

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

**APPEAL FROM GREENVILLE COUNTY
Circuit Court**

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

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SC Court of Appeals

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

v.

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

John Gandis and Andrea Comeau-Shirley, Third-Party Plaintiffs,

v.

Carolina Custom Converting, LLC, Third-Party Defendant and Counterclaim Plaintiff,

v.

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

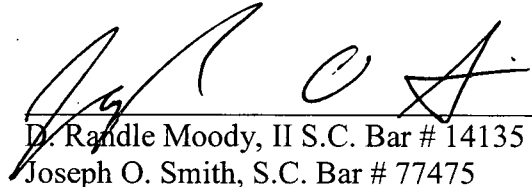
Of Whom David Wilson, Neologic Distribution, Inc. and Fresh Water Systems, Inc. are the
Respondents,

and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the
Appellants.

INITIAL BRIEF OF APPELLANTS

ROE CASSIDY COATES & PRICE, P.A.



D. Randle Moody, II S.C. Bar # 14135
Joseph O. Smith, S.C. Bar # 77475

1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax

*Attorneys for Appellants John Gandis and
Andrea Comeau-Shirley*

December 9, 2015
Greenville, South Carolina

TABLE OF CONTENTS

Table of Authorities.....	iii
I. Statement of the Issues on Appeal.....	1
II. Statement of the Case.....	2
III. Statement of the Facts.....	4
IV. Legal Arguments and Authorities.....	28
A. The trial court erred in applying an incorrect legal standard and finding that Wilson did not breach his fiduciary duties to Gandis and Shirley.....	29
1. Standard of Review.....	29
2. Appellants' breach of fiduciary duty claims were not time barred....	36
3. Wilson violated his fiduciary duties to CCC and its members by competing with the Company after January 2012	38
B. No Shareholder Oppression Occurred in this Case.....	40
1. Standard of Review.....	40
2. The trial court erred in finding Gandis and Shirley "froze-out" and oppressed Wilson	40
a. Evidence and circumstances of the case do not support a finding of oppression.....	49
i. Wilson controlled his destiny and CCC and therefore could not have been oppressed.....	50
ii. Wilson took all the good out of CCC.....	52
iii. Wilson was always ahead of other members in cash distributions.....	55
iv. Gandis and Wilson met to discuss potential business the day of his resignation.....	56
b. The Order's grounds for finding oppression fail.....	57

C.	The trial court erred in ordering the individual members to buyout Wilson’s interest in absence of unconscionable conduct.....	68
1.	Trial court erred in its valuation of Wilson’s interest in CCC	71
2.	Gandis and Shirley should only have to pay their proportional share..	72
D.	Wilson Wrongly Obtained Equity Despite his Unclean Hands	73
1.	Wilson’s Inequitable Acts	74
a.	Usurping Corporate Opportunities: Illegal Side Dealing.....	74
b.	Erasing Computers and Blackberry.....	74
c.	Theft of CCC Confidential Information and Trade Secrets.....	75
d.	Litigation Tactics.....	75
V.	Conclusion	77

TABLE OF AUTHORITIES

Cases

<i>Wheeler v. Estate of Green</i> , 381 S.C. 548, 673 S.E.2d 836, 839-40 (Ct.App.2009)	27
<i>Sloan v. Greenville County</i> , 380 S.C. 528, 534, 670 S.E.2d 663, 666-667 (Ct. App. 2009).....	29
<i>Wright v. Craft</i> , 362 S.C. 1, 17, 640 S.E.2d. 486, 495 (Ct.App.2006).....	29
<i>Jordan v. Holt</i> 191 S.C. 201, 205, 608 S.E.2d 129,131 (2005).....	29
<i>Linda Mc Co. v. Shore</i> , 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010)	29
<i>Anthony v. Padmar, Inc.</i> 320 S.C. 436, 448-49 (Ct. App.1995).....	30
<i>Few v. Few</i> , 239 S.C. 321, 122 S.E.2d 829 (1961).....	30
<i>Ellis v. Davidson</i> , 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004).....	31
<i>Moore v. Moore</i> , 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004).....	31
<i>Ellie v. Miccichi</i> , 358 S.C. 78, 100, 594 S.E.2d 485, 497 (Ct. App. 2004).....	32
<i>Moore v. Moore</i> , 360 S.C. 241, 252, 599 S.E.2d 467, 473 (Ct. App. 2004).....	32
<i>Maher v. Tietex Corp.</i> , 500 S.E.2d 204 (S.C. Ct. App. 1998).....	36
<i>Benton v. Roger C. Peace Hosp.</i> , 313 S.C. 520, 443 S.E.2d 537 (1994).....	36
<i>Tollison v. B&J Machinery Co., Inc.</i> , 812 F. Supp. 618, 619-20 (D.S.C. 1993).....	36
<i>Benton v. Roger C. Peace Hosp.</i> , 313 S.C. 520, 443 S.E.2d 537 (1994).....	36
<i>Doe v. Bishop of Charleston</i> , 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014).....	37
<i>Jordan v. Holt</i> , 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005).....	40
<i>Ballard v. Roberson</i> , 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012).....	40, 43-44, 46-47, 57, 73
<i>Kiriakides v. Atlas Food Systems & Services, Inc.</i> , 343 S.C. 587, 541 S.E.2d 257 (2001).....	42-46
<i>Mason v. Mason</i> , 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015).....	48

<i>Brown v. Green Tree Services, LLC</i> , 585 F.Supp. 2d 770 (D.S.C. 2008).....	69
<i>Holler v. Holler</i> , 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005).....	70
<i>16 Jade St., LLC v. R. Design Const. Co., LLC</i> , 398 S.C. 338, 728 S.E.2d 448 (2012).....	70
<i>16 Jade St., LLC v. R. Design Const. Co., LLC</i> , 405 S.C. 384, 747 S.E.2d 770 (2013).....	70-71
<i>Dockside Ass'n, Inc. v. Deytens</i> , 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987).....	71
<i>Anderson v. Buonforte</i> , 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005).....	73
<i>Straight v. Goss</i> , 383 S.C. 180, 207, 678 S.E.2d 443, 457-48 (Ct. App. 2009).....	73

Statutes and Regulations

S.C. Code Ann. § 33-44-409	32-36, 38
S.C. Code Ann. § 15-3-530	36
South Carolina Rule of Civil Procedure 15.....	38
S.C. Code Ann. § 15-3-410	42
S.C. Code Ann. § 15-3-801	42, 68-69
S.C. Code Ann. § 33-44-403	55, 59
S.C. Code Ann. § 33-44-405	55, 59, 66
S.C. Code Ann. § 33-44-406	55, 66
S.C. Code Ann. § 33-44-401	68

Other Authorities

John F. Lomax, Jr., <i>Privacy in the Workplace</i> , S.C. LAW, JANUARY-FEBRUARY 1998,.....	61
BLACK'S LAW DICTIONARY (10 th ed. 2014),.....	69

I. STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard for Fiduciary Duty Among Partners and LLC Members of Full and Honest Disclosure of Side Deals and Competitive Activity That Should Have Been Business of the Company?
2. Whether the Circuit Court Erred In Disregarding Fundamental Business Operations and Principles and Instead Focused on The Personal Financial Situation of Wilson to Find that Wilson Was An Oppressed Shareholder?
3. Whether the Circuit Court Erred by Failing to Dissolve the Company, Failed to Order the Company to Purchase the Shares, and Ordered Individual Members, One of Which Was a Non-Voting Member, to Purchase the Shares of Wilson at a Valuation Date Prior to Wilson Removing Substantial Value from the Company?
4. Whether the Circuit Court Erred in Fashioning Equitable Relief for Wilson When Wilson Had Unclean Hands?

II. STATEMENT OF THE CASE

Appellants and their counsel are sensitive to the length of this brief. As background, this is an appeal of a 4 ½ day bench trial, nearly 1,000 page transcript, approximately 300 exhibits, and a narrowly spaced 18 page Order. The Order summarily dismisses a number of grounds for which this Brief has to adequately address. With the standard of review on the equity claims permitting full review by this Court, the length was necessitated to summarize and distill a complex matter. In addition, there are novel matters of first impression that required additional space. Accordingly, a motion to exceed the 50 page limit was filed and efforts made to contain this Brief at its present length.

This case spawned from the establishment, management and eventual unraveling of Carolina Custom Converting, LLC (“CCC”), a company engaged in the plastic film business owned by three members – Defendant and Appellant John Gandis (45%); Defendant and Appellant Andrea-Comeau-Shirley (Shirley) (10%) and Plaintiff and Respondent David Wilson (45%). Wilson filed an action alleging (1) he was subjected to shareholder oppression by Gandis and Shirley; (2) Gandis breached his fiduciary duty to CCC and Wilson; (3) Gandis and Shirley converted company funds and property to their own use; (4) seeking dissolution of CCC, or in the alternative, disassociation. Gandis and Shirley answered and counterclaimed for Wilson’s breach of his fiduciary duties to CCC and its members. Wilson later brought a derivative suit as a representative of CCC and named ZOi Films, LLC (ZOi) and Deco-Tex, LLC (DecoTex) as additional defendants.

On September 20, 2013, Wilson filed a Second Amended Complaint alleging the same causes of action in an individual capacity as well as derivatively while adding CCC

as a party. CCC then counterclaimed against Wilson, Steve Norvell, Fresh Water Systems, Inc. and Neologic Distributions, Inc. for breach of duty of loyalty, conspiracy and violations of the South Carolina Trade Secrets Act. Norvell, Neologic, and Fresh Water responded, asserting the Trade Secrets Act claim was made in bad faith.

The parties agreed to waive a jury trial and submit all claims to a bench trial which was held September 30, 2014 through October 3, 2014 before the Honorable D. Garrison Hill.

On January 9, 2015 the trial court entered an Order finding that Gandis and Shirley “froze-out” and “oppressed” Wilson as the other member of CCC and ordered Gandis and Shirley individually to buy-out Wilson’s 45% interest of CCC for a total of \$347,863.23 pursuant to its claimed equitable powers under S.C. Code Ann. § 33-44-810.

The lower court’s January 9th order further found that:

- (1) the evidence presented at trial did not establish Wilson breached his fiduciary duty to Gandis or other members of CCC;
- (2) CCC failed to provide that Wilson, Neologic, or Freshwater misappropriated CCC’s trade secrets;
- (3) Evidence at trial demonstrated that Neologic/Freshwater used CCC’s confidential information and therefore the company was justified in bringing the trade secrets claim;
- (4) CCC failed to provide sufficient evidence in support of its claims for civil conspiracy against Wilson, Neologic, and Freshwater;
- (5) Neither party proved their respective conversion case against the other; and
- (6) Wilson was not entitled to prejudgment interest.

Gandis, Shirley and CCC filed a Rule 59 Motion for New Trial and Reconsideration on January 20, 2015 asking the trial court reconsider the date for valuation of Wilson's interest and/or give weight to the valuation when Gandis and Shirley agreed to sell their interest to Wilson during December 2011 and January 2012; its ruling requiring Gandis and Shirley to personally buy-out Wilson's membership interest; its conclusion that Wilson fully disclosed the existence and substance of disputed accounts and its application of the law respecting the South Carolina Trade Secrets Act. (Mot. Recon.). The circuit court denied that motion by Order dated January 28, 2015. (Order Den. Mot. Recon.). This appeal followed.

III. STATEMENT OF THE FACTS

A. Carolina Custom Converting, LLC

CCC distributes plastic films throughout America. The plastic films that CCC distributes are used in the food industry for packaging and labeling purposes, (Tr. 21, ln. 41-23); CCC also distributes metallized plastic films, and these films are used in the manufacturing of duct work for the heating and air industry. The Company's base of operations and headquarters are in Anderson, South Carolina.

CCC primarily operates as a middle man in the market place, providing a single source for film customers to connect with film suppliers. (Tr. 876, 4-12). CCC works with the customers to identify or create films that meet their manufacturing or product needs.(Tr. 870, 10-13; 871, 20-24). It has a stable of customers with long-term supply relationships. In this category of customers, CCC has usually gone through a qualifying process whereby it first locates a film suitable for its customer's needs. This qualifying process, which is done at the customer's plant, is used to test the subject film in a number

of different capacities to ensure suitability for the customer's end product. (Tr. 911, 3-10). The qualifying process can take over a year. Once a film is qualified, CCC then serves as that customer's dedicated film supplier.

CCC supports other customers on an as needed basis. For these customers, a request for supply is generated in the regular course of business, and CCC competes to meet that customer's requirements as soon as possible. (Tr. 879, 11-17). CCC developed an electronic reference program to make this process significantly more timely and efficient. (Tr. 877, 3 – 881, 4). CCC seeks to fill these requests for supply from its own film stocks, and other times it must enter the open market to purchase these films. In both instances, CCC makes use of the electronic reference program it developed. (*Id.*)

B. Formation of Carolina Custom Converting, LLC

The Company was formed in November of 2007. At its formation, it had two members: Wilson and Gandis as 50-50 partners. (Tr. 54, ln. 5-9). Wilson and Gandis first met a number of years ago when Gandis hired Wilson for a special project at VyTech Industries. (Tr. 20, ln. 24 – 21, ln. 7). VyTech was in the business of manufacturing and selling vinyl films. (Tr. 18, ln. 11-13).

Wilson graduated from Furman University in 1999. He first became acquainted with the plastic film industry when he took a job during college working as a machine operator at an upstate film company. (Tr. 360, ln. 2-24). After a few years with that company, Wilson joined another film company where he worked for about three years. (Tr. 361, ln. 7-22). That company found itself "on some rocky times," (Tr. 361, ln. 22-23), and Wilson left to run a film business, Palmetto Custom Films International, Inc. for his investors. (Tr. 362, ln. 2-14). After a few years, Wilson was forced to leave Palmetto

Custom Films due to strained financial relations with his investors regarding the company's debt load. (Tr. 363, ln. 15- ; 364, ln. 5). After leaving Palmetto Custom Films, Wilson started Eastern Films Solutions, LLC ("EFS"). EFS was a one-man operation, where Wilson worked as a film sales broker connecting suppliers with customers. (Tr. 364, ln. 10-19).

Gandis earned a mechanical engineering degree from North Carolina State University in 1992 (Tr. 17, ln. 8-12). Following graduation, he began working for Milliken Company at its Thompson, Georgia plant as a project engineer and was quickly promoted to a department head position. (Tr. 17, ln. 15-19). After two years with Milliken, Gandis left to join VyTech to start up a new textile line. (Tr. 17, ln. 15-19). Gandis' first role at VyTech was to oversee the installation of a textile line. He later developed a water base ink system for VyTech. Gandis later become the plant manager of VyTech. (Tr. 18, ln. 1-6). Gandis was later promoted to serve as VyTech's director of new product development. (Tr. 18, ln. 8-10). Gandis remained employed by VyTech until the company's liquidation bankruptcy in 2006. (Tr. 19, ln. 14-20).

