

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM PICKENS COUNTY
In the Court of Common Pleas

JUL 06 2018

SC Court of Appeals

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case 2017-002347

EPS Advisors, LLC Respondent/Appellant

v.

Jan Fredman and Clemson-EPS Advisors, LLC.....Appellant/Respondent

**MOTION TO REMOVE SARAH M. GABLE, ESQ. AS COUNSEL
OF RECORD IN THIS APPEAL**

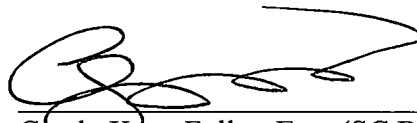
Pursuant to SCRAP 240 and 264, the undersigned hereby petitions to remove attorney Sarah M. Gable, Esq. as an Attorney of Record in this matter. The undersigned makes this Motion based upon the following:

- 1) Sarah M. Gable, Esq. was previously employed by the Upstate Law Group, LLC. Ms. Gable gave birth to her son in late May of 2017 and went out on maternity leave from Upstate Law Group, LLC in early May 2017 to prepare for the same;
- 2) Ms. Gable did not return from maternity leave, but, rather, on December 4, 2017, accepted employment with the South Carolina Human Affairs Commission as Staff Counsel, where she remains employed today;
- 3) Ms. Gable made **no** appearances of record in this case, made no appearances at depositions in this matter, nor did she sign any pleadings in this case. Further,

Ms. Gable did not participate in the trial of this case nor did she assist in the post-trial motions of this case;

- 4) The May 29, 2017, Order from the non-jury trial in this case (which was immediately after Ms. Gable gave birth) specifically was only served on the undersigned and Mr. Brandt. (**See Exhibit A**);
- 5) It is unknown as to how Ms. Gable's name was added as an attorney of record in this case, especially after she ceased practicing with the Upstate Law Group, LLC. However, her inclusion as an attorney of record appears to be an error and Ms. Gable wishes to be removed as counsel in this case as she has had no part in this case and can not, in her role as Staff Counsel for the S.C. Human Affairs Commission, participate in such representation in this appeal (**See Exhibit B**);

Accordingly, the undersigned moves that Ms. Gable be removed as Counsel of Record in this matter. The undersigned has not been able to consult with opposing counsel in this matter as she underwent a right total knee replacement two weeks ago (June 18, 2018) and was hospitalized last week and then home bound undergoing home health services since that time. However, the undersigned believes that opposing counsel would not oppose this request.



Candy Kern-Fuller, Esq. (SC Bar No. 11392)

UPSTATE LAW GROUP, LLC

200 E. Main Street

Easley, SC 29640

(864) 855-3114

(864) 855-3446 (facsimile)

Candy@UpstateLawGroup.com

July 2, 2018

**ATTORNEY FOR RESPONDENT/, EPS
ADVISORS, LLC**

EXHIBIT A

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2013CP3900434

EPS Advisors, LLC

Jan Fredman and
 Clemson-EPS
 Advisors, LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

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

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
EPS Advisors, LLC	Jan Fredman	\$12,955.37
EPS Advisors, LLC	Jan Fredman and Clemson-EPS (jointly and severally)	\$59,444.25
	(Total Judgement for EPS Advisors, LLC	\$72,399.62)

If applicable, describe the property, including tax map information and address, referenced in the order:

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

ELECTRONICALLY FILED - 2017 May 19 12:08 PM - PICKENS - COMMON PLEAS - CASE#2013CP3900434

	2755	5/19/2017
Circuit Court Judge	Judge Code	Date
For Clerk of Court Office Use Only		

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Candy Kern-Fuller *
200 East Main Street
Easley, SC 29640
ATTORNEY(S) FOR THE PLAINTIFF(S)

Larry C. Brandt *
P.O. Box 738
Walhalla, SC 29691
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter-Deborah R. Garrison

H. W. Welborn, Picken County Clerk Of Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

memorandum prepared by Dameron and Fredman. In April, 2010, Fredman terminated his arrangement with EPS Advisors and had all of his Schwab accounts transferred to Clemson EPS, an entity owned solely by Fredman which was organized on October 5, 2009 and began receiving commission payments directly from Schwab as of April 10, 2010 which covered commissions earned during the first quarter for 2010 on behalf of EPS Advisors.

