THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Appellate Case No. 2012-212145

Joseph E. Mason, Jr., Petitioner,

v.

Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc., and Irwin Levine, Respondents.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioner Joseph E. Mason, Jr. ("Son") petitions the Court for a writ of certiorari to review the opinion of the South Carolina Court of Appeals filed in this case on March 4, 2015. (*Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405, 2015 S.C. App. LEXIS 34 (Ct. App. 2015)).

This case raises important issues of corporate law, including the rights and remedies provided by the South Carolina Business Corporation Act of 1988, S.C. Code §§ 33-1-101, *et seq.* (the "Corporate Code"). It arises from a dispute between the shareholders of the family business, Mason Holding Company, Inc. ("the Company"). Son devoted over 24 years of his life building the Company from scratch until the

termination of his employment in 2008, at which time the Company had annual sales of almost $7 million. Since the termination of his employment, Son has been deprived of all economic value of his ownership in the Company, while the remaining shareholders have received compensation in excess of market value for their services, raises, bonuses, and lavish benefits.

In its March 4, 2015 opinion, the Court of Appeals concluded that Son was not entitled to a forced purchase of his shares or other relief under the judicial dissolution provisions of the Corporate Code and affirmed the special referee's rulings that Son was not entitled to additional shares in the Company, was not entitled to recovery under his tort claims, and that the Mason Respondents (Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and the Company, collectively) were entitled to recover under their counterclaims and to pursue a future claim against Son for damages relating to the Company's tax returns. Son respectfully submits that the Court of Appeals' opinion conflicts with prior precedent of this Court and the provisions of the Corporate Code and erred in the application of important principles of law.

CERTIFICATION BY COUNSEL

The undersigned counsel for Joseph E. Mason, Jr. certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals in this case by Order filed on April 29, 2015.

QUESTIONS PRESENTED

1. The Court of Appeals concluded that Son did not address on appeal the special referee's finding that Son's suit was improper because it was not filed as a derivative action. Did the Court of Appeals err in reaching this conclusion in light of the

detailed and specific factual and legal arguments in Son's Final Brief of Appellant that the claims were appropriately brought by Son as direct claims?

2. Did the Court of Appeals err in upholding the special referee's finding that Son's suit was improper because it was not filed as a derivative action where the damages sought by Son were for his personal loss of income and for his personal loss of value of his shares when no other shareholder sustained similar losses and in light of the judicial dissolution provisions of the Corporate Code's remedy of a direct claim for a forced buyout of an individual shareholder's shares?

3. Does the Court of Appeals' opinion upholding the special referee's finding that Son's suit was improper because it was not filed as a derivative action conflict with the holdings in *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001), South Carolina Code Sections 33-14-310(d) and 33-18-400 to -430, and other authorities?

4. Did the Court of Appeals err in concluding that Son was not entitled to a forced buyout of his shares of the Company or other relief under the Corporate Code when he has been deprived of all value of his shares since 2008?

5. Did the Court of Appeals err in concluding that Son was precluded from recovery for relief under the judicial dissolution provisions of the Corporate Code due to unclean hands or related equitable doctrines thereby allowing Respondents to deprive Son of all value of his shares of the Company?

6. Did the Court of Appeals err in concluding that Son was precluded from recovery for relief under his tort claims due to unclean hands or related equitable doctrines when Son brought legal claims against Respondents rather than derivative claims?

7. Pursuant to the judicial dissolution provisions governing South Carolina corporations and applicable case law, including *Santee Oil Co. v. Cox*, 265 S.C. 270, 217 S.E.2d 789 (1975), is the fair value of the Company $3,673,000, and is the fair value of Son's shares in the Company his proportionate interest in the Company?

8. Did the Court of Appeals err in giving deference to credibility determinations in orders drafted by opposing counsel without specific direction from the special referee?

9. Did the Court of Appeals err in affirming the special referee's holding that Son should not recover on his tort causes of action or be awarded his attorneys' fees and that the Mason Respondents did not breach their fiduciary duties when the evidence demonstrates, among other things, that they failed to take action for over four years after Son raised concerns regarding the Company's problematic tax and accounting practices, continued to employ the incompetent accountant that previously represented that those practices were appropriate, paid themselves excessive compensation and benefits, and deprived Son of all economic value of his ownership interest in the Company?

10. Did the Court of Appeals err in affirming the Special Referee's holding that Respondent Levine did not aid and abet the breach of fiduciary duties by the Mason Respondents when the evidence demonstrates, among other things, that Levine acknowledged, despite his prior representations to the contrary, that his accounting and tax advice was improper, that he continued as the Company account (as well as the owner of an interest in an affiliated Company) but did not take action to properly resolve the problems, and that he was openly hostile and took other actions to retaliate against Son because he raised those issues?

11. Did the Court of Appeals err in concluding that Son was barred under the two-issue rule from pursuing his claim that he owns an additional 20% of the shares of the Company because it was not specifically pleaded when the special referee made no such specific holding, the issue was a supplemental development after the filing of the amended complaint because shares were to be delivered annually, the issue was litigated in discovery, tried by consent, and no opportunity was given Son to move to amend to conform to the evidence pursuant to Rule 15(d), SCRCP or otherwise?

12. Did the Court of Appeals err in ruling that Respondents were entitled to judgment against Son for reimbursement of certain fees of prior counsel when Son solicited the subject advice while President of the Company, the advice concerned the Company's taxes, and the advice was not disputed and ultimately relied and acted upon by the Company (although Respondents waited several years)?

13. Did the Court of Appeals err in upholding a judgment related to funds for casings when the practice was longstanding, approved by the Mason Respondents, and, after entering into the father's "retirement" agreements, the funds were shared with Son's sister?

14. Did the Court of Appeals err in upholding the special referee's ruling that the Mason Respondents could maintain a future action against Son for damages based on the Company's tax returns on the grounds that the amount of damages could not be determined because the IRS had not indicated the amount due in back taxes where this remedy would otherwise be time-barred, this remedy was not sought before or during trial, the Mason Respondents were indisputably on notice of the potential claim since 2007, the reason the amount the IRS would require to be paid was unknown was because

the Mason Respondents elected not to inform the IRS until more than 3 years later in 2011, and the amount due to the IRS substantially increased as a result of that period of the Mason Respondents' intentional failure to report?

STATEMENT OF THE CASE

The shareholders of the Company are Son; his parents, Catherine L. Mason, Joseph E. Mason, Sr.; and his sister, Kathy M. St. Blanchard. Joe Sr., Catherine, and Kathy are also current officers of the Company.

Son initiated this case by filing his complaint in the Horry County Court of Common Pleas on August 5, 2008. (R. pp. 1-13.) He asserted six causes of action for breach of contract, breach of fiduciary duty, civil conspiracy, relief pursuant to the statutory judicial dissolution provisions pertaining to South Carolina corporations, wrongful termination of employment – constructive discharge, and wrongful termination – violation of public policy. He named as defendants the Company and the other shareholders of that entity (the Mason Respondents). The Mason Respondents filed an answer and asserted counterclaims for alleged breach of fiduciary duty and conversion on August 28, 2008. (R. pp. 14-24.)

On September 23, 2009, Son filed an amended complaint (R. pp. 31-45) that added Irwin Levine (the Company accountant and part-owner of one of the affiliated operating entities) as a defendant and added a seventh cause of action against him for aiding and abetting breach of fiduciary duty. The Mason Respondents and Levine are collectively referred to as "Respondents." On October 13, 2009, the Mason Respondents filed an answer and reasserted their counterclaims in response to the amended complaint. (R. pp. 46-58.)

This case was referred with finality to Ralph P. Stroman, Esquire, as Special Referee. (R. p. 82.) This case was tried without a jury during the week of November 14 through November 18, 2011.

At the conclusion of the trial, Special Referee Stroman asked for proposed orders from all parties without providing any guidance or direction with regard to the content. (R. pp. 750-752.) Special Referee Stroman subsequently granted judgment in favor of Respondents and against Petitioner by executing without any change the two proposed orders submitted by counsel for Respondents, which orders were filed on January 20, 2012.

The Final Order with regard to the Mason Respondents (the "Final Order") granted judgment in favor of the Mason Respondents as to all causes of action asserted by Son and granted judgment in favor of the Mason Respondents and against Son on the Mason Respondents' counterclaims in the total amount of $29,017.98.[1] (R. pp. 92-117.) The Final Order also held that the Mason Respondents could pursue a later claim against Petitioner for damages relating to the filing of false corporate tax returns. (R. p. 117.) The separate final order as to Levine (the "Levine Order") granted judgment in favor of Levine and against Son as to the cause of action against Levine. (R. pp. 118-124.)

Son timely filed a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP dated January 27, 2012, as to the finding and conclusion relating to a future claim against Son for payment of the Company's taxes (R. pp. 125-126), and that motion was denied by order received by Son's counsel on June 1, 2012. (R. pp. 127-128, 130.) This appeal followed.

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[1] Petitioner agreed to dismiss his claim for breach of contract at the close of his case during trial. (R. p. 570.)

STATEMENT OF FACTS

The Company, a statutory close corporation without a board of directors (*see* R. p. 839), wholly owns four subsidiaries that operate tire and auto service stores in four locations. (R. pp. 243-244, 1140.) In addition, the Company owns 48% of another entity that operates a tire and auto service store in a fifth location. Respondent Levine now owns the remaining 52% of that entity. (*Id.*)

Son left an excellent job with Ryder Truck Rental and moved from Florida to Myrtle Beach in about March of 1984 to start the Company. (R. pp. 237-239.) Son served as president of the growing Company for many years until October 24, 2007, and was employed by the Company until July 2008. (R. p. 697.) He generally worked around 12 hours per day Monday through Friday, five hours on Saturday, and often worked on Sunday. (R. pp. 244-245.) The Mason Respondents acknowledge that Son did an excellent job of managing and growing the business until his termination in 2008. (*See* R. pp. 712, 729-730, 789 (Son "has done an excellent job in making the company money"), 882 ("He's done a fantastic job").)

At Joe Sr.'s suggestion, Levine, who knew Joe Sr. and Catherine in Florida, provided accounting services to the Company for many years. (R. pp. 464-465, 1294.) The Company grew throughout the 1980s, 1990s, and into the 2000s, eventually operating the five tire and auto service stores. (R. pp. 241-242, 1140.)

In 1998, the Company structure changed. Mason Holding Company, Inc. was formed as the holding company for the various growing Mason Tire entities, all of which were consolidated under the holding company banner. (R. pp. 253-254.) In 1998, the 1,000 total shares in the Company were held as follows: Joe Sr. 520, Catherine 160, Son

160, Kathy 90, and Ozzy[2] 70. (R. p. 756.) Within several years, Joe Sr. sought to put together a plan to sell his shares back to the Company, which plan changed to a "retirement plan." (R. p. 1290.) Joe Sr. and Levine were the primary architects of Joe Sr.'s retirement package, along with Attorney Ed Kelaher and some input from Son.[3] (R. pp. 466-474, 801, 804-805, 808-809, 810-812.). With specific directions from Levine, Mr. Kelaher changed the structure of the retirement package to include three agreements, all dated on or about January 1, 2003. (R. pp. 473-474, 808.)

