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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-10-05463

RECEIVED

SEP 19 2019

SC Court of Appeals

The Boathouse at Breach Inlet, LLC, by and through its member,
Laurence O. Stoney, Jr. Respondent,

v.

Richard S.W. Stoney, individually and as member-manager of
The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC

and

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr. and Gregory G.
Holmes, Third-Party Intervenors,

of whom

Richard S. W. Stoney is Appellant.

MOTION TO DISMISS APPEAL AND REQUEST FOR EXPEDITED RULING

Defendant Richard S. W. Stoney ("Richard Stoney") has prematurely filed a Notice of Appeal from orders stemming from the trial court's preliminary rulings in this derivative action. On its face, the underlying order makes clear that these are preliminary rulings only and that the trial court is not making any findings of fact. In issuing these orders, the trial court did not make any certification of finality pursuant to Rule 54(b), SCRCP.

The orders on appeal simply find that this action should proceed to a trial on the merits, following which all aggrieved parties would have a right to appeal. Plaintiff the Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr. (“the Boathouse”) moves to dismiss the appeal because the orders are not presently appealable. The Boathouse asks that this motion be granted promptly such that this action can proceed to the date certain trial scheduled on October 14, 2019. The Boathouse further moves for sanctions pursuant to Rule 269, SCACR, as it appears that this appeal was filed solely for the reason of delay and to avoid scheduled pre-trial discovery.

BACKGROUND

The Boathouse filed this action on October 9, 2015.¹ Because of Richard Stoney’s delay tactics, this action remains untried. On December 5, 2016, Chief Business Court Judge, Roger Young, Sr., assigned this case to Circuit Court Judge Clifton Newman, who has since had exclusive jurisdiction over this case.

Richard Stoney’s notice of appeal is the latest chapter in his handbook on delay.² During this litigation, Richard Stoney has repeatedly frustrated the Boathouse’s efforts to advance this case. *See* Ex. 1. By way of illustration (and there are other examples that could have been included with respect to motion practice and discovery), the Boathouse served written discovery requests on the Defendants on April 7, 2017. When Defendants did not respond, the Boathouse filed a motion to

¹ The Public Index for this case is attached as Ex. 1.

² Richard Stoney and his brother, Intervenor Theodore Stoney, were previously chided by this Court for similar conduct in Richard Stoney’s other pending litigation, which was filed in April of 2009 and remains pending with no end in sight. There, this Court found that the Stoney brothers’ behavior prevented the trial court from conducting a successful trial on the merits, noting “[u]nfortunately, the record here simply does not provide the information necessary for this court to make its own findings *Regrettably, this is in large part due to [Mr. Stoney’s] antics and . . . the court’s repeated failure to address his contemptuous behavior.*” *Stoney v. Stoney*, 425 S.C. 47, 80 n. 19, 819 S.E.2d 201, 219 n. 19 (Ct. App. 2018) (emphasis added).

compel and attended a hearing on the matter at which the trial court ordered Defendants to produce answers by July of 2017. Finally, on September 28, 2018—*fourteen months after Defendants' court-ordered deadline*—Defendants served incomplete answers to the Boathouse's interrogatories.

On March 29, 2018, with the above-referenced discovery still outstanding, Defendants next moved to bifurcate this action into two separate bench trials with two entirely separate discovery phases. (Motion, attached as Ex. 2). The Boathouse cannot fathom a reason, other than delay, why Defendants could not have moved to bifurcate the action at the outset of the case, or, at the very least, sometime sooner than *thirty months into this action*. In any event, the trial court did not grant the Defendants' Motion to Bifurcate. The trial court instead granted the relief that the Boathouse requested in its *Memorandum in Opposition to Motion to Bifurcate*, wherein the Boathouse petitioned the Court to “set the standing issue for a hearing before year-end, and pursuant to Plaintiff's pending Motion for Scheduling Order, schedule a date certain bench trial on the merits in the first quarter of 2019.” (Memorandum, attached as Ex. 3).

The purpose of the preliminary hearing on standing was to permit the Court to evaluate whether there was sufficient evidence to support Laurence Stoney's position as the representative-plaintiff such that the case could proceed to trial. After a hearing on December 13-14, 2018, the trial court issued an order dated May 8, 2019, determining in essence that there was sufficient evidence for this case to proceed to trial on the merits. (Order, attached as Ex. 4). The trial court expressly declined to make any findings of fact and did not make any certification pursuant to Rule 54(b), SCRCF. (Ex. 4 at 3-8, 11).

The Defendants moved to reconsider, among other things, taking the position that the trial court had ruled on the merits of their standing argument. (Motion, attached as Ex. 5). At the hearing on the motion, the trial court made it clear that it had not made any final rulings. (Tr.

at 69:11-14 (“But, that’s a finding that I made. So—but factors may exist that may cause that to change. I don’t know. We didn’t hear the entire case.”); 74: 21-24 (“—well, if it were a final order th[e]n I would do a form four and the case is over without any determination of any of the major issues”); 75:4-18 (“I was careful to couch my terms in that way without reaching any findings on these issues, of course, sort of like when you have a bond hearing and someone is charged with murder and is trying to get out of jail. I say, I’m not sure whether you committed murder or not, but it – I’m not letting you out of jail because it appears you created an unreasonable risk of harm.”), excerpted at Ex. 6).

The trial court denied the motion in a short order dated August 29, 2019. (Order, attached as Ex. 7). Based on the positions taken in the motion for reconsideration, together with the protracted history in this case and the litigation history of Richard Stoney, the Boathouse took the proactive step of sending counsel for the Defendants a letter setting forth the position that the orders in question are preliminary orders and not immediately appealable. (Letter, Attached as Ex. 8).

In the meantime, the Boathouse filed a renewed motion for a scheduling order on July 30, 2019, seeking a date for a trial on the merits. (Motion, attached as Ex. 9). The Court responded on that date by setting this action for a date certain trial on October 14, 2019. (Email, attached as Ex. 10). The parties scheduled remaining depositions accordingly.

Richard Stoney faxed his notice of appeal to this Court on September 17, 2019, immediately prior to the scheduled deposition of Richard Stoney set for the next day and less than a month before this action is scheduled for a trial on the merits. (Notice of Deposition, attached as Ex. 11). The Boathouse believes this timing was intentional and designed to prevent

Richard Stoney's deposition and to prevent the trial court from proceeding due to the automatic stay imposed upon the filing of a notice of appeal pursuant to Rule 241, SCACR.

ARGUMENT

"The right of appeal arises from and is controlled by statutory law." *N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986). Appealability is generally governed by S.C. Code Ann. § 14-3-330. This Court has appellate jurisdiction to consider a "final judgment," an intermediate judgment "involving the merits," or an order "affecting a substantial right . . . when such order . . . (a) in effect determines the action and prevents a judgment from which an appeal might be taken . . . or (c) strikes out an answer or any part thereof or any pleading in an action." S.C. Code Ann. § 14-3-330. Interlocutory orders are otherwise not immediately appealable. *See, e.g., Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000); *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). None of these provisions is applicable here.

"An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). "The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously." *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004), *opinion on rehearing at* 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005).

An order “involves the merits,” as that term is used in S.C. Code Ann. § 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense. *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995); *Mid-State Distribs. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993); *Knowles v. Standard Sav. & Loan Ass’n*, 274 S.C. 58, 261 S.E.2d 49 (1979). An order is interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights. *Mid-State Distribs.*, 310 S.C. at 334-35, 426 S.E.2d at 780 (holding order denying motion to dismiss case based on lack of personal jurisdiction was not immediately appealable, as the litigant had “not arrived at the end of the road”); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002). As set forth above, the order and the trial court’s comments at the hearing on the motion to reconsider show that nothing has been finally determined in this matter. Nor do the orders affect a substantial right because “any error in the order can be corrected on appeal following the trial.” *Breland* at 93, 529 S.E.2d at 13.

Here, the orders and the trial court have made it clear that there has not been any determination on the merits. In essence, the orders are the functional equivalent of a denial of a motion for summary judgment. If the Defendants had prevailed, it would have effectively ended the case for lack of standing. However, the trial court, without ruling on the merits or making any final factual determinations, found there was sufficient evidence for the matter to proceed to trial. As such, there is nothing to appeal at this time. See *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (S.C. 1994) (“A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.”); *Olson*

v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) (explaining the denial of summary judgment is never appealable).

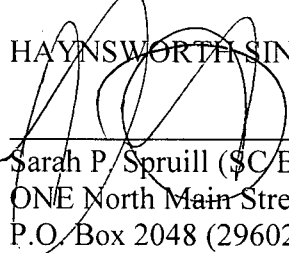
Any and all of these matters are subject to revision by the trial court after a full and fair trial on the merits. Any party may appeal that final order when it is issued.

CONCLUSION

For all of the above reasons, an appeal of these orders at this time would be premature. Richard Stoney is free to revisit these issues after a trial on the merits. Given the pending trial date and the pattern of delay, the Boathouse asks that this case be dismissed in an expedited fashion and that sanctions be imposed pursuant to Rule 269, SCACR.

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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ATTORNEYS FOR RESPONDENT

September 19, 2019

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September 19, 2019

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr. v. Richard S.W. Stoney, individually and as member-manager of The Boathouse at Breach Inlet, LLC, et al.; C.A. No.: 2015-CP-10-05463

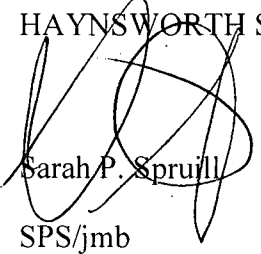
Dear Ms. Kitchings:

Our firm represents Respondent The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr., in the above-referenced matter. Enclosed herewith for filing is an original and seven (7) copies each of the Notice of Appearance of Sarah P. Spruill and Respondent's Motion to Dismiss Appeal, regarding the above-referenced case together with a Proof of Service. Also enclosed is our firm's check in the amount of \$50.00 to cover the cost of the filing fee. Please file the originals and return clocked copies to me via my courier.

Thank you for your assistance.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.


Sarah P. Spruill

SPS/jmb
Enclosures

RECEIVED
SEP 19 2019
SC Court of Appeals

cc: Capers G. Barr, III
George J. Kefalos
Scott Y. Barnes (via email only)
Stafford J. McQuillin III (via email only)
Tyler K. Gilliam (via email only)

EXHIBIT 1



Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

Charleston County Home Page Clerk of Court Home Page Magistrates Court SC Judicial Home Page Search Tips

Switch View

Boathouse at Breach Inlet LLC The , plaintiff, et al VS Richard S W Stoney , defendant, et al

Case Number:	2015CP1005463	Court Agency:	Common Pleas	Filed Date:	10/09/2015
Case Type:	Common Pleas	Case Sub Type:	Special-Comp/Oth 699	File Type:	Non-Jury
Status:	Pending/Newman	Assigned Judge:	Newman, Clifton		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Stoney, Richard S W	Notice of Appealing Order from Judge Newman, srv	Filing		09/18/2019-09:22		
Boathouse at Breach Inlet LLC The	Motion/Motion Filing Fee	Filing		07/30/2019-15:40		
McQuillin, Stafford John III	Pltff Motion/Scheduling Order & Crt/Srv	Motion		07/30/2019-13:38		
	Plaintiff's Response to Defendants' Reply, crt/srv	Filing		06/13/2019-11:52		
Stoney, Richard S W	Reply to Memo in Opposition to Motion/Reconsider, crt/srv	Filing		06/10/2019-14:05		
	Piff's Memo in Opposition to Mot/Alter or Amend Order, srv	Filing		06/05/2019-08:56		
Barr, Capers G. III	Defnt Motion/Amend Findings & Crt/Srv	Motion		06/04/2019-14:24		
Stoney, Richard S W	Motion/Motion Filing Fee	Filing		06/04/2019-11:27		
	Pltff's Memo in Opposition to Motion/Protective Order, srv	Filing		05/24/2019-08:39		
Stoney, Richard S W	Motion/Motion Filing Fee	Filing		05/22/2019-12:22		
Barr, Capers G. III	Defnt Motion/Protective Order & Crt/Srv	Motion		05/22/2019-09:26		
	Order on Laurence Stoney Standing to Maintain Action	Order		05/20/2019-10:03		
	Stipulation of Defendants & 3rd Party Intervenor	Filing		02/01/2019-08:54		
	Plaintiff's Memo in Support of Motion for Hearing, crt/srv	Filing		12/12/2018-08:58		
	Affidavit of Lori D. Stoney	Filing		12/12/2018-08:56		
	Stipulation, crt/srv	Filing		12/07/2018-09:01		
Boathouse at Breach Inlet LLC The	Motion/Motion Filing Fee	Filing		11/21/2018-16:15		
McQuillin, Stafford John III	Pltff Motion for Hearing & Crt/Srv	Motion		11/21/2018-12:12		
	Pltffs' Memo in Opposition to Motion to Bifurcate, crt/srv	Filing		11/08/2018-08:59		
Boathouse at Breach Inlet LLC The	Motion/Motion Filing Fee	Filing		10/29/2018-15:09		
McQuillin, Stafford John III	Pltff Motion/Compel & Crt/Srv	Motion		10/29/2018-10:55		
Barr, Capers G. III	Certificate Of Service	Filing		03/29/2018-11:48		
Barr, Capers G. III	Defnt & 3rd Party Intervenor Mot to Bifurcate & Memo	Motion		03/29/2018-11:47		
Stoney, Richard S W	Motion/Motion Filing Fee	Filing		03/29/2018-09:37		
Boathouse at Breach Inlet LLC The	Motion/Motion Filing Fee	Filing		03/28/2018-16:12		
McQuillin, Stafford John III	Plaintiff Motion for Entry of Amended Scheduling Order, srv	Motion		03/28/2018-11:15		
Stoney, Richard S W	Motion/Motion Filing Fee	Filing		08/08/2017-08:58		
Barr, Capers G. III	Defnts Motion to Compel Supp Discovery & cert/serv	Motion		08/07/2017-08:50		
	Answer of 3rd party Intervenor	Filing		07/24/2017-11:51		
Boathouse at Breach Inlet LLC The	Order/granting motion to intervene	Order		06/22/2017-11:44		
Boathouse at Breach Inlet LLC The	Order on Plntff's Mot to Compel Discovery Responses	Order		06/22/2017-11:35		
Barr, Capers G. III	Motion/Compel Discovery Responses & cert/serv	Motion		06/19/2017-15:03		
Stoney, Richard S W	Motion/Motion Filing Fee	Filing		06/19/2017-11:45		
Boathouse at Breach Inlet LLC The	Motion/Motion Filing Fee	Filing		06/12/2017-16:29		
McQuillin, Stafford John III	Motion/Compel by plaintiff, crt/srv	Motion		06/12/2017-11:25	06/22/2017-11:25	

	Applicant Intervenor's Memo in support of Mot/Intervene, srv	Filing		05/04/2017-14:23		
Stoney, Richard S W	Motion/Motion Filing Fee	Filing		05/04/2017-11:24		
Kefalos, George J.	Amended Motion to Intervene by Atty Kefalos, crt/srv	Motion		05/04/2017-09:22	06/22/2017-09:22	
Stoney, Richard S W	Certificate Of Service	Filing		04/13/2017-08:58		
Stoney, Richard S W	Answer of Richard Stoney & Cre Carolina to Amended Cmplnt	Filing		04/13/2017-08:57		
	Filing: Verified Amended Derivative Complaint, Crt/Srv	Filing		03/28/2017-10:53		
	Order/granting plntff's mot to amend cmplt	Order		03/21/2017-16:54		
McQuillin, Stafford John III	Roster/Notice of Case Roster Publication Sent	Action		02/01/2017-09:02		
Kefalos, George J.	Roster/Notice of Case Roster Publication Sent	Action		02/01/2017-09:02		
Barr, Capers G. III	Roster/Notice of Case Roster Publication Sent	Action		02/01/2017-09:02		
Boathouse at Breach Inlet LLC The	Memo in Opposition to Motion for Continance, crt/srv	Filing		01/26/2017-13:29		
Barr, Capers G. III	Motion/Continuance by Theodore Stoney, crt/srv	Motion		01/26/2017-13:27		
Kefalos, George J.	Motion/Motion Filing Fee	Filing		01/26/2017-11:31		
Boathouse at Breach Inlet LLC The	Memo in Support of Motion to Amend Complaint, crt/srv	Filing		01/25/2017-16:16		
	Plaintiffs Memo in Opposition to Motion to Intervene, srv	Filing		01/25/2017-16:03		
	Plaintiffs Memo in Opposition to Motion to Disqualify, srv	Filing		01/25/2017-15:37		
	Affidavit/Affidavit of Don M Hollerbach	Filing		01/25/2017-10:23		
	Affidavit/Affidavit of Patricia Thomas	Filing		01/25/2017-10:22		
	Affidavit of Nathan M Crystal In Opposition to Intervenor	Filing		01/25/2017-10:21		
	Affidavit/Affidavit of Lori D Stoney	Filing		01/25/2017-10:19		
Boathouse at Breach Inlet LLC The	Order/Order Filing Fee	Filing		12/22/2016-10:27		
Boathouse at Breach Inlet LLC The	Consent Scheduling Order	Order		12/21/2016-10:31		
	Order/Assign Case to Business Court-Judge Newman	Order		12/09/2016-12:19		
Boathouse at Breach Inlet LLC The	Motion/Motion Filing Fee	Filing		11/28/2016-16:21		
McQuillin, Stafford John III	Motion/Case Assignment to Business Court by plaintiff, srv	Motion		11/28/2016-11:11		
Boathouse at Breach Inlet LLC The	Motion/Motion Filing Fee	Filing		11/23/2016-15:26		
McQuillin, Stafford John III	Motion/To Amend Complaint, crt/srv	Motion		11/23/2016-09:37		
McQuillin, Stafford John III	Roster/Notice of Case Roster Publication Sent	Action		11/03/2016-09:12		
Barr, Capers G. III	Roster/Notice of Case Roster Publication Sent	Action		11/03/2016-09:12		
Kefalos, George J.	Roster/Notice of Case Roster Publication Sent	Action		11/03/2016-09:12		
Kefalos, George J.	Motion/Motion Filing Fee	Filing		10/18/2016-15:33		
Kefalos, George J.	Motion/Intervene & Remove Counsel by defendant, crt/srv	Motion		10/18/2016-10:05	05/03/2017-10:05	
Boathouse at Breach Inlet LLC The	ADR/Notice of ADR	Action		08/03/2016-10:53		
Barr, Capers G. III	Roster/Notice of Motions Roster Publication Sent	Action		06/07/2016-11:25		
McQuillin, Stafford John III	Roster/Notice of Motions Roster Publication Sent	Action		06/07/2016-11:25		
Boathouse at Breach Inlet LLC The	ADR/Alternative Dispute Resolution (Workflow)	Action		05/06/2016-16:46	08/03/2016-16:46	
Stoney, Richard S W	Motion/Motion Filing Fee	Filing		05/06/2016-12:21		
Barr, Capers G. III	Motion/Compel by defendant, crt/srv	Motion		05/06/2016-11:41	07/12/2016-11:41	
Stoney, Laurence O Jr	Archived Document	Filing		05/05/2016-00:00		
Boathouse at Breach Inlet LLC The	Archived Document	Filing		05/05/2016-00:00		
Stoney, Richard S W	Answer of Richard Stoney & Crew Carolina LLC & cert/srv	Filing		11/12/2015-11:32		
	Service/Acceptance Of Service	Filing		10/13/2015-11:47		
Boathouse at Breach Inlet LLC The	Summons & Complaint	Filing		10/09/2015-16:44		

EXHIBIT 2

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, et. al.

☐ Plaintiff

v.

Richard S. W. Stoney, Et. Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-10-5463

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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Defendant's Attorney:

Stafford J. "Mac" Mcquillin, III, Esq., Bar No.

Address:

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phone: (843) 724-1120 fax: (843) 722-2266

e-mail: mmcquillin@hsblawfirm.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Bifurcate

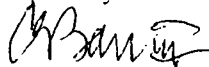
Estimated Time Needed: 60 Minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for ☐ Plaintiff / ☒ Defendant

March 29, 2018

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

CASE NUMBER: 2015 -CP-10-5463

The Boathouse at Breach Inlet, LLC)
by and through its member, Laurence)
O. Stoney, Jr.,)

Plaintiff,)

vs.)

Richard S.W. Stoney, individually)
and as Member-manager of The)
Boathouse at Breach Inlet, LLC and)
Crew Carolina, LLC)

Defendant.)

Theodore D. Stoney, Jr., individually)
and as trustee for Richard Stoney, Jr.,)
and Gregory G. Holmes,)

Third-Party Intervenors.)

**DEFENDANT AND THIRD-PARTY
INTERVENORS' JOINT RULE 42(B)
MOTION TO BIFURCATE AND
MEMORANDUM IN SUPPORT**

FILED
2018 MAR 29 AM 9:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: SCOTT Y. BARNES, STAFFORD J. MCQUILLIN III, AND PIERCE T. MACLENNAN,
ATTORNEYS FOR THE PLAINTIFF

MOTION TO BIFURCATE

Defendant Richard S.W. Stoney (hereafter, "Defendant"), and Third-Party Intervenors Gregory G. Holmes and Theodore D. Stoney, Jr., individually and as trustee for Richard Stoney, Jr. (hereafter, "Intervenors"), jointly move pursuant to Rule 42(b), South Carolina Rules of Civil Procedure ("SCRCP"), for an order bifurcating discovery and trial of this case into two phases. Phase one would determine whether the putative plaintiff, Laurence Stoney, is an adequate representative plaintiff as required by Rule 23(b)(1) SCRCP to bring a derivative action on behalf

of the Boathouse at Breach Inlet, LLC ("Boathouse"). Phase two would address Plaintiff's allegations that Defendant Richard Stoney misappropriated Boathouse funds for his personal use and for use in related restaurant business ventures, and would only arise should the Court rule that Plaintiff is an adequate representative.

The grounds for the motion are that a phased hearing of the separate issues in this case would be conducive to expedition and economy for the parties as well as for the court; and on the further grounds discussed in the Memorandum below.

MEMORANDUM IN SUPPORT.

1. Undisputed Facts.

The Boathouse is a predominately family owned LLC formed by Richard Stoney in 1997; that operates a restaurant on the Isle of Palms at Breach Inlet. The seven members of the Boathouse are as follows:

- (1) Richard Stoney holds a sixty percent (60%) Membership Interest.
- (2) Theodore Stoney ("Ted"), Richard's brother, holds a ten percent (10%) Membership Interest.
- (3) Ted Stoney holds a five percent (5%) Membership Interest in trust for Richard's adult son, Richard Stoney, Jr.
- (4) Gregory Holmes, who is not related to the Stoney family, holds a ten percent (10%) Membership Interest.
- (5) Lori Stoney, who is Richard Stoney's former wife, holds a five percent (5%) Membership Interest.
- (6) Lori Stoney holds a five percent (5%) Membership Interest in trust for Croft Stoney, who is the adult child of Lori and Richard Stoney
- (7) Laurence Stoney, Richard and Ted Stoney's first cousin and putative plaintiff in this case, holds a five percent (5%) Membership Interest.

On October 9, 2015, Laurence Stoney brought this action alleging that Richard Stoney, the

majority member and manager, mismanaged the company and misappropriated funds from the Boathouse for his personal use and for use in related restaurant business ventures. (Amended Derivative Complaint, ¶6).

In their answers to Plaintiff's complaint, Defendant Richard Stoney and Intervenor allege, *inter alia*, that Laurence Stoney does not fairly and adequately represent the interests of the Boathouse or its members; and that the complaint should be dismissed for this reason.

As reflected in affidavits to which reference will hereafter be made, Plaintiff's action is opposed by members owning 90% of the membership interests in the LLC. Stated differently, this action is supported only by Laurence Stoney and Richard's ex-wife Lori Stoney.

2. Derivative Actions.

The right of a member of an LLC to file a derivative action on behalf of the LLC is statutorily prescribed. *Section 33-44-1101*, Code of Laws of South Carolina for 1976, as amended. (Hereafter, "Code Section"). Notably, the LLC act also allows for a member to file a direct action to enforce the member's rights. *Code Section 33-44-410*. A significant difference between the two forms of action is that in a derivative suit a plaintiff may recover his attorney fees and costs. *Code Section 33-44-1104*; whereas in a direct action he may not.

