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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2020-000551

CRAIG CHAPPELL, on behalf of himself and others similarly situated,
Appellant,

v.

Ladles Soups – James Island LLC; Ladlessoups, LLC; Ladles Soups At Cane Bay LLC; Ladles Soups At Citadel Mall LLP; Ladles Soups Calhoun LLC; Ladles Soups Cane Bay LLC; Ladles Soups Coosaw LLC; Ladles Soups Downtown Charleston, LLC; Ladlessoups Fresh Fields, LLC; Ladles Soups @ Freshfields Village, LLC; Ladlesoups Mainstreet, LLC; Ladles Soups Moncks Corner LLC; Ladlessoups Mount Pleasant, LLC; Ladles Franchise Development, LLC; Ladles Franchising Inc.; Ladles Fort Mill, LLC; Ladles Knightsville LLC; Ladles West Ashley; Teri Owens; Sue Allen, Tracy Allen, Steve Traeger, Erik Dyke, Julie Dyke, Stan Sutton, Carol Sutton, Jason Dalter, Kellie Henderson; Jane Doe 1-25 (Unknown Operating Company and Management Company Owners); John Doe 25-40 (Management Personnel),

Of Which Ladles Soups Coosaw LLC, Ladles Soups Downtown Charleston, LLC, Traeger Unlimited dba Ladlessoups Fresh Fields, LLC, Ladles Soups @ Freshfields Village, LLC, Ladles Soups Moncks Corner LLC, Ladles Franchise Development, LLC, Ladles Fort Mill, LLC, Ladles Knightsville LLC, Ladles West Ashley, Steve Traeger, Stan Sutton, Carol Sutton, and Kellie Henderson are the Respondents.

**APPELLANT CRAIG CHAPPELL’S RETURN TO MOTION TO DISMISS APPEAL OR
IN THE ALTERNATIVE STRIKE APPELLANT’S BRIEF**

Appellant Craig Chappell hereby opposes the relief sought by Respondents in the Motion to Dismiss Appeal or in the alternative Motion to Strike Appellant’s Brief filed on December 4, 2020, pursuant to Rule 240(e), SCACR, and moves this Court for an Order denying the Motion to

Dismiss on the grounds that (1) Appellant complied with Rule 208(b)(1) and that (2) Appellant properly preserved all issues raised for appeal.

First, Respondents allege that Appellant's Statement of the Case is "filled with contested facts" but only cite "service of discovery on Respondents and the answer of discovery." However, Appellant's Statement of Facts simply cites the dates that discovery and Requests to Admit were served on Respondents and the dates that Appellant filed a Motion to Compel responses and Motion to Deem Requests Admitted. (Appellant's Initial Brief at p. 7).

Rule 208(b)(1)(C) provides that the Statement of the Case "shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal." Rule 208(b)(1)(C), SCACR. Further, while the statement shall not contain contested matters the statement shall contain, as a minimum, among other things, ". . . the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal" Rule 208(b)(1)(C), SCACR.

The first issue on appeal cited in Appellant's Initial Brief is that Summary Judgment was premature because Appellant did not have a full and fair opportunity to complete discovery. (Appellant's Initial Brief at p. 13). Appellant's Statement of the Case necessarily included a concise history of service of discovery and the subsequent filing of discovery related motions, orders, and proceedings to provide an understanding of the appeal and to "throw light upon the questions involved in the appeal." Rule 208(b)(1)(C), SCACR. Respondents argument that these are contested issues is without merit because the dates of service of discovery and responses and the dates of discovery related motions are matters that cannot be contested and the documents in question clearly stating the dates of service and responses and dates of filing discovery related

motions with the lower court are included in the Designation of Matter to be Included in the Record on Appeal.

Because Appellant complied with the requirements of the South Carolina Appellate Court Rules by providing a Statement of the Case containing a concise history of the proceedings “insofar as necessary to an understanding of the appeal” pursuant to Rule 208(b)(1)(C), SCACR, Respondents’ Motion to Dismiss or in the alternative Strike Appellant’s Brief should be denied.

Second, Respondents allege that Appellant’s Brief contains references to issues not preserved for appeal. Respondents allege that the issue discussed in Section II of Appellant’s brief pertaining to the trial court’s denial of Appellant’s Motion to Deem Requests for Admission Admitted was not preserved for appeal. Respondents also allege that the issue discussed in Section III of Appellant’s brief pertaining to the trial court denying Appellant’s Motion for Class Certification was not preserved for appeal.

However, Appellant raised both of these issues in his Response in Opposition to Respondents’ Motion for Summary Judgment (Memo in Opp. to MSJ at p. 8; p. 15), at the hearing (January 6, 2020 Hr’g Tr. at p. 17; pp. 53-55), and in Appellant’s Motion to Reconsider (Mot. to Recon. at pp. 4-5; pp. 8-12). Appellant properly raised and preserved these issues before the trial court and this appeal is Appellant’s first opportunity pursue the issues on appeal. *See*, S.C. Code Ann. 14-3-330; Rule 201(a), SCACR; *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 6, 630 S.E.2d at 467 (2006); *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986); *Patterson v. Specter Broadcasting*, 287 S.C. 249, 335 S.E.2d 803 (1985); and *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974).

Because Appellant properly raised and preserved the issues of the court's denial of his Motion to Deem Admitted Requests for Admission and his Motion for Class Certification, Respondents' Motion to Dismiss or in the alternative to Strike Appellant's Brief should be denied.

Finally, Respondents allege that Appellant designated matters that were not presented to the lower court and therefore, not preserved for the record. Respondents cite over 30 items without any explanation or authority as to why these matters should not be included in the Record on Appeal. For example, Respondents inexplicably claim that item 22 of Appellant's Designation of Matter which is Appellant's Motion to Compel, was not presented to the lower court. However, Appellant's Motion to Compel was a paramount issue in Appellant's argument as to why summary judgment should be denied and was presented to the lower court repeatedly in Appellant's Response in Opposition to Respondents' Motion for Summary Judgment (Memo in Opp. to MSJ at p. 7), at the hearing (January 6, 2020 Hr'g Tr. at p. 27), and in Appellant's Motion to Reconsider (Mot. to Recon. at p. 3). Respondents also cite items 29, 30, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 47 which are the Respondents' individual discovery responses. Again, Appellant's failure to obtain an opportunity for full discovery was a major issue in his opposition to summary judgment and all of these items were presented to the lower court. Respondents also cite item 50 which is a link to a video posted on the Ladles website. This item was presented to the lower court during the January 6, 2020 hearing at page 23, lines 9-18 and in Appellant's Motion to Reconsider at page 10.

