

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2013-000514
Lower Court Case No. 2008-CP-42-3397

RECEIVED

MAR 20 2015

S.C. Supreme Court

Quentin S. Broom, Jr., ...Petitioner,

V.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews Defendants,

OF WHOM

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Respondent,

V.

Quentin S. Broom, Jr., ... Third-party Defendant.

APPENDIX

Blake A. Hewitt (#73674)
John S. Nichols (#4210)
Bluestein, Nichols,
Thompson & Delgado
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599

Susan F. Campbell (#70545)
McGowan, Hood & Felder, LCL
304 Church Street
Georgetown, SC 29440
(843) 833-8082

Whitney B. Harrison (#100111)
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100

Patrick E. Knie (#3564)
Patrick E. Knie Law Offices
P.O. Box 5159
Spartanburg, SC 29306
(864) 641-3459

James R. Gilreath (#2133)
The Gilreath Law Firm, P.A.
P.O. Box 2147
Greenville, SC 29602
(864) 232-4395

ATTORNEYS FOR RESPONDENT

ATTORNEYS FOR PETITIONER

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

Quentin S. Broom, Jr., Respondent,

v.

Ten State Street, LLP, Timothy D. Scranton, Mark
Broadwater, and H. Hugh Andrews, Defendants,

Of whom H. Hugh Andrews, Individually and on behalf
of Tri-Star Communications, Inc., is the Appellant.

v.

Quentin S. Broom, Jr., Third-party Defendant.

Appellate Case No. 2013-000514

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2015-UP-030
Heard September 11, 2014 – Filed January 14, 2015

REMANDED

John S. Nichols and Blake Alexander Hewitt, both of
Bluestein Nichols Thompson & Delgado, LLC, of
Columbia, and Rodney F. Pillsbury, of Pillsbury & Read,
PA, of Greenville, for Appellant.

James R. Gilreath, of the Gilreath Law Firm, PA, of Greenville; Patrick E. Knie, of Patrick E. Knie, PA, of Spartanburg; Susan Foxworth Campbell and Whitney Boykin Harrison, both of McGowan Hood & Felder, LLC, of Georgetown and Columbia, respectively; all for Respondent.

PER CURIAM: This is an appeal from the trial court order dismissing H. Hugh Andrews's amended complaint pursuant to Rule 12(b)(6), SCRCP. The trial court found Andrews's claims were derivative in nature; therefore, it ruled his failure to comply with the requirements of Rule 23(b)(1), SCRCP, was grounds for dismissal. On appeal, Andrews argues the trial court erred in finding that all his claims were derivative. He maintains that he appropriately maintained certain claims in his individual capacity, and, therefore, Rule 23(b)(1), SCRCP, did not apply to them. Andrews also contends that even if all his claims are derivative, he should not be required to follow the procedures set forth in Rule 23(b)(1), SCRCP. Finally, Andrews contends the trial court erred in failing to grant his motion to amend his pleadings to comply with Rule 23(b)(1), SCRCP. We remand.

After the trial court dismissed Andrews's claims, Andrews filed two motions: a motion for reconsideration and a motion to amend his answer and counterclaims. The court heard arguments on these motions in the same hearing. During the hearing, Andrews requested the trial court allow him to amend his pleadings because he wanted to

bring the factual allegations of the complaint current to information that was learned from discovery so that in the event that there would be an appeal, the appellate court would be looking at the information that was known to the parties because it's a 12(B)(6) motion and it's not a summary judgment motion.

Broom argued that because the trial court dismissed the counterclaims, Andrews was "asking to be permitted to amend something that does not exist." Following the hearing, the trial court denied the motion to reconsider but did not rule on the motion to amend.

Because the record indicates the trial court never ruled on the motion to amend, we remand to the trial court for a ruling on this motion. On remand, the trial court is instructed to consider whether justice requires the amendment and whether Broom will be prejudiced by the amendment. *See* Rule 15(a), SCRCP (stating leave to amend shall be freely given when justice requires and does not prejudice any other party); *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004) (recognizing "the party opposing the motion has the burden of establishing prejudice").¹

REMANDED.

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

¹ In light of our decision, we decline to reach the remaining issues.

The South Carolina Court of Appeals

Quentin S. Broom, Jr., Respondent,

v.

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Broadwater, and H. Hugh Andrews, Defendants,

Of whom H. Hugh Andrews, Individually and on behalf
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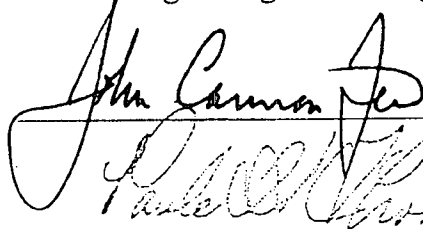
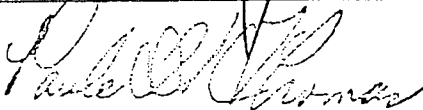
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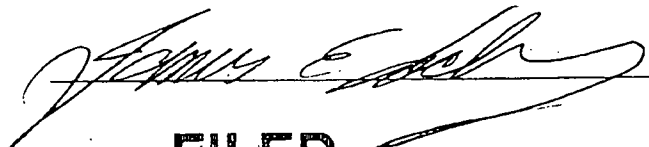
Quentin S. Broom, Jr., Third-party Defendant.

Appellate Case No. 2013-000514

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.

 J.

FILED

Columbia, South Carolina

2-19-15 AS

cc:

Patrick E. Knie, Esquire

James R. Gilreath, Esquire

John S. Nichols, Esquire

Rodney F. Pillsbury, Esquire

Blake Alexander Hewitt, Esquire

Susan Foxworth Campbell, Esquire

Whitney Boykin Harrison, Esquire

The Honorable J. Mark Hayes, II

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2013-000514
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v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews Defendants,

Of Whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Appellant,

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

PETITION FOR REHEARING

Susan F. Campbell (# 70545)
McGowan, Hood & Felder, LCL
304 Church Street
Georgetown, SC 29440
(843) 833-8082

Whitney B. Harrison (# 100111)
McGowan, Hood & Felder, L.L.C.
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100

Patrick E. Knie (# 3564)
Patrick E. Knie Law Offices
P.O. Box 5159
Spartanburg, SC 29306
(864) 641-3459

James R. Gilreath (# 2133)
The Gilreath Law Firm, P.A.
P.O. Box 2147
Greenville, SC 29602
(864) 232-4395

ATTORNEYS FOR RESPONDENT

Respondent Quentin S. Broom, Jr. petitions the Court for rehearing and reconsideration of Unpublished Opinion No. 2015-UP-030 filed January 14, 2015, pursuant to Rule 221(a), SCACR. Respondent asks this Court to reconsider the decision to remand this case to the trial court when Appellant failed to obtain a ruling on its Rule 15, SCRCR, motion and Appellant argued it was both (1) impliedly preserved and (2) encompassed within the trial court's order denying the motion to reconsider. As this opinion stands, it creates a second opportunity for Appellant to be heard on an issue that was not properly preserved for this Court's review and resuscitates an argument that should be considered waived for review. In support of the petition, Appellant respectfully submits the following:

I. Pertinent Facts

On November 14, 2011, Appellant filed a motion to amend and/or supplement the answer and counterclaims in addition to a motion for reconsideration. (R. 172-189). On February 1, 2013, the trial court entered a written order denying the motion to reconsider. The February 1, 2013 order does not address the November 14, 2011 motion to amend. Appellant's counsel filed a notice of appeal on March 8, 2013. (See attached NOI found on C-track.) Appellant's notice of appeal acknowledges that the motions were denied in written order dated January 30, 2013, and filed February 1, 2013.

Appellant's brief states:

On January 14, 2013, the circuit court issued a form order denying the motions to reconsider. (R. p. 15). On February 1, 2013, the court issued a written order confirming this ruling. (R. p. 17). Neither order expressly mentioned Andrews' motion to amend his answer, but the effect of the orders was to deny the motion.

Appellant's Brief pg. 3.

Respondent argued in his brief that Appellant's position that the trial court erred because it denied Appellant the opportunity to amend his pleadings was unpreserved because the trial court failed to make a ruling prior to Appellant filing a Notice of Appeal. In his Reply Brief, Appellant states:

[Respondent] is right about the court's order. It never mentions the motion to amend. See (R. p. 17). But the obvious import of the order is to deny the motion. [Respondent] had argued that the court could grant the amendment only if the court changed the order dismissing the case. The only rational view of the court's decision is that it agreed. In deciding not to alter the order that dismissed [Appellant's] claims, the circuit court necessarily rejected [Appellant's] request that he be allowed to amend his claims. Nothing else is possible.

There is no cogent justification for denying the motion to amend.

Appellant's Reply Brief p. 8.

II. Preservation

By remanding this case to the trial court, the Court is ignoring the general rules of issue preservation. Appellant took the position throughout his brief and oral argument that the issue of amending his pleadings was impliedly preserved. When the Court determined that the issue was never ruled upon, the general rules of issue preservation should have controlled. Thereby, allowing this Court to (1) rule on the remaining issues and (2) to find the issue of amending the pleadings could not be reached based on the grounds of preservation.

"It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court." *Chastain v. Hillabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009) (citing *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004)). This case does not qualify for any of the exceptions to issue preservation recognized by South Carolina appellate

courts: (1) subject matter jurisdiction, (2) rights of minors, (3) additional sustaining grounds, (4) judicial economy, nor (5) waiver of counsel. See *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143 (2006); *State v. Rocheville*, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993). As such, this issue could only have been preserved if Appellant had raised this unanswered issue in a separate 59(e) motion specific to the Rule 15 motion. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court); *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion). Appellant's failure to obtain a ruling should control. *Power v. Allstate Ins. Co.*, 312 S.C. 381, 383, 440 S.E.2d 406, 407 (Ct. App. 1994) (holding an issue was not preserved because the trial court did not address it in its order and the party did not request the trial court to rule upon it in any motion).

Appellant's reliance on an implied preservation was misplaced. The motion required a ruling. No futility existed in seeking a ruling of the Rule 15 motion. A plain reading of the order demonstrates that the judge never attempted to encompass a decision of the Rule 15 motion in that order. Appellant could have made a 59(e) motion to obtain a ruling, but did not. Remanding this case for a ruling was in error when Appellant could have sought a ruling.

CONCLUSION

For the foregoing reasons, Respondent requests this Court to grant this Petition for Rehearing.

January 26, 2015

Respectfully submitted,

A handwritten signature in black ink that reads "Whitney B. Harrison". The signature is written in a cursive, flowing style.

MCGOWAN HOOD & FELDER, LLC

Whitney B. Harrison (# 100111)

1517 Hampton Street

Columbia, South Carolina 29201

Telephone: (803) 779-0100

Facsimile: (803) 256-0702

MCGOWAN HOOD & FELDER, LLC

Susie F. Campbell (# 70545)

304 Church Street

Georgetown, SC 29440

Telephone: (843) 833-8082

Patrick E. Knie Law Offices

Patrick E. Knie (# 3564)

P.O. Box 5159

Spartanburg, SC 29306

Telephone: (864) 641-3459

The Gilreath Law Firm, P.A.

James R. Gilreath (#2133)

P.O. Box 2147

Greenville, SC 29602

(864) 232-4395

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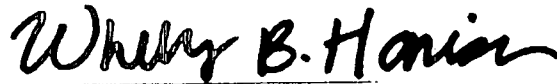
PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for Appellant with a copy of *Respondent's Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

John Nichols
Blake Hewitt
Bluestein, Nichols, Thompson & Delgado, LLC
1614 Taylor Street
Columbia, South Carolina 29202

January 26, 2015

Respectfully submitted,

A handwritten signature in black ink that reads "Whitney B. Harrison". The signature is written in a cursive, flowing style.

Whitney B. Harrison
McGowan Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JAN 29 2015

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-42-3397

Quentin S. Broom, Jr., ... Respondent,

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RETURN TO PETITION FOR REHEARING

This return is filed pursuant to Rules 221 and 240(e) of the South Carolina Appellate Court Rules, as well as this Court's communication of January 27, 2015. Rule 221 governs petitions for rehearing. Rule 240(e) governs returns to motions and petitions generally.

Rehearing is not needed. This Court's decision reaches the correct result. The following is a brief response to the argument raised in the petition.

The ultimate point of the petition is to advance the argument that Hugh Andrews failed to obtain a specific ruling denying his request to amend his counterclaims. The respondent took the same position in his brief. He argued that the failure to obtain a detailed ruling meant that any issue about amended pleadings was not preserved. (Resp. Br. p. 19).

First, the respondent told the circuit court that the motion to amend was improper because Mr. Andrews' counterclaims had already been dismissed. (R. p. 294, ll. 2-16). This Court noted this line of argument in its decision. If the concept of judicial estoppel means anything, it would seem to encompass these circumstances. It is one thing to be creative in refining arguments. It is another thing to tell the trial court that the opposing party's filing is a nullity and then argue on appeal that the filing was legitimate and required a ruling.

Second, it is hard to see why the point makes any difference in practice. Yes, Mr. Andrews argued that the only logical effect of a dismissal "with prejudice" is that any request to amend has been denied, but if the respondent is right and the motion was *not* decided, that means the motion is still pending. The respondent cannot honestly contend that there is a legitimate justification for denying the motion to amend. Either way, the respondent loses.

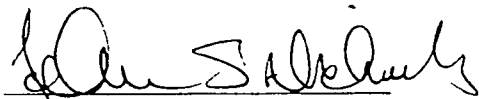
It is time for this waste of everyone's resources to end. The respondent litigated this contentious case for over five (5) years only to wait until the eve of trial to raise an issue about the sufficiency of pleadings. We know that this issue was not legitimate because we know that the purpose of Rule 23 is to filter frivolous suits at the *beginning* of a case—not the end—in order to preserve corporate assets. This was not an effort to filter a frivolous lawsuit; it was an effort to hijack a legitimate one. It was also not an effort to preserve assets. It appears to have been an exercise in delay, and a very successful one at that.

CONCLUSION

Candor requires the appellant to concede that he believed the only logical implication of the circuit court's decision was to deny the motion to amend, see (App. Br. p. 3), but the primary aim of the petition for rehearing is to resurrect an argument that is barred by judicial estoppel. The Court's decision is unpublished and does not have precedential value. This would seem to be an exercise in futility. Mr. Andrews respectfully requests that rehearing be denied so that this case can proceed towards a final resolution.

January 29, 2015

Respectfully submitted,



Blake A. Hewitt, #73674

John S. Nichols, #4210

BLUESTEIN, NICHOLS,

THOMPSON & DELGADO

Post Office Box 7965

Columbia, South Carolina 29202

(803) 779-7599

Rodney F. Pillsbury

PILLSBURY & READ

1204 E. Washington St., Ste A

Greenville, South Carolina 29601

(864) 241-9828

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
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v.

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel
for the Respondent with a copy of the *Return to Petition for Rehearing* by mailing copies of
the same by United States Mail with first class postage prepaid to the following addresses:

Susan F. Campbell
Whitney B. Harrison
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton St.
Columbia, SC 29201

Patrick E. Knie
Patrick E. Knie Law Offices
P.O. Box 5159
Spartanburg, SC 29304

James R. Gilreath
The Gilreath Law Firm
P.O. Box 2147
Greenville, SC 29602

A handwritten signature in cursive script that reads "Erin Bridges". The signature is written in dark ink and is positioned above a horizontal line.

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

January 29, 2015

THE STATE OF SOUTH CAROLINA
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NOV 07 2013

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Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorneys for Appellant

Susan F. Campbell, Bar # 70454
Whitney B. Harrison, Bar # 100111
MCGOWAN HOOD & FELDER
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
(803) 787-0750 (facsimile)

Attorneys for Respondent

Other Attorney for
Appellant:

Rodney F. Pillsbury

Other Attorneys for
Respondent:

Patrick E. Knie
James R. Gilreath

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Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorneys for Appellant

Susan F. Campbell, Bar # 70454
Whitney B. Harrison, Bar # 100111
MCGOWAN HOOD & FELDER
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
(803) 787-0750 (facsimile)

Attorneys for Respondent

Other Attorney for
Appellant:

Rodney F. Pillsbury

Other Attorneys for
Respondent:

Patrick E. Knie
James R. Gilreath

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COMMON PLEAS COURT

Quentin S. Broom, Jr.,)
Plaintiff,)

CONSENT ORDER

vs.)

Ten State Street, L.L.P.,)
Timothy D. Scrantom, Mark)
Broadwater, and H. Hugh)
Andrews,)

C/A No. 2005-CP-42-2875

Defendants.)

Of which)

Defendant H. Hugh)
Andrews, Individually and)
on behalf of Tri-Star)
Communications, Inc., as)
a Third-party Plaintiff,)
vs.)

Quentin S. Broom, Jr.,)
Third-Party)
Defendant.)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2008 JUN 10 PM 4:30
MARC KITCHENS

This matter comes before the Court upon a consent order to strike this case from the trial docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. In accordance with Rule 40(j) SCRPC, the statute of limitations shall be tolled during the time the case is stricken for a period of up to one (1) year. All pending Motions and Orders in this suit will be deemed as pending or in effect in the newly re-filed lawsuit.

41

FEE PAID

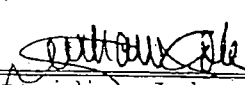
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The parties agree that if the plaintiff does not move to restore the case within thirty (30) days of entry of this order, Defendant Hugh Andrews and Third-party Plaintiff Tri-Star Communications shall have the right pursuant to Rule 40(j) to move to restore the counter-claims and third-party claims pled herein. All parties agree in advance to having the case restored. The statute of limitations applicable therein shall be tolled as provided for in Rule 40(j).

Finally, the parties agree that the restored case shall be subject to being called for trial on or after February 1, 2009.

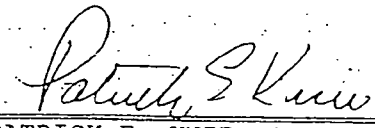
IT IS SO ORDERED.

GIVEN under my hand and the Seal of this Court this the 6 day of June, 2008.



Presiding Judge
SEVENTH JUDICIAL CIRCUIT

WE So Move:



PATRICK E. KNIE, Esq.
Attorney for Plaintiff
Quentin Broom, Jr.

FILED
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SPRINGFIELD COUNTY
2008 JUN 10 PM 4:30
MARC KITCHENS

A -2-

We So Consent:

Rodney Pillsbury

RODNEY F. PILLSBURY, Esq.
Attorney for Defendant/
Third Party Plaintiff
H. Hugh Andrews &
Tri-Star Communications, Inc.

R. Davis Howser

R. Davis Howser, Esq. *BP/PSK*
Attorney for Defendants Ten
State Street, LLP, Timothy D.
Scranton & Mark Broadwater

FILED
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SPARTANBURG COUNTY
2008 JUN 10 PM 4:30
MARC KITCHENS

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL
CASE

COUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

CASE NO. 2008-CP-42-3397

Quentin Broom

Ten State Street, LLP

PLAINTIFF(S)

DEFENDANT(S)

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ 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.

This matter is before the court on the plaintiff's (Broom) SCRCP Rule 12 (b)(6) and Rule 12(c) Motion to Dismiss the defendant's (Andrews and Tri-Star) counterclaims.

Broom asserts that the counterclaims should be dismissed because the claims are corporate derivative actions and, as such, Andrews and Tri Star have not complied with SCRCP Rule 23, thus requiring dismissal.

It is not contested that SCRCP 23 was not complied with prior to the filing of the counterclaims. It is also not contested, if SCRCP rule 23 is applicable, that dismissal is the appropriate remedy. Thus, the detailed analysis found in *Carolina First v. Whittle* does not have to be made by this Court since no argument was presented that even an attempt was made to comply with Rule 23. Andrews and Tri-Star assert Rule 23 is not applicable to their claims.

This case has a long history before this Court. However, the issues of the counter claims by defendant Andrews and on behalf of Tri-Star have neither been visited nor addressed previously by this Court. After reviewing the briefs presented by the attorneys, considering the arguments of the attorneys, and reading Rule 23 and all of the case law offered, the Court finds that Rule 23 is applicable to the counter claims and should have been followed. Thus, the claims related to

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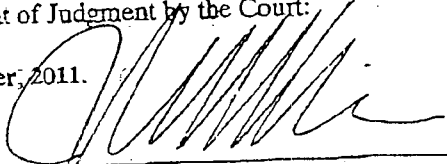
Tri-Star are dismissed. While this Court has heard numerous motions and arguments previously by the parties, this particular motion is based on a review of the pleadings. Also, all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom's mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23.

If, however, Andrews shows that Broom engaged in wrongful conduct that caused a particular loss that is individual to Andrews, the liability of such wrongful conduct is an asset of Andrews. This type of individual claim is not subject to the Rule 23 requirements and will not be dismissed on that basis. In reviewing the pleadings, this Court has read them in a light most favorable to Andrews, and in so doing, cannot determine with certainty, whether or not such claims exist.

The plaintiff's attorneys are asked to prepare a formal order granting its motion as outlined above, but plaintiff has liberty to fully address the motion to dismiss in the formal order, and is not limited to the verbiage expressed in this form 4.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at Spartanburg, South Carolina, this 7th day of October, 2011.


PRESIDING JUDGE

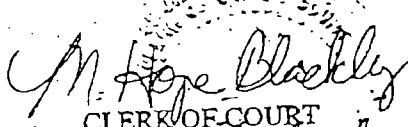
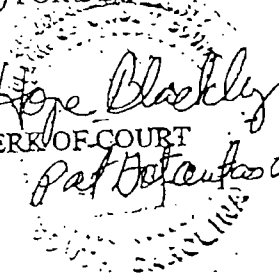
This judgment was entered on the 7 day of Oct 20 11, and a copy mailed first class this 7 day of Oct, 20 11 to attorneys of record or to parties (when appearing pro se) as follows:

Patrick E. Knie
Attorney at Law
P.O. Box 5159
Spartanburg, S.C. 29304

Rodney F. Pillsbury
Attorney at Law
512 Pettigru Street
Greenville, SC 29601

James R. Gilreath
The Gilreath Law Firm
P.O. Box 2147
Greenville, SC 29602
ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT


CLERK OF COURT


M. HOPE BLACKLEY

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SPARTANBURG COUNTY

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Quentin S. Broom, Jr.,	)	Civil Action No. 2008-CP-42-3397
	)	
Plaintiff,	)	
vs.	)	
Ten State Street, L.L.P., Timothy D. Scrantom,	)	ORDER GRANTING QUENTIN S.
Mark Broadwater, and H. Hughes Andrews,	)	BROOM, JR.'S MOTION TO
	)	DISMISS
Defendants,	)	
of which,	)	
Defendant H. Hughes Andrews, Individually and	)	
on behalf of Tri-Star Communications, Inc., as	)	
Third-party Plaintiff,	)	
vs.	)	
Quentin S. Broom, Jr.,	)	
	)	
Third-party Defendant.	)	

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SPARTANBURG COUNTY

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M. HOPE BLACKLEY

This case came before the Court on October 5, 2011, at a hearing held to consider Plaintiff Quentin S. Broom, Jr.'s ("Broom") motion to dismiss the counterclaims and third-party claims filed by Defendant H. Hughes Andrews ("Andrews"), individually and on behalf of Tri-Star Communications, Inc. ("Tri-Star").

Based on the argument of counsel for all parties and my review of the pleadings and memoranda of law submitted, I hereby GRANT the motion and dismiss all claims of Tri-Star and all claims brought by Andrews individually that overlap with any alleged injuries suffered by Tri-Star.

MOTION TO DISMISS STANDARD

The standard for a motion to dismiss under 12(b)(6) of the South Carolina Rules of Civil Procedure is whether the well-pled facts of a Complaint are sufficient to state a cause of action upon which relief can be granted. Rule 12(b)(6), SCRPC; see also Charleston Cty Sch. Dist. v. Laidlaw, Inc., 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. Cole Vision Corp. v. Hobbs, ___ S.C. ___, 714 S.E.2d 537, 539 (2011).

Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Id. The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Id.

The standard does not admit matters outside the pleadings or conclusions of law. Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 75, 374 S.E.2d 897, 899 (Ct. App. 1988). A motion to dismiss is directed solely toward defects in a plaintiff's claims for relief and is entered into without concern for the actual merits of the controversy. Id.

DISCUSSION

Tri-Star is a South Carolina corporation of which Andrews was a shareholder and creditor. (Countercl. ¶ 22). Broom was a director, officer, and a fifty percent (50%) owner of Tri-Star. (Id. ¶ 24). Broom contends the counterclaims and third-party claims must be dismissed because Andrews asserted derivative claims that failed to satisfy the pleading requirements of Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. Andrews opposed the motion to dismiss, arguing that he has standing to bring his suit *directly*, as opposed to derivatively, such that Rule 23(b)(1) is inapplicable.

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If Andrews lacks standing to maintain his claims directly, then he must bring them in compliance with Rule 23(b)(1), SCRC. Although this case is not brought as a class action, our courts have applied the requirements of Rule 23(b)(1) to shareholders of a closely held corporation. See Clearwater Trust v. Bunting, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (dismissing unjust enrichment claim brought by shareholder of closely held corporation for failure to comply with the pleading requirements of Rule 23(b)(1), SCRC).

No argument was presented that even an attempt was made to comply with this rule. Instead, Andrews asserts he has standing to bring the claims directly because he sustained a loss separate and distinct from that of Tri-Star. (Andrews' Memo in Opp. 4).

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I. Standing To Bring a Direct Action

A. The general rule.

Firmly established law restricts individual shareholders from suing corporate directors or officers directly for losses suffered by the corporation. Babb v. Rothrock, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991). "A corporation is a distinct legal entity." Todd v. Zaldo, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991). "[A] cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders." Id. Todd v. Zaldo, 403 S.E.2d 666, 668 (Ct.App. 1991).

A derivative action is brought when a corporation suffered an injury from actionable wrongs committed by its officers and directors. See Ward v. Griffin, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). The corporation or its shareholders can bring the cause of action on the corporation's behalf, so long as they comply with the applicable rules. See id. If any relief is granted, it goes to the corporation; shareholders cannot recover the damages in their

individual capacities because their loss is the indirect result of the injury to the corporation. See

id.

Where there are no allegations of a distinct injury to the shareholder, Ward, 295 S.C. at 221, 367 S.E.2d at 704, or where there is an action for misappropriation of corporate property, see Davis v. Hamm, 300 S.C. 284, 291, 387 S.E.2d 676, 680 (Ct. App. 1989), the action is derivative. If an allegation of damage to Andrews overlaps with any loss allegedly suffered by Tri-Star, then Andrews' claim is derivative and should have complied with Rule 23(b)(4), SCRC.P.

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1. Claim-By-Claim Analysis

This Court has carefully reviewed the counterclaims, reading them in the light most favorable to Andrews. In doing so, this Court cannot determine with certainty whether or not a particular loss to Andrews was alleged. Andrews has thus failed to allege any well-pled facts that are sufficient to show that he has standing to pursue this claim individually, whereby all recoveries would be paid to him directly, as opposed to the corporation.

Tri-Star is a South Carolina corporation of which Andrews was a shareholder and creditor. (Countercl. ¶ 22). Broom was a director, officer and a fifty percent (50%) owner of Tri-Star. (Id. ¶ 24) In each of the claims, Andrews clearly alleges losses suffered by the corporation. None of the corporate injuries are different from the loss allegedly suffered by Andrews.

In the breach of fiduciary duty claim, Andrews and Tri-Star allege they were injured by Broom "(1) paying himself from Tri-Star without consent or authority from Andrews; (2) selling substantially all of the assets of Tri-Star at below market value and without authority or consent of Andrews; and (3) converting Tri-Star's money and/or assets for Broom's own use and benefit." (Countercl. ¶ 36) In the breach of contract claim, Andrews and Tri-Star allege they

were injured when Broom (1) "disposed of the assets of Tri-Star at substantially below their market value," and "paid himself approximately five hundred twenty thousand (\$520,000) dollars in salary and/or distribution." (Id. ¶¶ 40, 42) In the conversion claim, Andrews and Tri-Star allege they were injured when Broom took possession of "monies and equipment belonging to Tri-Star." (Id. ¶¶ 55-56)

With regard to the claims for breach of contract accompanied by a fraudulent act, breach of the covenant of good faith and fair dealing, violation of S.C. Code § 33-8-300, and violation of S.C. Code § 33-8-420, Andrews and Tri-Star simply re-allege the mismanagement and dissipation of Tri-Star's assets as alleged in the prior derivative claims. (Id. ¶¶ 44, 49, 59 & 65)

Even when viewed in the light most favorable to Andrews, each counterclaim seeks recovery for misappropriation of corporate property. Andrews was required to bring such claims in a shareholder derivative action.

The remaining claims for promissory estoppel, fraud, and negligent misrepresentation are brought by Andrews only. However, there are no allegations within these causes of action that Andrews suffered a particular loss that is separate or different from the losses suffered by Tri-Star. These claims merely re-allege the mismanagement and dissipation of Tri-Star's assets as set forth in the previous claims. (Id. ¶¶ 71, 78 & 88)

Andrews states that Broom's "overall mismanagement of Tri-Star resulted in significant personal financial losses to Andrews . . . includ[ing] uncollected payments due Andrews from Tri-Star for the sale of gaming machines and other goods, non-payment of a \$130,000 loan Andrews made to Tri-Star, liquidating Tri-Star assets (in which Andrews had a substantial personal interest) at substantially below market value, and by unilaterally and without Andrews' consent or authority paying himself at least \$520,000 in salary and distribution thereby

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diminishing the value of Andrews' potential distributions and Tri-Star's ability to repay the aforementioned obligations." (Memo in Opp. 4) However, characterizing an injury as "personal" does not make it so.

In Todd v. Zaldo, the counterclaim plaintiff "characterized the damages as personal because Georganne Apparel Company, Inc. and MIV Textile Sales, Inc. were small closely held corporations" and, as Mr. Zaldo put it, "[m]y corporation is totally my money" Todd v. Zaldo, 304 S.C. at 277, 403 S.E.2d at 668. The Todd court stated that the "[m]ore characterization of damages by Zaldo as personal versus corporate does not prove their true nature." Id. After the Court of Appeals analyzed the categories of claimed damages, it determined them to be clearly corporate in nature. Id. at 278, 403 S.E.2d at 668. This determination applies equally to the case at hand since Tri-Star's assets are corporate assets, not personal assets.

Andrews' counterclaims also allege Tri-Star failed to pay a debt owed to Andrews (shareholder loan) and/or his company, Drews, Inc. (Gaming Machine financing).¹ Tri-Star is not named as a defendant in this action, which has been pending for more than five years. An attempt to add Tri-Star as a defendant now would be futile. See Jackson v. Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) (Rule 15(c), SCRCF only applies to a substitution or change in party, not the addition of a defendant).

¹ Andrews loaned Tri-Star one hundred thirty thousand dollars (\$130,000) on or before August 31, 2005. (Countercl. ¶ 25) Tri-Star purchased "Pot-O-Gold" video gaming machines ("Gaming Machines") and other goods and services from Drews Distributing, Inc., a South Carolina corporation ("Drews, Inc.") owned 100% by Defendant Andrews. Drews, Inc. distributed by assignment to Andrews all rights to payments from Tri-Star. (Id. ¶ 26) As of October 31, 2005, Tri-Star owed Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges). (Id. ¶ 27)

B. Exceptions to General Rule.

Relying on exceptions to the general rule, Andrews next argues he should be allowed to bring his claims directly because (1) full relief cannot be had through a recovery by the corporation and (2) shareholders in a closely held corporation need not bring their claims derivatively. (Memo in Opp. 5-6) None of the allegations in the counterclaims provide a basis for deviating from South Carolina's general rule that "(1) the assets of the corporation belong to the corporation and not to the stockholders individually, and (2) the liability of corporate officers for misappropriation of corporate property is an asset of the corporation" Davis, 300 S.C. at 288, 387 S.E.2d at 678.

Andrews' conclusion that he cannot be afforded full relief through recovery by Tri-Star is not supported by the factual allegations in the pleading. A motion under Rule 12(b)(6) or Rule 12(c) admits the well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. Carolina Winds Owners' Ass'n, Inc., 297 S.C. at 76, 374 S.E.2d at 899.

Andrews incorrectly relies upon an Arizona case which recognized an exception for closely held corporations. See Johnson v. Gilbert, 621 P.2d 916 (Ariz. Ct. App. 1980). In Johnson, a contractor and a real property owner formed a corporation to develop property. Id. at 917. Eventually, a disagreement arose and a lawsuit was filed. Id. The Arizona court concluded that plaintiffs and defendants "operated more as partners than in strict compliance with the corporate form." Id. at 918. As Andrews acknowledged, the Johnson exception has never been applied by our courts. (Memo in Opp. 6)

In Davis v. Hamm, the Court of Appeals expressly cited Johnson v. Gilbert and recognized that *other* jurisdictions applied the exception, but the court refused to apply it to the

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case at hand because the plaintiff was not a shareholder of the corporation when the complaint was filed. Davis, 300 S.C. at 288, 387 S.E.2d at 678. Two years later, the Court of Appeals again had an opportunity to adopt this exception for closely held corporations, and in declining to do so, the court stated as follows:

As an additional theory, Zaldo argues he may recover damages personally because Georganne Apparel Company, Inc. was a close corporation with only three stockholders. He seeks to have Georganne Apparel viewed more as a partnership than a corporation. See Johnson v. Gilbert, Davis v. Hamm. The record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.

Todd, 304 S.C. at 279, 403 S.E.2d at 668-69 (internal citations omitted).

In the years since the Davis and Todd cases, our appellate courts have consistently rejected exceptions to the general rule, even when those cases involved closely held corporations. See Babb, 303 S.C. at 464, 401 S.E.2d at 419-20; Brown v. Stewart, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001).

This record does not present a factual scenario sufficient to ignore the corporate nature of Tri-Star, Inc. As such, this case does not support the application of the exception for closely held corporations.

THEREFORE, IT IS ORDERED AND ADJUDGED that the present motion to dismiss is GRANTED and the claims of Defendant Andrews, brought individually and on behalf of Tri-Star, Inc., are dismissed, with prejudice.

Date:

10/31/11

A CERTIFIED COPY

M. Hope Blackley

CLERK OF COURT

SPARTANBURG COUNTY

SV: Pat D. [unclear] D.C.

FILED 10/31/11

S/O Mark Hayes II

The Honorable J. Mark Hayes, II

Pat D. [unclear] OC

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M. HOPE BLACKLEY

Spartanburg, South Carolina

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M. HOPE BLACKLEY

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-42-3397
2408

Quentin S. Broom, Jr.,

Ten State Street, LLP, Timothy D. Scrantom,
Mark Broadwater, and H. Hugh Andrews

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
- ☐ **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:

After reviewing the arguments presented by counsel, the court declines to alter or amend its prior order. The court requests that plaintiff's counsel prepare a formal order denying the present motion. Once signed and filed the formal order will be the final order of the court as to the motion.

ORDER INFORMATION

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 (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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.

SCRPC Form 4C (10/2011)

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Page 1 of 2

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 14 day of Jan 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this 14 day of Jan 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 14 PM 1:50
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Quentin S. Broom, Jr.,	)	Civil Action No. 2008-CP-42-3397
Plaintiff,	)	
vs.	)	
Ten State Street, L.L.P., Timothy D. Scrantom,	)	ORDER DENYING MOTIONS TO
Mark Broadwater, and H. Hughes Andrews,	)	RECONSIDER
Defendants,	)	
of which,	)	
Defendant H. Hughes Andrews, Individually and	)	
on behalf of Tri-Star Communications, Inc., as a	)	
Third-party Plaintiff,	)	
vs.	)	
Quentin S. Broom, Jr.,	)	
Third-party Defendant.	)	

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

This matter comes before the Court by way of consecutive motions to reconsider filed by Defendant H. Hughes Andrews, Individually and on behalf of Tri-Star Communications, Inc., as a Third-party Plaintiff, pursuant to Rules 59 and 60, SCRCP. Specifically, Hughes asks this Court to reconsider its Order of November 1, 2011, dismissing all of the claims brought by Hughes, individually and on behalf of Tri-Star Communications, Inc.

A hearing was held on October 5, 2011, to consider Broom's motion to dismiss all of the claims. On October 7, 2011, this Court issued a Form 4 and requested submission of a formal Order from Broom's counsel. On October 24, 2011, attorneys for Hughes filed a motion to reconsider, before entry of the Court's formal Order.

SCANNED

[Signature]

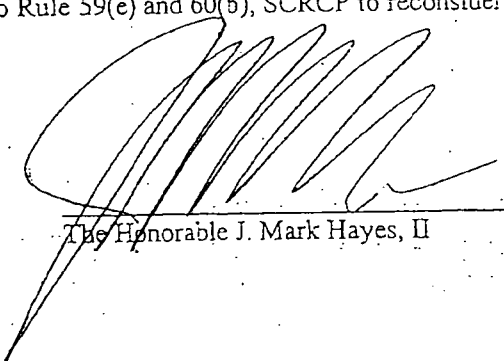
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On November 1, 2011, this Court entered the formal Order dismissing all claims. On November 11, 2011, Hughes filed a supplemental motion to reconsider the formal Order.

On December 17, 2012, a hearing was held, and after careful consideration of the record in this case, the submissions of the parties, and arguments of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of laws or facts not appropriately considered. Accordingly, this Court hereby DENIES the motions pursuant to Rule 59(e) and 60(b), SCRPC to reconsider this Court's Order filed November 1, 2011.

AND IT IS SO ORDERED.


The Honorable J. Mark Hayes, II

1/30/13
Date:

Spartanburg, South Carolina

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

PEK:mbg

STATE OF SOUTH CAROLINA)
) IN THE COMMON PLEAS COURT
COUNTY OF SPARTANBURG)

Quentin S. Broom, Jr.,)
)
Plaintiff,)
)
vs.) COMPLAINT
) Jury Trial Requested
) C/A No. 2005-CP-42-2875
Ten State Street, L.L.P.,)
Timothy D. Scrantom, Mark)
Broadwater, and H. Hugh)
Andrews,)
)
Defendants.)

The Plaintiff, complaining of the Defendants herein,
respectfully alleges:

JURISDICTIONAL AND GENERAL ALLEGATIONS

1. The Plaintiff, Quentin S. Broom, Jr., (hereinafter referred to as "Broom,") is a citizen and resident of the County of Spartanburg, State of South Carolina.
2. The Defendant, Ten State Street, L.L.P., (hereinafter referred to as "Ten State Street,") is a limited liability partnership organized and existing under the laws of the State of South Carolina, and at all times mentioned herein, doing business in Spartanburg County, South Carolina. On information and belief, Ten State Street is a law firm which includes off-shore law and international law among its areas of practice, and owned or controlled by Timothy D. Scrantom.
3. The Defendant, Timothy D. Scrantom, (hereinafter

referred to as "Scrantom,") is a citizen and resident of the County of Charleston, State of South Carolina, and is licensed to practice law in the State of South Carolina. On information and belief, Scrantom is a partner and member of Ten State Street, L.L.P.

4. The Defendant, Mark Broadwater, (hereinafter referred to as "Broadwater,") is a citizen and resident of the County of Charleston, State of South Carolina. On information and belief, Broadwater is the business manager for Ten State Street; and in that capacity, acts as the general manager of trust and company services for the firm.

5. The Defendant, H. Hugh Andrews, (hereinafter referred to as "Andrews,") is a citizen and resident of the County of Spartanburg, State of South Carolina.

6. For a number of years, Andrews and Broom have been business partners, primarily in Tri-Star Communications, Inc., (hereafter referred to as "Tri-Star,") but also in other enterprises, including the ownership of various parcels of real estate and other businesses.

7. In the early summer of 2000, Andrews and Broom were considering a new business venture, and Andrews insisted that Broom consult with Ten State Street, a law firm which Andrews had been using for certain off-shore financial purposes.

8. Ultimately, Andrews and Broom decided not to pursue this business venture.

9. In December of 2000, Andrews and Broom decided to undertake a business venture through their company, Tri-Star, in the Dominican Republic. Andrews and Broom agreed that they would be equal partners in the venture.

10. Once again, Andrews insisted that they employ and retain Ten State Street for the purpose of investing money in their Dominican Republic venture through the use of off-shore companies.

11. Andrews insisted that both he and Broom each individually contribute Three Hundred Thousand (\$300,000.00) Dollars to the Dominican Republic venture through off-shore entities recommended, created, and used by Ten State Street.

12. As part of the off-shore planning by Ten State Street, Ten State Street either acquired or formed two (2) entities known as AKILAH, LTD. and Calum, LLC for use by Andrews and Broom.

13. As a result, both Andrews and Broom provided Three Hundred Thousand (\$300,000.00) Dollars each directly to AKILAH, LTD. pursuant to wiring instructions provided by Ten State Street for which they each received an "ordinary member contract in AKILAH, LTD.," a corporation in St. Vincent and the Grenadines. The "ordinary member contract" reflected the ownership interest of Broom and Andrews to be equal.

14. Broom later discovered that his "ordinary member contract" had been altered while in the possession of Ten State

Street with Broom's interest reduced from fifty (50%) per cent to twenty-five (25%) per cent.

15. After Andrews insisted that Broom use the services of Ten State Street, Broom complained of the amount of the legal and management fees charged by Ten State Street. As a result, Ten State Street provided Broom with a portion of a letter of engagement with Andrews which authorized the charges for various partners and employees of Ten State Street.

16. Thereafter, there were a number of substantial fee increases by Ten State Street without prior notice given to Broom.

17. Broom, Calum, and AKILAH, LTD. were also billed for services by Ten State Street for work performed uniquely for Andrews.

18. Ten State Street also charged management fees and other costs apparently connected with the management of the off-shore entities which Ten State Street had created.

19. Andrews and Broom, in connection with their Tri-Star business venture, each individually loaned money to Tri-Star. In addition, Drews, Inc., a company owned by Hugh Andrews, sold equipment to Tri-Star creating a debt, the amount of which is a matter of disagreement by and between Andrews and Broom.

20. In July of 2004, Broom learned that Drews, Inc. had written off the debt allegedly owed to it from Tri-Star on Drews' 2003 federal tax return.

21. Broom received no notification of that event, however, he was thereafter obligated to amend Tri-Star's 2003 tax return to reflect the write-off by Drews, Inc. as income to Tri-Star.

22. Broom is informed and believes that Ten State Street advised Andrews concerning the loan write-off.

23. At approximately the same time, Defendant Andrews was in the process of liquidating Drews, Inc. in the face of a judgment in excess of \$1.6 Million Dollars against it by IGT.

24. Broom is informed and believes that Defendant Ten State Street assisted Andrews in the liquidation of Drews, Inc.

25. The actions of Ten State Street and its members/employees, Scrantom and Broadwater, in jointly representing Andrews, Broom, and a variety of other entities in which Andrews was involved, created a conflict of interest which was never waived by Broom and which was detrimental to Broom's legal, business, and personal affairs.

26. In July of 2004, Broom became concerned about a number of the items mentioned hereinabove, and first individually, and then through newly retained legal counsel, attempted to obtain possession of his complete files from Scrantom and Ten State Street, as well as all documents relating to Andrews.

27. The request both by Broom and his attorneys met with repeated resistance and delays.

28. Broom was never permitted to secure the files of Andrews though Ten State Street jointly represented Andrews and Broom simultaneously.

FOR A FIRST CAUSE OF ACTION

As to Defendants Ten State Street and Scrantom

(Negligence in Performance of Professional Duties)

29. The allegations of the preceding paragraphs are incorporated and referenced as if stated verbatim herein.

30. Broom is informed and believes that Ten State Street and Scrantom were willful, wanton, reckless, grossly negligent, and negligent at the times and places hereinabove mentioned and failed to exercise due care and caution as would have been exercised by a reasonably prudent attorney under the circumstances then and there prevailing in the following particulars:

- a. In changing the ordinary member agreement of Broom in AKILAH, LTD. without Broom's authorization;
- b. In changing the ordinary member agreement of Broom in AKILAH, LTD. when Andrews and Broom had agreed to be equal partners in such venture;
- c. In repeatedly increasing the hourly rate of fees charged without notice to Broom;
- d. In repeatedly increasing the hourly rate charged for the various services and employees of Ten State Street when Broom had engaged Ten State Street at lower hourly rates;

e. In representing both Andrews and Broom simultaneously on matters which created a conflict without notice to Broom;

f. In representing both Andrews and Broom simultaneously on matters which created a conflict without securing a waiver from Broom;

g. In charging management fees and costs without notice to Broom and without his prior approval;

h. In charging Broom, Calum, and AKILAH for services performed solely for Andrews;

i. In failing to timely provide Broom's legal documents to him when requested;

j. In refusing to provide the legal documents of Andrews when requested by Broom;

k. In self-dealing with Broom's funds and charging Broom, Calum, and AKILAH excessive fees for services actually rendered in such other particulars as may be ascertained through discovery procedures undertaken pursuant to South Carolina Rules of Civil Procedure.

31. As a direct and proximate result of the willful, wanton, reckless, grossly negligent, and negligent conduct of these Defendants, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

32. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A SECOND CAUSE OF ACTION

As to Defendants Ten State Street and Scrantom

(Breach of Contract)

33. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

34. Broom secured a contract for legal services and certain management services for which Broom agreed to compensate Ten State Street and Scrantom for the protection of his legal rights, legal advice, consultation, and other legal and management services performed by Ten State Street and Scrantom in their professional capacities as a law firm and attorney.

35. Implicit in the contract by and between these parties was the covenant of good faith and fair dealing which was breached by Ten State Street and Scrantom.

36. As a result of said breach of contract, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

37. Plaintiff is informed and believes he is entitled

to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A THIRD CAUSE OF ACTION

As to Defendants Ten State Street, Scrantom, and Broadwater

(Breach of Fiduciary Duty)

38. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

39. The Defendants, Ten State Street, Scrantom, and Broadwater, at all times mentioned herein were acting in a fiduciary capacity to Broom.

40. The Defendants breached their fiduciary duties by engaging in conflicting legal representation in management services which presented a conflict to Broom's interests.

41. Alternatively, these Defendants are liable for conspiracy to breach a fiduciary duty in that these Defendants wrongfully conspired to, agreed to, and participated in the breaches alleged herein.

42. As a direct and proximate result of the breach by these Defendants of their fiduciary duty, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

43. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A FOURTH CAUSE OF ACTION

As to All Defendants

(Common Law Fraud)

44. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

45. The Defendants set upon a course of conduct to defraud and mislead Plaintiff by making various representations outlined herein to Broom regarding his status as a member of AKILAH, the relationship by and among the Defendants, and other related matters.

46. The representations made by the Defendants were false, and the falsity of the same has been concealed by Defendants with repeated false and fraudulent assurances and promises.

47. Defendants knew that their representations to Broom were false and made the same to him in a reckless disregard for whether the same were true or false.

48. Broom was ignorant of the falsity of Defendants' representations, and Defendants knew that Broom was ignorant of the falsity of the same.

49. Broom relied on Defendants' false and fraudulent representations, and Defendants intended that he so rely.

50. The representations made by the Defendants unto Broom were material in that these representations were critical to Broom's individual and business success and his actions in reliance upon the representations.

51. Broom rightfully relied on the Defendants' representations since Andrews was a business partner of Broom and since Broom employed the other Defendants to protect and preserve his business interests.

52. As a direct and proximate result of the false and fraudulent misrepresentations and omissions made by Defendants unto the Plaintiff herein as aforesaid, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

53. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A FIFTH CAUSE OF ACTION

As to All Defendants

(Constructive Fraud)

54. The Plaintiff reasserts and realleges each and

every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

55. Even if Defendants did not know or appreciate the representations made by them to Plaintiff were false or with an intent to deceive or conceal such from the Plaintiff, nonetheless, Plaintiff asserts Defendants should have known the falsity thereof and should have appreciated the affect of the concealment thereof in light of the confidential and/or fiduciary relationship enjoyed by each with the Plaintiff binding them to act in good faith and with due regard for the best interests of the Plaintiff.

56. The actions of the Defendants in conveying representations to Plaintiff set forth above constitute constructive fraud for which Plaintiff Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

57. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A SIXTH CAUSE OF ACTION

As to All Defendants

(Negligent Misrepresentation)

58. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

59. The Defendants made and participated in the making of representations of fact to Broom by means of various documents, reports, and statements as alleged in the Complaint.

60. The Defendants had a pecuniary interest in making these false representations to Broom as hereinabove described.

61. The Defendants owed Broom a duty of exercising due care to insure the statements and representations made were truthful and accurate.

62. In making these representations, Defendants misrepresented or omitted to state material facts necessary in order to make statements, in light of the circumstances under which they were made, not misleading.

63. In making these representations, Defendants misrepresented or omitted stating material facts necessary for Broom to make informed decisions.

64. It was reasonably foreseeable to Defendants that Broom would rely on such statements.

65. Among the direct and proximate causes of the representations and omissions to state material facts were the negligence and carelessness of the Defendants and the absence of any reasonable basis for belief in the truth of such statements.

66. At the time the misrepresentations and omissions

were made, Broom was ignorant of their falsity and believed them to be true, and reliance on the misrepresentations and the reliance of the knowledge and expertise of the Defendants, Broom was induced to act where he may not otherwise have acted.

67. As a proximate result of Defendants' negligent misrepresentations, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

68. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A SEVENTH CAUSE OF ACTION

As to All Defendants

(Civil Conspiracy)

69. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

70. Broom is informed and believes that the Defendants combined and conspired to disseminate false and misleading information, to misappropriate Broom's assets without his knowledge and consent, and to otherwise injure and damage Broom.

71. Said Defendants' conduct was wrongful and illegal and caused Broom injuries and damages including, but not limited

to, loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

72. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR AN EIGHTH CAUSE OF ACTION

As to Ten State Street, Scrantom, and Broadwater

(Violation of S.C. Unfair Trade Practices Act,

Section 39-5-10, et.seq.)

73. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

74. The Plaintiff is informed and believes that the actions of the Defendants Ten State Street, Scrantom, and Broadwater constitute trade within the meaning of South Carolina Code 39-5-20(a).

75. The Plaintiff is informed and believes that the conduct of the Defendants in misrepresenting to the Plaintiff and misleading him, as more specifically set forth above, constitutes unfair and deceptive acts in willful violation of the South Carolina Unfair Trade Practices Act, Section 39-5-10, et.seq.

76. The actions of these Defendants impacted upon the

public interest of the people of the State of South Carolina and were capable of repetition.

77. As a direct and proximate result of the unfair and deceptive trade practices committed by these Defendants, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

78. As a direct and proximate result, the Plaintiff is informed and believes that he is entitled to actual damages to be trebled for the willful violations committed and an award of reasonable attorney's fees.

WHEREFORE, Plaintiff prays for judgment of this Court declaring:

- a. Void and unenforceable all fee contracts with Ten State Street and/or Scrantom and restitution of all fees received by either under such agreements;
- b. Restitution of all fees paid to Ten State Street, Scrantom, and Broadwater;
- c. Actual and punitive damages and costs;
- d. Prejudgment interest at the highest rate allowed by law on monies lost;
- e. Treble damages and reasonable attorney's fees;
- f. Such other and further relief as to the Court may seem appropriate under the circumstances.

PATRICK E. KNIE, P.A.

Patrick E. Knie
Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Telefax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Telefax (864) 232-4395

ATTORNEYS FOR PLAINTIFF

September 15, 2005

Spartanburg, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2005 SEP 16 AM 11:32
MARCO KITCHENS

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,)
)
Plaintiffs,)

C.A. No.: 05-CP-42-2875

v.)

DEFENDANT H. HUGH ANDREWS
ANSWER TO PLAINTIFF'S
COMPLAINT

Ten State Street, L.L.P.)
Timothy D. Scrantom, Mark Broadwater,)
and H. Hughes Andrews)

Defendants.)
)
)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2005 NOV 16 PM 2:37
MARC KITCHEN

TO: PATRICK E. KNIE AND JAMES R. GILREATH ATTORNEYS FOR
PLAINTIFF.

By and through their undersigned counsel, Defendant H. Hughes Andrews (hereinafter
"Defendant Andrews") answering Plaintiff's Complaint, allege and will show unto the Court the
following:

For A First Defense
(By Way of a General Denial)

1. All allegations of Plaintiff's Complaint not admitted, qualified or explained are expressly denied.
2. As to Paragraphs 1 through 4 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.
3. As to Paragraph 5 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.

4. As to Paragraphs 6 through 17 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

5. As to Paragraph 18 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

6. As to Paragraph 19 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

7. As to Paragraph 20 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

8. As to Paragraphs 21 through 24 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

9. As to Paragraphs 25 through 27 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

10. As to Paragraphs 28 through 32 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

11. As to Paragraph 34 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

12. As to Paragraph 35 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.

13. As to Paragraphs 36 through 38 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

14. As to Paragraph 39 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

15. As to Paragraphs 40 through 78 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

For A Second Defense
(Failure To State A Claim Upon Which Relief May Be Granted)

16. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth fully hereunder.

17. Plaintiff's Complaint does not set forth sufficient facts and/or the requisite legal elements for the claims sought therein such that Plaintiff fails to adequately state a claim upon which relief may be given against this Defendant.

Respectfully Submitted;

Pillsbury Law Firm, P.C.


Rodney F. Pillsbury (SC Bar #13067)
512 Pettigru Street
Greenville, SC 29601
Phone: (864) 271-3511
Fax: (864) 271-3590
Email: rpillsbury@pillsburylawfirm.com

FILED
CLERK OF COURT
SOUTH CAROLINA
2005 NOV 16 PM 2:57
MARCO NICHOLS

-and-

Stodghill Law Firm Chartered

Curt Stodghill by RFP

Curtis Stodghill (S.C. Bar #6458)

PO Box 2431

Greenville, SC 29602-2431

300 East McBee Avenue, Suite 300

Greenville, SC 29601-2899

Phone 864.271.0966

Fax 864.770.6167

curt@stodghill-law.com

ATTORNEY FOR PLAINTIFFS

November 9, 2005

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2005 NOV 16 PM 2:57
MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 05-CP-42-4875

Quentin S. Broom, Jr.)
Plaintiff,)

vs.)

