

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable D. Garrison Hill  
Circuit Court Judge

**RECEIVED**  
FEB 22 2018  
SC Court of Appeals

App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF  
CAROLINA CUSTOM CONVERTING, LLC, .....Plaintiff,

v.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND  
CAROLINA CUSTOM CONVERTING, LLC, .....Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, ..... Third-Party Plaintiffs,

v.

CAROLINA CUSTOM CONVERTING, LLC,  
..... Third-Party Defendant and Counterclaim Plaintiff,

v.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND  
FRESH WATER SYSTEMS, INC.,

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

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM  
CONVERTING, LLC, ..... Appellants.

**PETITION FOR REHEARING**

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants hereby file this petition for rehearing. Appellants respectfully submit that rehearing and issuance of a new opinion reversing the trial court's decision is warranted. The grounds for this petition are that the Panel's opinion overlooked or misapprehended several matters of fact and law in affirming the lower court's decision. This matter is of exceptional importance as it involves fundamental matters of partnership and limited liability company internal management and governance.

In Unpublished Opinion No. 5416 filed February 7, 2018, a Panel of this Court adopted in full the trial court's order in favor of Wilson and against Appellants Gandis and Comeau-Shirley individually and Appellant CCC corporately. On January 9, 2015 the trial court entered an Order finding that Gandis and Shirley "froze-out" and "oppressed" Wilson as the other member of CCC and ordered they individually buy-out Wilson's interest for a total of \$347,863.23 pursuant to its claimed equitable powers under S.C. Code Ann. § 33-44-810 (the "Order"). (R. pp. 1770-1789). The Order further found that: (1) the evidence at trial did not establish Wilson breached his fiduciary duty to Gandis or other members of CCC; (2) CCC failed to prove its trade secrets claim; (3) the evidence demonstrated that Neologic/Freshwater used CCC's confidential information and therefore the company's trade secrets claim was justified; (4) CCC failed to provide sufficient evidence in support of its civil conspiracy claims; (5) neither party proved their conversion cases; and (6) Wilson was not entitled to prejudgment interest. Appropriate post-trial motions were filed and denied which led to the appeal being perfected before the Panel.

The practical impact of the Order of the trial court and the adoption of the Order by the Panel is that concludes that a 45% owner of an LLC owed no fiduciary duties to his

company and other members and that the majority owners' decision not to make a distribution for the taxes of the 45% owner was oppression of the shareholder/member.

The Panel overlooked or misapprehended several matters of law and fact in adopting the Order in full. First, the Panel misapprehended the facts and law and applied an incorrect legal standard and found that Wilson did not breach his fiduciary duties he owed to Gandis and Shirley. Second, the Panel misapprehended the facts and the law by adopting the finding that shareholder (member) oppression occurred. Third, the Panel erred by adopting the holding that individual members (including a non-voting member) of the LLC and not the LLC had to buyout Wilson's interest. Fourth, the Panel overlooked and misapprehended facts and law by adopting an Order that awards one with unclean hands an equitable remedy. As a result, this Court should grant a rehearing.

### ARGUMENT

#### **I. The Panel Misapprehended the Facts and Law and Applied an Incorrect Legal Standard and Found that Wilson Did Not Breach His Fiduciary Duties to Gandis and Shirley.**

##### ***A. Fiduciary Duty Legal Standard and Application***

An action for breach of fiduciary duty is one at law. *Verenes v. Alvamos*, 387 S.C. 11, 690 S.E.2d 771 (2010). The Panel overlooked or misapprehended several matters of fact and law and applied an incorrect standard of disclosure for fiduciary duty. In discussing the operation of fiduciary duty in this case, the business started as a simple partnership and later became a limited liability company with no written operating agreement. Therefore, the standard of fiduciary duty in the partnership and the limited liability context is applicable. The Order affirmed by the Panel states that Appellants failed to prove their claim for breach of fiduciary duty. (R. p. 1783). The basis of this holding

was that “the evidence did not establish that Wilson had agreed to transfer the three import accounts to CCC in 2008.” (R. p. 1783). The court further stated that a “reasonable inquiry in 2009 by Defendants would have established the full extent of EFS activities with these import accounts, yet even with full knowledge of West Carrollton sales by EFS, Defendants did nothing.” (R. p. 1784). These holdings constitute errors of law in that they impose a duty on Defendants that does not exist in the context of fiduciary duty and disregard Wilson’s fiduciary obligations to CCC and his co-owners which is an affirmative duty to disclose such relationships. Wilson had an affirmative duty to disclose to Gandis his ongoing financial interest in other ventures. By affirming the lower court, the Panel erred by flipping responsibility to the non-violating party.

Our courts have long recognized that the duty of a partner is to exercise the utmost good faith, fairness and loyalty as required by statute and common law. *Anthony v. Padmar, Inc.* 320 S.C. 436, 448-49 (Ct. App.1995).<sup>1</sup> In expounding on “utmost good faith, fairness, and loyalty” the court explained that “[p]arties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.” *Id.* at 449 (internal citations omitted). A fiduciary relationship is founded on the trust and confidence imposed by one person in the integrity and fidelity of another. *Ellis v. Davidson*, 358 S.C. 509, 519 (Ct. App. 2004). A fiduciary relationship exists “when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Moore v. Moore*, 360

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<sup>1</sup> Citing S.C. Code Ann sec 33-41-540(1990)(partner is accountable as a fiduciary) and *Few v. Few*, 239 S.C. 321, 122 S.E.2d 829 (1961)(establishing that partners are treated as fiduciaries each to the other; their relationship is one of mutual trust and confidence, imposing upon them the usual trust requirements of loyalty, good faith, and fair dealing.).

S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004)(internal citations omitted). “Partners are fiduciaries to each other and their relationship is one of mutual trust and confidence imposing upon them requirements of loyalty, good faith and fair dealing.” *Id.* at 251. “Partners in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.” *Ellie v. Miccichi*, 358 S.C. 78, 100, 594 S.E.2d 485, 497 (Ct. App. 2004). This Court has stated a fiduciary’s duty of disclosure imposes an “obligation of *refraining from taking any advantage of one another by the slightest misrepresentations or concealment.*” *Moore*, 360 S.C. at 252, 599 S.E.2d at 473(*emphasis in original*). Accordingly, the fiduciary standard under partnership law is one in which Wilson was required to disclose to Gandis all known information that is significant and material. The court imposed on Gandis a duty to investigate that which he has been told was a zero volume account and may well continue to be a zero volume account. The trial court erred by failing to take into account Wilson’s repeated habit of failing to identify the names of the three accounts, particularly as Wilson had presumably already provided Gandis a complete listing of the EFS accounts with their two-year sale volumes. The court also failed to explain how any account that was on the listing should be retained by Wilson without absolute clarity of identification. By failing to recognize the fiduciary standard required of Wilson, the lower court committed a fundamental error of law.

