

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

D. Garrison Hill, Circuit Court Judge

Opinion No. 2018-UP-078 (S.C. Ct. App. Filed Feb. 7, 2018)

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

v.

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

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

v.

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

v.

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

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

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM
CONVERTING, LLC, are the..... Petitioners.

APPENDIX

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INDEX TO APPENDIX

Record on Appeal

Final Briefs Filed in Court of Appeals

Court of Appeals Opinion

Petition for Rehearing

Order Denying Petition for Rehearing

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and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM
CONVERTING, LLC, are the..... Petitioners.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of Certiorari this 3rd day of July
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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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JUN 22 2016

**APPEAL FROM GREENVILLE COUNTY
Circuit Court**

SC Court of Appeals

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

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.

David Wilson, Steve Norvell, NeoLogic Distribution, Inc. and Fresh Water Systems, Inc.,

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

and

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

**FINAL BRIEF OF APPELLANTS JOHN GANDIS AND
ANDREA COMEAU-SHIRLEY**

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TABLE OF CONTENTS

Table of Authorities.....	iii
I. Statement of the Issues on Appeal.....	1
II. Statement of the Case.....	1
III. Statement of the Facts.....	3
IV. Legal Arguments and Authorities.....	17
A. The trial court erred in applying an incorrect legal standard and finding that Wilson did not breach his fiduciary duties to Gandis and Shirley.....	19
1. Standard of Review.....	19
2. Appellants' breach of fiduciary duty claims were not time barred.....	24
3. Wilson violated his fiduciary duties to CCC and its members by competing with the Company after January 2012	26
B. No Shareholder Oppression Occurred in this Case.....	28
1. Standard of Review.....	28
2. The trial court erred in finding Gandis and Shirley "froze-out" and oppressed Wilson	28
a. Evidence and circumstances of the case do not support a finding of oppression.....	35
i. Wilson controlled his destiny and CCC and therefore could not have been oppressed	36
ii. Wilson took all the good out of CCC.....	38
iii. Wilson was always ahead of other members in cash distributions.....	40
iv. Gandis and Wilson met to discuss potential business the day of his resignation.....	41
b. The Order's grounds for finding oppression fail.....	43

C.	The trial court erred in ordering the individual members to buyout Wilson's interest in absence of unconscionable conduct.....	43
1.	Trial court erred in its valuation of Wilson's interest in CCC	46
2.	Gandis and Shirley should only have to pay their proportional share	46
D.	Wilson Wrongly Obtained Equity Despite his Unclean Hands	47
1.	Wilson's numerous inequitable acts were well established at trial....	47
a.	Usurping Corporate Opportunities: Illegal Side Dealing	47
b.	Erasing Computers and Blackberry.....	48
c.	Theft of CCC Confidential Information and Trade Secrets.....	48
d.	Litigation Tactics.....	48
V.	Conclusion	49

TABLE OF AUTHORITIES

Cases

<i>16 Jade St., LLC v. R. Design Const. Co., LLC</i> , 398 S.C. 338, 728 S.E.2d 448 (2012).....	45
<i>16 Jade St., LLC v. R. Design Const. Co., LLC</i> , 405 S.C. 384, 747 S.E.2d 770 (2013).....	45
<i>Anthony v. Padmar, Inc.</i> 320 S.C. 436, 448-49 (Ct. App.1995).....	20
<i>Ballard v. Roberson</i> , 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012).....	28, 31-32, 33-34, 35, 42
<i>Benton v. Roger C. Peace Hosp.</i> , 313 S.C. 520, 443 S.E.2d 537 (1994).....	24
<i>Brown v. Green Tree Services, LLC</i> , 585 F.Supp. 2d 770 (D.S.C. 2008).....	44
<i>Dockside Ass'n, Inc. v. Deytens</i> , 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987).....	45
<i>Doe v. Bishop of Charleston</i> , 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014).....	25
<i>Ellie v. Miccichi</i> , 358 S.C. 78, 100, 594 S.E.2d 485, 497 (Ct. App. 2004).....	21
<i>Ellis v. Davidson</i> , 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004).....	20
<i>Few v. Few</i> , 239 S.C. 321, 122 S.E.2d 829 (1961).....	20
<i>Holler v. Holler</i> , 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005).....	44
<i>Jordan v. Holt</i> , 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005).....	28
<i>Kiriakides v. Atlas Food Systems & Services, Inc.</i> , 343 S.C. 587, 541 S.E.2d 257 (2001).....	30, 31-35, 42, 43
<i>Linda Mc Co. v. Shore</i> , 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010)	19
<i>Maher v. Tietex Corp.</i> , 500 S.E.2d 204 (S.C. Ct. App. 1998).....	24
<i>Mason v. Mason</i> , 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015).....	34-35
<i>Moore v. Moore</i> , 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004).....	20, 21
<i>Sloan v. Greenville County</i> , 380 S.C. 528, 534, 670 S.E.2d 663, 666-667 (Ct. App. 2009).....	18

<i>Straight v. Goss</i> , 383 S.C. 180, 207, 678 S.E.2d 443, 457-48 (Ct. App. 2009).....	47
<i>Tollison v. B&J Machinery Co., Inc.</i> , 812 F. Supp. 618, 619-20 (D.S.C. 1993).....	24-25
<i>Verenes v. Alvamos</i> , 387 S.C.11, 690 S.E. 771 (2010).....	19
<i>Wheeler v. Estate of Green</i> , 381 S.C. 548, 673 S.E.2d 836, 839-40 (Ct.App.2009)	18
<i>Wright v. Craft</i> , 362 S.C. 1, 17, 640 S.E.2d. 486, 495 (Ct.App.2006).....	19

Statutes and Regulations

S.C. Code Ann. § 33-44-409	22-23, 26
S.C. Code Ann. § 15-3-530	24-25
South Carolina Rule of Civil Procedure 15.....	26
S.C. Code Ann. § 15-3-410	30
S.C. Code Ann. § 15-3-801	30-31,44
S.C. Code Ann. § 33-44-403	40-41
S.C. Code Ann. § 33-44-406	41
S.C. Code Ann. § 33-44-401	43

Other Authorities

BLACK’S LAW DICTIONARY (10 th ed. 2014).....	44
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I. STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard for Fiduciary Duty Among Partners and LLC Members of Full and Honest Disclosure of Side Deals and Competitive Activity That Should Have Been Business of the Company?
2. Whether the Circuit Court Erred in Disregarding Fundamental Business Operations and Principles and Instead Focused on The Personal Financial Situation of Wilson to Find that Wilson Was an Oppressed Shareholder?
3. Whether the Circuit Court Erred by Failing to Dissolve the Company, Failed to Order the Company to Purchase the Shares, and Ordered Individual Members, One of Which Was a Non-Voting Member, to Purchase the Shares of Wilson at a Valuation Date Prior to Wilson Removing Substantial Value from the Company?
4. Whether the Circuit Court Erred in Fashioning Equitable Relief for Wilson When Wilson Had Unclean Hands?

II. STATEMENT OF THE CASE

This case spawned from the establishment, management and eventual unraveling of Carolina Custom Converting, LLC (CCC), a company engaged in the plastic film business owned by three members – Defendants/Appellants John Gandis (45%); and Andrea Comeau-Shirley (Shirley) (10%) and Plaintiff/Respondent David Wilson (45%). Wilson filed an action alleging (1) shareholder oppression by Gandis and Shirley; (2) Gandis breached his fiduciary duty to CCC and Wilson; (3) Gandis and Shirley converted company funds and property; (4) seeking dissolution of CCC, or alternatively, disassociation. Gandis and Shirley answered and counterclaimed for Wilson's breach of

his fiduciary duties to CCC and its members. A bench trial was held September 30 - October 3, 2014 before the Honorable D. Garrison Hill.

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. Appellants filed a Rule 59 Motion on January 20, 2015 asking the trial court reconsider the date for valuation of Wilson’s interest or give weight to the valuation when Gandis and Shirley agreed to sell their interest to Wilson during December 2011 and January 2012; its ruling requiring Gandis and Shirley personally buy-out Wilson’s membership interest; its conclusion that Wilson fully disclosed the existence and substance of disputed accounts and its application of the law respecting the South Carolina Trade Secrets Act. (R. pp. 1814-1924). The circuit court denied that motion by Order dated January 28, 2015. (R. pp. 1794-1796). This appeal followed.

III. STATEMENT OF THE FACTS¹

A. The Deal

After VyTech's bankruptcy, Gandis' wife gave him the go ahead to cash in his 401(k) to support his family and pursue entrepreneurship.² (R. p. 19, ln. 22 – p. 20, ln. 1). Gandis sold his metal working assets and set out to make CCC a viable entity; living off his 401(k). Wilson, on the other hand, was supporting his family through his EFS work. Without other sources of income or available credit, Wilson requested initial income security at the outset of this new deal. He requested that if he rolled EFS into CCC, that he would initially receive a monthly income to replace his EFS income. (R. p. 55, ln. 6-10). This issue presented an obstacle to creating the combined company.

The men discussed their draft operating agreement and had several questions to explore. Gandis arranged for them to meet with Shirley (an accountant and trusted business advisor to his father) in early 2008. During this lengthy meeting the men discussed their plans and for expansion, management, and operating in the film industry. From late May to early July 2008, Gandis and Wilson exchanged e-mail correspondence dealing with this issue and others. Wilson believed that he could roll EFS into CCC, and still achieve income security by holding back three supplier relationships. (R. p. 45, ln. 3-17). This was his first pitch to Gandis. Gandis consulted with Shirley regarding this initial proposal. She did not like the idea because it did not sound like a partnership and Wilson could not adequately explain how this exclusive supplier relationship would not eventually lead to

¹ Appellants reference and incorporate CCC's Statement of Facts into their brief and provide the additional facts within this section necessary for discussion of the legal issues pertinent to Gandis and Shirley.

² Gandis also pulled money out of a home equity line to provide CCC with initial working cash. (Def. 7).

him cherry-picking the most profitable orders by simply "selecting" these suppliers rather than the suppliers that CCC was using. More importantly as these were purportedly low-cost suppliers, this exclusivity would damage CCC's potential. Accordingly, Gandis informed Wilson his initial proposal would not work. Ultimately Wilson's idea to withhold three accounts was dropped, and in return, Gandis agreed that he would use his lines of credit to make sure that Wilson received monthly income in the startup phase. To that end, beginning in July of 2008, and in exchange for Wilson rolling all of his customers into CCC, Wilson started receiving \$8,000.00 per month from the company. (R. p. 78, ln. 8-14). CCC was up and running and Wilson was now to dedicate all his efforts to the company. The following are the contemporaneous e-mail discussions that describe these conversations and how this all played itself out.

On May 30, 2008, Gandis sent an e-mail to Shirley, who at the time had no ownership interest, regarding her attendance at a meeting between Gandis and Wilson the previous week. (R. pp. 980-89). It was later agreed that she would be compensated by receiving a "fixed equity interest" making her a member of CCC with a 10% interest. Gandis writes that, "Dave and I sat down on Tuesday – and had some great discussions on moving our business forward. Dave is in favor [*sic*] moving his accounts over into the CCC account column and collecting a salary for a period of time until we can really get things going." (R. p. 982). He continues, "[w]e also discussed putting Dave on the payroll starting in July. I think we can handle the \$8000 that he pays himself. . . ." (R. p. 982). Later in that same e-mail, Gandis writes that there are "three accounts that Dave imports that do not currently go through CCC – we both think it best that these three accounts stay away from CCC. Dave agrees that all future orders (even if they are imports) should be

run through CCC.” (R. p. 982). Describing to Shirley what he was told by Wilson, Gandis writes that, “I do not know how much of his income is derived from these three accounts I mentioned – but again ... this is something you can help us with. Maybe CCC should not pay the salary portion that the three accounts cover.” (R. p. 982).

On June 2, 2008, Shirley responded attaching a worksheet to use in creating a partnership agreement advising Gandis to fill this form out based upon the conversation he and Wilson had in late May 2008: “I’d like to suggest that you complete the questionnaire alone (Although you are documenting the discussion you had with Dave). . . . Once you fill out the questionnaire (leaving open any items that you have not focused on – we’ll get them in the next round). Then send it to me and we can discuss the points together. I can help you think through the best case and worse case planning. . . .” (R. p. 981). Gandis filled out the partnership worksheet based upon his discussions with Wilson.

On June 16, 2008, as promised, Shirley provided her thoughts on the partnership worksheet so that she and Gandis could discuss before circling back up with Wilson. (R. pp. 990-99). The back and forth was set forth on Defendants’ Exhibit 7.³ (R. pp. 1677-83). Page five of the worksheet, paragraph e, addressed Wilson’s desire to retain three accounts separate from CCC. Gandis notes it “[n]eeds to be ...minus three.” (R. p. 1681). Shirley responds, “Everything in our industry...goes through LLC – first right of refusal on every single contract opportunity (new or old customers), and if we refuse, then he can pursue independently through [other] slitting business partners.” (R. p. 1681). In the same paragraph, Gandis sets forth his and Wilson’s late May 2008 discussion: “There are three accounts that Dave wants to retain something over ... maybe easier to discuss this over the

³ The blue ink represents Gandis’ recollection of the late May 2008 discussion with Wilson, and the green ink represents Shirley’s responsive advice.

phone.” (R. p. 1681). Shirley did not respond to that specific sub-paragraph, but it is apparent her response to paragraph e. covered it. Shirley’s June 16, 2008 e-mail also stated that she “[n]eed[ed] a list of every customer, with the old commission in whatever rate he used to charge and a year by year volume/sales figure.” (R. p. 990). She asked for this information in an effort to analyze the validity and feasibility of Wilson’s request for \$8k.

On June 24, 2008 Wilson responded to that request in an e-mail to Gandis with an attachment containing a listing of EFS customers (including the three he wanted to retain) and their purchasing volumes, but without an indication of either their contribution margin or his historical commissions as requested. (R. p. 1752-56). That same day, Gandis responded noting: “Good stuff. . . .What she said she wanted to get was a projection of what the EFS book of business was worth the last couple of years” (R. p. 1001). He continued: “If I understand what she is trying to do is assign a value (like equity) to the book of business to write into the agreement so that we are shown as 50/50 partners. My part is easy – dollars invested in equipment/hard assets... your[s] is a little more tricky since it is an intangible.... I think what she is looking for is a statement from EFS for the last two years – tax returns/customers – margins, etc.” (R. p. 1001). That same day, critically, and zeroing in on the question of what he was bringing to CCC in return for the proposed \$8k per month, Wilson made his final pitch: “The real question is this – are the customers, vendors and margins I am bringing to the table worth the salary we are proposing? *If I am to focus all my efforts in the film business on CCC, I am foregoing opportunities to earn money on those opportunities outside of CCC.*” (R. p. 1000)(*emphasis added*).

On July 1, 2008, CCC provided Wilson with an \$8,000.00 check, and it continued to do so during the entirety of its start-up phase. Looking back on this arrangement, on April 13, 2009, Wilson said this about the understanding: "The payments I received last year was basically a salary which I required since I was taking my customers from EFS and putting them in to CCC reducing my ability to earn a living." (R. p. 1529). He went on, "[n]ow that the company is profitable and cash flow is better, we are both pulling out money each month which is in the form of a distribution." (R. p. 1529).

Once the start-up phase passed, the company began to make money for its owners. In fact, CCC showed a profit from 2008-10. (R. p. 586, ln. 3-5). 2010 was a banner year for CCC based upon a world-wide film shortage. CCC was able to capitalize on the shortage because it was able to purchase large amounts of inventory. (R. p. 651, ln. 11-25). With inventory on-hand, CCC was able to serve a large number of customers (including other film convertors) that it did not previously service in 2008-09. (See R. p. 653, ln. 23-p. 654, ln. 1). In 2011, however, the company's profitability ended when the market dipped precipitously. (R. p. 586, ln. 5; R. p. 1659). During its successful start-up years, CCC grew to roughly 24 employees. (R. p. 39, ln. 2-24).⁴ Although 2011 sales started out above budget, by mid-year the forecasted budget was significantly reduced. (R. p. 655, ln. 8-24). By the fall of 2011, Wilson told Comeau-Shirley that his forecast should be reduced to 10% of the projected budget. (R. p. 655, ln. 17-24).⁵

⁴ In 2011, CCC's profitability ended and it posted a substantial loss that year. (R. p. 586, ln. 3-5). Specifically, CCC posted a loss of \$456,000 in 2011. (R. p. 245, ln. 8-15). The financial health of the company led to strife regarding the internal affairs of CCC and ultimately Wilson seeking employment elsewhere.

⁵ A: At some point he tells me to drop the sales to 10% of the number he had given me before.

Q: Drop by 10%?

B. The Banner Year Causes Internal Financial Stress

The banner year of 2010 resulted in a significant tax liability for the owners. Wilson testified that he owed roughly \$200k to the federal government. (R. p. 411, ln. 14-15). Wilson did not have the funds to pay this tax liability and neither did CCC. (R. p. 665, ln. 12-16). Wilson claimed that the tax issue was significant and sought assistance from Gandis. As a result of Wilson's financial strain, Gandis asked Shirley to develop a tax strategy that would allow Wilson to reduce or remove his tax liability. (R. p. 665, ln. 23 – p. 666, ln. 15). Gandis' efforts to help Wilson triggered tensions among the members that would end with Wilson leaving.

C. What Went Wrong: *Too Much Inventory*

In 2010 CCC had a banner year generating over \$1 million in net income. Wilson, as VP of sales and purchasing poured the vast majority of that cash back into purchasing film stock/inventory. As VP of sales and purchasing, Wilson alone bore the responsibility for both the film purchasing activities and sales; and liquidating film stocks to generate cash. (see R. p. 1532 at para. 4). Because Wilson invested the vast majority of the net profit into film stock and failed to make sales on it that meant that CCC did not have cash to distribute to its owners in 2011. This set the stage for Wilson's frustrated economic expectations and ultimately, his decision to leave the Company. The inventory issue, and the failure to turn it over, led to an impending tax scenario that would be the owners' and

A: No. Drop them to 10%.

Q: So he's asking you to revise the budget for the last half of the year - - that last third of the year, and drop the sales projection by 90%?

A: Yes. I was flabbergasted.

not CCC's responsibility.⁶ Thus Wilson himself created this tax liability. The resulting fallout of business to 10% of the budget in mid-year 2011 was the responsibility of Wilson and his failure to anticipate market changes.

By the end of 2010, Wilson built up the company's film stocks in excess of typical levels. (R. p. 145, ln. 22 - p. 146, ln. 1; *see e.g.* R. p. 1606 but not from 2010). As this matter impacted all the owners, the group met numerous times during 2011 to discuss inventory reduction planning. (R. pp. 1588-1606; R. p. 223, ln. 7-25). The owners had agreed to put a "tight clamp down on purchases" (R. p. 1588-89) meaning that each purchase should have a home. To demonstrate the magnitude of the issue created by the excess inventory levels, the company prepared various reports detailing film which has been purchased in prior year(s) which had yet to be converted to cash. (R. pp. 1590-1605). Stated simply, if these film purchases had been avoided through more careful planning by Wilson, that cash would have been available in the company for distributions. In fact, Wilson admits to this failure in execution in his discussions with the prospective buyers where he states "We need to address the purchasing/material planning function...When we had 30 customers and \$3,000,000 in sales, I could effectively do both sales and purchasing. Now that we have 100 customers, new products, and \$5,000,000 plus in sales, I have lost effectiveness." (R. p. 1662). Unfortunately, Wilson failed to execute the agreed-upon plan; this meant that CCC did not have sufficient cash for a tax distribution. (R. pp. 1763-

⁶ A LLC is taxed as a pass through entity, which means that its owners pay the income taxes on profits rather than the company. This is commonly referred to in the accounting world as "phantom income." For pass-through entities, phantom income is often synonymous with undistributed income. Phantom income is an accounting term given to taxable income reported to the Internal Revenue Service but not actually pocketed by the owner. It is called "phantom" because it does not generate cash flow that year, it only exists on paper, but the IRS expects tax revenue on business assets or investments. An example illustrates the point. On paper an LLC may have \$80k in distributable profit in a given year, but if it uses \$40k to purchase inventory the owner is still taxed on the full \$80k. The IRS expects the owner to pay taxes on \$80k.

69). This inventory issue and the resulting tax liability caused all members to experience significant phantom taxable income because their cash was tied up in inventory. Wilson already received preferred monthly cash distributions that caused CCC to be late in making payments to vendors. (R. p. 152, ln. 10-22). Wilson was already over \$100,000.00 ahead of Gandis in cash distributions, and Gandis had to borrow, in part from a home equity line of credit to pay his tax bill. (R. p. 1328; R. pp. 1003-05; R. p. 107, ln. 16-21; R. p. 256, ln. 6-14).

D. Wilson's Taxes & Draws

During 2011, and almost two and one-half years after steadily injecting capital into the company for start-up costs and Wilson's monthly draws, Gandis exercised his right to end steady capital infusions into CCC. (R. p. 101, ln. 7-19). Wilson claimed that he was not financially prepared to live off of distributions alone. He asked for the members to allow him to begin receiving company loans that could be off-set against future distributions, and Gandis agreed. (R. pp. 255-56). Unfortunately, CCC was already facing cash flow problems as the market turned sour. Gandis grew increasingly uncomfortable with the fact that Wilson had not remitted his tax distributions to the government and worried that this could negatively impact CCC.

In the spring of 2011, knowing what his own tax bill looked like, Gandis became concerned that Wilson may also be in a bind. (R. p. 410, ln. 13-18). Knowing that Shirley had significant experience when it came to reducing tax liabilities, he looked to her for help. (R. p. 228, ln. 18-23). All three members decided that they would meet to discuss the company's finances and their economic expectations. This was set to occur in late

March to early April 2011. As it turned out, Gandis could not make the meeting, but Wilson and Shirley went ahead without him.

In the time leading up to the members' meeting, Gandis and Shirley discussed Wilson's economic expectations, and whether he wouldn't be happier and financially safer as an employee. In one e-mail, Shirley notes the following:

He keeps wishing that cash would fall from the sky . . . but we have to BUILD the business to support additional cash. . . . I plan to explain to him that the role of an owner (even in an LLC) involves financing his business, mostly through deferred compensation. That an owner's eye is on the upside.

. . . .
I would then propose to him that his actions (e.g. loans from company) seems to indicate that he would really rather be in a structure where he receives good monthly salary and he earns a regular bonus. This alternative structure gives him (a) more cash now and (b) preserves some of his participation [in] the financial results. It also means that he would convert to a situation where his tax obligation matches his cash flow....

. . . .
If we are going to talk about what it means to be an owner, I think it is important that he not feel TRAPPED *by his LLC* and realize that . . . at this point in the game . . . we can talk restructure of his participation in a way that should be a win-win.

(R. pp. 1035-36)(*emphasis added*).

By the fall of 2011, with Wilson's tax bill not going anywhere, Gandis again reached out to Shirley for tax strategy help. (R. p. 225, ln. 18-23). Shirley offered up the *idea* (simplified here) that if Wilson were to convert from a member to an employee, and allocate various losses to him, the latter loss allocations could flow back into past tax years and eliminate the tax liability. (R. pp. 1047-49; R. p. 143, ln. 1-12; R. p. 228, ln. 24 – p. 229, ln. 3; R. p. 666, ln. 7-15; R. p. 669, ln. 9-17). After receiving the broad brushstrokes for the idea, Gandis asked Shirley whether it was in a form that he could forward to Wilson.

She responded he could and Gandis forwarded the e-mail in September 2011. (R. pp. 1047-49).

