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 REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant 5Star Life Insurance Co.'s ("5Star") primary brief explains the trial court's prejudicial and reversible errors, including but not limited to its entry of default (despite the absence of any viable claim), its refusal to set aside the entry of default (though good cause to do so had been shown), its improper and premature award of a default judgment (before damages had even been evaluated, much less determined), and its improper discovery ruling (for which no proper motion, briefing, or argument had been presented).

Respondent Peek Performance Inc.'s ("Peek") brief in response not only fails to rebut 5Star's arguments—it also misapprehends and affirmatively confuses the issues, procedural history, and arguments before this Court. As to the issues before the Court, for example, Peek challenges the appealability of the orders 5Star has appealed by recycling arguments already made to and rejected by this Court. As to the procedural history, Peek repeatedly (and incorrectly) refers to 5Star's Motion for Relief from Entry of Default and Motion to Set Aside Default Judgment as a "motion for reconsideration." As to the merits of the issues, Peek's arguments, like the trial court's rulings, principally rely on an inadmissible, untimely, and inaccurate affidavit, and on a reply memorandum (filed hours before a hearing), which Peek claims *really* was a motion. Peek also misdirects the Court to unpled "facts" and allegations regarding third parties in a fruitless effort to salvage its facially deficient "claims."

Reversal of the trial court's rulings is both correct and expedient. If the challenged Orders stand, they will handicap 5Star and other parties in the continued litigation, create the potential for inconsistent judgments, and hamstring 5Star in defending against the unliquidated and open-ended "damages" to which Peek now claims to be entitled—damages that, according to Peek, could exceed one million dollars. In contrast, if this Court reverses the appealed rulings, 5Star will simply

be given the chance to fairly litigate the merits of its claims and Peek's defenses without causing any prejudice to Peek's ability to defend against those claims and otherwise seek any relief to which it may be entitled. For these reasons, as well as those set forth below and in 5Star's primary brief, 5Star respectfully requests this Court reverse the trial court's orders and remand to allow this action to proceed below on the merits.

CLARIFICATION OF THE FACTS AND ISSUES[1]

In May 2017, nearly a year prior to the filing of the suit giving rise to this appeal, Peek sued its former business partners—Jeff Wright, Joe Caldwell, Nathan Wells, Jeff Magg, and Consolidated Assurance, LLC. *See* Complaint, *Peek Performance, Inc. and D. Clayton Peek v. Jeff Wright et al.*, C.A. No. 2017-CP-23-03269 (R. pp. 20–33). The parties in that suit are insurance salesmen and their agencies, and Peek claimed its former partners had usurped its position in the commission hierarchy. Notably, Peek did not sue 5Star.

At the time it filed the lawsuit against its partners (and at present), Peek owed 5Star over $100,000. Peek repeatedly promised to make 5Star whole, but failed to make good on this promise. Accordingly, in March 2018, 5Star initiated the instant debt collection lawsuit. Complaint (R. pp. 34–50). Peek electronically filed an Answer that included a purported "counterclaim" that did not denominate any causes of action. Answer (R. pp. 51-61). 5Star filed a reply two weeks late. Reply (R. pp. 62–65).

Peek filed a Motion for Entry of Default Judgment on May 10, 2018. *See* Motion (R. pp. 66–69). Six days later, Peek moved to consolidate 5Star's debt collection action with its own

[1] Much of Peek's Statement of the Issues and Statement of the Facts is mistaken or misapprehends the prior history, the parties' conduct, and what is actually before the Court. Rather than responding to each of these assertions *seriatim*, 5Star clarifies the most significant of them in this section and refers the Court to the issues and facts presented in 5Star's primary brief.

lawsuit against its former partners. *See* Mot. to Consolidate (R. pp. 77–80). As Peek admits, *see* Resp.'s Brief at 4, 5Star's then-counsel did not respond to Peek's motion to consolidate, attend the hearing on the motion, or even notify 5Star of the hearing or motion. Judge Verdin granted Peek's motion and consolidated the actions.

Several weeks later, a third party advised 5Star that Peek had filed a motion for default. 5Star's then-counsel had never informed 5Star of the motion, alleged counterclaims, or purported default. At the time 5Star learned of the motion, there had been no entry of default. 5Star quickly replaced its counsel and filed an opposition to Peek's motion for entry of default on August 17, 2018.[2] *See* Mem. in Opposition (R. pp. 85–133).

At the close of business on August 27, 2018—fewer than 24 hours before the hearing on the motion for entry of default—Peek filed an affidavit to support its motion. The trial court should not have considered this untimely affidavit, *see* Rule 6(d), SCRCP, which was also riddled with hearsay and inaccuracies.[3] Peek's Response brief relies heavily on the self-serving assertions in this untimely and improper affidavit—assertions that were not properly before the trial court and are not admissible record evidence. Along with its untimely affidavit, Peek also filed a supporting

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[2] Peek's brief wrongly represents that 5Star moved for relief from default in this opposition memorandum. *See* Resp.'s Brief at 5. 5Star did not—and could not—do so because there had not yet been an entry of default or default judgment.

