

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Opinion No. 2016-UP-402 (S.C. Ct. App. filed Aug. 17, 2016)
(Common Pleas Case No. 12-CP-02-01772)

Coves Darden, LLC, ... Petitioner,

v.

Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, ... Respondents.

APPENDIX
(Volume 1 of 2)

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APPENDIX DIVIDER

A

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Case No. 12-CP-02-01772

Coves Darden, LLC, ... Appellant,

v.

Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, ... Respondents.

APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. When a defendant moves for summary judgment without filing any accompanying materials and without stating any grounds in the written motion, does the nonmoving party have a burden to come forward with details on every possible element and piece of evidence in the case in response to evolving briefs and materials thereafter filed by the moving party?
2. What is a "judicial admission," and does it conclusively establish a matter for purposes of summary judgment?
3. Was there a question of fact, precluding summary judgment, as to whether there was a written contract?
4. Was there a question of fact, precluding summary judgment, as to whether there was a reasonably detailed oral contract between the parties, notwithstanding any lack of a written contract?
5. If the contract was oral, was there a question of fact, precluding summary judgment, as to whether it was impossible to have been performed within one year?
6. Does the existence of remaining unresolved factual issues as to whether a contract is written or oral require entry of summary judgment that there was no contract at all?
7. Even if there had been neither a written contract nor an oral contract with specific agreed terms beyond a general employment-at-will contract, was it error to determine that a high-level, highly trusted employee brought over from another country to live on the premises of his employer owed no fiduciary duties?
8. Even if there had been no written contract, nor detailed oral contract, would a general employment-at-will contract support a claim for either tortious interference with contract or tortious interference with prospective advantage?

9. Was there evidence of interfering in the contract?
10. Was justification for the interference established as a matter of law?
11. Was a written contract or detailed oral contract a necessary element of a claim for violation of the South Carolina Unfair Trade Practices Act?
12. Would inducing the employee of another to both breach fiduciary duties to his employer and breach or end his employment with his employer by offering him an illegal compensation arrangement not offered by the present employer present “impact on trade or commerce” (“public impact”) for purposes of a claim under the SCUTPA, either by presenting a conventional anticompetitive tort, a potential for repetition, or other type of public impact?
13. Does misleading advertising following tortiously interfering with a contract compound the violation of the SCUTPA?

SCOPE AND STANDARD OF REVIEW

In reviewing a South Carolina circuit judge’s grant or denial of summary judgment, the appellate court applies, de novo, the same standard and scope of review required to be applied by the circuit judge considering the motion. Laurens Emergency Med. Specialists v. M. S. Bailey & Sons Bankers, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003); Stinney v. Sumter School Dist. 17, 382 S.C. 352, 675 S.E.2d 760 (Ct. App. 2009). It is the appellate court’s duty to correct errors of law, with no particular deference to the court below. Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984).

In a South Carolina state court, summary judgment is governed by state procedural law, rather than federal. Summary judgment shall not be granted unless, first, all issues of fact are resolved in favor of the nonmoving party, and all facts and all inferences from those facts are viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36,

492 S.E.2d 55 (1997). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is disagreement concerning the conclusions to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 672 (2000); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

Summary judgment is a “drastic remedy” which should be cautiously invoked, so no person will be improperly deprived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Schmidt. All it takes is a “scintilla” of evidence in favor of the nonmoving party to create a genuine dispute as to an issue of fact, requiring denial of summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Rule 56, SCRCP delineates the materials to be considered in determining whether a moving party has made a showing of the absence of dispute of material fact; these do not include arguments, assertions or challenges in the moving party’s brief. The grounds for the motion shall be stated with particularity in the written motion. Rule 7(b)(1), SCRCP. Affidavits in support of the motion shall be served with the motion. Rules 6(d) and 56(c), SCRCP. Once a moving party has made a sufficient showing, through use of the materials required by Rule 56, of the absence of a dispute as to any material fact, the nonmoving party cannot rest on the mere allegations or denials in the nonmoving party’s pleadings in order to show a dispute as to any of those facts. Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005).

However, the burden of coming forward and demonstrating, in the first instance, the absence of dispute of material fact is entirely on the moving party. Yarborough v. Rogers, 306

S.C. 260, 411 S.E.2d 424 (1991); see also Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules, 1963 Amendment (“Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented”); and see Adickes v. S.H. Kress, 398 U.S. 144, 159-60 (1970) (discussing procedure under similar federal Rule 56, where moving party must first demonstrate absence of evidence by showing specific discovery passages where evidence was sought and determined to be nonexistent). Absent such a showing, the nonmoving party has no duty to come forward with any materials or other opposition at all. Yarborough; and see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)(federal standard).

STATEMENT OF THE CASE

This case arises from an international agreement with an equestrian trainer and showman.

This appeal arises from a grant of summary judgment, dismissing the case.

On July 20, 2012, Coves Darden, LLC sued Francisco Jose Garcia Ibañez, Dori Derr, and Half Moon Stables, LLC in the Aiken County Court of Common Pleas, seeking injunction and damages in an unspecified amount. Coves Darden alleged, among other things, breach of fiduciary duties of loyalty, honesty and information by Ibañez, and breach of contractual duties of exclusivity, loyalty, and noncompetition by Ibañez, Coves Darden’s former equestrian trainer.

Coves Darden alleged tortious interference with contract by Derr, and unfair trade practices by Derr and her company, Half Moon.

The defendants filed one answer, admitting or denying various allegations of the complaint, and raising no affirmative defenses. Among other things, the defendants specifically alleged in their answer that there was no written contract between Coves Darden and Ibañez, and

denied that any oral contract had ever been negotiated. (R. p. 41.) The defendants also asserted that Ibañez did not agree to ride for Half Moon in upcoming events until after terminating his employment with Coves Darden. (*Id.*, p. 43.)

The defendants sent interrogatories early in the suit. In the interrogatories, the defendants did not make any inquiry at all about a written contract. (See Int., R. pp. 211-212.) They asked for the details of any oral contract between the parties. Coves Darden responded that the contract was not oral, that it was written, and described the written contract. (Pl. Resp. to Int., ¶ 6, R. p. 214.)

The three defendants moved for summary judgment, stating no grounds in either of the two written motions. (R. pp. 106 and 161.) Briefs followed. Coves Darden moved at various times to compel various aspects of discovery. (See R. p. 108 (Dec. 6, 2012 mot.), p. 164 (Jan. 30, 2013 mot.), and p. 456 (Nov. 26, 2013 mot.).) Hearings or partial hearings were held on March 5, 2013, May 20, 2013, and October 15, 2013.

On March 5, 2013, the court ordered Ibañez to appear for a deposition within 30 days of March 5 and ordered responses to certain other discovery. In discovery which occurred, the prior oral agreement of the parties was explored at length. (E.g., Ibañez Depo., pp. 29, 32, 36-40, and 47-50, R. pp. 256, 259, 260-264, and 266-269.)

On July 11, 2013, the court advised the parties that it would hold ruling on summary judgment in abeyance while the parties conducted discovery for 90 days. After July 29, 2013, by consent, the defendants amended their answer to plead the statute of frauds. In other discovery, some deponents did not show up for their depositions and at the same time, counsel for the defendants did not appear. (Stanton Disc. Stat. Aff., ¶¶ 13-14, R. pp. 313-315.)

The Circuit Judge granted summary judgment in favor of the defendants, dismissing the

case.

Coves Darden received written notice of entry of the December 5, 2013 order on December 20, 2013 and served a motion to reconsider under Rule 59(e) on December 29, 2013. Coves Darden received written notice of entry of the January 13, 2014 order denying reconsideration, not before January 13, 2014, and served notice of this appeal on February 12, 2014.

OTHER FACTS

It is uncontested that the evidentiary materials in the record, viewed in the light most favorable to the nonmoving party, contain the following facts.¹

Beginning in 2010, Coves Darden, LLC, of the Aiken, S.C. area, explored reaching an agreement to employ Francisco Jose Garcia Ibañez ("Ibañez"), of Spain. (Coves Aff., ¶¶ 2 and 3, R. pp. 280-281.) Coves Darden explored an agreement which would include making arrangements to sponsor Ibañez's travel to the United States from his residence in Spain, and entry into the United States on a nonimmigrant visa issued by the United States. (Ibañez Depo., pp. 38-41, R. pp. 262-265.)

Coves Darden sought Ibañez to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden. (Coves Aff. ¶ 6, R. p. 281.) Under the U.S. immigration and nationality laws the parties were considering, Ibañez was required to work completely and exclusively for Coves Darden during the term of the visa while the agreement was in force. (Liberatore Aff. ¶¶ 4, 8, 11, 12, 14, and 16, R. pp. 275-278.) This was also the proposed agreement of the parties. (Coves Aff. ¶ 7, R. p. 281.)

¹Under Rule 56, the facts in the record in favor of the nonmoving party are required to be accepted as true.

Coves Darden was run by a married couple, Miguel Coves and Dorothea Darden, who lived on the premises where Ibañez would do most of his work. (Ibañez Depo., pp. 29-32, R. pp. 256-259, and see Coves Aff., ¶¶ 11 and 14, R. p. 282.) Coves Darden defrayed the costs of Ibañez's preliminary visits to the Aiken, South Carolina area for Ibañez to discuss and consider the job. (Ibañez Depo., pp. 29 and 32, R. pp. 256 and 259 (December, 2010 visit), and pp. 36-37, R. pp. 260-261 (January, 2011 visit, with wife).)

The parties reached agreement in January, 2011. (Ibañez Depo. p. 38, R. p. 262 (no differences between the two over the terms).)

They agreed on scope of duties (*id.* at 48-49, R. pp. 267-268), rate of pay, fringe benefits such as a furnished house and car, covering or reimbursement of legal and travel expense, and -- as limited by any visa granted -- duration of the employment. (*Id.*, p. 38, R. p. 262 ("expected" length of two years) and pp. 38-40, R. pp. 262-264 (contract was conditioned on visa); Coves Aff. ¶ 6, R. p. 281 (expected length of two years or more if supported by leave of absence, but determined by length of visa); Oct. 9, 2013 Pl. Supp. Resp. to Int., R. pp. 453-454 (initial term was for whatever initial duration was granted for visa, up to three years if supported by leave of absence).) There were no further terms they needed in order to go forward with their agreement. (Ibañez Depo., p. 38, R. p. 262.)

The basis for the nonimmigrant visa, known as an "O-1 visa," was Ibañez's international prominence and peculiar, extraordinary, and unique ability to train the particular breed of horses in question. (Liberatore Aff. ¶ 7, R. p. 276.) These horses were generally known as "Spanish Horses," or "P.R.E." (Pura Raza Espanola). (Ibañez Depo., pp. 16-17, R. pp. 252-253.) Coves Darden had a particular need for this level of expertise, because of the size of its operation, the particular breed in question, and the level of breeding and competition to which Coves Darden

aspired. (Coves Aff. ¶ 15, R. p. 283.) The expected length of an O-1 visa was three years (Coves Aff. ¶¶ 6, R. p. 281), but it was within the authority the immigration authorities, in spite of the length requested, to grant the visa for any shorter period, including a month. (Oct. 9, 2013 Pl. Supp. Resp. to Interrogatories, R. pp. 453-454.)

After reaching an agreement, Ibañez visited Coves Darden Farm in the United States two more times before getting his visa. (Ibañez Depo., pp. 57-58, and 69-70, R. pp. 270-273 (visits in April-June, 2011, and September-December, 2011).) Coves Darden hosted his pre-employment visits for over 150 days. (*Id.*, pp. 27-28, 37, 58, and 69-70, R. pp. 254-255, 261 and 271-273.)

Even before Ibañez moved to South Carolina and actually began his job, his expected station with Coves Darden was publicized, and at one or more events at Coves Darden's stable, Ibañez was introduced to Defendant Dori Derr, among others invited. (Coves Aff. ¶ 5, R. p. 281.)

Coves Darden proceeded to arrange for, and pay for, the application for, and processing of, the nonimmigrant visa petition. (Coves Aff. ¶ 12, R. p. 282.) They paid the legal expenses pertaining to this process. (*Id.*) They paid the travel expenses. (*Id.*, ¶¶ 3, 7, 11, 12, 30, and 35, R. pp. 280-282 and 285-286.) During this process, Coves Darden was asked by the United States Citizenship and Immigration Services to submit a written employment contract of the parties. (*Id.*) A written contract was prepared, signed by Miguel Coves, and submitted to the processing authorities. (*Id.*)

Coves Darden's visa attorney went over the written contract on the phone in an international call with Ibañez, and informed him it would be in the consular file when Ibañez went to Madrid for the visa interview in Spain. (Liberatore Aff. ¶ 10, R. pp. 276-277.)

STATEMENT OF ISSUES ON APPEAL

1. When a defendant moves for summary judgment without filing any accompanying materials and without stating any grounds in the written motion, does the nonmoving party have a burden to come forward with details on every possible element and piece of evidence in the case in response to evolving briefs and materials thereafter filed by the moving party?
2. What is a "judicial admission," and does it conclusively establish a matter for purposes of summary judgment?
3. Was there a question of fact, precluding summary judgment, as to whether there was a written contract?
4. Was there a question of fact, precluding summary judgment, as to whether there was a reasonably detailed oral contract between the parties, notwithstanding any lack of a written contract?
5. If the contract was oral, was there a question of fact, precluding summary judgment, as to whether it was impossible to have been performed within one year?
6. Does the existence of remaining unresolved factual issues as to whether a contract is written or oral require entry of summary judgment that there was no contract at all?
7. Even if there had been neither a written contract nor an oral contract with specific agreed terms beyond a general employment-at-will contract, was it error to determine that a high-level, highly trusted employee brought over from another country to live on the premises of his employer owed no fiduciary duties?
8. Even if there had been no written contract, nor detailed oral contract, would a general employment-at-will contract support a claim for either tortious interference with contract or tortious interference with prospective advantage?

9. Was there evidence of interfering in the contract?
10. Was justification for the interference established as a matter of law?
11. Was a written contract or detailed oral contract a necessary element of a claim for violation of the South Carolina Unfair Trade Practices Act?
12. Would inducing the employee of another to both breach fiduciary duties to his employer and breach or end his employment with his employer by offering him an illegal compensation arrangement not offered by the present employer present “impact on trade or commerce” (“public impact”) for purposes of a claim under the SCUTPA, either by presenting a conventional anticompetitive tort, a potential for repetition, or other type of public impact?
13. Does misleading advertising following tortiously interfering with a contract compound the violation of the SCUPTA?

SCOPE AND STANDARD OF REVIEW

In reviewing a South Carolina circuit judge’s grant or denial of summary judgment, the appellate court applies, de novo, the same standard and scope of review required to be applied by the circuit judge considering the motion. Laurens Emergency Med. Specialists v. M. S. Bailey & Sons Bankers, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003); Stinney v. Sumter School Dist. 17, 382 S.C. 352, 675 S.E.2d 760 (Ct. App. 2009). It is the appellate court’s duty to correct errors of law, with no particular deference to the court below. Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984).

In a South Carolina state court, summary judgment is governed by state procedural law, rather than federal. Summary judgment shall not be granted unless, first, all issues of fact are resolved in favor of the nonmoving party, and all facts and all inferences from those facts are viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36,

492 S.E.2d 55 (1997). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is disagreement concerning the conclusions to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 672 (2000); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). Summary judgment is a “drastic remedy” which should be cautiously invoked, so no person will be improperly deprived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Schmidt. All it takes is a “scintilla” of evidence in favor of the nonmoving party to create a genuine dispute as to an issue of fact, requiring denial of summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Rule 56, SCRPC delineates the materials to be considered in determining whether a moving party has made a showing of the absence of dispute of material fact; these do not include arguments, assertions or challenges in the moving party’s brief. The grounds for the motion shall be stated with particularity in the written motion. Rule 7(b)(1), SCRPC. Affidavits in support of the motion shall be served with the motion. Rules 6(d) and 56(c), SCRPC. Once a moving party has made a sufficient showing, through use of the materials required by Rule 56, of the absence of a dispute as to any material fact, the nonmoving party cannot rest on the mere allegations or denials in the nonmoving party’s pleadings in order to show a dispute as to any of those facts. Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005).

However, the burden of coming forward and demonstrating, in the first instance, the absence of dispute of material fact is entirely on the moving party. Yarborough v. Rogers, 306

S.C. 260, 411 S.E.2d 424 (1991); see also Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules, 1963 Amendment (“Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented”); and see Adickes v. S.H. Kress, 398 U.S. 144, 159-60 (1970) (discussing procedure under similar federal Rule 56, where moving party must first demonstrate absence of evidence by showing specific discovery passages where evidence was sought and determined to be nonexistent). Absent such a showing, the nonmoving party has no duty to come forward with any materials or other opposition at all. Yarborough; and see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)(federal standard).

STATEMENT OF THE CASE

This case arises from an international agreement with an equestrian trainer and showman.

This appeal arises from a grant of summary judgment, dismissing the case.

On July 20, 2012, Coves Darden, LLC sued Francisco Jose Garcia Ibañez, Dori Derr, and Half Moon Stables, LLC in the Aiken County Court of Common Pleas, seeking injunction and damages in an unspecified amount. Coves Darden alleged, among other things, breach of fiduciary duties of loyalty, honesty and information by Ibañez, and breach of contractual duties of exclusivity, loyalty, and noncompetition by Ibañez, Coves Darden’s former equestrian trainer.

Coves Darden alleged tortious interference with contract by Derr, and unfair trade practices by Derr and her company, Half Moon.

The defendants filed one answer, admitting or denying various allegations of the complaint, and raising no affirmative defenses. Among other things, the defendants specifically alleged in their answer that there was no written contract between Coves Darden and Ibañez, and

denied that any oral contract had ever been negotiated. (R. p. 41.) The defendants also asserted that Ibañez did not agree to ride for Half Moon in upcoming events until after terminating his employment with Coves Darden. (Id., p. 43.)

The defendants sent interrogatories early in the suit. In the interrogatories, the defendants did not make any inquiry at all about a written contract. (See Int., R. pp. 211-212.) They asked for the details of any oral contract between the parties. Coves Darden responded that the contract was not oral, that it was written, and described the written contract. (Pl. Resp. to Int., ¶ 6, R. p. 214.)

The three defendants moved for summary judgment, stating no grounds in either of the two written motions. (R. pp. 106 and 161.) Briefs followed. Coves Darden moved at various times to compel various aspects of discovery. (See R. p. 108 (Dec. 6, 2012 mot.), p. 164 (Jan. 30, 2013 mot.), and p. 456 (Nov. 26, 2013 mot.)) Hearings or partial hearings were held on March 5, 2013, May 20, 2013, and October 15, 2013.

On March 5, 2013, the court ordered Ibañez to appear for a deposition within 30 days of March 5 and ordered responses to certain other discovery. In discovery which occurred, the prior oral agreement of the parties was explored at length. (E.g., Ibañez Depo., pp. 29, 32, 36-40, and 47-50, R. pp. 256, 259, 260-264, and 266-269.)

On July 11, 2013, the court advised the parties that it would hold ruling on summary judgment in abeyance while the parties conducted discovery for 90 days. After July 29, 2013, by consent, the defendants amended their answer to plead the statute of frauds. In other discovery, some deponents did not show up for their depositions and at the same time, counsel for the defendants did not appear. (Stanton Disc. Stat. Aff., ¶¶ 13-14, R. pp. 313-315.)

The Circuit Judge granted summary judgment in favor of the defendants, dismissing the

case.

Coves Darden received written notice of entry of the December 5, 2013 order on December 20, 2013 and served a motion to reconsider under Rule 59(e) on December 29, 2013. Coves Darden received written notice of entry of the January 13, 2014 order denying reconsideration, not before January 13, 2014, and served notice of this appeal on February 12, 2014.

OTHER FACTS

It is uncontested that the evidentiary materials in the record, viewed in the light most favorable to the nonmoving party, contain the following facts.¹

Beginning in 2010, Coves Darden, LLC, of the Aiken, S.C. area, explored reaching an agreement to employ Francisco Jose Garcia Ibañez ("Ibañez"), of Spain. (Coves Aff., ¶¶ 2 and 3, R. pp. 280-281.) Coves Darden explored an agreement which would include making arrangements to sponsor Ibañez's travel to the United States from his residence in Spain, and entry into the United States on a nonimmigrant visa issued by the United States. (Ibañez Depo., pp. 38-41, R. pp. 262-265.)

Coves Darden sought Ibañez to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden. (Coves Aff. ¶ 6, R. p. 281.) Under the U.S. immigration and nationality laws the parties were considering, Ibañez was required to work completely and exclusively for Coves Darden during the term of the visa while the agreement was in force. (Liberatore Aff. ¶¶ 4, 8, 11, 12, 14, and 16, R. pp. 275-278.) This was also the proposed agreement of the parties. (Coves Aff. ¶ 7, R. p. 281.)

¹Under Rule 56, the facts in the record in favor of the nonmoving party are required to be accepted as true.

Coves Darden was run by a married couple, Miguel Coves and Dorothea Darden, who lived on the premises where Ibañez would do most of his work. (Ibañez Depo., pp. 29-32, R. pp. 256-259, and see Coves Aff., ¶¶ 11 and 14, R. p. 282.) Coves Darden defrayed the costs of Ibañez's preliminary visits to the Aiken, South Carolina area for Ibañez to discuss and consider the job. (Ibañez Depo., pp. 29 and 32, R. pp. 256 and 259 (December, 2010 visit), and pp. 36-37, R. pp. 260-261 (January, 2011 visit, with wife).)

The parties reached agreement in January, 2011. (Ibañez Depo. p. 38, R. p. 262 (no differences between the two over the terms).)

They agreed on scope of duties (*id.* at 48-49, R. pp. 267-268), rate of pay, fringe benefits such as a furnished house and car, covering or reimbursement of legal and travel expense, and -- as limited by any visa granted -- duration of the employment. (*Id.*, p. 38, R. p. 262 ("expected" length of two years) and pp. 38-40, R. pp. 262-264 (contract was conditioned on visa); Coves Aff. ¶ 6, R. p. 281 (expected length of two years or more if supported by leave of absence, but determined by length of visa); Oct. 9, 2013 Pl. Supp. Resp. to Int., R. pp. 453-454 (initial term was for whatever initial duration was granted for visa, up to three years if supported by leave of absence).) There were no further terms they needed in order to go forward with their agreement. (Ibañez Depo., p. 38, R. p. 262.)

The basis for the nonimmigrant visa, known as an "O-1 visa," was Ibañez's international prominence and peculiar, extraordinary, and unique ability to train the particular breed of horses in question. (Liberatore Aff. ¶ 7, R. p. 276.) These horses were generally known as "Spanish Horses," or "P.R.E." (Pura Raza Espanola). (Ibañez Depo., pp. 16-17, R. pp. 252-253.) Coves Darden had a particular need for this level of expertise, because of the size of its operation, the particular breed in question, and the level of breeding and competition to which Coves Darden

aspired. (Coves Aff. ¶ 15, R. p. 283.) The expected length of an O-1 visa was three years (Coves Aff. ¶¶ 6, R. p. 281), but it was within the authority the immigration authorities, in spite of the length requested, to grant the visa for any shorter period, including a month. (Oct. 9, 2013 Pl. Supp. Resp. to Interrogatories, R. pp. 453-454.)

After reaching an agreement, Ibañez visited Coves Darden Farm in the United States two more times before getting his visa. (Ibañez Depo., pp. 57-58, and 69-70, R. pp. 270-273 (visits in April-June, 2011, and September-December, 2011).) Coves Darden hosted his pre-employment visits for over 150 days. (*Id.*, pp. 27-28, 37, 58, and 69-70, R. pp. 254-255, 261 and 271-273.)

Even before Ibañez moved to South Carolina and actually began his job, his expected station with Coves Darden was publicized, and at one or more events at Coves Darden's stable, Ibañez was introduced to Defendant Dori Derr, among others invited. (Coves Aff. ¶ 5, R. p. 281.)

Coves Darden proceeded to arrange for, and pay for, the application for, and processing of, the nonimmigrant visa petition. (Coves Aff. ¶ 12, R. p. 282.) They paid the legal expenses pertaining to this process. (*Id.*) They paid the travel expenses. (*Id.*, ¶¶ 3, 7, 11, 12, 30, and 35, R. pp. 280-282 and 285-286.) During this process, Coves Darden was asked by the United States Citizenship and Immigration Services to submit a written employment contract of the parties. (*Id.*) A written contract was prepared, signed by Miguel Coves, and submitted to the processing authorities. (*Id.*)

Coves Darden's visa attorney went over the written contract on the phone in an international call with Ibañez, and informed him it would be in the consular file when Ibañez went to Madrid for the visa interview in Spain. (Liberatore Aff. ¶ 10, R. pp. 276-277.)

Ibañez obtained his visa in Madrid, entered the United States, and commenced work for Coves Darden in or around February 8, 2012.

Although for the first competition Ibañez entered, the training of the horses and other preparation began over a month earlier, Ibañez did not win. (Coves Aff. ¶ 18, R. p. 283.) He explained that he had studied the wrong test or set of rules or instructions for the competition. (Id.) Derr, who also owns a small number of the same breed of horses was present in the same competition, and did better than Ibañez. (Id.)

By June of 2012, preparations had long been underway for another competition in Georgia. (Coves Aff. ¶ 19, R. pp. 283-284.) The competition was on a Saturday, June 9, and entrance fees, lodging for people, and lodging for horses had to be arranged and committed in advance. (Id.) Departure from Aiken, with the horses, was scheduled for early the Friday before, June 8. (Id.) Ibañez assured Coves Darden in advance that he foresaw all of the logistics and needs for the competition. (Coves Aff. ¶ 20, R. p. 284.) Ibañez did not appear for work on the Friday before the competition. (Id.) Later in the day, the plans had to be cancelled. (Id.)

When there was no appearance by, or word from, Ibañez on Saturday, Coves Darden discovered that his residence was abandoned, that his car was left at the residence, and that he had left a note in the residence that he had ended his employment. (Coves Aff. ¶ 21, R. p. 284.)

Ibañez gave no advance notice to end his employment and did not give any of the advance warning required under the written contract. (Id.)

Coves Darden had also scheduled official entry and participation in a competition in Georgia for approximately one week later, which also required advance commitments of entry fees, lodging for people, and lodging for horses. (Coves Aff. ¶ 22, R. p. 284.) This competition, too, had to be cancelled. (Id.) Both competitions were necessary in order to advance to further

levels of competition. (Id.) Additionally, in the competitions themselves, success would enhance the value and reputation of the horses. (Coves Aff. ¶ 23, R. p. 284.) In addition, in the first competition, prize money was available for certain levels of success, and in this instance a success would have been very probable. (Id.)

For many forms of competition, commitment to enter the competition, along with a commitment of entry fees, must be made two or more weeks in advance of the competition. (Coves Aff. ¶ 24, R. p. 284.) For many forms of competition, a month or more of training of the horse is required. (Id.)

Shortly after finding Ibañez's note that he was breaking his employment agreement with Coves Darden, Coves Darden discovered that Ibañez had been registered to ride and show a horse for Derr and her stable, Defendant Half Moon Stables, in a shortly upcoming competition. (Id.)

Not known to Coves Darden until later, Derr and Half Moon promised Ibañez an employment arrangement at Half Moon, whereby, in addition to his direct pay from Half Moon, Ibañez could pursue side money from side jobs in his own right. (Coves Aff. ¶ 37, R. p. 287; Stanton Discovery Status Aff., ¶¶ 11 and 18, R. pp. 313 and 316.) Under the arrangement, Half Moon would facilitate these other endeavors of Ibañez in violation of U.S. immigration and nationality laws. (Id., and see Liberatore Aff., ¶¶ 4, 8, 11, 12, 14, and 16, R. pp. 275-278 (working for self is absolutely prohibited under the law).) Also not known precisely to Coves Darden until later, Derr and her husband had begun, at least as early as June 1, 2012, efforts to modify Ibañez's O-1 visa to substitute Half Moon as the exclusive employer of Ibañez. (Coves Aff. ¶ 54, R. p. 290; Stanton Disc. Stat. Aff., ¶¶ 8, 9, and 10, R. p. 313.) Not known precisely to Coves Darden until later in the litigation, Derr had registered Ibañez on June 2, 2012, while

Ibañez was still employed by Coves Darden, to ride for Half Moon in an event to be held about 21 days later. (Stanton Disc. Stat. Aff., ¶¶ 2-6, R. pp. 311-312.) The materials revealing these matters were not produced by the defendants in response to an order compelling certain discovery and were at odds with Derr's deposition testimony. (*Id.*) These materials also contradicted Derr's affirmative assertion in her answer to the complaint.

ARGUMENT

- I. The Circuit Court did not apply the correct standard of decision in deciding the summary judgment motion; the Circuit Court is not free to disregard contradictory evidence, an early unsworn interrogatory response is not a judicial admission that conclusively establishes a matter, and an early unsworn interrogatory response is also not an affidavit which renders a subsequent affidavit a "sham." (Issues 1 and 2)**

The Circuit Court erred in both stating and applying the standard by which to decide summary judgment. The Court erroneously held that that the court was "free to disregard" certain evidentiary materials of record in determining whether there was a genuine dispute of facts material to the motion.

In its order at 2 and 3, under a heading, "Undisputed Facts and Party Admissions," the court used and relied upon, but did not explain what it meant by, the term "judicial admission." Here, the court did not actually confine itself to facts which were undisputed, as required in determining a summary judgment motion.²

Rather, the court designated certain statements by a party to be "admissions," and then treated them as conclusively established, despite the presence of other material in the record throwing light on those statements, or contradicting the court's interpretation of them.

In a similar vein, but referencing distinctly different concepts, in its order at 4, the court

²The correct standard is stated under "Scope and Standard of Review," above, and incorporated in this argument.

misstated the “legal standard for summary judgment.” Here, the court incorrectly stated and applied the holding of Coffey v. Jenkins, 117 S.C. 321, 109 S.E. 117 (1920), and the much later holding of Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). The court accordingly proceeded to “freely disregard” any affidavits perceived by the court to be “conflicting” with other evidentiary matter adduced by the same party -- and even disregard the sworn testimony of the opposing party. (Cf. Order at 4, R. p. 14 (stating the court is “free” to ignore contradictory affidavits, citing 1920 case involving judicial estoppel when formal stipulation to testimony is given in order to avoid continuance).)

Under the foregoing predominant errors, the court was erroneously constrained in its analysis of whether there was a contract. Using the foregoing erroneous standard of decision, the court determined that there was no contract, basing its decision largely upon an early unsworn interrogatory response by Plaintiff to the effect that the contract at issue was written. Other materials indicated that the parties also had an oral contract, even if agreement to the written contract was denied.

The court interpreted the interrogatory response to state that the parties had never entered into an oral contract, not even prior to the written document the response referred to. This interpretation of the interrogatory response was contradicted by Defendant Ibañez’s own deposition testimony and by the Affidavit of Miguel Coves. Further, counsel for Plaintiff explained the interrogatory answer and the interrogatory answer was amended.

No leave to amend an interrogatory answer is required.³

Yet the court treated the early interrogatory response as immutable, and referred to the court’s interpretation of the response as a binding “judicial admission.” Accordingly, the court

³In fact, amendment is sometimes required by Rule 26, SCRCP.

ignored other material in the record and recited the interrogatory response as an established fact, for the purpose of granting summary judgment. (E.g., Order at 2, ¶ 6, R. p. 12 (“Plaintiff has judicially admitted”), 3, ¶ 6, R. p. 13 (Plaintiff “has not moved to withdraw the foregoing statement” and it “remains” a matter “of record” in the case) and 5, R. p. 15 (“Plaintiff judicially admitted”).) The Circuit Court erroneously applied the term “judicial admission” and failed to look at the abundance of evidence establishing that the parties had a contract, be it one sort or another.

In the early interrogatory answer, Plaintiff forthrightly attempted to clarify that there was a written document in which the parties did write up some of the common terms of their contract to support the application made to immigration authorities, and that the contract was, thus, not just an “oral” contract. The early response stated that the agreement was “not oral. It was a written contract....” This response did not state that if Ibañez denied the existence of a written contract, there was no oral one. (See Transcript of March 5, 2013 proceedings, p. 8, L9 to p. 9, L10, R. pp. 54-55 (“if there is no written contract, there is a verbal contract where the parties fully understood the basis on which this man was going to work for them and even if one determined that the contract was an at-will relationship, the black letter law of South Carolina is that employment at-will is ... contractual”).)

In the materials submitted by the defendants from time to time in support of their evolving summary judgment motion, Defendants never adduced a denial by Ibañez that he had entered into a contract of employment with Coves Darden.

The Circuit Court nevertheless misapprehended and misapplied, without citation of authority, the concept of a “judicial admission” to constrict the portions of the record the court considered in deciding to grant summary judgment. This amounted to the court deciding issues

of fact, which is not allowed in ruling on summary judgment. The order employs this “judicial admission” device to deny the existence of any oral contract at all, and focus only on whether a written contract existed.

There was evidence of a written contract. There was also abundant evidence of an earlier oral contract. As discussed further below, the oral contract was also clearly not within the statute of frauds.

An early interrogatory response in a case is sometimes admissible, but contrary to the court’s holding, does not permanently bind a party to an application of the response in a manner which avoids the actual facts of the case for purposes of granting summary judgment.

The court itself states in its Order at 1, R. p. 11, that the suit by Plaintiff is “for the alleged breach of an oral contract of employment.” The court then misapprehends and misapplies caselaw pertaining to in-court stipulations, judicial estoppel, and sham affidavits submitted in contradiction of prior sworn affidavits, none of which are present here. As a result, the court granted summary judgment in contradiction of the facts and justice of the case.

Under the South Carolina Rules of Civil Procedure, specifically Rules 33 and 36(b), responses to interrogatories are distinguished from responses to requests for admissions. A written statement during discovery in response to an interrogatory is not conclusively established in the manner of an admission in response to a request to admit. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991); Wright v. Hiester Const. Co., Inc., 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010).

In Wright, Hiester contracted with the Wrights to build a house for them. Hiester began building the home and hired D & O as a subcontractor to stain some woodwork in the house. After the D & O workers had spent several days in the house staining wood, a fire erupted,

destroying the house.

In the suit, the Wrights contended that Hiester should have been found liable as a matter of law because of “admissions” by Steve Hiester, the president of Hiester, to the effect that D & O caused the fire, written “admissions” by Hiester Construction during discovery that the fire was caused by Hiester's subcontractors' leaving a box of oily rags in one of the rooms, and provisions in the contract suggesting that Hiester was to be responsible for the acts of its subcontractors. Id., 389 S.C. at 518, 698 S.E.2d at 829.

The Court of Appeals observed, “The written admission during discovery was in response to interrogatories, rather than a request to admit.” Id. at 519, 698 S.E. 2d. 830. Distinguishing interrogatory responses from admissions which conclusively establish a fact, the Court of Appeals affirmed the opinion of the lower court, stating that, as opposed to requests to admit, interrogatories are construed “as seeking current information as of the time the question is asked and answered.” Id. The Court of Appeals also separately considered Heister’s deposition testimony, which the opposing party also characterized as “admissions.” The court held the testimony not to bind Heister to the point of excluding contrary facts, opinions, and inferences not in accord with the true facts. Id.

Under Rule 36 of the South Carolina Rules of Civil Procedure (pertaining to requests for admissions), any matter admitted under the rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Wright clearly distinguishes Rule 36, pertaining to the requests for admissions, from Rule 33, pertaining to interrogatories.

Some confusion can arise from multiple usages and meanings of the term “admission.” A statement in an interrogatory response is a statement of a party, and thus is an “admission of a party” under Rule 801(d)(2), S.C.R.Evid., and thus is not hearsay, and is therefore not excluded

from admissibility under the hearsay rule.

This sort of “judicial admission” is a statement which is attributable to a party, and which is, accordingly, nonhearsay for purposes of potential admissibility in evidence. However, this sort of “judicial admission” is not a statement that the party is bound to in the sense of conclusively establishing the matter.

In the sense that statements of a party in the course of litigation are “judicial admissions,” they are not, qua statement, binding stipulations unless specified as such or unless declared to be so by specific rule. Judicial admissions of this sort are generally regarded as simply evidence which can be “used” in a second trial. Alex Sanders, Deborah Neese, and John S. Nichols, South Carolina Trial Handbook for South Carolina Lawyers §10:23 (p.10-19)(Law Co-op. 1996)(“They are generally regarded as evidence of an admitted fact, so counsel should be careful in relying on them as excusing the need for other proof in the second trial”).

Few statements of a party, even when unambiguous, are regarded as binding, unamendable, or irrevocable, or as foreclosing introduction of other evidence. Even Rule 36(b), SCRPC, which relates to actual “rule” “admissions” made in response to a formal “request for admissions,” allows a party to withdraw or amend a response under certain circumstances.

Thus, a party is not immutably bound to an adverse characterization of an early unsworn interrogatory answer which is not only readily susceptible to a very different meaning, but contrary to the other papers and evidence, including facts known to and admitted by the other party. The Circuit Court erred in holding to the contrary. The Circuit Court erred in using the early unsworn interrogatory response to conclusively establish that there was never any oral contract.

An additional dimension of this error was the court’s ruling seeming to imply that

Ibañez's deposition testimony should be disregarded because it was tantamount to a "sham affidavit," because it contradicted the early unsworn interrogatory response of Coves Darden. The interrogatory response that the court relied on was given in response to a set of interrogatories in which opposing counsel for the defendants had noticeably failed to inquire about the written agreement, and referred only to an oral agreement. The meaning of the interrogatory response – clarifying that there was a written document – was later further clarified in later discovery and filings, including an amended interrogatory response.

The Circuit Court nevertheless ruled as if there were "sham affidavits" submitted in this case, contradicting some prior affidavit of the same party. The statement that the court relied on was in an early interrogatory response and not a sworn affidavit.

Even if a party says something in an actual affidavit and later contradicts it, the first statement is not necessarily regarded as a conclusively established fact for purposes of summary judgment. South Carolina law distinguishes between a "sham affidavit" and a correcting or clarifying affidavit. For guidance, a court first must look at whether an explanation is offered for the statements that contradict prior sworn statements. Cothran v. Brown, 357 S.C. 210, 218-19, 592 S.E.2d 629, 633 (2004). Here, the initial interrogatory response was not sworn, it was not an affidavit, and an explanation was offered -- that the interrogatory response was not intended to deny there had been an oral contract, and was intended to convey that Plaintiff thought Ibañez acceded to the later written contract.

Next, the court will look at how important the contradiction of fact is to the litigation. Id. Here, there was no contradiction, the facts were already within the knowledge of the defendants, and the fact of a prior oral contract was important.

The court must also look at the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact. Id. Here, the only sworn testimony on the subject was in the deposition of Ibañez and the affidavit of Coves. They are consistent on the issue of the oral contract. They are also consistent with the explanation offered for the initial unsworn interrogatory response.

The court may also consider when, in relation to summary judgment, the second affidavit is submitted. Id.; see also Pittman v. Atlantic Realty Co., 359 Md. 513, 535, 754 A.2d 1030, 1042 (2000)(An affidavit may only be disregarded as a sham when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact.)

Here, there is no issue of a second “affidavit.” There is an early unsworn interrogatory response. The record then shows the filing of a summary judgment motion with no stated grounds, and an objection by defendants to any further discovery. The record then shows deposition testimony supporting an oral contract, a sworn affidavit supporting an oral contract, and an amended interrogatory response supporting an oral contract.

In the instant case, abundant evidence of the existence of a detailed oral contract was already in the defendants’ possession when they received the first interrogatory answer, and extensive evidence of the existence of the oral contract was in Defendant Ibañez’s own sworn deposition testimony, obtained after the interrogatory response was given, after Ibañez was finally ordered by the court to appear for deposition. The rule allowing a court to disregard a second, competing, affidavit, is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. Cothran.

It is clear Coves Darden had no intent to create a sham issue and the Circuit Court made no such finding. Indeed, it would be nearly impossible for a party to obtain summary judgment based on the assertion that his own deposition testimony was the sham. Throughout the proceedings, Coves Darden consistently made it clear that there was an oral contract preceding the written document and that the statement in the early interrogatory was not comprehensive and was misused, if not misinterpreted and misapprehended. The court misapplied the sham affidavit rule, and should be reversed.

II. There was abundant material in the record creating at least a genuine dispute of material fact as to whether the parties had a written contract, and as to whether the parties had an oral contract of specified duration, not within the statute of frauds; if the parties proceeded with no specific duration term at all, they still would have had an at-will employment contract. (Issues 1, 3, 4, 5, and 6)

The extraordinary ruling of dismissing the entire lawsuit thus required a series of steps. The Circuit Judge first erroneously held there was no written contract because Ibañez allegedly had not “signed” one. Then, in further error, the Circuit Judge largely disregarded any evidence of a detailed oral contract, and the complete lack of an affidavit from Ibañez concerning the issue. The Circuit Judge then summarily characterized the relationship as “at-will employment.” This then brought the court to erroneously characterize at-will employment as the absence of a contract. The court’s factual finding that there could be no contract of any sort, then formed the basis, or part of the basis, for dismissing every count in the complaint.

There was a contract. It was therefore error to grant any aspect of summary judgment which depended on there being an absence of a contractual relationship. The Circuit Court erred when the court based the court’s decision to grant summary judgment on the perception that there was “contradiction” in the record as to whether the contract was oral or written. (E.g., Order at 5,

R.p. 15.) If there was contradiction, it is contradiction – requiring the resolution of factual issues – which generally requires the denial, rather than the granting, of summary judgment.

In its order at 5-6, R. pp. 15-16, the Circuit Court erroneously presented its decision as involving only two alternatives, both of which were incorrectly analyzed. On the one hand, the court held that the early unsworn interrogatory response and a written response to a request for production forced a conclusion that there was neither an oral contract, nor a written one. (Order at 5, R. p. 15.) This was error because the response and the rest of the record forced neither conclusion. On the other hand, the court held that if “judicial admissions” did not foreclose evidence of an oral contract (such as Ibañez’s own deposition testimony), an oral contract was impossible because of the statute of frauds. (Order at 5-6, R. pp. 15-16.) This was error because the oral contract of the parties was not impossible to be performed within one year. The court further erred in determining that in the event the parties had only an employment-at-will contract, the parties had no contract which would sustain an action for breach of contract. (Cf. Order at 6, R.p. 16 (ruling that termination of an at-will contract does not support an action for breach of contract, but wholly failing to consider other actions which may be a breach, such as lying, stealing, working against the employer while on the payroll, damaging the employer’s goods, carelessly handling the employer’s business, failing to do work already paid for, etc.).)

Summary judgment was required to be denied, because there was no showing by the defendants sufficient to negate any of the following:

1. A written contract, explained to, acknowledged by, and relied upon by Ibañez, regardless of whether he did or did not sign it;
2. A preceding, detailed oral contract including an understanding of exclusive employment, and a duration equal to the length of validity of the visa to be issued,

up to the length of Ibañez's leave of absence, and extendable by the parties subject to support with a visa; and

3. A less specific employment-at-will contract.

General contract law provides that a contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.

Prescott v. Farmer's Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). A contract may arise from oral or written words or by conduct. Id. In the employment context, a contract altering an at-will arrangement may arise, in part, from the oral statement of the employer. Id. The at-will status of an employee may be altered by an oral contract of definite employment. Id.

The required elements of a contract are an offer, acceptance, and valuable consideration. Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. Id. Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Id. A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. Id. All the elements of a contract were in the record.

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Prescott. The offer identifies the bargained for exchange and creates a power of acceptance in the offeree. Id. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act amounts to an offer. Id. To be binding, an offer must be definite. In addition, it must be one which is intended of itself to create

legal relations on acceptance. Id. Ibañez testified in his deposition that the terms of the offer were communicated to him in detail on his December, 2010 trip, that he continued to think about the offer, that he brought his wife back in January, 2011 to continue considering the offer, that he posited no change in the terms and did not need any additional terms, and that he accepted the offer on the January, 2011 trip.

The Circuit Court therefore erred when it granted summary judgment on the contract count against Ibañez based on a conclusion that there was no contract between Coves Darden and Ibañez. There was far more than the required “scintilla” of evidence of a written contract. Even in the absence of a written contract, there was ample evidence of an oral contract with specific terms as to exclusivity and duration. Absent such an oral contract, there would still have necessarily have been an employment-at-will contract, as it is indisputable that Ibañez actually began working for Coves Darden onsite for pay in February, 2012.

As discussed further hereinbelow, the court did not fully consider the issue of whether there was a contract because the court erroneously perceived the absence of a signature to conclusively vitiate the existence of a written contract. As discussed hereinabove, the court erroneously perceived one early interrogatory answer as limiting the development of the facts of the case, as to the earlier oral contract of the parties.

There was evidence in the record that the parties reached an oral agreement on the material terms of an employment contract, and that later, a modified version of that agreement was reduced to writing. The abbreviated and modified version of the oral contract was written out and signed by Coves Darden. A copy was also discussed with Ibañez over the phone and sent to the office that granted the visa to allow Ibañez to come to the United States for employment exclusively with Coves Darden pursuant to that written agreement. Ibañez relied on the terms of

the written contract when he got his visa and came to the United States and worked for Coves Darden. He relied on the approximately \$96,000 a year in pay specified in the contract.

There is thus evidence that the terms of a contract were written down, and discussed with Ibañez as being in written form. There is evidence that Ibañez was told the contract would be in his file at his visa interview. There is evidence that the written contract was available to Ibañez upon his request once he arrived in the U.S. to commence his work.

A written contract does not have to be signed to be a contract. The absence of the signature of one party to a written agreement does not necessarily negate the fact that there is a written contract. Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975); Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161 (1927); Jaffe v. Gibbons, 290 S.C. 468, 351 S.E.2d 343 (Ct. App. 1986). It was therefore error to grant summary judgment on the existence of a written contract.

Even if the written contract were not valid, a contract generally need not be in writing to be enforceable. Armstrong. If there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral. Id. Contracts “within” the statute of frauds must be in writing to be enforceable, unless subject to an exception.

The only statute of frauds which might apply to an employment relationship is the prohibition on contracts which, by their terms, are impossible to be performed within one year. The statute of frauds would require that any such contract be in writing and be signed by the person to be charged. Weber v. Perry, 201 S.C. 8, 9, 21 S.E. 2d 193, 194 (1942) (oral contract of employment for fixed period longer than one year, or so long as other condition remains in place, not exceeding the fixed period, is not within the statute); McGehee v. South Carolina Power Co., 187 S.C. 79, 196 S.E. 538 (1938) (reviewing employment cases in which contingencies,

including death or unsatisfactory performance, remove contracts – even for permanent employment – from the statute of frauds; Center State Farms v. Campbell Soup Company, 58 F.3d 1030 (4th Cir. 1995) (applying S.C. law).

This statute of frauds does not apply.

There is evidence that it was not impossible that the contract in question could be performed within one year.

The clear understanding was that the good faith effort of the parties would be to continue the relationship for at least two years, the expected length of Ibañez's leave of absence from his employer in Spain. This understanding was bolstered, corroborated, and protected by the fact that the O-1 visa was expected to be as long as three years, that the visa would basically allow Ibañez to work only for Coves Darden, and that when the relationship was over, Ibañez would be legally required to leave the country.

The parties reached their agreement in advance of Ibañez being issued a visa. Although the parties were in agreement on the length of the employment as supported by a visa, they were equally clear in agreeing that the actual length of employment would be determined by, and last for, the length of the visa, even if this length was less than one year. The petition for the visa was actually required to affirm this fact. This definition of the duration was satisfactory to Ibañez, as evidenced by the fact that he went right out and obtained his leave of absence from his employer in Spain before the visa could be applied for, and then required Coves Darden to support him in Spain while the application for the visa was pending. (See Coves Aff. ¶¶ 8-10, R. pp. 281-282.) The parties specifically contemplated and agreed for the employment to be for a minimum of the length of the visa, up to the length of Ibañez's expected two year leave of absence from his employer. (See Coves Aff., ¶ 6, R. p. 281, and Pl. Supp. Resp. to Int., R. pp. 453-454.) The oral

contract of the parties, which was reached in advance of getting the visa, was therefore not “within” the statute of frauds, and it was error to grant summary judgment on the absence of an oral contract.

Even if the agreement were “within” the statute of frauds, exceptions to the statute apply in various instances, and it could not be said that facts in the record foreclose the application of an exception to the late-pled defense. One exception, most frequently occurring in instances relating to oral sales of land and oral leases, is that the statute of frauds would not apply in instances in which there is an existing written memorandum of the agreement, and there is at least part-performance and reliance by one of the parties. See, e.g., Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957). Clearly, there is both a written memorandum of the terms of the agreement, and heavy performance and reliance by Coves Darden, along with performance by Ibañez consistent with an affirmance of the agreement. That is, the visa application papers explain the agreement of the parties, and the parties proceeded with the employment.

Even in instances of employment of unspecified duration, which are therefore not “within” the statute of frauds, but which also ordinarily do not have a term as to length which can be enforced, South Carolina courts will, in a proper case, imply a term of reasonable duration sufficient for the nonterminating party to recover its investment or consideration. This occurs when there is independent consideration given in return for the establishment of the employment agreement. Weber; Center State Farms. In such a case, although usually for the benefit of the employee, the independent consideration converts a terminable at will contract to one for a reasonable period of time to enable the party making the investment to recoup the investment.

Id.

As discussed further below, even if the parties had entered into an at-will employment arrangement of completely unspecified duration, they still would have had an at-will contract.

For the foregoing reasons, it was error to grant summary judgment on the absence of a contract between Coves Darden and Ibañez.

III. An employee is, by definition, an agent, and an agent, by definition, is a fiduciary. Ibañez was also a highly trained person of international renown and an important and trusted employee for Coves Darden, and he was a significant investment and worked at a high level where he owed fiduciary duties. Even if he had been an employee at will, an employee at-will still is in a contractual relationship with duties owed by both parties. An action lies for breaching duties in an employment-at-will relationship. (Issues 6 and 7)

Even if there had been no written contract and no oral contract with specific terms as to duration or termination, the Circuit Court further erred in dismissing the count against Ibañez for breach of fiduciary duties. The court further erred in this respect because the court confused an at-will employment contract with the absence of a contract. The Circuit Court held that because there was no detailed oral contract or written contract, the parties only had a relationship of employment at will and had no contract. (Order at 6, R. p. 16 (clarifying that court's ruling is as to "existence" of any sort of contract, and not as to existence or nonexistence of any particular term).) That is, the Circuit Court confused an at-will employment contract with the absence of any contract at all.

Employment at will is a contract. An at-will employment contract is still a contract; it is simply a contract in which one party agrees to work, in return for which the other party agrees to pay, and in which one of the terms is that the period of employment is terminable at will. Jones v. General Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998). If one party does terminate the relationship, the termination itself is generally not a breach and is not actionable. This does

not mean there are no other terms susceptible to breach. The agreement is still contractual.

Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979).

In South Carolina, an “at-will” employment relationship is not the absence of a contract; it is the presence of a contract, one term of which is that the contract may be terminated at will. Prescott v. Farmer’s Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). The relationship is contractual. Id.

Therefore, where the Circuit Court ruled Ibañez could not owe fiduciary duties to Coves Darden because Ibañez had no contract with Coves Darden (e.g., Order at 7, R.p. 17), the Circuit Court additionally erred. This error also misdirected the Circuit Court’s ruling on counts against the other defendants, as discussed further in the separate arguments hereinbelow.

Aside from the Circuit Court’s error regarding the contractual nature of Ibañez’s employment, whether Ibañez was an employee for a term, or an employee-at-will, he still owed fiduciary duties to Coves Darden. It was therefore additional reversible error to grant summary judgment on the breach-of-fiduciary-duties count, regardless of the disposition of the breach-of-contract count.

Ibañez was not an ordinary employee. He was a highly trained expert equestrian trainer, and was hired to provide expert instruction and consultancy services in the equestrian arts. There was a great deal of trust and confidence reposed in Ibañez by Coves Darden when they agreed to pursue a complicated program to hire him, have him work where they lived, have him deal with rare horses, and have him identified with their brand. Ibañez was highly paid and heavily advertised by Coves Darden and his employment was a large investment for Coves Darden.

The Circuit Court based its ruling on lack of fiduciary duties in part on “the absence of a contract of employment.” (Order at 7, R. p. 17.) The error of this basis is demonstrated in the

discussion above. The court was further “persuaded” of the existence of what the court referred to as a “non-fiduciary employee.” (Order at 7, R. p.17.) According to the Circuit Court, these are “non-contractual” employees who are not “upper level managerial employees.” (Id.) The Circuit Court characterized Ibañez as a “non-managerial non-fiduciary employee,” and on this basis, erroneously concluded Ibañez could not be found by a jury to owe fiduciary duties. (Id.)

It is undisputed that Ibañez became an employee of Coves Darden. In South Carolina, an employee per se owes fiduciary duties to an employer. The court’s ruling to the contrary is erroneous. An employee, by definition, is an agent. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999); Restatement (Third) of Agency § 1.01 (2006); id., Official Comment G; and see id. § 7.07(3)(a)(“an employee is an agent who”).

An agent, under black-letter law, owes fiduciary duties to his principal. See, e.g., Restatement (Third) of Agency § 8.01 (2006)(stating the general fiduciary principle of loyalty before other sections on other duties). Even in a hypothetical, bare-bones “at-will” employment relationship, Ibañez owed to Coves Darden, fiduciary duties of loyalty and information. Restatement (Third) of Agency § 1.01 (2006).

It was therefore error for the Circuit Court to determine that only “managerial” employees owe fiduciary duties to their employers.

The Circuit Court supported its ruling only with a tautology derived from North Carolina caselaw, holding that, absent a fiduciary relationship, an at-will employee does not owe a duty of loyalty supporting an action in tort. The court’s reasoning was to the effect that, absent a fiduciary relationship, a relationship is not fiduciary. Additionally, the Circuit Court remarked that the “law in other jurisdictions is in accord,” but cited only California cases relating to the availability of tort remedies in contract cases, some having nothing to do with employment.

Agency is defined as a fiduciary relationship, and other relationships are traditionally recognized as imposing fiduciary duties. Even in the absence of these relationships, a fiduciary relationship can arise from other special circumstances, and it was additional error to rule, on summary judgment, that no evidence existed from which to find such a special relationship.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Armstrong v. Collins, 366 S.C. 204, 621 S.E. 2d 368 (Ct. App. 2005); Moore v. Moore, 360 S.C. 241, 250-51, 599 S.E.2d 467, 472 (Ct. App. 2004); Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004); Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct. App. 2003); Island Car Wash v. Norris, 292 S.C. 595, 599, 358 S.E. 2d 150, 152 (Ct. App. 1987).

A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Moore v. Moore, 360 S.C. at 250-51, 599 S.E.2d at 472; Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); 251 SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

A relationship must be more than casual to equal a fiduciary relationship. Ellis, 358 S.C. at 519, 595 S.E.2d at 822; Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93. It cannot be gainsaid that this was not a casual relationship.

As courts in Texas have similarly recognized, "certain relationships give rise to a 'fiduciary' duty as a matter of law." Crim Truck and Tractor v. Navistar Intern., 823 S.W. 2d

591 at 593 (Tex. 1992). Among these traditional formal legal relationships is that of principal and agent. Id.

Texas has also recognized that certain informal relationships may constitute confidential relationships that give rise to fiduciary duties, where one person comes to trust in and rely upon another, “whether the relation is a moral, social, domestic or merely personal one.” Id. at 594. Generally, whether a confidential relationship gives rise to fiduciary duties is a question of fact for a jury, though it can be a question of law where no evidence exists to support a fiduciary relationship. Id. at 593 (distributor of heavy equipment not in fiduciary relationship with manufacturer). In general, once a fiduciary relationship has been established, the plaintiff may request a jury instruction that the nature of the relationship imposes a “duty to act with the highest degree of loyalty, trust and allegiance.” FDIC v. Wheat, 970 F. 2d 124, 130 (5th Cir. 1992).

Ibañez was a very high level employee at Coves Darden. Coves Darden went to Spain to seek his expertise in his field. Ibañez and his family were guests in Mr. Coves and Ms. Darden’s residence for extended visits preliminary to Ibañez’s arrival for the consummation of the employment contract. Coves Darden introduced Ibañez to Coves Darden’s friend and supplier in Spain, and arranged for accommodations for Ibañez there, and paid Ibañez for work in Spain. Coves Darden paid for all expenses to have Ibañez come work for Coves Darden Farm and went through the entire process of getting a visa for Ibañez to be able to work in the United States. Ibañez was bound to act in good faith and with due regard to the interests of Coves Darden who reposed confidence in Ibañez.

The relationship between Ibañez and Coves Darden was thus far from casual or lower echelon. This is all in addition to the fact that, contrary to the court’s finding, Ibañez did have a

contract with Coves Darden. It was a carefully planned and expensive process to bring Ibañez to the U.S. to work and necessarily required a high degree of trust. Ibañez abused that trust when he secretly worked for Derr, neglected his work at Coves Darden, lied to Coves Darden, calculated his departure in a manner calculated to harm Coves Darden, and competed with Coves Darden.

Regardless of contract, the employment relationship is one of principal and agent, and includes fiduciary duties of the employee to the employer. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Even where the employment relationship is at-will, an action may be maintained for breach of the fiduciary duties inherent in that at-will employment relationship. Id.

It was error to hold that there is such thing as a “nonfiduciary employee,” and it was error to hold that there were no issues of fact precluding a determination that Ibañez was a “non-fiduciary employee.” The Circuit Court accordingly should be reversed.

IV. Secretly using the services of another’s highly responsible employee in directly competing activities, encouraging the employee’s violation of an agreement for exclusivity, and inducing the employee to quit by facilitating a violation of U.S. immigration laws will support a cause of action for tortious interference with contract; it was error for the Circuit Court to rule that there was no contract to support a cause of action, that there was no inducement, and that such activities are justified as fair competition. (Issue 8, 9, and 10)

The Circuit Court also erred in granting summary judgment on the count for tortious interference with contract. The court held that there was no contract. (Order at 9, R. p.19). The court held that Derr did not procure the breach. (Id.) The court also held that there was a “qualified privilege” to interfere with the contract of an “at-will” employee. (Order at 10, R. p. 20.)

Under South Carolina law, a viable claim for tortious interference with contractual relations requires proof of (1) the existence of a contract, (2) the alleged wrongdoer's knowledge

of the contract, (3) an intentional and unjustified interference resulting in a breach of the contract, and (4) damages. Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 642 S.E.2d 726, 731 (2007); Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

An action may be maintained for tortious interference with a contract terminable at will. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct.App. 1987); Todd v. South Carolina Farm Bureau Mutual Insurance Company, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984).

