THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-23-1646

Kyle Pertuis, ... Respondent,

v.

Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond, ... Appellants.

APPENDIX TO THE RECORD ON APPEAL

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INDEX

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	COURT OF COMMON PLEAS
Kyle Pertuis, Plaintiff, v. Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond. Defendants.	C.A. No.: 2010-CP-23-1646 **Defendants' Motion To Alter or Amend and Motion to Reconsider**

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Pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure, Defendants Front Roe Restaurants, Inc., Beachfront Foods, Inc. Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond (hereinafter collectively identified as "Defendants") file their motion to alter or amend the Court's order of July 3, 2013, which was received by Defendants' counsel on July 9, 2013. [Exhibit 1, Order] Respectfully, the order (drafted by Plaintiff's counsel), contains numerous errors in its findings of fact and conclusions of law; the specifics of which are set forth hereunder in detail.

Factual Background

This case originated as a declaratory relief claim by Front Roe Restaurants, Inc. which sought to require the disclosure of its financial records to Mr. Pertuis to be subject to the terms of a confidentiality agreement. Since its original filing, this case metamorphosed into a minority shareholder oppression claim, which was the context in which the matter was tried before the court.

In 1998, Defendants Mark Hammond and Larkin Hammond formed Lake Point Restaurants, Inc. [hereinafter "Lake Point"], a North Carolina corporation, and purchased a restaurant on Lake Lure, North Carolina. The Hammond defendants were the sole shareholders with equal ownership in the corporation. The Hammonds financed the purchase of the restaurant through personal contributions, owner-financing as well as third-party loans. The Hammonds have personally guaranteed all third party business loans. The business operated as "Larkins on the Lake" and remains a viable business today.

In 2000, the Hammonds hired Plaintiff Kyle Pertuis [hereinafter "Plaintiff" or "Pertuis"] as a manager of the restaurant. The parties agree that Pertuis was to attain a ten percent (10%) ownership of Lake Point Restaurants, which vested at an agreed schedule over a five (5) year period. Although neither party could produce the document that set forth the vesting schedule, all parties agreed the document existed and all parties followed the terms of that document. Thus, by 2007, Pertuis had attained a ten (10%) ownership in Lake Point Restaurants. [Def. Ex. 29(f)]

In 2001, Defendants Mark Hammond and Larkin Hammond formed Beachfront Foods, Inc. [hereinafter "Beachfront"], a North Carolina corporation. In that corporation, they purchased a restaurant in Lake Lure, North Carolina, later sold that business and opened a restaurant in Columbus, North Carolina. The Hammond defendants were initially the sole shareholders with equal ownership in the corporation. The Hammonds financed the purchase of the restaurant through personal contributions, owner-financing as well as third-party loans. The Hammonds have personally guaranteed all third party business loans. The business currently operates as "Larkins Grill" and is not profitable.

As with Lake Point, the parties agree that Mr. Pertuis was to attain a ten percent (10%) ownership of Beachfront, which vested at an agreed schedule over a five (5) year period. Although neither party could produce the document that set forth the vesting schedule, all parties agreed the document existed and all parties followed the terms of that document. Thus, by 2007, Pertuis had attained a ten (10%) ownership in Beachfront. [Def. Ex. 30(f)]

When Beachfront was opened, Pertuis' title was changed to "Director of Operations" or "Managing Partner." His duties and responsibilities expanded as well as his compensation. Pertuis was paid a base salary, plus a bonus. The bonus was based upon each restaurant achieving certain quarterly profitability goals.

In April 2005, the Hammonds formed Front Roe Restaurants, Inc. [hereinafter "Front Roe"], a South Carolina corporation and purchased Renee's Steakhouse in Greenville, South Carolina. The Hammond defendants were the sole shareholders with equal ownership in the corporation. The Hammonds financed the purchase of the restaurant through personal contributions as well as third-party loans. The Hammonds have personally guaranteed all third party business loans. The business currently operates as "Larkins on the River" and is currently the most profitable of the three (3) corporations.

As to all defendant corporations, the purchase of the restaurant business assets was made, in part, with the payment from personal assets by Mark Hammond and Larkin Hammond.. The Hammonds have had to personally guaranty all third party business loans. Pertuis is not personally obligated for the payment of any business loan by any of the defendant corporations.

The parties agree that Pertuis was offered an opportunity to acquire ownership in Front Roe. However, instead of Pertuis' interest accumulating over time as with Lake Point and Beachfront, for Front Roe the parties agree that Pertuis would acquire a ten (10%) percent

interest in Front Roe once the restaurant achieved a certain financial milestones. If the milestones had been achieved in year one, Pertuis' interest would have been ten (10%) percent that year.

Unlike the other two corporations, the parties agree that there was a document that set forth the terms of the vesting of Pertuis' interest in Front Roe. Although neither party could produce the document that set forth the vesting schedule, all parties agree the document existed. Pertuis testified he could not remember what the terms of the agreement were, but he admitted that Front Roe never achieved the level of profitability that would have earned him a ten percent (10%) interest in Front Roe.

Mark Hammond testified that the agreement provided that Pertuis would receive a one percent (1%) ownership once Front Roe was profitable and ten percent (10%) once the restaurant achieved a net operating profit of $500,000. He testified, and the tax records confirmed, that in 2006, Front Roe was profitable for the first time, so Pertuis was awarded a one percent (1%) interest. He also testified, and the tax records confirm, that Front Roe has never achieved the $500,000 net operating profit goal.

The parties do not dispute that since 2007, Pertuis has received K-1's from Lake Point, Beachfront and Front Roe that reflect his interest in those corporations as 10%, 10% and 1%, respectively. The parties stipulated at no time has Pertuis filed notice with the IRS, pursuant to 26 U.S.C. §6037, that the income or percentage of ownership reported on his schedule K-1 by Front Roe was inaccurate or inconsistent with what he believed he owned.

During this time period, the Hammonds became concerned about the ownership of the land where Lake Point operated its restaurant on Lake Lure. The Hammonds were able to buy the property to preserve the restaurant's long-term leasehold. Towards that end, they formed

Largo Properties, LLC, a North Carolina limited liability company. As with all other purchases, the Hammonds funded the transaction with from their personal assets, from third-party lenders, as well as taking an owner-financed promissory note. The Hammonds had to personally guarantee the payments of all financial obligations.

At trial, Pertuis testified that he was not included on this real estate transaction. However, he admitted that he knew about the transaction had no objections when it was happening and never asked to be included. Additionally, he offered no evidence that he could have financially contributed to the down payment. Pertuis' expert valuation witness, Dr. Charles Alford, testified that he reviewed the terms of the lease between Largo Properties and Lake Front Restaurants and found the rent not to be excessive.

Beginning in January of 2009, Pertuis and the Hammonds sought to have agreements drawn up that memorialized his employment and the status of current and future ownership of the companies. In February 2009, the parties met and discussed these issues (and other issues, like disability insurance, etc.) at length began the process of having the appropriate paperwork generated. Following that meeting, Pertuis provided a copy of a proposed shareholder agreement and employment contract.

On April 14, 2009, Mark Hammond sent an email to Pertuis memorializing the status of the various matters, including the negotiating and drafting of a written shareholder agreement. Towards that end, the corporations employed Curtis Stodghill, Esquire, a corporate tax lawyer who had handled other corporate matters for the defendant corporations. Hammond wanted to wait until the 2008 tax returns were completed before finalizing a shareholder agreement so the parties could base their contract on the most current financial data.

By the end of June 2009, the parties were also negotiating the compensation package for Pertuis. In a June 27, 2009 proposal, Mark Hammond set forth three (3) different compensation options to Pertuis. [Def. Ex. 12] In his proposal, Hammond states that Pertius' Net Shareholder Distributions for all three (3) corporations is currently at eight percent (8%). Within one of the options, Hammond stated: "If we go with option A, we will extend the original timeline on the River into 2009 if the final numbers for 2008 fall short of what you need under the original agreement to get you to 10% ownership across the board." At trial, Mark Hammond explained that the "8% Net Shareholder Distribution" figure was derived by adding the 2007 shareholder distributions to Pertuis for Lake Point and for Beachfront at 10% and the distributions of Front Roe at 1%, and calculating what percentage that was of the overall total of distributions to all shareholders for that year. Specifically, Pertuis had received $18,750 for shareholder distributions; the Hammonds collectively received $213,750. $18,750 represented 8% of the $232,500 paid to all shareholders that year.

In Pertuis' counter-proposal [Def. Ex. 13],[1] Pertuis acknowledged, "If I did not achieve 10% ownership in 2008, we will extend the current program through 2009 in order to equalize current ownership at 10% across the board." By his own admission, Pertuis had not achieved 10% ownership in Front Roe. Although at trial Pertuis testified that he did not know what he needed to do to achieve 10% ownership of Front Roe, his counter-proposal made no mention of any ambiguity about what was required of him.

Hammond agreed to portions of Pertuis' counter-proposal for a compensation package. [Def. Ex. 14]. Pertuis' base salary was raised as well as several other areas of his compensation (including bonus, automobile allowance, and insurance).

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[1] "Def. Ex." refers to the Defendants' exhibit that was admitted into evidence at trial. References to "Ex" only, refer to exhibits attached to this motion and memorandum.

By the first of October, 2009, the shareholder agreements had not been received back from the corporate attorney. Pertuis wrote a long email expounding on various issues, ranging from frustration to not having a formal agreement, to 'industry burn-out' and wanting to spend more time with his family. Pertuis had contacted the corporate attorney who confirmed that the documents had been drafted; however, the associate who was responsible was out sick that day.

Pertuis requested, and the Hammonds consented, to take a week off to think about what he wished to do regarding his continuation with the defendant corporations. During that week, Mark Hammond met with Pertuis to discuss his status and his future.

On Sunday, October 11, 2009, Pertuis told Hammond that he had decided to keep moving forward with the companies. The parties were supposed to meet on Monday, October 12, 2009, at the Hammonds' residence on Lake Lure if he had decided to continue his employment.

That morning, the parties met at Larkins on the River in Greenville. Although his pleadings make no mention of wrongful termination or constructive discharge, Pertius testified that the departure was mutually agreed. Hammond testified that Pertuis resigned. Hammond testified that he wanted Pertuis to continue his employment and was disappointed that he had changed his mind. At his meeting that morning, Pertuis met with the director of catering Kristina Murphy. In her testimony Kristina Murphy, and stated that Pertuis told her that he had resigned to spend more time with his family and to pursue other interests. Pertuis did not dispute her testimony.

From that point, the parties began to negotiate the value of Pertuis' interests in the business. When the parties could not agree as to the value, Pertuis sought more detailed financial information about the three (3) corporations.

However, Pertuis admitted that he was looking for employment as a restaurant consultant. Hammond became concerned about releasing the detailed financial information to Pertuis without any assurance of maintaining its confidentiality. Hammond was concerned that Pertuis might use the information when working to help potential competitors of the defendant corporations.

When Pertuis would not consent to a confidentiality agreement, Front Roe filed a declarative suit, acknowledging Pertuis had a right to the information, but sought to impose a protective order restricting disclosure of the information to third-parties.

Procedural History

This case was originally commenced on March 1, 2010, by Front Roe, as the plaintiff, seeking protection of its financial information sought by Pertuis. Once a protective order was entered, Pertuis received all information he requested.

The parties were realigned by agreement. Pertuis first pleading alleging any claim for damages associated with minority shareholder oppression was not filed until two and a half (2½) years later on September 6, 2012. The matter proceeded to trial with Pertuis as the plaintiff, claiming damages for minority shareholder oppression and, seeking the Court to require the defendant corporations to purchase the value of his shares in the respective corporations.

The non-jury trial commenced on May 28, 2013 and concluded with the receipt of evidence on May 29, 2013. Following the receipt of testimony, in *lieu* of hearing closing motions and closing arguments, the Court directed the parties to each submit their proposed findings of fact and conclusions of law on or before June 7, 2013. Because the Court did not entertain post-trial evidentiary motions on the record, Defendants filed their motion for a directed verdict on May 31, 2013. [Ex. 2, Defendants' Motion for a Directed Verdict]

Defendants filed and served their proposed findings of fact and conclusions of law as directed on June 7, 2013. [Ex. 3, Defendants' Proposed Order] On June 18, 2013, the Court notified counsel for both parties of its decision [Ex. 4, Email from Court] The Court adopted Plaintiff's *ex parté* submission nearly *in toto.* [Ex. 5, Plaintiff's Proposed Findings of Fact and Conclusions of Law (with cover email)] Plaintiff's *ex parté* submission contained numerous claims for relief never previously raised and facts which were introduced into evidence.

Defendants file this motion to alter or amend the verdict to address these issues.

Legal Discussion

(1) Defendants' Motion for a Directed Verdict

The order does not address any issue addressed in Defendants' motion for a directed verdict. In this case, at the end of testimony on 5:45 PM on May 29, 2013, the Court had indicated that the parties would return the next day to argue motions and make closing arguments. The next day the parties returned, but engaged in an intensive effort, with the Court's guidance, to negotiate a private settlement. After those negotiations did not result in a resolution, the Court instructed the parties to file written briefs within eight (8) days. The parties never went back on the record to argue motions or to make closing arguments. Accordingly, Defendants timely filed their motion for a directed verdict. [Exhibit 2]

At the close of Plaintiff's evidence, Defendants moved for a directed verdict as to Plaintiff's claims for minority shareholder oppression, wrongful termination, and any monies allegedly due post-employment other the value of his shares in the respective defendant corporations. Defendants filed their written motion for a directed verdict at the close of all evidence and prior to any closing argument, renewing their motion for directed verdict on the

same grounds made at the close of Plaintiff's case regarding minority oppression, as to both the South Carolina corporation and the North Carolina corporations.

Defendants also renew their motion for a directed verdict as to Plaintiff's *de facto* claim for wrongful termination. In his pleadings, Plaintiff never asserted a claim for wrongful termination. Regardless of whether Plaintiff resigned or Plaintiff reached a "mutual decision" with the defendants to no longer work for the defendant corporations, Plaintiff has no claim for lost wages as a matter of law. It is axiomatic under South Carolina law that an employee is at-will unless a contract provides otherwise. There was no contract that altered Plaintiff's employment status. Furthermore, Plaintiff has neither alleged, nor suggested, that his separation from the defendant corporations was based upon some form of discrimination that would give rise to a wrongful termination claim. As such, Plaintiff's claim for wrongful termination and post-employment loss of wages should be stricken.

Finally, Defendants moved for a directed verdict as to any claim for post-employment damages other than the value of his shares in the defendant corporations. Plaintiff never testified that he should have received any specific amount of money allegedly due him as a shareholder of any defendant corporation. At the close of Plaintiff's case, Plaintiff had not requested any sum allegedly due for post-employment distributions. In reply, Plaintiff testified that he had not received any shareholder distribution as support of his claim for minority shareholder oppression, but he never claimed he was due any particular sum of money, nor did he testify that he was seeking them as an item of his he claim for damages. For this reason, Plaintiff's claim for any post-employment losses or damages, except for the value of his shares in the defendant corporations should be stricken.

(2) Erroneous Findings of Fact and/or Conclusions of Law within the Court's July 3, 2013 Order

(a) Plaintiff's request for unpaid shareholder distributions.

The Court's July 3, 2013 order (hereinafter, the "Order") states, "Plaintiff has also sought payment for shareholder distributions which were declared by the three corporate Defendants, but which Plaintiff never received." [Ex. 1, p. 1] This is not true. In Plaintiff's Amended complaint, Plaintiff never requested payment for distributions allegedly not received. [Exhibit 5, Plaintiff's Amended Complaint]. Furthermore, at trial, Plaintiff never testified that he was due any sum for any unpaid distribution. Plaintiff never requested, nor testified, that he was due any specific sum for distributions not received. This request was made for the first time after the evidence and testimony had closed by Plaintiff's attorney in his post-trial *ex parté* submission to the Court. [Ex. 4] Plaintiff's counsel cannot post trial request damages neither requested in the pleadings, nor requested by the plaintiff during the testimony and evidentiary phase of the trial.

(b) Evidence of Plaintiff's Interest in Front Roe Restaurants, Inc.

The Court's Order addresses the evidence of Plaintiff's ownership interest in Defendant Front Roe Restaurants, Inc. ("Defendant Front Roe") as follow:

> Defendant Mark Hammond testified that Plaintiff had become, at the least, a 1% shareholder in Front Roe Restaurants, Inc., ("FRR"). Defendant Mark Hammond disputed, however, that Plaintiff was a 10% shareholder. Hammond testified that there had been a document which set forth a vesting schedule so that, when FRR reached gross profit of $500,000 for a fiscal year, Plaintiff would become a full I 0% shareholder. Hammond testified that FRR had gross profit of $361,498 in 2008, which did not qualify Plaintiff for a 10% ownership position in FRR. Hammond testified that the FRR vesting schedule could not be found. Defendant

Larkin Hammond did not attend the trial of this case to corroborate Defendant Mark Hammond's testimony.[2]

Ex. 1, p.2

The Court's summary of this testimony and evidence is not accurate. It was not disputed by either party at trial that there was a document that memorialized the vesting schedule for Plaintiff's ownership interest in Front Roe. The plaintiff admitted there was a vesting schedule that he had agreed to. The plaintiff also admitted that as of June 30, 2008, Front Roe had not performed at a level that entitled him to a 10% ownership. No one testified, nor was there any other evidence, that the vesting schedule was graduated such that Plaintiff would acquire an interest in Front Roe of anything less than 10% for the restaurant achieving anything less than a net profit of $500,000.00.[3]

The order also misstates the testimony and evidence as to the content of the June 2009 emails surrounding an increase in Plaintiff's compensation. The Court's order states:

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[2] There was no statement by the plaintiff, by Plaintiff's counsel or the Court commenting on the presence or absence of Larkin Hammond at trial as it related to corroborating the terms of the Front Roe vesting schedule. Both Plaintiff and Defendant Mark Hammond testified that all of the terms of Plaintiff's base compensation, bonus and ownership interest in the respective corporations were negotiated and discussed exclusively between the two of them. Specifically, both parties testified that Larkin Hammond did not participate in any discussions or negotiations regarding Plaintiff's compensation.

