

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Joseph E. Mason, Jr.,

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	iv
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	3
STANDARD OF REVIEW	16
ARGUMENT.....	18
I. THE TRIAL COURT ERRED IN DENYING JOE RELIEF UNDER THE JUDICIAL DISSOLUTION PROVISIONS GOVERNING SOUTH CAROLINA CORPORATIONS.	18
II. THE FAIR VALUE OF THE 100% INTEREST IN MASON HOLDING COMPANY, INC... 25	
A. Valuation date.	25
B. The correct standard of value is “fair value.”.....	26
C. Discounts are not warranted or appropriate.	28
D. Valuation factors.	30
III. APPELLANT OWNS 50% OF THE COMPANY’S SHARES.	36
IV. THE SPECIAL REFEREE ERRED IN CONCLUDING THAT THE MASON DEFENDANTS DID NOT BREACH THEIR FIDUCIARY DUTIES TO JOE.	39
V. THE FINAL ORDER AS TO LEVINE SHOULD BE REVERSED BECAUSE DEFENDANT LEVINE AIDED AND ABETTED THE MASON DEFENDANTS IN BREACHING THEIR FIDUCIARY DUTIES TO THE SHAREHOLDERS OF THE COMPANY.	41
VI. THE MASON DEFENDANTS ENGAGED IN A CIVIL CONSPIRACY TO LOOT THE COMPANY AT THE EXPENSE OF APPELLANT.	43
VII. THE MASON DEFENDANTS VIOLATED PUBLIC POLICY AND WRONGFULLY AND CONSTRUCTIVELY DISCHARGED JOE FROM HIS EMPLOYMENT WITH THE COMPANY.	44
VIII. THE SPECIAL REFEREE ERRED IN AWARDING JUDGMENT AGAINST JOE ON THE MASON DEFENDANTS’ COUNTERCLAIMS.	45
IX. APPELLANT IS ENTITLED TO HIS ATTORNEYS’ FEES AND EXPENSES.	47
CONCLUSION.....	47

TABLE OF AUTHORITIES

CASES

<i>A. Teixeira & Co. v. Teixeira</i> , 1994 R.I. Super. LEXIS 71 (R.I. 1994).....	21
<i>Anderson v. City of Bessemer City, N.C.</i> , 470 U.S. 564 (1985).....	18
<i>Ballard v. Roberson</i> , Op. No. 27161 (S.C. Sup. Ct. filed Aug. 29, 2012) (Shearouse Adv. Sh. No. 30 at 18).....	17, 22
<i>Belk of Spartanburg, S.C., Inc. v. Thompson</i> , 337 S.C. 109, 522 S.E.2d 357 (Ct. App. 1999).....	27, 30, 31, 32
<i>Bright v. Westmoreland County</i> , 380 F.3d 729 (3d Cir. 2004).....	18
<i>Brown v. Stewart</i> , 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001).....	40
<i>Cavalier Oil Corp. v. Harnett</i> , 564 A.2d 1137 (Del. 1989).....	29
<i>Charland v. Country View Golf Club</i> , 588 A.2d 609 (R.I. 1991).....	29
<i>Charles v. Texas Co.</i> , 199 S.C. 156, 18 S.E.2d 719 (1942).....	43
<i>Clearwater Trust v. Bunting</i> , 367 S.C. 340, 626 S.E.2d 334 (2006).....	39
<i>Corley v. Ott</i> , 326 S.C. 89, 485 S.E.2d 97 (1997).....	16, 17
<i>Davis v. Hamm</i> , 300 S.C. 284, 387 S.E.2d 676 (Ct. App. 1989).....	40
<i>Future Group, II v. Nationsbank</i> , 324 S.C. 89, 478 S.E.2d 45 (1996).....	41
<i>Hendley v. Lee</i> , 676 F. Supp. 1317 (D.S.C. 1987).....	26
<i>Hollis v. Hill</i> , 232 F.3d 460 (5th Cir. 2000).....	26
<i>In re Luhr Bros., Inc.</i> , 157 F.3d 333 (5th Cir. 1998).....	18
<i>Jordan v. Holt</i> , 362 S.C. 201, 608 S.E.2d 129 (2005).....	16, 17
<i>Kaplan v. First Hartford Corp.</i> , 522 F. Supp. 2d 275 (D. Me. 2007).....	26
<i>Kiriakides v. Atlas Foods Sys. & Servs., Inc.</i> , 343 S.C. 587, 541 S.E.2d 257 (2001) 19, 20, 21, 22	
<i>Knauer v. Jonathon Roberts Fin. Group, Inc.</i> , 348 F.3d 230 (7th Cir. 2003).....	46
<i>Kreischer v. The Kerrison Dry Goods Co.</i> , 1999 U.S. App. Lexis 1097 (4th Cir. 1999). 21	
<i>Lewis v. Lewis</i> , 392 S.C. 381, 709 S.E.2d 650 (2011).....	17
<i>Ludwick v. This Minute of Carolina, Inc.</i> , 287 S.C. 219, 337 S.E.2d 213 (1985).....	45
<i>McDuffie v. O'Neal</i> , 324 S.C. 297, 476 S.E.2d 702 (Ct. App. 1996).....	17
<i>Morrow v. Martschink</i> , 922 F. Supp. 1093 (D.S.C. 1995).....	29
<i>Myatt v. RHBT Fin. Corp.</i> , 370 S.C. 391, 635 S.E.2d 545, 547-48 (Ct. App. 2006).....	46
<i>N. Am. Rescue Prods., Inc. v. Richardson</i> , 396 S.C. 124, 720 S.E.2d 53 (Ct. App. 2011).....	17
<i>Santee Oil Co. v. Cox</i> , 265 S.C. 270, 274, 217 S.E.2d 789, 791 (1975).....	27, 30
<i>Swinton Creek Nursery v. Edisto Farm Credit</i> , 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987).....	43
<i>Vortex Sports & Entm't, Inc. v. Ware</i> , 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008).....	41

STATUTES

S.C. Code Ann. § 33-8-300.....	39
S.C. Code Ann. § 33-8-420.....	39
S.C. Code Ann. § 33-13-101.....	27
S.C. Code Ann. § 33-13-102.....	27

S.C. Code Ann. § 33-14-300.....	19
S.C. Code Ann § 33-14-310.....	17, 19, 20, 27
S.C. Code Ann. §§ 33-18-400 to -430	19, 20, 27, 39, 40

OTHER AUTHORITIES

18A Am Jur 2d Corporations § 706.....	27
<i>Black's Law Dictionary</i> 806 (8th ed. 1999).....	46
Douglas K. Moll, <i>Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation</i> , 54 Duke L. J. 293, 363 n. 262 (2004).....	29
Douglas K. Moll, <i>Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective</i> , 53 Vand. L. Rev. 749, 790-791 (2000)	22
Hubbard & Felix, <i>S.C. Law of Torts</i> 404-408 (3d ed. 2004)	43
J.C. Bonbright, <i>Valuation of Property</i> , Vol. 1 (The Michie Co. 1965)	28
S. Pratt and A. Niculita, <i>Valuing a Business, the Analysis and Appraisal of Closely Held Companies</i> , (5th ed. McGraw Hill Co. 2008).....	28

STATEMENT OF ISSUES ON APPEAL

1. Does the evidence establish that the Mason Defendants should be required to purchase Appellant's shares in the Company at fair value or that Appellant be granted other appropriate relief under the judicial dissolution provisions governing South Carolina corporations when Appellant devoted over 24 years building the business from scratch, he has been constructively discharged from his employment, and has been deprived of all economic values of his shares in the Company, and Respondents have engaged in numerous acts that are illegal, fraudulent, oppressive, or unfairly prejudicial to Appellant?
2. Should Respondents Joseph E. Mason, Sr. and Catherine L. Mason be required to deliver shares for an additional 20% interest in the Company when they have been paid significant amounts for those shares and received other valuable consideration for them pursuant to written agreements?
3. Pursuant to the judicial dissolution provisions governing South Carolina corporations and applicable case law, including *Santee Oil Co. v. Cox*, 265 S.C. 270, 217 S.E.2d 789 (1975), is the fair value of Mason Holding Company, Inc. \$3,673,000, and is the fair value of Appellant's shares in the Company his proportionate interest in the Company?
4. Does sufficient evidence support the Special Referee's holding that the Mason Defendants did not breach their fiduciary duties when the evidence demonstrates, among other things, that they failed to take action for over four years after Appellant raised concerns regarding the Company's problematic tax and accounting practices, continued to employ the incompetent accountant that previously represented that those practices were appropriate, paid themselves excessive compensation and benefits, and have deprived Appellant of all economic value of his ownership interest in the Company?
5. Does sufficient evidence support the Special Referee's holding that Respondent Levine did not aid and abet the breach of fiduciary duties by the Mason Defendants when the evidence demonstrates, among other things, that Levine acknowledged, despite his prior representations to the contrary, that his accounting and tax advice was improper, he continued as the Company accountant (as well as the owner of an interest in an affiliated Company) but did not take action to properly resolve the problems, and he was openly hostile and took other actions to retaliate against Appellant because he raised those issues?
6. Does sufficient evidence support the Special Referee's holding that the Mason Defendants were not liable to Appellant under his cause of action for civil conspiracy where the evidence establishes that the individual Respondents combined to take actions that wrongfully and constructively discharged him from employment with the Company and have deprived him of all economic value of his ownership interest in the Company?

7. Does sufficient evidence support the Special Referee's holding that the Mason Defendants did not constructively discharge Appellant from employment with the Company when the evidence demonstrated, among other things, that, after Appellant raised the issues regarding the Company's problematic tax and accounting issues, they demoted him, undermined his actions, and took other actions adverse to Appellant and the Company's interests in retaliation?

8. Does sufficient evidence support the Special Referee's holding that Appellant is liable under the Mason Defendants' counterclaim for conversion regarding certain cash sales where the overwhelming evidence demonstrates that Appellant was entitled to half of those proceeds and that he split those proceeds with his sister, who was entitled to the other half?

9. Does sufficient evidence support the Special Referee's holding that Appellant is liable under the Mason Defendants' cause of action for conversion for reimbursement for certain amounts paid to the Turner Padgett law firm where these proceedings have demonstrated that the serious tax and accounting issues raised by that firm warranted corrective action by the Company and that the Company benefited from that advice?

10. Does sufficient evidence support the Special Referee's holding that the Mason Defendants may bring a future action for damages based on the Company's tax returns filed in or before 2007 when the issues were fully tried, such relief was not requested below, the Company is responsible for payment of its own taxes, and the Mason Defendants failed to take action regarding the tax issues for over four years after the issues were raised by Appellant thereby resulting in potential increased payments of interest and penalties?

STATEMENT OF THE CASE

This case arises from a dispute between the shareholders of Mason Holding Company, Inc. (“the Company”). The shareholders of this family-owned business are Joseph E. Mason, Jr. (“Joe” or “Appellant”); his parents, Catherine L. Mason, Joseph E. Mason, Sr.; and his sister, Kathy M. St. Blanchard.