After Gandis forwarded the tax reduction proposal, the relationship between Wilson and Gandis quickly soured. It is important to note that in all of this correspondence and planning, the idea was never to get Wilson out of the company, but to get him in a position that did not cause him the financial stress of the downturn. (R. pp. 1607-08; R. p. 228, ln. 24 – p. 229, ln. 3; R. p. 666, ln. 7-15; R. p. 669, ln. 9-17). As opposed to proper tax and business planning, Wilson viewed these good faith efforts as an alleged coup to get him out of CCC; a perception that led to this lawsuit and one Wilson successfully sold to the circuit court.

A few days after Gandis sent the tax reduction proposal to Wilson, on October 17, 2011, he responded in a negative fashion, claiming it was flawed and unlikely to help. (R. p. 1609). In addition, Wilson made the following three suggestions/threats. First, he suggested that the Company start making regular accruals and distributions to cover tax liabilities. (R. p. 1609). This was a curious request coming from Wilson, who alone, was responsible for the excess inventories that precluded CCC from having tax distributions. (R. pp. 1616-21).⁷ Second, he suggested that he would resign from the company, retain his equity interest, and go work for another film company stating that “he did not have any duty to the Company, but would maintain all of the ‘rights and privileges of a member.’” (R. p. 1609). Finally, Wilson suggested that he would simply resign and dissociate; forcing CCC to purchase his interest, and if the other members were “unable to or unwilling to

⁷ “As you know, we started saving money this spring so we could make a tax distribution this fall, but our money was spent on film.” (R. pp. 1616-21).

buy” him out, he would force a “liquidation.” (R. p. 1609). Wilson threw down a gauntlet as he recognized the power that he held over Gandis and Shirley – the control over sales.

Once these negotiations began Wilson was using his mistaken belief that he had the ability to unilaterally force a dissolution/liquidation as a leverage point. (R. pp. 1609-22; R. p. 39, ln. 20 – p. 40, ln. 1; R. p. 243, ln. 25 – p. 244, ln. 6). He continued to insist CCC pay his tax bill. (R. p. 1609; R. p. 229, ln. 21 – p. 230, ln. 4). He was also telling Gandis that if he did not bend, he would shut down the company. (R. p. 39, ln. 20 – p. 40, ln. 1; R. p. 243, ln. 25 – p. 244, ln. 6). Wilson continuously made these threats through the 2011 Christmas and New Year Holidays. (*Id.*). At that point, CCC had 23 employees, all of whom Wilson said he would put out of work. (R. p. 39, ln. 20 – p. 40, ln. 1).

E. Buy-Sell

After Wilson fired off his threatening e-mail, Gandis circled back to come up with a better solution. Wilson continued to ask for loans from the company—which had increased to \$12,000.00 per month. (R. pp. 1616-20). Despite having no obligation to provide these loans Gandis reluctantly signed off on the requests because Wilson was an integral member of the team. Nevertheless, as Gandis explained in a letter to Wilson, “[r]ecently we have had to pay several of our vendors late in order to set aside funds to loan to you. It is not in the best interest of our company to pay our vendors late, particularly when we have the funds available to pay them. The current payment of \$12,000 a month is too great a burden to pay monthly while assuring our legal obligations be paid in the order as they are outlined above.” (R. p. 1616). Gandis continued noting that “it is not my desire to create an undue burden for you and your family either. I have three options for you to consider.” (R. p. 1616). Option One: Remain as a member. This option meant

simply that Wilson would maintain his current equity position, but he was put on notice that he would no longer receive preferential treatment. (R. pp. 1616-17). Option Two: Buy-out and become a salaried officer with a bonus plan. (R. pp. 1617-18). Option Three: Shirley's membership modification to eliminate the tax bill, and become a salaried officer with a bonus plan. (R. p. 1618). Each option kept Wilson in the Company. Importantly, Gandis made known to Wilson that he was fine with anyone of them. (R. p. 1619). Wilson refused to engage this discussion and continued to look to the company to fund his tax liability.

Once the discussion of a buyout began, the whole dynamic of the members' relationship continued to change. During the buy-out negotiations, Wilson believed that Gandis and Shirley were trying to leverage him down to below fair value by altering the numbers. (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). Accordingly, Wilson stated that he would buy Gandis and Shirley out using *their valuation numbers* for his equity. (R. p. 670, ln. 23 – p. 671, ln. 2). Wilson's offer was accepted. (R. p. 1627-28; R. p. 1671) ("My first preference is that he buys us out at the price we offered him – there is no deadline on that ability"; *see also* R. p. 257, ln. 8-10). But, Wilson did not perform and did not buy Gandis and Shirley out at the price they offered. The buy-sell discussion lasted through the end of 2011 and into the beginning of 2012.

When Wilson told Gandis and Shirley that he was seeking a purchaser for CCC; they understood that this meant he was discussing a buy-out with his brother-in-law's family- Steve Norvell. (R. p. 1675). They later learned that Wilson was also in discussions with other parties. At that point, on January 6, 2012, Shirley sent an e-mail to Wilson with

the general concern of whether he was protecting CCC's confidential information during these discussions. (R. p. 1673). Wilson responded that he "certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor. . . . [And that his] desire is to continue discussions with the interested parties about buying out the company as a whole." (R. p. 1674).

One of these parties was a company out of Tennessee called FilmTech. Wilson however was not trying to sell CCC to FilmTech. On January 13, 2012, he received an e-mail from FilmTech discussing "a possible sales agency agreement." (R. pp. 1688-91).

Three days later Wilson sent an e-mail to FilmTech discussing their "agreement":

I look forward to the opportunity to join your organization. . . . Here are the points of discussion for our agreement....Full time employee with draw or salary of \$8k per for month for a period of time until my commission reaches a level that supports my needs. *My 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)(*emphasis added*); See also R. pp. 1695-1705). Wilson had made up his mind—he was operating in his best interest. He would not put CCC and standard business practices of paying vendors, employees, and taxes before he paid himself. The Company did not mean anything to Wilson and he was going to leave and take its customers and prospective business with him.

F. Wilson Announces his Intention to Leave the Company

When Wilson and Gandis did not reach a deal, Gandis assumed Wilson would continue as member. Then, on January 17, 2012, Shirley received a phone call from John Zamer, a partner in Jones Day's Atlanta office. (R. p. 163, ln. 11-14; R. p. 675, ln. 10-18).

During that phone call, Zamer told Shirley that he had just spoken with Wilson's lawyer, and that Wilson was going to leave CCC. (R. p. 675, ln. 10-18).

Gandis realized that he had a 23 employee company to protect. One of his initial reactions was to protect his Company's confidential information. (R. p. 163, ln. 18 – p. 165, ln. 8). Accordingly, when he showed up at the Company's Greenville office to accept Wilson's resignation, he brought along a police officer to make sure he would be able to retrieve the Company's property. (*Id.*). The plan did not work, however, because Wilson took the Company's computers, blackberry, and files with him. (R. p. 252, ln. 8-15).

G. Wilson's Side Deals

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. (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 \$8k a month as agreed in exchange for rolling all of those customers into CCC. (R. pp. 1318-27).⁸ The evidence at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings.⁹ Wilson never utilized his CCC email address to conduct 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:

⁸ Gandis testified that Def. 126 reflects sales Wilson ran through EFS without his knowledge beginning in July 2008 which should have gone to CCC. (R. p. 220, ln. 6-14).

⁹ Gandis testified that he only learned of these side deals "by accident." (R. p. 215, ln. 6-14).

A: I suspected Dave had done a side deal. And, you know, this was well after he had assured me that everything had rolled into CCC. We were coming off of a bumper year. We made a lot of money in 2010. And I was pretty disappointed to find that out. So I invited him to meet me at the Starbucks close to where we live.

And I asked him, I said, Did [*sic*] you do this deal outside of CCC? And he said, Hey, it's Christmas, you know.

And I was incensed. And, you know...he assured me, yeah, but I haven't done it much. And, you know, it's Christmas and I'm all in. That's what he told me.

(R. p. 235, ln. 5-25 – p. 236, ln. 1-10; *see also* R. p. 660, ln. 3-25 – p. 661, ln. 1-10; R. p. 1528).

H. Trial Court's Ruling

The circuit court found that Gandis and Shirley “froze-out”/oppressed Wilson through a litany of supposed oppressive and unfairly prejudicial conduct designed to squeeze Wilson out of CCC. (R. pp. 1777-78.). The lower court also held that Appellants failed to prove their claim for breach of fiduciary duty against Wilson based on his side dealings because “[t]he evidence did not establish that Wilson had agreed to transfer the three import accounts...to CCC in 2008.” (R. p. 1783).

IV. LEGAL ARGUMENTS AND AUTHORITIES

This is a case about business and the relationships of owners. It is also one about an individual who put his financial interests before those of the company and the fallout leading to complicated business litigation—with a deadly purpose. Business is simple math. Cash flow must exceed expenses or a business will cease to exist, much less provide payroll, pay vendors, and if there is any left—pay the owners. It is axiomatic that state and federal law requires employees be paid first, contractual and business relations require the payment of vendors for the goods and services necessary for a business, taxes must be

remitted to the government authorities, and the remainder may be distributed by the owners. In this case, there was one owner, Wilson, that sought to be paid first—before anyone—notwithstanding legal and business priorities of payment to anyone else. Wilson’s me-first mindset permeates this case, required multiple proposed plans to attempt to placate Wilson, and ultimately manifests itself through Wilson’s violations of his duties to his other owners who are striving to protect the interests of the company. Disregarding the other owners’ effective management and attempts to accommodate Wilson’s me-first demands with the priorities of the business as a whole, the trial court below ignored the business judgment rule, misapplied the standard for fiduciary duty requirements between LLC members, overreached and held that business conduct by the owners in managing a company and protecting it against an owner who was out for himself was oppression, and went so far as to hold that business activities by the owners were unconscionable to impose individual liability. If there is any ability of small business owners to conduct business and maintain appropriate business prerogatives against a demanding minority owner in this State, the lower court’s order must be reversed.

A. Standard of Review

“[A]n appellate court must look to the main purpose of the proceeding in order to determine the standard of review.” *Wheeler v. Estate of Green*, 381 S.C. 548, 554 (Ct. App. 2009). “The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action.” *Sloan v. Greenville County*, 380 S.C. 528, 534, 670 S.E.2d 663, 666–67 (Ct. App. 2009). “When legal and equitable actions are maintained in one suit, the court is presented with a divided

scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal.” *Wright v. Craft*, 372 S.C. 1, 17 (Ct. App. 2006).

A. The trial court erred in applying an incorrect legal standard and finding that Wilson did not breach his fiduciary duties to Gandis and Shirley.

1. Standard of Review

An action for breach of fiduciary duty is one at law. *Verenes v. Alvamos*, 387 S.C. 11, 690 S.E.2d 771 (2010). “In an action at law, the appellate court will correct any error of law, but it must affirm the [trial court’s] factual findings unless there is no evidence that reasonably supports those findings.” *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (internal citation omitted).

The lower court made a fundamental legal error and applied an incorrect standard of disclosure for fiduciary duty. In discussing the operation of fiduciary duty in this case, it is important to note that the business started as a simple partnership and at some point became a limited liability company with no written operating agreement. Accordingly, the standard of fiduciary duty in the partnership and limited liability context is applicable. The court found that “the parties agreed that Gandis and Wilson founded the business as equal partners[.]” (R. p. 1774). In addition, the court found that Wilson was to lead CCC’s sales efforts with Gandis managing operations. (R. p. 1774). CCC was later organized as a manager-managed LLC but no written operating agreement was ever completed. (R. p. 1774). Gandis and Wilson were 45% owners and Shirley accepted a 10% non-voting interest in exchange for providing her services. (R. p. 1774).

The Order states that Defendants, however, 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. The lower court erred by flipping the 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).¹⁰ 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 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004)(internal citations omitted).

¹⁰ 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.).

"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 this standard established by law, 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. 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.

Assuming *arguendo* that the lower court's conclusion is correct, it should read "Plaintiff proved he disclosed all material facts relevant to his agreement with Gandis to him as his partner and fellow member of CCC ... (three import accounts would be excluded from the deal... acted in good faith and did not compete with the company through some other venture)." The evidence presented at trial shows Wilson absolutely failed to abide by these fiduciary duties.

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 did not just fail to mention his side dealing, an act in and of itself sufficient for a breach of fiduciary duty finding. He took affirmative and deliberate measures to conceal his side dealings from Gandis and CCC.

2. 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 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). As noted above, 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.

3. 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).¹¹ Wilson provided this confidential information to Neologic and therefore breached his fiduciary duty to the other members of CCC.¹²

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

¹¹ "Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing its trade secrets claim."

¹² This breach of fiduciary duty would be independent of the claims possessed by CCC and addressed by CCC on brief.

fiduciary duty claim colored and tainted its oppression analysis and conclusion. This error is substantial and bleeds into the entire analysis of the case.

B. No Shareholder Oppression Occurred in this Case

1. Standard of Review

“A corporate dissolution is an action in equity.” *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). “A shareholders’ derivative action, as well as an action for stockholder oppression, is one in equity.” *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (internal quotation marks omitted). In an action in equity, the appellate court may find facts according to its own view of the preponderance of the evidence. *Ballard*, 399 S.C. at 593, 733 S.E.2d at 109.

2. The trial court erred in finding Appellants “froze-out” & oppressed Wilson

The trial court found 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). The Order's conclusion however was in 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).¹³ In establishing oppression considerations the Court recognized "that the terms

¹³ 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.

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 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 597.¹⁴ 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.¹⁵

¹⁴ 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.

¹⁵ Recently, 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

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. 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. The trial court mistakenly agreed.

a. 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 that has limits unless you are the government. One troubling aspect 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

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.

best deal for himself—not CCC. 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 lower court 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 as the lower court found. The particular grounds identified for the trial court's oppression holding aside, these undisputed facts in and of themselves require reversal of the lower court's oppression finding.

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, is it undisputed Wilson had the option to either be bought out by Gandis and Shirley or purchase their interest for the same price (valuation). As detailed above, 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).¹⁶ 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. To treat owners equally is not oppression but good business. As detailed above, 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

¹⁶ 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.

fine with any one of them.¹⁷ In short, Wilson had the option to remain with CCC 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.¹⁸ Having multiple options for business planning for future business activities is not oppression. It is effective management of a business and the expectations of its owners. Why did Wilson not exercise any of the options? The answer is clear from Wilson's own conduct. 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 welded enormous power over the company. A fundamental aspect of shareholder oppression is that those in control weld 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 welded it to his benefit and the detriment of Gandis, Shirley, and CCC.

ii. Wilson took all the good out of CCC

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

¹⁷ At trial Gandis testified that he wanted Wilson to remain with the company. (R. p. 229, ln. 5-8).

¹⁸ 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.

of customers and prospective business. A party making off with a business's assets cannot be oppressed.¹⁹

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.²⁰ 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).²¹

¹⁹ Gandis and Shirley incorporate the arguments of CCC regarding the confidential information and trade secret misappropriation.

²⁰ 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.

²¹ Trial court found Neologic/Freshwater was utilizing CCC confidential information.

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 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).²² 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)²³ to convince the lower court that he was oppressed.

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

²² R. pp. 1760-62 - discussing transaction with company named Imperial—a company that Wilson never transacted business with prior to CCC.

²³ 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.

rendered in winding up the business of the company.” S.C. Code Ann. § 33-44-403. 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 simply 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 an oft 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.²⁴ As detailed in Appellants' Motion to Reconsider, 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. (See Mot. Recon.). None of the actions listed were oppressive acts.

C. The trial court erred in ordering the individuals members to buyout Wilson's interest in absence of unconscionable conduct

Assuming Wilson was oppressed, the Order erred in ordering Gandis and Shirley individually to purchase his 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 serious misconduct....". § 33-44-801 Rep.

²⁴ 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.

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.²⁵ 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 (10th 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

²⁵ This was yet another error in the proceedings below exasperated by the denial of post-trial briefing.

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) requires reprehensible and shocking acts. The individual Appellants' allegedly oppressive acts are not ones calling for imposition of this rare and exceptional remedy. Therefore, should this Court find Wilson was oppressed it should order that CCC rather than Gandis and Shirley buy-out Wilson's interest.

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

The Order 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).²⁶ 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.

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

The Order 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, she should only have to pay

²⁶ 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.

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.

D. Wilson Wrongfully Obtained Equity Despite his Unclean Hands

“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.” The lower court flatly ignored the litany of inequitable conduct perpetrated by Wilson and erroneously in violation of the unclean hands doctrine awarded him equitable relief. Logical fallacies in the Order allowed Wilson to receive relief to which he was not entitled.

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

a. 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.²⁷ Wilson argued below that he and Gandis agreed to exclude three import

²⁷ 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.

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.”

b. 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.

c. 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.”).

d. 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. Other deeds chronicling Wilson's unclean hands have been addressed previously and are contained *passim*. 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 Order therefore should be reversed.

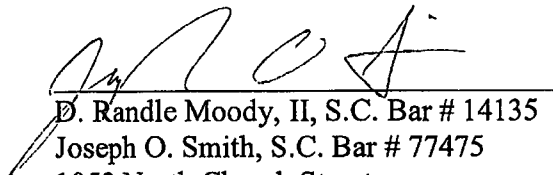
V. CONCLUSION

Wilson wanted all the upside of business ownership, none of the downside of ownership, and the security of being an employee. Reality and universally recognized

business principles require choosing one or the other. Business ownership entails greater risk for the accompanying possible greater reward. On the other hand, an employee enjoys little to no risk by receiving a salary but no possibility of reaping the potentially larger rewards accompanying ownership. Wilson uniquely received both the owner and employee upside for several years with CCC. When the business needed him to choose one or the other he took actions and maneuvered to maximize the upside and the trial court's order gave him just that. After absconding with CCC's valuable assets, namely its stock of customers and confidential information over to his new employer, the circuit court ordered Gandis and Shirley pay him for his interest in a devalued CCC company. Wilson wins threefold should the Order be upheld – (1) receipt of distributions over and above other members; (2) controlling CCC's valuable assets for use by his new employer Neologic and (3) payment for his interest in CCC at a price he only could have received had he not dismantled the company for his own benefit. Thus, for the reasons set forth above, the Circuit Court's Order of January 9, 2015 should be reversed.

Respectfully Submitted,

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June 20, 2016
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

RECEIVED

JUN 22 2016

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.

David Wilson, Steve Norvell, NeoLogic Distribution, Inc. and Fresh Water Systems, Inc.,

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

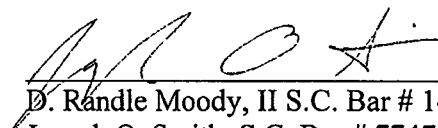
and

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellants John Gandis and Andrea Comeau-Shirley
complies with Rule 211(b), SCACR.

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June 21, 2016
Greenville, South Carolina

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Circuit Court**

D. Garrison Hill, Circuit Court Judge

RECEIVED

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

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

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

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David 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
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and

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

PROOF OF SERVICE

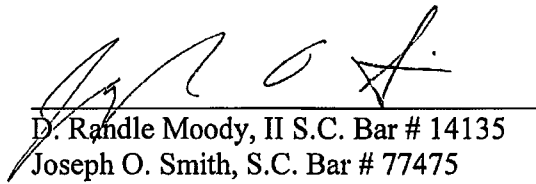
I certify that I have served the Final Brief of Appellants John Gandis and Andrea Comeau-Shirley by depositing a copy of same in the United States Mail, postage pre-paid, this 21th day of June, 2016, addressed to the attorneys of record as follows:

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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

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,

vs.

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

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

vs.

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

vs.

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
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TABLE OF CONTENTS

	Page
OPENING STATEMENT	1
STATEMENT OF ISSUE ON APPEAL.....	2
I. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding that the Company Did Not Prove a Trade Secret Existed	2
II. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding that the Company Did Not Sufficiently Safeguard its Confidential Information.....	2
III. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding the Company Was Not Entitled to Damages Under its Trade Secret Misappropriation Claim	2
IV. Whether the Circuit Court Erred by Applying the Wrong Legal Standard When it Judged the Breach of Fiduciary Duty and Usurpation of Corporate Opportunity Claim, and Therefore Committed Legal Error in its Application of Fiduciary Duty Law and its Application of the Statute of Limitations.....	2
I. STATEMENT OF THE CASE	3
II. STATEMENT OF FACTS AND EVIDENCE.....	4
A. Description of CCC.....	4
B. Formation of CCC.....	5
C. CCC Becomes Operational	9
D. Wilson Prepares to Leave CCC and Take its Trade Secrets with Him	9
E. Wilson Leaves and Destroys Evidence.....	11
F. Wilson Joins FreshWater Systems, Inc. and Neologic Distribution, Inc	12
G. Trial Court's Ruling.....	13
III. STANDARD OF REVIEW	13
IV. TRADE SECRET VIOLATIONS	14
A. Legal Standard	14
B. The Circuit Court Erred by Concluding No Trade Secrets Existed.....	16
1. The Confidential Information is a Trade Secret	16

2.	The Circuit Court Committed Legal Error by Relying Upon Improper Legal Authority	18
C.	The Circuit Court Erred by Applying an Incorrect Legal Standard When it Concluded that CCC Did Not Sufficiently Safeguard its Confidential Information.....	21
D.	The Circuit Court Erred by Concluding that CCC Was Not Entitled to Damages	23
V. BREACH OF FIDUCIARY DUTY		25
VI. CONCLUSION.....		25

Cases

<i>Atwood Agency v. Black</i> , 374 S.C. 68, 646 S.E.2d 882 (2007)	18, 19
<i>Bell v. Progressive Direct Inc. Co.</i> , 407 S.C. 565, 757 S.E.2d 399 (2014)	14
<i>Bell</i> , 407 S.C. at 576, 757 S.E.2d at 404	24
<i>Carolina Chemical Equipment Co. v. Muckenfuss</i> , 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996)	20, 21
<i>Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.</i> , 528 F.3d 1001 (8th Cir. 2008)	16
<i>Elm City Cheese Co. v. Federico</i> , 752 A.2d 1037, 1040-41 (Conn. 1999)	19
<i>Hill Holliday Connors Cosmopolos, Inc. v. Greenfield</i> , 433 Fed. Appx. 207 (4th Cir. 2011)	22
<i>Lowndes Products, Inc. v. Brower</i> , 259 S.C. 322, 191 S.E.2d 761 (1972)	22
<i>Milliken & Co. v. Morin</i> , 399 S.C. 23, 731 S.E.2d 288 (2012)	14
<i>N. Atlantic Instruments, Inc. v. Haber</i> , 188 F.3d 38 (2d Cir. 1999)	17
<i>Sigma Chemical Co. v. Harris</i> , 794 F.2d 371 (8th Cir. 1986)	20
<i>Williams v. Riedman</i> , 339 S.C. 251, 529 S.E.2d 28, (Ct. App. 2000)	16, 24, 25

Statutes

S.C. Code Ann. § 39-8-20(1) (1997)	15
S.C. Code Ann. § 39-8-20(2) (1997)	15, 24
S.C. Code Ann. § 39-8-20(5) (1997)	15, 16, 18, 22
S.C. Code Ann. § 39-8-30(B) (1997)	14, 23
S.C. Code Ann. § 39-8-40(A) (1997)	15, 24
S.C. Code Ann. § 39-8-40(B) (1997)	15

Other Authorities

<i>Employees Beware: Employer Rights Under the South Carolina Trade Secret Act</i> , Kirk T. Bradley, Note, 49 S.C. L. Rev. 597 (Spring 1998)	14, 23
S.C. JUR. INTELLECTUAL PROPERTY § 77	17

OPENING STATEMENT:

This appeal presents the reason why the General Assembly enacted the South Carolina Trade Secret Act a mere five years after enacting the Uniform Trade Secret Act. The General Assembly added a provision that placed an affirmative obligation upon a South Carolina employee not to misappropriate his employer's trade secrets even if he did not sign a confidentiality or non-compete agreement. This is just such a case.

