THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

FINAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant 5Star Life Insurance Co. ("5Star") provides life insurance primarily to military and first responders' families. In 2016, 5Star learned it had inadvertently paid unearned commissions to Peek Performance, Inc. ("Peek"), a marketing and recruiting agency. When Peek refused to return the unearned commissions, 5Star sued to recover them. Peek's Answer to this suit did not dispute it owed the money, but instead offered a lengthy explanation—styled as a "counterclaim"—of why it was supposedly unable to repay the funds. 5Star did not timely respond to the purported "counterclaim," and Peek sought a default judgment. Without first entering default, and without holding a hearing to determine what, if any relief, was warranted, the trial judge awarded a default judgment against 5Star on two causes of action he divined in Peek's pleading.

The trial court's judgment erred in at least five ways, any one of which warrants reversal. *First*, there was no viable claim upon which to enter judgment. The supposed "counterclaim" was merely a recitation of facts that did not assert any cause of action and which failed to plead a *prima facie* claim for the causes of action on which the trial court entered judgment. Peek may have pled an affirmative defense (to which no responsive pleading was required), but it did not assert a plausible counterclaim. *Second*, even if Peek had pled a viable counterclaim (which it did not), the trial court erred by awarding a default judgment without first entering default—a procedural error that prejudiced 5Star. *Third*, even if there was a viable counterclaim on which default had been entered, judgment was improper without first holding a damages hearing. *Fourth*, the trial court applied the wrong legal standard to 5Star's motion to set aside the entry of default and/or default judgment. And *fifth*, the trial court failed to consider or apply Virginia law.

In addition, the trial court erred by compelling 5Star to respond to Peek's discovery requests. 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. Accordingly, and for the additional reasons explained more fully below, the trial court's rulings should be reversed, the entry of default and the default judgment should be set aside, and the discovery ruling should be vacated.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court err by awarding a default judgment on a supposed "counterclaim" that did not set forth a claim to which a responsive pleading was required and that did not plead a *prima facie* claim upon which relief could be granted?

2. Did the trial court err by awarding a default judgment without first entering an entry of default?

3. Did the trial court err by awarding a default judgment without first holding a hearing or otherwise determining what, if any, relief to award?

4. Did the trial court err by applying the wrong legal standard to 5Star's motion to set aside the entry of default or to set aside the default judgment?

5. Did the trial court err by compelling discovery responses when there had been no motion requesting such relief, when the issue had not been briefed, and when the court had no basis upon which to make an informed analysis of the discovery dispute?

6. Did the trial court err by failing to consider and apply Virginia law as required by the contract governing disputes between 5Star and Peek?

STATEMENT OF THE CASE AND THE FACTS[1]

5Star provides life insurance to military and first responders' families as the insurance underwriting enterprise of the nonprofit Armed Forces Benefit Association. In 2013, 5Star contracted with Peek, an insurance marketing and recruiting agency, to procure applications for life insurance policies for 5Star. *See* Compl. at Ex. A (the "Contract") § 3 (R. pp. 37–50). The relationship between the 5Star and Peek was governed by a contract. *See* Compl. ¶ 3 (R. p. 35) (referring to and incorporating the terms of the Contract, which was attached to the Complaint); Contract (R. pp. 37–50).

[1] Because the relevant facts are so closely tied to the procedural history, 5Star consolidates the Statement of the Case and the Statement of the Facts under a single heading.

In 2016, 5Star learned it had inadvertently paid Peek $109,515.81 in commissions Peek had not earned. *See* Compl. ¶ 6 (R. p. 35); 5Star's Opp. to Mot. for Entry of Default J. at 1 (R. p. 85). The parties' contract gives 5Star the exclusive right to decide and settle all disputes regarding commissions, and it requires Peek to pay all debts owed to 5Star at any time on demand. *See* Contract at §§ 9 and 16 (R. pp. 38–39). When 5Star sought repayment of the unearned commissions, however, Peek declined to repay the amounts owed. *See* Compl. ¶ 4 (R. p. 35). Accordingly, 5Star filed this action on March 19, 2018 to recover the funds. *See* Compl. (R. pp. 34–50).

Peek electronically filed an Answer unusually early, on March 29, 2018, twenty days before its deadline to respond. *See* Answer (R. pp. 51–61). Peek's Answer admits the parties' contract is valid, affirms its terms, and admits 5Star inadvertently paid Peek unearned commissions. *See* Answer at ¶¶ 3 and 54 (R. pp. 51 and 58). Peek contends, however, in a lengthy factual recitation, that it should not have to repay the commissions based upon conduct by its former business partners or by 5Star. *See id.* at ¶¶ 9–68 (R. pp. 51–61).[2] The explanation in Peek's Answer is strikingly similar to the factual allegations in the Complaint Peek filed against its former business partners.[3] Even though this section of Peek's Answer is comprised almost exclusively of factual allegations, Peek labels it a "counterclaim." *See* Answer at ¶ 9 (R. p. 51). The

[2] Peek is in a dispute with its former business partners and had previously filed a suit against them in a case captioned *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 (Greenville Cnty. Ct. of Comm. Pleas). That suit was consolidated with the instant proceeding by order on June 28, 2018 (R. pp. 1-5).

[3] Indeed, of the 60 paragraphs in Peek's explanation, 56 of them are copied nearly verbatim from the fact section of Peek's prior Complaint. *Compare* Answer at ¶¶ 9–64 (R. pp. 51–60) *with* Peek's Complaint in *Peek Performance, Inc., et al. v. Jeff Wright, at al.* at ¶¶ 2–59 (R. pp. 21–30).