When VyTech went out of business in the early part of 2006 Gandis decided to focus on his other businesses rather than take another job. (Tr. 19, ln. 21-20, ln. 13). In the course of Gandis' new work, Wilson approached him about building a machine to produce one of the new products they had conceptualized while at Vytech to perforate film. It was this idea that brought the two men back together. *Id.* Gandis owned a warehouse and custom sheet metal engineering business in Anderson, and he and Wilson believed that this facility could serve as a hub of operation for a future film business. (Tr. 22, ln. 9 - 23, ln. 9). At this point in time, CCC had not been established as an entity.

Wilson and Gandis first decided to go into the perforation services business—punching holes in film. Their idea was to create a machine that would roll the film through its tooling and perforate the film during that process. (Tr. 22, ln. 9 – 23, ln. 9). To that end, Gandis built a machine at his warehouse that could be employed for this purpose. (Tr. 23, ln. 6-9). Wilson’s job would be to sell the service. It was not a successful venture and Gandis needed a more reliable source of income for his family. Wilson proposed an alternative rather than the two move on to separate paths. Although the perforation services business failed, it provided a helpful asset: a machine that could be used for slitting film. Wilson proposed that the men combine their efforts in a broader business. The men had already worked on an operating agreement for the perforating venture and the old structure ran into the new. (Tr. 24, ln. 13-14).

During this time, Wilson continued to operate Eastern Film Solutions, LLC (“EFS”) as a one-man film sales operation. In his work at EFS, Wilson routinely employed the services of a film slitting company(ies) to meet customer demand. (See Tr. 23, ln. 15-22). The men decided to use the machine created for perforation and see whether they could slit film with it. (Tr. 23, ln. 13 - 24, ln. 4). Film slitting was not a new idea in the market. Wilson thought that they could turn into a profitable venture.¹ In or around March of 2007, Gandis rebuilt the perforation machine into a slitting machine and over the course of the year the two endeavored to see whether they could make a go of this new business venture by solely slitting film for EFS as needed. (Tr. 24, ln. 9- 25,

¹ In the words of Gandis, film slitting means that you are “mak[ing] big rolls little.” (Tr. 24, ln. 2-4). For example, if a customer needed a certain type of film that was 45 inches wide, and the roll was currently 60 in. wide, a film slitter would run the film roll through a machine and slit 15 in. from the side of the roll.

ln. 21). As the months passed, however, Gandis came to the conclusion that slitting film was taking a large portion of his time but was not really creating a lasting company. (Tr. 37, 1-20). Soon thereafter, though, Wilson and Gandis began discussing the idea of folding the film sales functions of EFS into CCC—that is, creating a full service film company. (Tr. 37, 3-5).

By November of 2007, the men apparently believed this venture had a future; thus, they formed Carolina Custom Converting, LLC and registered it with the Secretary of State as an LLC. At its formation, it had two members: Wilson and Gandis as 50-50 partners. (Tr. 54, ln. 5-9). Carolina Custom Converting was formed to operate solely as a film slitting company—that is, *custom converting*. (Tr. 25, ln. 16-21). Gandis was in charge of CCC operations and worked from its Anderson headquarters. (Tr. 37, ln. 3-5) Wilson and Gandis ultimately did combine these two companies starting in July of 2008. (Pl. 10, 31).²

C. The Deal

Both Gandis and Wilson were excited about the prospect of creating a full service film company. Following VyTech's bankruptcy, Gandis' wife gave him the go ahead to cash in his 401(k) to support his family while he made a run at being an entrepreneur.³ (Tr. 19, ln. 22 - 20, ln. 1). Later Gandis sold his metal working assets and set out to make CCC a viable entity; living off his 401(k). Wilson, on the other hand, was supporting his

² Comeau-Shirley later joined CCC as a 10% member; she had an accounting and consulting background and agreed to receive a 10% ownership stake in return for providing consulting services. (Tr., 619, 4-14; 621, 13-22; 633, 13-22).

³ Gandis also pulled money out of a home equity line to provide CCC with initial working cash. (Def. 7).

family through his EFS work. Without other sources of income or available credit, Wilson requested initial income security at the outset of this new deal. Wilson requested that if he rolled EFS into CCC, that he would initially receive a monthly income to replace his EFS income. (Tr. 55, ln. 6-10). This issue presented an obstacle to creating the combined company.

The men discussed their draft operating agreement and had several questions to explore. Gandis arranged for them to meet with Andrea Comeau-Shirley (“Shirley”), an accountant and trusted business advisor to his father in early 2008. During this lengthy meeting the men discussed their plans and their vision for expansion, operations, management, and operating in the film industry.

Over the course of about a month and a half, from late May to early July 2008, Gandis and Wilson exchanged e-mail correspondence dealing with this issue and others from an initial meeting with Shirley. Wilson believed that he could roll EFS into CCC, and still achieve income security by holding back three supplier relationships. (Tr. 45, ln. 3-17). Indeed, this was his first pitch to Gandis. Gandis consulted with Shirley regarding this initial proposal. She did not like the idea because it did not sound like a partnership and Wilson could not adequately explain how this exclusive supplier relationship would not eventually lead to Wilson cherry-picking the most profitable orders by simply “selecting” these suppliers rather than the suppliers that CCC was using. More importantly as these suppliers purportedly were low-cost suppliers, this exclusivity would damage CCC’s potential. Accordingly, Gandis informed Wilson this initial proposed arrangement would not work. Ultimately Wilson’s idea to withhold three accounts was dropped, and in return, Gandis agreed that he would use his lines of credit to make sure

that Wilson received monthly income in the startup phase. To that end, beginning in July of 2008, and in exchange for Wilson rolling all of his customers into CCC, Wilson started receiving \$8,000.00 per month from the company. (Tr. 78, ln. 8-14). CCC was now up and running and Wilson was now to dedicate his efforts to CCC.

The following are the contemporaneous e-mail discussions that describe these conversations and how this all played itself out.

On May 30, 2008, Gandis sent an e-mail to Shirley regarding her attendance at a meeting between Gandis and Wilson the previous week. (Pl. 3). At this time, Shirley was merely serving as a consultant, not yet having her an immediate 10% interest in CCC. It was later agreed that she would be compensated for her services by receiving a “fixed equity interest” making her a member of CCC with a 10% interest in the company. Gandis writes that, “Dave and I sat down on Tuesday – and had some great discussions on moving our business forward. Dave is in favor in moving his accounts over into the CCC account column and collecting a salary for a period of time until we can really get things going.” (Pl. 3). He continues, “[w]e also discussed putting Dave on the payroll starting in July. I think we can handle the \$8000 that he pays himself” (Pl. 3).

Later in that same e-mail, Gandis writes that there are “three accounts that Dave imports that do not currently go through CCC – we both think it best that these three accounts stay away from CCC. Dave agrees that all future orders (even if they are imports) should be run through CCC.” (Pl. 3). Describing to Shirley and his father what he was told by Wilson, Gandis writes that, “I do not know how much of his income is derived from these three accounts I mentioned – but again ... this is something you can help us with. Maybe CCC should not pay the salary portion that the three accounts

cover.” (Pl. 3). Finally, Gandis notes that “[i]n two of these cases – I do not think that he has derived any income from the accounts ... and they could very easily go away.” (Pl. 3).

On June 2, 2008, Shirley responded to the above e-mail attaching a worksheet to use in creating a partnership agreement. (Pl. 3). She advised Gandis to fill this form out based upon the conversation he and Wilson had during late May, 2008: “I’d like to suggest that you complete the questionnaire alone (Although you are documenting the discussion you had with Dave). . . . Once you fill out the questionnaire (leaving open any items that you have not focused on – we’ll get them in the next round). Then send it to me and we can discuss the points together. I can help you think through the best case and worse case planning. . . . ” (Pl. 3). As instructed, Gandis filled out the partnership worksheet based upon his discussions with Wilson in late May 2008 and sent it to Shirley.

On June 16, 2008, as promised, Shirley provided her thoughts on the partnership worksheet so that she and Gandis could discuss before circling back up with Wilson. (Pl. 4). The back and forth was set forth on Defendants’ Exhibit 7, with the blue ink representing Gandis’ recollection of the late May 2008 discussion with Wilson, and the green ink representing Shirley’s responsive advice. (Def. 7).

Page five of the worksheet, paragraph e., addressed Wilson’s desire to retain three accounts separate from CCC. Gandis notes, it “[n]eeds to be ...minus three.” (Def. 7, p.5). Shirley responds, “Everything in our industry (product category) goes through LLC – first right of refusal on every single contract opportunity (new or old customers), and if we refuse, then he can pursue independently through the Chinese and India slitting

business partners.” (Def. 7, p.5). In the same paragraph, e., subparagraph, i., Gandis (again in blue ink) sets forth his and Wilson’s late May 2008 discussion: “There are three accounts that Dave wants to retain something over ... maybe easier to discuss this over the phone.” (Def. 7, p.5). Shirley did not respond to that specific sub-paragraph, but it is apparent her response to paragraph e. covered that subparagraph.

Shirley’s June 16, 2008, e-mail also stated that she “[n]eed[ed] a list of every customer, with the old commission in whatever rate he used to charge and a year by year volume/sales figure.” (Pl. 4). She asked for this information in an effort to help analyze the validity and feasibility of Wilson’s request for \$8,000.00.

On June 24, 2008, at 11:33 am, Wilson responded to that request in an e-mail to Gandis with an attachment containing a listing of EFS customers (including the three he wanted to retain) their purchasing volumes, but without an indication of either their contribution margin or his historical commissions as she had requested. (Def. 8). That same day, at 4:39 pm, Gandis responded noting: “Good stuff. . . . What she said she wanted to get was a projection of what the EFS book of business was worth the last couple of years” (Pl. 6). Gandis continued: “If I understand what she is trying to do is assign a value (like equity) to the book of business to write into the agreement so that we are shown as 50/50 partners. My part is easy – dollars invested in equipment/hard assets... your[s] is a little more tricky since it is an intangible. I need to look back at my notes, but I think what she is looking for is a statement from EFS for the last two years – tax returns/customers – margins, etc.” (Pl. 6).

That same day, at 5:50 pm, Wilson responded to Gandis stating that “[u]sing only the past two years does not really give us an accurate picture of what I am bringing to the

company. I sold accounts in the past two years that I am no longer selling. We may be able to sell to those accounts again but there are no guarantees. . . . How do we put a value on those?” (Pl. 6). Critically, and zeroing in on the question of what he was bringing to CCC in return for the proposed \$8,000.00 per month, Wilson made his final pitch: “The real question is this – are the customers, vendors and margins I am bringing to the table worth the salary we are proposing? *If I am to focus all my efforts in the film business on CCC, I am foregoing opportunities to earn money on those opportunities outside of CCC.*” (Pl. 6)(*emphasis added*).

On July 1, 2008, the Company provided Wilson with an \$8,000.00 check, and it continued to do so during the entirety of its start-up phase. Looking back on this arrangement, on April 13, 2009, Wilson had this to say about the understanding: “The payments I received last year was basically a salary which I required since I was taking my customers from EFS and putting them in to CCC reducing my ability to earn a living.” (Def. 31). Wilson went on to note that, “[n]ow that the company is profitable and cash flow is better, we are both pulling out money each month which is in the form of a distribution.” (Def. 31).

Once the start-up phase passed, the company began to make money for its owners. In fact, CCC showed a profit from 2008-10. (Tr. 586, 3-5). 2010 was a banner year for CCC based upon a world-wide film shortage. CCC was able to capitalize on the shortage because it was able to purchase large amounts of inventory. (Tr. 651, 11-25). With inventory on-hand, CCC was able to serve a large number of customers (including other film convertors) that it did not previously service in 2008-09. (*See* Tr. 653, 23- 654, 1). In 2011, however, the company’s profitability ended when the market dipped

precipitously. (Tr. 586, ln. 5; Def. 67, 4). During its successful start-up years, CCC grew to a company of roughly 24 employees. (Tr. 39, 2-24). And, it had opened an office in Greenville, South Carolina. Indeed, by the second half of 2011, Wilson was primarily overseeing CCC's sales force from Greenville, and was not interacting with the customers on a regular basis. (Tr. 415, 1-12).⁴

Although 2011 sales started out well above budget, by mid-year 2011 its forecasted budget was significantly reduced. (Tr. 655, 8-24). Specifically, by the fall of 2011, Wilson told Comeau-Shirley that his forecast should be reduced to 10% of the projected budget:

A: At some point he tells me to drop the sales to 10% of the number he had given me before.

Q: Drop by 10%?

A: No. Drop them to 10%.

Q: So he's asking you to revise the budget for the last half of the year - - that last third of the year, and drop the sales projection by 90%?

A: Yes. I was flabbergasted.

(Tr. 655, ln. 17-24).

D. The Banner Year Causes Internal Financial Stress

The banner year of 2010 resulted in a significant tax liability for the owners. Wilson testified that he owed roughly \$200,000 to the federal government. (Tr. 411, ln. 14-15). Wilson did not have the funds to pay this tax liability and neither did CCC. (E.g., Tr. 665, 12-16). Although 2011 sales started out well above budget, by mid-year 2011 its

⁴ In 2011, CCC's profitability ended and it posted a substantial loss that year. (Tr. 586, 3-5). Specifically, CCC posted a loss of \$456,000 in 2011. (Tr. 245, 8-15). The financial health of the company led to strife regarding the internal affairs of CCC and ultimately Wilson seeking employment elsewhere.

forecasted budget was significantly reduced to 10%--a number that flabbergasted Shirley. (Tr. 655, 8-24).

Wilson claimed that the tax issue was significant for him and he sought assistance from Gandis. As a result of the financial strain on Wilson, Gandis asked Shirley to develop a tax strategy that would allow Wilson to reduce or remove his tax liability. (Tr. 665, ln. 23 – 666, ln. 15). Gandis' efforts to help Wilson with his tax issues triggered tensions among the members that would end with Wilson leaving.

E. What Went Wrong: *Too Much Inventory*

In 2010 CCC had a banner year having generated over \$1 million in net income. Wilson, as vice president of sales and purchasing, poured the vast majority of that cash back into the purchase of film stock. The profit was used to purchase inventory. Because Wilson invested the vast majority of the net profit into film stock that meant that the Company did not have cash to distribute to its owners in 2011. That fact set the stage for Wilson's frustrated economic expectations when business slowed, and ultimately, his decision to leave the Company. The inventory issue, and the failure to turn it over, led to an impending tax scenario that would be the responsibility of the owners and not the company. A limited liability company ("LLC") is taxed as a pass through entity, which means that its owners pay the income taxes on profits rather than the company. This is commonly referred to in the accounting world as "phantom income." For pass-through entities (including LLCs), phantom income is often synonymous with undistributed income. Phantom income is an accounting term given to taxable income reported to the Internal Revenue Service but not actually pocketed by the owner. It is called "phantom"

because it does not generate cash flow that year, it only exists on paper, but the IRS expects tax revenue on business assets or investments.⁵

During 2010 the company spent \$4.6 million on new film purchases (Def. 95). As the vice president of sales and purchasing, it was Wilson alone who bore the responsibility for both the film purchasing activities and sales; he was also responsible for failing to liquidate film stocks required to generate cash. (*see* Def Ex. 40 – 4th paragraph). So the creation of this tax liability was the responsibility of Wilson. The resulting fall out of business to 10% of the budget in mid-year 2011 was the responsibility of Wilson and failure of Wilson to anticipate market changes.