ANSWER TO THE COMPLAINT AND
DEMAND FOR JURY TRIAL

Ten State Street, L.L. P., Timothy)
D. Scrantom, Mark Broadwater,)
and E. Hugh Andrews,)
Defendants.)

COPY

The Defendants Ten State Street, L.L.P., Timothy D. Scrantom and Mark Broadwater, answering the Complaint herein, allege:

FOR A DEFENSE TO THE JURISDICTIONAL AND GENERAL ALLEGATIONS:

1. That they deny each and every allegation of the Complaint not hereinafter specifically admitted.
2. That on information and belief they admit the allegations of paragraph 1 of the Complaint.
3. That with respect to paragraph 2 of the Complaint, they admit only that Ten State Street, L.L.P. is a limited liability partnership organized and existing under the law of the State of South Carolina with its principal place of business and offices in Charleston, South Carolina; that they further admit that Ten State Street, L.L.P. is engaged in the practice of law including matters related to and/or involving international law; and that they further admit that Timothy D. Scrantom is a partner in Ten State Street, L.L.P., but they deny the remaining allegations of this paragraph of the Complaint.

4. That they admit the allegations of the first sentence of paragraph 3 of the Complaint; that with respect to the second sentence of paragraph 3 of the Complaint, they admit only that Defendant Scrantom is a partner in Ten State Street, L.L.P.; and that they deny the remaining allegations of this paragraph of the Complaint.

5. That they admit the allegations of paragraph 4 of the Complaint.

6. That on information and belief they admit the allegations of paragraph 5 of the Complaint.

7. That they lack sufficient knowledge and information to form a belief as to the allegations of paragraph 6 of the Complaint, and therefore, they deny those allegations.

8. That with respect to paragraph 7 of the Complaint, they admit only that in the year of 2000, Defendant Andrews sought the legal services of Ten State Street, L.L.P., a firm that he had previously engaged and Andrews recommended the services of Ten State Street, L.L.P. for a venture that Andrews contemplated with Broom; and that they deny the remaining allegations of this paragraph of the Complaint.

9. That on information and belief, they admit the allegations of paragraph 8 of the Complaint.

10. That with respect to paragraph 9 of the Complaint, they admit on information and belief only that in late December 2000, Defendant Andrews and Plaintiff Broom decided to undertake a business venture in the Dominican Republic, but that to their knowledge the venture was not through Tri-Star; that they lack sufficient knowledge and information to form a belief as to the allegations of the second sentence of paragraph

9 of the Complaint, and therefore, they deny those allegations; and that they deny the remaining allegations of this paragraph of the Complaint.

11. That with respect to paragraph 10 of the Complaint, they admit on information and belief only that Defendant Andrews and Plaintiff Broom sought additional legal services from Ten State Street, L.L.P. for a business venture in the Dominican Republic and Defendant Andrews introduced Plaintiff Broom to off-shore entities previously created for Defendant Andrews; and that they deny the remaining allegations of this paragraph of the Complaint.

12. That with respect to paragraphs 11 and 12 of the Complaint, they admit only that Ten State Street, L.L.P. oversaw the creation of AKILAH, Ltd. and Calum, LLC, which were formed specifically and exclusively for Defendant Andrews in 2000 prior to their having any contact with Plaintiff; and that they lack sufficient knowledge and information to form a belief as to the remaining allegations of paragraphs 11 and 12 of the Complaint, and therefore, they deny those allegations.

13. That on information and belief they admit the allegations of paragraph 13 of the Complaint; but that on information and belief Defendant Andrews subsequently transferred an additional Six Hundred Thousand (\$600,000) directly to AKILAH, Ltd. in May 2001.

14. That they deny the allegations of paragraph 14 of the Complaint.

15. That with respect to paragraph 15 of the Complaint, they deny that Ten State Street charged any management fees; that they admit that Ten State Street provided certain information about legal fees to plaintiff Broom; and that they deny the remaining allegations of this paragraph of the Complaint.

16. That with respect to paragraph 16 of the Complaint, they deny that Ten State Street ever represented Plaintiff Broom in an individual capacity and therefore had no obligation to notify Plaintiff Broom of changes in Ten State Street fees; that they admit that there was an increase in legal fees by Ten State Street, and that they deny the remaining allegations of this paragraph of the Complaint.

17. That with respect to paragraph 17 of the Complaint, they deny that Ten State Street ever represented Plaintiff Broom in an individual capacity and therefore deny that they billed Plaintiff Broom for work performed uniquely for Defendant Andrews; that they admit that Calum, LLC was inadvertently billed for work performed uniquely for Defendant Andrews, but that a billing credit in the amount of Four Thousand Seventy Eight Dollars and Fifty Cents (\$4,078.50) was issued by Ten State Street, LLP on March 27, 2003 to correct this erroneous billing.

18. That they deny the allegations of paragraph 18 of the Complaint.

19. That they lack sufficient knowledge and information to form a belief as to the allegations of paragraphs 19, 20 and 21 of the Complaint, and therefore, they deny the allegations of those paragraphs of the Complaint.

20. That they deny the allegations of paragraph 22 of the Complaint.

21. That they lack sufficient knowledge and information to form a belief as to the allegations of paragraph 23 of the Complaint, and therefore, they deny the allegations of this paragraph of the Complaint.

22. That they deny the allegation of paragraph 24 of the Complaint and further assert that there was not a liquidation of Drews, Inc.

23. That with respect to paragraph 25 of the Complaint, they deny that Ten State Street ever represented Plaintiff Broom in an individual capacity and therefore they deny that there was any conflict of interest for Ten State Street and its members/employees in the representation alleged; that they further allege that if there was a conflict, which is denied, there was a knowing and informed waiver of the conflict; and that they deny the remaining allegations of this paragraph of the Complaint.

24. That with respect to paragraphs 26 and 27 of the Complaint, they admit only that on or about July 2004, Plaintiff Broom sought certain documents and Ten State Street provided him with the documents to which he was entitled based on their seeking independent legal advice from a recognized authority; and that they deny the remaining allegations of these paragraphs of the Complaint.

25. That with respect to paragraph 28 of the Complaint, they admit that they did not give Broom the files of Andrews; that they deny that they represented Andrews and Broom simultaneously; and that they deny the remaining allegations of this paragraph of the Complaint.

26. That they deny the remaining allegations of the Jurisdictional and General Allegations paragraphs of the Complaint.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION:

27. That they deny each and every allegation of the First Cause of Action not hereinafter specifically admitted.

28. That with respect to paragraph 29 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 26 of this Answer as if those allegations were set forth in their entirety herein.

29. That they deny the allegations of paragraph 30 of the Complaint including all of its subparagraphs.

30. That they deny the allegations of paragraphs 31 and 32 of the Complaint.

31. That they deny the remaining allegations of the First Cause of Action of the Complaint.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION:

32. That they deny each and every allegation of the Second Cause of Action not hereinafter specifically admitted.

33. That with respect to paragraph 33 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 29 of this Answer as if those allegations were set forth in their entirety herein.

34. That with respect to paragraph 34 of the Complaint, they deny that there was any contract for legal services and management services or an attorney client relationship between these defendants and Plaintiff Broom and therefore they deny the allegations of this paragraph of the Complaint.

35. That with respect to paragraph 35 of the Complaint, they deny that there was any contract for legal services and management services between these defendants and Broom and therefore there is and was no contract upon which a bad faith action could be based; and that they deny the remaining allegations of this paragraph of the Complaint.

36. That they deny the allegations of paragraphs 36 and 37 of the Complaint.

37. That they deny the remaining allegations of the Second Cause of Action of the Complaint.

FOR A FIRST DEFENSE TO THE THIRD CAUSE OF ACTION:

38. That they deny each and every allegation of the Third Cause of Action not hereinafter specifically admitted.

39. That with respect to paragraph 38 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 35 of this Answer as if those allegations were set forth in their entirety herein.

40. That with respect to paragraph 39 of the Complaint, they deny that Plaintiff Broom was a client of Ten State Street or its lawyers; that they deny that they had a fiduciary relationship with Broom; and that they deny the remaining allegations of the Complaint.

41. That they deny the allegations of paragraphs 40, 41, 42 and 43 of the Complaint.

42. That they deny the remaining allegations of the Third Cause of Action of the Complaint.

FOR A FIRST DEFENSE TO THE FOURTH CAUSE OF ACTION:

43. That they deny each and every allegation of the Fourth Cause of Action not hereinafter specifically admitted.

44. That with respect to paragraph 44 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 40 of this Answer as if those allegations were set forth in their entirety herein.

45. That they deny the allegations of paragraphs 45, 46, 47, 48, 49, 50, 51, 52, and 53 of the Complaint.

46. That they deny the remaining allegations of the Fourth Cause of Action of the Complaint.

FOR A FIRST DEFENSE TO THE FIFTH CAUSE OF ACTION:

47. That they deny each and every allegation of the Fifth Cause of Action not hereinafter specifically admitted.

48. That with respect to paragraph 54 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 46 of this Answer as if those allegations were set forth in their entirety herein.

49. That they deny the allegations of paragraphs 55, 56 and 57 of the Complaint.

50. That they deny the remaining allegations of the Fifth Cause of Action.

FOR A FIRST DEFENSE TO THE SIXTH CAUSE OF ACTION:

51. That they deny each and every allegation of the Sixth Cause of Action not hereinafter specifically admitted.

52. That with respect to paragraph 58 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 50 of this Answer as if those allegations were set forth in their entirety herein.

53. That with respect to paragraph 59 of the Complaint, these Defendants admit only that some of them had conversations with Plaintiff Broom and/or gave him certain information, but they deny the remaining allegations of this paragraph of the Complaint.

54. That they deny the allegations of paragraphs 60, 61, 62, 63, 64, 65, 66, 67 and 68 of the Complaint.

55. That they deny the remaining allegations of the Sixth Cause of Action of the Complaint.

FOR A FIRST DEFENSE TO THE SEVENTH CAUSE OF ACTION:

56. That they deny each and every allegation of the Seventh Cause of Action not hereinafter specifically admitted.

57. That with respect to paragraph 69 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 55 of this Answer as if those allegations were set forth in their entirety herein.

58. That they deny the allegations of paragraphs 70, 71 and 72 of the Complaint.

59. That they deny the remaining allegations of the Seventh Cause of Action of the Complaint.

FOR A FIRST DEFENSE TO THE EIGHTH CAUSE OF ACTION:

60. That they deny each and every allegation of the Eighth Cause of Action not hereinafter specifically admitted.

61. That with respect to paragraph 73 of the Complaint, they reallege and incorporate by reference the allegations of paragraphs 1 through 59 of this Answer as if those allegations were set forth in their entirety herein.

62. That they deny the allegations of paragraphs 74, 75, 76, 77 and 78 of the Complaint.

63. That they deny the remaining allegations of the Eighth Cause of Action as well as the remaining allegations of the Complaint.

FOR A SECOND DEFENSE:

64. That the Complaint fails to state facts sufficient to constitute a cause of action(s) since *inter alia* there are no allegations that would support a claim for disgorgement or restitution of legal fees or a claim for prejudgment interest; that there is no basis to recover for civil conspiracy since a party cannot recover damages for an alleged particular act and at the same time seek to recover for civil conspiracy to commit the same alleged act; that these parties are exempt from the provisions of the Unfair Trade Practices Act; that Defendants Scrantom and Broadwater were at all times acting as agents for a disclosed principal, Ten State Street, L.L.P., and agents for a disclosed principal can not be liable for breach of contract; that Defendants Scrantom and Broadwater were merely acting as agents for a disclosed principal, and as such they are not parties to the contract in their individual capacities, and the duty of good faith in the performance of obligations based on or arising from a contract does not extend to persons who are not a parties to the contract; and that punitive damages may not be recovered under the causes for alleged breach of contract, negligent misrepresentation and breach of fiduciary duty.

FOR A THIRD DEFENSE:

65. That any damages sustained by the Plaintiff as set forth in the Complaint were due to and proximately caused by the negligence, recklessness, willfulness and wantonness of the Plaintiff which acts combined, concurred, and contributed with any negligence, recklessness, willfulness and wantonness on the part of these Defendants, which is specifically denied, and without which the same would not have occurred, and these Defendants would ask that the Court compare the negligence of the Plaintiff with that of

these Defendants, if any, and if it is determined that the Plaintiffs negligence was greater than the negligence of these Defendants, which negligence is specifically denied, then Plaintiff should be totally barred from recovery, and if it is determined that the Plaintiffs negligence is equal to or less than the negligence of these Defendants, then the amount of recovery available to the Plaintiff should be reduced by the percentage of the Plaintiffs own negligence, recklessness, willfulness and wantonness.

FOR A FOURTH DEFENSE:

66. That Defendants Scrantom and Broadwater were at all times acting as agents for a disclosed principal, Ten State Street, and agents for a disclosed principal can not be liable for breach of contract.

FOR A FIFTH DEFENSE:

67. That Defendants Scrantom and Broadwater were merely acting as agents for a disclosed principal, and as such they were not parties to any contract(s) in their individual capacities, and the duty of good faith in the performance of obligations based on or arising from a contract does not extend to persons who are not a party to the contract, and therefore, they can not be liable for bad faith.

FOR A SIXTH DEFENSE:

68. That there was no justifiable reliance on any alleged statement or actions of these defendants.

FOR A SEVENTH DEFENSE:

69. That these defendants are exempt from the South Carolina Unfair Trade Practices Act since *inter alia* the conduct of these defendants are governed by the South Carolina Supreme Court and by regulatory and/or governmental authority and by reason

of which these defendants can not be liable under the South Carolina Unfair Trade Practices Act.

FOR AN EIGHTH DEFENSE:

70. That the alleged acts of these Defendants involve a transaction between private parties and do not impact on the public and the Unfair Trade Practices Act can not be used to redress a grievance between private citizens, by reason of which the plaintiff may not recover of these defendants under the Unfair Trade Practices Act.

FOR A NINTH DEFENSE:

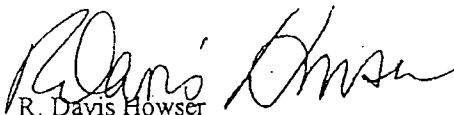
71. That the claim against these Defendants for punitive damages is barred as a matter of law because an assessment or award of punitive damages would violate the constitutional rights of these Defendants including those rights under the due process clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment to the United States Constitution; those rights under the Eighth Amendment, which prohibits excessive fines, as applied to the states through the Fourteenth Amendment; those rights under the Sixth Amendment as made applicable to the states through the Fourteenth Amendment; and, those rights under the relevant provisions of the South Carolina Constitution, including but not limited to, Article I, Section 3; all of which are asserted as bars to recovery of punitive damages against these Defendants.

FOR A SECOND DEFENSE TO THE CLAIM FOR PUNITIVE DAMAGES
AND THE CLAIM FOR TREBLE DAMAGES:

72. That these Defendants can not be liable for punitive damages and also for treble damages under the Unfair Trade Practices Act since such recovery would be a double recovery and would be in violation of the constitutional rights of these defendants

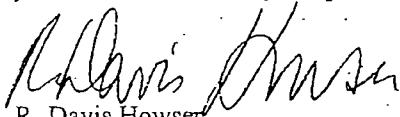
for the reason *inter alia* that such an award and assessment of damages would constitute excessive fines against these defendants.

WHEREFORE, having fully answered the Complaint herein these Defendants demand that the same be dismissed and that they seek such other and further relief as may be just and proper.


R. Davis Howser
of HOWSER, NEWMAN & BESLEY, LLC
1508 Washington Street
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000
Attorneys for Defendants Ten State Street,
L.L.P., Timothy D. Scrantom and Mark
Broadwater

November 18, 2005

The Defendants demand a trial by jury of the issues raised by the pleadings.


R. Davis Howser

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Quentin S. Broom, Jr.,

Plaintiff,

v.

Ten State Street, L.L.P., Timothy D.
Scrantom, Mark Broadwater, and H.
Hughes Andrews,

Defendants.

IN THE COURT OF COMMON PLEAS

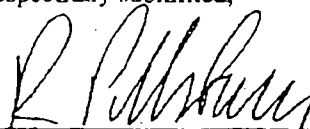
C.A. No.: 05-CP-42-2875

**MOTION TO AMEND DEFENDANT
H. HUGHES ANDREWS ANSWER**

Pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, Defendant H. Hughes Andrews moves to amend his answer to assert counterclaims arising out the same transactions and occurrences at issue in Plaintiff's complaint. The proposed amended answer and counterclaims of Defendant H. Hugh Andrews is attached hereto and incorporated herein. Defendant Andrews files this motion to ensure that all counterclaims available under the same facts alleged in Plaintiff's original complaint are properly before the Court. The granting of Defendant Andrews' motion will not hinder or delay the trial of this case because all causes of action are based upon the same facts and circumstances alleged in Plaintiff's original complaint.

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, Defendant Andrews has consulted with counsel for the Plaintiff about the subject matter of this motion prior to filing the same and as of this writing has been unable to obtain his consent for the granting of the relief requested herein.

Respectfully submitted,



Rodney F. Pillsbury (SC Bar No.: 13067)

Pillsbury Law Firm, P.C.

512 Pettigru Street

Greenville, SC 29662

Phone: (864) 271-3511

Fax: (864) 271-3590

Email: rpillsbury@pillsburylawfirm.com

www.pillsburylawfirm.com

May 25, 2006

MAILED 05/25/06

2006 MAY 25 PM 3:01

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,)
Plaintiff,)

C.A. No.: 05-CP-42-2875

v.)

**AMENDED ANSWER AND
COUNTERCLAIMS OF DEFENDANT
H. HUGHES ANDREWS**

Ten State Street, L.L.P.)
Timothy D. Scrantom, Mark Broadwater,)
and H. Hughes Andrews,)
Defendants,)

of which,)

Defendant H. Hughes Andrews, Individually)
and on behalf of Tri-Star Communications,)
Inc., as a Third-party Plaintiff,)

v.)

Quentin S. Broom, Jr.,)
Third-party Defendant.)

**TO: PATRICK E. KNIE AND JAMES R. GILREATH, ATTORNEYS FOR
PLAINTIFF AND THIRD-PARTY DEFENDANT QUENTIN S. BROOM, JR.**

By and through their undersigned counsel, Defendant H. Hughes Andrews (hereinafter "Defendant Andrews") answering Plaintiff's Complaint, and brings this action on individually and on behalf of the Third-Party Plaintiff, Tri-Star Communications, Inc. ("Third-party Plaintiff Tri-Star"), allege and will show unto the Court the following:

For A First Defense
(By Way of a General Denial)

1. All allegations of Plaintiff's Complaint not admitted, qualified or explained are expressly denied.

2. As to Paragraphs 1 through 4 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

3. As to Paragraph 5 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.

4. As to Paragraph 6 Defendant Andrews denies that he has been a business partner of Broom.

5. As to other assertions in Paragraphs 6 through 17 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

6. As to Paragraph 18 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

7. As to Paragraph 19 of Plaintiff's Complaint, Defendant Andrews admits the allegations set forth therein, with the exception that Drew's Distributing, Inc. sold the equipment to Tri-Star and the obligations of Tri-Star to Drew's Distributing Inc. were assigned to Defendant Andrews, of which Plaintiff received due notice.

8. As to Paragraph 20 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

9. As to Paragraphs 21 through 24 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

10. As to Paragraphs 25 through 27 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

11. As to Paragraphs 28 through 32 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

12. As to Paragraph 34 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

13. As to Paragraph 35 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.

14. As to Paragraphs 36 through 38 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

15. As to Paragraph 39 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

16. As to Paragraphs 40 through 78 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

For A Second Defense
(Failure To State A Claim Upon Which Relief May Be Granted)

17. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth fully hereunder.

18. Plaintiff's Complaint does not set forth sufficient facts and/or the requisite legal elements for the claims sought therein such that Plaintiff fails to adequately state a claim upon which relief may be given against this Defendant.

For A Third Defense
(Unclean Hands)

19. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth fully hereunder.

20. To the extent Plaintiff's complaint seeks equitable relief, Plaintiff's Complaint is barred by the doctrine of unclean hands.

For A Fourth Defense and By Way of Defendant Andrew's
First Counterclaim Against the Plaintiff and
First Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Fiduciary Duty)

21. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

22. Third-party plaintiff, Tri-Star Communications, Inc. ("Tri-Star"), is a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina. Defendant Andrews, at all times relevant herein, was a shareholder of and a creditor of Tri-Star.

23. Defendant Andrews has standing to bring this claim individually and on behalf of Third-party Plaintiff for losses and damages sustained to both via the malfeasance and nonfeasance of the plaintiff in his dealings with and on behalf of Tri-Star.

24. Plaintiff was a director, officer, and a fifty percent (50%) owner of Tri-Star, and in fact operated Tri-Star at all times at issue, including controlling Tri-Star books and records

and accounts, and as such owed a duties to Tri-Star and Defendant Andrews to act in the best interests of the company and of Defendant Andrews at all times.

25. Defendant Andrews loaned Tri-Star one hundred thirty thousand dollars (\$130,000.00) on or before August 31, 2005.

26. Tri-Star purchased "Pot-O-Gold" video gaming machines ("Gaming Machines") and other goods and services from Drews Distributing, Inc., a South Carolina corporation ("Drews, Inc.") owned 100% by Defendant Andrews. Drews Inc. distributed by assignment to Defendant Andrews all rights to payment from Tri-Star.

27. As of October 31, 2005, Tri-Star owed Defendant Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges).

28. Plaintiff controlled the operations of Jackpot, S.A. and Worldwide Entertainment, S.A., both Dominican Republic corporations [collectively "DR Businesses"], and had control of Tri-Star's business relationships and undertakings with respect to the DR Businesses, including but not limited to, importing Tri-Star Gaming Machines and ancillary equipment, providing Tri-Star services to the DR Businesses, maintaining the Tri-Star Gaming Machines, monitoring DR Businesses income and expenses, promoting business relations with individuals, governmental authorities, and other business enterprises in the Dominican Republic, making distributions and/or payments from DR Businesses to Tri-Star, paying applicable governmental taxes, charges, and duties related to the DR Businesses (imposed by both United States and Dominican

authorities), and undertaking such activities in the best interests of the DR Businesses and their constituents in accordance with applicable law and agreements.

29. At all times relevant herein, Defendant Andrews had an interest in DR Businesses via his ordinary member agreement in and AKILAH, Ltd which owns all of Calum, LLC, the entity which owns the majority of the capital interests in the DR Businesses.

30. Plaintiff transported or caused to have transported more than 1,100 Tri-Star Gaming Machines and various other related equipment for the use of the DR Businesses.

31. Plaintiff was reckless in the manner the Gaming Machines were imported, and such importation was documented so as to place Tri-Star's Gaming Machines at grave risk of confiscation or penalties to be payable to the Dominican Republic governmental authorities by Tri-Star or the DR Businesses.

32. Plaintiff has recklessly failed to cause the DR Businesses to pay all applicable charges to the Dominican Republic, which put Tri-Star's Gaming Machines at risk of confiscation, or impaired Tri-Star's ability to remove its Gaming Machines for resale in the United States or other markets, for fair market value of the Gaming Machines.

33. After repeated requests, Plaintiff has refused to produce the books and records related to DR Businesses to Defendant Andrews.

34. Without informing, obtaining consent, and authority, Plaintiff sold, or caused to be sold, the equipment in the possession of DR Businesses to third parties for less than fair market value. Indeed, Defendant Andrews expressly informed the plaintiff not to do so without his prior approval and consent.

35. Without informing, obtaining consent, and authority, between January 1, 2005 and April 30, 2005, Plaintiff made distributions to himself from Tri-Star in the amount of five

hundred twenty thousand dollars (\$520,000.00). Said distributions were made at a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star.

36. Plaintiff materially and substantially breached his fiduciary duty to Defendant Andrews in one or more of the following particulars:

- a. Paying himself from Tri-Star without consent or authority;
- b. Selling substantially all of the assets of Tri-Star Inc. at below market value and without authority or consent of Defendant Andrews;
- c. Converting Tri-Star's money and/or assets for Plaintiff's own use and benefit;
- d. Failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders.

37. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Fifth Defense and By Way of Defendant Andrew's
Second Counterclaim Against the Plaintiff and
Second Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Contract)**

38. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

39. By and through the various contracts, agreements, Defendant Andrews contracted with the Plaintiff to regarding the operations of Tri-Star and DR Businesses.

40. Without authority or consent from Defendant Andrews, Plaintiff disposed of the assets of Tri-Star at substantially below their market value.

41. Plaintiff did not use any of the proceeds to pay the loan given by Defendant Andrews or the monies owed to Defendant Andrews, by and through his creditor assignments.

42. At a time when Tri-Star owed Defendant Andrews substantial sums of money, without authority or consent from Defendant Andrews, Plaintiff paid himself approximately five hundred twenty thousand (\$520,000.00) dollars in salary and/or distribution.

43. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual damages hereunder in an amount to be determined by the Court.

**For A Sixth Defense and By Way of Defendant Andrew's
Third Counterclaim Against the Plaintiff and
Third Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Contract Accompanied by a Fraudulent Act)**

44. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

45. Plaintiff breached his contract(s) with Defendant Andrews.

46. Plaintiff had a fraudulent intent relating to the breaching of the contract and not merely to its making.

47. Plaintiff's breach was accompanied by a fraudulent act, which can be characterized by dishonesty in fact, unfair dealing and/or the unlawful appropriation of Defendant Andrew's money by design.

48. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Seventh Defense and By Way of Defendant Andrew's
Fourth Counterclaim Against the Plaintiff and
Fourth Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of the Covenant of Good Faith and Fair Dealing)**

49. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

50. There is an implied covenant of Good Faith and Fair Dealing in all contracts entered into or to be performed in the State of South Carolina.

51. Plaintiff's actions as alleged herein were unreasonable, willful, reckless, and unjustified, and amount to a breach of the implied In-Law duty of Good Faith and Fair Dealing inherent in all contracts.

52. As a proximate result, Defendant Andrews has suffered actual and consequential damages.

53. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For An Eighth Defense and By Way of Defendant Andrew's
Fifth Counterclaim Against the Plaintiff and
Fifth Cause of Action by Third-Party Plaintiff Tri-Star
(Conversion)**

54. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

55. Defendant Andrews had a right to possess monies and equipment belonging to Tri-Star.

56. Without authority from Defendant Andrews, Plaintiff took possession of these monies and/or equipment, or alternatively, exercised a right of ownership over the same, all to the exclusion of the rights of Defendant Andrews.

57. Such actions constitute conversion of Defendant Andrews' money and/or property.

58. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

For A Ninth Defense and By Way of Defendant Andrew's
Sixth Counterclaim Against the Plaintiff and
Sixth Cause of Action by Third-Party Plaintiff Tri-Star
(Violation of S.C. Code of Laws § 33-8-300)

59. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

60. The actions of the plaintiff were not in good faith.

61. The actions of the plaintiff were not with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

62. The actions of the plaintiff were not in a manner that a reasonable person could believe were in the best interests of the corporation and its shareholders.

63. Said actions constitute a violation of South Carolina Code of Laws § 33-8-300.

64. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Tenth Defense and By Way of Defendant Andrew's
Seventh Counterclaim Against the Plaintiff and
Seventh Cause of Action by Third-Party Plaintiff Tri-Star
(Violation of S.C. Code of Laws § 33-8-420)**

65. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

66. The actions of the plaintiff were not in good faith.

67. The actions of the plaintiff were not with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

68. The actions of the plaintiff were not in a manner that a reasonable person could believe were in the best interests of the corporation and its shareholders.

69. Said actions constitute a violation of South Carolina Code of Laws § 33-8-420.

70. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For An Eleventh Defense and By Way of Defendant Andrew's
Eighth Counterclaim Against the Plaintiff
(Promissory Estoppel)**

71. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

72. At the time Defendant Andrews went into business with Plaintiff in the formation of Tri-Star and its subsequent dealings with DR Businesses, Plaintiff promised Defendant

Andrews that he would at in the best interest of Tri-Star and Defendant Andrews at all times regarding the management of the same.

73. This promise was unambiguous on its terms.

74. Defendant Andrews reasonably relied upon Plaintiff's promise.

75. Plaintiff expected and foresaw that Defendant Andrews would rely upon his promise.

76. Defendant Andrews was injured in reliance upon the promise by Plaintiff.

77. As a direct and proximate result, Defendant Andrews has been damaged as set forth fully hereunder, thereby entitling Defendant Andrews to actual and punitive damages in an amount to be determined by the Court.

For A Twelfth Defense and By Way of Defendant Andrew's
Eighth Counterclaim Against the Plaintiff
(Fraud)

78. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

79. Plaintiff represented to Plaintiff that he would manage the assets of Tri-Star and act in the best interest of Tri-Star and Defendant Andrews.

80. These representations were false.

81. These representations were material.

82. Plaintiff either knew the representations were false or made such representations with a reckless disregard of their truth or falsity.

83. Plaintiff intended Defendant Andrews to act upon Plaintiff's representations.

84. Defendant Andrews was ignorant of falsity of Plaintiff's representations.

85. Defendant Andrews relied upon the truth of Plaintiff's representations.

86. Defendant Andrews had a right to rely upon the truth of Plaintiff's representations.

87. As a direct and proximate result, Defendant Andrews was damaged, thereby entitling him to actual and punitive damages hereunder in an amount to be determined by the Court.

For A Thirteenth Defense and By Way of Defendant Andrew's
Tenth Counterclaim Against the Plaintiff
(Negligent Misrepresentation)

88. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

89. Plaintiff made a false representation to Defendant Andrews.

90. Plaintiff had a pecuniary interest in making these statements.

91. Plaintiff owed a duty of care to see that he communicated truthful information to Defendant Andrews:

92. Plaintiff breached that duty by failing to exercise due care.

93. Defendant Andrews justifiably relied on Plaintiff's representation.

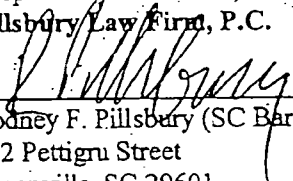
94. Defendant Andrews suffered pecuniary loss as proximate result of his reliance upon that representation.

95. As a direct and proximate result, Defendant Andrews was damaged, thereby entitling Defendant Andrews to actual and punitive damages hereunder in an amount to be determined by the Court.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant Andrews prays for the following relief:

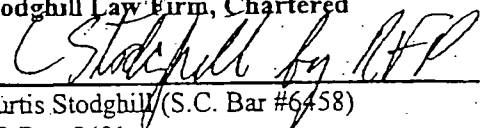
- (a) that Plaintiff's complaint be dismissed with prejudice, with costs and attorney's fees awarded to Defendant Andrews;
- (b) that Judgment be entered against the plaintiff on all of Defendant Andrews' counterclaims, for actual and punitive damages, in an amount to be determined by the Court;
- (c) that Judgment be entered against the plaintiff on all of Third-party Plaintiff Tri-Star's causes of action, for actual and punitive damages, in an amount to be determined by the Court; and
- (d) whatever further and just relief the Court deems appropriate under the circumstances.

Respectfully Submitted,
Pillsbury Law Firm, P.C.


Rodney F. Pillsbury (SC Bar #13067)
512 Pettigru Street
Greenville, SC 29601
Phone: (864) 271-3511
Fax: (864) 271-3590
Email: rpillsbury@pillsburylawfirm.com

-and-

Stodghill Law Firm, Chartered


Curtis Stodghill (S.C. Bar #6458)
PO Box 2431
Greenville, SC 29602-2431
300 East McBee Avenue, Suite 300
Greenville, SC 29601-2899
Phone 864.271.0966
Fax 864.770.6167
Email: curt@stodghill-law.com

ATTORNEYS FOR DEFENDANT H. HUGHES ANDREWS, and TRI-STAR
COMMUNICATIONS, INC. AS THIRD PARTY PLAINTIFF

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,)
Plaintiff,)

vs.)

REPLY TO COUNTERCLAIMS OF
DEFENDANT H. HUGH ANDREWS

Ten State Street, L.L.P.,)
Timothy D. Scranton, Mark)
Broadwater, and H. Hugh)
Andrews,)

C. A. 05-CP-42-2875

Defendants.)

of which,)

Defendant H. Hugh Andrews,)
Individually and on behalf of)
Tri-Star Communications, Inc.,)
as a Third-party Plaintiff,)

vs.)

Quentin S. Broom, Jr.,)

Third-party Defendant.)

The Plaintiff, replying to the Counterclaims of the Defendant H. Hugh Andrews
would show:

FOR A FIRST REPLY TO DEFENDANT ANDREWS' COUNTERCLAIMS

1. Plaintiff denies each and every allegation contained in Defendant
Andrews' Amended Answer and Counterclaims unless specifically admitted, modified or
explained herein.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' FIRST COUNTERCLAIM

2. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

3. As to Paragraph 22, Plaintiff admits generally the contents thereof and would specifically show that at times Defendant Andrews was a creditor of Tri-Star.

4. Paragraph 23 is denied.

5. Paragraph 24 is admitted.

6. As to Paragraph 25, Plaintiff admits only that at various times Defendant Andrews loaned money to Tri-Star, all of which has been repaid.

7. As to Paragraph 26, the Plaintiff admits only that at times Tri-Star purchased gaming machines from Drew's Distributing, Inc. and denies the remainder of said paragraph.

8. Paragraph 27 is denied.

9. As to Paragraph 28, Plaintiff admits only that he had some involvement in the operations of Jackpot, S.A. and Worldwide Entertainment, S.A.

10. As to Paragraph 29, Plaintiff admits that Defendant Andrews had an ownership interest in the DR Business by virtue of his ownership interest in Tri Star and his Ordinary Member Agreement in AKILAH, LTD.

11. As to Paragraph 30, Plaintiff admits only that Tri-Star transported gaming machines and related equipment for use in the Dominican Republic.

12. Paragraph 31 is denied.

13. Paragraph 32 is denied.

14. Paragraph 33 is denied.

15. As to Paragraph 34, the Plaintiff would show that as Chief Executive Officer of Tri-Star, Plaintiff sold various gaming machines belonging to Tri-Star for valid business reasons and for fair market value in light of serious political circumstances then existing in the Dominican Republic.

16. As to Paragraph 35, the Plaintiff admits paying himself salaries for which he had authority from the Defendant Andrews. The Plaintiff would further that debt owed Defendant Andrews by Tri-Star was subsequently satisfied in full and in fact Defendant Andrews received distributions personally.

17. Paragraph 36 is denied.

18. Paragraph 37 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS' FIRST COUNTERCLAIM

19. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

20. Defendant Andrews' First Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' FIRST COUNTERCLAIM

21. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

22. To the extent that Defendant Andrews seeks equitable relief in his First Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' FIRST COUNTERCLAIM

23. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

24. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' FIRST COUNTERCLAIM

25. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

26. The First Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' FIRST COUNTERCLAIM

27. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

28. The First Counterclaim is barred in all or in part by the Statute of Frauds.

FOR AN SEVENTH REPLY TO DEFENDANT ANDREWS' FIRST COUNTERCLAIM

29. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

30. The First Counterclaim has improperly joined several causes of action and should be dismissed, or in the alternative, Plaintiff moves to make said Counterclaim more definite and certain.

FOR A FIRST REPLY TO DEFENDANT ANDREWS SECOND COUNTERCLAIM

31. Plaintiff realleges each paragraph set forth hereinabove to the extent not

inconsistent herewith.

32. As to Paragraph 39, Plaintiff admits Defendant Andrews had certain business dealings with Tri-Star.

33. Paragraph 40 is denied.

34. Paragraph 41 is denied.

35. As to Paragraph 42, the Plaintiff admits that Tri-Star paid salaries to him.

36. Paragraph 43 is denied.

37.

FOR A SECOND REPLY TO DEFENDANT ANDREWS SECOND COUNTERCLAIM

38. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

38. Defendant Andrews' Second Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' SECOND COUNTERCLAIM

39. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

40. To the extent that Defendant Andrews seeks equitable relief in his Second Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' SECOND COUNTERCLAIM

41. Plaintiff realleges each paragraph set forth hereinabove to the extent not

inconsistent herewith.

42. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Second Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' SECOND COUNTERCLAIM

43. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

44. The Second Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' SECOND COUNTERCLAIM

45. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

46. The Second Counterclaim is barred in all or in part by the Statute of Frauds.

FOR A SEVENTH REPLY TO DEFENDANT ANDREWS' SECOND COUNTERCLAIM

47. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

48. The Second Counterclaim has improperly joined several causes of action and should be dismissed, or in the alternative, Plaintiff moves to make said Counterclaim more definite and certain.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' THIRD COUNTERCLAIM

49. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

50. Paragraph 45 is denied.

51. Paragraph 46 is denied.

52. Paragraph 47 is denied.

53. Paragraph 48 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS THIRD COUNTERCLAIM

54. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

55. Defendant Andrews' Third Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' THIRD COUNTERCLAIM

56. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

57. To the extent that Defendant Andrews seeks equitable relief in his third Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' THIRD COUNTERCLAIM

58. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

59. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Third Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' THIRD COUNTERCLAIM

60. Plaintiff realleges each paragraph set forth hereinabove to the extent not

inconsistent herewith.

61. The Third Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' THIRD COUNTERCLAIM

62. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

63. The Third Counterclaim is barred in all or in part by the Statute of Frauds.

64.

FOR A SEVENTH REPLY TO DEFENDANT ANDREWS' THIRD COUNTERCLAIM

65. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

66. The Third Counterclaim has improperly joined several causes of action and should be dismissed, or in the alternative, Plaintiff moves to make said Counterclaim more definite and certain.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' FOURTH COUNTERCLAIM

67. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

68. As to Paragraph 50, the Plaintiff would show that it states a legal conclusion instead of an actual allegation and therefore it is improperly pled.

69. Paragraph 51 is denied.

70. Paragraph 52 is denied.

71. Paragraph 53 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS FOURTH COUNTERCLAIM

72. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

72. Defendant Andrews' Fourth Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' FOURTH COUNTERCLAIM

73. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

74. To the extent that Defendant Andrews seeks equitable relief in his fourth Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' FOURTH COUNTERCLAIM

75. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

76. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Fourth Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' FOURTH COUNTERCLAIM

77. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

78. The Fourth Counterclaim is barred in all or in part by the Statute of

Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' FOURTH COUNTERCLAIM

79. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

80. The Fourth Counterclaim is barred in all or in part by the Statute of Frauds.

FOR A SEVENTH REPLY TO DEFENDANT ANDREWS' FOURTH COUNTERCLAIM

81. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

82. The Fourth Counterclaim has improperly joined several causes of action and should be dismissed, or in the alternative, Plaintiff moves to make said Counterclaim more definite and certain.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' FIFTH COUNTERCLAIM

83. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

84. Paragraph 55 is denied.

85. Paragraph 56 is denied.

86. Paragraph 57 is denied.

87. Paragraph 58 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS' FIFTH COUNTERCLAIM

88. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

89. Defendant Andrews' Fifth Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff, or in the alternative, Plaintiff moves to make the Counterclaim more definite and certain.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' FIFTH COUNTERCLAIM

90. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

91. To the extent that Defendant Andrews seeks equitable relief in his fifth Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' FIFTH COUNTERCLAIM

92. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

93. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Fifth Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' FIFTH COUNTERCLAIM

94. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

95. The Fifth Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' FIFTH COUNTERCLAIM

96. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

97. The Fifth Counterclaim is barred in all or in part by the Statute of Frauds.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' SIXTH COUNTERCLAIM

98. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

99. Paragraph 60 is denied.

100. Paragraph 61 is denied.

101. Paragraph 62 is denied.

102. Paragraph 63 is denied.

103. Paragraph 64 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS SIXTH COUNTERCLAIM

104. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

107. Defendant Andrews' Sixth Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff or in the alternative, Plaintiff moves to make the Counterclaim more definite and certain.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' SIXTH COUNTERCLAIM

108. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

109. To the extent that Defendant Andrews seeks equitable relief in his sixth Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' SIXTH COUNTERCLAIM

110. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

111. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Third Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' SIXTH COUNTERCLAIM

112. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

113. The Sixth Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' SIXTH COUNTERCLAIM

114. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

115. The Sixth Counterclaim is barred in all or in part by the Statute of Frauds.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' SEVENTH COUNTERCLAIM

116. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

117. Paragraph 66 is denied.

118. Paragraph 67 is denied.

119. Paragraph 68 is denied.

120. Paragraph 69 is denied.

121. Paragraph 70 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS' SEVENTH COUNTERCLAIM

122. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

125. Defendant Andrews' Seventh Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff, or in the alternative, Plaintiff moves to make the Counterclaim more definite and certain.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' SEVENTH COUNTERCLAIM

126. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

127. To the extent that Defendant Andrews seeks equitable relief in his seventh Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' SEVENTH COUNTERCLAIM

128. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

129. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Seventh Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' SEVENTH COUNTERCLAIM

130. Plaintiff realleges each paragraph set forth hereinabove to the extent not

inconsistent herewith.

131. The Seventh Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' SEVENTH COUNTERCLAIM

132. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

133. The Seventh Counterclaim is barred in all or in part by the Statute of Frauds.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' EIGHTH COUNTERCLAIM

136. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

137. Paragraph 72 is denied.

138. Paragraph 73 is denied.

139. Paragraph 74 is denied.

140. Paragraph 75 is denied.

141. Paragraph 76 is denied.

142. Paragraph 77 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS EIGHTH COUNTERCLAIM

143. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

144. Defendant Andrews' Eighth Counterclaim does not set forth sufficient

facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff or in the alternative, Plaintiff moves to make the Counterclaim more definite and certain.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' EIGHTH COUNTERCLAIM

145. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

146. To the extent that Defendant Andrews seeks equitable relief in his eighth Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' EIGHTH COUNTERCLAIM

147. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

148. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Eighth Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' EIGHTH COUNTERCLAIM

149. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

150. The Eighth Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' EIGHTH COUNTERCLAIM

151. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

152. The Eighth Counterclaim is barred in all or in part by the Statute of Frauds.

FOR A FIRST REPLY TO DEFENDANT ANDREW'S NINTH COUNTERCLAIM

153. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

154. Paragraph 79 is denied.

155. Paragraph 80 is denied.

156. Paragraph 81 is denied.

157. Paragraph 82 is denied.

158. Paragraph 83 is denied.

159. Paragraph 84 is denied.

160. Paragraph 85 is denied.

161. Paragraph 86 is denied.

162. Paragraph 87 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS' NINTH COUNTERCLAIM

163. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

166. Defendant Andrews' Ninth Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff or in the alternative, Plaintiff moves to make the Counterclaim more definite and certain.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' NINTH COUNTERCLAIM

167. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

168. To the extent that Defendant Andrews seeks equitable relief in his ninth Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' NINTH COUNTERCLAIM

169. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

170. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Ninth Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' NINTH COUNTERCLAIM

171. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

172. The Ninth Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' NINTH COUNTERCLAIM

173. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

174. The Ninth Counterclaim is barred in all or in part by the Statute of Frauds.

FOR A FIRST REPLY TO DEFENDANT ANDREWS' TENTH COUNTERCLAIM.

175. Plaintiff realleges each paragraph set forth hereinabove to the extent not

inconsistent herewith.

176. Paragraph 89 is denied.

177. Paragraph 90 is denied.

178. Paragraph 91 is denied.

179. Paragraph 92 is denied.

180. Paragraph 93 is denied.

181. Paragraph 94 is denied.

182. Paragraph 95 is denied.

FOR A SECOND REPLY TO DEFENDANT ANDREWS TENTH COUNTERCLAIM

183. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

186. Defendant Andrews' Tenth Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and Defendant Andrews fails to adequately state a claim upon which relief may be given against this Plaintiff or in the alternative, Plaintiff moves to make the Counterclaim more definite and certain.

FOR A THIRD REPLY TO DEFENDANT ANDREWS' TENTH COUNTERCLAIM

187. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

188. To the extent that Defendant Andrews seeks equitable relief in his tenth Counterclaim, Defendant's Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A FOURTH REPLY TO DEFENDANT ANDREWS' TENTH COUNTERCLAIM

189. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

190. To the extent that Defendant Andrews' Complaint seeks equitable relief, Defendant Andrews' Tenth Counterclaim is barred by the Doctrine of Laches.

FOR A FIFTH REPLY TO DEFENDANT ANDREWS' TENTH COUNTERCLAIM

191. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

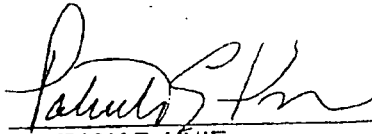
192. The Tenth Counterclaim is barred in all or in part by the Statute of Limitations.

FOR A SIXTH REPLY TO DEFENDANT ANDREWS' TENTH COUNTERCLAIM

193. Plaintiff realleges each paragraph set forth hereinabove to the extent not inconsistent herewith.

194. The Tenth Counterclaim is barred in all or in part by the Statute of Frauds.

WHEREFORE, having fully replied to Defendant Andrews' Counterclaims, the Plaintiff prays that this Court dismiss said Counterclaims or in the alternative, require the Defendant Andrews to re-plead eliminating misjoinder and properly stating the causes of action pled by this Defendant and for such other and further relief as to the Court seems just and proper under the circumstances.



PATRICK E. KNIE
250 Magnolia Street
Post Office Box 5159
Spartanburg, South Carolina 29304
(864) 582-5118 SC Bar No. 3564

_____, 2006

JAMES R. GILREATH
The Gilreath Law Firm, P.A.
Post Office Box 2147
Greenville, South Carolina 29602
(864) 242-4727

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COMMON PLEAS COURT

Quentin S. Broom, Jr.,)

Plaintiff,)

vs.)

Ten State Street, L.L.P.,)

Timothy D. Scrantom, Mark)

Broadwater, and H. Hugh)

Andrews,)

Defendants.)

SUMMONS

Jury Trial Requested

C/A No. 2008-CP-42-3397

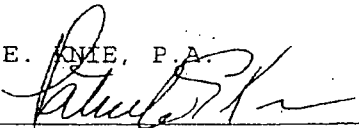
TO: TEN STATE STREET, L.L.P., TIMOTHY D. SCRANTOM, MARK
BROADWATER, AND H. HUGH ANDREWS, DEFENDANTS

2008 JUN 30 PM 12:08
MARCO RITCHENS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the undersigned at his office located at P.O. Box 5159, 250 Magnolia Street, Spartanburg, S.C. 29304, within thirty (30) days after the service hereof, exclusive of the day of such service, unless you received your copy by certified mail, in which case you must serve a copy of your answer on the subscriber within thirty-five (35) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

DATED at Spartanburg, South Carolina, on the 27th day of June, 2008.

PATRICK E. KNIE, P.A.


Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Telefax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Telefax (864) 232-4395

ATTORNEYS FOR PLAINTIFF

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JUN 30 2006
PM 12:08
MARCO KITCHENS

PEK:mbg

STATE OF SOUTH CAROLINA)
) IN THE COMMON PLEAS COURT
COUNTY OF SPARTANBURG)

Quentin S. Broom, Jr.,)

Plaintiff,)

vs.)

COMPLAINT

Jury Trial Requested

C/A No. 2008-CP-42-3397

Ten State Street, L.L.P.,)

Timothy D. Scrantom, Mark)

Broadwater, and H. Hugh)

Andrews,)

Defendants.)

The Plaintiff, complaining of the Defendants herein,
respectfully alleges:

JURISDICTIONAL AND GENERAL ALLEGATIONS

1. The Plaintiff, Quentin S. Broom, Jr., (hereinafter referred to as "Broom,") is a citizen and resident of the County of Spartanburg, State of South Carolina.

2. The Defendant, Ten State Street, L.L.P., (hereinafter referred to as "Ten State Street,") is a limited liability partnership organized and existing under the laws of the State of South Carolina, and at all times mentioned herein, doing business in Spartanburg County, South Carolina. On information and belief, Ten State Street is a law firm which includes off-shore law and international law among its areas of practice, and owned or controlled by Timothy D. Scrantom.

3. The Defendant, Timothy D. Scrantom, (hereinafter

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2008 JUN 30 PM 12:08
MARCO RITTO/CHEN

(referred to as "Scrantom,") is a citizen and resident of the County of Charleston, State of South Carolina, and is licensed to practice law in the State of South Carolina. On information and belief, Scrantom is a partner and member of Ten State Street, L.L.P.

4. The Defendant, Mark Broadwater, (hereinafter referred to as "Broadwater,") is a citizen and resident of the County of Charleston, State of South Carolina. On information and belief, Broadwater is the business manager for Ten State Street, and in that capacity, acts as the general manager of trust and company services for the firm.

(5. The Defendant, H. Hugh Andrews, (hereinafter referred to as "Andrews,") is a citizen and resident of the County of Spartanburg, State of South Carolina.

6. For a number of years, Andrews and Broom have been business partners, primarily in Tri-Star Communications, Inc., (hereafter referred to as "Tri-Star,") but also in other enterprises, including the ownership of various parcels of real estate and other businesses.

7. In the early summer of 2000, Andrews and Broom were considering a new business venture, and Andrews insisted that Broom consult with Ten State Street, a law firm which Andrews had been using for certain off-shore financial purposes.

(8. Ultimately, Andrews and Broom decided not to pursue this business venture.

9. In December of 2000, Andrews and Broom decided to undertake a business venture through their company, Tri-Star, in the Dominican Republic. Andrews and Broom agreed that they would be equal partners in the venture.

10. Once again, Andrews insisted that they employ and retain Ten State Street for the purpose of investing money in their Dominican Republic venture through the use of off-shore companies.

11. Andrews insisted that both he and Broom each individually contribute Three Hundred Thousand (\$300,000.00) Dollars to the Dominican Republic venture through off-shore entities recommended, created, and used by Ten State Street.

12. As part of the off-shore planning by Ten State Street, Ten State Street either acquired or formed two (2) entities known as AKILAH, LTD. and Calum, LLC for use by Andrews and Broom.

13. As a result, both Andrews and Broom provided Three Hundred Thousand (\$300,000.00) Dollars each directly to AKILAH, LTD. pursuant to wiring instructions provided by Ten State Street for which they each received an "ordinary member contract in AKILAH, LTD.," a corporation in St. Vincent and the Grenadines. The "ordinary member contract" reflected the ownership interest of Broom and Andrews to be equal.

14. Broom later discovered that his "ordinary member contract" had been altered while in the possession of Ten State

Street with Broom's interest reduced from fifty (50%) per cent to twenty-five (25%) per cent.

15. After Andrews insisted that Broom use the services of Ten State Street, Broom complained of the amount of the legal and management fees charged by Ten State Street. As a result, Ten State Street provided Broom with a portion of a letter of engagement with Andrews which authorized the charges for various partners and employees of Ten State Street.

16. Thereafter, there were a number of substantial fee increases by Ten State Street without prior notice given to Broom.

17. Broom, Calum, and AKILAH, LTD. were also billed for services by Ten State Street for work performed uniquely for Andrews.

18. Ten State Street also charged management fees and other costs apparently connected with the management of the off-shore entities which Ten State Street had created.

19. Andrews and Broom, in connection with their Tri-Star business venture, each individually loaned money to Tri-Star. In addition, Drews, Inc., a company owned by Hugh Andrews, sold equipment to Tri-Star creating a debt, the amount of which is a matter of disagreement by and between Andrews and Broom.

20. In July of 2004, Broom learned that Drews, Inc. had written off the debt allegedly owed to it from Tri-Star on Drews' 2003 federal tax return.

21. Broom received no notification of that event, however, he was thereafter obligated to amend Tri-Star's 2003 tax return to reflect the write-off by Drews, Inc. as income to Tri-Star.

22. Broom is informed and believes that Ten State Street advised Andrews concerning the loan write-off.

23. At approximately the same time, Defendant Andrews was in the process of liquidating Drews, Inc. in the face of a judgment in excess of \$1.6 Million Dollars against it by IGT.

24. Broom is informed and believes that Defendant Ten State Street assisted Andrews in the liquidation of Drews, Inc.

25. The actions of Ten State Street and its members/employees, Scrantom and Broadwater, in jointly representing Andrews, Broom, and a variety of other entities in which Andrews was involved, created a conflict of interest which was never waived by Broom and which was detrimental to Broom's legal, business, and personal affairs.

26. In July of 2004, Broom became concerned about a number of the items mentioned hereinabove, and first individually, and then through newly retained legal counsel, attempted to obtain possession of his complete files from Scrantom and Ten State Street, as well as all documents relating to Andrews.

27. The request both by Broom and his attorneys met with repeated resistance and delays.

28. Broom was never permitted to secure the files of Andrews though Ten State Street jointly represented Andrews and Broom simultaneously.

