

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellant Case No. 2018-002114
Civil Action No. 2018-CP-23-01639

5Star life Insurance Co. Appellant,

v.

Peek Performance, Inc. Respondent.

RECORD ON APPEAL

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SC Court of Appeals

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2301639

5 Star Life Insurance Company
PLAINTIFF(S)

Peek Performance Inc
DEFENDANT(S)

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
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **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:

This matter came before the Court on June 27, 2018, on Defendant's Motion to Consolidate the Case with Case No. 2017-CP-23-03269. The Court granted Defendant's motion and ordered that the cases be consolidated with each case retaining the respective case numbers while proceeding jointly to trial.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/28/2018 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc
Case Number: 2018CP2301639
Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2018-06-28 10:23:44 page 3 of 3

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 06-28-2018 01:48:12 PM.

Amanda Scott - Notification transmitted on 06-28-2018 01:48:12 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 06-28-2018 01:48:06 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Order/Electronic Form 4 Order/Electronic Form 4

Filed by or on behalf of: Letitia H. Verdin

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

**The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:**

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

LEGAL DISCUSSION

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

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

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

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

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

SCRCP 55 (b)(2).

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

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

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

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

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

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

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

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

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

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

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

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

In *Simon v. Flowers*,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

SO ORDERED, this _____ day of _____, 2018.

G. Thomas Cooper,
Circuit Judge presiding



Greenville Common Pleas

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

Case Number: 2018CP2301639

Type: Order/Default

So Ordered

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

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2018-CP-23-01639

5 Star Life Insurance Co.,

Plaintiff

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION,
RELIEF FROM ENTRY OF DEFAULT,
AND RELIEF FROM DEFAULT
JUDGMENT**

vs.

Peek Performance, Inc.,

Defendant.

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

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

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

AND IT IS SO ORDERED.

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

October 28, 2018



Greenville Common Pleas

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

Case Number: 2018CP2301639

Type: Order/Other

So Ordered

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

Electronically signed on 2018-10-28 16:21:41 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Peek Performance, Inc., and D. Clayton Peek,

Plaintiffs,

v.

Jeff Wright, d/b/a Agent Sales Group, Joe
Caldwell, Nathan Wells, Jeff Magg, and
Consolidated Assurance, LLC,

Defendants.

5Star Life Insurance Co.,

Plaintiff,

v.

Peek Performance, Inc.,

Defendant.

IN THE CIRCUIT COURT

2017-CP-23-03269

2018-CP-23-01639

**ORDER FOR CASE
ASSIGNMENT TO THE
BUSINESS COURT**

It is hereby ordered that assignment to the Business Court for Greenville County is **granted**. It is further ordered that exclusive jurisdiction over this case be assigned to the **Honorable J. Derham Cole** to hear and handle all pretrial motions and other matters pertaining to this case.

And it is SO ORDERED.

Charleston, South Carolina



Greenville Common Pleas

Case Caption: Peek Performance Inc , plaintiff, et al vs. Jeff Wright , defendant, et al
Case Number: 2017CP2303269
Type: Order/Case Assignment to Business Court Approved

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2017-CP-23-00 _____
	)	
Peek Performance, Inc., and D. Clayton Peek,	)	
	)	
Plaintiffs,	)	SUMMONS
	)	JURY TRIAL DEMANDED
v.	)	
	)	
Jeff Wright d/b/a Agent Sales Group, Joe Caldwell,	)	
Nathan Wells, Jeff Magg, and Consolidated	)	
Assurance, LLC,	)	
Defendants.	)	

To the Defendants:

You are hereby summoned and required to serve upon the attorney at the address below an Answer to the attached Complaint within 30 days of the date of service hereof. If you fail to do so, judgment by default will be entered against you for the relief demanded in the Complaint.

THE CARPENTER LAW FIRM, P.C.

S/ James G. Carpenter
James G. Carpenter, SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

CASE NO.: 2017-CP-23-00 _____

Peek Performance, Inc., and D. Clayton Peek,

Plaintiffs,

v.

Jeff Wright d/b/a Agent Sales Group, Joe Caldwell,

Nathan Wells, Jeff Magg, and Consolidated

Assurance, LLC,

Defendants.

**COMPLAINT
JURY TRIAL DEMANDED**

Plaintiffs, complaining of the Defendants alleges as follows:

1. Plaintiff Peek Performance, Inc. ("Peek Performance") is a South Carolina corporation headquartered in Greenville County, South Carolina.

2. Plaintiff D. Clayton Peek ("Clay Peek") is the owner and principal of Peek Performance, and is licensed to sell insurance in South Carolina, North Carolina, Georgia and other states.

3. Jeff Wright, d/b/a Agent Sales Group ("Wright") is a citizen of the State of Georgia who entered into a contract with Plaintiffs to be performed, in part, in Greenville County, South Carolina.

4. Defendants Joe Caldwell, Nathan Wells, and Jeff Magg are the principals of Defendant Consolidated Assurance, LLC, a South Carolina limited liability company headquartered in Greenville County, South Carolina (collectively "Consolidated").

5. This matter involves the breach of a contract which was to be, and which was, partly performed in Greenville County, South Carolina. Therefore, this Court has jurisdiction over this matter, and venue is proper in this Court.

6. At all relevant times, Jeff Wright has served as the Regional Director ("RD") for Armed Forces Benefits Association ("AFBA"), a subsidiary of 5Star Life Insurance Company of Alexandria, Virginia ("5Star") (collectively, "the Company").

7. Consolidated and its principals had previously done business with the Plaintiffs, when they, with review and approval from AFBA and Wright, sought out Plaintiffs for help in taking their marketing program to a national level. Consolidated was previously within Wright's Field Marketing Organization. Consolidated did not have the expertise and skills to convert its plans into a national recruiting and marketing endeavor, but approached the Plaintiffs, who did. Wright and AFBA approved Plaintiffs to be inserted as a managing agency above Consolidated after a visit and/or vetting process and provided a contract to validate this position.

8. Plaintiffs agreed to engage in this effort with Consolidated, Wright and AFBA. Plaintiffs agreed to take an override or commission of only five points in exchange for teaching Consolidated and to give Consolidated the benefit of Plaintiffs' oversight, size, and market experience, and its expertise in converting Consolidated's content into a national marketing and recruiting endeavor.

9. Plaintiffs and Consolidated agreed that Plaintiffs would help develop Consolidated's recruiting and marketing plan, for which Plaintiffs would receive a 5% commission on any AFBA policies that Consolidated sold except those policies sold personally by the three principals of Consolidated as noted in paragraph 20.

10. Plaintiffs also subsequently negotiated production bonuses for Plaintiffs and CA with AFBA.

11. On or about May 2, 2013, Plaintiffs entered into an agency contract with 5Star, by which Plaintiffs became an agent and marketing organization of 5Star and AFBA under the hierarchy of Jeff Wright and as the exclusive “upline hierarchy” for all “Consolidated” agents except the principals. Plaintiffs’ agents were entitled to sell life insurance for 5Star and AFBA, and Plaintiffs were entitled to receive a portion of the commissions on those sales from 5Star and AFBA.

12. As a marketing organization and pursuant to the contract, Plaintiffs and Consolidated could recommend “producers” to the company for appointment to sell the “covered products.”

13. Plaintiffs agreed to teach Consolidated how to recruit and train a team of agents nationwide. This consisted of the first few rounds of initial recruiting (including outreach and screening of prospective agents), live online webinar meetings with the prospective agents, initial online “First Responder” training classes that Plaintiffs and CA created jointly, assisting with the coordination of the initial live training events in Greenville, SC and Atlanta, GA and the administrative back office / contracting tasks were initially performed by the Plaintiffs. The objective of the training provided by the Plaintiffs was to train CA so that they could continue and expand this market on their own in the future. Over time Consolidated assumed these tasks as planned.

14. The ultimate goal was to have highly effective sales producers who would properly represent the “covered products,” comply with applicable law, and follow Company rules and procedures.

15. Plaintiffs worked with Consolidated to create training programs, opportunity shows, webinars, e-blasts, telephone outreaches, etc.

16. Plaintiffs were entitled to receive commissions on sales made by persons under Plaintiffs in the Plaintiffs' sales hierarchy for 5Star and AFBA.

17. If the Company required chargebacks from lapsed sales made by the producers under the Plaintiffs in the Plaintiffs' hierarchy, Plaintiffs were also responsible financially for those chargebacks for persons under Plaintiffs' hierarchy, including all agents appointed under Consolidated.

18. Consolidated is an insurance marketing agency that had a plan to market an insurance product sold by AFBA. That product was especially designed for First Responders such as police officers, fire fighters and EMS providers.

19. As further consideration for this agreement and commission, Plaintiffs agreed not to terminate Consolidated without cause, not to transfer agents, and not to make changes to commissions. Consolidated indicated that they wanted the same reciprocal arrangement that Wright and the Plaintiffs agreed to in paragraphs 21, 22, and 23 below.

20. Plaintiffs required that the principals of Consolidated would remain outside the Plaintiffs' hierarchy, but all agents under them and/or recruited by them and or Plaintiffs from that time forward would be placed under Plaintiffs' hierarchy. Accordingly, Wright, the company, AFBA, moved all agents, existing and new, to the Plaintiffs' hierarchy.

21. Plaintiffs and Wright entered into a written agreement via email that in consideration of Plaintiffs' helping Consolidated develop their marketing plan, Plaintiffs would receive a 5% commission on any AFBA policies that Consolidated sold.

22. In addition Wright promised in writing in an email:

Also, to confirm what we discussed, no one in my organization including myself will ever market to, or contact any of your downline agents **nor will we modify or change hierarchies or commissions unless under your direction** or giving you notice of comp changes that may come from the company itself (emphasis added).

23. Wright also agreed that he would not request termination of the contract “without cause.” By this agreement, of which Consolidated and AFBA were aware, Plaintiffs were placed in Wright’s Regional Director hierarchy above all of Consolidated’s agents or producers.

24. Consolidated also received a commission on the sales made by the producers under them in the hierarchy at a rate of 115% of the annual premium. Plaintiffs received 5% of the premium. Upon information and belief, Wright received approximately 20-30% of the premium as commission override.

25. Upon information and belief, at the request of Consolidated, Wright and AFBA, all Consolidated agents or producers (except the three principals) were placed in Plaintiffs’ hierarchy or downline. The Plaintiffs had no capacity to cause this to happen; it required the action of Consolidated, Wright and AFBA.

26. Plaintiffs immediately engaged in the active recruiting/training of prospective agents and in teaching Consolidated some of these methodologies.

27. Plaintiffs generously included agents from their own proprietary/contracted list as the initial resource of prospective agents for this program.

28. Together, Plaintiffs and Consolidated began recruiting agents to sell the insurance offered by the Company in many states across the country. As a result, Consolidated’s sales quickly grew, so that Plaintiffs’ 5% commission arising from the contract with Consolidated and Wright was approximately \$300,000.00 - \$400,000 per year.

29. Wright promised Plaintiffs that the agents recruited under this program would belong to Plaintiffs unless transferred/released by written consent of the Plaintiffs.

30. The Company contract does not specifically reserve any power for the Company to remove an agent from the Plaintiffs. The Company told Plaintiffs verbally that the RD traditionally has been granted this authority, but this provision does not appear in the contract provided to Plaintiffs. Further, the RD, Wright, yielded this alleged privilege to the Plaintiffs in order to consummate the agreement with the Plaintiffs.

31. The Plaintiffs taught Consolidated to negotiate with the Company for production bonuses, and the Plaintiffs negotiated and acquired bonuses from the Company based on successful recruiting and production of applications for the insurance that was beneficial to Consolidated, Wright, the Company, and the Plaintiffs.

32. High-level officers from the Company came to Greenville, SC and to Atlanta, GA to vet the Plaintiffs, approve the planning/program, and attend the training launches in which they observed the Plaintiffs presenting in classes for new agents.

33. The Plaintiffs taught Consolidated to negotiate with the Company for incentives and the Plaintiffs negotiated and acquired incentives from the Company for training seminars such as interest-free loans that could be forgiven if enough agents were recruited and enough applications were remitted.

34. When the Plaintiffs and Consolidated hosted agents or producers who attended live training, they signed a form called "Peek Performance Inc./Consolidated Assurance Agent Agreement." The parties to this Agreement agreed that "the prospects/clients . . . on the 'First Responder' marketing program are the prospects/clients of PPI/CA."

35. A significant part of the value proposition to the Plaintiffs, which motivated him to do the deal, was that Plaintiffs would have access to sales data in order to be able to market other,

non competing products to the clients and prospects from the First Responder marketing program. Plaintiffs have not been provided this data.

36. Together, Plaintiffs and Consolidated recruited agents from many states and became very successful, earning commissions, bonuses, and prizes such as trips to Scottsdale Arizona, Miami, FL, and Colorado Springs, Colorado, etc.

37. Plaintiffs helped Consolidated increase in sales from about 3000 policies a year to 30,000 policies a year in about a year and half.

38. Upon information and belief, Plaintiffs received commissions for all agents in Consolidated's downline more than a year without any modification of the arrangement occurred.

39. In 2015, Plaintiffs saw those commissions shrink, and inquired as to why this occurred.

40. Plaintiffs learned that Consolidated was trying to reduce the Plaintiff's commissions, in order to keep more of the commissions from sales for itself.

41. In order to accomplish this, upon information and belief, on or about December, 2014 to January, 2015, Consolidated had asked Wright to move some of Consolidated's producers or agents outside of the Plaintiffs' commission hierarchy (*the first known movement of agents*).

42. Upon information and belief, AFBA approved this movement.

43. In a personal meeting between the Plaintiffs, Wright and Erik Knutson in Atlanta, GA, Wright stated that he gave his power-of-attorney to Consolidated, by which Consolidated could cause and did cause its agents or producers to be transferred away from the Plaintiffs so that these agents could sell directly under Consolidated and Wright without paying Plaintiffs their 5% commission.

44. In the alternative, Wright made these hierarchy changes himself.

45. Eventually, on or about August of 2017, nearly all agents and producers were moved out of Plaintiffs' hierarchy and into a hierarchy that included Consolidated, but not the Plaintiffs, thereby taking away Plaintiffs' right and opportunity to earn its 5% override or commission, all without Plaintiffs' knowledge, consent or compensation (*the second known movement of agents*).

46. Upon information and belief, AFBA approved this movement.

47. Neither Consolidated nor Wright (nor AFBA, in their contract) possessed the legal authority to make such transfers out of Plaintiffs' hierarchy.

48. On or about December of 2014 or January of 2015 the Company alleged that due to a Company accounting error, the Company had overpaid the Plaintiffs by approximately \$100,000 of commissions. The Plaintiffs and the Company agreed to have the Company retain 50% of Plaintiffs' commissions. When Plaintiffs agreed to have the \$100,000 withdrawn, Plaintiffs were unaware that agents had been transferred out of Plaintiffs' hierarchy.

49. When Wright and Consolidated and AFBA removed the Plaintiffs' agents from Plaintiffs' hierarchy, they also removed the means of repayment, as agreed by the Company resulting in the termination of the Plaintiffs' contract with the Company and final removal of any remaining agents from the Plaintiffs' hierarchy.

50. Overpayment of commissions by AFBA to Plaintiff's caused AFBA to inform Plaintiffs that there was a debit balance owed to AFBA of approximately \$100,000. AFBA required repayment.

51. Plaintiffs, not yet fully aware of the transfer of agents away from their hierarchy and the resulting loss of commission from transferred agents, agreed to a payment plan by which AFBA would retain 50% of commissions until debit balance was repaid.

52. AFBA failed repeatedly to implement the agreement to retain 50%. The Plaintiffs requested again that the agreement be enforced.

53. After the second large group of agents were removed from Plaintiffs' hierarchy in August 2017, AFBA began to pressure Plaintiffs more aggressively for repayment, whereby Plaintiffs requested that AFBA keep 100% of commissions in order to pay the alleged debit balance until it was paid in full.

54. Because Consolidated, Wright, and AFBA had moved the vast majority of producing agents from the Plaintiffs' hierarchy, the remaining commission stream was inadequate to repay the alleged debit balance in a timely manner, and AFBA began issuing threats to the Plaintiffs.

55. The Plaintiffs spoke with their immediate supervisors at the Company, but AFBA refused to change its position.

56. Plaintiffs appealed to the president and to the chairman of the board of AFBA, but were denied a hearing and an opportunity to express his viewpoint and concerns.

57. Wright, Consolidated, and AFBA requested transfer of agents, and AFBA wrongfully removed agents from the Plaintiffs' hierarchy. As a result of these wrongful transfers, CA, Wright and the Company made it impossible for the Plaintiffs to repay the debit balance via the agreed upon method, which caused AFBA to terminate the Plaintiffs' contract.

58. On 11/28/16, Plaintiffs questioned AFBA about the movement of agents outside the PPI hierarchy, and AFBA stated that Consolidated had sought AFBA approval to move agents outside PPI hierarchy. AFBA said they allowed the movement of agents to occur.

59. Subsequently, because of the actions of Wright, Consolidated and AFBA, ABFA libelously reported the Plaintiffs to the Vector organization as a "Bad Debt" thereby soiling the

reputation of the Plaintiffs and causing other insurance carriers (such as Mutual of Omaha) to refuse to offer "advanced" commissions on sold business, which is common practice in the insurance industry. This action restricted the cash flow of the Plaintiffs and affect Plaintiffs' ability to meet normal expenses and obligations of doing business.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

60. The foregoing paragraphs are incorporated herein.

61. Wright breached the contract between himself and Plaintiffs not to alter the commission arrangement between Consolidated and Plaintiffs, proximately causing damages to the Plaintiffs in an amount to be determined at trial.

62. Wright breached the covenant of good faith and fair dealing with Plaintiffs.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

63. The foregoing paragraphs are incorporated herein.

64. Consolidated has added and/or transferred agents and placed them outside of Plaintiffs' hierarchy in violation of the agreement between Plaintiffs and Consolidated.

65. Consolidated breached the contract between Consolidated and Plaintiffs and altered the commission arrangement between Consolidated and Plaintiffs proximately causing damages to the Plaintiffs in an amount to be determined at trial.

66. Consolidated breached the covenant of good faith and fair dealing with Plaintiffs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

67. The foregoing paragraphs are incorporated herein.

68. In addition to breaching the contract by allowing Consolidated to sell AFBA policies without paying a commission to Plaintiffs, upon information and belief, Wright and Consolidated engaged in the unfair and fraudulent act of giving Wright's power-of-attorney to Consolidated principals so as to conceal from Plaintiffs that they had breached their contracts with Plaintiffs.

69. The actions of Wright and Consolidated proximately causing damages to Plaintiffs and entitling Plaintiffs to actual and punitive damages in an amount to be determined trial.

FOR A FOURTH CAUSE OF ACTION
(Tortious Interference with Contractual Relations)

70. The foregoing paragraphs are incorporated herein.
71. A contract existed between Plaintiffs and Wright as set forth above.
72. Consolidated had knowledge of the contract between Plaintiffs and Wright.
73. Consolidated was not a party to the contract between Plaintiffs and Wright.
74. Consolidated intentionally procured Wright breach of the contract with Plaintiffs.
75. Consolidated had no justification in inducing Wright to breach his contract with Plaintiffs.
76. Consolidated's actions have proximately caused damages to Plaintiffs and entitle Plaintiffs to actual and punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Tortious Interference with Contractual Relations)

77. The foregoing paragraphs are incorporated herein.
78. An agency and marketing organization contract existed between Plaintiffs and the Company as set forth above.

79. Wright and Consolidated had knowledge of the contract between Plaintiffs and the Company.

80. Wright and Consolidated intentionally procured the contract's breach by agreeing to have Wright issue his power-of-attorney to principals of Consolidated so as to allow Wright and Consolidated to circumvent Plaintiffs' entitlement to commissions by transferring agents out of Plaintiffs' hierarchy and directly into Consolidated's hierarchy, without the payment of compensation or commissions to Plaintiffs.

81. Consolidated has added and/or transferred agents and placed them outside of Plaintiffs' hierarchy in violation of the Plaintiffs' agreement with the Company.

82. Wright and Consolidated had no justification for transferring agents out of Plaintiffs' hierarchy and directly into Consolidated's hierarchy, without the payment of compensation or commissions to Plaintiffs.

83. Wright and Consolidated's actions have proximately caused damages to Plaintiffs and entitle Plaintiffs to an award of actual and punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Quantum Meruit/Unjust Enrichment)

84. The foregoing paragraphs are incorporated herein.

85. Plaintiffs conferred a benefit upon the Defendant Consolidated.

86. The Defendant Consolidated realized the benefit conferred by the Plaintiffs.

87. The Defendant Consolidated has retained the benefit conferred by the Plaintiffs under circumstances that make it inequitable for the Defendant Consolidated to retain the benefit without paying its value to the Plaintiffs.

WHEREFORE, Plaintiffs pray the Court for TRIAL BY JURY, and an award of actual and punitive damages, pre-judgment interest, post-judgment interest, costs, attorneys' fees, for appropriate equitable relief under the unjust enrichment cause of action, cause the debit balance to be repaid to the Company, reinsert Plaintiffs into the hierarchy in which he belongs, provide contact information on clients and prospects from the First Responder marketing program and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

S/ James G. Carpenter
James G. Carpenter, SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

5 STAR LIFE INSURANCE
COMPANY,

Plaintiff,

VS.

PEEK PERFORMANCE, INC., a
South Carolina corporation,

Defendant.

IN THE COURT OF COMMON PLEAS
13TH JUDICIAL CIRCUIT
CIVIL ACTION NO.

SUMMONS

TO: PEEK PERFORMANCE, INC., a
500 CLIMBING ROSE COURT
AGENT; DONALD CLAYTON PEEK
FOUNTAIN INN SC 29644

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscriber at P.O. Box 743, White Rock, SC within thirty (30) days after service hereof, exclusive of the day of service hereof. **AND IF YOU FAIL** to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

/s/ Amanda M. Scott
AMANDA M. SCOTT
S.C. Bar Number 73080
PARNELL & PARNELL, P.A.
P.O. Box 743
White Rock, SC 29177
Phone #866/629-0912

P&C No.: 1350056

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	13TH JUDICIAL CIRCUIT
	)	
5 STAR LIFE INSURANCE	)	
COMPANY,	)	COMPLAINT
	)	
	)	
	)	
Plaintiff,	)	
vs.	)	(NON-JURY COLLECTION)
	)	
PEEK PERFORMANCE, INC., a,	)	
South Carolina corporation,	)	
	)	C/A NO.:
Defendant.	)	

The above-named Plaintiff, complaining of the Defendant herein, respectfully alleges:

1. That Plaintiff is an entity authorized to conduct business in the State of South Carolina.
2. That upon information and belief, Defendant Peek Performance, Inc., is a organized business authorized to conduct business in the State of South Carolina, existing under the laws of the State of South Carolina.
3. That on or about May 02, 2013, Defendant, for good and valuable consideration, entered into a personal contract (the "Contract"), a copy of which is attached hereto and incorporated herein as **Exhibit "A"**.
4. That Defendant subsequently failed to pay the amount due, thereby making Defendant in default under the terms of the Contract.
5. That, upon information and belief, the right to cure notice required by S.C. Code Section 37-5-110 and 37-5-111 has been given or is not required.
6. That the Contract provided that in case of default in payment of any principal or interest due, or in case of default in the compliance with any other terms of the Contract, the holder of the Contract had the right to declare all sums owing on the Contract to be immediately due and payable, and that under the terms of the Contract there is presently due the principal amount of \$109,515.81, and interest due in the amount of \$9,372.60. Plaintiff would allege the Defendant owes interest to the date of any judgment entered in this case at the rate of 8.5% per annum.

7. That the Contract provided that in case of default in payment by Defendant, Plaintiff, in addition to the principal and interest left owing on the Contract, would also be able to collect from Defendant reasonable attorney's fees in the amount of \$17,833.26.

WHEREFORE, having fully set forth its Complaint, Plaintiff demands try by non-jury and prays for the following:

- (a) Judgment against Defendant in the total claim amount of \$136,721.67.
- (b) For the costs and disbursements of this action together with reasonable attorney's fees; and
- (c) For such other and further relief as the Court may deem just and proper.

PARNELL & PARNELL, P.A.

/s/ Amanda M. Scott
AMANDA M. SCOTT
Attorney for Plaintiff
S.C. Bar Number 73080
PARNELL & PARNELL, P.A.
P.O. Box 743
White Rock, SC 29177
Phone #866/629-0912



PRODUCER CONTRACT AND SCHEDULE OF COMMISSION

This contract is effective 5/3/2018 by and between 5 STAR LIFE INSURANCE COMPANY
Alexandria VA and Dee L. Perdue, Insurance Broker General Agent. In this contract the
General Agent will be referred to as "you" or "your" and 5 Star Life Insurance Company will be referred to as "Company"
"us" "we" or "our". It is agreed by the parties as follows:

1 PRIOR CONTRACT The execution of this contract terminates and renders void all prior agency contracts for life insurance made between you and us, except that it shall not be construed to affect or impair (a) any claim by you against us for compensation provided for in such contracts on business heretofore written and (b) any debts, claims or liens of any kind whether for money or otherwise by us against you under any such contract.

2 INDEPENDENT CONTRACTOR You are an independent contractor and nothing in this contract shall be construed to create the relationship of principal and agent or master and servant or employer and employee.

3 APPOINTMENT We appoint you personally and through your agents to procure applications for life insurance contracts as are issued by us subject to our Rules and Regulations. You and your agents agree to abide by our Rules and Regulations now or hereinafter in force, which Rules and Regulations shall constitute a part of this contract.

4 AGENTS Your agents include (a) agents and brokers assigned to you by us and (b) agents and brokers appointed by you and subject to the terms of this contract provided you maintain a valid license and appointment as our agent in each state in which you appoint any such agents. Each agent whom you appoint must execute a written contract directly with us and such contract shall be effective only when also executed by us. You have no authority to modify or amend any part of such contract. Although we may be required to appoint a person on our behalf in a particular state, such appointment shall not affect the fact that before is actually your agent. We reserve the following rights at our discretion without liability to you: (a) to refuse to contract with any proposed agent and (b) to terminate the contract of any of your agents with or without cause.

5 AUTHORITY Your right, power or authority on our behalf shall exist only as expressly stated in this contract. No right, power or authority shall be implied either from the grant or denial of powers specifically mentioned herein or the failure to mention any right or power herein. You agree that you and your agents are without authority to do or perform and expressly agree not to do or perform the following acts on our behalf: (a) incur any indebtedness or liability; (b) make, alter or discharge contracts; (c) waive forfeitures; (d) quote rates other than as quoted by us; (e) extend the time for payment of any premium; (f) waive payment in cash; (g) guarantee dividends; (h) deliver any policy more than thirty (30) days after issuance by us; or (i) deliver any policy unless the applicant is in the health described in the application and in good health. Further, you agree that you and your agents shall not: (j) violate the insurance laws of any state in which you may be soliciting applications for insurance; (k) withhold any of our policyholder's prospective policyholders or applicant's monies or property; (l) rebate or offer to rebate all or any part of a premium on our insurance policies; (m) induce or attempt to induce any of our policyholders to discontinue payment of premiums or to relinquish any insurance policy; (n) induce or attempt to induce any of our agents or brokers to leave our service; (o) perpetrate any fraud against us; our policyholders, prospective policyholders or applicants; or (p) violate our Rules and Regulations which are incorporated herein. In the event unauthorized act (j) (k) (l) (m) (n) (o) or (p) shall occur whether before or after termination of this contract, our obligation to pay commissions and any other compensation under this contract and any other contract with you shall cease and terminate immediately. It being agreed that our actual damages resulting from such violations will be difficult to calculate or measure.

6 MONIES All monies collected, received or which otherwise come into the control of you or your agents which belong to us, our policyholders, prospective policyholders or applicants shall be securely held and shall not be used for any personal or other purposes whatsoever, but shall be immediately paid over to us. You guarantee the payment to us of all monies intended for or owing to us, our policyholders, prospective policyholders or applicants that are collected, received or otherwise come into the control of you or your agents.

8 COMMISSIONS You shall be paid commissions on premiums paid to and received by us, as set out in the Schedule of Commission accompanying and forming a part of this contract. The Company may at any time terminate or amend any Schedule of Commission or issue a new Schedule of Commission. Any new or amended Schedule of Commission will be subject to the terms and conditions of this contract and will apply only to policies for which applications are written on or after the effective date of said new or amended Schedule of Commission. The Company will make available to you any new or amended Schedule of Commission by posting it on your agent website. Your commissions shall be reduced by the amount of any commissions to which your agents are entitled whether we pay such commissions to the agents or to third

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parties. Commissions shall be payable hereunder only in accordance with our Rules and Regulations and shall not be allowed on premiums waived or commuted by reason of death, disability or exercise of policy options. Commissions that become payable shall be paid to you, your executors, administrators or assigns; however, neither this contract nor any benefits to accrue hereunder shall be assigned nor transferred, either in whole or in part, without our written consent.

5Star reserves the right to withhold commissions payable at its sole discretion in certain circumstances. Such circumstances could include, but are not limited to, situations in which the possibility for a large amount of chargebacks or lapses exists and a possible shortfall of commissions earned to pay for such chargebacks.

9 DISPUTED COMMISSIONS In all cases where your claim to commissions is disputed for any reason, we shall have the right to decide and settle the dispute, and our decision shall be binding and conclusive.

10 FIRST YEAR AND RENEWAL COMMISSIONS First year and renewal commissions are subject to the following modifications:

(a) commissions for conversion of term policies or changes from one form of insurance to another (whether issued originally by this or a prior or predecessor company); or
(b) commissions for the rewriting or replacement of policies (whether issued originally by this or a prior or predecessor company) are not covered by this contract but may be quoted upon request to us and may be changed from time to time or eliminated by us in our sole discretion; and (c) if a policy is reinsured, we may modify the rate of first year and renewal commissions and the period for which renewals will be paid.

11 TERMINATION Either party may terminate this contract by giving the other party fifteen (15) days' written notice to such party's last known address. This contract shall terminate immediately in the event of (a) your death, (b) your breach of any provision of this contract, or (c) our withdrawal from the territories where you are licensed. Such termination shall not impair your right to receive commissions on policies previously procured except as provided in this contract. After termination of this contract, all debts hereunder are due and payable immediately without further notice or demand. In addition, if we terminate this contract because of your breach of any provision of this contract, such termination will be a termination for cause.

12 COMMISSIONS AFTER TERMINATION After termination of this contract, you shall not be entitled to receive commissions hereunder unless all debts are fully repaid by you to us within thirty (30) days from the date such debts are due. Commissions payable hereunder after the termination of this contract shall be payable only so long as such commissions exceed \$300. If such commissions are less than \$300 during any calendar year, no further commissions will be paid to you after the end of the calendar year.

13 RESERVATIONS We reserve the following rights at our discretion without liability to you: (a) to change commissions on any policy form or rider upon furnishing notice to you, but such change shall not affect applications received by us prior to such notice; (b) to withdraw any policy forms; (c) to change our premium rates; (d) to reject applications for insurance without specifying cause; and (e) to adopt rules and practices from time to time relating to any matter not otherwise covered in this contract.

14 ADVERTISING You and your agents shall not issue or authorize any advertisement, circular, news release, or other communication using our name or our product names (whether written, oral, audio, or visual) without prior written approval by us.

15 LEGAL ACTION AND INDEMNITY You agree to defend, indemnify, and hold harmless 5 STAR LIFE, its directors, employees, officers, shareholders, parents, subsidiaries, affiliated companies, predecessors, successors, assigns, agents, servants, and all others associated with its interests (collectively referred to in this paragraph as "COMPANY") for any claim, lawsuit, regulatory, administrative, or legal action or proceeding brought against COMPANY arising from or relating to your activity or status as an agent for 5 STAR LIFE. You agree that your defense obligation under this paragraph includes your agreement to pay for all expenses of any regulatory, administrative, or legal action or any combination thereof initiated by or against us and arising from or relating to your status as an agent for 5 STAR LIFE. YOU AGREE THAT YOUR DUTY TO DEFEND AND INDEMNIFY COMPANY IS WITHOUT LIMIT AND WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF, INCLUDING IN WHOLE OR IN PART, PREEXISTING CONDITIONS, STRICT LIABILITY, REGULATORY LIABILITY, STATUTORY LIABILITY, BREACH OF WARRANTY (EXPRESS OR IMPLIED), ANY THEORY OF TORT, ANY THEORY OF BREACH OF CONTRACT, ANY THEORY OF DECEPTIVE TRADE PRACTICES, ANY AGENCY THEORY, OR ANY THEORY OF NEGLIGENCE OF ANY PARTY, INCLUDING THE NEGLIGENCE OF COMPANY AND/OR YOUR NEGLIGENCE, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT, OR

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CONCURRENT, ACTIVE OR PASSIVE, GROSS NEGLIGENCE, WILLFUL MISCONDUCT, OR MALICE RELATING TO YOUR ACTIVITY OR STATUS AS AN AGENT FOR 5 STAR LIFE. You further agree that all expenses of COMPANY'S

defense will be borne by you but that COMPANY will have the right to choose its own counsel and direct its own defense at your expense. You agree not to institute any regulatory, administrative, or legal proceeding on our behalf without our written approval. You further agree that this defense and indemnity agreement complies with Virginia law and that you will never contend that this agreement does not satisfy Virginia law concerning indemnity agreements. You further agree that this defense and indemnity agreement shall be construed under the laws of the state of Virginia. Notwithstanding anything to the contrary in this paragraph, COMPANY shall not demand from you any amount that may be recovered against COMPANY in any action and any attorney's fees and other expenses that may have been paid by COMPANY therein in any case where COMPANY determines you were not at fault and should not be held responsible.

16 ADVANCEMENTS, COMMISSION FORFEITURE, AND DEBTS. Any sums that may be advanced to you or your agents by reason of our practice to advance against future commission earnings or for any other reason shall be and become a debt from you to us due and payable on demand. You shall also be liable for any claims we may have against you or your agents or both and such claims shall be considered a debt payable on demand. All debts shall bear interest at the highest rate permitted by law. We shall have a first lien on all compensation payable hereunder or any supplement or amendment hereto for any debt due us from you and we may at any time deduct from any monies due you under this contract, or from any other source, any debts due from you to us. We have the right to demand that any debts be paid by you at any time. In the event we shall either during the continuance of this agreement or after its termination, refund premiums under any policy for any reason, you shall forfeit all right to compensation on said policy and immediately repay us on demand the amount of commissions received on the premiums so refunded. You agree to pay any collection fees that we may incur in collecting all debts due from you to us including reasonable attorney's fees and court costs.

17 NON WAIVER. Forbearance or negligence by us to insist upon compliance by you with the terms and provisions in this contract shall not be construed as or constitute a waiver thereof.

18 CONSTRUCTION, MODIFICATION, AND VENUE. This contract shall be governed by and construed in accordance with the laws of the state of Virginia. All parties agree that any possible ambiguity found in the terms, provisions, and/or construction of this contract shall not be construed against the drafter of this contract. All agreements between the parties are contained in this contract and no modification of this contract shall be binding on either party unless made in writing in accordance with our policy. Any suit arising out of this contract shall be instituted in Fairfax County, Virginia and tried under Virginia law. Unless otherwise provided, all matters to be performed under this contract shall be performable at our offices in Alexandria, Virginia. Any amount due to either party under this contract shall be payable at our offices in Alexandria, Virginia.

19 SEVERABILITY AND SURVIVAL. In the event that any court of competent jurisdiction shall hold any provision or clause of this contract to be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

EXECUTED as of the date first written above.

Acknowledged, Accepted, and Agreed to 5 STAR LIFE INSURANCE COMPANY

General Agent

Signature

Date

5/2/13

5 Star Life Insurance Company

Signature

Date

MAY 14 2013

Regional Director

Signature

Date

5/6/13

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Agency Data Sheet

A. General Information

Name (as appears on license) Peak Performance, Inc.
 DBA _____
 Tax Id Number 8208
 Business Address 4115 East North St Ste 202
 City Greenville County Greenville State SC Zip Code 29615
 Business Phone 864-228-2635 Business Fax 800-589-1021
 Email clayce@ppsales.info Website www.peakperformanceinsurance.com
 Principal Name Donald C. Peck Principal SSN _____

B. Licensing Information

(Agency must have an active license in any state where an appointment is being requested where applicable. If electronic copy of license is available, it may be attached after completing this form.)

Please list states that you would like 5 Star Life Insurance Company appointments in
SC, GA, NC

(Agency will be billed for all non resident appointment fees)

Resident License # _____ License State SC
 Non Resident License # _____ License State GA
 License # _____ License State NC
 License # _____ License State _____

License type (can choose one or more) ☐ Individual ☒ Agency ☐ Life ☐ Accident & Health

Primary Markets Senior, Indiv + Group Health, Life, LTC Years in Insurance Sales 17
Annuitants

I hereby represent and warrant to 5 Star Life Insurance Company that the execution by me of an agency contract with 5 Star Life Insurance Company will in no manner breach or violate any existing contractual relationship between me and any other party or entity. Under penalties of perjury, I certify that the number shown on this form is my correct taxpayer identification number. This form authorizes any individual or company to give 5 Star Life, or its authorized representative, any and all information with reference to my character, credit, business reputation, criminal records, employment history, and I release said individual or company from any and all liability whatsoever which results, or might result, from the disclosure of such information. A photocopy of this Authorization shall be as effective as the original.

Entering my name below constitutes my digital signature, and is intended by me to have legally binding effect. By signing in this manner, I am certifying that the statements contained in this application are true and correct to the best of my knowledge and belief. I understand that any false statements on this application may be considered sufficient cause for rejection of this application or for termination if such false statement is discovered subsequently.