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

On September 23, 2009, Appellant filed an amended complaint. (R. __.) The amended complaint added Irwin Levine (the Company accountant and part-owner of one of the affiliated operating entities) as a defendant and added a seventh cause of action against him for aiding and abetting breach of fiduciary duty. The Mason Defendants and Levine are collectively referred to as “Respondents.” On October 13, 2009, the Mason Defendants filed an answer and reasserted their counterclaims in response to the amended complaint. (R. __.) Defendant Levine filed his answer to the amended complaint dated November 23, 2009. (R. __.) Defendant Levine filed a motion to dismiss dated

February 22, 2010, an amended motion to dismiss dated November 17, 2010, and a motion for summary judgment dated April 15, 2011.¹

Pursuant to Consent Order for Referral to Special Referee and Scheduling Order filed on February 11, 2011, and Consent Order for Referral to Special Referee filed April 13, 2011, this case was referred with finality to Ralph P. Stroman, Esquire, as Special Referee. (R. ____.) This case was tried without a jury during the week of November 14 through November 18, 2011.

At the conclusion of the trial, Special Referee Stroman asked for proposed orders from all parties without providing any guidance or direction with regard to the content of the proposed order. (11/18/11 Tr. at 263-65; R. ____.) Special Referee Stroman subsequently granted judgment in favor of Respondents and against Appellant by executing without any change the two proposed orders submitted by counsel for Respondents, which orders were filed on January 20, 2012.

The Final Order with regard to the Mason Defendants (the “Final Order”) granted judgment in favor of the Mason Defendants as to all causes of action asserted by Appellant and granted judgment in favor of the Mason Defendants and against Appellant on the Mason Defendants’ counterclaims in the total amount of \$29,017.98.² (R. ____.) The Final Order also held that the Mason Defendants could pursue a later claim against Appellant with regard to damages relating to the filing of false corporate tax returns. (Final Order at p. 26; R. ____.) The Final Order as to defendant Levine (the “Levine

¹ By Order of Special Referee Stroman dated September 26, 2011, Levine’s motions to dismiss and for summary judgment were denied. (R. ____.)

² Appellant agreed to the dismissal of his claim for breach of contract at the close of Appellant’s case during trial. (11/17/11 Tr. at 92; R. ____.)

Order”) granted judgment in favor of Levine and against Appellant as to the cause of action against Levine. (R. ____.)

Plaintiff timely filed a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCPP dated January 27, 2012 with regard to the finding and conclusion relating to a future claim against Joe for payment of the Company’s taxes. (R. ____.) Special Referee Stroman denied the motion by order received by plaintiff’s counsel on June 1, 2012. (R. ____.)

Plaintiff timely filed his Notice of Appeal dated June 4, 2012, an Amended Notice of Appeal dated June 8, 2012, and a Second Amended Notice of Appeal dated July 19, 2012. (R. ____.)

STATEMENT OF FACTS

Joe devoted over 24 years of his life building the Company from scratch until the termination of his employment in 2008, at which time the Company had annual sales of almost \$7 million. Since the termination of his employment, Joe has been deprived of all economic value of his ownership in the Company, while the remaining shareholders have received raises, bonuses, and lavish benefits. As a result of the conduct of the Respondents, Joe filed this action seeking a forced buyout of his shares of the Company at fair value under the judicial dissolution provisions of under South Carolina law governing corporations as well as other causes of action.

The Company, a statutory close corporation without a board of directors (*see* Plaintiff’s Exhibit (“PX”) 25; R. __), wholly owns four subsidiaries that operate tire and auto service stores in the following locations: Surfside Beach (Mason Tire & Auto Service, Inc.); North Myrtle Beach (J&O Tire & Auto Service, Inc.); Pawleys Island

(M&S Tire Co., Inc.); and Myrtle Beach (K&J Tire, Inc.). (11/14/11 Tr. at 18-19, R. at ____; PX 78, R. ____.) In addition, the Company owns 48% of another entity that operates a tire and auto service store in Conway (BCJ Tires, Inc.). Defendant Levine now owns the remaining 52% of that entity. (*Id.*)

Joe owns shares in the Company, and for many years he served as an officer of the Company and its subsidiaries and certain affiliated entities. (11/14/11 Tr. at 37-40, R. ____.) The Company is a family owned business, with shares owned now or previously by not only Joe but also by Joe's parents and sister. (*Id.*). In addition to being shareholders of the Company, Joe Sr., Catherine, and Kathy are current officers of the Company. Defendant Levine is the long-time accountant for the Company and for members of the Mason family. (11/16/11 Tr. at 185-87, R. at ____.) Levine is not and never has been a CPA, and he has never held an accounting license of any sort from the State of South Carolina. (11/16/11 Tr. at 187-88, R. at ____.)

Joe left an excellent job with Ryder Truck Rental and moved from Florida to Myrtle Beach in about March of 1984 to start the Company. (11/14/11 Tr. at 10-12, R. ____.) Joe oversaw and guided the beginnings of the Company, which started with his oversight of the construction of a single tire store in Surfside Beach—Mason Tire & Auto. (*Id.*) His sister Kathy moved from Florida to work with him and for the Company at or about the time the first store opened. (11/14/11 Tr. at 15, R. ____.) Although the four family members—Joe, Kathy, Joe Sr., and Catherine—were all original shareholders, Joe Sr. and Catherine did not physically move to South Carolina from Miami until the late 1980s. (11/18/11 Tr. at 187-88, R. ____.) Joe served as president of the growing Company for many years until October 24, 2007, and was employed by the

Company until July 2008. (11/18/11 Tr. at 190, R. ____.) He generally worked around 12 hours per day Monday through Friday, five hours on Saturday, and often worked on Sunday. (11/14/11 Tr. at 19-20; R. ____.) The Mason Defendants acknowledge that Joe did an excellent job of managing and growing the business until his termination in 2008. (See 11/18/11 Tr. at 205, 228-29; PX 6 (Joe “has done an excellent job in making the company money”); PX 41 at p. 27 (“He’s done a fantastic job ... ”); R. ____.) Joe Sr., Catherine, Kathy, and Kathy’s former husband Oswaldo St. Blanchard were all employed by or participated in the Company in various and fluctuating capacities. (Joe Sr. Dep. at 61, R. ____; Joe Sr. Dep. at 84, R. ____.) After Joe Sr. moved to South Carolina, Joe Sr. managed the commercial business of the Company, which involves selling tires for large trucks and other commercial vehicles. (11/14/11 Tr. at 23-24, R. ____.)

At Joe Sr.’s suggestion, Levine, who knew Joe Sr. and Catherine in Florida, provided accounting services to the Company for many years. (Joe Sr. Dep. at 50, R. ____; 11/16/11 Tr. at 196-97, R. ____.) The Company grew throughout the 1980s, 1990s, and into the 2000s, eventually operating five tire and auto service stores on the Grand Strand through several subsidiary corporations. (11/14/11 Tr. at 16-17, R. ____; PX 78, R. ____.)

In 1998, the Company structure changed. Mason Holding Company, Inc. was formed as the holding company for the various growing Mason Tire entities, all of which were consolidated under the holding company banner. (11/14/11 Tr. at 36-37, R. ____.) In 1998, the 1,000 total shares in the Company were held as follows: Joe Sr. 520, Catherine 160, Joe 160, Kathy 90, and Ozzy 70. (PX 1, R. ____.) Within several years, Joe Sr. sought to put together a plan to sell his shares back to the Company, which plan changed to a “retirement plan.” (Joe Sr. Dep. at 24, R. ____.) Joe Sr. and Levine were the

primary architects of Joe Sr.'s retirement package, along with Attorney Ed Kelaher and some input from Joe.³ (11/16/11 Tr. at 209-15 & 218-19; PXs 10, 12, 15, 16; R. ____). As originally conceived, the Company would purchase Joe Sr. and Catherine's shares in the Company under a typical stock purchase agreement, with immediate conveyance and delivery of the shares and with a stock pledge agreement securing the consideration. (Joe Sr. Dep. at 35-36; PX 8, R. ____.) With specific directions from Levine, Mr. Kelaher changed the structure of the retirement package to include three agreements, all dated on or about January 1, 2003. (11/16/11 Tr. at 218-19; PX 15, R. ____.)

First, the parties entered into an employment agreement whereby the Company would employ Joe Sr. or his wife at a salary of \$10,400 per year, along with various generous and valuable perquisites. (Joe Sr. Dep. at 48; PX 16, R. ____.)⁴

Second, the Company executed an additional lease to an entity owned by Joe's parents (Catson, LLC) for the Pawleys Island store, even though the store was already the subject of an existing lease. (Joe Sr. Dep. at 58-59; PX 18, R. ____.) The extra lease simply characterized additional compensation to Joe Sr. as rent so that certain employment taxes or capital gains taxes would allegedly not be due. (11/16/11 Tr. at 220-21, R. ____.)

Third, the parties also entered into a letter agreement pursuant to which Joe Sr. and Catherine gave their "promise, commitment, and absolute and unfailing word" that

³ Kelaher noted that the final arrangement was unusual, and he expressed serious concerns about how such an arrangement would be viewed from the standpoint of the IRS, the courts, or other interpreting bodies. (PX 15; R. ____.) Kelaher's notes and correspondence further show the primary role Levine played in crafting the arrangement. (PXs. 10, 12, 15, R. ____.)

⁴ Under the Employment Agreement, Joe Sr.'s monthly salary broke down to \$866.66 (PX 16, R. ____), the same figure as the monthly interest payments on the unexecuted Stock Purchase Agreement. (PX 8, R. ____.)

they would make a “gift” of their shares in the Company to Joe and Kathy in certain installments over the period ending on December 31, 2011. (Joe Sr. Dep. at 48; PX 17, R. ____.) The letter agreement recites that it grants the unusual consideration to Joe Sr. and Catherine of the right to designate the Certified Public Accountant for the Company. (*Id.*; PX 15, R. ____.)⁵ As a consequence, Joe Sr. and Catherine arranged to receive substantial benefits and payments over the course of many years and to divest themselves of their shares of the Company, while characterizing the conveyance of the shares as a gift. (11/16/11 Tr. at 227-28, R. ____.) As Levine testified, this arrangement improved the tax liability landscape for the Company, Joe Sr., and Catherine, and the three documents comprising the “retirement package” were structured according to his advice. (*Id.*). Levine also testified that he did not consider the incorrect characterization of the various payments as salary, rent, and a “gift” to be inappropriate. (11/16/11 Tr. at 221, R. ____.) The Mason Defendants’ own expert, Laura DuRant, CPA, however, testified that mischaracterizing the nature of these payments to avoid taxes was unlawful. (11/16/11 Tr. at 159-60; R. ____.)