The agreements provided considerable benefits to Joe Sr. and his wife, Catherine, including a salary and significant benefits. Further, the Company executed an additional lease to an entity owned by Joe Sr. and Catherine for the location of one of the Company's retail locations, even though the store was already the subject of an existing lease. (R. pp. 815-825, 1295-1296.) The extra lease simply characterized additional compensation to Joe Sr. as rent so that certain employment taxes or capital gains taxes would allegedly not be due. (R. pp. 475-476.)

The parties also entered into a letter agreement pursuant to which Joe Sr. and Catherine gave their "promise, commitment, and absolute and unfailing word" that they would make a "gift" of their shares in the Company to Son and Kathy in certain installments over the period ending on December 31, 2011. (R. pp. 813-814, 1293.) The letter agreement recites that it grants the unusual consideration to Joe Sr. and Catherine of the right to designate the Certified Public Accountant for the Company. (R. pp. 808-809,

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[2] Ozzy refers to Oswaldo St. Blanchard, Kathy's former husband.

[3] Kelaher noted that the final arrangement was unusual, and he expressed serious concerns about how it would be viewed by the IRS, the courts, or other interpreting bodies. (R. pp. 808-809.) Kelaher's notes and correspondence further show the primary role Levine played in crafting the arrangement. (R. pp. 801, 804-805, 808-809.)

813-814, 1293.)[4] As a consequence, Joe Sr. and Catherine arranged to receive substantial benefits and payments over the course of many years and to divest themselves of their shares of the Company, while characterizing the conveyance of the shares as a gift. (R. pp. 474-480.) As Levine testified, this arrangement improved the tax liability landscape for the Company, Joe Sr., and Catherine, and the three documents comprising the "retirement package" were structured according to his advice. (*Id.*) Levine also testified that he did not consider the incorrect characterization of the various payments as salary, rent, and a "gift" to be inappropriate. (R. p. 476.) The Mason Respondents' own expert, Laura DuRant, CPA, however, testified that mischaracterizing the nature of these payments to avoid taxes was unlawful. (R. pp. 449-450.)

After Joe Sr.'s stock redemption and retirement package was in place, he and the other shareholders agreed that Son and his sister, Kathy, should evenly split the remaining "extra money" or the profits of the business. (*See, e.g.*, R. pp. 274-286, 492-493, 507-508, 733-735, 830.) One way in which the "extra money" was split was by Son and Kathy having equal personal expenses paid by the Company. Another way was to divide certain cash on occasion. The cash revenue would be reflected in the books accurately, but then an invoice for "casings"[5] may be created and Son would split the

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[4] Levine has never been a CPA. Levine acknowledges that it was unlawful to hold himself out as a CPA, but he signed Company documents as a CPA, was involved with this "gift" agreement referring to the appointment of a CPA, and never mentioned that he was not a CPA when other correspondence and Company documents referred to him as a CPA. (*See, e.g.*, R. pp. 461-462, 793, 801, 804-805, 808-809, 829-830, 841.)

[5] A casing is used commercial truck tire that has had the remaining old tread removed before it is recapped with new tread. Joe Sr. dealt with the commercial side of the business and admits to selling used commercial tires and dividing the cash with his family members before his retirement package was in place. (R. pp. 1301-1302.) Son's sister generally denied this process but admits taking cash on occasion and testified that she thought they were gifts from her brother. (R. p. 624.)

cash with Kathy after taking into account any imbalance of personal expenses. (R. pp. 274-285, 829-830, 909.)

The Company operated under this arrangement for several years. In addition to guiding Joe Sr.'s retirement plans, Levine provided regular accounting advice to Son as president of the Company, as well as other members of the Mason family—both for the business and for their personal finances. (R. pp. 464-465.) All of the Mason family members relied on Levine to provide tax and accounting advice. (R. pp. 477-478, 1311.) One topic of Levine's accounting and tax advice to the Company was how to deal with the Company's continuing issues with understated inventory. (R. pp. 483-485; *see* R. pp. 779, 780, 837, 851.) The shareholder minutes, annual valuations prepared by Levine, and other trial exhibits demonstrate that the understated inventory problem was well known by all of the shareholders and Levine. (*See* R. pp. 779, 780, 802-803, 806-807.)

Levine advised Son and the other family members that it would be appropriate to "avoid" tax liability with regard to the understated inventory by having the Company "borrow" a total of $440,000 from Son and Kathy. (R. pp. 483-484, 1303-1305.) Although the Company executed promissory notes to both Son and Kathy for $220,000 each (R. pp. 827, 828), it is undisputed that neither Son nor Kathy ever lent the Company the money. (R. pp. 267, 647.) Levine showed these "loans" on the accountings and tax returns of the Company, thereby reducing the Company's tax liability. (R. p. 486.) Levine admitted later and at trial that he knew that what he was doing was fraudulent at the time he was doing it, but he assured Son and other members of the family that this tax treatment was appropriate as long as physical notes existed to provide a paper trail for the "loans." (R. pp. 486-489.) The Mason Respondents' own experts describe Levine's

advice as "not competent" (R. p. 450) and "fraud." (R. p. 458.) The Final Order characterized Levine's conduct as "professionally inappropriate." (R. p. 101, ¶ 18.) The Company's problems with understated inventory continued to accrue during tax years 2003 through 2006. (R. p. 440.)

Although Son signed the Company's tax returns in his capacity as president through tax year 2006, he relied on Levine to provide sound accounting and tax advice in conducting the Company's business. (R. pp. 365-367.) Prior to the fall of 2007, Son simply trusted that Levine was providing legal and legitimate ways of handling the Company's taxes and accountings. (R. pp. 308-309.) Son had been given no reason to believe otherwise, as Levine had assured him that everything was appropriate. (R. pp. 485-486.) Additionally, issues surrounding the Company's tax situation—including inventory issues and related "loan" issues—were fully disclosed and discussed among the family members as such events occurred. (R. pp. 560-561, 806-807, 827.) Family members, including Son, testified that they did not understand the illegality of and adverse impacts of Levine's "loan" scheme on the Company's tax liability at the time the scheme began. (R. pp. 266-269, 315, 366-367, 730-732.)

In August 2007, Son sought legal advice for various issues with the Company. (R. p. 307.) In the course of this advice, Son came to understand that the tax and financial practices of the Company—perpetuated and ratified by Levine and accepted by all the family members for years—were highly improper and needed to be corrected. (R. pp. 308-309.) Son, through counsel, immediately brought his various concerns to the attention of the Mason Respondents, their counsel, and Levine. (R. pp. 844-845, 846-

847, 848-850.) Although Son noted concerns with multiple aspects of the Company, the most pressing and urgent was the tax issue. (*Id.*)

Son's concerns culminated in a meeting of all the shareholders and officers of the Company and its wholly-owned subsidiaries on October 24, 2007. (R. pp. 856-890.) At this meeting, Son, Kathy, Joe Sr., and Catherine all agreed that the tax problems needed to be corrected immediately, that it would be improper for Levine to continue as accountant for the Company, and that the Company would retain Tim Duncan, CPA, to assume responsibility for the Company's accountings and tax returns. (R. pp. 871-873.) Also at this meeting, however, the Mason Respondents voted to remove Son from his position as president. (R. pp. 879-881.) Joe Sr. was elected to serve as president. (*Id.*). Son became vice president, and he no longer had responsibilities for handling financial matters for the Company. (R. pp. 544, 883-884, 895.) Joe Sr. and Levine have signed every tax return filed by the Company and its subsidiaries since that meeting on October 24, 2007, when the significant problems were raised by Son and fully discussed by the Mason Respondents. (R. pp. 636-637.)

The Mason Respondents soon began to reverse course from the positions they expressed in the October 24, 2007 meeting. The draft proposed amended tax returns for the years 2003-2007 were never filed by Joe Sr. as president of the Company. (R. pp. 510, 938-944, 945-946, 947-950, 951-954.) Levine remained the accountant for the Company. He prepared tax returns (signed by Levine and Joe Sr.) for the tax years 2007 and 2008 that over-report income for those years in an attempt to "correct" the under-reporting of income for earlier years. (R. pp. 511-512, 955-978, 979-994.) The Mason Respondents' own expert opined that the returns filed in 2007 and 2008 did not properly

correct the problem because, among other reasons, they did not address interest or penalties due. (R. p. 459.) Joe Sr., as president of the Company, did not file amended tax returns until after the trial of this case began in November 2011, and he has signed off on the recent tax returns after being put on notice of Levine's improper, unethical, and illegal practices. The Final Order attributes the subsequent actions as somehow the fault of Son. (R. pp. 107-109, 117.) The Court of Appeals specifically noted the credibility determinations in favor of Respondents set forth in the Final Order drafted by counsel for Respondents and appears to have relied on those determinations in reaching its conclusions. (2015 S.C. App. Lexis 34 at *5, *11, *14, *31-32, *34, & *36.) Among other things, however, the evidence is undisputed that Son did not draft, discuss the content of, or even see the alleged draft amended returns or the returns filed in subsequent years. (*See, e.g.*, R. pp. 316-317, 539, 544, 565, 743, 744-745.)

The relationships between the Mason family members involving the management of the Company had been stressed and dysfunctional for over a decade. (R. pp. 703-704.) Troubling events during the several years ending in Son's termination with the Company simply exacerbated the unhealthy situation.

Even before Son became aware of the impropriety of Levine's accounting and financial practices, actions of the various defendants were harmful to the Company. In 2004, Ozzy (Kathy's husband and a Company employee at the time) suffered a debilitating injury in a motorcycle accident while riding in a charity event, which left him paralyzed. (R. pp. 270-272.) Ozzy filed a workers' compensation claim for the injuries sustained in the accident. (R. pp. 831-835.) Joe Sr. provided a deposition in the course of the workers' compensation matter wherein he testified that Ozzy was acting in the course

and scope of his employment at the time of the accident. (R. p. 832.) Joe Sr. asked Son to provide similar testimony, but Son refused on the grounds that such testimony in support of the workers' compensation action would be perjury. (R. p. 273-273-A.) Further, Joe Sr. testified in his deposition in this case that he did not personally see Ozzy at the Mason Tire store on the morning of the accident (R. pp. 834, 1299-1300), but in shareholder minutes of Mason Tire, he represented that he had personally seen Ozzy that morning. (R. pp. 829-830.) Although Son was the actual and acting president of the Company, Joe Sr. also testified in his deposition in the workers' compensation proceeding (apparently so that Son's deposition would not be taken) that Joe Sr. was the "managing partner" of the Company. (R. p. 831.)

The Final Order drafted by counsel for the Mason Respondents included a finding that Son's testimony on this topic was not credible (R. pp. 102-103), but the above evidence demonstrates inappropriate representations by Joe Sr. to the Workers' Compensation Commission. Moreover, this workers' compensation issue caused problems in the management of the business of the Company. Joe Sr. and other family members resented Son's refusal to cooperate in the scheme, displayed open hostility towards him, and began retaliating against him. (R. pp. 300, 545-547, 564, 736.)

