STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,

Counterclaim Defendant,

v.

H. Hughes Andrews,

Counter-Claimant.

C.A. No.: 08-CP-42-3397

ORDER AND JUDGMENT

This case comes before the Court following a non-jury trial beginning June 26, 2017 and concluding June 28, 2017. Three witnesses testified. The parties introduced numerous exhibits. Following the conclusion of Andrews' case, Broom made a motion for directed verdict. The Court denied Broom's motion. Following the conclusion of all evidence, Broom renewed his motion for directed verdict. The Court denied Broom's motion and allowed the parties to make closing arguments.

The Court has done its level-best to consider all evidence and arguments. Having considered those materials, having also taken the opportunity to evaluate and weigh the credibility of witnesses, and having heard the arguments of counsel, the Court enters this order and judgment.

Brief Background Summary

This case is nearly 12 years old. It began in September 2005, when Quentin Broom sued Hugh Andrews, a law firm (Ten State Street), and two men who worked at the law firm: Broom v. Ten State Street, L.L.P., et al., C.A. No. 2005-CP-42-2875. Andrews brought counterclaims

against Broom in 2006, pleading his counterclaims on his own behalf as well as on behalf of Tri-Star Communications, an entity he and Broom jointly owned. By consent motion and order, that case was removed from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, and restored in 2008 under its current case number: Broom v. Ten State Street, L.L.P., et al., C.A. No. 2008-CP-42-3397.

There was an interlocutory appeal (more on that later) and parties were dismissed prior to trial. Shortly before trial, Broom also dismissed his claims against Andrews and all other parties.

Because of these intermediate events, the trial only concerned Andrews' claims, which were originally brought as counterclaims. The trial proceeded as though Andrews was the plaintiff and Broom was the defendant. Attorneys Rodney Pillsbury and Blake Hewitt were present for Andrews. Attorneys Matthew Richardson, Patrick Knie, Whitney Harrison, and McKinley Hyman were present for Broom.

The claims were contested, but it was generally established that Broom and Andrews had been co-owners of Tri-Star Communications, a business that ran video poker machines primarily in South Carolina during the 1990s. Following a ban of these machines in South Carolina, Broom and Andrews transferred them to the Dominican Republic and began operating them through a separate foreign entity (Worldwide Entertainment or "Worldwide" hereafter). It was generally established the business had 1,122 video poker machines in the Dominican Republic in the year 2005 via Worldwide, which Broom *de facto* controlled. It was generally established that unilaterally Broom orchestrated a sale of these machines in 2005 (over Andrews' objection) and that Tri-Star ceased operating almost immediately thereafter.

Andrews' claims against Broom can be generally characterized as fraud and self-dealing. Andrews alleges Broom paid himself an excessive salary without Andrews' consent.

Andrews also alleges Broom sold the video poker machines below market value; devising and executing a scheme to convert the machines to his own use without regard for Andrews' interests. Broom disputed each of these allegations. These matters were the focus at trial.

Preliminary Issues

Later sections of this order contain a detailed discussion of the evidence and the claims the Court found to be most relevant, but two preliminary matters require attention. Broom argues Andrews' claims are barred by *res judicata* (claim preclusion) and the law of the case doctrine. The Court has carefully considered Broom's arguments and respectfully denies them.

A few sentences about procedure are required to lay out these arguments. Andrews originally pled his counterclaims in 2006. He brought these on his own behalf as well as on behalf of Tri-Star.

Broom filed a motion to dismiss Andrews' counterclaims in September of 2011, seeking dismissal on the basis that all of Andrews' claims were derivative claims, pursuing recovery for harm done to Tri-Star in the first instance, not to Andrews individually. Broom claimed dismissal was warranted because Andrews had not complied with the pleading requirements for derivative lawsuits set out in Rule 23, SCRCP.

Andrews lodged two arguments in response to Broom's motion. First, Andrews asked the Court to relax the rule that derivative claims belong to the corporation and not the shareholder, noting this case involved a corporation with only two shareholders, one of whom was suing the other. Second, Andrews asked to amend his counterclaims.

The Court dismissed the counterclaims in November of 2011, directing in the order that the dismissal would be "with prejudice." Andrews appealed that order to the Court of Appeals.

In 2015, the Court of Appeals issued an unpublished opinion remanding the case to this Court with specific direction for the Court to rule on Andrews' motion to amend his pleading. Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015). Later that same year the Supreme Court reversed, holding that the Court of Appeals should not have addressed Andrews' motion to amend—even if only for the purpose of remanding for a ruling—because this Court had not decided the motion. Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015).