After Joe Sr.’s stock redemption and retirement package was in place, he and the other shareholders agreed that Joe and his sister should evenly split the remaining “extra money” or the profits of the business. (*See, e.g.*, 11/14/11 Tr. at 102-14; 11/16/11 Tr. at 240-41; 266-67; 11/18/11 Tr. at 235-37; PX 21 at p. 2; R. ____.) Levine even prepared tax returns for the corporation attributing none of the profit to Joe Sr. or his wife even though

⁵ As noted above, Levine has never been a CPA. Until this fact was revealed in 2007, the family members apparently did not realize it. Even though Levine acknowledges that it would be unlawful to hold himself out as a CPA, he signed Company documents as a CPA, was involved with this “gift” agreement referring to the appointment of a CPA, and never mentioned that he was not a CPA when other correspondence and Company documents referred to him as a CPA. (*See, e.g.*, 11/16/11 Tr. at 187-88, PXs 7, 10, 12, 15, 21, 26; R. ____.)

they purported to continue to be shareholders in this corporation organized under Chapter Sub S, which tax law mandates profits be attributed to shareholders based on percentage of share ownership. (*See, e.g.*, PX 71 (Bates No. Levine -00099 and 00103-00108), PX 72 (Bates No. Levine -00123, 00126-129), PX 73 (Bates No. Levine 140, 146-150); R.___.) Levine now admits, and it is undisputed, that this tax treatment was inappropriate. (11/16/11 Tr. at 266-67; R.___.) This issue was raised in 2007, but the returns were never amended. (*Id.*; PX 43 at ¶ 4, PX 48 at ¶ 4; 11/17/11 Tr. at 132-33; R.___.)

One way in which the “extra money” was split was by Joe and his sister having equal personal expenses paid by the Company. Another way was to divide certain cash on occasion. The cash revenue would be reflected in the books accurately, but then an invoice for “casings”⁶ may be created and Joe would split the cash with his sister after taking into account any imbalance of personal expenses. (11/14/11 Tr. at 102-13; PX 21, PX 60, R. ____.) Kathy’s son worked for the business (which served as another source of friction between Joe and the other shareholders) (11/14/11 Tr. 165-68; 11/17/11 Tr. at 208-12, 226-28; R.____), and, at Company expense, he upfitted about 15 cars with tires, wheels, and other equipment, which cars he bought and then resold while he was still in high school. That served as part of this balancing process. (11/14/11 Tr. 108-11; R.____.)

⁶ A casing is used commercial truck tire that has had the remaining old tread removed before it is recapped with new tread. Joe Sr. dealt with the commercial side of the business and admits to selling used commercial tires and dividing the cash with his family members before his retirement package was in place. (Joe Sr. Dep. 72-73; R.___.) Joe’s sister generally denied this process but admits taking cash on occasion and testified that she thought they were gifts from her brother. (11/17/11 Tr. at 250; R.____.)

The Company operated under this arrangement for several years. In addition to guiding Joe Sr.'s retirement plans, Levine provided regular accounting advice to Joe as president of the Company, as well as other members of the Mason family—both for the business and for their personal finances. (11/16/11 Tr. at 196-97, R. at ____.) All of the Mason family members relied on Levine to provide tax and accounting advice. (11/16/11 Tr. at 222-23, R. ____; Joe Sr. Dep. at 115, R. ____.) One topic of Levine's accounting and tax advice to the Company was how to target and achieve a contrived level of income by the operating companies of about \$100,000. (11/16/11 Tr. at 259-60, R. ____.) Further, he provided accounting and tax advice on how to deal with the Company's continuing issues with understated inventory. (11/16/11 Tr. at 231-33, R. ____; *see* PXs 2, 3, 24, 32; R. ____.) The shareholder minutes, annual valuations prepared by Levine, and other trial exhibits demonstrate that the understated inventory problem was well known by all of the shareholders and Levine. (*See* PXs 2, 3, 11, 13; R. ____.)

Levine advised Joe and the other family members that it would be appropriate to "avoid" tax liability with regard to the understated inventory by having the Company "borrow" a total of \$440,000 from Joe and Kathy. (11/16/11 Tr. at 231-34, Joe Sr. Dep. 81-83; R. ____.) Although the Company executed promissory notes to both Joe and Kathy for \$220,000 each (PXs 19, 20, R. ____), it is undisputed that neither Joe nor Kathy ever lent the Company the money. (11/14/11 Tr. at 82; 11/18/11 Tr. at 25, R. ____.) Levine showed these "loans" on the accountings and tax returns of the Company, thereby reducing the Company's tax liability. (11/16/11 Tr. at 234; R. ____.) Levine admitted later and at trial that he knew that what he was doing was fraudulent at the time he was doing it, but he assured Joe and other members of the family that this tax treatment was

appropriate as long as physical notes existed to provide a paper trail for the “loans.” (11/16/11 Tr. at 234-37, R. ____.) Indeed, Levine “overruled” and disregarded the tax laws “because [he] had a relationship with the family – a strong, loveable relationship with the family.” (11/16/11 Tr. at 236; R. ____.) The Defendants’ own experts describe Levine’s advice as “not competent” (11/16/11 Tr. at 160; R. ____.) and “fraud.” (11/16/11 Tr. at 175; R. ____.) The Special Referee’s Order characterized Levine’s conduct as “professionally inappropriate.” (Final Order p. 10 ¶ 18; R. ____.) The Company’s problems with understated inventory continued to accrue during tax years 2003 through 2006. (11/16/11 Tr. at 142, R. ____.)

Although Joe signed the Company’s tax returns in his capacity as president through tax year 2006, he relied on Levine to provide sound accounting and tax advice in conducting the Company’s business. (11/15/11 Tr. at 56-58; R. ____.) Prior to the fall of 2007, discussed *infra*, Joe simply trusted that Levine was providing legal and legitimate ways of handling the Company’s taxes and accountings. (11/14/11 Tr. at 183-84, R. ____.) Joe had been given no reason to believe otherwise, as Levine had assured him that everything was appropriate. (11/16/11 Tr. at 233-34, R. ____.) Additionally, issues surrounding the Company’s tax situation—including inventory issues and related “loan” issues—were fully disclosed and discussed among the family members as such events occurred. (PXs 13, 19; 11/17/11 Tr. at 54-55, R. ____.) Family members, including Joe, testified that they did not understand the illegality of and adverse impacts of Levine’s “loan” scheme on the Company’s tax liability at the time the scheme began. (11/14/11 Tr. at 81-84 & 194; 11/15/11 Tr. at 57-58; 11/18/11 Tr. at 229-31, R. ____.)

In August 2007, Joe sought legal advice for various issues with the Company. (11/14/11 Tr. at 178, R. ____.) In the course of this advice, Joe came to understand that the tax and financial practices of the Company—perpetuated and ratified by Levine and accepted by all the family members for years—were highly improper and needed to be corrected. (11/14/11 Tr. at 183-84, R. ____.) Joe, through his attorneys, immediately brought his various concerns to the attention of the Mason Defendants, their counsel, and Levine. (PXs 29, 30, 31, R. ____.) Although Joe noted concerns with multiple aspects of the Company, the most pressing and urgent was the tax issue. (*Id.*)

Joe's concerns culminated in a meeting of all the shareholders and directors of the Company and its wholly-owned subsidiaries on October 24, 2007. (PX 41, R. ____.) At this meeting, Joe, Kathy, Joe Sr., and Catherine all agreed that the tax problems needed to be corrected immediately, that it would be improper for Levine to continue as accountant for the Company, and that the Company would retain Tim Duncan, CPA, to assume responsibility for the Company's accountings and tax returns. (*Id.*). Also at this meeting, however, the Mason Defendants voted to remove Joe from his position as president. (*Id.*). Joe Sr. was elected to serve as president. (*Id.*). Joe became vice president, and he no longer had responsibilities for handling financial matters for the Company. (PXs 41, 47; 11/17/11 Tr. at 30; R. ____.) Defendants Joe Sr. and Levine have signed every tax return filed by the Company and its subsidiaries since that meeting on October 24, 2007, when the significant problems were raised by Joe and fully discussed by the Defendants. (11/17/11 Tr. at 10-11, R. ____.)

The Mason Defendants soon began to reverse course from the positions they expressed in the October 24, 2007 meeting. Indeed, and even in the face of the opinions

of his own retained expert witnesses and correspondence to the contrary, Joe Sr. testified that he does not believe that Levine did anything wrong. (Joe Sr. Dep. at 118-19; R. __.) Following the October 24, 2007 meeting, Joe Sr. did in fact hire Duncan as the new accountant for the Company; however, after later receiving and reviewing draft amended tax returns prepared by Levine and reviewed in form only by Duncan (11/17/11 Tr. at 129, R. __), Joe Sr. fired Duncan. (11/16/11 Tr. at 247; PXs 44, 46; R. __.) Levine did not know of his own termination, and, to his knowledge, continued as the accountant for the Company without interruption. (11/16/11 Tr. at 268, R. __.) The draft proposed amended tax returns for the years 2003-2007 were never filed by Joe Sr. as president of the Company. (11/16/11 Tr. at 269; PXs 65, 66, 67, 68; R. __.) Levine remained the accountant for the Company. He prepared tax returns (signed by Levine and Joe Sr.) for the tax years 2007 and 2008 that over-report income for those years in an attempt to "correct" the under-reporting of income for earlier years. (11/16/11 Tr. at 270-71; PXs 69, 70; R. __.) The Mason Defendants' own expert opined that the returns filed in 2007 and 2008 did not properly correct the problem. (11/16/11 Tr. at 179, R. __.) Joe Sr., as president of the Company, did not file amended tax returns prior to the trial of this case, and he has signed off on the recent tax returns after being put on notice of Levine's improper, unethical, and illegal practices. The Final Order attributes the subsequent actions as somehow the fault of Joe. (Final Order 16-18, 26; R. __.) The evidence is undisputed, however, that Joe did not draft, discuss the content of, or even see the alleged draft amended returns or the returns filed in subsequent years. (*See, e.g.*, 11/14/11 Tr. at 201-02; 11/17/11 Tr. at 25, 30, 70; 11/18/11 Tr. at 246, 249-50; R. __.)

The relationships between the Mason family members involving the management of the Company has been stressed and dysfunctional for over a decade. (11/18/11 Tr. at 196-97, R. ____.) Troubling events during the several years ending in Joe's termination with the Company simply exacerbated the unhealthy situation.

