

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
COURT OF COMMON PLEAS

LETITIA H. VERDIN, CIRCUIT COURT JUDGE

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CASE NO.: 2015-001744

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**RECEIVED**

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SC Court of Appeals

Check First of Greenville, LLC,  
d/b/a Evo Merchant Coop ..... Appellant,

v.

Merchant Services of the Upstate, Inc., and  
Alfred J. Pearce, IV ..... Respondents.

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**INITIAL BRIEF OF RESPONDENTS**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. DID THE RESPONDENTS FAIL TO PRESENT CLEAR AND CONVINCING EVIDENCE OF FRAUD?
- II. DID THE TRIAL JUDGE ERR IN FAILING TO REVERSE AN AWARD OF PUNITIVE DAMAGES AGAINST THE APPELLANT?
- III. DID THE TRIAL JUDGE ERR IN FAILING TO SET OFF THE FULL AMOUNT OF RESPONDENT'S SETTLEMENT WITH THE MERCHANT COOPERATIVE AGAINST THE VERDICT AGAINST CHECK FIRST?

## STATEMENT OF THE CASE

In April of 2010, the instant lawsuit was initiated in by Plaintiff (Appellant) Check First of Greenville, LLC and co-plaintiff The Merchant Cooperative, Inc. against both Defendant (Respondent) Alfred J. Pearce and his business, Defendant (Respondent) Merchant Services of the Upstate, Inc. for breach of fiduciary relationship, misappropriation of trade secrets, conversion of property, interference with economic relationship, negligence, defamation of character and breach of contract.

Defendants answered the complaint, asserted counterclaims and named John Cutler (owner of Appellant Check First of Greenville, LLC) and Christian Maurer (Owner of co-Plaintiff, The Merchant Cooperative, Inc.) as Third-Party Defendants.

The counterclaim and third-party complaint alleged the following causes of action against the plaintiffs and third-Party defendants: unfair trade practices, fraud, breach of contract accompanied by a fraudulent act, breach of the implied covenant of good faith and fair dealing, promissory estoppel, fraud in the inducement, negligent misrepresentation, negligence, outrage and conversion.

Prior to trial, Plaintiff The Merchant Cooperative, Inc., reached a settlement with the defendants and was dismissed from the action. Third-Party Defendant John Cutler, who had passed away during the litigation, was also dismissed individually from the case.

The five-day trial of this case began on March 2, 2015. At the conclusion of the plaintiff's case, the defendants moved for directed verdict on all causes of action. The plaintiff conceded a directed verdict on misappropriation of trade secrets. **(Tr. p.372, ln 24-25)** The court denied the motion as to the remaining causes of action.

At the conclusion of the defendants' case, Plaintiff Check First moved for directed verdict on all causes of action. The trial court directed a verdict in favor of the plaintiff with regard to Defendants' claims for unfair trade practices (**Tr. p.686-7, ln 3 - 4**), fraud in the inducement and outrage. The Court denied the motion as to the defendants' remaining causes of action. (**Tr. p.689 - 91, ln 10 - 7, p.691-2, ln 8 - 24**). In addition, the court granted the defendants' motion to amend the pleadings to conform to the evidence to include a cause of action for unjust enrichment. (**Tr. p.687-89, ln 10-3, p.694, ln 7-17**).

The jury returned a verdict on March 5, 2015. The various causes of actions resulted in the following verdicts for the parties:

The jury found for the Plaintiff on the cause of action for breach of fiduciary duty but awarded no damages. (**Tr. p.839, ln 11-23**).

The jury found for the Plaintiff on the cause of action for conversion and awarded \$50 in actual damages and \$1500 in punitive damages. (**Tr. p.839-40, ln 24 -19**).

The jury returned \$160,000 in actual damages for the Plaintiff for intentional interference with economic relationships. (**Tr. p.840 -841, ln20 - 3**).

A verdict for the plaintiff was returned on the breach of contract cause of action, but no damages were awarded. (**Tr. p.841-42, ln 24 -5**).

On the defendants' cause of action for fraud, the jury returned a verdict for \$175,000 in actual damages and \$85,000 in punitive damages. (**Tr. p.842, ln 6-14**).

On the defendants' cause of action for breach of covenant of good faith and fair dealing, negligent misrepresentation, negligence, and conversion the jury found for the defendants but awarded no damages. (Tr. p.842-44, ln 15-44).

The jury returned a verdict for \$100,000 for the defendants on their cause of action for unjust enrichment. (Tr. p.844, ln 5-13). The defendants elected recovery on the fraud cause of action rather than the unjust enrichment cause of action, resulting in the trial court striking the verdict for unjust enrichment. (Final Order, p.9)

Based on the findings of no damages, the verdicts for the Plaintiff on causes of action for breach of fiduciary duty and breach of contract were both construed as verdicts for the defendants. (Final Order, p.8). Similarly, the trial court found an award of no damages on defendants' causes of action for breach of covenant of good faith and fair dealing negligent misrepresentation, negligence, and conversion should result in those verdicts being converted to verdicts for the Plaintiff. (Final Order, p.8).

