THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-000474

C. Gordon Lovingood, Jr., C3 Investments, Inc., and PPC12, LLC..... .... Appellants

v.

Victor Apat; Anthony McAlister; J Eric Wade d/b/a CT Touring; and Pearl CO., SC, LLC .... Defendants,

Of Whom Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl CO., SC, LLC are ..... Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This case involves a dispute relating to PPC, LLC, a limited liability company formed to own and operate an airplane, in which parties to this action were members. On August 29, 2013, Appellants C. Gordon Lovingood, Jr., C3 Investments, Inc., and PPC12, LLC (collectively, "Appellants") filed suit against Respondents Anthony McAlister, J. Eric Wade d/b/a CT Touring, Pearl Co., SC, LLC (collectively, "Respondents") and Defendant Victor Apat, asserting claims of breach of fiduciary duty, contractual indemnity, and equitable subrogation. According to Appellants, Respondents are responsible for contractually indemnifying Appellants for aircraft expenses paid by Lovingood and C3 Investments after October 28, 2012. Additionally, Appellants claim that Respondents breached their fiduciary duty of loyalty owed to PPC12 and Lovingood by forming and becoming members of a separate limited liability company, which owns and operates an aircraft that competes with PPC12.

Respondents answered Appellants' complaint by denying the allegations and asserting counterclaims and crossclaims against Lovingood and Apat based on their fraudulent and negligent misrepresentations and concealment regarding how PPC12 would use Respondents' initial contributions and their approval of expenditures in violation of the Operating Agreement. Respondents defended Appellants' contractual

indemnity claim on the grounds that (1) the Operating Agreement does not require members to indemnify the company or other members, and (2) they were not responsible for any of the aircraft's expenses sought by Appellants because they dissociated from the company prior to Appellants incurring the costs for which they seek indemnification in this action. As defenses to Appellants' breach of fiduciary duty claim, Respondents asserted that (1) they did not breach a fiduciary duty to PPC12 or Lovingood because they did not compete against PPC12 and only took preliminary steps to become involved with a different aircraft prior to their dissociation from PPC12, and (2) Appellants' purported damages were not proximately caused by Respondents' alleged breach of fiduciary duty of loyalty.

On May 22, 2015, Respondents filed a motion for summary judgment on Appellants' claims for contractual indemnity, equitable subrogation, and breach of fiduciary duty. Appellants filed on September 8, 2015 a motion for partial summary judgment on Respondents' counterclaims against Lovingood. The motions were heard by the Honorable J.C. Nicholson on October 19, 2015, who granted both motions for summary judgment on December 1, 2015, ending all claims and counterclaims between Appellants and Respondents. Appellants filed a Motion for New Trial or to Alter and Amend on December 16, 2015, which was denied by Judge Nicholson on January 27, 2016. Appellants appealed the Order on March 2, 2016.

FACTS

Appellant C. Gordon Lovingood and Defendant Victor Apat organized Appellant PPC12, LLC in 2007 to own and operate a 1996 Pilatus PC-12 aircraft. (R. p. 145, line 6-p. 146, line 8) (Lovingood Dep. 9:6-10:8). The PPC12 aircraft was financed with a loan

from Cessna Finance Corporation. (R. p. 146, line 13-p. 148, line 3) (Lovingood Dep. 10:13-12:3). The financing required monthly principal and interest payments of $15,816. (R. p. 149, lines 10-19) (Lovingood Dep. 14:10-19). According to Lovingood, Appellant C3 Investments, Inc., a corporation owned by Lovingood, was the borrower under the promissory note to Cessna Finance, and he purports to have been a personal guarantor of the Cessna Finance loan. (R. p. 146, line 13-p. 148, line 3) (Lovingood Dep. 10:13-12:3).

Lovingood and Apat had equal fifty percent (50%) interests in PPC12 and contributed equally to the aircraft's fixed and variable expenses. (R. p. 146, lines 9-12; R. p. 149, lines 10-24) (Lovingood Dep. 10:9-12, 14:10-24). East Shore Aviation ("East Shore") managed the aircraft for PPC12 and used it for charter flights. (R. p. 150, line 10-p. 151, line 5; p. 152, line 8-p.153, line 3; pp. 218-222) (Lovingood Dep. 19:10-20:5, 21:8-22:3, Ex. 1).

East Shore leased the aircraft from PPC12 for charter flights, but PPC12's charter income was not sufficient to cover the aircraft's expenses. (R. p. 163, line 19-p. 164, line 1; p. 267, line 22-p. 268, line 16) (Lovingood Dep. 51:19-52:1; D. Gibbons Dep. 109:22-110:16). After the recession began in 2008, Lovingood and Apat reduced their use of the aircraft and struggled to pay the aircraft's expenses. (R. p. 252, line 17-p.253, line 19; p. 279, line 10-p. 280, line 3) (D. Gibbons Dep. 72:17-73:19; M. Gibbons Dep. 42:10-43:3). Due to their reduced use of the aircraft and desire to reduce their share of aircraft expenses, Lovingood and Apat, with East Shore's assistance, looked for new members to join PPC12 in late 2010 and early 2011. (R. p. 154, line 18-p. 157, line 1; p. 253, lines 5-19; p. 279, line 10-p. 280, line 3; p. 281, lines 5-11; p. 288, lines 4-13; p. 315, lines 6-10) (Lovingood Dep. 24:18-27:1; D. Gibbons Dep. 73:5-19; M. Gibbons Dep. 42:10-43:3,

46:5-11; McAlister Dep. 11:4-13; Wade Dep. 26:6-10). At that time, selling the aircraft was not financially feasible because of decreased demand during the recession. (R. p. 161, line 12-p. 162, line 15) (Lovingood Dep. 49:12-50:15).