Andrews began seeking a ruling on his motion to amend after the Supreme Court issued the remittitur. In July of 2016, this Court issued an order allowing Andrews to amend his pleading to state his counterclaims derivatively as well as directly, and to comply with the derivative pleading requirements in Rule 23.

The Court's order recognized and adhered to its ruling that all of Andrews' counterclaims were properly characterized as derivative claims. The Court allowed the claims to be stated by Andrews individually for the sole purpose of allowing Andrews to preserve for further review his argument that there is no distinction between direct and derivative claims when one of a corporation's two owners is suing the other owner.

Broom's "preclusion" arguments relate to this Court's 2011 dismissal of the counterclaims "with prejudice." The argument also involves Andrews' interlocutory appeal and this Court's 2016 order allowing Andrews to re-assert his counterclaims in a way that complies with Rule 23. Broom argues the 2011 dismissal of the counterclaims was a "final order." Broom contends Andrews abandoned his prior appeal of that final order and that the decision to dismiss Andrews' counterclaims is the law of this case. The Court disagrees.

First, the key term is not "final order," but "final judgment." A final judgment terminates the entire case. *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 557 (2013) (quoting

Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)). Rule 54(b), SCRCP, allows a court to direct a final judgment on fewer than all claims in a case, but the rule also instructs that unless the Court expressly directs the entry of judgment, any intermediate order is subject to revision, at any time, until a final judgment is issued. A final judgment happens when a case reaches the "end of the road." *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).

This Court's 2011 order was not a final judgment. The order dismissed Andrews' counterclaims, holding they were improperly pled as individual claims when they were in fact derivative claims that did not comply with Rule 23. That order did not direct the entry of any judgment. It was also not the end of the case. The order was not even the end of Andrews' pleading. Broom was still suing Andrews; Andrews' answer remained pending. Andrews moved to amend his pleading in response to the order dismissing his counterclaims. The counterclaims had not reached the end of the road as long as that motion remained pending.

The Court of Appeals recently noted "the ease with which pleadings may now be amended" and held "the fate of [a party's] counterclaims have not been finally determined as long as his motion to amend hangs in the balance." *Tillman v. Tillman*, Op. No. 5493 (S.C. Ct. App. filed June 14, 2017) (Shearouse Adv. Sh. No. 23 at 34, 36-37). The Supreme Court recently expressed the same sentiments, explaining amendments are "strongly favor[ed]" and "the court is encouraged to freely grant leave to amend." *Patton v. Miller*, Op. No. 27730 (S.C. Sup. Ct. filed July 26, 2017) (Shearouse Adv. Sh. No. 28 at 87, 99). The decision instructs "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* at 100 (quoting

Foman v. Davis, 371 U.S. 178, 182 (1962)). These principles point strongly in favor of allowing Andrews the opportunity to have his claims heard.

There has been no final judgment until *this* Order. There is no mandate or decision from an appellate court establishing *any* law for this case. The Court believes the proper application of the controlling principles counsel strongly in favor of parties' claims being heard on the merits.

A single cause of action: Andrews' amended pleading asserts 10 claims against Broom: breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, breach of the covenant of good faith and fair dealing, conversion, violation of the corporate standards for directors, violation of the corporate standards for officers, promissory estoppel, fraud, and negligent misrepresentation. Broom filed a motion to dismiss prior to trial, arguing Andrews' claims constitute a single cause of action for breach of the standards of care for an officer and director.

The Court agrees. Precedent explains the South Carolina Business Corporation Act codifies the common law duties owed by officers and directors to shareholders. *Clearwater Trust v. Bunting*, 367 S.C. 340, 349, 626 S.E.2d 334, 338 (2006). Andrews' pleading, evidence, and arguments consistently indicated his claims are classic claims for corporate self-dealing. Andrews claims Broom paid himself excessive and unauthorized salary without Andrews' consent, sold the video poker machines below market value, converted the machines to his own use, and failed to consider Andrews' interests. These claims constitute a single cause of action for breach of the corporate code.

Partnership Standards Do Not Apply: The parties contested the standard of care Broom owed to Andrews. Broom argued the standard was that of a director. Andrews argued Tri-Star

operated as a partnership notwithstanding the fact that Tri-Star was not a partnership, but was instead a corporation.