FOR A FIRST CAUSE OF ACTION

As to Defendants Ten State Street and Scrantom

(Negligence in Performance of Professional Duties)

29. The allegations of the preceding paragraphs are incorporated and referenced as if stated verbatim herein.

30. Broom is informed and believes that Ten State Street and Scrantom were willful, wanton, reckless, grossly negligent, and negligent at the times and places hereinabove mentioned and failed to exercise due care and caution as would have been exercised by a reasonably prudent attorney under the circumstances then and there prevailing in the following particulars:

a. In changing the ordinary member agreement of Broom in AKILAH, LTD. without Broom's authorization;

b. In changing the ordinary member agreement of Broom in AKILAH, LTD. when Andrews and Broom had agreed to be equal partners in such venture;

c. In repeatedly increasing the hourly rate of fees charged without notice to Broom;

d. In repeatedly increasing the hourly rate charged for the various services and employees of Ten State Street when Broom had engaged Ten State Street at lower hourly rates;

e. In representing both Andrews and Broom simultaneously on matters which created a conflict without notice to Broom;

f. In representing both Andrews and Broom simultaneously on matters which created a conflict without securing a waiver from Broom;

g. In charging management fees and costs without notice to Broom and without his prior approval;

h. In charging Broom, Calum, and AKILAH for services performed solely for Andrews;

i. In failing to timely provide Broom's legal documents to him when requested;

j. In refusing to provide the legal documents of Andrews when requested by Broom;

k. In self-dealing with Broom's funds and charging Broom, Calum, and AKILAH excessive fees for services actually rendered in such other particulars as may be ascertained through discovery procedures undertaken pursuant to South Carolina Rules of Civil Procedure.

31. As a direct and proximate result of the willful, wanton, reckless, grossly negligent, and negligent conduct of these Defendants, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

32. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A SECOND CAUSE OF ACTION

As to Defendants Ten State Street and Scrantom

(Breach of Contract)

33. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

34. Broom secured a contract for legal services and certain management services for which Broom agreed to compensate Ten State Street and Scrantom for the protection of his legal rights, legal advice, consultation, and other legal and management services performed by Ten State Street and Scrantom in their professional capacities as a law firm and attorney.

35. Implicit in the contract by and between these parties was the covenant of good faith and fair dealing which was breached by Ten State Street and Scrantom.

36. As a result of said breach of contract, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

37. Plaintiff is informed and believes he is entitled

to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A THIRD CAUSE OF ACTION

As to Defendants Ten State Street, Scrantom, and Broadwater

(Breach of Fiduciary Duty)

38. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

39. The Defendants, Ten State Street, Scrantom, and Broadwater, at all times mentioned herein were acting in a fiduciary capacity to Broom.

40. The Defendants breached their fiduciary duties by engaging in conflicting legal representation in management services which presented a conflict to Broom's interests.

41. Alternatively, these Defendants are liable for conspiracy to breach a fiduciary duty in that these Defendants wrongfully conspired to, agreed to, and participated in the breaches alleged herein.

42. As a direct and proximate result of the breach by these Defendants of their fiduciary duty, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

43. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A FOURTH CAUSE OF ACTION

As to All Defendants

(Common Law Fraud)

44. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

45. The Defendants set upon a course of conduct to defraud and mislead Plaintiff by making various representations outlined herein to Broom regarding his status as a member of AKILAH, the relationship by and among the Defendants, and other related matters.

46. The representations made by the Defendants were false, and the falsity of the same has been concealed by Defendants with repeated false and fraudulent assurances and promises.

47. Defendants knew that their representations to Broom were false and made the same to him in a reckless disregard for whether the same were true or false.

48. Broom was ignorant of the falsity of Defendants' representations, and Defendants knew that Broom was ignorant of the falsity of the same.

49. Broom relied on Defendants' false and fraudulent representations, and Defendants intended that he so rely.

50. The representations made by the Defendants unto Broom were material in that these representations were critical to Broom's individual and business success and his actions in reliance upon the representations.

51. Broom rightfully relied on the Defendants' representations since Andrews was a business partner of Broom and since Broom employed the other Defendants to protect and preserve his business interests..

52. As a direct and proximate result of the false and fraudulent misrepresentations and omissions made by Defendants unto the Plaintiff herein as aforesaid, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

53. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A FIFTH CAUSE OF ACTION

As to All Defendants

(Constructive Fraud)

54. The Plaintiff reasserts and realleges each and

11

every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

55. Even if Defendants did not know or appreciate the representations made by them to Plaintiff were false or with an intent to deceive or conceal such from the Plaintiff, nonetheless, Plaintiff asserts Defendants should have known the falsity thereof and should have appreciated the affect of the concealment thereof in light of the confidential and/or fiduciary relationship enjoyed by each with the Plaintiff binding them to act in good faith and with due regard for the best interests of the Plaintiff.

56. The actions of the Defendants in conveying representations to Plaintiff set forth above constitute constructive fraud for which Plaintiff Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

57. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A SIXTH CAUSE OF ACTION

As to All Defendants

(Negligent Misrepresentation)

58. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

59. The Defendants made and participated in the making of representations of fact to Broom by means of various documents, reports, and statements as alleged in the Complaint.

60. The Defendants had a pecuniary interest in making these false representations to Broom as hereinabove described.

61. The Defendants owed Broom a duty of exercising due care to insure the statements and representations made were truthful and accurate.

62. In making these representations, Defendants misrepresented or omitted to state material facts necessary in order to make statements, in light of the circumstances under which they were made, not misleading.

63. In making these representations, Defendants misrepresented or omitted stating material facts necessary for Broom to make informed decisions.

64. It was reasonably foreseeable to Defendants that Broom would rely on such statements.

65. Among the direct and proximate causes of the representations and omissions to state material facts were the negligence and carelessness of the Defendants and the absence of any reasonable basis for belief in the truth of such statements.

66. At the time the misrepresentations and omissions

were made, Broom was ignorant of their falsity and believed them to be true, and reliance on the misrepresentations and the reliance of the knowledge and expertise of the Defendants, Broom was induced to act where he may not otherwise have acted.

67. As a proximate result of Defendants' negligent misrepresentations, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

68. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR A SEVENTH CAUSE OF ACTION

As to All Defendants

(Civil Conspiracy)

69. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

70. Broom is informed and believes that the Defendants combined and conspired to disseminate false and misleading information, to misappropriate Broom's assets without his knowledge and consent, and to otherwise injure and damage Broom.

71. Said Defendants' conduct was wrongful and illegal and caused Broom injuries and damages including, but not limited

to, loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

72. Plaintiff is informed and believes he is entitled to a judgment for actual damages, plus such punitive damages as may be awarded, the costs of this action, and such other and further relief as to the Court may seem just and proper.

FOR AN EIGHTH CAUSE OF ACTION

As to Ten State Street, Scrantom, and Broadwater

(Violation of S.C. Unfair Trade Practices Act,

Section 39-5-10, et.seq.)

73. The Plaintiff reasserts and realleges each and every allegation contained in the preceding paragraphs as if they were set forth herein verbatim.

74. The Plaintiff is informed and believes that the actions of the Defendants Ten State Street, Scrantom, and Broadwater constitute trade within the meaning of South Carolina Code 39-5-20(a).

75. The Plaintiff is informed and believes that the conduct of the Defendants in misrepresenting to the Plaintiff and misleading him, as more specifically set forth above, constitutes unfair and deceptive acts in willful violation of the South Carolina Unfair Trade Practices Act, Section 39-5-10, et.seq.

76. The actions of these Defendants impacted upon the

public interest of the people of the State of South Carolina and were capable of repetition.

77. As a direct and proximate result of the unfair and deceptive trade practices committed by these Defendants, Broom has suffered loss of income, diminution of his interest in AKILAH, LTD., loss of use of his property, payment of excessive attorney's fees and management fees, as well as other consequential and related damages.

78. As a direct and proximate result, the Plaintiff is informed and believes that he is entitled to actual damages to be trebled for the willful violations committed and an award of reasonable attorney's fees.

WHEREFORE, Plaintiff prays for judgment of this Court declaring:

a. Void and unenforceable all fee contracts with Ten State Street and/or Scrantom and restitution of all fees received by either under such agreements;

b. Restitution of all fees paid to Ten State Street, Scrantom, and Broadwater;

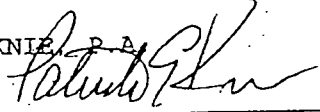
c. Actual and punitive damages and costs;

d. Prejudgment interest at the highest rate allowed by law on monies lost;

e. Treble damages and reasonable attorney's fees;

f. Such other and further relief as to the Court may seem appropriate under the circumstances.

PATRICK E. KNIE, P.A.



Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Telefax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Telefax (864) 232-4395

ATTORNEYS FOR PLAINTIFF

June 27, 2008

Spartanburg, South Carolina

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MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COMMON PLEAS COURT

Quentin S. Broom, Jr.,)
Plaintiff,)

vs.)

MOTION TO DISMISS
THIRD PARTY CLAIM

Ten State Street, L.L.P.,)
Timothy D. Scrantom, Mark)
Broadwater, and H. Hugh)
Andrews,)

C/A No. 2008-CP-42-3397

Defendants.)

Of Which,)

Defendant H. Hugh)
Andrews Individually and)
on behalf of Tri-Star)
Communications, Inc., as)
a Third-party Plaintiff,)

vs.)

Quentin S. Broom, Jr.,)

Third-Party)
Defendant.)

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Plaintiff Broom moves to dismiss with prejudice,¹ pursuant to SCRCP 12(b)(6) and 12(c), all of the counterclaims of the Defendant Andrews, purportedly brought as a stockholder of Tri-Star, and the Third-Party Complaint of Plaintiff Tri-Star. This Motion is based on the grounds that Andrews' Counterclaims and Third-Party Complaint,²

¹ The requisites of Rule 23 were not complied with within the statute of limitations. Any new action would be time barred.

² Sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained *189 within it. *McCormick v. England*, 328 S.C. 627, 633, 494 S.E.2d 431, 433 (Ct.App.1997). *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188-

together with the claims therein asserted, fail to meet the stringent pleading requirements of Rule 23, SCRCP³ to properly assert a shareholders derivative suit for the following five reasons:

- (1) Andrews has *never* made a demand⁴ on the Tri-Star Board of Directors;
- (2) Andrews has failed, as Rule 23 requires, to demonstrate that a demand would have been futile in this case;
- (3) The Complaint was not verified, as Rule 23 requires;
- (4) The complaint totally fails to allege with any particularity the efforts, if any, made by Andrews to obtain the action he desires and the reason for

89, 539 S.E.2d 402, 409 (S.C. Ct. App. 2000).

³Rule 23 of the South Carolina Rules of Civil Procedure provides:

(b)(1) *Derivative Actions by Shareholders.* In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs. (Emphasis added).

"At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Allison*, 604 F.Supp. at 1117; *see also Latimer*, 39 S.C. at 53, 17 S.E. at 261 ["The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity." (quoting *Hawes*, 104 U.S. at 461; 26 L.Ed. 827)]. Such a pre-suit demand must be alleged, ^{**410} not in a conclusory fashion, but through particularized allegations. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 189, 539 S.E.2d 402, 409-10 (S.C. Ct. App. 2000).

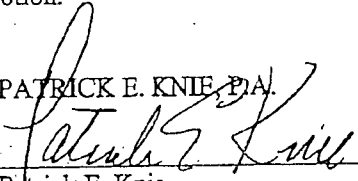
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HIDRELL AGENCY

his failure to meet this requirement (*Carolina First Corp. v. Whittle*, 343 S.C. 176, 188-89, 539 S.E.2d 402, 409 (S.C. Ct. App. 2000); and

- (5) the Complaint fails to allege that Andrews can fairly and adequately represent the interests of the other Tristar shareholder in this case.

Other authorities for this Motion will be submitted in a Memorandum of law to be submitted prior to argument of this Motion.

PATRICK E. KNIE, P.A.


Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Telefax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Telefax (864) 232-4395

ATTORNEYS FOR PLAINTIFF

September 13, 2011

Spartanburg, South Carolina

FILED
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SPARTANBURG COUNTY
2011 SEP 14 PM 4:37
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Quentin S. Broom, Jr.,	)	Civil Action No. 2008-CP-42-3397
	)	
Plaintiff,	)	PLAINTIFF QUENTIN S. BROOM,
vs.	)	JR., 'S MEMORANDUM OF LAW IN
	)	SUPPORT OF MOTION TO DISMISS
Ten State Street, L.L.P., Timothy D.	)	
Scrantom, Mark Broadwater, and H. Hughes	)	
Andrews,	)	
Defendants,	)	
of which,	)	
Defendant H. Hughes Andrews, Individually	)	
and on behalf of Tri-Star Communications,	)	
Inc., as Third-party Plaintiff,	)	
vs.	)	
Quentin S. Broom, Jr.,	)	
Third-party Defendant.	)	

2011 OCT -5 AM 11:29

This memorandum is respectfully submitted to the Court in support of the motion to dismiss filed by Plaintiff/*purported* counterclaim-defendant, Quentin S. Broom, Jr. ("Broom") on September 14, 2011.

INTRODUCTION

Broom is an officer, director and/or owner of Tri-Star Communications, Inc. ("Tri-Star"). The Defendant/*purported* counterclaim-plaintiff, H. Hughes Andrews ("Andrews"), attempted to bring this as a shareholder derivative suit on behalf of himself and Tri-Star, an entity in which he is a shareholder and creditor. Ten causes of action are set forth in the Amended Answer and Counterclaims of Defendant H. Hughes Andrews:¹ (1) Breach of Fiduciary Duty; (2) Breach of

¹ For sake of brevity, this pleading will be referred to hereinafter as "Counterclaim."

Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S.C. Code of Laws § 33-8-300; (7) Violation of S.C. Code of Laws § 33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation. These claims are based on various allegations of mismanagement on the part of Broom that has allegedly resulted in loss to Tri-Star, as a corporate entity, and to Andrews, as a shareholder and creditor of Tri-Star.

As explained further below, Andrews never received leave of court or written consent to file the Amended Answer and Counterclaims, and thus failed to properly file and serve his claims against Broom. Andrews also failed to comply with the legal prerequisite of making a proper pre-suit demand upon the Tri-Star management, to give management the opportunity first to decide whether Andrews' claims have merit, and whether it would be in the best interests of the company to assert those claims.

Andrews' shareholder derivative action purports to be brought by Andrews, in the name of Tri-Star, and, allegedly, for *its* benefit. A shareholder derivative action seeks to have a court compel a corporation to sue its own officers and directors, for the causes of action alleged. This is an extraordinary request.

It is of critical importance that Andrews comply with the legal requirements of making a proper pre-suit demand upon Tri-Star management, and alleging that proper demand was made in the operative pleading. It is clear from the four corners of the Counterclaim that Andrews did not present a demand to Tri-Star management. Nor has he made any allegation that management wrongfully refused a demand by Andrews. Finally, Andrews has made no attempt in the Counterclaim to allege adequate grounds to excuse the lack of a proper pre-suit demand. As discussed in detail below, because the law requires Andrews to allege either, (a) that a proper

demand was wrongfully refused, or (b) that making a demand would be futile, the Court must dismiss this action for failure to satisfy the demand requirement.

BACKGROUND AND SUMMARY OF ANDREWS' ALLEGATIONS

Tri-Star Communications, Inc. is a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina. (Counterclaim, ¶ 22). H. Hughes Andrews, is or was a shareholder of and a creditor of Tri-Star. (Id., ¶ 22). Quentin S. Broom, Jr., was a "director, officer, and a fifty percent (50%) owner of Tri-Star, and operated Tri-Star at all times at issue." (Id., ¶ 24).

While the Counterclaim presents a litany of factual allegations, there appear to be four general allegations supporting each of the causes of action. Andrews contends that Broom, acting as a "director, officer, and fifty percent (50%) owner of Tri-Star" acted wrongfully by

1. Paying himself from Tri-Star without consent or authority from Andrews;
2. Selling substantially all of the assets of Tri-Star Inc. at below market value and without authority or consent of Andrews;
3. Converting Tri-Star's money and/or assets for Broom's own use and benefit;
4. Failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders.

(Counterclaim, ¶¶ 24, 36)

Although Tri-Star is not listed as a defendant in Andrews' counterclaim pleading, encompassed within these allegations are various failures on the part of Tri-Star to pay a debt owed to Andrews (shareholder loan) and/or his company, Drews, Inc. (Gaming Machine financing).² Specifically, Andrews alleges the distributions Broom made to himself were made

² Andrews loaned Tri-Star one hundred thirty thousand dollars (\$130,000) on or before August 31, 2005. (Counterclaim, ¶ 25). Tri-Star purchased "Pot-O-Gold" video gaming machines ("Gaming Machines") and other goods and services from Drews Distributing, Inc., a South Carolina corporation ("Drews, Inc.") owned 100% by Defendant Andrews. Drews, Inc. distributed by assignment to Andrews all rights to

at a time when Tri-Star owed Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star. (Id., ¶¶ 25-27, 35).

MOTION TO DISMISS STANDARD

From the outset, it should be mentioned that Broom specifically pled that each and every one of the counterclaims failed to set forth sufficient facts or the requisite legal elements for the claims sought such that Andrews failed to adequately state a claim upon which relief may be given against Broom. (See Reply to Counterclaims of Defendant H. Hugh Andrews filed September 26, 2006, at ¶¶ 20, 38, 55, 72, 89, 107, 125, 144, 166, and 186).³

A motion to dismiss under Rule 12(b)(6) must be granted if the facts alleged and the inferences reasonably deducible from the pleadings would not entitle the counterclaim plaintiff to relief under any theory of the case. Brown v Leverette, 291 S.C.364, 353 S.E.2d 697 (1987); McCormick v. England, 328 S.C. 627, 494 S.E. 2d 431 (Cl.App. 1997). Thus, the question to be considered is whether, in the light most favorable to the plaintiff, the counterclaim pleading articulates any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987); Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999).

However, the court should not give effect to a counterclaim-plaintiff's legal conclusions. See United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979) (allegations that defendant acts "under color of state law" is a legal conclusion which is

payments from Tri-Star. (Id., ¶ 26). As of October 31, 2005, Tri-Star owed Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges). (Id., ¶ 27). For purposes of this motion, all allegations in the counterclaim pleading must be accepted as true.

³ Broom filed a Reply under the mistaken belief that the Amended Answer and Counterclaims had been properly filed and served. Recently, it was discovered that Andrews merely attached a proposed Amended Answer and Counterclaim to his Motion to Amend filed on or about May 26, 2006. He never received an Order on his motion nor did he ever formally file and serve the pertinent pleading.

insufficient to avoid dismissal of § 1983 claim). Furthermore, "[a] Rule 12(b)(6) motion should be granted when the complaint lacks a cognizable theory or facts sufficient to support a theory." C. Wright and A. Miller, Federal Practice and Procedure: Civil 2d § 1357 at 272 (Supp. 2001). Moreover, the court is not required to accept a counterclaim-plaintiff's conclusory allegations that contradict the specific facts pled. Id. § 319-21 (1990).

The United States Supreme Court discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss, in Ashcroft v. Iqbal, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009): "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id., at 1949 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955) (internal citations omitted).

South Carolina law requires dismissal of a complaint for failure to satisfy the pleading requirements of Rule 23(b)(1), SCRPC: "(a) derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRPC, is properly dismissed pursuant to Rule 12(b)(6)." Clearwater Trust v. Bunting, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (quoting Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)). "Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRPC, in that it requires particularized allegations." Id. at 188. A plaintiff who fails to satisfy the requirements of Rule 23(b)(1) lacks standing. Strickland v. Flue-Cured Tobacco Co-op. Stabilization Corp., 643 F. Supp. 310, 316 (D.S.C. 1986) ("[s]ince the plaintiffs ... have not complied with the requirements for a derivative action, they lack standing to bring the action before this Court....")

As is demonstrated below, the standard for granting a motion to dismiss under Rule 12(6)(b) is met in this case.

ARGUMENT

I. ANDREWS HAS NOT COMPLIED WITH THE PLEADING AND DEMAND REQUIREMENTS PRIOR TO COMMENCING A SHAREHOLDER DERIVATIVE ACTION ON BEHALF OF TRI-STAR

Andrews' shareholder derivative action should be dismissed pursuant to Rule 12(b)(6) and 12(c), SCRCP, based on the fact that he failed to satisfy the pleading and demand requirements of Rule 23(b)(1), SCRCP, which provides:

"In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

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A. Andrews' Amended Answer and Counterclaim Was Not Verified

There is no evidence or allegation anywhere in the Amended Answer and Counterclaims of Defendant H. Hughes Andrews that the pleading was verified before it was attached as a proposal to his Motion to Amend filed on or about May 26, 2006. No "verification" signature line is found within the proposed pleading nor is one attached to it.

The South Carolina Supreme Court has held that failure to comply with the pleading requirements of Rule 23(b)(1), SCRCP, is grounds for dismissal pursuant to Rule 12(b)(6), SCRCP: "[a] derivative action that does not meet the pleading requirements of Rule 23(b)(1),

SCRCF, is properly dismissed pursuant to Rule 12(b)(6)." Clearwater Trust, 367 S.C. at 351, 626 S.E.2d at 339 (quoting Carolina First Corp., 343 S.C. 176, 539 S.E.2d 402).

The importance of the verification requirement is discussed by a South Carolina district court analyzing the federal counterpart to Rule 23(b)(1); in Strickland, 643 F.Supp. 310:

This rule is not a technical procedural requirement, but reflects important policy concerns. Verification, for example, serves the important purpose of ensuring that the plaintiff or some other person has investigated the charges and found them to have substance.

Id. at 316 (internal quotations and citations omitted).

The verification requirement also serves to discourage lawsuits filed for improper purposes:

Rule 23.1 (FRCP)⁴ requiring verification of complaints in derivative actions "was originally adopted and has served since in part as a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them." Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371, 86 S.Ct. 845, 850, 15 L.Ed.2d 807 (1966). And, while it is undeniable that derivative suits have played a rather important role in protecting corporate shareholders from the machinations of corporation insiders, id., it is equally true that "nuisance" and "strike" suits cannot be tolerated under the guise of a derivative action ostensibly brought for the benefit of a corporation

Brown v. Hart, Schaffner & Marx, 96 F.R.D. 64, 66-67 (N.D. Ill. 1982).

In Strickland, the district court dismissed the plaintiffs' complaint for lack of standing resulting from the plaintiffs' failure to comply with the verification and demand requirements.

See Strickland, 643 F. Supp. at 316 ([t]he requirements of Rule 23.1 are to be vigorously

⁴ The reporter's notes to Rule 23, SCRCF, state that "[t]his Rule 23(b)(1) is the language of the present Federal Rule 23.1."

(enforced" and failure to meet them "requires dismissal of the suit.") (internal citations omitted) (emphasis added)

B. Andrews Did Not Comply With The Demand Requirement

Andrews has also failed to satisfy the legal requirement of a pre-suit demand on Tri-Star's Directors, Officers or Owners. Andrews has: (1) failed to allege a proper demand to management as to all of the claims in the Amended Answer and Counterclaim; (2) failed to allege that management wrongfully refused his demand; and (3) failed to allege the demand was excused due to futility.

Rule 23(b)(1), SCRCF, requires that the complaint (1) shall be verified; (2) shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (3) shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

It is noteworthy that the rule requires the allegations to be made "with particularity." This requirement means that conclusory allegations will not withstand a motion to dismiss. The South Carolina Court of Appeals in Carolina First Corp., 343 S.C. 176, 539 S.E.2d 402, discussed the minimum amount of detail required in a pleading, to satisfy the demand requirement: "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." Id. at 189, 539 S.E.2d at 409-10.

Andrews makes no allegations concerning a pre-suit demand, let alone any one that contains these particular attributes. The determination of whether a pre-suit demand was

sufficient must be made on the factual allegations contained within the "four corners of the pleading." Carolina First Corp., 343 S.C. at 190, 539 S.E.2d at 410.

Andrews utterly failed to plead with particularity that he made a proper pre-suit demand, that Tri-Star management wrongfully refused the demand, or that such a demand on the management would be futile. These requirements are not merely technical matters of pleading. The requirements of this rule are stringent because shareholder derivative suits "impinge on the inherent role of corporate management to conduct the affairs of the corporation." Carolina First Corp., 343 S.C. at 187, 539 S.E.2d at 408. This role of corporate management includes the right to decide whether the company should initiate litigation to redress an alleged wrong against the company, or to decide not to invest the resources of the corporation in pursuit of the shareholder's claim of a corporate wrong. This is the fundamental reason for the demand requirement. As explained by the South Carolina Court of Appeals:

"Demand is required in order to assure compliance with the most fundamental principle of corporate governance-directors are answerable to the shareholders and are charged with the duty and responsibility to manage all aspects of corporate affairs." Id., at 1117. As the United States Supreme Court explained, "The purpose of the demand requirement is to 'affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right.'" Kamen, 500 U.S. at 96, 111 S.Ct. 1711 (alteration in original) (quoting Daily Income Fund, Inc., 464 U.S. at 533, 104 S.Ct. 831). "Thus, the demand requirement implements the basic principle of corporate governance that the decisions of a corporation-including the decision to initiate litigation-should be made by the board of directors or the majority of shareholders." Kamen, 500 U.S. at 101, 111 S.Ct. 1711 (quoting Daily Income Fund, Inc., 464 U.S. at 530, 104 S.Ct. 831); see also Spiegel, 571 A.2d at 773 ("The purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does

occur."). A demand alerts the board so that it may take the corrective action, if any, which it deems necessary.

Carolina First Corp., 343 S.C. at 188, 539 S.E.2d at 409.

Because Andrews failed to allege with particularity a pre-suit demand on Tri-Star management, this case should be dismissed.

C. Failure To Allege That a Proper Demand Was Wrongfully Refused

Nowhere in the Counterclaim is it alleged that Tri-Star management wrongfully refused any pre-suit demand that was made. This missing allegation logically follows when a shareholder fails to allege that he made a pre-suit demand in the first place.

D. Failure To Allege Demand Futility

Andrews has failed to plead demand futility. While Rule 23(b)(1), SCRCP does provide that a shareholder need not make a pre-suit demand when it is clear that the act would be futile, the rule specifically states the shareholder must allege futility with particularity. "Shareholders still ha[ve] the burden of alleging particularized facts to support the assertion that demand would have been futile." Carolina First Corp., 343 S.C. at 192, 539 S.E.2d at 411 (emphasis added).

Andrews has failed to allege a pre-suit demand would have been futile. As such, all of the causes of action made by Andrews, individually and on behalf of Tri-Star must be dismissed.

II. ANDREWS' CLAIMS AGAINST BROOM CONSTITUTE A SINGLE CAUSE OF ACTION THAT IS TIME BARRED UNDER SECTION 33-8-420(e) AND, THEREFORE, THOSE CLAIMS FAIL AS A MATTER OF LAW.

A. Single cause of action governed by Section 33-8-420

Andrews' purported claims against Broom constitute a single cause of action governed by Section 33-8-420 of the Code of Laws of South Carolina of 1976, as amended,⁵ including the

⁵ This statute is applicable because Tri-Star is a South Carolina corporation with its principal place of business in Spartanburg County. (Counterclaim, ¶ 22.)

limitations periods contained in Subsection (e). Section 33-8-420 provides:

Section 33-8-420. Standards of conduct for officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

- (1) in good faith;
- (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.

(b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- (1) one or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or
- (2) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(c) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) An officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.

(e) An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

The allegations in the causes of action against Broom, while couched in terms of breach of contract (Counterclaim, at ¶¶ 38-43), breach of contract accompanied by a fraudulent act (Id.,

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at ¶¶ 44-48), breach of covenant of good faith and fair dealing (Id., at ¶¶ 49-53), conversion (Id., at ¶¶ 54-58), promissory estoppel (Id., at ¶¶ 71-77), fraud (Id., at ¶¶ 78-87), negligent misrepresentation and (Id., 88-95), and variations on those themes, constitute a single cause of action that arises out of a single core set of facts; namely that Broom, acting as a "director, officer, and fifty percent (50%) owner of Tri-Star" acted wrongfully by:

1. Paying himself from Tri-Star without consent or authority from Andrews;
2. Selling substantially all of the assets of Tri-Star Inc. at below market value and without authority or consent of Andrews;
3. Converting Tri-Star's money and/or assets for Broom's own use and benefit;
4. Failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders.

(Counterclaim, ¶¶ 24, 36)

Under South Carolina law, these allegations constitute a single cause of action. In Brice v. Glenn, 165 S.C. 509, 164 S.E. 302 (1932), the Supreme Court of South Carolina held as follows with regard to allegations that are similar to the allegations by Andrews:

What is the cause of action set out in the complaint? What constitutes a cause of action?

Every judicial action must involve the following elements: A primary right possessed by plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consists in a breach of such primary right, and duty; a remedial right in favor of plaintiff and a remedial duty resting upon defendant, springing from this delict; and finally the remedy or relief itself.

Analyzed by this definition, what is the cause of action stated in the complaint? It is that the Dollar Savings Bank, of which plaintiff is receiver, and in whose place he stands, entitled to all its rights and remedies, had the right to demand of defendants, as its officers and directors, honest service in its behalf; diligence in the performance of their duty, and faithfully and honestly to prosecute its business, and faithfully and honestly to protect and defend its

interests, that in violation of there [sic] duties and obligations defendants neglected their duties and by connivance, mismanagement, fraud, and deceit wasted its assets, converted them to their own use and benefit in the particulars set out in the complaint.

The complaint states one cause of action.

Id. at 513, 164 S.E. at 303 (emphasis added) (citations omitted).

Similarly, in Landvest Associates v. Owens, 276 S.C. 22, 274 S.E.2d 433 (1981), limited partners sued the general partner (1) for an accounting of profits from self-dealing by the general partner in connection with a sale of land that the general partner represented he was transferring at cost and without any profit, and (2) for damages for breach of the general partner's fiduciary duty to the limited partners. The general partner contended that there was only a single cause of action with two remedies, one at law and one in equity, and that the limited partners had to elect which remedy to pursue. The Supreme Court of South Carolina agreed, holding:

We have previously considered the nature of the primary right of the plaintiff and the primary duty of the defendant in a very similar context to that presented here. Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 involved a suit seeking an accounting for hidden profits as well as an action for fraudulent breach of fiduciary duty to disclose. The defendant in that case was an officer and dominant figure of the corporation. He allegedly contracted with a third party for the sale to him of all the company's capital stock. He then solicited and purchased the stock of the plaintiff at a lower price and sold the stock under the terms of the prior contract for a profit. Our Court held that the plaintiff had stated only one cause of action twice and required the plaintiff in that case to elect as to whether she would pursue a legal or equitable remedy.

We find the holding of Jacobson controlling. The respondents have alleged only one primary right, the right to not be subjected to a hidden profit from one owing them fiduciary duties, and only one primary duty of the appellant, the duty of a fiduciary to disclose and to deal in good faith. Because only one cause of action is alleged by which the respondents may seek either an equitable or a legal remedy, the respondents must make an election. See Jacobson supra.

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It is true, as pointed out by respondents, that this case varies from Jacobson since it involves an express misrepresentation whereas Jacobson involved a constructive misrepresentation because of a failure to disclose. We find this distinction of no significance. The substance of the action is the respondents have been victims of a misrepresentation by the appellant. As far as the ability to pursue separate causes of action, it matters not whether the misrepresentation was constructive or express. Suppression of a material fact which one is duty bound to disclose is equivalent to a false misrepresentation. See 37 C.J.S. Fraud, Section 16, p. 244.

Id. at 24, 274 S.E.2d at 434 (emphasis added).

Therefore, Andrews has but a single cause of action because the allegations in the Counterclaims against Broom demonstrate that there is but one primary right and one corresponding primary duty; namely, the right of Andrews as a shareholder of Tri-Star to receive competent care and diligence from Tri-Star's management that comports with the standards of Section 33-8-420(a)(1)-(2), i.e., management decisions performed in good faith and with the care an ordinarily prudent person in like position would exercise under similar circumstances. See Nunnery v. Brantley Constr. Co., 289 S.C. 205, 210, 345 S.E.2d 740, 743 (Ct. App. 1986) ("... a fundamental test used for comparing causes of action is to determine whether the primary right and duty and the delict or wrong are the same in each action. Under this test, there is but one cause of action where there is but one right in the plaintiff and one wrong on the part of the defendant involving that right.") (citation and internal quotation omitted).

Furthermore, under South Carolina law, the conclusion that Andrews has but a single cause of action against Broom is not affected by his characterizing what he allegedly did -- or failed to do -- as "fraudulent." (See, e.g., Counterclaim, at ¶ 46.) In Few v. Few, 239 S.C. 321, 330, 122 S.E.2d 829, 833 (1961), the Court held:

An action for the fraudulent breach of contract is not converted into an action in tort because the motive prompting the breach and

alleged acts accompanying such were characterized as "fraudulent", "flagrant" and "willful". These words do not change the structural essence of the cause of action. It remains as a cause of action on contract.

(Citations omitted).

The foregoing clearly establishes that Andrews has but a single cause of action and that his cause of action falls squarely under Section 33-8-420, quoted above, which codifies the primary right of shareholders and primary duty of officers on which only a single cause of action against him can be based.

B. Section 33-8-420 Has Abrogated The Common Law.

In the purported Answer and Counterclaims, Andrews asserts common law causes of action against Broom, in addition to relying on Section 33-8-420. This type of pleading is unavailing because Section 33-8-420 has abrogated Andrews' common law claims.

In this regard it is essential to keep in mind not only Section 33-8-420, which codifies South Carolina's standards for corporate officers, but also Section 33-8-300, which codifies those standards for corporate directors.⁶ Andrews also pled a separate cause of action under 33-8-300. (Counterclaim, ¶¶59-64). Indeed, the Official Comment to Section 33-8-300 states that it "defines the general standard of conduct for directors." S.C. Code Ann. § 33-8-300 (Law. Co-op. 2002). Plainly, therefore, these parallel sections reflect the Legislature's intent both to codify the duties owed by corporate officers and directors to shareholders and to attach time limitations within which actions may be brought against officers and directors for breaches thereof.

The conclusion that Andrews' common law causes of action have been abrogated also is manifest from the fact that Section 33-8-420(d) states that an "officer is not liable for any action

⁶ For the convenience of the Court, Section 33-8-300 is set out in Appendix A hereto.

taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section." S.C. Code Ann. § 33-8-420(d). Indeed, the Official Comment to Section 33-8-420(d) states that it is "self-executing, and the individual director's exoneration from liability is automatic." Plainly, therefore, Section 33-8-420 abrogates the common law as to the very claims Andrews is asserting here because if Broom complied with the standards set out in Section 33-8-420, he "is not liable" to Andrews "for any action taken as an officer, or any failure to take action," regardless of whether the claims asserted in the complaint are framed as arising solely under the common law.

Equally dispositive of this issue is the fact that the common law claims asserted by Andrews are precisely the same claims contemplated by Section 33-8-420 since the duties it imposes on officers of a corporation extend not only to the corporation but also to its shareholders. See Section 33-8-420(a)(3), which provides that "[a]n officer . . . shall discharge his duties . . . in a manner he reasonably believes to be in the best interests of the corporation and its shareholders." S.C. Code Ann. § 33-8-420(a)(3) (emphasis added).

To the extent there is a presumption that the common law prevails – such presumption is entirely inapposite because it only applies "when there is no binding South Carolina precedent or statute." 6 South Carolina Jurisprudence, Common Law, § 13, at 76 (1991); see Page v. Winter, 240 S.C. 516, 518, 126 S.E.2d 570, 572 (1962) ("Since there has been no legislative action in this state relating to the matter, we must be governed by the policy of the common law . . ."). Here, of course, there has been specific legislative action in the form of a statute that deals squarely with the standard of care and duties owed by corporate officers such as Broom to shareholders such as Andrews.

Moreover, if Section 33-8-420 did not abrogate the common law, its enactment (and the enactment of its sister provision, Section 33-8-300) would be meaningless because a plaintiff could follow the course Andrews seeks to pursue in this case: namely, assert common law causes of action, rely on the statute of limitations contained in Section 15-3-530, which provides for a three year limitations period triggered by discovery of the cause of action,⁷ and thereby deny to corporate officers not only the protection from liability granted them by the Legislature in Section 33-8-420(d), but also the protection from stale claims granted them in Section 33-8-420(e). In short, if Andrews' counterclaims as purportedly pleaded are accepted, he will have effectively stricken Section 33-8-420 from the statute books of South Carolina merely by claiming they are bringing a common law cause of action.

For these reasons, Section 33-8-420 abrogates the common law.

C. Andrews' Claims Against Broom Are Time-Barred Under Section 33-8-420(e) and the Purported Counterclaims and Third-Party Claims are a Legal Nulity.

Andrews' single cause of action against Broom is time-barred because the right to sue for a breach of any of the duties codified in Section 33-8-420 is subject to, Section 33-8-420(e), which expressly states that "[a]n action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered; *whichever sooner occurs.*" (Emphasis added.)

Here the two-year period was the first to expire and controls. Andrews concedes he had actual knowledge of his claims as of May 26, 2006, the date the Motion to Amend (attaching a "proposed" Amended Answer and Counterclaim) was filed with the clerk of court for

⁷ For the convenience of the Court, Section 15-3-530 and related provisions are set out in Appendix B, attached hereto.

Spartanburg County.⁸ Therefore, Andrews' claims against Broom are time-barred by the two-year period of limitations contained in Section 33-8-420(e).

It is well settled in South Carolina that statutes of limitations are "designed to promote justice by forcing parties to pursue a case in a timely manner." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000).

Rule 15 of the South Carolina Rules of Civil Procedure will not aid Andrews here should he move to amend the counterclaims to properly assert the requirements of a derivative suit. Rule 15(c) of the South Carolina Rules of Civil Procedure provides that the date of an amendment relates back *to the date of the original filing* if the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading. Rule 15(c), SCRPC. Recently, Broom's attorneys learned that Andrews' Amended Answer and Counterclaim *was never filed*. Instead, the proposed amendment was attached to a May 26, 2006 Motion to Amend, but Andrews never received written consent or a court order for the purported amendment.

If an amended pleading is improperly filed without the required leave or consent, it will be stricken on a proper motion by the adverse party, or regarded as without legal effect and treated as if it had never been filed. Roux v. Patrick, 226 A.D.2d 695, 642 N.Y.S.2d 33 (2d Dep't 1996); Weldon v. Dunn, 1998 OK 80, 962 P.2d 1273, 129 Ed. Law Rep. 485 (Okla. 1998).⁹

Therefore, the purported counterclaims and third-party complaint are a legal nullity. At this point, the trial court would not have the ability to allow an amended answer and

⁸ For the convenience of the Court, the cover letter and Motion to Amend dated May 26, 2006, are attached hereto in **Appendix C**.

⁹ For the convenience of the Court, these out-of-state cases are attached hereto in **Appendix D**.

counterclaim to properly assert a derivative suit. To do so would allow institution of a cause of action beyond the statute of limitations. "[A] defective complaint cannot be amended to state a new or different cause of action after the statute of limitations has run." Scott v. McCain, 272 S.C. 198, 202 (1978). "After the statute (of limitations) has run, the complaint cannot be amended to state a cause of action. Crocker v. South Carolina State Highway Dep't, 268 S.C. 147, 151 (1977).

D. The Contention That South Carolina Recognizes A Duty Owed By One Shareholder Of A Closed Corporation To Another Fails To State Facts Sufficient To Constitute A Cause Of Action.

A liberal reading of the pleading indicates that Andrews' counterclaims could be understood to assert wrongdoing by Broom, as a shareholder of Tri-Star, causing damages to Andrews as a shareholder and creditor of Tri-Star.¹⁰ There are two reasons why Andrews' claim of breach of the shareholder-to-shareholder duty by Broom fails to state facts sufficient to state a cause of action. The first reason is that no such duty exists under South Carolina law.

The second reason is that, taking as true for purposes of this Motion that Broom was both an officer and shareholder of Tri-Star, under South Carolina law the allegations constitute a single cause of action that is governed by Section 33-8-420, including Subsection (e). No separate cause of action exists.

In Jacobson v. Yaschik, 249 S.C. 577, 580, 155 S.E.2d 601, 603 (1967), Ms. Jacobson, who owned 25% of the stock, sued Mr. Yaschik, who owned the remaining 75% of the stock and was "the president, general manager, majority stockholder and dominant figure in the

¹⁰ Andrews alleges that Broom breached a fiduciary duty owed to him by "failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders." (Counterclaim, ¶ 36(d)) In particular, Andrews alleges "distributions were made [by Broom] at a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star.

corporation." Ms. Jacobson *alleged* that Mr. Yaschik was "in violation of his fiduciary duty to her as a fellow stockholder" because he convinced her to sell him her 25% of the stock for \$30,000 without disclosing that he already had agreed to sell 100% of the stock to a third party for \$144,000, of which total Ms. Jacobson's share would have been \$36,000. *Id.* at 581, 155 S.E.2d at 603 (emphasis added). The Court held that no matter how many different ways she framed her claims that Mr. Yaschik had fraudulently breached the duty he owed to her, "the plaintiff has stated only one cause of action," *id.* at 586, 155 S.E.2d at 606; namely, "that officers and directors of a corporation stand in a fiduciary relationship to the individual stockholders and in every instance must make a full disclosure of all relevant facts when purchasing shares of stock from a stockholder." *Id.* at 584-85, 155 S.E.2d at 605.

Therefore, no independent cause of action exists between Andrews and Broom based on the allegation that they were fellow shareholders of Tri-Star.

E. Andrews Did Not Sue Tri-Star Such That All Purported "Creditor" Claims Should Be Dismissed.

Although Tri-Star is not listed as a defendant in Andrews' counterclaim pleading, encompassed within these allegations are various failures on the part of Tri-Star to pay a debt owed to Andrews (shareholder loan) and to his company, Drews, Inc. (Gaming Machine financing).¹¹ Specifically, Andrews alleges the distributions Broom made to himself were made at a time when Tri-Star owed Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star. (*Counterclaim*, ¶¶ 25-27, 35).

To the extent Andrews seeks to recover monies owed to him as a creditor, he was required to bring his claim against Tri-Star when the contract to repay Andrews/Drews, Inc. was

¹¹ It is alleged that Drews, Inc. distributed by assignment to Andrews all rights to payments from Tri-Star. (*Counterclaim*, ¶ 26).

broken. Although the Amended Answer and Counterclaim does not allege when the contract was broken, it is clear that Andrews had actual knowledge of the breach by Tri-Star as of May 26, 2006, the date he filed the Motion to Amend.

Andrews failed to sue Tri-Star even though he knew Tri-Star was liable for the debt(s) as early as May 26, 2006. Such creditor claims would certainly be time-barred since it is now more than five years after Andrews had notice of a breach of contract by Tri-Star. See South Carolina Code § 15-3-530 (Within three years: an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520).

A breach of contract action generally accrues under South Carolina law at the time the contract is breached or broken. Richland-Lexington Airport Dist. v. American Airlines, Inc., 306 F.Supp.2d 548 (2002).

Even if Andrews moved to amend his pleading to add Tri-Star as a party-defendant, such request should be denied. Rule 15(c) provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Id. (emphasis added).

In Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct.App.2000), the Court of Appeals discussed the application of Rule 15(c) at length. In that case, Jackson amended her complaint

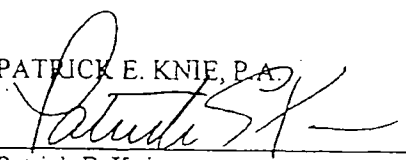
after the statute of limitations had expired in a John Doe hit and run action. Id. at 554, 537 S.E.2d at 568. Jackson *added* a named party as the defendant but did not dismiss John Doe as a defendant. Id. The majority of the court concluded the second paragraph of Rule 15(c) only applied to a substitution or change in party, *not* the addition of a defendant. Id. at 558, 537 S.E.2d at 570. ("The language of Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant. In our view, the addition of a party is not the same as a substitution or change of the party."). See also Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371 n. 2, 597 S.E.2d 27, 29 n. 2 (Ct.App.2004) (finding Rule 15(c) did not allow plaintiff to add a party to a negligence action after termination of statute of limitations when plaintiff discovered additional party was an independent contractor and not employee of original defendant); Gause v. Smithers, 384 S.C. 130, 132-33, 681 S.E.2d 607, 608-09 (Ct. App. 2009) (Acknowledging that dismissal of case where amendment sought to add a new defendant produces a harsh result, nevertheless, appellate court is compelled to affirm dismissal by the circuit court because the addition of a party is not contemplated by Rule 15(c)).

The creditor claims against Tri-Star for the shareholder loan and the Gaming Machine financing should have been brought more than five years ago. Rule 15 does not provide for the relation back of any claim against Tri-Star as a new party-defendant.

CONCLUSION

For the reasons set forth herein, the Counterclaims should be dismissed because they fail to state facts sufficient to constitute a cause of action against Broom. Therefore, Broom respectfully requests this Court to grant his motion to dismiss the Counterclaims pursuant to Rule 12(b)(6) and 12(c) of the South Carolina Rules of Civil Procedure.

PATRICK E. KNIE, P.A.


Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Telefax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Telefax (864) 232-4395

ATTORNEYS FOR PLAINTIFF

Date

Spartanburg, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,

2008-CP-42-3397

Plaintiff,

v.

Ten State Street, LLP, Timothy D.
Scrantom, Mark Broadwater, and H.
Hugh Andrews,

Defendants,

of which,

Defendant H. Hugh Andrews,
Individually and on behalf of Tri-Star
Communications, Inc., as a Third-Party
Plaintiff,

v.

Quentin S. Broom, Jr.

Third-party Defendant

**DEFENDANT AND THIRD-PARTY
PLAINTIFF HUGH ANDREWS'
INITIAL MEMORANDUM IN
OPPOSITION TO PLAINTIFF
QUENTIN S. BROOM, JR.'S MOTION
TO DISMISS**

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INTRODUCTION

Plaintiff Quentin S. Broom, Jr. ("Broom") moves pursuant to Rule 12(b)(6) and 12(c), SCRCP to dismiss all of Defendant and Third-party Plaintiff H. Hugh Andrews' ("Andrews") counterclaims in this action, which was instituted by Broom on September 16, 2005. Broom asserts that Andrews failed to meet the pleading requirements for instituting a shareholder derivative suit as set forth in Rule 23, SCRCP. Andrews submits this Initial Memorandum of Law in Opposition to Plaintiff's motion.¹

¹ Because the matter was filed pursuant to Rules 12(b)(6) and 12(c), Plaintiff's motion is limited to the pleadings. This memorandum is, accordingly, limited to issues raised in the pleadings, which were filed more than six (6) years ago.

BACKGROUND

Broom and Andrews were 50/50 owners in a business venture called Tri-Star Communications. [Exhibit 2, Amended Answer and Counterclaims of Defendant H. Hugh Andrews ¶ 22 & 24]. Broom had primary control over the operations, finances and business dealings of Tri-Star and was the point-man for Tri-Star's business affairs in the Dominican Republic. [Exhibit 2, Amended Answer and Counterclaims of Defendant H. Hugh Andrews ¶ 28]. Broom filed suit in September of 2005 against Andrews, Ten State Street, LLP, Timothy D. Scrantom, and Mark Broadwater alleging various causes of action related to the formation of certain video gaming operations in the Dominican Republic. [Exhibit 1, Plaintiff's Complaint].

Andrews, individually and on behalf of Tri-Star, filed counterclaims against Broom for breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, breach of the covenant of good faith and fair dealing, conversion, promissory estoppel, fraud, negligent misrepresentation and violations of S.C. Code of Laws §§ 33-8-300 & 420. [Exhibit 2, Amended Answer and Counterclaims of Defendant H. Hugh Andrews]. Andrews' counterclaims are based on Broom's unauthorized payment to himself for salary² and his unauthorized sale of the inventory of Tri-Star, over Andrew's stern objection. [Exhibit 2, Amended Answer and Counterclaims of Defendant H. Hugh Andrews ¶¶ 34-36]. Broom now seeks to have Andrews' counterclaims dismissed pursuant to Rule 12(b)(6) & 12(c), SCRCP for failure to comply with Rule 23(b)(1), SCRCP which sets forth the pleading requirements for shareholder derivatives actions.

² Although the amount is not set forth in the pleadings, Broom paid himself \$920,000.00 in "salary" over the course of four (4) months, without disclosure to or approval of Andrews.

DISCUSSION

A motion to dismiss a counterclaim pursuant to Rule 12(b)(6), SCRCF must be based solely on the allegations set forth in the pleadings and may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the complainant to any relief on any theory of the case. *Charleston County School Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (1987). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states *any* valid claim for relief. *Id.* (emphasis added).

In addition, in a motion for judgment on the pleadings pursuant to Rule 12(c), SCRCF, "the motion will be sustained only where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated." *Lydia v. Horton*, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000). Further, "a judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." *Id.*

Most importantly, a dismissal on the pleadings is considered a drastic procedure and therefore the pleadings should be construed liberally and presumed to be true as pled so that substantial justice is done between the parties. *United Educational Distributors, LLC v. Educational Testing Services*, 350 S.C. 7, 13, 564 S.E.2d 324, 327-28 (Ct. App. 2002).

Here, Broom, by way of his motion, makes the faulty assumption that the only valid theory of recovery available to Andrews is by way of a shareholder derivative suit and seeks dismissal based on the technical requirements of Rule 23, SCRCF. Based on the facts, allegations and causes of action set forth in Andrews' Answer and

Counterclaims, Andrews has asserted valid claims for relief which meet the threshold for Rules 12(b)(6) & 12(c), SCRCP and to which Rule 23, SCRCP does not apply.

I. Derivative Suit Not Necessary

A. Individual Action Allowed

A suit brought by a stockholder is a derivative action if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder. *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). However, "a stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally." *Id.* (citing 19 Am.Jur.2d Corporations § 2245, at 147 (1986)); see also *Todd v. Zaldo*, 304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991).

The gravamen of Andrews' counterclaims is clearly a loss separate and distinct from that of the corporation. Andrews alleges in his Amended Answer and Counterclaims that Broom's breach of fiduciary duty, breach of various contracts, tortious misconduct toward Andrews and overall mismanagement of Tri-Star resulted in significant personal financial losses to Andrews. These losses include uncollected payments due Andrews from Tri-Star for the sale of gaming machines and other goods, non-payment of a \$130,000 loan Andrews made to Tri-Star, liquidating Tri-Star assets (in which Andrews had a substantial personal interest) at substantially below market value, and by unilaterally and without Andrews' consent or authority paying himself at least \$520,000.00³ in salary and distribution thereby diminishing the value of Andrews potential distributions and Tri-Star's ability to repay the aforementioned obligations.

³ Since filing the original Answer and Counterclaims, discovery in the litigation has revealed that Broom paid himself a salary of \$920,000.00; not \$520,000.00 as was originally believed.

[Exhibit 2, Amended Answer and Counterclaims of Defendant H. Hugh Andrews, ¶¶ 23-27, 35, 40 and 41].

"If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder." *Ward*, 295 S.C. at 221, 367 S.E.2d at 703. Andrews' Answer and Counterclaims clearly set forth allegations of misconduct that have caused a particular loss to Andrews that would entitle him to relief on this theory and thus eliminating the need for pleading in accordance with Rule 23, SCRCF.

B. Recovery by Corporation Insufficient

"An individual action is also allowed if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation." *Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001) (citing, 19 Am.Jur.2d *Corporations* § 2268, at 167 (1986)). Here, as an entity owned by only two shareholders, one of which is alleged to have engaged in gross misconduct, Andrews clearly could not have been afforded full relief through recovery by the corporation. As alleged in Andrews Amended Answer and Counterclaims, Broom was the primary operator, bookkeeper and decision maker for Tri-Star and had control of Tri-Star's business relationships. [Exhibit 2, Amended Answer and Counterclaims of Defendant H. Hugh Andrews, ¶¶ 24 and 28]. Based on Broom's misconduct as the controlling shareholder, Andrews certainly could not expect recovery by and through the corporation and thus his only remedy was and is through individual action.⁴

⁴ Broom unilaterally liquidated the company and its assets, over Andrews' objection. The only available claim is that which Andrews seeks for damages for Broom's payment of an unauthorized salary to himself and for the sale of the assets of the corporation over Andrew's objection.

II. Substance Over Form

A. Exception for Closely Held Corporations

Our courts have recognized the proposition that where a closely held corporation or one involving only two shareholders or groups of shareholders is involved, a claimant need not employ the form of a derivative action. *See, Davis v. Hamm*, 300 S.C. 284, 387 S.E.2d 676 (relying primarily on *Johnson v. Gilbert*, 621 P.2d 916 (1980) (treating corporations owned by only two parties or groups of parties more as joint venturers or partners than corporate holders); *see also Todd v. Zaldo*, 304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991). In *Davis*, the Court chose not to apply this principle but clearly recognized its validity. "The case before us ... does not constitute a proper vehicle to apply the principles of law involved in this burgeoning field of litigation between shareholders in very close corporations. Davis was not a stockholder in the corporation at the time of the institution of this case and, therefore, the principles relating to disputes between stockholders in very close corporations are not relevant to the case before us." *Davis*, 300 S.C. at 289, 387 S.E.2d at 678 (internal citations omitted).

In addition, our courts have consistently held that the primary purpose of a derivative action is to protect the interests of all stockholders and compensate for damages and injuries common to and suffered by all stockholders collectively. *Brown*, 348 S.C. at 33, 557 S.E.2d at 685; *see also Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000); *see also Clearwater Trust v. Bunting*, 367 S.C. 340, 626 S.E.2d 334 (2006). As the Arizona court pointed out in the aforementioned *Johnson*, an individual action against corporation would generally "authorize multitudinous litigation and ignore the corporate entity ... no such danger exists where there are only two groups of stockholders." *Johnson v. Gilbert*, 621 P.2d at 918.

This is precisely the scenario presented in the case at bar. Because Tri-Star was held by only Broom and Andrews, it operated more as a joint venture than in strict compliance with corporate form. Under these circumstances, the purpose of a derivative suit is entirely inapplicable as Andrews is the only shareholder injured and in need of relief.

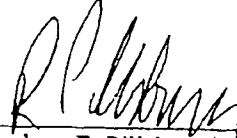
CONCLUSION

Plaintiff Broom requests that this Court take the drastic measure of dismissing Defendant Andrews counterclaims for failure to comply with Rule 23(b)(1), SCRPC. To do so, however, would require the Court to ignore the theories of recovery available to Andrews to which Rule 23 does not apply. Andrews has asserted facts and allegations in his Amended Answer and Counterclaims that if true clearly entitle him to relief on several fronts.