Counterclaim Defendant David Wilson ("Wilson") admitted that he stole Carolina Custom Converting, LLC's ("CCC") supplier list, pricing list, customer list, prospective customer list, electronic vendor reference program, and inventory reference program ("confidential information"). Contemporaneous e-mails showed that Wilson stole this information with the specific intent to take it to a competitor and use the confidential information to compete. The evidence showed that the initial competitor did not hire Wilson. Instead, he used his family connections to start a brand new company that did the same thing as CCC, and with the use of CCC's confidential information.

As the fourth day of the *bench* trial neared an end, counsel for CCC proposed a customary post-trial briefing schedule, which would set forth the law with citations to the voluminous record. The circuit court declined the invitation. Hours after closing argument on the fifth day of trial, the circuit court ruled that CCC did not prove its trade secret claim. In a subsequent written order, the circuit court based its reasoning on a manifest misunderstanding and misapplication of the South Carolina Trade Secret Act.

The legal errors committed by the circuit court are significant and require reversal.

STATEMENT OF ISSUE ON APPEAL:

- I. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding that the Company Did Not Prove a Trade Secret Existed.
- II. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding that the Company Did Not Sufficiently Safeguard its Confidential Information.
- III. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding the Company Was Not Entitled to Damages Under its Trade Secret Misappropriation Claim.
- IV. Whether the Circuit Court Erred by Applying the Wrong Legal Standard When it Judged the Breach of Fiduciary Duty and Usurpation of Corporate Opportunity Claim, and Therefore Committed Legal Error in its Application of Fiduciary Duty Law and its Application of the Statute of Limitations.

I. STATEMENT OF THE CASE

This is an appeal from a complex business litigation matter in the Greenville County Court of Common Pleas. On April 27, 2012, Wilson filed a complaint against John Gandis ("Gandis") and Andrea Comeau-Shirley ("Comeau-Shirley"). On July 3, 2012, Gandis and Comeau-Shirley answered the complaint and filed counterclaims. On October 10, 2012, Wilson filed an amended complaint against Gandis and Comeau-Shirley. On October 26, 2012, Gandis and Comeau-Shirley filed an answer to the amended complaint and again filed counterclaims against Wilson. On April 16, 2013, this case was designated complex and assigned to the Honorable D. Garrison Hill. On September 20, 2013, Wilson filed a second amended complaint against Gandis, Comeau-Shirley, and CCC. On November 15, 2013, CCC answered the second amended complaint and filed counterclaims. Also on November, 15, 2013, Comeau-Shirley answered the second amended complaint and filed counterclaims. Also on November 15, 2013, Gandis answered the second amended complaint and filed counterclaims.

Relevant to this appeal, Wilson's final and second amended complaint alleged claims for (1) dissolution against all defendants, and (2) breach of fiduciary duty against Gandis and Comeau-Shirley. All defendants' asserted counterclaims for breach of fiduciary duty against Wilson. CCC also asserted a counterclaim for violation of the South Carolina Trade Secret Act against Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc.

This case was tried non-jury before the Honorable D. Garrison Hill, with the trial including four full days of testimony and one morning of closing argument. On the afternoon following oral argument, the circuit court issued a letter outlining its ruling. The letter ruling found for Wilson on the dissolution claim and against the counter-claim

defendants on their claims. The circuit court's letter ruling further instructed Wilson to submit a proposed order.

Wilson submitted a proposed order, and on January 9, 2015, the circuit court entered its order in this case. On January 20, 2015, Defendants' timely filed a Rule 59, SCRCF, motion to alter or amend. On January 28, 2015, the circuit court denied Defendants' Rule 59 motion. On February 2, 2015, CCC received written notice of the denial of the Rule 59 motion. On February 26, 2015, CCC filed its notice of appeal.

II. STATEMENT OF FACTS AND EVIDENCE

The pleadings, documentary evidence, and testimony established the following undisputed facts as follows:

A. Description of CCC

CCC distributes plastic films throughout the United States, Mexico, and Canada. The plastic films that CCC distributes are used in a variety of applications, including the food industry for packaging and product labeling purposes. (R. p. 21, lines 21-23). CCC also distributes metallized plastic films, and these films are used in the flexible duct industry (i.e., the heating and air industry). (See R. p. 875, lines 3-6). CCC also distributes specialized films into niche markets, such as white board manufacturers. (R. p. 870, lines 2-17). CCC's base of operations and headquarters is in Anderson, South Carolina.

CCC primarily operates as an intermediary in the market place, connecting film suppliers with film customers. (See R. p. 876, lines 4-12). It has a stable of customers with long-term supply relationships. In this category of customers, CCC has gone through a thorough qualifying process whereby it first understands the customer's technical needs, and then works to select a specific film suitable to meet those needs. (R. p. 871, lines 20-25). The qualifying process, which is done at the customer's plant, is undertaken

to test the film (or multiple films) in a number of different capacities to ensure suitability for the customer's end product. (*See* R. p. 911, lines 3-10). A qualifying process can take a number of months or even longer. (*E.g.*, R. p. 301, lines 7-20). Once a film is qualified, CCC can serve as that customer's film supplier.

CCC supports other customers on an as needed basis. For these customers, a request for supply is generated in the regular course of business, and CCC competes to meet that customer's requirements as soon as possible. (R. p. 879, lines 11-17). CCC developed an electronic vendor reference guide, and an inventory reference program to make this process significantly more efficient. (R. p. 877 line 23-p. 881, line 4). CCC seeks to fill these requests for supply from its own film stocks, and other times it must enter the open market to purchase these films. In both instances, CCC makes use of the electronic vendor reference program and the inventory reference program, in addition to its employee's experience. (*Id.*) Finally, when a customer needs a film tailored to a specific width, CCC has the machine assets to convert the film down to the required width and length—that is, it has machines that can trim a 60 inch wide roll of film down to 35 inches. (*See* R. p. 24, lines 2-4).

B. Formation of CCC

Wilson and Gandis first met in the early 2000s while Wilson was working as a consultant for Gandis at VyTech Industries (VyTech). (R. p. 20, line 24-p. 21, line 7). VyTech was headquartered in Anderson, South Carolina and was in the business of manufacturing and selling vinyl films.) (R. p. 17, lines 17-19, R. p. 18, lines 11-13). When Wilson met Gandis, VyTech was seeking to develop new sources for film used by VyTech in the manufacturing process. (R. p. 20, line 25-p. 21, line 7).

Wilson graduated from Furman University in 1999, and has worked as a salesman for the better part of his adult life. He first became acquainted with the plastic film industry when he took a job during college working as a machine operator at company in the Greenville, South Carolina area. (R. p. 360, lines 2-24). After a few years with that company, Wilson joined another film company where he worked for about three years. (R. p. 361, lines 7-22). That company found itself "on some rocky times," (R. p. 361, lines 22-23), and Wilson left to start and manage his own business, Palmetto Custom Films, which was started with outside investors. (R. p. 362, line 2-p. 363, line 10). After a few years, Wilson was forced out of Palmetto Custom Films due to strained financial relations with his investors regarding the company's debt load. (R. p. 363, line 15-p. 364, line 5). After leaving Palmetto Custom Films, in 2005 Wilson started Eastern Films Solutions, LLC ("EFS"). EFS was a one man operation, where Wilson worked as a film sales broker. (R. p. 364, lines 10-19).

Gandis earned a mechanical engineering degree from North Carolina State University in 1992, and has worked as a product development engineer for a large portion of his adult career. (R. p. 17, lines 8-12; R. p. 18, lines 3-10). Following graduation, he began working for Milliken Company at its Thompson, Georgia plant. (R. p. 17, lines 15-19). After two years with Milliken, Gandis left to join VyTech. (R. p. 17, lines 15-19). Gandis' first role at VyTech was to oversee the installation of a textile line. Gandis later became the plant manager of VyTech. (R. p. 18, lines 1-6). Gandis was later promoted to serve as VyTech's director of new product development. (R. p. 18, lines 8-10). Gandis remained employed by VyTech until the company went out of business in 2006. (R. p. 19, lines 14-20).

After VyTech, Gandis decided to focus on creating a new business with his father and running an existing business he owned that was doing sheet metal fabrication. (R. p. 19, line 21-p. 20, line 9). It was at this time that Wilson approached Gandis about restarting some projects that the two had worked on at VyTech. (R. p. 20, lines 10-13). Gandis' machine business was located in Anderson, and he and Wilson believed that a portion of this facility could serve as a hub of operation for a future business in the film industry. (R. p. 22, line 9-p. 23, line 9). At this point in time, CCC had not been established as an entity.

The first business plan Wilson and Gandis tried was the manufacturing of a breathable vapor barrier for metal buildings. (R. p. 22, lines 17-24). Before going out of business, VyTech had tried to develop the product but was unsuccessful. (R. p. 22, lines 17-24). Their idea was to create a machine that would roll the film through its tooling and perforate the film during that process. (R. p. 22, line 9-p. 23, line 9). To that end, Gandis built a machine at his warehouse that could be used for this purpose. (R. p. 23, lines 6-9). The venture never got off the ground. (R. p. 23, lines 10-12). Although the perforation services business failed, it provided a helpful asset: a machine that could be used for slitting film. (R. p. 23, lines 15-22).

During this time, Wilson operated EFS. As noted above, EFS was a one-man film sales company. In his work at EFS, Wilson contracted out the services of a film slitting company in order to meet customer demand. (R. p. 25, lines 3-15). For example, if an EFS customer needed a certain type of film that was 45 inches wide, and the roll was currently 60 inches wide, EFS would contract with a film slitter to slit 15 inches from the side of the roll.

Wilson and Gandis decided to use the machine created for perforation and see whether they could operate it in a manner that would allow it to slit film. (R. p. 23, line 13-p. 24, line 4). Film slitting was not a new idea in the market, but it was something they thought that they could turn into a profitable venture. In or around March of 2007, Gandis rebuilt the perforation machine into a slitting machine. Over the course of the year Gandis and Wilson endeavored to see whether they could make a go of this new business venture by slitting film for EFS. (R. p. 24, line 9-p. 25, line 21).

By November of 2007, the men apparently believed this venture had a future; thus, CCC was formed and registered with the Secretary of State as an LLC. At its formation, it had two members: Wilson and Gandis as 50-50 partners. (R. p. 54, lines 5-9). Carolina Custom Converting was formed to operate solely as a film slitting company—that is, *custom converting*. (R. p. 25, lines 16-21). Gandis was in charge of CCC operations and worked from its Anderson headquarters. As the months passed, however, Gandis came to the conclusion that slitting film was taking a large portion of his time but was not really creating a lasting company. (R. p. 37, lines 1-2 and 19-20). Soon thereafter, though, Wilson and Gandis began discussing the idea of folding EFS into CCC—that is, creating a full service film company. (R. p. 37, lines 3-5). Wilson and Gandis ultimately did combine the operations of these two companies starting in July of 2008. (R. pp. 1285-1286; R. pp. 1529).¹

¹ Comeau-Shirley later joined CCC as a 10% member; she had a tax accounting and consulting background and agreed to receive a 10% ownership stake in return for providing consulting services. (R. p. 619, lines 4-14; R. p. 621, lines 13-22; R. p. 633, lines 13-22).

C. CCC Becomes Operational

The combined company emerged strong and made a profit for its owners quickly. CCC made a profit in each of its first three years: 2008-2010. (R. p. 586, lines 3-5). In 2010, however, it posted a banner profit of over \$1 million. It did so as a result of a world-wide film shortage. CCC was able to capitalize on the film shortage because it was able to purchase large amounts of film inventory. (R. p. 651, lines 11-25). With inventory on-hand, CCC was able to service a large number of customers that it did not previously service in 2008-09. (See R. p. 653, line 23-p. 654, line 1). During its successful start-up years, CCC grew to a company of roughly 24 employees. (R. p. 39, lines 20-24). In 2009, CCC opened an office in Greenville, South Carolina. By the second half of 2011, Wilson was primarily supporting CCC's sales force from Greenville, and was not interacting with the customers on a regular basis. (R. p. 415, lines 1-12).²

D. Wilson Prepares to Leave CCC and Take its Trade Secrets with Him

In January of 2012, Wilson began finalizing plans to leave CCC and join a film sales company in Tennessee named FilmTech, Inc. (R. p. 496, line 12-p. 499, line 18; Exs. 72-76, R. pp. 1687, 1688, 1692, 1697). On January 9, 2012, Wilson entered CCC's secure server, (R. p. 883, lines 5-9), and downloaded all of CCC's customer and contact information. (R. p. 868, line 10-p. 869, line 3; R. p. 1313). The next day, he ate dinner with FilmTech's owner, a gentleman named Mark McGarel.³ (R. p. 1687).

² In 2011, CCC's profitability ended and it posted a substantial loss that year. (R. p. 586, lines 3-5). Specifically, CCC posted a loss of \$456,000 in 2011. (R. p. 245, lines 8-15). The financial health of the company led to strife regarding the internal affairs of CCC and ultimately Wilson seeking employment elsewhere.

³ Initially Wilson approached McGarel to determine whether FilmTech would be interested in acquiring CCC. To that end, Wilson had McGarel sign a non-disclosure

On January 16, 2012, at 12:11 pm, Wilson sent an e-mail to McGarel regarding his plans:

Hi Mark,

I look forward to the opportunity to join your organization. . . .
Here are the points of discussion for our agreement.

....

4. Full time employee with draw or salary of \$8k per month for a period of time until my commission reaches a level that supports my needs. *My 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 our qualifying over the past 3 to 6 months.*

(R. p. 1692; R. p. 496, line 19-p. 497, line 22) (emphasis added).

Later that day, at 5:34 pm, Wilson sent a follow-up email to McGarel. (R. pp. 1697-1705. In that e-mail, Wilson went line-by-line through CCC's current markets and customers. He also attached CCC's 2012 budget forecast, which included CCC's projected customer sales and the prospects that CCC was working to secure. (*Id.*; R. p. 498, line 17-p. 499, line 14). Wilson testified that it was his plan to take all of the confidential information and use it at FilmTech. (*Id.*).

A week later, Wilson received a return e-mail from McGarel. (R. pp. 1709-1729). By that time, McGarel had been able to analyze the 2012 budget forecast Wilson sent him. McGarel noted the costs of the products he was currently purchasing versus the costs that CCC was paying for the film. (*Id.*; R. p. 502, lines 13-17). For some of these films, CCC's acquisition prices were more competitive. (R. p. 503, lines 1-17). Ultimately, McGarel passed on Wilson's proposal to join FilmTech. During their

agreement. The conversation, however, quickly turned to Wilson joining FilmTech. (R. p. 496, lines 15-18).

discussions McGarel had inquired about potential legal ramifications. (R. p. 1699). Presumably, those concerns or a lack of synergies won out.

As discussed below, instead of joining FilmTech, Wilson took everything he had planned to bring to FilmTech, and instead took it to NeoLogic Distribution Inc. and Fresh Water Systems, Inc. There is no question that Wilson took all of CCC's confidential information with him. (R. p. 506, lines 1-18).

E. Wilson Leaves and Destroys Evidence

During the first part of January, when Wilson was attempting to move over to FilmTech, he concurrently sought to negotiate the purchase of his equity interest by CCC, or purchase the other members' interest. At this time all parties had retained legal counsel. (*See* R. p. 499, line 18-p. 500, line 2). At some point during the negotiations, Wilson's counsel led Gandis' counsel to believe that Wilson was leaving CCC. (R. p. 163, lines 2-17; R. p. 435, line 14-p. 436, line 13). As a result, Gandis had CCC's information technology consultant disconnect the Greenville office from CCC's server. (*See Id.*) Gandis took this action to prevent Wilson from being able to download CCC's confidential information from the server and take it with him. On the afternoon of the next day (January 17), Gandis travelled to the Greenville office to remove Wilson from that office and prevent him from taking any of CCC's property. (R. p. 164, line 18-p. 165, line 8). Gandis brought along a member of law enforcement to help him with this goal. (*Id.*) Wilson did leave the Greenville office that day, but he took CCC property and computers with him (*Id.*). Wilson testified that he took two computers and a Blackberry phone. (R. p. 500, lines 10-16).

On January 19, CCC's labor lawyer sent a letter (via facsimile) to Wilson's counsel. (R. pp. 1706-1708). The letter notified Wilson, via counsel, that he had taken company property, which included "proprietary information, trade secrets, and other intellectual property," and instructed him "not to destroy, copy, sell or use any of this property, including the computer data." (*Id.* at 1706). After receiving this warning, Wilson then erased all of the data on both computers and the Blackberry." (R. p. 500, line 25-p. 501, line 2; see also R. p. 899, line 23-p. 901, line 2). Wilson admitted that he erased this information after receiving notice not to do so. (R. p. 501, lines 3-6). As an explanation for his actions, Wilson claimed that he transferred CCC's data from these devices prior to erasing them. (R. p. 500, line 24-p. 501, line 24).

F. Wilson Joins FreshWater Systems, Inc. and Neologic Distribution, Inc.

Gone from CCC, and ignoring the warning of CCC's labor lawyer's letter, Wilson began to siphon off CCC's customers. (R. p. 503, line 20-p. 504, line 25). He first began doing so with the financial backing of Fresh Water Systems, Inc. ("FWS") (*Id.*; R. p. 1757, fourth sentence ("What's your proposal on the profit allocation to FWS?"). FWS is a business owned by Wilson's brother-in-law, Mr. Norvell. (R. p. 728, line 18-p. 729, line 2). Soon thereafter, he began siphoning off customers through a company named Neologic Distribution, Inc. ("Neologic"). (R. p. 729, lines 19-23; R. pp. 1761). Neologic was a "sister" company to FWS.⁴ (*Id.*) When Wilson began working for Neologic it

⁴ These two companies were essentially the same entity. The Neologic balance sheet showed that all monies used by it flowed from FWS, and that FWS employees worked for Neologic. (R. p. 736, line 3-p. 737, line 3; R. p. 1330-1332). Although later disputed at trial, during a Rule 30(b)(6), SCRCF, discovery deposition of Neologic, that company (Neologic) testified that it paid for Wilson's attorney fees and treated the payment as an "overhead expense." (R. p. 2384, lines 9-16, p. 2385, lines 3-14; R. p. 733, line 1-p. 735, line 25).

created a film division. (R. p. 729, lines 12-23). Prior to Wilson joining Neologic, it was not in the film business. (*Id.*).

In its first year of existence, Neologic conducted over \$135,000 worth of business with CCC customers. (R. p. 1329). In 2013, Neologic conducted over \$580,000 worth of business with CCC customers. (*Id.*). By the time of trial, Neologic had conducted over \$980,000 worth of business with CCC customers. (*Id.*).

G. Trial Court's Ruling

The circuit court concluded that CCC did not prove its trade secret claims. (R. pp. 1784-1786). The court concluded that because the confidential information was accessible by the public, and Wilson had experience working in the industry, then the confidential information did not qualify as a trade secret. (*Id.*). The circuit court further concluded that CCC did not sufficiently safeguard its confidential information. (*Id.*). Finally, the circuit court concluded that CCC was not entitled to damages. (*Id.* at 1786). The circuit court further found that the "evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster^[5] from CCC." (*Id.*). Importantly, in denying FWS and Neologic's counterclaim that the trade secret claim was brought in bad faith, the circuit court correctly acknowledged that "[e]vidence shown at trial demonstrated that Neologic/[FWS] used CCC's confidential information and that CCC was justified in bringing the trade secrets claim." (*Id.* at 1788).

III. STANDARD OF REVIEW

A claim for misappropriation of a trade secret is an action at law. When an action

⁵ The circuit court's choice of the word "ouster" indicates the erroneous lens through which it must have viewed this claim. Whether Wilson was ousted from CCC, or not, had no bearing on the question whether he and Neologic/FWS misappropriated CCC's trade secrets.

at law is tried to a judge, this court is tasked with correcting all errors of law. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). “In an action at law tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless there is no evidence to reasonably support them.” *Bell v. Progressive Direct Inc. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014). (citation omitted). However, an appellate court may make its own determinations concerning questions of law and need not defer to the trial court’s rulings. *Id.* at 576, 757 S.E.2d at 404-05.

IV. TRADE SECRET VIOLATIONS

A. Legal Standard

South Carolina adopted the Uniform Trade Secret Protection Act in 1992. Within five years, apparently concluding that the Uniform Act was insufficient, the General Assembly enacted the South Carolina Trade Secret Act. *Employees Beware: Employer Rights Under the South Carolina Trade Secret Act*, Kirk T. Bradley, Note, 49 S.C. L. Rev. 597, 597-98 (Spring 1998) (hereinafter “Employees Beware”). The article posits that the South Carolina Act “arguably establishes the most comprehensive compilation of trade secret laws in the United States.” *Id.* One of the grounds for this statement is the presence of S.C. Code Ann. § 39-8-30(B) (1997), which is not found in the Uniform Act, and provides as follows:

Every employee who is informed of or should reasonably have known from the circumstances of the existence of any employer's trade secret ***has a duty to refrain from using or disclosing the trade secret*** without the employer's permission ***independently of*** and in addition to ***any written contract of employment, secrecy agreement, noncompete agreement, nondisclosure agreement, or other agreement between the employer and the employee.***

§ 39-8-30(B) (emphasis added). Accordingly, the General Assembly has created an obligation upon all employees in South Carolina, notwithstanding the absence of a

written agreement, to refrain from using their employer's trade secrets.

Under South Carolina law, a trade secret means the following:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) *A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.*

§ 39-8-20(5) (1997) (emphasis added).

Under South Carolina law, misappropriation means:

(a) acquisition of a trade secret of another by a person by improper means;

(b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

§ 39-8-20(2)(a-b) (1997). South Carolina law provides that "[i]mproper means" includes "theft." § 39-8-20(1) (1997).

Finally, under South Carolina law, "[a] complainant is entitled to recover actual damages for misappropriation of trade secrets." S.C. Code Ann. § 39-8-40(A) (1997). The damages available to a plaintiff "include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation." S.C. Code Ann. § 39-8-40(B) (1997). Accordingly, once a plaintiff proves that his trade secret has been

misappropriated by a defendant, a plaintiff is entitled to damages. If the facts of a case show that a full award would be “inequitable,” then a court has the authority to “reduce[] monetary recovery.” S.C. Code Ann. § 39-8-40(A) (1997).

B. The Circuit Court Erred by Concluding No Trade Secrets Existed

I. *The Confidential Information is a Trade Secret*

Wilson took all of CCC’s customer lists, supplier lists, pricing information, prospective customer lists, its electronic vendor reference program, and its inventory reference program. (R. p. 506, lines 1-18). CCC spent significant corporate resources and time building this body of information. (R. p. 870, lines 10-18; R. p. 871, line 20-p. 872, lines 1-17; R. p. 873, line 24-p. 874, lines 1-5; R. p. 875, lines 3-14; R. p. 876, lines 1-17; R. p. 877, line 8-p. 881, lines 4, and 12-24).⁶

The confidential information was comprised of “simple fact[s] . . . [that] although individually could be perceived as . . . minor or simple, collectively . . . [were] the basis for [CCC’s] commercial strategy.” § 39-8-20(5)(b). The plain language of the South Carolina Trade Secret Act makes clear that this information is a trade secret. *See also Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000) (Goolsby, J. concurring) (concurring in the opinion and clarifying that “I do not construe it to hold that a customer list cannot be a trade secret”). Further, Courts have concluded that this type of information is a trade secret. *See, e.g., Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1018-19 (8th Cir. 2008) (noting that public information gained “only after, extensive, time-consuming research [is] information entitled to

⁶ CCC also presented testimony that Wilson and Neologic/FWS were improperly conducting business based on information gained through the discovery process. (R. p. 876, line 18-p. 877, line 7; R. p. 882, line 4-p. 883, line 4; R. pp. 1394-1400).

protection”); *N. Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 46 (2d Cir. 1999) (collecting cases and noting same); see also S.C. JUR. INTELLECTUAL PROPERTY § 77 & n.1 (noting that “customer lists and other sales and marketing information can be trade secrets”). The circuit court committed legal error by failing to apply the plain language of the South Carolina Trade Secret Act.