The Court is not aware of a vehicle or mechanism allowing the Court to impose partnership duties on the members of this corporation. These parties chose to operate through the corporate form—they did not form and operate a partnership. The applicable standards of care between Broom and Andrews are the standards from the corporate code; specifically, the standards of conduct for officers and directors from Articles 3 and 4 of Title 33, Chapter 8.

Merits: Andrews' claim under the South Carolina Business Corporation Act asserts actual damages for three (3) separate areas: (1) Reimbursement for Broom's unauthorized salary payments to himself; (2) Monies owed from the unauthorized sale of the video poker machines; and (3) Monies due Andrews from Broom's subsequent lucrative income from the Dominican Republic. After considering all the evidence, the Court finds in favor of Andrews as to the first item, but finds for Broom as to the latter two. The Court concludes Broom did not honor the applicable standards of care. Instead, the Court is convinced—and finds as a fact—that Broom acted fraudulently and with bad faith with regard to the monies Broom unilaterally paid to himself in 2004 and 2005.

To be sure, Broom and Andrews tell very different stories. Broom testified that it was a struggle for operations in the Dominican Republic to be profitable. There were problems converting Dominican profits to U.S. dollars and there were problems related to import and export taxes. Broom also testified about legal issues surrounding Worldwide's poker games in the Dominican Republic.

Broom said he worked for years without taking a salary to help the business get on its footing. Broom also said the parties always contemplated his being entitled to a salary, both

prospectively and retroactively. As to the latter point, Andrews testified that he consented to a salary for Broom only after Andrews was paid for the video poker machines he sold to Tri-Star. Andrews believed Broom should not have taken a salary because Andrews was never paid for those machines.

Broom controlled the financial operations of Tri-Star. He admitted that when he began paying himself a salary, he did not consult with Andrews as to the amount (because he believed he was not obligated to); nor did he even notify Andrews he had begun paying himself. Although Tri-Star had been in operation since 1997, Broom did not begin paying himself a salary until December 31, 2004. From the financial records of Tri-Star, Broom paid himself the following amounts on the following dates:

December 31, 2004	$400,000.00
January 31, 2005	$130,000.00
February 28, 2005	$130,000.00
March 31, 2005	$185,000.00
April 30, 2005	$ 75,000.00
Total	$920,000.00

Broom testified he believed these were justified because the company had achieved profitability. However, the evidence directly refutes this assertion. For example, in order to pay himself $400,000.00 in salary from Tri-Star on December 31, 2004, Broom borrowed $325,000.00 from relatives and his other company, Best Games. [Pl. Ex. 23] If Tri-Star had been profitable enough to afford a $400,000.00 salary payment to Broom, it would not have had to borrow 81.25% of that amount to make the payment.

This transaction clearly and convincingly evidences Broom's bad faith and fraudulent intent. There is no legitimate business reason a company would borrow $325,000.00 from

family members to make a self-dealing $400,000.00 salary payment to an employee on the last business day of the year.

Other financial transactions demonstrate Broom's bad faith and fraudulent intent. In February 14, 2005, Broom purchased a $3.5 Million-dollar estate in Miami, Florida. Within the context of the money transfers and payments Broom made to himself beginning on December 31, 2004, the Court is convinced the purchase was made as part of Broom's plan to close down the Dominican operations and re-open them without Andrews. The homestead exemption under Florida law would have made Broom *de facto* judgment-proof from any claims asserted by Andrews.

Additionally, whenever Broom wanted to move money from Worldwide to Tri-Star, he would simply have the funds wire transferred to Tri-Star's account. However, in order to meet Tri-Star's unilateral salary commitment Broom made for himself, it became incumbent for the Dominican Republic's partner in Worldwide (Edmund Elias Yunes) to wire transfer personal funds to Tri-Star. Mr. Yunes transferred $100,000.00 on April 28, 2005 [Pl. Ex. 27] and $90,000.00 on June 29, 2005 [Pl. Ex. 29]. Clearly, neither Tri-Star nor Worldwide were independently profitable as Broom testified.

As to the purported sale of the video poker machines themselves, Broom testified that he sold 1,132 video poker machines for the sum of $400,000.00 in September 2005. The parties stipulated that Andrews did not receive notice of any potential sale until after the sale had already occurred. Andrews vehemently objected to the sale because he believed the machines were worth considerably more. Indeed, Andrews' expert witness, Mr. Mike Fletcher, testified that the CPU boards alone on the machines were worth $1,122,000.00. Mr. Fletcher opined a value of the machines in September 2005 between $1,767,150.00 and $1,512,000.00.