[3] At trial, Plaintiff testified there was a document that set forth when he would receive his 10% interest in Front Roe, but he testified he did not remember the terms. He confirmed Defendant Hammond's testimony that, unlike the vesting schedule for Beachfront Foods and Lake Point Restaurant which accumulated over time, the vesting schedule for Front Roe Restaurant was based solely on the "controlled profit" of the restaurant. Plaintiff was eligible to achieve a 10% interest in the first year, if the restaurant had met its profit goal. Plaintiff testified that he had received a copy of the vesting schedule document at one point, but could not locate it.

Defendant Mark Hammond provided the only evidence of the terms of the vesting schedule. He testified that he and the plaintiff agreed that if Front Roe achieved $500,000.00 in net profit, the plaintiff would earn a 10% interest.

> Plaintiff presented an exchange of emails which occurred during the early summer of 2009. The emails presented an offer from Plaintiff, apparently accepted by [Defendant Mark Hammond], that Plaintiff was to become a 10% shareholder in [Front Roe Restaurant]. Plaintiff testified that he endeavored to secure formal documentation of his 10% share ownership, to no avail.
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> [Ex. 1, p. 2]

The Court's order materially differs from the actual content of the emails as well as the testimony regarding the same. On June 27, 2009, Defendant Mark Hammond emailed the plaintiff offering three (3) different compensation options. [Def. Ex. 12] Hammond specifically stated:

> if we go with [the option ultimately selected by the plaintiff], we will extend the original timeline on [Front Roe Restaurants] into 2009 if the final numbers for 2008 fall short of what you need under the original agreement to get you to 10% ownership across the board.
>
> [Def. Ex. 12]

Plaintiff responded by accepting this express condition, "If I did not achieve 10% ownership in 2008, we will extend the current program through 2009 in order to equalize current ownership at 10% across the board." [Def. Ex. 13] At trial, while the plaintiff testified he did not remember the amount of net profit Front Roe needed to make for him to earn a 10% interest, he admitted that whatever the goal was, he did not make it. He did not make the threshold in 2008, and he resigned before the end of 2009. There was no testimony or evidence that Front Roe ever met the net profit goal to which the parties agreed would have earned the plaintiff a ten percent (10%) interest in Front Roe.

(3) Corporate loans among the corporate defendants.

In its order, the Court stated, "[f]rom the clear, uncontroverted testimony of Defendant Mark Hammond, Dr. Charles Alford and Louis Manios, this Court finds that there had been considerable movement of corporate funds between [*sic*] the three corporate Defendants, for which Defendants did not produce any documentation in the record of this case." [Ex. 1, p. 2-3] This misstates the evidence at trial. Both Mark Hammond and Louis Manios testified that all loans (including loans from shareholders as well as loans from one corporation to another) were documented within the electronic QuickBooks file for the companies. During his employment with the defendants, the plaintiff testified that he had full access to these electronic files and that he was encouraged to ask the corporate CPA in California any questions he may have had. The plaintiff testified that he elected never to ask the CPA.

There was documentation of the loans in the form accounting entries and tax returns; the parties treated the loans as valid enforceable open account obligations except Front Roe and Lake Point to Main Street, which was documented with a note.

(4) Corporate Meetings

In its order, the Court states, "Defendant Mark Hammond testified that there had been no shareholder meetings, nor had there been any meetings of the board of directors, of any of the three corporate Defendants." [Ex. p.3] This was not the testimony of Mark Hammond. To the contrary, Mr. Hammond testified that both board meetings and shareholder meetings were regularly held among Larkin Hammond, the plaintiff and himself to discuss the progress of the three companies. Plaintiff confirmed these business

meetings during his testimony. These meetings are reflected in the emails about which Mark Hammond generated his summaries. *See*, e.g., Def. Exhibits 6 and 9. Mr. Hammond did testify that they did not send out formal notices of these meetings or keep minutes of these meetings in the corporate records. This is materially different than finding no such meetings took place at all.

(5) All defendants represented by the same counsel.

In its order, the Court noted, "the three corporate Defendants and the majority shareholders were all represented by the same counsel." [Ex. 1, p. 2] The legal representation of a corporate defendant by the same counsel is not a relevant factor under any legal analysis for any issue in this case. There was no conflict of interest was raised by the Court or the opposing party at trial. Additionally, the economy of justice suggests that one counsel would be more beneficial.

(6) The three corporate defendants operated as a *de facto* partnership.

The Court concluded, "[Mark Hammond] and Plaintiff operated the three corporate Defendants as a *de facto* partnership of the corporate entities." There are numerous erroneous findings of fact and conclusions of law underlying this holding of the Court. The undisputed evidence was that Lake Point Restaurants, Inc., Beachfront Foods, Inc. and Front Roe Restaurants, Inc. were three entirely separate corporations. Other than same identity of shareholders (Plaintiff, Mark Hammond and Larkin Hammond) and the same identify of the board of directors (Mark Hammond and Larkin Hammond), the corporations were entirely distinct.

Two of the corporations (Lake Point and Beachfront Foods) are North Carolina corporations, while only one (Front Roe) is a South Carolina corporation. The corporations file separate state and federal income tax returns. Lake Point and Beachfront Foods file state tax returns in North Carolina and file no returns in South Carolina. Conversely, Front Roe files its state returns in South Carolina and does not file any North Carolina return.

Each restaurant corporation has its own location; its own address; its own management; and its own employees. They do not share the same office space or location. There is no one "corporate office" or central location. The shareholder percentage of ownership was not the same for the corporate entities. Employees or managers of one restaurant do not work for the other restaurants. The companies market to completely different clientele with completely different menus and unique cuisine. The companies have separate telephone numbers. In fact, if a prospective customer called Front Roe, for example, the customer could not make a reservation at the other two restaurants. The three corporations have completely different bank accounts and bank loans. The corporations have separate corporate credit cards.

Other than the identity of shareholders and board members, none of the factors support a finding of an amalgamation of corporations as set forth in Magnolia North Prop. Ass'n v. Heritage Communities, Inc., 725 S.E.2d 112, 397 S.C. 348 (Ct. App. 2012), where the purpose of the corporations was merely to operate "as 'cost centers,' thereby containing each development's expenses and oversight as it applied to property management and construction cost allocation." Id. at 118. In Magnolia North Prop. Ass'n, the Court noted that the companies all operated from the same location with the same phone number. No such centralization is evident here.

The Court's finding that Defendant Mark Hammond and the plaintiff operated the three corporate defendants as a '*de facto*' partnership [Ex. 1, p. 2] is not supported by the law or the facts. Section 33-41-210 of the Uniform Partnership Act provides,

> A "partnership" is an association of two or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of this State, a registered limited liability partnership. However, any association formed under any other statute of this State or any statute adopted by authority, other than the authority of this State, is not a partnership under this chapter unless the association would have been a partnership in this State before the adoption of this chapter on February 13, 1950.
>
> S.C. Code §33-41-210.

These corporations were formed under separate North Carolina and South Carolina corporate law. Furthermore, there was no intention to have a unified partnership. In fact, the parties discussed that very option (to form one umbrella corporation which would operate as a 'holding company' for the different corporate entities. This idea was discussed and specifically rejected. [Def. Exs 8, 9 and 11]

In supporting its finding of amalgamation, the court relied upon "the joint and unified web site for the three corporate Defendants." There was no evidence of such a web site, or how such a website meant the three corporations were should be disregarded *in lieu* of finding them to be on entity. In fact, there is no uniform, united website.

Finally, the court found that the locus of the partnership is Greenville, South Carolina. [Ex. 1, p. 2] This finding is also not supported by the evidence. Lake Point and Beachfront Foods operated for more than five years before Mark and Larkin Hammond opened Front Roe. No party did business in the state of South Carolina until that time in 2005. When business meetings for the plaintiff, Mark Hammond and Larkin Hammond were held, they were held

either in North Carolina or in Florida. When the plaintiff was considering resigning and took a week off to 'get his head straight,' he met with Mark Hammond during that week – that meeting took place in North Carolina. Plaintiff testified that he traveled to and among all three corporate restaurants and spent as much time in North Carolina as he did in South Carolina. Accordingly, there is no factual basis to support a finding of the legal amalgamation of Defendant Lake Point Restaurants, Inc., Defendant Beachfront Foods, Inc. and Defendant Front Roe Restaurants, much less that those entities are, in essence, one South Carolina business.

7. Plaintiff's ownership of Beachfront Foods and Lake Point Restaurants

The Court's order states that Defendants "conceded" plaintiff was a 10% owner of these two corporations. Perhaps a matter of semantics, but the defendants have never contended otherwise. The defendant corporations have always maintained in its tax filings, in its representations to the plaintiff and in its representations to the Court (*See*, original complaint of Front Roe Restaurant, Inc., filed March 10, 2010), that Plaintiff earned a 10% ownership interest in these corporations via his continued tenure of employment from 2000 to 2005.

8. Plaintiff's ownership interest of Front Roe Restaurants.

In its order, the Court references the exchange of emails in June 2008. As discussed in detail above, on June 27, 2009, Defendant Mark Hammond emailed the plaintiff offering three (3) different compensation options. [Def. Ex. 12] Hammond specifically stated:

> if we go with [the option ultimately selected by the plaintiff], we will extend the original timeline on [Front Roe Restaurants] into 2009 if the final numbers for 2008 fall short of what you need under the original agreement to get you to 10% ownership across the board.
>
> [Def. Ex. 12]

Plaintiff responded by accepting this express condition, "If I did not achieve 10% ownership in 2008, we will extend the current program through 2009 in order to equalize current ownership at 10% across the board." [Def. Ex. 13] At trial, the plaintiff admitted that he never met the agreed upon goal. He did not make the threshold in 2008, and he resigned before the end of 2009. There was **no** testimony or evidence that the vesting agreement was graduated (i.e., Plaintiff would earn a percentage of ownership by Front Roe achieving a percentage of the $500,000 net profit goal.

Adopting Plaintiff's post-trial *ex parté* submission, the Court then held that Plaintiff owns a 7.2% interest in Front Roe Restaurants because in 2008, the restaurant achieved 72% of the net profit goal. Neither party testified there was a graduated vesting schedule. Plaintiff never sought damages under this methodology at any point during the taking of testimony.

By its ruling, the Court has unilaterally (and, respectfully, impermissibly) rewritten a material term into the contract between the plaintiff and Defendant Front Roe. Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties. Lowcountry Open Land Trust v. Charleston Southern University, 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008); Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (1984) (Courts are without authority to alter a contract by construction or to make new contracts for the parties. Their duty is limited to the interpretation of the contract made by the parties themselves "..... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." *quoting*, Blakely v. Rabon, 266 S.C.68, 221 S.E.2d 767 (1976)).

Although the issue of minority shareholder oppression is an equitable matter, this Court cannot unilaterally create an independent of the contractual agreement to which neither party

testified was the basis of their ownership agreement. There was no testimony or evidence of a graduated vesting schedule, and, hence, no 'meeting of the minds' that ownership would be based upon this means.

It is axiomatic that the plaintiff has the burden to prove each of its elements of his claim. If plaintiff contends he was a 10% owner of Front Roe Restaurants, he must prove the existence of a valid agreement, based upon a meeting of the minds, and the defendants' breach thereof. Plaintiff's only testimony was that there was a vesting schedule (although he could not recall its terms), and that he never made the goal to which he agreed would earn him a 10% share.

At trial, Plaintiff suggested the compensation proposal by Hammond and counter-proposal by Pertuis as evidence that Pertuis' interest in Front Roe is something other than one percent. As noted above, Hammond's original compensation proposal recites that Pertuis currently received 8% of the shareholder distributions for the three corporations. It is not disputed that Pertuis owned 10% of Lake Point and 10% of Beachfront. The only means that Pertuis could receive 8% of shareholder distributions from all three corporations is if he owned something less than 10% of Front Roe.

On cross examination of Mark Hammond, Pertuis' counsel suggested that Pertuis' percentage of ownership in Front Roe could be 4% by averaging 10% for Lake Point, 10% for Beachfront, and 4% for Front Roe. However, there was simply no testimony or evidence that suggested Pertuis ever received 4% of the shareholder income allocations or distributions from Front Roe. It is not the province of the Court to speculate as to the terms of an agreement between two parties.

Once again, faced with the fact that the Pertuis has the burden to prove the amount of his interest, the only testimony about the specific amount of his interest is that he owned (and owns)

1% of Front Roe Restaurants. Accordingly, based upon the evidence at trial, there is no other basis to find that Plaintiff owned anything other than a one percent (1%) interest of Front Roe Restaurants, Inc.

9. Oppression by Mark Hammond

The court found, "[t]his case presents all of the facts which the *Kiriakides* court used as a basis for a court-ordered buyout." [Ex. 1, p. 6] In reaching this finding, the Court based its conclusion upon erroneous findings of fact and interpretations of law.

a. Excluding the plaintiff from a real estate opportunity.

The Court cited Plaintiff's exclusion from a real estate opportunity in connection with [Lake Point Restaurants]. This is a reference to the real estate upon which the Lake Point restaurant sits, which Mark Hammond and Larkin Hammond purchased. Mark Hammond testified this purchase was necessary to preserve the business, to insure a third-party landlord would not buy the property and then seek to terminate the lease with the restaurant.

The evidence supports this. Mark Hammond says that the lease payments of Lake Point are exactly the mortgage payment for the 1.7 Million dollars that the Hammonds had to pay for the property. Plaintiff's expert, Dr. Charles Alford, testified that the amount of the lease payments Lake Point pays is well within reason for that location.

But importantly from an oppression analysis, Plaintiff testified that he knew then the Hammonds were seeking to purchase the land and he never asked to participate. He was not excluded. The transaction was not concealed. Plaintiff never sought to participate.

Plaintiff presented no evidence that he would have been able to contribute to the substantial down payment that was required. Additionally, Plaintiff has absolutely suffered no harm, because the undisputed testimony that the property is upside-down (i.e., that more is owed

on the property than it is worth). Plaintiff cannot identify any damages for his not joining in a transaction that he never asked to be a part of.

b. Changing the threshold for Plaintiff to become a 10% Shareholder of Front Roe Restaurants.

The court found, "Defendants continued to frustrate Plaintiff by changing the threshold to become a 10% shareholder of [Front Roe]. There was no testimony that any defendant changed the threshold. Both parties testified about the existence of a document which contained a vesting schedule for Plaintiff to earn a 10% interest in Front Roe. Both parties testified that they had agreed to this schedule. Neither party could produce a copy of the document in question. Plaintiff testified that he could not remember its terms, but agreed that the restaurant never achieved the net profitability necessary for him to earn the 10% share.

He did not testify that Defendant Mark Hammond kept changing the terms of his vesting. In his email of June 30, 2009, the plaintiff agreed "[i]f I did not achieve 10% ownership in 2008, **we will extend the current program through 2009 in order to equalize current ownership at 10% across the board...**" [Def. Ex. 18(a) (emphasis added)] Importantly, the plaintiff did not say, "I do not understand what the current program is" or "what does it take for me to get 10% across the board?"

At the time of their agreement, there was no ambiguity about what was required. Defendant Hammond never changed the terms of the vesting program.

c. Failing to formally document the agreement memorialized in the email exchange of 2009.

The court held that Defendants continued to frustrate the plaintiff "by failing to formally document the agreement memorialized in the email exchange of 2009." [Ex.1, p.6]. The testimony was undisputed that once the parties reached an agreement in principal about

Plaintiff's compensation package on June 30, 2009, that Mark Hammond asked their corporate attorney to draft the necessary shareholder agreements and related documents. From that point, Defendant Hammond had done what any reasonable businessman would do, turn the matter over to the corporate attorney to draft the paperwork.

Approximately three (3) months later, when Plaintiff complained to Defendant Hammond about the amount of time it was taking, Hammond encouraged the plaintiff to call the corporate attorney to find out the status. Plaintiff's email of October 4, 2009 documents that he called corporate counsel and learned that he thought the paperwork was ready, but that the associate charged with drafting the documents was out sick that day.

By that point, Plaintiff had decided to take some time off to contemplate his future. The plaintiff never worked another day – he quit before returning to work. Thus the corporate attorney ceased working on the drafting of the documents.