As discussed, South Carolina courts have recognized that a shareholder is entitled to bring an individual action under the proper circumstances. Andrews' counterclaims, as pled, allege such circumstances. It would be inappropriate to dismiss these claims as the facts and allegations contained in the pleadings, read in the light most favorable to the defendants, are supported by theories of liability recognized by our courts. Accordingly, Plaintiff's motion should be DENIED.

Respectfully Submitted,

Pillsbury & Read, P.A.



Rodney F. Pillsbury (SC Bar 13067)
1204-A E. Washington St.
Greenville, SC 29601
Phone: (864) 241-9828
Fax: (864) 241-9818
Email: rpillsbury@prlawpa.com

October 4, 2011

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Quentin S. Broom, Jr.,

Plaintiff,

v.

Ten State Street, L.L.P., Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews,

Defendants.

Of which,

Defendant H. Hugh Andrews, Individually and
on behalf of Tri-Star Communications, Inc. as a
Third-party Plaintiff,

v.

Quentin S. Broom, Jr.

Third-party Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No.: 08-CP-42-3397

**DEFENDANT AND THIRD-PARTY
PLAINTIFF HUGH ANDREWS'
SUPPLEMENTAL MOTION TO
RECONSIDER**

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Pursuant to the Rules 52 and 60 of the South Carolina Rules of Civil Procedure, by and through his counsel, Defendant Andrews moves this Court to reconsider its order of October 7, 2011, which was not received by counsel for Defendant Andrews until October 13, 2011. [Exhibit 1, Order of October 7, 2011] Defendant Andrews further moves this Court to reconsider its order of November 1, 2011, which was received by counsel for Defendant Andrews on November 2, 2011. [Exhibit 2, Order of November 1, 2011]

The basis of this motion is set forth in the supporting memorandum of law filed concurrently herewith and incorporated, *in toto*, herein.

Respectfully Submitted,

Pillsbury & Read, P.A.



Rodney F. Pillsbury (SC Bar 13067)
Ransome H. Helmly (SC Bar #78081)
1204-A East Washington Street
Greenville, SC 29601
Phone: (864) 241-9818
Fax: (864) 241-9828
Email: rpillsbury@prlawpa.com

**ATTORNEYS FOR DEFENDANT H. HUGHES
ANDREWS, and TRI-STAR COMMUNICATIONS, INC.
AS THIRD PARTY PLAINTIFF**

November 11, 2011

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,)
)
Plaintiff,)

2008-CP-42-3397

v.)

Ten State Street, LLP, Timothy D.)
Scrantom, Mark Broadwater, and H.)
Hugh Andrews,)

Defendants,)

of which,)

Defendant H. Hugh Andrews,)
Individually and on behalf of Tri-Star)
Communications, Inc., as a Third-Party)
Plaintiff,)

v.)

Quentin S. Broom, Jr.)

Third-party Defendant)

DEFENDANT AND THIRD-PARTY
PLAINTIFF HUGH ANDREWS'
MEMORANDUM IN SUPPORT OF HIS
SUPPLEMENTAL MOTION TO
RECONSIDER

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Defendant and Third-party Plaintiff H. Hugh Andrews ("Andrews") submits this Memorandum in Support of his Motion to Reconsider filed with the Court on November 11, 2011. This memorandum supplements the motion previously filed with the Court on October 24, 2011, to include issues raised by the final order entered on November 1, 2011, which was received by counsel for Andrews on November 2, 2011.

INTRODUCTION

Plaintiff Quentin S. Broom, Jr. ("Broom") filed the original complaint on September 15, 2005. Defendant Andrews answered the complaint. At the time of filing,

Plaintiff and Defendant Andrews were co-owners in Tri-Star Communications, Inc. ("Tri-Star"), which was still in business with substantial assets. In late October of 2005, Plaintiff Broom, over Andrews' objection, unilaterally liquidated all of the assets of Tri-Star Communications.¹ Shortly thereafter, Defendant Andrews filed a Motion to Amend his Answer asserting counter-claims, individually, and third-party claims against Broom on behalf of Tri-Star Communications. His Amended Answer, Counterclaims, and Third-party complaint were filed with the motion on May 26, 2006.²

The court did not formally rule on the motion at that time. However, Plaintiff filed his reply to the Counterclaims on September 25, 2006, thereby consenting to amended pleadings filed by Andrews on behalf of Tri-Star Communications. While Plaintiff's reply asserted that Defendant Andrews had individually failed to state a claim upon which relief may be granted (Plaintiff's Reply, ¶ 20), Plaintiff did not challenge Tri-Star's right to sue him for his misconduct and breaches of fiduciary duty.

After five (5) years of discovery, Plaintiff did not challenge Tri-Star's right to sue him for his misdeeds until six (6) weeks before the scheduled trial date with the filing a motion to dismiss. Not once during the five years of discovery when Andrews was obtaining Plaintiff Broom's personal bank records and other personal information to prove the claims of Plaintiff's misconduct did Plaintiff object on the basis that Tri-Star

¹ Defendant Andrews has learned through the discovery that has taken place since that, upon information and belief, Broom did not sell the assets of Tri-Star Communications, but instead converted them for his personal use and benefit. This claim is in the millions of dollars.

² Concurrent with the filing of this motion and memorandum, Defendant Andrews is filing his Second Motion to Amend and /or to Supplement his Answer, Counterclaims and Third-party Complaint to reflect both the events that have transpired since the filing of the First Amended pleadings in May, 2006, as well as the information that has been learned since that time. Defendant's Second Amended Answer, Counterclaims and Third-party Complaint is incorporated *in toto* herein by reference.

and/or Andrews had not right to obtain this information based upon an alleged lack of standing to pursue the claims.

For the first time on September 14, 2011, Plaintiff raised the issue that the pleadings Andrews filed five and a half years ago failed to meet the pleading requirements for instituting a shareholder derivative suit set forth in Rule 23(b)(1), SCRCF (hereinafter "Rule 23"). Although Plaintiff's Reply filed in September 2006 did not challenge the right of Tri-Star Communications to bring an action against Broom (Plaintiff's Reply ¶ 20), the Court entertained the argument.

Andrews raised several issues in opposition to Broom's motion. Primarily, Andrews asserted that he was not required to follow the pre-trial notice and pleading requirements of a derivative action as it was proper for him to assert counterclaims directly against Broom. Andrews argued that as a direct action, Rule 23 and its pleading requirements were inapplicable. Andrews also argued that the issue before the Court was potentially one of novel impression and therefore should not be decided on a motion to dismiss pursuant to Rule 12(b)(6), SCRCF.

The Court heard Plaintiff's motion to dismiss on October 6, 2011. On October 7, 2011, the Court entered an order granting Plaintiff's motion in part and denying it in part.³ The Court granted Broom's motion as to the claims related to Tri-Star. The Court determined that Rule 23 was applicable to Andrews' claims and therefore should have been followed. The Court further determined that "all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom's mismanagement or breach of duties arising out of the shareholder

³ This order was apparently sent to an old address of Defendant Andrews' counsel and was not actually received until October 13, 2011.

relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23." [Exhibit 1, Order entered October 7, 2011]. However, the Court allowed Andrews to recover for claims of Broom's "wrongful conduct that caused a particular loss that is individual to Andrews."

On November 1, 2011, the court entered an order prepared by Plaintiff's counsel and signed by the docketing clerk on behalf of the Honorable Mark Hayes, which was received by Andrews' counsel on November 2, 2011. [Exhibit 2, Order entered November 1, 2011]

Andrews contends that the dismissal of the claims made directly by Andrews as a shareholder of Tri-Star was an error of law and respectfully requests that this Court reconsider its October 7, 2011 Order. Andrews asserts four errors of law: (1) Rule 23 has no application under the circumstances of this case as it is a proper direct action and not a class derivative suit; (2) Andrews claims may be maintained directly under certain exceptions to the general rule requiring shareholders suits to be filed derivatively; (3) the issue raised is one of novel impression and should not have been decided on a Rule 12(b)(6) motion; and (4) given the fact the court is allowing Andrews to recover for Broom's wrongful misconduct resulting in harm particular to Andrews, judicial economy dictates allowing the claims brought on behalf of Tri-Star to remain because they arise from the identical facts and circumstances. Furthermore, the final order entered November 1, 2011 directly contravenes the rules of construction applicable to a motion to dismiss and ignores the fact that Defendant Andrews has pled direct injury, which the court previously had deemed recoverable in its October 7, 2011 order.

FACTUAL BACKGROUND

Broom and Andrews were 50/50 owners in a business venture called Tri-Star Communications, Inc. (Amended Answer and Counterclaim, ¶ 22 & 24). Broom had primary control over the operations, finances and business dealings of Tri-Star and was the point-man for Tri-Star's business affairs in the Dominican Republic. (Id., ¶¶ 15 and 28). Broom filed suit in September of 2005 against Andrews, Ten State Street, LLP, Timothy D. Scrantom, and Mark Broadwater alleging various causes of action related to the formation of certain video gaming operations in the Dominican Republic. (Plaintiff's Complaint).

Andrews, individually and on behalf of Tri-Star, filed counterclaims against Broom for breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, breach of the covenant of good faith and fair dealing, conversion, promissory estoppel, fraud, negligent misrepresentation and violations of S.C. Code Ann. §§ 33-8-300 & 420. (Amended Answer and Counterclaims, ¶¶ 21-95). Andrews' counterclaims are based on Broom's unauthorized payment to himself for salary⁴ and his unauthorized sale of the inventory of Tri-Star, over Andrew's stern objection. (Id. at ¶¶ 34-36).

STANDARD OF REVIEW

"A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule." Elam v. South Carolina Dept. of

⁴ Since filing the pleadings in May 2006, Andrews has learned that Broom paid himself \$920,000.00 in "salary" over the course of four (4) months, without disclosure to or approval of Andrews.

Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). As such, parties are allowed to ask the trial court to reconsider its decision or ruling even if it requires rehashing all or part of the argument or issues presented during trial. Id. at 21, 602 S.E.2d at 779. Further, "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." Id.

Brooms' motion was before the Court pursuant to Rules 12(b)(6) and 12(c), SCRPC and therefore the standard of review as to these rules merits a brief discussion. A motion to dismiss a counterclaim pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the pleadings and may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the complainant to any relief on any theory of the case. Charleston County School Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 424, 559 S.E.2d 362, 364 (1987). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states *any* valid claim for relief. Id. (emphasis added).

In addition, in a motion for judgment on the pleadings pursuant to Rule 12(c) "the motion will be sustained only where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated." Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000). Further, "a judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Id. Most importantly, a dismissal on the pleadings is considered a drastic procedure and therefore the pleadings should be construed liberally and presumed to be true

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as pled so that substantial justice is done between the parties. United Educational Distributors, LLC v. Educational Testing Services, 350 S.C. 7, 13, 564 S.E.2d 324, 327-28 (Ct. App. 2002).

Based on this standard and as explained below, Andrews asserts valid claims for relief which meet the liberally construed threshold for Rules 12(b)(6) and 12(c).

ARGUMENT

I. **RULE 23, SCRPC HAS NO APPLICATION UNDER THE FACTS OF THIS CASE AND THEREFORE IT WAS AN ERROR OF LAW TO DISMISS ANDREWS' COUNTERCLAIMS FOR FAILURE TO COMPLY WITH THE PLEADING REQUIREMENTS OF RULE 23.**

A. **The Plain Language and Policy of Rule 23**

In interpreting a statute and a rule of civil procedure courts adhere to the cardinal rule that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute or rule. Marichris, LLC v. Derrick, 384 S.C. 345, 352, 682 S.E.2d 301, 306 (Ct. App. 2009) (stating that in interpreting the meaning of the South Carolina Rules of Civil Procedure, the court applies the same rules of construction used to interpret statutes) (App. A, #12).⁵ "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id. at 352-353, 682 S.E.2d at 306 (emphasis added; citation omitted).

Applying this rule of interpretation, it is abundantly clear that Rule 23 specifically applies to class actions and has no justifiable application to the facts and circumstances of the case at bar and others similarly situated. Titled "CLASS ACTIONS," Rule 23 maintains, in part, that a "derivative

⁵ For this Court's easy reference, an appendix of cases and sources is included with this memorandum. The initial cite for each case or source indicates the corresponding appendix tab number. Cases appear alphabetically within the appendix.

action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCP. As such, it is clear a derivative action is merely a certain breed of class action. The Reporter's Notes to Rule 23 further support this premise:

This Rule 23(b)(1) is the language of present Federal Rule 23.1. Existing State practice permits a **class action** in these circumstances. The Rule simply provides more specific guidance for the procedure.

Rule 23(b)(1) Reporter's Note, SCRCP (emphasis added; internal citations omitted).

This designation of a derivative suit as a type class action is not only found in the language of the rule itself, but is illustrated in a litany of cases. See Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000) (App. A, #6); see also Strickland v. Flue-Cured Tobacco Co-op Stabilization Corp., 643 F. Supp. 316 (D.S.C. 1986) (App. A, #14); and see Brown v. Hart Schaffner & Marx, 96 F.R.D. 64 (D.S.C. 1982) (App. A, #4). These cases not only demonstrate the intended application of Rule 23, but also the policies underlying the requirement for shareholders to file derivatively. Such policy goals include (a) the protection of creditors by insuring that the recovery benefits the entity, (b) the assurance that shareholders benefit in a manner proportionate their ownership interests, the discouragement of strike suits, and (c) the preservation of the corporation's ability to manage the suit and its resolution under court supervision. See John A. Gebaur, J.D., Action in Own Name by Shareholder of Closely Held Corporation, 10 A.L.R. 6th 293 (2006); see also Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001) (App. A, #5).

The cases Broom emphasizes in support of his motion to dismiss illustrate traditional class derivative suits and epitomize the policy and purposes of the derivative requirement and Rule 23. More importantly, they bear little resemblance to the case at

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the traditional corporate setting wherein relief was being sought for a large class of persons with common injuries. The District Court dismissed the action for lack of standing and for failing to properly state a claim of which relief could be granted. Citing the policy concerns for Rule 23, the Court stated:

This rule is ... reflects important policy concerns. Verification, for example, serves the important purpose of ensuring that the plaintiff or some other person has investigated the charges and found them to have substance. The requirement of a demand on directors and shareholders is designed, among other things, to require resort to the body legally charged with conduct of the company's affairs before licensing suit in the company's name by persons not so charged.

Id. at 316. (internal citations and quotations omitted). Again, these underlying policy concerns are inapplicable when the dispute is between only two owners, one of which has gone to great lengths to conceal rampant misconduct.

Lastly, Broom relies on Brown v. Hart Schaffner & Marx, 96 F.R.D. 64 (N.D. Ill. 1982), a U.S. District Court case from Illinois. There, a plaintiff brought a derivative action against Hart, Schaffner & Marx Corporation and all of its directors, alleging violations of federal securities laws, as well as common law fraud and breach of fiduciary duty. Id. at 66. It was determined that although the plaintiff had verified her complaint, she had done so "without having even the vaguest notion of whether or not a factual basis existed for any of the grave charges she had made against the HSM directors." Id. The District Court dismissed the action for failure to comply with the verification requirement of Rule 23 and in doing so described the policy behind it:

Both individual and corporate defendants are put to great financial expense in the defense of stockholders' derivative suits. In addition, the corporation incurs indirect expenses, such as bad publicity and diversion of executives' time and energies from profitable corporate activities. This

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may lead to settlement even when there is no basis for the complaint; and the settlement-inducing nature of these suits, in turn, encourages plaintiffs and their fee-seeking attorneys to bring such unfounded strike suits.

Id. at 67. (citations omitted). Again, the policy expressed, i.e., discouraging of strike suits, is wholly irrelevant to a legitimate dispute between two business partners.

As evidenced by these cases, Rule 23 is intended to apply in the context of a class action as the underlying policies for derivative actions and the framework for Rule 23 only make sense in these traditional corporate settings. In stark contrast, policy reasons for requiring that shareholder suits be pursued derivatively via Rule 23 are largely absent in the context of a closely held corporation. This is unquestionably the case here.

For instance, it makes no sense for Andrews to submit a demand requesting relief from Broom for misconduct committed by Broom. Such a demand would undoubtedly be denied, thus impeding the fair and efficient resolution of a valid dispute. It makes even less sense to require Andrews to demonstrate that he adequately represents the interests of the shareholders. Andrews cannot, of course, represent the only other shareholder, in this case Broom, as he is the person with whom Andrews has the dispute. Their interests are clearly divergent. Finally, Andrews would derive no benefit by pursuing a purely derivative claim. Broom, the alleged wrongdoer and the only remaining shareholder, would theoretically be entitled share in any judgment procured on behalf of Tri-Star. This is an untenable result for our courts. See Lesesne v. Lesesne, 307 S.C. 67, 413 S.E.2d 847 (Ct. App. 1992) (App. A, #11); see also Lattimer v. Richmond & D.R. Co., 39 S.C. 44, 17 S.E. 258, 261 (1893) (holding that to prevent a failure of justice courts of equity recognize exceptions to the general rule requiring derivative action) (App. A, #10).

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Further underscoring the lack of the Rule 23 policy objectives to the case at bar, Andrews would have to persuade Broom to bring an action against himself. See Anderson v. Clemens Mobile Homes, Inc., 333 N.W.2d 900, 904 (discussing the futility of the demand requirement in a two shareholder corporation and stating, "[o]ne cannot seriously contend that [the defendant] would have caused an action to be brought [against himself]") (App. A, #2). Additionally, such a suit under Rule 23 would, ironically, be subject to termination by Broom himself, the controlling shareholder/director. See American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 21 (2008) (a direct action may not be terminated on the basis of a board recommendation) (App. A, #1).

This flawed procedural undertaking would render Andrews right to bring suit meaningless and leave him without a remedy. This potential outcome makes it impractical for Andrews bring suit in such a fashion. Accordingly, the rationale behind the shareholders derivative requirement, as are the requirements outlined in Rule 23, is nonsensical within the context of the facts of the case at bar.

Because a derivative action and its procedural conduit have no application in this case and Andrews has sufficiently pled a direct action, Andrews should be allowed to proceed with his counterclaims.

II. ANDREWS MAY ASSERT A DIRECT ACTION AGAINST BROOM BASED ON WELL-RECONGNIZED EXCEPTION TO GENERAL RULE REQUIRING DERIVATIVE ACTION.

A. The ALI Rationale and Thomas Exception

Because the overarching policy goals of derivative actions and Rule 23 are inapplicable in most disputes arising in closely held corporations, certain well-recognized

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exceptions to this general rule have evolved. One of those exceptions applies when a stockholder suffers an injury as a result of a special relationship between the wrongdoer and the shareholder or an injury which is separate and distinct than that of the corporation.⁶ See Lesesne at 68-69, 413 S.E.2d at 848; see also Hite v. Thomas & Howard Company of Florence, Inc., 305 S.C. 358, 361-62, 409 S.E.2d 340, 342 (1991) (App. A, #9). The other exception arises when circumstances require a complainant to proceed in a direct action because "full relief to the stockholder cannot be had through a recovery by the corporation." Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001) (citing 19 Am.Jur.2d Corporations § 2268, at 167 (1986)).

This latter exception and the underlying rationale has been adopted by the American Law Institute⁷ ("ALI") and applied by numerous jurisdictions. Section 7.04(d) states:

⁶ This Court recognized this exception in its order of October 7, 2011 and allowed Andrews to proceed on those claims.

⁷ As the purveyor of the various Restatements and Principles of the Law, South Carolina courts have relied on the principles and rationales espoused by American Law Institute publications on numerous occasions and on a litany of topics. See e.g., Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010) (adopting the risk-utility test for products liability cases as published by the American Law Institute in the Restatement (Third) of Torts: Products Liability (1998) and emphasizing the Legislature's reliance on the ALI for guidance in this area of the law); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984) (adopting the rule formulated by the American Law Institute in its Restatement (Second) of Judgments § 29 (1982) for determining whether a party is precluded from relitigating an issue with a nonparty as the more flexible and modern view); McDaniel v. McDaniel, 243 S.C. 286, 292, 133 S.E.2d 809, 813 (1963) (holding that the appropriate rule for determining standing in a death case is "succinctly and aptly stated in American Law Institute's Restatement, Conflict of Laws ..."); and Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764, 766 (D.S.C. 1956) (citing the "prestige of the American Law Institute" as one of the reasons for adopting its new position on the recovery of damages for emotional distress resulting from abusive language).

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In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 17 (2008).

Importantly, South Carolina courts have indicated they are receptive to adopting this well-recognized exception, but have been unable to do so formally because of its application to the facts of the two cases before the Court. See Babb v. Rothrock, 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991) (App. A, #3); see also Brown v. Stewart, 348 S.C. at 33, 557 S.E.2d at 685. The focus of our courts' discussions has been on the exception articulated in Thomas v. Dickson, 301 S.E.2d 49 (1983) (App. A, #5), wherein a stockholder is permitted to file an individual action for losses suffered by the corporation if the underlying reasons for requiring a derivative action are absent. Id. at 774.

Thomas involved Trio Sales, Inc., a Georgia corporation owned by three equal shareholders, one of which was Dickson, the plaintiff. Id. at 50-51. Each shareholder served as an officer and agreed to receive a monthly salary of \$1000 and to distribute profits equally as bonuses. Id. Dickson eventually died and his shares passed to his wife through his estate. Id. At the time of his death no bonuses had been distributed. Subsequently, the two other defendant shareholders began paying bonuses to themselves but did not convey any part of the distribution of profits to the estate. Id. Dickson's

wife, individually and on behalf of his estate, filed an action against the corporation and the two shareholders for misappropriation and conversion of corporate assets. Id. The defendant shareholders sought a dismissal on the grounds that Dickson's action had to be brought derivatively and not directly. The trial court denied the motion and the two remaining shareholders appealed.

In its opinion, the Georgia Supreme Court set forth the reasons that shareholders must generally file derivative actions for losses suffered by the corporation:

The reasons underlying the general rule are that (1) it prevents a multiplicity of lawsuits by shareholders; (2) it protects corporate creditors by putting the proceeds of the recovery back in the corporations; (3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and (4) it adequately compensates the injured shareholder by increasing the value of his shares.

Id. at 51. After analyzing each of these reasons and whether or not they applied to Dickson's case, the court held that because Dickson was the sole injured shareholder and because the reasons underlying the general rule calling for corporate recovery did not exist, Dickson was properly allowed to bring a direct action. Id.

Our Court in Babb declined to adopt the Thomas exception based strictly upon the particular facts of the case. The Court determined that the claims of corporate creditors would be jeopardized and thus the parties could not maintain the action directly because at least one of the reasons for the general rule was prevalent. Babb, 303 S.C. at 464-65, 401 S.E.2d at 419-20.

The Thomas exception was again discussed in Brown v. Stewart, and though our court of appeals declined to apply it under the facts of the case, the exception received favorable treatment:

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Brown may not rely on the Thomas exception. As a result of the damage to the corporation, Brown suffered a reduction in the value of his stock. The damage to Brown as a stockholder, however, was shared by all of the stockholders including Silvers and Altier, who were dismissed from this action. Permitting Brown to maintain his action as an individual action would not protect the interests of all stockholders because the diminution in the value of the stock was suffered by all of the stockholders. Thus, the reasons for requiring a derivative action described in Thomas were not absent. Pursuant to Babb, where the reasons are not absent, we must rely on the general rule that individuals may not sue corporate directors or officers for losses suffered by the corporation.

Brown v. Stewart, at 775. Again, the Court found that one of the underlying reasons for requiring a derivative action was present, i.e., the protection of all injured shareholders. The language in the opinion, however, clearly suggests that under the proper factual scenario the Court would be inclined to apply the exception. The case at bar is easily distinguishable from both Babb and Brown and would thus fall within the framework of the Thomas exception.

In addition to Thomas, other courts have weighed-in in support the ALI/Thomas rationale and are similar to the case at bar. The case of Durham v. Durham, 871 A.2d 41 (N.H. 2005) (App. A, #7), is particularly persuasive as the New Hampshire Supreme Court was presented with facts nearly identical to the case at bar and chose to adopt the ALI's position for closely-held corporations. In Durham, the plaintiff shareholder brought a direct action against the other three shareholders of a closely held corporation for, *inter alia*, breach of fiduciary duty and unlawful distributions. The trial court determined that the plaintiff's claims should have been brought derivatively and dismissed them for failure to state a claim. On appeal, the plaintiff argued "that practical and policy reasons justify allowing a direct, as opposed to derivative, action against the

defendants because the plaintiff is the sole aggrieved shareholder and is suing all the remaining shareholders." Id. at 44.

Setting forth its rationale, the New Hampshire Supreme Court explained:

The corporation here is typical of other close corporations in that the shareholders are few in number, know each other, and actively serve in the management of the business as officers or directors. Because the corporation's shares are not publicly traded, the plaintiff as a minority shareholder does not have the opportunity to extricate himself from the corporation by selling his shares on the open market. In addition, construing all reasonable inferences drawn from the well-pleaded facts below in the plaintiff's favor, we conclude for purposes of this analysis that the corporation's board of directors is not disinterested. In these circumstances, the formalities of the derivative proceeding may be impractical and unnecessary because the corporation does not have a disinterested board of directors and a multiplicity of suits is unlikely.

Id. at 45. Citing Thomas and relying on the ALI rationale the Court concluded:

We are persuaded that the derivative/direct distinction makes little sense when the only interested parties are two individuals or sets of shareholders, one who is in control and the other who is not. In this context, the debate over derivative status can become purely technical. In cases such as this one, where the principles underlying the derivative proceeding are not served, the trial court should have the discretion to allow the plaintiff to pursue a direct claim against the corporate officers. Courts that continue to require a derivative proceeding in this context generally do so to promote consistency and predictability in corporate law. While we agree that consistency in the law is important, we also recognize that the derivative proceeding involves burdensome, and often futile, procedural requirements when a minority shareholder seeks to redress wrongful behavior by the majority shareholders. Furthermore, any recovery from a derivative proceeding goes to the corporation and thus would be under the control of the alleged wrongdoers.

Id. at 46. (internal citations and quotations omitted).

Similarly, in W & W Equipment Co. v. Mink, 568 N.E.2d 564 (Ind. Ct. App. 1991) (App. A, #17), a shareholder in a closely held corporation brought a direct suit alleging a breach of fiduciary against the directors for wrongful termination, misrepresentation and extortion. Id. at 573. The court rejected the defendant's claim that

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the plaintiff's suit had to be brought derivatively, concluding that "the reasons for requiring a derivative action are not present in this case." Id. at 571. The Court emphasized that there were only two shareholders, that the plaintiff was the sole injured shareholder, and there was "thus no potential for multiplicity of shareholder suits" Id. Further, "there [was] no evidence of any creditor in need of protection," nor was there "prejudice to other shareholders not a party to the suit since [the plaintiff was] the only injured shareholder" Id. Moreover, the plaintiff "would not be adequately compensated by a corporate recovery because [the corporation was] a close corporation with no ready market for the sale of [the plaintiff's] shares." Id.

Finally, in Richards v. Bryan, 879 P.2d 638, 641 (Kan. Ct. App. 1994), a minority shareholder in a close corporation brought a direct suit against the majority shareholders alleging that the defendants had effectively frozen out the plaintiff, denied the plaintiff a reasonable return on investment, and fraudulently induced the plaintiff to enter a formation agreement. Id. The Court permitted the plaintiff to bring a direct suit for the derivative claims explaining that the suit "will not expose [the corporation] to a multiplicity of actions or interfere with a fair distribution of recovery because the [plaintiff is] the only minority shareholder in the corporation." Id. at 648. Furthermore, the Court said, "there is no indication that resolution of [plaintiff's] claims will prejudice any creditors' interests." Id.

B. The ALI/Thomas Rational Applied to Andrews

In this case all the of the reasons for requiring derivative actions for losses suffered by the corporation set forth in Thomas and the ALI rationale are, in fact, absent. First, there is no need to prevent a multiplicity of lawsuits by shareholders. As in most

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cases that apply the exception, all of the corporations' shareholders (Broom and Andrews) are involved in the action either as a plaintiff or defendant. A direct suit could not expose the corporation to a multiplicity of lawsuits because all the corporate participants are parties and before this Court. Second, no protection of corporate creditors is necessary as Andrews is the only potential creditor. Third, the need to protect the interests of "all shareholders" is non-existent. Again, Andrews and Broom are the only shareholders and Andrews is the sole aggrieved shareholder.

Finally, Andrews cannot be adequately compensated by an increase in the value of his shares for three reasons. First, presumably doing such would confer a benefit to Broom, the sole wrongdoer, in the form of an increase in the value of his shares as well. Cf. Lesesne, 307 S.C. at 67, 413 S.E.2d at 848 ("It is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.").

Second, an increase in the value of shares is of little or no benefit to Andrews as there is no open market for shares of a closely held corporation.

Finally, the plaintiff unilaterally shut the corporation down. Although it was viable at the time Andrews filed his original claims, Broom has allowed the corporation to be administratively dissolved.⁸ Thus, at this juncture, the corporation technically could

⁸ This matter is the subject of Defendant Andrews' Second Amended Answer, Counterclaim and Third-party Complaint, which incorporated herein by reference.

not recover the losses due to Broom's unilateral actions by his dissolving of the same. It would be the highest form of inequity to prevent Andrews from recovering for the wrongful acts of his partner Broom by rewarding Broom for closing the corporate door from which Andrews' recovery could be obtained. The current ruling of the court promotes this very result.

Further, as alleged in the pleadings, Broom was the primary operator, bookkeeper decision maker and Chief Executive Officer for Tri-Star and had control of Tri-Star's business relationships. (Amended Answer and Counterclaims, ¶¶ 15, 24 and 28). As such, Andrew is akin to a minority shareholder. As explained in Durham, a derivative proceeding under these circumstances would involve "burdensome, and often futile, procedural requirements" and "any recovery from a derivative proceeding ... would be under the control of the alleged wrongdoers." 871 A.2d at 46. Based on Broom's misconduct as the controlling shareholder, Andrews certainly could not expect recovery by and through the corporation and thus his only remedy was and is through direct action.⁹

Based on the foregoing, Andrews is allowed to maintain a direct action under the circumstances of this case. As a result, Andrews' counterclaims are properly pled and are sufficient withstand 12(b)(6) motion.

⁹ Broom unilaterally liquidated the company and its assets, over Andrews' objection. The only available claim is that which Andrews seeks for damages for Broom's payment of an unauthorized salary to himself and for the sale of the assets of the corporation over Andrew's objection.

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III. NOVEL ISSUES OF LAW SHOULD NOT BE DECIDED IN MOTION TO DISMISS PURSUANT TO RULE 12(B)(6), SCRCF

If this court declines to apply the ALI/Thomas exception based on the decisions in Babb and Brown, it then remains one of novel impression that cannot be decided on a motion to dismiss pursuant to Rule 12(b)(6):

As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCF, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial. However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim.¹⁰

Evans v. State, 344 S.C. 60, 543 S.E.2d 547, 551 (2001) (App. A, #8); see also Univ. of S.C. v. S.C. Budget and Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) (no questions not to be decided on motion to dismiss where development of record would aid in decision) (App. A, #16). Though it is quite clear that our courts have recognized the validity of the rationale in Thomas and express favorable treatment of the exception, they have not been presented with the proper factual scenario with which to conduct a definitive analysis. Such an analysis would require a review of the full facts and record of the case not allowed in a motion to dismiss on the pleadings. Accordingly, the issue remains undecided and should not have been decided on Brooms' Rule 12(b)(6) motion.

¹⁰ The pleadings on which the motion to dismiss is based were filed more than five years ago. Subsequent discovery has revealed substantial and additional evidence of Broom's misconduct and therefore development of the record will substantially aid the resolution of this issue.

IV. JUDICIAL ECONOMY SUPPORTS THE DENIAL OF PLAINTIFF'S MOTION TO DISMISS.

The court's order permits Andrews to recover for Broom's wrongful misconduct that results in an injury specifically to Andrews, but not to the corporation. Andrews has pled such action and injury. (Amended Answer and Counterclaims, ¶ 35) Importantly, the identical wrongful misconduct of Broom resulted in harm to Andrews, both as a creditor of Tri-Star and as a shareholder of Tri-Star Communications. The same evidence will be presented at trial to support both claims.

Because of this, at this juncture of the litigation, judicial economy is best served by permitting Andrews' claims on behalf of Tri-Star to proceed. The jury can be given special interrogatories to distinguish the various damage claims. The Court may revise this issue post-trial without prejudice to either party. This way, in the event of an appeal, a second trial on the same facts is will not be required.

V. ISSUES WITH THE OCTOBER 7, 2011 FORM 4 AND THE COURT ORDER SIGNED ON BEHALF OF JUDGE HAYES

On October 7, 2011, the Court entered an order granting Plaintiff's motion in part and denying it in part. See Exhibit 1, Or. Grant. Broom's MTD (October 7, 2011). The Order reads in part:

[T]he Court finds that Rule 23 is applicable to the counterclaims and should have been followed. Thus, the claims related to Tri-Star are dismissed. While this Court has heard numerous motions and arguments previously by the parties, this particular motion is based on a review of the pleadings. Also, all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom's mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23.

If, however, Andrews shows that Broom engaged in wrongful conduct that caused a particular loss that is individual to Andrews, the liability of such wrongful conduct is an asset of Andrews. This type of individual claim is not subject to Rule 23 requirements and will not be dismissed on that basis. In reviewing the pleadings, this Court has read them in a light most favorable to Andrews, and in doing so, cannot determine with certainty, whether or not such claims exist.

The plaintiff's attorneys are asked to prepare a formal order granting its motion as outlined above, but plaintiff has liberty to fully address the motion to dismiss in the formal order, and is not limited to the verbiage expressed in this Form 4.

Id. (emphasis added). As requested, counsel for Broom prepared a "formal order" setting forth the Court's ruling as outlined in the Form 4. See Exhibit 2, Or. Grant. Broom's MTD (November 1, 2011). The Order was submitted to the Court and signed by the non-jury docket clerk on behalf of Judge Hayes.

Unfortunately, the order submitted by Plaintiff's counsel and subsequently entered by the Court exceeds the scope of the Form 4. The Form 4 allows Andrews to maintain claims for individual losses without the necessity of compliance with Rule 23. However, the November 1, 2011 Order submitted by Plaintiff's counsel undertakes a claim by claim analysis that disposes of all of Andrews' counterclaims on the basis that all of the individual claims overlap those of Tri-Star. It states, "[e]ven when viewed in the light most favorable to Andrews, each counterclaim seeks recovery for misappropriation of corporate property. Andrews was required to bring such claims in a derivative action." The Court in its Form 4 stopped short of such an analysis and presumably left the issue for determination by a jury. See Exhibit 1, Or. Grant. Broom's MTD (October 7, 2011) (This type of individual claim is not subject to Rule 23 requirements and will not be dismissed on that basis. In reviewing the pleadings, this

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Court has read them in a light most favorable to Andrews, and in doing so, cannot determine with certainty, whether or not such claims exist.")

The "formal order" submitted and signed is factually incorrect. Andrews' Amended Answer, Counterclaim and Third-party Complaint sets out facts and claims for individual losses separate and distinct from that of Tri-Star which undeniably should survive the motion to dismiss. The following facts and allegations are set forth in the pleading:

23. Defendant Andrews has standing to bring this claim individually and on behalf of third-party Plaintiff for losses and damages sustained to both via the malfeasance and nonfeasance of the plaintiff in his dealings with and on behalf of Tri-Star.

25. Defendant Andrews loaned Tri-Star one hundred thirty thousand (\$130,000.00) on or before August 31, 2005.

26. Tri-Star purchased "Pot-O-Gold" video gaming machines ("Gaming Machines") and other goods and services from Drews Distributing, Inc., a South Carolina corporation. ("Drews, Inc.") owned 100% by Defendant Andrews. Drews, Inc. distributed by assignment to Defendant Andrews all rights to payment from Tri-Star.

27. As of October 31, 2005, Tri-Star owed Defendant Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges).

34. Without informing, obtaining consent, and authority, Plaintiff sold, or caused to be sold, the equipment in the possession of DR Businesses to third parties for less than fair market value. Indeed, Defendant Andrews expressly informed the plaintiff not to do so without his prior approval or consent.

35. Without informing, obtaining consent, and authority, between January 1, 2005 and April 30, 2005, Plaintiff made distributions to himself from Tri-Star in the amount of five hundred twenty thousand dollars

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(Amended Answer and Counterclaim, ¶¶ 23, 25, 25, 27, 34 & 35).

Further, paragraphs 34 and 35 set forth facts and allegations that assert individual losses. Specifically, Andrews asserts that Broom made distributions to himself in the amount of \$520,000.00 despite owing Andrews substantial sums of money as a shareholder and creditor. This is clearly an individual loss to Andrews and is sufficiently pled as such.

The gravamen of Hite's complaint is clearly a particular loss separate and distinct from that of the corporation. He alleges appellants' breach of a fiduciary duty to him as a minority shareholder and their negligent mismanagement resulted in a diminution in his percentage of corporate ownership from 33 1/3% to 11.5%. This alleged reduction in Hite's individual percentage of corporate control is separate and distinct from any general diminution in the value of corporate stock. We affirm the trial judge's ruling that the causes of action for breach of fiduciary duty and negligent mismanagement are properly brought in Hite's individual capacity.

Id. at 361-62, 409 S.E.2d at 342. Here, Broom's malfeasance and wrongful misconduct resulted not only in a diminution of ownership value, but resulted in Tri-Star's inability to pay Andrews as a creditor of Tri-Star. As discussed, such losses were sufficiently pled.

These allegations of individual harm are incorporated by reference into each and every cause action as if pled in that particular cause of action. (Id. ¶¶ 38, 44, 49, 54, 59, 65, 71, 78, & 88). As such, the Court's Order finding that individual injury was not pled in causes of action after the first (See Exhibit 2, Order at p.5) is factually not true.

The November 1, 2011 order states that Andrews did not sue Tri-Star as a creditor when finding no relief for his individual injury is available. This construction is in complete opposition to the established law. South Carolina courts, as well as every jurisdiction previously cited, recognize that a shareholder may maintain a direct action against the director or officer who has mismanaged the corporation that has caused individual harm to the shareholder. Here, Andrews alleges that, in addition to the harm he suffered as a shareholder, Plaintiff's actions caused the company not to be able to repay debts owed to him personally. The harm is to him personally. Plaintiff's liability is based on his misconduct as an officer, director and/or manager of the company. Accordingly, the direct action is actionable and has been clearly pled.

Finally, the order prepared by Plaintiff's counsel (and signed by the Court) tortures the construction of the Defendant's pleading to obtain a specific result finding no existing claim. This construction directly contradicts the standard of review applicable to a 12(b)(6) motion. See Charleston County School Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 424, 559 S.E.2d 362, 364 (1987) (a motion to dismiss a counterclaim pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the pleadings and

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may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the complainant to *any* relief on any theory of the case.) (emphasis added); see United Educational Distributors, LLC v. Educational Testing Services, 350 S.C. 7, 13, 564 S.E.2d 324, 327-28 (Ct. App. 2002). (a dismissal on the pleadings is considered a drastic procedure and therefore the pleadings should be construed liberally and presumed to be true as pled so that substantial justice is done between the parties) (emphasis added).

CONCLUSION

For the reasons set forth herein, Andrews' Supplemental Motion to Reconsider should be granted and Andrews should be allowed to proceed directly on the counterclaims asserted. Plaintiff's motion to dismiss should be **DENIED**.

Respectfully Submitted,

Pillsbury & Read, P.A.



Rodney F. Pillsbury (SC Bar #13067)
Ransome H. Helmly (SC Bar #78081)
1204-A East Washington Street
Greenville, SC 29601
Phone: (864) 241-9828
Fax: (864) 241-9818
Email: rpillsbury@prlawpa.com

**ATTORNEYS FOR DEFENDANT H.
HUGHES ANDREWS, and TRI-STAR
COMMUNICATIONS, INC. AS THIRD
PARTY PLAINTIFF**

November 11, 2011

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,)

2008-CP-42-3397

Plaintiff,)

v.)

Ten State Street, LLP, Timothy D.)
Scrantom, Mark Broadwater, and H.)
Hugh Andrews,)

Defendants,)

of which,)

Defendant H. Hugh Andrews,)
Individually and on behalf of Tri-Star)
Communications, Inc., as a Third-Party)
Plaintiff,)

v.)

Quentin S. Broom, Jr.)

Third-party Defendant)

**MOTION TO AMEND and/or
SUPPLEMENT THE ANSWER AND
COUNTER CLAIMS OF DEFENDANT
AND THIRD-PARTY PLAINTIFF HUGH
ANDREWS, INDIVIDUALLY and on behalf
of TRI-STAR COMMUNICATIONS**

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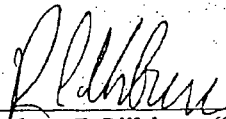
Pursuant to Rule 15(a) and (d) of the South Carolina Rules of Civil Procedure, Defendant H. Hughes Andrews, individually and on behalf of Tri-Star Communications, moves to amend his answer and counterclaims arising out the same transactions and occurrences at issue in Plaintiff's complaint, based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims in May 2006. Defendant H. Hugh Andrews' proposed Second Amended Answer and Counterclaims is attached hereto and incorporated herein. Defendant Andrews files this motion to ensure that the pleadings reflect all facts and information currently known that arise under the same facts and circumstances alleged in Plaintiff's original complaint and are properly before the Court. The granting of Defendant

Andrews' motion will not hinder or delay the trial of this case because all causes of action are based upon the same facts and circumstances alleged in Plaintiff's original complaint.

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, counsel for Defendant Andrews has consulted with counsel for the Plaintiff about the subject matter of this motion prior to filing the same and as of this writing has been unable to obtain his consent for the granting of the relief requested herein.

Respectfully submitted,

Pillsbury & Read, P.A.



Rodney F. Pillsbury (SC Bar #13067)
Ransome H. Helmly (SC Bar #78081)
1204-A East Washington Street
Greenville, SC 29601
Phone: (864) 241-9828
Fax: (864) 241-9818
Email: rpillsbury@prlawpa.com

ATTORNEYS for DEFENDANT H. HUGHES
ANDREWS, individually and on behalf of TRI-
STAR COMMUNICATIONS, INC. AS THIRD
PARTY PLAINTIFF

November 10, 2011

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,)

Plaintiff,)

v.)

Ten State Street, L.L.P.)

Timothy D. Scrantom, Mark Broadwater,
and H. Hughes Andrews,)

Defendants,)

of which,)

Defendant H. Hughes Andrews, Individually)
and on behalf of Tri-Star Communications,)
Inc., as a Third-party Plaintiff,)

v.)

Quentin S. Broom, Jr.,)

Third-party Defendant.)

C.A. No.: 08-CP-42-3397

**SECOND AMENDED ANSWER,
COUNTERCLAIMS and THIRD-
PARTY COMPLAINT OF DEFENDANT
H. HUGHES ANDREWS,
INDIVIDUALLY and on behalf of
TRI-STAR COMMUNICATIONS**

**TO: PATRICK E. KNIE AND JAMES R. GILREATH, ATTORNEYS FOR
PLAINTIFF AND THIRD-PARTY DEFENDANT QUENTIN S. BROOM, JR.**

By and through their undersigned counsel, Defendant H. Hughes Andrews (hereinafter "Defendant Andrews") answering Plaintiff's Complaint, and brings this action on individually and on behalf of the Third-Party Plaintiff, Tri-Star Communications, Inc. ("Third-party Plaintiff Tri-Star"), allege and will show unto the Court the following:

For A First Defense
(By Way of a General Denial)

1. All allegations of Plaintiff's Complaint not admitted, qualified or explained are expressly denied.

2. As to Paragraphs 1 through 4 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

3. As to Paragraph 5 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.

4. As to Paragraphs 6 through 17 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

5. As to Paragraph 18 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

6. As to Paragraph 19 of Plaintiff's Complaint, Defendant Andrews admits the allegations set forth therein, with the exception that Drew's Distributing, Inc. sold the equipment to Tri-Star and the obligations of Tri-Star to Drew's Distributing Inc. were assigned to Defendant Andrews, of which Plaintiff received due notice.

7. As to Paragraph 20 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

8. As to Paragraphs 21 through 24 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

9. As to Paragraphs 25 through 27 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

10. As to Paragraphs 28 through 32 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

11. As to Paragraph 34 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

12. As to Paragraph 35 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.

13. As to Paragraphs 36 through 38 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

14. As to Paragraph 39 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

15. As to Paragraphs 40 through 78 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

For A Second Defense
(Failure To State A Claim Upon Which Relief May Be Granted)

16. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth fully hereunder.

17. Plaintiff's Complaint does not set forth sufficient facts and/or the requisite legal elements for the claims sought therein such that Plaintiff fails to adequately state a claim upon which relief may be given against this Defendant.

For A Third Defense
(Unclean Hands)

18. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth fully hereunder.

19. To the extent Plaintiff's complaint seeks equitable relief, Plaintiff's Complaint is barred by the doctrine of unclean hands.

For A Fourth Defense and By Way of Defendant Andrew's
First Counterclaim Against the Plaintiff and
First Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Fiduciary Duty)

20. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

21. At all times relevant hereunder, Tri-Star Communications, Inc. ("Tri-Star") was a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina. Defendant Andrews, at all times relevant herein, was a shareholder of and a creditor of Tri-Star.

22. Defendant Andrews has standing to bring this claim individually and on behalf of Third-party Plaintiff for losses and damages sustained to both via the malfeasance and nonfeasance of the plaintiff in his dealings with and on behalf of Tri-Star Communications.

23. Plaintiff was a director and a fifty percent (50%) owner of Tri-Star, Communications, Inc. Plaintiff further solely controlled the financial operations of Tri-Star.

As the dominant and controlling shareholder/partner, Plaintiff owed a fiduciary duty to the company and to Defendant Andrews to act in the best interest of the company and of Defendant Andrews at all times regarding the operations of Tri-Star Communications.

24. As a stockholder, Defendant Andrews loaned Tri-Star one hundred thirty thousand dollars (\$130,000.00) on or about August 31, 2005.

25. As the assignee of a debt, as of October 31, 2005, Tri-Star Inc. owed Defendant Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for equipment (hereinafter "the equipment") sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual costs of equipment sold to Tri-Star.

26. Tri-Star sold and/or transferred a substantial amount of the equipment to a Worldwide Entertainment, S.A. ["Worldwide Entertainment"], a Dominican Republic corporation. Plaintiff was a manager of Worldwide Entertainment.

27. At all times relevant herein, Defendant Andrews owned an interest in Worldwide Entertainment, via his partial membership in and with Calum, LLC, the corporation which owned the majority of stock of Worldwide Entertainment.

28. Plaintiff failed to pay the taxes owed by Worldwide Entertainment.

29. Plaintiff refused to produce the financial statement of Worldwide Entertainment to Defendant Andrews.

30. In the summer and/or fall of 2004, Plaintiff and Defendant Andrews had a disagreement over the operations of Tri-Star and the operations in the Dominican Republic. Upon information and belief, Plaintiff undertook a concerted effort to liquidate the assets of Tri-

Star and convert the same for his personal use and benefit, without authority or consent of Andrews.

31. Towards that end, without the consent or authority of Defendant Andrews, Plaintiff paid himself a wage and/or salary in the amount of four hundred thousand (\$400,000.00) dollars December 15, 2004. Said distributions were made at a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star.

32. Upon information and belief, Plaintiff used the fraudulent payment of wages to obtain a mortgage on a \$3.5 Million dollar home located at 6565 Allison Road, Miami Beach, Florida, 33141-4508. Upon information and belief, Plaintiff made a deposit in the amount of \$5,000.00 on or about January 24, 2005 and signed an "Agreement for Deed" on February 14, 2005 to purchase the same.

33. Further, without the consent or authority of Defendant Andrews, between January 1, 2005 and April 30, 2005, Plaintiff paid himself wages and/or salary distribution from Tri-Star, Inc. in the amount of five hundred twenty thousand dollars (\$520,000.00). Said distributions were made at a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star.

34. Without consent or authority from Defendant Andrews, Plaintiff sold, or caused to be sold, the equipment in the possession of Worldwide Entertainment to third parties for substantially below market value. Indeed, when Plaintiff expressed his intention to sell Tri-Star's assets, Defendant Andrews expressly informed the plaintiff not to do so without his prior approval and consent. Plaintiff deliberately ignored Defendant Andrews' instruction.

35. Upon information and belief, Plaintiff converted essentially all of the assets of Tri-Star for his personal use and benefit. Upon information and belief, Plaintiff has received an estimated two million(\$2,000,000.00) dollars from the use of the assets that formerly belonged to Tri-Star since 2005, without the authority or consent from Andrews.¹ Said revenues were received by the plaintiff at a time when Defendant Andrews was owed millions of dollars for payment on the equipment.

36. At a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star, Plaintiff paid hundreds of thousands of dollars to his relatives, ostensibly as loan repayments. Upon information and belief, said loans were not legitimate. Additionally, Plaintiff gave preference to paying monies to relatives over paying the debts owed to Defendant Andrews.

37. Thereafter, Plaintiff unilaterally, and without the consent or authority from Defendant Andrews, liquidated Tri-Star Communications. On August 13, 2009, Tri-Star was administratively dissolved by the South Carolina Secretary of State due to the failure of plaintiff in filing income tax returns and other required documents.

38. Plaintiff's actions rendered Tri-Star incapable of paying the monies owed to Defendant Andrews, all at a time when Plaintiff (and his relatives) were paid substantial sums of money.

39. Plaintiff materially and substantially breached his fiduciary duty to Defendant Andrews in one or more of the following particulars:

¹None of this information was available as of May 26, 2006, the date Defendant Andrews filed his First Amended Answer, Counterclaims and Third-party Complaint, because Plaintiff had not filed the income taxes where this income was reported.

- a. Paying himself a salary and/or distribution from Tri-Star at a time when Tri-Star owed Defendant Andrews substantial sums of money;
- b. Selling of the assets of Tri-Star Inc. at far below market value without authority or consent of Defendant Andrews;
- c. Converting Tri-Star's money and/or assets for Plaintiff's own use and benefit;
- d. Failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders.

40. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Fifth Defense and By Way of Defendant Andrew's
Second Counterclaim Against the Plaintiff and
Second Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Contract)**

41. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

42. By and through the various contracts, agreements, Defendant Andrews contracted with the plaintiff to regarding the operations of Tri-Star and Worldwide Entertainment.

43. Without authority or consent from Defendant Andrews, Plaintiff disposed of the assets of Tri-Star at substantially below their market value.

44. Plaintiff did not use any of the proceeds to pay the loan given by Defendant Andrews or the monies owed to Defendant Andrews, by and through his creditor assignments.

45. At a time when Tri-Star owed Defendant Andrews substantial sums of money, without authority or consent from Defendant Andrews, Plaintiff paid himself approximately nine hundred twenty thousand (\$920,000.00) dollars in salary and/or distribution, within a four (4) month period of time. Additionally, Plaintiff distributed substantial sums of money to his relatives over repayment of monies owed to Defendant Andrews.

46. Plaintiff converted all of the assets of Tri-Star for his personal use and benefit and has received substantial sums of money since 2005.

47. Plaintiff's actions rendered Tri-Star incapable of repaying the monies owed to Defendant Andrews.

48. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual damages hereunder in an amount to be determined by the Court.

**For A Sixth Defense and By Way of Defendant Andrew's
Third Counterclaim Against the Plaintiff and
Third Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Contract Accompanied by a Fraudulent Act)**

49. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

50. Plaintiff breached his contract(s) with Defendant Andrews.

51. Plaintiff had a fraudulent intent relating to the breaching of the contract and not merely to its making.

52. Plaintiff's breach was accompanied by a fraudulent act, which can be characterized by dishonesty in fact, unfair dealing and/or the unlawful appropriation of Defendant Andrew's money by design.

53. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Seventh Defense and By Way of Defendant Andrew's
Fourth Counterclaim Against the Plaintiff and
Fourth Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of the Covenant of Good Faith and Fair Dealing)**

54. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

55. There is an implied covenant of Good Faith and Fair Dealing in all contracts entered into or to be performed in the State of South Carolina.

56. Plaintiff's actions as alleged herein were unreasonable, willful, reckless, and unjustified, and amount to a breach of the implied In-Law duty of Good Faith and Fair Dealing inherent in all contracts.

57. As a proximate result, Defendant Andrews has suffered actual and consequential damages.

58. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For An Eighth Defense and By Way of Defendant Andrew's
Fifth Counterclaim Against the Plaintiff and
Fifth Cause of Action by Third-Party Plaintiff Tri-Star
(Conversion)**

59. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

60. Defendant Andrews had a right to possess monies and equipment belonging to Tri-Star Communications.

61. Without authority from Defendant Andrews, Plaintiff took possession of these monies and/or equipment, or alternatively, exercised a right of ownership over the same, all to the exclusion of the rights of Defendant Andrews.

62. Such actions constitute conversion of Defendant Andrews' money and/or property.

63. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Ninth Defense and By Way of Defendant Andrew's
Sixth Counterclaim Against the Plaintiff and
Sixth Cause of Action by Third-Party Plaintiff Tri-Star
(Violation of S.C. Code of Laws § 33-8-300)**

64. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

65. The actions of the plaintiff were not in good faith.

66. The actions of the plaintiff were not with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

67. The actions of the plaintiff were not in a manner that a reasonable person could believe were in the best interests of the corporation and its shareholders.