As already discussed above, the Circuit Court erred when it ruled that no contract existed between the parties. There clearly was a contract between Coves Darden and Ibañez, whether it was oral or written.⁴ Ibañez coming to work for Coves Darden was greatly advertised. Ibañez was riding for Coves Darden when he met Derr of Half Moon Stables. Derr clearly knew his employment status with Coves Darden when she interfered with it. The law does not allow Derr to disavow knowledge that there was a contract by claiming not to know all its detailed terms; nor does the law allow Derr to disavow knowledge of a contract by cleverly ascertaining a basis on which Ibañez could claim never to have “signed” a contract. Bocook.

As the Court in Bocook stated:

It is obvious Bocook had a contractual agreement of **some kind** with the various landowners because Bocook had constructed billboards on their properties. Summey was in the same business and **would know Bocook had an agreement** with the landowners. All Summey had to do was to see the billboards **to know or have reason to know of the existence of agreements**. It is true Summey probably **would not know the details** of the leases because they were oral.

⁴Additionally, although, as already demonstrated above, the statute of frauds did not apply, the error of the Circuit Court in dismissing the tortious interference count is compounded by the fact that the statute of frauds is not an available defense for a third party to the contract, here, Derr and Half Moon. Bocook; Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E. 2d 181 (1976).

Unfortunately, the record does not contain much detail about the various leases and their terms. We do not know whether this is because no evidence was introduced or was introduced but the parties did not consider this information pertinent to the appeal. From what we do have, it appears most of the leases involved a payment by Bocook to the landowner with renewal accomplished by Bocook sending a check to the landowner. James Bocook testified the leases ran until the landowner told him to remove the sign. In some situations, there was a thirty day notice period for the landlord to notify Bocook to remove the billboard. There is no information in the record as to what notice Bocook would give a landowner if it desired to remove the billboard for some reason. From the record, we construe these agreements to be contracts terminable at will. This Court previously held a contract terminable at will is a contract upon which an action for interference with contractual relations may be brought.

Bocook, 363 S.E.2d at 394 (emphases added).

Derr induced Ibañez to breach. Derr talked to Ibañez about coming to work for her when they were in direct competition. Derr hired Ibañez. Too shortly after, he was competing for Derr. Considering the time required for getting to know a horse and advance training for competitions, it is clear that Derr had Ibañez working for Derr, against the interest of Coves Darden, while Ibañez was still employed with Coves Darden. This created an issue of fact as to whether Derr, who worked in secret with Ibañez, who did not pay Coves Darden, who claims to be free to do what she did, and whose testimony has been shown to be incorrect, counseled and procured the breach. The Circuit Court erred.

When Ibañez left, he immediately went to Half Moon Stables. The process of hiring a non-American citizen takes time. Half Moon needed to modify Ibañez's visa before he could work for Half Moon. Derr and Half Moon would have to become familiar with the exclusive nature of that visa, and the papers submitted in support of it. Ibañez did not leave adequate notice of the termination of his employment and left at a time calculated to do damage, after lying by making forward-looking comments and promises. (Coves Aff. ¶ 54, R. p.290.) Derr and Ibañez knew Ibañez would be breaching the contract Ibañez had with Coves Darden. The actions of Derr and Half Moon were more than a mere self-interested, unneighborly act. Ibañez

had reassured Coves Darden that he would be competing for Coves Darden in an upcoming competition and that everything was ready. (Id.)

Justification for inducing a breach of contract may be viewed as an affirmative defense. Commerce Funding Corp. v. Worldwide Sec. Servs. Corp., 249 F.3d 204, 213 (4th Cir. 2001)(noting that under Virginia law, one must actually possess a financial interest in the business of a third person to justify interference with the business relationship of another and the third person, citing Restatement (Second) of Torts § 779); accord, Edelco (holding that where allegedly interfering party acted pursuant to its own absolute contractual rights under a contract already existing at the time of the alleged interference, any interference was with justification) and Southern Contracting, Inc. v. H.C. Brown Construction Company, Inc., 317 S.C. 95, ____, 450 S.E. 2d 602, 605 (Ct. App. 1994) (same – “it can be said a factual issue exists unless the actor is exercising an absolute right, equal or superior to the right invaded”). Thus, the Circuit Court erred in granting summary judgment on the justification element.

The Circuit Court addressed the defendants’ justification defense in terms of a “qualified privilege” constructed from North Carolina caselaw and the law of other states. The fact remained, however, that as for being able to show any sort of justification, Defendants cannot do so. As they had no existing contractual relationship with Ibañez, they cannot show justification. Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.

All the caselaw relied upon by the Circuit Court was conditioned on circumstances, not present here, in which the sole breach was the employee’s merely leaving, in which the employee was presumably a U.S. worker whose pay and other working conditions are protected as against foreign workers by U.S. policy, in which the employee had no obligation to stay (“bound only by terminable at will contracts”), and the methods employed were not improper. (See Order at 10-

11, R. pp. 20-21.) In other words, the justification constructed by the Circuit Court depended upon a fact-intensive situation involving “mere enticement” and hiring of an “at-will” U.S. employee, in the absence of improper motive or methods. (See id.) None of this varied caselaw involved a special employment arrangement for a defined period, lying to the first employer and working for the competing employer while still employed by the first employer.

When the contract in question is “at-will,” it is sufficient that there only be a reasonable expectation that, but for the interference, the contract would have continued. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009). The following, among other things, provided such a reasonable expectation: Ibañez had obtained a two year leave of absence, packed up his house and family, got a visa under an understanding he was going to work for Coves Darden for two years, moved to the U.S. from Spain, began a \$96,000 a year job doing what he knew how to do, occupied a house owned by Coves Darden, drove a car owned by Coves Darden, had a family dog provided by Coves Darden, agreed not to work for anyone else, and had a visa only to work for Coves Darden.

Because, as discussed above, there was a contract, it was error for the Circuit Court to dismiss the tortious interference count of the complaint. This is so, even if the contract had been terminable at will. Bocook. It was also error to determine as a matter of law that Derr did not interfere, and that she was justified.

Even in the absence of a binding contract and in the absence of an at-will employment relationship, an action may also be maintained in South Carolina for intentional interference with prospective contractual relations. Crandall Corp. v. Navistar Int’l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990).

The elements of such a cause of action are: (1) the intentional interference with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; and (3) causing injury to the plaintiff. Love v. Gamble, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (Ct. App. 1994). As an alternative to establishing an improper purpose, the plaintiff may prove the defendant's method of interference was improper under the circumstances. Crandall, 302 S.C. at 266, 395 S.E.2d at 180.

In the instant case, Ibañez and Coves Darden did have a contractual relationship, so the "prospective advantage" prong of analysis is not needed. However, it should be noted that "[i]mproper methods," under Virginia law, "include a wide variety of conduct," including "[m]eans that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules." Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.; see also Skillstorm, Inc. v. Electronic Data Sys., LLC, 2009 WL 3316358, at *4 (E.D. Va. Oct. 9, 2009) (quoting Duggin v. Adams, 360 S.E.2d 832, 836 (Va. 1987)). In the instant case, it appears Derr was aided in her interference by violation of immigration laws, among other things.

Determining whether a defendant's methods are improper and whether a plaintiff has demonstrated the elements of tortious interference is ordinarily a matter for the jury and should not be decided in the context of either a motion to dismiss or a motion for summary judgment. Commerce Funding Corp. v. Worldwide Sec. Servs. Corp. (reversing summary judgment grant on the grounds that reasonable jury could find that elements of tortious interference have been met).

In its order, the Circuit Court does not present nor discuss a single alleged fact having a bearing on the "improper methods" element. It must be assumed the court found the actions of

Derr in interfering with the Coves Darden contract were not improper, based solely on the erroneous determination that Coves Darden had no contract with Ibañez.

It should be reiterated that improper method of interference is not an element of tortious interference with an existing contract. In the instant case, there was an existing contractual relationship. Bocook; Camp.

However, as for additional impropriety which would supply a cause of action even if, as in the erroneous finding of the Circuit Court, Ibañez had never entered a contractual relationship with Coves Darden, Coves Darden offers the following.

The visa obtained for Ibañez allowed him only to work for Coves Darden. The O-1 visa, as Derr now well knew after having actually applied for one through a reputable Miami immigration lawyer, requires that the nonimmigrant work only for the permitted employer and not work gainfully any other way – even for himself as an entrepreneur. When the employment ends, he has to leave the country. One of the concerns of the United States immigration and labor laws regarding temporary visas tied to specific employers is that the nonimmigrant do the sort of work that was the basis for the visa, and work gainfully only for the permitted employer.

Accordingly, the immigration laws are very specific that the alien work gainfully and stay in the U.S. only within the parameters of the visa he receives. He cannot simply rely on a visa to get into the country and then set up his own shop, change jobs or type of work, or take on additional jobs.

In the instant case, the means of interference were clearly improper in that Defendants Half Moon and Derr appear to have persuaded Ibañez himself to break the United States immigration laws in order to induce him to work for less than Coves Darden was paying. This would make it difficult for Coves Darden to compete with Half Moon without breaking the law.

In order to induce Ibañez with enough financial and personal incentive for it to be feasible for Ibañez to leave Coves Darden, Half Moon entered into an illegal agreement with Ibañez to facilitate his violation of U.S. immigration laws by allowing him to freelance. This appears in part from the deposition of Derr and from the express terms of the written contract Half Moon eventually entered with Ibañez. This cooperation allowed Half Moon to steal Ibañez from Coves Darden and appropriate the fruit of what Coves Darden worked long and spent much money on.

In their brief of February 28, 2013 at 11 (R. p. 201), the defendants argued that Ibañez's employment was at-will and that the status allowed him to work gainfully for them after hours, while he was employed by Coves Darden. Id. ("simply holding two jobs is not a breach"; "there was nothing under South Carolina law prohibiting Mr. [Ibañez] from working for Half Moon in his off-hours before quitting Coves Darden".) This was a violation of the laws of the United States. This is also "public impact" under the UTPA, as discussed further below.

Post-termination, the defendants continued to violate the law. The illegal compensation deal that Derr used to entice Ibañez away from Coves Darden is remarkable. (See, e.g., Derr Depo. at 18, R. pp. 129 (describing Ibañez as a "free agent").) The side money aspect of the deal is patently illegal. Derr also testified in her deposition that she knew Coves Darden thought it had a "contract" with Ibañez, but that since Ibañez claimed not to have a "copy," she proceeded without concerning herself at all with what it said. (Derr Depo. at 88-89, R. pp.136-137.)

For all the foregoing reasons, it was error to grant summary judgment on the tortious interference count, and the Circuit Court should be reversed.

V. Tortiously interfering with a contract by violating laws designed to protect U.S. workers is unfair competition and an unfair or deceptive act or practice in the conduct of trade or commerce; coupling the interference with advertisements having a tendency to mislead is an additional and related violation of SCUTPA. (Issues 11, 12, and 13)

As discussed in the foregoing argument, Derr used improper methods in interfering with the contract, including violating U.S. laws. Tortiously interfering with a contract by violating laws designed to protect U.S. workers is an “unfair method of competition and an unfair or deceptive act or practice in the conduct of any trade or commerce” prohibited by S.C. Code Ann. § 39-5-20(a) (“SCUPTA”); coupling the interference with follow-up advertisements having a tendency to mislead is an additional and related violation of SCUTPA.

The complaint incorporates into the SCUTPA count, all the previous allegations of the complaint, including Derr’s tortious interference with contract. Half Moon and Derr’s false and misleading advertisement regarding Ibañez being based at Half Moon for “a teaching sabbatical” are allegations in the SCUTPA count in addition to those regarding the already stated common-law unfair competition. Yet the Circuit Court addressed these allegations as if they were the exclusive basis for the claim.

As discussed above, the Circuit Court erred in dismissing the tortious interference claim. For the same reasons, the Circuit Court erred in dismissing the SCUTPA claim. SCUTPA is not, as held by the Circuit Court in its order at 12 (R. p.22), limited to redressing deceptive acts. If the violation complained of is a deceptive act, the damages sought must result from that act, but it does not follow that only deceptive acts are within the purview of SCUTPA.

SCUTPA creates new substantive rights by making unlawful, conduct which was not actionable under the common law. State ex rel. McLeod v. C & L Corp., Inc., 280 S.C. 519, 313 S.E.2d 334 (Ct.App. 1984)(discussing the fact that making out all the elements of an existing tort

is not necessary to establish a violation of the SCUTPA). A fortiori, already existing common law torts of unfair competition, such as tortious interference with contract, are per se unfair competition or unfair or deceptive acts or practices in the conduct of trade or commerce, within the purview of SCUTPA and similar state "Little FTC Acts." See Restatement (3rd) of Unfair Competition §§ 1(a)(3) and (1)(b)(American Law Institute through 2009)(providing that other conduct determined to be unfair competition, and other theories independently existing at common law remain actionable). Because it was error to dismiss the tortious interference count, it was error to dismiss the SCUTPA count. Contrary to the concerns of some of the caselaw cited by the Circuit Judge in his order at 13, this was not "an ordinary commercial dispute" unworthy, as a matter of law, of the protections of the Act.

A violation of SCUTPA basically is analyzed as follows:

The South Carolina Unfair Trade Practices Act makes it unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20 (1985). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." S.C. Law of Torts at 372 (quoting Young v. Century Lincoln-Mercury, Inc., 302 S.C.320, 396 S.E.2d 105, 108 (Ct.App.1989) affirmed in part, reversed in part, on other grounds, 309 S.C. 263, 422 S.E.2d 103 (1992) (per curium)).

Johnson v. Collins Entertainment Company, Inc., 349 S.C. 613, ____, 564 S.E.2d 653, 665 (2002).

The Act is modeled on the FTC Act. The FTC Act was originally concerned only with acts having a harmful effect upon competitors, rather than harm to consumers. FTC v. Raladam Co., 283 U.S. 643 (1931). The Wheeler-Lea Act of 1938 changed this, and allowed the FTC to prevent not only "unfair methods of competition in commerce," but also "unfair or deceptive acts or practices in commerce," Wheeler-Lea Act of 1938, § 3, 15 U.S.C. §45 (a)(1) (1970); and see 83 Cong. Rec. 391-92 (1938) (remarks of Rep. Lea); see also H.R. Rep. No. 1613, 75th Cong., 1st

Sess. 3 (1937). The alternative nature of the FTC Act, relating to both anticompetitive behavior and to consumer-harming behavior, is reflected in the South Carolina "Little FTC Act," the South Carolina Unfair Trade Practices Act. Chuck's Feed and Seed v. Ralston Purina, 810 F.2d 1289 (4th Cir. 1987). The FTC Act, §15, 15 U.S.C. §55 (1970), specifically includes in the realm of "false" advertising of products, an advertisement which may include true statements, when taken separately, but which "fails to reveal facts material in the light of such representations."

This misleading advertising is itself actionable. See Restatement (3rd) of Unfair Competition §§ 2 and 3 (one who, in connection with the marketing of goods or services, makes a representation relating to the actor's own commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another is subject to liability; a representation is to the likely commercial detriment of another if the representation is likely to affect the conduct of prospective purchasers and there is a reasonable basis for believing that the representation has caused or is likely to cause a diversion of trade from the other or harm to the other's reputation or good will.)

The advertisement of Half Moon contradicts the prior publicity of Ibañez' association with Coves Darden and implies that he is a semi-itinerant teacher who came to the United States to work and teach with Half Moon, rather than the fact that Coves Darden made a huge commitment to promote dressage and P.R.E. horses in the United States. The advertisement falsely leads one to believe that Half Moon is a place of prominence and established the connections and spent all the effort and money and somehow, by its prominence, attracted the teacher from across the ocean; the advertisement does not convey the truth that Ibañez' presence in the United States was procured over several years at great expense for a very large purpose by Coves Darden Farm.

The same secretive manner in which Half Moon and Derr coordinated Ibañez' departure from Coves Darden is perpetuated in Half Moon's misleading advertising. Rather than announce, in an above-board fashion which would acknowledge a businesslike and straight-forward change from one employer to another, that Ibañez has now become employed at Half Moon Farm after a change from other engagements in the U.S., Half Moon misleadingly implies that the man is either on some grand, self-sustaining, independent, public-interest teaching tour and was drawn to Half Moon as a place to lodge himself, or that Half Moon itself arranged – and underwrote – the entire program. This was something it took Coves Darden a great period of time, multiple visits, and many thousands of dollars to do. Half Moon and Derr essentially stole that work.

The Circuit Court's order allows Derr and Half Moon refuge in the assertion that when their advertisements are taken separately and out of context, they are technically true under one understanding of the word "sabbatical," and in the further sense that Ibañez is now based at Half Moon, even though that was not why he came to the U.S.

It is the whole meaning which is deceptive. Further, from a legal standpoint, under SCUTPA, actual deception is not required. State ex rel. McLeod v. C & L Corp., Inc. It is a tendency to deceive, which constitutes a violation. Id.⁵

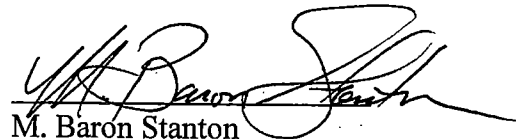
⁵The Circuit Court states in its order at 13, R. p. 23, that "Plaintiff has not pointed the court to any case from any jurisdiction finding that a true statement of fact could be a deceptive act." Plaintiff submits that when the issue is deception, the issue is deception, not literal falsity or truth. Deception is the act of leading a person to believe a state of facts which is not true. Listerine created an impression that it prevented the common cold, in addition to bad breath. When it ceased to claim to prevent the common cold, but continued with true advertisements that it killed germs, it was still misleading. Just as with the tort of defamation, falsity can be accomplished with words which are true when taken separately or out of a context but which can mean something else when understood in the manner intended and complained of. Cf. Richardson v. The State-Record Co., Inc., 330 S.C. 562, 499 S.E. 2d 822 (Ct. App. 1998) (when defamatory words are subject to an interpretation which is true when taken separately and an interpretation which is false when the insinuation is understood, the defense of truth requires

The only partially developed facts of the case, when viewed in the light most favorable to denying summary judgment, show: common law unfair competition in tortiously interfering with contract; improper means and methods violating the immigration laws and affecting the public interest; an interrupted undertaking and relationship which itself affected the public interest in regional and state recognition in horse competitions on an international scale; and misleading advertising which both had a tendency to confuse would-be consumers of Coves Darden's goods and services (P.R.E. dressage training, horse sales, stud services, etc.), and depreciated Coves Darden's investment in its brand. A SCUTPA claim has been fairly put forth.

CONCLUSION

For the reasons stated hereinabove, the Circuit Court should be reversed and the matter should be remanded to the Circuit Court.

Respectfully submitted,



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demonstrating the truth of both meanings).

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INTRODUCTION

This appeal involves a Plaintiff below - and an Appellant before this Court - who cannot make up its mind about the alleged contract giving rise to its claims. Initially, Appellant denied the existence of an oral contract and relied solely on a written contract of employment.¹ However, Appellant admitted that it did not have a fully executed copy of that document.² Indeed, although it was allowed to engage in extensive discovery, Appellant was never able to produce a fully executed copy of the contract.

Later, Appellant did an about face and relied solely on a purported oral contract of employment.³ Even then, it could not clearly articulate exactly what the terms of the oral agreement were.⁴ On still other occasions Appellant asserted the existence of *both* an oral *and* a written agreement.⁵ Appellant subsequently admitted, however, that only *some* of the terms

¹ Plaintiff's Response to Interrogatory 6 (R, p.195, lines 21-22): Interrogatory 6 from Defendants asked Plaintiff to identify the terms of any alleged oral agreement with Mr. Garcia. In response, Plaintiff stated: "The agreement was not oral. It was a written contract presented to and acknowledged by Ibanez in (sic) or before January of 2012, after August of 2011." Although it was supplemented, this admission has never been withdrawn.

² In responding to a request to produce the written contract (R, p. 196, lines 3-4), Plaintiff stated: "For Defendants' information, Defendant [sic, Plaintiff] believes there are none currently responsive to Request 1 (if requesting one with Ibanez's signature.)"

³ At one hearing Appellant's counsel stated: "Was there a contract? The affidavit of Miguel Coves says yes there was. It was an oral agreement that the parties worked on over lengthy meetings, visits from Spain where the man and his family were hosted in the United States, much expense, multiple visits." (R, p. 96, lines 10-14). See footnotes 6, 7, 8 and 9 below for various other versions of the terms of the purported oral agreement.

⁴ Affidavit of Miguel Coves (R, p. 281, lines 13-17) at ¶ 7: "Under the terms of the agreement, we agreed to pay Ibañez 6000 Euros per month (a little less than \$8,000 U.S.), furnish him a house, and pay for his transportation to work. Ibañez agreed to work completely and exclusively for us during the term of the agreement. We also agreed to pay for his individual travel to the U.S. on the first entry under the visa."

⁵ In his Affidavit (R, p. 286, lines 10-12) at ¶ 33, Miguel Coves stated: "Ibanez breached his contract with us. He breached the written agreement which he knew existed, and he breached the underlying agreement we had clearly reached before the contract was even written up."

allegedly agreed to by the parties were reduced to writing.⁶ Appellant has also claimed that the terms of an O-1 visa (terms that were never disclosed during the course of discovery) were incorporated into the agreement.⁷ Finally, Appellant offered the affidavit of its then-attorney, who stated that he reviewed the terms of the written agreement (which only contained *some* of the terms of the oral agreement) with Mr. Garcia⁸ and further stated that Mr. Garcia orally agreed with those terms.⁹ However, this supposed written contract, which only contained *some* of the terms of the purported oral agreement, also had material terms not contained in any of the ever- changing versions of the oral agreement.¹⁰

After postponing hearings on Defendants' motion for summary judgment to give Appellant sufficient time to propound written discovery and take depositions, the Circuit

⁶ Affidavit of Miguel Coves (R, p. 282, lines 16-18), at ¶ 13: "In the course of applying for the visa, *some* common aspects of the agreement were reduced to writing and submitted to the immigration authorities as the terms which would govern the employment if the visa was granted." (emphasis added).

⁷ Affidavit of Miguel Coves (R, p. 273, lines 8-9), at ¶ 16: "The O-1 visa itself, incorporated into the contract, required that Ibañez work exclusively for us as a trainer."

⁸ In documents filed in the court below, and in its brief before this Court, Appellant refers to the Defendant as Mr. Ibañez. In Spain, the patronymic (father's last name) is followed by the matronymic (mother's last name). In Hispanic countries an individual's legal name is the patronymic. Thus, Francisco Jose Garcia Ibañez is more properly referred to as Mr. Garcia. That convention will be followed throughout this brief, although the names are used interchangeably as the context requires.

⁹ Affidavit of Michael Liberatore, (R, p. 275, line 25, 26 & 276, line 22) ¶ 4 & 10.

¹⁰ This document, which is captioned "Confirmation of Terms of Oral Employment Agreement," contains additional material terms not set out in any of the other versions of the alleged oral agreement. (R, pp. 220-224). For example, it contains a thirty-day termination provision, a provision requiring written notice to Immigration and Naturalization Service, representations regarding Mr. Garcia's domicile and intent to return to Spain, assumption of personal liability by Mr. Garcia, salary terms that are materially different, a non-compete clause regarding employment after termination, and a clause requiring arbitration of disputes. None of these appear in any of the various versions of the oral agreement.

Court granted summary judgment, finding that Appellant had failed to come forward with any evidence demonstrating the existence of triable issues of fact, regardless of whether the contract was oral or written.

As discussed in detail below, the Circuit Court correctly granted summary judgment and dismissed the complaint, and that Order should be affirmed in all respects.

I. THE ALLEGED ORAL AGREEMENT FALLS WITHIN THE STATUTE OF FRAUDS AND IS UNENFORCEABLE

A. Oral Contracts of Employment for More than One Year Fall Within the Statute of Frauds and are Unenforceable., Absent Some Exception

The South Carolina Supreme Court has long recognized the applicability of the Statute of Frauds to oral employment contracts. *See Mendelsohn v. Banov*, 57 S.C. 147 (S.C. S.Ct. 1900); *McGehee v. South Carolina Power Co.*, 187 S.C. 79 (S.C. S.Ct. 1938). The common law version of the Statute of Frauds has been statutorily adopted in South Carolina for well over one hundred years, and provides in pertinent part that "No action shall be brought whereby . . . to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof . . ." (S.C. Code Ann. § 32-3-10 (1991)).

The alleged oral contract of employment in this case falls squarely within the scope of the statute and - to the extent it even exists because of the failure to have a meeting of the minds on essential terms of the agreement - is unenforceable unless one of the limited exceptions to the rule apply. One exception to the statute is for contracts where there is some possibility of performance within one year; another is where there has been partial performance of the contract by the party to be charged.

Yet a third exception is where there is independent consideration to support the agreement. Appellant argues *for the first time* on this appeal that all three of these exceptions apply in this case and that the Circuit Court erred in finding any oral agreement within the Statute of Frauds. However, as discussed below, Appellant failed to argue any of these exceptions to the Circuit Court and, therefore, has waived any right to assert them on appeal. Regardless, none of the three exceptions are applicable in this case.

B. Appellant has Waived any Claim that an Exception to the Statute of Frauds Applies in This Case

In *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406 (S.C. S.Ct. 2000), the South Carolina Supreme Court stated:

“The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *E.g., Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (same); *Sumter Building & Loan Ass'n v. Winn*, 45 S.C. 381, 23 S.E. 29 (1895) (same).”

And in *Herron v. Century BMW*, 395 S.C. 461 (S.C.S.Ct. 2011), the Supreme Court noted that “At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 (S.C. S.Ct.1998).” It is “axiomatic that an issue cannot be raised for the first time on appeal.” *Id.* “To hold otherwise would mean that an appellate court would be exercising original jurisdiction rather than serving as a reviewing court.” *State v.*

McCrary, 242 S.C. 506, (S.C. S.Ct. 1963).

1. Appellant Failed to Preserve the Argument that the Oral Agreement Could Possibly be Performed Within One Year

The issue regarding the possibility that the alleged oral contract could be performed within one year was only mentioned in passing in the Motion for Reconsideration. (R, p. 491, lines 4-5) by reference to Supplemental Responses to Interrogatories. However, those Supplemental Responses were wholly insufficient to raise - let alone preserve - any issue regarding the possibility of performance within one year:

“Michael J. (‘Mike’) Liberatore (immigration lawyer in Miami), 1000 Brickell Avenue, Suite 400, Miami, Florida 33131, Tel (305) 374-0306, Fax (786) 272- 0652, *may testify* that a nonimmigrant visa such as the one at issue here is always subject to being granted for a shorter time than requested and a shorter time than is typical or authorized and that in fact, this does occur, and may result in grants of periods for shorter than one year” (R, p. 487, lines 20-24; p 488, line 1; emphasis added)

Of course, a trial court does not rule on an issue based on what someone *may* say about it. Rather, the court is obligated to rule only on issues that are properly presented and supported by admissible evidence.¹¹ An attorney’s unsworn statement as to what a witness *may* testify to at some unknown time in the future carries no weight whatsoever. It is certainly not sufficient to raise, much less preserve, an issue for appeal.

2. Coves Darden Never Raised the Issue of Part Performance with the Circuit Court and Cannot Raise It for the First Time on Appeal

¹¹ SCRCF 56(e) provides in pertinent part that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

Coves Darden never raised, even in passing, the issue of part performance as an exception to the Statute of Frauds. The issue was never raised in any briefs filed by Coves Darden; it was never asserted during oral argument during the several hearings on the motion for summary judgment; and it was never mentioned in the Motion for Reconsideration. Rather, it appeared for the first time in Appellant's Initial Brief. Thus, the issue has been waived and should not be considered by this Court.

3. Coves Darden Never Raised the Issue of Independent Consideration as an Exception to the Statute of Frauds and Has Waived the Claim

Appellant's Initial Brief at Page 25 is also the first time that Coves Darden has raised the issue of independent consideration as an exception to the Statute of Frauds and the issue has been waived. However, even if this Court were to consider the argument for the first time, it is clear that Coves Darden has failed to raise a triable issue of material fact in that regard. (see discussion below).

C. Judicial Admissions by Coves Darden Establish that the Alleged Oral Contract Was for a Period of Over One Year

In his Affidavit (R., p.281, lines 8-17), Mr. Coves outlined what he contended were the terms of an oral agreement to employ Mr. Garcia, and then stated:

"We entered into an agreement to employ [Garcia] to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden Farm. We both acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years.") Affidavit of Miguel Coves, ¶ 6 (R., p. 281, lines 8-12) (emphasis added).

Appellant's brief also acknowledges that fact. At page 24, Appellant states:

"The clear understanding was that the good faith effort of the parties would be to continue the relationship *for at least two years*, the expected length of Ibanez' s leave of absence from his employer in Spain. This understanding was bolstered, corroborated, and protected (sic) by the fact *that the O-1 visa was expected to be as long as three years*" (emphasis added).

Thus, there simply is no question that the version of the alleged oral contract claimed by Mr. Coves contemplated employment for a period of time between two and three years.

D. Regardless, There Was No Evidence Creating a Triable Issue of Material Fact Regarding the Possibility That the Alleged Oral Contract Could be Performed Within One Year

There is no question that an oral agreement does not fall within the Statute of Frauds so long as it contains a condition or event that might possibly occur within one year of the making of the agreement. *Weber v. Perry*, 201 S.C. 8 (S.C. C.t. 1942) ("There can be no dispute as to the well-established principle that the statute applies only to those contracts which are impossible of performance within a year and that a contract on a contingency which may occur within the year need not be supported by a writing.")

The only contingency that Appellant put forward was the possibility that the Immigration and Naturalization Service might grant Mr. Garcia an O-1 visa for a period of less than one year. However, this is sheer speculation, and Appellant never presented any *admissible* evidence to create a triable issue of material fact regarding the issue. The only "evidence" supporting the claim that the visa might have been issued for a period of less than one year is the statement of Coves Darden's attorney

as to what Mr. Liberatore *might* testify to. If a Rule 56 motion is to be denied on the basis of such flimsy, hearsay conjecture, then the Rule would cease to have any effect at all.

On the other hand, the Affidavit of Miguel Coves (R, p. 281, lines 10-12) clearly stated that the agreement was to be for a *minimum* of two years, with a possible extension for another year or more ("We both acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years.").

Appellant's argument badly confuses the issue of *discharge* of a contract from *performance* of that contract. In this regard, Restatement of the Law, Second, Contracts, § 130, comment b. states in pertinent part:

"Any contract may be discharged by a subsequent agreement of the parties, and performance of many contracts may be excused by supervening events or by the exercise of a power to cancel granted by the contract. The possibility that such a discharge or excuse may occur within a year is not a possibility that the contract will be 'performed' within a year. This is so even though the excuse is articulated in the agreement."

The Restatement then gives the following example:

"A orally promises to work for B, and B promises to employ A for five years at a stated salary. The promises are within the Statute of Frauds. Though the duties of both parties will be discharged if A dies within a year, the duties cannot be 'performed' within a year. This conclusion is not affected by a term in the oral agreement that the employment shall terminate on A's death."

In summary, to the extent the argument has not been waived, Coves Darden has not offered any evidence whatsoever to create a triable issue of material fact regarding the possibility of performance within one year.

E. The Doctrine of Part Performance Does Not Apply to Personal Service Contracts Like the Alleged Contract at Issue Here

As discussed in detail above, Coves Darden has not raised this issue below, nor has it properly preserved the issue for review by this Court. However, even if the Court were to consider the issue, the law is clear in virtually all jurisdictions that the doctrine of part performance does not apply to actions at law seeking money damages based on personal service contracts.

1. The Doctrine of Part Performance Does Not Apply to Actions at Law Seeking Money Damages

It is important to note that the doctrine of part performance is universally held to apply only with respect to equitable remedies, but not to remedies at law, such as the instant case, which sought only money damages. *See Parr v. Parr*, 268 S.C. 58 (S.C. S.Ct. 1977) (“Sufficient part performance of a parol contract to convey or devise real estate will, *in equity*, remove the agreement from the operation of Section 11-101.” (emphasis added)); *Hosp. Corp. of Am. v. Assocs. in Adolescent Psychiatry*, 605 So. 2d 556 (Fl. App. 1992) (“[T]he doctrine of part performance does not remove the bar of the statute of frauds from actions for damages based upon the breach of oral contracts.”). *Doltz v. Harris & Assocs.*, 280 F. Supp. 2d 377 (E.D. Pa. 2003) (“Although the doctrine of partial performance may be used to remove a contract from the statute of frauds for the purpose of granting specific performance or other equitable relief, the doctrine of partial performance is not available in any action solely for damages at law.”); *Dwight v. Tobin*, 947 F.2d 455, 459 (11th Cir. 1991)

(same).

Since the instant action seeks only money damages the doctrine is not applicable.

2. The Doctrine of Part Performance Does Not Apply to Personal Service Contracts

There is an even more fundamental reason for finding the doctrine of part performance inapplicable: the doctrine does not apply with respect to personal service contracts. In *French v. Sabey Corp.*, 951 P.2d 260 (Wn. S.Ct. 1998), the Washington Supreme Court stated:

“The general rule, almost universally adhered to, is that a contract for personal services which by its terms is not to be performed within a year must be in writing. *See Building Serv. Employees Int'l Union Lodge 6 v. Seattle Hosp. Council*, 18 Wn.2d 186, 138 P.2d 891 (1943); *Cope v. School Dist.* 122, 149 Wash. 76, 270 P. 120 (1928); *Union Sav. & Trust Co. of Seattle v. Krumm*, 88 Wash. 20, 152 P. 681 (1915); 49 Am. Jur. Statute of Frauds § 52, at 410 (1943); 3 Williston, Contracts § 495, at 585 (3d ed. 1960).

Courts have routinely held the part performance doctrine does not to apply to contracts for personal services. *Food Fair Stores, Inc. v. Vanguard Inv. Co. LTD.*, 298 So.2d 515, 517 (Fla. App. 1974); *Johnson v. Edwards*, 569 So.2d 928, 929 (Fla. 1st DCA 1990) (It is “well established that partial performance of a contract for personal services is not an exception to the provisions of the Statute of Frauds.”); *Miller Constr. Co. v. First Indus. Tech. Corp.*, 576 So.2d 748, 751 (Fla. App 1991) (same). *Miller* is instructive in that it held that the rule was particularly applicable to personal service contracts involving “artistic and unique abilities,” which is exactly the situation here, given Appellant’s repeated claims that Mr. Garcia was hired because of his exceptional and unique equestrian abilities.

F. There is No Admissible Evidence Demonstrating the Existence of a Triable Issue of Material Fact Regarding Independent Consideration as an exception to the Statute of Frauds.

Once again, Appellant seeks to raise on appeal an issue that was never presented to or ruled on by the Circuit Court. However, even if this Court were to consider the issue, there is simply no issue of material fact, and the judgment below should be affirmed. The case relied on by Appellant, *Center State Farms v. Campbell Soup Company*, 58 F.3d 1030 (4th Cir. 1995), involved an agreement by State Farms to raise turkeys for Campbell Soup. This was done pursuant to an oral agreement with no set duration. Applying South Carolina law, the Fourth Circuit held that because Center State had made a considerable capital investment in the equipment to be used in the operation, the contract would be terminable only after a reasonable period of time to allow Center State to recoup its investment.

Here, the Affidavit of Miguel Coves (R, p. 281, lines 10-11) admitted that the term of the alleged oral contract of employment was not indefinite, but was for a term of at least two years, with a possible extension to three years. Additionally, Appellant failed to establish the existence of any type of independent consideration. According to Mr. Coves, the agreement was simple: Mr. Garcia would train and show their horses and Coves Darden would pay his salary and provide him with a place to live. There simply is no evidence of any type of independent consideration of the type relied on in *Center State Farms, supra*.

II. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THERE WAS NO EVIDENCE OF THE EXISTENCE OF A FIDUCIARY RELATIONSHIP AND NO BREACH OF ANY CLAIMED DUTY OF

LOYALTY

A. Appellant Misstates the Law Regarding an Employee's Duty of Loyalty

The duty of loyalty is not as black and white as Appellant argues. At Appellant's Brief, p. 28, Coves Darden states: "In South Carolina, an employee *per se* owes fiduciary duties to an employer." (emphasis added). Note that Appellant cites no authority for this proposition. That is not surprising because no South Carolina court has gone so far as to make such a sweeping pronouncement.

According to Appellant, all employees, from the janitor to the chief operating officer, are fiduciaries and have an equal duty of loyalty. That is simply not the case. Some courts have held that the duty of loyalty extends only to employees acting in a fiduciary capacity. South Carolina courts, in accord with most other jurisdictions, recognize the duty of loyalty only when a fiduciary relationship exists between the employer and the employee. Published opinions in South Carolina involving claimed breach of the duty of loyalty have all involved upper level managerial employees. *Loundes Products, Inc. v. Brower*, 259 S.C. 322 (S.C. S.Ct. 1972) (key employees meeting with investors and current customers of employer while starting competing business liable for breach of duty of loyalty.); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598 (S.C. S.Ct. 1999) (Manager of Operations); *Young v. McKelvey*, 286 S.C. 119 (S.C. S.Ct. 1985) (Vice-President of Sales).

The law in other jurisdictions is generally in accord. *See Dalton v. Camp*, 353 N.C. 647 (2001) (Outside the context of a fiduciary relationship, "there is no basis for recognizing an independent tort claim for a breach of a duty of loyalty. . . ." *Id* at 652.).

The recently promulgated Restatement of the Law Third, Employment Law (approved May 21, 2014) takes a slightly different approach to the issue. Restatement § 8.01(a) provides:

“Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in all matters related to their employment. Other employees may, depending on the nature of the employment position, owe an implied contractual duty of loyalty to the employer in matters related to their employment.”

The Restatement makes it clear that the duty of loyalty varies depending on the nature of the employer-employee relationship. Additionally, the Restatement makes it clear that the remedies available depend upon the nature of the relationship.

Comment a. to the foregoing section provides in pertinent part:

“All employees in a relationship of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer and are subject to special remedies for breach of fiduciary duty, including, in appropriate circumstances, forfeiture of compensation and disgorgement of profits. Even if not generally in a relationship of trust and confidence, employees owe a fiduciary duty for limited purposes if they come into possession of their employer’s trade secrets. Other employees, depending on the nature and circumstances of their employment, may owe an implied contractual duty of loyalty to their employer; such employees are subject only to contract remedies for breach.”

Restatement § 8.01(b) makes it clear that an employee breaches the duty of loyalty when the employee a) discloses or uses trade secrets, b) competes with the employer while still employed¹², or c) misappropriates the employer’s property or engages in self-dealing through the use of the employee’s position with the employer.

The Reporters’ Note to the foregoing provides:

“The precise contours of the duty of loyalty imposed on a given

¹² This is subject to certain exceptions discussed below.

employee vary according to the scope of responsibilities with which the employee is entrusted and other circumstances of his employment. Although all employees may in some sense owe a duty of loyalty to their employer, the specific implications vary with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires." (citation and internal quotes omitted).

Thus, Appellant is simply wrong when it asserts that all employees are fiduciaries of the employer. Moreover, as discussed below, Appellant failed to demonstrate the existence of a triable issue of material fact with respect to the existence of a fiduciary relationship, and it failed to show any issue regarding the breach of *any* duty of loyalty on the part of Mr. Garcia.

B. Appellant Failed to Produce Any Admissible Evidence From Which a Trier of Fact Could Conclude that a Fiduciary Relationship Existed

As noted above, the mere existence of an employer-employee relationship, standing alone, does not give rise to fiduciary obligations. *See Smalls v. Imperial Servs. Group*, 2011 U.S. Dist. LEXIS 140302 (D.S.C. 2011) ("An employer/employee relationship is not a fiduciary relationship upon which a fraudulent concealment action could spring.") Additionally, and most importantly, a fiduciary relationship cannot be created by the unilateral action of only one party. *Steele v. Victory Sav. Bank*, 368 S.E.2d 91 (S.C. App. 1988) ("[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party."); *Moore v. Moore*, 360 S.C. 241 (S.C. App. 2004) (same); *Regions Bank v. Schmauch*, 354 S.C. 648 (S.C. App. 2003) ("The other party must have actually accepted or induced the confidence placed in him."). The evidence must show that the entrusted party actually accepted or induced the confidence. *Regions Bank, supra*; *Brown v. Pearson*, 326 S.C. 409 (S.C.

S.Ct. 2003). *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996) (“A fiduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary.” (citation omitted)); *Furr’s Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 459-60 (Tex. Civ. App. 1964) (finding no confidential relationship existed where buyer failed to present evidence seller was aware of confidence buyer claimed to have reposed in him since a “confidential relationship is a two-way street”).

Judged by the foregoing standards it is clear that Coves Darden completely failed to carry its burden of demonstrating by admissible evidence the existence of a confidential or fiduciary relationship. The Complaint (R, p. 34, lines 14-18) at ¶ 23 does contain an allegation that “[a]s an employee of Plaintiff, and particularly as a special employee of Plaintiff under a specialized agreement, and as an employee in which Plaintiff specifically reposed trust and confidence (as evidenced by Plaintiff’s expenditures for, and accommodation of, Ibañez) Ibañez, as agent, owed fiduciary duties of loyalty, honesty and information to Plaintiff, as principal.” However, in responding to a Motion for Summary Judgment, reliance on a pleading is insufficient. “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” SCRCP 56(e).

The only evidence offered on the issue by Coves Darden - the Affidavit of

Miguel Coves (R, p. 280, line 26 and p. 281, lines 13-17) - attests to the fact that Coves Darden visited with Mr. Garcia in Spain, negotiated payment terms, and allegedly hired him to come to the United States and train horses. However, it contains no *facts* from which a trier of fact could find a fiduciary relationship. More importantly, it only sets out facts demonstrating unilateral actions and reliance on the part of Coves Darden. It is entirely devoid of any *facts* demonstrating what was special about the claimed relationship, or any facts that Mr. Garcia knowingly and willingly assumed any fiduciary obligations, or that he induced Coves Darden to enter into the relationship in the first place. Such unilateral actions by Coves Darden are insufficient to create an issue of fact regarding the existence of a fiduciary relationship. *Regions Bank, supra*.

In Appellant's brief, at page 27, counsel engages in wishful thinking about the state of the record with respect to the "facts" giving rise to the claimed fiduciary relationship:

"Ibanez was not an ordinary employee. * * * There was a great deal of trust and confidence reposed in Ibanez by Coves Darden when they agreed to pursue a complicated program to hire him, have him work where they lived, have him deal with rare horses, and have him identified with their brand. Ibanez was highly paid and heavily advertised by Coves Darden and his employment was a large investment for Coves Darden."

The problem with this statement is that there is not one single shred of admissible evidence in the record to support them and the arguments of counsel in an appellate brief without citation to any part of the record are just that: arguments. Making up facts is no substitute for demonstrating the existence of triable issues of fact by pointing out where they appear in the record. However, even if these fanciful

statements were to be considered, they would be insufficient to establish the existence of a fiduciary relationship because they all deal with unilateral actions on the part of Coves Darden, and those unilateral actions are simply not enough to create a triable issue of fact. *Steele v. Victory Sav. Bank*, 368 S.E.2d 91 (S.C. App. 1988) (“[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party.”).

To illustrate this point, consider the following: A building contractor may have the need for a highly trained and competent employee to operate a complex crane. However, that fact, standing alone, does not make the employee a fiduciary for all purposes - it merely demonstrates that the contractor had a need for a highly trained employee to perform services for him.

In summary, there was absolutely no evidence tending to show the existence of a confidential or fiduciary relationship between Coves Darden and Mr. Garcia, and the Circuit Court properly granted summary judgment.

C. An Employee Does Not Breach a Duty of Loyalty by “Moonlighting” for a Competitor or by Making Preparations to Compete After Terminating the At-Will Relationship

The sole allegations of alleged breach of the duty of loyalty are that a) Mr. Garcia was secretly planning to leave his employment with Coves Darden (Coves Affidavit, ¶ 25 (R, p.285, lines 1-2)), and b) that he had “secretly” been riding horses for Half Moon (*Id.*, ¶ 36).¹³ Summary judgment was properly granted with respect to those claims.

¹³ Paragraph 36 of the Affidavit does contain the further claim that Mr. Garcia intentionally compromised his performance and duties in order to develop business contacts. However, this claim is solely based on “information and belief” and does not meet the personal knowledge requirement of Rule 56(e).

Secretly planning to leave one's employment is not a tort in South Carolina, or in any other jurisdiction in the United States for that matter. In fact, as an at-will employee, Mr. Garcia's relationship with Coves Darden was terminable by either party at any time, for any reason or for no reason at all. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284 (S.C. S.Ct.1981), *appeal after remand*, 283 S.C. 155, *writ granted in part*, 285 S.C. 84, *quashed*, 287 S.C. 190; *Culler v. Blue Ridge Elec. Coop. Inc.*, 309 S.C. 243, 245 (S.C. S.Ct.1992)." It makes no difference whether the employee keeps his intention to leave secret until the day of departure or whether he makes his intentions known to the employer well in advance of departure. One's secret intention is simply not a tort.

It is also clear that merely "moonlighting" for a competitor is not a breach of the duty of loyalty. Restatement of Employment Law, § 8.04(c) dealing with competition with the current employer by an employee provides:

"Absent agreement with the employer to the contrary, an employee not subject to a fiduciary duty of loyalty to their first employer under § 8.01(a) may work for a competitor of the first employer as long as the work is not done during time committed to the first employer, does not involve the use or disclosure of the first employer's trade secrets, and does not injure the employer to any greater extent than would any other individual working for the competitor."

South Carolina law is on point. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (applying North Carolina and South Carolina law) ("An employee does not commit a tort simply by holding two jobs or by performing a second job inadequately. For example, a second employer has no tort action for breach of the duty of loyalty when its employee fails to devote adequate attention or effort to her second (night shift) job because she is tired.").

Once again, summary judgment was properly granted.

III. THE CIRCUIT COURT PROPERLY CONSIDERED APPELLANT'S RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION

Appellant faults the Circuit Court for basing its grant of summary judgment, in part, on Coves Darden's response to an interrogatory and a request for production in which Coves Darden admitted that there was no oral agreement between the parties and that it did not have a copy of the purported written agreement signed by Mr. Garcia.

Interrogatory 6 from Defendants asked Plaintiff to identify the terms of any alleged oral agreement with Mr. Garcia. (R. p. 211, lines 18-20) at ¶6. In response, Plaintiff stated:

"The agreement was not oral. It was a written contract presented to and acknowledged by Ibañez in (sic) or before January of 2012, after August of 2011." (R. p. 214, lines 10-12) at ¶6.

In response to a request to produce a fully executed copy of any employment contract, Plaintiff stated:

"For Defendants' information, Defendant [sic, Plaintiff] believes there are none currently responsive to Request 1 (if requesting one with Ibanez's signature.)" (R. p.218, lines 5-7).

During discovery Plaintiff produced a copy of a document it claims is the contract of employment between Coves Darden and Mr. Garcia. (R. p. 220-225). Significantly, while the document was signed by Miguel Coves on behalf of Coves Darden, LLC, it was not signed by Mr. Garcia. (R, p. 225). Thus, in its discovery responses Coves Darden denied the existence of an oral contract of employment and admitted that there was no executed written contract of employment.

Appellant seeks to get around these inconvenient facts in several ways. First, Appellant argues that it had the right to answer an interrogatory denying the existence of an oral contract and asserting the existence of a written contract, and then subsequently do a complete flip flop and assert that the agreement was oral. Appellant also seeks to avoid the admission in the interrogatory by claiming that the response was never verified (Appellant's Brief, p. 18). Appellant is wrong on all counts.

This contradictory state of affairs, created wholly by the Appellant in inconsistent discovery responses and during oral argument, is not grounds for reversal. First and most importantly, the Circuit Court acknowledged the changing positions taken by Appellant and, out of an abundance of caution, conducted an alternative analysis that examined the law under either scenario:

"In this case, Plaintiff, both directly and through its counsel, has made several contradictory statements regarding the nature of the relationship between Coves Darden and Defendant Garcia. In responding to Interrogatories, Plaintiff judicially admitted that there was no oral contract of employment, but only a written agreement that was allegedly "acknowledged" by Defendant Garcia. However, in responding to a Request to Produce Plaintiff further admitted that it had no written agreement signed by Defendant Garcia. At a hearing in this matter on May 5, 2013, Plaintiff's counsel contradicted his client's interrogatory responses and asserted that the agreement between the parties was, in fact, an oral agreement. On April 24, 2013, Miguel Coves, a principal of Plaintiff, filed an Affidavit in which he alleged that the agreement between the parties was an oral agreement of employment for between two and three years. At a final hearing on the Motion for Summary Judgment on October 15, 2013, Plaintiff's counsel reiterated the contention that the agreement was, in fact, an oral agreement."

The Circuit Court neatly resolved this conflict - a conflict created by Appellant itself - by analyzing the law under *both* scenarios:

"Nevertheless, regardless of which version the Court accepts, the end

result is the same. If the Court accepts Plaintiff's responses to an Interrogatory and a Request to Produce, then the Court is left with the conclusion that there was: a) no oral agreement between the parties, and b) no written agreement signed by the party to be charged, Defendant Garcia. On the other hand, if the Court ignores these earlier party admissions and accepts the belated contention of Plaintiff that there was no written contract of employment, but only an alleged oral agreement for employment between two and three years duration, the Court is again left with the fact that there is no writing signed by the party to be charged, Defendant Garcia, and, therefore, the alleged oral agreement violates the Statute of Frauds and is unenforceable."

Since the Circuit Court conducted its analysis under either of the scenarios argued by Appellant, there simply is no reversible error. Coves Darden offered no other alternative for consideration by the Circuit Court.

IV. SUMMARY JUDGMENT WAS PROPERLY GRANTED WITH RESPECT TO THE CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT

A. Elements of a Cause of Action for Tortious Interference

The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517 (S.C. S.Ct.1993).

An essential element to the cause of action for tortious interference with contractual relations is the intentional procurement of the contract's breach. *Kinard v. Crosby*, 315 S.C. 237 (S.C. S.Ct. 1993). Further, a tortious interference claim "presupposes the existence of a valid, enforceable contract." *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272 (S.C. Ct. App. 1993). Where there is no breach of the contract, there can be no recovery. *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 73 (S.C. Ct. App.1994).

Additionally, where the claim is that a third party induced an at-will employee to leave his employment, Plaintiff must plead and prove that the employment would have continued indefinitely but for such interference. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155 (S.C. App. 1984).

B. Appellant Failed to Establish a Triable Issue of Material Fact With Respect to Each Element of Its Cause of Action

1. No Proof of a Valid Oral or Written Contract

As discussed in detail above, there was no proof of a valid oral or written contract between Mr. Garcia and Coves Darden. Therefore, Appellant was required to establish all of the elements of a cause of action for intentional interference with an at-will relationship. *Todd, supra*.

2. No Proof of Actual Knowledge of the Existence of the Contact

In opposing the Motion for Summary Judgment it was incumbent upon Appellant to demonstrate some facts demonstrating Defendant Derr's actual knowledge of the existence of the at-will relationship. *Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc.*, 363 S.E.2d 390 (S.C. App. 1987), a case relied on heavily by Coves Darden, cannot supply the missing actual, or even inferential knowledge requirement. First, *Bocook* was overruled - albeit it on other grounds - by the Supreme Court in *O'Neal v. Bowles*, 314 S.C. 525 (S.C. S.Ct.). *Bocook* involved the placement of advertising signs that were open and obvious and gave at least inquiry notice of a relationship with the landowners. By way of contrast, the only "evidence" adduced by Appellant is that Dori Derr participated at an equestrian event at which Mr. Garcia also participated. *Bocook* cannot be stretched to the point that watching

someone ride a horse at an equestrian event creates the slightest inference that Mrs. Derr was aware of the fact that Mr. Garcia was an employee of Coves Darden. This Court should not supply the missing proof with respect to Appellant's cause of action by, in effect, imposing an affirmative duty on the part of a competitor to ascertain the status of Mr. Garcia's employment.

3. No Proof of Intentional Procurement

Not only is the record devoid of any evidence of intentional procurement, Appellant's principal, Miguel Coves actually attested to the contrary. Mr. Coves' affidavit asserts that it was Mr. Garcia who was looking for other employment and other ways to "feather his nest." Mr. Coves attested to the following in Paragraph 30 of his Affidavit (R, p.285, lines 18-22; p. 286, lines 1-5):

"In hindsight, it appears Ibañez began feathering his own nest right away, and planning his deceptions, rather than trying to advance the interests of our farm. It appears he escalated his desire to work against our interests, to the end of advancing his own and the interests of others, after he received: accommodations, introductions and payments from us in Spain; the benefit of several U.S. vacations largely at our expense; introductions and publicity in the U.S. and particularly in the Aiken area; the fruits of our efforts to assemble the documentation for his unusual if not extraordinary visa; the benefits of our expenditure of legal fees on Miami immigration counsel; a visa to the U.S. allowing work in his field; acclimatization in the U.S. in a house we furnished; and a comfortably supported opportunity to obtain a social security number, driving credentials, school enrollment for his daughter, banking facilities, etc."

Thus, not only is there a lack of any admissible evidence of intentional procurement by Defendant Derr, but Appellant's own affidavit establishes that it was Mr. Garcia looking to leave his employment, and not Mrs. Derr attempting to lure him away.

4. No Proof That Employment Would Have Continued But For the Alleged Interference

The Supreme Court in *Todd, supra*, while recognizing a cause of action for tortious interference with respect to at-will employment, added the additional requirement of “but for” causation - that the at-will employment would have continued indefinitely but for the tortious interference. Appellant put on no evidence whatsoever regarding this element. Indeed, as the foregoing quote from the affidavit of Miguel Coves makes clear, Appellant’s contention was that Mr. Garcia began “feathering his own nest” virtually from day one and was looking out for his own interests rather than the interests of Coves Darden.

In its brief, Appellant argues that “When the contract in question is ‘at-will,’ it is sufficient that there only be a reasonable expectation that, but for the interference, the contract would have continued. *Santoro v. Schulthess*, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009).” (Appellant’s Brief, p. 35). The problem with that statement is that it completely mis-quotes *Santoro*. In *Santoro*, the Court stated that “to maintain a cause of action for interference with a contract that is terminable at will, the plaintiff must show that, *but for* the interference, the contractual relationship would have continued.” (emphasis added). In fact, the words “reasonable expectation” do not appear anywhere in the opinion.

In short, not only was there a complete lack of admissible evidence from which a trier of fact could conclude that Mr. Garcia’s employment would have continued, but Appellant’s own statements claim that it was Mr. Garcia himself who was looking around for other business opportunities.

C. The Circuit Court Correctly Recognized the Exception For Job Offers by Competitors

The Circuit Court relied on a North Carolina case, *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216 (N.C. 1988), and the numerous authorities it cited from courts around the United States, for the proposition that there is a qualified privilege for competitors making better job offers to at-will employees. In a passage that deserves to be quoted at length, the North Carolina Supreme Court stated:

“[W]e recognize and apply the general principle that interference may be justified when the plaintiff and the defendant are competitors. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176. See also, *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W. 2d 892 (1965); *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203 (1912); *Philadelphia Dairy Prod. v. Quaker City Ice Cream Co.*, 306 Pa. 164, 159 A. 3 (1932); *Thacker Coal & Coke Co. v. Burke*, 59 W.Va. 253, 53 S.E. 161 (1906). *Contra Moye v. Eure*, 21 N.C. App. 261, 205 S.E. 2d 221 (1974); *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970). Further, we find the well-reasoned opinion of Judge Learned Hand in *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981 (2d Cir. 1918) to be persuasive. Judge Hand, writing for the majority in that case, stated that public policy demands that absent some monopolistic purpose everyone has the right to offer better terms to another's employee, so long as the latter is free to leave. *Id.* A contrary result would be intolerable, both to the new employer who could use the employee more effectively and to the employee who might receive added pay. *Id.* To hold otherwise would unduly limit lawful competition. *Id.* “Later cases adopt the rationale of *Triangle Film*. The free enterprise system demands that competing employers be allowed to vie for the services of the ‘best and brightest’ employees without fear of subsequent litigation for tortious interference. See *McCluer v. Super Maid Cook-Ware Corp.*, 62 F. 2d 426 (10th Cir. 1932); *Vincent Horwitz Co. v. Cooper*, 352 Pa. 7, 41 A. 2d 870 (1945); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968); *Coleman & Morris v. Pisciotto*, 107 N.Y.S. 2d 715, 279 A.D. 656 (1951). To restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression.

‘Competition . . . is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business To

hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of a class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants . . . are instances.'

"*Macaulay Bros. v. Tierney*, 19 R.I. 255, 256, 33 A. 1, 2 (1895), cited with approval in *C. S. Smith Metro. Mkt. v. Lyons*, 16 Cal. 2d 389, 106 P. 2d 414 (1940); *Kingston Trap Rock Co. v. International Union of Operating Engineers*, 129 N.J. Eq. 570, 19 A. 2d 661 (1941)."

In an attempt to discredit this clear statement of the majority rule around the United States, Appellant cites *Commerce Funding Com. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204, 213 (4th Cir. 2001), for the proposition that, under Virginia law, one must actually possess a financial interest in the business of a third person to justify interference with the business relationship of another and the third person. (Appellant's Brief, p. 34). Appellant then asserts that "As they had no existing contractual relationship with Ibañez, they cannot show justification." *Id.* Once again, Appellant badly mis-cites the authority on which it relies. *Commerce Funding* actually recognized five separate grounds for assertion of a privilege: "legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice." *Commerce Funding, supra* (emphasis added). Thus, even Appellant's authorities provide support for the proposition - and for the Circuit Court's decision - that legitimate business competition is not actionable.

Appellant offered no admissible evidence of any improper purpose in the hiring of Mr. Garcia. Although Appellant engaged in lengthy speculation about

alleged improper motives in its brief below, and in its brief before this Court, speculation and conjecture are no substitutes for admissible evidence in opposing a Motion for Summary Judgment, and the Order granting summary judgment should be affirmed.

V. THE CIRCUIT COURT CORRECTLY FOUND THAT THE SOUTH CAROLINA UNFAIR TRADES PRACTICES ACT DID NOT APPLY

A. Elements of a Cause of Action for Violation of the South Carolina Unfair Trade Practices Act

To prevail on a claim arising under the South Carolina Unfair Trade Practices Act (“SCUTPA”), “the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s)”. *Woodson v. DLI Props. LLC*, 406 S.C. 517 (S.C. S.Ct. 2014); *See Noack Enterprises, Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475 (S.C. S.Ct. 1986). Moreover, “An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act’s embrace” *Noack, supra*.

As to damages, “the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” *Woodson, supra*.

