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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

C.A. NO.: 2012-CP-23-02887

David Wilson, individually and
derivatively on behalf of Carolina
Custom Converting, LLC,

Plaintiff,

-vs-

John Gandis, Andrea Comeau-
Shirley, ZOi Films, LLC, and Carolina
Custom Converting, LLC,

Defendants,

John Gandis and Andrea
Comeau-Shirley,

Third-Party Plaintiffs,

-vs-

Carolina Custom Converting, LLC,

Third Party Defendant
and Counterclaim Plaintiff,

-vs-

Dave Wilson, Steve Norvell, Neologic
Distribution, Inc. and Fresh Water
Systems, Inc.

ORDER

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SC Court of Appeals

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GREENVILLE, S.C.
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2015 JAN 9 PM 4 28

I. PROCEDURAL BACKGROUND

This case concerns the management travails of Carolina Custom Converting, LLC (CCC), a company engaged in the plastic film business and owned by Plaintiff David Wilson (Wilson), Defendant John Gandis (Gandis), and Defendant Andrea Comeau-Shirley (Shirley). Wilson alleges (1) he was subject to shareholder oppression by Gandis and Shirley; (2) Gandis breached his fiduciary duty to CCC and Wilson; (3) Gandis and Shirley converted company funds and property to their own

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use; (4) he was entitled to dissolution of the company, or in the alternative, disassociation. Defendants Gandis and Shirley answered and counterclaimed that Wilson had breached his fiduciary duty. Wilson later sued as a derivative representative of CCC and brought in ZOi Films, LLC (ZOi) and Deco-Tex, LLC (Deco-Tex) as additional defendants.

On September 20, 2013, Wilson filed a Second Amended Complaint alleging the same causes of action in an individual capacity as well as derivatively, but added CCC as a party.¹ CCC then counterclaimed against Wilson, Steve Norvell, Fresh Water Systems, Inc., and Neologic Distribution, Inc. for breach of duty of loyalty, conspiracy, and violations of the S.C. Trade Secrets Act, among others, but this Answer was not served on Norvell, Neologic, and Fresh Water until March 24, 2014. Norvell, Neologic, and Fresh Water responded, asserting the S.C. Trade Secrets claim was made in bad faith.

The parties agreed to waive a jury trial and submit all claims to a bench trial, which was held September 29, 2014 through October 3, 2014.

I. FACTUAL FINDINGS

In November 2007, Wilson and Gandis formed CCC. At the time of formation, Wilson owned and operated Eastern Film Solutions (EFS), which bought and sold polyester, plastic, and metalized films.² Gandis owned and operated Decotex, which bought and sold decorative designs for vinyl film. The basic agreement was for CCC to perforate and “slit” (cut) film. Wilson agreed to run much of EFS’ slitting business through CCC.

In 2008, Wilson and Gandis discussed expanding the scope of CCC and winding down their individual businesses. They discussed EFS buying film from CCC and selling it as an additional source of income to CCC. CCC began to purchase and sell film in addition to slitting, and EFS became

¹ CCC entered an appearance as a party in October 2012; however, Plaintiff did not seek any relief from CCC. The amendment followed a debate about CCC’s status as a party, and Plaintiff agreed to add CCC as a first party Defendant.

² Wilson had been in the film business for nearly 20 years. His brother-in-law Steve Norvell occasionally financed Wilson’s overseas film transactions.

a slitting customer as well as a purchaser of CCC inventory. In either May or June 2008, Wilson agreed to make CCC the buyer and seller of film on one of EFS's major accounts, Minova, resulting in significant additional revenues for CCC.

The Minova account fueled additional discussions about EFS winding down and conducting all new film business through CCC. However, Wilson indicated he wished to keep 3 import accounts separate from CCC. The three accounts to be excluded from the deal were Lamborn, Modular Metal, and West Carrolton (two of which, Lamborn and West Carrolton, were financed by Steve Norvell). The parties did not sign a formal operating agreement for CCC, but this court finds that certain oral agreements were reached whose terms never altered Wilson's understanding that these three accounts would remain separate from CCC.