Derivative actions, whether arising in a corporation or an LLC, are governed by Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. ("SCRCP"). A derivative suit is an equitable action brought by a shareholder (or member) in the name or right of the corporation (or LLC) to redress an injury sustained by, or to enforce a duty owed to, the corporation. *Rivers vs. Wachovia Corp.* 665 F3d 610 (C.A.4, 2011), citing *Fletcher Cyclopedia of the Law of Corporations* Sec. 5939-5940 (rev.ed. 2011.) It is particularly available where the individual

shareholder has no individual right of redress to file an action on his own behalf.

Rule 23(b)(1) sets forth the technical prerequisites for pleading a derivative action: requiring prior demand, and for the form of the complaint. The Rule also provides a substantive, threshold criterion for the maintenance of the derivative action: The Rule requires that “ *The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.*” (Emphasis added.)

The Boathouse is manager-managed, and Richard Stoney has been its manager since inception in 1997. In a manager-managed LLC, the members have no rights in the management and conduct of the company's business unless otherwise provided in the operating agreement. Section 33-44-404(b). However, as before stated, individual members may sue directly for their damages. They may also bring a derivative action if the prerequisites of Rule 23(b)(1) have been met.

However, derivative suits are not favored, particularly in closely held corporations. The rule was designed to protect against potential abuse stemming from derivative actions and “seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders.” *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000) (internal citations omitted).

“Derivative actions have been characterized as a remedy of last resort because these actions impinge on the inherent role of corporate management to conduct the affairs of the corporation,

including the power to bring suit.” *Id.* citing *Renfro v. FDIC*, 773 F.2d 657, 658 (5th Cir.1985). For this reason, the law imposes certain prerequisites on a stockholder's right to sue derivatively. *Id.* citing *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del.1988).

It is with these fundamental principles in mind that Defendant and Third-Party Intervenors seek bifurcation of this case. If Plaintiff does not meet the threshold prerequisite of fairly and adequately representing the interests of the shareholders as required by Rule 23(b)(1), this action may not proceed. Bifurcating the trial would allow the parties and the Court to first resolve the threshold question whether Laurence Stoney is a suitable derivative plaintiff without the need to simultaneously delve into the very costly and time intensive financial allegations implicated by Plaintiff's claims of mismanagement and misappropriation; and the disputed quantifications of extensive accounting records that would certainly arise in a trial of all issues together.

3. Bifurcation Under Rule 42(b), SCRCP.

a. The Standard for Bifurcation

Rule 42(b) SCRCP governs bifurcation. The Rule states in pertinent part: “[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim...or of any separate issue...”

The trial judge has discretion whether to bifurcate a trial. *Durham v. Vinson*, 602 S.E.2d 760, 360 S.C. 639 (2004) at FN 2, citing *Senter v. Piggly Wiggly Carolina Co.* 341 S.C. 74, 77, 544 S.E. 2d 575 (2000). “A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice.” *Winthrop Univ. Trs. For State v. Roofing*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016), citing *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998).

South Carolina Courts have used bifurcation as a tool “to help clarify and simplify the issues.” *Durham v. Vinson*, 602 S.E.2d 760, 360 S.C. 639 (2004) at FN 2. Courts have also bifurcated cases to eliminate the expenses related with unnecessary expert witness testimony and to reduce the length of trial. See *Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 109, 512 S.E.2d 510 (the trial court bifurcated the case three weeks before trial, noting “bifurcation would eliminate the expense of having out of state doctors testify to [Plaintiff’s] damages if the jury entered a defendant’s verdict in the liability trial.”) See also *Winthrop University Trustees, etc. v. Roofing*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016), (the Court of Appeals noted, “We find the circuit court properly exercised its discretion in bifurcating the trial. Because most of the damages witnesses would not be called during the liability phase, the circuit court reasoned it would save time and resources by trying the liability phase separately. We find the bases for the circuit court’s ruling—convenience and judicial economy—are legitimate reasons for bifurcation. See Rule 42(b), SCRCP.”)

In the within case, the two issues before the Court are manifestly distinct. The threshold question whether Laurence Stoney is a proper representative Plaintiff can be easily separated from Plaintiff’s claims of corporate mismanagement and misappropriation of funds. The first issue concerns the conduct of the Plaintiff, his motives and interests in bringing this action, and whether those interests are in line with similarly situated shareholders (and also whether there are any similarly situated shareholders). The second issue, Plaintiff’s allegations concerning the conduct of Richard Stoney, requiring the forensic review of extensive records as well as expert testimony, would be a time consuming and costly process that could become unnecessary if the court were to find in Phase one of a trial that Laurence Stoney cannot be a proper representative plaintiff as

required by Rule 23(b)(1).

Bifurcating trial and discovery in this case would greatly reduce costs to the parties. Plaintiffs' accountant expert has produced thousands of pages of documents, including their billing records reflecting billings to date to Plaintiff of more than thirty eight thousand dollars. Should Phase one of a bifurcated trial demonstrate that Laurence Stoney is not an adequate representative plaintiff, the parties would save enormous costs and time. Expert accounting evidence would not be necessary in a bifurcated hearing to determine whether Laurence Stoney is a proper representative plaintiff.

The Court would also save considerable time and resources should Phase one determine that Laurence Stoney is not an adequate representative plaintiff. As in the case of *Durham vs. Vinson, supra*, bifurcating the trial would "help clarify and simplify the issues" and would be conducive to expedition and judicial economy – two proper grounds and reasons for bifurcation. Furthermore, the Phase one issues will require less discovery, less trial preparation, and less trial time, and can be ready for trial in advance of the time required than would a trial encompassing both Phases of this case.

Because the issues and the evidence in each Phase would be distinct, no injustice or prejudice will result from bifurcating the issues for discovery and trial.

4. Because Prima Facie Evidence Exists That Laurence Stoney Cannot "Fairly and Adequately Represent the Interests of Members Similarly Situated", the Motion to Bifurcate Should be Granted.

The parties have to date only exchanged written discovery; no depositions have yet been taken. However, based only upon written records there is a greater than *prima facie* showing that

Laurence Stoney cannot fairly and adequately represent the interests of other members of the Boathouse. The *prima facie* evidence justifies a bifurcated hearing of the separate issue in this non-jury matter.

South Carolina decisions on the adequacy of a representative plaintiff in a derivative lawsuit are sparse. However, Federal court decisions construing the adequacy of representation under the Federal Rule employ a two-pronged test: (1) The representative party must vigorously and conscientiously prosecute the action; and (2) The interests of the unnamed plaintiffs must not be antagonistic to the interests of the representative party. *See, e.g., DuPont v. Wyly*, 61 F.R.D. 615 (D.Del., 1973); *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y., 1968); *First American Corporation v. Foster*, 51 F.R.D. 248 (N.D.Ga., 1970); *Schupack v. Covelli*, 512 F. Supp. 1310, 1312–13 (W.D. Pa. 1981); *Lewis v. Curtis*, 671 F.2d 779, 788–89 (3d Cir.), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982); *Owen v. Modern Diversified Industries, Inc.*, 643 F.2d 441, 443–44 (6th Cir.1981) (no antagonistic interests); *GA Enterprises, Inc. v. Leisure Living Communities, Inc.*, 66 F.R.D. 123, 125–27 (D.Mass.1974), *aff'd*, 517 F.2d 24, 26–27 (1st Cir.1975).

Other courts have considered certain additional factors to determine the adequacy of a plaintiff's representation. The most relevant of these factors to the current action include: (1) the degree of support received by the plaintiff from other shareholders (*see Rothenberg v. Security Management Co.*, 667 F.2d 958, 961 (11th Cir.1982) (citations omitted); (2) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; and (3) plaintiff's vindictiveness toward the defendants. *See Davis v. Comed, Inc.*, 619 F.2d 588, 593–94 (6th Cir.1980). These factors are “intertwined or interrelated, and it is frequently a combination of

factors which leads a court to conclude that the plaintiff does not fulfill the requirements” of the rule. *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990).

a. **Laurence Stoney has not vigorously and conscientiously prosecuted this action.**

Laurence Stoney testified on behalf of the Defendant’s former wife Lori Stoney at a Family Court hearing in May, 2011, that Richard Stoney was not making sufficient distributions and that he (Laurence) was entitled to more money than he had received. (See Exhibit “A”, Transcript of Laurence Stoney, at p. 944). Despite his complaints about what monies he was owed, Laurence testified that he had not reviewed the Boathouse’s books after being offered the opportunity to review them, because to do so would entail him going to the Boathouse’s office. (Ex. “A” at p. 983). That office, according to Laurence’s own testimony, was located around the corner from where Laurence worked. (E. “A” at p. 1006). Laurence also testified that he had never written Richard about his complaints; he also acknowledged receiving several letters from Richard over the years regarding the “numbers” about the Boathouse. (Ex. “A” at p. at 984). This lawsuit was not filed until October 9, 2015. The equitable doctrine of laches is defined as neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. *Robinson v. Estate of Harris*, 698 S.E.2d 214 (S.C. 2010). Both Rule 23(b)(1) and the doctrine of laches¹ required Laurence to timely act. Instead, he let the claim languish for years and slept on his rights. He should not be allowed to

¹ The doctrine of laches applies in shareholder derivative suits as they are actions in equity. *McDuffie v. O’Neal*, 476 S.E.2d 702 (S.C.App. 1996). For purposes of this motion, Defendant and Intervenor argue laches, but do not concede this action is properly brought as a derivative action and, therefore contend the applicable statute of limitations and discovery rule also apply.

bring it now, under the circumstances.

b. Laurence Stoney has demonstrated a desire to usurp control of the Boathouse and seeks only a buyout of his own interest in the company.

This lawsuit represents the second attempt (and arguably the third) by Lori and Laurence Stoney to take over the management and control of the Boathouse from Richard Stoney. A February 2011 Family Court hearing in the Stoney divorce case was held pursuant to Lori Stoney's motion seeking a Family Court order that she take over the management and control of the Boathouse. The motion was denied.

Thereafter, at the Family Court hearing in May 2011 on the merits, Laurence Stoney testified on behalf of Lori Stoney that he would have no objection if Lori were given a controlling interest in the entity. (Ex. "A" at p. 965). When asked about Lori's lack of experience in operating a restaurant, he testified, "She's been around Richard, you know. So she must know something." (Ex. "A" at p. 1004). Laurence's support for placing management and control of the Boathouse in the hands of an inexperienced and unqualified manager demonstrates his personal animosity towards Richard, and his divergent interests from those of the other members.

That Laurence Stoney's interests diverge from those of the other members and is driven by a motive for personal gain is further shown by certain email exchanges between Laurence and Richard prior to the filing of this action. On December 16, 2014, Richard Stoney, aware of Laurence's dissatisfaction with Richard's management and wanting to resolve the discord between them, emailed Laurence to discuss buying out Laurence's interest in the Boathouse. The following email exchange ensued:

From: Richard Stoney <richard@crewcarolina.com>
Subject: Boathouse 5 percent interest□
Date: December 16, 2014 at 10:16:12 AM EST

□To: Laurence Stoney <Stoney@colemanmarine.com>

Laurence ,hope all is well. 2015 is about over and I am trying to complete a number of things before the end of the year. The last thing I want, given all that has transpired in my life over the past 5 plus years ,is to prolong the discord between us. If you are interested in trying to resolve as gentleman your interest in Breach I would suggest a meeting before Christmas. It would be my hope by meeting that we could reach a favorable resolution to this ongoing issue and put it behind us. Should you be willing to meet I would further suggest that we agree on a neutral and detached 3rd person to mediate for a couple hrs. Randell I am sure could give you the name of a few mediators . Regardless I would appreciate us initiating in the near future a civilized dialogue to get something moving. I will wait to hear back from you . Regards-Richard

Subject: Boathouse

From: "Laurence Stoney" <stoney@colemanmarine.com>

Date: Tue, December 16, 2014 11:45 am

To: <richard@crewcarolina.com>

Richard, A brief outline of what you have in mind would be helpful. LOS

From: Richard Stoney [mailto:richard@crewcarolina.com]

Sent: Wednesday, December 17, 2014 11:30 AM

To: Laurence Stoney

Subject: Re: Boathouse

Laurence, I am unfortunately still covered up with some other matters but wanted to get back to you a brief response per your request . My primary goal is to try and get with you as soon as possible, either alone or preferably with a 3rd party, and wind up in a mutual satisfactory way before the end of the year a buyout of your 5 percent of Breach. If we could reach an agreeable price I would need to have you agree to payment over 24 months or so along with a present day/transaction interest rate collateralized by your stock. I have a noon appointment I must attend but am free later today or tomorrow to either chat or meet . Understandably I anticipate that we will need to commit to setting aside some time to try and resolve this impasse. Communication I feel is the key. Just let me know if you think we can make some progress and your general thoughts. Thanks - Richard

Subject: RE: Boathouse

From: "Laurence Stoney" <stoney@colemanmarine.com>

Date: Wed, December 17, 2014 2:40 pm

To: "Richard Stoney" <richard@crewcarolina.com>

Cc: "Randell C. Stoney, Jr." <rstoney@barnwell-whaley.com>, <paultinkler@tinklerlaw.com>, <sbarnes@hsblawfirm.com>

Richard, I think the best way to go at this is for you to make your BEST offer up front. Keep in mind what you already owe me, plus interest and a cap rate based on recast numbers. Try 10% per year compounded yearly on all past due and a cap rate of 6% based on \$25,000.per year. Standing by L

From: Richard Stoney [mailto:richard@crewcarolina.com]

Sent: Wednesday, December 17, 2014 3:16 PM

To: Laurence Stoney

Cc: Randell C. Stoney, Jr.; <paultinkler@tinklerlaw.com>; <sbarnes@hsblawfirm.com>
Subject: Re: Boathouse

Laurence, based on the fact that you have copied our cousin Randell and two other attorneys I think it is obvious we are not going to get anywhere short of minimally mediation. Let me know - Richard

Subject: RE: Boathouse
From: "Laurence Stoney" <stoney@colemanmarine.com>
Date: Wed, December 17, 2014 3:23 pm
To: "Richard Stoney" <richard@crewcarolina.com>
Cc: "Randell C. Stoney, Jr." <rstone@barnwell-whaley.com>, <paultinkler@tinklerlaw.com>, <sbarnes@hsblawfirm.com>

Richard, Like I said make your best offer and we might not need all the pain. L.

Notably, two of the attorneys copied by Laurence Stoney in his reply email to Richard were Scott Barnes of Haynsworth Sinkler Boyd, who is one Laurence's lawyers in this case, and Paul Tinkler, Lori Stoney's *divorce* attorney. The subject matter of the email was the sale of Laurence Stoney's personal interest in the Boathouse, not a "derivative action" for the benefit of the LLC.

Laurence Stoney's final position in that exchange was to offer to sell his personal interest in the Boathouse. His words? "Richard, Like I said make your best offer and we might not need all the pain. L." (Emphasis added.) Movants expect the evidence will show that Laurence seeks only to cash out his interest, and at the same time have his legal fees paid by the LLC. If this is proved in a Phase one hearing, it sets up a clear conflict of interest between Laurence, the Boathouse and the other members. Laurence cannot be undividedly loyal to the Boathouse while also attempting to leverage a buyout for himself or to undertake a takeover of the company for his own personal benefit. "A plaintiff in a shareholder derivative action owes the corporation his undivided loyalty. The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda." *Smith v. Ayres*, 977 F.2d 946 (C.A.5 (Tex.), 1992).

- c. Laurence Stoney has little support from the shareholders he purports to represent as his interests are antagonistic to those of the other shareholders.

Nearly all members and member-beneficiaries of the Boathouse oppose this derivative action – most of whom have intervened in this suit to actively oppose it. Specifically, Richard Stoney, Sr., Gregory Holmes, Theodore Stoney, Richard Stoney, Jr., and Croft Stoney, representing 90% of the membership interests, oppose this derivative action and contend that it is damaging to the Boathouse and to their interests as members because it would result in the waste of the Boathouse's assets, damage to its institutional reputation, and damage to its financial interests. (See supporting affidavits, attached as follows: Exhibit "B", Ted Stoney; Exhibit "C", Greg Holmes; Exhibit "D", Croft Stoney). This derivative action is wasteful, harmful and unwarranted because:

1) Laurence Stoney is incurring legal bills on behalf of the LLC to prosecute a claim which has no support from the other shareholders;

2) pursuant to Article VIII of the Boathouse Operating Agreement, the LLC will be obligated to indemnify Richard Stoney for the legal costs incurred in defending this action (see LLC Operating Agreement, Ex. "D");

3) the lawsuit has propagated, and will likely propagate more bad publicity in the community that is harmful to the business (see P&C Article);

4) the members of the Boathouse, including Lori Stoney have benefitted from the actions of the current management; and

5) as is reflected in its annual tax return and member K1s, the Boathouse has reported a profit every year since it opened in 1997. In sum, the suit is simply not in the best interests of the company.

Despite initially purporting to "represent the interests of the Boathouse and its members in

enforcing and prosecuting the rights of the Boathouse,” Laurence Stoney never contacted Gregory Holmes, Theodore Stoney, or Richard Stoney, Jr. regarding the underlying action. It was only after these members filed a Motion to Intervene and challenge the present action that Laurence Stoney changed his initial position to now claim that he no longer represents their interests and that the Intervenor is not “similarly situated members.” However, this argument has no basis in fact or law because Intervenor, just as Laurence Stoney (and Croft Stoney who also opposes this derivative action), are all minority shareholders and therefore, are all similarity situated.

The only member who has expressed support for Laurence Stoney in this case is Lori Stoney, the ex-wife of Richard Stoney who is currently embroiled in marital litigation against Richard and has been actively attempting to take over the management and ownership of Boathouse for the past eight years. Lori Stoney certainly has a personal animus towards Richard, and because of her unique relationship with Richard as well as her protracted marital litigation with him, Lori Stoney is not similarly situated with any other shareholder, including Laurence. See *Steinberg v. Steinberg*, 434 N.Y.S.2d 877, 106 Misc.2d 720 (N.Y. Sup., 1980), finding that “[T]he circumstances in their totality strongly indicate that the derivative action was deliberately instituted to obtain leverage in the matrimonial proceeding, as a “weapon in the total ... arsenal”.

Where a representative plaintiff has little to no support from any of the other shareholders, including his fellow minority shareholders, he does not fairly and adequately represent the interests of the shareholders or those similarly situated. See *Kuzmickey v. Dunmore Corp.*, E.D.Pa.1976, 420 F.Supp. 226 (holding the plaintiff, who owned sixteen percent of stock of defendant corporation, did not fairly and adequately represent the interests of the shareholders and, hence, could not maintain a derivative action that charged the president and vice president with

mismanagement where individual defendants owned seventy percent of the stock between them and submitted affidavits of the remaining six shareholders, each of whom contended that plaintiff did not represent their interests and that suit was not brought in the best interests of the corporation); *see also Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990) (holding plaintiff who owned 23.4% of corporation's stock was not similarly situated with other shareholders because he did not have the support of other shareholders and other shareholders were either defendants or had an economic interest in supporting current management and benefited from current management; therefore Plaintiff could not bring a derivative suit and dismissal was warranted).

CONCLUSION

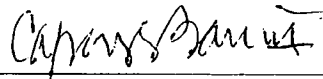
This case should be bifurcated to allow the conclusion of discovery on the Phase one issue and then to set a hearing to first determine whether Laurence Stoney is an adequate representative plaintiff to bring the present lawsuit as a derivative action on behalf of the Boathouse and its members, before the full merits of the suit are tried. For the reasons stated above, Defendant Richard Stoney, Sr., and Intervenor Gregory Holmes, Theodore Stoney, and Richard Stoney, Jr., respectfully request that this Court grant their Joint Rule 42(b) motion to bifurcate.

(Nothing Follows On This Page.)

The undersigned has consulted with counsel for Laurence Stoney in good faith to resolve the matter contained in this motion, but without success.

Respectfully Submitted,

BARR, UNGER, MCINTOSH, LLC



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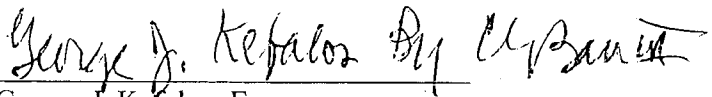
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Charleston, South Carolina
March 28, 2018

EXHIBIT 3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-5463

The Boathouse at Breach Inlet, LLC,
by and through its member, Laurence
O. Stoney, Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually
and as member-manager of The
Boathouse at Breach Inlet, LLC and
Crew Carolina, LLC.

Defendant.

MEMORANDUM IN OPPOSITION TO
MOTION TO BIFURCATE

FILED
2018 NOV -8 PM 3:57
JULIE J. ARMSTRONG
CLERK OF COURT

INTRODUCTION

Plaintiff submits this Memorandum in opposition to Defendants' delayed move to bifurcate both the discovery and trial of this derivative action, which Plaintiff filed over three year ago on October 9, 2015. Bifurcating this case to independently address Defendant's meritless standing argument would not further convenience or help avoid prejudice, and it certainly would not promote expedition and economy. Rather, bifurcating this case would only delay this action needlessly.

Defendants and Third-Party Intervenors (collectively "Defendants") in their Motion to Bifurcate are asking the Court to bifurcate both the trial and discovery phases of this case. They argue that bifurcating discovery and having two separate bench trials on the issues of Laurence

Stoney's standing as a representative-plaintiff and Defendant Richard Stoney's liability for misappropriating the Boathouse at Breach Inlet, LLC's (the "Boathouse" or the "Company") funds might save time and money by obviating the need for additional discovery should Defendants prevail on the standing issue. Perhaps if Defendants had filed their motion within a reasonable time after Laurence Stoney commenced the action, Defendants would have a colorable argument. But unfortunately for all involved, that time passed years ago.

In fact, Defendants already asserted the exact standing defense they now want bifurcated as an affirmative defense in their Original Answer that was filed nearly three years ago on November 11, 2015. *Answer*, ¶¶, 17-50. In the three years since Defendants filed their Original Answer, Plaintiff's counsel has worked diligently on this action. Together the parties have exchanged close to 100,000 pages of discovery documents, they have met with and deposed witnesses, and Plaintiff has already paid over \$100,000.00 in legal fees, and in excess of \$47,000.00 in expenses and expert accounting fees. Additionally, seven months ago when Defendants indicated that they planned to file their bifurcation motion, Plaintiff's counsel wrote to Defendants' counsel¹ and urged Defendants' counsel to go ahead and conduct any discovery Defendants felt necessary, and to request a hearing on the standing issue. Plaintiff's counsel hoped to avoid needless delays. However, over the last seven months Defendants have noticed and taken only one deposition, have not served any written discovery, and have not filed a motion on the standing issue.

Given the background of this case and the timing of Defendants' motion, Plaintiff cannot fathom a reason—other than tactical delay—why Defendants could not have filed this motion at

¹ The undersigned's March 28, 2018 letter to Defendants' counsel is attached as Exhibit A.

the outset of the case, or, at the very latest, over a year and a half ago.² Accordingly, Plaintiff respectfully requests that the Court deny Defendants' Motion to Bifurcate. Plaintiffs also ask that the Court set the standing issue for a hearing before year-end, and pursuant to Plaintiff's pending Motion for Scheduling Order, schedule a date certain bench trial on the merits in the first quarter of 2019.

BACKGROUND

On October 9, 2015, Laurence Stoney, a minority member of the Boathouse, filed this derivative action on behalf of the Company. The central allegation is that Defendant Richard Stoney, the manager of the Company, misappropriated in excess of \$4,000,000.00 from the Company to Crew Carolina, LLC ("Crew Carolina"). Crew Carolina is a single member limited liability company wholly owned and managed by Defendant Richard Stoney. Defendant Richard Stoney's own testimony is that Crew Carolina, the entity that received more than \$4,000,000 of Boathouse monies, is his "alter ego." *Stoney v. Stoney*, Op. No. 5593 (S.C. Ct. App. Filed August 29, 2018); (March/April 2011, Trial Trans., p. 586) ("Crew Carolina, as you know, is basically [my] alter-ego."). As evidenced in Plaintiff's Forensic Accounting Expert's affidavit, Richard Stoney treated Crew Carolina as his incorporated personal ATM machine. *Affidavit Don Hollerbach*, filed January 25, 2017, Exhibit B.