Respondents also cite certain deposition testimony of Sue Allen which they allege was not presented to the lower court. However, the deposition testimony cited by Respondents contains the history of the development of the Ladles franchise and individual franchise locations all of which was presented to the lower court in Appellant's Memo in Opposition to Summary Judgment

at pages 2-3 and addressed throughout the January 6, 2020 hearing, specifically at pages 19 through 20 and 23 through 24. Likewise, the testimony of Corey Paul cited by Respondents was also presented to the lower court. Mr. Paul's testimony in question deals with his purchase of his Ladles franchise and the policy with regard to payment of tips. This testimony was specifically presented to the lower court in Appellant's Memo in Opposition to Summary Judgment (pp. 3-4) and addressed throughout the January 6, 2020 hearing, specifically, page 24, lines 13 through 17.

Accordingly, because all of the items raised by Respondents in their Motion to Dismiss or in the alternative Motion to Strike Appellant's Brief were presented to the lower court, Respondents' motion should be denied.

CONCLUSION

For the foregoing reasons, Appellant respectfully opposes the relief sought by Respondents in the Motion to Dismiss or in the alternative Strike Appellant's Brief filed on December 4, 2020, and moves this Court for an order denying the Motion to Dismiss or in the alternative Strike Appellant's Brief.

Respectfully submitted,

January 4, 2021

s/David D. Ashley
Ben Le Clercq (S.C. Bar # 65754)
David D. Ashley (S.C. Bar #76206)
Le Clercq Law Firm
Ben@LeClercLaw.com
David@LeClercLaw.com
708 South Shelmore Blvd. #202
Mount Pleasant, SC 29464
Phone (843) 722-3523
Fax (843) 352-2977
Counsel for Appellant

Other Counsel of Record:

Paul B. Ferrara, III
8887 Old University Blvd. St. 200

North Charleston, SC 29406
paul@ferraralawfirm.net

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-785

CRAIG CHAPPELL, on behalf of himself and
others similarly situated,

Plaintiff(s),

v.

Ladles Soups – James Island LLC; Ladlessoups,
LLC; Ladles Soups At Cane Bay LLC; Ladles
Soups At Citadel Mall LLP; Ladles Soups
Calhoun LLC; Ladles Soups Cane Bay LLC;
Ladles Soups Coosaw LLC; Ladles Soups
Downtown Charleston, LLC; Ladlessoups
Fresh Fields, LLC; Ladles Soups @ Freshfields
Village, LLC; Ladlessoups Mainstreet, LLC;
Ladles Soups Moncks Corner LLC;
Ladlessoups Mount Pleasant, LLC; Ladles
Franchise Development, LLC; Ladles
Franchising Inc.; Ladles Fort Mill, LLC;
Ladles Knightsville LLC; Ladles West Ashley;
Teri Owens; Sue Allen, Tracy Allen, Steve
Traeger, Erik Dyke, Julie Dyke, Stan Sutton,
Carol Sutton, Jason Dalter, Kellie Henderson;
Jane Doe 1-25 (Unknown Operating Company
and Management Company Owners); John
Doe 25-40 (Management Personnel)

Defendants.

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SC Court of Appeals

**PLAINTIFF'S MOTION TO
RECONSIDER AND/OR ALTER OR
AMEND THE COURT'S FEBRUARY 11,
2020, ORDER**

TO: ALL DEFENDANTS AND THEIR ATTORNEYS

YOU WILL PLEASE TAKE NOTICE that Plaintiff, by and through his undersigned counsel, respectfully moves this Court for an Order reconsidering its grant of summary judgment for Defendants Dan Sutton, Carol Sutton, Steven Traeger, Traeger Unlimited, d/b/a Ladlessoups Fresh Fields, LLC, Ladles Soups @ Freshfields Village, LLC, Ladles Soup Downtown Charleston,

LLC, Ladles Franchise Development, LLC, Ladles Fort Mill, LLC, Ladles Soups Moncks Corner, LLC, Ladles Knightsville, LLC, Ladles West Ashley, Kelli Henderson and Ladles Soups Coosaw, LLC. The Order of the Court was filed on February 11, 2020. Pursuant to SCRCF Rule 59, and or SCRCF 60, the judgment of the Court filed on February 11, 2020 should be reconsidered and reversed because Plaintiff has standing with the moving Defendants and because Plaintiff has been denied a full and fair opportunity to complete discovery because the moving Defendants have failed to engage in discovery.

Standard of Review

Rule 59(e) of the South Rules of Civil Procedure, which is “substantially” the same as the Federal Rule, permits a court to “alter or amend [a] judgment.” S.C. R. Civ. P. 59(e); Id. at Notes (stating that “Rule 59 is substantially the Federal Rule”). Rule 59 “permits a court to amend a judgment within ten days for three reasons: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” E.E.O.C. v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997).

The Court Should Alter or Amend its Order Pursuant to SCRCF 59, and or SCRCF 60.

The Order grants summary judgment for the Franchisee Defendants. The Order is contrary to well-established law and the evidence in the record and should be altered or amended.

- A. Teri Owens is the owner of Ladles Soups James Island and is not entitled to summary judgment because the Court found that Plaintiff had standing with Ladles Soups James Island.

Due to what appears to be a mistake, the Order appears to grant summary judgment to Teri Owens who is the owner of Ladles Soups James Island. Pursuant to SCRCF 60(b)(1), the court may relieve a party from a final judgment, order, or proceeding for “mistake, inadvertence,

surprise, or excusable neglect.” The Order found that Plaintiff had statutory standing with Ladles Soups James Island. Individual owners are liable for failure to pay wages pursuant to Section 41-10-10 of the SCPWA. Neither Ladles Soups James Island nor Teri Owens were moving parties for the motion for summary judgment. Accordingly, Teri Owens is not entitled to summary judgment. Plaintiff respectfully requests that the Court alter or amend its order to reflect that Teri Owens is not entitled to summary judgment.

- B. Plaintiff Chappell has not had a full and fair opportunity to complete discovery because the moving Defendants have failed to respond to discovery in violation of SCRCF as well as this Court’s January 7, 2020 Order.

Discovery in this matter remains incomplete due to the moving parties’ refusal to respond to Plaintiff’s discovery requests. Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 114-15 410 S.E.2d 537, 545 (1991). “The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.” *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct.App. 1987). Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is “not merely engaged in a ‘fishing expedition.’” *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544. *See also, Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

Plaintiff served written discovery on all Defendants on May 24, 2019. Despite repeated requests by Plaintiff, all Defendants have refused to agree to a scheduling order. At no time did moving Defendant Ladles Soups Downtown respond at all to any of Plaintiff’s discovery requests. The other moving Defendants did not bother to respond to Plaintiff’s May 2019 written discovery

until the morning of the January 6, 2020 hearing on their motion for summary judgment. Notably, these discovery responses were woefully deficient. Specifically, the moving Defendants did not provide responses or documents regarding, but not limited to, the total number of and identity of employees; payroll and how or if tips are paid; communications between franchisees as well as between franchisees and franchisor regarding tipping and payroll policies; and payments made by franchisees to franchisor. As a result, in its January 7, 2020 Order, this Court granted Plaintiff's motion to compel against these moving Defendants. **(Exhibit 1)**. At no time did any of the moving Defendants make any attempt to comply with this Court's order compelling them to respond to Plaintiff's discovery requests.

