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SC Court of Appeals

EXHIBIT A

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Defendant's Motion to Bifurcate

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

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 Intervenor.)

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

FILED
2018 MAR 29 AM 9:39
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 Intervenor Gregory G. Holmes and Theodore D. Stoney, Jr., individually and as trustee for Richard Stoney, Jr. (hereafter, "Intervenor"), 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), SCRCF.

a. The Standard for Bifurcation

Rule 42(b) SCRCF 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." <rstone@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 Intervenors are not “similarly situated members.” However, this argument has no basis in fact or law because Intervenors, 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

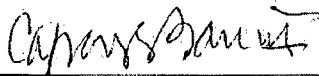
This case should be bifurcated to allow the conclusion of discovery on the Phase one issue and then to set a hearing to first determine whether Laurence Stoney is an adequate representative plaintiff to bring the present lawsuit as a derivative action on behalf of the Boathouse and its members, before 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.

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

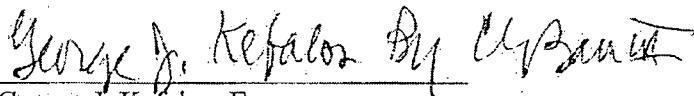
Respectfully Submitted,

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Charleston, South Carolina
March 28, 2018

EXHIBIT B

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Memo in Opposition to Motion to Bifurcate

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

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’s 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 had an interest, and wrongfully paid out to Intervenor disproportionate distributions from the Boathouse. Exh. B, *Affidavit Don Hollerbach*, filed January 25, 2017, ¶ 4 (referring to Intervenor 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.

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 SCRCF 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." SCRCF 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) (SCRCF 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 SCRCF 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 SCRCF 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**. SCRCF 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.*

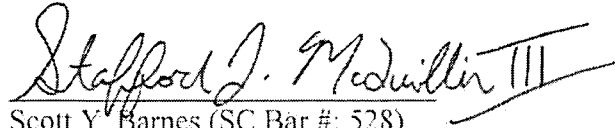
Because Laurence Stoney is not similarly situated to Defendant Richard Stoney and Intervenor Theodore Stoney and Gregory Holmes (the "chosen members"), Laurence Stoney is not required to represent their interests through this derivative action.⁷

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,



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November 8, 2018
Charleston, SC

ATTORNEYS FOR THE BOATHOUSE AT
BREACH INLET, LLC

HSB 5364776

EXHIBIT C

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Transcript of Record – Nov. 9, 2018

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
 2 COUNTY OF CHARLESTON) Case No. 2015-CP-10-5463
)
 3)
 4 THE BOATHOUSE AT BREACH INLET,)
 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: November 9, 2018
 11)

12 B E F O R E:

13 THE HONORABLE CLIFTON NEWMAN
 14

15 A P P E A R A N C E:

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

18 CAPERS G. BARR, III
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20 GEORGE J. KEFALOS,
 21 Attorney for Defendants Gregory Holmes, Richard S.W.
 Stoney, Theodore D. Stoney

22
 23 **Original transcript ordered by:**
Haynsworth Sinkler Boyd, P.A.

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

1 that Richard was robbing Peter to pay Paul?

2 No question.

3 In this interoffice, he had six or seven companies
4 going on and he was taking money from the only profits he had,
5 which was The Boathouse at Breach Inlet?

6 Correct.

7 And he shouldn't have been doing that?

8 And here's the answer: He had different owners. And
9 if you are taking an owner at The Boathouse at Breach Inlet and
10 he was taking money from the Boathouse at Breach Inlet to
11 subsidize another company, those partners were different. I
12 mean, somebody, the Boathouse, is getting ripped off on that
13 deal.

14 And so, Your Honor, we would ask that you set this for
15 a hearing as soon as practical, this issue. We are not opposed
16 to having this issue heard. We want to have a hearing on it,
17 but we want to proceed on a trial on the merits. This case has
18 been pending too long. Thank you

19 THE COURT: All right. Mr. Barr.

20 MR. BARR: May it please the Court. Your Honor, my
21 friend has thrown a lot in front of us here because he says,
22 this is really not a hearing on the merits, but here's my
23 argument on the merits.

24 This is not a hearing on the merits. The simple
25 motion that we have before Your Honor is let's set a hearing

1 with witnesses. We can call it a trial. We can call it a
2 hearing with witnesses. Let's set a separate hearing on this
3 threshold issue.

4 Certainly, many cases have threshold issues, if he
5 wants to refer to summary judgment motion as a threshold issue,
6 but that's separate and apart from a derivative case, because
7 the typical civil action file consists of questions of
8 liability and damages. Whereas, by Rule 23-1, says the
9 plaintiff has -- rule 23-1, says, the plaintiff must have the
10 requisite standing.

11 I agree, if you want to talk about the merits of this,
12 that there are decisions out there that say that a plaintiff
13 can represent a class of one, I don't disagree with that. But
14 the case I couldn't remember a minute ago, the *Davis v. Comed*
15 factors, those eight factors that I read out enumerate that
16 only one of them, the percentage of stock held by the
17 plaintiff, as opposed to the remaining members of the
18 corporation -- and so -- and I know I'm looking at the merits
19 of the standing issue, but this is what would be tried at that
20 initial hearing. And that is to say, the economic antagonisms
21 between Laurence Stoney and the other members of the class, the
22 remedy that he's seeking in the action, indications that he's
23 not the driving force, his unfamiliarity with the litigation,
24 he not even being here today and apparently not caring, other
25 litigation pending between the plaintiff and the defendants,

1 get into the financial loss. It has nothing to do with
2 Laurence's standing.

3 The standing issue all relates to the plaintiff, in
4 other words, to Laurence, what are his motivations, what are
5 his reasons, what is his rational. And that would be the
6 reason for the bifurcated trial. Thank you.