Specifically, the financial records produced in discovery clearly demonstrate that

² Defendant Richard Stoney and his brother/Intervenor, Theodore Stoney were chided recently by the Court of Appeals for similar delay tactics deployed in Richard Stoney's other pending litigation, which was filed in April of 2009 and has now been pending for *nine years* with no end in sight. The Court of Appeals found that the Stoney brother's behavior prevented the trial court from conducting a successful, worthwhile trial on the merits. The Court of Appeals wrote, "[u]nfortunately, the record here simply does not provide the information necessary for this court to make its own findings **Regrettably, this is in large part due to [Mr. Stoney's] antics and . . . the court's repeated failure to address his contemptuous behavior.**" *Stoney v. Stoney*, Op. No. 5593 (S.C. Ct. App. Filed August 29, 2018) (emphasis added).

Defendant Richard Stoney used Boathouse monies transferred to his "alter ego" (Crew Carolina) for various improper personal expenditures, and to improperly enrich Intervenors, who were treated as the "chosen members." *Affidavit Don Hollerbach*, filed January 25, 2017, Exhibit B. In other litigation in which Richard Stoney is involved, Intervenor Theodore Stoney's counsel elicited the following testimony from Richard Stoney' CPA, Tracy Amos:

Q. (Intervenor Theodore Stoney's Lawyer) I'm going to hesitate and I'm going to jump around because it's hard for me to keep up with all that goes on, but talking about Crew Carolina. **Is there any question that Richard was robbing Paul to pay Peter or whoever to pay Paul?**

A. (Tracy Amos, CPA) **No question.**

Q. And all this inter office - - He had six or seven companies going down and he was basically taking money from the only profits he had which was [The Boathouse at] Breach Inlet?

A. Correct.

Q. And he shouldn't have been doing that, should he?

A. It's not good business.

Q. Well, it's not good business and **he had different owners and if you're an owner at [The Boathouse at] Breach Inlet and he was taking money from [The Boathouse at] Breach Inlet to subsidize another company, those partners were different. I mean somebody [i.e., the Boathouse at Breach Inlet] is getting ripped off on that deal.**

A. **That's correct.**

Q. But basically, the ship is going down and the only place he's got to go is [The Boathouse at] Breach Inlet and it's the only profit center he's got.

A. Correct.

(March/April 2011, Trial Trans., p. 469) (emphasis added).

As demonstrated above, the testimony and records in this case clearly demonstrate that Richard Stoney used Boathouse monies to pay his personal expenses and to fund his lifestyle.

The evidence also demonstrates that Richard Stoney used Boathouse monies to fund other unrelated businesses in which he and Intervenor_s had an interest, and wrongfully paid out to Intervenor_s disproportionate distributions from the Boathouse. Exh. B, *Affidavit Don Hollerbach*, filed January 25, 2017, ¶ 4 (referring to Intervenor_s as “chosen members” and discussing over \$173,000 in disproportionate distributions to Intervenor Holmes).

Contrary to Defendants’ characterization, this action is not about personal animus. In fact, the Derivative Complaint does not seek removal of Defendant Richard Stoney as manager. Similarly, Laurence Stoney is not asking for distributions from the Company or demanding a buyout of his membership interest. Instead, this derivative action was filed to protect the Boathouse’s interests and is simply asking this Court to require Defendant Richard Stoney to repay to the Boathouse the monies that he misappropriated from the Company to his “alter ego” (Crew Carolina) for personal expenses and to enrich Intervenor_s.

DERIVATIVE ACTIONS

Laurence Stoney is a minority member in the Boathouse, a closely held, manager-managed LLC whose business is operating a restaurant located on the Isle of Palms. There are six other member of the LLC. The members are as follows:

- (1) Defendant Richard Stoney, manager;
- (2) Intervenor, Theodore Stoney;
- (3) Holmes Capital Management, LLC;
- (4) Richard Stoney, Jr., in trust;
- (5) Croft Stoney, in trust;
- (6) Lori Stoney; and
- (7) Laurence Stoney.

Under South Carolina law, “[a] member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or manager to commence the action is not likely to succeed.” S.C. Code Ann. § 33-44-1101 (2016). The purpose of a derivative action is to protect the interests of the company, an entity distinct from its individual members. *Rivers v. Wachovia Corp.*, 665 F.3d 610, 614 (4th Cir. 2011); S.C. Code Ann. § 33-44-201 (2016). It is well-settled in South Carolina that the assets of a corporation belong to the corporation—not its owners—and that a lawsuit for recovery of those assets “belongs solely to the corporation.” *Davis v. Hamm*, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989). Thus, where company assets have been misappropriated, only the company through a derivative action can sue for redress. The individual members or shareholders cannot bring an action in their individual capacity as members or shareholders.

Rule 23(b)(1) of the South Carolina Rules of Civil Procedure sets out the requirements for filing a derivative action. Ordinarily Rule 23(b)(1) requires a member filing a derivative action on behalf of a company to satisfy a “demand requirement” prior to filing the action. Under South Carolina law, however, the demand requirement is waived for futility where, like here, the alleged bad actor controls the company whose rights are being asserted. *See Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976) (“It is also a well-established rule that an application for redress within the corporation and refused need not be alleged, if it be shown that the directors or managing board are themselves the wrongdoers in some alleged breach of trust or fraudulent misappropriation of the corporate property”). Here, though Laurence Stoney was excused from making a demand to the Company’s manager, Defendant Richard Stoney, Laurence Stoney through his counsel conducted numerous in person meetings with Defendant

Richard Stoney and his counsel (including a pre-suit mediation) prior to filing the Derivative Complaint. In each meeting, Laurence Stoney demanded that Defendant return to the Boathouse the money that he misappropriated from the Company.³

Rule 23(b)(1) further provides that a representative-plaintiff maintaining a derivative action must “fairly and adequately represent the interests of the shareholders or members **similarly situated** in enforcing the right of the corporation or association.” (emphasis added). In determining whether an individual plaintiff is an adequate representative of other similarly situated members in a company, South Carolina courts apply a two-step test, and consider: (1) the common interests between the representative-plaintiff and the members he represents; and then (2) the representative-plaintiff’s ability and commitment to prosecuting those common interests. *Walbeck v. The I’On Co., LLC*, No. 2015-001590, 2018 WL 3748668, at *13 (S.C. Ct. App. Aug. 8, 2018).

Under Rule 23(b)(1), a representative-plaintiff is not expected to represent the interests of members with whom he is not similarly situated. “[T]he [derivative action] rule does not place any numerical limits on the number of shareholders who must be similarly situated.” *Walbeck*, No. 2015-001590, 2018 WL 3748668, at *13 (S.C. Ct. App. Aug. 8, 2018), (citing *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162-63 (Tex. 1990)). In fact, Judge Geathers, writing for the Court of Appeals, explained that even if **none** of the other members of a company are similarly situated to a representative-plaintiff, the representative-plaintiff may still maintain the derivative action as a “class of one.” *Walbeck*, No. 2015-001590, 2018 WL 3748668, at *13 (S.C. Ct. App. Aug. 8, 2018).

³ To date, Defendants have not challenged that the demand requirement is satisfied, presumably because they recognize that it is excused for futility. In any event, that issue is not currently before the Court.

Courts recognize that closely held companies, like the Boathouse, are more vulnerable to malfeasance on the part of managers and majority members. *Angel Inv'rs, LLC v. Garrity*, 2009 UT 40, ¶ 21, 216 P.3d 944, 950-51. Courts also recognize that in such companies, like the Boathouse, minority members are less inclined to speak out against managerial and majority malfeasance for fear of being cutout from the company or even ostracized from friends or family.

Id.

In closely held corporations, it becomes easy for the majority shareholders to identify themselves as the corporation. . . . [W]e recognize that closely held corporations may be more vulnerable to malfeasance. . . . [T]he nature of a closely held corporation, where there is often a small number of shareholders and many of those may have close ties to each other, lessens the likelihood that a minority shareholder will speak out against corporate malfeasance.

Id. It is for these reasons that courts have held that closely held companies are especially ripe for “class of one” derivative actions.

In light of the greater vulnerability to malfeasance that is present in closely held corporations, we hold that a sole dissenting shareholder in a closely held corporation qualifies as a class of one for purposes of derivative standing when that shareholder (1) seeks by its pleading to enforce a right of the corporation and (2) does not appear to be similarly situated to any other shareholder. **Further, we hold that shareholders' motivation for opposing the derivative action is relevant to determining the question of whether any shareholder is similarly situated to the derivative plaintiff. To conclude otherwise would be to permit corporate looting and malfeasance in circumstances where all but one shareholder benefit personally from the illegality or are at risk of personal detriment were the malfeasance brought to light.**

Id. (emphasis added). Similarly, because a claim regarding the misappropriation of corporate assets belongs exclusively to the corporation, courts are unwilling to dismiss “class of one” cases for lack of support from other members not similarly situated to the representative-plaintiff because to do so would “leave the plaintiff and the corporation without a remedy for the

defendants' alleged misconduct." *Eye Site, Inc.*, 796 S.W.2d 160, 162-63 (Tex. 1990), (citing *Halstead Video, Inc. v. Guttillo*, 115 F.R.D. 177 (N.D. Ill. 1987)).

Defendants argue that because Laurence is a minority member and lacks support from the majority of members, he should not be permitted to bring this action. As discussed, however, derivative actions were explicitly created to allow an oppressed minority member to make a claim on behalf of the company. Here, the Company is merely asking Defendant Richard Stoney to repay to the Boathouse the \$4,000,000 that he funneled into his self-described "alter ego," Crew Carolina. Initially Plaintiff's counsel was surprised that other members of the Boathouse would oppose the return of \$4,000,000 to the Company. But after examining the Company's financial records, it became abundantly clear that the members of the Company that oppose this action have personally benefited from Richard Stoney's wrongful actions. *See infra* Discussion, Section II; *see also*, Exh. B, *Affidavit of Don Hollerbach* (detailing Defendant Richard's Stoney's wrongful actions, which benefited the "chosen members" opposing this action).

DISCUSSION

This discussion section is divided into two parts. The first part (I) outlines the bifurcation standard under SCRCP 42(b), and explains why bifurcating this case is improper under the Rule 42(b) standard. The second part of this discussion section (II) rebuts Defendant's misrepresentation of the South Carolina law on standing for a representative-plaintiff in a derivative action. It explains that a representative plaintiff is not required to represent those with whom he is not similarly situated. It also establishes why Laurence Stoney is not similarly situated to Defendant and to Intervenor (and, thus, he is not expected to represent their interests), and makes clear that bifurcating discovery and trial based on Defendant's misguided legal arguments would delay this action needlessly.

- I. The Court should deny Defendants' Motion to Bifurcate because bifurcating this case would force the parties to conduct duplicative discovery, would not help avoid prejudice, and would significantly delay the outcome of this action, which has been pending for more than three years.**

Rule 42(b) of the SCRCP gives courts discretionary authority to order separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." SCRCP 42(b). But a trial should be bifurcated "only if the issues are so distinct that trial of each alone would not result in injustice." *Fortune v. Gibson*, 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991). Furthermore, bifurcation is inappropriate where overlapping evidence relates to the issues to be bifurcated. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998).

As the party seeking bifurcation, Defendants bear the burden of proving that bifurcation would satisfy the objectives expressed in Rule 42(b). 8 Moore's Federal Practice § 42.20[7][a] (2008) (SCRCP 42(b) is identical to and based upon Federal Rule of Civil Procedure ("FRCP") 42(b)). Courts recognize that separate trials are the exception, not the rule, and there is a presumption against bifurcation so that it "is not to be routinely ordered." Fed. R. Civ. P. 42(b) advisory committee's note; *Equal Rights Ctr. v. Equity Residential*, 483 F. Supp. 2d 482, 489 (D. Md. 2007) (interpreting FRCP 42(b) and holding that the party seeking bifurcation must show that: "(1) it will be severely prejudiced without a separate trial; and (2) the issue to be severed is so 'distinct and separable'; from the others that a trial of that issue alone may proceed without injustice."); *Cranston Print Works Co. v. J. Mason Prods., a Div. of Ming Ta Supply USA, Inc.*, No. 96 CIV. 9382 (DLC), at *1 (S.D.N.Y. Nov.13, 1998) (interpreting FRCP 42(b) and stating that bifurcation is "the exception, not the rule.").

In their motion Defendants ask the Court to bifurcate this case into two separate actions for both discovery and trial purposes; the first an action to determine whether Laurence Stoney is

a proper representative-plaintiff under SCRCP 23(b)(1), and the second an action to determine whether Defendant Richard Stoney misappropriated money from the Boathouse. Defendants' Memorandum in Support of this Motion suggests that these questions can be "easily separated" and that "[s]hould Phase one of a bifurcated trial demonstrate that Laurence Stoney is not an adequate representative plaintiff, the parties would save enormous costs and time."

But contrary to Defendants' argument the standard here is not how easily the issues can be conceptually separated, or whether answering a threshold issue might obviate the need for future proceedings.⁴ Rather, Defendants must prove that this particular action is uniquely ripe for bifurcation such that bifurcating this action would comport with intent of SCRCP 42(b). Defendants cannot meet this burden and bifurcation is inappropriate because: (A) the issues to be bifurcated require significant duplication of discovery and evidence; (B) conducting separate bench trials in front of the same judge would in no way prevent or help avoid prejudice; and (C) conducting two sets of discovery and separate bench trials more than three years after this action was filed is not conducive to expedition and economy.

A. The Court should not bifurcate this trial because it would require a significant duplication of discovery and evidence.

It is well-established in South Carolina that under the "separate issue mandate" bifurcation is inappropriate where overlapping evidence relates to the issues to be bifurcated. *Durham v. Vinson*, 360 S.C. 639, 654, 602 S.E.2d 767, 763 n.2 (2004); *The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d

⁴ As a practical matter, all cases contain preliminary questions that might obviate the need for future proceedings. Typically a defendant would move for a court to hear these questions early on in the proceeding via a motion for summary judgment or a motion to dismiss. Here, however, Defendants have waited an inordinate amount of time to present this "threshold issue" to the Court. And not in a motion for summary judgment, but in a move, after the case has been pending for three years, to conduct two entirely separate cases for discovery with two separate bench trials.

152, 165 (Ct. App. 2016), *reh'g denied* (Oct. 21, 2016), *cert. denied* (Nov. 15, 2017) (citing *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998)).

In this matter, proving that Laurence Stoney is a proper representative-plaintiff under SCRCP 23(b)(1) requires substantially the same discovery, experts, and evidence as proving that Defendant Richard Stoney misappropriated funds from the Boathouse.

Defendants argue that should they win in "Phase 1" they would not be forced to hire forensic accounting and financial experts to somehow prove that Defendant Richard Stoney did not misappropriate over \$4,000,000.00 of Company monies. Defendants' argument on this point is incorrect.

Central to the question of whether Laurence Stoney adequately represents the interests of similarly situated members in the Boathouse is the question of which members are "similarly situated" to representative-plaintiff Laurence Stoney. While Defendants correctly point out that the action is opposed by a majority of members, Defendants misconstrue the legal standard regarding the adequacy of a representative-plaintiff under SCRCP 23(b)(1). The test is not how many members support the derivative action, but whether the representative-plaintiff represents those members of the company who are **similarly situated**. SCRCP 23(b); *Walbeck v. The I'On Co., LLC*, No. 2015-001590, 2018 WL 3748668, at *13 (S.C. Ct. App. Aug. 8, 2018) ("Rule 23 . . . does not require a derivative action plaintiff to represent the interests of shareholders with whom he is not similarly situated.").

On this point, Defendant Richard Stoney and Interveners Theodore Stoney and Gregory Holmes are not similarly situated to representative-plaintiff Laurence Stoney. As discussed in detail below, the evidence demonstrates that Defendant Richard Stoney and the Interveners received improper benefits from the Company because of Richard Stoney's misappropriation of

\$4,000,000.00; representative-plaintiff Laurence Stoney did not. Unless Defendants are willing to concede that they are not similarly situated to Laurence Stoney,⁵ Defendants will need to conduct discovery, gather evidence, and hire experts to prove that Richard Stoney did not misappropriate funds and that Intervenors did not benefit from Richard Stoney's misappropriation. To prove this Defendants would need to conduct the same discovery, gather the same evidence, and use the same experts that they will need to use in order to prove that Richard Stoney did not misappropriate the Boathouse's monies in the liability phase of this trial.

Because proving that Laurence Stoney is a proper representative-plaintiff requires substantially the same discovery, experts and evidence as proving that Defendant Richard Stoney misappropriated funds from the Boathouse, bifurcating this action would violate the "separate issue mandate."

B. Conducting two separate bench trials in front of the same judge would in no way prevent or help "avoid severe prejudice."

Motions to bifurcate are typically filed in complex cases where juries might conflate disparate issues to harm a defendant. *Durham*, 360 S.C. 639, 645, 602 S.E.2d 760, 763 (2004) (In this medical malpractice jury trial the Court observed, "[w]e encourage . . . judges to bifurcate trials in complex medical malpractice cases such as this one."). Ordinarily courts bifurcate trials into separate liability and damages trials so that the same jury does not unfairly punish the defendant at the damages stage of the trial. *Id.* Again, the purpose of bifurcating trials in these instances is to avoid "severe prejudice" to the defendant. *Equal Rights Ctr. v. Equity Residential*, 483 F. Supp. 2d 482, 489 (D. Md. 2007) (holding that the party seeking bifurcation must show that "it will be severely prejudiced without a separate trial"). Here

⁵ In their Memorandum in Support, Defendants acknowledge that "Laurence Stoney['s] interests . . . are antagonistic to those of the other shareholders."

Defendants have not met their burden.

In their atypical motion, Defendants are asking that a bench trial—not a jury trial—be bifurcated. And not bifurcated on the issues of liability and damages, but on the issues of standing and liability. Both of these facts make it highly unlikely that bifurcating this trial would in any way help “avoid severe prejudice.”

Judges, unlike juries, are highly trained legal scholars. Judges are tasked with being judicious and fair, and they are well-versed in compartmentalizing issues to ensure that they fully understand any legal and factual issues presented, and that litigants are treated fairly. Given this, it seems highly unlikely that bifurcating one bench trial into two separate bench trials would help “avoid severe prejudice” to Defendant. There is a dearth of case law on this point, but at least one court summarized the issue, writing:

First, the Court notes that because the case is set for a bench trial, the issues of confusion that could conceivably be present in a jury trial do not exist here. The Court is capable of compartmentalizing its fact finding and adjudicatory responsibilities so that bifurcation would not afford any benefit of confusion avoidance. Second, bifurcation would mean that the Court would potentially be faced with scheduling two bench trials as opposed to one, with no doubt two periods of summary judgment briefing. One set of permissible motions preceding one trial date would prove easier to coordinate in the Court’s schedule.

Eighth Floor Promotions, LLC v. R.S. Owens & Co., No. 2:09-CV-102, 2009 WL 2982873, at *2 (S.D. Ohio Sept. 15, 2009).

Furthermore, in the exceptional situation where a court will bifurcate a trial they generally separate the trial into separate liability and damages phases to avoid punishing a defendant at the damages stage based on emotional reactions churned up in the liability phase. Bifurcating a trial on the issues of standing and liability does not serve the same purpose. Unlike an emotionally charged damages determination there is no threat of prejudice to Defendants by

having a judge determine a dry legal question like standing. Likewise, the issue of Laurence Stoney's standing and Defendant Richard Stoney's malfeasance are not so complex that conducting two separate bench trials on these issues would help avoid prejudice to Defendants from confusion (like, for example, the typical bifurcation scenario of a medical malpractice case being presented to a jury). Defendants cannot meet their burden and prove "severe prejudice" by having the assigned Judge hear these matters at a single bench trial.

C. Conducting two sets of discovery and two separate bench trials more than three years after this action was filed is not conducive to expedition and economy.

As stated, to date Plaintiff's counsel has worked diligently on this action for more than three years, together the parties have exchanged more than 100,000 pages of discovery documents, and Plaintiff has already paid over \$100,000.00 in legal fees and in excess of \$47,000.00 in expenses and expert accounting fees to ensure that it is ably and fully prosecuting the interests of the Boathouse. To argue that this action should be separated into two discovery phases and two separate bench trials in the name of "expedition and economy" this late in the game is offensive.

Defendants' argue that if they win on the standing issue then the court would not be forced to hear arguments regarding Defendant Richard Stoney's malfeasance. This brief has already detailed why that premise is inaccurate given the "similarly situated member" issue, but even ignoring this glaring omission, Defendants' argument is unpersuasive. There is no "likelihood of success on the merits" standard written into SCRCP 42(b). If the court is to consider the time saved if Defendants prevail on the threshold question then the court must also consider the time that will be wasted if Plaintiffs win on the threshold question. Because the evidence overlaps significantly across the standing and liability issues, the notion that any time

would be saved should Defendants win on the standing issue is illusory. It is certain, however, that if the Court bifurcates the action and Plaintiff wins on the standing issue, the parties and the Court will have wasted a significant amount of time and money by conducting two sets of duplicative discovery and two bench trials instead of one.

Further, contrary to Defendants' suggestion, the mere presence of a threshold question is not reason enough to justify bifurcation in the name of expedition and economy. All cases have threshold questions that are dispositive with respect to other issues within a given case. That is precisely why the rules of civil procedure allow for pre-trial motions. But the overwhelming majority of cases are not bifurcated despite the presence of threshold questions because bifurcation is the exception—not the rule—and common sense dictates that conducting two sets of discovery and two bench trials instead of one slows things down rather than speeds them up.

Defendants' move to bifurcate this action into two separate bench trials over three years after Plaintiff commenced the action is not at all an effort to encourage expedition and economy; it is just another attempt to grind this case to a halt to avoid having it heard on the merits. Since Plaintiff filed this action Defendants have already once moved to continue motions **that they themselves filed**. *Memorandum in Opposition to Proposed Intervenor's Motion for Continuance*, filed January 16, 2017. In fact, Defendants moved for the continuance less than twenty-four hours before the scheduled hearing on the motion that ultimately took about fifteen minutes to argue. *Id.* At one stage, Defendants even filed and later withdrew, after Plaintiff was forced to brief the issue, a Motion to Disqualify Haynsworth Sinkler Boyd, P.A. from the case. And just three weeks ago, on September 28, 2018, after repeated requests and the threat of a contempt motion, Defendants served incomplete answers to interrogatories that Plaintiff served on Defendants in April of 2017. When Defendants did not timely respond last year, Plaintiff was

forced to file a motion to compel and attend a hearing at which the Court ordered Defendants to produce answers by July 2017. Yet, Defendants ignored the Court's order, and Plaintiff did not receive these responses until last month.

These examples of Defendants' behavior should be shocking but, unfortunately, they are not. As mentioned, the Court of Appeals itself just two months ago recognized that Intervenor Theodore Stoney and Defendant Richard Stoney's "antics" and "contemptuous behavior" derailed other litigation in which they are involved. That litigation has now dragged on for almost a decade without a resolution in sight. Regrettably, given Richard Stoney's history in this case (and other litigation), and the extraordinary nature of Defendants' motion, Plaintiff cannot help but feel frustrated as Richard Stoney is again deploying antics to improperly impede and delay yet another lawsuit in which he is involved.

II. The court should not bifurcate this action because Defendants' argument that Laurence Stoney does not have standing as a representative-plaintiff lacks merit, and bifurcating discovery and trial on this issue would prolong this action needlessly in contravention of the standard for bifurcation.