B. Appellant Failed to Offer Admissible Evidence That the Advertising Was Unfair or Deceptive

Appellant claimed that Defendants Derr and Half Moon made two statements

that allegedly violated SCUPTA: a) that Defendant Garcia was in the United States on an extended teaching sabbatical, and b) that Defendant Garcia was based at Half Moon Stables. (Complaint, ¶ 45; R. p. 37, lines 6-8). However, in its Opposition to Defendants' Motion for Summary Judgment, Plaintiff conceded that "[The statements] are technically true under one understanding of the word 'sabbatical,' and in the further sense that Ibañez is now based at Half Moon" (Plaintiff's Opposition to Motion for Summary Judgment, p. 48; R, p 16-18; emphasis in original). Significantly Opposition never elaborated on what other possible "understandings" there could be of the two statements. And Appellant conceded that the two statements are "technically true." While admitting the "technical" truth of the statements, Appellant never offered the slightest hint of any alternative understanding that members of the public might possibly have with respect to the statements. Not only was the statement that Mr. Garcia was employed by Half Moon technically and factually true, it was his employment by Half Moon that gave rise to the claim of tortious interference in the first place.

The same thing is true with respect to the statement that Mr. Garcia was in the United States on an extended teaching sabbatical. (Complaint, ¶ 45; R, p. 37, line 7). The Affidavit of Miguel Coves (R, p.281, lines 18-20) at ¶ 8 states that "Ibanez was quick to commit us to the matter, so much so, that he commenced his leave of absence from his former employer in Spain (The Royal School) before we could apply for a visa for him." So, Appellant conceded that Mr. Garcia was going to be on a leave of absence from his employment as a trainer and instructor with the Royal School for a period of between two and three years.

The term "sabbatical" means "a period of time during which someone does not work at his or her regular job and is able to rest, travel, do research, etc.". <http://www.merriam-webster.com/dictionary/sabbatical>. With respect to the use of the term "extended" in the statement, Mr. Coves stated in his affidavit that "We both acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years." (R, p 281, lines 10-12). While one can quibble over whether a presence in the United States for a period of between two and three years is an "extended" stay, it is sufficient to note that the record does not establish the existence of a triable issue of fact.

In short, simply asserting that the statements were "misleading" without showing how or why they could possibly be misinterpreted by members of the public is not enough. The Circuit Court correctly found that Appellant had come forward with no evidence to support a claim that the statements were false or misleading.

C. Appellants Failed to Come Forward With Any Admissible Evidence Showing Any Possible Impact on the Public Interest

Appellant's filings in the Circuit Court and its Initial Brief before this Court are totally devoid of any *facts* from which a trier of fact could conclude that the two statements at issue here had any actual - or even potential - impact on the public interest. The best that Appellant could do was make vague references to "an interrupted undertaking and relationship which itself affected the public interest in regional and state recognition in horse competitions," "misleading advertising which both had a tendency to confuse would-be consumers of Coves Darden's goods and

services,” and “depreciat[ing] Coves Darden’s investment in its brand.” (Appellant’s Initial Brief, pp. 42 - 43). Conclusory statements unsupported by any reference to specific facts cannot replace the requirement for presentation of admissible evidence sufficient to establish the elements of Appellant’s *prima facie* case and there was absolutely no evidence proffered by Appellant to support any of those conclusory statements.

D. The Appellant Failed to Demonstrate the Existence of Any Damages Allegedly Suffered as a Result of the Alleged Unfair Practices

Finally, Appellant failed to offer any evidence whatsoever of the damages it allegedly suffered as a result of the publication of the two allegedly unfair or deceptive statements. With respect to damages, “the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” *Woodson, supra*. Appellant failed to demonstrate any damages suffered as a result of the allegedly unfair or deceptive statements. The best that Appellant was able to do was argue that the allegedly unfair and deceptive statements “depreciated Coves Darden’s investment in its brand.” (Appellant’s Initial Brief, p. 43). In *Woodson*, the Supreme Court found as insufficient a plaintiff’s claim to have suffered \$3,000 in damages, without offering any evidence to establish the existence of a triable issue of fact and therefore, affirmed the grant of summary judgment. In this case, Appellant’s unsupported claim that it suffered “depreciation” of its brand does not even come close to the damages allegation found insufficient in *Woodson*.

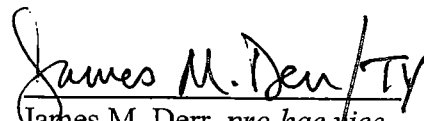
CONCLUSION

In summary, the Circuit Court properly granted summary judgment on Appellant's contradictory, unsupported, and speculative claims. Appellant was given several opportunities by the Circuit Court to propound interrogatories, to seek the production of documents, and to take depositions in order to support its claims. The Circuit Court granted summary judgment only after that discovery took place, after Appellant admitted it needed no more discovery to address the motion for summary judgment, and after three hearings on the motion. Despite all those opportunities, Appellant was unable to discover the existence of any facts supporting its various claims. The Circuit Court granted summary judgment after giving full consideration to Appellant's arguments.

For the foregoing reasons, and each of them, Appellees respectfully request that the Order of the Circuit Court granting summary judgment and dismissing the complaint be affirmed in all respects.

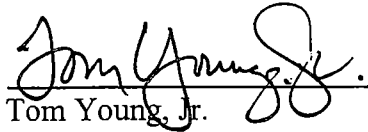
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Respectfully Submitted

A handwritten signature in black ink, appearing to read "Tom Young, Jr.", written over a horizontal line.

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APPENDIX DIVIDER

C

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 12-CP-02-01772

Coves Darden, LLC, ... Appellant,

v.

Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, ... Respondents.

APPELLANT'S REPLY BRIEF

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I. Discussion and Refutation of Significant Points, Characterizations, and Recurring Themes in Respondents' Arguments.

A. Clarification of Some Aspects of the Facts and the Procedural Posture of the Case.

1. What was pled, what was not pled, what was not timely raised, what was raised immediately, what was asserted, what was not disclosed, what was discovered, and what was false.

By not including their own Statement of the Case, the Respondents – defendants below – Ibanez, Derr, and Half Moon, are bound by Covese Darden's Statement of the Case in Appellant's Brief. Rule 208(b)(2), SCACR.

Covese Darden sued for both legal and equitable¹ relief. (Statement of the Case, App. Brf. at 4.) Covese Darden sought damages and injunction. (*Id.*) The Answer of Respondents did not raise the Statute of Frauds or any other affirmative defenses. (Stmt. of the Case, App. Brf. at 4.)

Respondents set forth no grounds whatsoever in either their December 4, 2012 motion for summary judgment (R. p. 106) or their January 28, 2013 motion for summary judgment (R. p. 161). Respondents filed no accompanying materials whatsoever at the time of filing their summary judgment motions.

Respondents asserted in their Answer that Ibanez did not agree to ride for Half Moon in upcoming events until after terminating his employment with Covese Darden. (Statement of the Case, *id.* at 5.) Covese Darden moved for and received an order compelling discovery. (*Id.*) Materials revealing Respondents' assertion in their answer to be squarely false were not produced by Respondents in response to the order compelling discovery explicitly directed to that issue. (Stanton Disc. Aff., ¶¶ 2-6, R. pp. 311-312.) Yet, Covese Darden obtained, from third

¹Compare Respondents' argument in their brief at 9, that the doctrine of part performance is inapplicable to actions seeking only money damages, and incorrectly asserting that "the instant action seeks only money damages." Also compare Respondents' argument in their brief at 30, that Covese Darden failed to "prove" the amount of damages resulting from the unfair methods of competition and unfair and deceptive acts or practices in the conduct of trade or commerce.

parties, materials revealing Respondents' assertion in their answer to be squarely false. (Id.)

The materials not produced by Respondents were also at odds with the sworn deposition testimony of Respondent Derr. (Id.)

So Respondents did not timely plead nor otherwise raise, the matters they argue Coves Darden did not "raise" timely counterarguments to. Material things they have asserted are untrue. They have attempted to prevent discovery of the full dimension of the facts. Therefore, Respondents' arguments regarding both evidence and the procedural posture of the case are unpersuasive in a motion for summary judgment. A permissible inference from the record is that Respondents have not disclosed nor told the truth about, clandestine or as yet undiscovered matters, and are not in a position to tell the whole truth about matters which actually have come out.²

2. The contract between Ibanez and Coves Darden.

It cannot be denied that, as admitted in the sworn deposition of Respondent Ibanez, Ibanez and Coves Darden had detailed discussions of a contract of employment which concluded in an agreement of the parties on the terms. (Ibanez Dep. at 29, 32, 36-40, and 47-50, R. pp. 256, 259, 260-264, and 266-269.) When the parties then proceeded under the oral contract they reached, and Coves Darden began pursuing the visa, the immigration authorities asked Coves Darden to submit a written agreement. (Coves Aff. ¶¶ 3, 7, 11, 12, 30, and 35, R. pp. 280-282 and 285-286.) Coves Darden prepared and submitted a written agreement, and had a lawyer discuss the written agreement with Ibanez. (Libertore Aff. ¶ 10, R. pp. 276-277.) Ibanez then

²Respondent Derr did eventually state in her deposition that she knew Coves Darden thought it had a "contract" with Ibanez, but that since Ibanez claimed not to have a "copy," she proceeded without concerning herself at all with what it said. (Derr Dep. at 88-89, R. pp. 136-137.) In their brief at 22, Respondents obliquely argue, incorrectly, that Derr had lack of knowledge of the existence of a contract. They in fact suggest that she was not even "aware that [Ibanez] was an employee of Coves Darden."

continued to proceed with the deal, obtaining his visa and entering the exclusive employment of Coves Darden.

Early in the suit, Respondents sent first interrogatories to Coves Darden, in which Respondents strangely made no inquiry whatsoever about a written contract. (Statement of the Case, App. Brf. at 5.) Instead, they asked for the details of any oral contract between Coves Darden and Ibanez. (*Id.*) Coves Darden responded that the contract was not oral, that it was written, and described the written contract that had been submitted to the immigration authorities as a condition of Ibanez's visa. (Statement of the Case, App. Brf. at 5.) Given the fact that Ibanez was being represented by the same counsel as Derr and Half Moon, and the possibility that Ibanez, a Spanish speaking person, had not fully described his contract with Coves Darden, this response was not only forthright disclosure of the written agreement, but a courtesy to Respondents' counsel.

When it became apparent that Ibanez might³ deny the validity of the written contract, Coves Darden immediately pursued discovery⁴ and promptly clarified that if there was no written contract superseding the preceding oral contract, the preceding oral contract remained.

The oral contract was reached prior to any application to the immigration authorities. As

³Respondents never filed an affidavit of Ibanez denying the existence of a written contract, denying knowledge of the contents of the written contract, denying having a copy of the contract, or denying signing the contract. They filed a motion for summary judgment stating no grounds, and not accompanied at the time of filing, by any affidavits or other supporting materials. When the motion was scheduled for hearing, Respondents argued that a written contract did not exist solely because Coves Darden responded to a request for production by noting that Coves Darden was unable to find in Coves Darden's possession, a fully executed copy.

⁴Respondents opposed discovery on the basis that they had filed a "motion for summary judgment." (See, e.g., Dec. 6, 2012 Mot. to Compel, R. pp. 108-126, Jan. 30, 2013 Mot. to Compel, R. pp. 164-176, Feb. 26, 2013 Rule 56(f) affidavit, R. pp. 186-189, May 14, 2013 discovery status affidavit, R. pp. 311-332, and Nov. 26, 2013 Mot. to Compel, R. pp. 456-482.) As noted, Respondents did not state any grounds in their motion for summary judgment.

Miguel Coves stated in Paragraph 2 of his affidavit, the contract involved “risk by both parties as to whether and on what terms the visa would be granted.” (R. p. 280.) The oral contract was expected to have a duration of two years or the length of Ibanez’s leave of absence, but was limited by whatever initial term was granted for the visa. (Coves Aff. ¶ 6, R. p. 281; Oct. 9, 2013 Supp. Resp. to Int., R. pp. 453-454; and see Ibanez Dep. pp. 38-40, R. pp. 262-264 (contract conditioned on visa).) It was thus possible, even if not likely or expected, that the contract could be performed within one year. Put differently, the parties did not agree that the contract could not under any circumstances be performed within one year.

B. Admissions, Admissibility, and Other Insidious Intrusions Into the Summary Judgment Standard.

In the “Introduction” of their brief at 1, Respondents mirror the same errors made in the Circuit Court’s order. For one, as demonstrated in Appellant’s Brief at 11-19, the Circuit Court erred in neither defining which sort of “judicial admissions” the court was referring to, nor stating the attributes of the so-called “admissions,” nor setting forth valid authority for the assumed attributes of the so-called “admissions.” The court did not properly regard the matters the court labeled as “admissions,” and erroneously treated them as conclusively established facts when interpreted in the light most unfavorable to the nonmoving party.

In the same vein, Respondents use the word “admission” or “admit” in their brief over 10 times, without ever confronting the authorities discussed by Coves Darden in Appellant’s Brief at 11-19, or citing any other authority supporting their usage. Rather than address the Circuit Court’s misunderstanding and consequent material misapplication of the terms “admission” and “judicial admission,” Respondents simply quote the Circuit Court itself at length, in which quote

the Circuit Court misunderstands and misuses the terms. (Resp. Brf. at 20-21.⁵)

Respondents assert, without authority, that a species of “judicial admission” foreclosed examination of various evidentiary materials in the record when determining a summary judgment motion. These arguments are simply incorrect under controlling authority. (See Appellant’s Brief at 11-19.)

Respondents, reminiscent of the Circuit Court’s order, further contrive conflicts among the facts adduced by Coves Darden, rather than view the facts as consistent. For example, Respondents, like the Circuit Court, recount the situation as if there could only have been an oral contract or a written one, when one in fact succeeded the other. Respondents, like the Circuit Court, recount the matter as if Coves Darden stated no oral contract had ever existed, rather than that Coves Darden disclosed its then belief that the written contract was in effect. If there is truly a conflict among facts, or an argument to be made concerning facts, those conflicts and arguments historically mandate denial of summary judgment. (See App. Brf. at 2-4.)

Respondents never address Coves Darden’s argument that Respondents never properly supported their motion for summary judgment by demonstrating, as opposed to “invoking,” the absence of dispute as to any material fact. Instead, in general, Respondents defend the Circuit Court’s order by impermissibly presenting and arguing disputed factual inferences and making

⁵In their brief at 18-21, Respondents purport to address the Circuit Court’s error in relying on so-called “judicial admissions,” and the rules pertaining to sham affidavits. However, in these pages, Respondents, in essence, simply use the word, “admit” or “admissions” six more times and quote the Circuit Court’s order at length. Respondents also persist in the mischaracterization that “Coves Darden denied the existence of an oral contract of employment, and admitted that there was no executed written contract of employment.” (Resp. Brf. at 19.) As repeatedly clarified both to the Circuit Court and to this Court, Coves Darden did not intend to deny the existence of an oral contract, but rather, to point up the existence of a written one, when Respondents had failed to inquire about a written one in their question. As further repetitively clarified by Coves Darden, there was no admission that there was no executed contract. There was only a disclosure that Coves Darden was unable to locate a fully executed copy in Coves Darden’s possession.

occasional unsupported passing assertions regarding lack of “evidence.” Where acknowledging the presence of evidence is unavoidable, Respondents add the unsubstantiated qualifier, with no statement of authority, that there is no “admissible” evidence.

Respondents use the word “admissible” in their brief over 14 times, and with the exception of one oblique⁶ footnote, never discuss the role of “admissibility” in the South Carolina rules governing summary judgment.

Our courts do not have a choice of one standard for summary judgment in cases in which they wish to grant summary judgment, and a different standard for summary judgment for cases in which they do not. (See App. Brf. at 2-4 (setting forth summary judgment standard).) This is where the Circuit Court erred in not denying summary judgment.

Because there is evidence that Respondents cannot characterize any other way, Respondents argue that some of the evidence is not “admissible” evidence. (See, e.g., Resp. Brf. at i-iii, 5, 7, 11, 14-16, 24, 26, 27, and 29.) This argument is not accompanied by a direct citation to an applicable portion of Rule 56, SCRPC, nor by any citation of controlling case law. The reference by Respondents to lack of “admissible evidence” is so persistent, however, that the creeping references imply the existence of a rule which does not exist, much the same as repeated

⁶Footnote 11 of Respondent’s brief recites the requirement, applicable only to affidavits, that the facts set forth in affidavits be such as “would be” admissible in evidence. Rule 56(e), even as to affidavits, is silent on whether it is the facts themselves which must not be inherently inadmissible under any circumstances, or whether it is the manner in which the facts are referenced which must meet admissibility requirements. Respondents have cited no rules pertaining to facts appearing in other materials of record, such as depositions and discovery responses. Respondents nevertheless frequently couch their arguments in terms of Coves Darden’s purported “burden of demonstrating by admissible evidence,” the existence of a selected fact. (See, e.g., Resp. Brf. at 15.) This fictitious burden is all the more rare when one considers that Respondents did not meet their own burden of making a competent summary judgment showing in the first place.

perfunctory reference to the variable term “judicial admission.”⁷

The federal rule governing summary judgment does include an unclear concept of admissibility, along with procedural protections of the nonmoving party in the event there is an objection. State and federal rules of civil procedure governing summary judgment are different. The rules are different. The judicial interpretations of those rules are different. The overarching error in the Circuit Court’s order, and in the arguments of Respondents, is a failure to analyze the case against the controlling standard for decision of a summary judgment motion in state court in South Carolina, in the proper procedural context.

A literal reading of Rule 56, SCRCP mandates a denial of summary judgment in this case. It is nonsensical that Respondents adduce an early interrogatory response by Coves Darden as a valid basis for granting summary judgment on one supposed issue, but argue that other interrogatory responses are not valid for purposes of denying summary judgment.

Nowhere in Rule 56, SCRCP is there a requirement that the materials adduced in opposition to a motion for summary judgment be in admissible evidentiary form.

Rule 56(e), SCRCP only states an admissibility requirement with regard to affidavits, if any, adduced in supporting or opposing summary judgment. And this requirement, stated only with respect to affidavits, refers to “such facts as would be admissible in evidence,” without ever further defining the subjunctive condition referred to.⁸

⁷Respondents never quote or address the extensive sworn deposition testimony of Defendant Ibanez himself, describing the detailed oral contract he entered with the Plaintiff. (Cf. Appellant’s Brief at 5 (citing defendant’s testimony to the existence of a contract).) Ibanez entered this contract after visiting in Coves and Darden’s house for several extended international visits at Coves Darden’s expense. Respondents do not argue that Ibanez’s own deposition is not “admissible.” They argue that his sworn testimony cannot be used to “contradict” their particular gloss of an early interrogatory response in the case.

⁸Scholars considering the different, federal, standard, have concluded that the federal reference to summary judgment “admissibility” as a precise basis for importing trial evidentiary

The Official Reporter's Note actually remarks that the second sentence of Rule 56(e), SCRCF (now the third sentence) is different from the federal rule and was added because it was needed. South Carolina courts do not, and cannot, simultaneously deny summary judgment on the basis of a "scintilla," and require a nonmoving party to provide full-blown, testamentary, evidentiary exposition in advance of trial, in response to a bare assertion that the moving party would like to see all the evidence and develop arguments about it.

Respondents apparently urge allowing a completely meandering laxity on the part of the proponent of summary disposition, while requiring highly technical and hair splitting precision on the part of the nonmoving party. It is astounding how perceptions can change. Historically, and constitutionally, the presumption and the allocation of burden has been in favor of trial, and against summary disposition. The proponent of summary disposition was held to an exacting standard, and the opponent was allowed great leeway in showing the existence of a genuine issue of fact. The highly technical and hair splitting precision urged by Respondents is not required in federal court, much less in South Carolina state court.

Yet, even if indulged, the elusive and illusory approach urged by Respondents is nearly impossible to apply and analyze. Respondents' motion for summary judgment was fatally flawed, procedurally, from the beginning. Rules governing submissions opposing summary judgment depend upon the submissions supporting it, including what grounds are stated for the motion, when the motion is filed, when the motion is heard, which materials are submitted for

standards at the summary judgment phase is unclear, and that a plaintiff's response to even a properly supported "no-evidence" motion for summary judgment is sufficient if the nonmoving party's materials are "reducible to admissible evidence." Adam N. Steinman, The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy, 63 Wash. & Lee L. Rev. 81, 130 (2006). The current version of the federal rule has a provision governing timely objection on the still murky notion of federal rule summary judgment admissibility, and provisions for cure by the proponent of material objected to.

purposes of being included in the motion, and the timeliness of the submissions to be included in the motion.

Respondents filed a motion for summary judgment twice, and both times stated no grounds whatsoever for the motion. No accompanying materials were included with the motion. No affidavit in any sort of evidentiary form was submitted by the proponent of summary judgment. The motion should have been denied at the inception, saving judicial resources.

Thus began a wading into a standardless attempt to try the entire case on discovery materials while Respondents were simultaneously resisting any efforts at ordinary and open discovery. This was a feature of the situation the Court of Appeals found “extremely troubling” in Schmidt v. Courtney, 357 S.C. 310, ___, 592 S.E. 2d 326, 331 (Ct. App. 2003).

Three different hearings were held, March 5, 2013, May 20, 2013 and October 15, 2013.

Coves Darden submits that there was no motion, that there were no grounds, and that there were no materials properly submitted by the moving parties. Coves Darden submits that there was no burden to submit any opposition.

As the motion evolved and Respondents simultaneously resisted discovery on the facts of the case, Respondents limited all of their grounds to the assertion that no contract of any sort existed. Namely, in resisting discovery on all aspects of the case, Respondents asserted that no discovery was relevant because all other claims in the case stood or fell on the question of whether or not a “contract” existed. (See discussion in May 16, 2013 Mem. at 5-37, R. pp. 338-370.)

As amply demonstrated in Coves Darden’s Appellant’s Brief, evidence of the existence of a contract was abundant, there was no sham inconsistency in any of Coves Darden’s positions, and general trial discovery is far from complete.

II. Errors and Inaccuracies in the Introduction to Respondents' Brief.

Ibanez's able counsel now contends that because Coves Darden cannot produce a copy of a written contract countersigned by Ibanez, there must not be one. Ibanez's able counsel further contends that this assumed lack of a countersigned version of the written document means that the written contract is invalid. However, Respondents never adduced any testimonial material, nor any discovery responses of any sort by any defendant, which denied the existence of a countersigned copy of the written contract or denied the validity of the written contract.⁹

If there was no valid written modification of the detailed, confirmed oral employment agreement reached by the parties, then the oral agreement is the contract. It was therefore error to grant summary judgment, declaring that there is no scintilla of fact in the record from which a reasonable jury could conclude that a contract between the parties existed.¹⁰

In their brief at page 1, Respondents incorrectly assert that Coves Darden "denied" the existence of an oral contract and relied solely on a written contract of employment. This repeated misstatement of Coves Darden's position, and the facts in the record, has already been

⁹In the instant case, it remains to be seen whether Defendant Ibanez will one day step up and claim to possess a countersigned copy of the written contract, in order to take advantage of the arbitration clause in it or attempt to avoid some other pitfall in the case. Even absent a countersigned copy of the written contract by Ibanez, factual issues remain as to whether the written contract is valid, based upon Ibanez's knowledge of it, and acceptance of the benefits of the contract, with that knowledge. (See Appellant's Brief at 22-23.)

¹⁰In their brief at page 1, Respondents assert that Coves Darden cannot "make up its mind" about the alleged contract giving rise to its claims. As pointed out above, Coves Darden is not required to do so on summary judgment. Coves Darden is required only to show a scintilla of fact in the record from which a reasonable jury could see an issue as to whether there was a contract. Additionally, Coves Darden is only required to do this in response to a properly supported motion for summary judgment, which was absent in instant case.

Similarly, Respondents incorrectly assert that Coves Darden did an "about face" in relying on the oral contract of employment. There was no 180 degree change in position. The parties had a binding agreement. Then they were asked to put it in writing. One of them then implied through counsel – but has never stated – that he never signed what was written up. There was still an oral agreement before the written agreement.

thoroughly addressed in Appellant's Brief at 11-19. The early interrogatory response on which Respondents base this centerpiece of their entire motion was served before any substantial discovery in a case in which the Respondents thereafter resisted all discovery.

In this same vein, Respondents continue to argue that Coves Darden "admitted" that it did not have a fully executed copy of the written contract. Coves Darden did indeed inform the defendants in response to a request for production, that upon looking, Coves Darden was unable to locate a fully executed copy of the contract. Coves Darden never stated, however, that there was not a fully executed copy of the contract in existence.¹¹

Because of the patience of the circuit judge, the Respondents were able to engage in an evolving, multi-month challenge that Coves Darden prove up every element of its case without ever having had a clear delineation of the particular grounds for summary judgment. Indeed, in the course of resisting discovery, while the groundless motion for summary judgment was pending, the Respondents asserted that the sole relevant issue in the case was the existence or nonexistence of a contract. (See, e.g., Jan. 30, 2012 Motion to Compel at 2-5, R. pp. 165-168, and see detailed discussion in May 14, 2013 brief of Coves Darden opposing renewed summary judgment motion at 5-37, R. pp. 338-370.)

In their brief, Respondents argue, with no support, that Coves Darden "could not clearly articulate exactly what the terms of the oral agreement were." Providing only a footnote as authority for this proposition, Respondents recount only an excerpt of one affidavit, and there is

¹¹In their brief at page 1, Respondents also assert that Coves Darden was "allowed" to engage in "extensive" discovery and was never able to produce a fully executed copy of the contract. It is correct that Coves Darden was never able to produce a fully executed copy of the written contract. However, the record of the case, as discussed in Appellant's Brief, demonstrates that Coves Darden had to pull "eye teeth" to do general, not extensive, discovery, in which assertions of the defendants continued to turn up false, and in which documents were discovered which the defendants had failed to timely produce.

nothing unclear in the footnote. (Resp. Brf. at page 1, n.4.)

In further arguments which are irrelevant under the applicable summary judgment standard, Respondents assert that only "some" of the terms agreed to by the parties were reduced to writing. Under basic contract law, the lack of a "completely integrated agreement" has never been fatal to the existence of a contract.

Respondents also argue in their brief at page 2, that the terms of the O-1 visa "were never disclosed during the course of discovery." This statement is incorrect. The general terms applicable to all O-1 visas are part of federal law, and these and any specific terms are also often stated when the visa is granted. All the immigration papers processed and received by Coves Darden were produced to the Respondents during discovery, and any unsupported implication to the contrary is incorrect. Respondents themselves attached a portion of what was furnished to them, as Exhibit C to their Feb. 28, 2013 Memorandum. (R. pp. 226-229.) Further, the record amply demonstrates that Respondents themselves applied for an O-1 visa (changing Ibanez's employer from Coves Darden to Half Moon Stables without Coves Darden's knowledge), and employed Miami immigration counsel to handle the matter. According to deposition testimony, dealings with Miami immigration counsel were coordinated by the legally trained husband of Defendant Dori Derr, owner of Half Moon Stables. It is a term of all O-1 visas, that the employee who is granted the visa for purposes of working with the employer who applies for the visa is allowed to work only for the employer for which the visa is granted. (See Libertore affidavit ¶¶ 4, 8, 11, 12, 14, and 16, R. pp 275-278.)

As a variant of the foregoing arguments, Respondents further contend in their brief at page 2, that the written contract contained some terms which were terms in addition to those the parties had orally agreed upon. In the footnote explaining this contention, Respondents complain

that the written contract included a "provision requiring written notice to immigration and naturalization service, [and] representations regarding Mr. Garcia's domicile and intent to return to Spain." Again, these are legal requirements of not only an O-1 visa, but any employer-sponsored nonimmigrant visa issued.¹²

In the footnote (Resp. Brf. at 2, n.10), Respondents also complain that the written contract contained a 30-day termination provision, a noncompete clause, and an arbitration clause. Respondents did not identify anything that is contrary to the oral agreement of the parties, except for the 30-day termination provision. The other terms are not unusual in written employment contracts, but are fairly unusual to find written in strictly oral contracts.

Given the fact that it was possible for events to occur which would cause the contract to be completed in well under the length of time the parties clearly contemplated and conditionally agreed to, and given the fact that immigration authorities had the province to grant the visa for a period much shorter than the "ordinary" maximum, it was likely prudent not to risk denial of the visa by stating a length which might exceed the length the official could be of a mind to grant. The 30-day termination provision was not a drastic change from the parties' oral contract. This is particularly so in light of the close family friendship, multiple visits, extensive discussions, and high degree of trust reposed in Ibanez by Coves Darden in proceeding with such a substantial and expensive endeavor. (See Coves Aff., ¶ 2, R. p. 280.)

In keeping with the arguments maintained on and off by Respondents throughout the case, the Introduction of Respondents' brief focuses solely on the question of whether there was evidence of a contract or not. As pointed out in Appellant's Brief at 26-27, 31 and 35, other

¹²A nonimmigrant visa is issued upon the condition of nonimmigration, that is, upon the assurance that the alien does not intend to immigrate, that is, that the alien maintains a residence abroad to which he intends to return and he does not intend to attempt to stay permanently in the United States.

counts of the complaint – which were also dismissed by the circuit judge on summary judgment – did not depend on the existence of a written contract or a detailed oral contract. A detailed contract certainly bolsters these claims, but the absence of such a contract is not fatal to any.

III. Roughly Seriatim Replies to Other Arguments in Respondents' Brief.

In their brief at 3-11, Respondents argue, despite failure to timely and properly raise the issue, and despite multiple issues of fact, that the oral contract entered into between Ibanez and Coves Darden falls within the Statute of Frauds and is therefore unenforceable. As discussed thoroughly in Appellant's Brief at 23-25, factual issues preclude summary judgment ruling that as a matter of law, the Statute of Frauds applies. Most simply put, the Respondents did not present to the Circuit Court, material showing that there was no genuine issue as to the fact of whether the oral contract was impossible to have been performed within one year.

Witness Michael Libertore, an immigration lawyer, could clarify that it was always possible for the visa to have been granted for a period of less than a year. (Coves Darden's supplemental responses to interrogatories, dated October 9, 2013 (R. pp. 453-454).) The presence of such a witness, whom Respondents did not depose, forecloses any possibility of summary judgment on the issue.

The Statute of Frauds was not stated as among the particular grounds for the Respondents' summary judgment motion, nor was it stated in any brief until after the motion had been heard twice. With consent of Coves Darden, Respondents amended their Answer to the Complaint while their summary judgment motion was still pending, to add the Statute of Frauds as a defense. Respondents engaged in no discovery whatsoever on the issue of the Statute of Frauds, and made no Rule 56 showing with respect to it.

Yet, Respondents argue that the supplemental responses to interrogatories, in which Mr.

Libertore's available testimony is disclosed, are "wholly insufficient" to "raise an issue" about the Statute of Frauds defense, which was not even an issue in the summary judgment motion.¹³

Under Rule 56(c), SCRPC, summary judgment shall only be rendered if, among other things, any "answers to interrogatories" on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party's burden is to show that, taking into account all of the described materials, there is no genuine issue as to any material fact. Respondents failed.

For decades, and as recently as 2009, South Carolina has adhered to the rule that even a "scintilla" of evidence in favor of the nonmoving party requires denial of summary judgment on that issue. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

There is no statement anywhere in any section of Rule 56 which allows a court, looking for that scintilla¹⁴, to ignore answers to interrogatories.

And there is no requirement anywhere in Rule 56 that interrogatory answers set forth "evidence" in admissible form or in any other required form.

As previously discussed, Rule 56(e) specifically permits other relevant materials to be considered by the court, as follows: "The court may permit affidavits to be supplemented or

¹³ In support of their assertion, Respondents cite only Rule 56(e), SCRPC, which relates solely to the required contents and qualifications of affidavits, whereas the discovery response in question is not an affidavit, and is not submitted in opposition to an affidavit.

¹⁴ A scintilla is commonly known as a tiny trace or spark of a specified quality or feeling. "Scintilla" is from the Latin, "scintilla," meaning "spark," or "trace." Merriam-Webster's Collegiate Dictionary, 11th ed., 2012. It first emerged in the English language as an English word, directly from Latin, in 1661. Id. It is thus generally synonymous with a particle, iota, jot, whit, atom, speck, bit, ounce, shred, crumb, fragment, grain, drop, spot, hint, touch, suggestion, whisper, suspicion, smidgen, or tad.

opposed by depositions, answers to interrogatories, or further affidavits.”¹⁵ The Official Reporter’s Note to Rule 56 describes this provision as a “needed addition.”

It is the moving party’s burden, in the first instance, to (1) state at the outset, with particularity, the grounds for its motion, (2) file at the outset, any supporting material, and (3) demonstrate, i.e., not simply make a bald claim regarding, the absence of evidence creating a genuine issue as to every fact material to the motion. Respondents, however, argue in their brief at 5, with no authority, “Of course, a trial court does not rule on an issue based on what someone may say about it.” (Emphasis in original.) Yes it does. On a motion for summary judgment, the trial court frequently does exactly this, and denies summary judgment when the moving party has not met its burden.

Respondents’ esteemed counsel’s argument that an exception to the Statute of Frauds was not “raised or preserved” by Coves Darden is simply incorrect on all counts. Respondents overlooked the fact that Respondents did not themselves raise the affirmative defense of the Statute of Frauds until after Respondents had already filed two summary judgment motions. The Circuit Court had held a hearing and received various briefings with no mention of the issue before the Respondents ever raised the issue.

From the very earliest time that the Statute of Frauds was brought up as an issue, Coves Darden responded to it, noting that the issue was not properly before the court. In open court in the second hearing when Respondents first argued the issue, Coves Darden’s counsel responded as follows:

First, they haven’t pled the statute of frauds, which is an affirmative defense, which if not pled, doesn’t apply. Second of all, the statute of frauds, there are exceptions to the statute

¹⁵In the instant case, Respondents never even filed affidavits in order to attempt to make a prima facie summary judgment showing; indeed, they never even stated grounds at the time of filing their motion.

of frauds.

* * *

Now, under the statute of frauds, Your Honor, there are a number of exceptions, and one is, that the statute of frauds only applies if it was impossible, impossible to perform this agreement within the space of one year.

* * *

The statute of frauds is a whole 'nother issue, as they say, and it hasn't been raised --

THE COURT: And does it say impossible or does it say impractical?

MR. STANTON: My recollection is that it has to be impossible to be performed within the space of one year.

THE COURT: I don't think that is right.

MR. STANTON: And there are other exceptions as Your Honor knows, too. My main point is, that hasn't been raised, it hasn't been briefed, it hasn't been argued. They have not raised it as an affirmative defense, so it's not even on the table.

(Trans. of May 20, 2013 Hrg., 8:22 to 10:11 (excerpted), R. pp. 71-73.)

The nonapplicability of the Statute of Frauds, with objection that the Statute of Frauds was not before the court, appeared in every brief or submission made by Coves Darden to the court thereafter.

Exceptions to the Statute of Frauds are not elements of a claim and are not affirmative defenses which must be pled. To the converse, the Statute of Frauds is a defense which must be pled, and if it is to be the subject of a motion for summary judgment, affirmatively establishing the defense, the burden is upon the moving party to establish the applicability of the defense, and negate the exceptions to it. In this, Respondents failed.

Nevertheless, in their brief at 6, Respondents also argue that an excerpt of the affidavit of Miguel Coves establishes that the "contemplated" employment under the oral contract was a time between two and three years. This argument establishes nothing. The parties did contemplate that the relationship would be between two and three years. However, the parties agreed and recognized that what they contemplated would not be definitive if the immigration authorities only allowed something different. (See Coves Aff. ¶ 2, R. p. 280.)

In their brief at 7, Respondents initially admit controlling law already cited by Coves

Darden regarding instances in which the Statute of Frauds does not apply. However, Respondents' argument against the application of the controlling law is an assertion contrary to the controlling law itself. That is, where the controlling law provides that a contract is only "within" the statute in instances in which it is "impossible" for the agreement to have been performed within one year, Respondents argue that mere possibilities do not take the agreement outside the purview of the statute. Respondents dismiss as "sheer speculation," the possibility that the immigration and naturalization service might grant a visa for a period of less than one year. Sheer speculation is an historically valid basis on which oral contracts have been held to be outside the Statute of Frauds. The South Carolina authorities cited in *Coves Darden's* May 24, 2013 Mem. at 7 (R. p. 410) clarify that "[t]he fact that performance within a year is highly improbable or not expected by the parties does not bring the contract within the scope of this clause."

In the instant case, the evidence is more than sheer speculation. Mr. Libertore, an experienced immigration attorney, is prepared to testify that, not only do the immigration authorities have the power to grant visas for less than the expected duration, but he has also personally seen it happen. Respondents repeat their now-familiar last-ditch claim that the evidence creating the triable issue of fact must be "admissible." Not only is this argument incorrect under South Carolina law, as discussed above, but when he is called to testify, Mr. Libertore's testimony would be admissible. Further, Respondents made no timely objection to the admissibility of the supplemental interrogatory response or to the underlying expected testimony of Mr. Libertore.

Finally, Respondents attempt to distinguish the possibility of performance within one year from the possibility of discharge within one year. Here, in their brief at 8, Respondents cite

sections of the Restatement (2nd) of Contracts, which may be at odds with the controlling South Carolina case law they agree with on the page before. Arguments and inferences as to whether the facts can be viewed as establishing a “condition or contingency which may occur within one year,” on the one hand, or as an “excusing or supervening event,” on the other, are best left to a fuller development of the facts and a determination by jury.¹⁶

In their memorandum at 9, Respondents argue that the doctrine of part performance, as an exception to the Statute of Frauds, does not apply in actions solely for damages at law. The instant action was for damages and injunction.

Respondents also argue that Coves Darden did not raise the particular exception of part performance in the court below. Coves Darden did immediately deny the applicability of the late-raised Statute of Frauds in the action below and stated there were numerous exceptions. The Statute of Frauds issue, itself, was not raised by Respondents in either their December 4, 2012 motion for summary judgment, or their January 28, 2013 motion for summary judgment, or in any brief until after the motion was heard twice.

Simply bringing up an issue in the course of oral argument, the second time a matter has been heard, does not constitute a Rule 56 showing by the moving party. Further, there were ample facts in the record showing not only the payment of consideration, but also far more than partial performance on the part of Coves Darden. Ibanez’s own application for a leave of absence from his employer in Spain, the visa application paperwork submitted to immigration authorities, pay stubs, and Ibanez’s physical occupation of a home provided for him, all were

¹⁶South Carolina case law clearly holds, for example, that employment of a person for life during his satisfactory performance, does not describe a contract within the Statute of Frauds, although unsatisfactory performance could be viewed as a power to cancel and a death could be viewed as an event discharging a duty to further perform. Again, examination of exception to a last-minute affirmative defense, which was not included among the grounds for summary judgment at the time of filing the motion, should not be necessary.

confirmatory of the existence of a contract.¹⁷

In their brief at 11, Respondents argue that a particularized statement of the South Carolina doctrine of independent consideration was not "raised" by Coves Darden in the court below. As previously discussed, Coves Darden immediately pointed out that the Statute of Frauds did not apply in this case, even if the Statute of Frauds, which was raised too late to be before the court on summary judgment, were to be considered an issue in the case.

Additionally, Respondents argue that the record contains no evidence of independent consideration. Here, Respondents characterize the sole consideration to Mr. Ibanez as "payment of his salary and providing him with a place to live." If Respondents' characterization is to be accepted, then other investment and expenditure by Coves Darden would be independent. These expenditures would include paying the man's travel expenses before there was ever a contract, paying the man to work in Spain while waiting on the visa, then paying all the legal expense of the visa application, paying for further travel of Ibanez, paying Ibanez's cable bill, providing Ibanez's car, providing Ibanez a family dog, etc.

In their brief at 12, Respondents now retreat from the ruling of the Circuit Court that Ibanez categorically could not be considered under any state of facts to owe a "duty of loyalty" to Coves Darden. Ibanez was not sued only for breaching his fiduciary duty of loyalty, but also for violating his fiduciary duties of honesty and information and his contractual duties of exclusivity,

¹⁷In their brief at 10, Respondents further argue that the equitable doctrine of part performance does not apply to personal service contracts. Although, as acknowledged in Appellant's Brief, the doctrine arises most often in instances of contracts concerning the conveyance of real estate, Respondents have cited no South Carolina case supporting their argument. The only authority provided by Respondents is an assertion that the "courts" have "routinely" held as Respondents now argue, accompanied by citation of only three Florida intermediate appellate court cases. No other courts. Even the Florida cases, when read for their "roots," lead to a rule that is far from categorical. The South Carolina law of equity, particularly South Carolina law pertaining to the related doctrine of independent consideration, suggests that the law in South Carolina differs.

loyalty, and noncompetition. (Statement of the Case, App. Brf. at 4.)

In their brief at 12-18, regarding fiduciary duties of employees, Respondents finally recognize that employees do owe their employers fiduciary duties, and that the dimensions of those fiduciary duties are describable by reference to the particular employment situation, the duties and station of the employee, and the employee's relationship with the employer.¹⁸ Respondents admit that the issue of fiduciary duties "is not black and white." (Respondents' Brief at 12.) A complicated and only partially developed factual record pertaining to a matter which is not black and white, is not a record on which summary judgment may be granted.

Respondents state that Coves Darden cites no authority for the proposition that an employee per se owes fiduciary duties to an employer. He does. Futch v. McAlister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Coves Darden also cited definitions from the Restatement (3rd) of Agency.

Respondents make various arguments to the effect that fiduciary duties are not owed in

¹⁸Respondents imply that a janitor and a chief operating officer do not have equal fiduciary duties, and incorrectly characterize Coves Darden's arguments to be to the contrary. They do both owe fiduciary duties. However, if a janitor does not have high-level interactions with the customers of his employer and engage in competitions on behalf of his employer which are designed to enhance the value of his employer's goods, and serve as a public relations measure on behalf of his employer, it serves very little purpose to observe that the janitor has a fiduciary duty not to do these things for a direct competitor in a manner which is a direct detriment to his employer.

In their brief at 13, Respondents discuss various sections of the Restatement (3rd) of Employment Law, which actually serve to confirm the error of any holding that an employee does not owe any duties to his employer. Respondents have gone from arguing that there was no fiduciary duty, to arguing for the existence of a "varying" fiduciary duty. The authorities cited by Respondents distinguish between whether a remedy should be in tort or in contract. They do not hold that there is a lack of duty, or a lack of remedy. The discussion provided by Respondents illustrates the error of granting summary judgment. In their brief at 14, Respondents vacillate from this discussion, stating, "As noted above, the mere existence of an employer-employee relationship, standing alone does not give rise to fiduciary obligations." This was not the proposition "noted above." Further, the facts of the instant case do not involve a "mere" employer-employee relationship standing alone."

nonfiduciary relationships. This protracted argument begs the question before this Court, which is whether the relationship in question was a fiduciary relationship.

Respondents also claim that the abundant evidence of Ibanez's special station and relationship is somehow "inadmissible."¹⁹ This Court can consider all of the circumstances of the relationship, including the fact that Ibanez agreed to be the godfather of Coves and Darden's children, the fact that Coves Darden trusted Ibanez enough to pay him in Spain to work on the premises of a special supplier before Ibanez ever started stateside employment, and that they asked him to stay for weeks in their house on their farm in the Aiken area and watch over it while they traveled to Spain to attend to other business.²⁰

In their brief at 17, Respondents assert that secretly planning to leave exclusive employment with Coves Darden and secretly performing services for Half Moon, a direct competitor, do not constitute a duty of the breach of loyalty.²¹ Respondents ignore Coves Darden's informed suspicion that Ibanez intentionally compromised his performance and duties

¹⁹In their brief at 15, Respondents recite the familiar standard of Rule 56(e), SCRCP, which applies "when a motion for summary judgment is made and supported as provided in this rule." However, nowhere in any of the 31 pages of Respondents' brief do they ever demonstrate that they made and supported a motion for summary judgment as provided in Rule 56.

²⁰Similarly, in their brief at 16, Respondents characterize as "wishful thinking," and as matters not supported by a shred of "admissible" evidence, certain matters recounted in Appellant's Brief. The record undeniably reveals that Coves Darden agreed to pursue a complicated program to hire Ibanez, that Coves Darden agreed to have Ibanez work where Coves and Darden lived, that Coves Darden agreed to have Ibanez deal with rare horses, that Coves Darden agreed to have Ibanez identified with their brand, that Ibanez was highly paid, that Ibanez was heavily advertised by Coves Darden, and that Ibanez's employment was a large investment for Coves Darden.

In the same vein, Respondents' calling Coves Darden's trust in Ibanez "unilateral" does not eliminate a genuine question of fact as to whether it was unilateral. In his affidavit, Miguel Coves stated Ibanez "invited and accepted" the trust. (R. p. 280.)

²¹Respondents continue to ignore the breach of duties of honesty and information, and the breach of contractual duties.

in order to develop business contacts. Respondents also ignore evidence in the record indicating that Ibanez pursued various "clinics" and other out-of-house teaching or riding engagements only after leaving Coves Darden. Respondents assert that "secretly planning to leave one's employment is not a tort in South Carolina."

Ibanez's plan involves doing harm to the employer while still employed, and lying about matters in the employee's charge and duty while still in the employ of the employer, and working for a direct competitor in violation of an agreement for exclusivity, while still in the employ of the employer.

In their brief at 18, Respondents submit that an employee may work for a competitor of the first employer if five conditions are present.²² Ibanez fails on all counts. He had an exclusivity agreement with the employer, he was in a special relationship of trust and confidence, all of his horsework time was committed to Coves Darden, and his very reason for being in the United States was that he was a more high-profile and more experienced trainer of PRE horses than could be obtained in the general market in the United States.²³

²²In their brief at 24-26, Respondents similarly argue for the existence of a qualified privilege exception in instances of job offers by competitors. The word "qualified" should sound the summary judgment denial alarm. Respondents cite one North Carolina case to establish the soi-disant "privilege." A simple reading of the lengthy quoted passage reveals that Ibanez would not qualify. In the instant case, there is no basis for a determination as a matter of law that Ibanez was a bare at-will employee; the facts in the record indicate that there was an agreement for exclusivity; the facts in the record indicate Derr represented to Ibanez that she would agree to break the law concerning a prohibition on outside compensation for earnings; and the facts of the record indicate Ibanez's departure was calculated to harm Coves Darden by leaving it with no rider for two planned competitions in the same dressage community in which both Coves Darden and Half Moon Stables competed. Efforts to delineate the inapplicable "qualified privilege" therefore serve no end in the instant case.

²³This was not a case of a grocery store worker showing up too tired for work because she had been holding down a shift on another job at a cardboard box factory or even another grocery store. Ibanez was taking time from Coves Darden specifically to improve a competitor's standing, when he was supposed to be preparing for two planned competitions for Coves Darden which he secretly planned to abandon at the last minute.

In their brief at 22, Respondents argue that there could be no tortious interference with contract because there was no proof of an oral or written contract. There is evidence in the record of both. Tortious interference with contract is a claim directed, not to Ibanez, but to Respondent Derr. The Statute of Frauds is not an available defense for a third party to the contract, here, Derr. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987); Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E.2d 181 (1976).

In their brief at 23, Respondents argue there is no “proof” of intentional procurement. “The requisite level of intent also exists if the interferor knows that the interference is certain or substantially certain to occur as a result of his [or her] actions.” Commerce Funding Corp. v. Worldwide Sec. Servs. Corp., 249 F.3d 204 at 212 (4th Cir. 2001).²⁴

In their brief at 26, Respondents assert that Coves Darden mis-cites Commerce Funding. A closer reading of Commerce Funding indicates that justification based on “legitimate business competition” depends upon the interferor either having his or her own competing contract concerning the third person (i.e., a financial interest), or the contract in question being one that is terminable at will. Respondents imply that the question with respect to contracts terminable at will is one of “improper purpose.” It is improper methods or means.

In their brief at 27-30, just as did the Circuit Court, Respondents fail to recognize that the

²⁴Derr had Ibanez ride her horses, she encouraged him to leave Coves Darden, she agreed to handle getting his visa switched and to begin doing so before he quit Coves Darden. She signed him up to ride in competition for her while he was still Coves Darden’s exclusive employee. Statements both in Derr’s answer and in her deposition have been shown to be materially incorrect. Any claim by Derr that a jury should infer that she did not know her actions would cause Ibanez to lie, defer his duties, leave when shows known to her were planned, and quit without any notice, should be presented to a jury.

UTPA is designed to address both anticompetitive behavior and behavior injurious to consumers. Just as did the Circuit Court, Respondents overlook the fact that the anticompetitive act of tortiously interfering with the contract between Coves Darden and Ibanez is a component of the unfair trade practices claim. The Respondents' flawed analysis has been refuted by Coves Darden in Appellant's Brief at 40-42. Among other things, the literal truth of misleading advertising is not a refuge for the advertiser engaging in it, and it is still false advertising.

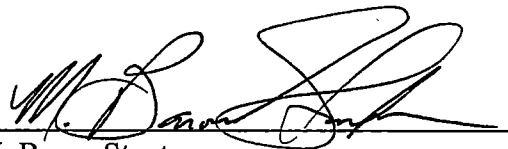
As moving parties, Respondents never pointed to any materials of record which had any bearing on the issue of damages under the unfair trade practices count.²⁵

Respondents also wholly fail to address the fact that Coves Darden additionally prayed for injunctive relief against Respondents.

IV. Conclusion.

For all the reasons set forth in Appellant's Brief, it is respectfully submitted that the Circuit Court erred in granting summary judgment and in dismissing the case. The Circuit Court should be reversed, and the matter should be remanded for unimpeded discovery and for trial.

Respectfully submitted,


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STANTON LAW OFFICES, P.A.
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²⁵Damages from false advertising are generally viewed by courts very flexibly, because of the inherent difficulty in quantification. Under the Lanham Act, for example, several forms of monetary relief are possible, including the amount of profits lost as a result of the defendant's false advertising, or the defendant's profits gained as a result of the false advertising. 15 U.S.C. §1117(a). There is even a doctrine allowing the plaintiff to use the defendant's advertising costs as a measure of the profits of the defendant, on the basis that a party would not spend advertising dollars unless the party determined that the profits flowing from the advertising would more than justify the expense of the advertising. See U-Haul Int'l Inc. v. Jartran Inc., 793 F.2d 1034, 1042 (9th Cir., 1986).

803-929-1484

ATTORNEY FOR APPELLANT
COVES DARDEN, LLC

Date:

November 18, 2014

APPENDIX DIVIDER

D

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 12-CP-02-01772

Coves Darden, LLC, ... Appellant,
v.

Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, ... Respondents.

RECORD ON APPEAL
(Including Certificate of Counsel and Stipulation)
Volume 1 of 2

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Order granting Plaintiff's motion to compel and
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STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
Coves Darden, LLC,)

Plaintiff,)

v.)

Francisco Jose Garcia Ibanez,)
Dori Derr, and Half Moon)
Stables, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 12-CP-02-01772

ORDER

FILED 3 19 2013
L. J. Anderson
CLERK, CP & GS.
A. K. Knepper 250
Deputy Clerk

This matter came before the Court by way of Motions filed by both sides. The parties appeared through counsel on March 5, 2013. The Court heard arguments from counsel as to the pending Motions. After hearing such arguments, this Court ruled as follows:

1. Defendant Garcia Ibanez must appear for a deposition within 30 days of March 5, 2013. This Court will hold in abeyance the Motion for Summary Judgment. After the deposition is transcribed, the Defendants may contact the Court to reset the Motion for Summary Judgment for a hearing.
2. This Court grants Plaintiff's motion to compel as to requests for production numbered 5, 7, and 8. Defendant Half Moon is to produce any responsive documents which are within its possession, custody or control within 15 days of March 5, 2013.

All other issues are held in abeyance.

IT IS SO ORDERED.


Honorable Doyet A. Early, III
Presiding Judge
Second Judicial Circuit

March 19, 2013
, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP0201772

Coves Darden, Llc	Francisco Jose Ibanez Half Moon Stables, Llc	Dori Derr
PLAINTIFF(S)		DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT ENTRY		
Complete this section below when the judgment affects title to real or personal property. If any amount should be entered, enter it in the judgment information box, indicate P, M, A in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge	Judge Code	Date
		3/19/2013

For Clerk of Court Office Use Only

This judgment was entered on 3-19-13, and a copy mailed first class or placed in the appropriate attorney's box on 3-19-13, to attorneys of record or to parties (when appearing pro se) as follows:

M. Baron Stanton PO Box 245 Columbia, SC 29202

Thomas Roy Young Jr. PO Box 651 Aiken, SC 29802

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard by Clerk

Liz Godard - Clerk of Court

Court Reporter

Judicial clerk's e-mail conveying determination of court
re 90 more days of discovery, sent July 11, 2013

Barry Stanton

From: Early, Doyet A. Law Clerk (Adam C. Ness) [dearlylc@sccourts.org]
Sent: Thursday, July 11, 2013 12:20 PM
To: Stanton, Barry
Cc: Early, Doyet A. Law Clerk (Adam C. Ness); Tom Young; James M. Derr; Early, Doyet A. Secretary (Karin Coker); Early, Doyet A.
Subject: Brief, etc. for Monday 5/20 Hearing of MSJ: Coves Darden, LLC v. Derr, Ibanez, et al; CA No. 2012_CP-02-01772

All:

Judge Early has decided to hold his ruling in abeyance on this motion for SJ. Furthermore, from the date of this email, July 11, 2013, you all have 90 days to do additional discovery, i.e. by October 9, 2013, which is the 90th day.

Sincerely,

Adam C. Ness, Esq.
Law Clerk to the Honorable D.A. Early, III The Circuit Court of the 2nd Judicial Circuit PO
Box 90 Bamberg, SC 29003
Telephone: 803.245.4004
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Order granting summary judgment, dated December 5, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
Coves Darden, LLC,)
Plaintiff,)
v.)
Francisco Jose Garcia Ibanez,)
Dori Derr,)
and Half Moon Stables, LLC,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 12-CP-02-01772

**ORDER GRANTING
SUMMARY JUDGMENT**

This matter came before the Court by way of Defendants' Motion for Summary Judgment. A hearing was held on October 15, 2013. After reviewing the pleadings, submissions including legal memoranda, and hearing the able arguments of counsel, the Court grants Defendants' Motion for Summary Judgment.

PROCEDURAL HISTORY

This case arises out of a lawsuit filed by Plaintiff for the alleged breach of an oral contract of employment. Defendants' Motion for Summary Judgment was originally heard on March 5, 2013. After that hearing, the Court ordered Defendants to produce certain written discovery and allowed Plaintiff the opportunity to depose Defendant Ibanez. Subsequently, the Motion was heard again on May 20, 2013. After that hearing, the Court took the matter under advisement and allowed the Defendants to amend their Answer to allege a statute of frauds defense. On July 9, 2013, this Court notified all counsel that the Court would hold the summary judgment motion in abeyance while allowing the parties ninety (90) more days of discovery.

FILED 12.20.13
Liz Hodard
C.C.P. & G.S.
Anita Knoepel 30
Deputy Clerk

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After the conclusion of the additional ninety day discovery period, this Court reheard argument on the summary judgment motion on October 15, 2013.

UNDISPUTED FACTS AND PARTY ADMISSIONS

1. Sometime before September 30, 2011, Plaintiff Coves Darden, LLC ("Coves Darden") submitted an application with the Department of Homeland Security, U.S. Citizenship and Immigration Services seeking issuance of an O-1 visa for Francisco Jose Garcia Ibañez. (Complaint, ¶¶ 6, 11; Admitted in First Amended Answer, ¶¶ 6, 11).

2. The application sought admission of Mr. Garcia to the United States to work as an equestrian trainer.¹ (Complaint, ¶ 7; Admitted in First Amended Answer, ¶ 7).

3. The application was granted, and Mr. Garcia entered the United States on or about February 8, 2012. (Complaint, ¶ 13; Admitted in Answer, ¶ 13).

4. It is undisputed that Mr. Garcia commenced working for Plaintiff Coves Darden shortly thereafter.

5. On or about June 8, 2012, Mr. Garcia quit Coves Darden. (Complaint, ¶¶ 17, 18; Admitted in Answer, ¶¶ 17, 18).

6. Plaintiff has judicially admitted that there was no oral contract of employment between Coves Darden and Defendant Garcia (Plaintiff's response to Interrogatory No. 6):

"The agreement was not oral. It was a written contract presented to and acknowledged by Ibanez in (sic) or before January of 2012, after August of 2011."

¹ The Complaint and Plaintiff's discovery responses repeatedly refer to the Defendant as Mr. Ibañez. In Spain, the patronymic (father's last name) is followed by the matronymic (mother's last name). In Hispanic countries an individual's legal name is the patronymic. Thus, Francisco Jose Garcia Ibañez is more properly referred to as Mr. Garcia. That convention will be followed throughout this Order.

Plaintiff has not moved to withdraw the foregoing statement and it remains a matter of record in this case.

7. In response to a request to produce a fully executed copy of the purported written contract, Plaintiff stated as follows:

““For Defendants’ information, Defendant [sic, Plaintiff] believes there are none currently responsive to Request 1 (if requesting one with Ibanez’s signature.).”

8. Despite the foregoing judicial admission, at oral argument on May 20, 2013, when asked by the Court “What kind of contract, oral or written?”, Plaintiff’s counsel responded “Certainly an oral one, your honor.” (Transcript, May 20, 2013, p. 11, ll. 15-17.)

9. Further, on October 15, 2013, Plaintiff’s counsel made the following admission regarding the alleged contract with reference to the Affidavit of Miguel Coves that was filed after the pending Motion for Summary Judgment had been fully briefed:

“ Was there a contract? The affidavit of Miguel Coves says yes there was. It was an oral agreement that the parties worked on over lengthy meetings, visits from Spain where the man and his family were hosted in the United States, much expense, multiple visits.”

10. In an Affidavit dated April 24, 2013, a principal of Coves Darden, Miguel Coves, filed an Affidavit in which he asserted that the alleged oral contract of employment contemplated employment by Mr. Garcia for between two and three years. (“We entered into an agreement to employ [Garcia] to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden Farm. *We both acknowledged we expected the relationship to continue for at least two years.*”) Affidavit of Miguel Coves, ¶ 6.

