THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Court Judge

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SC Court of Appeals

Appellate Case No.: 2015-000476

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

v.

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

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

v.

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

v.

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

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

and

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

INITIAL BRIEF OF RESPONDENT DAVID WILSON

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I. Statement of the Issues on Appeal

1. Was there was sufficient evidence presented to the trial court to support a finding that Appellants John Gandis and Andrea Comeau-Shirley engaged in unlawful, oppressive, fraudulent, or unfairly prejudicial conduct under S.C. Code § 33-44-801?

2. Did the trial court apply the correct legal standard for the fiduciary duty owed by a member (Respondent Wilson) to a manager-managed LLC in analyzing the business deals conducted by Wilson on behalf of his separate company during its wind-down that were known to the Appellants?

3. Did the trial court have discretion to fashion an equitable remedy for Respondent Wilson that individually required the "tightly controlled cabal" of Gandis and Shirley to purchase the ownership interest of Respondent Wilson at a valuation date coinciding with the date of Wilson's unlawful ouster from his own company?

II. Statement of the Case

Respondent David Wilson ("Wilson") brought this action on April 27, 2012, alleging that: (1) he was subject to shareholder oppression at the hands of Appellants John Gandis ("Gandis") and Andrea Comeau-Shirley ("Shirley"); (2) Gandis had breached his fiduciary duty owed to Appellant Carolina Custom Converting, LLC ("CCC") and Wilson; (3) Gandis and Shirley converted company funds to pay for litigation expenses, and Gandis used CCC property to further his own separate business; (4) he was entitled to dissolution of the company, or in the alternative, (5) he was entitled to dissociation. Defendants Gandis and Shirley answered on July 3, 2012, and averred counterclaims that Wilson had breached his fiduciary duty (for taking his laptop and cell phone with him and copying the information from the devices before returning them to

CCC), which Wilson answered on July 16, 2012. Wilson filed an amended complaint on October 10, 2012, which added Wilson as a derivative representative of CCC and brought in ZOi Films, LLC ("ZOi") and Deco-Tex, LLC ("Deco-Tex") as additional defendants.

On September 20, 2013, Wilson filed a Second Amended Complaint alleging the same causes of action in an individual capacity as well as derivatively but adding CCC as a party. Gandis, Shirley, and ZOi all filed Answers to Wilson's Second Amended Complaint. On November 15, 2013, CCC filed an answer to Wilson's Second Amended Complaint and alleged counterclaims against Wilson, Steve Norvell, Fresh Water Systems, Inc., and Neologic Distribution, Inc. for breach of fiduciary duty (for Wilson's alleged usurpation of corporate opportunities through his company, Eastern Film Solutions, in 2008 and 2009), conspiracy, and violations of the S.C. Trade Secrets Act, among others; this Answer was not served on Norvell, Neologic, and Fresh Water until March 24, 2014. Norvell, Neologic, and Fresh Water filed an Answer to CCC's claims on May 16, 2014, and counterclaimed that the S.C. Trade Secrets claim was made in bad faith, which CCC answered on June 11, 2014.

Prior to trial, the parties agreed to waive any jury trial demands and submit all the claims to a bench trial to be held before Circuit Judge D. Garrison Hill. A bench trial on the merits of the case was held the week of September 29 – October 4, 2014.

On January 9, 2015, the trial court issued its Order and determined that Wilson had proved his claim of minority shareholder oppression, and the court ordered Gandis and Shirley, as the oppressors, to buy out Wilson's 45% interest for $347,863.23. Thereafter, counsel for CCC, Gandis, and Comeau-Shirley made a Rule 59 motion for the court to reconsider its decision.

On January 28, 2015 the court issued its Order denying that motion, reaffirming its factual findings, and adding the following denunciation of Gandis and Comeau-Shirley's character, honesty, and business acumen:

> Mr. Wilson's testimony was credible on the key issues. **Mr. Gandis' and Ms. Comeau-Shirley's testimony lacked credibility in most important respects**.
>
> The evidence revealed that Mr. Gandis and Ms. Comeau-Shirley deliberately collaborated to oppress Mr. Wilson. **Their conduct was unconscionable**. They purposely created a toxic business environment with the goal of driving Mr. Wilson out.
>
> Defendants' [Gandis and Shirley's] tightly controlled cabal to oust Mr. Wilson could serve as a script for minority shareholder oppression. Their story even contains ample hubris, and an important irony: **they forgot Mr. Wilson was the partner who had the skills and contacts necessary to make the business work.**

Order Denying Defendants' Rule 59 Motion (emphasis added). The trial judge, as the sole factfinder in the present case, spent four and a half days observing the actions, reactions, body language, and physical presence of the witnesses, and he found that the testimony of Gandis and Shirley's only fact witnesses—themselves—to be without merit or credibility.

III. STATEMENT OF THE FACTS

A. David Wilson's Experience in the Film Industry

David Wilson has been working in the film business for nearly twenty-five years. (Tr. 360, ln. 17-19). After working for several film companies as an employee since 1991, he decided to start his own film company, Palmetto Custom Films, Inc. ("PCFI"), in 2003. (Tr. 361, ln. 23 – 362, ln. 11). The new business venture eventually caused tension to develop between Wilson and his investors due to financial concerns, and Wilson left PCFI in 2005. (Tr. 362, ln. 12 – 364, ln. 9). Wilson decided to start another

company—Eastern Film Solutions ("EFS")—that would allow him to function as a broker of film without having to own a plant or equipment, or to hire any employees, as well as allow him to represent different companies in buying and selling film. (Tr. 364, ln. 10-19).

At EFS, Wilson continued to expand his already-considerable stable of contacts in the film industry via unofficial partnerships with other film companies, joining trade associations, visiting trade shows, and scouring the Internet and the Thomas Registry[1] for potential customers and suppliers. (Tr. 365, ln. 5-25). EFS focused on polyester film, primarily due to Wilson's extensive contacts with polyester manufacturers in the United States. (Tr. 366, ln. 3-15). Wilson ran EFS by himself from 2005 until 2007, when he met John Gandis. (Tr. 366, ln. 16-20).

B. Formation of CCC

At the time the two men first met, Gandis was working for Vytech as a project engineer, and Wilson was running his own film business at EFS, where he bought film from manufacturers and sold to various customers; in short, he brokered film deals. (Tr. 18, ln. 1-2; 25, ln. 24 – 25; 367, ln. 1-5). Gandis also owned and operated Decotex, LLC, which bought and sold decorative designs that can be used on film, as well as M-Tech, which fabricated sheet metal. (Tr. 20, ln. 3-9). As part of M-Tech, Gandis owned some machines called "slitters" (used to cut film) and a building, against which he could borrow. (Tr. 20, ln. 3-5). This building later housed the operations of CCC. (Tr. 20, ln. 20-23).

[1] The Thomas Registry was a multi-volume directory of industrial product information covering 650,000 distributors, manufacturers and service companies within 67,000-plus industrial categories. It's now located online at http://www.thomasnet.com. (Tr. 343, ln. 11 – 345, ln. 1).

In or about November 2007, John Gandis and David Wilson decided to form Carolina Custom Converting, LLC ("CCC"). Initially, the idea was to have CCC perform perforation services (poke holes in the film) per customers' instructions. (Tr. 22, ln. 12-13; 24, ln. 21-22; 368, ln. 19-23). After the perforation idea fell apart, Wilson and Gandis decided to use to slit (or cut) large rolls of film down to customer-specified widths. (Tr. 23, ln. 10 – 24, ln. 4; 368, ln. 24 – 369, ln. 8). Many of Wilson's customers at EFS eventually used CCC to have their purchased film slit down to the required sizes. (Tr. 25, ln. 24 – 26, ln. 21).

At the time of initial formation, Gandis and Wilson were the only two members, each with a 50% ownership interest in the company. (Tr. 369, ln. 13-14). And although they had decided to form their new joint business venture as an LLC, they'd had no discussions about whether or not CCC would be organized as a term LLC. (Tr. 39, ln. 12-14; 369, ln. 9-12). However, using a questionnaire/worksheet prepared for Gandis' other company as a guide, Wilson and Gandis systematically discussed the various terms that they planned to be later enshrined in a formal operating agreement. (Pl. Ex. 1; Tr. 27, ln. 4-25). Gandis made handwritten notes on the document to be given to his attorney to aid in drafting the CCC operating agreement. (Tr. 30, ln. 20 – 31, ln. 5). CCC was ultimately organized as a manager-managed limited liability company, and Gandis was identified in the articles of organization as the only manager, which would become significant in his assumption of the power to involuntarily expel Wilson from the company. (Tr. 38, ln. 8-19; Pl. Ex. 129). Wilson and Gandis never signed a formal operating agreement, although both agreed the document given to Gandis' counsel represented many of the terms of their initial agreement. (Tr. 40, ln. 8-15).

In 2008, Gandis engaged Shirley, a Georgia-licensed Certified Public Accountant, for accounting and formation advice. (Tr. 56, ln. 16-20). In 2009, Shirley agreed to accept a 10% ownership interest in CCC in exchange for providing accounting services. Gandis and Wilson each transferred 5% of their interest in CCC to her, each retaining a 45% interest. (Tr. 103, ln. 25 – 104, ln. 8). Although Shirley did not have a formal voting interest, she took an active and ever growing role in management, primarily through private communications between her and Gandis.

C. Combining EFS with CCC: "Minus the Three"

In the first half of 2008, Wilson and Gandis began discussing the possibilities of expanding the scope of CCC and winding down their individual businesses. (Tr. 376, ln. 1-6, 19 – 378, ln. 2). Wilson eventually agreed to run much of EFS's slitting business through CCC instead of other companies, with EFS purchasing the film, bringing it to CCC for slitting (with CCC getting a fee for the slitting), and then selling it EFS's customer. (Tr. 37, ln. 6-15; 375, ln. 12-25; 377, ln. 14-18). This arrangement later evolved into CCC entering the film purchasing markets on its own behalf: first the domestic market and later the international market. (Tr. 37, ln. 16-20).

