THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington

Case No. 2009-CP-10-3333

Clifford C. Hansen .....Respondent/Appellant,

v.

Fields Company, LLC; Beechwood Advisory Group, Inc.; Beechwood Development Group of South Carolina, LLC; and Beechwood Development Group, Inc.....Defendants,

Of Whom Beechwood Development Group of South Carolina, LLC is the .....Appellant/Respondent.

RESPONDENT'S INITIAL BRIEF OF RESPONDENT/APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT BASED UPON THE EVIDENCE IN THE RECORD AND THE APPLICABLE LAW.

A. South Carolina law is clear and well settled regarding ratification of contracts.

B. Appellant was informed and well aware of Hansen's ownership interest in the new water company.

C. Hansen did not argue that ratification of one preformation contract entered by a promoter necessitates ratification of all that promoter's contracts. Rather, Hansen argued, as the law states, that Appellant cannot ratify that part of a contract which is advantageous to it and repudiate the remainder.

D. There was more than sufficient evidence from which a jury could reasonably find Hansen had a contract entitling him to an ownership interest in the new water company.

II. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO EACH OF THE SIX (6) CAUSES OF ACTION IN WHICH THE JURY FOUND IN FAVOR OF HANSEN.

A. There was more than sufficient evidence from which a jury could reasonably find Appellant intentionally interfered with Hansen's prospective contractual relation with Milner.

B. There was more than sufficient evidence from which a jury could reasonably find in favor of Hansen on the remaining five (5) causes of action on which he prevailed but did not elect.

1. There was more than sufficient evidence from which the jury could reasonably find that BDG converted Hansen's due diligence materials.

2. There was more than sufficient evidence from which the jury could reasonably find for Hansen on his breach of contract and breach of contract with fraudulent intent claim.

3. There was more than sufficient evidence from which a jury could find that BDG ratified the tortious acts of Fields thereby finding it liable to Hansen for negligent misrepresentation and breach of fiduciary duty.

STATEMENT OF THE CASE

On March 17, 2005, Respondent Clifford C. Hansen (hereinafter "Hansen") filed this action in the Orangeburg County Court of Common Pleas against Robert Fields, Fields Company, LLC, Beechwood Advisory Group, Inc., Dennis Byrd, Beechwood Development Group of South Carolina, Inc., and Beechwood Development Group of South Carolina, LLC (hereinafter "BDG "), which is the Appellant in this matter. (Complaint). On June 13, 2005, the defendants filed a motion to change venue and on April 26, 2006 The Honorable James C. Williams, Jr. issued an Order Transferring Venue in which he ordered the case transferred to the Charleston County Court of Common Pleas. (Order Transferring Venue).

On January 18, 2008, The Honorable R. Markley Dennis, Jr. signed a Consent Order Pursuant to Rule 40(j), in which the case was stricken from the active roster. Hansen filed his motion to restore the case on December 30, 2008 and a Consent Order Restoring Case was filed on May 13, 2009.

On January 18, 2010, pursuant to a Consent Order entered by the parties, Hansen filed an Amended Complaint in which Beechwood Development Group, Inc. was added as a defendant, and Robert Fields and Dennis Byrd were deleted as defendants. (Amended Complaint). Other than the change in parties and their respective involvement in the alleged misconduct, the Amended Complaint mirrored the original Complaint which asserted nine (9) causes of action related to the sale of a natural spring water company in Elloree, South Carolina.

Prior to trial, Hansen settled his claims against Beechwood Advisory Group, Inc. (hereinafter "BAG"). (Defendants' Ex. 1, Vol. I, Tr. pp. 31-32). The defendants Fields Company, LLC and Beechwood Development Group, Inc. never filed a responsive pleading and were in default. (Vol. I, Tr. p. 41, Vol. II, Tr. p. 304). At trial, Hansen only pursued his claims against BDG. Hansen voluntarily dismissed his claims for fraud, constructive fraud, and negligence, and proceeded on the remaining six (6) causes of action: (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, (3) breach of fiduciary duty, (4) misrepresentation, (5) conversion, and (6) intentional interference with prospective contractual relations. (Vol. I, Tr. p. 43, Vol. II, Tr. pp. 6-7, Vol. III, Tr. p. 109).

At the close of Hansen's case, BDG made a motion for directed verdict on all his claims and causes of action, but did not move for directed verdict on Hansen's claim for punitive damages. (Vol. III, pp. 89-121).

At the close of all evidence, BDG renewed its motion for directed verdict on the remaining six (6) causes of action, which were again denied by the trial court. (Vol. III, Tr. pp. 204-208). Then, after being prompted by the Court, BDG for the first time made a motion for directed verdict as to Hansen's claim for punitive damages. (Vol. III, Tr. pp. 208-210). The trial court then summarily granted the motion for directed verdict as to Hansen's claim for punitive damages. (Vol. III, Tr. p. 210).

The jury returned a verdict in favor of Hansen on all six (6) causes of action. Hansen was required by the trial court to elect his remedy at that point and elected to

receive damages for the intentional interference with prospective contractual relations claim. The jury awarded a verdict of actual damages in the amount of $1,189,408. (Vol. III, Tr. pp. 344, 351).

BDG made a motion for new trial, remittitur, and judgment notwithstanding the verdict on very limited grounds, which motion was denied by the trial court in an Order or Judgment filed on March 25, 2011. (Vol. III, Tr. pp. 354-356; Judgment II). BDG also made a motion for set-off against the jury verdict for the amount paid by BAG and Dennis Byrd to settle the claims against them in the amount of $130,000. (Vol. III, Tr. pp. 353-356). The trial court, relying upon S.C. Code Ann. §15-38-50, granted the motion in an Order or Judgment filed on March 24, 2011. (Judgment I). The trial court entertained further written argument and briefs on BDG's motion for remittitur, but ultimately denied that motion, as well as BDG's motion for reconsideration, in an Order or Judgment dated May 11, 2011. (Judgment III).

Hansen filed his Notice of Appeal on May 2, 2011.

FACTS

Clifford Hansen was born and raised in Charlotte, North Carolina. (Vol. I, Tr. p. 81). Hansen's father Floyd started and was a partner and General Manager of a water bottling plant in Union, South Carolina known as DHL Labs, as well as one in eastern North Carolina called Old Saratoga. (Vol. I, Tr. pp. 82-84). Hansen worked at the plants during summers and breaks while in high school and college and became intimately familiar and knowledgeable about all aspects of the water bottling business. (Vol. I, Tr. pp. 83-84).

