M BORG	4,000.00
04-18	Transpl/Fleetl 4409190415 440919 Triton S	12,937.48
04-18	0415-Fleet One AutoPay VISA BTS #9 BTS #9	756.65
04-18	843-2482835 SC FDGL LEASE PYMT TRITON STONE GROUP	40.98
04-21	NC DEPT OF REVEN SALES&USE 4111014006775 4111014006775	27,595.93
04-21	ADP TX/FINCL SVC ADP - TAX 578019192837YGI CONGAREE TRITON ACQUIS	21,134.92
04-21	ADP TX/FINCL SVC ADP - TAX A0YGI 042216A01 CONGAREE TRITON ACQUIS	8,958.57
04-21	ADP TX/FINCL SVC ADP - TAX 611019003724YHI CONGAREE TRITON ACQUIS	5,390.54
04-21	ADP TX/FINCL SVC ADP - TAX A0YHI 042216A01 CONGAREE TRITON ACQUIS	2,477.03
04-21	ADP TX/FINCL SVC ADP - TAX 578019192838YGI CONGAREE TRITON ACQUIS	626.76
04-21	ADP TX/FINCL SVC ADP - TAX 611019003725YHI CONGAREE TRITON ACQUIS	547.19
04-22	OUTGOING WIRE TRANSFER BRUNO LUCCHETTI MARMI E GRANIT	10,090.46
04-22	SC DEPT REVENUE DEBIT 2832403-1	12,227.00
04-22	AMERICAN EXPRESS ELEC REMIT	2,500.00

Defendant's Response to the Request for Admissions admitted the sale and delivery of the materials and admitted the prices but asserted that payments totaling Fifty-Four Thousand Nine Hundred Ninety-Six and 62/100 (\$54,996.62) Dollars were wrongfully applied toward pre-acquisition invoices. Thus the only matter controverted by the Defendant is his allegation that payments and credits totaling Fifty-Four Thousand Nine Hundred Ninety-Six and 62/100 (\$54,996.62) Dollars were wrongfully applied towards pre-acquisition invoices.

ARGUMENT

It is undisputed that a payment of Twenty Two Thousand Seventy-One and 45/100 (\$22,071.45) Dollars by a check dated April 12, 2011 signed by John Cattano, was applied to invoices dated from January 7, 2011 – February 4, 2011, and that on June 27, 2011, a credit for merchandise purchased by the Plaintiff from Triton Stone of Charlotte, was applied to invoices dated January 21, 2011 to April 18, 2011. The Affidavit of Plaintiff's employee Patrick Lytle, establishes, through its email stream with employees of Congaree Triton Acquisitions, LLC, how payments and credits were to be applied to the outstanding balance due. While the entire emails are re-printed in the Affidavit, attention is called to the highlighted sections, which reflect that by email dated April 6, 2011 and fax dated April 12, 2011, Annie Jones, Accounting Manager Triton Stone Group, directed that check number 1008 in the amount of Twenty Two Thousand Seventy-One and 45/100 (\$22,071.45) Dollars be directed towards the invoices dated January 7, 2011 to February 4, 2011, (Exhibit 1). Next, attention is called to the email of Mandy Naman, the business manager for Triton Stone Group directing that the credit for Forty Seven Thousand Five Hundred and 00/100 (\$47,500.00) Dollars, be applied to the oldest invoice as shown on the Statement, which were invoices dated January 11, 2011 to April 18, 2011, (Exhibit 2).

The Defendant, John D. Cattano, in his Third-Party Complaint dated and filed on October 22, 2012, in paragraph 25, (Exhibit 3) asserts that the Buyers and Sellers in the Asset Purchase Agreement, contemplated that creditors of the Sellers would present demands for payment of pre-existing debts

to Congaree Triton Acquisitions, LLC and that the agreement of the parties required the Sellers to indemnify Congaree in the event it was forced to make any payments on old debt and other pre-closing liabilities. In paragraphs 33 and 34, (Exhibit 4), of the Third-Party Complaint, the Defendant Cattano outlines that he along with his co-managing member, Carroll A. Campbell, III, made payments on pre-acquisition debt owed to vendors. This allegation flies in the face and contradicts Cattano's claim in his Affidavit that no employees had authority to authorize the payment of pre-acquisition debt. In a nutshell, the Defendant acknowledges that he was required to pay past due debt in order to get new credit. While the agreement of the Buyers and Sellers may have obligated the Sellers to indemnify the Buyers for any pre-existing debt that was paid by the Buyers, nowhere did it preclude the Plaintiff from requiring the authorized agents of Congaree Triton Acquisitions, LLC to pay the oldest debt before any new open account charges were allowed.