7 THE COURT: Mr. Kefalos.

8 MR. KEFALOS: Thank you, Your Honor. My only
9 observation is, it seems to me that despite all the finger
10 pointing and accusations going back and forth about who did
11 what, we are in agreement that there is a threshold issue that
12 has to be decided by this Court. Mr. McQuillin suggests
13 sometime before the end of the year that we have a hearing on
14 it. We would like to do some discovery into these things. We
15 think that we can bring evidence, or we would like to explore
16 evidence to show that the plaintiff has individual interests
17 that significantly conflict with those of the corporation. And
18 it would be inappropriate for the plaintiff to act as the
19 champion of the corporate cause. We think that's a threshold
20 question.

21 Both of us are agreeing we would like a hearing. I
22 think we are probably disagreeing on the form of the hearing.
23 We would like to be able to present witnesses. But we have to
24 deal with that before we get into the substance of the case and
25 spending the money and the time on what might be a rabbit hole.

1 THE COURT: All right. Mr. McQuillin.

2 MR. McQUILLIN: Very briefly, Your Honor. South
3 Carolina case law says --

4 MR. BARR: Excuse me, Your Honor. I object. This is
5 a motion hearing. It's my motion. Without the Court's
6 permission, counsel does not have the opportunity to rebut. I
7 don't mean to presume to speak for Your Honor. But I object to
8 it, because then if he does it, I'm going to ask for it.

9 MR. McQUILLIN: All I was going to say is bifurcation
10 is the exception, not the rule. Every derivative case has this
11 standing issue. There are no cases that defendant can find --
12 we are not aware of any cases that exist where a court has
13 bifurcated a derivative action to deal with the standing issue.
14 Derivative actions are actions in equity that involve bench
15 trials. And we are not aware of any case that dealt with a
16 derivative action being bifurcated. And defendant can't point
17 to any either.

18 THE COURT: Mr. Barr, you get the final word on that,
19 if you want.

20 MR. BARR: I will only speak to that one, too.

21 THE COURT: Yes, sir.

22 MR. BARR: Bifurcation is not the exception, or the
23 Supreme Court would not have said in *Durham v. Vinson*, we
24 encourage judges to bifurcate cases in complex medical
25 malpractice cases such as this one. And counsel has stipulated

1 this is a complex case. So I just disagree. And I don't think
2 the Supreme Court agrees with him either.

3 MR. KEFALOS: I did read an article this morning in
4 Law Review that explained that bifurcation was a tool that was
5 used in derivative actions to deal with the threshold issue of
6 standing. Thank you, Your Honor. I can send the Court the Law
7 Review article.

8 THE COURT: I may be happy to review it.

9 In essence, are you all speaking or calling the two
10 things, calling it the same thing, two different things? Is
11 there any difference if you call it a motion to determine
12 standing versus a motion to bifurcate?

13 MR. BARR: I think not. As long as it can proceed
14 with witnesses. I mean, the purpose is to have a hearing on
15 the substance of the evidence.

16 THE COURT: Well, perhaps to hear witnesses to
17 determine the standing issue?

18 MR. BARR: Correct. That's what I mean.

19 THE COURT: We are looking at our schedule here. This
20 particular week here in Charleston we were scheduled on a date
21 certain hearing, date certain trial on the Dewberry Restaurant,
22 Dewberry Hotel, and then we were -- and that settled. And we
23 were scheduled for a date certain, Pulson, which is a second
24 date certain case, and that settled. And we had a hearing on
25 the Ports Authority v. SMNE. They are architects. And we were

1 unavailable because we were in trial in Columbia in the State
2 and DHEC v. BP, which carried on and we didn't end it until
3 Wednesday night. So, fortunately, we were able to get here
4 today. But our Ports Authority folks are in Pittsburgh today.

5 So I mentioned all of that to say that we are set to
6 come back here the week of December the 9th -- 10th. But we've
7 been informed by the clerk's office here that they have a
8 medical mal case that they have set a date certain on. So we
9 would like to schedule more than one case, because, as I said,
10 we were triple booked this week and everything settled.

11 (Whereupon, an off-the-record discussion takes place.)

12 THE COURT: So under the theory of double booking
13 these things because something falls off, I'm thinking that the
14 week of December 10th should be a good week to try to have this
15 in the pipeline. And also, the last week in January, because
16 between those two, having cleared out the Dewberry Hotel and
17 other cases, both of which were business court cases this week
18 and our State v. BP, DHEC v. BP, that one was set to go on two
19 to three weeks, and we did it in eight days, and the jury
20 settled it in about one hour and decided it was way too long to
21 bring the action, settled verdict for the defense in one hour.
22 So we are on a roll as far as clearing up everything that's
23 been assigned to me. And this is one that's still in the
24 pipeline that we would like to get addressed, just as y'all
25 would.

1 And I think the best way to do it would be to schedule
2 a formal hearing. We will need to review everything and make
3 some determination as to what our findings -- well, this is not
4 granting or denying on the issue of Rule 23 on properly
5 derivative case or whether the person has or hasn't -- doesn't
6 have standing. We are going to review all of this and be in
7 touch with you regarding what's next for this case. But I
8 think what should be next is a hearing where we have time set
9 aside for witnesses all during the week that we are here.

10 We just found out about this medical mal case. I was
11 about to say that y'all would be first up during that week and
12 then we get a notice from the clerk that they have this medical
13 mal case. Of course, it's Ken Suggs and Henry Grimball and all
14 of them. If it goes to a trial, we will be lucky to do it in a
15 week's time. But things happen with cases. And a lot of
16 medical malpractice cases are getting resolved these days. And
17 we promised Justin Lucy and company that we will have motion
18 hearings that week of December 10th as well. Their motions are
19 motions to compel and the type of motions that will not take
20 more than a few hours to hear. And we will be here all that
21 week.

22 MR. KEFALOS: Your Honor, excuse me, I'm looking at my
23 calendar. I have plans to be out of town 10th, 11th and 12th
24 of that week, if we can postpone any hearing until later in the
25 week.

