

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Appellate Case No. 2018-001449
Case No. 2018-CP-32-000079

RECEIVED

DEC 13 2018

SC Court of Appeals

Flint Equipment Company, Respondent,
v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

RECORD ON APPEAL

November 15, 2018

D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar No. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com

Attorney for Appellants

M. Drew DeMott,
33 Bull St, Suite 203
Savannah GA 31401

Attorney for Respondent

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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Flint Equipment Company,

Plaintiff,

v.

North Edisto Logging, Inc. and Paul
Gunter,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

Civil Action Nos. 2018-CP-32-00079

**ORDER GRANTING PLAINTIFF'S MOTION TO
DISMISS DEFENDANT'S COUNTERCLAIMS**

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AUG 03 2018

SC Court of Appeals

This matter comes before the Court pursuant to Plaintiff's Motion to Dismiss or, in the Alternative, Strike Defendants' Counterclaims, filed on March 28, 2018. A hearing was conducted at the Lexington County Judicial Center on May 8, 2018, at which time Plaintiff was represented by M. Drew DeMott, Esquire. Defendants North Edisto Logging, Inc. and Paul Gunter, were represented by D. Randolph Whitt, Esquire.

For the reasons set forth below, Plaintiff's Motion to Dismiss is GRANTED.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that on or about November 19, 2010, Defendants executed and entered into a Credit Application with Plaintiff. Pursuant to the terms of the Application, Plaintiff contends it agreed to provide Defendants goods and services. In approximately April 2017, Plaintiff alleges Defendant requested services and/or repairs of Defendant's 753J Feller Buncher. Plaintiff further alleges it provided Defendants with certain goods and services related to Defendants' 753J Feller Buncher. Plaintiff contends on or about May 15, 2017, it issued an invoice in the amount of \$10,483.53 to Defendants. Plaintiff further contends the invoice became due and payable on or about June 10, 2017.

On January 9, 2018, Plaintiff initiated a civil action against Defendants in the Lexington County Court of Common Pleas asserting a cause of action for breach of contract. On February 26,

2018, Defendants filed an Answer and Counterclaims asserting causes of action for class action pursuant to Rule 23, SCRPC, breach of revolving credit contract-duty of good faith and fair dealing, and breach of loan contracts-duty of good faith and fair dealing. This Court now rules as follows.

CONCLUSIONS OF LAW

I. Defendants have failed to allege their own contractual performance.

Under South Carolina law, a plaintiff seeking to establish a claim for breach of contract “must establish three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage as a direct and proximate result of the breach. Advanced Pain Therapies, LLC v. Hartford Fin. Servs. Group, Inc., No. 3:14-CV-0050-MGL, 2014 WL 4402800, at *2 (D.S.C. Sept. 3, 2014) (citing Bank v. How Mad, Inc., No. 4:12-CV-3159-RBH, 2013 WL 5566038, at *3 (D.S.C. Oct. 8, 2013)).

One who seeks to recover damages for a breach of 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 it.” Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (quoting Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)). In Sharpe v. Household Fin. Corp. II, No. 8:09-cv-02784, 2010 WL 3893846, at *2 (D.S.C. Sept. 30, 2010), the court found that the plaintiffs’ failure to point to a provision of the settlement agreement that was actually breached by the defendant precluded the court from drawing “a reasonable inference that [defendant] is liable for a breach of contract.” Similarly, the same court dismissed a breach of contract claim when in part the plaintiff failed “to set forth sufficient facts regarding how the contract was breached.” Advanced Pain Therapies, LLC v. Hartford Fin. Servs. Grp., Inc., No. 3:14-cv-00050, 2014 WL 4402800, at *2 (D.S.C. Sept. 3, 2014).

Here, the facts supporting Defendants’ breach of contract claim references Plaintiff’s duty of good faith and fair dealing under the alleged contract between the parties. Defendants do admit in their

Answer that repairs were requested on their behalf, and that Plaintiff provided the requested goods and services. Defendants do not allege that they have performed or were able, ready and willing to perform. As such, Defendants' counterclaim fails to set forth sufficient facts regarding how the contract was breached or to provide sufficient facts to demonstrate how or if Defendants performed under the contract. Thus, Defendants' have not provided the necessary facts needed to support a breach of contract claim, and that claim must be dismissed.

II. Defendants' breach of contract claim is based solely on an alleged breach of the implied covenant of good faith and fair dealing, which is not an independent cause of action.

In South Carolina, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from a claim for breach of contract." RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). Rather, it is another term of the contract at issue. Id. at 884. While every contract includes an implied covenant of good faith and fair dealing, "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966); Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

In this case, Defendants did not allege in their counterclaims that Plaintiff breached an express term of the contract. Instead, Defendants' breach of contract claim is based solely on Plaintiff's alleged breach of an implied covenant of good faith and fair dealing. As stated above, under South Carolina law, a cause of action for breach of implied covenant of good faith and fair dealing cannot stand on its own. A breach of the implied covenant can only be alleged if a party's conduct in breaching the implied covenant is also a breach of the express terms. Here, Defendants have alleged no such facts. Therefore, Defendants' claims of breach of the implied covenant cannot stand alone as a cause of action and must be dismissed.

III. Defendants' Counterclaim for class action fails to state facts sufficient to constitute a cause of action.

Proponents of a class action bear the burden of proving five prerequisites pursuant to Rule 23 of South Carolina Rules of Civil Procedure.

The prerequisites are: 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class."

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20, 577 S.E.2d 190, 200 (2003). In determining whether class certification is proper, this Court must "apply a rigorous analysis to determine if each prerequisite is satisfied." Id. at 21. Failure to satisfy one of the prerequisites is fatal to class certification. Id.

To establish adequacy, a party must show he will adequately represent a proposed class pursuant to Rule 23(a)(4), SCRPC. One factor the court must consider is whether the named party has interests that are antagonistic or adverse to those of the rest of the class. Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). If so, that party will not be considered an adequate representative of the class. "The issue of whether a named [party] will adequately protect the interests of the class members is a question of fact which depends upon the circumstances of each case." Id.

Here, Defendants have not shown that the representative parties will fairly and adequately protect the interests of the class. The fact that Defendants are debtors who entered into a purchase agreement with Plaintiff is not, in and of itself, facts which qualify them to bring a class action on behalf of remaining debtors. Defendants must demonstrate they have no interest antagonistic to or in conflict with the interests of the unnamed members of the class such that they are fairly and adequately

able to protect the interests of the purported class. As previously discussed, the failure to meet any one prerequisite of Rule 23(a) is fatal to the certification of a class.

Further, Defendants have failed to allege facts to support damages. Rule 23 states that “in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.” “The amount in controversy is the value of the object to be gained by the suit.” Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 202 (1991). In this case, Defendants failed to provide sufficient facts to support this prerequisite. Therefore, dismissal of this cause of action is proper.

IT IS THEREFORE ORDERED that Plaintiff’s Motion to Dismiss is GRANTED and DISMISSED with prejudice.

AND IT IS SO ORDERED.

Jocelyn Newman
Presiding Judge

July 2, 2018
Columbia, South Carolina.



Lexington Common Pleas

Case Caption: Flint Equipment Company VS North Edisto Logging Inc , defendant,
et al
Case Number: 2018CP3200079
Type: Order/Dismissal

So Ordered

Jocelyn Newman

Electronically signed on 2018-07-02 12:30:36 page 6 of 6

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO. _____
	)	
FLINT EQUIPMENT COMPANY,	)	
	)	SUMMONS
Plaintiff,	)	(Non-Jury)
	)	
v.	)	
	)	
NORTH EDISTO LOGGING, INC., and	)	
PAUL GUNTER,	)	
	)	
Defendants.	)	

TO THE DEFENDANT ABOVE-NAMED: PAUL GUNTER

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

By: /s/ M. Drew DeMott
M. DREW DEMOTT
South Carolina State Bar No. 71653
Attorneys for Plaintiff
114 Barnard Street, Suite 2B
Savannah, Georgia 31401
Telephone: (912) 234-0995
Facsimile: (912) 234-0997
E-Mail:

Dated: January 9, 2018

Address: Paul Gunter
565 Steadman Road
Leesville, South Carolina 29070

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO. _____
	)	
FLINT EQUIPMENT COMPANY,	)	
	)	SUMMONS
Plaintiff,	)	(Non-Jury)
	)	
v.	)	
	)	
NORTH EDISTO LOGGING, INC., and	)	
PAUL GUNTER,	)	
	)	
Defendants.	)	

TO THE DEFENDANT ABOVE-NAMED: NORTH EDISTO LOGGING, INC.

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

By: /s/ M. Drew DeMott
M. DREW DEMOTT
South Carolina State Bar No. 71653
Attorneys for Plaintiff
114 Barnard Street, Suite 2B
Savannah, Georgia 31401
Telephone: (912) 234-0995
Facsimile: (912) 234-0997
E-Mail:

Dated: January 9, 2018

Address: North Edisto Logging, Inc.
c/o Paul Gunter, Registered Agent
916 North Edisto Road
Leesville, South Carolina 29070

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO. _____
	)	
FLINT EQUIPMENT COMPANY,	)	
	)	COMPLAINT
Plaintiff,	)	(Non-Jury)
	)	
v.	)	
	)	
NORTH EDISTO LOGGING, INC., and	)	
PAUL GUNTER,	)	
	)	
Defendants.	)	

NOW COMES, Flint Equipment Company (“Flint”), Plaintiff in the above-styled action, and files its *Complaint* against Defendants NORTH EDISTO LOGGING, INC. (“NEL”), and PAUL GUNTER (“Gunter”). In support thereof, Flint respectfully shows the Court the following:

I. ALLEGATIONS RELATED TO JURISDICTION AND VENUE

1.

Flint is a foreign corporation organized under the laws of the State of Georgia, is registered to transact business in the State of South Carolina, is in good standing in the States of Georgia and South Carolina, and is authorized to file this Complaint.

2.

NEL is a South Carolina For-Profit Corporation with its principal place of business and its office of its registered agent, Paul Gunter, being 916 North Edisto Road, Leesville, Lexington County, South Carolina, and, accordingly, NEL is subject to the jurisdiction and venue of this Court. NEL may be served by serving its registered agent, Paul R. Gunter, at its registered address.

3.

Gunter is an individual residing at 565 Steadman Road, Leesville, Lexington County, South Carolina, and, accordingly, Gunter is subject to the jurisdiction and venue of this Court.

II. ALLEGATION RELATED TO PLAINTIFF'S CLAIMS

4.

Paragraphs 1 through 3 are hereby incorporated as if fully restated herein.

5.

On or about November 19, 2010, Defendants executed and entered into a certain *Credit Application* (the "Application") in favor of Flint.

6.

NEL's authorized representative executed the original Application on behalf of NEL. Gunter executed the original Application in his individual capacity.

7.

A true and correct copy of the Application is attached hereto and incorporated herein as Exhibit "1."

8.

Pursuant to the terms of the Application, Flint agreed to provide Defendants goods and services on account.

9.

In or about April 2017, Defendants requested Flint to service and/or repair its 753J Feller Buncher (the "Requested Repairs").

10.

Flint provided Defendants certain goods and services related to the Requested Repairs on account.

11.

Defendants requested, received, and accepted the goods and services related to the Requested Repairs that Flint provided Defendants on account.

12.

Defendants did not reject the goods and services related to the Requested Repairs that Flint provided on account.

13.

On or about May 15, 2017, Flint issued an invoice, denoted as Invoice No. W15860 (the "Invoice"), in the amount of \$10,483.53 to Defendants for goods and services Flint provided Defendants on account (the "Indebtedness"). A true and correct copy of the Invoice is attached hereto and incorporated herein as Exhibit "2."

14.

Pursuant to the terms of the Agreement, invoices issued become due and payable on the 10th day of the following month.

15.

The Invoice became due and payable on June 10, 2017. As of the date of this Complaint, the Indebtedness remains unpaid.

16.

Pursuant to the terms of the Application, interest accrues on all amounts owing over thirty (30) days at the rate of 18% per annum (1.5% per month). As of December 29, 2017, interest has accrued on the Indebtedness in the total amount of \$1,044.33. Interest continues to accrue on the Indebtedness at the rate of 1.5% per month, or \$5.17 per day after December 29, 2017.

17.

Flint performed all of its obligations pursuant to the Application and Invoice.

18.

As of the date of this Complaint, Defendants have failed to pay Flint the amounts Defendants owe Flint on the account.

19.

The Indebtedness remains unpaid and past due.

20.

Defendants' failure to pay the Indebtedness has injured Flint, as of December 29, 2017, in the total amount of \$11,527.86, plus interest accruing after December 29, 2017, at the rate of 1.5% per month, or \$5.17 per day.

21.

Following Defendants' failure to pay amounts on the account and for purposes of collecting the outstanding amounts due, Flint employed the law firm of Moore, Clarke, DuVall & Rodgers, P.C.

22.

Pursuant to the terms of the Application, Flint is entitled to recover "collection costs and 15% attorneys' fees in the event [Flint] has retained an attorney to collect your account."

23.

On or about August 29, 2017, Flint served Defendants with a demand (the "Demand") via regular mail and certified mail, demanding Defendants to bring its account with Flint current. A true and correct copy of the Demand is attached hereto and incorporated herein as Exhibit "3."

24.

The Demand notified Defendants that they could avoid paying Flint's attorneys' fees by paying all outstanding balances due and owed within ten (10) days of the date they received the Demand.

25.

As of the date of this Complaint, Defendants have failed or refused to respond to the Demand and has consequently failed to satisfy its debt owing to Flint.