It is the law of this State that a creditor must apply payments as instructed by the debtor, but absent a written designation or instructions from the debtor, the creditor may apply payments in its own discretion. Wardlaw v. Troy Oil Mill, 74 S.C. 368, 54 S. E. 658 (1906) Maddux Supply Company, Inc. v. Safhi, Inc.

Based upon the foregoing, the Plaintiff has established that Triton Stone Group of Charlotte and Triton Stone Group of Myrtle Beach known as Congaree Triton Acquisitions, LLC, of which the Defendant, John Cattano was a co-managing member, and the guarantor of the debts of the corporation, was liable for the amounts due from Congaree Triton Acquisitions, LLC to Emser Tile LLC. Congaree Triton Acquisitions, LLC having filed for Bankruptcy, was not named as a party to the action. Cattano acknowledged that he was forced to make payment on pre-acquisition debt, and it is undisputed that employees of his company authorized the application of the payments. The assertion in the Defendant's Affidavit in response to Plaintiff's Motion for Summary Judgment contends that no employee had

authority to authorize these payments, but provides no evidence to support this allegation. The Defendant concedes in his Third Party Complaint (paragraph 25) that he expected that creditors would present demands for payment of pre-existing debt and that Congaree Triton Acquisitions, LLC would be indemnified and also asserts that the Defendant was forced to pay debts he did not owe. (paragraphs 33-41). Thus the allegations in Cattano's Affidavit do not raise a genuine issue. Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponents case, the non-moving party must come forward with specific facts and cannot simply rest on mere allegations or denials contained in the pleadings. Roland v. Heritage Litchfield, Inc. 372 S.C. 161, 641 S.E. 2d 465 (S.C. App. 2007).

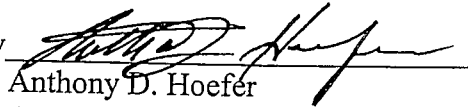
CONCLUSION

There is no genuine issue that the Plaintiff was entitled to apply payments and credits against the invoices designated, and approved by employees of Congaree Triton Acquisitions, LLC formerly known as Triton Stone Group of Charlotte and Triton Stone Group of Myrtle Beach; no genuine issue that the balance due from Congaree Triton Acquisitions, LLC to Emser Tile, LLC is Fifty-Five Thousand Two Hundred Sixty-Three and 24/100 (\$55,263.24) Dollars and no dispute that John D. Cattano is the guarantor of all sums due from Congaree Triton Acquisitions, LLC to Emser Tile, LLC, and accordingly Plaintiff is entitled to Summary Judgment pursuant to Rule 56 South Carolina Rules of Civil Procedure.

Respectfully Submitted.

LEVI, WITTENBERG, HARRITT,
HOEFER & DAVIS, P. A.

By


Anthony D. Hoefer
Attorney for Emser Tile, LLC
P.O. Drawer 730
Sumter, SC 29151-0730
803-773-8431

September 30, 2013.

CONGAREE TRITON ACQUISITIONS, LLO

10088

Invoice#	Description	Date	Amount	Paid	Total Paid
2536114		1/7/2011	\$429.03	\$429.03	\$429.03
2518180		1/14/2011	\$424.89	\$424.89	\$853.92
2536913		1/17/2011	\$21.29	\$21.29	\$875.21
2536016		1/18/2011	\$806.31	\$806.31	\$1,681.52
2537356		1/18/2011	\$92.40	\$92.40	\$1,773.92
2536919		1/18/2011	\$6.16	\$6.16	\$1,780.08
2541696		1/19/2011	\$170.55	\$170.55	\$1,950.63
2574218		1/19/2011	\$142.08	\$142.08	\$2,092.71
2559755		1/26/2011	\$1,062.12	\$1,062.12	\$3,154.83
2589580		1/27/2011	\$54,250.00	\$10,000.00	\$13,154.83
2566186		1/31/2011	\$312.33	\$312.33	\$13,467.16
2566194		2/1/2011	\$975.00	\$975.00	\$14,442.16
2586077		2/3/2011	\$90.11	\$90.11	\$14,532.27
2566743		2/4/2011	\$130.00	\$130.00	\$14,662.27