By the end of 2010, Wilson built up the company's film stocks in excess of typical levels. (Tr. 145, ln. 22 – 146, ln. 1; *see e.g.* Def. 46 but not from 2010). As this matter impacted all the owners, the group met numerous times during 2011 to discuss inventory reduction planning. (Def. 46; Def. Ex. 47; Tr. 223, ln. 7-25). The owners had agreed to put a “tight clamp down on purchases” (Def. 46) meaning that each purchase should have a home. To demonstrate the magnitude of the issue created by the excess inventory levels, the company prepared various reports detailing film which has been purchased in prior year(s) which had yet to be converted to cash. (Def. Ex. 46). Stated simply, if these film purchases had been avoided through more careful planning by Wilson, that cash would have been available in the company for distributions. In fact, Wilson admits to this failure in execution in his discussions with the prospective buyers

⁵ An example helps illustrate the point. On paper an LLC may have \$80,000 in distributable profit in a given year, but if it uses \$40,000 to purchase inventory, the owner is still taxed on the full \$80,000. Uncle Sam expects the owner to pay taxes on \$80,000.

from the Texas Draw where he states “We need to address the purchasing/material planning function...When we had 30 customers and \$3,000,000 in sales, I could effectively do both sales and purchasing. Now that we have 100 customers, new products, and \$5,000,000 plus in sales, I have lost effectiveness.” (Def. 67). Unfortunately, Wilson failed to execute the agreed-upon plan; this meant that the Company did not have sufficient cash for a tax distribution. (Def. 95). This inventory issue and the resulting tax liability caused all members to experience a significant phantom taxable income because their cash was tied up in inventory. Wilson already received preferred monthly cash distributions that caused CCC to be late in making payments to vendors. (Tr. 152, ln. 10-22). Wilson was already over \$100,000.00 ahead of Gandis in cash distributions, and Gandis had to borrow, in part, from a home equity line of credit to pay his tax bill. (Def. 129; Pl. 14; Tr. 107, ln. 16-21; Tr. 256, ln. 6-14).

F. Wilson’s Taxes & Draws

During 2011, and almost two and one-half years after steadily injecting capital into the company for start-up costs and Wilson’s monthly draws, Gandis exercised his right to end steady capital infusions into CCC. (Tr. 101, ln. 7-19). Wilson claimed that he was not financially prepared to live off of distributions alone. He asked for the members to allow him to begin receiving company loans that could be off-set against future distributions, and Gandis agreed. (Tr. 255-56). Unfortunately, CCC was already facing cash flow problems as the market turned sour. Gandis grew increasingly uncomfortable with the fact that Wilson had not remitted his tax distributions to the government and worried that this could negatively impact CCC.

In the spring of 2011, knowing what his own tax bill looked like, Gandis became concerned that Wilson may also be in a bind. (Tr. 410, ln. 13-18). Knowing that Shirley had significant experience when it came to reducing tax liabilities, he looked to her for help. (Tr. 228, ln. 18-23). All three members decided that they would meet to discuss the company's finances and their economic expectations. This was set to occur in late March to early April 2011. As it turned out, Gandis could not make the meeting, but Wilson and Shirley went ahead without him.

In the time leading up to the members' meeting, Gandis and Shirley discussed Wilson's economic expectations, and whether he wouldn't be happier and financially safer as an employee. In one e-mail, Shirley notes the following:

He keeps wishing that cash would fall from the sky . . . but we have to BUILD the business to support additional cash. . . . Upon reflection, your absence may give him the opportunity to share with me his concerns about cash flow results that he hasn't yet been able to express to you. OR rather, that he merely chooses to say to you, why are we not taking the risk of borrowing to fund our lifestyles? I plan to explain to him that the role of an owner (even in an LLC) involves financing his business, mostly through deferred compensation. That an owner's eye is on the upside.

.....

I would then propose to him that his actions (e.g. loans from company) seems to indicate that he would really rather be in a structure where he receives good monthly salary and he earns a regular bonus. This alternative structure gives him (a) more cash now and (b) preserves some of his participation [in] the financial results. It also means that he would convert to a situation where his tax obligation matches his cash flow situation.

.....

If we are going to talk about what it means to be an owner, I think it is important that he not feel TRAPPED *by his LLC* and realize that . . . at this point in the game ... we can talk restructure of his participation in a way that should be a win-win.

(Pl. 34)(*emphasis added*).

During this timeframe, the Company was working to receive a \$500,000 line of credit from Bank of America, and other local banks. (Tr. 236, ln. 16-19). All of the members were committed to this goal. The new line of credit was particularly important to Wilson, as he began lobbying Shirley to use it to pay-off his 2010 tax bill. (Tr. 665, ln. 3-5). The line of credit however never materialized.

By the fall of 2011, and with Wilson's tax bill not going anywhere, Gandis again reached out to Shirley for help for some tax strategies. (Tr. 225, ln. 18-23). Shirley offered up the *idea* (simplified here) that if Wilson were to convert from an equity holder to an employee, and allocate various losses to him, the latter loss allocations could flow back into past tax years and eliminate the tax liability. (Plf. 42; Tr. 143, ln. 1-12; Tr. 228, ln. 24 – 229, ln. 3; Tr. 666, ln. 7-15; Tr. 669, ln. 9-17). Gandis thought this was a good idea, and that Wilson would appreciate his efforts. In fact, after receiving the broad brushstrokes for the idea, he asked Shirley whether it was in a form that he could forward directly to Wilson. She responded he could and Gandis forwarded the e-mail in mid-late September 2011. (Plf. 42).

After Gandis forwarded the tax reduction proposal, the relationship between Wilson and Gandis quickly soured. Apparently, Wilson did not appreciate Gandis' efforts to help. It is important to note that in all of this correspondence and planning, the idea was never to get Wilson out of the company, but to get him in a position that did not cause him the financial stress of the downturn. (Def. 51; Tr. 228, ln. 24 – 229, ln. 3; Tr. 666, ln. 7-15; Tr. 669, ln. 9-17). As opposed to proper tax and business planning, Wilson viewed these good faith efforts as an alleged a coup to get him out of CCC; a perception that led to this lawsuit and one Wilson successfully sold to the circuit court.

A few days after Gandis sent the tax reduction proposal to Wilson, on October 17, 2011, Wilson responded in a negative fashion, asserting his belief that it was flawed and unlikely to help. (Def. 52). In addition to that response, Wilson made the following three suggestions/threats. First, he suggested that the Company start making regular accruals and distributions to cover tax liabilities. (Def. 52). This was a curious request coming from Wilson, who alone, was responsible for the excess inventories that precluded the Company from having tax distributions. (Def. 55, 56)(“As you know, we started saving money this spring so we could make a tax distribution this fall, but our money was spent on film.”). Second, he suggested that he would just resign from the company, retain his equity interest, and go work for a film company outside of CCC. (Def. 52). With regard to his second response, Wilson stated that “he did not have any duty to the Company, but would maintain all of the ‘rights and privileges of a member.’” (Def. 52). Finally, Wilson suggested that he would just resign and dissociate; the Company would then have to purchase his interest, and if the other members were “unable to or unwilling to buy” him out, then he would force a “liquidation.” (Def. 52). Wilson threw down a gauntlet as he recognized the power that he held over Gandis and Shirley. Wilson’s power was he had control over sales.

While not particularly relevant, it is important to note that once these negotiations began Wilson was using his mistaken belief that he had the ability to unilaterally force a dissolution/liquidation as a leverage point. (Def. 52-57; Tr. 39, ln. 20 – 40, ln. 1; Tr. 243, ln. 25 – 244, ln. 6). Wilson continued to insist that the Company pay his tax bill. (Def. 52; Tr. 229, ln. 21 – 230, ln. 4). He was also telling Gandis that if he did not bend, he would shut down the company. (Tr. 39, ln. 20 – 40, ln. 1; Tr. 243, ln. 25 – 244, ln. 6).

He continuously made these threats through the 2011 Christmas and New Year Holidays. (*Id.*). At that point in time, CCC had 23 employees, all of whom Wilson said he would put out of work. (Tr. 39, ln. 20 – 40, ln. 1).

G. Buy-Sell

After Wilson fired off his threatening e-mail, Gandis circled back to come up with a better solution. At this time, Wilson was continuing to ask for loans from the company—which had increased to \$12,000.00 per month. (Def. 55). The Company had no obligation to provide him with these loans, but because Wilson was an integral member of the team Gandis reluctantly signed off on the requests. Nevertheless, and as Gandis explained in a letter to Wilson, “[r]ecently we have had to pay several of our vendors late in order to set aside funds to loan to you. It is not in the best interest of our company to pay our vendors late, particularly when we have the funds available to pay them. The current payment of \$12,000 a month is too great a burden to pay monthly while assuring our legal obligations be paid in the order as they are outlined above.” (Def. 55, pg. 1). Gandis continued his letter. He noted that, “it is not my desire to create an undue burden for you and your family either. I have three options for you to consider.” (Def. 55, pg. 1). Option One: Remain as a member. This option meant simply that Wilson would maintain his current equity position, but he was put on notice that he would no longer receive preferential treatment. (Def. 55, pg. 1-2). Option Two: Buy-out and become a salaried officer, with a bonus plan. (Def. 55, pg. 2-3). Option Three: Shirley’s membership modification, to eliminate the tax bill, and become a salaried officer with a bonus plan. (Def. 55, pg. 3). Each option kept Wilson in the Company. More importantly, Gandis made known to Wilson that he was fine with

anyone of them. (Def. 55, pg. 4). Wilson refused to engage this discussion, continued to look to the company to fund his tax liability.

Once the discussion of a buyout began, the whole dynamic of the members' relationship continued to change. During the buy-out negotiations, Wilson believed that Gandis and Shirley were trying to leverage him down to below fair value. He believed they were altering the numbers to negatively impact him. (Def. 66, pg. 2; Tr. 156, ln. 17 – 157, ln. 3; 421-26; 670, ln. 23 – 671, ln. 2). Accordingly, Wilson stated that he would buy Gandis and Shirley out using *their valuation numbers* for his equity. (670, ln. 23 – 671, ln. 2). Everyone was enthusiastic about that prospect and Gandis and Shirley accepted his offer. (Def. 64; Def. 68, p. 2)(“My first preference is that he buys us out at the price we offered him – there is no deadline on that ability”; *see also* Tr. 257, ln. 8-10). But, Wilson did not perform and did not buy Gandis and Shirley out at the price they offered. The buy-sell discussion lasted through the end of December 2011 and into the beginning of January 2012.

When Wilson told Gandis and Shirley that he was seeking a purchaser for CCC; they understood that this meant he was discussing a buy-out with his family, specifically his brother-in-law's family—Steve Norvell. (Def. 69, pg. 3). They later learned that Wilson was also in discussions with other people and companies. At that point, on January 6, 2012, Shirley sent an e-mail to Wilson with the general concern of whether he was protecting the Company's confidential information during these discussions. (Def. 69, pg. 1). Wilson responded, stating that he “certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor. . . . [And

that his] desire is to continue discussions with the interested parties about buying out the company as a whole.” (Def. 69, pg. 1)

One of the companies Wilson was referring to was a company out of Tennessee called FilmTech. While it is unclear when Wilson initiated his discussions with FilmTech, it appears crystal clear that he was not trying to sell CCC. On January 13, 2012, Wilson received an e-mail from FilmTech discussing “a possible sales agency agreement.” (Def. 73). On January 16, 2012, Wilson sent an e-mail to FilmTech, relevant portions of which are below, discussing their “agreement”:

Hi Mark,

I look forward to the opportunity to join your organization. . . .
Here are the points of discussion for our agreement.

. . . .

4. Full time employee with draw or salary of \$8k per for month for a period of time until my commission reaches a level that supports my needs. *My goal will be to move as much of the business I manage at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective business that CCC has been working on our qualifying over the past 3 to 6 months.*

(Def. 74)(*emphasis added*); See also Def. 75-76). Wilson had made up his mind—he was operating in his best interest. Wilson would not put CCC and standard business practices of paying vendors, employees, and taxes before he paid himself. Wilson was divorcing CCC-his interest was himself. The Company did not mean anything to him; he was going to leave, and he was going to take its customers and prospective business with him.

H. Wilson Announces his Intention to Leave the Company

When Wilson and Gandis did not reach a deal, Gandis assumed that Wilson was going to continue as member. Then, on January 17, 2012, Shirley received a phone call

from John Zamer, Esq. (“Zamer”), a partner in Jones Day’s Atlanta office. (Tr. 163, ln. 11-14; Tr. 675, ln. 10-18). During the January 17, 2012 phone call, Zamer told Shirley that he had just spoken with Wilson’s lawyer, and that Wilson was going to leave CCC. (Tr. 675, ln. 10-18). It was later discovered that Wilson believed he was about to go start a job with FilmTech.

Gandis realized that he had a 23 employee company to protect. One of Gandis’ initial reactions was that he needed to protect his Company’s confidential information. (Tr. 163, ln. 18 – 165, ln. 8). Accordingly, when on January 18, 2012, he showed up at the Company’s Greenville office to accept Wilson’s resignation, he brought along a police officer to make sure he would be able to retrieve the Company’s property. (*Id.*). The plan did not work, however, because Wilson took the Company’s computers, blackberry, and files with him. (Tr. 252, ln. 8-15).

I. Wilson Leaves and Destroys Evidence

During the first part of January, when Wilson was attempting to move over to FilmTech, he was also trying to sell his equity interest. At this time all parties had retained legal counsel. (Tr. 499, ln. 18- 500, ln. 2). At some point during the negotiations, Wilson’s counsel led Gandis’ counsel to believe that Wilson was leaving CCC. (Tr. 163, ln. 2-17; Tr. 435, ln. 22- 436, 13). As a result, Gandis had CCC’s information technology consultant disconnect the Greenville office from CCC’s server. (*See Id.*) Gandis took this action to in an apparent effort to prevent Wilson from being able to download CCC’s customer information from the server and take it with him. On the afternoon of the next day (January 17), Gandis travelled to the Greenville office to remove Wilson from the Greenville office and prevent him from taking any of CCC’s property. (Tr. 164, ln. 18 –

165, ln. 8). Wilson did leave the Greenville office that day, but he took CCC property and computers with him (*Id.*). Wilson testified that he took two computers and a Blackberry phone. (Tr. 500, ln. 10-16).

On January 19, CCC's labor lawyer sent a letter (via facsimile) to Wilson's counsel. (Def. 77). The letter notified Wilson, via counsel, that he had taken company property, and instructed him "not to destroy, copy, sell or use any of this property, including the computer data." (*Id.*). After receiving this warning, Wilson then erased all of the data on both computers and the Blackberry." (Def. 77; Tr. 500, ln. 25 – 501, ln. 2; *see also* 899, 23-901, ln. 2). Wilson admitted that he erased this information after receiving notice not to do so. (Tr. 501, ln. 3-6). As an explanation for his conduct, Wilson claimed that he transferred the Company's data from these devices prior to erasing them. (Tr. 500, ln. 24 – 501, ln. 24).

