

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas, 13<sup>th</sup> Judicial Circuit  
G. Thomas Cooper, Jr., Circuit Court Judge  
Civil Action Number 2018-CP-23-01639

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**RECEIVED**  
DEC 20 2018  
SC Court of Appeals

Appellate Case No. 2018-002114

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5Star Life Insurance Co., ..... Appellant,

v.

Peek Performance, Inc., ..... Respondent

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**RESPONDENT'S MEMORANDUM  
ON APPEALABILITY**

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## STATEMENT OF FACTS

This case arises out of a contractual relationship between the Plaintiff 5Star, a national insurance company, and the Defendant, Peek Performance, Inc. ("PPI"), an insurance marketing organization. 5Star alleges that it mistakenly overpaid commissions due to PPI. PPI was earning \$20-\$40,000 a month in commissions. The alleged overage was about \$100,000. PPI agreed to have one half of its monthly commissions withheld until the alleged overage was repaid. 5Star agreed to this arrangement, but failed implement it.

A few months later, 5Star realized the alleged overage was not being paid and again requested payment from PPI. Again, PPI invited 5Star take one half of its monthly commissions until the alleged overage was repaid. Again, 5Star failed implement this common sense remedy.

Prior to this time, 5Star began wrongfully transferring agents out from PPI's downline, without PPI's knowledge or consent, so that PPI's commissions were drastically reduced. Eventually, 5Star transferred nearly all the agents out of PPI's downline, so that PPI was earning virtually no commissions from 5Star.

PPI is not sure whether the alleged overage was a legitimate debt or whether it arose from 5Star's continued payments of commissions after transferring PPI's agents out of PPI's downline.

PPI made multiple efforts and overtures to discuss these matters with 5Star. 5Star refused to discuss PPI's concern, but insisted on repayment of the alleged overage.

PPI had been one of the most productive managers for 5Star, yet 5Star refused to discuss their own misconduct, but insisted on discussing only the repayment of the alleged overage. March 15, 2018, 5Star terminated PPI's contract to market their products.

5Star then filed suit. PPI Answered and Counterclaimed. 5Star failed to Reply in a timely manner. On September 13, 2018, the Court issued an Order for Entry of Default and Default Judgment on the Counterclaim against 5Star. 5Star's multiple deficiencies led to the entry of default, including (1) failure to file a timely Reply, (2) failure to respond to interrogatories and requests for production, (3) failure to respond to the Motion to Consolidate, (4) failure to attend the hearing on the Motion to Consolidate, (5) failure to file any Reply beyond a cursory and late general denial, (6) failure to issue any discovery requests of its own, (7) failure to respond to PPI's letter asking again for discovery responses, and (8) failure to respond to the discovery requests, even when ordered to do so.

The Court's legal basis for its ruling was that the error of counsel is the error of the client who hired the counsel. *Sundown Operating Company Inc. v. Intedge Industries Inc.* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009); *Simon v. Flowers*, 231 S.C. 545, 550-51, 99 S.E.2d 391, 394 (1957); *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (2007); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014).

5Star filed a Motion to Alter or Amend, which was also denied. 5Star then gave notice of appeal.

The Court's letter dated December 6, 2018, instructed the parties to submit legal memoranda addressing the appealability of the Orders at issue. PPI submits this response.

## LEGAL DISCUSSION: APPEALABILITY

The right to appeal is controlled by statute. *North Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986). *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988). S.C. Code Ann. § 14-3-330 (1976) governs the appealability of an order. Ordinarily, absent falling within the exceptions set out in that statute, an order must be a final order before it can be appealed. "Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." South Carolina Appellate Court Rule 201. South Carolina adheres to the final judgment rule, which provides that, with certain exceptions, an appeal lies only from a final judgment. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 623 S.E.2d 870, (S.C. App. 2005), *reh. denied*.

These Orders from which appeal is taken are not final orders and are not appealable. The Order entered September 13, 2018, was a denial of 5Star's Motion under Rule 55(c). The Order entered October 29, 2018, was the denial of 5Star's Motion under Rule 59(e) asking the Court to reconsider the denial of its Motion under Rule 55(c). The Court has made no award of damages. The parties need to complete discovery before the Court may quantify damages and make an award.