The circuit court also failed to acknowledge that the efforts involved in locating the correct film for a customer required significant intellectual input by CCC. (R. p. 870, lines 5-17). It likewise erred in failing to acknowledge the complexity of the supplier market, and the resources CCC utilized in navigating that market in order to locate the correct film for a customer. (R. p. 872, lines 7-10).

The circuit court also failed to acknowledge the electronic vendor reference program and inventory reference program that CCC created and Wilson took. (R. p. 877, line 8-p. 881, line 4; R. pp. 1534-1587). During the discovery process, Neologic/FWS produced a printed out copy of the electronic vendor reference program. (*Id.*). The program operates using the Excel program. (R. p. 877, lines 24-25). Gandis testified that it was developed over time with the input of a number of CCC employees and Comeau-Shirley. (R. p. 878, lines 6-10).

Gandis testified about the operation of the program. CCC compiled into the program all of the different manufacturers of film, specific films types, and manufacturer codes. (R. p. 878, lines 1-20). Gandis testified that some of the codes are not publicly available. (*Id.*). He testified that when a customer calls with a description of what they need, he can put those specifications into the program and it will generate a result that provides you with every manufacturer that makes that film. (R. p. 879, lines 4-8).

Gandis also testified about the inventory reference program. That program was developed to provide a searchable system that immediately showed what inventory CCC had in its inventory at any given time. (R. p. 879, lines 18-p. 880, line 7). Gandis testified the development of this program increased CCC's efficiencies and gave it a competitive advantage. (R. p. 879, lines 9-17; *see also* R. p. 1661, first two sentences of "Company strengths," (Wilson noting the competitive advantage of CCC in its ability "turn an order faster than our competition"))).

Both of these programs are a trade secret. They are a "program . . . [that] derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use." § 39-8-20(5)(a)(i). They are also a "procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process" § 39-8-20(5)(b).

2. The Circuit Court Committed Legal Error by Relying Upon Improper Legal Authority

The circuit court erred in concluding that CCC's confidential information did not constitute a trade secret. Against the backdrop of the confidential information detailed in Part III.B.1., *supra*, and at issue in this case, the circuit court committed legal error by relying upon *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882 (2007) for the proposition that CCC's confidential information did not constitute a trade secret. *Atwood* did not hold that the confidential information at issue in this case is not a trade secret.

Atwood addressed a rental home business located in Edisto Beach. One of Atwood's employees left to join a competing company, and Atwood brought a claim for

misappropriation of its trade secrets against the former employee and her current employer. *Id.* at 70-71, 646 S.E.2d at 883. The trade secrets alleged in *Atwood* constituted the “homeowners list” and the “renters list.” *Id.* at 71, 646 S.E.2d at 883. In a split decision⁷, the *Atwood* court concluded that these lists did not constitute trade secrets.

The *Atwood* court based this finding on the “undisputed fact that a list of all the homeowners in Edisto Beach and their contact information is a matter of public record available at Town Hall.” *Id.* at 72, 646 S.E.2d at 884. The Court also based this finding on the fact that the former employee was “contacted directly by Atwood renters after Atwood sent out an announcement of her departure.” *Id.* at 72, 646 S.E.2d at 884.

The facts of *Atwood* are significantly different from this case. CCC’s business involves working with customers to qualify a film before entering into long-term supply relationships. (R. p. 886, lines 11-15). The qualifying process can take months. Wilson’s own witness confirmed this fact. (R. p. 301, lines 7-20). During the qualifying process, many times a CCC employee was required to travel to the customer’s plant for trial runs. (*Eg.*, R. p. 911, lines 3-10).

Qualifying the right film also requires CCC to first find the right film at the right price—both for CCC and the customer. (*E.g.*, R. p. 874, line 12-p. 875, line 14; R. p. 876, lines 1-17). That process involves expending employee time and resources to locate the correct film, and the most suitable supplier of that film. Indeed, locating the most suitable supplier of film is often the most valuable information, for it provides the competitive pricing advantage. (*E.g.*, R. p. 871, line 7-p. 873, line 8). *See Elm City Cheese Co. v. Federico*, 752 A.2d 1037, 1040-41, 1053 (Conn. 1999) (noting that cheese company’s

⁷ Two Supreme Court justices concluded that the “renters list” qualified as a trade secret. *Atwood*, 374 S.C. at 74, 646 S.E.2d at 884.

commercial strategy of locating “return milk” for use in its processes was a trade secret as it allowed the cheese company to purchase its raw goods at a much lower cost); see also *Sigma Chemical Co. v. Harris*, 794 F.2d 371, 373 (8th Cir. 1986) (noting that “which suppliers supplied chemicals at the requisite quality and price was not in public domain” and protected as a trade secret). The circuit court failed to appreciate the significant amount of time and energy that CCC devoted to creating its confidential information. This confidential information was not merely sitting at a “Town Hall” for anyone to simply review.

Unlike *Atwood*, documentary evidence showed that Wilson contacted the customers himself after he left. (E.g., R. pp. 1757-1759 (noting that “[w]hen I told them I had left CCC weeks ago”); R. p. 1336 (stating “Hi Trip, Good catching up with you today. As discussed, my new company is Neologic Distribution.”); R. p. 1337 (stating “I hope you are well. As you may have heard, I left [CCC] in January. I am still very much in the film business . . .”).

Atwood also did not involve competitive pricing. The price that a rental company charges is expressly advertised. CCC does not advertise the price that its customers pay for their film because its competitor could then underbid the company. The testimony at trial showed that Wilson and Neologic/FWS were underbidding CCC’s customers based upon their possession of CCC’s confidential information. (R. p. 870, line 18-p. 871, line 2; R. p. 873, lines 2-20; R. p. 874, lines 6-11; R. pp. 1342-1343 (stating “these prices are very attractive”; R. p. 1384 (showing \$400 profit on roughly \$80,000 sale).

The circuit court also improperly relied upon *Carolina Chemical Equipment Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), for the proposition that

Wilson's previous work in the industry precluded the confidential information from becoming a trade secret. In *Muckenfuss*, the company did not claim that the employee "took actual customer lists, pricing lists, or formula cards with him." *Id.* at 297, 471 S.E.2d at 725. Rather, the company alleged the misappropriation occurred from the employee's use of "knowledge he acquired during the 17 years he was employed" by the company. *Id.* at 297, 471 S.E.2d at 725. In this case, CCC expressly claimed, and Wilson was forced to admit, that he did take all of the confidential information. (R. p. 506, lines 1-18). And, CCC based its claim for relief upon the fact that Wilson took this confidential information with him to Neologic/FWS where he *started a film company*.

CCC devoted employee resources, time, and money into developing its confidential information. Wilson left CCC, then took and used all of this confidential information at Neologic/FWS—the circuit court made that specific finding. (R. p. 1788). The circuit court's conclusion, however, that this confidential information was not a trade secret constituted an error of law. This court should reverse that legal conclusion, and remand for a new trial.

C. The Circuit Court Erred by Applying an Incorrect Legal Standard When it Concluded that CCC Did Not Sufficiently Safeguard its Confidential Information

The undisputed testimony at trial established the following:

- Only three people had access to all of the confidential information: Wilson, Gandis, and Comeau-Shirley (R. p. 883, lines 5-16);
- The confidential information was located on a password protected server (*Id.*);
- When CCC was led to believe that Wilson was going to leave, his access to the server was disabled (R. p. 163, lines 2-17; R. p. 435, line 22-p. 436, line 13);
- When Gandis met Wilson to get him to leave the Greenville

office, he brought along a member of law enforcement in order to prevent Wilson from taking CCC property with him (R. p. 164, lines 5-14).

South Carolina law provides that the owner of a trade secret must employ “efforts that are reasonable under the circumstances to maintain its secrecy.” S.C. Code Ann. § 39-8-20(5)(b) (1997). At the time Wilson left CCC, it had 24 employees, (R. p. 39, lines 22-24), yet only the three owners had access to all of the confidential information. (R. p. 883, lines 5-16). When the threat of a misappropriation occurred, CCC acted to maintain the secrecy of its confidential information. (*See also* R. pp. 1673-1675 (learning that Wilson was sharing confidential information with potential suitors and asking him to protect the secrecy of the information)).

The circuit court did not apply the reasonable under the circumstances legal standard. Instead, the circuit court applied a different legal standard. The circuit court incorrectly stated that a “party claiming a trade secret violation must exercise ‘eternal vigilance,’ which calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.” (R. p. 1785). South Carolina law, however, does not include these requirements. S.C. Code Ann. § 39-8-30(B) (1997).

The incorrect legal standard cited by the circuit court came from an unpublished decision by the United States Court of Appeals for the Fourth Circuit. *Hill Holliday Connors Cosmopolos, Inc. v. Greenfield*, 433 Fed. Appx. 207 (4th Cir. 2011). That unpublished decision based its reasoning upon the South Carolina Supreme Court’s 1972 decision in *Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972). Following the enactment of the South Carolina Trade Secret Act *in 1997*—which “arguably establishe[d] the most comprehensive compilation of trade secret laws in the

United States”⁸—*Lowndes* is no longer controlling law.

The circuit court’s reliance on the unpublished Fourth Circuit decision constituted legal error. This court should reverse that decision, and remand for a new trial.

D. The Circuit Court Erred by Concluding that CCC Was Not Entitled to Damages

The circuit court’s conclusion that CCC was not entitled to damages resulted from a legally incorrect application of the South Carolina Trade Secret Act. Section 39-8-20 provides that “misappropriation means . . . acquisition of a trade secret of another by a person by improper means”; or “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.” S.C. Code Ann. § 39-8-20(2)(a)-(b) (1997). In turn, § 39-8-40(A) provides that a “complainant is entitled to recover actual damages for misappropriation of trade secrets.” S.C. Code Ann. § 39-8-40(A) (1997). Because CCC’s trade secrets were misappropriated, it was entitled to damages as a matter of law.

Wilson admitted that he took all of CCC’s confidential information. (R. p. 506, lines 1-18). Wilson admitted that at the time he left CCC he was primarily running the sales force, and not interacting with customers. (R. p. 415, lines 1-12). E-mails were stipulated into evidence, and presented at trial, showing that Wilson and Neologic/FWS were using CCC’s confidential information. (*E.g.*, R. pp. 1534-1587; R. p. 1313; R. p. 1338; R. p. 1339; R. pp. 1342-1343 ; R. p. 1368; R. pp. 1369-1383; R. pp. 1385-1386; R. pp. 1387-1389; R. pp. 1390-1393; R. pp. 1394-1400; R. pp. 1401-1427). Neologic/FWS produced financial information showing that they were conducting business with CCC’s customers. (R. p. 1329). Trial testimony showed that 23 of 27 Neologic customers were

⁸ *Employees Beware*, 49 S.C. L. Rev. at 597-98.

CCC customers.⁹ (R. p. 883, lines 17-24). But even setting aside Wilson's pre-CCC customers, the trial testimony showed that 11 of Neologic/FWS's customers were customers that CCC gained on its own. (R. p. 883, line 23-p. 885, line 25). As a matter of law, CCC was entitled to an award of damages.¹⁰ S.C. Code Ann. § 39-8-40(A).

The circuit court's conclusion that the "evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster^[11] from CCC" is legal error. It is based upon a legally erroneous application of the South Carolina Trade Secret Act.¹²

In *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 200), this Court addressed whether the facts of that case provided for a trade secret claim. This court concluded that it did not, and did so based upon the following factors:

- No evidence that employee took any tangible customer information. *Id.* at 281, 529 S.E.2d at 43.
- No evidence that employee actively solicited the customers. *Id.* at 281, 529 S.E.2d at 43.
- Employee denied she had a plan to solicit the customers after termination. *Id.* at 280, 529 S.E.2d at 43.

⁹ The circuit court apparently overlooked the fact that the agreement to create the combined company called for Wilson to provide all of his customers to CCC. pp. 1285-1286; R. p. 1529).

¹⁰ With all due respect to the circuit court, the absence of routine post-trial briefing apparently limited the circuit court's ability to properly judge this case. (R. p. 866, line 2-p. 867, line 18). It is important to point out that when counsel for CCC proposed a post-trial briefing schedule to set forth the law and its application to the evidence, counsel for the respondents objected. (*Id.*).

¹¹ See n.5, *supra*.

¹² In the alternative, and against the backdrop of the confidential information misappropriated in this case, the circuit court's legal conclusion is not reasonably supported by the evidence. *Bell*, 407 S.C. at 576, 757 S.E.2d at 404.

- Every client employee had at the new company was a client from the company that she sold to her former employer.¹³ *Id.* at 281, 529 S.E.2d at 44.

Each one of these factors points in in the opposite direction in this case.

The circuit court committed legal error by failing to properly interpret and apply the South Carolina Trade Secret Act.

V. BREACH OF FIDUCIARY DUTY

The Circuit Court committed legal error by applying the wrong legal standard when it judged the breach of fiduciary duty and usurpation of corporate opportunity claim. Therefore, the circuit court committed legal error in its application of fiduciary duty law and its application of the statute of limitations. The arguments and law presented by Appellants' Gandis and Comeau-Shirley in their appellate brief are hereby adopted by CCC and incorporated herein.

VI. CONCLUSION

The circuit court did not follow the South Carolina Trade Secrets Act when it judged this case. The text of the order and the legal authority cited in the order makes this legal conclusion inescapable. CCC respectfully requests that this Court issue an opinion reversing that portion of the order addressing the trade secret claims, and remand this claim for a new trial.

[SIGNATURE PAGE FOLLOWS]

¹³ The analogue here would be customers that Wilson had previously sold film to at EFS.

Respectfully submitted,



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July 7, 2016

Greenville, South Carolina

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

Appellate Case No. 2015-000476

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

v.

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

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

v.

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

v.

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

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

and

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

**FINAL BRIEF OF RESPONDENTS NEOLOGIC DISTRIBUTION, INC. AND
FRESH WATER SYSTEMS, INC.**

6.20.16

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
STANDARD OF REVIEW	3
ARGUMENT	4
I. THE TRIAL COURT'S DETERMINATION THAT CCC'S WITNESSES WERE NOT CREDIBLE IS ENTITLED TO SUBSTANTIAL DEFERENCE	4
II. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT AND PROPERLY CONCLUDED THAT CCC DID NOT PROVE ANY TRADE SECRETS EXISTED	5
III. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT AND PROPERLY CONCLUDED THAT CCC DID NOT SAFEGUARD CONFIDENTIAL INFORMATION	7
IV. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT AND PROPERLY CONCLUDED THAT CCC WAS NOT ENTITLED TO DAMAGES UNDER ITS TRADE SECRET MISAPPROPRIATION CLAIM	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>Atwood Agency v. Black</i> , 374 S.C. 68, 646 S.E.2d 882 (2007)	7
<i>Carolina Chem. Equip. Co. v. Muckenfuss</i> , 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996)	6
<i>Chapman v. Allstate Ins. Co.</i> , 263 S.C. 565, 211 S.E.2d 876 (1975)	3
<i>Hill Holliday Connors Cosmopulos, Inc. v. Greenfield</i> , 433 Fed. Appx. 207 (4th Cir. 2011)	7
<i>J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.</i> , 357 Mass. 728, 260 N.E.2d 723 (1970)	8
<i>Jordan v. Judy</i> , 413 S.C. 341, 776 S.E.2d. 96 (2015)	3
<i>Linda Mc Co. v. Shore</i> , 390 S.C. 543, 703 S.E.2d 499 (2010)	3, 5
<i>Lowndes Products Inc. v. Brower</i> , 259 S.C. 322, 191 S.E.2d 761 (1972)	7
<i>Sheek v. Crimestoppers Alarm Sys.</i> , 297 S.C. 375, 377 S.E.2d 132 (Ct. App. 1989)	3

Statutes

S.C. Code Ann. § 39-8-20(5)	5
S.C. Code Ann. § 39-8-20(5)(a)	6
S.C. Code Ann. § 39-8-20(5)(a)(ii).....	8
S.C. Code Ann. §39-8-30(B)	8

STATEMENT OF THE CASE

Respondents NeoLogic Distribution, Inc. and Fresh Water Systems, Inc. ("NeoLogic and Fresh Water") adopt by reference the Statement of the Case contained in the Initial Brief of Appellant Carolina Custom Converting, LLC, as supplemented by the Statement of the Case contained in the Initial Brief of Respondent David Wilson filed February 22, 2016.

STATEMENT OF FACTS

NeoLogic and Fresh Water adopt by reference the Statement of the Facts set forth in the Initial Brief of Respondent David Wilson filed February 22, 2016.

STANDARD OF REVIEW

Appellant CCC's claim for misappropriation of trade secrets is an action at law. When considering the appeal of an action at law tried without a jury, an appellate court cannot disturb the trial court's findings of fact unless no evidence reasonably supports the judge's findings. *Jordan v. Judy*, 413 S.C. 341, 776 S.E.2d. 96 (2015). "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010). Thus, the trial court's findings in an action at law action are the same as those of a jury. The credibility and weight of the evidence are questions exclusively for the trial judge. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975); *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "[An appellate court] may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." *Id.*

ARGUMENT

I. THE TRIAL COURT'S DETERMINATION THAT CCC'S WITNESSES WERE NOT CREDIBLE IS ENTITLED TO SUBSTANTIAL DEFERENCE.

The Circuit Court's determination that no trade secrets were misappropriated by Wilson, NeoLogic or Fresh Water and that CCC failed to prove that it suffered any damages was a fact-driven endeavor. The Circuit Court heard the trial testimony, observed the demeanor of the witnesses, and came to the very stark conclusion that CCC's witnesses were not simply credible. In ruling on Appellant's Rule 59 Motion to Alter or Amend the judgment presently on appeal, the Circuit Court wrote:

"Mr. Wilson's testimony was credible on the key issues. Mr. Gandis' and Ms. Comeau-Shirley's testimony lacked credibility in most important respects.

"The evidence revealed that Mr. Gandis and Ms. Como Shirley deliberately collaborated to oppress Mr. Wilson. Their conduct was unconscionable. They purposely created a toxic business environment with the goal of driving Mr. Wilson out.

"Defendants tightly controlled cabal to oust Mr. Wilson could serve as a script for minority shareholder oppression. Their story even contains ample hubris, and an important irony: they forgot Mr. Wilson was the partner who had the skills and contacts necessary to make the business work."

(R. pp. 1794-1795).

Insofar as that this Court may not weigh the evidence, but rather must construe the evidence so as to uphold the Circuit Court's decision when reasonably possible, it is appropriate that this Court defer to the Circuit Court's credibility findings and view the Appellant's arguments with the credibility lens provided by the Circuit Court. This lens tarnishes CCC's arguments, particularly the factual assertions in its brief. Given that this Court must affirm the Circuit Court's factual findings "unless there is no evidence that reasonably

supports those findings," the Circuit Court's blunt finding that Gandis and Shirley lacked credibility on key issues should be dispositive of all factual arguments made by CCC. See *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010).

II. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT AND PROPERLY CONCLUDED THAT THE CCC DID NOT PROVE ANY TRADE SECRETS EXISTED.

CCC tacitly acknowledges its difficulty with the facts and its witnesses' credibility and takes aim instead at the legal standards under which the Circuit Court reached its conclusions. CCC's challenge in this regard falls short as the Circuit Court's Order evidences its application of the proper legal standards to facts of this case.

In reaching its conclusion that CCC did not meet its burden of proof that Wilson, NeoLogic, or Fresh Water misappropriated CCC's trade secrets, the Circuit Court relied on the plain language of the South Carolina Trade Secrets Act, which provides, in pertinent part:

"Trade secret" means information that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39-8-20(5); (R. pp. 1785, 1788). The Circuit Court also noted that South Carolina law further defines a trade secret as:

information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its

disclosure or use, and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39-8-20(5)(a); (R. p. 1785). These are the same legal authorities that CCC argues the Circuit Court should have applied. (Brief of Appellant CCC, p.14). The Circuit Court committed no legal error.

Citing testimony from multiple witnesses with extensive experience and knowledge of the film industry, the Circuit Court concluded that the information CCC claimed as trade secrets was instead "readily ascertainable by proper means by the public or any other person" through trade shows and journals, and online sources and therefore not a trade secrets. S.C. Code Ann. § 39-8-20(5)(a); (R. p. 292, line 16-p. 293, line 3; p. 303, lines 9-20; p. 302, line 1-p. 304, line 17; p. 340, line 13 – p. 343, line 7; p. 344, line 3-p. 345, line 1). Furthermore, insofar as the film market is a commodities market, pricing was also public knowledge. Manufacturers advertise the pricing of their films for sale and customers routinely provide their pricing information in an effort to buy at the best price. (R. p. 303, line 21-p. 304, line 17; p. 388, lines 6-20). "In determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others." *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). The record reflects that the information CCC claims as trade secrets is easily acquired through public means.

Wilson brought 20 years of experience and a wealth of industry knowledge with him when he joined Gandis in forming CCC. The customers Wilson sold to while at NeoLogic were his customers prior to joining CCC. (R. p. 445, line 16-p. 447, line 17).

Appellant CCC failed to produce sufficient evidence that any customer information was not known by Wilson or ascertainable by him through public sources.

The Circuit Court found that the information claimed to be a trade secret was either generally known, ascertainable by proper means, or known by Dave Wilson before the formation of CCC. Information that is available through other proper means is not protected as a trade secret. *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882 (2007). The Circuit Court based its findings upon statutory language and applicable case law, and properly applied the law to the facts. Its finding should therefore be affirmed.

III. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT IN CONCLUDING THAT CCC DID NOT SAFEGUARD CONFIDENTIAL INFORMATION.

CCC again argues that the Circuit Court applied an improper legal standard, this time because the Circuit Court cited *Hill Holliday Connors Cosmopolos, Inc. v. Greenfield*, 433 Fed. Appx. 207 (4th Cir. 2011) with respect to the requirement that trade secrets be safeguarded. CCC posits that *Hill Holliday*, a case decided after the adoption of the South Carolina Trade Secrets Act, improperly relied upon *Lowndes Products Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972), a case decided long before either the Uniform or South Carolina Trade Secrets Acts were adopted by the South Carolina Legislature. CCC's argument fails to acknowledge however that the component of the trade secret definition at issue here (whether reasonable steps to safeguard the alleged trade secret were taken) existed before the adoption of the South Carolina Trade Secrets Act. The *Lowndes* Court, quoting the Massachusetts Supreme Judicial Court, stated:

But if the person entitled to a trade secret wishes to have its exclusive use in his own business, he must not fail to take *all proper and reasonable steps to keep it secret*. He cannot lie back and do nothing to preserve its essential secret quality,

particularly when the subject matter of the process becomes known to a number of individuals involved in its use or is observed in the course of manufacture within plain view of others. One may not venture on liberties with his own secret, may not lightly or voluntarily hazard its leakage or escape, and at the same time hold others to be completely obligated to observe it. As a naturally known member of the patent bar has written, one who claims that he has a trade secret must exercise *eternal vigilance*. This calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.

Id. at p. 33, quoting *J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.*, 357 Mass. 728, 738, 260 N.E.2d 723, ____ (1970)(emphasis added)(internal quotation and citation omitted). With respect to safeguarding trade secrets, South Carolina law did not change with the adoption of the South Carolina Trade Secrets Act. As *Lowndes* demonstrates, this component has always been a prerequisite to trade secret protection in South Carolina. The Circuit Court's reference to *Hill Holiday*, which simply repeats *Lowndes*'s reference to "reasonable steps" and "eternal vigilance," is not misplaced but rather is an accurate statement of South Carolina law.

