EXHIBIT A

5Star Life Ins. Co. v. Peek Performance, Inc.
Appellate Case No. 2018-002114
5Star's Memorandum Addressing the Appealability of the Orders on Appeal

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GREENVILLE	**CASE NO.: 2018-CP-23-01639**
5Star Life Insurance Company, Plaintiffs, v. Peek Performance, Inc., a South Carolina corporation Defendants.	**ORDER FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT ON THE COUNTERCLAIM**

This action comes before the Court on the Motion of Peek Performance, Inc. ("PPI") for Entry of Default and Entry of Default Judgment on the Counterclaim. The Court heard oral argument on August 28, 2018. James G. Carpenter represented PPI, and William S. Brown and Amanda M. Scott represented 5Star Life Insurance Company ("5Star").

STATEMENT OF THE CASE

This case arises out of a contractual relationship between 5Star, a national insurance company, and PPI, an insurance marketing organization. 5Star alleges that it mistakenly overpaid commissions to PPI. After several months of efforts to resolve matters between the parties, 5Star terminated PPI's contract, and on March 19, 2018, 5Star filed suit against PPI electronically.

On March 29, 2018, PPI Answered and Counterclaimed. On March 29, the Court notified 5Star's counsel of the filing of the "Answer/Answer & Counterclaim."

5Star failed to file or serve a timely Reply to the Counterclaim.

On May 10, 2018, PPI filed a Notice of Default and Motion for Entry of Default Judgment on the Counterclaim. On May 10, 2018, the Court notified 5Star's counsel of the filing of the Notice of Default, an "Affidavit/Default," and a "Motion /Entry of Default."

On May 17, 2018, 5Star filed a two page Reply, a general denial. 5Star also purported to "reserve[] the right to allege additional defenses upon discovery and/or notice of facts sufficient to support said defenses." However, 5Star issued no discovery requests to learn "facts sufficient to support said defenses."

On May 10, 2018, PPI served Interrogatories and Requests for Production on 5Star. 5Star failed to respond to the Interrogatories or the Requests for Production.

On May 17, 2018, PPI moved to consolidate this action with a related action arising out of the same facts, Case No. 2017-CP-23-03269. 5Star failed to respond to the Motion to Consolidate.

On June 27, 2018, the Court held a hearing on the Motion to Consolidate. 5Star failed to appear at the hearing. On June 28, 2018, the Court ordered the two cases consolidated.

On August 7, 2018, PPI wrote 5Star's counsel a follow up letter concerning the lack of response to PPI's discovery requests. 5Star failed to respond to the letter and failed to produce responses to the Interrogatories and Requests for Production.

On August 17, 2018, 5Star filed its Opposition to Motion for Entry of Default and an affidavit of 5Star's attorney. 5Star styles its Memorandum an "Opposition to Motion for Entry of Default." 5Star also opposes PPI's request for entry of default judgment.

LEGAL DISCUSSION

"The plaintiff **shall** serve his reply to a counterclaim in the answer within 30 days after service of the answer." Rule 12(a) (emphasis added).

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk **shall** enter his default upon the calendar (file book)." SCRCP 55(a) (emphasis added). "Entry of default is a ministerial act which a clerk is required to perform once default is

made to appear by the affidavit of the moving party." *Stark Truss Co., Inc. v. Superior Constr. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (2004). The *Stark Truss* Court continued, "A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRCP, meaningless." *Id.*

When a case does not involve liquidated damages, "the party entitled to a judgment by default shall apply to the court therefor." SCRCP 55 (b)(2). Thereafter,

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper.

SCRCP 55 (b)(2).

When faced with a similar situation, the Supreme Court reported that a Circuit Court "granted a default judgment against Petitioner, and following a damages hearing, the master-in-equity awarded damages to Respondents." *Sundown Operating Company Inc. v. Intedge Industries Inc.* 383 S.C. 601, 604, 681 S.E.2d 885, 886 (2009).

In accord with these authorities, PPI asks this Court to make an entry of default and to enter default judgment as to liability, reserving the right to require necessary discovery processes and a subsequent hearing on damages on the counterclaim.

For the reasons stated herein, the Court grants PPI's Motion for entry of default and entry of default judgment.

I. 5STAR FAILED TO SHOW GOOD CAUSE FOR RELIEF FROM DEFAULT.

5Star contends that it has "good cause" for being excused from default under SCRCP 55(c).

> Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside

> the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.

Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). 5Star contends its "good cause" consists of 5Star's attorney's failure to notice the Court's Notice of Filing of the Answer and Counterclaim, and her lack of familiarity with electronic filing.

In her affidavit, 5Star's attorney admits that she received the electronic notice of filing of the Answer and Counterclaim. She states that she "did not see an E-File notice alerting [her] to Defendant's answer. [She] did not know that Defendant had filed an answer or claimed to have filed a counterclaim until [she] saw its Motion for Entry of Default [sic]." Scott Affidavit, par. 6. Scott further testified, "I did not know a defendant could serve a counterclaim by E-Filing." Scott Affidavit, par. 7. Finally, she testifies, "I was very surprised when I saw the Motion for Entry of Default [sic]." Scott Affidavit, par. 8. The attorney's alleged surprise at receiving a timely Answer, and the failure to observe the "notice of electronic filing" of the Answer and Counterclaims, simply does not constitute "good cause" for the failure to file a timely Reply to the Counterclaim.

She further explains that she is "an associate attorney with the Alabama-based debt collection firm Parnell & Parnell, PA. [Her] practice is devoted entirely to debt collection . . . [and her] cases are frequently uncontested and do not typically involve counterclaims." Scott Affidavit, par. 1-2. 5Star's attorney appears to have a statewide practice, but she explains that her "practice is focused in the Midlands. Richland County courts did not begin to use the E-File system until March 8, 2018." Scott Affidavit, par. 3. This explanation, while understandable, underlines the

fact that 5Star's attorney testifies that she failed to demonstrate the required professional skill and attention in this case.

The Court finds that 5Star has failed to show "good cause" either to be granted relief from the entry of default, or to oppose the entry of default judgment. An attorney's failure is "imputable to the client." *Sundown Operating Company Inc. v. Intedge Industries Inc.* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009). A showing of an attorney's negligence does not meet "even the most minimal showing of good cause, and [5Star] is therefore not entitled to relief from the entry of default." *Id.* 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

In *Simon v. Flowers*,

> The affidavit of appellant's counsel, upon which the motion was based, shows that the **default was the result of forgetfulness** on his part which in turn was due to pressure of his business in the trial of cases and in attendance at hearings before the Industrial Commission. It is not suggested that either appellant or his counsel was misled by any statement or act of the respondent or of respondent's counsel. In the crowded routine of a busy lawyer's life **a mistake such as the record here discloses is understandable; but it entails the penalty of default** under strict enforcement of the rule of procedure, and the trial court's refusal to forgive it affords no basis for reversal.

Id., 231 S.C. 545, 550-51, 99 S.E.2d 391, 394 (1957) (emphasis added).

In *Simon*, the Court cited and relied on the rule and explanation from another case:

> **The only accident or mistake** relied upon for vacating the decree and judgment of foreclosure **is the neglect of the petitioner's counsel** in that suit to file an answer setting up the defense of partial failure of consideration in the mortgage debt. Whether the failure to do this occasioned any injustice to the petitioner it is unnecessary to determine, because **the neglect of the attorney must be regarded at the neglect of the petitioner himself. * * * When a party selects an attorney of the court to conduct his cause** in his stead and place, he confers upon the attorney authority to take such action in its prosecution or defense as he may decide to be legal, proper and necessary in the management of the cause; **his acts are, in the absence of fraud, the acts of his client**; and the rule that a party cannot in equity find relief from the consequences of his own negligence is equally applicable where the neglect is that of his attorney employed in the management of the case.'