After graduating from the College of Charleston in 1997 Hansen relocated to New York City, obtained his Series 7 license and became a stock broker and trader. (Vol. I, Tr. pp. 81-82). In December 2002, Hansen was living and working in New York City as a broker for Jefferies & Co. when he started looking for a water bottling company to purchase in the southeast. (Vol. I, Tr. pp. 86-88). Hansen visited and researched several water bottling companies before he learned about the Hickory Springs Water Company located in Elloree, South Carolina from some of his father's former colleagues. Hansen contacted the owner George Milner (hereinafter "Milner"). Hansen established a dialogue with Milner which ultimately led to discussions about Hansen purchasing the company. (Vol. I, Tr. pp. 86-89).

Over the next few months, Hansen spent a substantial amount of time, energy and money conducting due diligence on the company, including, but not limited to, reviewing the company's financial and other records, preparing pro formas and projections, obtaining hydrology reports regarding the natural springs which supply

the water, speaking to customers regarding future commitments, hiring and dealing with lawyers and accountants, and taking other necessary actions in furtherance of purchasing the water company from Milner. (Plaintiff's Exs. 4, 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), 10(h), 10(i), 10(j), 10(k), 10(l), 10(m), 10(n), Vol. I, Tr. pp. 89, 96-105, 109-129).

Hansen also spent a considerable amount of time with Milner personally, ultimately becoming close friends with him. (Vol. I, Tr. p. 89). Through Milner, Hansen learned even more details about the company, the personnel, and what actions would be necessary to make the business more competitive and successful. On March 27, 2003, Milner sent a letter to Hansen with "an informal nonbinding Letter of Understanding" and indicated his desire and agreement to sell Hickory Springs to Hansen. (Plaintiff's Ex. 1, Vol. I, Tr. p. 96-97).

After concluding his due diligence and investigation regarding the company, Hansen was convinced the company had great potential for growth and success, which was corroborated by Milner.[1] Hansen and Milner agreed upon a purchase price of $3.95MM. On April 21, 2003, Hansen and Milner executed a Purchase Term Sheet regarding the sale/purchase and in May of 2003 Hansen moved from New York to Charleston, South Carolina and proceeded to seek and secure financing to consummate the purchase. (Plaintiff's Ex. 1, Vol. I, Tr. p. 96-97).

[1] Unlike most water bottling companies, which simply sell purified tap water, Hickory Springs sells actual natural spring fed water, with the natural springs located on the property. (Vol. II, Tr. p. 202).

Hansen retained the accounting firm of Pratt-Thomas, Gumb & Co., P.A. to assist him with formal due diligence in connection with his purchase of Hickory Springs, for which he paid them $13,203.72. (Vol. I, Tr. p. 96, 100). Hansen retained and paid $14,175 to a Financial Consultant in Philadelphia named Allison Rulon-Miller to assist him with business plans and preparing detailed financial projections. (Plaintiff's Ex. 4). Hansen also retained an attorney, John H. (Johnny) Warren, III and his law firm Warren & Sinkler, L.L.P. in Charleston to assist him in all legal matters, including incorporating his company Carolina Springs Bottling, Inc., pertaining to the purchase and by July of 2003 had paid them in excess of $15,000. (Plaintiff's Ex. 5, Vol. I, Tr. pp. 102-106).

In the fall of 2003, Hansen was provided the name of David Fields and his son Robert Fields (hereinafter "Fields") by his friend Rich McConnell as someone who could potentially assist him with securing financing for the purchase. Hansen met the Fields at their office (Fields Company) in Charleston, South Carolina. Fields told Hansen he was a partner in an entity known as "Beechwood" which could help him. (Vol. I, Tr. pp. 129-130). Fields informed Hansen he had partners in Chicago, whom Hansen later learned were Dennis Byrd (hereinafter "Byrd"), Rich Gregg and Greg Easter. (Vol. I, Tr. p. 129). Fields also introduced Hansen to Rolf Richter, another member of "Beechwood" who, for reasons unknown to Hansen, at some point was no longer affiliated with Fields or "Beechwood".

After several meetings with Fields and Richter, they told Hansen the deal was too expensive and that "Beechwood" was not interested. (Vol. I, Tr. p. 130). Hansen,

on his own accord, went back to Milner and renegotiated the sale price. Milner agreed to accept $2.95MM to sell the business. (Vol. I, Tr. p. 130). Hansen informed Fields and Richter of the change in purchase price and they told Hansen "Beechwood" was now on board. Beechwood Advisory Group, Inc. (hereinafter "BAG") agreed to represent Hansen and act as his agent in securing financing for the purchase of Hickory Springs Water Company in return for a flat fee of $100,000 to be paid at closing.

On December 15, 2003, Hansen, Fields and Richter had dinner with Milner to further discuss the deal and its details. (Plaintiff's Ex. 6).

The following day, December 16, 2003, Hansen received from Fields a proposed Letter of Understanding between him and BAG regarding its representation of him in the purchase of Hickory Springs. (Plaintiff's Ex. 7). The Letter of Understanding which BAG prepared, however, now demanded a $10,000 retainer fee "up front" from Hansen to BAG, in addition to the $100,000 fee to be paid at closing, and stated Hansen would be responsible for securing $500k of investment capital and BAG would be responsible for raising $1.0MM in investment capital, with the remainder of the purchase price being in the form of a note to the seller and a bank loan. Fields and Byrd were well aware Hansen had exhausted his cash resources on due diligence and legal fees and accountants and could not pay such a fee on demand. (Vol. I, Tr. p. 135). Hansen did not pay the $10,000 up front fee. (Vol. I, Tr. p. 135).

On January 12, 2004, BAG, by and through Byrd, sent an e-mail to Hansen advising it was withdrawing from representing him in matters concerning the

acquisition of Hickory Springs Water Company. (Plaintiff's Ex. 8). The letter also refers to a "Notice of Intention" sent to Hansen on December 24, 2003, which Notice of Intention Hansen never received. In its January 12, 2004 e-mail, BAG also attempted to reserve "the right to independently purchase Hickory Springs" and offered to pay Hansen a 1% "finder's fee". (Plaintiff's Exs. 8, 9).

At this point, Hansen was speaking to Fields daily and had already provided him and Byrd a large amount of confidential and proprietary information regarding the company, including a business plan, pro formas and other financial projections he had prepared with the assistance of accountants whom he paid, due diligence performed on the business by Pratt, Thomas & Gumb and the substance of conversations he had with prospective customers as well as former customers of the company who confirmed they would purchase product from the company if certain changes were made.

Despite its e-mail of January 12, 2004, BAG did not withdraw from representing Hansen and, in fact, continued to serve and act as agent for Hansen and on his behalf concerning the purchase of Hickory Springs Water Company. (Vol. I, Tr. pp. 140-41).