1 THE COURT: It will take later in the week for
2 underbrush to clear out that week. So that might be well if
3 everyone else is available on the last -- in the last two days
4 of that week.

5 MR. McQUILLIN: We will make ourselves available.

6 MR. BARR: Do I understand that what you are
7 contemplating would be a hearing with witnesses, or have you
8 not yet ruled on this?

9 THE COURT: Well, I would think that based on whether
10 a standing or whether it's on the issue of -- I'm trying to --
11 if he has no standing, then that would have the effect of
12 granting your -- well, standing and bifurcation will be
13 determined in one hearing, I believe.

14 MR. BARR: Well, Your Honor, what we are asking for by
15 asking for bifurcation is for the Court to rule on the standing
16 issue.

17 THE COURT: Before the --

18 MR. BARR: Before any merits hearing, before any
19 liability or damages.

20 THE COURT: Yes, sir. Yeah, I think we are in
21 agreement with that.

22 MR. BARR: Right. And so, but we used the word --
23 I've used the word "bifurcated trial", so a trial. We talked
24 about a hearing. We talked about a hearing with witnesses.
25 But it just seems to me, in all candor, with there being

1 between today and 30 days from now, because this is the 9th, 30
2 days from tomorrow will be December the 10th, we've got the
3 Thanksgiving intervention, and so if we are going to have a
4 hearing with witnesses, which I'm going to say is no different
5 from a trial, you know, the first phase of a trial, if we are
6 going to have a hearing with witnesses, respectfully, I think
7 December the 10th is a little ambitious between now and then to
8 get --

9 THE COURT: Really, it would be December 13th.

10 MR. BARR: Well, even the 13th. I think that's --
11 now, if what we are talking about is -- this is not what we are
12 arguing for, but if what you are talking about is a motions
13 hearing on paper, maybe so. But what we are asking for is a
14 hearing where you hear testimony from witnesses.

15 THE COURT: Yeah. Well, would two days be sufficient
16 number of days for testimony with witnesses?

17 MR. BARR: I think it would be, yes.

18 MR. KEFALOS: Yes, that's right.

19 THE COURT: So, again, we want to review all the
20 arguments today that have been made on it all. But I am not
21 referring to just coming and listening to arguments only, but
22 arguments with witnesses to determine either standing or
23 bifurcation.

24 MR. BARR: As well, Your Honor, I think we want to
25 take -- I think we would want to take the plaintiff's

EXHIBIT D

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Trial Transcript – Dec. 13-14, 2018

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
 2 COUNTY OF CHARLESTON) Case No. 2015-CP-10-5463
)
 3)
 4 THE BOATHOUSE AT BREACH INLET,)
 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:

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21 GEORGE J. KEFALOS,
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 22 Stoney, Theodore D. Stoney

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

24

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

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1 MR. BARR: Thank you very much, Your Honor. We look
2 forward to working with you.

3 THE COURT: Mr. Kefalos.

4 MR. KEFALOS: All I was telling Mr. Barr earlier was
5 that I thought the trial ought to be a cartoon, a sketch that
6 creates an impression. First it's a Rembrandt that has all the
7 details that will allow someone to get lost. And we had a
8 philosophical discussion about how to go about creating an
9 impression.

10 Be that as it may, I represent Ted Stoney and Greg
11 Holmes, who are interveners in the case. We are here to -- my
12 clients are here to testify that they do not support the
13 derivative action. They think it's a personal claim that ought
14 to be handled as a personal claim and not burden the
15 corporation with the costs of the litigation.

16 THE COURT: All right. Plaintiff.

17 MR. MCQUILLIN: Thank you, Your Honor. I agree with
18 both of these gentlemen's theory on a trial. It's been a
19 pleasure to work with them in the case and learn from them.
20 These are kind of our mentors in the bar. So it's been a fun
21 case to practice with them. I will make my opening statements
22 brief.

23 Before I begin the opening statements, our
24 understanding from the last time we were arguing whether or not
25 we bifurcate the trial, the request -- and discovery, the

1 hearing live witnesses, if that's how they want to proceed.
2 But at the same time, we would ask that you consider all of our
3 written submissions as well.

4 We have submitted two affidavits to our brief, the
5 affidavit of Lori Stoney, as well as the affidavit of our
6 forensic account accountant, Don Hollerbach. Both of those
7 witnesses, Don Hollerbach is here and Ms. Stoney is here. If
8 the defendant wishes to cross-examine, we will make them
9 available. We will rely on our affidavit in interest of time,
10 so that we can finish quickly.

11 Capers, do you plan on cross-examining our forensic
12 accountant or can we -- in other words, if they are not going
13 to call him, I would like to release him, just because he's
14 talking about how expensive this is and the fees. And if he
15 can go, we would like to let him go.

16 MR. BARR: Your Honor, would you like to hear our
17 position on that?

18 THE COURT: No. As to whether or not he will be a
19 witness today?

20 MR. BARR: Well, actually, this goes a little bit
21 deeper. We move to bifurcate the trial. And, frankly, Judge,
22 I've been pondering myself to perceive what is the difference
23 between a hearing and a trial. I don't really find anything in
24 the rules that speak to it. I haven't researched it
25 extensively. But, for example, a classic example of a

1 there. And the clock is ticking. So goodness knows what that
2 \$200,000 is going to look like at the end of the day. But I
3 think Mr. Hollerbach is irrelevant. And that's a long-winded
4 explanation to what my friend just asked. So whether he wants
5 to keep him here or not, that's up to him. I am not interested
6 in cross-examining Mr. Hollerbach. If we succeed in this case,
7 I'm sure that Laurence is going to file a personal lawsuit,
8 which he has a right to do. And Mr. Hollerbach will be
9 identified. And I will get to depose him then.

10 Don't mean to offend Mr. Hollerbach, but I don't feel
11 the need to talk to him today. We subpoenaed Ms. Stoney. She
12 submitted an affidavit. It's not competent for the reasons
13 I've argued. Plus, she was deposed and counsel didn't ask her
14 these questions. So she can certainly testify live and we can
15 engage in her exchange as well.