Id., 231 S.C. 545, 551-52, 99 S.E.2d 391, 394 (1957), *quoting Butler v. Morse*, 66 N.H. 429, 23 A. 90 (emphasis added).

Similarly, the South Carolina Court of Appeals ruled, "Where an attorney is merely neglectful, the general rule applies and relief from judgment is unavailable." *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (2007).

The Supreme Court ruled that a party's losing the pleadings is not "good cause" under Rule 55(c). *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014).

PPI did not act with excessive haste in filing its Notice of Default and Motion for Entry of Default Judgment. PPI waited well after the deadline for filing the Reply, before PPI filed its Notice of Default and a Motion for Entry of Default Judgment. Accordingly, 5Star has failed to demonstrate "good cause" for its failure to file a timely Reply.

II. PPI PLED A COUNTERCLAIM, NOT AN AFFIRMATIVE DEFENSE.

5Star contends that PPI's Answer asserted only affirmative defenses and not a Counterclaim. The Court disagrees. The pleading is captioned "Answer and Counterclaim." The Counterclaim extends from paragraph 9 through paragraph 68, from page 1 through page 11. The allegations are clearly denominated a Counterclaim, and the Counterclaim alleges, in significant detail, claims for breach of contract and defamation, not merely affirmative defenses. The Prayer for Relief on the Counterclaim clearly requests damages and affirmative relief on the Counterclaim against 5Star.

III. PPI HAS SUFFERED PREJUDICE FROM 5STAR'S CONDUCT.

5Star contends that PPI has suffered and will suffer no prejudice if 5Star is relieved from default. The Court disagrees. In the companion litigation, now joined to this one, PPI has requested extensive documents, necessary prosecute its case. The other parties contend they do

not have the extensive documentation, but rather that the extensive documentation is solely in the possession of 5Star. PPI has suffered prejudice by the failure of 5Star to Reply, by its failure to participate in this litigation, and by 5Star's failure to respond to Interrogatories and Requests for Production of Documents. Accordingly, PPI has suffered prejudice by the conduct and failure of 5Star.

IV. AFTER SUFFICIENT OPPORTUNITY FOR DISCOVERY, THE COURT WILL SET A HEARING FOR DAMAGES.

PPI requests the Court to allow sufficient opportunity for discovery, to compel 5Star to respond fully to its discovery requests, and thereafter to set a hearing to determine the amount of damages.

> It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability. *Howard v. Holiday Inns Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); *Schenk v. National Health Care, Inc.*, 322 S.C. 316, 471 S.E.2d 736 (Ct.App.1996); *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 334 S.E.2d 528 (Ct.App.1985). Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence. *Howard*, 271 S.C. 238, 246 S.E.2d 880; *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct.App.1986). Moreover, once a party defaults, the trial court "may conduct such hearings or order such references as it deems necessary and proper" to enter the default judgment. Rule 55(b)(1), SCRCP.

Roche v. Young Bros., Inc. of Florence, 332 S.C. 75, 81-82, 504 S.E.2d 311 (1998).

Similarly, the Court of Appeals quoted 46 AmJur2d *Judgments* § 298 (2006): "In the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. Where damages claimed are not readily ascertainable from the pleadings and record, a hearing is appropriate to determine the amount of damages." *Wells Fargo Bank NA v. Marion Amphitheater LLC*, 408 S.C. 87, 92, 757 S.E.2d 557, 560 (Ct. App. 2014). The Court concurs with this analysis, and, after discovery, will set a hearing to determine the amount of damages.

CONCLUSION

For the reasons stated herein, the Court **ORDERS** that an Entry of Default be entered against 5Star, and that Default Judgment be entered against 5Star as to liability on the counterclaim.

The Court also **ORDERS** 5Star to respond promptly and fully to PPI's discovery requests.

Finally, after adequate opportunity for discovery, the Court will schedule a damages hearing.

SO ORDERED, this _____ day of _____, 2018.

_____

G. Thomas Cooper,
Circuit Judge presiding

Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc

Case Number: 2018CP2301639

Type: Order/Default

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit Judge 2126

EXHIBIT B

5Star Life Ins. Co. v. Peek Performance, Inc.
Appellate Case No. 2018-002114
5Star's Memorandum Addressing the Appealability of the Orders on Appeal

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
5 Star Life Insurance Co., Plaintiff vs. Peek Performance, Inc., Defendant.	)	C.A. No. 2018-CP-23-01639
Peek Performance, Inc. and D. Clayton Peek, Plaintiffs, v. Jeff Wright d/b/a Agent Sales Group, Joe Caldwell, Nathan Wells, Jeff Magg, and Consolidated Assurance, LLC, Defendants.	)	

PLAINTIFF 5STAR LIFE INSURANCE CO.'S MOTION FOR RECONSIDERATION, RELIEF FROM ENTRY OF DEFAULT AND RELIEF FROM DEFAULT JUDGMENT

Plaintiff 5Star Life Insurance Co. ("5Star") respectfully moves the Court to:

(1) reconsider/vacate/amend its September 13, 2018 Order pursuant to Rule 59, SCRCP

(2) set aside the entry of default against 5Star pursuant to Rule 55, SCRCP, and/or

(3) grant 5Star relief from the default judgment pursuant to Rule 60, SCRCP.

The bases for this relief are set forth more fully in the memorandum contemporaneously filed with this Motion. As to the Rule 59 motion, the Court should vacate its Order for Entry of Default and Default Judgment because the Court could not award a default judgment, the Order

does not support entry of default, the Court erred by finding Defendant Peek Performance, Inc.'s ("Peek") allegations to constitute counterclaim rather than affirmative defenses, the Order does not address Peek's request for injunctive relief, and the Order cannot compel discovery responses. Should the Court decline to vacate its Order 5Star respectfully requests the Court set aside the entry of default pursuant to Rule 55 because the purported counterclaims fail to state causes of action, the purported counterclaims constitute affirmative defenses to which no responsive pleading was required, 5Star has additional good cause, Peek will not be prejudiced, and judicial economy favors setting aside the entry of default. Should the Court decline to set aside the entry of default 5Star respectfully requests the Court grant it relief from the default judgment pursuant to Rule 60 due to mistake, inadvertence, excusable neglect, and surprise because 5Star has acted promptly and has meritorious defenses and Peek is not prejudiced.

This Motion is made in accordance with the South Carolina Rules of Civil Procedure and supported by the Complaint, the contract attached to the complaint as an exhibit, any memorandum in support and attached exhibits, and those facts, arguments, and law raised at any hearing on this motion.