Wilson did not join FilmTech. Instead, he joined ranks with his brother-in-law, with whom he had previously shared CCC's customer names, marketing plan, pricing information and other financial information (Ex. 67) and began selling film for Neologic Distribution. FilmTech would not be the recipient of CCC's trade secret and confidential information. Instead, it would be Neologic that received that information.

J. Wilson Joins FreshWater Systems, Inc. and Neologic Distributions, Inc.

Gone from CCC, Wilson began to siphon off CCC's customers. (Tr. 503, ln. 20-504, ln. 25). He first began doing so with the financial backing of Fresh Water Systems, Inc. ("FWS"), a business owned by Wilson's brother in law, Steve Norvell. (*Id.*; Def. 81, fourth sentence ("What's your proposal on the profit allocation to FWS?"; Tr. 728, ln. 18 – 729, ln. 2). Soon thereafter, he began siphoning off customers through a company

named Neologic Distribution, Inc. (“Neologic”). (Tr. 729, ln. 3-5; Def. 82). Neologic was a “sister” company to FWS. (*Id.*). When Wilson began working for Neologic it created a film division. (Tr. 729, ln. 12-23). Prior to Wilson joining Neologic, it was not in the film business. (*Id.*).

In its first year of existence, Neologic conducted over \$135,000 worth of business with CCC customers. (Def. 132). In 2013, Neologic conducted over \$580,000 worth of business with CCC customers. (*Id.*). By the time of trial, Neologic had conducted over \$980,000 worth of business with CCC customers. (*Id.*)

K. Wilson’s Side Deals

As noted above, the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS after all of its customers were supposed to be transitioned to CCC. (Tr. 211, ln. 18-22; Tr. 216, ln. 14-18; Tr. 217, ln. 20-22). In fact, Wilson continued to run side deals through EFS even after he began receiving the \$8,000 a month as agreed in exchange for roll all of those customers into CCC. (Def. 126).⁶ Gandis testified that he only learned of these side deals “by accident.” (Tr. 215, ln. 6-14). The evidence and testimony at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings. Specifically, Wilson never utilized his CCC email address to conduct his side deals, only using his EFS email. (Tr. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (Tr. 215, ln. 6-14). When

⁶ Gandis testified that Def. 126 reflects sales Wilson ran through EFS without his knowledge beginning in July 2008 which should have gone to CCC. (Tr. 220, ln. 6-14).

Gandis confronted Wilson about these side deals he denied them save one admission recounted by Gandis at trial:

Q: All right. John, I want to go back to the end of 2010. Do you recall a meeting with Dave at Starbucks in 2010?

A: Yes. It was around Christmastime.

Q: What happened?

A: I suspected Dave had done a side deal. And, you know, this was well after he had assured me that everything had rolled into CCC. We were coming off of a bumper year. We made a lot of money in 2010. And I was pretty disappointed to find that out. So I invited him to meet me at the Starbucks close to where we live.

And I asked him, I said, Did [*sic*] you do this deal outside of CCC? And he said, Hey, it's Christmas, you know.

And I was incensed. And, you know...he assured me, yeah, but I haven't done it much. And, you know, it's Christmas and I'm all in. That's what he told me.

Q: All right. There was some laughter about it being 800 bucks. What bothered you about it, the amount? What upset you about the whole thing?

A: Well, Dave and I both had a responsibility to our employee, our company, to our other partner. I was not making money. My exposure at that point was 300 plus, 320 plus. My house, my savings, everything was at risk.

And my partner – call it 800, it could have been \$10. It's just not right. Where does it stop when you've got somebody that's willing to cheat you after you just made all of that money? I don't care what the amount was. And I left there very upset knowing that I had to get my money out of this thing.

(Tr. 235, ln. 5-25 - 236, ln. 1-10; *see also* Tr. 660, ln. 3-25 - 661, ln. 1-10; Def. 25).

L. Trial Court's Ruling

The circuit court found that Gandis and Shirley “froze-out”/oppressed Wilson through a litany of supposed oppressive and unfairly prejudicial conduct designed to

squeeze Wilson out of CCC. (Order at 6-7.). The lower court also held that Appellants failed to prove their claim for breach of fiduciary duty against Wilson based on his side dealings because “[t]he evidence did not establish that Wilson had agreed to transfer the three import accounts...to CCC in 2008.” (Order at 12).

IV. LEGAL ARGUMENTS AND AUTHORITIES

Introduction

This is a case about business and the relationships of owners. This is also a case about an individual who put his own financial interests before those of the company and the fallout led to complicated business litigation—with a deadly purpose. Business is simple math. Cash flow must exceed expenses or a business will not continue to exist, much less provide payroll, pay vendors, and if there is any left—pay the owners. It is axiomatic that state and federal law requires employees to be paid first, contractual and business relations require the payment of vendors for the goods and services necessary for a business, taxes must be remitted to the government authorities, and the remainder may be distributed by the owners. In this case, there was one owner, Wilson, that sought to be paid first—before anyone—notwithstanding legal and business priorities of payment to anyone else. Wilson’s me-first mindset permeates this case, requires multiple proposed plans necessitated to attempt to placate Wilson, and ultimately manifests itself through Wilson’s violations of his duties to his other owners who are striving to protect the interests of the company. Disregarding the other owners’ effective management and attempts to find a way to accommodate Wilson’s me-first demands with the priorities of the business as a whole, the trial court below ignored the business judgment rule, misapplied the standard for fiduciary duty requirements between members in an LLC,

overreached and held that business conduct by the owners in managing a company and protecting a company against an owner who was out for himself was oppression, and went so far as to hold that business activities by the owners were unconscionable to impose individual liability. If there is any ability of small business owners to conduct business and maintain appropriate business prerogatives against a demanding minority owner in South Carolina, the lower court's order must be reversed.

Standard of Review

“[A]n appellate court must look to the main purpose of the proceeding in order to determine the standard of review.” *Wheeler v. Estate of Green*, 381 S.C. 548, 554, 673 S.E.2d 836, 839 - 40 (Ct.App.2009). “The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action.” *Sloan v. Greenville County*, 380 S.C. 528, 534, 670 S.E.2d 663, 666–67 (Ct.App.2009). “When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal.” *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct.App.2006). “The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review.” *Id.* at 17–18.

A. The trial court erred in applying an incorrect legal standard and finding that Wilson did not breach his fiduciary duties to Gandis and Shirley.

1. Standard of Review

“[A] claim of breach of fiduciary duty is an action at law....” *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). “In an action at law, the appellate court will correct any error of law, but it must affirm the [lower court's] factual findings unless

there is no evidence that reasonably supports those findings.” *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (citation omitted).

The lower court made a fundamental legal error and applied an incorrect standard of disclosure for fiduciary duty. In discussing the operation of fiduciary duty in this case, it is important to note that the business started as a simple partnership and at some point became a limited liability company with no written operating agreement. Accordingly, the standard of fiduciary duty in the partnership and limited liability context is applicable. The court found that “the parties agreed that Gandis and Wilson founded the business as equal partners[.]” (Order at 3.) In addition, the court found that Wilson was to lead CCC’s sales efforts and Gandis would manage the operations. (Order at 3.) CCC was later organized as a manager-managed limited liability company but no written operating agreement was ever completed. (Order at 3.) Gandis and Wilson were 45% owners and Shirley accepted a 10% interest in exchange for accounting services. (Order at 3.) Shirley’s interest was a non-voting interest.

The Order states that Defendants, however, failed to prove their claim for breach of fiduciary duty. (Order at 12.) The basis of this holding is that “the evidence did not establish that Wilson had agreed to transfer the three import accounts to CCC in 2008.” (Order at 12.) The court further stated that a “reasonable inquiry in 2009 by Defendants would have established the full extent of EFS activities with these import accounts, yet even with full knowledge of West Carrollton sales by EFS, Defendants did nothing.” (Order at 13.) These holdings constitute errors of law in that they impose a duty on Defendants that does not exist in the context of fiduciary duty and disregard Wilson’s fiduciary obligations to CCC and his co-owners which is affirmative duty to disclose

such relationships. Wilson had an affirmative duty to disclose to Gandis his ongoing financial interest in other ventures. The lower court erred by flipping the responsibility to the non-violating party.

Our courts have long recognized that the duty of a partner is to exercise the utmost good faith, fairness and loyalty is required by statute and common law. *Anthony v. Padmar, Inc.* 320 S.C. 436, 448-49 (Ct. App.1995)(citing S.C. Code Ann sec 33-41-540(1990)(partner is accountable as a fiduciary) and *Few v. Few*, 239 S.C. 321, 122 S.E.2d 829 (1961)(establishing that partners are treated as fiduciaries each to the other; their relationship is one of mutual trust and confidence, imposing upon them the usual trust requirements of loyalty, good faith, and fair dealing). In expounding on “utmost good faith, fairness, and loyalty” the court explained that “[p]arties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. *Id.* at 449 (string citations referencing other jurisdictions omitted). A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004). A fiduciary relationship exists “when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004)(internal citations omitted). “Partners are fiduciaries to each other and their relationship is one of mutual trust and confidence imposing upon them requirements of loyalty, good faith and fair dealing.” *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467 (Ct. App. 2004). “Partners in a fiduciary

relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.” *Ellie v. Miccichi*, 358 S.C. 78, 100, 594 S.E.2d 485, 497 (Ct. App. 2004). This Court has stated a fiduciary’s duty of disclosure imposes an “obligation of refraining from taking any advantage of one another by the slightest misrepresentations or concealment.” *Moore v. Moore*, 360 S.C. 241, 252, 599 S.E.2d 467, 473 (Ct. App. 2004)(emphasis in original). Accordingly, the fiduciary standard under partnership law is one in which Wilson was required to disclose to Gandis all known information that is significant and material. The court has imposed on Gandis a duty to investigate that which he has been told was a zero volume account and may well continue to be a zero volume account. The civil court erred by failing to take into account Wilson’s repeated habit of failing to identify the names of the three accounts, particular as Wilson had presumably already provided to Gandis a complete listing of the EFS accounts with their two year sale volumes. The court also fails to explain how any account that was on the listing should be retained by Wilson without absolute clarity of identification. By failing to recognize this standard established by law, the lower court committed a fundamental error of law.

The South Carolina Limited Liability Act recognizes the fiduciary relationships that exist among members. S.C. Code Ann. § 33-44-409 (General standards of member’s and manager’s conduct) states as follows:

- (a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).
- (b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:

(1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;

(2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

(3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

(c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

S.C. Code Ann. § 33-44-409. Subsection (b)(3) expressly states that a member's fiduciary duty of loyalty to a member-managed company and its other members requires that he refrain from competing with the company in the conduct of the company's business before the dissolution.

CCC was incorporated as a limited liability company with Wilson and Gandis as its sole members. The two were in a fiduciary relationship with one another by virtue of their shared membership and interest in CCC. As such Wilson owed Gandis certain fiduciary duties, including that of full and honest disclosure of material facts, refraining from concealment or misrepresentation, and refraining from competing with the company; all of which he indisputably breached. The trial court committed error by disregarding the duty and evaluating whether or not the evidence established Wilson agreed to transfer the three import accounts to CCC in 2008. Its evaluation was more

akin to a contract claim rather than a breach of fiduciary duty cause of action. Rather, the appropriate inquiry was whether the evidence showed Wilson fulfilled his fiduciary duties to Gandis and CCC by, among other things acting in good faith, disclosing material facts to Gandis, and refraining from competing with the company before its dissolution. This constitutes an error of law because the trial court essentially placed the burden of proof on the wrong party.

Assuming *arguendo* that the lower court's conclusion is correct, it should read "Plaintiff proved he disclosed all material facts relevant to his agreement with Gandis to him as his partner and fellow member of CCC ...(three import accounts would be excluded from the deal... acted in good faith and did not compete with the company through some other venture)." The evidence presented at trial shows Wilson absolutely failed to fulfill/abide by these fiduciary duties.

Further, Wilson breached his statutorily mandated fiduciary duty to "refrain from competing with [CCC] in the conduct of the company's business before the dissolution of the company." S.C. Code Ann. § 33-44-409(b)(3). Wilson unequivocally admits that he ran side deals through EFS while CCC was operating, including during the times when he was receiving \$8,000 a month from the company. He contended this was allowed because his agreement with Gandis carved out these three accounts. (Tr. 378, ln. 25 – 379, ln. 18). The veracity of that position is inconsequential in evaluating the breach of fiduciary duty claim. As noted above, the testimony and evidence at trial showed that the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS after all of that companies customers were supposed to be transitioned to CCC. (Tr.

211, ln. 18-22; Tr. 216, ln. 14-18; Tr. 217, ln. 20-22). In fact, Wilson continued to run side deals through EFS even after he began receiving the \$8,000 a month as agreed in exchange for roll all of those customers into CCC. (Def. 126).⁷ Gandis testified that he only learned of these side deals “by accident.” (Tr. 215, ln. 6-14). The evidence and testimony at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings. Specifically, Wilson never utilized his CCC email address to conduct his side deals, only using his EFS email. (Tr. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (Tr. 215, ln. 6-14). When Gandis confronted Wilson about these side deals he denied them save one admission recounted by Gandis at trial. (Tr. 215, ln. 6-14). These actions could not be further from the full and honest disclosure of material facts required of a business partner (to fulfill his fiduciary duties to other members/partners). Wilson did not just fail to mention his side dealing, an act in and of itself sufficient for a breach of fiduciary duty finding. He took affirmative and deliberate measures to conceal his side dealings from Gandis and CCC.

The lower court committed additional error by disregarding additional breaches of fiduciary duty in the weeks leading up to Wilson’s leaving CCC. The testimony is clear that Wilson conducted a transaction outside of CCC with an entity that is not among the alleged three excluded import accounts and that Wilson pocketed the money. When Gandis learned of this transaction and confronted Wilson, Wilson’s response was simply “it is Christmas.” (Tr. 235, ln. 5-25 – p. 236, ln. 1-10; Tr. p. 215, ln. 6-14). Therefore,

⁷ Gandis testified that Def. 126 reflects sales Wilson ran through EFS without his knowledge beginning in July 2008 which should have gone to CCC. (Tr. 220, ln. 6-14).

to the extent that the Order contains language that Plaintiff may possibly argue that the two issue rule would mandate it be affirmed, the facts do not support the fact that the “it is Christmas” violation was time barred. Moreover, as exhibited *supra* and throughout the record, Wilson concealed side deals and Gandis did not have full knowledge of Wilson’s activities since he concealed them and did not fully disclose them. The failure to fully disclose, as required by the fiduciary duty owed by Wilson, allowed Wilson to capitalize on his concealment and damage CCC business. Full and open disclosure to one’s business partner certainly does not include active concealment of competitive activity undertaken for one’s own gain while taking high profit business for yourself.