Son made several unsuccessful attempts to resolve the out of control situation by offering either to buy the other shares from his family members or to sell them his shares. (*See, e.g.*, R. pp. 305-307, 318-321, 327-328, 899.) After this frustrating series of events and discussing the situation with his father, his father very tellingly suggested that Son quit working for the business. (R. p. 321.)

At his father's suggestion, Son also sought a third party buyer for the Company. Son found an interested buyer in Steve Allison, who owned a business with an office next to one of the Mason Tire stores and was familiar with the Company. After being informed of the basic financial situation, he made a proposal to Joe Sr. to buy the Company for $3 million. Joe Sr. told Allison the family was not interested. (R. pp. 287-295, 324-326, 719-721, 900.)[6] Apparently, Joe Sr. thought the offer was insufficient in light of the Company's assets and financial performance, but he did not attempt to negotiate for a higher price. (R. pp. 719-721.)

Son's authority within the Company was continually and regularly undermined by the Respondents after Son brought the financial irregularities to their attention in early fall 2007. He was demoted from his position as president, his duties were reduced, his instructions were undermined, he had no access to bank accounts, he was regularly yelled at and berated by his family members, and the other family members often met without Son. (R. pp. 309-310, 313, 322-323, 339, 355, 357-358, 370, 375-376.) Things came to a head when Son noticed that a Company bookkeeper had discrepancies in her paycheck regarding a supplemental insurance policy that indicated that the employee was stealing money from the Company. (R. pp. 329-332.) With Joe Sr.'s support and on his request, Son terminated the employee. (R. pp. 333-334.) The next day, Joe Sr. told Son that terminating the employee was wrong, and he re-hired the employee over Son's objection. (R. pp. 335-337.) When the employee returned that day with the other Mason Respondents, she made a rude gesture to Son by shooting him "the bird." (R. pp. 337-

[6] After this proposal was rebuffed, Allison, along with other investors, purchased 43 Jiffy Lube stores in Florida. (R. p. 287.) Joe later went to work for that business.

338.) This employee remains a Company employee in the bookkeeping department and often works with Levine on accounting and money-management issues. (R. p. 1307.)

Understandably, Son found the entire situation intolerable and, consequently, acknowledged his constructive discharge from the Company on July 30, 2008 (R. p. 901), and filed this lawsuit. Since that time, Son has had no participation in any aspect of the Company. Moreover, no shareholder meetings have been held and no dividends have been paid. (R. p. 412.) Son has not received any financial benefit from the ownership of his shares in the Company since the termination of his employment in 2008. (*Id.*) On the other hand, the other shareholders have received compensation in excess of their market value (*see, e.g.*, R. pp. 423-426, 433-435, 638-639, & 653-654), raises, bonuses, and other financial benefits, such as new cars, the value of which has not been extended to Son. (R. pp. 1309-1310). Since Son's constructive discharge, the Mason Respondents have allowed the Company's profitability to decline while other companies in this business have enjoyed increasing profits. (R. pp. 295, 654-655, 1079.) The Mason Respondents have continued to ostracize and humiliate Son over the past several years. (*See, e.g.*, R. pp. 340-342, 746, 748-749.)

ARGUMENT

I. Son properly brought his claims in his individual capacity rather than in a derivative capacity, and he properly raised this issue on appeal in response to the special referee's ruling to the contrary.

The Court of Appeals erred in affirming the special referee's ruling that Son's claims should be dismissed because they should have been brought in a derivative capacity rather than in Son's individual capacity, and it erred in concluding that Son had not raised the issue on appeal.

Some claims have dual attributes of both direct and derivative claims. *See In re Activision Blizzard, Inc. Stockholder Litigation*, 2015 Del. Ch. Lexis 140, *41-42 & *64-77 (Del. Ch. May 20, 2015). Son brought his claims in his individual capacity rather than in a derivative capacity. (*See* Amended Complaint, R. 31-45.) **The only damages he sought were unique to him – his loss of compensation as an employee of the Company and the deprivation of the value of his shares.** (*See*, R. 1141-1150-E.) He did not, and did not purport to, assert actions on behalf of the Company nor did he seek damages that would inure to the benefit of the Company. The special referee incorrectly ruled that the claims actually brought by Son were owned by the Company and should have been asserted as derivative claims. (R. 114-115.)

In his Final Brief on Appeal, Son raised the issues that he should have been granted relief under each of his causes of action. (Final Brief of Appellant pp. iv-v.) Son specifically addressed the special referee's ruling that the claims should have been brought in a derivative capacity in his Final Brief of Appellant. (*Id.* at 39-40.) Son referred to that portion of the special referee's order and argued that the special referee erred because the overwhelming evidence demonstrated that the Mason Respondents breached their fiduciary duties and "in such a way as to injure Joe in an individual capacity. Therefore, they are personally liable to Son for those damages." (*Id.* p. 39). Son also cited the leading South Carolina case on point of *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (and the same and only case cited by the special referee; R. 115) for support and quoted its holding that "[a] shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. . . . 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.") (citation omitted). *See also Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (to determine whether a claim is derivative or direct, a court must consider "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"). Son further argued that he "suffered individual harm, as well as harm in the context of his claim seeking a buyout under the [Corporate Code]." (Final Brief of Appellant p. 39.) In addition, the Corporate Code grants shareholders the right of a direct action (not an action in a derivative capacity) to seek a forced buyout of a shareholder's shares under certain circumstances. See S.C. Code §§ 33-14-310(d) & 33-18-400 to -430.

Son not only properly brought his claims in an individual capacity, but he also properly raised the issue on appeal and certainly should not be deprived of his claim on this basis. Even if an issue is not specifically set out in the statement of issues, the appellate court may consider it if it is reasonably clear from appellant's arguments. *Herron v. Century BMW*, 395 S.C. 461, 465-467, 719 S.E.2d 640, 642-643 (2011); *Eubank v. Eubank*, 347 S.C. 367, 373 n. 2, 555 S.E.2d 413, 416 n. 2 (Ct. App. 2001). The record in this case demonstrates that Son properly raised the issue before the Court of Appeals.

II. Son should be granted the remedy of the forced buyout of his shares or other relief under the judicial dissolution provisions of the Corporate Code.

An action for stockholder oppression under the judicial dissolution provisions of the Corporate Code is one in equity; therefore this Court may find facts with regard to this claim according to its own view of a preponderance of the evidence. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). As this Court recently stated, "[t]he concern and focus in shareholder oppression cases is that the minority faces a trapped investment and an indefinite exclusion [from] participation in business returns," *Ballard*, 399 S.C. at 595, 733 S.E.2d at 110. The Court of Appeals quoted this language but failed to apply these principles in this case. Fundamentally, Son has been deprived of all value of his shares since 2008. Even if this Court concludes that Son engaged in inappropriate conduct, such conduct does not provide a basis for the majority to deprive a minority shareholder of the value of his shares. *See Hanekamp v. Atlas Techs., Inc.*, C.A. No. 2011-CP10-1243, Business Court Op. 2014-05-15-02 (Charleston County, May 15, 2014), available online at: http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2014-05-15-02 and attached hereto (the Business Court held that, despite "his own misconduct," "Plaintiff is entitled to a court ordered buyout for the 'fair value' of his shares... .").[7]

[7] In *Hanekamp*, the plaintiff "engaged in a scheme to defraud" the corporation, including "siphoning money from [the corporation] for his own personal use," "mismanaged the [corporation's] office, and further took actions "that are arbitrary, vexatious and in bad faith." Nevertheless, the Business Court found that the plaintiff was still entitled to a forced buyout of his shares in the corporation because he "faces a trapped investment from which he can no longer derive any benefit." *Id.*

III. The Court of Appeals erred in ruling that Son's tort claims and the claim for relief under the judicial dissolution provisions of the Corporate Code were barred by his "unclean hands."

The Court of Appeals cited *Straight v. Goss*, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009) for the proposition that Son's unclean hands precludes his recovery in this case. In *Straight* the plaintiff "had abandoned his individual claims and chose to continue on the derivative claims alone," and, unlike this case, *Straight* did not involve direct claims. *Id.* at 190, 678 S.E.2d at 448. Further, even if a party engages in tortious misconduct, such conduct does not provide a basis for the majority shareholders to deprive that party of all value of his shares and avoid the remedy of a forced buyout of shares under the corporate dissolution statutes. *Hanekamp, supra.* The equitable doctrine of "unclean hands" is simply inapplicable to the direct claims brought by Son as well as to the statutory forced buyout remedy.

IV. Pursuant to the dissolution provisions of the Corporate Code and applicable case law, this Court should find that the fair value of the Company is $3,673,000, and order that the Mason Respondents purchase son's proportionate interest at that value.

The Court of Appeals did not reach valuation issues. 2015 S.C. App. Lexis at *32 n. 9. At trial, the parties' experts reached agreement on many issues with regard to fair value of the Company. (*See, e.g.*, amended report of Dr. Woodside setting forth points of agreement and differences with the expert for the Mason Respondents; R. 1141-1150). Most of the disputed points are legal issues, and this Court may find the limited factual issues regarding valuation according to its own view of a preponderance of the evidence.

V. **The Court of Appeals erred in giving credibility determinations in orders drafted by opposing counsel without direction from the special referee.**

The Court of Appeals noted Son's argument that the final orders below had been drafted by opposing counsel without specific direction by the court and should therefore be treated with caution, but the Court did not do so and in fact appears to have relied on those credibility determinations for its conclusions.

VI. **The Court of Appeals erred in affirming the special referee's holding that Son should not recover on his tort causes of action and that the Mason Respondents did not breach their fiduciary duties.**

The evidence recited above demonstrates, among other things, that the Mason Respondents constructively discharged Son from employment with the Company, failed to take action for over four years after Son raised concerns regarding the Company's problematic tax and accounting practices, continued to employ the incompetent accountant that previously represented that those practices were appropriate, paid themselves excessive compensation and benefits, and deprived Son of all economic value of his ownership interest in the Company. Under these facts, Son should have been awarded recovery under his tort claims, including his claim for breach of fiduciary duties.

VII. **The Court of Appeals erred in ruling that Son should not be awarded the ownership of an additional 20% of the shares of the Company and that he was barred from pursuing his claim.**

Son claimed at trial that he should be awarded an additional 20% of the shares of the Company pursuant to the terms of his father's "retirement plan" under which his father received benefits for years. The Court of Appeals concluded that Son is barred under the two-issue rule from pursuing this claim because he did not address the issue of whether the claim was set forth in his Amended Complaint. 2015 S.C. Lexis at *33. The

special referee, however, made no specific holding that Son could not pursue the claim because it was not specifically pleaded. (R. 116 at ¶11.) Further, the issue was a supplemental development after the filing of the amended complaint because shares were to be delivered annually, the issue was litigated in discovery, tried by consent, and no opportunity was given Son to move to amend to conform to the evidence pursuant to Rule 15(d), SCRCP or otherwise. (R. pp. 1-13, 36-38, 566-567, 1297, 1308; *see also* Appellant's Reply Brief at pp. 13-14.)