[Signature on Following Page]

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/William S. Brown

William S. Brown
SC Bar No. 064164
E-Mail: william.brown@nelsonmullins.com
David C. Dill
SC Bar No. 101519
E-Mail: david.dill@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina

September 24, 2018

EXHIBIT C

5Star Life Ins. Co. v. Peek Performance, Inc.
Appellate Case No. 2018-002114
5Star's Memorandum Addressing the Appealability of the Orders on Appeal

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
5 Star Life Insurance Co.,	)	
Plaintiff	)	
vs.	)	C.A. No. 2018-CP-23-01639
Peek Performance, Inc.,	)	
Defendant.	)	
Peek Performance, Inc. and D. Clayton Peek,	)	
Plaintiffs,	)	
v.	)	
Jeff Wright d/b/a Agent Sales Group, Joe Caldwell, Nathan Wells, Jeff Magg, and Consolidated Assurance, LLC,	)	
Defendants.	)	

PLAINTIFF 5STAR LIFE INSURANCE CO.'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION, RELIEF FROM ENTRY OF DEFAULT AND RELIEF FROM DEFAULT JUDGMENT

Plaintiff 5Star Life Insurance Co. ("5Star"), an enterprise of the nonprofit Armed Forces Benefit Association, provides life insurance to military families. Defendant Peek Performance ("Peek," or "Defendant"), an insurance marketing consultancy, received $109,515.81 in unearned commissions from 5Star. 5Star filed the instant lawsuit for breach of contract to recover these

funds. Peek purports to have asserted a counterclaim[1] which it contends 5Star failed to timely answer.

On September 13, 2018 the Court ordered an Entry of Default and Default Judgment against 5Star. For the reasons set forth below, 5Star respectfully requests the Court alter this Order, and/or set aside its entry of default, and/or grant 5Star relief from this judgment.

I. Introduction and Factual Background

5Star is an insurance underwriting enterprise. It filed this action on March 19, 2018 to recover commissions it paid Peek but that Peek did not earn. Peek is an insurance marketing and recruiting agency. The Contract between 5Star and Peek was attached to and incorporated into the Complaint. Peek electronically filed an Answer on March 29, 2018. Peek admitted the validity of and terms of the Contract. (Answer ¶ 3.) Contrary to the terms of the admitted Contract, Peek alleges it was not required to repay the commissions to 5Star or, to the extent it was required to repay these monies, 5Star or other actors[2] caused Peek to be unable to repay the commissions through certain actions or omissions. Peek contends its Answer included a counterclaim. If the Answer included a counterclaim, 5Star was obligated to answer by May 3, 2018. *See* South Carolina Rules of Electronic Filing Rule 4(e)(4) (service by electronic filing provides five

[1] Although in the caption of—and throughout-- its Answer, Peek uses the word "Counterclaim", in the singular, Peek now asserts that it is asserting two counterclaims. "The purpose of a pleading is fair notice to the opponent and the court." *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001); see also, Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties."). The Answer is nebulous and does not give 5Star fair notice of the claim it attempts to assert, much less that it is attempting to assert multiple claim.

[2] Peek is a plaintiff is a second lawsuit, *Peek Performance, Inc. and D. Clayton Peek v. Jeff Wright d/b/a Agent Sales Group, Joe Caldwell, Nathan Wells, Jeff Magg, and Consolidated Assurance, LLC*, C.A. No. 2017-CP-23-03269 ("Second Lawsuit"). In that action, Peek alleges damages stemming from breach of a contract. 5Star is not a named party in that other action nor a party to the contract at issue in the action. The two actions were consolidated on June 28, 2018.

additional days for response). Peek filed its motion for entry of default on May 10, 2018. This motion alerted 5Star that Peek believed it was in default and 5Star then filed an answer on May 17, 2018.

II. The Court Should Amend Its Order Pursuant to SCRCP 59(e)

The Order (1) enters default, and (2) awards a default judgment. The Order is contrary to well-established law and should be vacated.

A. The Court Could Not Award a Default Judgment

South Carolina courts have made clear that a "[j]udgment by default is not properly entered until damages are determined." *Beckham v. Durant*, 300 S.C. 329, 331, n. 2, 387 S.E.2d 701, 703, n. 2 (Ct.App.1989) (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct.App.1987); H. LIGHTSEY, J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE, 77 (2nd Ed.1985)); *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 593, 615 S.E.2d 437, 439 (2005). Peek purported counterclaim does not seek liquidated damages. Therefore, Peek is required to prove damages before a default judgment can be properly issued. *See Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014) ("Even in a default case, therefore, the plaintiff must prove the amount of his damages, and such proof must be by a preponderance of the evidence.") (internal alterations omitted) (quoting *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct.App.2012)). The Order quotes *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, a recent Court of Appeals decision reversing and remanding a premature default judgment issued prior to the establishment of damages. 408 S.C. 87, 88, 757 S.E.2d 557, 557. Nevertheless, the Order shares the same defect as *Wells Fargo* and should be vacated.

B. The Order Does Not Support Entry of Default

1. The Order Fails to Include Findings as to the Sufficiency of Peek's Purported Causes of Action and the Allegations Fail to State a Claim

"A party seeking a default judgment is entitled to only such relief as is framed by his pleading . . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error. An objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default." *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984) (citing *Mutual Savings & Loan Association v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980); *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 72 S.E. 15 (1911)); *see also, e.g., Direct TV, Inc. v. Pernites*, 200 Fed. App'x 257, 257 (4th Cir. 2006) (vacating default judgment on claims that were not well pleaded in the complaint); *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1988) (overturning default judgment based on failure to properly plead fraud under RICO); *Nishimatsu Constr. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (vacating default judgment that was based on complaint that failed to state a cause of action). As discussed below, Peek's allegations fail to state a claim. The Order errs because it does not include any findings that Peek, as required, stated a prima facie claim.[3] Without such a finding the Order must be vacated as default cannot lie where a prima facie claim has not been asserted.

[3] Pursuant to the contract, which was incorporated into the Answer at Paragraph 3, this dispute "shall be governed by and construed in accordance with the laws of the state of Virginia." (Ex. to Compl. at § 18.) The Order, however, fails to consider any Virginia law. Because the Court failed to consider any Virginia law the Order is facially deficient and must be vacated. *See, e.g., Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law.") (cited with approval *by Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 450, 814 S.E.2d 643, 653 (Ct. App. 2018), *reh'g denied* (June 21, 2018)).

2. The Order Relies on Allegations Outside the Purported Counterclaim

As discussed above, default can only be entered where the claims, on their face, assert prima facie causes of action. Allegations outside the complaint/"counterclaim" (such as argumentation in a later motion or supporting affidavit) cannot sustain a facially deficient cause of action. The purported "counterclaim," as discussed below and in 5Star's opposition to Peek's Motion for Entry of Default, does not state a cause of action. To circumvent this failing, Peek presented an inadmissible and untimely affidavit. This affidavit in support was filed nineteen hours before the hearing and is untimely under the South Carolina Rules of Civil Procedure. *See* SCRCP 6(d) (stating affidavits supporting motion must be served with motion and additional affidavits can be served no later than 2 days before the hearing unless the court orders otherwise). Peek did not seek leave of the Court to file this affidavit. Further, the affidavit is filled with inadmissible hearsay and argument rather than factual assertions.

Even if admissible, however, this affidavit cannot rectify the pleading deficiencies in Peek's purported counterclaim. The sufficiency of the counterclaim must be proven on its face, not through extrinsic filings. The Order, however, relies upon extrinsic (and inadmissible) materials. Because it is based upon inadmissible evidence and not the plain language of the purported counterclaim, the Order should be vacated.

C. The Court Erred by Finding Peek's Allegations to Constitute Counterclaim Rather than Affirmative Defenses

5 Star's opposition to Peek's Motion for Entry of Default highlighted a critical failing in the purported "counterclaim"—the "counterclaim" is merely an affirmative defense mislabeled as a counterclaim. As discussed below, what a party labels a pleading is not dispositive. Rather, the Court is required to examine the contents. "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been

a proper designation." Rule 8(c), SCRCP. The only basis in the Order for the determination that the allegations in the Answer constitute a counterclaim is the title of the pleading. The title, alone, however is insufficient to sustain such a holding and without other findings the Court's holding that Peek asserted a counterclaim is invalid.