EPS Advisors filed this action seeking damages for conversion, breach of contract, breach of contract with fraudulent intent, negligent misrepresentation, tortious interference with contract, fraud, conspiracy and violation of the Unfair Trade Practices Act. All of these causes of action relate to Fredman and Clemson EPS taking EPS Advisors' accounts and clients, along with the commissions from these accounts and office furniture and equipment which Fredman did not return after the termination of his arrangement with EPS Advisors. In their response, Fredman and EPS Clemson asserted that he was not prohibited from starting his own business and taking his accounts and that EPS Advisors owed him money for outstanding matters.

FINDINGS OF FACT

After hearing the testimony of the witnesses and reviewing the evidence presented by the parties, the Court makes the following findings of fact.

The primary issue in this case resulted from Fredman taking his customers from EPS Advisors and transferring them to Clemson EPS. The new name was obviously confusing to customers and to Schwab who sent the final EPS Advisors' commission check to Clemson EPS. Even though this maneuver by Fredman would seemingly violate the ethics and moral standards of a business arrangement, especially the manner in which it was done, the legal ramifications of such actions are not as clear, especially as it relates to any recovery by the Plaintiff, EPS Advisors.

First, the Court will address the Plaintiff's causes of action for Breach of Contract (2nd Cause of Action), Breach of Contract with Fraudulent Intent (3rd Cause of Action), Negligent Misrepresentation (4th Cause of Action) and Fraud (6th Cause of Action). Since the nature of all of these causes of action arises out of the Defendants' conduct in transferring the EPS customers, they have been grouped together. The plaintiff has failed to establish any contract or legal basis which would have prohibited Fredman from transferring his EPS Advisors' customers to his new entity Clemson EPS. In fact, one of the Plaintiff's witness, David Dameron, who was previously one of the principles of EPS Advisors and designated as a Rule 30(b)(6) witness, testified that Fredman was not prohibited from transferring these customers as long as the customers consented to the transfer. Therefore, this conduct cannot support a cause of action for Breach of Contract nor Breach of Contract with Fraudulent Intent because the Plaintiff has not shown there was a contract breached by Defendants. For Fraud, the Plaintiff must establish all 9 elements of fraud which Plaintiff has failed to establish. *See M.B. Kahn Construction Co. v. South Carolina National Bank of Charleston*, 271 S.E.2d 414 (1980). With Negligent Misrepresentation, the Plaintiff must establish among other things that the Defendant made a false representation to the Plaintiff and that he owed a duty of care to the plaintiff. *See AMA Management Corp. v. Strasburger*, 420 S.E.2d 868 (Ct. App. 1992). The Plaintiff has failed to establish these elements as well.

Under the Fifth Cause of Action, the Plaintiff seeks damages for the Defendants' Tortious Interference with Contract between the Plaintiff and its customers. To prevail on this theory, the Plaintiff must show, among other elements, that the defendant intentionally procured the breach of the contract between the Plaintiff and a third party *and* the absence of any justification of this action by the Defendant. *Broach v. Carter*, 732 S.E.2d 185 (Ct. App. 2012). Under the testimony, it appears that the Defendants convinced the customers in question to move their account from

EPS to Clemson EPS. Although it has been inferred that Defendant accomplished this through some wrongdoing or deception, there was no direct evidence of such conduct, nor testimony from any of the customers supporting this claim. Based on the testimony, it appears that the customers had the right to transfer their accounts to whomever they wished and there was no evidence to support anything to the contrary. Therefore, this cause of action for Tortious Interference with Contract must fail as well.

Under the Seventh Cause of Action, the Plaintiff asserted a claim for Conspiracy between the Defendants and Schwab to divert customers away from the Plaintiff. The elements for civil conspiracy are the combination of two or more parties joining for the purpose of injuring the Plaintiff causing special damages to the plaintiff. *La Motte v. Punch Line of Columbia, Inc.*, 370 S.E.2d 711 (1988). As stated, the Defendants were not contractually nor legally prohibited from luring customers away from the Plaintiff and Schwab was required to honor the request to transfer accounts authorized by the customers. David Dameron as witness for the Plaintiff and a principle of EPS Advisors, acknowledged that Fredman had the right to have the customers transferred as long as EPS Advisors received its appropriate share of the commissions. Therefore, even if the actions of Schwab and Defendants resulted in the transfer of the customers to Clemson EPS and caused a loss of income for the Plaintiff, the Defendants' actions do not provide a basis for recovery under Civil Conspiracy.