The court finds the parties agreed that Gandis and Wilson founded the business as equal partners, that Wilson would wind down EFS and receive compensation in the amount of \$8,000 per month, and Gandis would fund the business through two credit lines (the M-Tech line of credit and the Decotex line of credit). Wilson would lead CCC's sales efforts and Gandis would manage operations.³ Gandis engaged Shirley, a Georgia-licensed Certified Public Accountant, for accounting and formation advice. CCC was organized as a manager-managed limited liability company, and Gandis was identified in the articles of organization as the manager. Beginning in or about July 2008 and consistent with his agreement with Gandis, Wilson began winding down EFS, which continued through July 2009.

While Shirley attempted to finalize an operating agreement for CCC, she also provided personal counsel to Gandis. However, no written operating agreement was ever completed. In 2009, Shirley agreed to accept a 10% interest in CCC in exchange for providing accounting services. Gandis and Wilson each transferred 5% of their interest in CCC to her, each retaining a 45% interest.

³ CCC did not engage in the import film market until 2010.

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Although Shirley did not have a formal voting interest, she took an active role in management, primarily through private communications between her and Gandis.

CCC's business grew, and with the help of a film shortage in 2010 it flourished, turning a profit of over a million dollars. However, since CCC was organized as a subchapter S entity, the members were responsible for taxes proportionate to their ownership interest. Also, because CCC filed taxes on an accrual basis, this tax liability was even greater. In the past, a tax distribution was made to the members, and funds had been set aside for a tax distribution for 2010. CCC's profits in 2010 created phantom income for the members, and the leaner revenue of 2011 produced a shortfall for the tax payment.

Shirley began to extensively advise Gandis as to the management of CCC and the treatment of Wilson, which ultimately led to his oppression and eventual ouster. She advised Gandis to pay off an equity line previously relied upon by CCC to help even out cash flow and purchase inventory so Gandis could pay his personal tax liability. Gandis used CCC funds set aside for the 2010 tax liability to pay off CCC's obligation of the line of credit, and then used the line of credit to pay his taxes. Wilson was then informed CCC would not make a tax distribution to cover his tax liability as previously agreed and as had been done in the past.

March 2011 emails between Shirley and Gandis revealed a plan to use CCC's employees to perform tasks for Gandis's other business interests, M-Tech, Inc. and Decotex, LLC. Testimony corroborated the emails. Also at this time, a secretive effort was initiated to monitor Wilson's emails. Shirley's emails to Gandis outlined a plan to flip Wilson from an owner to an employee. Contemporaneously, Shirley and Gandis began deferring their distributions and classifying the monthly income that Wilson had been paid pursuant to the July 2008 agreement as a "loan." By August 16, 2011, Shirley bluntly proposed that they develop an "Exit Strategy" for Wilson and identified who could take Wilson's place as head of the sales team.

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In September 2011, Gandis intercepted an email from Wilson's wife and forwarded it to Shirley. Shirley responded that the email demonstrated marital discord arising from Gandis's opportunity to "restructure" Wilson. From this point forward, the emails between Gandis and Shirley evidence an effort to exclude Wilson from the benefits of ownership and to cease paying him his monthly income as part of an effort to "squeeze" him to relinquish his ownership interest. Under pressure, Wilson engaged in discussions with Gandis to become an employee. In her private coaching to Gandis, Shirley advocated high pressure tactics. Wilson was given the deadline of January 7, 2012 to either become an employee or cease receiving the monthly income that he relied upon. As this deadline approached, Shirley prepared a "Pro-Forma Balance Sheet" to accompany an offer to Wilson to buy his interest. However, the balance sheet contained questionable accruals and removed assets that had been listed on previous CCC balance sheets. Although Gandis and Shirley indicated they would also sell at a price based upon this balance sheet, their offer had materially different terms, including the requirement that Shirley be paid a \$100,000 "preference on units" and that Wilson purchase M-Tech's building, which Shirley deemed a "burden." The balance sheet had the effect of devaluing Wilson's interest in CCC.

The parties could not reach an agreement. Wilson approached potential buyers of CCC, to whom he provided information about CCC's financial status, absent customer names, subject to a non-disclosure agreement. During this time, Shirley counseled Gandis to be patient and allow the pressure to build on Wilson. All the while, emails between Wilson and his lawyer, his accountant, and others were monitored, giving Shirley and Gandis access to Wilson's thought process. Wilson discussed potential employment with another company and indicated he did not have a non-compete or a non-solicitation agreement.