Even before Joe became aware of the impropriety of Levine's accounting and financial practices, actions of the various defendants were harmful to the Company. In 2004, Ozzy St. Blanchard suffered a debilitating injury in a motorcycle accident while riding in a "Toys for Tots" charity event, which left him paralyzed. (11/14/11 Tr. at 89-91, R. ____.) Ozzy filed a workers' compensation claim for the injuries sustained in the accident. (PX 22, R. ____.) Joe Sr. provided a deposition in the course of the workers' compensation matter wherein he testified that Ozzy was acting in the course and scope of his employment at the time of the accident. (PX 22 at 6-7, R. ____.) Joe Sr. asked Joe to provide similar testimony, but Joe refused on the grounds that such testimony in support of the workers' compensation action would be perjury. (11/14/11 Tr. at 95; R. ____.) Further, Joe Sr. testified in his deposition in this case that he did not personally see Ozzy at the Mason Tire store on the morning of the accident (Joe Sr. Dep. at 63-64, R. ____; PX 22 at 13, R. ____), but in shareholder minutes of Mason Tire, he represented that he had personally seen Ozzy that morning. (PX 21, R. ____.) Although Joe was the actual and acting president of the Company, Joe Sr. also testified in his deposition in the workers compensation proceeding (apparently so that Joe's deposition would not be taken) that Joe Sr. was the "managing partner" of the Company. (PX 22 at p. 3 of testimony; R. ____.)

The Final Order drafted by counsel for the Mason Defendants included a finding that Joe's testimony on this topic was not credible (Final Order at 11-12; R. ____), but the

above evidence demonstrates inappropriate representations by Joe Sr. to the Workers Compensation. Moreover, this workers compensation issue caused problems in the management of the business of the Company. Joe Sr. and other family members resented Joe's refusal to cooperate in the scheme, displayed open hostility towards him, and began retaliating against him. (11/14/11 Tr. at 150; 11/17/11 Tr. at 35-37, 69; 11/18/11 Tr. at 238; R. ____.)

Joe made several unsuccessful attempts to resolve the out of control situation by offering either to buy the other shares from his family members or to sell them his shares. (See, e.g., 11/14/11 Tr. at 176-78; 204-07; 227-28; PX 50; R. ____.) After this frustrating series of events and discussing the situation with his father, his father very tellingly suggested that Joe quit working for the business. (11/14/11 Tr. at 207, R. ____.)

At his father's suggestion, Joe also sought a third party buyer for the entire Company. Joe found an interested buyer in Steve Allison. Mr. Allison owned a business with an office next to one of the Mason Tire stores, and he was very familiar with the Mason Tire business. After being informed of the basic financial situation, he made a proposal to Joe Sr. to buy the Company for \$3 million. Joe Sr. told Allison the family was not interested. (11/14/11 Tr. at 224-26; 127-35; 11/18/11 Tr. 212-14; PX 52, R. ____.)⁷ Apparently, Joe Sr. thought the offer was insufficient in light of the Company's assets and financial performance, but he did not attempt to negotiate for a higher price. (11/18/11 Tr. at 212-14; R. ____.)

In addition to the grave tax and accounting issues facing the Company—which had been known for over four years yet not appropriately addressed until after the trial of

⁷ Allison's offer was obviously a very serious one. After this proposal was rebuffed, he, along with other investors, purchased 43 Jiffy Lube stores in Florida. (11/14/11 Tr. at 127; R. ____.) Joe later went to work for that business after leaving Mason Tire.

this case began —Joe was subjected to great humiliation and demotion at the hands of the Mason Defendants. This treatment began prior to 2007 when the tax and accounting issues came to light and continues to this day.

Joe's authority within the Company was continually and regularly undermined by the Respondents after Joe brought the financial irregularities to their attention in early fall 2007. He was demoted from his position as president, his duties were reduced, his instructions were undermined, he had no access to bank accounts, he was regularly yelled at and berated by his family members, and the other family members often met without Joe. (11/14/11 Tr. at 184-85, 191, 216-17, 241; 11/15/11 Tr. at 32, 34-35, 67, 81-82; R. ____.) Things came to a head when Joe noticed that Sandra Adams,⁸ a bookkeeper, had discrepancies in her paycheck regarding a supplemental insurance policy. (11/14/11 Tr. at 229-32, R. ____.) Such discrepancies indicated that Ms. Adams was stealing money from the Company. With Joe Sr.'s support and on his request, Joe terminated Ms. Adams. (11/14/11 Tr. at 234-35, R. ____.) The next day, Joe Sr. told Joe that terminating Ms. Adams was wrong, and he re-hired Ms. Adams over Joe's objection. (11/14/11 Tr. at 237-39, R. ____.) When Adams returned that day with the other Mason Defendants, she made a rude gesture to Joe by shooting him "the bird." (11/14/11 Tr. at 239-40; R. ____.) Ms. Adams remains an employee of the Company in the bookkeeping department and often works with Levine on accounting and money-management issues. (Joe Sr. Dep. at 98, R. ____.)

Understandably, Joe found the entire situation intolerable and, consequently, acknowledged his constructive discharge from the Company on July 30, 2008 (PX 55;

⁸ Adams had prior disciplinary problems at the Company. (PX 27; 11/18/11 Tr. at 45-47; R. ____.)

R.__) and filed this lawsuit.⁹ Since that time, Joe has had no participation in any aspect of the Company. Moreover, no shareholder meetings have held and no dividends have been paid. (11/15/11 Tr. at 212, R. __.) Joe has not received any financial benefit from the ownership of his shares in the Company since the termination of his employment in 2008. (*Id.*) On the other hand, the other shareholders have received raises, bonuses, and other financial benefits, such as new cars, the value of which has not been extended to Joe. (Joe Sr. Dep. at 101-02; R. __). Since Joe's constructive discharge, the Mason Defendants have allowed the Company profitability to decline while other companies in this business have enjoyed increasing profits. (11/14/11 Tr. at 135; 11/18/11 Tr. 57-58; PX 77 at p. 19; R. __.) The Mason Defendants have continued to ostracize and humiliate Joe over the past several years. (*See, e.g.*, 11/14/11 Tr. at 248-50; 11/18/11 Tr. at 255, 261-62; R. __.)

STANDARD OF REVIEW

Under South Carolina law, "[w]hen legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott*, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997); *see also Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) ("The proper analysis is to view the [legal and equitable] actions separately for the purpose of determining the appropriate standard of review."). This appeal involves both legal and equitable causes of action. *See McDuffie v. O'Neal*, 324 S.C. 297, 302-03, 476 S.E.2d 702, 705 (Ct. App. 1996) (describing an action for stockholder oppression and the relief sought under the judicial dissolution statute (S.C. Code Ann. § 33-14-310) as equitable);

⁹ Joe Sr. has been involved in litigation with family members on prior occasions. (11/14/11 Tr. at 9; R. __.)

Corley, 326 S.C. at 92 n.1, 485 S.E.2d at 99 n.1 (describing an action for breach of fiduciary duty as an action at law).

“A shareholders derivative action, as well as an action for stockholder oppression, is one in equity.’ ... Therefore [this court] may find facts according to [its] own view of a preponderance of the evidence.” *Ballard v. Roberson*, Op. No. 27161 (S.C. Sup. Ct. filed Aug. 29, 2012) (Shearouse Adv. Sh. No. 30 at 18) (citations omitted). As recently stated by the South Carolina Supreme Court, “Article V, § 5 of the South Carolina Constitution provides in relevant part that our appellate jurisdiction in cases of equity requires that we ‘review the findings of fact as well as the law.’” *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Indeed, the appellate courts have a *de novo* standard of review as to facts in equity cases. *Id.* “*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.” *Id.* at 390, 709 S.E.2d at 654-55. Additionally, “questions of law may be decided with no particular deference” to the trial court’s findings in both legal and equitable matters. *N. Am. Rescue Prods., Inc. v. Richardson*, 396 S.C. 124, 131-32, 720 S.E.2d 53, 58 (Ct. App. 2011). By contrast, in appeal of a legal cause of action, such as breach of fiduciary duty, “the trial judge’s findings will be upheld unless without evidentiary support.” *Jordan*, 362 S.C. at 205, 608 S.E.2d at 131.

Notably, some courts take into account a trial court’s “lack of personal attention to factual findings” and wholesale adoption of one party’s proposed findings when applying the applicable standard of review. *In re Luhr Bros., Inc.*, 157 F.3d 333, 338 (5th Cir. 1998) (“[I]n cases such as the instant one, where the district court’s Findings of Fact and Conclusions of Law are near-verbatim recitals of the prevailing party’s proposed

findings and conclusions, with minimal revision, we should approach such findings with ‘caution.’”). The United States Supreme Court has also criticized the practice of verbatim adoption of a party’s submitted findings, as happened in this case. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985); *see also Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d Cir. 2004) (“When a court adopts a party’s proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.”). For this reason, the Orders appealed from here as authored by counsel for the Defendants/Respondents should be approached with caution in applying the applicable standards of review.

ARGUMENT

I. The Trial Court erred in denying Joe relief under the judicial dissolution provisions governing South Carolina corporations.

Appellant contends that the Special Referee erred in concluding that Joe is not entitled to relief under the judicial dissolution provisions pertaining to South Carolina corporations. The judicial dissolution provisions of the South Carolina Business Corporation Act provide in part as follows:

The circuit courts may dissolve a corporation:

(2) in a proceeding by a shareholder if it is established that:

(ii) the directors or 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 (whether in his capacity as a shareholder, director, or officer of the corporation); . . .

(iv) the corporate assets are being misapplied or wasted

S.C. Code Ann. § 33-14-300. The Act sets forth the procedures governing dissolution in the next section, S.C. Code Ann § 33-14-310:

(d) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order:

(2) canceling, altering, or enjoining any act or resolution of the corporation;

(3) directing or prohibiting any act of the corporation or of shareholders, directors, officers, or other persons party to the action; or

(4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

(e) The relief authorized in subsection (d) may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate.

The very similar provisions pertaining to South Carolina statutory close corporations are set forth in S.C. Code Ann. §§ 33-18-400 to -430. The statutory grounds for dissolution or other relief under these statutes are intentionally broad and vague, and the Court has discretion to fashion an appropriate remedy based on the facts presented. *Kiriakides v. Atlas Foods Sys. & Servs., Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001). The statutory terms “oppressive” and “unfairly prejudicial” “are elastic terms and their meaning varies with the circumstances presented in a particular case,” and the proper inquiry is “a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior.” *Id.* at 602-03, 541 S.E.2d at 266. In making that determination, the Court must consider whether the conduct of the majority is sufficiently

egregious or unfair to the minority shareholders or whether “the circumstances are such that the relief” is appropriate. *See id.*

The *Kiriakides* Court further addressed factors or “badges of oppression” to consider in determining whether to grant a shareholder’s request to be bought out for fair value under this statute.¹⁰ In articulating factors and examining conduct warranting relief under the statute, the Court stated that “[c]ommon 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 604-05, 541 S.E.2d at 267. The Court also noted “that in a classic ‘freeze out,’ the majority first denies the minority any return and then proposes to buy the shares at a very low price.” *Id.* at 604 n.27, 541 S.E.2d at 267 n.

27. The Court further provided a “host of factors” to consider:

including, but not limited to, dividend withholding, eliminating minority shareholders from directorate and excluding them from employment, siphoning off corporate earnings via high compensation, leases and loans favorable to majority shareholders, failure to enforce contracts for the benefit of the corporation, appropriation of corporate assets, contracts or credit for personal use, usurping corporate opportunities, transactions between a parent corporation and a subsidiary, withholding information from minority shareholders.