[3] Many accusations in the affidavit were grossly misleading. For example, 5Star accommodated Peek for over two years, waiting patiently for the return of the unearned commissions, requesting in-person meetings to discuss resolution (brusquely rebuffed by Peek's counsel), and seeking minimally intrusive ways for Peek to repay it. In return for this indulgence, Peek's affidavit had the temerity to claim 5Star did not "negotiate in good faith" or offer adequate repayment options.

Further, Peek misunderstood (and in its Response Brief still misunderstands) the date on which 5Star's reply to its purported counterclaims would have been due. *See* Guideline 4(e)(4), S.C. E-Filing Guidelines (explaining parties have five additional days to respond following electronic service). While not dispositive in the instant appeal, this error illustrates the confusion regarding e-filing, particularly of counterclaims.

memorandum that (according to Peek) was *really* a motion. *See* Resp.'s Brief at 25–26. This single sentence in a memorandum, which is now asserted to be a "motion," sought to compel 5Star to respond "promptly and fully to [Peek's] discovery requests," a new issue for the trial court's consideration.[4] Like the affidavit, this "motion" was untimely under Rule 6(d), SCRCP, and the trial court erred by considering (and granting) the relief requested in the reply turned motion.

The trial court issued an order on September 13, 2018 (the "September Order") granting entry of default, default judgment, and compelling 5Star, generally, to respond to discovery. *See* Order (R. pp. 6–14). 5Star subsequently moved the court for relief from entry of default pursuant to Rule 55, relief from default judgment pursuant to Rule 60, and reconsideration of its order pursuant to Rule 59. *See* Motion and Mem. in Support (R. pp. 150–52 and 153–73). Peek, in its Response Brief, however, misapprehends (as it has done for the entirety of this case) the nature of 5Star's motion, cannily and repeatedly describes it merely as one for "reconsideration." *See, e.g.*, Resp.'s Brief at 10, 20. While reconsideration was one aspect of the motion, such limited phrasing omits two distinct bases—5Star's Rule 55 motion for relief from entry of default and Rule 60 motion for relief from default judgment—upon which relief was warranted. The trial court issued

[4] Peek did not include copies of the discovery requests as part of the record evidence submitted to the trial court, and 5Star's prior counsel had no record of receiving discovery requests from Peek. 5Star's new counsel, upon learning of the purported requests through Peek's reply memorandum, reached out to Peek's counsel to request copies of the requests Peek claimed to have previously served. Peek emailed the putative first set of requests and then served a second set of discovery requests on 5Star. 5Star served its responses to both sets of discovery requests on October 29, 2018, the same day the trial court issued its final order on the matter.

These discovery responses were—as to Peek's second set of requests for production—served fifteen days *early*. Nevertheless, Peek quickly filed a motion for sanctions on October 31, 2018. *See* Mot. for Sanctions (R. pp. 199–205). This motion came before the Honorable J. Derham Cole on February 22, 2019, at which time Peek conceded 5Star had responded to discovery and withdrew its motion.

an order (the "October Order") denying 5Star's motion on October 29, 2018. *See* Order (R. pp. 15–17). 5Star thereafter timely filed this appeal of the Court's September and October Orders.

ARGUMENT

I. This appeal is properly before this Court for consideration and resolution.

This Court has already requested, received, and considered memoranda regarding the appealability of the issues before the Court and—most importantly—*has resolved that question and concluded the appeal should proceed. See* Correspondence to Counsel (S.C. Ct. App., Feb. 1, 2019) (stating in part that, "Upon consideration of the parties' appealability memoranda, the appeal will be allowed to proceed"). Peek nevertheless devotes nearly 20 percent of its Response Brief to rehashing its arguments on this topic yet again. In the interest of economy, 5Star will not repeat its prior arguments and the authorities explaining why the appealed issues are properly before this Court, but instead merely relies on and incorporates them by reference. *See* 5Star's Memorandum Re: the Appealability of the Orders Challenged on Appeal (filed December 17, 2018).

Two of Peek's arguments, however, warrant a brief reply. First, despite the fact that Peek expressly requested a *judgment*,[5] the trial court expressly entered default *judgment*,[6] and 5Star expressly moved for relief from *judgment* pursuant to Rule 60, SCRCP,[7] Peek now argues the trial court's rulings were not *really* a judgment and a refusal to grant relief from the same. *See* Resp.'s Brief at 10. According to Peek, the trial court's order purporting to enter a default judgment couldn't have been a legitimate judgment because damages had not yet been determined. *See id.* Ironically,

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[5] *See, e.g.*, Tr. 11:17, 22:14–18 (R. pp. 341 and 352); Peek's Motion for Entry of Default *Judgment* (R. pp. 66–69).

[6] *See* September Order at 1, 8 (R. pp. 6 and 13).