The South Carolina Limited Liability Act recognizes the fiduciary relationships that exist among members stating:

- (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.

(d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

S.C. Code Ann. § 33-44-409. Subsection (b)(3) expressly states that a member's fiduciary duty of loyalty to a member-managed company and its other members requires that he refrain from competing with the company before dissolution.

CCC was incorporated as a LLC with Wilson and Gandis as its sole members. Their shared membership and interest carried with it a fiduciary relationship. As such, Wilson owed Gandis fiduciary duties, including that of full and honest disclosure of material facts, refraining from concealment or misrepresentation and competing with the company; all of which he indisputably breached. Wilson did not fully and honestly disclose material facts. Wilson violated his fiduciary duties owed to Gandis and Shirley as members

by competing with CCC. Wilson violated his fiduciary duties owed to Gandis and Shirley as members by misappropriating confidential and trade secret information.

The trial court committed error by disregarding the duty and evaluating whether or not the evidence established Wilson agreed to transfer three import accounts to CCC in 2008. Its evaluation was more akin to a contract rather than a breach of fiduciary claim. The appropriate inquiry was whether the evidence showed Wilson fulfilled his fiduciary duties to Gandis and CCC by acting in good faith, disclosing material facts to Gandis, and refraining from competing with CCC before its dissolution. This constitutes an error of law because the trial court essentially placed the burden of proof on the wrong party.

Further, Wilson breached his statutorily mandated fiduciary duty to “refrain from competing with [CCC] in the conduct of the company’s business before the dissolution of the company.” S.C. Code Ann. § 33-44-409(b)(3). Wilson unequivocally admits that he ran side deals through EFS while CCC was operating, including during the times when he was receiving \$8,000 a month from the company. He contended this was allowed because his agreement with Gandis carved out these three accounts. (R. p. 378, ln. 25 – p. 379, ln. 18). As noted above, the testimony and evidence at trial showed that the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS after all of that company’s customers were supposed to be transitioned to CCC. (R. p. 211, ln. 18-22; R. p. 216, ln. 14-18; R. p. 217, ln. 20-22). In fact, Wilson continued to run side deals through EFS even after he began receiving the \$8,000 a month as agreed in exchange for rolling all of those customers into CCC. (R. pp. 1318-27). Gandis testified that he only learned of these side deals “by accident” and that when he confronted Wilson about them

Wilson denied he was doing side deals. (R. p. 215, ln. 6-14; R. p. 217, ln. 3-22). The evidence and testimony at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings. Specifically, Wilson never utilized his CCC email address to conduct his side deals, only using his EFS email. (R. p. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (R. p. 215, ln. 6-14). When Gandis confronted Wilson about these side deals he denied them save one admission recounted by Gandis at trial. (R. p. 215, ln. 6-14). These actions could not be further from the full and honest disclosure of material facts required of a business partner (to fulfill his fiduciary duties to other members/partners). Wilson failed to mention his side dealing, an act in and of itself sufficient for a breach of fiduciary duty finding. He also took affirmative and deliberate measures to conceal his side dealings from Gandis and CCC.

***B. Appellants' breach of fiduciary duty claims were not time barred***

Generally, in South Carolina, a plaintiff has three years from the time he knew or should have known he had a cause of action to bring suit. S.C. Code § 15-3-530; *Maher v. Tietex Corp.*, 500 S.E.2d 204 (S.C. Ct. App. 1998). A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist. *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 443 S.E.2d 537 (1994). The statute begins to run from this point – the date upon which plaintiff discovers the injury – and not when Plaintiff learns the identity of all the alleged wrongdoers. *Tollison v. B&J Machinery Co., Inc.*, 812 F. Supp. 618, 619-20 (D.S.C. 1993).

The Order affirmed by the Panel concluded that Appellants received notice of Wilson's side dealing activities in July 2009, and because they failed to engage in a reasonable inquiry when they received notice that Wilson had in fact conducted side deals Appellants assert should have gone through CCC, their counterclaims for breach of fiduciary duty were time barred. (R. pp. 1783-84). The Order again made no specific citation to any evidence or trial testimony supporting this conclusion and failed to take into account the totality of the record – most importantly Wilson's active concealment of his side dealings.

“Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations.” *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014). The agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS after all of that company's customers were supposed to be transitioned to CCC. (R. p. 211, ln. 18-22; R. p. 216, ln. 14-18; R. p. 217, ln. 20-22; R. pp. 1318-27). Gandis testified that he only learned of these side deals “by accident” and that when he confronted Wilson about them Wilson denied he was doing side deals. (R. p. 215, ln. 6-14; R. p. 217 ln. 3-22). The evidence and testimony at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings. Specifically, Wilson never utilized his CCC email address to conduct his side deals, only using his EFS email. (R. p. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (R. p. 215, ln. 6-14). When Gandis confronted Wilson about these side deals he denied it except the admission in late 2010 when he attempted to justify

his side dealing saying “it’s Christmas.” (R. p. 215, ln. 6-14; R. p. 1528). Up until this point Wilson deceived his business partners to conceal his illicit activities, thus tolling the statute to at least late 2010 when he offered the paltry excuse that it was Christmas.

At trial Wilson submitted email correspondence from June 17 and October 30, 2009 related to EFS sales to West Carrolton. (R. pp. 1006-08). That email correspondence did not provide Appellants sufficient notice of the scope of Wilson’s illicit activities, and is insufficient to support that finding. Moreover, it may have related to deals Wilson maintained were precluded as an import deal that predated CCC. Nevertheless, assuming *arguendo* that it did, Appellants’ claim for breach of fiduciary duty was not time barred because it related back to Wilson’s initial filing on April 27, 2012. *See* SCRCP 15(c). Gandis and Shirley answered and filed counterclaims alleging breaches of fiduciary duty. Later, when CCC was added to the case via Wilson’s Second Amended Complaint, it counterclaimed seeking the same relief. Therefore, Appellants’ breach of fiduciary duty claims against Wilson were timely pursuant to SCRCP 15(c) as they related back to the original April 27, 2009 filing.