"counterclaim," however, fails to plead the elements of any cause of action or to identify or assert any cause of action. *See id.* at ¶¶ 9–68 (R. pp. 51–61).[4]

Peek filed and served its Answer via the South Carolina state court e-filing system. Assuming *arguendo* that Peek's Answer did, in fact, assert a counterclaim (which is an assumption 5Star disputed below and continues to dispute on appeal), 5Star's reply was due by May 3, 2018. *See* Rule 12(a), SCRCP ("The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer."); Guideline 4(e)(4), South Carolina Electronic Filing Policies and Guidelines (noting that service by electronic filing provides five additional days for response).

5Star did not respond to Peek's purported counterclaim by May 3, 2018. 5Star's original counsel, Amanda Scott of the Alabama law firm, Parnell & Parnell, P.A., later explained she is a Richland County resident whose practice focuses on debt collections in the Midlands. *See* September Order at 4 (R. p. 9). Due to the nature of her practice, Ms. Scott's cases are typically uncontested. *Id.* Ms. Scott was unfamiliar with the e-filing system when Peek filed its Answer because e-filing had only begun in her home county three weeks prior. *See* Scott Aff. ¶¶ 1, 3 (R. p. 99). Ms. Scott did not know that counterclaims could be served electronically—she thought personal service was required—and she does not recall seeing an e-file notice for the Answer. *See id.* ¶ 6 (R. p. 100).

Shortly after the reply to any counterclaim would have been due, Peek filed a Notice of Default, Affidavit of Default, and what it styled as a "Motion for Entry of Default Judgment." *See* Notice, Affidavit, and Motion, May 10, 2018 (R. pp. 70–72, 73–76, and 66–69). 5Star's then-counsel filed a Reply to the purported counterclaim on May 17, 2018. *See* Reply (R. pp. 62–65).

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[4] In contrast, Peek's prior complaint includes 27 additional paragraphs expressly asserting six causes of action and reciting the elements of each of them. *See* Complaint in *Peek Performance, Inc., et al. v. Jeff Wright, at al.* at ¶¶ 60–87 (R. pp. 30–32).

A third party subsequently informed 5Star of Peek's pending Motion. 5Star quickly retained new counsel. A hearing was scheduled for August 28, 2018. Because no entry of default had yet been entered in the case, 5Star's new counsel submitted a Memorandum in Opposition to the Motion for Entry of Default on August 17, 2018. *See* Mem. in Opposition (R. pp. 85–133). Peek filed a reply memorandum on August 27, 2018. *See* Reply (R. pp. 134–142). Peek also purported to serve an untimely supporting affidavit at 4:30 p.m. on August 27, 2018. *See* Affidavit (R. pp. 143–49).

The next morning, August 28, 2018, the Honorable G. Thomas Cooper conducted a hearing on Peek's Motion. *See* Transcript, Aug. 28, 2018 (R. pp. 331–57). Peek did not introduce any evidence at the hearing. In an Order entered on September 13, 2018, the trial court entered default, granted a default judgment, and ordered 5Star to "respond promptly and fully to [Peek's] discovery requests."[5] *See* Order, Sept. 13, 2018 (R. pp. 6–14) (the "September Order").

5Star timely filed a motion asking the trial court (1) to reconsider, vacate, or amend the September Order pursuant to Rule 59, SCRCP, (2) to set aside the entry of default pursuant to Rule 55, SCRCP, and (3) to grant relief from default judgment pursuant to Rule 60, SCRCP. *See* Motion, Sept. 24, 2018 (R. pp. 150–52). The trial court, without a hearing, denied the motion by an Order dated October 29, 2018. *See* Order, Oct. 29, 2018 (R. pp. 15–17) (the "October Order").

5Star timely appealed the September and October Orders. The Court of Appeals subsequently requested memoranda addressing the Orders' appealability, and, after receiving and considering the parties' memoranda, agreed it would consider and rule on the propriety of both the September and October Orders. *See* Clerk's letter, Feb. 1, 2019 (R. pp. 383–84).

[5] Peek had not filed a motion to compel discovery.

STANDARD OF REVIEW

The "decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 9–10, 615 S.E.2d 112, 114 (2005). Likewise, "[a] trial court judge's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

"An abuse of discretion arises where the judgment is controlled by an error of law or is based on factual conclusions that are without evidentiary support." *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 916 (Ct. App. 2009); *see also, e.g., Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) ("An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law."). "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

ARGUMENT

I. The trial court erred by entering default and awarding default judgment when there was no claim to which a responsive pleading was required.

The trial court erred and abused its discretion by entering default and awarding a default judgment when there was no viable claim to which a response was required, and the trial court compounded its error by refusing to set aside the entry of default or to grant 5Star relief from the default judgment.

A. Peek's allegations, which do not assert any cause of action or plead the requisite elements of a cause of action, are not a counterclaim.

The law is clear that regardless of how an Answer or portion thereof is labeled or captioned, it is the *substance* of the allegations that determine its nature and whether a response is required. *See, e.g.*, Rule 8(c), SCRCP ("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."); *see also Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183, 188 (1956) ("The substance of the pleadings and not their labels should govern our action.").

The *substance* of Peek's allegations—rather than their label—reveal Peek has not asserted a claim to which a response is required. Although Peek denominated a section of its Answer as a "counterclaim," neither in that section nor anywhere else in its Answer did Peek assert a single cause of action. The trial court purported to discern causes of action for breach of contract and defamation, *see* September Order at 6 (R. p. 11), but that is error when the Answer failed even to recite, much less plead the existence of, the requisite elements of those claims.