The point is that, in its order, the Court seemingly blames Defendant Hammond for a delay in paperwork for which he had reasonably hired counsel to complete. Defendant Hammond acted promptly to engage corporate counsel to complete this. Defendant Hammond was not responsible for the lapse between June 30, 2009 and October 4, 2009 in this not being completed.

d. Defendant Hammond resisting Plaintiff's request for financial records.

The court cited 'post-termination'[4] conduct, including Defendant Hammond's "resisting Plaintiff's request for financial records." [Ex. 1, p. 6] Once the plaintiff resigned, the parties began to negotiate the value of Plaintiff's interests in the businesses. When the parties could not

[4] Plaintiff was not terminated. He voluntarily resigned his employment.

agree as to the value, Plaintiff sought more detailed financial information about the three (3) corporations.

Plaintiff admitted that at the time he was requesting this detailed financial information about the operations of the three (3) corporate defendants, he was actively looking for employment as a restaurant consultant.[5] Hammond became concerned about releasing the detailed financial information to the plaintiff without any assurance of maintaining its confidentiality. Defendant Hammond was concerned that Plaintiff might use the information when working to help potential competitors of the defendant corporations.

By and through their corporate counsel, the defendant corporations reaffirmed it would release the information requested if Plaintiff would consent to a protective order governing its distribution. When plaintiff would not consent to a confidentiality agreement, Front Roe filed a declarative suit, acknowledging Plaintiff had a right to the information, but sought to impose a protective order restricting disclosure of the information to third-parties.

Once suit was filed, Plaintiff finally consented to a protective order. Once that was entered, the defendants produced all financial records.

Hence, Defendant Hammond's insistence upon a binding confidentiality agreement restricting the use of the information to the plaintiff and other authorized recipients was completely reasonable under the circumstances, given Plaintiff's own admission that he was seeking employment as a restaurant consultant at the time. As soon as the protective order was entered, Defendants produced the requested information. the parties began to negotiate the value of Pertuis' interests in the business. When the parties could not agree as to the value, Pertuis sought more detailed financial information about the three (3) corporations.

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[5] Plaintiff emphasized repeatedly that at that time he was looking to capitalize on his twenty-plus years in the restaurant industry.

However, Pertuis admitted that he was looking for employment as a restaurant consultant. Hammond became concerned about releasing the detailed financial information to Pertuis without any assurance of maintaining its confidentiality. Hammond was concerned that Pertuis might use the information when working to help potential competitors of the defendant corporations.

When Pertuis would not consent to a confidentiality agreement, Front Roe filed a declarative suit, acknowledging Pertuis had a right to the information, but sought to impose a protective order restricting disclosure of the information to third-parties.

e. Finding of oppression.

The court held that Defendant Hammond had "committed substantial and material breaches of their [*sic*] fiduciary duties [*sic*] to Plaintiff" and found that plaintiff had been the victim of minority oppression under both South Carolina and North Carolina law.[6] The testimony and evidence in this case do not support any such result.

Application of Internal Affairs Doctrine

Front Roe is a South Carolina corporation, and Lake Point is a North Carolina corporation. The internal affairs doctrine dictates that for purposes of governing affairs of Front Roe, South Carolina law applies and for Lake Point, North Carolina law applies. The internal affairs doctrine is "[a] conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs-matters peculiar to the relationships

[6] At the close of Plaintiff's case, Defendants moved for a directed verdict, *inter alia*, as to any minority oppression claim as to the North Carolina corporations: Lake Point Restaurants and Beachfront Foods. The testimony at that juncture was that the plaintiff had been given everything he was promised as to those two companies (i.e., a 10% interest). Plaintiff's contention was that he believed he owned more than 1% of Front Roe and he disagreed with the values of the corporations. He owned exactly what he was promised as to the two North Carolina corporations.

among or between the corporation and its current officers, directors, and shareholders-because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); similarly, "the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation." *First National Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

South Carolina has legislatively approved this policy and recognizes the law of the State of incorporation for the internal affairs of foreign corporations authorized to do business in South Carolina. SC Code §33-15-105(c).

North Carolina has not adopted a correlative provision with respect to foreign corporations, preferring instead that the internal affairs doctrine be applied on a case by case basis. Comment to NCGS §55-15-105. However, in corporate governance circumstances, the North Carolina court has adopted the internal affairs doctrine. See, *Bluebird Corp. v. Aubin*, 657 S.E.2d 55 (2008)

With respect to Pertuis' claims of oppression, this court should apply the internal affairs doctrine and South Carolina law to the internal affairs of Front Roe and North Carolina law to the internal affairs of Lake Point.

Purchase of Plaintiff's Shares

Plaintiff requested, and Defendant stipulates that this court should order a purchase of Pertuis' shares in Lake Point, Front Roe, and Beachfront. With respect to that purchase, this court must determine (i) the legal foundation; (ii) the purchase price of the shares; and (iii) any

other terms which are appropriate with respect to the purchase.[7] Neither party has advocated for nor is this case appropriate for a court ordered dissolution of any of the companies.

Pertuis ownership Front Roe, while in dispute, is between 1% and 8% and dependent upon the court's evaluation of evidence presented. His ownership in Lake Point is 10%. Both Front Roe and Lake Point are profitable, solvent, going concerns; even if the court finds oppression in one or both cases, dissolution is not appropriate; and in fashioning an appropriate remedy, the court should consider benefit or detriment to shareholders. Hendley v. Lee, 676 F. Supp. 1317 at 1324 (1987).

Effect of Oppression Determination

Pertuis has claimed that he is an oppressed minority shareholder. If oppression is found, then the court may order liquidation of the oppressing company or craft other appropriate relief, in this case a purchase of Pertuis shares at fair value. SC Code §33-14-310 (d) and (e) as to Front Roe and NCGS §55-44-31(d) as to Lake Point. The other aspects of the purchase such as terms, conditions, and procedures are to be established by the court. SC Code §33-14-310 (d) and NCGS §55-14-31(d). Commentators have suggested that a determination of fair value may include appropriate discounts dependent upon the circumstances surrounding the oppression. Sowell and DuRant, *Oppression of Minority Shareholders and Court Ordered Fair Value*, 22 S. Carolina Lawyer 30 (2010).

[7] For these purposes, the parties stipulate that Beachfront has no value. Both the plaintiff's and the defendants' experts as well as Mark Hammond testified that Beachfront had no value. Further, Hammond's testimony implied that because of persisting negative cash flow, debt in excess of assets, and personal guaranties by him and Larkin Hammond of the debt, Beachfront actually has negative value. Defendant Beachfront therefore assumes that as a part of the court's order, Pertuis will transfer all his interest in Beachfront back to the company without further consideration.

If the court does find oppression either in the case of Front Roe or Lake Point or both, neither Front Roe nor Lake Point have access to sufficient cash to purchase Pertuis shares immediately unless the total combined consideration is less than $25,000. In order that Front Roe and Lake Point remain financially healthy and stable they collectively request that no more than $25,000 be paid at the time of any adverse with remaining amounts to be paid quarterly over three years accruing interest at 6%, compounded quarterly.

If the court finds no oppression with respect to Front Roe or Lake Point or both, then relief under SC Code §33-14-300 and NCGS §55-44-30, respectively, is not applicable. Pertuis' prayer for relief would be denied, and Lake Point or Front Roe will not be obligated to purchase the shares Pertuis holds.

Absent oppression and the statutorily mandated "fair value" standard of value is inapposite and the use of a willing buyer willing seller fair market value standard would be appropriate to value the shares. This would require the application of both marketability and minority discounts, which Pertuis' expert testified would be at least 20%.[8]

Oppression Defined

While Pertuis' counsel has argued the Pertuis' termination was the inception of the oppression Both plaintiff's and defendant's experts as well as Mark Hammond testified that Beachfront had no value. For these purposes, the parties stipulate that Beachfront has no value.

Further, Hammond's testimony implied that because of persisting negative cash flow, debt in excess of assets, and personal guaranties by him and Larkin Hammond of the debt, Beachfront actually has negative value. Defendant Beachfront therefore assumes that as a part of

[8] Defendants' expert testified that the combined marketability and minority discounts would be higher reducing the value to Pertuis.

the court's order, Pertuis will transfer all his interest in Beachfront back to the company without further consideration.

Defendants' expert testified that the combined marketability and minority discounts would be higher reducing the value to Pertuis. many others, "[t]he straw that breaks the camel's back and often leads to litigation comes with the majority's offer to buy the minority's shares at fair market value. Once the minority learns fair market value takes into consideration the frozen nature of the stock, the race is on for a better deal or what appears a better deal--the court ordered buyout at fair value." Sowell and DuRant. "Reliable empirical data, for instance the Mergerstat/BVR Control Premium Study, exists to strongly support the proposition that investors prefer and will pay more for shares that convey the rights to control a corporation than for shares that do not. Other data (restricted stock and pre-IPO studies) supports the proposition that investors prefer and will pay more for liquid shares than for illiquid shares." Id at 33. In any event the standards and perspectives for determining oppression for Front Roe in South Carolina and Lake Point in North Carolina are different.

Front Roe – South Carolina

In a South Carolina corporation, the court may effect a remedy for oppression if it is established that "those in control of the corporation have acted, are acting, or will act in a manner that is ***illegal, fraudulent, oppressive, or unfairly prejudicial*** either to the corporation or to any shareholder" SC Code §33-14-300 (2)(ii)(emphasis added). The official comment 2(b) to §33-14-300 states, "[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." "No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These 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 v. Atlas Food Systems, 541 S.E.2d 587 at 597 (2001) "Kiriakides." However, the focus of the statutory language is on the controlling person's wrongful behavior.

The court went on to find, consistent with the Legislature's comment to SC Code §33–18–400, that the terms "oppressive" and "unfairly prejudicial" are elastic terms whose meaning varies with the circumstances presented in a particular case. As noted by one commentator:

While business corporation statutes may attempt to provide certainty and clarity in the law to enhance the attractiveness of doing business, the definition of oppression has been left to judicial construction on a case-by-case basis. Such an approach has been suggested by the Model Close Corporation Supplement which expressly indicates that no attempt has been made to statutorily define oppression, fraud or prejudicial conduct, leaving these "elastic terms" to judicial interpretation.... The judicial construction of the definition of oppressive conduct is well-suited to the diversified, fact-specific disputes among shareholders of closely-held corporations. However, the judicial development of a meaningful standard for defining oppressive conduct, apart from fraud or mismanagement, is a difficult task. Id at 266.

Kiriakides facts provide a "classic example of majority freeze-out... conduct which was fraudulent, oppressive, and unfairly prejudicial" Id. Excerpting *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective,* 53 Vand. L.Rev. 749, 826 (April 2000), the court enumerated common freeze out techniques include the termination of a minority shareholder's employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder. Often, these tactics are used in combination. Id at 757-758. The court then listed specific examples of oppressive conduct by the majority shareholders:

(1) Depriving the minority of the benefits of ownership in shares, and subsequent reduction in distributions based upon the reduced number of shares;

(2) Actions diverting ownership interest in a subsidiary from the minority;

(3) No prospect of minority receiving any financial benefit from their ownership of shares;

(4) The majority shareholder's family receiving substantial benefit from his ownership;

(5) Company holding substantial cash and liquid assets, very little debt and that, notwithstanding its ability to declare dividends, company indicated it would not do so in the foreseeable future;

(6) The fact that the majority shareholder took over total control of the company, and is totally estranged from minority;

(7) Majority shareholder made extremely low buyout offers to minority, and

(8) The company was not appropriate for a public stock offering.

These findings were then "coupled with findings of fraud" and a finding that the majority had acted "had acted "oppressively" and "unfairly prejudicially" to the minority. Kiriakides at 267-268.

Lake Point – North Carolina

The statutory standard for oppression in North Carolina is different than South Carolina and requires the complaining shareholder to establish a remedy available if "***reasonably necessary for the protection of the rights or interests of the complaining shareholder.***" NCGS §55-14-30 (2)(ii). Unlike the focus on the controlling persons for South Carolina corporations, for North Carolina corporations the focus is on the perception of the complaining shareholder. The statutory language without moderating judicial interpretation would leave corporations slave to the minority shareholder rights or interests, an untenable result. Fortunately, the court has limited the

language to the "reasonable expectations" of the minority shareholder in which the majority shareholders have concurred. *Meiselman v Meiselman*, 307 S.E.551 (1983). So it is left for the court to determine if the minority's expectation is reasonable, and the majority agreed to those expectations on a case by case basis. *Meiselman* outlines a four-step analysis for relief under the reasonable expectations standard.

(1) The complaining shareholder must prove he had one or more substantial reasonable expectations that were known or assumed by the other shareholders. *Id.* at 564. Examples of such expectations might include ongoing participation in the management of the company or secure employment with the company. Id. at 558.

(2) He must demonstrate that the expectation or expectations have been frustrated. Id. at 564.

(3) The complaining shareholder must show that this frustration of expectations was not the product of his own fault and was largely beyond his control. Id.

(4) Finally, he must show that the specific circumstances warrant some form of equitable relief. *Id.*

Factual Basis for Oppression Determination

Pertuis bears the burden of proving oppressive, unfair, and prejudicial conduct in both Kiriakides and Meiselman standards of analysis. In this case the evidence showed:

(1) Pertuis obtained his shares in all instances as part of his employment without tendering any separate monetary consideration or undertaking any personal liabilities.

(2) Pertuis was never an officer or director of any of the companies in which he owned shares, and therefore had no management authority.

(3) In spite of not being an officer, until his termination, Pertuis was informed and given the opportunity to discuss material decisions involving the companies.

(4) The parties disagree about whether Pertuis terminated his employment voluntarily. However, when Pertuis was repeatedly questioned about being fired he repeatedly equivocated about the nature of his termination, and characterized it as mutually agreed. This is not indicative of a freeze out or oppressive, unfair, and prejudicial conduct by the majority, neither does it lead to a reasonable expectation of continual employment. The defendants provided evidence that Pertuis chose to terminate employment for a lifestyle and career change. However, it should be noted that if the court determines that Pertuis was terminated involuntarily, then for purposes of Lake Point such termination may be a denial of Pertuis "reasonable expectations" with respect to Lake Point in accord with North Carolina standards for oppression by majority shareholders, but not Front Roe under South Carolina standards.

(5) When asked whether the majority treated Pertuis unfairly, his response was equivocal; paraphrasing, he said he was uncomfortable and didn't like the situation; further he was offended by what he perceived as a low offer for his shares after his employment terminated. Again this is not oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(6) Ignoring that the claim should have been made derivatively, Pertuis' counsel attempted to characterize the majority's conduct as breaching of fiduciary duty as it related to the Hammonds purchase real estate leased by Lake Point from an unrelated person in spite of (i) evidence submitted by Pertuis' expert indicating the Lake Point was paying fair rental; (ii) uncontroverted testimony by Mark Hammond that the value of the real estate is presently less than the price paid; and (iii) evidence that Pertuis knew of the investment, but did not ask to be included or evidence that he had the financial ability to be included. This is not oppressive, unfair, and prejudicial conduct, but reasonable business judgment, and no objection was voiced at the time

of the purchase. This is not oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(7) Again, ignoring that the claim should have been made derivatively, Pertuis' counsel attempted to characterize the majority's conduct as breaching of fiduciary duty as it related to the Hammonds opening another distinctively themed restaurant in Greenville in another corporation without Pertuis having ownership. This in spite of evidence of Pertuis previous involvement in ordinary business and legal practice to open each restaurant operation in separate corporations; and that Front Roe and Lake Point did in fact make a loan to the new enterprise, currently being serviced and generating interest income to Front Roe and Lake Point, which is to the advantage of all the shareholders including Pertuis. Continuing past business practice consistent with those before Pertuis' termination is not indicative of oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(8) In spite of Pertuis' counsel attempting to characterize loans from and to the corporation by the shareholders made before and during Pertuis employment (including Pertuis), there was no evidence that the Hammonds were looting the companies. In fact Pertuis' expert Dr. Alford indicated they were being paid less than market. This is not oppressive, unfair, and prejudicial conduct by the majority, but common practice where timing of cash needs of related companies vary under either the North or South Carolina standards.

(9) There was no evidence indicating the Hammonds were attempting to "freeze out" Pertuis by eliminating the financial benefits of ownership through distributions. The companies are all subject to substantial indebtedness to financial institutions or unrelated third parties, all of which is guaranteed by the Hammonds, but not Pertuis, and they made a reasonable business judgment to loan money to a new restaurant venture, which will benefit all the shareholders. Once that

loan is repaid, they expect distributions to be reinstated as with past practice. This is not indicative of oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(10) The Hammonds have not called shareholder meetings since Pertuis' termination and failed to properly document such meetings during his employment. While not excusing this failure, your honor should take judicial notice that failure to keep regular minutes and have shareholder meetings during litigation with minority shareholders is the rule and not the exception for closely held corporations. This could be interpreted as adverse to Pertuis' reasonable expectation and oppressive under the North Carolina standard, but is not oppressive, unfair, and prejudicial conduct by the majority under the South Carolina.

For these reasons, the plaintiff did not met his burden of proving the misconduct by the majority shareholders that rises to the level of constituting minority shareholder oppression under either North Carolina law or South Carolina. For this reason, his claim for relief under South Carolina Code of Laws §33-14-300, et seq. should be denied.