In early 2011, Respondents were solicited to become members of PPC12. During the solicitation, Respondents were informed that PPC12 owed more under the loan than the aircraft was worth and that it needed new members to increase usage and reduce Apat's and Lovingood's share of the aircraft's expenses. (R. p. 288, lines 4-13; p. 289, line 4-p. 291, line 4; p. 313, line 23-p. 314, line 2; p. 315, lines 1-10; p. 316, lines 6-22) (McAlister Dep. 11:4-13, 14:4-16:4; Wade Dep. 13:23-14:2, 26:1-10, 27:6-22). Also, Respondents were told that they would need to pay an initial contribution to create reserves for future maintenance and upgrade the aircraft's avionics. (R. p. 289, line 4-p. 291, line 4; p. 315, line 22-p. 316, line 1; p. 327, lines 13-21) (McAlister Dep. 14:4-16:4; Wade Dep. 26:22-27:1; Pearlstine Dep. 16:13-21).

As part of the solicitation of Respondents, Lovingood represented that he was the guarantor of the loan on the aircraft and that he wanted to reduce his ownership interest in PPC12. (R. p. 163, lines 4-5; p. 164, lines 12-22) (Lovingood Dep. 51:4-5, 52:12-22). As such, the parties anticipated that if Respondents became members of the aircraft, they would work together to refinance the loan on the aircraft. (R. p. 167, line 25-p.171, line 7) (Lovingood Dep. 60:25-64:7). However, Respondents never agreed or expressed any intent to personally guaranty any debt associated with the aircraft or replace Lovingood as guarantor on the loan, especially considering they knew the aircraft was upside down financially. (R. p. 167, lines 17-23; p. 168, line 25-p. 169, line 3; p. 170, lines 11-16; p. 289, line 7-p. 291, line 4; p. 333, lines 10-17; p. 334, lines 14-19; p. 340, line 16-p. 341,

line 15) (Lovingood Dep. 60:17-23, 61:25-62:3; 63:11-16; McAlister Dep. 14:7-16:4; Pearlstine Dep. 33:10-17, 36:14-19; Apat Dep. 31:16-32:15).

In April, May, and June of 2011, Respondents Wade, McAlister, and Pearl Co. became members of PPC12, respectively. Pearl Co. and McAlister each paid an initial contribution of $40,000 for respective twenty-five percent (25%) interests in the company. (R. pp. 234-235; p. 292, line 19-p. 293, line 1; p. 294, lines 8-15; p. 321, line 25-p. 322, line 4; p. 327, lines 13-24) (Lovingood Dep. Ex. 5; McAlister Dep. 22:19-23:1, 26:8-15; Wade Dep. 117:25-118:4; Pearlstine Dep. 16:13-24). Wade paid a $20,000 initial contribution for a twelve and one-half percent (12.5%) interest. (R. p. 321, line 25-p. 322, line 4; pp. 234-235) (Wade Dep. 117:25-118:4; Lovingood Dep. Ex. 5).

When Respondents joined PPC12, PPC12 amended its operating agreement (the "Operating Agreement"). (R. pp. 223-235) (Lovingood Dep. Exs. 4-5). The Operating Agreement specifically provides that "[n]o member is personally liable for any debt, obligation, or liability of the Company, whether arising in contract, tort or otherwise." (R. p. 226) (Lovingood Dep. Ex. 4 § 3.5). Under Sections 3.6 and 3.7 of the Operating Agreement, the members were required to pay their share of the aircraft's fixed and variable expenses to be eligible to use it. (R. p. 226) (Lovingood Dep. Ex. 4 §§ 3.6 and 3.7). The Operating Agreement provides that the member's "usage is not allowed if a Member is not current with all financial obligations required by the Company." (R. p. 226) (Lovingood Dep. Ex. 4 § 3.7). The Agreement provides no other remedy for a member's failure to pay his share of aircraft expenses. (R. p.165, line 1-p. 166, line 25; pp. 223-235; p. 338, line 23-p. 339, line 11) (Lovingood Dep. 54:1-55:25; Lovingood Dep. Exs. 4-5; Apat Dep. 29:23-30:11).

The Operating Agreement contains no provision governing a member's dissociation from PPC12. (R. pp. 223-235) (Lovingood Dep. Exs. 4-5). Nor does it prohibit the members from owning other aircraft. (R. p. 174, lines 13-21) (Lovingood Dep. 85:13-21). In fact, Lovingood owned other aircraft while he was a member of PPC12. (R. p. 163, lines 8-12) (Lovingood Dep. 51:8-12).

At the time Respondents joined PPC12, PPC12's 2010 property taxes in the amount of $43,181.94 were delinquent; however, this was not disclosed to Respondents prior to becoming members. (R. p. 158, line 20-p.160, line 23) (Lovingood Dep. 43:20-45:23). Soon after Respondents made their initial contributions to PPC12, Lovingood and/or Apat authorized a portion of those funds to pay the delinquent 2010 property taxes without consulting Respondents, despite the fact that the Operating Agreement requires seventy-five percent (75%) approval by all members for expenditures above $1,000. (R. p. 295, line 2-p. 298, line 13) (McAlister Dep. 39:2-42:13). After discovering the tax expenditure, McAlister objected to the use of funds for delinquent taxes and expressed his understanding that Respondents' contributions were not to be used for PPC12's delinquent debts. (R. pp. 306-307) (McAlister Dep. Ex. 3). In addition to using Respondents' initial contributions to pay delinquent taxes, PPC12 never set up engine or maintenance reserves or upgraded the avionics. (R. p. 299, line 20-p. 300, line 14; p. 335, lines 6-9) (McAlister Dep. 45:20-46:14; Pearlstine Dep. 49:6-9).

In late 2011 and early 2012, Wade initiated efforts to refinance PPC12's aircraft loan and ultimately obtained a commitment from a local lender to refinance the debt. (R. p. 319, line 17-p. 320, line 3) (Wade Dep. 62:17-63:3). Because PPC12 owed more on the aircraft than it was worth, the lender only agreed to provide partial refinancing, which

was several hundred thousand dollars short of what was owed to Cessna Finance at that time. (*Id*) Lovingood was not willing to pay the difference between the amount owed to Cessna Finance and the amount which PPC12 could obtain in financing from a new lender. (R. p. 258, line 16-p 259, line 21) (D. Gibbons Dep. 99:16-100:21). PPC12 also attempted to refinance the loan with Cessna Finance under different terms, but Cessna Finance would not refinance or amend the terms and conditions of the loan to PPC12. (R. p. 172, line 23-p. 173, line 2; p. 254, line 4-p. 258, line 12) (Lovingood Dep. 68:23-69:2; D. Gibbons Dep. 95:4-99:12).