***C. Wilson violated his fiduciary duties to CCC and its members by competing with the Company after January 2012***

Finally, Wilson also immediately set out to compete with CCC utilizing confidential company information. The Reporter Comments to § 33-44-409 make clear competitive activity constitutes a breach of a member’s fiduciary duty to the company – “[t]he duty to not compete terminates upon dissociation...[h]owever, a dissociated member is not free to use confidential company information after dissociation.” The trial court found that Neologic/Freshwater used CCC confidential information to compete with the

company. (R. p. 1788).<sup>2</sup> Wilson provided this confidential information to Neologic and therefore breached his fiduciary duty to the other members of CCC.<sup>3</sup>

Because the trial court misapplied the law and standard on fiduciary duty, the remainder of the Order's oppression analysis becomes suspect. Gandis and Shirley's actions were proper, legally based business acts taken by owners to protect the interests of the company against an owner who had concealed breaches of fiduciary duties for which he personally profited. In applying the wrong standard, the trial judge consequently viewed the Gandis and Shirley's acts as "oppressive" rather than as ones taken to protect their company. The context cannot be understated, CCC and the individual owners faced a large looming tax liability and business challenges including the need to wean from the reliance on personal debt/credit to fund the business when there was a business slow down. Wilson was an owner who was breaching his fiduciary duty to Gandis and Shirley and was side dealing/taking corporate opportunities for his own benefit. The fiduciary duty imposed by the law is there to prevent Wilson's disloyal actions.

The trial court's error of law colored the Court's findings on the remaining claims in this case. The Order reflects an utter failure to take Wilson's nefarious and unlawful conduct into account in evaluating the other claims – namely Wilson's shareholder oppression cause of action. The lower court's fundamental legal error on the breach of fiduciary duty claim colored and tainted its oppression analysis and conclusion. This error

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<sup>2</sup> "Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing its trade secrets claim."

<sup>3</sup> This breach of fiduciary duty would be independent of the claims possessed by CCC and addressed by CCC on brief.

is substantial and bleeds into the entire analysis of the case. The Panel erred by adopting the Order.

**II. The Panel Misapprehended the Facts and the Law by Adopting the Finding that Shareholder Oppression Occurred in this Case**

*A. The Panel erred in adopting the trial court's finding that the Appellants "froze-out" & oppressed Wilson*

The Panel adopted the trial court's finding that Gandis and Shirley "froze-out" and "oppressed" Wilson as the other member of CCC by:

- Initiating an "Exit Strategy" for Wilson on August 16, 2011;
- Giving Wilson the option to eliminate the tax burden from prior phantom income allocations, including the transition from member to employee in order to keep receiving the \$8,000 a month he had been receiving and prevent future phantom income issues or remain a member and be treated as such;
- Using company funds to repay a line of credit held by Gandis through which he funded CCC since its inception rather than dispersing that money solely to Wilson as a tax distribution (to cover his tax liability);
- Monitoring Wilson's company emails despite the fact that he had no expectation of privacy as evidenced from his own ability to access accounts of others (R. pp. 1752-56);
- Informing Wilson that he may not receive distributions for two or more years;
- Managing CCC's money supply in a way Wilson contends made it appear as if cash was more limited than it actually was;
- Limiting Wilson's access to CCC financial information so as to restrict his ability to export or otherwise distribute company data as of January 7, 2012;

- Removing Wilson from signatory authority on the operating account;
- Removing his ability to make wire transfers for the company;
- Not including him on certain discussions concerning CCC business operations (although the discussions did not pertain to the subject matters which the statute outline requires full member involvement);
- Physically locking Wilson out of the company following his resignation;
- Demanding Wilson return CCC's computer and blackberry following his resignation which he had removed whilst claiming to the officer present that he was only taking personal assets from his office;
- Terminating CCC funded cell phone plans for Wilson and his family while maintaining coverage for other members (Gandis) after accepting his resignation;
- Terminating health insurance coverage for Wilson and his family after accepting his resignation as of the month following his resignation;
- Forming ZOi after Wilson's departure from CCC to compete with the company.

(R. pp. 1777-78). Based on these findings, the Order directed Gandis and Shirley individually to buy-out Wilson's interest in CCC for \$347,863.23. (R. p. 1789). This is factual and legal error as Wilson was not "oppressed" or "frozen-out."

S.C. Code Ann. § 33-44-410 empowers a LLC member to "maintain an action against a limited liability company or another member or manager for legal or equitable relief...to enforce: (1) the member's rights under the operating agreement; (2) the member's rights under this chapter; and (3) the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company." S.C. Code Ann. § 33-44-410. Section 801 allows the circuit

court to dissolve an LLC under certain circumstances including if a member establishes that “the managers or those in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner.” S.C. Code § 33-44-801(4)(e). Section 801 permits the court to fashion equitable remedies other than dissolution in such cases, including ordering a buyout of the disgruntled member’s interest when “one or more members have engaged in fraudulent or unconscionable conduct...” S.C. Code § 33-44-801 Reporter Comments.

South Carolina courts have explicitly refused to fashion a standard/test for determining what constitutes shareholder “oppression” calling for consideration of various factors for evaluation on a case-by-case basis. In *Kiriakides v. Atlas Food Systems & Services, Inc.*, the South Carolina Supreme Court established how courts should determine whether majority shareholders oppressed the minority. 343 S.C. 587, 541 S.E.2d 257 (2001).<sup>4</sup> In establishing oppression considerations the Court recognized “that the terms oppressive and unfairly prejudicial are elastic terms whose meaning varies with the circumstances presented in a particular case” which should be determined on a case-by-case analysis. *Id.* at 602. “Although [the court] declined to set out specific factors in *Kiriakides*, [it] observed several commonly considered ones including: eliminating minority shareholders from directorate and excluding them from employment[,] ... failure to enforce contracts for the benefit of the corporation [and] withholding information from minority shareholders.” *Ballard*, 399 S.C. at 594, 733 S.E.2d at 110. The *Ballard* Court noted that an oppressed minority shareholder “faces prospects of exclusion from the

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<sup>4</sup> The case established how to determine if majority shareholders acted oppressively within the meaning of S.C. Code Ann. § 33-14-310 which is substantively identical to § 33-44-801.

business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.” *Id.* at 595.