10. Fair Market Value for Court-Ordered Buyout

The Court ordered the defendants to purchase Plaintiff's shares. In reaching the conclusion supporting oppression, the Court found the three (3) corporate defendants were a legal amalgamation of one entity. However, when assessing value, the court treats the corporations separately. Specifically, the court does not take into account that Beachfront Foods has a negative value. According to Dr. Alford's report, Beachfront Foods has negative owners' equity of $410,271. [Alford Report, Attachment 17] Given the fact that Dr. Alfords' values for the other two corporations ranged between 2.4 (Lake Point) and 2.7 (Front Roe) times his

derived owners' equity for those corporations, any award to the plaintiff should be offset by the ten percent (Plaintiff's share) of the loss of Beachfront. This would be a reduction between $98,465 and $110,773.

The plaintiff cannot have it both ways. Either all three corporations are combined, in which case the negative value of one must be included; or, they are separate and distinct, such that a finding of amalgamation is not legally supported.

11. Bonuses and Distributions

In its order, the Court stated that Defendant Hammond testified as to the "murkiness of the distributions which were given to Plaintiff." [Ex. p. 7] This was not his testimony. Defendant Hammond testified that the amount listed as shareholder distributions was a function of the amount of compensation due the plaintiff through his bonuses which were treated as a distribution as a tax advantage to the plaintiff. The companies' CPA booked these distributions were booked within the QuickBooks file for all three companies. On cross-examination, the plaintiff admitted that he was encouraged contact the CPA to ask any questions he had about these distributions and admitted that he never did.

Concluding this to be "shaky accounting," the court found the booking of the distributions to be an additional form of oppression and wrongdoing. [Ex. 1, p.8] The Court wrongfully blames Defendant Hammond for the QuickBooks files that were generated and prepared by the corporations' certified public accountant. As a matter of equity, this seems particularly inappropriate when the plaintiff was freely afforded the opportunity to ask any question he had about any confusion related to the booking of bonuses and distributions, and he did not even attempt to get a clarification.

Ironically, the Court goes on to conclude, "the Court has determined to rely on the corporate Defendants' tax returns as a more credible source." **The tax returns were prepared by the very same CPA who generated the accounting entries within the QuickBooks files.** Furthermore, the information contained with the tax returns were based upon the information taken from the QuickBooks files. There is no factual basis to conclude that the tax returns are more reliable than the QuickBooks files; or that the manner by which the company's CPA recorded the data constituted "shaky accounting" by Defendant Mark Hammond.

12. The calculation of the award to the plaintiff.

a. Front Roe Restaurants

The Court awarded the plaintiff $198,189 as 7.2% of the value of Front Roe. As stated previously, there was no agreement for a graduated vesting case, and therefore, no legal or factual basis for awarding 7.2%. Further, the value determined by the Court ignores the reality that the location has a lease terminating in 9.5 years. A large portion of Front Roe's current value is directly attributable to its current location. Dr. Alford could not identify a single major restaurant that had completely relocated to a second venue and remained successful. Finally, because there was no minority oppression, the value is not properly discounted to recognize the fact of owning a minority share of this amount.

b. Beachfront Foods and Lake Point Restaurants

The Court awarded the plaintiff $98,047 for the 10% value of Beachfront Foods and Lake Point Restaurants. As discussed above, the Court failed to incorporate the negative value of Beachfront Foods when awarding the plaintiff. If the companies are truly one for amalgamation purposes, any award to the plaintiff should be reduced by this amount, which based upon the values with Dr. Alford's report is between $98,465 and $110,773. Also, because there was no

minority oppression, the value is not properly discounted to recognize the fact of owning a minority share of this amount.

c. Shareholder distributions not received.

The Court also erroneously awarded the plaintiff $99,117 "for distributions which he did not receive." [*Id.*, p.9] As previously stated, Plaintiff cannot recover damages that he did not claim at trial. At no point during the course of his case in chief, or any time when the Court received testimony, did the plaintiff testify I am owed any sum of money for distributions I did not receive. The first time Plaintiff requested these damages was in his *ex parté* post-trial submission to the Court. Plaintiff never requested these damages in pre-trial discovery. In fact, when deposed the Friday before trial, Plaintiff did not testifying he was seeking to recover these alleged damages.

Because it was never requested, Defendants are completely without any opportunity to cross-examine the evidence about what the plaintiff is claiming he is owed. For these reasons, the damages should not be awarded.

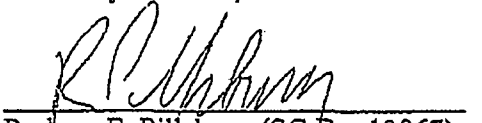
Conclusion

For the reasons set forth herein, the defendants respectfully request the court to reconsider and/or to amend its order to conform to the evidence that was admitted at trial, and once applying those facts, determine that plaintiff has not proven a claim for minority shareholder oppression or that there is a legal basis to find an amalgamation of the three corporate defendants. Further, the percentage of ownership by the plaintiff of Front Roe Restaurants, Inc. which the court found to be 7.2%, is, respectfully, supported neither by the evidence nor law. Also, Plaintiff cannot recover a claim for shareholder distributions that were not received, which was raised for the first time in post-trial submissions to the court. Finally, as

discussed above in detail, the values for the defendant corporations are not supported by the competent evidence.

Respectfully Submitted,

Pillsbury & Read, P.A.



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ATTORNEY FOR DEFENDANTS.

July 8, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO:

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUL -3 A 9:27

Kyle Pertuis *vs.* Beachfront Foods Inc

CHECK ONE:

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried and a decision rendered.

EXHIBIT 1

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ R

SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 3rd day of July, 2013, and a copy mailed first class this 3rd day of July, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Rodney F. Pillsbury 1204-A E. Washington St. Greenville, SC 29601
Curtis Warren Stodghill PO Box 2431 Greenville, SC 296022431

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ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

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PAM B. WICKENSIMER
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	2010-CP-23-1646
Kyle Pertuis,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER
Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond, Larkin Hammond,	)	
	)	
Defendants.	)	

This case came before this Court for a bench trial on May 28, 29, 2013. Plaintiff's claim, essentially, was that Defendants Mark and Larkin Hammond, ("MLH"), had oppressed Plaintiff as a minority shareholder in the corporate Defendants. As relief, Plaintiff sought that this Court order a buyout of Plaintiff's shareholding in the three corporate Defendants. Plaintiff has also sought payment for shareholder distributions which were declared by the successor corporate Defendants but which Plaintiff never received. Plaintiff additionally sought compensation for the termination of his employment by MLH.

Plaintiff testified that he had been employed by MLH to work for the three corporate Defendants as Managing General Partner for the restaurants owned by the corporate Defendants. Plaintiff's worked for Defendants for 9.5 years; Plaintiff was responsible for the operations of 3 restaurants and approximately 100 employees. Plaintiff had acquired a 10% ownership in Beachfront Foods, Inc., ("BFI"), and in Lake Point Restaurants, Inc., ("LPR"), by operation of graduated employee stock vesting plans.

Defendant Mark Hammond testified that Plaintiff had become, at the least, a 1% shareholder in Front Roe Restaurants, Inc., ("FRR"). Defendant Mark Hammond disputed however that Plaintiff was a 10% shareholder. Hammond testified that there had been a document which set forth a vesting schedule so that, when FRR reached gross profit of $500,000 for a fiscal year, Plaintiff would become a full 10% shareholder. Hammond testified that FRR had gross profit of $361,498 in 2008, which did not qualify Plaintiff for a 10% ownership position in FRR. Hammond testified that the FRR vesting schedule could not be found. Defendant Larkin Hammond did not attend the trial of this case to corroborate Defendant Mark Hammond's testimony.

Plaintiff presented an exchange of emails which occurred during the early summer of 2009. The emails presented appear to show Plaintiff apparently accepted by virtue that Plaintiff was to become a 10% shareholder in FRR. Plaintiff testified that he endeavored to solicit formal documentation of the 10% shareholder interest.

For Plaintiff, Dr. Charles Alford, Ph.D., testified as an expert witness as to the valuation of the corporate Defendants. Defendants presented Louis Manios, a local Public Accountant, to testify as to the valuation of the corporate Defendants. The Court finds, by virtue of his excellent credentials, Dr. Alford's testimony to be more persuasive.

Based on the testimony presented and the documents introduced into the record of this case, the Court makes the following findings of fact and conclusions of law:

1. **Plaintiff and Defendants owned and operated a *de facto* partnership from Greenville.**

This Court finds that Plaintiff was the Managing General Partner, in charge of the operations at the three corporate Defendants. From the clear, uncontroverted testimony of

Defendant Mark Hammond, Dr. Charles Alford, and Louis Manios. This Court finds that there had been considerable movement of corporate funds between the three corporate Defendants, for which Defendants did not produce any documentation in the record of this case. Defendant Mark Hammond testified that there had been no shareholder meetings, nor had there been any meetings of the board of directors, of any of the three corporate Defendants.

The record of this case presents other examples of disregard for corporate formalities. Defendant Mark Hammond testified that, without any corporate formality, MLH conveyed a boat to Plaintiff to avoid liability and high insurance premiums. It is worth noting that the three corporate Defendants and the majority shareholders were all represented by same counsel. Throughout, there has been a dearth of respect for proper corporate governance amongst the three corporate Defendants, blurring the distinction between the corporate Defendants. Accordingly, this Court finds and concludes, applying the standards articulated in *Magnolia North Prop. Owners' Ass'n* v. *Heritage Communities, Inc.*, 725 SE2d.112, 397 SC 348 (Ct. App. 2012), that MLH and Plaintiff operated the three corporate Defendants as a *de facto* partnership of the corporate entities. From Plaintiff's title, "Managing General Partner," from the joint and unified internet web site for the three corporate Defendants, and from the parties' email, the Court further finds that the *de facto* partnership's agent was MLH.

2. Plaintiff is a 10% shareholder in Defendants Beachfront Foods, Inc., and in Lake Point Restaurants, Inc.

MLH and the corporate Defendants conceded that Plaintiff was a 10% shareholder in Beachfront Foods, Inc. ("BFI") and Lake Point Restaurants ("LPR"). Accordingly, it is the law of this case that Plaintiff was, and is, a 10% shareholder in BFI and LPR.

3. **Plaintiff's shareholder ownership in Front Roe Restaurants, Inc.**

Plaintiff and Defendants contested the level of shareholding of Plaintiff in Front Roe Restaurants, Inc., ("FRR").

In support of his case for 10% ownership of FRR, Plaintiff introduced an exchange of emails. In the exchange of emails, Defendant Mark Hammond offered Plaintiff in late 2008 $5,000 in salary, conveyance of a boat, and 10% of the stock of the corporations. In reply to Mark Hammond's offer, Plaintiff counterproposed that Plaintiff receive a salary of $67,000, conveyance of the boat, and 10% of the shares of dividend distributions, retroactive to 2008. Plaintiff had not already achieved 10% ownership in the three corporate Defendants. In response to Plaintiff's counterproposal, Mark Hammond advised on June 30, 2009, that the corporations would incorporate Plaintiff's changes into a forthcoming "employment agreement," which was to be delivered soon.

Defendant Mark Hammond then adjusted Plaintiff's salary to $67,000; Mark Hammond conveyed the boat to Plaintiff. Plaintiff argues that there had been a "meeting of the minds" and that the parties engaged, at least, in part performance of their understanding, as documented by the foregoing emails. Plaintiff asserts that thereafter Plaintiff was a 10% shareholder in the three corporate Defendants.

Defendant Mark Hammond, however, testified that Plaintiff would not become a 10% shareholder in FRR until FRR reached $500,000 in gross profit, under the terms of the missing FRR vesting schedule. Defendant Mark Hammond testified that the 2008 gross profit for FRR was $361,498. Calculation shows that $361,498 is 72% of $500,000. This Court finds and concludes that details in support of Plaintiff's argument for 10% ownership from the exchange

Emy

[redacted] Based on the foregoing, this Court has determined to declare that Plaintiff's ownership in FRR is 7.2%. ("Equity regards and treats as done that which in good conscience ought to be done." *Wilkie* v. *Phila. Life Ins. Co.*, 197 SE 375, 187 SC 382 (1938); *Atwell* v. *Orr*, 589 F. Supp. 511 (D.Ct. SC, 1984).

4. Oppression of Plaintiff by MLH.

Plaintiff has alleged that MLH has oppressed him as a majority shareholder, in violation of their common-law corporate fiduciary duties to Plaintiff. The landmark SC case for the oppression of minority shareholders is *Kiriakides* v. *Atlas Food Systems and Services, Inc.*, 541 SE2nd 257, 343 SC 587, (S.Ct. 2001). In *Kiriakides*, the SC Supreme Court found, the following criteria sufficient to order a buyout of the minority shareholders:

1. Unilateral action to deprive the shareholder of correct shareholding percentage;
2. Refusal to offer opportunity to minority shareholder to participate in related enterprises;
3. Minority shareholder cannot participate in future salary, distributions, and profits;
4. Majority continues to reap the benefits from the corporations;

[1] The Court notes that the parties had employed a *graduated* employee stock vesting schedule for Plaintiff's stock acquisition in BFI and LPR, *supra*.

5. Adequate financial strength in the corporations to afford a buyout;

6. Total estrangement between majority and the minority;

7. Low-ball buyout offer to minority;

8. No public trading in stock of corporation.

Kiriakides, pp. 267-268, pp. 342-343, supra.

This case presents all of the facts which the *Kiriakides* court used as a basis for a court-ordered buyout. This Court has also considered legal authority from North Carolina, submitted by Defendants, which provides additional support for the foregoing analysis: *Meiselman* v. *Meiselman*, 307 SE2d 551, 309 NC 279 (S.Ct. 1983).

[redacted] These are classic examples of misappropriation of corporate opportunities by the majority shareholders and are oppressive to the minority shareholder.

[redacted] Post-termination examples of oppressive conduct by MLH included resisting Plaintiff's request for financial records, demanding return of the boat conveyed to Plaintiff as compensation, and using corporate funds to contest Plaintiff's shareholder rights. Based on the foregoing, this Court finds that MLH committed substantial and material breaches of their corporate fiduciary duties to Plaintiff.

5. Plaintiff established a fair market value for a court-ordered buyout.

Plaintiff presented Dr. Charles Alford, Ph.D., to testify, as an expert, as to the "fair market value" of the three corporate Defendants. Dr. Alford described his methodology and the data to which he applied his methodology. Essentially, Dr. Alford established that LPR had a fair market value of $507,000; Dr. Alford established that BR had no value; Dr. Alford established that FRR had a fair market value of $1,376,000. Dr. Alford established that "Larkins" was a brand which would have value in this area, regardless of the particular location in which it was located. This Court finds that Dr. Alford presented an entirely believable and competent analysis for the Court's use, based on his credentials and based on his demonstrated application of methodology.

In response to Dr. Alford, Defendants presented Louis Manios, a local public accountant. On cross-examination, Mr. Manios conceded that no minority shareholder discount should apply to any buyout of Plaintiff's stock by the majority. Mr. Manios' testimony as to the dismal future presented for FRR was not credible and did not take into account the growth and vibrancy of the downtown area of Greenville and the value of the name "Larkins" as a brand. Interestingly, Mr. Manios conceded that his schedules did not conform to GAAP, which govern the format of Mr. Manios' schedules.

6. Distributions and bonuses.

Plaintiff testified that he never received shareholder distributions from FRR or from LPR, despite tax returns, and K-1 schedules which purported to show such distributions. Defendant Mark Hammond, himself, testified as to the murkiness of the "distributions" which were "given" to Plaintiff. Defendant Mark Hammond testified that Plaintiff's bonuses were disguised as

distributions, but that they weren't distributions. To further confuse the issue about bonuses and distributions, there were emails between the parties which showed that the distributions and bonuses were to be separate and cumulative. In response to questions from the Court, Dr. Alford expressed concern that the bookkeeping for Defendants was unclear on this issue. The Court shares Dr. Alford's reservations about the reliability of Defendants' accounting. The record of this case is replete with references to shareholder/corporate loans for which no documentation was presented. For this reason the Court has determined to rely on the corporate Defendants' own more credible calculations of the amounts of distributions which were contributed to Plaintiff by the corporate Defendants.

This Court finds and concludes that the shaky accounting applied by Defendants MLH to the distribution/bonus compensation was an additional form of oppression and wrongdoing by Defendants MLH.

7. **Plaintiff shall not receive compensation for the termination of his employment.**

8. **Based on the testimony and exhibits which are the basis for the foregoing findings of fact and conclusions of law, this Court orders the following:**

Given the estrangement between the minority and the majority shareholders, there must be a parting of the ways among the shareholders. This Court adheres to sound judicial policy, as articulated under *Kirlakides* and *Meiselman, supra*, to provide for a fair buyout for an oppressed minority shareholder whose investment in a corporation is otherwise without a market. This Court concludes, then, that the most equitable way to achieve a just workout of the differences between the parties is the following:

a. Plaintiff shall receive $198,189 for a 7.2% shareholder interest in FRR;

b. Plaintiff shall receive $198,189 for his interest in Pizzeria LLC;

c. [redacted]

d. Plaintiff shall surrender all documents, records, stock certificates, and other corporate property to Defendants and shall execute all documents reasonably necessary to bring the corporate records to full compliance with good corporate governance.