Around this same time, Hansen advised Fields and Byrd he was unable to immediately pay the $10,000.00 deposit they requested. Hansen advised Fields and Byrd, however, that he did have an investor who he believed would participate in the deal. Hansen provided the name of this investor, David Hunt (hereinafter "Hunt"), to Byrd and Fields. (Vol. I, Tr. p. 141). Hunt is a member of the very wealthy Hunt Oil

family from Texas. Hansen and Hunt had known each other for years. As Pat Cobb testified, "[E]verybody knows the Hunts in Texas and Oklahoma". (Vol. III, Tr. p. 138). Hansen provided his due diligence information to Hunt in an email and introduced Hunt to Fields via conference call. (Plaintiff's Ex. 10). Hansen also arranged a lunch meeting in Dallas, Texas between Fields and Hunt in early March of 2004.

Fields contacted Hansen on his return trip from Texas and informed Hansen that he and Hunt "had a great meeting". (Plaintiff's Ex. 12). Hunt also agreed to travel to South Carolina to tour the water plant. Fields stated in his email, however, that Hansen would only receive ten (10%) percent of the company, "his salary"[2] and "his management team".

Hansen immediately contacted Fields and told him that was not their agreement. (Vol. I, Tr. p. 144). Therefore, the same week of Hunt's planned visit to the water plant, and in order to protect his interest, Hansen drafted and presented to Fields a new written agreement (Letter of Understanding) and contract, which agreement was signed and initialed by Fields on behalf of BAG and an entity he labeled as "BDG, Inc.". (Plaintiff's Ex. 13).

This Letter of Understanding, among other things, assured that Hansen would own twenty five (25%) per cent of Carolina Springs Bottling, LLC, which would own

[2] Hansen was promised a salary of $100,000 annually, and at trial introduced through Tom Finnegan the salaries of the actual Plant Managers in support of his lost salary (breach of contract) damages. Tom Finnegan testified Sid Schingler made "about $110,000-$120,000" and the current Plant Manager Richard Stewart is "paid $106,000, maybe $107,000".

one hundred (100%) percent of Carolina Springs Bottling, Inc., that no agreement could be made with Hunt, or his affiliates, without the prior consent of Hansen, that BAG would advise Hansen on negotiating the purchase of the water company, negotiate and secure bank debt, and assist in securing new capital and/or investments. In return, BAG/BDG would be compensated $100,000. (Plaintiff's Ex. 13).

Negotiations regarding details of the purchase continued between Fields and Milner. Hansen was sent copies of communications and kept informed of all negotiations. On March 16, 2004, Fields sent Milner an e-mail setting forth what he indicated were to be the "last and final" terms of the deal, indicating the company would be purchased by a 60/40 partnership between Hunt and Beechwood, and indicating a purchase price of $2,930,000.00. Fields sent Hansen a copy of this e-mail on the following day, March 17, 2004. (Plaintiff's Ex. 14).

Hansen thereafter prepared an Executive Summary for potential investors in regards to Carolina Springs Bottling, LLC. On April 3, 2004, Fields delivered the Executive Summary to potential investor, Pat Cobb, via e-mail at 10:29:54 a.m. Eastern Standard Time. At all times, Hansen was and is the sole owner of one hundred (100%) percent of the shares of stock of Carolina Springs Bottling, Inc., which is the company he incorporated to be the purchaser of Hickory Springs. On page 8 of the Executive Summary sent by Fields to Cobb, it states: "[T]he Company is seeking to raise such funds in the form of equity and has retained the Beechwood Group to serve as its placement agent in such endeavor." The "Company" referred to in this sentence referred to Carolina Springs Bottling, Inc. Also included as part of

this Executive Summary were pro formas and/or financial projections which were based solely upon confidential and proprietary information prepared by Hansen and provided to Fields and Byrd. (Plaintiff's Ex. 15).

The recipient of this Executive Summary sent by Fields, Pat Cobb, did invest in the project and, at the time of trial, owned 51.5% of BDG, by and through his company ACC Ventures, LLC. Thus, the very document based upon which Cobb invested in the project stated that "Beechwood" was acting as agent for Hansen and that Hansen would be "CEO" and a "Director" of the company.

Three days later, April 6, 2004, in an e-mail from Fields to Pat Cobb, Fields referred to Hansen as the "owner/operator" of the company and stated Hansen would be entitled to a ten percent (10%) ownership interest in the company. (Plaintiff's Ex. 16). Fields again attempted to whittle down Hansen's ownership interest to 10% despite signing an agreement indicating Hansen would own no less than 25% of the water company.

The first week of May, 2004, Hunt traveled to South Carolina to walk through the facility. Despite the previous existing relationship and friendship between Hansen and Hunt, and the introduction of Hunt to the deal by Hansen, Fields set about upon a plan to exclude Hansen from the meeting. Specifically, Fields informed Hansen that Hunt was "coming in late" and advising he would pick Hunt up in Augusta and the two would meet with Hansen after they went through the plant. (Vol. I, Tr. pp. 157-158). Fields further advised Hansen that Milner wanted as small a group as possible walking through the plant so as not to raise questions or concerns among the

employees. After Hunt and Fields toured the plant with Milner, Hunt, Fields, Milner and Hansen met for lunch at a nearby restaurant. Milner arrived on time, but Hunt arrived with Fields about 45 minutes later.

Hansen called Hunt the following week and, at this time, Hunt advised Hansen that after he and Fields visited the plant in Elloree Fields took Hunt to another facility which was for sale. (Vol. I, Tr. pp. 157-158). At this facility, Fields introduced Hunt to Sid Schingler who was, at the time, the Chief Operating Officer of Quality Beverage in Charleston, South Carolina and was operating the water plant for sale. Hunt further informed Hansen that Fields told him he intended to replace the management team Hansen had put together for Hickory Springs with Sid Schingler. Hansen was stunned and angered, and immediately called Fields.

Hansen met with Fields later that same day, May 10, 2004, and at this meeting Fields presented Hansen with an organizational chart which contained none of the management team Hansen had put together, including management who had many years of successful experience in other water companies. The same chart also had Hansen's ownership interest reduced to 2.5% with a potential earn in for an additional 2.5%.

Approximately a week after this meeting, Hunt informed Hansen he was backing out of the deal. (Vol. I, Tr. p. 170). Fields thereafter told Hansen the deal was dead. Hansen now began scrambling to get financing or investors on his own to salvage the deal with Milner, who was now anxious to sell the water company. (Vol. I, Tr. p. 169). Hansen reached out to a good friend by the name of Steve Wilson,

whom he had become friends with while in New York City. (Vol. I, Tr. p. 170). Steve Wilson is a very successful businessman, graduated from the U.S. Naval Academy and earned a Harvard MBA, who has served as Chief Financial Officer and President of several Fortune 500 companies, including RJR Nabisco, Footstar, Cadbury-Schweppes, Pepsi, USA, Frito-Lay, and others. (Plaintiff's Exs. 31, 32, Vol. II, Tr. pp. 190-244). Wilson is experienced in the water business through his experience with Cadbury-Schweppes and at the time of trial was serving as an expert witness in a matter involving a water bottling company. (Vol. II, Tr. pp. 193-96). Wilson served as a father figure to Hansen after his father died. (Vol. II, Tr. p. 197). Wilson testified he would have been willing, and probably able, to assist Hansen in successfully raising the necessary capital to consummate the sale if he had the necessary due diligence information Hansen had obtained and some additional time. (Vol. II, Tr. p. 202-206).