4/12/2011 10088 Emser Tile \$22,071.45

10088

CONGAREE TRITON ACQUISITIONS, LLC
 1813 Marion Street
 Columbia, SC 29201

CAROLINA FIRST
 CAROLINA FIRST IS A TRADE NAME OF TD BANK, N.A.
 67-219/638

DATE

AMOUNT

4/12/2011 10088 \$ 22,071.45

Twenty Two Thousand Seventy One and 45/100

PAY TO THE ORDER OF:
 Emser Tile
 PO Box 69339
 Los Angeles, Ca 90069-0339

John D. Cattano
 AUTHORIZED SIGNATURE

①010088① ①053902197①①71036①5579①



TRITON

STONE GROUP

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Patrick	Annie Jones
COMPANY:	DATE:
Emser	4/12/11
FAX NUMBER:	TOTAL NO. OF PAGES INCLUDING COVER:
775-655-8445	3
PHONE NUMBER:	SENDER'S PHONE NUMBER:
	704-583-1328
RE:	SENDER'S FAX NUMBER:
	704-583-1329

ACH check payment

URGENT
 FOR REVIEW
 PLEASE COMMENT
 PLEASE REPLY
 PLEASE RECYCLE

NOTES/COMMENTS:

11415 GRANITE ST. STE B CHARLOTTE, NC 28273

54

(Exhibit 2)

Patrick Lytle - Accounts Receivable (CAFAR)

From: Mandy Naman <mandy.naman@tritonstone.com>
Sent: Wednesday, June 29, 2011 6:41 AM
To: Patrick Lytle - Accounts Receivable (CAFAR)
Subject: RE: Triton Stone Group Application of: \$47,500.00

Apply to oldest invoices is fine. Just send me an updated statement when complete. ☺

Thank you,

*Mandy Naman
Business Manager
Triton Stone Group*

11415 Granite Street, Ste. B | Charlotte, NC 28273
P: 704.583.1328 | F: 704.583.1329
Mandy.Naman@tritonstone.com

From: Patrick Lytle - Accounts Receivable (CAFAR) [<mailto:PatrickLytle@emser.com>]
Sent: Tuesday, June 28, 2011 8:58 AM
To: Mandy Naman; Judy Weinberg - Accounts Receivable (CAFAR); Eric Barnett - Charlotte, NC (NCCLT)
Cc: Paul Jensen - Charlotte, NC (NCCLT)
Subject: RE: Triton Stone Group Application of: \$47,500.00

Hi Mandy,

Please see the attached. We just wanted to confirm to which invoices we will be applying the offset to. I forwarded the spreadsheet to Nick last night also. Please feel free to get in touch should you have any questions. Talk to you soon. Thanks.

Patrick Lytle
Sr. Credit/Collections Analyst
Emser Tile
Ph# 323-650-2000 Ext-365
Fax# 775-655-8445

From: Mandy Naman [<mailto:mandy.naman@tritonstone.com>]
Sent: Tuesday, June 28, 2011 5:50 AM
To: Judy Weinberg - Accounts Receivable (CAFAR); Eric Barnett - Charlotte, NC (NCCLT); Patrick Lytle - Accounts Receivable (CAFAR)
Cc: Paul Jensen - Charlotte, NC (NCCLT)
Subject: RE: Triton Stone Group Application of: \$47,500.00

I don't have any attachments so I cannot look at what you applied the funds too

Thank you,

SS

Judy Weinberg - Accounts Receivable (CAFAR)

From: Mandy Naman [mandy.naman@tritonstone.com]
Sent: Tuesday, June 28, 2011 6:16 AM
To: Patrick Lytle - Accounts Receivable (CAFAR); Judy Weinberg - Accounts Receivable (CAFAR); Eric Barnett - Charlotte, NC (NCCLT)
Cc: Paul Jensen - Charlotte, NC (NCCLT)
Subject: RE: Triton Stone Group Application of: \$47,500.00