“Freeze out” and “squeeze-out” are used interchangeably and the terms mean “the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control or utilization of some legal device or technique, to eliminate from the enterprise one or more owners or participants.” *Kiriakides*, 343 S.C. 587 at n.26. “Common freeze out techniques include termination of a minority shareholder’s employment, the refusal to declare dividends, the removal of the minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation.” *Id.* “Often, these tactics are used in combination.... The primary vulnerability of a minority shareholder is the specter of being locked in...having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.” *Id.* at 604-05. “The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion [and] [t]he court should be cautious...so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation.” *Id.* This cautionary admonition looms large in this case. The Court continued:

[W]e do not believe the Legislature intended a court to judicially order a corporate dissolution solely upon the basis that a party’s reasonable expectations have been frustrated by majority shareholders. To examine the reasonable expectations of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33-14-300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.

*Id.* at 599, 541 S.E.2d at 264. Importantly in the context of this case “[S]ection 33–14–300 does not place the focus upon the rights or interests of the complaining shareholder but, rather, specifically places the focus upon the actions of the majority, i.e., whether they have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder.” *Id.* 343 S.C. at 600, 541 S.E.2d at 265. “Given the language of our statute, a ‘reasonable expectations’ approach is simply inconsistent with our statute.” *Id.*

Oppression, fraud, and unfairly prejudicial conduct in the context of a shareholder suit remain elusive terms and no attempt has been made to define them as “[they] are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants.” *Kiriakides* at 598. “The concern and focus in shareholder oppression cases is that the minority ‘faces a trapped investment and an indefinite exclusion [from] participation in business returns.’” *Ballard*, 399 S.C. at 588 (internal citations omitted).

*Kiriakides* involved a family owned close corporation (Atlas), where the brother held the majority share. *Id.* at 591. His siblings, the plaintiffs in the case, were minority shareholders. *Id.* Siblings brought suit against Brother and Atlas seeking dissolution for oppression. *Id.* at 593. The Court found the facts “present[ed] a classic situation of minority ‘freeze out’” and noted several supporting factors including Brother paying Sibling less than what was owed to her based on her ownership; Brother’s conduct in transferring 21% of a wholly owned subsidiary to his children instead of to a partnership which included the Siblings; Brother and his family receiving substantial benefits from ownership of Atlas while Siblings had no such expectations of benefit; Atlas having no

intention of declaring dividends in the near future; Atlas' extremely low buyout options for the minority, offering them \$4,000,000 in 1998 when one minority had been told by an accountant in 1995 that his interest alone was worth \$10,000,000; and there being no market otherwise for the minority's stock. *Id.* at 603-06. These circumstances, coupled with findings of fraud, led the court to conclude that "the totality of the circumstances demonstrated that the majority had acted 'oppressively' and 'unfairly prejudicially'" and affirm the order requiring Brother buyout his Siblings' interests. *Id.* at 606-07.

Later in *Ballard* the Supreme Court found that Ballard (20% minority shareholder in Warpath Development) had been oppressed by the majority. Ballard incorporated Warpath for the development of a marina on Lake Keowee. *Id.* at 590. Following years of negotiations with Duke (owner of the lakefront property), Warpath entered a lease to use the property for a marina concept. Ballard later entered into a Stock Purchase Agreement with the three Appellants. Under the Agreement, the three paid Ballard \$1M in exchange for half the 40k shares he held and the additional 60k unissued shares so that Ballard would hold 20% and they hold 80% when all the stock was issued. Following the sale of Ballard's interest, it was discovered Warpath could only fit just over half the number of projected slips. Upset over the decrease in projected income, the majority shareholders tried to convince Ballard to return the money paid for his shares or to return his 20k shares and leave the company. *Id.* at 592. Ballard rejected both options, and was then removed as director at the first shareholder meeting. At that same meeting, all three majority shareholders were elected to the board and appointed as officers. Immediately after, the Appellants approved issuance of an additional 900,000 shares. *Id.* Issuance of the additional shares conflicted with the Articles of Incorporation, which authorized 100,000

shares and the Agreement, which stated Ballard would ultimately own 20% of Warpath. It also diluted Ballard's interest from 20% to 2%. In addition, the court found it granted the majority more control over allocation of benefits. *Id.* at 597.<sup>5</sup> Thus the court found that the majority's actions, while not as egregious as those in *Kiriakides*, constituted oppression. *Id.* at 595, 733 S.E.2d at 110.

In *Kiriakides* and *Ballard* the minority shareholders were offered at best a Hobson's choice, if one at all. In *Ballard*, the majority shareholders acted with a singular purpose – get the minority out of the business and control the allocation of any benefits flowing from it exclusively to their own interests. Ballard had no options to protect himself and remain a meaningful part of the business due to the drastic and illegal alteration of his ownership interest. In *Kiriakides*, the majority likewise welded his superior power to shut out the minority to service his own interests. None of this occurred in this case.<sup>6</sup>

The actions of Gandis and Shirley deemed “oppressive” certainly did not equate with the actions of the majority shareholders in *Kiriakides* and *Ballard*. They did not even rise to the level of those of the son in *Mason* where this Court found no minority oppression.

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<sup>5</sup> By increasing the amount of shares, the majority would be allowed further means through which to dictate and control the allocation of returns in favor of their own interest and to the exclusion of Ballard's.

<sup>6</sup> In *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015) this Court affirmed a finding that a minority shareholder of a family owned auto-service company was not oppressed. The minority shareholder, Son, brought an action for oppression and breach of fiduciary duty against the other shareholder family members and the company among other things. This Court examined the facts under the circumstances and in light of the decisions in *Ballard* and *Kiriakides* and found Son had not been oppressed: “Based on the evidence in the record, Son seems to be the primary party who engaged in illegal activities and benefited from those activities. He received the benefits of his casing scheme. He was not reelected as president of the Company, but was elected to serve as vice-president and receive the same salary. He chose to leave the Company and as a result to stop receiving a salary and other benefits he and the other stockholders enjoyed.... He was the one stockholder who refused to repay the Company for personal expenses .... Additionally, most of the testimony on the record indicates he had knowledge that adjusting the Company's inventory to diminish its tax liability was fraudulent.” *Id.* at 55-56, 770 S.E.2d at 419.

In this case Wilson was not “oppressed” or “frozen-out” of the business by Gandis and Shirley. He did not find himself in a “trapped investment” or suffering “indefinite exclusion from participation in business returns.” In fact, Wilson had repeatedly expressed a desire to increase his family’s investment and both times the remaining shareholders accepted the offer to sell. Rather Wilson took issue with the business decisions made and acted upon by his fellow CCC members and argued to the lower court that those actions constituted oppression.