When testifying about the difficulty of operating the machines in the Dominican Republic to justify his salary, Broom stated that the machines had extensive licensing issues that needed to be overcome to have them domesticated in the Dominican. However, when it came to the sale of the machines, literally Broom only had one (1) piece of paper to document the entire sale of $1,132 machines: a receipt showing someone paid Broom's employee, Frank Dillashaw, $400,000.00 cash in US dollars. There are no title transfers; no deposit slips; no other documents of any kind evidencing the sale of 1,132 video poker machines.

Meanwhile, back in South Carolina, Broom never deposited the $400,000.00 cash in Tri-Star's account. Broom made a $400,000.00 deposit in Tri-Star's account on November 3, 2005. This was designed to give the appearance of depositing the funds from the alleged sale of the machines, however, the deposit slip reveals the $400,000.00 came from multiple local accounts (money he allegedly borrowed from family and/or other companies he controlled). [Pl. Ex. 33]

Broom testified that he did not know what happened to the 1,132 poker machines formerly belonging to Tri-Star. He testified that the money he made in the Dominican Republic after closing Tri-Star was a different video game machine. The Court has serious reservations about the credibility of this testimony. Other than one manual, Broom did not provide any documented evidence to support his testimony that the machines were not the video poker machines formerly owned by Tri-Star: not one picture; receipt; title record or any other document which easily would have confirmed Broom's story.

Based upon the totality of the financial records and other evidence, the Court has serious concerns about Broom's purported sale in September 2005.. However, the prior Bankruptcy Court case significantly affects this Court's view of the video poker machines issue: *In re: Tri-Star Communications, Inc.*, C.A. 2005-45299-hb (D.Bnkrpt.SC). There, the parties stipulated in

the bankruptcy proceeding that the Attorney General of the Dominican Republic did issue a directive against the video poker machines, making them illegal. (Bankruptcy Court Order Paragraphs 12, 13 and 14). With the prior stipulation by both parties, this Court must accept those facts as true. Thus, this Court will infer that the immediate motivation in selling the machines was the Attorney General's action of prohibiting the machines and not the Defendant's desire to open another gaming operation. The record from the bankruptcy proceeding also indicates that the sale/liquidation of the machines was unilateral on the part of the Defendant. Therefore, the manner of sale remains an issue in this case.

Again, the prior bankruptcy proceeding affects this Court's view of the manner of the sale. With the actions of the Attorney General weighing on the liquidation, a reasonable inference is that the sale of the machines would be at a discounted price. At the time of the sale, the machines were illegal in the Dominican Republic and the Attorney General was in the process of hunting for the machines. But for this stipulated factual background, this Court would be in position to more favorably view the sale of machines as theorized by the Plaintiff. The facts as stipulated to the Bankruptcy Court govern this Court's view of those facts. Therefore, this Court cannot award a value for the machines under theories of liability offered by Plaintiff. Additionally, if the machines were sold at a price below the dark market rate as testified by Plaintiff's expert, then both the Plaintiff and Defendant have suffered from a bad business decision forced on them by the machines being declared illegal and subject to government confiscation.

Regarding the monies Broom earned from his operations in the Dominican Republic following the liquidation of Tri-Star Communications, the Court is highly suspicious that the income was not related to the machines formerly owned by Tri-Star. However, the evidence in

the record does not support the conclusion that Plaintiff is entitled to income from Defendant's subsequent business. The financial success of Defendant's subsequent gaming venture standing alone does not meet the standard or burden of proof. While Plaintiff accurately summarizes many aspect of the record before this Court, the Defendant voluntarily dismissed all of its claims against Plaintiff. Therefore the burden of proof rest solely on the Plaintiff. Even though this Court does find the Defendant liable under the theories offered by Plaintiff for the payment of salary, the same theories are not support by the facts presented to reach into the Defendant's subsequent gaming venture.

The Court finds that Broom acted fraudulently and in bad faith. It is clear that Tri-Star did not have the income to support the exorbitant salary Broom unilaterally began paying himself on New Year's Eve 2004. The only reasonable interpretation, and the Court so finds, is that by the end of 2004, Broom began a scheme by which he would close down Tri-Star and open operations in the Dominican Republic with Tri-Star's video poker games under an entity deliberately designed to exclude Andrews. Broom conceived and executed a scheme to take all the cash out of Tri-Star, liquidate the company, and cut Andrews out of the business.