Id. at 605 n.28, 541 S.E.2d at 541 n.28. The Court further noted that the judicial dissolution statute was amended in 1963 to broaden the grounds for dissolution to include

¹⁰ The Court’s Order misconstrues the appropriate measure of relief when it describes the relief requested by Joe to be the “purchase [of his] shares at fair market value.” Order at 21. The judicial dissolution statutes require purchase at *fair value*, not fair market value. S.C. Code Ann. § 33-14-310(d)(4) (“[T]he court may make such order or grant such relief . . . including . . . providing for the purchase at their *fair value* of shares”) (emphasis added); *see also* S.C. Code Ann. § 33-18-420.

conduct which might not rise to the level of fraud but which was unfairly prejudicial to the minority shareholder. *Id.* at 597 n.17, 541 S.E.2d at 263 n.17. The Court concluded that the facts presented constituted a classic example of a majority freeze-out and that the trial court properly found that the defendant had engaged in conduct which was fraudulent, oppressive, and unfairly prejudicial such that a forced buyout of the shares was appropriate. *Id.* at 603, 541 S.E.2d at 266.

In a case on appeal from a federal court in South Carolina, the Fourth Circuit concluded that the trial court had the ability under South Carolina statutory judicial dissolution provisions to order a forced buyout of a minority shareholder's shares where the conduct at issue warranted such relief, even though it upheld a finding that there had been no breach of fiduciary duty, fraud, or oppression. *Kreischer v. The Kerrison Dry Goods Co.*, 1999 U.S. App. Lexis 1097 (4th Cir. 1999); *see also A. Teixeira & Co. v. Teixeira*, 1994 R.I. Super. LEXIS 71, *18 (R.I. 1994) (finding no oppression by the majority but ordering a buyout of the minority shareholders at fair value because "[a] once friendly business venture which developed into a successful and profitable corporation has been damaged by corporate infighting and stagnated by dissention. There is no prospect for harmony between the factions"). In *Kreischer*, the Fourth Circuit found that a buyout achieved both parties' goals—the plaintiffs' goal of exiting the business and the majority's goal of continuing the business. Given these competing interests, a buyout was the most equitable solution for terminating the parties' relationship. *Kreischer*, 1999 U.S. App. Lexis at 1097.

The Court in *Ballard* recently addressed the factors set forth in *Kiriakides* and confirmed that "illegal or fraudulent conduct is not required under section 33-14-

300(2)(ii).” *Ballard*, Op. No. 27161 at 24. The Court further held that “[t]he concern and focus in shareholder oppression cases is that the minority ‘faces a trapped investment and an indefinite exclusion [from] participation in business returns.’” *Id.* (citing *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267 (quoting Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, 790-791 (2000))). The Court concluded that Ballard, “like John and Louise in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.” *Id.* The Court also noted that the defendants had plans to hire other family members and thus to profit from their ownership of the company “while not affording Ballard similar benefits. This result is especially significant because returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends.” *Id.* at 25-26 (quoting Moll, *Shareholder Oppression* at 758 (“[T]he close corporation investor typically looks to salary rather than dividends for a share of the business returns because the earnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits.”)). Even if no one action by the controllers of the corporation is so egregious as to warrant a finding of oppression, relief under the judicial dissolution statute is appropriate if the evidence as a whole demonstrates oppression by the majority. *Id.* at 26 n. 6. The *Ballard* Court concluded that the record in that case “evinces a clear intent by Appellants to ‘freeze-out’ Ballard and exclude him from involvement with [the corporation] and from the benefits of ownership” and affirmed the forced buyout of Ballard’s shares. *Id.* at 26-27.

In this case, Respondents committed numerous acts and engaged in conduct that is illegal, fraudulent, oppressive, or unfairly prejudicial to Joe, or present circumstances such that an order compelling the Mason Defendants to purchase Appellant's shares at fair value is appropriate. This conduct includes, but is not limited to, the following:

- Asking Joe to commit perjury to support a fraudulent workers' compensation claim regarding a significant injury to Ozzy St. Blanchard, perjury by Joe Sr. in support of the claim, and acts and displays of retaliation and hostility toward Joe when he refused to cooperate with the scheme.
- Preparation and execution of documents that mischaracterize the nature of the redemption or sale of Joe's parents' shares of the Company.
- Refusing to acknowledge Joe's proper share ownership in the Company and to deliver the remaining shares for 20% of the Company due to him.
- The inclusion of consideration for the purchase of Joe's parents' shares in the form of a provision allowing them to select the Company's accountant (Levine) and then their exercising that provision to hire an incompetent accountant for the Company and to retain that accountant for years after Joe discovered and brought to the attention of the Company and the other Respondents the fact that Levine's accounting and tax services were incompetent and inappropriate.
- Retaliating against Joe for demanding that the Company amend its tax returns, terminate Levine, and adopt appropriate accounting and tax practices by, among other things, wrongfully refusing those demands, immediately terminating Joe's role as President of the Company, prohibiting Joe from further roles in certain banking and financial matters of the Company, limiting Joe's access to information about the Company's tax and accounting practices, and other acts of retaliation and public and private displays of hostility towards Joe.
- Asking Joe for offers to purchase the other shares of the Company and negotiating and declining those offers in bad faith.
- Asking Joe to pursue third party offers to buy the Company but then, in bad faith, unreasonably rejecting and refusing to negotiate or pursue an offer to purchase the Company for \$3 million.
- Submitting a low-ball valuation based on inaccurate information and based on improper methods.

- Making a low-ball offer to purchase Joe's shares.
- Refusing to acknowledge the annual values of the Company computed by Levine.
- Failing to conduct a shareholder meeting since the termination of Joe's employment with the Company in 2008.
- Failing to pay any dividends whatsoever since terminating Joe as President in 2007.
- Mismanaging the Company since Joe's wrongful discharge and allowing sales and profits to decline during a period when other similar businesses have enjoyed increasing sales and profits.
- Paying significant amounts of Company funds to lawyers and experts to defend allegations of serious wrongdoing committed by the individual Mason Defendants.
- Siphoning off and wasting Company assets by paying bonuses, excessive compensation, and granting substantial pay increases to the individual Mason Defendants despite the fact that the market value of their skills and services do not warrant that compensation and despite their mismanagement of the Company, the Company's declining revenues and profits, and the fact that no dividends have been paid during the same multi-year period.
- Buying Kathy a new Cadillac despite their mismanagement of the Company and the Company's declining revenues and profits.
- Repeated acts of hostility and retaliation against Joe as a result of his actions and efforts to refuse to act wrongfully and to attempt to resolve serious problems with the Company's tax and accounting practices.
- Depriving Joe of all financial value of his ownership of shares in the Company -- and the value in the Company that he devoted almost 25 years of his life building -- by wrongfully discharging him from the Company by constant humiliation and acts of retaliation and failing to pay him any compensation or dividends since then.

As a result of all of the above, the appropriate remedy in this case is a court-ordered buyout of Joe's shares by the Mason Defendants at fair value.

II. The Fair Value of the 100% interest in Mason Holding Company, Inc.

The Special Referee held that Appellant did not establish entitlement to relief under the judicial dissolution provisions of the Corporate Code and did not address valuation issues. Under the standard of review for equitable claims of this nature, this Court can make its own findings and conclusions with regard to valuation issues, and Appellant requests that this Court do so.

Appellant retained Perry Woodside, III, Ph.D., as a business valuation expert in this case, and he issued his report with regard to his conclusion of value of the 100% equity interest of the Company as of August 5, 2008. (PX 77; R. __.) The Mason Defendants retained Sherry Smith as their business valuation expert, and she issued her original report as to her opinion of value of Joe's shares as of May 31, 2009. (Defendants' Exhibit ("DX") 58; R. __.)

At the request of the Special Referee, the parties' valuation experts met to ascertain what issues they could agree upon and, as to issues on which they could not reach a consensus, they were directed to be prepared to explain the bases of their respective positions and reasons for disagreement. As a result of these efforts, the Mason Defendants' expert issued a revised report dated November 7, 2011. (DX 57; R. __.) Woodside issued a report dated November 15, 2011, that sets forth amended valuation conclusions as well as a comparison of the two experts' amended valuation conclusions. (PX 79; R. __.) The Mason Defendants' expert agreed that Dr. Woodside's summary of the comparison and contrast of their opinions was a reasonable and fair description of the experts' respective positions. (11/17/11 Tr. at 127-28; R. __.)

A. Valuation date.

At trial, both experts agreed that the appropriate valuation date was August 5, 2008, which is the date of the filing of the original complaint in this case and shortly after the termination of Joe's employment with the Company. (11/17/11 Tr. at 137-38; R. __.) Selecting the date of filing as the valuation date in this case is supported by the law of South Carolina and other jurisdictions and by the circumstances presented in this case. *See, e.g., Hendley v. Lee*, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (finding the date of ouster would be most appropriate in a minority stockholder oppression case); *Hollis v. Hill*, 232 F.3d 460, 472 (5th Cir. 2000) ("The presumptive valuation date for other states allowing buy-out remedies is the date of filing unless exceptional circumstances exist which require an earlier or later date to be chosen."); *see also Kaplan v. First Hartford Corp.*, 522 F. Supp. 2d 275 (D. Me. 2007).

A joint and several judgment against the Mason Defendants requiring them to purchase Joe's shares as of this date also obviates the necessity of addressing certain other issues that arose after the filing date and the amount of any resulting damage to the Company or amount of adjustments needed in the share valuation, such as alleged mismanagement of the Company and the inappropriate payment by the Company of the attorneys' fees and expenses of the of the individual Mason Defendants since the Valuation Date. For these reasons, August 5, 2008, is the appropriate valuation date for this analysis

B. The correct standard of value is "fair value."

The starting point for this analysis consists of selecting and understanding the applicable standard of value, which informs and guides each of the various approaches and methods generally employed by business appraisal professionals. At the direction of

the Mason Defendants’ attorneys, their business appraisal expert, Smith, employed a *fair market value* standard of value in her analysis because she was specifically directed to use that standard of value rather than the fair value standard of value. (11/17/2011 Tr. at 134-37; R. ____.) Dr. Woodside employed the fair value standard of value and specifically relied on applicable South Carolina law including the principles set forth in the case of *Santee Oil Co. v. Cox*, 265 S.C. 270, 274, 217 S.E.2d 789, 791 (1975). (PX 77 at 2-3; R. ____.)