*1. Evidence and circumstances of the case do not support a finding of oppression*

It must be reiterated that this is a business case. The baseline for the dispute in this case is the continued existence of a business. Expenses and taxes must be paid from revenues produced. When revenues fall, owners are not able to continue to pay themselves out of cash flow and debt. One troubling aspect of the Order and the Panel’s adoption of the Order is the seeming absence of any consideration of real world business factors. The focus of the Order is driven by Wilson’s hindsight advocacy oriented approach that he was an oppressed shareholder. This is not an academic exercise and the factors utilized by the lower court did not occur in a vacuum. Wilson was an actor seeking the best deal for himself—not CCC.

Wilson controlled the company’s sales and purchasing, created the inventory issue, created the cash shortage, initiated a buyout discussion, threatened dissolution, erased company computers, replaced SIM cards in company phones, shared confidential and trade secret company information in seeking a new investor partner, had numerous options to assist on the tax issue confronting the company due to phantom income under the tax code, and held a superior position to the success or failure of the company due to the control of

its sales and customers. There was not oppression. Much like the *Mason* case, Wilson was the actor who made or spurred the actions from Gandis and Shirley as they responded to his demands and tried to find a workable way to grow the business. The lower court also erred in disregarding the impact on the health of the company when two options were considered. Specifically, Wilson sought to remove his tax obligation by demanding the company increase its debt leverage and make a priority distribution to him. The additional leverage as well as the heightened disparity amongst the members' relative interests would very likely impair the company's future value. Instead the Panel has, in essence, granted a minority member veto power over the business judgment rule when he is unsatisfied. The consequences to small business owners for such a ruling are profound. The Order and its oppression analysis failed to consider several undisputed facts and circumstances that demonstrate Wilson could not have been an oppressed.

*i. Wilson controlled his destiny and CCC and therefore could not have been oppressed*

The undisputed facts and evidence presented at trial show that Wilson was in control of his destiny and CCC and could not have been oppressed. First, it is undisputed Wilson had the option to either be bought out by Gandis and Shirley or purchase their interest for the same price (valuation). In mid to late 2011 there were exchanges among CCC members about Gandis and Shirley buying Wilson's interest. (*See supra* pgs. 20-21). Wilson began to claim it was his preference to buyout the other two. (R. pp. 1623-28). He believed they were altering numbers to drive down the buyout figure offered for his interest and therefore stated that he would buy them out using their valuation numbers for his equity. (R. p. 1655; R. p. 156, ln. 17 – p. 157, ln. 3; R. pp. 421-26; R. p. 670, ln. 23 – p.

671, ln. 2).<sup>7</sup> Gandis and Shirley accepted this offer. Wilson, however, failed to obtain a serious purchaser. Thus, in mid-late 2011 Wilson had the option of either selling his interest and getting out of the company or buying the other members' interests at the same price/valuation. A minority shareholder simply cannot be oppressed when the other members (and alleged oppressors) agree to buy his interest or sell theirs to him using the same valuation. It was an equal and reciprocal buy-sell situation in which Wilson had the power and ability to choose either option. He chose to do neither.

Second, Wilson had the option and ability to remain with CCC and be treated as the other members. The so called "exit strategy" cited by the Order as "oppression" kept Wilson in the business. He continued to be over \$100,000.00 ahead in compensation over Gandis. CCC needed to equalize Gandis and Wilson in lean times however Wilson objected to losing his favored status. Equal treatment is not oppression. To treat owners equally is not oppression but good business. In late 2011, CCC was in a cash flow crunch and could no longer continue providing Wilson loans which had increased to \$12,000 a month. Gandis and Shirley gave him three options to consider, the first of which was to remain a member and be treated as such - a top line participant as an owner. This meant Wilson would maintain his equity position but no longer receive preferential treatment in the form of monthly advanced distributions as the distributions would require debt to fund. The other two options altered his membership status to address his personal cash flow/tax situation. Importantly, all three kept Wilson in CCC and Gandis made it known to Wilson he was fine with any one of them.<sup>8</sup> In short, Wilson had the option to remain with CCC

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<sup>7</sup> Shirley referred to this arrangement as a Texas Draw. Gandis and Shirley were willing to sell their ownership for the amount that was offered to Wilson.

<sup>8</sup> At trial Gandis testified that he wanted Wilson to remain with the company. (R. p. 229, ln. 5-8).

and be treated the same as Gandis and Shirley. He chose not to do so. No longer agreeing to afford a member preferential treatment not required by agreement or law simply cannot equate to oppression. The former is a discontinuation of a gratuitous and unnecessary act while the latter requires affirmative acts that prevent a member from receiving what he or she is legally and rightfully owed. Wilson controlled the options of whether he bought the other owners' shares, sold his shares, or stayed in the company and be treated as the other members.<sup>9</sup> Having multiple options for business planning for future business activities is not oppression. Wilson controlled CCC because he was responsible for the company's sales without which no business survives. He acted as the conduit between CCC and its customers and therefore wielded enormous power over the company. A fundamental aspect of shareholder oppression is that those in control wield their power in a prejudicial, unfair, and inequitable manner to the detriment of the less powerful member. It is antithetical to the notion of oppression that a member with total control over a business's livelihood can be oppressed. In this case not only did Wilson have this power, he wielded it to his benefit and the detriment of Gandis, Shirley, and CCC.

*ii. Wilson took all the good out of CCC*

The Panel's adoption of the trial court's finding of oppression is also incongruent with the undisputed fact that Wilson ultimately made off with all the good aspects/assets of CCC – namely its stock of customers and prospective business. A party making off with a business's assets cannot be oppressed.<sup>10</sup>

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<sup>9</sup> These options are especially important because of the control over sales that Wilson had and the threats he made when he threw down the gauntlet after receiving Gandis and Shirley's proposal.

<sup>10</sup> Gandis and Shirley incorporate the arguments of CCC regarding the confidential information and trade secret misappropriation.