LEGAL STANDARD FOR SUMMARY JUDGMENT

One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and it should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett* 477 U.S. 317 (1986). After the moving party files an appropriate motion, the burden shifts to the non-moving party to demonstrate the existence of admissible evidence establishing a triable issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If the non-moving party cannot do so, summary judgment is appropriate. *Id.* The non-moving party cannot defeat the motion by relying upon the mere allegations of the complaint, but must disclose sufficient facts by affidavit or other proof. *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 6512, 655 (Ct. App. 1994). Conclusory statements as to ultimate issues are not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. *Id.* The Court is also free to ignore contradictory affidavits that attempt to create a triable issue of material fact, particularly when the affidavit is filed after a Motion for Summary Judgment. *See e.g. Coffey v. Jenkins*, 117 S.C. 321 (S.C. 1920) ("Where a continuance is sought to procure the attendance of an absent witness, and the adverse party, to avoid the postponement, admits that the witness will testify as stated in the affidavit filed for the purpose, the evidence thus given cannot be discredited on the trial by proof of contradictory statements. The party making the admission cannot be allowed to extricate himself from a situation created by his own voluntary act, in disregard of fixed rules of practice and evidence."); *Cothran v. Brown*, 357 S.C. 210 (S.C. 2004) ("[A] court may disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement.") Summary judgment is appropriate when it is

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clear that there is no genuine issue of material fact. *C&S National Bank v. Lanford*, 313 S.C. 540, 443 S.E.2d 549, 551 (1994).

DISCUSSION

A. Plaintiff's Claim for Breach of Contract

In this case, Plaintiff, both directly and through its counsel, has made several contradictory statements regarding the nature of the relationship between Coves Darden and Defendant Garcia. In responding to Interrogatories, Plaintiff judicially admitted that there was no oral contract of employment, but only a written agreement that was allegedly "acknowledged" by Defendant Garcia. However, in responding to a Request to Produce, Plaintiff admitted that it had no written agreement signed by Defendant Garcia. At a hearing in this matter on May 5, 2013, Plaintiff's counsel contradicted his client's interrogatory responses and asserted that the agreement between the parties was, in fact, an oral agreement. On April 24, 2013, Miguel Coves, a principal of Plaintiff, filed an Affidavit in which he alleged that the agreement between the parties was an oral agreement of employment for between two and three years. This position was further stated during the May 20, 2013 hearing. At a final hearing on the Motion for Summary Judgment on October 15, 2013, Plaintiff's counsel reiterated the contention that the agreement was, in fact, an oral agreement.

Regardless of which version the Court accepts, the end result is the same. If the Court accepts Plaintiff's responses to an Interrogatory and a Request to Produce, then the Court is left with the conclusion that there was: a) no oral agreement between the parties, and b) no written agreement signed by the party to be charged, Defendant Garcia. On the other hand, if the Court ignores these earlier party admissions and accepts the belated contention of Plaintiff that there was no written contract of employment, but only an alleged oral agreement for employment



T. M. Coves
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between two and three years duration, the Court is again left with the fact that there is no writing signed by the party to be charged, Defendant Garcia, and, therefore, the alleged oral agreement violates the Statute of Frauds and is unenforceable.¹

The Court is also mindful of the fact that, under South Carolina law, there is a presumption of at will employment, absent evidence of the creation of an enforceable contract of employment. *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 334 (S.C. 1999). Regardless of which version of Plaintiff's admissions the Court accepts, the result is the same: as a matter of law, Plaintiff has failed to overcome the presumption of at will employment.

"South Carolina has long recognized the doctrine of employment at-will. At-will employment is generally terminable by either party at any time, for any reason or for no reason at all. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981), *appeal after remand*, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984), *writ granted in part*, 285 S.C. 84, 328 S.E.2d 479 *quashed*, 287 S.C. 190, 336 S.E.2d 472 (1985); *Culler v. Blue Ridge Elec. Coop. Inc.*, 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992)." *Prescott, supra*.

Further, the termination of at-will employment does not give rise to a cause of action for breach of contract. *Hudson v. Zenith Engraving Co., Inc.*, 273 S.C. 766, 259 S.E.2d 812 (1979).

In summary, Plaintiff, who bears the burden of proof on the issue at trial, has failed to demonstrate by competent evidence the existence of a triable issue of material fact regarding the existence of either an enforceable oral contract of employment or an executed written contract of employment signed by Defendant Garcia. Therefore, summary judgment is proper with respect to the cause of action for breach of contract.

¹ In South Carolina, any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. See S.C. Code § 32-3-10(5).

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HCP

B. Plaintiff's Cause of Action for Breach of Fiduciary Duties of Loyalty, Honesty and Information

This Court is persuaded that there are no fiduciary duties of loyalty owed by a non-contractual, non-fiduciary employee subject only to the rules for common law at will employment. South Carolina cases finding a cause of action for breach of the duty of loyalty have all involved upper level managerial employees. See *Loundes Products, Inc. v. Brower*, 259 S.C. 322 (S.C. 1972) (key employees meeting with investors and current customers of employer while starting competing business liable for breach of duty of loyalty.); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598 (S.C. 1999) (Manager of Operations); *Young v. McKelvey*, 286 S.C. 119 (S.C. 1985) (Vice-President of Sales).

On the other hand, research has failed to disclose any published opinion from South Carolina courts finding a duty of loyalty on the part of a non-managerial, at will employee. The law from other jurisdictions supports the proposition that no such duty of loyalty exists.

Courts from around the United States are generally unsympathetic to breach of duty of loyalty claims in the absence of a confidential or fiduciary relationship, or in the absence of a contract of employment. The North Carolina Supreme Court's opinion in *Dalton v. Camp*, 353 N.C. 647 (2001), is persuasive. In that case, the Court held that outside the context of a fiduciary relationship, "there is no basis for recognizing an independent tort claim for a breach of a duty of loyalty. . . ." *Id* at 652. The Court further noted:

"Under the general rule, 'the relation of employer and employee is not one of those regarded as confidential.' *King v. Atlantic Coast Line R.R. Co.*, 157 N.C. 44, 72 S.E. 801 (1911); see also *Hiatt v. Burlington Indus., Inc.*, 55 N.C. App. 523, 529, 286 S.E.2d 566, 569, *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 365 (1982)."

See also *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362 (N.C. App. 201):

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#7

"Our Supreme Court has recently addressed the issue of an at-will employee's duty of loyalty to his employer in the context of starting a competing company. See *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). In *Dalton*, the Court held that, outside the purview of a fiduciary relationship, our State does not recognize an independent tort for breach of duty of loyalty by an at-will employee. *Id.* at 652, 548 S.E.2d at 708. Plaintiff presents no evidence that it held a fiduciary relationship with [Defendant]."

The law in other jurisdictions is in accord. *Mattel, Inc. v. MGA Entertainment, Inc.*, 2011 U.S. Dist. LEXIS 55756 (C.D. Cal. 2011) (Refusing to recognize the tort of breach of the duty of loyalty in the employment context); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (Cal. 1988) (Tort duties should not be wantonly interjected into contractual relationships.); *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312 (9th Cir. 1989), Kozinski, concurring ("Not every slight, nor even every wrong, ought to have a tort remedy. The intrusion of courts into every aspect of life, and particularly into every type of business relationship, generates serious costs and uncertainties, trivializes the law, and denies individuals and businesses the autonomy of adjusting mutual rights and responsibilities through voluntary contractual agreement.").

Moreover, although Plaintiff made general allegations regarding the existence of some type of fiduciary relationship between the parties, the Complaint and subsequent affidavits contain no specific facts from which a reasonable trier of fact could find the existence of a fiduciary relationship in the context of an at will employee. Mere conclusory allegations without reference to specific facts are not sufficient to avoid summary judgment. *Ayers v. Pastime Amusement Co.*, 283 F. Supp. 773 (D.S.C. 1968); *Simpkins v United States*, 253 F Supp 2d 4 (D.C. Colo. 2003).

In responding to summary judgment motion, the non-moving party may not rely solely on mere conclusory allegations. Rather, to avoid summary judgment, the nonmoving party must be

able to point to specific, competent evidence to support his claim; mere allegations, or conjecture unsupported in record, are insufficient to raise genuine issue of material fact. *August v Offices Unlimited, Inc.*, 981 F2d 576 (1st Cir. 1992).

For the foregoing reasons, Defendant Garcia should be granted to summary judgment with respect to the cause of action for breach of fiduciary duties of loyalty, honesty and information.

C. Cause of Action against Defendant Derr for Tortious Interference

Plaintiff also seeks to hold Defendant Dori Derr liable for tortious interference with contract. Mrs. Derr should be granted summary judgment on this issue.

The elements of a cause of action for tortious interference with contract in South Carolina are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (S.C. 1993).

In addition to the existence of a valid contract, an essential element to the cause of action for tortious interference with contractual relations is the intentional procurement of the contract's breach. *Kinard*, 315 S.C. at 240, 433 S.E.2d at 837. Where there is no breach of the contract, there can be no recovery. *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994). That factor alone is fatal to Plaintiff's claim.

Additionally, Plaintiff has not come forward with any admissible evidence from which a reasonable trier of fact could conclude that Defendant Derr intentionally procured the breach of contract. Moreover, as this Court has already found, Plaintiff has failed to demonstrate the existence of a legally enforceable contract of employment and there can be no cause of action for tortious interference with contract in the absence of an enforceable contract.

While the failure to establish a triable issue of fact with respect to two elements of Plaintiff's cause of action is sufficient to support this Court's grant of summary judgment, the Court notes that the majority of jurisdictions around the United States also recognize a further qualified privilege for individuals who offer employment to the at-will employee of a competitor.

Perhaps the most succinct statement of the legal principle, and the collection of authorities from around the United States is *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216 (N.C. 1988), where the North Carolina Supreme Court summarized the law and authorities with respect to tortious interference claims brought by a competitor:

"[W]e recognize and apply the general principle that interference may be justified when the plaintiff and the defendant are competitors. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176. See also, *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W. 2d 892 (1965); *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203 (1912); *Philadelphia Dairy Prod. v. Quaker City Ice Cream Co.*, 306 Pa. 164, 159 A. 3 (1932); *Thacker Coal & Coke Co. v. Burke*, 59 W.Va. 253, 53 S.E. 161 (1906). *Contra Moye v. Eure*, 21 N.C. App. 261, 205 S.E. 2d 221 (1974); *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970). Further, we find the well-reasoned opinion of Judge Learned Hand in *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981 (2d Cir. 1918) to be persuasive. Judge Hand, writing for the majority in that case, stated that public policy demands that absent some monopolistic purpose everyone has the right to offer better terms to another's employee, so long as the latter is free to leave. *Id.* A contrary result would be intolerable, both to the new employer who could use the employee more effectively and to the employee who might receive added pay. *Id.* To hold otherwise would unduly limit lawful competition. *Id.* "Later cases adopt the rationale of *Triangle Film*. The free enterprise system demands that competing employers be allowed to vie for the services of the 'best and brightest' employees without fear of subsequent litigation for tortious interference. See *McCluer v. Super Maid Cook-Ware Corp.*, 62 F. 2d 426 (10th Cir. 1932); *Vincent Horwitz Co. v. Cooper*, 352 Pa. 7, 41 A. 2d 870 (1945); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968); *Coleman & Morris v. Pisciotta*, 107 N.Y.S. 2d 715, 279 A.D. 656 (1951). To restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression.

'Competition . . . is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to



himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of a class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants . . . are instances.'

"*Macaulay Bros. v. Tierney*, 19 R.I. 255, 256, 33 A. 1, 2 (1895), cited with approval in *C. S. Smith Metro. Mkt. v. Lyons*, 16 Cal. 2d 389, 106 P. 2d 414 (1940); *Kingston Trap Rock Co. v. International Union of Operating Engineers*, 129 N.J. Eq. 570, 19 A. 2d 661 (1941)."

See also *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362 (N.C. App. 2001) ("[O]ur Supreme Court has held that the mere enticement and hiring of an at-will employee by a competing company, absent an improper motive, does not give rise to a tortious interference with a contract claim.").

To this extensive collection of authorities, this Court can add a reference to *Baxter Research Med., Inc. v. Medtronic, Inc.*, 1999 U.S. App. LEXIS 2850 (4th Cir. 1999), applying Virginia law:

In particular, Baxter seeks to bar KOL's efforts to improve the lot of its employees and Medtronic's efforts to improve its workforce. 'Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose every one has not the right to offer better terms to another's employee, so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as could use the employee more effectively and to such employees as might receive added pay. It would put an end to any kind of competition.' *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981, 982 (2d Cir. 1918). Here, Medtronic engaged in permissible, albeit aggressive, competition. Baxter may wish it had an agreement that prevented this competition, but the one for which it bargained did not do so.

The Complaint in this case alleges that Dori Derr and Half Moon are competitors of Coves Darden (Complaint, ¶¶ 45, 46). Because the foregoing authorities represent the majority view, this Court is further persuaded to grant summary judgment on the tortious interference with contract claim on this additional and independent basis separate from the Plaintiff's failure to submit sufficient evidence to carry its burden as to each element of this claim.

Based on the above, this Court grants Defendant Derr summary judgment on the claim for tortious interference with contract.

D. Cause of Action Against Derr and Half Moon for violation of the South Carolina Unfair Trade Practices Act.

Derr and Half Moon should be granted summary judgment with respect to the cause of action seeking recovery for alleged violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* ("SCUTPA").

To maintain a private cause of action under SCUTPA, a plaintiff must establish: (1) the defendant engaged in an unlawful trade practice; (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice; and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. *Daisy Outdoor Advertising Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47, 49 (S.C. 1996); *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998).

SCUTPA only creates causes of action in those suffering a loss as a result of a deceptive act. *Collins Holding Corp. v. Defibaugh*, 373 S.C. 446, 646 S.E.2d 147, 150 (Ct. App. 2007). SCUTPA also only applies to matters affecting the public interest. "While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest which is a prerequisite to any recovery under the UTPA. Were the rule

otherwise, every ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act." *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574 (D.S.C. 2003); *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 507-08 (4th Cir. 1992).

Plaintiff claims that Defendants Derr and Half Moon made two statements that allegedly violated SCUPTA: a) That Defendant Garcia was in the United States on an extended teaching sabbatical, and b) that Defendant Garcia was based at Half Moon Stables. (Complaint, ¶ 45).

However, in its Opposition to Defendants' Motion for Summary Judgment, Plaintiff conceded that "[The statements] are technically true under one understanding of the word 'sabbatical,' and in the further sense that Ibañez is now based at HalfMoon" (Plaintiff's Opposition to Motion for Summary Judgment, p. 48).

Plaintiff's Opposition never elaborated on what other possible "understandings" there could be of the two statements. Nevertheless, Plaintiff has conceded that the two statements are "technically true."

As noted above, the first element of a cause of action for deceptive trade practices is that there be a deceptive act. Plaintiff has not pointed the Court to any case from any jurisdiction finding that a true statement of fact could be a deceptive act. ~~The Court has failed to discover any such authority on its own.~~ ^{DAE}

Plaintiff's claim also fails to satisfy the third element of a SCUPTA claim: that the deceptive act affect the public interest. Plaintiff has failed to offer anything other than vague, unsubstantiated claims that any member of the public was deceived by hearing admittedly true statements.

Plaintiff's claim is more in the nature of a private dispute between the parties, and the impact on the public interest, if any, is too remote to satisfy this element. *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574 (D.S.C. 2003).

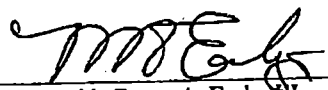
CONCLUSION

For the above-stated reasons, the Court concludes that there are no genuine issues of material fact and that Defendants' Motion for Summary Judgment should be granted.

Therefore, it is ORDERED, ADJUDGED, and DECREED that Defendant's Motion for Summary Judgment is GRANTED.

It is so ORDERED.

This the 6 day of Dec, 2013.


The Honorable Doyet A. Early, III
Presiding Judge
Second Judicial Circuit

Bamberg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP0201772

Coves Darden, LLC

Francisco José Ibanez Dori Derr
Half Moon Stables, LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

12/20/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on 12-20-13, and a copy mailed first class or placed in the appropriate attorney's box on 12-20-13, to attorneys of record or to parties (when appearing pro se) as follows:

M. Baron Stanton PO Box 245 Columbia, SC 29202

Thomas Roy Young Jr. PO Box 651 Aiken, SC 29802

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard Skeneppel

Court Reporter

Liz Godard - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Form 4 order denying motion to reconsider, dated January 13, 2014

-C4-Paper-

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-02-01772

Coves Dardon, LLC

Francisco Jose Garcia Ibanez, Dori Derr, and
Half Moon Stables, LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant
	☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRADING AND ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court; Motion to Reconsider December 5, 2013 Order is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

FILED 1-13-2014

0136
Judge Code

1-13-14
Date

Francisco Jose Garcia Ibanez
C.C.C.P. & G.S.
11:30am
Deputy Clerk

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godwin, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina, do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

JAN 13 2014

Liz Godwin
C.C.C.P. & G.S. Aiken County, S.C.

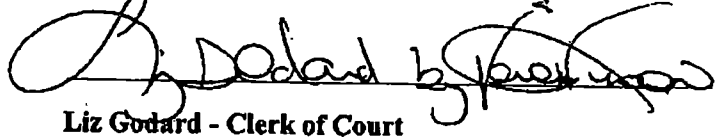
This judgment was entered on January 13, 2014, and a copy mailed first class or placed in the appropriate attorney's box on January 13, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

M. Baron Stanton PO Box 245 Columbia, SC 29202

Thomas Roy Young Jr. PO Box 651 Aiken, SC 29802

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Liz Godard - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Coves Darden's complaint, dated July 19, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02- 01772

Coves Darden, LLC,)

Plaintiff,)

v.)

Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)

Defendants.)

COMPLAINT
(Jury Trial Demanded)

Plaintiff, complaining of Defendants, alleges the following, and requests the following relief:

1. Plaintiff is a South Carolina limited liability company.
2. Defendant Francisco Jose Garcia Ibañez is a Spanish national who, as of the date of these papers and previously, has been living and working in Aiken County, South Carolina.
3. Defendant Dori Derr is, upon information and belief, a resident of Aiken County.
4. Defendant Half Moon Stables, LLC is a South Carolina limited liability company with an address at 2820 Old 96 Indian Trail, Wagener, SC, 29164, and an e-mail address of doriderr@gmail.com.
5. Derr is a controlling person of Half Moon.
6. In and before January of 2012, Plaintiff made arrangements to sponsor Ibañez's travel the United States from Spain, and entry into the United States on a nonimmigrant visa issued by the United States.
7. Plaintiff entered into an agreement to employ Ibañez act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for

clients of Plaintiff.

8. Under the terms of the agreement, Plaintiffs agreed to pay Ibañez \$6000 per month and pay for his transportation to work. Ibañez agreed to work completely and exclusively for Plaintiff during the term of the agreement.

9. Plaintiff arranged for and paid for the application for and processing of, the nonimmigrant petition allowing Ibañez to enter the United States. Plaintiff paid the legal expenses pertaining to this process, and paid for Ibañez's travel expenses from Spain to the United States.

10. Plaintiff furnished Ibañez and his family a home to live in near the stables where the horses were to be trained and, purchased and furnished for Ibañez's use while in the United States, an automobile. Plaintiff paid Ibañez \$8000 per month.

11. The basis for the nonimmigrant visa, known as an "O-1 visa," was Ibañez's peculiar, extraordinary, and unique ability to train the particular breed of horses in question, generally known as "Spanish Horses," or "P.R.E." (Pura Raza Espanola). Additionally, Plaintiff had a particular need for this level of expertise, because of the size of Plaintiff's operation, the particular breed in question, and the level of breeding and competition to which Plaintiff aspired.

12. The O-1 visa itself, incorporated into the contract, required that Ibañez work exclusively for Plaintiff as a trainer.

13. Ibañez entered the United States and commenced work for Plaintiff in January of 2012.

14. When Ibañez was in place, his station with Plaintiff was publicized, and at one or more events at Plaintiff's stable, Ibañez was introduced to Derr, among others invited.

15. Although for the first competition Ibañez entered, the training of the horses and other preparation began over a month earlier, Ibañez did not win and explained that he had studied the wrong test or set of rules or instructions for the competition. Derr, who also owns a small number of the same breed of horses was present in the same competition, and did better than Ibañez.

16. By March of 2012, preparations had long been underway for another competition in Georgia. The competition was on a Saturday, and entrance fees, lodging for people, and lodging for horses had to be arranged and committed in advance. Departure from Aiken, with the horses, was scheduled for early the Friday before.

17. Despite having assured Plaintiff in advance that he foresaw all of the logistics and needs for the competition, Ibañez did not appear for work on the Friday before the competition. Later in the day, the plans had to be cancelled.

18. When there was no appearance by, or word from, Ibañez on Saturday, Plaintiff discovered his residence abandoned, his car was left at the residence, and a notice that he had ended his employment. The notice was never sent to Plaintiff and did not give any of the advance warning required under the contract.

19. Plaintiff also scheduled official entry and participation in a competition in Georgia for approximately one week later, which also required advance commitments of entry fees, lodging for people, and lodging for horses. This competition too, had to be cancelled.

20. Both competitions were necessary in order to advance to further levels of competition. Additionally, in the competitions themselves, success would enhance the value and reputation of the horses. In addition, in the first competition, prize money was available for certain levels of success, and in this instance a success would have been very probable.

21. For many forms of competition, commitment to enter the competition, along with a commitment of entry fees, must be made two or more weeks in advance of the competition. For many forms of competition, a month or more of training of the horse is required. Shortly after receiving Ibañez's notice that he was breaking his employment agreement with Plaintiff, Plaintiff discovered that Ibañez had been registered to ride and show a horse for Derr in a shortly upcoming competition.

FOR A FIRST CAUSE OF ACTION

(Against Ibañez for breach of fiduciary duties of loyalty, honesty, and information)

22. The foregoing allegations of this complaint are incorporated herein as if repeated.

23. As an employee of Plaintiff, and particularly as a special employee of Plaintiff under a specialized agreement, and as an employee in which Plaintiff specifically reposed trust and confidence (as evidenced by Plaintiff's expenditures for, and accommodations of, Ibañez), Ibañez, as agent, owed fiduciary duties of loyalty, honesty and information to Plaintiff, as principal.

24. Ibañez breached his duty of loyalty.

25. Ibañez breached his duty of honesty.

26. Ibañez breached his duty of information.

27. As a result of these breaches of fiduciary duty, Plaintiff was damaged, and never received the material part of its bargain – and honest, loyal, employee.
28. All sums paid to or for the benefit of Ibañez should be disgorged back to Plaintiff.

FOR A SECOND CAUSE OF ACTION

(Against Ibañez for breach of contract, including duties of exclusivity,
and loyalty, and covenant not to compete)

29. The foregoing allegations of this complaint are incorporated herein as if repeated.
30. Ibañez breached his contract with Plaintiff.
31. The breach caused Plaintiff actual damages, including special damages.
32. The actual damages include all money spent making arrangements for Ibañez's visa, paying for Ibañez's travel, furnishing Ibañez a car and home, and dog, and all sums paid to Ibañez as salary or otherwise. The damages also include money lost on entry fees, lodging for people, and lodging for horses, for competitions which were missed, as well as damages for the lost opportunity to compete in the competitions.
33. Ibañez's breach of contract was accompanied by one or more separate but related fraudulent acts. Namely, Ibañez, before leaving notice of termination of his employment and outright breach of the contract, had secretly been breaching the contract by secretly working with Derr's horses. Upon information and belief, Ibañez intentionally compromised his own performance in order to promote the performance of Derr, all at Plaintiff's expense. Additionally, when asked about the upcoming first competition in Georgia, Ibañez falsely indicated that he was prepared and ready to go forward, thus intentionally inducing Plaintiff to go

forward with its plans, causing greater damage.

34. Ibañez's breach of contract was accompanied by fraudulent intent.

35. Plaintiff is informed and believe that, in addition to actual damages, Plaintiff is entitled to punitive damages in an amount to be determined the jury or Court.

FOR A THIRD CAUSE OF ACTION

(Against Derr for tortious interference with contract)

36. The foregoing allegations of this complaint are incorporated herein as if repeated.

37. Derr intentionally interfered with Plaintiff's contract with Ibañez.

38. Derr did so secretly, while knowing Ibañez's expenses were being paid for by Plaintiff.

39. Upon information and belief, Derr did so with knowledge of the restrictions in Ibañez's contract.

40. Upon information and belief, Derr knowingly accepted Ibañez's help in "ditching" or "throwing" his performance in the first competition in which he competed against Derr.

41. Upon information and belief, Derr's intentional interference with Ibañez's contract with Plaintiff was without justification, and was willful, wanton, and deliberate, as a knowing violation of Plaintiff's rights.

42. Derr's interference with the contract caused the damages suffered by Plaintiff as alleged above.

43. Plaintiff is informed and believes that, in addition to such damages, Plaintiff is

entitled to recover punitive damages in amount to be determined by the jury or Court.

FOR A FOURTH CAUSE OF ACTION

(Against Derr and Half Moon, jointly and severally, for violation of the
South Carolina Unfair Trade Practices Act)

44. The foregoing allegations of this complaint are incorporated herein as if repeated.

45. Upon employing Ibañez, Derr falsely advertised his purpose for being in the United States and working for her as his being "on an extended teaching sabbatical," "based at Half Moon Stables."

46. Derr's actions constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, in violation of the South Carolina Unfair Trade Practices Act.

47. Such actions and violations have a public impact, in that they have an adverse effect upon fair competition, are additionally likely lead to disclosure of trade secrets and private business information, and directly undermine a fair and bargained-for agreement for exclusivity. Additionally, owing to the secret, deceptive, and patently dishonest manner in which the acts and violations were committed, they have a potential for repetition.

48. Plaintiff's level of commitment to the endeavor of breeding and showing and competing with P.R.E. horses is consistent with an aspiration to proceed to high levels of international prominence, including competition in the Olympics.

49. The public impact of the form of competition and unfair and deceptive acts or practices exhibited by Derr is not simply present, but great.

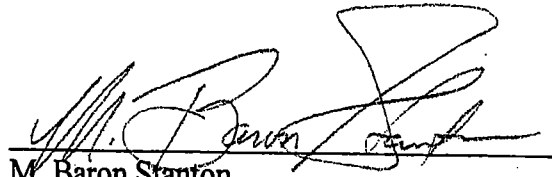
50. The acts and violations of Derr were willful.

51. Plaintiff is informed and believes that, with respect to the damages above, Plaintiff is entitled to have judgment against Derr for triple the damages, plus costs and expenses, including attorney's fees, under the Unfair Trade Practices Act.

WHEREFORE, Plaintiff prays for the following relief:

1. Injunction prohibiting Derr or Half Moon from employing Ibañez, directly or indirectly;
2. Injunction prohibiting Ibañez from working for Derr or Half Moon, directly or indirectly;
3. Judgment against Ibañez for actual damages in an amount to be proven;
4. Judgment against Ibañez for punitive damages in an amount to be determined;
5. Actual damages against Derr and Half Moon, jointly and severally, in an amount to be proven;
6. Punitive damages against Derr and Half Moon, jointly and severally, in an amount to be determined;
7. Judgment against Derr for two more times the actual damages, for a total of triple the actual damages;
8. Judgment against Derr and Half Moon, jointly and severally, for all costs and expenses of this action, including reasonable attorney's fees;
9. An appropriate post-award opportunity of Plaintiff to elect the greater of punitive and triple damages against Derr; and

10. For such other and further relief as the Court deems just and proper.



M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, South Carolina 29202
803-929-1484

ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

Date: 7-19-12

Defendants' Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, answer, dated
August 27, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2012-CP-02-01772

Coves Darden, LLC,

Plaintiff,

v.

ANSWER OF DEFENDANTS

Francisco Jose Garcia Ibanez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

Defendants FRANCISCO JOSE GARCIA IBANEZ, DORI DERR, and HALF MOON STABLES, LLC, (hereinafter collectively "Defendants") by and through their undersigned counsel of record, answer the Complaint filed herein as follows:

1. Defendants have no knowledge of the truth or falsity of this allegation and therefore, deny it on information and belief.
2. Admit the allegations of Paragraph 2.
3. Admit the allegations of Paragraph 3, and affirmatively allege that Dori Derr is a permanent resident of St. Thomas, Virgin Islands.
4. Admit the allegations of Paragraph 4.
5. Admit the allegations of Paragraph 5.
6. Admit the allegations of Paragraph 6.
7. Deny the allegations of Paragraph 7, and affirmatively allege that there was no written contract of employment between Ibanez and Plaintiff, and the terms of any alleged oral agreement were never negotiated between the parties.
8. Admit that, for some period of time, Plaintiff paid Ibanez \$6,000 per month gross.

The remainder of the allegations in Paragraph 8 are generally and specifically denied.

9. Defendants have no knowledge of the truth or falsity of the allegations of Paragraph 9 and therefore deny them on information and belief.

10. Admit that Plaintiff provided a partially furnished residence for Ibanez. The remainder of the allegations of Paragraph are generally and specifically denied.

11. Admit that an O-1 visa was issued to Ibanez based upon his extraordinary ability. The remainder of the allegations of Paragraph 11 are generally and specifically denied.

12. The allegations of Paragraph 12 are generally and specifically denied. Defendants deny the existence of any legally enforceable contract between Plaintiff and Ibanez.

13. Admit the allegations of Paragraph 13.

14. The allegations of Paragraph 14 are generally and specifically denied.

15. The allegations of Paragraph 15 are vague and ambiguous in that they do not specify the date of the "first competition" and, therefore, Defendants deny them on information and belief.

16. The allegations of Paragraph 16 are denied on information and belief.

17. The allegations of Paragraph 17 are generally and specifically denied, except Defendants admit that Ibanez terminated his at will employment with Plaintiff effective June 8, 2012.

18. Admit that Ibanez vacated his residence and left Plaintiff's vehicle at the residence on June 8, 2012. Further admit that Ibanez left notice to Plaintiff that he was terminating his at will employment. The remainder of the allegations of Paragraph 18 are generally and specifically denied.

19. Defendants have no knowledge of the truth or falsity of the allegations of Paragraph

19 and, therefore, deny them on information and belief.

20. The allegations of Paragraph 20 are generally and specifically denied.

21. Admit that after terminating his at will employment with Plaintiff and accepting employment with Defendant Half Moon Stables, Defendant Ibanez agreed to ride in upcoming events. The remainder of the allegations of Paragraph 21 are generally and specifically denied.

22. Defendants' responses to the allegations of Paragraphs 1 through 21, inclusive, are incorporated herein by reference.

23. The allegations of Paragraph 23 are generally and specifically denied. Defendants generally and specifically deny the existence of any enforceable employment agreement with Plaintiff.

24. The allegations of Paragraph 24 are generally and specifically denied.

25. The allegations of Paragraph 25 are generally and specifically denied.

26. The allegations of Paragraph 26 are generally and specifically denied.

27. The allegations of Paragraph 27 are generally and specifically denied.

28. The allegations of Paragraph 28 are generally and specifically denied.

29. Defendants' responses to the allegations of Paragraphs 1 through 28, inclusive, are incorporated herein by reference.

30. The allegations of Paragraph 30 are generally and specifically denied, and Defendants specifically deny the existence of a legally enforceable employment contract between Ibanez and Plaintiff.

31. The allegations of Paragraph 31 are generally and specifically denied and Defendants deny that Plaintiff has been damaged in the manner or amounts alleged, or in any manner or amount whatsoever, or at all and demand specific proof of such alleged damages.

32. The allegations of Paragraph 32 are generally and specifically denied and Defendants deny that Plaintiff has been damaged in the manner or amounts alleged, or in any manner or amount whatsoever, or at all.

33. The allegations of Paragraph 33 are generally and specifically denied.

34. The allegations of Paragraph 34 are generally and specifically denied.

35. The allegations of Paragraph 35 are generally and specifically denied and Defendants deny that Plaintiff has been damaged in the manner or amounts alleged, or in any manner or amount whatsoever, or at all.

36. Defendants' responses to the allegations of Paragraphs 1 through 35, inclusive, are incorporated herein by reference.

37. The allegations of Paragraph 37 are generally and specifically denied, and Defendants specifically deny the existence of any legally enforceable contract between Ibañez and Plaintiff.

38. The allegations of Paragraph 38 are generally and specifically denied.

39. The allegations of Paragraph 39 are generally and specifically denied, and Defendants specifically deny the existence of any legally enforceable contract between Ibañez and Plaintiff.

40. The allegations of Paragraph 40 are generally and specifically denied.

41. The allegations of Paragraph 41 are generally and specifically denied.

42. The allegations of Paragraph 42 are generally and specifically denied and Defendants deny that Plaintiff has been damaged in the manner or amounts alleged, or in any manner or amount whatsoever, or at all.

43. The allegations of Paragraph 43 are generally and specifically denied and

Defendants deny that Plaintiff has been damaged in the manner or amounts alleged, or in any manner or amount whatsoever, or at all and demand specific proof of such alleged damages.

44. Defendants' responses to the allegations of Paragraphs 1 through 43, inclusive, are incorporated herein by reference.

45. The allegations of Paragraph 45 are generally and specifically denied.

46. The allegations of Paragraph 46 are generally and specifically denied.

47. The allegations of Paragraph 47 are generally and specifically denied.

48. The allegations of Paragraph 48 are generally and specifically denied.

49. The allegations of Paragraph 49 are generally and specifically denied.

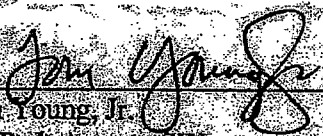
50. The allegations of Paragraph 50 are generally and specifically denied.

51. The allegations of Paragraph 51 are generally and specifically denied and

Defendants deny that Plaintiff has been damaged in the manner or amounts alleged, or in any manner or amount whatsoever, or at all.

WHEREFORE having fully answered the Complaint, the Defendants asks that this Court dismiss the case against it; allow for a jury trial, and allow for the award of all attorneys fees and cost associated with defending and pursuing the underlying claims.

LAW OFFICES OF TOM YOUNG, JR., PC


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ATTORNEYS FOR DEFENDANTS

Aiken, South Carolina
August 27, 2012

Transcript of March 5, 2013 hearing, all pages

State of South Carolina)
County of Aiken)

Court of Common Pleas
2012-CP-0201772

Coves Darden, LLC)
Plaintiff)
vs.)
Francisco Jose Ibanez, et al.)
Defendants)

Transcript of Record

March 5, 2013
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

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

M. Baron Stanton, Esq.
Attorney for the Plaintiff

Tom Young, Jr., Esq.
James M. Derr, Esq.
Attorneys for the Defendant

Lisa H. Davenport, RPR
Official Court Reporter

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EXHIBITS

10

NO.DESCRIPTIONIDEV

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(None offered)

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1 (Whereupon, on March 5, 2013 the following
2 proceedings were held:)

3 THE COURT: Mr. Young, it is your motion; right?

4 MR. YOUNG: Yes, sir. Your Honor, there actually --
5 we have a motion for summary judgment on behalf of the
6 defendants and the plaintiff also has a pending motion
7 with respect to discovery and motion for sanctions. We --
8 I am local counsel to the defendants in this case. My Pro
9 Hac Vice counsel is Jim Derr. He is from the United
10 States Virgin Islands. He's been admitted Pro Hac Vice to
11 this court. He actually also lives part-time here in
12 Aiken County. He has a horse farm here. His wife is one
13 of the defendants in the case.

14 This case is a dispute that has arisen with respect
15 to a person named Francisco Jose Garcia Ibanez who is a
16 former employee of the Coves Darden, LLC which is the
17 plaintiff and the lawsuit was filed after Mr. Ibanez left
18 his employment with Coves Darden, LLC. Mr. Derr is
19 prepared to argue our summary judgment motion if the court
20 will entertain it at this time.

21 THE COURT: Certainly. Mr. Derr, welcome.

22 MR. DERR: Thank you, Your Honor, and, first, I'd
23 like to appreciate -- express my appreciation to the court
24 for allowing me to appear Pro Hac Vice.

25 THE COURT: Glad to have you from the British Virgin

1 Isles.

2 MR. DERR: United States Virgin Isles.

3 THE COURT: United States Virgin Isles. I just got
4 back from Venezuela last night -- I mean, Sunday night.

5 MR. DERR: I'm heading down tomorrow and looking
6 forward to wearing some shorts.

7 THE COURT: It was 93.

8 MR. DERR: I think it is clear, Your Honor, from the
9 moving and opposing papers that today is really a decision
10 day for the plaintiff. There are only two alternatives
11 that are available to the plaintiffs at this point. The
12 first is that there is a partially-executed written
13 employment contract that has somehow been adopted by
14 action by Mr. Garcia Ibanez. The second option is that
15 there is no contract and that Mr. Ibanez is an at-will
16 employee subject only to the common law rules of at-law
17 employment. There aren't any other options that are
18 available to the plaintiff.

19 Now, if the plaintiff intends to stand by its
20 allegation that there is a partially-executed and adopted
21 written contract, then the court has to dismiss this case.

22 THE COURT: Why is that?

23 MR. DERR: Well, if you'll take a look, Your Honor,
24 at Exhibit B to the motion for summary judgment that is
25 the contract at issue and it contains an arbitration

1 clause. It says any controversy or claim arising out of
2 or relating to this agreement shall be settled by
3 arbitration in the City of Aiken, South Carolina in
4 accordance with the rules of the American Arbitration
5 Association, one arbitrator, and shall be enforceable in
6 any court in any competent jurisdiction.

7 THE COURT: So your position is if it's a contract
8 we're dealing with somebody has got to arbitrate it?

9 MR. DERR: That's -- if that's the position that the
10 plaintiff is taking, Your Honor.

11 THE COURT: And then if he takes the position that he
12 is an at-will employee you can fire him for any reason or
13 no reason at all.

14 MR. DERR: That's the alternative argument. Your
15 Honor, if I can hand up two cases that I just recently
16 brought down.

17 THE COURT: You may.

18 MR. DERR: These two cases, Your Honor, are the
19 latest pronouncements from the South Carolina Supreme
20 Court and the United States Supreme Court on the
21 arbitrability [sic] of the disputes. The South Carolina
22 Supreme Court case recognized that the Federal Arbitration
23 Act applies in South Carolina courts and that it should be
24 applied liberally in favor of arbitration. That's the
25 Grant versus Magnolia case.

1 THE COURT: Yes, sir, I am very aware of that.

2 MR. DERR: The Nitro-lift case is a United States
3 Supreme Court case that is so recent it doesn't even have
4 an official reporter page yet. It was handed down on
5 November 26 and it also says that the policy regarding
6 arbitrability of disputes should be liberally applied in
7 both state and federal courts. The two sections of the
8 Federal Arbitration Act -- sections two and sections three
9 of Title Nine say that arbitration agreements shall be
10 valid, irrevocable and enforceable. Section three
11 requires the court to either stay or as the South Carolina
12 Supreme Court has recognized dismiss cases that are
13 subject to arbitration agreements. So that's the one
14 option that if the plaintiff intends to stand by that
15 agreement we have to arbitrate it.

16 Now, if the plaintiff is willing to repudiate that
17 agreement, then we're left with essentially the law as it
18 was set out in our brief -- at-will employment, no
19 contract, terminable at-will at any time, and the
20 additional causes of action flow from that. Tortious
21 interference with contract -- the name of the tort says it
22 all: No contract, no tort. So that would go away.

23 The breach of duty of loyalty has been -- the issue
24 of that has been left open by the South Carolina Supreme
25 Court. Every other court around the United States that

1 has looked at the issue has either concluded no duty of
2 loyalty in the employment context for non-fiduciary
3 employees or that the breach of the duty of loyalty may
4 give rise to a right to terminate but does not give rise
5 to an independent cause of action. So, again, the law on
6 that is clear.

7 The last point is the Unfair Trade Practices Act
8 claim which the plaintiff has apparently abandoned. They
9 didn't even bother to address it in their opposition and
10 we filed the affidavit and a copy of their letter to
11 immigration and naturalization services essentially
12 admitting that both of the statements they are alleging
13 violate the act are, in fact, true.

14 So, as we view it today, Your Honor, the plaintiff
15 has to make a choice and there are going to be legal
16 consequences flowing from either choice.

17 THE COURT: Thank you. Sir?

18 MR. STANTON: May it please the court.

19 THE COURT: How are you proceeding? Contract or no
20 contract?

21 MR. STANTON: Pardon, Your Honor?

22 THE COURT: How are you proceeding? With a contract
23 or without a contract?

24 MR. STANTON: We're proceeding with a contract, Your
25 Honor.

1 THE COURT: Okay. Does not the contract call for
2 arbitration?

3 MR. STANTON: The written contract does call for
4 arbitration, Your Honor.

5 THE COURT: Is there any other contract involved?

6 MR. STANTON: Your Honor, if -- the same way that the
7 defendant asserts that it's decision time for the
8 plaintiff there's a little bit of---

9 THE COURT: I asked you a question. The question is
10 a simple question. You said the written contract calls
11 for arbitration. The other contract -- you made some
12 statement. Is there another contract?

13 MR. STANTON: If there is no written contract which
14 defendant contends there is not -- if there is no written
15 contract, there is a verbal contract where the parties
16 fully understood the basis on which this man was going to
17 work for them and even if one determined that that
18 contract was an at-will relationship the black letter law
19 of South Carolina is that employment at-will is contrary
20 to what Mr. Derr argues contractual; that it is a
21 contract. It is simply a contract which is terminable at
22 at will. There is still mutual consideration. One party
23 agrees to work. The other agrees to---

24 THE COURT: Just tell me just which way you're
25 proceeding. How about that? You're the moving party.

1 You're the plaintiff.

2 MR. STANTON: Well, the way I would like to proceed
3 first is to object procedurally to the motion; secondly,
4 to ask that the motion if it's not denied outright be
5 continued until we be given adequate opportunity for
6 discovery. We have a pending motion to compel. One of
7 the central figures in this is the Spanish national we
8 referred to as Mr. Ibanez which is the very tail end of
9 his name. He in some instances is called Garcia;
10 sometimes Ibanez.

11 The defendants have refused to produce him for a
12 deposition. For two and a half months it took us to get
13 the deposition of the principal of the stables and in our
14 moving papers we've made clear in addition to a Rule 56
15 affidavit that we've repetitively tried to schedule the
16 deposition of the defendant himself -- the one who we can
17 ask about the nature of the agreement of the parties --
18 and they refuse to produce him for a deposition.

19 We've moved for that, and, additionally, the summary
20 judgment motion, while called that, stated no grounds
21 whatsoever and it wasn't until two business days before
22 this hearing that we received by e-mail notice of what the
23 grounds for the motion were. So, we've hardly had time to
24 respond to what they have.

25 THE COURT: How long do you need to take his

1 deposition?

2 MR. STANTON: I would like -- it took us two and a
3 half months to get the other one scheduled.

4 THE COURT: I am asking you a question. I don't need
5 to know the history.

6 MR. STANTON: Three months, Your Honor.

7 THE COURT: Three months to take a deposition?

8 MR. STANTON: If Your Honor would order them to give
9 us a date within this month we'll do it in this month.

10 THE COURT: All right. Mr. Young, you're local.

11 When can I have your -- what is his name? Ibanez,
12 whatever, Garcia -- when can he be made available to be
13 deposed? Is he here?

14 MR. DERR: If I can respond, Your Honor, yes, he is
15 back in the United States now and he would be available
16 towards the end of the month. I pointed out and I think
17 the law is clear the decision---

18 THE COURT: I understand the law is very clear that I
19 have to let them have their opportunity for discovery or
20 we'll be right back here. There is a wealth of cases that
21 say that summary judgment can be premature if they're
22 denied discovery and discovery is not complete.

23 MR. DERR: I have no problem with that, Your Honor,
24 and all I would ask is that the scope of the deposition be
25 limited to contract formation issues.

1 THE COURT: What else would it be?

2 MR. DERR: From the other deposition that we allowed
3 it is going into how much he is being paid by us, what
4 shows he's going to, totally irrelevant things. If they
5 want to depose him to determine if there is a contract
6 and, if so, what the terms are, then all we ask is that
7 the deposition be limited to contract---

8 THE COURT: Well, I can't do that because under our
9 rules in discovery he can ask questions that may lead to
10 additional relevant evidence. Here is my ruling. I am
11 going to hold in abeyance the ruling on the matter.

12 Your fellow -- I'm sorry; I can't pronounce it --
13 Ibanez has to be made available for deposition within 30
14 days from March 5; i.e., April 5, 2013. Once that
15 deposition is transcribed we'll reschedule.

16 Mr. Young, just get in touch with me by everybody and
17 we don't necessarily have to have a term of court. I can
18 do it wherever I am. We'll reconvene the motion for
19 summary judgment, but I am telling you if there is a
20 contract and there is not any dispute over it, this
21 arbitration clause is going to be an interesting issue.
22 I'll put it like that.

23 MR. STANTON: Your Honor---

24 THE COURT: You agree with that?

25 MR. STANTON: I'm well aware of how enforceable

1 arbitration is, but also the ability of the parties to
2 waive it. There was no mention that it would be raised
3 until two days ago.

4 THE COURT: I understand. All right. Just hold it
5 in abeyance for 30 days to get the deposition.

6 If you don't make him available for deposition now it
7 is going to be a horse of a different color.

8 MR. DERR: I understand, Your Honor, and just to
9 clarify that the scope of the deposition is contract
10 formation issues?

11 THE COURT: No, sir, it is a regular discovery
12 deposition.

13 Mr. Young, explain what that means. I can't limit
14 him on his discovery. I mean, I can, but I'm not.

15 MR. YOUNG: Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. STANTON: May it please the court. Were we to
18 take up our motion to compel?

19 THE COURT: What do you have to compel?

20 MR. STANTON: The deposition I think has been
21 dispensed with, but there were some interrogatories and
22 requests for production. I believe it is primarily
23 requests for production that the defendants objected to.

24 THE COURT: What do you want to be produced that
25 would help you with the deposition of the individual in

1 question?

2 MR. STANTON: We wanted records -- employment records
3 pertaining to this man and the basis of his compensation
4 and that goes to several issues, Your Honor, even though
5 we're not required to attach them to specific issues. It
6 goes to the dates during which he began to work gainfully
7 for these people perhaps even during while he was working
8 for our people and it also goes to the Unfair Trade
9 Practices Act claim in that he appears to have been
10 offered an illegal situation in order to induce him away
11 from our employment; namely, one that would violate the
12 U.S. Immigration laws.

13 THE COURT: Sir, I just asked you what do you want.

14 MR. STANTON: I want the---

15 THE COURT: It is a simple question. You want the
16 employment records and the basis of his compensation were
17 the two things that you mentioned.

18 MR. STANTON: Five, seven, and eight of our requests
19 for production.

20 THE COURT: What are five, seven, and eight, please?

21 MR. STANTON: Records of money paid to or on behalf
22 of Ibanez or anything of value furnished to him whether it
23 be food, lodging, legal services, tuition, use of horses,
24 use of stables, use of transportation, or any other thing
25 regardless of whether in an employment or contractual

1 relationship.

2 Number seven: All applications or enlistments of
3 Ibanez for participation in any competitions or shows or
4 any applications or enlistments mentioning Ibanez as an
5 expected or potential participant, and number eight was
6 any other documents pertaining to the claims or defenses
7 in the case that you intend to use and so forth. That one
8 they made an objection that they didn't know what that
9 might include; so they only produced his 100 pages of visa
10 application. That's about the only thing they produced.

11 THE COURT: That might be all they have.

12 All right. Mr. Young, y'all need to come up with his
13 employment records, the basis of his compensation, any
14 other documents in his personnel file. I assume that's
15 what you got.

16 MR. YOUNG: I beg your pardon?

17 THE COURT: I assume that's what you have of record
18 with him, if anything. You may not -- I don't know what
19 you got.

20 MR. YOUNG: There are some employment records.

21 MR. DERR: Correct. There is an employment contract
22 which has already been produced.

23 THE COURT: I want his records produced within 15
24 days so they have time to look at it before the
25 deposition.

1 MR. STANTON: And the applications to participate in
2 shows as well, Your Honor?

3 THE COURT: I'll put that in there -- show
4 applications, whatever that means. Thank you.

5 (End of Transcript of Record.)
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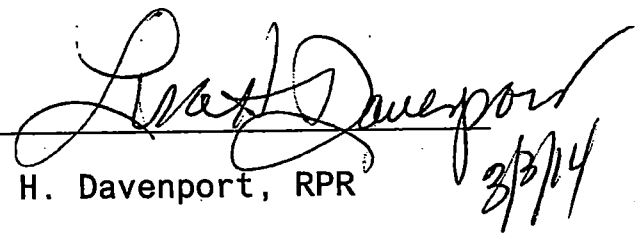
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State of South Carolina)
)
County of Aiken)

I, Lisa H. Davenport, Official Court Reporter for the
Second 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 for Aiken
County, South Carolina, on the 5th day of March, 2013.

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

April 28, 2013



Lisa H. Davenport, RPR

Transcript of May 20, 2013 hearing, all pages

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) COURT OF COMMON PLEAS
) 2012-CP-02-01772

2012-CP-02-01772

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I N D E X

(There were no witnesses produced.)

EXHIBITS

(There were no exhibits marked.)

1 THE COURT: Senator Young, you and the other
2 side, I'm ready to hear the motion for summary judgment.

3 MR. YOUNG: Yes, sir.

4 THE COURT: Have we got everybody here?

5 MR. YOUNG: Yes, sir.

6 THE COURT: We have defendant's motion for
7 summary judgment.

8 Senator Young.

9 MR. YOUNG: May it please the Court, Your Honor.
10 My name is Tom Young for the record, and I represent the
11 defendants, Francisco Jose Garcia Ibanez, Dori Derr, and
12 Half Moon Stables, LLC. I am here as local counsel. My
13 co-counsel is Mr. Jim Derr who has been admitted pro hac
14 vice to this court. He's an attorney who's both licensed
15 to practice in California as well as the United States
16 Virgin Islands, and he's prepared to argue the motion if
17 it's okay with the Court.

18 THE COURT: Absolutely.

19 Mr. Derr.

20 MR. DERR: Good morning, Your Honor.

21 THE COURT: Good morning.

22 This is a motion for summary judgment, right?

23 MR. DERR: Correct, Your Honor.

24 Just to remind the Court, this is a case
25 essentially where a horse trainer was working for one

1 horse farm and left and went to work for another horse
2 farm. That's the case at its heart.

3 We had filed summary judgment on the grounds
4 that there had been a prior admission that there was no
5 oral contract between the parties, and that the alleged
6 written contract was not executed by my client, and that
7 there were no other grounds for enforcing the written
8 contract. And to the extent that the Court found that
9 there was a written contract, it contained an arbitration
10 clause. So regardless, the matter would have to be
11 dismissed.

12 The Court continued that hearing to allow for
13 the deposition of Mr. Garcia and the production of certain
14 employment records and show records, which we have done.
15 Mr. Garcia has been deposed, and we've renoticed the
16 motion.

17 Since that time --

18 THE COURT: Is Garcia the same person as Ibanez?

19 MR. DERR: Jose Francisco Garcia Ibanez. And in
20 Spain they use the mother's name last, so they use the
21 father's name as their last name, just to complicate it.

22 THE COURT: Where was the admission that there's
23 no oral contract?

24 MR. DERR: It's in response to Interrogatory
25 Number 6, Your Honor. We asked for the terms of any oral

1 contract, and the response was, the agreement was not
2 oral, it was a written contract presented to and
3 acknowledged by Ibanez, entered before January of 2012.

4 THE COURT: So your position is very simple,
5 that number one, there's no oral contract as admitted by
6 the plaintiff; number two position, the second position,
7 that there was a written contract never executed, even if
8 it had been executed as an arbitration agreement --

9 MR. DERR: Absolutely, Your Honor.

10 THE COURT: -- which would require arbitration.

11 MR. DERR: Correct. And one third ground that
12 became apparent when the affidavit of Mr. Miguel Coves was
13 filed, in paragraph six, he set out the terms of what he
14 alleged was the oral agreement, and it was an agreement
15 for between two and three years. And the restatement of
16 contract, Section 130, and South Carolina law, are clear
17 that any employment contract for a term greater than one
18 year falls within the statute of fraud, so that's an
19 additional ground for the unenforceability of the alleged
20 oral contract.

21 The balance of the motion, Your Honor, rests on
22 that, tortious interference with contract; no contract, no
23 tort. And the Unfair Trade Practices Act, plaintiff by
24 himself has admitted that the two statements that were
25 made were true. He claims if you look at them in some

1 larger unspecified context, they're false, but the
2 statements themselves are true. And I'm unaware of any
3 case in South Carolina that has found an unfair trade
4 practice based on a statement of true fact.

5 THE COURT: Thank you very much.

6 MR. DERR: Thank you, Your Honor.

7 MR. STANTON: May it please the Court. I'm
8 Barry Stanton, and I represent the plaintiff, Coves
9 Darden, LLC.

10 The case does involve a person who worked with
11 Coves Darden who left to work with the defendant, Half
12 Moon Stables, but it's not quite that cut and dried. In
13 our brief --

14 THE COURT: Well, why is it not that cut and
15 dried? Did you admit that there's no oral contract in
16 your interrogatory?

17 MR. STANTON: I did not, Your Honor.

18 THE COURT: Well, read it to me.

19 MR. STANTON: The --

20 THE COURT: Read the response. One of you is
21 not telling me correctly.

22 MR. STANTON: Let me finish, Your Honor.

23 THE COURT: Well, I'm going to let you finish,
24 but I want you to read me the response to the
25 interrogatory.

1 MR. STANTON: See, the part that has been
2 excerpted by the defendant is part of a 14-page
3 interrogatory response, and it says, quote, "The agreement
4 was not oral. It was a written contract presented to and
5 acknowledged by Ibanez in or before January of 2012, after
6 August of 2011." That was interrogatory answer number
7 six.

8 THE COURT: Well, it says what it says, doesn't
9 it?

10 MR. STANTON: Right.

11 The circumstances of the response, Your Honor,
12 are as follows: It was an initial interrogatory response
13 early in the case unsworn, early on in the case, and if
14 you read the entire interrogatory response for context,
15 what we were clarifying was in response to a question
16 about what are the terms of the oral contract, please
17 detail this, that and the other. We were clarifying that
18 it wasn't just an oral contract, that it was reduced to
19 writing, and there were other requests in their request
20 for production and in their interrogatories asking about
21 the written contract, and we responded in there, we will
22 produce any copy that we have of the written contract, and
23 in a response to an interrogatory about whether the
24 written contract was signed, in the same interrogatory
25 responses, we said it may or may not have been

1 countersigned by Ibanez, so that the clear statement that
2 was being made was, this was not just an oral contract,
3 there was a written document and we will produce it, and
4 we don't know if he has countersigned it. We have looked,
5 but we can't find a countersigned copy in possession.

6 THE COURT: Let's assume you're right. Let's
7 assume it's a written contract and it's in full force and
8 effect. Mr. Derr says there's an arbitration clause in it
9 that would preclude moving forward in this court.

10 MR. STANTON: Well, I can address that. But
11 before we assume that, Your Honor, if they're denying that
12 the written contract is a contract, which I think they do,
13 then we do not -- we do not admit that there is no
14 contract at all. The clear deposition testimony of
15 Mr. Ibanez is that they had a very detailed agreement on
16 all the material terms verbally before the thing was even
17 written up.

18 THE COURT: Well, then your client said it
19 lasted -- it takes two to three years to enforce, and then
20 you've got the statute of frauds. So which way you going?

21 MR. STANTON: Well, there are several places I'm
22 going, Your Honor. First, they haven't pled the statute
23 of frauds, which is an affirmative defense, which if not
24 pled doesn't apply.

25 Second of all, the statute of frauds, there are

1 exceptions to the statute of frauds.

2 And third, the statement was that both parties,
3 Mr. Ibanez and Mr. Coves, said that they clearly discussed
4 this being a two-year relationship and he was going to get
5 a leave of absence for two years from his other place in
6 Spain, they were going to get a visa that would be a two
7 to three-year visa, and that if everything worked, they
8 expected it to be a minimum of two years and possibly to
9 extend it.

10 Now, under the statute of frauds, Your Honor,
11 there are a number of exceptions, and one is, that the
12 statute of frauds only applies if it was impossible,
13 impossible to perform this agreement within the space of
14 one year.

15 And it wasn't because they allowed for -- for
16 instance, if the United States -- I keep calling them the
17 Immigration and Nationalization Service, they've got a
18 five-letter term for them now -- if they revoked the visa
19 for any reason, then obviously they could not continue to
20 employ him. So all of that was built into the agreement.

21 The statute of frauds is a whole 'nother issue,
22 as they say, and it hasn't been raised --

23 THE COURT: Sir, I've been practicing law 40
24 years -- well, practicing law 30 years, on the bench 10 --
25 I know it's a whole 'nother issue, but it's an issue.

1 And does it say impossible or does it say
2 impractical?

3 MR. STANTON: My recollection of it is that it
4 has to be impossible to be performed within the space of
5 one year.

6 THE COURT: I don't think that's right.

7 MR. STANTON: And there are other exceptions as
8 Your Honor knows, too. My main point is, that hasn't been
9 raised, it hasn't been briefed, it hasn't been argued.
10 They haven't raised it as an affirmative defense, so it's
11 not even on the table.

12 But moving to the written contract, first of
13 all -- I'm unaware of any case anywhere, and I did a quick
14 look, where the party who contends that an agreement is
15 not the agreement, namely, the written contract, can then
16 enforce the written agreement. They have yet to come in
17 here and assert that the written agreement is a contract
18 that the man entered, yet they're saying in a footnote in
19 their brief that they may raise an arbitration issue if
20 the Court finds that the written contract was binding. We
21 have three parties here on -- three defendants, one is
22 Mr. Ibanez who entered into the contract, the other are
23 Ms. Derr and Half Moon who never signed any contract. So
24 on arbitration, the question is, do those defendants
25 consent to be bound by arbitration even though they're not

1 a party to the contract? If it's only Mr. Ibanez who's
2 moving for arbitration, does he agree that the written
3 contract is a contract he entered? If he denies it, he
4 can hardly assert that an arbitration clause in it
5 applies.

6 I don't think arbitration is even on the table.
7 It wasn't in the motion for summary judgment. It was in a
8 memorandum filed three days before the first time this was
9 set for hearing and it was in a footnote saying that that
10 might become an issue.

11 So plain and simple, the motion for summary
12 judgment is, is there evidence in the record from which a
13 jury could find that the parties entered into a contract,
14 and it's abundant. And one reason I briefed --

15 THE COURT: What kind of contract, oral or
16 written?

17 MR. STANTON: Certainly an oral one, Your Honor.
18 And as for the written one --

19 THE COURT: Then how are you going to make that
20 assertion before a jury when you've told us in documents
21 filed in this courtroom that there is no oral contract?
22 Seems like to me you've got inconsistent positions.