68. Said actions constitute a violation of South Carolina *Code of Laws* § 33-8-300.

69. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Tenth Defense and By Way of Defendant Andrew's
Seventh Counterclaim Against the Plaintiff and
Seventh Cause of Action by Third-Party Plaintiff Tri-Star
(Violation of S.C. Code of Laws § 33-8-420)**

70. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

71. The actions of the plaintiff were not in good faith.

72. The actions of the plaintiff were not with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

73. The actions of the plaintiff were not in a manner that a reasonable person could believe were in the best interests of the corporation and its shareholders.

74. Said actions constitute a violation of South Carolina *Code of Laws* § 33-8-420.

75. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For An Eleventh Defense and By Way of Defendant Andrew's
Eighth Counterclaim Against the Plaintiff
(Promissory Estoppel)**

76. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

77. At the time Defendant Andrews went into business with Plaintiff in the formation of Tri-Star Communications and its subsequent dealings with Worldwide Entertainment, Plaintiff promised Defendant Andrews that he would at in the best interest of Tri-Star and Defendant Andrews at all times regarding the management of the same.

78. This promise was unambiguous on its terms.

79. Defendant Andrews reasonably relied upon Plaintiff's promise.

80. Plaintiff expected and foresaw that Defendant Andrews would rely upon his promise.

81. Defendant Andrews was injured in reliance upon the promise by Plaintiff.

82. As a direct and proximate result, Defendant Andrews has been damaged as set forth fully hereunder, thereby entitling Defendant Andrews to actual and punitive damages in an amount to be determined by the Court.

**For A Twelfth Defense and By Way of Defendant Andrew's
Eighth Counterclaim Against the Plaintiff
(Fraud)**

83. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

84. Plaintiff represented to Plaintiff that he would manage the assets of Tri-Star and act in the best interest of Tri-Star and Defendant Andrews.

85. These representations were false.

86. These representations were material.
87. Plaintiff either knew the representations were false or made such representations with a reckless disregard of their truth or falsity.
88. Plaintiff intended Defendant Andrews to act upon Plaintiff's representations.
89. Defendant Andrews was ignorant of falsity of Plaintiff's representations.
90. Defendant Andrews relied upon the truth of Plaintiff's representations.
91. Defendant Andrews had a right to rely upon the truth of Plaintiff's representations.
92. As a direct and proximate result, Defendant Andrews was damaged, thereby entitling him to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Thirteenth Defense and By Way of Defendant Andrew's
Tenth Counterclaim Against the Plaintiff
(Negligent Misrepresentation)**

93. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.
94. Plaintiff made a false representation to Defendant Andrews.
95. Plaintiff had a pecuniary interest in making these statements.
96. Plaintiff owed a duty of care to see that he communicated truthful information to Defendant Andrews.
97. Plaintiff breached that duty by failing to exercise due care.
98. Defendant Andrews justifiably relied on Plaintiff's representation.
99. Defendant Andrews suffered pecuniary loss as proximate result of his reliance upon that representation.

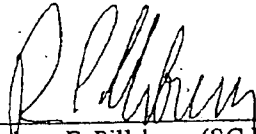
100. As a direct and proximate result, Defendant Andrews was damaged, thereby entitling Defendant Andrews to actual and punitive damages hereunder in an amount to be determined by the Court.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant Andrews prays for the following relief:

- (a) that Plaintiff's complaint be dismissed with prejudice, with costs and attorney's fees awarded to Defendant Andrews;
- (b) that Judgment be entered against the plaintiff on all of Defendant Andrews' counterclaims, for actual and punitive damages, in an amount to be determined by the Court;
- (c) that Judgment be entered against the plaintiff on all of Third-party Plaintiff Tri-Star's causes of action, for actual and punitive damages, in an amount to be determined by the Court; and
- (d) whatever further and just relief the Court deems appropriate under the circumstances.

Respectfully submitted,

Pillsbury & Read, P.A.



Rodney F. Pillsbury (SC Bar #13067)
Ransome H. Helmly (SC Bar #78081)
1204-A East Washington Street
Greenville, SC 29601
Phone: (864) 241-9828
Fax: (864) 241-9818
Email: rpillsbury@prlawpa.com

**ATTORNEYS for DEFENDANT H. HUGHES
ANDREWS, individually and on behalf of TRI-
STAR COMMUNICATIONS, INC. AS THIRD
PARTY PLAINTIFF**

November 11, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Quentin S. Broom, Jr.,	)	Civil Action No. 2008-CP-42-3397
Plaintiff,	)	
vs.	)	
Ten State Street, L.L.P., Timothy D. Scrantom,	)	PLAINTIFF QUENTIN S. BROOM'S
Mark Broadwater, and H. Hughes Andrews,	)	OPPOSITION TO DEFENDANT
Defendants,	)	AND <i>PURPORTED</i> THIRD-PARTY
of which,	)	PLAINTIFF HUGH ANDREWS'
Defendant H. Hughes Andrews, Individually and	)	MOTION TO RECONSIDER
on behalf of Tri-Star Communications, Inc., as a	)	
Third-party Plaintiff,	)	
vs.	)	
Quentin S. Broom, Jr.,	)	
Third-party Defendant.	)	

Plaintiff Quentin S. Broom ("Broom") respectfully submits this memorandum in opposition to the pending motion for reconsideration. Reconsideration should be denied and the final Order granting Broom's motion to dismiss should stand.

LEGAL STANDARD

South Carolina Rule of Civil Procedure, Rule 59(e) applies to motions for reconsideration. A party *may* file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2003).

Broom replied to all of the causes of action pled in the Amended Answer, Counterclaims and Third-Party Complaint¹ by alleging each failed to set forth sufficient facts or the requisite legal elements for the claims sought, and thus failed to adequately state a claim upon which relief may be granted. (See Reply to Counterclaims of Defendant H. Hugh Andrews ("Andrews") filed September 26, 2006, at ¶¶ 20, 38, 55, 72, 89, 107, 125, 144, 166, and 186). Broom thereafter moved to dismiss all claims made against him.

A motion to dismiss under Rule 12(b)(6) is proper where the facts alleged and the inferences reasonably deducible from the pleadings would not entitle a claimant to relief under any theory of the case. Brown v Leverette, 291 S.C.364, 353 S.E.2d 697 (1987). The question to be considered is whether the claims asserted by Andrews, individually and on behalf of Tri-Star, assert any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

The court should not give effect to a claimant's legal conclusions. See United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979) (allegations that defendant acts "under color of state law" is a legal conclusion which is insufficient to avoid dismissal of § 1983 claim). Furthermore, "[a] Rule 12(b)(6) motion should be granted when the complaint lacks a cognizable theory or facts sufficient to support a theory." C. Wright and A. Miller, Federal Practice and Procedure: Civil 2d § 1357 at 272 (Supp. 2001). Moreover, the court is not required to accept a claimant's conclusory allegations that contradict the specific facts pled. Id. § 319-21 (1990).

South Carolina law requires dismissal of a complaint for failure to satisfy the pleading requirements of Rule 23(b)(1), SCRPC: "[a] derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRPC, is properly dismissed pursuant to Rule 12(b)(6)."

¹ For sake of brevity, this pleading will be referred to hereinafter as "Amd. Answer"

Clearwater Trust v. Bunting, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (quoting Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)). "Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRPC, in that it requires particularized allegations." Id. at 188 (Emphasis added). A plaintiff who fails to satisfy the particularity requirements of Rule 23(b)(1), lacks standing. Strickland v. Flue-Cured Tobacco Co-op. Stabilization Corp., 643 F. Supp. 310, 316 (D.S.C. 1986) ("[s]ince the plaintiffs . . . have not complied with the requirements for a derivative action, they lack standing to bring the action before this Court . . .").

INTRODUCTION

Andrews attempted to bring a derivative suit by pleading various causes of action "on behalf of Tri-Star," an entity in which he and Broom were 50/50 shareholders. Ten causes of action are set forth in the Amended Answer: (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S.C. Code of Laws § 33-8-300; (7) Violation of S.C. Code of Laws § 33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation.

Claims (1) through (7) were brought by Andrews as third-party claims on behalf of Tri-Star, and were brought as identical counterclaims on behalf of Andrews, individually. (Amd. Answer, ¶¶ 21 to 70). For these claims, the the Court found in its Form 4:

"all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom's mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23."

(Form 4 filed October 7, 2011, p. 2)(Emphasis added). A shareholder derivative action seeks to have a court compel a corporation to sue its own officers and directors, for the causes of action

alleged. This is an extraordinary request and a shareholder would not have any right to sue in the name of the corporate entity without bringing a derivative claim and following certain procedural requirements.

Claims (8) through (10) were brought solely in the name of Andrew. (Amd. Answer, ¶¶ 71 to 95). However, these "individual" claims merely repeat the same allegations of loss set out in the previous seven claims. As the Court found in its Form 4:

"If, however, Andrews shows that Broom engaged in wrongful conduct that caused a particular loss that is individual to Andrews, the liability of such wrongful conduct is an asset of Andrews. This type of individual claim is not subject to the Rule 23 requirements and will not be dismissed on that basis. In reviewing the pleadings, this Court has read them in a light most favorable to Andrews, and in doing so, cannot determine with certainty, whether or not such claims exist."

(Id.)(Emphasis added).

Simply put, Andrews did not allege any facts would support his theory that Rule 23 was inapplicable to any of his or Tri-Star's claims.

BACKGROUND AND SUMMARY OF ANDREWS' ALLEGATIONS

While the Amended Answer presents a litany of factual allegations, there are four general allegations supporting *each* of the causes of action. Andrews contends that Broom, acting as a "director, officer, and fifty percent (50%) owner of Tri-Star" acted wrongfully by:

1. Paying himself from Tri-Star without consent or authority from Andrews;
2. Selling substantially all of the assets of Tri-Star Inc. at below market value and without authority or consent of Andrews;
3. Converting Tri-Star's money and/or assets for Broom's own use and benefit;
4. Failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders.

(Amd. Answer, at ¶¶ 24, 36).

Although Tri-Star is not listed as a defendant in Andrews' Amended Answer, he alleged various failures on the part of Tri-Star to pay a debt owed to Andrews (shareholder loan) and/or his company, Drews, Inc. (Gaming Machine financing).³ Specifically, Andrews alleged the distributions Broom made to himself were made at a time when Tri-Star owed Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star. (*Id.*, ¶¶ 25-27, 35). This is no more than an allegation that Tri-Star's assets were depleted. The alleged depletion of Tri-Star's assets may have the indirect effect of causing a depletion in funds available to shareholders and creditors, but such an allegation does not change the fact that the direct harm was to Tri-Star's assets.

A hearing was held on October 5, 2011, to consider Broom's motion to dismiss all of the claims. On October 7, 2011, this Court issued a Form 4 and requested submission of a formal Order from Broom's counsel. On November 1, 2011, this Court entered the formal Order dismissing all claims.

Andrews suggests this Court misunderstood or failed to fully consider the following arguments, as set out in his motion to reconsider: (1) Rule 23, SCRCF only applies to class action cases; (2) an exception applies which allows Andrews to bring a claim individually, even if the matter is a derivative action; (3) the Court's Form 4 was inconsistent with formal Order

³ Andrews loaned Tri-Star one hundred thirty thousand dollars (\$130,000) on or before August 31, 2005. (Amd. Answer ¶ 25). Tri-Star purchased "Pot-O-Gold" video gaming machines ("Gaming Machines") and other goods and services from Drews Distributing, Inc., a South Carolina corporation ("Drews, Inc.") owned 100% by Defendant Andrews. Drews, Inc. distributed by assignment to Andrews all rights to payments from Tri-Star. (*Id.*, ¶ 26). As of October 31, 2005, Tri-Star owed Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges). (*Id.*, ¶ 27). For purposes of this memorandum in opposition, all allegations in the Amended Answer must be accepted as true.

submitted by Plaintiff's counsel; and (4) Andrews properly alleged he sustained a loss separate and distinct from that of Tri-Star. (Andrews' Memo, p. 24-27).

ARGUMENT

I. IT IS UNDISPUTED THAT THE PLEADING AND DEMAND REQUIREMENTS OF RULE 23, SCRCP WERE NOT FOLLOWED.

As the Court found in its Form 4, "[i]t is not contested that SCRCP 23 was not complied with prior to the filing of the counterclaims. It is also not contested, if SCRCP rule 23 is applicable, that dismissal is the appropriate remedy . . . no argument was presented that even an attempt was made to comply with Rule 23." Andrews does not contest these finding. Instead he argues that, for various reasons, Rule 23 is not applicable to his individual counterclaims. Those arguments are dealt with fully below:

Tri-Star's claims⁴ were unquestionably derivative in that they were asserted by a shareholder (Andrews) on behalf of a corporate entity (Tri-Star) for injury allegedly suffered by that entity. Andrews' November 11, 2011, memorandum in support of his motion to reconsider offers no argument with regard to the dismissal of Tri-Star, except to say that judicial economy would be served to allow Tri-Star's claims to proceed. (Andrews' Memo, p. 22). Andrews cites no precedent which would support a holding that clearly derivative claims brought by a shareholder on behalf of a corporation could be exempt from Rule 23's pleading and demand requirements. Broom asserts no such precedent exists. Therefore, all of the claims of Tri-Star were properly dismissed.

⁴ See Amd Answer, at paragraphs 21 through 70.

Andrews limits his reconsideration request to the Court's dismissal of Andrews' individual counterclaims.⁵

II. THE SUPREME COURT OF SOUTH CAROLINA APPLIES RULE 23, SCRCP'S DERIVATIVE SUIT REQUIREMENTS TO NON-CLASS ACTION CASES

Andrews argues that Rule 23, SCRCP is intended to apply to class actions only. (Andrews Memo, pp. 7-13). None of the cases cited by Andrews actually hold that the derivative action requirements of Rule 23, SCRCP must be applied only to class action cases. To the contrary, the Supreme Court of South Carolina has already applied the pleading and demand requirements of Rule 23 to a non-class case involving a closely held corporation. See Clearwater Trust v. Bunting, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (dismissing unjust enrichment claim brought by shareholder of closely held corporation for failure to comply with the pleading requirements of Rule 23(b)(1), SCRCP). Andrews' motion does not mention the Bunting case.

There are numerous cases in various jurisdictions that have applied Rule 23 derivative suit requirements to non-class cases involving partnerships with as few as three, four or five members.⁶

⁵ Id. Andrews argues only that his "Supplemental Motion to Reconsider should be granted and Andrews should be allowed to proceed directly on the counterclaims asserted." (Emphasis added).

⁶ See Blasberg v. Oxbow Power Corp., 934 F. Supp. 21 (D. Mass. 1996) (two partners: sole limited partner brought claims against sole general partner); Cabrini Dev. Council v. LCA-Vision, Inc., 197 F.R.D. 90 (S.D.N.Y. 2000) (three LLC members); Golden Tee, Inc. v. Venture Golf Sch., Inc., 969 S.W.2d 625 (Ark. 1998) (dismissing complaint by four partners against the fifth, who had control of the partnership, for failure to bring action as a derivative suit); N.Y. Life Ins. Co. v. Ramco Holding Corp., 938 F. Supp. 754 (N.D. Okla. 1996) (three partners; noting that complaining limited partner owning 96.5% of the partnership); Whalen v. Connelly, 545 N.W.2d 284 (Iowa 1996) (three partners; dismissing one of the limited partner's claims (brought directly) because he had failed to make demand on the general partner (defendant)), aff'd, 593 N.W.2d 147 (Iowa 1999); S.B. McLaughlin & Co., Ltd. v. Cochrane, No. C4-92-2081, 1993 WL 231672 (Minn. Ct. App. June 29, 1993), aff'd, Cochrane v. Tudor Oaks Condominium Project, 529 N.W.2d 429 (Minn. Ct. App. 1995); Chamarac Props., Inc. v. Pike, No. 86 Civ. 7919, 1992 WL 332234 (S.D.N.Y. Nov. 12, 1992) (three partners); Burstin Investors, Inc. v. K.N. Investors, Ltd., 657 N.Y.S.2d 743 (App. Div. 1997) (two partners); Miltland Raleigh-Durham v. Myers, 807 F. Supp. 1025 (S.D.N.Y. 1992) (two partners; noting that sole limited partner was itself a general

Andrews further argues the rationale behind Rule 23's derivative suit requirements are nonsensical when applied here. (Memo, pp. 11-12). These policy-based arguments are grounded on his assertion that it would have been futile for Andrews to submit a demand to Tri-Star's management. Futility cannot be a basis for excusing (or excepting) Andrews from the requirements of the rule, when the rule itself provides that futility must be particularly pled.

This Court already found that Andrews did not even attempt to plead that a demand would be futile, so it is inappropriate for such an assertion to even be considered on a motion for reconsideration. While Rule 23(b)(1), SCRCF does provide that a shareholder need not make a pre-suit demand when it is clear that the act would be futile, the rule specifically states the shareholder must allege futility with particularity. "Shareholders still ha[ve] the burden of alleging particularized facts to support the assertion that demand would have been futile." Carolina First Corp., 343 S.C. at 192, 539 S.E.2d at 411 (emphasis added).

Because South Carolina courts have applied Rule 23(b)(1) requirements to non-class cases, and because Andrews failed to plead demand futility, each of his individual counterclaims were properly dismissed.

III. THE FORMAL ORDER DOES NOT EXCEED THE SCOPE OF THE FORM 4.

In the Form 4 Order dated October 7, 2011, the Court found no particularized facts to support the assertion that Andrews suffered losses that were distinct from corporate losses. (See Form 4, attached to Andrews' Memo, at Ex. 1, p. 2) ("In reviewing the pleadings, this Court has

partnership of 50 lawyers); Shlomchik v. Richmond, 103 Equities Co., 662 F. Supp. 365, 367 (S.D.N.Y. 1986) (ten partners); Hall Family Props., Ltd. v. Gosnell Dev. Corp., 916 P.2d 1098 (Ariz. Ct. App. 1995) (five partners);

read them in a light most favorable to Andrews, and in doing so, cannot determine with certainty, whether or not such (particular loss) claims exist.”).

The Court similarly found that in preparing a formal Order, “plaintiff has full liberty to fully address the motion to dismiss in the formal order, and is not limited to the verbiage expressed in this Form 4.” (Id.). The formal Order submitted by Plaintiff’s counsel and signed by the Court states “[e]ven when viewed in the light most favorable to Andrews, each counterclaim seeks recovery for misappropriation of corporate property. Andrews was required to bring such claims in a derivative action.” For all of the reasons below, the formal Order submitted and signed by the Court is factually correct.

A. Standing To Bring a Direct Action – The General Rule

Firmly established law restricts individual shareholders from suing corporate directors or officers directly for losses suffered by the corporation. Babb v. Rothrock, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991). “A corporation is a distinct legal entity.” Todd v. Zaldo, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991). “[A] cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders.” Id. Todd v. Zaldo, 403 S.E.2d 666, 668 (Ct.App. 1991).

A derivative action is brought when a corporation suffered an injury from actionable wrongs committed by its officers and directors. See Ward v. Griffin, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). The corporation or its shareholders can bring the cause of action on the corporation’s behalf, so long as they comply with the applicable rules. Id. If any relief is granted, it goes to the corporation; shareholders cannot recover the damages in their individual capacities because their loss is the indirect result of the injury to the corporation. Id.

Where there are no allegations of a distinct injury to the shareholder, Ward, 295 S.C. at 221, 367 S.E.2d at 704, or where there is an action for misappropriation of corporate property, see Davis v. Hamm, 300 S.C. 284, 291, 387 S.E.2d 676, 680 (Ct. App. 1989), the action is derivative. If an allegation of damage to Andrews overlaps with any loss allegedly suffered by Tri-Star, then Andrews' claim is derivative and should have complied with Rule 23(b)(1), SCRCF.

B. Broom is Not Personally Liable to Andrews for Corporate Debts.

Andrews' identification of paragraphs 23, 25, 26, 27, 34, and 35 of its Amended Answer do not reveal any particular loss suffered by him that was caused by Broom's alleged wrongful conduct. (Andrews' Memo, pp. 24-25). Those allegations clearly allege that Tri-Star owed money to Andrews, as a creditor.

Andrews did not sue Tri-Star to recover the debts owed to him and cannot sue Broom individually for payment of Tri-Star's debt. (Id., pp. 24-25) See S.C. Code Ann. § 33-6-220 and § 33-44-303 (South Carolina provides by statute that an owner of a corporation or limited liability company is not personally liable for the acts or debts of the corporation or LLC.). Andrews' purported "individual losses" overlap with Tri-Star's alleged corporate losses.

It is not uncommon for the court to label a claim "derivative," where a general partner or LLC manager is alleged to have (1) paid itself payments to which it was not entitled, (2) failed to monitor the operations of the business, (3) sold business assets to itself or an affiliate for less than fair market value, (4) made sweetheart deals with its affiliates, (5) mismanaged funds, (6) failed to perform obligations imposed in the partnership or operating agreement, (7) used firm

assets as security for personal loans, (8) paid to itself an improperly high price when selling assets to the entity, or (9) failed to properly investigate a business opportunity.⁷

Andrews alleges that Broom's misconduct caused harm to Tri-Star, which resulted in injuries flowing to Andrews, as a shareholder and creditor. These allegations actually support a finding that the claims are derivative.⁸

Paragraphs 26 and 27 of the Amended Answer alleges Tri-Star owed Andrews \$1,194,362.83 for the sale of gaming machines. (Andrews' Memo, p. 25). But if the allegations were accepted as true, the only reason Tri-Star did not pay this debt is because it suffered a loss in corporate assets, allegedly at the hands of Broom. This clearly is conduct that, if true, harmed Tri-Star directly, and its investors and creditors derivatively. See In re Granite Partners, L.P., 208 B.R. 332, 344 (Bankr. S.D.N.Y. 1997) ("Claims of mismanagement, waste and breach of fiduciary duty describe conduct which harms an entity directly, and its investors and creditors derivatively The investors and creditors suffer an indirect injury because the wrongful

⁷ See, e.g., Litman v. Prudential-Bache Props., Inc., 611 A.2d 12, 16 (Del. Ch. 1992) (holding that failure to investigate and monitor partnership investments and placing interest in general partnership fees above interests of limited partners, which reduced value and payout, stated a derivative claim); Lenz ex rel. Naples Tennis Resort v. Associated Inns & Rests. Co. of Am., 833 F. Supp. 362, 380 (S.D.N.Y. 1993) (finding that misconduct and misappropriation of funds which reduce partnership's income and distributions states derivative claim); P'ship Equities, Inc. v. Marten, 443 N.E.2d 134, 138-39 (Mass. App. Ct. 1982) (stating that all limited partners and creditors have an interest in a claim that the general partner has prematurely reimbursed itself--or engaged in other mismanagement, negligently diverted assets, acted beyond authority, or failed to perform partnership obligations); Kenworthy v. Hargrove, 855 F. Supp. 101, 105-06 (E.D. Pa. 1994) (holding that claim of improper governmental seizure of bank owned by partnership is a derivative claim under Pennsylvania law), aff'd, 27 F.3d 557 (3d Cir. 1994); Re v. Weksel, 515 N.Y.S.2d 568 (App. Div. 1987) (holding that claim for recovery of funds belonging to partnership is a derivative claim); Larson v. First Interstate Bank of Kalispell, 786 P.2d 1176, 1179-80 (Mont. 1990); Caley Invs. Inc. v. Lowe Family Assoc., 754 P.2d 793, 795 (Colo. Ct. App. 1988); Thomasson v. Mfrs. Hanover Trust Co., 657 F. Supp. 448, 453-54 (S.D. Tex. 1987) (applying Texas law in bankruptcy context), aff'd, 845 F.2d 1020 (5th Cir. 1988); Hauer v. Bankers Trust N.Y. Corp., 509 F. Supp. 168, 175 (E.D. Wis. 1981), aff'd, 671 F.2d 1020 (7th Cir. 1982); Field Enters. v. Gresser, No. 89-1234, 1990 WL 262001, at *8 (Wis. Ct. App. Dec. 27, 1990) (holding that limited partners in an Illinois limited partnership may only sue derivatively for breaches of duties owed to partners or the partnership).

⁸ Trademark Retail, Inc. v. Apple Glen Investors, LP, 196 F.R.D. 535, 540 (N.D. Ind. 2000) (finding that complaint repeatedly referenced harm that would befall the LLC which belied plaintiff's argument that the LLC was not a necessary party to the litigation).

conduct erodes the entity's assets, making it less likely that it will be able to pay creditors and distribute profits to investors.")(Emphasis added). The corporation and Andrews suffered the same loss of money. The loss therefore, overlaps.

Further, paragraphs 34 and 35 allege that Broom made distributions to himself in the amount of \$520,000.00 despite owing Andrews substantial sums of money as a shareholder and creditor. (Andrews' Memo, p. 25). This clearly is conduct that, if true, harmed Tri-Star directly, and its investors and creditors derivatively. The corporation and Andrews suffered the same loss of money. The loss therefore, overlaps. A claim-by-claim analysis further spotlights this overlap.

Claim No. 1 (breach of fiduciary duty): Andrews and Tri-Star allege they were injured by Broom "(1) paying himself from Tri-Star without consent or authority from Andrews; (2) selling substantially all of the assets of Tri-Star at below market value and without authority or consent of Andrews; and (3) converting Tri-Star's money and/or assets for Broom's own use and benefit." (Amd. Answer ¶ 36)

Claim No. 2 (breach of contract): Andrews and Tri-Star allege they were injured when Broom (1) "disposed of the assets of Tri-Star at substantially below their market value," and "paid himself approximately five hundred twenty thousand (\$520,000) dollars in salary and/or distribution [from Tri-Star's assets]." (Id. ¶¶ 40, 42)

Claim No. 5 (conversion): Andrews and Tri-Star allege they were injured when Broom took possession of "monies and equipment belonging to Tri-Star." (Id. ¶¶ 55-56)

Claim No. 3 (breach of contract accompanied by a fraudulent act), Claim No. 4 (breach of the covenant of good faith and fair dealing), Claim No. 6 (violation of S.C. Code 33-8-300), Claim No. 7 (violation of S.C. Code 33-8-420): Andrews and Tri-Star simply re-

allege the mismanagement and dissipation of Tri-Star's assets as alleged in the prior derivative claims. (Id. ¶¶ 44, 49, 59 & 65)

Claim No. 8 (promissory estoppel), Claim No. 9 (fraud), and Claim No. 10 (negligent misrepresentation): Andrews, individually, asserts these claims. However, there are no allegations within these causes of action that Andrews suffered a particular loss that is separate or different from the losses suffered by Tri-Star. These claims merely re-allege the mismanagement and dissipation of Tri-Star's assets as set forth in the previous claims. (Id. ¶¶ 71, 78 & 88)

In his memorandum opposing the motion to dismiss, Andrews stated that Broom's "overall mismanagement of Tri-Star resulted in significant personal financial losses to Andrews . . . includ[ing] uncollected payments due Andrews from Tri-Star for the sale of gaming machines and other goods, non-payment of a \$130,000 loan Andrews made to Tri-Star, liquidating Tri-Star assets (in which Andrews had a substantial personal interest) at substantially below market value, and by unilaterally and without Andrews' consent or authority paying himself at least \$520,000 in salary and distribution thereby diminishing the value of Andrews' potential distributions and Tri-Star's ability to repay the aforementioned obligations." (Memo in Opp., p. 4).

Characterizing an injury as "personal" does not make it so. Each of these "losses" were first and foremost losses to Tri-Star because it allegedly was unable to repay Andrews due to alleged dissipation of assets caused by Broom.

In Todd v. Zaldo, the counterclaim plaintiff "characterized the damages as personal because Georganne Apparel Company, Inc. and MIV Textile Sales, Inc. were small closely held corporations" and, as Mr. Zaldo put it, "[m]y corporation is totally my money" Todd v.

Zaldo, 304 S.C. at 277; 403 S.E.2d at 668. The Todd court stated that the "[m]ere characterization of damages by Zaldo as personal versus corporate does not prove their true nature." Id. After the Court of Appeals analyzed the categories of claimed damages, it determined them to be clearly corporate in nature. Id. at 278, 403 S.E.2d at 668. This determination applies equally to the case at hand since Tri-Star's assets are corporate assets, not personal assets.

Furthermore, the claims of *other* corporate creditors may be jeopardized if individual shareholders, like Andrews, are permitted to satisfy their personal debts by raising a claim which can only be asserted by the corporation. Babb v. Rothrock, 303 S.C. 462, 465, 401 S.E.2d 418, 420 (1991).

Tri-Star is not named as a defendant in this action, which has been pending for more than five years. To the extent Andrews seeks to recover from Tri-Star money owed to him as a creditor, he was required to bring his claim against Tri-Star when the contract to repay Andrews/Drews, Inc. was broken. Although the Amended Answer does not allege when the contract was broken, it is clear that Andrews had actual knowledge of the breach by Tri-Star as of May 26, 2006, the date he filed the Motion to Amend the Answer.

Such creditor claims would certainly be time-barred since it is now more than five years after Andrews had notice of a breach of contract by Tri-Star. See South Carolina Code § 15-3-530 (Within three years: an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520). A breach of contract action generally accrues under South Carolina law at the time the contract is breached or broken. Richland-Lexington Airport Dist. v. American Airlines, Inc., 306 F.Supp.2d 548 (2002).

An attempt to add Tri-Star as a defendant now would be futile. See Jackson v. Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) (Rule 15(c), SCRPC relation back provision only applies to a substitution or change in party, not the addition of a party).

D. Andrews' Reference to the "ALI/Thomas Exception" Is Misplaced.

First, it should be noted that the ALI/Thomas exception referenced by Andrews is applicable only when the claims at issue are deemed derivative. Therefore, an argument by Andrews that an exception applies is a concession that this Court properly found that the claims were all derivative, but improperly failed to consider whether an exception to the general rule applied.

Andrews concedes that the South Carolina appellate courts have never adopted the ALI/Thomas exception. (Andrews' Memo, p. 14). In fact, our Courts have rejected similar exceptions to the general rule for closely held corporations. This Court is not bound to apply the ALI/Thomas exception and there is no novel issue that would weigh against a dismissal of the claims.

Even if the ALI/Thomas exception had been adopted by South Carolina appellate courts, the Amended Answer contains no particularized factual allegations which would support use of an exception. (Id., p. 14) (the court must find that exempting an otherwise derivative claim is based upon specific finding that application of the exception would not (i) unfairly expose the corporation or the [officer or director defendants] to a multiplicity of suits; (ii) materially prejudice creditors of the corporation; or (iii) interfere with a fair distribution of the recovery among all interested persons.

None of the allegations in the counterclaims provide a basis for deviating from South Carolina's general rule that "(1) the assets of the corporation belong to the corporation and not to

the stockholders individually, and (2) the liability of corporate officers for misappropriation of corporate property is an asset of the corporation" Davis, 300 S.C. at 288, 387 S.E.2d at 678.

Andrews' conclusion that he could not be afforded full relief through recovery by Tri-Star is not supported by the factual allegations in the pleading. A motion under Rule 12(b)(6) or Rule 12(c) admits the well-pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. Carolina Winds Owners' Ass'n, Inc., 297 S.C. at 76, 374 S.E.2d at 899.

In Davis v. Hamm, the Court of Appeals expressly refused to apply an exception to the general rule concerning when a claim must be brought derivatively. Davis, 300 S.C. at 288, 387 S.E.2d at 678. Two years later, the Court of Appeals again had an opportunity to adopt this exception for closely held corporations, and in declining to do so, the court stated as follows:

As an additional theory, Zaldo argues he may recover damages personally because Georganne Apparel Company, Inc. was a close corporation with only three stockholders. He seeks to have Georganne Apparel viewed more as a partnership than a corporation. See Johnson v. Gilbert, Davis v. Hamm. This record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.

Todd, 304 S.C. at 279, 403 S.E.2d at 668-69 (internal citations omitted).

In the years since the Davis and Todd cases, our appellate courts have consistently rejected exceptions to the general rule, even when those cases involved closely held corporations. See Babb, 303 S.C. at 464, 401 S.E.2d at 419-20; Brown v. Stewart, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001).

This record does not present a factual scenario sufficient to ignore the corporate nature of Tri-Star, Inc. As such, this case does not support the application of any exception for closely held corporations.

E. Amendments to the Amended Answer Would Not Solve Andrews' Problems

Rule 15 of the South Carolina Rules of Civil Procedure will not aid Andrews here should he move to amend the counterclaims to properly assert the requirements of a derivative suit. This Court's final Order granted the motion to dismiss with prejudice.

IV. IN THE ALTERNATIVE, ANDREWS' CLAIMS AGAINST BROOM CONSTITUTE A SINGLE CAUSE OF ACTION.

A. Single cause of action governed by Section 33-8-420

There are other reasons why the Court's dismissal Order should be affirmed. Andrews' purported claims against Broom constitute a single cause of action governed by Section 33-8-420 of the Code of Laws of South Carolina of 1976, as amended.⁹ Section 33-8-420 provides:

Section 33-8-420. Standards of conduct for officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

- (1) in good faith;
- (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.

(b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- (1) one or more officers or employees of the corporation whom

⁹ This statute is applicable because Tri-Star is a South Carolina corporation with its principal place of business in Spartanburg County. (Amd. Answer, ¶ 22.)

the officer reasonably believes to be reliable and competent in the matters presented; or

- (2) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.
- (c) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.
- (d) An officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.
- (e) An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

The allegations in the causes of action against Broom, while couched in terms of breach of contract (Amd. Answer, at ¶¶ 38-43), breach of contract accompanied by a fraudulent act (Id., at ¶¶ 44-48), breach of covenant of good faith and fair dealing (Id., at ¶¶ 49-53), conversion (Id., at ¶¶ 54-58), promissory estoppel (Id., at ¶¶ 71-77), fraud (Id., at ¶¶ 78-87), negligent misrepresentation and (Id., 88-95), and variations on those themes, constitute a single cause of action that arises out of a single core set of facts; namely that Broom, acting as a "director, officer, and fifty percent (50%) owner of Tri-Star" acted wrongfully by:

1. Paying himself from Tri-Star without consent or authority from Andrews;
2. Selling substantially all of the assets of Tri-Star Inc. at below market value and without authority or consent of Andrews;
3. Converting Tri-Star's money and/or assets for Broom's own use and benefit;
4. Failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders.

(Amd. Answer, ¶¶ 24, 36)

Under South Carolina law, these allegations constitute a single cause of action. In Brice v. Glenn, 165 S.C. 509, 164 S.E. 302 (1932), the Supreme Court of South Carolina held as follows with regard to allegations that are similar to the allegations by Andrews:

What is the cause of action set out in the complaint? What constitutes a cause of action?

Every judicial action must involve the following elements: A primary right possessed by plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consists in a breach of such primary right, and duty; a remedial right in favor of plaintiff and a remedial duty resting upon defendant, springing from this delict; and finally the remedy or relief itself.

Analyzed by this definition, what is the cause of action stated in the complaint? It is that the Dollar Savings Bank, of which plaintiff is receiver, and in whose place he stands, entitled to all its rights and remedies, had the right to demand of defendants, as its officers and directors, honest service in its behalf; diligence in the performance of their duty, and faithfully and honestly to prosecute its business, and faithfully and honestly to protect and defend its interests, that in violation of there *[sic]* duties and obligations defendants neglected their duties and by connivance, mismanagement, fraud, and deceit wasted its assets, converted them to their own use and benefit in the particulars set out in the complaint.

The complaint states one cause of action.

Id. at 513, 164 S.E. at 303 (Emphasis added) (citations omitted).

Similarly, in Landvest Associates. v. Owens, 276 S.C. 22, 274 S.E.2d 433 (1981), limited partners sued the general partner (1) for an accounting of profits from self-dealing by the general partner in connection with a sale of land that the general partner represented he was transferring at cost and without any profit, and (2) for damages for breach of the general partner's fiduciary duty to the limited partners. The general partner contended that there was only a single cause of

action with two remedies, one at law and one in equity, and that the limited partners had to elect which remedy to pursue.

Therefore, Andrews has but a single cause of action because the allegations in the counterclaims against Broom demonstrate that there is but one primary right and one corresponding primary duty; namely, the right of Andrews as a shareholder of Tri-Star to receive competent care and diligence from Tri-Star's management that comports with the standards of Section 33-8-420(a)(1)-(2), i.e., management decisions performed in good faith and with the care an ordinarily prudent person in like position would exercise under similar circumstances. See Nunnery v. Brantley Constr. Co., 289 S.C. 205, 210; 345 S.E.2d 740, 743 (Ct. App. 1986) ("... a fundamental test used for comparing causes of action is to determine whether the primary right and duty and the delict or wrong are the same in each action. Under this test, there is but one cause of action where there is but one right in the plaintiff and one wrong on the part of the defendant involving that right.") (citation and internal quotation omitted).

Furthermore, under South Carolina law, the conclusion that Andrews has but a single cause of action against Broom is not affected by his characterizing what he allegedly did -- or failed to do -- as "fraudulent." (See, e.g., Amd. Answer, at ¶ 46.) In Few v. Few, 239 S.C. 321, 330, 122 S.E.2d 829, 833 (1961), the Court held:

An action for the fraudulent breach of contract is not converted into an action in tort because the motive prompting the breach and alleged acts accompanying such were characterized as "fraudulent," "flagrant" and "willful." These words do not change the structural essence of the cause of action. It remains as a cause of action on contract.

(Citations omitted).

In Jacobson v. Yaschik, 249 S.C. 577, 580, 155 S.E.2d 601, 603 (1967), Ms. Jacobson, who owned 25% of the stock, sued Mr. Yaschik, who owned the remaining 75% of the stock and was "the president, general manager, majority stockholder and dominant figure in the corporation." Ms. Jacobson *alleged* that Mr. Yaschik was "in violation of his fiduciary duty to her as a fellow stockholder" because he convinced her to sell him her 25% of the stock for \$30,000 without disclosing that he already had agreed to sell 100% of the stock to a third party for \$144,000, of which total Ms. Jacobson's share would have been \$36,000. *Id.* at 581, 155 S.E.2d at 603 (emphasis added).

The Court held that no matter how many different ways she framed her claims that Mr. Yaschik had fraudulently breached the duty he owed to her, "the plaintiff has stated only one cause of action," *Id.* at 586, 155 S.E.2d at 606; namely, "that officers and directors of a corporation stand in a fiduciary relationship to the individual stockholders and in every instance must make a full disclosure of all relevant facts when purchasing shares of stock from a stockholder." *Id.* at 584-85, 155 S.E.2d at 605.

The foregoing clearly establishes that Andrews has but a single cause of action and that his cause of action falls squarely under Section 33-8-420, quoted above, which codifies the primary right of shareholders and primary duty of officers on which only a single cause of action against him can be based.

B. Section 33-8-420 Has Abrogated The Common Law.

In the purported Answer and Counterclaims, Andrews asserts common law causes of action against Broom, in addition to relying on Section 33-8-420. This type of pleading is unavailing because Section 33-8-420 has abrogated Andrews' common law claims.

In this regard it is essential to keep in mind not only Section 33-8-420, which codifies South Carolina's standards for corporate officers, but also Section 33-8-300, which codifies those standards for corporate directors. Andrews also pled a separate cause of action under 33-8-300. (Amd. Answer, ¶¶ 59-64). Indeed, the Official Comment to Section 33-8-300 states that it "defines the general standard of conduct for directors." S.C. Code Ann. § 33-8-300 (Law. Co-op. 2002). Plainly, therefore, these parallel sections reflect the Legislature's intent both to codify the duties owed by corporate officers and directors to shareholders and to attach time limitations within which actions may be brought against officers and directors for breaches thereof.

The conclusion that Andrews' common law causes of action have been abrogated also is manifest from the fact that Section 33-8-420(d) states that an "officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section." S.C. Code Ann. § 33-8-420(d). Indeed, the Official Comment to Section 33-8-420(d) states that it is "self-executing, and the individual director's exoneration from liability is automatic." Plainly, therefore, Section 33-8-420 abrogates the common law as to the very claims Andrews is asserting here because if Broom complied with the standards set out in Section 33-8-420, he "is not liable" to Andrews "for any action taken as an officer, or any failure to take action," regardless of whether the claims asserted in the complaint are framed as arising solely under the common law. Id.

Equally dispositive of this issue is the fact that the common law claims asserted by Andrews are precisely the same claims contemplated by Section 33-8-420, since the duties it imposes on officers of a corporation extend not only to the corporation but also to its shareholders. See Section 33-8-420(a)(3), which provides that "[a]n officer . . . shall discharge

his duties . . . in a manner he reasonably believes to be in the best interests of the corporation *and* its shareholders." S.C. Code Ann. § 33-8-420(a)(3) (emphasis added).

To the extent there is a presumption that the common law prevails – such presumption is entirely inapposite because it only applies "when there is no binding South Carolina precedent or statute." 6 South Carolina Jurisprudence, Common Law, § 13, at 76 (1991); see Page v. Winter, 240 S.C. 516, 518, 126 S.E.2d 570, 572 (1962) ("Since there has been no legislative action in this state relating to the matter, we must be governed by the policy of the common law . . ."). Here, of course, there has been specific legislative action in the form of a statute that deals squarely with the standard of care and duties owed by corporate officers such as Broom to shareholders such as Andrews.

Moreover, if Section 33-8-420 did not abrogate the common law, its enactment (and the enactment of its sister provision, Section 33-8-300) would be meaningless because a plaintiff could follow the course Andrews seeks to pursue in this case: namely, assert common law causes of action, and thereby deny to corporate officers the protection from liability granted them by the Legislature in Section 33-8-420(d). In short, if Andrews' counterclaims as purportedly pled are accepted, he will have effectively stricken Section 33-8-420 from the statute books of South Carolina merely by claiming that he is bringing common law causes of action.

For these reasons, Section 33-8-420 abrogates the common law and all of the common law counterclaims were properly dismissed.

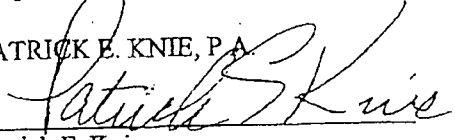
CONCLUSION

For the reasons set forth herein, all of the claims were properly dismissed because they fail to state facts sufficient to constitute a cause of action against Broom. Therefore, Broom

respectfully requests this Court deny the pending motion for reconsideration made pursuant to Rule 59(e), SCRCP.

Respectfully,

PATRICK E. KNIE, P.A.


Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Telefax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Telefax (864) 232-4395

ATTORNEYS FOR PLAINTIFF
QUENTIN S. BROOM

Date: December 17, 2012

Spartanburg, South Carolina

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2008-CP-42-03397

QUENTIN S. BROOM, JR,

Plaintiff,

vs.

TEN STATE STREET, L.L.P.,
TIMOTHY D. SCRANTON and H. HUGH
ANDREWS,

Defendants.

COPY

TRANSCRIPT OF RECORD

October 5, 2011

Spartanburg, South Carolina

Ordered: October 16, 2011

Delivered: October 21, 2011

B E F O R E:

THE HONORABLE J. MARK HAYES, II, Presiding Judge.

A P P E A R A N C E S:

MR. DAVIS GILREATH, Esquire
MR. PATRICK E. KNIE, Esquire
Attorneys Appearing for the Plaintiff

MR. RODNEY F. PILLSBURY, Esquire
MR. R. DAVIS HOWSER, Esquire
Attorneys Appearing for the Defendants

Pamela Faucette
Circuit Court Reporter

Pamela Faucette, CVR - Home: 864-574-9534 Cell: 336-260-2864

I N D E X O F W I T N E S S E S

(No Witnesses were called by either party.)

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I N D E X O F E X H I B I T S

Plaintiff's Exhibits:	Marked:	Received:
(None)		

Defendants' Exhibits	Marked:	Received:
(None)		

Court's Exhibits	Marked:	Received:
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1 October 5, 2011

9:32 A.M.

2 THE COURT: All right. So, I take it that, since
3 we're back together, that the mediation was not
4 successful?

5 MR. GILREATH: No, Your Honor.

6 MR. PILLSBURY: That's correct, Your Honor.

7 THE COURT: And, so, I still have to make a decision
8 on the Defendant's third-party Plaintiff's motion to
9 alter or amend my prior summary judgement ruling. That's
10 still left to do. Did we finish those arguments?

11 MR. GILREATH: Yes, sir.

12 MR. PILLSBURY: Yes, Your Honor.

13 THE COURT: Okay. Then, we have ---

14 (Pause)

15 THE COURT: Let's -- let's take up this issue first
16 on -- that Mr. Knie raises in his memorandum to dismiss
17 about the filing of the amended answer and counterclaims.

18 MR. GILREATH: Your Honor, let -- let me address
19 that and kind of update the Court on a couple of -- this
20 thing is kind of a case as you'll I think will appreciate
21 after we get started.

22 And this -- this is where we see it this morning and
23 this is something really we dug into this morning and got
24 over here and saw an order in Pat's file that we believe
25 -- I wasn't aware of that some of this stuff had been

1 filed.

2 But this -- let me just kind of go back and give you
3 a little short history.

4 What -- what happened is, we filed a complaint back
5 in -- what '05, Pat?

6 MR. KNIE: Yeah.

7 MR. GILREATH: And they filed an answer. And, then,
8 on May -- and it's -- it's in our papers, May 26th or
9 something of '06, they filed a motion to amend the
10 complaint and assert a third-party complaint
11 counterclaim.

12 That notion was never heard and no order was ever
13 handed down on that motion. Then, we got a 40(j) order
14 that comes in.

15 And I'll have to admit that we just saw this --
16 we've probably seen it before, but, in the context of
17 where the case stands now, what that order says -- and it
18 was entered on June the 10th '08, before there was ever
19 any ruling on his counterclaim.

20 And it says, "In accordance with 40(j), the statute
21 of limitation shall be tolled during the time the case is
22 stricken for a period of up to one year."

23 "All pending motions and orders in this suit will be
24 deemed as pending or in effect in the newly re-filed
25 lawsuit."

1 So, then, what happens is, within the appropriate
2 time frame, Pat filed a new suit in '09?

3 MR. KNIE: June 30th of '08.

4 MR. GILREATH: June 30th of '08. Mr. Howser filed a
5 new answer to that. Pat says that Rodney called him up
6 and said, "I'm not going to file an answer." And Pat
7 says, "That's fine."

8 So, the answer -- the original answer he had filed
9 would still be out there. And, under this order, I -- I
10 assume, his motion and order to amend is still pending
11 and has not yet been ruled on.

12 Now, unfortunately, we all got under the assumption
13 that, that had happened. But it has not happened. So,
14 we -- and we've actually filed motions -- a motion to
15 dismiss his pending counterclaim and third-party
16 complaint.

17 And -- and, technically, they are not pending yet
18 because there's been no order allowing them to be filed.
19 And I don't think we can waive that.

20 I think that order -- I'm not trying to play any
21 kind of "gotcha" with him. I mean, but I think his --
22 his rights under that order, whatever they are, if the
23 Court ruled and they said "All right, I'm going to grant
24 that motion."

25 Then, he files that motion, then, I think we got to

1 file -- we need to re-file an answer and -- to that, and,
2 then, we would file, obviously, pretty much the same
3 motions that we've got out there now.

4 I mean, our -- our position is going to be pretty
5 much the same when the case gets procedurally back in
6 that posture.

7 And -- and we're going to be arguing number one,
8 that he has not met the requisites of Rule 23 for a
9 derivative cause of action. He didn't file the demands
10 and all of that.

11 I'm not sure if the Court could rule on that today
12 because it would be ruling ---

13 THE COURT: Oh, I intend to rule on that today.

14 MR. GILREATH: You do?

15 THE COURT: Yes, sir.

16 MR. GILREATH: That's fine. We'll -- we'll --
17 that's -- that's good.

18 THE COURT: This case has been pending somehow with
19 the court system what, since 2000, 2001?

20 MR. GILREATH: Right.

21 THE COURT: And I've had it set for a day certain
22 for the end of October.

23 MR. GILREATH: Right.

24 THE COURT: And I asked you all to come here to
25 let's get all of these motions resolved.

1 MR. GILREATH: Right.

2 THE COURT: And I see that everybody has acted as if
3 the Defendant had filed that answer. Motions have been
4 filed by Plaintiff wanting me to dismiss parts of that
5 answer and counterclaim.

6 MR. GILREATH: Right.

7 THE COURT: So, I don't think anybody is surprised
8 by anything.

9 MR. GILREATH: Right.

10 THE COURT: So, I'm ---

11 MR. GILREATH: I -- I just bring that to the
12 Court's ---

13 THE COURT: Okay.

14 MR. GILREATH: --- I just -- the only reason I
15 mention that is I'm -- I'm just trying to get it
16 procedurally where it is.

17 I mean, I -- I think, as far as we're concerned, if
18 the Court is ready to rule on that derivative thing, I
19 mean, that's going to be something the Court is going to
20 have to rule on.

21 And anytime that the Court tells me they're ready to
22 rule, I'm not going to say I want to come back from
23 Greenville and come back over here another day. I'm
24 getting tired of getting on there on I-85.

25 THE COURT: I-85 is dangerous from Greenville.

1 MR. GILREATH: Not near as bad coming this way in
2 the morning as it was all those people going south.

3 But -- so, we're -- we're prepared to -- to argue
4 that and to argue the other points that are in our
5 motion.

6 There's some -- and there also a -- there's a statue
7 of limitations argument that -- that, you know, that we
8 made that even, if his claim was good, there's a two-year
9 statute that would apply to them. So...

10 THE COURT: All right. Let me ask ---

11 MR. GILREATH: So, that's -- that's our position.
12 And, then, we'll be prepared to argue that as -- as soon
13 as he wants to respond to what I just said.

14 THE COURT: All right. Do -- do you disagree with
15 the procedural history that was given?

16 MR. PILLSBURY: Here's -- here's what I know, Your
17 Honor, that we -- we filed a motion in -- in May. And,
18 with that motion, we had the amended answer which was
19 filed as part of that motion.

20 THE COURT: May -- May of two thousand and eight
21 (2008)?

22 MR. PILLSBURY: Two thousand and six (2006).

23 THE COURT: Two thousand and six (2006)? All
24 right.

25 MR. PILLSBURY: And -- let me ---

1 MR. GILREATH: The point I was making, Your Honor,
2 is it never got an order --

3 MR. PILLSBURY: If I could please ---

4 MR. GILREATH: --- an order about that.

5 (Brief Pause)

6 MR. KNIE: Rodney, I've got it if you want it.

7 MR. PILLSBURY: No, I've -- I've got it.

8 (Brief Pause)

9 MR. PILLSBURY: If I may, Your Honor. I --- I -- and
10 this is my copy that I'll ---

11 (Document handed up to the Court.)

12 MR. PILLSBURY: But it was stamped as -- as filed.
13 Okay. And what happened is, in -- in trying to
14 reconstruct the file, Your Honor, when that issue was
15 raised, for the first time last night at 5:15, it -- I do
16 not have a cover letter, but there was an order -- if I
17 may just tender it.

18 (Document handed up to the Court.)

19 MR. PILLSBURY: There was order that was submitted
20 to Judge Cole, who was the administrative judge at that
21 time, that -- and -- and basically it was all by consent
22 at that juncture.

23 And my recollection is that Mr. Knie and I had a
24 discussion after a few months -- you know, after a month
25 or so had gone by, and he just said well, he was going to

1 go ahead and file his answer. And, so, he files --

2 THE COURT: He was going to go ahead and file his
3 answer; he being...?

4 MR. PILLSBURY: Mr. Knie was going to -- filed an
5 answer on September the 25th ---

6 (Document handed up to the Court.)

7 MR. PILLSBURY: --- answering the amended complaint.
8 On June the 24th ---

9 THE COURT: Of two thousand and...?

10 MR. PILLSBURY: Yes, the date -- years are
11 important. June 24th, two thousand and seven (2007), the
12 -- the parties executed a consent scheduling order that
13 was prepared by Mr. Knie. And, if I may tender it,
14 please.

15 (Document handed up to the Court.)

16 MR. PILLSBURY: And that order that he prepared,
17 that was an order of the Court, said that the
18 counterclaims had been filed.

19 So, by two thousand and seven (2007), there was no
20 reason to believe that there was an issue with the
21 amended complaint being filed.

22 And -- and, so, I -- I -- I do not see an order by
23 -- that was ever signed by Judge Cole... You know, it has
24 been filed. It's been answered. It has been litigated
25 for, you know, four (4) plus years.

1 And last night, like I said, I think about 5:15 I
2 got their memorandum in support for the first time
3 raising the issue about that -- whether or not it had
4 been filed.

5 And, I mean, I -- I think Judge Couch's order trumps
6 it; that, you know -- I mean, if -- if the Court has
7 taken the position previously that the documents were
8 filed, then, it -- for me to go back after the fact and
9 say, "No, they weren't" -- and -- and, like I say, that
10 was a consent order that Mr. Knie prepared that all the
11 Counsel signed off on.

12 And, if there was an issue at that point, that
13 nothing had been filed, it should have been raised.

14 **THE COURT:** Okay. I mean, the way I see it,
15 everybody knew about it. Everybody has acted as if it
16 was filed.

17 Everybody has -- and substantively the Plaintiffs
18 have filed papers or motions with the Court wanting me to
19 address the things that are in the amended answer and
20 counterclaim.

21 And, so, I would like to go ahead and -- and hear
22 the Plaintiff's motions because they want me to dismiss
23 the amended answer -- I mean, dismiss the counterclaims.
24 So, I don't think anybody is surprised by that.

25 **MR. GILREATH:** We -- we agree, Your Honor. And

1 that's -- that's fine. In fact, those are -- the couple
2 of things that he just told you, that's -- that's why
3 this case is so old as far as -- to get all of that.