The Court finds these facts by clear and convincing evidence. The timeline and explanation Andrews offered in his closing summation was a compelling explanation of how different events fit together. The records of Tri-Star demonstrate that Broom was able to pull money out of Worldwide any time he wanted. Broom himself testified that he controlled Worldwide. Broom pays himself over $1,000,000.00 in salary at a time when Tri-Star owed Andrews significant sums for the video games. Broom moved money out of Worldwide at a time when that company owed significant sums for taxes in 2003 and 2004. The court finds it incredulous 1,122 video poker machines would be sold and the sole record is a single piece of

paper stating $400,000 in US dollars cash was received for 1,122 video poker machines. [Def.Ex. 14] Those funds, if ever received, were never deposited in Tri-Star's account.

When placed within the sequence of financial transactions, Broom's purchase in February 2005 of a $3.5 Million dollars of a luxurious waterfront estate in Miami, Florida fits neatly into his scheme to cut Andrews out of the Dominican operations. The large monthly salary payments that Broom unilaterally paid himself ($130,000.00 in January 2005; $130,000.00 in February 2005 and $185,000.00 in March 2005) correspond with the timeframe that Broom presumably would be attempting to secure a mortgage and needed to demonstrate a regular income stream.

Given how Broom secretly borrowed money from family and his other companies to give the appearance of legitimate transactions, it is clear that Broom's actions were fraudulent and in bad faith with respect to his obligations to Andrews and to Tri-Star.

Disposition/Recovery

Having concluded Andrews is entitled to a monetary judgment, the Court is required to again encounter the issue of direct claims versus derivative claims.

The monetary judgment represents the amount of harm the Court finds Broom's actions inflicted on Andrews. Broom gained from his conduct; Andrews is the only Tri-Star shareholder who did not gain. The recovery in a derivative claim normally goes to the corporation, but treating this recovery as a "derivative" recovery would require Andrews and Broom to equal shares in the judgment.

The American Law Institute has proposed a principle for handling such circumstances. This principle explains:

> In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from

> those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

Principles of Corporate Governance: Analysis and Recommendations, A.L.I., § 7.01(d), cmt. (e) (1994). The rationale of this exception is that when the purposes of a derivative suit are absent, proceeding derivatively forces litigants to comply with formalities that are cumbersome and futile. *Id.*

South Carolina has examined this exception in four cases: *Davis v. Hamm*, *Todd v. Zaldo*, *Babb v. Rothrock*, and *Brown v. Stewart*. None of these cases apply this exception and none of them reject this exception. This Court notes its decision at the pleading stage declining to apply the exception and requiring Andrews to plead the claims derivatively.

Now that a full record has been developed, the Court is convinced the appropriate recovery in this case is to Andrews, individually. In a two-person corporation, one shareholder's self-dealing necessarily corresponds to the other shareholder's harm. The record proves that principle is true here. All of Broom's gains that were ill-gotten were of necessity taken at Andrews' expense.

There is no risk of a multiplicity of actions. Tri-Star was administratively dissolved in 2009 and it only has two shareholders, one of whom is suing the other.

There are no outside creditors here. Broom asked the Court to take judicial notice of Tri-Star's involuntary bankruptcy and the bankruptcy court determined there were no claims against Tri-Star other than the claims of equity holders (Andrews).

An individual recovery will not interfere with a fair distribution of the recovery among interested persons. Again, the Court's judgment reflects the amount of financial damage done to Andrews. The Court has not been presented with and has not been able to discover any sensible argument against Andrews receiving an individual recovery in these circumstances.

Damages

Under S.C. Code Ann. § 33-18-410(9), when an officer/director has acted fraudulently and in bad faith, as Brooms has done here, the Court may award the aggrieved party damages. The Court finds that Andrews has proven damages casually related to the fraudulent and bad faith actions of Broom. Andrews claims several different items of damage. First, it is undisputed that from December 31, 2004 until September 2005, Broom paid himself $1,020,000.00 in salary (the bulk of which was done within a 120-day period). The Court will treat these payments as an unauthorized distribution. Therefore, Andrews is entitled to one-half of those payments, or, **$510,000.00**. Andrews also argued for prejudgment interest on these distributions. Under South Carolina law, the Court does not find that he is entitled to prejudgment interest.

As discussed previously, the Court denies Andrews' claims for monies related to the sale of the machines and for monies related to Broom's earnings subsequent to the purported sale of the machines in 2005.