The Court of Appeals also concluded that the Son "stopped complying with the terms of contract." 2015 S.C. Lexis at *34. Son, however, was no longer employed by the Company after 2008, and some of the payments to his parents were simply recharacterized as income instead of rent. (R. pp. 566-567, 1308.) Son should be awarded an additional 20% of the Company under these circumstances.

VIII. The Court of Appeals erred in affirming the special referee's ruling that the Mason Respondents were entitled to recovery under their counterclaims.

The Court of Appeals erred in affirming the special referee's ruling that the Mason Respondents were entitled to judgment against Son for $17,301.66 as a result of Son's reimbursement of attorneys' fees paid to the Turner Padget law firm, because Son solicited the advice from that firm while President of the Company, the advice rendered concerned the Company's taxes, and the advice was not disputed and ultimately relied and acted upon by the Company (although they waited until 2011).

The affirmance of the judgment regarding the casings in the amount of $11,716.32 overlooks the evidence that the practice was longstanding, approved by the

Mason Respondents, and, after entering into the father's "retirement" agreements, the funds were split with Sister.

IX. The Court of Appeals erred in allowing the Mason Respondents to maintain a future claim against Son based on the Company's tax returns, and its opinion conflicts with prior precedent of this Court.

The Court of Appeals affirmed the ruling below allowing the Mason Respondents to maintain a future action for damages based on the Company's tax returns on the grounds that the amount of damages could not be determined because the IRS had not indicated the amount due in back taxes and fees. 2015 S.C. App. LEXIS 74 at *45.[8] The Court of Appeals erred and its opinion conflicts with prior case precedent of this Court.

The Mason Respondents did not seek this remedy before or during trial, they were indisputably on notice of the potential claim in 2007 after receipt of the letters from Wayne Byrd, Esq. in August 2007 (R. 844-850) and receiving confirming legal and accounting advice before the October 24, 2007 shareholder and director meeting (R. 886-889), the reason the amount the IRS would require to be paid was unknown was because the Mason Respondents elected not to inform the IRS until more than three years later in 2011 after the trial of this case had started, and the amount due substantially increased as a result of that period of the Mason Respondents' intentional failure to report. This claim was barred by the three year statute of limitations found in S.C. Code Ann. § 15-3-530. The limitations period begins to run once a party knows or, through the exercise of reasonable diligence, should have known that a cause of action may exist in his favor, rather than when a full blown theory of recovery is developed and regardless of whether

[8] The Company proceeded to file such an action in the Horry County Court of Common Pleas on May 13, 2013 (Case No. 2013-CP-26-3484), which action has been stayed pending the resolution of this appeal.

he knows the exact nature or full extent of his damages. *Christensen v. Mikell*, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996).

CONCLUSION

For these reasons, Petitioner Joseph E. Mason, Jr. urges the Court to grant his Petition for a Writ of Certiorari in this matter.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

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May 28, 2015
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DM: 4080869 v.4

EXHIBIT A

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2011-CP-10-1243
	)	
ROBERT HANEKAMP,	)	
	)	
Plaintiff	)	
	)	**ORDER GRANTING SUMMARY JUDGMENT AS TO DEFENDANTS' COUNTERCLAIMS**
v.	)	
	)	
ATLAS TECHNOLOGIES, INC., TASL, INC., DAVID DIEHL, and BRIAN MILLER	)	
	)	
Defendants.	)	

This matter came before the Court at a hearing held on April 30, 2014 involving the (a) Motion for Summary Judgment as to counterclaims of Defendants Atlas Technologies, Inc. ("Atlas"), TASL, Inc. ("TASL"), Brian M. Miller ("Miller") and David Diehl ("Diehl") (all sometimes collectively referred to as "Defendants") and (b) Defendants' Motion for Summary Judgment for Plaintiff's willful violations of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and S.C. Code Ann. §15-36-10 (Sanctions), both filed on March 24, 2014 pursuant to S.C. R. CIV. PRO. 56. Defendants seek an Order of this Court awarding summary judgment as to their counterclaims for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions). This Court finds that Plaintiff has breached his fiduciary duty to Defendants, committed fraud, converted Atlas funds to his personal use, that plaintiff has been unjustly enriched and owes Defendants restitution, and has violated S.C. Code Ann. §33-18-410 (b) and S.C. Code Ann. §15-36-10, et. seq. Defendants also have sought a Court ordered buyout of Plaintiffs shares in Defendants Atlas and TASL as an alternative to dissolution of the Defendant corporations.

Plaintiff faces a trapped investment from which he can no longer derive any benefit. Based on the evidence presented in this case and the multiple affidavits filed by Defendants', as well as the excerpts of the deposition of the Plaintiff, I find that reconciliation between the Plaintiff and the Defendants is unrealistic and that a forced buy-out of Plaintiff's shares in both Atlas and TASL by the Defendants is the appropriate remedy in this case. Despite his own misconduct, as detailed throughout the record in this case, I find that Plaintiff is entitled to a court ordered buyout for the "fair value" of his shares in Atlas and TASL decreased by offsets for the amount of money converted to Plaintiff's personal use and money that Defendants paid in unnecessary legal fees, experts' fees [Dixon Hughes Goodman], and costs due to Plaintiff's vexatious conduct and frivolous filings and arguments in this litigation.

Present at the hearing held on April 30, 2014 were the Defendants Brian M. Miller and David Diehl represented by Richard S. Rosen, Esq. and John E. Rosen, Esq. of Rosen, Rosen & Hagood, LLC. The Plaintiff did not appear at the hearing despite receiving proper notice. Plaintiff signed a certified mail return receipt sent by John E. Rosen, Esq. on March 24, 2014. Plaintiff also participated in the

email exchanges in late March and early April 2014 between Defendants' counsel, Plaintiff and Caroline Niland, my law clerk, for the purpose of scheduling a hearing on Defendants' motions.. After Ms. Niland asked the parties on April 1, 2014 if Wednesday, April 30, 2014 at 10 a.m. was suitable for all parties, Mr. Hanekamp responded: "Ms. Niland, Currently, I am unable to attend this hearing. Thank you, Rob." Id. In response to Ms. Niland's email of April 7, 2014 at 9:39 a.m., EDT, stating that "it would be very helpful to give us dates that you would be available to attend this hearing. Please advise with some possible dates by **this Friday, April 11**. Please be aware that if you do not provide dates, a hearing will be set on this matter..." Id. Mr. Hanekamp replied, "Ms. Niland, I do not have the ability to return to Charleston at the moment, therefore, I am unable to provide my availability. I understand. Blessings Rob." Id.

After having reviewed the pleadings, affidavits, exhibits, and other documents of record and considering the arguments of counsel, I find that there are no genuine issues of material fact in this case precluding the entry of judgment in favor of the Defendants as a matter of law. For the reasons stated herein-below, this Court finds that the Defendants' motions should be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

This Court makes the following findings of fact:

This Motion comes after Plaintiff pursued a baseless Motion for Summary Judgment, a Second Motion for Receiver, a Second Motion for Leave to Amend his Complaint, an Amended Motion for Temporary Injunction and Restraining Order regarding advancement of Defendants' attorney's fees and costs by the corporations, as well as a Motion for Sanctions, Rule to Show Cause, to Compel, and for Commission of Out-of-State Subpoenas.

Plaintiff, since this case started over three (3) years ago, has filed three (3) Motions seeking appointment of a custodian or receiver including the most recent Motion for Summary Judgment filed in February of this year. All of these Motions have been denied. Judge Dennis pointed out at a hearing on August 3, 2011 that the first motion for receiver and/or custodian should never have been filed as there was no evidence to support it after Stephan V. Futeral, Esq., explained to the court that he hoped his discovery would give him the evidence needed to pursue the motion. See Transcript of Hearing August 3, 2011, pp. 2-4; 17-19.

The Court heard arguments on July 23, 2012 and ruled on the following motions in an Order dated October 24, 2012, with the exception of Plaintiff's Motion for Injunction regarding advancement of Defendants' attorney's fees and costs by the corporations, which motion was denied in an Order dated October 10, 2012. This Court denied the Second Motion for a Receiver and granted the Second Motion for Leave to Amend. Counsel for the parties advised the Court that they reached an agreement as to Plaintiff's motions for a rule to show cause, for the commission of out-of-state subpoenas, to compel discovery, to compel depositions in San Diego and Defendants' Motions to strike, for temporary restraining order/preliminary injunction/sanctions and for a protective order, and counsel published the agreement to the court at the July 23, 2012 hearing, all which became part of the October 24, 2012 Order. Plaintiff had not to date, more than one (1) year later, filed a Second Amended Complaint.

Subsequently, after Plaintiff's counsel, Stephan V. Futeral, Esq., received all discovery and subpoenaed documents as per the October 24, 2012 Order, he moved to be relieved as counsel for Plaintiff, which relief was granted by an Order dated December 5, 2012. Plaintiff was granted thirty (30) days to find new counsel. Plaintiff *pro se* sent this Court a letter on January 12, 2013, seeking additional time to find new counsel. On the same day, Plaintiff sent out invalid subpoenas as more fully set forth in Defendants' Motion to Quash dated January 29, 2012, seeking the same information he had already received on previous occasions.

This Court issued an Order on January 14, 2013, allowing Plaintiff until February 15, 2013 to retain

new counsel or proceed *pro se*. In that time period, Plaintiff, while presumably seeking new counsel, filed a Motion for Summary Judgment which had no basis and sought a receiver for a third time. See Transcript of Hearing February 20, 2013, pp. 12-13. This Court issued an Order on February 27, 2013 denying Plaintiff's Motion for Summary Judgment as well as Defendants' Motions for Rule to Show Cause and for Sanctions and Attorney's Fees.

Plaintiff found a third attorney, Bruce Miller, Esquire, who was granted reasonable time to become familiar with the case and who briefly represented Plaintiff until he too filed a Consent Motion to be relieved as counsel for Plaintiff on July 18, 2013. In the short time Bruce Miller represented Plaintiff, the parties held a status conference with this Court on June 20, 2013, which resulted in a consent scheduling order dated June 21, 2013, whereby the following would occur: (i) the Plaintiff would obtain a valuation by his own expert of Defendant Atlas by September 1, 2013, (ii) the parties would have until October 1, 2013 to mediate the case, and then (iii) if mediation failed, the parties would commence discovery on October 1, 2013 and have a date certain for a trial in February or March 2014. Plaintiff has not acted on the order he sought as he has not obtained a valuation of his own. Bruce Miller's Motion to be relieved as counsel for Plaintiff was granted on August 9, 2013.

Plaintiff, having had three (3) previous attorneys, David A. Collins, Esq., Stephan V. Futeral, Esq., and Bruce Miller, Esq. has been proceeding *pro se*. See Deposition of Robert Hanekamp, Page 7. Throughout this litigation, Plaintiff has been engaged in a pattern of reckless conduct as the record in this case makes clear.