In trying to obtain financing with new investors, including Wilson, Hansen needed and requested copies of various documentation he had given to Fields and Byrd in furtherance of the deal, and documents which they had prepared using his information while serving as his agents and on his behalf. Hansen's computer had crashed with all of the documentation that he had provided Fields & BAG and was unable to recreate it. (Tr. Vol. II, pp. 45-47). When Hansen requested the information be returned, Fields and BAG claimed the information was proprietary and refused to return it. Hansen approached Bank of America about financing with the understanding Wilson would assist him. Bank of America, however, required certain financial

documentation related to Hickory Springs which Hansen had given to Fields and Byrd. (Plaintiff's Ex. 22). Fields and Byrd refused to return the documents to Hansen in both an e-mail dated May 24, 2004 and a letter dated May 26, 2004, wherein Byrd purported to terminate its agency representation of Hansen. (Plaintiff Exs. 24, 25).

At this point, BDG, through Fields and Byrd, had used Hansen's substantial confidential and proprietary information, including his business plan, pro formas, financial projections, contracts concerning the purchase, conversations with potential and former customers, and information obtained by Hansen during due diligence investigations, all of which he had paid for, to its benefit to obtain loans and financing, investors, and to negotiate and consummate a purchase of Hickory Springs without Hansen .

Hansen now began working hard to salvage the deal on his own with Wilson. On May 28, 2004, Hansen sent an e-mail to Fields advising him that if Beechwood pursued the purchase of Hickory Springs to his exclusion, he would pursue them legally.[3] (Plaintiff's Ex. 26). Based upon this e-mail, Milner ceased negotiations with Hansen on May 31, 2004. (Plaintiff's Ex. 28).

On Friday, June 11, 2004, Milner sent Hansen an e-mail advising of two changes to the Letter of Intent he had previously sent to Hansen and that, upon confirmation of these changes, and a change requested by Steve Wilson, he would be "prepared to sign the LOI." Milner also attached various documents to the e-mail for

[3] In a state of panic and frustration, Hansen also threatened to turn over recorded telephone conversations he had between him and Fields. There are none. (Vol. I, Tr. pp. 166-67).

Hansen's review to consummate the deal. (Plaintiff's Ex. 29). Hansen immediately forwarded the e-mail to Steve Wilson and Caleb Fort. (Plaintiff's Ex. 30). Milner testified that while he was confident Wilson "had the financing and the wherewithal to do the deal", they "wanted more information for their own due diligence purposes", which he was simply not willing to provide at this time. (Vol. II, Tr. p. 165). Hansen asked for more time from Milner, but as Milner testified "Clifford wanted to extend the time and my – I was in the closing mode. It was time to get this thing done." (Vol. II, Tr. p. 163). While Fields sent Milner an e-mail telling him to allow Hansen to try and get the deal done first, BDG knew Hansen could not get the necessary information together for any investors or bank loans on Milner's time frame. Additionally, Milner testified that Fields actually tried to offer Milner an additional $100,000 to get the deal ahead of Hansen, which he refused. (Vol. II, Tr. p. 168).

By this point in time, Fields, along with Byrd, Easter and Gregg, his partners in BAG, had convinced Pat Cobb and Tom Finnegan to invest in the purchase of Hickory Springs Water Company, to the exclusion of Hansen. BDG would be a 48% owner of Hickory Springs and Greenbax would be a 52% owner. Fields formed and incorporated BDG for this purpose on July 12, 2004. (Defendant's Ex. 8, Plaintiff's Ex. 37, 38, Vol. III, Tr. p. 158).

Due to BDG's wrongful conversion and retention of crucial information, almost all of which was provided by Hansen initially, paid for by Hansen initially, and/or prepared based upon information Hansen provided, and all of which was utilized and/or prepared by Fields and Byrd in the course of their representing and

serving as agent for Hansen via written contract, including the identity of the bank which had agreed to provide financing for the deal, information provided to the bank for its consideration in the loan application and approval process, such as appraisals, and other information, Hansen and his new partners/investors simply could not obtain financing or re-create the needed documentation necessary to obtain financing and conclude due diligence within the time frame desired by Milner, who had been trying to close on the sale for over six (6) months at this point.

On or about July 20, 2004, armed with the information, documents, loan approval, due diligence information, and everything else necessary to consummate the deal, BDG proceeded to purchase the business and assets of Hickory Springs Water Company to the exclusion of Hansen.

STANDARD OF REVIEW

When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 629 S.E.2d 642 (2006); *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct.App. 2007). On appeal from an order denying a directed verdict, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. *Swinton Creek Nursery v. Edisto Farm Credit,* 334 S.C. 469, 514 S.E.2d 126 (1999); *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct.App. 2007). The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor. *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct.App. 2007); *Jones v. General Electric Co.*, 331 S.C. 351, 503 S.E.2d 173 (Ct.App. 1998). The court of appeals will reverse the trial court's ruling on a directed verdict motion only if no evidence exists to support the ruling, or if the decision was controlled by an error of law. *Pye v. Estate of Fox,* 369 S.C. 555, 633 S.E.2d 505 (2006); *Clark v. S.C. Dep't. of Pub. Safety,* 362 S.C. 377, 608 S.E.2d 573 (2005). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Erickson v. Jones Street Publishers, L.L.C,* 368 S.C. 444, 629 S.E.2d 653 (2006); *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct.App. 2007).

In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no

evidence which reasonably supports the jury's findings. *Broach v. Carter,* Op. No. 5006 (S.C.Ct.App., July 5, 2012); *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED BDG'S MOTION FOR DIRECTED VERDICT BASED UPON THE EVIDENCE IN THE RECORD AND THE APPLICABLE LAW.

A. South Carolina law is clear and well settled regarding ratification of contracts.

South Carolina has already recognized the doctrine of ratification. Specifically, South Carolina courts have adopted the following three elements to prove ratification: 1) acceptance by the principal of the benefits of the agent's acts; 2) full knowledge of the facts; and 3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. *Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 717 S.E.2d 74 (Ct.App. 2011).

Likewise, South Carolina law has recognized promoters and liability of promoters for pre-incorporation acts. *Bivens v. Watkins,* 313 S.C. 228, 437 S.E.2d 132 (Ct.App. 1993) ("persons who plan or organize a corporation are promoters"); *Duncan v. Brookview House, Inc.*, 262 S.C. 449, 205 S.E.2d 707 (1974). South Carolina law has recognized that an agreement or contract between promoters of a corporation "is as valid and binding as any other contract if the essential elements of an enforceable agreement are present. The presumption is that a promoter's contract is valid and legal; the law will not assume an intention to violate it and, if possible, will so construe it as to uphold and validate it." *Duncan,* 205 S.E.2d at 711 (citing 18 Am. Jur. (2d) *Corporations*, § 135 and 18 Am. Jur. (2d) *Corporations*, § 136).