23 MR. STANTON: Your Honor, the interrogatory
24 response was intended to be a forthright, clearing the air
25 that we have a written document and it wasn't just an oral

1 contract. If we have to explain that to a jury, we can,
2 but it's only evidence, it's not something that binds
3 someone to the end of time. There's been a great throwing
4 around by the defendants of this notion of a judicial
5 admission, and if you read the case law of judicial
6 admissions, all that case law directed to is whether a
7 statement may actually be attributed to the party for
8 purposes of whether it can be considered an admission --

9 THE COURT: Well, certainly answering an
10 interrogatory can be attributed to the party answering it,
11 can't it?

12 MR. STANTON: It certainly can, but they seem to
13 present it as if it's something that binds one to the end
14 of time contrary to all evidence and determines the case,
15 which is not the law of judicial admissions. So what the
16 motion --

17 THE COURT: So you're saying an issue of fact is
18 created because you admitted that there's no oral
19 contract, but that's not quite a correct admission. Now
20 you say there is an oral contract. So that creates an
21 issue of fact for the jury to determine? Is that your
22 position?

23 MR. STANTON: I think I agree with you, Your
24 Honor. Just let me make sure I'm clear with what I'm
25 agreeing with.

1 I'm agreeing that their own witness, Mr. Ibanez,
2 went on for page after page detailing the evidence of the
3 oral contract in terms of offer, acceptance, all material
4 terms, what he would do, what he would be paid, and how
5 long it would last. That is evidence in the record from
6 which a jury could find that a contract existed. And from
7 that, it disposes of every issue in their summary judgment
8 motion and summary judgment should be denied.

9 As to the other legal issues, of course, I'd be
10 happy to address those, tortious interference, unfair
11 trade practices.

12 THE COURT: It's your argument, sir, it's not
13 mine.

14 MR. STANTON: Well, to take them in order, Your
15 Honor, there being a contract --

16 THE COURT: What kind, oral or written?

17 MR. STANTON: Let's assume for the sake of the
18 discussion that at a minimum, it's an oral one.

19 I will go ahead and address the written one.
20 The status of that is, there's a written document. It's
21 signed by Miguel Coves for Coves Darden. We looked and
22 couldn't find a countersigned copy signed by Mr. Ibanez.
23 That document was prepared as they were getting his visa
24 processing done and the immigration authorities wrote back
25 after the application for the visa was filed and said, we

1 need to see some sort of a written contract, so then they
2 prepared something that wrote up the terms and --

3 THE COURT: That's something then what, a
4 contract?

5 MR. STANTON: Pardon?

6 THE COURT: You said they wrote up something
7 like it's some kind of thing floating around.

8 MR. STANTON: Well, it's actually in the
9 evidence. It's a multi-page document that says employment
10 agreement, here's what we'll pay, you know, and it's got
11 all that stuff in it, including the arbitration clause.

12 THE COURT: Well, that's pretty important stuff,
13 is it not?

14 MR. STANTON: It is, and yet, from the party
15 that's moving for summary judgment, we have no evidentiary
16 material or anything where he asserts that there is no
17 contract. And I'm not sure we have anything where he
18 asserts that there's no written contract. But where the
19 evidence is on the written contract, the reason we're up
20 in the air on that, is we don't have a countersigned copy
21 by Mr. Ibanez, and yet this contract was submitted to the
22 immigration authorities and the lawyer in Miami who
23 prepared the applications talked to Mr. Ibanez on the
24 phone while Mr. Ibanez was in Spain and walked him through
25 to prepare him for the visa interview, and our information

1 would be that that contract would have been in his file
2 with the immigration authorities.

3 THE COURT: Well, let's assume that the jury
4 might go along with that, say there is a written contract,
5 then do you not have the arbitration with at least
6 Mr. Garcia?

7 MR. STANTON: Not automatically, Your Honor. I
8 think the threshold is, first of all, somebody has to
9 determine that it is a contract and Mr. Ibanez has to
10 agree that he would be bound by any arbitration from it.

11 Secondly, I haven't done a lot of research on
12 this because it's not an issue that's been presented
13 formally in any motion, but the defendant's have invoked,
14 I think the term is the substantial machinery of this
15 court to seek a merits disposition of the case on summary
16 judgment. There's a lot of law out there on whether a
17 party goes so far in court, whether they've waived the
18 right to claim the arbitration clause --

19 THE COURT: Wait a minute now. They moved for
20 summary judgment and I graciously held it in abeyance
21 until some depositions could be done, and that's been
22 done, so I'm not going to say that they've waived that by
23 me putting it off.

24 MR. STANTON: Well, what my point is, Your
25 Honor, that hasn't been raised and briefed. I don't

1 purport to be an expert on all that law, but I've read a
2 little bit of it, and it's not an automatic conclusion
3 that because there's an arbitration clause in a contract
4 that a party may even deny entering, that that party can
5 invoke the clause, particularly when they moved in court
6 for a summary disposition of the case on the merits. And
7 so there are all those issues about whether arbitration
8 goes forward or not. I don't think that's before the
9 Court.

10 THE COURT: How much money are you talking
11 about?

12 MR. STANTON: Pardon?

13 THE COURT: How much money are you claiming?

14 MR. STANTON: We haven't set out a liquidated
15 sum, but we have stated that he should disgorge everything
16 that's been paid to him. He was paid at a rate of about
17 \$96,000 a year. All of his transportation was paid.

18 THE COURT: How many years was he paid?

19 MR. STANTON: He was paid -- he was paid for
20 part of the year before he came to the United States and
21 then he was only here four months before he abandoned his
22 employment, so probably about a year.

23 THE COURT: All right. Anything else?

24 MR. STANTON: If I might, Your Honor, I just
25 want to point out to the Court that we did file a reply

1 brief on the judicial admission issue.

2 THE COURT: I don't think I've gotten the reply
3 brief. I gotten your 50-some odd page brief, and I've
4 read it, but I haven't gotten the reply brief yet.

5 MR. STANTON: That one, Your Honor, I will be
6 happy to -- I filed it this morning.

7 THE COURT: Is it brief or is it -- it's a long
8 brief?

9 MR. STANTON: It's a short sur reply on the
10 judicial admissions issue. It does not quote the
11 depositions at length. I believe it might quote
12 interrogatory responses at length.

13 THE COURT: I'll look at it.

14 MR. STANTON: I'd like to hand those up, Your
15 Honor, but I did file them this morning and e-mailed them
16 was week.

17 THE COURT: 4 o'clock on Friday?

18 MR. STANTON: Approximately three hours after I
19 got their brief, yes, Your Honor.

20 THE COURT: That's no problem. Just pass it up
21 and I will include it.

22 MR. STANTON: Thank you.

23 THE COURT: All right. I want you to send me,
24 please, sir, by e-mail today the full set of
25 interrogatories with the response that you gave to the

1 questions concerning the oral contract. If you'd please
2 do that.

3 MR. STANTON: Yes, Your Honor.

4 THE COURT: Thank you.

5 Mr. Derr, anything in reply?

6 MR. DERR: Just very briefly, Your Honor.

7 Our position is not that we're attempting to
8 enforce the oral -- or the written contract. We don't
9 believe the written contract exists. Our argument is,
10 number one, there is no enforceable written contract, but
11 should the trier of fact find in fact that there was, just
12 in terms of the existence of the contract, it contains an
13 arbitration clause and mandates arbitration. So the
14 Plaintiff's argument is starting several steps down the
15 logic tree of the position that we're taking.

16 And I'd just like to refer the Court to the
17 restatement of contract, Section 130, dealing with the
18 statute of frauds issue.

19 And I'd also point out, Your Honor, we did not
20 become aware of their position regarding the length of the
21 contract until Mr. Coves' deposition was filed -- I'm
22 sorry -- affidavit was filed on April 27th. So we have
23 raised the issue as soon as we became aware of it.

24 But the contract says, any contract -- Section
25 130 says any contract in excess of a year is within the

1 statute of frauds.

2 THE COURT: How about that "impossible"
3 language, is it in there?

4 MR. DERR: That's what I'm reading, Your Honor.

5 Comment B says, Any contract may be discharged
6 by a subsequent agreement of the parties or -- and
7 performance of any contracts may be excused by supervening
8 events, or by the exercise of a power to cancel granted by
9 the contract. The possibility that such discharge or
10 excuse may occur within the year is not a possibility that
11 the contract will be performed within a year. This is so
12 even though the excuse is articulated in the agreement.

13 And the illustration that they give there,
14 illustration five, is (A) orally promises to work for (B)
15 and (B) promises to employ (A) for five years at stated
16 salary, which is exactly the situation we have here. The
17 promises are within the statute of frauds, though the
18 duties of both parties will be discharged if (A) dies
19 within a year, the duties cannot be, quote, performed, end
20 quote, within the year. This conclusion is not affected
21 by a term of the oral agreement that the employment shall
22 terminate on (A's) death.

23 So if it's a stated period of years, if it's a
24 three-year contract, a three-year contract cannot be
25 performed within one year, and that's what the restatement

1 says.

2 THE COURT: Thank you.

3 All right. I'll take it under advisement.

4 Mr. Stanton, get me that information, and,
5 Senator Young, if you can provide me with a copy of you
6 all's memo. I've got it on the e-mail, but I'd rather
7 have it so I can look at it.

8 MR. YOUNG: Yes, sir.

9 THE COURT: I've got your's this morning, and
10 then I've got your other brief, even though it was over 50
11 pages.

12 MR. STANTON: A lot of deposition excerpts, Your
13 Honor.

14 THE COURT: I know that. But it made it not so
15 breezy.

16 Thank you.

17 (The proceedings were concluded.)

18 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

I, CAROL M. THUEME, RPR, Official Court Reporter for the 11th 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 for Aiken County, South Carolina, on the 20th day of May, 2013.

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

November 12, 2013

A handwritten signature in cursive script, reading "Carol M. Thueme", is written over a horizontal line.

CAROL M. THUEME, RPR
Circuit Court Reporter

Transcript of October 15, 2013 hearing, all pages

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2013-CP-02-01772

3
4 COVES DARDEN, LLC,
5 Plaintiff,

6 -vs-

TRANSCRIPT OF RECORD

7 FRANCISCO JOSE IBANEZ,
8 et al,
9 Defendant.

10 Heard on Tuesday, October 15, 2013

11 Aiken, South Carolina

12
13 BEFORE:

14 THE HONORABLE DOYET A. EARLY, III

15
16 APPEARANCES:

17 Counsel on Behalf of the Plaintiff:
18 M. Baron Stanton, Esq.

19 Counsel on Behalf of the Defendant:
20 Thomas R. Young, Jr., Esq.

21
22 Cheri L. Young, RPR
23 Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29804-5232

25

1 ON TUESDAY, OCTOBER 15, 2013 AT 9:39 A.M.:

2 THE COURT: Mr. Stanton, we have a motion for summary
3 judgment.

4 MR. YOUNG: Good morning.

5 THE COURT: Good morning.

6 MR. STANTON: Good morning.

7 THE COURT: Gentlemen, I'll give you 10 minutes each
8 and five minute to reply.

9 MR. YOUNG: Thank you, Your Honor.

10 Tom Young, for the record. I am co-counsel in this
11 case representing the Defendants. Other counsel is Jim
12 Derr who's admitted pro hoc vice before the Court, and
13 he's actually out of the country today and I am going to
14 argue this before the Court today.

15 Your Honor, briefly, this is a case that arises out of
16 a lawsuit that was filed by the Plaintiff LLC against my
17 clients, Mr. Ibanez, who is a Spanish horse trainer and
18 Dori Derr, who is the principal of Half Moon Stables, LLC
19 and Half Moon Stables, LLC.

20 Ms. Derr and Half Moon Stables, LLC are the current
21 employers of Mr. Ibanez. And Coves Darden, LLC, the
22 Plaintiff, is the former employer of Mr. Ibanez.

23 In a lawsuit the Plaintiff has filed suit alleging
24 both a breach of contract claim, a tortious interference
25 with contract claim, a tortious breach of the duty of

1 loyalty claim, and an Unfair Trade Practices Act claim.

2 And this is the third time that we have been before
3 this Court to argue this summary judgment motion. The
4 first hearing was on March the 5th of this year. At that
5 time they -- the issue before the Court, we were not sure
6 how they were proceeding as to whether there was a written
7 or an oral contract.

8 At that hearing it was, it came out that the
9 Plaintiff's were proceeding, that there was an actually an
10 oral contract and not -- and they conceded that there was
11 not a written contract that they could find that had been
12 signed by Mr. Ibanez.

13 At that time you delayed ruling until they had an
14 opportunity to depose Mr. Ibanez. And after the
15 transcript from that deposition was prepared and it came
16 back, then you would re-hear the summary judgment motion.

17 We came back before the Court on May the 20th of this
18 year. And at that time we had renewed our motion and had
19 added a statute of frauds defense that we wanted to add
20 into our answer as an affirmative defense based on an
21 affidavit the Plaintiff prepared in late April in which
22 Mr. Coves, who is the principal of the Plaintiff LLC, he
23 stated in his affidavit that the employment contract which
24 existed between Coves Darden, LLC and Mr. Ibanez was not
25 in writing and it was for a period of two to three years.

1 And they have actually renewed that position in a
2 supplemental interrogatory response that they prepared
3 last week on October 9th. And I have a copy of it for the
4 Court. (Document handed to the Court.)

5 When you took the motion under advisement on May the
6 20th, you allowed the Plaintiffs, or, excuse me, the
7 Defendants to amend the answer to allege the statute of
8 frauds defense. And on July the 11th your former law
9 clerk, Adam Ness, e-mailed the parties and stated that you
10 were going to hold the summary judgment motion in abeyance
11 and allow 90 more days of discovery until October 9th.

12 And last week was October the 9th, on Wednesday, and
13 we're back before you today for the renewed motion for
14 summary judgment.

15 THE COURT: Was any additional discovery done during
16 that 90 days?

17 MR. YOUNG: There was. There was the deposition taken
18 of the 30(b)(6) designee of Half Moon Stables, LLC and
19 there was some written discovery.

20 THE COURT: And was Ibanez deposed?

21 MR. YOUNG: He was deposed back in -- before the May
22 20th hearing, I think, in April.

23 THE COURT: And are you of the opinion that enough
24 discovery has been done that I can now hear the motion for
25 summary judgment?

1 MR. YOUNG: Yes, sir. It's my understanding that the
2 Plaintiff's position is that there is additional discovery
3 that they want to do for trial but for purposes of hearing
4 this summary judgment motion the record is ripe.

5 THE COURT: Well, I gave you 90 days so you need to
6 either get it done or not. So, I'm listening to you.
7 I'll ask him in a minute.

8 MR. YOUNG: All right. So we're ready to roll. We
9 want you to rule on this motion for summary judgment.

10 And the bottom line, Your Honor, this whole dispute
11 boils down to whether or not there was a valid contract
12 with Mr. Ibanez and Coves Darden, LLC.

13 Now they have -- Mr. Coves in his affidavit and then
14 in his supplemental interrogatory response that I handed
15 up to the Court, he has stated in there that this was a
16 contract that was contemplated and expected but could not
17 be certain that the initial term would be for two to three
18 years. And that was based on the usual attributes of an
19 0-1 visa.

20 Now, if it's a two- to three-year employment contract
21 and it's not in writing and signed by the parties, then it
22 violates the statute of frauds and therefore there can't
23 be a contract. And if there's not a contract, then this
24 is an at-will relationship and it can be terminated by
25 either party at any time.

1 And so our position is that if that is their position
2 on the contract length of time which they've stated as of
3 last week, October 9th, that it was a contract with an
4 initial term to be two to three years, they've already
5 admitted that there's not a written contract that's signed
6 by Mr. Ibanez. And that has not come up during discovery
7 yet, a signed copy. Then it appears to us and our
8 argument is that it violate the statute of frauds and
9 therefore there can't be a contract and this is an
10 employment at-will relationship and the rest of their
11 claims fail as a matter of law.

12 Now, alternatively, if the Court believes that there
13 is a contract and that there's been some misunderstanding,
14 that it's an oral contract but it could be performed
15 within less than a year and therefore the statute of
16 frauds doesn't apply, then what they have argued is that
17 this was a contract that was formed by acquiescence of the
18 parties. Or actually there's a written contract that's
19 been accepted by Mr. Ibanez by acquiescence.

20 And the written contract has two significant
21 provisions in it. The first is that it contains an
22 arbitration clause. And the second is that it has a
23 30-day notice period for terminating that contract.

24 So, if it has an arbitration clause in it we argued
25 back at the March 5th hearing that case law in South

1 Carolina and in the United States, both the Grant versus
2 Magnolia decision from our State Supreme Court and the
3 Nitro-Lift case from the US Supreme Court last fall, both
4 recognized that the Federal Arbitration Act is to be given
5 a liberal interpretation in support of the arbitration
6 clause.

7 And, therefore, in this case if there is a contract
8 that's been agreed to by acquiescence, that contract has
9 an arbitration clause and therefore this lawsuit should be
10 dismissed and the Court should order arbitration.

11 At the same time there's a 30-day provision allowing
12 him to terminate the contract. If that's a valid contract
13 by acquiescence then therefore their damages would be
14 limited to whatever they would be during that 30-day
15 period.

16 So, you know, that's sort of our -- that is our
17 alternative argument. We go back, Your Honor, to the fact
18 that they have now stated in this supplemental
19 interrogatory that this is the contract that is not in
20 writing and signed by the parties but it's for a two- to
21 three-year period and it is a special employment
22 contract.

23 And if that's the case we think the statute of frauds
24 applies. It has been pled as an affirmative defense.
25 Therefore, there cannot be a contract that exists between

1 these parties. This is an employment at-will relationship
2 to be terminated at any time by either party.

3 And that's what happened here. Mr. Ibanez terminated,
4 went to work for someone else. And this is the United
5 States. It's a free country. And that's his right to do
6 that if he so chooses.

7 This lawsuit should be dismissed. Summary judgment
8 should be granted to the Defendants.

9 THE COURT: Thank you. Mr. Stanton, how are you
10 feeling today?

11 MR. STANTON: Pretty good, Your Honor. I think.

12 THE COURT: Well, I got your status report. It sounds
13 like to me you've been having some issues. Anyway, I hope
14 you're doing better.

15 MR. STANTON: It's been quite a year, Your Honor.

16 THE COURT: Sounds like it. Be glad to hear from you.

17 MR. STANTON: Thank you.

18 And, Your Honor, I want to say I appreciate Mr. Young
19 taking the Court through the, sort of the recent
20 procedural history of how many motions we've had. Most of
21 that was was about right. And I wanted to state that at
22 each those junctures we filed briefs with references at
23 length to deposition testimony and whatnot. One of the
24 biggest briefs was May the 14th, 2013.

25 But I actually get it confused in my mind without

1 going through my whole file, we'd have a hearing and there
2 might be some follow-up communications with the Court. I
3 bet we filed at least four different responses to things.

4 And I'd like -- in an interest of brevity, I can't go
5 through all of that. What I would like to do is cut to
6 the chase here --

7 THE COURT: Please do.

8 MR. STANTON: -- on summary judgment. Rule 56, plain
9 and simple says, you know, there has to be no dispute as
10 to -- no genuine dispute as to any material fact and the
11 moving party has to have, be entitled judgment as a matter
12 of law, be correct on the law that is. And it's the
13 moving party's duty to come forward and make a showing.

14 And the case law says if they want to make, make their
15 argument based on the absence of some evidence they have,
16 actually have to make a showing of where the absence is.
17 Where it's in the record and where it doesn't appear.

18 Well in the record, Your Honor, are some of the major
19 depositions that -- on file is the deposition of
20 Mr. Ibanez who is the employee. On the record and in the
21 file is a deposition of Dori Derr who is the principal of
22 Half Moon which is one of the Defendants. And last week
23 after we got the transcript from a deposition of Half Moon
24 itself which was taken pursuant to Rule 30(b)(6), that
25 deposition is on file.

1 A couple more highlights of what's in the file. The
2 interrogatory response that Mr. Young just handed up, and
3 that one is actually already on file with the Court. We
4 sent it in and filed it. So that's already in the file.
5 And there's an affidavit of Miguel Coves who's one of the
6 principals of the Plaintiff. And his affidavit was just
7 referred to by Mr. Young. It's a fairly extensive
8 affidavit. And an affidavit of attorney in Miami, Florida
9 named Mike Liberatore who's the immigration attorney who
10 helped the Plaintiff, Coves Darden, get the immigration
11 situation set up to bring this man over here from Spain.
12 It was a fairly lengthy and expensive process.

13 The claims against Mr. Ibanez and Half Moon and
14 Ms. Derr are breach of contract accompanied by fraudulent
15 act against Mr. Ibanez, breach of fiduciary duty. I may
16 be forgetting one, all this off the top of my head,
17 against Half Moon and Ms. Derr, tortious interference with
18 a contract and a violation of South Carolina Unfair Trade
19 Practices Act.

20 The material necessary to require a denial of summary
21 judgment in this case is probably all contained in the
22 affidavit of Miguel Coves alone, except a late issue came
23 up after that last hearing. The Plaintiff -- I mean,
24 excuse me, the Defendant's raised the statute of fraud as
25 an argument at the hearing but it never pled it as an

1 affirmative defense. Subsequent to that hearing without
2 our opposition they were allowed to amend and added that
3 defense.

4 Now they've added that defense, that interrogatory
5 response that Mr. Young referred to -- and which is right
6 here in my hand -- was provided on October the 9th, served
7 and filed with the Court. I believe -- I don't know if we
8 filed it on the 9th or not, but it's on file with the
9 Court.

10 Was there a contract? The affidavit of Miguel Coves
11 says yes there was. It was an oral agreement that the
12 parties worked on over lengthy meetings, visits from Spain
13 where the man and his family were hosted in the United
14 States, much expense, multiple visits. The man even
15 stayed in their place in South Carolina while they were
16 away and got a good look at the place and everything.

17 They reached an agreement and the affidavit of Miguel
18 Coves says we reached an agreement. It depended on a lot
19 of things. The man had to get a leave of absence from his
20 Government employer in Spain. He's actually still hooked
21 up to them, but he got a leave of absence so that he
22 wouldn't ruin that ongoing relationship under their laws.
23 So he had to get a leave of absence for them.

24 And they had to get a visa known as an O-1 visa.
25 That's a non-immigrant under the United States Immigration

1 and Nationality laws. An 0-1 is granted on a temporary
2 basis on a restricted level, and it is reserved for
3 someone of international prominence and renown. So in
4 order to get that visa they had to gather all of this
5 documentation to show what a great fellow this was, that
6 he trained a horse in the Olympics and whatnot.

7 So they agreed that he would come over here. That the
8 usual time for an 0-1 visa is two to three years. The
9 interrogatory response indicates that Mr. Liberatore can
10 substantiate the fact that no matter what the usual time
11 is, a visa can very well be granted for a much shorter
12 time. In his experience -- it doesn't say that, but in
13 his experience they may even grant it for 30 days even
14 though the normal time is three years or two years.

15 But the parties expected that it would be two to three
16 years but everything was subject to whatever the duration
17 of that visa was going to be. And the parties even had a
18 clear understanding that if it was -- everything was
19 mutually agreeable they would more than likely revisit the
20 situation at the end of their term and probably renew it.

21 So Coves goes through in the affidavit and explains
22 all the other attributes of this contract, all the
23 material terms, meeting of the minds on every one of them;
24 how much was he going to get paid; they were going to
25 provide him a house; they were going to provide him a car;

1 they were going to pay his transportation from Spain to
2 come over here, but not the transportation of his family.
3 They were going to do this, that and the other. He was
4 going to work, he was going to train these 80 to 90
5 horses, any of them that were trainable. He was going to
6 show any of them that were show-able, and that they would
7 employ him up to three years.

8 That discovery response on the statute of frauds makes
9 clear that the duration though was whatever the initial
10 visa authorization was and --

11 THE COURT: What was it? What was it?

12 MR. STANTON: And they ended up granting it for, you
13 know, I forget whether it was two years or three. It was
14 either two years or three.

15 THE COURT: Then it's either two years or three years;
16 right?

17 MR. STANTON: But the contract, well, the contract --
18 when they formed the contract, the contract was
19 prospective saying, this is what the parties are agreeing
20 to do. Okay. And the law of the statute of frauds in a
21 nutshell, the one that applies to this situation or rather
22 doesn't apply, is it has to be impossible of performance
23 within one year. However unlikely that condition could
24 be, the statute of frauds only applies if the contract is
25 impossible of performance within one year. Examples from

1 old dusty law where somebody says something about a ship
2 that everybody knows couldn't possibly come back in two
3 years, they say, you know, it's possible it could come
4 back in a year. Not under the statute of frauds. That's
5 the standard and there's a long history to how these
6 little contorted English nuances of a statute like that
7 come up. But that's the law in a nutshell and there is
8 more than adequate information in the record --

9 THE COURT: What cases are you relying on to tell me
10 that?

11 MR. STANTON: I filed one brief after the hearing on
12 the subject of the statute of frauds, Your Honor, if I can
13 flip to it. Make sure I have the right one.

14 THE COURT: All right. Your 10 minutes is running,
15 too.

16 MR. STANTON: I apologize. I can't put my hands on
17 it.

18 I incorporate by reference my brief on that subject,
19 Your Honor. I'm trying to find the -- oh. It was our
20 brief dated May 24th, 2013. Too many cases to cite, Your
21 Honor, or I'll run out of time.

22 THE COURT: Okay. Move on. I'll look at your brief.

23 MR. STANTON: That's our May 24th brief.

24 It's incorrect that the case, that the whole case
25 stands or falls on whether there was a contract for a term

1 of years even. If the man had an at-will employment
2 relationship, the law in South Carolina is clear. That's
3 a fiduciary relationship. The breach of fiduciary duty
4 claim was, is still good either way. We cite all of that
5 in the big brief that we filed back in, on May 14th, 2013.

6 THE COURT: Well, what if I ruled that it's not
7 subject to the statute of frauds, then they say, well, you
8 still got this arbitration issue.

9 MR. STANTON: On the arbitration issue, it is they who
10 need to make a decision, Your Honor.

11 The written agreement that the parties put together in
12 the course of applying for the visa had an arbitration
13 clause in it. They have yet to actually file a single
14 affidavit by Mr. Ibanez saying that that was not the
15 contract.

16 All they're saying is they're challenging us that we
17 can't produce one that he signed. The man apparently very
18 cleverly --

19 THE COURT: Let's assume there is a contract and it
20 has an arbitration clause in it. Where does that leave
21 us?

22 MR. STANTON: Once two parties have an arbitration
23 clause in a contract, then it's a matter of whether both
24 parties want to enforce that clause.

25 THE COURT: Both parties or one party?

1 MR. STANTON: Well, either -- either party can --

2 THE COURT: All right.

3 MR. STANTON: -- can move to enforce it, but we sued
4 in court. There's been no demand for arbitration. And
5 it's clear that parties can go ahead in court and not
6 invoke the arbitration clause.

7 THE COURT: That's very true.

8 MR. STANTON: Which is what they've done. They've
9 gone so far in this case as to seek a dismissal on the
10 merits in summary judgment, seeking to avail themselves of
11 the power of this Court.

12 And I guess for the hole in their back pocket that if
13 they lose, then they can, you know, trump it somehow by
14 bringing up arbitration. And I'm well aware of that case
15 law, Your Honor. You can go a long ways and still cause a
16 train wreck with the arbitration.

17 But let me point out what that train wreck would be.
18 There are two Defendants in this suit who didn't sign that
19 contract at all and weren't parties to it. Those are the
20 ones, Half Moon and Derr, they're being sued for tortious
21 interference and Unfair Trade Practices Act. So they
22 wouldn't be subject to that, that arbitration proceeding.

23 We thought it better to sue in court. They haven't
24 invoked the arbitration clause. In fact in court they
25 argued that they denied that there's a written contract.

1 It's just they've never filed anything by Mr. Ibanez that
2 said, I deny there was a written contract. They simply
3 point out that we can't produce a written.

4 So if they want to move to enforce arbitration, my
5 response is they've waived it by going this far. It
6 shouldn't be enforced at this point. Secondly, if it
7 were, if they were ever to do that and the Court were to
8 ever enforce it, the remedy is not dismissal. It would be
9 to stay the case so that it doesn't blow the statute of
10 limitations. And then there would be, I imagine, a fair
11 amount of shuffling around figuring out what we're doing
12 with the other Defendants.

13 THE COURT: All right. Your time's up. Thank you
14 anything in reply? Five minutes.

15 MR. YOUNG: Your Honor, we think the statute of frauds
16 applies. I mean, it's -- they have clearly stated -- I
17 mean, he argued that the parties --

18 THE COURT: Yeah, but he's saying it's not, it has to
19 be impossible to come to.

20 MR. YOUNG: Well, he said the parties expected the
21 contract to be two to three years and the visa was granted
22 for two to three years. And if that's the case, then they
23 expected to take, to be performed in a period of time more
24 than one year. And the statute, on the statute of frauds
25 it's extremely clear that if it's not in writing then it

1 violates the statute of frauds and you can't have a
2 contract.

3 He mentioned about, the Plaintiff mentioned about that
4 their, some of their claims would survive even if you find
5 that there's not a contract and there's an at-will
6 relationship. That's -- the cases that talk about that
7 really talk about it more in the context of some high
8 level employees maybe still have a fiduciary relationship
9 to the corporate entity in an at-will relationship
10 context.

11 And in this case, we have an equestrian horse trainer
12 and a riding instructor. And I just, we would argue that
13 that doesn't rise to the level that our courts have said
14 would create the fiduciary relationship as necessary for
15 them to survive on those claims in an at-will
16 relationship.

17 Again, we think that the statute of frauds applies and
18 that this was an at-will relationship. The man could go
19 to work for somebody else, which he did. And the Court
20 should grant summary judgment

21 THE COURT: Thank you. All right, gentlemen. I'll
22 take it under advisement. Please have me a proposed order
23 within 30 days.

24 MR. YOUNG: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MR. STANTON: Thank you, Your Honor.
2 END OF CASE: 10:03 A.M.

3 ** **

4 CERTIFICATE OF REPORTER

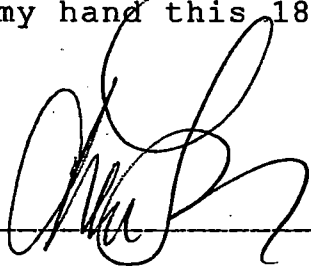
5 STATE OF SOUTH CAROLINA)

6 COUNTY OF AIKEN)

7 I, Cheri L. Young, Registered Professional Reporter
8 and Official Court Reporter for the State of South
9 Carolina, Second Circuit-At Large, do hereby certify that
10 the foregoing proceedings were written stenographically by
11 me using computer-aided translation; further, that the
12 foregoing is a true, accurate and complete record, to the
13 best of my skill and ability, of all the proceedings had
14 and evidence introduced in the hearing of the captioned
15 case, relative to appeal, in the Court of Common Pleas for
16 Aiken County, on the 15th day of October, 2013.

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

19 I have hereunder set my hand this 18th day of October,
20 2013.

21
22  Copy 031214
23 Cheri L. Young, RPR
24 Official Court Reporter
25

Defendants' motion for summary judgment, dated December 4, 2012

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN)

CIVIL ACTION NO. 2012-CP-02-01772

Coves Darden, LLC,)

Plaintiff,)

v.)

Defendants'

Motion for Summary Judgment

Francisco Jose Garcia Ibañez,)

Dori Derr,)

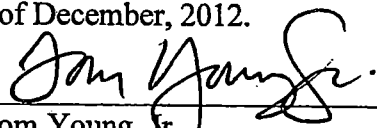
and Half Moon Stables, LLC,)

Defendants.)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by and through her undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, hereby move the Court to enter summary judgment in their favor and against Plaintiff Cover Darden, LLC as to all of the Plaintiff's claims. This Motion is based upon the pleadings and the record of this case. The grounds of this Motion will be set forth more fully in the Defendants' Memorandum of Law in Support of Its Motion for Summary Judgment and the Affidavits and Exhibits filed therewith. Counsel is currently drafting the Memorandum and it will be submitted before the hearing in this matter.

Respectfully submitted this 4th day of December, 2012.



Tom Young, Jr.
Law Offices of Tom Young, Jr., PC
409 Park Avenue, SW
Post Office Box 651
Aiken, SC 29802
Telephone: 803-649-0000
Facsimile: 803-649-7005
tyoung@tomyounglaw.com
Attorney for Defendants

Coves Darden's motion to compel and deem admitted against Defendant Half Moon Stables,
dated December 6, 2012 (with attached discovery)

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Coves Darden, LLC,

Plaintiff,

v.

Francisco Jose Garcia Ibañez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

**MOTION TO COMPEL
AND DEEM ADMITTED**

(Rule 40(a)(2) Priority Matter)

Plaintiff hereby moves the Court pursuant to Rule 37, SCRPC, for an order compelling Defendant to answer the interrogatories and/or respond to the requests for production here listed:

1. Plaintiff's Interrogatories, All Items.
2. Plaintiff's Request for Production, All Items.

If the motion is granted, Plaintiff also moves for an award of the expenses of making the motion, including reasonable attorney's fees.

Copies of these discovery requests, their certificate(s) of service, and any responses received are attached hereto.

The grounds for this motion are that the requests were duly served on the dates indicated and:

- XX that no response has been received within the time prescribed, or within the time of any applicable extension: Item(s) All.
- _____ that the responses are evasive or nonresponsive to the request and are therefore equivalent to a failure to respond: Item(s) _____.
- _____ that an inspecific or otherwise unsupported claim of privilege is asserted: Item(s) _____.
- _____ that the objection stated is invalid or otherwise

unsupported by facts: Item(s) _____.

_____ that the responses are not provided under oath as required by rule.

_____ that _____.

Accordingly, this Court should enter its order compelling full responses to these requests within fifteen (15) days of the date of entry of the order, or within any shorter period prescribed by the Court.

Plaintiffs also move to have deemed admitted, all items in Plaintiff's Requests for Admissions, on the grounds that same were duly served and that within the time for response and any applicable extension, no responses were served. A copy of the Requests for Admissions and certificate of service is attached.

The undersigned hereby affirms

_____ that the opposing party is pro se, and no consultation is required, or

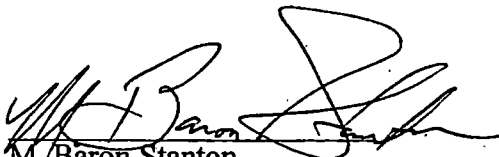
XX _____ that prior to filing this motion he has communicated orally or in writing with opposing counsel and has attempted in good faith to resolve the matter, or

XX _____ that consultation would serve no useful purpose, or

XX _____ that consultation could not timely be held, or

_____ that _____.

Respectfully submitted,


M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P.O. Box 245
Columbia, South Carolina 29202
803-929-1484

ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

DATE: 12-6-12

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC;

Plaintiff,

v.

Francisco Jose Garcia Ibañez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

**PLAINTIFF'S INTERROGATORIES
TO DEFENDANT HALF MOON**

**TO: DEFENDANT AND TOM YOUNG, JR., ESQUIRE, ATTORNEY FOR
DEFENDANT HALF MOON STABLES:**

Plaintiff, Coves Darden, LLC submits these interrogatories to the Defendant Half Moon Stables, LLC, to be answered under oath, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure.

1. Please give the names, addresses, and phone numbers of all persons known to you, your attorney(s) or agent(s) to be witnesses concerning the facts of this case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of these statements.
2. For each person known to the defendant, its attorney(s) or agent(s) to be a witness concerning the facts of this case (see question 1), set forth a summary sufficient to inform the plaintiff of the important facts known to or observed by such witness and provide a copy of any written or recorded statements taken from such witness.
3. Set forth a list of all photographs, plats, sketches, correspondence, letters, notes, e-mails, videos, or other prepared documents in possession of you, your attorney(s) or agent(s) that relate to any and all claims, defenses or facts in this case.
4. What was Francisco Jose Garcia Ibanez's employment status (e.g., salaried employee, hourly employee, independent contractor/consultant, etc.) with Half Moon, LLC as of July 19, 2012, the date of the first complaint against you in this action?
5. What was Francisco Jose Garcia Ibanez's employment status (e.g., salaried

employee, hourly employee, independent contractor/consultant, etc.) with Half Moon, LLC as of the date of these interrogatories to you?

6. What were the exact terms of Francisco Jose Garcia Ibanez's compensation with Half Moon as of July 19, 2012, the date of the first complaint against you in this action?

7. What were the exact terms of Francisco Jose Garcia Ibanez's compensation with Half Moon as of the date of these interrogatories to you?

8. What type of visa does Francisco Jose Garcia Ibanez currently have in the United States, what is the status of this visa, and when does it expire?

9. Please identify any documents, other than the web pages of Half Moon Stables and its associated divisions or operations, which confirm or describe Ibanez's status or purpose at Half Moon or in the United States as being "on an extended teaching sabbatical."

10. Has Half Moon made any commitment, request, and/or representation pertaining to Francisco Jose Garcia Ibanez's visa in order to have the visa issued, extended, or validated? If so, please fully describe it.

11. Set forth the names and addresses of any and all expert witnesses the defendant proposes to use as a witness at trial.

12. For each expert you propose to use at trial, please set forth the experts' educational credentials and experience in the field, the opinions the expert is expected to express, the facts and other bases the expert relied on to form the opinion, and all materials the expert consulted, reviewed, or was provided for the purpose of forthcoming such opinion.


M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P.O. Box 245
Columbia, South Carolina 29202
803-929-1484

ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

DATE: 10-26-12

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC,

Plaintiff,

v.

Francisco Jose Garcia Ibanez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

**PLAINTIFF'S REQUEST FOR PRODUCTION
TO DEFENDANT HALF MOON**

**TO: DEFENDANT AND TOM YOUNG, JR., ESQUIRE, ATTORNEY FOR
DEFENDANT HALF MOON STABLES:**

Plaintiff, Coves Darden, LLC requests pursuant to Rule 34, SCRCP, that Defendant Half Moon Stables, LLC, respond in writing as to each category below, that defendant will produce for inspection and copying, at 10:30 a.m., five days after the written response, at the office of the undersigned, the following documents or things.

1. All employment contracts or agreements or memoranda or correspondence between you and Ibanez.
2. All employment records of Ibanez.
3. All visa applications by or on behalf of Ibanez.
4. All correspondence, notices, e-mails or notes of conversations or communication with immigration authorities (e.g., INS or State Department) concerning Ibanez's basis for employment by Half Moon or any related entity or person, or concerning prospective employment or contractual arrangement.
5. All records of any money paid to or on behalf of Ibanez or of any thing of value furnished or provided to or on behalf of Ibanez, whether it be food, lodging, legal services, tuition, use of horses, use of stables use of transportation, or any other thing – regardless of whether in an employment or contractual relationship.
6. I-9 for Ibanez.
7. All applications or enlistments of Ibanez for participation in any competitions or

shows or any applications or enlistments mentioning Ibanez as an expected or potential participant.

8. All other documents pertaining to the claims or defenses in this action, including but not limited to any statements or notes or recordings of any witnesses, and any documents or other things you expect to offer as an exhibit at trial, use as a demonstrative exhibit, use as impeachment, or use as a refresher of recollection.



M. Baron Stanton
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1728 Main Street
P.O. Box 245
Columbia, South Carolina 29202
803-929-1484

ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

DATE: 10-26-12

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Coves Darden, LLC,

Plaintiff,

v.

Francisco Jose Garcia Ibañez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

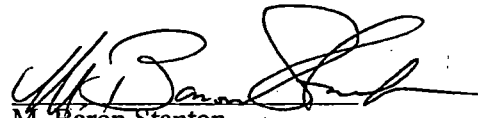
IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

**PLAINTIFF'S REQUEST FOR ADMISSIONS
TO DEFENDANT HALF MOON**

**TO: DEFENDANT AND TOM YOUNG, JR., ESQUIRE, ATTORNEY FOR
DEFENDANT HALF MOON STABLES:**

Plaintiff, Coves Darden, LLC requests pursuant to Rule 36, SCRCF, that Defendant Half Moon Stables, LLC, admit the genuineness of the following documents or the following matters of fact or application of law to fact.

1. Please admit that the attached are genuine copies of the content of the indicated pages of your website as of the 7-18-12 and 9-7-12 dates appearing thereon. [See attached page(s) indicating Ibanez is based at Half Moon, is on an extended teaching sabbatical, etc.]



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ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

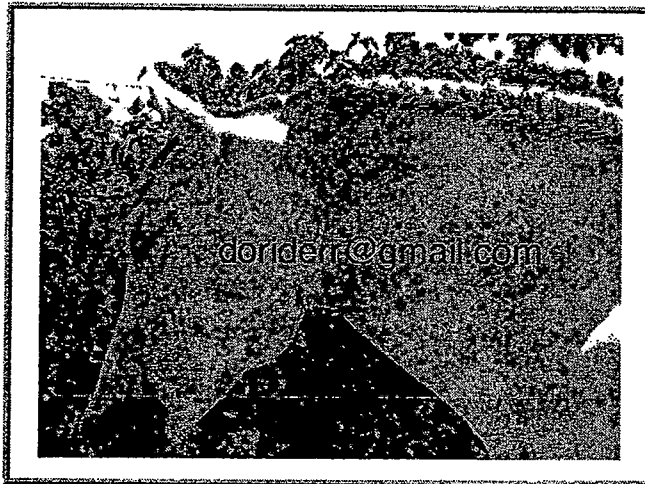
DATE: 10-26-12

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CONNECT WITH US AT HALF MOON DRESSAGE CENTER

To avoid spammers, we present this as an image. Type this address and send as normal.



CALL	VISIT	E-MAIL
Dori Derr at 803-564-6919	Location Address and Maps	The address in the Image or click here

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Copyright 2011-2012. All rights reserved.

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Señor Francisco Garcia Ibañez, 'Specialist Master Rider' from the Royal Andalusian School of Equestrian Art in Jerez de la Frontera, Spain.

The Royal Andalusian School of Equestrian Art, also known by its spanish name, the Real Escuela Andaluza del Arte Ecuestre, is located in the south of Spain in Jerez de la Frontera. It is recognised as one of Europe's four major equestrian centres, and the PRE stallions of the Escuela are admired worldwide for their displays of Alta Escuela work under saddle and in hand.

The School is run as a Foundation, teaching equestrian arts at the highest level for carefully selected students.



Horses and riders train in the art and traditions of classical baroque equitation, and work to preserve the heritage for coming generations. Only 4-6 horsemanship students are accepted each year.

The teachers are drawn from the most experienced and proven horsemen that Spain has to offer, and Francisco Garcia is one of these.

Over the past 25 years Sr. Garcia trained the students, and rode for the Royal School at International competitions throughout Europe. He worked directly with the PRE Oleaje, who went on to win Silver for dressage at the 2004 Olympics with Ignacio Rambla as his rider.



Sr Garcia is now in the U.S. for an extended teaching sabbatical. He is based at Half Moon Stables near Aiken, SC and is available for training, clinics and private lessons.

His focus is on classical methods, communication and lightness, and his training methods are appropriate for all breeds of horse and all levels of rider.

To discuss what works best for you [call us](#) - we are happy to help.

[Foto Gallery Francisco Garcia](#)

[Contact Half Moon Dressage](#)

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News from Half Moon Dressage

News from Half Moon Dressage Center.

We invite you to spend time with us and our horses.

- Get to know the PREs we love.
- Come with us to andalusian shows across America.
- Hear about our visiting dressage teachers and clinicians.
- Keep up to date with our new pages and blog entries.

HALF MOON DRESSAGE BLOG

Jul 10, 2012

Francisco Garcia

Señor Francisco Garcia Ibañez, 'Specialist Master Rider' from the Royal Andalusian School of Equestrian Art in Jerez de la Frontera, Spain, in the U.S. for an extended teaching sabbatical. He is based at Half Moon Stables near Aiken, SC.

[Permalink -- click for full blog post "Francisco Garcia"](#)

Jul 9, 2012

Don Francisco Joins us at Half Moon

Half Moon Dressage Center is delighted to announce that Don Francisco Jose Garcia Ibañez, Specialist Master Rider from the Royal Andalusian School of Equestrian Art in Jerez de la Frontera, is available for training, clinics and private lessons at the Center.

Don Francisco is on long-term sabbatical leave in the United States, and is basing his operation out of the Center. His classical training methods are appropriate for all breeds of horse and all levels of rider.

Thanks to the talents of Diana Hunt, we have some great photos of Tomillo and Sr Garcia working together.

[Permalink -- click for full blog post "Don Francisco Joins us at Half Moon"](#)

Jul 9, 2012

Connect

Connect with Half Moon Dressage Center. Breeding with Qualified PRE dressage stallion. Training facilities.

[Permalink -- click for full blog post "Connect"](#)

Jul 9, 2012

Dressage Training Center

Dressage training center and PRE breeding farm in South Carolina. Individual lessons. Clinics with USDF and international trainers. Training facilities. Breeding with Imported Qualified PRE dressage stallion.

[Permalink -- click for full blog post "Dressage Training Center"](#)

Jul 9, 2012

Half Moon Dressage Center

Half Moon Dressage Center USA. Breeding with Imported Qualified PRE

dressage stallion. Training facilities and clinics with National and International Trainers.

[Permalink -- click for full blog post "Half Moon Dressage Center"](#)

Jul 9, 2012

Tomi-fotogallery10

[Permalink -- click for full blog post "Tomi-fotogallery10"](#)

Jun 12, 2012

A quote to Note

Encouraging notes from the blog of Suzanne King, a dressage trainer in the Atlanta area.

"As an instructor of riders of all levels I would rather teach a person how to improve the gaits, and master riding on a horse that they are physically and mentally capable of handling.

"If that horse is a warmblood that's great. If it's an Andalusian, Connemara, Thoroughbred, Appendix, Quarter Horse, Appaloosa, POA, Arab, whatever, bring it on.

"When you can improve the gaits of any horse and promote the relaxation that the old-style warmbloods are known for, you are in the running."

[Click for more info](#)

May 15, 2012

Artificial Insemination

Artificial Insemination has become increasingly popular, using frozen semen or fresh cooled sperm.

Frozen semen is stored in liquid nitrogen at temperatures well below zero. This temperature permits an almost indefinite preservation of the sperm cells.

The advantage for stallion owners is that competing animals who are in demand do not have their show schedule disrupted.

An equal advantage for mare owners is that they can plan the insemination of their mares to their own convenience, rather than having to fit in with the schedule of a busy show horse.

An option to frozen semen in artificial insemination is freshly chilled semen, which is stored at a temperature that permits it to be used effectively within 24-48 hours.

Directly after extraction the semen is preserved in a cooling device, and transported immediately to the receptor mare.

We are finding that the majority of people opt for the fresh cooled sperm.

Collections can be arranged at short notice, and we have a bank of frozen sperm on hand for anyone who may want to breed during a time when it is difficult to perform a collection.

We work with an experienced consulting veterinary clinic and transport of semen is arranged as needed.

Tomillo is available for PRE and part bred mares.

[Permalink -- click for full blog post "Artificial Insemination"](#)

Apr 27, 2012

Fuego Does it Again!

His formal name is Fuego de Cardenas, to the world he is simply Fuego. He is one of the top ten FEI dressage horses in the world.

From the classic stud of Cardenas in Spain, he hit the headlines at WEG in Kentucky and I was there, among the crowd who cheered his breathtaking performance.

He continues to shine back home in Europe. For the third year in a row, he has won the Grand Prix at Saumur, in France, with a score of 74,021%.

Thank you Fuego for being such a wonderful ambassador.

[Click for more info](#)

Apr 17, 2012

US Olympian Amy Tryon dies at 42

Sad to read of the early death of Amy Tryon, Olympic 3 day eventer.

Amy and her special horse, the former racehorse Poggio II, represented the USA at two Olympic Games - Athens 2004 and Beijing 2008.

They also shone at two FEI World Equestrian Games, with a team gold in 2002 in Jerez de la Frontera, Tomillo's hometown in Spain, and an individual bronze in Aachen in 2006.

Our thoughts go out to her friends and family.

[Click for more info](#)

Mar 29, 2012

Tomillo keeps on Shining

Just back from the Aiken Southern Comfort Dressage show. Tomi did Grand Prix Special and got a 62.1.

In the mail this week were two ribbons from USEF - for Tomillo of course!

Reserve Champion in I-2 for 2011.

and

2011 USEF REGION HORSE OF THE YEAR!!!

Also, he got in the 2011 USEF REGION HORSE OF THE YEAR category, Fifth in Grand Prix.

I love my boy - not just for what he does, but for what he is!

[Permalink -- click for full blog post "Tomillo keeps on Shining"](#)

Mar 1, 2012

New Photos and Spring Cleaning

Spring really is in the air, and we are excited about what the new season will bring at Half Moon Dressage Center.

We have been diligently spring cleaning the website - it's amazing how much we have grown in less than a year. Links have been checked and pages updated, new photos added and Tomillo's results posted.

Our baby, the beautiful Bellissima, is growing even faster than the website - here's her latest photos:

[Permalink -- click for full blog post "New Photos and Spring Cleaning"](#)

Feb 24, 2012

Half Moon Dressage Galleries

Half Moon Dressage Center USA. Training facilities and clinics with National and International Trainers.

[Permalink -- click for full blog post "Half Moon Dressage Galleries"](#)

Feb 24, 2012

Bellissima-fotogallery01

[Permalink -- click for full blog post "Bellissima-fotogallery01"](#)

Jan 20, 2012

Exciting New Training at Half Moon Dressage Stables

Half Moon Dressage Center (Wagener, SC) is happy to announce that Valarie Swygert, L level judge, has joined us as the new trainer at the barn.

Add to that my "boot camp style" training with Tomillo under Diane Ritz at Hidden Springs Farm, in Monroe, N.C. (This initial session has been three weeks, but we will return in February for two weeks.)

Between the two of them, we are looking forward to lots of fun with our riding in 2012.

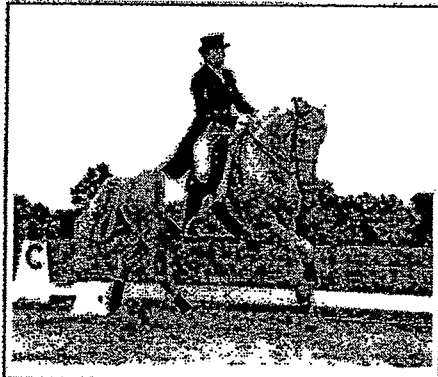
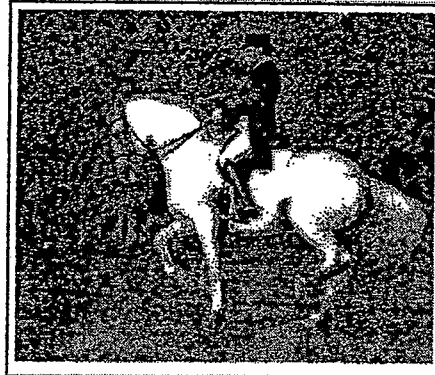
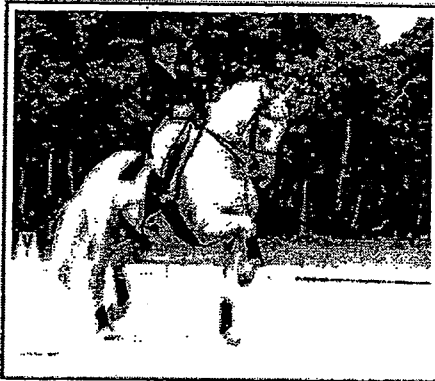
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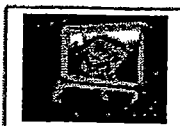


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[HOME](#)[ABOUT](#)[Our HORSES](#)[PHOTO Galleries](#)[The CENTER](#)[For SALE](#)[NEWS](#)[CONTACT](#)[SITE HOME](#)**TOMILLO VII**[About](#)[Bloodlines](#)[Qualified PRE](#)[Show Record](#)[Breeding to Tomi](#)[PHOTOS](#)[10 - Show Work](#)[01 - At Home](#)[02 - Training](#)[03 - Grand Prix](#)[04 - Foals 01](#)[05 - Foals 2007](#)[06 - Foals 2009](#)[07 - Foals 2010](#)[08 - Foals 2011](#)**TOMILLO VII GALLERY 10**Tomillo working with [Sr. Francisco Garcia](#)*Our thanks to Diana Hunt of HuntScene Photography and Editorial for these photos.**These images are copyright and may not be reproduced without written permission from the author.*

[return to Tomi's Home Page](#)

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HALF MOON DRESSAGE CENTER

Half Moon Dressage Center SC, for Training, Breeding and Boarding.

JULY 2012 – DON FRANCISCO JOSE GARCIA IBANEZ



Half Moon Dressage Center is delighted to announce that Don Francisco Garcia, Specialist Master Rider from the Royal Andalusian School of Equestrian Art in Jerez de la Frontera, Spain, is in residence and available for training, clinics and private lessons at the Center.



Don Francisco is on long-term sabbatical leave in the United States, and is basing his operation out of the Center. His classical training methods are appropriate for all breeds of horse and all levels of rider.

[Read more on Don Francisco](#)

[Tomillo working with Don Francisco](#)

[Contact us about lessons and clinics](#)

TOMILLO VII – IMPORTED PRE STUD STALLION

Tomillo VII is one of the very few pure spanish breeding stallions in the US who is graded at the level Qualified / Calificado.

- Competing FEI in the US at Grand Prix.
- Multiple Breed championships in Spain.
- Direct bloodlines 2 Olympic dressage PRES.
- Standing at Half Moon Dressage Center.

[more on Tomillo](#)

HALF MOON DRESSAGE CENTER – TRAINING BREEDING BOARDING



State of the art arena and facilities.
Paddocks, turnout, and boarding for short and long term stays.



Dressage clinics. Individual classes. USDF trainers.
Visiting instructors Spanish Royal School.



Breeding to our Qualified PRE stallion.
Artificial Insemination for distant covers.
Veterinary Clinic facilities and boarding for mares.

THE HALF MOON DRESSAGE WEBSITE IS GROWING

News from Half Moon Dressage

Half Moon Dressage Center and Pure Spanish Horse Breeding Center. Qualified PRE stud stallion. Dressage training clinics. Andalusians in the USA.

Build Horse Website

To build a horse website is not difficult. But just like in training a horse, it helps if you have some insider tips, and professional backup to call on. Half Moon Dressage Center chooses to work with Canovas Media - Real people who know horses, who understand websites and who work one on one. Proven results. Read how we built a successful website together.

Tomillo VII

Tomillo VII, Qualified PRE stud stallion imported to US from Spain. Top bloodlines. Competing high level dressage. Success in Spain and USA in breed and dressage.

Qualified Pre Stallion USA

Qualified PRE stallion at GP dressage, Tomillo VII now in the US. The grading Qualified/Calificado is more stringent and more detailed than the regular Revised/Apto grading. What is involved, what does it mean to breeders. Top bloodlines, winning in competition. Natural cover and Artificial Insemination.

Spanish Horse Bloodlines

Spanish horse bloodlines carry history and value. Qualified PRE stallion Tomillo VII, imported to US from Spain has historical, classic lines. Multiple winner in Spain, breed and dressage

Tomillo Show Record

Tomillo - a Show Record of Championships declares clearly what the judges of Spain think of him. Now in the USA. Qualified PRE stud stallion imported from Spain. Top bloodlines. Success in Spain and USA in breed and dressage.

Breeding Qualified Pre Stallion USA

Breeding to a qualified PRE stallion in the US. The Grading Qualified for a spanish horse has significance. Top bloodlines, winning in competition. Natural cover and Artificial Insemination.

Spanish Mare Montera XIX

Spanish mare Montera XIX, imported from Spain. 2010 chestnut colt, sired in Spain. 2011 bred to Qualified PRE stallion, multiple winner in Spain both breed and dressage. Filly born in June.

Dressage Training Boarding

Dressage training and boarding center S Carolina. We are an active competitive yard, and combine practical ease with comfort for horses and riders. USDF and international trainers. Training facilities. Stall and Pasture boarding.

Half Moon Dressage Galleries

Half Moon Dressage Center USA. Training facilities and clinics with National and International Trainers.

Tomí-fotogallery04

Alcazar VIII Chestnut PRE

Alcazar VIII. PRE colt for sale. Chestnut in color. Classic andalusian bloodlines. Imported from Spain now for sale in the USA

Andalusian Sale

Andalusian sale - spanish PRE and Lusitano, dressage and show horses in the US. Purebred, competing successfully in the USA. Private stud.

Andalusian Dressage Sale

Andalusian dressage sale - spanish PRE and Lusitano horses in the US. Purebred, competing successfully in the USA. Half Moon Dressage and PRE Breeding Center with imported Spanish lines. Private stud.

Lusitano Dressage Sale

lusitano dressage sale, gelding. Private stud. Lusitano dressage horses are gaining popularity as their ability in the show ring is displayed. Half Moon Dressage Center presents the Lusitano dressage gelding URON HI

South Carolina dressage training

South Carolina dressage training and PRE breeding farm. Close to Aiken and Columbia SC. Breeding with Qualified PRE dressage stallion, and imported bay PRE. International trainers, training facilities.