This Court granted summary judgment in favor of Defendants on all of Plaintiff's causes of action in its Order of December 23, 2013. Defendants assert counterclaims against Plaintiff for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions)

Defendant Atlas is a defense contracting firm doing work for the United States Government and that provides information technology, network engineering and software products and services. Defendant Brian Miller and Plaintiff Robert Hanekamp met at Naval Air Station in Bermuda. Defendant Miller met Defendant Diehl prior to moving to South Carolina and worked together at Scientific Research Corporation and then Defendant Miller established himself as an IT consultant for a program known as The Automated Digital Network System ("ADNS"), a shipboard based network communications program. Mr. Miller was then asked to install ADNS and make it functional on the U.S.S. Normandy, a new and innovative application of the program. Due to Mr. Miller's success in getting ADNS to function on naval warships, the ADNS program was able to survive such that Defendants and Plaintiff had discussions about forming a company to work on ADNS installation, application and consulting. Atlas was incorporated on October 13, 1997. Brian Miller was able to convey his existing subcontracts to establish the initial revenue stream until the successfully bid and won a contract to perform ADNS system integration on the Enterprise Battle Group. Depo. of Hanekamp, p. 13. In addition to the government contracting work, Plaintiff and Defendants often discussed work involving the potential application and development of these systems for commercial products and services, thereby trying to diversify their workload. Depo. of Hanekamp, pp. 268-271.

Defendant Miller owns fifty percent (50%) of the shares of Atlas, Defendant Diehl owns twenty five percent (25%) and Plaintiff owns twenty five percent (25%). Together, Defendants Miller and Diehl comprise seventy five percent (75%) of the ownership of Atlas. Atlas is a statutory close corporation without a board of directors. See S.C. Code Ann. § 33-18-210. Defendant Miller owns thirty three and thirty three hundredths percent (33.33%)of the shares of TASL, Defendant Diehl owns thirty three and thirty four hundredths percent (33.34%) and Plaintiff owns thirty three and thirty three hundredths percent (33.33%)of the shares of TASL. Defendant TASL was incorporated on November 22, 1999, and its business consists of owning and managing two parcels of commercial real estate that are leased to Defendant Atlas. Defendants Miller and Diehl together own sixty six and sixty seven hundredths percent (66.67%) of TASL shares. There have been zero (0) allegations made regarding

any misconduct in the management of TASL. TASL is a statutory close corporation in which the Articles of Incorporation and Bylaws provide for a board of directors but the shareholder management agreement excludes one and provides that management of the corporation will be conducted by the shareholders.

Plaintiff was hired by Atlas in 1998 initially as a junior level technician at the Charleston office with a salary of $50,000.00. See Affidavit of Brian M. Miller, ¶ 8; Affidavit of David Diehl, ¶ 10. His performance as an employee was satisfactory until 2003, when Plaintiff decided to move to San Diego, California, giving Defendants a mere one weeks' notice of his decision. Miller Aff., ¶ 8; Diehl Aff., ¶ 10. Plaintiff claims that he was tasked with opening the San Diego office for Atlas but cannot point to a specific conversation, correspondence, document or any evidence that supports his contention. Depo. of Hanekamp, pp. 347-348. Plaintiff and Defendants had often talked about opening offices in other locations – Washington, D.C., Washington State, San Diego, and others, but it came as a surprise to Defendants that Plaintiff took it upon himself to move to San Diego. Miller Aff., ¶ 8; Diehl Aff., ¶ 10; Depo. of Hanekamp, pp. 347-348. Apparently, Plaintiff had a romantic relationship with a woman who lived in San Diego and who was his girlfriend. Depo. of Hanekamp, pp. 38-40, 42 (name and identifying information redacted). In order to preserve their longstanding friendship with Plaintiff, Defendants retroactively agreed to allow Plaintiff to establish an Atlas office in San Diego despite the fact that Plaintiff had never been employed by Atlas in a managerial position. Miller Aff., ¶ 8; Diehl Aff., ¶ 10. It soon became apparent that Plaintiff was not qualified to manage the San Diego office and Defendants were forced to transfer the General Manager from Atlas' Virginia office to San Diego to manage operations. Miller Aff., ¶ 9; Diehl Aff., ¶ 11; Depo. of Hanekamp, pp. 46-48.

Plaintiff failed to properly manage the San Diego office such that it experienced cost overruns on task orders performed by Atlas San Diego. Miller Aff., ¶ 6; Diehl Aff., ¶ 6; Hughes Aff., ¶ 8. Plaintiff also mismanaged the San Diego office by failing to properly manage and supervise Atlas personnel such that Atlas had to settle an expensive sexual harassment lawsuit with one of its employees. Miller Aff., ¶ 10; Diehl Aff., ¶ 15; Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372. According to Ana Susi, the Plaintiff in that case and Mr. Hanekamp's assistant, the atmosphere of the Atlas San Diego office was out of control, had no organization, none of the employees had ever had sexual harassment training, there was no HR presence, many employees used extreme foul language, and a lot of physical activity was inappropriate. Deposition of Ana Susi, Pages 266-269. Plaintiff admitted that one of his employees of the San Diego office had a legitimate complaint. Depo. of Hanekamp, p. 381.

In 2008, Plaintiff's security credentials were revoked meaning that he no longer had access to any government customers' facilities where Atlas was required under contract to perform work. Miller Aff., ¶ 10; Diehl Aff., ¶ 14. Thereafter, Plaintiff again unilaterally decided to move, this time to Hawaii, without seeking authorization from Atlas. Miller Aff., ¶ 10; Diehl Aff., ¶ 15. While in Hawaii, Plaintiff charged a multitude of personal expenses to the corporation and then tried to misrepresent them to Atlas' accounting office as legitimate business expenses. Miller Aff., ¶¶ 11-12; Diehl Aff., ¶ 16-17. Coldren Aff., ¶ 7, Shortsleeves Aff., ¶5. Plaintiff even admitted that all of his expenses incurred in Hawaii were personal expenses that he tried to pass off as legitimate including meals, rent, gifts and a Nissan Truck. Depo. of Hanekamp, pp. 58-62; 64-74.

This drain on resources, compounded with the damage caused by Plaintiff's inadequate management, resulted in substantial losses to Atlas. Miller Aff., ¶ 9; Diehl Aff., ¶ 11. Additionally, Plaintiff's incompetence and unprofessional conduct harmed the reputation and goodwill of the company, threatening even greater losses. Miller Aff., ¶¶ 9-10; Diehl Aff., ¶¶ 12-15. Defendants informed Plaintiff that the company needed an onsite manager to properly manage Atlas' workload, customer relationships and properly supervise office personnel. Depo. of Hanekamp, pp. 98-121; 354-372.

In 2009, Defendant Miller, despite having abundant cause to terminate Plaintiff's employment, agreed to, under certain conditions, create the position of CCO, to allow Plaintiff to work this position from

Hawaii, and to give Plaintiff a $15,000.00 raise in salary if Plaintiff would perform certain tasks. The proposed offer required Plaintiff to facilitate a smooth transition -- to introduce, integrate and openly support a new General Manager to take Plaintiff's position. While Defendants admit that Miller and Plaintiff discussed the foregoing arrangement, Plaintiff failed to perform the conditions precedent to achieving such a deal. Depo. of Hanekamp, pp. 363-366. Plaintiff "squatted" in the General Manager position and did not find and perform the foregoing tasks with a new GM. Brian Miller Aff., August 1, 2011, ¶ 23; Depo. of Hanekamp, pp. 342-344; 363-365. Defendants deny that an enforceable contract ever existed in this regard or that they breached it.

Although still employed by Atlas, Plaintiff's performance continued to deteriorate. Plaintiff acknowledged in an email exchange with Defendants in June 2010 that he was insubordinate, incompetent, unprofessional and that he took full responsibility for all that he had done and deserved to be fired, but asked for another chance. Miller Aff., ¶ 6; Diehl Aff., ¶ 7. Defendants Miller and Diehl tried to provide Plaintiff with a dignified exit from the company given their longstanding friendship with Plaintiff. Miller Aff., ¶¶ 6, 18; Diehl Aff., ¶¶ 8, 23. Atlas received additional complaints of inappropriate behavior in the workplace from two (2) more San Diego Employees in February 2010. Finally, for the many reasons set forth herein, Plaintiff's employment was terminated in June 2010. Miller Aff., ¶¶ 18, 23; Diehl Aff., ¶ 23.

Prior to and following his termination, many attempts were made to reach a mutually agreeable solution as to the acquisition of Plaintiff's shares by Defendants Miller and Diehl. Miller Aff., ¶ 21; Diehl Aff., ¶ 26. However, Plaintiff simply refused to respond to any of these offers. Miller Aff., ¶ 21; Diehl Aff., ¶ 26. In fact, Plaintiff and Defendants agreed to have a valuation done for Atlas and utilized the CPA firm recommended by Plaintiff's then attorney David A. Collins Esq. Affidavit of James K. Kuyk, Esq., ¶ 7; Miller Aff., ¶ 21; Diehl Aff., ¶ 26; Affidavit of Dr. Perry Woodside, ¶¶ 2- 10. Plaintiff never made a demand on Defendants despite this valuation being performed and never produced a valuation of his own. Rather than make any attempt to resolve these issues, Plaintiff filed this lawsuit. Miller Aff., ¶ 21, Diehl Aff., ¶ 26. The parties to this case engaged in a ten (10) hour mediation on March 27, 2012 but to no avail.

The Defendants seek summary judgment as to their counterclaims based on the fact that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. The Court has reviewed and relied on excerpts of Plaintiff's deposition and numerous Affidavits in the record including those of: (1) James K. Kuyk, Esq., (2) Brian M. Miller, (3) David Diehl, (4) Victor K. Kliossis, CPA, (5) Greg W. Isley, (6) Peter Shortsleeves, (7) Elizabeth D. Hughes, (8) B. Perry Woodside, III, Ph.D., (9) Bill Walter, CPA, (10) Cynthia E. Coldren, (11) Chad Phillips, (12) Brent Hettick, (13) Andrew J. Oleksiak, (14) Steven Pigott, (15) Brian J. Ball, and (6) John E. Rosen, Esq.

II. CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

Defendants' asserted counterclaims against Plaintiff for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions).

A. Summary Judgment Standard.

In Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 411 S.E.2d 672 (Ct. App.), rev'd on other grounds, 311 S.C. 218, 428 S.E.2d 700 (1993), the South Carolina Court of Appeals explained the standard for granting summary judgment as follows:

> In deciding a Rule 56 motion, the court must view the facts and inferences therefrom in the light most favorable to the nonmoving party. Summary Judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions and affidavits show

> that there is no genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him.

Id. at 313, 411 S.E.2d at 673 (citations omitted)(emphasis added).

When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Baughman v. Am. Tel & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. Lanham v. Blue Cross and Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

Therefore, summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the moving part is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). Although summary judgment is an extreme remedy, the courts should not be reluctant to grant summary judgment in appropriate cases. SeeGalliard v. Fleet Mortgage Corp., 880 F. Supp. 1085 (S.C.D.C. 1995).