D. The Order Does Not Address Peek's Request for Injunctive Relief

Peek's answer sought vague and broad mandatory injunctive relief. "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). An injunction is "available only where no remedy at law exists or where the legal remedy would fail to make the party whole." *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 369–70, 588 S.E.2d 635, 639 (Ct. App. 2003), *holding modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). Peek acknowledged the calculability of any harm by seeking money damages. Thus injunctive relief is not required. Further, the requested mandatory injunction would force 5Star to take certain actions. For example, Peek demands the Court force the parties to conduct business together and make 5Star "reinsert" Peek into a sales commission relationship, "provide contact information on clients and prospects" to 5Star, and give him "client personal data for resale to other life and ancillary plans." "The issuance of a mandatory injunction depends upon the equities between the parties, and it rests in the sound judicial discretion of the court whether such an injunction should be granted." *Hunnicutt v. Rickenbacker*, 268 S.C. 511, 515–16, 234 S.E.2d 887, 889 (1977).

Peek failed to allege any basis through which it is entitled to this injunctive relief. Without such contractual allegations, its claim for mandatory injunctive relief was facially deficient. 5Star raised these deficiencies in its opposition to Peek's motion but the Order failed to address these

arguments. Accordingly the Court should vacate the Order or amend its Order to expressly deny Peek injunctive relief.

E. The Order Cannot Compel Discovery Responses

1. The Order Grants Relief Not Sought by the Motion

The Order exceeds the scope of the motion heard by the Court. Peek filed a Motion for Entry of Default Judgment. The Order, however, also orders 5Star to "respond promptly and fully" to Peek's discovery requests. The motion under consideration by the Court did not seek any discovery related relief. "A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it." *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 230, 599 S.E.2d 462, 464 (Ct. App. 2004) (citing *Skinner v. Skinner*, 257 S.C. 544, 550, 186 S.E.2d 523, 526 (1972)); *see also, e.g.*, Rule 7(b)(1), SCRCP. Thus the Court should vacate its Order.

2. The Order is Unsupported by Record Evidence as to the Discovery Related Relief

Peek's Motion for Entry of Default did not seek or discuss any discovery issues. Likewise, at the hearing on this motion on August 28, 2018, Peek failed to introduce any evidence concerning discovery. Accordingly, there was no factual basis in the record for the Court to grant any discovery related relief and the Order should be vacated. *See, e.g., Kendig v. Kendig*, No. 2015-002457, 2018 WL 2247175, at *7 (S.C. Ct. App. May 16, 2018).

III. The Court Should Set Aside the Entry of Default Pursuant to SCRCP 55

As set forth above, the Order should be vacated. Nevertheless, to the extent the Court finds that it could properly enter default, 5Star respectfully requests relief from this entry of default pursuant to Rule 55(c), SCRCP.

A. Legal Standard

South Carolina policy "favor[s] the disposition of issues on their merits rather than on technicalities." *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). To that end, the Court may set aside an entry of default "for good cause." SCRCP 55(c). Rule 55(c) is to be "liberally construed to promote justice. . . ." *Melton v. Olenik*, 379 S.C. 45, 54 (Ct. App. 2008). "[T]his element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." *Ricks v. Weinrauch*, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1987). In short, "[r]elief granted at the point of entry of default is within the equitable power of the court and excuses previous failure to act promptly." *Ricks*, 293 S.C. at 374, 360 S.E.2d at 536.

As the forgoing authority makes clear, this Court has the discretion to enter default and may utilize its equitable powers and inherent interest in the administration of justice. The Court should set aside the entry of default because:

1. Peek's purported counterclaims do not state prima facie causes of action.
2. Peek's purported counterclaims are affirmative defenses to which no responsive pleading was required.
3. 5Star has additional good cause for delay in responding to Peek's alleged counterclaim.
4. Peek will not be prejudiced and judicial economy favors setting aside the entry of default.

B. Peek's Purported Counterclaims Fail to State Causes of Action

Peek says it asserted counterclaims, but failed to identify any cause(s) of action in its Answer. Its Answer does not contain separate headings or otherwise name the purported counterclaim. *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001)("The purpose of a pleading is fair notice to the opponent and the court."). Even belatedly,

in its affidavit[4] in support of its motion for entry of default, Peek again failed to commit to specific causes of action. The untimely and inadmissible affidavit asserted the Answer contained causes of action for breach of contract and defamation, but also broadly asserts unspecified "other claims." (Aff. ¶ 16.) The ambiguity of Peek's pleading is further demonstrated by its complaint in the Second Lawsuit. Peek's counterclaim is simply a restatement of the "FACT" section of its complaint in the Second Lawsuit. (*Compare* Answer ¶¶ 9-64 *with* Second Lawsuit Complaint ¶¶ 5-59; *see also* Peek's Mot. to Consolidate (stating "the allegations in the Counterclaims in this case are repeated in large measure in the Complaint in [Second Lawsuit]").)

In the Second Lawsuit, however, Peek followed that FACT section with six separate and discrete causes of action, alleging specific elements needed to establish the causes of action: breach of contract (twice), breach of contract accompanied by a fraudulent act, tortious interference with contractual relations (twice), and quantum meruit/unjust enrichment. In its purported counterclaim, however, Peek fails to clearly identify any claim and does not allege the elements needed to establish a cause of action. Default is not a blank check to the claimant; there must be some certainty as to the claim in which default is sought. *Mut. Sav. & Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading. . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error."); *see, e.g.*, SCRCP 10(b) (requiring each claim to be "stated in a separate cause of action. . . .").

[4] As discussed above, this affidavit was filed nineteen hours before the hearing and is untimely under the South Carolina Rules of Civil Procedure. *See* SCRCP 6(d) (stating affidavits supporting motion must be served with motion and additional affidavits can be served no later than 2 days before the hearing unless the court orders otherwise). Likewise the affidavit is filled with inadmissible hearsay and argument.

Ultimately, the Order limited Peek to two causes of action: (1) breach of contract and (2) defamation. Even as to these two causes of action, however, Peek failed to allege prima facie claims. *See Masters v. Rodgers Dev. Group, S.C.*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct.App.1984) (holding defendant found in default was not precluded from challenging the sufficiency of the plaintiff's complaint as a basis for judgment).

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct.App.2012); *Filak v. George*, 267 Va. 612, 619, 594 S.E.2d 610, 614 (2004) ("The elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation."). "However, one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract, or at least that he was, at the appropriate time, able, ready, and willing to perform." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272-73 (Ct. App. 2015). Likewise, under Virginia law, "a party who commits the first breach of a contract is not entitled to enforce the contract." *Countryside Orthopaedics, P.C. v. Peyton*, 261 Va. 142, 154, 541 S.E.2d 279, 285 (2001)

Peek's alleged counterclaim fails to state a cause of action for breach of contract because it does not allege any contractual provision violated by 5Star. Peek likewise fails to allege the actual breach by 5Star. To the extent Peek alleges breach because 5Star demanded repayment of commissions, the terms of the contract which were attached to the Complaint, admitted in the Answer, and incorporated into the Answer by reference at Paragraph 3 acknowledge that 5Star had the authority to "decide and settle" all "disputed commissions" and its decision "shall be binding

and conclusive." (Ex. to Compl., Contract § 9.) Thus, any decision by 5Star as to commissions was authorized by the contract and could not constitute breach. Likewise the contract gives 5Star the "right to withhold commissions payable at its sole discretion and in certain circumstances." (*Id.* § 8.) Further, to the extent any purported breach was based on the transfer of agents outside of Peek's commission pipeline, the contract gives 5Star the power to transfer agents at its own discretion. (*Id.* § 6) (granting 5Star power "at any time to terminate or amend any Schedule of Commission"). Peek also fails to allege that it was able, ready, and willing to perform at the appropriate time. Finally, because Peek breached the contract first it cannot bring a claim for breach of contract against 5Star.