Additionally, the moving Defendants were over 120 days late in responding to Plaintiff's Requests to Admit. Counsel for the moving Defendants stated at the January 6, 2020 hearing that his office received by email the Requests to Admit, but that they were "misunderstood." This is not a sufficient basis to subvert the clear language of Rule SCRCP 36 and a clear error of law. *See* Rule 36(a), SCRCP ("[t]he matter is admitted" unless the party timely responds); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 645–46, 579 S.E.2d 151, 154 (Ct. App. 2003) ("Whether as previously embodied in prior South Carolina Circuit Court Rule 89 or as currently verbalized in Rule 36, SCRCP, South Carolina has long had the discovery rule that failure to respond to requests for admissions renders any matter listed in the request conclusively admitted for trial"); *Phillips v. Bayless*, No. 2006-UP-379, 2006 WL 7287200, at *3 (S.C. Ct. App. Nov. 21, 2006) (affirming the trial court's bright-line test in deeming the requests admitted for failure to timely respond); *Linda Lundstrom, Inc. v. Jennings*, No. 2005-UP-209, 2005 WL 7083850, at *4 (S.C. Ct. App. Mar. 21, 2005) ("Because [the defendant] failed to answer the requests to admit within thirty days of service, the matters contained therein were deemed admitted pursuant to Rule 36, SCRCP").

Given that the substance of the Requests to Admit (e.g., that all Franchisee Defendants had the illegal tip policy; that all Franchisee Defendants have communicated with representatives of the Franchisor regarding the illegal tip policy; and that all Franchisee Defendants have instructed their employees that they may not share with customers the fact that credit card tips are not paid to the employees but instead kept by Defendants)--which precludes a grant of summary judgement for those Defendants--Plaintiffs are substantially prejudiced by the Court's failure to deem the Requests to Admit conclusively admitted.

The February 11, 2020 Order granting summary judgment makes reference to a request by Plaintiff for "further discovery" and "additional discovery," however, Plaintiff has not requested either of these. Plaintiff simply requested the discovery he was already entitled to and which the moving Defendants refused to comply with. The Order also cites *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. at ___, 677 S.E.2d at 36, for the proposition that Plaintiff failed to "advance a good reason why the time [for discovery] was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." Plaintiff has never claimed that the time for discovery was insufficient and Plaintiff did not seek additional time for new discovery. Again, Plaintiff has only requested responses to the discovery that he already served and which this Court has already ordered Defendants to respond to. Moreover, this Court's February 11, 2020 Order stating that Plaintiff has not provided support for "additional" discovery is in direct contradiction to this Court's January 7, 2020 Order compelling Defendants to respond to Plaintiff's discovery requests.

These discovery requests are relevant to the issue of standing in that the requests regarding communications among the Franchisee Defendants as well as communications between the Franchisee Defendants and Franchisor Defendants are evidence of the common policy and

agreement between the Defendants to withhold credit card tips from their employees. The same is true of the discovery requests relating to payments made by the franchisees to the franchisor. All of these discovery requests are relevant to Plaintiff's allegations in his complaint regarding conversion and civil conspiracy and the information described above create a genuine issue of material fact.

Additionally, Plaintiff's original discovery requests regarding the identity and total number of employees affected by the tipping policy cannot be dismissed merely as part of a "fishing expedition." Plaintiff's complaint specifically alleges class action causes of action and Plaintiff is entitled to discovery on those issues under SCRPC Rules 23, 32, 33, 34, 36, and 37. Plaintiff's written discovery requests for employee information are directly related to, and vital to these claims and will uncover additional relevant evidence relating to, among other issues, standing of Plaintiff and other Ladles employees. Plaintiff has not had a full and fair opportunity to engage in this discovery due to the moving Defendants' refusal to respond to the discovery requests as well as their refusal to comply with this Court's order compelling them to respond.

The requirements to bring a class action claim under SCRPC Rule 23(a) (numerosity, commonality, typicality, adequacy, and amount in controversy) necessarily require that Plaintiff be permitted to pursue discovery on issues relating to the number and identity of employees at the Ladles locations. Because the moving Defendants have not responded to Plaintiff's written discovery regarding information about employees negatively impacted by the tipping policy, there is no way for Plaintiff and others similarly situated to meet the requirements to pursue the class action allegations in the complaint. The grant of summary judgment without the moving parties being required to engage in discovery effectively precludes Plaintiff and others similarly situated from ever having an opportunity to meet the SCRPC Rule 23(a) requirements to pursue this matter

as a class action which they are entitled to do. Accordingly, the failure of the moving Defendants to submit to discovery has caused prejudice to Plaintiff. *See, Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct.App. 1987).

In *Lanham v. Blue Cross and Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (S.C. 2002), Blue Cross moved for summary judgment and in response, Lanham filed a notice of taking the deposition of Blue Cross, and requests for production of information that was in the sole possession of Blue Cross. Blue Cross responded with a motion for protective order or to quash and Lanham moved to compel. *Id.* The trial court declined to rule on Lanham's motion to compel and granted Blue Cross summary judgment. *Id.* The South Carolina Supreme Court found that without being able to conduct further discovery, there was no way for Lanham to respond to Blue Cross' claim that Lanham's failure to disclose a pre-existing condition was material to its decision to offer coverage. *Id.* It further found that given the information sought by Lanham was in the sole possession of Blue Cross, the trial court erred in ruling on the summary judgment motion without first ruling on Lanham's motion to produce and motion to compel. *Id.*

Here, the facts are even more favorable to Plaintiff Chappell than they were to the plaintiff in *Lanham* where summary judgment was reversed. Unlike in *Lanham*, where the plaintiff waited until after the motion for summary judgment was filed to seek discovery, Plaintiff Chappell served his discovery requests on the moving Defendants months before summary judgment was even filed. Additionally, unlike in *Lanham*, where the plaintiff was seeking *further* discovery, Plaintiff Chappell is only seeking responses to his original discovery requests. Finally, in *Lanham*, the trial court did not rule on the plaintiff's motion to compel, whereas this Court actually granted Plaintiff Chappell's motion to compel but the moving Defendants failed to comply with the order. Like the plaintiff in *Lanham*, Plaintiff Chappell has been unable to fully respond to the moving Defendants'

motion for summary judgment due to their refusal to produce information in their sole possession that is vital to Plaintiff's claims. Accordingly, Plaintiff respectfully requests that this Court alter or amend its February 11, 2020 Order and deny summary judgment to the moving Defendants and permit the parties to proceed with discovery.

- C. Plaintiff has statutory standing because the Franchisee Defendants are employers and were engaged in a civil conspiracy and common scheme that damaged Plaintiff Craig Chappell through the Ladles restaurant policy of withholding credit card tips.