Peek's Answer fails to plead a claim of breach of contract. "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*, 594 S.E.2d 610, 614 (Va. 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.").[6] "However, one who seeks to recover damages for breach of a contract must demonstrate that he

[6] As discussed in Section VI, *infra*, the contract at issue was governed by Virginia law, *see* Compl. at Ex. A (Contract § 18) (R. p. 39), and the trial court also erred by failing to consider Virginia law as required by the contract.

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).

Peek's Answer 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." *See* Compl. at Ex. A (Contract § 9) (R. p. 38). 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.* at Contract § 8 (R. pp. 37–38). Further, to the extent any purported breach was based on the transfer of agents outside of Peek's commission hierarchy, the contract gives 5Star the power to transfer agents at its own discretion. *Id.* at Contract § 6 (R. p. 37) (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.

Peek's Answer likewise fails to plead a claim of defamation. "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*, 612 S.E.2d 203, 206 (Va. 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 failed to allege facts sufficient to establish the elements of defamation. Peek does not allege the contents of any defamatory statement or when/where/how such statement was made. Peek also fails to allege facts sufficient to show the falsity of any such statement as the terms of the contract incorporated into the Answer by reference at Paragraph 3 expressly gives 5Star the power to require Peek to repay commissions and therefore if 5Star deems Peek to owe commissions such a determination is conclusively established and cannot be false. Peek also fails to allege any fault by 5Star in making any statement and does not allege any actual malice. Finally, Peek fails to allege with particularly any special harm expressly caused by any publication.

The Trial Court erred by entering the September Order without finding that that Peek, as required, stated a *prima facie* claim, and because Peek's purported counterclaim does not state a *prima facie* claim. Accordingly, the September Order was an abuse of discretion as default judgment cannot be entered when there is not a *prima facie* claim.[7]

[7] As explained in Section I.D, *infra*, this Court has previously held that when a pleading fails to state a cause of action, the entry of default and award of default judgment are impermissible, reversible errors. *See Masters v. Rodgers Dev. Group, S.C.*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984); *Mut. Sav. & Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980); *see also* Alex Sanders and John S. Nichols, *Trial Handbook for S.C. Lawyers* § 4.18 (Sept. 2018 update).

B. At most, Peek's allegations constitute an affirmative defense to which no responsive pleading is required.

Had the trial court examined the Answer at issue, it would have found that the purported counterclaim was actually an affirmative defense. Peek admitted in its Answer that it entered the contract with 5 Star. *See* Answer ¶ 3 (R. p. 51). It blamed its failure to repay the unearned commissions on breaches of contract by 5Star or the prior breaches of contract and/or tortious conduct by third parties. *See, e.g., id.* at ¶¶ 9–68 (R. pp. 51–61). Peek alleges it breached the contract because 5Star approached it to repay the unearned commissions after the intervening conduct caused its "remaining commission stream [to be] inadequate to repay the alleged debit balance in a timely manner." *Id.* ¶ 60 (R. p. 59). These allegations constitute an affirmative defense.

"An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff's case have been established." *O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983). Here, Peek does not dispute that it is bound by the contract between the parties. Rather, it claims it should be excused from its breach because 5Star or third parties caused it to be unable to repay the unearned commissions. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App. 1993) (finding allegation of a defect in response to a claim for payment to be "clearly an affirmative defense under Rule 8(c), SCRCP."); *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. Dyncorp*, 24 Va. Cir. 538 (1989) (prior breach is an affirmative defense under Virginia law).

The Court should have treated the "counterclaim" as an affirmative defense—an assertion to which no responsive pleading is required. *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."). Instead, it relied on the heading on the Answer to find that the Answer included a counterclaim. Therefore, the Court erred by finding the Answer asserted a counterclaim and entering default.

C. The trial court failed to find that the purported counterclaim provided fair notice and complied with clear pleading standards.

"All pleadings shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRCP. "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). Likewise, Rule 10(b), SCRCP, requires each claim to be "stated in a separate cause of action. . . ." Rule 10(b) requires a clear presentation and to comply a claimant should have "separate sections for each of his claims and, under each section, list all the facts supporting that claim." Requirement of Separate Paragraphs, 5A FED. PRAC. & PROC. CIV. § 1322 (4th ed.) (as stated in *Dang v. Solar Turbines, Inc.*, 2007 WL 4536632, *7 (S.D. Cal. 2007)). Thus, to the extent the Answer included a counterclaim, which 5Star disputes, the Trial Court erred by entering default without considering if the Answer provided fair notice of the counterclaim(s) to 5Star and clearly presented each claim in a separate cause of action.

The inherent ambiguity and insufficiency of Peek's pleading is shown by comparing the "counterclaim" with Peek's prior complaint against its former business partners. A full 56 of the 60 paragraphs of Peek's "counterclaim" are copied nearly verbatim from the fact section of the prior complaint. *Compare* Answer at ¶¶ 9–64 (R. pp. 51–60) *with* Peek's Complaint in *Peek Performance, Inc., et al. v. Jeff Wright, at al.* at ¶¶ 2–59 (R. pp. 21–30). But unlike that prior complaint, Peek's "counterclaim" abruptly stops without reciting the elements of any cause of action and does not include headings identifying any cause of action.[8]

Not only are precise causes of action not readily apparent from Peek's Answer, but the number of counterclaims is likewise ambiguous. Peek's Answer and subsequent pleadings alternate between the plural "counterclaims" and singular "counterclaim." Even Peek is confused (and non-committal) about what precise claims it asserted against 5Star. Peek's principal, Clay Peek, belatedly submitted an inadmissible affidavit, ostensibly in support of Peek's motion for entry of default judgment.[9] In this affidavit Mr. Peek stated that Peek had "[c]ounterclaimed for breach of contract, defamation, *and other claims*." *See* Peek Aff. ¶ 16 (R. p. 145). If Peek itself cannot definitively identify its claims then, as a matter of law, the Trial Court could not have found the purported "counterclaim(s)" gave 5Star fair notice.