An early 2012 email between Gandis and Shirley reveals their decision to terminate Wilson but maintain that he resigned, and to physically lock him out of his office. On January 17, 2012, Gandis



arrived at CCC's Greenville office with law enforcement and a locksmith and advised Wilson his resignation was accepted. Wilson protested that he was not resigning, but eventually had no choice but to leave, although he left with two of his laptops and Blackberry in hand. Gandis then changed the locks.

After Wilson's ouster, Gandis and Shirley formed ZOi Films, LLC, which was intended to take CCC's better business opportunities. Representations to the bank and to the Internal Revenue Service demonstrate that ZOi Films was organized with two members: M-Tech, Inc. (owned by Gandis) and Creative Brain Storms, Inc., a Georgia corporation owned by Shirley. After Wilson discovered the ZOI Films scheme, Gandis and Shirley maintained ZOi was intended to be a wholly-owned subsidiary of CCC.

In sum, Gandis and Shirley's oppressive and unfairly prejudicial acts included:

- Initiating an "Exit Strategy" on August 16, 2011;
- Threatening to stop Wilson's guaranteed and agreed upon monthly payments unless he relinquished his equity interest and became an at-will employee with a non-compete agreement;
- Refusing to make tax distributions for Wilson while instead using money set aside for such to pay off the line of credit so Gandis could borrow to pay his own taxes;
- Monitoring all of Wilson's private emails, including those with his wife, his attorney, and his accountant;
- Making representations that he may not receive distributions for another two years;
- Managing the money supply to make it appear as if cash was more limited than it was in actuality;
- Continually making unilateral changes, including secretly back-paying rent at a higher rate than agreed upon and transferring assets (ex. air conditioner) to Gandis's entities through expensing such items as rent;
- Limiting Wilson's access to financial information of the company;
- Removing him from signatory authority on the operating account;

- Removing his ability to make wire transfers for the company;
- Excluding him from discussions about business operations;
- Stopping Wilson's guaranteed and agreed upon monthly distribution in January 2012;
- Manipulating the December 2012 pro-forma balance sheet to devalue Wilson's interest in CCC;
- Physically locking Wilson out of his business and refusing to allow him to return;
- Demanding possession of Wilson's computer and Blackberry;
- Terminating the cell phone plans for Wilson and his family while maintaining coverage for the other members;
- Terminating health insurance coverage for Wilson and his family;
- Forming ZOi to compete with CCC in order to siphon profits until Wilson caught Gandis and Shirley; and

After his ouster, Wilson began working and selling film for Neologic, Inc., owned by his sister-in-law and managed by Steve Norvell. Sales began slowly in 2012, mostly to former CCC customers with whom Wilson had long term relationships that predated CCC. Wilson continued to sell film for Neologic in 2013 and 2014, including to former CCC customers.

In 2013, CCC alleged that Wilson had usurped corporate opportunities in 2008 and 2009, including the three accounts excluded from the agreement between Wilson and Gandis. Norvell was alleged to have aided and abetted these alleged breaches of fiduciary duty and to have conspired with Wilson to dissolve CCC. In addition, CCC alleged that Wilson and Neologic/Freshwater had misappropriated trade secrets and converted company information for their own use.

However, Wilson presented testimony from others engaged in the film business demonstrating that polyester film was a commodity and that the alleged trade secrets were readily available from the internet, trade associations, trade shows and manufacturers' pricing information regularly furnished to potential film purchasers. Although industry and customer information was gathered by CCC, this

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information was readily available from public sources. Moreover, CCC made little if any effort to protect the information; neither Wilson, Gandis, Shirley, Bill Shaw, Mike Myers, nor any other CCC employee or contractor was required to sign a non-disclosure agreement prior to Wilson's ouster.

Both parties presented expert testimony as to CCC's value both at the time of ouster and at the end of 2013. Wilson's expert Catherine Stoddard valued CCC at the time of ouster at \$1,018,753 and Wilson's interest at \$408,335.⁴ However, there was testimony by both experts as well as the court-appointed experts as to possible adjustments to the value of the entity due to equipment moving costs, excess inventory, and advances.