In addition, the trial court reduced the plaintiff's punitive damages award against the defendants from \$1500 to \$500. (Final Order, p.8). The court reformed Plaintiff's defamation verdict against the defendants to reflect an award of \$5000 in actual damages and \$20,000 in punitive damages. (Final Order, p.9). The trial court also credited Plaintiff with a partial set off of \$21,500 against the defendants' verdict which represented 1/2 of the value of the proceeds that co-Plaintiffs agreed to pay Defendants to settle the matter prior to trial. (Tr. p.682, ln 11-12).

Plaintiff/Appellant's final award amounted to \$185,550 which consists of a \$550 award for conversion, a \$25,000 award for defamation, and a \$160,000 award for intentional

interference with economic relations. Defendants/Respondents' final award, incorporating the partial set off, amounted to \$238,500 for their fraud claims against Plaintiff.

## STATEMENT OF FACTS

Appellant Check First of Greenville, LLC (hereinafter “Appellant” or “Check First”) is a credit card sales organization that served as an independent contractor that sold credit card services for its co-Plaintiff The Merchant Cooperative, Inc. a credit card processing company which was released from the litigation prior to trial. Check First was owned at the relevant time by the late John Cutler, a formerly named third-party defendant who passed away during this litigation prior to trial. Check First employed persons as agents to perform the direct in-person sales of credit card services to local businesses to whom they referred as merchants in the parlance of their daily business dealings. Appellant and its co-plaintiff, The Merchant Cooperative, Inc. are and were separate companies with no identity of ownership.

In November of 2005, Respondent Alfred J. Pearce (hereinafter “Respondent” or “Pearce”) entered into hand-shake agreement with Appellant Check First of Greenville, LLC pursuant to which Mr. Pearce worked as a sales representative selling credit card services for Appellant to local businesses. **(Tr. p. 598, ln 18-25 – Testimony of Alfred J. Pearce)** As consideration for his sales, Respondent Pearce was to receive a certain percentage of the credit card servicing fees on each credit card transaction for each merchant that he had signed up. These percentages of fees are referred to as “residuals” within the credit card services industry. They are tracked on “residual reports” which are disseminated monthly. These reports track monthly merchant credit card sales. They reflect the persons or entities attached to the sales of the services and the appurtenant details of the sale which concern the division of the residuals and other fees. **(Tr. p. 467-469, ln 7-24 – Testimony of Alfred J. Pearce)** From 2005 until 2007 Respondent received these reports in paper form and had no trouble with mathematical discrepancies and few instances

where merchants he had signed up would not be reflected in his “book of business.” (Tr. p. 464, **ln 11-25 – Testimony of Alfred J. Pearce**)

In November of 2007 Respondent Pearce began having the issues that led to this litigation. He determined that the last eight merchants that he had signed up were not on the residual report provided him by Check First. (Tr. p. 471, **ln 16-25 – Testimony of Alfred J. Pearce**) Respondent Pearce had no relationship with The Merchant Cooperative at this time. (Tr. p. 479, **ln 7-12 – Testimony of Alfred J. Pearce**)

Pearce looked further into the problem and found that number of merchants missing from his book of business as reflected in the residual reports was increasing monthly. He responded to the problem by giving Mr. Cutler lists of these merchants and Pearce continued to write business for Check First. (Tr. p. 481, **ln 13-22 – Testimony of Alfred J. Pearce**) Mr. Cutler informs Pearce that he is giving these lists to The Merchant Cooperative so that it can help determine where these missing merchants have gone. At no time did Mr. Cutler ever inform Pearce that these merchants had been transferred off of Respondent Pearce’s book of business and onto Check First’s.

## ARGUMENTS

### I. **ALL OF THE ELEMENTS OF FRAUD ARE SUPPORTED BY CLEAR, COGENT AND CONVINCING EVIDENCE PRESENTED AT TRIAL.**

#### A. STANDARD OF REVIEW

The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury. Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

“An action in tort for damages is an action at law.” Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct.App.2005). “We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary.” Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct.App.1989). Questions regarding credibility and weight of evidence are exclusively for the trial court. *Id.*

An appellate court's scope of review in cases of fraud, where the proof must be by clear, cogent and convincing evidence, is limited to determining whether there is any evidence reasonably supporting the circuit court's findings. Burns v. Wannamaker, 286 S.C. 336, 333 S.E.2d 358 (Ct.App. 1985) *aff'd as modified* 288 S.C. 398, 343 S.E.2d 27 (1986). See also Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (in an action at law tried without a jury, the findings of fact of the judge will not be disturbed unless found to be without evidence which reasonably supports them). Cf. Cook v. Metropolitan Life Insurance Co., 186 S.C. 77, 194 S.E. 636 (1938) (in law action for fraud and deceit, the question of fraud was for the trier of fact if more than one reasonable inference could be drawn from the evidence). It is not for the appellate court to weigh the evidence to determine whether it is sufficient to meet the burden

of proof. 5A C.J.S. Appeal & Error § 1656(2) n. 71 at 447 (1958). See Southeastern PVC Pipe, Mfg. v. Rothrock Construction Co., 280 S.C. 498, 313 S.E.2d 50 (Ct.App.1984). Kiriakides v. Atlas Food Systems & Serv., 343 S.C. 587, 541 S.E.2d 257 (S.C., 2001)

## **B. ARGUMENT**

In South Carolina, an action for “fraud based on a representation are (1) a representation, (2) falsity, (3) materiality, (4) knowledge of falsity or a reckless disregard for its truth, (5) intent that the representation be acted upon, (6) the hearer’s reliance upon truth, (8) the hearer’s right to rely thereon, and (9) the hearer’s consequent and proximate injury.” Mylin v. Allen-White Pontiac, Inc., 314 S.E.2d 354, 356 (S.C. Ct. App. 1984), citing Moorhead v. First Piedmont Bank and Trust Co., 273 S.E.2d 414 (S.C. 1979). Each of these elements must be proven by clear and convincing evidence. Lundy v. Palmetto State Life Ins., 183 S.E.2d 335 (S.C. 1979).

### **1. Representation, Materiality and Reliance**

Appellant represented to Respondent that it would pay Respondent Pearce a specific percentage of the residuals that were generated by merchants to whom Respondent Pearce sold credit card services. It further represented to the Respondents that it did not know why Respondents weren’t being paid correctly, that he didn’t know where Respondents’ missing merchants were and that he was attempting to determine where the discrepancies were so that Respondents could be paid correctly. These representations were material because they served as the incentive for Respondent to enter into the agreement to sell and to continue to sell credit card services for Appellant Check First. Mr. Pearce relied on those representations and, therefore, signed up merchants for Check First.

2. Falsity, Knowledge of the Falsity, Intent that it be acted upon, Reliance, Hearer's Right to Rely and Proximate Injury

After four years of litigation and after having pored over multiple, heavily redacted pages of information that did not reveal where the missing merchants had gone, Respondents received, from Appellant's co-Plaintiff, The Merchant Cooperative, Inc., the original, native-format, electronic residual report for the year 2009 that revealed that the reason that Pearce's merchants had not appeared on his book of business was that Appellant had transferred them to his own book of business. Shortly thereafter Check First provided residual reporting for one month of that same year that reflected the same information.

7 Q At some point along the line, you were  
8 provided with an actual -- a year's worth of  
9 reporting, right?

10 A That is correct.

**(Tr. pp. 551-2, In 12-25 – Testimony of Respondent Alfred J. Pearce)**

20 Q I'm going to show you a document,  
21 an electronic document, that's on that thumb drive which  
22 I would like you to identify for the jury...

4 Q At the bottom, it says December 2009,  
5 right?

6 A That's correct. That's correct.

7 Q At the top?

8 A At the top, it says February of '09. This  
9 is John Cutler's personal book of business.

**(Tr. pp. 547-8, In 20-9 – Testimony of Respondent Alfred J. Pearce, Defendants' Exhibit 32 - CUTLER ACCOUNTS FEB 2009 - DEC 2009 FOR AJ REVIEW PER EMAIL REQUEST)**

2 Q Okay. And so at this point, you got this  
3 from the Merchant Cooperative?

4 A That is correct. After five years and  
5 Melinda Cutler's deposition, I was provided this.

6 Q You got this in October 2014?

7A 2014. That is correct.

8 Q About four months ago?

9 A Yes, sir.

10 Q After that, did you receive a month's worth

11 of residual reporting from Check First?

12 A I did.

**(Tr. pp. 548, In 2-12 – Testimony of Respondent Alfred J. Pearce, Defendants' Exhibit 32 - CUTLER ACCOUNTS FEB 2009 from Check First highlighted)**

25 A This is John Cutler's, Check First of

1 Greenville's residual reports for the entire --

2 besides January because remember it was in paper form

3 the first month. This is John Cutler's entire book

4 of business.

5 Q Okay.

6 A Residual reports for '09, February through

7 December of '09.

8 Q Okay. What did you find on that residual

9 report?

10 A Again, I don't want to drag this up. I

11 waited five years for this. I looked in my email and

12 there is where it was. I tried opening it up on my

13 computer. It was the worst three-and-a-half-hour

14 download. So I take it over to my laptop in my

15 dining area. I open it up. I take my list that I

16 had made years and years and years ago of 60 missing

17 merchants. All right.

18 I open this report up. I get this out. I

19 say a prayer. I start with John Cutler's personal

20 book of business. Start with John Cutler's personal

21 book of business and all of these highlighted, not

22 just some of them are on there, all 60 merchants that

23 I've been claiming missing for years and years since

24 2008 have appeared on John Cutler's personal book of

25 business.

**(Tr. pp. 551-2, In 25-25 – Testimony of Respondent Alfred J. Pearce, Defendants' Exhibit 32)**

The testimony excerpted below illustrates that while these merchants were present on Appellant's book of business and Appellant was receiving the residual payments due Respondents, Appellant feigned ignorance of their whereabouts and directed Respondents to look into whether its co-Plaintiff, The Merchant Cooperative could explain the disappearance. In other words, Appellant intentionally misdirected Respondent with the intent that Respondents would rely upon

that misdirection and allow Appellant to continue to receive and convert to its own use the revenue that was rightfully due Respondents.

7 Q Who's he saying is at fault for the missing  
8 merchants?

9 A Mr. Cutler is pointing the finger solely at  
10 the Merchant Cooperative and their new residual  
11 reporting system.

12 Q Did you believe him at that point?

13 A I sure did.

14 Q Did you rely on what he was telling you?

15 A I did. Exclusively. We were best friends.

**(Tr. p. 504, ln 7-15 – Testimony of Respondent Alfred J. Pearce)**

15 Q Okay. I'm going to show you Defendant's  
16 Exhibit 33. Do you recognize that document?

17 A I do. It is the actual report, the only  
18 report that Check First of Greenville, these redacted  
19 versions that we've actually ever received from them.

20 Q We have the February report from them from  
21 Check First now in the electronic form, right?

22 A Yes.

23 Q Do you have it -- you highlighted this; is  
24 that correct?

25 A I highlighted it, yes.

**(Tr. pp. 550 ln 7-15 – Testimony of Respondent Alfred J. Pearce, Exhibit 33)**

16 I found every single one of my  
17 claims on John Cutler's personal book of business.

18 There was a couple --

19 Excuse me. Right there. Stop please.

20 If you will see Melinda Sizemore at the  
21 time, it's now Cutler, is getting paid on my  
22 merchants as well. Those are four of my merchants.

23 As you can tell, they are just -- now you can see or  
24 in your mind, you can see why they don't want to give  
25 us these reports. You see where they were hiding  
1 these for five years.

**(Tr. pp. 553-4, ln 16-1 – Testimony of Respondent Alfred J. Pearce)**

17 Q That's where -- that's where I'm going.

18 You were being directed to the Merchant Co-op for  
19 this information while you were working.

20 A That is correct. That is correct. And  
21 while this information was sitting in his inbox. The  
22 money was in his account. Yes. My family's earnings  
23 -- we don't want to talk about merchants again. I  
24 want you want to know these are lots and lots of  
25 money. Once Jack gets to the spreadsheet and see I  
1 have laid out how much they owe me on every single  
2 one of these missing merchants. I just wanted pay. I  
3 begged them. I didn't want to be here.

**(Tr. pp. 554-55, In 8-3 – Testimony of Respondent Alfred J. Pearce, Defendants' Exhibits 32, 39, 40)**

Prior to the initiation of this litigation, Respondent Pearce possessed a single residual report from April of 2009, **(Defendant's Exhibit 37)** from when he had worked for Appellant. During discovery, Appellant provided Respondents with a heavily redacted residual report **(Defendant's Exhibit 38)** which held an information column that Respondents found was absent from the original report Pearce had been provided while he worked for Appellant. The column missing from the original report was the "share" column. The significance of the "share" column is that it reveals the residual percentages that the entities split. Appellant had manipulated the report that he provided to Respondent Pearce by removing the "share" column which would have revealed to Respondent that Appellant was not paying him according to their agreement. Removing the "share" column allowed Check First to change the numbers to its benefit.

20 Q There two April reports, April residual  
21 reports. Explain the circumstances under which you  
22 received those reports.

23 A Because I moved so many times since I  
24 started this, April of '09, this one report right  
25 here was the only report I actually saved from back  
1 in the day.

2Q That's the one -- that's the one with the  
3map on the side?

4A That's correct.

5Q This one is the one you received?

6A That document right there is the one I

7 received from Check First of Greenville in our  
8 discovery.

9 Q Okay. And that's the redacted one.

**(Trial Transcript, pp. 557-8, ln 20-9 – Testimony of Alfred J. Pearce)**

16 Tell the jury what you want to tell them  
17 about why this April report from Check First is  
18 significant.

19 A Number 1, the one that I had from back in  
20 the day is different than the one that I was  
21 presented in discovery. The same one that John gave  
22 me back in the day.

**(Tr. pp. 558, ln 16-22 – Testimony of Alfred J. Pearce)**

2 When you looked at these reports from April  
3 when you were able to look at what you were provided  
4 in discovery from the plaintiff versus the only  
5 report that you had ---

6 From back in the day.  
7 that you had maintained?

8 Uh-huh.

9 Then you made a discovery, right?

10 I did. A huge one.

11 What did you find?

12 Mr. Cutler -- I'm sorry. Which one is this?

13 Mr. Cutler had eliminated my share column. Not only  
14 coming from the Merchant Cooperative, this one in  
15 April and the one I received every single one after  
16 that was now in John Cutler's homemade spreadsheet.  
17 This one right here is missing a whole share column.

18 Hold on.

19 I'm sorry.

20 We have moved between the two. This is the  
21 one that you were provided in discovery, right? The

22 redacted one is --

23 Yes. Yes.

24 You're saying that there was a column in  
25 this that was not in this?

1 A Yeah, a big column.

**(Tr. pp. 560-1, ln 2-1 – Testimony of Alfred J. Pearce)**

23 Let's go to the other exhibit, the original

24 one

25 The original one, yes, sir.

1 The one you received outside of discovery.

2 That's right. The one I saved from back in

3 the day.  
4 Scroll to the end. There is no share  
5 column.  
6 A There is no share column. Mr. Cutler has  
7 eliminated the share column. I -- to me, an attempt  
8 to hide the fact that I was not getting paid 75  
9 percent.  
**(Tr. pp. 561-2, ln 23-9 – Testimony of Alfred J. Pearce)**

As indicated by the following testimony the evidence revealed that Appellant was also altering the math in other ways for his benefit at Respondents' expense.

16 A Where this is significant is that not only  
17 am I not getting paid the total residual, Mr. Cutler  
18 now is taking an additional 15 percent of the bottom  
19 off the top before he splits it in half.  
20 Do you know why?  
21 No, I do not. To generate more revenue for  
22 himself.  
**(Tr. p. 565, ln 16-22 – Testimony of Alfred J. Pearce)**

22 Q What we draw from -- let's move from the  
23 April reports. What we draw from the April reports  
24 is missing merchants that are reflected by the year-  
25 long statement -- residual statement, right?  
1 A Uh-huh.  
2 Q And also the manipulated share column.  
3 A That is correct.  
4 Q And the math.  
5 A And the math.  
6 Q Okay.  
7 A And the missing \$2 statement fee.  
8 Q Uh-huh.  
9 A The 15 percent off the top.  
**(Tr. pp. 566-7, ln 2-9 – Testimony of Alfred J. Pearce)**

The foregoing excerpts and exhibits constitute clear, cogent and convincing evidence of each element of fraud. The evidence firmly supports the jury's verdict and the trial court's findings.

## II. THE AWARD OF PUNITIVE DAMAGES IS SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL.

### A. STANDARD OF REVIEW

See *supra*.

### B. ARGUMENT

The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct.App.2000). Because of this discretion, our review on appeal is limited to the correction of errors of law. Kuznik, 342 S.C. at 611, 538 S.E.2d at 32; Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. See Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct. App.1984) Austin v. Specialty Transp. Services, 358 S.C. 298, 594 S.E.2d 867 (S.C. App., 2004). A punitive damages award will be upheld if there is evidence to reasonably support the trial judge's factual findings. Id at 314.

When evaluating whether an award of punitive damages violates due process, this court conducts a de novo review. Jenkins v. Few, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010), cert. granted February 13, 2012. A court conducting a post-judgment review of punitive damages must consider the degree of reprehensibility of the defendant's conduct, the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award, and the difference between the punitive damages award and the civil penalties imposed in comparable cases. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009).

The trial judge's Final Order states, in pertinent part,

Finally, the jury returned a verdict for Defendant for fraud, including \$175,000.00 in actual damages and \$85,000.00 in punitive damages. The Court finds that there was a sufficient degree of reprehensibility demonstrated during the trial to support this award. The ratio of actual to punitive damages-1:2.19-is well within the parameters of the due process clause. When compared to other punitive awards for fraud, the Court finds that the amounts returned by the jury are reasonable. Therefore Defendant's award of punitive damages for fraud is affirmed. **(Final Order, p. 9)**

1. Reprehensibility

Appellant argues that the evidence does not demonstrate the requisite degree of reprehensibility because "there was no evidence Check First acted with intentional malice, trickery, or deceit." Respondents submit that the exhibits and testimony excerpts presented above which illustrate the evidentiary basis for Respondents' fraud claim suffice to support the punitive damages award as well.

In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.<sup>7</sup> Campbell, 538 U.S. at 419, 123 S.Ct. 1513.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." Gore, 517 U.S. at 580, 116 S.Ct. 1589. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 425, 123 S.Ct. 1513. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." Id. at 425-26, 123 S.Ct. 1513. With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to

result from such conduct; and the defendant's ability to pay.<sup>8</sup> Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009).

Although the harm suffered by Respondents was economic rather than physical, the harm involved repeated incidents from 2007 through the date of trial. Additionally, the disparity between the actual damages award and the punitive damages award is not unreasonable or excessive. The ratio of actual to punitive damages is 1:2.19 and falls well within the single digit ratio presumed to satisfy due process. Each month of residual reporting involved subterfuge and fabrications to prevent Respondents from determining that the residual moneys due them were diverted to Appellant's pocket. The sum of the actual and punitive damages actually falls below the sum presented at trial as actual compensatory damages. **(Defendants' Exhibit 40)**

## 2. Elements of Tort Supporting Punitives

Appellant contends that the punitive damages verdict is not appropriate because the evidence supports only a breach of contract claim without any element of tort. Respondents refer to the above cited excerpts and exhibits identified as support of the jury's award for fraud.