Got it. I am waiting on the owner to come in. He is still really involved in this process so I have to talk to him first before I tell you anything. ☺

Thank you,

*Mandy Naman
Business Manager
Triton Stone Group*

11415 Granite Street, Ste. B | Charlotte, NC 28273
P: 704.583.1328 | F: 704.583.1329
Mandy.Naman@tritonstone.com

From: Patrick Lytle - Accounts Receivable (CAFAR) [mailto:PatrickLytle@emser.com]
Sent: Tuesday, June 28, 2011 9:07 AM
To: Mandy Naman; Judy Weinberg - Accounts Receivable (CAFAR); Eric Barnett - Charlotte, NC (NCCLT)
Cc: Paul Jensen - Charlotte, NC (NCCLT)
Subject: RE: Triton Stone Group Application of: \$47,500.00

Mandy,

We want to apply the money on account to your open invoices prior to our month end (which is today), so please review the spreadsheet and let us know that you are in agreement with the way it's going to be applied. That way we can avoid any confusion down the road. Please get back to us as soon as possible. Thanks.

Patrick Lytle
Sr. Credit/Collections Analyst
Emser Tile
Ph# 323-650-2000 Ext-365
Fax# 775-655-8445

From: Mandy Naman [mailto:mandy.naman@tritonstone.com]
Sent: Tuesday, June 28, 2011 5:50 AM
To: Judy Weinberg - Accounts Receivable (CAFAR); Eric Barnett - Charlotte, NC (NCCLT); Patrick Lytle - Accounts Receivable (CAFAR)
Cc: Paul Jensen - Charlotte, NC (NCCLT)
Subject: RE: Triton Stone Group Application of: \$47,500.00

I don't have any attachments so I cannot look at what you applied the funds too

Thank you,

Mandy Naman

56

(Exhibit 2- pg. 3)

8/9/2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Emser Tile)
)
Plaintiff,)
)
-vs-)
)
John D. Cattano,)
)
Defendant.)

C. A. #2012-CP-40-05587

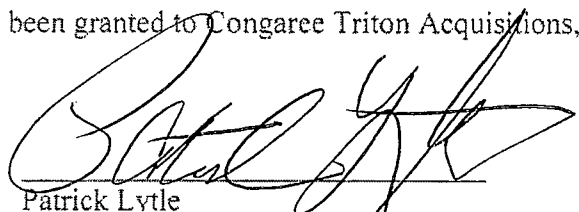
AFFIDAVIT

PERSONALLY appeared before me, Patrick Lytle, who on oath states that he is a Senior Credit/Collections Analyst and is presently employed in the Accounts Receivable Credit Department, and at all times pertinent to the above captioned action was employed by Emser Tile in this capacity; that as part of his ordinary and customary duties, he handles the Accounts Receivable for Emser Tile; that he was in charge of the account for Triton Stone of Charlotte and Triton Stone of Myrtle Beach, the assets of which were purchased by Congaree Triton Acquisitions, LLC on March 11, 2011; that on March 11, 2011, there was a balance due from Triton Stone of Charlotte and Triton Stone of Myrtle Beach in the amount of fifty six thousand eight hundred twenty two and 90/100 (\$56,822.90) Dollars; that, after March 11, 2011, the employees of Triton Stone of Charlotte and Triton Stone of Myrtle Beach acted on behalf of Congaree Triton Acquisitions LLC, and ordered additional merchandise on open account;

That by email dated April 8, 2011, a copy of which is attached hereto, I advised Annie Jones the Accounting Manager of Triton Stone Charlotte, Triton Stone of Myrtle Beach and Congaree Triton Acquisitions LLC, that additional orders could not be released without payment being made against past due accounts; that by check dated April 12, 2011, in the sum of Twenty Two Thousand Seventy-One and 45/100 (\$22,071.45) Dollars, Annie Jones specified the invoices that were to be paid, copies of which are attached hereto; that by email of April 18, 2011, I confirmed to Annie Jones that invoices that were paid, and that by email dated April 21, 2011, a copy of which is attached, she advised how the remainder was to be applied; that by email dated June 27, 2011, copy of which is enclosed, I confirmed to Nick Borg the