In either May or June 2008, Wilson agreed to make CCC the buyer and seller of film on one of EFS's major accounts, Minova, resulting in significant additional revenues of $775,000.00 for CCC in 2008. (Tr. 376, ln. 1-18; 63, ln. 4-21). Minova had been EFS and Wilson's customer since 2006 or 2007, before CCC existed, and had an established relationship with Wilson dating back nearly fifteen years. (Tr. 373, ln. 25 – 378, ln. 7). It was a significant opening gesture.

The Minova account fueled additional discussions about EFS winding down and conducting all new film business through CCC. However, Wilson indicated he wished to keep three import accounts separate from CCC until the deals were finished. (Tr. 378, ln. 17 – 379, ln. 22). The three accounts to be excluded from the deal were Lamborn, Modular Metal, and West Carrolton (two of which, Lamborn and West Carrolton, were financed by fellow Respondent Steve Norvell ("Norvell"), Wilson's brother-in-law). (*Id.*) Wilson had been working on these import deals for several months already,[2] and he had financed the deals through Norvell; Wilson told Gandis that these deals would not be folded into CCC because of existing obligations to others (as well as fairness to himself). (*Id.*) Gandis agreed to this arrangement. (Tr. 380, ln. 13-16; Def. Ex. 7, p. 5: "minus the three"). The three accounts were mostly import accounts (Tr. 68, ln. 9-13); CCC did not engage in import business until 2010 (and quite frankly was not capitalized to do so until then). (Tr. 68, ln. 14-18). Beginning in or about July 2008 and consistent with his agreement with Gandis, Wilson began winding down EFS and the three accounts' activity, which continued through July 2009. (Tr. 385, ln. 20 – 386, ln. 3; Pl. Ex. 21). Under the new combined masthead of CCC, the two men agreed that Wilson would lead CCC's sales efforts and Gandis would manage operations. (Tr. 369, ln. 15-22).

On January 19, 2010, Shirley acknowledged via an email to Wilson and Gandis that Wilson continued to transact business on behalf of Eastern Films in 2009 and indicated that part of the 2010 plan was "completing Dave's transition towards full-time CCC . . . ." (Pl. Ex. 21). On June 29, 2010, Shirley sent Wilson an email discussing tax

[2] The West Carrollton deal was in place as early as December 14, 2007 (Pl. Ex. 127; Tr. 284, ln. 9 – 285, ln. 23). This deal involved a type of metallized film that CCC never sold. (Tr. 286, ln. 5-9).

liability and stated "[o]bviously the world is much more complicated than that since you had two jobs and still had some wind-down activity from Eastern Films that muddies your tax world in 2009." (Tr. 547, ln. 20 – 548, ln. 16; Pl. Ex. 22). Despite these clear acknowledgements by Appellants that they were both aware of Wilson's wind-down activities with EFS through 2009, Appellants still boldly assert that Gandis was completely unaware that Wilson was still finishing up work with EFS. (App. Brief 15-16). Ultimately, the trial court found Appellants' claims that they were ignorant of Wilson's activities to be without merit. (Trial Order, January 2, 2015, pages 3, 12-13).

D. Wilson's Guaranteed Salary Agreement with Gandis

While Gandis has his other businesses (and their associated lines of credit) on which to draw for income during the early days of CCC's existence (Tr. 51, ln. 23 – 52, ln. 2), Wilson had only his EFS income to support his family. On June 24, 2008, as the parties were discussing the evolution of CCC, Wilson wrote to Gandis:

> If I am to focus all my efforts in the film business on CCC, I am foregoing opportunities to earn money on those opportunities outside of CCC. . . .
>
> Please look at it from my side...I am considering turning over accounts with all associated profits to CCC. **This is my primary source of income**. I have to be compensated for the business I have established.
>
> If you are having doubts about whether my accounts are worth the salary, we need to discuss this. If you feel that my salary puts you in an unfair position, we should also discuss this. I have no doubt that the contribution we both bring to the table can result in a successful business. I think you feel the same based on everything you have told me.

(Pl. Ex. 6) (emphasis added). Gandis met Wilson's demand for a fair guaranteed payment, and Gandis agreed that, in exchange for Wilson winding down EFS and shifting that income to CCC, Wilson would receive compensation in the amount of $8,000 per month. (Tr. 380, ln. 22 – 381, ln. 12; Pl. Ex. 6). Gandis would contribute financially by

funding the business through two credit lines (the M-Tech line of credit and the Deco-Tex line of credit). (Tr. 377, ln. 20; 51, ln. 23 – 52, ln. 2).

Wilson's need for regular income, now that his former EFS income was being funneled through CCC, was a clear weakness exploited by Gandis and Shirley. By 2011, when Appellants' efforts at oppression ramped up (as discussed fully below), Wilson had long wound down EFS and had begun conducting all new film sales through CCC. Gandis, who testified that his only income in 2007 when CCC was forming was borrowed money, kept running Deco-Tex for his own individual benefit after the formation of CCC. (Tr. 116, ln. 6-20). Later, Gandis also used CCC facilities and employees to work on Deco-Tex projects and duties, all the while paying for that Deco-Tex work with CCC funds. (Tr. 123, ln. 22 – 132, ln. 22). The real import of Gandis' CCC-subsidized Deco-Tex profits, which he had decided to keep to himself (Tr. 402, ln. 8-10), was that he could afford to forego guaranteed payments from CCC. (Tr. 416, ln. 20-25). Wilson relied on his CCC income to support his family, and of course, would need additional funds to pay his tax liability. (Tr. 411, ln. 14-22). Because Wilson did not have a side business to fall back on in 2011, he continued to need his monthly income to support his family, which Gandis and Shirley took to calling a loan. (Tr. 416, ln. 25 – 417, ln. 20). These moves made Wilson a debtor to both the IRS and to CCC and created additional financial pressure. (Tr. 420, ln. 24 – 421, ln. 15). This pressure was exploited by Gandis and Shirley in their concerted efforts to oust Wilson from his own company in 2011 and 2012, as outlined in more detail below.

E. Tax Burden for Wilson

CCC's business grew, and with the help of a film shortage in 2010 it flourished, turning a profit of over a million dollars. (Tr. 104, ln. 13-22; 387, ln. 24 – 388, ln. 20). However, since CCC was organized as a subchapter S entity, the members were responsible for taxes proportionate to their ownership interest. Also, because CCC filed taxes on an accrual basis, this tax liability was even greater. (Tr. 104, ln. 23 – 105, ln 7). In the past, a tax distribution was made to each member, and funds had been set aside for a tax distribution for 2010. Wilson reasonably expected such a practice to continue (Tr. 411, ln. 14-22). The tax reality for Wilson was that CCC's profits in 2010 created phantom income for the members, and the leaner revenue of 2011 produced a shortfall for the tax payment.

Around this same time period, Shirley had begun to extensively advise Gandis as to the management of CCC and the treatment of Wilson. She advised Gandis to pay off an equity line previously relied upon by CCC to manage cash flow and purchase inventory with CCC's excess cash. Instead of using the equity line as before, Gandis could use it to pay his personal tax liability. (Pl. Ex. 23, 24, 36; Tr. 105, ln. 20 – 110, ln. 13). So, Gandis used CCC funds set aside for the 2010 tax liability to pay off CCC's obligation of the line of credit, and then used the line of credit to pay his own taxes. (*Id.*). On April 15, 2011, Wilson was informed by Shirley CCC would not make a tax distribution to cover his tax liability as previously agreed and as had been done in the past (Shirley to Wilson: "I want to make certain there is no confusion – there are NO TAX DISTRIBUTION PAYMENTS for you or anyone else at this time.") (Pl. Ex. 35).

F. Monitoring of Wilson's Emails

With Shirley's tax pressure affecting Wilson by this time, Shirley and Gandis conspired to set up computer protocols to monitor surreptitiously all of Wilson's emails. (Tr. 415, ln. 13 – 416, ln. 10; 118, ln. 12 – 119, ln. 14; 700, ln. 15 – 701, ln. 12; Pl. Ex. 29). Critically, CCC had no written policy and did not advise Wilson that his emails would be intercepted and monitored. (Tr. 415, ln. 13 – 416, ln. 10). Instead, Gandis and Shirley took steps to conceal from Wilson that his email software would be altered so that Gandis and Shirley could intercept all of Wilson's email. (*Id.*). Shirley encouraged Gandis that "the more we act like nothing special is going on … the less likely they are to think that something unusual is going on … The same stuff that protects the business ALSO helps protect **the other goals**…" (Pl. Ex. 25; Tr. 119, ln. 22 – 120, ln. 10) (emphasis added).

In March 2011, Defendants also began discussing a plan to "restructure" Dave Wilson's equity (i.e, take it away) in exchange for a monthly salary. (Pl. Ex. 34; 39). There were several email exchanges about Wilson's contribution and how easy he would be to replace. Shirley's emails to Gandis outlined a plan to flip Wilson from an owner to an employee. By August 16, 2011, Shirley bluntly proposed that they develop an "Exit Strategy" for Wilson and identified who could take Wilson's place as head of the sales team. (Pl. Ex. 39).

But not until September 2011 did Shirley's spying efforts began paying real dividends. Gandis, who was now apparently spending part of his workday reading co-owner Wilson's emails, discovered an email from Julie Wilson, Wilson's wife, sent on September 12, 2011 to Wilson. (Pl. Ex. 41; Tr. 142, ln. 10-19). Julie Wilson was

expressing frustration with Shirley and Gandis' running of CCC, especially at a time that was now several months after Shirley's directive to Wilson that no tax payments would be made and after Shirley's decision that payments to Wilson would be classified as a "loan" instead of the "priority guarantee" agreed upon by Gandis in 2008. On September 19, Gandis forwarded this clearly personal email to Shirley with the suggestive comment that "I just want you to know what I know so that when the time comes…?" (*Id.*). Shirley seized upon this opportunity for exploitation with a vengeance, opining at length that:

> [t]his is probably your opportunity to make a RESTRUCTURING offer to Dave under which you restructure your relationship with him so he gives up his equity ownership and converts to a structure where he is only taxed on what he receives!
>
> ….
>
> Anyway, back to the import [*sic*] point—Now is the time to see if he wants to be in a different structure…we can restructure so that he is not an owner as of 1/1/2011…and you can put him into a different deal that compensate [sic] him for his time and energy—more like a regional sales manager is paid – so he gets paid on his sales and also on his sales team.