Thus, it is only logical to presume that South Carolina law would recognize the ratification by a corporate entity of a contract entered into by one of its promoters prior to formation. While this precise issue has not been specifically addressed or ruled upon by a South Carolina appellate court, this proposition is a generally recognized doctrine throughout American jurisprudence. "A corporation may, after its organization, become liable on preliminary contracts made by its promoters by expressly adopting such contracts or by receiving the benefits from them if such contracts are within the scope of the corporation powers and not otherwise objectionable." 18 Am. Jur. (2d) *Corporations*, § 123; *Lorillard Tobacco Co. v. American Legacy Foundation,* 903 A.2d 728 (Del. 2006); *SmithStern Yachts, Inc. v. Gyrographic Communications, Inc.,* 2006 Conn.Super. LEXIS 1927 (Conn. 2006); *Federal Savings and Loan Insurance Corp. v. Morque,* 372 N.W.2d 872 (N.D. 1985); *Whitten v. Bob King's AMC/Jeep, Inc.,* 292 N.C. 84, 231 S.E.2d 891 (N.C. 1977). "A pre-incorporation contract made by a promoter may be ratified, adopted, or accepted by a corporation after its incorporation, resulting in corporate liability on the contract. A corporation is then liable, both at law and in equity, on the contract itself and not merely for the benefits it has received." 18 Am. Jur. (2d) *Corporations*, § 124. "Although it is true that in general a corporation does not exist as a legal entity until incorporated and, therefore, cannot have agency for its organization, the pre-incorporation activities of a promoter may form the basis for corporation liability when they have been ratified by post-incorporation acts of the corporation. The acts of ratification relate back to the time of the original activities and establish an agency

relationship permitting the acts of the promoter to constitute, in effect, acts done by the corporation." 18 Am. Jur. (2d) *Corporations*, § 125; *See* 1A Fletcher Cyclopedia Corporations, Ch. 9, § 205 (1983); 1A Fletcher Cyclopedia Corporations, Ch. 9, § 207 (1983); 1A Fletcher Cyclopedia Corporations, Ch. 9, § 212 (1983); *Development Design Group, Inc. v. Deller,* 2012 U.S.Dist. LEXIS 44862 (D.Md. 2012); *Tayama v. Riom Corporation,* 2012 U.S.Dist. LEXIS 21643 (N.D.Tex. 2012); *Stolle Machinery Company, L.L.C. v. Ram Precision Industries,* 2011 U.S.Dist. LEXIS 144662 (S.D.Ohio 2011); *Gerrert Company, Inc. v. William J. Hirten Company, L.L.C.,* 815 F.Supp.2d 521 (D.R.I. 2010); *Godwin Gruber, P.C. v. Deuschle,* 2002 U.S.Dist. LEXIS 5873 (N.D.Tex. 2002); *Madeja v. Olympic Packer, LLC,* 155 F.Supp.2d 1183 (D.Haw. 2001); *Eden Temporary Services, Inc. v. House of Excellence, Inc.,* 270 A.D.2d 66, 704 N.Y.S.2d 239 (N.Y.App.Div. 2000); *Illinois Controls, Inc. v. Langham,* 70 Ohio St.3d 512, 639 N.E.2d 771 (Ohio 1994); *Coastal Shutters and Insulation, Inc. v. Derr,* 809 S.W.2d 916 (Tex.App. 1991); *Tin Cup Pass Limited Partnership v. Daniels,* 195 Ill.App.3d 847, 553 N.E.2d 82 (Ill.App. 1990); *Knop v. McMahan,* 872 F.2d 1132 (1st Cir. 1989); *Minidraft, Inc. v. Qualitech Computer Centers, Inc.*, 1987 U.S.Dist. LEXIS 5951 (E.D.Pa. 1987); *Blackwood Coal Company, Inc. v. Deister Concentrator Company, Inc.,* 626 F.Supp. 727 (E.D.Pa. 1985); *Chase v. Pan-Pacific Broadcasting, Inc.,* 617 F.Supp. 1414 (D.D.C. 1985); *John Deere Company v. First Interstate Bank of Arizona, N.A.,* 147 Ariz. 256, 709 P.2d 890 (Ariz.App. 1985); *Hog Heaven Corp. v. Midland Farm Management Company,* 380 N.W.2d 756 (Ohio App. 1985); *Rees v. Mosiac Technologies, Inc.*, 742

F.2d 765 (3rd Cir. 1984); *Quality Wood Chips v. Adolphsen,* 636 S.W.2d 94 (Mo.App. 1982); *Framingham Savings Bank v. Szabo,* 617 F.2d 897 (1st Cir. 1980); *DeCarlo v. Gerryco, Inc.,* 46 N.C.App. 15, 264 S.E.2d 370 (N.C.App. 1980); *Peters Grazing Association v. Legerski,* 544 P.2d 449 (Wyo. 1975); *Chartrand v. Barney's Club, Inc.,* 380 F.2d 97 (9th Cir. 1967); *McCloskey v. Charleroi Mt. Club,* 390 Pa. 212, 134 A.2d 873 (1957); *Spering v. Sullivan,* 361 F.Supp. 282 (D.Del. 1973); *Meyer v. Nator Holding, Co.,* 102 Fla. 689, 136 So. 636 (Fla. 1931). "Ratification, adoption, or acceptance of a pre-incorporation contract by a promoter need not be expressed, but may be implied from acts or acquiescence on the part of the corporation or its authorized agents." 18 Am. Jur. (2d) *Corporations*, § 129; *Lupo v. Share of North Carolina, Inc.,* 2009 N.C.App. LEXIS 1321 (N.C. Ct.App. 2009); *Mark F. Pfaller Associates, Inc. v. Rimer,* 89 Wis.2d 762, 278 N.W.2d 282 (Wisc.App. 1979).

It can be readily seen by the numerous cases cited herein virtually every state and federal circuit in the country has adopted or recognized these fundamental legal principles. There is no case law or other legal authority indicating South Carolina appellate courts would reject these well recognized legal principles. Simply because there is no reported decision from a South Carolina appellate court citing these legal principals does not mean they are not proper legal authority for consideration by the trial court regarding the issues raised in this case.

Contrary to BDG's assertion, the legal doctrine holding that a promoters contract entered preformation of a corporate entity but adopted and/or ratified by the corporate entity after its formation is not a "novel" legal issue, but rather is a well

settled legal doctrine recognized throughout the country and a logical extension of existing South Carolina law regarding ratification and promoters.