Principal Signature

Date

I have reviewed this agent's background information and recommend him/her for contracting

Regional Director Signature

Date

C Agent's Statements

- 1 Have you ever plead nolo contendere (no contest) or been found guilty of a felony? ☐ Yes ☒ No
- 2 Have you ever plead nolo contendere (no contest) or been found guilty of a misdemeanor other than a traffic violation? ☐ Yes ☒ No
- 3 Are you now, or have you ever been party to a legal hearing (including lawsuits initiated by private or government parties) related to your activities in the insurance industry? ☒ Yes ☐ No
- 4 Are you now, or have you ever been, under sanction in any manner, or a party to an insurance department or regulatory agency hearing relating to your activities in the insurance industry? ☐ Yes ☒ No
- 5 Are you indebted to any insurance company, or does any insurance company claim you owe them a debt? ☐ Yes ☒ No
- 6 Are you now, or have you ever been a party to the misappropriation of money, funds, premiums, or other property? ☐ Yes ☒ No
- 7 Are you now, or have you ever been, a party to a legal settlement of a dispute involving a client or company for which you worked? ☐ Yes ☒ No

If you answered "YES" to any of the questions above, please provide a detailed explanation

*Had a contract dispute w/ career agents who no taxed them
GA contract settled in Arbitration No damages paid No
Finding of any wrongdoing on my part.*

I hereby represent and warrant to 5 Star Life Insurance Company that the execution by me of an agency contract with 5 Star Life Insurance Company will in no manner breach or violate any existing contractual relationship between me and any other party or entity. Under penalties of perjury, I certify that the number shown on this form is my correct taxpayer identification number. This form authorizes any individual or company to give 5 Star Life, or its authorized representative, any and all information with reference to my character, credit, business reputation, criminal records, employment history, and I release said individual or company from any and all liability whatsoever which results, or might result from the disclosure of such information. A photocopy of this Authorization shall be as effective as the original.

Entering my name below constitutes my digital signature, and is intended by me to have legally binding effect. By signing in this manner, I am certifying that the statements contained in this application are true and correct to the best of my knowledge and belief. I understand that any false statements on this application may be considered sufficient cause for rejection of this application or for termination if such false statement is discovered subsequently.

Signature *Donald J.* Date 5/2/13

I have reviewed this agent's background information and recommend him/her for contracting

Regional Director Signature *[Signature]* Date 5/6/13

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SCDOI Online Services

Agency Demographics & License Information

[SCDOI Connect Login](#)

Agency Demographics

? Agency Name PEEK PERFORMANCE, INC
? SC Agency Code 155623
? Business Address 4115 East North Street
Greenville SC29615
? Mailing Address 4115 East North Street
Greenville SC29615

Agency
Links[View Licensed
Individuals](#)

Contact Information

? Phone Number 864-228 2635
? Toll Free Phone
Number
? Fax Number 800-539 1021

Other Information

? Web Address www.peakperformanceinsurance.com
? Organization Type Corporation
? Date Organized 10/09/2000

License Information

? License Effective Date 06/11/2007
? License Status Active
? Renewal Status Renewed (For the year 2012)

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Compensation Addendum

ERDS

	Year 1*	Years 2-3	Years 4-5	Years 6+
5Star Group Level Term	120%	0%	0%	0%
Military Better Alternative	105%	0%	0%	0%
Military Better Alternative - Active Duty (Age under 30, single no children)	0%	0%	0%	0%
Select Term - 10, 15, 20 year	75%	0%	0%	0%
Select Term - 25, 30 (10 year guaranteed)	75%	0%	0%	0%
5Star Group Level Term LYT1	45%	0%	0%	0%

* Lower level agent compensation will be deducted from gross commissions

Peek Performance, Inc

PRODUCER

Signature

Donald C Peek

Name (Print)

5/13/13

Date

REGIONAL DIRECTOR

Signature

James J. Wright

Name (Print)

5/13/13

Date

5 STAR LIFE INSURANCE COMPANY

Regional Vice President

Regional Vice President

MAY 21 2013

Date

This agreement supersedes all previous commission schedules and addendums

5/7/13

Agency Details

Office of Insurance and Safety Fire Commissioner
Ralph T. Hudgens
 Commissioner

Home Agents Insurers Fire Marshal Industrial Loan Consumer Services Premium Tax Enforcement Fraud Search

Agency Status Details

Agency License 125239	Select an agent here
Agency Name PEEK PERFORMANCE INC	
Status Active	
Effective Date 11/24/2008	
Expiration Date 12/31/2014	
Address #1 4115 EAST NORTH STREET	
Address #2 N/A	
Address #3 N/A	
City GREENVILLE	
State SC	
Zip 29615	
Telephone (864)228 2635	
Fax (864)244 6040	

AUTHORITIES

DESCRIPTION	Status	Event Date
Principal Agency Accident and Sickness	ACTIVE	11/24/2008
Principal Agency Life	ACTIVE	11/24/2008

[Home](#)
[Employment](#)
[E-Verify](#)
[Sitemap](#)
[Technical Contact](#)
[Contact Us](#)
[Privacy Policy](#)
[Laws & Regs](#)

177 16 0 11

5 Star Life Insurance Company is pleased to offer you the convenience of electronic funds transfers (EFT) for your commission payments. Commissions payable to you can be automatically deposited to your bank or savings account.

Your commissions will begin to be automatically transferred to the designated bank/savings account after a pre-nole testing period

Be sure to attach a copy of a voided check from your checking account (or a deposit slip from your savings account) after you have completed this form. If you are unable to attach, you may fax to 720 294-6421.

I hereby authorize 5 Star Life Insurance Company to electronically deposit into my checking/savings account all commission payments that are payable to me. I authorize 5 Star Life Insurance Company to electronically deduct from my checking/savings account as a correcting adjustment any deposits it may electronically transmit to my checking/savings account in error. This authority remains in force until 5 Star Life Insurance Company receives written notice from me terminating this service or notice from me changing the account information for this service. I agree to provide written notice to 5 Star Life Insurance Company of any bank/savings account information changes prior to their effective date so that 5 Star Life Insurance Company can act on them before the next commission payment is due me. I understand that 5 Star Life Insurance Company is not responsible for any payments made prior to its receipt of written change notice.

Agent Name: Donald Clayton Peck

5 Star Life Insurance Company Agent Number

I am requesting ☒ EFT for the first time ☐ Change in my existing EFT instructions

I have a(n) ☒ Checking Account ☐ Savings Account ☐ Investment Account

Name(s) on my Bank/Savings Account Peck Performance, Inc.

Account Number 7126 Routing Number (9 digits max) 11814

Financial Institution Name Regions

Financial Institution Address 2565 Walnut Rd

City Simpsonville State SC Zip Code 29681

Financial Institution Phone Number 864-289-2201

Agent Signature: [Signature] Date: 5-02-73

PEEK PERFORMANCE INC
1115 S NEMAN ST
Simpsonville, SC 29681
Ph. 864-228-2685

3744
67 181632

DATE _____

PAY TO THE ORDER OF _____ \$ _____

DOLLARS

 **REGIONS**

FOR _____

7448 844 7128

Agents currently contracted with 5 Star Life

Familiarity with this memorandum constitutes initial anti-money laundering training. New training must be taken at least every 2 years. At the end of this course, agents must check the Certification of Compliance page in the Agent Data Sheet certifying that training has been completed.

New agents (contracted with 5 Star Life subsequent to the training deadline for current agents)

All new agents will receive a hard copy of this training material. Each agent must execute the Certification of Compliance as part of the new agent appointment process. The Certification of Compliance is located in the Agent Data Sheets.

V DISCIPLINARY ACTION

5 Star Life may impose disciplinary measures against its agents for actions not in compliance with 5 Star Life's anti-money laundering policy and procedures, including but not limited to verbal warning, termination, and notification of law enforcement authorities. Whether to impose any or a combination of such disciplinary actions is within 5 Star Life's sole discretion, and the Anti-Money Laundering Compliance Plan does not create any rights for any agent. 5 Star Life will enforce the compliance program in a consistent manner, imposing appropriate disciplinary action and taking into account any mitigating or aggravating circumstances.

VI CONCLUSION

5 Star Life and its agents share an important responsibility to comply with the Company's Anti-Money Laundering Compliance Plan and all applicable anti-money laundering laws. Violation of federal anti-money laundering laws can expose those responsible to substantial civil and criminal penalties, including—but not limited to—fines and imprisonment. If an agent suspects that a customer may be using 5 Star Life's products for money laundering activities, the agent must inform the Company immediately before taking any further action.

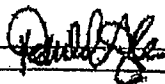
Any reporting required of agents under this program may be made to the Compliance Department in writing via email at Compliance@AFBA.com or by fax (703-224-0214). Please direct any questions that you may have concerning this training material to 5 Star Life Insurance Company's Sales Departments (866)863-9753 for Worksite, 866-466-0647 for Final Expense, and (800) 776-2322 option '4' for AFBA.

☐ I certify that I have read and understand 5 Star Life Insurance Company's anti-money laundering training regarding U.S. anti-money laundering laws and the responsibilities that agents have in detecting and preventing money laundering. I understand my responsibilities as an agent of 5 Star Life under the Anti-Money Laundering Compliance Plan and will comply with the requirements of this program.

OR

☒ If such AML training previously taken, I hereby certify that I have taken anti-money laundering training with Company Name 1st MB Date 7/17/13

Agent Signature


Date 5/02/13

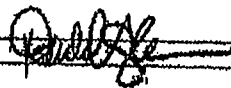
5Star Life Insurance Company's Ethical Market Conduct Values and Behaviors do not address all situations that may arise in the course of doing business. If you have specific questions or concerns regarding laws and regulations or the Company requirements, please contact the Company directly.

Good Selling!

Survival - The terms of this document are to survive termination of the producer's agreement with the Company.

I certify that I have read and understand 5 Star Life Insurance Company's Guide for Doing Business and will comply with the terms and conditions set forth.

Agent Signature



Date 02/02/18

MCG R1109

FOR PRODUCER USE ONLY NOT FOR PUBLIC USE
Page 12 of 12

03/21/2017

UNSECURED ADVANCES

(* - advances on policies that have become unsecured as of the current cycle)

CO:AF AGT:PEEK PERFORMANCE INC EGA62RG /CONV /01 FIN:EGA62RG

POL NUMBER ISS DATE EFF DATE END DATE ADVANCE AMOUNT ADVANCE BALANCE

1424500102	09/25/2014	09/02/2014	03/25/2016	7.75	3.20 P
1424700034	10/01/2014	09/04/2014	04/01/2016	15.50	6.47 P
1426500385	10/17/2014	09/22/2014	04/17/2016	28.13	14.09 P
1426500401	10/11/2014	09/22/2014	03/11/2016	15.00	7.50 P
1428000360	10/15/2014	10/07/2014	04/15/2016	24.38	12.20 P
1430100455	11/13/2014	10/28/2014	05/13/2016	15.63	15.63 P
1430100456	11/13/2014	10/28/2014	05/13/2016	8.13	8.13 P
1430700021	12/01/2014	11/03/2014	06/01/2016	8.13	8.13 P
1431700090	12/04/2014	11/13/2014	06/04/2016	11.19	11.19 P
1431700090	12/04/2014	11/13/2014	06/04/2016	11.19	11.19 P
1431700091	12/04/2014	11/13/2014	06/04/2016	5.81	5.81 P
1431700091	12/04/2014	11/13/2014	06/04/2016	5.81	5.81 P
1431700254	12/06/2014	11/13/2014	06/06/2016	19.38	19.38 P
1431800434	12/11/2014	11/14/2014	06/11/2016	4.06	4.06 P
1431800434	12/11/2014	11/14/2014	06/11/2016	4.06	4.06 P
1432100426	12/06/2014	11/17/2014	06/06/2016	3.88	3.88 P
1432800400	12/18/2014	11/24/2014	06/18/2016	3.88	3.88 P
1432800401	12/18/2014	11/24/2014	06/18/2016	3.88	3.88 P
1434200218	01/01/2015	12/12/2014	07/01/2016	6.88	4.60 P
1435700548	01/16/2015	12/30/2014	07/16/2016	28.13	21.11 P
1435800170	12/28/2014	12/24/2014	06/28/2016	8.13	5.41 P

179.61

CO:AF AGT:PEEK PERFORMANCE INC EGA62RG /CONV /02 FIN:EGA62RG

POL NUMBER ISS DATE EFF DATE END DATE ADVANCE AMOUNT ADVANCE BALANCE

1435700548	05/16/2015	05/15/2015	11/16/2016	28.13	.05 P
1435800130	01/14/2016	01/08/2016	09/14/2016	6.00	2.00 P
1500900198	01/16/2016	12/28/2015	08/16/2016	6.00	2.50 P
1510000086	05/10/2015	04/22/2015	11/10/2016	2.55	.03 P
1510000087	05/10/2015	04/27/2015	11/10/2016	2.55	.03 P
1510000088	05/10/2015	04/27/2015	11/10/2016	2.55	.03 P

1629800161	11/01/2016 10/24/2016 11/01/2016	6.60	6.60 P
1629900295	11/20/2016 10/25/2016 12/20/2016	5.25	5.25 P
1629900295	11/20/2016 10/25/2016 12/20/2016	5.25	4.37 P
1629900296	11/20/2016 10/25/2016 12/20/2016	3.75	3.75 P
1629900296	11/20/2016 10/25/2016 12/20/2016	3.75	3.13 P
1633900181	12/20/2016 12/04/2016 12/20/2016	6.60	6.60 P
1633900181	12/20/2016 12/04/2016 12/20/2016	6.60	6.60 P
999999999999	05/29/2015 05/29/2015 99/99/9999	111,403.26	96,455.20 P

109,000.04

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2018-CP-23-01639
	)	
5 Star Life Insurance Company,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ANSWER AND
	)	COUNTERCLAIM
	)	
Peek Performance, Inc., a South Carolina	)	JURY TRIAL DEMANDED
corporation	)	
Defendants.	)	
	)	

NOW COMES the Defendant, by its undersigned attorney and as an Answer and Counterclaim in the above referenced case admits, denies, and alleges as follows:

1. Upon information and belief, Defendant admits the allegations paragraph 1.
2. Defendant admits the allegations paragraph 2.
3. Defendant admits the allegations of paragraph 3 except for the word "personal."
4. Defendant denies the allegations of paragraph 4.
5. Defendant denies the allegations of paragraph 5.
6. Defendant denies the allegations of paragraph 6.
7. Defendant denies the allegations of paragraph 7.
8. In response to Prayer for Relief, Defendant denies that the Plaintiff is entitled to

any relief whatsoever, and that the claims of the Plaintiff are more than offset by the Counterclaims of the Defendant, set out below.

COUNTERCLAIM

9. D. Clayton Peek ("Clay Peek") is the owner and principal of Peek Performance, and is licensed to sell insurance in South Carolina, North Carolina, Georgia and other states.

10. Jeff Wright, d/b/a Agent Sales Group ("Wright") is a citizen of the State of Georgia who entered into a contract with Defendant to be performed, in part, in Greenville County, South Carolina.

11. Joe Caldwell, Nathan Wells, and Jeff Magg are the principals of Consolidated Assurance, LLC, a South Carolina limited liability company headquartered in Greenville County, (collectively "Consolidated").

12. At all relevant times, Jeff Wright has served as the Regional Director ("RD") for Plaintiff 5 Star ("5 Star") (or "the Company").

13. Consolidated and its principals had previously done business with the Defendant, when they, with review and approval from 5 Star and Wright, sought out Defendant for help in taking their marketing program to a national level. Consolidated was previously within Wright's Field Marketing Organization. Neither Consolidated nor Wright had the expertise and skills to convert its plans into a national recruiting and marketing endeavor, but approached the Defendant, who did. 5 Star extensively vetted Defendant and their marketing plans for Consolidated, and Wright and 5 Star approved Defendant to be inserted as a managing agency above Consolidated after a visit and/or vetting process and provided a contract to validate this position.

14. Defendant agreed to engage in this effort with Consolidated, Wright and 5 Star. Defendant agreed to take an override or commission of only five points in exchange for managing and teaching Consolidated and to give Consolidated the benefit of Defendant's oversight, size, and market experience, and its expertise in converting Consolidated's content into a national marketing and recruiting endeavor.

15. Defendant and Consolidated agreed that Defendant would help develop Consolidated's recruiting and marketing plan as Consolidated's direct manager, for which

Defendant would receive a 5% commission on any 5 Star policies that Consolidated sold except those policies sold personally by the three principals of Consolidated as noted in paragraph 20.

16. Defendant also subsequently negotiated marketing assistance and production bonuses for Defendant and CA with 5 Star.

17. On or about May 2, 2013, Defendant entered into an agency contract with 5 Star, by which Defendant became an agent and marketing organization of 5 Star under the hierarchy of Jeff Wright and as the exclusive “upline hierarchy” for all “Consolidated” agents except the principals. Defendant’s agents were entitled to sell life insurance for 5 Star, and Defendant was entitled to receive a portion of the commissions on those sales from 5 Star.

18. As a marketing organization and pursuant to the contract, Defendant and Consolidated could recommend “producers” to the company for appointment to sell the “covered products.” The 5 Star agency contract repeatedly refers to these agents as “Your agents” – the agents of the Defendants.

19. Defendant agreed to teach Consolidated how to recruit and train a team of agents nationwide. This consisted of the first few rounds of initial recruiting (including outreach and screening of prospective agents), live online webinar meetings with the prospective agents, initial online “First Responder” training classes that Defendant and CA created jointly, creating qualifications for early recruits to advance to live training, assisting with the coordination of the initial live training events in Greenville, SC and Atlanta, GA and the administrative back office / contracting tasks were initially performed by the Defendant. The objective of the training provided by the Defendant was to train CA so that they could continue and expand this market on their own in the future. Over time Consolidated assumed these tasks as planned.

20. The ultimate goal was to have highly effective sales producers who would properly represent the "covered products," comply with applicable law, and follow Company rules and procedures. Defendant's efforts have been highly successful.

21. Defendant worked with Consolidated to create training programs, opportunity shows, webinars, e-blasts, telephone outreaches, etc.

22. Defendant was entitled to receive commissions on sales made by agents placed under Consolidated, persons under Defendant in the Defendant's sales hierarchy for 5 Star.

23. If the Company required chargebacks from lapsed sales made by the producers under the Defendant in the Defendant's hierarchy, Defendant was also responsible financially for those chargebacks for persons under Defendant's hierarchy, including all agents appointed under Consolidated.

24. Consolidated is an insurance marketing agency that had a plan to market an insurance product sold by 5 Star. That product was especially suitable for First Responders such as police officers, fire fighters and EMS providers.

25. As further consideration for this agreement and commission, Defendant agreed not to terminate Consolidated without cause, not to transfer agents, and not to make changes to commissions without their consent. Consolidated indicated that they wanted the same reciprocal arrangement that Wright and the Defendant agreed to in the paragraphs below.

26. Defendant required that the principals of Consolidated would remain outside the Defendant's hierarchy, but all agents under them and/or recruited by them and or Defendant from that time forward would be placed under Defendant's hierarchy. Accordingly, Wright and the company, 5 Star, moved all agents, existing and new, to the Defendant's hierarchy.

27. Defendant and Wright entered into a written agreement via email that in consideration of Defendant's helping Consolidated develop their marketing plan, Defendant would receive a 5% commission on any 5 Star policies that Consolidated sold.

28. In addition Wright promised in writing in an email:

Also, to confirm what we discussed, no one in my organization including myself will ever market to, or contact any of your downline agents **nor will we modify or change hierarchies or commissions unless under your direction** or giving you notice of comp changes that may come from the company itself (emphasis added).

29. Wright also agreed that he would not request termination of the contract "without cause." By this agreement, of which Consolidated and 5 Star were aware, Defendant was placed in Wright's Regional Director hierarchy above all of Consolidated's agents or producers.

30. Consolidated also received a commission on the sales made by the producers under them in the hierarchy at a rate of 115% of the annual premium, which was an increase recommended by the Defendant in order to increase Consolidated's profitability on the program to approximately 50 – 60 points or 50-60%. Defendant received 5% of the premium. Upon information and belief, Wright received approximately 20-30% of the premium as commission override.

31. Upon information and belief, at the request of Consolidated, Wright and 5 Star, all Consolidated agents or producers (except the three principals) were placed in Defendant's hierarchy or downline. The Defendant had no capacity to cause this to happen; it required the action of Consolidated, Wright and 5 Star.

32. Defendant immediately engaged in the active recruiting/training of prospective agents and in teaching Consolidated some of these methodologies.

33. Defendant generously included agents from their own proprietary/contracted list as the initial resource of prospective agents for this program.

34. Together, Defendant and Consolidated began recruiting agents to sell the insurance offered by the Company in many states across the country. As a result, Consolidated's sales quickly grew, so that Defendant's 5% commission arising from the contract with Consolidated and Wright was approximately \$300,000.00 - \$400,000 per year.

35. Wright promised Defendant that the agents recruited under this program would belong to Defendant unless transferred/released by written consent of the Defendant.

36. The Company contract does not specifically reserve any power for the Company to remove an agent from the Defendant. The Company told Defendant verbally that the RD traditionally has been granted this authority, but this provision does not appear in the contract provided to Defendant. Further, the RD, Wright, yielded this alleged privilege to the Defendant in order to consummate the agreement with the Defendant.

37. The Defendant taught and led Consolidated to negotiate with the Company for marketing dollars and production bonuses, and the Defendant negotiated and acquired bonuses from the Company based on successful recruiting and production of applications for the insurance that was beneficial to Consolidated, Wright, the Company, and the Defendant.

38. High-level officers from the Company came to Greenville, SC and to Atlanta, GA to vet the Defendant, approve the planning/program, and attend the training launches in which they observed the Defendant presenting in classes for new agents.

39. The Defendant taught Consolidated to negotiate with the Company for incentives and the Defendant negotiated and acquired incentives from the Company for training seminars such as interest-free loans that could be forgiven if enough agents were recruited and enough applications were remitted. The Defendant was willingly liable as guarantor for the payback of these loans.

40. When the Defendant and Consolidated hosted agents or producers who attended live training, they and the agents signed a form called "Peek Performance Inc./Consolidated Assurance Agent Agreement." The parties to this Agreement agreed that "the prospects/clients . . . on the 'First Responder' marketing program are the prospects/clients of PPI/CA."

41. A significant part of the value proposition to the Defendant, which motivated him to do the deal, was that Defendant would have access to client and prospect sales data in order to be able to market other, non-competing products to the clients and prospects from the First Responder marketing program. Defendant has not been provided this data. James Bradford was aware of this arrangement, as were Consolidated and Jeff Wright.

42. Together, Defendant and Consolidated recruited agents from many states and became very successful, earning commissions, bonuses, and prizes such as trips to Scottsdale Arizona, Miami, FL, and Colorado Springs, Colorado, etc.

43. Defendant helped Consolidated increase in sales from about 3000 policies a year to about 30,000 policies a year in about a year and half.

44. Upon information and belief, Defendant received commissions for all agents in Consolidated's downline more than a year without any modification of the arrangement occurred.

45. In 2015, Defendant saw those commissions shrink, and inquired as to why this occurred.

46. Defendant learned that Consolidated was trying to reduce the Plaintiff's commissions, in order to keep more of the commissions from sales for itself.

47. In order to accomplish this, upon information and belief, on or about December, 2014 to January, 2015, Consolidated had asked Wright to move some of Consolidated's producers or agents outside of the Defendant's commission hierarchy (*the first known movement of agents*).

48. Upon information and belief, 5 Star approved this movement.

49. In a personal meeting between the Defendant, Wright and Erik Knutson in Atlanta, GA, Wright stated that he gave his power-of-attorney to Consolidated, by which Consolidated could cause and did cause its agents or producers to be transferred away from the Defendant so that these agents could sell directly under Consolidated and Wright without paying Defendant their 5% commission.

50. In the alternative, Wright made these hierarchy changes himself at Consolidated's request.

51. Eventually, on or about August of 2017, nearly all agents and producers were moved out of Defendant's hierarchy and into a hierarchy that included Consolidated, but not the Defendant, thereby taking away Defendant's right and opportunity to earn its 5% override or commission, all without Defendant's knowledge, consent or compensation (*the second known movement of agents*). Other agents were likely appointed directly to CA (or alternative organization under CA's authority, like Tyler Harris) who were not appointed under the Defendant, as they should have been.

52. Upon information and belief, 5 Star approved this movement.

53. Neither Consolidated nor Wright (nor 5 Star, in their contract) possessed the legal authority to make such transfers out of Defendant's hierarchy.

54. On or about December, 2014 or January, 2015, the Company alleged that due to a Company accounting error, the Company had overpaid the Defendant by approximately \$100,000 of commissions. The Defendant and the Company agreed to have the Company retain 50% of Defendant's commissions. When Defendant agreed to have the \$100,000 withdrawn, Defendant was unaware that agents had been transferred out of Defendant's hierarchy.

55. When Wright and Consolidated and 5 Star removed the Defendant's agents from Defendant's hierarchy, they also removed the means of repayment, as agreed by the Company resulting in the termination of the Defendant's contract with the Company and final removal of any remaining agents from the Defendant's hierarchy.

56. Overpayment of commissions and removal of downline agents by 5 Star to Plaintiff's caused 5 Star to inform Defendant that there was a debit balance owed to 5 Star of approximately \$100,000. 5 Star required repayment.

57. Defendant, not yet fully aware of the transfer of agents away from their hierarchy and the resulting loss of commission from transferred agents, agreed to a payment plan by which 5 Star would retain 50% of commissions until debit balance was repaid. Had 5 Star done this, and had they not inappropriately removed the Defendant's agents from his hierarchy, the debit balance would have been repaid in only several months.

58. 5 Star failed repeatedly to implement the agreement to retain 50%. The Defendant requested again that the agreement be enforced.

59. After the second large group of agents were removed from Defendant's hierarchy in August 2017, 5 Star began to pressure Defendant more aggressively for repayment, whereby Defendant requested that 5 Star keep 100% of commissions in order to pay the alleged debit balance until it was paid in full.

60. Because Consolidated, Wright, and 5 Star had moved the vast majority of producing agents from the Defendant's hierarchy, the remaining commission stream was inadequate to repay the alleged debit balance in a timely manner, and 5 Star began issuing threats to the Defendant.

61. On 11/28/16, Defendant questioned 5 Star (Kimo Wong and James Bradford) about the movement of agents outside the PPI hierarchy, and 5 Star stated that Consolidated had sought 5 Star approval to move agents outside PPI hierarchy. 5 Star said they allowed the movement of agents to occur.

62. Defendant appealed to the president and to the chairman of the board of 5 Star, but was denied a hearing and an opportunity to express his viewpoint and concerns. Further, in email from the President, Mark Singleton and in phone communication, General Counsel, Mike Moser and Singleton stated that they viewed the Defendant as a "consultant" not as an agency with a hierarchy, as the 5 Star contract indicates.

63. Wright and Consolidated requested transfer of agents, and 5 Star wrongfully removed agents from the Defendant's hierarchy. As a result of these wrongful transfers, CA, Wright and the Company made it impossible for the Defendant to repay the debit balance via the agreed upon method, which caused 5 Star to terminate the Defendant's contract.

64. Subsequently, because of the actions of Wright, Consolidated and 5 Star, 5 Star libelously reported the Defendant to the Vector organization as a "Bad Debt" thereby soiling the reputation of the Defendant and causing other insurance carriers (such as Mutual of Omaha) to refuse to offer "advanced" commissions on sold business, which is common practice in the insurance industry. This action restricted the cash flow of the Defendant and could have affected Defendant's ability to meet normal expenses and obligations of doing business. United Home Life terminated their contract with the Defendant upon notice of the Vector, and other carriers have increased their screening of the Defendant in their contracting process as a result of 5 Star's actions.

65. 5 Star has transferred agents outside of Defendant's hierarchy in violation of the agreement between Defendant and 5 Star.

66. 5 Star breached the contract between itself and Defendant, proximately causing damages to the Defendant in an amount to be determined at trial.

67. 5 Star breached the implied covenant of good faith and fair dealing with Defendant.

68. Defendant also should receive all client personal data for resale to other life and ancillary plans.

WHEREFORE, Defendant prays the Court for an award of actual damages, pre-judgment interest, post-judgment interest, costs, attorneys' fees, for appropriate equitable relief causing Defendant to be reinserted into the hierarchy in which he belongs, provide contact information on clients and prospects from the First Responder marketing program, all client personal data for resale to other life and ancillary plans, and grant such other and further relief as the Court deems just and proper.

DEFENDANT DEMANDS TRIAL BY JURY.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

/S/ James G. Carpenter

SC Bar No. 1136

819 E. North St.

Greenville, SC 29601

Tel. (864) 235-1269

Fax (864) 331-3083

Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
5 Star Life Insurance Company,	)	Docket No.: 2018-CP-23-01639
	)	
Plaintiff,	)	
	)	PLAINTIFF'S REPLY TO ANSWER &
vs.	)	COUNTERCLAIM OF DEFENDANT
	)	
Peek Performance, Inc., a South Carolina	)	
Corporation,	)	
	)	
Defendant.	)	
	)	

Plaintiff, responding to Defendant's Answer and Counterclaims, responds as follows:

AS A FIRST DEFENSE TO DEFENDANT'S ALLEGATIONS/COUNTERCLAIM
(General Denial)

1. All allegations of Defendant's Answer and Counterclaim are denied unless specifically admitted to herein.
2. To the extent that the allegations contained in paragraphs 1 through 8 of Defendant's Answer and paragraphs 9 through 68 of Defendant's Counterclaim, including Defendant's factual allegations, deny the allegations of Plaintiff's Complaint, said allegations are denied and strict proof thereof is demanded.
3. Paragraphs 1 through 8 of the Answer either require no responsive pleading or alternatively state conclusions of law to which no responsive pleading is required. To the extent Plaintiff is required to respond Plaintiff denies these allegations and strict proof thereof is demanded.
4. Plaintiff admits the allegations contained in Paragraphs 9, 10, 11 and 12 of Defendant's Counterclaim.
5. Plaintiff is without sufficient information to either admit or deny the allegations contained in Paragraphs 12 through 61 of Defendant's Counterclaim. To the extent Plaintiff is required to respond, Plaintiff denies these allegations and strict proof thereof is demanded.
6. Plaintiff denies the allegations contained in Paragraphs 62, 63, 64, 65, 66, 67 and 68 of the

Defendant's Counterclaim and strict proof thereof is demanded.

AS A SECOND DEFENSE TO DEFENDANT'S ALLEGATIONS/COUNTERCLAIM
(Failure to State a Claim – SCRPC 12(b)(6))

7. Defendant has failed to state facts sufficient to constitute a cause of action. Therefore, Defendant's Counterclaim, if any, should be dismissed as a matter of law pursuant to Rule 12(b)(6), SCRPC.
8. By pleading this dismissal 12(b)(6) defense in its Reply, Plaintiff does not intend or claim to waive any right to have the Court hear a motion for dismissal. This dismissal defense is included for notice purposes and to preserve Plaintiff's right to move for a dismissal at any time before trial as well as at any time new facts and/or evidence are presented to Plaintiff to support the defenses herein.
9. Plaintiff further reserves the right to allege additional defenses upon discovery and/or notice of facts sufficient to support said defenses.

WHEREFORE, having fully responded to the allegations contained in Defendant's Counterclaim, Plaintiff prays for the following:

- (a) That Defendant's Counterclaim be dismissed with costs;
- (b) That Plaintiff be granted the relief requested in the Complaint; and
- (c) For such other and further relief as the Court may determine to be just and proper.

Respectfully submitted this 17th day of May, 2018.

PARNELL & PARNELL, P.A.

BY: s/Amanda M. Scott
Amanda M. Scott
SC Bar No.: 73080
Post Office Box 743
White Rock, South Carolina 29177
(866) 629-0912
Ascott@parnellssoutheast.com
Attorneys for the Plaintiff

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 05-17-2018 08:18:48 AM.

Amanda Scott - Notification transmitted on 05-17-2018 08:18:48 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 05-17-2018 08:18:31 AM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Reply/Reply to Counterclaim

Filed by or on behalf of: Amanda Mange Scott

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

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

NOW COMES the Defendant, by its undersigned attorney and moves the Court for entry of Default Judgment on the Counterclaims pursuant to SCRCP 55, and in support of that motion would show unto the Court the following:

1. Plaintiff filed this action on March 19, 2018.
2. Defendant filed an Answer and Counterclaim on March 29, 2018.
3. More than thirty days passed after March 29, 2018, without a Reply or other responsive pleading being filed. Accordingly Plaintiff is in default on the Counterclaims.
4. Defendant filed a Notice of Default as to the Counterclaims.
5. Defendant prays the Court for entry of Default Judgment as to the Counterclaims.

WHEREFORE, Defendant prays the Court for Default Judgment, and granting Defendant such other and further relief as the Court deems just and proper.

Respectfully submitted,

THE CARPENTER LAW FIRM, P.C.

/S/ James G. Carpenter

SC Bar No. 1136

819 E. North St.

Greenville, SC 29601

Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Defendant

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 05-10-2018 05:50:46 PM.

Amanda Scott - Notification transmitted on 05-10-2018 05:50:46 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 05-10-2018 05:49:08 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Motion/Entry of Default

Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

5 Star Life Insurance Company,

Plaintiffs,

v.

Peek Performance, Inc., a South Carolina
corporation

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2018-CP-23-01639

**NOTICE OF DEFAULT ON
COUNTERCLAIMS**

NOW COMES the Defendant, by its undersigned attorney and gives Notice of Default on the Counterclaims in this action, and would show unto the Court the following:

1. Plaintiff filed suit on March 19, 2018.
2. Defendant filed and served an Answer and Counterclaims on March 29, 2018
3. More than thirty days passed after March 29, 2018, without a Reply being filed.

Accordingly plaintiff is in default.

Respectfully submitted,

THE CARPENTER LAW FIRM, P.C.

/S/ James G. Carpenter

SC Bar No. 1136

819 E. North St.

Greenville, SC 29601

Tel. (864) 235-1269

Fax (864) 331-3083

Attorney for Defendant

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 05-10-2018 05:39:36 PM.

Amanda Scott - Notification transmitted on 05-10-2018 05:39:36 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 05-10-2018 05:39:09 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Notice/Other

Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

5 Star Life Insurance Company,

Plaintiffs,

v.

Peek Performance, Inc., a South Carolina
corporation

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2018-CP-23-01639

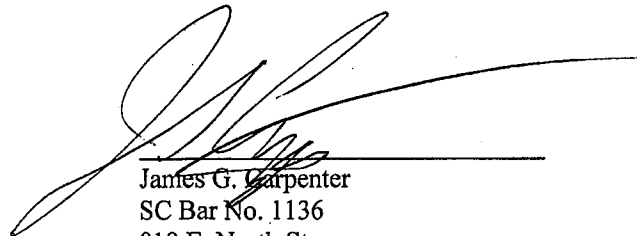
AFFIDAVIT FOR ENTRY OF DEFAULT
ON COUNTERCLAIMS

The undersigned attorney for the Defendant, being first duly sworn on oath, deposes and states as follows:

1. I am the attorney for the Defendant in the above-captioned action.
2. The Answer and Counterclaims were duly and legally served on the Plaintiff by electronic filing in court and service on Plaintiff's attorney on March 29, 2018, as shown by the electronic records of this Court.
3. The time within which the Plaintiff may Reply or otherwise plead as to the Counterclaims has expired without Plaintiff Replying or otherwise pleading.
4. Upon information and belief, Plaintiff is now in default.

FURTHER AFFIANT SAITH NAUGHT.

THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Attorney for Defendant

Subscribed and sworn to before me
this 10th day of May, 2018.

Rebecca Jones
Notary Public, State of South Carolina



Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 05-10-2018 05:42:26 PM.

Amanda Scott - Notification transmitted on 05-10-2018 05:42:26 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 05-10-2018 05:41:57 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Affidavit/Default

Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2017-CP-23-03269
	)	
Peek Performance, Inc., and D. Clayton Peek,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' MOTION TO
	)	CONSOLIDATE THIS CASE WITH
	)	CASE NO.: 2018-CP-23-01639
v.	)	
	)	
Jeff Wright d/b/a Agent Sales Group, Joe Caldwell,	)	
Nathan Wells, Jeff Magg, and Consolidated	)	
Assurance, LLC,	)	
Defendants.	)	

NOW COME the Plaintiffs, by their undersigned attorney, and move the Court pursuant to SCRCP 42(a) to consolidate this case with *5 Star Life Insurance Company v. Peak Performance, Inc.*, Case No.: 2018-CP-23-01639, which involves common questions of fact and law, many of the same witnesses, and some common parties. The allegations in the Complaint in this case are repeated in large measure in the counterclaims in *5 Star Life Insurance Company v. Peak Performance, Inc.* Matters of proof would be duplicative, and matters of discovery would be duplicative. Upon information and belief, 5 Star Life Insurance Company is the custodian of a very large volume of records that are of critical importance both to the case at bar and to the *5 Star* case.

Under the allegations in this Complaint and in the Counterclaims in the *5 Star* case, all the opposing parties might be held jointly and severally liable. If the two cases are tried separately, Peek Performance, Inc. faces the risk of inconsistent verdicts. Accordingly is appropriate for this Court to consolidate these two actions.

The undersigned attorney has consulted with counsel for the Defendants in this action, and they also favor consolidation of this case with the *5 Star Life Insurance Company* case. The undersigned attorney has attempted to consult with the attorney for 5 Star, and has been unable to reach her.

Peek Performance, Inc., the Defendant in the *Five Star Life Insurance Company* case, filed Counterclaims against the Plaintiff *5 Star*, but *5 Star* has failed to Reply. Peek Performance, Inc. filed Notice of Default, an Affidavit of Default, and a Motion for Entry of Default Judgment against 5 Star Life Insurance Company.