The buy-sell discussions between Wilson and the other two members lasted through the end of 2011 and into early 2012. Wilson informed Gandis and Shirley he was seeking a purchaser for CCC. During this time, Gandis and Shirley became concerned that Wilson was sharing CCC's confidential information with prospective purchasers and reminded him to refrain from doing so.<sup>11</sup> Wilson responded that he "certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor....[and his] desire is to continue discussions with the interested parties about buying the company...." (R. p. 1673). Contrary to this statement, the evidence revealed that Wilson was attempting to get a job with FilmTech, a competing business in TN. (R. p. 1685). In a January 2012 email Wilson stated that "[he] look[ed] forward to the opportunity to join [the] organization...." and that "[m]y goal will be to move as much of the business I manage at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective business that CCC has been working on or qualifying over the past 3 to 6 months." (R. p. 1692). A member who is taking the business and the last six months of CCC prospects to a competitor cannot be oppressed. Filmtech ultimately did not hire Wilson. He, however left CCC, taking with him the company's confidential information to a competitor and his new employer Neologic. (R. p. 1788).<sup>12</sup>

Wilson capitalized on CCC's information after his departure and generated cash for Neologic with it. Wilson cannot claim that he was oppressed for failure to receive regular distributions following his departure. The circuit court's expert confirmed that neither

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<sup>11</sup> This is consistent with the arguments regarding the fiduciary duty owed to CCC that Wilson not act in his own interest but in the interest of CCC.

<sup>12</sup> Trial court found Neologic/Freshwater was utilizing CCC confidential information.

Gandis nor Shirley received distributions following his departure. Accordingly, this case does not present a situation where the minority has been prevented from receiving the economic benefits retained by the majority. Instead, the evidence of this case showed that after leaving CCC, Wilson almost immediately took advantage of the information he took from CCC and generated cash for his family. (*See* R. p. 1757; R. pp. 1760-62).<sup>13</sup> A list of Neologic customers submitted at trial showed that 23 out of the 27 were customers of CCC. (R. p. 1333; R. p. 883, ln. 17-24). When it became clear to Wilson that he would no longer receive preferential treatment by way of advanced monthly distributions/loans he set out to take everything of value he could out of CCC, concealed his own selfish actions, acted as if he was attempting to sell the company to a third party, and used the time to find a better deal for himself to the detriment of CCC. In proving his effectiveness as a salesman, Wilson convinced the lower court to focus on his dire personal financial situation (of his own making)<sup>14</sup> to convince the lower court that he was oppressed. The Panel erred in adopting the holding.

*iii. Wilson was always ahead of other members in cash distributions*

Under the LLC statute “[a] member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.” S.C. Code Ann. § 33-44-403.

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<sup>13</sup> R. pp. 1760-62 - discussing transaction with company named Imperial—a company that Wilson never transacted business with prior to CCC.

<sup>14</sup> It should be noted that Wilson had a number of prior failed business ventures in the film industry due to a disagreement with other owners about appropriate debt loads that led to his expulsion and an instance where his venture as a sole proprietor led to his own personal bankruptcy. (R. p. 306, ln. 8-13; R. p. 365, ln. 2-3). Personal financial distress was apparently very common for Wilson. He resisted accounting controls, responsible cash management, and business/financial management at CCC.

Section 405(a) mandates distributions made before dissolution be made in equal shares to the members and Section 406 prohibits distributions if:

(1) the limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or

(2) the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

S.C. Code Ann. § 33-44-406(a). The undisputed evidence presented at trial established that Wilson was always ahead of Gandis and Shirley in cash distributions. (R. p. 115, ln. 12-18; R. p. 153, ln. 18; R. p. 256, ln. 10-14). Wilson does not dispute that he received numerous monthly payments as advanced distributions which neither Gandis nor Shirley received. Wilson did not simply get his proportional interest in distributions; he undeniably received above and beyond the other members throughout his tenure at CCC and remains substantially ahead of them to this day. Simply put, Wilson received more cash distributions than he was actually entitled to under the LLC statute. Oppression requires a member failing to receive what is owed to him. One receiving more than they are entitled to under the statute cannot be oppressed.

*iv. Gandis and Wilson met to discuss potential business the day he resigned*

The Order's oppression finding also ignores the fact that Gandis and Wilson had a sales meeting to discuss what needed to be done to get the Company going the day Gandis and Shirley learned he was leaving CCC. (R. p. 163, ln. 5-13). It makes no sense that a member who is far along in a plan to oppress and freeze-out another member would meet with him to discuss sales plans and opportunities going forward. On the contrary, having

such a meeting indicates one thing – Gandis thought and planned for Wilson to remain a part of CCC at that point. Wilson’s own words corroborate this fact when he wrote on January 6, 2012 that “[s]ince John and I began discussions regarding CCC buying me out and extending an employment arrangement, John has insisted that the goal was not to force me out of the company but to give me some security and incentive to help grow the business.” (R. p. 1674). Wilson’s own word “incentive” is the polar opposite of oppression and indicative that this was not a “trapped investment,” but merely an ownership interest that required work to grow it and keep its value. That is business.

In sum, none of the factors identified in *Kiriakides* and *Ballard* as indicators of shareholder oppression are present in this case. The undisputed facts and circumstances show Wilson was not and could not have been “oppressed.” Wilson did not find himself rendered powerless and vulnerable to the calculated actions of the other members. He was not “trapped in his investment” in CCC without the prospect of receiving a beneficial return. On the contrary, he remained and stands to this day substantially ahead of Gandis and Shirley in distributions received. The only valuable investment Wilson made into CCC was the stock of EFS customers he rolled into the business and the subsequent development of those and other customers with Gandis’ help in product development and sourcing. He took that investment when he left CCC. The *Ballard* Court recognized, “[r]elationships in business, like any other relationship, can quickly sour when they are predicated on unmet expectations, whether justified or not.” 399 S.C. at 590. This case is one in which a business relationship soured when Wilson’s unrealistic and selfish expectations of preferential treatment were not met.

***B. The Order's grounds for finding oppression fail***

The grounds listed in the Order as supporting its oppression holding are contradicted by the evidence presented at trial. The Order sets forth a laundry list of alleged “prejudicial acts” evidencing Wilson’s oppression. (R. pp. 1777-78). Wilson not getting his way in a business relationship is not a “prejudicial act” against him but a true business reality that an owner does not get their own subjective expectations met. It is a fact that Gandis and Shirley as CCC members had no obligation to do any of the things listed as oppressive acts by the lower court.<sup>15</sup> The alleged oppressive acts were nothing of the sort and all done as real world responses that responsible businesses take every day to protect a business.