The Circuit Court correctly ruled that in order for information to be a "trade secret," the information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(a)(ii); (R. p. 1785). The Circuit Court also acknowledged that South Carolina law imposes an independent duty on employees to not use or disclose trade secrets, a duty separate from any written contract of employment or secrecy agreement. (January 9, 2015 Order, p. 7, citing S.C. Ann. §39-8-30(B); R. p. 1778). In so doing the Circuit Court stated "[i]t is not required that a contract or secrecy agreement exist, and it is understandable that a very small company such as CCC did not have elaborate agreements in affect [sic]." (R. p. 1785). The Circuit Court was thus cognizant of (and applied) the same legal standard advocated by CCC.

One of the first documents discussed during the trial of the case was an organizational outline completed by Gandis. The outline summarized the terms of his deal with Wilson and the formation of CCC. (R. pp. 976-979). Among other things, this questionnaire asks whether the parties will be bound by non-competition and non-disclosure agreements. Gandis answers no, clearly documenting CCC's lack of interest in safeguarding any information that could potentially constitute a trade secret. (R. pp. 976-979; p. 35, line 22-p. 36, line 13).

Moreover, although a written non-disclosure agreement is not required to impose a duty on an employee not to disclose trade secrets, it seems a reasonable step to take with employees if a company had trade secrets it wanted to protect. Yet, the record reveals that no CCC members or employees were ever asked to sign non-disclosure agreements before Wilson left CCC. (R. p. 179, lines 7-8; p. 175, lines 16-20; p. 434, lines 7-12). Bill Shaw, a CCC customer service representative who worked from home and had possession of purchase orders and sales orders in his home that contained all of the information CCC now claims to be trade secrets, was not required to sign a non-disclosure agreement. (R. p. 318, lines 1-9; p. 320, line 24-p. 321, line 1; p. 324, line 18-p. 325, line 1). Likewise, Mike Myers, an independent sales representative that sold for CCC, was not asked to sign a non-disclosure agreement. (R. p. 304, lines 18-20). In fact, CCC presented no testimony of its effort to protect the secrecy of its alleged trade secrets other than a password for its QuickBooks software. (R. p. 883, lines 5-16). CCC not only failed to safeguard its alleged trade secrets, Gandis and Shirley gave CCC company information and opportunities away. In July 2012, Gandis and Shirley secretly created Zoi Films, LLC to avoid having to "haggle" with Wilson over post-lock-out profits. (R. p. 186, lines 1-7; p. 713, lines 20-25;

pp. 1125-1129; pp. 1130-1133). Zoi had two members: M-Tech, a company owned by Gandis, and Major Brainstorms, Inc., a Georgia company owned by Comeau-Shirley. (R. p. 187, line 16-p. 189, line 21; pp. 1134-1135; pp. 1198-1200). *See also* (R. p. 1197; pp. 1201-1204; p. 1205; pp. 1216-1218). CCC, through its manager Gandis, provided information to Zoi about CCC's more profitable corporate opportunities. (R. pp. 1198-1200; p. 184, line 12-p. 186, line 22; p. 194, line 19-p. 196, line 22). According to Bill Shaw, Zoi was "a new company that John [Gandis] and Andrea [Comeau-Shirley] were starting up." (R. p. 325, lines 18-23). CCC paid Shaw to work on Zoi deals using CCC's QuickBooks system to enter sales transactions and purchase orders. (R. p. 325, line 5- p. 327, line 18). Accordingly, CCC's pricing and customer information used by Shaw in performing his customer service duties on behalf of CCC were also being used by Shaw in performing purchasing and sales duties for Zoi Films. So not only did CCC fail to take reasonable steps to maintain the secrecy of its alleged trade secrets, it provided CCC's information and business opportunities to a competing company.

CCC knew in March of 2012 that Wilson had left CCC's offices with a Blackberry, business papers and two computers containing all of CCC's customer information-- the same information CCC now is claiming as trade secrets. (R. p. 175, line 2-p. 176, line 3; R. p. 252, lines 8-14). CCC also knew by July of 2012 that Wilson was "out there selling film again for his new employer." (R. p. 1140). Nonetheless, CCC waited over two years to file its trade secret claims against NeoLogic and Fresh Water. The fact is that CCC's trade secret claims were an afterthought, alleged late in this case for purposes of leverage in the litigation, rather than to protect any commercially sensitive information.

IV. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT IN

CONCLUDING THAT CCC WAS NOT ENTITLED TO DAMAGES
UNDER ITS TRADE SECRET MISAPPROPRIATION CLAIM.

The Circuit Court ruled that CCC failed to prove that any of its alleged damages were proximately caused by a misappropriation of alleged trade secrets. The Circuit Court noted:

The evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster from CCC. There was very little, if any, evidence that possession of CCC's customer information by Wilson was the proximate cause of any lost revenue experience by CCC. (R. p. 1786).

The Circuit Court's finding is based on the proper application of South Carolina law to the facts of this case and should therefore be affirmed.

NeoLogic and Fresh Water adopt Wilson's arguments with respect to the alleged misappropriation. In summary, there is ample evidence in the record to support the Circuit Court's finding that CCC's alleged trade secrets were not misappropriated by Wilson. Wilson, a member of CCC, took his work computers with him as he was being locked out of his company by Gandis. He did so while in the presence of law enforcement and in order to preserve the evidence necessary to prove the oppression he experienced. (R. p. 442, line 1 – p. 444, line 8). Wilson returned his computer to CCC with all information intact. (R. p. 442, lines 1-3). Wilson, an owner of CCC, could hardly have taken CCC information by improper means—he had as much of a right to it as anyone else.

Although CCC represents that “Wilson left CCC, then took and used all of this confidential information at NeoLogic/FWS – the circuit court made that specific finding.” (Brief of Appellant CCC, LLC, p. 20), there is no reference to such a finding by the Circuit Court. The Order makes no such finding. The Court, in ruling on the ancillary question of whether NeoLogic and Fresh Water were entitled to an award of attorney's fees under

the South Carolina Trade Secrets Act, found that NeoLogic/Freshwater used CCC's confidential information (as opposed to trade secrets). This information was in the form of a spreadsheet Bill Shaw used while working at CCC. (R. p. 331, lines 3-21). Shaw testified that the spreadsheet was "a very generic vendor cross-reference for my own purpose there at CCC." (R. p. 331, lines 3-21; pp. 1534-1587). This information did not have customer information and there was no evidence this information was used in connection with any CCC customers. (R. pp. 1534-1587). All of the information was readily and publicly available or ascertainable, was not the subject of a non-disclosure agreement or non-competition agreement, and it was dated. The spreadsheet bore the date November 4, 2010, over year prior to when Wilson was locked out of CCC. (R. p. 331, line 22-p. 332, line 3; pp. 1534-1587).

Gandis' testimony at trial about this spreadsheet was very limited, and there was no testimony that Bill Shaw's use this spreadsheet resulted in any damage to CCC. To the contrary, there is substantial evidence in the record demonstrating that the few customers to which Wilson sold film in 2012 while at NeoLogic were Wilson's customers prior to joining CCC. (R. p. 445, line 16-p. 447, line 17). CCC argues that eleven of NeoLogic's customers "were customers that CCC gained on its own." (Brief of Appellant CCC, p. 23). However, there was evidence that of these eleven, all but three were customers which Wilson had pre-existing relationships. Of those three, two had left CCC because of quality issues and one did not do business with NeoLogic until 2014. (R. p. 449, line 13-p. 450, line 113; p. 448, lines 7-16). The largest account initiated contact with Wilson in 2013, after he was locked out of CCC. (R. p. 451, lines 4-8). There is therefore ample evidence to support the Circuit Court's determination that CCC failed to prove that Wilson's post-

CCC activity at NeoLogic constituted "anything but legitimate competition by one who had superior knowledge of and wide contacts in the film industry." (R. p. 1786).

CONCLUSION

The Circuit Court applied the correct legal standard when it determined that CCC failed to prove that Wilson, NeoLogic or Fresh Water misappropriated CCC's trade secrets. The Circuit Court also applied the correct legal standard when it determined that CCC failed to prove that it incurred any damages as a result of an alleged misappropriation of trade secrets. Moreover, the record supports the Circuit Court's credibility findings and its findings with respect to the public nature of CCC's alleged trade secrets, CCC's lack of effort to protect its alleged trade secrets, and the lack of evidence of damage to CCC. The Circuit Court's decision should therefore be affirmed.

Respectfully submitted,



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June 16, 2016

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

Appellate Case No. 2015-000476

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

v.

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

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

v.

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

v.

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

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

and

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

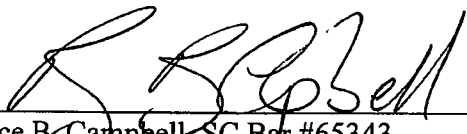
PROOF OF DELIVERY

I certify that I have served Respondents NeoLogic Distribution, Inc., and Fresh Water Systems, Inc.'s Final Brief by depositing a copy of same in the United States Mail, postage prepaid, on June 17, 2016, addressed to the attorneys of record:

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**THE STATE OF SOUTH CAROLINA
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David Wilson, individually and derivatively on behalf of Carolina Custom Converting, LLC,
Plaintiff,

v.

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

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

v.

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

v.

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

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

and

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

**FINAL BRIEF OF RESPONDENT DAVID WILSON IN REPLY TO
BRIEF OF APPELLANT CAROLINA CUSTOM CONVERTING, LLC**

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TABLE OF CONTENTS

Table Of Authorities	iii
I. Statement of the Case	1
II. Statement of Facts	3
A. Dave Wilson's 20 Years of Experience in the Plastic Film Industry	3
B. Wilson Looks for Buyer for CCC to Remedy Squeeze Out Attempt.....	5
C. Gandis Locks Wilson Out of CCC.....	7
D. Making a Living: Customers	8
E. Gandis and Shirley Secretly Create a Competing Business: Zoi Films LLC.....	9
F. Testifying Witness Bill Shaw	11
G. Testifying Witness Mike Myers.....	13
H. Testifying Witness Bruce Hotmer	14
I. Sales: CCC and Neologic.....	15
III. ARGUMENT	15
A. STANDARD OF REVIEW	15
B. TRADE SECRETS CLAIM.....	16
1. The Circuit Court Applied the Correct Legal Standard In Concluding that Appellant CCC Failed To Establish that Information Claimed to be Trade Secrets was Not Generally Known to Others and Not Readily Ascertainable by Proper Means.	16
2. The Circuit Court Applied the Correct Legal Standard In Concluding that Appellant CCC Failed To Establish that CCC Made Efforts That Were Reasonable Under the Circumstances to Maintain its Secrecy	20
3. The Circuit Court Applied the Correct Legal Standard In Concluding that Appellant CCC Defendants Failed to	

Establish by a Preponderance of the Evidence that Information Claimed to be Trade Secrets Were "Misappropriated.".....	24
--	----

C. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD WHEN IT JUDGED THE BREACH OF FIDUCIARY DUTY CLAIM.....	28
--	----

IV. CONCLUSION.....	28
---------------------	----

TABLE OF AUTHORITIES

CASES

<i>Carolina Chem. Equip. Co. v. Muckenfuss</i> , 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996)	17, 18
<i>Cedar Cove Homeowners Ass'n v. DiPietro</i> , 368 S.C. 254, 259, 628 S.E.2d 284, 286, (S.C. Ct. App. 2006)	19
<i>Chapman v. Allstate Ins. Co.</i> , 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975)	16
<i>Geiger v. Aetna Ins. Co.</i> , 215 S.C. 144, 149, 54 S.E.2d 549, 551, (1949)	26
<i>Hill Holiday Connors Cosmopolous, Inc. v. Greenfield</i> , 433 Fed. Appx. 207, 214 (4th Cir. 2011) (relying on <i>Lowndes Prods. v. Brower</i> , 259 S.C. 322, 331, 191 S.E.2d 761, 766 (S.C. 1972))	20
<i>Jordan v. Judy</i> , 413 S.C. 341, 776 S.E.2d. 96 (2015)	16
<i>Lafitte v. Bridgestone Corp.</i> , 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009)	21
<i>Linda Mc Co. v. Shore</i> , 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010)	16
<i>Lowndes Prods, Inc. v. Brower</i> , 259 S.C. 322, 331, 191 S.E.2d 761, 766 (S.C. 1972)	17, 20, 21
<i>Moore v. Weinberg</i> , 373 S.C. 209, 226-227, 644 S.E.2d 740, 749 (Ct. App. 2007) 27	26
<i>Ross v. Bernhard</i> , 396 U.S. 531, 543 (1970)	15
<i>Sapp v. Wheeler</i> , 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013), citing <i>Silver v. Aabstract Pools & Spas, Inc.</i> , 376 S.C. 585, 590, 658 S.E.2d 539, 541-42 (Ct. App. 2008)	15
<i>Sheek v. Crimestoppers Alarm Sys.</i> , 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)	15
<i>Williams v. Riedman</i> , 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000)	17, 18

STATUTES

S.C. Code Ann. §39-8-20(1) (1997)	25
S.C. Code Ann. §39-8-20(2) (2016)	25

S.C. Code Ann. §39-8-20(5) (1997)	17, 19, 20, 21, 22
S.C. Code Ann. §39-8-20(5)(a)(ii).....	20
S.C. Code Ann. §39-8-30.....	21, 22

OTHER AUTHORITIES

<i>Restatement of Torts</i> , § 757	20
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I. STATEMENT OF THE CASE

Respondent David Wilson ("Wilson") agrees generally with Appellant CCC's outline of the procedural history of the case in its Statement of Claim, although there are a few omissions from the procedural history that would be helpful for the Court to know in understanding the progress of this case. First, on April 27, 2012 Wilson filed a complaint against John Gandis ("Gandis") and Andrea Comeau-Shirley ("Comeau-Shirley") alleging oppression and seeking dissolution and/or a buyout of his membership interest in Carolina Custom Converting, LLC ("CCC"). Gandis and Comeau-Shirley answered and counterclaimed on July 3, 2012. On October 10, 2012, Wilson filed a motion to compel the production of electronically stored financial information in its Quickbooks' files. Per order of the court dated November 26, 2012, CCC produced uncondensed electronic QuickBooks' files for 2011 and 2012.

On May 20, 2013, Wilson filed a motion seeking to compel the production of discovery and hard drives of Comeau-Shirely based upon the affidavit of expert witness, Catherine Stoddard, who found alterations and manipulations of Quickbooks' electronic data produced pursuant to the court's November 26, 2012 order. On October 28, 2013, the court ordered Comeau-Shirley to produce her hard drives for imaging and searching after determining she failed to produce emails and she altered electronically stored information in Quickbooks, including back dating transactions, deleting hundreds of thousands of dollars in inventory, and inserting accounts payable to her accounting firm. More than a thousand of previously unproduced emails were harvested from Comeau-Shirley's hard drive over a period of six months as the parties conducted searches pursuant to the protocol set out in the court's order. These emails were critical, and make up most of the documentary evidence introduced by Plaintiff at trial.

In addition, after a status conference on August 26, 2013, the court determined that an accounting of the financial books were in order. On October 22, 2013, the court ordered a full accounting of the financial records of Carolina Custom Converting, LLC and ZOi Films, LLC. The order appointed Del Bradshaw, Certified Public Accountant (CPA), to carry out the execution of the exhaustive review of books. The process took over nine months and cost approximately \$150,000 because the financial records needed to be normalized and in some instances reconstructed. This report was admitted into evidence in this case, and Del Bradshaw testified about his findings.

It was not until June 2013 and after a trial date had been set that CCC filed claims alleging misappropriation of trade secrets, these claims would not be served on all parties until months later. There were no motions for injunctions and protective orders, and CCC conducted no forensic examination of Wilson's computer or any Neologic computer. The filing of the trade secret claims (and many others) would delay trial another twelve months.

In September/October 2014, the parties presented evidence during a bench trial on the merits. After a four day trial on the merits and a three hour oral argument on the 5th day of the proceeding, the Court ruled quickly after having sat eyewitness to the testimony of CCC's three members (as well as Plaintiff's other witnesses and the damning testimony of court appointed accounting expert, Del Bradshaw). With instructions from the trial judge, Wilson drafted a proposed order as well as requested rulings on matters not addressed in the directions of Judge Garrison Hill. This proposed order was submitted on October 20, 2014, and the opposing parties were provided an opportunity to comment. The court took the matter under advisement and issued its own final order on January 9th, 2015, rejecting Wilson's request for prejudgment interest and attorneys fees. Wilson initially appealed several aspects of the order but decided to

abandon those grounds, and simply seek a ruling affirming the trial court's decision to finally end this litigation. CCC appealed the trial court's decision regarding CCC's trade secrets claim. This Initial Brief by Respondent David Wilson is filed in support of this Court affirming the trial court's decision.

II. STATEMENT OF FACTS

Carolina Custom Converting, LLC ("CCC") was organized as a manager-managed limited liability company, and John Gandis ("Gandis") was the managing member. (R. p. 38 lines 8-19; pages 976-979). Gandis held forty-five percent ownership interest. Respondent David Wilson ("Wilson") was also a forty-five percent owner of CCC; Andrea Comeau Shirley ("Shirley") held a ten percent distributional interest. After a year long attempt to force Wilson to sell his ownership interest, Gandis called law enforcement to accompany him to CCC's Greenville office to remove Wilson from his own business; once Wilson had left the premises, Gandis had the locks changed.¹ Wilson has never been permitted to return to his former office or to participate in the business of CCC again. Four years after his ouster and hundreds of thousands of dollars later, Wilson has still not been paid for any of his membership interest.

A. Dave Wilson's 20 Years of Experience in the Plastic Film Industry

After serving active duty in the Navy during Desert Storm and while attending Furman University, Wilson became employed by working nights for Interfilm as polyester film machine operator as well as working in the warehouse with the film inventory. (R. p. 360 lines 19-p. 361

¹ The detailed factual description of the "squeeze out" is described in detail in Respondent Wilson's brief related to the appeal of Appellants Gandis and Shirley. These facts are helpful in understanding context especially in light of the court's ruling "Mr. Gandis and Ms. Comeau-Shirley's testimony lacked credibility in most important respects." (R. pages 1794-1795) Because there is so much disputed testimony, credibility was a critical determinant in the outcome of this trial. Examination of the emails between Gandis and Shirley makes this determination a foregone conclusion.

line 6). Much of this film is used as packaging: food packaging, air packaging, and flex packaging. After a year or two with Interfilm, Wilson was then recruited by another film company, where he became employed as a film metalizer, which involved taking clear films and applying aluminum to the surface to give a better barrier. (R. p. 361, lines 7-17). After a stint at another film company, Wilson started his own film business, Palmetto Custom Films, Inc. (PCFI) in 2003 with two partners. (R. p. 362, lines 1-11). Wilson later formed his own film brokerage, Eastern Films Solutions (EFS), in 2005. (R. p. 364, lines 11-21).

By the time he formed EFS, Wilson had approximately 15 years of experience in the film business and his focus had been (and continued to be) polyester film (R. p. 365, lines 20-21; p. 366, lines 1-12). During his years in the film business, Wilson had made significant number of vendor and customer contacts as well as partnered with other film businesses and brokers for various transactions. (R. p. 365, lines 1-18; p. 366 lines 3-8). Before and while operating EFS, Wilson was a member of the various trade associations related to the film and packaging businesses, and further developed contacts and customers through these memberships as well. (R. p. 365, lines 18-25). It was through EFS that Wilson met Gandis in 2007, when EFS sold some product to VyTech, a business owned by Gandis' father before it went bankrupt. (R. p. 367, line 15-p. 368, line 11).

When Gandis and Wilson decided to form CCC, EFS customers were gradually serviced through CCC; Wilson had all the product knowledge, all the vendor/supplier contacts (and there are very few domestic manufacturers of polyester film), and all the customer contacts. Significantly, Dave Wilson had developed a relationship with Minova through EFS, and made the decision to turn this account over to CCC at its formation. This resulted in \$775,000 in revenue for CCC from that one account alone in 2008, which helped fund its start-up operations.

(R. p. 63, lines 4-16). Gandis had zero accounts and no real industry contacts other than Wilson. (R. p. 53, lines 6-12). However, Gandis offered that he had access to capital as well as a building which could be used to operate CCC. (R. p. 376, line 22-p. 377, line 8).

B. Wilson Looks for Buyer for CCC to Remedy Squeeze Out Attempt

Beginning in early 2011, Gandis and Shirley began an effort to force Wilson out of CCC, and after threatening to stop paying him his “guaranteed” monthly draw, buy-out negotiations began. (R. pages 1770-1789). So, in December 2011 and January 2012, Wilson began looking for a buyer for CCC with the knowledge and permission of the other two members.² (R. p. 430, line 3-p. 431, line 19). Gandis indicated he and Shirley were open to selling their interests. (*Id.*) Wilson approached various possible purchasers, including his brother-in-law Steve Norvel (Wilson’s brother-in-law who owns Neologic) as well as Filmtech, which was owned by Mark McGarel. (R. p. 430, line 19-p. 431, line 11). Filmtech was both a competitor and a supplier and a potential customer. (*Id.*)

Wilson sent McGarel CCC’s financials and received a non-disclosure from him. (R. p. 431, line 23-p. 432, line 6). Customer names were removed from the financial disclosures, and thereby providing only revenue figures necessary to compute a potential purchase price. (*Id.*) Wilson obtained a non-disclosure agreement from all the persons with whom he discussed a possible sale of CCC. (R. p. 432, lines 4-6). McGarel decided he was not interested in buying

² Despite claims to the contrary made in Appellant’s CCC brief on page 9, Wilson did not enter CCC’s secure server and download all of CCC’s customer contact information on January 9, 2012, but was still employed and actively working on the business that remains to this day forty-five percent his company. Appellant CCC makes the opposite claim with a citation to the record that indicates merely that Wilson modified a couple of files on January 9th, 2012. The fact that Wilson merely accessed information related to his activities on behalf of CCC does not support the much more damning statement made in Appellant’s brief on page 9 which is simply not supported by any facts in the record.

CCC, and Wilson and McGarel explored the idea of Wilson coming to work for McGarel. (R. p. 432, line 7-p. 434, line 12). Wilson did not have a non-compete, and had already been advised he had received his last paycheck for a while. (*Id.*) However, nothing ever came of these discussions with McGarel.³

It is important to note that months earlier in 2011, Gandis and Shirley had IT contractors access Wilson's computer and program it to forward all of his emails, personal and business, to Gandis so he could monitor Wilson's emails. (R. p. 119, line 6-p. 120, line 10; pages 1018-1022; p. 700, line 15-p. 701, line 1). Gandis read emails between Wilson and his accountant, Wilson and his lawyer, and Wilson and his wife, and would forward to Comeau-Shirley so they could strategize how to use the information in its attempt to force Wilson out of the business. (R. p. 121, line 21-p. 122, line 6; *see e.g.*, pages 1045-1046). Gandis also read the emails from Wilson and Mark McGarel, and received them in real time just as McGarel would have received these emails (and the CCC financials as attachments). (R. p. 163, lines 14-17; p. 555, lines 15-17). However, there were no actions taken to protect what CCC now claims was a disclosure of trade secrets. During litigation, the trade secret claim was not raised for years until Appellant CCC (under the control of Gandis and Comeau-Shirely) filed Amended Third-Party claim a month before the original trial date to gain leverage; there was never a motion for injunctive relief sought related to any information now the subject to claims of "theft" of trade secrets.⁴

³ Plaintiff's Exhibit 116 is an email in which CCC sent an email to McGarel containing the very information it alleges was disclosed by Wilson. It seems as if the email might have been sent inadvertently, but it appears the disclosure was of no consequence since McGarel's business sales higher grade film to a different set of customers than CCC. It took no steps to obtain the return of this information.