As the parties have explained, under South Carolina law a representative-plaintiff maintaining a derivative action must "fairly and adequately represent the interests of the shareholders or members **similarly situated** in enforcing the right of the corporation or association." SCRCP 23(b)(1). South Carolina courts apply a two-step analysis to determine whether a representative-plaintiff adequately represents other similarly situated members in a company. *Walbeck v. The I'On Co., LLC*, No. 2015-001590, 2018 WL 3748668, at *13 (S.C. Ct. App. Aug. 8, 2018). Courts first determine which members, if any, are similarly situated to the representative-plaintiff by considering the common interests between the representative-plaintiff and the members that he purportedly represents. *Id.*

Under SCRCP 23(b)(1) a representative-plaintiff is not expected to represent the interests of members with whom he is not similarly situated. *Id.* Moreover, the South Carolina Court of Appeals has acknowledged that “Rule 23 places no minimum numerical limits on the number of shareholders who must be ‘similarly situated.’” *Walbeck v. The I’On Co., LLC*, No. 2015-001590, 2018 WL 3748668, at *13 (S.C. Ct. App. Aug. 8, 2018). In fact, as Judge Gaethers recently explained in *Walbeck*, even if none of the other members of a company are similarly situated to a representative-plaintiff, the representative-plaintiff may still maintain the action as a “class of one.” *Id.* This well-established rule, which Defendant’s chose not to mention in their briefings to the Court, has been adopted across the United States. See e.g., *Larson v. Dumke*, 900 F.2d 1363 (9th Cir. 1990), *cert. denied sub nom. Round Table Pizza, Inc. v. Larson*, 498 U.S. 1012, 111 S. Ct. 580, 112 L.Ed.2d 585 (1990) (finding that a shareholder can be a legitimate class of one where other shareholders are not similarly situated to the representative-plaintiff); *Jordon v. Bowman Apple Prod. Co.*, 728 F. Supp. 409, 412-13 (W.D. Va. 1990) (“Since defendants apparently concede that the other shareholders are not similarly situated vis-a-vis plaintiff, the court concludes that the plaintiff constitutes a legitimate class of one and adequately and fairly represents those shareholders similarly situated.”); *ShoreGood Water Co. v. U.S. Bottling Co.*, No. CIV.A. RDB08-2470, 2009 WL 2461689, at *6 (D. Md. Aug. 10, 2009) (“A sole shareholder may . . . bring a derivative suit”); *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177 (N.D.Ill.1987) (holding that a representative-plaintiff in a derivative action is not required to “represent the interests of shareholders with whom he is not similarly situated.”); *Nagy v. Riblet Prod. Corp.*, No. S90-202(RLM), 1991 WL 332633, at *6 (N.D. Ind. Oct. 16, 1991) (accepting representative-plaintiff’s argument that he was a legitimate class of one); *Cattano v. Bragg*, 283 Va. 638, 648, 727 S.E.2d 625, 629 (2012) (holding that “[t]he remedy

sought—the return of funds, misappropriated by an officer, to the corporation—is highly appropriate for a derivative claim,” and that a representative-plaintiff can maintain a derivative suit as a “class of one.”); *Eye Site, Inc.*, 796 S.W.2d 160, 162-63 (Tex. 1990) (holding that a representative-plaintiff can maintain a derivative suit as a class of one and stating that in a derivative action there “[are not] any numerical limits on the number of shareholders who must be similarly situated.”); *Hall v. Tennessee Dressed Beef Co.*, 957 S.W.2d 536, 540 (Tenn. 1997) (“The court agrees . . . that the class of shareholders [in a derivative action] may consist of one shareholder.”); *Brandon v. Brandon Const. Co. Inc.*, 300 Ark. 44, 51, 776 S.W.2d 349, 354 (1989) (establishing the rule that in Arkansas a derivative action may be maintained by a class of one); *Demoulas v. Demoulas Super Markets, Inc.*, No. 902927B, 1993 WL 818670, at *4 (Mass. Super. Oct. 29, 1993) (finding that representative-plaintiff may maintain a derivative suit as a class of one); *Angel Inv'rs, LLC v. Garrity*, 2009 UT 40, ¶ 22, 216 P.3d 944, 951 (Utah 2009) (“In light of the greater vulnerability to malfeasance that is present in closely held corporations, we hold that a sole dissenting shareholder in a closely held corporation qualifies as a class of one for purposes of derivative standing.”). It is only after answering these threshold questions that a court can evaluate properly a representative-plaintiff’s commitment to prosecuting the common interests of similarly situated members of a company (assuming, of course, that there are any).⁶

Turning then to the threshold question of which members are “similarly situated” to Laurence Stoney, Defendants themselves concede that Laurence Stoney is not similarly situated to Defendant Richard Stoney or to Intervenor. Specifically, in their motion to bifurcate, Defendants state that Laurence Stoney’s “interests are antagonistic to those of the other

⁶ Defendants misconstrue the legal standard regarding the adequacy of a representative-plaintiff under SCRCP 23(b)(1). The test is not how many members support the derivative action, but whether the representative-plaintiff represents those members of the company, if any, who are similarly situated.

[members]” and ask the question of “whether there are any similarly situated shareholders [to Laurence Stoney].” *Motion to Bifurcate*, p. 12. On this point, Plaintiff agrees with Defendants that Laurence Stoney is **not similarly situated** to Defendant Richard Stoney and Intervenor Theodore Stoney and Gregory Holmes because unlike Defendant and Intervenor (or as Plaintiff’s expert refers to them “the chosen members”), Laurence Stoney did not benefit from Richard Stoney’s misappropriation of over \$4,000,000 of Boathouse monies.

Accordingly, because Laurence Stoney is not similarly situated to Defendant Richard Stoney and Intervenor Theodore Stoney and Gregory Holmes, Laurence Stoney is not required to represent their interests through this derivative action. Given this, Defendant and Intervenor’s argument that Laurence Stoney is an improper representative-plaintiff because he does not adequately represent Defendant and Intervenor’s interests, is moot and bifurcating discovery and trial based on this argument would delay this action needlessly.

A. Richard Stoney is not similarly situated to Laurence Stoney because he manages the Boathouse and misappropriated over \$4,000,000 of Boathouse monies.

Richard Stoney is not similarly situated to Laurence Stoney because he manages the Boathouse and misappropriated over \$4,000,000 from the Boathouse to enrich himself and the “chosen members” of the Boathouse. Indeed, Plaintiff’s Forensic Accountant outlines specific instances of Richard Stoney putting Boathouse monies to his personal use. For instance, Richard Stoney wrote one check from the Boathouse to “Pay latino workers at Kensington,” his plantation in Berkeley County. Exh. B, *Affidavit Don Hollerbach*, filed January 25, 2017, ¶ 4. Richard Stoney wrote another check for \$2,750 with the memo line reading, “[a]s needed to cover mortgage for Kensington.” *Id.* He wrote another check with the memo line “Richard requested this cash for dinner at Kensington.” *Id.*

In addition to covering expenses and paying for dinners at his plantation, Richard also took Boathouse monies to fund for his polo hobby, and for other personal and business payments. *Id.* Plaintiff's Forensic Accountant found instances of Richard writing himself a check for \$5,000 to buy a horse, and \$2,000 for Vet bills on his polo horse, Sophie. *Id.* Richard wrote a \$14,000 check from the Boathouse to "MISC / Ellis Creek Clos." *Id.* Ellis Creek is a separate business venture managed and owned by Richard Stoney. *Id.* Laurence Stoney is not a member and has no involvement in Ellis Creek. Richard also took \$150 for "RS Hair Cut," he took \$230 for a "Swiss Watch Repair," and took \$18,095 to pay the annual premium on his personal life insurance policy. *Id.* Again, these examples of Richard's misappropriation of Boathouse money represent a fraction of the more than \$4,000,000 that he improperly took from the company.

For the purposes of this motion these misappropriations demonstrate that Richard Stoney is not similarly situated to Laurence Stoney with regards to their respective interests in the Boathouse at Breach Inlet, LLC.

B. Theodore Stoney is not similarly situated to Laurence Stoney because he improperly benefited from Richard Stoney's misappropriation of Boathouse monies.

Plaintiff's Forensic Accountant's Affidavit also clearly outlines examples of Defendant Richard Stoney's brother, Theodore Stoney, benefitting from Richard Stoney's misappropriation of Boathouse funds. Theodore Stoney was also member of two separate business ventures managed and owned by Richard Stoney, Lake Julian and Carolinas. Laurence Stoney was not a member of the entities and had no involvement with them. As stated in Forensic Accountant's Affidavit, Chip Robinson (the Boathouse's former in-house accountant) wrote Defendant Richard Stoney a Confidential Interoffice Memo and stated that one way to resolve the

Boathouse's "cash flow issues" was "removing Breach from its role as blood donor for the hemorrhages that are Lake Julian and Carolinas [other entities that both Richard Stoney and Theodore Stoney were members of]." Exh. B, *Affidavit Don Hollerbach*, filed January 25, 2017, ¶ 4 (quoting Boathouse_17365). Thus, Theodore Stoney clearly benefited from Defendant Richard Stoney removing monies from the Boathouse to fund other separate entities of which he was a member. Richard Stoney also caused the Boathouse to issue checks to Wells Fargo directly on Theodore Stoney's behalf for Theodore Stoney's mortgage. On March 4, 2014 the Boathouse issued a check to Wells Fargo for \$3,006.93, and the memo line states, "Ted Stoney Loan #00264293068 Obligation #18." *Id.* In fact, Plaintiff's Forensic Accountant found at least three other instances of the Boathouse paying Theodore Stoney's mortgage. *Id.*

In addition to paying Theodore Stoney's mortgage and funding Lake Julian and Carolinas, Defendant Crew Carolina (Richard Stoney's self-described "alter ego") made similar payments in excess of \$80,000 to or on behalf of Theodore Stoney and his Company, the Stoney Company, including a \$3,039.58 check written from Crew Carolina to Mass Mutual Financial Group, which Crew Carolina's General Ledger indicates was for "Ted's Mass Mutual Payment." *Id.* Further, in other litigation, Defendant Richard Stoney and Theodore Stoney testified that Defendant Richard Stoney owes Theodore Stoney hundreds of thousands of dollars, which explains why Theodore Stoney, as one of the "chosen members," is opposed to this action. *Stoney v. Stoney*, (2011, Trial Trans.).

Again, as with Richard Stoney, these special benefits that Theodore Stoney received as a direct result of Richard Stoney misappropriating funds from the Boathouse mean that Theodore Stoney is not similarly situated to representative-plaintiff Laurence Stoney, who received no such special treatment from the manger.

C. Gregory Holmes is not similarly situated to Laurence Stoney because he improperly benefited from Richard Stoney's misappropriation of Boathouse monies.

Like Theodore Stoney, Intervenor Gregory Holmes, Richard Stoney's close personal friend, directly benefited from Richard Stoney's misappropriation of Boathouse monies and is one of the "chosen members." Indeed, while most members of the Company were receiving no distributions, Gregory Holmes received improper disproportionate distributions in excess of \$170,000. Exh. B, *Affidavit Don Hollerbach*, filed January 25, 2017, ¶ 4. Defendant Richard Stoney's preferential treatment towards his friend, Gregory Holmes, is documented in the general ledger and explains why Gregory Holmes, as one of the "chosen members," is opposed to this action. *Id.*

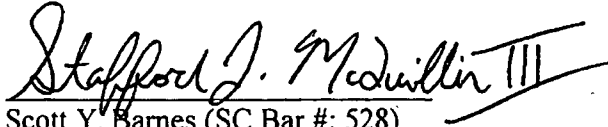
Because Laurence Stoney is not similarly situated to Defendant Richard Stoney and Intervenor Theodore Stoney and Gregory Holmes (the "chosen members"), Laurence Stoney is not required to represent their interests through this derivative action.⁷

Conclusion

For the forgoing reasons, Plaintiff respectfully requests that Defendants' Motion to Bifurcate this action be denied and that this Court set the standing issue for a hearing before year-end, and pursuant to Plaintiff's pending Motion for Scheduling Order, schedule a date certain bench trial on the merits in the first quarter of 2019.

⁷ Even if the court is unsure of who would succeed on the merits of the similarly situated member issue, this section, at the very least, demonstrates that bifurcating discovery and trial in this action would violate the "separate issue mandate" and require re-litigation of the same issues because the issues of standing and liability significantly overlap with respect to what discovery, experts and evidentiary issues need to be established under both matters – namely, did Defendant Richard Stoney misappropriate Boathouse monies and where were those monies directed.

Respectfully submitted,



Scott Y. Barnes (SC Bar #: 528)

Stafford J. McQuillin III (SC Bar #: 78203)

Tyler K. Gilliam (SC Bar #: 103170)

Haynsworth Sinkler Boyd, P.A.

P.O. Box 340

Charleston, SC 29402

(843) 724-1120

November 8, 2018
Charleston, SC

ATTORNEYS FOR THE BOATHOUSE AT
BREACH INLET, LLC

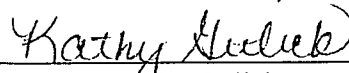
HSB 5364776

CERTIFICATE OF SERVICE

I hereby certify that I have had a true and correct copy of Plaintiff's Memorandum in Opposition to Motion to Bifurcate was served upon all counsel of record by email, U.S. Mail and/or hand delivery, this 8 day of November 2018:

Capers G. Barr, III, Esq.
Barr, Unger McIntosh, LLC
11 Broad Street
Charleston, SC 29401

George J. Kefalos, Esq.
George J. Kefalos, P.A.
46A State Street
Charleston, SC 29401


Kathy Gulick

Charleston, South Carolina

FILED
2018 NOV -8 PM 3:57
JULIE J. ARISTONIS
CLERK OF COURT

EXHIBIT A

134 MEETING STREET, THIRD FLOOR (29401-2240)
POST OFFICE BOX 340 (29402-0340)
CHARLESTON, SOUTH CAROLINA
TELEPHONE 843.722.3388
FACSIMILE 843.722.2286
WEBSITE www.hsblawfirm.com

STAFFORD J. MCQUILLIN, III
DIRECT DIAL NUMBER 843.724.1120
EMAIL mmcquillin@hsblawfirm.com

March 28, 2018

VIA HAND DELIVERY

Capers G. Barr III, Esq.
Barr, Unger McIntosh, LLC
11 Broad Street
Charleston, SC 29401

Re: Boathouse at Breach Inlet, LLC v. Richard Stoney and Crew Carolina, LLC
Our File 37631.0001

Dear Capers:

I am in receipt of your letter dated March 23rd regarding bifurcating discovery and trial in the above-referenced matter, and I have spoken with my client regarding your request. Although my client cannot consent to your request for the reasons outlined below, we offer the following proposal which I believe addresses your concerns and is in the best interest of all parties.

Your letter indicates that bifurcation is important because it would save money prior to discovery on the merits of the case. Unfortunately for all involved, that ship sailed a long time ago. Plaintiff has been diligently working on the merits of this case since the Complaint was filed in this action approximately two and half years ago. The parties have exchanged more than 80,000 pages of documents in response to initial and supplemental discovery requests. To date, Laurence has paid over \$100,000.00 in legal fees, the majority of which is attributable to meritless motions filed Third Party Intervenors (Motion to Disqualify Haynsworth Sinkler Boyd, P.A., which was withdrawn after Plaintiff was forced to brief the issue) and by the voluminous production from Defendants. In addition, Laurence has paid in excess of \$20,000.00 in expert accounting fees.

Laurence certainly would have entertained your proposal if made at or near the start of this case, or even perhaps when Third Party Intervenors moved to disqualify this Firm from representing Plaintiff in or around October 2016. I cannot fathom a reason, other than delay, why such a motion to bifurcate was not made at that time, and is now being made over a year and a half later. We believe Judge Newman will agree with us on this point.

Thus, given that this case has been pending since October 2015, and the case is subject to trial pursuant to the current scheduling order, we are moving the Court to enter a revised scheduling

Capers G. Barr, IV, Esq.

March 28, 2018

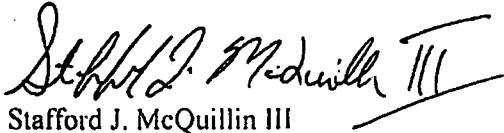
Page 2

order. The Scheduling Order will seek a date certain trial for September, October or November 2018 (subject to the Court's availability), and calls for completion of discovery by July 31, 2018.

Notwithstanding the above, we are in agreement that the issue of whether or not Laurence meets the requirements of Rule 23(b)(1) is divisible from the merits of the action. To that end, Laurence is agreeable to a motion hearing on that issue prior to trial on the merits. The proposed Scheduling Order should give you plenty of time to conduct discovery on that issue and have your motion heard prior to trial. However, Laurence cannot agree to any order that would unnecessarily delay or limit the discovery in this case in any manner.

Thank you and please do not hesitate to contact me with any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stafford J. McQuillin III", with a stylized flourish at the end.

Stafford J. McQuillin III

PTM/kmg

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-5463

The Boathouse at Breach Inlet, LLC,
by and through its member, Laurence
O. Stoney, Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually
and as member-manager of The
Boathouse at Breach Inlet, LLC and
Crew Carolina, LLC.

Defendant.

AFFIDAVIT OF
DON M. HOLLERBACH

FILED
2017 JAN 25 AM 11:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Personally appeared before me, Don M. Hollerbach, who being duly sworn, affirms and swears as follows:

1. I am 64 years old and qualified to make this affidavit. I am a resident of the State of South Carolina. I am currently a Member with the firm of Baldwin & Associates, LLC—a South Carolina Certified Public Accounting firm located at 210 Wingo Way, Suite 202, Mount Pleasant, SC 29464. I currently hold the following credentials—Certified Public Accountant (SC#4899), Certified in Financial Forensics, Certified Fraud Examiner, Forensic Certified Public Accountant, Certified Valuation Analyst, and Certified Global Management Accountant. I have been practicing in the accounting field for over 20 years. Please refer to my Curriculum Vitae at Exhibit I.

2. In December 2015, I was retained by the Plaintiff and the Plaintiff's counsel to investigate the financial records of The Boathouse at Breach Inlet, LLC (BBI or Boathouse) to include tax filings and other supporting information concerning the business conduct of this entity. Primary focus was an approximately \$4.0+ million-dollar receivable (Due From) and other smaller receivables (Due From) associated with this enterprise. The largest receivable is associated with an entity named Crew Carolina, LLC (Crew) which is owned solely by one of the members of The Boathouse at Breach Inlet, LLC. Because of the close business relationship of the company members with other associated enterprises and the use of common accounting staff associated with those other closely held enterprises, the accounting records and bank statements were inspected for intercompany transactions as well. In addition, I was engaged to inspect the various internal and external documents provided for sources and uses of cash throughout the inspection period.

3. During this inspection, I personally, in addition with other staff members of Baldwin & Associates, LLC under my direct supervision, examined numerous documents—General Ledger accounts, bank statements, memos, emails as well as income and payroll tax filings. These documents included but were not limited to:

- (a) General Ledger Reports from BBI and Crew.
- (b) Income tax filings for the years 2008-2014 for BBI.
- (c) Payroll tax filings and payroll information for BBI and Crew.
- (d) Compiled financial statements and associated financial and tax supporting workpapers for BBI as provided by Dixon Hughes, Goodman, PLC.—a national accounting firm.
- (e) Bank provided account statements, merchant statements and copies of checks and deposits within those accounts associated with BBI, Crew and Richard Stoney.

The documents I inspected were provided by the attorney for the plaintiff from various sources, and except for certain bank statements and original form documents (Excel files), present Bates markings as prescribed by the attorney.

4. I submit the following findings that are supported by references to Bates markings, reference to an Exhibit or both:

Balance Sheet—Boathouse at Breach Inlet, LLC

The balance sheet of BBI, (Boathouse_07261) as of November 30, 2015 shows a balance owed to BBI from Crew of more than \$4.278 million dollars, increasing from the previous year in excess of \$174,000 dollars. During the same measurement periods of 2015 and 2014 the amount owed BBI by one of its partners personally increased more than \$74,000 dollars to a balance in excess of \$231,000 dollars. This indicates the uses of monies for purposes other than the normal business operations of the entity that holds that receivable. See Exhibit II.

BBI, Crew and Richard Stoney commingled funds. BBI appears to be the funding mechanism for other ventures and personal spending of Mr. Stoney. Mr. Stoney was placed on notice by his attorney Mr. Pearlman as evidenced by a memo dated November 11, 2007, that the commingling of funds is not permissible but the activities continued unabated resulting in the large amounts owed to the Boathouse by both Crew and Mr. Stoney personally. The attorney's warning is provided at Exhibit III.

Despite the specific warning of his lawyer, Richard Stoney continued to use Boathouse monies to fund other entities he owned wholly or in part. Specifically, on April 15, 2010, Chip Robinson, the former in-house accountant for the Boathouse, wrote another "Confidential Interoffice Memo" to Defendant Richard Stoney regarding his "accounting world" being "totally and completely consumed with cash-flow related issues." (Boathouse_17365). In the memo, Chip Robinson indicated that one way to solve Breach Inlet's "cash flow issues," was "removing Breach from its role as blood donor for the hemorrhages that are Lake Julian and Carolinas [other entities that Richard Stoney owned wholly or in part]. (Boathouse_17366). See Exhibit IV.

On July 7, 2014, Dennis Jarvis, an accountant hired by the Boathouse to prepare the Boathouse tax returns, emailed Jamie Stabler, the Controller for the Boathouse, regarding the \$4,278,165.98 due from Crew Carolina to the Boathouse. In the email, Mr. Jarvis wrote the following:

"One of the first statements Chip [former in-house accountant for the Boathouse] mentioned to me when I took over filing the tax return for the Boathouse was that the Crew receivable would not be paid. I'm concerned that after posting the payroll and the management fee that the receivable is still going up." (Boathouse_12149). See Exhibit V.

On July 8, 2014, Jamie Stabler, the Boathouse controller, responded to Dennis Jarvis' email after discussing the issue with Chip Robinson, the former in-house accountant for the Boathouse. In the email, Ms. Stabler wrote the following:

"Dennis, this is what Chip had to say . . . Why are you continuing to book these expenses, if Crew has no prospect of paying them? [I]t may be time for Richard to begin recognizing that the money leaving Breach is his . . . it seems likely to me that it would be a Draw for RS personally." (Boathouse_11432).

At the controller level within the entity itself, there is recognition of the fact that the monies leaving BBI needed to be recorded differently thereby reflecting their true nature which was neither investment or receivable but rather distributions because of the ultimate use of the funds which were personal in nature. The word "Draw" in this context would equate to a distribution to the member who received the benefit of such a distribution. Because of the inherent personal nature of the fund use, the other members would derive no benefit from such an expenditure resembling any sort of return of investment. See Exhibit VI.

With regard to the balance sheet, the receivable attributable to Richard Stoney personally of (\$231,129.49) that was continually growing in amount points directly at the use of company assets for personal use to the detriment of the entity and the other stakeholders. Those investors faced the risks inherent with investment while Mr. Stoney reaped the benefits from their individual burden of the investment risk. There were multiple instances, as detailed below where Mr. Stoney paid for personal items directly from company funds—for example:

- Mortgage payments on his personal plantation (known as Kensington)
- Payment of his son's traffic ticket
- Payment of his brother's mortgage
- Payment for polo ponies for a polo match
- Horse feed, polo fees
- "Weekend money"

(Boathouse_7261)

Throughout the history of BBI, cash flow was a problem that necessitate the juggling of funds and scrambling to meet the deadlines for tax payments, vendor payments and the like. Clearly, the availability of over \$4 million dollars to BBI for operations would not only alleviate this cash flow issue but also provide the ability to provide a return on investment for all members and not just "the chosen" members.

The concept of disproportionate distributions was discussed on several occasions and directed to the accounting staff at BBI and Richard Stoney personally. Dixon Hughes Goodman, LLP (DHG) wrote a letter to Richard Stoney, Gregory Homes (Holmes Capital) and Chip Robinson on October 11, 2011 specifically warning of a breach to the operating agreement for such distributions to Mr. Holmes and advised obtaining an amendment to the operating agreement signed by all members. (Boathouse_06373). On the same date, DHG issued a memo to the same individuals advising them of the research into this matter and the remedy available which was consistent with the letter issued by DHG the same day. (Boathouse_06370).

This concept of disproportionality of distributions should have resonated as not acceptable without agreement of all parties with an amendment to the operating agreement signed by all parties and to cease current practices. Such advice was ignored by Mr. Stoney.