26.

Flint is entitled to recover its attorneys' fees in the amount of 15% of the principal and interest owing at entry of a judgment.

WHEREFORE, Flint respectfully requests that the Court afford it the following relief:

- (1) That Summonses issue and the Defendants be properly served;
- (2) That judgment enter in favor of Flint and against Defendants, joint and severally, in the amount equal to the sum of: \$10,483.53 in principal, \$1,044.33 in accrued interest as of December 29, 2017, plus interest continuing to accrue after December 29, 2017, at the rate of 1.5% per month, or \$5.17 per day until entry of judgment;
- (3) That judgment enter in favor of Flint and against Defendants, joint and severally, in an amount equal to Flint's attorneys' fees, calculated as 15% of the principal and interest owing at entry of a judgment; and
- (4) That the Court grant such other and further relief as it deems proper.

RESPECTFULLY SUBMITTED this 9th day of January 2018.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

By: s/ M. Drew DeMott
M. DREW DEMOTT
South Carolina State Bar No. 71653
Attorneys for Plaintiff
114 Barnard Street, Suite 2B
Savannah, Georgia 31401
Telephone: (912) 234-0995
Facsimile: (912) 234-0997
E-Mail:

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. _____

VERIFICATION (Non-Jury)

(Non-Jury)

**NORTH EDISTO LOGGING, INC., and
PAUL GUNTER,**

Defendants.

COUNTY OF FULTON

ALTON REED, being duly sworn, says that he is Vice President, Credit and Finance, of Flint Equipment Company, the Plaintiff herein, and has read the foregoing *Complaint* and knows the contents thereof, that the same are true of his own knowledge, except as matters therein stated to be alleged on information and belief; and to those matters he believes them to be true.

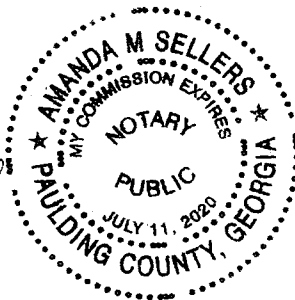
ALTON REED

Sworn to and subscribed before me this
3 day of January, 2018.

Amanda M. Sellers
Notary Public

Notary Public

My Commission Expires 7-11-2020





CONSTRUCTION & FORESTRY DIVISION

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Adairsville, GA
Andrews, SC
Atlanta, GA
Aynor, SC
Braselton, GA

Brunswick, GA
Columbus, GA
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Dothan, AL
Grovetown, GA
Ladson, SC

Macon, GA
Savannah, GA
Simpsonville, SC
Troy, AL
Walterboro, SC
West Columbia, SC

CORPORATE OFFICE
1206 Blaylock Street
P.O. Box 3329
Albany, GA 31706-3329
229-888-1212
www.flintequipco.com



JOHN DEERE

EXHIBIT 2

Ship To:

SAME AS BELOW

Invoice To:

NORTH EDISTO LOGGING
916 N EDISTO RD
LEESVILLE SC 29070

Branch FEC-W. COLUMBIA		
Date 05/15/17	Time 08:37:50 (O)	Page 01
Account No 1302965	Phone No 803-657-5551	Inv No W15860
Ship Via		Purchase Order POWER PLAN
Sales Tax License No		Federal Exemption No
		Salesperson MT1

SERVICE INVOICE

STK#/FLEET#		HRS	PIN/EIN	WARRANTY DATE	HRS
F568984	753J FELLER BUNCHE	3631	1T0753JXJEC255864	01/31/15	
788192	753J		RG6090G015203		

REPAIR# 1 5 09845 NA 04/06/17 04/06/17

WILL NOT START

COMPLAINT:

MACHINE WILL NOT START

CAUSE:

TRAVELED TO MACHINE AND FOUND MACHINE HAD BEEN SUNK IN SWAMP. FOUND CONTROLLER SHORTED AND REPLACED. MACHINE WOULD NOT CRANK. WHEN RUNNING MACHINE SHOWED NO OIL PRESSURE. VERIFIED WITH MANUAL GAUGE.

CORRECTION:

REMOVED ENGINE FROM MACHINE IN FIELD. DISASSEMBLED ENGINE. HAD CRANK TURNED BY MACHINE SHOP. INSTALLED NEW MAIN & ROD BEARINGS. INSTALLED NEW OIL COOLER. INSTALLED NEW OIL PUMP. INSTALLED NEW THERMOSTATS. INSTALLED NEW ENGINE OIL PRESSURE SENSOR. INSTALLED NEW FILTER & OIL. INSTALLED ENGINE IN MACHINE. AFTER INSTALL FOUND WATER PUMP LEAKING. REPLACED WATER PUMP WITH NEW GASKETS. TESTED MACHINE & FOUND NO FURTHER ISSUES.

ADDITIONAL DESCRIPTION:

SUBLET \$206.55 IS FOR OUTSIDE LABOR TO TURN & POLISH CRANK DOUG'S MACHINE SHOP - INV # 46623

AR55394	OIL COOLER	1 M	339.39	339.39
AT112176	HOSE CLAMP	2	22.89	45.78
AT262612	HOSE	1	99.86	99.86
AT37478	CLAMP	2 N	19.35	38.70
DZ100553	thermostat	2	23.69	47.38
FRTIN	FREIGHT IN	4	23.75	95.00
PM38657	SEALANT	2	21.95	43.90
RE167207	SENSOR ENG OIL	1	92.72	92.72

CONTINUED ON PAGE 02

IMPORTANT WARRANTY NOTICE: IT IS UNDERSTOOD THAT FLINT EQUIPMENT COMPANY IS NOT A MANUFACTURER AND ALL CHARGES SHOWN AS "WARRANTY APPLIED FOR" MAY BE CHARGED TO MY ACCOUNT IF NOT PAID BY MANUFACTURER FOR ANY REASON. I UNDERSTAND THAT TRANSPORTATION OF EQUIPMENT, SERVICE CALLS, OILS AND REPAIRS DUE TO NORMAL WEAR OR ABUSE ARE NEVER COVERED UNDER WARRANTY. Any warranties associated with the merchandise purchased hereunder are acknowledged to be from the manufacturer only and Flint Equipment Company has expressly disclaimed any warranty, either expressed or implied, including any implied warranty of merchantability or fitness for particular purpose. The seller neither assumes nor authorized any other person to assume for it any liability in connection with the sale of said products. Any limitation contained herein does not apply where prohibited by law.

ACKNOWLEDGEMENTS: I HEREBY AUTHORIZE THE ABOVE REPAIR WORK TO BE DONE ALONG WITH THE USE OF NECESSARY MATERIALS. YOU AND YOUR EMPLOYEES MAY OPERATE ABOVE MACHINE FOR PURPOSE OF TESTING, INSPECTION OR DELIVERY AT MY RISK. I AGREE TO PAY CASH ON DELIVERY OF MACHINE OR ON TERMS SATISFACTORY WITH FLINT EQUIPMENT COMPANY AND, UNTIL PAID IN FULL, AN EXPRESSED MECHANICS LIEN IS ACKNOWLEDGED ON ABOVE MACHINE TO SECURE THE AMOUNT OF REPAIR THERETO. IT IS UNDERSTOOD THAT FLINT EQUIPMENT COMPANY ASSUMES NO RESPONSIBILITY FOR LOSS OR DAMAGE BY THEFT OR FIRE TO MACHINE PLACED WITH THEM FOR STORAGE, SALE, REPAIR, OR WHILE FIELD TESTING.

Customer's Signature _____ Date _____

ELECTRONICALLY FILED - 2018 JAN 09 10:58 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3200079



CONSTRUCTION & FORESTRY DIVISION

Albany, GA
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Grovetown, GA
Ladson, SC

Macon, GA
Savannah, GA
Simpsonville, SC
Troy, AL
Walterboro, SC
West Columbia, SC

CORPORATE OFFICE
1206 Blaylock Street
P.O. Box 3329
Albany, GA 31706-3329
229-888-1212
www.flintequipco.com



JOHN DEERE

EXHIBIT 2

Ship To:

SAME AS BELOW

Invoice To:

NORTH EDISTO LOGGING
916 N EDISTO RD
LEESVILLE SC 29070

Branch FEC-W. COLUMBIA		
Date 05/15/17	Time 08:37:50 (O)	Page 02
Account No 1302965	Phone No 803-657-5551	Inv No W15860
Ship Via		Purchase Order POWER PLAN
Sales Tax License No		Federal Exemption No
		Salesperson MT1

SERVICE INVOICE

STK#/FLEET#		HRS	PIN/EIN	WARRANTY DATE	HRS
F568984	753J FELLER BUNCHE	3631	1T0753JXJEC255864	01/31/15	
788192	753J		RG6090G015203		
RE509672	FILTER	1	21.43		21.43
RE519144	SENSOR	1	36.98		36.98
RE520036	SEAL	1	56.48		56.48
RE524105	GASKET	1 M	9.84		9.84
RE525523	FUEL FILTER	1	110.45		110.45
RE529318	BEARING	6	33.65		201.90
RE529319	BEARING	6	37.12		222.72
RE529320	THRUST BEARING	1	85.63		85.63
RE542195	SEAL	2 M	10.66		21.32
RE543187	Oil Pump	1	772.04		772.04
R100569	GASKET	1	1.87		1.87
R119383	GASKET	2	18.71		37.42
R119384	GASKET	1	17.12		17.12
R504810	O-RING	2	2.95		5.90
R505146	O-RING	4 M	4.69		18.76
R519287	CAP SCREW	14	10.20		142.80
R522768	GASKET	1 M	7.39		7.39
R526807	SEAL	1	13.84		13.84
R532464	Gasket	1	38.94		38.94
R536992	Push Rod	2 M	9.45		18.90
R542878	Cap Screw	12	7.02		84.24
R71732	O-RING	4	2.15		8.60
SE501228	WATER PUMP	1	309.56		309.56
	Water Pump Reman				
TY26576	COOL GARD II	4	33.51		134.04
TY26673	PLUS-50 TM ENGI	8	16.82		134.56
	Plus-50 II Oil 15W40 CJ4/SN				
TY26674	PLUS-50 TM ENGI	2	6.10		12.20
	Plus-50 II Oil 15W40 CJ4/SN				
T226600	AIR FLOW TUBE	1	65.80		65.80

CONTINUED ON PAGE 03

IMPORTANT WARRANTY NOTICE: IT IS UNDERSTOOD THAT FLINT EQUIPMENT COMPANY IS NOT A MANUFACTURER AND ALL CHARGES SHOWN AS "WARRANTY APPLIED FOR" MAY BE CHARGED TO MY ACCOUNT IF NOT PAID BY MANUFACTURER FOR ANY REASON. I UNDERSTAND THAT TRANSPORTATION OF EQUIPMENT, SERVICE CALLS, OILS AND REPAIRS DUE TO NORMAL WEAR OR ABUSE ARE NEVER COVERED UNDER WARRANTY. Any warranties associated with the merchandise purchased hereunder are acknowledged to be from the manufacturer only and Flint Equipment Company has expressly disclaimed any warranty, either expressed or implied, including any implied warranty of merchantability or fitness for particular purpose. The seller neither assumes nor authorized any other person to assume for it any liability in connection with the sale of said products. Any limitation contained herein does not apply where prohibited by law.

ACKNOWLEDGEMENTS: I HEREBY AUTHORIZE THE ABOVE REPAIR WORK TO BE DONE ALONG WITH THE USE OF NECESSARY MATERIALS. YOU AND YOUR EMPLOYEES MAY OPERATE ABOVE MACHINE FOR PURPOSE OF TESTING, INSPECTION OR DELIVERY AT MY RISK. I AGREE TO PAY CASH ON DELIVERY OF MACHINE OR ON TERMS SATISFACTORY WITH FLINT EQUIPMENT COMPANY AND, UNTIL PAID IN FULL, AN EXPRESSED MECHANICS LIEN IS ACKNOWLEDGED ON ABOVE MACHINE TO SECURE THE AMOUNT OF REPAIR THERETO. IT IS UNDERSTOOD THAT FLINT EQUIPMENT COMPANY ASSUMES NO RESPONSIBILITY FOR LOSS OR DAMAGE BY THEFT OR FIRE TO MACHINE PLACED WITH THEM FOR STORAGE, SALE, REPAIR, OR WHILE FIELD TESTING.