B. Breach of Fiduciary Duty, Misrepresentation/fraud, Conversion, Unjust Enrichment, Constructive Fraud, and Accounting.

i. Breach of Fiduciary Duty

In order to prove breach of fiduciary duty, Defendants must show that wrongful conduct of the Plaintiff, with whom the Court finds that they have a fiduciary relationship, caused Defendants damage. Plaintiff was terminated for abandoning his post, incompetence, and failing to document his personal expenditures. Plaintiff also siphoned money out of the company to fund another company owned by his then live-in girlfriend. Miller Aff., ¶¶ 11-12; Diehl Aff., ¶ 16-17. Coldren Aff., ¶ 7, Shortsleeves Aff., ¶5. Plaintiff contributed to a dysfunctional atmosphere in Atlas' San Diego office such that the company was subjected to a sexual harassment suit involving hundreds of thousands of dollars in attorney's fees and costs. Miller Aff., ¶ 10; Diehl Aff., ¶ 15; Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372.

Plaintiff, by virtue of his being a shareholder of Atlas, a statutory close corporation ***without*** a board of directors, by virtue of his being a Vice President of Atlas, by virtue of his being the General Manager and in charge of the San Diego, California office of Atlas since October 2003, and by virtue of the special relationship between him and Defendants, each reposing trust and confidence in the other regarding corporate affairs over which they had knowledge, owes fiduciary duties and obligations to Defendants. Through Plaintiff's own admission, by virtue of his allegations of a breach thereof in his initial Complaint and Amended Complaint, there exists a fiduciary duty between Plaintiff and Defendants, one that Defendants honored and Plaintiff did not. See, e.g. Amended Complaint, ¶¶ 64-68.

Plaintiff, from approximately December 23, 2008 to July 7, 2009, "telecommuted" to work in Atlas' San Diego, California office from Captain Cook, State of Hawaii, primarily by email, telephone and video conference, unbeknownst to Defendants. By virtue of unilaterally moving to Hawaii, only to "telecommute" to work, Plaintiff abandoned his post and failed to fulfill his duties as General Manager of the San Diego office of Defendant Atlas, which job required his physical presence to manage Atlas accounts, relationships and personnel.

Plaintiff, contemporaneously with his abandonment of his duties as General Manager, engaged in a

scheme to defraud Atlas by using the corporate credit card to pay rental payments for his own personal residence in Captain Cook, Hawaii and authorized payments from Atlas' funds to "csanpietro", a PayPal account, later known as Ekololo, LLC, which he represented were for legitimate business purposes. In fact, "csanpietro", later known as Ekololo, LLC, was not a vendor of Atlas' and instead was a company controlled by Plaintiff's live-in girlfriend. The funds were actually intended for their personal land development project and possibly other business dealings for their personal benefit. Plaintiff's misrepresented that he was actually living in San Diego and properly managing Atlas's San Diego operation. He actually was living in Hawaii. Plaintiff deceived and defrauded Defendants and covered up Plaintiff's actual residence in Hawaii for fear of legitimate repercussions. Plaintiff engaged in this deceitful, illegal, fraudulent and self dealing arrangement for his own personal benefit, so that he could live on the island of Hawaii, Hawaii while deceiving Defendants into believing that he was fulfilling his duties at Atlas' San Diego office. See Depo. of Hanekamp, pp. 58-62, 323; Affidavit of Brian Miller dated August 1, 2011, ¶ 11, 12; Affidavit of David Diehl, dated August 1, 2011, ¶ 16; Affidavit of Cynthia Coldren ¶ 7.

The unrefuted evidence in this case demonstrates that Plaintiff is guilty of siphoning money from Atlas for his own personal use. See Depo. of Hanekamp, pp. 58-62; Affidavits of Brian M. Miller (original and supplemental), David Diehl (original and supplemental), and Cynthia Coldren (original and supplemental), and Elizabeth D. Hughes. Plaintiff concedes this fraud in an email chain with Defendants dated August 19-20, 2010. See Hanekamp Depo. Exhibit 74 (See also Miller Aff., Exhibit D). Plaintiff purchased a Nissan truck with Atlas funds only to title the vehicle in his own name and then sell it to a third party on Craig's List and retain the proceeds for his personal use. Depo. of Hanekamp pp. 75-78; 148-155. Plaintiff either failed to properly document his expenses or intentionally misrepresented that such expenses were legitimate business expenses when in fact they were not. See Second Supplemental Affidavit of Cynthia Coldren, dated March 21, 2014, ¶¶ 5 - 8.

Plaintiff mismanaged the San Diego office by failing to properly manage and supervise Atlas personnel such that Atlas had to settle an expensive sexual harassment lawsuit with one of its employees. Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372; Miller Aff., ¶ 10; Diehl Aff., ¶ 15. That litigation revealed a sexually charged atmosphere in the San Diego office for which Plaintiff was the direct supervisor. The problems were either ignored by Plaintiff or unknown to him due to his consistent absence from the office while living in Hawaii. Ana Susi Depo., Pages 267-269; 270 ("the atmosphere of the Atlas San Diego office was out of control...had no organization...none of the employees had ever had sexual harassment training...there was no HR presence... many used of extreme foul language, and a lot of physical activity was inappropriate.")(Q: "Do you contend that Mr. Hanekamp acted inappropriately toward you during your employment at Atlas? A: Yeah...") That lawsuit, other problems, including those with critical customer relationships (See, e.g. Depo. of Hanekamp, Exhibits 42, 45, 49, 60, 61, 62) personnel and cost overruns on task orders performed by Atlas San Diego prompted Defendant Miller to demand that San Diego have an onsite manager in 2009. Depo. of Hanekamp, pp. 98-121, 354-372. Plaintiff lost his credentials to access an important client installation, thereby making it impossible for him to properly manage Atlas' relationship with the customer or properly supervise the work being performed. See Miller Aff., ¶ 23; Depo. of Hanekamp, pp. 98-121. Plaintiff also mismanaged client relationships such that Defendant Miller had to travel to San Diego several times to repair the damage Plaintiff caused to Atlas' relationships with those customers. Depo of Hanekamp, pp. 355-372; Miller Aff., ¶¶ 9-10; Diehl Aff., ¶¶ 12-13.

Plaintiff, in preferring his own personal interests to that of Defendants, breached his fiduciary duties to Defendants. As a foreseeable, direct and proximate result of Plaintiff's breaches of his fiduciary duties and obligations, Defendants have been damaged in the amount of One Hundred and Two Thousand Four Hundred and Fifty Seven and 61/100 Dollars ($102,457.61). Plaintiff was given a credit of $29,220.79 as the amount that was treated as a shareholder distribution to Mr. Hanekamp due to his failure to follow Atlas protocols and properly document certain expenses. See Kliossis Supp. Aff., filed July 20, 2012. As a result of that credit, Defendants have suffered a net loss of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82). See Coldren Sec. Supp. Aff., ¶ 8.

ii. Misrepresentation/Fraud

In order to prove misrepresentation, Defendants must show that (1) factual representations and omissions made by Plaintiff to Defendants as alleged above were (2) false and misleading and (3) were material, and (4) were known by Plaintiff or his agents to be false or were made in the absence of reasonable grounds to believe in the truth of the representations; (5) were intended that they should be acted upon by Defendants; (6) with Defendants being ignorant of the representations' falsity; (7) with the Defendants relying on the truth of the representations; (8) while having a right to rely thereon; and (9) the Defendants suffering actual damages as a consequent, proximate injury of Plaintiff's misconduct and by reason of Plaintiff's fraud.

Plaintiff engaged in conduct which amounts to a false representation, conduct which he calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which the Plaintiff knew to be true at the time the representations were made. Plaintiff intended that such conduct would be acted upon by the Defendants, and the Plaintiff had actual or constructive knowledge of the real facts. The Defendants lacked knowledge, and the means of knowledge, of the truth as to the facts in question, and justifiably relied upon the Plaintiff's conduct. Defendants relied on the Plaintiff's conduct to their detriment and prejudice which caused Defendants injury.

Plaintiff falsely represented:

a. That he was residing in San Diego, California, and properly supervising Atlas' operations there when in fact he was residing on the island of Hawaii, Hawaii;

b. That payments made by Plaintiff to "csanpietro", a PayPal account, later known as Ekololo, LLC, from Atlas' funds were for legitimate business purposes, when, in fact, "csanpietro", later known as Ekololo, LLC, was not a vendor of Atlas' and instead was a company controlled by Plaintiff's live-in girlfriend intended for their personal land development project and possibly other business dealings for their personal benefit;

c. That he purchased a company automobile with corporate funds when, in fact, he used Atlas' corporate funds to purchase same in his own name without authorization;

d. That he was purchasing goods from Costco for corporate purposes when in fact he was using the corporate credit card to purchase his personal groceries from Costco;

e. That he was properly supervising Atlas' personnel and carrying out his duties as shareholder, Vice President and General Manager of Atlas' San Diego, California office throughout 2008 and 2009 when in fact he was living in Hawaii and "telecommuting" to San Diego;

f. That he was able to access Atlas' client installations and facilities to carry out his duties when, in fact, he had lost such privileges due to his own misconduct;

g. That he has had valid and justifiable reasons to withhold his personal financial statements and tax returns from Atlas' and TASL's lenders when, in fact, he has refused to do so in order to extort concessions from Defendants; And

h. he was "intimately familiar with Atlas' accounting and billing practices, its contracts with the government, Atlas accounting codes and the requirements of the Department of Defense and the Defense Contracting Auditing Agency as to what costs are allowable in our contracts for services" (See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2) only to admit in his deposition that he was not (Hanekamp Deposition day 2, pp. 264-265);

Plaintiff made several admissions throughout this litigation that were contrary to allegations he

previously made in this lawsuit, including, but not limited to:

a. Admitting he lived in a vacation home with his girlfriend in Hawaii while he paid for it and characterized it as "business rent".

b. Admitted, that he had a meal with a romantic interest at the Pamplemousse Grill on May 10, 2010 for $203.67 and that such a meal was not a legitimate business expense. Depo. of Hanekamp, pp. 285-287, Day 2;

c. Never wanted to dissolve Atlas even though he sought that relief. See Depo. of Hanekamp. pp. 324-325;

Plaintiff's representations were false or made with reckless disregard for their truth or falsity. Plaintiff's misrepresentations and omissions were material. Plaintiff intended to deceive Defendants by making such statements and representations. Plaintiff intended for Defendants to rely on Plaintiff's false statements, misrepresentations, and omissions. Defendants were ignorant as to the falsity of Plaintiff's misrepresentations. Defendants had the right to rely on the representations of Plaintiff. Defendants reasonably and justifiably relied upon such statements and representations to their detriment by, among other things, continuing to pay him salary and benefits and had a right to so rely. Defendants suffered damages as a direct and proximate result of Plaintiff's fraud and are entitled to actual damages in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[net amount after credit of $29,220.79] plus punitive damages. See Coldren Sec. Supp. Aff., ¶ 8. Plaintiff has proffered no credible evidence to refute the facts presented to the Court that Plaintiff converted funds in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[net amount after credit of $29,220.79].

iii. Conversion

Defendants' counterclaim for conversion requires them to prove: (1) an interest of the Plaintiff in the thing converted; (2) the Plaintiff converted the property to his own use; and (3) the use was without Defendants' permission. Plaintiff has converted assets of Atlas and TASL as discussed in detail above. The Plaintiff's actions and theft and other unauthorized exercise of the rights of ownership over the credit cards, cash, assets and other properties of the Defendants Atlas and TASL, to the exclusion of the Defendants' rights in and ownership of their assets, as hereinabove set forth, constitutes a conversion of Defendant's assets in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[net amount after credit of $29,220.79] plus punitive damages. See Coldren Sec. Supp., ¶ 8. As a direct and proximate result of the Plaintiff's actions and conversions of Defendants' cash, credit cards and property, Defendants have been damaged and are entitled to the return of all cash and properties, in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[net amount after credit of $29,220.79].