General Ledger—Boathouse at Breach Inlet, LLC

- The following items from the Boathouse's General Ledger contain specific examples demonstrating how Defendant Richard Stoney improperly used funds belonging to the Boathouse (references are to Line Numbers on the Exhibits as Outlined):

Kensington Plantation—See Exhibit VII

Owned by Richard Stoney and Theodore Stoney

- 35992 - \$2,750 "As needed to cover mortgage for Kensington"
- 37262 - "Pay latino workers at Kensington"
- 37249 - "\$160 is going to victor for Kensington work."
- 36480 - "Cash for Tractor"
- 35927 - "Richard requested this cash for a dinner at Kensington"
- 36960 - "Kensington Groceries"
- 36708 - "Tempo was allowed to get some advances on his causal labor pay . . . Work done for RS"

Payments to or on Behalf of Richard Stoney—See Exhibit VIII

Richard Stoney's Polo Horses and Polo Matches

- 36333 - "Shipping polo horses for a match, horse feed, polo fees, weekend money"
- 37079 - "\$5,000 for a horse"
- 37191 - "\$2,000 Vet hospital bills for Sophie snake bites, rs weekend cash"
- 36256 - "Horse Feed and Horse Feeding Person"
- 36053 - "Horse shoes"

Other Personal Payments

- 36716 - "\$14,000 MISC / Ellis Creek Clos." Ellis Creek is a separate business venture owned in part by Richard Stoney.
- 36728 - "\$2,000 - Cash for RS x-mas"
- 36718 - "\$2,500 - Cash needed to deposit to RS account"

- 36295 – "\$150 – CASH / RS Hair Cut"
- 36254 – "\$230 – Richard Swiss Watch Repair"
- 35958 – "\$423.62 – Richard Grocery List – Richard has taken from BH for his personal use"

Payment of Life Insurance Annual Premium for Richard Stoney

50178

THE BOATHOUSE AT BREACH INLET, LLC
845 LEE CLAYTON BLVD STE 10
 MT PLEASANT CO MO 64053
 (816) 677-7183

The Boathouse at Breach Inlet

REC'D OVERNIGHT MAIL 67-187-513

DEC 05 2014

12/4/14

PAY TO THE ORDER OF North American Life Insurance Company \$18,095.00

eighteen thousand ninety five & 00/100 DOLLARS

MEMO Rs annual premium

THE BOATHOUSE AT BREACH INLET, LLC

Janice R Stoller

RECEIVED

Payments to or for the benefit of Theodore Stoney—See Exhibit IX

- The Boathouse issued checks to Wells Fargo directly on Theodore Stoney's behalf for Theodore Stoney's mortgage. On March 4, 2014, the Boathouse issued a check to Wells Fargo for \$3,006.93, and the memo line indicates "Ted Stoney Loan #00264293068 Obligation #18." (Boathouse_61234). On June 24, 2014, the Boathouse issued another check to Wells Fargo for \$2,707.93, and the memo line indicates "Customer #00264293068 Obligation #18." (Boathouse_62091).
- 37185 – "\$5,000 TED – back payments on Wharfside [Theodore Stoney's Mortgage]"
- 37201 "\$2,500 – Wells Fargo Ted Pmts [Theodore Stoney's Mortgage]"
- 35930 – "\$2,541.66 – MISC/Ted Stoney"
- Defendant Crew also made similar payments in excess of \$80,000 to or on behalf of Theodore Stoney and his Company, the Stoney Company, including a \$3,039.58 check

written from Crew Carolina to Mass Mutual Financial Group. (Boathouse_55110) Crew's General Ledger indicates that this payment was for: "Ted's Mass Mutual Payment, Policy #011159407."

Payments to or on Behalf of Gregory Holmes—See Exhibit X

- 37747 – "\$15,943.00 payment for Greg Holmes . . . He has signed an agreement and it is filed in breach inlet permanent files."
- The General Ledger and tax returns for the Boathouse indicate that Gregory Holmes, as a member of Holmes Capital Management, LLC, received \$173,458.95 in disproportionate distributions. Both Richard Stoney and Gregory Holmes were advised by a CPA that Richard Stoney was not permitted to make any disproportionate distributions to his friend and business partner, Gregory Holmes, unless the purported operating agreement for the Boathouse was amended and signed by all members. *See* (Boathouse_06370, 10/26/2011 Email from CPA to Richard Stoney and Gregory Holmes) ("ALL of this is subject to an amended and executed operating agreement"); *see also* (Boathouse_06373, Memo to Richard Stoney and Gregory Holmes dated 10/25/2011) ("A business attorney should be obtained to update the operating agreement with preferred distribution status. It should be signed and executed by all members of the LLC."). However, Richard Stoney ignored this advice, and proceeded with making improper disproportionate distributions to Gregory Holmes without amending the purported operating agreement.

Payments to or for the benefit of Richard Stoney, Jr.—See Exhibit XI

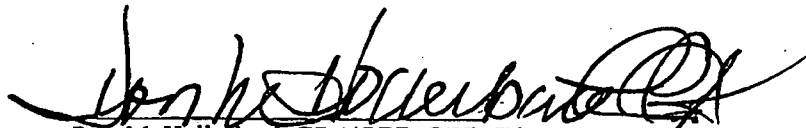
- 36890 – "Cash to pay for jr ticket . . . used pmt for that purpose at MTPD. For running stop."
- 36965 – "RSWSJR / 5.13.14 – from rs as bday present for jr for nola trip."
- 37247 – "\$450 down pmt on suit for jr. wedding"
- 36343 – "\$850 – rsjr bday cash, rs personal cash repay js 150"
- The General Ledger for the Boathouse indicates that Richard Stoney Jr. also received \$27,217.12 in disproportionate distributions.

Payments to and Reimbursements from Jesse Sanchez—See Exhibit XII

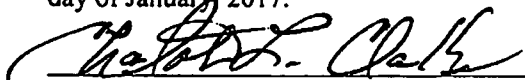
The Boathouse paid amounts directly to Jesse Sanchez for Services. These payments showed payments to Mr. Sanchez with a corresponding Due From S.W. Stoney for services attributable to Mr. Stoney personally. A search of the payroll records did not show Mr. Sanchez as an employee of BBI or Crew. Therefore, it appears that Mr. Sanchez was paid in a status as an independent contractor. Subsequent inspection of the bank accounts of Mr. Stoney shows a series of reimbursements by Mr. Sanchez of health insurance premiums paid on his behalf.

If Mr. Sanchez was a participant in a health insurance plan aligned with either BBI or Crew that is an employee benefit plan and he was clearly not an employee of either, then that employee benefit health plan is placed in grave risk of termination due to fraudulent activity associated with the plan. Termination of a benefit plan poses grave risks and consequences to the wellbeing of all employees and the penalties associated to the entity itself. I examined no direct evidence of the plan participants but the reimbursements by Mr. Sanchez would indicate that he was a participant in a plan containing multiple members.

FURTHER AFFIANT SAITH NAUGHT.


Don M. Hollerbach CPA/CFF, CFE, FCPA, CVA, FCPA

Sworn to before me this 25th
day of January, 2017.


Notary Public for South Carolina

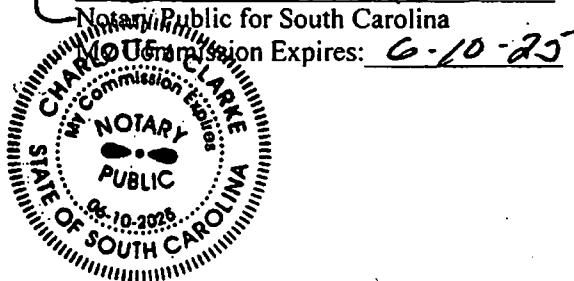


EXHIBIT 4

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually and as member-manager of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC,

Defendants.

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr. and Gregory G. Holmes,

Third-Party Intervenors.

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10-5463

ORDER

FILED
2019 MAY 20 PM 4:01
JULIE J. ARMSTRONG
CLERK OF COURT

Date of Hearing/Trial:	December 13 – 14, 2018
Presiding Judge:	Clifton Newman
Attorneys for Plaintiff:	Stafford J. McQuillin III Scott Y. Barnes Tyler K. Gilliam
Attorney for Defendants:	Capers G. Barr III
Attorney for Intervenors:	George J. Kefalos
Court Reporter:	Karen V. Anderson

At the request of the parties, the Court held a preliminary hearing (the “Hearing”) on the issue of whether the derivative-action plaintiff, Laurence Stoney, has standing to maintain this derivative action filed on behalf of the plaintiff, The Boathouse at Breach Inlet, LLC (the “Company” or the “Boathouse”), a restaurant situated at Breach Inlet on the Isle of Palms. For the reasons set forth

below, the Court finds that the derivative-action plaintiff has standing to maintain this action on behalf of the Company.

With respect to the evidence presented at the Hearing, Plaintiff's counsel consented to Defendants' and Intervenor's counsel's request to call witnesses. Defendants' and Intervenor's counsel likewise consented to Plaintiff's counsel's request that the Court be permitted to consider the affidavit of Plaintiff's forensic accounting expert, Don Hollerbach.¹

BURDEN OF PROOF

The parties agree that where defendants to a derivative action challenge the plaintiff's standing, "[t]he burden is on defendants to show that the plaintiff will not fairly and adequately represent the company and its Members." *See Halstead Video, Inc. v. Guttillo*, 115 F.R.D. 177, 179 (N.D. Ill. 1987); *see also Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341, 344 (D. Or. 1987) ("The burden is on defendants to show that [the representative-plaintiff] is an inadequate representative."); *Brandon v. Brandon Const. Co. Inc.*, 300 Ark. 44, 50, 776 S.W.2d 349, 353 (1989) ("The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.").

BACKGROUND

On October 9, 2015, Laurence Stoney, a minority member of the Boathouse, filed this derivative action on behalf of the Company against Defendants, Richard Stoney and Crew Carolina, LLC ("Crew Carolina"). The Defendant, Richard Stoney, is the Manager and majority member of the Boathouse. Richard Stoney is also the Manager of co-Defendant, Crew Carolina, a single member LLC owned by Richard Stoney that provides management services to the Boathouse and to other, unrelated restaurants. The complaint provides, "[t]he central allegation of this Complaint is that

¹ Defendants maintained a relevance objection regarding the Hollerbach affidavit. The Court, overruled this objection, finding that the affidavit was relevant on the issue of whether the Defendants and Intervenor have unclean hands.

Defendant R. Stoney misappropriated and converted in excess of \$4,000,000.00 from the Boathouse to Defendant Crew Carolina . . . for his own personal use and for use in separate business ventures.” (*Amended Complaint*, ¶ 6). As its sole remedy, Plaintiff “seeks repayment of the funds back to the Boathouse.” *Id.*

At the Hearing, Defendants and Third-Party Intervenors proffered numerous affirmative defenses concerning Laurence Stoney’s standing as a derivative-action Plaintiff. These included the equitable defenses of laches, unclean hands, and judicial estoppel, and the legal defense that Laurence Stoney is not “fairly and adequately” representing the Company’s interest in maintaining this derivative action, as required by Rule 23(b)(1), SCRCF.

PRELIMINARY FINDINGS OF FACT

1. Richard Stoney is the Manager and majority member of the Company. As the Company’s Manager, Richard Stoney exercised unilateral control over the Company’s finances, which he ran through his solely-owned management company, Crew Carolina.

2. Laurence Stoney is a minority member of the Company and had no control over the Company’s finances.

3. The parties stipulate that Laurence Stoney is not “similarly situated” to any other member of the Company. *Stipulation*, filed December 7, 2018.

4. The Court finds credible testimony supports a finding that Laurence Stoney is pursuing this derivative action because he believes that Defendants misappropriated Company assets, which he believes should be returned to the Company. As he testified, “[t]his case is about finding four and a quarter million dollars that’s missing that needs to go back to The Boathouse, sir. That’s what this case is about.” (December 13–14, 2018 Hearing Transcript (“Trans.”), p. 105:7-9). When asked why he filed this lawsuit, Laurence Stoney testified, “I seek to make [the] Boathouse at Breach Inlet whole. It will need to recover the [misappropriated] funds.” (Trans., p. 125:16-17).

5. The Court finds credible evidence that Laurence Stoney is not pursuing this derivative action primarily because of animus towards Richard Stoney. When asked at the Hearing if he had “animosities against [his] cousin Richard,” Laurence Stoney replied, “No, I don’t.” (Trans., p. 35:2-4). This testimony corroborates Laurence Stoney’s deposition testimony. (Laurence Stoney Dep., p. 10:2-4).

6. The Court does not find credible evidence that supports Defendants’ and Intervenor’s theories that Lori Stoney (the ex-wife of Richard Stoney) encouraged Laurence Stoney to file this action, that Lori Stoney is the driving force behind this action, or that Lori Stoney has colluded with Laurence Stoney in this action. When Lori Stoney was asked about her involvement in this litigation she testified, “I have not been involved in this litigation” (Trans., p. 86:15). She also testified with respect to this litigation, “I did not know what Laurence’s plan was. I did not know what he was going to do as far as filing a case. I did not read any complaint. I was not consulted about that. He did what he did. At some point, I found out he had filed the case.” (Trans., p. 82:20-24). Laurence Stoney also denied any collusion or involvement by Lori in the filing of this action. (Trans., p. 36:12, 126:2-4). Laurence Stoney was asked, “[h]as Lori Stoney . . . influenced you in any way to file this lawsuit”? He answered plainly, “No.” (Trans., p. 126:2-4).

7. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Richard Stoney misappropriated money from the Company. Richard Stoney admitted that he took money from the Boathouse, put it into Crew Carolina, and used that money to fund other, unrelated entities, and to pay for personal expenses. Specifically, at the Hearing Plaintiff’s counsel asked Richard Stoney, “[s]ir, you don’t dispute that you took money from the Boathouse at Breach Inlet to fund other businesses and personal matters; is that correct”? Richard Stoney replied, “I do not.” (Trans, p. 204:13-16). Plaintiff’s counsel also asked Richard Stoney, “[w]ere you taking money from the Boathouse and putting it in Crew and using it to fund other

entities”? Richard Stoney replied, “I admitted that.” (Trans., p. 206:3-6). The affidavit of Don Hollerbach corroborates Richard Stoney’s testimony. In his affidavit, Hollerbach writes:

[The Boathouse] and Richard Stoney commingled funds. [The Boathouse] appears to be the funding mechanism for other ventures and personal spending of Mr. Stoney.

Affidavit Don Hollerbach ¶ 4. Hollerbach then cites numerous examples of Richard Stoney using Company monies, filtered through Crew Carolina, to fund personal expenses and other, unrelated business.

8. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Intervenorors knew that Richard Stoney was misappropriating Company assets, and that Intervenorors benefitted financially from Richard Stoney’s misappropriations. With respect to Intervenor Theodore Stoney, Richard Stoney’s brother, Hollerbach writes, “[t]he Boathouse issued checks to Wells Fargo directly on Theodore Stoney’s behalf for Theodore Stoney’s mortgage.” *Affidavit Don Hollerbach* ¶ 4. Hollerbach also notes, “Crew [Carolina] also made . . . payments in excess of \$80,000 to or on behalf of Theodore Stoney and his company, the Stoney Company . . .” *Id.* With respect to the Intervenor Gregory Holmes, who did not attend the Hearing, Hollerbach’s affidavit provides, “Gregory Holmes, as a member of Holmes Capital Management, LLC, received \$173,458.95 in disproportionate distributions.” *Id.* Hollerbach notes:

Richard Stoney and Gregory Holmes were advised by a CPA that Richard Stoney was not permitted to make any disproportionate distributions to his friend and business partners, Gregory Holmes unless the purported operating agreement for the Boathouse was amended and signed by all members. . . . However, Richard Stoney ignored this advice, and proceeded with making improper disproportionate distributions to Gregory Holmes without amending the purported operating agreement.

Id.

9. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Laurence Stoney did not know that Richard Stoney was using Boathouse

monies to fund other business. Defense counsel elicited from Laurence Stoney the following testimony:

Q. You knew what Crew Carolina was doing, Crew Carolina was . . . managing the expenses of [multiple] restaurants?

A. I did not know what was going on and how the funds were being commingled or even if they were. All I knew was that the distributions were going down every year from Breach Inlet and the place seemed to be just rocking and rolling with customers. That's all I knew. I never got to see the numbers. Only thing is, at the end of the year, I get a, what is it, K1.

(Trans., p. 41:15-23). When asked about Richard Stoney's impetus for forming Crew Carolina and its operating practices, Laurence Stoney testified, "Richard formed [Crew Carolina] for his own devices. I have no idea why he formed it. And I didn't know that all of the finances and all would be comingled." (Trans., p. 32-33:25-02). Defense counsel also asked Laurence Stoney, "You knew that Crew was taking all the revenue from all of the restaurants into one account and paying the expenses of the restaurants"? In response, Laurence Stoney answered, "I did not know that for a fact, no." (Trans., p. 109:1-4).

10. It appears that Laurence Stoney developed suspicions that Richard Stoney was using Company monies improperly because the amount of Laurence Stoney's distributions decreased. As cited above, Laurence Stoney testified:

Q. You knew what Crew Carolina was doing, Crew Carolina was . . . managing the expenses of [multiple] restaurants?

A. I did not know what was going on and how the funds were being commingled or even if they were. *All I knew was that the distributions were going down every year from Breach Inlet and the place seemed to be just rocking and rolling with customers. That's all I knew. . . .*

(Trans., p. 41:15-23) (emphasis added).

11. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Laurence Stoney asked Richard Stoney for Company financial records

and that Richard Stoney did not provide those records. Defendants' Exhibit 1 to the Hearing is a letter addressed to Laurence Stoney from Richard Stoney, in which he writes, "it is my understanding . . . that you would like to see 'everything' that has impacted the two restaurants you are involved in . . . as well as Crew's books to the extent that Crew's expenses are passed along to the restaurants." Defendant's Hearing Exh. 1, August 9, 2005 Letter from Richard Stoney to Laurence Stoney ("Exh.1"); Trans. p.109:6-10). When Laurence Stoney was asked about requesting financial information from Richard Stoney at the Hearing, he confirmed that he sought—but never received—financial records. (Trans, p.109:6-10) ("I asked for the [financial] information which I was not given.").

12. The Court finds that Laurence Stoney asked Richard Stoney if he was misappropriating Company assets, and that Richard Stoney represented to Laurence Stoney that he was not misappropriating Company Assets. In Exhibit 1, the letter from Richard Stoney to Laurence Stoney, Richard Stoney writes, "I am . . . insulted by the insinuation that I have mismanaged or misappropriated funds in the restaurants and/or Crew." Exh. 1.

13. The Court finds that it was reasonable for Laurence Stoney to rely on Richard Stoney's attestations that he was not misappropriating Company assets. Richard Stoney was the manager of the Company and represented to his cousin, Laurence Stoney, a minority member of the Company, that the Company was struggling because of factors outside of Richard Stoney's control. Richard Stoney wrote:

Certainly I have had some decisions to make, as Managing Member and majority owner of the respective restaurants, that were necessary to the operations of the restaurants that were not necessarily 'profitable' . . . , but they were my judgment calls on the best way to manage the business functions of the locations in question for the long-term.

...

I know it is frustrating that increased competition and cost of goods has decreased our sales and profitability, but I cannot control the rapid expansion of dining options in

East Cooper any more than I can control beef and lobster prices. At the end of the day, you have to trust me. I'm not in business with my family and dear friends in an attempt to skim profits or benefits not available to them as well.

Exh. 1.

14. The Court finds that the attorneys representing the Plaintiff are qualified to conduct this litigation on behalf of the Company.

CONCLUSIONS OF LAW

I. This action to recover Company assets is properly brought in a derivative capacity.

Defendants and Intervenor argue that Laurence Stoney should sue for damages in his personal capacity rather than derivatively on behalf of the Company because Defendants and Intervenor allege that this action is about unpaid distributions. The evidence does not support this conclusion. Throughout this action the only remedy that Plaintiff has requested is the return of Company monies. Plaintiff's Complaint provides, "[t]he central allegation of this Complaint is that Defendant R. Stoney misappropriated and converted in excess of \$4,000,000.00 from the Boathouse This suit seeks repayment of the funds back to the Boathouse." (*Amended Complaint*, ¶ 6) (emphasis added).

Based upon the pleadings and the evidence presented at the Hearing, the Court finds that Laurence Stoney is not seeking to recover for any individualized loss. Instead, Plaintiff is attempting to recover a Company asset, Company monies, which Plaintiff claims that Richard Stoney misappropriated individually and through the vehicle of his single-member LLC, Crew Carolina. Accordingly, only the Company can maintain this lawsuit to recover its assets, and Laurence Stoney correctly brought this suit as a derivative action, and cannot sue to recover Company assets in his personal capacity.

II. Laches does not bar Laurence Stoney from maintaining this action.

A derivative action is one in equity, and only the doctrine of laches applies—not the statute of limitations. *Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978); *McDuffie v. O'Neal*, 324 S.C. 297, 308, 476 S.E.2d 702, 707 (Ct. App. 1996). Laches is the negligent failure to act for an unreasonable period of time. *Gray v. South Carolina Public Service Authority*, 284 S.C. 397, 400, 325 S.E.2d 547, 549 (1985). But delay alone in the assertion of a right is not enough. A party asserting the laches defense also must prove that the opposing party had knowledge of the wrong committed, and that it was materially prejudiced by the opponent's unreasonable delay in bringing an action. See *Archambault v. Sprouse*, 218 S.C. 500, 63 S.E.2d 459 (1951); *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004) (both holding that the party to be lached must have had actual knowledge of the wrong committed or must have refused to embrace an opportunity to ascertain facts about the wrong committed); *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993) (holding that a party cannot maintain a laches defense unless it can prove that it was materially prejudiced by the opponent's unreasonable delay). Thus, to succeed, the party asserting laches bears the burden of proving (1) delay, (2) unreasonable delay based on knowledge of a known right, and (3) material prejudice caused by the delay in asserting the known right. *Emery*, 361 S.C. at 215, 603 S.E.2d at 602; *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999).

Here, based on the evidence presented at the hearing, Defendants and Intervenor have not met their burden, and laches does not apply to bar Plaintiff's claim because (A) Defendants and Intervenor appear to have unclean hands, (B) Laurence Stoney did not rest on a known right, and (C) neither Defendants nor Intervenor were materially prejudiced by the timing of the filing this lawsuit. Each of these reasons, *alone*, is sufficient to find that Plaintiff's claim is not barred by the equitable defense of laches.

A. Neither Defendants nor Intervenor can assert the equitable defense of laches because Defendants and Intervenor appear to have unclean hands.

Laches is a defense in equity. It is a time honored maxim of equity that "he who seeks equity must do equity." Accordingly, the equitable defense of laches is not available to those who come into the court with "unclean hands." Put simply, a party has unclean hands, and cannot assert a laches defense, where they have acted in bad faith or unfairly with respect to the matter at issue.

1. Richard Stoney appears to have unclean hands.

Both Richard Stoney's testimony and Don Hollerbach's affidavit each credibly alleges that Richard Stoney acted in bad faith when he breached his statutorily prescribed fiduciary duties owed to the Company and its Members.

2. Intervenor appear to have unclean hands.

The Intervenor also appear to have unclean hands with respect to the matter at issue. Specifically, the testimony from the Hearing and Don Hollerbach's affidavit each credibly support the allegation that Intervenor knew that Richard Stoney was misappropriating Company monies, but did not intercede on behalf of the Company as they were benefitting from Richard Stoney's misappropriations from the Boathouse. Defendants and Intervenor did not present evidence at the Hearing to counter the evidence presented by Plaintiff in the form of Don Hollerbach's affidavit that Intervenor appear to have unclean hands. Because the Court finds that Intervenor, Theodore Stoney and Gregory Holmes, appear to have unclean hands, Intervenor cannot assert the equitable defense of laches.

B. Laurence Stoney did not rest upon a known right.

"As with waiver, laches arises upon the failure to assert a known right" *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994), citing *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971); *Byars v. Cherokee County*, 237 S.C. 548, 118 S.E.2d 324 (1961). The party asserting the laches defense bears the burden of proof, and must prove that the

opposing party “had actual knowledge or inquiry notice of the facts forming the basis of its claim” *Provident Life & Acc. Ins. Co.*, 317 S.C. at 479, 451 S.E.2d at 929.

After weighing the evidence presented at the Hearing, the Court finds that Defendants have not sufficiently shown that Laurence Stoney *actually knew* that Richard Stoney was using Boathouse monies to fund other business and for personal expenses.