(*Id.*). The entire idea to restructure Wilson to the ultimate advantage of Shirley originated solely from the mind of Andrea Comeau-Shirley. (Tr. 699, ln. 14-16).

G. Bad Faith Offers to Restructure Wilson's Interest

The next morning, September 20, 2011, after taking the night to sleep on her own suggestion, Shirley doubled down. In yet another extensive email, Shirley, the 10% non-voting member/accountant, directed Gandis on how best to use the financial and domestic pressure on Wilson to their advantage by providing Gandis with the exact words to say to Wilson:

> So...I go to Dave and I say - "This year has been tough on cash and I expect next year will be as well. Are you prepared for another year like last year - with high taxable income where we have to borrow to cover our taxes? I have a proposal for you to consider ... here it is in writing. I am not telling you that you have to convert to this structure .. I am just

offering it to you if this would be better for you. If you like the current structure, I am ok with it staying this way .. I just want to make certain that you are as well.

In reviewing the financial statements with Andrea, she tells me that it could be a couple of years in this same cash flow position and that this is typical of growing companies. As you know, I have actually taken NOTHING out of the company since April and we are going to need to decide what our distribution levels for 2012 are based upon what the company can actually support – not what we wish it would be able to support. As an owner, this could mean sacrifice. If you are not able to share in the sacrifice .. then I think we should convert you to something that works for you and lets us still work together."

Shirley goes on to provide the real reason and meaning behind the words above:

If we ever found that Dave was "cheating" - or selling any type of film? laminate? paper, film, or foil - then his agreement with CCC would cease immediately. This would be covered in the non-compete – and we need to find out from the attorney's how to make certain that this agreement on his part would be linked to #5 above ...**making your commitment voidable if you find even the SMALLEST amount of evidence**. The attorney might say .. the courts could overturn it .. but that would be up to Dave to sue to get that back ... or ... better yet .. to just stop all this playing every side of the fence. I would include a sentence that say that you have the RIGHT to request copies of his tax returns or to otherwise verify that the exclusivity is being met.
***
He cannot continue to have access to the financial records – not because he doesn't need any of the information – but because he needs to be able to ARTICULATE what information is needed and we need ... as a company ... to know what information is needed by the sales team on a daily, weekly and monthly basis.

(Pl. Ex. 42) (emphasis added). Under this arrangement, Wilson would switch from a 45% owner of CCC with no non-compete agreement to an at-will employee subject to an onerous non-compete. (Tr. 146, ln. 2 – 147, ln. 7; 421, ln. 20 – 422, ln. 22).

As Wilson's financial position and income prospects became more precarious, Wilson sent an email to Gandis asking for a meeting with all three owners to discuss the plan for tax payments. (Pl. Ex. 43). Gandis immediately forwarded that email to Shirley,

with the hopeful remark: "**Now maybe the panick** [*sic*] **is setting in.**" (Pl. Ex. 43; Tr. 149, ln. 3-16). Shirley then instructed Gandis to reply that "the Company will not have cash for a tax distribution until we reduce our inventory levels" and to again hammer away at the restructuring option; but, she ordered, "make [my words] sound more like John [Gandis] and less like Andrea." (Pl. Ex. 43).

The financial pressure was intensifying on Wilson. Now he was being forced to consider relinquishing his equity, but the financial information he kept receiving from Gandis and Shirley was changing to the negative. (Tr. 421, ln. 16 – 426, ln. 18). Shirley kept feeding Gandis ideas about "potential restructuring for Dave." (Pl. Ex. 44). All the while in October and November 2011, Gandis and Shirley continue to put the ability to pay the agreed-upon monthly draw in question. (Tr. 556, ln. 10-15). When Wilson asked for a precise amount of his capital account, Shirley exploded: "NO he does not understand...We can CALL in his loan . . . and then he either comes up with $123K or he forfeits his membership interest." (Pl. Ex. 46). This was never part of the deal; Wilson had almost a half-million dollar positive balance in his capital account. (Tr. 417, ln. 21 – 418, ln. 4).

In her private coaching to Gandis, Shirley advocated high pressure tactics. Ultimately, Wilson was given the deadline of January 7, 2012 to either become an employee or cease receiving the previously guaranteed monthly income that he relied upon. (Pl. Ex. 85). As this deadline approached, Shirley prepared a "Pro-Forma Balance Sheet" to accompany an offer to Wilson to buy his interest. (Pl. Ex. 163). However, the balance sheet contained questionable accruals and removed assets that had been listed on previous CCC balance sheets. (Pl. Ex. 163; Tr. 154, ln. 14 – 159, ln. 12; 423, ln. 19 –

426, ln. 18). Although Gandis and Shirley indicated they would also sell at a price based upon this balance sheet, their offer had materially different terms, including the requirement that Shirley be paid a $100,000 "preference on units" (which Shirley later admitted was not promised to her by anyone, despite Gandis' testimony under oath to the contrary) and that Wilson purchase M-Tech' s building, which Shirley deemed a "burden." (Pl. Ex. 82, 84, 85; Tr. 154, ln. 14 – 159, ln. 12; 159, ln. 13 – 162, ln. 13; 423, ln. 1 – 18; 712, ln. 3-16). This is important because the building was a burden on Gandis, and by making it requirement of any deal, Gandis was engaging in self-dealing. Ultimately, the Shirley-prepared balance sheet had the effect of devaluing Wilson's interest in CCC. (Tr. 423, ln. 1 – 426, ln. 18; 427, ln. 6-10).

When Gandis and Shirley indicated that they were willing to sell their interest in CCC, Wilson told them that he might be able to gather some investors together to buy the business outright. (Tr. 430, ln. 3-13). With Gandis' knowledge, Wilson began approaching potential buyers of CCC, including Steve Norvell, Wilson's brother-in-law law (Tr. 430, ln. 20), and Mark McGarel of Filmtech, to whom Wilson provided information about CCC's financial status, absent customer names and subject to a nondisclosure agreement. (Tr. 431, ln. 8 – 432, ln. 6). All the while, emails between Wilson and his lawyer, his accountant, and others were monitored, giving Shirley and Gandis access to Wilson's thought process in real time. (Tr. 121, ln. 21 – 122, ln. 9). When discussing the option of CCC being bought out by another company, Wilson also broached the idea potential employment with Mark McGarel and indicated he did not have a non-compete or a non-solicitation agreement. (Tr. 432, ln. 7 – 434, ln. 19). However, these other options for resolving the situation were not successful. (*Id.*).

On January 5, 2012, Shirley locked Dave Wilson out of the accounting system, which eliminated his ability to review basic financial data or to print the information. (Tr. 435, ln. 18-21; Pl. Ex. 86). As the deadline for Wilson accepting Gandis and Shirley's offer approached, Shirley sent an email to Gandis with the subject line "RE: Dave Offer Expires? Patience, grasshopper, patience...." (Pl. Ex. 88). A squeeze-out takes time, as Shirley points out in this email:

> I know you want this done .. but ... it is like a cake in the oven .. you just have to wait until the buzzer goes off. Once Friday comes and goes .. we are better off than we are today.
> ***
> PLEASE JUST LET THIS SLEEPING DOG LIE.
>
> You teach a child lessons by making them suffer the consequences of their actions/inactions. Dave apparently missed this lesson . . . .

(*Id.*). At this point in the email, Shirley lets slip what her true plan has been all along:

> My second preference is that we keep him as a partner—but we have to recapitalize and reorganize the company to continue. I hope he stays as a partner...Then we need to increase my equity for my additional participation and then we will increase your equity for funding you are providing to the company.. and **I can see us ending up in a structure where you are 50%--Dave is 25% and I am 25%.** Your new LLC shares have super-voting rights have a PRIORITY at liquidation. My new shares will also have a priority...Dave will only own old shares....I say we get Zamer drafting a new LLC agreement.

(Pl. Ex. 88). Shirley, who at this time existed as a non-voting member in charge of the finances, planned to decrease Wilson's ownership interest, increase her own ownership interest, and continue pulling Gandis' strings as to the rest of the company. She would effectively be running the entire company if her endgame reached fruition, but a little patience from her protégé Gandis would be essential.

H. Termination and Expulsion[3]

But by mid-January, Shirley informed Gandis that the time for waiting had passed. A January 17, 2012 email between Gandis and Shirley reveals their decision to terminate Wilson but maintain that he resigned, and to physically lock him out of his office. (Pl. Ex. 92). Shirley and Gandis hatched their final plan to expel Wilson CCC on January 18, 2012. In response to Gandis pondering the "[p]ossible legal ramifications for firing Dave [Wilson]" and wondering "[w]hat words should I use in the termination," Shirley assured him that firing employees in South Carolina is impossible to botch, and that their cover story would be that Wilson had already resigned, as supposedly conveyed by his attorney, and that Gandis was just "basically here to bring that to a closure." (*Id.*). That same day, Gandis and Shirley cut off Wilson's access to CCC's Anderson computer server. (Tr. 436, ln. 6-13).

On January 18, 2012, Gandis arrived at CCC's Greenville office with a law enforcement officer and a locksmith and announced to Wilson that his resignation was accepted. (Tr. 436, ln. 14-18). Wilson protested that he was not resigning, but Gandis, hewing closely to the script that Shirley had written for him, insisted that Wilson had resigned, and Gandis was accepting that resignation. (Tr. 436, ln. 19-22; 712, ln. 17-21; 321, ln. 8 – 323, ln. 4). Wilson initially refused to leave, and the police officer declined to physically remove Wilson because Wilson was an owner of the company, but when the locksmith began changing the locks on the building, Wilson eventually realized that he had no choice but to leave. (Tr. 436, ln. 23 – 438, ln. 9).