16 THE COURT: Mr. McQuillin.

17 MR. MCQUILLIN: Your Honor, briefly, had Mr. Barr read
18 our brief, the reason Mr. Hollerbach's testimony is relevant,
19 is that it's a time-honored maximum equity that one who seeks
20 equity must do equity. And the first defense and the primary
21 defense relied on by the defendants is Laurence Stoney is not a
22 suitable person to bring this derivative action because his
23 claim is barred by the equitable doctrine of laches. Our first
24 point is that Mr. Stoney has unclean hands and, therefore, an
25 equity cannot rely on the equitable doctrine of laches.

1 MR. BARR: Objection. Hearsay, Your Honor.

2 Objection, hearsay.

3 THE COURT: Response?

4 MR. McQUILLIN: I will rephrase the question, Your
5 Honor.

6 BY MR. McQUILLIN:

7 Q. When you requested the return from Richard Stoney's
8 CPA, did the CPA also refuse to provide it to you based on
9 Richard's instructions?

10 A. Yes.

11 MR. BARR: Objection, Your Honor. Objection. It's
12 hearsay.

13 THE COURT: I sustain the objection.

14 BY MR. McQUILLIN:

15 Q. All right. When you wrote this e-mail about, let's
16 move forward with suing on Croft's behalf, why did you want to
17 sue on Croft's behalf? What was the cause of that? Was it
18 because Richard -- one of the primary reasons, because Richard
19 refused to provide you with the company tax return?

20 A. Yes. And because he was not -- he was making a
21 statement on a K-1 that he expected me to sign a tax return
22 related to that said had made a distribution, but would give no
23 information about what that supposed distribution was. And it
24 was a very small amount. But he wasn't making a distribution
25 proportionate to her share of The Boathouse. So there is no

1 seeks equity must do equity. Accordingly, the equitable
2 defense of laches is not available to those who come to the
3 court with unclean hands.

4 What I'm establishing, Your Honor, is that Mr. Stoney
5 continued to take money from the company and continued to rob
6 Peter to pay Paul. Even after lawyers were involved and were
7 meeting with his lawyer and trying to resolve this case.

8 So I believe it's highly relevant, his actions and
9 when they occurred, to show that he has unclean hands to go
10 against laches. One of the other things --

11 THE COURT: Laches is a basis that's being asserted
12 that Mr. Laurence Stoney did not have standing?

13 MR. McQUILLIN: Yes, Your Honor. If you look at page
14 2 of defendant's pretrial brief, Laurence Stoney is not a
15 suitable person to bring this derivative action because his
16 claim is barred by laches.

17 So we believe that this is relevant that the witness
18 has unclean hands. And it's limited to what he did after he
19 knew it was wrong, because his lawyer told him, and he knew it
20 was belong because Laurence had lawyered up and he was meeting
21 with his lawyer at the time. This is September 2015. We filed
22 in October.

23 THE COURT: I overrule the objection.

24 BY MR. McQUILLIN:

25 Q. Mr. Stoney, does this refresh your recollection that

1 Do you want to depose the witness? Do you want me to return to
2 Charleston in another month or two? How would you like to
3 address the issue?

4 MR. BARR: Why don't you give us about a week to make
5 that decision, Judge. And, again, as I said yesterday, without
6 intending to insult my colleague across the way, I haven't read
7 the brief. Therefore, I haven't studied that affidavit. I
8 have read our prior affidavit from Mr. Hollerbach.

9 MR. McQUILLIN: His affidavit we filed in January of
10 2017 that we filed along --

11 MR. BARR: I don't remember much about it. And it
12 may well be that we will decide there's no need to depose him,
13 but I think we can let both the Court and counsel know within a
14 week.

15 THE COURT: All right. That will be fine. We are
16 going to review the submissions, including deposition of
17 Mr. Hall, and we will be prepared to decide this case. I may
18 contact of parties for proposed orders. But if the defense
19 would like to depose Mr. Hollerbach, you can. If the State --
20 if the plaintiff wants to take a deposition for that purpose,
21 you can, or as I've indicated, these issues -- I would consider
22 what's submitted. I've reviewed it. These issues have been
23 addressed through witnesses for the most part.

24 MR. BARR: Could well have been.

25 MR. McQUILLIN: To the extent they want to depose, we

1 will make him available quickly so we don't hold the process
2 up.

3 MR. BARR: Would you like a form of memorandum or
4 proposed orders?

5 THE COURT: Well, I would like to first know what,
6 within a week, whether to just close the record.

7 MR. BARR: Yes, sir.

8 THE COURT: Then if nothing further is forthcoming,
9 then we will, in the interim, be reviewing it. And most
10 likely, I would request proposed orders or competing proposed
11 orders with opportunities to serve the other.

12 So today is the 14th. So next week we will hear from
13 you. And we will indicate what we need further. Very good.
14 Thank you all.

15 (Whereupon, proceedings are adjourned.)

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EXHIBIT E

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

*Order re Dec. 2018 Hearing –
filed May 20, 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 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's 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), SCRCP.

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 Intervenors' 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 Intervenors knew that Richard Stoney was misappropriating Company assets, and that Intervenors 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 (Cl. 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, SCRCP, 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.

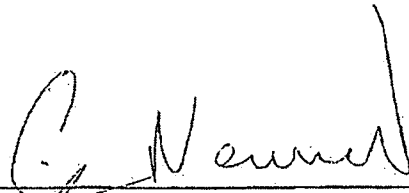
Where, as here, there are no members similarly situated to a derivative-action plaintiff, the derivative-action plaintiff is treated as a class of one and is not required to represent the interests of any other member in a company. *See e.g., Larson v. Dumke*, 900 F.2d 1363 (9th Cir. 1990), *cert. denied 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 Intervenor 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 F

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Motion to Reconsider

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(c)
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 11:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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, SCRCP

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

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 commingled 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 as 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.