As a result of the futile efforts to refinance the aircraft and Respondents being aggrieved by PPC12's use of their capital contributions to pay delinquent taxes and failure to establish reserves and upgrade avionics, Respondents, with others who were not members of PPC12, began looking for a new aircraft that would not be associated with PPC12. (R. p. 301, line 19-p. 304, line 17; p. 310, line 8-p. 312, line 22) (McAlister Dep. 51:19-54:17; Wade Dep. 8:8-10:22). In the summer of 2012, Respondents, along with other partners, located another Pilatus PC-12 to purchase, and they established CP Aviation, LLC to own and operate that aircraft. (*Id.*) CP Aviation thereafter purchased the aircraft, and it was relocated from England to the United States in September or October 2012. (R. p. 248, line 16-p. 249, line 3; p. 317, line 25-p. 318, line 7) (D. Gibbons Dep. 20:16-21:3; Wade Dep. 55:25-56:7). The CP Aviation aircraft did not become eligible for charter until February 2013. (R. p. 246, lines 9-20) (D. Gibbons Dep. 17:9-20).

On September 4, 2012, Wade called Lovingood to inform him that Respondents were dissociating from PPC12 effective October 1, 2012 and would be using the new

aircraft owned by CP Aviation. (R. p. 175, line 3-p. 186, line 2; p. 312, lines 4-22; p. 323, line 16-p. 324, line 24) (Lovingood Dep. 101:3-112:2; Wade Dep. 10:4-22, 122:16-123:24). Lovingood admits that during this conversation Wade informed him that Respondents had "decided to move in a different direction" and were buying another airplane. (R. p. 175, lines 3-18) (Lovingood Dep. 101:3-18). According to Lovingood, he responded to this news by telling Wade that "if you drop out and leave me alone in this situation, I'll sue the shit out of you." (R. p. 175, lines 19-21) (Lovingood Dep. 101:19-21).

After receiving Wade's call, Lovingood emailed David Gibbons of East Shore, stating, "Just got a call from Eric. I think we need to meet on this soon. No one has told me anything about this situation. So, I am asking you to get everyone together so we can get this resolved without any problems." (R. p. 183, line 17-p. 186, line 2; p. 237) (Lovingood Dep. 109:17-112:2, Ex. 7). Respondents' intent to dissociate from PPC12 effective October 1, 2012 was confirmed in another email from David Gibbons to Lovingood and Apat on October 22, 2012. In that email, Gibbons stated, "We were only recently informed by the other members that they notified you by phone of their intention to leave PPC12 effective October 1st. Those members have not used the aircraft since that time and are current with their financial obligations." (R. pp. 239-240) (Lovingood Dep. Ex. 8).

Lovingood admits that the October 22nd email confirmed Respondents' intent to dissociate from PPC12:

> Q: So, in fact, on October 22nd, 2012 you received an email that states the other members' intention to leave PPC12 effective October 1st, isn't that correct?

A: Yes.

(R. p. 187, line 25-p. 188, line 4) (Lovingood Dep. 115:25-116:4). Although Lovingood disputes that Respondents' attempt to dissociate from PPC12 was legally effective (R. p. 188, lines 13-22) (Lovingood Dep. 116:13-22), Lovingood has repeatedly admitted that Respondents expressed their intent to dissociate:

> A: Because I had members with me and they didn't – to me, sir, they didn't – sending me an email telling me you're leaving an LLC doesn't mean to me that you're not obligated. It says – and not only that, it says it's the intention to leave. It didn't say they were leaving. It said they're intending to leave on October the 1st. . . .
>
> Q: So by this date –
>
> A: They didn't say they were or they weren't. They didn't say they were or they weren't, they were intending to. . . .
>
> Q: But you knew that was their intention, correct?
>
> A: Yeah, they intended, but did they, you know.
>
> Q: What do you think was required for them to leave the LLC?
>
> A: Well, first of all, in my estimation, they intended to leave but they never formally left, and which they didn't say, we are definitely not going to be in the L LC anymore. It just said they intended to leave.

(R. p. 189, line 3-p. 190, line 10) (Lovingood Dep. 118:3-119:10). In addition, Defendant Apat admits that he understood that Respondents had either dissociated or were intending to dissociate around October 2012. (R. p. 342, line 24-p. 346, line 3) (Apat Dep. 34:24-38:3). Michael Gibbons, who worked for East Shore and was the pilot of the PPC12 aircraft, similarly confirms that it was his understanding that Respondents had dissociated effective October 1, 2012. (R. p. 283, line 14-p. 285, line 17) (M. Gibbons Dep. 77:14-79:17).

On October 28, 2012, approximately one week after Respondents' dissociation from PPC12 was confirmed to Lovingood, the PPC12 aircraft suffered major engine failure leaving Peachtree-Dekalb airport in Atlanta on an East Shore charter flight and had to make an emergency landing. (R. p. 250, line 7-p. 251, line 6; p. 269, lines 2-4; p. 272, line 4-p. 278, line 11; p. 282, lines 7-11) (D. Gibbons Dep. 44:7-45:6, 123:2-4; M. Gibbons Dep. 18:4-24:11, 48:7-11). As a result of the engine failure, the aircraft was inoperable, needed major engine repairs, and remained at Peachtree-Dekalb airport for months. (R. p. 191, line 5-p. 196, line 10) (Lovingood Dep. 121:5-126:10). At that time, Lovingood took control of management of the aircraft from East Shore and undertook efforts to repair the engine, which was ultimately performed by Epps Aviation in Atlanta. (R. p. 192, line 13-p. 207, line 11; p. 260, line 10-p. 266, line 20) (Lovingood Dep. 122:13-138:11; D. Gibbons Dep. 101:10-107:20). Lovingood and his attorneys negotiated with the engine manufacturer to overhaul the engine, and Lovingood approved other repairs to get the aircraft ready for sale. (R. p. 192, line 13-p. 207, line 11) (Lovingood Dep. 122:13-138:11). Because the aircraft was inoperable, East Shore removed the aircraft from its charter certificate in December 2012. (R. p. 246, line 21-p. 247, line 3) (D. Gibbons Dep. 17:21-18:3).