Because the number and type of purported counterclaims was not clear from the face of the Answer the Answer does not provide fair notice of any such claims to 5Star. Therefore, it was an abuse of discretion for the Trial Court to enter default.

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[8] This stands in contrast to Peek's prior complaint against its business partners. *See* note 4, *supra*.

[9] Allegations outside the Answer cannot sustain a facially deficient cause of action. Further, this affidavit was filed 19 hours before the motion hearing and is untimely under the South Carolina Rules of Civil Procedure. *See* Rule 6(d), SCRCP (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. In addition, the affidavit is full of inadmissible hearsay and argument rather than factual assertions.

D. Because Peek failed to assert a claim to which a responsive pleading was required, the trial court's refusal to set aside the entry of default and the default judgment are reversible error.

As explained above, Peek failed to assert any claim to which a responsive pleading was required. Accordingly, it was impossible for 5Star to default, and the trial court erred and abused its discretion by ruling otherwise. The trial court's refusal to correct its error by setting aside the entry of default pursuant to Rule 55(c), SCRCP, or by providing relief from the default judgment pursuant to Rule 60(b), SCRCP, may—and should—be reviewed and corrected on appeal.[10] *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 and noting that "[a]n objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default") (citation omitted); *Mut. Sav. & Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980) ("[I]f 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.");[11] *see also* Alex Sanders and John S. Nichols, *Trial Handbook for S.C. Lawyers* § 4.18 (Sept. 2018 update) ("In addition to motions based on excusable neglect, etc., numerous other grounds exist for avoiding or vacating a default

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[10] A trial court's ruling on a motion under Rule 55(c)—although not itself immediately appealable—may be reviewed and corrected on appeal along with another appealable order such as a trial court's ruling on a motion under Rule 60(b). *See, e.g., Melton v. Olenik*, 379 S.C. 45, 56–57, 664 S.E.2d 487, 493 (Ct. App. 2008) (noting the appellant "appeals the circuit court's order denying her motion to set aside entry of default and denying relief from default judgment," and ultimately "remanding for further proceedings on the motion to set aside the entry of default").

[11] Although *Masters* and *McKenzie* were decided prior to the adoption of the Rules of Civil Procedure, they have subsequently been cited with approval by this Court in an unpublished ruling to support the validity of the proposition that, despite an entry of default, a party may raise issues regarding the sufficiency of the pleading to which they did not respond. Because memorandum opinions and unpublished orders should not be cited as precedential authorities, *see* Rule 268(d)(2), SCACR, 5Star mentions this more recent case without citation merely to note the ongoing validity of the principle recognized in *Masters* and *McKenzie*.

judgment. Most of them involve a lack of authority to enter the judgment due to some procedural defect. The following list contains examples of the major grounds: . . . default judgment may be avoided or set aside on the ground that the complaint fails to state a cause of action. [] A defaulting party does not waive this objection by suffering the entry of default. [] A corollary rule provides a default judgment granting relief beyond the well-pleaded allegations of the complaint is without authority and must be set aside.") (citations omitted).[12]

II. The trial court erred by awarding default judgment without first entering a default.

Even if Peek's Answer had asserted a viable counterclaim to which a response was required (which it did not), the trial court nevertheless erred by awarding a default judgment without first granting an entry of default. Entry of default and an award of default judgment are two different steps in the default process. *See, e.g., Rodriguez v. Gutierrez*, 391 S.C. 323, 327, 705 S.E.2d 94, 97 (Ct. App. 2011) (detailing motion for entry of default followed by hearing on damages and entry of default judgment); *see also, e.g., Jefferson v. Briner, Inc.*, 461 F. Supp. 2d 430, 433 (E.D. Va. 2006) (discussing the "two-step process" under the analogous Federal Rule 55, and noting the "entry of the order of default does not automatically entitle a party to a default judgment" unless and until the court takes certain subsequent actions).[13] "The entry of default is an official

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[12] Other jurisdictions agree. *See, 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); *Weft, Inc. v. G.C. Inv. Assocs.*, 630 F. Supp. 1138, 1141 (E.D.N.C. 1986), *aff'd sub nom. Weft, Inc. v. Georgaide*, 822 F.2d 56 (4th Cir. 1987) ("The court is bound, then, to consider whether plaintiff's allegations are sufficient to state a claim for relief.").

[13] The distinction between the two procedural steps is apparent from the language and structure of Rule 55 itself. *Compare* Rule 55(a) (titled "Entry" and noting the entry of default may be performed by *the clerk* without judicial involvement) *with* Rule 55(b) (titled "Judgment" and noting a judgment of default shall be entered by *a judge* after performing certain steps); *see also*

recognition of the failure to appear or otherwise respond, but is not a judgment by default." *Beckham v. Durant*, 300 S.C. 329, 331, 387 S.E.2d 701, 703 (Ct. App. 1989).