Because cases involve common questions of law and fact, and because 5 Star is the custodian of a large volume of very important business records, applicable to both cases, both as to the issues of liability and damages, Plaintiffs moved for consolidation under Rule 42(a).

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

S/ James G. Carpenter
James G. Carpenter, SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Plaintiffs

Certificate of Electronic Notification

Recipients

Beattie Ashmore - Notification transmitted on 05-16-2018 04:10:27 PM.

James Carpenter - Notification transmitted on 05-16-2018 04:10:26 PM.

Adam Bach - Notification transmitted on 05-16-2018 04:10:26 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2017CP2303269

Official File Stamp: 05-16-2018 04:09:10 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

Case Caption: Peek Performance Inc , plaintiff, et al vs. Jeff Wright , defendant, et al

Document(s) Submitted: Motion/Consolidate

Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Beattie B. Ashmore for Agent Sales Group, Jeff Wright

James G. Carpenter for Peek Performance Inc et al

Adam Crittenden Bach for Jeff Magg, Nathan Wells, Joe Caldwell, Consolidated Assurance Llc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Agent Sales Group

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2018-CP-23-01639
	)	
5 Star Life Insurance Company,	)	
	)	
Plaintiffs,	)	
	)	DEFENDANT'S MOTION TO
v.	)	CONSOLIDATE
	)	
Peek Performance, Inc., a South Carolina	)	
corporation	)	
Defendants.	)	
	)	

NOW COMES the Defendant, by its undersigned attorney, and moves the Court pursuant to SCRCP 42(a) to consolidate this case with *Peak Performance, Inc. v. Jeff Wright d/b/a Agent Sales Group, Joe Caldwell, Nathan Wells, Jeff Magg, and Consolidated Assurance, LLC*, Case No.: 2017-CP-23-03269, which involves common questions of fact and law, many of the same witnesses, and some common parties. The allegations in the Counterclaims in this case are repeated in large measure in the Complaint in *Peak Performance, Inc.* Matters of proof would be duplicative, and matters of discovery would be duplicative. Upon information and belief, Plaintiff 5 Star Life Insurance Company is the custodian of a very large volume of records that are of critical importance both to the case at bar and to the *Peek Performance* case.

Under the allegations in the Counterclaims in this case and the Complaint in the *Peek Performance* case, all the opposing parties might be held jointly and severally liable. If the two cases are tried separately, Peek Performance, Inc. faces the risk of inconsistent verdicts. Accordingly is appropriate for this Court to consolidate these two actions.

The undersigned attorney has consulted with counsel for the Defendants in *Peek Performance* case, and they also favor consolidation of this case with the *Peek Performance* case.

The undersigned attorney has attempted to consult with the attorney for 5 Star, and has been unable to reach her.

Peek Performance, Inc. filed Counterclaims against the Plaintiff *5 Star*, but *5 Star* has failed to Reply. Peek Performance, Inc. filed Notice of Default, an Affidavit of Default, and a Motion for Entry of Default Judgment against 5 Star Life Insurance Company.

Because cases involve common questions of law and fact, and because 5 Star is the custodian of a large volume of very important business records, applicable to both cases, both as to the issues of liability and damages, Plaintiffs moved for consolidation under Rule 42(a).

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

S/ James G. Carpenter
James G. Carpenter, SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Defendant

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 05-16-2018 04:05:56 PM.

Amanda Scott - Notification transmitted on 05-16-2018 04:05:56 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 05-16-2018 04:04:24 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Motion/Consolidate

Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,)
)
 Plaintiff)
)
 vs.) C.A. No. 2018-CP-23-01639
)
 Peek Performance, Inc.,)
)
 Defendant.)
)
 _____)
)
 Peek Performance, Inc. and D. Clayton)
 Peek,)
)
 Plaintiffs,)
)
 v.)
)
 Jeff Wright d/b/a Agent Sales Group, Joe)
 Caldwell, Nathan Wells, Jeff Magg, and)
 Consolidated Assurance, LLC,)
)
 Defendants.)
 _____)

**5 STAR LIFE INSURANCE CO.'S OPPOSITION TO MOTION FOR ENTRY OF
 DEFAULT BY PEEK PERFORMANCE, INC.**

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

Defendant seeks an entry of default against 5 Star for what it purports to be a “counterclaim.”¹ Defendant’s “counterclaim” is actually an affirmative defense to which no responsive pleading is required. The Court has not entered default and 5 Star requests the Court decline Defendant’s Motion because Defendant did not assert a counterclaim against 5 Star or, to the extent the Court finds Defendant asserted a counterclaim, 5 Star had good cause, timely acted, and has meritorious defenses while Defendant will suffer little to no prejudice from the denial of its Motion. 5 Star requested Defendant’s counsel withdraw the Motion for Default but Defendant refused. (Affidavit of Amanda Scott attached as Exhibit A at ¶ 9.)²

I. Defendant Did Not Assert a Counterclaim against 5 Star but Rather Mischaracterizes an Affirmative Defense as a Counterclaim.

Due to an accounting error, 5 Star paid Defendant \$109,515.81 in unearned commissions. (Ex. B, Compl. ¶¶ 4, 6). After this error was discovered, 5 Star gave Defendant numerous opportunities to repay these funds. (Ex. C, Answer ¶¶ 54, 59). In late 2017 it became clear that Defendant would not return the unearned commissions. (*Id.* ¶ 60.) This breached the contract between the parties. (Ex. B, Compl. ¶ 4.) 5 Star then terminated the contract and filed in the instant action.

Defendant admits it entered the contract with 5 Star. (Ex. C, Answer ¶ 3 (admitting that “on or about May 02, 2013, Defendant, for good and valuable consideration, entered into a

¹ In May 2017, Defendant filed an action (“Defendant’s Lawsuit”) against several third parties it contends caused its failure to repay 5 Star for the unearned commissions. After 5 Star filed the instant breach of contract lawsuit Defendant filed the “counterclaim” blaming 5 Star for Defendant’s inability to repay the monies it had unjustly retained. On Defendant’s subsequent motion, these two lawsuits were consolidated on June 27, 2018.

² For the Court’s convenience 5 Star’s March 19, 2018 Complaint is attached as Exhibit B, Defendant’s March 29, 2018 Answer is attached as Exhibit C, and Defendant’s May 19, 2017 Complaint in Defendant’s Lawsuit (“Defendant’s Complaint”) is attached as Exhibit D.

personal contract,” a copy of which was attached to and incorporated into the Complaint). Defendant, however, claims its failure to repay the unearned commissions was caused by earlier breaches of contract by 5 Star that shrank Defendant’s commission stream. Defendant alleges:

- In December 2014 third parties moved “producers or agents outside of the Defendant’s commission hierarchy” and 5 Star “approved this movement.” (*Id.* ¶¶ 47, 48.)
- 5 Star “in their contract” did not “possess[] the legal authority to make such transfers out of Defendant’s hierarchy.” (*Id.* ¶ 53)
- By August 2017, “nearly all agents and producers were moved out of Defendant’s hierarchy” and 5 Star “approved this movement.” (*Id.* ¶¶ 51-52.)
- 5 Star’s “transfer[] of agents outside of Defendant’s hierarchy” was “in violation of the agreement between Defendant and 5 Star.” (*Id.* ¶ 65.)

5 Star did not approach Defendant until after “agents had been transferred out of Defendant’s hierarchy.” (*Id.* ¶ 54) 5 Star then did not demand immediate repayment until after “August 2017.” (*Id.* ¶ 59.) Because by then “5 Star had moved the vast majority of producing agents from the Defendant’s hierarchy, the remaining commission stream was inadequate to repay the alleged debit balance in a timely manner,” Defendant was unable to repay the unearned commissions and breached the contract. (*Id.* ¶ 60.)

Defendant did not assert a counterclaim against 5 Star, but rather raised the affirmative defense of prior breach. Its breach of contract by failing to repay 5 Star unearned commissions was caused by prior breaches of contract by 5 Star.³

³ This is in accord with Defendant’s Complaint which states “[t]his matter involves the breach of a contract. . . .” (Ex. D, Def’s Compl. ¶ 5.)

“When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation.” Rule 8(c), SCRCP. Prior breach is an affirmative defense. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (denying claim for breach of implied covenant of good faith and fair dealing because party was in default under the contract); *Retailers Serv. Bureau v. Smith*, 165 S.C. 238, 163 S.E. 649, 651 (1932) (describing as a defense to a breach of contract action the contention that a party was “justified in doing so by the prior breach thereof by plaintiff”); *see also, e.g., Fonar Corp. v. Tomsco Imaging, Inc.*, 46 F.3d 1123 (4th Cir. 1995) (describing prior breach as an affirmative defense); *Gulledge v. Dynacorp*, 24 Va. Cir. 538 (1989) (prior breach is an affirmative defense under Virginia law⁴). Accordingly, the Court should treat the “counterclaim” as an affirmative defense. *First S. Bank v. Rosenberg*, 418 S.C. 170, 183, 790 S.E.2d 919, 927 (Ct. App. 2016); *see also, e.g., Friends of DeReef Park v. Nat’l Park Serv.*, No. 2:13-CV-03453-DCN, 2015 WL 12807800, at *10 (D.S.C. May 27, 2015) (“Many district courts have dismissed counterclaims that are duplicative of affirmative defenses.”) (collecting cases); *Columbia Gas Transmission, LLC v. David N. Martin Revocable Tr.*, 833 F. Supp. 2d 552, 555 (E.D. Va. 2011) (“Res judicata and collateral estoppel are, however, affirmative defenses. Accordingly, the Court treats the pleadings as asserting these doctrines only as a defense and will not further address Count One of the counterclaim.”); *Tyler v. Cashflow Techs., Inc.*, No. 6:16-CV-00038, 2016 WL 6538006, at *6 (W.D. Va. Nov. 3, 2016) (“Defendants’ requests for declaratory judgment will be dismissed because they are merely defenses characterized as counterclaims.”).

⁴ Pursuant to § 18 of the contract, all disputes arising under the contract are governed by Virginia law.

Accordingly, the Court should treat the “counterclaim” in Defendant’s Answer as an affirmative defense and deny the Motion as moot.

II. The Court Should Deny Defendant’s Motion for Entry of Default

a. Legal Standard

South Carolina policy “favor[s] the disposition of issues on their merits rather than on technicalities.” *Micronics, Inc. v. S.C. Dep’t of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). To that end, the Court may set aside an entry of default “for good cause.” SCRCP 55(c). The Court also considers (1) the timing of the party’s motion for relief; (2) whether the party has a meritorious defense; and (3) the degree of prejudice to the other party if relief is granted. *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App. 1989).

Rule 55(c) should be “liberally construed to promote justice and dispose of cases on the merits.” *Melton v. Olenik*, 379 S.C. 45, 54 (Ct. App. 2008); *see also, e.g., see also Mann v. Walker*, 285 S.C. 194, 328 S.E.2d 659 (Ct.App.1985) (holding under the earlier statutory provisions for default judgment the rules dealing with default are liberally construed to see that justice is promoted and to strive for the disposition of cases on their merits). “[T]his element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default.” *Ricks v. Weinrauch*, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1987) (explaining Rule 55(c) is less rigorous than SCRCP 60(b), which applies after a judgment has been entered) (citing 10 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2685); *accord, e.g., Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4th Cir.2010) (“We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits.”); *Tazco, Inc. v. Dir., Office of Workers Comp.*

Programs, U.S. Dep't of Labor, 895 F.2d 949, 950 (4th Cir.1990) (noting "[t]he law disfavors default judgments as a general matter"). In short, "[r]elief granted at the point of entry of default is within the equitable power of the court and excuses previous failure to act promptly." *Ricks*, 293 S.C. at 374, 360 S.E.2d at 536.

b. 5 Star Had Good Cause for the Delay in Responding to Defendant's "Counterclaim"

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

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

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

instant Motion for Entry of Default (“Motion”). The Motion alerted 5 Star to the purported counterclaim and it swiftly filed an answer on May 17, 2018. (*Id.* at ¶8.)

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

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

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

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

c. No Default has been Entered, Thus 5 Star has Acted in a Timely Manner

The Court must also consider the timing of the defaulting party's motion for relief. *See Wham*, 298 S.C. at 465, 381 S.E.2d at 502. Here there has been no entry of default. Therefore, 5 Star cannot yet move for relief from entry of default. Accordingly, there is no timeliness issue as to 5 Star's motion for relief.

Further, 5 Star acted quickly to remedy this situation upon learning of the electronic service. It filed a Reply a mere five business days after learning of the purported counterclaim. (Scott Aff. ¶ 8.) To the extent any affirmative act was required when there was no entry of default, 5 Star timely acted to file a reply and submit the instant memorandum in advance of Defendant's Motion.

d. 5 Star has Meritorious Defenses

The Court must also consider whether 5 Star has a meritorious defense. To establish a meritorious defense, a party is not required to show an absolute defense. *See, e.g., Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989); *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978) (“[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial”). Rather, a meritorious defense “need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.” *Graham*, 272 S.C. at 453, 248 S.E.2d at 599.

i. Defendant's “Counterclaim” is Confusing, Ambiguous, and Vague and Fails to Assert Cause(s) of Action

Defendant's alleged “counterclaim” is vague and ambiguous. This is because Defendant simply inserted the fact section from complaint in Defendant's Lawsuit with a few minor adjustments. (*Compare* Ex. C, Answer ¶¶ 9-64 *with* Ex. D, Defendant's Complaint ¶¶ 5-59.) As 5

Star was not an original party to the other lawsuit, many of the allegations in the “counterclaim” concern third parties, not 5 Star. (*See, e.g.*, Ex. C, Answer ¶ 51 (“Wright made these hierarchy changes himself at Consolidated’s request.”)) To the extent it states a claim against 5 Star the “counterclaim” fails under the South Carolina Rules of Civil Procedure and the federal and state constitutions as it deprives 5 Star of a meaningful opportunity to know and respond to the allegations against it.

“The purpose of a pleading is fair notice to the opponent and the court.” *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct.App.2001). Under the South Carolina Rules of Civil Procure, “[a] pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain ... a short and plain statement of the facts showing that the pleader is entitled to relief. . . .” Rule 8(a), SCRPC. “If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading.” Rule 12(e), SCRPC; *see also, e.g.*, Rule 8(f), SCRPC (“All pleadings shall be so construed as to do substantial justice to all parties.”). “Failure to state sufficient facts and failure to state a cause of action upon which relief can be granted constitute the same defense under our state law.” *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 241–42, 363 S.E.2d 691, 692 (1988). A defense of “failure to state a cause of action upon which relief can be granted” may be raised at the trial on the merits. *Id.*; Rule 12(h)(2).

The “counterclaim” is largely the “fact” section of Defendant’s Complaint with a few minor tweaks. In Defendant’s Lawsuit, however, Defendant followed the fact section with six separate and discrete causes of action: breach of contract (twice), breach of contract accompanied by a fraudulent act, tortious interference with contractual relations (twice), and quantum

meruit/unjust enrichment. In contrast, here Defendant fails to present delineate which, if any, cause of action it asserts. 5 Star does not know what claims Defendant seeks to raise and is not required to guess by the South Carolina Rules of Civil Procedure. Further, the Court cannot grant relief on such uncertain, vague, and ambiguous claims. Therefore, Defendant's "counterclaim" is facially deficient and, even if true, fails to satisfy the requirements of due process or the South Carolina Rules of Civil Procedure.

e. Defendant Fails to State a Claim for Breach of Contract and Its' Overly Broad Prayer for Relief is Unmoored from Factual Allegations

To the extent Defendant can be found to have asserted any prima facie claim for relief, it must necessarily be a claim for breach of contract.⁷ (*Accord* Ex. D, Defendant's Complaint ¶ 5 ("This matter involves the breach of a contract. . . .").) Defendant fails, however, to allege the contractual clause 5 Star violated.

Further, Defendant's "counterclaim" seeks remedies for which it fails to allege causation and to which it is not entitled. "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). Defendant seeks "actual damages," though what and how much are not apparent from the face of the counterclaim (particularly in light of the Defendant's \$136,721.67 debt to 5 Star).

Additionally, however, Defendant seeks broad mandatory injunctive relief. "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Defendant does not demand the Court restrain 5 Star but rather force it to

⁷ As discussed above, pursuant to Defendant's pleadings and in light of the facts of this case, this "counterclaim" is really an affirmative defense to Defendant's breach of contract.

act. “The issuance of a mandatory injunction depends upon the equities between the parties, and it rests in the sound judicial discretion of the court whether such an injunction should be granted. Where a great injury will be done to the defendant, with very little if any to the plaintiff, the courts will deny equitable relief.” *Hunnicut v. Rickenbacker*, 268 S.C. 511, 515–16, 234 S.E.2d 887, 889 (1977). An injunction is “available only where no remedy at law exists or where the legal remedy would fail to make the party whole.” *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 369–70, 588 S.E.2d 635, 639 (Ct. App. 2003), *holding modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

Defendant demands to be “reinserted into the hierarchy in which he [sic] belongs, provide[d] contact information on clients and prospects from the First Responder marketing program, [and] client personal data for resale to other life and ancillary plans.” (Ex. C, Answer at WHEREFORE.) It fails to provide any contractual basis through which it is entitled to this injunctive relief. Indeed, the relief demanded is so vague and broad as to grant Defendant information it never would have obtained under the parties’ contractual relationship. *See, e.g., id.* (“all client personal data for resale to other life and ancillary plans. . . .”). Accordingly it provides the Court no basis to compel action. Defendant also seeks money damages. This illustrates that any harm to Defendant should be calculable and does not require injunctive relief. Finally, the relief requested cannot be obtained from 5 Star. For example, the “First Responder marketing program” relates to an agreement between Defendant and Consolidated Assurance, an entity independent from 5 Star. (See Answer ¶ 40.) The requested relief should be demanded from other actors, not 5 Star.

f. Defendant Will Suffer Little, if Any, Meaningful Prejudice

The Court's final consideration is the degree of prejudice to Defendant if default is not granted. *Wham*, 298 S.C. at 465, 381 S.E.2d at 502. Defendant's Motion presents a unique situation; unlike most default actions, this litigation will continue even if the Court enters default. First, 5 Star will continue to pursue its claim for \$136,721.67 plus further fees and costs. Second, in addition to its own claim, because there are insufficient allegations in the "counterclaim" to establish damages 5 Star will pursue discovery and a full hearing as to Defendant's alleged damages. *Mut. Sav. & Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading. . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error."); *see also, e.g., Masters v. Rodgers Dev. Group, S.C.*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct.App.1984) (holding defendant found in default was not precluded from challenging the sufficiency of the plaintiff's complaint as a basis for judgment). Third, after filing the Motion Defendant elected to consolidate this action with Defendant's Lawsuit, a separate litigation. Defendant filed the other litigation in 2017 against various persons/entities it contends hampered its ability to repay 5 Star the unearned commissions. Defendant's "counterclaim" in the instant lawsuit borrows from the allegations in the other action.⁸ Discovery is ongoing in the other litigation.

⁸ It is telling that Defendant did not originally bring suit against 5 Star. At the time it filed the other action, Defendant was engaged in delay tactics to put off repayment of the unearned commissions. It only asserted the "counterclaim" against 5 Star once it could no longer avoid its obligations. *See, e.g., Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920), *overruled in part on other grounds by Antley v. New York Life Ins. Co.*, 139 S.C. 23, 137 S.E. 199 (1927) ("No person shall be allowed to reap the benefits arising from his own wrongful acts."); *id.* ("He who seeks equity must do equity."); *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) ("The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.'").

Thus, regardless of whether a default is entered, the full factual scenario is subject to litigation and discovery. Accordingly, Defendant will suffer little, if any, prejudice if the Court denies its Motion.

WHEREFORE, Plaintiff 5 Star respectfully requests the Court treat Defendant's purported "counterclaim" as an affirmative defense and deny the Motion as moot. In the alternative, 5 Star asks the Court to deny Defendant's Motion as 5 Star had good cause for its brief delay in responding to Defendant's counterclaim, default has not been entered and thus there are no timeliness considerations, 5 Star has meritorious defenses, and Defendant will suffer little, if any, prejudice.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Plaintiff 5 Star Life Insurance Co.

Greenville, South Carolina

August 17, 2018

Exhibit A

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,	)	
	)	
Plaintiff	)	
	)	
vs.	)	C.A. No. 2018-CP-23-01639
	)	
Peek Performance, Inc.,	)	
	)	
Defendant.	)	
	)	
_____	)	
	)	
Peek Performance, Inc. and D. Clayton	)	
Peek,	)	
	)	
Plaintiffs,	)	C.A. No. 2017-CP-23-03269
	)	
v.	)	
	)	
Jeff Wright d/b/a Agent Sales Group, Joe	)	
Caldwell, Nathan Wells, Jeff Magg, and	)	
Consolidated Assurance, LLC,	)	
	)	
Defendants.	)	
_____	)	

AFFIDAVIT OF AMANDA SCOTT

Personally appeared before me, the undersigned, who, being duly sworn, states as follows:

1. I am an associate attorney with the Alabama based debt collection law firm Parnell & Parnell, P.A.

2. My practice is devoted entirely to debt collection. Due to the nature of my practice, my cases are frequently uncontested and do not typically involve counterclaims.

3. While I occasionally appear in Greenville County, I reside in Richland County South Carolina and the majority of my practice is focused in the Midlands. Richland County courts did not begin to use the E-File system until March 8, 2018.

4. I filed the complaint in the instant action against Peek Performance, Inc. on March 19, 2018.

5. Defendant had until April 19, 2018 to file an answer to this complaint. In my experience, defendants typically file answers very close to their responsive deadline. Other than the instant lawsuit, I do not recall ever previously having a

defendant file an answer within two weeks of service. The current case is the soonest after service of a complaint that I can ever recall a defendant filing an answer.

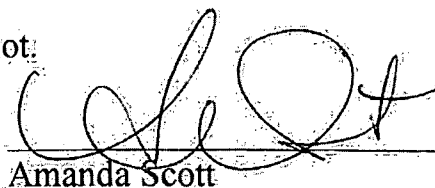
6. I did not see an e-file notice alerting me to Defendant's answer. I did not know that Defendant filed an answer or claimed to have filed a counterclaim until I saw its Motion for Entry of Default. Had I seen an E-File notice, I would not have expected it to be for the instant lawsuit so soon after I filed the complaint.

7. I did not know a defendant could serve a counterclaim by E-Filing. At the time, I understood that all complaints and counterclaims needed to be served by traditional methods such as mail or personal service.

8. I was very surprised when I saw the Motion for Entry of Default. This motion alerted me to the alleged counterclaim and I immediately drafted a responsive pleading. I filed this Reply five business days after Defendant filed its Motion for Entry of Default.

9. I also quickly contacted Jim Carpenter, Defendant's counsel, to explain my confusion and why I did not see the notice of filing. I asked Mr. Carpenter to withdraw the Motion for Entry of Default. Mr. Carpenter refused to withdraw the motion.

Further, Affiant sayeth not.



Amanda Scott

Sworn to before me this 16
day of August, 2018.



Notary Public for South Carolina
My commission expires: 11.16.18

Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

5 STAR LIFE INSURANCE
COMPANY,

Plaintiff,

VS.

PEEK PERFORMANCE, INC., a
South Carolina corporation,

Defendant.

**IN THE COURT OF COMMON PLEAS
13TH JUDICIAL CIRCUIT
CIVIL ACTION NO.**

SUMMONS

TO: PEEK PERFORMANCE, INC., a
500 CLIMBING ROSE COURT
AGENT; DONALD CLAYTON PEEK
FOUNTAIN INN SC 29644

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscriber at P.O. Box 743, White Rock, SC within thirty (30) days after service hereof, exclusive of the day of service hereof. **AND IF YOU FAIL** to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

/s/ Amanda M. Scott
AMANDA M. SCOTT
S.C. Bar Number 73080
PARNELL & PARNELL, P.A.
P.O. Box 743
White Rock, SC 29177
Phone #866/629-0912

P&C No.: 1350056

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
13TH JUDICIAL CIRCUIT

5 STAR LIFE INSURANCE
COMPANY,

COMPLAINT

Plaintiff,

vs.

(NON-JURY COLLECTION)

PEEK PERFORMANCE, INC., a,
South Carolina corporation,

C/A NO.:

Defendant.

The above-named Plaintiff, complaining of the Defendant herein, respectfully alleges:

1. That Plaintiff is an entity authorized to conduct business in the State of South Carolina.
2. That upon information and belief, Defendant Peek Performance, Inc., is a organized business authorized to conduct business in the State of South Carolina, existing under the laws of the State of South Carolina.
3. That on or about May 02, 2013, Defendant, for good and valuable consideration, entered into a personal contract (the "Contract"), a copy of which is attached hereto and incorporated herein as **Exhibit "A"**.
4. That Defendant subsequently failed to pay the amount due, thereby making Defendant in default under the terms of the Contract.
5. That, upon information and belief, the right to cure notice required by S.C. Code Section 37-5-110 and 37-5-111 has been given or is not required.
6. That the Contract provided that in case of default in payment of any principal or interest due, or in case of default in the compliance with any other terms of the Contract, the holder of the Contract had the right to declare all sums owing on the Contract to be immediately due and payable; and that under the terms of the Contract there is presently due the principal amount of \$109,515.81, and interest due in the amount of \$9,372.60. Plaintiff would allege the Defendant owes interest to the date of any judgment entered in this case at the rate of 8.5% per annum.

7. That the Contract provided that in case of default in payment by Defendant, Plaintiff, in addition to the principal and interest left owing on the Contract, would also be able to collect from Defendant reasonable attorney's fees in the amount of \$17,833.26.

WHEREFORE, having fully set forth its Complaint, Plaintiff demands try by non-jury and prays for the following:

- (a) Judgment against Defendant in the total claim amount of \$136,721.67.
- (b) For the costs and disbursements of this action together with reasonable attorney's fees; and
- (c) For such other and further relief as the Court may deem just and proper.

PARNELL & PARNELL, P.A.

/s/ Amanda M. Scott
AMANDA M. SCOTT
Attorney for Plaintiff
S.C. Bar Number 73080
PARNELL & PARNELL, P.A.
P.O. Box 743
White Rock, SC 29177
Phone #866/629-0912

Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2018-CP-23-01639
	)	
5 Star Life Insurance Company,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ANSWER AND COUNTERCLAIM
	)	
Peek Performance, Inc., a South Carolina corporation	)	JURY TRIAL DEMANDED
	)	
Defendants.	)	
	)	

NOW COMES the Defendant, by its undersigned attorney and as an Answer and Counterclaim in the above referenced case admits, denies, and alleges as follows:

1. Upon information and belief, Defendant admits the allegations paragraph 1.
2. Defendant admits the allegations paragraph 2.
3. Defendant admits the allegations of paragraph 3 except for the word "personal."
4. Defendant denies the allegations of paragraph 4.
5. Defendant denies the allegations of paragraph 5.
6. Defendant denies the allegations of paragraph 6.
7. Defendant denies the allegations of paragraph 7.
8. In response to Prayer for Relief, Defendant denies that the Plaintiff is entitled to

any relief whatsoever, and that the claims of the Plaintiff are more than offset by the Counterclaims of the Defendant, set out below.

COUNTERCLAIM

9. D. Clayton Peek ("Clay Peek") is the owner and principal of Peek Performance, and is licensed to sell insurance in South Carolina, North Carolina, Georgia and other states.

10. Jeff Wright, d/b/a Agent Sales Group (“Wright”) is a citizen of the State of Georgia who entered into a contract with Defendant to be performed, in part, in Greenville County, South Carolina.

11. Joe Caldwell, Nathan Wells, and Jeff Magg are the principals of Consolidated Assurance, LLC, a South Carolina limited liability company headquartered in Greenville County, (collectively “Consolidated”).

12. At all relevant times, Jeff Wright has served as the Regional Director (“RD”) for Plaintiff 5 Star (“5 Star”) (or “the Company”).

13. Consolidated and its principals had previously done business with the Defendant, when they, with review and approval from 5 Star and Wright, sought out Defendant for help in taking their marketing program to a national level. Consolidated was previously within Wright’s Field Marketing Organization. Neither Consolidated nor Wright had the expertise and skills to convert its plans into a national recruiting and marketing endeavor, but approached the Defendant, who did. 5 Star extensively vetted Defendant and their marketing plans for Consolidated, and Wright and 5 Star approved Defendant to be inserted as a managing agency above Consolidated after a visit and/or vetting process and provided a contract to validate this position.

14. Defendant agreed to engage in this effort with Consolidated, Wright and 5 Star. Defendant agreed to take an override or commission of only five points in exchange for managing and teaching Consolidated and to give Consolidated the benefit of Defendant’s oversight, size, and market experience, and its expertise in converting Consolidated’s content into a national marketing and recruiting endeavor.

15. Defendant and Consolidated agreed that Defendant would help develop Consolidated’s recruiting and marketing plan as Consolidated’s direct manager, for which

Defendant would receive a 5% commission on any 5 Star policies that Consolidated sold except those policies sold personally by the three principals of Consolidated as noted in paragraph 20.

16. Defendant also subsequently negotiated marketing assistance and production bonuses for Defendant and CA with 5 Star.

17. On or about May 2, 2013, Defendant entered into an agency contract with 5 Star, by which Defendant became an agent and marketing organization of 5 Star under the hierarchy of Jeff Wright and as the exclusive “upline hierarchy” for all “Consolidated” agents except the principals. Defendant’s agents were entitled to sell life insurance for 5 Star, and Defendant was entitled to receive a portion of the commissions on those sales from 5 Star.

18. As a marketing organization and pursuant to the contract, Defendant and Consolidated could recommend “producers” to the company for appointment to sell the “covered products.” The 5 Star agency contract repeatedly refers to these agents as “Your agents” – the agents of the Defendants.

19. Defendant agreed to teach Consolidated how to recruit and train a team of agents nationwide. This consisted of the first few rounds of initial recruiting (including outreach and screening of prospective agents), live online webinar meetings with the prospective agents, initial online “First Responder” training classes that Defendant and CA created jointly, creating qualifications for early recruits to advance to live training, assisting with the coordination of the initial live training events in Greenville, SC and Atlanta, GA and the administrative back office / contracting tasks were initially performed by the Defendant. The objective of the training provided by the Defendant was to train CA so that they could continue and expand this market on their own in the future. Over time Consolidated assumed these tasks as planned.

20. The ultimate goal was to have highly effective sales producers who would properly represent the “covered products,” comply with applicable law, and follow Company rules and procedures. Defendant’s efforts have been highly successful.

21. Defendant worked with Consolidated to create training programs, opportunity shows, webinars, e-blasts, telephone outreaches, etc.

22. Defendant was entitled to receive commissions on sales made by agents placed under Consolidated, persons under Defendant in the Defendant’s sales hierarchy for 5 Star.

23. If the Company required chargebacks from lapsed sales made by the producers under the Defendant in the Defendant’s hierarchy, Defendant was also responsible financially for those chargebacks for persons under Defendant’s hierarchy, including all agents appointed under Consolidated.

24. Consolidated is an insurance marketing agency that had a plan to market an insurance product sold by 5 Star. That product was especially suitable for First Responders such as police officers, fire fighters and EMS providers.

25. As further consideration for this agreement and commission, Defendant agreed not to terminate Consolidated without cause, not to transfer agents, and not to make changes to commissions without their consent. Consolidated indicated that they wanted the same reciprocal arrangement that Wright and the Defendant agreed to in the paragraphs below.

26. Defendant required that the principals of Consolidated would remain outside the Defendant’s hierarchy, but all agents under them and/or recruited by them and or Defendant from that time forward would be placed under Defendant’s hierarchy. Accordingly, Wright and the company, 5 Star, moved all agents, existing and new, to the Defendant’s hierarchy.

27. Defendant and Wright entered into a written agreement via email that in consideration of Defendant's helping Consolidated develop their marketing plan, Defendant would receive a 5% commission on any 5 Star policies that Consolidated sold.

28. In addition Wright promised in writing in an email:

Also, to confirm what we discussed, no one in my organization including myself will ever market to, or contact any of your downline agents **nor will we modify or change hierarchies or commissions unless under your direction** or giving you notice of comp changes that may come from the company itself (emphasis added).

29. Wright also agreed that he would not request termination of the contract "without cause." By this agreement, of which Consolidated and 5 Star were aware, Defendant was placed in Wright's Regional Director hierarchy above all of Consolidated's agents or producers.

30. Consolidated also received a commission on the sales made by the producers under them in the hierarchy at a rate of 115% of the annual premium, which was an increase recommended by the Defendant in order to increase Consolidated's profitability on the program to approximately 50 - 60 points or 50-60%. Defendant received 5% of the premium. Upon information and belief, Wright received approximately 20-30% of the premium as commission override.

31. Upon information and belief, at the request of Consolidated, Wright and 5 Star, all Consolidated agents or producers (except the three principals) were placed in Defendant's hierarchy or downline. The Defendant had no capacity to cause this to happen; it required the action of Consolidated, Wright and 5 Star.

32. Defendant immediately engaged in the active recruiting/training of prospective agents and in teaching Consolidated some of these methodologies.

33. Defendant generously included agents from their own proprietary/contracted list as the initial resource of prospective agents for this program.

34. Together, Defendant and Consolidated began recruiting agents to sell the insurance offered by the Company in many states across the country. As a result, Consolidated's sales quickly grew, so that Defendant's 5% commission arising from the contract with Consolidated and Wright was approximately \$300,000.00 - \$400,000 per year.

35. Wright promised Defendant that the agents recruited under this program would belong to Defendant unless transferred/released by written consent of the Defendant.

36. The Company contract does not specifically reserve any power for the Company to remove an agent from the Defendant. The Company told Defendant verbally that the RD traditionally has been granted this authority, but this provision does not appear in the contract provided to Defendant. Further, the RD, Wright, yielded this alleged privilege to the Defendant in order to consummate the agreement with the Defendant.

37. The Defendant taught and led Consolidated to negotiate with the Company for marketing dollars and production bonuses, and the Defendant negotiated and acquired bonuses from the Company based on successful recruiting and production of applications for the insurance that was beneficial to Consolidated, Wright, the Company, and the Defendant.

38. High-level officers from the Company came to Greenville, SC and to Atlanta, GA to vet the Defendant, approve the planning/program, and attend the training launches in which they observed the Defendant presenting in classes for new agents.

39. The Defendant taught Consolidated to negotiate with the Company for incentives and the Defendant negotiated and acquired incentives from the Company for training seminars such as interest-free loans that could be forgiven if enough agents were recruited and enough applications were remitted. The Defendant was willingly liable as guarantor for the payback of these loans.

40. When the Defendant and Consolidated hosted agents or producers who attended live training, they and the agents signed a form called "Peek Performance Inc./Consolidated Assurance Agent Agreement." The parties to this Agreement agreed that "the prospects/clients . . . on the 'First Responder' marketing program are the prospects/clients of PPI/CA."

41. A significant part of the value proposition to the Defendant, which motivated him to do the deal, was that Defendant would have access to client and prospect sales data in order to be able to market other, non-competing products to the clients and prospects from the First Responder marketing program. Defendant has not been provided this data. James Bradford was aware of this arrangement, as were Consolidated and Jeff Wright.

42. Together, Defendant and Consolidated recruited agents from many states and became very successful, earning commissions, bonuses, and prizes such as trips to Scottsdale Arizona, Miami, FL, and Colorado Springs, Colorado, etc.

43. Defendant helped Consolidated increase in sales from about 3000 policies a year to about 30,000 policies a year in about a year and half.

44. Upon information and belief, Defendant received commissions for all agents in Consolidated's downline more than a year without any modification of the arrangement occurred.

45. In 2015, Defendant saw those commissions shrink, and inquired as to why this occurred.

46. Defendant learned that Consolidated was trying to reduce the Plaintiff's commissions, in order to keep more of the commissions from sales for itself.

47. In order to accomplish this, upon information and belief, on or about December, 2014 to January, 2015, Consolidated had asked Wright to move some of Consolidated's producers or agents outside of the Defendant's commission hierarchy (*the first known movement of agents*).

48. Upon information and belief, 5 Star approved this movement.

49. In a personal meeting between the Defendant, Wright and Erik Knutson in Atlanta, GA, Wright stated that he gave his power-of-attorney to Consolidated, by which Consolidated could cause and did cause its agents or producers to be transferred away from the Defendant so that these agents could sell directly under Consolidated and Wright without paying Defendant their 5% commission.

50. In the alternative, Wright made these hierarchy changes himself at Consolidated's request.

51. Eventually, on or about August of 2017, nearly all agents and producers were moved out of Defendant's hierarchy and into a hierarchy that included Consolidated, but not the Defendant, thereby taking away Defendant's right and opportunity to earn its 5% override or commission, all without Defendant's knowledge, consent or compensation (*the second known movement of agents*). Other agents were likely appointed directly to CA (or alternative organization under CA's authority, like Tyler Harris) who were not appointed under the Defendant, as they should have been.

52. Upon information and belief, 5 Star approved this movement.

53. Neither Consolidated nor Wright (nor 5 Star, in their contract) possessed the legal authority to make such transfers out of Defendant's hierarchy.

54. On or about December, 2014 or January, 2015, the Company alleged that due to a Company accounting error, the Company had overpaid the Defendant by approximately \$100,000 of commissions. The Defendant and the Company agreed to have the Company retain 50% of Defendant's commissions. When Defendant agreed to have the \$100,000 withdrawn, Defendant was unaware that agents had been transferred out of Defendant's hierarchy.

55. When Wright and Consolidated and 5 Star removed the Defendant's agents from Defendant's hierarchy, they also removed the means of repayment, as agreed by the Company resulting in the termination of the Defendant's contract with the Company and final removal of any remaining agents from the Defendant's hierarchy.