[7] *See* 5Star's Motion (R. pp. 150–52).

in an effort to attack the appealability of the order,[8] Peek effectively concedes on the merits of one of the issue being appealed, namely that the trial court's entry of judgment prior to a determination of damages is improper and impermissible. *See generally* App.'s Brief at 14–18 (explaining the trial court's September Order entering judgment was premature, improper, and reversible because it was made prior to a determination of damages).

Second, Peek argues that because other claims remain before the trial court in the consolidated lawsuits, this appeal cannot or should not proceed. *See* Resp.'s Brief at 12. The fact that other claims remain pending below, however, has no bearing on this Court's ability and obligation to consider an appealable issue and any other issues permissively joined with it. The Rules expressly consider and permit the appeal of fewer than all of the claims and issues in a case. *See, e.g.*, Rules 205 and 241(a), SCACR. Further, to the extent the claims remaining below overlap with the claims and issues on appeal, the solution is to stay the proceedings below (a solution 5Star has previously proposed to the trial court, to which Peek has adamantly objected, *see* E-mail from Jim Carpenter to trial court (Dec. 13, 2018) (R. pp. 380–82), not to deny 5Star its right to an appeal. In sum, the issues being appealed are properly before this Court, and Peek's recycled arguments to the contrary should be rejected—again.

II. Peek's Answer did not assert any claim to which a response was required.

Peek's purported counterclaim does not satisfy the pleading requirements necessary to assert an offensive claim. The "counterclaim" does not provide adequate or fair notice of any claims, lacks separately stated causes of action, and does not include a jurisdictional allegation.

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[8] Peek's effort to attack the appealability of that order is fruitless. 5Star refers the Court to its prior memorandum setting out the black-letter law allowing the immediate appeal from an entry of default judgment, even (and perhaps *especially*) when the judgment was impermissible. *See* 5Star's Memorandum Re: the Appealability of the Orders Challenged on Appeal (filed December 17, 2018).

A. Peek's Answer did not provide 5Star fair notice of any causes of action.

To state a valid counterclaim, an Answer must provide the receiving party with fair notice of the cause of action asserted, as that party (in this case, 5Star) is entitled to know what claims the counterclaimant is pursuing and the bases for each claim. "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *S.C. Nat'l Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986); *Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are."); *see also*, *e.g.*, Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties."); Rule 8(a), SCRCP (requiring counterclaim include "a short and plain statement of the grounds" in addition to a "short and plain statement of the facts"). Treatises agree: "a complaint should never haphazardly intermingle allegations based on different theories so as to make it difficult for the defendant to answer the complaint." 61A AM. JUR. 2d Pleading § 189.

Rather than identify particular causes of action, as it did in its complaint against its former business partners, Peek's "counterclaim" simply duplicates the fact section of its prior complaint.[9] *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. 20–30). Accordingly, many of the rambling allegations are unrelated to 5Star. *See, e.g.*, Answer ¶ 42 (R. p. 27) ("Together, Defendant [Peek] and Consolidated recruited agents from many states and became very successful, earning commissions,

[9] In contrast, the Complaint from which the factual allegations are borrowed goes on to identify six causes of action asserted against various of the defendants in that suit: (1) breach of contract against Jeff Wright, (2) breach of contract against Consolidated Assurance, LLC, (3) breach of contract accompanied by fraudulent act, (4) tortious interference with contractual relations, (5) tortious interference with contractual relations, and (6) quantum meruit/unjust enrichment. *See* Complaint in *Peek Performance, Inc., et al. v. Jeff Wright, at al.* at ¶¶ 60–87 (R. pp. 30–32).

bonuses, and prizes such as trips to Scottsdale, Arizona, Miami, FL, and Colorado Springs, Colorado, etc."). Those that apparently relate to 5Star are so jumbled among Peek's allegations against its former partners that it is difficult to decipher what Peek is asserting 5Star did wrong. *See, e.g.*, Answer ¶ 35 (R. pp. 26–27) ("Wright [Peek's former partner] promised Defendant that the agents recruited under this program would belong to Defendant [Peek] unless transferred/released by written consent of the Defendant [Peek]."); *id.* ¶ 49 (R. p. 28) ("Consolidated [Peek's former partner] could and did cause its agents or producers to be transferred away from the Defendant [Peek] so that these agents could sell directly under Consolidated and Wright [Peek's former partner] without paying Defendant [Peek] their 5% commission.").

Peek's briefing accentuates its failure to comply with the fair notice requirements. Peek finally limits itself to two counterclaims: breach of contract and defamation. Previously, Peek has stated that its purported counterclaim include a limitless number of other causes of action. *See* Peek Aff. ¶ 16 (R. p. 145) ("On March 29, 2018, [Peek] Answered and Counterclaimed for breach of contract, defamation, *and other claims*."). Such an open-ended pleading cannot give rise to a counterclaim as it failed to provide 5Star fair notice. *See* 61A AM. JUR. 2d Pleading § 189 ("[A] complaint should never haphazardly intermingle allegations based on different theories so as to make it difficult for the defendant to answer the complaint."); *see also, e.g., Atl. Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 717 (4th Cir. 1983) (stating a properly pled complaint provides an opponent "illumination as to the substantive theory under which [claimant is] proceeding, which is the function of pleadings. . . ."). In the absence of such fair notice, Peek's Answer asserted no claim to which a responsive pleading was required.