Customer's Signature _____ Date _____

ELECTRONICALLY FILED - 2018 JAN 09 10:58 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3200079



CONSTRUCTION & FORESTRY DIVISION

Albany, GA
Adairsville, GA
Andrews, SC
Atlanta, GA
Aynor, SC
Braselton, GA

Brunswick, GA
Columbus, GA
Cuthbert, GA
Dothan, AL
Grovetown, GA
Ladson, SC

Macon, GA
Savannah, GA
Simpsonville, SC
Troy, AL
Walterboro, SC
West Columbia, SC

CORPORATE OFFICE
1206 Blaylock Street
P.O. Box 3329
Albany, GA 31706-3329
229-888-1212
www.flintequipco.com



JOHN DEERE

EXHIBIT 2

Ship To:

SAME AS BELOW

Invoice To:

NORTH EDISTO LOGGING
916 N EDISTO RD
LEESVILLE SC 29070

Branch FEC-W. COLUMBIA		
Date 05/15/17	Time 08:37:50 (O)	Page 03
Account No 1302965	Phone No 803-657-5551	Inv No W15860
Ship Via		Purchase Order POWER PLAN
Sales Tax License No		Federal Exemption No
		Salesperson MT1

SERVICE INVOICE

STK#/FLEET#		HRS	PIN/EIN	WARRANTY DATE	HRS
F568984	753J FELLER BUNCHE	3631	1T0753JXJEC255864	01/31/15	
788192	753J		RG6090G015203		
T274505	Hose	1 N	35.26		35.26
WASTE	WASTE OIL TAX	19	.08		1.52
YZ590140	REPAIR KIT	1 N	101.76		101.76
19M8384	CAP SCREW	1	7.71		7.71
57M8991	Elec. Connector	2 N	2.01		4.02
	PARTS				3543.73
	LABOR				5057.25
10409013	REPAIR TOTAL==>				8600.98

REPAIR# 2 5 09845 NA

04/06/17 04/07/17

TRAVEL TIME AND MILEAGE

TED 300-0072

TOTAL 40 MILES X \$3.00 = \$120.00 (04/06/2017)

TOTAL 60 MILES X \$3.00 = \$180.00 (04/10/2017)

TOTAL 40 MILES X \$3.00 = \$120.00 (04/11/2017)

TOTAL 60 MILES X \$3.00 = \$180.00 (04/12/2017)

TOTAL 40 MILES X \$3.00 = \$120.00 (04/21/2017)

TRK1302 SVC TRK 54 3.00 162.00

TRK1304 SVC TRK 240 3.00 720.00

PARTS 882.00

LABOR 594.00

10409013 REPAIR TOTAL==> 1476.00

***** WORK ORDER TOTALS *****

PARTS 4425.73

LABOR 5651.25

EPA RECOVERY 200.00

SUBLET 206.55

XXXXXXXXXXXXXXXXXX

PAY TO POWERPLAN 10483.53

IMPORTANT WARRANTY NOTICE: IT IS UNDERSTOOD THAT FLINT EQUIPMENT COMPANY IS NOT A MANUFACTURER AND ALL CHARGES SHOWN AS "WARRANTY APPLIED FOR" MAY BE CHARGED TO MY ACCOUNT IF NOT PAID BY MANUFACTURER FOR ANY REASON. I UNDERSTAND THAT TRANSPORTATION OF EQUIPMENT, SERVICE CALLS, OILS AND REPAIRS DUE TO NORMAL WEAR OR ABUSE ARE NEVER COVERED UNDER WARRANTY. Any warranties associated with the merchandise purchased hereunder are acknowledged to be from the manufacturer only and Flint Equipment Company has expressly disclaimed any warranty, either expressed or implied, including any implied warranty of merchantability or fitness for particular purpose. The seller neither assumes nor authorized any other person to assume for it any liability in connection with the sale of said products. Any limitation contained herein does not apply where prohibited by law.

ACKNOWLEDGEMENTS: I HEREBY AUTHORIZE THE ABOVE REPAIR WORK TO BE DONE ALONG WITH THE USE OF NECESSARY MATERIALS. YOU AND YOUR EMPLOYEES MAY OPERATE ABOVE MACHINE FOR PURPOSE OF TESTING, INSPECTION OR DELIVERY AT MY RISK. I AGREE TO PAY CASH ON DELIVERY OF MACHINE OR ON TERMS SATISFACTORY WITH FLINT EQUIPMENT COMPANY AND, UNTIL PAID IN FULL, AN EXPRESSED MECHANICS LIEN IS ACKNOWLEDGED ON ABOVE MACHINE TO SECURE THE AMOUNT OF REPAIR THERETO. IT IS UNDERSTOOD THAT FLINT EQUIPMENT COMPANY ASSUMES NO RESPONSIBILITY FOR LOSS OR DAMAGE BY THEFT OR FIRE TO MACHINE PLACED WITH THEM FOR STORAGE, SALE, REPAIR, OR WHILE FIELD TESTING.

Customer's Signature _____ Date _____

James H. Moore, III
 Luanne Clarke *
 Willis A. DuVall, Jr.
 W. Ralph Rodgers, Jr.
 David A. Garland +++
 C. Jason Willcox
 Edgar W. Duskin, Jr.
 Kevin C. Gaulke **
 D. Bradley Folsom
 Wallace D. Bonner, Jr.
 Donald E. Strickland, Jr.
 Matthew E. Eutzler ++
 R. Lee Brown, Jr.
 M. Drew DeMott +++
 Michael T. Hammond
 J. Bart Davis ++
 Michael Eric Hooper
 James H. Edge
 Stephan A. Ray +
 Robert Britton Beecher
 Beau T. Shrabie

Of Counsel:
 Leesa A. Bohler **

**MOORE CLARKE
 DuVALL & RODGERS**
 ATTORNEYS AT LAW

114 Barnard Street, Suite 2B (31401)
 Post Office Box 8427 (31412)
 Savannah, Georgia
 Telephone (912) 234-0995
 Facsimile (912) 234-0997
 E-mail: ddemott@mcdrr-law.com

August 29, 2017

Albany Office
 2829 Old Dawson Road
 Albany, Georgia 31707
 (229) 888-3338

Atlanta Office
 900 Circle 75 Parkway, Suite 700
 Atlanta, Georgia 30339
 (770) 563-9339

Valdosta Office
 2611 North Patterson Street (31602)
 Post Office Box 4540
 Valdosta, Georgia 31604-4540
 (229) 245-7823

* Certified Mediator/Arbitrator
 ** Certified Mediator

Also admitted in:
 I Alabama
 ++ Florida
 +++ South Carolina
 ++++ Tennessee

Via Regular and Certified Mail

Paul Gunter
 North Edisto Logging, Inc.
 916 North Edisto Road
 Leesville, SC 29070

Tracking No.: 70062760000254346741

Paul Gunter
 R.F.D. 1, Box 139
 Leesville, SC 29070

Tracking No.: 70062760000254346758

Re: **Flint Equipment Company v. North Edisto Logging, Inc.**
MCDDR File No. 12359.059

Mr. Gunter,

Please be advised that this law firm represents the interests of Flint Equipment Company ("Flint") with respect to the collection of the obligation North Edisto Logging, Inc. ("North Edisto") and Paul Gunter ("Gunter") owe Flint for goods and services provided on a commercial account. The amounts owing upon your account are past due. For your information, as of August 29, 2017, the total indebtedness due from North Edisto, less interest and costs, is \$10,483.53. In addition, interest continues to accrue upon the original principal balance at the rate of eighteen percent (18%) per annum until paid.

You have a period of ten (10) days from the date of this letter within which to bring your obligations to Flint current. If you do not bring your obligations current within that time, Flint has authorized us to initiate collection proceedings against you.

In addition to the above-referenced amount, please be advised that Flint intends to seek recovery of its costs, expenses of litigation, including attorney's fees in the event it is forced to file collection proceedings. Accordingly, unless you repay the referenced indebtedness in full within ten (10) days from the date of this letter, Flint will seek to collect from you reasonable attorney's fees in addition to the other amounts due. This letter serves as formal notice to North Edisto and Gunter of Flint's intent to seek attorney's fees.

North Edisto
August 29, 2017
Page 2

We urge you to make immediate arrangements to satisfy this obligation so that the necessity for legal action will be avoided.

PLEASE GOVERN YOURSELF ACCORDINGLY.

We appreciate your cooperation.

Sincerely,

MOORE, CLARKE, DuVALL & RODGERS, P.C.

A handwritten signature in black ink, appearing to read 'MDD', with a long horizontal stroke extending to the right.

M. Drew DeMott

MDD:rlm
cc: Flint Equipment Company
D. Randolph Whitt

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
Case No. 2018-CP-32-00079

Flint Equipment Company.,

Plaintiff,

vs.

North Edisto Logging, Inc., and Paul Gunter,

Defendants.

Answer and Counterclaims
(Jury Trial Demanded)

Defendants North Edisto Logging, Inc (NEL), and Paul Gunter, offer this Answer to the complaint filed January 9, 2018 and asserts the Counterclaims herein against Plaintiff, Flint Equipment Company ("Plaintiff" or "Flint").

- 1) Each allegation not hereafter admitted or qualified is hereby denied.
- 2) The allegations of Paragraph 1 through 3 are admitted, except to the extent Flint has confused Paul D. Gunter, the sole owner of NEL and Paul R. Gunter, who is employed by NEL
- 3) As to the allegations of Paragraph 4, Defendants reallege their previous responses.
- 4) As to the allegations of Paragraph 5, 6 and 7, the execution by NEL of the document identified in Paragraph 5 is admitted, however the balance of these allegations are denied. The document is not a complete copy, as the first page indicates further terms are included on the reverse of the page which are included on the copy attached to the complaint. Further, the document identifies Paul R. Gunter as the co-applicant, but the document is signed by Paul D. Gunter.
- 5) As to the allegations of Paragraph 8, Defendants deny this allegation, in the absence of the second page of terms from the revolving credit agreement, and further allege that the terms will speak for themselves when they are provided.

- 6) As to the allegations of Paragraphs 9, 10, 11 and 12, Defendants admit that a repair was requested, and that some goods and services were provided. However, Defendants believed that the repairs were covered by a warranty arising from the credit transaction resulting from the purchase of the unit in question. Plaintiff did not advise Defendants that they contended that the repairs were not covered until the work had already been done .
- 7) As to the allegations of Paragraphs 13,14, 15 and 16 Defendants acknowledge receiving the invoice, however, Defendants deny that any amount is due, and further allege that the invoice contains charges that are inflated and improper.
- 8) The allegations of Paragraph 17 are denied.
- 9) As to the allegations of Paragraphs 18, 19, 20 and 25, Defendants admit that no payment has been made, but deny that any payment is due.
- 10) As to the allegations of Paragraphs 21, 22 and 26 Defendants admit the employment of Plaintiff's attorney, but deny that any amounts are due, including attorney's fees
- 11) As to the allegations of Paragraphs 23 and 24 Defendants admit the receipt of the letter in question, but allege that the document speaks for itself
- 12) Defendants further alleges that in the course of several financing transactions that Flint has submitted one set of figures to NEL and inconsistent set of figures to John Deere Financial which was the ultimate lender on these transactions.
- 13) Attached as Exhibits A and B are examples of two of these transactions, where an extended warranty was included in the figures provided to NEL, but excluded from the figures provided to John Deere Financial with the other amounts being increased to keep the total amount the same.

**For a Further Defense
(Unclean Hands)**

- 14) The Plaintiff's conduct as outlined above provides a basis for barring the relief sought by

Plaintiff pursuant to the doctrine of unclean hands.

**FOR A FIRST COUNTERCLAIM AGAINST
FLINT EQUIPMENT COMPANY.
(Class Action, Rule 23, SCRCP)**

15) Defendants reincorporate and reallege each of the foregoing allegations as fully as if repeated herein verbatim.

16) Defendants intend to conduct extensive discovery to identify potential members of the following classes.

- a) Customers of Flint who were presented invoices containing inflated and improper charges
- b) Customers of Flint who entered into financing transactions and were presented one set of figures by Flint, but a different set of figures were provided to the ultimate lender in the credit transaction.

17) Afterwards, Defendants will move before a Circuit Court Judge to certify the class action as to each class

**FOR A SECOND COUNTERCLAIM AGAINST
FLINT EQUIPMENT COMPANY.**

(Breach of Revolving Credit Contract-Duty of Good Faith and Fair Dealing)

18) Defendants reincorporate and reallege each of the foregoing allegations as fully as if repeated herein verbatim.

19) Plaintiff's conduct as outlined above constitutes a breach of contract in that it violates Plaintiff's duty of good faith and fair dealing under the alleged revolving credit contract between the parties.

20) Defendants have suffered damages as a direct and proximate result of Plaintiff's breach.

**FOR A SECOND COUNTERCLAIM AGAINST
FLINT EQUIPMENT COMPANY.
(Breach of Loan Contracts-Duty of Good Faith and Fair Dealing)**

- 21) Defendants reincorporate and reallege each of the foregoing allegations as fully as if repeated herein verbatim.
- 22) Plaintiff's conduct as outlined above constitutes a breach of contract in that it violates Plaintiff's duty of good faith and fair dealing under the each of the loan contracts originated by Flint and subsequently assigned to John Deere Financial.
- 23) Defendants have suffered damages as a direct and proximate result of Plaintiff's breach.

Therefore, Defendants request that the Court deny the relief sought by the Plaintiff and grant judgment on their counterclaims.

s/ D. Randolph Whitt

D. Randolph Whitt SC Bar. No, 13068
Fleming & Whitt, P.A.
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com

Attorney for Defendants

February 25, 2018

Exhibit A

FLINT

CONSTRUCTION & FORESTRY DIVISION

Albany, GA
Adairsville, GA
Andrews, SC
Atlanta, GA
Aynor, SC
Braselton, GA

Brunswick, GA
Columbus, GA
Cuthbert, GA
Dothan, AL
Grovetown, GA
Ladson, SC

Macon, GA
Savannah, GA
Simpsonville, SC
Troy, AL
Walterboro, SC
West Columbia, SC

CORPORATE OFFICE
1206 Blaylock Street
P.O. Box 3329
Albany, GA 31706-3329
229-888-1212
www.flintequipco.com



JOHN DEERE

Ship To:

SAME AS BELOW

Invoice To:

NORTH EDISTO LOGGING
916 N EDISTO ROAD
LEESVILLE, SC 29070

Branch 13 - FEC-W. COLUMBIA		
Date 09/30/2015	Time 15:40:56 (O)	Page 1
Account No 1302965	Phone No 8036575551	Inv No 01 S00863
Ship Via	Purchase Order	
Sales Tax License No	Federal Exemption No	
		Salesperson DLB

EQUIPMENT INVOICE

Description

Amount

Stock #: F584522 Serial #: 1T0853MXEFD277576 400000.00
2015 JOHN DEERE 853M TRACK FELLER BUNCHER
WITH ALL STANDARD EQUIPMENT
SUBJECT TO JOHN DEERE FINANCIAL SECURITY AGREEMENT
ULTIMATE UPTIME 59263.00

Miscellaneous Charges/Credits:

NPAYMENT

Qty: 1 Price: 30000.00- 30000.00-

Subtotal: 429263.00
TOTAL: 429263.00

IMPORTANT WARRANTY NOTICE: Any warranties associated with the equipment purchased hereunder are acknowledged to be from the manufacturer only and Flint Equipment Company has expressly disclaimed any warranty, whether expressed or implied, including any implied warranty of merchantability or fitness for particular purpose. The seller neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of said products. Any limitation contained herein does not apply where prohibited by law.