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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.

[...]

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.

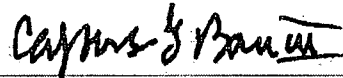
B. The equitable doctrine of *laches* bars Laurence Stoney from maintaining a derivative action because he admitted in his testimony to having inquiry notice that funds from the Breach Inlet restaurant were being used to support other entities, as long ago as 1999, and conceded that "I sat on my hands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

BARR, UNGER & MCINTOSH, LLC



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Attorney for Defendant Richard S.W. Stoney

Charleston, South Carolina
June 3, 2019

EXHIBIT G

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Transcript of Record – June 14, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON)

) COURT OF COMMON PLEAS
2015-CP-10-5463

BOATHOUSE AT BREACH INLET,)
LLC)
PLAINTIFF)
vs.)
RICHARD STONEY)
DEFENDANT)

TRANSCRIPT OF RECORD

June 14, 2019
CHARLESTON, SC

B E F O R E:

THE HONORABLE CLIFTON NEWMAN, JUDGE

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

STAFFORD "MAC" MCQUILLIN, Esq.
Attorney for the Plaintiff

CAPERS BARR, III, Esq.
Attorney for the Defendant

PATRICIA A. DANNER
Official Court Reporter

1 So base on South Carolina law, the Court
2 properly permitted us to present evidence of Richard
3 Stoney's actions for the limited purpose of showing
4 that he acted with unclean hands quote in a matter that
5 is the subject of a litigation.

6 So, number one, we didn't apply it just to show
7 general misconduct. It was specifically relevant to
8 the issue of laches, number one. And then number two,
9 the law cited by Defendants does not apply in this
10 case.

11 And, Your Honor adequately address the laches
12 issues and weighs the factors particularly in lines
13 containing paragraphs 11, 12, and 13 of it's order,
14 Your Honor.

15 But again, Your Honor, the crux of this matter
16 comes down to how you -- you're here and what your
17 order actually says. And, if you look at it, the first
18 sentence of the Court's May 20, 2019, on Lawrence's
19 standing it says, at the request of the parties, the
20 Court held a preliminary hearing on the issue of
21 whether derivative action Plaintiff has standing to
22 maintain this derivative action.

23 And, yet Defendants in their motion to
24 reconsider, attempt to recast your Court's order as a
25 quote final order on the issue of standing completely

1 ignoring Your Honor's characterization of it's ruling.

2 Now, generally, Your Honor, logic would dictate
3 that a Defendant in a civil case would ordinarily be
4 glad to characterize an order finding the Defendant not
5 meet it's burden to defeat standing as preliminary.
6 But here Your Honor, Defendants would sacrifice their
7 right to challenge standing at trial to the extent
8 discovery reveals new evidence for a chance to further
9 delay this almost four year old case by filing an
10 interlocutory appeal without having to post an appeal
11 bond.

12 And, Your Honor, that's what's at the crux of
13 this hearing is the Defendant's recharacterization of
14 your Court's order. So if you look at the order again,
15 the first sentence reads, at the request of the
16 parties, the Court held a preliminary hearing on the
17 issue of whether the derivative action Plaintiff has
18 standing to maintain this case.

19 Contrary to the Defendant's representations,
20 the Court's order doesn't make any final findings of
21 facts. In fact, the fact section of the order is
22 entitled quote preliminary findings of fact. Every
23 factual findings in your order falls under the heading
24 as a preliminary findings of fact. That's on page
25 three of your order.

1 The Court even goes further and makes
2 statements in it's preliminary findings like quote
3 without making any findings of fact. Or quote, the
4 Court finds credible evidence that. Or quote, it
5 appears. So Your Honor's findings of facts are clearly
6 subject to modification, additions, or amendment at the
7 trial of the merits. It was like any pretrial hearing.

8 And, then ultimately the Court's order finds
9 that Defendants and interveners cannot meet their
10 burden and that Lawrence Stoney can maintain this
11 derivative action on behalf of the company such to
12 proceed to trial. And, that's ultimately what we're
13 concerned about, Your Honor, is this attempt to try to
14 recast the Court's order as final to tie this case up
15 in the Appellate Court.

16 Now, I will note that we cited a case in our
17 response memorandum that says that South Carolina has
18 settled an immediate appeal of various orders issues
19 before or during trial, generally has not been allowed
20 and that piece meal appeals should be avoided. And,
21 that's Haygood(sp) versus Summerville, 362 SC 191.
22 And, Justice Beatty recently issued an opinion that
23 said, piece meal appeals are not favored by this Court.

24 The other thing that is important when you
25 considered -- so we've looked at the actual wording of

1 sought.

2 Now, despite the Court's language in the
3 Court's order and despite this procedural history where
4 the Court didn't grant Defendant's motion to bifurcate
5 discovery and trial, Defendants in their motion to
6 alter and amend claimed that the hearing on December
7 13th and 14th was pursuant to intervener's motion to
8 bifurcate.

9 And, so it's important because the Defendant's
10 now say that they have no other option but to treat the
11 Court's order as a final order on the issue of
12 standing.

13 And, Your Honor, we would ask that the Court --
14 your order is perfectly clear and the procedural
15 history is clear. We would ask that you clarify it for
16 Defendants so that this case does not get tied up in
17 the Appellate Courts for another four years. It's
18 already a four year old case. We haven't made it to a
19 trial yet and we believe this is going to be yet
20 another delay tactic.

21 Your Honor, based on the language of the
22 Court's order and the record leading up to the Court's
23 order, the December 13th and 14th hearing on standing
24 was clearly a preliminary hearing in which the Court
25 made, "preliminary findings of facts," such that

1 Defendants did not meet their burden to defeat Lawrence
2 Stoney's standing at this pretrial stage in litigation.

3 This was not an unusual hearing. Most cases
4 have preliminary threshold issues that necessitate
5 preliminary findings of fact all of which are subject
6 to amendments by the Court at trial.