C. Defendants and Intervenors did not prove that they were materially prejudiced by the timing of the filing of this lawsuit.

In South Carolina, the party asserting laches bears the burden of proving that he was materially prejudiced by his opponent’s delay in bringing suit. *Provident Life*, 317 S.C. at 479, 451 S.E.2d at 929. The Court of Appeals explained:

Prejudice is an essential element of laches. In order to constitute laches, the delay in bringing suit must have caused some injury, prejudice or disadvantage to the party claiming laches. It is reversible error to apply and bar relief to the plaintiff where defendant has enjoyed a benefit and not suffered a detrimental change of position attributable to the delay.

317 S.C. at 479, 451 S.E.2d at 929.

At the Hearing, Defendants and Intervenors did not offer evidence that any supposed delay in bringing this action by Laurence Stoney caused them to suffer a detrimental change in position.

III. Laurence Stoney does not appear to have unclean hands.

Defendants and Intervenors argue that Laurence Stoney cannot maintain this derivative action because he has unclean hands. Despite the fact that Laurence Stoney was a minority member in the Company with no control over the Company’s finances, Defendants and Intervenors suggest that Laurence Stoney has unclean hands because they allege that he knew about and consented to Richard Stoney’s misappropriations from the Company. The Court disagrees.

Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Laurence Stoney did not know that Richard Stoney was using Boathouse profits to fund other unrelated businesses and to pay for personal expenses for himself and Intervenors.

IV. Plaintiff is not judicially estopped from arguing that Laurence Stoney is not similarly situated to other members of the Company and is a class of one.

Plaintiff amended its Complaint pursuant to Rule 15, SCRCR, to remove this statement.

Therefore, this argument is without merit.

V. The Court finds that Laurence Stoney is fairly and adequately representing the interests of the Company.

Rule 23(b)(1) provides that a derivative-action plaintiff has standing to maintain a derivative suit where they “fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the [company].” Guided by Rule 23(b)(1), this Court must first determine which members of the Company, if any, are “similarly situated” to the representative-plaintiff to determine if Laurence Stoney is a suitable derivative-action plaintiff.

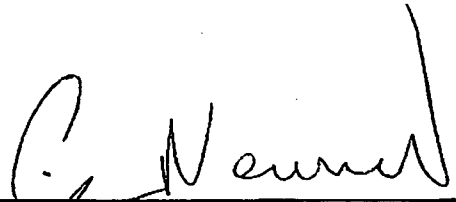
Where, as here, there are no members similarly situated to a derivative-action plaintiff, the derivative-action plaintiff is treated as a class of one and is not required to represent the interests of any other member in a company. *See e.g., Larson v. Dumke*, 900 F.2d 1363 (9th Cir. 1990), *cert. denied sub nom. Round Table Pizza, Inc. v. Larson*, 498 U.S. 1012, 111 S. Ct. 580 (1990) (finding that a shareholder can be a legitimate class of one where other shareholders are not similarly situated to the derivative-action plaintiff).

“The burden is on the defendants to show that the plaintiff will not fairly and adequately represent the corporation and its [similarly situated] shareholders.” *Halstead Video, Inc.*, 115 F.R.D. 177, 179 (N.D. Ill. 1987); *see also Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341, 344 (D. Or. 1987) (“The burden is on defendants to show that [the representative-plaintiff] is an inadequate representative.”); *Brandon*, 300 Ark. 44, 50, 776 S.W.2d 349, 353 (1989) (“The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.”).

The Court finds that Defendants and Intervenors cannot meet their burden, and that Laurence Stoney can maintain this lawsuit on behalf of the Company because (A) Laurence Stoney is a class of one and is not required to represent the interests of other members of the Company, and (B) Laurence Stoney is fairly and adequately representing the interests of the Company in this derivative action.

AND IT IS SO ORDERED.

May 8, 2019



Clifton Newman
Presiding Judge

EXHIBIT 5

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, et al.

Plaintiff,

vs.

Richard S. W. Stoney, et al.

Defendant.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-5463

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Capers G. Barr, III, Bar No. 542

Address:

11 Broad Street, Charleston, SC 29401

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Other:

Defendant's Attorney:

Stafford J. "Mac" McGuillil, III, Bar No. _____

Address:

134 Meeting Street, Charleston, SC 29401

Phone: 843-724-1120 Fax 843-722-2266

E-mail: mmcquillin@hsblawfirm.com Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion of Defendant to Alter or Amend

Estimated Time Needed: 1 hr

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

06-03-19

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, by and
through its member, Laurence O. Stoney,
Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually and as
member-manager of The Boathouse at
Breach Inlet, LLC and Crew Carolina, LLC,

Defendants.

Theodore Stoney, Jr., individually and as
Trustee for Richard Stoney, Jr. and Gregory
G. Holmes,

Third-Party Intervenors.

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10-5463

**DEFENDANT'S RULE 52(b) MOTION
TO AMEND FINDINGS, RULE 59(e)
MOTION TO ALTER OR AMEND,
MOTION FOR RECONSIDERATION,
OR, IN THE ALTERNATIVE, RULE
59(a) MOTION FOR A NEW TRIAL
(Re: Order, filed on 5/20/19)**

FILED
2019 JUN -4 AM 11:24
JULIE J ARMSTRONG
CLERK OF COURT
BY 2

TO: THE HONORABLE STAFFORD J. McQUILLIN, ATTORNEY FOR PLAINTIFF:

Defendants, Richard S.W. Stoney and Crew Carolina, LLC, and Third-Party Intervenors, Gregory G. Holmes, and Theodore D. Stoney, Jr., individually and as trustee for Richard S.W. Stoney, Jr, through their undersigned attorneys, respectfully move that this Honorable Court alter, amend, and reconsider its findings of fact and conclusions of law set forth in the Order ("Order") filed on May 20, 2019 (Exhibit A). This Motion is made pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure.¹

¹ Notice of Entry of the Order was received on May 24, 2019.

I. PROCEDURAL HISTORY

For the purpose of providing clarification, and to properly frame the present motions before the Court, the movants set forth the relevant procedural history of this issue as follows: On March 29, 2018, Defendants and Third-Party Intervenors filed *Defendant and Third-Party Intervenors' Joint Rule 42(b) Motion to Bifurcate [Trial] and Memorandum in Support* ("Motion"). The Motion sought to bifurcate this trial into two phases: Phase One of the trial would determine whether the putative plaintiff, Laurence Stoney, is an adequate plaintiff as required by Rule 23(b)(1) SCRCF to bring a derivative action on behalf of the Boathouse at Breach Inlet, LLC ("Boathouse"). Phase Two of the trial would address Plaintiff's allegations that Defendant Richard Stoney misappropriated Boathouse funds for his personal use and for use in related restaurant business ventures, and would only arise should the Court rule that Plaintiff is an adequate representative.

Plaintiff opposed the Motion on November 9, 2018, this Court held a hearing on Defendants and Intervenors' Motion to Bifurcate, wherein Defendants' counsel specifically presented argument as to why the trial should be bifurcated: "What we think is necessary is for the Court to have a trial on that standing issue, hear the witnesses on that standing issue, make findings of fact and reach conclusions of law on that standing issue. I think that's what we are entitled to." *Hr'g Transcript*, p. 14, lines 19 - 23. "We suggest an orderly way to do it is, let's have a trial on the merits of the standing issue, set a backup trial date if the Court finds that there is standing. But we don't need that backup if the Court finds there's no standing." *Id.*, p. 18, line 24 - p. 19, line 2. "This is not a hearing on the merits. The simple motion that we have before Your Honor is let's set a hearing with witnesses. We can call it a trial. We can call it a hearing

with witnesses. Let's set a separate hearing on this threshold issue." *Id.*, p. 32, line 24 - p. 33, line 3.

On December 13th and 14th, pursuant to Defendants' and Intervenor's Motion to Bifurcate, the Court held a hearing in which the parties presented oral arguments, called witnesses, and submitted exhibits into evidence. The **sole** issue before the Court was whether Laurence Stoney had standing to bring a derivative action on behalf of the Boathouse. Although the present Order now refers to this two-day civil proceeding as a "preliminary hearing", a term which is normally reserved for criminal proceedings, there is no record of any party or the Court referring to it as such prior to the drafting and entry of the Order. To the extent that the Order makes findings as to whether Laurence Stoney has standing to bring a derivative action on behalf of the Boathouse, movants have no option but to treat it as a final order as to the issue of standing.

II. STANDARD REVIEW OF UNDER RULES 52 AND 59, SCRC

Pursuant to Rule 52, SCRC, a party in a non-jury action may move the Court to amend its findings. More specifically, Rule 52(b) SCRC states:

Amendment. Upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

In addition, Rule 59(e), SCRC, sets forth the procedure for altering or amending a judgment:

Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

III. SHAREHOLDER DERIVATIVE ACTIONS

A. GENERALLY.

A derivative suit is an equitable action brought by a shareholder or member in the name or right of the corporation or LLC to redress an injury sustained by, or to enforce a duty owed to, the corporation. *Rivers vs. Wachovia Corp.* 665 F3d 610 (C.A.4, 2011), citing *Fletcher Cyclopedia of the Law of Corporations* Sec. 5939-5940 (rev.ed. 2011.)

Derivative suits are not favored, particularly in closely held corporations. The rule was designed to protect against potential abuse stemming from derivative actions and “seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders.” *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402,407 (Ct. App. 2000) (internal citations omitted).

B. “STANDING”

For this reason, the law imposes certain prerequisites on a stockholder's right to sue derivatively. *Id.* citing *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del.1988). Rule 23(b)(1) sets forth the technical prerequisites for pleading a derivative action: requiring prior demand, and for the form of the complaint. The Rule also provides a substantive, threshold criterion for the maintenance of the derivative action: “The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of

the shareholders or members similarly situated in enforcing the right of the corporation or association.” (Emphasis added.) See also, Rule 23(b)(1), SCRCF.

South Carolina decisions on the adequacy of a representative plaintiff in a derivative lawsuit are sparse. However, Federal court decisions construing the adequacy of representation under the Federal Rule employ a two-pronged test: (1) The representative party must vigorously and conscientiously prosecute the action; and (2) The interests of the unnamed plaintiffs must not be antagonistic to the interests of the representative party. See, e.g., *DuPont v. Wyly*, 61 F.R.D. 615 (D. Del., 1973); *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y., 1968); *Owen v. Modern Diversified Industries, Inc.*, 643 F.2d 441, 443-44 (6th Cir.1981) (no antagonistic interests).

Other courts have considered certain additional factors to determine the adequacy of a Plaintiff's representation. The most relevant of these factors to the current action include: (1) the degree of support received by the plaintiff from other shareholders (see *Rothenberg v. Security Management Co.*, 667 F.2d 958, 961 (11th Cir.1982) (citations omitted); (2) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; and (3) plaintiff's vindictiveness toward the defendants. See *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir.1980). These factors are “intertwined or interrelated, and it is frequently a combination of factors which leads a court to conclude that the plaintiff does not fulfill the requirements” of the rule. *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990).

The above criteria can be distilled into the following questions:

- 1) Did the Plaintiff make a good faith pre-suit demand for redress?
- 2) Did the Plaintiff demonstrate an attempt to confer with other shareholders before suit?

- 3) Does the Plaintiff represent and receive the support of other members similarly situated?
- 4) Does the Plaintiff have clean hands?
- 5) Did the Plaintiff act with reasonable promptness once learning of the alleged wrong?
- 6) Is the claim a personal and not a corporation claim?
- 7) Is the Plaintiff motivated by personal animus?
- 8) Does the Plaintiff have personal interests in pursuing the claim that are antagonistic to other members?

IV. GROUNDS AND ARGUMENTS

A. This is a case of first impression. The proposition that a shareholder derivative suit may be brought by a single shareholder as a class of one is a question of first impression in South Carolina. Indeed, in the case of Larson v. Dumke, 900 F.2nd 1363 (9th Cir. 1990), cited by the Court in its Order, the Ninth Circuit Court of Appeals acknowledges as much: “Although the cases are not uniform, we are persuaded that a single shareholder may bring a derivative suit. Halsted Video, Inc. v. Guttillo, 115 FRD 177, 179-80 (ND Illinois 1987); See Nolen v. Shawdash Walker Co., 449 F2d 506, 509 Note 4 (6th Cir.1971). But compare, Kuzmickey v. Dunmore Corp., 420 F.Supp.226, 230-31 (Ed. Pennsylvania 1976) (one plaintiff alone may not maintain a derivative suit) with Lewis, 671 F.2d at 788-89 (one plaintiff who owned 100 shares in a corporation with nearly 8 million shares outstanding was considered an adequate representative under Rule 23.1)”.

The Kuzmickey decision holds this: “Plaintiff avers in her amended complaint that she ‘fairly and adequately represents the interests of the shareholders similarly situated.’ The individual defendants, who owned 70 percent of the Dunmore stock between them, on the other hand, point out that plaintiff’s interest are obviously antagonistic to theirs and they have submitted affidavits...that the suit is not brought in the best interests of the corporation”.

“These affidavits make it readily apparent that plaintiff does not represent anyone but herself for there are no other shareholders who are “similarly situated”, viz., shareholders who are dissatisfied with the actions of the officers and directors of Dunmore. (citations omitted.)”

“While I recognize it is not necessary in a derivative action that the plaintiff have the support of all of the minority shareholders, see, e.g. Nolen v. Shaw-Walker Co., supra, here plaintiff has no support at all.”

“It seems to me the language of Rule 23.1 is clear that a derivative action may not be maintained unless the plaintiff represents ‘interests of shareholders’ other than herself. If a derivative action could be maintained by a single non-representative shareholder, this language would be unnecessary.” (420 F.Supp at 230, 231)

Whereas the Court has “preliminarily” concluded that Plaintiff Laurence Stoney acts on behalf of the company in this case, we suggest the Court should make further findings as to the adoption of the “class of one” line of cases. The simple, grammatical analysis adopted by the Kuzmickey court that the rule itself is expressed in terms of the interests of the “shareholders or members”, using the plural tense, is persuasive.

Plaintiff’s position in this case has meandered from initially alleging that he would represent the interests of all shareholders, to the allegation that he would represent the interests of shareholders “similarly situated”, which would have excluded Laurence Stoney and Greg

Holmes, to alleging that he was instead representing the interests of himself and Lori and Croft Stoney, to finally asserting that he represents only the interests of himself, as a class of one.

Similarly to Kuzmicky, plaintiff has no support at all, except for that of Richard Stoney's ex-wife.

Plaintiff is not without a remedy: he may seek recovery of what he contends to be his share of the disproportionate distributions. The fact that, as he testified, plaintiff has not set foot in the Breach Inlet restaurant for several years is telling as to his true motivation. This case should not be the bellweather for the South Carolina court to adopt the principal that a "class of one" has standing to bring a shareholder derivative action.

B. The Order should be amended because it substantially overreaches the Scope of the December 13/14, 2018 Hearing on the limited issue of standing.

The December Hearing was set by the Court as the specific result of a Motion for Bifurcation filed by Defendants and Third-Party Intervenors on March 29, 2018, and heard by the Court on November 8, 2018. Although the Court issued no written Order from the November 8th Hearing, the scope of the Bifurcated Hearing was specifically to decide the issue of standing, as framed in the Fifth Defense and the Eighth Defense in the Answer filed by Defendants Richard Stoney and Crew Carolina.

Because the only issue to be decided at this stage was the standing of Plaintiff to bring a derivative action, issues of liability and damages were specifically reserved for a subsequent phase of the case. As more specifically set forth below, the Court makes findings (factual and otherwise) relating to the liability of Defendant Richard Stoney on the underlying causes of action for breach of fiduciary duty and misappropriations of funds. Because issues of liability and damages were not reserved for a subsequent phase of the case, and were not the subject of

the proceedings before the Court, these findings are improper, and are prejudicial to Defendant Richard Stoney on the second trial phase issue of his liability.

C. The Order should be amended because it makes findings of fact that are not relevant to the issue of standing.

1. Finding of Fact # 4 of the Order finds that “credible testimony supports a finding that Laurence Stoney [the putative plaintiff] is pursuing this derivative action because he believes that Defendants misappropriated Company assets, which he believes should be returned to the Company.” The paragraph then cites testimony in which Laurence Stoney makes allegations that “four and a quarter million dollars” is “missing” and “needs to go back to the Boathouse” and that he “seeks to make [the] Boathouse at Breach Inlet whole.” This finding is not relevant to the issue of standing for several reasons.

First, the mere belief that a wrongdoing has been committed does not qualify a putative plaintiff to bring a derivative action in a representative capacity. Rather, to bring a derivative action, the putative plaintiff must demonstrate, among other things, that he can fairly and adequately represent the interests of shareholders and members in enforcing the rights of the company. See Standard of Review, cited *supra*. The Order cites no rule, statute, or case law that a party’s “belief” that a wrongdoing has been committed is recognized as a relevant factor in determining whether the party has standing to bring a derivative action.

Second, any member can make allegations of wrongdoing against the managers and other members of an LLC. Absent a showing that the member meets the recognized requirements for bring a derivative action, a member’s willingness to hurl insults and allegations of impropriety against other members does not give rise to that member’s standing. If that were the case, any disgruntled minority member of a company could undermine its governance at the expense and

detriment of the Company and its membership. This is particularly true where, as in this case, the putative plaintiff is a five percent (5%) member of an LLC and wishes to bring a derivative action that is opposed by ninety percent (90%) of the other members and/or member-beneficiaries and where the only other member supporting the lawsuit is the Defendant's ex-wife, who has been embroiled in marital litigation against Defendant for over a decade. This finding should be stricken and/or amended because it is not relevant to the issue of standing.

2. Finding # 7 of the Order "finds credible evidence sufficient to support the allegation that Richard Stoney misappropriated money from the Company." Although the Order qualifies this finding by stating that the Court is not making this finding as a "finding of fact," this finding should be stricken and/or amended as it is neither relevant to nor appropriate at this stage of the proceedings, but should be reserved for the trial on the merits of liability and damages. The Court's predetermination of that issue is prejudicial to Defendant Richard Stoney, because it is exclusively relevant only to liability and not standing.

Moreover, the Answer of Defendant Richard Stoney asserts, among other defenses, the defenses of the Business Judgment Rule in its Sixth Defense and Waiver and Estoppel in its Seventh Defense (see Exhibit "A"). The Court has heard no evidence regarding the Business Judgment Rule, waiver or estoppel; and neither has the Court received evidence relating to the provisions of the LLC Operating Agreement. All of these issues are and must be deferred for hearing on the merits of liability and damages.

The issue of liability and damage was not joined for the December 13/14, 2018 Hearing. Defendants were not noticed of any intent by Plaintiff to prosecute and to seek findings about the liability of Richard Stoney for "misappropriation". To the contrary, and at all times, Plaintiff acknowledged the limited issue joined for the Hearing would be related only to Plaintiff's

standing to bring a derivative lawsuit. Accordingly, this finding should be stricken and/or amended because it is not relevant to the issue of standing and involves and/or affects the merits of liability and damages. That it was disingenuously cloaked in the guise of “unclean hands” is addressed immediately below.

The Hollenback Affidavit.

The Order, including Finding # 7, also improperly relies on the Affidavit of Don Hollenback. On the day before the December Hearing – December 12, 2018 – Plaintiff filed a Memorandum with the Court, asserting for the first time that Defendants’ defense of *laches* would also be an issue for the Court to decide. Admittedly, Defendants acquiesced to this suggestion.

However, it is now apparent that Plaintiff’s ulterior motive for introducing *laches* as an issue for the December hearing was an attempt to justify the admission of the affidavit of Don Hollenback into evidence. Mr. Hollenback is a forensic accountant whose affidavit states that Defendant Richard Stoney comingled funds of The Boathouse at Breach Inlet with other restaurants managed by Crew Carolina, the company that also managed Boat House at Breach Inlet.

Over the objection of Defendants as to relevance, the Court ruled that Mr. Hollenback’s affidavit was relevant to the issue of Defendant Richard Stoney’s unclean hands as a bar to the defense of *laches*. However, Plaintiff’s proposed Order does not cite to any reference in the Hollenback evidence that is relevant to the issue of unclean hands as a bar to the defense of *laches*.

Whereas it is a correct principle of law that a defendant’s unclean hands may defeat his defense of *laches*, a plaintiff must show that the defendant’s unclean hands is relevant to the

issue of *laches*; that is, that the unclean hands was the cause of the plaintiff's delay in bringing the lawsuit, in order for unclean hands to be relevant to the defense of *laches*.

If a claim of the general unclean hands of a defendant would bar the defense of *laches*, then no defendant could ever assert *laches* as a defense; because in every lawsuit a plaintiff contends some cause of action against a defendant, often based upon allegations of the defendant's misconduct. In that situation, if the substantive allegations of misconduct would bar the defense of *laches*, no defendant could assert the defense of *laches*, if the facts of the underlying cause of action would bar it. Rather, the unclean hands of a defendant must be the cause of plaintiff's delay in filing the suit. Otherwise, proof of general unclean hands is not relevant.

The case of *Serdarevic v. Advanced Medical Optics, Inc.*, 532 F.3rd 1352 (Fed.Ct.App.2018), was a patent case in which Plaintiff sued for misappropriation of her patent, and for unjust enrichment and fraud. The Federal District Court granted summary judgment to the Defendant on the grounds of *laches* and the statute of limitations. The Federal Court of Appeals affirmed the District Court.

Plaintiff's appeal to the Federal Circuit Court of Appeals argued that the unclean hands of Defendants barred them from asserting the defense of *laches*. The Federal Court of Appeals there held: "To succeed in an unclean hands claim, a plaintiff is required to show that the defendant has 'engaged in particularly egregious conduct that would change the equities significantly in plaintiff's favor' (citations omitted). But it is not enough to show misconduct. (citations omitted)". Rather, the unclean hands of defendant must be responsible for plaintiff not finding out (about defendant's misconduct). "If the party which advances the defense of *laches* is responsible for the delay or contributes substantially to it, he cannot take advantage of it...thus

we hold that in the context of an inventorship claim, a plaintiff relying on the unclean hands doctrine to defeat a claim of *laches* must show not only that the defendant engaged in misconduct, but moreover that defendant's misconduct was responsible for plaintiff's delay in bringing suit." 532 F.3rd at 1361. (Emphasis added.)

Hollenback's Affidavit certainly attempts to tar Richard Stoney with a brush of misconduct. However, Hollenback does not address, at all, any underlying conduct of Richard Stoney that would have caused Laurence Stoney to delay in the filing of this lawsuit. To the contrary, Laurence suspected a long ago as 1999 that Richard Stoney was paying the expenses of other restaurants with Breach Inlet funds. Yet he did nothing about it, and by his own admission "sat on his hands". See the arguments below, Page ____, discussing Finding of Fact #9 of the Order, citing the Trial Transcript Page 42, Line 10-18, in which Laurence Stoney admitted that he suspected as far back as 1999 that Richard was "using Crew Carolina as an ATM".

3. Finding # 8 of the Order "finds credible evidence sufficient to support the allegation that Intervenor's knew that Richard Stoney was misappropriating Company assets, and that Intervenor's benefitted financially from Richard Stoney's misappropriations." Just as with the case of Finding # 7, the Order qualifies this finding by stating that the Court is not making this finding as a "finding of fact." However, this finding, like Paragraph # 7, is neither relevant nor appropriate at this stage of the proceedings, but should be reserved for the trial on the merits of liability and damages. As with the case of Finding # 7, the underlying liability of Richard Stoney was not an issue for the December, 2018 Hearing. Likewise, the references to the Hollenback Affidavit are not relevant or appropriate for the same reasons argued above as to the Paragraph # 7.

References to Hollenback's affidavit should also be stricken from the Order because it cites to hearsay evidence. For example, in Finding # 8, Page 5, the proposed Order cites, in indentations from the Hollenback Affidavit, in which Mr. Hollenback states Richard Stoney and Gregory Holmes were advised by a CPA...". This is manifestly hearsay evidence and is not competent for the Court's consideration.