Acknowledgements: SERVICE CHARGE ON OVERDUE ACCOUNTS AT THE RATE OF 1.5% PER MONTH (15% PER ANNUM). I (We) promise to pay the balance due shown above in cash, or to execute a Time Sale Agreement (Retail Installment Contract), or a Loan Agreement, for the purchase price of the Product, plus additional charges shown thereon, or execute a Lease Agreement, on or before delivery of the Product ordered herein. Deeds physical delivery of the Product, title shall remain in the seller until one of the foregoing is accomplished.

Customer Signature

Customer Signature

Accepted By

(Authorized Signature of Seller)



Version Number: 2

C&F Business or Commercial Use

LOAN CONTRACT - SECURITY AGREEMENT

Contract Begin Date : 09/30/2015

CO-BORROWER'S NAME AND PHYSICAL ADDRESS				TYPE OF BUSINESS
PAUL DAVIS GUNTER 916 N EDISTO RD LEESVILLE, SC 29570-9707		CO-BORROWER'S SOC. SEC. NUMBER ***-**-7577	CO-BORROWER'S PHONE NO. 803-657-5551	

3. **Installment Payments.** In addition to any down payment, you agree to pay us the Amount Financed, together with finance charges from the Date Finance Charge Begins, at the Annual Percentage Rate, by remitting each of the Installment Payments on or before the due dates indicated. Any amounts applied to this Contract will be applied first to any late charges, any charges for dishonored checks and any other fees or costs due under this agreement, then to finance charges, computed on the date the payment is received and the remainder to the Amount Financed. You agree that your payments will be applied as of the date of receipt if received by 11:00 a.m. Central Time Monday through Friday (otherwise next business day); but if payment is not accompanied by the payment stub, is not in the envelope we provided, includes other items such as other checks, staples or paper clips, or is not received at that location, credit may be delayed up to five days. This Contract is not accepted by us until we sign it, even if you have made a payment to us. You agree to remit to us the Installment Payments and all other amounts when due and payable each Billing Period, even if we do not send you a bill or an invoice. **YOUR PAYMENT OBLIGATIONS ARE ABSOLUTE AND UNCONDITIONAL, AND ARE NOT SUBJECT TO CANCELLATION, REDUCTION OR SETOFF FOR ANY REASON WHATSOEVER.** For any scheduled payment which is not received by its due date, you agree to pay us interest on the unpaid amount at a rate of 20% per annum on that scheduled payment, but in no event more than the maximum lawful rate, from the due date until paid. Restrictive endorsements on checks you send to us will not change or reduce your obligations to us. We will not lose any rights if we accept late or partial payments or delay enforcing our rights under this Contract. If a check or electronic payment authorization you give us is dishonored upon first presentment, you agree to pay us a fee of \$25.00, or the maximum amount permitted by law, whichever is less. Installment Payments and other payments, including proceeds of insurance or any sale of the Equipment, may be applied, at our discretion and in spite of any instructions you may provide, to any obligation you may have to us or any of our affiliates. If the total of all payments made by you exceeds the total of all amounts due under this Contract by less than \$25.00, we may retain such excess.

EQUIPMENT PURCHASED

THE TERMS OF THIS CONTRACT ARE CONTAINED ON MORE THAN ONE PAGE

Page 1 of 5

Revision Date: 14 September 2014

014

QTY.	NEW/USED	MFR.	MODEL	EQUIPMENT DESCRIPTION	AMOUNT
1	NEW	JD	853M	853M Tracked Feller Buncher	\$384,981.00
PRODUCT ID NO. 1T06S3MXEFD277576 - CAB, AIR, JD LINK					
1	NEW	JD	R22B	FR22B FELLING HEAD	\$75,000.00
PRODUCT ID NO. 1DWFR22BKF0030447					

TRADE-IN and CASH DOWN PAYMENT

QTY.	MFR.	MODEL	DESCRIPTION OF TRADE-IN (From Purchase Order)	PRODUCT ID NO.	AMOUNT
				TOTAL TRADE-IN:	\$0.00
				CASH DOWN PAYMENT:	\$30,000.00
				RENTAL APPLIED:	\$0.00
				TOTAL TRADE-IN PLUS CASH DOWN:	\$30,000.00

INSTALLMENT PAYMENTS

DATE FINANCE CHARGE BEGINS: September 30, 2015		
The first Installment Payment Due Date is November 10, 2015 and each successive Installment Payment is due on the same day of the Month thereafter, (the "Billing Period"), unless otherwise provided below:		
NUMBER OF PAYMENTS	AMOUNT OF EACH PAYMENT	DUE DATE
48	\$9,113.14	November 10, 2015

The amounts shown below as Finance Charge, Total of Payments and Total Sale Price are estimates based upon the assumption that payments will be made on the scheduled payment due date according to the installment schedule. The actual Finance Charge, Total of Payments, and Total Sale Price may vary depending upon the early or late payment of scheduled installments.

ITEMIZATION OF AMOUNT FINANCED

SALES TAX (Paid to Govt. Agencies)		\$0.00
CASH PRICE (Including Tax)	1	\$459,081.00
TOTAL DOWN PAYMENT (Sum of Trade-In & Cash Down Payment)	2	\$30,000.00
UNPAID BALANCE OF CASH PRICE (The amount credited to your account with us)	3	\$429,081.00
INSURANCE (Physical Damage Paid to Insurance Companies)	4	\$0.00
ORIGINATION FEES	4A	\$500.00
OFFICIAL FEES (Paid to Public Officials)	5	\$32.00
AMOUNT FINANCED (Lines 3, 4, 4A, 5 & 5A (If Applicable)) The amount of credit provided to you.	6	\$429,613.00
FINANCE CHARGE (Based on Line 6) The dollar amount the credit will cost you	7	\$8,057.72
TOTAL OF PAYMENTS (Lines 6 & 7) The amount you will have paid after you have made all payments as scheduled.	8	\$437,670.72
ANNUAL PERCENTAGE RATE (The cost of your credit as a yearly rate)		0.90%
TOTAL SALE PRICE (Lines 1, 4, 4A, 5, 5A (If Applicable), & 7) The total price of your purchase on credit, including the Total Down Payment of \$30,000.00		\$467,570.72

4. Prepayment. You may prepay your obligations under this Contract in full at any time by paying the unpaid principal balance and any earned and unpaid finance charges. The unpaid principal balance includes any origination fee.

5. Security Interest; Missing information. You grant us and our affiliates a security interest in the Equipment (and all proceeds thereof) to secure all of your obligations under this Contract and any other obligations which you may have to us or any of our affiliates or assignees at any time and you agree that any security interest you have granted or hereafter grant to us or any of our affiliates shall also secure your obligations under this Contract. You agree that we may act as agent for our affiliates and our affiliates may act as agent for us, in order to perfect and realize on any security interest described above. Upon receipt of all amounts due and to become due under this Contract, we will release our security interest in the Equipment (but not the security interest for amounts due an affiliate), provided no event of default has occurred and is continuing. You agree to keep the Equipment free and clear of all liens and encumbrances, except those in favor of us and our affiliates as described above, and to promptly notify us if a lien or encumbrance is placed or threatened against the Equipment. You irrevocably authorize us, at any time, to (a) insert or correct information on this Contract, including your correct legal name, serial numbers and Equipment descriptions; (b) submit notices and proofs of loss for any required insurance; (c) endorse your name on remittances for insurance and Equipment sale or lease proceeds; and (d) file a financing statement(s) which describes either the Equipment or all equipment currently or in the future financed by us. Notwithstanding any other election you may make, you agree that (1) we can access any information regarding the location, maintenance, operation and condition of the Equipment; (2) you irrevocably authorize anyone in possession of that information to provide all of that information to

THE TERMS OF THIS CONTRACT ARE CONTAINED ON MORE THAN ONE PAGE

DOC8015	Settlement No. 12019854	Equipment Type: Construction & Forestry Commercial	09/24/2015 03:31 PM	Page 2 of 5
Revision Date: 14 September 2014	Application ID: 12019854	Version Number: 2		

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

Exhibit B

FLINT

CONSTRUCTION & FORESTRY DIVISION

Andrews, SC
Atlanta, GA
Aynor, SC
Braselton, GA

Cuthbert, GA
Dothan, AL
Grovetown, GA
Ladson, SC

Simpsonville, SC
Troy, AL
Walterboro, SC
West Columbia, SC

REGIONAL OFFICE
P.O. Box 3529
Albany, GA 31706-3529
229-888-1212
www.flintequipco.com



Ship Via

SAME AS BELOW

Invoice To

NORTH EDISTO LOGGING
916 N EDISTO ROAD
LEESVILLE, SC 29070

Branch 13 - FRC-W. COLUMBIA		Page 1
Date 07/29/2015	Time 13:29:20 (O)	Inv No 01
Account No 1302965	Phone No 8036575551	800816
Ship Via	Purchase Order	
Sales Tax License No	Federal Exemption No	
		Salesperson DLB

EQUIPMENT INVOICE

Description

Amount

Stock #: F584717 Serial #: 1DW843LXCFF668472
JOHN DEERE 843L WHEEL FELLER BUNCHER
INCLUDES 36 MONTHS/5,000 HRS ULTIMATE UPTIME PACKAGE
**
FINANCED WITH JOHN DEERE FINANCIAL

266903.00

ULTIMATE UPTIME

32097.00

Subtotal: 300000.00
TOTAL: 300000.00

IMPORTANT WARRANTY NOTICE: Any warranties associated with the equipment purchased hereunder are acknowledged to be from the manufacturer only and Flint Equipment Company has expressly disclaimed any warranty other expressed or implied, including any implied warranty of merchantability or fitness for particular purpose. The dealer further disclaims any liability for any third party's action with the sale of said products. Any liability, even if third party, does not apply to Flint Equipment Company.

Accepted by _____
Signature of Customer

Customer Signature

Customer Signature

Accepted By

Signature of Dealer

Date Received

Salesperson

WARRANTY BEGINS

SIGNATURE (DEALER)

PURCHASER NAME AND ADDRESS (First Signer)				DEALER NAME AND ADDRESS			
NAME (First, Middle, Last) NORTH EDISTO LOGGING, INC.				DEALER NAME FLINT EQUIPMENT CO.		Dealer Account No. 179135	
STREET or RR 946 N EDISTO RD				STREET or RR 3464 SUNSET BLVD			
CITY LEESVILLE	STATE SC	ZIP CODE 29079	COUNTY Lexington	CITY WEST COLUMBIA	STATE SC	ZIP CODE 291693054	Phone Number 8037949340
PHONE NUMBER 803-657-5551				Date Of Order: Jun 17, 2015			
EMAIL ADDRESS				Dealer Order No.:		TYPE OF SALE: ☐ CASH ☐ LEASE ☒ TIME SALE	
PURCHASER NAME AND ADDRESS (Second Signer)				PURCHASER TYPE:		MARKET USE CODE:	
NAME (First, Middle, Last)				12 Large Fleet (25-74)		21 Harvesting	
STREET or RR				Add Purchaser to Mailing List (Check One or More)			
CITY				☐ Construction ☐ Utility ☒ Forestry ☐ Government			
STATE				PURCHASER IS:			
ZIP CODE				☒ Business ☐ Individual			
COUNTY				Purchaser Acct.:			
PHONE NUMBER				☐ SOCIAL SECURITY ☐ IRS TAX ID NO ☐ EIN			
EMAIL ADDRESS				NO.:			

EXTENDED WARRANTY IS: ☒ Accept ☐ Decline		LOCATION OF FIRST WORKING USE:		Use State/Province		COUNTY CODE	
(Initials) <i>P.D.</i>		Use Country LEXINGTON		SC		63	
Ultimate Uptime Package Purchase:		☒ Yes ☐ No		(Initials) <i>P.D.</i>			
QTY	2nd Gen + 12mo + 5000 Hrs	EQUIPMENT (Model, Size, Description)		Hours of Use	PIN or Serial Number	Delivered Cash Price	
1		2014 JOHN DEERE 843L WHEEL FELLER BUNCHER Stock # 0101F564717			RDW643LXOFF66472	\$ 300,000 00	
+ John Deere Preventative Maintenance : Service Agreement						\$ 0 00	
+ John Deere Extended Warranty : Comprehensive						\$ 0 00	
(1) TOTAL CASH PRICE						\$ 300,000 00	

266,903.00

QTY	TRADE-IN (Model, Size, Description)	Hours of Use	PIN or Serial Number	AMOUNT
COMMENTS:				
0% for 36 Months w/ John Deere Financial, 36-Months or 5,000 Hours Ultimate Uptime Package.				
			(2) TOTAL TRADE-IN ALLOWANCE	\$ 0 00
			(3) TOTAL TRADE-IN PAY-OFF	\$ 0 00
			(4) BALANCE	\$ 300,000 00
			Additional 00	33,097 00
			(5) SUBTOTAL	\$ 300,000 00
			(9) RENTAL APPLIED	\$ 0 00
			(10) CASH WITH ORDER	\$ 0 00
			(11) BALANCE DUE (5-8 & 10)	\$ 300,000 00

ACKNOWLEDGMENTS: Purchaser agrees to sell, transfer, and convey the item(s) listed as "Trade In" to the Dealer at or prior to the time of delivery of the above product(s), as a "trade-in" to be applied against the cash price. Purchaser represents that each "trade-in" item shall be free and clear of all security interests, liens, and encumbrances at the time of transfer to the Dealer except to the extent shown below. The price to be allowed for each "trade-in" item is listed on this

document. The Purchaser promises to pay the balance due (line 11) shown herein in cash, or to execute a Time Sale Agreement (Retail Installment Contract), or a Loan Agreement for the purchase price of the Product(s), plus additional charges shown hereon, or to execute a Lease Agreement, on or before delivery of the equipment ordered herein. Despite delivery of the Product(s) to the Purchaser, title shall remain with the Seller until one of the foregoing is accomplished. The Purchaser and the Dealer agree that this Purchase Order is not a security agreement and that delivery of the Product(s) to the Purchaser pursuant to this Purchase Order will not constitute possession of the Product(s) by the Purchaser, as a debtor, for the purposes of the purchase money security provisions in any statutes relating to personal property security or its equivalent. Purchaser understands that its rights in connection with this purchase are limited as set forth in this Purchase Order.