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[3] Further information regarding the facts of Wilson's termination and his actions with the computers and Blackberry are explained in pages 7-8 of Respondent Wilson's Initial Brief on Trade Secrets, and for sake of brevity, these pages are hereby incorporated by reference.

He gathered up his computers, files, tax returns, bank statements, and Blackberry to take with him out of fear that he would never see them again. (Tr. 438, ln. 8 – 439, ln. 6). Wilson was concerned (1) about leaving his personal information on his computer in Gandis and Shirley's possession, and (2) he would need "information about CCC to prove what had happened, to prove what I had done for the company. . . ." (Tr. 321, ln.12 – 323, ln. 4; 441, ln. 3-17). Wilson took his laptop with him when he vacated, copied the electronic information to another computer, erased the computers to remove his personal information, added CCC files and emails back to the CCC laptop, and returned the computer. (Tr. 442, ln. 1-25 – 444, ln. 1-8). In fact, the search of the computer paid for by Appellant revealed that there were 40,000 emails on the computer when it was returned despite Appellants' claims it was wiped clean. (Tr. 443, ln. 9-25 – 444, ln. 1-2). Wilson testified the information he had copied was stored on the same hard drive on which it was originally copied, and had never been used to compete. (Tr. 444, ln. 4-8). Gandis and Shirley did not seek access to the hard drive or retain an expert to determine whether any of the information was actually opened and used.

After Wilson's departure, Gandis changed the locks (Tr. 102, ln. 7-10) and had Wilson's cell phone immediately shut off, along with all the cell phones of Wilson's family. (Tr. 439, ln. 7-21). Wilson's family health insurance, which he received through the company of which he was an owner, was also terminated. (Tr. 439, ln. 22 – 440, ln. 24). Wilson, who is still 45% owner of CCC, has not been able to access his company from January 18, 2012 until the present day.

Shirley's concocted story about Wilson's "resignation" is undercut by yet another email from Shirley to Gandis just three days later, when she instructs Gandis to "ignore

what I said about 'Dave resigned,'" and ordered Gandis to tell a customer that the true reason that Wilson was no longer with CCC was because Wilson was competing with CCC and they had to let Wilson go. (Pl. Ex. 97; Tr. 169, ln. 21 – 170, ln. 23). This exchange is just one example of why the factfinder found Shirley's testimony to lack even the barest hint of credibility.

I. Appellants' Self-Dealing After their Expulsion of Wilson

1. Excessive Rent and Interest

Within two weeks of expelling Wilson, Shirley send Gandis and his wife, Denise, an email beginning with, "I want to make certain that both of you know how I see the $$ moving about here." (Pl. Ex. 100). The first place it moved to was Gandis' pocket, as rent was increased from $2,500 to $6,000 a month. (*Id.*; Tr. 171, ln. 11-23). Shirley also removed hard assets attached to the plant from CCC's balance sheet and transferred them to Gandis via M-Tech. (Tr. 134, ln. 11 – 137, ln. 23). This transaction was classified as "rent," thereby increasing the rent for 2011 retroactively. (*Id.*). Wilson never agreed to this increase of rent as the oral/memorialized operating agreement required. (Pl. Ex. 1; Tr. 440, ln. 19-20). Second, Defendant Shirley confirmed with Gandis that CCC will have use of M-Tech's line of credit but "at a rate of 1.5% per month (This is 18% annual interest rates) ... and ...if we are still advancing funds on the loan next year—that rate increase to 2% per month." (Pl. Ex. 98; Tr. 172, ln. 10 – 173, ln. 4). However, this form of self-dealing was really just the beginning.

2. Gandis and Shirley Secretly Create a Competing Business: ZOi Films

As Gandis and Shirley admit, CCC was a manager-managed LLC and Gandis was the manager. (Gandis and Shirley Amended Initial Brief, page 19). Shirley was his sole

advisor after Wilson was locked out. After Wilson's ouster, the biggest concern for Gandis and Shirley was how to allocate company proceeds now that a 45% owner was no longer allowed into his own company. To address this practical concern, Gandis and Shirley began plotting on March 15, 2012 to create a competing entity so they did not have "to haggle with Dave W about how much of the new stuff was his." (Pl. Ex. 107; Tr. 713, ln. 20-25; 185, ln. 19 – 187, ln. 15). Just months later, ZOi Films, LLC was created by Gandis and Shirley to handle the most profitable business and let CCC die on the vine; ZOi used the CCC server with all of CCC's alleged trade secrets, sold to CCC customers, and had access to pricing, customers, products, and anything else it alleges that Wilson took. (Tr. 184, ln. 12 – 186, ln. 22, Pl. Ex. 107, 108, 109, 113).

After Gandis and Shirley created ZOi, they submitted corporate resolutions with the bank indicating that ZOi was owned by two LLCs owned by Gandis and Shirley, yet at trial and while under oath they both maintained that they had intended to create a wholly-owned subsidiary of CCC. (Tr. 187, ln. 16 – 191, ln. 25; Pl. Exh. 133). More significantly, tax documents signed under the penalty of perjury confirmed that ZOi had not been organized as a wholly-owned subsidiary of CCC. (Tr. 192, ln. 1-9; 714, ln. 6 – 715, ln. 19; Pl. Ex. 134, 135). But the documentary evidence did not stand in the way of Gandis and Shirley maintaining their cover story. Despite Appellant CCC's causes of action to the contrary, the same "trade secrets" claimed to have been taken by Wilson to Neologic were willingly given to ZOi by Gandis and Shirley beginning in July 2012, all the while Gandis and Shirley were maintaining under oath that this was not their intention.

Former CCC customer service manager, Bill Shaw, testified that he was told by Gandis and Shirley that ZOi Films was "a new company that John [Gandis] and Andrea [Comeau-Shirley] were starting up." (Tr. 325, ln. 18-23). Shaw further testified that while he was being paid by CCC, he was in reality working on ZOi Film deals, before Gandis and Shirley became secretive about ZOi's business. (Tr. 325, ln. 5 – 327, ln. 18). ZOi Film business was being conducted at CCC and using its Quickbooks system to enter sales transactions and purchase orders to make it appear that ZOi was buying film from CCC. (Tr. 326, ln. 1-8). Accordingly, CCC's pricing and customer information used by Shaw in performing his customer service duties on behalf of CCC were also being used by Shaw in performing purchasing and sales for ZOi Films.

J. Wilson's Post-CCC Activities

Several months after his ouster, Wilson began working and selling film for Neologic, Inc., owned by his sister-in-law and managed by Steve Norvell just to make ends meet. (Tr. 729, ln. 19-23; 451, ln. 23 – 452, ln. 16). Sales began slowly in 2012, mostly to former CCC customers with whom Wilson had long term relationships that predated CCC. (Tr. 444, ln. 17 – 451, ln. 14). Wilson continued to sell film for Neologic in 2013 and 2014, including to former CCC customers, but he did not use any of CCC's information to compete. (Tr. 443, ln. 9-25 – 444, ln. 1-2). Whatever success he had after being ousted from his own company by Gandis and Shirley stemmed from his skills and extensive contacts in the film business that he had developed in his twenty-plus years of experience.[4] And not even Gandis and Shirley's "tightly controlled cabal to oust Mr.

[4] The issue regarding allegations of trade secret infringements is briefed extensively in Respondent Wilson's Brief on Trade Secrets in the companion appeal filed by CCC.

Wilson" could change that bit of reality. (Order Denying Defendants' Rule 59 Motion, page 2, Jan. 28, 2015.

K. Court-Appointed Accountant Del Bradshaw Report and Testimony

While that concludes the basic narrative surrounding Appellants' oppression and ouster of Wilson, it is important for this Court to take note of the following trial testimony by court-appointed expert Del Bradshaw ("Bradshaw'), a Greenville CPA, before diving into the legal arguments. After Wilson was ousted, Shirley managed to muck up and confuse CCC's financial records to such a degree that the court felt compelled to appoint a third party accountant to reconstruct the financial documents of CCC. Del Bradshaw was appointed by the court to answer specific questions contained in an order of the trial court, a task which ultimately took from November 2013 to August 2014. (Tr. 588, ln. 1-12). (Wilson, by the way, wound up paying for one-half of the resulting six figure plus accounting bill.) (*Id.*).

Bradshaw's first finding was that the tax returns prepared by Shirley and the financial statements prepared (and later manipulated) by Shirley simply did not match. (Tr. 588, ln. 13-17). Bradshaw testified that an accountant—in this case, Shirley, who is a Georgia Certified Public Accountant (CPA)—should have created a copy of the general ledger and stored it as a permanent record for tax returns. However, Bradshaw testified that this was not done. (Tr. 589, ln. 6 – 590, ln. 2). Because the records were not "locked down," the financial records continued to "evolve." (Tr. 591, ln. 11 – 592, ln. 3).

Bradshaw testified that Shirley had to be held to a higher standard because she was an owner of CCC *and* the CPA. (Tr. 593 ln. 18 – 594, ln. 1). However, the result of all the alterations of the financials during the climax of the squeeze-out of Wilson was

that the financial records were not reliable. (Tr. 593, ln. 9-15). Bradshaw testified that a locked-down version of the financial records would have made any fraud more "traceable" (Tr. 592, ln. 15-18), and given the factual context surrounding this case, it's clear that the traceability of any fraudulent activity was not a high priority on Shirley's list. Ultimately, many financial accounting issues remained a mystery even after Bradshaw's extensive attempt to reconstruct accurate financial records.