**III. The Panel Erred By Adopting The Trial Court’s Holding That Ordered The Individual Members To Buyout Wilson’s Interest Because There Was Not Unconscionable Conduct**

Assuming Wilson was oppressed, the Panel further erred by adopting the Order that directed individual LLC members Gandis and Shirley to individually to purchase Wilson’s interest in CCC. The trial court fashioned this remedy pursuant to its equitable powers under S.C. Code §§ 33-44-401 and 801. (R. p. 1789). While those provisions allow a court to order a buyout of an oppressed member’s interest, the Reporter Comments to Section 801 make it clear that fraudulent or unconscionable conduct is required to order individuals buyout another member: “a buy-out might be appropriate where, for example, one or more members have (i) engaged in fraudulent or unconscionable conduct...or (iii) engaged in

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<sup>15</sup> There is an important procedural point to address regarding the facts and the courts application of the facts. The lower court refused to allow post trial briefing. This refusal amplified its misconception and misinterpretation of the evidence and grounds it relied upon. The Order itself does not cite to any supporting evidence and does not cite to any trial testimony. The Order does reveal that it was submitted by an advocate and the advocate’s view of the evidence was amplified by not allowing post trial briefing. This was an issue that the Panel overlooked in adopting the Order.

serious misconduct....”. § 33-44-801 Rep. Comm. The Order did not find Gandis’ or Shirley’s actions unconscionable or fraudulent. It simply deemed them “oppressive.” Only in denying Appellants’ Rule 59 motion did the trial court attempt to remedy this fatal error by summarily stating that “[t]he evidence revealed that Mr. Gandis and Ms. Comeau-Shirley deliberately collaborated to oppress Wilson. Their conduct was unconscionable.” (R. p. 1795). Neither order deemed their actions “fraudulent.” The trial court failed to specify what conduct it deemed unconscionable and any basis for its conclusion. Without a specific finding that Gandis and Shirley’s actions were unconscionable, ordering individual buyout was not an option.

The LLC statute does not define “unconscionable conduct” and what constitutes such under the statute appears to be an issue of first impression in South Carolina. Black’s defines “unconscionable” as “(of an act or transaction) showing no regard for conscience, affronting the sense of justice, decency, or reasonableness...shockingly unjust or unfair.” BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014). Unconscionable conduct arises in case law most often in contract disputes. In that regard, “unconscionability” is a narrow doctrine whereby a challenged contract must be one which no reasonable person would enter, and inequality so gross as to shock the conscience. *Brown v. Green Tree Services, LLC*, 585 F.Supp. 2d 770 (D.S.C. 2008). Our courts define “unconscionability” as the absence of meaningful choice for one party due to one-sided provisions with terms so oppressive that no reasonable person would make them and no fair person would accept them. *Holler v. Holler*, 364 S.C. 256 (Ct. App. 2005). Based upon these recognized definitions and iterations of unconscionable/unconscionability one’s conduct must go well beyond simple oppression and be so one-sided, unjust, shocking to the conscience and unfair that no

reasonable person would undertake such acts. The Reporter's Comment denotes a higher burden of devious activity beyond oppression necessary to order individuals buyout an oppressed member. Assuming Gandis and Shirley's actions were oppressive, they certainly were not unconscionable. The actions deemed oppressive by the Order were business decisions made and acted upon to address ordinary issues such as tax liabilities and ensuring cash flow to pay debts. They did not reach the level of offending human decency to a degree no reasonable person would undertake or tolerate them. Furthermore, South Carolina courts have shown clear hesitancy to disregard statutorily created corporate liability shields and hold individual LLC members liable for acts taken on behalf of the company. In *16 Jade St., LLC v. R. Design Const. Co., LLC*, 398 S.C. 338, (2012) the Court initially held that a LLC member was not shielded from personal liability under the LLC Act under the circumstances of that case but subsequently withdrew and entered a superseding opinion walking back the opening to individual liability. *16 Jade St., LLC v. R. Design Const. Co., LLC*, 405 S.C. 384 (2013). Similarly, the judiciary has long respected and looked to the business judgment rule to evaluate whether actions by those in power within a business are actionable because acts that appear nefarious or unlawful may very well be justified reasonable business decisions under the circumstances. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Dockside Ass'n, Inc. v. Deytens*, 291 S.C. 214, 217, (Ct. App. 1987).

Holding individual LLC members liable to another member in the absence of fraudulent or unconscionable behavior sets a dangerous precedent, creates bad policy and an unfriendly business climate. The Reporter Comments to 801 reflect the legislature's

recognition of this simple concept and provides the rare exception (individual liability) to the majority rule (corporate liability) that requires reprehensible and shocking acts. The individual Appellants' allegedly oppressive acts are not ones calling for imposition of this rare and exceptional remedy. Therefore, the panel overlooked and misapprehended the law in adopting this finding and holding of the trial court Order that individual members of the LLC (and not the LLC) were to buy-out Wilson's interest.

***A. Trial court erred in its valuation of Wilson's interest in CCC***

The Order adopted by the Panel also erred in valuing Wilson's interest by relying on Stoddard's adjusted December 30, 2011 valuation thereby greatly inflating the value of Wilson's interest while failing to consider his actions that greatly devalued CCC. (R. p. 1789).<sup>16</sup> Should the Court deem buyout appropriate the valuation of Wilson's interest should be based upon the court appointed accounting expert's 2013 valuation. To do otherwise allows Wilson to "double dip" by being paid a certain value for his interest and allowing him to continue to capitalize on the business that he took from CCC.

***B. Gandis and Shirley should only have to pay their proportional share***

The Order adopted by the Panel is profoundly unfair to the minority member Shirley. It relied upon Stoddard's schedule derived from Bradshaw's work (R. pp. 1281-84), for the computation of Wilson's equity value. (R. pp. 1782-83, R. p. 1789). The Order erred by not relying upon that same schedule prepared by Bradshaw in identifying what portion of that figure was attributable to Gandis and Shirley based on their respective relative capital account in the company. The evidence showed that Shirley owned 10% of CCC, had no voting rights and did not participate in daily business operations. At worst,

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<sup>16</sup> There was no consideration of the taking of its customers, theft of its confidential information, and the costs imposed by the use of scorched earth litigation tactics to the financial detriment of the business.

she should only have to pay her proportional share based on her relative capital account. The Order erred by imposing an inequitable remedy on her as a 10% non-voting owner.

**IV. The Panel Overlooked and Misapprehended Facts and Law By Adopting An Order that Allows One With Unclean Hands to Obtain Equity.**

“He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.” *Straight v. Goss*, 383 S.C. 180, 207 (Ct. App. 2009)(Court found the minority shareholder’s “own inequitable conduct came directly to bear on the transactions of which [he] now complains.”). “The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Id.* 383 S.C. at 206. The trial court afforded Wilson equitable relief to which he was precluded from receiving due to his “unclean hands.”