Ultimately, Lovingood sold the aircraft in February 2014 and paid off the loan to Cessna Finance. (R. p. 213, line 25-p. 214, line 14) (Lovingood Dep. 178:25-179:14). According to Lovingood, he or C3 Investments paid for all repairs to the aircraft and the interest payments on the loan after the aircraft suffered engine failure until it was sold. (R. p. 208, line 22-p. 212, line 13) (Lovingood Dep. 140:22-144:13).

After the aircraft suffered engine failure on October 28, 2012, Lovingood did not consult with Respondents in any manner about the aircraft. He did not inform Respondents that the aircraft's engine failed. (R. p. 196, lines 11-20) (Lovingood Dep. 126:11-20). He did not seek contributions from them for loan payments. (R. p. 205, line 8-p. 206, line 4) (Lovingood Dep. 136:8-137:4). He did not include them in discussions with the engine manufacturer. (R. p.194, line 22-p. 196, line 10; p. 202, line 6-p. 205, line 7) (Lovingood Dep. 124:22-126:10, 133:6-136:7.) He did not seek their consent before authorizing repairs to the aircraft. (*Id.*) He did not involve them in the sale of the aircraft. (R. p. 333, lines 13-14) (Pearlstine Dep. 33:13-14).

On August 29, 2013, nearly a year after Lovingood last communicated with Respondents and learned of their dissociation from PPC12, Appellants filed suit against Respondents and Apat for all expenses incurred for the aircraft after it suffered engine failure. (R. pp. 27-37). Appellants assert claims of breach of fiduciary duty, contractual indemnity, and equitable subrogation. (*Id.*) According to Appellants, Respondents breached their fiduciary duties by forming and becoming members of CP Aviation for the purpose of owning and operating an aircraft in competition with PPC12. (*Id.*) Appellants further claim that Respondents are liable for their respective shares of the aircraft expenses paid by Appellants after October 28, 2012 because Respondents failed to dissociate. (*Id.*)

STANDARD OF REVIEW

Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). In

determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence is viewed in the light most favorable to the non-moving party. *Hamiter v. Retirement Div. of the S.C. Budget & Control Bd.*, 326 S.C. 93, 96, 484 S.E. 2d 586, 587 (1997). "The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case." *Fender & Latham, Inc. v. First Union Nat'l Bank of S.C.*, 316 S.C. 48, 50, 446 S.E. 2d 448, 449 (Ct. App. 1994).

A party opposing a motion for summary judgment may not rest on the mere allegations of his pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Rule 56(c), SCRCP; *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994). The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY HELD THAT APPELLANTS ARE NOT ENTITLED TO CONTRACTUAL INDEMNITY.

The circuit court granted Respondents summary judgment on Appellants' contractual indemnity claim on several grounds. In their appeal, Appellants argue that the circuit court erred in granting summary judgment on this claim because it misconstrued the nature of the claim, despite admitting that the ruling was "technically correct that there is no provision of the Operating Agreement that provides for direct indemnity amongst the members."

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Winnsboro v.*

Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." *Rock Hill Tel. Co. v. Globe Communs., Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (Ct. App. 2004). "The default rule of interpretation for indemnity clauses is that third party claims are a prerequisite to indemnification." *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 110, 584 S.E.2d 375, 378 (2003).

As contractual indemnity must be established by the contract between the parties, any right for contractual indemnity that Appellants have against Respondents must arise under the terms of the Operating Agreement. "The operating agreement of a limited liability company is a binding contract that governs the relations among the members, managers, and the company . . . [and] operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply." *Clary v. Borell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012).

A. The Operating Agreement does not require PPC12's members to indemnify each other, and Lovingood has no right to contractual indemnity against Respondents.

The circuit court granted summary judgment to Respondents on Lovingood's claim for contractual indemnity because the PPC12 Operating Agreement contains no provision addressing contractual indemnity between its members. The circuit court's ruling in this regard is correct, and Appellants do not cite any language in the Operating Agreement which requires a member of PPC12 to indemnify another member. In fact, Appellants admit this fact in their brief, stating that it is "technically correct that there is

no provision of the Operating Agreement that provides for direct indemnity amongst members for their expenses." (Appellants' Initial Br. p. 13.) Therefore, the circuit court correctly granted Respondents' summary judgment on Lovingood's claim for contractual indemnity.

B. C3 Investments is not a party to the Operating Agreement, and it has no right to contractual indemnity against Respondents.

In granting summary judgment to Respondents on C3 Investments's claim for contractual indemnity, the circuit court correctly concluded that C3 Investments "was neither a member of PPC12 nor a party to the Operating Agreement." (R. p. 10) (Order p. 10). In their appeal, Appellants do not appear to dispute these facts or to challenge the circuit court's ruling as to whether C3 Investments can maintain a claim for contractual indemnity. Accordingly, there is no genuine issue of fact on this issue, and the circuit court appropriately granted summary judgment to Respondents on C3 Investments's claim of contractual indemnity.

C. PPC12 does not have a right to contractual indemnity against Respondents.

1. The Operating Agreement does not provide PPC12 with a right to indemnity from its members.

The circuit court also correctly granted summary judgment as to PPC12's claim of contractual indemnity against Respondents. Just as the Operating Agreement contains no provision requiring Respondents to indemnify Lovingood or C3 Investments, it similarly contains no provision that requires them to indemnify PPC12 for its expenses and liabilities. In fact, the Operating Agreement expressly disclaims such an obligation. Sections 3.5 and 8.2(a) of the Operating Agreement state that "[n]o member is personally

liable for any debt, obligation, or liability of the company, whether arising in contract, tort or otherwise." (R. pp. 226; 230) (Lovingood Dep. Ex. 4 §§ 3.5 & 8.2(a)).

In apparent recognition that the Operating Agreement is completely devoid of any contractual provision that requires PPC12's members to indemnify PPC12, Appellants attempt to establish PPC12's claim for contractual indemnity by resorting to an attenuated, strained interpretation of the Operating Agreement that renders the no liability provision meaningless. Appellants' argument is supported by neither law nor facts, and the Court should reject Appellants' interpretive acrobatics.