It is ordered that the parties shall comply with the terms of this Order within 45 days of the date of this Order.

Judge Edward W. Miller

June 7/2 2013

EXHIBIT 2

STATE OF SOUTH CAROLINA)
FILED CLERK OF COURT
GREENVILLE CO. S.C.
COUNTY OF GREENVILLE PAUL B. WICKENSIMER)
)
2013 MAY 31 P 4:34
Kyle Pertuis)
Plaintiff,)
vs.)
)
Front Roe Restaurants)
Defendant.)

IN THE COURT OF COMMO
13th JUDICIAL CIRCUIT

CASE NO.: 10-CP-23-1646

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Robert Wilson, Bar No. _____ Address: 201 Whitsett St., Greenville, SC Phone: (864)241-9488Fax 864)242-6251 E-mail: _____Other: _____	Rodney F. Pillsbury, Bar No. _____ Address: 1204-A E. Washington St., Greenville, SC 29601 Phone: (864) 241-9828 Fax(864) 241-9818 E-mail: _____Other: _____

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Defendants' Motion for Directed Verdict
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ May 31, 2013
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

Kyle Pertuis,

Plaintiff,

v.

Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond.

Defendants.

C.A. No.: 2010-CP-23-1646

DEFENDANTS' MOTION FOR A DIRECTED VERDICT

Pursuant to Rule 50 of the South Carolina Rules of Civil Procedure, Defendants move for a directed verdict as to Plaintiff's claims for minority shareholder oppression, wrongful termination, and any monies allegedly due post-employment other the value of his shares in the respective defendant corporations.[1] Defendants renew their motion for directed verdict on the same grounds made at the close of Plaintiff's case regarding minority oppression, as to both the South Carolina corporation and the North Carolina corporations.

Defendants also renew their motion for a directed verdict as to Plaintiff's *de facto* claim for wrongful termination. In his pleadings, Plaintiff never asserted a claim for wrongful termination. Regardless of whether Plaintiff resigned or Plaintiff reached a "mutual decision" with the defendants to no longer work for the defendant corporations, Plaintiff has no claim for lost wages as a matter of law. It is axiomatic under South Carolina law that an employee is at-

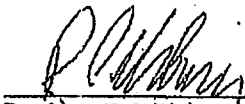
[1] At the end of testimony on 5:45 PM on May 29, 2013, the Court had indicated that the parties would return the next day to argue motions and make closing argument. The next day the parties returned, but engaged in an intensive effort, with the Court's guidance, to negotiate a private settlement. After those negotiations did not result in a resolution, the Court instructed the parties to file written briefs within eight (8) days. The parties never went back on the record to argue motions or to make closing arguments.

will unless a contract provides otherwise. There was no contract that altered Plaintiff's employment status. Furthermore, Plaintiff has neither alleged, nor suggested, that his separation from the defendant corporations was based upon some form of discrimination that would give rise to a wrongful termination claim. As such, Plaintiff's claim for wrongful termination and post-employment loss of wages should be stricken.

Finally, Defendants move for a directed verdict as to any claim for post-employment damages other than the value of his shares in the defendant corporations. Plaintiff never testified that he should have received any specific amount of money allegedly due him as a shareholder of any defendant corporation. At the close of Plaintiff's case, Plaintiff had not requested any sum allegedly due for post-employment distributions. In reply, Plaintiff testified that he had not received any shareholder distribution as support of his claim for minority shareholder oppression, but he never claimed he was due any particular sum of money, nor did he testify that he was seeking them as an item of his he claim for damages. For this reason, Plaintiff's claim for any post-employment losses or damages, except for the value of his shares in the defendant corporations should be stricken.

Respectfully Submitted,

Pillsbury & Read, P.A.



Rodney F. Pillsbury (SC Bar 13067)
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ATTORNEY FOR DEFENDANTS.

May 31, 2013

Rodney F. Pillsbury
John M. Read, IV*
† Admitted in SC & GA
* Admitted in NY

PILLSBURY & READ, P.A.
ATTORNEYS AT LAW

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Greenville, South Carolina 29601
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Facsimile: (864) 241-9818
http://www.prlawpa.com

June 7, 2013

FILE COPY

VIA HAND-DELIVERY

EXHIBIT 3

The Honorable Edward W. Miller
13th Judicial Circuit
Greenville County Courthouse
305 E. North St.
Greenville SC 29601

Re: Kyle Pertuis v. Front Roe Restaurants, et al., 10-CP-23-1646

Dear Judge Miller:

Pursuant to your request, please find enclosed Defendant's Proposed Findings of Fact and Conclusions of Law along with a copy of our Certificate of Service for same. I have submitted the first page with a revised caption of "Order" for your convenience.

By copy of this letter, I am enclosing and serving upon them a copy of same to all counsel.

If you need anything further please let me know. As always, please accept my highest regards,

Yours very truly,

Pillsbury & Read, P.A.

Rodney F. Pillsbury

RFP/tpd
Enclosure
cc: Clerk of Court, Greenville County (via hand delivery)
Curtis Stodghill, Esq. (via email only)
Robert C. Wilson, Esq. (via email and US mail)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	13th JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	
)	CASE NO.: 10-CP-23-1646
)	
Kyle Pertuis)	MOTION AND ORDER INFORMATION
Plaintiff,)	FORM AND COVERSHEET
vs.)	
)	
Front Roe Restaurants)	
Defendant.)	

Plaintiff's Attorney:	Defendant's Attorney:
Robert Wilson, Bar No. _____	Rodney F. Pillsbury, Bar No. _____
Address:	Address:
201 Whitsett St., Greenville, SC	1204-A E. Washington St., Greenville, SC 29601
Phone: (864)241-9488Fax 864)242-6251	Phone: (864) 241-9828 Fax(864) 241-9818
E-mail: _____Other: _____	E-mail: _____Other: _____

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Defendants' Proposed Findings of Fact andConclusions of Law
Estimated Time Needed: _____ Court Reporter Needed: ☐YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby ~~move for relief or action~~ by the court as set forth in the attached proposed order.

_____ June 7, 2013
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $_____
☐ CONTESTED – AMOUNT DUE: $_____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Kyle Pertuis,	)	C.A. No.: 2010-CP-23-1646
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond.	)	
	)	
Defendants.	)	

This matter comes before the Court after holding a non-jury trial on May 28 and 29, 2013. Based upon the testimony and evidence admitted, the Court makes the following findings of fact and conclusions of law:

Factual Background

This case originated as a declaratory relief claim by Front Roe Restaurants, Inc. which sought to require the disclosure of its financial records to Mr. Pertuis to be subject to the terms of a confidentiality agreement. Since its original filing, this case metamorphosed into a minority shareholder oppression claim, which was the context in which the matter was tried before the court.

In 1998, Defendants Mark Hammond and Larkin Hammond formed Lake Point Restaurants, Inc. [hereinafter "Lake Point"], a North Carolina corporation, and purchased a restaurant on Lake Lure, North Carolina. The Hammond defendants were the sole shareholders with equal ownership in the corporation. The Hammonds financed the purchase of the restaurant through personal contributions, owner-financing as well as third-party loans. The Hammonds

have personally guaranteed all third party business loans. The business operated as "Larkins on the Lake" and remains a viable business today.

In 2000, the Hammonds hired Plaintiff Kyle Pertuis [hereinafter "Plaintiff" or "Pertuis"] as a manager of the restaurant. The parties agree that Pertuis was to attain a ten percent (10%) ownership of Lake Point Restaurants, which vested at an agreed schedule over a five (5) year period. Although neither party could produce the document that set forth the vesting schedule, all parties agreed the document existed and all parties followed the terms of that document. Thus, by 2007, Pertuis had attained a ten (10%) ownership in Lake Point Restaurants. [Def. Ex. 29(f)]

In 2001, Defendants Mark Hammond and Larkin Hammond formed Beachfront Foods, Inc. [hereinafter "Beachfront"], a North Carolina corporation. In that corporation, they purchased a restaurant in Lake Lure, North Carolina, later sold that business and opened a restaurant in Columbus, North Carolina. The Hammond defendants were initially the sole shareholders with equal ownership in the corporation. The Hammonds financed the purchase of the restaurant through personal contributions, owner-financing as well as third-party loans. The Hammonds have personally guaranteed all third party business loans. The business currently operates as "Larkins Grill" and is not profitable.

As with Lake Point, the parties agree that Mr. Pertuis was to attain a ten percent (10%) ownership of Beachfront, which vested at an agreed schedule over a five (5) year period. Although neither party could produce the document that set forth the vesting schedule, all parties agreed the document existed and all parties followed the terms of that document. Thus, by 2007, Pertuis had attained a ten (10%) ownership in Beachfront. [Def. Ex. 30(f)]

When Beachfront was opened, Pertuis' title was changed to "Director of Operations" or "Managing Partner." His duties and responsibilities expanded as well as his compensation. Pertuis was paid a base salary, plus a bonus. The bonus was based upon each restaurant achieving certain quarterly profitability goals.

In April 2005, the Hammonds formed Front Roe Restaurants, Inc. [hereinafter "Front Roe"], a South Carolina corporation and purchased Renee's Steakhouse in Greenville, South Carolina. The Hammond defendants were the sole shareholders with equal ownership in the corporation. The Hammonds financed the purchase of the restaurant through personal contributions as well as third-party loans. The Hammonds have personally guaranteed all third party business loans. The business currently operates as "Larkins on the River" and is currently the most profitable of the three (3) corporations.

As to all defendant corporations, the purchase of the restaurant business assets were made, in part, with the payment from personal assets by Mark Hammond and Larkin Hammond. The Hammonds have had to personally guaranty all third party business loans. Pertuis is not personally obligated for the payment of any business loan by any of the defendant corporations.

The parties agree that Pertuis was offered an opportunity to acquire ownership in Front Roe. However, instead of Pertuis' interest accumulating over time as with Lake Point and Beachfront, for Front Roe the parties agree that Pertuis would acquire a ten (10%) percent interest in Front Roe once the restaurant achieved a certain financial milestones. If the milestones had been achieved in year one, Pertuis' interest would have been ten (10%) percent that year.

Unlike the other two corporations, the parties agree that there was a document that set forth the terms of the vesting of Pertuis' interest in Front Roe. Although neither party could

produce the document that set forth the vesting schedule, all parties agree the document existed. Pertuis testified he could not remember what the terms of the agreement were, but he admitted that Front Roe never achieved the level of profitability that would have earned him a ten percent (10%) interest in Front Roe.

Mark Hammond testified that the agreement provided that Pertuis would receive a one percent (1%) ownership once Front Roe was profitable and ten percent (10%) once the restaurant achieved a net operating profit of $500,000. He testified, and the tax records confirmed, that in 2006, Front Roe was profitable for the first time, so Pertuis was awarded a one percent (1%) interest. He also testified, and the tax records confirm, that Front Roe has never achieved the $500,000 net operating profit goal.

The parties do not dispute that since 2007, Pertuis has received K-1's from Lake Point, Beachfront and Front Roe that reflect his interest in those corporations as 10%, 10% and 1%, respectively. The parties stipulated at no time has Pertuis filed notice with the IRS, pursuant to 26 U.S.C. §6037, that the income or percentage of ownership reported on his schedule K-1 by Front Roe was inaccurate or inconsistent with what he believed he owned.

During this time period, the Hammonds became concerned about the ownership of the land where Lake Point operated its restaurant on Lake Lure. The Hammonds were able to buy the property to preserve the restaurant's long-term leasehold. Towards that end, they formed Largo Properties, LLC, a North Carolina limited liability company. As with all other purchases, the Hammonds funded the transaction with from their personal assets, from third-party lenders, as well as taking an owner-financed promissory note. The Hammonds had to personally guarantee the payments of all financial obligations.

At trial, Pertuis testified that he was not included on this real estate transaction. However, he admitted that he knew about the transaction had no objections when it was happening and never asked to be included. Additionally, he offered no evidence that he could have financially contributed to the down payment. Pertuis' expert valuation witness, Dr. Charles Alford, testified that he reviewed the terms of the lease between Largo Properties and Lake Front Restaurants and found the rent not to be excessive.

Beginning in January of 2009, Pertuis and the Hammonds sought to have agreements drawn up that memorialized his employment and the status of current and future ownership of the companies. In February 2009, the parties met and discussed these issues (and other issues, like disability insurance, etc.) at length began the process of having the appropriate paperwork generated. Following that meeting, Pertuis provided a copy of a proposed shareholder agreement and employment contract.

On April 14, 2009, Mark Hammond sent an email to Pertuis memorializing the status of the various matters, including the negotiating and drafting of a written shareholder agreement. Towards that end, the corporations employed Curtis Stodghill, Esquire, a corporate tax lawyer who had handled other corporate matters for the defendant corporations. Hammond wanted to wait until the 2008 tax returns were completed before finalizing a shareholder agreement so the parties could base their contract on the most current financial data.

By the end of June 2009, the parties were also negotiating the compensation package for Pertuis. In a June 27, 2009 proposal, Mark Hammond set forth three (3) different compensation options to Pertuis. [Def. Ex. 12] In his proposal, Hammond states that Pertius' Net Shareholder Distributions for all three (3) corporations is currently at eight percent (8%). Within one of the options, Hammond stated: "If we go with option A, we will extend the original timeline on the

River into 2009 if the final numbers for 2008 fall short of what you need under the original agreement to get you to 10% ownership across the board." At trial, Mark Hammond explained that the "8% Net Shareholder Distribution" figure was derived by adding the 2007 shareholder distributions to Pertuis for Lake Point and for Beachfront at 10% and the distributions of Front Roe at 1%, and calculating what percentage that was of the overall total of distributions to all shareholders for that year. Specifically, Pertuis had received $18,750 for shareholder distributions; the Hammonds collectively received $213,750. $18,750 represented 8% of the $232,500 paid to all shareholders that year.

In Pertuis' counter-proposal [Def. Ex. 13], Pertuis acknowledged, "If I did not achieve 10% ownership in 2008, we will extend the current program through 2009 in order to equalize current ownership at 10% across the board." By his own admission, Pertuis had not achieved 10% ownership in Front Roe. Although at trial Pertuis testified that he did not know what he needed to do to achieve 10% ownership of Front Roe, his counter-proposal made no mention of any ambiguity about what was required of him.

Hammond agreed to portions of Pertuis' counter-proposal for a compensation package. [Def. Ex. 14]. Pertuis' base salary was raised as well as several other areas of his compensation (including bonus, automobile allowance, and insurance).

By the first of October, 2009, the shareholder agreements had not been received back from the corporate attorney. Pertuis wrote a long email expounding on various issues, ranging from frustration to not having a formal agreement, to 'industry burn-out' and wanting to spend more time with his family. Pertuis had contacted the corporate attorney who confirmed that the documents had been drafted; however, the associate who was responsible was out sick that day.

Pertuis requested, and the Hammonds consented, to take a week off to think about what he wished to do regarding his continuation with the defendant corporations. During that week, Mark Hammond met with Pertuis to discuss his status and his future.

On Sunday, October 11, 2009, Pertuis told Hammond that he had decided to keep moving forward with the companies. The parties were supposed to meet on Monday, October 12, 2009, at the Hammonds' residence on Lake Lure if he had decided to continue his employment.

That morning, the parties met at Larkins on the River in Greenville. Although his pleadings make no mention of wrongful termination or constructive discharge, Pertius testified that the departure was mutually agreed. Hammond testified that Pertuis resigned. Hammond testified that he wanted Pertuis to continue his employment and was disappointed that he had changed his mind. At his meeting that morning, Pertuis met with the director of catering Kristina Murphy. In her testimony Kristina Murphy, and stated that Pertuis told her that he had resigned to spend more time with his family and to pursue other interests. Pertuis did not dispute her testimony.

The Court finds that based upon on the facts and circumstances that Pertuis voluntarily resigned from his employment.

From that point, the parties began to negotiate the value of Pertuis' interests in the business. When the parties could not agree as to the value, Pertuis sought more detailed financial information about the three (3) corporations.

However, Pertuis admitted that he was looking for employment as a restaurant consultant. Hammond became concerned about releasing the detailed financial information to Pertuis without any assurance of maintaining its confidentiality. Hammond was concerned that Pertuis

might use the information when working to help potential competitors of the defendant corporations.

When Pertuis would not consent to a confidentiality agreement, Front Roe filed a declarative suit, acknowledging Pertuis had a right to the information, but sought to impose a protective order restricting disclosure of the information to third-parties.

Procedural History

This case was originally commenced on March 1, 2010, by Front Roe, as the plaintiff, seeking protection of its financial information sought by Pertuis. Once a protective order was entered, Pertuis received all information he requested.

The parties were realigned by agreement. Pertuis first pleading alleging any claim for damages associated with minority shareholder oppression was not filed until two and a half (2½) years later on September 6, 2012. The matter proceeded to trial with Pertuis as the plaintiff, claiming damages for minority shareholder oppression and, seeking the Court to require the defendant corporations to purchase the value of his shares in the respective corporations.

The parties never disputed that Pertuis owns 10% of Lake Point and 10% of Beachfront. The contested issues at trial were as follows:

(1) Did Pertuis prove his *de facto*[1] claim for wrongful discharge?