B. Peek's Answer failed to separately state any causes of action.

Peek's Answer also did not comply with the minimal pleading requirements. The Rules require "each cause of action . . . shall be stated in a separate cause of action . . . ." Rule 10(b),

SCRCP. This requirement is critical because it is "difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking." *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U.S. 384, 392 (1949); *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) ("Even though the requirements for pleading a proper complaint are substantially aimed at assuring that the defendant be given adequate notice of the nature of a claim being made against him, they also provide criteria for defining issues for trial."). Here, Peek failed to separately state its causes of action, instead lumping all of its accusations into a monolithic 60-paragraph block labeled a "counterclaim."[10] *See* Answer (R. pp. 51–61). When a pleading fails to satisfy the Rules' requirements, it fails to assert a claim on which an opposing party may default. *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) ("In addition to motions based on excusable neglect, etc., numerous other grounds exist for avoiding or vacating a default 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 . . . . [D]efault 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."). The trial court erred by ruling otherwise, and the entry of default and default judgment should be reversed.

C. Peek's Answer failed to make the required jurisdictional statement.

Peek's Response Brief glosses over another key failing in its purported counterclaim. Peek acknowledges a counterclaim must include "a short and plain statement of the grounds including

[10] Use of the singular "counterclaim" rather than the plural "counterclaims" despite asserting what Peek now claims to be two counterclaims (and previously alleged to be three or more counterclaims) further demonstrates the unjustly amorphous nature of Peek's pleading.

facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it." *See* Resp.'s Brief at 13 (quoting Rule 8(a), SCRCP). Peek acknowledges its "counterclaim" lacked such a jurisdictional statement, but argues it need not comply with this requirement because the "circuit court already possessed jurisdiction by virtue of 5Star's claim." *Id.*

Peek's analysis, however, is incorrect. A trial court is not automatically vested with jurisdiction over all potential counterclaims. Rather, a pleading asserting a permissive counterclaim must, as Rule 8(a) requires, include a statement of jurisdiction.

> With respect to counterclaims . . . a jurisdictional foundation is a prerequisite to the court having the authority to hear the claims, and the fact that the court already has jurisdiction over previously asserted related claims does not obviate the need for the new claims to indicate their basis for jurisdiction. Subsequent claims that are merely permissive—such as permissive counterclaims under Rule 13(b) . . . will require an independent basis for jurisdiction and, thus, parties asserting such claims should state the grounds for jurisdiction under Rule 8(a)(1).

Pleading Jurisdiction—Pleadings Beyond the Initial Complaint, 5 FED. PRAC. & PROC. CIV. § 1207 (3d ed.).[11]

Peek's "counterclaims" are ambiguous and, until its Response Brief, Peek had steadfastly avoided limiting itself to any specific causes of action. Nevertheless, its Response Brief finally identifies its claims as "breach of contract" and "defamation." *See* Resp.'s Brief at 3, 13–14. Both causes of action would be merely permissive counterclaims, not compulsory, and thus independently required Peek to assert a jurisdictional statement to assert a valid claim.

[11] When interpreting and applying the South Carolina procedural rules, South Carolina courts will look to the analogous federal rule and authorities interpreting it. *See, e.g., Heins v. Heins*, 344 S.C. 146, 153, 543 S.E.2d 224, 227 (Ct. App. 2001); *Chewning v. Ford Motor Co.*, 346 S.C. 28, 35, 550 S.E.2d 584, 588 (Ct. App. 2001), *aff'd*, 354 S.C. 72, 579 S.E.2d 605 (2003).

Peek's putative defamation claim is a permissive counterclaim because it does not affect the enforceability of the contract on which 5Star filed suit. *See, e.g.*, *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 296, 778 S.E.2d 106, 109 (2015) (identifying a debtor's civil conspiracy claim in a foreclosure proceeding as a permissive counterclaim "because the allegations, if true, would not render the guarantees unenforceable."); *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270–71, 449 S.E.2d 580, 582–83 (Ct. App. 1994), *aff'd in part, vacated on other grounds*, 320 S.C. 532, 466 S.E.2d 367 (1996) (finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note).[12]

A counterclaim is not compulsory if "at the time the action was commenced the claim was the subject of another pending action . . . ." Rule 13(a), SCRCP. Peek's purported counterclaim for breach of contract is also the subject of its companion lawsuit against its former business partners. *See, e.g.*, Resp.'s Brief at 12 (stating the claims in the companion lawsuit "overlap extensively with the facts of the Counterclaim.").[13] Accordingly, the purported breach of contract "counterclaim" against 5Star was permissive, not compulsory, and required a jurisdictional statement.