III. LAW / ANALYSIS

A. Wilson's Claim for Shareholder Oppression.

Under S.C. Code Ann. § 33-44-410:

[a] member or manager may maintain an action against a limited liability company or another member or manager for legal or equitable relief, with or without an accounting as to the company's business, to enforce:

- (1) the member's rights under the operating agreement;
- (2) the member's rights under this chapter; and
- (3) the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company.

The full range of equitable remedies are available to the court, although the South Carolina Code § 33-44-801(4) sets out specific provisions for dissolution, which shall occur:

(4) on application by a member or a dissociated member, upon entry of a judicial decree that:

....

(e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner.

⁴ Defendant CCC's expert valued Wilson's interest at the time of ouster at \$354,000.

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The courts have used the terms "freeze out" or "squeeze out" interchangeably; the terms mean "the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control or utilization of some legal device or technique, to eliminate from the enterprise one or more owners or participants." *Kiriakides v. Atlas Food Sys. & Servs. Inc.* 343 S.C. 587, 604 n.26, 541 S.E.2d 257, 267 n.26. (2000) (citation omitted). "Common freeze out techniques include termination of a minority shareholder's employment, the refusal to declare dividends, the removal of the minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation. Often, these tactics are used in combination." *Id.* at 604-05, 541 S.E.2d at 267 (footnotes omitted). So it is in this case.

The South Carolina Supreme Court recently applied the oppression standard in *Ballard v. Roberson* when it stated the following:

We acknowledge that the facts before us are not as egregious as those in *Kiriakides*, which included actual fraud by Alex upon the minority. However, illegal or fraudulent conduct is not required under section 33-14-300(2)(ii), and we agree with the circuit court that the evidence in the record shows oppression by the majority in this instance. The concern and focus in shareholder oppression cases is that the minority "faces a trapped investment and an indefinite exclusion [from] participation in business returns." *Ballard* here, like John and Louise in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment. 399 S.C. 588, 595, 733 S.E.2d 107, 110 (2012) (citations omitted).

Interestingly, the Court in *Ballard* relied on emails to determine the motives behind the plaintiff's exclusion from the business.

In particular, e-mail communications between the other shareholders clearly indicate their desire to oust Ballard. The individual Appellants wanted to convince Ballard to return his 20% interest in Warpath in the hopes that "he [would] take his [\$1,000,000] and run [] after a little threatening, posturing and whining." Furthermore, when discussing what options to give Ballard, Thoennes, III posited, "Don't we want to get him out of the deal?" *Id.* at 595, 733 S.E.2d at 110-111 ("Although at trial the individual Appellants sought to downplay the implications of these electronic exchanges, this enunciation of their intent to force out Ballard simply contextualizes their subsequent actions").

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The emails proved an overt scheme to oust Wilson, and document the step by step efforts of the majority to "flip" Wilson from an owner to an employee. Moreover, the emails provide multiple examples of oppressive and prejudicial actions by Gandis, CCC's manager, and Shirley, who exercised control delegated to her by Gandis, including the management of CCC's financial affairs. In addition, Gandis and Shirley were surreptitiously reading Wilson's emails. The record—particularly the remarkable emails between Gandis and Shirley—abounds with evidence of calculated oppression. There is little left for the fact finder in this "freeze out" claim to do when Wilson's business partners declare "we will freeze his capital account" and gloat that their cabal will "mean that Dave sits with a frozen capital account until the LLC liquidates (and he will still have a 2010 tax bill that he has to pay)." Plaintiff Ex. 48 (October 24, 2011 email from Shirley to Gandis). The financial manipulation of the minority is the essence of oppression in a close corporation; what makes this instance so striking is the brazen but clumsy manner in which the plan was conceived and executed.

Wilson was also literally locked out of his business. He has not had access to financial information about CCC's finances except when this court has compelled Defendants to produce such information, and he has had none since August 2013. This is a classic squeeze-out, and Wilson established by clear and convincing evidence that "the managers [and] members in control of [CCC] have acted, are acting [and] will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." S.C. Code Ann. § 33-44-801(4)(e).