B. BDG was informed and well aware of Hansen's ownership interest in the new water company.

BDG argues that Pat Cobb and Tom Finnegan, the two BDG representatives who appeared at trial, were "innocent investors" and were completely unaware of the actions of Fields and agreements Fields entered into with Hansen regarding his ownership interest in the new water company. The evidence presented to the jury clearly shows otherwise.

Hansen agrees with BDG's recitation of the law which states that a corporation can only ratify or accept the benefits of those actions or contracts of which it has full knowledge. Cobb clearly had such knowledge and the jury so found.

Prior to Fields traveling to Texas to meet with Hansen's friend David Hunt, Fields entered into an agreement with Hansen which indicated Hansen would have no less than a twenty-five percent (25%) ownership interest in the new water company and that Fields would not negotiate or agree to any deal regarding the new water company without Hansen's review and approval. (Plaintiff's Ex. 13). Hansen wrote the agreement and while he referred in the agreement to Beechwood Advisory Group, Inc., Fields executed the agreement as a partner of and on behalf of "BDG, Inc.", which was an entity Fields had formed for the purpose of purchasing the water company. Fields also initialed every page of the three page document. The shareholders of Beechwood Development Group, Inc., were Fields, Dennis Byrd,

Richard Gregg, Andrew Easter and Rolf Richter. (Vol. I, Tr. pg. 141). Four of these five investors (all but Richter) would ultimately become shareholders or members of BDG.[4] Thus, there was at least evidence sufficient from which a jury could infer that four of the shareholders or members of BDG were aware of Fields contract guaranteeing Hansen a twenty-five percent (25%) ownership interest in the new water company and thus had knowledge sufficient to hold BDG liable for the preformation contract.[5]

Even assuming, *arguendo*, Cobb and Finnegan could somehow argue they were unaware of this preformation contract entered into by Fields, they cannot possibly distance themselves from Fields promise ("contract") to give Hansen a ten percent (10%) ownership interest in the company. On April 3, 2004, Fields sent to Cobb an e-mail along with an Executive Summary of Carolina Springs Bottling Company. (Plaintiff's Ex. 15). The Executive Summary indicates it was prepared specifically for Cobb and contains Hansen's contact information on the front page. The Executive Summary is replete with references to Hansen, including the fact he would be President and CEO of the new water company, serve on the Board of Directors, would handle day to day operations of the company, and also that Beechwood had been retained specifically to represent Hansen and his company

[4] Interestingly, Byrd, Gregg, and Easter, who had absolutely nothing to do with the development and work on this deal, ultimately wound up with 24.5% of Hansen's promised 25% ownership interest in the water company. (Plaintiff's Exs. 38, 39, 40).

[5] BDG adopted and honored the other terms of this contract, including representing and advising Hansen with respect to the negotiations with Milner and trying to raise capital or find investors.

Carolina Springs in acquiring a capital investment. Thus, it is incomprehensible how Cobb could possibly disavow any knowledge of Clifford Hansen based upon the very document which served as the basis for all information relating to his decision to invest in the venture. But the information train doesn't stop here. Three days later, on April 6, 2004, Fields sent another e-mail to Cobb in which he specifically states the terms of the deal and tells Cobb that "ten percent (10%) is to be for the owner/operator (Hansen) on an earn-in basis." (Plaintiff's Ex. 16) It is clear that Cobb is now not only on notice of Hansen's active involvement in the management and day to day operations of the water company, but that also he is the sole shareholder of Carolina Springs, which would be the purchasing entity of Hickory Springs, and that he will be getting ten percent (10%) ownership interest in the company as the "owner/operator". At this point, the jury not only had circumstantial evidence from which it could reasonably infer Cobb (the majority owner of BDG) had knowledge and notice of the preformation contract between Fields and Hansen, but now had direct evidence upon which it could rely.

BDG's argument that Cobb and Finnegan somehow were "not aware" of Hansen and his involvement or ownership interest in the new water company flies in the face of logic, common sense and the direct evidence presented to the jury. There was more than sufficient evidence from which the jury could find BDG, by and through Cobb and Fields at the very least, had full knowledge and notice of Hansen's ownership interest in the new company, and the trial court was correct in denying BDG's motion for a directed verdict as to liability.

C. Hansen did not argue that ratification of one preformation contract entered by a promoter necessitates ratification of all that promoter's contracts. Rather, Hansen argued, as the law states, that BDG cannot ratify that part of a contract which is advantageous to it and repudiate the remainder.

Contrary to BDG's argument, Hansen never argued to the trial court nor to the jury that simply because BDG ratified one or more actions and contracts entered into by Fields on its behalf meant that it had ratified all of them. Rather, as is the well settled law of South Carolina law, Hansen argued that BDG could not ratify those parts of any contract advantageous to it while repudiating those parts of the contract which it found burdensome. In *Southern Bell Telephone and Telegraph Co. v. WRNO, Inc.*, 216 S.C. 533, 59 S.E.2d 146 (1950), the Supreme Court of South Carolina stated the law as follows:

> "In the absence of consent on the part of the third person involved in a transaction with one acting on behalf of another without authority, a principal cannot ratify a part of the agent's unauthorized act without ratifying the whole transaction. Therefore the principal cannot ratify that part of the transaction which is advantageous to himself while repudiating the burdensome part, nor can he make the ratification conditional upon his suffering no loss. On the contrary, a principal who ratifies the unauthorized act of his agent also ratifies his representations and warranties, as well as all other instrumentalities employed by the agent as an inducement to the action of the third person involved in the unauthorized transaction." (citing 2 C.J.S., *Agency*, § 66, p. 1145).

This is a correct recitation of South Carolina law and was so charged to the jury by the trial court. *See* also *Tulsa Tribune Co. v. Commission of Internal Revenue*, 58 F.2d 937 (10th Cir. 1932). This statement of law by the Supreme Court of South

Carolina accurately states the position, factually and legally, taken by Hansen in the case. BDG, sought to and did, in fact, ratify all of the actions, agreements, representations, contracts and warranties made by Fields in furtherance of their purchase of Hickory Springs Water Company, with only one exception. BDG apparently was unhappy with the acts, representations, agreements, promises and warranties that Hansen would be the "owner/operator" of the new water company and would have a ten percent (10%) ownership interest. All other actions and conduct by Fields were adopted and ratified by BDG, including, but not limited to: negotiation of an agreement to purchase the water company with owner George Milner, filing papers with the South Carolina Secretary of State to incorporate BDG (Defendant's Ex. 8), allowing Fields to execute an Unconditional Guarantee on behalf of the company to Wachovia Bank for financing for the purchase (Plaintiff's Ex. 36), allowing Fields to sign the Operating Agreement of BDG as its "Member/Manager" (Plaintiff's Ex. 37, p. 33), allowing Fields to execute the Operating Agreement of the new company, Hickory Springs Water, LLC on its behalf and as its "Manager" (Plaintiff's Ex. 38, p. 36), allowing Fields to own ten percent (10%) of the entity for which he invested no capital (Plaintiff's Ex. 39), and appearing on behalf of the entity at the closing in which it and Greenbax purchased Hickory Springs Water Company.