To obtain a default judgment, Peek should have first moved for Entry of Default and then (after the clerk entered the default) moved for default judgment. Peek short-circuited this process by moving for an "Entry of Default *Judgment,*" *see* Motion (R. pp. 66–69) (emphasis added), without first requesting or obtaining an entry of default. The trial court mistakenly believed that entry of default is the same as default judgment. *See* Transcript 25:11–13 (R. p. 355) (The Court: "Well, I think they're one in the same. And I think you can take an entry of default and make it a default judgment."). This procedurally impropriety—awarding default judgment without first entering default—is no mere harmless error; it deprived 5Star of an opportunity to move the Court for relief from entry of default—an easier standard than relief from default judgment. *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), and . . . an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment.").

Furthermore, granting a default judgment without first entering default means the trial court failed to conduct the factual and policy analysis required prior to an entry of default, and deprived 5Star of the chance to challenge that analysis. While the "[e]ntry of default is a ministerial act," *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004), "[t]he clerk's function is not perfunctory. Before entering a default, the clerk must examine the affidavits filed and find that they meet the requirements of Rule 55(a)." Entry of Default Under

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Rules 55(c) and 60(b) (setting out different standards for the setting aside of an entry of default and the setting aside of a judgment by default).

Rule 55(a), 10A FED. PRAC. & PROC. CIV. § 2682 (4th ed.). The Court may enter default. If presented with an application for entry of default, the Court should "exercise its discretion" and can "refuse to enter a default." *Id.*; *see, e.g.*, *Brown v. Weschler*, 135 F. Supp. 622, 624 (D.D.C. 1955) (declining to enter default when the court would then use its discretion to set aside the default on a subsequent motion). "This approach is in line with the general policy that whenever there is doubt whether a default should be entered, the court ought to allow the case to be tried on the merits." *Id.*; *Mictronics, Inc. v. S.C. Dept. of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) ("Public policy favors the disposition of cases on their merits rather than on technicalities."); *see also, 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."); *Swink v. City of Pagedale*, 810 F.2d 791, 792 n. 2 (8th Cir. 1987) ("There is a strong public policy, supported by concepts of fundamental fairness, in favor of trial on the merits . . . particularly when monetary damages sought are substantial.").

In sum, the trial court's award of default judgment without first ordering an entry of default was erroneous, contrary to the Rules and precedent, omitted requisite analysis, and deprived 5Star of the opportunity to show good cause to set aside the entry of default.

III. The trial court erred by awarding a default judgment without first holding a hearing or otherwise analyzing what, if any, relief was warranted.

Even if there was a viable counterclaim to which a responsive pleading was required (which there was not), and even if the trial court had first entered a default as required by the Rules (which it did not), the trial court still committed a reversible error by awarding a default judgment without first holding a hearing to determine what, if any, damages or other relief should be awarded.

The Court of Appeals has repeatedly instructed that "a court is unable to enter judgment until damages are determined." *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987); *Beckham v. Durant*, 300 S.C. 329, 331, n. 2, 387 S.E.2d 701, 703, n. 2 (Ct.App.1989) ("Judgment by default is not properly entered until damages are determined."); *see also, e.g., Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 92–93, 757 S.E.2d 557, 560 (Ct. App. 2014) (citing, with approval, *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)); *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 593 n.2, 615 S.E.2d 437, 439 (2005).

The September Order ignored the Court of Appeals' guidance to focus instead on the confusing procedural history in *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 604, 681 S.E.2d 885, 886 (2009). The *Sundown* procedural history mistakenly states that "[t]he trial court granted a default judgment against Petitioner, and following a damages hearing, the master-in-equity awarded damages to Respondents." *Id.* Elsewhere in the *Sundown* order, however, the Supreme Court clarifies that only an entry of default and *not* a default judgment was granted before the damages hearing. *Id.* at 383 S.C. 601, 606, 681 S.E.2d 885, 887 ("On July 18, 2002, the trial court . . . held that Petitioner was not entitled to set aside the entry of default with regard to the September 4, 2001 service date. The case was then referred to the master-in-equity for a hearing to assess damages. The master [then] entered *judgment* . . . .") (emphasis added)).

Peek's purported counterclaim seeks unliquidated damages. Therefore, Peek was required to prove damages before a default judgment could be properly issued. Peek never did so. The trial court erred by conflating entry of default with default judgment and granting default judgment

without completing the required damages hearing.[14] *H. W. Carriker Co. v. Johnson*, 277 S.C. 280, 283, 286 S.E.2d 140, 142 (1982) ("The demand being unliquidated and no verified account being served on the defendant with the summons and complaint, the trial judge erred in awarding default judgment based on the pleadings alone."); *see also* Alex Sanders and John S. Nichols, *Trial Handbook for S.C. Lawyers* § 4.10 (Sept. 2018 update) ("The entry of default is not the equivalent of a default judgment. . . . Default judgment does not occur until the assessment of damages, usually at a damages hearing.") (citations omitted).

IV. The trial court erred by applying the wrong legal standard to 5Star's motion to set aside the entry of default or to set aside the default judgment.

The Trial Court treated 5Star's Rule 55 motion for relief from entry of default and Rule 60 motion for relief from default judgment as if they were merely part and parcel of the Rule 59 motion for reconsideration. The three motions are separate, distinct, and governed by three unique standards. Accordingly, they should have been independently evaluated by the Court.

The October Order failed to consider the Rule 55 or 60 standards. Rather, the Trial Court stated that it "DENIE[D] Plaintiff's Motion pursuant to 59(e) SCRCP. . . ." *See* October Order at 2 (R. p. 2). It was a legal error and an abuse of discretion for the Trial Court to review the Rule 55 and Rule 60 Motions pursuant to the Rule 59 standard.[15] 5Star had not—and could not have—previously sought relief from entry of default or relief from default judgment because no entry of

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[14] The August hearing could not, as a matter of law, constitute a hearing on unliquidated damages because Peek did not give notice of the hearing via first class mail as required by Rule 55(b)(2), SCRCP.