The Plaintiff also contends that Defendants' actions constituted a violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et. seq.* (Eighth Cause of Action). Even though the Plaintiff established a potential loss of income as its damages, it failed to establish the remaining requirements of this Act: (1) the acts of defendants were deceptive and unfair in the conduct of trade or commerce; (3) the unfair or deceptive act has an adverse impact on the public

interest and; (4) the act of defendants are capable of being duplicated. The Act cannot be used to address a private wrong between the parties. *Woodson v. DLI Properties, LLC*, 753 S.E.2d 428 (S.C. Sup. Ct. 2014). Without showing that this conduct impacted one of the customers or other members of the public, the Plaintiff falls short of bringing the Defendants' conduct within the parameters of this Act.

In summary, the Court finds in favor of the Defendants as to the Cause of Action for Breach of Contract (2nd Cause of Action); Breach of Contract with Fraudulent Intent (3rd Cause of Action); Negligent Misrepresentation (4th Cause of Action); Tortious Interference with Contract (5th Cause of Action); Fraud (6th Cause of Action); Conspiracy (7th Cause of Action); and Unfair Trade Practices Act Violations (8th Cause of Action).

Finally, in the first cause of action, the Plaintiff contends that the Defendants converted certain assets owned by the Plaintiff, specifically, the furniture and office equipment and commissions which were paid to Clemson EPS by Charles Schwab which should have been paid to EPS Advisors.

As to the furniture, witnesses for both parties testified that the furniture in question, which consisted of 2 "nice chairs", 4-5 smaller chairs and a table, were owned by the Plaintiff and were provided to Fredman as part of the arrangement between the parties. There were some additional equipment referenced but these were subject to leases and repossessed and therefore do not appear to be in issue. When Fredman left and started up his new business, the Plaintiff demanded that arrangements be made to return the items immediately. Fredman contends that he was put on trespass notice and asked not to contact the Plaintiff or its representative, so he was unable to make arrangements to return the items in question, but he kept the personal property in storage. Fredman was fully aware that this property belonged to the Plaintiff and he made no arrangement or attempt

at having the items returned or available to the Plaintiff. In order to prevail on a cause of action for conversion, the plaintiff must prove that (1) it owned or had a right to possession of the personal property; (2) that Defendant gained control and possession of the property or prevented the plaintiff from using the property and (3) that Defendant did this without Plaintiff's permission. See *Oxford Finance Companies, Inc. v. Burgess*, 402 S.E.2d 480 (1991) and *Owens v. Andrews Bank and Trust Co.*, 220 S.E.2d 116 (1975). A claim for conversion can also be based on an unauthorized detention of property, after demand for its return has been made. See *Oxford at 480*. The Court finds that the Plaintiff has met its burden in showing that Fredman converted these items which were clearly owned by the Plaintiff, but the plaintiff was deprived of their use and the defendant held the property without the Plaintiff's permission after the termination of the business arrangement between the parties. The conversion would have occurred at such time that the return of the items was demanded by David Dameron, as President of EPS Advisors, by letter dated April 20, 2010. Susan Lockwood, as agent of the Plaintiff testified that the furniture in question had a value of \$8046.30 as of the date of the conversion and there was no evidence to the contrary. Therefore, the Court finds in favor of the Plaintiff against Fredman, individually as to the conversion of the personal property. This portion of the judgment would not be against Clemson EPS since it would not have been involved with the conversion of the personal property.

Plaintiff also claims that the Defendants Fredman and Clemson EPS wrongfully held funds which were improperly paid by Schwab to Clemson EPS on April 9, 2010. Plaintiff has clearly established that this commission check in the amount of \$105,352.50 should have been paid to EPS Advisors since it covered commissions earned by Fredman during the first quarter of 2010 under EPS Advisors' account. The Court finds that the Plaintiff has established that these funds were converted by Fredman and Clemson EPS when they should have been returned to EPS

Advisors as of April 9, 2010. But under the agreement between the parties which had been entered into in January, 2010, Plaintiff was only entitled to retain 15% of the commissions, with the balance, 85%, going to Fredman. Therefore, Defendants wrongfully withheld EPS Advisors' 15% or \$15,802.87. The Court finds that both Defendants benefited from this conversion, thus this Court finds that the Plaintiff is entitled to a judgment for this amount against both defendants.