The parties acknowledge this court has the authority to fashion an equitable remedy of a buy-out of Wilson's distributional interest as an alternative to dissolution.⁵ S.C. Code Ann. § 33-44-410 permits broad discretion in fashioning an equitable remedy to enforce the rights of a member. See

⁵ Based in part upon *Hendley v. Lee*, 676 F. Supp. 1317 (D.S.C. 1987), Defendants took the position in response to Plaintiff's motion for partial summary judgment and during the trial of this matter that a buy-out was an equitable remedy available to the court as an alternative to the harsh remedy of dissolution. Although Plaintiff pled a cause of action for dissolution, Plaintiff agreed with Defendants' position that under S.C. Code § 33-44-410, this court had the authority to fashion an equitable remedy. In addition, Plaintiff's actions for an accounting, dissolution, and derivative actions are all equitable in nature.

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Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009) (“[W]e find that the LLC Act grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members”), *citing* S.C. Code Ann. §§ 33-44-410 cmt.,- 801 cmt. (2006). In addition, when considering remedies for shareholder oppression in the corporate context, the Supreme Court has stated:

if it is established by a shareholder that “the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation)” [citing S.C. Code § 33-14-300(2)(ii)], [then] Section § 33-14-310(d)(4) permits a court to make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

Kiriakides v. Atlas Food Sys. & Servs., Inc., 343 S.C. 587, 596 (2001).

To the extent applicable to a buy-out of a member’s distributional interest as an equitable remedy for oppressive, fraudulent, or unfairly prejudicial conduct is proper, this court has valued Plaintiff’s interest consistent with § 33-44-702. In determining the fair value of Wilson’s distributional interest, the Court believes that the time of ouster is the most appropriate date for valuing Wilson’s interest.⁶ See *Hendley v. Lee*, 676 F. Supp. 1317 (D.S.C. 1987); *see also* Douglas K. Moll, *Shareholder Oppression and “Fair Value”: Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293 (2004). In this regard, this court adopts Ms. Stoddard’s credible December 31, 2011 valuation with three adjustments. As of that date, Stoddard determined that CCC had a valuation of \$1,018,753. The first adjustment is that the value should be adjusted downward by \$50,625, to account for possible excess inventory. Second, the value of the equipment should be adjusted further downward by twenty five percent (25%) of fair market value of the equipment to account for moving costs. After these two adjustments, the value of CCC as of December 31, 2011 is

⁶ In a case of dissociation, S.C. Code § 33-44-702 provides for valuation on the date of dissociation.

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\$884,140.50; the fair value of Wilson's forty-five percent (45% interest) is \$397,863.23. Wilson's share is reduced by another \$50,000.00 for previous advances he had received.

Moreover, there was no evidence presented by Defendants as to the current financial condition of CCC.⁷ Unlike a dissociation provided for in §33-44-701 where the managing members have no fault, this case involves clear and convincing evidence of oppressive conduct by Gandis and Shirley and a forced lock out of Wilson. Therefore, this Court believes the most equitable remedy is that Gandis and Shirley be ordered to buy out Wilson's distributional interest.⁸

B. Defendants' Claims for Breach of Fiduciary Duty.

Defendants failed to prove their claim for breach of fiduciary duty. The evidence did not establish that Wilson had agreed to transfer the three import accounts (West Carrollton, Modular Metal and Lamborn) to CCC in 2008. First, Wilson testified that these three accounts were clearly excluded. Second, a document provided by Gandis to Shirley for the purpose of drafting an operating agreement specifically references Wilson's intent to exclude three import accounts; another email from Gandis to Shirley further corroborates Wilson's testimony. Finally, there was conflicting testimony from Shirley and Gandis as to their understanding of these accounts.

The court finds Defendants were aware EFS was conducting business with these accounts in 2008 and 2009. Even if Wilson had agreed to transfer them to CCC, these claims would be time barred. Gandis and Shirley knew that EFS continued to do business with West Carrollton in July 2009, and with Lamborn after July 2008. Even assuming the three accounts were intended to be part of the Wilson-Gandis agreement, Defendants failed to engage in a reasonable inquiry when they received notice in 2009 that Wilson had in fact conducted import business with these accounts. Defendants' failure to take action upon receipt of knowledge of EFS' continued business with West Carrollton

⁷ At the time of trial, Wilson had a pending motion to compel for financial information for CCC. Bradshaw's report concluded with financials for the calendar year 2013.