"To recover for defamation, the plaintiff must establish by a preponderance of the evidence, that there was (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication." *Parrish v. Allison*, 376 S.C. 308, 320, 656 S.E.2d 382, 388 (Ct. App. 2007); see also Jordan v. Kollman, 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005) ("In Virginia, the elements of libel are (1) publication of (2) an actionable statement with (3) the requisite intent. To be actionable, the statement must be both false and defamatory. True statements do not support a cause of action for defamation. Further, statements of opinion are generally not actionable because such statements cannot be objectively characterized as true or false[.]")

Peek has failed to allege facts sufficient to establish any element of defamation. Peek does not allege the contents of any defamatory statement or when/where/how such statement was made. Peek also fails to allege facts sufficient to show the falsity of any such statement as the terms of

the contract incorporated into the Answer by reference at Paragraph 3 expressly gives 5Star the power to require Peek to repay commissions and therefore if 5Star deems Peek to owe commissions such a determination is conclusively established and cannot be false. Peek also fails to allege any fault by 5Star in making any statement and does not allege any actual malice. Finally, Peek fails to allege with particularly any special harm expressly caused by any publication.

Because Peek's "counterclaim" fails, on its face, to state a cause of action, the Court should set aside its entry of default.

C. The Purported "Counterclaims" Constitute Affirmative Defenses to Which No Responsive Pleading Was Required

"This matter involves the breach of a contract. . . ." (Def's Compl. ¶ 5.) 5Star's Complaint seeks the repayment of commissions that it contends Peek did not earn. Peek's Answer, on its face, argues that it does not have to repay these commissions due to the conduct of 5Star and others. The allegations in Peek's Answer, as pled, do not assert counterclaims but rather affirmative defenses. If the purported counterclaims are merely affirmative defenses then the Court cannot enter default as 5Star is not obligated to file a responsive pleading to affirmative defenses.

Peek relied on the title of its responsive pleading "Answer and Counterclaim." The rules, however, demonstrate that what a party titles a pleading is not dispositive. The Court is to examine the contents and "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation." Rule 8(c), SCRCP.

Peek's allegations state the affirmative defenses of prior breach and third party conduct to 5Star's breach of contract claim. Peek asserts 5Star breached the contract first and any failure to repay commissions was caused by the conduct of the defendants Peek sued in the Second Lawsuit. *See, e.g., Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App.

1993). Accordingly, pursuant to Rule 8(c), SCRCP, the allegations should be treated as affirmative defenses and the Court should set aside its entry of default.

D. 5Star Has Additional Good Cause for Its Allegedly Untimely Response

Defendant was paid $109,515.81 in unearned commissions. (Compl. ¶ 6.) Despite various accommodations from 5 Star, Defendant failed to repay these ill-retained gains. (Answer ¶¶ 54, 59 (describing how 5 Star agreed to allow Defendant to repay it through 50% of its future commission streams and after this proved insufficient Defendant later requested to repay 5 Star by authorizing 5 Star to retain 100% of its commissions). 5 Star filed this action to recover the money it is owed plus interest and attorney's fees on March 19, 2018. At the time, 5 Star was represented by Amanda Scott of the Alabama based law firm, Parnell & Parnell, P.A. (Scott Aff. ¶ 1., previously filed on August 17, 2018). Ms. Scott, a Richland County resident whose practice focuses on collections,[5] was unfamiliar with the Greenville County E-Filing system. (*Id.* at ¶ 3.)

Defendant submitted its answer and purported counterclaim unusually early; it had until April 19, 2018 to answer but filed a mere ten days after service of 5 Star's complaint. (Answer; Scott Aff. ¶ 5.) Ms. Scott did not expect to receive a filing in this action at that time and mistakenly believed any counterclaim would have to be served traditionally via mail. (Scott Aff. at ¶ 5.) She did not see the electronic notice of the filing and 5 Star did not enter a reply by its deadline, May 3, 2018. (*Id.* at ¶ 6.) Shortly thereafter, on May 10, 2018, Defendant filed its Motion for Entry of Default. The Motion alerted 5 Star to the purported counterclaim and it swiftly filed an answer on May 17, 2018. (*Id.* at ¶ 8.)

[5] The E-Filing Pilot Program is not yet used in all counties. Richland County courts did not begin to use the E-File system until March 8, 2018.

The South Carolina E-Filing Rules "shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of on the merits." E-Filing Court Rules, Rule 11(e) (previously filed on August 17, 2018). 5 Star did not receive notice of the purported counterclaim because its counsel did not see the Notice of Electronic Filing. Its counsel did not expect a return to be filed so soon after service and did not know counterclaims could be served electronically. (Scott Aff ¶¶ 5-7.)

Ms. Scott is not alone in her misunderstanding of the E-Filing Rules concerning electronic service. Defendant's counsel, for example, cites the wrong deadline in the Motion because he appears to believe E-Filing equates to in-person service. (Mot. ¶ 4 (asserting that "Plaintiff is in default on the Counterclaims" because "more than thirty days passed after March 29, 2018, without a Reply. . . .").) But, where E-Filing is used to *serve* parties (rather than simply file), it is treated as the equivalent of service by mail and five extra days are added to the time for response. E-Filing Rule 4(e)(4). Thus, Defendant's own Motion demonstrates the understandable confusion surrounding electronic service.[6]

The unseen notice—premised in part on the unexpected timing and confusion about the propriety of electronic service in E-Filing counties—constitutes good cause, particularly in light of the liberal construction of the E-Filing Rules.

[6] This misunderstanding also renders Defendant's Motion technically deficient and incapable of sustaining an entry of default. The Motion alleges that 5 Star did not answer within thirty days. 5 Star had thirty-five days to respond and thus the allegations in the Motion are insufficient to sustain an entry of default.

E. Peek Will Not Be Prejudiced and Judicial Economy Favors Setting Aside the Entry of Default

This is a unique factual scenario. The litigation will continue despite any entry of default. First, Peek has requested extensive discovery for use in this action. The purported counterclaim(s) were not verified and contain no dollar amount. Peek conceded at the hearing on this matter that it is unable to calculate its damages. Second, Peek emphasizes that it will need to conduct extensive discovery on 5Star for use in the Second Lawsuit. At the hearing on this matter Peek repeatedly advised the Court that 5Star was the only potential source of these documents or information. Third, the lawsuit was initiated by 5Star and 5Star will continue to pursue its original claim to recover the unearned commissions.

"The court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009). Entry of default against 5Star does not speed up the litigation or minimize the involvement of the Court. To the contrary, entry of default requires the Court to expend more judicial resources. If the entry of default is sustained, this litigation will break into two duplicative paths each requiring similar briefing, arguments, and hearings. The Court would, as Peek requested, need to supervise extensive discovery including document requests, interrogatories, and depositions into damages while the parties likewise resume separate discovery on the merits of 5Star's claim and the Second Lawsuit. The Court would also need to conduct a detailed damages hearing requiring witness testimony, evidentiary motions, briefing, and argument. If the Motion is denied, however, the parties will merely remain at status quo ante and proceed with one cohesive discovery process until a comprehensive trial on the merits. This would avoid serial depositions and duplicative motions in limine, rulings, briefing,

and hearings. This eight party litigation is in stark contrast to those cases where a plaintiff has a verified complaint containing damages or where only one party has asserted claims.