Office Manager/Sales Manager/Controller of Triton Stone Group that the credit of Forty Seven Thousand Five Hundred and 00/100 (\$47,500.00) Dollars for goods and merchandise purchased by Emser Tile from Triton Stone Charlotte was to be applied against the designated invoices, copy of which is attached; that by email dated June 28, 2011, copy of which is attached. I forwarded the Statement reflecting the open invoices to which the Forty Seven Thousand Five Hundred and 00/100 (\$47,500.00) Dollar credit was to be applied; that, by email dated June 29, 2011, I received an email from Mandy Naman advising that the credit should be applied to the oldest invoices, copy of which is attached; that, by email dated July 26, 2011, to Nick Borg, copy of which is attached hereto, I confirmed the application of the Forty Seven Thousand Five Hundred and 00/100 (\$47,500.00) Dollar credit.

That, after March 11, 2011, the date that Congaree Triton Acquisitions LLC acquired Triton Stone of Charlotte and Triton Stone of Myrtle Beach, open account sales in the amount of Eighty Nine Thousand one Hundred fifty six (\$89,156.67) Dollars were made; that, but for the application of payment to the oldest invoices, new credit would not have been granted to Congaree Triton Acquisitions, LLC.


Patrick Lytle
Senior-Credit/Collections Analyst
Accounts Receivable Credit Department

Sworn to before me this _____ day of _____
Notary Public for the State of _____
My Commission Expires: _____

See attached PL

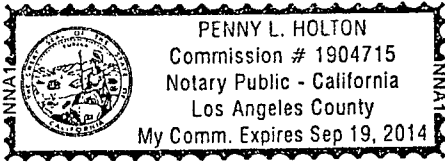
CALIFORNIA JURAT

State of California }
County of Los Angeles } ss.

Subscribed and sworn to (or affirmed) before me on
this 16 th day of August, 2013, by

Patrick Lytle

proved to me on the basis of satisfactory evidence
to be the person who appeared before me.



Penny L. Holton

OPTIONAL

Description of Attached Document

Title or Type of Document: Affidavit

Document Date: no date Number of pages 2

Signer (s) Other Than Named Above:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Emser Tile)

C.A. #2012-CP-40-05587

)
)
Plaintiff,)

vs)

John D. Cattano)

)
)
Defendant)

2012 SEP -3 PM 3:23
JEANETTE W. McBRIDE
C.C.P. & G.S.
AFFIDAVIT
FILED
RICHLAND COUNTY

DEFENDANT'S AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

PERSONALLY appeared before me, John D. Cattano, who on oath states that he was the Chief Financial Officer of Congaree Triton Acquisitions, LLC (dba "Triton Stone Group") from March 11, 2011, through June 29, 2012, which was the date the company entered Chapter 7 bankruptcy.

On March 11, 2011, the officers of Congaree Triton Acquisitions, LLC executed the Asset Purchase Agreement and acquired all of the assets of Triton Stone of Myrtle Beach, Inc and Triton Stone of Charlotte, Inc. The Asset Purchase Agreement confirms that all pre-acquisition liabilities were the responsibility of the selling parties and were not included in the acquisition (attached is a copy of the Asset Purchase Agreement that is incorporated herein by reference).

No employee of the new company had the authority to bind Congaree Triton Acquisitions, LLC to pre-acquisition debts, and only the officers of Congaree Triton Acquisitions, LLC, John D. Cattano as the Chief Financial Officer and Carroll A. Campbell, III as the Chief Executive Officer, had the authority to authorize the payment of pre-acquisition debts.

The payment of \$22,071.45 on April 12, 2011, and the credit of \$47,500 on June 28, 2011, were to be applied to post-acquisition invoices.

As such, genuine issues of material facts exist in this case, and the Plaintiff's motion should be denied.



John D. Cattano
September 3, 2013

Subscribed and sworn to (or affirmed) before me on this 3rd day of September, 2013, by **John D. Cattano**, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Notary for the State of SL - Rockland Co

My Commission Expires: 1/16/17



4. THE CONTINGENCY OF THE COMPENSATION.

That the undersigned represents the Plaintiff at a contingency rate of 15% of the sums recovered on its behalf if paid in full, together with a Five Hundred and 00/100 (\$500.00) Dollar non-contingent fee.