56. Overpayment of commissions and removal of downline agents by 5 Star to Plaintiff's caused 5 Star to inform Defendant that there was a debit balance owed to 5 Star of approximately \$100,000. 5 Star required repayment.

57. Defendant, not yet fully aware of the transfer of agents away from their hierarchy and the resulting loss of commission from transferred agents, agreed to a payment plan by which 5 Star would retain 50% of commissions until debit balance was repaid. Had 5 Star done this, and had they not inappropriately removed the Defendant's agents from his hierarchy, the debit balance would have been repaid in only several months.

58. 5 Star failed repeatedly to implement the agreement to retain 50%. The Defendant requested again that the agreement be enforced.

59. After the second large group of agents were removed from Defendant's hierarchy in August 2017, 5 Star began to pressure Defendant more aggressively for repayment, whereby Defendant requested that 5 Star keep 100% of commissions in order to pay the alleged debit balance until it was paid in full.

60. Because Consolidated, Wright, and 5 Star had moved the vast majority of producing agents from the Defendant's hierarchy, the remaining commission stream was inadequate to repay the alleged debit balance in a timely manner, and 5 Star began issuing threats to the Defendant.

61. On 11/28/16, Defendant questioned 5 Star (Kimo Wong and James Bradford) about the movement of agents outside the PPI hierarchy, and 5 Star stated that Consolidated had sought 5 Star approval to move agents outside PPI hierarchy. 5 Star said they allowed the movement of agents to occur.

62. Defendant appealed to the president and to the chairman of the board of 5 Star, but was denied a hearing and an opportunity to express his viewpoint and concerns. Further, in email from the President, Mark Singleton and in phone communication, General Counsel, Mike Moser and Singleton stated that they viewed the Defendant as a "consultant" not as an agency with a hierarchy, as the 5 Star contract indicates.

63. Wright and Consolidated requested transfer of agents, and 5 Star wrongfully removed agents from the Defendant's hierarchy. As a result of these wrongful transfers, CA, Wright and the Company made it impossible for the Defendant to repay the debit balance via the agreed upon method, which caused 5 Star to terminate the Defendant's contract.

64. Subsequently, because of the actions of Wright, Consolidated and 5 Star, 5 Star libelously reported the Defendant to the Vector organization as a "Bad Debt" thereby soiling the reputation of the Defendant and causing other insurance carriers (such as Mutual of Omaha) to refuse to offer "advanced" commissions on sold business, which is common practice in the insurance industry. This action restricted the cash flow of the Defendant and could have affected Defendant's ability to meet normal expenses and obligations of doing business. United Home Life terminated their contract with the Defendant upon notice of the Vector, and other carriers have increased their screening of the Defendant in their contracting process as a result of 5 Star's actions.

65. 5 Star has transferred agents outside of Defendant's hierarchy in violation of the agreement between Defendant and 5 Star.

66. 5 Star breached the contract between itself and Defendant, proximately causing damages to the Defendant in an amount to be determined at trial.

67. 5 Star breached the implied covenant of good faith and fair dealing with Defendant.

68. Defendant also should receive all client personal data for resale to other life and ancillary plans.

WHEREFORE, Defendant prays the Court for an award of actual damages, pre-judgment interest, post-judgment interest, costs, attorneys' fees, for appropriate equitable relief causing Defendant to be reinserted into the hierarchy in which he belongs, provide contact information on clients and prospects from the First Responder marketing program, all client personal data for resale to other life and ancillary plans, and grant such other and further relief as the Court deems just and proper.

DEFENDANT DEMANDS TRIAL BY JURY.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

/S/ James G. Carpenter

SC Bar No. 1136

819 E. North St.

Greenville, SC 29601

Tel. (864) 235-1269

Fax (864) 331-3083

Attorney for Defendant

Exhibit D

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) CASE NO.: 2017-CP-23-00 _____
Peek Performance, Inc., and D. Clayton Peek,)
Plaintiffs,)
v.) SUMMONS
Jeff Wright d/b/a Agent Sales Group, Joe Caldwell,) JURY TRIAL DEMANDED
Nathan Wells, Jeff Magg, and Consolidated)
Assurance, LLC,)
Defendants.)

To the Defendants:

You are hereby summoned and required to serve upon the attorney at the address below an Answer to the attached Complaint within 30 days of the date of service hereof. If you fail to do so, judgment by default will be entered against you for the relief demanded in the Complaint.

THE CARPENTER LAW FIRM, P.C.

S/ James G. Carpenter
James G. Carpenter, SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2017-CP-23-00 _____
	)	
Peek Performance, Inc., and D. Clayton Peek,	)	
	)	
Plaintiffs,	)	COMPLAINT
	)	JURY TRIAL DEMANDED
v.	)	
	)	
Jeff Wright d/b/a Agent Sales Group, Joe Caldwell,	)	
Nathan Wells, Jeff Magg, and Consolidated	)	
Assurance, LLC,	)	
Defendants.	)	

Plaintiffs, complaining of the Defendants alleges as follows:

1. Plaintiff Peek Performance, Inc. ("Peek Performance") is a South Carolina corporation headquartered in Greenville County, South Carolina.
2. Plaintiff D. Clayton Peek ("Clay Peek") is the owner and principal of Peek Performance, and is licensed to sell insurance in South Carolina, North Carolina, Georgia and other states.
3. Jeff Wright, d/b/a Agent Sales Group ("Wright") is a citizen of the State of Georgia who entered into a contract with Plaintiffs to be performed, in part, in Greenville County, South Carolina.
4. Defendants Joe Caldwell, Nathan Wells, and Jeff Magg are the principals of Defendant Consolidated Assurance, LLC, a South Carolina limited liability company headquartered in Greenville County, South Carolina (collectively "Consolidated").

5. This matter involves the breach of a contract which was to be, and which was, partly performed in Greenville County, South Carolina. Therefore, this Court has jurisdiction over this matter, and venue is proper in this Court.

6. At all relevant times, Jeff Wright has served as the Regional Director ("RD") for Armed Forces Benefits Association ("AFBA"), a subsidiary of 5Star Life Insurance Company of Alexandria, Virginia ("5Star") (collectively, "the Company").

7. Consolidated and its principals had previously done business with the Plaintiffs, when they, with review and approval from AFBA and Wright, sought out Plaintiffs for help in taking their marketing program to a national level. Consolidated was previously within Wright's Field Marketing Organization. Consolidated did not have the expertise and skills to convert its plans into a national recruiting and marketing endeavor, but approached the Plaintiffs, who did. Wright and AFBA approved Plaintiffs to be inserted as a managing agency above Consolidated after a visit and/or vetting process and provided a contract to validate this position.

8. Plaintiffs agreed to engage in this effort with Consolidated, Wright and AFBA. Plaintiffs agreed to take an override or commission of only five points in exchange for teaching Consolidated and to give Consolidated the benefit of Plaintiffs' oversight, size, and market experience, and its expertise in converting Consolidated's content into a national marketing and recruiting endeavor.

9. Plaintiffs and Consolidated agreed that Plaintiffs would help develop Consolidated's recruiting and marketing plan, for which Plaintiffs would receive a 5% commission on any AFBA policies that Consolidated sold except those policies sold personally by the three principals of Consolidated as noted in paragraph 20.

10. Plaintiffs also subsequently negotiated production bonuses for Plaintiffs and CA with AFBA.

11. On or about May 2, 2013, Plaintiffs entered into an agency contract with 5Star, by which Plaintiffs became an agent and marketing organization of 5Star and AFBA under the hierarchy of Jeff Wright and as the exclusive “upline hierarchy” for all “Consolidated” agents except the principals. Plaintiffs’ agents were entitled to sell life insurance for 5Star and AFBA, and Plaintiffs were entitled to receive a portion of the commissions on those sales from 5Star and AFBA.

12. As a marketing organization and pursuant to the contract, Plaintiffs and Consolidated could recommend “producers” to the company for appointment to sell the “covered products.”

13. Plaintiffs agreed to teach Consolidated how to recruit and train a team of agents nationwide. This consisted of the first few rounds of initial recruiting (including outreach and screening of prospective agents), live online webinar meetings with the prospective agents, initial online “First Responder” training classes that Plaintiffs and CA created jointly, assisting with the coordination of the initial live training events in Greenville, SC and Atlanta, GA and the administrative back office / contracting tasks were initially performed by the Plaintiffs. The objective of the training provided by the Plaintiffs was to train CA so that they could continue and expand this market on their own in the future. Over time Consolidated assumed these tasks as planned.

14. The ultimate goal was to have highly effective sales producers who would properly represent the “covered products,” comply with applicable law, and follow Company rules and procedures.

15. Plaintiffs worked with Consolidated to create training programs, opportunity shows, webinars, e-blasts, telephone outreaches, etc.

16. Plaintiffs were entitled to receive commissions on sales made by persons under Plaintiffs in the Plaintiffs' sales hierarchy for 5Star and AFBA.

17. If the Company required chargebacks from lapsed sales made by the producers under the Plaintiffs in the Plaintiffs' hierarchy, Plaintiffs were also responsible financially for those chargebacks for persons under Plaintiffs' hierarchy, including all agents appointed under Consolidated.

18. Consolidated is an insurance marketing agency that had a plan to market an insurance product sold by AFBA. That product was especially designed for First Responders such as police officers, fire fighters and EMS providers.

19. As further consideration for this agreement and commission, Plaintiffs agreed not to terminate Consolidated without cause, not to transfer agents, and not to make changes to commissions. Consolidated indicated that they wanted the same reciprocal arrangement that Wright and the Plaintiffs agreed to in paragraphs 21, 22, and 23 below.

20. Plaintiffs required that the principals of Consolidated would remain outside the Plaintiffs' hierarchy, but all agents under them and/or recruited by them and or Plaintiffs from that time forward would be placed under Plaintiffs' hierarchy. Accordingly, Wright, the company, AFBA, moved all agents, existing and new, to the Plaintiffs' hierarchy.

21. Plaintiffs and Wright entered into a written agreement via email that in consideration of Plaintiffs' helping Consolidated develop their marketing plan, Plaintiffs would receive a 5% commission on any AFBA policies that Consolidated sold.

22. In addition Wright promised in writing in an email:

Also, to confirm what we discussed, no one in my organization including myself will ever market to, or contact any of your downline agents **nor will we modify or change hierarchies or commissions unless under your direction** or giving you notice of comp changes that may come from the company itself (emphasis added).

23. Wright also agreed that he would not request termination of the contract “without cause.” By this agreement, of which Consolidated and AFBA were aware, Plaintiffs were placed in Wright’s Regional Director hierarchy above all of Consolidated’s agents or producers.

24. Consolidated also received a commission on the sales made by the producers under them in the hierarchy at a rate of 115% of the annual premium. Plaintiffs received 5% of the premium. Upon information and belief, Wright received approximately 20-30% of the premium as commission override.

25. Upon information and belief, at the request of Consolidated, Wright and AFBA, all Consolidated agents or producers (except the three principals) were placed in Plaintiffs’ hierarchy or downline. The Plaintiffs had no capacity to cause this to happen; it required the action of Consolidated, Wright and AFBA.

26. Plaintiffs immediately engaged in the active recruiting/training of prospective agents and in teaching Consolidated some of these methodologies.

27. Plaintiffs generously included agents from their own proprietary/contracted list as the initial resource of prospective agents for this program.

28. Together, Plaintiffs and Consolidated began recruiting agents to sell the insurance offered by the Company in many states across the country. As a result, Consolidated’s sales quickly grew, so that Plaintiffs’ 5% commission arising from the contract with Consolidated and Wright was approximately \$300,000.00 - \$400,000 per year.

29. Wright promised Plaintiffs that the agents recruited under this program would belong to Plaintiffs unless transferred/released by written consent of the Plaintiffs.

30. The Company contract does not specifically reserve any power for the Company to remove an agent from the Plaintiffs. The Company told Plaintiffs verbally that the RD traditionally has been granted this authority, but this provision does not appear in the contract provided to Plaintiffs. Further, the RD, Wright, yielded this alleged privilege to the Plaintiffs in order to consummate the agreement with the Plaintiffs.

31. The Plaintiffs taught Consolidated to negotiate with the Company for production bonuses, and the Plaintiffs negotiated and acquired bonuses from the Company based on successful recruiting and production of applications for the insurance that was beneficial to Consolidated, Wright, the Company, and the Plaintiffs.

32. High-level officers from the Company came to Greenville, SC and to Atlanta, GA to vet the Plaintiffs, approve the planning/program, and attend the training launches in which they observed the Plaintiffs presenting in classes for new agents.

33. The Plaintiffs taught Consolidated to negotiate with the Company for incentives and the Plaintiffs negotiated and acquired incentives from the Company for training seminars such as interest-free loans that could be forgiven if enough agents were recruited and enough applications were remitted.

34. When the Plaintiffs and Consolidated hosted agents or producers who attended live training, they signed a form called "Peek Performance Inc./Consolidated Assurance Agent Agreement." The parties to this Agreement agreed that "the prospects/clients . . . on the 'First Responder' marketing program are the prospects/clients of PPI/CA."

35. A significant part of the value proposition to the Plaintiffs, which motivated him to do the deal, was that Plaintiffs would have access to sales data in order to be able to market other,

non competing products to the clients and prospects from the First Responder marketing program. Plaintiffs have not been provided this data.

36. Together, Plaintiffs and Consolidated recruited agents from many states and became very successful, earning commissions, bonuses, and prizes such as trips to Scottsdale Arizona, Miami, FL, and Colorado Springs, Colorado, etc.

37. Plaintiffs helped Consolidated increase in sales from about 3000 policies a year to 30,000 policies a year in about a year and half.

38. Upon information and belief, Plaintiffs received commissions for all agents in Consolidated's downline more than a year without any modification of the arrangement occurred.

39. In 2015, Plaintiffs saw those commissions shrink, and inquired as to why this occurred.

40. Plaintiffs learned that Consolidated was trying to reduce the Plaintiff's commissions, in order to keep more of the commissions from sales for itself.

41. In order to accomplish this, upon information and belief, on or about December, 2014 to January, 2015, Consolidated had asked Wright to move some of Consolidated's producers or agents outside of the Plaintiffs' commission hierarchy (*the first known movement of agents*).

42. Upon information and belief, AFBA approved this movement.

43. In a personal meeting between the Plaintiffs, Wright and Erik Knutson in Atlanta, GA, Wright stated that he gave his power-of-attorney to Consolidated, by which Consolidated could cause and did cause its agents or producers to be transferred away from the Plaintiffs so that these agents could sell directly under Consolidated and Wright without paying Plaintiffs their 5% commission.

44. In the alternative, Wright made these hierarchy changes himself.

45. Eventually, on or about August of 2017, nearly all agents and producers were moved out of Plaintiffs' hierarchy and into a hierarchy that included Consolidated, but not the Plaintiffs, thereby taking away Plaintiffs' right and opportunity to earn its 5% override or commission, all without Plaintiffs' knowledge, consent or compensation (*the second known movement of agents*).

46. Upon information and belief, AFBA approved this movement.

47. Neither Consolidated nor Wright (nor AFBA, in their contract) possessed the legal authority to make such transfers out of Plaintiffs' hierarchy.

48. On or about December of 2014 or January of 2015 the Company alleged that due to a Company accounting error, the Company had overpaid the Plaintiffs by approximately \$100,000 of commissions. The Plaintiffs and the Company agreed to have the Company retain 50% of Plaintiffs' commissions. When Plaintiffs agreed to have the \$100,000 withdrawn, Plaintiffs were unaware that agents had been transferred out of Plaintiffs' hierarchy.

49. When Wright and Consolidated and AFBA removed the Plaintiffs' agents from Plaintiffs' hierarchy, they also removed the means of repayment, as agreed by the Company resulting in the termination of the Plaintiffs' contract with the Company and final removal of any remaining agents from the Plaintiffs' hierarchy.

50. Overpayment of commissions by AFBA to Plaintiff's caused AFBA to inform Plaintiffs that there was a debit balance owed to AFBA of approximately \$100,000. AFBA required repayment.

51. Plaintiffs, not yet fully aware of the transfer of agents away from their hierarchy and the resulting loss of commission from transferred agents, agreed to a payment plan by which AFBA would retain 50% of commissions until debit balance was repaid.

52. AFBA failed repeatedly to implement the agreement to retain 50%. The Plaintiffs requested again that the agreement be enforced.

53. After the second large group of agents were removed from Plaintiffs' hierarchy in August 2017, AFBA began to pressure Plaintiffs more aggressively for repayment, whereby Plaintiffs requested that AFBA keep 100% of commissions in order to pay the alleged debit balance until it was paid in full.

54. Because Consolidated, Wright, and AFBA had moved the vast majority of producing agents from the Plaintiffs' hierarchy, the remaining commission stream was inadequate to repay the alleged debit balance in a timely manner, and AFBA began issuing threats to the Plaintiffs.

55. The Plaintiffs spoke with their immediate supervisors at the Company, but AFBA refused to change its position.

56. Plaintiffs appealed to the president and to the chairman of the board of AFBA, but were denied a hearing and an opportunity to express his viewpoint and concerns.

57. Wright, Consolidated, and AFBA requested transfer of agents, and AFBA wrongfully removed agents from the Plaintiffs' hierarchy. As a result of these wrongful transfers, CA, Wright and the Company made it impossible for the Plaintiffs to repay the debit balance via the agreed upon method, which caused AFBA to terminate the Plaintiffs' contract.

58. On 11/28/16, Plaintiffs questioned AFBA about the movement of agents outside the PPI hierarchy, and AFBA stated that Consolidated had sought AFBA approval to move agents outside PPI hierarchy. AFBA said they allowed the movement of agents to occur.

59. Subsequently, because of the actions of Wright, Consolidated and AFBA, ABFA libelously reported the Plaintiffs to the Vector organization as a "Bad Debt" thereby soiling the

reputation of the Plaintiffs and causing other insurance carriers (such as Mutual of Omaha) to refuse to offer "advanced" commissions on sold business, which is common practice in the insurance industry. This action restricted the cash flow of the Plaintiffs and affect Plaintiffs' ability to meet normal expenses and obligations of doing business.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

60. The foregoing paragraphs are incorporated herein.

61. Wright breached the contract between himself and Plaintiffs not to alter the commission arrangement between Consolidated and Plaintiffs, proximately causing damages to the Plaintiffs in an amount to be determined at trial.

62. Wright breached the covenant of good faith and fair dealing with Plaintiffs.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

63. The foregoing paragraphs are incorporated herein.

64. Consolidated has added and/or transferred agents and placed them outside of Plaintiffs' hierarchy in violation of the agreement between Plaintiffs and Consolidated.

65. Consolidated breached the contract between Consolidated and Plaintiffs and altered the commission arrangement between Consolidated and Plaintiffs proximately causing damages to the Plaintiffs in an amount to be determined at trial.

66. Consolidated breached the covenant of good faith and fair dealing with Plaintiffs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

67. The foregoing paragraphs are incorporated herein.

68. In addition to breaching the contract by allowing Consolidated to sell AFBA policies without paying a commission to Plaintiffs, upon information and belief, Wright and Consolidated engaged in the unfair and fraudulent act of giving Wright's power-of-attorney to Consolidated principals so as to conceal from Plaintiffs that they had breached their contracts with Plaintiffs.

69. The actions of Wright and Consolidated proximately causing damages to Plaintiffs and entitling Plaintiffs to actual and punitive damages in an amount to be determined trial.

FOR A FOURTH CAUSE OF ACTION
(Tortious Interference with Contractual Relations)

70. The foregoing paragraphs are incorporated herein.
71. A contract existed between Plaintiffs and Wright as set forth above.
72. Consolidated had knowledge of the contract between Plaintiffs and Wright.
73. Consolidated was not a party to the contract between Plaintiffs and Wright.
74. Consolidated intentionally procured Wright breach of the contract with Plaintiffs.
75. Consolidated had no justification in inducing Wright to breach his contract with Plaintiffs.
76. Consolidated's actions have proximately caused damages to Plaintiffs and entitle Plaintiffs to actual and punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Tortious Interference with Contractual Relations)

77. The foregoing paragraphs are incorporated herein.
78. An agency and marketing organization contract existed between Plaintiffs and the Company as set forth above.

79. Wright and Consolidated had knowledge of the contract between Plaintiffs and the Company.

80. Wright and Consolidated intentionally procured the contract's breach by agreeing to have Wright issue his power-of-attorney to principals of Consolidated so as to allow Wright and Consolidated to circumvent Plaintiffs' entitlement to commissions by transferring agents out of Plaintiffs' hierarchy and directly into Consolidated's hierarchy, without the payment of compensation or commissions to Plaintiffs.

81. Consolidated has added and/or transferred agents and placed them outside of Plaintiffs' hierarchy in violation of the Plaintiffs' agreement with the Company.

82. Wright and Consolidated had no justification for transferring agents out of Plaintiffs' hierarchy and directly into Consolidated's hierarchy, without the payment of compensation or commissions to Plaintiffs.

83. Wright and Consolidated's actions have proximately caused damages to Plaintiffs and entitle Plaintiffs to an award of actual and punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Quantum Meruit/Unjust Enrichment)

84. The foregoing paragraphs are incorporated herein.

85. Plaintiffs conferred a benefit upon the Defendant Consolidated.

86. The Defendant Consolidated realized the benefit conferred by the Plaintiffs.

87. The Defendant Consolidated has retained the benefit conferred by the Plaintiffs under circumstances that make it inequitable for the Defendant Consolidated to retain the benefit without paying its value to the Plaintiffs.

WHEREFORE, Plaintiffs pray the Court for TRIAL BY JURY, and an award of actual and punitive damages, pre-judgment interest, post-judgment interest, costs, attorneys' fees, for appropriate equitable relief under the unjust enrichment cause of action, cause the debit balance to be repaid to the Company, reinsert Plaintiffs into the hierarchy in which he belongs, provide contact information on clients and prospects from the First Responder marketing program and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

S/ James G. Carpenter
James G. Carpenter, SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Plaintiffs

Exhibit E

right. The Confidential Reference List must be E-Filed as a separate document from the redacted filing, but included within the same submission as the redacted filing.

(c) Sealed Cases and Documents.

(1) Motions to seal are governed by Rule 41.1, SCRC. A motion to file any document under seal pursuant to Rule 41.1 shall be E-Filed, unless prohibited by law. The document(s) for which sealing is sought shall be submitted for an *in camera* review by Traditional means as provided in Rule 41.1(b) and

shall not be E-Filed. Where the documents sought to be sealed are required to be served, the E-Filer must use a Traditional Service method to serve those documents. The process for filing a motion to seal is fully set forth in the Filer Interface User Guide.

(2) *In camera* submissions shall be presented to the court by paper copy.

(3) Any case or document under seal shall not be available to the public through electronic or other means.

GUIDELINE 11. MISCELLANEOUS

(a) Discovery. The E-Filing System shall not be used for the electronic exchange of discovery materials and other communications between the parties that are not intended to be filed with the court.

(b) Citation. These Policies and Guidelines may be cited as follows: Section ____, SCEF.

(c) Courtesy Copies. The court shall not require parties to furnish courtesy paper copies of E-Filed documents.

(d) Request to Correct Data Entry Error. A party or an attorney for a party may seek to correct an alleged data entry error in case information entered in the E-Filing System or the Case Management System Public Index by filing a written request with the Clerk of Court in the county in which the case was filed.

(1) A request may only be filed where a party asserts a data entry error, such as a clerical error or scrivener's error, occurred during entry of case or event information in the Case Management System or the E-Filing System. Examples include circumstances where the names of parties were correctly set forth in pleadings, but were incorrectly entered by the E-Filer or the Clerk of Court electronically. Other examples include the incorrect selection of a filing event by the E-Filer or the Clerk of Court.

(2) No request may be filed as a means to amend a filed pleading, order, or other document. Where a party believes a pleading or order of the court contains an error that requires amendment, the party may seek to amend the pleading or order or request other relief in accordance with the SCRC.

(3) Requests to Correct Data Entry Errors shall be processed as follows:

(A) The party or an attorney for a party shall file a Request to Correct Data Entry Error on a Form approved by the Supreme Court. The request shall contain a brief description of the data entry error and the specific correction that is requested.

(B) If the request properly alleges a data entry error under paragraph (d)(1) of this section, the Clerk of Court shall, within ten days, make the requested correction and file

a Response to the Request to Correct Data Entry Error on a Form prescribed by the Supreme Court.

(C) If the request does not properly allege a data entry error under paragraph (d)(1) of this section, the Clerk of Court shall, within ten days, file a Response to the Request to Correct Data Entry Error declining to make the correction on a Form prescribed by the Supreme Court.

(D) Where it is unclear whether the request properly alleges a data entry error under paragraph (d)(1) of this section, the Clerk of Court shall refer the matter to the Chief Judge for Administrative Purposes or other judge involved in the matter for a determination of whether the change is appropriate.

(E) A party who believes the Clerk of Court has erroneously declined to correct a data entry error in accordance with this section may seek relief from the court.

(e) Construction. These Policies and Guidelines shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of on the merits.

(f) Adding Parties. An Authorized E-Filer may E-File a document on behalf of a person or entity who is not a party to an existing case by utilizing the E-Filing function that electronically adds the person or entity as a party to the case record. Authorized E-Filers may not utilize this function to add a party where a motion to intervene, motion to join a party, motion to substitute a party, motion to amend, or any other motion is required under the South Carolina Rules of Civil Procedure or statute. An Authorized E-Filer must include a document, such as an answer, response, or other pleading in any submission. Examples of proper use of the function include, but are not limited to:

(1) a motion to quash a subpoena filed on behalf of a non-party;

(2) initial filings made on behalf of insurers in cases involving underinsured motorist coverage;

(3) filings made on behalf of third party bidders in foreclosure matters;

(4) filings made by attorney guardians ad litem.

[Amended effective October 12, 2017.]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2018-CP-23-01639
5Star Life Insurance Company,	)	
	)	
Plaintiffs,	)	
	)	DEFENDANT'S REPLY MEMORANDUM
v.	)	IN SUPPORT OF MOTION FOR ENTRY
	)	OF DEFAULT JUDGMENT
Peek Performance, Inc., a South Carolina	)	
corporation	)	
Defendants.	)	
	)	

NOW COMES Peek Performance, Inc. ("PPI"), by its undersigned attorney, and submits this Reply Memorandum in Support of Entry of Default Judgment on the Counterclaims.

STATEMENT OF FACTS

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

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

Just prior to this timeframe, 5Star began wrongfully transferring agents out from PPI's downline, without PPI's knowledge or consent, so that PPI's commissions were grant drastically

reduced. Eventually, 5Star transferred nearly all the agents that should have been in PPI's downline out of its downline so that PPI was earning virtually no commissions from 5Star.

At this point, PPI is not sure whether the alleged overage was a legitimate debt; but rather PPI is concerned that the alleged overage might have arisen from 5Star's attempt to remove commissions from PPI retroactively after secretly transferring PPI's agents out of PPI's downline, and therefore the alleged overage might not have been a valid debt.

PPI made multiple efforts and overtures to discuss these matters with 5Star. On November 28, 2016, PPI communicated with James Bradford and Kimo Wong, employees of 5Star, who insisted that the debt was valid, even though they had agreed to remove PPI's agents from his hierarchy in breach of the 5Star contract.

Starting December 1, 2016, PPI repeatedly attempted to contact Mr. Moser, General Counsel for 5Star in an effort to address the whole relationship between PPI and 5Star, especially the wrongful transfer of PPI's sales agents out of its downline without the consent of PPI. The General Counsel refused to discuss PPI's concern, but insisted on demanding and discussing only the repayment of the alleged overage.

PPI also repeatedly attempted to contact Mr. Singleton, president of 5Star. Singleton likewise refused to discuss the matter with PPI, but referred to PPI back to its General Counsel, Mr. Moser, who refused to discuss the matter with PPI.

PPI wrote the Chairman of the 5Star Board, General Eberhardt (Ret.), who likewise refused to address the matter with PPI, but rather, referred PPI back to the General Counsel, Mr. Moser, and marketing executives.

PPI had been one of the most productive managers of business for 5Star, yet 5Star refused to discuss their own misconduct, but insisted on discussing only the repayment of an alleged

overage that may or may not have been rightfully due. March 15, 2018, 5Star terminated PPI's contract to market their products.

STATEMENT OF THE CASE

1. On March 19, 2018, 5Star sued PPI to recover the alleged overpayment of commissions to PPI.

2. On March 29, PPI Answered and Counterclaimed for breach of contract, defamation, and other claims.

3. The Reply to the Counterclaims was due April 28, 2018.

4. 5Star failed to file or serve a Reply to the Counterclaims.

5. On May 10, 2018, PPI filed the Notice of Default and Motion for Entry of Default Judgment on the Counterclaims.

6. After receipt of the Notice and Motion, on May 17, 2018, 5Star's counsel filed a terse Reply in the nature of a general denial consisting of only two pages, mostly alleging a lack of information necessary to admit or deny the allegations in the Counterclaims. 5Star also purported to "reserve[] the right to allege additional defenses upon discovery and/or notice of facts sufficient to support said defenses."

7. Since filing this terse Reply, 5Star has issued no discovery requests or made any apparent effort to learn "facts sufficient to support said defenses."

8. On May 10, 2018, PPI served Interrogatories and Requests for Production on 5Star.

9. 5Star has failed to respond to the Interrogatories or the Requests for Production.

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

11. 5Star failed to respond to the Motion to Consolidate.

12. On June 27, 2018, the Court held a hearing on the Motion to Consolidate.
13. 5Star failed to appear at the hearing on the Motion to Consolidate.
14. On June 28, 2018, the Court entered an Order Consolidating the two cases.
15. On August 7, 2018, PPI wrote 5Star's counsel a follow up letter concerning the lack of response to the discovery requests.
16. 5Star has not responded to the letter and still has not produced responses to the Interrogatories or Requests for Production.
17. On August 17, 2018, *more than three months* after the Notice of Default and Motion for Entry of Default Judgment, and having done virtually nothing for five months, 5Star filed its opposition to the Entry of Default, and the Motion for Entry of Default Judgment.

LEGAL DISCUSSION

5Star's arguments against the entry of default judgment on the Counterclaim are ineffectual. 5Star suggests that PPI's failure to assert a claim earlier was somehow deceitful. On the contrary, since November, 2016, PPI had been trying to negotiate with 5Star to resolve the differences amiably. Instead of negotiating in good faith, 5Star drew first blood.

First, 5Star contends that PPI's Answer asserted only affirmative defenses and not counterclaims. This is simply inaccurate. The pleading is captioned "Answer and Counterclaim." The counterclaim stretches from paragraph 9 through paragraph 68, from page 1 through page 11. The allegations are clearly denominated a Counterclaim, and not an affirmative defense. However, "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation." SCACR 8(c).

The Prayer for Relief on the Counterclaim states the following:

WHEREFORE, Defendant prays the Court for an award of actual damages, pre-judgment interest, post-judgment interest, costs, attorneys' fees, for appropriate

equitable relief causing Defendant to be reinserted into the hierarchy in which he belongs, provide contact information on clients and prospects from the First Responder marketing program, all client personal data for resale to other life and ancillary plans, and grant such other and further relief as the Court deems just and proper

Accordingly, the Answer and Counterclaim is not merely an affirmative defense, but rather pleads a clear and definite counterclaim, and asks for affirmative relief against 5Star, which significantly exceeds the claims of 5Star against PPI.

Second, 5Star contends that it had “good cause” for being in default. This “good cause” consists of the fact that 5Star’s attorney did not expect or notice the filing of a timely answer, and allegedly was not familiar with electronic filing. The Attorney appears to admit that she received the electronic notice of filing. 5Star’s attorney appears to have a statewide practice. The attorney’s alleged surprise at receiving a timely Answer, and the failure to observe the “notice of electronic filing” of the Answer and Counterclaims, simply does not constitute “good cause” for the failure to file a timely Reply to the Counterclaim. Contrary to 5Star’s implication, PPI did not jump the gun on filing its Notice of Default and Motion for Entry of Default Judgment. PPI waited almost 2 weeks after the deadline for Reply, before filing Notice of Default and a Motion for Entry of Default Judgment. Accordingly, 5Star has failed to demonstrate “good cause” for its failure to file a timely Reply.

Finally, 5Star contends that PPI will suffer no prejudice if 5Star is relieved from default. This is not true. PPI has been prejudiced by 5Star’s behavior for 2½ years. In the companion litigation, now joined this one, PPI has requested extensive documents, absolutely necessary prosecute its case. The other parties contend they do not have the extensive documentation, but rather the extensive documentation is solely in the possession of 5Star. PPI has suffered prejudice by the failure of 5Star to Reply, by its failure to participate in this litigation, and by 5Star’s failure to respond to Interrogatories and Requests for Production of Documents.

Plaintiff has suffered prejudice by 5Star's failure and refusal to negotiate in good faith with the PPI prior to filing suit, and its refusal to even address PPI's concerns. 5Star failed to take agreed-upon partial payments from PPI's commissions, and PPI suffered prejudice by 5Star's contemporaneous approval of the removal of more than 100 agents out of the downline of PPI (which has cost PPI more than \$1 million to date), and made it so that PPI did not have the funds and commissions coming to it, in order to repay the alleged overpayment. In other words, 5Star illegally removed the means by which PPI was going to repay the alleged accidental overpayment, and 5Star refused to act reasonably and negotiate in good faith with PPI to resolve these issues.

Furthermore, 5Star did not act in good faith by terminating PPI's contract and by reporting PPI to Vector (the nationwide reporting agency for insurance marketers), for PPI's alleged failure to repay the accidental overpayment. This reporting to Vector severely damaged PPI's financial reputation and creditworthiness in the industry.

As a result of the report to Vector, one carrier (Mutual of Omaha) ceased paying "advance commissions" to PPI, and another carrier (United Home Life) terminated PPI's contract on May 18, 2018, and did not fulfill 5Star's duty of good faith and fair dealing, which is implied in every commercial contract in South Carolina. 5Star's conduct has been conspicuous for its *lack* of good faith and its *lack* of fair dealings with PPI.

Finally, 5Star comes to this Court with unclean hands because for years, it has wrongfully taken away PPI's rightful commissions. Accordingly, it would be unfair and unjust to PPI for this Court to relieve 5Star from default.

This Court should enter Judgment by Default against 5Star, and require 5Star to respond promptly and fully to PPI's discovery requests so that we can move forward toward a damages hearing.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

S/ James G. Carpenter
James G. Carpenter, SC Bar No. 1136
819 E. North St.
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for Defendant

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 08-27-2018 04:33:29 PM.

David Dill - Notification transmitted on 08-27-2018 04:33:29 PM.

Amanda Scott - Notification transmitted on 08-27-2018 04:33:28 PM.

William Brown - Notification transmitted on 08-27-2018 04:33:29 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 08-27-2018 04:33:11 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Memo/Memo

Affidavit/Affidavit of

Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

David Curry Dill for 5 Star Life Insurance
Company

William Stevens Brown, V for 5 Star Life
Insurance Company

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

5Star Life Insurance Company,

Plaintiffs,

v.

Peek Performance, Inc., a South Carolina
corporation

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2018-CP-23-01639

**AFFIDAVIT OF CLAY PEEK IN
SUPPORT OF MOTION FOR ENTRY OF
DEFAULT JUDGMENT**

Donald Clayton Peek, a.k.a. Clay Peek, being first duly sworn, deposes and states as follows:

1. My name is Donald Clayton Peek, and I am commonly known as Clay Peek. I am the president and primary owner of Peek Performance, Inc., a South Carolina corporation engaged in the marketing of insurance products and in the recruitment of insurance agents. I submit this affidavit in Support of PPI's Motion for Entry of Default Judgment on the Counterclaim.
2. This case arises out of a contractual relationship between the Plaintiff 5Star, an insurance company, and the Defendant, PPI.
3. 5Star alleges that it mistakenly overpaid commissions due to PPI. The alleged overage was a little over \$100,000.
4. PPI was earning \$20-\$40,000 a month in commissions from 5Star. PPI agreed to have one half of its monthly commissions withheld until the alleged overage was repaid. 5Star agreed to this arrangement, but failed implement it.

5. A few months later, 5Star realized the alleged overage was not being paid and again requested payment from PPI. Again, PPI invited 5Star take one half of its monthly commissions until the alleged overage was repaid. Again, 5Star failed implement this common sense remedy.
6. Just prior to this timeframe, 5Star began unlawfully transferring agents out from PPI's downline, without PPI's knowledge or consent, so that PPI's commissions were drastically reduced.
7. Eventually, 5Star wrongfully transferred nearly all the agents that should have been in PPI's downline out of its downline so that PPI was earning virtually no commissions from 5Star.
8. At this point, PPI is not sure whether the alleged overage was ever a legitimate debt; but rather PPI is concerned that the alleged overage might have arisen from 5Star's attempt to remove commissions from PPI retroactively, after secretly transferring PPI's agents out of PPI's downline, and therefore the alleged overage might not have been a valid debt.
9. PPI made multiple efforts and overtures to discuss these matters with 5Star. On November 28, 2016, PPI communicated with James Bradford and Kimo Wong, who insisted that the debt was valid, even though they had agreed to remove PPI's agents from his hierarchy in breach of the 5Star contract.
10. Starting December 1, 2016, PPI repeatedly attempted to contact Mr. Moser, General Counsel for 5Star in an effort to address the whole relationship between PPI and 5Star, especially the wrongful transfer of PPI's sales agents out of its downline without the consent of PPI. The General Counsel refused to discuss PPI's concern, but insisted on demanding and focusing solely on the repayment of the alleged overage.