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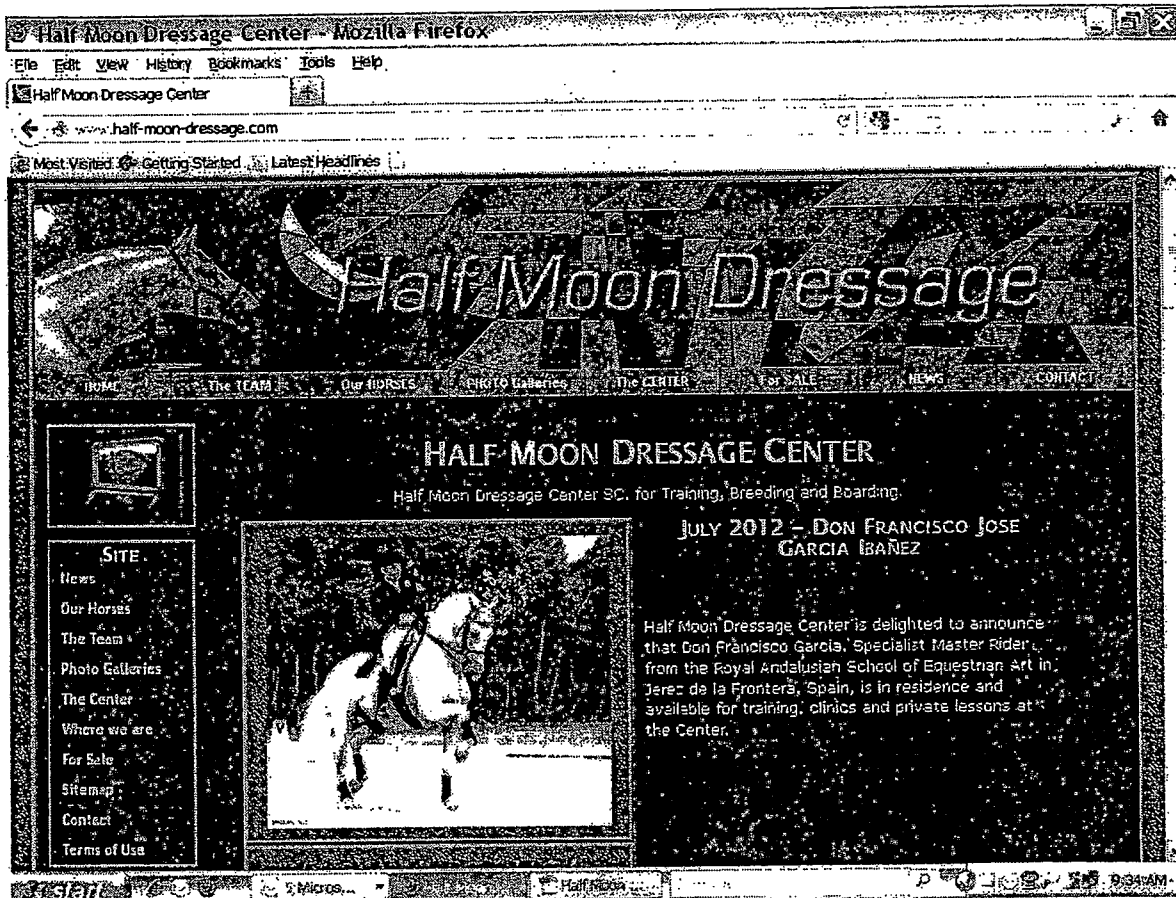
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Half Moon Dressage Team

Half Moon Dressage Team. Half Moon Dressage Center trainers and team members.

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Screenshot 9-7-12



Deposition of Dori Derr, taken on January 14, 2013, pages 17-24 and 88-111

1 it.

2 It's -- at the moment, you know, people
3 are getting paid for what they do. The taxes
4 are being paid. We're taking, you know, the --
5 we keep track of everything. Half Moon keeps
6 track of everything, but you know, he's pretty
7 much paid as it comes in.

8 Q: What taxes are being paid?

9 A: Income tax.

10 Q: You mean like --

11 A: Income tax.

12 Q: FICA, the withholding?

13 A: Right.

14 Q: So --

15 A: Taxes.

16 Q: I think that answers my question.

17 A: Okay.

18 Q: I'm trying to understand when you remit the
19 money to him, you're taking out the taxes and
20 that's his employment with -- I mean, that's
21 his compensation from Half Moon as his
22 employer; correct?

23 A: Basically.

24 Q: Put a different way, I'm trying to determine is
25 he doing any freelance work where he is

1 charging on his own and people are paying him
2 directly?

3 A: Well, really I don't know if he's doing any or
4 not. I mean, we don't -- we've employed him to
5 do what he does for us, you know. I don't
6 watch him every second. I don't know where he
7 goes -- if he leaves, for example, to go
8 somewhere, what he does there I don't know, and
9 I don't care. It has nothing to do with me.

10 I mean, I have a contract with him to do
11 for me what he does for me. What he does above
12 and beyond that has nothing to do with me.

13 Q: And your contract does not require him to work
14 exclusively for you?

15 A: No. No, no, no. No. He's a, you know,
16 basically he's a free agent. I mean, if he's
17 got more time. Hard to decide that he would
18 have more time but if he does, you know, people
19 are free to do what they want, you know. Like
20 if, you know, if Jim wanted to go get a
21 gardening job and he's an attorney, I'm sure,
22 you know, he would be allowed to do that.

23 Q: And the other scenario you described where it's
24 possible that he would go and train someone
25 else's horses, but not on your premises?

1 A: Right.

2 Q: In that situation, is the -- does the customer
3 pay Half Moon for that?

4 A: No. Doesn't have anything to do with me.

5 Q: So you don't -- if he goes off-premises to
6 train someone's horse at another location --

7 A: If he were. I'm not saying he is.

8 Q: Right. But --

9 A: If he were to, yes.

10 Q: But if he did, you -- you wouldn't be -- Half
11 Moon would not be charging that customer for
12 that?

13 A: No.

14 Q: Put shortly, you don't yet have to have any
15 system where you're charging people for off-
16 premises training by him?

17 A: Well, this is supposing an awful lot of things
18 really. It's sort of imagining that things are
19 happening that -- I don't know if they're
20 happening or not happening, but the short
21 answer is what he does when he doesn't work for
22 me is his business and it doesn't have anything
23 to do with the stable.

24 Q: Did you not just testify a few minutes ago that
25 sometimes people bring their horses there and

1 sometimes they don't?

2 A: Yes.

3 Q: Right. I just was wanting to find out what
4 happens when they don't.

5 A: Oh.

6 Q: Who's charging for it, him or Half Moon?

7 A: How did I not answer? I'm sorry. How did I
8 not answer?

9 MR. DERR: I think she did answer that.

10 A: I thought I answered it. At Half Moon when
11 they're using my premises, my arena, my
12 facilities, I'm feeding their horses, then
13 they're involved in Half Moon business, then I
14 do get something. Okay? If he were to -- and
15 again, this is all you know, in a bubble up
16 here that says he is to or whatever. If he
17 goes somewhere else, that's up to him.

18 Q: As a hypothetical, in other words, if I -- if
19 I had a horse in Camden --

20 A: Right.

21 Q: -- and I called up Half Moon and said, hey, I
22 need some dressage help. Can I get Mr. Garcia
23 to come over here and ride my horse and show us
24 a few things?

25 A: Uh-huh (affirmative response).

1 Q: I'd be making that arrangement with Mr. Garcia,
2 not with Half Moon?

3 A: If they called me, which is what you just said
4 --

5 Q: Right.

6 A: -- I would say, you would need to discuss that
7 with Mr. Garcia.

8 Q: Right. And then you wouldn't be involved in
9 the transaction, so to speak?

10 A: Doesn't have anything to do with me, no.

11 Q: So when was Mr. Garcia actually hired to first
12 do any work for Half Moon?

13 A: The date of the contract.

14 Q: August the 1st, 2012?

15 A: Right. That's became -- when he became an
16 employee.

17 Q: And before that date you did not pay him any
18 money?

19 A: I paid him for a riding lesson, but I didn't
20 pay him a salary. I paid him for a riding
21 lesson the first time I met him, but that was,
22 like, \$55. It was a one-time thing and it's
23 standard. Someone gives you a riding lesson,
24 and he didn't ask for the money; I volunteered
25 it to him, because he did give me a lesson.

1 But in terms of that being a salary or a form
2 of employment or an ongoing situation, no. It
3 was just you know, 30 minutes of his time that
4 I compensated him for as a professional.

5 Q: You paid him \$55 for a riding lesson the first
6 time you met him?

7 A: The first time I -- I met -- well, we're going
8 to start that conversation in the middle or
9 because that's kind of -- the first lesson I
10 took from him was at my farm. It was not
11 arranged. Mr. Garcia I had seen at a horse
12 show. He saw my horse Tomillo Siete, a horse
13 which is from the Spanish riding school where
14 he taught, a horse which interested him. He
15 came late one afternoon and asked me if he
16 could see the horse.

17 I took him to the stable and he saw the
18 horse, and he asked me if I would ride the
19 horse. I rode the horse. He asked me then if
20 he could ride the horse. I said that he could
21 ride the horse. Developing out of that, he
22 gave me some suggestions. Said, you know,
23 maybe you should try this, this, this, with
24 this movement or this movement, and it might be
25 of use to you.

1 And we wound up spending about, I don't
2 know, another 30 minutes with him just giving
3 me pointers on that, for which I thanked him
4 very much. I offered to pay him. He said no,
5 and I just gave him 55 bucks, because I know
6 that's what it costs and thanked him very much.

7 Q: When did that occur?

8 A: That was just before Jim and I went to the
9 Virgin Islands for two weeks in April, and the
10 exact date I cannot remember. I know it was in
11 the week before. I think the Virgin Islands
12 trip was April 27th something, and he came late
13 one afternoon and that occurred. And I did not
14 see nor hear from him until we returned from
15 St. Thomas two weeks later.

16 Q: So it was sometime before April 20th?

17 A: Twenty-seventh.

18 Q: Sometime before April 27th?

19 A: Yeah. If my memory is right on that trip.
20 It's -- it's right in there. Those might not
21 be solid dates, but it's -- it's end of -- last
22 two weeks, sort of, end of April.

23 Q: And that was just one instance, namely one day
24 that he came out and the events you described
25 occurred?

1 A: One hour, yeah.

2 Q: And that was the only time before August the
3 1st, 2012 that you paid him any money?

4 A: Yes. Most certainly. The only time I ever
5 spoke to him other than hello.

6 Q: Other than hello?

7 A: Yeah. I first saw -- I can tell you the
8 chronology of my entire dealings in three
9 separate instances with Francisco Garcia, which
10 may help us to move this along. Francisco
11 Garcia came to Coves Darden to work. I
12 received an invitation to go to a clinic that
13 he put on there. I did not attend this clinic.
14 I was already scheduled for a clinic that
15 weekend. That -- on that occasion I did not
16 meet the man. I heard of him first then.

17 The first occasion I met Francisco Garcia
18 or saw Francisco Garcia, because I did not meet
19 or speak with him, was at a horse show which
20 was conducted at Coves Darden. We were invited
21 to attend. We brought our stallion, Tomillo.
22 He was shown by my trainer at the time, Jill
23 Allard. I saw Francisco. Everyone was
24 speaking about who he was.

25 He rode, oh, 75 percent of the Coves

1 attract into your barn for training, which
2 affects you know, basically how much you're
3 going to be able to charge. And your standing
4 in the community.

5 But overall this is not something that a
6 lot of people enter into as a money-making
7 venture. This is something that we do for the
8 love of the sport and the animal.

9 Q: And I believe I'm correct that you never met
10 Mr. Garcia in Spain. You only met him for the
11 first time here in the United States?

12 A: That is correct.

13 Q: Did Mr. Garcia ever provide you a copy of his
14 employment contract or prospective employment
15 contract with Coves Darden?

16 A: No. He didn't have one.

17 Q: He did not have a prospective employment
18 contract with Coves Darden?

19 A: We inquired from Mr. Garcia if he had a
20 contract. His response to us was that he
21 repeatedly asked for a copy of a contract from
22 Miguel, and he was never, ever provided with
23 one. And the only time he was ever shown
24 anything which purported to be a contract was
25 when Miguel waved a piece of paper in his face

1 in his office the day after he had, you know,
2 sort of did his spyware thing and seen him at
3 our farm and told him he was not allowed to
4 speak to us in any fashion, and it said so
5 right here in this contract.

6 The contract, which we have subsequently
7 seen, is written in English. Mr. Garcia does
8 not read English and neither was it signed by
9 him. Mr. Garcia always, always has been
10 adamant that he never signed a contract, was
11 never shown a contract and continuously asked
12 for a contract, which was not provided to him.
13 And everything we've seen verifies that, unless
14 there's a contract signed out there that we
15 haven't been provided, which I would really
16 much be amazed at.

17 Q: Do you know whether his application for his 01
18 visa at the embassy in Spain was conducted in
19 English or Spanish?

20 A: Sir, I think I've told you I never met Mr.
21 Garcia until, you know, very, very much past
22 that and I would have no way of knowing what
23 was done there, said there, signed there or
24 anything else. But if there was and we weren't
25 provided it, well then we're being maybe put at

1 a disadvantage.

2 Q: Perhaps.

3 A: And that could come from two sides.

4 Q: When did you first begin to prepare photos,
5 advertisements or any type of marketing
6 materials regarding Mr. Garcia's affiliation
7 with Half Moon?

8 A: Pretty much right after he came onboard we did.
9 We sat together at photo session and we set
10 about trying to let everybody know that he was
11 here, available to work and earn so that we
12 could pay for his being here and justify having
13 someone of his caliber and expense who we could
14 not personally pay for forever by ourselves on
15 the payroll.

16 Q: And what time do you refer to when you say it
17 was right after he came?

18 A: The contract date.

19 Q: So it would have been after and not before
20 August the 1st, 2012?

21 A: I'd have to go back and check on that to do --
22 I know we sat down and started to do some
23 figuring and how we would do it and where we
24 should place it, but I don't believe it could
25 have been placed before then, because all of

1 these articles take a lead month -- they have
2 -- need like a month or two of lead time before
3 they can ever be put together.

4 Q: And when you say "all of these articles," what
5 sort of articles?

6 A: The articles we discussed in the
7 interrogatories.

8 Q: Could we discuss them here? What articles are
9 we talking about?

10 A: Well, let's see. We did an article in the
11 Foundation for the Pure Spanish Horse. We did
12 Dressage Extensions. We did Anduluthian. We
13 did IALHA. I think we did something in the
14 local South Carolina Combined Training and
15 Dressage Association. We did Sidelines.

16 I don't know when all these were done in
17 terms of one versus the other. These are just
18 a conglomerate of advertising that I'm
19 remembering right now we did.

20 Q: Could you -- I don't mean to slow you down, but
21 I'm a little slow taking it in. What are the
22 publications you're referring to? Are these in
23 magazines or newspapers?

24 A: Some are websites; some are magazines; some are
25 both.

1 Q: And what are these media, if you could just --
2 you may be repeating yourself, but you went
3 through it kind of quickly.

4 A: SCTDA has both -- that's the South Carolina
5 Combined Training Dressage Association. That's
6 our local dressage group. They allow free
7 advertising, I believe, and that's an online
8 publication. We did something there. We did
9 -- in the Aiken Horse we did something.

10 Q: Aiken Horse is a publication?

11 A: Yes, it is.

12 Q: Like a paper or a magazine?

13 A: It's our local sheet. It comes out about six
14 times a year, four to six times a year, and
15 gives all the local, you know, advertising for
16 people, barns and it's like a local horse
17 magazine for horse people. Then we did -- I
18 don't know if it was Dressage Today or Dressage
19 Extensions, which is a nationwide publication
20 which features riders of distinction, events,
21 gives information about various forms of riding
22 and disciplines, that sort of thing.

23 Then we did PRE, which is Pura Raza
24 Espanola Magazine. We did Anduluthian Today,
25 which is again a -- I think these come out,

1 like, four times a year. What was the other
2 one?

3 Q: Sidelines?

4 A: Sidelines. And Sidelines has -- we had a
5 banner in Sidelines on the website and then
6 they did an article on Francisco, a feature
7 article on him.

8 Q: Sidelines, is that a magazine or a --

9 A: It's a magazine which is published and
10 distributed primarily in Wellington, Florida,
11 and here in Aiken.

12 Also they have a website.

13 Q: So you would not have first begun preparing
14 anything announcing his affiliation with you
15 before August 1st, 2012?

16 A: I don't believe we did. I believe the
17 interviewing may have started prior to that.
18 There was a good deal of interviewing which had
19 to be done through interpreters in order to,
20 you know, to create a storyline and, you know,
21 explain who he was, what he did, what his
22 background was.

23 As a rider he started at 14 years old and,
24 you know, his association with the school, how
25 he worked himself up, the horses, that he

1 trained there, his fortes as both an instructor
2 and a trainer, his reputation and what he hoped
3 to -- why he was here, what he hoped to
4 accomplish, that sort of thing.

5 Q: Well, you say that he began working with you
6 August 1st, 2012. Today is January the 14th,
7 so we're only --

8 A: Five.

9 Q: About five months into what you said is sort of
10 an evolving --

11 A: Right.

12 Q: -- situation; correct? In the time that he has
13 been working with you, has he come back to you
14 and asked for more money?

15 A: Not more money. We discussed the fact that he
16 was not able to meet his bills on the 3,500
17 euros and we agreed that because we had belief
18 in his ability to become a success, and that
19 things don't happen overnight, that we would
20 allow him -- give him more money, so that he
21 would be able to stay and, you know, we could
22 have some time to work it out.

23 Q: Oh, so I understand you started with the base
24 stipend understanding of about 3,500 euros --

25 A: Uh-huh (affirmative response).

1 Q: -- but then he came back to you and you decided
2 to increase that to the 4,000?

3 A: We did and it had to do with euro, the changes
4 in the euro and things.

5 Q: As in the five months that he's been working
6 with you, has he come back to you and asked for
7 anything else additional other than money, for
8 instance, any additional housing or support or
9 transportation or any other perks?

10 A: Well, we offered him transportation immediately
11 and housing immediately, and maybe again, this
12 isn't like most people, but we don't let them
13 ask. If he needs something and we see he needs
14 it, we give it to him.

15 Q: My question is, has he asked?

16 A: No.

17 Q: He's not come back to you and asked for more --

18 A: No.

19 MR. DERR: Let him finish.

20 Q: He has not come back and asked for more non-
21 monetary compensation or more support services,
22 anything like that?

23 A: No.

24 Q: In the five months that he's been with you, has
25 he met your expectations in terms of what he

1 committed and agreed to do for you?

2 A: One hundred per cent.

3 Q: When was the first show or competition in which
4 he appeared as your rider?

5 A: Whoa. It was Tryon, and I don't remember the
6 date. It was, I think, two months into his
7 having been there. Tommy -- our Tommy was
8 still a nut case. We were still dealing with
9 his -- the treatment that he received and his
10 behavior was -- he was a completely different
11 horse than he was last year. We had huge
12 problems with Tommy.

13 Q: Could you -- Tommy, the horse, was a nut case
14 you say?

15 A: Pretty much a nut case. He was -- he didn't
16 want to go in an arena anymore. He had been
17 ridden by some German people who had really
18 bullied him. I got him back, he had blisters
19 in his mouth. He had been bullied and he was
20 not the horse that he was a year ago.

21 I was having a lot of problems with Tommy
22 and a lot, a lot of work had to be done to get
23 him back into his old mentality. And so the
24 first two outings that we had with him were not
25 successful at all. We didn't expect they would

1 be.

2 Q: The first two outings you had with him?

3 A: Tomillo and Francisco's first two outings
4 together were not, you know, anywhere near what
5 he'd been doing the year before. But he was
6 agreeing -- the horse was agreeing to go in an
7 arena and he was doing, you know, most of the
8 performance, but it took four months and in --
9 I mean, for a horse that couldn't catch cold
10 until August, he won the All Breeds Award for
11 the year this year in a matter of three months,
12 so he did certainly come around, and has
13 responded beautifully to working with
14 Francisco.

15 Q: So the first of those two outings would have
16 been the one in Tryon?

17 A: One in Tryon, one in Virginia.

18 Q: Well, my question was when was the first show
19 or competition in which --

20 A: Tryon --

21 Q: -- he --

22 A: -- but I don't remember the day.

23 MR. DERR: Let him finish.

24 Q: My question was, what was the first show or
25 competition in which Mr. Garcia appeared as

1 your rider and that's what I was trying to
2 ascertain. Your answer is it was in Tryon?

3 A: Yes.

4 Q: And do you remember about when that was?

5 A: No.

6 Q: Was it before or after August the 1st, 2012?

7 A: It was probably just after. I think it was
8 early August.

9 Q: When was the first time you applied to have Mr.
10 Garcia appear as a rider of yours in a show or
11 competition?

12 A: I don't remember. It was late. The only
13 reason we got in was because there were no --
14 they had a dearth of people applying, so they
15 let us in at the last minute, but I don't
16 remember exactly what day it was.

17 Q: Was there a time when you applied to have him
18 appear as a rider when he then did not indeed
19 appear as a rider? I'm trying to understand.

20 A: I'm going to have to go back and look these
21 dates up and fill them in if you can leave a
22 blank for me, because I'm not comfortable
23 guessing at these dates, and I have records of
24 it, so that's I think the best way to answer
25 your question as accurately without guessing.

1 Q: Just to be clear, I understand figuratively
2 speaking, when you say "leave a blank," but
3 part of our purpose here is to determine what
4 you can remember and what you do remember and
5 what you can remember.

6 A: Okay.

7 Q: If you can't, it may be an acceptable answer to
8 say that you can't.

9 A: Okay, I can't.

10 Q: But it's also acceptable for me to see how much
11 you do remember or how you might be able to
12 figure it out. So I don't literally want to
13 leave a blank and have you come back and fill
14 in stuff later.

15 A: Okay.

16 Q: Nobody wants to do that.

17 **COURT REPORTER:** Can we go off record?

18 **MR. STANTON:** Sure.

19 (Off the record.)

20 Q: Now, in the complaint in this matter, there is
21 a description of a competition that Coves
22 Darden had planned to participate in using Mr.
23 Ibanez -- excuse me, Mr. Garcia as the rider in
24 June of 2012, which he then did not participate
25 in. Is it true that that June, 2012

1 competition, he did then proceed to participate
2 in as your rider?

3 A: Not to my recollection.

4 Q: And I'm not looking at anything as I ask you
5 these questions other than my notes. My
6 impression was it may or may not have been a
7 show or competition in -- somewhere in Georgia
8 or if that refreshes -- you know, rings any
9 bell. You don't recall his being submitted as
10 a rider for Half Moon Stables in a June, 2012
11 show or exhibition?

12 A: I was going to go to a show in Georgia. I did
13 not go, but Mr. Garcia was not listed as the
14 rider. I was. I was listed as the owner and
15 the rider, because I was going to ride Tommy in
16 the show. I decided not to do that. It has
17 nothing to do with anything in the world of
18 Coves Darden. It was a decision between me and
19 my horse. Garcia had nothing to do with it.

20 Q: So the June, 2012 show in Georgia that we're
21 referring to, your horse never went to that?

22 A: No, he never went to it. I didn't take him.
23 I can't -- you know, I canceled it.

24 Q: Right. And it's your assertion that that was
25 something you and Tomillo were going to do and

1 that Mr. Garcia was not to be involved in that?

2 A: Yes, and not only that, you can verify that by
3 the entry forms that were submitted to the
4 horse show. I was submitted as the owner and
5 the rider. You can't change riders. You can't
6 go in and change a rider the day of the show.
7 It's not possible.

8 Q: How much lead time would you need in order --

9 A: A month. I'm sorry.

10 Q: How much lead time would you need in order to
11 determine that you were going to go be in one
12 of those shows?

13 A: Depending on how busy the show is and generally
14 speaking, they have a closing date for the
15 entry to the show and it's a month. So --

16 Q: And by closing date you mean a cut-off?

17 A: A cut-off date for entries, but that -- that
18 little cut-off date is not set in cement,
19 because those shows are set up to make money.
20 If they don't have riders, they'll let you in
21 the day of the show oftentimes. But if you
22 want to be sure you're going to that show and
23 you're going to ride, you need to qualify with
24 the date when the -- closing dates.

25 Oftentimes a month out before a show, you

1 really don't know if you're going to be ready
2 or not, but if you want to go and you think
3 you're going to go, you better get your entry
4 in or you cannot be sure you will go and be
5 admitted. Now, my entry for that, if it's the
6 same show we're talking about -- there were two
7 shows there in -- at Conyers. There was a
8 dressage show.

9 Also there was a breed show and, you know,
10 I don't know what show they're talking about.
11 We may not even be talking about the same show.
12 But it's my recollection that I did sign up to
13 take Tommy to Conyers and then I changed my
14 mind after that. I had -- I don't know -- an
15 event happen with him. Somebody showed him
16 something and it went very badly, and I decided
17 to scratch him from there.

18 Q: Now, whether it was a breed show or a dressage
19 show, do you need a rider for both of those or
20 only for the dressage show?

21 A: You need both. And those both have to be
22 designated at the time of filing. You cannot
23 change riders. It's a big no-no at the last
24 minute. They won't let you do it so, you know,
25 a lot of people would love to say, you know,

1 get some hotshot come in at the last minute and
2 put him on and, I mean, they just don't do
3 that.

4 Q: When you have a rider other than yourself --

5 A: Right.

6 Q: -- go ride a horse for you --

7 A: Yes.

8 Q: -- at an exhibition or a show and you've
9 designated that rider in advance and they go,
10 do you typically pay the rider to do that or is
11 it just a matter of whether they're your friend
12 or your employee or --

13 A: Everybody -- I'm sorry, are you finished?

14 Q: Yeah.

15 A: Everybody has a different arrangement for that.
16 Sometimes you're training -- your trainer will
17 do it for you as part of the training package.
18 Sometimes you'll just want the rider to come
19 ride the horse, they will charge you, and
20 sometimes both.

21 Q: Let's say I have a really good horse that's
22 been trained to do all sorts of things and I
23 decide I would like to put the horse in some
24 type of a show, for instance, a dressage
25 competition. Are there third parties that I

1 can just hire to go ride my horse, you know?
2 Can I just contract with somebody who's not my
3 employee just like I want you to come show this
4 horse for me?

5 A: As long as it's a month out and they agree to
6 it.

7 Q: Are there people who do that?

8 A: You know, not so much as you would think.
9 Unless you've worked with the trainer, you
10 don't want somebody else sitting on your horse
11 who doesn't know your horse. It takes a long
12 time for horses and people to get a
13 relationship together. You know the horse
14 could show worse for that person than he could
15 for you.

16 Q: So it's typically someone who's had some
17 experience with the horse, probably because
18 that person is the owner or an employee or
19 someone who's a frequent friend or what have
20 you?

21 A: In our discipline. Now, racehorse people, I
22 mean, they pick up a ride every time. It
23 depends on the discipline.

24 (Off the record.)

25 Q: I don't understand one of your answers to the

1 interrogatories. Are you familiar with what I
2 mean by an interrogatory?

3 A: (Nods head affirmatively.)

4 Q: In this case we sent you essentially written
5 questions, which required you to respond
6 through your lawyer with written answers. And
7 I'm referring to your answers dated around
8 December 14th, 2012 in this lawsuit, and there
9 was a question asked, question number four,
10 what was Francisco Jose Garcia Ibanez's
11 employment status, parentheses, e.g., salaried
12 employee, hourly employee, independent
13 contractor/consultant, et cetera, closed
14 parentheses, with Half Moon, LLC as of July the
15 19th, 2012, the date of the first complaint
16 against you in this action.

17 And the response was given -- I can hand
18 it to you -- I'll just read it first -- for
19 number four was, on July the 19th, 2012 Mr.
20 Garcia was a salaried at-will employee pursuant
21 to an oral contract of employment with Half
22 Moon, that was subsequently reduced to writing
23 and executed in English and Spanish
24 counterparts in August of 2012.

25 I'll hand you that document and there's

1 number four if you want to look at it. Is that
2 an accurate answer to that question?

3 A: Assume so.

4 Q: So were you in error earlier in this deposition
5 when I asked when was the first time you ever
6 paid him anything and when did his employment
7 with you start, and I believe you affirmed that
8 it didn't start before August the 1st, 2012.

9 A: I think what I said was the date of the
10 contract.

11 Q: Which is August the 1st, 2012; correct?

12 A: Right. The written contract. The oral
13 contract was prior to that.

14 Q: Right. And what was unclear about when was
15 the first time that he came to work for you for
16 money? Is there something unclear about that?

17 A: No, I think I was just confused by the fact
18 that one was a written and one was an oral
19 contract. I was thinking that we would --
20 started paying him when we had the written, but
21 you're right. We did do the written. It was
22 reduced later, and he was -- it was -- the oral
23 contract was done, so I will amend my answer
24 based on this refreshing my recollection on the
25 two -- two forms of contract.

1 Q: With your memory having been refreshed, can you
2 now tell me when you first hired him to work at
3 Half Moon Stables, and when you first paid him
4 anything to work at Half Moon Stables?

5 A: I don't remember the exact date, other than the
6 fact that I know I paid him for that one
7 lesson. I don't remember the exact date.
8 There was -- until the visa was in effect. I
9 know that was a big -- if we didn't have a
10 visa, then we wouldn't have an employment, so
11 I think that was the primary criteria. I don't
12 remember all the exact dates as to when all
13 that came through, but certainly once he was --
14 had a visa and could be employed by us legally,
15 I would imagine that would be the day that he
16 would have been paid.

17 Q: Well, now, you earlier testified that he wasn't
18 hired or paid before August 1st, 2012.

19 A: Right. Well, I was referring to that, what we
20 just said. The written contract was executed
21 that date. And that --

22 Q: But you understand the earlier question wasn't
23 when was the written contract executed. The
24 question was when did you first hire him and
25 pay him anything.

1 A: No, the earlier question was when was the
2 contract, not written.

3 Q: Well, the record will reflect what it was.

4 A: Okay.

5 Q: But let's just move on and explore when did you
6 first hire him regardless of whether there was
7 a written contract, an oral contract or any
8 contract at all? When did you first hire him
9 and pay him, if you remember?

10 A: What I -- I don't remember exactly. I remember
11 that it had to do with the visa finalization.
12 In other words, that was the only determining
13 factor. Whether we would hire him or not hire
14 him had to do with whether or not we could get
15 the visa.

16 Q: So are you now testifying that you would not
17 have hired him or paid him anything before the
18 visa was approved?

19 A: We couldn't have.

20 Q: I don't want to know whether you could have.
21 I want to know whether you did or did not, if
22 you remember.

23 A: Other than that lesson, no. To my
24 recollection, no. And the confusion was over
25 the written contract and the oral contract in

1 our earlier discussion, so I can clarify that.

2 Q: Do you recall that you applied for the visa on
3 or around June the 2nd of 2012?

4 A: I did not apply for the visa.

5 Q: Half Moon Stables, LLC, did; correct?

6 A: Yes. I personally am not an attorney so I
7 didn't handle that. My husband handled the
8 visa and he would have those dates in mind much
9 better than I did.

10 Q: Then you don't recall one way or the other,
11 whether you applied -- whether Half Moon
12 applied for the visa on or around June the 2nd
13 of 2012?

14 A: I do not remember the exact date that Half Moon
15 applied for the date of the visa (sic).

16 Q: Do you remember how long it took to get it
17 approved?

18 A: Other than that it came through fairly quickly,
19 no.

20 Q: Right. Say around June 28th of 2012?

21 A: I can't say.

22 Q: But you can say that prior to its being
23 approved, you did not hire nor pay Garcia to
24 work for you at Half Moon Stables, LLC;
25 correct?

1 A: That's my recollection.

2 Q: Now, when it was only a verbal contract and not
3 a written contract, were the terms of
4 employment different in terms of his
5 compensation or any other salient features?

6 A: I don't remember all those details at this
7 time.

8 Q: Is there anything to which you could refer that
9 would refresh your recollection as to those
10 details?

11 A: I could inquire as to whether there is
12 something. Right now I'm not aware of
13 anything.

14 Q: If you paid him something pursuant to the
15 verbal contract rather than the written
16 contract, would you have paid him with a
17 paycheck?

18 A: I don't remember.

19 Q: Is there some other way that you would have
20 paid him, other than with a paycheck?

21 A: I don't recollect when it was or where it was,
22 so I wouldn't recollect when -- how he was paid
23 or anything else. My understanding is, you
24 know, it started with a verbal. It started
25 when we had what we understood to be a

1 contract, and there -- there were two
2 contracts; one was written, because we wanted
3 it in Spanish, so he would understand it and we
4 would be sure.

5 Q: You're the sole owner of Half Moon Stables,
6 LLC; correct?

7 A: Yes.

8 Q: And you've testified that on a given day
9 there's not more than you and maybe a couple of
10 other people out there; correct?

11 A: That's correct.

12 Q: Right. And you pretty much run the affairs of
13 Half Moon Stables, LLC?

14 A: Yes, I do.

15 Q: And in the interrogatory response before you
16 there, there is an assertion that on July the
17 19th, 2012 this man was an at-will, verbal
18 employee of yours; correct?

19 A: Yes, that's what it says.

20 Q: And you can't remember how you paid him?

21 A: No, I don't remember right now.

22 Q: You can't remember whether you paid him with a
23 paycheck?

24 A: Well, I imagine we did pay him with a paycheck,
25 but I don't -- cannot say 100 percent as we sit

Defendants' motion for summary judgment, dated January 28, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
Coves Darden, LLC,)
)
Plaintiff,)
)
v.)
)
Francisco Jose Garcia Ibañez,)
)
Dori Derr,)
)
and Half Moon Stables, LLC,)
)
Defendants.)
)

IN THE COURT OF COMMON PLEAS

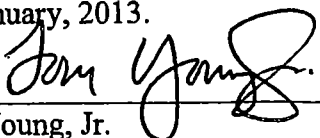
CIVIL ACTION NO. 2012-CP-02-01772

Defendants'
Motion for Summary Judgment

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by and through her undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, hereby move the Court to enter summary judgment in their favor and against Plaintiff Cover Darden, LLC as to all of the Plaintiff's claims. This Motion is based upon the pleadings and the record of this case. The grounds of this Motion will be set forth more fully in the Defendants' Memorandum of Law in Support of Its Motion for Summary Judgment and the Affidavits and Exhibits filed therewith. Counsel is currently drafting the Memorandum and it will be submitted before the hearing in this matter.

Respectfully submitted this 28 day of January, 2013.



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Coves Darden's motion to compel production and to sanction for noncooperation in appearance for deposition (including affirmation under rule 56(f)), dated January 30, 2013 (with attached discovery)

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Coves Darden, LLC,

Plaintiff,

v.

Francisco Jose Garcia Ibañez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

**MOTION TO COMPEL
PRODUCTION AND TO SANCTION FOR NONCOOPERATION
IN APPEARANCE FOR DEPOSITION**

(Rule 40(a)(2) Priority Matter)

Plaintiff hereby moves the Court pursuant to Rule 37, SCRCP, for an order compelling Defendant Half Moon to produce the documents or other things in Plaintiff's Request for Production, Items 5, 7 and 8. Plaintiff also moves with respect to noncooperation on a deposition as hereinbelow stated.

If the motion is granted, Plaintiff also moves for an award of the expenses of making the motion, including reasonable attorney's fees.

Regarding the requests for production, copies of these discovery requests, their certificate(s) of service, and any responses received are attached hereto.

The grounds for this motion are that the requests were duly served on the dates indicated and:

XX that the objection stated is invalid or otherwise
unsupported by facts: Item(s) 5, 7, and 8.

XX that the responses are not provided under oath as required by rule.

To wit:

In request for production, item 5, Plaintiff asked Half Moon to produce all records of money paid or things furnished to its employee, Ibañez.

In response, Half Moon objected that it is not relevant to the subject matter. The objection is not valid. The request is clearly within the scope of permissible discovery. The case is about employment and interference with employment. Issues include when that employment started, and what inducements were offered. Additionally, Ms. Derr, the principal and manager of Half Moon, was unable to recall dates, the basis of compensation, and numerous other details in her deposition. She also inaccurately stated the first time Ibañez worked for Half Moon. She also alleged that Ibañez alleged that he was not being paid enough by Plaintiff at Coves Darden Farm. Further, while Half Moon's interrogatory answers allege Ibañez was simply "salaried," Ms. Derr testified that he was compensated on the basis of some sort of override which she could not explain in her deposition because it was "very complicated."

In request for production, item 7, Plaintiff asked for records of applications for shows in which Ibañez was supposed to ride Half Moon's horse. (In this case, Ibañez had been hired to ride and train Plaintiff's horses exclusively, but then suddenly quit before a scheduled show and went to work riding Defendant Half Moon's horses.)

In response, Half Moon objected that it was irrelevant to the subject matter. The objection is not valid. The request is clearly within the scope of permissible discovery. Further, Ms. Derr testified that she did not list Ibañez for a June or July, 2012 competition. She did. The application is an exhibit to her deposition. This document was dated before the date she testified he first worked for Half Moon. Plaintiff wants all the records and should not be required to rely on Derr's purported memory.

In interrogatories, item 3, and request for production, item 8, Plaintiff asked for all documents pertaining to the matter.

In response, Half Moon objected that it did not yet know. Half Moon produced only 98 numbered pages, most of which pertained to a single visa application. No applications for shows, no advertisements, no memos, no payroll records, no records pertaining to the house and car furnished to Ibañez, no records of checks written to Ibañez, no records of Ibañez's clinics for others, and no records pertaining to the far-ranging allegations or assertions made in Half Moon's

answer to the Complaint and answers to interrogatories. If Half Moon does know, now, of anything other than its documents numbered 1-98, Half Moon should be required to produce them immediately. Half Moon should be precluded from using, for any purpose, anything other than those.

Accordingly, this Court should enter its order compelling full responses to these requests within fifteen (15) days of the date of entry of the order, or within any shorter period prescribed by the Court.

Plaintiff also moves to have a deposition set for Mr. Ibañez and that he be sanctioned for failure to appear at the time previously noticed. Plaintiff respectfully suggests the striking of his answer (and consequent default) is an appropriate sanction.

His deposition was originally noticed in October for December 12, 2012. Defendants requested rescheduling to January, but did not provide dates. They then announced they would not reschedule and would move for summary judgment first.

Defendants later announced they would postpone their summary judgment motion and explicitly agreed to provide dates in January for this and another deposition. (12/10/12 e-mail.) Ms. Knoepfle at the Courthouse was advised of the parties' agreement by e-mail of 12/19/12 by Defendants: "there is additional discovery which the parties have agreed to do and that discovery will not be done before Jan. 7 or Jan. 8."

The parties first agreed on January 28 as a date for the Ibañez deposition. (12/10/12 e-mail.) Then at the request of Defendants, Plaintiff agreed to make it January 14, with another deposition, provided January 28 be held open if both were not completed. (12/10/12 e-mails (3).)

Then Defendants confirmed the other deponent was available for January 14, but advised they were "confirming Ibañez's availability for the 14th as of right now." (12/10/12 e-mail.) Ibañez was not available, and remained scheduled for January 28. Ibañez's counsel by phone indicated that January 28 was now a problem based on what was represented as Ibañez's then-known travel plans.

Upon pursuing rescheduling, Plaintiff was advised by Defendants' counsel, "Mr. Derr says set it for February 4 or later." Plaintiff responded it would be the 4th and Defendants' counsel agreed, "OK." (12/20/12 and 12/21/12 e-mails.)

At the January 14 deposition of Defendant Derr, counsel (Derr) indicated a "conflict" for Ibañez on February 4, due to his travel schedule. Plaintiff followed up to ascertain that plans for February 4 would go forward. (1/15/13 and 1/18/13 e-mails.)

On January 19, Defendants' pro hac counsel Derr responded that he was "not committing to any particular date." (1/19/13 e-mail.) No further information was provided until January 27, at which time counsel Derr announced refusal to produce Ibañez for a deposition, based on allegations or speculations concerning an exhibit to Ms. Derr's deposition. (1/27/13 e-mail.) Mr. Derr indicates that because he wants a protective order on a document inquired about in Ms. Derr's deposition, Defendants will not go forward with any discovery.

In summary, Plaintiff cooperated in numerous requested reschedulings. Defendants at one point announced an intention to refuse to proceed with depositions on the grounds that they had decided to file a summary judgment motion. Defendants withdrew their purported summary judgment motion and explicitly agreed to proceed with the depositions before re-evaluating. After one deposition was taken, Ibañez or his counsel has reneged on his counsel's prior agreement to proceed with the deposition. As of this writing, Plaintiff is informed that Ibañez will not appear for the February 4 date scheduled and that Defendants refuse to provide another date.

While trying to cooperate with Defendants on scheduling, Plaintiff has lost the interpreter scheduled for February 4, 2013. Plaintiff has rescheduled and re-noticed the December 12, 2012 deposition yet again, for Friday, February 8, 2013.

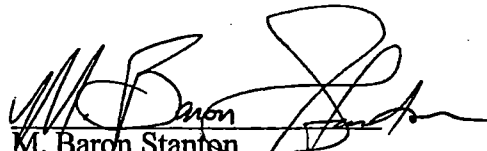
Plaintiff has done all it can to accommodate the schedules of Defendants and their counsel. If this motion is heard before February 8, it would make no sense to wait for Ibanez to not show up before seeking an appropriate sanction. A copy of the recent notice of deposition is attached. Undersigned counsel attests to the foregoing factual grounds for the motion concerning

the deposition in lieu of separate affidavit repeating same. Undersigned counsel also requests that this attestation be received as a Rule 56(f) affidavit opposing any future motion for summary judgment by Defendants. Undersigned counsel does not wish to burden the court with voluminous correspondence among counsel. Any supporting correspondence needed will be provided.

The undersigned hereby affirms

_____ that the opposing party is pro se, and no consultation is required, or
XX that prior to filing this motion he has communicated orally or in writing
with opposing counsel and has attempted in good faith to resolve the
matter, or
XX that consultation would serve no useful purpose, or
XX that consultation could not timely be held, or
_____ that _____.

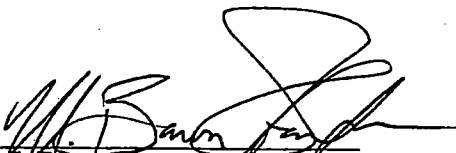
Respectfully submitted,


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ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

DATE: 1-30-12

I hereby affirm that the foregoing account of the facts pertaining to the efforts to take Defendant Ibañez's deposition are true and correct.


M. Baron Stanton

SWORN TO BEFORE ME

THIS 30th DAY of January, 2013

Rachel Mirada Crawford
Notary Public for S.C.

My commission expires Nov. 12th, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2012-CP-02-01772

Coves Darden, LLC,)
)
)
Plaintiff,)

RESPONSE OF HALF MOON STABLES, LLC
TO REQUESTS TO PRODUCE

v.)
)

Francisco Jose Garcia Ibanez,)
Dori Derr,)
and Half Moon Stables, LLC,)
)
Defendants.)

TO: Coves Darden, LLC
c/o M. Baron Stanton, Esq.
STANTON LAW OFFICES, P.A.
1728 Main Street
P.O. Box 245
Columbia, SC 29202

HALF MOON STABLES, LLC herewith responds to Plaintiff's Request to Produce
dated October 26, 2012 as follows:

1. All employment contracts or agreements or memoranda or correspondence
between you and Ibanez.

ANSWER: The INS application is bates stamped nos. HalfMoonStables000001 -
000090. The I-797C-Notice of Action is attached as HalfMoonStables000091-000093. The
employment contract is attached as HalfMoonStables000094-000098.

2. All employment records of Ibanez.

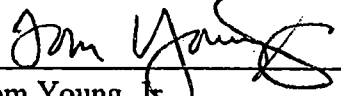
ANSWER: Defendant objects to this request on the grounds that it seeks
information that is not relevant to the subject matter of this action and is not reasonably

ANSWER: Defendant objects to this request on the grounds that it seeks information that is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence.

8. All other documents pertaining to the claims or defenses in this action, including but not limited to any statements or notes or recordings of any witnesses, and any documents or other things you expect to offer as an exhibit at trial, use as a demonstrative exhibit, use as impeachment, or use as a refresher of recollection.

ANSWER: Defendant objects to this Request to the extent it requires this Defendant to speculate as to which documents might pertain to the claims of Plaintiff. As to defenses, Half Moon states that all relevant documents with respect to this request will be produced in these responses, or will be produced in support of the pending Motion for Summary Judgment. As to trial exhibits and materials, this Defendant has not yet decided which, if any, documents will be used at trial, assuming that a trial is required. Those documents will be disclosed in accordance with the South Carolina Rules of Civil Procedure.

Respectfully submitted,



Tom Young, Jr.
LAW OFFICES OF TOM YOUNG, JR., PC
P.O. Box 651
409 Park Ave SW
Aiken, SC 29802
(803) 649-0000
tyoung@tomyounglaw.com

Date:

12/17/12

Aiken, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Coves Darden, LLC,

Plaintiff,

v.

Francisco Jose Garcia Ibañez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

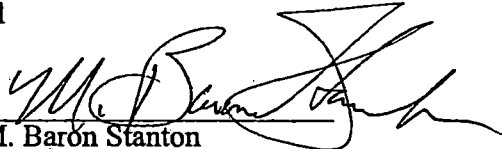
**SECOND
AMENDED NOTICE OF DEPOSITION
AND CONFIRMATION OF PRIOR
STIPULATIONS OR AGREEMENTS OF COUNSEL**

TO DEFENDANTS: Please take notice that instead of the times and places previously noticed or agreed (December 12, 2012, January 28, 2013, February 4, 2013) and pursuant to prior notice and arrangements made as evidenced in part by the attachments hereto, Plaintiff WILL take the deposition of Defendant Ibanez at the time, date and place stated below, unless mutually agreed otherwise in writing.

Ibanez: Time: 10:00 a.m.

Date: February 8, 2013

Place: Harlow Law Office. P.A.
104 Park Ave., Southwest
Aiken, SC 29801


M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P.O. Box 245
Columbia, South Carolina 29202
803-929-1484

ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

DATE: 1-30-13

From: Stanton, Barry
To: Tom Young; "Knoepfle, Anita";
cc: "Elizabeth Hughey";
Subject: RE: Anita -- Coves Darden, LLC v. Derr, Ibanez, et al; CA No. 2012_CP-02-01772
Date: Wednesday, December 19, 2012 3:15:00 PM

Anita, additionally, we (Plaintiff) have a motion to compel pending, which is now narrowed, but we have not had time to consult further over whether it can be resolved. In that the summary judgment motion will not go forward Jan 7 or 8, could we also defer the motion to compel until further advice?

Barry Stanton

(Between Tom and me, all parties are represented.)

-----Original Message-----

From: Tom Young [mailto:tyoung@tomyounglaw.com]
Sent: Wednesday, December 19, 2012 3:01 PM
To: 'Knoepfle, Anita'
Cc: Stanton, Barry; 'Elizabeth Hughey'
Subject: Anita -- Coves Darden, LLC v. Derr, Ibanez, et al; CA No. 2012_CP-02-01772

Anita:

The Defendants' Motion to Compel in the above case which is set for Jan. 7 is premature as there is additional discovery which the parties have agreed to do and that discovery will not be done before Jan. 7 or Jan. 8. What do you need? Something more than this email?

Thank you.

Tom

=====
Tom Young, Jr.
Law Offices of Tom Young, Jr., P.C.
PO BOX 651
Aiken, South Carolina 29802

Phone: 803-649-0000

Fax: 803-649-7005

tyoung@tomyounglaw.com

=====

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From: Tom Young
To: Stanton, Barry;
Subject: RE: barry -- ibanez depo
Date: Friday, December 21, 2012 8:29:29 AM

ok

From: Stanton, Barry [mailto:bstanton@stantonlaw.com]
Sent: Thursday, December 20, 2012 7:26 PM
To: tyoung@tomyounglaw.com
Subject: RE: barry -- ibanez depo

Thanks. I'll set for 4th.

Barry Stanton 803-530-2642

----- Original message -----

From: Tom Young <tyoung@tomyounglaw.com>
Date:
To: "Stanton, Barry" <bstanton@stantonlaw.com>
Subject: barry -- ibanez depo

Mr. Derr says set it for Feb. 4 or later

Tom Young, Jr.
Law Offices of Tom Young, Jr., P.C.
PO BOX 651
Aiken, South Carolina 29802
Phone: 803-649-0000
Fax: 803-649-7005

tyoung@tomyounglaw.com

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No virus found in this message.

Checked by AVG - www.avg.com

Version: 2013.0.2805 / Virus Database: 2637/5976 - Release Date: 12/21/12

Coves Darden's brief in opposition to Defendants' January 28, 2013 motion for summary judgment, dated February 26, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
)
Coves Darden, LLC,)
)
Plaintiff,)
)
v.)
)
Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Brief of Plaintiff in Opposition to Defendants' Motion for Summary Judgment

Plaintiff submits this memorandum in opposition to Defendants' paper dated January 28, 2013, and served on January 28, 2013. There, with no accompanying materials, Defendants give notice only that they will ask for "summary judgment" and that they will supply the grounds in the future.

The motion should be denied on any of a number of bases: (1) the motion does not timely state any grounds at all; (2) the motion was unaccompanied by any affidavits or other materials when it was served; (3) at the time of serving the motion, there were no depositions, interrogatories or admissions "on file," nor even referred to with any particularity in support of the motion; (4) the motion is untimely, and is therefore not a proper motion for summary judgment or motion for anything else at all; (5) there has not been adequate time or opportunity for discovery by Plaintiff – Plaintiff has diligently sought same, but has not been able to complete it, and this has mostly been because of objections, noncompliance, or accommodation of, the

Stanton Law Offices, P.A., 1728 Main Street, P.O. Box 245, Columbia, SC 29202 803-929-1484

Defendants; (6) Plaintiff has a pending motion to compel the deposition of Ibañez, a party opponent, as well as to obtain production of withheld documents; and (7) because Defendants state no particular grounds in the motion they served, Plaintiff guesses that Defendants misapprehend the law applicable to the case, and which facts are material to the motion.

Nature of the Case and Factual Background

This case arises from a scheming and callous betrayal of trust by Defendant Ibañez under an employment agreement. The betrayal was unjustifiably facilitated and induced by Defendants Derr and Half Moon, who made undisclosed arrangements to employ Ibañez in a competing operation using improper means.

If Defendants' motion were proper under Rule 56, SCRPC, governing motions for summary judgment, the facts would be required to be viewed in the light most favorable to the nonmoving party, here, Plaintiff. Turner v. Milliman, 392 S.C. 116, 121-122, 708 S.E.2d 766, 769 (2011). Additionally, all reasonable inferences to be drawn from those facts must be drawn in favor of Plaintiff. Id.

Plaintiff ("Coves Darden") and its two principals, Miguel Coves and wife Dorothea Darden, expressly reposed trust and confidence in Defendant Francisco Jose Garcia Ibañez. They entered into a special and extraordinary relationship with Ibañez, who is a Spanish national. Under this relationship, Coves Darden had numerous discussions with Ibañez concerning the prospects of his coming to the United States from Spain for two years. The parties contemplated that Ibañez would undertake the development of the dressage capabilities of Coves Darden's specialized breed of horses. This is a breed originating in Spain and dating back to as early as the 1500s, often referred to as "PRE," "Pura Raza Espanol," or "Pure Spanish Horses."

They had him come stay at their farm, including staying in their home, for several visits. They hired a lawyer to painstakingly assemble an extraordinary visa application for him. They had a lawyer prepare the written terms of employment to submit in support of the visa application. They paid Ibañez a stipend while he was in Spain waiting on the visa. They had a lawyer go over the employment agreement with him on the phone, prepare him on the phone for the visa interview in Spain, and explain the limitations of the visa to him. They obtained a visa which, by its terms, allowed him only to work for them. They paid his travel expenses. They trusted their 200 horses to him. They trusted their reputation and "brand" to him. They advertised and promoted the fact of his association with them and their farm. They paid him \$8000 per month (annualized to \$96,000 per year), provided him a house, and provided him a car.

On June 8, 2012, immediately before a horse show in which he was enrolled to ride for Coves Darden, Ibañez abandoned his duties, left, and quit without notice. He was found to be immediately in the employ of Defendant Half Moon Stables, owned and run by Defendant Derr.

Reasons why Summary Judgment Must be Denied

A motion for summary judgment must be served at least ten days before the time fixed for the hearing. Rules 6(d) and 56(c), SCRPC. This requirement is construed to require that specific notice of the day certain fixed for the hearing must be furnished not later than ten days prior to such hearing. Dedes v. Strickland, 307 S.C. 152, 414 S.E. 2d 132 (1992). The purpose of this construction is to assure that the opposing party has full use of the ten days immediately before the actual hearing date in which to prepare to meet the issues raised. Dedes.

The rule in Dedes presupposes that the motion in question is a proper motion which gives specific notice of the issues by specifying the materials relied upon and the particular grounds. When there is no proper motion within the notice period, the motion should be denied. The rule presupposes that the time runs from the time an actual motion with grounds, and any affidavits, is served. In that no motion was actually made within 15 days¹ preceding the scheduled hearing date for this motion, the motion is not timely.

The motion paper filed by Defendants cannot be regarded as a motion. It did not state any grounds for the motion whatsoever. The motion stated only that it would be based on grounds supplied later. A written motion must state its grounds. Rule 7(b)(1), SCRCPP. The motion is therefore improper and should be denied.

Any supporting affidavit must be served with the motion. Rule 6(d), SCRCPP; Rule 56 (e), SCRCPP. The motion was also unaccompanied by any affidavits. Therefore, the motion may not be salvaged by filing affidavits later, and the motion should be denied.

Additionally, although no memorandum of law is required, the motion stated that its grounds would be supplied by a memorandum of law. No memorandum of law was submitted with the motion or within the fifteen days preceding the date for the hearing. Again, the motion should be denied as improper, and any later materials should be disallowed as untimely.

Therefore, no motion at all was actually filed or served on January 28, 2013, much less a proper motion for summary judgment. An opposing party has numerous rights to fair notice and opportunity to respond before a motion for summary judgment may be ripe for presentation or

¹A paper served by mail accrues an additional five days' time for any period measured from its time of service. Rule 6(e), SCRCPP.

decision. See Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), and Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (discussing why a bare-bones motion cannot simply be regarded as a summary judgment motion based on after-filed materials).

A party responding to summary judgment has both a right to adequate time for discovery in advance of the motion and a right to adequate notice and time to assemble opposing materials before the motion is heard.

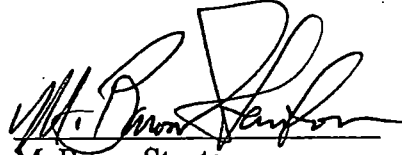
A party opposing summary judgment must be given an adequate opportunity for discovery to oppose any grounds stated in the motion. Rule 56(f) SCRPC (providing for denial of motion and opportunity to take depositions or other measures when necessary to oppose the motion). Here, the grounds for the motion were not stated timely in the motion, and, other than the complaint and the answer, there are no materials "on file" (Rule 56(c)) in support of the motion. There is no motion to oppose and the motion should be denied.

Plaintiff has only taken one deposition and propounded one wave of paper discovery to Defendants. It took two and a half months of rescheduling to accommodate Defendants, in order to get the first deposition – of Derr – taken. The deposition of Ibañez is the subject of a motion to compel and for sanctions, dated January 30, 2013. His deposition was most recently re-noticed for February 22, 2013. He did not show up for the deposition. The pending motion to compel also includes facts constituting a Rule 56(f) affidavit as to the inadequacy of time for discovery. Defendants have not fully responded to the paper discovery yet; Plaintiff first filed a motion to compel before getting any responses at all, and withdrew that motion. Plaintiff has filed a motion to compel with respect to inadequate answers with invalid objections, and that motion is still pending; Plaintiff seeks to take additional depositions in the case, but has been

fully occupied in "pulling eye teeth" to get Ibañez's deposition. Rule 56(f) Affidavit of Stanton (reiterating facts already contained in 1/30/13 motion to compel). The motion should therefore also be denied under Rule 56(f).

Although no grounds were stated for the motion, Plaintiff, reserving objection to lack of notice and lack of motion, speculates on possible grounds. Defendants may move for summary judgment on the grounds that Ibañez managed to get all the way through the relationship without actually adding his signature to the written contract. If these are the grounds, they are insufficient. This contract was the basis for the visa application he made, and the visa he accepted and used in order to enter the United States and work gainfully. Nothing in the record negates these facts. Despite efforts, Plaintiff has not had the opportunity to depose him about the contract, the terms of his employment with Plaintiff, or any other matter pertaining to this case. Under South Carolina law, the absence of a written signature on a contract is not dispositive as to the existence of a contract, and even in the absence of any writing at all, or any agreed length of employment, an employee owes fiduciary duties to his employer. Ibañez breached his duties, as alleged in the complaint. This is not negated anywhere in the record. Further, a signed, written contract is not necessary for an action for tortious interference with an employment relationship. In light of the factual questions which are actually made material by the applicable law, there is no way Defendants can demonstrate the absence of dispute of material fact. But because Defendants' motion is completely lacking in timely stated grounds and timely identified supporting materials, legal argument and factual analysis is guesswork, and the motion should be denied without requiring short-notice analysis of surprise grounds.

Respectfully submitted,



M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P.O. Box 245
Columbia, South Carolina 29202
803-929-1484

ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

DATE: 2-26-13

Rule 56(f) affidavit of Stanton, dated February 26, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC,)
)
Plaintiff,)

v.)

RULE 56(f)
AFFIDAVIT OF STANTON

Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)
)
Defendants.)

Comes before me, M. Baron Stanton, who, being duly sworn, deposes and says:

1. This affidavit largely reiterates information already contained in Plaintiff's January 30, 2013 motion to compel and for sanctions.

2. Defendant Ibañez's deposition was originally noticed in October for December 12, 2012. Defendants requested rescheduling to January, but did not provide dates. They then announced they would not reschedule and would move for summary judgment first.

3. Defendants later announced they would postpone their summary judgment motion and explicitly agreed to provide dates in January for this and another deposition. (12/10/12 e-mail.) Ms. Knoepfle at the Courthouse was advised of the parties' agreement by e-mail of 12/19/12 by Defendants: "there is additional discovery which the parties have agreed to do and that discovery will not be done before Jan. 7 or Jan. 8."

4. The parties first agreed on January 28 as a date for the Ibañez deposition. (12/10/12 e-mail.) Then at the request of Defendants, Plaintiff agreed to make it January 14,

Stanton Law Offices, P.A., 1728 Main Street, P.O. Box 245, Columbia, SC 29202 803-929-1484

with another deposition, provided January 28 be held open if both were not completed.

(12/10/12 e-mails (3).)

5. Then Defendants confirmed the other deponent was available for January 14, but advised they were "confirming Ibañez's availability for the 14th as of right now." (12/10/12 e-mail.)

6. Ibañez was not available, and remained scheduled for January 28. Ibañez's counsel by phone indicated that January 28 was now a problem based on what was represented as Ibañez's then-known travel plans.

7. Upon pursuing rescheduling, Plaintiff was advised by Defendants' counsel, "Mr. Derr says set it for February 4 or later." Plaintiff responded it would be the 4th and Defendants' counsel agreed, "OK." (12/20/12 and 12/21/12 e-mails.)

8. At the January 14 deposition of Defendant Derr, counsel (Derr) indicated a "conflict" for Ibañez on February 4, due to Ibañez's travel schedule. Plaintiff followed up to ascertain that plans for February 4 would go forward. (1/15/13 and 1/18/13 e-mails.)

9. On January 19, Defendants' pro hac counsel Derr responded that he was "not committing to any particular date." (1/19/13 e-mail.) No further information was provided until January 27, at which time counsel Derr announced refusal to produce Ibañez for a deposition, based on allegations or speculations concerning an exhibit to Ms. Derr's deposition. (1/27/13 e-mail.) Mr. Derr indicates that because he wants a protective order on a document inquired about in Ms. Derr's deposition, Defendants will not go forward with any discovery.

10. After indicating that February 4 would not be changed as the date, Plaintiff had to re-notice the deposition for February 8, because the interpreter had not been able to hold

February 4 open any longer.