Appellants argue that PPC12 is entitled to contractual indemnity because PPC12 has an obligation to indemnify members of the company for liabilities and obligations incurred by the members in the ordinary course of business of PPC12 or for the preservation of PPC's business or property under Section 8.2(c) of the Operation Agreement and because members have an obligation to pay their share of the PPC12 aircraft's fixed and variable expenses under Sections 3.6 and 3.7 of the Operation Agreement. According to Appellants, these two provisions, in conjunction with S.C. Code Ann. § 33-44-1101, allow Lovingood to bring a derivative action for contractual indemnification in the name of PPC12 against the other members for the expenditures that he and C3 Investments made to repair the aircraft and pay the loan on the aircraft. This argument is flawed for several reasons.

First, the Operating Agreement does not obligate the members to indemnify PPC12 or the other members. Instead, the Operating Agreement expressly limits members' personal liability for the liabilities of the company, and Section 8.2(c) merely provides that PPC12 has an obligation to indemnify members. If the members intended

for them to have an obligation to indemnify the company for its liabilities, then they could have included that obligation in the Operating Agreement. They did not and instead chose to ensure that individual members are not personally responsible for the debts, obligations, and liabilities of PPC12 by including Sections 3.5 and 8.2(a) in the Operating Agreement. Appellants cannot abrogate the limitation of liability expressly established in Sections 3.5 and 8.2(a) by bootstrapping two independent, unrelated sections of the Operating Agreement together for the purpose of creating an obligation to which the members did not agree.

Second, Appellants have failed to establish that Lovingood has a right to indemnity from PPC12 under Section 8.2(c). For Lovingood to have a right to indemnity, he must show that he incurred liabilities or expenses in the ordinary course of PPC12's business or to preserve PPC12's business or property. Lovingood has not proffered any evidence that he was acting on behalf of PPC12 when he made payments to Cessna Finance or to repair the aircraft. Rather, Appellants' Complaint and Lovingood's testimony reveal that Lovingood unilaterally took control of the management and finances of the aircraft in his capacity as a guarantor on the loan to Cessna Finance. (R. p. 33; R. p. 35; R. p. 171, lines 4-6; p. 194, line 27-p. 196, line 11; p. 197, lines 1-16; p. 200, lines 2-11; p. 202, line 6-p. 206, line 1) (Comp. §§ 20, 33, 34, 35; Lovingood Dep. 64:4-6, 124:27-126:11, 128:1-16, 131:2-11, 133:6-137:1).

In so doing, Lovingood completely disregarded his obligations to PPC12 and the other purported members of PPC12 by excluding them from all decisions relating to the aircraft after October 28, 2012 in violation of the Operating Agreement. Section 4.4 of the Operating Agreement provides that "[a]ll decisions related to the operation and

management and sale of the plane shall rest with PPC12, LLC and will require a 75% member approval for changes in the current operating structure." Additionally, Section 4.1 requires "seventy-five (75%) percent approval by all members" for expenditures over $1,000 per occasion and $5,000 in a thirty day period. That section further provides that all powers of the company relating to the sale of the plane require "seventy-five (75%) percent approval from the Members."

Lovingood failed to comply with these obligations in directing the repair of the PPC12 aircraft, making expenditures for the aircraft, and selling the aircraft. He did not consult with the other members of PPC12 in any manner before he took these actions. Instead, he unilaterally made decisions in his capacity as guarantor of the loan for the PPC12 aircraft and then sued the other members without making any effort to resolve this dispute.

Lovingood's unilateral actions in disregard of the Operating Agreement not only reveal that he knew Respondents had dissociated from PPC12, they also preclude him from bringing a derivative action for indemnification under S.C. Code Ann. § 33-44-1101. "A derivative action is a suit brought by a stockholder to enforce a corporate right. A suit brought by a stockholder is a derivative action if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder." *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). "A derivative action is, in essence, a challenge to a [company's] managerial authority." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 187, 539 S.E.2d 402, 408 (Ct. App. 2000).

Appellants' complaint and the facts demonstrated by the evidence in this case reveal that Lovingood and C3 Investments are suing on behalf of their own individual

interests and that PPC12 has not suffered injury from Respondents' alleged actions. Lovingood and C3 Investments made expenditures because they were protecting their personal interests as guarantors of the loan on the aircraft and were not acting on behalf of PPC12. In so doing, they disregarded the obligations of the Operating Agreement and acted unilaterally. Therefore, they cannot now claim that PPC12 has suffered an injury which can be remedied through a derivative action.

Moreover, the right that Lovingood seeks to pursue in his purported derivative action does not exist under the Operating Agreement. According to Appellants, Lovingood can pursue a derivative action against Respondents under Sections 3.6 and 3.7 of the Operating Agreement. These sections, however, provide no right of action for money damages against Respondents for their failure to make contributions for the aircraft's fixed and variable expenses. Sections 3.6 and 3.7 govern the members' right to use the aircraft and sets forth the amount of usage to which each member is entitled based on their respective ownership interest. Section 3.7 of the Operating Agreement provides that a member's "usage is not allowed if a Member is not current with all financial obligations required by" PPC12. The sole remedy for failure to pay the aircraft's fixed and variable expenses is a suspension of the delinquent member's right to use the aircraft, and Sections 3.6 and 3.7 do not provide the right of contractual indemnity that Appellants seek in this action. As a result, any derivative claim made by Lovingood on behalf of PPC12 under Sections 3.6 and 3.7 could not obtain the monetary damages that Appellants seek, and the circuit court appropriately granted summary judgment to Respondents on PPC12's claim for contractual indemnity.

2. PPC12 has no right to contractual indemnity against Respondents for the expenditures made by Lovingood or C3 Investments because Respondents dissociated from PPC12 prior to Lovingood and C3 Investments making such expenditures.