11. PPI also repeatedly attempted to contact Mr. Singleton, president of 5Star, but Singleton refused to discuss the matter with PPI, but referred to PPI back to its General Counsel, Mr. Moser, who refused to discuss any matter with PPI except the repayment of the alleged overage.
12. PPI wrote the Chairman of the Board for 5Star, General Eberhardt (Ret.), who likewise refused to address the matter with PPI, but rather referred PPI back to the General Counsel and some marketing executives.
13. PPI had been one of the most productive managers of business for 5Star; yet 5Star refused to discuss their own misconduct, but insisted on the repayment of an alleged overage that may or may not have been rightfully due.
14. On March 15, 2018, 5Star terminated PPI's contract to market their products.
15. On March 19, 2018, 5Star sued PPI to recover the alleged overpayment of commissions to PPI.
16. On March 29, 2018, PPI Answered and Counterclaimed for breach of contract, defamation, and other claims.
17. The Reply to the Counterclaims was due April 28, 2018.
18. 5Star failed to file or serve a Reply to the Counterclaims.
19. On May 10, 2018, PPI filed the Notice of Default and Motion for Entry of Default Judgment on the Counterclaims.
20. After receipt of the Notice and Motion, May 17, 2018, 5Star filed a terse Reply in the nature of a general denial consisting of only two pages, alleging a lack of information necessary to admit or deny the allegations in the Counterclaims. 5Star also purported to "reserve[]" the

right to allege additional defenses upon discovery and/or notice of facts sufficient to support said defenses.”

21. Since the filing of its Reply, 5Star has issued no discovery requests or made any apparent effort to learn “facts sufficient to support said defenses.”

22. On May 10, 2018, PPI served Interrogatories and Requests for Production on 5Star.

23. 5Star has failed to respond to either the Interrogatories or the Requests for Production.

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

25. 5Star failed to respond to the Motion to Consolidate.

26. On June 27, 2018, the Court held a hearing on the Motion to Consolidate.

27. 5Star failed to appear at the hearing on the Motion to Consolidate.

28. On June 28, 2018, the Court entered an Order Consolidating the two cases.

29. On August 7, 2018, PPI wrote 5Star’s counsel a follow up letter concerning the lack of response to the discovery requests.

30. 5Star has not responded to the letter and still has not produced any responses to the Interrogatories or Requests for Production.

31. On August 17, 2018, *more than three months* after the Notice of Default and Motion for Entry of Default Judgment, and having done virtually nothing for five months, 5Star filed its opposition to the Entry of Default, and the Motion for Entry of Default Judgment.

32. 5Star suggests that PPI’s failure to assert a claim earlier was somehow deceitful, but since November, 2016, PPI had been trying to negotiate with 5Star to resolve the differences amiably. Instead of negotiating in good faith, 5Star drew first blood.

33. In PPI's "Answer and Counterclaim," the counterclaim stretches from paragraph 9 through paragraph 68, from page 1 through page 11. The allegations are clearly denominated a Counterclaim, and not an affirmative defense.

34. PPI's Prayer for Relief on the Counterclaim states the following:

WHEREFORE, Defendant prays the Court for an award of actual damages, pre-judgment interest, post-judgment interest, costs, attorneys' fees, for appropriate equitable relief causing Defendant to be reinserted into the hierarchy in which he belongs, provide contact information on clients and prospects from the First Responder marketing program, all client personal data for resale to other life and ancillary plans, and grant such other and further relief as the Court deems just and proper

35. 5Star's attorney appears to admit that she received the electronic notice of filing related to the Answer and Counterclaim.

36. PPI waited almost 2 weeks after the Reply deadline, before filing Notice of Default and a Motion for Entry of Default Judgment.

37. PPI has been prejudiced by the behavior of 5Star for 2½ years. In the companion litigation, now joined to this one, PPI has requested from the other parties extensive documents, absolutely necessary to prosecute its case. The other parties contend they do not have the requested extensive documentation, but rather the requested documentation is solely in the possession of 5Star. PPI has suffered prejudice by the failure of 5Star to Reply, by its failure to participate in this litigation, and by its failure to respond to its Interrogatories and Requests for Production of Documents.

38. Plaintiff suffered prejudice by 5Star's failure and refusal to negotiate in good faith prior to filing suit, and its refusal to even address PPI's concerns. 5Star failed to withhold part of PPI's commissions, as agreed, to address the alleged accidental overpayment.

39. PPI suffered prejudice by 5Star's contemporaneous approval of the removal of more than 100 agents out of the downline of PPI (which has cost PPI more than \$1 million to date), and

made it so that PPI did not have the funds and commissions coming to it, in order to repay the alleged overpayment as they had agreed. In other words, 5Star illegally removed the agreed-upon means by which PPI was going to repay the alleged accidental overpayment, and 5Star refused to act reasonably and negotiate in good faith with PPI to resolve these issues.

40. 5Star did not act in good faith when it terminated PPI's contract and when it reported PPI to Vector (the nationwide reporting agency for insurance marketers), for PPI's alleged failure to repay the accidental overpayment. This reporting to Vector severely damaged PPI's financial reputation and creditworthiness in the industry.

41. As a result of the report to Vector, one carrier (Mutual of Omaha) ceased paying "advance commissions" to PPI, and another carrier (United Home Life) terminated PPI's contract on May 18, 2018.

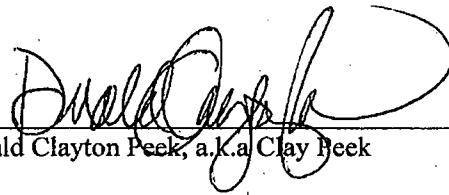
42. 5Star did not act in good faith and fair dealing with PPI. 5Star's conduct has been conspicuous for its *lack* of good faith, and its *lack* of fair dealings with PPI.

43. Finally, 5Star has wrongfully taken away PPI's rightful commissions, which it had earned and was due.

44. I respectfully submit that considering all the foregoing circumstances, it would be unfair and unjust to PPI for this Court to relieve 5Star from default.

45. I request that this Court enter Judgment by Default against 5Star on the Counterclaim, and order 5Star to respond promptly to PPI's discovery requests so that we can move forward toward a damages hearing.

Further the Affiant saith naught.


Donald Clayton Peek, a.k.a Clay Peek

Subscribed and sworn to before me
This 27 day of August, 2018.

Notary Public, State of South Carolina
My commission expires 3/98



STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,)
)
 Plaintiff)
)
 vs.) C.A. No. 2018-CP-23-01639
)
 Peek Performance, Inc.,)
)
 Defendant.)
)
 _____)
)
 Peek Performance, Inc. and D. Clayton)
 Peek,)
)
 Plaintiffs,)
)
 v.)
)
 Jeff Wright d/b/a Agent Sales Group, Joe)
 Caldwell, Nathan Wells, Jeff Magg, and)
 Consolidated Assurance, LLC,)
)
 Defendants.)
 _____)

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

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

- (1) reconsider/vacate/amend its September 13, 2018 Order pursuant to Rule 59, SCRCP
- (2) set aside the entry of default against 5Star pursuant to Rule 55, SCRCP, and/or
- (3) grant 5Star relief from the default judgment pursuant to Rule 60, SCRCP.

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

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

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

[Signature on Following Page]

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/William S. Brown

William S. Brown

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Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina

September 24, 2018

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,)
)
 Plaintiff)
)
 vs.) C.A. No. 2018-CP-23-01639
)

Peek Performance, Inc.,)
)
 Defendant.)

 Peek Performance, Inc. and D. Clayton)
 Peek,)
)
 Plaintiffs,)

v.)
)
 Jeff Wright d/b/a Agent Sales Group, Joe)
 Caldwell, Nathan Wells, Jeff Magg, and)
 Consolidated Assurance, LLC,)
)
 Defendants.)

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

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

funds. Peek purports to have asserted a counterclaim¹ which it contends 5Star failed to timely answer.

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

I. Introduction and Factual Background

5Star is an insurance underwriting enterprise. It filed this action on March 19, 2018 to recover commissions it paid Peek but that Peek did not earn. Peek is an insurance marketing and recruiting agency. The Contract between 5Star and Peek was attached to and incorporated into the Complaint. Peek electronically filed an Answer on March 29, 2018. Peek admitted the validity of and terms of the Contract. (Answer ¶ 3.) Contrary to the terms of the admitted Contract, Peek alleges it was not required to repay the commissions to 5Star or, to the extent it was required to repay these monies, 5Star or other actors² caused Peek to be unable to repay the commissions through certain actions or omissions. Peek contends its Answer included a counterclaim. If the Answer included a counterclaim, 5Star was obligated to answer by May 3, 2018. *See* South Carolina Rules of Electronic Filing Rule 4(e)(4) (service by electronic filing provides five

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

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

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

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

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

A. The Court Could Not Award a Default Judgment

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

B. The Order Does Not Support Entry of Default

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

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

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

2. The Order Relies on Allegations Outside the Purported Counterclaim

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

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

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

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

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

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

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

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

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

E. The Order Cannot Compel Discovery Responses

1. The Order Grants Relief Not Sought by the Motion

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

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

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

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

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

A. Legal Standard

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

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

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

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

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

in its affidavit⁴ in support of its motion for entry of default, Peek again failed to commit to specific causes of action. The untimely and inadmissible affidavit asserted the Answer contained causes of action for breach of contract and defamation, but also broadly asserts unspecified “other claims.” (Aff. ¶ 16.) The ambiguity of Peek’s pleading is further demonstrated by its complaint in the Second Lawsuit. Peek’s counterclaim is simply a restatement of the “FACT” section of its complaint in the Second Lawsuit. (*Compare* Answer ¶¶ 9-64 *with* Second Lawsuit Complaint ¶¶ 5-59; *see also* Peek’s Mot. to Consolidate (stating “the allegations in the Counterclaims in this case are repeated in large measure in the Complaint in [Second Lawsuit]”).)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Legal Standard

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

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

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

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

1. Excusable Neglect

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

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

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

2. Mistake/Inadvertence/Surprise

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

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

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

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

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

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

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

V. Conclusion

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

Signature on Following Page

Respectfully submitted,

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September 24, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2018-CP-23-01639
	)	
5Star Life Insurance Company,	)	
	)	
Plaintiff,	)	MEMORANDUM OF LAW IN
	)	OPPOSITION TO MOTION TO
	)	RECONSIDER
v.	)	
	)	
Peek Performance, Inc., a South Carolina	)	
corporation	)	
Defendant.	)	
	)	

NOW COMES Peek Performance, Inc. ("PPI"), by its undersigned attorney and submits this Memorandum of Law in Opposition to the Motion to Reconsider filed by 5Star Life Insurance Company.

On September 13, 2018, this Court issued an Order for Entry of Default and Default Judgment on the Counterclaim against 5Star. On September 24, 2018, 5Star filed a Motion to Reconsider, citing Rules 55, 59 and 60. In the Motion to Reconsider, 5Star makes the same arguments as were made in 5Star's Opposition to Motion for Entry of Default filed August 17, 2018. This Court addressed each of those arguments in its Order entered September 13, 2018. There is no reason for a different result now.

I. 5Star failed to Show "Good Cause."

This Court ruled that 5Star had failed to show "good cause" for relief from default under Rule 55(c). 5Star argued previously, and continues to argue, that its counsel simply missed the Notice of Electronic Filing of the Answer and Counterclaim and contends that this failure constitutes "good cause." The Court found otherwise in its Order entered September 13, 2018.

5Star fails to acknowledge its multiple deficiencies set out in the statement of facts that led to the entry of default and default judgment:

1. On March 19, 2018, 5Star sued PPI to recover the alleged overpayment of commissions to PPI.
2. On March 29, PPI Answered and Counterclaimed for breach of contract and defamation.
3. “The plaintiff **shall** serve his reply to a counterclaim in the answer within 30 days after service of the answer.” Rule 12(a) (emphasis added). The Reply to the Counterclaims was due May 3, 2018.
4. 5Star failed to file or serve a timely Reply to the Counterclaims.
5. On May 10, 2018, PPI filed the Notice of Default and Motion for Entry of Default Judgment on the Counterclaims.
6. After receipt of the Notice and Motion, on May 17, 2018, 5Star’s counsel filed a terse Reply in the nature of a general denial consisting of only two pages, mostly alleging a lack of information necessary to admit or deny the allegations in the Counterclaims. 5Star also purported to “reserve[] the right to allege additional defenses upon discovery and/or notice of facts sufficient to support said defenses.”
7. Since filing this terse Reply, 5Star has issued no discovery requests or made any apparent effort to learn “facts sufficient to support said defenses.”
8. On May 10, 2018, PPI served Interrogatories and Requests for Production on 5Star.
9. 5Star has failed to respond to the Interrogatories or the Requests for Production.
10. On May 17, 2018, PPI moved to consolidate this action with a related action arising out of the same facts, Case No. 2017-CP-23-03269.
11. 5Star failed to respond to the Motion to Consolidate.
12. On June 27, 2018, the Court held a hearing on the Motion to Consolidate.

13. 5Star failed to appear at the hearing on the Motion to Consolidate.
14. On June 28, 2018, the Court entered an Order Consolidating the two cases.
15. On August 7, 2018, PPI wrote 5Star's counsel a follow up letter concerning the lack of response to the discovery requests.
16. 5Star has not responded to the letter and, even after being ordered to do so, still has not produced responses to the Interrogatories or Requests for Production.

This Court relied upon multiple authorities, all standing for the rule that the error of counsel is the error of the client who hired the counsel: *Sundown Operating Company Inc. v. Intedge Industries Inc.* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009); *Simon v. Flowers*, 231 S.C. 545, 550-51, 99 S.E.2d 391, 394 (1957); *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (2007); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014). This ruling, finding 5Star in default and refusing to find "good cause" to relieve 5Star from default was eminently proper, and 5Star has raised no valid ground for overturning this ruling.

II. PPI Pled a Valid Counterclaim, not just Affirmative Defenses.

5Star argued previously that PPI's counterclaim was really an affirmative defense. The Court rejected that argument before, and 5Star has given no basis for changing this ruling. The pleading is captioned "Answer and Counterclaim." The Counterclaim extends from paragraph 9 through paragraph 68, from page 1 through page 11. The allegations are denominated a Counterclaim, and the Counterclaim alleges, in significant detail, claims for breach of contract and defamation, not merely affirmative defenses. The Prayer for Relief on the Counterclaim requests damages against 5Star, over and above the \$109,000 that 5Star claims.

5Star argued previously that the Counterclaim failed to state a cause of action. The Court properly found that the Counterclaim stated causes of action for breach of contract and defamation. The Complaint included a copy of the contract between 5Star and PPI. The Counterclaim described the history and background between PPI, Jeff Wright, and Consolidated Assurance. In paragraph 17 of the Counterclaim, PPI alleges:

On or about May 2, 2013, [PPI] entered into an agency contract with 5Star, by which [PPI] became an agent and marketing organization of 5Star under the hierarchy of Jeff Wright and as the exclusive “upline hierarchy” for all “Consolidated” agents except the principals. [PPI]’s agents were entitled to sell life insurance for 5Star, and [PPI] was entitled to receive a portion of the commissions on those sales from 5Star.

In paragraph 18 of the Counterclaim, PPI alleges, “The 5Star agency contract repeatedly refers to these agents as ‘Your agents’ – the agents of [PPI].”

The next several paragraphs recite how PPI fulfilled its obligations under the contract between PPI and 5Star. In paragraph 22 of the Counterclaim, PPI alleges: “[PPI] was entitled to receive commissions on sales made by agents placed under Consolidated, persons under [PPI] in the [PPI]’s sales hierarchy for 5Star.” In paragraph 26 of the Counterclaim, PPI alleges: “[PPI] required that the principals of Consolidated would remain outside the [PPI]’s hierarchy, but all agents under them and/or recruited by them and or [PPI] from that time forward would be placed under [PPI]’s hierarchy. Accordingly, Wright and the company, 5Star, moved all agents, existing and new, to [PPI]’s hierarchy.”

The Counterclaim then recites the terms of the agreement between PPI and Wright, who was 5Star’s Regional Director. One of the most important terms was set out in an email in which Wright promised PPI:

Also, to confirm what we discussed, no one in my organization including myself will ever market to, or contact any of your downline agents **nor will we modify or change hierarchies or commissions unless under your direction** or giving you notice of comp changes that may come from the company itself.

Counterclaim, par. 28 (emphasis added). In the next paragraph, PPI alleges that 5Star was aware of this contractual promise, and pursuant to that arrangement, PPI was placed in Wright's Regional Director hierarchy above all of Consolidated's agents or producers.

Paragraph 30 of the Counterclaim alleges that Consolidated received a commission on the sales made by the producers under Consolidated and PPI in the hierarchy of approximately 50-60%; PPI received 5%; and upon information and belief, Wright received approximately 20-30%.

Paragraph 31 of the Counterclaim alleges:

Upon information and belief, at the request of Consolidated, Wright and 5Star, all Consolidated agents or producers (except the three principals) were placed in [PPI]'s hierarchy or downline. [PPI] had no capacity to cause this to happen; **it required the action of Consolidated, Wright and 5Star.**

Id. (emphasis added)

Paragraphs 32-34 describe how PPI fulfilled his contractual duties, so that PPI's 5% contractual commission was approximately \$300,000.00 - \$400,000 per year.

Paragraph 35 alleges, that "Wright promised [PPI] that the agents recruited under this program would belong to [PPI] unless transferred/released by written consent of [PPI]."

Paragraph 36 alleges that the 5Star "contract does not specifically reserve any power for [5Star] to remove an agent from [PPI]. [5Star] told [PPI] verbally that the RD [Jeff Wright] traditionally has been granted this authority, but this provision does not appear in the contract provided to [PPI]. Further, the RD, Wright, yielded this alleged privilege to [PPI] in order to consummate the agreement with [PPI]."

Paragraphs 37 - 43 describe how PPI fulfilled its contractual duties over the next several months and years.

PPI alleges that it received commissions for all agents in Consolidated's downline for years without any modification of the arrangement, but that in 2015, PPI saw those commissions shrink,

and inquired as to why this occurred. Counterclaim, par. 44-45. PPI alleges that “Consolidated had asked Wright to move some of Consolidated’s producers or agents outside of [PPI]’s commission hierarchy (*the first known movement of agents*).” Counterclaim, par. 47. PPI further alleges: “Upon information and belief, **5Star approved this movement.**” Counterclaim, par. 48 (emphasis added).

Eventually, on or about August of 2017, nearly all agents and producers were moved out of [PPI]’s hierarchy and into a hierarchy that included Consolidated, but not [PPI], thereby taking away [PPI]’s right and opportunity to earn its 5% override or commission, all without [PPI]’s knowledge, consent or compensation (*the second known movement of agents*). Other agents were likely appointed directly to CA (or alternative organization under CA’s authority, like Tyler Harris) who were not appointed under [PPI], as they should have been.

Upon information and belief, **5Star approved this movement.**

Neither Consolidated nor Wright (nor 5Star, in their contract) possessed the legal authority to make such transfers out of [PPI]’s hierarchy.

Counterclaim, par. 51-53 (emphasis added). The authority and approval to make these changes to PPI’s downline had to come from 5Star. However, as previously alleged, 5Star did not have contractual authority to make changes to PPI’s downline. PPI also alleges: “On 11/28/16, [PPI] questioned 5Star (Kimo Wong and James Bradford) about the movement of agents outside the PPI hierarchy, and 5Star stated that Consolidated had sought 5Star approval to move agents outside PPI hierarchy. **5Star said they allowed the movement of agents to occur.**” Counterclaim, par. 61 (emphasis added). PPI also alleges: “Wright and Consolidated requested transfer of agents, and **5Star wrongfully removed agents from [PPI]’s hierarchy.**” Counterclaim, par. 63.

Finally, PPI alleges:

5Star has transferred agents outside of [PPI]’s hierarchy **in violation of the agreement between [PPI] and 5Star.**

5Star **breached the contract** between itself and [PPI], **proximately causing damages to [PPI]** in an amount to be determined at trial.

5Star breached the implied covenant of good faith and fair dealing with [PPI].

Counterclaim, par. 65-67 (emphasis added).

Based on the foregoing allegations, PPI has stated sufficient facts to constitute the cause of action for breach of contract.

The Counterclaim also states a valid cause of action for defamation. After explaining the background and circumstances in paragraphs 54-64 of the Counterclaim, PPI alleges:

Subsequently, because of the actions of Wright, Consolidated and 5Star, 5Star libelously reported [PPI] to the Vector organization as a "Bad Debt" thereby soiling the reputation of [PPI] and causing other insurance carriers (such as Mutual of Omaha) to refuse to offer "advanced" commissions on sold business, which is common practice in the insurance industry. This action restricted the cash flow of [PPI] and could have affected [PPI]'s ability to meet normal expenses and obligations of doing business. United Home Life terminated their contract with [PPI] upon notice of the Vector, and other carriers have increased their screening of [PPI] in their contracting process as a result of 5Star's actions.

Counterclaim, par. 54-64 (emphasis added).

The Court found that these allegations state a claim for defamation; they state the alleged defamatory matter, its falsity, causation, and damages to PPI. Truth is an affirmative defense that must be pled, *Kunst v. Loree*, 817 S.E.2d 295, 303 (2018). Similarly, a conditional or qualified privilege must be pled as an affirmative defense. *Id.*, at 304. Because 5Star failed to Reply timely, it pled no affirmative defense, and PPI has stated a valid claim of defamation.

5Star contends that the allegations in the Counterclaim are the same as the allegations in the case against Jeff Wright and Consolidated. That is true, in large measure, and accordingly, that factual overlap was a significant reason for the joining of the two cases together. 5Star failed to respond to the motion to join the two cases together, and failed to attend the hearing held for that purpose. Accordingly 5Star has little basis to raise any objection based on the overlapping allegations or the joinder of the two cases.

III. The Order Did not Grant Injunctive Relief.

Next, 5Star objects that an order of default or default judgment should not grant injunctive relief. The Court's order did not grant injunctive relief, and this assertion from 5Star provides no basis for relief from the Court's September 13, 2018 Order. /

IV. The Court Properly Ordered 5Star to Respond to Discovery.

Next, 5Star purports to tell this Court that it may not issue an order related to discovery requests that have gone unanswered since May 10, 2018. However, in its Reply Memorandum of Law in Support of Motion for Entry of Default Judgment, PPI notified the Court that on May 10, 2018, it had served Interrogatories and Requests for Production on 5Star, but that more than three months later, 5Star had failed to respond to the Interrogatories and Requests for Production. Furthermore, PPI argued to the Court that it should "require 5Star to respond promptly and fully to PPI's discovery requests." Reply Memorandum, page 6. The Court agreed and ordered 5Star "to respond promptly and fully to PPI's discovery requests." Order entered September 13, 2018, page 8.

Now, five months have passed since PPI served these discovery requests. A month and a half has passed since PPI asked the Court to order responses to the discovery requests in the Reply Memorandum. Nearly a month has passed since the Court ordered 5Star to respond promptly and fully to PPI's discovery requests. However, rather than make the responses as required by the rules and as ordered, 5Star has chosen to quibble about technicalities, but still, to this date, has provided no responses.

V. The Court Properly Ruled that it Would Schedule a Hearing on Damages.

Finally, 5Star argues that the Court should not have entered a default judgment, until after a hearing to establish the amount of the damages. In its Order, the Court granted judgment as to liability and ruled that it would allow sufficient opportunity for discovery, to compel 5Star to respond fully to its discovery requests, and thereafter to set a hearing to determine the amount of damages. This is in keeping with the Supreme Court's ruling:

Moreover, once a party defaults, the trial court "may conduct such hearings or order such references as it deems necessary and proper" to enter the default judgment. Rule 55(b)(1), SCRCP.

Roche v. Young Bros., Inc. of Florence, 332 S.C. 75, 81-82, 504 S.E.2d 311 (1998). It is also in keeping with the rule from 46 AmJur2d *Judgments* § 298 (2006): "In the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. Where damages claimed are not readily ascertainable from the pleadings and record, a hearing is appropriate to determine the amount of damages." *Wells Fargo Bank NA v. Marion Amphitheater LLC*, 408 S.C. 87, 92, 757 S.E.2d 557, 560 (Ct. App. 2014). The Court properly agreed to set a hearing to determine the amount of damages.

CONCLUSION

For all the reasons stated herein, the Court should deny the Motion to Reconsider.

Respectfully submitted,
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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,)
)
 Plaintiff)
)
 vs.) C.A. No. 2018-CP-23-01639
)

Peek Performance, Inc.,)
)
 Defendant.)
)

 Peek Performance, Inc. and D. Clayton)
 Peek,)
)
 Plaintiffs,)
)

v.)
)
 Jeff Wright d/b/a Agent Sales Group, Joe)
 Caldwell, Nathan Wells, Jeff Magg, and)
 Consolidated Assurance, LLC,)
)
 Defendants.)
)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

propriety of default judgment prior to a damages hearing but merely states that “unliquidated damages normally are not awarded without an evidentiary hearing.” 46 Am. Jur. 2d Judgments § 288.³ More telling, however, is that Peek conveniently fails to include the very next citation in *Wells Fargo* to “*Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir.1983) (holding **a judgment by default may not be entered without a hearing on damages** unless the complaint indicates the amount claimed is liquidated or capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits).” *Wells Fargo*, 408 S.C. at 92–93, 757 S.E.2d at 560 (emphasis added). Thus Wells Fargo does not support Peek’s contention that the Court may issue a default judgment prior to a damages hearing.

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

Respectfully submitted,

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October 11, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2018-CP-23-01639
	)	
5Star Life Insurance Company,	)	
	)	
Plaintiff,	)	REPLY MEMORANDUM OF LAW
	)	OF PEEK PERFORMANCE, INC.
v.	)	IN OPPOSITION TO
	)	MOTION TO RECONSIDER
Peek Performance, Inc., a South Carolina	)	
corporation	)	
Defendant.	)	
	)	

NOW COMES Peek Performance, Inc. ("PPI"), by its undersigned attorney and submits this Reply Memorandum of Law in Opposition to the Motion to Reconsider filed by 5Star Life Insurance Company.

On September 13, 2018, this Court issued an Order for Entry of Default and Default Judgment as to liability on the Counterclaim against 5Star. On September 24, 2018, 5Star filed a Motion to Reconsider, citing Rules 55, 59 and 60. PPI opposed 5Star's Motion. Now 5Star contends that PPI's Memorandum was ineffective.

PPI responded in detail to the Motion for Relief from Default under Rule 55. 5Star concedes that the standard for relief under Rule 60 is more difficult than the standard for relief under Rule 55. Having refuted 5Star's Motion for relief under Rule 55, PPI did not think it necessary to refute separately 5Star's motion under the more difficult standard of Rule 60.

5Star's substantive arguments in its Motion to Reconsider are similar to those 5Star made in its Opposition to Motion for Entry of Default filed August 17, 2018. This Court addressed each of those arguments in its Order entered September 13, 2018. Again, there is no reason for a different result now.

I. 5Star failed to Show “Good Cause.”

This Court ruled that 5Star had failed to show “good cause” for relief from default under Rule 55(c). 5Star now argues that not only did its counsel simply miss the Notice of Electronic Filing of the Answer and Counterclaim, it also contends that its counsel “was unfamiliar with the . . . Electronic E-Filing System” (Motion to Reconsider, p. 13) and that she “mistakenly believed that any counterclaim would have to be served traditionally.” (*Id.*) 5Star also contends that she was not expecting the Answer and Counterclaim to be filed before the deadline. (*Id.*) 5Star fails to explain how those contentions advance its cause.

5Star continues to ignore its multiple deficiencies that led to the entry of default, including (1) failure to file a timely Reply, (2) failure to respond to interrogatories and requests for production for five months, (3) failure to respond to the Motion to Consolidate, (4) failure to attend the hearing on the Motion to Consolidate, (5) failure to file any Reply beyond a cursory and late general denial, (6) failure to issue any discovery requests of its own, (7) failure to respond to PPI’s letter asking again for discovery responses, and (8) failure to respond to the discovery requests, even when **Ordered** to do so by this Court.

5Star also fails to dispute the fundamental **legal** basis for this Court’s ruling: that the error of counsel is the error of the client who hired the counsel: *Sundown Operating Company Inc. v. Intedge Industries Inc.* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009); *Simon v. Flowers*, 231 S.C. 545, 550-51, 99 S.E.2d 391, 394 (1957); *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (2007); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014).

This Court's ruling, finding 5Star in default and refusing to find "good cause" to relieve 5Star from default was eminently proper, and 5Star has raised no valid ground for overturning this ruling.

II. PPI did not introduce evidence of contracts from outside the record.

5Star argues that PPI introduced evidence from outside the record to support its counterclaim, by referring to "other contracts." PPI quoted extensively from the allegations of the Counterclaim. The references to "other contracts" that PPI cited in support of its argument that it had pled valid counterclaims were quotations from the Counterclaim itself, not from outside the "record."

III. The Court Properly Ordered 5Star to Respond to Discovery.

Next, 5Star purports to tell this Court that it has no power to order 5Star to respond to discovery requests that have gone unanswered since May 10, 2018. 5Star contends that this Court is powerless to order it to comply with the Rules of Discovery without a formal motion from PPI.

The Rules of Civil Procedure list the three characteristics of a motion. PPI has met all three characteristics. "An application to the court for an order shall be by motion which . . . [1] shall be made in writing, [2] shall state with particularity the grounds therefor, and [3] shall set forth the relief or order sought." SCRCP 7(b)(1).

PPI met the requirements of Rule 7(b)(1). PPI notified the Court in its Reply Memorandum of Law in Support of Motion for Entry of Default Judgment, ([1] "in writing") that it had served Interrogatories and Requests for Production on 5Star on May 10, 2018, but that 5Star had failed to respond ([2] "stat[ing] with particularity the grounds therefor.") Then, PPI asked to

the Court to “require 5Star to respond promptly and fully to PPI’s discovery requests” ([3] “the relief or order sought”). Reply Memorandum, page 6.

The Court granted the motion and ordered 5Star “to respond promptly and fully to PPI’s discovery requests.” Order entered September 13, 2018, page 8.

If a party fails to respond at all to interrogatories and requests for production of documents, that circumstance is governed by Rule 37(d).

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Id. (emphasis added). Accordingly, when a party fails to respond at all, the Court may “make such orders in regard to the failure as are just.” That is exactly what the Court did.

Now, more than five months have passed since PPI served these discovery requests. More than a month has passed since the Court **ordered** 5Star to respond “promptly.” However, rather than respond promptly, as required by the rules and as ordered, 5Star continues to argue about technicalities, but refuses to provide responses, which seems quite close to contempt of court.

IV. The Court Properly Ruled that it Would Schedule a Hearing on Damages.

Finally, 5Star argues that the Court should not have entered a default judgment, until after a hearing to establish the amount of the damages. In its Order, the Court properly granted judgment

as to liability and ruled that it would allow sufficient opportunity for discovery, to compel 5Star to respond fully to its discovery requests, and thereafter to set a hearing to determine the amount of damages. “[O]nce a party defaults, the trial court ‘may conduct such hearings or order such references as it deems necessary and proper’ to enter the default judgment. Rule 55(b)(1), SCRPC. *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 81-82, 504 S.E.2d 311 (1998). Furthermore, “In the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. Where damages claimed are not readily ascertainable from the pleadings and record, a hearing is appropriate to determine the amount of damages.” *Wells Fargo Bank NA v. Marion Amphitheater LLC*, 408 S.C. 87, 92, 757 S.E.2d 557, 560 (Ct. App. 2014), citing 46 AmJur2d *Judgments* § 298 (2006). In this case, the damages are not only “not readily ascertainable from the pleadings and record,” they are impossible to calculate without responses to the discovery requests. The Court properly Ordered responses to the discovery requests and properly agreed to set a hearing to determine the amount of damages.

CONCLUSION

For all the reasons stated herein, the Court should deny the Motion to Reconsider.

Respectfully submitted,
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Certificate of Electronic Notification

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James Carpenter - Notification transmitted on 10-16-2018 01:01:15 PM.

David Dill - Notification transmitted on 10-16-2018 01:01:15 PM.

Amanda Scott - Notification transmitted on 10-16-2018 01:01:15 PM.

William Brown - Notification transmitted on 10-16-2018 01:01:16 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 10-16-2018 01:00:54 PM
Court: CIRCUIT COURT
Common Pleas
Greenville
Case Caption: 5 Star Life Insurance Company vs. Peek
Performance Inc
Document(s) Submitted: Memo/Memo in Opposition
Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

David Curry Dill for 5 Star Life Insurance
Company
William Stevens Brown, V for 5 Star Life
Insurance Company
James G. Carpenter for Peek Performance Inc
Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

CASE NO.: 2018-CP-23-01639

5Star Life Insurance Company,)
)
 Plaintiff,)
)
 v.)
)
 Peek Performance, Inc., a South Carolina)
 corporation)
 Defendant.)
)

**MOTION FOR SANCTIONS,
 INCLUDING A FINDING OF
 CONTEMPT OF COURT
 SCRPC 37(b)**

NOW COMES Peek Performance, Inc. ("PPI"), by its undersigned attorney and moves the Court for sanctions pursuant to SCRPC 37(b), including a finding of contempt of court.

Statement of the Case

The Court ordered the Plaintiff 5Star Life Insurance Company ("5Star") "to respond promptly and fully to PPI's discovery requests." (Order entered September 13, 2018, p. 8). More than five months have passed since PPI served these discovery requests. More than a month has passed since the Court ordered 5Star to respond "promptly." However, 5Star has failed to provide responses, which seems to reflect a contempt of this Court.

PPI requests that this Court enforce its prior Order with sanctions under Rule 37. PPI further requests that the Court find 5Star in contempt of court for failure to obey this Court's Order.

Legal Discussion

(2) *Sanctions by Court in Which Action Is Pending.* If a party . . . **fails to obey an order to provide or permit discovery**, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (A) An order that the matters regarding which the order was made or any other designated **facts shall be taken to be established** for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order **refusing to allow the disobedient party to support or oppose designated claims or defenses**, or prohibiting him from introducing designated matters in evidence;
- (C) An order **striking out pleadings or parts thereof**, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a **judgment by default** against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a **contempt of court** the failure to obey any orders except an order to submit to a physical or mental examination;

* * *

In lieu of any of the foregoing orders or in addition thereto, **the court shall require the party failing to obey the order** or the attorney advising him or both **to pay the reasonable expenses, including attorney's fees, caused by the failure**, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

SCRCP 37 (b) (emphasis added).

This Court has already held 5Star to be in default on PPI's counterclaim. Accordingly, the Court would not have the sanctions listed in subparagraphs (A) through (C) available as to PPI's counterclaims against 5Star, but these sanctions would be available as to 5Star's claims against PPI. In addition, a finding of contempt of court and an award of attorneys' fees are also available to vindicate the Court's authority.

A finding of contempt of court may be civil or criminal. Generally, civil contempt is designed to compel compliance with a court's orders, and criminal contempt is to punish

willful disobedience to the orders of the Court. *Curlee v. Howe*, 277 S.C. 377, 287 S.E.2d 915 (1982).

There can be no doubt about the power of the courts of general jurisdiction in this State to punish for contempt. This power is not derived from any statute but from the common law which from its inception recognized this implied and necessary power, without which contumacious conduct could well destroy the authority of any court.

State v. Goff, 228 S.C. 17, 21-22, 88 S.E.2d 788, 790 (1955).

The South Carolina Supreme Court has articulated the standard for a finding of civil contempt of court.

Courts have the inherent power to punish for contempt. *In re Brown*, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). Willful disobedience of a court order may result in contempt. *In re Brown*, 333 S.C. at 420, 511 S.E.2d at 355. A willful act is one done voluntarily and intentionally, with the specific intent of doing something the law forbids. *Id.*

Civil contempt must be proved by clear and convincing evidence. *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998) (citation omitted). "The purpose of civil contempt is to 'coerce the defendant to do the thing required by the order for the benefit of the complainant.'" *Id.* at 111, 502 S.E.2d at 88.

Durlach v. Durlach, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004). A sanction for contempt of court can include the payment of an attorney's fee. *Id.* at 359 S.C. 64, 76, 596 S.E.2d 908, 915. The Court of Appeals ruled,

Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory. **Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders.** See *Poston v. Poston*, 331 S.C. 106, 114, 502 S.E.2d 86, 90, (1998) ("In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, **including reasonable attorney's fees.** The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding.") *Lindsay v. Lindsay*, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct.App.1997) ("A compensatory contempt award may include attorney fees.") (citation omitted); *Curlee v. Howle*, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-20 (1982) ("Compensatory contempt is a money award for the plaintiff when the

defendant has injured the plaintiff by violating a previous court order Included in the actual loss are the costs of defending and enforcing the court's order, including litigation costs and attorney's fees.").

Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct.App.2001) (emphasis added).

This Court can award attorneys' fees pursuant to the "lodestar" analysis and use a multiplier to enhance the award of reasonable attorneys' fees. *Layman v. State of South Carolina*, 376 S.C. 434, 658 S.E.2d 320 (2008). Furthermore, the South Carolina Supreme Court has ruled that a "reasonable attorney's fee" awarded in a fee-shifting circumstance can exceed the hourly rate agreed to between the party and his attorney. *Jackson v. Speed*, 326 S.C. 289, 307-308, 486 S.E.2d 750, 759-760 (1977) (emphasis added).

In the case at bar, the fee agreement between counsel and PPI is at counsel's normal hourly rate, \$275 per hour.

CONCLUSION

WHEREFORE, PPI prays the Court to enforce its Order entered September 13, 2018, under Rule 37, and sanction 5Star under Rule 37 (b), and/or find 5Star in contempt of court for failure to comply with its Order, plus award PPI its reasonable attorneys' fees, to be established by affidavit, at the normal rate, \$275 per hour.

Respectfully submitted,
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October 31, 2018

Certificate of Electronic Notification

Recipients

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David Dill - Notification transmitted on 10-31-2018 12:51:10 PM.

Amanda Scott - Notification transmitted on 10-31-2018 12:51:10 PM.

William Brown - Notification transmitted on 10-31-2018 12:51:10 PM.