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[12] An unpublished 2015 Court of Appeals opinion found counterclaims premised on the publication of false information about a debtor, including defamation, to be "permissive, rather than compulsory, because they do not affect the enforceability of the note secured by the mortgage, which is the 'transaction or occurrence' that is the subject of Bank's foreclosure complaint." Because unpublished opinions lack precedential authority, *see* Rule 268(d)(2), SCACR, 5Star mentions this ruling without citation merely to illustrate the applicability and continued vitality of the rule set out in the cases cited above.

[13] The factual allegations in the "counterclaim" and in Peek's earlier-filed lawsuit are essentially identical. *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). When Peek chose to sue its former partners in 2017 for claims arising from the same set of facts, Peek chose not to sue 5Star, presumably because Peek realized there was no basis upon which to state a claim against 5Star and because and because the facts did not involve any actions or wrongdoing by 5Star. The facts were insufficient to state a claim against 5Star then, and the facts are insufficient to state a counterclaim against 5Star now.

Because Peek did not include a jurisdictional statement in its purported counterclaim(s), it did not comply with the prerequisites to state a cause of action and 5Star was not required to submit a reply. Accordingly, 5Star could not be in default.

III. Even assuming Peek's Answer included a counterclaim, the allegations in it did not constitute valid causes of action.

Peek did not plead the necessary elements to assert claims for breach of contract or defamation. There can be no default where there is no claim. Thus, the trial court erred by entering of default and default judgment. Peek's Response Brief not only fails to rebut this argument, it further demonstrates the deficiency of its purported counterclaim.

A. Peek's Answer did not make a *prima facie* claim for breach of contract.

In an attempt to paper over the fatal deficiencies of its purported counterclaim, Peek's Response Brief relies extensively on allegations relating not to 5Star but rather to the conduct of Peek's former business partners. For example, Peek identifies "one of the most important [contractual] terms" in its so-called counterclaim as a promise from Peek's former business partner, Jeff Wright, to Peek. *See* Resp.'s Brief at 15. As Peek acknowledges, however, "Wright was an independent contractor [of 5Star], not an employee." *Id.* n. 1. The purported counterclaim does not allege the conduct of Wright or other parties is attributable to 5Star—nor was it. Instead, Peek merely asserts that "5Star was aware of this contractual promise," *see* Resp.'s Brief at 15, but fails to allege how "awareness" of a "contractual promise" between other independent actors could give rise to a claim for breach of a separate contract between Peek and 5Star.

Peek's framing of the purported breach of contract "counterclaim" in its Response Brief is revealing. Indeed, Peek's "claim" relies merely on bald accusations that 5Star (1) entered an agency contract with Peek on May 2, 2013, (2) supposedly breached the contract by "transferr[ing] agents outside of [Peek's] hierarchy, and (3) thereby causing damages. *See* Resp.'s Brief at 14, 17

(citing Answer ¶¶ 17 and 66–67 (R. pp. 53 and 61)). Peek, however, fails to cite to a provision in the contract prohibiting 5Star from transferring agents outside of Peek's hierarchy, nor is there any such provision.[14] Rather, as 5Star explained in its primary brief, the contract at issue authorized 5Star to transfer agents at its own discretion. *See* Contract § 6 (R. p. 37) (granting 5Star the power "at any time to terminate or amend any Schedule of Commission").[15]

If, as here, the attachments to a pleading reveal the filing party is not entitled to relief, the claims in that pleading should be dismissed. *See Metal Serv. Corp. v. Indus. Elec. Co.*, 253 S.C. 507, 508-09, 171 S.E.2d 703, 704 (1970) (dismissing plaintiffs complaint where an attachment to the complaint showed that notice was a requirement to filing suit, and there were no allegations in the complaint that plaintiff gave notice); *Lee v. Kelley*, 89 S.C. 155, 156, 378 S.E.2d 616, 616 (Ct. App. 1989) (holding the facts shown in the attachment to the complaint prevailed over the contrary allegations in the complaint stating that the contract was between the plaintiffs and the defendant); *see also Cannon v. Wells Fargo Bank, Nat. Ass'n*, 509 F. App'x 251, 252 (4th Cir. 2013) ("Because the terms of the Deed of Trust directly contradict Cannon's arguments, we conclude that her claims lack merit."); *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991) ("Indeed, in the event of conflict between the bare allegations of the complaint and any exhibit attached pursuant to Rule 10(c), Fed. R. Civ. P., the exhibit prevails.").

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[14] The contract was attached to 5Star's Complaint and its terms were incorporated into Peek's Answer, *see* Contract (R. pp. 37–50) and Answer ¶ 3 (R. p. 51), and thus is record evidence upon which the trial court and this Court may rely when analyzing whether the purported counterclaim asserts a *prima facie* cause of action to which a responsive pleading was required. Rule 10(c), SCRCP.

[15] Peek conceded this argument by failing to respond to it in its Response Brief.