At trial Bradshaw noted that Gandis and Shirley had engaged in questionable behavior after Wilson's ouster that provided unusually favorable results for Gandis' father and Gandis himself. For example, Bradshaw discovered a "loan" from Cliff Gandis (Gandis' father) to ZOi Films, LLC, the not-so-covert limited liability company created by Gandis and Shirley, to fund a large film purchase. (Tr. 596, ln. 23 – 597, ln. 3). Cliff Gandis made an "exorbitant" interest rate on this three month loan that netted a "phenomenal" $33,000 return on a $130,000 loan. (Tr. 597, ln. 1-17). Bradshaw testified that, in regards to the matter of a fiduciary duty, Shirley's advising Gandis to increase CCC's rent was inappropriate. (Tr. 598, ln. 4-20; Pl. Ex. 33) (Shirley to Gandis: "You seem to have forgotten I forced you to raise the rent for CCC."). Bradshaw also found that despite a total absence of an agreement between any of the parties regarding the terms of a lease, Gandis unilaterally increased rent for a total of an additional $72,000 in 2012. (Tr. 601, ln. 10-25). In order to get an honest set of financials, Bradshaw had to deduct these payments from Gandis' capital account. (*Id.*).

Bradshaw also reviewed the financials that Appellants had originally presented to Wilson on December 27, 2011 that purported to show the valuation of the business. One of the problems that Wilson had raised was that the financials contained a reserve for tax

distributions. (Tr. 602, ln. 3-23). After his own impartial review, Bradshaw said he could not find that entry in Quickbooks because that the reserve entry was added by Appellants to an Excel spreadsheet to create a new Balance Sheet to give to Wilson, which was different than the balance sheet in the books of CCC. (*Id.*). Bradshaw testified that this insertion resulted in a reduction in the equity (value) of the company. (Tr. 602, ln. 24 – 603, ln. 2). The reduction in value was done at the time Appellants were negotiating the purchase of Wilson's interest. Bradshaw stated that Shirley added a debt to herself of $100,000 that was included on the December 27, 2011 financials provided to Wilson, which further reduced the value of the company—at least, the value of the company on the documents given to Wilson. (Tr. 604, ln. 15 – 605, ln. 24). Though woefully and deliberately inaccurate, these financial records were the last that Wilson would see from CCC—absent a court order—from that day until present.

IV. LEGAL ARGUMENTS AND AUTHORITIES

A. There Was Sufficient Evidence Presented to the Trial Court to Support a Finding that Appellants John Gandis and Andrea Comeau-Shirley Engaged in Unlawful, Oppressive, Fraudulent, or Unfairly Prejudicial Conduct Under S.C. Code § 33-44-801.

1. Standard of Review

"A shareholders derivative action, as well as an action for stockholder oppression, is one in equity." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012), *citing Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). Therefore, this Court may find facts according to its own view of the preponderance of the evidence. *Id.*, *citing S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). However, this broad scope does not relieve Appellants of their burden to show that the trial court erred in its findings. *Id.*, *citing Pinckney v. Warren*, 344 S.C.

382, 387-88, 544 S.E.2d 620, 623 (2001). Furthermore, this Court is not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses. *Id.*

2. The Law of Oppression under S.C. Code § 33-44-801

Under S.C. Code Ann. § 33-44-410:

> (a) member or manager may maintain an action against a limited liability company or another member or manager for legal or equitable relief, with or without an accounting as to the company's business, to enforce:
>
> **(1)** the member's rights under the operating agreement;
>
> **(2)** the member's rights under this chapter; and
>
> **(3)** the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company.

S.C. Code Ann. § 33-44-410(a) (2014). The code places no limitations on the equitable relief fashioned by the court. Moreover, South Carolina Code § 33-44-801(4)(e) provides specifically for the equitable remedy of dissolution when "the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." Also, the comments to § 33-44-801 make it clear that the court may order a buy-out of the oppressed member's interest in lieu of a dissolution. In fact, when Wilson moved for summary judgment seeking dissolution, Appellant CCC and Appellants Gandis and Shirley opposed the remedy of dissolution and instead argued the court should order a buy-out. (June 24, 2014 Hearing Transcript p. 40, 54, 55). Appellants prevailed on that issue, and, upon a finding of that Appellants had violated § 33-44-801 after a four day bench trial on the merits, the court awarded Wilson the remedy of a buy-out by the individual Appellants.

3. *Appellants Oppressed and Squeezed Wilson Out of CCC*

The courts have used the terms "freeze out" or "squeeze out" interchangeably. The terms mean "the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control or utilization of some legal device or technique, to eliminate from the enterprise one or more owners or participants." *Kiriakides v. Atlas Food Sys. & Servs. Inc.*, 343 S.C. 587, 604 n.26, 541 S.E.2d 257, 267 n.26. (2000) (citation omitted). "Common freeze out techniques include termination of a minority shareholder's employment, the refusal to declare dividends, the removal of the minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation. Often, these tactics are used in combination." *Id.* at 604-05, 541 S.E.2d at 267 (footnotes omitted). So it was in this case.

i. "Exit Strategy"

First, Appellants Gandis and Shirley developed an "exit strategy" to "flip" Respondent Wilson from an owner of CCC to an at-will employee with a five-year non-compete. This strategy included: (1) Shirley not making tax distributions to members as in years past by manipulating use of cash and equity line balances (Pl. Ex. 39, 41, 163; Tr. 154, ln. 14 – 159, ln. 12; 423, ln. 19 – 426, ln. 18; Pl. Ex. 82, 84, 85; Tr. 154, ln. 14 – 159, ln. 12; 159, ln. 13 – 162, ln. 13; 423, ln. 1 – 18; 712, ln. 3-16); (2) Gandis running his side business (Deco-Tex) out of CCC's home offices and using CCC resources to help generate profits for himself (Tr. 123, ln. 22 – 132, ln. 22); (3) Gandis no longer taking CCC contributions while converting Wilson's agreed-upon guaranteed payments into loans (Tr. 380, ln. 22 – 381, ln. 12; Tr. 411, ln. 14-22; Tr. 420, ln. 24 – 421, ln. 15; Pl. Ex. 6, 46); (4) Appellants manipulating cash and falsifying accounting records to make

the cash position of company support their threats to stop all CCC payments to Wilson (Pl. Ex. 82, 84, 85; Tr. 154, ln. 14 – 159, ln. 12; 159, ln. 13 – 162, ln. 13; 423, ln. 1 – 18; 712, ln. 3-16); (5) Appellants intercepting Wilson's emails to gain information about his intentions, his negotiating strategy, and even the emotional toll it was taking on Wilson's wife; and (6) Appellants attempting to force Wilson to sale his interest for less than fair value by falsifying and altering the financial records of CCC.

Appellants' plan is clearly set out in detailed emails between Gandis and Shirley as it evolved step by step. The entire plot was essentially spoon fed to Gandis line by line through a constant stream of emails from the trusted Shirley. On August 16, 2011, Shirley discussed how Wilson was becoming expendable, and that they needed "an exit strategy *from* Dave [Wilson]. (Pl. Ex. 39). On September 19, 2011, Gandis intercepted an email chain that begins with an email from Julie Wilson (Dave Wilson's wife) sent on September 12, 2011 email to her husband, Dave Wilson: "If John [Gandis] and Andrea [Comeau-Shirley] are unwilling to do things the right way that is fine … but I am not standing by and watching it happen anymore. I cannot take the stress." (Pl. Ex. 41). On September 19th, Gandis forwarded the intercepted the email to Shirley and noted that "[t]his explains a little of Dave's behavior." (*Id.*). Shirley's response was immediate and calculated: "This is probably your opportunity to make a restructuring offer to Dave [Wilson] under which you restructure your relationship with him so that he gives up his equity interest . . . ." (*Id.*).

The next day, she continued to walk through the plan with Gandis:

> So…I go to [D]ave and I say – This year has been tough on cash, and I expect next year will be as well. Are you prepared for another year like last year – with high taxable income where we have to borrow to cover I taxes? I have a proposal for you to consider….

(Pl. Ex. 42). And so for the next two pages of her email proposal, Shirley lays out her "Confidential Business Restructuring" plan, which includes paragraph 3: **"Dave will sign his shares to me** so that he is only taxed on what he receives from CCC monthly – not the profits." (*Id.*) (emphasis added).

ii. Control of the Cash

Appellants implemented their exit strategy for Wilson primarily by using their strategic positions of controlling the checking accounts and accounting records. These positions of control allowed them to manipulate the available cash to justify their unilateral decision to stop paying Wilson the agreed-upon guaranteed monthly payments, and instead characterize these payments as "loans"—even when Wilson had a positive balance in his equity account. (Tr. 380, ln. 22 – 381, ln. 12; Pl. Ex. 6; Tr. 411, ln. 14-22; Tr. 420, ln. 24 – 421, ln. 15). (Of course, a regular monthly income for Wilson was part of the original deal.) (Tr. 380, ln. 22 – 381, ln. 12; Pl. Ex. 6). Both Gandis and Shirley continually threatened to stop Wilson's only form of compensation unless he agree to become an at-will employee with a five-year non-compete (Tr. 146, ln. 2 – 147, ln. 7; 421, ln. 20 – 422, ln. 22; Tr. 556, ln. 10-15). In November or December of 2011, Gandis and Shirley had Wilson removed as a signatory on CCC's bank account. (Tr. 418, ln. 5-419, ln. 13).

Emails make it clear that the manipulation of CCC's bank account balances were a means to accomplish the squeeze-out. Consider the following email from Shirley to Gandis as just one blatant example of the many possible:

> Right now we have some funds accumulated and it is in our best interest to distribute those funds to you and me (and to reclassify portion of Dave's note). It will be difficult to convince Dave that we don't have the funds to

give him a $12K loan so long as we are sitting there with a fat balance of money that really is your money (and to a much smaller extent, my money).

(Pl. Ex. 43; *see also* Pl. Ex. 49).[5] As an example that truth would not stand in their way, Shirley advised Gandis he might be able to deny that Wilson even owned 45% of CCC: "As for the LLC Agreement – I am looking for our copy … and he may find we never did execute the LLC agreement that you might be able to take the position that he is not some flat percentage --- I will ask Zamer."[6] (Pl. Ex. 47; *see also* Pl. Exs. 48, 49, 50, and 61).