⁴ The spying and testimony related to it are additional evidence that certainly would be relevant to credibility; emails contradicting Gandis' and Shirley's stories about the scheme to spy on Wilson, looking for incriminating information to take away his interest, and obtaining

C. Gandis Locks Wilson Out of CCC

So, on January 17, 2012, Gandis showed up unannounced with law enforcement and made the claim that Wilson had resigned. This was the plan hatched in an email exchange between Gandis and Comeau-Shirley. (R. p. 1110-1112). Since Wilson had never resigned, Wilson denied his resignation and at first refused to leave. (R. p. 321, line 12-p. 323, line 4.) Gandis persisted. Wilson became concerned about (1) leaving his personal information on his computer in Gandis and Shirley's possession and (2) he needed "information about CCC to prove what had happened, to prove what I had done for the company...." (R. p. 321, line 12-p. 323, line 4; p. 441, lines 3-17). So, Wilson took his laptop with him when he vacated, copied the electronic information to another computer, erased the computers, added CCC files and emails back to the CCC laptop, and returned the computer. (R. p. 442, line 1-p. 444, line 8). In fact, the search paid for by Appellant of the computer revealed that there were 40,000 emails on the computer when it was returned despite claims it was wiped clean. (R. p. 443, line 9-p. 444, line 2). Wilson testified the information he had copied was stored on the same hard drive on which it was originally copied, and had never been used to compete. (R. p. 444, lines 4-8). Appellant did not seek access to the hard drive or retain an expert to determine whether any of the information was actually opened and used. (Some of the information was eventually presented as evidence to prove Wilson's case.) Wilson testified that he did not use any of CCC information in his possession "to call on, solicit or obtain business...." (R. p. 445, lines 6-9).⁵ The identity of those

information to be used to squeeze Wilson out of the business he co-founded. (*See e.g.*, R. pages 1045-1046; page 700, line 15-p. 701, line 12).

⁵ Gandis claimed Wilson had resigned, when in fact emails between he and Shirley plotted out the manner of termination and the words Gandis should use when terminating Wilson. (R. pages 1110-1111; p. 167, line 20-p. 169, line 15). Shaw corroborated Wilson's testimony that he did not resign. (R. p. 321, line 12-p. 323, line 4). Shaw's testimony is consistent with the plans

customers he did call upon while at Neologic corroborates this testimony; Appellants presented no evidence to the contrary.

D. Making a Living: Customers

In the remaining 11 months of 2012 following his ouster, Wilson needed to provide for his family. (R. p. 505, lines 13-16). Through Neologic, Wilson sold only a \$132,000 worth of film to customers who had done business with CCC compared to the \$5.2 million in reported sales CCC did in Wilson's last year with the company (2011). (R. p. 445, lines 10-15). However, the \$132,000 in sales were all to customers that Wilson either sold to previously through PCFI or EFS and/or customers and contacts with whom he had some pre-existing relationship. (R. p. 1334; p. 444, line 17-p. 445, line 15). The \$132,000 in revenue in 2012 came from 7 accounts, most of them small accounts:⁶

1. American Sales Group was a customer of Wilson's while at PCFI. (R. p. 445, lines 16-25).
2. Flexease was an Interfilm account, EFS account, and a PCFI account going back 20 years. (R. p. 446, lines 2-6).
3. Griff Paper and Film, which was a distributor and not a customer of CCC. (R. p. 446, lines 7-12).
4. Horizon Energy was an PCFI customer and an EFS customer. (R. p. 446, lines 6-20).
5. Imperial Manufacturing Group, Inc., a duct manufacturer in Canada, that Wilson had called on while at EFS. And EFS had sold film to a company called Bowflex which was eventually bought by Imperial Manufacturing. (R. p. 446, line 21-p. 447, line 6).
6. Industrias Vermont is a flex duct account in Mexico sold to initially through EFS. (R. p. 447, lines 7-12).

devised in the email exchange between Gandis and Shirley. Once again, more evidence that impeaches the credibility of Gandis and Shirley.

⁶ Imperial Manufacturing Group, Inc. is an exception.

7. Valencia Speciality Films is Bruce Hotmer's company. (Hotmer was a witness presented by Plaintiff, and his relationship with Hotmer dates back more than a decade.) (R. p. 447, lines 13-17; p. 340, line 1-p. 342, line 25).

It is undisputed that every singled account that Wilson sold to in 2012 were customers of his prior to the formation of CCC. (R. p. 447, lines 15-18). And he sold to these accounts in 2013 and some in 2014. (R. p. 1334).

With three exceptions from 2012-2014, every account sold at anytime by Neologic had been some combination of former EFS, PCFI or InterFilm customer (R. p. 451, lines 11-15). No trade secrets were needed to make sales to these accounts. One of the three such accounts was Plastic Packing Technologies, but Neologic did not solicit or sell any film to Plastic Packing until 2014, which was two years after Wilson was locked out of his office.⁷ (R. p. 449, lines 13-20). Another of the three accounts was Filtrosmallas. Wilson had no prior relationship with Filtrosmallas prior to joining Neologic, but Filtrosmallas had quit doing business with CCC due to quality issues before Neologic made its first contact. (R. p. 448, lines 7-16). Finally, Supply One became a customer of Neologic, and Wilson had no prior relationship. (R. p. 449, line 21-p. 450, line 13). However, Supply One initiated the contact with Wilson in 2013 (R. p. 451, lines 4-8). There was not one shred of evidence that Wilson used CCC's alleged trade secrets to solicit these accounts; the weight of the evidence established just the opposite.⁸

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

⁷ Any of CCC's pricing information would have become obsolete by the next year, 2013. (R. p. 447, lines 19-23).

⁸ It should also be noted that CCC claimed that Wilson interfered with its relationship with JBF RAC, a supplier of CCC. However, emails that came to light late in discovery demonstrate that Gandis had accused JBF of trying to steal 3M, a CCC customer for which JBF was to provide product. (R. p. 1226; p. 914, line 16-p. 917, line 23). Just another instance where Gandis' credibility took a hit.

As Respondent CCC admits, CCC was a manager-managed LLC and Gandis was the manager. Shirley was his sole advisor after Wilson was locked out. Quite simply, Gandis and Shirley began plotting on March 15, 2012 to create a competing entity so they did not have "to haggle with Dave W about how much of the new stuff was his." (R. pages 1130-1133; p. 713, lines 20-25). Just months later, ZOi Films, LLC was created by Gandis and Shirley to handle the most profitable business and let CCC die on the vine; ZOi used the server with all the alleged trade secrets, sold to CCC customers, had access to pricing, customers, products, and anything else it alleges that Wilson took. (R. p. 184, line 12-p. 186, line 22; pages 1130-1143).

Gandis and Shirley created an entity and submitted corporate resolutions with the bank indicating that it was owned by two LLCs owned by Gandis and Shirley while under oath maintaining that they had intended to create a wholly-owned subsidiary of CCC. (R. p. 190, line 11-p. 191, line 25; pages 1198-1200). More significantly, tax documents signed under the penalty of perjury confirmed that ZOi had not been organized as a wholly-owned subsidiary of CCC. (R. pages 1201-1205) but still, the documentary evidence did not stand in the way of Gandis and Comeau-Shirley maintaining their cover story. So, "trade secrets" claimed to have been taken by Wilson to Neologic were given to ZOi by Gandis and Shirley beginning in July 2012 (all the while Gandis and Shirley maintained under oath this was not their intention).

Former customer service manager, Bill Shaw testified that he was told by Gandis and Comeau-Shirley that ZOi Films was "a new company that John [Gandis] and Andrea [Comeau-Shirley] were starting up." (R. p. 325, lines 18-23). Shaw further testified that while he was being paid by CCC, he was in reality working on ZOi Film deals, before Gandis and Shirley became secretive about ZOi's business. (R. p. 325, line 5-p. 327, line 18). ZOi Film business was being conducted at CCC and using its Quickbooks system to enter sales transactions and

purchase orders to make it appear that ZOi was buying film from CCC. (R. p. 326, lines 1-8). Accordingly, CCC's pricing and customer information used by Shaw in performing his customer service duties on behalf of CCC were being used by Shaw in performing purchasing and sales for ZOi Films.

F. Testifying Witness Bill Shaw

Bill Shaw was hired by CCC to create and establish a customer service department as well as assisting with purchasing film. (R. p. 318, lines 1-9). He also created purchase orders and sent those to customers. (*Id.*). When he was hired by CCC, Shaw was not asked to sign a non-disclosure agreement nor a non-compete. (R. p. 318, lines 21-25). His description of the typical film purchasing process shows the lack of reliance on any trade secrets to do his job:

When Dave was still there and he and I were in the Greenville office, you know, the decisions were made if we had a customer -- specific customer need, we'd go out. We'd look at three or four different vendors, find the film that we needed. If it was available, then, you know, the decision to purchase it was made.

(R. p. 320, lines 8-15).

Despite Appellant's (apparent) claims that every sale was subject to a qualification process, it was the exception that a qualification process took place.⁹ In connection with these transactions, purchase orders were generated. (R. p. 320, line 24-p. 321, line 1). After Wilson was ousted, Shaw handled all the purchasing decisions, reported to Gandis and worked from his home office three days a week. (R. p. 323, lines 18-p. 324, lines 1-8). Critically, at his home Shaw generated copies of purchase orders and sales orders; the information was stored electronically, but each transaction generate paper containing customer information, product

⁹ On the one hand Appellant claims that the process of making a sell involves a long qualification process; on the other, Gandis in support of his attempt to claim the spreadsheet was a trade secret testified that the spreadsheet allowed CCC to make a sale in "two minutes." (R. p. 879, lines 4-17).

information, and pricing information. (R. p. 324, line 18-p. 325, line 1). Gandis nor any other person with CCC ever inquired about the retention or storage or protection of this information which was not returned to CCC upon Shaw's termination. (R. p. 325, lines 2-4).

As mentioned above, Shaw also was involved in making purchases for ZOi Films, a separate film company selling plastic film established by Gandis and Shirley to siphon off profits from CCC without Wilson even knowing. (R. p. 325, lines 7-22). Shaw performed the purchasing function for this competing entity, ZOi, before Gandis and Shirley began acting more secretive. (R. p. 325, line 24-p. 327, line 14). In the fall of 2012, Shaw received a subpoena from Wilson's counsel seeking production of documents, electronic information and emails in his possession. (R. p. 327, lines 23-25). Within an hour of receiving the subpoena, Shaw received a call to bring his laptop to CCC so the "IT guys" could upgrade software. (R. p. 328, line 13). When he showed up, Gandis fired Shaw and kept his laptop. (R. p. 328, line 14-p. 329, line 3). However, no mention was made of all of the CCC business information in his home office, and so, Shaw had (and later produced to Wilson's counsel without objection) a box full of information about all of CCC's customers, purchases, and prices. (R. p. 329, lines 12-21). There was no misappropriation of use, but neither was there any attempt by CCC to protect these "trade secrets."

Importantly, Shaw testified as to what is now being called "electronic vendor reference program" and "inventory reference program." However these terms were never used at trial and are simply made up terms to describe a simple Excel spreadsheet created by Bill Shaw to help him keep information he received from manufacturers organized, which he described as "a very generic vendor cross-reference for my own purpose there at CCC." (R. p. 331, lines 3-21; Def. p. 1534). This information did not have customer information and there was no evidence this

information was used in connection with any CCC customers. (R. p. 1534). When Shaw was terminated, no attempt was made to obtain this document or any other document. (R. p. 329, lines 12-21). Shaw came to work for Neologic without objection after he was terminated from CCC. (R. p. 329, line 22-p. 330, line 7). This is the single piece of information from his time at CCC that was used while at Neologic. (R. p. 331, line 22-p. 332, line 3).¹⁰

G. Testifying Witness Mike Myers

However, even though Wilson possessed a substantial amount knowledge and experience in the film industry, Mike Myers ("Myers"), independent film broker, testified there is more than enough information about plastic film users, sellers, and manufacturers which can be gathered from mere searches on the internet to obtain leads and generate revenue. (R. p. 282, line 2; p. 292, lines 12-24; p. 302, lines 3-15). Myers also testified that a simple internet search would reveal all the domestic manufacturers of polyester film; he also testified that as for potential customers, the internet is a good source of publicly known market information that Appellant CCC claims to be "trade secrets." (R. p. 302, line 23-p. 303, line 9).

Myers also testified that supplier and customer information could be obtained through trade associations and its databases, which were all available to the public. (R. p. 303, lines 9-20). Moreover, pricing was public knowledge. The largest manufacturers send out weekly emails with the pricing for their films for sale and because the customers routinely would provide you with pricing information in an effort to negotiate a lower price. (R. p. 303, line 21-p. 304, line 17). Customers do not sign non-disclosure agreements. Myers sold film for CCC, but was never

¹⁰ On page 16-17 of Appellant CCC's initial brief, appellant makes reference to the spreadsheet as a "program." Of course, anyone who knows what an Excel spreadsheet is knows it is not a "program." This language was used to match the language of the Act but not once during trial did Gandis or any other witness refer to the spreadsheet created by Bill Shaw as a "program."

asked to sign a non-disclosure agreement protecting any the customer, vendor or pricing information.¹¹ (R. p. 304, lines 18-20).

H. Testifying Witness Bruce Hotmer

Bruce Hotmer ("Hotmer") owns Valencia Speciality Films and is a film broker, who began selling polyester film over 40 years ago. (R. p. 340, line 13-p. 341, line 25). Hotmer's background is both in the domestic market and the international market, having ran Jindal America, a subsidiary of a multinational company based in India that sold polyester film. (R. p. 341, lines 6-12).

Hotmer testified that the film market (including polyester film) functioned as a commodities market. (R. p. 349, lines 15-18). Purchasers of film do not sign non-disclosure agreements; customers are the primary source of information of the price they are paying for film. (R. p. 348, lines 5-17). Customers who are looking for a better price (and which one is not?) will simply inform competitors' sales persons of the current price they are paying for film from their current distributor. (R. p. 348, line 11-p. 349, line 12). In a commodities market, manufacturers prices are publicly reported.

Hotmer testified that in the market of polyester film much of the information about potential customers and distributors was available through a public source, The Thomas Registry, which includes contacts and phone numbers of film buyers and sellers. (R. p. 344, line 3-p. 345, line 1). Moreover, because polyester film is used in several market segments, all of which have trade associations with customer and distributor information, films sellers attend these trade shows, including customer information, contacts and obtain printed membership lists

¹¹ Myers also testified that based upon his experience with Gandis, "he's a crook." (R. p. 307, line 17; p. 304, line 22-p. 305, line 22).

distributed at the trade show. (R. p. 345, lines 10-25). And, it is common knowledge for those in the industry to know what type of film is used by the various market segments. Hotmer testified by way of example of food packaging uses primary half mill film, and it is a product that everyone in the market sells. (R. p. 345, line 18-p. 346, line 16).¹²

I. Sales: CCC and Neologic

As a basis of comparison, when Wilson and Gandis formed CCC, Wilson had pre-existing customer relationships that generated \$1.6 million in revenue for CCC in its first year of selling film. (R. p. 376, lines 12-18). During its 3 years of existence, EFS had sold \$5.8 million in film; by 2007, CCC did \$7 million in sales, and \$3.5 million with former EFS customers. (R. p. 383, line 16-p. 385, line 19). CCC gross receipts in 2011 was over \$5 million. (R. pages 1207-1215). In 2012, CCC had a gross revenue of \$3.5 million compared to Neologic's gross sales of \$132,000 (and as stated above, all of these were customers of Wilson's prior to the formation of CCC). (R. pages 1206-1215). CCC refused to produce any revenue information for 2014. Over three years of operation, Neologic had total gross sales of \$985,276.18. (R. p. 1206).

III. ARGUMENT

A. STANDARD OF REVIEW

Civil claims seeking money damages are legal in nature. *See Ross v. Bernhard*, 396 U.S. 531, 543 (1970); *see also Sapp v. Wheeler*, 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013), *citing Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541-42 (Ct. App. 2008). Appellant CCC's claim for the misappropriation of trade secrets is an action at law.

¹² When reviewing information provided to Mark McGarel by Dave Wilson by email in Pl. Exhibit 76, Hotmer testified the email contained information that everyone in the film market would have access to. (R. p. 346, line 17-p. 34, line 3).

When considering the appeal of an action at law tried without a jury, an appellate court cannot “disturb the trial court's findings of fact unless no evidence reasonably supports [the trial judge’s] findings.” *Jordan v. Judy*, 413 S.C. 341, 348, 776 S.E.2d. 96, 100 (2015). “In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings.” *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010). Thus, the trial court's findings in an action at law action are the same as a jury's findings: the credibility and the weight of the evidence are questions exclusively for the trial judge. *See Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). “[An appellate court] may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible.” *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). “[The Court] must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary.” *Id.*

B. CCC’S TRADE SECRETS CLAIM

1. The Circuit Court Applied the Correct Legal Standard In Concluding that Appellant CCC Failed To Establish that Information Claimed to be Trade Secrets was Not Generally Known to Others and Not Readily Ascertainable by Proper Means.

“Trade secret” means information that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

0(5). This is the definition applied by the trial court. (R. p.1785, p. 1788). The court simply made findings of fact that the information CCC claimed to be a trade secret was either generally known, ascertainable by proper means, or known by Dave Wilson before of the formation of CCC. (R. pages 1785-1786). Each of these categories is the standard for evaluating whether a trade secret exists and is directly based upon statutory language.¹³ "The threshold issue in any trade secrets case is not whether there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether, there was a trade secret to be misappropriated." *Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000), quoting *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972).¹⁴ "A trade secret must be secret." *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). The trial court concluded that information claimed by CCC to be trade secrets was known and/or ascertainable, and therefore not secret. (R. pages 1784-1785).

The conclusion by the trial court is supported by sufficient facts in the record. First and foremost, the evidence showed that Dave Wilson had been in the industry for over 20 years (R. p. 360, lines 17-25), had been a principal in two separate film businesses previously (R. p. 361, line 21-p. 362, line 11; p. 364, line 20-p. 365, line 4), developed substantial contacts in the polyester film industry, joined trade associations, attended trade shows and expositions (R. p. 365, lines 8-23), had relationships with the polyester films manufacturers in the U.S. (R. p. 366, lines 1-15), and built a customer base that generated approximately \$5.8 million in revenues for EFS before joining CCC. (R. p. 383, lines 16-19). In fact, every single customer to which

¹³ In addition, the court made a finding of fact that CCC did not reasonably safeguard its information. This is discussed in more detail below.

¹⁴ CCC takes the trial judge to task for citing a case (*Hill Holiday*) that based its reasoning on *Lowndes Products*, which remains good law. The SCTSA only displaces common law that contradicts the Act.

Wilson sold film while at Neologic was a customer he had sold to prior to coming to CCC. (R. p. 447, lines 15-18; p. 445, lines 16-25; p. 446, lines 2-6; p. 446, lines 7-12; p. 446, lines 16-20; p. 446, line 21-p. 447, line 6; p. 447, lines 7-12; p. 447, lines 13-17). *See Williams v. Riedman*, 339 S.C. at 279, 529 S.E.2d at 42-43 (“According to Williams, the eleven clients she serviced at Web-Kor were from her original 148 accounts. She further testified that while employed with Riedman, she did not gain any additional or ‘secret information’ about these customers.”)¹⁵ Appellant CCC failed to produce any evidence that any customer information for a customer sold to by Neologic was not known by Wilson prior to forming CCC or not ascertainable by him through public sources.

Mike Myers and Bruce Hotmer, both film brokers who have been engaged in the film industry for decades, corroborated Wilson’s testimony regarding the availability of information relating to vendors/suppliers and customers/potential customers, specifically stating that such information could be obtained through trade journals, at trade shows, or in other publicly available sources like the Thomas Register (R. p. 292, line 16-p. 293, line 3; p. 340, line 13-p. 343, line 7; p. 303, lines 9-20; p. 302, line 23-p. 303, line 9; p. 344, line 3-p. 345, line 1). Each testified that the sort of information being claimed by CCC as trade secrets was publicly available through trade associations and its databases (R. p. 303, lines 9-20; p. 302, line 23-p. 303, line 9; p. 344, lines 3-25; p. 345, line 1). Moreover, pricing was public knowledge because the largest manufacturers send out weekly emails with the pricing for their films for sale and because the customers routinely would provide dealers/sellers with pricing information in an effort to negotiate a lower price. (R. p. 303, line 21-p. 304, lines 17). *See Carolina Chem. Equip.*

¹⁵ Any pricing known by Wilson (which was publicly available in any event from the manufacturers and customers) would have become obsolete by the next year, 2013. (R. p. 447, lines 19-23).

Co. v. Muckenfuss, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996) (“In determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others.”).

At trial, CCC offered no evidence to establish the existence of trade secrets other than Gandis’ own conclusory testimony. (See, e.g., R. p. 904, lines 11-15; p. 908, lines 7-14). As this Court has noted elsewhere, “[w]e acknowledge the superior position of the trial judge to assess witness credibility. We would not, even under de novo review, lightly disregard a trial judge’s credibility determinations.” *Cedar Cove Homeowners Ass’n v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006). As the trial court said in denying Defendants’ Rule 59 motion, “Mr. Gandis’ and Ms. Comeau-Shirley’s testimony lack credibility in most important respects.” CCC presented no credible evidence to establish that any information claimed to be trade secrets was in fact secret or to counter the testimony of Dave Wilson, Bill Shaw, Bruce Hotmer, and Mike Myers.

Additionally, CCC presented no testimony by its computer forensics examiner as to the specific information that was contained on Wilson’s hard drive or as to whether any of it was used or opened after he was forced out of CCC. There was no testimony from any employees involved in purchasing, sales, inventory, or customer service regarding whether this information was secret or otherwise a trade secret. There was no testimony by any individuals familiar or engaged in the film business to establish any of the elements of trade secrets, particularly the element of secrecy. Accordingly, the trial court applied the correct legal standard contained in S.C. Code Ann. §39-8-20(5), and its factual finding that information was readily available from

public sources or that Wilson knew the information even before CCC was formed has more than ample support in the record. (R. p. 1778, pages 1784-1785).

2. The Circuit Court Applied the Correct Legal Standard In Concluding that Appellant CCC Failed To Establish that CCC Made Efforts That Were Reasonable Under the Circumstances to Maintain its Secrecy.

As stated above, the trial court clearly stated that for information to be a “trade secret,” the information must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” S.C. Code Ann. §39-8-20(5)(a)(ii). This is the statutory definition of “trade secrets,” and it was the one cited to and applied by the court. Appellant CCC attempts to divert attention from the lack of evidence of trade secrets by declaring that the trial judge applied the wrong legal standard by its citation to *Hill Holiday Connors Cosmopolous, Inc. v. Greenfield*, 433 Fed. Appx. 207, 214 (4th Cir. 2011) (relying on *Lowndes Prods. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (S.C. 1972)). However, Appellant ignores the fact that the trial court first cited South Carolina Code §39-8-20(5) for the meaning of trade secret (R. p. 1785), and that *Hill Holiday*’s warning to be “vigilant” is certainly one supported by the reasonable efforts prong of the trade secrets definition.

Importantly, the warning of “eternal vigilance” stems from the South Carolina Supreme Court enunciation of the prevailing common law standard, which set a “proper and reasonable” standard for guarding trade secrets. *Lowndes Prods. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (S.C. 1972). In fact, the Supreme Court was applying the well-settled definition of trade secrets found in the *Restatement of Torts*, §757 (see particularly comment B) and comparing it (and other sources cited by *Lowndes*) to the S.C. Code Ann. §39-8-20(5). Consider a more extensive statement of the *Lowndes* holding:

[I]f the person entitled to a trade secret wishes to have its exclusive use in his own business, he must not fail to take *all proper and reasonable steps* to keep it secret. He cannot lie back and do nothing to preserve its essential secret quality, particularly when the subject matter of the process becomes known to a number of individuals involved in its use or is observed in the course of manufacture within plain view of others. '[O]ne may not venture on liberties with his own secret, may not lightly or voluntarily hazard its leakage or escape, and at the same time hold others to be completely obligated to observe it.' As a naturally known member of the patent bar has written, one who claims that he has a trade secret must exercise **eternal vigilance**. This calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it. To exclude the public from the manufacturing area is not enough.