2. Appellants’ breach of fiduciary duty claims were not time barred

Generally, in South Carolina, a plaintiff has three years from the time he knew or should have known he had a cause of action to bring suit. S.C. Code Ann. § 15-3-530; *Maher v. Tietex Corp.*, 500 S.E.2d 204 (S.C. Ct. App. 1998)(the “discovery rule”). A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist. *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 443 S.E.2d 537 (1994). The statute begins to run from this point – the date upon which plaintiff discovers the injury – and not when Plaintiff learns the identity of all the alleged wrongdoers. *Tollison v. B&J Machinery Co., Inc.*, 812 F. Supp. 618, 619-20 (D.S.C. 1993).

The Order concluded that Appellants received notice of Wilson’s side dealing activities in July 2009, and because they failed to engage in a reasonable inquiry when they received notice that Wilson had in fact conducted side deals Appellants assert should

have gone through CCC, their counterclaims for breach of fiduciary duty were time barred. (Order at 12-13). The Order again made no specific citation to any evidence or trial testimony supporting this conclusion and failed to take into account the totality of the record – most importantly Wilson’s active concealment of his side dealings.

“Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations.” *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014). As noted above, the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS after all of that company’s customers were supposed to be transitioned to CCC. (Tr. 211, ln. 18-22; Tr. 216, ln. 14-18; Tr. 217, ln. 20-22; Def. 126).⁸ Gandis testified that he only learned of these side deals “by accident.” (Tr. 215, ln. 6-14). The evidence and testimony at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings. Specifically, Wilson never utilized his CCC email address to conduct his side deals, only using his EFS email. (Tr. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (Tr. 215, ln. 6-14). When Gandis confronted Wilson about these side deals he denied it except the admission in late 2010 when he attempted to justify his side dealing saying “it’s Christmas.” (Tr. 215, ln. 6-14; Def. 25). Up until this point Wilson deceived his business partners to

⁸ Gandis testified that Def. 126 reflects sales Wilson ran through EFS without his knowledge beginning in July 2008 which should have gone to CCC. (Tr. 220, ln. 6-14).

conceal his illicit activities, thus tolling the statute to at least late 2010 when he offered the paltry excuse that it was Christmas.

At trial Wilson submitted email correspondence from June 17, 2009 and October 30, 2009 related to EFS sales to West Carrolton. (Pl. 17). That email correspondence did not provide Appellants sufficient notice of the scope of Wilson's illicit activities, and is insufficient to support that finding. Moreover, it may have related to deals that Wilson maintained were precluded as an import deal that predated CCC. Nevertheless, assuming *arguendo* that it did, Appellants claim for breach of fiduciary duty was not time barred because it related back to Wilson's initial filing. *See* SCRCP 15(c). Wilson initiated the lawsuit on April 27, 2009. Gandis and Shirley answered and filed counterclaims alleging breaches of fiduciary duty. Later, when CCC was added to the case via Wilson's Second Amended Complaint, it counterclaimed seeking the same relief. Therefore, Appellants' breach of fiduciary duty claims against Wilson are timely pursuant to SCRCP 15(c) as they related back to the original April 27, 2009 filing.

3. Wilson violated his fiduciary duties to CCC and its members by competing with the Company after January 2012

Finally, Wilson also immediately set out to compete with CCC utilizing confidential company information. Competitive activity are actions that the Reporter Comments to § 33-44-409 make clear constitutes a breach of a member's fiduciary duty to the company – “[t]he duty to not compete terminates upon dissociation...[h]owever, a dissociated member is not free to use confidential company information after dissociation.” The trial court found that Neologic/Freshwater used CCC confidential

information to compete with the company. (Order at 17).⁹ Wilson provided this confidential information to Neologic and therefore breached his fiduciary duty to Gandis and Shirley as members of CCC.¹⁰

Because the trial court misapplied the law and standard on fiduciary duty, the remainder of the Order's analysis regarding oppression becomes suspect. The actions of Gandis and Shirley were proper, legally based business actions taken by owners to protect the interests of the company against an owner who had concealed breaches of fiduciary duties for which he personally profited. In contrast, in applying the wrong standard, the trial judge consequently viewed the acts of Gandis and Shirley noted as "oppressive" rather than as ones taken to protect their company. The context cannot be understated, CCC and the individual owners faced a large looming tax liability and business challenges including the need to wean from the reliance on personal debt/credit to fund the business when there was a business slow down. Wilson was an owner who was breaching his fiduciary duty to Gandis and Shirley and was side dealing/taking corporate opportunities for his own benefit. The fiduciary duty imposed by the law is there to prevent the Wilson's disloyal actions.

The trial court's error of law colored the Court's findings on the remaining claims in this case. The Order reflects an utter failure to take Wilson's nefarious and unlawful conduct into account in evaluating the other claims – namely Wilson's shareholder oppression cause of action. The lower court's fundamental legal error on the breach of

⁹ "Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing its trade screws claim."

¹⁰ This breach of fiduciary duty would be independent of the claims possessed by CCC and addressed by CCC on brief.

fiduciary duty claim colored and tainted its oppression analysis and conclusion. This error is substantial and bleeds into the entire analysis of the case.

B. No Shareholder Oppression Occurred in this Case

1. Standard of Review

“A corporate dissolution is an action in equity.” *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). “A shareholders derivative action, as well as an action for stockholder oppression, is one in equity.” *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (internal quotation marks omitted). In an action in equity, the appellate court may find facts according to its own view of the preponderance of the evidence. *Ballard*, 399 S.C. at 593, 733 S.E.2d at 109.

2. The trial court erred in finding Gandis and Shirley “froze-out” and oppressed Wilson

The trial court found that Gandis and Shirley “froze-out” and “oppressed” Wilson as the other member of CCC by:

- Initiating an “Exit Strategy” for Wilson on August 16, 2011;
- Giving Wilson the option to eliminate the tax burden from prior phantom income allocations, including the transition from member to employee in order to keep receiving the \$8,000 a month he had been receiving and prevent future phantom income issues or remain a member and be treated as such;
- Using company funds to repay a line of credit held by Gandis through which he funded CCC since its inception rather than dispersing that money solely to Wilson as a tax distribution (to cover his tax liability);

- Monitoring Wilson's company emails despite the fact that Wilson had no expectation of privacy as evidenced from his own ability to access accounts of others (Def. 8);
- Informing Wilson that he may not receive distributions for two or more years;
- Managing the CCC money supply in a way Wilson contends made it appear as if cash was more limited than it actually was;
- Limiting Wilson's access to CCC financial information so as to restrict his ability to export or otherwise distribute company data as of January 7, 2012 ;
- Removing Wilson from signatory authority on the operating account;
- Removing his ability to make wire transfers for the company;
- Not including him on certain discussions concerning CCC business operations (although the discussions did not pertain to the subject matters which the statute outline require full member involvement);
- Physically locking Wilson out of the company following his resignation;
- Demanding Wilson return CCC's computer and blackberry following his resignation which he had removed whilst claiming to the officer present that he was only taking personal assets from his office;
- Terminating CCC funded cell phone plans for Wilson and his family while maintaining coverage for other members (Gandis) after accepting his resignation;
- Terminating health insurance coverage for Wilson and his family after accepting his resignation as of the month following his resignation;
- Forming ZOi after Wilson's departure from CCC to compete with the company.

(Order at 6-7). Based on these findings the Order directed Gandis and Shirley individually to buy-out Wilson's 45% interest of CCC for a total of \$347,863.23 pursuant to the court's claimed equitable powers under S.C. Code Ann. §§ 33-44-410, 801. (Order at 18). The Order's conclusion however was in error as Wilson was not "oppressed" or "frozen-out" by Gandis and Shirley.

S.C. Code Ann. § 33-44-410 empowers a LLC member to:

maintain an action against a limited liability company or another member or manager for legal or equitable relief...to enforce:

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

S.C. Code § 33-44-801 allows the circuit court to dissolve an LLC under certain circumstances including if a member establishes that "the managers or those in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." S.C. Code Ann. § 33-44-801(4)(e) (2004). Section 801 permits the court to fashion equitable remedies other than dissolution in such cases, including ordering a buyout of the disgruntled member's interest when "one or more members have engaged in fraudulent or unconscionable conduct...." See S.C. Code Ann. § 33-44-801 Reporter Comments.

South Carolina courts have explicitly refused to fashion a standard or test for determining what constitutes shareholder "oppression" calling for consideration of various factors for evaluation on a case-by-case basis. In *Kiriakides v. Atlas Food Systems & Services, Inc.*, the South Carolina Supreme Court established how courts

should determine whether majority shareholders acted oppressively towards those holding a minority stake in the business. 343 S.C. 587, 541 S.E.2d 257 (2001).¹¹ In establishing proper considerations for finding oppression, the Court recognized

that the terms oppressive and unfairly prejudicial are elastic terms whose meaning varies with the circumstances presented in a particular case. [The court] also noted this was a fact-sensitive review and should therefore be determined through a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior. Although [the court] declined to set out specific factors in *Kiriakides*, [it] observed several commonly considered ones including: eliminating minority shareholders from directorate and excluding them from employment[,] ... failure to enforce contracts for the benefit of the corporation [and] withholding information from minority shareholders.

Ballard v. Roberson, 399 S.C. 588, 594, 733 S.E.2d 107, 110 (2012)(citations and internal quotation marks omitted). In *Ballard* the Court noted that the minority shareholder, “like [the minority shareholders] in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.” *Id.* at 595, 733 S.E.2d at 110.

“Freeze out” a squeeze-out” are used interchangeably and the terms mean “the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control or utilization of some legal device or technique, to eliminate from the enterprise one or more owners or participants.” *Kiriakides*, 343 S.C. 587 at n.26.

Common freeze out techniques include termination or a minority shareholder’s employment, the refusal to declare dividends, the removal of the minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation. Often, these tactics are used in combination.... The primary vulnerability of a

¹¹ The case established how to determine if majority shareholders acted oppressively within the meaning of S.C. Code Ann. § 33-14-310 which is substantively identical to § 33-44-801.

minority shareholder is the specter of being locked in, that is, having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.

Id. at 604-05. “The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion in the application of a general standard to concrete circumstances.” *Id.* at 598, 541 S.E.2d at 263. The Supreme Court warned that “[t]he court should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation.” *Id.* This cautionary admonition looms large in this case.

The Court continued:

[W]e do not believe the Legislature intended a court to judicially order a corporate dissolution solely upon the basis that a party’s reasonable expectations have been frustrated by majority shareholders. To examine the reasonable expectations of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33–14–300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.

Id. at 599, 541 S.E.2d at 264.

Importantly in the context of this case, the Court noted that:

[S]ection 33–14–300 does not place the focus upon the rights or interests of the complaining shareholder but, rather, specifically places the focus upon the actions of the majority, i.e., whether they have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder. Given the language of our statute, a reasonable expectations approach is simply inconsistent with our statute.

Kiriakides, 343 S.C. at 600, 541 S.E.2d at 265.

Oppression, fraud, and unfairly prejudicial conduct in the context of a shareholder suit remain elusive terms and no attempt has been made to define them as “[they] are

elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants.” *Kiriakides*, 343 S.C. at 598, 541 S.E.2d at 263-64. “The concern and focus in shareholder oppression cases is that the minority ‘faces a trapped investment and an indefinite exclusion [from] participation in business returns.’” *Ballard v. Roberson*, 399 S.C. 588, 595, 733 S.E.2d 107, 110 (2012)(internal citations omitted).

Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 541 S.E.2d 257 (2001) involved a family owned close corporation , Atlas Food Systems & Services, Inc. where the oldest brother, Alex, was the majority shareholder owning 57.68% of the shares. *Id.* at 591. His siblings John and Louise, the plaintiffs in the case, owned 37.7% and 37.7% and 3% of the corporation, respectively. *Id.* John and Louise brought suit against Alex and the company seeking, among other things, dissolution for oppression. *Id.* at 593. Examining the facts of the case, the Supreme Court found it “present[ed] a classic situation of minority ‘freeze out’” and noted several factors supporting its finding including Alex paying Louise less than what was owed to her based on her ownership; Alex’s conduct in transferring 21% of a wholly owned subsidiary to his children instead of to a partnership which included John and Louise; Alex and his family receiving substantial benefits from ownership of the company through employment while Louise and John had no such expectations of benefit; Atlas having no intention of declaring dividends in the near future; Atlas’ extremely low buyout options for John and Louise, offering them \$4,000,000 in 1998 when John had been told by an accountant in 1995 that his interest alone was worth \$10,000,000; and there being no market otherwise for John and Louise’s stock. *Id.* at 603-06, 541 S.E.2d at 268. These circumstances, coupled with

the special referee's findings of fraud, led the court to conclude that "the totality of the circumstances demonstrated that the majority had acted 'oppressively' and 'unfairly prejudicially' to John and Louise" and affirm the lower court's order requiring Alex to buyout his siblings' interests. *Id.* at 606-07.

Later in *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012) the South Carolina Supreme Court found that Ballard, the 20% minority shareholder in Warpath Development, Inc., had been oppressed by the majority. Ballard incorporated Warpath for the development of a marina on Lake Keowee in Pickens County. *Id.* at 590. After several years of negotiating with Duke Energy (owner of the lakefront property), Warpath entered a lease with Duke to use the property for the marina concept. Ballard later entered into a Stock Purchase Agreement with the Appellants, Roberson, Thoennes and Thoennes III. Under the Agreement, the three paid Ballard \$1,000,000 in exchange for 20,000 shares of the 40,000 held by him and the additional 60,000 unissued shares from the corporation so that Ballard would hold 20% and the other 80% would be held by the three Appellants when all the stock was issued. The marina was projected to have between 100-200 boat slips however following the sale of Ballard's interest it was discovered Warpath could fit at most 102 slips onto the site. Upset over the decrease in projected income, the majority shareholders attempted to convince Ballard to return some or all of the money paid for his shares or to return his 20,000 shares and no longer remain involved with the company. *Id.* at 592, 733 S.E.2d at 108-09. Ballard rejected both options, and was subsequently removed as director at the first shareholder meeting. At that same meeting, all three majority shareholders were elected to the board and appointed as officers. Immediately after, the individual Appellants – with the dissent of

Ballard—approved issuance of an additional 900,000 shares “for the purpose of raising capital, paying expenses and offering employee incentives.” *Id.* Issuance of these additional shares directly conflicted with the Articles of Incorporation, which authorized 100,000 shares and the Agreement, which stated Ballard would ultimately own 20% of Warpath. It also diluted Ballard’s interest from 20% to 2%. In addition, the court found it also allowed the corporation to use the extra stock for “employee incentives,” thereby granting the majority more control over allocation of benefits flowing from the business. *Id.* at 597, 733 S.E.2d at 111 (“By increasing the amount of shares, the majority would be allowed further means through which to dictate and control the allocation of returns in favor of their own interest, and to the exclusion of Ballard’s.”). In light of the circumstances the court found that these actions of the majority, while not as egregious as those in *Kiriakides*, constituted oppression noting that the minority shareholder, “like [the minority shareholders] in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.” *Id.* at 595, 733 S.E.2d at 110.