5. A FEE CUSTOMARILY CHARGED IN LOCALITY FOR SIMILAR LEGAL SERVICES.

That, depending upon the expected recovery, the undersigned is informed and believes that a range of 33.3% to 45% is customary on a contingency fee arrangement or an hourly rate between \$200.00 and \$300.00 per hour;

6. BENEFICIAL RESULT.

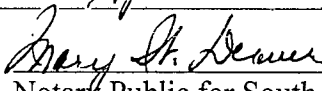
That the undersigned has performed services and labor as set forth herein above and, although no recovery has been made, the basis for judgment has been established, which would place the Plaintiff in a position to pursue its post-judgment remedies if the Order for Judgment is granted and that the Plaintiff believes that an award of fifteen (15%) per cent in the amount of Eight Thousand Two Hundred Eighty-Nine and 00/100 (\$8,289.00) Dollars is an appropriate award;


That the undersigned affirms that this Affidavit is a factual statement based upon the information and belief of the undersigned, the pleadings filed, the laws of this State and is submitted to this Court for an Order for Judgment by Default and an award of attorney's fees on behalf of the Plaintiff.



Anthony D. Hoefel

Sworn to before me this 30th
day of September, A.D., 2013.



Notary Public for South Carolina 
My Commission Expires: July 13, 2020

2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-05587

RECEIVED

DEC 19 2013

SC Court of Appeals

EMSER TILE, LLC,

Respondent,

v.

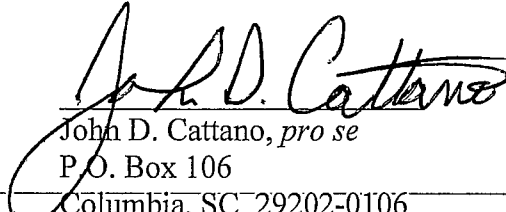
JOHN D. CATTANO,

Appellant.

NOTICE OF APPEAL

John D. Cattano appeals the order/judgment of the Honorable G. Thomas Cooper, Jr. dated November 20, 2013. Appellant received written notice of entry of this order/judgment on December 9, 2013.

December 19, 2013


John D. Cattano, *pro se*

P.O. Box 106

Columbia, SC 29202-0106

803-381-5850

cattanoj@aol.com

Other Counsel of Record:

Anthony D. Hoefler, Esq.
Levi, Wittenberg, Harritt, Hoefler & Davis, PA
270 N. Washington Street
P.O. Drawer 730
Sumter, South Carolina 29151
803.773.8431/803.775.9011 (f)

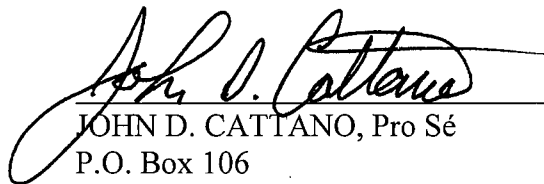
RECEIVED

MAR 24 2014

SC Court of Appeals

The undersigned appellant John D. Cattano certifies that this Record on Appeal contains no matter which is irrelevant to this appeal and contains all material proposed to be included by the parties.

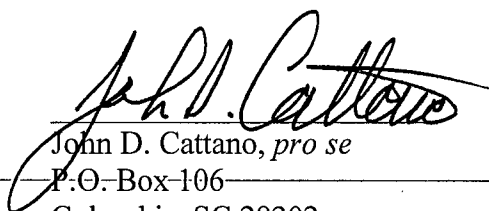
Respectfully submitted,



JOHN D. CATTANO, Pro Sé
P.O. Box 106
Columbia, SC 29202
803-381-5850

CERTIFICATE OF COUNSEL

I hereby certify that I have mailed a true copy hereof to: Anthony D. Hoefler, Esq., Levi, Wittenberg, Harritt, Hoefler & Davis, PA, P.O. Box 730, Sumter, SC 29151 this 24th day of March 2014.



John D. Cattano, *pro se*
P.O. Box 106
Columbia, SC 29202
803-381-5850

RECEIVED

MAR 24 2014

SC Court of Appeals

(65)