Both Gandis and Shirley abused their managerial control to use account balances set aside for the members' 2010 tax liability to instead pay down the equity line, which in turn permitted Gandis use the equity line funds to pay his *personal* tax liability. The practical result of these manipulations was to decrease Gandis' need for cash and significantly increase his ability to squeeze Wilson.[7] (Pl. Ex. 23, 24, 36; Tr. 105, ln. 20 – 110, ln. 13). These manipulations occurred in the context of other pressure tactics, but they were all done to apply financial pressure to Wilson. As Shirley opined in one email, "[t]he fact that [Wilson] really needs the cash is just the motivation we need to ensure that he doesn't spend the next three weeks debating over which option he elects." (Pl. Ex. 49; Tr. 556, ln. 16 – 557, ln. 13). The options for Wilson were to remain an owner or become an at-will employee with a five-year non-compete. (Tr. 146, ln. 2 – 147, ln. 7; 421, ln. 20 – 422, ln. 22).

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[5] Plaintiff's Exhibit Nos. 1 through 174 were marked for identification and admitted into evidence. (Tr. 15, ln. 15-16).
[6] John Zamer is an attorney with Jones Day in Atlanta.
[7] At same time she was advising Gandis to use the equity lines to pay his taxes, Shirley told Wilson, "I want to make certain there is no confusion – there are NO TAX DISTRIBUTION PAYMENTS for you or anyone else at this time." (Pl. Ex. 35).

Upon the advice and counsel of Shirley, Gandis used his position as CCC's manager of operations to use CCC's facilities and employees to work on Deco-Tex projects and duties, thereby using CCC funds to pay for work to generate Deco-Tex profits. (Tr. 123, ln. 22 – 132, ln. 22; Tr. 124, ln. 16 – 129, 3; Pl. Ex. 31, Pl. Ex. 32; Tr. 23, ln. 23 – 132, ln. 22; Tr. 337, ln. 6 – 338, ln. 11). Between using the equity line to pay his personal taxes and CCC subsidizing his side business income, Gandis was in a position to forego his monthly salary and to characterize Wilson's monthly payment as a "loan" to CCC. (Tr. 116, ln. 9-20).

In addition, Gandis and Shirley then used their position to set up computer protocols to monitor surreptitiously all of Wilson's emails and used this inside information for their own benefit. (Tr. 415, ln. 13 – 416, ln. 10; 118, ln. 12 – 119, ln. 14; 700, ln. 15 – 701, ln. 12; Pl. Ex. 29). As evidence of bad faith, Gandis and Shirley took steps to conceal from Wilson that his email software would be altered so that Gandis and Shirley could intercept all of Wilson's email. (*Id.*). Shirley encouraged Gandis that "the more we act like nothing special is going on ... the less likely they are to think that something unusual is going on ... The same stuff that protects the business ALSO helps protect **the other goals**..." (Pl. Ex. 25; Tr. 119, ln. 22 – 120, ln. 10) (emphasis added). And, as discussed above, Appellants' interception of the Julie Wilson email played a key role in the increased pressure Appellants applied to Wilson after August 2011. (Pl. Ex. 41). Appellants also intercepted additional Wilson emails, including one from his accountant discussing with Wilson his response to Shirley's assertions. (Pl. Ex. 45).

With Wilson under the pressure of an unpaid tax bill and the threat of having his compensation terminated, Shirley used her position to prepare manipulated financials,

which included a $100,000 debt payable to herself, which she later admitted had never been promised to her. (Pl. Ex. 163; Tr. 154, ln. 14 – 159, ln. 12; 423, ln. 19 – 426, ln. 18; Pl. Ex. 82, 84, 85; Tr. 154, ln. 14 – 159, ln. 12; 159, ln. 13 – 162, ln. 13; 423, ln. 1 – 18; 712, ln. 3-16). Nonetheless, Appellants attempt to argue that Wilson could have purchased their interests at the same price as they were offering to buy his;.however, this is not true. The offer to sell required Wilson not just to purchase the interest of Gandis and Shirley, but also to buy Gandis' building, which was deemed a "burden" to unload on Wilson. (*Id.*). As the deadline for Wilson to accept Gandis and Shirley's offer approached, Shirley sent an email to Gandis with the subject line "RE: Dave Offer Expires? Patience, grasshopper, patience...." (Pl. Ex. 88). A squeeze out takes time, as Shirley points out in this email:

> I know you want this done .. but ... it is like a cake in the oven .. you just have to wait until the buzzer goes off. Once Friday comes and goes .. we are better off than we are today.
>
> ***
>
> PLEASE JUST LET THIS SLEEPING DOG LIE.
>
> You teach a child lessons by making them suffer the consequences of their actions/inactions. Dave apparently missed this lesson . . . .

(Pl. Ex. 88).

iii. Appellants' actions regarding CCC's finances were taken for the purpose of oppressing Wilson.

The South Carolina Supreme Court more recently applied the *Kiriakides* oppression standard *Ballard v. Roberson,* 399 S.C. 588, 733 S.E.2d 107, (2012), which is for the most part factually dissimilar to the present case. However, what is relevant is the Court's reiteration that "[a]lthough we declined to set out specific factors in *Kiriakides*

[for oppression], we observed several commonly considered ones including: 'eliminating minority shareholders from directorate and excluding them from employment[,] . . . failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders.'" *Ballard*, 733 S.E.2d at 110, 399 S.C. at 594. These common factors are actively present in today's case.[8]

Appellants have consistently withheld financial information from Wilson, who remains a 45% owner of the company. There have been no tax returns filed for CCC since 2011 (Tr. 616, ln. 14-19), and Shirley simply refused to provide any financials after 2013. (Tr. 718, ln. 4-16). There's no dispute that Wilson has been denied financial information from the time of his ouster and had to seek the court to compel production of financials for his own company.

Additionally, Appellants not only failed to enforce contracts for the benefit of CCC, but instead actively revised contracts (particularly lease arrangements with Gandis) to retroactively increase the 2011 rent in an attempt to facilitate the transfer of assets

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[8] Interestingly, the Court in *Ballard* relied on emails to determine the motives behind the plaintiff's exclusion from the business:

> In particular, e-mail communications between the other shareholders clearly indicate their desire to oust Ballard. The individual Appellants wanted to convince Ballard to return his 20% interest in Warpath in the hopes that "he [would] take his [$1,000,000] and run after a little threatening, posturing and whining." Furthermore, when discussing what options to give Ballard, Thoennes, III posited, "Don't we want to get him out of the deal?

Id. at 595, 733 S.E.2d at 110-111. The *Ballard* emails quotes appear almost quaint and naïve compared to the gigabytes of emails containing blatantly laid plans to cause Wilson to panic, to "flip" Wilson from owner to employee, to force a forfeiture of his membership interest, and all to be done with a healthy dose of "[p]atience, grasshopper, patience…." (Pl. Ex. 88). According to Shirley, such things are as easy as baking a cake. (*Id.*).

from CCC to Gandis. (Tr. 424, ln. 24 – 426, ln. 24; Pl. Ex. 29; Tr. 599, ln. 16 – 600, ln. 2). Specifically, immediately after ousting Wilson in early 2012, rent more than doubled from $2,500/month to $6,000/month. (Pl. Ex. 98; Tr. 170, ln. 24 – 171, ln. 17); *see Kiriakides*, 343 S.C. at 605 n.28, 541 S.E.2d at 267 n.28 ("siphoning corporate profits").

The self-dealing wasn't limited to just the lease arrangements and Deco-Tex. There was also Gandis' attempt to unload the "burden" of his building by including its purchase as a term of the buy/sell offer, which had the additional result of further squeezing Wilson into hunting for investors and potential buyers of CCC. Gandis also waited until after Wilson was expelled to give himself security interests in all the assets of CCC, while Shirley took the opportunity to back date $50,000 worth of payables to her accounting firm. (Tr. 716, ln. 3-9; 606, ln. 13 – 14).

Just as the trial court concluded, this is a classic case of a squeeze out; any other conclusion is simply not permitted by the record. But, despite the emails which laid out in embarrassing detail after detail, Appellants still took the stand and denied it all. Little wonder the judge cites Appellants' lack of credibility prominently in his order denying their motion to reconsider.

iv. Appellants' bad faith negotiations and ouster

Wilson's story needs no spoiler warning because we already know how it ends: the unlawful ouster of Wilson. However, the physical lock-out of Wilson from his office at CCC was preceded by a period of negotiations among the parties, including Appellants' bad faith offer on December 27, 2011 to purchase Wilson's interest at a greatly devalued amount. Appellants contend that the offer to purchase Wilson's interest was not oppressive since they were willing to accept the same offer. (App. Brief, p. 36).

This is simply incorrect for several reasons. First, on the "Pro Forma Balance Sheet" attached to the emailed offer to Wilson, Shirley had added a $100,000 "preference on units"; this wildly skewed balance sheet formed the basis for the bargaining to follow. (Pl. Ex. 163; Tr. 422, ln. 23 – Tr. 423, ln. 18. Tr. 156 ln. 11-157, ln. 8). The "preference on units" had the dual effect of increasing CCC's liabilities by $100,000 and thus reducing net asset value. However, because the debt was owed to her, Shirley would be able to recoup the devaluation though its repayment. (Tr. 156, ln. 13-20, Tr. 157 ln. 4-16; Tr. 158, ln. 18-21.) All in all, the newest balance sheet had reduced Wilson's value by another $70,000. (Tr. 423, ln. 3-18).[9]

The second significant difference in the buy/sale option presented by Appellants was that any purchaser of CCC had to not only pay the inflated value of Gandis and Shirley's interest, but also had to assume the "burden of our building," as Shirley bluntly put it in yet another email directing the moves of Gandis. (Tr. 555, ln. 18 – 556, ln. 8; Pl. Ex. 85). But the value for any investor or buyer was not the building, since the most serious investors were already in the film business and had their own buildings. Of course, once Wilson was ousted, Gandis still managed to shift all the burden to CCC by raising the rent from $2,500/month to $6,000/month.