Both the dissenters’ rights statute and the judicial dissolution statute (which applies in this case) provide that, when appropriate, the claimant’s shares must be purchased at “fair value” in an amount to be determined by the court. S.C. Code Ann. § 33-13-102(A) (“A shareholder is entitled to dissent from, and obtain payment of the *fair value* of, his shares”) (emphasis added); *Id.* § 33-14-310(d)(4) (“[T]he court may make such order or grant such relief . . . including . . . providing for the purchase at their *fair value* of shares”) (emphasis added). The statutes, the comments to the statutes, and applicable case law further define and explain how to compute fair value. *E.g. id.* § 33-13-101(3); *see also* S.C. Code Ann. § 33-18-420. That law also makes it clear that fair value under this state law is something different from the concept of fair market value commonly used in the business valuation industry for certain purposes. *See, e.g., Santee Oil*, 265 S.C. at 274, 217 S.E.2d at 791 (finding that fair value involves the three major factors of net asset value, market value, and the earnings or investment value of the dissenting stock); *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 116, 522 S.E.2d 357, 360 (Ct. App. 1999) (equating fair value with “intrinsic value” and affirming *Santee Oil* method); *see also* 18A Am Jur 2d Corporations § 706 (“‘Fair value,’ for the

purposes of a proceeding appraising the value of shares in a corporation, carries a statutory purpose of fair compensation to shareholders, which may not equate to the market's judgment of the value of a share. 'Fair value' is not necessarily synonymous with 'fair market value,' and 'fair value' is not even necessarily tied to market value, as reflected in actual stock trading.").

"It is impossible to intelligently discuss methods of valuation without reference to some assumed definition of value...." S. Pratt and A. Niculita, *Valuing a Business, the Analysis and Appraisal of Closely Held Companies*, (5th ed. McGraw Hill Co. 2008), quoting J.C. Bonbright, *Valuation of Property*, Vol. 1 (The Michie Co. 1965). The standard of value for purposes of analysis under state law statutes governing shareholder dissent and appraisal rights and shareholder oppression litigation is a "*legally created standard of value*." Pratt, *Valuing a Business* at 45 (emphasis added). "When a situation arises of actual or potential stockholder dissent or dissolution action, it is necessary to carefully research the legal precedents applicable to each case. The appraiser should solicit the view of counsel as to the interpretation of fair value...." *Id.* (emphasis added).

The appropriate standard of value for this analysis is fair value as further defined by South Carolina statutory and case law, including the cases of *Belk* and *Santee Oil*. Despite clear statutory and case law authority establishing fair value as the appropriate standard in South Carolina, Smith, at the direction of counsel for the Mason Defendants, failed to use this standard in her analysis. To the extent her resulting opinion varies from the legal guidance set forth under South Carolina law for fair value, it should be rejected entirely.

C. Discounts are not warranted or appropriate.

One critical valuation issue in this case that can be resolved by selecting the appropriate standard of value is the propriety of the application of discounts or premia. Dr. Woodside applied the fair value standard of value in his analysis and concluded that the application of discounts was not warranted or appropriate. Smith applied a discount of 30% for lack of control under both of the approaches she used and an additional 35% discount for lack of marketability under the method she selected under the income approach in both her original report dated September 9, 2009 (DX 57; R.___), as well as the very different report she prepared a few days before trial. (DX 58; R.___.)

The entire Company should be valued as a going concern, and Joe's shares should be valued pro-rata based on that valuation. No discounts should be applied, including any discounts based on theories of lack of control or lack of marketability. *See, e.g., Morrow v. Martschink*, 922 F. Supp. 1093, 1105 (D.S.C. 1995) ("[N]o minority discount or marketability discount should be applied to reduce the fair value of Plaintiff's shares. These discounts have not been recognized in South Carolina in the context of corporate dissolution actions and have been rejected by many courts."); *see also Charland v. Country View Golf Club*, 588 A.2d 609, 613 (R.I. 1991) (reviewing case law from multiple jurisdictions and holding that marketability and minority discounts are inappropriate in valuing shares in a dissolution or buyout proceeding). Neither *Santee Oil* nor *Belk* apply discounts in their calculations of fair value. This approach is in accord with the law of Delaware and virtually all other states. *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del. 1989); Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L. J. 293, 363 n. 262 (2004).

The application of discounts as suggested by Smith is legally and factually inappropriate in this case.

D. Valuation factors.

Santee Oil guides the analysis of what constitutes fair value of a corporation's shares. In *Santee Oil*, the South Carolina Supreme Court examined Delaware law and held that "fair value means 'intrinsic value.' ... But 'fair value' does not restrict the appraising court to the use of any one method of valuation." *Id.* at 273, 217 S.E.2d at 791. Each case must be "decided upon its own facts and circumstances. 'Every relevant fact and circumstance which enters into the value of the corporate property and which reflects itself in the worth of the corporate stock' ... must be considered." *Id.* at 273-74, 217 S.E.2d at 792 (citations omitted). "[T]he three major factors to be considered are: (1) net asset value; (2) market value; and (3) the earnings or investment value of the dissenting stock." *Id.* The various major factors, known as the Delaware Block Method, "should then be weighed as to their relative bearing upon the ultimate question of the fair value of the dissenting stock, and a final determination of value made." *Id.* (citations omitted).

The South Carolina Court of Appeals reaffirmed that the *Santee Oil* analysis must be considered in evaluating fair value under the Act in *Belk*, 337 S.C. at 116, 522 S.E.2d at 361.

In *Santee* our supreme court determined three factors were ordinarily to be considered in a stock valuation case: (1) net asset value, (2) market value, and (3) the earnings or investment value of the dissenting stock. After these factors have been considered, each is then weighted as to their relative bearing upon the ultimate determination of the fair value of the dissenting stock. Not only did the dissenters' experts not utilize *all three of these methods*,

they also did not engage in weighting. Because [the appraisers] failed to engage in a *Santee* analysis, *we must accordingly discount* the significance of their appraisals in valuing Thompson's shares.

Id. (emphasis added, citations omitted). Although "each case must be decided on its own facts and circumstances," the Court of Appeals made it clear that a fair value appraisal that did not consider the three approaches of the Delaware Block method would be immediately suspect and not entitled to great weight. *Id.* To determine the fair value of Appellant's shares of the Company, the Court may examine the methods used by the parties' experts in this case and make its independent analysis.

Under the facts presented in this case, both experts concluded that the net asset and income approaches did not lead to reliable or appropriate indications of value of the Company. Both experts placed 100% weight to the indications of value resulting from the use of the market approach.

The *Belk* court instructed "[i]f there is no reliable established market value for the shares a reconstructed market, if one can be made, must be given consideration." *Belk*, 337 S.C. at 124, 522 S.E.2d at 365 (quoting *Santee Oil*). The parties agree that there is no reliable, established market value for shares of the Company. Both parties' experts calculated a reconstructed market value by using the guideline company transaction method, also known as the direct market data method. (PX 77 at 24; DX 57 at 6; R. ____.) Under this method, value indications can be derived from actual sales of other businesses. The parties' experts also agreed that, under the facts of this case, the appropriate metric to use to derive value should be based on the level of revenues of the Company. (11/16/11 Tr. at 51; 11/18/11 Tr. at 146-47; R. ____.) The unreliability of the Company's financial records stems from the uncertainty and propriety of the level of

certain expenses, but the level of revenue was considered generally reliable by the parties. This method is an appropriate method to use in this case, and the Company's level of revenue is the appropriate and reliable metric to consider.

For revenue estimates for this method, Woodside used the Company's weighted average revenues for the period of 2004 through August of 2008 in the amount of \$6,685,007. (PX 77 at 29; PX 79 at 7; R.___) Smith used the Company's 2008 year-end consolidated revenues of \$6,152,830. (DX 57 at 50; DX 58 at 6; R.___) Using data from a multi-year period, as Woodside did, is more appropriate and more reliable under the facts presented by this case than using data from just one year. In *Santee Oil*, the Court used data from an average of three years. 265 S.C. at 275-76, 217 S.E.2d at 792-93. In *Belk*, the Court noted the *Santee Oil* court's use of the average of three years performance and was critical of an expert who used data from only one year. 337 S.C. at 115 n.4, 522 S.E.2d at 360 n.4. Smith's reliance on 2008 year-end revenues suffers the additional problem of relying on data that was not known or knowable as of August 5, 2008. It is appropriate to use the Company's weighted average revenues for the period of 2004 through August of 2008 in the amount of \$6,685,007 for purposes of these calculations of value under the market approach.

The next critical step in this analysis is to select the appropriate multiple based on a selection of the most comparable transactions. Woodside used two databases, Bizcomps (PX 81; R.___) and one published by the Institute of Business Appraisers ("IBA") (PX 80; R.___). From these databases, he selected only transactions that occurred in the five years preceding the Valuation Date and for acquired companies with revenues in excess of \$1 million. (PX 77 at 34-35, R. ____.) This screening left him with

22 observations, 10 from Bizcomps and 12 from the IBA database. (PX 77 at 35, R. ____.) Using these observations, he found a median sales price to annual gross sales multiple of .39 using the Bizcomps database and .54 using IBA. (PXs 80, 81, & 79; R. ____.) After adding the Company's cash, account receivables, and inventory and subtracting working capital liabilities, he reached a value indication of \$3,236,398 from Bizcomps and \$3,354,794 from IBA for a rounded average of \$3,296,000. (PX 79 at 3; R. ____.)

Smith also used the IBA database but did not use the one published by Bizcomps. (DX 57 at 6, R. ____.) More importantly, she used the IBA database in a different fashion than Woodside. She selected transaction data for Auto and Home Supply Stores and then removed any company that did not have the words "tire dealer" in the description. (DX 58 at 6; R. ____.) This approach left her with 55 transactions that are identified at pages 39-40 of her original report. (DX 57; R. ____.) As she notes in her report, the Company's sales in 2008 of over \$6 million were "nearly twice as large as the largest company in the IBA data." (*Id.* at 49; R. ____.) In fact, over half of the companies in her screened database had sales of less than \$500,000 and all but five had sales of less than \$2 million. (*Id.* at 39-40; R. ____.) Moreover, the data relied upon by Smith included transactions that occurred as early as 1989, almost 20 years before the Valuation Date. (*Id.*; R. ____.)

In *Belk*, the Court was critical of an expert that used data from large multi-state chains to value a corporation that owned only two stores and specifically did not approve of the use of such data in the application of the guideline public company method (another method under the market approach). 337 S.C. at 115 n.4 & 120-21, 522 S.E.2d at 360 n. 4 & 363. It is instructive to note that both experts in this case concluded that the

guideline public company method could not be applied reliably in this case because all of the publicly traded companies in this industry are much larger than Mason Holding Company. (PX 77 at 34; DX 57 at 44; R. __.) The data used by Smith suffers from the same problem in that it includes information for companies with a fraction of the sales of Mason Holding, and Smith agreed that most presumably only had one retail location as opposed to Mason Holding, which has the synergies and scale associated with five retail locations. (11/18/11 Tr. at 144-45; R. __.)

The revenue to price multiple derived by Woodside is the appropriate multiple to use in this case under this method. Smith's data is not reliable in that it uses information from companies that are too small and includes transactions that are too remote in time to provide a reliable guide to value in this case.