South Carolina courts have ruled on the specific circumstances that this case presents, and the orders at issue are not appealable. "[T]he grant or denial of a Rule 55(c) motion is not directly appealable under S.C. Code Ann. § 14-3-330 (1976)." *Jefferson by Johnson v. Genes Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988). *See also, Thynes v. Lloyd*, 294 S.Ct. 152, 363 S.E.2d 122 (1987) (the **denial** of a Rule 55(c) motion is not

directly appealable); *Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 361 S.E.2d 340 (Ct.App.1987) (the **granting** of a Rule 55(c) motion is not directly appealable).

This Court provided a lengthy discussion of the appealability of interlocutory orders like the one in the case at bar. Piecemeal litigation, including piecemeal appeals are to be avoided.

“The provisions of [s]ection 14–3–330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.” *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). “The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.” *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000).

*Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014).

Appellant 5Star acknowledges this legal difficulty in footnote 2 in the Notice of Appeal: “[T]his ruling would not, if standing alone, be susceptible to an immediate appeal.” Appellant then asserts, or implies, that “there is an appealable issue before the court.” 5Star does not articulate what that appealable issue is.

Furthermore, 5Star cites *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 409 S.E.2d 340 (1991) in support of its Notice of Appeal, but fails to acknowledge that the Supreme Court explicitly overruled *Hite*:

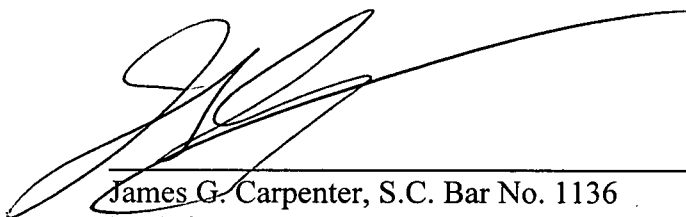
Although generally the denial of a Rule 12(b)(6) motion is not directly appealable, we have allowed an appeal in cases such as this where the issue is whether a claim is properly asserted as a direct action or as a shareholder’s derivative action. *Compare Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986) with *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 409 S.E.2d 340 (1991). **We now reconsider *Hite*, and overrule it** to the extent it holds this type of order is directly appealable.

*Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860 (1995) (emphasis added). Appellant offers no excuse or explanation for its failure to inform the Court that a case which it cites in support of its Notice of Appeal has been explicitly overruled.

### CONCLUSION

The Orders at issue are not final orders and therefore not appealable. Accordingly, Respondent PPI, Inc. prays the Court to dismiss the appeal and award costs to the Respondent.

Respectfully submitted,



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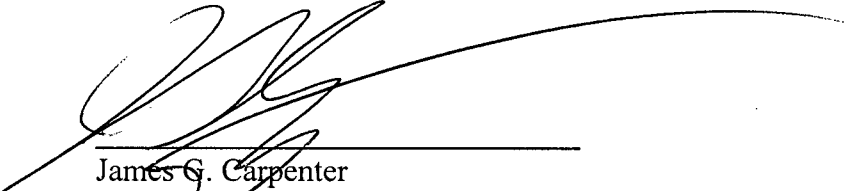
December 13, 2018

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he served a copy of the foregoing Respondent's Memorandum on Appealability upon counsel for the Appellant by first class mail, postage prepaid, this December 13, 2018, addressed as follows:

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WHEN IT'S WORTH FIGHTING FOR

JAMES G. CARPENTER  
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SERVING S.C. AND N.C.

December 13, 2018

Jenny Abbott Kitchings, Clerk  
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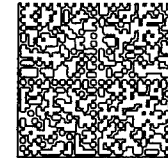
Dear Ms. Kitchings:

Respondent Peek Performance, Inc. submits the enclosed Memorandum on Appealability, as instructed by your letter dated December 6, 2018.

Respectfully submitted,

James G. Carpenter

CC w/ enclosure: Wm. S. Brown V  
Miles E. Coleman  
David C. Dill



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