Respectfully, Plaintiff believes that the Order's finding that Plaintiff lacks statutory standing with the moving Defendants is a clear error of law. Plaintiff has statutory standing under the South Carolina Payment of Wages Act because Defendants are employers and were engaged in a civil conspiracy and common scheme that damaged Plaintiff Craig Chappell through the Ladles restaurant policy of withholding credit card tips. "A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); see also *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) ("Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another."); *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct.App.1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage."). The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design. *Vaught*, 300 S.C. at 208, 387 S.E.2d at 95. "Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence." *McMillan*, 367 S.C. at 564, 626 S.E.2d at 886.

Plaintiff, Craig Chappell, was employed by Defendant Ladles James Island and his credit card tips were withheld in violation of SCPWA. Mr. Chappell was also informed by his co-worker that this was a common policy among most, if not all of the Ladles Restaurant locations. From the deposition of Craig Chappell:

Q: It was the same conversation with Logan when you had talked about specifically the Mount Pleasant location that you remember Logan also talking about all the other Ladles locations?

A: I don't know if it was the same conversation or a different one.

Q: But you recall a conversation with Logan where he said something along the lines of all the other Ladles locations, what, don't give charge tips to their employees?

MR. KOON: Object to the form.

MR. FERRARA: Object to the form.

A: Yes.

Q: Do you recall just one of those conversations happening with Logan, or were there a few?

A: It's been a few, a couple of times probably.

Deposition of Craig Chappell at p 129, Lns. 18-25 and p. 130, Lns. 1-9. **(Exhibit 2).**

Additionally, counsel's investigation (without the benefit of discovery) uncovered evidence from the West Ashley Ladles which indicates the existence of a civil conspiracy, and commensurate "special damages" of Plaintiff. A Ladles West Ashley employee, Lani Charpia, states that multiple Ladles customers have discovered the illegal, secret and common scheme or policy of Defendants to convert Plaintiff's credit card tips/wages, which makes it more likely that such customers will not leave a tip in the future when they visit that same *or other* Ladles Franchises. *See*, Affidavit of Lani Charpia at paragraphs 5 – 8. **(Exhibit 3).**

Specifically, the Ladles West Ashley customer identified by Ms. Charpia who finds out about the policy while dining at Ladles West Ashley (which policy is covert and clandestine, and the result of a civil conspiracy, common plan or scheme, between the Ladles West Ashley and the Franchisor), and then subsequently dines at the Ladles James Island (or Summerville, Coosaw, Fort Mill, etc.) and fails to leave a credit card tip for those employees since he/she already knows “employees do not get the credit card tips at Ladles,” shows how Ladles James Island (or Summerville, Coosaw, Fort Mill, etc.) employees are damaged by the actions of *other* Ladles Franchisee Defendants who do not sign their pay checks.

Additionally, the common scheme or common tipping policy is vital to maintaining the Ladles “concept” for all Franchisee Defendants. The Franchisee Defendants that have been deposed so far indicate that the policy of withholding credit card tips from employees is necessary to prevent them from losing employees or having to change the whole restaurant concept. *See* Deposition excerpts of Terri Owens for Ladles James Island at p. 35, Lns. 2-10 (**Exhibit 4**) and Deposition excerpt of Corey Paul for Ladles West Ashley and Ladles Fort Mill at p. 32, Lns. 6-16. (**Exhibit 5**). Also, as noted in the video on the Ladles website and Suzie Allen’s deposition, part of the “Ladles concept” includes maintaining a small number of employees each of whom must perform all of the duties required to run a Ladles restaurant. In order for each Ladles restaurant to retain its employees and maintain the Ladles concept, all of them must and do withhold credit tips from their employees. The entire Ladles concept depends on each location maintaining this policy. Again, this control of wages serving as a fundamental cornerstone of Ladles is evident in the Ladles franchising video, where Ms. Allen says: “*The design of the store, the reason we did it the way we did it, is because **the only two things that you can really control in money, is food costs and employee wages**, so the way that the store is designed is to have less employees.*” (emphasis

added). Based on the foregoing, Plaintiff respectfully requests that this Court alter or amend its February 11, 2020 Order and deny summary judgment to the moving Defendants

D. Plaintiff has standing with all Franchisee Defendants for his cause of action for conversion.

The February 11, 2020 Order failed to find that Plaintiff had standing with the moving Defendants on his conversion cause of action. Respectfully, Plaintiff believes this is a clear error of law. Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights. *Ray v. Pilgrim Health & Life Ins. Co.*, 206 S.C. 344, 34 S.E.2d 218, 34 S.E.2d 218 (1945). Conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel. *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 135 S.E.2d 311 (1964). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The credit card tips of Plaintiff Chappell and other Ladles employees are retained by Ladles James Island who pay a percentage of them to the Franchisor Defendants. The Franchisor Defendants then use a portion of these funds to engage in/pay for joint marketing, which is used by all Franchisees. Accordingly, all Franchisees are in possession of a benefit paid for by Plaintiff Chappell's tips. The amount of Plaintiff's credit card tips retained by Ladles James Island and the percentages paid to Franchisor are capable of being identified. Likewise, the amount of funds devoted to the joint marketing fund for all Franchisee Defendants is capable of being identified. Plaintiff requested a complete, itemized accounting and financial summary of all amounts paid by each Franchisee Defendant to the Franchisor Defendants in his Request for Production No. 11, however, all of the Franchisee Defendants have failed to respond to this discovery request despite

this Court's January 7, 2020 Order compelling them to do so. Once again, Plaintiff is prejudiced by the moving Defendants failure to comply with the SCRCR rules of discovery and this Court's order by failing to provide information vital to Plaintiff's cause of action for conversion that is in the sole possession of the moving Defendants. Accordingly, Plaintiff respectfully requests that this Court alter or amend its February 11, 2020 Order and deny summary judgment to the moving Defendants and permit the parties to proceed with discovery.

This Motion is made in accordance with the South Carolina Rules of Civil Procedure and supported by the Complaint, deposition testimony, and any memorandum in support and attached exhibits, and those facts, arguments, and law raised at any hearing on this motion.

s/David D. Ashley
Ben Le Clercq (S.C. Bar #65754)
David D. Ashley (S.C. Bar #76206)
Le Clercq Law Firm
Ben@LeClercLaw.com
David@LeClercLaw.com
708 South Shelmore Blvd. #202
Mount Pleasant, SC 29464
Phone (843) 722-3523
Fax (843) 352-2977
Counsel for Plaintiff

Date: February 21, 2020
Mt. Pleasant, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP1000785

Craig Chappell
PLAINTIFF(S)

Ladles Soups James Island LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion to Intervene is denied. The Motion for Summary Judgment as to the LLCs is denied. Motion for Class certification is denied. Plaintiff's Motion to Amend is denied. Plaintiff's Motion to Compel discovery is granted. Jurisdiction will be retained over this case for discovery purposes. As to Plaintiff's Request to Admit is denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/06/2020 .