4. Finding #9 of the Order "finds credible evidence sufficient to support the allegation that Laurence Stoney did not know that Richard Stoney was using Boathouse monies to fund other business." Just as with the case of Findings # 7 and #8, the Order qualifies this finding by stating that the Court is not making a "finding of fact." However, this finding is again neither relevant nor appropriate at this stage of the proceedings, but should be reserved for the trial on the merits of liability and damages. As with the case of Findings # 7 and #8, the underlying liability of Richard Stoney was not an issue for the December, 2018 Hearing. In addition, this finding should be stricken and/or amended because, as argued below, it makes findings that are not sufficiently supported by the evidence.

D. The Order should be amended because it makes findings that are not sufficiently supported by the evidence.

1. Finding of Fact # 5 of the Order finds "credible evidence that Laurence Stoney is not pursuing this derivative action primarily because of animus towards Richard Stoney. This finding is not sufficiently supported, but rather is contradicted by the evidence. To support its finding, the Order points to a single question asked of Laurence Stoney during phase one of the trial. Specifically, "You told me that you have no animosities against your cousin Richard, did you tell me that?" Laurence Stoney replied, "No, I didn't." (Trans., p. 35:2-p, 10:2-4). The Order then cites, but does not quote two lines in Laurence Stoney's Deposition and states, "This

testimony corroborates Laurence Stoney's deposition testimony." However, Laurence Stoney's deposition was never offered as evidence.

The Order fails to acknowledge the evidence demonstrating that Laurence Stoney is pursuing this derivative action because of animus toward Richard Stoney. For example, Theodore Stoney testified about Laurence's long-standing jealousy of Richard:

A. Laurence was always jealous of Richard. There were five grandsons. Laurence was the only one that did not graduate from college. In fact, the other four had postgraduate degrees. Richard was a successful attorney. He was successful in the restaurants. He was a popular person.

L
SEP

In addition, during his trial testimony Laurence admitted to speaking ill of Richard to numerous people over the past decade, volunteering to testify on Lori Stoney's behalf during her divorce from Richard in 2011, and most recently copying Lori Stoney's divorce attorney, Paul Tinkler, in an email to Richard to gain leverage in a buyout of his own personal shares, stating, "make your best offer and we might not need all the pain." Transcript, p. 65, lines 18-19. See also, Plaintiffs Trial Exhibit # 6. The record reflects Laurence's animus and vindictiveness in pursuing this action.

2. Finding of Fact # 6 of the Order "does not find credible evidence that Defendants' and Intervenor's theories that Lori Stoney (the ex-wife of Richard Stoney) encouraged Laurence Stoney to file this action, that Lori Stoney is the driving force behind this action, or that Lori Stoney has colluded with Laurence Stoney in this action." This finding is not sufficiently supported by the evidence, but rather is contradicted by the evidence. In support of this finding the Order points to only a few excerpts of the trial transcript where Lori Stoney denies being involved with this litigation.

The Order fails to acknowledge the considerable amount of evidence demonstrating her intimate and protracted involvement in this case, discussions with Laurence Stoney, and discussions with the lawyers representing Laurence Stoney in this case. For example, Lori Stoney testified as follows:

(Examination by Mr. Barr, using Lori Stoney's deposition transcript.)

Q. And so I asked you what conversations, on Line 3, what conversations did you have with Laurence about that. Oh, excuse me. On page 45, I asked you, all right, you talked about suing on Croft's behalf, but go on to say if you can get Laurence onboard. And I asked you, what did you mean by that? And your answer was, probably that I have absolutely no money to spend on attorneys or litigation fees, and that the only way that litigation could be pursued would be with him willing to pay the costs associated with that.

Is that what you said?

A. Yes, with regard to Laurence being involved with that part of it.

[...]

Q. On page 46, line 3, I asked you, so, what conversations did you have with Laurence about that? Read your answer out loud.

A. Yes, sir. I don't remember specifically, but at some point in time, I talked to Mack and Scott about the general issues with the Boathouse and the disparate treatment of the members. And I don't remember whether Laurence was present or not. He may have been. It was a long time ago.

SEP

Q. Let me stop right there. You can read the rest if you want, but let me ask you some questions about that just for the record. Mack and Scott are Mack McQuillin and Scott Barnes, right?

A. Yes.

Q. Who are Laurence's lawyers, correct?

A. Well, they are now. I don't know if they were when I talked --

Q. I said, who are Laurence's lawyers, correct?

A. Right.

Q. And who were giving you legal counsel at the time, correct?

A. Yes.

Q. But then you say, I don't remember whether Laurence

was present or not, he may have been. Wasn't that your answer?

A. Yes.

December 13-14th Trial Transcript, p. 88, lines 46 - p. 91, line 13

Correspondence between Lori Stoney and Mac McQuillin, Laurence Stoney's lawyer, dating back to September 12, 2014 clearly demonstrates that she encouraged Laurence to file his action. Prior to the filing of the action, she stated, "let's move forward with suing on Croft's behalf btw if you can get Laurence onboard." (Defendant Exhibit 5.)

Laurence Stoney testified as to having communications with Lori Stoney regarding this litigation, further demonstrating his animosity against Richard Stoney:

(By Mr. Barr)

Q. Now, Mr. Stoney, let me let you look at this e-mail chain. The first page of it, just publish what it is, seems to be an e-mail from Lori to you on March 9th and your reply. And then the second page is also March the 9th. Tell me when you've read it.

A. Okay.

Q. Let's start on the second page at the bottom of the e-mail. On March 9th, 2016, Lori writes you: accountants for you, who is doing that for you? Can I please, please somehow get whatever info you find from 2011 forward? This is the last info I have. And I know we are going to end up having our case remanded. Sigh. How is everything else in your world? I'm going to the Bahamas in two weeks with Barbara" -- and so forth and so forth. And you respond saying, "Lori, I'm not sure who the accountants are, but I'm told it will be after April 15th before they get back to me." Is that what you said to her?

A. Yes.

Q. Okay. Let's go to the first page. On March the 9th at 2:56 p.m., Lori is writing you saying, hey, Bud -- that's you, right?

A. Correct.

Q. She's calling you Bud, right?

A. I guess so.

Q. She says, what is the latest? Still no word on the appeal, unfortunately. Why don't you read to us what you reply. You read it into the record.

A. "All right. The usual expected foot-dragging crap.

Last I heard, the accountants were going through books.
Comment from all -- this is after they looked at the books,
Dick is toast.”

Q. And Dick, of course, is Richard Stoney?

A. Cousin Richard, yes.

Q. So this cousin whom you love --

A. Yes.

-- you are telling his ex-wife, Dick is toast?

A. Dick is toast.

Q. And you feel no acrimony toward him, do you?

A. No.

Q. But Dick is toast?

A. Right, just a phrase.

December 13-14th Trial Transcript, p. 71, line 8 - p. 72, line 23

3. Finding # 9 of the Order also makes findings that are not sufficiently supported by the evidence. Again, Paragraph # 9 “finds credible evidence sufficient to support the allegation that Laurence Stoney did not know that Richard Stoney was using Boathouse monies to fund other businesses.” This finding is not sufficiently supported by the evidence but rather directly and repeatedly contradicted by Laurence Stoney himself:

(By Mr. Barr)

Q. So you suspected that the money from Breach Inlet and East Bay was being used by Crew to support those other Restaurants, correct?

A. I had my suspicions.

Q. You had your suspicions. And that was in 2005, right?

A. Yes.

Q. Okay. And so, let's see, that's 13 years ago, right?

A. Correct.

December 13-14th Trial Transcript, p. 42, lines 10-18

And

Q. So you suspected that Richard was siphoning off money?

A. I asked the question. It was never answered as far as I know.

Q. But you asked him because you suspected it.

A. I suspected it correct.

Q. And that was as long as ago as 1999, isn't that right?

A. I don't know, whenever. It makes no--whatever. When was it.

Q. But you testified that was financial misfeasance going on?

A. Malfeasance.

Q. Malfeasance, that's right. In your deposition you testified that Richard was using Crew Carolina as an ATM; isn't that your testimony?

A. If that's what I said.

Q. **And that goes as far back as 1999?**

A. That's correct.

Q. But you didn't do anything about it out of the goodness of your heart?

A. The goodness of my heart and being a very patient person and dealing with family.

Q. **So you just sat on your hands?**

A. **I sat on my hands and took it.** I was going through a divorce of my own at the time. And I had better things to do than to fill it with all of this.

December 13-14th Trial Transcript, p. 73, line 16- p. 74, line 16 [Emphasis added]

4. Finding # 11 of the Order "finds credible evidence sufficient to support the allegation that Laurence Stony asked Richard Stoney for Company financial records and that Richard Stoney did not provide those records." This finding is not sufficiently supported by the evidence in that it ignores that Richard Stoney invited Laurence to review the Company's financial records as far back as 2009 at the Boathouse and Crew Carolina's office and that Laurence Stoney declined to avail himself of the opportunity to review the records despite the fact that the Company's office was less than a five minute walk from Laurence Stoney's workplace. Laurence Stoney testified:

Q. Now, your offices for your operation, your business are just down the street or around the corner from the offices of Crew Carolina?

A. Where the offices of Crew Carolina used to be.

Q. Used to be. Okay. And was there anything that stopped you from going down to Romney Street where Crew Carolina's office used to be and looking at the books?

A. Only time I was allowed to -- I was told I was going to be allowed to look at the books were for the East Bay Street Boathouse. And I was going to have to go into the office physically, sign complete release document and lay eyes on them, no copies, no nothing. And I agreed -- I decided no, I

am not going to do that. They can just e-mail me the thing.
What do they got to hide?

Q. You weren't asked to sign the release. You were asked to sign a confidentiality agreement?

A. Confidentiality. But at the same time, I was told we were not going to be able to take anything out of the office. Only thing that was going to happen, we were going to be able to lay eyes on them in the office.

Q. So when Crew Carolina closed East Bay, you were given the opportunity to look at the books. But your relationship with -- this was in, what, 2009?

A. I guess so.

December 13-14th Trial Transcript, p. 122, lines 2-25

And

Q. When Richard asked you to sign the confidentiality agreement, he was concerned or he had expressed concern that you were saying bad things about him on the street. And yesterday you testified to the fact that you were saying things about him.

A. Yeah. So why are we --

Q. Is it any surprise that he asked you to sign a confidentiality agreement?

A. It wasn't just me. He asked everyone to sign the thing.

Q. Given your past behavior, is it any surprise to you that he wanted you to sign the confidentiality agreement?

A. No surprise.

Q. That is an unreasonable request that you sign --

A. The place was already closed. What does he have to hide? Done.

Q. Well, these are private records, aren't they?

A. Yeah, whatever.

Q. They are not a matter for the public, are they?

A. I have no idea. You would have to ask an expert.

Q. Isn't it reasonable for him to ask that you maintain confidentiality for these records?

A. Yes. I don't think it's unreasonable, but I wasn't going to go over there to look at it.

MR. KEFALOS: That's all the questions I have of this witness.

December 13-14th Trial Transcript, p. 124, line 9 - page 125, line 9.

Laurence Stoney's testimony was also corroborated by Richard Stoney who testified that he invited Laurence Stoney to review company records:

I would also add that I find it remarkable Laurence has denied that he was not offered multiple times to look at the books. All he had to do was drive over. All we ask is that he come to Crew and look at the box at Crew. That's all we ever asked.

Q. Where was -- where were the offices of Crew in relation to his office?

A. Less than a two-minute drive. You could walk it in five minutes. We were two blocks away, a very unobstructed area, what you call right off of Morrison Drive.

December 13-14th Trial Transcript, p. 193, lines 3-12.

5. Finding of Fact # 14 of the Order "finds that the attorneys representing the Plaintiff are qualified to conduct this litigation on behalf of the Company." This finding is not sufficiently supported by the evidence in so far as the Order does not point to any evidence submitted by the Plaintiff or considered by the Court to support this finding.

V. CONCLUSION.

For the reasons argued above, this Court should reconsider, alter and amend its findings of fact and conclusions of law as follows:

A. By reconsidering its conclusion that Laurence Stoney has standing to bring this action. There is no established law to support the conclusion that a "class of one" may bring a representative derivative case in South Carolina. Moreover, the evidence shows that Laurence Stoney acted out of a vindictive motivation against his cousin, Richard Stoney.

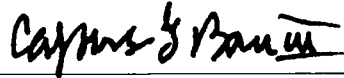
B. The equitable doctrine of *laches* bars Laurence Stoney from maintaining a derivative action because he admitted in his testimony to having inquiry notice that funds from the Breach Inlet restaurant were being used to support other entities, as long ago as 1999, and conceded that "I sat on my hands and accepted it."

C. Defendant's and Third Party Intervenors are prejudiced by Laurence's unreasonable delay, because Laurence himself conceded in his testimony that he could have reduced the alleged losses to the company, had he taken action in 1999 when he first was put on notice of the activities. Moreover, the sheer increase in accounting necessary would have been substantially less, as would the ability of the parties to recall the facts.

D. Richard Stoney and Third-Party Intervenors should not be barred from asserting *laches* as a defense, because no evidence was presented that any act or omission on their part caused or encouraged Laurence's inexcusable delay in bringing this action. Rather, he admittedly "sat on his hands".

Respectfully submitted,

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Charleston, South Carolina

June 3, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)

The Boathouse at Breach Inlet, LLC, by and)
through its member, Laurence O. Stoney,)
Jr.,)
)

Plaintiff,)
)

vs.)
)

Richard S.W. Stoney, individually and as)
Member-manager of The Boathouse at)
Breach Inlet, LLC and Crew Carolina, LLC,)
)

Defendants.)
)

Theodore D. Stoney, Jr., individually and as)
Trustee for Richard Stoney, Jr. and Gregory)
G. Holmes,)
)

Third-Party Intervenors.)
)

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2015-CP-10-5463

CERTIFICATE OF SERVICE

FILED
2019 JUN -4 AM 11:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I certify that on the 30 day of June, 2018, I served a copy of **DEFENDANT'S**,
MOTION TO ALTER OR AMEND on the following counsel of record by mail and email:

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June 4, 2019

BY HAND

Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: Laurence O. Stoney, Jr., et. al. vs. Richard S. W. Stoney, et. al.
Case No: 2015-CP-10-5463
Our File No: 2015-1098

Dear Ms. Armstrong:

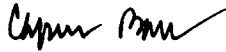
Enclosed please find an original and one copy of Defendant's Rule 52(b) Motion to Amend Findings, Rule 59(e) Motion to Alter or Amend, Motion for Reconsideration, or, in the Alternative, Rule 59(a) Motion for New Trial (Re: Order, filed on 5/20/19) for filing in the above-referenced matter. Also enclosed is a Motion Slip and check for the \$25.00 filing fee.

Please note this case is assigned to Business Court Judge Clifton Newman.

Please file the original and provide a clocked copy back to me via bearer of this letter.

Thank you for your assistance.

Sincerely yours,



Capers G. Barr, III

CGBIII/shg
Enclosures (as stated)

cc: Hon. Clifton Newman, Judge (by e-mail; w/enclosures)
Richard Stoney (by e-mail; w/enclosures)
Jesse Sanchez, Esq. (by e-mail; w/enclosures)
Stafford J. McQuillin, III, Esq. (by e-mail w/enclosures)
George J. Kefalos, Esq. (by e-mail; w/enclosures)

11 Broad Street P.O. Box 1037 Charleston, SC 29402
Telephone 843-577-5083 Fax 843-723-9039

EXHIBIT 6

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHARLESTON) Court of Common Pleas
Case No. 2015-CP-10-5463
_____))
3)
THE BOATHOUSE AT BREACH INLET,)
4 LLC, by and through its member,)
Laurence O. Stoney, Jr.)
5)
Plaintiff,)
6)
vs.) Transcript of Record
7)
RICHARD S.W. STONEY,)
8 individually and as)
member-manager of THE BOATHOUSE)
9 AT BREACH INLET, LLC, and CREW)
CAROLINA, LLC,)
10)
Defendants.) DATE:
11) December 13 - 14, 2018
_____))
12)

13 B E F O R E:

14 THE HONORABLE CLIFTON NEWMAN

15

16 A P P E A R A N C E:

17 STAFFORD JOHN MCQUILLIN, III, TYLER GILLIAM and
SCOTT BARNES
18 Attorneys for the Plaintiff

19 CAPERS G. BARR, III
Attorney for the Defendants, Crew Carolina
20 and Richard S.W. Stoney

21 GEORGE J. KEFALOS,
Attorney for Defendants Gregory Holmes, Richard S.W.
22 Stoney, Theodore D. Stoney

23

24 Original transcript ordered by:
Haynsworth Sinkler Boyd, P.A.

25 Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 A. Ask the question again, please.

2 (Whereupon, the court reporter reads back the
3 requested question.)

4 A. Correct.

5 Q. And then you forwarded those e-mails to Lori, right?

6 A. Yes.

7 Q. In December?

8 A. I did.

9 Q. Now we are in April. That's four months later, April
10 the 24th. Isn't it correct that this is the letter from
11 Haynsworth Sinkler Boyd that jump starts this case?

12 A. Yes. Actually, wasn't jump starting the case, just
13 asking for information I've been trying to get for years.
14 Wasn't any case, man.

15 Q. Well, as a result of that letter, wasn't there
16 dialogue between Richard and the lawyers and then Richard
17 engaged me?

18 A. I guess so.

19 Q. And then we had some things that we ought not to talk
20 about here trying to get it resolved, but it led to this
21 lawsuit, didn't it?

22 A. I assume it did.

23 Q. And that was the letter that jump started it, didn't
24 it?

25 A. It did start. Didn't jump start it, just asking for

1 on?

2 A. Malfeasance.

3 Q. Malfeasance, that's right. In your deposition you
4 testified that Richard was using Crew Carolina as an ATM; isn't
5 that your testimony?

6 A. If that's what I said.

7 Q. And that's as far back as 1999?

8 A. That's correct.

9 Q. But you didn't do anything about it out of the
10 goodness of your heart?

11 A. The goodness of my heart and being a very patient
12 person and dealing with family.

13 Q. So you just sat on your hands?

14 A. I sat on my hands and took it. I was going through a
15 divorce of my own at the time. And I had better things to do
16 than to fill it with all of this.

17 Q. Now, Mr. Stoney, when you first filed this lawsuit in
18 October of 2015, which was three years ago now --

19 A. Yes, over three years ago.

20 Q. -- over three years ago, right. Do you remember me
21 asking you about this in your deposition? It was a verified
22 complaint, correct?

23 A. I have no idea what deposition, which time.

24 Q. Two weeks ago, in my office up on Broad Street.

25 A. What was the question again?

1 Q. I asked you about the complaint in the deposition in
2 my office down the street?

3 A. Yes, sir.

4 Q. All right. And I asked you, isn't it correct it's a
5 verified complaint?

6 A. It's a verified complaint.

7 Q. Meaning that you swore under oath that what it said
8 was true to the best of your knowledge?

9 A. Yes, sir.

10 Q. Do you remember that?

11 A. Yes.

12 Q. All right. And in that first complaint, you said that
13 you would fairly represent the members of The Boathouse; do you
14 remember that?

15 A. Correct.

16 Q. But before filing that lawsuit, you did not consult
17 with Ted, did you?

18 A. I did not.

19 Q. You didn't consult with Greg Holmes, did you?

20 A. I did not.

21 Q. You didn't consult with Richard, did you?

22 A. No, I did not.

23 Q. The only person you had consulted with was Lori,
24 wasn't it?

25 A. And had really not even consulted with her. This is

EXHIBIT 7

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, by and
through its member, Laurence O. Stoney,
Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually and as
member-manager of The Boathouse at
Breach Inlet, LLC and Crew Carolina, LLC,

Defendants.

Theodore Stoney, Jr., individually and as
Trustee for Richard Stoney, Jr. and Gregory
G. Holmes,

Third-Party Intervenors.

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10-5463

**ORDER DENYING
MOTION TO ALTER OR AMEND**

FILED
2019 SEP 17 AM 9:45
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the Court on a Motion to alter or amend the Order of the Court issued on May 20, 2019.

Having fully considered the Motion, the Court finds that the Order of the Court should not be altered or amended.

The Motion to Alter or Amend is therefore denied.

AND IT IS SO ORDERED this 29th day of August 2019.

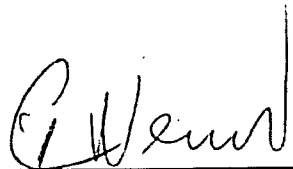

Clifton Newman
Presiding Judge

EXHIBIT 8

HAYNSWORTH SINKLER BOYD

HAYNSWORTH SINKLER BOYD, P.A.
134 MEETING STREET, 3RD FLOOR
P.O. BOX 340 (29402)
CHARLESTON, SOUTH CAROLINA 29401
MAIN 843.722.3366
FAX 843.722.2266
www.hsblawfirm.com

STAFFORD J. MCQUILLIN III
DIRECT 843.724.1120
mmcquillin@hsblawfirm.com

August 30, 2019

VIA EMAIL

Capers G. Barr, III, Esquire
Barr Unger McIntosh, LLC
11 Broad Street
Charleston, SC 29401
cgb@barrungermcintosh.com

George J. Kefalos, Esquire
George J. Kefalos, P.A.
45A State Street
Charleston, SC 29401
george@kefaloslaw.com

Re: Boathouse at Breach Inlet, LLC, *et al.*, v. Stoney, *et al.*
Case No.: 2015-CP-10-05463; HSB File No.: 37631.0001

Dear Capers and George:

As you know, today Judge Newman issued his Order denying Defendants' Motion to Reconsider. We respectfully write you regarding our concern that Defendants will wrongfully attempt to appeal the Court's May 20, 2019 Order on Laurence Stoney's standing (the "Order") to further delay the trial on the merits.¹ Based on Defendant Richard Stoney and his brother/Intervenor Theodore Stoney's well-documented appeal history and litigation tactics, we have asked you directly whether you intend to appeal Judge Newman's Order. You responded, "I don't know." We are writing to ask you not to enable or assist your clients with this frivolous delay tactic.

The first sentence of the Order reads, "[a]t the request of the parties, the Court held a *preliminary hearing* on the issue of whether the derivative-action plaintiff, Laurence Stoney, has standing to maintain this derivative action." *Order*, at p. 1 (emphasis added). Yet in Defendants' Motion to Reconsider, you attempted to recast the Court's Order as a "final order on the issue of standing,"

¹ Your clients, Defendant Richard Stoney and his brother/Intervenor Theodore Stoney, have employed similar appeal delay tactics in other litigation, which was filed in April of 2009, and has now been **pending for over a decade** with no end in sight. *Stoney v. Stoney*, Op. No. 5593 (S.C. Ct. App. Filed August 29, 2018) (noting your clients' prior "antics" and "contemptuous behavior").

August 30, 2019

Page 2

ignoring completely the Court's characterization of the December hearing on standing as "preliminary." (*Defendants' Motion to Alter or Amend*, filed June, 4 2019, p. 3) ("movants have no option but to treat [the Order] as a final order as to the issue of standing").

The Court's Order does not make "final" findings of fact. Indeed, the fact section of the Order is entitled, "Preliminary Findings of Fact." *Order*, at p. 3. Logic dictates that a civil defendant ordinarily would be glad to characterize an order finding that a defendant did not meet his burden to defeat a plaintiff's standing as preliminary; but here, it appears Defendants would sacrifice their right to challenge standing at trial, to the extent discovery leads to new evidence, for the chance to further delay this almost four year-old case without having to post an appeal bond. Any appeal would be contrary to well settled South Carolina law. *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (holding that "immediate appeal of various orders issued before or during trial generally has not been allowed" and that "[p]iecemeal appeals should be avoided");

The above-cited language in the Order itself establishes that it is preliminary—not final. But based on the Court's statements at the June 14, 2019 hearing on Defendants' Motion to Reconsider, it is beyond debate that the Order is not a "final order" and, thus, not appealable. Specifically, at the June 14, 2019 hearing, the Court stated:

I was careful to couch my terms in that way *without reaching any findings on these issues*, of course, sort of like when you have a bond hearing and someone is charged with murder and is trying to get out of jail. I say, I'm not sure whether you committed murder or not, but it – I'm not letting you out of jail because it appears you created an unreasonable risk of harm.

June 14, 2019 Trans., p. 75:8-15. The Court also pointed out that standing was "continuous" and that "factors may exist that may cause [standing] to change . . . we didn't hear the entire case." *Id.* at 16:11-4, 23.