Regardless of whether the Operating Agreement creates a right to contractual indemnity that PPC12 could enforce against its members, PPC12 and Lovingood cannot enforce that right against Respondents in this case because Respondents had dissociated from PPC12 prior to Lovingood and C3 Investments making the expenditures for which they seek indemnity in this action. Because Respondents were no longer members of PPC12 when the aircraft suffered engine failure and afterwards when Lovingood and C3 Investments made the expenditures in question, Respondents are not responsible for indemnifying PPC12, Lovingood, or C3 Investments for those expenditures. The circuit court properly ruled that Respondents had property dissociated from PPC12 prior to Appellants' incurring the expenses they seek to recover, and Appellants have failed to identify a scintilla of evidence to show that this ruling was in error.

S.C. Code Ann. §§ 33-44-601 and 33-44-602 govern the manner in which a member may dissociate from a limited liability company. A dissociation occurs, among other ways, as a result of "the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." § 33-44-601(1). Section 33-44-601 does not require that such notice be given in any particular manner or form unless otherwise provided in the company's operating agreement. Rather, § 33-44-602 provides that, "[u]nless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to Section 33-44-601(1)." That section further provides that if "the operating agreement has not eliminated a member's

power to dissociate, the member's dissociation from a limited liability company is wrongful only if . . . it is in breach of an express provision of the agreement."

Section 33-44-102 defines notice under the South Carolina Limited Liability Company Act. Section 33-44-102(b) provides that a person has notice of a fact if the person: (1) knows the fact; (2) has received a notification of the fact; or (3) has reason to know the fact exists from all of the facts known to the person at the time in question. Section 33-44-102(c) provides that a "person notifies or gives notification of a fact to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person know the fact." Section 33-44-102(d) states that a person receives notification when the notification (1) comes to the person's attention; or (2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications. Section 33-44-102(e) provides:

> An entity knows, has notice, or receives notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the entity knows, has notice, or receives notification of the fact, or in any event when the fact would have been brought to the individual's attention had the entity exercised reasonable diligence.

Respondents properly dissociated from PPC12 pursuant to §§ 33-44-601 and 33-44-602 and gave notice of such dissociation under § 33-44-102. Despite Lovingood's vague recollection and self-serving testimony, there is no dispute of material fact that PPC12 knew of Respondents' intent to dissociate from PPC12 on September 4, 2012, and certainly no later than October 22, 2012, which is when PPC12's manager, David Gibbons, sent an email to Lovingood and Apat, expressly confirming Respondents' intent to dissociate effective October 1, 2012. As a result, there is no material issue of fact that PPC12 and its members had notice of Respondents' express will to withdraw as members

of PPC12 prior to the aircraft suffering engine failure, and the circuit court's ruling on this issue is correct.

To avoid this obvious conclusion, Appellants make two arguments: (1) there are material issues of fact as to whether the oral notification of Respondents' dissociation on September 4, 2012 was effective; and (2) the written notification of Respondents' dissociation on October 22nd was improper because it purported to have a retroactive effective date. Neither argument provides Appellants relief in this appeal.

First, the evidence in this case overwhelmingly proves that Lovingood and PPC12 had notice of Respondents' dissociation from the September 4, 2012 phone call in which Respondent Wade informed Lovingood that they were dissociating. Lovingood's self-serving, vague recollection of that phone call does not alter that fact. Although Lovingood cannot recall the specifics of the conversation, he admits that Wade told him that Respondents had decided to go in a different direction and were buying another airplane. According to Lovingood, he responded to this news by telling Wade that "if you drop out and leave me alone in this situation, I'll sue the shit out of you." (R. p. 175, lines 19-21) (Lovingood Dep. 101:19-21). After receiving Wade's call, Lovingood then emailed David Gibbons of East Shore, stating "Just got a call from Eric. I think we need to meet on this soon. No one has told me anything about this situation. So, I am asking you to get everyone together so we can get this resolved without any problems." (R. p. 183, line 17-p. 186, line 2; p. 237) (Lovingood Dep. 109:17-112:2, Ex. 7).

Even construed in the light most favorable to Lovingood, the only inference to draw from his recollection of the phone call, his subsequent threat to sue Respondents, and his request for a meeting with the members to "get this resolved" is that he knew

Respondents were dissociating from PPC12. Moreover, this phone conversation and his follow-up email to PPC12's manager calling for a meeting of PPC12's members to "get this resolved" show that Lovingood and PPC12 had sufficient facts to put them on notice of Respondents' dissociation if they had exercised reasonable diligence, which is all that is required for the entity to receive notice under § 33-44-102.

Lovingood's and PPC12's actions after the aircraft suffered engine failure further demonstrate that PPC12 had notice of Respondents' intent to withdraw from the company. After the aircraft suffered engine failure, neither Lovingood nor PPC12 informed Respondents of the incident. PPC12 sent no further invoices to Respondents for the continuing expenses of the plane, including loan payments, and Respondents were never consulted about the management of the aircraft while it sat grounded. Furthermore, Lovingood approved the repairs of the aircraft without obtaining consent of Respondents, despite the fact that the Operating Agreement required consent of seventy-five percent (75%) of all members. PPC12 then sold the aircraft without consulting with or obtaining approval of Respondents. If Lovingood truly believed that the Respondents had not dissociated, he would have consulted with them and sought their contributions for the loan payments and repairs. He did not, and the only reasonable inference to draw from Lovingood's exclusion of the Respondents is that he knew they had dissociated.

Second, even if there are material issues of fact regarding whether the phone conversation on September 4, 2012 and follow-up email were sufficient to provide notice of Respondents' dissociation, there can be no doubt that the October 22, 2012 email from David Gibbons to Lovingood and Apat demonstrates that PPC12, its manager, and all of its members had notice of dissociation. Although Appellants argue that the email

providing notice of dissociation was ineffective because § 33-44-601(1) does not permit notice to be retroactively effective, the Court need not address this issue because, at worst, the email demonstrates that the notice of dissociation would have become effective no later than October 22, 2012, which is prior to the airplane suffering engine failure. The most reasonable reading of the October 22nd email under § 33-44-601 is that PPC12 had notice of dissociation no later than October 22nd. Any other construction of the email would elevate form over substance and create the absurd result of requiring members of a limited liability company to remain members despite the fact that the company had received notice of their clear intent to dissociate.