Peek has not presented any evidence of actual prejudice. The Order states Peek has suffered "prejudice" not due to any *default* by 5Star but because of 5Star's alleged failure to respond to discovery requests. As discussed above, there is no evidence before the Court showing any outstanding discovery requests served on 5Star that have not been answered. Further, the failure to answer discovery (if any) is wholly separate from any default. There have been no allegations as to prejudice suffered by Peek due to the alleged default. Even if 5Star delayed in responding to any discovery requests, this litigation is in its infancy and the parties are in the process of transferring the matter to a business court. Peek can make no showing of any lasting harm due to delayed discovery.

The requested relief, in light of the totality of the circumstances, does not maximize judicial resources, particularly in light of Peek's failure to demonstrate any prejudice.

IV. The Court Should Grant 5Star Relief from the Order Pursuant to SCRCP 60

As set forth above, the Order's default judgment is in error and should be vacated. Rule 55(c), SCRCP, therefore governs 5Star's Motion for Relief from Entry of Default. Nevertheless, to the extent the Court finds that it could properly enter a default judgment, 5Star also respectfully requests relief from this judgment pursuant to Rule 60(b), SCRCP.

A. Legal Standard

In contrast to the less rigorous Rule 55(c) "good cause" standard, Rule 60(b), SCRCP, requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. In determining whether to grant a motion under Rule 60(b), the circuit court should consider: (1) the

promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct.App.2001). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991).

B. 5Star Should Receive Relief from the Default Judgment Due to Mistake, Inadvertence, Excusable Neglect, and Surprise

"It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292 (1981).

1. Excusable Neglect

As discussed above in 5Star's Motion for Relief from Entry of Default, Peek's purported counterclaims appear on their face to be affirmative defenses or mere background. The counterclaim lacks headings to delineate each cause of action. Likewise, the purported counterclaim is a nearly verbatim copy of the "FACT" section of Peek's complaint in the Second Lawsuit. In contrast to that complaint in the Second Lawsuit, however, the purported counterclaim does not recite any elements or causes of action. Thus, when read both individually and in concert with the Second Lawsuit, Peek's purported counterclaims were vague, ambiguous, and confusing as to whether causes of action were being asserted against 5Star or whether Peek was merely reciting the facts from its other lawsuit as an affirmative defense or background information to the collection complaint.

An analogous scenario was addressed in *Tyson v. United Food Servs., Inc.*, 289 S.C. 271, 272, 346 S.E.2d 27, 28 (1986). In *Tyson*, the claimant brought multiple proceedings in several forums. The defendant failed to answer one of the complaints. The Supreme Court the defendant

demonstrated "excusable neglect by showing its confusion over the various claims instituted by [Plaintiff]." The Supreme Court found the defendant "could reasonably have believed the complaint related to the action then pending" in another forum and thus allowed the defendant to file a late answer. Here, like *Tyson*, Peek is participating in multiple actions. Its purported "counterclaim" is a virtually verbatim copy of the fact section of its complaint in the Second Lawsuit. But, unlike the Second Lawsuit, the "counterclaim" does not include enumerated specific causes of action or recite the required elements. Thus, 5Star, like the Tyson defendant, acted with excusable neglect as it was reasonable for 5Star to have understood the purported counterclaim to be incorporating the Second Lawsuit's fact section as additional background for the Court or to allege an affirmative defense. The format of the "counterclaim"—with no headings or delineation—is significantly different from Peek's prior pleadings in the Second Lawsuit.

2. Mistake/Inadvertence/Surprise

5Star is also entitled to relief from default judgment due to mistake, inadvertence, and surprise. 5Star filed the complaint on March 19, 2018. A mere ten days later Peek filed the Answer and its purported counterclaim. Peek's submission was unusually early; in the experience of 5Star's then counsel, Ms. Scott, it was highly unusual for an adverse party to file a responsive pleading with two-thirds of its time to respond remaining. (Scott Aff. ¶ 5.) Ms. Scott did not expect to receive a responsive pleading at that time and believed any counterclaim had to be served traditionally via mail. (Scott Aff. at ¶ 5.) 5Star thus did not enter a reply before May 3, 2018. (*Id.* at ¶ 6.) Shortly thereafter, on May 10, 2018, Defendant filed the instant Motion for Entry of Default ("Motion"). The Motion alerted 5 Star to the purported counterclaim and it swiftly filed an answer on May 17, 2018. (*Id.* at ¶ 8.).

The situation is analogous to that of *Myers v. Food Town Stores, Inc.*, 276 S.C. 571, 572, 281 S.E.2d 108, 108 (1981). In *Myers*, the defendant was properly served with a complaint but the summons was located in the back cover of the document. *Id.* The Court found the "unusual location of the summons failed to fulfill the essential purpose of clearly placing respondent on notice of the time period in which to answer" and allowed the defendant to file a late answer. *Id* at 573. Likewise here, the unusual timing of Peek's filing, in the e-filing era, excuses 5Star's belated filing to the extent the Answer is found to include a counterclaim requiring response. *See* Rule 11(e), South Carolina E-Filing Court Rules (stating the Rules "shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of on the merits.").

C. 5Star Acted Promptly and Has Meritorious Defenses and Peek is Not Prejudiced

To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, only that his defense is meritorious. *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903. A meritorious defense need only be one "worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation or a real controversy as to real facts arising from conflicting or doubtful evidence." *Id.* (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)). As discussed in detail above, 5Star has a number of meritorious defenses including Peek's failure to state prima facie claims.

The Court must also consider the timing of the defaulting party's motion for relief. *See Wham*, 298 S.C. at 465, 381 S.E.2d at 502. 5 Star acted quickly to remedy this situation upon learning of the electronic service and alleged default. It filed a Reply a mere five business days after learning of the purported counterclaim. (Scott Aff. ¶ 8.) It has now filed a motion for relief from entry of default and a motion for relief from default judgment within a week of the Court's

entry of default and entry of default judgment. Thus, there is no timeliness issue as to 5Star's motion for relief.

Finally, as discussed above, Peek has not alleged—nor did it sustain—any prejudice. The Order references prejudice due to needed documents but: (1) this issue is separate from any failure to answer the "counterclaim," (2) there is no record evidence as to any discovery requests, and (3) discovery is still in its infancy and the parties intend to remove this action to the business court for further discovery. There is no prejudice due to the week delay in filing a Reply to the purported "counterclaim."

V. Conclusion

5Star respectfully requests that the Court vacate its Order for Entry of Default and Default Judgment because the Court could not award a default judgment, the Order does not support entry of default, the Court erred by finding Peek's allegations to constitute counterclaim rather than affirmative defenses, the Order does not address Peek's request for injunctive relief, and the Order cannot compel discovery responses. Should the Court decline to vacate its Order 5Star respectfully requests the Court set aside the entry of default because the purported counterclaims fail to state causes of action, the purported counterclaims constitute affirmative defenses to which no responsive pleading was required, 5Star has additional good cause, Peek will not be prejudiced, and judicial economy favors setting aside the entry of default. Should the Court decline to set aside the entry of default 5Star respectfully requests the Court grant it relief from the default judgment due to mistake, inadvertence, excusable neglect, and surprise because 5Star has acted promptly and has meritorious defenses and Peek is not prejudiced.