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NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 10-31-2018 12:50:11 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Motion/Sanctions

Filed by or on behalf of: James G. Carpenter

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

David Curry Dill for 5 Star Life Insurance
Company

William Stevens Brown, V for 5 Star Life
Insurance Company

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Thirteenth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-002114
Case No. 18-CP-23-01639

RECEIVED
DEC 17 2018
SC Court of Appeals

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

v.

Peek Performance, Inc. Respondent.

MEMORANDUM REGARDING THE APPEALABILITY
OF THE ORDERS CHALLENGED ON APPEAL

Appellant 5Star Life Insurance Co. ("5Star")¹ files this memorandum in response to the Deputy Clerk's letter of December 6, 2018 requesting memoranda addressing the appealability of the Orders 5Star has challenged on appeal. 5Star has appealed from two Orders: (1) an Order denying 5Star's motion for relief from default judgment pursuant to Rule 60(b), SCRCP, and (2) an Order entering default and default judgment. As explained more fully below, the former is immediately appealable as a matter of right, and the latter may also be considered on appeal to conserve the resources of the lower court and the litigants by avoiding later, unnecessary litigation.

RELEVANT PROCEDURAL POSTURE²

5Star filed this suit on March 19, 2018, to recover commissions it paid Peek Performance ("Peek") which Peek had not earned. On March 29, 2018, Peek filed an Answer and what it

¹ The caption includes an erroneous space inserted in Appellant's name. The main text of this memorandum, however, employs the correct appellation.

² For the sake of brevity, this memorandum omits the factual background and summarizes only the portions of the procedural background relevant to the question of appealability.

styled as a Counterclaim. On May 10, 2018, Peek filed a Notice of Default and Motion for Entry of Default. On May 17, 2018, 5Star filed a Reply to the Answer and Counterclaim and, on August 17, 2018, filed an Opposition to the Motion for Entry of Default.

On September 13, 2018, Judge Cooper entered an order of default and default judgment against 5Star. *See* Order for Entry of Default and Default Judgment (attached hereto as **Exhibit A**). In addition, that Order compelled 5Star to respond fully to Peek's discovery requests. *See id.* at 8. Notably, Peek had not filed a motion to compel discovery, the issue had not been briefed to the trial court, and the court had no basis upon which to make an informed decision to compel responses to the discovery requests. Peek's Motion for Entry of Default did not raise the issue of discovery or request discovery relief, and it was not until Peek filed its Reply Memorandum in support of the motion that discovery was even mentioned. Furthermore, undersigned counsel is unsure if the interrogatories and requests for production that Peek allegedly served on 5Star were, in fact, actually served. None were conveyed to undersigned counsel by 5Star's prior counsel when undersigned counsel was retained.

5Star subsequently filed a Motion for Reconsideration, Relief from Entry of Default, and Relief from Default Judgment pursuant to Rules 59(e), 55, *and* 60, SCRCP.³ *See* Motion, Sept. 24, 2018 (attached hereto as **Exhibit B**). In addition, 5Star filed a 20-page memorandum of law

³ As explained below, the critical procedural fact authorizing 5Star's appeal is that this motion was made pursuant to Rule 60, SCRCP. Peek's memorandum recently filed with this Court incorrectly refers to 5Star's motion as a "Motion to Alter or Amend" and fails to mention it was a motion for Relief from Default Judgment pursuant to Rule 60(b). *See* Peek's Dec. 13, 2018 memo at 2; *id.* at 3 (stating "[t]he Order entered October 29, 2018, was the denial of 5Star's Motion under Rule 59(e)," but failing to disclose the motion was also made under Rule 60(b)).

In addition, Peek's memo erroneously states 5Star's Notice of Appeal cites a case without acknowledging it had been overruled. *See id.* at 4–5. This is incorrect. 5Star's Notice of Appeal does not rely on *Hite*, a 1991 case that was overruled on other grounds in 1995. Rather, the Notice of Appeal cites to *Watson v. Underwood*—a 2014 case *that is still good law* and which itself cites to *Hite* for a proposition that likewise is still good law. In keeping with proper citation format, 5Star's citation to *Watson* noted parenthetically that *Watson* cited *Hite*. Any insinuation that 5Star's Notice of Appeal lacked candor or relied on bad law is categorically false.

in support of the relief requested. *See* Memorandum, Sept. 24, 2018 (attached hereto as **Exhibit C**). The memorandum explained at length that 5Star sought to set aside the default judgment pursuant to Rule 60(b). *See id.* at 16–20. On October 11, 2018, 5Star filed a Reply in further support of its motion, again expressly stating its motion was made pursuant to Rule 60(b). *See* Reply, Oct. 11, 2018, at p.2 (attached hereto as **Exhibit D**). Judge Cooper denied 5Star’s motion in an Order issued on October 29, 2018. (Attached hereto as **Exhibit E**.)

5Star filed and served its Notice of Appeal on November 28, 2018, appealing (1) the September 13, 2018 Order entering default and default judgment, and (2) the October 29, 2018 Order denying 5Star’s motion for relief from default judgment.

ANALYSIS

The two Orders from which 5Star has appealed may properly be considered by this Court at this time. One of the Orders is immediately appealable as a matter of right. The other Order would not on its own be immediately appealable, but it may be considered—and 5Star respectfully argues, *should* be considered—on appeal along with the other, immediately appealable order.

I. The October 29, 2018 Order denying 5Star’s motion for relief from default judgment is immediately appealable.

The appealability of an interlocutory order is governed primarily by S.C. Code Ann. § 14-3-330, which permits the immediate appeal of orders including those “involving the merits” or “affecting a substantial right.” That statute and the applicable rules have been interpreted by our courts to permit the immediate appeal of the denial of a motion seeking relief from default judgment pursuant to Rule 60(b), SCRPC. Judge Cooper’s ruling dated October 29, 2018 is such an order, and the law is clear that the denial of such a motion is immediately appealable:

The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule

60(b), SCRCP. *An appeal may then be taken from the denial of this motion.*

Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985) (emphasis added). *See also Ex parte Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals*, 340 S.C. 57, 58, 530 S.E.2d 383, 384 (2000) (“We find the Court of Appeals was incorrect in summarily dismissing the appeal. Petitioner was appealing the denial of the Rule 60 motion Therefore, the Court of Appeals should have considered the merits of the appeal, and if the Court of Appeals agreed with the circuit court, it should have affirmed the circuit court’s ruling on the Rule 60 motion rather than summarily dismissing the appeal.”); *Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (1987) (“Rule 60(b) [is] similar to the comparable federal rules. According to Professors Wright, Miller and Kane, the denial of a motion under Federal Rule 60(b) to set aside a default judgment is immediately appealable.”); Jean H. Toal et al., *Appellate Practice in South Carolina* 100 (2d ed., 2002) (“The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion.”) (citing *Ex parte Sadisco*, 340 S.C. 57, 530 S.E.2d 383; *Winesett*, 287 S.C. 332, 338 S.E.2d 340).

Notably, the ability to appeal from the denial of a Rule 60(b) motion is not limited to situations where the default judgment concluded the litigation *in toto*. Rather, a motion pursuant to Rule 60(b) may be made—and its denial appealed—even from *an order*. *See* Rule 60(b), SCRCP (“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, *order*, or proceeding for the following reasons”) (emphasis added). Further, allowing the immediate appeal from the denial of a Rule 60(b) motion to set aside a default judgment, even though damages have not been determined, makes good sense from a standpoint of efficiency and judicial economy. Requiring the parties to litigate the remainder of the case before appealing the default judgment would—if the appellate court

reverses the entry of default judgment—force the parties and the court below to start afresh and re-litigate the remaining claim starting at square one from discovery to motions practice to trial to post-trial motions.

Furthermore, as noted above, 5Star's motion was based in part on Rule 60(b), and the denial of such a motion is immediately appealable. Accordingly, the *entire* order (including those aspects of it based on Rules 55 and 59(e)) is appealable. As long as one aspect of an order is appealable, the entire order should be considered upon appeal. See *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) ("This Court reviews interlocutory orders when they contain other appealable issues.") (citing *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)); *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 511, 59 S.E.2d 132, 136 (1950), *overruled on other grounds*, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) ("We have here a single order from a part of which an appeal admittedly will lie, but it is manifest that the entire order should be considered upon this appeal; and the cases cited are sufficient to support this conclusion."); see also Toal, *Appellate Practice in South Carolina* 88 ("Where there is a single order that is admittedly appealable in part, the entire order should be considered upon the appeal.").

In sum, because Judge Cooper's October 29 Order denied 5Star's motion seeking relief from default judgment under Rule 60, that Order is immediately appealable in its entirety.

II. The September 13, 2018 Order for Entry of Default and Default Judgment may be joined in the appeal of another Order that is itself immediately appealable.

5Star also appeals from Judge Cooper's Order dated September 13, 2018 entering default and default judgment. Admittedly, this Order, if standing alone, would not be immediately appealable. *Winesett*, 287 S.C. at 334, 338 S.E.2d at 341; *Belue v. Belue*, 276 S.C. 120, 121, 276 S.E.2d 295, 295 (1981). In the context of this appeal, however, this Order does not stand alone.

“[A]n order that is not directly appealable will nonetheless be considered if there is an

appealable issue before the court and a ruling on appeal will avoid unnecessary litigation.” *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)). In the instant appeal, there is an appealable issue—namely, the Order denying the motion to set aside the default judgment pursuant to Rule 60(b)—and this Court’s simultaneous consideration of the prior order will spare the lower court and the parties from expending needless resources litigating what could otherwise be resolved by this Court.

Specifically, the lower court’s September 13, 2018 Order wrongly compelled 5Star to respond to discovery requests Peek had allegedly served on 5Star. Peek, however, had not filed a motion to compel discovery, the issue had not been briefed to the trial court, and the court had no basis upon which to make an informed decision to compel responses to the discovery requests. *See* Order for Entry of Default and Default Judgment at 8 (attached hereto as **Exhibit A**). Peek’s Motion for Entry of Default did not raise the issue of discovery or request discovery relief. Rather, it was not until Peek filed its Reply Memorandum in support of its Motion for Entry of Default that the issue of discovery was first mentioned. But a party may not request discovery relief through a reply memorandum, nor may a party receive such relief if it was not requested *in the motion*. *See Wilson v. Walker*, 340 S.C. 531, 537, 532 S.E.2d 19, 22 (Ct. App. 2000) (noting that where the motion before the lower court had “failed to request an order compelling Father to answer interrogatories or produce documents, . . . discovery issues were not properly before” the trial court). In the absence of a proper request and adequate briefing by both parties, the lower court had no basis upon which to determine if the discovery requests were appropriate, overly broad, sought privileged or confidential information, or otherwise were requests which should or should not be enforced.

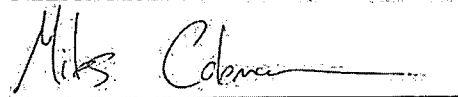
If not reversed, the lower court's erroneous discovery ruling will result in further litigation below. Indeed, on December 13, 2018, Peek's counsel urged the trial court to sanction 5Star for allegedly not complying with the lower court's discovery order—nevermind the fact that the order has been appealed. Should the lower court's September 13, 2018 Order stand, there will be further litigation, perhaps including a subsequent appeal if 5Star is held in contempt of the erroneous order. This Court should take the opportunity now to resolve the situation and avoid further litigation and an appeal on this erroneous ruling.

CONCLUSION

Because one of the Orders being appealed is immediately appealable, and because a related Order—even if not itself immediately appealable—may be joined in the appeal of an appealable ruling, this Court has jurisdiction to consider and rule upon both of the Orders appealed in 5Star's Notice of Appeal.

Respectfully submitted,

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Greenville, South Carolina
December 14, 2018

RECEIVED
DEC 17 2018
SC Court of Appeals

EXHIBIT A

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

LEGAL DISCUSSION

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

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

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

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

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

SCRCP 55(b)(2).

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

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

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

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

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

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

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

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

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

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

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

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

In *Simon v. Flowers*,

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

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

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

The only accident or mistake relied upon for vacating the decree and judgment of foreclosure is the neglect of the petitioner's counsel in that suit to file an answer setting up the defense of partial failure of consideration in the mortgage debt. Whether the failure to do this occasioned any injustice to the petitioner it is unnecessary to determine, because the neglect of the attorney must be regarded at the neglect of the petitioner himself. * * * When a party selects an attorney of the court to conduct his cause in his stead and place, he confers upon the attorney authority to take such action in its prosecution or defense as he may decide to be legal, proper and necessary in the management of the cause; his acts are, in the absence of fraud, the acts of his client; and the rule that a party cannot in equity find relief from the consequences of his own negligence is equally applicable where the neglect is that of his attorney employed in the management of the case.²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

SO ORDERED, this _____ day of _____, 2018.

G. Thomas Cooper,
Circuit Judge presiding



Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc
Case Number: 2018CP2301639
Type: Order/Default

So Ordered

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

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EXHIBIT B

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

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

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

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

- (1) reconsider/vacate/amend its September 13, 2018 Order pursuant to Rule 59, SCRCP
- (2) set aside the entry of default against 5Star pursuant to Rule 55, SCRCP, and/or
- (3) grant 5Star relief from the default judgment pursuant to Rule 60, SCRCP.

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

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

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

[Signature on Following Page]

Respectfully submitted,

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Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina

September 24, 2018

EXHIBIT C

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

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

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

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

funds. Peek purports to have asserted a counterclaim¹ which it contends 5Star failed to timely answer.

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

I. Introduction and Factual Background

5Star is an insurance underwriting enterprise. It filed this action on March 19, 2018 to recover commissions it paid Peek but that Peek did not earn. Peek is an insurance marketing and recruiting agency. The Contract between 5Star and Peek was attached to and incorporated into the Complaint. Peek electronically filed an Answer on March 29, 2018. Peek admitted the validity of and terms of the Contract. (Answer ¶ 3.) Contrary to the terms of the admitted Contract, Peek alleges it was not required to repay the commissions to 5Star or, to the extent it was required to repay these monies, 5Star or other actors² caused Peek to be unable to repay the commissions through certain actions or omissions. Peek contends its Answer included a counterclaim. If the Answer included a counterclaim, 5Star was obligated to answer by May 3, 2018. *See* South Carolina Rules of Electronic Filing Rule 4(e)(4) (service by electronic filing provides five

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

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

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

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

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

A. The Court Could Not Award a Default Judgment

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

B. The Order Does Not Support Entry of Default

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

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

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

2. The Order Relies on Allegations Outside the Purported Counterclaim

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

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

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

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

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

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

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

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

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

E. The Order Cannot Compel Discovery Responses

1. The Order Grants Relief Not Sought by the Motion

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

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

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

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

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

A. Legal Standard

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

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

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

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

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

in its affidavit⁴ in support of its motion for entry of default, Peek again failed to commit to specific causes of action. The untimely and inadmissible affidavit asserted the Answer contained causes of action for breach of contract and defamation, but also broadly asserts unspecified "other claims." (Aff. ¶ 16.) The ambiguity of Peek's pleading is further demonstrated by its complaint in the Second Lawsuit. Peek's counterclaim is simply a restatement of the "FACT" section of its complaint in the Second Lawsuit. (*Compare Answer ¶¶ 9-64 with Second Lawsuit Complaint ¶¶ 5-59; see also Peek's Mot. to Consolidate* (stating "the allegations in the Counterclaims in this case are repeated in large measure in the Complaint in [Second Lawsuit]").)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Legal Standard

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

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

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

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

1. Excusable Neglect

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

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

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

2. Mistake/Inadvertence/Surprise

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

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

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

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

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

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

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

V. Conclusion

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

Signature on Following Page

Respectfully submitted,

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September 24, 2018

EXHIBIT D

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

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,)
)
 Plaintiff)

vs.)

C.A. No. 2018-CP-23-01639

Peek Performance, Inc.,)
)
 Defendant.)

 Peek Performance, Inc. and D. Clayton
 Peek,)
)
 Plaintiffs,)

v.)

Jeff Wright d/b/a Agent Sales Group, Joe
 Caldwell, Nathan Wells, Jeff Magg, and)
 Consolidated Assurance, LLC,)
)
 Defendants.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Peek's Opposition further leads the Court astray as to the requested discovery relief. As explained in 5Star's motion, the record is critically devoid of any evidence as to the service of any discovery requests or the contents of any such requests. To provide 5Star with sufficient notice of its obligations there must be some record evidence as to specific requests that are outstanding.

Here there is no record evidence. As Peek failed to provide the Court with the record evidence necessary to support its order the requested discovery relief is improper.

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

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

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

propriety of default judgment prior to a damages hearing but merely states that “unliquidated damages normally are not awarded without an evidentiary hearing.” 46 Am. Jur.2d Judgments § 288.³ More telling, however, is that Peek conveniently fails to include the very next citation in *Wells Fargo* to “*Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir.1983) (holding a judgment by default may not be entered without a hearing on damages unless the complaint indicates the amount claimed is liquidated or capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits).” *Wells Fargo*, 408 S.C. at 92–93, 757 S.E.2d at 560 (emphasis added). Thus *Wells Fargo* does not support Peek’s contention that the Court may issue a default judgment prior to a damages hearing.

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

Respectfully submitted,

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October 11, 2018

EXHIBIT E

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

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2018-CP-23-01639

5 Star Life Insurance Co.,

Plaintiff

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION,
RELIEF FROM ENTRY OF DEFAULT,
AND RELIEF FROM DEFAULT
JUDGMENT**

vs.

Peek Performance, Inc.,

Defendant.

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

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

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

AND IT IS SO ORDERED.

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

October 28, 2018

ELECTRONICALLY FILED - 2018 Oct 29 9:52 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2301639



Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc
Case Number: 2018CP2301639
Type: Order/Other

So Ordered

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

Electronically signed on 2018-10-28 16:21:41 page 3 of 3

ELECTRONICALLY FILED - 2018 Oct 29 9:52 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2301639

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Thirteenth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-002114
Case No. 18-CP-23-01639

RECEIVED
DEC 17 2018
SC Court of Appeals

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

v.

Peek Performance, Inc. Respondent.

PROOF OF SERVICE

I hereby certify that I have caused a copy of Appellant 5Star's Memorandum Regarding
the Appealability of the Orders Challenged on Appeal to be served upon all counsel of record, by
mailing copies of same, postage prepaid to the following addresses:

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December 14, 2018

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

**5STAR LIFE INSURANCE CO.'S MEMORANDUM IN OPPOSITION TO MOTION
FOR SANCTIONS/CONTEMPT**

5Star Life Insurance Co. ("5Star"), an enterprise of the nonprofit Armed Forces Benefit Association, hereby submits the following Memorandum in Opposition to Peek Performance, Inc.'s ("Peek") Motion for Sanctions/Contempt ("Motion").

I. INTRODUCTION

Peek seeks extreme relief for 5Star's alleged violation of the Court's September 13, 2018 Order. Because the underlying order is under appellate review, the Motion exceeds the Court's jurisdiction. But, even there wasn't a pending appeal, Peek's Motion would still fail.

There has been no sanctionable conduct. 5Star has not violated any court order. It answered Peek's discovery requests. Peek's counsel has never objected to those responses, sent any formal or informal request for supplementation, consulted with the undersigned counsel, or otherwise raised any issue with 5Star's responses. Rather, Peek presents the Court with a fiction and omits key details in a procedurally flawed, moot, and improper Motion. Accordingly, the Motion — which seeks to burden this Court over discovery responses that 5Star has already answered — should be denied.

II. BRIEF FACTUAL BACKGROUND

A. Case History

5Star provides life insurance to military families. Peek, an insurance marketing consultancy, received \$109,515.81 in unearned commissions from 5Star. 5Star filed the instant lawsuit for breach of contract to recover these funds on March 19, 2018. Peek answered and, it contends, asserted a counterclaim. If the Answer included a counterclaim, 5Star was obligated to answer by May 3, 2018. Peek filed a motion for entry of default on May 10, 2018. This motion made no reference to discovery.

5Star filed an answer to the purported counterclaim on May 17, 2018. Its then-counsel did not advise 5Star that Peek believed it to be in default. After 5Star became aware of the alleged default, it obtained new counsel and submitted a memorandum in opposition to the motion for entry of default. A hearing was held on August 28, 2018. Peek did not introduce any evidence concerning discovery and no motion to compel discovery was ever filed.

The Court issued an order on September 13, 2018 granting the motion for entry of default. The order also entered default judgment and ordered 5Star to respond to discovery responses. The complete text of the order, as it relates to discovery, was: "The Court also ORDERS 5Star to

respond promptly and fully to PPI's discovery requests." Shortly thereafter, 5Star properly filed a motion under (1) Rule 59 motion to reconsider/vacate/amend the order, (2) Rule 55 to set aside the entry of default, and/or (3) Rule 60 to grant relief from default judgment. The Court denied this motion by order dated October 29, 2018. 5Star timely appealed the September 13th and October 29th Orders on November 28, 2018. (Exhibit A) Peek's counsel then contacted the Court on December 6, 2018 to request a hearing on this Motion. On December 7, 2018, 5Star's counsel responded by noting the pending appeal. On December 13, 2018, Peek's counsel again emailed the Court, indicating that the appeal would be dismissed. Contrary to Peek's belief, the Court the Court of Appeals accepted 5Star's appeal, the time for briefing is underway, and the parties will soon file their initial appellate briefs.

B. Discovery

5Star's prior counsel has no record of receiving any discovery requests in this case. Thus, 5Star does not believe it was served with any discovery requests. Peek did not submit any evidence concerning the purported discovery requests to the Court. 5Star contacted Peek's counsel on September 24th to request a copy of the allegedly pending discovery requests. Peek's counsel e-mailed copies of these requests at 5:49 PM that evening.¹ 5Star served its responses to these requests on October 29, 2018. (Exhibit B)

Peek served 5Star with a second set of requests for production via U.S. Mail on October 9, 2018. 5Star's responses to the second set of requests for production were due on November 13,

¹ Although electronic mail is not valid service, service via U.S. Mail at the same time would have resulted in a discovery deadline of October 29, 2018. 5Star served its responses to these requests on October 29, 2018.

2018. 5Star served its responses to the second set of requests for production fifteen days early, on October 29, 2018. (Exhibit C).²

On October 31, 2018—after 5Star served its responses to both set of discovery requests—Peek filed the instant motion for sanctions. This Motion falsely alleges that 5Star violated the Court’s September 13th Order because it “failed to provide [discovery] responses.”

5Star served its own discovery requests on Peek on November 15, 2018. Peek has never responded to these requests. While the unaddressed Requests for Admission have now been deemed admitted, Peek still owes 5Star responses to its Requests for Production and Interrogatories.

III. ARGUMENT

A. The Pending Appeal Precludes Peek’s Motion

Peek’s Motion is based on the alleged violation of the September 13, 2018 Order; specifically the provision that 5Star “respond promptly and fully to PPI’s discovery requests.” This order is under appellate review. One of the issues on appeal is that the Order exceeded the scope of the motion presented to the Court (by compelling discovery when no motion to compel had been filed), lacked specificity, and was not founded on any record evidence in the record. *See, e.g., City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 230, 599 S.E.2d 462, 464 (Ct. App. 2004) (“A reversal is required when the trial court’s ruling exceeds the limits and scope of the particular motion before it.”); Rule 7(b)(1), SCRCP.

² The responsive documents to both sets of requests are confidential. They contain financial data, customer/agent names and identifying information, and/or other proprietary or commercially sensitive information. The parties agree a confidentiality order is needed and have communicated regarding the same. All parties—except Peek—agreed to an order largely mirroring the standard form used in District of South Carolina. Peek objected, however, stating that “[w]e’ll just have to take it to the judge.” Exhibit D, Nov. 16, 2018 Email from 5Star Counsel to Carpenter (explaining the proposed order); Exhibit E, Nov. 19, 2018 Email from Carpenter.

It is axiomatic that “the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” Rule 241, SCACR,³ *Bradley v. Hullander*, 266 S.C. 188, 193, 222 S.E.2d 283, 286 (1976) (“The appeal from the ruling of the order of February 8, 1975, stayed all further proceedings in the circuit court pertaining to this ruling. After the notice of intention to appeal from the order of February 8 was served, the circuit court lost jurisdiction as to this order and the motions, which the [non-appealing party] attempted to pursue, should not have been heard without the permission of the Supreme Court.”) The Court, therefore, cannot consider Peek’s motion seeking to punish 5Star for violating the September Order because the appeal divested the Court of jurisdiction regarding that order. *See, e.g., Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 531, 818 S.E.2d 758, 764 (2018) (stating, in relation to a Rule 11 motion for sanctions, “[t]he first and most important consideration is whether the court still retains jurisdiction over the case.”).

B. Peek Has Not Complied with Necessary Prerequisites and the Court Must Strike its Motion

1. No Consultation Pursuant to Rule 11, SCRCF

To preserve judicial resources and prevent frequent court intervention, a movant is required to consult with opposing counsel before filing a motion. Rule 11, SCRCF. Further, the movant must certify to the Court that such consultation has occurred. *Id.* (“All motions filed shall contain an affirmation that the movant’s counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion.”) The Rules of Civil Procedure are unequivocal about the repercussions for a movant’s

³ Rule 241 provides certain exceptions, none of which apply here.

failure to consult: the motion *must* be stricken and the Court may order the moving party or its attorney to pay the other party its attorney's fees or any other appropriate relief. *Id.* (see mandatory language requiring the motion "shall be stricken").

Peek did not consult with 5Star before filing this Motion. That is evident because, if it had, Peek would not have claimed that 5Star failed to provide discovery responses. Accordingly, the Motion should be stricken and 5Star is entitled to such other relief as this Court may deem just and proper.

2. No Verified Petition or Rule to Show Cause

Peek seeks both sanctions and/or contempt. Its request for contempt lacks the required prerequisites and cannot be granted. There are two types of contempt: direct and constructive. "Constructive contempt is contempt that occurs outside the presence of the court." *Floyd v. Floyd*, 365 S.C. 56, 75 92, 615 S.E.2d 465, 475 (Ct.App.2005), *overturned on other grounds by* 2008 S.C. Acts 211, § 1 (amending S.C. Code Ann. § 62-1-110). "In contrast, direct contempt involves contemptuous conduct occurring in the presence of the court." *Id.* The alleged failure to respond to discovery occurred outside of the Court's presence. Thus, Peek seeks a finding of constructive contempt.

"Charges of constructive contempt are brought by a rule to show cause which must be based upon an affidavit or verified petition." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994). "The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect." *Id.*; *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 121 (2008) ("[O]ur jurisprudence clearly establishes that the proper procedure to determine whether a party should be held in contempt is to bring a summons and a rule to show cause.")

Here, there is no rule to show cause and Peek has failed to submit an affidavit or a verified petition. Therefore, the Court cannot hold 5Star in contempt.

C. 5Star has not Violated the Court's Order

The Order did not contain a specific date by which 5Star was obligated to respond to Peek's discovery requests or identify the requests for which 5Star was obligated to respond. 5Star's prior counsel has no record of being served with Peek's first set of discovery requests. 5Star asked for and received copies of the requests on September 24, 2018. Despite no record of valid service, 5Star treated the emailed requests as having been served via mail on the date received. 5Star responded to the requests on the same day that the Court issued its final ruling on the Order in question. This response was likewise within the time limit provided by the Rules of Civil Procedure if the requests had been served via mail on the date Peek's counsel emailed them to 5Star. 5Star served full discovery responses on Peek two days before Peek filed the instant Motion. Therefore, there is no unanswered discovery and no basis for Peek's Motion.

D. Peek's Request for Sanctions and Contempt are Inappropriate

Peek requests sanctions against 5Star pursuant to Rule 37, SCRCP, and/or a finding of contempt of court. Both requests are extreme, unwarranted, and unnecessary.

Contempt is "an extreme measure" and "not to be lightly asserted." *Ex parte Kent*, 379 S.C. 633, 637, 666 S.E.2d 921, 923 (Ct. App. 2008). "Contempt results from the willful disobedience of a court order and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based." *Id.* "A willful act is an act done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." *Id.* (internal quotations omitted). Civil contempt must be proven by clear

and convincing evidence. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994).⁴

Likewise, sanctions are an extraordinary remedy. “In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011). “The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned.” *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542–43, 489 S.E.2d 679, 682 (Ct. App. 1997). Here, Peek seeks drastic sanctions, including striking 5Star’s complaint. Dismissal of a complaint is “harsh medicine that should not be administered lightly.” *Id.* Accordingly, the Court must find a heightened level of misconduct. *Id.* (“Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants.”).

5Star has not willfully failed or refused to respond to discovery. To the contrary, it responded promptly and fully to Peek’s requests. 5Star asked Peek for copies of the discovery requests on September 24, 2018. Despite no record of service, 5Star treated Peek’s email transmittal as service of the discovery requests and responded within the time provided in the Rules

⁴ In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt. *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998). Defendant’s Motion appears to seek civil contempt but to the extent Defendant may later claim otherwise, his Motion fails to satisfy the significant additional standards and protections of criminal contempt. *See, e.g.*, U.S. CONST. amend. XIV; S.C. CONST. art. I § 3; *Bloom v. Ill.*, 391 U.S. 194 (1968) (most procedural requirements applicable to other criminal trials are applicable to a hearing on criminal contempt including notice and an opportunity to be heard); *Ex parte Jackson*, 381 S.C. at 259, 672 S.E.2d at 588 (“The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards.”).

of Civil Procedure. 5Star's Rule 59 motion⁵ to reconsider/vacate/amend the Order was pending during the entire response period. Nevertheless, 5Star worked diligently and was able to serve its responses the same day that the Court denied its motion. It also contemporaneously served its responses to Peek's Second Set of Requests for Production *fifteen days early*. Peek had full discovery responses two days before it filed the instant Motion. Therefore, there can be no sanctions or contempt against 5Star premised upon a failure to respond to discovery.

5Star timely submitted its responses in good faith and intending to fully respond to Peek. Peek did not make 5Star aware of any deficiencies and is wholly responsible for the delay in entry of a confidentiality order. Therefore, an order of sanctions or contempt against 5Star is unnecessary and unmerited.

E. 5Star Cannot be Held in Contempt because the Order was not Definite and Specific.

A court order must be definite and specific before a party can be held in contempt for violation thereof. *Phillips v. Phillips*, 288 S.C. 185, 188, 341 S.E.2d 132, 133 (1986) ("A court need go no further in reviewing the evidence in a contempt action when there is uncertainty in the commands of the order."). "One may not be convicted of contempt for violating a court order which fails to tell him *in definite terms* what he must do. The language of the commands *must be clear and certain* rather than implied." *Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973) (emphasis added). "The order 'must contain a mandatory or prohibitive provision . . . and it must be so clearly expressed that when applied to the act complained of it will appear with

⁵ The motion was also made pursuant to Rule 55 to set aside the entry of default, and Rule 60 to grant relief from default judgment.

reasonable certainty that it has been violated.” *S.C. Dep’t of Social Servs. v. Brock*, 285 S.C. 395, 397, 329 S.E.2d 773, 774 (Ct. App. 1985) (internal citations omitted).

Here, the Order in question dedicates one sentence to discovery, stating that 5Star should “respond promptly and fully to PPI’s discovery requests.” Among other issues, the Court’s Order is indefinite as to the time for 5Star to comply. 5Star acted promptly. While its prior counsel has no record of being served with the first set of discovery requests, 5Star responded within the time that would have been available had it been served pursuant to the SCRCPP. Further, it responded to the discovery requests the same day that the Court issued its final ruling on the disputed order. The requests in question were overly broad and extensive.⁶ Nevertheless, 5Star worked diligently to review its materials and compile a full response for Peek. Any contention by Peek that the response was not “prompt” ignores the realities of its request and demonstrate the inherent ambiguity in the Court’s Order. This ambiguity makes it impossible for there to be reasonable certainty that 5Star has violate the Order and therefore precludes the entry of contempt.

IV. CONCLUSION

Peek needlessly imposes on this Court’s time for a motion that could have been resolved if it checked its records or completed the mandatory pre-filing consultation. Peek’s pursuit of sanctions and contempt is frivolous. The order on which the Motion is premised is under appellate review and subject to a mandatory stay. Nevertheless, 5Star had already complied with the order and served its discovery responses before Peek filed its Motion.

⁶ The Court was unaware of the overbreadth because Defendant failed to submit them into evidence.

For the reasons set forth above, 5Star respectfully request this Court to deny Peek's Motion for Sanctions/Contempt, award 5Star its attorney's fees and costs, and grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina
February 21, 2019

Exhibit A

RECEIVED

NOV 28 2018

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Thirteenth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 18-CP-23-01639

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

v.

Peek Performance, Inc. Respondent.

NOTICE OF APPEAL

5Star Life Insurance Co. ("Appellant"), appeals the Order filed by Judge Cooper on October 29, 2018, denying Plaintiff's Motion seeking, *inter alia*, relief from a default judgment pursuant to Rule 60, SCRCP.¹ Appellant also appeals the Order for Entry of Default and Default Judgment on the Counterclaim filed by Judge Cooper on September 13, 2018.² Copies of both orders are attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR.

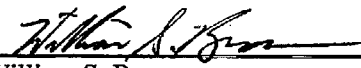
[SIGNATURE PAGE ATTACHED]

¹ If, as here, one aspect of an order is appealable, the entire order should be considered upon appeal. See *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E.2d 132 (1950), overruled on other grounds, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); see also *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002).

² Though this ruling would not, if standing alone, be susceptible to an immediate appeal, "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation." *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)).

Respectfully submitted,

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Attorneys for Appellant 5Star Life Insurance Co.

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November 27, 2018

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

5Star Life Insurance Company,

Plaintiffs,

v.

Peek Performance, Inc., a South Carolina
corporation

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2018-CP-23-01639

ORDER FOR ENTRY OF DEFAULT
AND DEFAULT JUDGMENT
ON THE COUNTERCLAIM

RECEIVED

NOV 28 2018

SC Court of Appeals

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

LEGAL DISCUSSION

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

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

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

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

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

SCRCPP 55 (b)(2).

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

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

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

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

5Star contends that it has “good cause” for being excused from default under SCRCPP 55(c).

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

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

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

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

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

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

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

In *Simon v. Flowers*,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

SO ORDERED, this _____ day of _____, 2018.

G. Thomas Cooper,
Circuit Judge presiding



Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc
Case Number: 2018CP2301639
Type: Order/Default

So Ordered

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

Electronically signed on 2018-09-12 14:08:31 page 9 of 9

ELECTRONICALLY FILED - 2018 Nov 28 4:05 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2301639
ELECTRONICALLY FILED - 2018 Sep 21 13:27 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2301639
ELECTRONICALLY FILED - 2018 Sep 13 10:18 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2301639

STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

2018-CP-23-01639

5 Star Life Insurance Co.,

Plaintiff

**ORDER DENYING PLAINTIFF'S
 MOTION FOR RECONSIDERATION,
 RELIEF FROM ENTRY OF DEFAULT,
 AND RELIEF FROM DEFAULT
 JUDGMENT**

vs.

Peek Performance, Inc.,

Defendant.

RECEIVED

NOV 28 2018

SC Court of Appeals

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

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

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

AND IT IS SO ORDERED.

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

October 28, 2018

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ELECTRONICALLY FILED - 2018 Feb 22 2:27 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2301639
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Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc
Case Number: 2018CP2301639
Type: Order/Other

So Ordered

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

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Thirteenth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

NOV 28 2018

SC Court of Appeals

Case No. 18-CP-23-01639

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

v.

Peek Performance, Inc. Respondent.

PROOF OF SERVICE

I hereby certify that I have caused a copy of the Notice of Appeal to be served upon all
counsel of record, by mailing copies of same, postage prepaid to the following addresses:

Counsel Served:

James G. Carpenter, Esq.
The Carpenter Law Firm, PC
819 East North Street
Greenville, SC 29601

Beattie Ashmore, Esq.
650 East Washington Street
Greenville, South Carolina 29601

Adam C. Bach, Esq.
R. Hudson Smith, Esq.
Eller Tonnsen Bach, LLC
1306 South Church Street
Greenville, SC 29605

[SIGNATURE PAGE ATTACHED]

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
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Attorneys for Appellant 5Star Life Insurance Co.

Greenville, South Carolina
November 27, 2018

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 11-28-2018 04:05:29 PM.

David Dill - Notification transmitted on 11-28-2018 04:05:29 PM.

Amanda Scott - Notification transmitted on 11-28-2018 04:05:29 PM.

William Brown - Notification transmitted on 11-28-2018 04:05:30 PM.

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***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 11-28-2018 04:05:21 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals

Filed by or on behalf of: William Stevens Brown, V

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

David Curry Dill for 5 Star Life Insurance
Company

William Stevens Brown, V for 5 Star Life
Insurance Company

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

Exhibit B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,)
)
 Plaintiff)
)
 vs.) C.A. No. 2018-CP-23-01639
)

Peek Performance, Inc.,)
)
 Defendant.)
)
)

Peek Performance, Inc. and D. Clayton)
 Peek,)
)
 Plaintiffs,) C.A. No. 2017-CP-23-03269
)

v.)
)
 Jeff Wright d/b/a Agent Sales Group, Joe)
 Caldwell, Nathan Wells, Jeff Magg, and)
 Consolidated Assurance, LLC,)
)
 Defendants.)

PLAINTIFF 5STAR LIFE INSURANCE CO.'S RESPONSES TO
DEFENDANT'S INTERROGATORIES

Pursuant to South Carolina Rule of Civil Procedure 33, Plaintiff 5Star Life Insurance Co. ("5Star"), hereby responds to the First Set of Interrogatories by Peek Performance, Inc. ("Peek") as follows:

GENERAL OBJECTIONS

5Star incorporates the following objections into its responses to each request. 5Star's objects generally on the following bases:

1. To the extent Peek contends it properly served the instant requests on 5Star.
2. To the extent Peek subsequently adopts any construction of these requests contrary to their plain meaning or seeks to add obligations beyond those set forth in the South Carolina Rules of Civil Procedure.
3. 5Star reserves its rights to supplement or amend these responses as it is continuing to investigate the allegations in this action. Should it discovery any additional responsive material it will supplement pursuant to the South Carolina Rules of Civil Procedure.