In fact, BDG acknowledged that Fields was its "Managing Member", and it did not remove him from this role until February 25, 2005. (Plaintiff's Ex. 39, p. 2). Thus, the evidence in the record was patently clear to the trial court and to the jury that BDG placed Fields in the position of its Managing Member, authorized him to act

on its behalf and execute documents in its name, and adopted and ratified every single act and representation and agreement of Fields with the exception of his agreement that Hansen would have ten percent (10%) ownership in the new company and serve as the operator.

Hansen did not argue that because BDG adopted or ratified one or more of the actions and agreements of Fields that it was legally bound to be considered to have adopted and ratified all of them, as this is not the law. Hansen did point out to the jury, however, that BDG had adopted and ratified all of the actions and agreement of Fields with the exception of Hansen's ownership or participation in the new company. Hansen did argue to the trial court and to the jury, as set forth above, that South Carolina law will not allow BDG to adopt and ratify those actions and portions of agreements of Fields which are advantageous to it, and which inured to its benefit, while allowing it to repudiate that portion of an agreement which burdens it. This is exactly what BDG is trying to do.

Fields' agreement with Hansen, on behalf of BDG, was clearly set forth in the e-mail communications between Fields and Cobb on April 3 and April 6, 2004. Even if BDG can successfully argue it did not know about Fields' signed agreement that Hansen would have a twenty five percent (25%) ownership interest in the company it cannot escape its knowledge of his promise that Hansen would have a ten percent (10%) interest, of which it is undisputed he did notify Cobb. Fields agreement, promise, representation and contract with Hansen that he would own ten percent (10%) of the company and serve as a salaried operator (President/CEO/Board

Member) were part and parcel of the entire agreement regarding the purchase of Hickory Springs Water Company by the individuals and groups which would ultimately compromise the BDG entity. Under South Carolina law, BDG should not be allowed to reap the benefits of the contract between Fields and Hansen in which it acts as his agent to find an investor and purchase the water company, utilizing the work and negotiations performed by Hansen, and yet repudiate that part of the contract regarding his involvement and ownership. The only single actions or representation or agreement entered into by Fields which BDG has, at any time, stated he did not have authority to do so involved Hansen. BDG should not be allowed to have its cake and eat it too. This is exactly the type of misconduct which South Carolina law prohibits and makes unlawful.[6]

D. There was more than sufficient evidence from which a jury could reasonably find Hansen had a contract entitling him to an ownership interest in the new water company.

Contrary to BDG's argument, Hansen is not asking this Court to adopt or recognize any heretofore unknown or unrecognized legal principal or to create any new "rule" regarding the liability of a corporation when it has adopted or ratified the preformation actions and agreements of its promoters. As set forth herein above, South Carolina law and the law of other states is very well settled regarding

[6] Appellant states in its Initial Brief that the ultimate terms, conditions and contract up on which Hickory Springs was purchased were not the same as when Hansen was involved. This argument was never made by Appellant at any point in time at trial, Appellant presented no evidence of such at trial, and Appellant should not be allowed to present this argument for the first time in its Initial Brief on Appeal. This Court should disregard and reject any arguments or factual submissions regarding this fact even if it were true, which Hansen denies.

ratification by an entity after its formation of actions and conduct of its promoters preformation. Hansen has never argued that Fields was the "alter ego" of BDG and has not suggested such a rule. Hansen has never argued that BDG's officers and directors are the same as, rather than separate and distinct from, the corporate entity and has not suggested such a rule.

Hansen has not argued or suggested a rule regarding liability of a corporate entity for the "unknown acts of its promoters" as these are not the facts of this case. Hansen submits that a corporate entity can and should be liable for adopting and ratifying the **known** acts of its promoters, which are the facts in this case. There is nothing new, novel, unusual or unprecedented regarding any of the arguments made by Hansen or the law cited by Hansen to the trial court or the jury.

BDG's argument that this Court affirming the jury verdict in this case would somehow "wreak havoc on economic development in South Carolina" is not only speculative and without evidentiary support, but misplaced because the facts as stated in BDG's argument are not in accord with the facts heard by the trial court and the jury.

II. THE TRIAL COURT CORRECTLY DENIED BDG'S MOTION FOR DIRECTED VERDICT AS TO EACH OF THE SIX (6) CAUSES OF ACTION IN WHICH THE JURY FOUND IN FAVOR OF HANSEN.

A. There was more than sufficient evidence from which a jury could reasonably find BDG intentionally interfered with Hansen's prospective contractual relation with Milner.

Sufficient evidence existed from which a jury could reasonably find BDG intentionally interfered with Hansen's prospective contract to purchase Hickory Springs Water Company from Milner. In order to establish a claim of intentional interference with a prospective contract, Hansen must show: 1) the defendant intentionally interfered with the plaintiff's potential contractual relation; 2) for an improper purpose or by improper methods; 3) causing injury to the plaintiff. *Dutch Fork Development Group II, LLC v. SEC Properties, LLC,* Op. No. 27139 (S.C.Sup.Ct., August 22, 2012); *Camp v. Springs Mtg. Corp.,* 310 S.C. 514, 426 S.E.2d 304 (1993); *Crandall Corp. v. Navistar Int'l Transp. Corp.,* 302 S.C. 265, 395 S.E.2d 179 (1990). Examples of improper methods include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of insider confidential information, or breach of a fiduciary relationship. *Id.* Methods that are unethical, overreaching, or violate an established standard of trade have also been deemed "improper" for the purpose of this tort. *Id.*

Initially, Hansen and Milner entered into a written contract concerning the potential purchase by Hansen of Hickory Springs Water Company. (Plaintiff's Exs. 1,

2). Later, after Beechwood's entry and involvement, the specific terms and conditions of the purchase set out in that agreement were modified. It was still evident, however, that Milner intended to enter into a contract to sell the water company to Hansen. (Vol. II, Tr. pp. 163-68, Plaintiff's Ex. 29). It is undisputed BDG interfered with Hansen's prospective contractual relationship to purchase Hickory Springs from Milner when it acted on its own behalf and purchased the company out from under him. (Vol. II, Tr. p. 157). The only question remains whether BDG's interference with Hansen's potential contract was done by improper methods. Hansen submits there is ample evidence from which the trial court and the jury could determine improper methods were utilized by BDG to interfere with Hansen's prospective contract to purchase the water company.

As late as June 2004, Fields and BAG/BDG allowed Hansen to continue thinking he would have both a twenty-five percent (25%) ownership interest in the company, his salary and his management team.[7] It was not until a meeting on May 10, 2004 that Fields, for the first time, informed Hansen that his "team was out" and that Sid Schingler would be running the water company rather than Hansen. Even at this time, however, Fields did not tell Hansen he would have no ownership interest in the company and no job or salary.