DISCLOSURE OF REGULATION APPLICABILITY: When operated in California, any off-road diesel vehicle may be subject to the California Air Resources Board In-Use Off-Road Diesel Vehicle Regulation. It therefore could be subject to retrofit or accelerated turnover requirements to reduce emissions of air pollutants. More information is available on the California Air Resources Board website at <http://www.arb.ca.gov/mpr/engr/diesel/industrial.htm>.



JOHN DEERE FINANCIAL

John Deere Construction & Forestry Company
6400 NW 86th Street
PO Box 6600
Johnston, IA 50131-6600

NORTH EDISTO LOGGING, INC.
916 N EDISTO RD
LEESVILLE, SC 29070-9707

Co-Debtor or Guarantor:

PAUL DAVIS GUNTER

Dear NORTH EDISTO LOGGING, INC.,

Thank you for choosing John Deere Financial. We appreciate your business and the opportunity to be your trusted financial resource. We are committed to understanding your business, and providing the flexible financing solutions and customer service to accommodate your needs in good and challenging times. Please review and retain the enclosed card filled with helpful information and tools to get the most from your John Deere Financial experience.

This letter is confirmation that your loan described below has been accepted by John Deere or that your retail installment contract described below has been assigned to John Deere by your John Deere Dealer. This is not an invoice.

The account number is 510001121033

The details for this transaction include:

Contract Date: 28 July 2015

AMOUNT FINANCED	\$300,532.00
FINANCE CHARGE	\$
TOTAL PAYMENTS	\$300,532.00

EQUIPMENT PURCHASED

QTY.	NEW USED	MFR.	MODEL	EQUIPMENT DESCRIPTION	AMOUNT
1	NEW	JD	843L	843L Wheel Feller Buncher	\$245,000.00

PRODUCT ID NO 1DW843LXCFF668472 - CAB, AIR, JD LINK

1	NEW	JD	22	FD225 Saw	\$55,000.00
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PRODUCT ID NO 1DWFD22BLF0020801

TRADE-IN and CASH DOWN PAYMENT

QTY.	MFR.	MODEL	DESCRIPTION OF TRADE-IN (From Purchase Order)	PRODUCT ID NO.	AMOUNT
				TOTAL TRADE-IN:	\$0.00
				CASH DOWN PAYMENT:	\$0.00
				RENTAL APPLIED:	\$0.00
				TOTAL TRADE-IN PLUS CASH DOWN:	\$0.00

INSTALLMENT PAYMENTS

DATE FINANCE CHARGE BEGINS: July 20, 2015

The first Installment Payment Due Date is August 30, 2015 and each successive Installment Payment is due on the same day of the Month thereafter, (the "Billing Period"), unless otherwise provided below;

NUMBER OF PAYMENTS	AMOUNT OF EACH PAYMENT	DUE DATE
35	\$8,348.12	August 30, 2015
1	\$8,347.80	July 30, 2018

You can easily manage your account or make a payment online by using MYJDFACCOUNT.COM.

If you prefer to mail a payment, please include your account number on the check and mail to:
John Deere Financial, PO Box 4450, Carol Stream, IL 60197-4450

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO. 2018-CP3200079
	)	
FLINT EQUIPMENT COMPANY,	)	
	)	PLAINTIFF'S MOTION TO DISMISS
	)	OR, IN THE ALTERNATIVE, STRIKE
	)	DEFENDANTS' COUNTERCLAIMS
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
NORTH EDISTO LOGGING, INC., and	)	
PAUL GUNTER,	)	
	)	
Defendants.	)	

COMES NOW Flint Equipment Company ("Flint"), Plaintiff in the above-styled action, and, pursuant to Rule 12(b) and (f) of the South Carolina Rules of Civil Procedure ("SCRCP"), files this its Plaintiff's Motion to Dismiss or, in the Alternative, Strike Defendants' Counterclaims (hereinafter "Motion"), respectfully showing the Court the following:

I. PROCEDURAL BACKGROUND

On January 9, 2018, Plaintiff filed a Verified Complaint against Defendants for failure to pay a repair invoice in the amount of \$10,483.53. On or about February 26, 2018, Defendants filed their unverified Answer and Counterclaims in the above-referenced matter admitting they requested the repairs and that Plaintiff provided them. However, Defendants go on to raise unrelated counterclaims, which are the subject of this Motion. To frustrate Plaintiff's effort to collect for services performed, Defendants have sought to transform a simple collections case into a baseless class action and free-for-all.

II. STANDARD OF REVIEW

Rule 8(a) of SCRCP provides that a counterclaim shall contain "a short and plain statement of the facts showing that the pleader is entitled to relief." While there are no technical forms of pleadings, each

avermment of a pleading shall be simple, concise, and direct. SCRCP 8(e)(1). The elementary purpose of a pleading is “to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial.” Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013) (citing S.C. Nat'l Bank v. Joyner, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct.App.1986)); see also Langston v. Niles, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) (“The purpose of pleadings is to place the adversary on notice as to what the issues are.”).

The Court may dismiss a claim where the movant demonstrates a “failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006) (Internal quotations omitted). The disposition of a motion to dismiss “must be based solely on the allegations set forth in the counterclaim.” Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 424 (Ct. App. 2001). “The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.” Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 122 (Ct. App. 2006). Thus, “[t]he question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief.” Laidlaw Transit, Inc., 348 S.C. at 424.

III. ARGUMENT

A. Defendants' Counterclaims for breach of the covenant of good faith and fair dealing fail to state a claim.

1. Defendants have failed to allege their own contractual performance.

“It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready and willing so to perform it.” Parks v. Lyons, 219 S.C. 40, 48 (1951).

Defendants' do not allege that they have performed or were able, ready and willing to perform. Instead, Defendants make the bald allegation that “Plaintiff's conduct as outlined above constitutes a breach

of contract in that it violates Plaintiff's [sic] duty of good faith and fair dealing." (Answer and Counterclaims ¶¶ 19, 22). Defendants admit that they asked Plaintiff to provide repairs and that Plaintiff in fact made the repairs, (Answer and Counterclaims ¶ 6), but do not allege their own performance. As such, they cannot recover damages, and their counterclaims fail.

2. Under South Carolina law, there is no independent claim for breach of the covenant of good faith and fair dealing.

While every contract includes an implied covenant of good faith and fair dealing that neither party will do anything to impair the right of the other to receive the benefits of the agreement, Episcopal Church in S.C. v. Church Ins. Co. of Vermont, 993 F. Supp. 2d 581, 593 (D.S.C. 2014), there is no independent cause of action separate from a claim for breach of contract for the implied covenant of good faith and fair dealing. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473 (Ct. App. 2004). Thus,

whenever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied that the cooperation will be given. [Furthermore,] [w]hen one undertakes to accomplish a certain result he agrees by implication to do everything to accomplish the result intended by the parties.... Moreover, there is an implied undertaking in every contract on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Burdette v. Turner, No. 2004-UP-059, 2004 WL 6248985, at *4 (S.C. Ct. App. Jan. 29, 2004)(quoting 17A Am.Jur.2d Contracts § 380 (2003)). "[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277 (1995). Further, there is no breach of an implied covenant of good faith and fair dealing in the absence of a contract or privity of contract between the parties. Burdette v. Turner, No. 2004-UP-059, 2004 WL 6248985, at *4.

Defendants do not assert an independent, free-standing cause of action for breach of contract. They only incorrectly claim breach of the duty of good faith and fair dealing. In the absence of a separate claim for breach of contract, Defendants' implied covenants claims cannot stand alone. Further, assuming

arguendo that Defendants' implied covenant claim could stand, Defendants admit that Plaintiff made the requested repairs. (Answer and Counterclaims ¶ 6). As such, Plaintiff has done what the contract gives it the right to do, Defendants have alleged no impairment of rights, and Defendants' claims fail.

Furthermore, as admitted by Defendants and illustrated in those Exhibits "A" and "B" attached Defendants' Answer and Counterclaim, John Deere Financial was the ultimate lender on the loan transactions. (Answer and Counterclaims ¶¶ 12, 13, and 22, Ex. "A," "B"). Contrary to Defendants' assertion that Plaintiff "originated" and "subsequently assigned" the loans to John Deere Financial, Exhibits "A" and "B" to the Answer and Counterclaims illustrate that the loan contract was solely between John Deere Financial and Defendants. Plaintiff merely provided the details of the transaction through its dealer agreement with John Deere Financial – an agreement in which Defendants are not a party. As such, no privity of contract exists between Plaintiff and Defendants as to the loan contracts; privity of contract between Plaintiff and Defendant existed only as to the invoices. Because no privity of contract exists between Plaintiff and Defendant as to the loan contracts, no implied covenant of good faith and fair dealing exists, and no breach thereof occurred. Burdette, No. 2004-UP-059, 2004 WL 6248985, at *4.

Further, assuming arguendo that privity of contract did exist as to the loan contracts, Defendants failed to allege that Plaintiff intentionally and purposely did anything to prevent them from carrying out their part of the agreement, or do anything which would destroy or injure their rights to receive the fruits of the contract. In fact, Defendants simply allege that the numbers between the invoice and the loan contracts differ, but the total amount of both remained the same. (Answer and Counterclaims ¶ 13). Further, John Deere Financial approved the loan transactions. (Answer and Counterclaim Exhibit "B"). Because Defendants suffered no damage and received the fruits of the contracts (the equipment and financing), Plaintiff did not breach the implied covenant of good faith and fair dealing. See Burdette, No. 2004-UP-059, 2004 WL 6248985, at *4.

3. Defendants implied covenant claims should also be stricken under Rule 12(f).

Alternatively, for the same reasons discussed above, Plaintiff respectfully asks the Court to strike Defendants' counterclaims pursuant to Rule 12(f), SCRPC. Because Defendant's allegations are defective; contain no facts to support a breach of the covenant of good faith and fair dealing; and do not support a viable cause of action, Defendants' counterclaims are immaterial and impertinent and should be stricken pursuant to Rule 12(f), SCRPC.

B. Defendants' Counterclaims for "Class Action, Rule 23, SCRPC" fails to state a facts sufficient to constitute a cause of action.

1. Defendants literally state no cause of action.

Defendants state their "First Counterclaim against Flint Equipment Company" in Paragraphs 15, 16, and 17 of their Answer and Counterclaim. These paragraphs purport to state a claim for Class Action; however, there is no cognizable cause of action. A class action is not a cause of action. A class action must state an underlying cause of action, which is the basis of the Class Action. Because Defendants' Counterclaim lacks any such cause of action, it should fail.

2. Breach of the Implied Duty of Good Faith and Fair Dealing is not a basis for the Class Action.

As set forth in Section III, A, 2 and 3 above, under South Carolina law, there is no independent cause of action for breach of the implied duty of good faith and fair dealing. Assuming that Defendants intend such claims to serve as the causes of action for the Class Action, the Defendants' Counterclaim fails to state a claim. Further, no privity of contract existed between Plaintiff and Defendants as to the loan contracts. Thus, no breach of the implied duty of good faith and fair dealing occurred.

3. Defendants' have failed to state sufficient facts to state a claim that meet the five prerequisites of Rule 23.

Rule 23, SCRPC, provides the following prerequisites for a class action:

One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable [Numerosity], (2) there are questions of law or fact common to the class [

Commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [Typicality], (4) the representative parties will fairly and adequately protect the interests of the class [Adequacy], and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

The proponent of a class action bears the burden of proving the existence of each prerequisite.

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20-21 (2003). The failure to satisfy even one prerequisite is fatal. Id.

To establish **Numerosity**, a party must show that “the class is so numerous that joinder of all members is impracticable.” Rule 23, SCRPC. Defendants’ Counterclaims contains no such allegation. Defendants have not pleaded the identity of any other potential class member; rather, they state that they need “extensive discovery to identify potential members[.]” (Answer and Counterclaim ¶ 16). The failure to satisfy the numerosity prerequisite is fatal to the cause of action for a class action. Gardner, 353 S.C. at 21.