As set forth in the Second Supplemental Affidavit of Atlas' Finance Director, Cynthia Coldren, dated March 21, 2014, Plaintiff: (1) submitted credit card expenses from 2008-2010 that Atlas paid for totaling $12, 538.33 as legitimate, reimbursable business expenses but did not provide any supporting documentation; (2) purchased a Nissan Titan truck in 2009 in Hawaii for which Atlas incurred a loan for $11,769.00; (3) used the Atlas credit card to pay Ekololo, LLC and PayPal*CSanPietro a total of $14, 800.00; (4) incurred from 2007-2009 many other expenses while in Hawaii that were reported as legitimate business expenses in the amount of $63, 335.28. The grand total of these expenses is $102.457.61. In the summer of 2009, Atlas realized that Plaintiff was failing to follow Atlas protocols to properly document his expenses by producing receipts for legitimate business expenses. Atlas' accountant appropriately accounted for $29, 220.75 in improper expenses incurred by Plaintiff as a shareholder distribution on Plaintiff's account.

iv. Unjust Enrichment/Quantum Meruit/Restitution

Defendants counterclaim for unjust enrichment requires them to prove: (1) a benefit conferred upon the Defendants by Plaintiff; (2) realization of that benefit by the Defendants; and (3) retention by the Defendants of the benefit under conditions that would make it unjust to retain it without paying its value. Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868, 872 (2000).

Plaintiff misappropriated corporate cash and credit cards for his own personal benefit and for that of his friends and cohorts as discussed in detail, supra, including but not limited to, paying for groceries at Costco with the corporate credit card, cash paid to "csanpietro", a PayPal account, later known as Ekololo, LLC or other "vendors", such as "Little Reatta" and Kona Pacific Farms that Plaintiff represented as legitimate, using corporate funds to supposedly purchase a corporate automobile but which Plaintiff registered in his own name, making a multitude of purchases in Hawaii using the corporate credit card, claiming they were for the purpose of opening a Hawaii office, when in fact Plaintiff later admitted in an email, dated August 19, 2009, that there was never an intent to start an Atlas office in Hawaii. Defendants conferred a valuable benefit upon the Plaintiff which he has realized in full. Defendants are entitled to the return of the monies Plaintiff misappropriated and/or restitution of all cash, capital, and/or funding that it contributed to the success of the Atlas San Diego office which Plaintiff converted, wasted, stolen or misappropriated.

C. Defendants are allowed to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act).

This Court has previously determined that no oppressive conduct toward a minority shareholder has occurred in this case. See This Court's Order dated December 28, 2013. Nevertheless, the Court is statutorily authorized to require a buyout pursuant to S.C. Code Ann. 33-14-310(d)(4) and (e) which provide as follows:

> (d) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order:
>
> (4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.
>
> (e) The relief authorized in subsection (d) **may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate.**

Id. (emphasis added)

"**[A] court should have broad discretion to fashion the most appropriate remedy to resolve the dispute.**" See official Cmt., S.C. Code Ann. § 33–18–410 (1976) (Emphasis added). This Court has been involved with this case for over three (3) years and has held 4 hearings (not including Judge Dennis' hearing of August 3, 2011 for a total of 5 hearings). The case was originally filed in March of 2011 before it was transferred to this Court in August of 2011. This Court has determined that, under the circumstances of this case, an Order allowing Defendants to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" pursuant to S.C. Code Ann. §33-14-310(d)(4) and (e) [and §33-18-420[1]] is appropriate, with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act). S.C. Code Ann. § 33–14–420(b) (2006) provides the terms under which such a buyout should be accomplished.

While Hendley v. Lee, 676 F. Supp. 1317, 1319 (D.S.C. 1987) is a South Carolina U.S. District Court case, it is instructive here. In Hendley, Plaintiffs, Dixon L. Hendley and Ryan D. Hendley, brought an action against Terry L. Lee, Defendant, pursuant to S.C. Code Ann. § 33–21–150, et seq., (1976), as amended, seeking judicial intervention in the affairs of a deadlocked corporation engaged in the business of providing housekeeping and maintenance service to industrial plants. The Court recognized that in addition to allowing an order of forced dissolution [under predecessor statute to 33-18-400], the statute empowers a court to grant other relief, including ordering the purchase of the shares of any shareholder, either by the corporation or by other shareholders. § 33–21–155(a)(4) [the predecessor statute since repealed]. Actions arising under the [prior] statute are proceedings in equity. Hendley (citing Ward v. Ward Farms, Inc., 283 S.C. 568, 324 S.E.2d 63 (1984). The South Carolina District Court ordered a share buyout as a result of a deadlock between the shareholders and required the shareholders with financial wherewithal to purchase the other party's shares after review of the parties' relative financial positions. The Court ordered that the Hendleys were in a better position to purchase Lee's shares. Personal financial statements were submitted by all of the parties and the Hendleys had much greater financial strength than Lee, the Hendleys together being worth approximately ten (10) times as much as Lee. To require Lee to purchase the Hendley stock would require him to commit several times his net worth, while to require the Hendleys to purchase the Lee stock would require them to commit approximately twenty five (25%) percent of their net worth. Id.

The situation in Hendley is analogous to the present case. Plaintiff is financially strapped, having faced three (3) foreclosures in the last few years and is likely unable to buyout the Defendants. See American Savings Bank v. Robert Paul Hanekamp, et al., 3CC11-1-0183K, 3CC11-1-0184K (HI 2010); NDEX West, LLC v. Robert P. Hanekamp (CA 2012)(ended in short sale 2013). The situation among the shareholders of Atlas and TASL is untenable such that absent requiring a dissolution, which is not justified by the facts of this case as the Order of December 28, 2013 makes clear, the only logical remedy to this situation is for the majority shareholders, Defendants, who are financially capable, to buyout the Plaintiff's shares in Defendants Atlas and TASL for "fair value" with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act). It would be manifestly unjust to give Plaintiff a windfall because he was a destructive force in the corporation and responsible for pursuing a litigation strategy intended to devalue the corporation and injure the Defendants. Likewise, it is unworkable to allow Plaintiff to remain as a shareholder of either Atlas or TASL.

I find that the "fair value" of Plaintiff's twenty five percent (25%) ownership of the outstanding shares in Atlas is Two Hundred and Eighty Four Thousand Two Hundred and Fifty and No/100 Dollars ($284,250.00) based on the report prepared by B. Perry Woodside, III, Ph.D. of Dixon Hughes Goodman entitled "Valuation of a 100% Equity Interest in Atlas Technologies, Inc. as of December 31, 2010" summary report dated May 10, 2011, as amended as of May 12, 2012 (the "Revised Report").

I find that the "fair value" of Plaintiff's thirty three and 33/100 percent (33.33%) ownership of the outstanding shares in TASL is One Hundred and Twelve Thousand Seven Hundred and Ninety One and 21/100 Dollars ($112,791.21) based on the county appraisals for TASL's real estate holdings less the amount of debt outstanding plus cash on hand. This amount reflects TASL's "net equity" in the property that it owns in Virginia and South Carolina. TASL has $79,150.50 in cash.

Plaintiff has taken actions in this case that are arbitrary, vexatious and in bad faith in violation of S.C. Code Ann. §33-18-410(b). He disclosed confidential and proprietary information such as Atlas' "Multiple" to the public either negligently, or with the intent of injuring the Defendants. Depo. of Hanekamp, pp. 235-236. The Multiple, or "multiplier is the ratio of indirect costs to direct costs and the methods used to calculate indirect expense rates and their results are highly confidential and proprietary information that, if known by a competitor, can provide them with a competitive advantage where preparing their prices for bids for U.S. Government contracts." Affidavit of Bill Walter, ¶ 5;

Depo. of Hanekamp, pp. 235-36. Plaintiff has engaged in a variety of disruptive activities as previously detailed in Defendants' Motion for a Temporary Restraining Order, Preliminary Injunction and Sanctions, filed on June 28, 2012, Motion for Rule to Show Cause and Contempt filed on January 29, 2013, and a variety of other motions and legal memoranda on file with the Court.

I find that Defendants should be allowed to buy Plaintiff's shares in Atlas and TASL for their "fair value" of Three Hundred and Ninety Seven Thousand and Forty One and 21/100 Dollars ($397,041.21) *as offset by*:

(1) The amount of money Plaintiff converted to his own use of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82);

(2) The amount of costs Defendants incurred, including reasonable counsel fees and expenses of appraisers and their other experts, incurred in this proceeding of Fifty Two Thousand Eight Hundred and Ninety Eight and 98/100 Dollars ($52,898.98), due to Plaintiff's actions being arbitrary, vexatious and in bad faith. See S.C. Code Ann. §33-18-410(b); and

(3) Two Hundred and Four Thousand One Hundred and Two and 75/100 Dollars ($204,102.75) in attorneys fees for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. §15-36-10, as amended. See Affidavit of John E. Rosen, Esq.

Plaintiff violated S.C. Ann. § 33-18-410 (b) and S.C. Ann. § 15-36-10 in a variety of particulars, including but not limited to:

(1) Naming TASL as a Defendant in the litigation but never making a single allegation of any misconduct or wrongdoing associated with TASL;

(2) Failing to produce a valuation or offer any evidence to rebut or question the valuation report prepared by Dixon Hughes Goodman, entitled "Valuation of a 100% Equity Interest in Atlas Technologies, Inc. as of December 31, 2010" summary report, as amended by that certain Memo dated March 27, 2012 (collectively, the "Revised Report");

(3) Filing two (2) unsubstantiated motions for the appointment of a receiver and dissolution of Atlas after being admonished by the Court to produce evidence to support his motions or face sanctions, which motions were filed frivolously, as Plaintiff later admitted in his deposition that he never wanted Atlas dissolved or to have a receiver appointed (See Depo. of Hanekamp. pp. 324-325);

(4) Filing a frivolous motion for summary judgment seeking appointment of a receiver for a third (3rd) time while the parties were in a Court ordered abeyance, an abeyance sought by Plaintiff so that he could secure a third attorney to represent him;

(5) Disclosing confidential and proprietary information of Defendants, in particular their billing rates known as the "Multiple", through court filings in violation of the Consent Confidentiality Order entered into by the parties (See, E.g., Hanekamp Supp. Aff., p. 2);

(6) Filing a second frivolous Motion for Sanctions, Motion to Compel and Motion for Rule to Show Cause, in which Plaintiff misrepresented the understandings and agreements between the parties with respect to several issues including, but not limited to:

(i) the parties agreement as of September 28, 2011 in chambers limiting discovery to issues of valuation of Plaintiff's interest in an attempt to mediate the case;

(ii) the agreement of the parties to hold in abeyance discovery other than that related to valuation of the company as agreed to at the previous status conference (See Memorandum in Opp. to Plaintiff's Motions for Rule to Show Cause, Motion to Compel, and Motion for Sanctions, filed June 22, 2012); and

(iii) misrepresenting the Defendants' cooperation in attempting to provide records requested pursuant to the Plaintiff's right to inspect corporate records, which records are voluminous, difficult to locate, collate and organize, as well as burdensome in time, effort and expense to meet Plaintiff's unduly burdensome requests and arbitrary deadlines. Defendants diligently addressed these requests, but Plaintiff set arbitrary deadlines and filed frivolous Motions to Compel, for Sanctions and for Rule to Show Cause in an attempt to abuse the litigation process and Defendants.