In addition, the Plaintiff seeks punitive damages for Defendants' conversion. Punitive damages may be recovered for conversion when a defendant's acts have been "reckless . . . with conscious indifference to the . . . rights" of another. *Green v. Waidner*, 324 S.E.2d 331, 333 (Ct. App. 1984). The test for this standard of conduct "is whether [the conversion] has been committed in such a manner or under such circumstances that [an ordinary person] would ... have been conscious of it as an invasion of [another's] rights." *Rogers v. Florence Printing Co.*, 106 S.E.2d 258, 263 (1958).

The Court finds that the conduct of the defendants was "reckless . . . with the conscious indifference to the rights" of the Plaintiff and therefore the Plaintiff is entitled to punitive damages for its conversion cause of action. In *Gamble v. Stevenson*, 406 S.E.2d 350 (1991), the South Carolina Supreme Court identified eight considerations for a punitive damages award. These considerations are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Id.* at 354. In consideration of these factors and the testimony presented, the Court finds that punitive damages in the amount of \$35,000.00 are appropriate.

Therefore, the Court finds for the Plaintiff is entitled to a judgment on its cause of action for conversion as follows:

For actual damages against Defendant Fredman in the amount \$8046.30 for the value for the value of the furniture, plus interest from April 20, 2010 at the prejudgment interest of 8 3/4% as provided by S.C. Code Section 34-31-10 for total interest of \$4909.07 for a total actual damages of \$12,955.37.

For the wrongfully held portion of the commission check, the Court finds in favor of the Plaintiff against both Defendants Fredman and Clemson-EPS for \$15,802.87, plus interest of \$9,641.38 for a total actual damages of \$25,444.25.

With the punitive damages, the judgments against the parties will be as follows:

- 1) Against Defendant Jan Fredman, individually \$12,955.37 actual damages.
- 2) Against Defendant Jan Fredman and Clemson-EPS Advisors, LLC, jointly and severally, \$25,444.25 actual damages; and
- 3) Against Defendant Jan Fredman and Clemson-EPS Advisors, LLC, jointly and severally, punitive damages of \$35,000.00.

All other relief requested by Plaintiff is hereby denied.

IT IS SO ORDERED.

Signature Page for Perry H. Gravely as Presiding Judge attached

EXHIBIT B

Candy M. Kern-Fuller, Esq.

From: Gable, Sarah <sgable@schac.sc.gov>
Sent: Friday, June 22, 2018 11:34 AM
To: susan@upstatelawgroup.com; christiana@upstatelawgroup.com;
candy@upstatelawgroup.com
Subject: EPS Advisors v. Jan Fredman; 2017-002347

Attorney Kern-Fuller,

I am aware that I was unnecessarily named as an attorney of record in the above-captioned case, despite having no part in the case, including trial. Please accept this email as consent to be removed as a counsel of record in the above-captioned case.

Sincerely,

Sarah M. Gable

Sarah M. Gable, Esq.
Staff Counsel
South Carolina Human Affairs Commission
1026 Sumter Street, Suite 101
Columbia, SC 29201
O: 803.737.0753
F: 803.253.4191

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Este mensaje (incluyendo los archivos adjuntos) está dirigido solo al receptor señalado y puede contener información de carácter privilegiada, privada o confidencial. Si usted no es el receptor señalado o bien si ha recibido este mensaje por error, por favor notifique inmediatamente al remitente y elimine el mensaje original. Cualquier otro uso de este mensaje de correo electrónico está prohibido. Gracias por su cooperación.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
In the Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case 2017-002347

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EPS Advisors, LLC Respondent/Appellant

v.

Jan Fredman and Clemson-EPS Advisors, LLC.....Appellant/Respondent

PROOF OF SERVICE

I certify that pursuant to SCRAP 240 and 264, on this 2nd day of July, 2018, I filed and served a copy of the undersigned's Motion to Remove Sarah M. Gable, Esq. as Attorney of Record in this Appeal via First Class U.S. Postal Mail upon the parties as follows:

An original and 6 copies of the motion to:

*The Honorable Jenny Abbott Kitchens
P.O. Box 11629
Columbia, SC 29211*

A copy of the motion to Sarah M. Gable, Esq.