“To establish **Commonality**, a party must show that there are questions of law or fact common to the class ... this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together.” Gardner, 353 S.C. at 21 (2003) (internal citations and quotations omitted). First, as set forth more fully above, Defendants’ Counterclaim shows no questions of law at all. Second, Defendants have failed to allege any law or facts common to a potential class. The case arises out of Defendants’ failure to pay Invoice No. W15860 in the amount of \$10,483.53 for repairs Flint made to Defendants’ John Deere 753J Feller Buncher. (Verified Complaint, ¶ 9, 13, and Exhibit “2”). There is certainly no commonality as to that central issue, and the Counterclaim asserts no common issues binding the proposed class together. The predominant issue in this case is analysis of the individual repair invoice between Flint Equipment Company, North Edisto Logging, Inc. and Paul Gunter. This case does not arise out of purchase contracts and loan agreements. (See Answer and Counterclaims, Ex. “A” and “B”). By introducing these issues into the case, Defendants destroy any basis for commonality. First, the purchase

agreement between Flint and North Edisto has no bearing on whether Defendants must pay for the repairs it requested. Second, the loan agreements are between John Deere Financial and Defendants – Flint is not even a party to the loan agreements. The failure to satisfy the commonality prerequisite is fatal to the cause of action for a class action. Gardner, 353 S.C. at 21.

There is no **Typicality**. The Counterclaim contain no allegations that the Defendants claims or defenses are typical of the claims or defenses of the purported class. Because the case arises out of the repairs made to Defendants' Feller Buncher, the case will focus on that individualized proof, and typicality is not present. Defendants' defenses to payment for repairs are completely atypical to the purported class. Defendants have not plead any relationship between its defenses to payment for repairs and its implied covenant/class action claims. The same arguments that show no commonality show no typicality. The failure to satisfy this prerequisite is fatal to the cause of action for a class action. Gardner, 353 S.C. at 21.

There is no **Adequacy**. Defendants have not shown that the representative parties will fairly and adequately protect the interests of the class. Defendants are not ideal class representatives. They are Plaintiff's debtors and currently owe Plaintiff in excess of \$11,000.00. Defendants' interest is in avoiding paying a legitimate debt, which is not a dispute common to any other class member. The instant Answer and Counterclaims appears to be an attempt to make the litigation so costly that Plaintiff gives up on its legal rights against Plaintiff. Further, as discussed above, no privity of contract existed between Plaintiff and Defendants in regard to the loan contracts. Therefore, because Defendants have no legal basis for recovery, they are not adequate class representatives.

Defendants have further failed to allege facts to support damages. Rule 23, SCRPC, states that "in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class." The amount in controversy means "the value of the object to be gained by the suit." Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 331 (1991). In the absence of alleging damages, Defendants have failed to state

a claim. What's more, Rule 23, SCRCP, requires the amount in controversy to exceed \$100.00 per member of a class or a damage amount; Defendants failed to satisfy their burden. The failure to satisfy the amount in controversy prerequisite is fatal to the cause of action for a class action. Gardner, 353 S.C. at 21.

4. Defendants Class Action claim should also be stricken under Rule 12(f) and as permitted under Rule 23(d)(1).

"As soon as practicable, after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Rule 23(d)(1), SCRCP. Under these circumstances—where Defendants' own allegations render certification of a class an impossibility—an Order striking Defendants' class allegations is an appropriate remedy. See Rikos v. Proctor & Gamble Co., 2012 WL641946, at *3 (S.D. Ohio Feb 28, 2012) ("[C]lass action allegations may be stricken prior to motion for class certification where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met"); Sanders v. Apple, Inc., 672 F. Supp.2d 978, 990 (N.D. Cal. 2009) ("Where the complaint demonstrates that a class action cannot be maintained on the facts alleged, a defendant may move to strike class allegations prior to discovery."); Thompson v. Merck & Co., 2004 WL 62710, at *5 (E.D. Pa. Jan. 6, 2004) ("[P]laintiffs argue that this court lacks authority to strike class action allegations from the complaint until after the plaintiffs have filed a motion for class certification. We do not agree.").

The United States Supreme Court has acknowledged, "[s]ometimes the issues are plain enough from the pleadings . . . and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the [class] certification question." Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982). Here, the impossibility of the case proceeding is plain enough on the pleadings. Plaintiff respectfully requests the Court to strike the class allegations pursuant to Rule 12(f), SCRCP. "A motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP." Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010). Thus, the standards outlined above apply equally to a motion to strike under Rule 12(f), SCRCP. See id. A motion to strike under Rule 12(f), SCRCP, is appropriate for

insufficient defenses or any immaterial or impertinent matter. Rule 12(f), SCRPC. Because Defendants' allegations are insufficient and no class exists for certification, Defendants' class allegations are immaterial and impertinent and should be stricken pursuant to Rule 12(f), SCRPC.

This issue is not merely academic. Absent dismissal, the parties and Court will be compelled to devote significant time and expense to class discovery, class certification briefing, and class certification hearings before even getting to the merits of the legitimate legal issues involved in this case. To prevent the imposition of this needless burden on itself and the parties, the Court can and should strike Plaintiff's class allegations now. See 35A C.J.S. Fed. Civ. P. § 469 ("Rule 12(f) reflects an inherent power of the courts to reduce pleadings, to expedite the administration of justice, and . . . ensure prompt disposition of legal actions"); Id. at § 470 ("The motion to strike . . . saves the time and money that would be spent litigating spurious issues that will not affect the outcome of a case . . ."). Furthermore, because Plaintiff is not a party to the loan contracts, Defendants have failed to join an indispensable party. John Deere Financial must be joined if the Court permits the class allegations to continue. Rules 12 and 19, SCRPC. Therefore, Plaintiff respectfully requests the Court to dismiss Defendants' class allegations.

WHEREFORE, Flint respectfully requests the Court to dismiss or, in the alternative, strike each and every counterclaim asserted by Defendants in their Answer and Counterclaims; and that the Court grant such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 28th day of March 2018.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

By: s/ M. Drew DeMott
M. DREW DEMOTT
South Carolina State Bar No. 71653
Attorneys for Plaintiff
114 Barnard Street, Suite 2B
Savannah, Georgia 31401
Telephone: (912) 234-0995
Facsimile: (912) 234-0997
E-Mail:

Flint Equipment Company v. North Edisto Logging, Inc., and Paul Gunter
In the Court of Common Pleas of Lexington County, South Carolina
Civil Action No. 2018-CP-3200079

Plaintiffs' Motion to Dismiss or, in the Alternative, Strike Defendants' Counterclaims

Page 9 of 9

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FLINT EQUIPMENT COMPANY,

Plaintiff,

v.

NORTH EDISTO LOGGING, INC., and
PAUL GUNTER,

Defendants.

) IN THE COURT OF COMMON PLEAS

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CIVIL ACTION NO. 2018-CP3200079

CERTIFICATE OF SERVICE

COMES NOW, counsel for Flint Equipment Company, Plaintiff in the above-styled matter, who certifies that he has served a copy of *Plaintiff's Motion to Dismiss or, in the Alternative, Strike Defendants' Counterclaims* on Defendant's counsel, by depositing a copy of same in the United States Mail, properly addressed, with sufficient postage affixed thereto to ensure delivery, addressed as follows:

D. Randolph Whitt
Fleming & Whitt, P.A.
344 Blossom View Ct.
West Columbia, SC 29170

This 28th day of March, 2018.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

By: s/ M. Drew DeMott

M. DREW DEMOTT

South Carolina Bar No. 71653

Attorneys for Flint Equipment Company

114 Barnard Street, Suite 2B

Savannah, Georgia 31401

Telephone: (912) 234-0995

Facsimile: (912) 234-0997

E-Mail:

Flint Equipment Company.,

Plaintiff,

vs.

North Edisto Logging, Inc., and Paul Gunter,

Defendants.

Memorandum in Opposition to Motion to Dismiss Counterclaims

Defendants' 12(b)(6) Motion is without merit and the relief sought should be denied. A 12(b)(6) Motion may not be granted if the Pleadings, viewed in the light most favorable to the Plaintiff, and the inferences drawn therefrom, show that the Plaintiff could prevail on a theory of the case. Gray v. State Farm Auto Ins. Co., 491 S.E.2d 272, 274-75 (S.C. Ct. App. 1995).

"All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings." Hambrick v. GMAC Mortg. Corp., 634 S.E.2d 5, 7 (S.C. Ct. App. 2006).

Factual allegations

1. That the Plaintiff tendered an invoice for repairs to Defendants which contains "inflated and improper charges" (Answer and Counterclaims ¶ 7)
2. That the Plaintiff tendered an invoice to Defendants which includes a charge of \$59,263.00 for an "Ultimate Uptime" extended warranty, but that this payment was not reported to John Deere Financial when Plaintiff submitted a different set of numbers to then to become the basis of a John Deere Financial loan. (Answer and Counterclaims Exhibit A)
3. That the Plaintiff tendered an invoice to Defendants which includes a charge of \$33,097.00 for an "Ultimate Uptime" extended warranty, but that this payment was not reported to John Deere Financial when Plaintiff submitted a different set of numbers to then to become the basis of a John Deere Financial loan. (Answer and Counterclaims Exhibit B)

The RoTec Case

In the Motion to Dismiss Plaintiff relies primarily on *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597S.E. 2d 881 (Ct. App. 2004). However, the Plaintiff finds more in the RoTec decision than is there. In *RoTec*, two causes of action were asserted, a cause of action for breach of contract, and an additional cause of action for breach of the duty of good faith and fair dealing. While RoTec found that there is no special cause of action for breach of the duty of good faith and fair dealing, it does not make the breach of the duty no longer actionable. Rather, it makes clear that violation of the implied term requiring good faith and fair dealing is no different than breach of any of the express terms of the contract. The rule established by *RoTec* is simply that a claimant may not advance both a cause of action for breach of contract and a second cause of action for breach of the duty of good faith and fair dealing.

Contractual Performance by Defendants

The tender of an invoice with improper and inflated charges, which breached Plaintiff's duty of good faith and fair dealing, excuses any further performance by Defendants

Class Action Allegations

Plaintiff attempts to advance prematurely to a full consideration of the issues required before any discovery has been done which would allow a decision on these factors on the basis of conjecture.

s./D. Randolph Whitt

D. Randolph Whitt
Fleming & Whitt, P.A.
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel

May 8, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Case No. 2018-CP-32-000079

Flint Equipment Company,

Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter,

Appellants.

RECEIVED
AUG 03 2018
SC Court of Appeals

NOTICE OF APPEAL

North Edisto Logging, Inc. and Paul Gunter appeal the order of the Honorable Jocelyn Newman, dated July 2, 2018 and filed July 2, 2018. Appellants received written notice of entry of the order on July 2, 2018.



D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar no. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellants

August 1, 2018

Other counsel of Record:

M. Drew DeMott
33 Bull St, Suite 203
Savannah GA 31401

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Case No. 2018-CP-32-000079

Flint Equipment Company,

Respondent,

v.

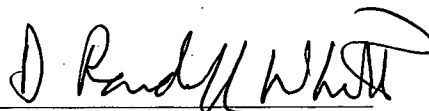
North Edisto Logging, Inc. and Paul Gunter,

Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent listed above by depositing a copy of it in the United States Mail, postage prepaid, on August 1, 2018, addressed to their attorney of record, M. Drew DeMott, 33 Bull St, Suite 203, Savannah GA 31401.

August 1, 2018



D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar no. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellants

RECEIVED
AUG 03 2018
SC Court of Appeals

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF LEXINGTON) COURT OF COMMON PLEAS NONJURY

3
4 FLINT EQUIPMENT COMPANY,)
5 PLAINTIFF,)
6 vs.) RECORD
7 NORTH EDISTO LOGGING, INC., and)
8 PAUL GUNTER,) 2013-CP-32-00079
9 DEFENDANT.)

10
11 May 8th, 2018
12 Lexington, South Carolina

13
14 B E F O R E:

15 THE HONORABLE JOCELYN NEWMAN, Judge.

16
17 A P P E A R A N C E S:

18 MATTHEW DREW DeMOTT
19 ESQ.
Attorney for the Plaintiff

20 DAVID RANDOLPH WHITT
21 ESQ.
Attorney for the Defendant

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24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

(WHEREUPON, there were no exhibits marked or testimony
taken during this hearing.)

1 P R O C E E D I N G S

2
3 THE CLERK: All right. Looks like we can go back to
4 Number 19.

5 All right. Next up will be Flint Equipment Company
6 versus North Edisto Logging. Case Number 2018-CP-32-00079.

7 THE COURT: Okay. This is the Plaintiff's Motion to
8 Dismiss?

9 MR. DeMOTT: That's correct, Your Honor.

10 THE COURT: Okay.

11 MR. DeMOTT: It seems a little backwards.

12 THE COURT: It does.

13 MR. DeMOTT: I'll explain.

14 THE COURT: All right. Oh, Counterclaims.
15 Okay.

16 MR. DeMOTT: You got it.

17 THE COURT: I see it.

18 All right. Let's go.

19 MR. DeMOTT: Okay. May it please the Court?

20 THE COURT: Yes, sir.

21 MR. DeMOTT: My name is Drew DeMott. I'm from the firm
22 of Moore Clarke DuVall & Rodgers. I'm here on behalf of
23 Flint Equipment Company, a forestry and construction
24 equipment company that sells throughout South Carolina, and
25 is based in West Columbia.