[15] The October Order likewise errs because it: (1) fails to contain factual findings that would sustain a denial of the Rule 55/60 Motions and (2) deprived 5Star of a hearing on its Rule 55 and Rule 60 motions because of an inapplicable rule, namely "Rule 59(f)." *See* October Order at 2 (R. p. 16). Rule 59(f) allows the trial court to rule on a motion to alter/amend without a hearing but it does not allow a trial court to rule on a motion for relief from entry of default or motion for entry of default judgment without a hearing. *Compare with* Rule 40(h) (discussing motion hearings).

default had been made prior to the order and no judgment of default existed. Thus, the Trial Court could not have already appropriately considered all factors. *Cf., e.g., State v. Hinojos*, 393 S.C. 517, 525, 713 S.E.2d 351, 355 (Ct. App. 2011) (finding an abuse of discretion where trial court failed to consider all factors set out by the Court of Appeals).

A. If the trial court had applied the correct standard to 5Star's motion under Rule 55, it would have set aside the entry of default for good cause shown.

The trial court should have analyzed 5Star's motion under the liberally-construed and more easily-satisfied Rule 55 standard. *See* Alex Sanders and John S. Nichols, *Trial Handbook for S.C. Lawyers* § 4.9 (Sept. 2018 update) ("The lesser 'good cause' standard is to be applied even though the claiming party has moved for default judgment, where the defaulting party moves to set aside the entry of default prior to a required hearing on damages.") (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)); *see also Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 460 S.E.2d 427 (Ct. App. 1995) (noting that, at most, the plaintiffs only had an entry of default, not a default judgment; hence, the trial court should have applied Rule 55(c) and not Rule 60(b) in deciding the defendant's motion to set aside the entry of default, thus the order refusing to grant the defendant relief from default was controlled by an error of law and had to be vacated).

Had the trial court properly applied the correct standard, it should have set aside the entry of default. South Carolina policy "favor[s] the disposition of issues on their merits rather than on technicalities." *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). To that end, the Court may set aside an entry of default "for good cause." SCRCP 55(c). Rule 55(c) is to be "liberally construed to promote justice. . . ." *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (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.

5Star showed "good cause" to set aside the entry of default. For example, as noted above, Peek's purported counterclaim(s) fail to state prima facie causes of action and fail to assert any claim to which a responsive pleading is required. Further, as explained in the State of the Case and the Facts, *supra*, when Peek served its purported counterclaim via e-filing, 5Star was represented by Amanda Scott of the Alabama based law firm, Parnell & Parnell, P.A. *See* Scott Aff. ¶ 1 (R. p. 99). Ms. Scott, a Richland County resident whose practice focuses on collections,[16] was unfamiliar with the E-Filing system. *Id.* at ¶ 3 (R. p. 99). E-filing had only begun in her home county earlier that month. *Id.* Peek submitted its Answer and purported counterclaim unusually early, filing it a mere ten days after service of 5Star's complaint. *Id.* ¶ 5 (R. pp. 99–100). Ms. Scott did not expect to receive a filing in this action at that time and, in her unfamiliarity with the e-file process, mistakenly believed any counterclaim would have to be served traditionally via mail. *Id.* She did not see the electronic notice of the filing. *Id.* at ¶ 6 (R. p. 100).

Ms. Scott is not alone in her misunderstanding of electronic service. Peek's counsel, for example, did not understand that service by e-filing entitles the recipient to additional response time. *Compare* Peek's Mot. ¶ 4 (R. p. 66) (asserting "Plaintiff is in default on the Counterclaims" because "more than thirty days passed after March 29, 2018, without a Reply") *with* Guideline 4(e)(4), South Carolina Electronic Policies and Guidelines (granting five additional days to

[16] 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.

respond after electronic service). Thus, Peek's own motion demonstrated the understandable confusion surrounding electronic service.

Novel issues in electronic service and confusion are contemplated in the South Carolina Electronic Policies and Guidelines. Guideline 11(e) states that the guidelines "shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of *on the merits*." (Emphasis added.) 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 required by the E-Filing Guidelines. By failing to evaluate 5Star's motion to set aside the entry of default and the default judgment under the proper standard, the trial court overlooked the foregoing arguments, which demonstrate good cause for which the trial court should have set aside the entry of default and foreclosed the possibility of a default judgment.

B. If the trial court had applied the correct standard to 5Star's motion under Rule 60, it would have set aside the default judgment.

As an initial matter, if the trial court had followed the proper procedural steps, it would never have reached the stage of awarding default judgment or considering a motion to set aside such a judgment. Having reached that stage, however, the trial court compounded its errors by failing to apply the correct standard to evaluate 5Star's motion for relief from the default judgment. "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). But 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 trial court should have considered: (1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001). Each of these elements is considered in turn below

First, as to the existence of one of the enumerated bases of Rule 60(b) to set aside the default judgment, 5Star submits that under the facts of this case and controlling precedent, 5Star's lack of response to the "counterclaim" was excusable neglect. As discussed above, Peek's purported counterclaims appear on their face to be affirmative defenses or mere background information. The supposed counterclaim lacks headings to delineate any cause of action and does not contain a discrete set of factual allegations for each claim as required by Rule 10(b), SCRCP. The purported "counterclaim" is a nearly verbatim copy of the "FACT" section of Peek's complaint in its lawsuit against its former business partners. In that lawsuit, however, Peek recites 27 additional paragraphs to identify and support specific causes of action. Thus, when read both individually and in concert with the companion 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.