7 According to the Defendant's argument that it
8 was -- somehow this hearing was a waste of time unless
9 we treat it as a final trial on standing, is
10 disingenuous. If that were the case, then all hearings
11 on all motions to dismiss, all motions for summary
12 judgments, and all other pretrial rulings subject to
13 modification at trial would be -- if denied, would be a
14 waste of time.

15 The Defendants likely would not be so quick to
16 argue that it was a waste of time had the Court found
17 that they met their burden.

18 Your Honor, so based on the language of the
19 Court's order and the procedural history leading up to
20 this, we would ask that the Court makes clear to the
21 Defendants that the Court's order is not a final order
22 but a preliminary order where the Court reserves the
23 right to make additional or amended findings at the
24 trial of this case. Thank you, Your Honor.

25 THE COURT: Mr. Barr.

1 MR. BARR: Thank you, Your Honor. My initial
2 comment is purely rhetorical, Your Honor, and I'm
3 sorry. The question is this, if Your Honor's ruling at
4 the November hearing motion for bifurcation, Your Honor
5 ruled we can hear this in December, the week of
6 December, if that was not for the purpose of
7 adjudicating with finality the question of standing,
8 then what did we do in December? What was the whole
9 purpose of that? If now we are going to retry that
10 whole question again, that's what client is -- counsel
11 is suggesting.

12 Our motion was to bifurcate the two issues.
13 True, we moved to bifurcate both the trial and the
14 discovery. Your Honor set the trial so quickly we
15 didn't have the -- we never reached any -- we did some
16 depositions, we didn't reach a bifurcation with
17 discovery stage.

18 But, if the purpose of the December hearing was
19 not a trial to decide standing, then why were we there?
20 Why was it not decided with finality? And, then we --
21 again, we said rhetorical, didn't we just waste our
22 time? I don't know what clarification could be made,
23 but further I don't see what purpose it would served by
24 the Court telling us in December -- you know, I think
25 for every hour and Your Honor probably remembers this

1 We have had law clerk's research it. There are no
2 cases that the Defendant can cite to you allowing for
3 bifurcation in a derivative action case to determine
4 Plaintiff's standing.

5 This was a preliminary hearing on the threshold
6 issue on whether my client had standing such that the
7 case could proceed to a trial on the merits like any
8 other preliminary hearing. The Court could amend or
9 add to it's facts to the extent discovery leads to new
10 evidence.

11 We're not suggesting that the whole issue of
12 standing be retried, but to the extent discovery brings
13 up new evidence that may have a bearing on the Court's
14 findings, of course, Defendants have a right to bring
15 that up. We haven't tried the case yet.

16 And so, Your Honor, we would respectfully
17 request that you clarify for Defendants that this was,
18 in fact, a preliminary hearing and that your findings
19 are subject to amendments, modifications, or addition
20 at the trial of the merits in this case.

21 *THE COURT:* All right. Mr. Barr?

22 *MR. BARR:* Just briefly, Your Honor.

23 *THE COURT:* Yes, sir.

24 *MR. BARR:* Well, let me start with the access to
25 the books issues and counsel was citing page 129. At

1 reference to a case, I don't need to -- I mean, clearly
2 know everything that was said in another case.

3 MR. BARR: Yes, sir.

4 THE COURT: That's just part of it. I wanted to
5 clear that I wasn't making any final determination on
6 any issue other than the preliminary issue of standing
7 and that the fact that this problem is within the
8 corporation has been going on for a long time, he is
9 not barred by laches from maintaining the action.

10 Now, I guess that order was what, 25 pages
11 maybe 22 pages?

12 MR. BARR: I think you parceled it down to 13.

13 THE COURT: Thirteen, all right.

14 MR. BARR: The original may have been that long.

15 THE COURT: Yeah, probably started out longer than
16 that. But, I think the order speaks for itself. I
17 don't believe that Judges need to issue an order and
18 then issue another order saying what I mean by the
19 order.

20 MR. BARR: I don't disagree with that.

21 THE COURT: Either the order -- either the motion
22 for reconsideration---

23 MR. BARR: ---I'd like for the -- of course, the
24 order does say something different, but I understand
25 Your Honor---

1 the company throughout the term of the litigation. He
2 has to always be a member of the company to bring a
3 derivative action.

4 Those are factors. They are subject to change.
5 Factors and new evidence can surface during the course
6 of discovery that could ultimately result in the Court
7 making an additional amended, modified, ruling in the
8 final ruling at the trial on the merits.

9 And, we're not asking the Court to modify it's
10 order. We agree with Your Honor, your order is clear
11 on it's face. It makes preliminary findings of facts
12 and states that it's a preliminary hearing.

13 The reason that we are before Your Honor today
14 talking about this, is Defendants in their motion to
15 reconsider say that they have no choice but to treat
16 Your Honor's order as a final order. And, so all we're
17 asking is that you clarify for the Defendants that it
18 was not that because otherwise 30 days from now we are
19 going to be getting a notice of appeal and this
20 thing---

21 *THE COURT:* ---well, if it were a final order than.
22 I would do a form four and the case is over without any
23 determination of any of the major issues which is any
24 issue of liability it manages.

25 *MR. BARR:* Well, if -- that's assuming you granted

EXHIBIT H

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Order Denying Motion to Reconsider

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.