Peek therefore failed to state a *prima facie* case for breach of contract because the terms of the contract, which were incorporated into its pleading, directly contradict its conclusory allegations. In the absence of a viable claim, there can be no default. The trial court erred by ruling otherwise.

B. Peek's Answer did not make a *prima facie* claim for defamation.

Peek's "counterclaim" for defamation meets a similar demise. As clarified in Peek's Response Brief, the supposed claim for defamation rests on but a single paragraph in Peek's Answer, namely Paragraph 64. *See* Resp.'s Brief at 18.[16] Peek's single-paragraph "cause of action" for defamation, however, is deficient for at least two reasons. First, it is not "stated in a separate cause of action" as required by Rule 10(b), SCRCP. Second—and most fatally—as explained in 5Star's primary brief (*see* App.'s Brief at 8–9), Peek's defamation "claim" does not allege several of the necessary elements of the claim, such as when, where, or how the allegedly defamatory statement was made or what special damages or harm resulted from the alleged statement. *See, e.g.*, *McNeil v. S.C. Dept. of Corr.*, 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013) (holding that, in the absence of specific allegations of when, where, and how the allegedly defamatory statements were made, a complaint fails to allege a *prima facie* claim); *Costas v. Florence Printing Co.*, 237 S.C. 655, 663, 118 S.E.2d 696, 700 (1961) (holding a complaint that failed to plead special damages arising from alleged defamation failed to state a cause of action and should have been dismissed). Peek failed to contest this argument in its Response Brief and should be deemed to have conceded to 5Star's argument.[17]

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[16] Peek's Brief quotes this paragraph but mistakenly cites it as "Counterclaim, par. 54–64."

[17] Even if Peek had attempted to contest this assertion, it would not have succeeded. Reporting a debt does not constitute libel *per se* because a debt does not involve "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous." *Castine v. Castine*, 403 S.C. 259, 268, 743 S.E.2d 93, 97–98 (Ct. App. 2013). This is particularly true when, as here, the debt was valid. As explained in 5Star's

IV. Peek effectively concedes the trial court failed properly to consider 5Star's motions for relief from entry of default and relief from default judgment.

Peek fails substantively to grapple with many of 5Star's arguments that the trial court erred by awarding a default judgment without first entering default, without first determining damages, and by analyzing 5Star's motions pursuant to Rules 55 and 60 under the wrong standard. *See generally* App.'s Brief at 14–27. Accordingly, 5Star's uncontested arguments merit reversal of the September and October Orders. *See, e.g., Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008); *First Union Nat'l Bank v. FCVS Comm's*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *rev'd on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997). To the extent Peek's brief might be generously construed to address the issues, 5Star replies briefly below.

A. The trial court erred by simultaneously entering default and default judgment.

The trial court erred because it failed to enter default before entering default judgment, instead electing to enter default and default judgment concurrently. These errors were material because, after entry of default, 5Star was entitled to move for relief from entry of default pursuant to Rule 55, SCRCP, which imposes less stringent requirements than a Rule 60 motion for relief from default judgment. Specifically, a defaulting party may, after entry of default but before entry of default judgment, seek relief due to good cause. By entering both default and default judgment

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primary brief, the terms of the contract between Peek and 5Star, which Peek incorporated into the purported counterclaim, expressly gave 5Star the power to unilaterally and conclusively establish if Peek owed it commissions. *See* Contract §§ 8–9 (R. pp. 37–38). Accordingly, to plead a *prima facie* claim for defamation, Peek must have alleged "common law malice and special damages." *Myers v. Dollar Gen. Corp.*, 738 F. App'x 773, 775 (4th Cir. 2018). The special damages must have been stated with specificity. Rule 9(g), SCRCP. Peek's "counterclaim" failed to allege malice and special damages at all (much less with specificity), and thus failed to state a claim for defamation.

at the same time, the trial court did not afford 5Star an opportunity to pursue relief from entry of default under the more lenient standard.

B. The trial court erred by evaluating 5Star's motions for relief from entry of default and for relief from default judgment under the wrong standard.

The trial court erred by evaluating the Rule 55 and 60 motions under the wrong standard of review. *See* App.'s Brief at 18–25. The October Order focuses on the standard for reconsideration under Rule 59 and fails to consider the Rule 55 or 60 motions or to analyze any of the relevant factors under Rules 55 and 60. *See, e.g.*, October Order (R. pp. 15–17) (stating only that the court was "unable to discover" anything it had "overlooked or disregarded."). 5Star's Rule 55 and 60 motions for relief from entry of default and relief from default judgment were subject to independent evaluation and should not have been lumped by the trial court into 5Star's companion motion for reconsideration pursuant to Rule 59. Peek's Response Brief does not contend otherwise. Accordingly, the trial court erred by analyzing the Rule 55 and 60 motions (assuming it analyzed them at all) as motions for reconsideration and ruling upon them based upon the Rule 59 standard.