*Sarah M. Gable, Esq., Staff Counsel
S.C. Human Affairs Commission
1026 Sumter St., Suite 101
Columbia, SC 29201*

A copy of the motion to counsel for Appellants/Respondents:

*Larry C. Brandt, Esq.
PO Box 738
Walhalla SC 29691*

A copy of the Motion to the Respondent/Appellant's Members:

David C. Dameron (Via U.S. Mail)
8 N. Orchard Farms Ave
Simpsonville, SC 29681

Susan G. Lockwood (Via Hand Delivery)



Candy Kern-Fuller, Esq. (SC Bar No. 11392)

UPSTATE LAW GROUP, LLC

200 E. Main Street

Easley, SC 29640

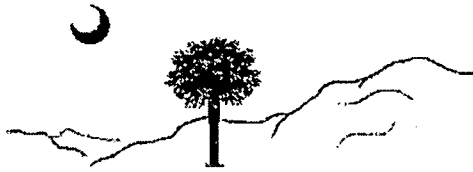
(864) 855-3114

(864) 855-3446 (facsimile)

Candy@UpstateLawGroup.com

July 2, 2018

**ATTORNEY FOR RESPONDENT/
APPELLANT, EPS ADVISORS, LLC**



UPSTATE LAW GROUP, LLC

Candy M. Kern-Fuller, Esq.
Managing Partner

Howard E. Sutter, III, Esq.
Partner

200 EAST MAIN STREET
EASLEY, SOUTH CAROLINA 29640

www.UPSTATELAWGROUP.com
864.855.3114 (ph) • 864.855.3446 (fax)

July 2, 2018

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JUL 06 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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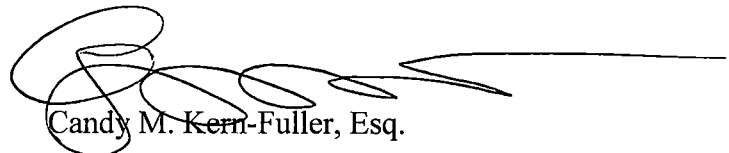
Re: EPS Advisors, LLC v. Jan Fredman and Clemson-EPS Advisors, LLC
Appellate Case 2017-002347

Dear Ms. Kitchens:

In response to Ms. Allen's June 20, 2018 letter, please find enclosed the Respondent/Appellant's Motion to Remove Sarah M. Gable, Esq. as Counsel of Record in This Appeal as she has never been a Counsel of Record in this Appeal or in the underlying matter and appears to have been erroneously added because Opposing Counsel erroneously served her a copy of his Motion for Reconsideration *after* she left our employment.

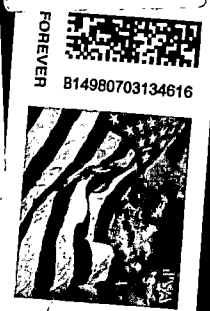
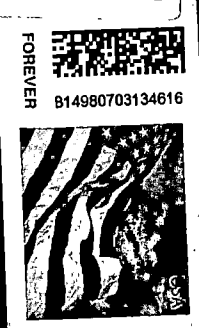
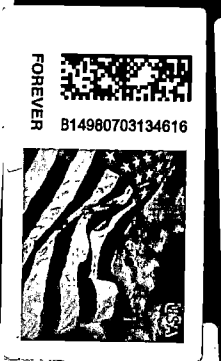
I am currently out on medical leave due to a total knee replacement on my right knee on June 18, 2018. However, feel free to call my assistant at Ext. 301 at my office if anything further is required or call my cell at 864-905-3610.

With kindest regards,



Candy M. Kern-Fuller, Esq.

cc: Mr. Larry Brandt, Esq.
Client Members



*The American People
of the United States
are hereby notified
that the President
of the United States
has signed the
Executive Order
dated 1/20/17
relating to the
National Security
Council's review
of the Federal
Bureau of
Investigation's
collection, use,
dissemination,
and retention of
information
concerning the
activities of
foreign persons
within the United
States.*

*1/20/17
Executive Order
13774
National Security
Council*