Stan Sutton
Teri Owens
Ladles Soups Cane Bay LLC
Ladles Soups Calhoun LLC
Ladles Soups at Citadel Mall LLP
Ladles Soups at Cane Bay LLC
Ladlessoups Mainstreet LLC
Ladles Soups James Island LLC
Ladlessoups Fresh Fields LLC
Doe, John 25-40
John 25-40 Doe
Doe, Jane 1-25
Jane 1-25 Doe
Jason Dalter

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

FILED FROM CAALLY FILED -- 2020 FEB 27 01:45 AM -- CHARRLESTON -- COMMONWEALTH OF MASS -- CASE# 2018CP10007855



Charleston Common Pleas

Case Caption: Craig Chappell VS Ladles Soups James Island LLC , defendant, et al
Case Number: 2018CP1000785
Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

CRAIG H. CHAPPELL

129

1 Q Sometime in your first stint?

2 A Yeah, probably, probably.

3 Q And so was it also in talking with Logan that
4 you came to form some view of what other Ladles
5 locations were doing with charge tips? Do you recall
6 Logan telling you something about how other Ladles
7 locations handled charge tips?

8 MR. KOON: Object to the form of the question.

9 A No. What I understood is the one and only
10 time we talked about Mount Pleasant was the time that we
11 were actually talking about the tips and how all Ladles
12 keeps charge tips except Mount Pleasant.

13 Q So isn't that same conversation when you-all
14 specifically talked about the Mount Pleasant location --

15 A I don't know if --

16 Q Hang on, let me finish.

17 A Okay. Go ahead.

18 Q It was the same conversation with Logan when
19 you had talked about specifically the Mount Pleasant
20 location that you remember Logan also talking about all
21 the other Ladles locations?

22 A I don't know if it was the same conversation
23 or a different one.

24 Q But you recall a conversation with Logan where
25 he said something along the lines of all the other

1 Ladles locations, what, don't give charge tips to their
2 employees?

3 MR. KOON: Object to the form.

4 MR. FERRARA: Object to the form.

5 Q Answer orally for the record, please.

6 A Yes.

7 Q Do you recall just one of those conversations
8 happening with Logan, or were there a few?

9 A It's been a few, a couple of times probably.

10 MR. KOON: Object to the form of the question.

11 BY MR. RIDDELL:

12 Q Do you remember about when these couple of
13 conversations occurred, were they both like really near
14 the beginning of your employment or were they kind of
15 spread out?

16 MR. FERRARA: Object to the form.

17 MR. KOON: Object to the form.

18 A I'm probably guessing in the beginning because
19 after the first six months or whatever, it was never
20 brought up again. So I'm guessing at the beginning of
21 my employment.

22 Q Why didn't any employees ever challenge this?

23 MR. KOON: Object to the form of the question.

24 A Because they're young, and they need a job.
25 And some were in high school. Some were just starting

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-785

CRAIG CHAPPELL, on behalf of himself
and others similarly situated,

Plaintiff(s),

v.

Ladles Soups – James Island LLC;
Ladlessoups, LLC; Ladles Soups At Cane
Bay LLC; Ladles Soups At Citadel Mall
LLP; Ladles Soups Calhoun LLC; Ladles
Soups Cane Bay LLC; Ladles Soups
Coosaw LLC; Ladles Soups Downtown
Charleston, LLC; Ladlessoups Fresh Fields,
LLC; Ladles Soups @ Freshfields Village,
LLC; Ladlessoups Mainstreet, LLC; Ladles
Soups Moncks Corner LLC; Ladlessoups
Mount Pleasant, LLC; Ladles Franchise
Development, LLC; Ladles Franchising
Inc.; Ladles Fort Mill, LLC; Ladles
Knightsville LLC; Ladles West Ashley;
Teri Owens; Sue Allen, Tracy Allen, Steve
Traeger, Erik Dyke, Julie Dyke, Stan
Sutton, Carol Sutton, Jason Dalter, Kellie
Henderson; Jane Doe 1-25 (Unknown
Operating Company and Management
Company Owners); John Doe 25-40
(Management Personnel)

Defendants.

AFFIDAVIT

I, Lani Charpia, having been duly sworn, declare under penalty of perjury the following:

1. I have been employed as a server at Ladles West Ashley since approximately February, 2018, located at 3125 Bees Ferry Rd, Charleston, SC 29414.

Exhibit 3

2. I was hired “on the spot” when I walked in the location at that time, and this has been my first job.

3. I started working for probably 15 hours a week, and have worked as much as 30 hours a week since I started.

4. Normally all of the employees do everything – – everybody pitches in a little bit. Specifically, employees work in the kitchen, help out with serving, and also handle the register. I believe this is a common practice for all Ladles locations.

5. One night, approximately 6 or 7 months ago (after the filing of this action) I was working at the register, and a female customer asked me words to the effect of “who gets the tip if I leave it on a credit card?” I responded “I don’t know – – all I know is that all I get are the cash tips.” The customer appeared to me to be upset, saying words the fact that she thought that was misleading. She said that she wanted to speak to the manager. I did not hear the conversation between the customer and the manager, as I was in a back room talking with one of the other managers.

6. The other manager told me “don’t ever tell a customer that the servers don’t get the tips.

7. It must’ve been a heated conversation between the customer and the manager, Taylor, because Taylor was crying when she came back into the back.

8. I have had other customers ask me words to the effect of “who gets the credit card tips.” That of course makes me feel very uncomfortable, and I usually will say words to the effect of “I’m not allowed to say.”

FURTHER AFFIANT SAYETH NAUGHT.

August 22, 2019

A handwritten signature in cursive script, reading "Lani Charpia". The signature is written in black ink and is positioned above the printed name.

Lani Charpia

1 question.

2 A. If Ladles Franchising decided to
3 change or do something?

4 Q. If they decide that they no longer
5 wanted you to have the policy of you keeping the
6 credit card tips, could they change that?

7 A. Yeah. I'd have to change my whole
8 thing, but...

9 Q. Okay.

10 A. I'd lose people.

11 Q. And are you aware of any other Ladles
12 locations that have the policy of keeping credit
13 card tips?

14 A. I don't know. I honestly do not know
15 what everyone else does.

16 Q. Okay. But do you know, are you aware
17 of what any of the other stores do?

18 A. Huh-uh.

19 Q. You never had a discussion with them
20 about it?

21 A. No.

22 Q. Even since this lawsuit?

23 A. No. We're always working. So we
24 don't get to talk to each other.

25 Q. But even since this lawsuit has --

1 Q. Okay. And what do you tell them?

2 A. That everybody is a non-tipped
3 employee, but we have cash tips on the counter,
4 and as a bonus to them they're allowed to take
5 those cash tips.