When the Court asked you, "What is the significance to you with the term preliminary finding of standing versus final determination of standing . . . what's the significance?," you responded, "the significance is that it makes it insignificant." *Id.* at p.64-64:24-4. The logical inference from your reply is that if the Court's Order was not "final," your client would not have colorable grounds to appeal.

In the event you elect to file an appeal, it will be interposed solely for delay, and we will be forced to move to dismiss and ask for expedited consideration based on the pending trial date and the Court's repeated statements in the Order and at the hearing on Defendants' Motion to Reconsider. We will also seek relief to the fullest extent possible to protect the Company from any further

**HAYNSWORTH
SINKLER BOYD**

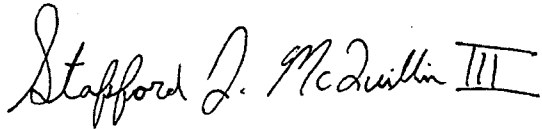
August 30, 2019

Page 3

damages in the interim, including relief from any automatic stay and for the appointment of a receiver. Should you file an appeal in the face of all of the above-cited evidence, please understand that we will seek sanctions pursuant to Rule 11 SCRPC, Rule 269 SCACR, and the South Carolina Frivolous Proceedings Sanctions Act ("SCFPSA"). We are hopeful you will not force us down that path. Please accept this letter as our Rule 11 consultation.

As always, we are happy to discuss over the phone or meet with you in person to discuss this issue should you have any questions.

Very truly yours,

A handwritten signature in black ink that reads "Stafford J. McQuillin III". The signature is written in a cursive style with a horizontal line at the end.

Stafford J. McQuillin III

EXHIBIT 9

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, by and through
its member, Laurence O. Stoney, Jr.,
☒ Plaintiff

v.

Richard S.W. Stoney, Et Al.
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-10-5463

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Stafford J. Mcquillin III, Bar No. 78203
Address:
Haynsworth Sinkler Boyd, P.A., P.O. Box 340,
Charleston, SC 29402
phone: (843) 722-3366 fax: (843) 722-2266
e-mail: mmcquillin@hsblawfirm.com other:

Defendant's Attorney:
Capers G. Barr, III, Bar No.
Address:
Barr, Unger McIntosh, LLC, 11 Broad St., Charleston,
SC 29401
phone: fax:
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

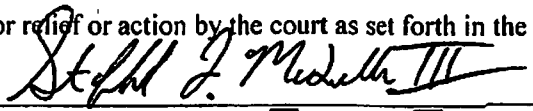
Nature of Motion: Motion for Scheduling Order

Estimated Time Needed: 0 minutes Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

July 30, 2019

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached
order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-5463

The Boathouse at Breach Inlet, LLC,
by and through its member, Laurence
O. Stoney, Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually
and as member-manager of The
Boathouse at Breach Inlet, LLC and
Crew Carolina, LLC.

Defendant.

PLAINTIFF'S RENEWED
MOTION FOR SCHEDULING ORDER

FILED
2019 JUL 30 PM 3:42
JULIE J. ARMSTRONG
CLERK OF COURT

With this Renewed Motion for a Scheduling Order,¹ Plaintiff, the Boathouse at Breach Inlet, LLC (the "Boathouse"), is respectfully asking the Court to set a date-certain bench trial on the merits before the close of this calendar year, 2019. Plaintiff is renewing its request with urgency as recent discovery revealed that Defendant, Richard Stoney, has been misappropriating Boathouse assets throughout the course of this litigation. Specifically, the Boathouse accountant and its bookkeeper both recently provided sworn testimony that *during the pendency of this litigation* Richard Stoney has siphoned hundreds of thousands of dollars from the Boathouse into his wholly owned management company, and "alter ego," Crew Carolina, LLC ("Crew Carolina").²

¹ Plaintiff previously filed a *Motion for Amended Scheduling Order* on March 28, 2018, requesting a trial date in late 2018. On November 8, 2018, Plaintiff filed a *Memorandum in Opposition to Motion Bifurcate*, asking the Court to set a date certain bench trial on the merits in the first quarter of 2019. On May 24, 2019, Plaintiff filed a *Memorandum in Opposition to Defendants Motion for Protective Order and Motion for Scheduling Order*, requesting a date certain trial in November of 2019.

² Richard Stoney has testified that Crew Carolina is his "alter ego." *Stoney v. Stoney*, Op. No. 5593 (S.C. Ct. App. Filed August 29, 2018); (March/April 2011, Trial Trans., p. 586) ("Crew Carolina, as you know, is basically [my] alter-ego.").

Dennis Jarvis served as the accountant for Defendants, Richard Stoney, Crew Carolina, and the Boathouse from 2012 through 2017. In a sworn affidavit, Mr. Jarvis testified:

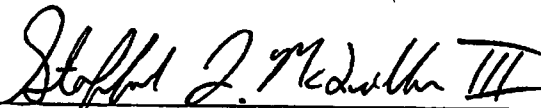
When I began working with Stoney, the Boathouse, and Crew, I was informed . . . that Richard Stoney would not repay the several million dollar receivable owed to the Boathouse from Crew. I learned that Crew was a conduit through which Stoney would syphon money out of the Boathouse to himself to pay for his personal expenses and other unrelated entities that were owned wholly or in part by Richard Stoney.

Affidavit of Dennis Jarvis, ¶ 3, April 3, 2019, Exhibit A. Mr. Jarvis then testified that *during the course of this litigation*, “from December 31, 2016 to December 31, 2017,³ the Due To/From that Crew [Carolina] owed the Boathouse grew by \$183,532.14.” *Affidavit of Dennis Jarvis*, ¶ 4, signed April 3, 2019.

Jamie Stabler, the bookkeeper for the Boathouse and Crew Carolina, affirmed Mr. Jarvis’ testimony. In her June 25, 2019 deposition, Mrs. Stabler confirmed that the Boathouse’s “Due From” Richard Stoney grew by more than \$180,000 in 2017. Stabler Dep. 22:2-5, Exhibit B. (“Q. [F]rom December 31st, 2016 to December 31st, 2017, while this lawsuit was pending, the receivable from Crew Carolina continued to grow by over \$180,000 correct? A. On those dates, yes, sir.”); Stabler Dep. 216:8-12 (“Q. And in fact the due to, due from Crew Carolina grew during the pendency of this Lawsuit from 2016 to 2017, correct? A. If I remember the Balance Sheet, that would be.”). Mrs. Stabler also explained that Richard Stoney used Boathouse monies for, among other things, “personal travel unrelated to the business to go to Belgium, Chicago, the Bahamas, New York and Key West,” and to support his expensive Horse-Polo hobby by using the Boathouse’s funds for “shipping polo horses for a match, polo fees and weekend money.” Stabler Dep. 219:7-10; Stabler Dep. 165:1-2.

³ Plaintiffs filed this case in 2015, nearly four years ago, and Defendants have continually deployed tactics to delay the trial on the merits as detailed in Plaintiff filings with the Court.

Together, the sworn testimony of Mr. Jarvis and Mrs. Stabler demonstrate that Richard Stoney has continued to misappropriate Boathouse funds during this litigation.⁴ To stop the bleeding and end this nearly four year litigation, Plaintiff respectfully renews its request that the Court schedule a date-certain trial on the merits before year-end.



Scott Y. Barnes (SC Bar #: 528)
Stafford J. McQuillin III (SC Bar #: 78203)
Tyler K. Gilliam (SC Bar #: 103170)
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402
(843) 724-1120

ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC

July 30, 2019

⁴ With demonstrable evidence and testimony that Richard Stoney misappropriated Boathouse assets during the course of this litigation, Defendants' continued assertion of its laches argument (that was raised most recently in Defendants' Motion for Reconsideration, which the Court has not yet ruled on) is without merit.

2015-08-10-5463

CERTIFICATE OF SERVICE

I hereby certify that I have had a true and correct copy of Plaintiff's Renewed Motion for Scheduling Order served upon all counsel of record by email and U.S. Mail this 30th day of July 2019:

Capers G. Barr, III, Esq.
Barr, Unger McIntosh, LLC
11 Broad Street
Charleston, SC 29401

George J. Kefalos, Esq.
George J. Kefalos, P.A.
46A State Street
Charleston, SC 29401

Kathy M. Gulick
Kathy M. Gulick

FILED
2019 JUL 30 PM 3:42
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-5463

The Boathouse at Breach Inlet, LLC,
by and through its member, Laurence
O. Stoney, Jr.,

Plaintiff,

vs.

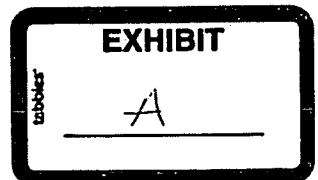
Richard S.W. Stoney, individually
and as member-manager of The
Boathouse at Breach Inlet, LLC and
Crew Carolina, LLC.

Defendant.

**AFFIDAVIT OF
J. DENNIS JARVIS**

Personally appeared before me, J. Dennis Jarvis, who being duly sworn, affirms and swears
as follows:

1. I am a Certified Public Accountant and live in Hollywood South Carolina.
2. In 2012, I was retained to serve as the accountant for Defendant Richard S.W. Stoney ("Stoney"), the Boathouse at Breach Inlet, LLC ("the Boathouse") and Defendant Crew Carolina, LLC ("Crew") to prepare tax returns. I prepared these returns for tax years 2012 through 2015. Calvert and Co. purchased my business around 2017, at which time I stopped preparing the returns.
3. When I began working with Stoney, the Boathouse, and Crew, I was informed by Richard Stoney, Chip Robinson (a former Controller and consultant of the Boathouse), and Jamie Stabler (the current Controller of the Boathouse and Crew) on numerous occasions that Richard Stoney would not repay the several million dollar receivable owed to the Boathouse from Crew. I



learned that Crew was a conduit through which Stoney would syphon money out of the Boathouse to himself to pay for his personal expenses and other unrelated entities that were owned wholly or in part by Richard Stoney.

4. During my time working with Stoney, the Boathouse and Crew from 2012 to 2017, the Due To/From that Crew owed to the Boathouse grew considerably from \$3,578,945.77 to \$4,373,507.83. For example, from December 31, 2016 to December 31, 2017, the Due To/From that Crew owed to the Boathouse grew by \$183,532.14.

5. On July 7, 2014, I emailed Jamie Stabler, the Controller for Crew and the Boathouse, and stated "[t]he account Due To/From Crew Carolina on the books of the Boathouse went up between 1.1.13 and 12.31.13 by \$138,000. One of the first statements Chip mentioned to me when I took over filing the tax returns for Boathouse was that the Crew receivable would not be paid. I'm concerned that after posting the payroll and the management fee that the receivable is still going up."

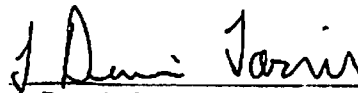
6. I expressed concerns to Stoney, Jamie Stabler, and Chip Robinson that Crew was continuing to take money from the Boathouse that had no prospect of being repaid, yet these items were being booked as "loans." Crew did not have a cash flow stream or a tangible prospect of generating one, and, after consulting with Chip Robinson, we agreed that Stoney should treat the monies owed from Crew to the Boathouse as personal draws to Stoney that must be repaid.

7. In 2015, Richard Stoney proposed closing down Crew and writing off the \$4,041,603.03 receivable Crew owed to the Boathouse. In response, I informed him that "if Crew wrote off the payable that Richard would need to include it as income for tax purposes."

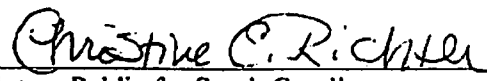
8. When asked, Richard Stoney instructed me not to discuss the Due To/From with other members of the Boathouse and did not permit me share the Company's tax returns with certain members, including Laurence Stoney.

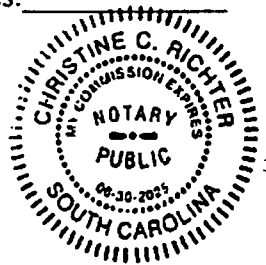
9. I have reviewed the affidavit of Don Hollerbach and believe that it is credible and reliable, and accurately reflects the financial realities of the Boathouse. I have no reason to dispute the contents of his affidavit.

FURTHER AFFIANT SAITH NAUGHT.


J. Dennis Jarvis

Sworn to before me this 3
day of April, 2019.


Notary Public for South Carolina
My Commission Expires: _____



1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON) CASE NO. 2015-CP-10-5463
3
4 The Boathouse at Breach)
5 Inlet, LLC, by and)
6 through it's member,)
7 Laurence O. Stoney, Jr.,)
8 Plaintiff,)
9 -vs)
10 Richard S.W. Stoney,)
11 individually and as)
12 member-manager of The)
13 Boathouse at Breach)
14 Inlet, LLC and Crew)
15 Carolina, LLC,)
16 Defendant.)
17
18 DATE: Tuesday, June 25, 2019
19 TIME: 9:41 a.m.
20 LOCATION: Haynsworth Sinkler Boyd
21 134 Meeting Street
22 Third Floor
23 Charleston, SC 29401-2240
24 REPORTER: Lisa Kerns
25 Professional Court Reporter

RES COURT REPORTING SERVICES
243 NELLIEFIELD CREEK DRIVE
CHARLESTON, SC 29492
(843) 818-9396
(843) 654-9534
LISAKERNS.CRS@GMAIL.COM

EXHIBIT

B

1 Q. All right. So, my question then again is from
2 December 31st, 2016 to December 31st, 2017, while this
3 lawsuit was pending, the receivable from Crew Carolina
4 continued to grow by over \$180,000 correct?

5 A. On those dates, yes, sir.

6 Q. Okay. We're done with that one.

7 A. Flip it over or give it back to you?

8 Q. You, just keep them in a stack, because we may
9 have to go back to that.

10 A. Okay.

11 Q. Have you ever had your Deposition taken
12 before?

13 A. No, sir.

14 Q. Okay. Have you ever testified in Court
15 before?

16 A. Yes, sir.

17 Q. Okay. When have you testified in Court and
18 for what?

19 A. Richard Stoney's what you call it, Divorce I
20 guess. Divorce Hearing in Orangeburg.

21 Q. Okay. Did you just testify once or twice
22 there?

23 A. Once, I think. Once I'm pretty sure.

24 Q. And you signed a couple Affidavits in
25 connection with that as well? I think probably two

1 A. Oh, do you know what page you're on or does it
2 matter.

3 Q. No, I'm just general question.

4 A. Oh, okay. It was someone who used to work at
5 the Boathouse as well as someone that Richard dated.

6 Q. Okay. Do, if you'll flip with me to 5/24/13
7 on the General Ledger.

8 A. I'm with you.

9 Q. It says \$400 for Jessie and rest for Richard
10 Stoney. Can, is that, do you see that on the, where I
11 am?

12 A. Uh-huh.

13 Q. All right. Tell me, it's a \$1,500 charge, so
14 tell me what the 15, \$1,500 of Boathouse funds were used
15 for on May 24th, 2013?

16 A. It shows, it says, "\$400 for Jessie and rest
17 for RS shipping polo horses for a match, horse feed,
18 polo fees and weekend money."

19 Q. Okay. Did Richard use Boathouse funds to
20 support his polo hobby?

21 A. I, it looks like he used a portion on this one
22 to support for that day.

23 Q. To go to a polo fees and match --

24 A. It says.

25 Q. -- horse feed --

1 A. Polo, it says, "shipping polo horses for a
2 match, horse feed, polo fees and weekend money."

3 Q. Okay. My question is, did Richard use
4 Boathouse funds to support his polo hobby?

5 A. According to this right here I would say yes.

6 Q. Okay. Do you know why Richard flew to the
7 Bahamas in June of 2013?

8 A. No.

9 Q. All right. Do you know whether that was a
10 business-related trip?

11 A. I have no idea.

12 Q. Okay. Bottom of, bottom of this same page, it
13 looks?

14 A. Uh-huh.

15 Q. Like on June 4th, it just says \$300 cash,
16 Richard Stoney?

17 A. Uh-huh.

18 Q. What is that for?

19 A. For \$300 cash for Richard. I don't know what
20 he would have used it for.

21 Q. Okay. You don't know whether it was personal
22 or business?

23 A. I don't know based on the notes.

24 Q. Okay. The next page, on June, June 30th, 2014
25 there's a \$5,000 charge?

1 Q. All right. But yet Boathouse funds were used
2 to pay for Richard's personal unrelated business trip,
3 correct?

4 A. Yes.

5 Q. All right. All right. Based on the documents
6 we have reviewed today, Richard Stoney used Boathouse
7 funds for personal travel unrelated to the business to
8 go to Belgium, Chicago, the Bahamas, New York and Key
9 West, correct?

10 A. I believe that's what we've covered.

11 Q. Okay.

12 A. Excuse me.

13 Q. As the Controller for the Company, do you
14 believe that that's fair to the other members of the
15 Boathouse at Breach Inlet LLC?

16 MR. BARR: Object to the form of the
17 question.

18 THE WITNESS: Do I believe it was fair?

19 Well, sorry, can you repeat that?

20 BY MR. MCQUILLIN:

21 Q. For Richard to be using funds from the
22 Boathouse for personal travel, do you believe that
23 that's fair to the other members of the Boathouse at
24 Breach Inlet LLC.

25 A. I guess I don't have an opinion about it.

1 question.

2 THE WITNESS: I would say during the
3 timeframe that we've just covered that he,
4 we've shown that he's taken some cash out of
5 the entity, and up above, above and beyond his
6 salary.

7 BY MR. MCQUILLIN:

8 Q. Okay. And in fact the due to, due from Crew
9 Carolina grew during the pendency of this Lawsuit from
10 2016 to 2017, correct?

11 A. If I remember the Balance Sheet, that would
12 be.

13 Q. Exhibit One to your Deposition.

14 A. Huh?

15 Q. That's Exhibit One to your Deposition.

16 A. Oh, sorry. Yes, sir. Yes, most of the time.

17 Q. So he, he's, he's continued to take --

18 A. But again the money that he would have done
19 personally for the things that you're pointing out here
20 would have gone to due to, due from Richard.

21 Q. Except for we've seen some records where
22 there?

23 A. Yeah there was, right, and I --

24 Q. Some of it's been booked as due to, due from
25 Richard?

EXHIBIT 10

Gilliam, Tyler

From: Newman, Clifton Law Clerk (Jazmon Kears) <CNewmanLC@sccourts.org>
Sent: Tuesday, July 30, 2019 3:38 PM
To: McQuillin, Mac
Cc: Gilliam, Tyler; Barnes, Scott; Capers Barr III; Tish Solomon; George Kefalos; Gulick, Kathy
Subject: RE: Renewed Motion for Scheduling Order -- The Boathouse v. Stoney (Case No. 2015-CP-10-5463)

Follow Up Flag: Follow up
Flag Status: Flagged

Good Afternoon:

Please be advised that the Court has scheduled this matter for a date certain of October 14, 2019, in Charleston County. Please advise if counsel has a conflict with this date as this is the only week that Judge C. Newman is scheduled to be in Charleston this calendar year.

Best,

Jazmon Kears
Law Clerk to the Honorable Clifton Newman
(843) 318-3831
cnewmanlc@sccourts.org

From: McQuillin, Mac <mmcquillin@hsblawfirm.com>
Sent: Tuesday, July 30, 2019 3:09 PM
To: Newman, Clifton Law Clerk (Jazmon Kears) <CNewmanLC@sccourts.org>; Newman, Clifton <CNewmanJ@sccourts.org>
Cc: Gilliam, Tyler <tgilliam@hsblawfirm.com>; Barnes, Scott <sbarnes@hsblawfirm.com>; Capers Barr III <cgb@barrungermcintosh.com>; Tish Solomon <Tish@kefaloslaw.com>; George Kefalos <George@kefaloslaw.com>; Gulick, Kathy <kgulick@hsblawfirm.com>
Subject: Renewed Motion for Scheduling Order -- The Boathouse v. Stoney (Case No. 2015-CP-10-5463)

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge Newman,

Attached please find a courtesy copy of Plaintiff's Renewed Motion for Scheduling Order, which is being filed today.

Respectfully,

-Mac McQuillin

HAYNSWORTH SINKLER BOYD

Stafford J. ("Mac") McQuillin III | Attorney

Direct 843.724.1120 | mmcquillin@hsblawfirm.com

Haynsworth Sinkler Boyd, P.A.

134 Meeting Street, 3rd Floor | Charleston, SC 29401

Main 843.722.3366 | Mobile 843.709.1041 | Fax 843.722.2266

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## **EXHIBIT 11**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, by and  
through its member, Laurence O. Stoney,  
Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually and as  
member-manager of The Boathouse at  
Breach Inlet, LLC and Crew Carolina, LLC,

Defendants.

---

Theodore Stoney, Jr., individually and as  
Trustee for Richard Stoney, Jr. and Gregory  
G. Holmes,

Third-Party Intervenors.

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10-5463

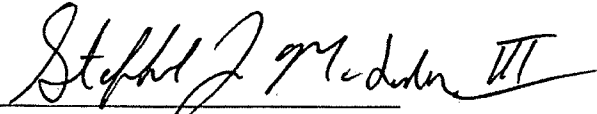
**NOTICE OF DEPOSITION OF  
RICHARD STONEY**

TO: CAPERS G. BARR, III, ESQUIRE, ATTORNEY FOR DEFENDANTS:

PLEASE TAKE NOTICE that on Wednesday, September 18, 2019, at 9:00 a.m., at the law offices of Haynsworth Sinkler Boyd, P.A., 134 Meeting Street, 3<sup>rd</sup> Floor, Charleston, South Carolina, the Attorney for Plaintiff will take the deposition of Richard Stoney upon oral examination, pursuant to the South Carolina Rules of Civil Procedure, before a Notary Public for South Carolina or some other officer authorized by law to take depositions, said deposition to continue from day to day until completed.

The deposition is to be taken for discovery purposes, for use at trial, and all other purposes as are permitted under the South Carolina Rules of Civil Procedure.

You are invited to attend and take such part as is fit and proper.



Scott Y. Barnes (SC Bar # 528)

Stafford J. McQuillin III (SC Bar #78203)

Tyler K. Gilliam (SC Bar #103170)

Haynsworth Sinkler Boyd, P.A.

134 Meeting Street, 4<sup>th</sup> Floor

Charleston, SC 29401

(843) 724-1120

ATTORNEY FOR PLAINTIFF

Charleston, South Carolina

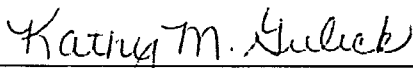
September 9, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that I have had a true and correct copy of a Notice of Deposition of Richard Stoney served upon Defendants' counsel of record by e-mail and 1<sup>st</sup> Class Mail, this 9 day of September 2019:

Capers G. Barr, III, Esq.  
Barr, Unger McIntosh, LLC  
11 Broad Street  
Charleston, SC 29401

George J. Kefalos, Esq.  
George J. Kefalos, P.A.  
45A State Street  
Charleston, SC 29401

  
\_\_\_\_\_  
Kathy M. Gulick

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-10-05463

RECEIVED  
SEP 19 2019  
SC Court of Appeals

The Boathouse at Breach Inlet, LLC, by and through its member,  
Laurence O. Stoney, Jr. .... Respondent,

v.

Richard S.W. Stoney, individually and as member-manager of  
The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC

and

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr. and Gregory G. Holmes,  
Third-Party Intervenors,

of whom

Richard S. W. Stoney is .... Appellant.

**PROOF OF SERVICE**

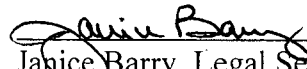
I certify that I have served the Notice of Appearance of Sarah P. Spruill and Respondent  
The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr.'s Motion

to Dismiss Appeal on all attorneys of record by depositing copies of the same in the United States

Mail, postage prepaid, on September 19, 2019, addressed to:

Capers G. Barr, III  
Barr, Unger & McIntosh, LLC  
P.O. Box 1037  
Charleston, SC 29402

George J. Kefalos  
George J. Kefalos P.A.  
46-A State Street  
Charleston, SC 29401

  
Janice Barry, Legal Secretary  
HAYNSWORTH SINKLER BOYD, P.A.  
P.O. Box 2048  
Greenville, SC 29602  
864.240.3223