V. 5Star has good cause entitling it to relief from entry of default under Rule 55.

If the trial court had considered 5Star's Rule 55 motion, it would have found 5Star to have good cause entitling it to relief from entry of default, namely that Peek's purported counterclaim(s) failed to assert a claim to which a responsive pleading is required, failed to assert *prima facie* causes of action, and the novel issues created by the rollout of electronic filing and service. *See generally* App.'s Brief at 19–21.[18]

Peek's Response Brief underscores yet another element of 5Star's good cause. As Peek acknowledges, the errors of counsel are traditionally imputed to its client *except* when counsel's

[18] Peek misapprehends 5Star's arguments and mistakenly characterizes 5Star as arguing only counsel's "surprise" and "failure to observe" the electronic filing. *See* Resp.'s Brief at 19.

conduct rises to the level of withdrawal or willful abandonment. *See, e.g., Graham v. Town of Loris*, 272 S.C. 442, 452–53, 248 S.E.2d 594, 599 (1978) (holding defendant was entitled to relief from judgment due to its counsel's withdrawal or willful abandonment because "[c]onscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client."); 47 AM. JUR. 2d Judgments § 664 (recognizing "exception to the general rule that neglect by an attorney is attributable to the client where an attorney, after making a general court appearance, totally abandons the client and disappears," including "constructive disappearance").

Peek's Response Brief demonstrates that 5Star's prior counsel constructively withdrew and/or willfully abandoned 5Star. For example, as Peek admits, 5Star's prior counsel: (1) failed to file a timely Reply, (2) failed to respond to Peek's Motion to Consolidate, (3) failed to attend the hearing on Peek's Motion to Consolidate, (4) failed (according to Peek, as there is no record evidence of such communications) to respond to Peek's communications regarding discovery requests, and (5) failed (again, according to Peek, as there is no record evidence of any discovery requests) to respond to interrogatories and requests for production. *See* Resp.'s Brief at 20. 5Star's former counsel failed to even *notify* 5Star of the purported counterclaim, the motion for entry of default judgment, or the alleged discovery requests. As Peek points out, this was not isolated, unexplained inaction, but rather was a protracted abandonment. Accordingly, even Peek admits (albeit inadvertently) there was good cause for 5Star to be relieved from the entry of default.

VI. 5Star established the elements required for relief from default judgment pursuant to Rule 60.

To obtain relief from default judgment pursuant to Rule 60, SCRCP, a defaulting party must show mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. When considering such a motion, the

trial court must 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. *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001). As explained in 5Star's primary brief, 5Star established the requisite elements and was entitled to relief from default judgment pursuant to Rule 60, SCRCP.

Peek again effectively concedes, through its silence, nearly all of 5Star's arguments. The only opposition Peek raises to 5Star's position is to claim that Peek "has suffered prejudice by 5Star's conduct." *See* Resp.'s Brief at 22–24. Peek's argument, however, fails to grapple with the relevant issue, which is not whether 5Star was allegedly harmed by Peek in the past but, rather, whether Peek would be prejudiced *by the granting of 5Star's motion for relief from default judgment. See Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009) (stating that when determining whether to grant relief from default under Rule 60(b), "the factors to consider are . . . the degree of prejudice to the opposing party *if relief is granted*") (citations omitted; emphasis added). Peek, however, focuses on pre-suit conduct and discovery disputes in which it was supposedly inconvenienced (*i.e.*, "prejudiced"). *See* Resp.'s Brief at 22–24. Such conduct, however, is not relevant to evaluate the prejudice in relieving a party from default judgment.

Once the question of prejudice is properly addressed, it is clear that Peek would suffer no prejudice from the setting aside of the default judgment. Related litigation between Peek and 5Star is already pending, and this suit has been consolidated with another one involving claims arising from precisely the same facts. Litigating Peek's "counterclaims" in the consolidated suits would be no additional burden, particularly when—as Peek concedes—discovery below "has barely begun." *See* Resp.'s Brief at 10. Nor would there be any prejudicial surprise to Peek if it had to

litigate the merits of claims it has long known 5Star disputed.[19] *See Williams*, 384 S.C. at 327, 681 S.E.2d at 918 (noting the prejudice the non-moving party would suffer as a result of setting aside the default judgment was not great in light of the fact that he "was on notice of [the defaulting party's] denial of the allegations and was therefore on notice to gather evidence against [that party]").

In contrast, if the September and October Orders are not set aside, they will directly prejudice 5Star and the defendants in other lawsuit.[20] Peek claims that it is entitled to "millions" in damages from 5Star for the purported counterclaims. 5Star has meritorious defenses, good cause for its conduct, and was abandoned by its prior counsel. Nevertheless, 5Star will be unable to contest the judgment because of a two-week delay in filing a reply to a jumbled mess of factual allegations largely concerning third parties and lacking clear delineation. These factors all weigh in favor of relief from the default judgment, especially in light of the fact that "'the law favors the resolution of disputes based upon all parties having their day in court.'" *Id.* (citation omitted) (reversing a trial court's denial of a Rule 60(b) motion for relief from default judgment).