6 Q. Okay. But they don't take the credit
7 card tips?

8 A. Correct. And that is discussed that
9 they don't get the credit card tips, but they get
10 the cash tips as an added bonus to their hourly
11 wage, because we don't have designated servers
12 here, because if we did that, then those people up
13 front would no longer be -- they wouldn't --
14 they're not supposed to work in the back anymore,
15 and that defeats our whole concept and our whole
16 teamwork.

17 Q. Right. Well, do you have a tip
18 pooling policy?

19 A. No.

20 Q. Where you just put all the tips into
21 and it can just get divvied up between the people
22 on the shift?

23 A. No, there's no policy for that.

24 Q. With the cash tips then, how do you
25 decide who gets that?

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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CRAIG CHAPPELL, on behalf of himself and
others similarly situated,

Plaintiff(s),

v.

Ladles Soups – James Island LLC;
Ladlessoups, LLC; Ladles Soups At Cane Bay
LLC; Ladles Soups At Citadel Mall LLP;
Ladles Soups Calhoun LLC; Ladles Soups
Cane Bay LLC; Ladles Soups Coosaw LLC;
Ladles Soups Downtown Charleston, LLC;
Ladlessoups Fresh Fields, LLC; Ladles Soups
@ Freshfields Village, LLC; Ladlessoups
Mainstreet, LLC; Ladles Soups Moncks
Corner LLC; Ladlessoups Mount Pleasant,
LLC; Ladles Franchise Development, LLC;
Ladles Franchising Inc.; Ladles Fort Mill,
LLC; Ladles Knightsville LLC; Ladles West
Ashley; Teri Owens; Sue Allen, Tracy Allen,
Steve Traeger, Erik Dyke, Julie Dyke, Stan
Sutton, Carol Sutton, Jason Dalter, Kellie
Henderson; Jane Doe 1-25 (Unknown
Operating Company and Management
Company Owners); John Doe 25-40
(Management Personnel)

Defendants.

**PLAINTIFF’S MEMORANDUM IN
OPPOSITION TO DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

RECEIVED

Jan 04 2021

SC Court of Appeals

TABLE OF CONTENTS

I.	Factual Background.....	2
II.	Procedural Background.....	4
III.	Standard of Review.....	6
IV.	Legal Argument.....	7

A.	Defendants’ Motion for Summary Judgment is premature and should be denied because the moving Defendants have not fully complied with Plaintiff’s written discovery requests or requests to be deposed and these requests will likely uncover additional relevant evidence, and Defendants failed to respond to Plaintiffs’ RTAs, which contain admissions precluding summary judgment.....	7
B.	Tips are wages under the SCPWA and a cause of action under SCPWA is separate, distinct, and significantly broader than federal Fair Labor Standards Act claims, and is not limited to controversies involving minimum wage and overtime but applies to all wages due, including both cash and credit card tips.....	11
C.	Plaintiff Craig Chappell and putative Plaintiff Lani Charpia are tipped employees.....	14
D.	Plaintiff Craig Chappell and putative Plaintiff Lani Charpia have standing against all of the Franchise Defendants.....	15
i.	All of the Franchise Defendants were engaged in a civil conspiracy and common scheme that damaged Plaintiff Craig Chappell and putative Plaintiff Lani Charpia.....	15
ii.	Plaintiff’s injuries are a result of a conspiracy or concerted action between the Defendants and all Defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.....	17
V.	Conclusion.....	18

Plaintiff submits this Memorandum in Opposition to Defendants Dan Sutton, Carol Sutton, Steven Traeger, Traeger Unlimited, d/b/a Ladlessoups Fresh Fields, LLC, Ladles Soups @ Freshfields Village, LLC, Ladles Soup Downtown Charleston, LLC, Ladles Franchise Development, LLC, Ladles Fort Mill, LLC, Ladles Soups Moncks Corner, LLC, Ladles Knightsville, LLC, Ladles West Ashley, Kelli Henderson and Ladles Soups Coosaw, LLC’s Motion for Summary Judgment. Defendants’ Motion for Summary Judgment should be denied.

FACTUAL BACKGROUND

The Ladles Soups restaurant concept was created by Defendants Suzie Allen and her spouse Tracy Allen with the first location opening in West Ashley (Defendant Ladlessoups, LLC)

in 2007, the second location, opening on Kiawah Island in 2008, and the third location opening in Summerville in 2009. In 2010, Suzie Allen and Tracy Allen started Ladles Franchising, Inc. for the purpose of selling Ladles Soups franchises. Suzie Allen's sisters, Defendant Teri Owens and Carol Ellenburg, worked at the Ladles West Ashley location where they learned the business before opening their own Ladles Soups restaurants on James Island and downtown Charleston, respectively. Additionally, Defendants Julie Dyke and Corey Paul also worked at the Ladles West Ashley location where they learned the business before opening their own locations in Mt. Pleasant and Fort Mill, respectively. In 2017, Mr. Paul purchased the West Ashley location from Suzie Allen and Tracy Allen.

This lawsuit is brought by a former employee of Ladles Soups James Island, Craig Chappell, as well as putative additional Plaintiff Lani Charpia¹, who currently works at Ladles West Ashley, on behalf of themselves and others similarly situated, alleging causes of action for failure to pay wages under the South Carolina Payment of Wages Act ("SCPWA"), breach of contract, and conversion. Plaintiff alleges that Defendants are wrongfully and intentionally withholding credit card tips/wages that were rightly intended for Plaintiff and others similarly situated and that the illegal conversion by Defendants of credit card tips is a common scheme or policy of Defendants.

Mr. Paul testified in his deposition as representative for Ladles West Ashley and Ladles Fort Mill that, upon purchasing the West Ashley Ladles Franchise, he continued the same policy of withholding credit card tips/wages that Franchisor Defendants Suzie Allen and Tracy Allen

¹ Plaintiff's Motion to Amend the Complaint to add Ms. Charpia as an additional party and class representative is currently pending with this Court. It also includes additional theories of liability, the basis of which has been discovered not through discovery, in which Defendants have failed to participate, but through counsel's investigations.

implemented when they owned the West Ashley location under the Ladlessoups, LLC operating company:

Q: What was the policy when you worked at West Ashley when – before you purchased it?

A: It was, I'm assuming, very similar to what I have now.

Q: Because you didn't change any policies when you purchased it, correct?

A: I did not come up with any new policies.

Q: Okay. So when you worked there, the store kept the credit card tips?

A: Yes.

Deposition excerpts of Corey Paul for Ladles West Ashley and Ladles Fort Mill at p. 66, Lns. 1-11. **(Exhibit 1)**.

Of the three moving Franchise Defendants that have been made available to be deposed, (Ladles James Island, Ladles West Ashley, and Ladles Fort Mill), all three have confirmed that they have a policy of withholding credit card tips from employees. *See* Deposition excerpts of Terri Owens for Ladles James Island at p. 25, Lns. 10-25; p. 27, Lns. 1 -18 and Corey Paul for Ladles West Ashley and Ladles Fort Mill² at p 32, Lns. 1-16; p. 37, Lns. 3-5 **(Exhibits 2 and 3)**. As outlined further below, the moving Franchise Defendants have stonewalled Plaintiff in seeking information with regard to the tipping policies of the other Franchise Defendants.