(2) What was percentage of Front Roe does Pertuis own?

(3) Did Pertuis prove his claims for minority shareholder oppression?

(4) If so, what are the values of the interest in the three (3) defendant corporations?

[1] Plaintiff's Amended complaint, filed September 6, 2012, makes no factual allegation or legal claim that Plaintiff was involuntarily discharged or otherwise forcibly terminated from his employment. At trial, Plaintiff sought damages associated for his alleged firing.

(1) Wrongful Discharge

As set forth above, the Court finds that Pertuis voluntarily resigned from his employment. On the date of his resignation, there was no oral or written agreement that provided the basis of an employment contract that altered his at-will status. At a minimum, Pertuis failed to carry his burden of proof to establish the necessary elements of such a contract, such that he would be entitled to any compensable damages. Plaintiff's *de facto* claim for wrongful termination is dismissed.

(2) Plaintiff's Ownership Interest in Front Roe Restaurants

It is axiomatic that the plaintiff bears the burden of proving the elements of his claim. At trial, Plaintiff acknowledged he had an agreement with Mark Hammond that he would be receive 10% ownership of Front Roe if the restaurant achieved certain net profit goals. The plaintiff also admitted that Front Roe never met the goal (whatever it was) that entitled him to a 10% interest of the business.

At trial, Plaintiff testified that he never understood what the goal was. However, his email of June 30, 2009 contradicts this testimony. In his email, Pertuis states, "If I did not achieve 10% ownership in 2008, we will extend the current program through 2009 ..." Noticeably absent from his proposal is any complaint about not understanding what "the current program" was. To the Court, it seems clear that Pertuis knew the terms of the agreement in 2009 and that he had not satisfied those terms to qualify him for a 10% ownership interest.

Mark Hammond testified about the terms of the agreement, as discussed above. His testimony is the only testimony about the terms of the agreement. Pertuis did not dispute or refute this testimony. Additionally, Pertuis has never made any filing with the appropriate

governmental agency that he owns an interest that differs than the 1% interest that has been reported on his K-1 schedule for Front Roe since 2007.

Pertuis points to the compensation proposal by Hammond and counter-proposal by Pertuis as evidence that Pertuis' interest in Front Roe is something other than one percent. As noted above, Hammond's original compensation proposal recites that Pertuis currently received 8% of the shareholder distributions for the three corporations. It is not disputed that Pertuis owned 10% of Lake Point and 10% of Beachfront. The only means that Pertuis could receive 8% of shareholder distributions from all three corporations is if he owned something less than 10% of Front Roe.

On cross examination of Mark Hammond, Pertuis' counsel suggested that Pertuis' percentage of ownership in Front Roe could be 4% by averaging 10% for Lake Point, 10% for Beachfront, and 4% for Front Roe. However, there was simply no testimony or evidence that suggested Pertuis ever received 4% of the shareholder income allocations or distributions from Front Roe. It is not the province of the Court to speculate as to the terms of an agreement between two parties.

Once again, faced with the fact that the Pertuis has the burden to prove the amount of his interest, the only testimony about the specific amount of his interest is that he owned (and owns) 1% of Front Roe Restaurants. Accordingly, the Court finds that Pertuis owns a one percent (1%) interest of Front Roe Restaurants, Inc.

(3) Minority Shareholder Oppression.

Amalgamation of the three (3) corporations

Relying upon the case, Magnolia North Prop. Owners' Ass'n v. Heritage Communities, Inc., 725 S.E.2d 112 (SC Ct. App. 2012), Plaintiff argues that the three (3) defendant

corporations (Lake Point, Beachfront and Front Roe) should be treated as one *de facto* entity. In Kincaid v. Landing Development Corporation, this court found a sibling company liable for the obligation of another sibling company due to the evidence revealing an"`amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities.'" Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct.App.1986). In Magnolia North Prop. Owners, the Court found that the corporations at issue shared a location, telephone number, board members, officers, and employees and held themselves out to the public as being responsible for the other. The separate corporations in Magnolia North Prop. Owners were opened merely as "cost centers."

However, the facts in the case at bar do not support a finding of amalgamation. The three corporations are three different restaurants. Aside from having common directors and shareholders, the three corporations have no overlap. They operate independently from three different locations; they have different employees; different names; different telephone numbers; different managers; completely different operations. The corporations file separate tax returns. Lake Point and Beachfront are North Carolina corporations that file state taxes in North Carolina and not in South Carolina. Front Roe is a South Carolina corporation that files its state taxes in South Carolina, and not in North Carolina. The companies have separate bank accounts and separate corporate credit cards.

Although the companies have made loans between themselves from time-to-time, those loans are tracked and accounted for. Under the facts of this case, Plaintiff has failed to show an amalgamation of corporate interests, entities and activities so as to blur the legal distinction between the corporations and their activities.

Application of Internal Affairs Doctrine

Front Roe is a South Carolina corporation, and Lake Point is a North Carolina corporation. The internal affairs doctrine dictates that for purposes of governing affairs of Front Roe, South Carolina law applies and for Lake Point, North Carolina law applies. The internal affairs doctrine is "[a] conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs-matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders-because otherwise a corporation could be faced with conflicting demands." Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); similarly, "the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation." First National Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983).

South Carolina has legislatively approved this policy and recognizes the law of the State of incorporation for the internal affairs of foreign corporations authorized to do business in South Carolina. SC Code §33-15-105(c).

North Carolina has not adopted a correlative provision with respect to foreign corporations, preferring instead that the internal affairs doctrine be applied on a case by case basis. Comment to NCGS §55-15-105. However, in corporate governance circumstances, the North Carolina court has adopted the internal affairs doctrine. See, Bluebird Corp. v. Aubin, 657 S.E.2d 55 (2008)

With respect to Pertuis' claims of oppression, this court should apply the internal affairs doctrine and South Carolina law to the internal affairs of Front Roe and North Carolina law to the internal affairs of Lake Point.

Purchase of Pertuis Shares

Plaintiff requested, and Defendant stipulates that this court should order a purchase of Pertuis' shares in Lake Point, Front Roe, and Beachfront. With respect to that purchase, this court must determine (i) the legal foundation; (ii) the purchase price of the shares; and (iii) any other terms which are appropriate with respect to the purchase.[2] Neither party has advocated for nor is this case appropriate for a court ordered dissolution of any of the companies.

Pertuis ownership Front Roe, while in dispute, is between 1% and 8% and dependent upon the court's evaluation of evidence presented. His ownership in Lake Point is 10%. Both Front Roe and Lake Point are profitable, solvent, going concerns; even if the court finds oppression in one or both cases, dissolution is not appropriate; and in fashioning an appropriate remedy, the court should consider benefit or detriment to shareholders. Hendley v. Lee, 676 F. Supp. 1317 at 1324 (1987).

Effect of Oppression Determination

Pertuis has claimed that he is an oppressed minority shareholder. If oppression is found, then the court may order liquidation of the oppressing company or craft other appropriate relief, in this case a purchase of Pertuis shares at fair value. SC Code §33-14-310 (d) and (e) as to Front Roe and NCGS §55-44-31(d) as to Lake Point. The other aspects of the purchase such as terms, conditions, and procedures are to be established by the court. SC Code §33-14-310 (d) and

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[2] For these purposes, the parties stipulate that Beachfront has no value. Both the plaintiff's and the defendants' experts as well as Mark Hammond testified that Beachfront had no value. Further, Hammond's testimony implied that because of persisting negative cash flow, debt in excess of assets, and personal guaranties by him and Larkin Hammond of the debt, Beachfront actually has negative value. Defendant Beachfront therefore assumes that as a part of the court's order, Pertuis will transfer all his interest in Beachfront back to the company without further consideration.

NCGS §55-14-31(d). Commentators have suggested that a determination of fair value may include appropriate discounts dependent upon the circumstances surrounding the oppression. Sowell and DuRant, *Oppression of Minority Shareholders and Court Ordered Fair Value*, 22 S. Carolina Lawyer 30 (2010).

If the court does find oppression either in the case of Front Roe or Lake Point or both, neither Front Roe nor Lake Point have access to sufficient cash to purchase Pertuis shares immediately unless the total combined consideration is less than $25,000. In order that Front Roe and Lake Point remain financially healthy and stable they collectively request that no more than $25,000 be paid at the time of any adverse with remaining amounts to be paid quarterly over three years accruing interest at 6%, compounded quarterly.

If the court finds no oppression with respect to Front Roe or Lake Point or both, then relief under SC Code §33-14-300 and NCGS §55-44-30, respectively, is not applicable. Pertuis' prayer for relief would be denied, and Lake Point or Front Roe will not be obligated to purchase the shares Pertuis holds.

Absent oppression and the statutorily mandated "fair value" standard of value is inapposite and the use of a willing buyer willing seller fair market value standard would be appropriate to value the shares. This would require the application of both marketability and minority discounts, which Pertuis' expert testified would be at least 20%.[3]

[3] Defendants' expert testified that the combined marketability and minority discounts would be higher reducing the value to Pertuis.

Oppression Defined

While Pertuis' counsel has argued the Pertuis' termination was the inception of the oppression Both plaintiff's and defendant's experts as well as Mark Hammond testified that Beachfront had no value. For these purposes, the parties stipulate that Beachfront has no value. Further, Hammond's testimony implied that because of persisting negative cash flow, debt in excess of assets, and personal guaranties by him and Larkin Hammond of the debt, Beachfront actually has negative value. Defendant Beachfront therefore assumes that as a part of the court's order, Pertuis will transfer all his interest in Beachfront back to the company without further consideration.

Defendants' expert testified that the combined marketability and minority discounts would be higher reducing the value to Pertuis. many others, "[t]he straw that breaks the camel's back and often leads to litigation comes with the majority's offer to buy the minority's shares at fair market value. Once the minority learns fair market value takes into consideration the frozen nature of the stock, the race is on for a better deal or what appears a better deal--the court ordered buyout at fair value." Sowell and DuRant. "Reliable empirical data, for instance the Mergerstat/BVR Control Premium Study, exists to strongly support the proposition that investors prefer and will pay more for shares that convey the rights to control a corporation than for shares that do not. Other data (restricted stock and pre-IPO studies) supports the proposition that investors prefer and will pay more for liquid shares than for illiquid shares." Id at 33. In any event the standards and perspectives for determining oppression for Front Roe in South Carolina and Lake Point in North Carolina are different.

Front Roe – South Carolina

In a South Carolina corporation, the court may effect a remedy for oppression if it is established that "those in control of the corporation have acted, are acting, or will act in a manner that is *illegal, fraudulent, oppressive, or unfairly prejudicial* either to the corporation or to any shareholder" SC Code §33-14-300 (2)(ii)(emphasis added). The official comment 2(b) to §33-14-300 states, "[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." "No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These 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 v. Atlas Food Systems, 541 S.E.2d 587 at 597 (2001) "Kiriakides." However, the focus of the statutory language is on the controlling person's wrongful behavior.

The court went on to find, consistent with the Legislature's comment to SC Code §33-18-400, that the terms "oppressive" and "unfairly prejudicial" are elastic terms whose meaning varies with the circumstances presented in a particular case. As noted by one commentator:

> While business corporation statutes may attempt to provide certainty and clarity in the law to enhance the attractiveness of doing business, the definition of oppression has been left to judicial construction on a case-by-case basis. Such an approach has been suggested by the Model Close Corporation Supplement which expressly indicates that no attempt has been made to statutorily define oppression, fraud or prejudicial conduct, leaving these "elastic terms" to judicial interpretation.... The judicial construction of the definition of oppressive conduct is well-suited to the diversified, fact-specific disputes among shareholders of closely-held corporations. However, the judicial development of a meaningful standard for defining oppressive conduct, apart from fraud or mismanagement, is a difficult task. Id at 266.

Kiriakides facts provide a "classic example of majority freeze-out... conduct which was

fraudulent, oppressive, and unfairly prejudicial" Id. Excerpting *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective,* 53 Vand. L.Rev. 749, 826 (April 2000) the court enumerated common freeze out techniques include the termination of a minority shareholder's employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder. Often, these tactics are used in combination. Id at 757-758. The court then listed specific examples of oppressive conduct by the majority shareholders:

(1) Depriving the minority of the benefits of ownership in shares, and subsequent reduction in distributions based upon the reduced number of shares;

(2) Actions diverting ownership interest in a subsidiary from the minority;

(3) No prospect of minority receiving any financial benefit from their ownership of shares;

(4) The majority shareholder's family receiving substantial benefit from his ownership;

(5) Company holding substantial cash and liquid assets, very little debt and that, notwithstanding its ability to declare dividends, company indicated it would not do so in the foreseeable future;

(6) The fact that the majority shareholder took over total control of the company, and is totally estranged from minority;

(7) Majority shareholder made extremely low buyout offers to minority, and

(8) The company was not appropriate for a public stock offering.

These findings were then "coupled with findings of fraud" and a finding that the majority had acted "had acted "oppressively" and "unfairly prejudicially" to the minority. Kiraikides at 267

and 268.

Lake Point – North Carolina

The statutory standard for oppression in North Carolina is different than South Carolina and requires the complaining shareholder to establish a remedy available if "*reasonably necessary for the protection of the rights or interests of the complaining shareholder.*" NCGS §55-14-30 (2)(ii). Unlike the focus on the controlling persons for South Carolina corporations, for North Carolina corporations the focus is on the perception of the complaining shareholder. The statutory language without moderating judicial interpretation would leave corporations slave to the minority shareholder rights or interests, an untenable result. Fortunately, the court has limited the language to the "reasonable expectations" of the minority shareholder in which the majority shareholders have concurred. Meiselman v Meiselman, 307 S.E.551 (1983). So it is left for the court to determine if the minority's expectation is reasonable, and the majority agreed to those expectations on a case by case basis. Meiselman outlines a four-step analysis for relief under the reasonable expectations standard.

(1) The complaining shareholder must prove he had one or more substantial reasonable expectations that were known or assumed by the other shareholders. *Id.* at 564. Examples of such expectations might include ongoing participation in the management of the company or secure employment with the company. Id. at 558.

(2) He must demonstrate that the expectation or expectations have been frustrated. Id. at 564.

(3) The complaining shareholder must show that this frustration of expectations was not the product of his own fault and was largely beyond his control. Id.

(4) Finally, he must show that the specific circumstances warrant some form of equitable

relief. *Id.*

Factual Basis for Oppression Determination

Pertuis bears the burden of proving oppressive, unfair, and prejudicial conduct in both Kiriakides and Meieslman standards of analysis. In this case the evidence showed:

(1) Pertuis obtained his shares in all instances as part of his employment without tendering any separate monetary consideration or undertaking any personal liabilities.

(2) Pertuis was never an officer or director of any of the companies in which he owned shares, and therefore had no management authority.

(3) In spite of not being an officer, until his termination, Pertuis was informed and given the opportunity to discuss material decisions involving the companies.

(4) The parties disagree about whether Pertuis terminated his employment voluntarily. However, when Pertuis was repeatedly questioned about being fired he repeatedly equivocated about the nature of his termination, and characterized it as mutually agreed. This is not indicative of a freeze out or oppressive, unfair, and prejudicial conduct by the majority, neither does it lead to a reasonable expectation of continual employment. The defendants provided evidence that Pertuis chose to terminate employment for a lifestyle and career change. However, it should be noted that if the court determines that Pertuis was terminated involuntarily, then for purposes of Lake Point such termination may be a denial of Pertuis "reasonable expectations" with respect to Lake Point in accord with North Carolina standards for oppression by majority shareholders, but not Front Roe under South Carolina standards.

(5) When asked whether the majority treated Pertuis unfairly, his response was equivocal;

paraphrasing, he said he was uncomfortable and didn't like the situation; further he was offended by what he perceived as a low offer for his shares after his employment terminated. Again this is not oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(6) Ignoring that the claim should have been made derivatively, Pertuis' counsel attempted to characterize the majority's conduct as breaching of fiduciary duty as it related to the Hammonds purchase real estate leased by Lake Point from an unrelated person in spite of (i) evidence submitted by Pertuis' expert indicating the Lake Point was paying fair rental; (ii) uncontroverted testimony by Mark Hammond that the value of the real estate is presently less than the price paid; and (iii) evidence that Pertuis knew of the investment, but did not ask to be included or evidence that he had the financial ability to be included. This is not oppressive, unfair, and prejudicial conduct, but reasonable business judgment, and no objection was voiced at the time of the purchase. This is not oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(7) Again, ignoring that the claim should have been made derivatively, Pertuis' counsel attempted to characterize the majority's conduct as breaching of fiduciary duty as it related to the Hammonds opening another distinctively themed restaurant in Greenville in another corporation without Pertuis having ownership. This in spite of evidence of Pertuis previous involvement in ordinary business and legal practice to open each restaurant operation in separate corporations; and that Front Roe and Lake Point did in fact make a loan to the new enterprise, currently being serviced and generating interest income to Front Roe and Lake Point, which is to the advantage of all the shareholders

including Pertuis. Continuing past business practice consistent with those before Pertuis' termination is not indicative of oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(8) In spite of Pertuis' counsel attempting to characterize loans from and to the corporation by the shareholders made before and during Pertuis employment (including Pertuis), there was no evidence that the Hammonds were looting the companies. In fact Pertuis' expert Dr. Alford indicated they were being paid less than market. This is not oppressive, unfair, and prejudicial conduct by the majority, but common practice where timing of cash needs of related companies vary under either the North or South Carolina standards.