Signature on Following Page

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: S/William S. Brown

William S. Brown
SC Bar No. 064164
E-Mail: william.brown@nelsonmullins.com
David C. Dill
SC Bar No. 101519
E-Mail: david.dill@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina

September 24, 2018

EXHIBIT D

5Star Life Ins. Co. v. Peek Performance, Inc.
Appellate Case No. 2018-002114
5Star's Memorandum Addressing the Appealability of the Orders on Appeal

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
5 Star Life Insurance Co., Plaintiff vs. Peek Performance, Inc., Defendant.	)	C.A. No. 2018-CP-23-01639
Peek Performance, Inc. and D. Clayton Peek, Plaintiffs, v. Jeff Wright d/b/a Agent Sales Group, Joe Caldwell, Nathan Wells, Jeff Magg, and Consolidated Assurance, LLC, Defendants.	)	

PLAINTIFF 5STAR LIFE INSURANCE CO.'S REPLY IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION, RELIEF FROM ENTRY OF DEFAULT AND RELIEF FROM DEFAULT JUDGMENT

Peek's Memorandum in Opposition to 5Star Life Insurance Co.'s ("5Star") Motion for Reconsideration, Relief from Entry of Default, and Relief from Default Judgment ("Opposition") failed to address two of the three Rules under which the motions were filed by 5Star. Where Peek responded to 5Star's arguments, its assertions would lead the Court into a thicket of reversible error. Plaintiff 5Star files the instant reply to highlight a few critical failings, omissions, mischaracterizations, and misapplications in Defendant Peek Performance Inc.'s ("Peek") Opposition.

I. Three motions are before the Court. Peek incorrectly treats the motions as one.

Peek's treatment of 5Star's pleading is a misstatement of law and fact. Peek treats 5Star's pleading exclusively as a motion for reconsideration of the Court's September 13, 2018 order granting Peek's May 10, 2018 motion for entry of default. It conveniently ignores, however, that in addition to the motion for reconsideration 5Star also sought relief from entry of default and relief from default judgment.[1] These motions under three separate Rules are governed by three separate standards of review. Rules 55, 59(e), 60, SCRCP; *see also, e.g., Sundown Operating Co., Inc. v.. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) ("[T]he standard for granting relief under Rule 60(b) is more rigorous than under Rule 55(c), [SCRCP,] and ... an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment."). Peek's Opposition, therefore, leads the Court down a path of clear error. The Court must individually review each request for relief pursuant to the individual standards (as set forth in 5Star's memorandum in support) and a failure to do would be reversed on appeal. *See, e.g., John Deere Fin. v. Bruce*, No. 2013-002435, 2016 WL 1589212, at *1-2 (Ct. App. Apr. 20, 2016) ("[T]he trial court erred in applying the more stringent standard of Rule 60(b) in considering [party in default's] motion for relief because as its order did not award damages the court had merely entered default and not a default judgment").

Peek's Opposition not only blurs the three requests for relief together but it also mischaracterizes the nature of the Court's review. Peek erroneously represents that the Court has

[1] 5Star did not previously seek, and could not have sought, relief from entry of default or relief from default judgment because no entry of default had been made prior to the order and no judgment of default existed.

already considered and rejected 5Star's arguments.[2] Not only is this not true but, even if it were, the prior ruling on Peek's motion for entry of default is by no means dispositive as to the subsequent motions filed by 5Star. 5Star, like any movant, is entitled to a full review of its motion for relief from entry of default or motion for relief from default judgment. 5Star could not have filed these motions prior to the Court's entry of default. *See, e.g., Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 463, 381 S.E.2d 499, 500 (Ct. App. 1989) (explaining the sequence at issue- a party can only move to set aside entry of default after default has been entered). Accordingly the Court must review these motions with new eyes, not through a prism of its prior order. Further, even as to 5Star's motion for reconsideration, the prior order is not is not dispositive nor does it create any sort of presumption as to how the Court should rule. The Court must review each request for relief on its own merits and Peek's representations that the Court can or should short circuit such a review is in error.

II. Peek's Opposition introduces evidence outside the record of contracts to which 5Star was not a party.

Peek further misleads the Court by attempting to introduce purported contracts that are not in the record and not incorporated into the alleged "counterclaim." "A party seeking a default judgment is entitled to only such relief as is framed by his pleading . . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error. An objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default." *Masters v. Rodgers Dev. Grp.*,

[2] Peek's Opposition also liberally mischaracterizes 5Star's arguments. For example, Peek claims 5Star asked the Court to reconsider its prior order because its counsel did not see the notice of electronic filing of Peek's answer. 5Star did not present this as a basis for relief in its motion for reconsideration. Further, this distortion grossly oversimplifies the good cause argument that 5Star did make in its motion for relief from entry of default.

283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984). Peek's purported "counterclaim" does not incorporate any contract other than the Producer Contract and Schedule of Commission between Peek and 5Star. Peek's Opposition, however, introduces multiple other agreements that are not incorporated into the alleged "counterclaim" or elsewhere in the record. It would be in error for the Court to consider any contract other than the Producer Contract and Schedule of Commission. Nevertheless, even if these alleged contracts could properly be considered 5Star was not a party to them. Thus, Peek's introduction of these contracts is misleading and would be in error for the Court to consider.

III. Discovery issues were not presented to the Court and there is insufficient record evidence to compel responses.

Peek's Opposition makes a critical admission that is fatal to its claimed discovery relief: it never filed a motion to compel discovery. Rather, Peek admits it did not raise the issue of discovery deficiencies until it filed its "Reply Memorandum of Law in Support of Motion for Entry of Default Judgment." Peek could not request discovery relief through a reply memorandum. "[A] party may not ordinarily receive relief not contemplated in the pleadings." *Wilson v. Walker*, 340 S.C. 531, 537, 532 S.E.2d 19, 22 (Ct. App. 2000); *Gainey v. Gainey*, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983). This issue has previously come before the appellate courts. In *Wilson*, for example, the movant's "initial motion to compel sought an order requiring Father to file a financial declaration, but failed to request an order compelling Father to answer interrogatories or produce documents." *Id.* The Court of Appeals therefore stated the interrogatory and document production "discovery issues were not properly before" the trial court. *Id.* Likewise the Court of Appeals explained that "due process requires that a litigant be placed on notice of the issues which the court will consider to afford the litigant an opportunity to be heard." *Id.* (citing *Abbott v. Gore*, 304 S.C. 116, 119, 403 S.E.2d 154, 156 (Ct.App.1991).) Because the compelled party in *Wilson* "never received notice

that at the hearing he would be required to address discovery issues relating to the interrogatories and document request" then an order compelling discovery under such facts would "tread[ ] perilously close to violating fundamental notions of due process." *Id.* (citing *Abbott*, 304 S.C. at 119, 403 S.E.2d at 156). The facts as to Peek's conduct are even more egregious. Peek, by its own admission, never filed a motion to compel discovery. Thus Peek did not provide 5Star with adequate notice or properly present the Court with discovery matters.

Peek's Opposition further leads the Court astray as to the requested discovery relief. As explained in 5Star's motion, the record is critically devoid of any evidence as to the service of any discovery requests or the contents of any such requests. To provide 5Star with sufficient notice of its obligations there must be some record evidence as to specific requests that are outstanding. Here there is no record evidence. As Peek failed to provide the Court with the record evidence necessary to support its order the requested discovery relief is improper.