The parties' experts disagree with regard to whether an amount should be added to the value indicated by the income approach for non-operating assets – specifically for the real estate owned by the Company. Woodside relied upon the value of the real estate reflected in the books of the Company shortly after the building was constructed on the site on Highway 544 in Conway. (11/16/11 Tr. at 31-32; R. __.) After reducing that value by the mortgage balance as of the Valuation Date, he concluded that the real estate had a value over the mortgage balance of \$377,056. (See PX 79 at 2 & 5-6; R. __.)

Smith agreed that, conceptually, if there is equity in this real estate, the amount of that equity would be considered a non-operating asset and should be added to the indicated value under this method. She concluded, however, that the real estate had no equity over the mortgage balance. (11/18/11 Tr. at 156; R. __.) For her conclusion, Smith relied on a letter from an appraiser about the approximate current value of the

property as of the trial date and other statements about the current value of the property. (11/18/11 Tr. at 157-58; R. ____.) This analysis must look to the value as of August 5, 2008. Based on the evidence presented, the Company had a non-operating asset of equity in this real estate in the amount of \$377,056, and, for the reasons set forth above, the total value indication using the guideline company transaction method is \$3,673,000.

The parties and their experts also disagree as to whether the value indications should be reduced by an amount representing the Company's tax liability as a result of under-reporting income in prior year tax returns. Appellant submits that whether any additional taxes and the amount of such taxes owing as of August 5, 2008, has not been determined and is too speculative to be considered in this analysis.

Smith does not do her own analysis of the tax liability but simply adopts the conclusion from the report of Laura DuRant that the tax liability could be \$745,832. (DX 58 at 7; R. ____.)¹¹ In her report, DuRant does not attempt to compute what the current tax liability will ultimately be, but rather calculated a worst case scenario, including an assumed finding of fraud by the taxing authorities and the assessment of penalties based on such a finding. (11/16/11 Tr. at 144-49; R. ____.) The witnesses for the Mason Defendants acknowledged that this is not the position they would advocate with the taxing authorities. (11/16/11 Tr. at 173; R. ____.) Further, DuRant's calculations are based on the liability as of the trial date, not what the liability allegedly was several years earlier on the valuation date of August 5, 2008. (11/16/11 Tr. at 148; R. ____.) Indeed, most of the alleged liability is the accumulation of interest and penalties that may have

¹¹ Smith also inappropriately reduced her value conclusions for the tax liability after taking discounts for lack of control and marketability. Even if such discounts were appropriate, and they are not, any reduction for the tax liability should have been taken prior to applying those discounts.

accrued since Joe left the employment of the Company in 2008 and after the appropriate Valuation Date in this case. Moreover, any tax liability would undoubtedly be much lower if the issues had been properly handled when Joe raised them in 2007. (*See, e.g.*, 11/16/11 Tr. 167-68, 174-75; R.___) Under these circumstances, it is not appropriate to reduce the indication of value of the Company for an unascertained potential tax liability as of August 5, 2008.

As noted above, the asset approach and income approach are not reliable or appropriate methods for indications of value in this case. As a result, the value indication under the market approach, using the guideline company transaction method, should be given 100% weighting. Accordingly, the fair value of the entire equity interest in Mason Holding is \$3,673,000.¹²

III. Appellant owns 50% of the Company's shares.

Joe has physical possession of 30% of the outstanding shares of the Company, and it is undisputed that he owns at least that portion of the shares. Joe also contends that he owns another 20% of the shares of the Company, which shares the Mason Defendants have refused to deliver.

This issue requires the analysis of certain “unusual” documents pertaining to the “retirement plan” for Joe Sr. The original document drafted by Ed Kelaher, Esq. sometime around early 2002 was a typical stock purchase agreement. (PX 8; R.___) Under that agreement, Joe’s parents, Joe Sr. and Catherine, were to deliver and convey immediately at closing their share certificates to Plaintiff and his sister, leaving Plaintiff

¹² This value is consistent with other record evidence. For example, Steve Allison made an attempt to buy the Company for \$3 million and Levine prepared annual valuations that reflected the growing Company was increasing in value over time and had a value as of the end of 2006 of \$4.4 million. (11/14/11 Tr. at 132; PXs 2, 3, 24, 52; R. ___.)

and his sister with 50% each of the shares of the Company. A stock pledge agreement would secure the payment of the consideration. (*Id.*)

After discussion with family members and at the direction of Respondent Levine, Mr. Kelaheer drafted a package of several agreements. Mr. Kelaheer informed the shareholders that the agreements were very unusual documents that raised a number of legal and tax issues. (PX 15; R. __.) The final set of executed documents included an employment agreement (PX 16; R. __), an extra, second lease for the Pawleys Island location (the location was already the subject of another lease that remained in effect) (PX 18; R. __), and a letter agreement purporting to “give” the shares to Joe and Kathy for the quite unusual consideration to Joe Sr. and Catherine of the right to designate the Company’s “Certified Public Accountant.” (PX 17; R. __.)

Joe Sr. and Catherine stated in the letter agreement that the agreement stood “as our promise, commitment, and absolute and unfailing word that we will make a gift to” Joe and Kathy of their shares in the Company in installments, the last installment of a 5% interest each due on or before December 31, 2011 – a date that has now passed. (*Id.*) After the last installment, Joe and the St. Blanchards (Kathy and Ozzy) were to each own 50% of the Company’s shares. Joe Sr. and Catherine received valuable consideration for their shares for many years, and Joe Sr. continued to receive compensation and benefits under his retirement plan after the termination of Joe’s employment with the Company, although some of the payments may have been recharacterized¹³ since Joe raised his concerns about certain of the Company’s financial issues in 2007. In fact, Joe Sr.

¹³ The extra rent was recharacterized as salary to Joe Sr.. (Joe Sr. Dep. at 100; 11/17/11 Tr. at 74-75; R. __.)

testified that the only reason he did not deliver the remaining shares to Joe was “because he sued me.” (Joe Sr. Dep. 60; R. __.)

The consideration under the letter agreement of the right to appoint Levine as the Company “CPA” proved to be quite substantial – and detrimental. As noted above, Joe notified the Mason Defendants in the summer and fall of 2007 that there were many serious problems with Levine’s accounting advice and the tax returns he prepared. Rather than work to cure those problems, the Mason Defendants immediately terminated Joe as President and elected Joe Sr. to serve in that capacity. Moreover, despite the acknowledged problems with Levine’s prior advice and actions and tax returns, Joe Sr. has continued to employ Levine as the Company’s and his personal accountant to the present. Further, as of the trial of this case, no amended tax returns had been filed, although counsel for the Mason Defendants indicated that after the trial started they began notifying the tax authorities of the situation. However, that was *over four years after receiving the letters from Mr. Byrd addressed to them informing them that the earlier returns and advice by Levine were inappropriate and needed urgent attention.* (PXs 29, 30, 31; R. __.)

The Special Referee concluded that, even though Joe Sr. received valuable consideration under these agreements for many years, “under no circumstances could this Court engage in the enforcement of a series of agreements which clearly, on their face, were illegal and unenforceable.” (Order p. 25, ¶¶ 11 & 12; R. __.) This result is completely inequitable. Joe spent many years of hard work earning the income that was diverted and paid to his parents under these agreements. Under the facts presented by this arrangement, the Court should declare Joe the owner of 50% of the shares of the

Company, require that the shares be delivered to Joe, and require the Mason Defendants to purchase all of those shares for fair value. Because the fair value of the entire equity interest in Mason Holding is \$3,673,000, the Special Referee's holding should be reversed and the Mason Defendants should be ordered to purchase Joe's 50% interest in the Company for the amount of \$1,836,500.

IV. The Special Referee erred in concluding that the Mason Defendants did not breach their fiduciary duties to Joe.

Directors and officers of a corporation owe fiduciary duties to the corporation's shareholders. S.C. Code Ann. §§ 33-8-300 & -420; *see also Clearwater Trust v. Bunting*, 367 S.C. 340, 350, 626 S.E.2d 334, 339 (2006) ("The common law fiduciary duty, first recognized in 1913, owed to shareholders by corporate officers and directors has been codified by §§ 33-8-300 and -420."). The statute provides in pertinent part: "(a) A director shall discharge his duties as a director . . . (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders." S.C. Code Ann. § 33-8-300(a).¹⁴

The Mason Defendants, as corporate officers and directors, owed fiduciary duties to the Company and its shareholders, including Joe. The Special Referee held that the Mason Defendants did not breach their fiduciary duties and that any such claim was owned by the Company. (Final Order; R. __.) The Final Order should be reversed because the overwhelming evidence demonstrates that the Mason Defendants breached

¹⁴ The provision for officers is almost identical: "(a) An officer with discretionary authority shall discharge his duties under that authority: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders." S.C. Code Ann. § 33-8-420(a).

their fiduciary duties and in such a way as to injure Joe in an individual capacity. Therefore, they are personally liable to Joe for those damages. *See Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (“A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. . . . An individual action is also allowed if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation.”) (citation omitted); *Davis v. Hamm*, 300 S.C. 284, 292, 387 S.E.2d 676, 680 (Ct. App. 1989) (Section 33-8-420(a) “imposed on officers of a corporation a duty of care to discharge their duties in good faith, with prudent care, and in the reasonable belief they are acting in the best interest of the corporation and its shareholders. After careful analysis of all authority relating to the 1981 Act and its successor Act, we hold there is no liability to shareholders unless the duty asserted to have been breached flows to the plaintiff . . . in actions [such as those] brought by minority stockholders of close corporations pursuant to . . . Sections 33-14-300 to 33-14-330.”).

Joe has suffered individual harm, as well as harm in the context of his claim seeking a buyout under the Act. Joe is no longer employed by the Company, and the Mason Defendants, as officers of the Company, have given themselves raises¹⁵ and bonuses, and purchased a Cadillac for Kathy (among other things) without paying a dividend or otherwise allowing Plaintiff—the *sole* excluded minority shareholder—to

¹⁵ The compensation to the Mason Defendants constitutes excess compensation because their services could be replaced in the market at a lower rate of compensation. For example, Kathy’s salary increased from \$50,000 in 2005 to \$90,000 in 2008 and forward, plus bonuses and benefits, such as a new Cadillac. (11/18/11 Tr. at 56-57; R. __.) She does not have a college degree and had no prior training or education in accounting. Her services could easily be replaced in the market at a lower rate. (11/16/11 Tr. at 55-58, 128-30; 11/18/11 at Tr. 15-16; R. __.)

reap the benefits of maintaining an ownership stake in the Company. Further, the Mason Defendants have undertaken various fraudulent and improper activities that would entitle Plaintiff to relief under the judicial dissolution statute, as discussed above. Consequently, the Mason Defendants have breached their fiduciary duties to Joe.

V. The Final Order as to Levine should be reversed because Defendant Levine aided and abetted the Mason Defendants in breaching their fiduciary duties to the shareholders of the Company.