1 I'm here with my representatives from Flint. I have
2 Mr. Bob Porter, Mr. Matt Peats (phonetic), and Mr. Alton
3 Reid because we're very interested in this case, Your Honor.
4 We know you have a busy docket, and a lot of things on your
5 mind. We will try to be as quick as we can.

6 THE COURT: That's fine. Go ahead.

7 MR. DeMOTT: So, we filed this suit as a pretty routine
8 collection suit. The Defendants signed a Credit Application
9 back in 2010, and then, in 2017, Flint performed services on
10 a Feller Buncher, which is -- it looks a lot like an
11 excavator, but it has a saw head on it. It goes out to the
12 forest and can cut down really big trees really quickly.

13 The Defendants, North Edisto Logging and Paul Gunter,
14 are in the logging business. And so they've been a long
15 time customer of Flint's.

16 And so, in April of 2017, North Edisto had this Feller
17 Buncher out in the woods and sank it in a bog. Literally
18 submerged the machine. And so, as they always do, they
19 called Flint to come and repair the machine, which Flint
20 did, and the, the fees for the repairs were about \$10,500.
21 Pursuant to the Credit Agreement, we have a claim for
22 interest and attorney fees.

23 So, when you boil down the Plaintiff's case, it's
24 essentially a small collections case for nonpayment on those
25 repairs. The Defendants, based on their answer, don't deny

1 that the repairs were made. They don't deny that Flint did
2 anything that Flint wasn't suppose to do. Respectfully to
3 North Edisto's attorney, what their response was, was to
4 file a Counterclaim for a class action. And so, not making
5 light of collections case, but a fairly routine collections
6 case has turned into the potential of a gargantuan class
7 action that -- and we contend, with a thorough review of the
8 Pleadings and the Motion that we filed, is baseless.

9 And so, the essence of their Counterclaim, which I'm,
10 I'm sure Mr. Whitt will be able to articulate more clearly,
11 is they claim that there are some discrepancies in numbers
12 on invoices and on loan contracts. And so this is where it
13 can get a little confusing, but we repaired one machine.

14 The issue on the open account is \$10,500 repairs on one
15 machine. The, the Counterclaim brings in two separate
16 machines, has nothing to do with repairs, and looks at the
17 sales invoice with Flint, and the loan contract with John
18 Deere on those two machines.

19 And so, when Flint sells these machines, they're very
20 large, several hundred thousand dollar machines. Flint
21 sells and then, most of the time, the customer's finance
22 through John Deere. And so Mr. Whitt argues that there are
23 discrepancies between the, the invoice from Flint and the
24 loan contract from John Deere, which we dispute.

25 But we're, we're here, Your Honor, today on a Rule 12

1 Motion. So, it's 12(b)(6) and 12(f). Because I -- the
2 Court knows what those are, I don't, I don't want to spend a
3 whole lot of time arguing 12(b)(6) and then arguing 12(f).
4 I'm gonna combine my arguments because I think, if, if the
5 Court rules in our favor on one, you would rule on the
6 other. If we lose on one, we would lose on the other. The
7 Court can rule in our favor on 12(b) or on 12(f) under
8 either of those standards.

9 So, whether it's a complaint or a counterclaim, the
10 pleader's burden is to clearly and concisely state facts,
11 and, under Rule 12, their burden is to state a claim that
12 can be -- that gives us notice what their claims are.

13 And so our claim -- our response to their Counterclaim
14 is you failed to state a claim for which relief can be
15 granted, and so, under Rule 12(b), it can be stricken or
16 dismissed, and, under Rule 12(f), it can be stricken because
17 it's immaterial and irrelevant.

18 The Counterclaim is about a page and a half
19 Counterclaim that lacks any substance at all. And so I'm
20 gonna go through why 12(b)(6) is proper in this case.

21 Two overarching points. The, the first is that their
22 barebones Counterclaim doesn't state a claim for breach of
23 the Covenant of Good Faith and Fair Dealing. You can really
24 boil their entire claim down to Covenant of Good Faith and
25 Fair Dealing. And so they don't state a claim for that

1 actually, and we'll go into more detail on that.

2 The second big topic is that they fail to state a class
3 action, and, and, Your Honor, frankly the main reason we're
4 here today, the last thing I want to do is come into Court
5 too often on a \$10,000 collections case, but we're staring
6 down the barrel of a class action. So, we are inviting the
7 Court's serious review of the class action. And so, as you
8 see in the counterclaim, they fail to state a class action.

9 And so those are the two, two main points. Now I want
10 to dig a little deeper into both of those.

11 So, first, they, they don't state a claim for breach of
12 the Covenant of Good Faith and Fair Dealing. Number one,
13 there's some elements that they would need to plead in order
14 to properly plead that claim. They don't allege their own
15 performance. You can't counterclaim for breach of the
16 Covenant of Good Faith and Fair Dealing if you don't even
17 plead, plead your own performance.

18 They didn't perform their job under the contract was to
19 pay for the services. They haven't performed. The -- we're
20 suing them over their nonperformance. Also, short of
21 performance, you can allege well, I'm ready, willing, and
22 able to perform. well, they don't, they don't allege that
23 they're ready, willing, and able. This case isn't really
24 well suited for that because ready, willing, and able, if
25 you're ready, willing, and able, just pay the money. It's

1 not a -- like an executory contract that would require
2 performance over time. Just pay the money. They admit that
3 they haven't done that, and they admit that, in Paragraph 6,
4 that the Plaintiff has performed.

5 And so, when you look at the, the elements of a claim
6 for breach of the Covenant of Good Faith and Fair Dealing,
7 they don't even articulate those fundamental elements of the
8 claim. Importantly, and this is a second argument -- it's
9 not a back up argument. It's equally as strong, but either
10 one carries the day. They don't state an independent breach
11 of contract claim.

12 And so what's very important is, under South Carolina
13 law, there's, there's the ROTEC case, then we cite a few
14 other cases. In addition, in our brief, a Counterclaimant
15 or Plaintiff, you can't sue someone simply for the breach of
16 the implied duty of the Covenant of Good Faith and Fair
17 Dealing. What we typically see is, if someone tries to do
18 that, they don't have anything else to throw up. And so
19 they're just trying to make some desperate claim.

20 In order to make a claim for the Implied Covenant of
21 Good Faith and Fair Dealing, there has to be an independent
22 breach that goes under -- underlies that. And so the
23 Claimant, the Counterclaimant, would have to assert that
24 independent breach, you didn't perform the services,
25 something like that, and then, on top of that, they would

1 allege the breach of the Covenant of Good Faith and Fair
2 Dealing. Because there's no underlying claim, there's only
3 a claim for good faith and fair dealing, that claim fails.

4 In, in addition, there can be no breach of the Covenant
5 of Good Faith and Fair Dealing when a party has done what
6 the contract allows. So, even if you look into -- I'm not
7 looking at the merits, like discovery.

8 If you look at the face of the Complaint, has Flint
9 done what they're allowed to do?

10 Well, the contract said repair the machine. We
11 repaired the machine. So, there's no allegation of -- even
12 if a claim for Breach of Implied Duty was allowed, there's
13 no facts to support that claim because Flint did what Flint
14 was allowed to do under the contract.

15 Another basis is you can't have a breach of implied
16 duty if there's no privity of contract. Privity of contract
17 being that Flint and North Edisto both have to be parties to
18 the agreement. When you look at their exhibits, the
19 contracts that are claiming that there's a breach of are
20 loan agreements with John Deere. John Deere loaned North
21 Edisto the money to pay for the equipment. So, we can't
22 possibly have breached a contract that we're not even a
23 party to.

24 Another consideration is they don't argue that, that
25 Flint has done anything to prevent them from performing.

1 And so that's another reason why the claim fails.

2 So, for, for all of those reasons, they failed to state
3 a claim for breach of implied duty of the Covenant of Good
4 Faith and Fair Dealing.

5 Okay. So, back to our second main point, which is that
6 they failed to state a claim for a class action. First, if
7 you look at their first Counterclaim, it literally says the
8 cause of action is class action. There is no such thing as
9 a cause of action for class action. A class action rests on
10 causes of action, but, when you read that, that count,
11 there's no cause of action in there. And, as you can
12 imagine, Your Honor, staring down the barrel of a class
13 action case, you'd like to know what the class action is
14 about.

15 So, it, it doesn't state a cause of action to support
16 the class action, and then, because the Plaintiff should
17 prevail on the first argument that's there's no implied
18 duty, assume that what the Defendants and Counterclaimants
19 really mean is that their class action is for breach of the
20 implied duty of the Covenant of Good Faith and Fair Dealing,
21 if you assume that, but it's not clear from the face of the
22 Counterclaim, then, because there's no claim for the breach
23 of the implied duty, then there's no class action.

24 So, if the -- if my first argument prevails, then it
25 knocks the feet out from under the class action argument.

1 Okay. Additionally, Your Honor, Rule 23 is the Class
2 Action Statute. And so, when you sue for class action,
3 there's five elements that the Court looks at to determine
4 whether it's proper to permit the class action to continue.
5 Importantly, Your Honor, Rule 23 gives you the power, right
6 now at the early phases of the litigation, to manage the
7 litigation.

8 Our position today is that the Court should dismiss or
9 strike the Counterclaims altogether. I think the, the law
10 that -- we're, we're on squares there, and -- but a backup
11 is, Your Honor, we need to manage the class action
12 appropriately so that we don't spend literally tens of
13 thousands of dollars chasing our tail on issues that we
14 don't understand and that aren't gonna get us anywhere.

15 That being said, I'm not here for my backup. We're
16 here to have it dismissed, and it's, it's proper to have it
17 dismissed, Your Honor.

18 The first factor or, or an element -- actually it's an
19 element because you have to have it. My understanding of
20 factors and elements are, factors, you waive them, but you
21 don't have to have all of them. Elements, you have to have
22 all of them.

23 Here, there are five elements to Rule 23 class action.

24 Okay. So, the first is numerosity. Numerosity means
25 there's multiple class members. Well, they have one person,

1 one Defendant, that would be the Counterclaimant, who could
2 theoretically be their class. They've identified, in their
3 Counterclaim, no other potential class members. So, there's
4 no numerosity.

5 The next element is that there has to be commonality.
6 So, it's commonality as to law, and commonality as to facts.
7 Well, there's no commonality as to law because their
8 counterclaim fails because there is no law because you can't
9 have a claim for implied duty -- breach of the implied duty.

10 In addition, there's no commonality among facts. When
11 you have a class action case, you look for kind of the same
12 song, second verse, ten thousandth verse. Here, our claim
13 is for repairs of a machine. It appears that what they're
14 trying to build is some discrepancies between invoices for
15 the sales of machines and financing machines by John Deere,
16 and those machines have what's called an ultimate uptime
17 warranty and service package.

18 The repaired machine did not have that ultimate uptime
19 service package. And so we're here on a repair on a
20 non-ultimate uptime machine. They're bringing in --
21 attempting to bring in other class plaintiffs who don't have
22 a repair problem, have a warranty, and have purchased
23 different machines. So, you -- it defies the whole same
24 song, second verse approach that's necessary for
25 commonality.

1 The next is typicality. Really for the same issues.
2 The issues in this case are not typical of the issues of any
3 potential class members because of the element of
4 individualized proof. Here there's a lot of individualized
5 proof as to the repair issues. And so it's completely
6 different than what the claims would be for -- the
7 difference between -- their alleged difference between the
8 invoices and John Deere's loan agreements.

9 The fourth element is adequacy. The, the Court is
10 directed to look at whether this Counterclaim Plaintiff is
11 an adequate class representative. Our position is that the
12 Counterclaimant is not an adequate class representative.
13 Their primary goal is to make it so expensive that we can't
14 recover our \$10,500 in repairs. So, they're not an adequate
15 class representative.

16 The, the final element, Your Honor, is Rule 23 is, is
17 very clear. You have to plead that the amount of the
18 controversy exceeds \$100. That is not pled. And so,
19 failure to establish that amount is fatal to the claim.

20 So, Your Honor, I know I've thrown a lot of -- a lot at
21 you this morning. We ask that you dismiss or strike the
22 Counterclaims in their entirety. Both Rule 12 permits that.
23 Rule 23 permits the Court to take a peek under the hood at
24 the class action and manage it from the get go. If -- with
25 the Court indulgences, I would like to hear from Mr. Whitt,

1 and then have time for rebuttable.

2 THE COURT: Absolutely.

3 Yes, sir.

4 MR. WHITT: Your Honor, first of all, Randy Whitt on
5 behalf of the Defendants. I efiled a memorandum this
6 morning, and I've got a paper copy if you would like me to
7 hand that up as well.

8 THE COURT: Please.

9 Thank you.

10 MR. WHITT: So, to start, the RoTEC case, every defense
11 lawyer I know loves the RoTEC case. Not one of them seems
12 to really understand what the case says because I hear,
13 repeatedly, you've got to have a breach of an expressed term
14 of the contract in order to make the implied duty of good
15 faith and fair dealing actionable. If I had a nickel for
16 every time I've heard a defense lawyer say that, somebody
17 else would be here, and I'd be on a yacht somewhere in the
18 Mediterranean.

19 what RoTEC actually says is you can't have,
20 simultaneously, two separate causes of action for breach of
21 an expressed term of the contract, and a breach of the
22 implied term that's the duty of good faith and fair dealing.
23 It doesn't say there are no situations in which the implied
24 duty of good faith is actionable unless the corporate
25 interests slip up and actually write something into the

1 contract that requires them to do something that they
2 accidentally breach.