11. Upon discovering that re-noticing for February 8 would not technically provide the full ten days' notice required by rule in absence of an agreement, Plaintiff re-noticed the deposition for February 22, 2013, and sent an explanatory letter as well.

12. At the appointed time on February 22, neither the party opponent, Ibañez, nor his counsel appeared for the deposition. Plaintiff was advised in advance that they would not, but Defendants did not obtain a protective order pursuant to the last paragraph of Rule 37(d), SCRCp. Nor did they file a motion for one.

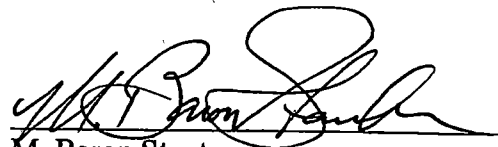
13. Plaintiff's pending motion to compel also seeks production of certain documents to which Defendants objected.

14. In summary, Plaintiff cooperated in numerous requested reschedulings. Defendants at one point announced an intention to refuse to proceed with depositions on the grounds that they had decided to file a summary judgment motion. Defendants withdrew their purported summary judgment motion and explicitly agreed to proceed with the depositions before re-evaluating. After one deposition was taken, Ibañez or his counsel reneged on his counsel's prior agreement to proceed with the deposition for February 4, did not appear on February 4, and refused to provide another date.

15. While trying to cooperate with Defendants on scheduling, Plaintiff lost the interpreter scheduled for February 4, 2013. Plaintiff rescheduled and re-noticed the December 12, 2012 deposition yet again, for February 22, 2013, and the deponent did not show or seek court relief.

16. What Defendants have done is file a motion described as a summary judgment motion. It states no grounds. If it did, Plaintiff would likely not be in a position to respond to it without further discovery in the case, including but not limited to the deposition of Defendant and his witnesses.

17. Plaintiff has done all it can to accommodate the schedules of Defendants and their counsel. Undersigned counsel does not wish to burden the court with voluminous correspondence among counsel. Any supporting correspondence needed will be provided.


M. Baron Stanton

SWORN TO AND ACKNOWLEDGED TO ME

this 26th day of February, 2013.

Nahel Nimeh Coughlin (L.S.)

Notary Public of South Carolina

My Commission Expires: Nov 12th 2019

Defendants' memorandum in support of summary judgment, dated February 28, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Coves Darden, LLC,)

Plaintiff,)

v.)

Francisco Jose Garcia Ibañez,)

Dori Derr,)

and Half Moon Stables, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 12-CP-02-01772

**MEMORANDUM IN SUPPORT OF
SUMMARY JUDGMENT**

By and through their undersigned counsel of record, Defendants move the Court for an Order granting summary judgment in their favor and against Plaintiff. This Motion is brought pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the grounds that there are no triable issues of material fact and Defendants are entitled to judgment as a matter of law.

STATEMENT OF RELEVANT FACTS

This is a somewhat unusual case in which Plaintiff denies the existence of an oral contract of employment, but seeks to hold a former employee ("Ibanez") liable for breach of an unsigned written contract. Plaintiff further seeks to hold another Defendant ("Half Moon Stables, LLC"), the current employer and competitor of the Plaintiff, liable for inducing the breach of that unsigned agreement. Plaintiff further seeks to hold a third Defendant ("Derr") liable under the South Carolina Unfair Trade Practices Act for making two undeniably true statements of fact. Because the relevant facts are not in dispute and because the law is clear, this is a case that is particularly appropriate for summary adjudication.

A. Relevant History

Some time prior to September 30, 2011, Plaintiff Coves Darden, LLC ("Coves Darden") submitted an application with the Department of Homeland Security, U.S. Citizenship and Immigration Services seeking issuance of an O-1 visa for Francisco Jose Garcia Ibañez. (Complaint, ¶¶ 6, 11). The application sought admission of Mr. Garcia to the United States to work as an equestrian trainer.¹ (Complaint, ¶ 7). The application was granted, and Mr. Garcia entered the United States on or about February 8, 2012. (Complaint, ¶ 13). It is undisputed that Mr. Garcia commenced working for Plaintiff Coves Darden shortly thereafter. On or about June 8, 2012, Mr. Garcia quit Coves Darden. (Complaint, ¶¶ 17, 18) Thereafter, Defendant Half Moon Stables, LLC ("Half Moon") sought and received approval for the issuance of an O-1 visa permitting Mr. Garcia's employment with Half Moon. Mr. Garcia is presently employed by Half Moon (Complaint, ¶ 33).

B. Employment status with Coves Darden

Paragraph 7 of the Complaint alleges that "Plaintiff entered into an agreement to employ Ibañez as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equine arts for clients of Plaintiff." However, the Complaint is silent as to whether the agreement was oral or written. It is also silent regarding the term of employment.

In response to an Interrogatory, Plaintiff identified Mr. Garcia as "a special employee of Plaintiff under a specialized agreement" although the response fails to identify whether that

¹ The Complaint and Plaintiff's discovery responses repeatedly refer to the Defendant as Mr. Ibañez. In Spain, the patronymic (father's last name) is followed by the matronymic (mother's last name). In Hispanic countries an individual's legal name is the patronymic. Thus, Francisco Jose Garcia Ibañez is more properly referred to as Mr. Garcia. That convention will be followed throughout this brief.

"specialized agreement" was oral or written. Defendants' Interrogatory 6 asked Plaintiff to identify the terms of any alleged oral agreement with Mr. Garcia. In response, Plaintiff stated:

"The agreement was not oral. It was a written contract presented to and acknowledged by Ibanez in (sic) or before January of 2012, after August of 2011."²

Responding to a request to produce a fully executed copy of any employment contract, Plaintiff stated:

"For Defendants' information, Defendant [sic, Plaintiff] believes there are none currently responsive to Request 1 (if requesting one with Ibanez's signature.)" (See Exhibit A hereto).

Responding to another discovery request, Plaintiff produced a copy of a document it claims is the contract of employment between Coves Darden and Mr. Garcia. Significantly, while the document is signed by Miguel Coves on behalf of Coves Darden, LLC, it is not signed by Mr. Garcia. (See Exhibit B hereto). Thus, Plaintiff denies the existence of an oral contract of employment while, at the same time, admitting that there is no executed written contract of employment.

SUMMARY OF ARGUMENT

As to the breach of contract claim, Plaintiff denies the existence of an oral contract of employment and has conceded that there is no signed employment contract with Mr. Garcia (Response to Interrogatory No. 6). Thus, Mr. Garcia was a common law at will employee of Coves Darden and could terminate that relationship at any time and for any reason, or for no reason whatsoever.

² Copies of the referenced discovery requests and responses are attached hereto as Exhibit A and are incorporated herein by reference.

As to the tortious interference with contract claim, Plaintiff should fail. Again, Plaintiff admits that there was no written or oral employment contract. Because there was no contract with which to interfere, Defendants Dori Derr and Half Moon should be granted judgment as a matter of law on the tortious interference claim. Moreover, the law recognizes an exception to the rule regarding tortious interference with respect to competitors seeking to hire at will employees of another competitor.

Plaintiff should also fail as to the claim for tortious breach of the duty of loyalty. Although breach of that duty provides grounds for termination of an employee, it does not give rise to an independent tort cause of action as to non-managerial, non-fiduciary employees like Mr. Garcia. While the South Carolina Supreme Court has recognized an independent tort cause of action for breach of the duty of loyalty, it has done so only in the context of high level employees in a fiduciary relationship with the employer. The court left open the question of the viability of breach of the duty of loyalty claim as one independent of the breach. Other courts that have considered that issue have generally concluded that where there is no written or oral contract, there is no duty of loyalty.

Finally, as a matter of law, there was no violation of the Unfair Trade Practices Act ("UTPA"). The Complaint sets out two statements that allegedly violate the Act: a) that Mr. Garcia was employed at Half Moon Stables, and b) that Mr. Garcia was in the United States on an extended teaching (Complaint, ¶ 45). Both of those statements are demonstrably true (See Affidavit of Francisco Garcia Ibanez filed concurrently herewith), and no South Carolina court, and no other court in any other State has held that a true statement of fact could constitute an unfair trade practice.

For each of the above reasons explained more fully below, summary judgment herein is proper.

I. PLAINTIFF'S CONTRACT CLAIMS SHOULD FAIL BECAUSE THERE IS NO EMPLOYMENT CONTRACT AND MR. GARCIA WAS AN AT-WILL EMPLOYEE OF COVES DARDEN

A. There is no written contract of employment

Conspicuously missing from Plaintiff's Complaint is any reference to the existence of a written contract of employment. However, in responding to Defendants' interrogatories, Plaintiff claims the existence of a written contract. Specifically, Interrogatory No. 6, and Plaintiff's response thereto, are as follows:

6. State with particularity the terms and conditions of any alleged oral agreement with Francisco Garcia Ibañez with respect to the terms and conditions of his employment, and with respect to each, state:
 - a. the date of each alleged oral agreement;
 - b. the place where each oral agreement took place;
 - c. Identify all writings or communications memorializing said alleged oral agreement; and
 - d. Identify each person with knowledge of said alleged oral agreement and state with specificity the knowledge of each such person.

Response:

The agreement was not oral. It was a written contract presented to and acknowledged by Ibanez in or before January of 2012, after August of 2011. It states the terms and conditions of the employment contract, except it mentions US\$6000 as pay, which was intended and agreed to be Euros. Ibanez was paid \$8000 in US dollars. It included a promise to devote all time and energies to Coves Darden and to not engage in any other business regardless of whether for compensation. It was an integral part of his nonimmigrant visa application and actual visa, which required the same. It was terminable upon proper notice described in it. It may or may not have been countersigned by him. (Exhibit A hereto).

Defendants also served a request for production of documents on Plaintiff. Request Number 1 sought the production of a fully executed copy of any contract of employment. Plaintiff's response was: "For Defendants' information, Defendant [sic, Plaintiff] believes there are none currently responsive to request 1 (if requesting one with Ibanez's signature)." (Exhibit A hereto).

B. With no written or oral contract of employment, Mr. Garcia was an at will employee subject only to the common law rules regarding at will employees.

In *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 334 (S.C. S.Ct.1999), the South Carolina Supreme Court stated:

"South Carolina has long recognized the doctrine of employment at-will. At-will employment is generally terminable by either party at any time, for any reason or for no reason at all. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981), *appeal after remand*, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984), *writ granted in part*, 285 S.C. 84, 328 S.E.2d 479 *quashed*, 287 S.C. 190, 336 S.E.2d 472 (1985); *Culler v. Blue Ridge Elec. Coop. Inc.*, 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992) (doctrine of employment at-will in its pure form allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability). The termination of an at-will employee normally does not give rise to a cause of action for breach of contract. *Hudson v. Zenith Engraving Co., Inc.*, 273 S.C. 766, 259 S.E.2d 812 (1979)."

Indeed, at-will employment is presumed absent the creation of a specific contract of employment. *Prescott, supra*. *Singleton v. Time Warner Entm't Partnership*, 2012 U.S. Dist. LEXIS 44747 ("South Carolina recognizes the doctrine of employment at-will."); *Nelson v. Charleston County Parks & Recreation Commission*, 362 S.C. 1 (Ct.App. 2004).

In summary, without a written contract of employment specifying different terms, Mr. Garcia was free to terminate his relationship with Coves Darden at any time, and for any reason, or for no reason whatsoever, with or without notice. Therefore, Plaintiff's breach of contract

claim fails as a matter of law and Mr. Garcia should be granted summary judgment with respect to that issue.

C. Even the unsigned contract Plaintiff claims controls provides for at will termination without any consequence to Mr. Garcia

For the reasons set out above, the unsigned written contract is simply unenforceable, and Mr. Garcia's term of employment with Coves Darden was subject only to the South Carolina common law rules governing at will employees. However, even if the unsigned contract did apply, it clearly provides for at will termination by either party, without consequence to either.

Specifically, § 1.2(c) of the purported written contract provides:

"Either party may send a written notice of intent to rescind this Agreement(hereinafter, "Rescission Notice") to the other's notice address as defined herein, at least thirty calendar days before the intended date of the termination of employment, on which date the employment relationship shall end, and by which date Employer shall complete the payment of all compensation due to Employee under this Agreement, and no additional compensation shall be payable to Employee, and all rights and obligations of the parties under this agreement shall cease to exist." (Exhibit B hereto).

Thus, the unsigned contract clearly provides for at will termination by either party for any reason whatsoever. It also does not provide for damages for termination of the relationship.

While the unsigned contract is clearly unenforceable, Plaintiff parenthetically notes that Coves Darden does not seriously seek to invoke the terms of that contract. For example, the contract requires that disputes between the parties be arbitrated. (See Exhibit B § 3.7). Not only has Coves Darden ignored this provision; it has demanded trial by jury in this matter, a right waived in the contract.³ Additionally, Coves Darden seeks remedies (return of monies spent in

³ While Defendants contend that the purported written agreement is unenforceable, should this Court ever find that the contract is enforceable, Defendants do not waive their right to invoke the arbitration clause and the waiver of the right to trial by jury implicit in the agreement.

obtaining a visa, lost future riding event opportunities, etc.) that are not allowed under the contract. In short, Plaintiff simply ignores the terms of the contract, and its actions in filing the instant action instead of demanding arbitration are a clear acknowledgment by Plaintiff that neither side is bound by the terms of that unsigned agreement.

II. THERE IS NO INDEPENDENT CAUSE OF ACTION FOR BREACH OF THE DUTY OF LOYALTY FOR NON-MANAGERIAL, NON-FIDUCIARY EMPLOYEES

Plaintiff also seeks recovery from Mr. Garcia based on a claim of tortious breach of the duty of loyalty. However, while breach of the duty of loyalty may give an employer the right to terminate an employee, it does not give rise to an independent tort, except in limited circumstances.

The breach of the duty of loyalty arises in two separate contexts. First, breach of the duty of loyalty provides grounds for termination of the employee by the employer. Second, in a more limited context, breach of the duty of loyalty by an employee in a managerial or fiduciary capacity may give rise to an independent tort under South Carolina law in certain circumstances. Both of those circumstances are also subject to the caveat that - although an open question under South Carolina law - the great weight of authority supports the proposition that there is no duty of loyalty owed by a non-contractual, non-fiduciary employee subject only to the rules for common law at will employment.

Berry v. Goodyear Tire & Rubber Co., 270 S.C. 489 (S.C. 1978), involved a salesman who had been employed by Goodyear for nineteen years.⁴ He was terminated when his employer

⁴ Although not specifically identifying Plaintiff as a contract employee, the issue before the Supreme Court was the employee's entitlement to "release pay" under an agreement with Goodyear and, therefore, he appears to have been a contract employee.

learned that he had been working for a competitor while on a health leave of absence. The Supreme Court held that "clearly constituted an abandonment by him of his employment contract." The Court further noted that "where an employee acts adversely to the interest of his employer, he is disloyal and his discharge is justified." Thus, *Berry* stands for the proposition that disloyalty is grounds for termination for any contract employee.

Where a situation involves disloyalty by a management-level employee or by an employee occupying a fiduciary relationship with the employer, the Supreme Court has recognized a tort action for breach of the duty of loyalty. *Loundes Products, Inc. v. Brower*, 259 S.C. 322 (S.C. S.Ct. 1972) (key employees meeting with investors and current customers of employer while starting competing business liable for breach of duty of loyalty.); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598 (S.C. S.Ct. 1999) (Manager of Operations); *Young v. McKelvey*, 286 S.C. 119 (S.C. S.Ct. 1985) (Vice-President of Sales). Research has failed to disclose any South Carolina case where a non-managerial, non-fiduciary employee has been found liable for the independent tort of breach of a duty of loyalty.

More important to the instant case, however, is the question of whether there can be a breach of duty of loyalty claim independent of a contract of employment. The Supreme Court in *Foreign Academic & Cultural Exchange, supra*, specifically left this question open ("we express no opinion as to the viability of the breach of the duty of loyalty claim as one independent of the breach . . .").

Courts from around the United States are generally unsympathetic to breach of duty of loyalty claims in the absence of a confidential or fiduciary relationship, or in the absence of a contract of employment. The North Carolina Supreme Court's opinion in *Dalton v. Camp*, 353

N.C. 647 (2001), is on point. In that case, the Court held that outside the context of a fiduciary relationship, "there is no basis for recognizing an independent tort claim for a breach of a duty of loyalty" *Id* at 652. The Court further noted:

"Under the general rule, 'the relation of employer and employee is not one of those regarded as confidential.' *King v. Atlantic Coast Line R.R. Co.*, 157 N.C. 44, 72 S.E. 801 (1911); *see also Hiatt v. Burlington Indus., Inc.*, 55 N.C. App. 523, 529, 286 S.E.2d 566, 569, *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 365 (1982)."

See also Combs & Assocs. v. Kennedy, 147 N.C. App. 362 (N.C. App. 201):

"Our Supreme Court has recently addressed the issue of an at-will employee's duty of loyalty to his employer in the context of starting a competing company. *See Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). In *Dalton*, the Court held that, outside the purview of a fiduciary relationship, our State does not recognize an independent tort for breach of duty of loyalty by an at-will employee. *Id* at 652, 548 S.E.2d at 708. Plaintiff presents no evidence that it held a fiduciary relationship with [Defendant]."

The law in other jurisdictions is in accord. *Mattel, Inc. v. MGA Entertainment, Inc.*, 2011 U.S. Dist. LEXIS 55756 (C.D. Cal. 2011) (Refusing to recognize the tort of breach of the duty of loyalty in the employment context); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (Cal. 1988) (Tort duties should not be wantonly interjected into contractual relationships.); *Oki America, Inc. v. Microtech Intn'l, Inc.*, 872 F.2d 312 (9th Cir. 1989), Kozinski, concurring ("Not every slight, nor even every wrong, ought to have a tort remedy. The intrusion of courts into every aspect of life, and particularly into every type of business relationship, generates serious costs and uncertainties, trivializes the law, and denies individuals and businesses the autonomy of adjusting mutual rights and responsibilities through voluntary contractual agreement.").

Moreover, in South Carolina, in the non-contractual context, simply holding two jobs is not a breach of the duty of loyalty. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), the Fourth Circuit stated:

“An employee does not commit a tort simply by holding two jobs or by performing a second job inadequately. For example, a second employer has no tort action for breach of the duty of loyalty when its employee fails to devote adequate attention or effort to her second (night shift) job because she is tired. That is because the inadequate performance is simply an incident of trying to work two jobs. There is no intent to act adversely to the second employer for the benefit of the first.”

Thus, without a contractual relationship with Coves Darden, there was nothing under South Carolina law prohibiting Mr. Garcia from working for Half Moon in his off-hours before quitting Coves Darden.

For the foregoing reasons, there was no duty of loyalty on Mr. Garcia's part and Defendants should be granted summary judgment on the claim for tortious breach of the duty of loyalty.

III. THERE IS NO CAUSE OF ACTION AGAINST A COMPETITOR FOR TORTIOUS INTERFERENCE WITH AN AT WILL CONTRACT

Plaintiff also seeks to hold Dori Derr liable for tortious interference with contract. Again, Mrs. Derr is entitled to summary judgment on this issue.

In *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216 (N.C. 1988), the North Carolina Supreme Court, in an opinion that deserves to be cited at length, noted the law with respect to tortious interference claims brought by competitors::

“[W]e recognize and apply the general principle that interference may be justified when the plaintiff and the defendant are competitors. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176. See also, *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W. 2d 892 (1965); *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203

(1912); *Philadelphia Dairy Prod. v. Quaker City Ice Cream Co.*, 306 Pa. 164, 159 A. 3 (1932); *Thacker Coal & Coke Co. v. Burke*, 59 W.Va. 253, 53 S.E. 161 (1906). *Contra Moyer v. Eure*, 21 N.C. App. 261, 205 S.E. 2d 221 (1974); *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970). Further, we find the well-reasoned opinion of Judge Learned Hand in *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981 (2d Cir. 1918) to be persuasive. Judge Hand, writing for the majority in that case, stated that public policy demands that absent some monopolistic purpose everyone has the right to offer better terms to another's employee, so long as the latter is free to leave. *Id.* A contrary result would be intolerable, both to the new employer who could use the employee more effectively and to the employee who might receive added pay. *Id.* To hold otherwise would unduly limit lawful competition. *Id.*

"Later cases adopt the rationale of *Triangle Film*. The free enterprise system demands that competing employers be allowed to vie for the services of the 'best and brightest' employees without fear of subsequent litigation for tortious interference. See *McCluer v. Super Maid Cook-Ware Corp.*, 62 F. 2d 426 (10th Cir. 1932); *Vincent Horwitz Co. v. Cooper*, 352 Pa. 7, 41 A. 2d 870 (1945); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968); *Coleman & Morris v. Pisciotto*, 107 N.Y.S. 2d 715, 279 A.D. 656 (1951). To restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression.

'Competition . . . is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of a class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants . . . are instances.'

"*Macauley Bros. v. Tierney*, 19 R.I. 255, 256, 33 A. 1, 2 (1895), cited with approval in *C. S. Smith Metro. Mkt. v. Lyons*, 16 Cal. 2d 389, 106 P. 2d 414 (1940); *Kingstron Trap Rock Co. v. International Union of Operating Engineers*, 129 N.J. Eq. 570, 19 A. 2d 661 (1941)."

See also *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362 (N.C. App. 2001) (“[O]ur Supreme Court has held that the mere enticement and hiring of an at-will employee by a competing company, absent an improper motive, does not give rise to a tortious interference with a contract claim.”).

The Complaint itself alleges that Dori Derr and Half Moon are competitors of Coves Darden (Complaint, ¶¶ 45, 46). Thus, the foregoing authorities are applicable and both Dori Derr and Half Moon should be granted summary judgment on the tortious interference with contract claim.

IV. THE UTPA SHOULD NOT APPLY TO DEFENDANTS DERR AND HALF MOON BASED ON THE FACTS HEREIN

The *sine qua non* of a claim under the South Carolina Unfair Trade Practices Act is that there be an unfair or deceptive trade practice. Here, Plaintiff alleges that “Upon employing Ibanez, Derr falsely advertised his purpose for being in the United States and working for her as being “on an extended teaching sabbatical,” “based at Half Moon Stables.” (Complaint, ¶ 45). What the Complaint fails to disclose, however, is just how these two facts were either false or misleading.

Because this is a summary judgment motion, Plaintiff may not rely on the allegations of the complaint, but must affirmatively come forward with admissible evidence establishing the existence of a triable issue of material fact with respect to each element on which it will bear the burden of proof at trial. *Allstate Financial Corp. v Financorp, Inc.*, 934 F2d 55 (4th Cir. 1991); *Bryant v Kentucky*, 490 F2d 1273 (6th Cir. 2003) (conclusions and speculation not sufficient to avoid summary judgment). Further, the moving party need not affirmatively negate plaintiff's

claim in order to obtain summary judgment; instead, the moving party only bears the initial burden of "showing" (i.e. pointing out to the court) that there is an absence of evidence to support plaintiff's case. *Allen v Muskogee*, 119 F3d 837 (10th Cir. 1997) *cert den* 522 US 1148.

To be actionable under the South Carolina Unfair Trade Practices Act, an allegedly unfair or deceptive practice or act must adversely affect the public interest. Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim. *Jefferies v. Phillips*, 316 S.C. 523 (S.C. Ct. App. 1994); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66 (S.C. 1988); *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240 (S.C. 1988) (Unfair Trade Practices Act is unavailable to redress private wrongs if the public interest is unaffected.)

Moreover, Plaintiff must come forward with specific facts demonstrating that members of the public were adversely affected by the claimed practice. Simple speculation of public impact is not sufficient. *Id.* Additionally, whether a specific act constitutes an unfair method of competition is a question of law for the court. *Jefferies, supra*.

Judged by the foregoing standards, summary judgment is proper as explained below.

A. True factual statements cannot give rise to an Unfair Trade Practices Act claim

In addition to impacting members of the general public, a statement or act must be untrue or deceptive in order to be actionable under the UTPA. Examples of cases where South Carolina courts have found violations of the UTPA include representing a used car as being new (*Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240 (S.C. 1988)), and selling counterfeit products (*Jones v. Ram Med., Inc.*, 807 F. Supp. 2d 501 (D.S.C. 2011)). Research has failed to disclose a single case in which a defendant has been found to have violated the UTPA by making a true statement.

The Complaint alleges two supposedly false statements: 1) that Mr. Garcia is working for Half Moon, and 2) that Mr. Garcia is in the United States on an extended sabbatical. The first statement is unquestionably true. Indeed, it is Mr. Garcia's employment with Half Moon that gave rise to the Complaint in the first place. The second statement is likewise demonstrably true. Plaintiff itself has produced a document showing that it has communicated with the Immigration and Naturalization Service confirming that Mr. Garcia maintains his residence in Spain and is only in the United States for a limited period of time and will return to Spain at the conclusion of his work in the United States (Exhibit C hereto). Whether one characterizes Mr. Garcia's presence in the United States as a temporary visit or as a sabbatical is a distinction without a difference. Mere quibbling over such words is certainly not within the scope of the UTPA.

B. Plaintiff has not and cannot demonstrate any damage to the South Carolina public at large

Merely pleading an impact on the public at large is not sufficient to avoid summary judgment. As set out above, true statements of fact, as a matter of law, cannot constitute violations of the UTPA. The only other allegation in the complaint is that the hiring of Mr. Garcia has some unspecified "effect upon fair competition." Plaintiff has not set out any specific *facts* showing that members of the public have been impacted in any fashion by the hiring of Mr. Garcia. Whether members of the public receive instruction from Mr. Garcia when he is an employee of Plaintiff or when he is an employee of the Defendant has no impact on the public at large. It is true that Plaintiff will no longer benefit from Mr. Garcia's services, but that is a private impact that is not compensable under the UTPA. *Jefferies v. Phillips*, 316 S.C. 523 (S.C. Ct. App. 1994).

In *TalentBurst, Inc. v. Collabera, Inc.*, 567 F. Supp. 2d 261 (D. Ma. 2008), an at will non-managerial employee left TalentBurst and took a job with a competitor named Collabera. TalentBurst sued both the employee and Collabera for, among other things, breaching the duty of loyalty and tortious interference with contract. The complaint further alleged that the actions of Collabera in hiring the employee constituted an unfair or deceptive trade practice. Thus, *TalentBurst* is factually identical to the instant case.⁵ Defendants moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The *Talentburst* court first found that the employee entered into an employment agreement with Collabera immediately after leaving his employment with TalentBurst and continued working on a project for a former client of TalentBurst. However, the court held that the vast majority of cases decided under Massachusetts law held that the duty of loyalty did not extend to "rank and file" employees, absent some special circumstance. *Id.* at 266. In fact, only two Massachusetts cases, both involving associates at law firms with access to confidential information, had found a duty of loyalty applicable to anyone other than managers and executives. *Id.* The same thing is true under New Hampshire law. *White v. Rainsmeier & Spellman*, 950 F.Supp. 39, 43 (D.N.H. 1996). For that reason, the court dismissed the count of the complaint alleging breach of the duty of loyalty.

Next, as to the tortious interference claim, the *Talentburst* court found that, because the employee owed no duty of loyalty, there could be no liability for aiding and abetting the employee's breach of his agreement. The court also concluded that, absent making fraudulent

⁵ The only substantial factual difference is that in *TalentBurst* the employee actually signed a covenant not to compete. Here, Mr. Garcia never signed such an agreement.

statements or threats to the employee, a competitor could not be liable for tortious interference by merely offering a better job to the employee:

"Advancement of one's economic interest, however, is not an improper motive. See *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 817, 551 N.E.2d 20 (1990). Finally, TalentBurst fails to allege or that Collabera utilized improper means -- such as making fraudulent statements or threats -- to induce Pallerla to leave TalentBurst. Rather, TalentBurst's complaint indicates that all Collabera did was perhaps to recruit Pallerla and then offer him a job. Massachusetts courts, however, have held that the offering of a job to a competitor's at-will employee, including one that provides better pay and benefits, does not as matter of law constitute improper means. *Perishables By Air, Inc. v. OceanAir, Inc.*, 68 Mass. App. Ct. 1110, at *6 (2007)."

In a footnote to the foregoing statement, the court also stated that the desire to hire the employee away because he was highly talented could not constitute an improper purpose.

Finally, the court held that, under Massachusetts law, a deceptive trade practices claim could not be predicated on claims arising from an employment relationship:

"Chapter 93A [the Massachusetts unfair trade practices statute] was intended to address the conduct of 'individuals acting in a business context in their dealings with other business persons, and not every commercial transaction whatsoever.' *Manning v. Zuckerman*, 388 Mass. 8, 10, 444 N.E.2d 1262 (1983). The Supreme Judicial Court has squarely held that it was not intended to cover employment contract disputes. *Id.* at 12. Disputes arising out of the employer-employee relationship are not cognizable under chapter 93A." *Id.* at 14.

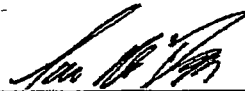
CONCLUSION

In summary, this Court should grant summary judgment to Defendants as to all of Plaintiff's claims. Mr. Garcia was an at will employee subject only to the common law rules governing at will employees. He was free to leave his employment at any time and for any reason, or for no reason whatsoever. Even if Mr. Garcia breached his duty of loyalty as alleged in the Complaint (which Defendants deny), there is no independent tort recovery for breach of that duty.

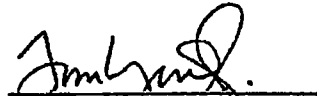
Actions by a competitor to make Mr. Garcia a better offer of employment are not actionable. Finally, true statements of fact that do not result in demonstrable damage to the public at large do not constitute violations of the UTPA.

For the foregoing reasons, Defendants respectfully request that the Court enter summary judgment in favor of all Defendants and dismiss all causes of action with prejudice.

Respectfully submitted,



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February 28, 2013

Aiken, South Carolina

EXHIBIT A

(Discovery Excerpts)

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

Coves Darden, LLC,)

Plaintiff,)

v.)

Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

**DEFENDANTS' FIRST INTERROGATORIES
TO PLAINTIFF**

TO: PLAINTIFF AND M. BARON STANTON AS ATTORNEY FOR PLAINTIFF.

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, and Defendants serve the following written Interrogatories on Plaintiff COVES DARDEN, LLC, to be answered separately and fully in writing, under oath, within thirty (30) days from the date of service hereof. If additional space is needed, attach a separate page and indicate the interrogatory which is being answered.

**I.
DEFINITIONS**

The terms "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these interrogatories any information which might otherwise be construed to be outside their scope.

The terms "any/all" shall both mean any and all as appropriate in order to bring within the scope of these interrogatories information and documents which might otherwise be considered to be beyond their scope.

"Claim" means a demand or assertion, whether oral or written, formal or informal, by any person for monetary payment, the undertaking of action or the cessation of action.

III. INTERROGATORIES

1. Identify each person who assisted in any fashion in responding to these interrogatories, provide documents in response to the accompanying requests for production, or provided any information whatsoever to assist in the preparation of your responses to these interrogatories or the accompanying requests for production.
2. Identify each person with any knowledge of the damages allegedly suffered by Coves-Darden, LLC alleged in your Complaint and, with respect to each such individual, state with particularity the knowledge of each with respect to said damages.
3. Identify any person with whom you communicated regarding the employment of Francisco Garcia Ibañez and, with respect to each such person, state the substance of the communication.
4. Identify each person with whom you communicated regarding schooling and/or instructional services by Francisco Garcia Ibañez on behalf of Coves Darden.
5. State all facts and identify all persons with knowledge of the allegation contained in Paragraphs 24, 25, and 26, inclusive, that Francisco Garcia Ibañez breached alleged duties of loyalty, honesty, and information to Coves Darden, LLC.
6. State with particularity the terms and conditions of any alleged oral agreement with Francisco Garcia Ibañez with respect to the terms and conditions of his employment, and with respect to each, state:
 - a. the date of each alleged oral agreement;
 - b. the place where each oral agreement took place;
 - c. Identify all writings or communications memorializing said alleged oral

agreement; and

- d. Identify each person with knowledge of said alleged oral agreement and state with specificity the knowledge of each such person.
7. State with particularity each fact upon which you base the allegations of Paragraph 33 of the Complaint and identify each person with knowledge of said facts.
8. State with particularity each fact upon which you base the allegations of Paragraphs 37, 39, and 39 of the Complaint and identify each person with knowledge of said facts.
9. State with particularity each fact upon which you base the allegations of Paragraph 40 of the Complaint and identify each person with knowledge of said facts. To the extent that you rely upon information and belief as the basis for said allegations, state with particularity each fact, supposition, or thought upon which you base such information and belief.
10. With respect to your Fourth Cause of Action, please state:
 - a. The relevant market in which Coves Darden, LLC and Half Moon Stables, LLC competed;
 - b. State with particularity each trade secret and private business that Coves Darden disclosed to Francisco Garcia Ibañez during the term of his employment with Coves Darden, as alleged in Paragraph 47 of the Complaint. Defendants will stipulate to an appropriate confidentiality and non-disclosure agreement with respect to said trade secrets, subject to further order from the court.
11. State with particularity each instance of public impact as alleged in Paragraph 49 of your Complaint and identify each person with knowledge thereof.
12. Identify each employee, contractor, or independent contractor of Coves Darden who performed any services at the Coves Darden facility during the time Francisco Garcia Ibañez was employed by you.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Coves Darden, LLC,

Plaintiff,

v.

Francisco Jose Garcia Ibañez,
Dori Derr,
and Half Moon Stables, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

**PLAINTIFF'S RESPONSES TO
INTERROGATORIES AND REQUESTS FOR
PRODUCTION**

**TO: DEFENDANT AND TOM YOUNG, JR., ESQUIRE, ATTORNEY FOR
DEFENDANTS:**

Plaintiff, Coves Darden, LLC responds to interrogatories as follows:

1. Plaintiff first states the following general objection (hereinafter "The General Objection"): Plaintiff is proceeding directly to question 1 and the questions following it, and is ignoring the preceding instructions, definitions and directives (as well as any interspersed or following) as either superfluous, as attempting to expand impermissibly the requirements of Rules 26, 33 and other rules of civil procedure, or as injecting tedium, ambiguity, uncertainty, and unnecessary burden into the discovery process contrary to the requirements of, among other things, Rule 1. **FURTHER RESPONSE:** Miguel Coves; Dorothea Darden; and Barry Stanton.
2. The General Objection is repeated. Miguel Coves; Francisco García Ibañez; Dorothea Darden; Dori Kerr; and employees, agents and facilitators of Ms. Derr and Half Moon Stables. Mr. Coves and Ms. Darden have knowledge of what they spent to make arrangements to sponsor Ibañez's travel the United States from Spain, and entry into the United States on a nonimmigrant visa issued by the United States. They have knowledge of the stipend they paid Ibañez while he was awaiting travel and the \$8000 per month they paid him when he got to the United States. They have knowledge of what they paid for the application for and processing of the nonimmigrant petition allowing Ibañez to enter the United States. They have knowledge of Ibañez's travel expenses from Spain to the United States, which they paid. They have knowledge of the home they furnished Ibañez and his family live in near the stables where the

related fraudulent acts. Namely, Ibañez, before leaving notice of termination of his employment and outright breach of the contract, had secretly been breaching the contract by secretly working with Derr's horses. Upon information and belief, Ibañez intentionally compromised his own performance in order to promote the performance of Derr, all at Plaintiff's expense. Additionally, when asked about the upcoming first competition in Georgia, Ibañez falsely indicated that he was prepared and ready to go forward, thus intentionally inducing Plaintiff to go forward with its plans, causing greater damage. Ibañez's breach of contract was accompanied by fraudulent intent. Plaintiff is informed and believe that, in addition to actual damages, Plaintiff believes Plaintiff is entitled to punitive damages in an amount to be determined the jury or Court.

6. The General Objection is repeated. The agreement was not oral. It was a written contract presented to and acknowledged by Ibanez in or before January of 2012, after August of 2011. It states the terms and conditions of the employment contract, except it mentions US\$6000 as pay, which was intended and agreed to be Euros. Ibanez was paid \$8000 in US dollars. It included a promise to devote all time and energies to Coves Darden and to not engage in any other business regardless of whether for compensation. It was an integral part of his nonimmigrant visa application and actual visa, which required the same. It was terminable upon proper notice described in it. It may or may not have been countersigned by him.

7. The General Objection is repeated. The persons with knowledge of the allegations contained in paragraph 33 are Mr. Miguel Coves and Ms. Dorothea Darden, as well as Francisco García Ibañez, Dori Derr; and employees, agents and facilitators of Ms. Derr and Half Moon Stables. The relevant facts are as follows. In and before January of 2012, Plaintiff made arrangements to sponsor Ibañez's travel the United States from Spain, and entry into the United States on a nonimmigrant visa issued by the United States. Plaintiff entered into an agreement to employ Ibañez act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Plaintiff. Under the terms of the agreement, Plaintiffs agreed to pay Ibañez EUR 6000 per month and pay for his transportation to

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

Coves Darden, LLC,)

Plaintiff,)

v.)

Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

**DEFENDANTS' FIRST REQUESTS FOR
PRODUCTION**

TO: PLAINTIFF AND M. BARON STATON AS ATTORNEY FOR PLAINTIFF:

Defendants FRANCISCO JOSE GARCIA IBÁÑEZ, DORI DERR and HALF MOON STABLES, LLC. through their undersigned attorney, pursuant to S. C. R. Civ. P. 26 and 34, request that Plaintiff COVES DARDEN, LLC ("Coves Darden") produce documents in response to the following requests for production within thirty (30) days after service of these requests:

**I.
DEFINITIONS**

The terms "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these interrogatories any information which might otherwise be construed to be outside their scope.

The terms "any" as well as "all" shall both mean any and all as appropriate in order to bring within the scope of these requests information and documents which might otherwise be considered to be beyond their scope.

"Claim" means a demand or assertion, whether oral or written, formal or informal, by any person for monetary payment, the undertaking of action or the cessation of action.

possession, custody or control, the manner in which it is ceased, and the name and address of its present custodian.

19. Unless otherwise indicated, each request is to be construed as encompassing all documents that pertain to the stated subject matter and to events which transpired from January 1995 up to the present.

III, DOCUMENTS REQUESTED

1. Produce the fully executed employment contract as alleged in your Complaint.
2. Produce all applications, correspondence, and other documents of any nature whatsoever between Coves Darden, LLC and Department of Homeland Security, U.S. Citizenship and Immigration ("DHS") pertaining to or referring to any of the matters set out in your complaint. This Request specifically includes, without limitation, any communications between Coves Darden, LLC and DHS from and after June 8, 2012.
3. Produce all correspondence between your attorneys and DHS pertaining to or referring to Francisco Garcia Ibañez.
4. Produce all documents pertaining to or referring in any manner to the damages you claim to have suffered, as alleged in your Complaint specifically including, without limitation, the damages alleged in Paragraph 32 of your Complaint.
5. Produce all applications for entry into show competitions from January 1, 2012 through including the date of your response to these Requests. This request specifically includes all cancelled checks, correspondence and any other documents of any nature whatsoever pertaining to or referring to entries into show competitions in which you planned that Francisco

investment and gives the state a reputation nationally and internationally. If other laws were broken, there would be additional public impact, because laws are for the protection of and the business of, the public.

12. The General Objection is repeated. Plaintiff additionally objects to the overbreadth and ambiguity of the question and its irrelevance and lack of being a reasonable way of getting admissible evidence. Every employee or nonemployee who performed services at a 330 acre stable is not readily known. If there is a more specific request, Plaintiff will answer it. Miguel Coves and Dorothea Darden certainly were there.

13. The General Objection is repeated. Plaintiff also objects that this is irrelevant and makework. The following can be found at

<http://publicindex.sccourts.org/aiken/publicindex/PISearch.aspx> :

Name Party

Type Case Number Filed Date Case Status Disposition

Date Type Subtype Judgment

Court Agency

Coves, Miguel Defendant 2009CP0200558 03/19/2009 Special

Referee

Common

Pleas Breach of Cont 140 Common Pleas

Coves, Miguel Defendant 2009CP0201252 06/05/2009 Dismissed 06/12/2012 Common

Pleas Breach of Cont 140 Common Pleas

Coves Darden Defendant 2012CV0211100145 09/28/2012 Pending Civil Summons &

Complaint Wagener-Salley Summary

Court

Coves Darden,

Llc Plaintiff 2012CP0201772 07/20/2012 Pending Common

Pleas Torts/Other 399 Common Pleas

Plaintiff, Coves Darden, LLC responds to requests for production as follows:

Plaintiff objects to producing documents within thirty days of service of the requests, same being a shorter time than the time allowed for these written responses themselves. Plaintiff further responds to the Requests for Production with the same General Objection as to the instructions and definitions as stated with respect to the Interrogatories, and subject to such

Stanton Law Office, P.A., 1728 Main Street, P.O. Box 245, Columbia, SC 29202 803-929-1484

objection, responds to requests 1-14 as follows: Plaintiff objects to producing back to Defendants, documents provided by, produced by or filed with authorities by Defendants and already within Defendants' possession, but as to any other documents fitting the description given, which are not privileged and are within Plaintiff's possession, Plaintiff agrees to produce them for inspection and copying at a time and place mutually agreed by counsel. For Defendants' information, Defendant believes there are none currently responsive to request 1 (if requesting one with Ibanez's signature).

M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P.O. Box 245
Columbia, South Carolina 29202
803-929-1484

ATTORNEY FOR PLAINTIFF
Coves Darden, LLC

DATE: _____

EXHIBIT B

(Partially Executed Employment Contract)

AGREEMENT

between

COVES DARDEN LLC

and

MR. FRANCISCO GARCIA IBÁÑEZ

THIS AGREEMENT is made effective as of the date that Mr. Francisco Garcia Ibañez (the "Employee") enters the United States of America with a valid O-1 nonimmigrant visa enabling him to work for Coves Darden LLC (the "Employer"), and is entered into by and between Employer, a South Carolina limited liability company, and Employee, a national of Spain who has been designated to work for the Employer as its Expert Equestrian Trainer.

WITNESSETH

WHEREAS Employer seeks to employ Employee as an expert Equestrian trainer, instructor and consultant, to train both Employer's horses and the horses of clients, as well as riders, mainly for participation in dressage and equestrian competitions and events, and to provide expert instruction and consultancy services in the equestrian arts for clients of Employer;

WHEREAS, the parties now wish to memorialize the terms and conditions of the employment in order to confirm that an employer-employee relationship will in fact exist between the parties following the date that an O-1 nonimmigrant work petition is approved by the Department of Homeland Security, and an O-1 visa is issued to Mr. Garcia Ibañez;

WHEREAS, this Agreement will define the terms and conditions of the employment between the parties;

WHEREAS, this Agreement is intended to serve as evidence of an offer of employment, in satisfaction of the requirements of the O-1 nonimmigrant worker petition that Employer has filed for Employee.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein, it is mutually covenanted and agreed by and between the parties hereto as follows:

§ 1.1 Employment

The Employer hereby employs the Employee to act as Equestrian Trainer, Instructor and Consultant for the Employer, and the Employee does hereby accept such employment.

§ 1.2 Restrictions on Employee's Representation of Employer

Employee agrees to assume direct, personal liability for any breach of the obligation enumerated in this section. Any breach of the enumerated obligations herein shall be considered a material breach of this Agreement.

§ 1.2 Term of Employment

(a) This Agreement is intended to serve as evidence of an offer of employment, in satisfaction of the requirements of the O-1 nonimmigrant worker petition that Employer has filed for Employee.

(b) This Agreement shall only be deemed to have validity and legal effect on the date Employee first enters the U.S. on an O-1 non-immigrant visa, and shall remain in effect only for so long as the Employee has appropriate O-1 work or employment authorization from the U.S. government.

(c) Either party may send a written notice of intent to rescind this Agreement (hereafter, "Rescission Notice") to the other's notice address as defined herein, at least thirty calendar days before the intended date of the termination of employment, on which date the employment relationship shall end, and by which date Employer shall complete the payment of all compensation due to Employee under this Agreement, and no additional compensation shall be payable to Employee, and all rights and obligations of the parties under this agreement shall cease to exist.

§ 1.3 Compensation

For all services rendered by the Employee under this Agreement the Employer shall compensate the Employee at the rate of US\$6,000.00 per month. Employer shall pay for Employee's transportation to Employer's place of business, and shall pay for return transportation to Employee's place of domicile abroad upon termination of the instant employment.

§ 2.1 Duties

(a) *Expert Equestrian Duties.* The Employee's duties shall be to provide a program of instruction in the Equestrian arts, customized in accordance with the needs of specific clients (private and public companies and institutions, as well as individuals) contracting with the Employer for specific areas of equestrian training and instruction for horses and riders. Duties shall include preparing customized training sessions for horses, training sessions for riders and instruction and advice for specific equestrian events, competitions and tournaments.

Employee will also render specific consultancy services with regard to purchases and sales of horses and specialized equestrian equipment for clients of Employer. Employee shall accompany clients to, and offer expert training, coaching and consultancy services for, competitions, tournaments and events. Employee shall provide the same scope of services to Employer's own horses and riders, and shall assist Employer in organizing its own equestrian fairs, events, tournaments, competitions, demonstrations and outreach programs.

Executive/Administrative Discretion. Employee shall enjoy wide discretion to develop and direct his activities as Equestrian Arts Trainer and Instructor. Notwithstanding this level of discretion, Employee shall report directly to the executive directors of the company, to whom he shall report directly and who shall have organizational control over his work schedule and work duties.

§ 2.2 Extent of Services

The Employee shall devote his entire time, attention, and energies to the business of the Employer, and shall not during the term of this agreement be engaged in any other business activity whether or not such business activity is pursued for gain, profit, or other pecuniary advantage without the prior written consent of the Employer first obtained; but this shall not be construed as preventing the Employee from investing, when such investment will not interfere with the Employee's full time employment by the Employer.

§ 2.3 Non-Competition

The Employee agrees that at all times during the term of his employment hereunder and for a period of one year after the termination of his employment hereunder, howsoever brought about, he will not, within 10 miles of the then current principal place of business of the Employer engage in the sale of the same goods and services marketed by the Employer. In the event that the provisions of this section should ever be deemed to exceed the time, geographic or occupational limitations permitted by the applicable laws, then such provisions shall be reformed to the maximum time, geographic or occupational limitations permitted by the applicable laws.

The Employee agrees that for a period of two (2) years after the termination of this agreement, he will not (A) directly or indirectly induce any customers or clients of the Employer to patronize any competing professional; (B) canvass, solicit or accept any business relationship from any customers or clients of the Employer; (C) directly or indirectly request or advise any customers or clients of the Employer to withdraw, curtail or cancel such customers' or clients' business with the Employer or (D) directly or indirectly disclose to any other person, firm or corporation the names or addresses of any of the customers or clients of the Employer.

§ 2.4 Disclosure of Confidential Information

The Employee recognizes and acknowledges that any information of a confidential or proprietary nature relating to the business of the Employer, as it may exist from time to time, is a valuable, special, and unique asset of the Employer's business. The Employee will not, during or after the term of his employment, disclose such confidential or proprietary information, or any part thereof, to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever. In the event of a breach or threatened breach by the Employee of the provisions of this paragraph, the Employer shall be entitled to an injunction restraining the Employee from disclosing, in whole or in part, the confidential or proprietary information of the Employer, or from rendering any services to any person, firm, corporation, association, or other entity to whom such information, in whole or in part, has been disclosed or is threatened to be disclosed. Nothing herein shall be construed as prohibiting the Employer from pursuing any other remedies available to the Employer for such breach or threatened breach, including the recovery of damages from the Employee. It is further agreed and understood by and between the parties to this Agreement that upon the Employee's termination, the Employee shall promptly deliver to the Employer all data, memoranda, and other papers of any nature in the Employee's possession or control which relate the foregoing matters; and further, the Employee hereby assigns and agrees to assign to the Employer all of Employee's right, title, and interest in any such materials which may heretofore or hereafter be conceived or reduced to practice, individually or jointly with any other person or persons, during the contract year(s) and for five (5) year(s) thereafter.

§ 3.1 Notice

Any and all notices provided for herein shall be given in writing by registered or certified mail, return receipt requested, which shall be addressed, in the case of the Employer, to Coves Darden LLC C/O Mr. Miguel Coves, 1305 Surry Race Road, Springfield, South Carolina 29146, and in the case of the Employee, to Employee's last address known to the Employer.

§ 3.2 Modifications

No modification of this Agreement shall be valid unless such modification is in writing and signed by the Employer and Employee.

§ 3.3 Waiver

No waiver of any provision of this Agreement shall be valid unless in writing and signed by the person or party against whom charged.

§ 3.4 Applicable Law

This Agreement shall be subject to and governed by the laws of the State of

§ 3.5 Invalid Provision

The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed as if such invalid or unenforceable provisions were omitted.

§ 3.6 Assignment

This Agreement shall be binding upon and inure to the benefit of the Employer and the Employee and their respective heirs, legal representatives, executors, administrators, successors and assigns, provided, however, that neither party may assign nor delegate any of its rights or obligations hereunder without first obtaining the written consent of the other party.

§ 3.7 Arbitration

Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in the City of Aiken, South Carolina in accordance with the rules of the American Arbitration Association, one arbitrator, and shall be enforceable in any court having competent jurisdiction.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

[Remainder of page intentionally blank; signature page of parties follows this page.]

06.01.2012 16:32

Coves Darden Farm

803 258 3280

PAGE. 7/ 7

Employer:



COVES DARDEN LLC
By: Miguel Coyes, Managing Director

Employee:

Francisco García Ibañez

EXHIBIT C

(Coves Darden to INS excerpt)



August 13, 2011

--VIA FEDERAL EXPRESS COURIER--
Department of Homeland Security
U.S. Citizenship & Immigration Services
Vermont Service Center
75 Lower Welden Street
St. Albans, VT 05479

Petitioner: Coves Darden LLC
Beneficiary: Mr. Francisco Jose Garcia Ibanez
Case Type: O-1

Dear Madam/Sir:

Please accept this letter as an overview and summary of the evidence submitted in support of the referenced petition of Coves Darden LLC to employ Mr. Francisco Jose Garcia Ibanez as an O-1 nonimmigrant worker. We believe Mr. Garcia Ibanez qualifies as an O-1 alien of extraordinary ability, by virtue of demonstrated achievement in the equestrian arts, as a trainer and clinician. The initial requested period of employment is three years.

The Petitioner

The petitioner in this case is Coves Darden LLC (the "Petitioner"). Petitioner was incorporated under the laws of South Carolina, in 2011.

Coves Darden is located in the County of Springfield, South Carolina, spread over approximately 330 acres of pristine horse country. A thirty stall barn houses 15 Stallions on the stallion station and showcases the sales horses in training. Young horses are raised in an ideal pastoral setting where they can develop both physically and psychologically. At three years, they begin their career under saddle. CD is dedicated to breeding, importing and training quality P.R.E. ("Pura Raza Española") horses for sale.

Attached herewith are supporting materials concerning the performance of the horse *Oleaje* in the Athens Olympic Games - a competition in which the horse, ridden by Mr. Ignacio Rambla Algarin, and trained beforehand by Mr. García Ibañez, established the primacy of Pure Spanish Breed Horses in international competitions, for *Oleaje* finished an astounding second and won the Silver Medal. Involvement as a Trainer for a horse that garners a Silver Medal in an international competition as prestigious and universally recognized as the Olympic Games establishes, indubitably, that the beneficiary performed services in a "leading" role in an event - the Olympic Games - that has a distinguished reputation.

The remaining materials track the beneficiary's international equestrian appearances. They reinforce the exceptionally strong character of his credentials as a leading equestrian figure in international circles.

**OTHER EVIDENCE THAT MR. GARCÍA IBÁÑEZ HAS BEEN EMPLOYED IN A CRITICAL OR
ESSENTIAL CAPACITY FOR ORGANIZATIONS AND ESTABLISHMENTS THAT HAVE A
DISTINGUISHED REPUTATION**

Mr. García Ibañez is an acknowledged instructor, trainer and technician in international equestrian circles. He is recognized as a key professor and instructor at the Royal Foundation, and as a rider and trainer who has performed in Dressage competitions in Spain, France, Germany, Portugal, Italy, the U.S., the Middle East and in other countries abroad, for nearly 25 years.

Enclosed herewith are the two testimonials from Directors of the Royal Foundation in Andalucía, Spain, to document this level of achievement. Also enclosed are the aforementioned materials documenting the Silver Medal finish of the horse - called *Oleaje* - trained by Mr. García Ibañez.

The Service should take note that these materials establish that the beneficiary has acted in a leading role for a highly prestigious institution of learning in Equestrian matters - as an instructor/professor for the Royal Foundation of Andalucía, Spain - and most notably as a trainer of a horse that went on to win a Silver Medal at the most celebrated sporting event on the earth, the Olympic Games. These materials, we submit, satisfy the requirements of applicable O-1 regulations.

TERMS OF EMPLOYMENT

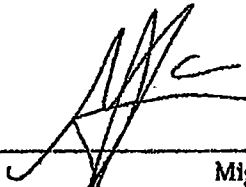
Although the parties have not entered into a fixed compensation agreement, Mr. García Ibañez is being offered employment in accordance with the following principles:

- ☐ Assuming the O-1 renewal petition is approved, the beneficiary will serve petitioner as Equestrian Arts Instructor and Trainer.
- ☐ Petitioner will employ Mr. García Ibañez for a term of three (3) years, or for such period as is authorized by the United States of Citizenship and Immigration Services (USCIS).
- ☐ Petitioner and Mr. García Ibañez each agree to inform USCIS, in writing, of any termination or cancellation of the employment relationship, as soon as any such termination or cancellation comes into effect;
- ☐ Petitioner has informed Mr. García Ibañez of the temporary nature of this employment, and Mr. García Ibañez has accepted this condition. Petitioner will not employ the beneficiary beyond his authorized period of stay.
- ☐ Mr. García Ibañez has acknowledged to petitioner that he maintains a permanent domicile in Spain; that he has no intention of abandoning that domicile; and that he fully intends to return there upon the conclusion of the instant employment, even if the employment is terminated prior to the expiration date of the O-1 employment.

Based upon the explanations herein and the record of evidence attached herewith, petitioner submits that it has produced evidence of more than the requisite evidentiary categories required for approval of an O-1 non-immigrant worker petition. Petitioner therefore requests, respectfully, that the instant petition be approved.

Thank you for your attention.

Very truly yours,


Name: Miguel Covés
Title: Sole member of Covés Darden LLC

Affidavit of Francisco Garcia (Ibañez) in support of summary judgment, dated December 10, 2012, served February 28, 2013 (with certificate of mailing)

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC,)

Plaintiff,)

v.)

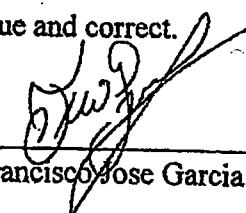
Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)

Defendants.)

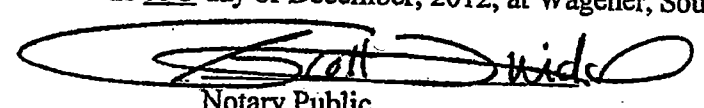
**AFFIDAVIT OF FRANCISCO GARCIA
IN SUPPORT OF SUMMARY JUDGMENT**

FRANCISCO JOSE GARCIA IBAÑEZ, being duly sworn, deposes and says:

1. I am an adult male resident of Spain. I am presently working in the United States as an equestrian rider and instructor. I am in the United States on an O-1 visa.
2. I am presently employed by Half Moon Stables, LLC in Wagener, South Carolina.
3. Before coming to the United States I was employed by the Fundacion Real Escuela Andaluza del Arte Equestre as a rider and equestrian instructor.
4. I was given a sabbatical from the school so that I could come to the United States for temporary employment.
5. Attached to this Affidavit is a copy of the authorization letter from the school granting me a sabbatical.
6. I speak and read very little English. Therefore, this Affidavit has been translated and read to me in Spanish.
7. Everything set out in this Affidavit is true and correct.


Francisco Jose Garcia Ibañez

Subscribed and sworn to before me this 10th day of December, 2012, at Wagener, South Carolina.


Notary Public

My Commission Expires: 01/2022



FUNDACIÓN REAL ESCUELA
ANDALUZA DEL ARTE ECUESTRE

En la Ciudad de Jerez de la Frontera, a veinticuatro de Marzo de dos mil once.

REUNIDOS:

DE UNA PARTE: DON FRANCISCO MANUEL REINA OSUNA, mayor de edad, D.N.I.- 31.379.754-A, en su calidad de Director-Gerente de la FUNDACIÓN REAL ESCUELA ANDALUZA DEL ARTE ECUESTRE, C.I.F.- G.- 11.614.286, con domicilio en Jerez de la Frontera, Avenida Duque de Abrantes, s/n, Palacio del Recreo de las Cadenas.

Y DE OTRA: DON FRANCISCO JOSÉ GARCÍA IBÁÑEZ mayor de edad, D.N.I.- 31.670.358-W, con domicilio en Jerez de la Frontera, Barriada Puente de Las Pachecas, nº7.

Ambas partes tienen y mutuamente se la reconocen, capacidad legal bastante para suscribir el presente documento, a cuyo fin previamente

EXPONEN

I.- Que Don FRANCISCO JOSÉ GARCÍA IBÁÑEZ, trabajador de la Fundación R.E.A.A.E. con la categoría de Jinete Profesor Especialista, ha solicitado una Excedencia Voluntaria por periodo de dos años desde el 1 de Abril de 2011, cumpliendo los requisitos exigidos para ello.

II.- Que accediendo la Empresa al disfrute del mencionado periodo de Excedencia, ambas partes acuerdan las condiciones de disfrute de la misma, con sujeción a las siguientes

Recreo de las Cadenas • Avda. Duque de Abrantes
11407 JEREZ DE LA FRONTERA. Cádiz • España



FUNDACIÓN REAL ESCUELA
ANDALUZA DEL ARTE ECUESTRE

ESTIPULACIONES

Primera.- Don FRANCISCO JOSÉ GARCÍA IBÁÑEZ, que cumple los requisitos establecidos en el artículo 18 del Convenio Colectivo y 46 del Estatuto de los Trabajadores, disfrutará de un periodo de Excedencia Voluntaria por dos años a contar desde el 1 de Abril de 2011, finalizando la misma el 31 de Marzo de 2013.

Segunda.- No obstante lo dispuesto en la Estipulación anterior, las partes acuerdan la posibilidad de que a la terminación del primer año de excedencia, el 31 de Marzo de 2012, el trabajador pueda solicitar la reincorporación al trabajo.