(9) There was no evidence indicating the Hammonds were attempting to "freeze out" Pertuis by eliminating the financial benefits of ownership through distributions. The companies are all subject to substantial indebtedness to financial institutions or unrelated third parties, all of which is guaranteed by the Hammonds, but not Pertuis, and they made a reasonable business judgment to loan money to a new restaurant venture, which will benefit all the shareholders. Once that loan is repaid, they expect distributions to be reinstated as with past practice. This is not indicative of oppressive, unfair, and prejudicial conduct by the majority under either the North or South Carolina standards.

(10) The Hammonds have not called shareholder meetings since Pertuis' termination and failed to properly document such meetings during his employment. While not excusing this failure, your honor should take judicial notice that failure to keep regular minutes and have shareholder meetings during litigation with minority shareholders is the rule and not the exception for closely held corporations. This could be interpreted as adverse to Pertuis' reasonable expectation and oppressive under the North Carolina standard, but is

not oppressive, unfair, and prejudicial conduct by the majority under the South Carolina.

For these reasons, the Court finds that Plaintiff has not met his burden of proving the misconduct by the majority shareholders that rises to the level of constituting minority shareholder oppression under either North Carolina law or South Carolina. For this reason, Plaintiff's claim for relief under South Carolina Code of Laws §33-14-300, et seq. is denied.

(4) Value of Pertuis' Interest.

Because the court does not find defendants engaged in conduct that rises to the level that requires a buy-out of his interest or the dissolution of the defendant corporations, the court need not address this issue.

Conclusion

The court finds that Plaintiff has failed to carry the burden of proof as to any claim for wrongful termination. The court finds that Plaintiff's interests in the defendant corporations are as follows:

Lake Point Restaurants, Inc. – 10%;

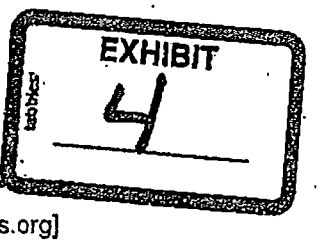
Beachfront Foods, Inc. – 10%; and

Front Roe Restaurants, Inc. – 1%.

The court further finds that Plaintiff did not meet his burden of proof to establish any claim for relief for minority shareholder oppression under North Carolina law or South Carolina law. All other claims are dismissed with prejudice.

It is so ordered, this _____ day of June, 2013.

The Honorable Edward W. Miller
Presiding Circuit Court Judge



Rodney Pillsbury

From: Miller, Edward W. Law Clerk (Helena L. Jedziniak) [emillerlc@sccourts.org]
Sent: Tuesday, June 18, 2013 9:54 AM
To: trigor527@aol.com; Rodney Pillsbury
Subject: Petruis v. Front Roe; 2010-CP-23-1646

Mr. Wilson and Mr. Pillsbury,

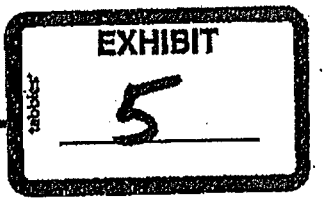
Judge Miller has to decided to find in favor of the Plaintiff, Kyle Petruis. He has asked that Mr. Wilson prepare a proposed order and then share it with Mr. Pillsbury. He has asked that the proposed order contain the following findings:

1. There is an amalgamation of the three corporations. As a result, Lake, Point, Beachfront, and Front Roe are de facto one entity.
2. Front Roe has been run without any semblance of proper corporate governance and largely for the benefit of the majority shareholder. There were no shareholder or board meetings, bonus payments were characterized as shareholder distributions, and a boat was titled in the plaintiff's name to save on insurance costs. This frivolous approach to corporate governance and maintenance diminishes Hammond's credibility.
3. It is worth noting for the record that the corporate entities, distinct parties in the lawsuit, were represented by the same attorney who represented the distinct individual majority shareholder defendants in this suit brought by a minority shareholder.
4. Given the estrangement between the minority and majority shareholders, there must be a parting of the ways among the shareholders. The best way to achieve that is a forced buyout of the minority shareholder.
5. Petruis is entitled to the following:
    a. 7.2% interest in Front Roe (a total of $198,189)
        i. Petruis is not entitled to pro-rate payment of Grill Mark Distribution
    b. 10% interest in the other two corporations (a total of $98,047)
    c. The distributions that he did not receive (a total of $99,117)
6. Petruis is not entitled to a severance package

Please let me know if you have any questions or concerns.

Best,
Helena

Helena Jedziniak
Law Clerk to the Honorable Edward W. Miller
305 E. North Street, Suite 219
Greenville, South Carolina 29601
(864) 467-8558
(864) 233-4173 Fax
emillerlc@sccourts.org



Rodney Pillsbury

From: trigor527@aol.com
Sent: Tuesday, June 18, 2013 10:57 AM
To: Rodney Pillsbury
Subject: Pertuis v. Front Roe Rest., Inc. et al.
Attachments: 20130618_094304.pdf

Dear Mr. Pillsbury:

Appended please find Memorandum in Support of Plaintiff's claims.

Best Regards, Bob Wilson.

-----Original Message-----
From: copier <copier@wilsonlawfirm.com>
To: trigor527 <trigor527@aol.com>
Sent: Tue, Jun 18, 2013 10:37 am
Subject: Scanned Image from Wilson Law Firm

Reply to: copier@wilsonlawfirm.com <copier@wilsonlawfirm.com>
Device Name: MX-B402 @ Wilson Law Firm
Device Model: MX-B402
Location: Not Set

File Format: PDF MMR(G4)
Resolution: 200dpi x 200dpi

Attached file is scanned image in PDF format.
Use Acrobat(R)Reader(R) or Adobe(R)Reader(R) of Adobe Systems Incorporated to view the document.
Adobe(R)Reader(R) can be downloaded from the following URL:
Adobe, the Adobe logo, Acrobat, the Adobe PDF logo, and Reader are registered trademarks or trademarks of Adobe Systems Incorporated in the United States and other countries.

http://www.adobe.com/

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	2010-CP-23-1646
Kyle Pertuis,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM IN SUPPORT
	)	OF PLAINTIFF'S CLAIMS
Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond, Larkin Hammond,	)	
	)	
Defendants.	)	
	)	

This case came before this Court for a bench trial. Plaintiff's claim, essentially, was that Defendants Mark and Larkin Hammond, ("MLH"), had oppressed Plaintiff as a minority shareholder in the corporate Defendants. As relief, Plaintiff seeks that this Court order a buyout of his 10% shareholding in the three corporate Defendants. Plaintiff also seeks payment for shareholder distributions which were declared by the three corporate Defendants, but which Plaintiff never received. Because Defendants MLH terminated Plaintiff as a part of the squeeze-out of Plaintiff as a shareholder, Plaintiff also seeks a reasonable severance package.

1. Plaintiff is a 10% shareholder in all three corporate Defendants.

Defendants MLH concede that Plaintiff is a 10% shareholder in Beachfront Foods, Inc., ("BFI"), and in Lake Point Restaurants, Inc., ("LPR").

Defendants MLH, however, claim that Plaintiff is only a 1% shareholder in Front Roe Restaurants, Inc., ("FRR"). Central to Plaintiff's claim of increased shareholding in FRR is an

exchange of emails between Mark Hammond and Plaintiff. In the exchange of emails, Mark Hammond offered to Plaintiff, on June 27, 2009, $50,000 in salary, conveyance of a boat, and 10% of net shareholder distributions. In reply to Mark Hammond's offer, Plaintiff counterproposed that Plaintiff receive a salary of $67,000, the conveyance of the boat, and 10% of net shareholder distributions, certainly in 2010, if Plaintiff had not already achieved 10% ownership in all three corporate Defendants. In response to Plaintiff's counterproposal, Mark Hammond advised on June 30, 2009, that the corporations would incorporate Plaintiff's changes into a forthcoming "employment agreement," which was to be delivered soon.

Mark Hammond then adjusted Plaintiff's salary to $67,000; Mark Hammond conveyed the boat to Plaintiff. There can be no question that there had been a "meeting of the minds" and that the parties engaged, at least, in part performance of their understanding, as documented by the foregoing emails. Plaintiff asserts that, thereafter, Plaintiff was a 10% shareholder in all three corporate Defendants.[1] Plaintiff submits that this Court, in its inherent equitable power, may invoke the classical maxim in equity to provide relief to Plaintiff:

> "Equity regards and treats as done that which in good conscience ought to be done."
>
> *Wilkie* v. *Phila. Life Ins. Co.*, 197 SE 375, 187 SC 382 (1938); *Atwell* v. *Orr*, 589 F. Supp. 511 (D.Ct. SC, 1984).

---

[1]Mark Hammond testified that Plaintiff would not become a 10% shareholder in FRR until FRR reached $500,000 in gross profit. Hammond testified that the 2008 gross profit for FRR was $361,498. Of course, $361,498 is 72% of $500,000. Plaintiff suggests that, while he *should* be a 10% shareholder *per* the parties' agreement, FRR had reached 72% of the qualifying threshold. Plaintiff suggests that, if there was a *graduated* vesting schedule, **at a minimum**, Plaintiff should be 72% of 10% shareholding in FRR, or he should be, **at a minimum**, a 7.2% shareholder of FRR. Indeed, Plaintiff has included a schedule of damages which set out Plaintiff's shareholder losses at 10% and at 7.2%.

2. Defendants MLH never performed their shareholder agreement: they squeezed out Plaintiff as an employee; they made a low-ball offer to purchase Plaintiff's stock in the three corporate Defendants; and they refused to afford Plaintiff ready access to corporate financial records.

The landmark SC case for the oppression of minority shareholders is *Kiriakides* v. *Atlas Food Systems and Services, Inc.*, 541 SE2nd 257, 343 SC 587, (S.Ct. 2001). In *Kiriakides*, the SC Supreme Court found, the following criteria sufficient to order a buyout of the minority shareholders:

1. Unilateral action to deprive the shareholder of correct shareholding percentage;
2. Refusal to offer opportunity to minority shareholder to participate in related enterprises;
3. Minority shareholder cannot participate in future salary, distributions, and profits;
4. Majority continues to reap the benefits from the corporations;
5. Adequate financial strength in the corporations to afford a buyout;
6. Total estrangement between majority and the minority;
7. Low-ball buyout offer to minority;
8. No public trading in stock of corporation.

Kiriakides, pp. 267-268, pp. 342-343, supra.

This case meets presents all of the facts which the *Kiriakides* court used as a basis for a court-ordered buyout. Plaintiff submits that this Court should order a buyout of his 10% ownership of stock in all three corporate Defendants.

Additionally, Plaintiff submits that the Supreme Court, in *Kiriakides, supra*, held that "oppressive" and "unfairly prejudicial" are elastic terms whose meaning varies with the circumstances presented in a particular case. *Kiriakides, supra*, p. 602; p. 266. The Supreme

Court also noted that this was a fact-sensitive review and should therefore be determined by a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior. *Kirialides, supra,* p. 603; p. 266. Plaintiff asserts that the terms "oppressive" and "unfairly prejudicial" are apt terms to describe the wrongful, intra-corporate acts of Defendants.

Plaintiff presented evidence that he was excluded from a real estate opportunity in connection with LPI. Likewise, cross-examination established that Defendants MLH had opened a new restaurant, "Grill Marks," using funds from FRR, without offering to allow Plaintiff to participate in the new venture, while using funds from a corporation of which Plaintiff was a 10% shareholder. These are classic examples of misappropriation of corporate opportunities by the majority shareholders, Defendants MLH, to the damage of Plaintiff.

Plaintiff submits that, in addition to this case satisfying the eight dispositive criteria from *Kirialides* set out above, Defendants MLH were engaging in a "*shareholder incent ruse*:"[2] Under the "*shareholder incent ruse*, Defendants MLH were moving the goal line of the vesting schedule for Plaintiff's acquisition of 10% of FRR, without making full and fair disclosure to Plaintiff, who was already a 1% shareholder. Undoubtedly, the "*shareholder incent ruse*" was designed to keep Plaintiff in thrall as the Managing General Partner for the three corporate Defendants at a lower salary, but with illusory promises of increased shareholding. Undoubtedly, Defendants MLH use of the "*shareholder incent ruse*" on a minority shareholder presents a gross violation of the majority's corporate fiduciary obligations, to Plaintiff, of fair dealing, full disclosure, and honesty in fact.

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[2]Plaintiff is unsure of the meaning of the word "*incent*" as used by Mark Hammond; Plaintiff believes, however, that the word is somehow related to "incentive."

3. Plaintiff established a fair market value for a buyout of his 10% ownership in the three corporate Defendants.

Plaintiff presented Dr. Charles Alford, Ph.D., to testify, as an expert, as to the "fair market value" of the three corporate Defendants. Dr. Alford described his methodology and the data to which he applied his methodology. Essentially, Dr. Alford established that LPR had a fair market value of $507,000; Dr. Alford established that BFI had no value; Dr. Alford established that FRR had a fair market value of $1,376,000. Dr. Alford established that "Larkins" was a brand which would have value in this area, regardless of the particular location in which it was located. Plaintiff submits that Dr. Alford presented an entirely believable and competent analysis for the Court's use.

In response, Defendants presented Louis Manios, a local public accountant. On cross-examination, Mr. Manios conceded that no minority shareholder discount should apply to any buyout of Plaintiff's stock by the majority. Mr. Manios' testimony as to the dismal future presented for FRR was fantastic and did not take into account the growth and vibrancy of the downtown area of Greenville and the value of the name "Larkins" as a brand. Interestingly, Mr. Manios conceded that his schedules did not conform to GAAP, which governs the format of Mr. Manios' schedules. Also, it appears ironic that, once corrected to conform to GAAP, Mr. Manios' valuations did not differ materially from the valuations of Dr. Alford.

4. Plaintiff never received distributions from FRR and from LPR.

Plaintiff testified that he never received shareholder distributions from FRR or from LPR, despite tax returns, and K-1 schedules which purported to show such distributions. Mark Hammond testified as to the murkiness of the "distributions" which were "given" to Plaintiff:

Mark Hammond testified that Plaintiff's bonuses were disguised as distributions, but that they weren't distributions.

Plaintiff asserts that this Machiavellian math employed in the distribution/bonus compensation was an additional form of oppression and wrongdoing by Defendants MLH.

From the tax returns in the record of this case, it appears that Plaintiff's unpaid distribution from FRR, for 2006, was $2226, and for 2007 it was $3776. Plaintiff received a loan from FRR whose outstanding balance was $6445.

From the tax returns admitted into the record of this case, the following are the unpaid distributions from FRR to which Plaintiff is entitled[3]:

Year	Profit	10%	7.2%
2008	$361,498	$36,149	$26,027
2009	$192,934	$19,293	$13,891
2010	$338,107	$33,811	$24 343
2011	$218,476	$21,858	$15,370
2012	$265,516	$26,552	$19,117
TOTAL	**$1,376,531**	**$137,653**	**$99,117**

The tax returns show that Plaintiff should have received $47,347 as distributions due to a 10% shareholder in LPR.

5. Plaintiff was wrongfully terminated as part of his squeeze-out as a minority shareholder; Plaintiff should receive a reasonable severance package.

On October 12, 2009, Plaintiff and Mark Hammond were scheduled to meet to discuss Plaintiff's future with the three corporate Defendants. It was agreed that Plaintiff and Hammond

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[3]During the period shown, Defendants MLH received distributions and loans from FRR in the amount of **$1,102,415**.

would meet at Hammond's house in Lake Lure, N.C., if Plaintiff was going to stay on as Managing General Partner. If Plaintiff were going to leave his employ with the three corporate Defendants, then Plaintiff and Hammond would meet in Greenville, at Larkin's on the River Restaurant. Hammond called Plaintiff and told Plaintiff to go to Greenville. While there appears to be conflicting testimony about the meeting, there is no conflicting testimony that Plaintiff went downstairs to tell his staff of his departure. There is no conflicting testimony that the staff already knew that Plaintiff was leaving, because they had already heard the news from Mrs. Hammond *who was not at the meeting between Plaintiff and Mark Hammond.* The only reasonable inference to be drawn is that Mrs. Hammond already knew that the Hammonds were going to terminate Plaintiff and had told the staff of the termination.[4]

Based on the wrongful termination of Plaintiff for squeeze-out purposes, Plaintiff asserts that he should receive a reasonable severance payout of six (6) months, or $33,500, as shown in the record of this case.

6. **It is uncontroverted that FRR made an investment in Grill Marks of $275,000.**

As a 10% shareholder in FRR, Plaintiff is entitled to a *pro rata* share of the distribution/loan to Grill Marks from FRR funds, as engineered by Defendants MLH.

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[4]There is no explanation in the record for Mrs. Hammond's absence from the trial of this case. Plaintiff submits that the long-standing policy articulated in *Duckworth v. 1st Nat'l Bank*, 176 SE 2nd 297, 252 SC 563 (S.Ct. 1970) applies: Failure of a party to call a witness who has knowledge of the fact in issue creates a presumption that the testimony of such witness, if produced, would be unfavorable.