VII. The trial court's Rule 59(e) analysis was incorrect.

As explained in 5Star's initial brief, the trial court erred both by treating 5Star's motions under Rules 55 and 60 as if they were motions to reconsider pursuant to Rule 59(e) *and* by

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[19] As noted in the Statement of the Case and Facts in 5Star's primary brief and in the Clarification of the Facts in the instant Reply, 5Star's then-counsel filed a Reply to the supposed counterclaims two weeks after a responsive pleading was due (assuming *arguendo* that a Reply was required).

[20] Peek's former business partners, the defendants in the companion lawsuit, also face significant prejudice if the entry of default and default judgment are not set aside in this suit. The two actions, according to Peek, have "significant factual overlap." There is a risk that a subsequent factfinder may be swayed or misled by the default judgment into assuming liability by the defendants in the other lawsuit. Likewise, there is a substantial risk that the cases may see inconsistent results. The risk of such prejudice illustrates why Rule 54(b), SCRCP, prohibits the entry of a final judgment as to fewer than all claims or parties "without an express determination that there is no just reason for delay." The trial court did not make such a finding, therefore the September and October Orders, as a matter of law, should not terminate the action as to any of the claims.

mishandling the Rule 59(e) analysis itself. *See* App.'s Brief at 25–27. Peek's brief does not address or attempt to rebut this argument, and thus tacitly concedes 5Star is correct that the error warrants reversal. *See First Union Nat'l Bank*, 321 S.C. at 502, 469 S.E.2d at 617 (holding respondent's failure to address an issue was a concession that appellant's argument was correct), *rev'd on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

VIII. The trial court's Orders were riddled with procedural and substantive errors.

Even assuming Peek asserted a counterclaim to which a response was required (it did not), and even assuming it was procedurally permissible to enter default and default judgment at the time and in the way the trial court did (it was not), the September and October Orders are nevertheless reversible because they contain yet other procedural and substantive errors. Peek fails to address (or misapprehends) most of these errors in its Response. To the extent Peek discusses them, however, Peek's arguments are rebutted below.

A. The trial court erred by granting Peek's defective and untimely discovery "motion."

In the September Order, the trial court ordered 5Star to "respond promptly and fully to [Peek's] discovery requests." (R. pp. 6–14.) As 5Star explained in its primary brief (*see* App's Brief at 27–30), this Order was an abuse of discretion that warrants reversal for two independent reasons: (1) Peek did not file a motion to compel, and (2) the order was unsupported by record evidence.

Rather than rebutting 5Star's arguments, Peek's Response further demonstrates the overreach permeating the September and October Orders. Peek contends the reply memorandum it filed with the trial court in support of Peek's motion for entry of default was *really* a motion to compel. Notably, however, because Peek's memorandum was filed at the close of business the day before the hearing, *see* Reply Mem. (Aug. 27, 2018) (R. pp. 134–42)), Peek's contention is

squarely foreclosed by the Rules of Civil Procedure, which require a motion to be served no later than 10 days before the time specified for a hearing. *See* Rule 6, SCRCP. Likewise, Rule 7, SCRCP requires an application to the court for an order to be in the form of a *motion*, not a memorandum. As Peek's reply memorandum failed to comply with either Rules 6 or 7, SCRCP, the trial court erred by gratuitously including language regarding discovery in the September Order and failing to reverse the order following 5Star's motion for reconsideration.[21]

B. The trial court's discovery ruling was not supported by findings of fact.

Peek's Response Brief does not dispute, and thus effectively concedes, 5Star's argument (*see* App.'s Brief at 28–29) that the September Order does not contain the necessary findings of fact to support its discovery ruling, which should thus be reversed.

C. The trial court erred by failing to apply Virginia law.

The contract at issue—the Distributor Agreement—included a Virginia choice of law provision. *See* Contract (R. pp. 37–50). In yet another example of the inattentive attitude with which the trial court and Peek approached the appealed orders, neither considers Virginia law. *See generally* App.'s Brief at 30.

CONCLUSION

For the foregoing reasons as well as those stated in 5Star's primary brief and to be asserted at oral argument, 5Star respectfully requests the Court reverse these trial court's challenged orders so the parties can resume fully litigating all disputes on the merits.

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[21] If this Court does not correct these errors, Peek is likely to weaponize the vague September Order. Indeed, Peek has already moved for sanctions and a finding of contempt against 5Star on that basis, *see* Mot. for Sanctions (R. pp. 199–205), only to withdraw the motion at the hearing when it conceded that 5Star had, in fact, already responded to discovery. If this past conduct is any guide, Peek seems likely to seek further aggressive relief under the September Order for any perceived deficiency in 5Star's responses.

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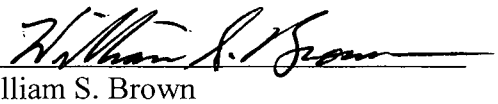
By: 

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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 Reply Brief of Appellant complies with Rule 211(b), SCACR.

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