

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

Apellate Case 2017-002347

EPS Advisors, LLCRespondent/Appellant

v.

Jan Fredman and Clemson-EPS Advisors, LLCAppellant/Respondent

DAMERON/EPS ADVISORS, LLC ANSWER TO RETURN OF CANDY KERN-FULLER, ESQ.

I.

Dameron continues to attempt to secure counsel, for EPS Advisors, LLC. Dameron requests the Court allow the Motion to Relieve Counsel, or in the alternative allow reasonable time for Dameron to secure counsel and cure.

II.

In Section II of the Answer, Respondent claims, "... the rights and obligations of EPS Advisors, LLC are now governed by the Partners' Dissolution Agreement". Dameron disagrees, however, validity of the Dissolution Agreement is at least in controversy.

To Ms. Kern-Fuller's representation as EPS' counsel, which in turn effects Dameron and Susan Lockwood (the other EPS Member) individually, there has been longstanding disagreement between Dameron and Lockwood as to the validity of the Partner's Dissolution Agreement. Mr. Dameron's view is built on his belief that the Agreement was predicated on the sale of EPS to an outside party, Robert Guess. Dameron believes this is plainly indicated multiple times in the

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Agreement, including in the beginning at “WHEREAS, Dameron and Lockwood have decided that the accounts and good will of the business of EPS Advisors, LLC **shall be sold to Robert Guess...**” and that “WHEREAS, Dameron and Lockwood wish to document and formalize **said agreement between them for the dissolution/sale of EPS Advisors, LLC**; and “**THEREFORE**, Dameron and Lockwood agree as follows”. (emphasis added)

Ms. Kern-Fuller is the author of the Agreement. Her Agreement is now the subject of controversy between the two signers of the Agreement, signing as individuals. Ms. Kern-Fuller has represented each Dameron and Lockwood in the past as individuals. Her position at the time of her drafting the agreement was rife with conflict, and now that conflict is preventing her from giving unbiased counsel.

Logic and ethics would prompt impartial attorneys to recuse themselves- subsequent to the Agreement the Member/signers have been in a lawsuit over EPS issues already; they are now at the cusp of litigation against each other over a document you drafted, and; they are both as individuals, former clients. Remarkably, and to the contrary, Ms. Kern-Fuller actually includes the Agreement in her Answer to this Motion as to why she should remain counsel. Rule 1.7 clearly states, “(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

(Emphasis added)

The conflict here is self-evident. Dameron requests the Court approve the Motion.

Respondent further claims in Section II that “THE MOTION RUNS COUNTER TO (the Dissolution Agreement)”.

Dameron disagrees. Even if the Agreement were valid, granting the Motion to Relieve Counsel would not run counter to the Agreement. Assuming validity only for purposes of this item, there is nothing in the Agreement that says Ms. Kern-Fuller is, in perpetuity and without accountability to the Members/Ex-Members, the ONLY attorney that could represent EPS in the Fredman matter. The Agreement only references Fredman in paragraph 5, as included in the Answer. Dameron complied with that provision, provided the information required by this paragraph, and Ms. Kern-Fuller prosecuted the Fredman claim.

Even assuming validity of the Agreement (which Dameron denies) a decision to relieve Ms. Kern-Fuller would not violate item 5, or any other provision of the Agreement, but would allow Dameron to choose/or allow the influence of selection of counsel he believes would impartially represent his interests, which he believes also are consistent with Lockwood’s.

At paragraph 3 of Item 2, Ms. Kern-Fuller extends this point of conflict over the Agreement by stating “...(Dameron) understands Ms. Lockwood, the other member of EPS Advisors, LLC has retained counsel to enforce her rights under the LLC’s Dissolution Agreement, those rights have yet to be adjudicated by a Court of competent jurisdiction.” *This assertion is incorrect.* It is only by this inclusion of this paragraph that Dameron became aware Lockwood had retained counsel and intended to adjudicate the Agreement.

Given that: Ms. Lockwood had retained counsel to file another lawsuit against Dameron; regarding a controversy involving EPS; and specifically controversy over the Agreement drafted by her, Ms. Kern-Fuller, in her presumed role as counsel for EPS, should have, at least made

Dameron aware of these facts. That she did not further indicates Ms. Kern-Fuller's inability to be impartial in this matter.

Upon learning of Ms. Lockwood's retention of counsel, Dameron forwarded to Lockwood's counsel the Motion to cure this issue.

In paragraph 4 of the Answer, Ms. Kern-Fuller claims that it is her "**professional opinion**" that "... this appeal's defense and the prosecution of its own appeal issues is in the best interests of the **dissolved corporation**...". (emphasis added) Contrary to Ms. Kern-Fuller's implication in her description of the Dissolution Agreement, and her outright claim here, EPS Advisors, LLC is not a dissolved corporation. Exhibit A attached hereto is a "screenshot" from the South Carolina Secretary of State's Office Web Site showing EPS as in "Good Standing" and David Dameron as its Registered Agent.

Ms. Kern-Fuller's inclusion of this to support her point, ironically, supports the Motion. IF the Dissolution Agreement were valid as she claims, then as counsel to EPS, she herself as counsel for EPS should have dissolved the company. If it is not, she could have easily researched the issue, found the same information available to Dameron, and avoided this inaccurate inclusion in her Answer. In including this incorrect assertion, Ms. Kern-Fuller herself supports Dameron's concern over her "professional opinions" and that he should be allowed to have different counsel.

Very importantly, in paragraph 4 Ms. Kern-Fuller shows her real concerns regarding substitution of counsel- that should counsel be substituted and if the settlement being advanced by Dameron becomes the resolution to this Fredman matter, that she will not make her contingency fee. "It is

the undersigned's professional opinion that the settlement amount being advanced by Dameron is inadequate to even pay the undersigned's legal fees...".