4 But, I mean, I -- and as I just said earlier, even
5 -- even if Your Honor said, "Okay, there's never been an
6 order, you could -- if you granted it today, it would be
7 valid.

8 I mean, he's -- he's not -- his motion is -- would
9 still be alive based on the 40(j) order. That's what I
10 realized this morning.

11 And, I mean -- and there's been so much action
12 taken, as far as we were concerned, it's ---

13 **THE COURT:** Now, I've had a case before where
14 documents were represented me where -- and a summons and
15 complaint was prepared, after a final judgment was
16 entered, and the lawyers asked the judge to nunc pro tunc
17 the filing of the summons and complaint back to a time
18 where, in my opinion, the summons and complaint is what
19 gives the Court jurisdiction.

20 So, actually, they asked the Court to take
21 jurisdiction and, then, back date it to the date that you
22 took the jurisdiction of it. So, you know, we -- I mean,
23 I -- I don't think there was any harm to anybody if we
24 proceed as if it's ---

25 **MR. GILREATH:** I -- we agree, Your Honor.

1 THE COURT: Okay.

2 MR. GILREATH: We're -- we're prepared to argue that
3 motion and we've got it -- we've got it teed up and if
4 you want me start arguing, I'm ready to go.

5 THE COURT: Okay.

6 MR. HOWSER: Well, Judge, may I just interject? I'm
7 -- I'm Dave Howser and I represent Ten State Street and
8 Tim Scranton. And I'm only collaterally I guess
9 involved.

10 So, it's really a -- a -- an argument between Mr.
11 Pillsbury's client and -- and Mr. Knie's and Mr.
12 Gilreath's client.

13 THE COURT: Did you have anything that you -- you
14 want to add to it?

15 MR. HOWSER: Judge, I think I'd be better off being
16 quiet.

17 THE COURT: Okay.

18 MR. GILREATH: Your Honor, I think I can
19 affirmatively say I'm not going to say anything about his
20 client at this motion.

21 MR. HOWSER: I just wanted to clarify that, Judge.

22 THE COURT: All right.

23 MR. GILREATH: Your Honor -- so -- so, we're on our
24 motion -- on our motion to dismiss. And -- and the --
25 the basic heart of our motion is that he -- he has failed

1 to -- he -- he basically is asserting what is a
2 derivative claim.

3 And he has not complied with the requirements of
4 Rule 23(b)(1) of the South Carolina Rules of Civil
5 Procedure, which deal with derivative claims and has a
6 number of requirements.

7 And I'm going to go through each of those briefly.
8 We've got all that laid out in our papers which we sent
9 to you yesterday.

10 But, number one, the amended answer and counterclaim
11 were not verified. That -- that is a -- that's not an
12 optional requirement. The Rule says the complaint shall
13 be verified.

14 And, then, it goes on and says, "The complaint shall
15 allege with particularity the efforts, if any, made by
16 the Plaintiff to obtain the action he desires from the
17 director of comparable authority and necessary for the
18 shareholders and members and the reason for his failure
19 to make them." (Phonetic)

20 Then, the next requirement of the Rule -- and, in
21 the *Strickland* case we cited, which was a District Court
22 case, says the -- the requirements of Rule 23(1) are to
23 be "vigorously enforced and failure to meet them requires
24 dismissal of the suit." And that's a federal court case
25 but it's dealing with basically the same Rule.

1 Number two, there's nothing in the complaint that --
2 that refers to or -- or satisfies the legal requirement
3 of a pre-suit demand on Tri-Star's officers or directors
4 or owners.

5 He's failed to allege a proper demand, failed to
6 allege that they refused his demand. And he's failed to
7 allege the -- that there was a -- a -- the requirement
8 for a demand would be excused because of utility.

9 The -- there's -- there's just nothing there to meet
10 the requirements of a demand. And there's -- the -- the
11 case that we cited goes into that.

12 It's a Court of Appeals case. It's the *Carolina*
13 *First Corporation* case -- which I might add just so that
14 Your Honor understands the history of that case, when you
15 look it up on Westlaw you see that cert (phonetic) was
16 granted, but the -- the case is been out there a long
17 time. And you don't ever find an opinion from the
18 Supreme Court.

19 I talked to Wallace Lisik (phonetic) over at the
20 White firm who was involved in that case and Johnny
21 Hagens (phonetic) was on the other side of it. And it
22 was -- I knew all the players in it because they were all
23 from Greenville.

24 And what happened is they went down and actually arg
25 -- the Supreme Court granted cert. They actually had

1 oral arguments in Columbia. And, from what I understand,
2 the oral arguments didn't go too well for Mr. Hagens.
3 And, about a day or two later, they settled the case and
4 the appeal was dismissed.

5 But that's -- that's not -- I don't see that
6 anywhere in Westlaw. But that's what Wallace told me.
7 So, I just bring that to the Court's attention.

8 They failed to allege that a proper demand was
9 wrongfully refused. And they failed to allege to demand
10 any utility.

11 So, we think assuming that, that claim -- that claim
12 is out there and it's properly filed and everything, as
13 we're already discussed here, that the claim still should
14 be dismissed because they failed to comply with the
15 requirements of Rule 23(1).

16 We talked about the -- they've got a lot of causes
17 of action in their complaint, Your Honor. And we -- when
18 you talk about how Rule -- section 33-8-420 and 33-8-- I
19 think it is 300, our position is that those sections --
20 and I think the law in this state is clear that those two
21 sections, one dealing with officers and the other one
22 dealing with the duty of directors, abrogated all of the
23 common law causes of action that you could have.

24 And there is no common law cause of action where a
25 shareholder can sue another shareholder. And that's what

1 he's attempting to do.

2 Those two sections give rise to two causes of
3 action; one dealing with the wronging of an officer and
4 one dealing with the wronging of a director. But those
5 causes of action belong to the corporation and are
6 properly asserted in a derivative action.

7 Now, he has actually, in his complaint, mixed in
8 with all of his other seven, eight, or nine causes of
9 action, he -- he does have a -- a separate cause of
10 action under each one of those statutes.

11 But that's still a derivative claim and, therefore,
12 must still be dismissed because he did not comply with
13 the proper requirements of Rule 23(1).

14 There are also -- assuming that everything related
15 back and whatever, I -- I -- I don't know whether we've
16 actually got a motion pending on this or not right now,
17 but even if he properly asserted those two causes of
18 action, and -- which he can't because they're derivative
19 -- they're subject to the two-year statute.

20 And Mr. Andrews long knew of what he was complaining
21 about there before he filed his complaint assuming it
22 relates back to May 26th of '06. He knew about it in '04
23 and earlier because he was getting tax returns and he was
24 getting financial statements.

25 So, the statute would have run on that. So, we

1 believe, in the posture that the case is right now, he
2 has tried to assert a derivative claim and he has failed
3 to -- to meet the requirements of Rule 23(1), which must
4 be strictly construed. And, therefore, the Court should
5 dismiss that claim. And --

6 THE COURT: That would be to all of the
7 counterclaims?

8 MR. GILREATH: All the counterclaims, yeah. The
9 counterclaims have got to go away.

10 THE COURT: All right.

11 MR. PILLSBURY: May it please the Court, Your Honor?

12 THE COURT: (Nods affirmatively.)

13 MR. PILLSBURY: Fundamentally, there's a mis-
14 characterization of the amended answer and the
15 counterclaims.

16 There are claims that Mr. Andrews has individually.
17 And there are claims that he is also bringing on behalf
18 of Tri-Star that -- the entity.

19 Tri-Star was a -- it -- it was a LLC. These two
20 were the only owners, fifty/fifty (50/50) owners.

21 And I have in -- I believe previous motions, I -- I
22 -- because the paper on this file is so thick -- it's not
23 disputed that based on all of the tax returns for Tri-
24 Star Communications, they were 50/50 owners of the
25 business.

1 I think -- and, so, the -- the -- the first thing is
2 that this complaint is -- is brought both as a direct
3 action that Mr. Andrews has a right to do as a
4 shareholder.

5 And the -- the case that is pretty much on point for
6 that one *Hight vs. Thomas and Howard Company* (phonetic).
7 And -- and what -- what *Hight* stands for is -- I need to
8 -- yeah --

9 (Off-the-Record Comments)

10 MR. PILLSBURY: If I may?

11 (Document handed up to the Court.)

12 MR. PILLSBURY: *Hight* stands for the proposition
13 that, if a shareholder is uniquely injured, then, that
14 shareholder may bring an action directly for those
15 damages.

16 The -- when -- when he talks about a shareholder
17 derivative suit, the classic situation -- and -- and all
18 of the cases that he cites are large corporations with
19 many, many, many shareholders.

20 And like in *Carolina First*, the Court said, "The
21 primary purpose of Rule 23 is to prevent unrestrained use
22 of derivative actions by minority shareholders which
23 would undermine the basic principle that the decisions of
24 the corporation should be made by management or voted on
25 by the majority of shareholders."

1 The *Strickland* case that he cites says that "The
2 policy requirement for a demand, on the Board of
3 Directors and shareholders, is designed to require a
4 resort to the body legally charged with the conduct of
5 the company's affairs before licensing a suit in the name
6 -- in the company's name by persons not so charged."

7 And -- and, so, what you have is a fundamental
8 premise of, if I've got five shares of GM stock, that I'm
9 going to basically -- if I'm going to hold the -- if I'm
10 going to say, "I am GM," and I'm going to sue on behalf
11 of GM, that's why Rule 23 applies.

12 When you have, in essence, a closed corporation or,
13 as the Plaintiff alleges in the complaint, a partnership,
14 the -- the Plaintiff's allegation was that Broom and
15 Andrews were partners. That, in that situation, all of
16 the policy reasons that you have for a shareholder's
17 derivative suit simply don't apply.

18 Which is why -- and, so, in essence there's two
19 arguments here. One is that, under the law, under *Hight*,
20 we are entitled to bring a direct action because we were
21 specifically harmed. And the way that we were harmed --
22 and does Your Honor have a copy of the amended complaint
23 -- I mean the amended answer handy?

24 I tell you what, let me ---

25 MR. KNIE: It's -- it's actually attached to our

1 memorandum.

2 MR. PILLSBURY: Yeah, it's attached here, Your
3 Honor.

4 (Document handed up to the Court.)

5 MR. PILLSBURY: What -- what I would like to do is
6 just walk you through the allegations, the most pertinent
7 allegations of the complaint -- or the amended answer and
8 counterclaims:

9 Paragraph 25, on Page 5, "Defendant Andrews loaned
10 Tri-Star a hundred and thirty thousand dollars (\$130,000)
11 on or before August 30 -- 31st, two thousand and five
12 (2005)."

13 Paragraph 27, "As of October the 31st, two thousand
14 and five (2005), Tri-Star owed Andrews the sum of three
15 million, six hundred twenty-six thousand, three hundred,
16 ninety-three dollars and seventeen cents."

17 Paragraph 33, "And -- Broom refused to produce the
18 books and records of the businesses to Andrews." And --
19 and, obviously, this is a motion to dismiss everything;
20 "A" has to be assumed to be true and "B" any inference
21 has to go our way.

22 Thirty-four (34), "Without informing, obtaining
23 consent, or authority, the Plaintiff caused -- the
24 Plaintiff sold or caused to be sold the equipment in the
25 possession of the Dominican Republic businesses to third

1 parties for less than fair market value.

2 "Indeed, Defendant Andrews expressly informed the
3 Plaintiff not to do so without his prior approval and
4 consent."

5 Thirty-five (35), "Without informing, obtaining the
6 consent and authority, between January 1st, two thousand
7 and five (2005) and April 30th, two thousand and five
8 (2005), Plaintiff made distributions to himself from Tri-
9 Star in the amount of five hundred and twenty thousand
10 dollars (\$520,000).

11 "The distributions were made at a time that Tri-Star
12 owed Andrews substantial sums of money as a shareholder
13 for a shareholder loan and as a creditor of Tri-Star."

14 So, he has multiple ways that he is owed money from
15 this business. And, at the time that he is owed money
16 from this business, the Plaintiff unilaterally paid
17 himself a half a million dollars plus in salary over a
18 four-month period.

19 What we've learned, since the '06 filing, was that
20 he actually paid himself four hundred thousand dollars
21 (\$400,000) in December of '04.

22 So, even though we're going by the pleadings, what
23 we know factually since then was that, in the course of
24 four months, the Plaintiff had paid himself nine hundred
25 and twenty thousand dollars (\$920,000) in salary at a

1 time that he owed my client \$3.6 million -- or the
2 business owed my -- my client three point six (\$3.6)
3 million.

4 And, so, this would be the classic situation where
5 he has basically taken the assets of the corporation by
6 paying himself an unauthorized salary. He has sold the
7 assets of the business for far less than market value.

8 And, you know, again, there's a lot of information
9 that's come out since this came out in '06.

10 What we found out is that, since the alleged sale of
11 the machines in the Dominican, he's made about one point
12 eight (\$1.8) million dollars off of Dominican business
13 since the -- the machines were sold.

14 So, we have reason to believe that they were never
15 actually sold; he just converted them for personal use.
16 But that's not -- again, it's a factual issue that's come
17 up in the last five (5) years.

18 But, even going by the naked complaint, we see that
19 the allegation is there; that, at the time that my client
20 was owed money, both as a shareholder and as a creditor,
21 in -- in both hats, the Defendant was (a), paying himself
22 almost a million dollars. And -- and two, sold the
23 machines for substantially less than what they were
24 actually worth.

25 And, so, that's why, if you look at the plea for

1 relief on Page 14, it asks for judgement to be entered on
2 behalf -- against the Plaintiff -- by Andrews
3 individually. And it also asks that judgment be entered
4 against him on behalf of Tri-Star.

5 So, there's really two hats that he's wearing here.

6 The -- the Court in *Hight* clearly rec -- clearly
7 recognizes that, "When the actions of a corporation have
8 specifically harmed one shareholder, that shareholder can
9 bring a direct action against the officers of the
10 company."

11 The -- the other issue -- and that's the first
12 argument is that it's perfectly fine with what we're
13 doing.

14 The -- the second argument is that, in situations
15 like this, Courts --

16 (Off-the-Record Discussion)

17 MR. PILLSBURY: In -- in situations where you have
18 two shareholders ---

19 (Document handed up to the Court.)

20 MR. PILLSBURY: --- the -- the Court -- now, this is
21 a Georgia State Supreme Court decision. And I'll get to
22 how South Carolina has recognized the principle, but not
23 yet applied it because the facts haven't been there.

24 But in essence, in -- in that decision...

25 (Brief Pause)

1 MR. PILLSBURY: If Your Honor would turn to what
2 would be the second page of the opinion, the second
3 paragraph up on the left-hand column that begins, "...In
4 the *Instant* case..."

5 What the Court did in this situation was basically,
6 when you have in essence a closed corporation, that it
7 went through the analysis of what are the public policy
8 purposes of a shareholder derivative suit? And do they
9 apply in -- in the instances like this where it is two --
10 two shareholders? And the Court concluded that it does
11 not.

12 It -- specifically it analyzed that the reasons for
13 the -- the Rule 23 derivative requirement, which is to
14 "...prevent multiplicity of lawsuits by shareholders,
15 protects the corporate creditors, by putting the proceeds
16 of the recovery back into the corporation.

17 "It protects the interest of the shareholders by
18 increasing the value of the shares instead of allowing a
19 recovery for one shareholder to prejudice the rights of
20 others not party to the suit. And it adequately
21 compensates injured shareholders by increasing the value
22 of the shares."

23 None of those factors apply here because they're --
24 they're -- it's basically two people. And the guy, who
25 was in charge, had the checkbook, paid himself a million

1. dollars -- nine hundred and twenty thousand dollars
2. (\$920,000) without authority, and, then, sold all the
3. assets of the company.

4. So, there's only two parties that could be privy to
5. that litigation. There are no other creditors other than
6. my client.

7. And I think he contended one of his own companies
8. was owed money; I'm not sure that was something on the
9. books.

10. But there were no outside creditors of -- of Tri-
11. Star. So, there's no injury to any third party in this
12. situation, which, again, you -- if you're doing a
13. shareholder derivative suit -- and that's one of the
14. things that was talked about in the *Babb vs. Rockwell*
15. (phonetic) -- Rock -- Rocke.

16. (Document handed up to the Court.)

17. MR. PILLSBURY: This -- and what -- what I would
18. point the Court to is the very last paragraph on the
19. first page.

20. It -- it -- this is the South Carolina Supreme
21. Court, 1991, recognizing that *Thompson-Dixon* (phonetic)
22. situation that I just discussed.

23. And -- and what the Court concluded was that it
24. recognizes in *Thompson* the Georgia Supreme Court
25. "...allowed a direct shareholder suit for

1 misappropriation of corporate assets where the underlying
2 reasons for requiring a derivative suit were absent."
3 (phonetic).

4 I think the way that the Court phrased it is
5 important. If you -- if you flip over to the next page,
6 assuming we adopt the *Thompson* exception, these
7 Defendants would not be entitled to its benefit unlike in
8 *Thompson* here the record discloses the president -- that
9 there were other creditors basically.

10 So, in the particular facts of this case, what
11 happened is that the Court recognized that, if these
12 shareholders got the money, then, the third-party
13 creditors would basically be screwed.

14 And, so, there was a reason why, in that situation,
15 that the Court didn't adopt it on its facts.

16 Now --, and the reason why I say the wording is
17 important, Your Honor, is because, if the Supreme Court
18 wanted to say, "That's not the law of South Carolina,"
19 then, that's exactly what they would have said.

20 They would have said, "We don't adopt that rule."
21 But, what they -- what they did say is -- you know,
22 assuming we should, we -- we can't do it under these
23 facts.

24 So, you've really got two tiers. You've got one --
25 there's -- it was pled that he was injured specifically

1 because he was owed money. And, at the time he was owed
2 money, the Plaintiff was paying himself and selling the
3 assets of the company below market value.

4 Two -- and that's the *Hight* thing. Two, you have
5 this *Dixon vs. Thomas* which says, when you have basically
6 two shareholders, the whole shareholder derivative
7 situation simply does not apply. And -- oh, the last
8 thing I just wanted to point out --

9 (Off-the-Record Discussion)

10 (Brief Pause)

11 MR. PILLSBURY: Okay. Is the -- the one case that
12 -- and I'll hand up. I've only got one copy, so, I'll --
13 but the case cite for it is 413, SE Second, 847.

14 And -- and it's a Court of Appeals decision from
15 1992. And I -- and it's L-e-s-e-s-n-e, Lesensne?

16 THE COURT: Lesensne.

17 MR. PILLSBURY: Lesensne. Yeah, he corrected me
18 three or four times. And in -- that was a situation
19 where the -- there was a young girl the uncle had the
20 company, kind of misrepresented the value of the company,
21 got her to sell her stock at below value, and she sues.

22 The important principle I think from that case is
23 when the Court recognized, "It is a well settled
24 equitable rule that anyone acting in a fiduciary
25 relationship shall not be permitted to make use of that

1 relationship to benefit his own personal interests.

2 "It is a doctrine repeatedly announced by the Courts
3 of this nation that Courts of Equity will scrutinize,
4 with the most zealous vigilance, transactions between
5 parties occupying confidential relationships towards each
6 other and particularly any transaction between parties by
7 which the dominant party secures any profit or advantage
8 at the expense of the person under his influence."

9 The -- the analogy in that case would be that Mr.
10 Broom is the one that had the checkbook. And he was the
11 one that made -- and he admits -- you know, again, these
12 are factual issues which have been developed.

13 But they're also consistent with the pleadings that
14 he didn't have the authority to pay himself. He didn't
15 have -- well, he admits that he never had the consent to
16 pay himself.

17 He admits that, from 1998 until two thousand and
18 five (2005), he drew no salary. And, so, we -- we --
19 and, Your Honor, there is evidence that has come up,
20 since these pleading were filed five (5) years ago, where
21 we have found evidence that Mr. Broom was writing checks
22 on the company account.

23 And I'll -- I'll just tender this as a Court
24 exhibit.

25 MR. GILREATH: Your Honor, this -- this is a motion

1 to dismiss. I -- I don't think he -- he can't be putting
2 in any exhibits here that deal with the facts.

3 I mean, we're dealing with the pleadings. I -- I --
4 he's getting -- he's straying. And I've let him stray
5 about as far as I can -- can stand.

6 THE COURT: All right. You're noted for the record.
7 Go ahead.

8 MR. PILLSBURY: That is a check that, on the books,
9 would have gone from -- as a loan repayment to the
10 Plaintiff's father.

11 And what we learned in discovery, by subpoenaing the
12 records, was that he actually endorsed that check to
13 himself. His father never touched it.

14 And, so, on the books, it shows "loan repayment."
15 But what we know is that he converted this money
16 personally.

17 So, there is -- which is -- the reason why I raise ;
18 this point, Your Honor, is kind of twofold: One is
19 there's -- there's -- you know, to the extent -- if this
20 Court has any trepidation whatsoever that the *Thompson vs*
21 *Dixon* theory is a novel theory or it hasn't officially
22 been adopted, although I think the *Babb* case makes it
23 clear that it's consistent with South Carolina law, *Evans*
24 *vs the State of South Carolina*, at 543 SE Second, 547,
25 states that basically anytime that you have a -- a novel

1 issue, it should never be resolved as a 12(b)(6).

2 And -- and the reason why I sub -- submitted that
3 information is those pleadings were filed in '06. And
4 there has been a substantial amount of information that
5 we've learned since then that go to the equities that the
6 Court is charged to oversee when there's a fiduciary
7 relationship between the parties.

8 So, we clearly -- within the pleadings we're --
9 we're okay because it's a direct action that's permitted
10 under South Carolina law.

11 Additionally, this is not -- when you have two
12 shareholders, it's not the situation where you would have
13 your Rule 23 shareholder derivative suit.

14 And I -- I think that pretty much covers it. Thank
15 you.

16 THE COURT: Well, I thought he had to -- they had
17 other grounds in their motion as well.

18 MR. PILLSBURY: I'm trying to ---

19 THE COURT: Failure to plead utility, time
20 barred --

21 MR. PILLSBURY: The failure to plead utility assumes
22 that Rule 23 applies. And the -- and -- and the failure
23 to plead utility is kind of -- that's kind of an example
24 of -- you know, what -- what -- what they want is for us
25 to have sent notice to Quentin Broom that he stole money

1 from the company.

2 And -- and he was already on notice, at the time of
3 the sale, when he sold the assets that we objected to it.
4 So, you know, that portion he had actual notice of.

5 And -- and, so, you know, clearly, when he's paying
6 himself almost a million dollars in unauthorized salary,
7 that sending him a note saying that was wrong would be
8 about a futile an effort as possible.

9 THE COURT: Right. But, does -- does your argument
10 support both of your claims of relief on behalf of Tri-
11 Star and also your -- your claim for relief on behalf of
12 the individual?

13 MR. PILLSBURY: The -- I -- I think technically the
14 way it would work, Your Honor, is that the *Hight*
15 decision, where a -- a shareholder can sue directly,
16 would cover Mr. Andrews' individual claims.

17 And I think the *Thompson vs. Dixon* situation would
18 cover to the extent that they are deemed claims on behalf
19 of the corporation.

20 And -- and there's also, you know, case law. And I
21 think it's in the *Lesensne* -- no. What's the name of it
22 that I keep getting wrong?

23 THE COURT: The *Lesensne* --

24 MR. PILLSBURY: The *Lesensne*, that a party should
25 never benefit from a breach of fiduciary duty.

1 And, so, there's a real issue out there about
2 whether or not, even though my client is a 50/50 owner of
3 the business, whether he should get any portion of the
4 recovery from himself.

5 But -- so, the basic issue is, Your Honor, I believe
6 number one, under *Hight*, the direct claims that Mr.
7 Andrews has as a shareholder are permissible. And
8 they're also pled.

9 So, there's -- there's no question that they're in
10 the complaint and it's permitted under South Carolina
11 law.

12 To the extent that there's a shareholder derivative
13 suit, or -- or that type of issue where the corporation
14 is recovering losses, then, that would be that *Thompson*
15 vs *Dixon* where -- that says it's -- those policy reasons
16 just don't apply here.

17 THE COURT: Right. What about the statute of
18 limitations argument?

19 MR. PILLSBURY: I -- I think that related to if --
20 and I was trying to figure that one out. If that related
21 to whether or not the pleading had been filed, that may
22 be what that was for.

23 There's clearly, at -- at a minimum, a statute of
24 limitations is a factual issue. I mean, there's --
25 there's nothing in the pleadings that would suggest, as a

1 matter of law, that the claim is out.

2 And -- and, for what it's worth, Your Honor, this
3 was filed in May of '06. And he could only -- that was
4 within six (6) months of him converting the assets over
5 our objection, and within a year and a half of his paying
6 himself the unauthorized salary.

7 So, there's -- I mean, there's just no way the
8 statute could have run at that point, even a two-year
9 statute.

10 THE COURT: Okay.

11 MR. GILREATH: Your Honor, can I respond just
12 briefly?

13 THE COURT: Is that it?

14 MR. PILLSBURY: Yes. I -- I -- did I address the
15 issues --

16 THE COURT: (Nods affirmatively.)

17 MR. PILLSBURY: Okay. Thank you.

18 MR. GILREATH: Your Honor, several points ---

19 MR. HOWSER: Judge, I'll just say my client is
20 caught in the middle between the fighting between two of
21 them. So, with that, I'll sit down.

22 THE COURT: Okay.

23 MR. GILREATH: I haven't said anything about your
24 client yet and I'm not going to.

25 Your Honor, where -- where Mr. Pillsbury is missing

1 the boat here is that the -- the legislature has very
2 clearly, in those two sections we cite - they're in the
3 corporate code; one of them is dash five hundred and the
4 other is four, twenty-something. (Phonetic)

5 It said those are causes of action that belong to
6 the corporation with respect to any action that an
7 officer takes or a director takes.

8 And all the cases that he cited are minority
9 stockholder cases, oppression cases. And this is not
10 about an minority oppression case.

11 These two people -- one thing is clear in this case
12 that I don't think anybody takes issue with is these two
13 stockholders are worth fifty (50) billion (phonetic). So
14 -- so, whatever happens here or whatever, you know, went
15 back to the corporation, Mr. Broom still gets half of it,
16 and they get half of it. -

17 So, I mean, if you look at *Thompson vs Hight*,
18 *Thompson vs Hight*, I'm very familiar with that case. My
19 friend John Freeman (phonetic) was in it..

20 It's -- it's -- it -- it first says, "Generally, an
21 action seeking a remedy of law for the corporation is a
22 derivative one.

23 "If, however, corporate management has caused a
24 particular loss to an individual, the liability is an
25 asset of the individual." (Phonetic)

1 But here this -- this -- that would be like if -- if
2 Quentin had run out in a company truck or something and
3 run into Mr. Andrews, then, he could sue him for tort.

4 So, whatever Quentin did as an officer or a
5 director, there is no cause of action between officers
6 against other officers or a shareholder against an
7 officer or a shareholder against a director. The law is
8 very clear on that.

9 There's a case that rose here out of Spartanburg.
10 And I'm somewhat familiar with that. I think somebody
11 talked to me about it; I'm glad I didn't get in it now.
12 Of course, we're in this case again (phonetic).

13 This is the case of *Clearwater Trust vs Bunting*,
14 which is at 367, South Carolina, 340 (phonetic). And
15 that involved a stockholder and a closed held corporation
16 involving Spartan -- the Spartanburg television station
17 over here.

18 And the -- it says in one place, "Our decision to
19 impose a fiduciary duty on fellow shareholders are
20 limited to situations that involve oppression of a
21 minority shareholder by a controlling shareholder."

22 (Phonetic) And they cite the *Lesensne* case.

23 They go on and they say, "There is no contention
24 that Bunting was a controlling shareholder." There is no
25 contention here that Mr. Broom was a controlling

1 shareholder.

2 The common -- and, this, by the way, was a five (5)
3 -- a three-two decision where they clearly said
4 shareholders can't sue other shareholders; "This action
5 has got to be brought on behalf of the corporation by a
6 derivative action."

7 And it says, "The Common Law fiduciary duty first
8 recognized in 1913 owed to shareholder by corporate
9 officers and directors has been codified by Sections 33-
10 8-300 and -420."

11 There are no other Common Law causes of action.
12 That -- this is a 19 -- this is a two thousand and six
13 (2006) Supreme Court case.

14 "The trial Court correctly held that Appellant's
15 breach of fiduciary duty claims against Bunting must be
16 brought within the statute's terms."

17 So, it's got to be a derivative action. And this --
18 this is not a derivative action.

19 The Georgia case he cites, and that other case, both
20 of those involve minority stockholders or oppression of
21 an minority stockholder.

22 There's no -- there's been no action here brought by
23 him and neither could one be brought because he's not a
24 minority stockholder.

25 So, where he finds himself is, he's got -- he's got

1 to go back to what the legislature has codified, those
2 two sections. The only actions that can be brought are
3 brought by the corporation.

4 And, of course, you got to go through the demand
5 procedure and whatever the Court says he's got to pay to
6 the corporation he would pay in. Of course, he can get
7 the benefit of half of it because he's a fifty percent
8 (50%) stockholder.

9 And they -- they just cannot ---

10 (Brief Pause)

11 MR. GILREATH: And this -- this is a copy of the
12 Bunting case. And I don't have a copy right on me, but
13 if I could approach and hand that up to Your Honor.

14 (Document handed up to the Court.)

15 MR. GILREATH: That's the case out of Spartanburg
16 that I think clearly supports our -- our position. And
17 -- and I think there's one thing that is clear and our
18 position is, they -- they have not complied with Rule 23.

19 And -- and it should be a derivative claim. And
20 they haven't complied with it, so...

21 And, even if Your Honor said -- if they came back
22 and said, "Well, we want to amend and make it a
23 derivative claim," it's too late now. The statute has
24 already run on that.

25 So -- so, they would be time barred on that. So,

1 the case ought to be dismissed on -- on -- on that -- on
2 those grounds.

3 This is not a minority stockholder fight. This --
4 this is two individual people. The case they -- they
5 cited out of south -- down there at -- at Myrtle Beach,
6 they -- they did not adopt the *Thomas* exemption.

7 They said, "Assuming we should adopt the *Thomas*
8 exception." However, that case was still -- the --
9 *Bradford Barr vs Rockwell* (phonetic) case, I think that
10 -- I didn't see it until this morning, but that involved
11 I believe -- they were still minority stockholders there
12 too, so...

13 (Off-the-Record Comments)

14 MR. GILREATH: Thank you.

15 (Brief Pause)

16 THE COURT: All right.

17 MR. PILLSBURY: Briefly, Your Honor ---

18 THE COURT: Okay.

19 MR. PILLSBURY: --- or have you heard enough?

20 THE COURT: No, sir.

21 MR. PILLSBURY: The -- the focus is not whether or
22 not the stockholder -- what interest the stockholder has.
23 It's not -- he -- he says that it is limited to minority
24 shareholder situations.

25 The rule applies when a stockholder has suffered a

1 particular harm. That's the focus. And that's the rule.

2 And -- and that's where we are is that, as opposed
3 to Mr. Broom, we've suffered a particular harm because he
4 was paying himself and not paying our debts or our loans.

5 And the -- the case of *Ward vs Griffin* (phonetic),
6 which is 367, SE 2nd, 703, again, it -- it just recognizes
7 the *Angier* (phonetic) principle, "In corporations that a
8 stockholder may individually sue corporate officers --
9 corporate directors, officers, or other persons when he
10 has sustained a loss separate and distinct from that of
11 others stockholders generally."

12 And that's exactly where we are.

13 (Brief Pause)

14 MR. PILLSBURY: I'll -- I've got a copy of that.

15 (Document handed up to the Court.)

16 (Brief Pause)

17 THE COURT: Okay. Now, we have Defendant Hugh
18 Andrews' motion to compel or alternatively a motion to
19 strike.

20 And I would -- gentlemen, I -- I know that we
21 received some documents through email yesterday. Be sure
22 that you all have got those filed with the clerk of
23 court's office.

24 (Off-the-Record Discussion)

25 MR. PILLSBURY: Okay. Your Honor, this is the Evans

1 vs State case that I mentioned about resolving a
2 12(b)(6) issue.

3 (Document handed up to the Court.)

4 MR. PILLSBURY: I'm ready when you are, Your Honor,
5 on our motion.

6 (Brief Pause)

7 THE COURT: All right.

8 MR. PILLSBURY: This case was filed in two thousand
9 and five (2005). And I had served interrogatories on the
10 Plaintiff.

11 Interrogatory Number 5 is -- asks for, "An itemized
12 statement of damages, exclusive of pain and suffering,
13 claimed to have been sustained by you in this action,"
14 the standard interrogatory from Rule 33.

15 I don't have the exact date that I served the
16 original interrogatory. It may be -- let me look and see
17 if I attached it.

18 (Brief Pause)

19 MR. PILLSBURY: It would have been served in two
20 thousand and six (2006). On February 28th of two thousand
21 and seven (2007), I received answers from the Plaintiff
22 that said, "The Plaintiff has suffered loss of income,
23 diminution of his interests in Akilah..." -- A-k-I-l-a-h,
24 Limited -- "...loss of use of his property, payment of
25 excessive attorneys' fees and management fees, as well as

1 other consequential and related damages."

2 I deposed Mr. Broom or Mr. Howser and I both deposed
3 Mr. Broom in June of two thousand and seven (2007). At
4 that time, he hadn't articulated, with any specificity,
5 any damages. And we were coming up on the two-year
6 anniversary of the lawsuit.

7 Mr. Howser -- Mr. Knie, in the deposition -- they
8 originally took the position that we had to ask all of
9 our questions that day; he was only there for that day.

10 When they realized he had not articulated any
11 damages, they said that they would make him available for
12 a subsequent deposition on the issue of damages.

13 I filed a motion for summary judgement ---

14 (Off-the-Record Discussion)

15 MR. PILLSBURY: Your Honor, I filed a motion for
16 summary judgement as a result of that deposition. And
17 this would have been -- and I apologize for not having
18 the date, but his deposition is in June of two thousand
19 and seven (2007);

20 In his deposition, he said, "I've got the mis-
21 payment of management fees and I've got this loss -- this
22 -- I'm -- there are documents that say I own twenty-five
23 percent (25%) instead of the fifty percent (50%)" that he
24 thought he had.

25 But there was no articulation with any specificity

1 as to what dollar amount that meant.

2 In his deposition, he acknowledged that my client
3 had loaned six hundred thousand dollars (\$600,000) to the
4 offshore entities.

5 So, whatever money was left over in the offshore
6 accounts, the first six hundred (\$600,000) came to my
7 client. And, then, they would split the rest. The
8 offshore accounts don't have in excess of six hundred
9 thousand dollars (\$600,000).

10 The -- on November the 5th of two thousand and seven
11 (2007), Mr. Knie identified, for the first time, that his
12 client believed he was owed thirty-nine thousand, ninety-
13 three dollars (\$39,093) for overpayments of excessive
14 attorneys' fees and management fees.

15 At that time, he -- that's when the whole issue
16 about that A&A Entertainment came into play, when he was
17 claiming that whatever damages are associated with A&A
18 Entertainment, those will be damages that I will claim.

19 And he didn't have that information, at that time,
20 so, he would not have known a number. I get that.

21 But I -- which gets us back to the first form of
22 that -- that item of damages, one that legally I don't
23 think he can claim, and that's the subject of that
24 outstanding order from Your Honor.

25 That's in November of two thousand and seven (2007).

1 And, then, we had a hearing over here on summary
2 judgement. And I believe I had sent a motion to alter or
3 amend.

4 But there's a September 27th, two thousand and seven
5 (2007) -- I mean -- I'm sorry, September 27th, two
6 thousand and ten (2010) letter from Mr. Knie that says --
7 and -- and I'll provide this to the Court.

8 But basically says that, "...in addition to the A&A
9 Entertainment..." -- which they believed at that time
10 they were entitled to recover four hundred and fifty
11 thousand dollars (\$450,000) -- he said, quote, "These
12 damages are real -- which will be -- which should be
13 entitled to develop more fully at trial just as he should
14 be able to develop the damages regarding his tax loss and
15 other damages to which I alluded during the summary
16 judgement motion."

17 So, this is over a year ago. He's identified
18 categories of damages that he wants to claim, but I've
19 never got a detailed response to that original
20 interrogatory in two thousand and six (2006) which said,
21 "What number goes with what you're claiming?"

22 The mediation broke down. And immediately, after
23 that mediation, one of the first things I did, is I wrote
24 Mr. Knie and I said, "I need an itemized statement of
25 damages." Because at the mediation, for the first time,

1 they identified numbers ---

2 MR. KNIE: Your Honor, what takes place at a
3 mediation is strictly confidential and is not to be
4 discussed outside of mediation. And I would object to
5 Counsel going into anything that took place in mediation.

6 MR. PILLSBURY: Well, I -

7 THE COURT: Generally I agree.

8 MR. PILLSBURY: Okay. I -- my only point was first
9 time I get any number associated with an item of damage.

10 THE COURT: All right.

11 MR. PILLSBURY: All right. I sent a letter saying,
12 "I need to know this information." And no response.

13 He files his motion to dismiss. I figure we're
14 coming over here, I need to protect myself on this issue,
15 so, I filed my motion to compel or, in -- in the
16 alternative, to strike.

17 Last night, or at 4:20 yesterday, I got the
18 supplemental claim for damages that were originally
19 requested five (5) years ago.

20 The -- the damage request has the thirty-nine
21 thousand dollars (\$39,000) which I've known about; don't
22 have a problem with that.

23 And I'm not sure whether -- Your Honor was cc'd on
24 some of the emails. I'm -- I'm not sure whether Your
25 Honor got a copy of the supplemental answer or not?

1 THE COURT: We -- yes, we got that.

2 MR. PILLSBURY: Okay. And do you have your copy
3 handy?

4 THE COURT: (Nods affirmatively.)

5 MR. PILLSBURY: Okay. Because I want to walk
6 through these sort of line item by line item.

7 The -- the damages in Category B basically, as it
8 appears, the Plaintiff looked at -- realized that he had
9 '02 and '04 tax returns for these entities and ran some
10 calculations where he says he's owed five hundred,
11 eighty-seven thousand, two hundred and five dollars
12 (\$587,205).

13 That is the first time -- now that we are three
14 weeks away from trial -- that I have seen that number or
15 an explanation for it.

16 Now, there's a whole legal issue as to why that item
17 goes away because the split that he talks about was never
18 approved by management or the membership interest was
19 never -- you know, there's a whole different factual
20 issue on why the twenty-five percent (25%) thing is a red
21 herring.

22 But, for purposes of this motion, this is a new
23 number that I see three weeks before trial. Now, one or
24 two things:

25 Either I -- I don't have time to do the homework

1 that is required to respond to this in three weeks
2 claiming over a half million dollars when I've been
3 asking for it for five years.

4 And, if the Court wants to give us more time, I'm
5 okay. But I cannot, over the next two and a half, three
6 weeks, to do all of the discovery that I need to do to
7 investigate this new number at this juncture.

8 Item Number C in -- in that, two points there: One
9 is this is all information based on Mr. Broom's own
10 personal tax returns from '03, '04, '05.

11 So, obviously, he would have known about this in
12 '07. I mean, this is -- if he's claiming this item of
13 damage, this is something that should have been
14 articulated four years ago. It's not based on any new
15 information.

16 Secondly -- and I -- actually I should say this
17 first because this is the -- you know, this is the one
18 that matters. This item of damages is no longer in this
19 lawsuit because it has nothing to do -- the only -- the
20 sole claim that the Plaintiff has against the Defendants
21 at this juncture is civil conspiracy.

22 And there's absolutely nothing that Mr. Howser's
23 clients had anything to do with any write-off of my
24 client's business.

25 I mean, so, that item of damage, it doesn't apply to

1 civil conspiracy at all. And -- and Your Honor has
2 basically kick out all of his other claims against us.

3 So, from a legal standpoint of where the case is,
4 and the claims remaining, Item C goes away. From a
5 factual standpoint, this stuff was clearly something that
6 he would have known when we deposed him in two thousand
7 and seven (2007).

8 The witness that they've identified that ran these
9 calculations I am going to depose on a completely
10 different issue. But this, in essence, is expert
11 testimony. He's not been identified as an expert.

12 And -- and, again, you know, three weeks before
13 trial. I -- I just don't have time to go into a new item
14 of damage that is -- is undoubtably expert testimony.

15 Again, if the Court wants to continue the case,
16 allow -- I'm -- I'm okay, but I'm just saying I can't do
17 it in three weeks.

18 And, then, Item D is the -- that's that old issue
19 pending with Your Honor on the summary judgment that he's
20 claiming damages for this A&A Entertainment, which I
21 think also goes away.

22 So, in essence, the -- the damage claim that I have,
23 Item A is something that was disclosed in '07. I don't
24 have a problem with that.

25 B either I need more time or it's got to go because

1 it's all based on old information that his client had.
2 And I think, if I may, Your Honor, his affidavit that he
3 generated...

4 (Brief Pause)

5 MR. PILLSBURY: In -- in my packet, the affidavit is
6 kind of in the middle. It's the affidavit of Quentin
7 Broom, Jr. And he says that he reviewed the two thousand
8 and two (2002) Dominican Republic tax returns.

9 And, as a result of -- "I was looking for
10 documentation regarding their accounts. As a result of
11 reviewing those returns, I located accounts payable
12 information. I've prepared summaries of those."

13 So, basically what he's submitted three weeks before
14 trial is information on an '02 tax return that I -- that
15 he's had possession of I -- I assume since '02.

16 And, so, you know, Item A is okay. Item B either I
17 need more time or -- or it's -- it's got to go. Item C
18 is not part of the conspiracy claim number one.

19 And number two, the same issue. This is the first
20 time it's been articulated. It's all based on its own
21 tax returns, you know, since '03, '04, '05.

22 And, then, Item D would go, pending Your Honor's
23 issuance of the A&A Entertainment matter. Thank you.

24 MR. KNIE: May it please the Court?

25 MR. HOWSER: Your Honor, may I be -- be heard?

1 THE COURT: Uh-huh (affirmative). You can follow
2 up. Do you -- are you going to join him or are you going
3 to them in --

4 MR. HOWSER: I'm joining him on this issue. Mr.
5 Knie called me yesterday and said would -- would I agree
6 that the res -- responses to Mr. Knie's interrogatory
7 could serve as a supplement to my answers, which I have
8 no problem with.

9 But I'm in the same mode with regard to Item B,
10 getting that information yesterday and here we are
11 twenty-seven (27) days from trial. And it's just
12 possible to -- to -- to respond to that in this period of
13 time.

14 THE COURT: Okay. All right. Yes, sir?

15 MR. KNIE: First, Your Honor, the documents that I
16 used, in preparation of this supplemental response, are
17 -- are documents that have been available to and -- and
18 to all of the parties almost since this litigation began.

19 So, to the extent that they claim a surprise, that
20 surprise has got to be tempered by the fact that they got
21 the documents.

22 Their clients are aware of the numbers in the
23 documents and that there really is no surprise that, for
24 instance, receivables exist. It's always existed;
25 they've had the documents.

1 But to back up, Your Honor, after the deposition of
2 Mr. Broom, in which he attempted to articulate his
3 damages, didn't do a particularly good job during the
4 deposition, I wrote several letters when Counsel asked me
5 to -- to more specifically articulate his damages.

6 And there was the November 5th letter that Mr.
7 Pillsbury referred to where I gave him the thirty-nine
8 thousand dollar (\$39,000) figure.

9 And I also expressed that we had learned about the
10 A&A Entertainment involvement only recently and that was
11 something that we were going to have to develop.

12 Well, when -- when I say that we learned about it
13 and we're going to have to develop it, after that Mr.
14 Andrews puts Tri-Star into involuntary bankruptcy. And
15 this case was stayed for about a year and a half, so, I
16 couldn't do anything.

17 Then, we come back and I want to take three or four
18 depositions to develop damages. Those depositions
19 included two CPAs, Travis Owens, who is a manager of --
20 for -- for Mr. Broom, his -- his secretary and in-house
21 accountant, Claudia Humphries, and a former partner of
22 his.

23 And, to say I was Stonewalled, I had to fight for
24 about a year and a half to -- to be allowed to take those
25 depositions. And not only was I Stonewalled, but, then,

1 they had a lawyer show up from Columbia because the CPAs
2 had their own counsel saying that I -- that those were
3 privileged and confidential matters and that we weren't
4 entitled to them.

5 Ultimately, Your Honor ruled that we were entitled.
6 And we finally took those depositions.

7 Now, that's just to give the Court an overall
8 history of the struggle that we've had. But they have
9 always known our theories the damages.

10 In addition to the letter of November, if I may,
11 Your Honor, in December of two thousand and seven (2007),
12 I wrote a letter to -- to both Mr. Howser and Mr.
13 Pillsbury in which I attempted to further articulate the
14 damages.

15 And I -- if I may, Your Honor, I'll hand up a copy
16 of that letter ---

17 (Document handed up to the Court.)

18 MR. KNIE: --- in which pretty much everything that
19 -- that I provided to them yesterday I have (phonetic).
20 Now, I won't bore the Court with all the -- the -- the
21 complications and internal problems that -- that I've had
22 in -- in securing the numbers that I have provided to
23 them.

24 But they always knew that numbers were coming. And
25 they basically could look to the same documents and, on

1 their own, figure out what they are.

2 Now, when I used the number, for instance, in
3 Category C, claiming that because of an assignment of a
4 receivable that Ten State Street was involved in, Your
5 Honor -- and there's actually a letter that I don't have
6 with me today where one of the members even refers to
7 that assignment taking place.

8 Mr. Broom suffered a tax consequence of a hundred
9 and fifty-three thousand, six hundred and ten dollars
10 (\$153,610). They've always had his tax returns from
11 those years.

12 They've understood our position. They take the
13 position that, in fact, that's not a taxable event. So,
14 the amount isn't even significant to them because they're
15 going to come into court and argue that -- that, that's
16 wrong; their -- their CPA is going to testify otherwise.

17 So -- but we have provided them with the amount now.
18 And we've given them back up as to each tax year when it
19 would have impacted Mr. Broom.

20 Secondly, we've provided them with the figures that
21 there are assets in Callum (phonetic) that total \$2.9
22 million dollars and that my client is entitled to --
23 would be entitled to a significant portion of those
24 assets.

25 And he has been divested of twenty-five percent

1 (25%) of that company by the actions of Mr. And -- Mr.
2 Andrews in instructing Ten State Street to -- to alter
3 the original documents which provided my client with a
4 fifty percent (50%) interest.

5 They concede Item Number 1 and have had that figure
6 for -- for several years.

7 As to Item D, Your Honor, with respect to A&A
8 Entertainment, a spreadsheet was created and was -- was
9 provided to opposing counsel a year, a year and a half
10 ago; I -- I don't know how long, which basically gave
11 them the numbers.

12 They could make the computation themselves showing
13 what the income to A&A Entertainment was for each
14 calendar year.

15 I've actually referred to it in the summary judgment
16 motion. And there is -- there should be a large three-
17 ring notebook that the Court has. And the last exhibit
18 in that notebook is that spreadsheet on A&A
19 Entertainment.

20 So, I -- I think that -- that in claiming surprise
21 they maybe didn't have the exact numbers, but they
22 understood the theories.

23 And they had the underlying documents from which
24 they could have obtained the numbers or made the
25 calculations themselves. And, if they didn't have them

1 before, Your Honor, they certainly have them now.

2 So, we -- we would argue, Your Honor, that we have
3 complied. We have supplemented our answer and that the
4 motion should be denied.

5 MR. PILLSBURY: If Your honor will turn to Exhibit 5
6 of their supplemental responses.

7 THE COURT: Is that towards the back?

8 MR. PILLSBURY: Yes, Your Honor. Mine are not
9 tabbed.

10 THE COURT: Mine aren't either.

11 MR. PILLSBURY: There's -- if I may approach.

12 (Indicating)

13 MR. PILLSBURY: There's like a little tab here.
14 It's an e-mail. There, that's it (indicating).

15 Okay. The gentleman that sent it, that did the
16 calculations, was the accountant for Mr. Broom personally
17 for '06, '07, '08, and '09.

18 I had -- he's not been identified as an expert. He
19 actually has not even been identified as a witness by the
20 Plaintiff.

21 But Mr. Knie and I have agreed that I was going to
22 take his deposition based on Mr. Broom reporting that one
23 point eight (\$1.8) million dollars of income from the
24 Dominican Republic since the year two thousand and six
25 (2006). So, to say that we were on notice of a general

1 category would be true, but that's not sufficient.

2 And, you know, I -- and -- and, again, if -- if Your
3 Honor wants to give us time -- you know, because right
4 now I've got to go get with a CPA to see what they will
5 agree -- you know, whether the calculations are right; I
6 mean, the whole thing that you have to do in discovery.

7 And my point is there's no -- what he talked about
8 with A&A Entertainment is absolutely true.

9 There was a lot of time spent trying to get that
10 information; don't disagree with that one iota, which is
11 why all this stuff that pertains to A&A Entertainment,
12 the reason why that's off the table isn't because of
13 timing.

14 The reason that's off the table is the legal issue.
15 The -- the -- the two issues where I have the timing are
16 this item and -- and the one Item B that, you know, I
17 either need more time or I -- I -- I just don't have time
18 in three weeks after six years to get this.

19 And it absolutely was not based on new information.
20 This was based on his own tax returns that they -- you
21 know, that he's had since '03, '04, and '05.

22 (Brief Pause)

23 THE COURT: All right.

24 (Someone sneezes)

25 MR. PILLSBURY: Bless you.

1 (Brief Pause)

2 THE COURT: All right. I have a question. Is there
3 an outstanding motion of Plaintiffs to amend the
4 complaint that was filed in February of two thousand, ten
5 (2010)?

6 MR. KNIE: Yes, sir.

7 THE COURT: All right.

8 MR. KNIE: And that amendment, Your Honor, solely
9 relates to the A&A damages, simply adding them to the
10 complaint.

11 (Brief Pause)

12 MR. KNIE: I would add I think the Court had
13 deferred hearing that a couple of times simply because
14 there had been no ruling on the motion to alter or amend.

15 So, I guess that's why I think it's still pending.

16 THE COURT: All right. Do you want to -- I would
17 like to go ahead and receive the arguments on that.

18 MR. PILLSBURY: Your Honor, if it helps, other than
19 the A&A Entertainment, which is the pending matter, if
20 the motion is granted ---

21 THE COURT: If the ---

22 MR. PILLSBURY: If the motion to amend is granted, I
23 -- I won't let that get in the way of an October. I -- I
24 don't need the thirty (30) days to respond.

25 I've had notice of the complaint. I can do the --

1 you know, the -- the answer. It would essentially be a
2 mirror of the answer that was filed in '06.

3 So, cleaning up that technicality won't delay the --
4 the trial. I -- I think the -- the ultimate issue is
5 whether or not the amendment is necessary in light of the
6 A&A Entertainment claim.

7 That -- if -- if that helps, Your Honor.

8 THE COURT: I think that does.

9 MR. PILLSBURY: Does that -- I didn't mean to speak
10 out of turn. But I just thought I'd shortcut his ---

11 THE COURT: So, depending on the ruling on the
12 motion to alter or amend, if it goes Defense's way, then,
13 we don't need the amended complaint.

14 If it goes Plaintiff's way, then, the Defense is
15 okay with the amended answer --

16 MR. PILLSBURY: Right.

17 THE COURT: --- as -- as he is suggesting in his --
18 by the one that he's filed? Did I hear that -- did I say
19 that correctly?

20 MR. HOWSER: But that's just -- just to his clients
21 I guess. As to my clients, Judge, if -- if the amendment
22 is allowed, I can anticipate some motions coming with
23 regard to that particular claim.

24 THE COURT: Okay. All right. Okay. Let's do this
25 then: Before we address that, I want to go back.

1 Any other motions that you all know that are outstanding?

2 MR. PILLSBURY: I can't think of any, Your Honor.

3 MR. KNIE: There -- in reviewing the file -- and beg
4 the Court's indulgence; I need some water.

5 (Brief Pause)

6 MR. KNIE: In reviewing the -- the file, I found a
7 motion for partial summary judgment where -- by -- by the
8 Plaintiff in which the Plaintiff argues that the claim of
9 Mr. Andrews for a large receivable and/or a note is -- is
10 -- is time barred because it -- it is a -- a receivable
11 or note that existed since about 2000 or maybe even 1999.

12 And there had been no attempt to collect it and he
13 only asserted it as part of the counterclaim in -- in the
14 third-party action, but he attempt -- has attempted to
15 bring it.

16 That's -- the Court asked and -- and that is
17 outstanding. I -- we -- we can certainly raise that
18 later in another -- in another format at trial if this
19 case actually gets tried.

20 MR. PILLSBURY: I would just -- he's probably right
21 on the motion. It sounds vaguely familiar. I'm just not
22 ready to argue it today.

23 If you want to -- I -- I would ask the Court, if you
24 want to hear the motion, that we just reconvene. I don't
25 need ten (10) days, but I would need a -- you know, a few

1 days to sort of figure out what the motion was and what
2 information there was and if I need affidavits and things
3 like that.

4 MR. KNIE: I -- I think we can defer and raise it in
5 another manner. I -- I just -- the Court asked and I
6 just didn't want to ignore the fact that it existed.

7 MR. PILLSBURY: All right.

8 THE COURT: All right. Let's go back to the -- if
9 you would, to the motion to alter or amend. Refresh my
10 memory on the corporate structure.

11 MR. PILLSBURY: Mr. Gilreath gave me grief about not
12 bringing a projector today. But -- and -- and I'll be
13 glad to provide the PowerPoint as a -- as a visual aid to
14 the Court.