In both *Kiriakides* and *Ballard*, the minority shareholders were offered at best a Hobson’s choice, if one at all. In *Ballard*, the majority shareholders acted with a singular purpose – get the minority out of the business and control the allocation of any benefits flowing from it exclusively to their own interests. Ballard had no options to protect himself and remain a meaningful part of the business due to the drastic and illegal alteration of his interest in it. In *Kiriakides*, the majority shareholder likewise welded his superior power to shut out the minority shareholders to service his own interests. None of this occurred in this case.

Recently, in *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015) this Court affirmed a lower court's finding that a minority shareholder of a family owned auto-service company was not oppressed. The minority shareholder, Son, brought an action for oppression and breach of fiduciary duty against the other shareholder family members and the company among other things. This Court examined the facts under the circumstances and in light of the decisions in *Ballard* and *Kiriakides* and found Son had not been oppressed:

Based on the evidence in the record, Son seems to be the primary party who engaged in illegal activities and benefited from those activities. He received the benefits of his casing scheme. He was not reelected as president of the Company, but was elected to serve as vice-president and receive the same salary. He chose to leave the Company and as a result to stop receiving a salary and other benefits he and the other stockholders enjoyed, such as a company car and a gas credit card. He was the one stockholder who refused to repay the Company for personal expenses such as housekeeping services. Additionally, most of the testimony on the record indicates he had knowledge that adjusting the Company's inventory to diminish its tax liability was fraudulent.

Id. at 55-56, 770 S.E.2d at 419.

The actions of Gandis and Shirley deemed "oppressive" by the lower court certainly did not equate with the actions of the majority shareholders in *Kiriakides* and *Ballard*. They did not even rise to the level of those of the Son in *Mason* where this Court found no minority oppression. In this case Wilson was not "oppressed" by Gandis and Shirley or "frozen-out" of the business by them. Under the circumstances, Wilson did not find himself in a "trapped investment" or suffering "indefinite exclusion from participation in business returns." In fact, Wilson had repeatedly expressed a desire to increase his family's investment and both times the remaining shareholders accepted the offer to sell. Rather Wilson took issue with the business decisions made and acted upon

by his fellow CCC members and argued to the lower court that those actions constituted oppression. The trial court mistakenly agreed.

a. Evidence and circumstances of the case do not support a finding of oppression

It must be reiterated that this is a business case. The baseline for the dispute in this case is the continued existence of a business. Expenses and taxes must be paid from revenues produced. When revenues fall, owners are not able to continue to pay themselves out of cash flow and debt has limits unless you are the United States government. One aspect of the Order in this case that is troubling is the seeming absence of any consideration of real world business factors. The focus of the Order is driven by Wilson's hindsight advocacy oriented approach that he was an oppressed shareholder. This is not an academic exercise and the factors utilized by the lower court did not occur in a vacuum. Wilson was an actor seeking the best deal for himself—not for the company. There was not oppression. Much like the *Mason* case, Wilson was the actor who made or spurred the actions from Gandis and Shirley as they responded to Wilson's demands and tried to find a workable way to grow the business. The lower court also erred in disregarding the impact on the health of the company when two options were considered. Specifically Wilson sought to remove his tax obligation by demanding the company increase its debt leverage and make a priority distribution to him. The additional leverage as well as the heightened disparity amongst the members' relative interests would more than likely impair the future value of the company. Instead the lower court has, in essence, granted a minority member veto power over the business judgment rule when that minority member is unsatisfied. The consequences to small business owners for such a ruling are profound. The Order and its oppression analysis

failed to consider several undisputed facts and circumstances that demonstrate Wilson could not have been an oppressed as the lower court found. The particular grounds identified for the trial court's oppression holding aside, these undisputed facts in and of themselves require reversal of the lower court's oppression finding.

i. Wilson controlled his destiny and CCC and therefore could not have been oppressed

The undisputed facts and evidence presented at trial show that Wilson was in control of his destiny and CCC and could not have been oppressed.

First, is it undisputed Wilson had the option to either be bought out by Gandis and Shirley or purchase their interest for the same price (valuation). As detailed above, in mid to late 2011 there were exchanges among the members of CCC about Gandis and Shirley buying Wilson's interest in the company. (*See supra* pgs. 20-21). Wilson began to claim it was his preference to buyout Gandis and Shirley. (Def. 62-64). He believed they were altering numbers to drive down the buyout figure offered for his interest and therefore stated that he would buy them out using their valuation numbers for his equity. (Def. 66, pg. 2; Tr. 156, ln. 17 – 157, ln. 3; 421-26; 670, ln. 23 – 671, ln. 2).¹² Gandis and Shirley accepted this offer. Wilson, however, allegedly failed to obtain a serious purchaser despite testimony by his brother-in-law that he could finance a deal of this magnitude without seeking bank financing. Thus, in mid to late 2011 Wilson had the option of either selling his interest and getting out of the company or buying the other members' interests at the same price/valuation. A minority shareholder simply cannot be oppressed when the other members (and alleged oppressors) agree to buy his interests or

¹² Shirley referred to this arrangement as a Texas Draw. Gandis and Shirley were willing to sell their ownership for the amount that was offered to Wilson.

sell theirs to him using the same valuation. It was an equal and reciprocal buy-sell situation in which Wilson had the power and ability to choose either option. He chose to do neither.

Second, Wilson had the option and ability to remain with CCC and simply be treated as the other members. The so called “exit strategy” cited by the trial court as an oppressive act kept Wilson in the business. Wilson continued to be in a position where he was over \$100,000.00 ahead in compensation over Gandis. CCC had a need to equalize Gandis and Wilson in lean times and Wilson objected to losing his favored status. To treat owners equally is not oppression but good business. Specifically, as detailed above, in late 2011 CCC was in a cash flow crunch and could no longer continue providing Wilson loan in what had increased to \$12,000 a month. Gandis and Shirley gave Wilson three options to consider, the first of which was to remain a member and be treated as such—a top line participant as an owner. This meant Wilson would maintain his current equity position but no longer receive preferential treatment in the form of monthly advanced distributions as the distributions would require debt to fund. The other two options altered his membership status in order to address his personal cash flow/tax situation. Importantly, each option kept Wilson in the company and Gandis made it known to Wilson he was fine with any one of them. At trial Gandis testified that he wanted Wilson to remain with the company. (Tr. 229, ln. 5-8). In short, Wilson had the option to remain with CCC and be treated the same as Gandis and Shirley. He chose not to do so. No longer agreeing to afford a member preferential treatment not required by any agreement or law simply cannot equate to oppression. The former is a discontinuation of a gratuitous and unnecessary act while the latter requires affirmative

acts that prevent a member from receiving what he or she is legally and rightfully owed. Wilson controlled the options of whether he bought the other owner shares, sold his shares, or stayed in the company and be treated as the other members. Having multiple options for business planning for future business activities is not oppression. It is effective management of a business and the expectations of its owners. These options are especially important because of the control over sales that Wilson had and the threats he made when he threw down the gauntlet after receiving Gandis and Shirley's proposal.

The question becomes, why did Wilson not exercise any of the options? The answer is clear from Wilson's own conduct. Wilson controlled CCC because he was responsible for the company's sales. Without sales no business survives. Wilson acted as the conduit between CCC and its customers and therefore wielded enormous power over the company. A fundamental aspect of shareholder oppression is that those in control weld their power in a prejudicial, unfair, and inequitable manner to the detriment of the less powerful member. It is antithetical to the notion of oppression that a member with total control over a business's livelihood can be oppressed. In this case not only did Wilson have this power, he wielded it to his benefit and the detriment of Gandis, Shirley, and CCC.

ii. Wilson took all the good out of CCC

The trial court's finding of oppression is also incongruent with the undisputed fact that Wilson ultimately made off with all the good aspects/assets of CCC – namely its

stock of customers and prospective business. A party making off with a business's assets cannot be oppressed.¹³

The buy-sell discussions between Wilson and the other two members lasted through the end of December 2011 and into the beginning of January 2012. Wilson informed Gandis and Shirley he was seeking a purchaser for CCC. During this period of time, Gandis and Shirley became concerned that Wilson was sharing CCC's confidential information with prospective purchasers and reminded that he should refrain from doing so.¹⁴ Wilson responded by assuring Shirley that he "certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor....[and that his] desire is to continue discussions with the interested parties about buying the company as a whole." (Def. 69, pg. 1). Contrary to what he stated to Shirley, the evidence revealed that Wilson was attempting to get a job with FilmTech, a competing business in Tennessee—to be an employee. (Def. 70 p. 2 January 11, 2012 email.) In a January 16, 2012 email Wilson stated that "[he] look[ed] forward to the opportunity to join [the] organization...." and that "[m]y goal will be to move as much of the business I manage at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective business that CCC has been working on qualifying over the past 3 to 6 months." (Def. 70). How is someone who is taking the business and the last six months of CCC prospects to a competitor oppressed?

¹³ Gandis and Shirley incorporate the arguments of CCC regarding the confidential information and trade secret misappropriation.

¹⁴ This is consistent with the arguments regarding the fiduciary duty owed to CCC that Wilson not act in his own interest but in the interests of CCC.

Presumably, the owner at Filmtech saw the illegality of Wilson's proposal and did not hire him. Wilson, however, left CCC, taking with him the company's confidential information to a competitor and his new employer Neologic. (Order at 17).¹⁵

Wilson capitalized on CCC's information after his departure and generated cash for Neologic built off of the back of CCC. Wilson cannot claim that he was oppressed for failure to receive regular distributions following his departure. The circuit court's expert confirmed that neither Gandis nor Shirley received distributions following his departure. Accordingly, this case does not present a situation where the minority has been prevented from receiving the economic benefits retained by the majority. Instead, the evidence of this case showed that after leaving CCC, Wilson almost immediately took advantage of the information he took from CCC and generated cash for his family. (*See* Def. 81, p.1; Def. 82).¹⁶ A list of Neologic customers submitted at trial showed that 23 out of the 27 were customers of CCC. (Def. 135; Tr. 883, ln. 17-24). When it became clear to Wilson that he would no longer receive preferential treatment by way of advanced monthly distributions/loans he set out to take everything of value he could out of CCC, concealed his own selfish actions, acted as if he was attempting to sell the company to a third party, and used the time to find a better deal for himself to the detriment of CCC. In proving his effectiveness as a salesman, Wilson convinced the lower court to focus on his dire personal financial situation (of his own making)¹⁷ to

¹⁵ Trial court found Neologic/Freshwater was utilizing CCC confidential information.

¹⁶ Def. 82 - discussing transaction with company named Imperial—a company that Wilson never transacted business with prior to CCC.

¹⁷ It should be noted that Wilson had a number of prior failed business ventures in the film industry due to a disagreement with other owners about appropriate debt loads that led to his expulsion and an instance

convince the lower court that he was oppressed. In reality, his dire financial condition was of his own making and Gandis and Shirley as members of CCC were in no way obliged to rescue him.

iii. Wilson was always ahead of other members in cash distributions

Under the LLC statute “[a] member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.” S.C. Code Ann. § 33-44-403. Section 405 mandates distributions made before dissolution to be made in equal shares to the members. S.C. Code Ann. § 33-44-405(a). Section 406 prohibits distributions if:

(1) the limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or

(2) the company’s total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

S.C. Code Ann. § 33-44-406(a).

The undisputed evidence presented at trial established that Wilson was always ahead of Gandis and Shirley in cash distributions. Wilson does not dispute that he received numerous monthly payments as advanced distributions which neither Gandis nor Shirley received. Due to the monthly payments to Wilson he always remained ahead of

where his venture as a sole proprietor led to his own personal bankruptcy. (Tr. 306, ln. 8-13; Tr. 365, ln. 2-3). Personal financial distress was apparently very common for Wilson. He resisted accounting controls, responsible cash management, and business/financial management at CCC.

the other two members in receiving distributions. (Tr. 115, ln. 12-18; Tr. 153, ln. 18; Tr. 256, ln. 10-14). Wilson did not simply get his proportional interest in distributions; he undeniably received above and beyond the other members throughout his tenure at CCC and remains substantially ahead of both of them to this day. That is to say, Wilson received even more cash distributions than he was actually entitled to under the LLC statute. This begs the question of how can member sitting at over \$100,000 dollars ahead of the other two members be oppressed by them? He simply cannot as oppression results in a member not receiving what is owed to him.

iv. Gandis and Wilson met to discuss potential business the day of his resignation

The trial court's finding of oppression also ignores the fact that Gandis and Wilson had a sales meeting to discuss what needed to be done to get the Company going in 2012 the same day Gandis and Shirley learned he was leaving CCC. (Tr. 163, ln. 5-13). It simply makes no logical sense that a member who is allegedly far along in his plan to oppress and freeze-out another member would meet with him to discuss sales plans and opportunities going forward. On the contrary, having such a meeting indicates but one thing – Gandis thought and planned for Wilson to remain a part of CCC at that point. This is not only corroborated by Gandis' testimony, but the words of Wilson. On January 6, 2012, Wilson wrote that “[s]ince John and I began discussions regarding CCC buying me out and extending an employment arrangement, John has insisted that the goal was not to force me out of the company but to give me some security and incentive to help grow the business.” (Def 69, p.2). Wilson's own word “incentive” is the absolute polar opposite of the word oppression. Incentive is also indicative that this was not a

“trapped investment,” but merely an ownership interest that required work, sometimes hard work, to grow it and keep its value. That is business.

In sum, none of the factors identified in *Kiriakides* and *Ballard* as indicators of shareholder oppression are present in this case and the undisputed facts and circumstances show Wilson was not and could not have been “oppressed.” Wilson did not find himself rendered powerless and vulnerable to the calculated actions of the other two members of CCC. He was not “trapped in his investment” in the company without the prospect of receiving a beneficial return. On the contrary, he remained and stands to this day substantially ahead of Gandis and Shirley in distributions received. The only valuable investment Wilson made into CCC was the stock of EFS customers he contributed/rolled into the business and the subsequent development of those and other customers with Gandis’ help in product development and sourcing during his tenure. He took that investment with him when he left CCC. The *Ballard* Court recognized, “[r]elationships in business, like any other relationship, can quickly sour when they are predicated on unmet expectations, whether justified or not.” *Ballard*, 399 S.C. at 590. This case is one in which a business relationship turned sour when Wilson’s unrealistic and selfish expectations of preferential treatment were not met.

b. The Order’s grounds for finding oppression fail

The grounds listed in the Order as its basis for an oppression holding are contradicted by the evidence presented at trial. The Order sets forth a laundry list of alleged “prejudicial acts” evidencing Wilson’s oppression. (Order, p. 6-7). Wilson not getting his way in a business relationship is not a “prejudicial act” against him. It is often a harsh reality of economics and the realities of a business that an owner does not get

their own subjective expectation met. In the list of oppressive acts, it is a fact that Gandis and Shirley as CCC members had no obligation to do any of the things stated.