Specifically, Plaintiffs noticed the depositions of all Franchise Defendants, but only the Defendants mentioned above were produced. Moreover, Franchise Defendants failed to respond to Plaintiffs' Requests to Admit ("RTAs") within 30 days, despite having abundant notice of the existence of the same, and these RTAs are now deemed admitted (see Plaintiffs' motion for the

² Corey Paul owns Ladles West Ashley as well as Ladles Fort Mill.

same). These RTAs include that the relevant Franchise Defendants that have not been deposed have “had a policy of not paying customer credit card tips to employees” both prior and subsequent to January 1, 2015.

PROCEDURAL BACKGROUND

1. On February 14, 2018, Plaintiff commenced this action by Summons and Complaint which asserted a number of claims against the Ladles Defendants including failure to pay wages under the South Carolina Payment of Wages Act, breach of contract, and conversion.

2. Plaintiffs encountered substantial challenges getting all the defendants served. After Plaintiffs were unable to effect service on all parties, on June 13, 2018 Plaintiff filed a Motion for Extension of Time to Serve Summons and Complaint and Petition for Order of Publication which was granted by this Court on July 20, 2018.

3. On or about June 20, 2018, Defendants Ladles Soups Mt. Pleasant, Erik Dyke, and Julie Dyke filed Answers to the Complaint.

4. Next, an additional sixteen Defendants filed Answers on or about July 18, 2018. Finally, four additional Defendants filed Answers on or about August 1, 2018.

5. Subsequent to Answers being filed by Defendants, a number of motions were filed. On July 24 and 28, 2018, a Motion to Disallow Class Certification, Motion to Dismiss Improper Parties, and Motion to Dismiss based on Rule 12(b)(6) were filed by sixteen of the Defendants. In the interim, a Consent Order exempting this matter from ADR under SCADR Rule 5(e) due to scheduling issues of all counsel was filed on December 18, 2018.

6. Next, a hearing on Defendants’ motions was held and all three motions were denied by Orders of this Court dated January 29, 2019.

7. On February 14, 2019, a Motion to Reconsider the January 29, 2019 Order denying the Motion to Dismiss was filed on behalf of sixteen Defendants and denied by an Order of this Court dated March 6, 2019.

8. Currently, Motions for Summary Judgment by all Defendants and Plaintiff's Motion to Compel against all Defendants, Motion for Continuance, Motion to Intervene and/or Amend the Complaint, and Motion for Class Certification are pending with this Court.

9. Plaintiff has submitted a proposed scheduling order with a trial date not before April 13, 2020, and a status conference in this matter was held on November 7, 2019.

STANDARD OF REVIEW

Summary judgment is only appropriate when 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, SCRCF. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); *see also Laurens Emergency Med. Specialists*, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003); *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRC. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) (“On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.”). Finally, “because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.” *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct.App. 2005).

LEGAL ARGUMENT

- I. Defendants’ Motion for Summary Judgment is premature and should be denied because the moving Defendants have not fully complied with Plaintiff’s written discovery requests or requests to be deposed and these requests will likely uncover additional relevant evidence, and Defendants failed to respond to Plaintiffs’ RTAs, which contain admissions precluding summary judgment.

The Franchise Defendants’ Motion for Summary Judgment is premature because they have not complied with Plaintiff’s written discovery requests or requests to be deposed and these requests will likely uncover additional relevant evidence. Plaintiff’s Motion to Compel is pending with this Court. See, Plaintiff’s Motion to Compel (**Exhibit 4**). Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 114-15 410 S.E.2d 537, 545 (1991). Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is “not merely engaged in a

'fishing expedition.'" *Id.* at 112, 410 S.E.2d at 544. See also, *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

Despite being served with Plaintiff's first set of Interrogatories and Requests for Production on May 24, 2019, as well as repeated Rule 11 communications, the Franchise Defendants through their attorney, Paul B. Ferrara, III, have either provided woefully insufficient discovery responses or have completely failed to respond at all to Plaintiff's written discovery requests. Defendants Ladles James Island, Ladles West Ashley and Fort Mill, and Ladles Coosaw have provided extremely late and deficient discovery responses. For example, Plaintiff's Request for Production No. 18 to Defendant Ladles Coosaw simply asks for a copy of an employee handbook which appears to be in Defendant's possession based on interrogatory answers and Defendant objected that the request was "vague, ambiguous, overly broad, unduly burdensome, and/or seeks information or documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." Additionally, Plaintiff's Request for Production No. 23 asks for payroll records relating to salary payments, tips, wages, and employment tax records since January 1, 2015. Defendant provided federal tax returns and balance sheets but failed to provide any payroll records relating to salary payments, tips, and wages, so that Plaintiff can determine what the policy is regarding Defendant retaining credit card tips. See, Plaintiff's Rule 11 communications dated November 13, 2019 (**Exhibit 5**). The remaining moving Franchise Defendants have not provided any written discovery responses at all, and were not made available for deposition, despite being noticed.

Additionally, despite being served Plaintiff's Requests to Admit on August 23, 2019, all of the moving Franchise Defendants have failed to respond to these Requests to Admit and Plaintiff's Motion to Deem Requests to Admit be Admitted is pending with this Court. See,

Plaintiff's Motion to Deem Requests to Admit be Admitted (**Exhibit 6**). These RTAs, which are now admitted, actually militate in favor of summary judgment for the *Plaintiffs*, not Defendants, since they include Defendants' admissions that Defendants i) have retained credit card tips before and after January 1, 2015, ii) have instructed managers to deceive customers as to the illegal policy; iii) allow employees to keep cash tips, which confirms that "tips are wages", and iv) do not provide employees with written notice, statements, or opportunity to dispute the illegal policy, all of which violates the Wages Act.

Finally, Plaintiff has noticed the depositions of all of the moving Franchise Defendants, however, only the Ladles James Island, Ladles West Ashley, and Ladles Fort Mill Defendants have been made available. Notably, all three of these Franchise Defendants confirmed in their depositions that they have a policy of withholding credit card tips from their employees. *See* Deposition excerpts of Ladles James Island at p. 25, Lns. 10-25; p. 27, Lns. 1 -18 and Ladles West Ashley and Ladles Fort Mill³ at p 32, Lns. 1-16; p. 37, Lns. 3-5 (**Exhibits 2 and 3**). From the deposition of Ladles James Island:

Q: And when you talk about rates with them, do you talk about tips with them?

A: . . . The ACH tips, they go into the business because that's the only way I can afford the pay the higher rate.

Q: When you say the ACH, that's credit cards?

A: Yes, credit cards, credit, debit.