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 held 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 other lawsuit. But, unlike the other 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 other lawsuit's fact section as additional background for the trial court or to allege an affirmative defense. The format of the "counterclaim"—with no headings or delineation—differs significantly from the typical complaint (and Peek's own complaint in the other action) and counterclaim.

Even if the foregoing does not constitute excusable neglect (and 5Star asserts it does), 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 10 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. *See* Scott Aff. ¶ 5 (R. pp. 99–100). Ms. Scott did not expect to receive a responsive pleading at that time and believed any counterclaim had to be served traditionally via mail. *Id.* 5Star thus did not enter a reply before May 3, 2018. *Id.* at ¶ 6 (R. p. 100). Shortly thereafter, on May 10, 2018, Peek filed the Motion for Entry of Default, which alerted Ms. Scott to the purported counterclaim. She filed an answer on May 17, 2018.[17] *Id.* at ¶ 8 (R. p. 100).

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

[17] Ms. Scott did not, however, alert 5Star of the alleged default.

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.").

Having established the existence of a basis under Rule 60(b) for relief from the default judgment, the remaining analytical factors are easily satisfied. For example, as to the promptness with which relief is sought and the reasons for any failure to act promptly, 5Star acted promptly. Upon discovering the motion for entry of default judgment it quickly retained new counsel and submitted an opposition to the motion for entry of default judgment. At the time, there had been no entry of default or default judgment.

As to the question of whether the party seeking to set aside the default judgment has a meritorious defense, 5Star has such a defense. To establish that he has a meritorious defense, a party 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 any *prima facie* claims.

As to the question of whether the other would be prejudiced by setting aside the default judgment, Peek has not alleged—nor did it sustain—any prejudice. The September 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 recently removed the actions to the business court for further discovery. There is no prejudice due to the week delay in filing a Reply to the purported "counterclaim." The litigation will doubtless continue despite any entry or setting aside of default (or default judgment). First, significant discovery is needed to establish the amount of damages for Peek's purported counterclaims as Peek contends that it is unable to calculate its damages. Second, Peek has repeatedly emphasized that it needs extensive discovery from 5Star to use in the consolidated lawsuit against its former business partners. Peek claims that 5Star is the only potential source of these materials. Third, 5Star will continue to pursue its original claim to recover the unearned commissions.

Thus, in light of the totality of the circumstances, entry of default is detrimental judicial economy. Entry of default 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. The entry of default broke this litigation into two duplicative paths—litigation on the merits and establishment of damages. Each path will involve evidentiary motions, briefing, arguments, and hearings and the Trial Court will need to supervise extensive discovery including document requests, interrogatories, and depositions.

Had the Court granted 5Star's motion for relief from entry of default, however, the parties would have simply remained at status quo ante and proceeded 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. The trial court failed to consider these reasons and abused its discretion by declining to grant 5Star relief from default judgment.

C. Even the trial court's analysis under Rule 59 was erroneous.

As noted above, the trial court erred by evaluating 5Star's motions for relief under Rules 55 and 60 using the standard that should apply to a motion under Rule 59(e). But even assuming a Rule 59(e) analysis was warranted, the trial court's analysis was infected by an error of law. The October Order relies exclusively on *Mauro v. Clabaugh*, 299 S.C. 184, 191, 383 S.E.2d 244, 248 (Ct. App. 1989). The Trial Court found that under *Mauro*'s interpretation of Rule 7(a), SCRCP, the *label* attached to a purported counterclaim, rather than its *content*, determines whether it is a claim to which a responsive pleading is required. This is wrong and *Mauro* misstates the applicable law.

Mauro relies on Moore's Federal Practice for the proposition that labeling an allegation a "counterclaim" is sufficient to make it one. *Id.* (citing 2A J. Moore and J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 7.03 ("A reply is mandatory only to a counterclaim, including a set-off, denominated as such . . . ."). But *Mauro* misapprehends the excerpt and fails to read the remainder of the applicable chapter. This citation does ***not*** require a responsive pleading simply because a party denominates a portion of its Answer as a counterclaim. Rather, *Federal Practice* simply states that a counterclaim heading is a *necessary* condition to require responsive pleading—not a *sufficient* condition. *See* 2 MOORE'S FEDERAL PRACTICE—CIVIL § 7.02 (2019) ("The difficulty of distinguishing between a counterclaim and certain affirmative defenses necessitated the provision requiring denomination of counterclaims. If a counterclaim is not denominated as such, no reply is required. . . . If an affirmative defense is mistakenly designated as a counterclaim, no reply is required because the answer does not technically contain a counterclaim."). Wright and Miller are in accord. *See* Answer to a Counterclaim, 5 FED. PRAC. & PROC. CIV. § 1184 (3d ed.) ("If a party labels a matter that actually constitutes a defense as a counterclaim, an answer to a counterclaim is technically improper because there is no counterclaim. . . ."). Accordingly, the trial court erred

by concluding that a caption, heading, or label alone is sufficient to transform mere factual allegations into a viable counterclaim.

The trial court's interpretation is further in error because it would render Rule 8(c) of the South Carolina mere surplusage. *See In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir. 2013) ("Principles of statutory construction require a court to construe all parts to have meaning and, accordingly, avoid constructions that would reduce some terms to mere surplussage."). As stated above, the South Carolina Rules of Civil Procedure require a court to treat an affirmative defense mistakenly designated as a counterclaim as what it is—an affirmative defense. *See* Rule 8(c), SCRCP ("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."); *see also, e.g., Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183, 188 (1956) ("The substance of the pleadings and not their labels should govern our action."). Because the trial court's October Order is controlled by an error of law it constitutes an abuse of discretion and must be reversed.