15 But, let me -- the -- essentially, Your Honor, they
16 were 50/50 shareholders of Tri-Star. Let me -- and they
17 were members of Akilah, that A-k-i-l-a-h entity. Akilah
18 was the sole shareholder of Callum (phonetic).

19 Callum, LLC was the entity that was listed as a
20 fifty-one percent (51%) owner on A&A Entertainment in '03
21 and '04. Those returns were -- there were no payments
22 made; there were no anything.

23 Those returns were amended in '05 and early '06 to
24 reflect Drew's Distributing (phonetic). That -- from '05
25 on, it was always Drew's Distributing as a fifty-one

1 percent (51%) owner.

2 So, the -- the schematic goes that they own Akilah,
3 are fifty/fifty percent (50/50%) owners. Akilah is the
4 sole shareholder of Callum.

5 Callum was the entity that was listed here. And --
6 yeah, Callum was the one listed on the return.

7 And -- and to refresh Your Honor's memory, the -- the
8 argument was, if Callum suffered damages because of being
9 listed on a tax return, number one, Callum is the sole
10 entity that has the right to claim that loss.

11 Two is that, that would -- whatever recovery was made
12 would go up to Akilah before there was any transfer of
13 interest to him individually.

14 So, he's two steps away -- two steps removed from
15 being able to claim any damages. But the primary issue
16 was he didn't have a legal right to do it under the
17 agreements that he signed. Does that help?

18 THE COURT: Yes, sir.

19 MR. PILLSBURY: And I -- if it -- if it will help,
20 I'll email Your Honor that -- it's the same PowerPoint
21 that I've shown that sort of walks through what -- where
22 the parties were -- you know, where they were set up and
23 what interest they held.

24 Will that -- is that permissible? I mean, if it -- I
25 don't want to -- you've gotten so much information I

1 hesitate to give you more.

2 If you think it'll be helpful, I'll be glad to
3 provide it. I just don't -- I mean, I'm a little leery at
4 this juncture of putting more stuff out there for you.

5 So, if -- if the Court will find it helpful, I'll be
6 glad to provide it.

7 MR. KNIE: May it please the Court? I -- I wasn't
8 prepared on -- on this one this morning. I'll do my best.
9 Your Honor, I'm having a little trouble with my voice
10 right now.

11 But, the underlying basis is that Mr. Broom and Mr.
12 Andrews each had fifty percent (50%) ownership of Callum
13 by virtue of their ownership of Akilah.

14 And legal malpractice was committed when Ten State
15 Street altered -- excuse me -- when Ten State Street
16 created A&A Entertainment, a South Carolina Corporation,
17 for Mr. Andrews and did not tell Mr. Broom that they were
18 going to make Callum a fifty-one percent (51%) shareholder
19 of A&A Entertainment.

20 And the purpose for doing so, at the time Mr. Andrews
21 was being sued by a company called IET (phonetic) on a
22 supplemental proceeding and he was trying to hide his
23 assets -- and this was an asset that was very valuable to
24 him and that's why he tried to hide it in Callum.

25 So, what we have is we have a South Carolina law firm

1 and a South Carolina Defendant committing malpractice and
2 a conspiracy inside the state of South Carolina.
3 Everything that took place took place in South Carolina.

4 As a result, my client claims that he was damaged
5 because, after they put all of this into Callum, they
6 deprived him of the profits of A&A, as is reflected on the
7 spreadsheet.

8 So -- so, clearly, on a jurisdictional issue, this
9 Court has jurisdiction over these South Carolinians and
10 events which took place totally within this state.

11 That's -- that's about as far as I can take it, Your
12 Honor, without my notes and memo.

13 I got a very specific on-point memorandum that's very
14 short that -- that I'll be happy to -- to -- to send to
15 Counsel and to the Court that probably better articulates
16 what I just tried to say if I may.

17 THE COURT: Well, I believe we've already received
18 all the arguments on it.

19 MR. KNIE: Okay.

20 THE COURT: Okay.

21 MR. HOWSER: And -- and I -- if I may add, Your
22 Honor, that, if the A&A material is added to the amended
23 complaint, then, I'm going to have motions related to that
24 for the very reason that we dispute and do not think that
25 the record supports what Mr. Knie has -- has asserted.

1 And we think that there is no genuine issue of
2 material fact as to those allegations; which will have to
3 be addressed by the Court.

4 **(Brief Pause)**

5 **THE COURT:** All right. Can -- can we take a break
6 for about thirty (30) minutes and reconvene?

7 **MR. PILLSBURY:** Yes, that's fine.

8 **THE COURT:** Okay.

9 **MR. KNIE:** Does -- does the Court need paper copies
10 of either the -- the memorandum on the motion that I -- I
11 emailed to the Court yesterday or of the supplemental
12 responses?

13 I didn't know if the Court had printed those out or
14 not. I'll be happy to hand up paper ---

15 **THE COURT:** I got paper copies. We printed most of
16 the -- most of the things, but there might be something
17 that we did not.

18 **MR. KNIE:** Just out of an abundance of caution, I --

19 **(Documents handed up to the Court.)**

20 **MR. KNIE:** I'm handing to the Court the memorandum of
21 law and the motion to dismiss and the supplemental answer
22 to Mr. Andrews' first set of interrogatories.

23 **(Whereupon, Court's Exhibit Number 1 was marked for**
24 **identification and admitted into evidence.)**

25 **(Whereupon, the proceeding concluded at 11:30 a.m.)**

(No further arguments were put on the record after
the recess was taken. Counsel met with the Court in
chambers.)

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS
3
4 Quentin S. Broom, Jr.,)
5 Plaintiff,) TRANSCRIPT OF RECORD
6 -vs-) 2008-CP-42-3397
7 Ten State Street, L.L.P.,)
8 Timothy D. Scrantom, and)
9 H. Hugh Andrews,)
10 Defendants.) December 17, 2012
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 HONORABLE J. MARK HAYES, II, JUDGE
15

16 A P P E A R A N C E S:

17 JAMES R. GILREATH, ESQUIRE
18 PATRICK E. KNIE, ESQUIRE
19 Attorneys for the Plaintiff

20 KYLIENE LEE KEESLEY, ESQUIRE
21 JOHN S. NICHOLS, ESQUIRE
22 RODNEY F. PILLSBURY, ESQUIRE
23 Attorneys for the Defendants

24 Margaret A. Woods
25 Circuit Court Reporter

COPY

1 THE COURT: Alright, we -- this is the matter of Broom
2 vs. Ten State Street. Got two matters on the docket, we only
3 have two hours worth of time. This -- these matters are
4 scheduled for a total of three hours, are ya'll gonna be able
5 to do 'em in two hours?

6 MR. PILLSBURY: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. GILREATH: Think so.

9 THE COURT: Alright, I believe that we have Mr. Pillsbury
10 on the plate first. Are you ready?

11 MR. PILLSBURY: Yes, Your Honor. I think there are two
12 motions that defendant Andrews has, one is a motion to amend
13 and the other is a, is the motion to reconsider and and
14 Mr. Nichols will handle the motion to reconsider. I'll I'll
15 just address the motion to amend.

16 THE COURT: Alright.

17 MR. PILLSBURY: Is that what Your Honor has?

18 THE COURT: Those are the two that I have, yes.

19 MR. PILLSBURY: Okay, um, ---

20 THE COURT: So and ---

21 MR. PILLSBURY: --- and on the motion to amend, um, ---

22 MR. GILREATH: Your Your Honor, our, I I don't wanna
23 interrupt his argument, but but our position would be that if
24 the other motion is disposed of he's got no right to file a
25 motion to amend so I mean, I -- we we would suggest that maybe

1 they oughta be heard and, I mean, I guess you gotta hear 'em
2 both anyway, I I'll leave that up to Your Honor but ---

3 THE COURT: Well let's start with the motion to
4 reconsider just in the event that Mr. Nichols is more verbosed
5 in what I think that he is then we can only get one in.

6 MR. GILREATH: Alright.

7 MR. NICHOLS: Thank you, Judge, John Nichols here with
8 Mr. Pillsbury. We've filed a memorandum and I'm just
9 basically I'm gonna be very brief in fact upon the memorandum.
10 Our position is that it's it's multi-layered and I I've I've
11 received today the response that plaintiff filed and and it
12 looks like what's been argued long and long except for maybe
13 an additional argument about how the part of the corporations
14 that has somehow supplanted the common law and I'll address
15 that separately but what what we would contend, Your Honor, is
16 first that we have set up claims that are separate apart from
17 the corporation for purposes of whether we have to bring a
18 derivative claim or whether we can bring an individual claim
19 and then if failing that argument we would contend that the
20 Court should adopt the ALI exception to the derivative the
21 requirement that a party bring a derivative claim we have a
22 close corporation and you can't get any closer than what's in
23 this case where there are two, basically two shareholders in a
24 small corporation and what the effect would have if you -- if
25 Mr. Andrews is not allowed to bring a direct claim, he'd have

1 to bring a demand upon Mr. Broom which would obviously be
2 denied in this case where Mr. Broom is the plaintiff suing Mr.
3 Andrews, he, Andrews can't represent, you know, he that there
4 would be a cl -- a fear that he wouldn't be able to represent
5 the other shareholder as well, the other shareholder here as
6 well who is again the other party in the, in the lawsuit;
7 number three, Andrews will derive no benefit by pursuing
8 purely derivative claims, you know, because Broom the wr --
9 the wrongdoer would share in any, in any judgment so it -- the
10 A -- we think that the ALI rule makes sense. I realize that
11 the courts in South Carolina have looked at this issue but I
12 disagree with the plaintiff's characterization of those
13 opinions, there has not been a straight up rejection of the
14 ALI exception. I think I think the best that can be said
15 about those decisions is they've looked at the *Johnson* case,
16 they've looked at the *Thomas* case and what they've said is in
17 those particular cases even if South Carolina were going to
18 follow that rule, the -- those particular cases didn't didn't
19 meet the test because there was not a lack of all of the
20 elements under, uh, for purposes of bringing a a derivative
21 claims so really that's as verbose as I intend to go unless
22 you have any specific questions, Judge.

23 One thing I do wanna say is we do take exception, an
24 exception to the written order that was I think signed on your
25 behalf and filed in this case which appears to go beyond what

1 your bench instructions were which it looked to to us like in
2 your bench instructions you were preserving part of the case
3 but just granting the motion to dismiss as to some of it you
4 felt like that based on your review of the pleadings what was
5 in front of you that it was premature to dismiss some of the
6 claims that Mr. Andrews brought individually so you, so you
7 were not dismissing that but this order that was filed
8 dismisses the entire case and so we would ask that you
9 reconsider that, that there's a case I think it's called
10 *Dutton vs. Pelican Builders* which says that where a court's
11 order is more expansive than what was apparent in the, in the
12 instructions that we're required to raise that by Rule 59
13 motion or we waive the issue so we're raising that and;
14 finally, there are some cases, again I received this right
15 before I headed outta the door in Columbia, but there are some
16 cases that hold that unless the Supreme Court and I I ran 'em
17 off but apparently I didn't pick 'em up outta the tray, Judge,
18 but unless the legislature expressly states in the statute
19 that it is an -- it -- there's an intent abrogate common law
20 that the Court will will consider that legis -- that
21 legislation has passed with the common law in mind, um, I do
22 know that the name on one of the case is *Nuckles*,
23 N-U-C-K-L-E-S, it's from I think the 1920s, it's been cited
24 favorably more recently by the Supreme Court but the, but the
25 Court ru -- has ruled that the common law does not, I mean, a

1 s -- the enactment of the statute doesn't abrogate the common
2 law unless it's clearly expressed by the legislature that
3 that's its intent so I I would take issue with plaintiff's
4 characterization that that the adoption of the Corporation,
5 Business Corporations Act eliminated the plaintiff's common
6 law claim.

7 THE COURT: And the *Nuckles* case is referenced only ---.

8 MR. NICHOLS: It ---

9 THE COURT: --- is it in your brief?

10 MR. NICHOLS: --- it is not, Judge, because I saw that
11 when I saw the memorandum in opposition that was filed as I
12 was walkin' out the door. I may be able to obtain the cite to
13 it off my iPad if I can, if I can get to that but, uh, ---

14 (Whereupon, a discussion was held off the record.)

15 THE COURT: Alright, well you can look for it.

16 MR. NICHOLS: Yes, sir.

17 THE COURT: Do you want or that concludes your argument
18 on that so you can be lookin' for that while he's talks?

19 MR. NICHOLS: Yes, sir.

20 THE COURT: Okay.

21 MR. GILREATH: Judge, just just briefly, we handed up a
22 brief that got all of our contentions so I'm not gonna
23 regurgitate more than just a couple a points, one is in your
24 Form 4 order was dated October the 7th you said, "If, however,
25 Andrews shows that Broom engaged in wrongful conduct to cause

1 a particular loss that is individual to Andrews, liability of
2 such wrongful conduct is an asset of Andrews. This type of
3 vidua -- individual claim is not subject to the Rule 23
4 requirements and will not be dismissed on that basis. In
5 reviewing the pleadings, this court has read them in the light
6 most favorable to Andrews and so and in so doing cannot
7 determine with certainty whether or not such claims exist,"
8 and when you go back and look at the claims that that are in
9 his complaint he's stuck with those claims and the biggest
10 problem he's got is they didn't sue Tri-Star. He didn't sue
11 Tri-Star and he's trying, and if you go through some of 'em,
12 I'm not gonna go through all of 'em but I think Paragraph 23
13 of of his third-party complaint he he, well he says defendant
14 Andrews has standing to bring his claim individually on behalf
15 of third-party plaintiff for losses and damages sustained to
16 both by the malfeasance and nonfeasance of the plaintiff in
17 his dealings with and on behalf of Tri-Star and then, and then
18 the next paragraph or Paragraph 25 it says defendant Andrews
19 loaned Tri-Star \$130,000 and didn't get paid. That's clearly
20 a claim that Andrews has that, I mean, the corporation would
21 have or he would have against the corporation, excuse me.
22 Then he talks about some pot of gold which are in the same
23 thing, then Paragraph 27 he loaned 'em \$3,626,000 and hadn't
24 been paid, yet he's wantin' to bring a derivative claim
25 against our client. He's claiming they sold some of the

1 business stuff that was improper, that's a claim the
2 corporation would have so goes back to what, you know, we said
3 when we brought this thing up the first time, what Your Honor
4 said in your Form 4 order and what is in the final order you
5 said is these these are claims that belong that he's got
6 against the corporation and that he cannot sue, that he he
7 can't sue Mr. Broom derivatively so so I think in short that's
8 that's our position, Your Honor. And I don't know whether I
9 pointed it out but you said in the Form 4 order you said the
10 plaintiff has full liberty to fully address this motion to
11 dismiss in the formal order and is not limited to the verbiage
12 expressed in the Form 4 order, wanna -- might oughta point
13 that out.

14 MR. NICHOLS: And, Judge, I'm lookin' for that but I I
15 would say that my response to that is that this goes beyond
16 just verbiage in the Form 4 order. I think you were saying
17 that this is my ruling, please put this ruling in an order but
18 put in whatever words you want but what the order that
19 ultimately got filed expanded that. Now I realize that until
20 an order is reduced in writing and delivered to the clerk for
21 filing the judge can can change his mind but we're here today
22 because if it was your intent to change your mind, we wanna be
23 heard that, you know, and we would go back to the arguments
24 that were made before that you you had instructed us that some
25 of these claims require additional additional development and

1 when you ruled that, it's my understanding that discovery came
2 to a stop, there was other discovery that would have needed to
3 be d -- have done so I -- if if if it's your view that dis --
4 dismissing the entire case is simply, you know, semantics or
5 going beyond the the verbiage and and meets that instruction,
6 well that's certainly your prerogative, Judge, but it it was
7 our reading that you weren't dismissing the entire case and in
8 that regard if the case is, if you agree with us if the case
9 is going to continue then it would be our position that it
10 would make more sense not to dismiss the claims based on a a
11 ruling that South Carolina would not follow the exception but
12 rather to go ahead and let let the trial of all the claims be
13 done and if there's a verdict then to deal with that at
14 directed verdict so that or JNOV so that we can take it all up
15 at one time, we won't risk two trials which is what will
16 happen if the appellate courts agree with us and we prevail
17 today that you didn't intend to dismiss the whole case so as a
18 matter of judicial economy it would make sense not to dismiss
19 the whole case but to allow us to proceed and try to develop
20 this novel issue which, Judge, I mean, none of the cases that
21 are cited it said that South Carolina would not recognize that
22 exception, what they've said is we just don't find it in each
23 of these cases and there is no South Carolina case that has
24 rejected the ALI rule.

25 MR. NICHOLS: I'm loo ---

1 THE COURT: Alright.

2 MR. NICHOLS: --- I I'm looking for the Nuckles case,
3 Judge, and I've ---

4 THE COURT: Okay.

5 MR. NICHOLS: --- just about got it.

6 THE COURT: Sometimes we have bad wireless in the
7 courtroom.

8 MR. NICHOLS: I'm I'm usin' my hot spot and I'm not
9 findin' it, Judge. Judge, the the more recent case that I was
10 referencing is a case called Callen, that's C-A-L-L-E-N, v.
11 Callen and it is a, it's a Supreme Court case from 2005, 365
12 South Carolina 618 and 620 southeast second 59, and what the
13 Court said there it had to do, it it's actually a a, it's
14 actually a domestic case but that issue came up and I'm tryin'
15 to find the cite to Nuckles. Apparently that's not it. I
16 apologize, Judge, and again, I I recognize this order as I was
17 wa -- I mean, this issue as I was walkin' out the door reading
18 that memo on my way up here but if if I can find it before we
19 get outta here I'll get it to ya, Judge.

20 THE COURT: Okay.

21 MR. NICHOLS: Thank you.

22 THE COURT: Alright. Let me ask a question and maybe
23 since you're relatively new to the case compared to the other
24 three lawyers, other four lawyers in the courtroom, maybe you
25 can enlighten me a little bit. I realize that the verbiage

1 used in the final order did seem to be more expansive than
2 what I had originally put in the Form 4 but I went ahead and
3 signed the order anyway because this has been a case that has
4 been long on the Court's docket and the, I think in my career
5 I have just one other file that is more voluminous than this
6 one, and the claims that are being made that have been pursued
7 by your client are factually based upon, and this is a very
8 general description, of layer upon layer of different
9 corporate entities and I came to the conclusion that I would
10 go ahead and sign the order as it was presented to me even
11 though it was a little bit more expansive than what I had
12 written in the Form 4 because I wanted your client to know you
13 tell me then where where are those independent claims, where
14 are those claims that you are seeking that would not fall
15 within Rule 23, not that this is just one of those situations
16 where if you apply a special rule and say well lets take a
17 look if it's just a closely held corporation, where are these
18 individuals claims that that are not touched upon by this, by
19 the corporate structures that both of these clients benefited
20 from in their pursuit of business activities because I would
21 like to bring this matter to a resolution as expeditiously as
22 and and and as efficiently as possible.

23 MR. NICHOLS: I I understand, Judge, and and I am very
24 new to this case and I but I do realize it's got some age; in
25 fact, it had been as I understand the folks have been rockin'

1 along through discovery for almost five years before this
2 point was even brought to Court's attention and so the parties
3 were basically there there was no claim for five years of
4 litigating this case that the case oughta be dismissed 'cause
5 it shoulda been a derivative case and it was a, it was a sort
6 of a late in the day conversion on the eve of trial that this
7 issue was even brought up but of course the Court chose to to
8 address it and since it, since it involved standing. I I
9 would say that under, you know, the *Dove vs. Gold Kist* case
10 wh -- in which the Supreme Court described those things that
11 amount to subject matter jurisdiction this would not be a
12 subject matter jurisdiction issue so whether it was fairly
13 raised or whether the parties had acquiesced that these claims
14 were alive and active and and on on the way to trial up until
15 the eve of trial is is something I think the Court oughta
16 think about but ---

17 THE COURT: And Court usually does not act until the
18 Court is asked to act either.

19 MR. NICHOLS: Well-behaved children is how Judge Sanders
20 describes it.

21 THE COURT: I I've been, I think I I -- on -- in some
22 appellate decision somewhere I was not expressly implicitly
23 reprimanded because I acted upon something on my own that I
24 saw in a case that the lawyers didn't see and they decided
25 that they would reverse me for that.

1 MR. NICHOLS: And I would say, Judge, that I've been told
2 on numerous occasions that I I don't know how to read the law
3 as well so, um, um, ---

4 THE COURT: Alright, well tell you what, let's let's go
5 to the motion ---

6 MR. NICHOLS: Alright.

7 THE COURT: --- to amend. Now my understanding is this
8 is Broom's desire to amend the com -- cross-complaint that
9 they have filed, is that correct?

10 MR. PILLSBURY: It's Andrews, yes, Your Honor.

11 THE COURT: Andrews, I'm sorry.

12 MR. PILLSBURY: That that's fine, Your Honor. Yes,
13 basically, the the gist of it was this: that the original
14 amended answer was filed in June of 2006 and in just like what
15 Mr. Nichols said both parties proceeded through discovery
16 under the assumption that it was going to trial on all of the
17 issues including the matters regarding the misappropriation or
18 or the misuse of the assets by the plaintiff and then when
19 this motion to dismiss was raised on the eve of trial, the
20 motion to dismiss is based on a strict, that it's based
21 squarely on the pleadings and and so the motion to amend or
22 it's actually plaintiff's second motion to amend was a design
23 to incorporate all of the facts that had been learned through
24 the course of discovery so that it in the event that there was
25 an appeal that was filed, the the factual information about

1 what the plaintiff did in this case in converting the assets
2 to his name personally were in the pleadings and I I didn't,
3 you know, it was based strictly on in 2006 we didn't know that
4 the plaintiff had been making somewhere between 700 and
5 \$900,000 of income from the Dominican, that information just
6 wasn't known and and so and and clearly the only basis for
7 that income would have been the assets of the corporation
8 which we allege he converted and and so the purpose of the
9 motion is simply to bring the factual allegations of the
10 complaint current to information that was learned from
11 discovery so that in the event that there would be an appeal,
12 the appellate court would be looking at the information that
13 was known to the parties because it's a 12(B)(6) motion and
14 it's not a summary judgment motion.

15 THE COURT: Because the motion that had been filed by
16 Broom was a 12(B)(6), not a summary judgment motion, therefore
17 you want to amend your complaint.

18 MR. PILLSBURY: The, yes, amend the answer and
19 counterclaims ---

20 THE COURT: Answer and counterclaims.

21 MR. PILLSBURY: Right, to bring in the factual
22 allegations about how he had converted the assets, he made
23 substantial money from the Dominican and that he, you know,
24 bought the million, multi-million dollar house in Florida and,
25 yeah, and and then we also learn where he was running checks

1 through the company paying himself exorbitant salaries without
2 any approval and so there was, there was just a, there was a
3 plethora of information that we learned about the abuse of the
4 corporate assets by the plaintiff and if the appellate court
5 is going to hear it as a 12(B)(6) motion, we wanted the
6 pleadings to reflect the information that we knew and and the
7 the amended complaint does not change any of the allegations,
8 it doesn't change any of the parties, it just makes the
9 factual information about the plaintiff's misconduct more
10 contemporary with the, you know, it it it's a result of the
11 motion to dismiss being filed five years after the original
12 pleadings were filed and there cannot be any conceivable
13 prejudice to the party because it's the information that was
14 from the discovery.

15 THE COURT: Okay.

16 MR. KNIE: May it please the Court. I went to the
17 trouble to highlight the changes that were made to the, to the
18 answer and counterclaim when by way of the amendment in the
19 supplemental and if I may, Your Honor, there are, there are
20 some twenty plus paragraphs that were supplemented or amended
21 in only in the counterclaim, the answer pretty much reads
22 exactly as it did and so to the the allegations were
23 supplement but the point of all this is, Your Honor, that
24 these allegations were supplemented after the judge's formal
25 order; in other words, the the the motion to amend the

1 counterclaim basically is what it is was made after the
2 judge's order and there is no counterclaim right now, you
3 dismissed the counterclaims, so they are asking to be
4 permitted to amend something that does not exist. Now they
5 won't -- will not be prohibited before the appellate courts if
6 that's where this is headed from making the arguments that are
7 contained within this proposed amended and supplemented
8 counterclaim because it will have been filed and ruled on by
9 the Court. If the Court just says, I'm gonna deny it at this
10 time because there is no counterclaim before the Court, it's
11 still a matter of record attached to the motion, will still be
12 their proposed amendment and it will travel its way up to the
13 appellate courts just just like everything else will on the
14 record so we believe that for the simple reason that there are
15 no counterclaims which exist right now you can't amend
16 something that doesn't exist.

17 THE COURT: Unless I, unless I grant their motion to
18 amend in ---

19 MR. KNIE: Yes.

20 THE COURT: --- a substantive way that keeps the
21 counterclaim alive.

22 MR. KNIE: Correct, Your Honor, yes.

23 THE COURT: Okay.

24 MR. NICHOLS: And and, Judge, I was just misspelling the
25 name of it, it's N-U-C-K-O-L-L-S v. *Great Atlantic & Pacific*

1 *Tea Company*, 192 South Carolina 156, 5 southeast second 862,
2 it's a 1939 case. Justice Moore cited it in a recent dissent
3 that Justice Toal joined him on actually dealing with Title
4 33, Chapter 8 but what justice, uh, what that case says it it
5 is presumed that the legislature intended to abrogate or it is
6 not presumed that the legislature intended to abrogate or
7 modify a rule of the common law by the enactment of the
8 statute on the same subject, that it is rather to be presumed
9 that no change in the common law was intended unless the
10 language employed clearly indicates such an intention. So if
11 you find wi -- in the language employed a clear indication
12 that the legislature intended to abrogate the common law, what
13 the Supreme Court's telling us is there is no such
14 presumption.

15 THE COURT: Thank you. Alright. Alright, best thing I
16 can tell ya'll is I'll take a look at it. I've got the e-mail
17 brief of the Broom and I've got the brief by Andrews, I've got
18 your reference to *Nuckolls*. Did you say you had other cases
19 you wanna ---

20 MR. NICHOLS: That the other case I was thinking of was
21 Justice Moore's dissent in his recent case was hearkened back
22 to that. I will tell tell you that I argued a case called
23 *Sulton vs. National Health Corp.*, this this was an issue at
24 oral argument but at when the opinion finally came out it it
25 it disappeared. For some reason the Supreme Court even though

1 I lost that decision they chose not to address, they sent it
2 back to a new trial, they chose not to address the defendant's
3 very specific argument that it had to do with whether when we
4 adopted the consortium statute there was an alteration of the
5 common law rule regarding but the Supreme Court didn't, chose
6 not to, not to address it but I will tell you that that that
7 issue is alive or that the ru -- that principle of law is
8 alive and well in South Carolina.

9 THE COURT: Okay. Alright, well I'll take a look at it.
10 I had -- this is not on a trial docket, right?

11 MR. GILREATH: No.

12 THE COURT: Okay. Okay, some reading for the holidays.

13 MR. PILLSBURY: Thank you, Your Honor.

14 MR. NICHOLS: Thank you, Judge.

15 MR. PILLSBURY: And, Your Honor, if there is something,
16 because I did not see the brief until right before having to
17 come over here, if it does raise an issue, may we supply some
18 some supple -- some response? I I mean, it, obviously it
19 won't be extensive but it it was something that had been sort
20 of dumped on us at the last minute and I would just like a an
21 opportunity to meaningfully go through it and and it it may be
22 that we -- there is nothing but I, I mean, if Your Honor just
23 gives us till Friday.

24 THE COURT: Friday it is.

25 MR. PILLSBURY: Okay, thank you.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-42-3397

Quentin S. Broom, Jr., ... Respondent,

v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews, ... Defendants,

Of whom

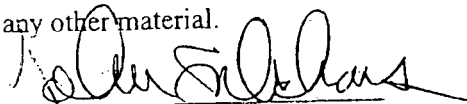
H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Appellant.

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.



Blake A. Hewitt, SC Bar # 73674

John S. Nichols, SC Bar # 4210

BLUESTEIN, NICHOLS,

THOMPSON & DELGADO

Post Office Box 7965

Columbia, South Carolina 29202

(803) 779-7599

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Attorneys for Appellant

November 5, 2013

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel
for the Respondent with a copy of the *Record on Appeal* by mailing copies of the same by
United States Mail with first class postage prepaid to the following addresses:

Susan F. Campbell
Whitney B. Harrison
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton St.
Columbia, SC 29201

November 7, 2013
Columbia, South Carolina

Erin Bridges

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

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Quentin S. Broom, Jr., ... Third-party Defendant.

BRIEF OF APPELLANT

Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

Rodney F. Pillsbury, Bar # 13067
PILLSBURY & READ
1204-A East Washington Street
Greenville, SC 29601
(864) 241-9828
(864) 241-9818 (facsimile)
rpillsbury@prlawpa.com

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SC Court of Appeals

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BRIEF OF APPELLANT

Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Rodney F. Pillsbury, Bar # 13067
PILLSBURY & READ
1204-A East Washington Street
Greenville, SC 29601
(864) 241-9828
(864) 241-9818 (facsimile)
rpillsbury@prlawpa.com

Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. If a Corporation Only Has Two Shareholders and If One Suspects the Other Has Been Engaged in Self-dealing, Whether the Complaining Shareholder May Sue the Alleged Wrongdoer Directly, as Opposed to Bringing a Derivative Suit on Behalf of the Company.
- II. If Hugh Andrews Was Required to Bring His Claims in a Derivative Suit on Behalf of His Company, Whether the Circuit Court Erred in Dismissing the Claims Without Allowing Andrews the Opportunity to Amend Them.

STATEMENT OF THE CASE

This lawsuit arises out of a dispute between business partners. Hugh Andrews and Quentin Broom are the owners of Tri-Star Communications. They own equal shares in the company. At some point, says Andrews, Broom began to secretly pay himself an excessive salary. Broom also allegedly sold-off Tri-Star's inventory over Andrews' objection.

The primary issue in this appeal is whether Andrews may pursue a lawsuit directly against Broom for this alleged wrongdoing, or whether he must instead bring a shareholder derivative suit, which would be in Tri-Star's name. This question is significant because it implicates the pleading rules for derivative suits, and it also governs whether any money damages will go directly to Andrews, as opposed to Tri-Star.

Broom initiated this suit in September of 2005. In general, he alleged that he and Andrews were partners in several business entities and that Andrews conspired with a South Carolina law firm to reduce the value of some of Broom's business interests. Broom also alleged that he had been improperly charged for legal work done for Andrews individually. Broom named Andrews, the law firm, and two men who worked at the firm as defendants. See (R. p. 19). Andrews answered the complaint with a general denial. See (R. p. 36).

In May of 2006, Andrews asked to amend his answer. In the amended answer, Andrews alleged several counterclaims against Broom. He captioned most of them both as counterclaims and as third-party claims, and he purported to bring the third-party claims on Tri-Star's behalf. See (R. p. 53) (the motion to amend) and (R. p. 55) (the amended answer).

In September of 2006, Broom filed a reply to the amended answer. The reply alleged several defenses to the counterclaims and third-party claims, but none of those defenses are relevant to the issues in this appeal. (R. p. 69).

In September of 2011, Broom filed a motion to dismiss the counterclaims and the third-party claims. The grounds given to support the motion were that Andrews had not complied with the procedure for bringing a derivative suit; specifically, he never asked Tri-Star's board of directors to investigate any alleged wrongdoing, he never claimed such a request would be futile, he did not verify his counterclaims, and he did not allege that he could fairly represent the interests of Tri-Star's other shareholders. See (R. pp. 109-111).

Andrews opposed this motion, arguing that his claims were individual claims against Broom and that the rules for a derivative lawsuit did not apply. He also argued that if his claims fell technically within the definition of derivative claims, the court should follow the lead of several other jurisdictions that have allowed derivative claims to proceed as direct claims when the corporation in question is a small corporation with only a few shareholders. See (R. p. 135) (Andrews' memo in opposition).

In October of 2011, the circuit court conducted a hearing on the motion to dismiss. Shortly after the hearing, the court issued a form order that granted the motion. (R. p. 4). The court confirmed this ruling in a written order filed November 1, 2011. (R. p. 6).

The circuit court reasoned that all of Andrews' claims sought recovery for the misappropriation of corporate property. In the circuit court's view, such claims belonged in a derivative suit. (R. p. 10).

The circuit court also recognized that Andrews had claimed Broom caused Tri-Star to be unable to pay a debt the corporation owed Andrews personally, but the court dismissed this claim because Andrews did not name Tri-Star as a defendant. (R. p. 11).

The circuit court declined Andrews' request to relax the rule that derivative claims belong to the corporation and not to an individual shareholder. The court wrote that South Carolina courts had "rejected" this principle in the past and that "[t]his record" did not support the application of the exception some other jurisdictions have recognized.

Andrews asked the court to reconsider both the form order and the written order of dismissal. See (R. pp. 143, 145). He also requested leave to amend his answer a second time for the purpose of supplementing the factual allegations. See (R. p. 172). The court conducted a hearing on these motions in December of 2012.

On January 14, 2013, the circuit court issued a form order denying the motions to reconsider. (R. p. 15). On February 1, 2013, the court issued a written order confirming this ruling. (R. p. 17). Neither order expressly mentioned Andrews' motion to amend his answer, but the effect of the orders was to deny the motion.

On February 7, 2013, Andrews received written notice of the entry of the final order dismissing his claims. On March 8, 2013, Andrews initiated this appeal.

There is much more to the procedural history of this case, but this description is limited to that which is relevant to this appeal.

ARGUMENT

The first reason the Court should reverse is that Mr. Andrews' claims are not derivative. A hallmark of a derivative claim is that there is a class of shareholders who have suffered similar injuries as a result of the alleged wrongdoing. Such shareholders are "similarly situated," and one reason the law requires a derivative suit is that such a suit ensures all of the injured shareholders will enjoy the appropriate proportion of any recovery.

No one is similarly situated with Hugh Andrews. If Broom was stealing from Tri-Star, the only person he was stealing from was Andrews. When a corporation has only two shareholders, one's self-dealing necessarily correlates to the other's unique injury.

The second reason this Court should reverse is that the rules for derivative lawsuits cannot reasonably apply to these circumstances; the fact that this company has two equal owners results in too many oddities. Chief among these is the fact that it is impossible to ascertain Tri-Star's position in the case — one 50% owner thinks the company should sue the other. This is a classic case for relaxing the rules; applying them leads to absurd results. If the rules apply, Andrews must ask Broom to sue himself, Andrews must claim he can represent the interests of injured shareholders (he is the only one), and any money damages must go to Tri-Star, where they will be locked in a tug-of-war between equal shareholders.

The last reason this Court should reverse is that the law generally grants a party the chance to amend his pleadings if they are dismissed and the statute of limitations has expired. Again, this is a classic case for applying that principle. If the only defect in Mr. Andrews' claims is that he did not specifically state things that are obvious, he should be given the opportunity to amend his answer. In these circumstances, outright dismissal is unjust.

I. The Circuit Court Erred When it Held That Hugh Andrews Could Not Directly Sue His Business Partner for the Partner's Alleged Self-dealing.

The Court should hold that when a defunct corporation has two shareholders and one wishes to sue the other for alleged self-dealing, it is possible for those claims to be direct claims that belong to the complaining shareholder individually. Hugh Andrews is not really complaining about the depreciation of his stock value. Because Tri-Star is both defunct and caught between two shareholders who cannot agree, the company cannot function and effectively no longer exists. At its core, this is a dispute between Andrews and Broom individually; the claim is that when Broom stole from Tri-Star, he was stealing from no one else but Andrews. This view is supported by existing South Carolina law, and it is also supported by authority from other jurisdictions, which should be persuasive.

**a. A Derivative Claim Involves a Corporate Injury;
a Direct Claim Involves an Individual Injury.**

If a stockholder brings a lawsuit concerning corporate mis-management, the stockholder is normally only a nominal party. Instead, the corporation is typically the real party in interest. The Supreme Court's decision in *Latimer v. Richmond & D.R. Co.* contains an early recognition of this principle, see 39 S.C. 44, 51-52, 17 S.E. 258, 260-61 (1893) (the "right of action" for mis-management "exists in the corporation itself"), and South Carolina courts have reiterated these principles on several other occasions. See, e.g., *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006); *Davis v. Hamm*, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989); *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952).

Derivative suits are so-named because the plaintiff's standing derives from his status as a stockholder. The core of a derivative complaint thus does not allege a direct injury to the individual plaintiff; instead, it seeks redress for an injury to the corporation and, by extension, to *all* shareholders. This injury, the suit alleges, will not otherwise be redressed because the corporation's governing body is refusing to redress it. See *Jones v. H. F. Ahmanson & Co.*, 460 P.2d 464, 470 (Cal. 1969) (one definition of a derivative suit).

Special pleading rules apply to derivative suits because they represent a challenge to the principle that a corporation is primarily managed by its directors, not its shareholders. These rules include the requirement that the complaining shareholder verify the allegations of wrongdoing and describe the action he or she has taken to request that management remedy the problem. See Rule 23(b)(1), SCRCPP; see also S.C. Code Ann. § 33-7-400 (2006). This Court explained the rationale for these rules in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185-88, 539 S.E.2d 402, 407-09 (Ct. App. 2000), and another jurisdiction has explained that state's rules, which are similar to South Carolina's, as being "designed to create a balanced environment" that deters wasteful litigation based only a suspicion of wrongdoing, but permits litigation if a plaintiff can raise reasonable doubt about whether the people who control the corporation have abdicated their duties. *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1216-17 (Del. 1996)).

When, however, corporate action results in a loss that is unique to one particular shareholder, a claim related to that loss is not derivative. This is because the complaining shareholder's injury is not common to other shareholders — no one else has suffered similar harm as a result of the conduct at issue.

The Supreme Court's decision in *Hite v. Thomas & Howard Co. of Florence, Inc.* concerned one such scenario. There, the owner of 1/3 of the business alleged that his percentage of ownership had been reduced as a result of the majority owner's self-dealing. See 305 S.C. 358, 360-61, 409 S.E.2d 340, 341-42 (1991).

Hite was partially overruled by *Huntley v. Young*, which held that the denial of a motion to dismiss is not immediately appealable, see 319 S.C. 559, 560, 462 S.E.2d 860, 860-61 (1995), but nothing suggests that *Hite*'s discussion of corporate law is invalid.

This Court's decision in *Brown v. Stewart* references, but does not apply, another feature of this principle. *Brown* instructs that a complaining stockholder has an individual claim if the wrongdoer owes him a fiduciary duty and if recovery to the corporation will not provide him with full relief. 348 S.C. 33, 50, 557 S.E.2d 676, 685 (Ct. App. 2001).

The features that distinguish a derivative claim from a direct claim are easy enough to describe. Indeed, almost every case states them the same way. But describing the rules is one thing. Faithfully applying them is something else.

b. It Can Be Difficult to Distinguish a Derivative Claim from a Direct Claim, and That Difficulty Increases as the Number of Shareholders Shrinks.

A variety of jurisdictions have recognized that a single series of events can give rise to both direct and derivative litigation. *Norman v. Nash Johnson & Sons' Farms, Inc.*, 537 S.E.2d 248, 253 (N.C. Ct. App. 2000); *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 381 (7th Cir. 1990); *Sutter v. General Petroleum Corp.*, 170 P.2d 898, 901 (Cal. 1946). In the same vein, cases from several jurisdictions have recognized that as the number of the shareholders in a corporation diminish, the difficulty of applying the direct/derivative

distinction increases. One common illustration includes reciting that while a corporation with a large number of shareholders generally has a clear distinction between ownership (the shareholders) and management (the board), this is often absent in a corporation with a very small number of shareholders. Instead, the shareholders are likely the same individuals who manage the business. See, e.g., *Durham v. Durham*, 871 A.2d 41, 45 (N.H. 2005); *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1280-81 (Utah 1998).

Another common illustration, closely related to ownership, is that corporations with a small number of shareholders may operate more like partnerships than corporations. *Johnson v. Gilbert*, 621 P.2d 916, 918 (Ariz. Ct. App. 1980); *Donahue v. Rodd Electrottype Co. of New England*, 328 N.E.2d 505, 512 (Mass. 1975). Several secondary authorities explore these issues in detail. See, e.g., Allan B. Cooper et al., *Too Close for Comfort: Application of Shareholder's Derivative Actions to Disputes Involving Closely Held Corporations*, 9 U.C. Davis Bus. L.J. 171 (2009); see also F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Close Corporations*, §§ 1:02 & 9:22 (3d ed. 1994).¹

This should not be taken as an invitation to ignore the corporate form or disregard the fact that business partners have chosen to conduct business through a corporation. Far from it. Instead, this discussion observes the reality that unlike large corporations, corporations with a small number of shareholders often have no functional distinctions between ownership and management. Consider Tri-Star as an example. This corporation does not appear to have had a board of directors, and with ownership divided 50/50 between Broom and

¹Relevant sections in a more recent version of the *O'Neal* treatise include §§ 1:02, 9:2, and 9:26. O'Neal & Thompson, *O'Neal's Close Corporations* (rev. 3d ed. 2012)

Andrews, the corporation's management was tied directly to its ownership. Undoubtedly, there were some actions Tri-Star could not take if Broom and Andrews disagreed.

c. Faithfully Applying These Principles Leads to the Conclusion That Mr. Andrews' Claims Are Direct.

One defining characteristic of a derivative claim is that there is a class of shareholders who are similarly situated with the individual plaintiff. Because the injury is to the corporation in a derivative case, the injured shareholders find themselves in the same boat.

But when a company has only two shareholders and one alleges that the other has stolen from the business, the shareholders are *not* similarly situated. In this situation, the complaining shareholder has alleged a loss that is unique. This rule should control this case.

The complaining shareholder's loss is unique because he is the only party that has actually suffered a reduction in the value of his interest. If this case were a purported class action, Mr. Andrews would be a class of one. The alleged wrongdoer (Broom) has not suffered any injury, because while his stock may have decreased in book value, he has enjoyed the fruit of his alleged wrongdoing. This illustrates the absurdity of one of Rule 23's requirements and is one reason why that rule cannot apply: Rule 23 instructs that a plaintiff may not maintain a derivative suit if he does not fairly represent the interest of similarly situated shareholders. Here, there are no similarly situated shareholders. Other than Andrews, the only shareholder is Broom, and Broom is the alleged wrongdoer and defendant.

Other jurisdictions have applied this analysis to cases presenting similar circumstances. *Norman*, 537 S.E.2d at 260-61; *Noakes v. Schoenborn*, 841 P.2d 682, 687 (Or. Ct. App. 1992); *Yanow v. Teal Indus.*, 422 A.2d 311, 321-22 (Conn. 1979); *Funk v.*

Spalding, 246 P.2d 184, 187 (Ariz. 1952). This reasoning should be persuasive. The reason Mr. Andrews' claims should go forward is not because Tri-Star has not been injured — on paper, it has. The critical fact is that as compared to all other *shareholders*, Andrews is only shareholder bearing the alleged loss. O'Neal & Thompson, *supra* p.8, at §9.22 pp.115-117.

There do not appear to be any South Carolina cases illustrating a similar application of these principles, but that can only be because similar circumstances have not previously been present. On a number of occasions, South Carolina has recognized the "separate and distinct" rule — the rule allowing a direct suit against a manager if misconduct has caused a particular loss to an individual stockholder. *Hite*, 305 S.C. at 361-62, 409 S.E.2d at 342; *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). The general theory of Andrews' claims is that Broom has mis-managed the business, paid himself an excessive salary, and sold all of the inventory over Andrews' objection. While these would no doubt be derivative claims if Tri-Star was a large corporation with a clear division between ownership and management, it should be equally obvious that they are "separate and distinct" claims in the context of a corporation with only two owners. In such a situation, one shareholder's self-dealing will necessarily correspond to the other shareholder's unique loss.

None of this State's previous "close corporations" cases have presented this scenario.

Todd v. Zaldo involved a corporation with three shareholders, one of whom was not a party to the suit. The complaining party in *Todd* indicated that he believed his damages were personal because "my corporation is my money," and this Court wrote in *Todd* that while this shareholder contended that the business operated as a partnership, "[the] record" did not support that contention. 304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991).

The present case cannot be fairly comparable. For one thing, there is no *record* to use in evaluating how this business operated. This Court's decision in *Todd* was the result of an appeal from a jury verdict, but in the present case, there not has been a trial. Here, the circuit court based its decision solely on the pleadings.

Other cases like *Brown v. Stewart* and *Clearwater Trust v. Bunting* are different for similar reasons. Like *Todd*, *Brown* presented a situation where the plaintiff's alleged injury was no different in character from that of a shareholder who was not a party to the lawsuit. *Brown*, 348 S.C. at 51, 557 S.E.2d at 685. Thus, the plaintiff's injury was not unique. In *Clearwater Trust*, there is no substantive discussion of whether any claims could have been brought directly. The court's opinion is silent as to whether all shareholders were parties and contains only a passing reference to the fact that in the normal case, a breach of fiduciary duty claim belongs in a derivative suit. 367 S.C. at 351, 626 S.E.2d at 339.

But when a business has only two shareholders, and when one alleges that the other has stolen from the business, all of the shareholders are not similarly situated. Because a complaining shareholder like Mr. Andrews has alleged a loss that is unique, this Court should reverse the circuit court's decision that he does not have standing to pursue his claim for corporate mis-management directly.

d. Even If Mr. Andrews' Claims Were Truly for a Corporate Harm, the Court Should Nevertheless Allow Him to Plead Those Claims Directly.

On at least four previous occasions, South Carolina's appellate courts have acknowledged that when the corporation in question has only a few shareholders, some foreign jurisdictions have applied an exception to the general rule that derivative claims

always belong to the corporation. From the oldest to the most recent, those cases are *Davis v. Hamm*, *Todd v. Zaldo*, *Babb v. Rothrock*, and *Brown v. Stewart*. None of these cases apply this exception and none of them reject this exception. Instead, they each observe that the circumstances of the case in question were not appropriate for relaxing the rule that claims for corporate injuries are derivative claims. These cases are listed in the Appendix at the end of this brief along with a brief paragraph describing each case's reasoning.

The American Law Institute proposed this exception in 1992, and one authority reported that as of 2009, 37 states had considered the exception with 16 states choosing to adopt it. *Cooper et al., supra* p.8, at 175, 182. The rationale of this exception is that when the purposes of a derivative suit are absent, proceeding derivatively forces litigants to comply with formalities that are cumbersome and futile. See *Principles of Corporate Governance: Analysis and Recommendations*, A.L.I., § 7.01(d), cmt. (e) (1994); *Durham*, 871 A.2d at 46.

For example, the demand requirement is designed to give the board of directors the first opportunity to redress a grievance. *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1112 (D.Del. 1985). One jurist on the Seventh Circuit has described that “[t]he persuasive rationale for the demand requirement is that it allows directors to make a business decision about a business question: whether to invest the time and resources of the corporation in litigation.” *Starrels v. First Nat. Bank of Chicago*, 870 F.2d 1168, 1173 (7th Cir. 1989) (Easterbrook, J., concurring).

Nobody could seriously contend that there would be any point in asking Mr. Broom, in his capacity as a 50% owner of Tri-Star, to vote to sue himself. No one can expect Andrews to win the grant of that request.

Derivative cases often reference the need to raise doubts about whether the corporation's board can objectively decide whether to investigate the grievance or pursue a lawsuit. Many of these cases focus on asking if there is a reasonable question whether the challenged decision was tainted by board members looking out for their own self-interest. *Aurora Credit Servs.*, 970 P.2d at 1280; *Allison*, 604 F. Supp. at 1114, 1121 (1985).

That point has an interesting application to the circumstances of the present case. Here, there are *no* disinterested members of this corporation — one shareholder is the plaintiff, the other shareholder is the defendant. Tri-Star's official position is impossible to ascertain — it is a corporation in limbo. One 50% shareholder believes the corporation ought to sue the other shareholder. Not surprisingly, the alleged thief disagrees.

There are really two parts to the question whether to apply American Law Institute's proposed exception. The first is a pleading question. The second is a recovery question.

The pleading question should be easy to answer. The rules of civil procedure are designed to secure just and speedy outcomes, see Rule 1, SCRCP, and it seems odd to apply a rule for "class actions" to a lawsuit between 2 people. See Rule 23, SCRCP. Moreover, requiring Andrews to ask Broom to sue himself is, frankly, foolish. Decisions from other jurisdictions have recognized the futility of such a request. *Anderson v. Clemens Mobile Homes, Inc.*, 333 N.W.2d 900, 904 (Neb. 1983); *Funk*, 246 P.2d at 186. This point should not be controversial. When one partner alleges that the other is the wrongdoer, the claim for relief does nothing if it does not allege demand futility.

The Supreme Court of Texas took an interesting view of this question. It reasoned that when there is a derivative suit on behalf of a close corporation and all of the remaining

shareholders are named as defendants, that state's special pleading rules are deemed satisfied as a matter of law. *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162-63 (Tex. 1990).

The recovery question posed by the ALI's exception is the question whether the money damages from the lawsuit should go to the corporation and its treasury, as opposed to the complaining shareholder personally. This question is harder to answer, and it may be impossible to answer it until later in the litigation. It may take discovery and a trial to determine whether the particular corporation has outside creditors who need to be protected or whether equity otherwise favors the corporation itself getting the recovery.

Concern for creditor's rights drove our Supreme Court's decision in *Babb*, but *Babb* differs from the present case because the Supreme Court had the benefit of reviewing a record that had been developed by a trial. 303 S.C. 462, 463, 401 S.E.2d 418, 419 (1991). This illustrates the error of the summary manner in which the circuit court rejected the ALI exception in the present case. The circuit court wrote that the "record" in this case did not support the application of the exception, see (R. p. 13), but at the 12(b)(6) stage, there is no substantive record. No one's *pleadings* will ever prove whether creditors need to be protected or whether the business, though a corporation on paper, ran as a partnership.

The argument for never allowing derivative suits to be brought directly is that the law prefers predictability and that a clean rule allows parties to avoid squabbles at the beginning of a suit. A well-written articulation of this reasoning can be found in the Seventh Circuit's decision in *Bagdon v. Bridgestone/Firestone, Inc.*. See 916 F.2d at 383-84.

The biggest problem with this view is that predictability proves to be an empty promise. Everyone agrees that corporate action can create both derivative and direct liability,

and there are plenty of cases, in this jurisdiction and others, that focus only the question whether the claims in a given case are truly derivative or direct. Predictability is not the ultimate goal — the law exists to vindicate the purposes behind the rules, not the rules themselves. One of the ultimate goals here is to protect the principle that a corporation is generally governed by its directors. Another goal is to limit the court system's role to adjudicating legitimate disputes. This is why derivative suits exist, and if these reasons do not exist in a particular case, the suit cannot legitimately be called derivative.

Hugh Andrews may not win any of his claims, but it ought to be obvious that he and his partner are embroiled in a non-trivial controversy. These men are 50/50 owners of the company in question, and unless they have a change of heart, no one but the court system can settle their dispute. This Court should accordingly reverse the decision dismissing Andrews' claims. The Court should explain that the requirements of Rule 23 either do not apply or have been functionally satisfied by the fact that Andrews named the only other shareholder as a defendant, and the Court should defer the question of whether the damages should be paid to Andrews personally, as opposed to Tri-Star, until after a record has been developed.

II. The Circuit Court Erred When it Dismissed Mr. Andrews' Claims Without Giving Him an Opportunity to Amend His Pleadings.

One of Andrews' claims arose out of a debt that Tri-Star allegedly owed him personally, and the circuit court dismissed this claim on the grounds that Andrews did not name Tri-Star as a defendant. See (R. p. 11).

In *Ward v. Griffin*, this Court wrote that “[a] stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and

distinct from that of other stockholders generally.” 295 S.C. at 221, 367 S.E.2d at 704 (quoting 19 Am. Jur. 2d *Corporations* § 2245 (1986)). The circuit court’s order offers no authority for the proposition that in order to maintain this claim, Andrews had to sue Tri-Star instead of the officer who allegedly caused the debt to go unpaid. The reason why no authority is cited is that the proposition is not correct.

In *Spence v. Spence*, the Supreme Court instructed that “[w]hen a complaint is dismissed under Rule 12(b)(6) . . . [t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint.” 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). *Spence* was a real estate case, and the issue of amended pleadings arose because the plaintiff asked for the chance to file an amended complaint before the trial court dismissed some of the parties with prejudice. *Id.* at 128, 628 S.E.2d at 880. The Court held that when the statute of limitations has expired, an appellate court which affirms a dismissal should grant a reasonable opportunity to amend the complaint if the aggrieved party presents additional allegations or a different theory of recovery which might state a claim upon which relief could be granted. *Id.* at 130, 628 S.E.2d at 881-82. The essence of this holding is that when the plaintiff shows that he or she can cure the defect that led to dismissal, the court should modify the dismissal to be without prejudice.

None of Broom’s arguments were directed to the merits of Andrews’ suit. Instead, they were all directed to the manner and sufficiency of pleading. Derivative cases inside and outside South Carolina reference parties having the opportunity to amend their pleadings. See *Carolina First Corp.*, 343 S.C. at 183, 539 S.E.2d at 406; *Allison*, 604 F.Supp. at 1119. Yet, when Andrews sought to amend his complaint, that request was denied.

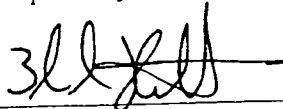
All of this has been so wasteful. Broom knows why Andrews never made a demand on Tri-Star's board of directors — there is no board. Broom knows why Andrews did not ask him to sue himself — the request would obviously have been futile. Broom knows that Andrews cannot and will not adequately represent the interests of all Tri-Star shareholders — Broom is the only other shareholder and he is the defendant. All of this is clear when everyone's pleadings are considered together, but if Andrews must specifically allege this in order for his claims to survive, *Spence* instructs that he should have that opportunity.