RESPONSES AND SPECIFIC OBJECTIONS

1. Give the names and addresses of persons known to the Plaintiff or counsel to have knowledge concerning the facts of the case and indicate whether written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

No written or recorded statements have been taken at this time. 5Star continues to investigate the allegations in Peek's alleged counterclaim and reserves the right to supplement its response. 5Star identifies:

- (a) **D. Clayton Peek:** is believed to have knowledge concerning the relationship between the parties, 5Star's claims, Peek's claims, and Peek's damages. Mr. Peek can be contacted through his counsel in this litigation.
- (b) **Deborah Peek:** may have knowledge concerning Peek's claims and Peek's damages. Mrs. Peek can be contacted through counsel for D. Clayton Peek.
- (c) **Jeff Wright:** is believed to have knowledge concerning the conduct complained of by Peek. Mr. Wright can be contacted through his counsel in this litigation.
- (d) **Nathan Wells:** is believed to have knowledge concerning the conduct complained of by Peek. Mr. Wells can be contacted through his counsel in this litigation.
- (e) **Joe Caldwell:** is believed to have knowledge concerning the conduct complained of by Peek. Mr. Caldwell can be contracted through his counsel in this litigation.

- (f) Jeff Magg: is believed to have knowledge concerning the conduct complained of by Peek. Mr. Magg can be contacted through his counsel in this litigation.
- (g) Tyler Harris: is believed to have knowledge concerning the conduct complained of by Peek. Mr. Harris can be contacted through counsel for Consolidated Assurance, LLC in this litigation.
- (h) James J. Wright: is believed to have knowledge concerning the relationship between the parties, 5Star's damages, 5Star's claim, and Peeks' claims. Mr. Wright can be contacted through the undersigned counsel.
- (i) James Bradford: is believed to have knowledge concerning the relationship between the parties, 5Star's damages, 5Star's claim, and Peeks' claims. Mr. Bradford can be contacted through the undersigned counsel.
- (j) Sheree Jackson: is believed to have knowledge concerning the relationship between the parties, 5Star's damages, 5Star's claims, and Peeks' claims. Ms. Jackson can be contacted through the undersigned counsel.
- (k) Mark Singleton: is believed to have knowledge concerning the relationship between the parties, 5Star's damages, 5Star's claims, and Peeks' claims. Mr. Singleton can be contacted through the undersigned counsel.
- (l) General Ed Eberhart: is believed to have knowledge concerning the relationship between the parties, 5Star's damages, 5Star's claims, and Peeks' claims. Gen. Eberhart can be contacted through the undersigned counsel.
- (m) Michael Kimo Wong: is believed to have knowledge concerning the relationship between the parties, 5Star's damages, 5Star's claims, and Peeks' claims. Mr. Wong can be contacted through the undersigned counsel.
- (n) Other representatives of Peek: are believed to have knowledge concerning the relationship between the parties, 5Star's claims, and Peek's damages. These representatives can be contacted through Peek's counsel in this litigation.
- (o) Other representatives of Agent Sales Group: are believed to have knowledge concerning the conduct complained of by Peek. These representatives can be contacted through Agent Sales Group's counsel in this litigation.
- (p) Other representatives of Consolidated Assurance, LLC: are believed to have knowledge concerning the conduct complained of by Peek. These representatives can be contacted through Consolidated Assurance, LLC's counsel in this litigation.
- (q) Other representatives of 5Star: are believed to have knowledge concerning the relationship between the parties, 5Star's damages, 5Star's claims, and Peek's damages. can be contacted through the undersigned counsel.
- (r) Any witnesses identified by any other party. See discovery responses of other parties for identity and contact information of such witnesses.
- (s) Any other witness identified or named in any pleading or any documents produced in discovery for this matter.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of the Plaintiff or counsel that relate to any claim, or defense in the case.

ANSWER:

5Star objects to this request to the extent it seeks attorney client communications or attorney work product. Without waiving these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER:

5Star objects to the request on the basis that this request is vague and ambiguous. Notwithstanding this objection, 5Star expressly denies liability but responds that it has sufficient assets and coverage to satisfy any potential judgment in this case. 5Star is continuing to investigate any potential sources of coverage and will supplement to identify any potential policy.

4. List the names and addresses of any expert witnesses whom the Plaintiff or counsel propose to use as a witness at the trial of the case.

ANSWER:

5Star objects to this request to the extent it seek information about non-testifying consultants. Without waiving this objection, 5Star has not identified any expert witness that it expects to call as a witness in this matter at this time. 5Star reserves the right to supplement this response if or when a testifying expert is identified.

5. For each person known to the Plaintiff or counsel to have knowledge concerning the facts of the case, set forth either a summary sufficient to inform the Defendant of the important facts known to or observed by such witnesses, and provide a copy of any written or recorded statements taken from such witnesses.

ANSWER:

See response to Interrogatory No. 1.

6. For each expert witness whom the Plaintiff or counsel proposes to use as a witness at the trial of the case, state:
- a. the subject matter on which the expert is expected to testify;
 - b. the substance of the facts and opinions to which the expert is expected to testify; and,
 - c. a summary of the grounds for each opinion.

ANSWER:

5Star objects to this request to the extent it seek information about non-testifying consultants. Without waiving this objection, 5Star has not identified any expert witness that it expects to call as a witness in this matter at this time. 5Star reserves the right to supplement this response if or when a testifying expert is identified.

7. If the Plaintiff is improperly identified, give the proper identification and state whether counsel will accept service of an Answer and Counterclaim reflecting the correct information.

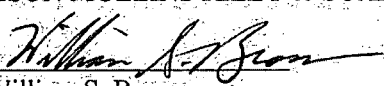
ANSWER:

5Star is not properly identified in the caption; its name is 5Star Life Insurance Company with no space between 5 and Star.

Respectfully,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:


William S. Brown

SC Bar No. 064164

E-Mail: william.brown@nelsonmullins.com

David C. Dill

SC Bar No. 101519

E-Mail: david.dill@nelsonmullins.com

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Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina

October 29, 2018

ELECTRONICALLY FILED - 2019 Feb 21 2:27 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2301639

CERTIFICATE OF SERVICE

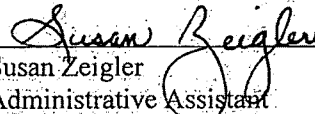
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for 5Star Life Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by Certified Mail, postage prepaid, to the following address(es):

Pleadings:

Plaintiff 5Star Life Insurance Co.'s Response to Defendant's Interrogatories

Counsel Served:

James G. Carpenter, Esq.
The Carpenter Law Firm, PC
819 East North Street
Greenville, SC. 29601


Susan Zeigler
Administrative Assistant

October 29, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
5 Star Life Insurance Co.,	)	
	)	
Plaintiff	)	
vs.	)	C.A. No. 2018-CP-23-01639
	)	
Peek Performance, Inc.,	)	
	)	
Defendant.	)	
	)	
_____	)	
Peek Performance, Inc. and D. Clayton	)	
Peek,	)	
	)	
Plaintiffs,	)	
v.	)	C.A. No. 2017-CP-23-03269
	)	
Jeff Wright d/b/a Agent Sales Group, Joe	)	
Caldwell, Nathan Wells, Jeff Magg, and	)	
Consolidated Assurance, LLC,	)	
	)	
Defendants.	)	

**PLAINTIFF 5STAR LIFE INSURANCE CO.'S RESPONSES TO
DEFENDANT'S REQUESTS FOR PRODUCTION**

Pursuant to South Carolina Rule of Civil Procedure 34, Plaintiff 5Star Life Insurance Co. ("5Star"), hereby responds to Defendant's Requests for Production as follows:

GENERAL OBJECTIONS

5Star incorporates the following objections into its responses to each request. 5Star's objects generally on the following bases:

1. To the extent Peek contends it properly served the instant requests on 5Star.
2. To the extent Peek subsequently adopts any construction of these requests contrary to their plain meaning or seeks to add obligations beyond those set forth in the South Carolina Rules of Civil Procedure.
3. 5Star reserves its rights to supplement or amend these responses as it is continuing to investigate the allegations in this action. Should it discovery any additional responsive material it will supplement pursuant to the South Carolina Rules of Civil Procedure.

RESPONSES AND SPECIFIC OBJECTIONS

1. Any written or recorded statements that have been taken from any witness for this action.

RESPONSE:

5Star objects to this request as overly broad and unduly burdensome because it does not contain any limitations as to time or scope and seeks information outside of 5Star's possession or control. Notwithstanding this objection, 5Star has not identified the individuals it will call as witnesses in this matter nor is 5Star aware of the witness designations of any other party. Nevertheless, at this time 5Star is not aware of any written or recorded statements regarding the allegations at issue in this litigation from any prospective witness.

2. All prepared documents in possession of the Plaintiff or counsel that relate to any claim or defense in the case.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges. 5Star also objects to this request as it is overly broad, unduly burdensome, and lacks sufficient limitations as to time or scope. 5Star further objects to this request to the extent it seeks information which is confidential, proprietary, or trade secret information. 5Star additionally objects because it is continuing to investigate its defenses in this action. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

3. All documents provided to any expert witness whom the Plaintiff or counsel propose to use as a witness at the trial of the case.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges. 5Star has not yet determined what, if any, expert it will call to testify in this case. As a consequence, subject to the foregoing objections, no responsive materials exist to produce at this time.

4. All documents referring or relating to any transfer of agents or producers out from the Defendant's sales hierarchy or downline.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges. 5Star also objects to this request as it is overly broad, unduly burdensome, and lacks sufficient limitations as to time or scope. 5Star further objects to this request to the extent it seeks information which is confidential, proprietary, or trade secret information. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

5. All documents referring or relating to a power of attorney of Jeff Wright.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding these objections, 5Star is not aware of any responsive documents at this time. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

6. All documents relating or referring to commissions paid to any agent or producer currently or formerly in the downline of the Defendant.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges. 5Star also objects to this request as it is overly broad, unduly

burdensome, lacks limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

7. All documents relating or referring to communications between Plaintiff and Jeff Wright or Consolidated Associates that mention, refer to, or allude to the Defendant.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges. 5Star also objects to this request as it is overly broad, unduly burdensome, vague, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

8. All communications between Plaintiff and Jeff Wright or Consolidated Associates that refer or relate to the transfer of agents out of the Defendant's downline.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges. 5Star also objects to this request as it is overly broad, unduly burdensome, vague, and lacks sufficient limitations as to time or scope. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

9. All documents that refer or relate to communications between Defendant and Plaintiff relating or referring to the nature of the business relationship between the Plaintiff and any of the Defendant [sic].

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges and seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope. 5Star further objects on the basis that the requested materials were either sent or received by Defendant and thus are already in Defendant's possession. Notwithstanding these

objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

10. All documents, including electronic records or spreadsheets that relate or refer to commissions or overrides to be paid to Defendant from AFBA or 5Star.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, and lacks sufficient limitations as to time or scope. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

11. All documents, including electronic records or spreadsheets that relate or refer to commissions or overrides to be paid to Jeff Wright or Consolidated Associates from AFBA or 5Star.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

12. All documents relating or referring to any attempts at settlement negotiations related to the relationships among the parties.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad,

unduly burdensome, lacks sufficient limitations as to time or scope, is not reasonably calculated to lead to the discovery of admissible or relevant evidence, and seeks materials outside of 5Star's possession or control. Peek further objects to this request as the language of the request is confusing and it is unable to ascertain what documents are sought. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

13. All documents relating or referring to monies paid by AFBA and/or 5Star to Peek Performance Insurance for products sold by Consolidated Assurance.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

14. All documents relating or referring to monies paid by AFBA and/or 5Star to Agent Sales Group for products sold by Consolidated Assurance.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

15. All documents relating or referring to monies paid by AFBA and/or 5Star to Jeff Wright or entities owned by Jeff Wright for products sold by Consolidated Assurance.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

16. All documents relating or referring to monies paid by AFBA and/or 5Star to Consolidated Assurance for products sold by Consolidated Assurance.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

17. All documents relating or referring to monies paid by AFBA and/or 5Star to any other entity owned by the principles of Consolidated Assurance for products sold by Consolidated Assurance.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

18. All documents relating or referring to monies paid by AFBA and/or 5Star to any entity owned in whole or in part by Tyler Harris for products sold by Consolidated Assurance.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, lacks sufficient limitations as to time or scope, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

19. All contracts, applications, agreements and completed forms related to the contracting, transfer, or termination of Consolidated Assurance agents who sold AFBA products in the period April 1, 2013 to present.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

20. All contracts, applications, agreements and completed forms related to the relationship among AFBA, Peek Performance Insurance, entities owned by Jeff Wright, Consolidated Assurance, and any companies owned by the principals of Consolidated Assurance in the period April 1, 2013 to present.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

21. All correspondence related to the contracting, transfer, or termination of Consolidated Assurance agents who sold AFBA products in the period April 1, 2013 to present.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

22. All correspondence between employees or owners of AFBA, Peek Performance Insurance, entities owned by Jeff Wright, Consolidated Assurance, and any companies owned by the principals of Consolidated Assurance in the period April 1, 2013 to present.

RESPONSE:

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

23. All documents and records in electronic form, including but not limited to those in a comma delimited file in .csv format or data tables, from AFBA / 5Star reflecting all monies paid from April 1, 2013 to the present, by AFBA for products sold by Consolidated Assurance, to:

- a. Peek Performance Insurance,
- b. Agent Sales Group,
- c. entities owned by Jeff Wright,
- d. Consolidated Assurance,
- e. any entity owned by the principals of Consolidated Assurance,
- f. any entity owned by Tyler Harris

5Star objects to this request as it seeks documents protected by the attorney client and work product privileges or seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request as it is overly broad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible or relevant evidence. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

Respectfully,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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

Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina
October 29, 2018

CERTIFICATE OF SERVICE

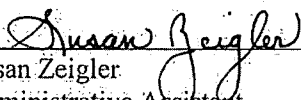
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for 5Star Life Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by Certified Mail, postage prepaid, to the following address(es):

Pleadings:

Plaintiff 5Star Life Insurance Co.'s Response to Defendant's Requests for Production

Counsel Served:

James G. Carpenter, Esq.
The Carpenter Law Firm, PC
819 East North Street
Greenville, SC 29601



Susan Zeigler
Administrative Assistant

October 29, 2018

Exhibit C

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)

5 Star Life Insurance Co.,)
)
 Plaintiff)
)
 vs.) C.A. No. 2018-CP-23-01639
)

Peek Performance, Inc.,)
)
 Defendant.)
)

Peek Performance, Inc. and D. Clayton)
 Peek,)
)
 Plaintiffs,) C.A. No. 2017-CP-23-03269
)

vs.)
)
 Jeff Wright d/b/a Agent Sales Group, Joe)
 Caldwell, Nathan Wells, Jeff Magg, and)
 Consolidated Assurance, LLC,)
)
 Defendants.)

**PLAINTIFF 5STAR LIFE INSURANCE CO.'S RESPONSES TO
 DEFENDANT'S SECOND REQUESTS FOR PRODUCTION TO PLAINTIFF**

Pursuant to South Carolina Rule of Civil Procedure 33, Plaintiff 5Star Life Insurance Co. ("5Star"), hereby responds to the "Second" Requests for Production to Plaintiff by Peek Performance, Inc. ("Peek") as follows:

GENERAL OBJECTIONS

5Star incorporates the following objections into its responses to each request. 5Star's objects generally on the following bases:

1. To the extent Peek contends it properly served any prior requests for production on 5Star.

2. To the extent Peek subsequently adopts any construction of these requests contrary to their plain meaning or seeks to add obligations beyond those set forth in the South Carolina Rules of Civil Procedure.
3. 5Star reserves its rights to supplement or amend these responses as it is continuing to investigate the allegations in this action. Should it discovery any additional responsive material it will supplement pursuant to the South Carolina Rules of Civil Procedure.

RESPONSES AND SPECIFIC OBJECTIONS

24. All documents (including all applications and a list in electronic .csv format) relating or referring to the First Responder program that contains contact information – including, but not limited to, name, address, telephone number, email, employer, work phone, and any family or personal data attached – on applicants, prospects, or employer contact personnel, solicited or sold by:
 - a. Consolidated Assurance, LLC, or its agents,
 - b. Persons affiliated with Consolidated Assurance, LLC,
 - c. Persons or entities affiliated with the principals of Consolidated Assurance, LLC, and
 - d. Any other entity or marketing organization affiliated with AFBA/5Star engaged in First Responder marketing.

RESPONSE:

5Star objects to this request as it is overly broad, unduly burdensome, and lacks sufficient limitations as to time or scope. 5Star further objects to this request as it seeks information which is confidential, proprietary, or trade secret information and as it appears to seek materials for business purposes rather than use in this litigation. 5Star further objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star is continuing to search for responsive documents and, if necessary, will supplement.

25. All documents relating to referring to the marketing of the First Responder program by:
 - a. Consolidated Assurance, LLC, or its agents,
 - b. persons affiliated with Consolidated Assurance, LLC,

- c. persons or entities affiliated with the principals of Consolidated Assurance, LLC, and
- d. Jeff Wright and Agent Sales Group, and
- e. any other entity consultant, (such as Gary Burch) or marketing organization, affiliated with AFBA/5Star engaged in First Responder marketing.

RESPONSE:

5Star objects to this request as it is overly broad, unduly burdensome, and lacks sufficient limitations as to time or scope. 5Star further objects to this request as it seeks information which is confidential, proprietary, or trade secret information. 5Star also objects to this request on the basis that it seeks materials outside of 5Star's possession or control. Notwithstanding these objections, 5Star will produce non-privileged responsive materials following entry of a confidentiality order to protect confidential and trade secret business information.

Respectfully,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

William S. Brown

SC Bar No. 064164

E-Mail: william.brown@nelsonmullins.com

David C. Dill

SC Bar No. 101519

E-Mail: david.dill@nelsonmullins.com

104 South Main Street / Ninth Floor

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 250-2300

Attorneys for Plaintiff 5Star Life Insurance Co.

Greenville, South Carolina

October 29, 2018

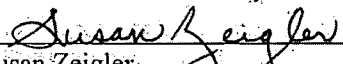
CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for 5Star Life Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by Certified Mail, postage prepaid, to the following address(es):

Pleadings:

Plaintiff 5Star Life Insurance Co.'s Responses to Defendant's Second Requests for Production to Plaintiff

Counsel Served: James G. Carpenter, Esq.
The Carpenter Law Firm, PC
819 East North Street
Greenville, SC 29601


Susan Zeigler
Administrative Assistant

October 29, 2018

Exhibit D

David Dill

From: David Dill
Sent: Friday, November 16, 2018 10:55 AM
To: James Carpenter; Stephanie Gray; 'Hudson Smith'; Beattie Ashmore; 'Adam Bach'
Cc: William Brown; 'Rhonda Bell'
Subject: RE: Proposed Protective Order: Consolidated Peek Cases
Attachments: 11-16 Confidentiality Order Draft.docx

Jim,

I believe the original draft Stephanie circulated addresses your concerns here. If a document is marked AEO but you believe (without divulging the specific information to your client) that Mr. Peek already knows the information contained therein you can contact the producing attorney to object to the AEO designation. The attorneys can then consult about the issue. There is no way for a producing attorney to know what Mr. Peek does or doesn't know. Thus we would not be able to make the affirmation proposed in yesterday's draft.

In the attached, I have taken Stephanie's original draft and inserted a clause defining confidential. That definition comes from the draft circulated among the parties earlier this year.

David

**David Dill**

Attorney at Law
 Admitted in North Carolina and South Carolina
david.dill@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP

Poinsett Plaza, Suite 900
 104 South Main Street, Greenville, SC 29601
 Tel: 864.373.2224
 Fax: 864.373.2925

www.nelsonmullins.com
 ([View Bio](#))

From: James Carpenter [<mailto:james.carpenter@carpenterlawfirm.net>]
Sent: Thursday, November 15, 2018 5:36 PM
To: Stephanie Gray <stephanie@beattieashmore.com>; David Dill <david.dill@nelsonmullins.com>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie Ashmore <Beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>; 'Rhonda Bell' <rhonda@beattieashmore.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

Counsel,

I think that the Confidentiality Order is fine, except that I have modified the definition of documents entitled to attorneys' eyes only protection.

Jim Carpenter
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Mobile: (864) 380-4880
www.carpenterlawfirm.net



WHEN IT'S WORTH FIGHTING FOR!

From: Stephanie Gray <stephanie@beattieashmore.com>
Sent: Tuesday, November 13, 2018 3:28 PM
To: David Dill <david.dill@nelsonmullins.com>; James Carpenter <james.carpenter@carpenterlawfirm.net>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie B. Ashmore, P.A. <beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>; Rhonda Bell <rhonda@beattieashmore.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

Jim and David, do you have any objection to this version of the proposed Protective Order? If not we can get it filed. Thanks. Stephanie

Stephanie J. Gray
Associate Attorney
Beattie B. Ashmore, P.A.
stephanie@beattieashmore.com

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From: Stephanie Gray
Sent: Monday, November 12, 2018 9:26 AM
To: 'David Dill' <david.dill@nelsonmullins.com>; James Carpenter <james.carpenter@carpenterlawfirm.net>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie B. Ashmore, P.A. <beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

All,

I have attached our proposed version which contains an "attorneys' eyes only" provision. A version of this was circulated last spring, but it has since been updated. Let me know if you all have any objection to working off the attached and/or have any edits. Thanks. Stephanie

Stephanie J. Gray
Associate Attorney
Beattie B. Ashmore, P.A.
stephanie@beattieashmore.com

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From: David Dill <david.dill@nelsonmullins.com>
Sent: Tuesday, November 6, 2018 11:21 AM
To: James Carpenter <james.carpenter@carpenterlawfirm.net>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie B. Ashmore, P.A. <beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>; Stephanie Gray <stephanie@beattieashmore.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

Thanks, Jim. Attached are a few predominantly stylistic changes. We are fine with the attached draft after all changes have been accepted. If everyone signs off we'd be glad to coordinate filing.

David

From: James Carpenter [<mailto:james.carpenter@carpenterlawfirm.net>]
Sent: Tuesday, October 30, 2018 3:45 PM
To: David Dill <david.dill@nelsonmullins.com>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie Ashmore <Beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

David,

There was another draft, somewhat similar, that was passed among the parties last spring (attached).

I'm not sure it was ever put in final form, or finally agreed to, or submitted to a judge.

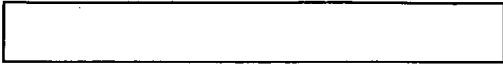
Jim Carpenter

From: David Dill <david.dill@nelsonmullins.com>
Sent: Tuesday, October 30, 2018 3:02 PM
To: james.carpenter@carpenterlawfirm.net; Hudson Smith <Hsmith@etblawfirm.com>; Beattie Ashmore <Beattie@beattieashmore.com>; Adam Bach <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: Proposed Protective Order: Consolidated Peek Cases

All,

Attached is a proposed protective order for the confidential business and financial records of all parties. If this meets with your approval we are happy to coordinate filing.

David



David Dill

Attorney at Law

Admitted in North Carolina and South Carolina

david.dill@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP

Poinsett Plaza, Suite 900

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[\(View Bio\)](#)

Confidentiality Notice

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Exhibit E

David Dill

From: James Carpenter <james.carpenter@carpenterlawfirm.net>
Sent: Monday, November 19, 2018 5:15 PM
To: 'Adam Bach'; Stephanie Gray; David Dill; 'Hudson Smith'; Beattie Ashmore
Cc: William Brown; 'Rhonda Bell'
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

We'll just have to take it to the judge.

Jim

From: Adam Bach <abach@etblawfirm.com>
Sent: Monday, November 19, 2018 5:14 PM
To: James Carpenter <james.carpenter@carpenterlawfirm.net>; 'Stephanie Gray' <stephanie@beattieashmore.com>; 'David Dill' <david.dill@nelsonmullins.com>; Hudson Smith <Hsmith@etblawfirm.com>; 'Beattie B. Ashmore, P.A.' <beattie@beattieashmore.com>
Cc: 'William Brown' <william.brown@nelsonmullins.com>; 'Rhonda Bell' <rhonda@beattieashmore.com>
Subject: Re: Proposed Protective Order: Consolidated Peek Cases

I'm sorry, but we can't agree to this change re definition of attorney's eyes-only material. We prefer the original language.

Adam C. Bach
 ELLER TONNSEN BACH
 Attorneys at Law
 1306 South Church Street
 Greenville, SC 29605
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From: James Carpenter <james.carpenter@carpenterlawfirm.net>
Date: Thursday, November 15, 2018 at 5:35 PM
To: 'Stephanie Gray' <stephanie@beattieashmore.com>, 'David Dill' <david.dill@nelsonmullins.com>, Hudson Smith <Hsmith@etblawfirm.com>, "'Beattie B. Ashmore, P.A.'" <beattie@beattieashmore.com>, Adam Bach <abach@etblawfirm.com>
Cc: 'William Brown' <william.brown@nelsonmullins.com>, 'Rhonda Bell' <rhonda@beattieashmore.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

Counsel,

I think that the Confidentiality Order is fine, except that I have modified the definition of documents entitled to attorneys' eyes only protection.

Jim Carpenter
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
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WHEN IT'S WORTH FIGHTING FOR!

From: Stephanie Gray <stephanie@beattieashmore.com>
Sent: Tuesday, November 13, 2018 3:28 PM
To: David Dill <david.dill@nelsonmullins.com>; James Carpenter <james.carpenter@carpenterlawfirm.net>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie B. Ashmore, P.A. <beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>; Rhonda Bell <rhonda@beattieashmore.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

Jim and David, do you have any objection to this version of the proposed Protective Order? If not we can get it filed. Thanks. Stephanie

Stephanie J. Gray
Associate Attorney
Beattie B. Ashmore, P.A.
stephanie@beattieashmore.com

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From: Stephanie Gray
Sent: Monday, November 12, 2018 9:26 AM
To: 'David Dill' <david.dill@nelsonmullins.com>; James Carpenter <james.carpenter@carpenterlawfirm.net>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie B. Ashmore, P.A. <beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

All,

I have attached our proposed version which contains an "attorneys' eyes only" provision. A version of this was circulated last spring, but it has since been updated. Let me know if you all have any objection to working off the attached and/or have any edits. Thanks. Stephanie

Stephanie J. Gray
Associate Attorney
Beattie B. Ashmore, P.A.
stephanie@beattieashmore.com

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From: David Dill <david.dill@nelsonmullins.com>
Sent: Tuesday, November 6, 2018 11:21 AM
To: James Carpenter <james.carpenter@carpenterlawfirm.net>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie B. Ashmore, P.A. <beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>; Stephanie Gray <stephanie@beattieashmore.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

Thanks, Jim. Attached are a few predominantly stylistic changes. We are fine with the attached draft after all changes have been accepted. If everyone signs off we'd be glad to coordinate filing.

David

From: James Carpenter [<mailto:james.carpenter@carpenterlawfirm.net>]
Sent: Tuesday, October 30, 2018 3:45 PM
To: David Dill <david.dill@nelsonmullins.com>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie Ashmore <Beattie@beattieashmore.com>; 'Adam Bach' <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: RE: Proposed Protective Order: Consolidated Peek Cases

David,

There was another draft, somewhat similar, that was passed among the parties last spring (attached).

I'm not sure it was ever put in final form, or finally agreed to, or submitted to a judge.

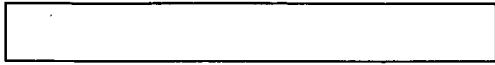
Jim Carpenter

From: David Dill <david.dill@nelsonmullins.com>
Sent: Tuesday, October 30, 2018 3:02 PM
To: james.carpenter@carpenterlawfirm.net; Hudson Smith <Hsmith@etblawfirm.com>; Beattie Ashmore <Beattie@beattieashmore.com>; Adam Bach <abach@etblawfirm.com>
Cc: William Brown <william.brown@nelsonmullins.com>
Subject: Proposed Protective Order: Consolidated Peek Cases

All,

Attached is a proposed protective order for the confidential business and financial records of all parties. If this meets with your approval we are happy to coordinate filing.

David



David Dill

Attorney at Law

Admitted in North Carolina and South Carolina

david.dill@nelsonmullins.com

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Recipients

James Carpenter - Notification transmitted on 02-21-2019 02:27:40 PM.

J. Cole - Notification transmitted on 02-21-2019 02:27:40 PM.

David Dill - Notification transmitted on 02-21-2019 02:27:40 PM.

Amanda Scott - Notification transmitted on 02-21-2019 02:27:40 PM.

William Brown - Notification transmitted on 02-21-2019 02:27:40 PM.

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NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 02-21-2019 02:27:12 PM

Court: CIRCUIT COURT

Common Pleas

Greenville

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

Document(s) Submitted: Memo/Memo in Opposition

- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits

Filed by or on behalf of: William Stevens Brown, V

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

David Curry Dill for 5 Star Life Insurance
Company

William Stevens Brown, V for 5 Star Life
Insurance Company

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

) COURT OF COMMON PLEAS

) 2018CP2301639

)

)

)

5 STAR LIFE INSURANCE COMPANY)

PLAINTIFF)

vs.)

) TRANSCRIPT OF RECORD

)

PEEK PERFORMANCE, INC.)

DEFENDANT)

ORIGINAL

August 28, 2018

Greenville, South Carolina

B E F O R E:

THE HONORABLE G. THOMAS COOPER, Judge.

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

WILLIAM S. BROWN, V, ESQ.

AMANDA M. SCOTT, ESQ.

Attorneys for the Plaintiff

JAMES G. CARPENTER, ESQ.

Attorney for the Defendant

APRIL HERRON

Official Court Reporter

There were no witnesses.

There were no exhibits.

» > o < «

Certificate of Reporter 27

1 THE COURT: All right, only have one case left
2 at 11:30 and that's 5 Star Life Insurance vs. Peek
3 Performance. Usually a debt collection doesn't
4 require six lawyers. All right. Who represents 5
5 Star?

6 MR. BROWN: Your Honor, William Brown here on
7 behalf of 5 Star.

8 MS. SCOTT: Amanda Scott, Your Honor. 5 Star.

9 THE COURT: Mr. Brown, so I know Mr. Carpenter
10 represents Peek; is that correct?

11 MR. CARPENTER: Yes, sir.

12 THE COURT: All right, for the record. All
13 right, Mr. Brown, what you got?

14 MR. BROWN: Yes, Your Honor. This matter began
15 as a debit collection. There is a separate lawsuit
16 that has just recently been consolidated with this
17 matter in which Mr. Carpenter's client is suing a
18 group of other agents or brokers for 5 Star over a
19 commission dispute.

20 THE COURT: He's not a third-party plaintiff?

21 MR. BROWN: Well, he is a plaintiff in that
22 other case. That other case existed for, I believe,
23 less than a year or so before this action was
24 started. In which 5 Star is a party. He sued those
25 others over a commission dispute. He did not sue 5

1 Star in that case. 5 Star raised a different
2 commission dispute with his client and sued for
3 collection of those commissions and that's what gets
4 us here. He presented a pleading, which is captioned
5 a answer and counterclaim and has now sought default
6 of the counterclaim.

7 THE COURT: Was it served on you?

8 MR. BROWN: We have -- it was sent through ECF.
9 But, Your Honor, we would contend that if you
10 actually look at the document itself, it does not
11 state a claim.

12 THE COURT: That was the summons?

13 MR. BROWN: Excuse me?

14 THE COURT: Did it have a summons?

15 MR. BROWN: No, Your Honor. There was no
16 summons attached to the counterclaim, it was simply
17 served through the electronic filing system as part
18 of the answer. No summons was --

19 THE COURT: Part of the answer to this case?

20 MR. BROWN: Part of the answer to the collection
21 action brought by 5 Star, yes, Your Honor.

22 THE COURT: 1639?

23 MR. BROWN: Yes, 1639 -- 2018-23-1639.

24 THE COURT: All right. So, Mr. Carpenter filed
25 an answer and counterclaim, right?

1 MR. BROWN: Well, he styled it that, Your Honor.
2 We would contend that if you actually look at the
3 document, it simply says, We don't know owe you
4 that--

5 THE COURT: Did they file an answer?

6 MR. BROWN: Excuse me?

7 THE COURT: Did he file the answer?

8 MR. BROWN: He did file an answer.

9 THE COURT: I mean, he did file the document
10 that is styled as an answer and counterclaim? And
11 you were served with that?

12 MR. BROWN: It was sent through ECF. Through
13 the collection counselor, yes.

14 THE COURT: You deny service?

15 MR. BROWN: We do not deny that it was sent
16 through ECF. No summons was attached and it was not
17 served pursuant to the service rules. But it was
18 served through ECF.

19 THE COURT: So, is that the issue, the ECF, is
20 that the issue?

21 MR. BROWN: That is an issue with regard to our
22 good cause, but the principle issue we raise is that
23 the -- what he styles as counterclaims, do not state
24 necessary elements to assert a cause of action. And
25 as such, cannot be the basis for a default.

1 THE COURT: Well, seems like you got to get over
2 the ECF hurled first. Or he does. Educate me on
3 service of process by filing electronically in
4 response to a lawsuit. I mean, if it's not service,
5 then everybody would be in default. If they're
6 filing electronically. So, it must be service.

7 MR. BROWN: Yes, Your Honor. I mean, it is
8 appropriate service on an answer.

9 THE COURT: Okay. Okay. And the counterclaim.

10 MR. BROWN: To the extent that he doesn't need
11 the summons, yes.

12 THE COURT: Okay.

13 MR. BROWN: We don't deny that it was received
14 by counsel. It was not received by the client. But
15 it was received by counsel.

16 THE COURT: Yeah, now you're -- now you're
17 adding an additional element in there. Is service
18 good? A responsive pleading, which is not required
19 to be served on the Plaintiff, individually. But
20 service by counsel, to counsel is sufficient service.

21 Do you agree with that?

22 MR. BROWN: Yes, Your Honor.

23 THE COURT: Okay. So, when you say your client
24 was not served individually, that's -- that's not
25 reason to. . .

1 MR. BROWN: Well, it's a factor to be considered
2 in the good cause analysis under Wham, Your Honor, as
3 to the justice to be served to the client itself, as
4 whether the case should be heard on its merits, as
5 opposed to whether a default should be presented.

6 THE COURT: Okay.

7 MR. BROWN: Your Honor, the way that the
8 document is styled in essences, has significant
9 allegations in it about the misconduct of the third
10 parties who are Defendants in the first case, the
11 other agents. And how they acted improperly in
12 redirecting commissions away from--

13 THE COURT: Were they your agents? Were they 5
14 Star people?

15 MR. BROWN: Well, they weren't employees of 5
16 Star. All of these people were people were agents or
17 producers of policies for 5 Star. In both these
18 cases--

19 THE COURT: They're independent contractors?

20 MR. BROWN: They're independent contractors,
21 yes, Your Honor.

22 THE COURT: And they're selling your property?

23 MR. BROWN: They are. And the dispute here --

24 THE COURT: They may sell for other people too.
25 Or they're not your exclusive agents?

1 MR. BROWN: In fact, I don't know for sure if
2 they do or not but they are free to do so. And it is
3 my understanding that the dispute the Plaintiff has
4 with those people is that -- or, excuse me, that Peek
5 Performance has with those people is that Peek
6 Performance believes that in the hierarchy of
7 commissions, they should have been treated as just to
8 him so he gets a cut of everything they sell. There
9 became a dispute as to that hierarchy and whether the
10 other agents were acting properly under contracts to
11 which 5 Star was not a party.

12 THE COURT: Were they contracts with Peek?

13 MR. BROWN: They were contracts between those
14 individuals and Peek. Yes, Your Honor. As to how
15 commissions should be shared.

16 THE COURT: So Peek has got a group of agents
17 that work through Peek?

18 MR. BROWN: That is there -- their allegation in
19 that case that's been consolidated here, yes, Your
20 Honor.

21 THE COURT: And his counterclaim against you
22 deals with the performance of those agents?

23 MR. BROWN: Yes, Your Honor. The counterclaim
24 basically says that we should never have allowed them
25 to change any of the commission structure so that he

1 should continue to get commissions under a contract
2 with those other individuals for which 5 Star is not
3 a party to that contract.

4 THE COURT: Okay.

5 MR. BROWN: And so, but he has not -- if you
6 look at the allegations as specifically presented in
7 that document, it does not present the elements
8 necessary to establish any particular cause of
9 action. An affidavit was submitted yesterday from
10 his client which purports to supplement the
11 allegations of the counterclaim.

12 THE COURT: Of the other lawsuit?

13 MR. BROWN: In this lawsuit. He's presented an
14 affidavit--

15 THE COURT: Well it would work in both of them,
16 wouldn't it?

17 MR. BROWN: Theoretically it could. But the
18 purpose of his submission was to say that here are
19 allegations which support the holding of 5 Star in
20 default. So, he wants to, in essence, amend and
21 supplement his counterclaim through this affidavit
22 that he submitted. And in that affidavit he
23 specifically says that the cause of action made
24 assertive or defamation in breach of contract and
25 other claims. But we have, you know, we don't have

1 the ability to know what claims are presented in that
2 compliant because it doesn't state a claim as a
3 matter of law. And it doesn't identify a contract,
4 it doesn't identify a term that was breached in that
5 contract. It doesn't identify a defamatory
6 statement. It doesn't identify malice or special
7 damages for that defamation. Those are the two
8 particular causes of action that the affidavit
9 references as potential ones there being asserted.