Lowndes Prods., 259 S.C. at 331, 191 S.E.2d at 766 (emphasis added). "All proper and reasonable steps" differs only in semantics from the "reasonable efforts under the circumstances" standard found in S.C. Code Ann. §39-8-20(5). "Vigilance" is nothing more than the state of keeping careful watch. And as the trial court in our own case properly noted, "[u]nlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, the value diminishes quickly." (R. pages 1785-1786, *quoting Lafitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009)). It is not enough to be temporarily vigilant; reasonable efforts must continue or else secrecy is eroded, value is diminished, and trade secret protection is lost because it no longer meets the definition.

As further indication that the trial court understood and applied the correct standard, consider the trial court's denial of Respondent's Neologic/Fresh Water's motion for attorneys' fees under the South Carolina Trade Secrets Act. In denying Respondent Neologic's motion for attorney's fees, the court stated "South Carolina law states that employees have a duty not to use or disclose trade secrets independent of and in addition to any written contract of employment or secrecy agreement. S.C. Ann. §39-8-30. It is not required that a contract or secrecy agreement exist, and it is understandable that a very small company such as CCC did not have elaborate

agreements in affect.” (R. p. 1788). Clearly the Court understood and applied the correct standard while recognizing that Defendants had failed to present sufficient evidence that its information met the legal definition of “trade secrets.” The court applied the “reasonable efforts under the circumstance” test, bolstered by the guidance of S.C. Ann. §39-8-30.

But, even if this Court concludes that, as applied, the standard was in error, the record leaves little doubt that CCC did *not* take “reasonable efforts under the circumstances.” S.C. Code Ann. §39-8-20(5).¹⁶ The facts clearly demonstrate that Appellant CCC failed to prove it had taken reasonable steps to protect information it claimed as trade secrets. In fact the contrary is true: Gandis and Shirley used and misappropriated this same information to create another business entity (ZOi) to sell polyester film to CCC’s customers. Just two months after locking Wilson out of CCC (March 15, 2012), Gandis and Shirley began plotting to create a competing entity so they did not have “to haggle with Dave W about how much of the new stuff was his.” (R. p. 186, lines 1-7; p. 713, lines 20-25; pages 1125-1133). In July 2012, Gandis and Shirley, created ZOi Films, LLC to secretly compete in the film business; ZOi would have two members, one a company owned by Gandis (M-Tech) and the other a Georgia company owned by Comeau-Shirley (Major Brainstorms, Inc.). (R. p. 187, line 16-p. 189, line 21; pages 1134-1135; pages 1198-1200; *see also* p. 1197, pages 1201-1205, pages 1216-1218). Gandis was its president and Comeau-Shirley was its vice-president. (R. p. 190, line 17-p. 191, line 1; pages 1198-1200).

With Gandis’ blessing, Comeau-Shirley sought an investment from Gandis’ father, Cliff Gandis, to fund ZOi, including funding for a import deal belonging to CCC. (R. p. 193, line 22-p.

¹⁶ This court can affirm on any ground found in the record. There are several alternative grounds presented based upon the findings of fact of this court, and Respondent requests this Court to affirm the judgment below on any such grounds. S.C. Appellate Rule 220(c) (2007).

194, line 3; pages 1138-1143). She asked Cliff Gandis to fund a credit line for ZOi, which would fund the “silver transactions” while telling vendors and customers that CCC had no money to purchase inventory. (R. pages 1138-1143). CCC, through its manager John Gandis, was using information about CCC’s corporate opportunities and sharing it all with ZOi – and creating a \$30,000 fee for Cliff Gandis. (R. pages 1198-1200; p. 184, line 12-p. 186, line 22; p. 194, line 19-196, line 22). It seems impossible for CCC to claim at one time that CCC took reasonable steps to maintain the secrecy of its company information and its customer information when at the same time it created ZOi to utilize that information to generate profits that would be unknown to Wilson.¹⁷

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

Thus, not only did CCC fail to take reasonable steps to maintain the secrecy of its “trade secrets,” but it also affirmatively gave information (and deals) to the newly created entity, ZOi

¹⁷ ZOi was formed in July 2012, discovered by Wilson in August 2012 on LinkedIn. (R. p. 454, line 23-p. 456, line 6). In response, Gandis and Comeau-Shirely created a “declaration” in late August and attempted to back date it to July 9, 2012 to make it appear that it had been created at time ZOi Films was formed in Georgia. However, an email from Comeau-Shirely to Cliff Gandis tells the true intentions of the parties. (R. pages 1138-1143).

Films. Moreover, despite e-mails and corporate resolutions showing a scheme to secretly funnel the best deals through ZOi Films, Gandis and Shirley maintained that ZOi was simply a "wholly owned subsidiary" of CCC. (*See e.g.*, R. p. 187, lines 12-15). Of course, the creation of ZOi and the cover story was exposed by emails, and the credibility of Gandis and Shirley was completely impeached on this subject as well as others.

Although the ZOi scheme is sufficient to sustain the court's finding that Appellant did not take reasonable steps to protect its company information, there was more evidence that reasonable efforts to maintain its secrecy were not undertaken to protect its information. In fact, other than password protecting Quickbooks, there was no testimony offered by CCC as to any effort to protect the secrecy of its information. (R. p. 883, lines 5-16). Bill Shaw, CCC's customer service representative, had possession of purchase orders and sales orders containing pricing and customer information in his home that contained all the information CCC now claims to be trade secrets (R. p. 318, lines 1-9; p. 320, line 24-p. 321, line 1). Shaw did not sign a non-disclosure agreement nor a non-compete. (R. p. 318, lines 21-25). Employees and members did not sign non-disclosures, and neither Wilson nor Andrea Comeau-Shirely had non-disclosure agreements (R. p. 179, lines 7-8; p. 175, lines 16-20; p. 434, lines 7-12). Mike Myers, an independent sales representative who had worked with CCC making sales to select customers, did not have a non-disclosure. (R. p. 304, lines 18-20). If Appellant CCC actually believed that Wilson had was using misappropriated trade secrets to compete, it would be reasonable have sought the Court's intervention. CCC never did.

3. **The Circuit Court Applied the Correct Legal Standard In Concluding that Appellant CCC Defendants Failed to Establish by a Preponderance of the Evidence that Information Claimed to be Trade Secrets Were "Misappropriated."**

The Trade Secrets Act states as follows:

“Misappropriation” means:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:

- (i) used improper means to acquire knowledge of the trade secret;
or

- (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

- (A) derived from or through a person who had utilized improper means to acquire it;

- (B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

- (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

- iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

S.C. Code Ann. §39-8-20(2) (2016). “Improper means include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or espionage through electronic or other means.” S.C. Code Ann. §39-8-20(1). There is no evidence in the record that Wilson obtained any alleged trade secrets by “improper means” or used or disclosed such information.

When Gandis arrived at Wilson’s office with law enforcement in January 2012 and told Wilson to leave, Wilson took his computer with him when he left so he could preserve the emails

on the hard drive to protect his membership interest and to pursue remedies in connection with the oppression that had been in full force for months. (R. p. 442, line 1-p. 444, line 8). Importantly, he returned his CCC computer with all the information contained in the 40,000 emails, which were on the computer. (R. p. 442, lines 1-3). This is hardly “theft” as it has been interpreted under South Carolina law. “[T]o constitute a theft it is necessary that there be a taking of the property without the consent of the owner coupled with an intention on the part of the taker to convert it to his own use and deprive the owner of his property rights therein.” *Geiger v. Aetna Ins. Co.*, 215 S.C. 144, 149, 54 S.E.2d 549, 551 (1949) (interpreting meaning of “theft” within the context of insurance policy.); *see also Moore v. Weinberg*, 373 S.C. 209, 226-227, 644 S.E.2d 740, 749 (Ct. App. 2007) (“Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights.”)¹⁸ It is undisputed that Wilson returned the computer to Nexsen Pruet, one of the law firms that would represent CCC, Gandis, and Shirley. (R. p. 442, line 20-p. 444, line 8). There was no improper means used to obtain any information in Wilson’s possession after he left. CCC was not deprived of any of its business information. In fact, Wilson brought a derivative claim on behalf of CCC, and this information was intended to protect CCC from the sort of conduct that makes up the oppression case.

Moreover, there was no evidence presented at trial that Wilson used any of CCC’s “trade secrets.” CCC’s brief represents that “Wilson left CCC, then took and used all of this confidential information at Neologic/FWS – the circuit court made that specific finding.” (App. Brief 20). Yet Appellant CCC makes no citation to the record where such a finding is supported, and the trial court’s order in fact did not make a finding that Wilson “took and used all of CCC’s

¹⁸ CCC’s complaint alleged a conversion claim relating to trade secrets.

confidential information,” as claimed by CCC. In fact, Bill Shaw testified that he used a single Excel spreadsheet (not a “program”) on which he had entered publicly is available information to assist him in doing his job at CCC. (R. p. 331, lines 3-21). Shaw testified that the spreadsheet was “a very generic vendor cross-reference for my own purpose there at CCC.” (R. p. 331, lines 3-21; pages 1534-1587). This document did not have customer information and there was no evidence this information was used in connection with any CCC customers. (R. pages 1534-1587). This is the single piece of information from Shaw’s time at CCC that he later used while at Neologic, and all of the information was readily and publicly available or ascertainable. (R. p. 331, line 22-p. 332, line 3). However, the spreadsheet in Neologic’s possession (R. pages 1534-1587) was dated 11/4/2010, approximately fourteen months before Wilson’s ouster. Gandis’ testimony at trial about this spreadsheet was sparse, and Gandis’ lack of credibility made Bill Shaw’s testimony more believable on this precise nature of the spreadsheet and the information contained therein.

Clearly, Appellant failed to prove any use of trade secrets, and therefore failed to prove any damages arising from such use. As stated above, every single customer Dave Wilson sold film to in 2012 was a customer he had sold to prior to coming to CCC. (R. p 447, lines 15-18; p. 445, lines 16-25; p. 446, lines 2-6; p. 446, lines 7-12; p. 446, lines 16-20; p. 446, line 21-p. 447, line 6; p. 447, lines 7-12; p. 447, lines 13-17). These accounts were small accounts and the total in sales for all of 2012 was \$132,000. Appellant claims that Gandis’ testimony demonstrated that eleven of Neologic’s customers “were customers that CCC gained on its own.” (App. Brief 23). However, reading the testimony of Gandis cited in CCC’s brief in support of this argument simply established that there were eleven customers that were not on ONE list of former EFS customers, but Gandis made no mention of Wilson’s relationships dating back to PCFI or

Interfilm. (R. p. 883, line 23-p. 885, line 25). As outlined in the statement of facts above, there was evidence that all but three were customers with which Wilson had pre-existing relationships, and two of the three left CCC because of quality issues and the other did not do business with Neologic until 2014. (R. p. 449, lines 13-20; p. 448, lines 7-16; p. 449, line 21-p. 450 line 13). The biggest account, Supply One, initiated the contact with Wilson in 2013 (R. p. 451, lines 4-8). As the Court concluded “that there was insufficient evidence that [Wilson’s] post-CCC activity was anything but legitimate competition by one who had superior knowledge of and wide contacts in the film industry.” (R. p. 1786).

C. **THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD WHEN IT JUDGED THE BREACH OF FIDUCIARY DUTY CLAIM.**

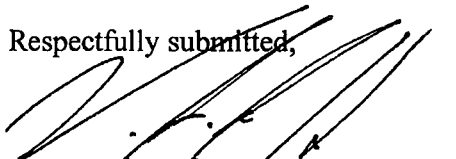
The fourth issue presented for appeal has been sparsely and insufficiently briefed; there are no arguments for which to draft a reply. The trial court applied the correct legal standards when it judged all aspects of this case, including the fiduciary duty claims and related issues. Appellant purports to incorporate arguments yet to come from Gandis and Comeau-Shirely by reference. Respondent will await its turn to address those arguments when the arguments are actually made.

IV. CONCLUSION

The circuit court properly applied the South Carolina Trade Secrets Act and made findings of facts supported by the record, including findings related to credibility. There was little evidence presented regarding alleged trade secrets, and none regarding the use of alleged trade secrets that caused even the slightest monetary damage to Appellant CCC. The trial court observed this weeklong preceding and sat eyewitness to defendants’ testimony that all too often

lacked in credibility. This Court should affirm the trial court's decision in all respects, including those finding for Respondent on Appellant CCC's trade secret and fiduciary duty claims.

Respectfully submitted,



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Dated June 16th, 2016

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

Appellate Case No.: 2015-000476

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

v.

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

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

v.

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

v.

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

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

and

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

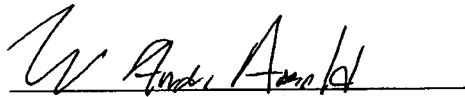
PROOF OF DELIVERY

I certify that I have served the Final Brief of Respondent David Wilson in Reply to Brief
of Appellant Carolina Custom Converting, LLC by depositing a copy of the same in the United
States Mail, postage prepaid, on June 17, 2016, addressed to the attorneys of record as follows:

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A handwritten signature in black ink, appearing to read "W. Andrew Arnold", is written over a horizontal line.

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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

Appellate Case No.: 2015-000476

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

v.

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

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

v.

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

v.

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

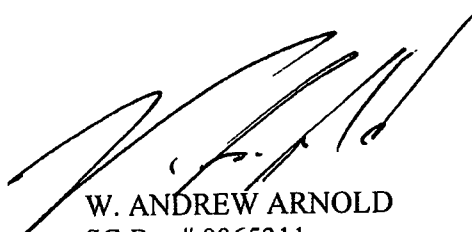
Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc., are the
Respondents,

and

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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June 16th, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The 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, are the Appellants.

Appellate Case No. 2015-000476

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2018-UP-078
Heard November 8, 2017 – Filed February 7, 2018

AFFIRMED

Joseph Owen Smith, of Roe Cassidy Coates & Price, PA,
and D. Randle Moody, II, of Jackson Lewis, P.C., both of
Greenville, for Appellants John Gandis and Andrea
Comeau-Shirley; and Burl F. Williams, of Nexsen Pruet,
LLC, of Greenville, for Appellant Carolina Custom
Converting, LLC.

Bruce Bellinger Campbell, of Horton Law Firm, P.A., of
Greenville, for Respondents Neologic Distribution, Inc.
and Fresh Water Systems, Inc.; and W. Andrew Arnold,
of Horton Law Firm, P.A., of Greenville, for Respondent
David Wilson.

PER CURIAM: In this civil matter, Carolina Custom Converting, LLC (CCC), John Gandis, and Andrea Comeau-Shirley appeal the circuit court's order finding Gandis and Shirley "froze-out" David Wilson as the minority shareholder of CCC and ordering Gandis and Shirley to buy out Wilson's interest in CCC. On appeal, Gandis and Shirley argue the circuit court erred in (1) finding Wilson did not breach his fiduciary duties to Gandis and Shirley, (2) finding Gandis and Shirley froze-out and oppressed Wilson, (3) ordering them to buy out Wilson's interest despite the absence of unconscionable conduct, and (4) awarding Wilson equitable relief when he had unclean hands. CCC argues the circuit court erred in (1) finding no trade secret existed under the South Carolina Trade Secret Act, (2) finding CCC did not sufficiently safeguard its confidential information, (3) finding CCC was not entitled to damages for trade secret misappropriation, and (4) misapplying fiduciary duty law and the statute of limitations to the claims of breach of fiduciary duty and usurpation of corporate opportunity. We affirm and



adopt the circuit court's order in full. *See Byrd v. Livingston*, 398 S.C. 237, 245, 727 S.E.2d 620, 624 (Ct. App. 2012) (adopting the circuit court's order as to some issues); *Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the circuit court's order as to some of the issues on appeal).

AFFIRMED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

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

App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

RECEIVED
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.

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).¹ 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

¹ 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; *Maier 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).² Wilson provided this confidential information to Neologic and therefore breached his fiduciary duty to the other members of CCC.³

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

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

³ 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).⁴ 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

⁴ 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 597.⁵ 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.⁶

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.

⁵ 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.

⁶ 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, is it 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).⁷ 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.⁸ In short, Wilson had the option to remain with CCC

⁷ 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.

⁸ 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.⁹ 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.¹⁰

⁹ 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.

¹⁰ 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.¹¹ 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).¹²

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

¹¹ 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.

¹² 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).¹³ 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)¹⁴ 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.

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

¹⁴ 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.¹⁵ 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

¹⁵ 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 (10th 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).¹⁶ 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,

¹⁶ 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 inequiteness 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.¹⁷ 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.”

¹⁷ 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

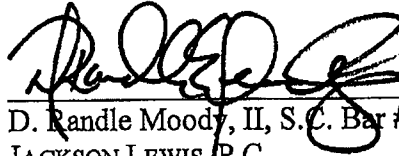
This Court should grant the Petition of Gandis and Shirley because the Panel overlooked or misapprehended several matters of fact and law when it:

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,



D. Randle Moody, II, S.C. Bar # 14135

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Gandis and Shirley

February 21, 2018
Greenville, South Carolina

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

App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

RECEIVED
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.

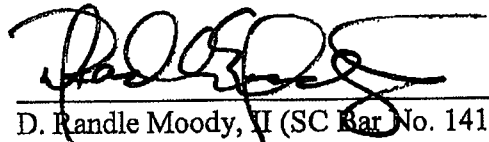
PROOF OF SERVICE

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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Greenville, South Carolina
February 21, 2018

The South Carolina 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, are the Appellants.

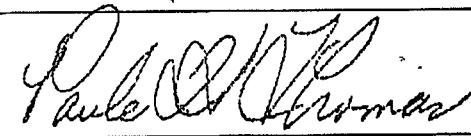
Appellate Case No. 2015-000476

ORDER

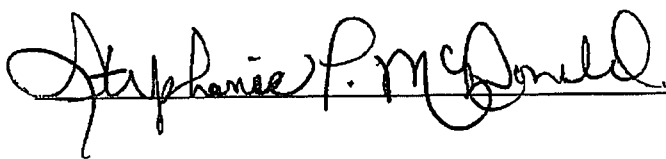
After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



J.



J.



J.

Columbia, South Carolina

FILED

cc:

D. Randle Moody, II, Esquire
Joseph Owen Smith, Esquire
Burl F. Williams, Esquire
W. Andrew Arnold, Esquire
Bruce Bellinger Campbell, Esquire
The Honorable D. Garrison Hill

May 24, 2018

The South Carolina 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,

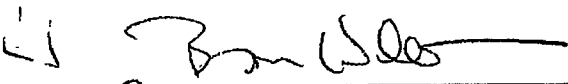
and

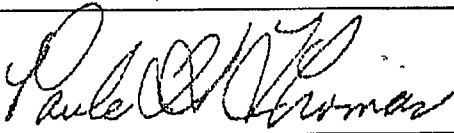
John Gandis, Andrea Comeau-Shirley, and Carolina
Custom Converting, LLC, are the Appellants.

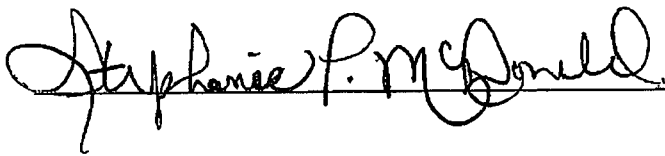
Appellate Case No. 2015-000476

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

FILED

cc:

D. Randle Moody, II, Esquire
Joseph Owen Smith, Esquire
Burl F. Williams, Esquire
W. Andrew Arnold, Esquire
Bruce Bellinger Campbell, Esquire
The Honorable D. Garrison Hill

May 24, 2018

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

App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

RECEIVED
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.

PETITION FOR REHEARING

Appellant Carolina Custom Converting, LLC ("CCC"), by and through undersigned counsel and pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, hereby files this petition for rehearing ("Petition"). The grounds for this Petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law.

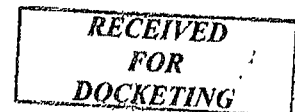
In Unpublished Opinion No. 2018-UP-078, filed February 7, 2018, a Panel of this Court adopted and affirmed the circuit court's order finding CCC did not prove its trade secret misappropriation claims against Neologic Distribution, Inc., Freshwater Systems, Inc., and David Wilson, and its breach of fiduciary duty claim against David Wilson. By adopting the circuit court's order, the Panel overlooked or misapprehended several matters of law and fact in the opinion. The Panel should rehear this matter and issue a published opinion that addresses these issues.

First, the Panel improperly concluded that no trade secret existed under the South Carolina Trade Secret Act. Second, the Panel improperly concluded that CCC did not sufficiently safeguard its confidential information. Third, the Panel improperly concluded that CCC was not entitled to damages for trade secret misappropriation. Fourth, the Panel improperly affirmed the trial court's misapplication of fiduciary duty law and the statute of limitations to the claims of breach of fiduciary duty and usurpation of corporate opportunity. Accordingly, CCC respectfully submits that rehearing is warranted.

ARGUMENT

I. The Panel Erred In Concluding That No Trade Secret Existed Under The South Carolina Trade Secret Act.

In adopting the circuit court's order, the Panel found that no trade secret existed



under the South Carolina Trade Secret Act. Because the Panel's holding is based on a misapprehension of law, rehearing is warranted.

A. Legal Standard

South Carolina adopted the Uniform Trade Secret Protection Act in 1992. Within five years, apparently concluding that the Uniform Act was insufficient, the General Assembly enacted the South Carolina Trade Secret Act. *Employees Beware: Employer Rights Under the South Carolina Trade Secret Act*, Kirk T. Bradley, Note, 49 S.C. L. Rev. 597, 597-98 (Spring 1998) (hereinafter "Employees Beware"). The article posits that the South Carolina Act "arguably establishes the most comprehensive compilation of trade secret laws in the United States." *Id.* One of the grounds for this statement is the presence of S.C. Code Ann. § 39-8-30(B) (1997), which is not found in the Uniform Act, and provides as follows:

Every employee who is informed of or should reasonably have known from the circumstances of the existence of any employer's trade secret has a duty to refrain from using or disclosing the trade secret without the employer's permission independently of and in addition to any written contract of employment, secrecy agreement, noncompete agreement, nondisclosure agreement, or other agreement between the employer and the employee.

S.C. Code Ann. § 39-8-30(B) (emphasis added). Accordingly, the General Assembly has created an obligation upon all employees in South Carolina, notwithstanding the absence of a written agreement, to refrain from using their employer's trade secrets.

Under South Carolina law, a trade secret means the following:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain

economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

S.C. Code Ann. § 39-8-20(5) (1997) (emphasis added).

Under South Carolina law, misappropriation means:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

S.C. Code Ann. § 39-8-20(2)(a-b) (1997). South Carolina law provides that “[i]mproper means” includes “theft.” S.C. Code Ann. § 39-8-20(1) (1997).

Finally, under South Carolina law, “[a] complainant is entitled to recover actual damages for misappropriation of trade secrets.” S.C. Code Ann. § 39-8-40(A) (1997). The damages available to a plaintiff “include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation.” S.C. Code Ann. § 39-8-40(B) (1997). Accordingly, once a plaintiff proves that his trade secret has been misappropriated by a defendant, a plaintiff is entitled to damages. If the facts of a case show that a full award would be “inequitable,” then a court has the authority to “reduce[] monetary recovery.” S.C. Code Ann. § 39-8-40(A) (1997).