CONCLUSION

This Court should reverse the circuit court's decision and remand this case for proceedings consistent with the Court's decision.

November 22, 2013

Respectfully submitted,



Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

APPENDIX

Davis v. Hamm,
300 S.C. 284, 387 S.E.2d 676 (Ct. App. 1989)

Appeal from damages award after a bench trial. The award was in favor of a former stockholder and against a corporate director. This Court noted some of the foreign decisions applying special rules to derivative suits involving close corporations, but ultimately declined to apply the rule because the plaintiff was not a stockholder at the time she brought the case. This was a classic derivative suit. The claim was that one of the president's decisions had caused a reduction in the price of the business' stock.

Todd v. Zaldo,
304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991)

Appeal of a jury verdict in favor of the majority stockholder and against one of the two minority stockholders. The third stockholder was not a party to the lawsuit. This Court wrote that there was "no indication in the record the companies operated as *de facto* sole proprietorships or partnerships," and that the record did not present "a factual scenario" for "ignoring" the fact that the claim for mis-management was a corporate claim.

Babb v. Rothrock,
303 S.C. 462, 401 S.E.2d 418 (1991)

Appeal from a master's judgment on claims for set-off and mis-appropriation in a suit involving the 4 shareholders of a bankrupt corporation. The Supreme Court dismissed the case, relying on the general rule that individual shareholders may not sue corporate directors for losses suffered by the corporation. The court rejected the application of special rules for close corporations, writing "[a]ssuming we should adopt the [] exception . . . the record discloses the presence of a reason compelling a derivative action, to wit, protection of corporate creditors."

Brown v. Stewart,
348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001)

Appeal of a jury verdict in favor of an individual shareholder. This Court wrote that the plaintiff "[could] not rely on [the exception for close corporations]," because allowing the plaintiff to maintain an individual action would not protect the interests of other shareholders who were not parties to the suit.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews, ... Defendants,

Of whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Appellant.

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the
Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13,
2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

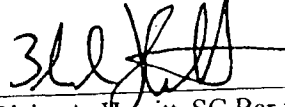
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SC Court of Appeals
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November 22, 2013

Respectfully submitted,



Blake A. Hewitt, SC Bar # 73674

John S. Nichols, SC Bar # 4210

BLUESTEIN NICHOLS

THOMPSON & DELGADO

Post Office Box 7965

Columbia, SC 29202

(803) 779-7599

(803) 779-8995 (facsimile)

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Final Brief of Appellant, Reply Brief and Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Susan F. Campbell
Whitney B. Harrison
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton St.
Columbia, SC 29201

NOV 26 2013
SC Court of Appeals

November 26, 2013
Columbia, South Carolina

Erin Bridges

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

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Quentin S. Broom, Jr., ... Third-party Defendant.

FINAL BRIEF OF RESPONDENT

Susan F. Campbell
Bar No. 70545
Whitney B. Harrison
Bar No. 100111
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
(803) 256-0702 (Fax)

Attorneys for Respondent
Quentin S. Broom, Jr.

RECEIVED

NOV 25 2013

SC Court of Appeals

Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Fax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Fax No. (864) 232-4395

Additional Attorneys for
Respondent Quentin S. Broom, Jr.

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court properly determined that Hugh Andrews brought a derivative action when his third-party complaint asserted identical counterclaims both individually and on the behalf of Tri-Star Communications, Inc. against Quentin S. Broom, Jr., thereby triggering the procedural requirements of Rule 23, of the South Carolina Rules of Civil Procedure?
- II. Did Hugh Andrews waive his right to appeal the amendment to pleading issue when the circuit court never ruled on his Newmotion to amend, and Andrews failed to file a motion pursuant to Rule 59(e), of the South Carolina Rules of Civil Procedure, requesting that the circuit court issue a ruling?

COUNTER-STATEMENT OF THE CASE

Broom initiated a lawsuit on September 15, 2005, against Andrews, Ten State Street L.L.P., Timothy D. Scrantom, and Mark Broadwater. (R. 19-35). Defendant Andrews filed an Answer on November 16, 2005, generally denying Broom's allegations. (R. 36-39). The remaining Defendants answered separately on November 18, 2005. (R. 40-52). In May 2006, Andrews moved to amend his Answer to assert certain claims individually and on behalf of Third-Party Plaintiff, Tri-Star Communications, Inc. ("Tri-Star"). (R. 53-68).

Tri-Star was not named as a Defendant in the 2006 Amended Answer. (R. 55). However, Andrews alleged that Tri-Star failed to pay debts owed to Andrews (shareholder loan) and/or his company, Drews, Inc. (Gaming Machine financing). (R. 55)¹ Specifically, Andrews alleged the

¹ According to the 2006 Answer filed by Andrews, he loaned Tri-Star one hundred thirty thousand dollars (\$130,000) on or before August 31, 2005. (R. 59, ¶ 25). Tri-Star purchased "Pot-O-Gold" video gaming machines ("Gaming Machines") and other goods and services from Drews Distributing, Inc., a South Carolina corporation ("Drews, Inc.") owned 100% by Defendant Andrews. Drews, Inc. distributed by assignment to Andrews all rights to payments from Tri-Star. (R. 59, ¶ 26). According to the 2006 Answer, as of October 31, 2005, Tri-Star owed Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges). (R. 59, ¶ 27).

distributions Broom made to himself were made at a time when Tri-Star owed Andrews substantial sums of money both as a shareholder, holder of a shareholder loan, and as a creditor of Tri-Star. (R. 59., ¶¶ 25-27, 35). On September 26, 2006, Broom filed a Reply to the 2006 Amended Answer with general denials to the counterclaims. (R. 69-89).

Pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, the parties filed a Stipulation of Dismissal with regard to the entire case. (R. 1). On June 27, 2008, Broom restored the case by filing a Complaint within one year of the dismissal. (R. 90-108). Andrews never filed an answer, counterclaim and/or third-party claim with regard to the 2008 Complaint filed by Broom.²

On September 14, 2011, Broom filed a motion to dismiss the counterclaims by Andrews and the third-party claims by Tri-Star. (R. 109-134). On October 5, 2011, the circuit court conducted a hearing on the motion to dismiss. (R. 214-278). On October 7, 2011, the court issued a Form 4 order granting the motion, but requested submission of a formal written order from Broom's counsel. (R. 4-5). On October 24, 2011, Andrews filed a motion to reconsider, however, the court had not yet entered its formal, written Order. (R. 135-144). On November 1, 2011, the circuit court entered the formal Order, dismissing all claims by Tri-Star and dismissing all overlapping claims by Andrews. (R. 6-14).

Ten causes of action are set forth in the 2006 Amended Answer: (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S.C. Code of Laws § 33-8-300; (7) Violation of S.C. Code of Laws § 33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation. (R. 58-67).

² Pursuant to Rule 220(c), SCRAP, Andrews's failure to file could serve as an additional sustaining ground to affirm the circuit court.

Claims (1) through (7) were brought by Andrews as third-party claims on behalf of Tri-Star, and were brought as identical counterclaims on behalf of Andrews, individually. (R. 58-65, ¶¶ 21 to 70). For these claims, the circuit court found that:

“all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom’s mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23.”

(R. 5, 6)(emphasis added).

Claims (8) through (10) were brought solely in the name of Andrews. (R. 65-67, ¶¶ 71 to 95). These claims re-allege the mismanagement and dissipation of Tri-Star’s assets as set forth in the previous seven claims. (R. 67 at ¶¶ 71, 78, and 88). These “individual” claims clearly reference Tri-Star. (R. 65-66 at ¶ 72) (“Plaintiff promised Defendant Andrews that he would [act] in the best interest of Tri-Star and Defendant Andrews at all times regarding the management of the same”); (R. 66 at ¶ 79) (“Plaintiff represented to [Defendant] that he would manage the assets of Tri-Star and act in the best interest of Tri-Star and Defendant Andrews”); (R. 67 at ¶ 88) (“Defendant Andrews realleges each above paragraph . . .”).

The circuit court’s Order dismissed “all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom’s mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom . . . because these claims are also require compliance with Rule 23.” (R. 6).

On November 11, 2011, Andrews filed a supplemental motion to reconsider the formal, written Order. (R. 143-171). On December 17, 2012, Broom filed an opposition to the supplemental motion to reconsider. (R. 190-213).

On November 14, 2011, Andrews filed a motion to amend and/or supplement the answer and counterclaims. (R. 172-189).

On December 17, 2012, the circuit court heard arguments from counsel with regard to Andrews's supplemental motion for reconsideration and his 2011 motion to amend the answer. (R. 279). On January 14, 2013, the circuit court issued a Form 4 order denying the supplemental motion for reconsideration. (R.15). On February 1, 2013, the circuit court issued a formal, written order denying the motion for reconsideration. (R. 17). On February 7, 2013, Andrews received written notice of the entry of the final order, and filed his Notice of Appeal on March 8, 2013.

The circuit court never ruled on Andrews's 2011 motion to amend his pleadings. Andrews never filed a motion requesting a specific ruling on the 2011 motion to amend.

COUNTER-STATEMENT OF FACTS

Tri-Star is a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina. (R. 58). Andrews was a 50% shareholder and a creditor of Tri-Star. *Id.* Broom was a director, officer, and 50% owner of Tri-Star. (R. 58). Andrews alleged that he had "standing to bring [these] claims individually and on behalf of Third-party Plaintiff [Tri-Star] for losses and damages sustained to both via the malfeasance and nonfeasance of the plaintiff [Broom] in his dealings with and on behalf of Tri-Star." (R. 58).

There are no allegations in Andrews's 2006 Amended Answer that Tri-Star lacked outside creditors.³ Andrews's own pleading references debt owed to the Dominican Republic: "Plaintiff was reckless in the manner the [sic] Gaming Machines were imported, and such

³ Rule 210(c) of the South Carolina Rules of Appellate Practice states that the Record shall not include matter which was not presented to the lower court or tribunal. Despite this rule, Andrews seeks to insert "facts" or factual allegations that do not appear anywhere in his 2006 Amended Answer. For example, the 2006 Amended Answer does not allege that Tri-Star lacked a board of directors. (See Appellant's Initial Brief, pp. 5, 8).

importation was documented so as to place Tri-Star's Gaming Machines at grave risk of confiscation or penalties to be payable to the Dominican Republic governmental authorities by Tri-Star or the DR Businesses. Plaintiff has recklessly failed to cause the DR Businesses to pay all applicable charges to the Dominican Republic, which put Tri-Star's Gaming Machines at risk of confiscation" (R. 60).

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 64 (Ct. App. 2012). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.*, 398 S.C. at 307, 728 S.E.2d at 64-65. "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.*

Although Broom denies all of the wrongful acts alleged in the 2006 Amended Answer and Counterclaims, a 12(b)(6) motion tests the legal sufficiency of the complaint (or counterclaim) on the assumption that all well-pled allegations are true. *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006). A motion under Rule 12(b)(6) or Rule 12(c) admits the well-pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 76, 374 S.E.2d 897, 899 (Ct. App. 1988), *rev'd on other grounds*, *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989).

"[W]hen the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court," the case should be dismissed. *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (2004). Plaintiffs who fail to allege a legally recognized theory of causation or damages also subject their complaint to dismissal. See *id.* at 475, S.E.2d at 562 (affirming dismissal when plaintiff failed to allege any legal basis for damages); *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232, (Ct. App. 1999) (upholding dismissal where the plaintiff failed to allege a valid theory of causation).

South Carolina law requires dismissal of a complaint for failure to satisfy the pleading requirements of Rule 23(b)(1), SCRPC: "[a] derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRPC, is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (quoting *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)). A plaintiff who fails to satisfy the particularity requirements of Rule 23(b)(1), lacks standing. *Strickland v. Flue-Cured Tobacco Co-op. Stabilization Corp.*, 643 F. Supp. 310, 316 (D.S.C. 1986) ("Since the plaintiffs . . . have not complied with the requirements for a derivative action, they lack standing to bring the action before this Court.").

ARGUMENTS

I. DISMISSAL OF TRI-STAR'S CLAIMS IS THE LAW OF THE CASE BECAUSE ANDREWS DID NOT CHALLENGE THAT RULING.

third-party claims were asserted on behalf of Tri-Star for injuries allegedly suffered by Tri-Star. (R. 58-65). In the proceeding below, Andrews offered no argument with regard to the dismissal of Tri-Star as a Third-Party Plaintiff, except to say that judicial economy would be served to allow Tri-Star's claims to proceed. (R. 166). Andrews has not appealed the circuit court's determination that Tri-Star's claims were derivative. Andrews also did not appeal the

circuit court's dismissal of Tri-Star's Third-Party claims for failure to comply with Rule 23(b)(1), SCRCP.

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. See *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. *Id.*

The Court of Appeals should affirm the dismissal of all third-party causes of action by Tri-Star for failure to meet the requirements of Rule 23 and/or for failure to plead with particularity the applicability of the exceptions to Rule 23(b)(1). (R. 58-65).

II. THE CIRCUIT COURT CORRECTLY HELD THAT HUGH ANDREWS'S CLAIMS WERE PLED AS DERIVATIVE CLAIMS, AS OPPOSED TO DIRECT CLAIMS.

As the circuit court found in its Order, "[i]t is not contested that SCRCP 23 was not complied with prior to the filing of Andrews's counterclaims. It is also not contested, if Rule 23, SCRCP, is applicable, that dismissal is the appropriate remedy . . . no argument was presented that even an attempt was made to comply with Rule 23." (R. 4). Andrews does not appeal these findings by the circuit court. Instead he argues that Rule 23 is not applicable to his counterclaims because those claims are direct, as opposed to derivative.

South Carolina adheres to the internal affairs doctrine and applies the law of the state of incorporation to disputes involving relations among shareholders, directors, and officers of a corporation. See S.C. Code § 33-15-105(c) (2006) (providing that this title "does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state"). As the Official Comment to Section 33-15-105(c) of the South

Carolina Code notes, this section “preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation’s business and assets are located primarily in other states.”

Because Tri-Star is a South Carolina corporation with its principal place of business in Spartanburg County, the law of South Carolina governs. *Id.* (R. 58). Andrews’s alleged injury flows not from what happened to him, but from what happened to Tri-Star.

A. Derivative Action: the General Rule in South Carolina

South Carolina adheres to the general rule that individuals may not sue corporate directors or officers for losses suffered by the corporation. *See Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 686 (Ct. App. 2001). This prohibition on individual suits for damages suffered by the corporation is a central tenet of corporate law. *See Fletcher*, Cyclopedic of Corporate Law § 5912 (stating the general rule and observing that “a diminution in the value of corporate stock resulting from some deprecation or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder,” even if “the act complained of was done with the specific intent of injuring plaintiff as a shareholder.”).

Andrews’s counterclaims represent an attempt to recover individually for an injury that was admittedly suffered by Tri-Star. Broom and Andrews chose the corporate structure and form to establish and operate Tri-Star. Andrews strategically determined the course of litigation by asserting identical claims in his name and on behalf of Tri-Star in the 2006 Amended Answer. (R. 58-66).

South Carolina law restricts shareholders from suing corporate directors or officers directly for losses suffered by the corporation. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d

418, 419 (1991). "A corporation is a distinct legal entity." *Todd v. Zaldo*, 304 S.C. 275, 278 403 S.E.2d 666, 668 (Ct. App. 1991). "[A] cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders." *Id.* A plaintiff may not avoid the demand requirement of a derivative suit by merely styling his suit as an individual. *Id.* Characterizing an injury as personal does not make it so. It is the nature of the wrong alleged which controls whether the suit asserts a derivative or individual claim. *Id.*

A derivative action is brought when a corporation suffered an injury from actionable wrongs committed by its officers and directors. *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). The corporation or its shareholders can bring the cause of action on the corporation's behalf, so long as they comply with the applicable rules. *Id.* If any relief is granted, it goes to the corporation; shareholders cannot recover the damages in their individual capacities because their loss is the indirect result of the injury to the corporation. *Id.*

Where there are no allegations of a distinct injury to the shareholder, *Ward*, 295 S.C. at 221, 367 S.E.2d at 704, or where there is an action for misappropriation of corporate property, *Davis v. Hamm*, 300 S.C. 284, 291-92, 387 S.E.2d 676, 680 (Ct. App. 1989), the action is derivative.

"A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Hite v. Thomas Howard Company of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991) (emphasis added), *rev'd on other grounds*, *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

B. Application of South Carolina Law to Andrews's Counterclaims Leads to the Conclusion That His Claims Are Derivative.

A careful review of Andrews's 2006 Amended Answer shows that Andrews did not allege that his loss was separate and distinct from the injury allegedly sustained Tri-Star.

Therefore, as a matter of law, the claims alleged individually by Andrews are derivative and should have complied with the requirements of Rule 23(b)(1), SCRCP.

Paragraphs 23, 25, 26, 27, 34, and 35 of Andrews's Amended Answer do not reveal any particular loss suffered by him. (R. 58-61). Rather they clearly allege, in part, that Tri-Star owed money to Andrews; however Andrews did not sue Tri-Star to recover debts and cannot legally sue Broom individually for such debt. See S.C. Code Ann. §33-6-220 and §33-44-303 (2006) (explaining South Carolina provides by statute that an owner of a corporation or limited liability company is not personally liable for the acts or debts of the corporation or LLC). (R. 58-61).

Paragraphs 26 and 27 of the Amended Answer allege Tri-Star owed Andrews \$1,194,362.83 for the sale of gaming machines. (R. 58). If the allegations were accepted as true, the only reason Tri-Star did not pay this debt is because it suffered a loss in corporate assets, allegedly at the hands of Broom. This conduct, if true, harmed Tri-Star directly, and its investors and creditors derivatively. See *In re Granite Partners, L.P.*, 208 B.R. 332, 344 (Bankr. S.D.N.Y. 1997) ("Claims of mismanagement, waste and breach of fiduciary duty describe conduct which harms an entity directly, and its investors and creditors derivatively The investors and creditors suffer an indirect injury because the wrongful conduct erodes the entity's assets, making it less likely that it will be able to pay creditors and distribute profits to investors.") (emphasis added). Tri-Star and Andrews allegedly suffered the same loss of money. This overlapping loss therefore is not separate and distinct.

Further, paragraphs 34 and 35 allege that Broom made distributions to himself in the amount of \$520,000.00 despite the fact that Tri-Star owed Andrews substantial sums of money as a shareholder and creditor. (R. 59-60). This alleged conduct harmed Tri-Star directly, and its

investors and creditors derivatively. The corporation and Andrews suffered the same loss of money.

A claim-by-claim analysis further demonstrates the overlap between Andrews and Tri-Star.

Claim No. 1 (breach of fiduciary duty): Andrews and Tri-Star allege they were injured by Broom “(1) paying himself from Tri-Star without consent or authority from Andrews; (2) selling substantially all of the assets of Tri-Star at below market value and without authority or consent of Andrews; and (3) converting Tri-Star’s money and/or assets for Broom’s own use and benefit.” (R. 60) (emphasis added).

Claim No. 2 (breach of contract): Andrews and Tri-Star allege they were injured when Broom (1) “disposed of the assets of Tri-Star at substantially below their market value,” and “paid himself approximately five hundred twenty thousand (\$520,000) dollars in salary and/or distribution [from Tri-Star’s assets].” (R. 62) (emphasis added).

Claim No. 5 (conversion): Andrews and Tri-Star allege they were injured when Broom took possession of “monies and equipment belonging to Tri-Star.” (R. 64) (emphasis added).

Claim No. 3 (breach of contract accompanied by a fraudulent act), Claim No. 4 (breach of the covenant of good faith and fair dealing), Claim No. 6 (violation of S.C. Code 33-8-300), Claim No. 7 (violation of S.C. Code 33-8-420): Andrews and Tri-Star simply re-allege the mismanagement and dissipation of Tri-Star’s assets as alleged in the prior derivative claims. (R. 62-65) (emphasis added).

Claim No. 8 (promissory estoppel), Claim No. 9 (fraud), and Claim No. 10 (negligent misrepresentation): Andrews, individually, asserts these claims. However, there are no allegations within these causes of action that Andrews suffered a particular loss that is separate

or different from the losses suffered by Tri-Star. These claims merely re-allege the mismanagement and dissipation of Tri-Star's assets as set forth in the previous claims. (R. 65-67) (emphasis added).

The crux of Andrews's argument is that he has suffered a personal loss; however characterizing an injury as "personal" does not make it so in South Carolina. As discussed above, each of Andrews's alleged "losses" were first and foremost losses to Tri-Star because it allegedly was unable to repay Andrews due to alleged dissipation of assets caused by Broom.

In *Todd v. Zaldo*, the counterclaim plaintiff "characterized the damages as personal because Georganne Apparel Company, Inc. and MIV Textile Sales, Inc. were small closely held corporations" and, as Mr. Zaldo put it, "[m]y corporation is totally my money" *Todd*, 304 S.C. at 277, 403 S.E.2d at 668. The *Todd* court stated the, "Mere characterization of damages by Zaldo as personal versus corporate does not prove their true nature." *Id.* The Court of Appeals analyzed the categories of claimed damages and found them to be "clearly corporate in nature." *Id.* 304 S.C. at 278, 403 S.E.2d at 668. This analysis and determination applies equally to the case at hand since Tri-Star's assets are corporate assets, not personal assets.

It is not uncommon for a court to label a claim "derivative," where a general partner or LLC manager is alleged to have (1) paid itself payments to which it was not entitled, (2) failed to monitor the operations of the business, (3) sold business assets to itself or an affiliate for less than fair market value, (4) made sweetheart deals with its affiliates, (5) mismanaged funds, (6) failed to perform obligations imposed in the partnership or operating agreement, (7) used firm assets as security for personal loans, (8) paid to itself an improperly high price when selling assets to the entity, or (9) failed to properly investigate a business opportunity.⁴

⁴ See, e.g., *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (holding that failure to investigate and monitor partnership investments and placing interest in general partnership fees above

Based on the foregoing reasons, this court should affirm the circuit court's ruling that the claims alleged by Andrews are derivative in nature, thus requiring Andrews to comply with the pleading requirements of Rule 23(b)(1), SCRCF.

C. Rule 23, SCRCF Applies in Non-Class Action Settings.

Andrews asked the circuit court to find that Rule 23, SCRCF, is intended to apply to class actions only. None of the cases cited by Andrews actually hold that the derivative action requirements of Rule 23, SCRCF, must be applied only to class action cases. To the contrary, the Supreme Court of South Carolina has already applied the pleading and demand requirements of Rule 23 to a non-class case involving a closely held corporation. *See Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (dismissing an unjust enrichment claim brought by shareholder of closely held corporation for failure to comply with the pleading requirements of Rule 23(b)(1), SCRCF).

interests of limited partners, which reduced value and payout, stated a derivative claim); *Lenz ex rel. Naples Tennis Resort v. Associated Inns & Rests. Co. of Am.*, 833 F. Supp. 362, 380 (S.D.N.Y. 1993) (finding that misconduct and misappropriation of funds which reduce partnership's income and distributions states derivative claim); *P'ship Equities, Inc. v. Marten*, 443 N.E.2d 134, 138-39 (Mass. App. Ct. 1982) (stating that all limited partners and creditors have an interest in a claim that the general partner has prematurely reimbursed itself or engaged in other mismanagement, negligently diverted assets, acted beyond authority, or failed to perform partnership obligations); *Kenworthy v. Hargrove*, 855 F. Supp. 101, 105-06 (E.D. Pa. 1994) (holding that claim of improper governmental seizure of bank owned by partnership is a derivative claim under Pennsylvania law), *aff'd*, 27 F.3d 557 (3d Cir. 1994); *Re v. Weksel*, 515 N.Y.S.2d 568 (App. Div. 1987) (holding that claim for recovery of funds belonging to partnership is a derivative claim); *Larson v. First Interstate Bank of Kalispell*, 786 P.2d 1176, 1179-80 (Mont. 1990); *Caley Invs. Inc. v. Lowe Family Assoc.*, 754 P.2d 793, 795 (Colo. Ct. App. 1988); *Thomasson v. Mfrs. Hanover Trust Co.*, 657 F. Supp. 448, 453-54 (S.D. Tex. 1987) (applying Texas law in bankruptcy context), *aff'd*, 845 F.2d 1020 (5th Cir. 1988); *Hauer v. Bankers Trust N.Y. Corp.*, 509 F. Supp. 168, 175 (E.D. Wis. 1981), *aff'd*, 671 F.2d 1020 (7th Cir. 1982); *Field Enters. v. Gresser*, No. 89-1234, 1990 WL 262001, at *8 (Wis. Ct. App. Dec. 27, 1990) (holding that limited partners in an Illinois limited partnership may only sue derivatively for breaches of duties owed to partners or the partnership).

South Carolina and other jurisdictions apply Rule 23 derivative suit requirements to non-class cases involving partnerships with as few as three, four or five members.⁵

As other jurisdictions note, the number of shareholders is irrelevant. *Morris v. Hennon & Brown Properties, LLC*, 1:07CV780, 2008 WL 2704292 (M.D.N.C. July 3, 2008) (“But, if the plaintiff shareholder in a closely held corporation owns a 50% interest in the stock, then such shareholder would not be allowed to bring an individual action and can only bring a derivative action.”).

D. Even if the ALI /Thomas Exception Were Adopted in South Carolina, It Would Not Be Applicable Under the Facts of This Case.

Andrews argues that some foreign jurisdictions have applied an exception to the general rule that derivative claims always belong to the corporation. (Andrews’s Initial Brief, pp. 11-12)

⁵ *Ono v. Itoyama*, 884 F. Supp. 892, 895 (D.N.J. 1995) *aff’d sub nom*; *Keiko Ono v. Itoyama*, 79 F.3d 1138 (3d Cir. 1996); *Executive Leasing Company, Inc. v. Leder*, 191 A.D.2d 199, 200, 594 N.Y.S.2d 217 (1993) (“[W]here there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder’s derivative action.”); *L.W. Kent and Co., Inc. v. Wolf, et al.*, 143 A.D.2d 813, 533 N.Y.S.2d 119, (1988) (holding where a president and 50% shareholder initiates corporate lawsuit against other 50% shareholder, presumption of president’s authority to initiate corporate lawsuit does not apply and appropriate avenue of relief is a derivative action); *Abelow v. Grossman*, 91 A.D.2d 553, 554, 457 N.Y.S.2d 30 (1982) (“[A]n action could not be maintained in the name of the corporation, where brought by one stockholder against another with an equal stock interest and degree of control over corporate affairs. The appropriate remedy in such a case is a stockholder’s derivative action.”); *Blasberg v. Oxbow Power Corp.*, 934 F. Supp. 21 (D. Mass. 1996) (two partners: sole limited partner brought claims against sole general partner); *Cabrini Dev. Council v. LCA-Vision, Inc.*, 197 F.R.D. 90 (S.D.N.Y. 2000) (involving three LLC members); *Golden Tee, Inc. v. Venture Golf Sch., Inc.*, 969 S.W.2d 625 (Ark. 1998) (dismissing complaint by four partners against the fifth, who had control of the partnership, for failure to bring action as a derivative suit); *N.Y. Life Ins. Co. v. Ramco Holding Corp.*, 938 F. Supp. 754 (N.D. Okla. 1996) (involving three partners; noting that complaining limited partner owning 96.5% of the partnership); *Whalen v. Connelly*, 545 N.W.2d 284 (Iowa 1996) (involving three partners; dismissing one of the limited partner’s claims (brought directly because he had failed to make demand on the general partner (defendant)), *aff’d*, 593 N.W.2d 147 (Iowa 1999); *S.B. McLaughlin & Co., Ltd. v. Cochrane*, No. C4-92-2081, 1993 WL 231672 (Minn. Ct. App. June 29, 1993), *aff’d*, *Cochrane v. Tudor Oaks Condominium Project*, 529 N.W.2d 429 (Minn. Ct. App. 1995); *Chamarac Props., Inc. v. Pike*, No. 86 Civ. 7919, 1992 WL 332234 (S.D.N.Y. Nov. 12, 1992) (three partners); *Burstin Investors, Inc. v. K.N. Investors, Ltd.*, 657 N.Y.S.2d 743 (App. Div. 1997) (involving two partners).

First, the exceptions referenced by Andrews are applicable only when the claims at issue are deemed derivative. Therefore, an argument by Andrews that an exception applies is a concession that the circuit court properly found that the claims were derivative, but improperly failed to consider whether an exception to the general rule applied.

When Andrews raised this issue with the circuit court, he relied on *Thomas v. Dickson*, 250 Ga. 772 (1983). ((R. 156-163). In *Thomas*, the Supreme Court of Georgia allowed minority shareholders in closely held corporations to pursue direct actions against majority shareholders for injuries done to the corporation strictly in "exceptional situations." *Id.* at 774. According to *Thomas*, a shareholder in a closely held corporation may bring a direct action when the four reasons for requiring a derivative suit do not apply: (1) preventing a multiplicity of lawsuits; (2) protecting corporate creditors by putting the proceeds of the recovery back in the corporation; (3) protecting the interests of all shareholders by increasing the value of their shares; and (4) adequately compensating the injured shareholder by increasing the value of their shares. *Id.* If none of these reasons are applicable, the shareholder may circumvent the requirements of a derivative action and bring a direct action, which tenders any recovery to the shareholder alone rather than to the corporation which has suffered the harm.

While the court allowed a direct action in *Thomas*, it specifically did so because of evidence indicating that the corporation has been paying its debts as they became due and that there was no outstanding or dissatisfied creditor. However, the Georgia Supreme Court expressly disapproved of permitting direct actions if allowing this course "does not consider the possibility of prejudice to other interested parties, such as creditors," and ruled that "if such a possibility [of prejudice to creditors] exists, a direct recovery should not be allowed." *Id.* at 775. (emphasis added). Thus, the *Thomas* court strictly construed the corporate creditor factor and

made clear Georgia's policy favoring priority recovery to corporate creditors as opposed to corporate shareholders, like Andrews. The *Thomas* court held that if "a possibility exists" of prejudice to other interested parties such as "outstanding or dissatisfied creditors" then "a direct recovery should not be allowed." *Thomas* at 775.

There are no allegations in Andrews's 2006 Amended Answer that Tri-Star lacked outside creditors. Andrews's own pleading references debt owed to the Dominican Republic: "Plaintiff was reckless in the manner the [sic] Gaming Machines were imported, and such importation was documented so as to place Tri-Star's Gaming Machines at grave risk of confiscation or penalties to be payable to the Dominican Republic governmental authorities by Tri-Star or the DR Businesses. Plaintiff has recklessly failed to cause the DR Businesses to pay all applicable charges to the Dominican Republic, which put Tri-Star's Gaming Machines at risk of confiscation" (R. 60). Andrews asserts in his Initial Brief that "[it] may take discovery and a trial to determine whether the particular corporation has outside creditors who need to be protected or whether equity otherwise favors the corporation itself getting the recovery." Andrews, as a 50/50 shareholder, knows whether Tri-Star has outside creditors. It is disingenuous to allege that discovery is needed on that fact when Andrews's own pleadings reference outside creditors.

Because the four corners of the Andrews's own pleading show a possibility of prejudice to outstanding or dissatisfied creditors, the *Thomas* exception is inapplicable even if this Court chose to adopt the exception.

South Carolina has a similar policy of favoring priority recovery to corporate creditors as opposed to corporate shareholders. See, e.g., S.C. Code Ann. § 33-6-400(c) (2006) (stating no distribution may be made corporate shareholders if "[t]he corporation would not be able to pay

its debts as they become due in the usual course of business” or “the corporation's total assets would be less than the sum of its total liabilities . . .”). See also *Babb*, 303 S.C. at 464-65, 401 S.E.2d at 418 (1991) (finding a direct action was disallowed in a lawsuit involving misappropriation of corporate property; where corporation had disposed of its assets and was bankrupt, assuming the *Thomas v. Dickson* exception to derivative actions was applied, “[t]he claims of corporate creditors may be jeopardized if individual shareholders are permitted to satisfy their personal debts by raising a claim which can only be asserted by the corporation. As between creditors and shareholders, the interest of the creditors must prevail”).

“Because a corporate recovery in a derivative action will benefit creditors while a direct recovery by a shareholder will not, the protection of creditors principle could well be implicated in a shareholder suit against a closely held corporation with debt.” *Barth v. Barth*, 659 N.E. 2d 559, 562 (Ind. 1995) (“Barth II”); *Barth v. Barth*, 693 N.E.2d 954 (Ind. App. 1998) (“Barth III”) (holding the trial court properly dismissed direct action brought by shareholder for misappropriation of assets of closely held corporation; complaint seeking corporate dissolution and asking that damages be paid to corporate shareholder, not to creditors, could result in “potentially prejudice” to creditors); *Maki v. Estate of Ziehm*, 55 A.D.2d 454 (N.Y. App. Div. 1977) (refusing to permit 50% shareholder of dissolved corporation to bring direct action for misappropriation of corporate assets; “[p]etitioner may not be permitted to circumvent the rights of creditors by maintaining a direct action, the potential benefits of which would inure solely to himself”).

E. The ALI Exception Has Not Been Adopted in South Carolina.

Allowing an exception challenges the fundamental operation of the corporate form in South Carolina. While *Andrews* raises interesting policy concerns, there are serious ramifications for allowing such a relaxed standard for pleadings, as suggested by the ALI

exception, when bringing derivative actions. Our current rule exists for the purpose of protecting the rights of all entities that place a trust in a business, be it customers, shareholders, creditors, officer, etc.

In *Davis v. Hamm*, the Court of Appeals expressly refused to apply an exception to the general rule concerning when a claim must be brought derivatively. *Davis*, 300 S.C. at 288, 387 S.E.2d at 678. Two years later, the Court of Appeals again had an opportunity to adopt this exception for closely held corporations, and in declining to do so, the court stated as follows:

As an additional theory, Zaldo argues he may recover damages personally because Georganne Apparel Company, Inc. was a close corporation with only three stockholders. He seeks to have Georganne Apparel viewed more as a partnership than a corporation. See *Johnson v. Gilbert*, *Davis v. Hamm*. This record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.

Todd, 304 S.C. at 279, 403 S.E.2d at 668-69 (internal citations omitted).

In the years since the *Davis* and *Todd* cases, our appellate courts have consistently rejected exceptions to the general rule, even when those cases involved closely held corporations. See *Babb*, 303 S.C. at 464, 401 S.E.2d at 419-20; *Brown*, 348 S.C. at 51, 557 S.E.2d at 685.

This record does not present a factual scenario sufficient to ignore the corporate nature of Tri-Star. As such, this case does not support the application of any exception for closely held corporations.

III. THE CIRCUIT COURT DID NOT RULE ON ANDREWS'S MOTION TO AMEND SUCH THAT THERE IS NO ERROR TO REVIEW.

A. This Issue Was Not Preserved For Appellate Review

On November 14, 2011, Andrews filed a motion to amend and/or supplement the answer and counterclaims. (R. 172-189). The circuit court never ruled on that motion to amend, and Andrews failed to obtain a ruling.

Where a party raises an issue, but the issue is never ruled on by the circuit court, and the party fails to attempt to obtain a ruling on the issue by way of a motion to alter or amend, the issue is not preserved for appellate review. *On, L.C.C. v Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Andrews has waived his right to appeal this issue because the circuit court never ruled on his 2011 motion to amend his pleadings. *See Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000) (holding an issue not ruled upon by the trial judge is not preserved for appeal).

B. Even If Andrews Had Not Waived This Issue, The Argument Fails On The Merits.

Andrews cites *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006), and requests that this Court grant him the opportunity to amend his pleadings. (Andrews's Initial Brief, at p. 16). In *Spence*, the plaintiff appealed the lower court's denial of plaintiff's request to amend her complaint. *Spence*, 368 S.C. at 128, 628 S.E.2d at 880. Before affirming the lower court's dismissal with prejudice, the South Carolina Supreme Court noted that, when affirming a motion to dismiss with prejudice, appellate courts have the discretion to allow the plaintiff to amend his

complaint. *Id.* at 130, 628 S.E.2d at 881. Furthermore, the Supreme Court noted that an appellate court should follow the "procedure when the plaintiff presents additional factual allegations or an alternative theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted." *Id.* at 130, 628 S.E.2d at 881-82. Finding that the appellant had not alleged sufficient facts to state a cause of action, the Supreme Court affirmed the lower court's dismissal with prejudice. *Id.*

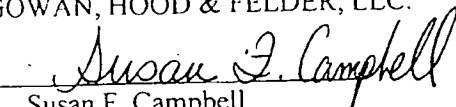
If this Court disagrees on preservation, Broom contends that the Supreme Court's holding in *Spence* cautions against granting Andrews the right to amend his pleadings. Andrews has failed to suggest any additional facts that, if alleged, would properly support a direct action against Broom. His allegations continue to support a loss suffered by Tri-Star. An attempt to re-file for the purposes of styling the claim solely in Andrews's name does not negate the fact that the alleged harm was a corporate loss, thus still causing Andrews's claims to be subject to a derivative action. *Todd*, 304 S.C. at 278, 403 S.E.2d at 668. Therefore, the circuit court should be affirmed.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted

McGOWAN, HOOD & FELDER, LLC.

BY: 

Susan F. Campbell
S.C. Bar No. 70545
Whitney B. Harrison
S.C. Bar No. 100111
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
(803) 256-0702 (fax)

Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone No. (864) 582-5118
Fax No. (864) 585-1615

James R. Gilreath
S.C. Bar No. 2133
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue
Post Office Box 2147
Greenville, South Carolina 29602
Telephone (864) 242-4727
Fax No. (864) 232-4395

ATTORNEYS FOR RESPONDENT
QUENTIN S. BROOM, JR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-42-3397

Quentin S. Broom, Jr., ... Respondent,

v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews Defendants,

OF WHOM

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and on behalf of Tri-Star
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v.

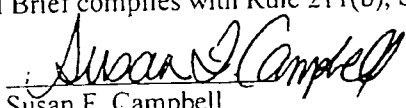
Quentin S. Broom, Jr., ... Third-party Defendant.

CERTIFICATE OF COUNSEL

The undersigned counsel certified that this Final Brief complies with Rule 211(b), SCACR.

November 21, 2013

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SC COURT of Appeals


Susan F. Campbell
Bar No. 70545
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
(803) 256-0702 (Fax)

Attorneys for Respondent
Quentin S. Broom, Jr.

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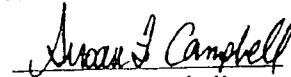
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PROOF OF SERVICE

I certify that I have served **Respondent's Final Brief** on Blake A. Hewitt and John S. Nichols, attorneys for Appellant, by depositing a copy of it in the United States Mail, postage prepaid, addressed to P.O. Box 7965, Columbia, South Carolina 29202, on this 22nd day of November, 2013.



Susan F. Campbell
Bar No. 70545
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
(803) 256-0702 (Fax)

Attorneys for Respondent
Quentin S. Broom, Jr.

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Quentin S. Broom, Jr., ... Third-party Defendant.

REPLY BRIEF

Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Rodney F. Pillsbury, Bar # 13067
PILLSBURY & READ
1204-A East Washington Street
Greenville, SC 29601
(864) 241-9828
(864) 241-9818 (facsimile)
rpillsbury@prlawpa.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
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REPLY BRIEF

Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Rodney F. Pillsbury, Bar # 13067
PILLSBURY & READ
1204-A East Washington Street
Greenville, SC 29601
(864) 241-9828
(864) 241-9818 (facsimile)
rpillsbury@prlawpa.com

Attorneys for Appellant

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ARGUMENT

There are three reasons why this Court should reverse the order that dismissed Hugh Andrews' claims against his business partner, Quentin Broom.

First, the circuit court erred when it held that Mr. Andrews' claims must be derivative and not direct. In a true derivative claim, there would be other injured shareholders, but no other shareholder has suffered the same injury as Mr. Andrews. The only other shareholder that exists is Broom, and according to Andrews, Broom has benefitted from the acts in question. There is a split of authority on this point, but this view is the better view.

Second, if Mr. Andrews' first argument is wrong—if his claims *are* derivative and not direct—the circuit court was still wrong to use a pleading defect to dismiss Andrews' claims. There is no cogent justification, none, for applying Rule 23 to a suit where one of a corporation's two shareholders is suing the other. The rules of procedure are designed to ensure just and speedy outcomes, but there is no justice in requiring someone to perform an obviously meaningless act. When one of a corporation's two shareholders is suing the other, the claim necessarily alleges the functional equivalent of demand futility.

Finally, *if* Rule 23 applies—if Mr. Andrews is required to put things in his pleadings despite the fact that these things are obvious—the circuit court nevertheless erred when it dismissed Mr. Andrews' claims without allowing him to amend them. If this must be a derivative suit, and if Mr. Andrews' claims are indeed defective, all of the defects are defects that Mr. Andrews could easily cure. Broom could not seriously claim prejudice. He litigated this case for 6 years before any of this became an issue. This matter should be reversed and remanded for trial. It is time for this foolishness to end.

A. Mr. Andrews' Claims Are Not Truly Derivative. In a Two Person Corporation, a Claim of Self-dealing Necessarily Alleges That the Plaintiff Has Suffered a Harm That Is Unique.

A claim for corporate self-dealing is normally a derivative claim. This is the basic tenor of Broom's response; this is supposedly a normal mismanagement case. Broom says that Andrews' alleged injury does not flow from what happened to him, but from what happened to Tri-Star, Andrews' company. Because Andrews' injury derives from his status as a shareholder, Broom argues that all of Andrews' claims must be derivative.

This is not true. The fact that Broom and Andrews are this corporation's only shareholders makes this case different.

In *Ward v. Griffin*, this Court explained that an individual stockholder will have a direct suit if he or she "has sustained a loss separate and distinct from that of other stockholders generally." 295 S.C. 219, 221, 367 S.E.2d 703, 703-04 (Ct. App. 1988). That is what has happened here. Broom and Andrews are Tri-Star's only shareholders. If Broom improperly took money from the company, it necessarily follows that Andrews was injured and Broom was not. Yes, Tri-Star was also injured, and yes, Andrews' injury derives from his status as shareholder, but that does not change the fact that if Andrews' claims are true, he is the *only* injured shareholder. Tri-Star cannot be the only owner of a claim that injured Andrews and no one else.

If there was a third shareholder—a silent partner—the result would be different. Andrews and the third shareholder would have the same injury, and the court would be justified in labeling that suit as derivative. When multiple parties have the same sort of injury, this signals that the corporation's rights are the real rights at stake.

That is not true here. Instead, this case makes the debate entirely semantic. Does it really matter whether these claims are labeled as “derivative” or “direct?” Either way, the two shareholders of this corporation will be on opposite sides of the suit and the suit will be between them. If Tri-Star owns the rights to sue for Broom’s (alleged) wrongdoing, how does Broom propose that process will work? What steps does a corporation take to pursue its rights when one of its 50% shareholders alleges that the other 50% shareholder has plundered the assets and left the business defunct? Which one of the 50% shareholders gets to manage the litigation, and who gets to decide what to do with any recovery?

This is why there has been an evolution in how the law treats corporations that have a small number of stockholders. Professor Hodge O’Neal, whose scholarship on this topic is referenced by many of the decisions in this area, has written that the derivative/direct distinction makes “little sense” and becomes “technical” in these sorts of circumstances. O’Neal & Thompson, *O’Neal’s Close Corporations*, § 9:26 (rev. 3d ed. 2012). Other courts have recognized that when there are only two shareholders, the self-dealing of one will result in a unique injury to the other. See, e.g., *Noakes v. Schoenborn*, 841 P.2d 682, 687 (Or. Ct. App. 1992); *Yanow v. Teal Industries, Inc.*, 422 A.2d 311, 321-22 (Conn. 1979).

This is the better view. Derivative suits are designed to protect the principles of corporate governance and discourage frivolous lawsuits, but these concerns do not exist when one 50% shareholder is suing the other. In that situation, there is no corporate governance to protect. The corporation cannot act because the controlling shareholders are fighting. When one of two shareholders is suing the other, the suit is obviously not frivolous. Because the corporation cannot function, nobody is left to resolve the dispute but the court.

There is no cogent reason to make this situation more complicated. There is no reason to shoehorn this case into a process designed for things that are more complex.

Broom has not presented the Court with any authority that persuasively rebuts this argument. At no point does Broom cite a case that considers this argument and rejects it.

Several of the cases cited by Broom deal with whether a corporate officer has the authority to bring a lawsuit in the corporation's name, as opposed to the officer's own name. See, e.g., *Ono v. Itoyama*, 884 F.Supp. 892, 895-99 (D.N.J. 1995); *L. W. Kent & Co. v Wolf*, 533 N.Y.S.2d 119 (N.Y. App. Div. 1988); and *Abelow v Grossman*, 457 N.Y.S.2d 30 (N.Y. App. Div. 1982); cited at (Brief of Respondent, p.14 n.5). This did not occur here. Andrews did not bring any claims in Tri-Star's name. Andrews brought claims in his own name, both on his own behalf and on behalf of Tri-Star. These cases are inapposite. Because they do not consider the question that Andrews has presented, they do not have any meaningful value, one way or the other.

Andrews' view of the law has not been universally adopted. Good expressions of the counter-argument include *Landstrom v. Shaver*, 561 N.W.2d 1 (S.D. 1997) and *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 384 (7th Cir. 1990). As Mr. Andrews' principal brief described, these cases should not be persuasive. These cases are premised on an unyielding respect for the corporate form, and while respecting the corporate form is a fair consideration, the reality is that a business cannot function when its equal shareholders are suing each other. In that situation, there is no substance to the direct/derivative distinction.

For these reasons, this Court should hold that the circuit court erred when it held that Mr. Andrews' claims are derivative and not direct.

B. If Mr. Andrews' First Argument Is Wrong (Meaning, If His Claims Are Derivative), There Was Still No Reason to Require Compliance with Rule 23 and Dismiss His Claims.

Even if the Court disagrees with the argument that Mr. Andrews' claims are direct and not derivative, this Court should still reverse the decision to dismiss them. There is no cogent justification—none—to apply Rule 23 to a suit where one of a corporation's two shareholders is suing the other.

Rule 23 requires a derivative claim to be verified by the plaintiff and to allege what the plaintiff has done to obtain relief from the company's management. Rule 23(b)(1), SCRCP. It also provides that the plaintiff must fairly represent the other shareholders who are similarly situated. *Id.* These are not statutory requirements. They derive from the rules. S.C. Code Ann. § 33-7-400 (2012) (pointing to the rules for derivative suits).

The requirements of Rule 23 serve specific functions. "Verification," one court has described, "serves the purpose of ensuring that the plaintiff or some other person has investigated the charges and found them to have substance." *Strickland v. Flue-Cured Tobacco Co-op. Stabilization Corp.*, 643 F. Supp. 310, 316 (D.S.C. 1986). Another court described verification as discouraging "strike suits" based on worthless claims that are made without regard to their truth. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966).

Nobody has argued that Andrews' suit against his business partner is a meritless "strike suit." In the circumstances of the present case, enforcing this requirement appears to be nothing more than requiring compliance with a hyper-technicality.

"The persuasive rationale for the demand requirement is that it allows [a corporation's] directors to make a business decision about a business question: whether to

invest the time and resources of the corporation in litigation.” *Starrels v. First Nat. Bank of Chicago*, 870 F.2d 1168, 1173 (7th Cir. 1989) (Easterbrook, J., concurring). Does anyone seriously contend that Andrews should be required to include a statement in his pleadings indicating that he asked Broom to sue himself? As far as Mr. Andrews has been able to discover, no court has adopted this theory, and several cases have openly described this proposition as nonsense. See, e.g., *Anderson v. Clemens Mobile Homes, Inc.*, 333 N.W.2d 900, 904 (Neb. 1983); *Funk v. Spalding*, 246 P.2d 184, 186 (Ariz. 1952).

Broom cites one such case favorably in his brief. In *Ono v. Itoyama*, a United States District Court in New Jersey found that Rule 23’s requirements for a derivative suit were deemed satisfied when one 50% shareholder was suing the other. 884 F.Supp. at 899 (cited in the Brief of Respondent, p.14 n.5). The court ultimately dismissed the case due to incomplete diversity of citizenship, but the analysis on the demand requirement follows the same argument that Mr. Andrews is making.

Broom also cites a decision from the United States District court in Oklahoma. *New York Life Ins. Co. v. Ramco Holding Corp.*, 938 F.Supp. 754 (N.D. Okla. 1996). That decision involved the application of Texas law. *Id.* The citation is instructive because in the state of Texas, the pleading rules for derivative suits are deemed satisfied as a matter of law if the suit is on behalf of a close corporation and all of the remaining shareholders are named as defendants. *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162-63 (Tex. 1990). Here again, the law supports the argument that Mr. Andrews is making.

Broom says that there are “serious ramifications” for relaxing the pleading rules in these circumstances. (Brief of Respondent, p.18). What are they? If the concern is

protecting the corporation's creditors, that is a recovery question—not a pleading question. Deeming the requirements of Rule 23 to be satisfied would have no impact whatsoever on what would happen to any financial recovery on Andrews' claims. If the pleading rules are deemed satisfied, the claims would still be derivative.

Thus, if Mr. Andrews' first argument is wrong—if his claims *are* derivative and not direct—this Court should still hold that the circuit court was wrong to use a pleading defect to dismiss Andrews' claims. There is no cogent justification to apply Rule 23 to a suit where one of a corporation's two shareholders is suing the other.

C. This Is the Paradigm Case for Allowing Amended Pleadings, and Mr. Broom Is Taking a Position That Is Opposite to the Position He Placed on the Record in Circuit Court.

If this Court determines that the pleading requirements for Rule 23 are mandatory, Broom says that this Court should not allow Andrews to amend his claims because Andrews failed to obtain a specific ruling on this request from the circuit court.

After the circuit court dismissed Andrews' claims, Andrews filed two motions: a motion for reconsideration and a motion to amend his answer and counterclaims. The court heard arguments on these motions in the same hearing.

Broom told the circuit court that because Andrews' claims had been dismissed, he did not have any claims to amend. (R. pp. 293-294). Broom argued Andrews was "asking to be permitted to amend something that does not exist. Now they won't – will not be prohibited before the appellate courts if that's where this is headed from making the arguments that are contained within this proposed [filing] . . . [but] you can't amend something that doesn't exist." (R. p. 294).

Broom is right about the court's order. It never mentions the motion to amend. See (R. p. 17). But the obvious import of the order is to deny the motion. Broom had argued that the court could grant the amendment only if the court changed the order dismissing the case. The only rational view of the court's decision is that it agreed. In deciding *not* to alter the order that dismissed Andrews' claims, the circuit court necessarily rejected Andrews' request that he be allowed to amend his claims. Nothing else is possible.

There is no cogent justification for denying the motion to amend. Nobody has blown a jurisdictional deadline. Rule 23 is a rule of pleading and it must "be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRPC. There is no justice in deciding this case based on a trivial technicality and not on the merits.

This is a pleading question, but it also affects the other issues in this appeal. In opposing the ALI exception, Broom says that "this record" does not present facts that justify considering that exception. What factual record? There has been no evidence presented in this case. This case was decided on the pleadings. Moreover, every previous instance where a South Carolina appellate court has considered the close corporation exception, the court was reviewing a case that had been decided on the merits by some sort of trial.¹

There may be no need to protect corporate creditors. Perhaps there are none, or perhaps Broom and Andrews, like the shareholders in other small corporations, personally guaranteed Tri-Star's debts. See *Mynatt v. Collis*, 57 P.3d 513, 529 (Kan. 2002) (referencing

¹*Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001) and *Todd v. Zaldo*, 304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991) were appeals from jury trials. *Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991) and *Davis v. Hamm*, 300 S.C. 284, 387 S.E.2d 676 (Ct. App. 1989) were appeals from proceedings in front of a judge alone.

the American Law Institute's observation on this point). This is why states adopting the ALI exception grant trial courts a measure of discretion. See *Richards v. Bryan*, 879 P.2d 638, 646-48 (Kan. Ct. App. 1994) (adopting this approach after rejecting the arguments to the contrary). But without an evidentiary record to review, all of this is just guesswork.

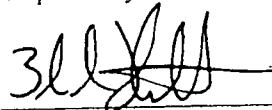
The point is this: at the pleading stage, nobody can say with any certainty that this case does not justify following the ALI approach. There is no evidentiary record, and the reason a record was not developed was because Andrews omitted things from his pleading. Because these things were obvious from this case's context, it was error to use a technical defect to dismiss this case with prejudice. The circuit court simply cannot meaningfully review the issues in question without having some sort of proceeding on the merits.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's decision and remand this case for additional proceedings.

November 22, 2013

Respectfully submitted,



Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY.
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-42-3397

Quentin S. Broom, Jr., ... Respondent,

v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews, ... Defendants,

Of whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Appellant.

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the
Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13,
2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

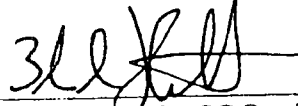
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SC Court of Appeals

November 22, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Blake A. Hewitt", written over a horizontal line.

Blake A. Hewitt, SC Bar # 73674

John S. Nichols, SC Bar # 4210

BLUESTEIN NICHOLS

THOMPSON & DELGADO

Post Office Box 7965

Columbia, SC 29202

(803) 779-7599

(803) 779-8995 (facsimile)

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Attorneys for Appellant

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Final Brief of Appellant, Reply Brief and Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Susan F. Campbell
Whitney B. Harrison
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton St.
Columbia, SC 29201

NOV 26 2013
SC Court of Appeals

November 26, 2013
Columbia, South Carolina

Erin Bridges

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC