

22822

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

NOV 03 2016

SC Court of Appeals

The Hon. J.C. Nicholson, Jr., Circuit Court Judge

CASE NO. 2016-000474

C. GORDON LOVINGOOD, JR., C3 INVESTMENTS, INC., and PPC12, LLC

Appellants,

v.

VICTOR APAT, ANTHONY MCALLISTER, J. ERIC WADE d/b/a CT TOURING,
and PEARL CO. SC, LLC, Defendants, of whom,

ANTHONY MCALLISTER; J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC are

Respondents.

RECORD ON APPEAL

Trudy H. Robertson
Brandon Gaskins
Moore Van Allen
78 Wentworth Street
Charleston, South Carolina 29401
Ph. (843) 579-7061
Fax (843) 579-8722
Attorney for Respondent

David B. Marvel
P.O. Box 22734
Charleston, South Carolina 29413
Ph. (843) 853-4877
Fax (843) 380-3025
Email: dave@marvel.lawyer
Attorney for Appellant

INDEX

Order Granting Defendants' Motion for Summary Judgment and Granting Plaintiffs' Motion for Partial Summary Judgment.....	1
Order Denying Plaintiffs' Motion for New Trial and to Alter and Amend the Judgment filed on December 16, 2015.....	22
Order Pursuant to Rule 40(j), SCRCP.....	23
Summons and Complaint.....	27
Answer, Counterclaim and Cross-claim of Defendants' Anthony McAllister, J. Eric Wade d/b/a/ CT Touring and Pearl Co. SC, LLC.....	38
Plaintiffs' Reply to Defendant's Counterclaims.....	61
Transcript of Hearing.....	66
Defendants' Motion for Summary Judgment.....	116
Defendants' Memorandum in Support of Motion for Summary Judgment.....	124
Memorandum in Opposition to Defendants' Motion for Summary Judgment.....	349
Plaintiffs' Motion for Partial Summary Judgment.....	367
Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment.....	369
Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment.....	377
Defendants' Response to Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment.....	383
Plaintiffs' Motion for New Trial and to Alter and Amend the Judgment.....	397
Notice of Appeal.....	418

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

) CIVIL ACTION NO. 2015-CP-10-4549
)

) **ORDER GRANTING DEFENDANTS'**
) **MOTION FOR SUMMARY JUDGMENT**
) **AND GRANTING PLAINTIFFS'**
) **MOTION FOR PARTIAL SUMMARY**
) **JUDGMENT**

FILED
2015 DEC -1 AM 10:38
JULIE J. ARMSTRONG
CLERK OF COURT

On May 22, 2015, Defendants Anthony McAlister, J. Eric Wade d/b/a CT Touring, Pearl Co., SC, LLC filed a Motion for Summary Judgment on the Plaintiffs' claims of contractual indemnity, equitable subrogation, and breach of fiduciary duty. On September 8, 2015, Plaintiffs filed a Motion for Partial Summary Judgment on the issues of all counterclaims asserted by Defendants and on their claims for contractual indemnity and breach of fiduciary duty. Plaintiffs and Defendants submitted memoranda of law in support of their respective positions, and a hearing on the motions was held before the Court on October 19, 2015. After careful consideration of the facts, testimony, and arguments presented on this matter, the Court hereby grants Defendants' Motion for Summary Judgment and grants Plaintiffs' Motion for Partial Summary Judgment on the counterclaims.

FINDINGS OF FACT¹

Plaintiff C. Gordon Lovingood and Defendant Victor Apat organized PPC12, LLC in 2007 to own and operate a 1996 Pilatus PC-12 aircraft. (Lovingood Dep. 9:6-10:8) The PPC12 aircraft was financed with a loan from Cessna Finance Corporation. (Lovingood Dep. 10:13-12:2) The financing required monthly principal and interest payments of \$15,816. (Lovingood Dep. 14:13-19) According to Lovingood, Plaintiff C3 Investments, Inc., a corporation owned by Lovingood, was the borrower under the promissory note to Cessna Finance, and he purports to have been a personal guarantor of the Cessna Finance loan. (Lovingood Dep. 10:13-12:2)

 Lovingood and Apat had equal fifty percent (50%) interests in PPC12 and contributed equally to the aircraft's fixed and variable expenses. (Lovingood Dep. 10:9-12, 14:10-24) East Shore Aviation ("East Shore") managed the aircraft for PPC12 and used it for charter flights. (Lovingood Dep. 19:10-20:5, 21:8-22:3, Ex. 1) East Shore leased the aircraft from PPC12 for charter flights, but PPC12's charter income was not sufficient to cover the aircraft's expenses. (D. Gibbons Dep. 109:22-110:16; Lovingood Dep. 51:19-52:1) After the recession began in 2008, Lovingood and Apat reduced their use of the aircraft and struggled to pay the aircraft's expenses. (D. Gibbons Dep. 72:17-73:19; M. Gibbons Dep. 42:10-43:3) Due to their reduced use and desire to reduce their share of expenses, Lovingood and Apat, with East Shore's assistance, looked for new members to join PPC12 in late 2010 and early 2011. (D. Gibbons Dep. 73:5-19; M. Gibbons Dep. 42:10-43:3, 46:5-11; Lovingood Dep. 24:18-27:1; McAlister Dep. 11:4-13; Wade Dep. 26:6-10) At that time, selling the aircraft was not financially feasible because of decreased demand during the recession. (Lovingood Dep. 49:12-50:15)

¹ Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Rule 52, SCRCP.

In early 2011, Defendants were solicited to become members of PPC12. Defendants were informed that PPC12 owed more under the loan than the aircraft was worth and that it needed new members to increase usage and reduce Apat's and Lovingood's share of the aircraft's expenses. (Wade Dep. 13:23-14:2, 26:1-10, 27:6-22; McAlister Dep. 11:4-13, 14:7-16:5) Defendants were told that they would need to pay an initial contribution to create reserves for future maintenance and upgraded avionics. (Pearlstone Dep. 16:13-21; McAlister Dep. 14:7-16:5; Wade Dep. 26:22-27:1) Lovingood never got current on the amounts he owed to PPC12, and the amount Lovingood owed to PPC12 continued to increase during the time Defendants were members of PPC12. (Wade Dep. 145:21-146:18; Gibbons Dep. Ex. 6) In addition, no engine reserves were ever created for the aircraft. (Wade Dep. 146:14-147:23)



As part of the solicitation of Defendants, Lovingood represented that he was the guarantor of the loan on the aircraft and that he wanted to reduce his ownership interest in PPC12. (Lovingood Dep. 51:4-5, 52:12-22) As such, the parties anticipated that if Defendants became members of the aircraft, they would work together to refinance the loan on the aircraft. (Lovingood Dep. 60:25-64:1) However, Defendants never agreed or expressed any intent to personally guaranty any debt associated with the aircraft or replace Lovingood as guarantor on the loan, especially considering they knew the aircraft was upside down financially. (Lovingood Dep. 60:17-23, 61:25-62:3, 63:11-16; McAlister Dep. 14:7-16:4; Pearlstone Dep. 33:10-17, 36:14-19; Apat Dep. 31:16-32:15)

In or around April, May, and June of 2011, Wade, McAlister, and Pearl Co. became members of PPC12, respectively. Pearl Co. and McAlister each paid an initial contribution of \$40,000 for respective twenty-five percent (25%) interests in the company. (McAlister Dep.

22:19-23:1, 26:8-15; Pearlstine Dep. 16:13-24) Wade paid a \$20,000 initial contribution for a twelve and one-half percent (12.5%) interest. (Wade Dep. 117:25-118:4; Lovingood Dep. Ex. 5)

When Defendants joined PPC12, the Operating Agreement was amended. (Lovingood Dep. Ex. 4) The Operating Agreement specifically provides that “[n]o member is personally liable for any debt, obligation, or liability of the Company, whether arising in contract, tort or otherwise.” (Lovingood Dep. Ex. 4 § 3.5) Under Sections 3.6 and 3.7 of the Operating Agreement, the members were required to pay their share of the aircraft’s fixed and variable expenses to be eligible to use it. (Lovingood Dep. Ex. 4 §§ 3.6 and 3.7) The Operating Agreement provides that the member’s “usage is not allowed if a Member is not current with all financial obligations required by the Company.” (Lovingood Ex. 4 § 3.7) The Agreement provides no other remedy for a member’s failure to pay his share of aircraft expenses. (Lovingood Dep. 54:1-55:25; Apat Dep. 29:23-30:11)

The Operating Agreement also provides that the members “shall endeavor to refinance the debt associated with the ownership of the asset no later than January 1, 2014. This may include negotiations with Cessna Finance or related companies to reduce the outstanding debt. [Lovingood] agrees to assist in this process.” (Lovingood Ex. 4 § 4.3(f)) The Operating Agreement contains no provisions governing a member’s dissociation from PPC12 or prohibiting the members from owning other aircraft. (Lovingood Dep. 85:13-21) In fact, Lovingood also owned other aircraft while he was a member of PPC12. (Lovingood Dep. 51:8-12)

At the time Defendants joined PPC12, PPC12’s 2010 property taxes in the amount of \$43,181.94 were delinquent; however, this was not disclosed to Defendants prior to becoming members. (Lovingood Dep. 43:20-45:23) Soon after Defendants made their initial contributions to PPC12, a portion of those funds was used to pay the delinquent 2010 property taxes without

consulting Defendants. (McAlister Dep. 39:2-42:13) After discovering the tax expenditure, McAlister objected to the use of funds for delinquent taxes and expressed his understanding that Defendants' contributions were not to be used for PPC12's delinquent debts. (McAlister Dep. Ex. 3) In addition to using Defendants' initial contributions to pay delinquent taxes, PPC12 never set up engine or maintenance reserves or upgraded the avionics. (McAlister Dep. 45:20-46:14; Pearlstine Dep. 49:6-9)

 In late 2011 and early 2012, Wade initiated efforts to refinance PPC12's loan and obtained a commitment from a local lender to refinance the debt. (Wade Dep. 62:17-63:3) Because PPC12 owed more than the aircraft was worth, the lender only agreed to provide partial refinancing, which was several hundred thousand dollars short of what was owed to Cessna Finance at that time. Lovingood was not willing to pay the difference between the amount owed to Cessna Finance and the amount which PPC12 could obtain in financing from a new lender. (*Id.*; D. Gibbons Dep. 99:16-100:21) PPC12 also attempted to refinance the loan with Cessna Finance under different terms, but Cessna Finance would not refinance or amend the terms and conditions of its loan to PPC12. (Lovingood Dep. 68:22-69:2; D. Gibbons Dep. 95:4-99:12)

Upon futile efforts to refinance the aircraft and Defendants being aggrieved by PPC12's use of their capital contributions to pay delinquent taxes and failure to establish reserves and upgrade avionics, Defendants began looking for a new aircraft that would not be associated with PPC12 with others who were not members of PPC12. (McAlister Dep. 51:19-54:17; Wade Dep. 8:8-10:22) In the summer of 2012, Defendants, along with other partners, located another Pilatus PC-12 to purchase, and established CP Aviation, LLC to own and operate that aircraft. (Wade Dep. 10:22) CP Aviation purchased the aircraft, and it was relocated from England to the United States in or around September or October 2012. (Wade Dep. 55:25-56:7; D. Gibbons Dep. 20:16-

21:3) Although the CP Aviation aircraft is now available for charter through East Shore, it did not become eligible for charter until February 2013. (D. Gibbons Dep. 14:10-17:20)



On September 4, 2012, Wade called Lovingood to inform him that Defendants were dissociating from PPC12 effective October 1, 2012 and would be using the new aircraft owned by CP Aviation. (Wade Dep. 10:9-22, 122:16-123:24; Lovingood Dep. 101:3-112:2) Although there is some dispute regarding the specifics of the phone conversation, it is immaterial because Lovingood admits that Wade informed him that Defendants had “decided to move in a different direction” and were buying another airplane. (Lovingood Dep. 101:3-18) After receiving Wade’s call, Lovingood emailed David Gibbons of East Shore, stating “Just got a call from Eric. I think we need to meet on this soon. No one has told me anything about this situation. So, I am asking you to get everyone together so we can get this resolved without any problems.” (Lovingood Dep. 109:17-112:2, Ex. 7)

Further, Defendants’ intent to dissociate from PPC12 effective October 1, 2012 was confirmed in another email from David Gibbons to Lovingood and Apat on October 22, 2012. In that email, Gibbons stated, **“We were only recently informed by the other members that they notified you by phone of their intention to leave PPC12 effective October 1st.** Those members have not used the aircraft since that time and are current with their financial obligations.” (Lovingood Dep. Ex. 8) Lovingood admits that the October 22nd email confirmed Defendants’ intent to dissociate from PPC12. (Lovingood Dep. 115:25-116:4) Although Lovingood disputes that Defendants’ attempt to dissociate from PPC12 was legally effective (Lovingood Dep. 116:13-22), Lovingood has repeatedly admitted that Defendants expressed their intent to dissociate. (Lovingood Dep. 118:3-119:10) In addition, Defendant Apat admits that he understood that Defendants had either dissociated or were intending to dissociate around

October 1, 2012. (Apat Dep. 34:24-38:3) Apat was the registered agent of PPC12 under the Operating Agreement, and according to Lovingood, Apat was the managing member of PPC12 at the time. Michael Gibbons, who worked for East Shore and was the pilot of the PPC12 aircraft, similarly confirms that it was his understanding that Defendants had dissociated effective October 1, 2012. (M. Gibbons Dep. 77:14-79:17)



On October 28, 2012, approximately one week after Defendants' dissociation from PPC was confirmed to Lovingood, the PPC12 aircraft suffered catastrophic engine failure leaving Atlanta on a charter flight and the pilot had to make an emergency landing. (M. Gibbons Dep. 18:4-24:11, 48:7-11; D. Gibbons Dep. 44:7-45:6, 123:2-4) It was determined that a First Stage Planetary Gear in the aircraft's Pratt Whitney engine had seized. The aircraft was inoperable, needed major engine repairs, and remained at Peachtree-Dekalb airport for months. (Lovingood Dep. 121:5-126:10) After the engine failure, Lovingood took control of management of the aircraft from East Shore and had the engine repaired at Epps Aviation in Atlanta. (Lovingood Dep. 128:13-138:11; D. Gibbons Dep. 101:10-107:6) Lovingood and his attorneys negotiated a reduced-cost repair and overhaul of the engine, under the terms of Pratt-Whitney's warranty. (Lovingood Dep. 128:13-138:11) Because the aircraft was inoperable, East Shore removed it from its charter certificate in December 2012. (D. Gibbons Dep. 17:21-18:3) Ultimately, Lovingood sold the aircraft in February 2014 and paid off the loan to Cessna Finance. (Lovingood Dep. 178:25-179:14) According to Lovingood, he or Plaintiff C3 Investments paid for all repairs to the aircraft and the interest payments on the loan after the aircraft suffered engine failure until it was sold. (Lovingood Dep. 140:22-144:13) Lovingood and C3 Investments allege that they incurred expenses of over \$530,000 to repair and sell the aircraft. Lovingood did not inform Defendants that the aircraft's engine failed and did not seek contributions for loan

payments. (Lovingood Dep. 124:22-126:10-11, 133:6-136:7) He did not include them in discussions with the engine manufacturer. (Lovingood Dep. 124:22-126:10, 133:6-136:7) He did not seek their consent before authorizing repairs to the aircraft and did not involve them in the sale of the aircraft. (Pearlstine Dep. 33:13-14)

On August 29, 2013, Plaintiffs filed suit against Defendants and Apat for all expenses incurred for the aircraft after it suffered engine failure. Plaintiffs assert claims of breach of fiduciary duty, contractual indemnity, and equitable subrogation. Defendants answered the complaint by denying the allegations and asserting counterclaims and crossclaims against Lovingood and Apat asserting fraudulent and negligent misrepresentations and concealment regarding how PPC12 would use Defendants' initial contributions. In addition, Defendants asserted a counterclaim against Lovingood for breach of fiduciary duty.



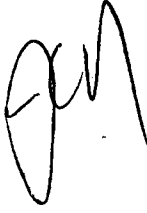
CONCLUSIONS OF LAW

This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court. Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56, SCRPC; Baird v. Charleston County, 333 S.C. 519, 529 (1999) In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence is viewed in the light most favorable to the non-moving party. Hamiter v. Retirement Div. of the S.C. Budget & Control Bd., 326 S.C. 93, 96 (1997). "The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case." Fender & Latham, Inc. v. First Union Nat'l Bank of S.C., 316 S.C. 48, 50 (Ct. App. 1994). A party opposing a motion for summary judgment may not rest on the mere allegations of his pleadings, but must set forth or

point to specific facts showing that there is a genuine issue of material fact. *See* Rule 56(c), SCRCF; Strickland v. Madden, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994). The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *See* George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Contractual Indemnity



Plaintiffs seek contractual indemnification from Defendants under the Operating Agreement for the fixed expenses incurred to repair the PPC12 aircraft and pay the financing costs to Cessna Finance from October 2012 to present. According to Plaintiffs, Defendants are responsible for these contributions because they did not dissociate pursuant to S.C. Code Ann. § 33-44-601. Plaintiffs' claim for contractual indemnification is based on their argument that the Operating Agreement obligates all members of PPC12 to make contributions to the company for the aircraft's fixed expenses. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." Rock Hill Tel. Co. v. Globe Communs., Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (Ct. App. 2004).

Any right for contractual indemnification that Plaintiffs have against Defendants must arise under the terms of the Operating Agreement. "The operating agreement of a limited liability company is a binding contract that governs the relations among the members, managers, and the company ... [and] operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to

some matter that statutory law will apply.” Clary v. Borell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012).

Plaintiff C3 Investments, Inc.’s claim for contractual indemnification fails because C3 Investments was neither a member of PPC12 nor a party to the Operating Agreement. Plaintiffs have not presented any evidence to the contrary or any legal grounds on which C3 Investments could maintain a claim for contractual indemnification under the Operating Agreement. There is no genuine dispute of material fact that a contract between C3 Investments and Defendants did not exist. Therefore, C3 Investments cannot maintain a claim for contractual indemnification as a matter of law. Defendants are entitled to summary judgment on C3 Investments’ claim for contractual indemnification, and that claim is hereby dismissed.



In addition, Plaintiff Lovingood also cannot maintain a claim for contractual indemnification because the PPC12 Operating Agreement contains no provision addressing contractual indemnity between its members. Lovingood claims that he is entitled to indemnification under Sections 3.6 and 8.2 of the Operating Agreement. Those provisions, however, do not provide him a remedy for contractual indemnification, and he cites no operable language in those sections that would entitle him to indemnification. Section 3.6 of the Agreement merely governs the members’ usage of the PPC12 aircraft and requires members to pay the fixed and variable expenses of the aircraft for such usage. Nothing in that section requires a member to indemnify another member for expenses incurred with respect to the aircraft. Thus, Section 3.6 does not support Plaintiffs’ claim for contractual indemnification.

While Section 8.2(c) provides for PPC12 to indemnify members for expenses incurred by a member “in the ordinary course of the business of the Company or for the preservation of the Company’s business or property,” that provision does not require a member to indemnify

another member under any circumstance and neither does S.C. Code Ann. § 33-44-403. While Lovingood may conceivably have a cause of action for contractual indemnification against PPC12 under Section 8.2(c), he has failed to sue PPC12. This claim is not viable because the Operating Agreement does not provide for contractual indemnification among members. Therefore, Defendants are entitled to summary judgment on Lovingood's claim for contractual indemnification, and that claim is dismissed accordingly.

gn
Plaintiffs' claim for contractual indemnity fails because Defendants properly dissociated by expressing their intent to dissociate from PPC12 prior to Plaintiffs incurring the expenses they seek to recover. § 33-44-601 and § 33-44-602 govern the manner in which a member may dissociate from a limited liability company. A dissociation occurs, among other ways, as a result of "the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." § 33-44-601(1). Section 33-44-601 does not require that such notice be given in any particular manner or form unless otherwise provided in the company's operating agreement. Rather, § 33-44-602 provides that, "[u]nless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to § 33-44-601(1)." That section further provides that if "the operating agreement has not eliminated a member's power to dissociate, the member's dissociation from a limited liability company is wrongful only if . . . it is in breach of an express provision of the agreement."

In this case, Defendants properly dissociated from PPC12 pursuant to §§ 33-44-601 and 33-44-602 prior to Plaintiffs incurring the expenses they seek to recover. The evidence demonstrates that Defendants expressed their will to dissociate from PPC12 in September and that all members of PPC12 and its manager knew of Defendants' intent to dissociate no later than

October 22, 2012. An email sent by PPC12's manager, David Gibbons, expressly confirms that Defendants had provided notice of their intent to dissociate effective October 1, 2012. As a result, PPC12 and its members had notice of Defendants' express will to withdraw as members of PPC12, and their dissociation was effective prior to the engine failure and aircraft expenses.

gm
Lovingood admits that as of October 22, 2012 he was aware of Defendants' intent to withdraw from PPC12. Because Plaintiffs cannot deny that Defendants had expressed their intent to dissociate prior to the engine failure, they claim that Defendants had to do more than provide notice of their intent to withdraw to effectuate the dissociation. This argument has no merit because the Operating Agreement is completely silent on dissociation and does nothing to eliminate a member's right to dissociate under § 33-44-601(1). As such, § 33-44-601(1) governs Defendants' dissociation under these circumstances, and this section clearly holds that a member's dissociation is effective upon "the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." It is undisputed that PPC12 had notice of Defendants' express will to withdraw from PPC12 no later than October 22, 2012. Therefore, Defendants dissociated from PPC12 prior to the engine failure and have no contractual obligation under the Operating Agreement to make contributions for expenses and financing costs incurred after their dissociation.

In addition, Lovingood's and PPC12's actions after the aircraft suffered engine failure further demonstrate that PPC12 had notice of Defendants' intent to withdraw from the company. After the aircraft suffered engine failure, neither Lovingood nor PPC12 informed Defendants of the incident. PPC12 sent no further invoices to Defendants for the continuing expenses of the plane, such as loan payments, and Defendants were never consulted about the management of the aircraft while it sat grounded. Furthermore, Lovingood approved the repairs of the aircraft

without obtaining consent of Defendants, despite the fact that the Operating Agreement required consent of seventy-five percent (75%) of all members. PPC12 then sold the aircraft without consulting or obtaining approval of Defendants.

According to Plaintiffs, Defendant Apat was the managing member of PPC12 at the time the aircraft suffered engine failure. (Pls.' Mem. Opp'n Mt. Summ. J. p. 3) The Operating Agreement also named Apat as PPC12's registered agent. Apat admitted that it was his understanding that Defendants dissociated on or about October 1, 2012, prior to the aircraft suffering engine failure. (Apat Dep. 34:24-38:3) As a result, there is no genuine issue of material fact that PPC12, through its managing member and registered agent, had notice of Defendants' dissociation prior to the aircraft's engine failure. As such, Defendants were no longer members of PPC12 when Plaintiffs incurred the expenses they now seek to recover under their claim for contractual indemnification, and they are entitled to summary judgment on Plaintiffs' claim for contractual indemnification on this basis as well.

Equitable Subrogation

Under South Carolina law, subrogation is "broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right." Shumpert v. Time Ins. Co., 329 S.C. 605, 610, 496 S.E.2d 653, 655 (Ct. App. 1998). Under equitable subrogation, one who pays a debt on behalf of another only steps into the shoes of the original creditor. Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 601, 538 S.E.2d 15, 31 (Ct. App. 2000). Plaintiffs Lovingood and C3 Investments, Inc. allege that they, on behalf of PPC12, made payments on the promissory note for the PPC12 aircraft held by Cessna Finance and for repairs to the aircraft performed by Epps Aviation and are therefore entitled to equitable subrogation. To the extent that the doctrine of equitable subrogation applies in this case, Plaintiffs Lovingood and C3 Investments would

have only acquired the rights of Cessna Finance and Epps Aviation, as the original creditors. Neither Cessna Finance nor Epps Aviation had any recourse against Defendants under the promissory note or the agreement to make repairs. Moreover, Defendants did not sign guaranties to pay any debts of PPC12, and the PPC12 Operating Agreement expressly provides that no member shall be personally liable for the debts of PPC12. (Lovingood Dep. Ex. 4 §§ 3.5, 8.2(a))



Plaintiffs have failed to proffer any evidence or legal arguments in support of their equitable subrogation claim. Plaintiffs cannot recover against Defendants under the doctrine of equitable subrogation because the original creditors of PPC12 have no right or claims against Defendants. See Kuznik, 342 S.C. at 610, 496 S.E.2d at 655 (ruling that equitable subrogation could not be applied by one partner against his other partners for debts paid on behalf of the partnership because the partnership's creditor had no recourse against the other partners). Therefore, Defendants are entitled to summary judgment on Plaintiffs' claim for equitable subrogation, and that claim is also dismissed.

Breach of Fiduciary Duty

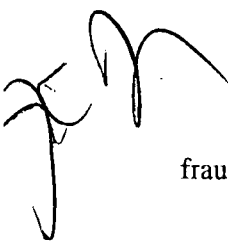
Plaintiffs assert a cause of action against Defendants for breach of fiduciary duty of loyalty under § 33-44-409(b)(3) based on Defendants' alleged competition with PPC12 arising from their ownership and operation of another aircraft. To establish a breach of fiduciary duty, the plaintiff must prove, (1) the existence of a fiduciary duty, (2) a breach of the duty owed to the plaintiff by defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). Plaintiff C3 Investments, Inc.'s claim for breach of fiduciary duty claim fails because C3 Investments cannot establish the existence of any fiduciary duty that Defendants owed to C3 Investments. Under § 33-44-409, a member of a member-managed limited liability

company owes a duty of loyalty to the company and its other members. *See* § 33-44-409(a) (“The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and duty of care imposed by subsections (b) and (c).”) C3 Investments was not a member of PPC12, and it had no relationship with Defendants. As such, Defendants did not owe C3 Investments any fiduciary duty. Plaintiffs have not provided any evidence that a fiduciary relationship existed between Defendants and C3 Investments. Therefore, there is no genuine issue of fact on this matter, and Defendants are entitled to summary judgment on Plaintiff C3 Investments’ breach of fiduciary duty claim.

gm Additionally, none of the Plaintiffs can maintain a claim of breach of fiduciary duty under § 33-44-409(b)(3) because they cannot establish the second element of that claim – i.e., that Defendants breached the fiduciary duty of loyalty. Section 33-44-409(b) provides that the only fiduciary duty that a member of a member-managed limited liability company owes to the company and the other members is the duty of loyalty, which includes the duty “to refrain from competing with the company in the conduct of the company’s business before the dissolution of the company.” § 33-44-409(b)(3). A member’s duty of loyalty under § 33-44-409(b)(3) terminates upon the member’s dissociation from the company. § 33-44-603(4).

Plaintiffs cannot recover under their claim for breach of fiduciary duty because they cannot prove that Defendants’ alleged breach of the duty of loyalty proximately caused them any damages. Shortly after Defendants dissociated from PPC12 and began operating another aircraft, the PPC12 aircraft became inoperable after suffering engine failure and was no longer used for member or charter flights from the time it became inoperable until it was sold. As a result, even if Plaintiffs can establish a breach of fiduciary duty by Defendants, Plaintiffs cannot establish that they suffered any damages as a result of such breach. Although Plaintiffs assert that they are

entitled to damages associated with the expenses they incurred to repair the aircraft and pay the loan payments after the aircraft suffered engine failure in October 2012, those damages were not the result of Defendants' alleged breach of duty of loyalty. To the extent that Defendants are liable for any of those damages, that liability must arise from a contractual or statutory obligation to pay contributions to PPC12 or indemnify Plaintiffs. And to the extent that Defendants breached a duty of loyalty to Plaintiffs by competing against PPC12, the resulting damages must necessarily arise from the wrongful competition, which is completely separate from the expenses of the aircraft, such as maintenance, repairs, and financing costs. Therefore, Plaintiffs cannot prove the third element of their breach of fiduciary duty claim, and Defendants are entitled to summary judgment on this claim on this basis as well.



PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs seek summary judgment on Defendants' counterclaims against Lovingood for fraud, fraudulent concealment, and negligent misrepresentation.

Fraud

In order to prevail on any of the counterclaims alleging fraud, the Defendants must prove those claims by clear, cogent and convincing evidence. Anderson v. Citizens Bank, 294 S.C. 387, 365 S.E. (2d) 26 (Ct. App. 1987). The elements of fraud are: a representation; its falsity; its materiality; knowledge of its falsity or a reckless disregard of its truth or falsity; intent that the representation be acted upon; hearer's ignorance of its falsity; hearer's reliance on its truth; hearer's right to rely; and hearer's consequent and proximate injury. E.g., Florentine Corp., Inc. v. PEDA I, Inc., 339 S.E. (2d) 112 (1985). A nondisclosure becomes fraudulent only when a party having knowledge of facts has a duty to disclose them. The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between

the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. Jacobson v. Yaschik, 155 S.E.2d 601, 605-606 (S.C. 1967)

Constructive Fraud

gcN
To establish constructive fraud, the counterclaim defendants must establish all elements of actual fraud, except the element of intent. O'Quinn v. Beach Associates, 272 S.C. 95, 249 S.E.2d 734 (1978). Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud while intent to deceive is an essential element of actual fraud. Giles v. Lanford & Gibson, Inc., 328 S.E.2d 916 (Ct. App. 1985). However, in a constructive fraud case, where there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely. Poco-Grande Investments v. C&S Family Credit, Inc., 301 S.C. 323, 391 S.E.2d 735 (Ct. App. 1990). This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests. Id. Ardis v. Cox, 431 S.E.2d 267, 269-270 (S.C. Ct. App. 1993).

Negligent Misrepresentation

To establish liability for negligent misrepresentation, the Defendants must show that the Plaintiff 1) made a false representation to the Defendants, (2) had a pecuniary interest in making the representation, (3) owed a duty of care to see that he communicated truthful information (4) breached that duty by failing to exercise due care. The Defendants must also establish that they

justifiably relied on the representation; and suffered a pecuniary loss as the proximate result of their reliance. Sauner v. Public Serv. Auth., 581 S.E.2d 161, 166 (S.C. 2003); AMA Management Corp. v. Strasburger, 420 S.E.2d 868 (Ct. App. 1992). "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." Id. Winburn v. Insurance Co. of North America, 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct. App. 1985).

Breach of Fiduciary Duty

To establish their claim that the Plaintiff breached a fiduciary duty, the Defendants must establish both the existence of a fiduciary relationship and a breach of the responsibility of the fiduciary to act in good faith and with due regard to the interests of the one imposing the confidence. Moore v. Moore, 599 S.E.2d 467, 473 (S.C. Ct. App. 2004). For members of a Limited Liability Company, those duties are defined by the South Carolina Limited Liability Company Act, which states:

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

(b) A member's duty of loyalty to a member-managed company and its other members is limited to the following: (1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity; (2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and (3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

(c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. S.C. Code Ann. § 33-44-409.

Applying these standards to the facts of the case, the only evidence in the record that supports the Defendant's counterclaims is the testimony of David Gibbons, the aircraft manager, that Defendant Apat instructed him to pay \$21,672.71 in 2010 Charleston County Property taxes from the PPC12, LLC operating account. (Deposition of D. Gibbons, p. 69, line 4-p. 72, line 6; Ex. 7, p. 44, lines 20-p. 45, line 19) Perhaps this testimony may support the crossclaims against Apat; however, there is no evidence in the record suggesting that Lovingood had any knowledge or involvement in Apat's act. There is no evidence that Lovingood performed any act that would violate the fiduciary duties imposed by § 33-44-409. There is no evidence suggesting that Lovingood made any material representation whatsoever to Defendants Wade, McAllister, or Pearlstine.



The evidence before the Court on summary judgment establishes that Lovingood was not the managing member of the LLC, had no actual knowledge that the taxes of the aircraft were overdue, and made no representations otherwise to the Defendants. The testimony of record shows that Lovingood was not aware that the 2010 property taxes were unpaid before being notified by the County, and Lovingood then paid his share of the 2010 property taxes directly to Charleston County after receiving such notice. All of this occurred before Defendants McAllister and Pearlstine became members of PPC12, LLC.

Moreover, the Court finds as a matter of law that the Defendants' allegation that Lovingood failed to disclose the status of the 2010 property taxes on the PPC12, LLC aircraft cannot support a claim of fraud, fraudulent concealment, constructive fraud, or negligent misrepresentation. This case involves an arms-length transaction between sophisticated, successful businessmen. None of the counterclaiming defendants performed a public records search to ensure that any 2010 taxes had been paid prior to becoming members of the LLC. A

search of those records would have taken minutes and would have established the status of all past tax payments. Under these facts, it is wholly unreasonable for the counterclaiming defendants to have relied upon an alleged representation on the status of property taxes. Even if such a representation had been made, the counterclaiming defendants had no right to rely on that representation, given the ease with which the information could have been ascertained from the public records. Moseley v. All Things Possible, 719 S.E. 2d 656, 658-659 (S.C. 2011).

There is no evidence in the record that Lovingood made any representation, misrepresentation, or committed any act that would support the counterclaims against him.

Defendants Wade, McAllister, and Pearlstine became members of PPC12, LLC, after having full opportunity to examine the books and records of the LLC, and to question Apat and the aircraft manager of East Shore Aviation. There is no evidence in the record that any misrepresentation or false statement was ever made to them, and no evidence suggesting they had a right to or actually did rely on such statements. Accordingly, as to the counterclaims, there is no material question of fact for the trier of fact to decide, and the counterclaims must fail. Accordingly, this Court hereby grants the Plaintiffs' Motion for Partial Summary Judgment, dismissing the counterclaims of Defendants Wade, McAllister, and Pearlstine against Plaintiff Lovingood.

CONCLUSION

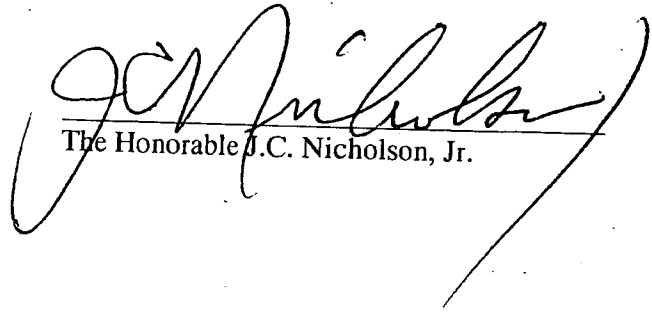
Based on the record herein, there are no genuine issues of material fact on Plaintiffs' claims, and Defendants Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co. SC, LLC are entitled to judgment on all of Plaintiffs' claims. I further conclude that there are no genuine issues of material fact on Defendants' counterclaims against Lovingood, and Plaintiffs' Motion for Partial Summary Judgment is also granted.

IT IS THEREFORE ORDERED that:

1) Defendants' Motion for Summary Judgment is hereby GRANTED, and Plaintiffs' claims are dismissed in their entirety.

2) Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED.

AND IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.

November, 30, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-4549

C. Gordon Lovinggood, Jr. et al

Victor Apat, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This matter came before this Court on Plaintiffs' Motion for New Trial and to Alter and Amend the Judgment filed on December 16, 2015. Plaintiffs' motion is respectfully **denied** without a rehearing pursuant to Rule 59(g).

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2117
Judge Code

1/27/16
Date

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3)
INVESTMENTS, INC and PPC12, LLC)
☒ Plaintiff)

v.)

Victor Apat, Anthonty Mcallister; J. Eric Wade)
D/B/A Ct Touring; And Pearl Co. Sc, Llc)
☒ Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-10-5080

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
David B. Marvel, Bar No. 68803
Address:
90 Queen Street, Charleston, SC 29401
phone: (843) 722 7250 fax: (843) 722 7260
e-mail: dave@prennermarvel.com other:

Defendant's Attorney:
Brandon Gaskins, Bar No.
Address:
78 Wentworth Street, Charleston, SC 29401
phone: fax:
e-mail: other:
e-mail: other:

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

SECTION I: Hearing Information

Nature of Motion: Consent Order Pursuant to Rule 40(j), SCRCP

Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

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

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

June 18, 2015

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: 2060 Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CIVIL ACTION NO. 2013-CP-10-5080

ORDER PURSUANT TO
RULE 40(j), SCRCP

FILED
2015 JUN 30 AM 9:19
JULIE J. ARMSTRONG
CLERK OF COURT

THIS MATTER came before me upon Motion, signed by all parties who have appeared in the action, and who hereby request that all claims, counter-claims, cross claims, etc. be stricken from the docket pursuant to Rule 40(j), SCRCP, and the following stipulations:

1) Pursuant to Rule 40(j), if the claims are restored upon motion made within one (1) year of the date of the entry of this order that the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date the claim is restored; and

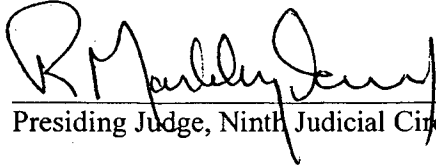
2) the parties may participate in discovery and mediation during the time in which the case is stricken as was noticed, agreed and outstanding on the date of this Order; and this Order shall not prejudice the parties during that course of discovery; and

3) the parties have stipulated that any party may move to restore this matter at any time on or after July 29, 2015 and the case will be immediately restored, without need for any further hearing or Order on such motion to restore; and

CHARLESTON\608575v1

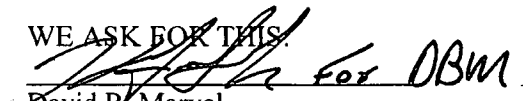
4) the parties have stipulated that, upon any restoration of the case, the case may be immediately transferred to the to the Jury Trial Roster, and that the case shall be subject to being called for jury selection and trial at any time on or after August 31, 2015.

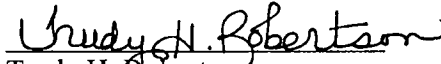
IT IS SO ORDERED!

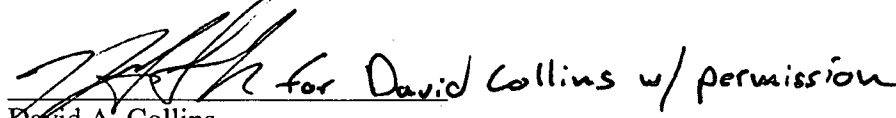

Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
June 25, 2015

WE ASK FOR THIS:


David B. Marvel
PRENNER MARVEL, P.A.
636 King Street
Charleston, South Carolina 29403
Attorneys for the Plaintiffs

 6-18-15
Trudy H. Robertson
E. Brandon Gaskins
MOORE & VAN ALLEN PLLC
78 Wentworth Street
Charleston, SC 29401
*Attorney for Defendants Anthony
McAlister; J. Eric Wade d/b/a CT
Touring; and Pearl Co. SC, LLC*

 for David Collins w/ permission
David A. Collins
Law Office of David A. Collins, LLC
P.O. Box 40578
Charleston, SC 29418
Attorney for Defendant Victor Apat

PMW/2

CHARLESTON\608575v1

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC,

Plaintiff(s)

vs.

VICTOR APAT; ANTHONY MCALLISTER, J.
ERIC WADE d/b/a CT TOURING; and PEARL
CO. SC, LLC;

Defendant(s)

Submitted By: David B. Marvel

Address: 636 King Street Charleston, SC 29403

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP - 10- 5080

SC Bar #: 68803

Telephone #: (843) 722-7250

Fax #: (843) 722-7260

Other:

E-mail: dave@prennermarvel.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☒ Other (199)

Breach of

**Fiduciary Duty;
Contractual Indemnity,
Equitable Subrogation**

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP-
☐ Notice/ File Med Mal (230)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Administrative Law/Relief

- ☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Judgments/Settlements

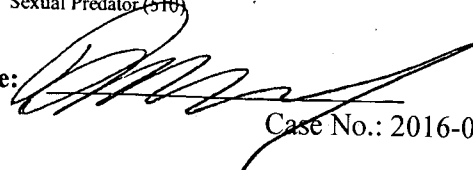
- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers' Compensation Settlement Approval (780)
☐ Other (799)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510)

Submitting Party Signature: 

Date: 8/29/2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendant.

Civil Action No.: 2013-CP-10-5080

SUMMONS

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2013 AUG 29 AM 11:29

FILED

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the Plaintiff, through its counsel, PRENNER MARVEL, P.A., at its office at 636 King St., Charleston, South Carolina, 29403 within Thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Complaint and Judgment by default will be rendered against you for the relief demanded in the Complaint.

RESPECTFULLY SUBMITTED:
PRENNER MARVEL, P.A.

By:


David B. Marvel

Kenneth G. Goode, Jr.

636 King Street

Charleston, SC 29403

Tel: 843-722-7250

Fax: 843-722-7260

E-mail: dave@prennermarvel.com

Attorneys for Plaintiff

Charleston, South Carolina
August 29, 2013

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendant.

Civil Action No.: 2013- CP-10 5080

COMPLAINT
(Breach of Fiduciary Duty)
(Contractual Indemnity)
(Equitable Subrogation)

FILED
2013 AUG 29 AM 11:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiffs, C. Gordon Lovingood, Jr., C3 Investments, Inc., and PPC12, LLC, through undersigned counsel, and complaining of the Defendants Victor Apat, Anthony McAllister, J. Eric Wade d/b/a CT Touring, and Pearl Co. SC, LLC, hereby allege and aver as follows:

1. Plaintiff C. Gordon Lovingood, Jr. ("Lovingood"), is a natural person above the age of majority and a resident and citizen of the State of South Carolina, County of Charleston.
2. Plaintiff C3 Investments, Inc. ("C3") is a corporation organized and existing under the laws of the State of South Carolina with its registered office and principal place of business in Charleston County, South Carolina.
3. Defendant Victor Apat ("Apat"), is a natural person above the age of majority and a resident and citizen of the State of South Carolina, County of Charleston.
4. Defendant Anthony McAllister ("McAllister"), is a natural person above the age of majority and a resident and citizen of the State of South Carolina, County of Charleston.

5. Defendant J. Eric Wade (“Wade”) is a natural person above the age of majority and a resident and citizen of the State of South Carolina, County of Charleston. At all times and in all matters relative to the allegations herein, Wade alleged that he was doing business as CT Touring, LLC, which upon information and belief is either not a duly formed or existing Limited Liability Company or is not properly authorized to do business in South Carolina. Accordingly, Wade is personally liable for all of the actions stated herein.

6. Defendant Pearl Co. SC, LLC (“Pearl”) is a South Carolina Limited Liability Company with its registered office and principal place of business in North Charleston, South Carolina.

7. Plaintiff PPC12, LLC (“PPC12”) is a duly formed and existing South Carolina Limited Liability Company with its registered office in Charleston County, South Carolina. PPC12 appears as a plaintiff herein pursuant to S.C. Code § 33-44-1101.

8. Lovingood, Apat, McAllister, Wade, and Pearl are the members of PPC12.

9. PPC12 is the owner of a Pilatus PC-12 aircraft with serial no. 154 and bearing FAA registration number N217EB (“the PPC Aircraft”).

10. The operation of PPC 12 is governed by the First Amended Operating Agreement of PPC12, LLC (“the Agreement”).

11. The Second Amended Operating Agreement of PPC12, LLC identifies the current members of PPC12, but otherwise reaffirms the Agreement.

12. This action concerns the fiduciary duties that Defendants owe to Lovingood as members of PPC12 and, to the extent applicable, the duties owed to PPC12 itself.

13. Defendant Apat is the Managing Member of PPC12, and has breached his duties as Managing Member and as a Member in general as stated further herein. Accordingly, any

effort to cause Apat to commence this action is unlikely to succeed and Lovingood has standing to bring this action on behalf of PPC12 to the extent PPC12 owns the causes of action stated herein.

14. Section 2.6 of the Agreement states that the purpose of PPC12 is to “engage in aircraft operations . . . and to carry on any other lawful business or activity in connection with the foregoing”. Owning and operating the PPC Aircraft fulfills the entire stated purpose of the LLC.

15. Section 3.6 of the Agreement requires the members of PPC12 to pay the fixed and variable expenses of the PPC Aircraft .

16. Section 8.2(b) of the Agreement requires the members to refrain from engaging in a knowing violation of the law, and requires the members to act “consistently with the obligation of good faith and fair dealing.”

17. South Carolina Code § 33-44-409 prohibits a member of an LLC such as PPC12 from “competing with the company in the conduct of the company's business” and requires members to “exercise any rights consistently with the obligation of good faith and fair dealing.”

18. PPC12 entered into an aircraft management agreement with East Shore Aviation that allowed the members of PPC12 to use the PPC Aircraft as need and also allowed East Shore Aviation to charter the PPC Aircraft pursuant to a Part 135 certificate.

19. The PPC Aircraft is financed by and secures a Note to Cessna Finance Corporation (“CFC”) with an initial principal amount of \$2,170,913.75 (“the Note”).

20. C3 and Lovingood are guarantors of the Note. Section 4.3 of the Agreement recognizes that Lovingood is a guarantor and imposes certain requirements upon the members relating to the Note and that guaranty.

21. In accordance with Section 3.6 of the Agreement, each member is required to contribute a share of the payment due to CFC.

22. In accordance with Section 3.6 of the Agreement, each member is required to contribute a share of maintenance, repair, and other expenses of the PPC Aircraft.

23. In April 2012, McAllister, Wade, and/or Pearl formed or became members of CP Aviation LLC, for the purpose of purchasing, owning, and operating an aircraft similar to the PPC Aircraft and in competition with PPC12.

24. On September 14, 2012, CP Aviation LLC became the registered owner of a Pilatus PC-12 aircraft with serial number 830 bearing FAA Registration number N561GG ("the CP Aircraft").

25. Contemporaneous with its purchase of the CP Aircraft, CP Aviation LLC entered into an aircraft management agreement with East Shore Aviation that allowed the members of PPC12 to use the PPC Aircraft as needed and also allowed East Shore Aviation to charter the PPC Aircraft pursuant to a Part 135 certificate.

26. On or about September 28, 2012, the PPC Aircraft suffered an unexpected engine failure that ultimately required the engine to be removed, shipped back to its manufacturer, and rebuilt. The PPC Aircraft was inoperable from September 28, 2012 until August 2013.

27. Following the engine failure, the Defendants have refused to make any contributions to PPC12, or to otherwise contribute to the expenses of the PPC Aircraft.

28. None of the Defendants have dissociated pursuant to S.C Code § 33-44-601.

29. Apat has failed to make any contribution to the payments to CFC or other expenses of the PPC Aircraft since October 2012. He was in arrears at that time and owes his contribution for all fixed and variable expenses from April 2012 to the present.

30. McAllister has failed to make any contribution to the payments to CFC or other expenses of the PPC Aircraft since January 2013 and owes his contribution for all fixed and variable expenses from October 2012 to the present.

31. Pearl has failed to make any contribution to the payments to CFC or other expenses of the PPC Aircraft since February 2013 and owes its contribution for all fixed and variable expenses from October 2012 to the present.

32. Wade has failed to make any contribution to the payments to CFC or other expenses of the PPC Aircraft since November 2012 and owes his contribution for all fixed and variable expenses from October 2012 to the present.

33. As guarantors of the Note, C3 and Lovingood were required to maintain the PPC Aircraft in sufficient condition to satisfy CFC, lest the note be called and the collateral foreclosed.

34. As guarantors of the Note, C3 and Lovingood were required to continue to make payments on the Note, lest the Note be called and the collateral foreclosed.

35. To preserve the value of the PPC Aircraft, and therefore preserve CFC's collateral, and to avoid foreclosure of the Note and Security Agreement, C3 and Lovingood have expended sums to repair the PPC Aircraft and restore it to zero-hour condition, to pursue and negotiate remedies and concessions from parties potentially liable for the engine failure, to negotiate and continue payments on the Note to CFC, and to store and otherwise maintain and preserve the PPC Aircraft. These payments made and liabilities incurred by C3 and Lovingood continue, but as of the date of the filing of this Complaint exceed \$450,000.

36. All of these sums, however paid, were made in the nature of loans to PPC12, having been paid by C3 and Lovingood due to the Defendants' failure to make the contributions required by Section 3.6 of the Agreement.

37. All Defendants, individually and by virtue of their status as Members of PPC12, owe contributions to the LLC, as required by the Agreement.

38. C3 and Lovingood have made payments of behalf of PPC12 and the Defendants, are secondarily liable for the debts incurred by PPC12 by virtue of being guarantors of the note, and are therefore equitably subrogated to PPC12's claims against the Defendants.

39. The Defendants McAllister, Wade, and Pearl, formed and/or joined an LLC that was created for the purpose of owning and operating a sister aircraft in the same manner as the PPC aircraft. This LLC directly competed with the PPC12 in the ownership and operation of aircraft and otherwise engaged in aircraft operations in violation of the Agreement and S.C. Code § 33-44-409(b)(3). As a result of their membership in the competing LLC, Defendants McAllister, Wade, and Pearl have failed and refused to contribute to PPC12 or otherwise pay their share of the expenses of the PPC Aircraft. Accordingly, Defendants McAllister, Wade, and Pearl breached their fiduciary duties and the duty of good faith and fair dealing owed to PPC12 and to Lovingood, and are liable for all damages that Plaintiffs have incurred, plus punitive damages.

40. All Defendants have breached the duty of good faith and fair dealing that they owed to Lovingood by virtue of their informal abandonment of and refusal to contribute to the expenses of the LLC.

41. Further, the Plaintiffs have incurred attorney's fees and costs to bring this action.

WHEREFORE, having averred their claims, Plaintiffs pray for an Order, to wit:

- 1) Granting Judgment in the nature of Contractual Indemnity against All Defendants, for all contributions, expenses, payments, etc. made by C3 Investments, Inc., C. Gordon Lovingood, Jr., or PPC12, LLC; and for all other amounts owed in the nature of contributions;
- 2) Granting Judgment in the nature of Equitable Subrogation against All Defendants, for all contributions, expenses, payments, etc. made by C3 Investments, Inc., C. Gordon Lovingood, Jr., or PPC12, LLC, and for all other amounts owed in the nature of contributions;
- 3) Granting Judgment on the cause of action for Breach of Fiduciary Duties against Defendants McAllister, Wade, and Pearl, joint and several, for all damages that may be shown at trial, plus punitive damages;
- 4) Granting Judgment against All Defendants, joint and several, for the costs and attorneys' fees associated with this action, pursuant to S.C. Code § 33-44-1104; and
- 5) For pre-judgment interest, costs, and all other relief that this Court may deem just and right following the trial of this Cause.

RESPECTFULLY SUBMITTED:

PRENNER MARVEL, P.A.



David B. Marvel
Kenneth G. Goode, Jr.
636 King St.
Charleston, South Carolina 29403
Ph. (843) 722-7250
Fax (843) 722-7260
Email: dave@prennermarvel.com

ATTORNEYS FOR THE PLAINTIFFS

Charleston, South Carolina
August 28, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
C. GORDAN LOVINGOOD, JR., C3	)	CIVIL ACTION NO. 2013-CP-10-5080
INVESTMENTS, INC., and PPC12, LLC	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ANSWER, COUNTERCLAIM AND
	)	CROSS-CLAIM OF DEFENDANTS
	)	ANTHONY MCALLISTER, J. ERIC
VICTOR APAT; ANTHONY	)	WADE d/b/a CT TOURING and
MCALLISTER; J. ERIC WADE d/b/a CT	)	PEARL CO. SC, LLC
TOURING; and PEARL CO. SC, LLC,	)	
	)	
Defendants.	)	(Jury Trial Demanded)
	)	

FILED
 JUNE 15 PM 1:58
 CLERK OF COURT
 JEFFREY A. STRONG

Defendants Anthony McAlister ("McAlister") (incorrectly identified as "Anthony McCallister"), J. Eric Wade d/b/a CT Touring ("Wade"), and Pearl Co. SC, LLC ("Pearl") (collectively referred to as "Defendants") hereby answer Plaintiffs' Complaint, and counterclaim and cross-claim, as follows.

FOR A FIRST DEFENSE

1. Defendants deny each allegation of the Complaint not specifically admitted, qualified, or explained below.
2. Defendants admit the allegations in Paragraph 1 of the Complaint.
3. Upon information and belief, Defendants admit the allegations in Paragraph 2 of the Complaint.
4. Defendants admit the allegations in Paragraph 3 of the Complaint.
5. Defendants admit the allegations in Paragraph 4 of the Complaint.
6. In response to the allegations in Paragraph 5 of the Complaint, Defendants admit only that (Wade) is a natural person above the age of majority and a resident and citizen of the

State of South Carolina, County of Charleston. Defendants deny the remaining allegations in Paragraph 5 of the Complaint.

7. Defendants admit the allegations in Paragraph 6 of the Complaint.

8. In response to the allegations in Paragraph 7 of the Complaint, Defendants admit that PPC12, LLC ("PPC12") is a duly formed and existing South Carolina limited liability company with its registered office in Charleston County, South Carolina. Defendants admit that PPC12 purports to appear as a plaintiff pursuant to S.C. Code Ann. § 33-44-1101. Defendants deny the remaining allegations in Paragraph 7 of the Complaint.

9. In response to the allegations in Paragraph 8 of the Complaint, Defendants admit only that Lovingood, Apat, and Defendants were formerly members of PPC12. Defendants deny that Defendants are currently members of PPC12. Defendants are without sufficient knowledge to form a belief as to the truth of whether Lovingood and Apat are currently members of PPC12. Defendants deny the remaining allegations in Paragraph 8 of the Complaint.

10. Defendants admit the allegations in Paragraph 9 of the Complaint.

11. In response to the allegations in Paragraph 10 of the Complaint, Defendants crave reference to the First Amended Operating Agreement of PPC12, LLC ("Agreement") and deny all allegations inconsistent therewith.

12. In response to the allegations in Paragraph 11 of the Complaint, Defendants deny that the Second Amended Operating Agreement identifies the current members of PPC12. Defendants crave reference to the Second Amended Operating Agreement of PPC12, LLC and deny all allegations in Paragraph 11 of the Complaint inconsistent therewith.

13. Paragraph 12 of the Complaint contains only a statement regarding the purpose of this action, to which no response from Defendants is required. To the extent a response is required, Defendants deny the allegations in Paragraph 12.

14. Defendants deny the allegations in Paragraph 13 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

15. In response to the allegations in Paragraph 14 of the Complaint, Defendants crave reference to Section 2.6 of the Agreement and deny all allegations inconsistent therewith.

16. In response to the allegations in Paragraph 15 of the Complaint, Defendants crave reference to Section 3.6 of the Agreement and deny all allegations inconsistent therewith.

17. In response to the allegations in Paragraph 16 of the Complaint, Defendants crave reference to Section 8.2(b) of the Agreement and deny all allegations inconsistent therewith.

18. Paragraph 17 of the Complaint contains legal conclusions to which no response is required.

19. In response to the allegations of Paragraph 18 of the Complaint, Defendants crave reference to the purported aircraft management agreement with East Shore Aviation and deny all allegations inconsistent therewith.

20. Defendants deny the allegations in Paragraph 19 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

21. In response to the allegations of Paragraph 20 of the Complaint, and upon information and belief, Defendants admit that Lovingood was a guarantor on the Note for the

PPC Aircraft. In further response to Paragraph 20 of the Complaint, Defendants crave reference to Section 4.3 of the Agreement and deny all allegations inconsistent therewith.

22. In response to the allegations of Paragraph 21 of the Complaint, Defendants crave reference to Section 3.6 of the Agreement and deny all allegations inconsistent therewith.

23. In response to the allegations of Paragraph 22 of the Complaint, Defendants crave reference to Section 3.6 of the Agreement and deny all allegations inconsistent therewith.

24. In response to the allegations of Paragraph 23 of the Complaint, Defendants admit only that Pearl is a member of CP Aviation, LLC, which has a purpose of aircraft operations, including air transportation, aircraft ownership, aircraft leasing, and other related purposes. Defendants deny the remaining allegations in Paragraph 23 of the Complaint.

25. Defendants admit the allegations in Paragraph 24 of the Complaint.

26. In response to the allegations of Paragraph 25 of the Complaint, Defendants crave reference to the aircraft management agreement between C P Aviation, LLC and East Shore Aviation and deny all allegations inconsistent therewith.

27. Upon information and belief, Defendants admit Paragraph 26 of the Complaint.

28. In response to the allegations of Paragraph 27 of the Complaint, Defendants admit only that they have not made capital contributions since they dissociated from PPC12. Defendants deny that they had any obligation to make capital contributions. Defendants lack knowledge or information sufficient to form a belief as to the truth or falsity of the allegations regarding whether Defendant Victor Apat ("Apat") has made any capital contributions since the PPC Aircraft suffered engine failure and therefore deny that allegation. Defendants deny the remaining allegations in Paragraph 27 of the Complaint.

29. In response to the allegations in Paragraph 28 of the Complaint, Defendants deny that they did not dissociate pursuant to S.C. Code Ann. § 33-44-601. Defendants lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations regarding whether Apat has dissociated from PPC12 and therefore deny that allegation. Defendants deny the remaining allegations in Paragraph 28 of the Complaint.

30. Defendants deny the allegations in Paragraph 29 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

31. In response to the allegations in Paragraph 30 of the Complaint, Defendants admit that McAlister has not made contributions to the payments to CFC or other expenses of the PPC Aircraft since dissociating from PPC12. Defendants deny that McAlister had any obligation to make such contributions. Defendants deny the remaining allegations in Paragraph 30 of the Complaint.

32. In response to the allegations in Paragraph 31 of the Complaint, Defendants admit that Pearl has not made contributions to the payments to CFC or other expenses of the PPC Aircraft since dissociating from PPC12. Defendants deny that Pearl had any obligation to make such contributions. Defendants deny the remaining allegations in Paragraph 31 of the Complaint.

33. In response to the allegations in Paragraph 32 of the Complaint, Defendants admit that Wade has not made contributions to the payments to CFC or other expenses of the PPC Aircraft since dissociating from PPC12. Defendants deny that Wade had any obligation to make such contributions. Defendants deny the remaining allegations in Paragraph 32 of the Complaint.

34. Defendants deny the allegations in Paragraph 33 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

35. Defendants deny the allegations in Paragraph 34 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

36. Defendants deny the allegations in Paragraph 35 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

37. Defendants deny the allegations in Paragraph 36 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

38. Defendants deny the allegations in Paragraph 37 of the Complaint.

39. Defendants deny the allegations in Paragraph 38 of the Complaint.

40. In response to the allegations in Paragraph 39 of the Complaint, Defendants admit that Pearl is a member of an LLC, which has a purpose of aircraft operations, including air transportation, aircraft ownership, aircraft leasing, and other related purposes. Defendants deny the remaining allegations in Paragraph 39 of the Complaint.

41. Defendants deny the allegations in Paragraph 40 of the Complaint.

42. Defendants deny the allegations in Paragraph 41 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

43. Defendants deny that Plaintiffs are entitled to any relief requested in their Prayer for Relief, including but not limited to any relief for claims of contractual indemnity, equitable subrogation, breach of fiduciary duties, and for pre-judgment interest, costs, and attorneys' fees.

44. Defendants deny any allegations in the Complaint not specifically admitted herein.

FOR A SECOND DEFENSE

45. Further answering the Complaint, and as and for a further defense thereto, Plaintiffs' claims against Defendants are barred pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, because Plaintiffs have failed to state a claim for which relief can be granted.

FOR A THIRD DEFENSE

46. Further answering the Complaint, and as and for a further defense thereto, Plaintiffs' recovery is barred to the extent that Plaintiffs failed to mitigate their damages.

FOR A FOURTH DEFENSE

47. Further answering the Complaint, and as and for a further defense thereto, Plaintiffs' claims are barred by the doctrines of estoppel, waiver, laches, and/or unclean hands.

FOR A FIFTH DEFENSE

48. Further answering the Complaint, and as and for a further defense thereto, Plaintiffs lack standing to prosecute this action.

FOR A SIXTH DEFENSE

49. Further answering the Complaint, and as and for a further defense thereto, Plaintiffs' derivative action is barred because Plaintiffs have not engaged in efforts to secure initiation of the action by the members or manager of PPC¹² as required by S.C. Code Ann. §§ 33-44-1101 and 33-44-1103.

FOR A SEVENTH DEFENSE

50. Further answering the Complaint, and as and for a further defense thereto, Plaintiffs' claims fail because Defendants at all times acted in accordance with the Agreement, in good faith, and without corrupt motives, and they are therefore protected from liability by the business judgment rule.

**RESERVATION TO ADD ADDITIONAL
AFFIRMATIVE DEFENSES**

51. Defendants reserve the right to assert all proper affirmative defenses, including those which may be disclosed or discovered at a later time.

**BY WAY OF COUNTERCLAIM AGAINST PLAINTIFF
C. GORDON LOVINGOOD, JR. AND BY WAY OF CROSS-CLAIM
AGAINST DEFENDANT VICTOR APAT**

52. Defendants reallege each answer, allegation, and affirmative defense set forth above.

53. In or around early 2011, Apat and C. Gordon Lovingood, Jr. ("Lovingood") recruited Defendants to become members in PPC12.

54. In recruiting Defendants, Apat and Lovingood represented that Lovingood owned the PPC12 Aircraft, which was financed by a loan received from Cessna Finance Corporation ("CFC") pursuant to a promissory note ("Note"). According to Apat and Lovingood, Lovingood was the guarantor on the Note pursuant to a guaranty agreement ("Guaranty"). Apat and Lovingood represented that Lovingood owed more under the Note than the PPC12 Aircraft was worth. Additionally, Apat and Lovingood represented that the PPC12 Aircraft was available for charter pursuant to Part 135 of the Federal Aviation Regulations ("FAR") but that it was not being chartered regularly enough to generate sufficient income for PPC12 to operate and

maintain the PPC12 Aircraft and pay the Note without significant monthly capital contributions from Apat and Lovingood.

55. Apat and Lovingood represented to Defendants that PPC12 needed additional members who could make an initial capital contribution and recurring monthly contributions in exchange for the right to use the PPC12 Aircraft for a certain amount of hours per month, which amount was to be determined according to their ownership interest in PPC12. The additional members' contributions were needed to reduce Apat's and Lovingood's monthly capital contributions and to increase reserves necessary for future maintenance and improvements for the PPC12 Aircraft.

56. Additionally, Apat and Lovingood represented to Defendants that PPC12 needed additional members whose presence would help create the perception of financial stability for the purposes of refinancing the debt owed by Lovingood on the PPC12 Aircraft or negotiating with CFC to reduce Lovingood's outstanding financial liability under the Note and Guaranty.

57. At no time during Apat's and Lovingood's recruitment of Defendants did Apat or Lovingood represent that Defendants, through their prospective membership in PPC12, would be responsible for guaranteeing Lovingood's debt to CFC for the PPC12 Aircraft. Defendants were aware of Lovingood's obligations as guarantor on the Note and expressly disclaimed to Lovingood and Apat any intent to become co-guarantors or secondarily liable for the debt owed on the PPC12 Aircraft by Lovingood and/or PPC12.

58. Apat and Lovingood represented to Defendants that payment of a member's monthly capital contributions to PPC12 was a condition of having rights to use the PPC12 Aircraft and that a member's failure to make the monthly capital contributions or stay current with other financial obligations would preclude such member from using the PPC Aircraft. Apat

and Lovingood did not notify Defendants that failure to make monthly capital contributions to PPC12 would result in any other penalties or liability, including secondary liability under the Note or Guaranty.

59. Based on the representations alleged above, Defendants agreed to become members of PPC12. At the time Defendants joined PPC12, Defendants Apat and Lovingood understood and intended that Defendants were not guarantors of or secondarily liable for the Note, Guaranty, or other obligations of PPC12 and for Lovingood. Additionally, Defendants Apat and Lovingood understood that a member's failure to make monthly capital contributions resulted only in the suspension of the member's right to use the PPC12 Aircraft until the member's financial obligations became current.

60. Apat and Lovingood, as the only members of PPC12 at that time, required Defendants to each make an initial capital contribution to become members of PPC12. According to Apat and Lovingood, the initial capital contributions from Defendants would be utilized for future maintenance and operating costs and to establish reserves needed for future improvements and unforeseen expenses for the PPC12 Aircraft.

61. As required by Apat and Lovingood, Wade paid an initial capital contribution of \$20,000 for a 12.5% membership interest in PPC12.

62. As required by Apat and Lovingood, Pearl paid an initial capital contribution of \$40,000 for a 25% membership interest in PPC12.

63. As required by Apat and Lovingood, McAlister paid an initial capital contribution of \$40,000 for a 25% membership interest in PPC12.

64. Apat, Lovingood, and Defendants entered into a Second Amended Operating Agreement of PPC12, LLC ("Second Amendment") on or around May 15, 2011 to reflect that

Apat had an 18.75% interest, Lovingood had a 18.75% interest, that Colonel Tom Touring had a 12.5% interest, Pearl had a 25% interest, and McAlister had a 25% interest in PPC12. All other terms of the Agreement remained unchanged by the Second Amendment.

65. Consistent with Defendants' intent and understanding that the sole penalty for a member's failure to keep the financial obligations owed to PPC12 current was the suspension of the member's right to use the PPC12 Aircraft, Section 3.7 of the Agreement provided that the member's "usage [of the PPC12 Aircraft] is not allowed if a Member is not current with all financial obligations required by the Company."

66. Consistent with Defendants' intent and understanding that they were not guarantors of or secondarily liable for the Note, Guaranty, or other obligations of PPC12 and/or Lovingood and consistent with S.C. Code Ann. § 33-44-303, Sections 3.5 and 8.2(a) of the Agreement provided that "[n]o Member is personally liable for any debt, obligation, or liability of the Company, whether arising in contract, tort, or otherwise."

67. Prior to and at the time Defendants became members of PPC12, Defendants believed that all obligations and liabilities of PPC12, including property taxes, were current.

68. Unbeknownst to Defendants at the time they became members of PPC12, Apat and Lovingood had not paid property taxes on the PPC Aircraft for 2011 and were both delinquent in making their required monthly capital contributions necessary for the maintenance and operational expenses of the PPC12 Aircraft. Apat and Lovingood willfully failed to disclose these material facts to Defendants in their efforts to induce Defendants to become members of PPC12.

69. Upon information and belief, PPC12 had other delinquent liabilities and debts at the time Defendants became members of PPC12, which were not disclosed to Defendants by Apat or Lovingood.

70. Soon after Defendants made their initial capital contributions to PPC12, Apat and Lovingood directed PPC12's manager, East Shore Aviation, to pay the overdue property taxes on the PPC12 Aircraft for 2011. Specifically, PPC12 made a payment of \$43,181.94 on or around July 5, 2011 for delinquent 2011 property taxes. Upon information and belief, PPC12 did not have sufficient funds to pay the delinquent 2011 property taxes because Apat and Lovingood had failed to make the required contributions to PPC12, and they used the initial capital contributions from Defendants to pay the delinquent 2011 property taxes.

71. Upon information and belief, Apat and Lovingood directed East Shore Aviation to pay other delinquent liabilities and debts from the initial capital contributions made by Defendants.

72. Apat and Lovingood directed East Shore Aviation to pay the delinquent 2011 property taxes for the PPC12 Aircraft and PPC12's overdue liabilities and debts without receiving the consent of Defendants, which was necessary to have 75% approval of the members for all expenditures over \$1,000 as required by Sections 4.1 and 4.2 of the Agreement.

73. Defendants would not have become members in PPC12 if they had known that PPC12 owed delinquent property taxes, debts, and liabilities, that Apat and Lovingood were not current with their financial obligations owed to PPC12, and that their initial contributions were necessary to pay PPC12's delinquent taxes, debts, and liabilities.

74. As a result of Apat's and Lovingood's direction to East Shore Aviation to pay PPC12's delinquent property taxes, debts, and liabilities from Defendants' initial capital

contributions, PPC12 did not have sufficient reserves and funds for future maintenance, improvements, and operations of the PPC12 Aircraft.

75. Throughout the course of Defendants' membership in PPC12, Apat and Lovingood consistently directed East Shore Aviation to pay various expenses without receiving the consent of Defendants, which was necessary to have 75% approval of the members for all expenditures over \$1,000 as required by Sections 4.1 and 4.2 of the Agreement.

76. Throughout the course of Defendants' membership in PPC12, Lovingood refused to cooperate with Defendants in attempting to refinance the debt owed on the PPC12 Aircraft or reduce the debt owed to CFC. Defendants repeatedly requested that Lovingood attempt to negotiate with CFC to reduce the debt owed to CFC under the Note. Lovingood refused these requests because he was concerned that doing so would negatively affect his credit worthiness, despite the fact that Defendants agreed to become members in PPC12 on the understanding that the members would work together to refinance the PPC12 Aircraft as reflected in Section 4.3(f) of the Agreement.

77. Throughout the course of Defendants' membership in PPC12, Apat and Lovingood have exercised constructive control over the operations and expenditures of the PPC12 in violation of the Agreement by approving expenditures without the necessary consent of Defendants. In addition, Apat and Lovingood have failed to provide an accounting of the expenditures approved by them or PPC12's finances.

78. As a result of Lovingood's refusal to cooperate in attempting to refinance the PPC12 Aircraft, Apat's and Lovingood's direction of East Shore Aviation to expend Defendants' initial capital contributions for unapproved and deceitful purposes, including delinquent taxes and debts, Apat's and Lovingood's deceitful failure to notify Defendants' of their failure to keep

current with their financial obligations owed to PPC12, and Apat's and Lovingood's breaches of the Agreement, Defendants dissociated from PPC12. Defendants effected their dissociation from PPC12 by providing notice of their express will to Lovingood and East Shore Aviation.

79. As a result of Defendants' dissociation from PPC12, their obligations to PPC12 and its members terminated.

**FOR A FIRST COUNTERCLAIM AGAINST PLAINTIFF C. GORDON
LOVINGOOD, JR. AND CROSS-CLAIM AGAINST VICTOR APAT
(FRAUD)**

80. Defendants reallege each answer, allegation, and affirmative defense set forth above.

81. Lovingood and Apat made representations to Defendants that PPC12's financial obligations were current and that their own personal financial obligations owed to PPC12 were current prior to Defendants becoming members of PPC12.

82. Lovingood and Apat knew that these representations were false.

83. Lovingood's and Apat's representations regarding PPC12's financial obligations and the status of their personal financial obligations to PPC12 were material to Defendants' decision to become members of PPC12.

84. Lovingood and Apat made such representations with the intent that Defendants rely on them in deciding whether to become members of PPC12.

85. Defendants relied on Lovingood's and Apat's representations in deciding to become members of PPC12 and would not have become members of PPC12 if they had known that Lovingood and Apat were not current on their financial obligations owed to PPC12 or that PPC12 owed delinquent property taxes and other debts at the time that they became members.

86. Defendants were not aware of the falsity of Lovingood's and Apat's representations until after they became members of PPC12.

87. Defendants had a right to rely on Lovingood's and Apat's representations because Lovingood and Apat were the sole members of PPC12 at the time of the representations.

88. As a result of relying on Lovingood's and Apat's fraudulent representations, Defendants became members of PPC12 and suffered damages in the form of initial capital contributions and monthly capital contributions made to PPC12 that they would not have made but for Lovingood's and Apat's fraud.

89. Defendants are entitled to actual, consequential, and punitive damages as a result of Lovingood's and Apat's fraud.

**FOR A SECOND COUNTERCLAIM AGAINST PLAINTIFF C. GORDON
LOVINGOOD, JR. AND CROSS-CLAIM AGAINST VICTOR APAT
(Fraudulent Concealment)**

90. Defendants reallege each answer, allegation, and affirmative defense set forth above.

91. Lovingood and Apat failed to disclose to Defendants that PPC12 owed delinquent property taxes and other debts at the time they recruited Defendants to become members of PPC12.

92. Lovingood and Apat also failed to disclose to that they were not current on their own personal financial obligations owed to PPC12.

93. As the sole members of PPC12 who were recruiting Defendants to become members, Lovingood and Apat had fiduciary and legal duties to fully and accurately disclose PPC12's financial obligations and situation, including the facts that PPC12 owed delinquent property taxes and other debts and that PPC12's members were not current on their financial obligations owed to the company.

94. The information relating to PPC12's delinquent property taxes and debts and the fact that they were not current on their own personal financial obligations that they owed to

PPC12, which Lovingood and Apat failed to disclose, was material to Defendants' decision to become members of PPC12.

95. Lovingood and Apat failed to disclose this information with the intent that Defendants rely on the failure to disclose the information in deciding whether to become members of PPC12.

96. Defendants relied on Lovingood's and Apat's failure to disclose such information in deciding to become members of PPC12 and would not have become members of PPC12 if they had known that Lovingood and Apat were not current on their financial obligations owed to PPC12 or that PPC12 owed delinquent property taxes and other debts at the time that they became members.

97. Defendants were not aware that Lovingood and Apat had fraudulently concealed that Lovingood and Apat were not current on their financial obligations owed to PPC12 and that PPC12 owed delinquent property taxes and other debts until after they became members of PPC12.

98. Defendants had a right to rely on Lovingood's and Apat's representations because Lovingood and Apat were the sole members of PPC12 at the time of they failed to disclose the information relating to PPC12's financial obligations and situation, including the facts that PPC12 owed delinquent property taxes and other debts and that PPC12's members were not current on their financial obligations owed to the company.

99. As a result of relying on Lovingood's and Apat's fraudulent concealment, Defendants became members of PPC12 and suffered damages in the form of initial capital contributions and monthly capital contributions made to PPC12 that they would not have made but for Lovingood's and Apat's fraudulent concealment.

100. Defendants are entitled to actual, consequential, and punitive damages as a result of Lovingood's and Apat's fraudulent concealment.

**FOR A THIRD COUNTERCLAIM AGAINST PLAINTIFF C. GORDON
LOVINGOOD, JR. AND CROSS-CLAIM AGAINST VICTOR APAT
(Constructive Fraud)**

101. Defendants reallege each answer, allegation, and affirmative defense set forth above.

102. Lovingood and Apat made representations to Defendants that PPC12's financial obligations were current and that their own personal financial obligations owed to PPC12 were current prior to Defendants becoming members of PPC12.

103. Lovingood and Apat knew that these representations were false.

104. Lovingood's and Apat's representations regarding PPC12's financial obligations and the status of their personal financial obligations to PPC12 were material to Defendants' decision to become members of PPC12.

105. Defendants relied on Lovingood's and Apat's representations in deciding to become members of PPC12 and would not have become members of PPC12 if they had known that Lovingood and Apat were not current on their financial obligations owed to PPC12 or that PPC12 owed delinquent property taxes and other debts at the time that they became members.

106. Defendants were not aware of the falsity of Lovingood's and Apat's representations until after they became members of PPC12.

107. Defendants had a right to rely on Lovingood's and Apat's representations because Lovingood and Apat were the sole members of PPC12 at the time of the representations.

108. As a result of relying on Lovingood's and Apat's fraudulent representations, Defendants became members of PPC12 and suffered damages in the form of initial capital

contributions and monthly capital contributions made to PPC12 that they would not have made but for Lovingood's and Apat's constructive fraud.

109. Defendants are entitled to actual, consequential, and punitive damages as a result of Lovingood's and Apat's constructive fraud.

FOR A FOURTH COUNTERCLAIM AGAINST PLAINTIFF C. GORDON
LOVINGOOD, JR. AND CROSS-CLAIM AGAINST VICTOR APAT
(Negligent Misrepresentation)

110. Defendants reallege each answer, allegation, and affirmative defense set forth above.

111. Lovingood and Apat negligently made false representations to Defendants that PPC12's financial obligations were current and that their own personal financial obligations owed to PPC12 were current prior to Defendants becoming members of PPC12.

112. Lovingood and Apat made representations to Defendants regarding PPC12's financial obligations and situation but negligently failed to disclose that PPC12 owed delinquent property taxes and other debts and that PPC12's members were not current on their financial obligations owed to the company.

113. Lovingood and Apat had a pecuniary interest in making such representations to Defendants because they used such representations to induce Defendants to become members in PPC12 and their own financial contributions and obligations to PPC12 would be reduced if Defendants became members of PPC12.

114. Lovingood and Apat, as PPC12's sole members who were responsible for recruiting Defendants to become members of PPC12, had a duty to Defendants to communicate truthful information regarding PPC12's financial obligations and situation, including the fact that PPC12 owed delinquent property taxes and other debts and that PPC12's members were not current on their financial obligations owed to the company.

115. Lovingood and Apat breached their duty to Defendants to communicate truthful information regarding PPC12's financial obligations and situation by negligently making false representations and failing to disclose information relating to PPC12's financial obligations and situation.

116. Defendants justifiably relied on Lovingood's and Apat's negligent and false representations regarding PPC12's financial obligations and situation and would not have become members of PPC12 if they had known that Lovingood and Apat were not current on their financial obligations owed to PPC12 or that PPC12 owed delinquent property taxes and other debts at the time that they became members.

117. As a result of relying on Lovingood's and Apat's negligent and false representations, Defendants became members of PPC12 and suffered damages in the form of initial capital contributions and monthly capital contributions made to PPC12 that they would not have made but for Lovingood's and Apat's fraud.

118. Defendants are entitled to actual, consequential, and punitive damages as a result of Lovingood's and Apat's negligent misrepresentations.

FOR A FIFTH COUNTERCLAIM AGAINST PLAINTIFF C. GORDON
LOVINGOOD, JR. AND CROSS-CLAIM AGAINST VICTOR APAT
(Breach of Fiduciary Duties)

119. Defendants reallege each answer, allegation, and affirmative defense set forth above.

120. Lovingood and Apat, as members of PPC12, owed Defendants fiduciary duties to refrain from engaging in grossly negligent or reckless conduct and intentional misconduct and to discharge their duties pursuant to the Agreement and in accordance with the obligation of good faith and fair dealing.

121. Lovingood and Apat breached their fiduciary duties to Defendants by violating the Agreement by directing East Shore Aviation to make expenditures without the necessary consent of 75% of PPC12's members as required by the Agreement.

122. Lovingood and Apat breached their fiduciary duties to Defendants by failing to properly disclose material information relating to PPC12's financial obligations and situation and taking actions that were detrimental to PPC12, including but not limited to diverting PPC12's funds, which had been designated for maintenance and improvements, to pay delinquent property taxes and debts.

123. Lovingood breached his fiduciary duties to Defendants by refusing to attempt to refinance the debt owed on the PPC12 Aircraft or to renegotiate the Note with CFC.

124. As a result of Lovingood's and Apat's breaches of their fiduciary duties, Defendants suffered losses in the form of initial and monthly capital contributions, lost value of their investment in PPC12, and consequential damages arising from the diminishment of the value of the PPC12 Aircraft arising from the loss of funds needed for the proper maintenance and improvement of the PPC12 Aircraft.

PRAYER FOR RELIEF

WHEREFORE, Defendants pray the Court to:

1. Dismiss Plaintiffs' claims against Defendants;
2. Enter judgment in favor of Defendants on Plaintiffs' claims;
3. Enter judgment in favor of Defendants on their Counterclaims against Lovingood;
4. Enter judgment in favor of Defendants on their Cross-claims against Apat;
5. Award Defendants all actual, compensable, and punitive damages in an amount to be determined at trial on their Counterclaims against Lovingood;

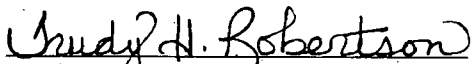
6. Award Defendants all actual, compensable, and punitive damages in an amount to be determined at trial on their Cross-claims against Apat;

7. Award all costs and expenses, including attorneys' fees, in defending and prosecuting this action; and

8. Grant such other and further relief as may seem just and proper to the Court.

A jury trial is demanded on all claims triable by jury.

MOORE & VAN ALLEN PLLC


Trudy H. Robertson

E. Brandon Gaskins
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
brandongaskins@mvalaw.com
trudyrobertson@mvalaw.com

ATTORNEYS FOR DEFENDANTS
ANTHONY MCALLISTER; J. ERIC
WADE d/b/a CT TOURING; and PEARL
CO. SC, LLC

November 15, 2013

Charleston, South Carolina

) IN THE COURT OF COMMON PLEAS

) FOR THE NINTH JUDICIAL CIRCUIT

) CIVIL ACTION NO. 2013-CP-10-5080

(

‘

;

)

)

;

,

)

)

)

)

)

Certificate of Service

2013 NOV 15 PM 1:58
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Heather J. Morin

22

Moore & Van Allen

November 15, 2013

Trudy Hartzog Robertson
Attorney at Law

T 843 579 7061
F 843 579 8722
trudyrobertson@mvalaw.com

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

**Re: C. Gordon Lovingood, Jr., C3 Investments, LLC, and PPC12, LLC vs. Victor Apat,
Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co SC, LLC
Case No. 2013-CP-10-5080
MVA File No. 038737-1**

Dear Ms. Armstrong:

Enclosed for filing please find the original and one (1) copy of the **Answer, Counterclaim and Cross-Claim of Defendants Anthony McCallister, J. Eric Wade d/b/a CT Touring and Pearl Co. SC, LLC.** in the above referenced matter. Please return a file-stamped copy to me via the bearer of this letter.

By copy of this letter, I am serving counsel of record with a copy of same.

Thank you for your assistance in this matter.

Respectfully yours,

Moore & Van Allen PLLC



Trudy H. Robertson

THR/hm
Enclosures: as stated

cc: David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No.: 2013-CP-10-5080

**PLAINTIFFS' REPLY TO
THE COUNTERCLAIM OF
DEFENDANTS ANTHONY
MCALLISTER, J. ERIC WADE
d/b/a CT TOURING, and
PEARL CO. S.C., LLC**

The Plaintiffs hereby respond to Counterclaims of the Defendants, Anthony McAllister, J. Eric Wade d/b/a CT Touring and Pearl Co, SC, LLC, as follows:

1. Plaintiffs deny any and all allegations not averred in their Complaint, those being Paragraphs 52 through 124 of the Answer and Counterclaim, to the extent those paragraphs assert allegations against the Plaintiffs.

**Further Answering the Complaint
and as a First Affirmative Defense Thereto
(Statute of Limitations)**

2. The counterclaims are barred by the applicable Statute of Limitations.

**Further Answering the Complaint
and as a Second Affirmative Defense Thereto
(Laches)**

3. The counterclaims are barred by the doctrine of laches.

2014 FEB 18 PM 3:31
JULIE J. ARSTRONG
CLERK OF COURT

FILED

Further Answering the Complaint
and as a Third Affirmative Defense Thereto
(Waiver/estoppel)

4. The counterclaims are barred by the doctrines of waiver and/or estoppel.

Further Answering the Complaint
and as a Fourth Affirmative Defense Thereto
(Failure to State a Claim)

5. The counterclaims are barred because the Answer and Counterclaim fails to state facts sufficient to constitute a cause of action against the Plaintiffs.

Further Answering the Complaint
and as a Fifth Affirmative Defense Thereto
(Sole Breach/Negligence)

6. The counterclaims are barred because the alleged damages suffered were solely due to and caused by the negligence, carelessness, recklessness, willfulness and wantonness of the Defendants, their agent, or persons or entities other than the Plaintiffs.

Further Answering the Complaint
and as a Ninth Affirmative Defense Thereto
(Accord and Satisfaction)

7. The counterclaims are barred under the doctrines of accord and satisfaction.

Further Answering the Complaint
and as a Tenth Affirmative Defense Thereto
(Failure to Mitigate)

8. The counterclaims are barred or must be reduced by the Defendants' failure to properly mitigate their damages.

Further Answering the Complaint
and as an Eleventh Affirmative Defense Thereto
(Failure to Comply with Statutory Requirements)

9. The counterclaims are barred as a result of the Defendants' failure to comply with applicable statutory requirements.

Further Answering the Complaint
and as a Twelfth Affirmative Defense Thereto
(Prior Material Breach)

10. The counterclaims are barred because the damages alleged, which are specifically denied, are the result of the Defendants' prior breach of contract or fiduciary duties.

Further Answering the Complaint
and as a Thirteenth Affirmative Defense Thereto
(Unclean Hands)

11. The counterclaims are barred by the doctrine of unclean hands.

Further Answering the Complaint
and as a Fourteenth Affirmative Defense Thereto
(Set-Off)

12. To the extent that any amount is owed to the Defendants, which is specifically denied, that amount must be reduced by amounts that the Defendants owe to the Plaintiffs.

Further Answering the Complaint
and as a Fifteenth Affirmative Defense Thereto
(Absence of Duty)

13. The counterclaims are barred because the Plaintiffs had no duty, contractual or otherwise, to perform in the manner asserted or demanded by the Defendants.

Further Answering the Complaint
and as a Sixteenth Affirmative Defense Thereto
(Beneficial Use)

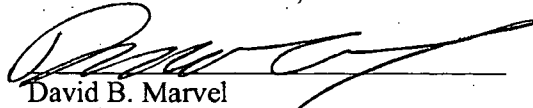
14. The counterclaims are barred or should be reduced by the beneficial use of the Aircraft, which the Defendants received by virtue of being members of the LLC.

Further Answering the Complaint
and as Seventeenth Affirmative Defense Thereto
(Absence of Right to Rely)

13. The counterclaims alleging fraud in any capacity are barred because the Defendants had no right to rely on any statement, representation, or assertion of these Plaintiffs.

RESPECTFULLY SUBMITTED:

PRENNER MARVEL, P.A.



David B. Marvel

Kenneth G. Goode, Jr.

636 King St.

Charleston, South Carolina 29403

Ph. (843) 722-7250

Fax (843) 722-7260

Email: dave@prennermarvel.com

ATTORNEYS FOR THE PLAINTIFFS

Charleston, South Carolina
February 18, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendant.

Civil Action No.: 2013-CP-10-5080

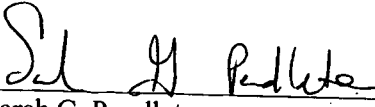
CERTIFICATE OF SERVICE

FILED
2014 FEB 18 PM 3:31
JULIE J. ARMSTRONG
CLERK OF COURT

I, Sarah G. Pendleton, do hereby certify that I provided all parties of record a filed copy of Plaintiff's Reply to Counterclaim in the above referenced matter this 18th day of February, 2014 via U.S. Mail, postage prepaid, to the address stated below:

Trudy H. Robertson, Esquire
Moore & Van Allen
78 Wentworth Street
Charleston, South Carolina 29401
Attorney for Anthony McAllister, J. Eric Wade and Pearl Co. SC., LLC

Victor Apat
1525 Ashley River Road
Charleston, South Carolina 29407


Sarah G. Pendleton

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON 2015-CP-10-4549

C. GORDON LOVINGOOD, JR.,)
C3 INVESTMENTS, INC., and)
PPC12, LLC,)

Plaintiffs,)

-vs-)

VICTOR APAT, ANTHONY)
MCALLISTER, J. ERIC WADE)
d/b/t CT TOURING and)
PEARL CO SC, LLC,)

Defendants.)

TRANSCRIPT OF RECORD

October 19, 2015

Charleston, South Carolina

B E F O R E:

The Honorable J.C. Nicholson, Jr.

A P P E A R A N C E S:

David B. Marvel, Esquire
Attorney for the Plaintiffs

David A. Collins, Esquire
Attorney for Defendant Victor Apat

E. Brandon Gaskins, Esquire
Attorney for Defendants Anthony McAllister, Eric Wade,
and Pearl Co SC LLC

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (October 19, 2015.)

2 MR. COLLINS: This is the airplane case that
3 we were in front of you three weeks ago.

4 THE COURT: I don't know. I may remember
5 that when I hear the facts. All right. Who's here
6 representing who?

7 MR. GASKINS: Brandon Gaskins here on behalf
8 of defendants Anthony McAllister, Eric Wade, and Pearl Co
9 SC LLC.

10 MR. MARVEL: Your Honor, David Marvel here on
11 behalf of plaintiff C. Gordon Lovingood, C3 Investments,
12 Incorporated, and PPC12.

13 MR. COLLINS: David Collins for Victor Apat.

14 THE COURT: Okay. We're going to take about
15 a five-minute break, okay? About a ten-minute break,
16 real quick.

17 (Recess taken.)

18 THE COURT: They didn't do all the spec
19 analysis?

20 MR. COLLINS: Right.

21 THE COURT: I'm with you.

22 MR. COLLINS: I knew you would have to
23 remember that.

24 THE COURT: Yeah. And I think we had motions
25 to compel last time, right?

1 MR. MARVEL: Correct, Your Honor.

2 THE COURT: And we ordered certain documents,
3 and what, did the CPA produce some names?

4 MR. GASKINS: That's correct, Your Honor.

5 THE COURT: What are we back for today?

6 MR. GASKINS: Your Honor, this is the
7 defendants' motion for summary judgment. The plaintiff
8 has also filed a motion for a partial summary judgment.

9 THE COURT: Has all that discovery been
10 complied with?

11 MR. GASKINS: Well, we filed a motion for
12 sanctions shortly after the order. It has been complied
13 with now -- well, partly as of today and as of Friday.

14 THE COURT: If it's now just complied with,
15 how can we have a summary judgment motion until these
16 people have an opportunity to look at it? I'm just
17 asking that question.

18 MR. MARVEL: I can answer that, Your Honor,
19 by saying my whole argument on the motion for -- or the
20 motion to compel was that the documents were being sought
21 were completely irrelevant to the case, and that still
22 remains the case, Your Honor.

23 THE COURT: That was your argument last time.

24 MR. MARVEL: I do not believe it affects the
25 motions for summary judgment.

1 MR. GASKINS: I do, Your Honor. I think the
2 documents we were requesting go more towards damages, and
3 we are seeking summary judgment on liability.

4 THE COURT: Just liability?

5 MR. GASKINS: Well -- well, no.

6 THE COURT: When you said partial summary
7 judgment, are you talking about duty, breach of duty and
8 causation, or just issue of damages? What are you
9 talking about?

10 MR. GASKINS: Well, our motion is based on, I
11 think, a number of factors beyond damages, including
12 liability. There are different causes of action.

13 THE COURT: I understand, but you said
14 partial summary judgment.

15 MR. GASKINS: They're moving for partial
16 summary judgment.

17 MR. MARVEL: We move for partial summary
18 judgment on counterclaims, Your Honor, and it would be
19 partial because we think the counterclaims should be
20 thrown out. We're not seeking summary judgment on the
21 whole case.

22 THE COURT: When you say -- are you talking
23 about partial as to the summary judgment? You're not
24 saying limited liability.

25 MR. MARVEL: Correct, Your Honor.

1 THE COURT: Okay. All right. Who's first?

2 MR. GASKINS: Your Honor, I'll go first. We
3 filed our motion for summary judgment first, so you
4 recall the basic facts of the case.

5 THE COURT: I remember basic facts about the
6 airplane.

7 MR. GASKINS: It was a Pilatus PC-12, and it
8 was owned by an entity called PPC12.

9 THE COURT: How many people, six, eight?

10 MR. GASKINS: Eight people with cargo, single
11 engine.

12 THE COURT: Okay.

13 MR. GASKINS: That aircraft was owned by and
14 entity called PPC12, LLC, and that entity was originally
15 found in 2007 by Gordon Lovingood, the plaintiff, and
16 codefendant Victor Apat, and at that time they both owned
17 50 percent of the plane and were responsible for 50
18 percent of the expenses.

19 The plane was financed with a loan from
20 Cessna Finance. Mr. Lovingood was the guarantor under
21 the note. The recession hit --

22 THE COURT: Was he the only guarantor?

23 MR. GASKINS: Mr. Lovingood is the purported
24 guarantor.

25 THE COURT: The only one?

1 MR. GASKINS: Yes, sir. And the recession
2 hit, and Mr. Apat and Mr. Lovingood, they don't use the
3 plane much. They're struggling to keep up with the fixed
4 expenses of the plane, including the financing, the
5 management, the cost of maintenance and repair, hangers,
6 and so forth, and they began to recruit new members.

7 And those members that they recruited are my
8 clients, Mr. Eric Wade, Anthony McAllister --

9 THE COURT: You say members. To do what?

10 MR. GASKINS: They were joining PPC12, LLC as
11 members of the LLC.

12 THE COURT: And what was that for?

13 MR. GASKINS: Well, that may be in some
14 dispute, but I think most of the other facts are not, but
15 what the operating agreement did is they all bought in
16 for different shares. Mr. McAllister --

17 THE COURT: They gave him a percentage of the
18 plane, or what were they buying into?

19 MR. GASKINS: Well, they were buying in to
20 use the plane, to have the right to use the plane, at a
21 reduced cost.

22 THE COURT: Okay. So they were just getting
23 so many hours?

24 MR. GASKINS: They got a certain number of
25 hours, and they were responsible for paying for the use

1 of that, and also for their respective shares of the
2 aircraft.

3 THE COURT: But they didn't get any ownership
4 of the plane itself.

5 MR. GASKINS: Well, I think there's different
6 testimony about that, but the operating agreement -- I
7 think the operating agreement does provide that they had
8 ownership in the entity, and the entity had the ownership
9 interest in the aircraft, but they did not agree to --

10 THE COURT: Ownership in the LLC. That was
11 just assets of the LLC, is what you're saying.

12 MR. GASKINS: Correct.

13 THE COURT: Okay. That was just assets of
14 the LLC, is what you're saying.

15 MR. COLLINS: Correct. None of them agreed
16 to become guarantors on the debt or become personally
17 responsible for PPC12's debts. Mr. McAllister and Pearl
18 Co SC got a respective 25 percent interest, and they had
19 to pay an initial contribution of \$40,000 apiece, and
20 then after that they would pay for the fixed expenses.

21 Mr. Wade paid an initial contribution of
22 \$20,000, and he had a 12.5 percent share and the other
23 members have a reduced interest as a result of my
24 clients' entry into the LLC. At the time that my clients
25 joined the LLC, there were representations made that

1 their money that they were putting into the plane would
2 be used to upgrade the avionics and also to create engine
3 reversion.

4 So my clients join in the LLC and the parties
5 amended the operating agreement between Mr. Apat and Mr.
6 Lovingood, and it was a pretty basic operating agreement,
7 and we would provide a lot more detail.

8 THE COURT: Were they going to use this plane
9 as a charter plane? Were they going to fly it
10 themselves? Are they pilots or what?

11 MR. GASKINS: No. The aircraft, the PPC12,
12 had contracted with a managing agency who took care of
13 the plane, managed the plane on a day-to-day basis, and
14 they also --

15 THE COURT: So your client can call up and
16 say, I want to go to Phoenix next week, and they'd take
17 them?

18 MR. GASKINS: As long as the plane wasn't
19 booked by another member or the plane wasn't reserved on
20 a charter.

21 THE COURT: So your client didn't have a
22 pilot's license where he could go get in the plane and
23 fly to Phoenix?

24 MR. GASKINS: It's not my understanding --
25 well, Mr. Lovingood may, but no, none of my clients have

1 a pilot's license and could fly the plane personally. It
2 was managed by a group called East Shore Aviation which
3 had the management contract which was part of the fixed
4 expenses, and East Shore Aviation also had an arrangement
5 with PPC12, LLC where they can lease the aircraft and
6 charter it under their charter certificate, but beyond --
7 the charter operations didn't produce a lot of income.
8 It was more of a way to offset some of the expenses.

9 The plane really didn't charter very much.
10 Mr. Apat and Mr. Lovingood weren't using it very much;
11 hence the entry of my clients into this LLC. The
12 members -- the parties to this case entered into this
13 operating agreement, and I think there are some key
14 provisions in the operating agreement that are pertinent
15 to my motion here today.

16 First of all, section 3.5 of the operating
17 agreement provides that no member is personally liable
18 for the debts of PPC12. Sections 3.6 and 3.7 address the
19 members' obligations to pay for the fixed expenses of the
20 aircraft, but it come provides no penalties if you don't
21 do that, except you don't get to use the plane, and
22 that's the only provision that addresses a member's
23 failure to pay fixed expenses.

24 And then there's -- the operating agreement
25 contains no provision requiring the members to indemnify

1 each other for anything. It's completely silent on that
2 issue amongst the members, and, I think, most
3 importantly, the operating agreement has no provisions
4 regarding dissociation from the LLC, how a member would
5 withdraw from the LLC, so the members all entered into
6 this operating agreement.

7 My clients become members, and almost
8 immediately after they become members and pay their
9 initial contributions, they find out that their money is
10 being used, or what appears to be their money that is
11 coming -- now coming into the LLC is being used to pay
12 delinquent taxes and other past bills so that leaves a
13 bad taste in my mouth.

14 Also, when they entered into the LLC, Mr.
15 Lovingood made it clear that he wasn't using the plane.
16 He wanted to get out. He no longer wanted to be the
17 guarantor under the note, so they worked together to try
18 to refinance the claim. My client waived fines, a lender
19 who was willing to provide some financing, but not enough
20 to cover the outstanding balance owed to Cessna Finance.

21 So my clients are in an LLC with an
22 underwater claim, members they don't trust because they
23 feel their money has been misappropriated for past debts,
24 which were not disclosed to them when they were joining
25 the LLC, and they start planning an exit strategy. They,

1 along with other individuals who were not parties to this
2 lawsuit and who were not members of PPC12, LLC begin
3 looking for a plane in the spring -- late spring, early
4 summer of 2012.

5 Ultimately, this group finds an aircraft that
6 they want to buy -- and during this whole time, they're
7 still members of PPC12, LLC. They're still paying their
8 bills. They're still paying their expenses, unlike the
9 other members of the LLC who were delinquent.

10 But they ultimately find this aircraft, which
11 is also a Pilatus PC-12, but a newer version, and they
12 decide to buy that aircraft, and they form another
13 LLC with them and a couple other individuals to buy it,
14 and I think ultimately they buy it around September --

15 THE COURT: What do they buy?

16 MR. GASKINS: Another Pilatus PC-12, just
17 another version, maybe a little more bells and whistles.

18 So they form this new LLC, CP Aviation, and
19 they purchase it in or around September of 2012 and have
20 the plane shipped over from England, and this is where it
21 gets interesting amongst the members and why we're here
22 today.

23 On or about September 4, 2012, one of the
24 defendants, my client Eric Wade, called Mr. Lovingood,
25 lets him know -- and there is some dispute about what was

1 said in this conversation, and I don't think the dispute
2 really matters to the issues in this case because there
3 is other evidence.

4 There is some dispute about what is said, but
5 Mr. Lovingood, in his deposition, admits that Mr. Wade
6 told him that my clients were buying another plane and
7 going in another direction. That's the deposition
8 testimony, and I asked him what the response to that was,
9 and I can quote it for you because I think it's a pretty
10 clear indication of what Mr. Lovingood understood
11 Mr. Wade to be telling him, even under his version.

12 He told Mr. Wade, if you drop out and leave
13 me alone in this situation, I'll sue the shit out of you.

14 So it's our contention that our clients
15 associated during that phone call, but we realized that
16 there may be a dispute of fact about what was said during
17 that phone call, but I think the real key evidence in
18 this case, and it's in the materials that we provided, is
19 an e-mail that was sent from the management to Mr. Apat
20 and Mr. Lovingood on October 22nd, 2012, and I'm going to
21 quote to you what Mr. Gibbons of East Shore Aviation
22 wrote to Mr. Lovingood and Mr. Apat. This is Mr. Gibbons
23 speaking.

24 Quote: We were only recently informed by the
25 other members that they notified you by phone of their

1 intention to leave PPC12 effective October 1st.

2 This is October 22nd, 2012. He's stating in
3 the e-mail that notice was provided effective October
4 1st. Those members had not used the aircraft since that
5 time and are current with their financial obligations,
6 and I asked Mr. Lovingood about this e-mail during his
7 deposition.

8 He admitted receiving it and that there were
9 several times in his deposition where he expressed that
10 it was those numbers, my client's intent, to withdraw
11 from the company or leave the LLC, and those excerpts are
12 cited in my memo which we provided to you last week in
13 hard copy. And then, unfortunately for Mr. Lovingood,
14 about a week later, October 28th, 2012, the aircraft
15 suffers a catastrophic failure, and you heard a little
16 bit about the incident the last time, but the plane had
17 just taken off from Peachtree Dekalb airport in Atlanta,
18 had to make an emergency landing, landed safely, but the
19 plane was inoperable and had to stay there in Atlanta.

20 Now, after that incident, the pilot let Mr.
21 Lovingood know. Mr. Lovingood never called my clients.
22 He then at that point took over management of the
23 aircraft from East Shore Aviation, didn't consult my
24 client about that. He then had to, with him and his
25 lawyers, had to negotiate with the engine manufacturer to

1 get the repairs to the aircraft. He did not involve my
2 clients in the negotiations with the engine manufacturer,
3 Pratt Whitney.

4 At some point, they came to some agreement
5 about how they would repair the aircraft, and he had
6 those repairs made, among others, by a group called Epps
7 Aviation in Atlanta. Never consulted my clients about
8 those repairs, approved those repairs, and what is
9 interesting is under the operating agreement, all
10 expenditures over \$1,000 have to be approved by 75
11 percent of the membership. He never consulted them once.

12 He then, after the repairs were made, sold
13 the plane and ultimately after the engine was repaired,
14 he ended up basically breaking even, making a little bit
15 of money over what was owed under the note to Cessna
16 Finance. Never consulted my client about selling the
17 plane. It's a decision he made on his own.

18 And then at that point, while he's not
19 communicating with my clients they're in this other
20 aircraft, haven't heard from Mr. Lovingood, haven't heard
21 from Mr. Apat about the aircraft. They're managing their
22 aircraft, but it's not until February of 2013 that they
23 utilize the new CP Aviation aircraft for charter flights,
24 and the PPC12 aircraft was taken off the charter
25 certificate in December of 2012. So they never competed

1 with each other for the charter flights. In fact, the
2 PPC12 aircraft couldn't compete because it was grounded
3 in Atlanta, couldn't fly.

4 So Mr. Lovingood, either in conjunction with
5 or through another entity that he owns called C-3
6 Investments, Incorporated, paid for the cost of the
7 repairs to the aircraft and I think negotiated with
8 Cessna Finance to pay the interest on the note while it
9 was being repaired and grounded, and it appears that C-3
10 investments and/or Mr. Lovingood made those payments and
11 then they filed this lawsuit against my clients and Mr.
12 Apat for -- on three claims: One, contractual indemnity;
13 two, equitable subrogation; and, three, breach of
14 fiduciary duty.

15 And, Your Honor, we think we are entitled to
16 summary judgment on all those claims, and the reason why
17 is, first of all, under the contractual indemnity claim,
18 my clients had clearly expressed their intent to
19 disassociate from PPC12, LLC prior to the aircraft --

20 THE COURT: Is it in the contract?

21 MR. GASKINS: Is what in the contract?

22 THE COURT: Indemnification.

23 MR. GASKINS: There is no indemnification
24 amongst the members. There is a provision that allows
25 the members to seek indemnification from the company, but

1 not amongst each other, and I think it's very important
2 to remember that the C-3 Investments --

3 THE COURT: I thought you said there was
4 something in the contract that said they would split the
5 cost of the plane.

6 MR. GASKINS: There is a provision that says
7 that each member is responsible for the fixed portions to
8 their interest, but there is no penalty in that except
9 for suspension of the member's usage, but there is no
10 provision for contractual indemnity among the members.

11 THE COURT: Okay.

12 MR. GASKINS: So that's on one ground that we
13 think we're entitled to summary judgment on the
14 contractual indemnity claim, and with regards to C-3
15 Investments, that entity should have no claim for
16 contractual indemnity because it was not a member of the
17 LLC. It was not a party to the operating agreement, so
18 there was no contract between C-3 Investments and my
19 clients.

20 And then also, even if there was some
21 provision that could be construed to give Mr. Lovingood
22 or PPC12 a right to contractual indemnity for my clients
23 that it wouldn't matter because my clients clearly
24 disassociated under the governing statute. As I
25 mentioned earlier, the operating agreement is completely

1 silent on dissociation.

2 THE COURT: Did they follow the statute?

3 MR. GASKINS: The operable statute is code
4 33-44-601, and that code section provides, If
5 dissociation occurs -- and this is my language, and I'll
6 tell you when I'm quoting -- dissociation occurs among
7 other ways as a result of, quote, the company's having
8 notice of the members' express will to withdraw upon the
9 date of notice or on a later date specified by the
10 member, and then 33-44-602 provides that, quote, unless
11 otherwise provided in the operating agreement, a member
12 has the power to dissociate from a limited liability
13 company at any time, rightfully or wrongfully, by express
14 will pursuant to section 33-44-601 subsection 1, which is
15 the one I just read to you.

16 And, clearly, as of October 22nd, 2012, the
17 company and all members had notice that my clients had
18 express will to withdraw from the limited liability
19 company, and that is just disputed. Mr. Lovingood in his
20 deposition testified that yes, I received this e-mail,
21 and that was their intent.

22 Now, he goes on to say in his deposition,
23 well, they should have done more. What, it's not clear,
24 but it doesn't matter because the statute is clear. You
25 don't have to provide it in any manner or in any form.

1 You don't have to provide it in writing. If the company
2 has notice of the express will, the dissociation is
3 affected and that is clear under the statutes that I just
4 cited. So we think we are entitle to summary judgment on
5 the contractual indemnity claim.

6 Secondly, there's a breach of fiduciary duty
7 claim as well, and under the LLC statute -- and there is
8 some debate about whether this is a member managed LLC or
9 a manager managed LLC. And at this stage in our motion
10 for summary judgment, we're going to assume it's a member
11 managed LLC because that's what the plaintiff has
12 alleged, and if it's a manager managed LLC, there is no
13 fiduciary duty.

14 But with regards to a member managed
15 fiduciary duty, the LLC statute provides that the only
16 fiduciary duty that a member of a member managed LLC owes
17 to the company and other members is a duty of loyalty,
18 which includes the duty, quote, to refrain from competing
19 with the company in the conduct of the company 's
20 business before the dissociation of the company.

21 So under its plain terms, it only prevents
22 competition. My clients never competed with PPC12, LLC.
23 Even if you assume that they didn't properly
24 disassociate, even if you assume they were still members
25 of PPC12, they didn't compete. What they did was they

1 took steps to own another aircraft.

2 Mr. Lovingood says, There is nothing wrong
3 with owning another aircraft. He, in fact, admitted that
4 he owns another aircraft, so there's nothing in the
5 operating agreement, nothing under the statute that
6 prohibited them from owning another aircraft.

7 Now, in February of 2013, yes, they started
8 charter operations with their new aircraft, but at that
9 point, the PPC12 aircraft was grounded. It wasn't
10 flying. It was already off the charter certificate, so
11 there was no competition, and even if there was
12 competition, the damages that Mr. Lovingood and C-3
13 Investments are seeking are not the proximate result of
14 any competition that they may have engaged in.

15 Their damages are relating to the repairs of
16 the aircraft and the carrying costs for financing, so
17 those are totally separate damages than what could arise
18 from wrongful competition in violation of some fiduciary
19 duty of loyalty, and I asked Mr. Lovingood about this in
20 his deposition.

21 I said, Assume that my clients did everything
22 they said they would do in regards to breaching their
23 fiduciary duties... They held these meetings; they found a
24 plane; they went out and found a plane and engaged in
25 charter operations, but let's assume that they also

1 continue to pay whatever expenses you believe were their
2 obligations under the operating agreement.

3 And his response is: We probably wouldn't be
4 sitting here today because those damages that he admits
5 he is seeking in this lawsuit has nothing to do with any
6 violation of any fiduciary duty, so even if you do find
7 that they breached their fiduciary duty, one, plaintiff
8 cannot establish any damages.

9 And then last, with regards to the claim for
10 equitable subrogation, that claim also fails as a matter
11 of law, and I cite specifically to the -- I think it's
12 Kuznik -- I may be mispronouncing that, but Kuznik versus
13 Bees Ferry claim that deals with the claim of equitable
14 subrogation, and what the law holds is that under
15 equitable subrogation, one who pays the debt on behalf of
16 another only steps into the shoes of the original
17 creditor.

18 So in this case, the original creditor would
19 be Cessna Finance and Epps Aviation. To the extent that
20 they can be considered creditors, I think certainly
21 Cessna Finance could be considered a creditor of PPC12
22 but they only had rights or claims against PPC12, LLC,
23 not against the individual members, and the operating
24 agreement is clear on that.

25 It says that no members are partially liable

1 for the debts of PPC12. My clients never signed anything
2 guaranteeing the debts of PPC12. They never signed a
3 guarantee. They didn't have any personal liability. So
4 the original creditor, it would have been impossible for
5 them to recover against the individual members, and if
6 you look at the case of Kuznik v. Bees Ferry, the point
7 of that discussion and that portion of the case is
8 directly applicable here in that when the partner sued --
9 one partner sued some other partners for debts that he
10 paid off, and the Court said, No, you can't do that under
11 equitable subrogation because it was a non-recourse note.
12 The owner of the note had no recourse with the other
13 partners; therefore, that claim fails, and that is almost
14 exactly what we have in this case..

15 So on all those grounds, we believe that we
16 are entitled to summary judgment on everything based on
17 all the arguments and facts that I just read to you, and
18 I would reiterate that with regards to C-3 Investments
19 they certainly wouldn't have a claim for contractual
20 indemnification or breach of fiduciary duty.

21 THE COURT: Okay. Thank you very much.

22 MR. MARVEL: Your Honor, I've got a lot of
23 documents here. I request your permission -- I got a lot
24 of documents that I may refer to and I beg the Court's
25 indulgence to argue from the table.

1 THE COURT: That's fine.

2 MR. GASKINS: Your Honor, the only thing I
3 would say is none of these documents have been submitted
4 to the Court in response to the motion for summary
5 judgment or the memo deposition excerpts.

6 MR. COLLINS: Not a single one of them.

7 THE COURT: He's asking to stand at the
8 table. I gave him permission to do it. Go ahead.

9 MR. MARVEL: And, Your Honor I apologize for
10 not filing a motion. This is one of the rescheduled
11 hearings from the flood week, and I'm in bankruptcy court
12 and have proceedings starting tomorrow, so I have been
13 kind of focussed on that. I have not filed a memorandum.

14 What I would says is that I think the Court
15 can here at least one of the causes. These are documents
16 that -- we're talking about deposition transcripts that
17 the defendant has just referred to. I'm just pointing
18 out the different aspects of it -- the documents are
19 deposition transcripts that the defendant has already
20 cited to you and operating agreements and things that the
21 defendant is actually relying on. They're not new
22 submissions.

23 And, Your Honor, I guess, to start, just to
24 give the Court a little better overview of what it was,
25 it's not correct to say Mr. Lovingood was the only

1 guarantor on the note. It is correct to say that none of
2 the defendants were also guarantors on that particular
3 note as applied to Cessna Finance, but the two
4 guarantors -- and the reason why the case is styled as it
5 is, is both Mr. Lovingood personally and his company, C-3
6 Investments, Incorporated -- he's a real estate developer
7 and a preferred developer for certain drugstore chains.
8 So those properties are owned by C-3 Investments,
9 Incorporated, and, therefore, Cessna Finance wanted C-3
10 Investments to also be a guarantor as a corporate entity
11 as well as Mr. Lovingood.

12 The ultimate repair costs were paid through
13 C-3 Investments, Incorporated. So to the extent they
14 paid the repair costs that should have been paid by the
15 other members I certainly think that chain is not
16 necessarily directly toward the other members; however,
17 C-3 Investments as the guarantor has that right to make
18 that claim against PPC12. I will point to Your Honor
19 that the operating agreement, the applicable provision of
20 the operating agreement, states very clearly: Members
21 shall pay the applicable aircraft fees and charges
22 representing the fixed and various expenses as set forth.

23 Your Honor, the members themselves clearly
24 had a duty under the operating agreement to pay for what
25 is essentially maintenance and repairs of the aircraft

1 and ongoing contributions toward the note. I'll also
2 note from the operating agreement, Your Honor, it's a
3 somewhat unusual situation because of the way these
4 members came into it, but this is Section 4.3 of the
5 operating agreement, and it states: PPC12, LLC
6 acknowledges that C. Gordon Lovingood, Jr. is the
7 guarantor on the loan in establishing the following, and
8 there's a number of different things that are cited
9 underneath there.

10 The company is supposed to provide evidence
11 to Mr. Lovingood that the monthly payment has been made.
12 There are certain provisions in there that require a
13 balance to be kept that can be used to pay -- an ongoing
14 balance can be used to pay the note in the event that
15 members don't contribute. The ability of Mr. Lovingood
16 to sell market claims for sale and proceed to a
17 consummation of the sale once the other members default,
18 and, perhaps most importantly, is Section (f), Section
19 4.3(f) of the operating agreement: A member shall
20 endeavor to refinance the debt associated with the
21 ownership of the asset no later than January 1, 2014.
22 This may include negotiations with Cessna Finance or
23 related companies to reduce the outstanding debt. Mr.
24 Lovingood agrees with this process.

25 Now, that, essentially, is an acknowledgement

1 that was very important when this operating agreement
2 came together in that because Mr. Lovingood and C-3
3 Investments were the sole guarantors of the airplane, and
4 these other people, Mr. Gaskins's clients, came into it
5 later just as members, it was important to have that
6 obligation in there because Mr. Lovingood wanted
7 everybody to recognize that he did not intend and had no
8 intention and no thought of the idea that he was going to
9 continue to be the sole guarantor. Those were supposed
10 to pursue refinancing the claim.

11 What they ended up doing and what the
12 testimony found is that Mr. Wade called his banker at TD
13 Bank. They came over. Mr. Wade gave them -- didn't have
14 a survey done of the airplane. They didn't have any sort
15 of cost basis. Mr. Wade gave them what they thought the
16 value of the airplane was. They made an offer to
17 refinance, but they wanted a cash input into getting
18 equity from the plane. There's some dispute about this,
19 but my clients' position would be the plane wasn't
20 actually under water, but it was going to require
21 somebody to do 100 percent financing on it.

22 TD Bank wanted equity, and every witness has
23 testified, every defendant has testified, that that was
24 the only pursuit they ever made to pursue any other
25 financing of that, but, clearly, the intent of the

1 operating agreement was to get Mr. Lovingood off of the
2 note.

3 The intent of this agreement is to allow for
4 the reduction of the ownership position for C. Gordon
5 Lovingood to 1 percent, that he was going to go from what
6 was originally 50 percent down to 1 percent, and Mr.
7 Gaskins's clients were willing to give people who
8 assisted with that their money, that it was going to make
9 them the owners of this aircraft because that was going
10 to be their membership interest in the PPC12.

11 I will also note that the operating agreement
12 is very explicit in that it requires that no action be
13 taken to place Mr. Lovingood in default of the note. The
14 position in response to what TD Bank said, Mr. Wade
15 apparently went to Mr. Lovingood and said, Can you call
16 Cessna Finance and see if they would agree to waive some
17 of the principal or something? Certainly, he would be in
18 default of the note for doing that.

19 Mr. Lovingood wasn't interested in pursuing
20 that. That wasn't the deal. The deal was they were
21 supposed to find financing somewhere. They were supposed
22 to get Mr. Lovingood off of the note, and then his input
23 in the airplane at that point would be down to 1 percent.

24 Now, Your Honor, I guess it begs the question
25 of if the defendants dissociated, how does that affect

1 their requirements under the operating agreement? It
2 clearly states that they have to pay the variable
3 expenses of the aircraft.

4 Your Honor, we would say they clearly did not
5 comply with the statute. There is no provision in the
6 operating agreement that provides a specific way to
7 dissociate; however, there are provisions that say when
8 you dissociate when the aircraft is sold, you know,
9 there's going to be an accounting. There's going to be
10 termination. There's going to be winding up of all the
11 usual things that you do in the process of winding up an
12 LLC.

13 The statute itself, 33-44-601, says that a
14 member can and may dissociate by giving the company --
15 the company having express notice of the member's express
16 will to withdraw upon the date of the notice or a later
17 date specified. The only evidence that's been presented
18 to the Court, and it's presented in deposition, was an
19 e-mail from the aircraft manager stating that he had just
20 been informed that Mr. Wade and Mr. McAllister and
21 Mr. Pearlstein intended to withdraw from the LLC
22 effective three weeks prior.

23 Your Honor, that does not comply with the
24 statute. You can express your will to the company that
25 you plan to withdraw on a date or on a future date. You

1 cannot express your will to the company that you have
2 actually withdrawn three weeks prior to that date.

3 Now, more importantly, perhaps, is that that
4 e-mail is so ambiguous because all it said was that they
5 had expressed their intent to withdraw. They didn't say
6 they were actually withdrawing. They didn't indicate any
7 plan for winding up the LLC, didn't indicate any plan for
8 figuring out what the different members' different
9 distributional interests were. They didn't make any plan
10 provision whatsoever, and, in fact, the e-mail was sent
11 in response to Mr. Lovingood's e-mail to the aircraft
12 manager, saying, Hey, we need to have a meeting with
13 everybody so we can figure out what's going on with the
14 aircraft.

15 As it turned out, nobody at this time had any
16 idea what was going to happen six days later, which was
17 this catastrophic failure of the engine, but, in any
18 event, it wasn't clearly stated. It didn't comply with
19 the statute.

20 THE COURT: Well, what does the statute say
21 about the withdrawal? What does it say about the
22 liabilities at the time of the withdrawal under the
23 agreement? You said that the had obligations for fees,
24 charges, and the repairs. I mean, does the statute say
25 you can just withdraw and walk away from those

1 obligations?

2 MR. MARVEL: It does not, Your Honor.

3 THE COURT: What does the statute say? And
4 we're not really talking about -- I guess dissolution,
5 really. I mean, the LLC hasn't been dissolved. I
6 understand. There's no dissolution agreement, but does
7 the withdrawal of the partners mean they just walk away?

8 MR. MARVEL: We don't believe so, Your Honor.

9 THE COURT: What does the statute say? I'm
10 just asking a question because I don't know.

11 MR. MARVEL: I would say the statute is
12 silent as to this particular situation.

13 THE COURT: I just can't comprehend why -- if
14 I'm in an LLC and the LLC owes \$100,000 and I send you a
15 dissolution or I say I'm going withdraw from the LLC two
16 months from now, that means I don't owe any of my portion
17 of the 100,000?

18 MR. MARVEL: I 100 percent agree with you,
19 Your Honor. I'll take it even one step further, because
20 what we are talking about is not -- the operating
21 agreement has a provision that limits the members'
22 liability on torts, contracts, et cetera, which I think
23 is consistent with the ability to do that in the LLC act;
24 however, that provision has been completely misconstrued
25 in this motion because that just means a contract to a

1 party, for example, the East Shore Aviation Management
2 contract.

3 That's not what we're suing over that. We're
4 suing over the members' contributions to the LLC that
5 were made by my client who is also a member of the LLC on
6 behalf of LLC which he's clearly allowed to, Your Honor,
7 as to -- let me find it.

8 Unless otherwise provided in the operating
9 agreement, the company, its receivers, or its trustees
10 shall indemnify members and officers from all liabilities
11 and expenses, including reasonable attorneys' fees,
12 incurred by such member or officer in the ordinary course
13 of the business of the company or for the preservation of
14 the company's business for property. That is exactly
15 what my clients did.

16 MR. GASKINS: What was that?

17 MR. MARVEL: This is 8.2(c), and I will also
18 point out to the Court that 8.2(b) says: Each member and
19 officer shall perform his or her duties as members or
20 officers by refraining from engaging in gross, negligent
21 or reckless conduct, intentional misconduct, or a knowing
22 violation of law in acting consistently with the
23 obligation of good faith and fair dealing. A person who
24 so performs such duties shall not have any liability to a
25 member or to the company by reason of having -- being or

1 having been a member or officer of the company.

2 Our argument is that they clearly engaged in
3 a knowing violation of law by setting up a competing LLC.
4 They also violated the duty of good faith and fair
5 dealing by walking away from this aircraft when it was
6 obviously in bad need of some repair, and then when the
7 engine failure happened, leaving Mr. Lovingood and C-3
8 Investments as the only entity that could make --
9 effectuate and make those repairs and pay for them, and
10 that is exactly what happened, which is that my client,
11 Mr. Lovingood, is a member who incurred these expenses in
12 the ordinary course of the business of the company and
13 for the preservation of the company's sole profit.

14 Now, as to the -- this is a little bit
15 circular, but it applies to Mr. Gaskins's last argument,
16 is that the LLC Act very clearly says that a member may
17 not -- it's non-waiveable provision, and you cannot
18 engage in competition with an LLC that you are a member
19 of already. Now, this LLC was set up for the purpose of
20 doing one thing: The purpose of the company is to engage
21 in aircraft operations, including but not limited to air
22 transportation, aircraft ownership, aircraft charter
23 pursuant to part 135 of the federal aviation regulations,
24 and to carry on any other lawful business or activity in
25 connection with the foregoing or otherwise.

1 So that is exactly what CP Aviation, which is
2 Mr. Wade and Mr. McAllister and Mr. Pearlstein's other
3 LLC, that's exactly what it does.

4 THE COURT: What's the purpose of that new
5 LLC, do you know?

6 MR. MARVEL: I don't, Your Honor. They
7 haven't produced a copy of the operating agreement.

8 THE COURT: So you don't know what's in the
9 operating agreement of the new LLC.

10 MR. MARVEL: I don't know what's in the
11 operating agreement. I will say that every single one of
12 those defendants has testified that what their new
13 LLC does is exactly that. It owns a Pilatus PC-12 that
14 is exactly like the one that we're arguing about here.
15 It carries the same people virtually. They have the same
16 management company. They operate out of the same hanger.
17 They use the same part 135 certificate to seek charter
18 operations.

19 They are engaging in exactly the business
20 that CP Aviation, LLC as PPC12, LLC. Clearly, that is
21 competing with your own LLC. It's a fiduciary duty
22 that's in the statute. It's non-waiveable. I will note
23 that the statute allows for an operating agreement to
24 define what reasonable competition is, that the nature is
25 not to take advantage of that, and it's -- you know,

1 perhaps -- I know we do this in real estate LLCs all the
2 time, and we'll put a definition in that says that owning
3 a piece of property in some other LLC is not competing
4 with this particular LLC.

5 That way, if you've got three or four people
6 who are members of an LLC that is the property of an LLC,
7 those members can be members of other LLCs that also own
8 property, but you have to put that in the operating
9 agreement. There's nothing that allows any of the
10 members of PPC12 to go by virtually the same aircraft,
11 operate exactly the same business, and then what they did
12 was wholly abandon PPC12 in order to continue what they
13 were doing.

14 If they had not competed, if they had not
15 gone across the world to buy the same aircraft and bring
16 it back to the same hanger, then their obligation would
17 have been pretty clear. They would have all been
18 standing around the phone that day when the PPC12
19 aircraft failed, trying to figure out how quickly they
20 can get it fixed, who they were going to get to do it,
21 what Pratt Whitney was going to do, because they were
22 flying an aircraft. Instead, they went and bought their
23 own aircraft and competed with their own LLC.

24 So on that, we would say that the members,
25 Mr. Wade and Mr. McAllister and Mr. Pearlstein, cannot

1 take advantage of the limitations provisions inside the
2 operating agreement because they violated the duty of
3 good faith and fair dealing and they engaged in knowing
4 violation of the act.

5 THE COURT: Okay. Who's next?

6 MR. COLLINS: Judge, I think I probably
7 should say something. I've got a client that has not
8 been implicated in most of what you heard about.

9 THE COURT: He's not involved in the new
10 plane?

11 MR. COLLINS: No, sir, he's not. He was
12 involved with the old plane, and I think the record is
13 pretty clear he was a little behind on his contributions.

14 So I'm in a little different position. I
15 don't have all those allegations being thrown at me,
16 which is why I don't have the memos and all that stuff in
17 front of me. I didn't file a motion with them. I got in
18 a little different category, and, quite frankly, I wanted
19 to see what happened today before I waste my client's
20 money and time to file a motion, so that's why I'm
21 sitting here just kind of watching, spectating today,
22 because I'm in a little different category than the other
23 guys.

24 THE COURT: Very briefly.

25 MR. GASKINS: Yes, Your Honor very briefly.

1 THE COURT: Let me say this: I don't think
2 you can sit there and say to the Court that because this
3 plane engine failed in Atlanta they didn't have any
4 competition. I just don't follow the argument, but that
5 is just sort of reversing what's in the agreement.

6 They couldn't compete because the engine
7 wasn't working, that's not what we're talking about. I
8 don't buy that argument at all.

9 MR. GASKINS: Even if you accept that
10 argument, Your Honor, what were the damages from that
11 competition?

12 THE COURT: Well, I don't know, but I assume
13 the damages are what it cost to fix the airplane and sell
14 it and what they lost on the sale, I assume. I don't
15 know. Nobody has addressed that. I'm just making that
16 assumption.

17 I don't know what the damages are, because it
18 hasn't been addressed, but I would assume whatever it
19 cost to repair the engine and sell it, if there was a
20 loss of the sale, that is going to be the damage. I
21 don't know.

22 MR. GASKINS: I don't think that's right
23 because --

24 THE COURT: What are they asking for in
25 damages?

1 MR. GASKINS: The damages they're asking
2 for -- and this is very important: The damages that they
3 are asking for are the expenses to repair the plane that
4 occurred after October 28th, 2012 and the carrying costs
5 on financing the plane after October 28, 2012. I think
6 that's very important.

7 THE COURT: I just said damages to repair the
8 plane.

9 MR. GASKINS: Well, the reason I say that is
10 because I think my clients clearly dissociated prior to
11 October 28, 2012. At that point, they were no longer
12 responsible for the future expenses of the aircraft, and
13 I want to correct Mr. Marvel. He said the only evidence
14 that they dissociated was this one e-mail on October
15 22nd, and that's just not true, Your Honor. The evidence
16 is clear. Mr. Lovingood testified --

17 THE COURT: From your perspective when they
18 did associate?

19 MR. GASKINS: September 4, 2012, effective
20 October 1st.

21 THE COURT: October 1st.

22 MR. GASKINS: Mr. Lovingood admits that phone
23 conversation occurs. He admitted --

24 THE COURT: So that's when you're saying the
25 dissociation occurred, right?

1 MR. GASKINS: That's right, Your Honor.

2 THE COURT: All right. What do you think
3 their obligations were up until that point?

4 MR. GASKINS: I think, up until that point
5 when they gave notice that they would be members through
6 October 1st, their obligations were to pay the expenses
7 through their dissociation.

8 So if their dissociation became effective
9 October 1st, they were not responsible for the future
10 fixed expenses of the aircraft, including the repairs and
11 including the financing costs, and I want to talk about
12 that evidence because there's a lot of evidence, and
13 there's no evidence to the contrary, that on September
14 4th this phone conversation was had in that Mr. Lovingood
15 said, If you leave me in this plane alone, I will sue the
16 shit out of you, and then --

17 THE COURT: I don't think that amounts to
18 anything. That's just some hot air. I mean, I don't
19 think that amounts to anything as far as summary judgment
20 motion is concerned, okay?

21 So you're saying you don't think there's any
22 future expenses owed or repairs, financing costs after
23 October 1, is that right?

24 MR. GASKINS: Correct, Your Honor.

25 THE COURT: What did he owe prior to October

1 1?

2 MR. GASKINS: Well, whatever the fixed
3 expenses were.

4 THE COURT: I know, but how can you get out
5 of summary judgment if he owes some money that's in
6 dispute?

7 MR. GASKINS: I don't think that's in
8 dispute. They are completely paid up through October
9 1st.

10 THE COURT: Is that correct, they're paid up
11 through October 1, 2012?

12 MR. MARVEL: The management company would
13 have send an invoice out through there, and through the
14 management company's records, I believe that each of
15 their defendants were caught up.

16 THE COURT: So they were caught up October
17 1st, 2012?

18 MR. MARVEL: At some point they got caught up
19 on what was at that time the fixed, invariable expenses
20 of the aircraft, which the way it's figured out, Your
21 Honor, is there was a certain number that was everybody's
22 contribution to the note to Cessna Finance, and it wasn't
23 that they bought in a specific hour or specific number of
24 hours they could use on an airplane, they used it as much
25 as it was available, as much as they wanted to, and they

1 they were billed every month for whatever their usage
2 was, so that would be their own personal expenses, and
3 then the fixed expenses, which are the note and the
4 ongoing maintenance, which I will throw in the variable
5 category.

6 THE COURT: They were current?

7 MR. MARVEL: They eventually became
8 concurrent through October 1st.

9 THE COURT: Okay. They became current. All
10 right.

11 MR. GASKINS: And, Your Honor, the evidence
12 in the record, this was in the October 22 e-mail from the
13 manager of the aircraft to Mr. Lovingood and Mr. Apat:
14 We were informed by the other members that they notified
15 you by phone of their intention to leave PPC12, LLC
16 effective October 1, period. Those members have not used
17 the aircraft since that time and are current with their
18 financial obligations.

19 And that's the evidence in the record, and I
20 don't think it's in dispute, Your Honor.

21 THE COURT: Okay. All right.

22 MR. GASKINS: And going back to your original
23 question about the competition, even if it was
24 competition, there were no damages because the -- the
25 damages have to be proximately caused by the breach.

1 These damages, the aircraft repairs, the
2 finances, they were going to occur anyway regardless of
3 whether my clients competed, so what damages would have
4 to flow from the competition? So if my clients are out
5 there marketing their charter flight and is taking away
6 money from PPC12, yeah, there's your damages, but that's
7 not the damages they're seeking. They're seeking the
8 damages that they want because my clients failed to pay
9 what they think they're owed under the operating
10 agreement, so there are two different types of damages.

11 And with regards to the other evidence of
12 when my clients dissociated, there's an e-mail that Mr.
13 Lovingood sent the day after, or the day of, he had the
14 phone conversation and dispute, saying, I just talked to
15 Eric. First I've heard about this. We need to have a
16 meeting.

17 He never tried to have another meeting. At
18 that point, my clients' e-mails were listed on the
19 October 22 e-mail. He never communicated with them
20 again. He didn't tell them the plane had catastrophic
21 engine failure. He didn't consult with them about what
22 repairs needed to be done. He didn't consult with them
23 about negotiating --

24 THE COURT: What difference does that make?
25 Your position is they were out of it. They dissociated,

1 so what difference does it make?

2 MR. GASKINS: I think that goes to what the
3 company knew, and did they know that my clients had
4 dissociated? If they didn't know, you're daggone right
5 they would have been calling him, trying to get this
6 money, but he knew. He knew they were out, and that's
7 why he didn't make the phone call. That's why he didn't
8 involve them in these discussions.

9 THE COURT: You're drawing that conclusion.
10 I don't know if that's the right conclusion or not. Go
11 ahead. Anything else?

12 MR. GASKINS: No, Your Honor. Well, yeah,
13 one other thing: The provisions that Mr. Marvel were
14 discussing regarding to dissociation don't exist. Those
15 relate to dissolution. It does govern dissolution, but
16 it's completely silent on dissociation.

17 THE COURT: This wasn't necessarily a
18 dissolution.

19 MR. GASKINS: And then the 4.3(g), which
20 talks about different remedies that Mr. Lovingood had
21 with the guarantor, I think those buttress our argument
22 that are limited to what's in the contract, but that
23 provision make very clear it did not go into effect until
24 Mr. Lovingood's ownership interest was reduced to 1
25 percent, so that discussion about 4.3(g) is completely

1 irrelevant in my opinion, Your Honor.

2 THE COURT: All right. Thank you very much.

3 MR. MARVEL: If I may?

4 THE COURT: What do you need to tell me that
5 you haven't already told me?

6 MR. MARVEL: I'd like to point out this is my
7 clients' testimony regarding -- it says -- this is
8 Mr. Gaskins question: Let's go back to the phone
9 conversation you had with Eric. He told you the partners
10 were going in a different direction, right?

11 Answer: That's all he said.

12 And he told you they were buying another
13 airplane?

14 THE COURT: Let me ask you this, talking
15 about your summary judgment motion: I mean, y'all
16 arguing about whether -- you've been arguing, I don't
17 know how long, an hour, however long it's been, about
18 whether you dissociated the LLC or not. You got one
19 position saying you have dissociated. He's saying that
20 you haven't dissociated.

21 Now, please tell me why that wouldn't be a
22 jury question in this case and summary judgment motion
23 should be denied. He's making that argument. He's got
24 his position he didn't think it was dissociation, you do.
25 So how can I be a fact finder on a summary judgment issue

1 when you're talking about a scintilla of evidence? His
2 scintilla says there was no dissociation; is that
3 correct?

4 MR. MARVEL: Correct, Your Honor.

5 THE COURT: How can I grant summary judgment?

6 MR. GASKINS: I would ask what that scintilla
7 is. He's arguing, but he's not pointing to facts. All
8 the facts say they were dissociated, but -- and that's
9 just one. Don't forget about the other two claims,
10 breach of fiduciary duty, which we don't think they can
11 establish damages, and then the equitable subrogation,
12 which I think clearly should be dismissed because I
13 mentioned earlier those -- whoever is seeking that claim,
14 the only exception to due to the original creditor, and
15 with regards to C-3, I think it's very important: C-3
16 was not a party to the operating agreement. C-3 was not
17 a member of PPC12, LLC, so there can be no contractual
18 claim there so that needs to be -- I think that's clear.

19 And then also with the breach of fiduciary
20 duty, there was no fiduciary duty owed to C-3 Investments
21 by my clients, so on those points, I would submit to Your
22 Honor that even if you find the fact question about
23 dissociation on those issues, there should be no issue of
24 fact.

25 THE COURT: All right. Thank you very much.

1 Did y'all file the memos downstairs?

2 MR. GASKINS: I did, Your Honor.

3 THE COURT: How long are they?

4 MR. GASKINS: I don't think it's that long,
5 Your Honor.

6 THE COURT: You could get me copies of those
7 memos out of the file?

8 MR. MARVEL: Can I be heard on our motion for
9 partial summary judgment on the countersuit? I can be
10 very brief on this one, Your Honor.

11 The counterclaims in their entirety, there
12 are five of them: There's a claim for fraud, a claim for
13 fraudulent concealment, a claim for constructive fraud, a
14 claim for negligent misrepresentation, and a claim for
15 breach of fiduciary duty against both Mr. Lovingood and
16 Mr. Apat, and the crux of all of those causes of action
17 is that at the time Mr. Wade became a member, there was a
18 back tax payment due.

19 He became a member in April of 2011. At that
20 time, nobody had paid the 2010 taxes, and at that time --
21 I don't know if there's full agreement on that, but the
22 bulk of the testimony is that Mr. Apat was in charge of
23 this. When Mr. Wade and Mr. McAllister and
24 Mr. Pearlstein came into this LLC, they made capital
25 contributions in the nature of \$100,000 total, and at

1 some point Mr. Apat directed Mr. Gibbons, who is the
2 aircraft manager with East Shore Aviation, to pay \$21,000
3 in taxes.

4 What is important about this from Mr.
5 Lovingood's standpoint -- so all of their causes of
6 action are that there was a misrepresentation, there was
7 fraud committed because nobody told Mr. Wade, Mr.
8 McAllister, and Mr. Pearlstein there were back taxes
9 owed, and, after they became members, Mr. Apat chose to
10 use the fair contributions to pay the back tax. All of
11 the testimony from each of --

12 THE COURT: You got a cross claim against
13 them?

14 MR. COLLINS: There are cross-claims between
15 us, Your Honor.

16 THE COURT: Okay.

17 MR. COLLINS: I don't know whether this is
18 the proper time to say this, but there's none of this in
19 the record. I received this motion for partial summary
20 judgment some time ago. There are no affidavits to
21 support any of this. There's no memo of law. There's no
22 deposition transcript. There's not one thing, and just
23 to show you how genuine issue of material facts come up,
24 Mr. Marvel has just testified that my client was one that
25 chose to use contributions from Mr. Gaskins's clients to

1 pay the back taxes.

2 THE COURT: Right.

3 MR. COLLINS: That's flat not right. My guy
4 wasn't the manager of this company. Is there more a
5 classic genuine issue of material fact? When the lawyers
6 sitting here arguing over motions can't agree, then it
7 doesn't get any better than that.

8 THE COURT: Okay. Thank you very much.
9 Anything else?

10 MR. MARVEL: Your Honor, we made our motion
11 on the basis of the deposition testimony, and I think
12 that Mr. Apat's disagreement about how that happened
13 isn't necessarily material to all this. The deposition
14 of Mr. Wade and Mr. McAllister --

15 THE COURT: Have you submitted them?

16 MR. MARVEL: I have copies here for you today
17 that I'm happy to submit to you. I think what we can
18 say --

19 THE COURT: I don't want the deposition.
20 I'll be happy to receive some excerpts.

21 MR. MARVEL: Okay. Thank you, Your Honor.

22 MR. COLLINS: And I'll have the opportunity
23 to respond.

24 THE COURT: Yes, sir, you will. Okay.
25 Anything else?

1 MR. MARVEL: That's it, Your Honor.

2 THE COURT: Thank you very much.

3 MR. COLLINS: We got one more.

4 MR. GASKINS: There was also a motion for
5 sanctions filed after both parties failed to comply with
6 your order.

7 THE COURT: I thought you said they had
8 complied.

9 MR. GASKINS: They complied partly. I still
10 don't have the name of the accountant. Mr. Collins
11 complied today. Mr. Marvel complied on Friday.

12 The reason I'm asking for sanctions is
13 because this is the third hearing for motion to compel.
14 My client has incurred over \$2,000. My client has
15 incurred over \$2,000. There was no excuse.

16 THE COURT: What do you not have?

17 MR. GASKINS: I have it all now.

18 THE COURT: You got it all now.

19 MR. GASKINS: Except for the name of the
20 accountant.

21 THE COURT: Who's got the name of the
22 accountant?

23 MR. COLLINS: I can shed some very, very
24 brief light on that. When we were arguing about this
25 last time, nobody in this room wanted to go out and find

1 out who got the tax returns done and all that kind of
2 stuff because nobody wanted to have their client fess up
3 and say, I was responsible for it.

4 If you remember, I volunteered to go get my
5 client to give me the name of somebody that he knew,
6 which he did. Unfortunately, the only one he knows is
7 the one that initially started it, and somewhere along
8 the line, apparently, the company that was managing this
9 aircraft went and got another accountant, and it really
10 seems ludicrous to me that six sophisticated businessmen,
11 including my client, can't produce the name of one
12 accountant that filed tax returns on their behalf.

13 Now, my client -- and as ludicrous as that
14 sounds, he did give me a number, which I sent on, of a
15 lady that was supposed to be doing an original, and she
16 was out of some funky -- Ridgeway, South Carolina or
17 something -- someplace that I've never heard of, and I've
18 lived here my whole life. I don't know where that is,
19 but as far as anyone after that, even my guy doesn't know
20 who it is.

21 MR. MARVEL: Your Honor, got a K-1 at the end
22 of every year from the LLC.

23 THE COURT: Let me say this to all of you:
24 If the name of the accountant is not produced by
25 somebody, all of you, I'm going to fine \$1,000 by 5:00

1 tomorrow, okay? It's ludicrous.

2 MR. COLLINS: I've already produced one.

3 THE COURT: I know. Do you all understand?

4 MR. GASKINS: Yes, Your Honor.

5 THE COURT: It's crazy.

6 MR. MARVEL: I agree, Your Honor.

7 THE COURT: Produce the name of the
8 accountant that filed the tax returns for the LLC by 5:00
9 tomorrow or it's going to cost all your clients \$1,000.

10 Am I clear? Your motion for sanctions is
11 denied. Have a good day.

12 - - -

13 (Whereupon, the proceedings were concluded.)

14 - - -

15

16

17

18

19

20

21

22

23

24

25

I, the undersigned Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 19th of October 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 13, 2016

Amanda K. Haffenden

Circuit Court Reporter

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

CASE NO. 2013-CP-10-5080

☐ Plaintiff

VS.

VICTOR APAT; ANTHONY MCALLISTER; J. ERIC WADE d/b/a CT TOURING; and PEARL CO. SC, LLC,
☒ Defendants.

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: David B. Marvel Kenneth G. Goode, Jr. PRENNER MARVEL, P.A. 636 King Street Charleston, SC 29403 Tel.: 843 722 7250 Fax: 843 722 7260	Defendant's Attorney: Trudy H. Robertson (S.C. Bar No. 64856) E. Brandon Gaskins (S.C. Bar No. 73274) MOORE & VAN ALLEN, PLLC 78 Wentworth Street P.O. Box 22828 Charleston, SC 29413-2828 Tel: 843 579 7038 Fax: 843 579 8738 <i>Attorneys for Defendants Anthony McAllister, J. Eric Wade d/b/a CT Touring, and Pearl Co., SC, LLC</i> David A. Collins P.O. Box 40578 Charleston, SC 29423 <i>Attorneys for Defendant Victor Apat</i>
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for Summary Judgment Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order – General Order of Reference I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☐ Plaintiff / ☒ Defendant <u>May 22, 2015</u> Date submitted	
SECTION III: Motion Fee ☒ PAID – AMOUNT: \$ 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

SCCA/233 (11/03)

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2013-CP-10-5080

2015
JUL
CL
BY

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

1516000

11-11-68

FILED
2015 MAY 22 PM 2:42
JULIE STRONG
CLERK OF COURT
BY _____
MOTION FOR
JUDGMENT

ina Rules of Civil Procedure, Defendants Anthony
and Pearl Co. SC, LLC (“Defendants”) move for
e is no genuine issue as to any material fact of
contractual indemnity, and equitable subrogation.
summary judgment on the following grounds:

contractual indemnity as a matter of law under the
defendants dissociated from PPC12, LLC and have
dissociated with their membership in PPC12, LLC

contractual indemnity as a matter of law under the
sole remedy under such operating agreement for a
er expenses associated with membership in PPC12,
s right to use the PPC12, LLC aircraft. *Cf. Clary v.*
pp. 2012) (“The operating agreement of a limited

liability company is a binding contract that governs the relations among the members, managers, and the company . . . [and] are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply.”)

(C) Plaintiffs are not entitled to equitable subrogation for any contributions, expenses, and payments made by Plaintiffs as a matter of law because Plaintiffs, to the extent that they made payments on the promissory note for the PPC12, LLC aircraft, only acquired the rights of the creditor, which had no right or claims against Defendants. Under South Carolina law, subrogation is “broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right.” *Shumpert v. Time Ins. Co.*, 329 S.C. 605, 610, 496 S.E.2d 653, 655 (Ct. App. 1998). Under equitable subrogation, one who pays a debt on behalf of another only steps into the shoes of the original creditor. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 601, 538 S.E.2d 15, 31 (Ct. App. 2000). In this case, Plaintiffs C. Gordon Lovingood, Jr. and C3 Investments, Inc. allege that they, on behalf of PPC12, LLC, made payments on the promissory note for the PPC12, LLC aircraft held by Cessna Finance. Accordingly, to the extent that the doctrine of equitable subrogation applies in this case, Plaintiffs Lovingood and C3 Investments would have only acquired the rights of Cessna Finance, as the original creditor. Cessna Finance had no recourse against Defendants under the promissory note, and Defendants did not sign guaranties to pay any debts of PPC12, LLC to Cessna Finance. Moreover, the PPC12, LLC operating agreement expressly provides that no member shall be personally liable for the debts of PPC12, LLC. Therefore, Plaintiffs cannot recover against Defendants under the doctrine of equitable subrogation. *See Kuznik*, 342 S.C. at 610, 496 S.E.2d at 655 (ruling that

equitable subrogation could not be applied by the applied against his partners because the creditor had no recourse against the partners).

(D) Plaintiffs cannot recover under their claim for breach of fiduciary duty because Defendants did not compete against PPC12, LLC in violation of S.C. Code Ann. § 33-44-409(b)(3). Towards the end of their tenure as members of PPC12, LLC, Defendants made plans to own and operate another aircraft. However, Defendants did not use the new aircraft until after they dissociated from PPC12, LLC. The fiduciary duties owed by members of a limited liability company under S.C. Code Ann. § 33-44-409(b)(3) do not prohibit them from planning to compete against that entity. *Cf. Meehan v. Shaughnessy*, 404 Mass. 419, 535 N.E.2d 1255 (1989) (stating that “fiduciaries may plan to compete with the entity to which they owe allegiance, provided that in the course of such arrangements they do not otherwise act in violation of their fiduciary duties”). Therefore, Defendants did not breach their fiduciary duties by planning to own and operate another aircraft.

(E) Plaintiffs cannot recover under their claim for breach of fiduciary duty because they have suffered no damages as a result of Defendants’ alleged breach of fiduciary duty. Shortly after Defendants dissociated from PPC12, LLC and began operating another aircraft, the PPC12, LLC aircraft became inoperable after suffering engine failure and was no longer used for member or charter flights from the time it became inoperable until it was sold. As a result, even if Plaintiffs can establish a breach of fiduciary duty by Defendants, which Defendants deny, Plaintiffs cannot establish that they suffered any damages as a result of such breach.

Defendants’ Motion is based upon the pleadings, exhibits, discovery, and deposition testimony from this proceeding. The Motion will be further supported by a memorandum to be filed in advance of the hearing on the Motion.

Respectfully submitted,

E. B. Allen

Trudy H. Robertson
E. Brandon Gaskins
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
brandongaskins@mvalaw.com
trudyrobertson@mvalaw.com

ATTORNEYS FOR DEFENDANTS
ANTHONY MCALLISTER; J. ERIC
WADE d/b/a CT TOURING; and PEARL
CO. SC, LLC

May 22, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) CIVIL ACTION NO. 2013-CP-10-5080

CERTIFICATE OF SERVICE

FILED
2015 MAY 22 PM 2:43
JULIE J. AMSTRONG
CLERK OF COURT

This is to certify that I have this date served a true and correct copy of Defendants'

Motion for Summary Judgment on the parties identified below by U.S. Mail with proper
postage affixed thereto and addressed to the following:

David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire
PRENNER MARVEL, P.A.
636 King Street
Charleston, SC 29403
Attorneys for Plaintiffs

David A. Collins
Law Office of David A. Collins, LLC
P.O. Box 40578
Charleston, SC 29418
Attorney for Defendant Victor Apat

MOORE VAN ALLEN, PLLC


Heather Morin

May 22, 2015

Moore & Van Allen

May 22, 2015

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandon.gaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

**Re: C. Gordon Lovingood, Jr., C3 Investments, LLC, and PPC12, LLC vs. Victor Apat,
Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co SC, LLC
Case No. 2013-CP-10-5080
MVA File No. 038737-1**

Dear Ms. Armstrong:

Enclosed for filing please find the original and one (1) copy of a **Motion for Summary Judgment** in the above-referenced matter, together with a motion slip and our firm's check in the amount of \$25.00, representing the required filing fee.

Please file the originals and return the filed-stamped copy back to me by bearer of this letter.

Thank you for your assistance in this matter.

Respectfully yours,

Moore & Van Allen PLLC



E. Brandon Gaskins

EBG/hm

Enclosures: as stated

cc: Trudy H. Robertson, Esquire
David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire
David A. Collins, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) CIVIL ACTION NO. 2015-CP-10-4549

) **DEFENDANTS' MEMORANDUM IN**
) **SUPPORT OF MOTION FOR**
) **SUMMARY JUDGMENT**

FILED
2015 OCT 15 PM 4:31
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendants Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co. SC, LLC ("Defendants") submit this Memorandum in Support of their Motion for Summary Judgment against Plaintiffs on their claims for contractual indemnity, equitable subrogation, and breach of fiduciary duty.

I. STATEMENT OF FACTS

Plaintiff C. Gordon Lovingood and Defendant Victor Apat organized PPC12, LLC in 2007 to own and operate a 1996 Pilatus PC-12 aircraft. (Lovingood Dep. 9:6-10:8.) The PPC12 aircraft was financed with a loan from Cessna Finance Corporation. (Lovingood Dep. 10:13-12:2.) The financing required monthly principal and interest payments of \$15,816. (Lovingood Dep. 14:13-19.) According to Lovingood, Plaintiff C3 Investments, Inc., a corporation owned by Lovingood, was the borrower under the promissory note to Cessna Finance, and he purports to have been a personal guarantor of the Cessna Finance loan. (Lovingood Dep. 10:13-12:2.)

Lovingood and Apat had equal fifty percent (50%) interests in PPC12 and contributed equally to the aircraft's fixed and variable expenses. (Lovingood Dep. 10:9-12, 14:10-24.) East

Shore Aviation ("East Shore") managed the aircraft for PPC12 and used it for charter flights. (Lovingood Dep. 19:10-20:5, 21:8-22:3, Ex. 1.)

East Shore leased the aircraft from PPC12 for charter flights, but PPC12's charter income was not sufficient to cover the aircraft's expenses. (D. Gibbons Dep. 109:22-110:16; Lovingood Dep. 51:19-52:1.) After the recession began in 2008, Lovingood and Apat reduced their use of the aircraft and struggled to pay the aircraft's expenses. (D. Gibbons Dep. 72:17-73:19; M. Gibbons Dep. 42:10-43:3.) Due to their reduced use of the aircraft and desire to reduce their share of aircraft expenses, Lovingood and Apat, with East Shore's assistance, looked for new members to join PPC12 in late 2010 and early 2011. (D. Gibbons Dep. 73:5-19; M. Gibbons Dep. 42:10-43:3, 46:5-11; Lovingood Dep. 24:18-27:1; McAlister Dep. 11:4-13; Wade Dep. 26:6-10.) At that time, selling the aircraft was not financially feasible because of decreased demand during the recession. (Lovingood Dep. 49:12-50:15.)

In early 2011, Defendants were solicited to become members of PPC12. During the solicitation, Defendants were informed that PPC12 owed more under the loan than the aircraft was worth and that it needed new members to increase usage and reduce Apat's and Lovingood's share of the aircraft's expenses. (Wade Dep. 13:23-14:2, 26:1-10, 27:6-22; McAlister Dep. 11:4-13, 14:7-16:5.) Also, Defendants were told that they would need to pay an initial contribution to create reserves for future maintenance and upgrade the aircraft's avionics. (Pearlstone Dep. 16:13-21; McAlister Dep. 14:7-16:5; Wade Dep. 26:22-27:1.)

As part of the solicitation of Defendants, Lovingood represented that he was the guarantor of the loan on the aircraft and that he wanted to reduce his ownership interest in PPC12. (Lovingood Dep. 51:4-5, 52:12-22.) As such, the parties anticipated that if Defendants became members of the aircraft, they would work together to refinance the loan on the aircraft.

(Lovingood Dep. 60:25-64:1.) However, Defendants never agreed or expressed any intent to personally guaranty any debt associated with the aircraft or replace Lovingood as guarantor on the loan, especially considering they knew the aircraft was upside down financially. (Lovingood Dep. 60:17-23, 61:25-62:3, 63:11-16; McAlister Dep. 14:7-16:4; Pearlstine Dep. 33:10-17, 36:14-19; Apat Dep. 31:16-32:15.)

In or around April, May, and June of 2011, Wade, McAlister, and Pearl Co. became members of PPC12, respectively. Pearl Co. and McAlister each paid an initial contribution of \$40,000 for respective twenty-five percent (25%) interests in the company. (McAlister Dep. 22:19-23:1, 26:8-15; Pearlstine Dep. 16:13-24.) Wade paid a \$20,000 initial contribution for a twelve and one-half percent (12.5%) interest. (Wade Dep. 117:25-118:4; Lovingood Dep. Ex. 5.)

When Defendants joined PPC12, PPC12 amended its operating agreement (the "Operating Agreement"). (Lovingood Dep. Ex. 4.) The Operating Agreement specifically provides that "[n]o member is personally liable for any debt, obligation, or liability of the Company, whether arising in contract, tort or otherwise." (Lovingood Dep. Ex. 4 § 3.5.) Under Sections 3.6 and 3.7 of the Operating Agreement, the members were required to pay their share of the aircraft's fixed and variable expenses to be eligible to use it. (Lovingood Dep. Ex. 4 §§ 3.6 and 3.7.) The Operating Agreement provides that the member's "usage is not allowed if a Member is not current with all financial obligations required by the Company." (Lovingood Ex. 4 § 3.7.) The Agreement provides no other remedy for a member's failure to pay his share of aircraft expenses. (Lovingood Dep. 54:1-55:25; Apat Dep. 29:23-30:11.)

The Operating Agreement also provides that the members "shall endeavor to refinance the debt associated with the ownership of the asset no later than January 1, 2014. This may

include negotiations with Cessna Finance or related companies to reduce the outstanding debt. [Lovingood] agrees to assist in this process.” (Lovingood Ex. 4 § 4.3(f).)

The Operating Agreement contains no provisions governing a member’s dissociation from PPC12. Nor does it prohibit the members from owning other aircraft. (Lovingood Dep. 85:13-21.) In fact, Lovingood owned other aircraft while he was a member of PPC12. (Lovingood Dep. 51:8-12.)

At the time Defendants joined PPC12, PPC12’s 2010 property taxes in the amount of \$43,181.94 were delinquent; however, this was not disclosed to Defendants prior to becoming members. (Lovingood Dep. 43:20-45:23.) Soon after Defendants made their initial contributions to PPC12, Lovingood and/or Apat authorized a portion of those funds to pay the delinquent 2010 property taxes without consulting Defendants, despite the fact that the Operating Agreement requires seventy-five percent (75%) approval by all members for expenditure above \$1,000. (McAlister Dep. 39:2-42:13.) After discovering the tax expenditure, McAlister objected to the use of funds for delinquent taxes and expressed his understanding that Defendants’ contributions were not to be used for PPC12’s delinquent debts. (McAlister Dep. Ex. 3.) In addition to using Defendants’ initial contributions to pay delinquent taxes, PPC12 never set up engine or maintenance reserves or upgraded the avionics. (McAlister Dep. 45:20-46:14; Pearlstine Dep. 49:6-9.)

In late 2011 and early 2012, Wade initiated efforts to refinance PPC12’s aircraft loan and ultimately obtained a commitment from a local lender to refinance the debt. (Wade Dep. 62:17-63:3.) Because PPC12 owed more on the aircraft than it was worth, the lender only agreed to provide partial refinancing, which was several hundred thousand dollars short of what was owed to Cessna Finance at that time. (*Id.*) Lovingood was not willing to pay the difference between

the amount owed to Cessna Finance and the amount which PPC12 could obtain in financing from a new lender. (*Id.*; D. Gibbons Dep. 99:16-100:21.) PPC12 also attempted to refinance the loan with Cessna Finance under different terms, but Cessna Finance would not refinance or amend the terms and conditions of its loan to PPC12. (Lovingood Dep. 68:22-69:2; D. Gibbons Dep. 95:4-99:12.)

As a result of the futile efforts to refinance the aircraft and Defendants being aggrieved by PPC12's use of their capital contributions to pay delinquent taxes and failure to establish reserves and upgrade avionics, Defendants, with others who were not members of PPC12, began looking for a new aircraft that would not be associated with PPC12. (McAlister Dep. 51:19-54:17; Wade Dep. 8:8-10:22.) In the summer of 2012, Defendants, along with other partners, located another Pilatus PC-12 to purchase, and they established CP Aviation, LLC to own and operate that aircraft. (Wade Dep. 10:22.) CP Aviation thereafter purchased the aircraft, and it was relocated from England to the United States in or around September or October 2012. (Wade Dep. 55:25-56:7; D. Gibbons Dep. 20:16-21:3.) Although the CP Aviation aircraft is now available for charter through East Shore, it did not become eligible for charter until February 2013. (D. Gibbons Dep. 14:10-17:20.)

On September 4, 2012, Wade called Lovingood to inform him that Defendants were dissociating from PPC12 effective October 1, 2012 and would be using the new aircraft owned by CP Aviation. (Wade Dep. 10:9-22, 122:16-123:24; Lovingood Dep. 101:3-112:2.) Although there is some dispute regarding this phone conversation, Lovingood admits that Wade informed him that Defendants had "decided to move in a different direction" and were buying another airplane. (Lovingood Dep. 101:3-18.) According to Lovingood, he responded to this news by

telling Wade that “if you drop out and leave me alone in this situation, I’ll sue the shit out of you.” (Lovingood Dep. 101:19-21.)

After receiving Wade’s call, Lovingood emailed David Gibbons of East Shore, stating “Just got a call from Eric. I think we need to meet on this soon. No one has told me anything about this situation. So, I am asking you to get everyone together so we can get this resolved without any problems.” (Lovingood Dep. 109:17-112:2, Ex. 7.) Defendants’ intent to dissociate from PPC12 effective October 1, 2012 was confirmed in another email from David Gibbons to Lovingood and Apat on October 22, 2012. In that email, Gibbons stated, **“We were only recently informed by the other members that they notified you by phone of their intention to leave PPC12 effective October 1st.”** Those members have not used the aircraft since that time and are current with their financial obligations.” (Lovingood Dep. Ex. 8) (emphasis added).

Lovingood admits that the October 22nd email confirmed Defendants’ intent to dissociate from PPC12:

Q: So, in fact, on October 22nd, 2012 you received an email that states the other members’ intention to leave PPC12 effective October 1st, isn’t that correct?

A: Yes.

(Lovingood Dep. 115:25-116:4.) Although Lovingood disputes that Defendants’ attempt to dissociate from PPC12 was legally effective (Lovingood Dep. 116:13-22), Lovingood has repeatedly admitted that Defendants expressed their intent to dissociate:

A: Because I had members with me and they didn’t – to me, sir, they didn’t – sending me an email telling me you’re leaving an LLC doesn’t mean to me that you’re not obligated. It says – and not only that, it says **it’s the**

intention to leave. It didn't say they were leaving. It said they're
intending to leave on October the 1st. . . .

Q: So by this date –

A: They didn't say they were or they weren't. They didn't say they were or
they weren't, they were intending to. . . .

Q: But you knew that was their intention, correct?

A: Yeah, they intended, but did they, you know.

Q: What do you think was required for them to leave the LLC?

A: Well, first of all, in my estimation, they intended to leave but they never
formally left, and which they didn't say, we are definitely not going to be
in the LLC anymore. It just said they intended to leave.

(Lovingood Dep. 118:3-119:10) (emphasis added). In addition, Defendant Apat admits that he understood that Defendants had either dissociated or were intending to dissociate around October 2012. (Apat Dep. 34:24-38:3.) Michael Gibbons, who worked for East Shore and was the pilot of the PPC12 aircraft, similarly confirms that it was his understanding that Defendants had dissociated effective October 1, 2012. (M. Gibbons Dep. 77:14-79:17.)

On October 28, 2012, approximately one week after Defendants' dissociation from PPC was confirmed to Lovingood, the PPC12 aircraft suffered major engine failure leaving Peachtree-Dekalb airport in Atlanta on an East Shore charter flight and had to make an emergency landing. (M. Gibbons Dep. 18:4-24:11, 48:7-11; D. Gibbons Dep. 44:7-45:6, 123:2-4.) As a result of the engine failure, the aircraft was inoperable, needed major engine repairs, and remained at Peachtree-Dekalb airport for months. (Lovingood Dep. 121:5-126:10.) At that time, Lovingood took control of management of the aircraft from East Shore and undertook

efforts to repair the engine, which was ultimately performed by Epps Aviation in Atlanta. (Lovingood Dep. 128:13-138:11; D. Gibbons Dep. 101:10-107:6.) Lovingood and his attorneys negotiated with the engine manufacturer to overhaul the engine, and Lovingood approved other repairs to get the aircraft ready for sale. (Lovingood Dep. 128:13-138:11.) Because the aircraft was inoperable, East Shore removed it from its charter certificate in December 2012. (D. Gibbons Dep. 17:21-18:3.)

Ultimately, Lovingood sold the aircraft in February 2014 and paid off the loan to Cessna Finance. (Lovingood Dep. 178:25-179:14.) According to Lovingood, he or Plaintiff C3 Investments paid for all repairs to the aircraft and the interest payments on the loan after the aircraft suffered engine failure until it was sold. (Lovingood Dep. 140:22-144:13.)

Lovingood did not inform Defendants that the aircraft's engine failed. (Lovingood Dep. 126:11.) He did not seek contributions from them for loan payments. (Lovingood Dep. 136:8-137:1.) He did not include them in discussions with the engine manufacturer. (Lovingood Dep. 124:22-126:10, 133:6-136:7.) He did not seek their consent before authorizing repairs to the aircraft. (*Id.*) He did not involve them in the sale of the aircraft. (Pearlstone Dep. 33:13-14.)

On August 29, 2013, nearly a year after Lovingood last communicated with Defendants and learned of their dissociation from PPC12, Plaintiffs filed suit against Defendants and Apat for all expenses incurred for the aircraft after it suffered engine failure. Plaintiffs assert claims of breach of fiduciary duty, contractual indemnity, and equitable subrogation. According to Plaintiffs, Defendants breached their fiduciary duties by forming and becoming members of CP Aviation for the purpose of owning and operating an aircraft in competition with PPC12. Plaintiffs further claim that Defendants are liable for their respective share of the aircraft expenses paid by Plaintiffs after October 28, 2012 because Defendants failed to dissociate.

Defendants answered the complaint by denying the allegations and asserting counterclaims and crossclaims against Lovingood and Apat based on their fraudulent and negligent misrepresentations and concealment regarding how PPC12 would use Defendants' initial contributions.

II. STANDARD OF REVIEW

Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56, SCRPC; *Baird v. Charleston County*, 333 S.C. 519, 529 (1999); see also *True v. Monteith*, 327 S.C. 116, 119 (1997). In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence is viewed in the light most favorable to the non-moving party. See *Hamiter v. Retirement Div. of the S.C. Budget & Control Bd.*, 326 S.C. 93, 96 (1997). "The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case." *Fender & Latham, Inc. v. First Union Nat'l Bank of S.C.*, 316 S.C. 48, 50 (Ct. App. 1994).

A party opposing a motion for summary judgment may not rest on the mere allegations of his pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. See Rule 56(c), SCRPC; accord *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994). The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. See *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

III. ARGUMENT

A. Contractual Indemnity

1. Plaintiffs are not entitled to contractual indemnity as a matter of law under the PPC12 Operating Agreement because Defendants dissociated from PPC12 and are not responsible for the aircraft's expenses after their date of dissociation.

Plaintiffs seek contractual indemnification from Defendants under the Operating Agreement for the fixed expenses incurred to repair the PPC12 aircraft and pay the financing costs to Cessna Finance from October 2012 to present. According to Plaintiffs, Defendants are responsible for these contributions because they did not dissociate pursuant to S.C. Code Ann. § 33-44-601. Plaintiffs' claim for contractual indemnity fails because Defendants properly dissociated by expressing their intent to dissociate from PPC12.

S.C. Code Ann. §§ 33-44-601 and 33-44-602 govern the manner in which a member may dissociate from a limited liability company. A dissociation occurs, among other ways, as a result of "the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." § 33-44-601(1). Section 33-44-601 does not require that such notice be given in any particular manner or form unless otherwise provided in the company's operating agreement. Rather, § 33-44-602 provides that, "[u]nless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to Section 33-44-601(1)." That section further provides that if "the operating agreement has not eliminated a member's power to dissociate, the member's dissociation from a limited liability company is wrongful only if . . . it is in breach of an express provision of the agreement."

In this case, Defendants properly dissociated from PPC12 pursuant to §§ 33-44-601 and 33-44-602. The evidence demonstrates that Defendants expressed their will to dissociate from PPC12 in September and that all members of PPC12 and its manager knew of Defendants' intent to dissociate no later than October 22, 2012. An email sent by PPC12's manager, David

Gibbons, expressly confirms that Defendants had provided notice of their intent to dissociate effective October 1, 2012. As a result, PPC12 and its members had notice of Defendants' express will to withdraw as members of PPC12, and their dissociation was effective October 1, 2012.

Significantly, it is undisputed that Defendants provided notice of their intent to withdraw from PPC12 effective October 1, 2012. In fact, Lovingood admits that as of October 22, 2012 he was aware of Defendants' intent to withdraw from PPC12. Because Plaintiffs cannot deny that Defendants had expressed their intent to dissociate prior to the engine failure, they claim that Defendants had to do more than provide notice of their intent to withdraw to effectuate the dissociation.

This argument, however, has no merit because the Operating Agreement is completely silent on dissociation and does nothing to eliminate a member's right to dissociate under § 33-44-601(1). As such, § 33-44-601(1) governs Defendants' dissociation under these circumstances, and this section clearly holds that a member's dissociation is effective upon "the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." It is undisputed that PPC12 had notice of Defendants' express will to withdraw from PPC12 no later than October 22, 2012. Therefore, Defendants dissociated from PPC12 prior to the engine failure and have no contractual obligation under the Operating Agreement to make contributions for expenses and financing costs incurred after their dissociation.

In addition, Lovingood's and PPC12's actions after the aircraft suffered engine failure further demonstrate that PPC12 had notice of Defendants' intent to withdraw from the company. After the aircraft suffered engine failure, neither Lovingood nor PPC12 informed Defendants of

the incident. PPC12 sent no further invoices to Defendants for the continuing expenses of the plane, such as loan payments, and Defendants were never consulted about the management of the aircraft while it sat grounded. Furthermore, Lovingood approved the repairs of the aircraft without obtaining consent of Defendants, despite the fact that the Operating Agreement required consent of seventy-five percent (75%) of all members. PPC12 then sold the aircraft without consulting or obtaining approval of Defendants.

In sum, PPC12 had notice of Defendants' express will to withdraw from the company. Plaintiffs admit that Defendants intended to dissociate prior to the aircraft suffering engine failure, and Plaintiffs never consulted with Defendants about the aircraft after the engine failure, thereby demonstrating their knowledge that Defendants had withdrawn from PPC12. Therefore, there are no genuine issues of fact regarding Defendants' dissociation from PPC12, and Plaintiffs' claim for contractual indemnification under the Operating Agreement should be dismissed accordingly.

2. *Plaintiffs are not entitled to contractual indemnity under the Operating Agreement because there is no right to indemnity under the Operating Agreement and the sole remedy for a member's failure to make contributions is the suspension of the member's flying privileges.*

As stated above, Plaintiffs' claim for contractual indemnification is based on its argument that the Operating Agreement obligates all members of PPC12 to make contributions to the company for the aircraft's fixed expenses. Assuming *arguendo* that Defendants did not dissociate from PPC12, Plaintiffs' claim for contractual indemnification nevertheless fails as a matter of law because the Operating Agreement contains no contractual indemnity provision and the sole remedy under the Operating Agreement for a member's failure to pay contributions to PPC12 is suspension of the delinquent member's right to use the PPC12 aircraft.

“Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.” *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). “Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties.” *Rock Hill Tel. Co. v. Globe Communs., Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (Ct. App. 2004).

As contractual indemnification must be established by the contract between the parties, any right for contractual indemnification that Plaintiffs have against Defendants must arise under the terms of the Operating Agreement. “The operating agreement of a limited liability company is a binding contract that governs the relations among the members, managers, and the company . . . [and] operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply.” *Clary v. Borell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012).

The PPC12 Operating Agreement contains no provision addressing contractual indemnity between its members. While the Operating Agreement does contain a contractual provision requiring PPC12 to indemnify its members, that provision does not require members to indemnify each other, and Plaintiff Lovingood has not sued PPC12 for contractual indemnification. Furthermore, Plaintiff C3 Investments, Inc. is not a party to the Operating Agreement, and therefore, it has no contractual rights under the Operating Agreement.

To the extent that Plaintiffs argue that PPC12 has a right of contractual indemnity against Defendants, that argument also fails. The Operating Agreement does not provide any right to contractual indemnity for a member’s failure to make contributions. Rather, the sole remedy for

failure to make contributions for fixed expenses is suspension of the member's right to use the aircraft. Section 3.7 of the Operating Agreement provides that a member's "usage is not allowed if a Member is not current with all financial obligations required by" PPC12. (Lovingood Dep. Ex. 4, § 3.7.) Accordingly, Plaintiffs have failed to identify any contractual provision which would require Defendants to contractually indemnify them, and Defendants are entitled to summary judgment on Plaintiffs' claim for contractual indemnification.

B. Equitable Subrogation

Plaintiffs are not entitled to equitable subrogation for any contributions, expenses, and payments made by them as a matter of law because they only acquired the rights of the PPC12's creditors, which had no rights or claims against Defendants. Under South Carolina law, subrogation is "broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right." *Shumpert v. Time Ins. Co.*, 329 S.C. 605, 610, 496 S.E.2d 653, 655 (Ct. App. 1998). Under equitable subrogation, one who pays a debt on behalf of another only steps into the shoes of the original creditor. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 601, 538 S.E.2d 15, 31 (Ct. App. 2000).

In this case, Plaintiffs C. Gordon Lovingood, Jr. and C3 Investments, Inc. allege that they, on behalf of PPC12, made payments on the promissory note for the PPC12 aircraft held by Cessna Finance and for repairs to the aircraft performed by Epps Aviation. Accordingly, to the extent that the doctrine of equitable subrogation applies in this case, Plaintiffs Lovingood and C3 Investments would have only acquired the rights of Cessna Finance and Epps Aviation, as the original creditors. Neither Cessna Finance nor Epps Aviation had any recourse against Defendants under the promissory note or the agreement to make repairs, respectively. Moreover, Defendants did not sign guaranties to pay any debts of PPC12, and the PPC12 Operating

Agreement expressly provides that no member shall be personally liable for the debts of PPC12. (Lovingood Dep. Ex. 4 §§ 3.5, 8.2(a).) Therefore, Plaintiffs cannot recover against Defendants under the doctrine of equitable subrogation. *See Kuznik*, 342 S.C. at 610, 496 S.E.2d at 655 (ruling that equitable subrogation could not be applied by one partner against his other partners for debts paid on behalf of the partnership because the partnership's creditor had no recourse against the other partners).

C. Breach of Fiduciary Duty

1. *Plaintiffs' breach of fiduciary duty claim fails because Defendants did not compete against PPC12.*

Plaintiffs assert a cause of action against Defendants for breach of fiduciary duty of loyalty under S.C. Code Ann. § 33-44-409(b)(3) based on Defendants' alleged competition with PPC12 arising from their ownership and operation of another aircraft. To establish a breach of fiduciary duty, the plaintiff must prove, (1) the existence of a fiduciary duty, (2) a breach of the duty owed to the plaintiff by defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). In this case, Defendants did not compete against PPC12 in violation of S.C. Code Ann. § 33-44-409(b)(3), and therefore, Plaintiffs cannot recover under their claim for breach of fiduciary duty because they cannot prove a breach of the duty of loyalty.

S.C. Code Ann. § 33-44-409(b) provides that the only fiduciary duty that a member of a member-managed limited liability company owes to the company and the other members is the duty of loyalty, which includes the duty "to refrain from competing with the company in the conduct of the company's business before the dissolution of the company." § 33-44-409(b)(3). A member's duty of loyalty under § 33-44-409(b)(3) terminates upon the member's dissociation from the company. S.C. Code Ann. § 33-44-603(4).

The fiduciary duties owed by members of a limited liability company under S.C. Code Ann. § 33-44-409(b)(3) do not prohibit them from planning to compete against that entity. Although no South Carolina courts have addressed the scope of the duty of loyalty under § 33-44-409(b)(3), the plain language of the statute dictates that it only covers competition and does not prohibit members from taking preliminary steps to engage in competitive activities after dissociating from the company. This interpretation is consistent with decisions from other jurisdictions, *see Meehan v. Shaughnessy*, 404 Mass. 419, 535 N.E.2d 1255 (1989) (stating that “fiduciaries may plan to compete with the entity to which they owe allegiance, provided that in the course of such arrangements they do not otherwise act in violation of their fiduciary duties”), as well as cases from South Carolina courts interpreting an employee’s duty of loyalty to his employer. For example, in *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 607, 518 S.E.2d 591, 595 (1999), the South Carolina Supreme Court declared that the duty of loyalty does not prohibit employees from laying plans and taking limited steps to begin competing with their employers.

In this case, it is clear that Defendants did not breach any duty of loyalty owed to PPC12 and its members under § 33-44-409(b)(3) because they did not compete with PPC12. Towards the end of their tenure as members of PPC12, Defendants made plans to own and operate another aircraft. However, Defendants did not use the new aircraft until after they dissociated from PPC12. Furthermore, CP Aviation never competed with PPC12 in any manner, at any time. CP Aviation did not become certified for charter flights until February 2013, which was four months after the PPC12 aircraft was grounded and two months after it was removed from East Shore’s charter certificate. Therefore, Defendants did not compete against PPC12 in violation of any

alleged duty of loyalty, and they are entitled to summary judgment on Plaintiffs' claim for breach of fiduciary duty as a result.

2. Plaintiffs' claim for breach of fiduciary duty should be dismissed because they cannot establish any damages that were proximately caused by Defendants' alleged wrongful competition.

Plaintiffs cannot recover under their claim for breach of fiduciary duty because they cannot prove that Defendants' alleged breach of the duty of loyalty proximately caused them any damages. Shortly after Defendants dissociated from PPC12 and began operating another aircraft, the PPC12 aircraft became inoperable after suffering engine failure and was no longer used for member or charter flights from the time it became inoperable until it was sold. As a result, even if Plaintiffs can establish a breach of fiduciary duty by Defendants, which Defendants deny, Plaintiffs cannot establish that they suffered any damages as a result of such breach.

Although Plaintiffs assert that they are entitled to damages associated with the expenses they incurred to repair the aircraft and pay the loan payments after the aircraft suffered engine failure in October 2012, the evidence clearly demonstrates that those damages were not the result of Defendants' alleged breach of duty of loyalty. To the extent that Defendants are liable for any of those damages, that liability must arise from a contractual or statutory obligation to pay contributions to PPC12 or indemnify Plaintiffs. And to the extent that Defendants breached a duty of loyalty to Plaintiffs by competing against PPC12, the resulting damages must necessarily arise from the wrongful competition, which is completely separate from the fixed expenses of the aircraft, such as maintenance, repairs, and financing costs.

If Defendants had remained members of PPC12 and continued to pay for the PPC12 aircraft's fixed expenses after they purchased and operated another aircraft, Plaintiffs would not have suffered the damages they are seeking under their breach of fiduciary duty claim. Put

simply, the damages that Plaintiffs seek did not result from Defendants' alleged breach of duty of loyalty. And Plaintiff Lovinggood effectively admitted this fact in his deposition:

Q: Let's assume this hypothetical. Let's say [Defendants] held these meetings without you. They went and purchased another plane and they operated that other plane, but they also paid the expenses of PPC12. So by your reasoning they still committed a breach of fiduciary duty, correct?

A: It's not about whether they bought a plane. It's what they agreed to do with PPC12. That's what it's about. And they, to me, in my eyes, and for what I feel is they violated any fiduciary responsibility they had with me. .

Q: But you're not answering the question so I'll ask it again. In my hypothetical, let's say they did everything that they did but they continued to make the payments for PPC12.

A: We wouldn't be sitting here. . . .

Q: And your feeling was that if they'd have done that, we wouldn't be here today?

A: If they would have kept up with that agreement that we all sat down in a room and talked about and signed and everything else, leaving the other airplane out and just doing their obligation to what they agreed to do with me personally plus the note, we probably wouldn't be sitting here.

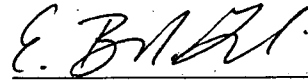
(Lovinggood Dep. 195:6-197:6.) This testimony makes clear that the damages that Plaintiffs seek arise out of Defendants' purported failure to honor the Operating Agreement and are not the result of Defendants' purchasing or operating another aircraft in violation of an alleged fiduciary

duty of loyalty. Therefore, Plaintiffs cannot prove the third element of their breach of fiduciary duty claim, and Defendants are entitled to summary judgment on this claim.

IV. CONCLUSION

For the foregoing reasons, Defendants Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co. SC, LLC respectfully request that the Court grant their Motion for Summary Judgment.

Respectfully submitted,



Trudy H. Robertson
E. Brandon Gaskins
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
brandongaskins@mvalaw.com
trudyrobertson@mvalaw.com

ATTORNEYS FOR DEFENDANTS
ANTHONY MCALISTER; J. ERIC WADE
d/b/a CT TOURING; and PEARL CO. SC,
LLC

October 15, 2015

Charleston, South Carolina

**LOVINGOOD
DEPOSITION TRANSCRIPT PAGES**

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON) CASE NO. 2013-CP-10-5080
3
4

5 C. GORDON LOVINGOOD, JR.,) DEPOSITION OF
6 C3 INVESTMENTS, INC.,)
7 PPC12, LLC) C. GORDON
8) LOVINGOOD, JR.

9 Plaintiffs,
10)
11)

12 -versus-
13)
14)

15 VICTOR APAT; ANTHONY)
16 MCALLISTER; J. ERIC WADE D/B/A)
17 CT TOURING; AND PEARL CO. SC,)
18 LLC,)
19)

20 Defendants.
21)
22)
23)
24)
25)

DATE: Friday, June 19, 2015

TIME: 10:02 a.m.

LOCATION: Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401

REPORTED BY: Janice D. Hayward, RMR
NCRA Registered Merit Reporter
101 Dorchester Court
Charleston, South Carolina 29418
843.478.6756
JanHayward1@gmail.com

Janice D. Hayward, RMR
843.478.6756

1 Investments of North Carolina, LLC; C3 Investments
2 of Beaufort, LLC; C3 Investments of Walterboro, LLC;
3 C3 Investments of Williston -- that might be in C3
4 Investments. Just -- that's all I can think of
5 right now.

6 Q Okay. And you are also a member of PPC12,
7 LLC?

8 A PPC12, LLC.

9 Q Is that still an ongoing or active entity?

10 A I think so.

11 Q And you're still a member?

12 A Yes.

13 Q Were you one of the organizing members of
14 PPC12?

15 A Yes.

16 Q Who else, if anybody else?

17 A Victor Apat.

18 Q When did you all establish PPC12?

19 A I don't recall. I would say it was
20 probably around 2007, somewhere around in there.

21 Q And what was the purpose of organizing
22 PPC12, LLC?

23 A Both of us had an interest in flying
24 aircraft. I had my own airplane. He had -- I think
25 he was involved in an aircraft. And through

1 connections, we found a PC12 Pilatus aircraft,
2 decided to get involved in a higher speed, more
3 capacity type airplane.

4 Q And is the aircraft that, I guess that
5 PPC12 ultimately bought, is that 217 Echo Bravo?

6 A Correct.

7 Q And PPC12 bought that in roughly 2007?

8 A Yeah.

9 Q And did you and Mr. Apat have a 50/50
10 interest in PPC12, LLC or was it different than
11 that?

12 A As I recall it was 50/50.

13 Q Okay. Who actually purchased the plane?
14 Was it PPC12, LLC?

15 A That was kind of a funny thing. We -- C3
16 Investments did all the paperwork and actually
17 signed the note. Victor was supposed to sign the
18 note. He never did. So I guess it was all -- C3
19 Investments was on the note to buy the airplane.

20 Q Why didn't he sign the note?

21 A You'd have to ask him that.

22 Q He never told you why?

23 A It never came up until we got in an
24 argument and he said, you're on the note, not me,
25 so.

1 Q When did that argument take place?

2 A I have no idea. It was just a little
3 conversation over, more than likely, expenses.

4 Q So C3 actually purchased the aircraft?

5 MR. MARVEL: Object to form.

6 You can answer.

7 A Yeah, I guess.

8 BY MR. GASKINS:

9 Q Okay.

10 A I mean, we were the note holder.

11 Q When you say we, you mean C3 --

12 A C3 Investments was the note holder.

13 Q Okay. And the note holder is the entity
14 or person who's obligated to pay the note, is that
15 correct?

16 A Yes, I believe so. I also personally
17 guarantied, and he was supposed to personally
18 guaranty but he never got around to signing the
19 documents. That might have been why we had a little
20 spat.

21 Q I understand. Where did you get financing
22 from?

23 A It started with, I want to say, Star Bank
24 and then was sold to -- the note was sold to Cessna.

25 Q So Cessna held the note or holds the note?

Janice D. Hayward, RMR
843.478.6756

1 A Yes.

2 Q Or held the note?

3 A Held the note, yes, sir.

4 Q How much did you purchase the plane for?

5 A I don't remember the exact number.

6 Q Roughly?

7 A 2.1 million, somewhere around in there.

8 Q How much did you finance?

9 A I don't recall. It's been a pretty long
10 time ago.

11 Q Do you remember roughly how much you
12 financed?

13 A No, sir.

14 Q Has anybody else ever held the note
15 besides Cessna Finance?

16 A Not to my knowledge, no.

17 Q Who made the payments on the plane under
18 the note initially?

19 A I guess C3 Investments and myself.

20 Q And did Mr. Apat pay the note at all?

21 A Yes.

22 Q Okay. And tell me how that worked between
23 C3 Investments, PPC12 and Mr. Apat as far as paying
24 the note and other fixed expenses for the plane.

25 A We had a pilot who basically managed the

1 the books over.

2 Q Who maintained those records for C3?

3 A My assistant.

4 Q Do you remember roughly how many years,
5 months that C3 managed the finances?

6 A I have no clue.

7 Q What were the terms of the financing that
8 you got from Cessna Finance?

9 A I have no clue.

10 Q You don't remember how much you were
11 responsible for paying?

12 A I remember -- no, not the exact numbers.

13 Q Okay. I've seen, I think, I believe the
14 monthly payment was around 15,000 and -- I can't
15 give an exact number, but roughly about 15,000.
16 Does that sound right, \$15,816 a month?

17 A I was getting ready to say fifteen-eight,
18 so. As soon as you said fifteen, it popped in my
19 head.

20 Q And either you or C3 Investments and
21 Mr. Apat would split that 50/50?

22 A Correct.

23 Q And all other fixed expenses 50/50?

24 A Correct.

25 Q At any point did you, you being PPC12,

Janice D. Hayward, RMR
843.478.6756

1 for some time and then later East Shore came in?

2 A Yes.

3 Q How many accounts did PPC12 have?

4 A I think just one.

5 Q Just one, just one operating account?

6 A I think so, sir. I don't remember.

7 Q You didn't have a reserve account or a
8 maintenance account?

9 A Not to my knowledge.

10 Q It's my understanding that PPC12 also
11 had -- was also a charter aircraft under East Shore?

12 A It operated under a 91 for awhile, and
13 then went into a 135.

14 Q Was it always a charter aircraft from the
15 beginning?

16 A The FAA laws state that if you're a
17 section 91 or type 91 aircraft you can't charge
18 people for profit.

19 Q Okay.

20 A That whoever flew on the plane had to pay
21 normal operating.

22 Q And when it was ever chartered under, I
23 guess, part 91 or part 135 --

24 A Michael Gibbons came to me and said, we
25 need to be -- I need a 135.

1 Q And I guess what I'm asking, does either
2 91 or 135 cover expenses or charges that you had or
3 that the customers had for the plane? Those funds
4 were returned to PPC12?

5 A Correct.

6 Q How often -- during roughly 2010, 2011,
7 how often was the plane chartered?

8 A I have no clue.

9 Q Once a month?

10 A I have no clue. I never chartered the
11 airplane. I never rode on it, didn't -- I never
12 asked Michael. I really don't have any idea. I
13 know that there were people using the aircraft.

14 Q Before East Shore Aviation began managing
15 the aircraft and before the other members joined,
16 did PPC12 have a manager of the LLC?

17 A Yes.

18 Q And who was that?

19 A Started out being me.

20 Q And when did that change?

21 A When I got tired of paying everybody
22 else's bills.

23 Q When was that?

24 A I have no clue, but then Apat took it
25 over.

1 Q And that was before you engaged East Shore
2 to become a manager?

3 A I think East Shore was involved at that
4 time.

5 (Marked for identification was Defendants'
6 Exhibit 1.)

7 BY MR. GASKINS:

8 Q Mr. Lovingood, I've handed you what's been
9 marked Exhibit Number 1 which is a document that has
10 been produced in this case by East Shore Aviation.
11 And it appears to be the aviation management
12 contract between East Shore Aviation and PPC12, LLC.

13 A Correct.

14 Q Does that look -- have you seen this
15 document before?

16 A I don't recall. I know I don't -- I
17 wasn't a signatory on it, so --

18 Q So you didn't review it before?

19 A I don't know if I did or not. All I
20 remember was the 8500 a month was going to go to
21 East Shore.

22 Q Okay. And this document was signed,
23 became effective on December 1st, 2010. Does that
24 seem accurate to you?

25 A I mean, it's on the paper.

Janice D. Hayward, RMR
843.478.6756

1 Q But to the best of your recollection is
2 that when East Shore began managing the aircraft?

3 A To the best of my knowledge, yes.

4 Q And at that point only you and Mr. Apat
5 were members of PPC12, LLC, is that correct?

6 A I can't answer that. I don't know for
7 sure. I don't know if William Worthy was still
8 involved at that time or if he was already in
9 prison. I don't remember.

10 Q Okay.

11 A If I had the log in front of me I could
12 probably tell you.

13 (Marked for identification was Defendants'
14 Exhibit 2.)

15 BY MR. GASKINS:

16 Q I'm handing you what has been marked as
17 Exhibit 2 which is another document that has been
18 produced by East Shore in this case. And to me it
19 appears to be the respective membership interests of
20 the different members of PPC12, LLC in 2010, 2011.
21 Do you agree with that?

22 A Yes.

23 Q And does this look accurate to you?

24 A Yes.

25 Q So according to this, Mr. Worthy would

Janice D. Hayward, RMR
843.478.6756

1 That's all.

2 Q When did they begin using the aircraft?

3 A I don't know exactly. I mean, I can go
4 back and check the logbooks and the billings and --
5 but I know Mr. Wade was on the airplane several
6 times. I know Mr. McAllister was on the plane
7 several times prior to them getting involved.

8 Q I understand they may have chartered the
9 plane or used it without being members of PPC12.

10 A Correct.

11 Q But this reflects, I think this reflects
12 when they actually joined PPC12.

13 A Again, this is the first time I've really
14 looked at this.

15 Q Okay. But you were a member of PPC12
16 during 2011?

17 A Sure.

18 Q And you remember Mr. Wade joining?

19 A Yes.

20 Q And you remember Mr. McAllister joining?

21 A Yes.

22 Q And you remember Pearl Co. joining?

23 A Yes. I just don't know when.

24 Q Okay. All right. Well, at some point in
25 2011 you would agree that Mr. Wade joined as a

Janice D. Hayward, RMR
843.478.6756

1 member of PPC12, LLC, is that right?

2 A That's correct.

3 Q Tell me how he came to become a member of
4 PPC12.

5 A He knew I was involved with that aircraft,
6 and I would see him at Mozzo's every once in awhile
7 which is a restaurant in Mount Pleasant, breakfast,
8 and he asked to join.

9 Q He initiated the discussions about
10 joining, or did you ask him if he would like to
11 join?

12 A As I recall, he asked to join.

13 Q Okay. And this just came up out of the
14 blue? Tell me about how this happened.

15 A Well, I mean we talked about the airplane.
16 I mean, he was traveling quite a bit back and forth
17 to Nashville, and I think he chartered it a couple
18 of times and just said, you know, how's it going? I
19 said, it's going.

20 I don't really recall how we
21 started talking about whether he was going to get in
22 or not. I wasn't out there soliciting for business,
23 that's for sure. I did offer the plane to people
24 that came to me and asked me if they could use it.
25 Then I would contact Michael and they'd set it all

Janice D. Hayward, RMR
843.478.6756

1 up.

2 Q Well, why weren't you soliciting? You
3 weren't using the plane, were you?

4 A No.

5 Q You were just paying for it pretty much
6 out of your pocket, right?

7 A At that particular time, as I recall,
8 Michael was handling, trying to -- he would come to
9 me and say, I have somebody that wants to get into
10 the deal. I said, go for it.

11 Q Did he undertake that on his own
12 initiative, or is that something you asked him to
13 do?

14 A I think it was a mutual thing. He knew
15 that we -- I needed somebody that would pay and, you
16 know, I wasn't getting much support from anybody
17 else. So, you know, sure. I'm sure we had the talk
18 several times about, you know, if you got anybody
19 that wants to get into the plane.

20 I think I even talked to Rob
21 Sammartino up at Skytech and said, look, if you got
22 anybody that wants to charter the airplane, you
23 know, it's here.

24 But if you're asking me if I
25 actively went out and said, you know, had a sign,

1 you know, rent my plane, no, sir, I did not do that.

2 Q Now, tell me about the discussions about
3 Mr. Wade actually becoming a member of PPC12, LLC.
4 I understand that you say he wanted to become a
5 member. How was it determined that he would become
6 a member, under what terms and conditions? Can you
7 explain that to me?

8 A Yeah. He asked me what was available. I
9 said you can buy whatever you would like. I mean, I
10 really don't want to be in it. You can take half of
11 mine if you want.

12 Q Okay.

13 A He said that sounded good to him because
14 he wasn't going to be using it that much. Plus it
15 took half the burden off of me.

16 Q But he didn't buy half of yours, did he?
17 He only bought 12.5 percent?

18 A I was a 25 percent owner when the new
19 structure came up.

20 Q Well, Mr. Wade was the first one to join,
21 correct?

22 A I can't answer. I don't know exactly the
23 order that people got in.

24 Q Okay. But at one time you were 50/50?

25 A Correct.

Janice D. Hayward, RMR
843.478.6756

1 A Probably by check.

2 Q To who?

3 A The county.

4 Q Okay. So you would only pay a percentage?

5 You would send the check to the county for your
6 percentage? Is that how they normally take
7 payments?

8 A Not when you had somebody who wasn't
9 paying. That's who had -- I wasn't going to -- I
10 can't answer it correctly. I shouldn't say anything
11 because I don't really remember exactly how that
12 went down.

13 Q Okay.

14 A All I know is that the county didn't come
15 and get the airplane. Cessna didn't come and get
16 it. So somebody was paying.

17 (Marked for identification was Defendants'
18 Exhibit 6.)

19 BY MR. GASKINS:

20 Q All right. Mr. Lovingood, I've handed you
21 what's been marked as Exhibit 6 which appears to me
22 to be a delinquent tax notice from Charleston County
23 issued to PPC12, LLC on April 18th, 2011. Would you
24 agree with that?

25 A Yes, sir.

Janice D. Hayward, RMR
843.478.6756

1 Q And it was sent to 220 Church Street,
2 Suite 101, Mount Pleasant, South Carolina?

3 A Correct.

4 Q Whose address is that?

5 A C3 Investments.

6 Q Okay. So this would have been sent to
7 you?

8 A Yes, sir.

9 Q Okay. And according to this document, as
10 of April 18th, 2011, PPC12 owed taxes in the amount
11 of \$43,181.94, is that correct?

12 A Correct.

13 Q Okay. Do you have any reason to doubt
14 that that was what was owed by PPC12 for the 2010
15 taxes on the aircraft?

16 A No reason to doubt it.

17 Q So what were the taxes normally on the
18 plane? Around this same --

19 A They fluctuated year to year.

20 Q Does this appear to be a full tax bill?
21 And what I mean by that, it doesn't appear to me
22 that you paid any share of the taxes at this time.

23 A All I know is that when we got tax bills,
24 we sent them directly over to Victor for payment.

25 Q Okay.

1 A 'Cause he had the checkbook. We didn't
2 even have a checkbook at that time. And this could
3 have gone to him. All I know is that the county
4 would always call me. John Guerry was the tax
5 delinquent guy. And I'd talk to him, and I'd tell
6 him exactly when he could get paid, when he couldn't
7 get paid.

8 Q But as of April 18, 2011, the 2010
9 property taxes had not been paid?

10 A It appears that way, yes.

11 Q Okay. And that was prior to the second
12 amended operating agreement, correct?

13 A Yes, sir.

14 Q And that was shortly after the first
15 amendment to the operating agreement in which Mr.
16 Wade joined, correct?

17 A Yes.

18 Q Okay. Did you or anyone on behalf of
19 PPC12 disclose to Mr. Pearlstine, Mr. McAllister or
20 Mr. Wade that the 2010 property taxes had not been
21 paid?

22 MR. MARVEL: Object to form.

23 A I can't answer. I don't know.

24 BY MR. GASKINS:

25 Q Did you?

1 actually worth or what they would loan on it was
2 probably less than what was owed on it because they
3 wanted equity in everything; not only airplanes but
4 buildings, houses, everything.

5 If you'll recall, this was back
6 when the banking crunch was going on. From all
7 indications that I saw, when we were talking about
8 the airplane's worth, I think at that time, and I
9 don't have numbers in front of me, but I think we
10 owed anywhere from 1.8 to \$1.9 million. I think
11 that's what the plane was worth.

12 Q Well, why didn't you just sell the plane
13 if you wanted to get out and Mr. Apat wasn't paying
14 the bills?

15 A Because of the crunch. There were a lot
16 of people wanting to be in the plane business or
17 using an airplane, but there weren't anybody out
18 there really trying to buy aircraft.

19 In other words, there were --
20 this particular aircraft is one of the most sought
21 after single-engine airplanes in the world; Swiss
22 made, flies fast, hauls a lot of stuff.

23 To go out and buy like a King
24 Air 90b or a jet would be three times what this
25 plane would probably cost. So it was a sought after

Janice D. Hayward, RMR
843.478.6756

1 aircraft.

2 Q So why couldn't you sell it?

3 A At that time there was probably anywhere
4 out of the -- in low production numbers. Our
5 production number was 154, I think. You know, at
6 that particular time it was just the market. There
7 were a lot of airplanes on the market, let's just
8 put it that way.

9 Q There was more demand than there was -- or
10 there was more supply than there was demand,
11 correct?

12 A Well, there was more supply than demand;
13 however, in this particular aircraft, a PPC12 or a
14 PC12 which is a Pilatus, they were selling but not
15 at the clips they were before.

16 Q So it's fair to say that if you tried to
17 sell it you could not sell it for what was owed on
18 the plane?

19 A I didn't try to sell it.

20 Q Why not?

21 A Because we had people interested in buying
22 interests in it. I mean, I didn't go to like
23 Star -- or to Skytech and say, Rob, sell the
24 airplane. There was always the belief to keep the
25 aircraft to build value in it later on, work it

1 through the low times because all indications in the
2 things that I saw were the bottom was near and it
3 was starting to go back up again.

4 Q But you wanted to get out of it, right?

5 A Yeah. I wasn't using it.

6 Q If it was going back up, why were you
7 wanting to get out of it?

8 A Because I had another airplane that I fly.
9 I had two airplanes, sir, this one and a smaller one
10 that I was -- and for my use I could fly from
11 Charleston to Cincinnati, Ohio and spend a third of
12 the money that I would if I flew on the Pilatus.

13 The Pilatus was for charter. I
14 was -- I viewed it as a charter business only. I
15 never flew on it. I've flown in that plane three
16 times since we owned it. That was it. One of them
17 was to take my daughter and my father-in-law to a
18 graduation.

19 Q So you believed PPC12, LLC was a charter
20 business?

21 A I felt like it was.

22 Q Okay.

23 A People were using it. There was some
24 demand for it. And it helped pay the bills.

25 Q But it didn't pay the bills fully, did it?

Janice D. Hayward, RMR
843.478.6756

1 A No.

2 Q That's why you wanted to get out, 'cause
3 you were losing money?

4 MR. MARVEL: Object to form.

5 A I'm a businessman.

6 BY MR. GASKINS:

7 Q And you were losing money on this plane,
8 correct?

9 A No, I wasn't after the guys got in it. I
10 didn't mind paying \$3,000 a month for a \$2 million
11 airplane, sir.

12 Q Then why were you trying to get out of it?

13 A Because I wasn't using it. I threw it on
14 the table the very first meeting that if you guys
15 want me out -- I hold the note, and the reason why
16 was because I was the note holder. I didn't have
17 anybody on with me.

18 So here it is. I'm a partner in
19 an LLC that's a charter, but I'm also guarantor on a
20 note. And all I asked them to do was get me off the
21 note and I'd stay in the deal. Does that sound
22 ridiculous? I don't think so.

23 Q But --

24 A So that puts me --

25 Q Okay.

1 Q And I'm looking at 3.6, the second
2 paragraph. It says the member shall pay the
3 applicable aircraft fees and charge representing the
4 fixed and variable expenses as set by the company.
5 That's the provision I was referring to.

6 A At all times.

7 Q Okay.

8 A Such flight operation shall be conducted
9 in accordance with the Federal Aviation Regulations.

10 Q All right. Other than that provision, is
11 there any other provision requiring members to pay
12 the expenses associated with the plane?

13 A I think that pretty much covers the
14 expenses, all expenses.

15 Q And if you go down to Section 3.7, the
16 first paragraph, this deals with how much the
17 members are permitted to use the plane, correct?

18 A And the question?

19 Q That provision deals with the members' use
20 of the plane, correct?

21 A Yes.

22 Q Okay. And you see where it says such
23 usage is not allowed if the member is not current
24 with all financial obligations required by the
25 company. Do you see that?

Janice D. Hayward, RMR
843.478.6756

1 A Yes.

2 Q Okay. What's your understanding of that
3 provision?

4 A It says that if you -- such usage is not
5 allowed. In other words, you can't use the plane
6 unless you're financially -- you've made all your
7 financial obligations.

8 Q Is there any other provision in here that
9 has a remedy or a penalty if a member fails to pay
10 the contributions -- or fails to pay the expenses
11 associated with the plane?

12 MR. MARVEL: Object to form.

13 A Ask the question again, please.

14 BY MR. GASKINS:

15 Q Is there any other provision that sets a
16 penalty or provides a remedy if a member fails to
17 pay the financial obligations they have to the
18 company?

19 MR. MARVEL: Same objection.

20 A I don't think so. I haven't read the
21 whole thing through today, no, but I don't know.

22 BY MR. GASKINS:

23 Q You're not aware of one?

24 A I'm not aware of one, no, other than
25 verbal, and what the intent was.

Janice D. Hayward, RMR
843.478.6756

1 through the financial parts of it. You know, I
2 don't think I would sign a document not knowing
3 anything. And I'm sure Michael informed them
4 because they wanted to know everything.

5 That's why I stayed out of it
6 'cause Michael flew the airplane every day. He was
7 with them more than I was. His father met them and
8 went through, I'm sure, a lot of this stuff that
9 they had questions about, and then they decided to
10 join the LLC.

11 Q But when they joined they didn't sign
12 anything personally --

13 A No, I'm just saying --

14 Q -- agreeing to -- can I finish the
15 question?

16 A Sure, I'm sorry.

17 Q But when they joined the LLC, they didn't
18 sign anything in which they personally agreed to pay
19 the loan or guaranty the loan?

20 A To my knowledge, no.

21 MR. MARVEL: Object to form.

22 You can answer.

23 A I said to my knowledge, no.

24 BY MR. GASKINS:

25 Q Instead, you all were going to try to

Janice D. Hayward, RMR
843.478.6756

1 refinance the note with another lender, is that
2 correct?

3 MR. MARVEL: Object to form.

4 A They understood that the payment was X.
5 They understood the fixed expenses. They understood
6 all of that.

7 What my question was to them was
8 I wanted to get off the note personally.

9 BY MR. GASKINS:

10 Q And that was before they --

11 A And they were willing to do that.

12 Q And how were they going to do that?

13 MR. MARVEL: Object to form.

14 A We were going back to Cessna. We were
15 getting TD involved. We were getting -- there was
16 another entity that was involved that was doing, I
17 think it was P & C Finance, aircraft finance. There
18 were several avenues to look at refinancing the
19 airplane.

20 BY MR. GASKINS:

21 Q But until there was some refinancing of
22 the airplane with another lender, they weren't
23 personally obligated on the note, were they?

24 MR. MARVEL: Object to form.

25 A I was personally obligated on the note.

1 BY MR. GASKINS:

2 Q And they were not, correct?

3 A No. They weren't on the note, no.

4 Q And they weren't personally obligated to
5 pay the note, were they?

6 A Through this agreement they were obligated
7 to pay the note payment.

8 Q Okay. Where does it say that?

9 A It starts basically in paragraph 4.2. If
10 you read the -- all sections of it, it gets down and
11 starts talking about, in addition, in the event of a
12 nonpayment of a loan, CGL is entitled to apply funds
13 from operations, maintenance and reserves up to
14 the -- it explains where the money basically goes.

15 And if there's a case of
16 default, that I have the right -- after the
17 continuance -- continuing default, it explains
18 basically what we've asked. The shareholders were
19 supposed to go to refinance the debt by January 1,
20 '14.

21 It kind of goes into all of
22 pretty much the obligations of the LLC.

23 Q Okay. And I'm asking more about that, but
24 before I do that, I think you referred to it as 4.2.

25 A Or I'm sorry, it's 4.3.

Janice D. Hayward, RMR
843.478.6756

1 Q 4.3, correct.

2 A I apologize.

3 Q Now, initially my question to you was that
4 the -- what provision in this agreement required the
5 members personally to pay the note. And you just
6 walked through Section 4.3 for me, correct?

7 A You asked me -- is this prior to or after
8 or the whole time?

9 Q This --

10 A Are we still prior to?

11 Q I'm asking you, after this agreement went
12 into effect in May, after the second operating
13 agreement went into effect in May of 2011, what
14 provision in this document required the members to
15 personally pay the note?

16 A To my knowledge there is none, sir.

17 Q Okay. And instead, the intent was to try
18 to refinance it, correct? To refinance the note,
19 correct?

20 A I'm sorry?

21 Q The plan was for the members to attempt to
22 refinance the note when they joined, correct?

23 A Correct.

24 Q And that was never done, was it?

25 A Not to my knowledge. I was still on the

1 note.

2 Q And when you say you were on the note, do
3 you mean that you --

4 A C3 Investments and myself.

5 Q -- were obligated to pay the note?

6 A Yes. I was the guarantor on the note. C3
7 Investments was the equity behind it.

8 Q And Mr. Lovingood, there's nothing in this
9 agreement, is there, that requires the members to
10 reimburse either you or C3 Investments for any
11 payments that it pays on the note, correct?

12 MR. MARVEL: Object to form.

13 A Can you ask that again?

14 BY MR. GASKINS:

15 Q Yeah. Isn't it correct that there was no
16 provision in this operating agreement that requires
17 a member to reimburse either you, Gordon Lovingood,
18 or C3 Investments for payments that either one of
19 those persons personally makes on the note?

20 MR. MARVEL: Object to form.

21 A As a member of the LLC, I think you were
22 obligated to pay the note.

23 BY MR. GASKINS:

24 Q Okay. What is that based on?

25 A Their intent to use the airplane. Did

Janice D. Hayward, RMR
843.478.6756

1 Q Everybody.

2 MR. MARVEL: Object to form.

3 A I know that I tried to go to Cessna to
4 renegotiate the note lower 'cause I was asked to by
5 the members.

6 BY MR. GASKINS:

7 Q And what were the results of that?

8 A They weren't in the position to help.

9 Q Why not?

10 A I wasn't really given an answer why not.

11 Q What were you seeking? What did you ask
12 them to do?

13 A They asked me to go in and ask for a half
14 a million dollars less than what we owed on the
15 thing.

16 Q And Cessna wouldn't agree to that?

17 A Cessna was in the process of selling out
18 so they didn't want to even talk -- I never got to
19 the point to where I actually got to a number.

20 Q Okay.

21 A I called the representative up and said,
22 we want to renegotiate the note, and basically he
23 hung up on me.

24 MR. COLLINS: That's what they do
25 whenever I call them.

1 A In a nice way. We're not interested,
2 click.

3 BY MR. GASKINS:

4 Q Did you talk to anybody else about
5 refinancing the note?

6 A The only other contact I had was Eric Wade
7 was supposed to bring in TD and I sat in on that
8 meeting.

9 Q And TD didn't refinance the note either?

10 A They offered a number that was a couple of
11 hundred thousand less than what we owed which was
12 equity, from my knowledge. I never saw a document,
13 never -- just from what Eric or one of the other
14 members said to me was that, you know, we're not
15 interested in that.

16 Q Eric said they weren't interested?

17 A I think it was Eric.

18 Q Okay.

19 A I'm not real sure. They were interested
20 in financing the airplane but not at the full
21 amount, that they wanted some equity in it.

22 Q And did Eric approach you --

23 A That's what I was told --

24 Q -- to see if you'd be willing to refinance
25 at that lower amount?

Janice D. Hayward, RMR
843.478.6756

1 about it?

2 A I never talked to Anthony McAllister.

3 Q Did you ever talk to Mr. Pearlstine about
4 it?

5 A That kind of rings a bell but I'm not real
6 sure.

7 Q So you don't remember talking to anybody
8 about the members purchasing another plane?

9 MR. MARVEL: Object to form.

10 A I don't recall. I don't remember. It's
11 too long ago.

12 BY MR. GASKINS:

13 Q Was there anything in the operating
14 agreement that prohibited them from purchasing
15 another plane?

16 A No.

17 Q So it didn't really affect their
18 obligations to PPC12, did it?

19 MR. MARVEL: Object to the form.

20 A Shoot, no. In fact, we really wanted them
21 to stay in PPC12.

22 BY MR. GASKINS:

23 Q Okay. Well, why didn't you talk to them
24 about it when you found out they were trying to buy
25 another plane, you wanted them to stay?

1 A I haven't seen the operating agreement
2 that says that they dropped out, so.

3 Q Okay. Did you ever talk with Eric Wade?

4 A Eric Wade called me one afternoon. I can
5 tell you exactly where I was when he called me. He
6 called me when I was on Hungryneck Boulevard almost
7 to the intersection of Venning Road and said -- he
8 made one statement and one statement only and that
9 was the partnership has decided to move in a
10 different direction.

11 And if you wake up 3 o'clock in
12 the morning about every day for two years worrying
13 about what they just said, trust me, I know that's
14 exactly what he said.

15 Q And that was it?

16 A I said, what do you mean?

17 Q What was his response?

18 A We're buying another airplane.

19 Q What did you say in response to that?

20 A I said, if you drop out and leave me alone
21 in this situation, I'll sue the shit out of you.

22 Q Why were you going to sue them?

23 A I was angry, sir. I don't know why it
24 flew out of my mouth but I said that. You asked me,
25 I'm telling you.

Janice D. Hayward, RMR
843.478.6756

1 Q What else did you all say?

2 A That was it. He hung up on me. No, he
3 did say, I don't have to listen to this. Click.
4 And that was it, never heard another word about
5 anything.

6 Q So it was your understanding that they
7 were getting out of the -- out of PPC12, LLC?

8 MR. MARVEL: Object to form.

9 A No, I understood that they were buying
10 another aircraft.

11 BY MR. GASKINS:

12 Q Okay. Well, why did you care about that?

13 MR. MARVEL: Object to form.

14 A Because I in my mind knew that they wanted
15 to move to a different aircraft and were going to
16 stick me with this one.

17 BY MR. GASKINS:

18 Q To get out of the LLC, to get out of
19 PPC12?

20 MR. MARVEL: Object to the form.

21 A I don't know what they were saying.
22 That's my question is why did they do it? I don't
23 know.

24 BY MR. GASKINS:

25 Q They can have two planes, can't they?

1 A Yeah, but then they'd still be a part of
2 the LLC.

3 Q Right. So I don't know why you would want
4 to sue them unless they were getting out.

5 A Tell them to send me a bill for their
6 airplane then. I'll own that one too.

7 Q Well, I want to understand why, what your
8 understanding was when you had this phone
9 conversation with Eric.

10 A That if you'll look in the record, I think
11 that they sent over -- they never said that they
12 were out of the LLC, but they said they were going
13 to quit paying. That's what I got out of it.

14 Q All right. That's not --

15 A That's what I got out of it.

16 Q They were going to quit paying?

17 A That's what I got out of it.

18 Q That's what you understood, because they
19 were --

20 A I don't see anything that says they were
21 going to keep paying and I just assumed, since they
22 quit paying, that they quit paying.

23 Q And they were quitting paying because they
24 were no longer going to be members of the LLC,
25 correct?

1 MR. MARVEL: Object to the form.

2 A Where is the document that says that they
3 dropped out of the LLC? You can't just walk out on
4 an LLC.

5 BY MR. GASKINS:

6 Q Why can't you?

7 A I don't know.

8 Q Is there anything in the operating
9 agreement that governs how members can disassociate?

10 A That's what the Court's going to decide.

11 Q Yeah, but I'm asking you right now.

12 A I don't have an answer for it.

13 Q Do you see anything?

14 A I want the law to tell me whether I'm
15 right or I'm wrong.

16 Q I'm asking you.

17 A And I'm telling you, I don't have an
18 answer because I'm going to let the Court decide
19 whether that's the law.

20 Q Okay. So you're not aware of anything in
21 that operating agreement --

22 A I'm not aware of anything other --

23 MR. MARVEL: Let him finish the
24 question.

25 THE WITNESS: He did. He said --

Janice D. Hayward, RMR
843.478.6756

1 BY MR. GASKINS:

2 Q You're not aware of anything in that
3 operating agreement that governs how members
4 disassociate?

5 MR. MARVEL: Object to form.

6 A I'm not aware of whether it's in that
7 agreement or not. If your intent was to do
8 something, and you intended to do it, that doesn't
9 relieve your obligation for it.

10 BY MR. GASKINS:

11 Q Okay. Well, Mr. Worthy is no longer a
12 member of PPC12, LLC according to you, right?

13 A As far as I'm concerned, when I sent a
14 bill to him and he didn't pay it, then what I did
15 was to not take any action whatsoever and then he
16 went to prison.

17 Q Okay. Did you -- do you have anything in
18 writing saying he's no longer a member?

19 A He's probably still a member but I'm --
20 hard to get money out of somebody who's in prison.

21 Q Well, earlier you said he was no longer a
22 member.

23 A Okay.

24 Q So is he a member?

25 A I can't answer that.

1 MR. MARVEL: Object to form.

2 A I don't have all these papers in front of
3 me, sir. If I had everything in front of me to
4 where I could answer your questions more clearly,
5 but this is a long time ago, and I'm running off of
6 frustration, I'm running off of anger, and I'm
7 running off of ludicrous questions from an attorney.

8 Q All right.

9 A And that's a giveaway.

10 MR. MARVEL: Let's take a break for a
11 second.

12 (The deposition went off the record.)

13 BY MR. GASKINS:

14 Q All right. Let's go back to that phone
15 conversation you had with Eric. And he told you
16 that the partners were going in a different
17 direction, right?

18 A That's all he said.

19 Q And he told you that they were buying
20 another airplane?

21 A I think he said that. I think he just
22 said -- I might have just thrown that in. But I
23 think all he said was we're moving in another
24 direction. That's all I really remember. And I
25 might have just thrown in, through frustration and

1 being -- getting fired on, that.

2 But I don't really recall other
3 than the fact that the main thing was that we have
4 decided to move in a different direction. That was
5 it.

6 Q And --

7 A He never said whether they're leaving the
8 LLC, never, never -- never mentioned anything about
9 PPC12 at all.

10 Q Okay. He didn't have any other reason to
11 call you about anything other than PPC12, LLC,
12 correct?

13 A I don't know. You know, we were friends
14 and that's why I answered the phone when I saw his
15 number.

16 Q And he was referring to a partnership.
17 You don't have any other partnerships with him, do
18 you?

19 A I don't know. All I'm saying is what he
20 said.

21 Q Okay.

22 A I don't know what his intent was.

23 Q Isn't it true that you understood Eric to
24 mean that they were disassociating or getting out of
25 the LLC?

Janice D. Hayward, RMR
843.478.6756

1 MR. MARVEL: Object to form.

2 A I know -- no, I don't know they were going
3 to get out of the LLC. All I know is that I felt
4 like they were buying another aircraft, and if they
5 did, I was going to sue them for whatever we had on
6 this airplane.

7 BY MR. GASKINS:

8 Q Okay. What if they bought another
9 airplane and continued paying the bills, were you
10 still going to sue them?

11 A No.

12 Q Okay. So why did you threaten to sue
13 them?

14 A 'Cause I felt threatened.

15 Q 'Cause you felt like they were leaving the
16 LLC, correct?

17 MR. MARVEL: Object to form.

18 A I don't know what their intention was
19 other than the fact that they were moving in another
20 direction and that doesn't sound good to me as a
21 businessman.

22 Q So instead of asking questions about what
23 he meant, you threatened to sue him?

24 A Out of frustration and anger, yes.

25 Q Okay. All right. Well, after that phone

Janice D. Hayward, RMR
843.478.6756

1 conversation with Eric, did you ever learn that they
2 were disassociating from the LLC?

3 A No.

4 Q Okay. Do you remember when that phone
5 conversation was?

6 A No, sir.

7 Q But it was before the plane had engine
8 failure, correct?

9 A Yes.

10 Q The plane had engine failure in October,
11 on October 28, 2012, does that sound right to you?

12 A I don't know the exact date.

13 Q Does that sound about right?

14 A September, October, I know it wasn't in
15 November.

16 Q Okay.

17 (Marked for identification was Defendants'
18 Exhibit 7.)

19 BY MR. GASKINS:

20 Q All right. I'm handing you what's been
21 marked as Exhibit 7. And I want to focus your
22 attention to the first email in this email chain
23 that is towards the bottom. And this appears to be
24 an email from you to David Gibbons sent on
25 September 4, 2012, is that correct?

Janice D. Hayward, RMR
843.478.6756

1 A Yes.

2 Q Okay. And that's your email account,
3 CGLovingood@Comcast.net?

4 A Yeah. Where is that?

5 Q On the "From" line.

6 A Oh, okay, the bottom one. Yes.

7 Q Okay. What's this email about?

8 A Nobody told me about the situation that I
9 just got hit with Eric. So I'm asking to get
10 everyone together so they can resolve it without any
11 problems.

12 Q Okay. You say you just got a call from
13 Eric. Is this the call you were referring to
14 earlier?

15 A I would assume so, yes, sir. I don't know
16 that for sure.

17 Q Okay. And you say no one has told me
18 anything about this situation. What situation are
19 you referring to?

20 A At this point I don't know if that was the
21 airplane other than maybe it could have been another
22 situation. I don't know if that's the date that he
23 called me. It doesn't say that it was the -- about
24 them taking a different direction.

25 Q But that's probably what it was about,

Janice D. Hayward, RMR
843.478.6756

1 correct?

2 A I don't know.

3 Q That would have been around the same
4 timeframe?

5 A It could have been something else. I
6 don't know.

7 Q What else could it have been?

8 A I don't know. I wish I could sit here and
9 say that that's exactly what the day and everything
10 but I can't tell you that. I don't know if they had
11 a maintenance issue, don't know if it was something
12 else.

13 Q Do you normally send emails asking to have
14 a meeting about maintenance issues?

15 A Sometimes. I mean, I don't have all the
16 emails but I'm sure that there were other issues,
17 you know, landing gear problems, it could have been
18 anything. You know, I wish I could tell you that
19 this was the exact time and day that Eric called.

20 Q All right. Well, let's look at
21 Mr. Pearlstine --

22 A I'm not going to say that that is it.

23 Q Okay. Well, let's look at
24 Mr. Pearlstine's response and see if that helps
25 refresh your memory.

1 A That was the next day so apparently that
2 could have been Eric's phone call.

3 Q Okay. Did you all ever hold a meeting?

4 A I don't recall. I disagreed with his
5 opinion 'cause that's his opinion, not mine.

6 Q Right. Did he ever tell you that opinion?

7 A Not to my knowledge.

8 Q Okay.

9 A Other than this.

10 Q Did Gibbons ever relay that information to
11 you?

12 A Not to my knowledge.

13 Q Did you and Gibbons have any further
14 conversations about this issue?

15 A I didn't talk to probably anybody about it
16 other than Dave Marvel.

17 Q You didn't talk to anybody else about it
18 afterwards?

19 A I don't recall, sir.

20 Q Why didn't you contact the other members
21 individually instead of working through Gibbons?

22 A I didn't have a relationship, personal
23 relationship to call Anthony up and say, you know,
24 what's going on. I didn't have the relationship
25 with Mr. Pearlstine other than knowing him casually.

1 their intention to leave PPC12, LLC effective
2 October 1st.

3 Those members have not used the
4 aircraft since that time and are current on their
5 financial obligations.

6 It is East Shore's understanding
7 that the departing members attempted and explored
8 the idea of refinancing N217 Echo Bravo, or EB, to
9 TD Bank, but they were told that they could not --
10 they could only do so far as much lower amount than
11 which was currently owed on the -- to Cessna
12 Finance.

13 Cessna's stance is not to alter
14 the note -- will always make bringing new members
15 into PPC12 to be on the note with you improbable.

16 Unfortunately, anyone brought in
17 will be in the same manner as those that -- who have
18 come and gone before due to the inability to adjust
19 the note without refinancing.

20 We feel that our people that can
21 replace these -- those leaving, and we will continue
22 to garner as many interested parties as possible.

23 Q That's good.

24 A I don't remember --

25 Q So, in fact, on October 22nd, 2012 you

Janice D. Hayward, RMR
843.478.6756

1 received an email that states the other members'
2 intention to leave PPC12 effective October 1st,
3 isn't that correct?

4 A Yes.

5 Q Okay. And at that time the aircraft had
6 not suffered engine failure, had it?

7 A I don't think so.

8 Q What did you do after you received this
9 email?

10 A I don't know. I don't remember.

11 Q So --

12 A Probably got really pissed off.

13 Q Why?

14 A Because a phone call doesn't constitute
15 abandoning. To me, if you were going to get out of
16 an obligation like this, wouldn't you put it in
17 writing? Wouldn't you call -- instead of calling
18 somebody?

19 Q So you knew that they were leaving but you
20 just didn't feel that it was an effective
21 disassociation?

22 A No.

23 MR. MARVEL: Object to form.

24 A Not at all.

25 Q Why did it need to be in writing if you

1 Q Well, why did you view it differently? I
2 mean --

3 A Because I had members with me and they
4 didn't -- to me, sir, they didn't -- sending me an
5 email telling me you're leaving an LLC doesn't mean
6 to me that you're not obligated. It says -- and not
7 only that, it says it's the intention to leave. It
8 didn't say they were leaving. It said they're
9 intending to leave on October the 1st.

10 Q And October the 1st was in the past,
11 correct?

12 A I'm just saying it's --

13 Q So by this date --

14 A They were intending to leave --

15 Q And you understood --

16 A They didn't say they were or they weren't.
17 They didn't say they were or they weren't, they were
18 intending to.

19 Q You didn't call them up and say, hey, I
20 found out you --

21 A I can't remember if I did or I didn't,
22 sir, I'll be honest with you.

23 Q But you knew that was their intention,
24 correct?

25 MR. MARVEL: Object to form.

Janice D. Hayward, RMR
843.478.6756

1 A Yeah, they intended, but did they, you
2 know.

3 BY MR. GASKINS:

4 Q What do you think was required for them to
5 leave the LLC?

6 A Well, first of all, in my estimation, they
7 intended to leave but they never formally left, and
8 which they didn't say, we are definitely not going
9 to be in the LLC anymore. It just said they
10 intended to leave.

11 What they did was just quit
12 paying, which doesn't relieve them of the obligation
13 without some kind of saying, we quit. We're not in
14 anymore. I didn't get that email. I didn't get
15 that letter. I didn't get that document.

16 Q You think that was necessary?

17 A So under the assumption of that, I have to
18 assume that they're still members.

19 Q Okay. You think that was necessary, that
20 you needed something in writing?

21 A Sure.

22 Q Why do you think that?

23 A That's just -- I'm a businessman. I would
24 think, you know, Mr. Pearlstine, Mr. McAllister and
25 Mr. Wade are businessmen. And if they do business

1 or anything. But they weren't paid after that and I
2 think --

3 Q They were ultimately paid, correct?

4 A Ultimately they were paid.

5 Q Okay. All right. Tell me about the
6 engine failure and what happened.

7 A I don't know where I was, but I got a call
8 from Michael. He was all in a panic. I don't even
9 remember if I was in town or out of town. All I
10 remember was first thing out of my mouth is I'm just
11 glad you're safe.

12 He said there was an engine
13 failure. We were taking off out of Atlanta. He and
14 a buddy of his were going somewhere and had engine
15 failure on takeoff and made it back to the airport,
16 barely.

17 Q Did he call you right after? Is it your
18 understanding that he called you right after?

19 A I think it was right after. I remember
20 that it was -- no, I think it might have been a
21 couple of days. I'm kind of unclear of that. I
22 think it was a couple of days. But he was totally
23 shaken up about it, that's for sure. But I think he
24 kind of --

25 MR. COLLINS: I guess so.

Janice D. Hayward, RMR
843.478.6756

1 A Trust me, when that happens -- and I will
2 say this about it, that in dealing with Pratt
3 Whitney, he handled that impeccably. If he'd have
4 shut the engine off, they would have crashed. But
5 he kept it fired up and kept it running, kept it --
6 when he taxied it up to the tarmac, it quit.

7 So, I mean, they told me if he'd
8 have shut it down and tried to restart it, he would
9 have crashed the airplane, so. That's just an
10 aside. But anyway. So he informed me of an engine
11 failure.

12 BY MR. GASKINS:

13 Q What did you do after you learned about
14 it?

15 A You know, I just was devastated. I mean,
16 didn't know what to do. You know, I think I talked
17 to David and Michael about it. Pratt Whitney
18 engines don't fail. Out of all the PC12s, there's
19 only maybe been, that I know of, maybe four
20 accidents in the history; maybe two engine failures.

21 The PT6 engine is used all over
22 the world. And the first thing I thought of was,
23 you know, what caused it? You know, why? How could
24 this happen?

25 Then we decided, I think David

1 said, you might want to engage an aviation attorney
2 to contact these folks and let them know what's
3 going on. Now we're getting into stuff I remember.

4 Michael said that Hodges, or
5 Hodge, whatever, was somebody that we had done --
6 you know, had some dealings with before, you might
7 give him a call. So I called him up, said, yeah,
8 you know, we ought to send these guys notice of
9 what's happened.

10 We sent, I think, notices to
11 Pilatus and to Pratt Whitney and just, you know,
12 kept following through.

13 Q And I guess the plane remained in
14 Piedmont, or?

15 A No, Epps, E-p-p-s.

16 Q But that's at Piedmont? Or I may have the
17 airport wrong. But in Atlanta, correct?

18 A Peachtree, DeKalb. Remained there for
19 almost a year.

20 Q It took a year for you to work with Pratt
21 Whitney to get some resolution?

22 A What happened was is Mr. Hodge was
23 charging, you know, by the hour. We weren't getting
24 anywhere. So I decided to fly to West Virginia and
25 meet with Pratt Whitney personally. And that's when

Janice D. Hayward, RMR
843.478.6756

1 the ball started rolling. This was probably four
2 months after we engaged Mr. Hodge.

3 Q What was going on with the plane while you
4 were --

5 A They wouldn't touch it.

6 Q Absolutely wouldn't touch it?

7 A No.

8 Q So it just sat there?

9 A I'm sure the FAA -- I don't know if the
10 FAA looked at it. I know that we hired our own
11 inspector to inspect the engine and was there when
12 Pratt Whitney showed up to tear the engine down to
13 see what had happened.

14 We also sent it to, I think
15 Canada. It's really amazing what they do when they
16 have a failure on an engine. Trust me, I'm fairly
17 experienced in it now.

18 Q When did the plane ultimately get fixed?

19 A You want to bring those bad memories back.
20 I'm not real sure of the date it got back to
21 service.

22 Q And Epps made some other repairs, correct?

23 A Oh, there were, you know, I mentioned
24 earlier, the seats and some of the maintenance
25 issues. One of the comments from the guys at Epps

Janice D. Hayward, RMR
843.478.6756

1 was, I don't know how they were flying the plane
2 with the pilot seat like that, so.

3 I mean, yeah, I remember odds
4 and ends that they brought up. But I also knew that
5 there were some issues that needed to be, you know,
6 looked at that weren't being looked at, so, you
7 know, while they had it.

8 The seats were the most
9 prominent because they were -- I wish they were like
10 a \$2,000 fix but each one of them was like 15,000 to
11 fix, so. Those are things that roll in my mind.

12 I can't tell you every single
13 item that was on the plane, but the engine, of
14 course, was the most, you know, devastating and cost
15 more than anything else.

16 Q I guess what was the ultimate resolution
17 with Pratt Whitney regarding the engine?

18 A They weren't going to do anything. And I
19 went up and met with them. And I'm going to tell
20 you the truth, I took my checkbook and I put it on
21 the table and I said, I'm not leaving here until we
22 have a deal. I'll write you a check, be done with
23 it. You know, I can't have this plane sitting down
24 any longer.

25 They sent that information up to

Janice D. Hayward, RMR
843.478.6756

1 their Canada office which was the office for Pratt
2 Whitney. I got involved with their department when
3 I found out what had caused the engine to blow.

4 I started hammering them on
5 price. They wanted six hundred and fifty to seven
6 hundred thousand to fix it and, all said and done
7 with the new parts and things like that, we were
8 looking at somewhere, and I don't know the exact
9 number, but it was somewhere between three and
10 \$400,000.

11 Q Now, after you got the call from Michael
12 that the plane had suffered engine failure, did you
13 contact Mr. McAllister?

14 A Not personally, no.

15 Q Did you contact Mr. Wade?

16 A Not personally, no.

17 Q Did you contact Mr. Pearlstine?

18 A Not personally, no.

19 Q Did you contact Mr. Apat?

20 A Not personally, no.

21 Q Why not?

22 A I was dealing with other issues other than
23 that. I basically turned everything over to
24 Dave Marvel to handle for me, and Mr. Hodge.

25 Q Did you instruct -- did you ever attempt

Janice D. Hayward, RMR
843.478.6756

1 give you the unilateral authority to make decisions
2 about the aircraft?

3 A They were making decisions, so I didn't
4 really think about it. I was more thinking about it
5 as the -- at that time PPC12 was over here. Now I'm
6 personally guarantying a note.

7 So if you're asking me whether
8 or not I was paying attention to LLC policies or
9 procedure, no, sir. I was over here worried about
10 the note.

11 As my company and myself being
12 there personally, those are the things I was focused
13 on. This was not something -- this wasn't a
14 transmission going out. This wasn't a, you know, a
15 broken rod in an engine. This was a pretty
16 substantial blow.

17 Q And if you had other members in the LLC at
18 that time, they could have assisted with that,
19 correct?

20 A They showed me where they were by quit
21 paying in October, so.

22 Q Well, why do you think they didn't pay in
23 October?

24 A I have no idea. You need to ask them.

25 Q So how do you know they quit paying in

Janice D. Hayward, RMR
843.478.6756

1 October?

2 A Because I didn't get any money and I got a
3 call from the mortgage company that said nobody made
4 the mortgage payment this month. So I wrote the
5 check.

6 Q Well, all right.

7 A And I kept writing the checks.

8 Q Mr. Lovingood, you weren't writing checks
9 at this time, were you? East Shore Aviation was,
10 correct?

11 A I wrote every check that -- every check
12 that was after October, I wrote every check, I paid
13 every bill, I never let one bill go without being
14 paid. I paid every part of that engine repair. I
15 paid everything, sir.

16 Q I'm not asking you about October 2012.
17 I'm asking you at the time of this accident, which
18 is in October 2012 --

19 A I paid every penny of it out of my own
20 pocket.

21 Q You cut the check. You wrote the check.
22 You signed it and you sent it to Cessna Finance, not
23 East Shore Aviation?

24 A To my knowledge I think I did. Maybe they
25 wrote one. But I took responsibility for all

1 expenses thereafter.

2 Q Okay. I'm asking you --

3 A I don't know, sir. I don't know the
4 answer to your question.

5 MR. MARVEL: Let him ask his
6 question.

7 BY MR. GASKINS:

8 Q I haven't asked my question.

9 A Well, you asked me did I know who wrote
10 the check and I said I think I did but I really
11 don't know.

12 Q All right. I'm going to ask you another
13 question.

14 A Okay. Good.

15 Q As of October 28th or shortly thereafter
16 when you were informed of the engine failure, why do
17 you think Mr. McAllister, Mr. Wade, and Pearl Co.
18 had stopped paying?

19 MR. MARVEL: Object to form.

20 A I don't know. You have to ask them.

21 BY MR. GASKINS:

22 Q No, I'm asking you why you think that.

23 A Why I think?

24 Q Yes.

25 A Because I think they went and bought

Janice D. Hayward, RMR
843.478.6756

1 another airplane.

2 Q No. I'm asking you how do you -- what is
3 the basis of your statement that they weren't making
4 payments?

5 A To me, they were in default of their
6 agreement with me, basically. At that point I was
7 looking at it as a note holder, again, sir. I
8 wasn't looking at it as a member of the LLC. Now
9 I'm looking to the guys that were on the note -- or
10 not on the note but were obligated through an
11 operating agreement to pay \$15,816 a month.

12 Q Okay. And maybe I'm not stating my
13 question clearly. But let's go back to the email
14 that is Exhibit 8.

15 A You mean the one that says intent to drop
16 out?

17 Q That one, yes.

18 A Okay. Good.

19 Q And as of October 22nd, 2012, based on
20 what Mr. Gibbons had told you, they were current
21 with their financial obligations, isn't that
22 correct?

23 A As I had mentioned earlier, no, they
24 weren't. I think Mr. McAllister was -- still had
25 some payments outstanding.

1 Q But you didn't know that at the time, did
2 you?

3 A I didn't, no. But to the best of my
4 knowledge, yes, they were current.

5 Q Okay. So why, if you believe that they
6 had not formally disassociated, and at the time they
7 were current with their financial obligations, did
8 you not call them and let them know about this
9 significant event with the aircraft?

10 MR. MARVEL: Object to form.

11 A Because I'm sure Michael Gibbons let them
12 know what happened.

13 BY MR. GASKINS:

14 Q How are you sure about that?

15 A I'm not. I'm just saying. You asked me
16 my thought. My thought is that Michael told them.

17 Q You said, I'm sure he told them. So
18 you're not sure, are you?

19 A I'm pretty sure.

20 Q Why are you pretty sure?

21 A Well, let's get a lie detector. No.

22 I'm sure.

23 Q How are you sure?

24 A 'Cause he told me.

25 Q Michael Gibbons told you that?

1 A I'm pretty sure he did.

2 Q And if he testified in his deposition that
3 he didn't --

4 A Then I guess one of us is lying.

5 Q Yeah. Okay.

6 A But I also said to the best of my
7 knowledge and that's, to my knowledge, I'll tell you
8 one thing, and I'm going to state it, I was in total
9 panic mode.

10 I mean, you have an airplane
11 sitting over there in Epps. It's sitting on a
12 tarmac. They wouldn't even bring it into a hangar
13 so it's totally exposed. And they won't do anything
14 until you tell them you're going to pay them and
15 send them money. Simple fact.

16 So I had a lot of pressure on
17 this side. What happened over here I don't really
18 remember. I don't -- these emails were done. I
19 don't think anybody -- other than the fact of how we
20 were to get the plane back, how we were going to do
21 this, who's going to take care of the correspondence
22 through the manufacturers who produced the plane,
23 all that stuff.

24 There was a lot more than just
25 sitting worrying about, did you notify them. Did

Janice D. Hayward, RMR
843.478.6756

1 you do this.

2 Man, I'm telling you, the
3 pressure of an airplane that just blew an engine
4 almost killing two people is enough to make you not
5 think real straight, to be honest with you.

6 Q So at some point I would imagine that
7 pressure subsided and you had to deal with Pratt
8 Whitney and after -- after that did you talk to
9 Mr. McAllister or Mr. Pearlstine or Mr. Wade or
10 Mr. Apat?

11 A Sir, the pressure never came off.

12 Q Okay.

13 A Between traveling to Bridgeport, West
14 Virginia, to meeting with probably no less than five
15 or ten people on their team, talking to Pilatus in
16 Switzerland, to -- it never was relenting. It was a
17 relentless agony. Every phone call, every, every
18 text, every email was agony.

19 Something -- I mean, laying
20 awake till 4 o'clock in the morning every day for
21 almost a year, I don't think that's fun. Did I
22 think about those other guys? I was more interested
23 in getting the plane back and getting the note paid
24 off.

25 That's why I let those guys

Janice D. Hayward, RMR
843.478.6756

1 handle it, being Mr. Hodge and Mr. Marvel. I was
2 more focused on getting the rest of it taken care
3 of.

4 Q Okay. So you decided to bear that on your
5 own?

6 A I had no choice.

7 Q Why didn't you have a choice?

8 A The choices were to default on the note or
9 to fix it.

10 Q Well, you got these other people that you
11 say that are members of the LLC. You had a choice
12 to call them, let them know. But they weren't
13 members at that time, were they?

14 A Yes, they were.

15 MR. MARVEL: Object to the form.

16 BY MR. GASKINS:

17 Q But you didn't call them?

18 A They were in default. They knew what was
19 going on. I mean, I'm not --

20 Q Mr. Lovingood, we just talked about this
21 and they were not in default, isn't that true?

22 A They were in default. If I go back and
23 check the records, and you want to be, you know,
24 straight on, I'm sure that I can find where one of
25 them owed money. I didn't put them in that

1 position, they did it themselves.

2 Q To the best of your knowledge --

3 A Then the best of my knowledge, I don't
4 think they were in default, but I found out later
5 that they did owe money. All right? As a note
6 holder, I was acting as getting that plane put back
7 together.

8 Q Okay. Now, after -- while the plane was
9 sitting in Atlanta, there are note payments that are
10 still due, right?

11 A Yes.

12 Q And you're paying those?

13 A Yeah.

14 Q Okay.

15 A C3 was paying those.

16 Q C3 was paying those.

17 Did you send out any invoices
18 asking for their share of it?

19 A I don't recall.

20 Q Did East Shore Aviation do it?

21 A I don't recall.

22 Q So you don't know if -- you don't know
23 what my clients knew about the engine failure, do
24 you?

25 A I don't have any recollection of any of

Janice D. Hayward, RMR
843.478.6756

1 that.

2 Q Why didn't you send out invoices for their
3 share of the loan payment?

4 A I have no -- I don't have any idea why.

5 Q I apologize, my cross-referencing system
6 is not great.

7 (Lunch recess.)

8 (Marked for identification was Defendants'
9 Exhibit 9.)

10 BY MR. GASKINS:

11 Q All right. I'm handing you what's been
12 marked as Exhibit 9, which are invoices from Epps
13 that your attorney has provided in discovery.

14 I don't have any specific
15 questions about what's in the invoices, but are
16 those all the invoices that you received from Epps?

17 A To the best of my knowledge, yes.

18 Q And that's what your damages calculation
19 is based on, is my understanding?

20 A Yes.

21 Q Okay.

22 (Marked for identification was Defendants'
23 Exhibit 10.)

24 BY MR. GASKINS:

25 Q I'm handing you what's been marked as

1 Exhibit 10 which appears to be an estimate from
2 Pratt Whitney. Can you tell me about that document
3 and whether it's -- what it is? I know it's an
4 estimate, but how it relates to the final resolution
5 of the engine problems?

6 A I just went and met with them, met with
7 them, negotiated, negotiated, and this is the number
8 we came up with to start, pretty much. I don't
9 recall the final number, but this was -- we got it
10 from like six hundred to seven hundred thousand down
11 to two seventy-five.

12 Q Okay. And I just want to make sure I
13 understand it correctly. Whatever was charged
14 through Pratt Whitney was actually charged through
15 Epps?

16 A Epps, 'cause they're --

17 Q You don't have a separate invoice or
18 payment that you made to Pratt Whitney, correct?

19 A Correct. Epps was the authorized dealer
20 for Pratt Whitney.

21 Is that all you need?

22 Q Yeah, I just wanted to make sure. All
23 right. Before I get to that and ask you about it, I
24 want to understand the damages that you, as opposed
25 to C3 Investments or PPC12, but you as Gordon

Janice D. Hayward, RMR
843.478.6756

1 A I don't know.

2 MR. MARVEL: Yeah, I'll object to the
3 form on that.

4 MR. GASKINS: Okay.

5 MR. MARVEL: And I think I understand
6 your question. If you want me to clarify
7 that and you want to send me an
8 interrogatory about it, I can probably
9 sort through that.

10 MR. GASKINS: I think --

11 MR. MARVEL: I don't know you asked
12 it in that fashion.

13 We can go off the record a
14 second.

15 (The deposition went off the record.)

16 MR. MARVEL: Is this marked?

17 MR. GASKINS: Not yet, but it's going
18 to be -- we'll mark it.

19 (Marked for identification was Defendants'
20 Exhibit 11.)

21 BY MR. GASKINS:

22 Q Mr. Lovingood, I'm handing you what's been
23 marked as Exhibit 11 which is a spreadsheet that has
24 been produced by your attorney in discovery which I
25 understand to be the amount of damages that either

1 you, C3 Investments, and/or PPC12 are seeking in
2 this action.

3 And your counsel wanted to make
4 a stipulation for the record.

5 MR. MARVEL: Exhibit 11 is a document
6 prepared, I don't recall if I did it but
7 it certainly came from my office, as a
8 calculation that was, to my recollection,
9 prepared for the purpose of responding to
10 the interrogatory. It was not a
11 preexisting document.

12 And so what this represents is
13 the total damage. And it's not
14 necessarily broken down by entity because
15 they may have been -- I can't tell you,
16 and I don't think Gordon's prepared to
17 tell you who funded what aspect of it.

18 As a practical matter, C3
19 Investments and Gordon personally were
20 responsible for the note and, therefore,
21 they ensured that these costs were paid on
22 behalf of PPC12.

23 So I don't know that there's a
24 distinction between any of the entities --
25 who would claim what damages, for example.

Janice D. Hayward, RMR
843.478.6756

1 I don't think you can say that C3 had some
2 damages as opposed to Gordon.

3 If you want me to make that
4 determination of who paid what, I can
5 probably do that. I have not done that
6 yet, so.

7 MR. GASKINS: Okay. I think that
8 would be helpful because, I mean, there
9 are different causes of action which I
10 think are pertinent to some plaintiffs but
11 not to the others. So I think, you know,
12 we need to make those distinctions. But I
13 will ask a few questions. I understand
14 what answers I may get, but I need to go
15 ahead and ask them anyway.

16 BY MR. GASKINS:

17 Q So I'm asking you what damages you
18 personally have suffered and are claiming in this
19 lawsuit. And I understand them to be the cost of
20 the repairs made to the engine, is that correct?

21 A Correct.

22 Q And the carrying cost on the note?

23 A Correct.

24 Q And some attorney's fees for Mr. Hodge?

25 A Correct.

1 Q Okay. And based on what your counsel
2 said, it may be hard to distinguish between which
3 plaintiff or which person suffered these damages,
4 but we would try to figure that out.

5 Did you personally make the
6 payment to Epps for the repairs?

7 A Did I sign the checks?

8 Q No. Did you -- did the payment come from
9 your personal assets or were they paid from C3
10 Investments?

11 A I don't have the numbers to really
12 substantiate what amount came from what accounts and
13 all that, so I can't answer that right now.

14 Q Okay. How about the payments on the note,
15 were those made by you personally or by C3
16 Investments?

17 A I'd have to go back and look at all the
18 canceled checks and everything. I don't know the
19 exact amount.

20 Q How about Mr. Hodge?

21 A Again, I don't --

22 Q Well, let me ask you this. If you look at
23 Exhibit 11 on the top, those are the -- the top
24 portion is the repair, correct?

25 A Yes.

Janice D. Hayward, RMR
843.478.6756

1 Q Okay. And I notice that there was a
2 \$137,000 deposit made and then later there was a
3 \$140,000 deposit made, correct?

4 A Correct.

5 Q And after all the work that was done that
6 is reflected in Exhibit 9, there was a balance of
7 \$97,603.48?

8 A Correct, I guess, I didn't look at it, but
9 I'm assuming that's right.

10 Q Has that balance, in fact, been paid?

11 A Yes, sir.

12 Q So the balance as of today is zero?

13 A Zero.

14 Q What about the invoices for Mr. Hodge, has
15 that been paid in full?

16 A To my knowledge, yes, sir.

17 (Marked for identification was Defendants'
18 Exhibit 12.)

19 MR. MARVEL: You've got both of them
20 as 12?

21 MR. GASKINS: Yeah.

22 MR. MARVEL: Okay.

23 BY MR. GASKINS:

24 Q And there are two separate invoices from
25 Mr. Hodge for services that you claim were related

1 MR. MARVEL: Object to form.

2 A Yes.

3 BY MR. COLLINS:

4 Q Okay. Do you know whether or not
5 Mr. Gaskins' client received final K-1s from the
6 accountant?

7 A No. I didn't even know this one existed.

8 Q Did you?

9 A No.

10 Q Okay. So -- 'cause you I believe
11 testified I think that you're still a member?

12 A I still -- I think I am. I don't know.

13 Q Okay. Well, do you -- did you get a K-1
14 last year?

15 A I don't know.

16 Q Who would it have gone to?

17 A Probably my new -- or my accountant, not a
18 new one but my accountant probably.

19 Q Who is that?

20 A Brandon Hoffman.

21 Q Where is he?

22 A He's in Charleston.

23 Q In Charleston?

24 A West Ashley.

25 Q Okay. The plane's been sold, right?

Janice D. Hayward, RMR
843.478.6756

1 A Correct.

2 Q And the note's been paid off?

3 A Correct.

4 Q So the bleeding has stopped, so to speak?

5 A Correct.

6 Q Did the sale of the plane generate enough
7 cash to pay off the note?

8 A Yes.

9 Q Was there any surplus?

10 A I think there was a little bit of money.
11 I'm not real sure.

12 Q How much do you think it was?

13 A I think it was probably less than 10,000
14 bucks or I would have remembered more than that.

15 Q We all have our threshold, right?

16 A I just do what the IRS says.

17 Q Mine is 20 bucks.

18 MR. MARVEL: I was going to say, mine
19 is ten.

20 BY MR. COLLINS:

21 Q We think there was some sort of surplus,
22 whether it be 10,000 or 50,000 or 5,000?

23 A The surplus was something that had to do
24 with Skytech giving a rebate on their commission or
25 something 'cause I asked them to but, yeah, there

1 were you?

2 A Sure I was. I came out of pocket for my
3 share of it plus theirs.

4 Q Okay. Well, let's --

5 A See, that's why they are part of the deal.

6 Q Let's assume this hypothetical. Let's say
7 they held these meetings without you. They went and
8 purchased another plane and they operated that other
9 plane, but they also paid the expenses of PPC12. So
10 by your reasoning they still committed a breach of
11 fiduciary duty, correct?

12 A It's not about whether they bought a
13 plane. It's what they agreed to do with PPC12.
14 That's what it's about. And they, to me, in my
15 eyes, and for what I feel is they violated any
16 fiduciary responsibility they had with me.

17 Q I understand how you feel. I understand
18 how you feel.

19 A Hey, you asked the question, that's my
20 answer.

21 Q But you're not answering the question so
22 I'll ask it again. In my hypothetical, let's say
23 they did everything that they did but they continued
24 to make the payments for PPC12.

25 A We wouldn't be sitting here.

1 Q But they still would have breached your
2 fiduciary duty, right?

3 A That's why we're here. They didn't do
4 that.

5 Q No. Well, that's because they didn't make
6 the payments, right?

7 A They didn't --

8 Q That's a separate obligation, right?

9 MR. MARVEL: Object to form.

10 A Sir, I'm not an attorney and I'll be happy
11 to go study the law and I'll be happy to come back
12 and give you an answer that I feel that I'm
13 comfortable in giving to you.

14 But right now I don't really
15 feel comfortable in answering this question without
16 any -- other than my feelings. I'd rather have to
17 read it and see what a fiduciary responsibility is
18 which I think I read when I was in real estate
19 school and what I think it means to me.

20 But I would decline to answer
21 your question right now until I -- but in my
22 feeling, I gave you an answer. That's why --
23 BY MR. GASKINS:

24 Q And your feeling was that if they'd have
25 done that, we wouldn't be here today?

1 A If they would have kept up with that
2 agreement that we all sat down in a room and talked
3 about and signed and everything else, leaving the
4 other airplane out and just doing their obligation
5 to what they agreed to do with me personally plus
6 the note, we probably wouldn't be sitting here.

7 Q Okay. All right. Let's go back to the
8 agreement. Mr. Collins was asking you about the
9 management of the plane. And I want to go back to
10 that. I forget what that exhibit is, 3?

11 A 3 or 4. They're both the same.

12 Q Yeah. Let's go to 4.

13 MR. MARVEL: Go to 4.

14 MR. GASKINS: Go to 4?

15 MR. MARVEL: Yeah.

16 BY MR. GASKINS:

17 Q I'm glad you're admitting that they're the
18 same. It took me forever to get that from you.

19 All right. Look at page three,
20 section 4.1.

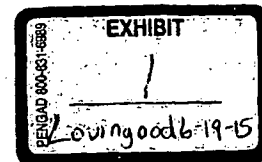
21 A 4.1?

22 Q Yeah.

23 A I've got it.

24 Q All right. And according to that
25 provision, isn't it true that David Gibbons and East

LOVINGOOD DEPOSITION EXHIBIT 1



Aviation Management Contract between East Shore Aviation, LLC and PPC12, LLC.

Section 1.0 - Scope

This contract covers the agreement between PPC12, LLC (**the owners**) and East Shore Aviation (**East Shore**) for the management of Pilatus PC-12 N217EB. It also stipulates that East Shore Aviation will be the sole operator of this aircraft and will exercise total control concerning the operation of and maintenance of the aircraft for the contract period. PPC12, LLC also agrees to wet lease the aircraft to East Shore Aviation at an agreed upon rate for all Part 135 charters.

1.1 - Duration

The contract will be for a period of One (1) year. The effective date of the contract is December 1, 2010.

1.2 - Cancellation

If, for any reason, either party wishes to cancel the agreement, that party must give the other Thirty(30) days notice of their intention to cancel the agreement.

1.3 - Definitions

- For operational determination, record keeping and reports, the following definitions apply:
- A. **Owners** - for the purposes of this contract, the owners are stipulated in the PPC12 Operating Agreement.
 - B. **Part 135 user** - Any person, organization or group who contracts for flight through East Shore Aviation or any other means.
 - C. **All references to aircraft in this contract** should be construed to apply to Pilatus PC-12 N217EB unless otherwise stipulated.
 - D. **East Shore Aviation** - all references in this contract to **East Shore** should be construed to mean East Shore Aviation

Section 2.0 - Management Fee

The owners agree to pay **East Shore** a fee on the 10th of every month for the management of N217EB as follows:

- A. For the term of the contract - \$8,500/Month.

2.1 - Pilot Services

The management fee includes pilot services for 500 hours of Part 91 usage. The hours will be measured using the Hour Meter installed on N217EB. This hour meter records time from wheels off to wheels on.

2.2 - Management Services

The management fee also includes the services of an **East Shore** employee to act as Manager for PPC12 LLC. These services are for up to 10 hours/week. If circumstances make it necessary to exceed this number then **East Shore** will be paid \$25/hour for each hour above the limit. **East Shore** will report every month on the amount of time and duties spent accomplishing this requirement.

2.3 - Pilot Records

East Shore will maintain all pilot records and insure that all pilots assigned to any mission are legal and compliant with respect duty time, flying time, insurance, and FAA requirements.

2.3 - Pilot Expenses

All reasonable pilot expenses incurred from operations under the Part 91 section of this contract will be the responsibility of the **owners**. This includes overnight accommodations. For the purposes of this contract, reasonable will be defined as \$50/day for each required pilot for meal expenses, a Hampton Inn or similar hotel, and if a crew car is not available, \$50/day for rental car. Pilot

expenses for operations under the Part 135 section are the responsibility of the person or organization chartering.

2.4 – Pilot Training

All initial and recurrent pilot training will be the responsibility of the **owners**. This training expense will be for two(2) pilots but can be negotiated higher as operational needs dictate.

Section 3.0 – Part 91 (Owner) Operations

In return for the monthly fee, **East Shore** will provide the following services:

3.1 – Operations

Operations under Part 91 of the FAR's can only include passengers that are an **owner** or that an individual **owner** identifies as a friend, family member or business acquaintance. The cost of any owner operation must be borne solely by the owner. All time, except Part 135 Charter operations, would count against the 500 hour limit used to calculate pilot fees in section 2.1.

- a. **East Shore** will conduct all flights flown by PPC 12's aircraft (N217EB) and will exercise operational control of all flight operations for PPC 12 LLC.
- b. **East Shore** will notify all other **owners** as soon as possible when use of the aircraft is requested for a non-owner. **East Shore** will resolve these conflicts according to the owner agreements in the PPC12 operating agreement.
- c. **East shore** will notify all **owners** as soon as possible of any scheduling conflicts caused by air traffic delays and unscheduled maintenance during non-owner use. Reports covering all non-owner activity will be provided in the monthly reports in Section 3.4.

3.2 – Maintenance

East Shore will insure all scheduled, routine, and non-routine maintenance will be accomplished and all records are updated to reflect this. **East Shore** will also insure that all Airworthiness Directives are complied with and all appropriate records concerning these directives are updated. **East Shore** will use an agreed upon maintenance following program to track these requirements.

3.3 – Aircraft Care

East Shore will insure that the Aircraft is hangared when not in use and is cleaned and washed regularly.

3.4 – Reports

East Shore will provide reports covering expenses and **owner** activity for each month. These reports will be provided by the 10th of each month and to each owner. **East Shore** will also provide a report on anything the **owners** agree is necessary at the time of contract signing.

3.5 – Owner usage

Aircraft usage will be charged to each **owner** based on the hour meter installed on N217EB. Any operations by non-owners under Part 91 will be charged to the **owner** who grants permission for the operation.

3.6 – Scheduling

East Shore will use **Flight Schedule Pro** to schedule flights. Each owner will be provided a username and password to view the schedule. The owners will have to call **East Shore** to actually schedule the flight.

- a. The scheduling **owner** will provide East Shore with a list of all authorized passengers as much in advance of the scheduled flight as possible.
- b. At the **owner's** request, **East Shore** will make all arrangements for ground transportation, rental cars, lodging and any other necessary requirement.
- c. If N217EB is not available for any reason, **East Shore** will arrange alternate air transportation at the **owner's** request and expense.

3.7 - Records

East Shore will maintain records of all transactions concerning use of the aircraft by the owners. Also, on the date stipulated by the owners, **East Shore** will track and ensure that all owner's monthly invoices are distributed and the amounts indicated are deposited into the PPC 12 Operations account and all monetary payments on the aircraft note, maintenance, fuel, insurance and management fee are made.

3.8 - Aircraft Availability

East Shore will notify all **owners** in a timely manner of all scheduled maintenance, aircraft downtime and any other matters that would affect the owners' use of the aircraft. **PPC12** also agrees to allow the use of the aircraft by **East Shore** for non-commercial reasons at the prevailing **owners** rate for up to (7) seven hours each month based on availability.

3.9 - Aircraft Dispatch and Monitoring

The pilot-in-command will be responsible and the final authority as to the dispatch and operation of all flights. **East Shore** will also use a flight monitoring web site to track all flights as to arrival time and other aircraft movement related topics. All flights will be operated under an FAA filed flight plan, VFR or IFR if necessary.

Section 4.0 - Part 135 Operations

The **owners** agree that **East Shore Aviation** is authorized to operate as charter agent for N217EB. These charters will be operated under Part 135 of the FAR's.

4.1 - Operations

The **owners** agree to let **East Shore Aviation** advertise and solicit additional flying as charters and use N217EB to carry out this flying. This use is covered by the following sections.

- a. **East Shore** will have operational control of all Part 135 Charter flights.
- b. **East Shore** agrees to remain in compliance at all times with all FAA requirements concerning operations under Part 135 of the FAR's.
- c. The **owners** agree that Part 135 Charter revenue will be dispersed as follows: The owners will receive the revenue from the hourly charter rate minus the \$150.00/Hour for Pilot Fees.
- d. All charters operated under this section are at the approval of all the **owners** subject to the following stipulations:
 1. **East Shore** will notify the **owners** as soon as possible and, when able, not less than 48 hours before all pending charters.
 2. The **owners** have until 24 hours before the scheduled departure time of a pending Part 135 operation, when scheduling time permits, to object to the operation and schedule the aircraft for their own use. If scheduling time does not permit, the owners should object to the operation within 3 hours of notification.
- e. **East Shore** will ensure timely collection and distribution of all charter revenue and reports covering these charters will be governed by Section 3.3

For PPC12, LLC

165
VICTORIA PAT - MAYOR
Date 12/1/10

For East Shore Aviation

[Signature]
MICHAEL GIBBONS - PRESIDENT
Date 12/01/10

Witness

Denise Haines
Date 12/1/10

East Shore 0177

**LOVINGOOD
DEPOSITION EXHIBIT 4**



**FIRST AMENDED
OPERATING AGREEMENT
OF**

APR 2nd 2011 
PPC12, LLC

THIS OPERATING AGREEMENT (the "Agreement") of PPC12, LLC (the "Company") dated as of ~~January 1, 2011~~, is (a) adopted by its Members, and (b) executed and agreed to, for good and valuable consideration, by the Member.

**ARTICLE I
DEFINITIONS**

The following terms used in this Agreement shall have the following meanings (unless otherwise expressly provided herein):

1.1 "Act" means the South Carolina Uniform Limited Liability Company Act, Chapter 44 of Title 33 of the South Carolina Code of Laws 1976, as amended from time to time.

1.2 "Articles" means the Articles of Organization filed with the Secretary of State of the State of South Carolina ("Secretary of State") to form the Company, as originally executed and as amended from time to time, as the context requires.

1.3 "Capital Contribution" means any contribution of cash or other property by the Member to the capital of the Company.

1.4 "Code" means the Internal Revenue Code of 1986 and any successor statute, as amended from time to time.

1.5 "Company" means PPC12, LLC, a South Carolina limited liability company.

1.6 "Member" means any Person (i) who is C. Gordon Lovingood, Jr., Victor Apat, CT Touring, LLC or who have become a Member pursuant to this Agreement and (ii) who has not ceased to be a Member.

1.7 "Person" includes any domestic or foreign individual, general or limited partnership, limited liability company, trust, estate, corporation, custodian, trustee, executor, administrator, nominee, government, governmental entity, or other entity.

**ARTICLE II
ORGANIZATION**

2.1 **Formation.** The Company has been organized as a South Carolina limited liability company by the filing of the Articles pursuant to the Act with the Secretary of State.

2.2 Name. The name of the Company is PPC12, LLC and all Company business must be conducted in that name (or such other names that comply with applicable law as the Member may select from time to time).

2.3 Registered Office. The designated office of the Company required by the Act to be maintained in the State of South Carolina shall be 1525 Ashley River Road, Charleston, SC 29407, or such other office within the State of South Carolina (which need not be a place of business of the Company) as the Member may designate from time to time upon compliance with Act § 33-44-109.

2.4 Registered Agent. The registered agent of the Company in the State of South Carolina shall be Victor Apat, 1525 Ashley River Road, Charleston, SC 29407, or such other Person as the Member may designate from time to time in the manner provided by Act § 33-44-109.

2.5 Principal place of business. The principal place of business of the Company shall be at 1525 Ashley River Road, Charleston, SC 29407, or at such other place as the Member may designate from time to time, which need not be in the State of South Carolina. The Company may have such other offices as the Members may designate from time to time.

2.6 Purposes. The purposes of the Company are to engage in aircraft operations, including but not limited to air transportation, aircraft ownership, aircraft charter pursuant to Part 135 of the Federal Aviation Regulations (FAR), and to carry on any other lawful business or activity in connection with the foregoing or otherwise, and to have and exercise all of the powers, rights and privileges that a limited liability company organized pursuant to the Act may have and exercise. Any aircraft owned by the Company may be referred to hereinafter as "the Aircraft."

2.7 Term. The Company commenced on the date the Articles were filed with the Secretary of State of South Carolina and shall continue in existence until the Company is dissolved in accordance with the provisions of this Agreement or the Act.

2.8 Shares. The ownership interest of a Member, includes, without limitation, the right to participate in management of the Company, the right to vote on any action of the Members, and the right to allocations of profits and losses and distributions.

ARTICLE III MEMBER

3.1 Initial capital contributions. As an initial Capital Contribution to the Company, the Members have contributed the capital on Schedule A to the Company.

3.2 No interest on capital contributions. The Members are not entitled to be paid interest in respect of the Member's capital account or the Member's Capital Contributions. Any unrepaid Capital Contribution is not a liability of the Company.

3.3 Additional capital contributions; loans. The Members may make additional Capital Contributions to the equity of the Company or may loan money or other property to the Company on such terms as may be agreed to by the Company and the Members. The Members shall designate to the Company whether a transfer of cash or other property from a Members to the

Company is to be treated as an additional Capital Contribution or a loan.

3.4 Additional Members. A Person may be admitted to the Company as an additional Member by the issuance by the Company to such Person of Shares for such consideration as the existing Member may determine. Any such admission also must comply with the requirements described elsewhere in this Agreement and is effective only after the Person has executed and delivered to the Company and the existing Member an operating agreement acceptable to the existing Member which reflects the existence of at least two members.

3.5 Limitation of Liability. No Member is personally liable for any debt, obligation, or liability of the Company, whether arising in contract, tort or otherwise.

3.6 Aircraft Use. A member of the Company shall have the right to use the aircraft as long as it is available and not previously scheduled, based upon the terms and conditions of this section.

The Member shall pay the applicable aircraft fees and charges representing the fixed and variable expenses as set by the Company. At all times, such flight operations shall be conducted in accordance with the Federal Aviation Regulations (FARs).

3.7. Each shareholder is entitled to use the aircraft owned by the Company for up to twenty (20) hours each month. This is based on a 25% (1/4) share ownership interest. Ownership interest that is different the 25% shall be prorated accordingly. Such usage is not allowed if a Member is not current with all financial obligations required by the Company. A Member may not schedule the aircraft to cause cancellation of a revenue flight pursuant to the FAA Part 135 Certificate.

Should a scheduling conflict exist between Members, a Member who has not reached twenty (20) hours or, in the event that no Members have flown twenty (20) hours, the Member with the least time credited to his account shall have priority over a Member with greater time. If the aircraft is not being utilized, each owner may fly in excess of the twenty (20)-hour limit, but in doing so, Member shall not have priority over another Member or a revenue flight as indicated herein. The Member shall pay the Company an hourly use rate for the aircraft that is not less than the operating cost of the aircraft. The Company may calculate and adjust the operating cost as necessary to meet its obligations as set forth herein. Each Member shall be responsible for the payment of all crew costs.

ARTICLE IV MANAGEMENT

4.1 Management. The members hereby select David Gibbons and East Shore Aviation as its manager with the rights and duty to handle all day-to-day operational needs including, but not limited to cleaning, maintenance, invoicing, payment of bills, bookkeeping, accounting, taxes, regulatory filings and licensing, inspections and all general operational requirements. All expenditures are approved up to \$1,000.00 per occasion and no more than \$5,000.00 in a thirty (30) day period. Expenditures above these require a seventy-five (75%) percent approval by all members. All other issues or powers, including those enumerated in section 4.2, require a seventy-five (75%) percent approval from the Members.

4.2 Powers. The powers enumerated herein apply to the Company, and not to the Manager. The Manager shall act at the direction of the Company and in accordance with this Operating Agreement, as amended. In conducting the business of the Company, in addition to any powers granted to the Company by the Act or by other applicable law, unless otherwise restricted by a valid act of the Company, the Members shall have power and authority on behalf of the Company:

- (a) The opportunity to select, hire, or appoint a manager for the Company;
- (b) To acquire and manage any real or personal property on any terms;
- (c) To borrow money for the Company from any person (including a Member or affiliate of a Member) on any terms, and in connection therewith, to hypothecate, encumber and grant security interests in the assets of the Company to secure repayment of the borrowed sums;
- (d) To purchase liability and other insurance to protect the Company's assets and business;
- (e) To sell or otherwise dispose of any part or all of the assets of the Company on any terms;
- (f) To execute on behalf of the Company all instruments and documents, including, without limitation, checks; drafts; notes and other negotiable instruments; mortgages or deeds to secure debt; security agreements; financing statements; documents providing for the acquisition, mortgage or disposition of the Company's property; assignments; easements; bills of sale; leases; partnership agreements; operating agreements of other limited liability companies; and any other instruments or documents;
- (g) To engage accountants, legal counsel, managing agents or other experts, and to employ personnel, to perform services for the Company and to compensate them from Company funds;
- (h) To enter into and perform any agreements on behalf of the Company, with any other person for any purpose;
- (i) To make donations for the public welfare or for charitable, scientific, or educational purposes; and
- (j) To do and perform all other acts as may be necessary or appropriate to the conduct of the Company's business.
- (l) At no time shall an expenditure or transaction by the Company place the loan for the aircraft in default with the lender.

4.3 PPC12, LLC acknowledges that C. Gordon Lovingood, Jr. (CGL) is the guarantor on the loan and establishes the following:

(a) Evidence that the monthly loan payment has been made shall be provided to CGL on a monthly basis;

(b) In the case that evidence of payment is not provided to CGL within 14 days of the due date, CGL has the authority to direct the Manager to make the payment from the PPC12, LLC bank account noted above. In this case, the bank account shall be refunded prior to the next payment due date;

(c) In addition, in the event of nonpayment of the loan, CGL shall be entitled to apply funds from the Operations, Maintenance, and Engine Reserve account(s) up to the amount of a second monthly loan payment (\$15,816.00). Should any of the aforementioned accounts have a balance of less than \$15,816.00, the full balance shall be applied. The payments in this paragraph will only be made, if within fourteen (14) days of the due date, a second monthly payment is due and is unpaid. Under such circumstances, CGL may direct the Manager to disburse funds from the aforementioned accounts, and the Manager shall immediately comply.

(d) In the case that no money exists to make the payment, CGL may make the payment which shall be re-paid to CGL within ten (10) days of demand. If this is not possible, CGL shall have the right to restrict use of the plane until the account status has been brought back into good standing.

(e) In the case of default and only after all remedies noted here-in have been exhausted, CGL, after a continuing default of sixty (60) days, shall have the right to market the plane for sale and proceed to consummation of a sale. In the case of a sale, any net proceeds shall be disbursed as noted in section 4.6.

(f) The members shall endeavor to refinance the debt associated with the ownership of the asset no later than January 1, 2014. This may include negotiations with Cessna Finance or related companies to reduce the outstanding debt. CGL agrees to assist with this process.

(g) The intent of this agreement is to allow for the reduction of the ownership position for CGL to one percent (1%) and the reduction of ownership position for Victor Apat to 25% by the introduction of new members acquiring an ownership interest. The creation of the powers, authority and remedies noted in section 4.3 above shall only take affect when this revised ownership position is in existence.

4.4. All decisions related to the operation and management and sale of the plane shall rest with PPC12, LLC and will require a 75% member approval for changes in the current operating structure;

4.5 In the case of a sale of the plane, any equity recovered due to the sale shall be distributed in accordance with the Capital accounts of the members.;

4.6 Operational control as required under the FAA guidelines for the part 135 certificate shall rest with East Shore Aviation

ARTICLE V MEMBERS

5.1 List of Members: The Members of the Company are:

<u>Name</u>	<u>Address</u>	<u>Ownership Interest</u>
C. Gordon Lovingood, Jr.	200 Church Street Mount Pleasant, SC 29464	43.75%
Victor Apat	1525 Ashley River Road Charleston, SC 29464	43.75 %
CT Touring, LLC (as of 4/4/11)	PO Box 1697 Mt. Pleasant, SC 29464	12.5%

5.2 PPC12, LLC shall establish a bank account with a minimum balance equal to one monthly loan payment (\$15,816.00). See section 4.3.

ARTICLE VI OFFICERS

6.1 **Officers.** The Member may, from time to time, designate one or more Persons to be officers of the Company. No officer need be a resident of the State of South Carolina or a Member. Any officers so designated shall have such authority and perform such duties as the Member may, from time to time, delegate to them. The Member may assign titles to particular officers. Unless the Member decides otherwise, if the title is one commonly used for officers of a business corporation, the assignment of such title shall constitute the delegation to such officer of the authority and duties that are normally associated with that office, subject to any specific delegation of authority and duties made to such officer by the Member. Each officer shall hold office until his or her successor shall be duly designated and shall qualify or until his or her death or until he or she shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Company shall be fixed from time to time by the Member. Any officer may resign as such at any time. Such resignation shall be made in writing and shall take effect at the time specified therein, or if no time be specified, at the time of its receipt by the Member. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation. Any officer may be removed as such, either with or without cause, by the Member whenever in such Member's judgment the best interests of the Company will be served thereby; provided, however, that such removal shall be without prejudice to the contract rights, if any, of the Person so removed. Designation of an officer shall not of itself create contract rights. Any vacancy occurring in any office of the Company may be filled by the Member. Any Person dealing with the Company, other than a Member, may rely on the signature of any Member or officer on any instrument, contract, certificate or any other document and the authority of any one Member or officer in taking any action in the name of the Company, without inquiry into the provisions of this Operating Agreement or compliance herewith, regardless of whether that action actually is taken in accordance with the provisions of

this Operating Agreement.

ARTICLE VII DISTRIBUTIONS

7.1 Distributions. Distributions shall be made to the Member at such times and in such amounts (in cash or in-kind) as the Member may determine.

7.2 Limitation on distribution. No distribution may be made if, after giving effect to the distribution (a) the Company would not be able to pay its debts as they become due in the usual course of business; or (b) the liabilities of the Company would exceed the fair value of the Company's assets. The Company may base a determination that a distribution is not prohibited upon financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

ARTICLE VIII STANDARD OF CARE AND INDEMNIFICATION

8.2 Liability of Member and Officers.

(a) No Member or officer is personally liable for any debt, obligation, or liability of the Company, whether arising in contract, tort or otherwise.

(b) Each Member and officer shall perform his or her duties as Member or officer by refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law and acting consistently with the obligation of good faith and fair dealing. A person who so performs such duties shall not have any liability to a Member or to the Company by reason of being or having been a Member or officer of the Company.

(c) Unless otherwise provided in Section 8.2(d), the Company, its receiver or its trustee shall indemnify the Member and officers for all liabilities and expenses (including reasonable attorneys' fees) incurred by such Member or officer in the ordinary course of the business of the Company or for the preservation of the Company's business or property.

(d) Notwithstanding the provisions of Section 8.2(c), such section shall be enforced only to the maximum extent permitted by South Carolina law and no Member or officer shall be indemnified from any liability for any grossly negligent or reckless conduct, intentional misconduct, breach of fiduciary duty or a knowing violation of law that was material to the cause of action.

ARTICLE IX DISSOLUTION, LIQUIDATION, AND TERMINATION

9:1 Dissolution. The Company shall dissolve and its affairs shall be wound up on the first to occur of the following:

- (a) the written consent of the Member; or
- (b) administrative dissolution as provided in Act §§ 33-44-809 and 33-44-810, unless reinstated pursuant to Act § 33-44-811.

9.2 Winding up and termination. On dissolution of the Company, the Member (or a Person designated by the Members) will act as liquidator. The liquidator shall proceed diligently to wind up the affairs of the Company and make final distributions as provided herein and in the Act. The costs of liquidation shall be borne as a Company expense. The steps to be accomplished by the liquidator are as follows:

- (a) as promptly as possible after dissolution and again after final liquidation, the liquidator shall cause a proper accounting to be made by a recognized firm of certified public accountants of the Company's assets, liabilities and operations through the last day of the calendar month in which the dissolution occurs or the final liquidation is completed as applicable;
- (b) the liquidator may cause the notice described in Act § 33-44-807 to be mailed to each known creditor of the Company and shall publish the notice described in such Act § 33-44-808;
- (c) the liquidator shall pay, satisfy or discharge from Company funds all of the debts, liabilities and obligations of the Company or otherwise make adequate provision for payment and discharge thereof (including, without limitation, the establishment of a cash escrow fund for contingent liabilities in such amount and for such term as the liquidator may reasonably determine); and
- (d) all remaining assets of the Company shall be distributed to the Member.

9.3 Articles of Termination. Upon completion of the winding up of the Company, the Member shall file Articles of Termination with the Secretary of State and take such other actions as may be necessary to terminate the Company.

ARTICLE X GENERAL PROVISIONS

10.1 Books and records. The Company shall maintain such books and records as may be required by law and as the Company may deem necessary or desirable. The Member shall select a method of accounting.

10.2 Amendment or modification. The Agreement may be amended and modified from time to time only by a written instrument adopted and executed by the Member.

10.3 Checks, notes, drafts, etc. All checks, drafts or other orders for payment of money, notes or their evidences of indebtedness issued in the name of or payable to the Company shall be signed or endorsed by a designated person who may be appointed by the Member. The designated person may be an officer(s) or other person(s) as may from time to time be designated by the Member.

10.4 Construction. If any portion of this Agreement shall be invalid or inoperative, then, so far as is reasonable and possible:

(a) The remainder of this Agreement shall be considered valid and operative;
and

(b) Effect shall be given to the intent manifested by the portion held invalid or inoperative.

10.5 Entire agreement; supersedure. This Agreement constitutes the entire agreement of the Member and its affiliates relating to the Company and supersedes all prior contracts or agreements with respect to the Company, whether oral or written.

10.6 Governing law. This Agreement is governed by and shall be construed in accordance with the law of the State of South Carolina excluding any conflict-of-laws rule or principle that might refer the governance or the construction of this Agreement to the law of another jurisdiction.

IN WITNESS WHEREOF, the undersigned, being the Members, hereby certifies that the foregoing Agreement was adopted by the Members, effective as of the day and year first set forth above.

MEMBERS:

Signature: _____

C. Gordon Lovingood, Jr.

Signature: _____

Victor Apat

Signature: _____

CT Touring, LLC,
Eric Wade, Managing Member
4/1/11

Signature: _____

Future

LOVINGOOD DEPOSITION EXHIBIT 5

SECOND AMENDED
OPERATING AGREEMENT
OF
PPC12, LLC



THIS OPERATING AGREEMENT (the "Agreement") of PPC12, LLC (the "Company") dated as of May 15, 2011, is (a) adopted by its Members, and (b) executed and agreed to, for good and valuable consideration, by the Member.

The members agree to the following ownership changes:

ARTICLE V
MEMBERS

5.1 List of Members: The Members of the Company are:

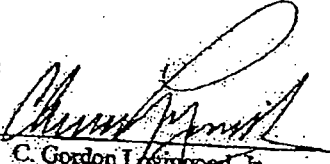
<u>Name</u>	<u>Address</u>	<u>Ownership Interest</u>
C. Gordon Lovingood, Jr.	200 Church Street Mount Pleasant, SC 29464	18.75%
Victor Apat	1525 Ashley River Road Charleston, SC 29464	18.75%
CT Touring, LLC (as of 4/4/11)	PO Box 1697 Mt. Pleasant, SC 29464	12.50%
Pearl Co SC, LLC	5264 International Blvd N. Chas, SC	25.00%
Anthony Mcalister	106 Pitt St Mt. Pleasant, SC	25.00%

All other terms of the operating agreement remain unchanged.

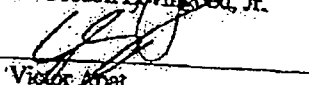
IN WITNESS WHEREOF, the undersigned, being the Members, hereby certifies that the foregoing Agreement was adopted by the Members, effective as of the day and year first set forth above.

MEMBERS:

Signature:


C. Gordon Lovingsood, Jr.

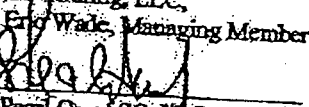
Signature:


Victor Apat

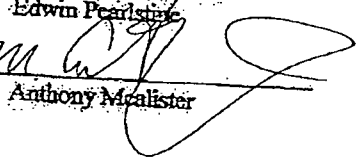
Signature:


CPTouring, LLC,
Eric Wade, Managing Member

Signature:


Pearl Co of SC, LLC
Edwin Pearlstein

Signature:


Anthony Mizalister

**LOVINGOOD
DEPOSITION EXHIBIT 7**



From: Edwin Pearlstone <pearlprop@aol.com>
To: dmichaelgibbons <dmichaelgibbons@verizon.net>
Subject: Re: Airplane
Date: Wed, Sep 5, 2012 11:35 am

Dave,

I don't see the need to have a meeting at this time. I have reviewed the LLC agreement and from my review, I don't believe we have any continuing obligation to pay for the plane nor do I believe there is any obstacle to our dissolving the LLC. Can you give me a report of how much our fixed monthly payments have reduced the liability on the plane during the existence of PPC12?

Edwin

-----Original Message-----

From: David Gibbons <dmichaelgibbons@verizon.net>
To: 'Eric Wade' <eric@cttouting.com>; Edwin Pearlstone <pearlprop@aol.com>; anthonymcalister <anthonymcalister@aol.com>; 'Vic Apat' <VApat@completebldg.com>
Sent: Tue, Sep 4, 2012 4:12 pm
Subject: FW: Airplane

Gentlemen,

Please let me know your availability for such a meeting.

Thanks,
Dave

From: cglovingood@comcast.net [mailto:cglovingood@comcast.net]
Sent: Tuesday, September 04, 2012 4:05 PM
To: David Gibbons
Subject: Airplane

Just got a call from Eric. I think we need to meet on this soon. No one has told me anything about this situation. So, I am asking you to get everyone together so we can get this resolved without any problems.

Gordon

Pearl 0049

LOVINGOOD DEPOSITION EXHIBIT 8

Vic Apat



From: Vic Apat
Sent: Tuesday, October 23, 2012 1:31 PM
To: 'David Gibbons'
Subject: RE: PPC12

Can you send me the e-mail?

Vic

-----Original Message-----

From: David Gibbons [mailto:dmichaelgibbons@verizon.net]
Sent: Tuesday, October 23, 2012 8:37 AM
To: Vic Apat
Subject: RE: PPC12

Vic,

It responds to a Gordon e-mail.

-----Original Message-----

From: Vic Apat [mailto:VApat@completebldg.com]
Sent: Monday, October 22, 2012 11:21 AM
To: David Gibbons
Subject: RE: PPC12

David,
What prompted this E-mail? Thanks

Vic

-----Original Message-----

From: David Gibbons [mailto:dmichaelgibbons@verizon.net]
Sent: Monday, October 22, 2012 10:46 AM
To: cglovingood@comcast.net
Cc: Vic Apat
Subject: PPC12

Gordon,

I sent out a short e-mail requesting the availability of the members for a meeting as you requested. We were only recently informed by the other members that they notified you by phone of their intention to leave PPC12 LLC effective October 1st. Those members have not used the aircraft since that time and are current with their financial obligations.

It is East Shore's understanding that the departing members attempted and explored the idea of refinancing N217EB with TD Bank, but were told that they could only do so for a much lower amount than that which is currently owed to Cessna Finance. Cessna's stance of not altering the note will always make bringing new members into PPC 12 to be on the note with you improbable. Unfortunately, anyone brought in will be in the same manner as those who have come and gone before due to the

inability to adjust the note without refinancing. We feel there are people that can replace those leaving, and we will continue to garner as many interested parties as possible.

As for East Shore's role concerning current and former members of PPC12's LLC, we only facilitate the book keeping, flying, and maintenance of N217EB.

We have no authority over how PPC12's members relate to one another. Any and all membership disputes need to be handled by the members.

PPC12 and N217EB have and remain East Shore Aviation's first priority. It is the only aircraft that we have on our charter certificate, and will remain actively chartered and flown as is spelled out in our current contract with PPC12. Clearly, there is no conflict of interest as we have several pilots in addition to Michael and I able to do any and all flying required. There has never been a charter missed or owner flight not completed. We have always managed N217EB's maintenance and have actively kept its membership as full as possible. We will continue to do so until PPC12 terminates its current contract with East Shore Aviation.

I am in New York attending to other business but I am available by phone or I can come to Charleston if necessary. Michael is available and will be in town all week. Let us know

The e-mail addresses of the members are as follows:

Eric Wade	eric@cttouting.com
Anthony McAlister	anthonymcalister@aol.com
Edwin Pearlstine	pearlprop@aol.com
Vic Apat	vapat@completebldg.com

Thanks,
Dave

David M. Gibbons
Director of Operations
East Shore Aviation
516-702-0438
631-549-4258
dmg1946@verizon.net

D. GIBBONS
DEPOSITION TRANSCRIPT PAGES

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

-versus-

Case No.:
2013-CP-10-5080

VICTOR APAT, ANTHONY McALISTER,)
J. ERIC WADE d/b/a CT TOURING,)
and PEARL COMPANY SC, LLC,)

Defendants.

THE DEPOSITION OF DAVID GIBBONS was taken as a witness on behalf of the Plaintiff, pursuant to South Carolina Rules of Civil Procedure, at 1:00 p.m. on Thursday, the 23rd day of October 2014, at the offices of Prenner Marvel, 636 King Street, in the City of Charleston, State of South Carolina, before Janice O. Darby, Registered Professional Reporter and Notary Public in and for the State of South Carolina.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 A Schedule it, staff it, and keep track of
2 who flew on it.

3 Q And by staffing it, I assume you mean who
4 is going to be piloting it?

5 A Right.

6 Q That's generally, as you described
7 earlier, what you do for any aircraft that you have
8 under contract?

9 A Mm-hmm. Yes.

10 Q What types of records are you required to
11 keep as the manager of an aircraft like PPC12?

12 A We have to keep maintenance records only.
13 And for Part 130 flights -- 135 flights, which are
14 charter flights, we have to keep certain records
15 about weight and balance and time, pilot time.

16 But PPC12 really had nothing to do with
17 the charter, other than we lease the airplane from
18 them to charter it. And so charters came through
19 us.

20 Q And that was my understanding. If
21 somebody wanted to charter an aircraft or in
22 particular that one or any aircraft --

23 A Well, that was the only one we had on the
24 certificate at that point. So that was the only one
25 we could charter.

1 Q When you say the certificate, you mean --

2 A There is an air carrier certificate that
3 we possess.

4 Q And that is what generally is called a
5 Part 135 certificate?

6 A That's an on-demand charter certificate,
7 and it allows us to hold ourselves out for -- to the
8 public as a common carrier.

9 Q Is the certificate aircraft specific or
10 company specific?

11 A It's company specific.

12 Q When did East Shore Aviation obtain a
13 Part 135 certificate?

14 A November of 2010.

15 Q Is it correct to say that PPC12 paid
16 whatever costs were involved in obtaining that
17 certificate?

18 A No.

19 Q Who did that?

20 A Who did that? We did.

21 Q East Shore Aviation?

22 A Yeah. There were no real costs involved
23 in it. It's a matter of application. We paid for
24 the manuals that we needed to -- We have to have a
25 certain set of manuals for the FAA. So we paid for

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 those. We lease the airplane from them when we
2 needed to take flights.

3 However, I guess you could say that they
4 did pay for some of those -- as shared owner
5 expenses for those charter flights -- I mean the
6 training flights and check rides.

7 Q Explain to me -- I'm not a pilot. You'll
8 probably have to dumb this down a little bit.
9 Explain to me what the process is for getting the
10 135 certificate.

11 A You have to make an application with the
12 FAA. You have to present them with a set of manuals
13 on how you're going to operate, how you're going to
14 train your pilots and what specific types of
15 operations you're going to do. Then you have an
16 inspection. You have to have a check ride from the
17 FAA. They inspect all of your manuals. And once
18 the manuals are inspected, they give you a
19 certificate.

20 Actually, you don't have to have a check
21 ride, because you would have a certificate, but the
22 pilot needs the check ride.

23 They also need to -- Not only is it
24 carrier specific or company specific, but you can't
25 just add airplanes. Like we have three airplanes.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 Only one of them right now is on the certificate,
2 because they have to inspect it, and you have to
3 show your maintenance records to them.

4 So it takes -- We are going to have a
5 second one on here pretty quick, because they are
6 coming down to inspect that.

7 But at that point that you're speaking
8 about, we had just N217EB.

9 Q And what plane do you have on the
10 certificate now?

11 A 561GG.

12 Q When did you add that particular aircraft
13 on to the certificate?

14 A I'm only going to be guessing now. We
15 picked the airplane up in September of 2012, and I
16 don't think we added it to the certificate until
17 February of 2013. But I would really have to check
18 my records on that. You can't hold me to that. I
19 can give you a date if you want to give me -- I
20 can't tell you specifically.

21 Q That's fine. When did 217EB come off of
22 your certificate?

23 A I believe I sent the letter removing it
24 from the certificate in December of 2012 when it
25 became apparent that the engine was going to take

1 some time. And so the airplane would not be
2 operating, or we couldn't use it, so we took it off
3 the certificate.

4 Q Now, the check rides and the training
5 flights you referred to earlier, am I correct in
6 saying that the training flights were not something
7 that the FAA needed to accompany you on. Correct?

8 A No. I'm the flight trainer for the
9 company. Essentially in those days we were flying
10 with just myself and Michael. So if we had training
11 to do, we would do it on a dead leg so there
12 wouldn't be any extra expense.

13 Q What do you mean by a "dead leg"?

14 A Somebody wants to fly to the Bahamas but
15 they don't want to leave the airplane there for a
16 week, so we fly it back empty. So that's a dead
17 leg. So if we had something like that come up, in
18 order to keep the costs down, we would always do the
19 training that way.

20 Q Now, the check ride that you describe,
21 that is something that --

22 A Yeah, the FAA has to accompany you on
23 that.

24 Q Did I hear you correctly that that is a
25 pilot-specific ride?

1 Because my check ride comes up in --
2 usually in December or November, and N217EB was
3 unflyable after October 28, 2012. So I can't tell
4 you from 2012 on.

5 Prior to 2012, they would have been done
6 on -- Prior to October 28, 2012, they would have
7 been done on EB. After that, they would have been
8 done on 561GG.

9 Q You have to do them every year?

10 A You have to do two every year, yes. Each
11 pilot. As of right now, we only have the same two
12 pilots that are allowed to do -- We have four
13 pilots, but only two pilots are allowed to do Part
14 135 flights, because there are only two pilots that
15 are checked out, and that's myself and Michael.

16 Q When did East Shore Aviation pick up
17 561GG as a plane?

18 A You want the exact date? I think it was
19 September 19th is when we finally picked it up.
20 There were some bank problems, and so it carried on
21 until September, and that's when we brought it home.
22 It was in England, so we had to fly it home from
23 England.

24 Q That was 2012?

25 A Yes.

1 Q Did you literally fly it back from
2 England?

3 A Yes.

4 Q What is different about those two
5 aircraft?

6 A You want the technicalities?

7 Q Sure.

8 A Well, they have a different paint job,
9 number one. Number two, they have a different
10 interior. One is capable of six seats, only six
11 seats. The other is capable of eight seats. One is
12 a model 47, and the other is a model 45. The model
13 47 can take off at 10,450 pounds, while the model 45
14 can only take off at 9,921 pounds.

15 Q Which one is which?

16 A EB is the model 45. GG is -- And plus,
17 one was built in 1996 and the other was built in
18 2007.

19 Q What was your personal involvement in the
20 purchase of 561GG?

21 A I found -- East Shore Aviation or me?

22 Q You personally, first.

23 A I was part of finding the airplane for
24 purchase.

25 Q Who asked you to find the airplane for

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 fact that we have some -- we put some rates on there
2 allowing for volume discount, friends and family
3 discount, and I think the other one was called
4 block-out discount. So they had a full rack rate --
5 There were four rates. I don't think this one
6 had -- It was just the same rate.

7 Q Now, how did you come to be aware of the
8 incident in which 217EB had an engine failure?

9 A My son called me.

10 Q When did he call you in relation to the
11 actual engine failure?

12 A When he got on the ground.

13 Q And tell me about that conversation.

14 A He just said that he just lost an
15 engine -- he just lost the engine. He just had a
16 return to PDK, and that was it. I asked him a few
17 questions about what happened, and he explained it
18 to me. Do you want me to go into that?

19 Q Yes.

20 A I asked him did the engine stop
21 completely. He said no; that he had a reduction in
22 power to the point where he could only make 10
23 percent on the torque, and that he was at 4200 or
24 something at the time that it happened and in the
25 clouds. He declared an emergency to send it below

1 the clouds, found the airport, landed.

2 Q And that was the airport he took off
3 from. Correct?

4 A PDK, yes.

5 Q And that's in Atlanta?

6 A Yes.

7 Q At that point after you took that call
8 from him, how did you relay that information to the
9 members of PPC12?

10 A I can't remember, if I even relayed it at
11 all. Michael may have. I don't really know at that
12 point. I can't say with any certainty.

13 Q Did you have any thoughts or knowledge of
14 what had actually physically happened with that
15 engine that caused the failure at that point?

16 A No. I was as interested as anybody else.

17 Q Obviously, that was unexpected.
18 Otherwise, the aircraft wouldn't have been flying.
19 That experience, have you ever had that experience
20 prior to that particular incident?

21 A On a Pilatus?

22 Q In any aircraft.

23 A Yeah. Plenty of emergencies.

24 Q How about specific to a Pilatus?

25 A No, I have never had an emergency on an

1 Q Did any of the members of the LLC ever
2 come to you and say why did you write that
3 particular check for the taxes?

4 A I can't recall specifically. I know
5 there was some question about that, and I just told
6 them that Mr. Apat told me to write it.

7 Q What was the question that was raised
8 about it?

9 A Why did we pay the taxes from this
10 account.

11 Q Do you recall who raised that question to
12 you?

13 A No.

14 Q Do you recall if it was more than one of
15 the members?

16 A Not that I could swear to.

17 Q At the point in which Mr. Wade and
18 Mr. McAlister and Mr. Pearlstine became members in
19 April, May and June of 2011, to your recollection,
20 were there any outstanding bills other than that
21 particular tax bill that needed to be paid on that
22 aircraft?

23 A I could not say for sure what outstanding
24 bills there were. I'm sure there were, but I can't
25 say what they were. I know the taxes -- There was a

1 tax bill, and that's all -- There were bills for
2 everyday day-to-day operations, what have you. But
3 I can't tell you exactly what they were or even what
4 they were.

5 Q Do you recall at that time being in a
6 position where you felt that PPC12 was unable to
7 meet its obligations on the aircraft?

8 A You're going to have to give me a time
9 frame.

10 Q In April through June of 2011.

11 A April through June of 2011? There was
12 some doubt.

13 Q What was it that caused that doubt in
14 your mind?

15 A It's hard for me to answer without
16 casting an aspersion, and I don't want to do that.

17 Q I'm asking you for your opinion.

18 A Because Mr. Lovingood and Mr. Apat were
19 well behind on their payments.

20 Q What happened when the new members came
21 in?

22 A There was an influx of each -- I believe
23 they each paid \$25,000. And so there was an influx
24 of capital. And those people, when they used the
25 airplane, they paid their bills. I know there was

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net.

1 financing that particular aircraft.

2 Q But you do know that T.D. Bank was?

3 A Yes, I believe it was T.D. Bank.

4 Q Were there ever any attempts by you or
5 any of the members of PPC12, LLC, to refinance the
6 plane through Cessna Finance?

7 A I think I had a conversation with
8 somebody out at T.D. -- I mean at Cessna Finance on
9 the direction of Mr. Lovingood, and I actually said
10 too much according to what Mr. Lovingood had wanted
11 me to say. So I disassociated myself from those
12 endeavors in the future.

13 And they were unresponsive to changing
14 anything on the note.

15 What we were trying to do was to get them
16 to lower -- you know, to cut a deal on the note, to
17 make it more tenable for refinancing.

18 Q I'm going to ask you some more questions
19 about that series of events and discussions you had
20 with Cessna Finance and Mr. Lovingood, and I want
21 you to be as specific as you can.

22 What directions did Mr. Lovingood give
23 you about contacting Cessna Finance to discuss
24 refinancing?

25 A Just to see if they would be willing to

1 talk about adjusting the remaining amount on the
2 note.

3 Q Do you remember when those discussions
4 occurred?

5 A No. If I had to guess at it, I would say
6 that it was in 2011 at some point. I have no real
7 idea.

8 Q Do you know why Mr. Lovingood didn't
9 contact Cessna Finance himself?

10 A He did eventually after I guess I made a
11 botch of it.

12 Q Explain to me why he was --

13 A I really don't know. He just asked me to
14 lay the groundwork and then to see if there was any
15 kind of an interest. Maybe he was too busy. I
16 really don't know.

17 Q And I think you answered my question,
18 then. I'm trying to move on to another question. I
19 probably didn't make that clear.

20 I believe you said something to the
21 effect that you exceeded the directions or
22 instructions that Mr. Lovingood gave you --

23 A Well, I said some things --

24 Q If you'll let me finish the question and
25 then I'll let you talk as much as you want.

1 I believe you said something to the
2 effect that you exceeded -- or Mr. Lovingood felt
3 that you exceeded the instructions that he gave you.
4 Can you explain what he thought or why he --

5 A I only know that he said -- And I can't
6 remember what it was about, but he said I shouldn't
7 have told them that.

8 Q What shouldn't you have told them?

9 A You know, I don't really remember whether
10 I said something about chartering it or I said
11 something about -- I really don't know. I just
12 don't know. It was in 2011. I didn't mark it down
13 as an event. It just got filed in all of that stuff
14 that goes back there. I just don't really remember
15 exactly to the point where I could swear to
16 anything.

17 Q I understand that. I don't want you to
18 say that he said exactly this --

19 A And I'm not. I'm not saying that he said
20 this or he said that. The general tenure of the
21 discussion was that I shouldn't have said some of
22 the things that I said and that he would take care
23 of it from this point forward.

24 Q What did you say to Cessna Finance
25 generally?

1 A Just to the fact that we were hoping that
2 we could lower -- if they would be willing to lower
3 what was left on the note.

4 Q Reduce the principal?

5 A Exactly.

6 Q Why was Mr. Lovingood not pleased that
7 you gave that information to Cessna?

8 A He didn't like something that I said. I
9 don't really remember. Like I said, I'm not trying
10 to be evasive. I just don't really remember
11 exactly. And I don't want to say, oh, it was
12 because of this or it was because of that. I'm
13 going to tell you that I don't have a clear
14 recollection as to what I said. Sometimes I talk
15 too much.

16 Q I understand that you may not have a
17 perfect recollection of what happened. And I
18 understand that you are qualifying your comments.

19 But to the best of your recollection, why
20 was Mr. Lovingood not happy with what you told
21 Cessna?

22 A I wish I could tell you. I wish I could
23 tell you for sure. I just don't know. I don't
24 know -- I can't remember exactly everything that I
25 said to the gentleman out there in Wichita. If I

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 don't remember that, then I can't remember exactly
2 what it was that he didn't like.

3 But I do recall a conversation with him
4 where he said I shouldn't have said that. He would
5 take care of it from this point forward.

6 Q After that, did Mr. Lovingood talk to
7 Cessna Finance directly?

8 A That is not something I could speak to.

9 Q Did he tell you that he did?

10 A I can't recall if he told me or he
11 didn't. But I can't tell you for sure that I know
12 that he spoke to Cessna Financing.

13 Q Do you know if Mr. Lovingood spoke to
14 anyone else about refinancing?

15 A That I have no knowledge of.

16 Q Tell me about the meeting with -- either
17 with or regarding the proposal from T.D. Bank to
18 refinance for about \$1.4, \$1.5 million. If I'm
19 remembering your testimony correctly, you think at
20 that time it was roughly \$1.9 million in principal
21 owed under the note. Is that correct?

22 A Just a little under.

23 Q So that would have left approximately
24 ~~\$400,000~~ \$400,000 to \$500,000 that they would need to pay to
25 fully pay the principal on the Cessna loan?

1 A Yes.

2 Q Was there any discussion about whether
3 the members of PPC12 would be willing to come up
4 with that additional \$400,000 or \$500,000 to fully
5 pay off the Cessna loan and get the loan from T.D.
6 Bank?

7 A No, I don't really think there was any
8 discussion about that, that they would pay off the
9 loan. I'm pretty sure there wasn't.

10 Again, that meeting is a long, long time
11 ago. I would not want to swear to anything. I just
12 know that there was some discussion and that T.D.
13 Bank offered a certain number and that number was
14 not good enough for Mr. Lovingood for whatever
15 reason, and so that's where the discussion stopped,
16 as I recall.

17 Q So Mr. Lovingood didn't want to pay the
18 extra \$400,000 or \$500,000 on the note. Is that
19 fair to say?

20 A It's fair to say, but it's not something
21 that I have any knowledge of.

22 Q Is it fair to say that the defendants in
23 this lawsuit, the other members in PPC12 besides
24 Mr. Lovingood, did not feel that they were
25 personally responsible for making up the difference

1 in the T.D. Bank loan --

2 A Yes.

3 MR. MARVEL: Object to the form.

4 BY MR. GASKINS:

5 Q I want to switch gears and go back to the
6 October 2012 event, I believe is what we're calling
7 it, when there was an engine failure --

8 A I just don't like people to say the
9 aircraft went down.

10 Q I understand. If I say the event, you
11 understand I'm referring to the 2012 October
12 incident in which the engine failed?

13 A Yes.

14 Q I'm not trying to talk over you. I'm
15 just trying to get my question out fully. I know
16 you understand where I'm going. So please let me
17 get my question out and then you can --

18 A I apologize.

19 Q I understand. And I know you're not
20 intending to do that, but we just want a clear
21 record.

22 After the event and the plane landed and
23 obviously was not in condition to fly again, what
24 were your plans as manager of the aircraft to get it
25 in flying condition?

1 A It was taken out of my hands.

2 Q Explain what you mean by that.

3 A I had nothing -- It was Mr. Lovingood's
4 call, and he was the one that was the owner -- I
5 mean the person on the note. So he was the one that
6 took over the negotiations with Pratt & Whitney. I
7 was never asked to talk to Pratt & Whitney in any
8 way, shape or form.

9 Q We'll walk through that. I guess
10 immediately, what conversations did you have after
11 the event with Mr. Lovingood about the plans for
12 fixing the plane?

13 A I don't recall ever having any
14 conversations with Mr. Lovingood about fixing the
15 plane after that. I don't recall. I'm not saying
16 that I didn't, but I don't recall any.

17 Q Was that a chartered flight?

18 A It was on a charter flight, yes. But the
19 passengers had been dropped in PDK, and so there
20 were no passengers on board.

21 Q When you're on a charter flight, you're
22 leasing that from PPC12. Correct?

23 A Correct.

24 Q And you're responsible for the plane
25 during the charter. Right?

1 A Yes.

2 Q What I'm trying to understand is, it's
3 not like the plane went down and Michael got in the
4 car and came home and said, oh, it's not our problem
5 anymore. I want you to walk me through how you
6 dealt with this issue of an unflyable plane that you
7 were leasing. What did East Shore Aviation do after
8 the event?

9 A As a matter of fact, Michael and the
10 other pilot on board went over to the Atlanta
11 airport and flew home. They made sure that the
12 airplane was at Epps, which is a PC-12 service
13 center. The airplane was taken to Epps.

14 And then it was our mechanic, Tom
15 Randall -- Actually, he wasn't our mechanic then,
16 but he was the mechanic at Charleston Jet who took
17 care of the airplane. He was in contact with
18 maintenance management at Epps, I think probably the
19 next day or whatever. And they discussed what it
20 was that failed or what they thought was the
21 problem. He sent them some stuff about the oil
22 samples.

23 We always take oil samples. Apparently,
24 they found a lot of metal in the oil, which was the
25 first thing they found. In order to get to that

1 gear that I was talking about or bearing or whatever
2 they want to call it, that engine had to be cracked
3 open, and they weren't going to do that because
4 Pratt & Whitney became involved right away. That
5 engine has a very, very low failure rate.

6 And Pilatus, since it's an
7 owner/operator, it's mostly flown by owners -- in
8 other words, somebody who is wealthy enough -- and
9 they had a lot of problems with accidents. And if
10 there had been an owner on board that airplane, more
11 than likely it would have been all over a
12 neighborhood just to the east of PDK. But Michael
13 got it back to the airport. So now Pratt & Whitney
14 had a failed engine that they could look at and find
15 out what the problem was so they could do the
16 correction.

17 So basically we worked with Epps. That I
18 recall, I didn't hear anything from Gordon at all.
19 I don't recall anything, other than the fact that
20 Epps said that they were talking to Mr. Lovingood
21 after a certain point, and so we didn't need to be
22 involved anymore. And the airplane is at Epps.
23 They are taking care of it. They have
24 responsibility for it now, because it can't fly. So
25 that's what we did.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 That's my recollection. I'm sure that
2 there were steps that I'm leaving out. Basically
3 that's it.

4 The pilots came home. Michael probably
5 had to fill out a report, because it was -- You know
6 what, though? The engine never stopped. It just
7 had a reduction in power. So they actually had to
8 shut the fuel off to get it to stop. So the engine
9 didn't fail. It just wouldn't produce the correct
10 amount of power.

11 Q Who was your mechanic again? What was
12 his name?

13 A Tom Randall.

14 Q To your knowledge, was Tom Randall in
15 communication with Gordon about --

16 A I couldn't speak to that. I know he
17 talked to Epps. I don't know if he talked to
18 Gordon.

19 Q Do you remember talking to any of the
20 other members of PPC12 besides Gordon about the
21 event and the state of the plane?

22 A I'm sure I must have, but I don't recall
23 specific conversations.

24 Q If you recall, Mr. Marvel showed you
25 Exhibit 1, which I believe is in front of you, which

1 is an Aircraft Dry Lease Agreement.

2 A Here it is right here (indicating).

3 Q And I believe your testimony was that a
4 similar agreement would have been in place in
5 October of 2012?

6 A No.

7 Q No?

8 A No, because we wouldn't have had an
9 agreement like this in place until we were going to
10 charter the airplane, and the airplane wasn't on the
11 certificate at that point.

12 Q In October of 2012?

13 A You're talking about 561GG?

14 Q No. I'm talking about PPC12. So as of
15 October of 2012, East Shore would have had a similar
16 agreement with PPC12?

17 A Yes.

18 Q At that time was there a separate
19 management agreement that East Shore had with PPC12,
20 or is that all included within here?

21 A This part of it is, the contract, the
22 management contract. This is actually two documents
23 to my way of thinking. It's the Aircraft Dry Lease
24 and the management contract.

25 Q So this encompasses your management

1 duties?

2 A Yes.

3 Q So at some point after the event in
4 October of 2012 you stopped performing those
5 management functions. Correct?

6 A Yes.

7 Q Did you formally terminate the management
8 contract?

9 A Actually, probably not formally.

10 Q You just stopped?

11 A Well, I answered all of the questions and
12 sent documents and did whatever else. But at that
13 point, I stopped being paid or we were no longer
14 being paid.

15 I think Mr. Marvel wanted some
16 information. There was a bunch of people that
17 wanted information. And I sent all of that
18 information to those people and did whatever I
19 could. But I was no longer being paid by PPC12.
20 So, yes, I stopped.

21 Q As I understand it, you were in charge of
22 PPC12's finances and had the authority to write
23 checks?

24 A Up to a certain amount.

25 Q And you essentially had the authority to

1 plane, any repairs it may have needed, paying the
2 note, paying the taxes? Do you remember?

3 A I wasn't reporting to anyone. We tried
4 to become involved in the -- not tried to become
5 involved. We were initially involved in the
6 maintenance, in getting the airplane set up for
7 maintenance when Mr. Lovingood took over. As far as
8 those negotiations were concerned, the airplane was
9 safe as far as we could see. There was no longer
10 anyone involved in the LLC that was going to pay us.

11 Q Explain that statement to me. You said
12 nobody else involved in the LLC was going to pay
13 you. Why do you believe that?

14 A Well, because at that point I think the
15 LLC consisted of Mr. Lovingood.

16 Q At that time it's your understanding that
17 Mr. Wade, Mr. McAlister and Pearl Company were out
18 of the LLC?

19 A That was my understanding, yes.

20 Q I'm trying to phrase this in a clear
21 manner. That's why I'm taking my time.

22 Was PPC12, LLC, organized primarily to
23 allow the plane owners to have use and access to a
24 plane and not for business as a charter operator?

25 MR. MARVEL: Object to the form.

1 You can answer.

2 A Yes, that's correct. It was not
3 formulated to be specifically a charter -- PPC12 was
4 not formulated to be a charter. It was for them to
5 fly the airplane.

6 BY MR. GASKINS:

7 Q And the charter operations were just as a
8 way to get some extra money in when the plane wasn't
9 being used by the owners. Is that correct?

10 A Yes. There is a specific separation.
11 PPC12 cannot have a charter certificate. In order
12 to do a charter, you have to have a certificate.
13 There was nobody at PPC12 that would have been
14 qualified to get a certificate. So the certificate
15 rested with East Shore Aviation. The plane was
16 owned by PPC12.

17 Q Can a plane be under multiple
18 certificates, charter certificates?

19 A Negative. No.

20 Q So if EB was under East Shore Aviation's
21 charter certificate, it couldn't be chartered out by
22 another business. Is that right?

23 A It couldn't be used by another charter
24 company as an aircraft.

25 Q To your knowledge, EB has not been used

1 A Correct.

2 Q The event occurred on October 28, 2012.

3 Right?

4 A Right.

5 Q If there had been any -- During the month
6 of October you were still providing management
7 services. Correct?

8 A Yes.

9 Q It wasn't until probably November that
10 you terminated or that the management --

11 A I don't remember the exact date, but
12 that's probably fair to say.

13 Q And you didn't send out any invoices to
14 Mr. Pearlstine, Mr. McAlister, Mr. Wade for October,
15 did you?

16 A Not according to this.

17 Q But if they had been members at that
18 time, they would have been responsible for the
19 expenses for October. Right?

20 A Yes.

21 MR. GASKINS: That's all I have.

22 E X A M I N A T I O N

23 BY MR. MARVEL:

24 Q The statements don't indicate you sent an
25 October invoice to anybody.

M. GIBBONS
DEPOSITION TRANSCRIPT PAGES

COUNTY OF CHARLESTON

Defendants.

)
)

)
)
) Case No.:
) 2013-CP-10-5080

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 Q Because 217 was actually on that.

2 Correct?

3 A Yes.

4 Q You mentioned earlier the incident. We
5 should probably go ahead and put that on the record.

6 I know David wants to hear the juicy details.

7 Describe what you're calling "the incident."

8 A Well, the airplane, 217EB, had a
9 catastrophic engine failure. And that would be what
10 brought us into the period of the airplane obviously
11 needing a great deal of maintenance, and I believe
12 that would probably be the impetus for its -- you
13 know, it not flying under our management company,
14 under us anymore. Because at that point decisions
15 that I couldn't make and checks I wasn't going to
16 write were being dealt with by other people.

17 Q And you were actually flying the
18 aircraft?

19 A I was flying the aircraft.

20 Q Where were you going?

21 A We left PDK, Peachtree Dekalb, to fly
22 back to Charleston on Sunday night. I think it
23 was -- Maybe it was the 28th. I don't really know.
24 I know Dallas was playing on Sunday Night Football.
25 That's all I can remember. I'm sure the dates are

1 somewhere. I'm sure you have the date. I don't
2 remember. October of '12. And we were flying back
3 to Charleston and the engine, like I said, tore
4 itself apart.

5 Q When you say "we," who is "we"?

6 A I had a friend in the right seat, Richard
7 Kidd.

8 Q Kidd?

9 A Yes.

10 MR. COLLINS: K-i-d-d?

11 THE WITNESS: K-i-d-d.

12 A He wasn't working for East Shore. He
13 wasn't working for anybody. He wasn't being paid.
14 He was a pilot enthusiast that was along for the
15 ride.

16 BY MR. MARVEL:

17 Q Is he still a pilot enthusiast?

18 A Well, subsequently, I guess he is.

19 Q Why was the aircraft in Atlanta?

20 A We had flown a charter to Atlanta that
21 afternoon. It should be in the books somewhere.

22 Q It is. Do you recall who it was?

23 A I believe it was Sam Shapiro.

24 Q Obviously, you were not planning on
25 bringing him back to Charleston?

1 A No. This was with a one-way drop off
2 with a Part 91 reposition. So at the time the
3 aircraft was actually in a Part 91 flight. If there
4 is no one on the plane and they've paid for our trip
5 to Atlanta, the plane was being repositioned Part
6 91. So it was not a 135 flight.

7 We could have stayed there. We could
8 have done anything, you know.

9 Q Do you recall off the top of your head
10 what the next scheduled flight after that was?

11 A I do not.

12 Q Do you know what caused the engine
13 failure?

14 A Not really. I would just be speculating.
15 Something about a planetary gear, something that --
16 I don't know. You probably could tell me better
17 with all the stuff you've done on this. I don't
18 know. I didn't really -- I walked away, and I got
19 it on the ground, and at that point I'm not a
20 mechanic, so I just knew that it was something big,
21 obviously. It wasn't something small.

22 Q That was where the aircraft was left.
23 Correct? Back at PDK?

24 A That's where the aircraft had to remain,
25 would probably be a better way of putting it. We

1 didn't leave it. We couldn't do anything with it,
2 unless you would have taken the wings off.

3 Q How does this process work? I'm assuming
4 you called the tower?

5 A Well, you mean the process of securing
6 the airplane at PDK?

7 Q Describe for me what you did after the
8 engine goes out.

9 A Well, we declared an emergency and did
10 our best to get the airplane back on the ground in
11 one piece.

12 To be honest with you, it was kind of
13 a -- After a couple of years, honestly, I don't have
14 many details other than we were at 5,000 feet. It
15 was dark. We were in the clouds. It was a cold and
16 windy night. It was like 38 knots gusting to 45.
17 Horrible weather. And the ceilings were only a
18 thousand feet.

19 I did everything I could based on my own
20 kind of internal map of where we were, we took off
21 to the north, we turned east. So I knew I had to
22 come back to the south and west on a direct course
23 to try and intersect myself with the field. I
24 didn't have time to set up an approach, which is
25 what you would do or what we had done to land there

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 in the first place.

2 Honestly, beyond that, I mean, I kept the
3 plane under control and navigated myself as closely
4 as I could. And as I popped out of the clouds,
5 thankfully, we did a decent-enough job that there
6 was an airport there, and we made it by a small
7 margin and kind of came at the airport from an
8 angle, but somehow we managed to get it on the
9 ground.

10 That area is not very hospitable. A lot
11 of times we're told as pilots that you can land in a
12 field or a road. Around here, there would probably
13 be a lot of suitable choices that you'd walk away.

14 Atlanta is hilly with towers and
15 buildings. We were right in the Peachtree Dekalb
16 area. So I had to get to the airport, and we did.

17 Q It was definitely good work. After
18 you're on the ground, do you have to go meet with
19 anybody from the FAA --

20 A Have a drink.

21 Q That's what I would have done.

22 A That's what I did. No, we called -- You
23 know, the FAA -- My dad was alerted since he was the
24 chief pilot or the person in charge of East Shore.
25 I let him know. Obviously, we secured the plane.

1 Ironically, or the one thing in everybody's favor, I
2 think, was that it was at Epps, which is a Pilatus
3 service center. Way better than ending up in some
4 other million airports that we could have been stuck
5 at. So the airplane was in as good a place as it
6 could be. We have had work done there many, many
7 times.

8 I stuck around until the next day, talked
9 to the service manager, explained what happened.

10 I don't remember when or how I talked to
11 Gordon, but I'm sure I called Gordon and Vic the
12 next day, relayed what happened to them, and thus
13 started the ball rolling in terms of what to do with
14 the airplane.

15 I know Pratt & Whitney became involved
16 and a lot of people became involved. I made a
17 statement to the FAA. They took my statement. They
18 didn't investigate it, I don't think. I don't think
19 there was anything to investigate. Obviously, the
20 engine didn't work, and there is the plane.

21 I don't think there was much of a process
22 surrounding it.

23 Q I think I asked somebody the question one
24 time and got the answer that it never -- there never
25 was an investigation, because there wasn't actually

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 an incident?

2 A That's right. I mean, I had an airplane
3 that I declared an emergency. I explained why I
4 declared an emergency. And we landed on a runway.
5 We got permission from air traffic control, any
6 runway, any taxiway, as they will often say. And I
7 took what I could get and got the plane on the
8 ground. It actually rolled out onto Epps' ramp. So
9 I didn't even need to have them close the taxiway
10 and tow me in. I managed to get it without hitting
11 the brakes onto Epps' ramp.

12 Q I think you said that you were sure you
13 called Gordon and Vic the next day?

14 A Yes. I'm sure at some point I called
15 Gordon and Vic, or my dad did. I don't remember the
16 chain of events two years, three years later who
17 called who and exactly when. But I'm sure they were
18 informed at the first available opportunity.

19 Q Would you have called Mr. Wade?

20 A I'm sure I talked to him at some point.
21 I think I would have called Gordon first as the
22 managing partner or the person that I saw -- I think
23 I would have called Vic and Gordon first.

24 Q Why do you place Vic and Gordon in the
25 same category?

1 introduced --

2 A I mean, they knew each other before that.
3 I introduced the idea of them meeting together; or I
4 said this is here, you guys could meet, and then
5 maybe they would make themselves available to use
6 the airplane.

7 Q And at some point that culminated in what
8 we've got in front of us as Exhibits 1 and 2?

9 A Yes. Correct.

10 Q And that shows who all the members are of
11 PPC12 as of that date?

12 A In my opinion, at the time the airplane
13 217EB with Gordon and Vic as owners was not going to
14 make it financially. There wasn't enough use. If
15 someone didn't come in, then there would be no 217EB.
16 for very much longer.

17 Well, it didn't seem like there would be,
18 since Gordon barely used it. Obviously, numbers
19 show, you know, Vic's flying was down. And the
20 aircraft was -- I'm not a broker. I don't know this
21 for a fact. But the aircraft was under water. It
22 was worth this and it owed that (indicating).

23 And that was the main impetus for me to
24 say, well, there's these guys, Gordon. It wasn't
25 just let me talk to those guys and bring them there.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 It was on Gordon's end as well. I was maybe a
2 conduit to them having a meeting, but that was the
3 extent of it.

4 Q Do you know if you attended any of those
5 meetings?

6 A I might have been at one at Edwin's
7 office, but that was probably well on to after they
8 had already been involved. I was not at any
9 meetings that had anything to do with the genesis of
10 these two Exhibits 1 and 2.

11 Q To your recollection, did any of the
12 incoming members ask you any direct questions about
13 costs of operating and maintaining the aircraft?

14 A They might have asked me direct questions
15 about the cost. But again, I spoke to it costs this
16 much a month for the plane to be here, insurance,
17 note, tie-down. Those are the big three. And it
18 costs X amount of hours to run it, gas and
19 maintenance. Those numbers I provided, I'm sure.

20 Again, I don't know in what form. I
21 don't know if on the third hole at Bull's Bay did I
22 say it would be this, this and this. At a bar
23 downtown at a Cougar game did I say it would be
24 that, that and that. I don't know when. Obviously,
25 that was probably asked of me, but I can't tell you

1 here it is, no. That was their stuff. And I didn't
2 have that anyway. Gordon had that stuff.

3 Q Gordon didn't tell you not to give them
4 any information?

5 A Gordon never told me not to, no. Gordon
6 told me to go find somebody to buy it, told me he
7 would give me \$10,000 if I found someone to buy it
8 from him. All I did by introducing those three
9 people was to stave off what I felt to be maybe the
10 inevitable that the plane just wasn't going to be
11 something that Gordon and Vic could keep on with.

12 (Exhibit No. 3 marked for
13 identification.)

14 BY MR. MARVEL:

15 Q Let me show you what we've marked as
16 Exhibit 3. Tell me if you recognize that document.

17 A Yeah, it looks like how we kept track of
18 where the airplane went and who was flying on it.

19 Q Is this something that you do as part of
20 your job at East Shore?

21 A No.

22 Q That's something that your father does?

23 A Yes.

24 Q If you could, look at the user codes on
25 the first page of that document. Explain to me

1 A AMC would probably be Anthony McAllister.
2 I guess AMA -- I don't know off the top of my head
3 who that would be.

4 Q If you could turn back to the area that
5 shows October of 2012. It's about six pages in.

6 A I'm in '10 now.

7 Q As you indicated earlier, there is here a
8 record on October 28, 2012, that shows the PDK to
9 PDK flight, which is the one in which there was an
10 engine failure. Correct?

11 A Correct.

12 Q The flights previous to that month, it
13 looks like most of them were ESA. There was VAP.
14 Do you know if that's Victor Apat?

15 A I believe that to be Victor Apat.

16 Q And you said earlier I think that AMC,
17 you think that's Anthony McAllister?

18 A I think that might be Anthony McAllister.

19 Q How does this data actually get
20 physically put in to whatever this spreadsheet is?

21 A There is a flight record sheet on the
22 airplane. We generate one for each flight. You
23 know, I am responsible for that. I land the plane.
24 I see what we flew. I put down the pertinent
25 information, and I hand it to my father. My father

1 or \$1.5, and he declined to take it, which I
2 remember saying earlier was moved on to plan B.

3 It was my understanding that when they
4 bought that, they would, of course, terminate their
5 relationship with PPC12.

6 Q And it's your understanding that they did
7 terminate that relationship?

8 A Yeah, it was my understanding that that
9 was always going to be the case. I wasn't under the
10 impression that they would join something that was
11 upside down \$500,000 and then thus be responsible
12 for that debt that they didn't have anything to do
13 with.

14 (Exhibit No. 4 marked for
15 identification.)

16 BY MR. GASKINS:

17 Q Take a minute and review that.

18 A Okay.

19 Q What is this document?

20 A It looks like it's an e-mail between
21 Gordon and my dad.

22 Q D. Michael Gibbons, that would be your
23 dad?

24 A That's correct.

25 Q That's his e-mail address?

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 A I guess.

2 Q Have you seen this document before?

3 A No. I mean, I may have seen the e-mail
4 two or three years ago, but I don't recall seeing it
5 as a document like this.

6 Q In the original message that was sent
7 from your dad to Cglovingood@comcast.net, that's
8 Gordon. Right?

9 A Yes.

10 Q And then cc'd is Vic Apat?

11 A Yes.

12 Q And in that second sentence your dad
13 writes, "We were only recently informed by other
14 members that they notified you by phone of their
15 intention to leave PPC12, LLC, effective October
16 1st."

17 A Correct.

18 Q Is that consistent with your memory of
19 when --

20 A Yeah. Like I said, I expressed to Eric
21 that someone should tell Gordon, not us. It's not
22 our place. Like we said, we could have happily
23 managed both airplanes. It had nothing to do with
24 how they -- like he says, how they relate to each
25 other.

1 I guess that's my dad's recollection or
2 my recollection as to when -- Did Eric tell me that,
3 yes, I did tell Gordon, and maybe that's why Gordon
4 e-mailed us and this started? I don't know.

5 Q I understand. I just wanted to make sure
6 that that statement was consistent with your
7 recollection that they were getting out October 1st?

8 A Yeah, I believe their intent was to do
9 that. Whether or not I knew that and didn't tell
10 Gordon before they told Gordon, I believe my stance
11 at the time was feeling like I was kind of a little
12 bit in the middle.

13 My dad and I, I think, discussed it, if I
14 can remember, and thought that, well, that's their
15 job to tell them what they are doing. Not ours.

16 Like I said, we could have easily and
17 happily managed both.

18 Q To your knowledge, did either Eric Wade,
19 Anthony McAllister or Edwin Pearlstine fly in 217EB
20 after October 1, 2012?

21 A I didn't think so, but I guess I see AMC
22 here. I don't know what that was related to.

23 No, actually, they didn't. AMC is
24 aircraft maintenance. And I see that because
25 Charleston and Johns Island. That was for

MCALISTER DEPOSITION TRANSCRIPT PAGES

COUNTY OF CHARLESTON

Defendants.

) Case No.:
) 2013-CP-10-5080

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 day-to-day basis?

2 A One of several companies that develops
3 real estate.

4 Q How is it that you came to be involved in
5 PPC12?

6 A Michael Gibbons is a pilot friend that I
7 play golf with sometimes -- used to, used to play
8 golf -- told me that another member -- I believe
9 that would be Gordon -- had a plane and needed help;
10 that it was sitting and they needed a few good
11 people that needed to use it to help pay for -- help
12 him pay for, you know, maintenance. That's how I
13 got involved.

14 Q Had you held an ownership interest in any
15 aircraft prior to your joining PPC12?

16 A No. Minus a Flexjet, you know, where you
17 buy a Flexjet card.

18 Q Did you know Gordon previously to that
19 conversation with Michael Gibbons?

20 A Did not.

21 Q How did you know Michael Gibbons?

22 A From Bull's Bay Golf Club.

23 Q Did you know Victor Apat prior to that
24 conversation with Michael Gibbons?

25 A I had heard of Victor through the

1 the PPC12 aircraft to go to Clemson?

2 A Or any project out of town in the south
3 east.

4 Q After you had that conversation with
5 Michael Gibbons, what was the next event that you
6 recall happening in your membership of PPC12?

7 A Michael set up a meeting with Vic Apat.

8 Q And how long do you think that was after
9 you had that initial conversation with Michael?

10 A I don't know.

11 Q Did that meeting actually happen?

12 A Yes.

13 Q What happened at that meeting?

14 A I met Vic at Med Deli for lunch to ask
15 some very important questions about the plane, plans
16 for the plane, former owners, what kind of financial
17 shape the partnership was in, who the partners were.

18 Q Anything else?

19 A No.

20 Q Was it just you and Vic at that
21 particular meeting?

22 A Yes.

23 Q I'll come back to that. After that
24 meeting, what was the next thing that happened?

25 After that meeting, what was the next thing to

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 happen in the course of your becoming a member of
2 PPC12?

3 A After Vic answered my questions, and I
4 had two major questions that he answered, but I
5 repeated -- repeatedly asked him two to three times
6 each. He answered them. And that was it.

7 Q What were the two major questions?

8 A When I first looked into it, I knew the
9 plane was worth a lot less than what was owed on it.
10 That's what I was told. And I believe he was the
11 managing member or managing partner, and that he
12 would be the one that could answer the question.

13 And the main question was to make sure
14 that he agreed that we would have no financial
15 obligation under the note or any debt on the
16 airplane. And he answered three times, You are not
17 responsible for the debt. You do not own the
18 airplane. You will just be paying a monthly fee and
19 hourly rate when you use the plane.

20 The second big question to me was -- It
21 was my understanding that there were two other
22 people that were looking or may have already been in
23 or looking to come in at the same time. And that
24 together we were putting in around \$100,000 to
25 upgrade the plane. And I pressed him on that,

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 because what I was told and wanted to verify with
2 him as a managing member is that the money that we
3 put up was -- the hard money that we put up was for
4 avionics upgrades, maintenance and proper reserves.

5 (Discussion off the record.)

6 BY MR. MARVEL:

7 Q I'm going to break that down a little
8 bit. So you knew the plane was worth a lot less
9 than what was owed on it. That's what I wrote down.

10 A That's what I'd been told by the pilots.

11 Q Michael Gibbons told you that?

12 A Mm-hmm.

13 Q Did he tell you specifically how much was
14 owed on the note?

15 A No.

16 Q So you knew that before you went down and
17 sat down with Vic Apat?

18 A I didn't know values of planes. This is
19 my first plane deal. But I wanted it clear and I
20 wanted, you know, to ask the question to a managing
21 member what the money was going to be used for and
22 were they caught up, were we coming into a
23 caught-up -- everybody's bills starting from the day
24 that we all came in, starting over. And his answer
25 was yes. And I pressed him on that. I wanted to

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 A No.

2 Q What did Mr. Apat tell you, if anything,
3 about who was actually responsible for the note?

4 A He didn't.

5 Q Did you ever ask to actually see a copy
6 of the note itself?

7 A I didn't personally.

8 Q Were you at that time aware that PPC12,
9 LLC, was actually the borrower on the note?

10 A No. I was told Gordon Lovingood was the
11 borrower and owner, and that's the way he wanted it.

12 Q Did you have any knowledge as to who the
13 registered owner of the aircraft was?

14 A No.

15 Q Did you make any effort to inquire about
16 that, either to Mr. Apat or Mr. Lovingood or the FAA
17 or anybody?

18 A I did not.

19 Q After that meeting with Mr. Apat, what
20 was the next thing that happened in the course of
21 your becoming a member of PPC12?

22 A I believe shortly after -- and we would
23 have to look at the documents -- I joined the
24 partnership and put \$40,000 in for those
25 improvements maybe around May possibly. May,

1 summer, early summer.

2 (Exhibit Nos. 1 and 2 marked
3 for identification.)

4 BY MR.. MARVEL:

5 Q I'll show you what I've marked as Exhibit
6 No. 1. I'll represent to you that it was marked as
7 Exhibit No. 4 to Mr. Lovingood's deposition. And
8 it's my understanding that that is a copy of the
9 first amended operating agreement of PPC12, LLC. Do
10 you recall seeing that document?

11 A I cannot remember seeing this, what looks
12 like an early version of an operating agreement.

13 Q I'll show you what's been marked as
14 Exhibit No. 2 to your deposition and tell me if you
15 recognize that particular document.

16 A I only recognize it from reviewing for
17 this deposition.

18 Q Is that your signature on page 2 of that
19 document?

20 A It looks like it. But it looks like --
21 there is a fax -- all the other signatures are
22 faxed, and mine looks like a -- it's different than
23 the other signatures. I don't know why. There may
24 be an explanation for that.

25 Q I don't know either. The only thing I

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 documents together was a gentleman named John Hodge
2 and another attorney from Haynsworth in Columbia.
3 Did you have any prior relationship with either one
4 of those?

5 A I don't know them.

6 Q Have you ever met Mr. Hodge?

7 A I don't believe so..

8 Q You put in, you said, \$40,000?

9 A I believe so.

10 Q Do you recall what the other new members
11 put into the aircraft?

12 A I was told a 25 percent share puts in
13 \$40,000; 12 and a half puts in \$20,000.

14 Q And you bought a 25 percent share?

15 A Well, yes.

16 Q The second amended operating agreement
17 indicates that Mr. Lovingood and Mr. Apat's
18 ownership percentage went to 18.75 percent. What
19 was your understanding that their membership
20 percentage was going to be?

21 A I never asked.

22 Q Do you have any knowledge of what East
23 Shore Aviation actually billed their percentage of
24 fixed ownership costs to be?

25 MR. GASKINS: Object to the form.

1 sure it was handled a lot differently.

2 Q Well, how was that handled differently
3 from you becoming a member of PPC12?

4 A This was pitched to me as no ownership,
5 use the plane. When you use it, you pay your bills,
6 your hourly rate. And you weren't an owner. You
7 didn't have any equity in the plane, good or bad.
8 And that, our group was helping him fund the
9 operation because he needed partners.

10 Soon after that, when I found out three
11 days after I gave him my \$40,000 that the money that
12 was supposed to go to the upgrades of the plane went
13 to pay old bills -- that was exactly what I was told
14 wouldn't happen by Mr. Apat -- I knew I was in a bad
15 partnership.

16 Q Tell me about that.

17 A I got a phone call, I believe. I'm not
18 sure, but I believe I got a phone call or was in the
19 plane or could have been on the golf course, but
20 Mike Gibbons told me that the account had been hit
21 with an old property tax bill and they used the
22 money that we sent in for the upgrades for it.

23 And that's when the alarm went off, and I
24 had Anna send an e-mail -- I believe it's in here,
25 in this information -- that we asked Vic if they did

1 that. And I believe he said, yes, we did. But we
2 would have to look at the document.

3 (Exhibit No. 3 marked for
4 identification.)

5 BY MR. MARVEL:

6 Q Tell me if you recognize Exhibit 3.

7 A Yes.

8 Q And tell me what that is.

9 A This is an e-mail from Anna Rogers to Vic
10 Apat, an e-mail chain.

11 Q What's the subject of that e-mail
12 chain?

13 A I asked Anna to find out if they, in
14 fact, took the money we put in for upgrades to pay
15 old bills. That's what that is.

16 Q That e-mail refers specifically to the
17 property taxes that you just discussed a second ago.

18 A Right.

19 Q Let me ask you one question about that.
20 You said David Gibbons informed you --

21 A Not David. Michael.

22 Q I'm sorry. Michael Gibbons informed you
23 that that money had been taken out of the account?

24 A Yes.

25 Q Do you know who authorized that money --

1 A I do not, and I want to know.

2 Q Can you tell from Exhibit 3 what amount
3 that was paid out of that account was?

4 A Is this part of Exhibit 3 (indicating)?

5 Q Yes. It's the second page.

6 A I'm looking for Vic, from Vic. I don't
7 see anything from Vic with a number in it, other
8 than -- May I read it to you?

9 Q Yes.

10 A This is from Vic to Anna Rogers. "Each
11 partner was told prior to buy-in that the money they
12 were investing in the plane, their portion of
13 equity, was to be used for plane upgrades and taxes.
14 The bill is for taxes for the plane and accordingly
15 should not need a vote as it is a normal bill in the
16 operation of the plane. We did vote during the
17 members meeting a few weeks ago to move \$25,000 to
18 engine reserve. Let me know if you have any further
19 questions."

20 Well, I wasn't in any members meeting,
21 and I disagree that you don't need a vote. We
22 agreed to pay taxes as of the day we came in moving
23 forward. Not former partners or owner bills,
24 whether they are taxes or maintenance or credit card
25 bills. It was real clear what that \$100,000 that

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 the new partners put in was to be used for. At
2 least it was to me.

3 Q That e-mail refers only to taxes as far
4 as I recall. Is there any other expense that you
5 asked your assistant to ask Mr. Apat about?

6 A I would have to look, but I don't think
7 so. But we could look.

8 Q That was the beef that you had initially,
9 was that payment of taxes?

10 A That was not a beef. That was a clear
11 bait-and-switch misrepresentation by either Vic Apat
12 or Gordon Lovingood. Hopefully, through discovery,
13 we can find out who spent that money.

14 Q You testified earlier that this is right
15 after you became a member. You hadn't even met
16 Gordon Lovingood at that point, had you?

17 A No.

18 Q So Gordon Lovingood didn't tell you
19 anything about what your money was going to go to,
20 did he?

21 A He did not.

22 Q And Gordon Lovingood didn't make any
23 representation to you about the taxes one way or the
24 other, did he?

25 A I never talked to him. I believed I was

1 which is second page to Exhibit 3, in which
2 Ms. Rogers states, "There is a withdraw of
3 \$21,672.67 for South Carolina property taxes."

4 A Mm-hmm.

5 Q And she asks were these last year's
6 taxes, and that starts the e-mail chain. Is that
7 correct?

8 A I don't know. There's no date on this
9 one. Is this this (indicating)?

10 Q I'll represent to you that it was at
11 least produced to us in that fashion. It says.
12 McAlister 19 and McAlister 20. What is on McAlister
13 20 actually starts the e-mail chain and then it goes
14 forward in time from there.

15 A Okay, yeah.

16 Q Is it your understanding that that is the
17 amount that was removed from the PPC12 bank account
18 to pay the back taxes?

19 A That's what it looks like to me.

20 Q Was there any other expense other than
21 the taxes that you believe was misrepresented to you
22 in the course of your becoming a member of PPC12?

23 MR. GASKINS: Object to the form.

24 A Yes.

25 BY MR. MARVEL:

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 Q And what was that?

2 A The avionics, what happened to -- What I
3 would like to know, and hopefully we'll find out, is
4 what happened to the \$100,000? Where did it go?
5 Was it just the 21? We never got the avionics. So
6 where did that money go? And the reserves, proper
7 reserves, did those go in the right place? And
8 that's what I hope to find out, is what happened to
9 the money. That's not what we were told. Where did
10 it go?

11 But I don't know where it went yet. I
12 know \$21,000 for old property taxes, I know where
13 that went and where it came from. But that's what
14 worried me right out of the gate.

15 Q Did you have any specific concerns about
16 property taxes when you spoke with Mr. Apat about
17 the financial condition of PPC12 before becoming a
18 member?

19 A Didn't have any specific questions about
20 property taxes. I asked him if all the bills were
21 going to be brought up to date, all monies owed, are
22 we starting new, are we starting fresh; and what is
23 he planning on doing with the \$100,000, because I'm
24 being told by the pilots that we're going to get new
25 avionics, we're going to get the partnership

1 the plane whenever you went anywhere --

2 A Right.

3 Q As a passenger in the aircraft, would you
4 have noticed if the avionics had been upgraded?

5 A Possibly, if there's a new fancy radar up
6 there. I like radars.

7 Q Was that something you ever asked him
8 about routinely?

9 A I was told before we came in that we
10 needed to upgrade our avionics and that we needed to
11 raise some capital. I agreed to participate in
12 that. I think Mr. Pearlstine was pushing real hard
13 on the avionics. I believe I asked for a little
14 more creature comfort, so the children can plug in,
15 you know, and charge their stuff. I was told they
16 would try. But the big deal was getting the plane
17 safer and more up to date, reserves, starting off on
18 the right foot.

19 Q Now, how is it that you came to be a
20 member of CP Aviation, LLC?

21 A I was asked to go in on another plane
22 that we would own.

23 Q Who asked you to do that?

24 A I don't remember. One of the partners.
25 I really don't remember. One of our partners that

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 are in the partnership now. I don't know who it
2 was.

3 Q Do you recall when that was that you were
4 asked to become a member of that LLC?

5 A I don't know exactly when. But if I had
6 to guess, it would be sometime in the spring or
7 early summer of '12.

8 Q What was your intention personally with
9 regard to the first aircraft, 217EB, once you became
10 a member of CP Aviation?

11 A Ask that again, please.

12 Q What was your intention -- well, strike
13 that.

14 The purpose of becoming a member of CP
15 Aviation, LLC, was to buy a second aircraft.
16 Correct?

17 A Well, no. To buy a first aircraft.

18 Q Another aircraft other than --

19 A Well, we didn't buy -- I've never bought
20 an aircraft. This is the first aircraft I've ever
21 purchased, is the GG.

22 Q Do you know who the record owner of GG
23 is?

24 A I don't.

25 Q Is it your understanding that your name

1 is on the registration or certificate anywhere?

2 A I didn't know that. I don't know. I'm
3 on the bank note.

4 Q You're on the bank note. Are you the
5 actual borrower, to your knowledge?

6 A I don't know. I'm a 25 percent owner.

7 Q You're at least a guarantor of the bank
8 note. Is that correct?

9 A Yes.

10 Q Is it your understanding -- Well, you
11 tell me. What is the purpose of the LLC, CP
12 Aviation?

13 A It's a plane partnership for business.

14 Q To own and operate the aircraft GG?

15 A For me, personally, it's to use for
16 business and family.

17 Q Well, but I'm asking about the purpose of
18 the LLC is to own the aircraft. Is that your
19 understanding?

20 A I don't know. I really don't know.

21 Q Tell me about the process of purchasing
22 GG. How did that happen?

23 A I got a call that there was a newer
24 plane, lower hours, better equipment. I believe
25 possibly from Eric or Michael. I don't remember

1 exactly who it was; that there was a plane in
2 England that was a good one and was I interested. I
3 said, well, let's look at, you know, how we exit
4 this partnership, because I have a Flexjet share and
5 I'm involved with using -- having the use of -- I
6 don't know the numbers, but Gordon's plane. But
7 that I would look at it.

8 Q You brought that up in the first
9 telephone call that you recall, was you needed to
10 look at how to exit your relationship with Gordon's
11 plane?

12 A I don't know if I talked about it in that
13 call, but that's my first thought. Keep in mind, I
14 wasn't happy from the get-go after what happened.
15 But I did use the plane until we decided to either
16 go with a bigger Flexjet share or go back to Fennell
17 Aviation, you know, charter.

18 Q Did you ever express to Gordon in any way
19 that you wanted to dissociate from PPC12, LLC?

20 A No, I did not. Eric Wade was to call him
21 and let him know, you know, that we were going to
22 buy a plane, we were looking to buy a plane.

23 Q Do you know if he actually did that?

24 A He said he did. He told me he did.

25 Q When was that?

MCALISTER DEPOSITION EXHIBIT 3

Anna Rogers

From: Anna Rogers [arogers@mcalistdevelopment.com]
Sent: Tuesday, July 19, 2011 10:08 AM
To: 'Anthony McAlister'
Subject: FW: PPC12, LLC

From: Vic Apat [mailto:VApat@completebldg.com]
Sent: Monday, July 18, 2011 5:16 PM
To: Anna Rogers
Subject: RE: PPC12, LLC

Anna,
Sorry I was out of the office on business at the end of the week. I am sorry for the misunderstanding but was clear during the purchase period that the money could be used for taxes. One other way to look at it is like any other investment where the entity being bought out would have taken all of the money except in this case no distributions were made from the money. The tax bill was simply an on-going bill for the LLC. I am glad to meet with Anthony and clear anything up. Let me know what his schedule is as mine is getting very full over the next week or two. Thanks

Vic

From: Anna Rogers [mailto:arogers@mcalistdevelopment.com]
Sent: Thursday, July 14, 2011 12:49 PM
To: Vic Apat
Subject: RE: PPC12, LLC

Dear Mr. Apat,

Anthony understands and agrees with paying the taxes for the upcoming year, but he was not a partner last year and no mention was made to him about paying *last year's* taxes. Sorry, we are not trying to be difficult, but this is not a charge. Anthony agreed to.

Regards,
Anna

From: Vic Apat [mailto:VApat@completebldg.com]
Sent: Thursday, July 14, 2011 11:20 AM
To: Anna Rogers
Subject: RE: PPC12, LLC

Each partner was told prior to buy in that the money they were investing in the plane (their portion of equity) was to be used for plane upgrades and taxes. The bill is for taxes for the plane and accordingly should not need a vote as it is a normal bill in the operation of the plane.. We did vote during the members meeting a few weeks ago to move \$25,000.00 to engine reserve. Let me know if you have further questions. Thanks

Vic

From: Anna Rogers [mailto:arogers@mcalistdevelopment.com]
Sent: Thursday, July 14, 2011 10:41 AM

**DEPOSITION
EXHIBIT**

McAlister 3

To: Vic Apat
Subject: PPC12, LLC

Dear Mr. Apat,

I hope all is well. We are still confused about one issue and wanted to ask for your help in clarifying. With regards to the Capital Improvement Account Disposition, there is a withdrawal of \$21,672.67 for SC Property Taxes. Were these last year's taxes?

It is Anthony's understanding that all of the partners will have the opportunity to vote on any money spent from the Capital Improvement Account, as was the case with the life raft.

Thank you for your help.

Anna R. Rogers
McAlister Development Company, Inc.
106 Pitt Street
Mt. Pleasant, SC 29464
(843)388-1750
(843)723-5523 fax
arogers@mcalisterdevelopment.com

**WADE
DEPOSITION TRANSCRIPT PAGES**

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

-versus-

VICTOR APAT, ANTHONY McALISTER,)
J. ERIC WADE d/b/a CT TOURING,)
and PEARL COMPANY SC, LLC,)

Defendants.

THE DEPOSITION OF ERIC WADE was taken as a witness on behalf of the Plaintiff, pursuant to South Carolina Rules of Civil Procedure, at 2:00 p.m. on Tuesday, the 17th day of February 2015, at the offices of Moore & Van Allen, 78 Wentworth Street, in the City of Charleston, State of South Carolina, before Janice O. Darby, Registered Professional Reporter and Notary Public in and for the State of South Carolina.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 A Maybe that's what it is. Could be.

2 Q It's my understanding that you and
3 Mr. McAllister and Mr. Pearlstine and O.L. Thompson
4 are the members of that?

5 A And Doug McElveen. Doug and I own 25
6 percent together under McWade, LLC. Anthony owns 25
7 percent, Edwin owns 25 and O.L. owns 25.

8 Q How did you come to be involved in that
9 particular aircraft?

10 A I was involved in another aircraft with
11 Gordon. I forget what number it was. Gordon had
12 been after me -- I've had planes in the past. And I
13 really wasn't getting in another plane. And Gordon
14 kept asking me to get in this. I tried it. And
15 then I got Edwin to get in, and we tried it. But
16 the plane was just so old and wasn't kept up.

17 I went to Gordon and asked him could I
18 call Cessna, and it took about two months for Gordon
19 to get back to me. I tried to get it refinanced.
20 He wouldn't let me talk to Cessna, because he was
21 scared -- He was upside down in it. And he was
22 scared I was going to make them an offer and they
23 were going to take it and he was going to get left
24 with whatever it was.

25 But that wasn't my problem. It was his.

1 I hate the economy turned, just like the rest of the
2 builders in the world. Economy turned. It turned.

3 We couldn't get anything worked out. We
4 had a clause in the contract that says, you know, if
5 we don't pay, we don't fly. So we didn't pay, we
6 didn't fly.

7 Q I understand what you're getting at.
8 That doesn't really answer the question I've got.

9 The aircraft 561GG, how did you become
10 involved in ownership of that particular aircraft?

11 A I was elected to buy it. I was actually
12 elected to go out and try to find a plane.

13 Q When you say that, by whom?

14 A By Edwin, by Anthony. By Anthony and
15 Edwin basically. O.L. wasn't in it. I'm not sure
16 if O.L. was in it at that time or not, to be honest.
17 Doug was not in it at that time. Doug got in later.

18 Q So Edwin and Anthony asked you to go out
19 and --

20 A We all three decided we would go out --
21 We just couldn't get anything done. We all three
22 agreed that we would go get another plane.

23 Q When was that? Do you know a general
24 time frame?

25 A I've got no idea. I field 150 phone

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 calls a day and 100 e-mails. It would have been
2 probably six months before we bought it. I think we
3 bought it like in October of '13. I don't know, to
4 be honest. May or June maybe. I called Gordon and
5 told him what I was doing.

6 Q When did you do that?

7 A About that same time.

8 Q About what same time?

9 A About the same time I went out looking
10 for an airplane. I can tell you where I was. I was
11 getting on the IOP Connector going home when I
12 called him when you turn left to go to his house.

13 Q And you called Gordon and said what?

14 A I just told him, you know, you didn't
15 give me a chance to call Cessna to try to
16 renegotiate this thing. This plane is behind on
17 maintenance. You've got no engine reserves. You've
18 got no maintenance reserves. We can't keep flying
19 this plane. We're going to try to find something
20 else.

21 The contract says if we don't pay, we
22 don't fly. So we didn't pay and we didn't fly.

23 Q Let me show you what has been marked
24 as -- We've marked it as Mr. Pearlstine's Deposition
25 Exhibit No. 1. We could use this for background.

1 Gibbons.

2 Q I'll represent to you that this has what
3 we call a Bates stamp, which is lawyers' speak for
4 how we number things. It says East Shore 153, is
5 the first page of this. And that's on there because
6 this is the operating agreement that East Shore?

7 A Okay. Then that's the one they chased
8 him around to get him to sign.

9 Q And the final page has everybody's
10 signature except for Mr. McAllister's on it.

11 A Right.

12 Q To my recollection, I have not seen one
13 that Mr. McAllister actually signed. Do you know if
14 he actually ever signed the agreement?

15 A No.

16 Q Did you consider him to be a member of
17 PPC12, LLC?

18 A Yes, he was a member.

19 Q What was your understanding of who was
20 the manager and maintained --

21 A When I got in? Gordon was the manager.
22 Gordon kept the books.

23 Q How did it come to be that you came to be
24 a member of PPC12, LLC?

25 A Gordon asked me about every day at

1 breakfast would I get in the plane with him because
2 he was upside down. He needed some help.

3 Q How did you know Gordon?

4 A I ate breakfast with a group of men every
5 morning that he was part of.

6 Q What led him, to your knowledge, to talk
7 to you about it?

8 A I've had five planes in my life.

9 Q Did you know Victor Apat at all?

10 A Not at all. Met him at the round Holiday
11 Inn with Michael, Edwin, himself and me one day.

12 Q What led you to actually sign on and
13 become a member of PPC12, LLC?

14 A Gordon and Vic told me they would bring
15 up their receivables, because they had no reserve
16 for engines. They had no reserve for maintenance.
17 Gordon was \$100,000 under water. He owed over
18 \$100,000.

19 I sat there (indicating), he sat there in
20 a board meeting, and I looked at Gordon and I said,
21 Do you think it's not wise for you to disclose your
22 hundred and something thousand dollars to the people
23 that is getting this airplane? He looked at me and
24 he said, no, I'll do that, but now is not the right
25 time.

1 Q Now, based on the records in front of
2 you, what do you believe Gordon's balance was as of
3 the date that you became a member of PPC12?

4 A He was \$100,000 behind.

5 Q Show me something --

6 A I can't show you that. I can tell you
7 what they told me. I can tell you Gordon told me
8 himself that he was behind. He needed some people
9 to get into the plane to help him get out. I can
10 tell you he told me that. Under oath.

11 Q I think I understand what you're saying.
12 What I'm asking you is a different question.

13 You've told me you trust these guys to do
14 your accounting. They were doing the accounting for
15 PPC12. You joined the LLC and became a member?

16 A Right.

17 Q You became a member before Mr. Pearlstine
18 became a member, and you became a member before
19 Mr. McAllister became a member?

20 A Correct.

21 Q At the time when you came in --

22 A But I also was told when I came in that
23 my money was not to pay their old bills. My money
24 would be to pay -- to go into engine reserve and
25 foregoing maintenance. That's not what happened to

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 my money.

2 Q When you became a member of PPC12, do you
3 know what anybody's arrearage was? Period.

4 A I know what I was told. Do I know for a
5 fact? No.

6 Q You're the one who said earlier it's what
7 you call due diligence. You didn't do your homework
8 to find out what Mr. Gibbons thought everybody's
9 arrearage was?

10 A No, I know what Gordon told me. Gordon
11 told me he was in arrears. He needed to be bailed
12 out.

13 Q Do you even know what he was referring to
14 if he said that?

15 A Yes. In his plane, in the taxes, in the
16 maintenance. It had no engine reserve. We had that
17 conversation, because I called him a fool. I said
18 you're a fool for not having engine reserve. I've
19 never been involved in a plane that doesn't have
20 engine reserve, and I won't be involved in this one
21 if you don't put money up for engine reserve.

22 Q And you chose to sign on as a member of
23 PPC12, LLC?

24 A Yeah. And we put money in engine
25 reserve. Money to be deposited on every flight that

1 BY MR. MARVEL:

2 Q And you paid that invoice?

3 A Had a zero balance.

4 Q Do you remember when the last time you
5 flew on that plane was?

6 A No clue.

7 Q Do you know why the last invoice that you
8 paid was the last invoice that you received?

9 MR. GASKINS: Object to the form.

10 A Because it was the last time I flew on
11 the plane.

12 BY MR. MARVEL:

13 Q Do you know why that was the last invoice
14 you received?

15 A It's the last time I flew the plane.

16 Q Did you ever tell David and Michael
17 Gibbons to stop sending you invoices for that plane?

18 A No.

19 Q They just did it?

20 A I didn't fly. They had no reason to send
21 me an invoice.

22 Q So are you saying that the only
23 obligation you had to PPC12 was to pay for when you
24 were flying the airplane?

25 A No. We had bought the other plane at

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 that time. I think we bought our airplane in
2 October. We got it here in October. We had to do a
3 couple of things to it to comply with the U.S.,
4 because I bought it in England. So that would be
5 about right. I probably flew it somewhere around
6 the first -- end of October, first of November, paid
7 the invoice off. We had a new plane.

8 Q When did East Shore Aviation begin
9 invoicing you for the new plane?

10 A When we got it.

11 Q Do you know John Hodge?

12 A I don't know that I've ever met him, no.

13 Q Do you know who John Hodge is? Does that
14 name ring a bell?

15 A No. Yeah, is he the attorney from
16 Columbia?

17 Q Yes.

18 A I don't know him. I've heard his name.
19 Don't know anything about him.

20 Q Do you know how he became involved in
21 working with the operating agreement for PPC12?

22 A He and David Gibbons.

23 Q What was your input into the drafting of
24 the operating agreement that you eventually signed
25 for PPC12?

1 was it billed to the other people who were on the
2 phone?

3 A Billed?

4 Q When I say billed, how was it put to
5 them --

6 A I just told you. That's how it was put
7 to them. All of those things were discussed. I was
8 asked how I got along with Gordon. Gordon told me
9 after three months of chasing him, two months of
10 chasing him, he didn't want me talking to Cessna. I
11 said if he doesn't want me talking to Cessna, he's
12 scared that we're going to buy the plane 60 cents on
13 the dollar. He's going to be stuck with the
14 difference. It's time for us to hunt for a new
15 plane. At that time this plane was 13 years old, 14
16 years old.

17 Q You referenced earlier that your bank
18 wouldn't refinance it, I think is how you put it?

19 A Would not.

20 Q What bank is that?

21 A T.D. Bank.

22 Q Who did you deal with at T.D. Bank?

23 A Dixon Woodward, president of the bank.

24 Q What efforts did you make to try to
25 refinance 217EB?

1 A I asked them to refinance what Gordon
2 owed, \$2.9 million, and they said not without us
3 putting down \$600,000. We passed.

4 Q I saw a reference in a document somewhere
5 that referred to a rate that you didn't think was
6 favorable.

7 A To refinance the plane?

8 Q Yes.

9 A What rate?

10 Q Do you recall that ever being an issue?

11 A No.

12 Q To your recollection, the issue was how
13 far it was upside down?

14 A They were upside down, according to the
15 plane book, like the Blue Book of cars, they were
16 upside down \$400,000 or \$500,000. We felt like the
17 plane was worth between \$1.3 and \$1.5, is what we
18 felt like the plane was worth.

19 Q Do you know what it actually sold for?

20 A Have no clue.

21 Q Other than T.D. Bank, what institutions
22 did you --

23 A None. T.D. Bank did our loan on the new
24 plane.

25 Q But you didn't ask any other banks other

1 that Mr. Apat told you, because you hadn't met him
2 before you put your money in?

3 A I don't think so. I'm being honest. I
4 don't think so.

5 Q I expect you to be honest, because you're
6 under oath.

7 A I don't think I met Vic at that point. I
8 think after I did, I asked to meet -- I wanted to
9 meet who we were going to be in business with to
10 make sure we're all on the same page.

11 Q You had met Mr. Lovingood, though,
12 because you ate breakfast with him?

13 A I knew him five years before I got in.

14 Q Who else is part of the breakfast group?

15 A Ben Hanna (phonetic). He is about an
16 80-year-old guy. We used to meet at Boulevard Diner
17 in the morning. Gordon came in and ate every so
18 often.

19 Q Do you still do that?

20 A No, I don't anymore.

21 Q Good food.

22 A Yeah, but you don't have a beast that's
23 worldwide. I didn't either back then. Now, I do.
24 So I'm up all hours of the night.

25 Q How much was the check? Do you remember?

1 A It was either \$20,000 or \$25,000.

2 Q Whatever it is.

3 A If he said Edwin put \$40,000 in, then I
4 put \$20,000.

5 Q Did you mail the check in or did you give
6 it to somebody?

7 A I couldn't tell you.

8 Q Would you have given it to Mr. Lovingood?

9 A I would have either given it to Gordon,
10 Michael, or I would have mailed it, one of the
11 three.

12 Q The date that check was deposited or
13 cashed or whatever it is, is that the day that you
14 consider that you were in?

15 A Yeah, I would assume.

16 Q And then you think it was after that that
17 you met at the round Holiday Inn, and that it was
18 after that that you had a board meeting?

19 A I think so, yes.

20 Q Do you know what a fiduciary duty is?

21 A I do.

22 Q Tell me what it is.

23 A To be responsible for the money of
24 others --

25 Q Well said.

1 A That's a payment and an invoice, yes.

2 Q So look at that again. What was the date
3 of the last invoice you received?

4 A Oh, the last invoice? 9/30 to 10/26.

5 Q What year is that?

6 A 2012.

7 Q So the last invoice you received from
8 PPC12 was dated 9/30/2012?

9 A It was.

10 Q Do you have any reason to believe that's
11 inaccurate?

12 A No.

13 Q And you never received an invoice for any
14 fixed expenses after that. Right?

15 A No.

16 Q I'm going to show you what's been marked
17 as Pearlstine No. 7. I believe this is an e-mail
18 chain that you were on part of dated September 4th
19 and September 5th. This references -- If you look
20 at the beginning e-mail, it's from C.G. Lovingood to
21 David Gibbons. Do you see that?

22 A Where? Here (indicating)?

23 Q Yeah, at the bottom.

24 A I do.

25 Q It says, "Just got a call from Eric. I

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 think we need to meet on this soon. No one has told
2 me anything about the situation, so I'm asking to
3 get everyone together so we can get this resolved
4 without any problems." Do you see that?

5 A I do.

6 Q Do you know what call he's referring to?

7 A Yes.

8 Q What call was that?

9 A That's when I called him and told him
10 that we were getting out of the plane and getting
11 into another plane.

12 Q When you say "we," you mean you, Pearl --

13 A Edwin.

14 Q And McAllister?

15 A Anthony, and then O.L. came in later,
16 yeah.

17 Q But O.L. wasn't part of --

18 A O.L. wasn't part of it.

19 Q So he wasn't getting out?

20 A No. Just Anthony, Edwin and myself.

21 Q Were getting out of the LLC?

22 A Correct.

23 Q And that was September 4, 2012?

24 A Yes.

25 Q Mr. Collins was asking you several

**PEARLSTINE
DEPOSITION TRANSCRIPT PAGES**

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

-versus-

VICTOR APAT, ANTHONY McALISTER,
J. ERIC WADE d/b/a CT TOURING,
and PEARL COMPANY SC, LLC,

Defendants.

)
)
)
) Case No.:
) 2013-CP-10-5080
)

THE DEPOSITION OF EDWIN PEARLSTINE was
taken as a witness on behalf of the Plaintiff,
pursuant to South Carolina Rules of Civil Procedure,
at 10:00 a.m. on Tuesday, the 17th day of February
2015, at the offices of Moore & Van Allen, 78
Wentworth Street, in the City of Charleston, State
of South Carolina, before Janice O. Darby,
Registered Professional Reporter and Notary Public
in and for the State of South Carolina.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 A We paid a certain amount of fixed costs
2 and then we paid an hourly rate.

3 Q Generally, in the process of paying both
4 the fixed costs and the hourly rate, was that less
5 than you think you would have paid to charter an
6 aircraft?

7 A Probably not.

8 Q Did you end up using the aircraft as much
9 as you thought you might when you became a member of
10 the LLC?

11 A Well, I really don't know. It's been a
12 long time.

13 Q To your recollection, did Mr. Apat tell
14 you anything else about your membership interest in
15 the aircraft other than what you just stated?

16 A I understood that we would use the
17 \$40,000, or call it whatever you want, the
18 initiation fee or whatever, that that would go into
19 a maintenance account and it would upgrade avionics
20 and electronics. That's what I understood that the
21 capital that I put in would go towards.

22 Q \$40,000 was what you put in originally?

23 A I think so. It's been a long time ago,
24 but I believe that's probably the amount.

25 Q I'll represent to you that if you look on

1 what's marked as East Shore 164, the date of the
2 Second Amended Operating Agreement which provides
3 Pearl Company South Carolina, LLC, with a 25 percent
4 ownership interest in PPC12, LLC, the date of that
5 is May 15, 2011. Do you know if you signed it on
6 that date?

7 A I don't recall.

8 Q Do you recall whether you-all signed this
9 document at one time, or was this mailed to you or
10 e-mailed to you?

11 A I can't recall.

12 Q That's another thing. This is not a
13 memory test --

14 A I'll tell you that I've had some pretty
15 recent health problems. I was just in the hospital
16 recently. In fact, they implanted in me a cardiac
17 defibrillator.

18 Q I'm sorry to hear you had health
19 problems, but I think that that's probably a good
20 thing to get one of those.

21 A Well, I went into atrial fib twice.
22 Luckily, I was able to get to Roper Emergency.

23 Q Are you under any medication or anything
24 that would keep you from remembering things today or
25 testifying truthfully?

1 A I don't think medications cause me that.

2 Q Do you have any other memory-related
3 problems other than the usual things that --

4 A Well, I'll be 80 years old March 3rd.
5 I'm not quite as smart as I used to be. I'll put it
6 that way.

7 Q I doubt that.

8 (Exhibit No. 2 marked for
9 identification.)

10 BY MR. MARVEL:

11 Q I'll represent to you that what I've got
12 marked here as Exhibit 2, and it's Bates stamped
13 East Shore 48, is what East Shore provided us
14 relating to your account. And it does not show an
15 initial payment of \$40,000, but that may be their
16 bookkeeping error, or at least it's not shown on
17 that particular account.

18 It's your recollection that you
19 originally paid in \$40,000 in the process of taking
20 an ownership interest in PPC12. Is that correct?
21 Do you know if you paid that at one time or over a
22 series of payments?

23 A One time.. I don't recall if that's the
24 exact amount or not. It's many years ago.

25 Q We can find that out from other sources.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 A You can find out from East Shore.

2 Q Do you recall who you paid that to?

3 A No.

4 Q Other than that, in reviewing what's been
5 marked as Exhibit 2, do you have any reason to
6 dispute the accuracy of how they kept their records
7 on when bills were sent out and when they were paid?

8 A No.

9 Q What's at the 5264-B International
10 Boulevard address?

11 A I have an office there.

12 Q Is that part of one of the other
13 companies, or is that just --

14 A We have a family office.

15 Q If East Shore Aviation mailed the
16 statement to 5264-B International Boulevard, Suite
17 220, who gets the mail there?

18 A That's where the statements came to.

19 Q Right, but who would actually physically
20 receive and open the mail?

21 A We have multiple people working there. I
22 don't know exactly who would open it.

23 Q In the process of paying these invoices
24 as they came in, would you personally do that, or
25 did you have somebody working for you that would do

1 that?

2 A One of my employees did it.

3 Q Anyone in particular that would handle
4 that?

5 A Yeah, Sheila Pace, CPA.

6 Q Was she working for you during this
7 entire time --

8 A Yes.

9 Q She works for you currently?

10 A Yes.

11 Q Does Pearl Company South Carolina own
12 anything else other than --

13 A No.

14 Q Is it actually the member of the entity
15 that owns 261GG?

16 A 251 Huger Street?

17 Q No, the other aircraft, the other
18 Pilatus.

19 A I think so. I'm not sure.

20 Q And does your son-in-law use that
21 aircraft also?

22 A Yeah.

23 Q Did your son-in-law use the aircraft that
24 was owned by PPC12?

25 A He's been on it.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 (Exhibit No. 3 marked for
2 identification.)

3 BY MR. MARVEL:

4 Q I'm going to show you what's been marked
5 as Deposition Exhibit No. 3. I'll represent to you
6 this is what we've received from East Shore Aviation
7 that shows the flight records and pilot flight time.
8 And we've got them for the other years, but I'm
9 going to show you this one that relates to 2012.

10 If you don't mind reviewing that and tell
11 me if it more or less looks accurate as far as your
12 recollection of when you used the aircraft. Have
13 you ever seen that document before?

14 A No.

15 Q Have you ever seen a document like it
16 from East Shore?

17 A No.

18 Q I'll represent to you -- I'm looking at
19 my copy of East Shore 7. If you'll notice the first
20 one is January 2, 2012, references a trip from one
21 airport to another. It's got the time out, I think
22 what the our hour meter read on there, the time it's
23 back in, how long the flight time was.

24 And if you go across, there's a user
25 code, which to my understanding is the individual

1 me. Convenience.

2 Q What is your understanding of your
3 interest in the aircraft that is 261GG?

4 A My family is a 25 percent owner.

5 Q Is that different in any way than your
6 understanding of what your interest was in PPC12?

7 A Absolutely.

8 Q Describe for me what the differences are
9 in your mind.

10 A In my mind, number one, with PC12
11 Mr. Lovingood could have painted that plane pink and
12 purple with polka dots. I couldn't say a word. He
13 could have sold that plane at any time. He didn't
14 have to ask my permission to sell the plane. I
15 never felt that I had any equity, any financial
16 obligation with Cessna Finance. It was just a
17 method of transportation to me.

18 Q Did you have an opportunity to review the
19 First Amended Operating Agreement of PPC12, LLC,
20 before you signed the signature page on the end of
21 it?

22 A I probably read it.

23 Q On the page that's immediately prior to
24 your signature page, which is Bates stamped on the
25 bottom East Shore 164, that indicates the Pearl

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 in in the LLC's attempts to refinance the debt?

2 A None.

3 Q Were you aware that this provision was in
4 the operating agreement when you signed it?

5 A No.

6 Q Now, when you signed on to the operating
7 agreement, Mr. Wade was already a member. Is that
8 correct?

9 A I don't recall who was first.

10 Q Were you aware that any of the other
11 members of PPC12, LLC, were making any attempts to
12 refinance the debt?

13 A Not that I know of.

14 Q You knew that Mr. Lovingood was the one
15 that was on the note. Correct?

16 A Correct.

17 Q You knew that he was a personal guarantor
18 of the note, or did you?

19 A I assume he was. I wasn't.

20 Q You're an astute businessman. I assume
21 you've had a lot of banking relationships over the
22 years. You would assume that somebody was the
23 personal guarantor of the note on that aircraft.
24 Correct?

25 A Not necessarily. He went through Cessna

1 Q When did you find that out?

2 A I have no idea. I don't remember.

3 Q What did you do in response to finding
4 that out, if anything?

5 A Nothing.

6 Q Were the avionics of the PPC12 aircraft
7 ever upgraded in the way that you thought they were
8 going to be?

9 A No.

10 Q To your understanding, were the avionics
11 that were on the aircraft satisfactory for the use
12 in which you intended it for?

13 A Were they satisfactory?

14 Q Yes.

15 A I don't know the difference of
16 satisfactory. They were two generations old. There
17 are a lot more modern and safer avionics on planes
18 now.

19 Q But you continued to use the aircraft?

20 A Right.

21 Q And you let your family use the aircraft?

22 A Right.

23 Q I would assume that you wouldn't have let
24 your daughters get on the aircraft if you would have
25 thought that it was unsafe in any way. Correct?

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

APAT DEPOSITION TRANSCRIPT PAGES

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON) CASE NO. 2013-CP-10-5080
3
4

5 C. GORDON LOVINGOOD, JR.,) DEPOSITION OF
6 C3 INVESTMENTS, INC.,)
7 PPC12, LLC) VICTOR APAT

8 Plaintiffs,

9 -versus-

10 VICTOR APAT; ANTHONY
11 MCALLISTER; J. ERIC WADE D/B/A
12 CT TOURING; AND PEARL CO. SC,
13 LLC,

14 Defendants.
15 -----
16
17
18
19
20
21
22
23
24
25

DATE: Monday, February 23, 2015

TIME: 10:42 a.m.

LOCATION: Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401

REPORTED BY: Janice D. Hayward, RMR
NCRA Registered Merit Reporter
101 Dorchester Court
Charleston, South Carolina 29418
843.478.6756
JanHayward1@gmail.com

Janice D. Hayward, RMR
843.478.6756

1 mind, is the difference between a capital
2 contribution and paying a fixed or variable cost for
3 the aircraft?

4 A If we were going to upgrade the plane, as
5 an example, and there wasn't enough money in the
6 accounts to do that, you would make a capital
7 contribution. I believe the document requires
8 75 percent of the owners to agree to that.

9 Engine reserve, as an example,
10 if there wasn't enough money in the engine reserve,
11 you might be required to make a contribution.

12 Q Other than the initial contributions that
13 were -- initial capital contributions that were paid
14 by the members, do you recall there ever being any
15 additional capital contributions paid by the
16 members?

17 A I'm not aware of anything beyond the
18 initial capital contributions.

19 Q Okay. And you were talking about 3.6 and
20 3.7 and its language, referring to the obligations
21 to pay for cost of the aircraft. Do you see --
22 strike that.

23 Would you agree that the only
24 remedy that the operating agreement provides for a
25 member's failure to pay the fixed and variable

1 expenses of the aircraft is that the member cannot
2 use or fly the plane?

3 MR. MARVEL: Object to form.

4 A " It does appear that the document simply
5 notes that if you don't pay and are not in good
6 standing, you're not allowed to fly.

7 BY MR. GASKINS:

8 Q Do you see any other remedies available in
9 the event a member doesn't pay?

10 MR. MARVEL: Object to form.

11 A I do not note one.

12 BY MR. GASKINS:

13 Q If we stay on page 3, look at Section 3.5.
14 Do you see the provision with the caption,
15 limitation of liability?

16 A Yes.

17 Q Can you read that aloud for me, please?

18 A No member is personally liable for any
19 debt, obligation, or liability of the company
20 whether arising in contract, tort, or otherwise.

21 Q What do you understand that provision to
22 mean?

23 A Means the intent of that is if there's an
24 issue with the company, no member is personally
25 liable.

1 Q And is it your understanding that that
2 applies to the loan or any monies owed on the PPC12
3 aircraft as well?

4 MR. MARVEL: Object to form.

5 A I believe it would apply to the loan and
6 any other debt or obligation.

7 BY MR. GASKINS:

8 Q And do you think that's consistent with
9 the way the LLC was originally set up?

10 A I believe it is.

11 Q And why is that?

12 A Simply because Gordon was the manager and
13 Gordon is the one who bought the plane, and the
14 intent for the rest of us coming in were simply to
15 be users of the plane.

16 Q When you came in and later when Mr. Wade
17 and Mr. McAllister and Pearl Company came in, was
18 there ever any discussion about having the other
19 members become personally liable or to provide a
20 guaranty for the note to Cessna Finance?

21 MR. MARVEL: Object to form.

22 A I know that there was -- all of us had the
23 discussion that no one was willing to provide
24 additional personal guaranties for the note.

25 BY MR. GASKINS:

1 Q And everybody understood that?

2 A I can't speak for everybody. I can only
3 speak for myself.

4 Q But it's your understanding that neither
5 you nor any of the codefendants in this case
6 intended to become personally responsible for making
7 the note on the PPC12 aircraft?

8 A I know that discussions surrounded the
9 fact that nobody wanted to become a personal
10 guarantor on the note.

11 Q And to your knowledge was the note or
12 guaranty or any other agreement with Cessna Finance
13 renegotiated to make any other members a guarantor?

14 A I'm unaware of any negotiations that would
15 have made anybody else a guarantor.

16 Do you mind if I just stand up
17 for one second?

18 Q No, absolutely.

19 A Keep asking questions.

20 Q Sure. Do you need me to take a break?

21 A No. Go ahead, please.

22 Q Sure. Are you currently a member of
23 PPC12, LLC?

24 A No.

25 Q When did you cease being a member of

1 Did you see any provisions in the operating
2 agreement that required a member to disassociate in
3 any particular manner?

4 A No.

5 Q So you're not aware of anything that would
6 have limited your or any other member's ability to
7 disassociate verbally?

8 A Correct.

9 Q Mr. Apat, is it your understanding that
10 Mr. Wade, Mr. McAllister, and Pearl Company South
11 Carolina or SC, LLC are no longer members of PPC12,
12 LLC as well?

13 MR. MARVEL: Object to form.

14 A Again, I'm unaware whether they are or are
15 not members.

16 BY MR. GASKINS:

17 Q Do you think that they're members?

18 A You know, based on the rumor mill, it's my
19 understanding that they perceive themselves now no
20 longer as members.

21 (Marked for identification was Deposition
22 Exhibit 2.)

23 BY MR. GASKINS:

24 Q You've been handed what's been marked as
25 Exhibit Number 2. Can you review those and let me

1 know when you're finished?

2 A Okay.

3 Q What is this document?

4 A It's an email train through various
5 people.

6 Q And it begins with an email from David
7 Gibbons to cglovingood@comcast.net. I'm assuming
8 that's Mr. Lovingood, is that right?

9 A I believe that's correct.

10 Q That appears to be his email address,
11 correct?

12 A It does appear to be his email address.

13 Q And the email is addressed to Gordon,
14 correct?

15 A Correct..

16 Q And you were cc'd on this email?

17 A I was, yes.

18 Q And it's dated October 22nd, 2012, right?

19 A It is dated October 22nd, 2012.

20 Q Do you recall whether you were still a
21 member of PPC12, LLC on the date of this email?

22 A I was out somewhere in that same
23 timeframe, from memory.

24 Q Can you read the second sentence on this
25 email aloud, please?

1 A Those members have not used the aircraft
2 since that time and are current with their financial
3 obligations.

4 Q The sentence before that.

5 A Sorry. We were only recently informed by
6 the other members that they notified you by phone of
7 their intention to leave PPC12, LLC effective
8 October 1st.

9 Q What does that sentence mean to you?

10 A That they have an intention to
11 disassociate from PPC12.

12 Q It's your understanding that they
13 expressed that intention to Mr. Lovingood?

14 MR. MARVEL: Object to form.

15 A I don't know. The way this is written, it
16 appears that they expressed that to David Gibbons.

17 BY MR. GASKINS:

18 Q They expressed what to David Gibbons?

19 A Again, reading the sentence, we -- and
20 he's sending this to Gordon, so "we" would imply
21 that it's David and Michael, were only recently
22 informed by other members that they notified --
23 okay, notified you by phone of their intention to
24 leave PPC.

25 So somebody that you're

1 representing apparently told Michael and David that
2 they had spoken to Gordon.

3 Q Do you have any reason to believe that's
4 not a true statement?

5 A No.

6 BY MR. GASKINS:

7 Q Was that your understanding around that
8 time, that they were -- that they had either
9 disassociated or were intending to disassociate from
10 PPC12, LLC?

11 A Yes.

12 Q And that was your intention as well?

13 A Correct.

14 Q And this was prior to the aircraft having
15 engine failure. Is that your understanding?

16 MR. MARVEL: Object to the form.

17 A Honestly, I don't remember the date. If
18 you could provide me with the date of the engine
19 failure, that would answer the question. I don't
20 recall the exact timing of the engine failure.

21 BY MR. GASKINS:

22 Q It's my understanding, I'll represent to
23 you that I believe that the engine failure occurred
24 on or around October 28th, 2012.

25 And this would have been,

1 obviously, prior to that?

2 A Right. Assuming that's the correct date,
3 then yes.

4 Q Okay. Do you recall receiving this email?

5 A Vaguely.

6 Q What do you remember about the operations
7 of PPC12 around this timeframe in October 2012?

8 A I'm not really sure that there's a
9 specific question in there. I mean, David and
10 Michael were operating the airplane. There was a
11 charter utilization of the plane. Various people
12 were using the plane at that point in time,
13 including the people that -- the codefendants that
14 you're representing.

15 I was not using the plane. I
16 don't believe Gordon was using the plane. That's
17 about it.

18 Q Why did you decide to disassociate?

19 A Wasn't using the plane.

20 Q Did you feel you could just disassociate
21 at any time without having any further financial
22 obligations?

23 A I do.

24 Q And you've reviewed the operating
25 agreement. Is there anything in there that makes

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

) CIVIL ACTION NO. 2015-CP-10-4549
)

CERTIFICATE OF SERVICE

2015 OCT 15 PM 4:32
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

This is to certify that I have this date served a true and correct copy of **Defendants'**

Memorandum in Support of Motion for Summary Judgment on the parties identified below

by U.S. Mail with proper postage affixed thereto and addressed to the following:

David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire
PRENNER MARVEL, P.A.
636 King Street
Charleston, SC 29403
Attorneys for Plaintiffs

David A. Collins
Law Office of David A. Collins, LLC
P.O. Box 40578
Charleston, SC 29418
Attorney for Defendant Victor Apat

MOORE VAN ALLEN, PLLC

Megan Hickey

October 15, 2015

Moore & Van Allen

October 15, 2015

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

BY HAND DELIVERY

Moore & Van Allen PLLC

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

**Re: C. Gordon Lovingood, Jr., C3 Investments, LLC, and PPC12, LLC vs. Victor Apat,
Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co SC, LLC
Case No. 2013-CP-10-5080
MVA File No. 038737-1**

Dear Ms. Armstrong:

Enclosed for filing please find an original and one (1) copy of Defendants' Memorandum in Support of Motion for Summary Judgment.

Please file the original and return a file stamped copy in the return envelope.

Thank you for your assistance in this matter.

Sincerely,

Moore & Van Allen PLLC



E. Brandon Gaskins

EBG/ws

Enclosures: as stated

cc (via U.S. Mail): David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire
David A. Collins, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiffs,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendants.

2015-CP-10-4549
Civil Action No.: 2013-CP-10-5080

FILED
2015 OCT 23 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW PLAINTIFFS, who hereby file this Memorandum in Opposition to the Motion for Summary Judgment filed by the Defendants Anthony McAllister, Eric Wade, and Pearl Co. SC, LLC, which was heard by the Court on October 19, 2015. Plaintiffs note that while Defendant's counsel provided the undersigned with a copy of their memorandum in support of their Motion for Summary Judgment by email on October 15, 2015, Defendants' counsel did not serve a copy including exhibits until one was delivered to the undersigned's office after 4:00 pm on October 19, 2015, while all counsel were in court waiting for oral argument. Accordingly, Plaintiffs' respectfully request that this Honorable Court grant leave for this memorandum offer a brief reply to Defendants' Motion.

The Court's familiarity with the facts is presumed. For purposes of this memorandum, the Plaintiffs seek to recover the costs and expenses related to repairing a Pilatus PC12 aircraft that was owned by PPC12, LLC. During the October 19, 2015 hearing, Defendant's counsel

asserted that the evidence conclusively established that McAllister, Wade, and Pearl Co. had dissociated from PPC12, LLC prior to the aircraft's engine failure. The court noted that there was evidence in the record tending to create a question of fact on that issue.

Defendants have asserted that they dissociated from the LLC pursuant to S.C. Code § 33-44-601(1), which states that "[a] member is dissociated from a limited liability company upon . . . (1) the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member. The only evidence supporting this assertion is testimony from Plaintiff Lovingood that he received a phone call from Defendant Wade in which Wade indicated that he was "going in a different direction", followed by an October 22, 2012 email from the aircraft manager, David Gibbons, in which Mr. Gibbons indicating that the defendants had expressed "their intention to leave PPC12 LLC Effective October 1st."

First, no fair reading of Lovingood's testimony supports the concept that Wade's telephone call constituted "notice of [his] express will to withdraw". Lovingood's testimony on this question was as follows:

- Q. Let's go back to that phone conversation you had with Eric. And he told you that the partners were going in a different direction, right?
- A. That's all he said.
- Q. And he told you that they were buying another airplane?
- A. I think he said that. I think he just said -- I might have just thrown that in. But I think all he said was we're moving in another direction. That's all I really remember. And I might have just thrown in, through frustration and being -- getting fired on, that. But I don't really recall other than the fact that the main thing was that we have decided to move in a different direction. That was it.
- Q. And --
- A. He never said whether they're leaving the LLC, never, never -- never mentioned anything about PPC12 at all.
- Q. Okay. He didn't have any other reason to call you about anything other than PPC12, LLC, correct?
- A. I don't know. You know, we were friends and that's why I answered the phone when I saw his number.

- Q And he was referring to a partnership. You don't have any other partnerships with him, do you?
- A I don't know. All I'm saying is what he said.
- Q Okay.
- A I don't know what his intent was.
- Q Isn't it true that you understood Eric to mean that they were disassociating or getting out of the LLC? (Objection to relevance, asked and answered)
- A I know -- no, I don't know they were going to get out of the LLC.

(Ex. 1, p. 106, line 14-p. 108, line 6).

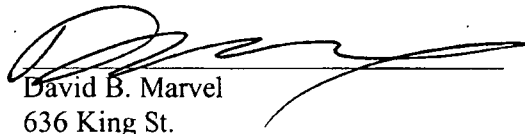
Moreover, Section 33-44-601(1) requires that a dissociating member must give notice of that express will to "the company". Although Lovingood was one of the original members of PPC12, LLC, at that point he was simply a minority membership interest. Conversely, David Gibbons is the Director of Operations of East Shore Aviation, who was contracted by PPC12, LLC, and named in the Operating Agreement to manage, operate, and maintain the aircraft. Gibbons testified that on the date the aircraft suffered a catastrophic engine failure, Victor Apat was the Managing Member of the LLC, and none of the defendants had not advised him of any change in their relationship to PPC12, LLC. (Ex. 2, p. 30, line 9-p.31, line 2; lp. 48, line 23-p. 49, line 6). As far as Gibbons knew, all of the defendants were members of the LLC on that date. (Ex. 2, p.84, line 20-p.85, line 8). In fact, as late as February, 2013, Defendant McAllister was still paying off his flight time balance with PPC12, LLC, even though the aircraft was not flying. (Ex. 2, p. 54, lines 2-9).

Finally, the October 22, 2011 email relied on by the Defendants to corroborate their claim of dissociation, attached as Exhibit 3, fails as a matter of law. Notably, Apat, who Gibbons identified as the managing member, responded to the email in a manner that clearly shows that he has no information on the issue. Moreover, the email on October 22 references an October 1 dissociation date, which is ineffective under the statute as any notice of express will to dissociate must, by definition, must apply "upon the date of notice or on a later date". Finally, the email

only references an intention to leave, not an actual withdrawal or an actual dissociation, so Gibbons, Lovingood, and Apat had no notice of any member's "express will" to do anything.

Lovingood and his company, C3 Investments, incurred over \$500,000 in expenses to preserve the LLC's asset in the ordinary course of the LLC's stated business purpose. He is entitled to be indemnified by the other members of the LLC under Articles 3.6, and 8.2(b-c) of the Operating Agreement. Further, Defendants Wade, McAllister, and Pearl Co. clearly competed with PPC12, LLC long before October 2012 by forming CP Aviation, LLC to perform exactly the same business, and that competition (including attending to the members own flying needs) led those Defendant to abandon their obligations to PPC12, LLC. The Plaintiffs have stated their case on all causes of action, and Defendants' Motion for Summary Judgment must be Denied.

RESPECTFULLY SUBMITTED:
PRENNER MARVEL, P.A.



David B. Marvel
636 King St.
Charleston, South Carolina 29403
Ph. (843) 722-7250
Fax (843) 722-7260
Email: dave@prennermarvel.com
ATTORNEYS FOR THE PLAINTIFFS

Charleston, South Carolina
October 23, 2015

In The Matter Of:

Lovingood v.

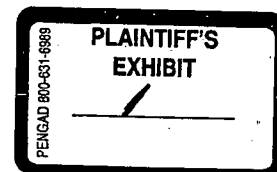
Apat

C. Gordon Lovingood, Jr.
June 19, 2015



Janice D. Hayward, RMR
Independent Court Reporter
843.478.6756
JanHayward1@gmail.com

Original File 061915CLovingood.txt
Min-U-Script® with Word Index



Page 105

1 BY MR. GASKINS:
2 Q You're not aware of anything in that
3 operating agreement that governs how members
4 disassociate?
5 MR. MARVEL: Object to form.
6 A I'm not aware of whether it's in that
7 agreement or not. If your intent was to do
8 something, and you intended to do it, that doesn't
9 relieve your obligation for it.
10 BY MR. GASKINS:
11 Q Okay. Well, Mr. Worthy is no longer a
12 member of PPC12, LLC according to you, right?
13 A As far as I'm concerned, when I sent a
14 bill to him and he didn't pay it, then what I did
15 was to not take any action whatsoever and then he
16 went to prison.
17 Q Okay. Did you -- do you have anything in
18 writing saying he's no longer a member?
19 A He's probably still a member but I'm --
20 hard to get money out of somebody who's in prison.
21 Q Well, earlier you said he was no longer a
22 member.
23 A Okay.
24 Q So is he a member?
25 A I can't answer that.

Page 106

1 MR. MARVEL: Object to form.
2 A I don't have all these papers in front of
3 me, sir. If I had everything in front of me to
4 where I could answer your questions more clearly,
5 but this is a long time ago, and I'm running off of
6 frustration, I'm running off of anger, and I'm
7 running off of ludicrous questions from an attorney.
8 Q All right.
9 A And that's a giveaway.
10 MR. MARVEL: Let's take a break for a
11 second.
12 (The deposition went off the record.)
13 BY MR. GASKINS:
14 Q All right. Let's go back to that phone
15 conversation you had with Eric. And he told you
16 that the partners were going in a different
17 direction, right?
18 A That's all he said.
19 Q And he told you that they were buying
20 another airplane?
21 A I think he said that. I think he just
22 said -- I might have just thrown that in. But I
23 think all he said was we're moving in another
24 direction. That's all I really remember. And I
25 might have just thrown in, through frustration and

Page 107

1 being -- getting fired on, that.
2 But I don't really recall other
3 than the fact that the main thing was that we have
4 decided to move in a different direction. That was
5 it.
6 Q And --
7 A He never said whether they're leaving the
8 LLC, never, never -- never mentioned anything about
9 PPC12 at all.
10 Q Okay. He didn't have any other reason to
11 call you about anything other than PPC12, LLC,
12 correct?
13 A I don't know. You know, we were friends
14 and that's why I answered the phone when I saw his
15 number.
16 Q And he was referring to a partnership.
17 You don't have any other partnerships with him, do
18 you?
19 A I don't know. All I'm saying is what he
20 said.
21 Q Okay.
22 A I don't know what his intent was.
23 Q Isn't it true that you understood Eric to
24 mean that they were disassociating or getting out of
25 the LLC?

Page 108

1 MR. MARVEL: Object to form.
2 A I know -- no, I don't know they were going
3 to get out of the LLC. All I know is that I felt
4 like they were buying another aircraft, and if they
5 did, I was going to sue them for whatever we had on
6 this airplane.
7 BY MR. GASKINS:
8 Q Okay. What if they bought another
9 airplane and continued paying the bills, were you
10 still going to sue them?
11 A No.
12 Q Okay. So why did you threaten to sue
13 them?
14 A 'Cause I felt threatened.
15 Q 'Cause you felt like they were leaving the
16 LLC, correct?
17 MR. MARVEL: Object to form.
18 A I don't know what their intention was
19 other than the fact that they were moving in another
20 direction and that doesn't sound good to me as a
21 businessman.
22 Q So instead of asking questions about what
23 he meant, you threatened to sue him?
24 A Out of frustration and anger, yes.
25 Q Okay. All right. Well, after that phone

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

Plaintiff,

-versus-

VICTOR APAT, ANTHONY McALISTER,
J. ERIC WADE d/b/a CT TOURING,
and PEARL COMPANY SC, LLC,

Defendants.

)
)
)
) 2015-CP-10-4549
) Case No.:
) ~~2013-CP-10-5080~~

THE DEPOSITION OF DAVID GIBBONS was taken as a witness on behalf of the Plaintiff, pursuant to South Carolina Rules of Civil Procedure, at 1:00 p.m. on Thursday, the 23rd day of October 2014, at the offices of Prenner Marvel, 636 King Street, in the City of Charleston, State of South Carolina, before Janice O. Darby, Registered Professional Reporter and Notary Public in and for the State of South Carolina.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net



1 DAVID GIBBONS
2 having been first duly sworn, was called as a
3 witness herein and was examined and testified as
4 follows:

5

6 E X A M I N A T I O N

7 BY MR. MARVEL:

8 Q Could you please state your full name for
9 the record.

10 A David Michael Gibbons.

11 Q And it is my understanding that you are
12 the director of operations for East Shore Aviation.
13 Is that correct?

14 A That's correct.

15 Q Have you ever given a deposition before?

16 A No.

17 Q You've been subpoenaed here today in a
18 lawsuit that's amongst the members of PPC12, which
19 it's my understanding that East Shore Aviation at
20 one time had a contract with for maintenance and
21 operation of an aircraft. This is our opportunity
22 to ask you questions.

23 You've been sworn in, so you're under
24 oath just as if we were in a court proceeding.
25 However, we do it in a slightly less formal manner

1 named Jay, I think, was who I dealt with the most.
2 And that was mainly due to -- you know, concerning
3 paperwork. All the rest of this stuff is above my
4 pay grade.

5 Q What types of paperwork did they need
6 from you?

7 A They didn't need anything from me. It
8 was basically the aircraft registration, several
9 documents that stipulated that I was going to be the
10 manager, you know, the financial manager, and that
11 was really basically all. I had to sign my name in
12 a few places. That's all.

13 Q And that's essentially the same -- You
14 performed the same services for that aircraft as you
15 did for the 217EB. Is that correct?

16 A Starting in January of 2011. Prior to
17 that, Mr. Lovingood took care of that.

18 Q Let me break that down a little bit.
19 East Shore Aviation operated and maintained and
20 managed 217EB from its inception until January of
21 2011. Correct?

22 A No. Well, East Shore Aviation managed
23 217EB from December of 2007 until October of 2012.

24 Q And prior to January of 2011, what
25 services did you provide for that aircraft?

1 ever became aware of that. I don't really know
2 that.

3 Q Did you ever have any conversations with
4 Mr. Lovingood about the fact that Mr. Wade was going
5 to or had purchased another aircraft?

6 A I can't say yes or no. I really don't
7 know. I don't remember. And I really don't
8 remember.

9 Q Do you recall the date that the aircraft
10 had the engine failure?

11 A October 28, 2012.

12 Q And Michael was flying at the time.
13 Correct?

14 A He was.

15 Q At that point was Mr. Wade in your
16 opinion still an active member of PPC12?

17 A I can't answer that question.

18 Q What would assist you in answering that
19 question?

20 A I don't really know. I know that at that
21 point he would have been involved with 561GG. I
22 don't know what Mr. Wade did or did not do in terms
23 of what his relationship with PPC12 was.

24 Q Same question as to Mr. Pearlstine?

25 A Same thing.

1 Q What about Mr. McAlister?

2 A Same thing.

3 Q Is Mr. Apat involved in any aircraft that
4 you're involved in?

5 A Yes. He was involved with 217EB.

6 Q Let me restate that question. Is he
7 currently --

8 A No.

9 Q You don't have any current business
10 relationship with Mr. Apat?

11 A No.

12 Q What was Mr. Apat's involvement in PPC12?

13 A Well, as far as I knew, he was one of the
14 two owners at the beginning.

15 Q What was your contact with Mr. Apat in
16 that context?

17 A I had some meetings with him, you know,
18 about money, about what we were going to charge
19 people to fly in the airplane. Other than that,
20 pretty well nothing. He used the airplane every
21 once in a while. I flew him a couple of times.

22 Q Did he appear to be any more or less
23 involved than Mr. Lovingood was?

24 A Well, I think he was a little bit more.
25 But I can't -- You're asking me to give an opinion

Ex 2 ps

1 to talk to somebody, it probably would have been
2 him. But Eric, no.

3 Q In general, was there any one member of
4 PPC12 that you spoke with about administrative
5 matters more than others?

6 A Yeah, Vic.

7 (Exhibit No. 2 marked for
8 identification.)

9 BY MR. MARVEL:

10 Q Do you recognize the document that I
11 handed to you marked as Exhibit 2?

12 A Yes.

13 Q What is that document?

14 A I can't remember exactly what I called
15 it, but it's an ownership or a breakdown of how the
16 ownership on the airplane went throughout that year.

17 Q What period does that exhibit cover?

18 A Well, it covers 2010 and 2011, it looks
19 like. Oh, no. It covers 2008 and 2009, 2010 and
20 2011.

21 Q And that came to me with the Bates stamp
22 that's on the bottom that says East Shore and some
23 numbers on it. Is that something that you put on
24 there?

25 A No. Nothing that I recognize, that stamp

1 the last page.

2 Q As of the date of this statement, which
3 is February 15, 2013, Mr. McAlister had a balance of
4 \$9,700 and some change. To your knowledge, has that
5 been paid?

6 A Yes.

7 Q And that would have been paid to you-all?

8 A It was paid to PPC12. It was deposited
9 in their bank account.

10 (Exhibit No. 8 marked for
11 identification.)

12 BY MR. MARVEL:

13 Q If you could, review what has been marked
14 as Exhibit 8 and tell me if you recognize that
15 document.

16 A It looks like a response -- I have to
17 look at it. It looks like a response from me about
18 the raft telling them that in order to -- We needed
19 a raft because of flying over water to the Bahamas,
20 and we had priced out a few rafts. So it was up to
21 them to make a choice.

22 Q You would have sent that e-mail out to
23 allow the members to make a choice about the rafts
24 that you had sourced?

25 A Yes. It looks like I sent it to Vic and

1 Q Would either one of those two websites
2 tell me anything about the transaction between the
3 parties?

4 A No.

5 Q Is there any sort of public database
6 where I would find that out?

7 A I don't know.

8 Q Do you know how liens on aircraft are
9 recorded?

10 A No. I searched that database out of
11 curiosity only, just to see where the airplane went.

12 Q When did you do that?

13 A Last year sometime.

14 Q You haven't checked on it since then?

15 A Well, no. I knew where it was.

16 Q Well, yeah, but it might not be there
17 now.

18 A After I found out that it went to Alaska,
19 that was enough for me.

20 Q So as I got it, once the event happened
21 in October of 2012, McAlister, Wade, Lovingood and
22 Pearlstine were members of the LLC. Is that
23 correct?

24 MR. MARVEL: Object to the form.

25 BY MR. COLLINS:

1 Q They owned that aircraft?

2 MR. MARVEL: Same objection. You
3 can answer.

4 A I don't know.

5 BY MR. COLLINS:

6 Q As far as you knew?

7 A As far as I knew. But as far as I knew,
8 Mr. Apat was still involved, too.

9 Q Assume for the sake of that question that
10 my client had disassociated himself, like you said
11 you had heard. So that leaves us four guys in the
12 LLC. Right?

13 A Yeah.

14 Q That owned this aircraft?

15 A If Vic had disassociated himself, yes,
16 then there would be four.

17 Q And at that time in October of 2012, were
18 all of the members current in their financial
19 obligations?

20 A No.

21 Q Out of those four, who was not current?

22 A Mr. Lovingood, Mr. Apat and probably --

23 Q Mr. Apat has disassociated himself.

24 Assume that for the sake of my question.

25 A For the sake of your question, then it

Anna Rogers

From: David Gibbons [dmichaelgibbons@verizon.net]
Sent: Tuesday, July 31, 2012 3:34 PM
To: 'Anna Rogers'
Subject: FW: Final info needed for PPC12 tax filings: McAlister tax ssn
Attachments: image001.png

Anna,
Could you reply to Andrew Castle with Anthony's SSN.

Thanks,
Dave

From: Andrew Castle [mailto:acastle@main-sheet.com]
Sent: Tuesday, July 31, 2012 11:43 AM
To: 'David Gibbons'
Subject: Final info needed for PPC12 tax filings: McAlister tax ssn

Hi David,
We received the filing authorization. I believe we still need the SSN for Anthony McAlister. We can't file without it.
Thanks,

Andrew

C. Andrew Castle, CPA

Mainsheet Financial Solutions
498 Wando Park Blvd, Suite 1125
Mount Pleasant, SC 29464 USA
tel 843-628-0033 | fax 888-822-3184
acastle@main-sheet.com | www.main-sheet.com

This electronic mail message contains confidential and legally privileged information intended only for the use of the recipient. If the reader of this message is not the intended recipient, the reader is hereby notified that any dissemination, distribution, copying or other use of this message is strictly prohibited and is hereby instructed to notify the sender immediately by return email and destroy this copy of this message.

IRS CIRCULAR 230 DISCLOSURE REQUIREMENT: IRS Circular 230 requires us to notify you that any tax advice contained in this communication (including attachments) is not intended or written to be used, and cannot be used, by any person for the purpose of avoiding tax penalties that may be imposed by law.

From: David Gibbons [mailto:dmichaelgibbons@verizon.net]
Sent: Friday, June 01, 2012 8:37 AM
To: 'Andrew Castle'
Subject: FW: Tax Id or SSN's for PPC12 2011 Taxes.

Andrew,
This is for CT Touring. I am still working on McAlister.

Thanks,
Dave

From: Eric Wade [mailto:eric@cttouring.com]
Sent: Wednesday, May 30, 2012 6:01 PM
To: David Gibbons
Subject: Re: Tax Id or SSN's for PPC12 2011 Taxes.



Ex 3 of 1

Here you go

J. Eric Wade

CT Touring
864 Low Country Blvd, Suite B
Mt. Pleasant, SC 29464
Mailing:
P.O. Box 1697
Mt. Pleasant, SC 29465

office: 843.856.4336
Cell: 843.830.3444
Fax: 803.753.9969
Email: eric@cttouring.com
Web: www.cttouring.com



USA UK Germany Dubai China

The information contained in the email and any attachments may be confidential. If you have received this mail in error please notify us immediately by telephone or by a return email. You should not use, copy or disclose the contents of this email or any attachments for any purpose or to any person. Please consider the environment before printing this e-mail

From: Michael Gibbons <dmichaelgibbons@verizon.net>
To: Eric Wade <eric@cttouring.com>, 'Edwin Pearlstine' <pearlprop@aol.com>, "anthonymcalister@aol.com" <anthonymcalister@aol.com>
Cc: 'Shelia Pace' <SheliaPace@pearlstine.net>, 'Anna Rogers' <arogers@mcalistdevelopment.com>
Subject: Tax Id or SSN's for PPC12 2011 Taxes.

Gentlemen,

The accountant has finished the PPC12 2011 Taxes. He does need the Tax ID or SSN you want on the taxes. He needs this for:

CT Touring
Pearl Co. SC

Anthony McAlister – whichever entity you want to show.

Please forward this information to me today, if possible, so we can complete the taxes.

Thanks,
Dave

David M. Gibbons
Financial Manager
PPC12 LLC
516-702-0438

Ex 3. P. 2

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendant.

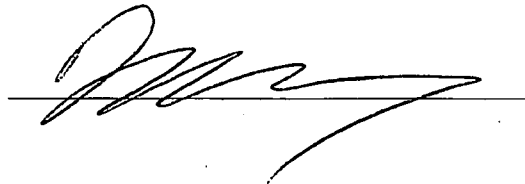
2015-CP-10-4549
Civil Action No.: ~~2013-CP-10-5080~~

CERTIFICATE OF SERVICE

FILED
2015 OCT 23 PM 2:15
JULIE J. ARMSTRONG
CLERK OF COURT

I do hereby certify that I provided all parties of record a copy of Plaintiffs'

Memorandum in Opposition to Defendants' Motion for Summary Judgment this 23rd day of
October, 2015 via email, postage prepaid, to all counsel of record.



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC and PPC12, LLC

☒ Plaintiff

v.

Victor Apat, Anthony Mcallister; J. Eric Wade
D/B/A Ct Touring; And Pearl Co. Sc, Llc

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

~~2013 CP 10-5080~~

2013 CP 10-4549

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

David B. Marvel, Bar No. 68803

Address:

90 Queen Street, Charleston, SC 29401

phone: (843) 722 7250 fax: (843) 722 7260

e-mail: dave@prennermarvel.com other:

Defendant's Attorney:

Brandon Gaskins, Bar No.

Address:

78 Wentworth Street, Charleston, SC 29401

phone: fax:

e-mail: other:

e-mail: other:

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

SECTION I: Hearing Information

Nature of Motion: Plaintiff's Motion for Partial Summary Judgment

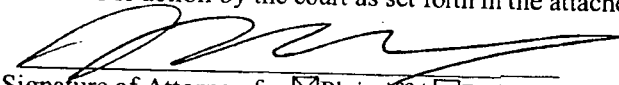
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

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


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

September 8, 2015

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiffs,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendants.

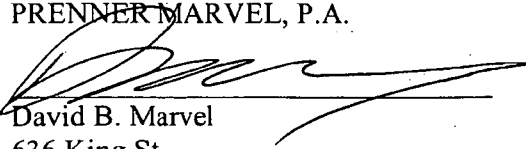
Civil Action No.: 2013-CP-10-5080

**PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

FILED
2015 SEP -8 PM 2:55
JULIE J. ARRESTBORG
CLERK OF COURT
BY

COMES NOW PLAINTIFFS, who hereby move and give notice of their Motion for Summary Judgment pursuant to Rule 56, SCRCP, on all Counter-Claims asserted by the Defendants Anthony McAllister, J. Eric Wade, and Pearl Co. SC, LLC, and further for Partial Summary Judgment on Plaintiffs' causes of action for contractual indemnity and for breach of fiduciary duties on liability only, leaving Plaintiff's damages as a matter to be proven at trial. This Motion is based upon the deposition testimony of all parties as well as the deposition testimony of David Gibbons and Michael Gibbons, all counsel being present therefore, as well as the discovery responses of the parties.

RESPECTFULLY SUBMITTED:
PRENNER MARVEL, P.A.


David B. Marvel
636 King St.
Charleston, South Carolina 29403
Ph. (843) 722-7250
Fax (843) 722-7260
Email: dave@prennermarvel.com
ATTORNEYS FOR THE PLAINTIFFS

Charleston, South Carolina
September 8, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CIVIL ACTION NO. 2015-CP-10-4549.

) **DEFENDANTS' REPLY TO**
) **PLAINTIFFS' MEMORANDUM IN**
) **OPPOSITION TO DEFENDANTS'**
) **MOTION FOR SUMMARY JUDGMENT**
)

FILED
OCT 26 PM 4:25
CLERK OF COURT

I. INTRODUCTION

Defendants Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co. SC, LLC ("Defendants") submit this Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment.¹

II. ARGUMENT

A. Contractual Indemnification

Plaintiffs ignore the legal deficiencies of their claim for contractual indemnification under the PPC12 Operating Agreement and instead argue primarily that Defendants failed to dissociate from PPC12. Even if Plaintiffs could create an issue of fact about whether Defendants

¹ Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment and attached deposition excerpts should be stricken from the record and not considered by the Court because they are untimely under Rule 6(d), SCRPC. Defendants filed and served their Motion for Summary Judgment on May 22, 2015. Plaintiffs had ample time to file their opposition materials prior to the hearing, but failed to submit them until four days **after** the hearing. In any event, Plaintiffs' belated attempt to avoid summary judgment fails for the reasons stated below.

properly dissociated from PPC12, their claim for contractual indemnification nevertheless fails for the reasons stated below.

1. *Plaintiff C3 Investments, Inc.'s claim for contractual indemnification fails because C3 Investments was neither a member of PPC12 nor a party to the Operating Agreement.*

Defendants argue that they are entitled to summary judgment on Plaintiff C3 Investments, Inc.'s claim for contractual indemnification because C3 Investments was neither a member of PPC12 nor a party to the Operating Agreement. Plaintiffs have not presented any evidence to the contrary or any legal grounds on which C3 Investments could maintain a claim for contractual indemnification under the Operating Agreement. As a result, there is no genuine dispute of material fact on this issue, and C3 Investments' claim for contractual indemnification should be dismissed accordingly.