There is an important procedural point to address. Regarding the facts and the courts application of the facts, the lower court refused to allow post trial briefing. This refusal amplified its misconception and misinterpretation of the evidence and grounds it relied upon. The Order itself does not cite to any supporting evidence and does not cite to any trial testimony. The Order does reveal that it was submitted by an advocate and the advocate's view of the evidence was amplified by not allowing post trial briefing. Examination of the specific grounds cited by the court in support of its oppression holding reveals these errors:

\$8,000.00 per month: The trial court concluded there was an agreement to pay Wilson, \$8,000.00 per month, beginning in July of 2008, for the life of the Company, and that Appellants sought to "squeeze" Wilson by threatening to take this payment away, and ultimately ceasing this monthly payment. (Order at 6-7). Appellants denied the \$8,000.00 was a guarantee and presented evidence it was only guaranteed for the very beginning of the venture in the startup phase. Wilson's own words in an April 13, 2009 email confirm this understanding:

"The payments I received last year was [sic] basically a salary which I required since I was taking my customers from EFS and putting them into CCC reducing my ability to earn a living. John, you agreed to not take any money out initially since cash flow was tight. This was helpful. Now that the company is profitable and cash flow is better, we are both pulling out money each month which is in the form of a distribution"

(Def. 31).

At trial Wilson took the position that he and Gandis had an enforceable agreement to pay Wilson the \$8,000 a month salary for the life of the company. Wilson's own email

proves otherwise. Furthermore, success of Wilson's position and the court's finding of oppression rest upon finding that Wilson and Gandis had an enforceable agreement to pay Wilson the \$8,000 a month salary indefinitely. Without reducing this alleged agreement to writing it would be unenforceable pursuant to the statute of frauds. Furthermore, Wilson failed to perform his obligations under this alleged agreement when he did not roll all EFS customers into CCC. Wilson's claim in this regard is more suited for a breach of contract claim rather than oppression as LLC members are not entitled to any compensation other than their proportional share of distributions if and when those materialize. See S.C. Code Ann. § 33-44-403(d). LLC members certainly are not entitled to distribution advances above and beyond those received by other members. In fact, the LLC statute calls for equal distributions to members in proportion to their interest. S.C. Code Ann. § 33-44-405(a).

Tax Distributions: The trial court concluded that Gandis wrongfully paid down a line of credit used by CCC, upon which he was personally obligated, as opposed to keeping cash available for tax distributions to Wilson in priority over the other shareholders, and thus keeping in place his debt obligations. (Order at 6).

Paying off the CCC debt was not wrongful. Wilson agreed that the company should operate without debt. Defendant's Exhibit 31: April 13, 2009 email from Wilson to Gandis, cc to Shirley: "I think we need to have a plan for distributions that we both agree on and that makes sense for us to operate the company without debt. I don't know what that should look like but I think we should have some idea so we can plan our personal finances based on how the business is doing." (Def. 31).

- Appellants also showed at trial that Wilson received extra cash distributions to cover future taxes
- Under the LLC statute Gandis was entitled to repayment of the loans he made to CCC to preserve the company and buoy its finances until it could become self-sufficient - LLC statute mandates the corporation reimburse a member or manager for payments made “for the preservation of its business or property” (403(a)); reimbursement to a member for an advance to the company beyond the amount of contribution member agreed to make (403(b) and expressly identifies those contributions as “loans” upon which interest accrues (403(c)).

Managing the money supply to make it appear cash was more limited: The trial court concluded that Defendants managed the money supply in a way to understate available cash. (Order at 6).

- Wilson presented e-mail correspondence to the trial court to attempt to prove this claim, but the e-mail correspondence showed that the claimed wrongful act of “managing the money supply” was simply paying off over \$360,000 in debt. *See* Plf. 59, p.3 (noting CCC generated about \$500,000 in cash in 2011 but had to spend \$361,459 to pay off its debts).
- In addition, the lower court’s own expert (a certified public accountant) did not identify any issues with the management of the money supply.
- CCC was actively seeking a line of credit with Bank of America to assist with funding.

Monitoring Wilson’s email: The Court concluded that Defendants wrongfully monitored Wilson’s “private emails.” (Order, p. 6).

- The only e-mails that were monitored were Wilson’s “@ccc-films.com” address; these were not private emails. These were company emails.
- Appellants presented evidence that these emails were monitored because Wilson was caught usurping corporate opportunities in December 2010.
- “Employees frequently view voice mail and e-mail systems as private communications devices, yet most are company-owned property, meriting no legitimate claim of private use.” John F. Lomax, Jr., *Privacy in the Workplace*, S.C. Law, JANUARY-FEBRUARY 1998, at 14.

Limiting Wilson’s Access to Financials: The circuit court concluded that Appellants wrongfully limited Wilson’s access to CCC financials, (Order at 6), and only provided financials when the “court compelled Defendants to produce such information.” (Order at 10).

- Wilson presented evidence that his access to financial information—that is, full access to “quickbooks”—was limited. (Plf. 85). But the limitation did not occur until January 5, 2012, and it only occurred because Gandis and Shirley learned that Wilson was talking to a CCC competitor (FilmTech) without running that action by them. *Id.* Consequently, the limitations were for the sole purpose of protecting CCC’s confidential information.
- During this case, Appellants resisted providing electronic “quickbook” information to Wilson based upon their desire to maintain the confidential vendor and customer information contained in the same. *Cf.* S.C. Code Ann. §§ 39-8-60(C), (E).

- On November 26, 2012, the circuit court issued a protective order related to the electronic “quickbook” information, and Appellants produced the same pursuant to the protective order. At the June 24, 2014 summary judgment hearing, Appellants produced evidence of apparent protective order violations. Further, Gandis testified that Neologic/Freshwater were utilizing an obscure film manufacturer in China that CCC began purchasing from well after Wilson’s departure.
- Further, the evidence showed that Wilson received exhaustive financial information related to the buy-out discussions in December 2011-January 2012, and again during the December 2012 “offer.”
- The court appointed expert testified that accounting controls and access are proper.

Manipulating the December 2012 balance sheet: The Order found that Appellants manipulated the 2012 balance sheet to devalue Wilson’s interest. (Order at 7).

- Del Bradshaw as the trial court’s expert did not find that Appellants did anything wrongful with regard to the year-end balance sheet. (Tr. 580). Indeed, Appellants expressly told Wilson that they would accept an offer to buy them out based upon the same balance sheet. (Def. 154). While Gandis hoped to include the real property used by CCC in the deal, and Shirley hoped to receive extra consideration for her work over and above a 10% non-voting member, the fact remains that the balance sheet used in valuing their respective interests was the same for the valuation of Wilson’s interest.

Forming ZOi to compete with CCC and siphon profits: The Court concluded that ZOi was formed to siphon profits from CCC. (Order, p. 7).

The court correctly noted during the trial that ZOi was formed after Wilson left CCC. E-mail correspondence between Shirley and Gandis' father (regarding the need to secure a line of credit for ZOi) detail its intended operations—that is, the e-mail shows that ZOi was intended to be the new company following the hoped for amicable wind down of CCC. (Plf. 113: July 20, 2012 email):

- As there likely won't be new film purchases [for CCC] (there are some open POs still to be fulfilled) – this cash [from collecting CCC AR] should allow CCC to pay all its vendors and . . . if we do this right, have cash left over – which would be divisible amongst the owners. The first portion of cash goes to John (and Me) to catch us up to the cash that Dave has already received (via loans) from CCC. Any excess would be divided appropriately - - the court &/or the attorneys will guide us as to how to properly settle matters with Dave so it can all be done. *Id.* at p. 3 (second paragraph).
- “As you may know, we have been taking monthly physical inventory since May. Our next one is scheduled for Friday August 3rd. After this tally – we will deliver that tally to Dave (and continue to do so for each month-end throughout the year). As Dave is also out there selling film again for his new employer, it is [in] CCC's best interest to have his new employer buy film from us and help us to wrap up CCC more quickly.” *Id.* (fourth paragraph).

- Wilson's litigation strategy, however, made sure that a swift resolution of CCC would never happen.
- In short, Wilson's own evidence confirms that ZOi was not intended to siphon profits.

Management Decisions: The trial court found fault in various management decisions: removing Wilson from signatory authority on the operating account, removing his ability to make wire transfers for the company, and expensing repairs to the CCC facilities as rent as opposed to balance sheet items. (Order, p. 6-7).

- Gandis was the manager of CCC and these actions were properly exercised by the manager of the company.
- As for the management of the banking activities, Wilson never presented any testimony that he previously had check signing or wire transfer authority.
- But even assuming these actions were not properly made by the manager, these actions do not support a claim for minority shareholder oppression.

Freeze His Capital Account: The trial court found Shirley's email comment that Wilson's capital account would be frozen as confirmatory evidence for its ultimate legal conclusions. (Order, p. 10). Respectfully, the comments must be considered for the purpose they were made—the proposed member modification designed to eliminate Wilson's tax liabilities. The context of that quote begins with the first e-mail. (Plf. 48, p.2: October 24, 2011):

- In the first e-mail Shirley lists all of the cash that Wilson had gotten out of CCC since its inception. The number was large and included a car (Lexus) that CCC purchased for Wilson.

- In the next email Gandis responded that he was not sure what to do with those numbers, and how to allocate the loans. *Id.* at p.2.
- Shirley then responds (frustrated): “NO – you don’t need to decide how much is the loan.” The context for this email is her proposed solution to Wilson’s tax burden and her efforts to reduce the same *if* he converted from an owner to an employee. His capital account would be frozen, according to Shirley’s suggestion, because it would not be reduced as per her proposal and any excess cash flow would go “FIRST to partner distributions, second to guaranteed payment and third towards any payment to Dave.” *Id.* at p.1. But these statements expressly assumed that Wilson would be an employee receiving a “salary/bonus combination.” *Id.* at p.1.
 - In this context Wilson would never have left the company and would have received salary and benefits and continued participation in the growth of the company. *See* Def. 55, p.3.
- In contrast to the frozen capital account, consider an e-mail sent three weeks later. (Plf. 62: November 13, 2011 between Gandis and Shirley):
 - The context for this e-mail was Gandis had just finished meeting with Wilson to discuss his future at CCC and which of the three options, *see* Def. 55, that he was open to choosing.
 - Gandis: question: “Following my meeting with Dave - - I have a new guess . . . What if he decides to not change anything in our structure – but rather . . . ‘do nothing’ – but leave to get another job? Or go back to

selling film with Eastern Film? Would we have to prove that he was never 'an owner'? Just thinking out loud.

- Shirley answer: "Then we will form a new company – buy all the assets from CCC subject to the liabilities – distribute to Dave his final check in liquidation of his interest – and all the new business will be done in a new company.

- This is exactly what Gandis and Shirley tried to do from the very beginning of this lawsuit. Wilson wouldn't allow it to happen. He pursued a scorched earth litigation strategy against these individuals, alleging all manner of fraud and wrongdoing, seeking actual and punitive damages. Years later, after the circuit court's expert issued its report and findings and after Gandis and Shirley resoundingly defeated all of these allegations, Wilson limped into the court and asked for the value of his membership interest as of December 2011. And he did so, after having spent a significant portion of this litigation seeking to weaken CCC since leaving. (See Def. 113).

Making representations that Wilson may not receive a distribution for two years: The court concluded that Appellants pressured Wilson by claiming he would not receive a distribution for two years. (Order, p. 6). As discussed above, as a LLC member Wilson was not entitled to any distributions above and beyond those equally available to other members when there is enough cash in the business to pay its debts in the ordinary course and its creditors in the event of dissolution. See S.C. Code Ann. §§ 33-44-405, 406. In

short, an LLC member is only entitled to the equal share of distributions if and when they are available. He sits last in line behind vendors, employees and other creditors.

Demanding possession of Wilson's computer and blackberry: The circuit court concluded that demanding Wilson's computers and Blackberry evidenced oppression. (Order, p. 7).

Wilson conceded that he did not have a claim for conversion and the court so ruled. Accordingly, any finding that it was wrongful for Appellants to demand the return of CCC's own computers and Blackberry is not supported by the evidence or law.

Initiating an Exit Strategy: The trial court concluded that Wilson was oppressed because Appellants created an exit strategy. (Order, p.6).

Wilson cites an email that addresses sales functions to support this claim. The email does not discuss removing Wilson from the company. (Plf. 39.) The email addresses the removal of a member of the sales team—Jim Bucks—and an exit strategy for Mr. Bucks. The “exit strategy” did not address Mr. Wilson but was taken out of context for his own use in the litigation.

Against the backdrop of the above discussed evidence, the circuit court's conclusion that Wilson was oppressed hinges upon the fact that he was locked out of the business, that his cellular phone plan was terminated, and that his health insurance was not maintained, none of which constitute oppressive acts.

Locked Out: There is no question that Wilson was locked out of the business. Gandis learned that Wilson was preparing to leave CCC as Wilson's attorney had notified the CCC attorney and was justifiably concerned for the protection of the company and its confidential information. (Def. 117)(screen shot showing on January 9, 2012, Wilson

made copies of contacts and opportunities); *see also* Def. 77(Jan. 19, 2012 letter from Nexsen Pruet regarding confidential and trade secret information and preservation of evidence). Accordingly, Gandis showed up at CCC's Greenville office and hoped to gain access to, and secure, the company's confidential and trade secret information before Wilson left.

Cellular Phone: Gandis testified that Wilson's cellular phone number was CCC's main sales phone number. He took steps to cut off Wilson's use of that line. Gandis testified that it was not his intention to affect Wilson's family's service and that he took steps to fix their loss of service upon notice.

Health Insurance: Plaintiffs health insurance was not maintained by CCC after he left.

Each of these actions were taken after Wilson expressed his intention to leave and compete. These are real world responses that responsible businesses take every day to protect a business. They are not oppressive actions.

C. The trial court erred in ordering the individuals members to buyout Wilson's interest in absence of unconscionable conduct

Assuming Wilson was oppressed, the trial court erred in ordering Gandis and Shirley individually to purchase his interest in CCC. The lower court fashioned this particular remedy pursuant to its equitable powers under S.C. Code Ann. §§ 33-44-401 and 801. (Order at 18). While those provisions allow a court to order a buyout of an oppressed member's interest, the Reporter Comments to Section 801 make it clear that actions beyond simple oppression need be found before a court orders individual members to buyout another. Specifically, the South Carolina Reporters Comments to S.C. Code Ann. § 33-44-801 provides that "a buy-out might be appropriate where, for example, one or more members have (i) engaged in fraudulent or unconscionable

conduct...or (iii) engaged in serious misconduct....". The trial court's Order did not find Gandis' or Shirley's actions were unconscionable or fraudulent. It simply deemed them "oppressive." Only in denying Appellants Rule 59 motion, which make this very point in seeking reconsideration, did the trial court attempt to remedy this fatal error. The Order Denying [Appellants'] Rule 59 Motion summarily states that "[t]he evidence revealed that Mr. Gandis and Ms. Comeau-Shirley deliberately collaborated to oppress Wilson. Their conduct was unconscionable." (Order Den. 59 Mot. at 2). Neither order deemed Gandis and Shirley's actions "fraudulent." The trial court utterly failed to specify what conduct it deemed unconscionable and any basis for its conclusion. This was yet another error in the proceedings below exasperated by the denial of post-trial briefing. Without a specific finding that Gandis and Shirley's actions were unconscionable the court cannot order they individually buyout Wilson's interest in CCC. The LLC statute, including the Reporter Comments to section 801 does not define "unconscionable conduct." What constitutes "unconscionable conduct" under the LLC statute appears to be an issue of first impression in South Carolina.