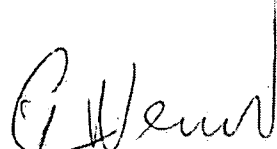

Clifton Newman
Presiding Judge

EXHIBIT I

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Motion for Hearing on Standing

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

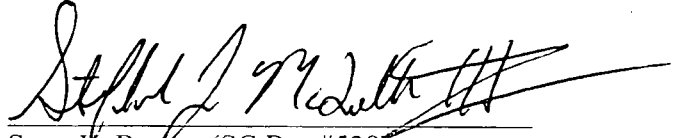
Case No. 2015-CP-10-5463

**PLAINTIFF'S MOTION FOR A HEARING
ON LAURENCE STONEY'S STANDING
AS A REPRESENTATIVE-PLAINTIFF
FOR THE BOATHOUSE AT
BREACH INLET, LLC**

2018 NOV 21 PM 4:15
JULIE J. ANDERSON
CLERK OF COURT
BY _____

The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, ("Plaintiff") filed a Summons and Complaint against the Company's manager, Richard Stoney ("Defendant"), on October 12, 2015. The parties and counsel for Intervenor-Defendants, Theodore Stoney and Gregory Holmes, appeared before the Court on a Motion to Bifurcate trial and discovery in this matter on November 8, 2018. After hearing arguments, and based upon the parties' requests, the Court ruled from the bench that it would hold a hearing on the matter of Laurence Stoney's standing as a representative-plaintiff during the week of December 10, 2018; the expected dates of the hearing being Thursday and Friday, December 13 and 14, 2018. All parties agreed to make themselves available for the hearing on Thursday and Friday, December 13 and 14, 2018.

Plaintiff now moves the Court to formally schedule this hearing at which Plaintiff will present evidence to the Court that demonstrates that Laurence Stoney does, in fact, have standing as a representative-plaintiff under SCRCP 23(b).

A handwritten signature in black ink, appearing to read "Scott Y. Barnes", written over a horizontal line.

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, 4th Floor
Charleston, SC 29401
(843) 724-1120

ATTORNEY FOR PLAINTIFF

CHARLESTON, SC

November 21, 2018

EXHIBIT J

to

Return to Motion to Dismiss Appeal

Appellate Case No. 2019-001583

Answer to Amended Complaint

5. Answering paragraph 16, Defendants allege that Richard Stoney has served as manager of The Boathouse since its formation, and they deny any allegations of paragraph 16 inconsistent with this answer.

6. Answering the allegations of paragraph 18, Defendants admit that Theodore D. Stoney, Jr. as trustee for the benefit of Richard S. W. Stoney, Jr., Lori Stoney, Lori Stoney as trustee for the benefit of Croft Stoney, and Holmes Capital Management, LLC have been added as additional members to The Boathouse, LLC, and they deny any allegations of paragraph 18 inconsistent with this answer.

7. Answering paragraph 20, Defendants admit only that Breach Inlet is governed by the 1997 Operating Agreement and by the provisions of the South Carolina LLC Act.

8. Answering paragraph 21, Defendants aver that Crew Carolina, LLC was formed in 1998 for purposes, *inter alia*, of consolidating the administrative management of Breach Inlet, and subsequently of The Boathouse at East Bay, LLC (hereafter "East Bay") (of which Laurence Stoney was a member), a Boathouse at Lake Julian and Boathouse at Ellis Creek; all with the knowledge and acquiescence of Laurence Stoney for more than fifteen years prior to his filing of the within action.

9. Answering paragraph 23, Defendants aver that, through his attorneys, Laurence Stoney made a succession of strident, unreasonable demands on behalf of Laurence Stoney against Richard Stoney, in every instance accompanied by short and arbitrary time deadlines; none of which were calculated for any purpose other than to profit Laurence Stoney individually, and to penalize Richard Stoney, individually; and none of which were designed for the benefit of Breach Inlet.

10. Answering paragraph 24, Defendant avers that Plaintiff has improperly alleged matters and communications arising in mediation, contrary to the letter, if not the spirit, of Rule 8 of the South Carolina ADR Rules. Accordingly, the allegations of paragraph 24 are denied.

11. Answering paragraph 27, Defendants admit only that Laurence Stoney has been a member of Breach Inlet since its formation on November 21, 1997.

12. Answering paragraph 28, Defendants admit only that Richard Stoney has been the member/manager of Breach Inlet since its formation on November 21, 1997.

13. Answering paragraph 37, Defendants admit that The Boathouse is a manager-managed LLC, and that Code § 33-44-301 contains provisions relating to manager-managed LLC's, as do other sections of the South Carolina Code.

14. Answering paragraph 38, Defendants admit that South Carolina Code § 33-44-409 (h) describes general standards of member and manager conduct in a manager-managed LLC; and they deny any allegations of paragraph 38 inconsistent with this answer.

15. Answering paragraph 39, Defendants admit only that Richard Stoney owes the statutory duties set forth in Code Section 33-44-409.

16. Answering paragraph 52, Defendants crave reference to Code Sections 33-44-407 and 33-44-103, and they deny any allegations inconsistent with the language of those statutory sections.

17. Answering paragraph 53, Defendants crave reference to Code Section 33-44-405, and they deny any allegations inconsistent with the language of that statutory section.

18. Answering paragraph 67, Defendants crave reference to Code Section 33-44-1104, and they deny any allegations inconsistent with the language of that statutory section.

FOR A SECOND DEFENSE

19. The allegations of the Complaint fail to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE

20. The claims of Plaintiff are barred by the Statute of Limitations.

FOR A FOURTH DEFENSE

21. The claims of Plaintiff are barred by the Equitable Doctrine of Laches.

FOR A FIFTH DEFENSE

22. The claims of Plaintiff should be dismissed because Plaintiff seeks only to benefit himself individually, and does not act in the best interests of Breach Inlet or its members.

FOR A SIXTH DEFENSE

23. The conduct of Richard Stoney about which Plaintiff complains is protected and privileged under the Business Judgment Rule.

FOR A SEVENTH DEFENSE

24. The claims of Plaintiff are barred by the Doctrines of *Waiver* and *Estoppel*.

FOR AN EIGHTH DEFENSE

25. Plaintiff cannot fairly and adequately represent the interests of Breach Inlet and its members because of his past disloyal, deceitful, deceptive and dishonest conduct; because his animus in pursuing the within action is to punish Richard Stoney ("Richard"); and because the majority of members of Breach Inlet do not support Plaintiff's actions herein.