South Carolina law recognizes a cause of action for aiding and abetting breach of fiduciary duty. The plaintiff must prove: “(1) a breach of a fiduciary duty owed to the plaintiff, (2) the defendant’s knowing participation in the breach, and (3) damages.” *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). “The gravamen of the claim is the defendant’s knowing participation in the fiduciary’s breach.” *Id.*; see also *Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008).

The Special Referee held that Joe had not established liability against Levine under this cause of action because: (1) the Mason Defendants did not breach their fiduciary duties to Joe; (2) the claim against Levine could only be pursued on behalf of the Company; (3) Joe had “unclean hands;” and (4) there were no distinct damages arising from the conduct of Levine. (Levine Order, R. ____.) These holdings should be reversed.

As argued above, the Mason Defendants breached their fiduciary duties to Joe in numerous respects. And, because the damage was unique to Joe and Levine’s conduct was adverse to the Company’s interest, Joe had standing to assert the claim. Levine’s conduct was a proximate cause of damage to Appellant in the form of his constructive

discharge from employment and the deprivation of the value of his shares in the Company. Unclean hands is not a recognized defense to the claim against Levine. Furthermore, Levine admits advising all family members that the accounting and tax advice he gave was appropriate at the time he gave that advice (11/16/11 Tr. at 233-34; R. ____.) Consequently, Joe is not barred from asserting the claim as a result of unclean hands.

Levine is more than the accountant for the Company – he owns 52% of the shares of an affiliated entity that operates one of the stores. Levine also knowingly participated in the breaches of fiduciary duties by the Mason Defendants. Levine played a key part in many of those allegations and was the author of the false and fraudulent tax filings and other accounting documents. Levine admitted knowledge of such fraud and falsity in his testimony at trial and in writing: “In order to maintain the above figure [\$100,000] I closed my eyes knowing that the family would benefit in the long run.” (PX 32; R.____.) Despite assuring the shareholders it would be appropriate at the time, he admits that the loans to Joe and his sister were “set up on a fraudulent basis.” (11/17/11 Tr. 251-55, 264, PX 36; R. ____.) Levine also admits that he was mad at Joe for raising the problematic tax and accounting issues because of the professional embarrassment to Levine. (11/16/11 Tr. at 259, 264, 272, 274-75; R. ____.)¹⁶ Levine attempted to extort an excessive fee to provide to Joe’s new accountant a copy of a prior schedule and then sent Joe a handwritten note calling him a bastard. (PXs 57, 58, and 59; R.____). Further, Levine perpetuated the breach of fiduciary duties by not appropriately fixing the false and fraudulent tax returns, despite having actual knowledge of the problems for over four

¹⁶ Levine acknowledges that the other family members were also mad at Joe for raising these issues. (11/16/11 Tr. at 272, R. ____).

years. In addition, Levine aided and abetted the Mason Defendants in retaliating against Joe when he attempted to cure the problems.

The Special Referee's holding that Levine was not liable for aiding and abetting breach of fiduciary duties should be reversed because Levine's shockingly unprofessional and inappropriate conduct and active participation in efforts to run Joe out of the business and to deprive him of the value of his shares constitutes aiding and abetting breach of fiduciary duties.

VI. The Mason Defendants engaged in a civil conspiracy to loot the Company at the expense of Appellant.

To prove a claim for civil conspiracy, a plaintiff must show a combination of two or more persons for the purpose of injuring plaintiff causing plaintiff special damage. Hubbard & Felix, *S.C. Law of Torts* 404-408 (3d ed. 2004). Damages may include specific items of loss, including loss of business. *Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942). Punitive damages are possible if actual malice is shown. *Swinton Creek Nursery v. Edisto Farm Credit*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987).

Here, the Mason Defendants and Levine—four people—retaliated against Joe and sought to cut him out of the management of and employment with the Company due to Joe's vocal and repeated concerns about false and fraudulent practices pressed and carried out by the Mason Defendants, with guidance and assistance from Levine. The Mason Defendants have demonstrated actual malice against Joe by removing him from his positions within the Company due to his concerns, which the Mason Defendants refused to remedy for over four years. The Mason Defendants have continued to financially benefit from the Company at Joe's expense, by refusing to pay any dividends or hold a shareholders' meeting despite giving themselves raises, bonuses, and additional

perquisites, such as company cars. Further, the Mason Defendants have looted the Company at Joe's expense by continuing the employment of Levine as the Company's accountant and not fixing known problems with the taxes and accountings for years, thus severely damaging the Company.

Joe has suffered damages due to the Mason Defendants' conduct by losing his employment with the Company, the business relationships he built at the Company, and the financial and other benefits associated with his work with the Company. Such financial and other benefits have only been partially mitigated by Joe's current employment with Atlantic Coast Enterprises. Joe is entitled to actual and punitive damages due to the Mason Defendants' civil conspiracy.

VII. The Mason Defendants violated public policy and wrongfully and constructively discharged Joe from his employment with the Company.

Joe worked tirelessly for the Company for years with the understanding that his employment was secure. Indeed, he consistently tried to do his very best for the Company. When it became clear to Joe and the Mason Defendants that Levine had concocted improper and fraudulent accounting devices that could seriously harm the Company, Joe was the *only* shareholder to insist repeatedly that the problem be fixed. After Joe's departure, the Mason Defendants have persisted in the retention of Levine and, as of the trial of this dispute, had not appropriately addressed the tax issues despite knowing of them for over four years. Such delay caused significant harm to the Company by allowing penalties and interest to accrue.

Although South Carolina is generally an employment at-will state, the "public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law." *Ludwick v. This Minute of*

Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). Here, Joe was asked to assist the Mason Defendants in defrauding the federal and state governments with respect to tax and workers compensation benefits and when he failed to do so, Respondents retaliated against him and constructively discharged Joe from his employment with the Company. This dismissal clearly violates the public policy of this state and cannot be condoned by this Court.

Woodside computed damages in the amount of \$1,161,585 (PX 80; R. __) with regard to the employment and breach of fiduciary duty claims. Such an award is appropriate and is supported by the evidence. The Special Referee should be reversed and the case should be remanded for a trial on damages as to this cause of action.

VIII. The Special Referee erred in awarding judgment against Joe on the Mason Defendants' Counterclaims.

The Mason Defendants asserted counterclaims against Plaintiff for breach of fiduciary duty and conversion. The actions complained of by the Mason Defendants, however, were well known by the Mason Defendants, the Mason Defendants participated in and benefitted from the accounting and financial practices at issue, and they all approved, authorized, or ratified the actions. Like Joe, prior to October of 2007, the Mason Defendants relied on the professional judgment of Levine to guide various corporate decisions and policies. Such advice, as now recognized by Joe but persistently ignored by the Mason Defendants, was grossly inappropriate and detrimental to the Company. Consequently, the Mason Defendants are barred from challenging the actions by the applicable statute of limitations for certain matters and by the doctrines of waiver, estoppel, and laches.

The Mason Defendants are further barred from challenging these actions by the doctrine of *in pari delicto*. Very generally, *in pari delicto* is “[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.” *Black’s Law Dictionary* 806 (8th ed. 1999); *see also Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395-96, 635 S.E.2d 545, 547-48 (Ct. App. 2006). This rule bars recovery where the plaintiff and defendant are equally in the wrong. *See generally Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230, 237 (7th Cir. 2003). Here, the Mason Defendants had full knowledge of everything they point to as wrongdoing and further ratified all actions. They also refused to remedy the situation when Plaintiff brought the problems of Levine’s tax and accounting advice to light. They have no standing or right to recover anything from Joe.

The Special Referee held that the Mason Defendants may bring a future action for damages against Joe based on the Company’s tax returns filed in or before 2007. (Final Order p. 26; R. ____.) That judgment should be reversed. The issues regarding such liability were fully tried, this relief was not requested below, the Company is responsible for payment of its own taxes, and the Mason Defendants failed to take action regarding the tax issues for over four years after the issues were raised by Joe thereby resulting in potential increased payments of interest and penalties.

The Special Referee awarded damages against Joe for \$11,716.32 with regard to cash for casings sold by the Company. (Final Order p. 26; R. ____.) That judgment should be reversed. As discussed above, the cash proceeds from those sales were to be divided equally between Joe and his sister. The overwhelming evidence is that those proceeds

were divided and otherwise equalized between Joe and his sister with regard to payment of personal expenses by the Company.

The Special Referee also awarded damages against Joe in the amount of \$17,301.66 for alleged conversion of funds used to pay the Turner Padgett law firm. (Final Order p. 26; R. __.) That judgment should be reversed. These proceedings have demonstrated that the serious tax and accounting issues raised by that firm (*see* PXs 29, 30, and 31) were appropriate issues warranting corrective action by the Company. The Company benefitted from that advice, and it was fully appropriate for Joe to be reimbursed for the fees paid to that law firm. *See, e.g.*, S.C. Code Section 33-8-250.

IX. Appellant is entitled to his attorneys' fees and expenses.

In addition to the remedies sought for each of the causes of action in this case, Joe further seeks an award of attorneys' fees. Such an award is consistent with the broad powers given to the Court by the Act. Under the dissolution statute, the Court may "grant such relief, other than dissolution, as in its discretion is appropriate." S.C. Code Ann. § 33-14-310(d). In addition to the mandatory indemnification provisions found in Sections 33-8-520 and -560, Section 33-8-540 provides the Court the ability to award indemnification even when the criteria in S.C. Code Ann. § 33-8-510 are not met if the director (or officer per -560) "is fairly and reasonably entitled" to it. As demonstrated at trial, Joe has fought to force the company to do the right thing for many years to no avail and at great personal expense. The Defendants have engaged in illegal, unfair, and vexatious conduct towards Joe. Joe is entitled to recover from the Respondents his attorneys' fees incurred in this matter.

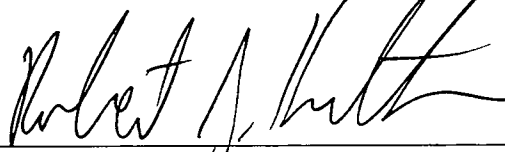
CONCLUSION

For the reasons set forth herein, the Final Order should be reversed with regard to the cause of action for relief under the South Carolina statutory judicial dissolution provisions, and the case should be remanded with instructions to require Respondents Joseph E. Mason, Sr. and Catherine L. Mason to deliver to Appellant shares representing an additional 20% interest in the Company and to require the Mason Defendants to purchase Appellant's shares for the amount of \$1,836,500.00 or for a determination of the fair value of those shares.

In addition, Appellant requests that the Final Order and the Levine Order be reversed and the case remanded for a new trial on damages as to Appellant's other claims against the Mason Defendants and as to the aiding and abetting breach of fiduciary duties as to Levine.

Further, the Final Order should be reversed as to the holdings regarding the counterclaims asserted by the Mason Defendants, including the holding that the Mason Defendants can pursue a future claim against Appellant based on the Company's prior tax returns.

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