In sum, PPC12 had notice of Respondents' express will to withdraw from the company prior to Lovingood and C3 Investments incurring the costs for which they seek indemnity. Therefore, there are no genuine issues of fact regarding Respondents' dissociation from PPC12, and the circuit court correctly determined that Appellants cannot maintain a claim for contractual indemnity for expenses occurring after Respondents' dissociation.

3. Lovingood cannot maintain a derivative claim on behalf of PPC12 because he did not make any efforts to secure the initiation of his action or comply with procedural rules to bring a derivative action.[1]

A member of a limited liability company may bring a derivative action only "if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed." S.C. Code Ann. § 33-44-1101. A derivative action pleading must "set forth with particularity the effort of the plaintiff to secure initiation of the action by a member or manager or the reasons for not making the effort." § 33-44-1103. Additionally, Rule 23(b)(1) of the South Carolina Rules of Civil Procedure requires that a complaint in a derivative action be verified and "allege with particularity the efforts, if any, made by the

[1] Although the trial court did not rule on the issue of whether Lovingood complied with the pleading requirements for a derivative action, this Court may decide the issue in the interest of judicial economy. *See S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (deciding an issue of appeal in the interest of judicial economy). Additionally, whether Lovingood adequately pleaded a derivative action is determinative of whether he has standing to pursue this claim, which can be addressed by the Court *sua sponte*. South Carolina courts have routinely held that a shareholder's ability to sue in a derivative capacity is an issue of standing. *See, e.g., Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991) (ruling that shareholder did not have standing to pursue derivative claim); *Johnson v. Baldwin*, 221 S.C. 141, 69 S.E.2d 585 (1952) (same); *Davis v. Hamm*, 300 S.C. 284, 387 S.E.2d 676 (Ct. App. 1989). This rule is consistent with decisions from federal courts that have dismissed derivative actions on the basis of lack of standing because the plaintiff failed to comply with the particularized pleading requirements of Rule 23.1, Fed.R.Civ.P. *See, e.g., In re Computer Scis. Corp. Derivative Litig.*, 244 F.R.D. 580 (C.D. Cal. 2007) (dismissing derivative action for lack of standing because plaintiffs failed to adequately plead their status of shareholders or futility of making pre-litigation demand under Rule 23.1); *Royston v. Eastern Empire Corp.*, 393 F. Supp. 1010 (E.D. Pa. 1975) (stating that Rule 23.1 mandates the requirements of standing in derivative actions and dismissing complaint because plaintiff failed to meet particularized pleading requirements). Therefore, the Court may address whether Lovingood has standing to pursue his purported derivative action *sua sponte*. *See Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 907-08 (Ct. App. 1998) (ruling that objections to standing cannot be waived and can be raised by the courts *sua sponte*).

plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort."

In this case, Lovingood cannot maintain a derivative action against Respondents because he has not complied with the heightened pleading requirements of § 33-44-1103 and Rule 23(b)(1), SCRCP. Lovingood's complaint contains no allegations of the efforts he undertook to secure initiation of this action or the reasons why such efforts would have been futile. Nor is the complaint verified as required by Rule 23(b)(1). Moreover, the evidence reveals that Lovingood did nothing to consult with Respondents prior to commencing this action. Rather, he unilaterally made decisions regarding payment of the airplane loan, repairs to the airplane, and the sale of the airplane without once communicating with Respondents. After making those decisions, he did not seek contribution from Respondents. In fact, neither PPC12 nor Lovingood sent any invoices to Respondents for expenses or contributions after October 2012. Instead, Lovingood filed a lawsuit without ever seeking pre-litigation resolution. As a result, Lovingood is prohibited from bringing a derivative action on behalf of PPC12. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000) (dismissing shareholder derivative action against corporation because complaint lacked particularized allegations of pre-litigation demand efforts).

II. THE CIRCUIT COURT PROPERLY HELD THAT RESPONDENTS ARE ENTITLED TO SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR BREACH OF FIDUCIARY DUTY UNDER S.C. CODE ANN. § 33-44-409.

Appellants assert a cause of action against Respondents for breach of fiduciary duty of loyalty under S.C. Code Ann. § 33-44-409(b)(3) based on Respondents' alleged

competition with PPC12 arising from their ownership and operation of another aircraft. The circuit court granted Respondents summary judgment on this claim because (1) Respondents owed no duty of loyalty to C3 Investments, which was not a member of PPC12;[2] (2) Respondents did not breach their duty of loyalty owed to Lovingood or PPC12; and (3) PPC12 and Lovingood did not suffer any injury from Respondents' alleged breach of fiduciary duty. (R. pp. 14-16.)

To establish a breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty; (2) a breach of the duty owed to the plaintiff by defendant; and (3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012).

S.C. Code Ann. § 33-44-409(b) provides that the only fiduciary duty that a member of a member-managed limited liability company owes to the company and the other members is the duty of loyalty, which includes the duty "to refrain from competing with the company in the conduct of the company's business before the dissolution of the company." § 33-44-409(b)(3). A member's duty of loyalty under § 33-44-409(b)(3) terminates upon the member's dissociation from the company. S.C. Code Ann. § 33-44-603(4).

A. Respondents did not breach the fiduciary duty of loyalty because they did not compete against PPC12.

The circuit court correctly ruled that PPC12 and Lovingood cannot prevail on their claim of breach of fiduciary duty of loyalty against Respondents because they cannot establish the second element of that claim, i.e. that Respondents breached a

[2] Appellants' brief does not appear to challenge the circuit court's ruling in this regard.

fiduciary duty. The fiduciary duties owed by members of a limited liability company under S.C. Code Ann. § 33-44-409(b)(3) do not prohibit them from planning to compete against that entity. Although South Carolina courts have not addressed the scope of the duty of loyalty under § 33-44-409(b)(3), the plain language of the statute dictates that it only covers competition and does not prohibit members from taking preliminary steps to engage in competitive activities after dissociating from the company. This interpretation is consistent with decisions from other jurisdictions, *see Meehan v. Shaugnessy*, 404 Mass. 419, 535 N.E.2d 1255 (1989) (stating that "fiduciaries may plan to compete with the entity to which they owe allegiance, provided that in the course of such arrangements they do not otherwise act in violation of their fiduciary duties"); *Grants Pass Imaging & Diagnostic Ctr., LLC v. Marchini*, 270 Ore. App. 127, 139, 346 P.3d 644, 651 (Ore. Ct. App. 2015) (refusing to find that members of a limited liability company had a duty to refrain from preparation to compete), as well as cases from South Carolina courts interpreting an employee's duty of loyalty to his employer. For example, in *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 607, 518 S.E.2d 591, 595 (1999), the South Carolina Supreme Court declared that the duty of loyalty does not prohibit employees from laying plans and taking limited steps to begin competing with their employers.