Para ello deberá presentar una solicitud por escrito con un mes de antelación al transcurso del primer año de excedencia, en cuyo caso tendrá un derecho preferente al reingreso en las vacantes de igual o similar categoría a la suya que hubiera en la Empresa en dicha fecha.

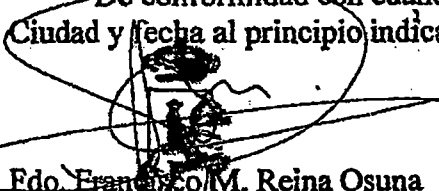
En caso de no solicitar el reingreso en el plazo indicado, continuará en la situación de Excedencia Voluntaria por otro año más, hasta el 31 de Marzo de 2013.

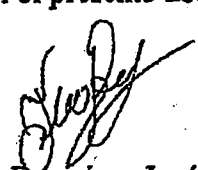
Tercera.- En caso de continuar en situación de Excedencia hasta el período total de dos años, deberá solicitar a la Empresa con quince días de antelación el reingreso, al que tendría derecho en las vacantes de igual o similar categoría a la suya que hubiera en ese momento en la Empresa.

Si por el contrario no solicitara el reingreso en el plazo indicado, se entenderá que renuncia a la relación laboral, produciéndose la baja definitiva en la Empresa.

Cuarta.- Ambas partes que el presente Acuerdo no supone renuncia de derechos prohibida legalmente ni afecta a derechos de terceros.

De conformidad con cuanto antecede, firman el presente documento en la Ciudad y fecha al principio indicadas.


Edo. Francisco M. Reina Osuna
Director Gerente
FUNDACIÓN REAL ESCUELA
ANDALUZA DEL ARTE ECUESTRE


Fdo. Francisco José García Ibáñez

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN)

CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC,)

Plaintiff,)

v.)

CERTIFICATE OF SERVICE

Francisco Jose Garcia Ibañez,)

Dori Derr,)

and Half Moon Stables, LLC,)

Defendants.)

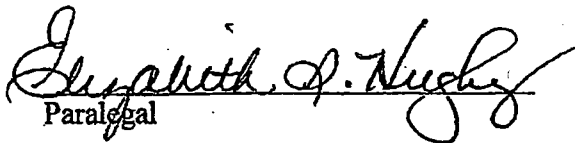
The undersigned certifies that she is an employee at Law Offices of Tom Young, Jr., PC, and that she has served, on the date set forth below, a copy of the documents, described below, in the above entitled action to the following persons, pursuant to Section 15-9-930 and Section 15-9-940 of the Code of Laws of South Carolina, 1976, by United States Mail, postage prepaid and by email:

TO: M. Baron Stanton, Esquire
Stanton Law Offices, P.A.
PO Box 245
Columbia, SC 29202-0245
Attorneys for Plaintiff
bstanton@stantonlaw.com

DOCUMENTS: Affidavit of Francisco Garcia in Support of Summary Judgment

DATE: February 28, 2013

Aiken, South Carolina


Paralegal

Defendants' memorandum in opposition to motion to compel production and motion for sanctions, dated March 1, 2013

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN)	CIVIL ACTION NO. 12-CP-02-01772
Coves Darden, LLC,)	
Plaintiff,)	
v.)	MEMORANDUM IN OPPOSITION
Francisco Jose Garcia Ibañez,)	TO MOTION TO COMPEL PRODUCTION
Dori Derr,)	AND MOTION FOR SANCTIONS
and Half Moon Stables, LLC,)	
Defendants.)	

Defendants, by and through their undersigned counsel of record, oppose Plaintiff's Motion to Compel Production and Motion for Sanctions Noncooperation in Appearance for Deposition on each of the following grounds:

Preliminary Statement

This is an unusual case in that Plaintiff has sued Defendants for breach of contract and tortious interference with contract while, at the same time, judicially denying the existence of either an oral or a signed written contract. Nevertheless, Plaintiff seeks to engage in extensive discovery involving Defendants' business practices, accounting, participation in equine events, and other matters completely unrelated to any possible claims that Plaintiff might have or damages that it allegedly suffered.

To save time and expense and to move this case to a speedy conclusion, Defendants have moved for summary judgment pointing out the purely legal deficiencies in Plaintiff's complaint. That motion is presently scheduled for hearing on March 5, 2013. It is respectfully suggested that the Court should defer any consideration of this motion until it has had an opportunity to rule on

the dispositive motion for summary judgment.

Defendants will not repeat their arguments made in the pending summary judgment motion, but they may be briefly summarized as follows:

1. With no oral or written contract, Mr. Garcia was free to end his relationship with Plaintiff at any time, and for any reason whatsoever, or for no reason at all.¹

2. There is no independent tort cause of action for breach of a duty of loyalty in the at-will employment context.

3. Because there is no enforceable contract between Plaintiff and Mr. Garcia, there can be no cause of action for tortious interference. In any event, there is no cause of action for tortious interference between competitors.

4. There is no cause of action for violation of the Unfair Trade Practices Act for true statements.

Because the pending Motion for Summary Judgment is based on Plaintiff's own admissions and on the relevant legal principles in light of those admissions, there simply is no need for further discovery in this case. Therefore, it would be appropriate to defer discovery until after the Court has ruled on that motion.

I. Alleged failure to produce Mr. Garcia for deposition

Plaintiff complains that Defendants have refused to produce Mr. Garcia for deposition. What Plaintiff fails to disclose, however, is that Mr. Garcia was not in the country for most of January. His wife, who presently resides in Spain, was pregnant and was scheduled for a

¹ The Complaint and the instant motion repeatedly refer to the Defendant as Mr. Ibañez. In Spain, the patronymic (father's last name) is a person's generally used name, and it is followed by the matronymic (mother's last name). Thus, Francisco Jose Garcia Ibañez is more properly referred to as Mr. Garcia. That convention will be followed throughout this brief.

caesarian delivery in the middle of January. However, she had a premature normal delivery and Mr. Garcia left the United States to be with his wife and new son. Thus, during much of the time Plaintiff was seeking his deposition, Mr. Garcia was simply unavailable.

However, there is a more fundamental reason for holding off on further discovery until the Court rules on the pending motion for summary judgment. Entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of a court's discretion. *Chavous v D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 FRD 1 (D.C. Colo. 2001). In *Santos v. Bledsoe*, 2011 U.S. Dist. LEXIS 94261, the court noted:

"Certain basic principles, however, guide the exercise of this discretion. One of these cardinal principles, governing the exercise of discretion in this field, is that the district court may properly defer or delay discovery while it considers a potentially dispositive pretrial motion, provided the district court concludes that the pretrial motion does not, on its face, appear groundless. See, e.g., *James v. York County Police Department*, 160 F. App'x 126, 136 (3d Cir. 2005); *Nolan v. U.S. Department of Justice*, 973 F.2d 843, 849 (10th Cir. 1992); *Johnson v. New York Univ. Sch. of Ed.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002). Briefly deferring discovery in such a case, while the Court determines the threshold issue of whether a complaint has sufficient merit to go forward, recognizes a simple, fundamental truth: Parties who file motions which may present potentially meritorious and complete legal defenses to civil actions should not be put to the time, expense and burden of factual discovery until after these claimed legal defenses are addressed by the Court.

"[A] stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion appear[s] to have substantial grounds or, stated another way, do[es] not appear to be without foundation in law." *In re Currency Conversion Fee Antitrust Litigation*, 2002 U.S. Dist. LEXIS 974 (S.D.N.Y. 2002) (quoting *Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 209-10 (S.D.N.Y.1991)); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1996 U.S. Dist. LEXIS 2684 (S.D.N.Y. 1996)).

The pending dispositive motion for summary judgment is based on Plaintiff's own judicial admissions, and testimony from Mr. Garcia is not required. In fact, the law is clear that there is no tort or contract cause of action base on termination of an at-will relationship. *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 334 (S.C. S.Ct.1999). No amount of discovery will change that purely legal principle. Likewise, there is no independent tort based on breach of the duty of loyalty in the at-will context. *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216 (N.C. 1988). Further, the hiring of an at-will employee from a competitor is not actionable. *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362 (N.C. App. 2001).

In short, Defendants' motion is based on Plaintiff's own admissions and established legal principles. There simply is no reason to put the parties to the time and expense of engaging in lengthy factual discovery that will ultimately prove irrelevant and unnecessary in view of the existing settled law.

II. Alleged failure to produce documents

Plaintiff also claims that it is entitled to see documents and records pertaining to Mr. Garcia's employment with Half Moon. However, there is no possible relevance to any issue raised in this litigation and, therefore, such discovery is improper. Mr. Garcia's employment and pay records with Half Moon have nothing to do with the fact that Mr. Garcia terminated his at-will relationship with Plaintiff. They likewise have nothing to do with any damages that Plaintiff might claim. The appropriate measure of damages - assuming an otherwise enforceable contract - would be compensation for the detriment suffered by the plaintiff, not the benefit (if any) received by the Defendant.² Likewise, evidence regarding shows that Mr. Garcia may have

² In fact, the contract Plaintiff seeks to enforce (See Exhibit B to Motion for Summary Judgment filed on February 28, 2013) specifically provides for at will termination of the contract with no damages to either party.

participated in following his termination of the at-will relationship have absolutely no relevance to any issue in this case. They certainly have nothing whatsoever to do with the termination of the relationship, and they have absolutely no relevance to any measure of damages.

III. Need for an Order to prevent abuse of the discovery process

Defendants permitted the deposition of Defendant Dori Derr to go forward because of the remote chance that she might have some information bearing on the allegations of the Complaint, particularly with respect to the claimed solicitation of Mr. Garcia. During the course of her deposition, counsel for Coves Darden produced a show entry application purportedly signed by Ms. Derr. This exhibit contained certain confidential information, including Ms. Derr's credit card number, expiration date, CCV number, and billing address -- all the information necessary for someone to use the card. At the conclusion of the deposition, undersigned *pro hac vice* counsel contacted the show organizer and inquired if they had given the information Plaintiff. The show organizer stated that show entry applications are considered confidential in that they contain credit card information for show participants, and that all applications are kept locked up. The organizer was extremely concerned about this and has undertaken an investigation to determine how the information was leaked. A copy of email correspondence dealing with this theft of information is attached hereto as Exhibit A.

After this discovery, counsel for Coves Darden was contacted and a demand was made for the return of all copies of the application in his or his client's possession. Counsel was also informed that no further discovery would be permitted until the Court had entered an appropriate Order to insure that future discovery abuses did not occur. As of the date of this Opposition the documents have not been returned.

Defendants submit that it would be inappropriate to allow Plaintiff to engage in unfettered discovery, particularly in light of the improper use of documents in the past. If anything remains in this case after the Court's consideration of the pending Motion for Summary Judgment, Defendants respectfully submit that the Court should consider an appropriate Order prohibiting any use of the improperly obtained application and directing that any further discovery abuses will be subject to sanctions.

IV. Sanctions are not appropriate

In *Pioneer Hi-Bred Int'l, Inc. v. Ottawa Plant Food, Inc.*, 219 F.R.D. 135 (N.D. Iowa 2003), the Court stated:

“[A]mong the permissible sanctions if a party fails to comply with an order compelling discovery is the court's refusal to allow the disobedient party to support or oppose designated claims or defenses or a prohibition on the party's introduction of designated matters into evidence. See FED. R. CIV. P. 37(b)(2)(B). *However, these sanctions depend upon a party seeking to compel discovery first moving the court for an order compelling discovery and the party opposing discovery refusing to comply with the court's order. Id.*” (emphasis added).

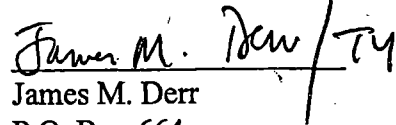
Moreover, Rule 37 provides that the refusal must have been without “substantial justification.” In this case, Defendants promptly moved for summary judgment based on Plaintiff's own judicial admissions and applicable legal principles. A party should not be forced to engage in what will ultimately prove to be fruitless discovery merely because the other side wants to take it. Further, the discovery concerns raised by the credit card information presented in the Derr deposition with Mr. Garcia's being out of the country justify Defendants' actions.

Conclusion

For the foregoing reasons, and each of them, Defendants respectfully request that the Court deny the Motion to Compel, deny sanctions, order that no further discovery take place

before it has ruled on the pending Motion for Summary Judgment and, should future discovery be required, that it be taken subject to an appropriate Order.

Respectfully Submitted,



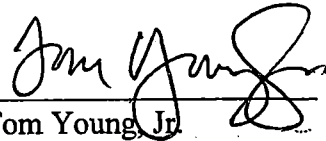
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March 1, 2013

Aiken, South Carolina

EXHIBIT A

EX. A

James M. Derr

From: Ann Genovese <goodhorseman@att.net>
Sent: Saturday, January 19, 2013 2:04 PM
To: jimderlaw@gmail.com
Subject: RE: Entries book

From: Ann Genovese [mailto:goodhorseman@att.net]
Sent: Saturday, January 19, 2013 1:56 PM
To: 'Mary Freil'; 'gloriseeker@comcast.net'; 'cwgr24@comcast.net'
Subject: Entries book

Dear Robin, Mary Lou, Kim and Dennis—At our June show last year, we had a horse/rider/owner entry to the show that ultimately was a scratch and they did not come to the show.

The horse was Tomillo 7, rider Jose Garcia, owner Dorrie Derr, from Aiken, SC. They are in a lawsuit with a neighbor who presented a copy of Dorrie's entry form to our show at the deposition.

I found out about it from Dorrie's husband. How could someone have gotten hold of a copy of the entry form? Have you ever allowed anyone to make a copy of an entry form for someone else at our shows?

We need to start taking the entries book home at night and to guard it at other times.

These forms have very private information on them, including credit card information. This is serious and is very troubling to me. It is possible that someone could have sneaked into the office to do this.

The person who is on the other end of this lawsuit was in the show. Her name is Dorothea Darden. Does this ring a bell? Ann

Robin—Please let Dennis see a copy of this. A.

Ann Genovese, The Good Horseman Foundation
4567 Rockbridge Rd. #297
Pine Lake (Atlanta area), GA 30072
404-289-9328 cell; FAX 404-288-3500
www.goodhorseman.org

Deposition of Francisco Jose Garcia Ibañez, taken on March 26, 2013, pp. 4-9, 16-17, 27-32, 36-41, 47-49, 50, 57-58, and 69-70

1 JOHN BRITT HUNT, INTERPRETER FOR MR. FRANCISCO JOSE
2 GARCIA IBANEZ, being duly sworn, deposes and
3 testifies to transliterate the following
4 testimony from English to Spanish and Spanish
5 to English to the best of your ability:

6 MR. HUNT - EXAMINATION BY MR. STANTON:

7 Q: Good Morning Mr. Hunt. I'm Barry Stanton,
8 otherwise known as M. Baron Stanton, and I'm
9 representing the plaintiff's in this action.
10 I wanted to ask you a few things about your
11 education and credentials, particularly with
12 respect to being an interpreter.

13 A: Okay.

14 Q: Could you tell me any certifications that you
15 hold as an interpreter of English to Spanish or
16 Spanish to English?

17 A: Yes. I'm certified court interpreter in the
18 ~~state of Georgia and the state of South~~
19 Carolina, and I'm a certified healthcare
20 interpreter also.

21 MR. DERR: Mr. Hunt, if I could ask also, once you
22 finish in English could you just give us a --

23 A: Of course.

24 MR. DERR: -- recap in Spanish --

25 A: Of course.



1 MR. DERR: -- so Mr. Garcia can --

2 Q: What sort of things do you have to do in order
3 to be certified in the state of South Carolina
4 as an interpreter?

5 A: In order to be certified in the state of South
6 Carolina you have to take an orientation
7 course. After that you take a written exam and
8 after those two steps are passed you take an
9 oral exam where they evaluate your -- well,
10 the written exam is more for language skills
11 and the oral exam is more for the process of
12 procedure of interpreting.

13 Q: And who administers those tests?

14 A: In South Carolina it's administered by the
15 State Court Administration. However, it's a
16 consortium of several states -- well several,
17 most states are members of the state consortium
18 and it's a standardized exam that's used in
19 many different states and if -- usually if
20 you're certified in one state it's recognized
21 in other states.

22 Q: So the certification that you have received is
23 a certification granted by the South Carolina
24 Court Administration?

25 A: Correct.



1 Q: And the Georgia certification that you hold is
2 a comparable certification from the authority
3 in Georgia?

4 A: That's correct. The only difference is Georgia
5 it's actually a license so it has to be renewed
6 every year where in South Carolina it's just a
7 -- basically a list of approved interpreters
8 who are certified.

9 (Off the Record)

10 Q: Have you offered interpretive services in state
11 court proceedings in South Carolina either in
12 depositions or trials?

13 A: Yes, I have both.

14 Q: Approximately how many times?

15 A: Depositions probably 30 to 50, I would say and
16 in courtroom trials probably 50 or so and then
17 other proceedings I'm in the courtroom almost
18 every day.

19 Q: And could you tell me the particular education
20 or experience that you had that led you to
21 become an interpreter?

22 A: Sure. I was a Spanish major at Clemson
23 University and I graduated with a degree in
24 Spanish and international trade. After I got
25 out of college I worked in Latin America



1 traveling a good bit, based in Atlanta, but
2 traveling to Latin America a bit. I did an
3 internship in Madrid, Spain while at Clemson
4 for summer. That's really where I learned
5 Spanish. And then after that I lived in South
6 America for four years in Ecuador and Colombia,
7 two years each. Then came back and did my
8 Master's degree in Latin American and Caribbean
9 studies at Florida International University in
10 Miami. After that moved to South Carolina and
11 with a colleague started our company,
12 Comunicar, ten years ago and we've been working
13 in translation and interpreting for ten years,
14 based in Columbia, South Carolina.

15 Q: English is your first language?

16 A: Yes.

17 Q: Where were you born?

18 A: Columbia, South Carolina.

19 Q: So your first study of Spanish was academically
20 at Clemson?

21 A: Yeah, academically, but I had Spanish starting
22 in grammar school through high school also.

23 Q: And your first immersion in the Spanish
24 speaking culture for purposes of advancing that
25 learning was in Madrid?



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1 A: Correct.

2 MR. STANTON: I would submit Mr. Hunt as qualified
3 to interpret for us.

4 MR. DERR: I'm willing to stipulate to that.

5 MR. STANTON: Okay. Mr. Derr, do you have any
6 questions?

7 MR. DERR: No, I don't have any. Thank you.

8 Q: Mr. Hunt, if you could advise me as to whether
9 the following ground rules are achievable for
10 this deposition. Would you agree to -- to
11 please translate what I say to Mr. Garcia and
12 only what I say, and would you agree to
13 translate what Mr. Garcia says and only what
14 Mr. Garcia says?

15 A: Yes.

16 Q: Further, would it be agreeable for you to
17 translate everything that Mr. Garcia says and
18 not to offer any explanations or additional
19 information to Mr. Garcia without translating
20 that for the rest of us?

21 A: Yes.

22 Q: And lastly, if Mr. Garcia should have any
23 questions or misunderstandings in the course of
24 the deposition, would you remember to instruct
25 him to direct his questions to me and you would



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1 then properly interpret those questions rather
2 than directing his questions to you?

3 A: Yes.

4 Q: Okay. With that I think we could go ahead and
5 swear the witness and begin.

6 FRANCISCO JOSE GARCIA IBANEZ, being duly sworn,
7 deposes and testifies as follows:

8 MR. GARCIA - EXAMINATION BY MR. STANTON:

9 (Off the Record)

10 Q: Good morning, Mr. Garcia. I'm Barry Stanton,
11 and I'm representing the plaintiffs or
12 plaintiff in this action. This is a
13 deposition. Have you ever participated in a
14 deposition before?

15 A: Never.

16 Q: Do you understand that this is a court
17 proceeding and that you are under oath just as
18 if you were in court?

19 A: Perfectly.

20 Q: We are convened here without a judge present,
21 but we are supposed to behave as if a judge
22 were here. You understand?

23 A: Yes.

24 Q: If I should ask you any questions through the
25 interpreter that you don't understand, it's



1 body. And the object is for the rider to
2 communicate with the horse what he wants the
3 horse to do without it being obvious. It's
4 half sport, half art.

5 Q: Does it involve jumping hurdles as in a steeple
6 chase?

7 A: No.

8 Q: So it is not that type of competition?

9 A: No.

10 Q: More like dancing?

11 A: Well, one could call it that.

12 Q: So when you were at the Royal Academy training
13 horses, participating in exhibitions and
14 educating students those three activities were
15 all in the area of dressage?

16 A: Yes, of course.

17 Q: Were the horses that you worked with at the
18 Royal Academy confined to one type of horse?

19 A: No.

20 Q: Would you explain what a P.R.E is?

21 A: Pure Spanish breed.

22 Q: Is that a particular type of horse?

23 A: Of course.

24 Q: At the Royal Academy you worked with ^{other} those
25 types of horses as well?



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1 A: Yes.

2 Q: Could you give me a few examples of some of the
3 other types of horses?

4 A: Yes. In addition, the Royal Academy also works
5 with a type of horse which is a mix between
6 three different bloods. It's the Spanish blood
7 -- Arabic and English, and that's the type of
8 horse that's used for the Spanish cowboys.

9 Q: Is there one name for that horse which is a mix
10 of three?

11 A: Anglo-Hispano-Arabic.

12 Q: Makes sense. How were you compensated when you
13 worked for the Royal Academy?

14 A: As any type of worker who works for a
15 governmental company.

16 Q: And how is that?

17 A: Well, they pay by month.

18 Q: A fixed amount per month?

19 A: No.

20 Q: Is it based upon hours worked in the month?

21 A: Well, it's based on hours but the exhibitions
22 could be outside the regular hours worked or
23 they could be even abroad and paid in a
24 different way.

25 Q: How many years did you work for the Royal



1 was only for one day?

2 A: No.

3 Q: Two?

4 A: Possibly four or five.

5 Q: In a clinic such as that, how many classes
6 could you teach in a day?

7 A: It depends on the students who are present.

8 Q: More than three classes?

9 A: Yes, of course.

10 Q: Could you teach more than five in a day,
11 classes?

12 A: If there are five students, yes.

13 Q: When you came to South Carolina in December of
14 2010 to teach the clinic, was that as business
15 of the Royal school or strictly a private
16 arrangement?

17 A: It was private.

18 Q: Was your purpose in coming to teach the clinic
19 in December of 2010 solely to make money?

20 A: That's why one works.

21 Q: So is the answer yes?

22 A: Yes.

23 Q: When you came to South Carolina to teach the
24 clinic in December of 2010, how long did you
25 stay?



1 A: Like I said before, approximately five days,
2 around that.

3 Q: Where did you stay?

4 A: At the farm.

5 Q: At Coves Darden Farm?

6 A: Yes.

7 Q: Did you stay at the residence of Mr. Coves and
8 Ms. Darden or in another building?

9 A: No, in the house.

10 Q: On that trip in December of 2010, where did you
11 eat your meals?

12 A: At the farm with all the students, they
13 organized group meals.

14 Q: Was that for breakfast and for lunch and for
15 the evening meal as well?

16 A: Yes, of course.

17 Q: So do I understand you to testify that the
18 students who participated in the clinic had
19 their supper or evening meal there at the farm?

20 A: I don't remember.

21 Q: Did you provide any of your own food during
22 that visit?

23 A: I came with all expenses paid.

24 Q: And all of those expenses were paid by Mr.
25 Coves?



1 A: I don't know.

2 Q: Do you know anyone else who paid for the
3 expenses?

4 A: I don't know.

5 Q: During that visit in December of 2010 for the
6 four or five days that you stayed at the Coves
7 Darden residence, did you have any discussions
8 about the prospect of employment with Coves
9 Darden?

10 A: Yes.

11 Q: What were those discussions?

12 A: Well, they offered me employment here.

13 Q: Were you interested?

14 A: If we were to reach an agreement.

15 Q: What terms of employment did they offer?

16 A: Well, the terms of employment they offered me
17 were to provide me with a home and a car, 14
18 pay periods per year of 6,000 euros each
19 payment, health insurance for me and my family,
20 and request a work visa for me. And until that
21 visa was approved, that they would pay my
22 expenses coming back and forth from Spain.
23 Once my visa was issued and I was living here
24 working, any trip to Spain would be considered
25 vacations, and I would have to pay that..



1 Q: Did you have any discussion about the expected
2 length of the employment?

3 A: Yes. We talked about if we were able to reach
4 an agreement that I would take a two year
5 sabbatical. And then depending on how things
6 moved along, well, it could be extended or not.

7 Q: Were these terms appealing to you?

8 A: Yes. It wasn't just economically, also
9 changing countries, my children could learn
10 English.

11 Q: You liked the idea of coming to the United
12 States?

13 A: Yes.

14 Q: The exchange rate for euros to U.S. dollars
15 changes over time, correct?

16 A: Yes.

17 Q: Do you have a general idea of the approximate
18 relationship of a euro to a dollar today?

19 A: Yes.

20 Q: Today, March 26, 2013, about how many dollars
21 would it take to make a euro?

22 A: Let me just say it this way, one dollar
23 probably would be about --

24 MR. HUNT: Interpreter error.

25 A: Let me say it this way, one euro would be about



1 \$1.20 or .30, but let me reiterate again that
2 the payment was set in euros, not in dollars.

3 Q: At the time that you first had these
4 discussions in December of 2010, was that
5 relationship between the dollar and the euro
6 approximately the same?

7 A: I don't know.

8 Q: During the visit in December of 2010 for the
9 four or five days that you stayed at the
10 residence of Coves Darden Farm, did you have an
11 opportunity to look at the rest of the farm?

12 A: Yes.

13 Q: Did you get to see the horses?

14 A: Yes.

15 Q: Did you get to see the house that you would be
16 allowed to live in?

17 A: No.

18 Q: Why not?

19 A: It hadn't been built.

20 Q: Did you get to see the car that you were going
21 to be furnished?

22 A: No.

23 Q: Why not?

24 A: I wasn't working yet.

25 Q: Were you curious about what was being offered?



1 A: No. I didn't know.

2 Q: Okay. Did you get to see the stables?

3 A: Of course.

4 Q: On that December 2010 visit to the Coves Darden
5 Farm, did you accept the offer of employment?

6 A: No.

7 Q: Did you reject the offer?

8 A: No.

9 Q: What understanding did you have when you left?

10 A: Well, we left it -- the thing is, I needed more
11 time. I asked for more time to speak with my
12 family about it. I requested to be able to
13 come back with my wife so she could see the
14 area and know where we'd be living and just
15 have time to think about it.

16 Q: So you were interested?

17 A: Of course.

18 Q: Did you like the -- Mr. Coves and Ms. Darden?

19 A: Yes.

20 Q: Did you get along well?

21 A: Well, you know, in a week there wasn't much
22 time to have problems.

23 Q: Okay. When Mr. Coves and Ms. Darden offered
24 you the employment, did you have any discussion
25 about payments to you while you were waiting on



1 to do that. But if there is any consultation
2 after a break or during lunch, you're subject
3 to being asked about the nature of those
4 communications when the proceeding resumes.
5 However, it's all right to talk about the
6 weather and food and drink and those sorts of
7 things.

8 A: Okay. I understand.

9 Q: We were just discussing a visit you made to
10 South Carolina in December of 2010. When was
11 the next time that you met with or talked with
12 Mr. Coves or Ms. Darden?

13 A: Possibly January, late January, early February,
14 but no later than that.

15 Q: January or February of 2011 approximately?

16 A: Yes. If you want, I can look if I have the
17 dates.

18 Q: That would be fine.

19 A: January.

20 Q: And what happened in January? Was there a
21 telephone call or a visit?

22 A: No. I went to visit with my wife.

23 Q: And you had some communication with Mr. Coves
24 or Ms. Darden?

25 A: Of course. We came with my wife to talk more



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1 about the proposal.

2 Q: Oh, I understand. You went with your wife to
3 visit with Mr. Coves and Ms. Darden?

4 A: Yes.

5 Q: At their farm in South Carolina?

6 A: Yes.

7 Q: Did you bring anyone else with you?

8 A: No.

9 Q: Who paid the cost of your travel?

10 A: Mr. Coves.

11 Q: Did you stay in South Carolina for a while?

12 A: Four or five days..

13 Q: Did you stay at the Coves Darden Farm?

14 A: I think I remember it was a house they own
15 outside of the farm.

16 Q: And what was the purpose of the visit?

17 A: Like I said before, to decide the proposal.

18 Q: Did your wife like what she saw?

19 A: Yes.

20 Q: Did she get along well with Mr. Coves and Ms.
21 Darden?

22 A: In four or five days, there's not much time to
23 have problems.

24 Q: Where did you eat your meals when you were
25 visiting in January of 2011?



1 A: At Miguel's home.

2 Q: Did you prepare any food at the house you were
3 provided for that visit?

4 A: I don't know really. Maybe we helped out, but
5 those are things I don't remember.

6 Q: What I'm asking is whether you ate most of your
7 meals with the -- with Mr. Coves and Ms.
8 Darden.

9 A: Yes.

10 Q: How did the discussions progress regarding the
11 prospect of employment?

12 A: I don't understand.

13 Q: Did you continue to entertain the possibility
14 of working for them?

15 A: Yes.

16 Q: Did you discuss any differences between the two
17 of you over the terms that would be acceptable?

18 A: No. We continue with the same agreement.

19 Q: Did you accept their proposed terms on that
20 visit?

21 A: Yes.

22 Q: So at this time, you reached an agreement in
23 which you would work for an expected length of
24 two years, which might possibly be extended?

25 A: Yes.



1 Q: And the agreed rate of payment was to be 6,000
2 euros per month?

3 A: With two double payments.

4 Q: For a total of 14 pay periods per year?

5 A: Okay.

6 Q: When were the double payments to be made?

7 A: August and December.

8 Q: How did you decide upon the time for the double
9 payments?

10 A: That's a common practice in Spain. And since
11 Mr. Coves and I are both Spanish, we just
12 agreed to it that way.

13 Q: And the terms would also include that Coves
14 Darden would furnish a house for you to live
15 in?

16 A: Yes.

17 Q: And that house was not yet built?

18 A: No. Well, actually they gave me two options.
19 One would be to take a house in town, and the
20 other would be to take a house in a development
21 they were doing near the farm, so I could do
22 either one of those.

23 Q: And which one did you decide upon?

24 A: We chose to get one near the farm at the
25 development they were developing.



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1 Q: And the terms were also to include furnishing
2 you a car?

3 A: Yes.

4 Q: And the terms were also to include a health
5 insurance for you and your family?

6 A: Yes.

7 Q: And the terms were also to include applying for
8 a visa for you to come?

9 A: Yes.

10 Q: Under the terms that you agreed to, who was to
11 bear the expense of making the visa
12 application?

13 A: Well, the visa has to be requested by the
14 person here who's going to sponsor and pay the
15 government, so that would be done by them.

16 Q: All right. Including the legal expenses?

17 A: Of course.

18 Q: And the terms of employment also were that your
19 travel expenses from Spain to the United States
20 for you and your family including the airline
21 travel would be paid by Coves Darden?

22 A: Yes. We didn't have a contract until after we
23 had a visa, but that was the agreement.

24 Q: Right.

25 A: Yes, but the trips were part of that.



1 Q: Right. And they would also pay under the terms
2 you agreed to, they would also pay the travel
3 back and forth between Spain and the United
4 States before the visa was approved if
5 necessary?

6 A: Yes.

7 Q: And I believe you said that you had an
8 understanding that once the visa was obtained
9 and you came to the United States and began the
10 employment, after that, the travel would be at
11 your expense, correct?

12 A: Yes. I would have been -- I would be working,
13 so those would be considered personal
14 vacations.

15 Q: And one of the additional terms was that Coves
16 Darden would begin paying you while you were in
17 Spain awaiting the visa prior to coming to the
18 United States?

19 A: Of course.

20 Q: And on that last term, what was the expected
21 length of time that they would pay you in Spain
22 before you actually came to the United States
23 and began work?

24 A: That would be until the visa is issued, but I
25 would be working for them in Spain at the same



1 MR. HUNT: And the deponent added that the horse --
2 the interpreter will ask to --

3 A: A horse doesn't psychologically excuse poor
4 treatment. If a trainer -- for example, if you
5 were to have someone training a horse and there
6 was poorly trained, if you don't know when to
7 -- the limits of the horse psychologically and
8 physically, it's like abuse. It's like abusing
9 a person, and the horse is always going to
10 remember.

11 Q: I think I understand some. The horse does not
12 have the capacity to forgive an overstep. Once
13 an overstep is made, it leaves an impression on
14 the horse?

15 A: Yes.

16 Q: Okay. Could you give me an example of another
17 horse of Coves Darden that was not yet trained
18 to do very well?

19 A: Yes. Montanero, for example.

20 Q: And could you give me one example of the
21 shortcomings of Montanero?

22 A: Until I arrived there, no one wanted to mount
23 Montanero because he was very scared. He would
24 run away.

25 Q: Now, having visited Coves Darden Farm in



1 December of 2010 and having returned for a
2 visit in January of 2011, did you get a chance
3 to look at their horses before accepting the
4 employment?

5 A: Of course. Yeah, in fact that's why he offered
6 me the job because he saw me mounting his
7 horses.

8 Q: He saw you mounting his horses when you came
9 for the clinic in December of 2010?

10 A: I rode some horses that he wanted me to. It
11 was more of a friendly thing, but he wanted to
12 see me. It's normal, you know, if you're
13 offering someone a job, you'd like to see the
14 way they work.

15 Q: And that's what you meant by his having seen
16 you mounting his horses?

17 A: Yes.

18 Q: Thank you. Now, on the subject of what you
19 were expected to do for Coves Darden in
20 training horses and taking them to competitions
21 and perhaps also giving clinics, what hours
22 were expected of you?

23 A: Yes. When we were talking about the terms of
24 the contract or the agreement in December 2010,
25 of course one of my questions was what type of



1 schedule I would have, and he answered that I
2 was a professional, and he had total confidence
3 in me, and I would run things in my way.

4 Q: Then did you have any discussion about the
5 quantity of work or the approximate number of
6 hours in the day or week that you would work?

7 A: No real questions about that. We basically
8 were just understood that the schedule would be
9 based on the workers that were already working
10 in the stable.

11 Q: Back when you were working at the Royal Academy
12 in 2009 and 2010, did the Royal Academy itself
13 own or keep horses?

14 A: I imagine.

15 Q: You were there, did you see?

16 A: I don't understand.

17 Q: At the Royal Academy, were there horses kept on
18 the premises?

19 A: Their horses?

20 Q: No, any horses.

21 A: Man, on at a school like that for equestrian,
22 it's easier to find horses than cars.

23 Q: And they would -- those horses would stay on
24 the premises in stables there?

25 A: They're property of the school.



1 Q: Approximately how many horses did the school
2 have?

3 A: Around 130/140.

4 Q: About how many stalls were there?

5 A: Well, about the same amount.

6 Q: About the same amount as horses?

7 A: Yes.

8 Q: Was part of your job at the Royal Academy to
9 train the horses owned by the School?

10 A: Of course.

11 Q: So when you and Miguel Coves were discussing in
12 January of 2011 what your duties would be, did
13 you yourself have an idea of about how much
14 work would be involved in training 200 horses?

15 A: Let me just clarify that in there of those 200
16 there are mothers and then there are young that
17 aren't trainable.

18 Q: Not trainable at that point in their life?

19 A: Of course.

20 Q: Did you expect it to require at least as much
21 work as you did at the Royal Academy?

22 A: No, more.

23 Q: Okay. After you accepted the proposal of
24 employment in January of 2011, what did you do
25 next to pursue that -- the consummation of that



1 person.

2 Q: Did he ever tell you anything more than what
3 you have recounted today?

4 A: No.

5 Q: Did you ever ask anyone else about the nature
6 of the trial or the nature of the charges?

7 A: I don't get involved in other people's
8 problems.

9 Q: So the answer is no?

10 A: Yes.

11 Q: The answer is no, you never asked anyone else
12 about the nature of the trial or the nature of
13 the charges?

14 A: (Shakes head negatively.)

15 Q: My poor understanding of Spanish is that we
16 have much more difficulty with double negatives
17 in English than in Spanish. Did you ever hear
18 anything from anyone else about the nature of
19 the trial or the nature of the charges?

20 A: No, just what I've told you before. I just
21 knew that he had to leave the farm for reasons
22 dealing with the justice department. And they
23 seemed like good people to me, so I had
24 confidence in them.

25 Q: So when did you next actually come to South



1 Carolina to stay at Coves Darden Farms?

2 A: Well, I came in April.

3 Q: And you stayed until when, June?

4 A: I stayed until we had the first incident. And
5 then the next day -- I believe it was the next
6 day, yes, I left.

7 Q: And was that in or around June?

8 A: Yes, toward the end of June.

9 Q: Did you already have your tickets for the day
10 that you left?

11 A: Yes.

12 Q: So you stayed until an incident occurred and
13 left on the next day, but did not have to
14 change your tickets?

15 A: I don't understand the question.

16 Q: When you arrived in April, did you already have
17 tickets booked for your return in June?

18 A: Yes.

19 Q: And you state to me that you stayed until there
20 was an incident, and then you left the next
21 day, correct?

22 A: Yes. Coincidentally, one or two days before I
23 was scheduled to go was an incident. It was
24 pretty grave, where he threatened my life with
25 a weapon in front of my family and other



1 Q: And you state that before that time, you had
2 seen him have problems with other people,
3 correct?

4 A: Yes.

5 Q: So did you see these other problems with --
6 these problems with other people during your
7 first visit in December of 2010?

8 A: No.

9 Q: Did you see these problems with other people in
10 your second visit in January of 2011?

11 A: I never saw problems that he had with other
12 people in my short visits of five/six days. I
13 just noticed it when we were here for longer
14 periods of time.

15 Q: Was there any period that you were there for a
16 longer period of time other than the period
17 from April of 2011 to June of 2011?

18 A: Yes.

19 Q: When were those?

20 A: I understand long period, two or three months,
21 not just a week.

22 Q: Before you came to the United States with a
23 visa, were there any other visits you made to
24 Coves Darden Farm other than the three?

25 A: Yes.



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1 Q: When were those?

2 A: At the end of summer, when I finished --

3 MR. HUNT: The interpreter misunderstood a word
4 there.

5 A: When I finished my job with them in Spain at
6 the end of the summer. In September, I came
7 back again to work for him. And at that time,
8 I was by myself without family.

9 Q: The end of summer 2011, correct?

10 A: September more or less. Possibly the end of
11 September.

12 Q: So there's one other visit? I'm sorry. I was
13 maybe not understanding the interpreter's
14 interpretation.

15 A: No problem. I'll clarify. I came for a clinic
16 in December and January 11th with my wife.

17 Q: Uh-huh (affirmative response).

18 A: We came the early April, and we left after the
19 incident in June. I worked for him in Spain,
20 July, August, September. And at the end of
21 September, I come back here, and I'm here until
22 around Christmas. In January, I get the visa.
23 In February, I'm here working again with my
24 wife and two children.

25 Q: Uh-huh (affirmative response).



Affidavit of Liberatore, dated April 23, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC,)
)
Plaintiff,)

v.)

AFFIDAVIT OF LIBERATORE

Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)
)
Defendants.)

Comes before me, Michael Joseph Liberatore, who, being duly sworn, deposes and says:

1. I am familiar with the matters in this affidavit.
2. In and before January of 2012, Coves Darden, LLC, through Miguel Coves and Dorothea Darden, made arrangements to sponsor Ibañez' travel to the United States from Spain, and entry into the United States on a nonimmigrant visa issued by the United States.
3. Coves Darden entered into an agreement to employ Ibañez act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden.
4. Under the terms of the agreement, Coves Darden agreed to pay Ibañez \$6000 per month and pay for his transportation to work. Ibañez agreed to work completely and exclusively for Coves Darden during the term of the agreement.
5. Coves Darden arranged for and paid for the application for and processing of, the nonimmigrant petition allowing Ibañez to enter the United States. Coves Darden paid the legal

expenses pertaining to this process, and paid for Ibañez' travel expenses from Spain to the United States.

6. To the best of my knowledge, Coves Darden furnished Ibañez and his family a home to live in near the stables where the horses were to be trained and, purchased and furnished for Ibañez' use while in the United States, an automobile. It is my understanding that Coves Darden paid Ibañez \$8000 per month.

7. The basis for the nonimmigrant visa, known as an "O-1 visa," was Ibañez' peculiar, extraordinary, and unique ability to train the particular breed of horses in question, generally known as "Spanish Horses," or "P.R.E." (Pura Raza Espanola). Additionally, Coves Darden had a particular need for this level of expertise, because of the size of Coves Darden's operation, the particular breed in question, and the level of breeding and competition to which Coves Darden aspired.

8. The O-1 visa itself, incorporated into the contract that was drafted, required that Ibañez work exclusively for Coves Darden as an equestrian arts trainer and instructor.

9. Ibañez entered the United States and commenced work for Coves Darden in January of 2012.

10. Coves Darden hired me to painstakingly assemble an extraordinary visa application for Ibañez. They had me prepare the written terms of employment to submit in support of the visa application subject to the final review of South Carolina legal counsel. It was to be effective upon the visa being granted and Ibañez entering the United States. To the best of my knowledge, Coves Darden paid Ibañez a stipend while he was in Spain waiting on the visa. They had me go over the employment agreement with Ibañez on the phone, prepare him on the

phone for the visa interview in Spain, and explain the limitations of the visa and the employment agreement to him. I discussed point by point each part of the employment agreement with Ibañez, as part of the interview prep. Immigration provides the Embassy with a complete copy of the immigration case file, including the employment agreement. Mr. Ibañez received an O-1 visa which, by its terms, allowed Ibañez only to work for Coves Darden. Coves Darden paid Ibañez' travel expenses from Spain to the United States.

11. The visa did not allow Ibañez to work for other people while he was working for Coves Darden. The visa obtained for Ibanez allowed him only to work for Coves Darden. The O-1 visa program requires that the nonimmigrant worker perform services only for the permitted employer and not work in any other way – even for himself as an entrepreneur. When the employment ends, the visa holder must leave the country, or apply for a change of status BEFORE THE EMPLOYMENT TERMINATES. One of the concerns of the United States immigration and labor laws regarding temporary visas based on work positions is that the public impact of the nonimmigrant working gainfully be minimized by restricting when the nonimmigrant can work, what kind of work he is allowed to do, and how much he must be paid.

12. Accordingly, the immigration laws are very specific that the alien work gainfully and stay in the U.S. only within the parameters of the visa he receives. He cannot simply rely on a visa to get into the country and then set up his own shop, change jobs or type of work, or take on additional jobs.

13. When it became clear that Ibañez might remain in the United States after leaving Coves Darden and had entered some other employment or self-employment situation, I advised

USCIS that the O-1 employment between Coves Darden and Ibañez had ended, and requested immediate cancellation of Ibañez' O-1 nonimmigrant status.

14 Under immigration law, Ibañez was prohibited from working for anyone other than petitioner company Coves Darden. There were no exceptions to the rule.

15. Ibañez' status did not allow him to work for another employer after hours, during the time he was employed by Coves Darden.

16. The O-1 visa program does not allow the nonimmigrant to make side money from another employer or on his own while employed by the petitioning employer. The nonimmigrant is not allowed to freelance.

Michael J. Liberatore

Michael J. Liberatore

SWORN TO AND ACKNOWLEDGED TO ME

this 23 day of April, 2013.

Laura E. Kerek (L.S.)

Notary Public of the State of Florida

My Commission Expires:



LAURA E. KERK
MY COMMISSION # DD 968420
EXPIRES: March 24, 2014
Bonded thru Budget Notary Services

Stanton Law Offices, P.A., 1728 Main Street, P.O. Box 245, Columbia, SC 29202 803-929-1484

Affidavit of Coves, dated April 24, 2013 (with certificate of mailing)

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC,)
)
Plaintiff,)

v.)

AFFIDAVIT OF COVES

Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)
)
Defendants.)

Comes before me, Miguel Coves, who, being duly sworn, deposes and says:

1. I am familiar with the matters in this affidavit, and Spanish is my primary language, but I have some familiarity with English and also have had this affidavit read to me in Spanish.

2. In and before January of 2012, we made arrangements to sponsor Ibañez's travel to the United States from Spain, and entry into the United States on a nonimmigrant visa issued by the United States, so that he could work exclusively for us. It involved expenditure of much time and money on our part, risk by both parties as to whether and on what terms the visa would be granted, development of a trusting personal relationship with Ibañez, and a decision to expressly repose our trust and confidence in him. He invited and accepted this trust.

3. We first visited with him in Spain in 2010, and then paid his travel to our home in Springfield, S.C. for visits to explore the matter. These were not just visits of a day or two. He ended up agreeing to be the godfather of our child, and referred to me on almost familial terms. At one later point, he and I even ripped our shirts open to bare our chests in a "Flamenco" ritual

to show "co-fathership." In some correspondence, he addressed me as "Compare," meaning roughly, co-father.

4. Before he agreed with us on the terms of the relationship which was to follow, he got a good look at our horses and said he thought well of them.

5. In the initial visits, Ibanez' affiliation with us was publicized, and at one or more events at our stable, I believe Ibanez was introduced to Derr or persons affiliated with her, among others invited.

6. We entered into an agreement to employ Ibañez to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden Farm. We both acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years.

7. Under the terms of the agreement, we agreed to pay Ibañez 6000 Euros per month (a little less than \$8,000 U.S.), furnish him a house, and pay for his transportation to work. Ibañez agreed to work completely and exclusively for us during the term of the agreement. We also agreed to pay for his individual travel to the U.S. on the first entry under the visa.

8. Ibanez was quick to commit us to the matter, so much so, that he commenced his leave of absence from his former employer in Spain (The Royal School) before we could apply for a visa for him. We had to explain to him that he could not come to the U.S. to commence work until we obtained the visa.

9. We then agreed to begin paying Ibañez a stipend of the same amount in Spain

before he commenced work in the United States, while he awaited arrangements for the visa. He often communicated when his money was not available on the very first of the month.

10. In Spain, we acquainted him with our primary source of horses in Spain, involved him at the site in Spain with our friend and business contact there, and asked his assistance in riding and selecting horses. Our friend and business contact provided Ibanez and his family various accommodations.

11. We paid Ibanez' travel again to the United States for several months in the time before the visa was granted, during which time we allowed him to become familiar with the horses and farm in our absence, and asked him to live in our house and look after things for us while we were gone. We continued to host him and his family and visited with him further upon our return.

12. We arranged for and paid for the application for and processing of, the nonimmigrant petition allowing Ibañez to enter the United States. He brought his whole family. We paid the legal expenses pertaining to this process, and paid for Ibañez's travel expenses from Spain to the United States.

13. In the course of applying for the visa, some common aspects of the agreement were reduced to writing and submitted to the immigration authorities as the terms which would govern the employment if the visa was granted.

14. We furnished Ibañez and his family a home to live in near the stables where the horses were to be trained, and purchased and furnished for Ibañez's use while in the United States, an automobile. We paid Ibañez \$8000 per month. We also furnished him with a family dog.

15. The basis for the nonimmigrant visa, known as an "O-1 visa," was Ibañez's peculiar, extraordinary, and unique ability to train the particular breed of horses in question, generally known as "Spanish Horses," or "P.R.E." (Pura Raza Espanola). Additionally, we had a particular need for this level of expertise, because of the size of our operation, the particular breed in question, and the level of breeding and competition to which we aspired. Virtually all our horses are P.R.E., and they have won many awards. We have as many as 85-90 at a time.

16. The O-1 visa itself, incorporated into the contract, required that Ibañez work exclusively for us as a trainer. We were very clear that regardless of the visa, this was an exclusive relationship and that it would take time and a moral commitment for us to get the financial benefit out of the extraordinary effort and expenditures we were investing in it.

17. Ibañez entered the United States on the visa and commenced work for us in February of 2012.

18. Before he would engage in a competition, Ibanez would work with a horse for weeks. Although for the first competition Ibañez entered, the training of the horses and other preparation began over a month earlier, Ibañez did not win and explained that he had studied the wrong test or set of rules or instructions for the competition. Derr, who also owns a small number of the same breed of horses was present in the same competition, and did better than Ibañez.

19. By early June of 2012, preparations had long been underway for another competition in Georgia. The competition was on a Saturday, and entrance fees, lodging for people, and lodging for horses had to be arranged and committed in advance. Departure from

Aiken, with the horses, was scheduled for early the Friday before. Ibanez was the rider.

20. Despite having assured us in advance that he foresaw all of the logistics and needs for the competition, Ibañez did not appear for work on the Friday before the competition. Later in the day, the plans had to be cancelled.

21. When there was no appearance by, or word from, Ibañez on Saturday, we discovered his residence abandoned, his car left at the residence, and a notice that he had ended his employment. The notice was never sent to us he did not give any advance warning. He certainly did not give notice like that required under the contract.

22. We had also scheduled official entry and participation in a competition in Georgia for approximately one week later. Ibanez was the rider. This competition also required advance commitments of entry fees, lodging for people, and lodging for horses. Ibañez knew this. This competition too, had to be cancelled.

23. Both competitions were necessary in order to advance to further levels of competition. Additionally, in the competitions themselves, success would enhance the value and reputation of the horses. In addition, in the first competition, prize money was available for certain levels of success, and in this instance a success would have been very probable.

24. For many forms of competition, commitment to enter the competition, along with a commitment of entry fees, must be made two or more weeks in advance of the competition. For many forms of competition, a month or more of the rider training with the horse is required. Shortly after receiving Ibañez's notice that he was breaking his employment agreement with us, we discovered that Ibañez had been registered to ride and show a horse for Derr in a shortly upcoming competition.

25. It appears, now, that Ibañez had signed up with Derr in mid-June, 2012, to participate on her horse in Georgia in a show in July. It also appears that he actually participated in mid-June, 2012 on Derr's horse in a competition in North Carolina. Derr has not disclosed when arrangements were made for the mid-June entry, or when Ibañez began training with the horse. Generally, there is an advance cut-off to register for such events. In fact, it is my understanding that Derr claims to maintain no records of her applications to enter shows, despite running a well-advertised stables operation as a business.

26. As an employee of ours, and particularly as a special employee of ours under a specialized agreement, and as an employee in which we specifically reposed trust and confidence (as evidenced by our expenditures for, and accommodations of, Ibañez, and the responsibilities and "branding" we confided to Ibanez' charge), Ibañez, I believe, owed high duties of loyalty, honesty and information to us.

27. Ibañez breached his duty of loyalty – to work for us, not for himself or for others.

28. Ibañez breached his duty of honesty – to be truthful and not to sit silent when he had a duty to disclose.

29. Ibañez breached his duty of information – to give us timely information coming into his hands having a material bearing on our business and the matters under his charge.

30. In hindsight, it appears Ibañez began feathering his own nest right away, and planning his deceptions, rather than trying to advance the interests of our farm. It appears he escalated his desire to work against our interests, to the end of advancing his own and the interests of others, after he received: accommodations, introductions and payments from us in Spain; the benefit of several U.S. vacations largely at our expense; introductions and publicity in

the U.S. and particularly in the Aiken area; the fruits of our efforts to assemble the documentation for his unusual if not extraordinary visa; the benefits of our expenditure of legal fees on Miami immigration counsel; a visa to the U.S. allowing work in his field; acclimatization in the U.S. in a house we furnished; and a comfortably supported opportunity to obtain a social security number, driving credentials, school enrollment for his daughter, banking facilities, etc.

31. As a result of these breaches of duty, we were damaged, and never received the material part of our bargain – an honest, loyal, employee.

32. I believe all sums paid to or for the benefit of Ibañez should be disgorged back to us.

33. Ibañez breached his contract with us. He breached the written agreement which he knew existed, and he breached the underlying agreement we had clearly reached before the contract was even written up.

34. The breach caused us actual damages, including special damages.

35. The actual damages include all money spent making arrangements for Ibañez's visa, paying for Ibañez's travel, furnishing Ibañez a car and home, and dog, and all sums paid to Ibañez as salary or otherwise. The damages also include money lost on entry fees, lodging for people, and lodging for horses, for competitions which were missed, as well as damages for the lost opportunity to compete in the competitions.

36. Ibañez's breach of contract was accompanied by one or more separate but related fraudulent acts. Namely, Ibañez, before leaving notice of termination of his employment and outright breach of the contract, had secretly been breaching the contract by secretly working with Derr's horses. Upon information and belief, Ibañez intentionally compromised his own

performance and duties to advance our interests in order to develop his own contacts and to promote the performance of Derr, all at our expense. Additionally, when asked about the upcoming first competition in Georgia, Ibañez falsely indicated that he was prepared and ready to go forward, thus intentionally inducing us to go forward with our plans, causing greater damage.

37. It appears, now, that in order to induce Ibañez to breach his duties to us, Derr offered as an incentive, an ability of Ibañez to carry on his own side business or other endeavors in which he could earn money directly from others.

38. Ibañez's breach of contract was accompanied by fraudulent intent.

39. I believe that, in addition to actual damages, Ibañez should be assessed with punitive measures, such as punitive damages.

40. I believe Derr intentionally interfered with our contract and relationship with Ibañez.

41. I believe Derr did so secretly, while knowing Ibañez's expenses were being paid for by us.

42. I believe Derr did so with knowledge of the restrictions in Ibañez's contract and visa. If they did not know what he was doing was wrong, they would not have been doing it clandestinely, without paying Coves Darden Farm, he would not have lied about it on June 7, 2012, and they would not now fail to tell the truth about it and would not be contradicting each other's story.

43. I believe Derr knowingly accepted Ibañez's help in "ditching" or "throwing" his performance in the first competition in which he competed against Derr.

44. I believe Derr's intentional interference with Ibañez's contract with us was without justification, and was willful, wanton, and deliberate, as a knowing violation of our rights.

45. Derr's interference with the contract caused the damages suffered by us as stated above.

46. I believe that, in addition to such damages, Derr should be assessed with punitive measures, such as punitive damages.

47. Upon employing Ibañez, Derr misleadingly advertised his purpose for being in the United States and working for her as his being "on an extended teaching sabbatical," "based at Half Moon Stables." This contradicted promotions we had made, publicizing his identification with our stables. We underwrote the expense of getting him to the United States. He came to Coves Darden Farm as his destination. He came to train our horses and eventually teach some of our clients. We paid for it. He was not out for an open teaching sabbatical. And his destination and sponsor certainly was not Half Moon Stables. Her advertisement is misleading and has a tendency to mislead.

48. Derr's actions in inducing Ibanez' breaches, and misleadingly advertising Ibanez' status and initial sponsorship in the U.S., and apparent facilitation of violation of the U.S. immigration and labor laws constitute unfair methods of competition and unfair or deceptive acts or practices.

49. Such actions are not fair competition, are additionally likely to lead to disclosures of private information about the operation of our farm and aspects of our horses, and directly undermine a fair and bargained-for agreement for exclusivity. The actions appear to have been

committed in a secret, deceptive, and patently dishonest manner. During the course of this lawsuit, Ibañez has made disparaging remarks about our horses, and Derr has relayed his comments as well. We presently can imagine what other false disparagement and rumor mongering has occurred.

50. Our level of commitment to the endeavor of breeding and showing and competing with P.R.E. horses is consistent with an aspiration to proceed to high levels of international prominence, including competition in the Olympics. We have been set back by the activities of Derr.

51. We expressly reposed trust and confidence in Defendant Francisco Jose Garcia Ibañez. We entered into a special and extraordinary relationship with him. Under this relationship, we had numerous discussions with Ibañez concerning the prospects of his coming to the United States from Spain for two or more years. Both parties contemplated that Ibañez would undertake the development of the dressage capabilities of Coves Darden's specialized breed of horses and work exclusively for Coves Darden.

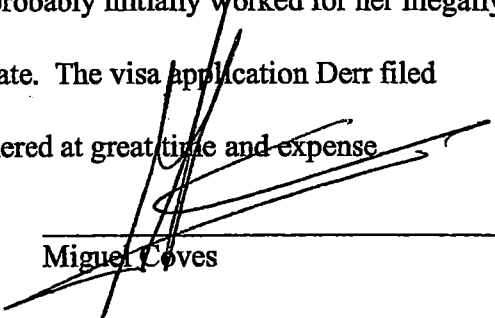
52. We had him come stay at our farm, including staying in our home, for several visits. We hired a lawyer to painstakingly assemble an extraordinary visa application for him. We had a lawyer write up some of the common written terms of employment to submit in support of the visa application. We paid Ibañez a stipend while he was in Spain waiting on the visa. We had a lawyer go over the employment agreement with him on the phone, prepare him on the phone for the visa interview in Spain, and explain the limitations of the visa to him.

53. We obtained a visa which, by its terms, allowed him only to work for us. We paid his travel expenses. We trusted our 85 to 90 horses to him. We trusted our reputation and

"brand" to him. We advertised and promoted the fact of his association with us and our farm. We paid him \$8000 per month (annualized to \$96,000 per year), provided him a house, and provided him a car, and a dog.

54. On June 8, 2012, immediately before a horse show in which he was enrolled to ride for us, Ibañez abandoned his duties, left, and quit without notice. He had told us just before, that all the plans were in order for the competition and had made other forward-looking comments and promises. He was found to be immediately in the employ of Half Moon Stables, owned and run by Derr. Namely, Derr was secretly applying for a change in the visa for him on June 1, shortly after this time he mentioned making up some hours with us in subsequent weeks, he told us everything was fine for the Georgia show on June 7, he disappeared and abandoned us on June 8 when we were due to depart for the show in Georgia, and about thirteen days later, by around June 21, his was on horseback for Derr in a competition in North Carolina.

55. I have seen the visa application Derr eventually filed to cover Ibañez's employment at Half Moon. It is my impression that he probably initially worked for her illegally and that his present arrangement still may not be legitimate. The visa application Derr filed appears to have made extensive use of materials we gathered at great time and expense


Miguel Coves

SWORN TO AND ACKNOWLEDGED TO ME

this 24 day of April, 2013.

Gammie B. Jones (L.S.)

Notary Public of South Carolina

My Commission Expires: 12/13/21

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 12-CP-02-01772

Coves Darden, LLC,)

Plaintiff,)

v.)

Francisco Jose Garcia Ibañez,)
Dori Derr,)
and Half Moon Stables, LLC,)

Defendants.)

CERTIFICATE OF SERVICE

The undersigned certifies that the undersigned served on this date a copy of the foregoing
on the following, by causing a copy to be mailed, by first class mail, with proper postage affixed,
and addressed as follows, to the following addressee(s):

Thomas R. Young, Jr., Esquire
Law Offices of Tom Young, Jr., PC
P.O. Box 651
Aiken SC 29802

*Having e-mailed an unsigned copy
Thurs., 4/25/13.*

M. Baron Stanton
M. Baron Stanton

Date: 4/29/13

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