Andrews also request punitive damages. A detailed explanation of the purpose and legal requirements for awarding punitive damages can be found in *Mellon v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008):

> Punitive damages, alternatively known as exemplary damages, are imposed as punishment. *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). Punitive damages are allowed in the interest of

society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. *Id.* Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party. *Id.*

At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights. *Id.* The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others.

On the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15-33-135 of the South Carolina Code provides: "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (Supp. 2003). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Taylor v. Medenica*, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996); *Lister v. NationsBank of Delaware*, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct.App.1997).

There is no formula or standard to be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are: (1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. *See Gamble v. Stevenson*, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991); see also *Welch v. Epstein*, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct.App.2000) ("Under *Gamble*, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award.").

Id. at 289-291, 659 S.E.2d at 251-252.

The Court finds by clear and convincing evidence that Andrews is entitled to punitive damages. When all evidence is placed in context and within its timeframe, it is clear to this

Court that Broom engaged in a deliberate pre-planned scheme to shut down his business with Andrews by unilaterally paying himself an authorized salary of over one million dollars during the last months Tri-Star was in operation. The plan was meticulously conceived. For example, there is no legitimate business reason to borrow $325,000.00 for the sole purpose of paying Broom $400,000.00 in payroll two (2) weeks later. In order to make a payroll payment to himself of $400,000.00 on December 31, 2004, Broom had to coordinate with family members in advance to obtain substantial monies loaned to him to help him effectuate this purpose. Similarly, when concealing the $400,000 for alleged proceeds for the sale of the machines, Broom once again had to coordinate with family members to make this deposit on November 3, 2005. These actions evidence a clear intent to conceal the truth from Andrews.

The Court agrees with Andrews' argument that this scheme was pre-conceived well in advance and executed with surgical precision to cut Andrews out of the business operations in the Dominican Republic. The Court is equally concerned that Broom may likely have violated relevant tax laws with the manner by which he attempted to document the sale of the poker machines, given the fact that $400,000.00 in cash was allegedly received in the Dominican Republic but this income was by Broom's admission not reported.

The Court also finds that awarding punitive damages in this case would deter others who may who may seek to engage in similar misconduct in the future.

The actual damages for Andrews totals $510,000.00. Under South Carolina law, to pass constitutional scrutiny, a punitive award can be no more than ten (10) times actual damages. The Court finds that Broom's fraudulent and bad faith conduct warrants an award equal to Plaintiff's actual damages. An award of $510,000.00 fairly and accurately reflects the scope of Broom's

misconduct, is reasonably related to the harm suffered by Andrews, and satisfies all other factors outlined in *Gamble* and *Mellon*.

The Court has considered the reprehensibility of Broom's conduct and finds it was the result of an intentional design to deceive Andrews for Broom's financial benefit. See *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) (requiring a court to consider the degree of reprehensibility when reviewing punitive damages). The Court has already considered the ratio and finds a 1 to 1 ratio of actual and punitive damages is reasonable and proportional to the harm inflicted on Andrews.

The Court has also considered comparative penalty awards. The harm to Andrews was purely economic, but it was the result of a meticulously-planned and executed scheme designed to siphon all the value out of Tri-Star while maximizing Broom's take and minimizing the extent to which the company would repay Andrews. South Carolina courts have long upheld punitive awards for cases involving fraudulent conduct. *See*, e.g., *Jordan v. Holt*, 362 S.C. 201, 608 S.E.2d 129 (S.C., 2005) (punitive award for self-dealing upheld). The Court believes a 1 to 1 ratio between actual damages and punitive damages is justified considering this history and was unable to locate any case suggesting the punitive award in this case was out-of-step with comparable awards.

Finally, Andrews has requested payment of attorney's fees and costs as permitted by SC Code 33-18-410(b): "If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding." Broom certainly has acted "arbitrarily, vexatiously, or otherwise not in good faith." As such, the Court finds that Andrews is entitled to attorney's fees and costs.

As noted above, this case has had a lengthy litigation history. As such, the Court will give Andrew's fifteen (15) days from the date of entry of this order to submit a petition for attorney's fees and costs. Broom will have fifteen (15) days from Andrew's petition to file any response or reply. Thereafter, the Court will rule on the attorney's fee and cost amount to be added to the awards set forth herein.

It is so ordered, this 2nd day of November, 2017.

The Honorable J. Mark Hayes, II
Presiding Circuit Court Judge

11/2, 2017