⁸ Plaintiff also brought claims for breaches of fiduciary duties both individually and derivatively. This Court concludes that ordering a buy-out of Wilson's interests at the time of ouster makes a ruling on this claim unnecessary.

suggests that the three accounts were not part of the deal. See e.g., *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394-395 (Ct. App. 2004). A reasonable inquiry in 2009 by Defendants would have established the full extent of EFS activities with these three import accounts, yet even with full knowledge of West Carrollton sales by EFS, Defendants did nothing.

Because Wilson did not breach any fiduciary duty to the Defendants, the claims that Norvell aided and abetted these breaches are likewise without merit. Moreover, there is no evidence that Norvell had any knowledge of Wilson's duties to the Defendants or the nature of his agreement with Gandis.⁹ "The gravamen of the claim [of aiding and abetting] is the defendant's knowing participation in the fiduciary's breach." *Future Group, II v. NationsBank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) (rejecting a claim of aiding and abetting a breach of fiduciary duty because defendant's lack of actual knowledge prevented knowing participation in the breach). See also *Simmons v. Danhauer & Assocs., LLC*, 2010 U.S. Dist. LEXIS 112483 (D.S.C. Oct. 21, 2010); *Vortex Sports & Entm't. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008) (finding liability where the defendant had actual knowledge of a fiduciary duty and "knowingly encouraged" the fiduciary to breach that duty). CCC presented no evidence that Norvell had knowledge of a fiduciary duty Wilson owed to CCC or its members. Nor was there any evidence that Norvell's financing of Wilson's film purchases (as he had done before the formation of CCC) would relate to or encourage breach of any of duty. Defendants failed to prove any of the elements of this claim against either Wilson or Norvell.

C. **CCC's Claims for Violation of the S.C. Trade Secrets Act.**

CCC failed to prove that Wilson, Neologic, or Freshwater misappropriated CCC's trade secrets. Multiple witnesses who have extensive experience and knowledge of the film and packaging industry testified that much (if not all) of the information claimed as trade secrets is publicly accessible. Trade shows, trade journals, and online sources provide access to customer information, pricing information

⁹ At trial, there was conflicting testimony by the Defendants about the precise terms of the Wilson-Gandis agreement, which further undermines any assertion that Norvell knew and understood the agreement between Wilson and Gandis.

as well as information about manufacturers and suppliers. See e.g., *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 883 (2007) (“Because the information [a list of potential customers] Atwood seeks to protect is available through other proper means, it is not protected as a trade secret.”). In addition, Wilson had been in the industry for 20 years and brought much information with him when he joined Gandis in forming CCC. See *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996).

Moreover, CCC did not sufficiently safeguard its information as required to warrant protection under the S.C. Trade Secrets Act. South Carolina law defines a trade secret to mean:

information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39-8-20(5)(a) (2012). In *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), the court determined that “[t]he threshold issue in any trade secrets case is not whether there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether there was a trade secret to be misappropriated,” and in order to decide “whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others.” *Id.* at 295, 471 S.E.2d at 724.

A party claiming a trade secret violation must exercise “eternal vigilance,” which “calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.” *Hill Holliday Connors Cosmopolos, Inc. v. Greenfield*, 433 Fed. Appx. 207, 214 (4th Cir. 2011). “Unlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, the value quickly diminishes.” *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154,

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161 (2009). Thus while some of Wilson's business practices may have been sharp and his conduct at times deceptive, there was insufficient evidence that his post-CCC activity was anything but legitimate competition by one who had superior knowledge of and wide contacts in the film industry.

Finally, CCC failed to prove its alleged damages were proximately caused by a misappropriation of the alleged trade secrets. The evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster from CCC. There was very little, if any, evidence that possession of CCC's customer information by Wilson was the proximate cause of any lost revenue experience by CCC.

D. CCC's Claims for Civil Conspiracy.

CCC failed to present sufficient evidence in support of its claims for civil conspiracy against Wilson, Neologic and Fresh Water. "[T]he tort of civil conspiracy contains three elements: (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 546 (2009). The damages element is also slightly different than other causes of action. *Pye v. Estate of Fox*, 369 S.C. 555, 568 (2006).