***A. Wilson’s Numerous Inequitable Acts Were Well Established at Trial***

***1. Usurping Corporate Opportunities: Illegal Side Dealing***

Wilson was to roll all of his EFS customers into CCC in exchange for a monthly draw. Gandis provided the draw however Wilson did not roll all EFS customers into CCC but instead conducted a steady stream of side deals which he attempted to conceal from the other members.<sup>17</sup> Wilson argued below that he and Gandis agreed to exclude three import accounts from coming into CCC. Even if this were true, which Appellants deny, there was undisputed evidence presented at trial that Wilson was doing illegal side deals including one which he attempted to excuse by claiming “it’s Christmas.”

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<sup>17</sup> Discovery showed that Wilson transacted over \$1.7 million in illegal side deals while being paid with Gandis’ personal money. (R. pp. 1318-27). Gandis was unaware his partner was conducting side deals for his own gain which could and should have come through CCC.

## ***2. Erasing Computers and Blackberry***

Wilson destroyed evidence both before and during the litigation. (R. p. 1312; R. pp. 1314-17). Wilson's pre-litigation evidence destruction is particularly troubling because he received an evidence preservation letter the day after taking CCC's computers and Blackberry. (R. pp. 1706-08). His destruction of evidence prevented Appellants from conducting complete discovery on their fiduciary duty claims, and hindered others from defending themselves.

## ***3. Theft of CCC Confidential Information and Trade Secrets***

The evidence presented at trial showed Wilson shared CCC trade secret and confidential information with competitors when he was attempting to get a new job under the false pretense of selling the business. (*See* R. p. 1788)(“Evidence at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing the trade secrets claim.”).

## ***4. Litigation Tactics***

Wilson's original and amended pleadings requested the court order dissolution. Gandis and Shirley thus assumed that CCC would be dissolved and acted accordingly. In a December 6, 2012 hearing scheduled for the dissolution relief he requested, Wilson argued against dissolution by telling his counsel (who relayed the message to the court) that a legitimate offer had been made to purchase Appellants' equity. (R. pp. 1288-1309; R. p. 257, ln. 11 – p. 259, ln. 25). The court was told “we've made an offer to purchase this business for almost half a million dollars, their interest. That hasn't been – they haven't accepted or rejected that yet. But we think this business has value.” (R. p. 1294). The court did not order dissolution and the purchase of Gandis and Shirley's interest never came to

fruition. Wilson then came to trial demanding buyout of his interest in CCC. Not only did the trial court order the buyout, it erroneously valued Wilson's interest at a point before his own actions greatly devalued the company. The Order simply turns a blind eye to Wilson's numerous egregious and consistent inequitable actions. In short, Wilson undertook a campaign of deliberate and undeniably inequitable actions for his personal gain and to the detriment of CCC and his fellow members. He exercised control over the sales and the future of the business. Because of his own personal financial situation, he used Gandis for funding, acted as an owner when business was good, and when Company sales under his direction plummeted and taxes had to be paid, he did not want to suffer the pain of ownership and he sought to be paid as an employee-with a mantle of ownership. At all times, he placed his interest above those of the collective good of the Company. It is antithetical to the concept of equity that someone who acted in this manner can be rewarded by the court's award of equitable relief. The trial court disregarded Wilson's known and established history of inequitable conduct and wrongfully awarded him equitable relief in the form of an ordered buyout contrary to the established principle of "unclean hands." The Panel's adoption of the Order overlooked these legal and factual circumstances.

### **CONCLUSION**

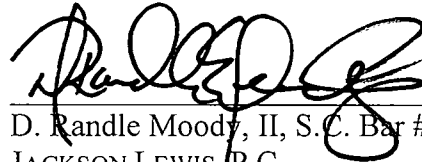
This Court should grant the Petition of Gandis and Shirley because the Panel overlooked or misapprehended several matters of fact and law when it:

1. Applied an incorrect legal standard and found that Wilson did not breach his fiduciary duties he owed to Gandis and Shirley.
2. Improperly concluded that shareholder oppression occurred.

3. Improperly concluded that individual members (including a non-voting member) of the LLC and not the LLC had to buyout Wilson's interest.
4. Improperly awarded one with unclean hands an equitable remedy.

As a result, this Court should grant rehearing in this matter.

Respectfully Submitted,



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*Attorney for the Appellants*

*Gandis and Shirley*

February 21, 2018  
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable D. Garrison Hill  
Circuit Court Judge

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App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

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FEB 22 2018  
SC Court of Appeals

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF  
CAROLINA CUSTOM CONVERTING, LLC, ..... Plaintiff,

v.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND  
CAROLINA CUSTOM CONVERTING, LLC, ..... Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, ..... Third-Party Plaintiffs,

v.

CAROLINA CUSTOM CONVERTING, LLC,  
..... Third-Party Defendant and Counterclaim Plaintiff,

v.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND  
FRESH WATER SYSTEMS, INC.,

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

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM  
CONVERTING, LLC, ..... Appellants.

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**PROOF OF SERVICE**

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I certify that I have served a **Petition for Rehearing** on all Counsel of Record by

U.S. Mail on February 21, 2018, addressed as follows:

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February 21, 2018

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FEB 22 2018

SC Court of Appeals

**VIA FEDERAL EXPRESS**

Ms. V. Claire Allen  
Deputy Clerk  
The South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201  
Tel: 803-734-1839

Re: David Wilson v. John Gandis  
Appellate Case No. 2015-000476

Dear Ms. Allen:

Enclosed please find an original and six copies of a Petition for Rehearing and a \$25 check covering the filing fee. Please return a stamped copy of this petition to me, using the enclosed self-addressed, stamped envelope. Thank you for your assistance.

Very truly yours,

JACKSON LEWIS P.C.

*D. Randle Moody*  
D. Randle Moody, Jr.

DRM/msw  
Enclosures

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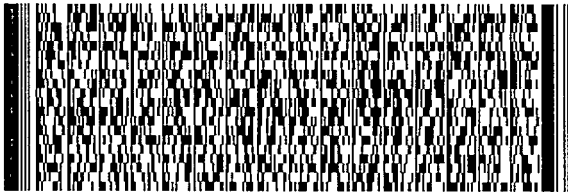
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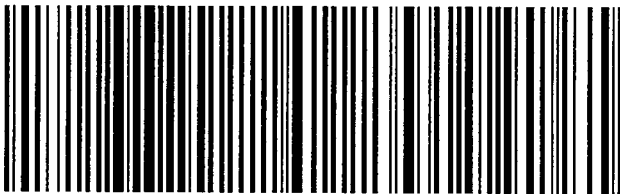
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