2. *Plaintiff Lovingood fails to identify any provision of the Operating Agreement that would entitle him to contractual indemnification.*

Although C3 Investments advances no grounds or evidence to support relief for contractual indemnification under the Operating Agreement, Plaintiff Lovingood does argue in the opposition memorandum that "[h]e is entitled to be indemnified by the other members of the LLC under Articles 3.6 and 8.2(b-c) of the Operating Agreement." (Pls.' Mem. Opp'n Mt. Summ. J. p. 4.) Plaintiff Lovingood, however, neglects to cite any operable language in those sections that would entitle him to indemnification. In fact, no such language exists.

Section 3.6 of the Agreement merely governs the members' usage of the PPC12 aircraft and requires members to pay the fixed and variable expenses of the aircraft for such usage. Nothing in that section requires a member to indemnify another member for expenses incurred with respect to the aircraft. Thus, Section 3.6 does not support Plaintiffs' claim for contractual indemnification.

While Section 8.2(c) provides for PPC12 to indemnify members for expenses incurred by a member "in the ordinary course of the business of the Company or for the preservation of the Company's business or property," that provision does not require a member to indemnify another member under any circumstance. While Plaintiff Lovingood may conceivably have a cause of action for contractual indemnification against PPC12 under Section 8.2(c), he has failed to sue PPC12. Instead, he has improperly asserted claims for contractual indemnification against Defendants and Defendant Apat. This claim is not viable because the Operating Agreement does not provide for contractual indemnification among members. Therefore, Plaintiff Lovingood's claim for contractual indemnification should be dismissed.

3. *Plaintiffs ignore the undisputed evidence that PPC12 had notice of Defendants' dissociation from PPC12.*

Regardless of whether the Operating Agreement provides for contractual indemnification among members of PPC12, Plaintiffs have failed to create an issue of material fact about whether Defendants were members of PPC12 when Plaintiffs incurred the expenses which they seek to recover under the Operating Agreement. Plaintiffs argue that there is a disputed issue regarding Defendants' dissociation because the third-party aircraft manager, East Shore Aviation, was not aware of whether Defendants had dissociated when the aircraft suffered engine failure on October 28, 2012. However, East Shore Aviation's knowledge of whether Defendants dissociated is irrelevant because it was not a member of PPC12 or responsible for managing the members' relations with each other. The East Shore Aviation management agreement provides that it is responsible for the operation and maintenance of the aircraft, but there is nothing in that agreement that authorizes East Shore Aviation to be the agent for accepting notice of a member's dissociation. (Lovingood Dep. Ex. 1.)

As stated by Plaintiffs in the opposition memorandum, dissociation is effective under S.C. Code Ann. § 33-44-601(1) when “the company” receives notice of a member’s express will to dissociate. According to Plaintiffs, Defendant Apat was the managing member of PPC12 at the time the aircraft suffered engine failure. (Pls.’ Mem. Opp’n Mt. Summ. J. p. 3.) The Operating Agreement also named Defendant Apat as PPC12’s registered agent. Defendant Apat has admitted that it was his understanding that Defendants dissociated on or about October 1, 2012, prior to the aircraft suffering engine failure. (Apat Dep. 34:24-38:3.) As a result, there is no genuine issue of material fact that PPC12, through its managing member and registered agent, had notice of Defendants’ dissociation prior to the aircraft’s engine failure. As such, Defendants were no longer members of PPC12 when Plaintiffs incurred the expenses they now seek to recover under their claim for contractual indemnification, and that claim should be dismissed.

B. Breach of Fiduciary Duty

1. *Plaintiffs have produced no evidence that Defendants breached any fiduciary duty or that such breach was the proximate cause of any damages.*

Defendants contend that Plaintiffs’ breach of fiduciary duty should be dismissed because there is no evidence that Defendants breached a fiduciary duty of loyalty to PPC12 or Lovingood or that Defendants’ alleged breach proximately caused any damages to Plaintiffs. Plaintiffs have produced no evidence to the contrary. Instead, Plaintiffs devote only one sentence in their opposition memorandum to the breach of fiduciary duty claim and assert in conclusory fashion that Defendants wrongfully competed with PPC12. Plaintiffs cite to no evidence before the Court on this Motion for Summary Judgment that would support this conclusory argument. Therefore, Plaintiffs have failed to demonstrate that there is an issue of material fact on whether they can prove the essential elements of their claim for breach of fiduciary duty, and Defendants are entitled to summary judgment on this claim as a result. *See Regions Bank v. Schmauch*, 354

S.C. 648, 660, 582 S.E.2d 432, (2003) (“Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial.”) (emphasis added).

2. *Defendants owed no fiduciary duty of loyalty to Plaintiff C3 Investments.*

Defendants argue in the Motion for Summary Judgment that Plaintiff C3 Investments cannot maintain a cause of action against them for breach of fiduciary duty because they did not owe C3 Investments a duty of loyalty under S.C. Code Ann. § 33-44-409. Under that section, a member of a member-managed limited liability company owes a duty of loyalty to the company and its other members. *See* S.C. Code Ann. § 33-44-409(a) (“The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and duty of care imposed by subsections (b) and (c).”)

C3 Investments was not a member of PPC12, and it had no relationship with Defendants. As such, Defendants did not owe C3 Investments any fiduciary duty, including a duty of loyalty. Plaintiffs’ opposition memorandum fails to counter this argument or present any evidence that a fiduciary relationship existed between Defendants and C3 Investments. Therefore, there is no genuine issue of fact on this matter, and Defendants are entitled to summary judgment on Plaintiff C3 Investments’ breach of fiduciary duty claim.

C. Equitable Subrogation

Defendants argue in the Motion for Summary Judgment that Plaintiffs’ claim for equitable subrogation should be dismissed because, to the extent that equitable subrogation could apply in this instance, Plaintiffs would have acquired only the rights of PPC12’s original

creditors, who had no right or claims against Defendants. Plaintiffs present no evidence or legal arguments to rebut this argument. Therefore, Plaintiffs' equitable subrogation claim cannot survive Defendants' Motion for Summary Judgment.

III. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment should be granted.

Respectfully submitted,



Trudy H. Robertson
E. Brandon Gaskins
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
brandongaskins@mvalaw.com
trudyrobertson@mvalaw.com

ATTORNEYS FOR DEFENDANTS
ANTHONY MCALISTER; J. ERIC WADE
d/b/a CT TOURING; and PEARL CO. SC,
LLC

October 26, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CIVIL ACTION NO. 2015-CP-164549

CERTIFICATE OF SERVICE

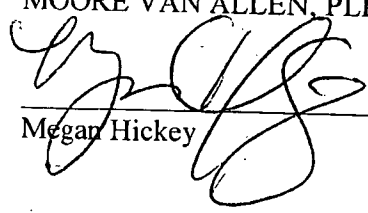
FILED
2015 OCT 26 PM 4:25
JULIE ARMSTRONG
CLERK OF COURT

This is to certify that I have this date served a true and correct copy of **Defendants'**
Memorandum in Support of Motion for Summary Judgment on the parties identified below
by U.S. Mail with proper postage affixed thereto and addressed to the following:

David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire
PRENNER MARVEL, P.A.
636 King Street
Charleston, SC 29403
Attorneys for Plaintiffs

David A. Collins
Law Office of David A. Collins, LLC
P.O. Box 40578
Charleston, SC 29418
Attorney for Defendant Victor Apat

MOORE VAN ALLEN, PLLC


Megan Hickey

October 26, 2015

Moore & Van Allen

October 26, 2015

BY HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Ste. 106
Charleston, SC 29401

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

**Re: C. Gordon Lovingood, Jr., C3 Investments, LLC, and PPC12, LLC vs. Victor Apat,
Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co SC, LLC
Case No. 2013-CP-10-5080
MVA File No. 038737-1**

Dear Ms. Armstrong:

Enclosed for filing please find an original and one (1) copy of Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment.

Please file the original and return a file stamped copy in the return envelope.

Thank you for your assistance in this matter.

Sincerely,

Moore & Van Allen PLLC



E. Brandon Gaskins

EBG/meh

Enclosures: as stated

cc (via U.S. Mail): David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire
David A. Collins, Esquire

Charlotte, NC
Research Triangle Park, NC
10/28/2015

Case No.: 2016-000474 Record on Appeal page 376

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Civil Action No.: 2013-CP-10-5080

Plaintiffs,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendants.

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW PLAINTIFFS, who hereby file this Motion in support of their Motion for Partial Summary Judgment, as requested by the Court during the October 19, 2015, hearing on this motion.

The Court's familiarity with the facts is presumed. For purposes of this memorandum, Plaintiff PPC12, LLC was formed for the purpose of owning and operating a Pilatus PC12 aircraft. The aircraft suffered a catastrophic engine failure on October 28, 2012, while flying over Atlanta. Plaintiffs Lovingood and C3 Investments were the personal guarantors of the promissory note used to purchase the aircraft, and they were forced to incur over \$500,000 in expenses to repair the aircraft so that it could be returned to a condition where it could be sold. Plaintiffs seek to recover those costs and expenses from the Defendants, who were the other members of PPC12, LLC.

Defendants Wade, McAllister, and Pearl Co. SC, LLC filed counterclaims against Lovingood and cross claims against Defendant Apat, asserting causes of action for fraud, fraudulent concealment, constructive fraud, negligent misrepresentation, and breach of fiduciary duties. The gravamen of all of these claims is that Lovingood and Apat failed to tell Wade, McAllister, or Pearlstine that the 2010 property taxes on the aircraft were delinquent, and then directed the payment of those taxes from the PPC12, LLC operating account, using capital contributions of Wade, McAllister, and Pearlstine. (Answer and Counterclaim, ¶¶ 68-72, 85, 91, 98, 105, 122).

As a matter of law, the fact that the Charleston County property taxes on the PPC12, LLC aircraft were not fully paid until some point after the counterclaiming defendants became members cannot support a claim of fraud, fraudulent concealment, or constructive fraud as to either Lovingood or Apat. This case involve an arms-length transaction between very sophisticated, successful businessmen. None of the counterclaiming defendants bothered to perform a public records search to ensure that the 2010 taxes had been paid prior to becoming members of the LLC. (Ex. 5, lines 5-9). A search of those records would have taken less than five minutes from any internet connected device, and would have established the status of all past tax payments. Under these facts, it is wholly unreasonable for the counterclaiming defendants to have relied upon an alleged representation on the status of property taxes. Even if such a representation had been made, which the Plaintiff's dispute, the counterclaiming defendants had no right to rely on that representation, given the ease with which the information could have been ascertained from the public records. See, e.g., Moseley v. All Things Possible, 719 S.E. 2d 656, 658-659 (S.C. 2011).

Regardless, as a factual matter, each of the counterclaims requires that the Defendants establish that Lovingood made a material false representation to them. There no evidence of such a false representation, and the testimony of the counterclaiming defendants conclusively establishes the contrary: that **Gordon Lovingood made no representation to the Defendants whatsoever.**

In the beginning of 2011, Lovingood and Apat were the only members of PPC12, LLC, each owning a 50% share. Defendant Wade officially became a member of the LLC on April 2, 2011, when he paid his \$20,000 share and signed the First Amended Operating Agreement attached as Exhibit 1. Defendants McAllister and Pearl Co. SC, LLC officially became members of the LLC on May 15, 2011 when they each paid \$40,000 and executed the Second Amended Operating Agreement attached as Exhibit 2.

David Gibbons is the Operations Director of East Shore Aviation, who was hired by PPC12, LLC to manage the aircraft. His son, Michael, is East Shore Aviation's chief pilot. According to David Gibbons, Apat instructed him to pay \$21,672.71 in Charleston County Property taxes from the PPC12, LLC operating account. (Ex. 3, p. 69, line 4-p. 72, line 6; Ex. 7, p. 44, lines 20-p. 45, line 19).

Lovingood testified that he was unaware that the 2010 taxes had not been paid until he received an execution notice from the Charleston County treasurer, dated April 18, 2011. Lovingood forwarded the notice to Apat, because he was the managing partner, asking why they had not been paid). He also testified that he then paid his portion of that bill by check. (Ex. 4,

p. 42, line 19-p. 48, line 5; Ex. 5¹). That payment was made on May 4, 2012, before McAllister and Pearlstine became members of the LLC.

Wade was the first of the counterclaiming defendants to become a member of PPC12, LLC. He testified that he thoroughly reviewed the financial records of the LLC and took advantage of his complete opportunity to question the aircraft manager about the aircraft and its finances. Wade testified that all of this information was honest and open to him. (Ex. 6, p. 57, line 11-p.58, line 9; p. 75, lines 4-13). Wade even testified that he was well aware, from a lunch conversation with Apat and Michael Gibbons, that the 2010 property taxes had not been paid. (Ex. 6, p. 92, lines 1-23; p. 98, line 5-p. 100, line 10). It was his assumption that the past due taxes had been billed to Apat and Lovingood, and that their \$13,525.36 balance due on both of their accounts in April 2011 included that invoice. (Ex. 6, p. 124, line 21-p.126, line 21). Wade also testified that, after McAllister and Pearlstine became members of the LLC, the only financial issue he was concerned enough about to discuss was that the aircraft was “upside down” in its financing. (Ex. 6, p.67, line 9-14).

Wade explicitly testified that Lovingood provided him with all the information that he should have prior to Wade’s entry in the LLC. (Ex. 6, p. 73, lines 9-15). Ultimately, Wade admitted that the ONLY thing Lovingood did in violation of the LLC agreement was that “ he didn’t pay his bills.” (Ex. 6, p. 146, line 10-p. 147, 16). However, when pressed, Wade could not identify a single invoice that Lovingood had not paid. (Ex. 6, p. 149, lines 1-3). More importantly, he could not recall a single misrepresentation that Lovingood made to him. (Ex. 6, p. 150, line 24-p.151, line 3).

¹ Exhibit 5 is comprised of a copy of the execution notice, which was Exhibit 4 to Lovingood’s deposition, and the C3 Investments check stub for its payment, which was Exhibit 4 to McAllister’s deposition (Ex. 5, p. 48, line 2- p. 49, line 18).

McAllister was approached by the aircraft manager to become a member of PPC12, LLC, after chartering the aircraft several times. (Ex. 7, p. 11, lines 4-13). At that point, McAllister did not know Lovingood at all. (Ex. 7, p. 11, lines 18-20). He did not know Apat, Wade, or Pearlstine personally. (Ex. 7, p.18, line 17-p.19, line 3). It was McAllister's understanding from the aircraft manager that Apat was the managing partner of PPC12, LLC. (Ex. 7, p.15, lines 8-12). McAllister subsequently met with Apat for lunch at the Med Deli "to ask some very important questions about the plane, former owners, what kind of financial shape the partnership was in, who the partners were." (Ex. 7, p. 14, lines 4-19).

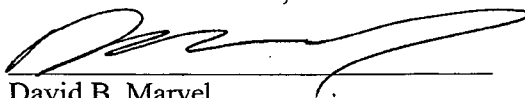
McAllister only met Lovingood one time, after he had already become a member of PPC12, LLC. (Ex. 7,p. 28, line 10-p. 29, line 1). McAllister had no communication with Lovingood prior to that meeting, and Lovingood made no representation whatsoever that induced McAllister to become a member. (Ex. 7, p. 28, lines 3-15). McAllister testified explicitly, that Lovingood never made any representation to him relating to the payment of the property taxes on the aircraft. (Ex. 7,p. 42, line 14-p. 43, line 3). After the taxes had been paid, McAllister never even contacted Lovingood to discuss the issue, and never asked the aircraft manager to discuss it with him. (Ex. 7, p. 44, lines 7 -19).

Pearlstine was approached by Apat to become a member of PPC12, LLC (Ex. 8, p. 17, lines 1-17, p. 13, lines 9-23). After becoming a member of PPC12, LLC, Pearlstine's only communications about the aircraft or the financial conditions of the LLC were with East Shore Aviation. (Ex. 8, p. 25, line 11-p.28, line 22). He believed that East Shore Aviation performed its job well, and he had no expectation that Lovingood would play any role in the aircraft. (Ex. 8, p. 28, lines 10-22). Pearlstine only met Lovingood one time, when they were introduced by Defendant Apat during the first PPC12 Membership Meeting. (Ex. 8, p 12, lines 6-14, p. 27,

lines 9-17). During that meeting, Lovingood made no representations to Pearlstine (or at all) about the condition of the aircraft or PPC12, LLC's financial condition. In fact, they had no conversation at all other than the usual pleasantries. (Ex. 8, p.27, lines 18-p.28, lines 9). According to Defendant Wade, that meeting was the first and last meeting that Lovingood attended. (Ex 6, P. 37, lines 13-23).

Defendants Wade, McAllister, and Pearlstine are sophisticated businessmen who became members of PPC12, LLC, after having full opportunity to examine the books and records of the LLC and to question Apat and the aircraft manager of East Shore Aviation. There is no evidence in the record that any misrepresentation or false statement was ever made to them. However, even if such a false statement had been made, and if the counterclaiming defendants had a right to rely on that statement, all of the sworn testimony of the parties establishes as a factual matter that Lovingood made no representations of any kind to any party. There simply is no question of fact for the jury on this issue. must fail. Therefore, this Court must grant the Plaintiffs' Motion for Partial Summary Judgment, dismissing the counterclaims of Defendants Wade, McAllister, and Pearlstine.

RESPECTFULLY SUBMITTED:
PRENNER MARVEL, P.A.



David B. Marvel
636 King St.
Charleston, South Carolina 29403
Ph. (843) 722-7250
Fax (843) 722-7260
Email: dave@prennermarvel.com
ATTORNEYS FOR THE PLAINTIFFS

Charleston, South Carolina
October 26, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CIVIL ACTION NO. 2015-CP-10-4549

**DEFENDANTS' RESPONSE TO
MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

FILED
2015 OCT 27 PM 1:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

I. INTRODUCTION

Defendants Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co. SC, LLC ("Defendants") submit this Response to Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment.¹

II. FACTS

Pursuant to Rule 10(c), SCRCP, Defendants adopt by reference the facts and arguments presented in Defendants' Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment. In addition, Defendants submit the following facts relevant to Plaintiffs' Motion for Partial Summary Judgment:

¹ Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment and attached deposition excerpts should be stricken from the record and not considered by the Court because they are untimely under Rule 6(d), SCRCP. Plaintiffs filed and served their Motion for Partial Summary Judgment on September 8, 2015. Plaintiffs had ample time to file their supporting materials prior to the hearing held on Plaintiffs' motion on October 19, 2015, but failed to submit them until one week after the hearing. In any event, Plaintiffs' belated attempt to support their motion for summary judgment nevertheless fails for the reasons stated below.

Plaintiff Gordon Lovingood was primarily responsible for recruiting Defendant Eric Wade to become a member in PPC12, LLC. Lovingood recruited Wade to get involved with the PPC12 aircraft because the plane was "upside down" and Lovingood needed help with it. (Wade Dep. 13:23-14:2.) At the time, the PPC12 aircraft had no maintenance reserves, and Lovingood and Defendant Apat were delinquent in paying their contributions for the aircraft's expenses. (Wade Dep. 14:14-15:4.) To induce Wade to become a member of PPC12, Lovingood and Apat represented to Wade that they would get current with the amounts they owed to PPC12, which were in arrears, and that they would create an engine reserve for the aircraft. (Wade Dep. 14:12-18, 27:2-21.) Despite these assurances, Lovingood never got current on the amounts he owed to PPC12, and, in fact, the amount Lovingood owed to PPC12 continued to increase during the time Defendants were members of PPC12. (Wade Dep. 145:21-146:18; D. Gibbons Dep. Ex. 6.) In addition, no engine reserves were ever created for the aircraft. (Wade Dep. 146:14- 147:23.)

III. ARGUMENT

In their efforts to obtain summary judgment on Defendants' counterclaims of fraud, fraudulent concealment, and negligent misrepresentation, Plaintiffs claim that Lovingood made no representations to Defendants whatsoever to induce them to become members of PPC12. Wade's testimony, however, reveals that there are disputes regarding what representations Lovingood made to induce Wade to become a member of PPC12. According to Wade, Wade decided to become a member of PPC12 based on Lovingood's representation that Lovingood would get his past due account with PPC12 current and that the company would create engine reserves for the aircraft. Accordingly, there are genuine issues of material fact regarding the representations that Lovingood made to Wade to induce him to become a member of PPC12, and Lovingood is not entitled to summary judgment on this basis.

Moreover, there is evidence demonstrating that these representations were false. Lovingood's account balance as demonstrated by the PPC12 statements show that Lovingood's representation that he would become current were false, as he never became current on his obligations to PPC12 and he continued to get farther behind in his financial obligations to PPC12. Significantly, these types of misrepresentations are actionable for fraud and negligent misrepresentation. *See Page v. Pilot Life Ins. Co.*, 192 S.C. 59, 67, 5 S.E.2d 454, 457 (1939) ("Where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of fact, and actionable as such.") Moreover, whether Wade had a right to rely on Lovingood's representations is a question of fact for a jury and is not one of law to be determined at summary judgment or directed verdict. *See Tallevast v. Herzog*, 225 S.C. 563, 570, 83 S.E.2d 204, 207 (1954) (ruling that whether or not plaintiff had a right to rely on representations of defendants was a question of fact for the jury). Accordingly, there are genuine issues of material fact regarding Defendants' counterclaims for fraud, fraudulent concealment, and negligent misrepresentation against Lovingood, which preclude summary judgment.

Last, Lovingood fails to address Defendants' counterclaim for breach of fiduciary duty. Defendants' counterclaim for breach of fiduciary duty alleges that Lovingood, as a member of PPC12, had a duty to refrain from engaging in grossly negligent and reckless conduct and intentional misconduct. This duty is established by S.C. Code Ann. § 33-44-409(c). Defendants allege that Lovingood breached that duty by authorizing expenditures above \$1,000 and authorizing the sale of the aircraft without obtaining consent of the members possessing a 75% interest in PPC12, as required by Section 4.1 of the Operating Agreement. It is undisputed that Lovingood unilaterally approved expenditures for hundreds of thousands of dollars to repair the

PPC12 aircraft and sold the aircraft without receiving the consent of Defendants or Defendant Apat. Therefore, Defendants have proffered sufficient evidence to support their breach of fiduciary duty claim against Lovingood, and Lovingood has failed to establish that he is entitled to summary judgment on this claim.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Partial Summary Judgment should be denied.

Respectfully submitted,



Trudy H. Robertson
E. Brandon Gaskins
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
brandongaskins@mvalaw.com
trudyrobertson@mvalaw.com

*ATTORNEYS FOR DEFENDANTS
ANTHONY MCALISTER; J. ERIC WADE
d/b/a CT TOURING; and PEARL CO. SC,
LLC*

October 27, 2015

Charleston, South Carolina

WADE DEPOSITION TRANSCRIPT PAGES

1 I looked at Victor Apat. You're \$80,000
2 behind. When do you intend to pay it?

3 I'll have it paid up next week.

4 It never happened.

5 Q Where was this?

6 A Round Holiday Inn.

7 Q Is this the meeting you referred to a
8 minute ago when you met Mr. Apat?

9 A Yes, sir.

10 Q When was that?

11 A I got no idea.

12 Q How many times did you meet with the
13 other members of the LLC?

14 A That's it. I mean, now, the members of
15 the plane we have? A number of times. But then,
16 only twice.. Gordon once. Vic twice. Vic showed up
17 in that meeting. So I met Vic twice, Gordon once.
18 I saw Gordon other times. But specifically for the
19 plane, one time that I remember. To the best of my
20 knowledge, it was one time. We had that one board
21 meeting.

22 Q One meeting. And who was present?

23 A Myself, Anthony -- Gordon, me, Anthony
24 Edwin, Sheila, Michael, David and Vic. I think
25 that's who it was. I may be wrong, but I think

1 He was \$4,000 behind you. And you were flying in
2 the plane and he was not.

3 A How is he running up bills if he's not
4 flying?

5 Q Because he's got fixed costs.

6 A I've got fixed costs. Where is my
7 balance due? Show me where I didn't pay.

8 Q I'm not saying you didn't pay. I'm
9 saying that the accounting, the way it runs, as we
10 discussed earlier, all the members, if you look at
11 them, they all have generally a balance due. It's
12 very rare to get to where you have a balance of
13 zero.

14 A That's being paid 10/6, 10/6, 10/6, 10/6,
15 11/7, 11/7, 11/7, 11/7, 12/8, 12/8, 12/23, 12/23,
16 1/23, 1/24, 1/24, 1/24, 2/10 --

17 Q I think as of 1/24 you came down to zero.

18 A I make payments the whole month every
19 time I get invoiced.

20 Q I'm not disagreeing with that.

21 A But that's not what's happening over here
22 (indicating). As I get an invoice, I pay mine.
23 It's right there. You can see it.

24 If I flip back over to Mr. Lovingood's,
25 he's invoiced 3/31, 3/31, 4/30, 4/30, then he makes

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 a payment on 5/9. He's invoiced 5/31, 5/31, 6/30,
2 6/30, 6/30, and he makes a payment on 7/7. He got
3 invoiced 7/31, 7/31. He makes a payment on 8/25.
4 That's a little different than the way I pay my
5 bills.

6 Q You're missing the point. So
7 Mr. McAllister's --

8 A We are not talking about McAllister.
9 We're talking about me and Gordon.

10 Q I've asked you what Gordon told you --
11 what he misrepresented to you before you came to the
12 LLC.

13 A As I said, he didn't pay his bills.

14 Q The only thing you've told me that he
15 misrepresented to you was that he was going to catch
16 his account up and get it current?

17 A Correct. And we would have engine
18 reserve, which he didn't do.

19 Q You were billed for it and you paid it.
20 Right?

21 A No. He was going to start the engine
22 reserve that he should have had in there.

23 Q Mr. Lovingood wasn't in charge of the
24 accounting for this company, was he? Who was paying
25 the bills?

1 MR. GASKINS: Object to the form.

2 A I don't care who was in charge of the
3 accounting.

4 BY MR. MARVEL:

5 Q Who was paying the bills for PPC12?

6 A I'm telling you what the man told me. I
7 don't care who is in charge of accounting. I'm
8 telling you what he sat at the end of that table and
9 told me. He said he would make sure that was done.

10 Q So he told you two things: One, he was
11 going to get his account current; two, he was going
12 to start an engine reserve?

13 A No.

14 Q What?

15 A We were going to start an engine reserve.
16 He didn't get a choice in that. We did.

17 Q If he didn't get a choice in it, how did
18 he misrepresent it to you?

19 A He was going to catch up the engine
20 reserve that was supposed to be there that they had
21 been using to pay bills. They had been keeping the
22 engine reserve. They had been going into the engine
23 reserve money and paying their bills with it.

24 Q Who had control of the checkbook for
25 PPC12?

D. GIBBONS
DEPOSITION EXHIBIT 6

PPC12, LLC
1525 Ashley River Rd.
Charleston, SC 29407

Statement

Date
2/15/2013

To:
Gordon Lovingood C3 Investments 220 Church St Mount Pleasant, SC 29464-4482

**DEPOSITION
EXHIBIT**

Gibbons 6

		Amount Due	Amount Enc.		
		\$23,575.59			
Date	Transaction	Amount	Balance		
12/31/2010	Balance forward		13,525.36		
01/12/2011	PMT This payment was a credit to GLP for paying the AC Note in Jan 2011	-15,816.00	-2,290.64		
01/31/2011	INV #6. Due 02/11/2011.				
02/23/2011	PMT #6.	14,307.34	12,016.70		
02/28/2011	INV #8. Due 03/11/2011.	-7,908.36	4,108.34		
03/30/2011	PMT Gordon's check was deposited to ESA. Then an ESA check was deposited in his behalf.	13,519.87	17,628.21		
		-12,500.00	5,128.21		
03/31/2011	INV #14. Due 04/15/2011.				
03/31/2011	INV #46. Due 04/15/2011.	13,613.44	18,741.65		
04/30/2011	INV #17. Due 05/09/2011.	4,500.00	23,241.65		
04/30/2011	INV #21. Due 05/10/2011.	9,891.00	33,132.65		
05/09/2011	PMT	1,298.06	34,430.71		
05/31/2011	INV #29. Due 06/08/2011.	-16,606.80	17,823.91		
05/31/2011	INV #31. Due 06/15/2011.	6,594.00	24,417.91		
06/13/2011	DEP	62.34	24,480.25		
06/30/2011	INV #39. Due 07/08/2011.	-1,135.98	23,344.27		
06/30/2011	INV #42. Due 07/15/2011.	3,297.00	26,641.27		
06/30/2011	INV #50. Due 06/30/2011.	62.65	26,703.92		
07/07/2011	PMT #29.	2,250.00	28,953.92		
07/31/2011	INV #54. Due 08/12/2011.	-8,242.50	20,711.42		
07/31/2011	INV #60. Due 08/19/2011.	3,297.00	24,008.42		
08/25/2011	PMT #39.	193.14	24,201.56		
08/31/2011	INV #65. Due 09/09/2011.	-4,945.50	19,256.06		
08/31/2011	INV #70. Due 09/16/2011.	3,297.00	22,553.06		
09/29/2011	PMT #65.	488.72	23,041.78		
09/30/2011	INV #76. Due 10/14/2011.	-4,945.50	18,096.28		
09/30/2011	INV #81. Due 10/17/2011.	3,297.00	21,393.28		
09/30/2011	INV #86. Due 10/24/2011.	191.29	21,584.57		
10/31/2011	INV #91. Due 11/11/2011.	1,125.00	22,709.57		
10/31/2011	INV #96. Due 11/18/2011.	3,297.00	26,006.57		
11/04/2011	PMT #91.	150.69	26,157.26		
11/30/2011	INV #102. Due 12/07/2011.	-3,297.00	22,860.26		
		3,297.00	26,157.26		
CURRENT	1-30 DAYS PAST DUE	31-60 DAYS PAST DUE	61-90 DAYS PAST DUE	OVER 90 DAYS PAST DUE	Amount Due
0.00	0.00	0.00	0.00	23,575.59	\$23,575.59

Statement

PPC12, LLC

1525 Ashley River Rd.
Charleston, SC 29407

Date
2/15/2013

To:
Gordon Lovingood C3 Investments 220 Church St Mount Pleasant, SC 29464-4482

		Amount Due	Amount Enc.		
		\$23,575.59			
Date	Transaction	Amount	Balance		
11/30/2011	INV #107. Due 12/22/2011.	522.43	26,679.69		
12/20/2011	PMT #14.	-3,297.00	23,382.69		
12/31/2011	INV #112. Due 01/13/2012.	3,297.00	26,679.69		
12/31/2011	INV #118. Due 01/20/2012.	1,125.00	27,804.69		
12/31/2011	INV #123. Due 01/27/2012.	425.20	28,229.89		
01/19/2012	PMT #96.	-150.69	28,079.20		
01/19/2012	PMT #76.	-3,297.00	24,782.20		
01/19/2012	PMT #54.	-3,297.00	21,485.20		
01/31/2012	INV #137. Due 02/10/2012.	3,277.00	24,762.20		
01/31/2012	INV #142. Due 02/17/2012.	117.43	24,879.63		
02/29/2012	INV #148. Due 03/09/2012.	3,277.00	28,156.63		
02/29/2012	INV #154. Due 03/16/2012.	336.19	28,492.82		
03/05/2012	PMT #102.	-3,297.00	25,195.82		
03/29/2012	PMT #137.	-3,277.00	21,918.82		
03/31/2012	INV #160. Due 04/13/2012.	3,277.00	25,195.82		
03/31/2012	INV #165. Due 04/20/2012.	1,140.00	26,335.82		
03/31/2012	INV #171. Due 03/31/2012.	33.67	26,369.49		
04/30/2012	INV #176. Due 05/11/2012.	3,277.00	29,646.49		
04/30/2012	INV #181. Due 05/25/2012.	42.42	29,688.91		
05/01/2012	PMT #160.	-3,277.00	26,411.91		
05/01/2012	PMT #165.	-1,140.00	25,271.91		
05/31/2012	INV #187. Due 06/15/2012.	3,277.00	28,548.91		
05/31/2012	INV #192. Due 06/22/2012.	40.18	28,589.09		
06/19/2012	PMT	-3,277.00	25,312.09		
06/30/2012	INV #197. Due 07/13/2012.	3,277.00	28,589.09		
06/30/2012	INV #203. Due 07/20/2012.	61.22	28,650.31		
06/30/2012	INV #208. Due 07/27/2012.	1,140.00	29,790.31		
07/17/2012	PMT #187.	-3,277.00	26,513.31		
07/17/2012	PMT #197.	-3,277.00	23,236.31		
07/31/2012	INV #214. Due 08/17/2012.	3,277.00	26,513.31		
07/31/2012	INV #219. Due 08/24/2012.	915.52	27,428.83		
08/03/2012	PMT #203.	-61.22	27,367.61		
08/28/2012	PMT #1228. Inv# 214,219	-4,192.52	23,175.09		
CURRENT	1-30 DAYS PAST DUE	31-60 DAYS PAST DUE	61-90 DAYS PAST DUE	OVER 90 DAYS PAST DUE	Amount Due
0.00	0.00	0.00	0.00	23,575.59	\$23,575.59

Statement

To:
Gordon Lovingood C3 Investments 220 Church St Mount Pleasant, SC 29464-4482

Page 3

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC., and PPC12, LLC

Plaintiffs,

v.

VICTOR APAT; ANTHONY
MCALLISTER; J. ERIC WADE d/b/a CT
TOURING; and PEARL CO. SC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) CIVIL ACTION NO. 2015-CP-10-4549

CERTIFICATE OF SERVICE

2015 OCT 27 PM 1:48
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

This is to certify that I have this date served a true and correct copy of **Defendants'**

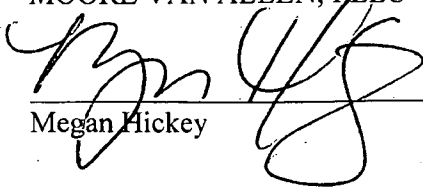
Memorandum in Support of Motion for Summary Judgment on the parties identified below

by U.S. Mail with proper postage affixed thereto and addressed to the following:

David B. Marvel, Esquire
Kenneth G. Goode, Jr., Esquire
PRENNER MARVEL, P.A.
636 King Street
Charleston, SC 29403
Attorneys for Plaintiffs

David A. Collins
Law Office of David A. Collins, LLC
P.O. Box 40578
Charleston, SC 29418
Attorney for Defendant Victor Apat

MOORE VAN ALLEN, PLLC


Megan Hickey

October 27, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR., C3
INVESTMENTS, INC and PPC12, LLC
☒ Plaintiff

v.

Victor Apat, Anthony Mcallister; J. Eric Wade
D/B/A Ct Touring; And Pearl Co. Sc, Llc
☒ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-10-4549

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
David B. Marvel, Bar No. 68803
Address:
636 King Street, Charleston, SC 29401
phone: 843 212 6949 fax: (843) 722 7260
e-mail: dave@marvel.lawyer other:

Defendant's Attorney:
Brandon Gaskins, Bar No.
Address:
78 Wentworth Street, Charleston, SC 29401
phone: fax:
e-mail: other:
e-mail: other:

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

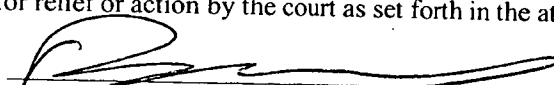
SECTION I: Hearing Information

Nature of Motion: Plaintiff's Motion for ~~Partial Summary Judgment~~ *Total or Amended*
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached.
☐ Form Motion/Order

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


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

December 16, 2015
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE: _____

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiffs,

vs.

VICTOR APAT;
ANTHONY MCALLISTER;
J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC;

Defendants.

4549
Civil Action No.: 2015-CP-10-5080

**PLAINTIFFS' MOTION FOR
NEW TRIAL AND TO ALTER AND
AMEND THE JUDGMENT**

FILED
2015 DEC 16 PM 3:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY

COMES NOW PLAINTIFFS, who hereby move and give notice of their Motion, pursuant to Rule 59, SCRPC for this Honorable Court to Alter or Amend its Order Granting Summary Judgment to the Defendants Anthony McAllister, J. Eric Wade, and Pearl Co SC, LLC. The Order is dated November 30, 2015. Plaintiffs received the Notice of Entry of Judgment on December 7, 2015. This Motion is based on the Deposition Testimony of the parties, as well as the deposition testimony of David Gibbons, excerpts of which have been previously exhibited to the Court. While this Motion and the Exhibits hereto are intended to state the grounds for the motion in full, the Motion shall be supplemented with a Memorandum in Support to be filed prior to the hearing on the Motion.

Plaintiffs respectfully request that the Court reconsider its ruling, and Amend the Order and Judgment to deny summary judgment to the defendants.

The Court erred in granting summary judgment to the Defendants on Lovingood and PPC12, LLC's claims for contractual indemnity, and Lovingood and C3 Investments' claims for equitable subrogation. The Court's Order fails to recognize that PPC12, LLC is a named

plaintiff pursuant to S.C. Code § 33-44-1101, which allows a member of an LLC to bring a claim in the name of the LLC when “an effort to cause those members or managers to commence the action is not likely to succeed.” The Court’s Order recognizes that the Operating Agreement requires the members to pay the LLC for the fixed and variable expenses of the aircraft. The Court’s Order also recognizes that the Operating Agreement provides for Lovingood to be reimbursed the expenses at issue from the LLC. Plaintiff Lovingood is not required to sue PPC12, LLC for those expenses in this case, because the LLC is itself a proper plaintiff to collect those fixed and variable expenses and reimburse Lovingood for those expenses, as is required by the Operating Agreement. Further, while the Court ruled that the doctrine of equitable subrogation would only allow Lovingood and C3 to step into the shoes of Cessna Finance, that ruling fails to recognize and address that PPC12, LLC was the creditor with claims against the defendants. PPC12, LLC was the owner of the aircraft and the obligor on the Note. Lovingood and C3 paid the LLC’s obligation for both the note and the repairs of the aircraft. Those obligations were clearly imposed on the members by Section 3.6 of the Operating Agreement, the LLC was a creditor of the Defendants. Lovingood and C3’s payments allow them to step into the shoes of the LLC and assert the LLC’s right of payment against the Defendants.

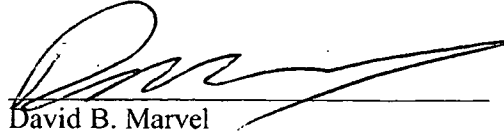
It was also error for the court to rule as a matter of law that the Defendants dissociated prior to the aircraft’s engine failure on October 28, 2012. Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence. E.g., Zurich Am. Ins. Co. v. Tolbert, 692 S.E.2d 523, 524 (2010). The testimony of Lovingood and Gibbons previously submitted to the Court satisfied that standard. Moreover, the testimony of Defendant Apat cited by the Court in support of this ruling does not support the finding. Apat’s testimony related to his own purported dissociation, he stated clearly that he had no conversation with any of the other

defendants about their wish to dissociate, and if anything, he claimed that *he* had actually dissociated from the LLC, and therefore would not have been a proper recipient of any such communication. (Apat, p.33, line 1-p39, line 8).

Finally, the Court erred in ruling that Plaintiffs Lovingood and PPC12, LLC failed to assert a proper claim for breach of fiduciary duty under S.C. Code § 33-44-409. As the Court noted, that provision prevents members of an LLC from competing with the company in the conduct of the company's business. The business of PPC12, LLC was to own and operate a Pilatus PC12 aircraft for the benefit of the members and for charter. It is an uncontested fact that Defendants McAllister, Wade, and Pearl Co. SC opened a second LLC with exactly that same purpose, purchased another Pilatus PC12 aircraft, and operated it for the benefit of its members and for charter. If the Defendants did properly dissociate under the terms of the Operating agreement and the South Carolina limited liability act, Plaintiffs Lovingood and PPC12, LLC suffered damages because their act of competing with PPC12, LLC led to that dissociation, as they would not have dissociated from the LLC absent their purchase of the competing aircraft. Further, the Court's Order implies that those Defendants dissociated from PPC12, LLC prior to purchasing the competing aircraft, a finding that is incorrect, not supported by any evidence in the record, and is contradicted by the defendants' testimony. (McAllister, p. 61, line 22-p.66, line 5).

For any and all of the reasons stated herein, Plaintiffs respectfully request that the Court Amend its Order granting summary judgment to the Defendants, denying that Motion, and allowing Lovingood and PPC12, LLC's claims for Contractual Indemnity and Breach of Fiduciary Duty, and Lovingood and C3 Investments' claims for equitable subrogation, to proceed.

RESPECTFULLY SUBMITTED:



David B. Marvel
636 King St.
Charleston, South Carolina 29403
Ph. (843) 212-6949
Fax (843) 722-7260
Email: dave@marvel.lawyer
ATTORNEY FOR THE PLAINTIFFS

Charleston, South Carolina
December 16, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of December, 2015, I Served Defendants, Anthony McAllister, J. Eric Wade and Pearl Co. SC, LLC with the foregoing Motion by mailing a copy to their counsel, Trudy H. Robertson and Brandon Gaskins, (with a copy to all counsel of record) by U.S. Mail, postage prepaid, at the following address:

Moore Van Allen
78 Wentworth Street
Charleston, South Carolina 29401



In The Matter Of:
Lovingood v.
Apat

Victor Apat
February 23, 2015



Janice D. Hayward, RMR
Independent Court Reporter
843.478.6756
JanHayward1@gmail.com

Original File 022315VApat.txt
Min-U-Script® with Word Index

1 Q And everybody understood that?

2 A I can't speak for everybody. I can only
3 speak for myself.

4 Q But it's your understanding that neither
5 you nor any of the codefendants in this case
6 intended to become personally responsible for making
7 the note on the PPC12 aircraft?

8 A I know that discussions surrounded the
9 fact that nobody wanted to become a personal
10 guarantor on the note.

11 Q And to your knowledge was the note or
12 guaranty or any other agreement with Cessna Finance
13 renegotiated to make any other members a guarantor?

14 A I'm unaware of any negotiations that would
15 have made anybody else a guarantor.

16 Do you mind if I just stand up
17 for one second?

18 Q No, absolutely.

19 A Keep asking questions.

20 Q Sure. Do you need me to take a break?

21 A No. Go ahead, please.

22 Q Sure. Are you currently a member of
23 PPC12, LLC?

24 A No.

25 Q When did you cease being a member of

1 PPC12?

2 A Somewhere in the fall of 2012.

3 Q Okay. And how did you communicate your,
4 I'm going to call it disassociation. Do you know
5 what I mean by that?

6 A I do.

7 Q Did you disassociate with PPC12, LLC in
8 the fall of 2012?

9 A I communicated that with David and Michael
10 Gibbons.

11 Q Okay. Before -- before you go there, I
12 just want an answer to my question because I think
13 it's assumed in your answer, but I just want to be
14 clear.

15 Did you disassociate from PPC12,
16 LLC in the fall of 2012?

17 A I did.

18 Q And how did you do that?

19 A I communicated that with David and Michael
20 Gibbons.

21 Q And was that verbally?

22 A Yes.

23 Q Did you do it in writing?

24 A I don't recall one way or the other.

25 Q You've looked at the operating agreement.

1 Did you see any provisions in the operating
2 agreement that required a member to disassociate in
3 any particular manner?

4 A No.

5 Q So you're not aware of anything that would
6 have limited your or any other member's ability to
7 disassociate verbally?

8 A Correct.

9 Q Mr. Apat, is it your understanding that
10 Mr. Wade, Mr. McAllister, and Pearl Company South
11 Carolina or SC, LLC are no longer members of PPC12,
12 LLC as well?

13 MR. MARVEL: Object to form.

14 A Again, I'm unaware whether they are or are
15 not members.

16 BY MR. GASKINS:

17 Q Do you think that they're members?

18 A You know, based on the rumor mill, it's my
19 understanding that they perceive themselves now no
20 longer as members.

21 (Marked for identification was Deposition
22 Exhibit 2.)

23 BY MR. GASKINS:

24 Q You've been handed what's been marked as
25 Exhibit Number 2. Can you review those and let me

1 know when you're finished?

2 A Okay.

3 Q What is this document?

4 A It's an email train through various
5 people.

6 Q And it begins with an email from David
7 Gibbons to cglovingood@comcast.net. I'm assuming
8 that's Mr. Lovingood, is that right?

9 A I believe that's correct.

10 Q That appears to be his email address,
11 correct?

12 A It does appear to be his email address.

13 Q And the email is addressed to Gordon,
14 correct?

15 A Correct.

16 Q And you were cc'd on this email?

17 A I was, yes.

18 Q And it's dated October 22nd, 2012, right?

19 A It is dated October 22nd, 2012.

20 Q Do you recall whether you were still a
21 member of PPC12, LLC on the date of this email?

22 A I was out somewhere in that same
23 timeframe, from memory.

24 Q Can you read the second sentence on this
25 email aloud, please?

1 A Those members have not used the aircraft
2 since that time and are current with their financial
3 obligations.

4 Q The sentence before that.

5 A Sorry. We were only recently informed by
6 the other members that they notified you by phone of
7 their intention to leave PPC12, LLC effective
8 October 1st.

9 Q What does that sentence mean to you?

10 A That they have an intention to
11 disassociate from PPC12.

12 Q It's your understanding that they
13 expressed that intention to Mr. Lovingood?

14 MR. MARVEL: Object to form.

15 A I don't know. The way this is written, it
16 appears that they expressed that to David Gibbons.

17 BY MR. GASKINS:

18 Q They expressed what to David Gibbons?

19 A Again, reading the sentence, we -- and
20 he's sending this to Gordon, so "we" would imply
21 that it's David and Michael; were only recently
22 informed by other members that they notified --
23 okay, notified you by phone of their intention to
24 leave PPC.

25 So somebody that you're

1 representing apparently told Michael and David that
2 they had spoken to Gordon.

3 Q Do you have any reason to believe that's
4 not a true statement?

5 A No.

6 BY MR. GASKINS:

7 Q Was that your understanding around that
8 time, that they were -- that they had either
9 disassociated or were intending to disassociate from
10 PPC12, LLC?

11 A Yes.

12 Q And that was your intention as well?

13 A Correct.

14 Q And this was prior to the aircraft having
15 engine failure. Is that your understanding?

16 MR. MARVEL: Object to the form.

17 A Honestly, I don't remember the date. If
18 you could provide me with the date of the engine
19 failure, that would answer the question. I don't
20 recall the exact timing of the engine failure.

21 BY MR. GASKINS:

22 Q It's my understanding, I'll represent to
23 you that I believe that the engine failure occurred
24 on or around October 28th, 2012.

25 And this would have been,

1 obviously, prior to that?

2 A Right. Assuming that's the correct date,
3 then yes.

4 Q Okay. Do you recall receiving this email?

5 A Vaguely.

6 Q What do you remember about the operations
7 of PPC12 around this timeframe in October 2012?

8 A I'm not really sure that there's a
9 specific question in there. I mean, David and
10 Michael were operating the airplane. There was a
11 charter utilization of the plane. Various people
12 were using the plane at that point in time,
13 including the people that -- the codefendants that
14 you're representing.

15 I was not using the plane. I
16 don't believe Gordon was using the plane. That's
17 about it.

18 Q Why did you decide to disassociate?

19 A Wasn't using the plane.

20 Q Did you feel you could just disassociate
21 at any time without having any further financial
22 obligations?

23 A I do.

24 Q And you've reviewed the operating
25 agreement. Is there anything in there that makes

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

C. GORDON LOVINGOOD, JR.,
C3 INVESTMENTS, INC., and
PPC12, LLC,

Plaintiff,

-versus-

VICTOR APAT, ANTHONY McALISTER,
J. ERIC WADE d/b/a CT TOURING,
and PEARL COMPANY SC, LLC,

Defendants.

)

)

)

)

) Case No.:

) 2013-CP-10-5080

)

)

)

)

)

)

THE DEPOSITION OF ANTHONY McALISTER was
taken as a witness on behalf of the Plaintiff,
pursuant to South Carolina Rules of Civil Procedure,
at 1:00 p.m. on Tuesday, the 23rd day of June 2015,
at the offices of Moore & Van Allen, 78 Wentworth
Street, in the City of Charleston, State of South
Carolina, before Janice O. Darby, Registered
Professional Reporter and Notary Public in and for
the State of South Carolina.

Janice Ohlendorf Darby, RPR
(843) 814-7666 jodarby@comcast.net

1 whatsoever that Mr. Lovingood had any monetary
2 issues that would have kept him from paying his
3 monthly invoice?

4 A I don't know. Through the rumor mill in
5 the beginning after the money was taken out of the
6 account that was supposed to be for other uses, I'm
7 sure people were asking questions on did they get
8 asked if they got caught up. Because if they were
9 using that money, did they at least get caught up
10 like we were told they would -- or I was told they
11 would. But I can't recall exactly when or with
12 whom. Right after that. How bad is this, I think
13 is what I had asked Michael Gibbons. And then
14 things kind of settled down and no improvements were
15 made.

16 Q Did Michael ever give you any indication
17 that he was concerned about Mr. Lovingood's
18 financial status?

19 A Don't remember. Don't think so.

20 Q Do you know anything personally about
21 Mr. Lovingood's financial status?

22 A I don't know Gordon.

23 Q Do you know what C3 Investments does?

24 A I don't.

25 Q Do you know what Mr. Apat's balance was

1 at the time East Shore Aviation stopped doing the
2 bookkeeping for PPC12?

3 A I don't.

4 Q Did you ever inquire as to what
5 Mr. Apat's balance was at any point in time?

6 A Once I was out, I was out.

7 Q At any time while you were a member of
8 PPC12, did you?

9 A I didn't get involved in anybody else's
10 business.

11 (Recess taken.)

12 (Exhibit No. 6 marked for
13 identification.)

14 BY MR. MARVEL:

15 Q I've taken these out of sequence from the
16 way they were presented to me for purposes of this
17 question. I'm presenting it to you as one exhibit:

18 MR. MARVEL: What's the Bates No. on
19 the second one?

20 MR. GASKINS: 13.

21 BY MR. MARVEL:

22 Q I'll just represent to you that in
23 response to a request for correspondence relating to
24 the purchase of GG that we received both of these
25 documents. I believe what is the earliest

1 correspondence, which is between Mr. Pearlstine and
2 Mr. Gibbons which you are not copied on, that's
3 March 26th.

4 A. Right.

5 Q And the second page, which is CP Aviation
6 13, indicates this is the first e-mail -- It doesn't
7 indicate that it's the first e-mail. This is the
8 earliest e-mail that I was able to locate that you
9 were copied on.

10 A In June.

11 Q June 27th.

12 A That goes along with what I was thinking.

13 Q That's more or less your recollection of
14 the timeline?

15 A Yeah, I think it was late.

16 Q Were you aware in March of 2012 that
17 Mr. Pearlstine was involved in any efforts to locate
18 and/or purchase another aircraft?

19 A No. I don't think I was involved that
20 early. To the best of my recollection, I don't know
21 for sure, but I feel like I was contacted later in
22 that process.

23 Q How soon in time before the June 27th
24 e-mail do you think you had been contacted about the
25 process?

1 A I have no idea.

2 Q When they contacted you, do you know if
3 financing had already been arranged?

4 A No. Oh, no.

5 Q Do you know if the sale agreement was in
6 place at all?

7 A No. I didn't have anything to do with
8 the details of the new plane.

9 Q Did you actually review or sign the sale
10 agreement for the GG?

11 A I can't remember. I would be surprised
12 if I did.

13 Q Did you contribute anything to the
14 deposit?

15 A I believe I did. But I don't know when.
16 I don't know. You mean to get the plane back? I
17 didn't think we put any money down on it.

18 Q Well, the second page of Exhibit 6 --

19 A I really can't remember.

20 Q This is an e-mail from Dave Gibbons to
21 Bob Matthews, who I'm going to assume is the broker
22 for whoever the seller was of the aircraft.

23 A Don't know him.

24 Q Anyway, David Gibbons says, "Bob, we need
25 to discuss another change to the sales agreement.

1 We have the money for the deposit and service work
2 deposit in place and are ready to wire, but the
3 owners brought up a question today at their
4 meeting." Do you recall that meeting?

5 A No.

6 Q It indicates, at least according to Dave,
7 that he has got money together from somebody for a
8 deposit.

9 A Let me see when this is. I'm usually out
10 of town when the children get out of school, get
11 down to the Turks. I was not in a meeting that I
12 can remember.

13 Q And you don't recall contributing
14 anything to the deposit?

15 A If each partner had to pay, I'm sure I
16 did. But it would have been in the form of a phone
17 call, hey, send money.

18 Q To your knowledge, did they need you to
19 send on to the financing, or did you just do it as a
20 matter of course?

21 A I don't think I signed on to the
22 financing until a long time after that went down. I
23 wasn't on that note, original note.

24 Q Is it safe to say by June 27th you
25 intended to become a member of CP Aviation, LLC, and

1 an owner of the aircraft GG?

2 A No. I would doubt it. That seems a
3 little early. But I could have been. For me, it's
4 whenever -- if I sent money, whenever that was.
5 That would be easy to find out.

6 Q Well, from the time that Eric first
7 called you to discuss the idea of purchasing a
8 secondary aircraft, how long do you think it was
9 before you actually sent money?

10 A I don't know. I don't think there was a
11 whole lot of time.

12 Q How long was it between the time that you
13 would have intended to become a member of CP
14 Aviation, LLC, that you would have told Eric to
15 express anything to Gordon about PPC12, LLC?

16 A We'd have to look at the documents on
17 when I sent a deposit and if I sent one to answer
18 that. I don't even know, was it July or August when
19 we put money up for the plane? I don't know when it
20 was.

21 I wasn't involved in any financing, any
22 meetings. If I have money in it, the deposit, that
23 date is important, I think, because that's when I
24 would have committed -- Whether being on the note or
25 not at that time, yes, I'm in on this other

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Hon. J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No.: 2015-CP-10-⁴⁵⁴⁹~~5080~~

FILED
2016 MAR 14 PM 2:17
JULIE J. ARMSTRONG
CLERK OF COURT

C. GORDON LOVINGOOD, JR., C3 INVESTMENTS, INC., and PPC12, LLC

Appellants,

v.

VICTOR APAT, ANTHONY MCALLISTER, J. ERIC WADE d/b/a CT TOURING,
and PEARL CO. SC, LLC, Defendants, of whom,

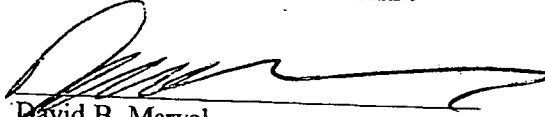
ANTHONY MCALLISTER; J. ERIC WADE d/b/a CT TOURING;
and PEARL CO. SC, LLC are

Respondents.

NOTICE OF APPEAL

PLAINTIFFS C. GORDON LOVINGOOD, JR., C3 INVESTMENTS, INC., and PPC12, LLC hereby give Notice that they Appeal the Order of the Hon. J.C. Nicholson, Jr., dated November 30, 2015 and filed December 1, 2015. See Exhibit A. Appellants filed a timely motion pursuant to Rule 59, SCRCP on December 16, 2015, which was denied by Form 4 Order dated and filed January 27, 2016. See Exhibit B. Appellants received the written Notice of Entry of Judgment on February 5, 2016.

RESPECTFULLY SUBMITTED:



David B. Marvel

P.O. Box 22734

Charleston, South Carolina 29413

Ph. (843) 853-4877

Fax (843) 380-3025

Email: dave@marvel.lawyer

ATTORNEY FOR THE PLAINTIFFS

Charleston, South Carolina
March 2, 2015

David B. Marvel

Attorney at Law • Proctor in Admiralty
Certified Civil and Federal Court Mediator
Admitted to Practice in South Carolina and Georgia

March 2, 2016

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Lovingood v. Apat, et al.
Charleston County Court of Common Pleas
Case No. 2015-CP-10-~~5000~~ 4549

Dear Ms. Kitchings,

I hope this letter finds you well. I have enclosed a Notice of Appeal in this matter, along with the requisite filing fee.

Please file this Notice in your usual prompt and efficient manner and return a clocked copy to me in the self-addressed, postage paid envelope provided. If you have any questions, comments, or concerns, please do not hesitate to contact me at any time. With best regards, I remain

Sincerely,



David B. Marvel

/DBM

Enclosures

Cc: Julie J. Armstrong, Clerk of Court
Brandon Gaskins, Attorney for the Respondents
David A. Collins, Attorney for Defendant Victor Apat