26. Richard and Laurence Stoney ("Laurence") are first cousins.

27. On or about November 21, 1997 Richard formed a business entity known as The Boathouse at Breach Inlet, LLC ("Breach Inlet") and on that same date he filed Articles of Organization with the South Carolina Secretary of State.

28. At Richard's invitation, Laurence invested the sum of \$28,500 into Breach Inlet, for which he received a 5% membership share.

29. Laurence also signed an Operating Agreement, that defines the relationship of the parties as members of Breach Inlet; the terms and provisions of which are incorporated herein by reference.

30. Breach Inlet is a seafood restaurant, located at Breach Inlet, a tidal inlet between Isle of Palms and Sullivan's Island, South Carolina in Charleston County. The restaurant was created in 1997 according to a menu scheme adopted by Richard, that affords to its customers fresh, local seafood and alternative selections of side orders, which made its menu offering, at the time, different from other local seafood restaurants.

31. In December of 1998 and January of 1999 Richard formed two additional business entities:

a. On December 21, 1998 Richard formed Crew Carolina, LLC, ("Crew"), a single member LLC of which Richard is the sole member. Crew was formed for the purpose of consolidating and coordinating the administration and management of a future group of restaurants, to be formed.

b. On January 8, 1999 Richard formed The Boathouse on East Bay, LLC ("East Bay"), adopting the same business model and menu model that had been established at Breach Inlet.

32. At Richard's invitation, Laurence invested in East Bay, for which he received a 4% interest in the LLC.

33. Richard is informed and believes that Laurence was aware of, and that he acquiesced to, the business model: that is, to expand the Boathouse restaurants as a chain, with central administrative management to be provided by Crew.

34. The central management model of administering multiple restaurants is not unique to the Boathouse chain, and on information and belief it is utilized by other restaurant groups in the Charleston area, as well as outside the Charleston area.

35. The Operating Agreements of Breach Inlet and of East Bay, to which Laurence was a signator, gives Richard as Manager of Breach Inlet and East Bay the authority to contract for centralized management, as was made between Breach Inlet, East Bay and Crew Carolina.

36. Laurence was paid substantial distributions by Breach Inlet for the years 1999, 2000, 2001, 2002, 2003, 2004 and 2010.

37. On July 22, 2002 Richard formed a third Boathouse, known as "Boathouse at Lake Julian", ("Lake Julian") located in Asheville, North Carolina; and on December 10, 2008 he formed a fourth Boathouse known as "Boathouse on Ellis Creek", located on James Island in Charleston County.

38. Laurence was not offered the opportunity to invest in either Lake Julian or Ellis Creek, although he asked to do so, because Laurence had participated in conduct that was disloyal and disruptive to East Bay and to the business model to which he had acquiesced, as hereafter alleged.

40. When East Bay began operating in 1999, the property from which it operated was located at 549 East Bay Street, and was leased from "14 Chapel, LLC" an entity owned or controlled by James Drew.

41. After operating 549 East Bay Street for several years, disputes and differences arose between East Bay and the landlord over, among other things, maintenance issues and upkeep of the property; such that the dispute and the conditions of the property were not furthering the best interests of the ongoing restaurant business.

42. In the circumstances, Richard concluded that the best business course of action for East Bay would be to purchase the property at 549 East Bay Street from Mr. Drew.

43. As an example of Laurence's disloyalty: knowing the stresses placed on the business operations of East Bay and on Richard because of the disputes with the landlord, and while Richard was negotiating with Drew to buy 549 East Bay Street, Laurence deceptively, secretly and surreptitiously attempted to purchase 549 East Bay Street, himself, from Mr. Drew.

44. Laurence did not disclose to Richard, or to any person affiliated with Richard, or with East Bay, his surreptitious attempts to purchase 549 East Bay Street.

45. Richard is informed and believes that Laurence attempted to buy 549 East Bay in order to gain leverage to undermine and to cause harm to Richard and to East Bay.

46. Although Laurence did not acquire title to 549 East Bay Street, and it was purchased by Boathouse at East Bay, LLC, Laurence's devious, dishonest and disloyal acts were contrary to, if not the letter, at least the spirit, of East Bay's Operating Agreement and Laurence's status as a member of East Bay.

47. When East Bay closed because of financial exigency Richard assumed and fully paid its debts without a capital call to its members, thereby enabling Laurence, and the other members, to avoid a financial liability.

48. Richard is informed and believes that, as another act of disloyalty, Laurence conspired with Lori Stoney, Richard's former wife, and with Charleston restaurateur Bill Hall in Lori's case against Richard in Family Court, to wrest control of Breach Inlet from Richard.

49. On information and belief, in furtherance of the conspiracy above alleged Bill Hall, restaurant owner of Hall's Chophouse on King Street, would have taken over the management responsibilities, and perhaps the controlling ownership of Breach Inlet.

50. In furtherance of the conspiracy with Lori Stoney and Bill Hall, Laurence testified against Richard in the Family Court proceedings, and Bill Hall appeared in the same Family Court proceeding to testify as to the management of Breach Inlet, although Hall did not testify in the final analysis.

FOR A NINTH DEFENSE

51. The allegations of paragraphs 1-50 are incorporated herein.

52. The claims of Plaintiff are barred by the equitable doctrine of unclean hands.

FOR A TENTH DEFENSE

53. The allegations of paragraphs 1-52 are incorporated herein.

54. Plaintiff is and should be liable to Defendant for his attorney fees and for the costs of this action.

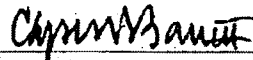
WHEREFORE, having fully answered the complaint of Plaintiff, Richard Stoney prays:

1. That the relief sought in the Complaint of the Plaintiff be denied;

2. That the Plaintiff be ordered to pay Defendant's costs and expenses, including a reasonable legal fee;

3. For such other and further relief as may be proper.

BARR, UNGER, MCINTOSH, LLC



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Attorney for Defendant

Charleston, South Carolina
April 12, 2017