CCC maintained that Wilson's effort to obtain dissolution, which was funded by Norvell's companies, constituted a conspiracy to harm CCC. The evidence demonstrated that Wilson's efforts were in furtherance of his legal rights and not improper. Norvell's assistance was likewise not improper. Therefore, CCC's claim on this ground fails.

E. Both Parties' Claims for Conversion.

Both parties brought claims of conversion against the other. "Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights. . . . [P]laintiff [must] establish either title to or right to the possession of the personal property." *Regions Bank v. Schmauch*,

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354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003). Neither party proved that their chattel or property was converted.

F. Prejudgment Interest.

This court has not found any authority allowing prejudgment interest in a shareholder oppression case, but there is a Court of Appeals decision that did not allow it. *Dibble v. Sumter Ice and Fuel Co.*, 283 S.C. 278, 322 S.E.2d 674 (Ct. App. 1984). Decisions from other jurisdictions have denied prejudgment interest in oppression cases. *See Tiffit v. Stevens*, 987 P.2d 1 (Or. Ct. App. 1999); *see also Jahn v. Kinderman*, 814 N.E.2d 116 (Ill. App. Ct. 2004). Wilson points to S.C. Code § 33-44-702(e), which provides that "[i]nterest must be paid on the amount awarded from the date determined under Section 33-44-701(a) to the date of payment." Wilson argues it would be unjust for the court, in the exercise of its equitable powers, to deny a remedy for his unlawful ouster and oppression that would be available for his lawful dissociation. However, prejudgment interest may only be awarded if "the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties," and it is plain that the sum was never certain and that the parties did not agree to a mathematical calculation in advance. *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006). The record is replete with disagreement on a number of issues which precluded determination of a readily ascertainable value on December 30, 2011. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009).

Wilson contends that denying prejudgment interest to a "squeezed out" shareholder but granting it to one merely disassociated creates an unwarranted disparity, and provides no deterrent to the majority's unfair treatment of the minority. The majority could therefore freeze out a minority shareholder, whose only recourse would be judicial dissolution, a remedy that has no prejudgment interest risk to the majority. Wilson's argument is properly addressed to the legislature rather than the courts.

G. The Trade Secrets Statute.

Under S.C. Code § 39-8-80, if "(1) a claim for misappropriation is made in bad faith,... the court may award reasonable attorney's fees to the prevailing party." Neologic/Freshwater cites the following alleged facts as supporting its claim of bad faith: (1) CCC never sought to protect trade secrets by way of a non-compete or confidentiality agreement; (2) CCC had no company policy or handbook evidencing the existence of, or attempt to, protect any trade secrets; (3) CCC took no steps to enjoin Wilson, Neologic/Freshwater from using alleged trade secrets; (4) CCC allowed its alleged trade secrets to be produced in response to a subpoena; (5) according to Mr. Campbell, CCC's trade secrets were publicly available on the Internet; and (6) CCC waited two years after Wilson left before it served Neologic and Freshwater. However, South Carolina law states that employees have a duty not to use or disclose trade secrets independent of and in addition to any written contract of employment or secrecy agreement. S.C. Code Ann. § 39-8-30. It is not required that a contract or secrecy agreement exist, and it is understandable that a very small company such as CCC did not have elaborate agreements in affect. Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing the trade secrets claim. Finally, the convoluted history of the case and the actions of Wilson and Norvell delayed CCC from pressing the claims it decided to bring.

H. Injunctive Relief.

Wilson requests that the court grant injunctive relief requiring CCC to perform certain actions pending the buy-out of Wilson. The court declines to become a monitor for feared transgressions. Courts cannot be called upon to preemptively secure genies in bottles that may never be opened. It is precisely for this reason that a party seeking a preliminary injunction must show that "irreparable injury is likely in the absence of injunctive relief." *Winter v. Nat'l Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A party's fear of harm, however legitimate, is not enough if the object of the


harm, however damaging, is not likely to materialize. See *Holiday Inns of America, Inc. v. B & B Corp.*, 405 F.2d 614, 618 (3d Cir. 1969) ("The dramatic and drastic power of injunctive relief may be unleashed only against conditions generating a presently existing threat; it may not be used simply to eliminate the possibility of a remote future injury, or a future invasion of rights. ...") (Aldisert, J.); see also Wright & Miller, Federal Practice & Procedure, section 2948.1 (2013) ("Speculative injury is not sufficient, there must be more than an unfounded fear on the part of the applicant. ... A presently existing actual threat must be shown.").