10 But, Your Honor, we have cited law, The Mutual
11 Savings and Loan Association vs --

12 THE COURT: Where did you cite that?

13 MR. BROWN: In your memo on Page 12.

14 THE COURT: What memo?

15 MR. BROWN: We filed a memo last week, Your
16 Honor.

17 THE COURT: All right. I -- do you have a copy
18 of it? You know, I just got here this morning.

19 You seen this, Mr. Carpenter?

20 MR. CARPENTER: They filed it electronically, I
21 read that, yes, sir.

22 THE COURT: Okay.

23 MR. CARPENTER: I don't know what else is in
24 that notebook there.

25 MR. BROWN: It's a memo with tabs to exhibits.

1 You want a copy?

2 THE COURT: Mr. Brown, let me do you a favor and
3 me a favor and I'll return this.

4 MR. BROWN: All right.

5 THE COURT: I have several hundred of those.

6 But I am taking the contents and I will peruse it.

7 All right. Anything further?

8 MR. BROWN: Just the arguments we presented in
9 our brief to support the point that I make that the
10 complaint in and of itself does not state a cause of
11 action; it cannot support a default.

12 THE COURT: All right, Mr. Carpenter.

13 MR. CARPENTER: Your Honor, this is a hearing on
14 the--

15 THE COURT: This is your hearing?

16 MR. CARPENTER: Yes, sir, my motion. Yes, sir.
17 Motion for entry of default judgment under the
18 counterclaims. In our reply memo that we filed along
19 with the affidavit that we filed--

20 THE COURT: Well you better let me have a copy
21 of that too.

22 MR. CARPENTER: Absolutely, Your Honor.

23 THE COURT: You know, when y'all filed 50 and 60
24 page memos and put them on electronic filing. . .

25 MR. CARPENTER: These are each seven pages, Your

1 Honor.

2 THE COURT: I appreciate it.

3 MR. CARPENTER: There's a lot of overlap between
4 the affidavit and the memo. But in this hearing on
5 the motion for entry for default judgment, we gave
6 notice of default. The -- if you look at Page 3 of
7 the memo under Statement of the case. Those seem to
8 me to be the operative facts for the entry of default
9 judgment. March 19th, 5 Star sued PPI, Peek
10 Performance Inc. to recover alleged overpayment of
11 commissions. March 29th he answered counterclaims
12 for breach of contract defamation and other claims.
13 The reply was due April 28th. They failed to file or
14 serve a reply to the counterclaims. We waited 12
15 days. May 10 filed a notice of default motion for
16 default judgment on the counterclaims. They hustled
17 around and filed a very short two page answer, which
18 was basically a general denial after that. They said
19 they were reserving the right to do discovery to find
20 out the fact, they've done no discovery.

21 Paragraph eight, we served interrogatories on
22 them May 10 and request for production of documents
23 on them May 10. They failed to respond to the
24 interrogatories. Failed to respond to request for
25 production. May 17th we moved to consolidate this

1 case with another case arising from the same facts.

2 THE COURT: That's not been heard.

3 MR. CARPENTER: Oh, yes, it has.

4 THE COURT: It has?

5 MR. CARPENTER: Yes, sir. They failed to
6 respond --

7 THE COURT: What was the outcome of that?

8 MR. CARPENTER: It was consolidated.

9 THE COURT: It is?

10 MR. CARPENTER: Yes, sir.

11 5 Star failed to respond to the motion to
12 consolidate. June 27th the Court held a hearing on
13 the motion to consolidate, they failed to appear at
14 the hearing. June 28th the Court--

15 THE COURT: Give them notice?

16 MR. CARPENTER: Oh, yes, sir.

17 The Court entered an order consolidating the two
18 cases. August 7, a month and a half later, we wrote
19 a follow-up letter asking about answers to our
20 interrogatories and requests for production, we got
21 no response to the letter. Got no response still to
22 the interrogatories and request for production that
23 were served May 1. And then, just recently,
24 August 17th, they got new counsel and came in and
25 objected to the notice of default and the motion

1 entering default judgment.

2 Now, I looked up a couple of cases --

3 THE COURT: It's not a motion to be relieved of
4 default, is it?

5 MR. CARPENTER: No, they're -- they title it
6 opposition to motion for entry of default, which is
7 not an exact -- the -- you give notice of default and
8 they're in default. We move for judgment. And this
9 is maybe not properly captioned but they apparently
10 are opposing the motion for entry of default judgment
11 because that's what we're here today, the judgment.

12 In their memorandum of law and their affidavit
13 in support of it, the counsel, Ms. Scott, filed an
14 affidavit and she said basically, well, yes, I got
15 the notice that there was an answer and counterclaim
16 but I'm so not use to having somebody file a timely
17 answer, I didn't do anything with it. And I'm not
18 use to practicing in courts where they do electronic
19 filing. And this firm is from Alabama, I'm in
20 Columbia. But basically, I just missed it. And this
21 is very crude paraphrase but that's the essence of
22 it. And their affidavit is attached to their
23 memorandum.

24 But I got two cases from South Carolina that
25 say, The negligence of the attorney is attributed to

1 the client. The client picks the attorney. And when
2 the attorney negligently fails to file an answer or
3 responsive pleading, then that is attributable to the
4 client and the default should be entered. I have a
5 couple of those cases, I'll hand them up to the
6 Court.

7 The first one is from the Supreme Court, 1957, a
8 case called Simons vs. Flowers. The second is a case
9 from the Court of Appeals in 2007. Judge Kittridge,
10 now Justice Kittridge. And both of them hold the
11 same thing. And I've got, if I can approach, I've
12 got the relevant points bolded and underlined in
13 those print outs of the cases. We look first at the
14 Simons vs. Flowers case. And it, as far as I can
15 tell, this has been the law since at least 1957.

16 The third page, The affidavit of appellant's
17 counsel upon which the motion is based shows that the
18 default was a result of forgetfulness on his part,
19 which in turn was due to pressure of his business in
20 the trial of cases and then the attendance of hearing
21 before for the industrial commission.

22 If you look at the next page. The Supreme Court
23 quotes a couple of authorities. The general rule
24 undoubtedly is that the neglect of the attorney is
25 the neglect of the client. And then below that, the

1 neglect of the attorney must be regarded as the
2 neglect of the petitioner himself when a party
3 selects an attorney of the court to conduct his cause
4 and instead his place he confers upon the attorney,
5 the authority to take such action in prosecution or
6 defense as he may decide to be legal, proper and
7 necessary to the management of the cause. His acts
8 are in the absence of fraud, the acts of his client.
9 And the rule of the party cannot inequity find relief
10 from the consequences of his own negligence as
11 equally applicable where the neglect is that of his
12 attorney, employed in the management of his case.

13 That is apparently a rule very broadly accepted.
14 And indeed, this was repeated again by the Court of
15 Appeals in the 2007 case. Sterns National Bank --
16 Sterns Bank National Association vs. Glenwood Falls,
17 LLP. I've highlighted a couple of the headnotes.
18 But if you look over at the -- the Page 6 of the
19 case, the Court of Appeals said, Concerning claim of
20 attorney neglect, the general rule is the neglect of
21 the attorney is attributable to the client. Then
22 they quote again from Simons vs. Flowers, which is
23 the case we just read.

24 So, Your Honor, we got a fairly simple case.
25 You got the Plaintiff, 5 Star, is in default. And

1 has no good excuse for the failure to reply in a
2 timely manner to the counterclaim. And opposing
3 counsel went into the facts somewhat. And in our
4 affidavit that we submitted with the memorandum, we
5 go into the facts somewhat. And the default couldn't
6 happen to a more deserving client.

7 My client was a manager, a recruiter of agents
8 for this company. He reported to a guy named Jeff
9 Wright. Jeff Wright got an override of everything
10 that was sold by people under him. My guy, Clay
11 Peek, Peek Performance, he helped three other guys
12 Consolidated Associates. They recruited agents.
13 Peek was supposed to get a five percent override on
14 everything that the agents recruited by him and
15 Consolidated sold. Over the course of the years--

16 THE COURT: So Peek was an agent?

17 MR. CARPENTER: Peek was a manager. He didn't
18 actually go out and sell the policies, he was
19 recruited and managed the agents.

20 THE COURT: Did he have a contract?

21 MR. CARPENTER: Yes, he had a that contract with
22 5 Star. He had agreements with Jeff Wright over him
23 and consolidated under him. The agreement he had
24 with Jeff Wright and this is--

25 THE COURT: In writing?

1 MR. CARPENTER: Sir?

2 THE COURT: In writing?

3 MR. CARPENTER: Yes. In the form of -- it was a
4 verbal agreement but confirmed by a written email.
5 And the agreement was that Jeff Wright would bring
6 Peek in, Peek would take only five percent, which is
7 a very low commission. But in exchange for that he
8 promised that he wouldn't mess with his down line,
9 his hierarchy. He's not going to go in there and
10 start moving people around without Pete's consent.

11 Well, they started going like gangbusters. The
12 combination of Pete and Consolidated worked very
13 well. They recruited a lot of agents, they sold a
14 lot of policies, the business was booming. Then all
15 of a sudden, Peek started realizing that he wasn't
16 getting paid the commissions that was expecting to
17 get paid. He's supposed to get 20 to \$40,000 a
18 month. Then it started dropping off and dropping off
19 and Peek checked with Consolidated, hey you guys
20 doing okay? Yeah, we are doing great, business never
21 better. And it kept dropping off and dropping off.

22 And what was happening was somehow all those
23 agents that were supposed to be under Peek, were
24 moved out from under him and he wasn't getting paid
25 that five percent override. So, we start talking to

1 people about it, we talked Jeff Wright about it, we
2 talked to Consolidated about it, we even go up and
3 talk to 5 Star about it. 5 Star says yes we have
4 ultimate authority to make these changes but,
5 ultimately, basically, if the regional manager
6 approves that we want to go along with it, meaning
7 that if Jeff Wright approved it, we're going to go
8 along with it.

9 So, he talked to Jeff Wright. We don't know why
10 he told us this but what he told us was, oh, one time
11 I was going through some hard times and Consolidate
12 was after me for more money so I lent them my power
13 of attorneys so they could transfer those agents out
14 on their own without involving Peek and really
15 without involving Wright. Now, since then they have
16 denied that they ever said that and they denied it
17 happened. But that's the story they told us. In any
18 event, the company itself has the ultimate say so
19 over whether those agents get transferred out from
20 under Peek.

21 So anyway, there came a time when the company, 5
22 Star, came to believe that they had overpaid advance
23 commissions of about 100, 110,000 to Peek. Well Peek
24 said okay, well if that's the case--

25 THE COURT: All right, I don't need to try the

1 case.

2 MR. CARPENTER: Well, that's fine. But in any
3 event, they're in default, they got no excuse. We
4 have tried and tried and tried to negotiate and
5 resolve it with them. All to no avail. It's been
6 like talking to brick wall. So, the fact that
7 they're in default couldn't happen to a more
8 deserving client. But the law is that the negligence
9 of the attorney attributed to the client and we ask
10 for a default judgment.

11 THE COURT: Mr. Brown.

12 MR. BROWN: Yes, sir, Your Honor. A couple of
13 points on what he just mentioned. There is a written
14 contract between Peek and 5 Star. That contract is
15 attached to the complaint that 5 Star filed and Peek
16 admitted that that is the contract. They admitted
17 that those are the terms of the agreement. Their
18 purported counterclaim alleges facts which directly
19 contradict the admitted contract. Which is improper
20 under the law. And again, another reason why their
21 purported counterclaim fails as a matter of law.

22 But we would also note, Your Honor, that the
23 complaint that the counterclaim is not a verified
24 counterclaim. There is no statement of damages in
25 the counterclaim. There has been no entry of

1 judgment by the clerk of court at this point.

2 Therefore--

3 THE COURT: What kind of judgment?

4 MR. BROWN: He's contending that -- excuse me,
5 there's been no entry of default by the clerk of
6 court?

7 THE COURT: He's asking me?

8 MR. BROWN: So, he's asking you to make an entry
9 of default--

10 THE COURT: That's what he's asking --

11 MR. BROWN: That's different than an entry of
12 default judgment. He has said earlier that he wants
13 default judgment. There's a difference there, Your
14 Honor. A entry of default judgment would require
15 there to be a stated some certain verified compliant,
16 which doesn't exist and there has not been an
17 appropriate time for us to conduct discovery as to
18 potential damages and challenge damages for an entry
19 of judgment.

20 THE COURT: Okay. All right. I understand.

21 How about that, Mr. Carpenter?

22 MR. CARPENTER: The entry of default is, as I
23 understand it, a clerical decision by the clerk of
24 court. That the entry of default --

25 THE COURT: Well Circuit Court can, also.

1 MR. CARPENTER: Sir?

2 THE COURT: The Circuit Court can also do it.

3 MR. CARPENTER: Right, right--

4 THE COURT: But is there an entry of default?

5 MR. CARPENTER: No, that is a ministerial thing.

6 We gave notice of default and upon notice of default.
7 the clerk is supposed to enter default.

8 THE COURT: Well, perhaps, unless there's some
9 argument.

10 MR. CARPENTER: Well, if the clerk looks at the
11 pleadings and the pleadings show a default then --
12 and we got an affidavit that testifies to the
13 default. And it was supposed to be a ministerial act
14 that they had a default. Now, default judgment I
15 agree is a different thing.

16 THE COURT: Right.

17 MR. CARPENTER: And that's what we're here for
18 today. Now, he is right we have articulated a
19 specific amount of damages but that's an acceptable
20 remedy. You can enter default as a matter of
21 liability. Then we discovery. Which we have to do.
22 One other thing I didn't mention was, they got all
23 the records. When we made discovery requests in the
24 other case, both sides -- we're talking about a
25 multi-million dollar business too. And they said,

1 oh, we don't have any records, they're all over at 5
2 Star. So we need their records to establish the
3 exact amount of the judgment and of all these
4 commissions that should have been paid and weren't.

5 THE COURT: How can I ever order a judgment
6 amount?

7 MR. CARPENTER: You can't. But you can order an
8 entry of liability. A judgment -- a entry of
9 judgment of liability. You know, with a -- you know,
10 this is done all the time where you have like in a
11 personal injury case--

12 THE COURT: I know that.

13 MR. CARPENTER: You have a hearing later to
14 establish the amount of damages. But there can be a
15 judgment of default.

16 THE COURT: Yeah. And a damage hearing.

17 MR. CARPENTER: Right.

18 THE COURT: Testimony and etcetera, etcetera,
19 etcetera.

20 MR. CARPENTER: Well you can have, as I
21 understand it, and maybe I'm wrong, but as I
22 understand it, you can have a judgment of default on
23 liability and then later a damages hearing to
24 establish the amount of the judgment. We're asking
25 for a judgment on liability on this case.

1 THE COURT: Liability?

2 MR. CARPENTER: Based on the default, yes.

3 THE COURT: How would you -- what would an order
4 like that look like? Other than saying they're in
5 default.

6 MR. CARPENTER: That would be -- and what we
7 would like it to look like is a ruling that they are
8 in default and that discovery can go forward so we
9 can establish -- so we can discovery and get evidence
10 to establish the amount of the damages. Because
11 we've got thousands of policies that we're entitled
12 to commissions and they got all the records of what
13 the amounts are in their computer system. And they
14 alone. Well, they and the agents.

15 THE COURT: I understand that all that, I'm just
16 trying to. . .

17 MR. CARPENTER: Okay. But a judgment that they
18 are in default as opposed to a ministerial entry of
19 default. This would be a judgment of default. Which
20 would lead to do discovery for damages.

21 THE COURT: It would just be a judgment of
22 default?

23 MR. CARPENTER: Yes, sir.

24 THE COURT: How does that differ from a entry of
25 default?

1 MR. CARPENTER: The entry of default can be
2 entered by the clerk of court which is ministerial.
3 This is the Judge's ruling after a hearing that they
4 are, indeed, in default. A judicial declaration that
5 they're in default carries more weight than the
6 clerk's ministerial entry.

7 MR. BROWN: Your Honor, I think that's an
8 extension that doesn't exist under the law. I think
9 that you either have a entry of default or a judgment
10 of default and we don't--

11 THE COURT: Well, I think they're one in the
12 same. And I think you can take a entry of default
13 and make it a judgment of default.

14 MR. CARPENTER: Well, if the Court would enter
15 default, I would be happy with that.

16 MR. BROWN: And, Your Honor, we would ask you
17 before you rule to read the case we cite on Page 12
18 of our memo which talk about the sufficiency of the
19 pleadings to support the default.

20 THE COURT: Well, you started out saying that
21 the counterclaim didn't have any summons attached to
22 it. The compliant was served. I mean, the answer
23 and counterclaim were served but I think we got past
24 that. And I think the counterclaim stands with the
25 answer without the necessity of additional summons to

1 attach to the counterclaim. I mean, answers and
2 counterclaims are filed simultaneously all the time.

3 And according, to Mr. Carpenter's chronology,
4 that there's been no answer to the counterclaim or
5 there was no response to the counterclaim--

6 MR. BROWN: Your Honor, that's not correct.
7 There has been an answer filed.

8 THE COURT: But it was late.

9 MR. BROWN: It was after the deadline, yes, but
10 it has been answered.

11 THE COURT: Okay, I misunderstood.

12 All right, I'd like to rule from the bench but
13 I'm afraid I'm going to have to read these cases.
14 And request a proposed order within 10 days. All
15 right.

16 MR. BROWN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 (WHEREUPON, the proceedings were concluded.)
19
20
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23
24
25

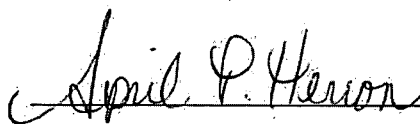
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth 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 Greenville County, South Carolina, on the
28th day of August, 2018.

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

February 6, 2019



APRIL P. HERRON, Court Reporter

From: roster@greenvillecounty.org <roster@greenvillecounty.org>
Sent: Thursday, May 17, 2018 2:07 PM
To: james.carpenter@carpenterlawfirm.net
Cc: slopez@greenvillecounty.org
Subject: Motion "MCONSL-Peek Performance's Motion/Consolidate" for Case
"2018CP2301639- 5 Star Life Insurance Company vs. Peek Performance Inc"
was added to a Motions Roster for 6/27/2018 at 2:00 PM

A Hearing in this case is SCHEDULED- DATE & TIME on Subject line above-

Location: Greenville County Courthouse, 305 East North Street, Greenville, SC 29601
MOVANT IS RESPONSIBLE TO NOTIFY OPPOSING COUNSEL AND PRO SE PARTIES Check the online
roster at <http://www.greenvillecounty.org/scjd/courtrosters/>
CONTINUANCE, RESOLVED, WITHDRAWN - send detailed e-mail (copy opposing
counsel/party)
to Non-Jury Coordinator, Steve Lopez at: nicoord@greenvillecounty.org
MEMO REQUIREMENTS
(www.greenvillecounty.org/CourtSupport/MemPolicies.aspx)



WHEN IT'S WORTH FIGHTING FOR

JAMES G. CARPENTER
james@carpenterlawfirm.net
SERVING S.C. AND N.C.

August 7, 2018

Amanda M. Scott
Parnell & Parnell, PA
PO Box 743
White Rock, SC 29177

Re: 5 Star Life Insurance Company v. Peak Performance, Inc.
Civil Action Number 2018-CP-23-01639

Dear Ms. Scott:

On May 10, 2018, we served Defendant's Interrogatories to Plaintiff and Defendant's Requests for Production of Documents to Plaintiff. We have received no responses. If we do not receive responses by August 18, we will be forced to file a Motion to Compel.

Sincerely yours,

James G. Carpenter
Attorney for the Defendant

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NOV 28 2018

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Thirteenth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 18-CP-23-01639

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

v.

Peek Performance, Inc. Respondent.

NOTICE OF APPEAL

5Star Life Insurance Co. ("Appellant"), appeals the Order filed by Judge Cooper on October 29, 2018, denying Plaintiff's Motion seeking, *inter alia*, relief from a default judgment pursuant to Rule 60, SCRCF.¹ Appellant also appeals the Order for Entry of Default and Default Judgment on the Counterclaim filed by Judge Cooper on September 13, 2018.² Copies of both orders are attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR.

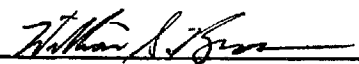
[SIGNATURE PAGE ATTACHED]

¹ If, as here, one aspect of an order is appealable, the entire order should be considered upon appeal. *See Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E.2d 132 (1950), *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002).

² Though this ruling would not, if standing alone, be susceptible to an immediate appeal, "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation." *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)).

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Appellant SStar Life Insurance Co.

Greenville, South Carolina
November 27, 2018

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

5Star Life Insurance Company.

Plaintiffs,

 γ

Peek Performance, Inc., a South Carolina corporation

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2018-CP-23-01639

**ORDER FOR ENTRY OF DEFAULT
AND DEFAULT JUDGMENT
ON THE COUNTERCLAIM**

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NOV 28 2018

SC Court of Appeals

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

LEGAL DISCUSSION

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

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

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

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

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

SCRCP 55 (b)(2).

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

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

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

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

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

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

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

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

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

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

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

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

In *Simon v. Flowers*,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

SO ORDERED, this _____ day of _____, 2018.

G. Thomas Cooper,
Circuit Judge presiding



Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc
Case Number: 2018CP2301639
Type: Order/Default

So Ordered

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

Electronically signed on 2018-09-12 14:08:31 page 9 of 9

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2018-CP-23-01639

5 Star Life Insurance Co.,

Plaintiff

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION,
RELIEF FROM ENTRY OF DEFAULT,
AND RELIEF FROM DEFAULT
JUDGMENT**

vs.

Peek Performance, Inc.,

Defendant.

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NOV 28 2018

SC Court of Appeals

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

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

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

AND IT IS SO ORDERED.

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

October 28, 2018



Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc
Case Number: 2018CP2301639
Type: Order/Other

So Ordered

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

Electronically signed on 2018-10-28 16:21:41 page 3 of 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Thirteenth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

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NOV 28 2018

SC Court of Appeals

Case No. 18-CP-23-01639

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

v.

Peek Performance, Inc. Respondent.

PROOF OF SERVICE

I hereby certify that I have caused a copy of the Notice of Appeal to be served upon all
counsel of record, by mailing copies of same, postage prepaid to the following addresses:

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[SIGNATURE PAGE ATTACHED]

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
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Attorneys for Appellant 5Star Life Insurance Co.

Greenville, South Carolina
November 27, 2018

Certificate of Electronic Notification

Recipients

James Carpenter - Notification transmitted on 11-28-2018 04:05:29 PM.

David Dill - Notification transmitted on 11-28-2018 04:05:29 PM.

Amanda Scott - Notification transmitted on 11-28-2018 04:05:29 PM.

William Brown - Notification transmitted on 11-28-2018 04:05:30 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2301639

Official File Stamp: 11-28-2018 04:05:21 PM

Court: CIRCUIT COURT
Common Pleas
Greenville

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

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals

Filed by or on behalf of: William Stevens Brown, V

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

David Curry Dill for 5 Star Life Insurance
Company

William Stevens Brown, V for 5 Star Life
Insurance Company

James G. Carpenter for Peek Performance Inc

Amanda Mange Scott for 5 Star Life Insurance
Company

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
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December 06, 2018

Mr. William Stevens Brown, V, Esquire
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Mr. Miles Edward Coleman, Esquire
104 South Main Street
Suite 900
Greenville SC 29601

Mr. David Curry Dill, Esquire
Poinsett Plaza, Suite 900
104 South Main Street
Greenville SC 29601

Re: 5 Star Life Insurance Co. v. Peek Performance, Inc.
Appellate Case No. 2018-002114

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the order(s) challenged on appeal indicates they might not be immediately appealable.

Accordingly, it is requested that both parties serve and file memoranda addressing the issue of appealability within ten (10) days of the date of this letter.

Very truly yours,

V. Claine Allen, Deputy

CLERK

cc: James G. Carpenter, Esquire
Beattie B. Ashmore, Esquire
Adam Crittenden Bach, Esquire

From: James Carpenter <james.carpenter@carpenterlawfirm.net>
Sent: Thursday, December 13, 2018 3:47 PM
To: David Dill; JColeJ@SCCourts.org; JColeLC@SCCourts.org
Cc: ascott@parnellssoutheast.com; William Brown; 'Adam Bach'; Stephanie Gray; 'Hudson Smith'; Beattie Ashmore; 'Rhonda Bell'
Subject: RE: 2017CP2303269; 2018CP2301639
Attachments: Letter from Court of Appeals 12.6.18.pdf; Respondent's Memorandum on Appealability.pdf

Judge Cole,

On behalf of Peek Performance, Inc., ("PPI"), we disagree with 5Star's suggestion that they be excused from the discovery process and the hearing related to discovery, for three reasons:

- (1) 5Star is still a party to this joined litigation in this Court. 5Star sued PPI, and PPI counterclaimed. 5Star's claims against PPI are still active in this case; they are not on appeal. Accordingly, 5Star must participate in the discovery process, regardless of its attempt at a partial, piecemeal appeal.
- (2) 5Star defaulted on PPI's counterclaims, and Judge G. Thomas Cooper ruled that they should not be relieved from default. 5Star is attempting to appeal his ruling. The orders from which 5Star attempts to appeal are not final orders, and they are not appealable. 5Star's appeal is subject to dismissal. The Court of Appeals, *sua sponte*, recognized this deficiency and wrote the parties asking us to file a memo on the issue of appealability. I attach the letter from the Court of Appeals and our Memo on Appealability.
- (3) When we served document requests on the other defendants (Jeff Wright and Consolidated Associates and its principals), they said that all, or nearly all, the relevant documents are in the possession of 5Star. Accordingly, 5Star must participate in the discovery process in order for us to litigate this case.

For these reasons, we respectfully request that the Court **not** excuse 5Star from participating in the discovery process or from the hearings related to this case, despite their futile appeal.

Respectfully submitted,

Jim Carpenter
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Facsimile: (864) 331-3083
Mobile: (864) 380-4880
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WHEN IT'S WORTH FIGHTING FOR!

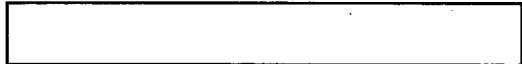
From: David Dill <david.dill@nelsonmullins.com>
Sent: Friday, December 07, 2018 4:33 PM
To: JColeJ@SCCourts.org; JColeLC@SCCourts.org
Cc: ascott@parnellssoutheast.com; William Brown <william.brown@nelsonmullins.com>; 'Adam Bach' <abach@etblawfirm.com>; Stephanie Gray <stephanie@beattieashmore.com>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie Ashmore <Beattie@beattieashmore.com>; 'Rhonda Bell' <rhonda@beattieashmore.com>; James Carpenter <james.carpenter@carpenterlawfirm.net>
Subject: RE: 2017CP2303269; 2018CP2301639

Good afternoon, Judge Cole,

William Brown and I represent 5Star Life Insurance, Co. 5Star filed an appeal in this matter on November 28th. Thus, to the extent Mr. Carpenter's request is intended to encompass 5Star, it is our position that the pending appeal stays proceeding on any issues involving 5Star.

Thank you,

David Dill


David Dill

Attorney at Law
Admitted in North Carolina and South Carolina
david.dill@nelsonmullins.com

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(View Bio)

From: James Carpenter [mailto:james.carpenter@carpenterlawfirm.net]
Sent: Thursday, December 6, 2018 12:31 PM
To: JColeJ@SCCourts.org; JColeLC@SCCourts.org
Cc: ascott@parnellssoutheast.com; William Brown <william.brown@nelsonmullins.com>; David Dill <david.dill@nelsonmullins.com>; 'Adam Bach' <abach@etblawfirm.com>; Stephanie Gray <stephanie@beattieashmore.com>; 'Hudson Smith' <Hsmith@etblawfirm.com>; Beattie Ashmore <Beattie@beattieashmore.com>; 'Rhonda Bell' <rhonda@beattieashmore.com>
Subject: 2017CP2303269; 2018CP2301639

Dear Judge Cole,

These two cases were joined together by Order of the Circuit Court for Greenville County. By another Order, they were transferred to the Business Court and assigned to Your Honor. Discovery motions were pending and had been set for hearing. When the cases were assigned to Your Honor, those hearings were canceled. I write to request that the motions to compel be scheduled before Your Honor.

In addition, all counsel have attempted to work out a Consent Protective Order with provisions for documents designated as Attorney's Eyes Only. We have agreed to most of the provisions, but we have not been able to agree on the definition of the documents entitled to Attorney's Eyes Only protection. Accordingly, we need a ruling on that definition for the Protective Order.

I am copying all other Counsel on this email. We look forward to your response.

Respectfully submitted,

Jim Carpenter
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WHEN IT'S WORTH FIGHTING FOR!

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The South Carolina Court of Appeals

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February 01, 2019

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Mr. Adam Crittenden Bach, Esquire
1306 S. Church Street
Greenville SC 29605

Re: 5 Star Life Insurance Co. v. Peek Performance, Inc.

Appellate Case No. 2018-002114

Dear Counsel:

Upon consideration of the parties' appealability memoranda, the appeal will be allowed to proceed. Our records reflect that the time for receiving the transcript has expired. Within ten days of the date of this letter, you must notify the Court as to the status of the transcript. If the transcript has been received, the appellants' initial brief and designation of matter will be due 30 days from the date of this letter.

Very truly yours,

V. Claims Allen, Deputy

CLERK



Greenville County 13th Judicial Circuit Public Index



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Switch View

5 Star Life Insurance Company vs. Peek Performance Inc					
Case Number:	2018CP2301639	Court Agency:	Greenville County Common Pleas	Filed Date:	03/19/2018
Case Type:	Common Pleas	Case Sub Type:	Debt Collection 110	File Type:	Jury
Status:	Pending/Business Court	Assigned Judge:	Cole, J. Derham		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties	Judgments	Tax Map Information	Associated Cases	Actions	Financials	
Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
5 Star Life Insurance Company	NEF(04-11-2019 04:29:32 PM) Motion/Compel	Filing		04/12/2019-09:44		
5 Star Life Insurance Company	Plt/5 Star Life Insurance Company Motion/Compel	Motion		04/11/2019-16:29		
5 Star Life Insurance Company	ADR/Notice of ADR	Action		02/27/2019-16:21		
5 Star Life Insurance Company	NEF(02-21-2019 02:27:12 PM) Memo/Memo in Opposition	Filing		02/21/2019-15:03		
5 Star Life Insurance Company	Memo/Memo in Opposition	Filing		02/21/2019-14:27		    
5 Star Life Insurance Company	Verification/Verified	Filing		01/14/2019-15:09		
5 Star Life Insurance Company	Appeal/Notice of Appeal to Court of Appeals	Action		11/29/2018-16:05		
5 Star Life Insurance Company	Archived Document	Filing		11/29/2018-00:00		
5 Star Life Insurance Company	NEF(11-28-2018 04:05:21 PM) Appeal/Notice of Appeal to C...	Filing		11/28/2018-16:29		
Carpenter, James G.	11/26/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action		11/01/2018-16:24		
Brown, William Stevens V	11/26/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action		11/01/2018-16:24		

Dill, David Curry	11/26/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action		11/01/2018-16:24		
Scott, Amanda Mange	11/26/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action		11/01/2018-16:24		
Peek Performance Inc	NEF(10-31-2018 12:50:11 PM) Motion/Sanctions	Filing		10/31/2018-16:04		
Peek Performance Inc	Def/Peek Performance Inc Motion/Sanctions	Motion		10/31/2018-12:50		
Peek Performance Inc	NEF(10-29-2018 09:52:25 AM) Order/Other	Filing		10/29/2018-09:52		
Peek Performance Inc	Order/Other-Motion to Reconsider Denied	Order		10/29/2018-09:52		
Peek Performance Inc	NEF(10-16-2018 01:00:54 PM) Memo/Memo in Opposition	Filing		10/16/2018-16:36		
Peek Performance Inc	Memo/Memo in Opposition	Filing		10/16/2018-13:00		
5 Star Life Insurance Company	ADR/Alternative Dispute Resolution (Workflow)	Action		10/15/2018-15:30	02/27/2019-15:30	
5 Star Life Insurance Company	NEF(10-11-2018 07:20:41 PM) Reply/Other	Filing		10/12/2018-11:21		
5 Star Life Insurance Company	Reply/Other	Filing		10/11/2018-19:20		
Peek Performance Inc	NEF(10-05-2018 02:23:26 PM) Memo/Memo in Opposition	Filing		10/05/2018-15:57		
Peek Performance Inc	Memo/Memo in Opposition to Motion to Reconsider	Filing		10/05/2018-14:23		
5 Star Life Insurance Company	NEF(09-24-2018 02:57:14 PM) Motion/Reconsider	Filing		09/25/2018-11:39		
5 Star Life Insurance Company	Memo/Memo in Support	Filing		09/24/2018-16:04		
5 Star Life Insurance Company	Plt/5 Star Life Insurance Company Motion/Reconsider	Motion		09/24/2018-16:03		
5 Star Life Insurance Company	Plt/5 Star Life Insurance Company Motion/Reconsider	Motion		09/24/2018-14:57		
5 Star Life Insurance Company	Memo/Memo in Support of Motion/Reconsider	Filing		09/24/2018-14:57		
5 Star Life Insurance Company	Certificate/Certificate of Technical Failure or Difficulties	Filing		09/24/2018-09:15		
5 Star Life Insurance Company	Verification/Verified	Filing		09/14/2018-09:14		
Peek Performance Inc	NEF(09-13-2018 10:18:14 AM) Order/Default	Filing		09/13/2018-10:18		
	Order/Default On Counterclaim	Order		09/13/2018-10:18		

Peek Performance Inc						
5 Star Life Insurance Company	NEF(09-07-2018 11:32:05 AM) Proposed Order/Other	Filing		09/07/2018-12:02		
5 Star Life Insurance Company	Order/Order Cover Sheet \$25.00	Filing		09/07/2018-11:32		
5 Star Life Insurance Company	NEF(08-29-2018 09:36:48 AM) Order/Form 4	Filing		08/29/2018-09:37		
5 Star Life Insurance Company	Order/Form 4/Motions Under Advisement	Order		08/29/2018-09:36		
Peek Performance Inc	NEF(08-27-2018 04:33:11 PM) Memo/Memo	Filing		08/27/2018-16:52		
Peek Performance Inc	Memo/Defendants Reply Memorandum	Filing		08/27/2018-16:33		
Peek Performance Inc	Affidavit/Affidavit of Clay Peek	Filing		08/27/2018-16:33		
5 Star Life Insurance Company	NEF(08-17-2018 03:13:01 PM) Memo/Memo in Opposition	Filing		08/17/2018-16:08		
5 Star Life Insurance Company	Memo/Memo in Opposition to Motion for Entry of Default	Filing		08/17/2018-15:13		 
Scott, Amanda Mange	8/27/2018_MOTION_Roster/Notice of Motions Roster Publication	Action		07/25/2018-15:10		
Carpenter, James G.	8/27/2018_MOTION_Roster/Notice of Motions Roster Publication	Action		07/25/2018-15:10		
5 Star Life Insurance Company	NEF(06-28-2018 01:48:06 PM) Order/Electronic Form 4	Filing		06/28/2018-13:48		
5 Star Life Insurance Company	Order/Electronic Form 4	Order		06/28/2018-13:48		
Carpenter, James G.	7/30/2018_MOTION_Roster/Notice of Motions Roster Publication	Action		06/28/2018-10:23		
Scott, Amanda Mange	7/30/2018_MOTION_Roster/Notice of Motions Roster Publication	Action		06/28/2018-10:23		
Scott, Amanda Mange	6/25/2018_MOTION_Roster/Notice of Motions Roster Publication	Action		05/17/2018-14:06		
Carpenter, James G.	6/25/2018_MOTION_Roster/Notice of Motions Roster Publication	Action		05/17/2018-14:06		
5 Star Life Insurance Company	NEF(05-17-2018 08:18:31 AM) Reply/Reply to Counterclaim	Filing		05/17/2018-09:37		
5 Star Life Insurance Company	Reply/Reply To Answer & Counterclaim	Filing		05/17/2018-08:18		
Peek Performance Inc	NEF(05-16-2018 04:04:24 PM) Motion/Consolidate	Filing		05/16/2018-16:09		
Peek Performance Inc	Peek Performance's Motion/Consolidate	Motion		05/16/2018-16:04	06/27/2018-16:04	
		Filing				

Peek Performance Inc	NEF(05-10-2018 05:49:08 PM) Motion/Entry of Default			05/11/2018-08:56		
Peek Performance Inc	NEF(05-10-2018 05:41:57 PM) Affidavit/Default	Filing		05/11/2018-08:34		
Peek Performance Inc	NEF(05-10-2018 05:39:09 PM) Notice/Other	Filing		05/11/2018-08:33		
Peek Performance Inc	Def/Peek Performance Inc Motion/Entry of Default	Motion		05/10/2018-17:49	08/28/2018-17:49	
Peek Performance Inc	Affidavit/Default	Filing		05/10/2018-17:41		
Peek Performance Inc	Notice of Default on Counterclaims	Filing		05/10/2018-17:39		
Peek Performance Inc	NEF(03-29-2018 12:55:38 PM) Notice/Notice of Appearance	Filing		03/29/2018-14:06		
Peek Performance Inc	Notice/Notice of Appearance	Filing		03/29/2018-12:55		
Peek Performance Inc	Answer/Answer & Counterclaim	Filing		03/29/2018-12:55		
5 Star Life Insurance Company	Verification/Verified	Filing		03/20/2018-14:38		
5 Star Life Insurance Company	Summons & Complaint	Filing		03/19/2018-15:30		

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Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 19, 2019



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Attorneys for Appellant 5Star Life Insurance Co.

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JUN 28 2019
SC Court of Appeals