(7) Filing affidavits in which the Plaintiff made a variety of false statements, including:

(i) that he was "intimately familiar with Atlas' accounting and billing practices, its contracts with the government, Atlas accounting codes and the requirements of the Department of Defense and the [DCAA] as to what costs are allowable in our contracts for services" (See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2) only to admit in his deposition that he was not (Hanekamp Deposition day 2, p.264-265);

(ii) falsely claiming that he: "was personally aware that the Defendants record [these] personal expenses as supposed business expenses", only to admit in his deposition that he was not personally aware of how personal expenses were coded or whether they were ever passed on the government. See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2 and Hanekamp Depo. day 2, p. 264-269;

(iv) misrepresenting the magnitude and significance of the percentage of "General and Administrative" ("G&A") expenses Defendant Miller incurred for G&A travel and meals as being "53% of the entire company's costs" when in fact it was less than one (1%) percent of the entire company's travel and meal costs (Plaintiff juxtaposed the figure that Atlas had 80 to 100 employees alongside this statement to mislead the Court as the record makes clear); (See Hanekamp Aff., p. 2; See Also Affidavit of Bill Walter, ¶ 17-18 and Supplemental Affidavit of Cynthia Coldren filed July 20, 2012, ¶ 10) ;

(v) falsely claiming that he could: "personally attest that Miller does not maintain regular work hours, that he spends most of his time away from our offices indulging in his personal pleasures such as boating and vacationing and there is no business purpose for the bulk of Miller's meals and travel". (Hanekamp Aff., p. 3); and

(vi) claiming that: "Defendant Miller also bills two vehicles to the company, a Porsche Panamera and a BMW 7-series, one which his wife drives, for a total annual cost of $28, 812.00" even though these statements were false and Plaintiff knew they were false. See Supp. Hanekamp Aff., p. 3; Supp. Coldren Aff. filed July 20, 2012, ¶ 16.

To reach the consideration which Defendants should pay to acquire Plaintiff's interest in Atlas and TASL, I have relied on B. Perry Woodside, III, Ph.D's Supplemental Affidavit, the Second Supplemental Affidavit of Cynthia Coldren, Atlas' Chief Financial Director, Brian M. Miller's Fourth Supplemental Affidavit and the Affidavit of John E. Rosen, Esq. Cynthia Coldren's affidavit details the

money Plaintiff converted to his own personal use. Brian Miller's fourth supplemental affidavit reflects his allocation of legal fees and costs between Defendants Atlas and TASL, including the amounts deemed to be frivolous or in bad faith as to each Defendant. John E. Rosen's affidavit provides the amount of money Defendants paid in fees and costs to defend Plaintiff's frivolous claims and his bad faith, vexatious and arbitrary actions in this litigation.

An analysis of this information prepared by Cynthia Coldren results in set offs to Plaintiff's "fair value" in Atlas shares are as follows: $26, 476.25 for bad faith litigation in violation of S.C. Code Ann. § 33-18-410(b); $58,898.98 in expert's fees for Dixon Hughes Goodman; $145,018.50 in frivolous claims in violation of S.C. Code Ann. §15-36-10; and $73,236.82 for conversion of Atlas' funds. The resulting value for Plaintiff's buyout from Atlas is -$13,380.55. Set offs to the "fair value" of Plaintiff's shares in TASL are: $6, 278.75 for bad faith in violation of S.C. Code Ann. § 33-18-410(b); $26, 329.25 in frivolous claims in violation of S.C. Code Ann. §15-36-10. The resulting value for Plaintiff's buyout from TASL is $80,183.21.

I find that Defendants are therefore allowed to purchase all of Plaintiff's shares in both Defendants Atlas and TASL for a total purchase price of **SIXTY SIX THOUSAND EIGHT HUNDRED AND TWO AND 66/100 DOLLARS ($66,802.66).**

III. CONCLUSION

Based on the above findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Summary Judgment as to their counterclaims for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, and (5) constructive fraud is hereby GRANTED; and

FURTHER ORDERED, that the Defendants' Motion for Summary Judgment for Plaintiff's willful violations of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and violation of S.C. Code Ann. §15-36-10 (Sanctions) filed on March 24, 2014, is hereby GRANTED;

FURTHER ORDERED, that Defendants are hereby allowed to purchase to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" of Atlas ($284,250.00) and TASL ($112,791.21) *with such purchase price to be offset by*:

a. the amount of money Plaintiff converted to his own use of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[net amount after credit of $29,220.79];

b. the amount of costs Defendants incurred, including reasonable counsel fees and expenses of appraisers and their other experts, in this proceeding due to Plaintiff's actions being arbitrary, vexatious and in bad faith (See S.C. Code Ann. §33-18-410(b) in the amount of Fifty Two Thousand Eight Hundred and Ninety Eight and 98/100 Dollars ($52,898.98); and

c. Two Hundred and Four Thousand One Hundred and Two and 75/100 Dollars ($204,102.75) in attorney's fees due to Plaintiff's violations of S.C. Code Ann. §33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. §15-36-10, as amended.

FURTHER ORDERED, that Defendants Miller and Diehl shall purchase all of Plaintiff's shares in Atlas for $284,250.00 and all of Plaintiff's shares in TASL for $112,791.21 within sixty (60) days from the date this Order is served upon Plaintiff;

FURTHER ORDERED, that the proceeds from the sale of Plaintiff's shares in Atlas be paid to Atlas to reimburse Atlas for (i) the $73,236.82 converted by Plaintiff from Atlas for his own use, (ii) $52,898.98 in litigation costs, and (iii) $171,494.75 in attorney's fees paid by Atlas resulting from

Plaintiff's violation of SC Code Ann. § 33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10, as amended;

FURTHER ORDERED, that a portion of the proceeds from the sale of Plaintiff's shares in TASL (i) be paid to TASL to reimburse TASL for $32,608.00 in attorney's fees paid by TASL resulting from Plaintiff's violation of SC Code Ann. § 33-18-410(b) and the SC Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10, as amended, and (ii) be paid to Atlas to pay the remaining $13,380.55 the Plaintiff owes Atlas pursuant to the terms of this Order;

FURTHER ORDERED, that to facilitate the sale of Plaintiff's shares and payment of funds to Atlas, TASL and Plaintiff, that the Law Firm of Rosen, Rosen & Hagood, LLC act as Disbursement Agent to receive the proceeds from the sale of Plaintiff's stock in Atlas and TASL and disburse the proceeds in accordance with the terms of this Order; and

FURTHER ORDERED, that following the Disbursement Agent's receipt of $284,250.00 and $112,791.21 from Defendants Miller and Diehl, and the disbursement of those funds as provided herein, the Defendant Corporations, Atlas and TASL, shall cancel the shares formerly held by the Plaintiff on the respective books of those Corporations.

AND IT IS SO ORDERED!

The Honorable Roger M. Young, Jr.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
This 15th day of May, 2014

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[1] S.C. Code Ann. § 33-18-420 provides in pertinent part: (a) If the court finds that the ordinary relief described in Section 33-18-410(a) is or would be inadequate or inappropriate, it may order the corporation dissolved under Section 33-18-430 unless the corporation or one or more of its shareholders purchase all the shares of the shareholder for their fair value and on terms determined under subsection (b). For section (b) see *infra*.

Haynsworth
Sinkler Boyd, P.A.

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May 28, 2015

Via Hand Delivery

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: Joseph E. Mason, Jr. v. Catherine L. Mason, et al.
Appellate Case No. 2012-212146

Dear Mr. Shearouse:

Enclosed for filing in the above-referenced matter and pursuant to Rule 242, SCACR, please find the following documents:

1. One original unbound, and seven (7) copies of Petitioner Joseph E. Mason, Jr.'s Petition for Writ of Certiorari;
2. One original and two (2) copies of the Proof of Service;
3. One unbound and two (2) bound copies of the Appendix (with the Record of Appeal filed separately); and
4. Firm check in the amount of $100.00 for the filing fee.

Please return a filed copy of the Petition for a Writ of Certiorari, Appendix, and Proof of Service with my courier. As required by Rule 226, SCACR, I have also filed a copy with the Clerk of the Court of Appeals. We have also served a copy of the documents, excluding the Record on Appeal, on counsel for Respondents.

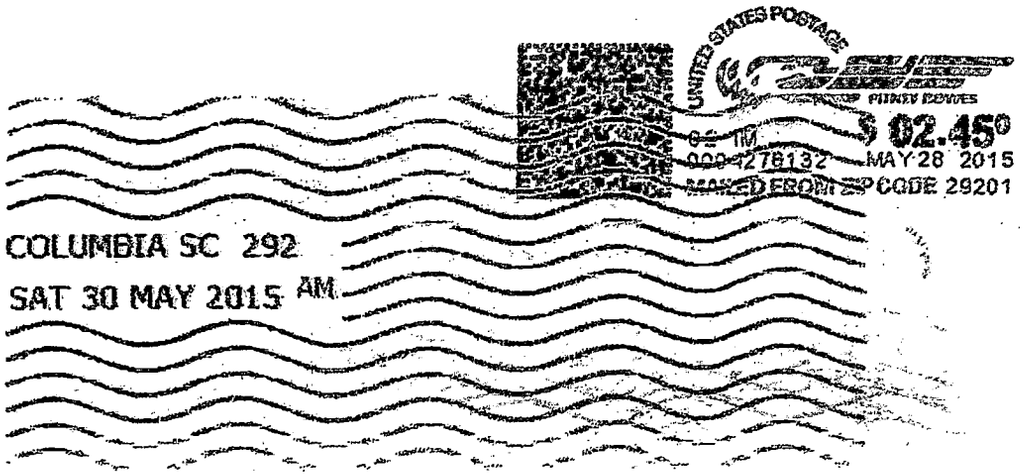
Sincerely,

Robert Y. Knowlton

RYK/bev
Enclosures

DM: 4083608 v.1

cc: (via U.S. Mail, w/enclosures excluding Record on Appeal)
J. Jackson Thomas, Esq.
Emma Ruth Brittain, Esq.
John M. Leiter, Esq.
The Honorable Jenny Abbot Kitchings (also w/out Appendix) ✓



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35061.0001

The Honorable Jenny Abbott Kitchings
Clerk of Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201