[7] Cobb also knew, based upon his written communications with Fields, that Hansen would be the "owner/operator" and would have a 10% ownership interest in the company, his salary and his management team. Hansen did not know that Fields had unilaterally reduced his interest from 25% to 10%, but Cobb was aware of some level of ownership and operation by Hansen.

By this point in time, Cobb and Fields had strung Hansen along allowing him to believe he would be running the plant, with a salary and his management team, and own a ten percent (10%) interest in the company in order to prevent him from lining up other investors or sources of capital, such as Steve Wilson. Cobb and Fields knew, however, that by this time Milner was very anxious and hungry to sell the water company and was not willing to give much more time to consummate the transaction. BDG attempted to save itself from liability for its actions by making a last minute statement to Milner that he should let Hansen close the deal if he could (while Fields quietly offered Miler $100,000 to close with BDG), knowing full well that Milner was not willing to extend the time, and at the same time refusing to return to Hansen all of the due diligence documentation and financial information he had compiled during the previous year. BDG knew Hansen would be unable to recreate and recompile this necessary due diligence and financial information in sufficient time to put together a competing offer for the water company. Thus, the evidence was more than sufficient that BDG used misrepresentation or deceit, fraud, and misuse of inside or confidential information as improper methods in interfering with Hansen's prospective contract to buy the water company from Milner.

BDG's argument throughout trial and on appeal is that Fields is the guilty party and should be liable for the wrong done to Hansen. As the jury properly found, however, it was BDG, and not Fields, who interfered with Hansen's contract with Milner by buying the water company out from under him and to his exclusion. South Carolina law is clear that the managing member of an LLC cannot be held

individually liable for the torts of the LLC. *16 Jade Street, LLC v. R. Design Constr. Co., LLC,* Op. No. 27107, 2012 WL 1111466 (S.C.Sup.Ct., April 4, 2012), 728 S.E.2d 448 (2012); *Dutch Fork Development Group II, LLC v. SEC Properties, LLC,* Op. No. 27139 (S.C.Sup.Ct., August 22, 2012), id. There was more than sufficient evidence from which the jury could find that the LLC (BDG) was the tortfeasor and not Fields individually, especially since no evidence was introduced at trial that Fields invested one cent in the purchase of the water company.

Even without addressing the issues of ratification and liability of an entity for the preformation actions of a promoter, this cause of action can successfully stand on its own. Hansen submits the trial court correctly denied BDG's motion for directed verdict as to Hansen's claim for intentional interference with prospective contractual relation.

B. There was more than sufficient evidence from which a jury could reasonably find in favor of Hansen on the remaining five (5) causes of action on which he prevailed but did not elect.

There was more than sufficient evidence from which a jury could reasonably find BDG ratified and adopted the actions of Fields thereby exposing it to liability on Hansen's remaining five (5) causes of action.

1. There was more than sufficient evidence from which the jury could reasonably find that BDG converted Hansen's due diligence materials.

There was sufficient evidence from which the jury could reasonably find that BDG converted Hansen's due diligence materials. The basis for Hansen's conversion claim is not, as BDG argues, the conversion of his due diligence materials by Fields,

but rather BDG itself. By the time Hansen learned he was being cut out of the deal by BDG the last week of May 2004, all of the principals of BDG were already in place. Cobb had been in the deal for two (2) months at this point and time. Thus, it wasn't just "Fields" who converted Hansen's due diligence materials but rather BDG itself.

2. There was more than sufficient evidence from which the jury could reasonably find for Hansen on his breach of contract and breach of contract with fraudulent intent claim.

There was ample evidence introduced at trial indicating that Hansen had a contract with the individuals who would ultimately become the principals and owners of BDG. Specifically, Hansen had an agreement that he would own 25% of the company, have his salary and his management team and would operate the company. Hansen concedes it is arguable that Cobb only knew Hansen was entitled to 10% of the company as represented by Fields rather than the 25% to which Fields had agreed in writing. Even in a light most favorable to BDG, however, there was more than ample evidence that each of the principals was aware that Hansen would have a 10% ownership interest in the company, be the "owner/operator", have the salary of a plant manager and have his choice of management team.[8] This contract was breached by BDG and was breached by fraudulent intent as they used deceit and dishonesty in furtherance of breaching the contract and excluding Hansen totally from the purchase and operation of the water company.

[8] There was also sufficient evidence from which the jury could reasonably conclude all the principals of BDG knew BAG and its principals (Fields, Byrd, Easter, Greg) were agents of Hansen representing him and could not 'compete' against him.

There was more than sufficient evidence from which a jury could reasonably find in favor of Hansen and against BDG on his claim of breach of contract and breach of contract accompanied by a fraudulent act.

3. There was more than sufficient evidence from which a jury could find that BDG ratified the tortious acts of Fields thereby finding it liable to Hansen for negligent misrepresentation and breach of fiduciary duty.

While BDG has cited three (3) cases supporting its position that a corporation cannot ratify the tortious acts of its promoters, Hansen submits the majority of case law supports the opposite position. *See*, e.g., *H. Horowitz, Inc. v. Weehawken Trust & Title Co.*, 159 A. 384 (N.J. 1932) (a corporation had to pay checks written by a corporation's promoter before incorporation because it had ratified all of the checks the promoter had written and could not choose which ones it would ratify.). Hansen concedes that his claims for negligent misrepresentation and breach of fiduciary duty stem from the actions and conduct of Fields. As set forth extensively above, however, case law is clear that a corporation can adopt and ratify the acts of its promoter after its incorporation. The fact that Fields' acts and conduct were tortious in nature does not matter as BDG ratified all of the acts and conduct of Fields in furtherance of its purchasing the water plant and operating it to the exclusion of Hansen.

Hansen submits there was more than sufficient evidence from which the jury could reasonably find in favor of Hansen against BDG on his causes of action for negligent misrepresentation and breach of fiduciary duty.

CONCLUSION

Based upon the reasons stated herein, Hansen respectfully submits this Court should affirm the jury verdict in favor of Hansen for actual damages, reverse the trial court's setoff in the amount of $130,000 against the jury's verdict for actual damages, and remand for a new trial only on the issue of punitive damages.

Respectfully submitted,

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September 6, 2012

CERTIFICATE OF COMPLAINCE WITH FONT REQUIREMENT

I certify that this brief was typed in 13-point Times New Roman font.

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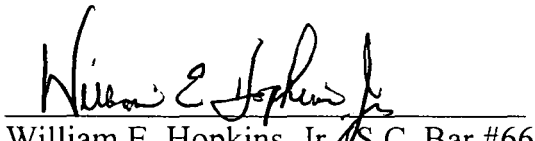

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