7. Based on the testimony and exhibits, Plaintiff seeks the following:

PLAINTIFF'S DAMAGES:

Front Roe Restaurants, Inc.

Shareholder Relief	10%	7.2%
Buyout of H's ownership	$137,600	$99,072
Payment of c-corp. Profit Distributions, per tax returns	$137,653	$99,117
Pro-rata Payment of Grill Marks Distribution ($275,000)	$27,500	$19,800
TOTAL	$302,753	$217,989

Lakepoint Restaurants, Inc.

Buyout of H's ownership (10%)	$50,700
Payment of c-corp. Profit Distributions, per Tax returns (10%)	$47,347
TOTAL	$98,047

Severance Package for loss of employment

Severance for 6 mos. @$67,000/yr. per Agreement by email exchange	$33,500

Respectfully submitted:

Dated:_____

_____

Robert C. Wilson, Jr.
201 Whitsett Street
Greenville, SC 29601
SC ID 006178
(864) 242-9488
Email: trigor527@aol.com

Attorney for Kyle Pertuis

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

Kyle Pertuis,

Plaintiff,

v.

Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond.

Defendants.

C.A. No.: 2010-CP-23-1646

Defendants' Amended Motion To Alter or Amend and Motion to Reconsider

Pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure, Defendants Front Roe Restaurants, Inc., Beachfront Foods, Inc. Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond (hereinafter collectively identified as "Defendants") file their motion to alter or amend the Court's order of July 3, 2013, which was received by Defendants' counsel on July 9, 2013. [Exhibit 1, Order] Respectfully, the order (drafted by Plaintiff's counsel), contains numerous errors in its findings of fact and conclusions of law; the specifics of which are set forth hereunder in detail. This amended motion incorporates those grounds previously set forth in Defendants' Motion to Reconsider filed on July 19, 2013 and raises the additional ground regarding the mathematical calculation of the award due to Plaintiff.

13. The mathematical calculation of the award to the plaintiff.

In its order, the Court awarded the plaintiff the following:

(a) Plaintiff shall receive $198,189 as 7.2% shareholder interest in [Front Roe].
(b) Plaintiff shall receive $98,047 for his interest in [Beachfront Foods] and in [Lake Point Restaurants];
(c) Plaintiff shall receive the sum of $99,117 for distributions he did not receive.

[Ex. 1, pp. 8-9]

The Court found the value of Front Roe to be $1,376, 000.00 and that Plaintiff owned a 7.2% interest in the same. 7.2% of $1,376,000 is $99,072; not $198,189 as listed in the Court's order in sub-paragraph (a).

The Court found the value of Lake Point Restaurants to be $507,000 and the parties have always agreed Plaintiff owned a 10% interest in the same. 10.0% of $507,000 is $50,700; not $98.047 as set forth in the Court's order in sub-paragraph (b).

The Court held the plaintiff was owed $99,117 for distributions allegedly not received. Nowhere is this amount itemized or otherwise delineated. Because Plaintiff never requested this item of damages at trial, Defendants cannot determine which monies Plaintiff contends he should have received, but did not. Accordingly, at a minimum, the Court should itemize which distributions Plaintiff did not receive, which he now contends to be owed.

Conclusion

In addition to the grounds set forth in Defendants' original motion to alter and/or to and their motion to reconsider, and without conceding any award to the plaintiff is proper under the evidence and law of this case, the mathematical calculation of the damages held for the plaintiff should be revised to confirm with the rulings of the court. Furthermore, Defendants respectfully request the Court itemize those amounts upon which the Court calculated an award to the plaintiff for alleged distributions not received, as set forth in subparagraph (c) of the Court's order.

Respectfully Submitted,

Pillsbury & Read, P.A.

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ATTORNEY FOR DEFENDANTS

July 22, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO:

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUL -3 A 9:27

Kyle Pertuis *vs.* Beachfront Foods Inc

CHECK ONE:

☐ JURY VERDICT. This action came before the court for a trial by Jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried and a decision rendered.

EXHIBIT 1

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 3rd day of July, 2013, and a copy mailed first class this 3rd day of July, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Rodney F. Pillsbury 1204-A E. Washington St. Greenville, SC 29601
Curtis Warren Stodghill PO Box 2431 Greenville, SC 296022431

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert C. Wilson Jr. 201 Whitsett St. Greenville, SC 29601
David A Lloyd 230 Spindale St Ste 2 Spindale, NC 28160

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

RECEIVED JUL 09 2013

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	2010-CP-23-1646
Kyle Pertuis, Plaintiff, vs. Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond, Larkin Hammond, Defendants.	**ORDER**

This case came before this Court for a bench trial on May 28, 29, 2013. Plaintiff's claim, essentially, was that Defendants Mark and Larkin Hammond, ("MLH"), had oppressed Plaintiff as a minority shareholder in the corporate Defendants. As relief, Plaintiff sought that this Court order a buyout of Plaintiff's shareholding in the three corporate Defendants. Plaintiff has also sought payment for shareholder distributions which were declared by the three corporate Defendants, but which Plaintiff never received. Plaintiff additionally sought compensation for the termination of his employment by MLH.

Plaintiff testified that he had been employed by MLH to work for the three corporate Defendants as Managing General Partner for the restaurants owned by the corporate Defendants. Plaintiff's worked for Defendants for 9.5 years; Plaintiff was responsible for the operations of 3 restaurants and approximately 100 employees. Plaintiff had acquired a 10% ownership in Beachfront Foods, Inc., ("BFI"), and in Lake Point Restaurants, Inc., ("LPR"), by operation of graduated employee stock vesting plans.

Defendant Mark Hammond testified that Plaintiff had become, at the least, a 1% shareholder in Front Roe Restaurants, Inc., ("FRR"). Defendant Mark Hammond disputed, however, that Plaintiff was a 10% shareholder. Hammond testified that there had been a document which set forth a vesting schedule so that, when FRR reached gross profit of $500,000 for a fiscal year, Plaintiff would become a full 10% shareholder. Hammond testified that FRR had gross profit of $361,498 in 2008, which did not qualify Plaintiff for a 10% ownership position in FRR. Hammond testified that the FRR vesting schedule could not be found. Defendant Larkin Hammond did not attend the trial of this case to corroborate Defendant Mark Hammond's testimony.

Plaintiff presented an exchange of emails which occurred during the early summer of 2009. The emails presented an offer from Plaintiff, apparently accepted by MLH, that Plaintiff was to become a 10% shareholder in FRR. Plaintiff testified that he endeavored to secure formal documentation of his 10 % share ownership, to no avail.

For Plaintiff, Dr. Charles Alford, Ph.D., testified as an expert witness as to the valuation of the corporate Defendants. Defendants presented Louis Manios, a local Public Accountant, to testify as to the valuation of the corporate Defendants. The Court finds, by virtue of his excellent credentials, Dr. Alford's testimony to be more persuasive.

Based on the testimony presented and the documents introduced into the record of this case, the Court makes the following findings of fact and conclusions of law:

1. Plaintiff and Defendants owned and operated a *de facto* partnership from Greenville.

This Court finds that Plaintiff was the Managing General Partner, in charge of the operations at the three corporate Defendants. From the clear, uncontroverted testimony of

Defendant Mark Hammond, Dr. Charles Alford, and Louis Manios, this Court finds that there had been considerable movement of corporate funds between the three corporate Defendants, for which Defendants did not produce any documentation in the record of this case. Defendant Mark Hammond testified that there had been no shareholder meetings, nor had there been any meetings of the board of directors, of any of the three corporate Defendants.

The record of this case presents other examples of disregard for corporate formalities. Defendant Mark Hammond testified that, without any corporate formality, MLH conveyed a boat to Plaintiff to avoid liability and high insurance premiums. It is worth noting that the three corporate Defendants and the majority shareholders were all represented by same counsel. Throughout, there has been a dearth of respect for proper corporate governance amongst the three corporate Defendants, blurring the distinction between the corporate Defendants. Accordingly, this Court finds and concludes, applying the standards articulated in *Magnolia North Prop. Owners' Ass'n* v. *Heritage Communities, Inc.*, 725 SE2d.112, 397 SC 348 (Ct. App. 2012), that MLH and Plaintiff operated the three corporate Defendants as a *de facto* partnership of the corporate entities. From Plaintiff's title, "Managing General Partner," from the joint and unified internet web site for the three corporate Defendants, and from the parties' email, the Court further finds that the *locus* of the partnership is Greenville, S.C..

2. Plaintiff is a 10% shareholder in Defendants Beachfront Foods, Inc., and in Lake Point Restaurants, Inc.

MLH and the corporate Defendants conceded that Plaintiff was a 10% shareholder in Beachfront Foods, Inc., ("BFI"), and Lake Point Restaurants, ("LPR"). Accordingly, it is the law of this case that Plaintiff was, and is, a 10% shareholder in BFI and LPR.

3. Plaintiff's shareholder ownership in Front Roe Restaurants, Inc.

Plaintiff and Defendants contested the level of shareholding of Plaintiff in Front Roe Restaurants, Inc., ("FRR").

In support of his case for 10% ownership of FRR, Plaintiff introduced an exchange of emails. In the exchange of emails, Defendant Mark Hammond offered to Plaintiff, on June 27, 2009, $50,000 in salary, conveyance of a boat, and 10% of net shareholder distributions. In reply to Mark Hammond's offer, Plaintiff counterproposed that Plaintiff receive a salary of $67,000, the conveyance of the boat, and 10% of net shareholder distributions, certainly in 2010, if Plaintiff had not already achieved 10% ownership in all three corporate Defendants. In response to Plaintiff's counterproposal, Mark Hammond advised on June 30, 2009, that the corporations would incorporate Plaintiff's changes into a forthcoming "employment agreement," which was to be delivered soon.

Defendant Mark Hammond then adjusted Plaintiff's salary to $67,000; Mark Hammond conveyed the boat to Plaintiff. Plaintiff argues that there had been a "meeting of the minds" and that the parties engaged, at least, in part performance of their understanding, as documented by the foregoing emails. Plaintiff asserted that, thereafter, Plaintiff was a 10% shareholder in all three corporate Defendants.

Defendant Mark Hammond, however, testified that Plaintiff would not become a 10% shareholder in FRR until FRR reached $500,000 in gross profit, under the terms of the missing FRR vesting schedule. Defendant Mark Hammond testified that the 2008 gross profit for FRR was $361,498. Calculation shows that $361,498 is 72% of $500,000. This Court finds and concludes that, despite the strength of Plaintiff's argument for 10% ownership from the exchange

of emails, FRR had reached 72% of Defendants' alleged qualifying threshold for Plaintiff to become a 10% owner of FRR under the missing FRR vesting schedule. In light of the "missing" FRR vestment schedule which was under the control of MLH, this Court has determined to equitably treat this disputed ownership issue as if there was a *graduated* vesting schedule in place[1], so that Plaintiff had achieved 72% of the goal of 10% shareholding in FRR, or 7.2% ownership of FRR. Based on the foregoing, this Court has determined to declare that Plaintiff's ownership in FRR is 7.2%. ("Equity regards and treats as done that which in good conscience ought to be done." *Wilkie* v. *Phila. Life Ins. Co.*, 197 SE 375, 187 SC 382 (1938); *Atwell* v. *Orr*, 589 F. Supp. 511 (D.Ct. SC, 1984).

4. **Oppression of Plaintiff by MLH.**

Plaintiff has alleged that MLH has oppressed him as a majority shareholder, in violation of their common-law corporate fiduciary duties to Plaintiff. The landmark SC case for the oppression of minority shareholders is *Kiriakides* v. *Atlas Food Systems and Services, Inc.*, 541 SE2nd 257, 343 SC 587, (S.Ct. 2001). In *Kiriakides*, the SC Supreme Court found, the following criteria sufficient to order a buyout of the minority shareholders:

1. Unilateral action to deprive the shareholder of correct shareholding percentage;
2. Refusal to offer opportunity to minority shareholder to participate in related enterprises;
3. Minority shareholder cannot participate in future salary, distributions, and profits;
4. Majority continues to reap the benefits from the corporations;

---

[1]The Court notes that the parties had employed a *graduated* employee stock vesting schedule for Plaintiff's stock acquisition in BFI and LPR, *supra*.

5. Adequate financial strength in the corporations to afford a buyout;

6. Total estrangement between majority and the minority;

7. Low-ball buyout offer to minority;

8. No public trading in stock of corporation.

Kiriakides, pp. 267-268, pp. 342-343, supra.

This case presents all of the facts which the *Kiriakides* court used as a basis for a court-ordered buyout. This Court has also considered legal authority from North Carolina, submitted by Defendants, which provides additional support for the foregoing analysis: *Meiselman* v. *Meiselman*, 307 SE2d 551, 309 NC 279 (S.Ct. 1983).

Plaintiff presented evidence that he was excluded from a real estate opportunity in connection with LPR. Likewise, cross-examination established that Defendants MLH had opened a new restaurant, "Grill Marks," using funds from FRR, without offering to allow Plaintiff to participate in the new venture, while using funds from a corporation of which Plaintiff was a shareholder. These are classic examples of misappropriation of corporate opportunities by the majority shareholders and are oppressive to the minority shareholder.

This Court finds that Defendants continued to frustrate Plaintiff by changing the threshold for Plaintiff to become a 10% shareholder in FRR and by failing to formally document the agreement memorialized in the email exchange of 2009. Post-termination examples of oppressive conduct by MLH included resisting Plaintiff's request for financial records, demanding return of the boat conveyed to Plaintiff as compensation, and using corporate funds to contest Plaintiff's shareholder rights. Based on the foregoing, this Court finds that MLH committed substantial and material breaches of their corporate fiduciary duties to Plaintiff.

5. Plaintiff established a fair market value for a court-ordered buyout.

Plaintiff presented Dr. Charles Alford, Ph.D., to testify, as an expert, as to the "fair market value" of the three corporate Defendants. Dr. Alford described his methodology and the data to which he applied his methodology. Essentially, Dr. Alford established that LPR had a fair market value of $507,000; Dr. Alford established that BFI had no value; Dr. Alford established that FRR had a fair market value of $1,376,000. Dr. Alford established that "Larkins" was a brand which would have value in this area, regardless of the particular location in which it was located. This Court finds that Dr. Alford presented an entirely believable and competent analysis for the Court's use, based on his credentials and based on his demonstrated application of methodology.

In response to Dr. Alford, Defendants presented Louis Manios, a local public accountant. On cross-examination, Mr. Manios conceded that no minority shareholder discount should apply to any buyout of Plaintiff's stock by the majority. Mr. Manios' testimony as to the dismal future presented for FRR was not credible and did not take into account the growth and vibrancy of the downtown area of Greenville and the value of the name "Larkins" as a brand. Interestingly, Mr. Manios conceded that his schedules did not conform to GAAP, which govern the format of Mr. Manios' schedules.

6. Distributions and bonuses.

Plaintiff testified that he never received shareholder distributions from FRR or from LPR, despite tax returns, and K-1 schedules which purported to show such distributions. Defendant Mark Hammond, himself, testified as to the murkiness of the "distributions" which were "given" to Plaintiff. Defendant Mark Hammond testified that Plaintiff's bonuses were disguised as

distributions, but that they weren't distributions. To further confuse the issue about bonuses and distributions, there were emails between the parties which showed that the distributions and bonuses were to be separate and cumulative. In response to questions from the Court, Dr. Alford expressed concern that the bookkeeping for Defendants was unclear on this issue. The Court shares Dr. Alford's reservations about the reliability of Defendants' accounting. The record of this case is replete with references to shareholder/corporate loans for which no documentation was presented. For this reason, the Court has determined to rely on the corporate Defendants' tax returns as a more credible source for the amounts of distributions which were not distributed to Plaintiff by the corporate Defendants.

This Court finds and concludes that the shaky accounting applied by Defendants MLH to the distribution/bonus compensation was an additional form of oppression and wrongdoing by Defendants MLH.

7. **Plaintiff shall not receive compensation for the termination of his employment.**

8. **Based on the testimony and exhibits which are the basis for the foregoing findings of fact and conclusions of law, this Court orders the following:**

Given the estrangement between the minority and the majority shareholders, there must be a parting of the ways among the shareholders. This Court adheres to sound judicial policy, as articulated under *Kirtakides* and *Metselman, supra*, to provide for a fair buyout for an oppressed minority shareholder whose investment in a corporation is otherwise without a market. This Court concludes, then, that the most equitable way to achieve a just workout of the differences between the parties is the following:

a. Plaintiff shall receive $198,189 for a 7.2% shareholder interest in FRR;

b. Plaintiff shall receive $98,047 for his interest in BFI and in LPR;

c. Plaintiff shall receive the sum of $99,117 for distributions which he did not receive;

d. Plaintiff shall surrender all documents, records, stock certificates, and other corporate property to Defendants and shall execute all documents reasonably necessary to bring the corporate records to full compliance with good corporate governance.

It is ordered that the parties shall comply with the terms of this Order within 45 days of the date of this Order.

Judge Edward W. Miller

June 7/2 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-23-1646

Kyle Pertuis,..... Respondent,

v.

Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond,..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Appendix to the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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October 15, 2015