The quality of a proposed settlement is not directly the issue. What is clear though is that Ms. Kern-Fuller is worried that if Dameron is allowed to take control of the case, she won't get paid. Further, in paragraph 5, she, as "...the undersigned asserts that it is in the best interests of the company and its creditors for the appeal to continue...". Noteworthy is that the interests of the MEMBERS are not included in this assertion. She is able to twice plead her interest as a creditor, but omits the interests of (all) the members, who she otherwise claims to represent. While impugning the advanced settlement, Ms. Kern-Fuller also fails to inform the Court that EPS has an outstanding debt to the IRS in the form of unpaid payroll taxes- a debt for which IRS could pursue EPS' Members personally and jointly and severable. Putting her own contingency fee interests ahead of her clients is unethical. At a minimum her interest in her fee makes her conflicted.

In Item III Ms. Kern-Fuller claims the Motion should be dismissed because Dameron failed to serve Ms. Lockwood's individual counsel. This claim should be rejected for the reasons described above, and that upon learning of Ms. Lockwood securing counsel, Dameron immediately cured the issue.

IV. In Item IV Ms Kern-Fuller describes her engagement by the Bankruptcy Court to continue the Fredman Matter. In its Order attached as Exhibit C to Ms. Ken-Fuller's Answer, the Order states, "...that Upstate Law Group, LLC are attorneys duly admitted to practice in this court, that they hold or represent no interest adverse to (Dameron's) estate..." .

On 11/07/2013 Dameron filed with the United States Bankruptcy Court a Voluntary Petition under Chapter 7 of the Bankruptcy Code. In this filing, a portion of which is included herein as Exhibit B, Dameron names Ms. Kern-Fuller, Esq. Upstate Law Group as Creditor against a potential claim of \$6,000. This puts Dameron, Ms. Kern-Fuller and her firm at direct conflict in the Bankruptcy proceeding, and should have triggered Ms. Kern-Fuller to remove herself as counsel to EPS Advisors, LLC. She did not.

In addition, Dameron contends an agreement between Ms. Kern-Fuller/Upstate Law Group and the Bankruptcy Court/Trustee is no longer valid. On or about December 12, 2017, Randy Skinner, Trustee of Dameron's Bankruptcy estate abandon's his interest in the Fredman matter, and in March 2018 closed the Bankruptcy. Dameron understand from his Bankruptcy counsel that by these actions EPS Advisors, LLC has returned to a freestanding entity, and Dameron returning as the Managing Member. This issue of Ms. Kern-Fuller and her firm's interest in the case, now as both a creditor of EPS and in line for a contingency fee by its very nature is a position in conflict with Dameron and Lockwood as Members should they decide to accept a settlement of an amount sufficient to meet their needs, but would be "inadequate to even pay (Ms. Kern-Fuller's) legal fees from the engagement by Bankruptcy counsel...".


Conclusion:

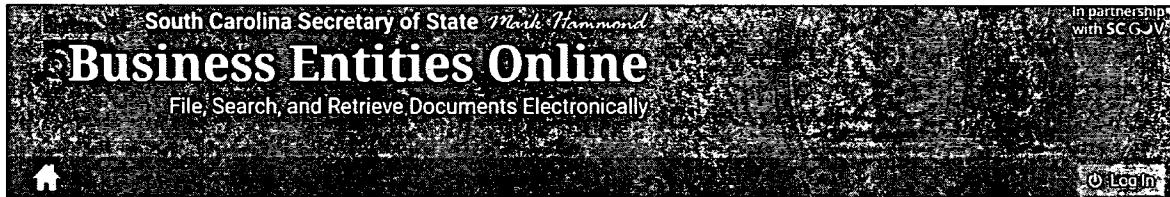
For reasons set forth above, the Motion to Substitute Counsel should be approved.

David C. Dameron
138 Montauk Dr
Lexington, SC 29072
864-363-8036
dcdameron@gmail.com

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EXHIBIT A



→  <https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/eb5540dd-4c66-4b07-854c-13a744e54f66> ☆



South Carolina Secretary of State *Mark Hammond* In partnership with SCGJV

Business Entities Online

File, Search, and Retrieve Documents Electronically

EPS ADVISORS, LLC

Corporate Information

Entity Type Limited Liability Company

Status Good Standing

Domestic/Foreign Domestic

Incorporated State South Carolina

Important Dates

Effective Date 01/18/2008

Expiration Date N/A

Term End Date 12/31/2057

Dissolved Date N/A

Registered Agent

Agent DAVID C DAMERON

EXHIBIT B

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS (Continuation Sheet)

Account No.	Legal Services				
Candy M. Kern-Fuller, Esq Upstate Law Group 200 East Main Street Easley, SC 29640					6,000.00

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CERTIFICATE OF SERVICE

I, David Dameron, Managing Member of EPS Advisors, LLC hereby certify that on December 11, 2018 I served a true and correct copy of the foregoing Answer Via Certified Mail to:

Candy Kern Fuller, Esq.
200 E Main St.
Easley, SC 29640

Larry Brandt
Attorney for the Appellant/Respondent, Jan Fredman and Clemson-EPS Advisors, LLC
3691 Blue Ridge Blvd.
Walhalla, SC 29691

Tucker S. Player, Esq.
Attorney for Susan G. Lockwood
1415 Broad River Rd.
Columbia, SC 29210

David C. Dameron
138 Montauk Dr
Lexington, SC 29072
864-363-8036
dcdameron@gmail.com