In this case, Respondents did not breach any duty of loyalty owed to PPC12 and its members under § 33-44-409(b)(3) because they did not compete with PPC12. Towards the end of their tenure as members of PPC12, Respondents made plans to become members in another entity that would own and operate another aircraft. However, Respondents did not use the new aircraft until after they dissociated from

PPC12. Furthermore, CP Aviation, the new entity created by Respondents, never competed with PPC12 in any manner, at any time. CP Aviation did not become certified for charter flights until February 2013, which was four months after the PPC12 aircraft was grounded and two months after it was removed from East Shore's charter certificate. Therefore, Respondents did not compete against PPC12 in violation of any alleged duty of loyalty, and they are entitled to summary judgment on Appellants' claim for breach of fiduciary duty as a result.

B. Respondents' membership in an entity that owned and operated another aircraft did not result in an injury to PPC12 or Lovingood.

The circuit court properly concluded that Appellants' breach of fiduciary duty claim fails because they cannot establish the third element, which is that they suffered damages proximately caused by Respondents becoming members in another entity that owned and operated an airplane. This ruling is correct because Appellants cannot prove that Respondents' alleged breach of the duty of loyalty proximately caused them any damages. Shortly after Respondents dissociated from PPC12 and became involved with another aircraft, the PPC12 aircraft became inoperable after suffering engine failure and was no longer used for member or charter flights from the time it became inoperable until it was sold. As a result, even if Appellants can establish a breach of fiduciary duty by Respondents, which Respondents deny, Appellants cannot establish that they suffered any damages as a result of such breach.

Appellants mistakenly contend that Lovingood is entitled to damages under his breach of fiduciary duty claim based on Respondents' "failure to pay their share of the expenses to repair the aircraft." The fatal flaw in Appellants' argument is that Respondents' failure to pay the expenses which Appellants now seek to recover is

independent from Respondents' alleged wrongful competitive activities. To the extent that Respondents breached a duty of loyalty by competing against PPC12, the resulting damages must necessarily arise from the wrongful competition, which is separate from the expenses of the aircraft, such as maintenance, repairs, and financing costs. Thus, Appellants cannot prove that Respondents' alleged competition proximately caused the damages they seek in this claim.

If Respondents had remained members of PPC12 and continued to pay for the PPC12 aircraft's expenses after they purchased and operated another aircraft, Appellants would not have suffered the damages they seek under their breach of fiduciary duty claim, even if Respondents joined a separate entity that owned and operated a competing aircraft. Put simply, Appellants' purported damages did not result from Respondents' alleged breach of duty of loyalty. And Lovingood effectively admitted this fact in his deposition:

> Q: Let's assume this hypothetical. Let's say [Respondents] held these meetings without you. They went and purchased another plane and they operated that other plane, but they also paid the expenses of PPC12. So by your reasoning they still committed a breach of fiduciary duty, correct?
>
> A: It's not about whether they bought a plane. It's what they agreed to do with PPC12. That's what it's about. And they, to me, in my eyes, and for what I feel is they violated any fiduciary responsibility they had with me. . . .
>
> Q: But you're not answering the question so I'll ask it again. In my hypothetical, let's say they did everything that they did but they continued to make the payments for PPC12.
>
> A: We wouldn't be sitting here. . . .
>
> Q: And your feeling was that if they'd have done that, we wouldn't be here today?

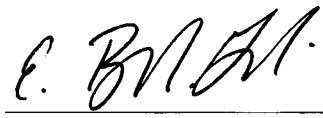
A: If they would have kept up with that agreement that we all sat down in a room and talked about and signed and everything else, leaving the other airplane out and just doing their obligation to what they agreed to do with me personally plus the note, we probably wouldn't be sitting here.

(R. p. 215, line 6-p. 217, line 6) (Lovingood Dep. 195:6-197:6). This testimony makes clear that Appellants' alleged damages arise out of Respondents' purported failure to honor the Operating Agreement and are not the result of Respondents joining an entity that purchased and operated another aircraft in alleged violation of their fiduciary duty of loyalty.

As further illustration of the fact that possessing an ownership interest in another airplane did not proximately cause Appellants' purported damages in this case, the Court should consider that fact that Lovingood also owned another airplane while he was a member of PPC12. Conveniently, Lovingood does not consider his own ownership in another airplane to be a breach of the fiduciary duty he owed to PPC and Respondents. More importantly, though, Lovingood's ownership in a separate airplane did not preclude him from making contributions for the expenses of the PPC12 aircraft, and he continued to make payments to PPC12 despite his ownership in another aircraft. Similarly, Respondents' ownership in another aircraft did not preclude them from making contributions for the expenses of the PPC12 aircraft. Therefore, Appellants cannot prove the third element of their breach of fiduciary duty claim, and the circuit court correctly awarded Respondents summary judgment on this claim.

CONCLUSION

The circuit court correctly granted summary judgment to Respondents for the reasons set forth above. Therefore, Respondents respectfully request that this Honorable Court affirm the circuit court's Order granting summary judgment in its entirety.



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-000474

C. Gordon Lovingood, Jr., C3 Investments, Inc., and PPC12, LLC,..... Appellants

v.

Victor Apat, Anthony McAllister, J Eric Wade d/b/a CT Touring..... Respondents

Of Whom Anthony McAllister, J. Eric Wade d/b/a CT Touring and
Pearl Co., SC, LLC are ..... Respondents.

CERTIFICATE OF COUNSEL

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

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