Wilson presented expert testimony at trial that showed just how unfair Appellants' offers were. CPA Catherine Stoddard testified that, using Del Bradshaw's normalized financial numbers, she was able to more accurately calculate the actual value of CCC by adding into the mix the information regarding fair market value of CCC's

[9] Dave Wilson testified: "And keep in mind that in August [2011], our books showed a net income of $800,000...By the time this came along, our P&L showed negative $40,000." (Tr. 424, ln. 7-14.)

equipment (obtained according to a certified appraisal).[10] She then calculated CCC's net asset value to be $1,018,753.00 as of December 2011, the last month prior to Wilson's ouster. (Tr. 770, ln. 25 – Tr. 773 ln. 10; Pl. Ex. 180.) Wilson's 45% interest was valued at $408,335. Compare this number to the $200,000 and forgiveness of the $123,000 "loan" that constituted Appellants' December 2011 offer. (Tr. 154, ln. 21 – 155, ln. 2). Accordingly, the terms of the restructure were themselves oppressive, especially when you consider that Appellants' offers to Wilson were contingent on him agreeing to a five-year non-compete in the only industry in which he had worked. (Tr. 421, ln. 23 – 422, ln. 16).

When Wilson failed to capitulate to Appellants' oppressive terms, Gandis initiated the ouster strategy. He terminated Wilson's "employment" and declared him no longer a participant in the business Wilson still owned. (Pl. Ex. 92; Tr. 436, ln. 6-22; 436, ln. 23 – 438, ln. 9). As noted previously, Gandis and Shirley had fully discussed their plans for terminating Wilson and claiming he resigned in multiple emails, and even when faced with these emails at trial that directly contradicted their testimony, they continued to deny such a plan ever took place. (Tr. 162, ln. 16-18; Pl. Ex. 92). As planned (or, you could say, "as directed by Shirley"), Gandis had contacted law enforcement before firing Wilson and then changed the locks to prevent Wilson's reentry. (Tr. 102, ln. 7-10; Pl. Ex. 92). Ruthlessly, Gandis and Shirley then terminated Wilson's family health insurance, which he received through the company. (Tr. 439, ln. 22 – 440, ln. 24). Adding insult to injury, Wilson and his family's cell phone service was shut off without warning. (Tr. 439, ln. 7-21). Wilson would never return to his office or to the CCC plant, and he would have

[10] The trial court specifically noted that it found Stoddard's testimony to be "credible." (Trial Order, p. 11).

to sue to get any financial information about his own company, information that was ultimately altered before being produced.

But at least as Wilson was leaving his CCC office for the last time on that cold January day in 2011, struggling to carry whatever personal possessions he could frantically grab on his way out, and as his cell phone was simultaneously shut off so that he couldn't even call his wife and let her know what had just happened, and as he hoped to God that none of his family got sick or hurt any time soon because his health insurance had just been cut off, at least Wilson could still take some measure of comfort from Gandis and Shirley's assurances that he "was not [being] oppressed," nor was he being "frozen-out." (App. Brief, p. 29). In fact, Gandis and Shirley assured him, their action were simply "business decisions," made necessary by "consideration of real world business factors." (App. Brief, p. 35). Besides, Gandis and Shirley added, Mr. Wilson "was in control of his destiny and CCC," and therefore oppression was impossible. (*Id.* at 36).

v. Appellants' Claim: "Wilson took all the good out of CCC."

Ignoring the ample irony of this statement, it is enough simply to state that Appellants' assertion is untrue to the extent that Appellants claim that "Wilson ultimately made off with all the good aspects/assets of CCC – namely its stock of customers and prospective business." (App. Brief, p. 38). Of course, the statement comes without any citation to the record, and for good reason: there are no facts in the Record to support such an outlandish assertion. Wilson needed to provide for his family, and he did so by making contact with his industry contacts developed during his twenty years in the industry. (Tr. 505, ln. 13-16). To the extent that any additional factual information is

needed, Respondent incorporates by reference pages 8-11 of Respondent Wilson's Brief on Trade Secrets in the sister appeal initiated by CCC and notes that after his ouster, without a non-compete and with no fiduciary duties owed to CCC as a mere member of a manager-managed LLC, Wilson had every legal right to compete while he waited on the payment of his interest as of the day he was ousted.

B. The Trial Court Applied the Correct Legal Standard in Finding that Wilson, a Member in a Manager-Managed LLC, Did Not Breach his Fiduciary Duties to Gandis and Shirley.

1. Standard of Review

An action for breach of fiduciary duty is one at law. *See Verenes v. Alvamos*, 387 S.C. 11, 690 S.E.2d 771 (2010). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

2. Duties of a member in a manager-managed LLC

The LLC statute makes clear that Wilson owes no fiduciary duty simply by being a member in a manager-managed LLC. S.C. Code Ann. § 33-44-409(h) (2014). Yet Appellants initiate their attack on the trial court's order by asserting that "the lower court made a fundamental legal error and applied an incorrect legal standard of disclosure for fiduciary duty." (App. Brief, Page 19). Appellants proceed to argue that the law of partnerships and **member**-managed LLCs apply to the legal analysis of Wilson and Gandis' relationship. Appellants then cite nearly two pages of case law for the fiduciary duty in partnerships, followed by a page long quotation of the LLC statute pertaining to **member**-managed LLCs.

Yet Gandis and Wilson were not organized as a member-managed LLC in November 2007—they were a **manager**-managed LLC with Gandis as the sole manager. (Tr. 38, 8-19; Pl. Ex. 129). Such an arrangement involves different duties for Wilson than those outlined in Appellants' Brief, page 20. For **manager**-managed LLCs, the South Carolina Limited Liability Act provides the following:

> (h) In a manager-managed company:
>
> > (1) a member who is not also a manager owes **no duties** to the company or to the other members solely by reason of being a member.

S.C. Code Ann. § 33-44-409(h) (2014) (emphasis added). In short, Wilson owed no special duty to the LLC or Appellants simply by being a member of CCC, and upon being ousted, he was nothing more than a member of a manager-managed LLC. Appellants' repeated and inapplicable citations to the statute for members in member-managed LLCs and to partnerships, neither of which apply to Wilson's status as a member in a manager-managed LLC, while lengthy, do nothing to advance their argument and should be disregarded.

Appellants attack two bases of the trial court's finding that Gandis and Shirley failed to prove their claim for breach of fiduciary duty: (1) that "the evidence did not establish that Wilson had agreed to transfer the three import accounts to CCC in 2008"; and (2) that Gandis and Shirley failed to conduct a reasonable inquiry in 2009 about the full extent of EFS's activities with the three import accounts, despite having full knowledge about, at the very least, the West Carrollton deal. (Order at 12-13).

The evidence presented at trial supports the trial court's determination that Wilson and Gandis had agreed that three accounts were not to be rolled into CCC because of pre-

existing commitments to funding sources and partners in the deals. Wilson testified that he and Gandis had reached an agreement about what part of EFS Wilson would be merging into CCC immediately, and he stated at trial that he and Gandis agreed that three accounts would not be rolled into CCC, a fact which Gandis also contemporaneously acknowledged in an email to Shirley. (Tr. 378, ln. 17–379, ln. 22; *see also* Tr. 380, 13-16; Def. Ex. 7, p. 5: "minus the three"). The court further made a specific finding that Wilson and Gandis entered into oral agreements that these three accounts would remain separate from CCC. (Trial Order, page 3).

As late as 2010, Shirley herself acknowledged in emails that Wilson continued to wind-down the business for EFS in 2009. (Pl. Ex. 21, 22; Tr. 547, ln. 20 – 548, ln. 16). Despite this email evidence, Gandis testified that he knew nothing of these accounts and that he learned of them only by accident (Tr. 211, In. 18-22; Tr. 216, In. 14-18; Tr. 217, In. 20-22), but Gandis' testimony on this issue was deemed by the trial judge to be without credibility, leaving Wilson's testimony standing alone as the only credible presentation of what actually occurred. Importantly, Wilson's testimony is corroborated by Appellants' own emails.

3. Gandis and Shirley's awareness of EFS's activities in 2008 and 2009

The trial court found that Appellants were well aware of Wilson's EFS transactions with these accounts in 2008 and 2009. (Trial Order, p. 12; *see* Tr. 378, ln. 17 – 379, ln. 22; 380, ln. 13-16; Def. Ex. 7, p. 5: "minus the three"). First of all, if Gandis and Wilson agreed that the three accounts were to be held by EFS separate from CCC, then Appellants' argument that the court applied the wrong duty of reasonable inquiry to Gandis is moot. Second, the court found that Appellants' awareness dated back to *2008*,

more than four years before the initiation of Wilson's lawsuit. Shirley and Gandis failed to initial legal action within the three year statute of limitations, and therefore their failure to act timely on this knowledge bars their action from proceeding.

4. Gandis' Fiduciary Duties to Wilson and CCC

A manager (like Gandis) in a manager-managed LLC (like CCC), however, does owe all the fiduciary duties to the LLC and the members that is extensively recounted in Appellants' Brief and as outlined in S.C. Code Ann. § 33-44-409(b)-(f). *See* S.C. Code Ann. § 33-44-409(h)(2) ("[A] manager is held to the same standards of conduct prescribed for members in subsections (b) through (f)"). As will be argued more extensively in the section on shareholder oppression below, the factfinder in this case found that Gandis and Shirley engaged in a litany of unfair and oppressive conduct that hardly conforms to the fiduciary duties owed by Gandis to the LLC members. (*See* Trial Order, pp. 6-7).