3 The implied term is the term of the contract just like
4 any other. Breach of that one term is sufficient to support
5 a cause of action.

6 what the Court said in ROTEC, which I've handed up a
7 copy, is that the -- it's subsumed -- an action for breach
8 of the implied duty of good faith and fair dealing is
9 subsumed within a breach of contract. It doesn't say
10 anything about there's got to be a breach of an expressed
11 term of the contract in addition. Certainly, if you have a
12 breach of an expressed term, that's actionable as well, but
13 it's not required, and ROTEC does not mean that a single
14 cause of action based on breach of that implied duty of good
15 faith and fair dealing is not actionable. It's just not
16 there in the opinion, Your Honor, and I'll, I'll move on.
17 Certainly with -- the Court's adequate -- more than
18 adequately capable of reading that and seeing what's there
19 and what's not.

20 I was shocked to hear opposing counsel say it wasn't
21 clear what kind of class we're talking about. If you look
22 at Paragraph 16 of the Answers and Counterclaims, 16-A
23 identifies a potential class of customers of Flint who were
24 presented invoices containing inflated and improper charges,
25 which is the machine that was repaired as opposed to the

1 other two, the Exhibit A and Exhibit B machines, which are
2 related to the safe -- our claim in those cases is related
3 to the sale of those units.

4 So, we've got one class where we're saying Flint did
5 the repairs, but the agreement does not function as a blank
6 check for Flint just to then, after the repairs have been
7 done, send us a bill for whatever amount they, they decide
8 to send it for, and that the dispute that is here and that,
9 in the context of a 12(b)(6) Motion, our allegation that
10 they sent us an invoice with inflated and improper charges
11 is, is taken as true for today. There's opportunity to stay
12 on the road where they'll have to be additional proof to
13 sustain that allegation, but, for today, it's taken as true
14 that they sent us an invoice with inflated and improper
15 charges in it.

16 we're also saying they may have done that to other
17 people, and, in the event they did that to the other people,
18 that it would be appropriate, down the road, for the Court,
19 after there's been discovery and we've identified who else
20 may have received similar invoices, for the Court to look at
21 is it appropriate to certify a class. But until that
22 discovery's done, and there's an indication of how many
23 people this happened to, and what similarities there are
24 between the invoices that we got and the invoices that other
25 people may have gotten, that it's premature. It's, it's

1 pure conjecture as to whether there's a class action that's
2 ultimately going to be certified by the Court because we
3 don't have the discovery. We don't have the basis for
4 making all those decisions at this point.

5 The defense would like to short circuit that and say we
6 don't ever want to have to do any discovery on this. We
7 don't want to have to produce any evidence as to whether
8 we've done this to other people. We just -- we just want it
9 all to be over now.

10 The second class that I've identified in 16-B is
11 customers who entered into financing transactions, and were
12 presented one set of figures by Flint, but a different set
13 of figures were provided to John Deere who ultimately did
14 the financing in these cases. This -- the piece of
15 equipment was sold by Flint, but then there was a loan from
16 John Deere Financial to actually pay that purchase price.

17 And in Exhibit A and Exhibit B to the counterclaims,
18 we've got two examples of whether, on Flint's invoice,
19 looking at Exhibit A, there's a piece of equipment that's
20 got a price of \$400,000, and then there's an ultimate uptime
21 charge in the amount of \$59,263.

22 Well, if look at the next page, that's the John Deere
23 figures. The ultimate uptime has disappeared from this set
24 of numbers, and the charges for the physical items that were
25 sold have been increased to make up the same total amount.

1 we believe that's a problem. We believe that that, at
2 least, puts the burden on Flint to come in, and, if they say
3 everything's on the up and up, they need to come in and
4 explain where all that money went and why this item was two
5 different prices in these two different documents.

6 So, Your Honor, there are three contracts. Each of
7 which has an implied duty of good faith and fair dealing.
8 There's the contract for the repair, and the way they
9 violated that was by presenting us with an invoice that is
10 inflated, and has improper charges in it. Then there's the
11 contract for sale of these various items where they reported
12 one set of numbers to us, but then reported a different set
13 of numbers where our very expensive warranty that we paid
14 for appears to have vanished from the second set of numbers.

15 And those factual allegations, pursuant to Rule 12(b),
16 those are all taken as true for today, and the burden now
17 comes for the Defendant to explain whatever defenses they
18 may have, whatever issues they have. They can do discovery
19 to pin us down about the precise amounts that were inflated
20 and improper. But, just from a standpoint of pleading, I
21 don't believe that, for a class action, you've got to
22 anticipatorily plead facts that you can only learn through
23 discovery.

24 I've put what can be put in to give them fair notice of
25 the two classes that we're talking about, and that then,

1 when we do discovery about the class action and other people
2 who may be similarly situated, they'll know what we're, what
3 we're talking about, what the issue is, what kind of
4 invoices they need to look for, what kind of sales
5 documents, and what kind of documents that they've presented
6 to John Deere that they need to look for to determine how
7 frequently this is happened, and how typical my client's
8 situation is compared to other people that this is happened
9 to.

10 It may be that, when all the facts are in, the Court
11 declines to certify a class or it might grant class
12 certification, but that decision can only be made based on
13 facts that have to come through discovery in this situation.
14 What I've presented is an invoice that we've alleged is
15 inflated, documents that are inconsistent, and I believe
16 that's enough to justify further inquiry. P.

17 As far as discovery goes and it costing tens of
18 thousands of dollars or whatever figure was mentioned, when
19 I served discovery on the Plaintiff, they'll still have the
20 opportunity to come in and file a motion for protective
21 order and say this is outrageous, this is nonsense, this is
22 too expensive, this is that, the other thing, whatever
23 defenses they would have to the discovery. It's just simply
24 inappropriate for them to short circuit the entire case
25 today, and by apparently reading minds as to what my motives

1 are, my client's motives are, a desperate attempt, we're
2 just trying to muddy the water as opposed to, you know, our
3 characterization of their actions is they got caught with
4 their hand in the cookie jar. And they've been sending
5 these invoices out to we don't know how many people at this
6 point that are more than they should be, and we're the first
7 ones that have looked at it and said no, this is not right.

8 And, Your Honor, I believe, under the procedural
9 posture that we're in, it's inappropriate -- it would be
10 inappropriate to dismiss the counterclaims today, and that
11 they should be allowed to go forward, and they'll be ample
12 opportunities down the road for things to be proven, and the
13 Defendant to be protected, but their reading of the ROTEC
14 case is incorrect, and this case should go forward.

15 THE COURT: Yes, sir.

16 MR. DeMOTT: Thank you, Your Honor.

17 We're having to read minds. That's why we're here on
18 12(b)(6). 12(b)(6) is for the purpose of not having to read
19 minds.

20 Have a page and a half counterclaim that we can't make
21 sense of. We got a brief an hour before the hearing that's
22 a page and a half. It doesn't address all the issues. It
23 doesn't even respond to Rule 23 and the five elements that
24 are necessary. It doesn't respond to show that they've pled
25 a hundred dollars in damages. We're having to read their

1 minds to figure out where they're going with this, Your
2 Honor, and that's improper.

3 As to ROTEC, I invite you to read ROTEC. ROTEC's not
4 the only case out there. As outlined in our brief, we cite
5 a couple of other cases. Adams versus G.J. Creel and then
6 the Burdette are, are both in that section that would
7 address that concept. If a claim for the implied duty can't
8 survive, their whole Counterclaim fails. That's really the
9 bottom of the tree. That's a bad pun given the case we're
10 dealing with.

11 As far as the potential classes, the proposition that,
12 that, that he admits that there will be two classes is
13 problematic already because of the very elements of Rule 23.
14 There's no typicality, no commonality. Now the Court's
15 being asked to manage these two separate classes in, in one
16 case.

17 The other thing is they claim inflated charges, but I
18 don't think that's, that that's properly telling us what the
19 claim is. It's not enough facts that they've literally just
20 said inflated charges. Today was the first time that we can
21 even figure out that they mean inflated charges on the
22 repairs. Not inflated charges on the invoices. There
23 should be some explanation as to what those allegations are.

24 As to transforming that into a class action, what that
25 means is anytime I take my car in to get it repaired and I

1 have a dispute with the repairman, I can come into Court,
2 say he overcharged me to fix my transmission, and now I've
3 got a class action against him for every customer who has
4 come in and had their oil changed, tires rotated, and their
5 transmission worked on. Completely unmanageable given the
6 concept of what Rule 23 looks at for purposes of a class
7 action.

8 As far as the, the second class that he proposes, the
9 sales invoices with Flint, and then the loan agreements,
10 Your Honor, I think the Court can take judicial notice of
11 math. If you look at Exhibit B to their Counterclaim, and I
12 apologize that this -- there's no super clean way to, to go
13 through math, and, Your Honor, I have it printed out if you
14 would like it --

15 THE COURT: Okay.

16 MR. DeMOTT: -- if that would help.

17 May I approach, Your Honor?

18 THE COURT: I've got it here.

19 MR. DeMOTT: Oh, you got it?

20 THE COURT: Yeah.

21 MR. DeMOTT: Okay. Okay. So, on Exhibit B, the, the
22 first page is the Flint invoice. And so if you see the
23 Feller price was \$266,903, and then the ultimate uptime
24 warranty and service plan charge was \$33,097 for a total of
25 \$300,000.

1 what is not perfectly clear from this document is that,
2 for the \$266,903, they got the Feller and the saw head. The
3 saw head is \$55,000 and the Feller Buncher is \$211,903. So,
4 \$211,903 plus 55,000 is \$266,903.

5 So, what he -- they bought was a Feller, a saw head,
6 and a warranty. All three of those are expressed on this
7 invoice. The Feller and the head are combined \$266,903.
8 So, for a total purchase price of 300,000.

9 If you flip, and this is, again, on Counterclaimant's
10 Exhibit B, to the last page, which is the letter from John
11 Deere Financial, on that letter, it says the Feller Buncher
12 is 245,000, and that the saw is 55,000. This is the evil,
13 and I don't, I don't mean that sarcastically. This is the
14 evil that they're claiming that Flint perpetrated.

15 well, 245,000 plus 55,000 is \$300,000. On the John
16 Deere invoice, we have 300,000. On the Flint invoice, we
17 have \$300,000.

18 Okay. The only difference is the Feller Buncher, on
19 John Deere's document, says that it's 245,000. Well, John
20 Deere shows the Feller price and the warranty price combined
21 plus the saw head. We show the Feller and the saw head plus
22 the warranty. Either way, you have three numbers that reach
23 \$300,000.

24 THE COURT: Okay. I mean I'm with you.

25 MR. DeMOTT: okay.

1 THE COURT: I just -- I don't know that it's important
2 for a Motion to Dismiss.

3 MR. DeMOTT: And I think the reason it's important,
4 Your Honor, is I think the Court can take notice of math,
5 and, to the extent the class is based on incorrect math,
6 then there's no class claim.

7 THE COURT: Okay.

8 MR. DeMOTT: So, Your Honor, despite the confusion, the
9 reading of the minds, it all comes back to that there's --
10 they haven't stated a claim for the class. They haven't
11 stated a claim for the breach of the implied Covenant of
12 Good Faith and Fair Dealing. And if there -- if that claim
13 doesn't exist, then the Counterclaims fail.

14 THE COURT: Yes, sir.

15 MR. WHITT: Your Honor, if I may just briefly.

16 Burdette is an unpublished opinion. So, I meant to
17 bring that to the Court's attention earlier. So, I think
18 that is important just to get out there.

19 I don't think that any of these cases say anything
20 inconsistent with what ROTEC says, but I just, for
21 completeness sake, felt like I needed to say that Burdette's
22 unpublished, and the Supreme Court rules are very clear
23 about what that, what that means.

24 Your Honor, there's nothing wrong with their being two
25 subclasses. That happens all the time. It's entirely

1 appropriate. They're well defined. They can be managed.
2 And, again, I'm, you know, mystified as to the assertion
3 that they knew, for the first time today, that we were
4 complaining about inflated charges in an invoice where, in
5 Paragraph 7 and in Paragraph 16, we've said in both cases
6 invoice containing inflated and improper charges.

7 And, Your Honor, the last thing I'll say, cause I don't
8 want to take up your, take up your whole afternoon here,
9 when the -- when you go to the transmission guy, he gives
10 you an estimate beforehand, and you sign that estimate
11 saying my transmission repairs are gonna be 500 bucks, 800
12 bucks, whatever it is.

13 That didn't happen in this case. After the repairs
14 were done, we get an invoice. There's no estimate ahead of
15 time. There's no document that they've provided that shows
16 that we agreed to those charges in anyway, and, essentially,
17 what they're asserting is that it's good faith and fair
18 dealing for them to just render a bill for any amount, and
19 our only choice is just cheerfully pay it, and that's not,
20 that's not the law in South Carolina.

21 THE COURT: Okay. I'll let y'all know something.

22 MR. DeMOTT: Appreciate your time, Your Honor.

23 MR. WHITT: Thank you, Your Honor.

24 THE COURT: Thank you.

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* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Lexington County, South Carolina, on the 8th day of May, 2018.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

August 13th, 2018

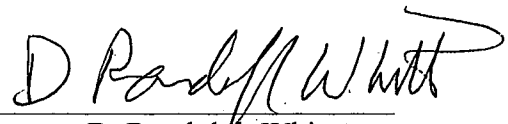
A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and no other material.

November 15, 2018



D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar No. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com

Attorney for Appellants

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