B. Trade Secrets Existed

1. *The Confidential Information is a Trade Secret*

Wilson took all of CCC’s customer lists, supplier lists, pricing information,

prospective customer lists, its electronic vendor reference program, and its inventory reference program. (R. p. 506, lines 1-18). CCC spent significant corporate resources and time building this body of information. (R. p. 870, lines 10-18; R. p. 871, line 20-p. 872, lines 1-17; R. p. 873, line 24-p. 874, lines 1-5; R. p. 875, lines 3-14; R. p. 876, lines 1-17; R. p. 877, line 8-p. 881, lines 4, and 12-24).¹

The confidential information was comprised of "simple fact[s] . . . [that] although individually could be perceived as . . . minor or simple, collectively . . . [were] the basis for [CCC's] commercial strategy." S.C. Code Ann. § 39-8-20(5)(b) (1997). The plain language of the South Carolina Trade Secret Act makes clear that this information is a trade secret. *See also Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000) (Goolsby, J. concurring) (concurring in the opinion and clarifying that "I do not construe it to hold that a customer list cannot be a trade secret"). Further, courts have concluded that this type of information is a trade secret. *See, e.g., Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1018-19 (8th Cir. 2008) (noting that public information gained "only after, extensive, time-consuming research [is] information entitled to protection"); *N. Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 46 (2d Cir. 1999) (collecting cases and noting same); *see also* S.C. JUR. INTELLECTUAL PROPERTY § 77 & n.1 (noting that "customer lists and other sales and marketing information can be trade secrets"). The circuit court committed legal error by failing to apply the plain language of the South Carolina Trade Secret Act.

The circuit court also failed to acknowledge that the efforts involved in locating

¹ CCC also presented testimony that Wilson and Neologic/FWS were improperly conducting business based on information gained through the discovery process. (R. p. 876, line 18-p. 877, line 7; R. p. 882, line 4-p. 883, line 4; R. pp. 1394-1400).

the correct film for a customer required significant intellectual input by CCC. (R. p. 870, lines 5-17). It likewise erred in failing to acknowledge the complexity of the supplier market, and the resources CCC utilized in navigating that market in order to locate the correct film for a customer. (R. p. 872, lines 7-10).

The circuit court also failed to acknowledge the electronic vendor reference program and inventory reference program that CCC created and Wilson took. (R. p. 877, line 8-p. 881, line 4; R. pp. 1534-1587). During the discovery process, Neologic/FWS produced a printed out copy of the electronic vendor reference program. (*Id.*). The program operates using the Excel program. (R. p. 877, lines 24-25). Gandis testified that it was developed over time with the input of a number of CCC employees and Comeau-Shirley. (R. p. 878, lines 6-10).

Gandis testified about the operation of the program. CCC compiled into the program all of the different manufacturers of film, specific films types, and manufacturer codes. (R. p. 878, lines 1-20). Gandis testified that some of the codes are not publicly available. (*Id.*). He testified that when a customer calls with a description of what they need, he can put those specifications into the program and it will generate a result that provides you with every manufacturer that makes that film. (R. p. 879, lines 4-8).

Gandis also testified about the inventory reference program. That program was developed to provide a searchable system that immediately showed what inventory CCC had in its inventory at any given time. (R. p. 879, lines 18-p. 880, line 7). Gandis testified the development of this program increased CCC's efficiencies and gave it a competitive advantage. (R. p. 879, lines 9-17; *see also* R. p. 1661, first two sentences of "Company strengths," (*Wilson* noting the competitive advantage of CCC in its ability

“turn an order faster than our competition”)).

Both of these programs are a trade secret. They are a “program . . . [that] derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use.” S.C. Code Ann. § 39-8-20(5)(a)(i) (1997). They are also a “procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process” S.C. Code Ann. § 39-8-20(5)(b) (1997).

2. *Reliance Upon Atwood v. Black was Improper*

The circuit court erred in concluding that CCC’s confidential information did not constitute a trade secret. Against the backdrop of the confidential information detailed in Part I.B.1., *supra*, and at issue in this case, the circuit court committed legal error by relying upon *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882 (2007) for the proposition that CCC’s confidential information did not constitute a trade secret. *Atwood* did not hold that the confidential information at issue in this case is not a trade secret.

Atwood addressed a rental home business located in Edisto Beach. One of Atwood’s employees left to join a competing company, and Atwood brought a claim for misappropriation of its trade secrets against the former employee and her current employer. *Id.* at 70-71, 646 S.E.2d at 883. The trade secrets alleged in *Atwood* constituted the “homeowners list” and the “renters list.” *Id.* at 71, 646 S.E.2d at 883. In a split decision², the *Atwood* court concluded that these lists did not constitute trade

² Two Supreme Court justices concluded that the “renters list” qualified as a trade secret. *Atwood*, 374 S.C. at 74, 646 S.E.2d at 884.

secrets.

The *Atwood* court based this finding on the “undisputed fact that a list of all the homeowners in Edisto Beach and their contact information is a matter of public record available at Town Hall.” *Id.* at 72, 646 S.E.2d at 884. The Court also based this finding on the fact that the former employee was “contacted directly by Atwood renters after Atwood sent out an announcement of her departure.” *Id.* at 72, 646 S.E.2d at 884.

The facts of *Atwood* are significantly different from this case. CCC’s business involves working with customers to qualify a film before entering into long-term supply relationships. (R. p. 886, lines 11-15). The qualifying process can take months. Wilson’s own witness confirmed this fact. (R. p. 301, lines 7-20). During the qualifying process, many times a CCC employee was required to travel to the customer’s plant for trial runs. (e.g., R. p. 911, lines 3-10).

Qualifying the right film also requires CCC to first find the right film at the right price—both for CCC and the customer. (E.g., R. p. 874, line 12-p. 875, line 14; R. p. 876, lines 1-17). That process involves expending employee time and resources to locate the correct film, and the most suitable supplier of that film. Indeed, locating the most suitable supplier of film is often the most valuable information, for it provides the competitive pricing advantage. (E.g., R. p. 871, line 7-p. 873, line 8). See *Elm City Cheese Co. v. Federico*, 752 A.2d 1037, 1040-41, 1053 (Conn. 1999) (noting that cheese company’s commercial strategy of locating “return milk” for use in its processes was a trade secret as it allowed the cheese company to purchase its raw goods at a much lower cost); see also *Sigma Chemical Co. v. Harris*, 794 F.2d 371, 373 (8th Cir. 1986) (noting that “which suppliers supplied chemicals at the requisite quality and price was not in public

domain” and protected as a trade secret). The circuit court failed to appreciate the significant amount of time and energy that CCC devoted to creating its confidential information. This confidential information was not merely sitting at a “Town Hall” for anyone to simply review.

Unlike *Atwood*, documentary evidence showed that Wilson contacted the customers himself after he left. (E.g., R. pp. 1757-1759 (noting that “[w]hen I told them I had left CCC weeks ago”); R. p. 1336 (stating “Hi Trip, Good catching up with you today. As discussed, my new company is Neologic Distribution.”); R. p. 1337 (stating “I hope you are well. As you may have heard, I left [CCC] in January. I am still very much in the film business”)).

Atwood also did not involve competitive pricing. The price that a rental company charges is expressly advertised. CCC does not advertise the price that its customers pay for their film because its competitor could then underbid the company. The testimony at trial showed that Wilson and Neologic/FWS were underbidding CCC’s customers based upon their possession of CCC’s confidential information. (R. p. 870, line 18-p. 871, line 2; R. p. 873, lines 2-20; R. p. 874, lines 6-11; R. pp. 1342-1343 (stating “these prices are very attractive”); R. p. 1384 (showing \$400 profit on roughly \$80,000 sale)).

The circuit court also improperly relied upon *Carolina Chemical Equipment Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), for the proposition that Wilson’s previous work in the industry precluded the confidential information from becoming a trade secret. In *Muckenfuss*, the company did not claim that the employee “took actual customer lists, pricing lists, or formula cards with him.” *Id.* at 297, 471 S.E.2d at 725. Rather, the company alleged the misappropriation occurred from the

employee's use of "knowledge he acquired during the 17 years he was employed" by the company. *Id.* at 297, 471 S.E.2d at 725. In this case, CCC expressly claimed, and Wilson was forced to admit, that he did take all of the confidential information. (R. p. 506, lines 1-18). And, CCC based its claim for relief upon the fact that Wilson took this confidential information with him to Neologic/FWS where he *started a film company*.

CCC devoted employee resources, time, and money into developing its confidential information. Wilson left CCC, then took and used all of this confidential information at Neologic/FWS—the circuit court made that specific finding. (R. p. 1788). The circuit court's conclusion, however, that this confidential information was not a trade secret constituted an error of law.

II. The Panel Erred In Concluding That CCC Did Not Sufficiently Safeguard Its Confidential Information.

In adopting the circuit court's order, the Panel found that CCC did not sufficiently safeguard its confidential information. In so holding, the Panel misapprehended the law and failed to apply the correct legal standard to the instant matter.

The undisputed testimony at trial established the following:

- Only three people had access to all of the confidential information: Wilson, Gandis, and Comeau-Shirley (R. p. 883, lines 5-16);
- The confidential information was located on a password protected server (*Id.*);
- When CCC was led to believe that Wilson was going to leave, his access to the server was disabled (R. p. 163, lines 2-17; R. p. 435, line 22-p; 436, line 13);
- When Gandis met Wilson to get him to leave the Greenville office, he brought along a member of law enforcement in order to prevent Wilson from taking CCC property with him (R. p. 164, lines 5-14).

South Carolina law provides that the owner of a trade secret must employ "efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-

20(5)(b) (1997). At the time Wilson left CCC, it had 24 employees, (R. p. 39, lines 22-24), yet only the three owners had access to all of the confidential information. (R. p. 883, lines 5-16). When the threat of a misappropriation occurred, CCC acted to maintain the secrecy of its confidential information. (*See also* R. pp. 1673-1675 (learning that Wilson was sharing confidential information with potential suitors and asking him to protect the secrecy of the information)).

The circuit court did not apply the reasonable under the circumstances legal standard. Instead, the circuit court applied a different legal standard. The circuit court incorrectly stated that a “party claiming a trade secret violation must exercise ‘eternal vigilance,’ which calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.” (R. p. 1785). South Carolina law, however, does not include these requirements. S.C. Code Ann. § 39-8-30(B) (1997).

The incorrect legal standard cited by the circuit court came from an unpublished decision by the United States Court of Appeals for the Fourth Circuit, *Hill Holliday Connors Cosmopolos, Inc. v. Greenfield*, 433 Fed. Appx. 207 (4th Cir. 2011). That unpublished decision based its reasoning upon the South Carolina Supreme Court’s 1972 decision in *Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972). Following the enactment of the South Carolina Trade Secret Act *in 1997*—which “arguably establishe[d] the most comprehensive compilation of trade secret laws in the United States”³—*Lowndes* is no longer controlling law. Thus, the circuit court’s reliance on the unpublished Fourth Circuit decision constituted legal error.

³ *Employees Beware*, 49 S.C. L. Rev. at 597-98.

III. The Panel Erred In Concluding That CCC Was Not Entitled To Damages For Trade Secret Misappropriation.

By adopting the circuit court's order, the Panel found that CCC was not entitled to damages for trade secret misappropriation. Because this conclusion resulted from a legally incorrect application of the South Carolina Trade Secret Act, the Panel misapprehended the law in adopting it.

Section 39-8-20 provides that "misappropriation means . . . acquisition of a trade secret of another by a person by improper means"; or "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." S.C. Code Ann. § 39-8-20(2)(a)-(b) (1997). In turn, § 39-8-40(A) provides that a "complainant is entitled to recover actual damages for misappropriation of trade secrets." S.C. Code Ann. § 39-8-40(A) (1997). Because CCC's trade secrets were misappropriated, it was entitled to damages as a matter of law.

Wilson admitted that he took all of CCC's confidential information. (R. p. 506, lines 1-18). Wilson admitted that at the time he left CCC he was primarily running the sales force, and not interacting with customers. (R. p. 415, lines 1-12). E-mails were stipulated into evidence, and presented at trial, showing that Wilson and Neologic/FWS were using CCC's confidential information. (E.g., R. pp. 1534-1587; R. p. 1313; R. p. 1338; R. p. 1339; R. pp. 1342-1343 ; R. p. 1368; R. pp. 1369-1383; R. pp. 1385-1386; R. pp. 1387-1389; R. pp. 1390-1393; R. pp. 1394-1400; R. pp. 1401-1427). Neologic/FWS produced financial information showing that they were conducting business with CCC's customers. (R. p. 1329). Trial testimony showed that 23 of 27 Neologic customers were

CCC customers.⁴ (R. p. 883, lines 17-24). But even setting aside Wilson's pre-CCC customers, the trial testimony showed that 11 of Neologic/FWS's customers were customers that CCC gained on its own. (R. p. 883, line 23-p. 885, line 25). As a matter of law, CCC was entitled to an award of damages.⁵ S.C. Code Ann. § 39-8-40(A) (1997).

The circuit court's conclusion that the "evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster^[6] from CCC" is legal error. It is based upon a legally erroneous application of the South Carolina Trade Secret Act.⁷

In *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 200), this Court addressed whether the facts of that case provided for a trade secret claim. This court concluded that it did not, and did so based upon the following factors:

- No evidence that employee took any tangible customer information. *Id.* at 281, 529 S.E.2d at 43.
- No evidence that employee actively solicited the customers. *Id.* at 281, 529 S.E.2d at 43.

⁴ The circuit court apparently overlooked the fact that the agreement to create the combined company called for Wilson to provide all of his customers to CCC. (R. pp. 1285-1286; R. p. 1529).

⁵ With all due respect to the circuit court, the absence of routine post-trial briefing apparently limited the circuit court's ability to properly judge this case. (R. p. 866, line 2-p. 867, line 18). It is important to point out that when counsel for CCC proposed a post-trial briefing schedule to set forth the law and its application to the evidence, counsel for the respondents objected. (*Id.*).

⁶ The circuit court's choice of the word "ouster" indicates the erroneous lens through which it must have viewed this claim. Whether Wilson was ousted from CCC, or not, had no bearing on the question whether he and Neologic/FWS misappropriated CCC's trade secrets.

⁷ In the alternative, and against the backdrop of the confidential information misappropriated in this case, the circuit court's legal conclusion is not reasonably supported by the evidence. *Bell v. Progressive Di. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014).

- Employee denied she had a plan to solicit the customers after termination. *Id.* at 280, 529 S.E.2d at 43.
- Every client employee had at the new company was a client from the company that she sold to her former employer.⁸ *Id.* at 281, 529 S.E.2d at 44.

Each one of these factors points in in the opposite direction in this case. Accordingly, the circuit court committed legal error by failing to properly interpret and apply the South Carolina Trade Secret Act.

IV. The Panel Erred In Affirming The Trial Court's Misapplication Of Fiduciary Duty Law And The Statute Of Limitations To The Claims Of Breach Of Fiduciary Duty And Usurpation Of Corporate Opportunity.

In adopting the circuit court's order, the Panel affirmed the misapplication of fiduciary duty law and the statute of limitations to the claims of breach of fiduciary duty and usurpation of corporate opportunity. The Panel misapprehended the law in adopting both conclusions.

A. The Circuit Court Applied the Wrong Burden of Proof

Our courts have long recognized that the duty of a partner to exercise the utmost good faith, fairness and loyalty is required both by statute and by common law. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 448-49, 465 S.E.2d 436, 752 (Ct. App. 1995) (internal citations omitted). "Parties 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, 465 S.E.2d at 752 (internal citations omitted). Moreover, this Court has stated that a fiduciary's duty of disclosure imposes an "obligation of *refraining from taking any advantage of one another by the slightest*

⁸ The analogue here would be customers that Wilson had previously sold film to at EFS.

misrepresentations or concealment." *Moore v. Moore*, 360 S.C. 241, 252, 599 S.E.2d 467, 473 (Ct. App. 2004) (emphasis in original).

Accordingly, as a partner and later co-manager of CCC, Wilson owed a fiduciary duty to the company and his fellow members to disclose all known information that was significant and material. As a result of that fiduciary duty, it was Wilson's burden to prove that he disclosed all significant and material information relating to the corporate opportunities that he took from the company and fellow members. See *Meinhard v. Salmon*, 164 N.E. 545, 546-49 (N.Y. 1928). The circuit court committed reversible error by placing the burden of proof upon the non-violating party, CCC.

B. Wilson Breached His Fiduciary Duty to CCC

Wilson breached his fiduciary obligations to refrain from competing with CCC before dissolution.

The South Carolina Limited Liability Act provides:

(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 (1996). Specifically, Subsection (b)(3) expressly states that a member's fiduciary duty of loyalty to a member-managed company requires that he refrain from competing with the company before dissolution.

As detailed above, CCC was incorporated as an LLC with Wilson and Gandis as its sole members. Their shared membership and interest in CCC carried with it a fiduciary relationship. As such, Wilson owed CCC fiduciary duties, including that of refraining from competing with the company before dissolution, which he indisputably breached. The circuit court erred by disregarding this duty and instead evaluating whether the evidence established that Wilson agreed to transfer three import accounts to CCC in 2008. This evaluation was more akin to a contract claim than a breach of fiduciary duty claim. The appropriate inquiry is whether the evidence showed that Wilson fulfilled his fiduciary duties to CCC by acting in good faith and refraining from competing with CCC before its dissolution.

Wilson clearly breached his fiduciary duty to "refrain from competing with [CCC] in the conduct of [CCC's] business before the dissolution of [CCC]." S.C. Code Ann. § 33-44-409(b)(3) (1996). Wilson unequivocally admitted that he engaged in side deals through EFS while CCC was operating, including during the times he was receiving \$8,000 per month from CCC. He argued that this was allowed because his agreement with Gandis carved out three accounts. (R. p. 378, line 25 – p. 379, line 18). 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 and for Wilson to receive \$8,000 per month from CCC in exchange. (R. p. 78, lines 8-14). Gandis later discovered that unbeknownst to him, Wilson continued to engage in side deals with EFS after all of its customers were supposed to be transitioned to CCC. (R. p. 211, lines 18-22; R. p. 216, lines 14-18; R. p. 217, lines 20-22). In fact, Wilson continued to engage in side deals through EFS even after he began receiving the \$8,000 per month from CCC. (R. pp. 1318-27). By engaging in such conduct, Wilson clearly breached his fiduciary duty to refrain from competing with CCC before dissolution.

Moreover, after leaving CCC, Wilson immediately set out to compete with CCC by utilizing CCC's confidential information. The Reporter Comments to § 33-44-409 make clear that competitive activity constitutes a breach of a member's fiduciary duty to the company. *See* Comment to S.C. Code Ann. § 33-44-409 ("[T]he duty to not compete terminates upon dissociation However, a dissociated member is not free to use confidential company information after dissociation."). The circuit court expressly found that Neologic/Freshwater used CCC's confidential information. (R. p. 1788) ("Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing its trade secrets claim."). Because Wilson provided this confidential information to Neologic, he breached his fiduciary duty to CCC.

B. CCC's Breach of Fiduciary Duty Claim Was 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 file suit. S.C. Code Ann. § 15-3-530; *see also Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998). A cause of

action should be discovered through exercise of reasonable diligence when the facts and circumstances would put a person of common knowledge and experience on notice that some right has been invaded or a claim against another party might exist. *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 524, 443 S.E.2d 537, 539 (1994). The statute begins to run from this point – the date upon which a plaintiff discovers the injury – and not when a 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 circuit court concluded that Appellants received notice of Wilson's side dealing activities in July 2009, and because they failed to engage in a reasonable inquiry after receiving notice that Wilson had engaged in such conduct, their counterclaims for breach of fiduciary duty were time-barred. (R. pp. 1783-84). In reaching this conclusion, the circuit court failed to specifically cite any evidence or trial testimony in support of its conclusion, and likewise failed to take into account the totality of the record.

Furthermore, "[d]eliberate 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). As noted above, the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC and for Wilson to receive \$8,000 per month from CCC in exchange. (R. p. 78, lines 8-14). Gandis later discovered that unbeknownst to him, Wilson continued to engage in side deals with EFS after all of its customers were supposed to be transitioned to CCC. (R. p. 211, lines 18-22, R. p. 216, lines 14-18; R. p. 217, lines 20-22; R. pp. 1318-27).

Notably, Gandis testified that he only learned of these side deals "by accident,"

and that when he confronted Wilson about them, Wilson denied engaging in such conduct. (R. p. 215, lines 6-14; R. p. 217, lines 3-22). The evidence and testimony at trial showed that Wilson took active steps to conceal his side dealings. Specifically, Wilson only used his EFS email address – rather than his CCC email address – while engaging in side deals. (R. p. 215, lines 6-14). He never copied Gandis or CCC on the side deal correspondence, and never informed them that he was conducting business outside of CCC for his sole benefit. (R. p. 215, lines 6-14). When Gandis confronted Wilson about his side deals, Wilson denied engaging in such conduct except for an admission in late 2010, when he attempted to justify his conduct by saying, “it’s Christmas.” (R. p. 215, lines 6-14; R. p. 1528). Until this admission in late 2010, Wilson deceived CCC and concealed his illicit activities. As such, the statute was tolled until at least when Wilson offered his paltry “Christmas” excuse in late 2010.

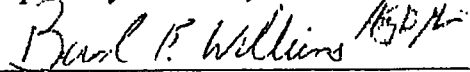
At trial, Wilson submitted email correspondence from June 17, 2009 and October 30, 2009 regarding EFS sales to West Carrolton. (R. pp. 1006-08). That email correspondence did not provide Appellants sufficient notice of the scope of Wilson’s illicit activities. Moreover, it could have related to deals Wilson maintained were precluded as an import deal that predated CCC. In any event, 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). When CCC was added to the case via Wilson’s Second Amended Complaint, it timely counterclaimed for breach of fiduciary duty. Therefore, pursuant to Rule 15(c), SCRCP, Appellants’ breach of fiduciary duty claims against Wilson related back to the original April 27, 2012 filing.

CONCLUSION

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

1. Improperly concluded that no trade secret existed under the South Carolina Trade Secret Act;
2. Improperly concluded that CCC did not sufficiently safeguard its confidential information;
3. Improperly concluded that CCC was not entitled to damages for trade secret misappropriation; and
4. Improperly affirmed the trial court's misapplication of fiduciary duty law and the statute of limitations to the claims of breach of fiduciary duty and usurpation of corporate opportunity.

Respectfully submitted,



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February 22, 2018
Greenville, South Carolina

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.

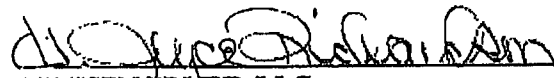
PROOF OF SERVICE

This is to certify that this 22nd day of February, 2018, a copy of the foregoing Petition for Rehearing has been served upon the following counsel of record by placing the same in the United States mail, first class, postage prepaid, addressed to the following as shown below.

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NEXSEN PRUET, LLC

The South Carolina 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

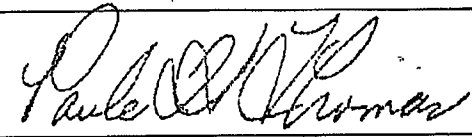
John Gandis, Andrea Comeau-Shirley, and Carolina
Custom Converting, LLC, are the Appellants.

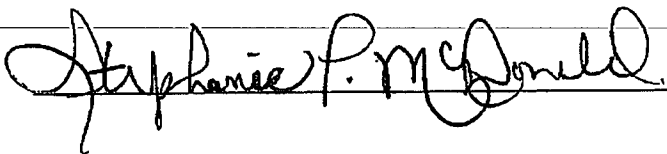
Appellate Case No. 2015-000476

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

FILED

cc:

D. Randle Moody, II, Esquire
Joseph Owen Smith, Esquire
Burl F. Williams, Esquire
W. Andrew Arnold, Esquire
Bruce Bellinger Campbell, Esquire
The Honorable D. Garrison Hill

May 24, 2018