Black's defines "unconscionable" as "2. (of an act or transaction) showing no regard for conscience, affronting the sense of justice, decency, or reasonableness...4. Shockingly unjust or unfair." BLACK'S LAW DICTIONARY (10th ed. 2014). Unconscionable conduct arises in South Carolina case law most often in contract disputes. In that regard, "unconscionability" is a narrow doctrine whereby a challenged contract must be one which no reasonable person would enter into, and inequality must be so gross as to shock the conscience. *Brown v. Green Tree Services, LLC*, 585 F.Supp. 2d 770 (D.S.C. 2008). Our courts have defined "unconscionability" as the absence of

meaningful choice on the part of one party, due to one-sided contract provisions, together with terms so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Holler v. Holler*, 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005). In short, based upon the recognized definitions and iterations “unconscionable” and “unconscionability” it is clear that one’s conduct must go well beyond simple oppression and be so one-sided, unjust, shocking to the conscience and unfair that no reasonable person would undertake such acts. The Reporters Comment denotes a higher burden of devious activity beyond oppression necessary to order individuals buyout an oppressed member. Assuming Gandis and Shirley’s actions were oppressive, they certainly were not unconscionable. As discussed above, the actions deemed oppressive by the trial court were business decisions made and acted upon to address ordinary business issues such as tax liabilities and ensuring cash flow to pay debts in the ordinary course of business. They cannot be said to have reached the level of offending common human decency to a degree no reasonable person would undertake or tolerate them.

Furthermore, South Carolina courts have shown a marked hesitancy to disregard statutorily created corporate liability shields and hold individual LLC members liable for acts undertaken on behalf of the company. In *16 Jade St., LLC v. R. Design Const. Co., LLC*, 398 S.C. 338, 728 S.E.2d 448 (2012) the Court held that a LLC member was not shielded from personal liability under the Uniform Limited Liability Company Act under the circumstances of that case. The Court subsequently withdrew and entered a superseding opinion walking back the opening to individual liability under the LLC act created by the prior decision. *16 Jade St., LLC v. R. Design Const. Co., LLC*, 405 S.C.

384, 747 S.E.2d 770 (2013). Similarly, the judiciary has long respected and looked to the business judgment rule to evaluate whether actions by those in power within a business are actionable because acts that appear superficially nefarious, deviant or unlawful may very well be justified/reasonable business decisions under the circumstances. “Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.” *Dockside Ass’n, Inc. v. Deytens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987)(internal citations omitted).

Holding individual LLC members liable to another member or a third party in the absence of egregious behavior that is an affront to reason and human decency sets a dangerous precedent, creates bad policy and an unfriendly business climate. The Reporter Comments to § 33-44-801 reflect the General Assembly’s recognition of this simple concept and provide the rare exception (individual liability) to the majority rule (corporate liability) requires reprehensible and shocking actions. The individual Appellants’ allegedly oppressive acts are not ones calling for imposition of this rare and exceptional remedy. Therefore, should this Court find Wilson was in fact oppressed it should order that the Company rather than Gandis and Shirley as individuals buy-out Wilson’s interest in CCC.

1. Trial court erred in its valuation of Wilson’s interest in CCC

The circuit court’s Order also erred in its valuation of Wilson’s distributional interest by relying on Catherine Stoddard’s adjusted December 30, 2011 valuation of the company less half of the excess inventory for a total buyout figure of \$347,863.23. (Order at 18). By utilizing the December 2011 calculation, the lower court greatly

inflated the value of Wilson's distributional interest and more disturbingly failed to consider the actions he undertook to greatly devalue the business. There was no consideration of the taking of its customers, theft of its confidential information, and the costs imposed by the use of scorched earth litigation tactics to the financial detriment of the business. Should the Court find a buyout is appropriate in this case the valuation of Wilson's distributional interest should be based upon the court appointed accounting expert Del Bradshaw's valuation of Wilson's distributional interest in 2013. To do otherwise allows Wilson to "double dip" by being paid a certain value for his interest and allowing him to continue to capitalize on the business that he took from CCC.

2. Gandis and Shirley should only have to pay their proportional share

The Order is profoundly unfair to the minority member Shirley. The trial court relied upon Catherine Stoddard's schedule, which was derived from Del Bradshaw's work (exhibit 20 in Ct. Ex. 1), for the computation of Wilson's equity value. (Order at 11-12, 18). The Order erred by not relying upon that same schedule prepared by Bradshaw in identifying what portion of that figure was attributable to Gandis and Shirley based on their respective relative capital account in the company. The evidence at trial showed that she owned 10% of CCC and unlike the other members, did not actively participate in the daily business operations, and most significantly had no voting rights. At worst, Shirley should only have to pay her proportional share based on her relative capital account for Wilson's interest. The Order errs in miscalculating the proportional erred by imposing an inequitable remedy on a 10% owner based upon her small ownership (based upon accounting services rendered) and her nonvoting capacity.

D. Wilson Wrongfully Obtained Equity Despite his Unclean Hands

“When [the appellate court] is sitting in equity, and thus viewing the evidence for its preponderance, [it] is to consider the equities of both sides, balancing the two to determine what, if any, relief to give.” *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). “A shareholders derivative action, as well as an action for stockholder oppression, is one in equity.” *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). The principle defense is that of unclean hands. “He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.” *Straight v. Goss*, 383 S.C. 180, 207, 678 S.E.2d 443, 457-48 (Ct. App. 2009)(Court found the minority shareholder’s “own inequitable conduct came directly to bear on the transactions of which [he] now complains.”); *see also Mason v. Mason* discussed *supra*. Pgs. 48-49). “The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Straight*, 383 S.C. at 206, 678 S.E.2d at 457.

As noted above, the trial court afforded Wilson equitable relief under § 33-44-801 in ordering Gandis and Shirley to buyout his distributional interest in CCC. Wilson’s inequitable acts, giving him “unclean hands,” preclude him from receiving the equitable relief. The lower court flatly ignored the litany of inequitable conduct perpetrated by Wilson and erroneously and in violation of the unclean hands doctrine awarded him equitable relief. Logical fallacies in the Order allowed Wilson to receive relief to which he was not entitled.

1. *Wilson's Inequitable Acts*

a. *Usurping Corporate Opportunities: Illegal Side Dealing*

Wilson's inequitable acts were numerous and well established in the record presented to the trial court. As detailed above, Wilson was to roll all of his EFS customers into CCC in exchange for an \$8,000 monthly draw from Gandis. Gandis provided him the money as agreed however Wilson did not roll all of the EFS customers into CCC. Rather than abiding by his promise to Gandis, Wilson conducted a steady stream of side deals outside of CCC which he attempted to conceal from Gandis and Shirley. Discovery in the case showed that Wilson transacted over \$1.7 million in illegal side deals while being paid with Gandis' personal money. (Def. 126). Gandis was unaware that his partner was conducting side deals for his own gain which could and should have come through CCC.

Wilson argued below that he and Gandis agreed to exclude three import accounts from coming into CCC. Even if this were true, which Appellants deny, there was undisputed evidence presented to the trial court that Wilson was doing illegal side deals including one which he attempted to excuse by claiming "it's Christmas."

b. *Erasing Computers and Blackberry*

Wilson destroyed evidence; he did so before the litigation began and he did so during the litigation. (Def. 115, 122). Indeed, Wilson's pre-litigation evidence destruction is particularly troubling because he specifically received an evidence preservation letter the day after he took CCC's computers and Blackberry. (Def. 77). Wilson's destruction of evidence prevented Appellants from conducting complete discovery on their breach of

fiduciary duty claims, as well as hindering the other parties' in litigating their claims and defending themselves against his.

c. Theft of CCC Confidential Information and Trade Secrets Erasing

The evidence presented to the trial court showed that Wilson shared CCC trade secret and confidential information with competitors when he was attempting to get a new job under the false pretense of attempting to sell the business. The Order actually recognizes “[e]vidence at trial demonstrated that Neologic/Freshwater used CCC’s confidential information and that CCC was justified in bringing the trade secrets claim.” (Order at 17).

d. Litigation Tactics

Wilson’s pleadings requested that the court order dissolution, and shortly thereafter, Appellants’ amended pleading sought the same relief. Consistent with those pleadings, Gandis and Shirley assumed that the Company would be dissolved and acted accordingly. In a December 6, 2012 hearing scheduled for the dissolution relief he requested, Wilson argued against dissolution by telling his counsel (who relayed the message to the court) that a legitimate offer had been made to purchase the equity of Gandis and Shirley. (Def. 102; Tr. 257, ln. 11 – 259, ln. 25). His counsel told the court, “we’ve made an offer to purchase this business for almost half a million dollars, their interest. That hasn’t been – they haven’t accepted or rejected that yet. But we think this business has value.” (Def. 102). The court did not order dissolution and this alleged purchase of Gandis and Shirley’s interest never came to fruition.

Wilson then came to the court at trial demanding buyout of his interest in CCC. Not only did the trial court order the buyout, it erroneously valued Wilson’s distributional

interest at a point before his own actions greatly devalued the company. The Order permits Wilson to “double dip” by allowing him to make off with the company goods, use them for his personal gain to compete with CCC, engage in scorched earth litigation tactics, back out of the dissolution he requested, and then get paid as if none of his conduct ever happened. The Order simply turns a blind eye to the egregious, numerous, and consistent inequitable actions of Wilson.

Wilson lulled Gandis and Shirley into winding down the affairs of CCC in 2012 under the belief that the parties would liquidate the company, split the proceeds, and go their separate ways. Out of the blue, he halted the planned dissolution of CCC with the “offer.” For reasons known only to him and Mr. Steve Norvell, Wilson then refused to go forward with the offer to purchase the shares of Gandis and Shirley.

In short, Wilson undertook a campaign of deliberate and undeniably inequitable actions for his personal gain and to the detriment of CCC and his fellow members. He exercised control over the sales and the future of the business. Because of his own personal financial situation he used Gandis for funding, acted as an owner when business was good, and when Company sales under his direction plummeted and taxes had to be paid, he did not want to suffer the pain of ownership and he sought to be paid as an employee-with a mantle of ownership. At all times, he placed his interest above those of the collective good of the Company. Other deeds chronicling Wilson’s unclean hands have been addressed previously and are contained *passim*. It is antithetical to the concept of equity that someone who acted in this manner can be rewarded by the court’s award of equitable relief. The trial court disregarded Wilson’s known and established history of inequitable conduct and wrongfully awarded him equitable relief in the form of an

ordered buyout contrary to the established principle of “unclean hands.” The Order therefore should be reversed.

V. CONCLUSION


Wilson wanted all the upside of business ownership, none of the downside of ownership, and the security of being an employee. The reality and universally recognized business principles require choosing one or the other. Business ownership entails greater risk people take for the accompanying possible greater reward. On the other hand an employee enjoys little to no risk by receiving a salary but no possibility of reaping the potentially larger rewards accompanying ownership. Wilson uniquely received both the owner and employee upside for several years with CCC. When the business needed him to choose one or the other he took actions and maneuvered to maximize the upside and the trial court’s order gave him just that. After absconding with CCC’s valuable assets, namely its stock of customers and confidential information over to his new employer and competitor, the circuit court ordered Gandis and Shirley pay him for his interest in a devalued CCC company. Wilson wins threefold should the Order be upheld – (1) receipt of distributions over and above other members; (2) controlling CCC’s valuable assets for use by his new employer Neologic and (3) payment for his interest in CCC at a price he only could have received had he not dismantled the company for his own benefit.

For the reasons set forth above, the Circuit Court’s Order of January 9, 2015 should be reversed.

(signature page to follow)

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.



D. Randle Moody, II, S.C. Bar #
Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
rmoody@roecassidy.com
jsmith@roecassidy.com
*Attorneys for the Appellants
Gandis and Shirley*

December 9, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

RECEIVED

DEC 10 2015

SC Court of Appeals

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

v.

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

John Gandis and Andrea Comeau-Shirley, Third-Party Plaintiffs,

v.

Carolina Custom Converting, LLC, Third-Party Defendant and Counterclaim Plaintiff,

v.

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

Of Whom David Wilson, Neologic Distribution, Inc. and Fresh Water Systems, Inc. are the
Respondents,

and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the
Appellants.

PROOF OF SERVICE

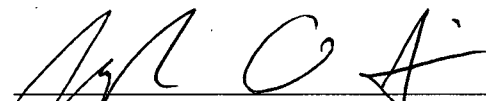
I certify that I have served the Initial Brief of Appellants John Gandis and Andrea Comeau-Shirley and Designation of Matter on all Counsel of Record by depositing a copy of each in the United States Mail, postage pre-paid, this 9 day of December, 2015, addressed as follows:

W. Andrew Arnold, Esq.
712 E. Washington Street
Greenville, South Carolina, 29601
Attorney for Respondent David Wilson

Bruce B. Campbell, Esq.
307 Pettigru Street
Greenville, South Carolina 29601
*Attorney for Respondents Steve Norvell,
Neologic Distribution Inc. and Fresh Water Systems, Inc.*

Burl F. Williams
NEXSEN PRUET, LLC
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
Attorney for Co-Appellant, Carolina Custom Converting, LLC

ROE CASSIDY COATES & PRICE, P.A.



D. Randle Moody, II S.C. Bar # 14135

Joseph O. Smith, S.C. Bar # 77475

1052 North Church Street

Greenville, South Carolina 29601

(864) 349-2600

(864)-349-0303 fax

*Attorneys for Appellants, John Gandis and
Andrea Comeau-Shirley*

Greenville, South Carolina

December 9, 2015

VIA FEDERAL EXPRESS

The Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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DEC 10 2015

SC Court of Appeals

Re: David Wilson v. John Gandis
Appellate Case No. 2015-000476
Lower Case No. 2012-CP-23-02887
RCCP 2209.0002

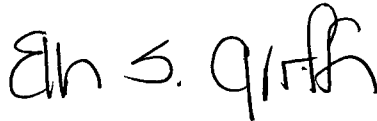
Dear Ms. Kitchings:

Enclosed please find the original and one copy of the **Initial Brief of Appellants and Designation of Matter** in the above-referenced appeal. Also enclosed is a Proof of Service for the same. Please file the enclosed documents in your usual manner and kindly return a clocked copy of the same to me in the stamped, self-addressed envelope provided herein.

If you have any questions or concerns, please do not hesitate to call. Thank you for your assistance.

With kind regards, I am

ROE CASSIDY COATES & PRICE



Ellen S. Griffin
Paralegal to D. Randle Moody, II
and Joseph O. Smith

Enclosures: (as stated above)

cc: Burl F. Williams with Enclosures
W. Andrew Arnold with Enclosures
Bruce B. Campbell with Enclosures