IV. The Court cannot issue a default judgment until it determines damages.

It is black letter law in South Carolina that "[j]udgment by default is not properly entered until damages are determined." *Beckham v. Durant*, 300 S.C. 329, 331, n. 2, 387 S.E.2d 701, 703, n. 2 (Ct.App.1989) (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct.App.1987)); *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 593, 615 S.E.2d 437, 439 (2005). Peek attempts to counter this undisputed principle through the deceptive presentation of two cases: *Roche v. Young Bros., of Florence*, 332 S.C. 75, 82, 504 S.E.2d 311, 314 (1998) and *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 92–93, 757 S.E.2d 557, 560 (Ct. App. 2014). Peek misleads the Court as to these holdings.

Peek cherry picks one citation from *Wells Fargo*, a quotation from the national survey publication, American Jurisprudence. The quotation does not support Peek's contention as to the

propriety of default judgment prior to a damages hearing but merely states that "unliquidated damages normally are not awarded without an evidentiary hearing." 46 Am. Jur. 2d Judgments § 288.[3] More telling, however, is that Peek conveniently fails to include the very next citation in *Wells Fargo* to "*Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir.1983) (holding **a judgment by default may not be entered without a hearing on damages** unless the complaint indicates the amount claimed is liquidated or capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits)." *Wells Fargo*, 408 S.C. at 92–93, 757 S.E.2d at 560 (emphasis added). Thus Wells Fargo does not support Peek's contention that the Court may issue a default judgment prior to a damages hearing.

Peek likewise contends that the Supreme Court in *Roche* authorized the issuance of a default judgment prior to a hearing on damages. It did not. The *Roche* Court reviewed whether a defaulting party who has made an appearance in a case is required to consent before the circuit court may refer the case to a special referee. 332 S.C. at 80, 504 S.E.2d at 313. In the course of this analysis *Roche* briefly quotes Rule 55, SCRCP. Peek relies on this quote to support its Opposition but the quote actually supports *5Star's* position that default judgment cannot be issued until the court has made a determination as to damages. 332 S.C. at 82, 504 S.E.2d at 314 (1998) ("[O]nce a party defaults, the trial court 'may conduct such hearings or order such references as it deems necessary and proper' **to enter the default judgment.**") (emphasis added) (quoting Rule 55(b), SCRCP).

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[3] It is clear that Peek did not actually review the AmJur citation to understand the context because the citation it identifies does not contain the quotation. The citation provided is to an unrelated AmJur article about motions for judgment notwithstanding verdict. Peek copied the errant citation directly from *Wells Fargo* where the Court made the same error. Thus, while Peek cites 46 Am.Jur.2d Judgments § 298 it should really have cited to 46 Am.Jur.2d Judgments § 288.

This is more fully shown by other more fulsome interpretations of the quoted portion of Rule 55. For example:

> According to Rule 55(b)(1) S.C.R.Civ.P. "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages . . . the court may conduct such hearings or order such references as it deems necessary and proper. . . ." **This language indicates a court is unable to enter judgment until damages are determined.** The entry of default is an official recognition of the failure to appear or otherwise respond, but is not a judgment by default.

See Ricks, 293 S.C. at 374, 360 S.E.2d at 536 (citing H. LIGHTSEY, J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE, 77 (2nd Ed.1985)) (emphasis added).

Peek's Opposition, therefore, does not contradict 5Star but further underscores why the Court erred by issuing a default judgment prior to finding any damages.

V. Peek fails to oppose 5Star's motions and arguments.

Peek fails to respond to many of 5Star's arguments in its motion for reconsideration and does not respond to 5Star's motion for relief from entry of default and relief from default judgment. The failure to oppose a motion is treated as conceding the validity of the arguments contained therein. *See, e.g., First Union Nat. Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly."); 5 Am.Jur.2d Appellate Review § 555, at 254 (1995) ("[i]f an appellee fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct"); *see also, e.g., Arnold v. Welch*, No. CV 2:16-1359-BHH, 2018 WL 4346870, at *2 (D.S.C. Sept. 12, 2018) (holding that by failing to "respond to the arguments in question" a party "concede[s] those arguments"); *Perkins v. S.C. Cmty. Bank*, 2017 WL 121851, at *3 (D.S.C. Jan. 12, 2017); *Jenkins v. Pate*, 2016

WL 5799313, at *14 (D.S.C. May 26, 2016), *report and recommendation adopted*, No. 5:15-cv-02241-JMC, 2016 WL 5661700 (D.S.C. Sept. 30, 2016), *appeal denied*, 722 F. App'x 345 (4th Cir. 2018) (citations omitted) ("[W]here a party fails to respond to the opposing party's argument in support of the opposing party's motion for summary judgment, the party who fails to respond will be found to have conceded to that argument."); *Campbell v. Rite Aid Corp.*, No. 7:13-cv-02638-BHH, 2014 WL 3868008, at *2 (D.S.C. Aug. 5, 2014) (holding that, where the plaintiff failed to respond to an argument in the defendant's motion to dismiss, "the Court can only assume that Plaintiff concedes the argument").

Accordingly the Court should grant 5Star its requested relief pursuant to the unopposed motion for relief from entry of default and motion relief from default judgment as well as the unopposed grounds in its motion for reconsideration:

- The Court did not consider Virginia law;
- The Court relied on an untimely and inadmissible affidavit;
- The Court relied on extrinsic and inadmissible materials;
- The Order does not include findings sufficient to establish that Peek stated a prima facie claim;[4] and
- There is no record evidence as to any discovery deficiencies.

[4] Peek's Opposition states, in conclusory fashion, that the order contains findings that Peek stated a prima facie claim but does not identify the findings or provide any explanation or law supporting its position.

VI. Conclusion

For the reasons stated above, as well as those in its memorandum in support, 5Star respectfully requests that the Court vacate its Order for Entry of Default and Default Judgment. Should the Court decline to vacate its Order 5Star respectfully requests the Court set aside the entry of default. Should the Court decline to set aside the entry of default 5Star respectfully requests the Court grant it relief from the default judgment.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: S/William S. Brown
William S. Brown
SC Bar No. 064164
E-Mail: william.brown@nelsonmullins.com
David C. Dill
SC Bar No. 101519
E-Mail: david.dill@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina

October 11, 2018

EXHIBIT E

5Star Life Ins. Co. v. Peek Performance, Inc.
Appellate Case No. 2018-002114
5Star's Memorandum Addressing the Appealability of the Orders on Appeal

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
	2018-CP-23-01639
5 Star Life Insurance Co., Plaintiff	**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION, RELIEF FROM ENTRY OF DEFAULT, AND RELIEF FROM DEFAULT JUDGMENT**
vs.	
Peek Performance, Inc., Defendant.	

This Court has reviewed the Plaintiff's Motion for Reconsideration this Courts Order of September 12, 2018, For Entry of Default and Default Judgment on the Counterclaim, the memoranda of law submitted by both parties, and *South Carolina Civil Procedure,* Second Edition, James F. Flanagan (Counterclaims and Cross-Claims, p. 105). "Rule 7(a) requires a responsive pleading to a 'counterclaim denominated as such' while Rule 8(c) permits, but does not require, a responsive pleading to an affirmative defense. Thus, the designation, rather than its legal content, determines whether another pleading is required. A party receiving a 'counterclaim' should file a response even if there is ground to believe it is an affirmative defense". Mauro v. Clabaugh, 299 S.C. 184, 383 S.E. 2d (Ct. App. 1989).

After careful consideration of the Defendant's Motion, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds

no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Plaintiff's Motion pursuant to Rule 59(e) SCRCP to Alter, Amend, or Reconsider the Order For Entry of Default and Default Judgment on the Counterclaim entered on September 12, 2018. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge, Thirteenth Judicial Circuit

October 28, 2018

Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc

Case Number: 2018CP2301639

Type: Order/Other

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit Judge 2126