In essence, Appellants purport to place upon Wilson the fiduciary duty standards of a manager and then proceed to argue that he fails to meet this duty, all the while ignoring that Gandis is the one person in this litigation that is actually obligated under those standards and who was found to have engaged in such un-fiduciary-duty-like behavior that was described by the trial court as a "tightly controlled cabal" engaged in "unconscionable" conduct yet defended with testimony that entirely "lacked credibility." While a brazen strategy, the evidence presented at trial simply fails to support Appellants' arguments on this point.

5. *Wilson's Activity After Being Unlawfully Expelled from CCC in January 2012*

Respondent Wilson has addressed in detail his activities following his unlawful ouster from CCC in Respondent Wilson's Initial Brief on Trade Secrets, filed February 22, 2016, which Wilson hereby incorporates by reference in its entirety.

Additionally, the trial court made no finding that Wilson took any confidential information with him upon his ouster in January 2012, nor that Wilson provided this information to Neologic/Freshwater, as claimed by Appellants in their Brief (yet without citation to the Record). (Appellants' Brief, p. 26).

6. ***Gandis and Shirley lack standing to appeal the trial court's ruling on the breach of fiduciary duty claim against Wilson for usurpation of corporate opportunities because that claim belongs solely to CCC.***

As a final point on the fiduciary duty matter, Rule 201(b) of the South Carolina Rules of Appellate Practice provides that "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." SCACR 201(b); *see also* South Carolina Code Ann. § 18-1-30. In this case, Gandis and Shirley cannot be personally aggrieved by the trial court's ruling against their co-defendant CCC on **its** cause of action, which Appellants even recognize themselves in footnote 12 of their Brief. (Appellants' Brief, p. 26).

Appellants Gandis and Shirley argue that the trial court erred in ruling against them on their breach of fiduciary duty claims against Wilson for Wilson's alleged usurpation of corporate opportunities through EFS in 2008 and 2009. However, the trial court did not rule against Gandis and Shirley on this issue; the court ruled against CCC. The specific breach of fiduciary duty counterclaims brought **by Gandis and Shirley** against Wilson are based solely on allegations that Wilson took a cell phone and two

laptops with him when he was locked out of CCC by Gandis, that he copied and then erased the hard drives before returning them, and that he used that information to compete against CCC. (*See* Answer and Counterclaims of Andrea Comeau-Shirley to Plaintiff's Second Amended Complaint, pp.15-16 (filed November 15, 2013); Answer and Counterclaims of John Gandis to Plaintiff's Second Amended Counterclaim, pp. 28-30 (filed November 15, 2013)). Nowhere in their counterclaims do Appellants allege that Wilson usurped corporate opportunities through EFS during 2008 and 2009. Those corporate usurpation claims were raised by CCC alone and for the first time in November 2013. In essence, Gandis and Shirley are appealing a ruling on a cause of action that does not belong to them, but instead belongs to CCC, as CCC is the proper party to bring such claims.[11] However, Appellant CCC has declined to offer a serious argument on this matter in its Initial Brief, choosing instead to adopt by reference Gandis and Shirley's arguments on the fiduciary duty issue. For that reason, this Court should disregard any arguments made by Gandis and Shirley regarding the usurpation of corporate opportunities allegations on page 18-27 of their Initial Brief.

C. The Trial Court Properly Used its Discretion to Fashion an Equitable Remedy for Wilson that Individually Required the "Tightly Controlled Cabal" of Gandis and Shirley to Purchase the Ownership Interest of Respondent Wilson at a Valuation Date Coinciding with the Date of Wilson's Unlawful Ouster from His Own Company.

1. The trial court found that Gandis and Shirley's behavior was fraudulent and unconscionable.

Appellants argue that their conduct was merely "oppressive," as it lacked that particular *je ne sais quoi* typically associated with truly "unconscionable" or "fraudulent"

[11] These claims could only have been pursued by CCC or derivatively, which neither Appellants pursued.

conduct. As such, Appellants conclude that the trial court's ruling that the individual Appellants be required to buy out Wilson's interest was in error.

However, the trial court did not "simply deem[] [Appellants' actions] oppressive": in its January 2, 2015 Trial Order, the court denunciated Appellants' actions as "unfairly prejudicial," an "overt scheme," "calculated oppression," "financial manipulation," "brazen," "unlawful," and "fraudulent." In its Order Denying Defendants' Rule 59 Motion, the court reaffirmed its previous factual findings and further found that Appellants "deliberately collaborated to oppress Mr. Wilson," that "their conduct was unconscionable," and that they "purposefully created a toxic business environment with the goal of driving Mr. Wilson out." The court supported its findings in the Trial Order with six pages of factual findings, including an extensive list of the specific acts it deemed fraudulent, unconscionable, and oppressive. All of Appellants' behavior has been discussed extensively in the sections above.

Moreover, the self-dealing by Gandis and Shirley, as well as the financial records that were either unreliable or non-existent, made it impossible for the trial court to conclude that CCC had the ability and financial wherewithal to purchase Wilson's interest. The unilateral increases in rent, the creation of ZOi Films, LLC, the missing inventory, and the reams of emails between Gandis and Shirley that incontrovertibly demonstrate an intent by Appellants to raid CCC and leave it a shell of a company had left CCC damaged in ways which were simply incalculable. As the trial court determined, the most equitable remedy is to simply turn back the clock to the date of Wilson's ouster and before Appellants' most egregious and damaging conduct occurred; to value the

company and the parties' interest on that date; and to order the individuals responsible for the unlawful ouster of Wilson to purchase Wilson's interest.

Additionally, Appellants' arguments on this issue are unsupported by the Record and include mischaracterizations and misrepresentations of the trial court's order.[12] Appellants have conceded that the trial court had discretion to fashion an equitable remedy, including individual buyout. Therefore, the trial court properly found that Appellants' egregious conduct warranted the remedy of an individual buyout.

2. The trial court properly valued Wilson's interest in CCC.

Appellants argue that the trial court failed to consider Gandis and Shirley's testimony about the effect that Wilson's actions had on the value of CCC. On the contrary, the trial court did consider Appellants' testimony. It found Gandis and Shirley's testimony "lacked credibility." (Order Denying Defendants' Rule 59 Motion, p. 1). It found that the valuation of Wilson's expert, Catherine Stoddard, to be "credible." (Trial Order, page 11). Therefore, Wilson's interest was properly valued.

3. The trial court properly found that Shirley should have to help pay for the damage she caused.

Appellants' actions are profoundly unfair to wrongfully ousted member Wilson. But Wilson is indifferent as to whether Shirley should have to pay her proportional percentage of Wilson's interest or split it some other way with Gandis.

---

[12] Appellants' Brief, page 43: "The Order did not find Gandis' or Shirley's actions unconscionable or fraudulent." *See* Trial Court Order, page 10: "Wilson established by clear and convincing evidence that [Gandis and Shirley] have acted, are acting [and] will act in a manner that is unlawful, oppressive, **fraudulent**, or unfairly prejudicial to the petitioner."
Appellants' Brief, page 44: "Without a specific finding that Gandis and Shirley's actions were unconscionable[,] ordering individual buyout was not an option." *See* Order Denying Defendants' Rule 59 Motion, page 2: "Their conduct was **unconscionable**."

D. Appellants Failed to Establish that Wilson's Alleged "Unclean Hands" Prevented his Access to an Equitable Remedy.

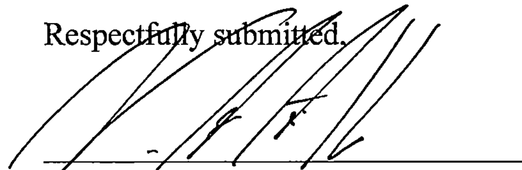
Each point raised in Appellants' Brief related to equitable remedies and unclean hands has already been addressed *ad infinitum* in the various issues discussed above (and in the brief in the companion appeal brought by CCC). The trial court did not "flatly ignore the litany of inequitable conduct perpetuated by Wilson"; it instead found that Gandis and Shirley lacked credibility in their testimony related to such alleged inequitable misconduct. In short, the trial court did not believe anything that Gandis and Shirley testified to at trial: (1) the trial court did not believe that the deals Wilson did on behalf of EFS in 2008 and 2009 were illegal side dealing; (2) the trial court did not believe that Wilson destroyed evidence; (3) the trial court did not believe that Wilson stole confidential information and trade secrets; and (4) the trial court did not believe that Wilson's use of the legal system to obtain his interest in his company constituted inequitable conduct. (*See generally* Trial Order and Order Denying Defendants' Rule 59 Motion).

The court determined that Wilson was credible as a witness and so afforded his testimony and evidence greater weight, while simultaneously giving no weight to the testimony and evidence of Gandis and Shirley. The court further found that Wilson did not engaged in conduct that would constitute "unclean hands," leaving the court free to fashion an equitable remedy, which in this case required the individuals oppressing Mr. Wilson to pay individually for their misconduct. The trial court's determination on this issue should be affirmed.

V. CONCLUSION

Every argument made by Appellants swings on the unsteady and faltering hinges of Gandis and Shirley's testimony, which the trial court and sole factfinder determined to lack credibility in all important respects. The trial court properly applied the law related to fiduciary duties and shareholder oppression, and it made significant findings of fact amply supported by the record. Further, the trial court's use of its inherent equitable powers was proper and results in a fair outcome of the wrongfully ousted David Wilson. For the forgoing reasons, Respondent David Wilson respectfully requests that this Court affirm the judgment of the trial court in all respects.

Respectfully submitted,



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Dated March 24, 2016

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RE: David Wilson v. John Gandis
Appellate Case Number: 2015-000476

Dear Sir or Madam:

In reference to the above, enclosed for filing are Initial Brief of Respondent David Wilson, Designation of Matter to be Included in the Record on Appeal, and Proof of Delivery.

Sincerely,

Jodie D. Fowler
Paralegal

cc: Bruce B. Campbell, Esquire (with enclosures)
D. Randle Moody, II, Esquire (with enclosures)
Burl F. Williams, Esquire (with enclosures)

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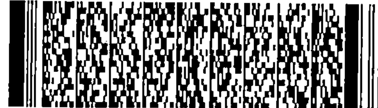

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