It is a well settled principle that ordinarily punitive damages are not recoverable in an action ex contractu, but that where the plaintiff alleges facts disclosing an element of tort into the case, then in certain classes of cases such damages are recoverable. Thus, if the facts surrounding the making of a contract involve fraud and deceit, punitive as well as actual damages may be claimed. Moody v. Stem, 214 S.C. 45, 51 S.E.2d 163 (S.C., 1948)...

In all of the decided cases in this State on this subject the underlying principle of law is that there must be proof of some fraudulent act, other than the mere receiving of the money, either in the inception of the contract or in its non-fulfillment and fraudulent breach. For example, in a case where, after the contract was entered into to work a crop on halves, and after the cropper had been induced to labor to make it, he was run off the premises by the landlord, who gathered the crop, and refused to settle with the cropper, it is clear that the subsequent taking of the crop was a fraudulent act accompanying the breach with fraudulent intent to cheat and defraud." Sullivan v. Calhoun, 117 S.C. 137, 108 S.E. 319 \_\_\_\_\_. as cited in Moody v. Stem, 214 S.C. 45, 51 S.E.2d 163 (S.C., 1948).

The facts generated for the illustrative example cited above in the case of Sullivan v. Calhoun conform to those presented in this one. Appellant entered into an Agreement with Respondent Pearce. Appellant purposefully and systematically, for the duration of their relationship moved merchants of Respondents to Appellant's own book of business, profited from Respondents' merchant accounts, modified documents to obscure the improper placement, manipulated the calculations in violation of their agreement and lied to Pearce about where the missing merchant accounts were. The tortious nature of the appellant's conduct is well-supported. Therefore the award of punitives is appropriate.

**III. BECAUSE THERE IS EVIDENCE IN THE RECORD THAT REFLECTS THAT THE FRAUDULENT ACTS COMMITTED BY APPELLANT WERE SEPARATE AND DISTINCT FROM ANY ALLEGED TO HAVE COMMITTED BY ITS CO-PLAINTIFF, NO SET OFF IS JUSTIFIED OR REQUIRED.**

**A. STANDARD OF REVIEW**

*See Supra.*

**B. ARGUMENT**

1. No Reference to Co-Plaintiff The Merchant Cooperative, Inc.

The trial court's Final Order specifically addresses the application of a setoff for a settlement between Respondent Alfred J. Pearce and his co-defendant and co-respondent Merchant Services of the Upstate, Inc.; however, there is no evidence in the record of any settlement between these two parties.

The trial court's order states as follows:

Plaintiff also moved for a setoff in light of Defendant's settlement with Co-Defendant Merchant Services of the Upstate, Inc., entered into the week prior to trial. This settlement resolved all pending cross-claims between the two parties in exchange for Merchant Services of the Upstate, Inc. paying Defendant Pearce

\$43,000.00. In light of the facts, the close connection of all claims involved between all original parties, and in the interests of equity, the Court finds that a partial setoff is proper in light of Defendant Pearce's settlement with Defendant Merchant Services of the Upstate. Therefore, Plaintiff may set off \$21,500.00 from Defendant's total award.

It further states,

Plaintiffs request for a setoff from Defendant's settlement with Co-Defendant Merchant Services of the Upstate is GRANTED in part. Plaintiff may set off \$21,500.00 from Defendant's total award.

There are no allegations in any pleadings, evidence or testimony that Respondent and co-defendant Merchant Services of the Upstate ever brought or settled any claims against the other. Therefore, Appellant's claim for any additional setoff must be denied.

2. Distinct and Separate Factual Scenarios

Assuming, arguendo, that it is within this Court's authority to substitute the former co-Plaintiff, The Merchant Cooperative, Inc. for the entity contemplated by the trial court's Order, co-defendant Merchant Services of the Upstate, Inc., regarding the question of setoff, it remains inappropriate to apply any setoff at all to the verdict against Appellant because, as the record reflects, the factual scenario supporting the claim for which the verdict seeks to compensate Respondent is separate and distinct from the factual scenario supporting the claims settled between Respondents and former co-Plaintiff, The Merchant Cooperative, Inc.

a. Respondent Pearce and Appellant Check First

As set forth above, Appellant Check First placed the merchants belonging to Respondent Pearce on its own book of business. It then withheld information that would have revealed this fraud and converted funds to its own use. Check First specifically altered and manipulated reports at a time when its previously released co-plaintiff had no direct contact or

contractual relationship with Pearce. Check First received the benefit of the income stream from the missing merchants. Moreover, there is no evidence that the co-plaintiff The Merchant Cooperative, Inc. benefited from Check First's transfer of Pearce's merchants to Check First's book of business. Perhaps most tellingly, Check's First directed Pearce's attention straight toward The Merchant Cooperative, Inc. in order to deflect Pearce's inquiries and suspicion from itself, an act which does not suggest complicity between the two co-plaintiffs.

b. Respondent Merchant Services of the Upstate, Inc. and released co-Plaintiff The Merchant Cooperative, Inc.

The only evidence adduced at trial reflects that the settlement between The Merchant Cooperative, Inc. and Respondents involves only the acts of The Merchant Cooperative, Inc. as related to certain merchant accounts signed up under Respondent Merchant Services of the Upstate, Inc., the company that Pearce opened in 2007.