IV. CONCLUSION

1. Plaintiff Wilson has proven by clear and convincing evidence his claim of minority shareholder oppression. Mr. Gandis and Ms. Comeau Shirley are ordered to purchase Wilson's 45% membership interest at fair value based on Catherine Stoddard's Adjusted December 30, 2011 valuation of CCC, less half of the excess of inventory (i.e., 1/2 of the \$101,250.00 figure from Ex. 38 of Del Bradshaw's report), less 25% of the equipment's FMV due to moving costs, and less \$50,000.00 for previous advances. In other words, the buyout amount for Wilson's distributional interest would be 45% of the adjusted December 30, 2011 value of CCC after these inventory and equipment adjustments are made, which totals \$397,863.23, less \$50,000.00 for previous advances, for a total buy-out figure of \$347,863.23. The buy-out shall occur no later than March 1, 2015.

- 2. Plaintiff and the third party Defendants are entitled to judgment on Defendants' claims.
- 3. Wilson's claims for prejudgment interest and attorneys fees are denied.

IT IS SO ORDERED.



D. Garrison Hill
Circuit Judge

January 2, 2015
Greenville, South Carolina

Certified Copy
Paul B. Williams
Clerk of Court C.P. & G.S.
Greenville County, SC
1-9-2015

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

David Wilson, individually and)
derivatively on behalf of Carolina)
Custom Converting, LLC,)

Plaintiff,)

-vs-)

John Gandis, Andrea Comeau-)
Shirley, ZOi Films, LLC, and Carolina)
Custom Converting, LLC,)

Defendants,)

John Gandis and Andrea)
Comeau-Shirley,)

Third-Party Plaintiffs,)

-vs-)

Carolina Custom Converting, LLC,)

Third Party Defendant)
and Counterclaim Plaintiff,)

-vs-)

Dave Wilson, Steve Norvell, Neologic)
Distribution, Inc. and Fresh Water)
Systems, Inc.)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2012-CP-23-02887

**ORDER DENYING DEFENDANT'S
RULE 59 MOTION**

RECEIVED

FEB 27 2015

SC Court of Appeals

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2015 JAN 28 5 PM 3 30

Defendants' Rule 59 motion presents arguments previously argued and ruled upon, and is respectfully denied.

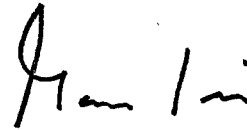
The previous factual findings are reaffirmed, based as they were on the court's finding that Mr. Wilson's testimony was credible on the key issues. Mr. Gandis' and Ms. Comeau-Shirley's testimony lacked credibility in most important respects.

Fit

The evidence revealed that Mr. Gandis and Ms. Comeau-Shirley deliberately collaborated to oppress Mr. Wilson. Their conduct was unconscionable. They purposely created a toxic business environment with the goal of driving Mr. Wilson out.

Defendants' tightly controlled cabal to oust Mr. Wilson could serve as a script for minority shareholder oppression. Their story even contains ample hubris, and an important irony: they forgot Mr. Wilson was the partner who had the skills and contacts necessary to make the business work.

IT IS SO ORDERED.



D. Garrison Hill
Circuit Judge

January 28, 2015
Greenville, South Carolina

RECEIVED
FEB 27 2015
SC Court of Appeals

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2302887

David Wilson vs. John Gandis

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 JAN 28 PM 3 30

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, 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: _____
- 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; Statement of Judgment by the Court:

NOTICE

This is a notice to you that an Order Denying Defendant's Rule 59 Motion in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to cnoblitt@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 28th day of January, 2015.

PRESIDING JUDGE -

- Mason A. Goldsmith** PO Box 1887 Greenville, SC 29602
- Daniel L. Draisen** 207 E. Calhoun St. Anderson, SC 29621
- Larry Lee Plumblee** Eppes & Plumblee, P.A. P.O. Box 10066 Greenville, SC 29603
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Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court