V. The trial court erred by compelling discovery responses when such relief had not been requested, when the issue had not been briefed, and the court had no basis to make an informed decision about any supposed discovery disputes.

"It is well settled that ordinarily a party may not receive relief not contemplated in his or her pleadings." *Heins v. Heins*, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct.App.2001); *see also, e.g.*, Rule 7(b)(1), SCRCP ("An application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought."). "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).

Peek did not file a motion to compel discovery responses.[18] This issue has previously come before the Court of Appeals. In *Wilson v. Walker*, 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." 340 S.C. 531, 537 n.2, 532 S.E.2d 19, 22 n.2 (Ct. App. 2000). The Court stated the "discovery issues were not properly before" the trial court and an order compelling discovery "treads perilously close to violating fundamental notions of due process." *Id.*; *see also, e.g.*, *Bass v. Bass*, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) ("Due process requires that a litigant be placed on notice of the issues which the court is to consider.").

Furthermore, the discovery relief granted in the September Order was an abuse of discretion because it was unsupported by record evidence. Peek did not submit copies of its discovery requests, evidence that it served the requests, evidence that 5Star received the requests, or any indication that it consulted with 5Star regarding the purportedly overdue requests.[19] Nevertheless, the Trial Court broadly ordered 5Star to "respond promptly and fully to [Peek's] discovery requests." *See* September Order at 8 (R. p. 13). Without record evidence to show service and failure to respond, the Trial Court ought not to have ordered this relief.[20] *See Gardner v. Litton*

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[18] Not until Peek filed its Reply Memorandum in support of its Motion for Entry of Default Judgment was the issue of discovery 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*, 340 S.C. at 537, 532 S.E.2d at 22 (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).

[19] 5Star's prior counsel states that she has no record of receiving any discovery requests.

[20] The sole information available to support, *inter alia*, the trial court's findings as to discovery and prejudice was the untimely and inadmissible affidavit of Clay Peek. *See, e.g.*, Peek Aff. ¶¶ 21–23, 29–30, and 37 (R. pp. 146–47). This affidavit was filed the evening 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

Loan Servicing LP, No. CV 9:12-1766-SB-BHH, 2013 WL 12138711, at *1 (D.S.C. Oct. 22, 2013) ("As a motion to compel discovery, however, her motion is ineffective. Namely, there is no evidence that the plaintiff actually served discovery requests on the defendants.").

The lack of record evidence again raises significant due process concerns. For 5Star to comply with its obligations—or for the trial court to enforce any noncompliance—the September Order (or, at minimum, the express motion upon which a discovery order should be based) must specify the outstanding requests. Otherwise, Peek has a blank check with which it may threaten continued judicial involvement and 5Star is deprived of any meaningful opportunity to ensure compliance. These fears have already come true. Peek filed a motion for sanctions and a finding of contempt of court against 5Star on October 31, 2018 for alleged violations of the September Order. Peek filed this motion a mere two days after the Trial Court entered its final ruling on this matter. This motion sought, *inter alia*, to strike 5Star's Complaint. Indeed, Peek has redoubled its efforts after the filing of the instant appeal in express disregard of the automatic appellate stay.[21] If the September Order is not reversed, Peek will continue to weaponize the trial court's vague and unsupported discovery order in furtherance of its concerted efforts to obtain windfall monetary relief, avoid obligations to repay the unearned commissions, and evade an actual trial on the merits.

In sum, despite the fact that Peek never moved to compel discovery responses, and despite the fact that the parties did not brief, argue, or otherwise provide the trial court with a sufficient

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to file it. Further, the affidavit is filled with inadmissible hearsay and argument rather than factual assertions. To the extent the trial court relied on the affidavit to establish facts necessary to support the September Order, it erred and abused its discretion. *See, e.g., Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980) (affidavit that is "conclusory in nature and based almost entirely on hearsay" "should have been excluded from the trial court's consideration").

[21] When 5Star advised the trial court of this appeal, for example, Peek's counsel assured the court—incorrectly, as it turned out—that the Court of Appeals would dismiss this appeal and repeatedly asked the Trial Court to proceed with Peek's motion for discovery sanctions.

basis to conduct an informed analysis of any discovery disputes, the September Order ordered "full" and "prompt" responses to the unknown discovery requests. Because the September Order exceeded the scope of the pending motion and was unsupported by any record evidence, it is an abuse of discretion and should be reversed.

VI. Both the September and October Orders must be reversed because they fail to consider or apply Virginia law.

Pursuant to the parties' contract, which was incorporated into Peek's Answer at paragraph 3, this dispute "shall be governed by and construed in accordance with the laws of the state of Virginia." *See* Compl. at Ex. A § 18 (R. p. 39). The September and October Orders, however, fail to apply—or even 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)).

CONCLUSION

For the foregoing reasons, Appellant 5Star respectfully requests this Court reverse the trial court's Order for Entry of Default and Default Judgment, including its conclusory statement in the decretal paragraph ordering 5Star to respond to Peek's discovery requests. Appellant 5Star further requests this Court reverse the trial court's Order denying 5Star's motions for reconsideration, to set aside the entry of default, and for relief from default judgment.

[*SIGNATURE PAGE ATTACHED*]

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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

Appellate Case No. 2018-002114
Case No. 18-CP-23-01639

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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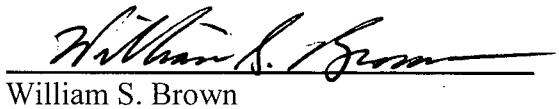
By: 

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