Q Okay. So, at this point, you were looking  
10 at the Merchant Cooperative?

11 A Absolutely not. Again, I have no direct  
12 relationship with them until I signed with them May  
13 1<sup>st</sup>...

**(Tr. p. 506, ln 11-13 – Testimony of Alfred J. Pearce,)**

Q You're not asking this jury for anything  
relating to Merchant Services of the Upstate, right?

A No, sir. Absolutely not. It's been  
satisfied. **(Tr. p. 513, ln 19-22 - Testimony of Alfred J. Pearce, )**

25 Q Does this have to do with Merchant Services  
1 or does this have to do with Check First?

2 A This is a Merchant Services merchant.

3 Q So you're not asking this jury to give you  
4 anything for this particular merchant?

5 A I am not. That has been taken care of.

**(Trial Transcript – Testimony of Alfred J. Pearce, p. 526-7, ln 25-5)**

The testimony above illustrates that Respondents have settled claims with where the facts support recompense for specific accounts signed up with former co-Plaintiff, The Merchant Cooperative, Inc. by Respondent Merchant Services of the Upstate, Inc.

c. Respondent Merchant Services of the Upstate, Inc. and Appellant Check First.

Nevertheless, the evidence at trial reflects that Appellant had also fraudulently “rolled over” or taken certain other merchants from Merchant Services of the Upstate, Inc.

12 Q So you're talking about your business that  
13 you started that has nothing to do with Check First;  
14 is that correct?  
15 A Well, I didn't until I found my new  
16 Merchant Services merchants on Check First of  
17 Greenville's residual reports.

**(Tr. p. 612, In 12-17, Testimony of Alfred J. Pearce)**

21 Q So you were having problems with receiving  
22 money?  
23 A Yeah, the first residual report, I never--  
24 from May, I never received. You know why I never  
25 received it? Because the merchants made it to John  
1 Cutler's personal book of business from Merchant  
2 Services. Two totally separate companies, but yes,  
3 sir—

**(Tr. p. 612, In 12-17, Testimony of Alfred J. Pearce)**

16 A Oh, great. I submitted this to you. I  
17 submitted this list in efforts to try to solve this.  
18 All right. As on this list that you've already  
19 provided here to this jury of lists of people that  
20 you think stole from me that I stole from yours and  
21 actually, it's the opposite. We provided this list  
22 to the court. John Cutler took that list and rolled  
23 a merchant over to his new book of business. That is  
24 in the evidence that you provided. Okay. I signed a,  
25 contract

1 You didn't sign your new company until the end of the  
2 year. All right. So you rolled that merchant over  
3 based on what I provided to this court, Bill -- Mr.  
4 Bouton. Sorry. That's why I'm not turning you over  
5 another list. You stole a merchant off the one I did  
6 provide.

7 Q All right. Everybody is accusing everybody  
8 of stealing each other's merchants.

9 A No, bring it over here. Bring the evidence  
10 over here and I will actually, physically show you  
11 the date I signed the contract and I will show you  
12 the date that you opened Melinda's other business and  
13 it is rolled over to her new business. From the  
14 documents --

**(Tr. p. 642-3, ln 12-17, Testimony of Alfred J. Pearce)**

The evidence presented at trial reflects that the fraudulent acts for which the jury awarded damages consist entirely of acts performed by Appellant Check First through its owner, John Cutler.

These acts consisted of the withholding of information from his independent contractor Respondent Alfred J. Pearce, his conversion of funds due to Mr. Pearce and the alteration and his manual manipulation of reports to mask the conversion.

The evidence presented at trial shows that Appellant:

- (1) had moved merchants belonging to both Respondent Pearce and Respondent Merchant Services of the Upstate, Inc. to its own book of business,
- (2) had received years of payments on these accounts,
- (3) had removed data and altered data within residual reports that he gave to Respondent,
- (4) had misdirected Respondents to seek answers with The Merchant Cooperative, Inc. with full knowledge that Respondents' merchants were on the Check First book of business, and,

(5) did not produce the original residual reports in its possession which proved the location of the merchant and the nature all of these fraudulent acts until nearly five years after Respondents first requested this information.

In addition, it is informative to the analysis regarding the factual scenario that the damages that Appellant presented at trial are only those damages that were directly attributable to the separate and distinct fraudulent actions of Appellant Check First. **(Defendant's Exhibits 32, 39 and 40)**

Section 15-38-50 of the South Carolina Code (2005) provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort **for the same injury** or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C.Code Ann. § 15-38-50 (2005).

In Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct.App.1999), the plaintiff brought negligence causes of action against a hospital and similar causes of action including wrongful death against a doctor. The plaintiff appealed the trial court's set-off of her award from the doctor with her settlement with the hospital. *Id.* **The plaintiff contended because the measure of damages was different for the two causes of action, then two different injuries occurred.** *Id.* at 113, 515 S.E.2d at 272. This court noted the plaintiff's "**claims against Richland Memorial and Dr. Oliver arose out of the same factual scenario**" and found the plaintiff "confuse[d] the concept of damages with the meaning of the word injury as used in the statute. Injury, as used in the statute, is broad enough to include all damages." *Id.* Vortex Sports & Entertainment, Inc. v. Ware, 662 S.E.2d 444, 378 S.C. 197 (S.C. App., 2008)

In contrast to the facts described in Ellis, the instant action, which was brought by the Appellants as co-Plaintiffs, contains multiple, disparate factual scenarios to be sorted through.

The co-plaintiffs filed suit in concert, initially employing the same counsel. **(Complaint)**

However, the co-plaintiffs' claims, despite being brought in one suit did not involve facts or circumstances that were common to both co-Plaintiffs. For instance, The Merchant Cooperative, Inc. technically brought a claim as co-Plaintiff which related to a telephone number to which it never had any claim whatsoever.

19 Q You had Merchant Co-op and Check First were

20 both suing you, right?

21 A That's correct.<sup>2</sup>

2 Q For a phone number that the Merchant Co-op

23 never had anything to do with?

24 A That is correct.

**(Tr. p. 535, ln 19-25 - Testimony of Alfred J. Pearce,)**

The question of whether the Respondents' claims against the Appellant arise from the same factual scenario as those against the released co-Plaintiff is not controlled by the co-Plaintiffs' choice to litigate their own disparate factual positions via inaccurate representations in their initial pleadings.

It is the facts, themselves, elicited at trial that determine whether the Respondents' claims arise from the same factual scenario. They do not, as shown by the above-referenced testimony and exhibits.

The reasonable conclusion to be drawn from the trial court's application of set-off of one-half of the proceeds is that the court's decision is based upon the fact that there was evidence in the record that the both the co-Plaintiff and the Appellant had taken funds that rightfully belonged to Respondent Merchant Services of the Upstate, Inc.

However, despite the fact that the trial court's set off is understandable, it would have been more appropriate not to apply the set off at all to the verdict because the shared factual scenario is not clear with regard to Respondent Merchant Services of the Upstate, Inc. and there

is no arguable identity of facts at all with regard to the fraudulent acts committed by Check First against Respondent Pearce as a sales representative.

**CONCLUSION**

For the reasons stated herein above, Respondent respectfully requests this Court affirm the decision of the Greenville County Circuit Court.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'JMR', written over a horizontal line.

**JOHN M. READ, IV, ESQ.**

THE READ LAW FIRM

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Greenville, SC

Dated: November 15, 2016

**ATTORNEY FOR RESPONDENTS**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY  
COURT OF COMMON PLEAS

LETITIA H. VERDIN, CIRCUIT COURT JUDGE

CASE NO.: 2015-001744

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SC Court of Appeals

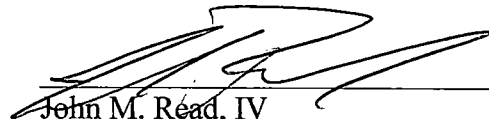
Check First of Greenville, LLC,  
d/b/a Evo Merchant Coop ..... Appellant,

v.

Merchant Services of the Upstate, Inc., and  
Alfred J. Pearce, IV ..... Respondents.

**CERTIFICATE OF COUNSEL**

The undersigned certified that this INITIAL BRIEF OF RESPONDENT complies with Rule 211(b), SCACR.



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Greenville, SC 29601  
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**ATTORNEY FOR RESPONDENTS**

Greenville, South Carolina  
November 15, 2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM  
GREENVILLE COUNTY  
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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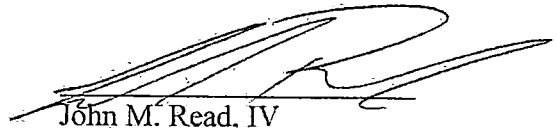
Check First of Greenville, LLC  
d/b/a Evo Merchant Coop., Appellant,  
V.

Merchant Services of  
the Upstate, Inc., and  
Alfred J. Pearce, IV,

Respondents.

PROOF OF SERVICE

I certify that I have served **Respondents' Motion to File Out of Time, Designation of Matter and Initial Brief** on Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on November 15, 2016, addressed to its attorney of record, **Joshua Snow Kendrick, Kendrick & Leonard, P.C., 419 Vardry Street, Greenville, SC 29601**

  
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Attorney for Respondents

November 15, 2016

South Carolina Court of Appeals  
V. Claire Allen, Deputy Clerk  
PO Box 11629  
Columbia, SC 29211

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**SC Court of Appeals**

Re: Respondents' Motion to File Out of Time,  
Designation of Matter and Initial Brief  
Check First v. Merchant Services  
Appellate Case No 2015-001744

Dear Ms. Allen:

Enclosed please find the original Respondent's Respondents' Motion to File Out of Time, Designation of Matter and Initial Brief and a copy. along with a check for \$25.00. Please return a stamped copy in the enclosed self-addressed envelope, for our records.

Thank you very much for your assistance. If you have any questions or concerns please do not hesitate to contact my office.

Sincerely,



Jack Read

Enclosures

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