Deposition of Ladles James Island at p. 25, Lns 10-25. Additionally, from the depositions of Ladles West Ashley and Ladles Fort Mill discussing the tipping policy for Ladles West Ashley and Ladles Fort Mill:

³ Corey Paul owns Ladles West Ashley as well as Ladles Fort Mill.

Q: Okay. What do you tell them?

A: That everybody is a non-tipped employee, but we have cash tips on the counter, and as a bonus to them they're allowed to take those cash tips.

Q: Okay. But they don't take the credit card tips?

A: Correct.

Deposition of Ladles West Ashley and Ladles Fort Mill at p. 32, Lns. 1-16. Further, from the depositions of Ladles West Ashley and Ladles Fort Mill:

Q: And whose tips are they, though, the credit card tips?

A: Those would be the store's tips.

Deposition of Ladles West Ashley and Ladles Fort Mill at p. 37, Lns. 3-5.

Plaintiff is "not merely engaged in a 'fishing expedition'" with his discovery requests and these requests are more than likely to uncover additional relevant evidence, particularly the existence of a company-wide policy of withholding credit card tips from employees. Plaintiff alleges that Defendants are engaged in a common scheme and have a common policy of withholding credit card tips from their employees. This allegation is supported by the deposition testimony of every moving Franchise Defendant that has been made available to be deposed. The Defendants deny the existence of a common scheme or policy and alleged at the status conference (though not in their motion) that Plaintiff lacks standing with regard to all but two Franchise Defendants.

Plaintiff's written discovery requests seek information regarding the moving Franchise Defendants' employees and each Defendant's policy and process for paying the employee credit card tips. The Franchise Defendants' discovery responses will show that most, if not all, Franchise Defendants have the same policy regarding withholding credit card tips from their employees. At

a telephone status conference held November 6, 2019, Judge Young indicated that he questioned and likely would not grant summary judgment motions prior to discovery being done, and standard procedure would likely be that, once ruling has been made on the Motion for Class Certification, a Scheduling Order could be signed by Judge McCoy, the Chief Administrative Judge beginning January, 2020, to include reasonable discovery and mediation. Accordingly, Defendants' Motion for Summary Judgment must be denied because the moving Defendants have denied Plaintiff a full and fair opportunity to complete discovery.

- II. Tips are wages under the SCPWA and a cause of action under SCPWA is separate, distinct, and significantly broader than federal Fair Labor Standards Act claims, and is not limited to controversies involving minimum wage and overtime but applies to all wages due, including both cash and credit card tips.

Pursuant to the South Carolina Payment of Wages Act, an employer shall not "withhold or divert" any portion of any employee's wages unless required or permitted by federal or state law "or the employer has given written notice of the deductions . . ." S.C. Code Ann. § 41-10-40(C).

The issue of whether tips constitute wages has arisen several times recently in the United States District Court for the District of South Carolina. *Carbone v. Zen 333 Inc.*, No. 2:16-CV-0108-DCN, 2016 WL 7383920, at *4 (D.S.C. Dec. 21, 2016) (holding that tips constitute wages under the SCPWA); *Degidio v. Crazy Horse Saloon & Rest., Inc.*, No. 4:13-CV-02136-BHH, 2016 WL 3125467, at *5 (D.S.C. June 3, 2016) (same); *Gardner v. Country Club, Inc.*, No. 4:13-CV-03399-BHH, 2016 WL 3125469, at *5 (D.S.C. June 3, 2016) (same); *Spallone v. SOHO Univ., Inc.*, No. 4:15-CV-1622-RBH, 2015 WL 5098154, at *5 (D.S.C. Aug. 31, 2015) (allowing a claim alleging that tips constituted wages under the SCPWA to survive without determining whether tips actually constituted wages because defendants asserted only that the FLSA preempted the SCPWA claim); *Foster v. M5 Hosp. Grp., LLC*, No. 4:14-CV-4517-RBH, 2015 WL 5024404, at *5 (D.S.C. Aug. 24, 2015) (same); see also *Browder v. Peninsula Grill Associates, LLC*, No. 2:14-CV-4135-

PMD, 2015 WL 4389502, at *1 (D.S.C. July 15, 2015) (noting that the original complaint contained a SCPWA claim asserting that tips were wages within the meaning of the SCPWA; however, the amended complaint dropped this claim). Neither the South Carolina Supreme Court nor the South Carolina Court of Appeals has addressed this issue.

The cardinal rule of statutory interpretation is to “determine the intent of the legislature.” *Bass v. Isochem*, 617 S.E.2d 369, 377 (S.C. Ct. App. 2005). S.C. Code Ann. § 41-10-10(2) defines “wages” as all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. *See also, Sean Bass v. 817 Corp.*, No.: 2:16-cv-1964-RMG (D. S.C., 2017) (**Exhibit 7**).

The Court in *Sean Bass v. 817 Corp.* found that the literal meaning of “all amounts for which labor rendered is recompensed” suggests that the statute covers just that, all amounts. Moreover, the Court found that the broad language that follows the clause to include amounts “fixed or ascertained” by any “method of calculating the amount” is intended to reinforce the comprehensiveness of “all amounts” rather than limit the term. *Id.* Finally, the statutory text specifically excludes only funds placed in pension plans or profit sharing plans from the definition of wages. *Id.*

Tips are an amount for which tipped employees are recompensed for labor rendered. The amount is ascertainable by simple addition. And tips are not specifically excluded by the statute. Accordingly, the plain language of the statute supports finding that tips are wages within the meaning of the SCPWA. *Id.*

In their Motion, Defendants cite several federal cases dealing with the federal Fair Labor Standards Act (FLSA) in support of their argument that tips are not wages under the SCPWA and that Plaintiff does not have a private right of action under the SCPWA. Defendants cite *Trejo v. Ryman Hospitality Props., Inc.*, 795 F.3d 442 (4th Cir. 2015) to support their argument that Plaintiff does not have a private right of action under the FLSA because he was paid the minimum wage. Defendants further argue that the FLSA “requires payment of minimum wages and overtime wages only,” and “is unavailing where wages do not fall below the statutory minimum and hours do not rise above the overtime threshold.” *Narkahata v. New York-Presbyterian Healthcare Sys.*, 723 F.3d 192, 201 (2d Cir.2013).

However, the statute's remedial purpose does not support these conclusions because its purpose is broader than that of the FLSA. Although the court first looks to a statute's language to construe and enforce the intent of the legislature, the court also reads it in light of the statute's purpose. The SCPWA "is remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld." *Dumas v. InfoSafe Corp.*, 463 S.E.2d 641, 645 (S.C. Ct. App. 1995). It was enacted "to protect employees from the unjustified and willful retention of wages by the employer." *Rice v. Multimedia, Inc.*, 456 S.E.2d 381, 383 (S.C. 1995). The Court's literal statutory construction, that is, interpreting "all amounts" to include tips, is within the spirit of the SCPWA's remedial purposes, and strongly suggested by the federal authority from the District of South Carolina cited above.

Accordingly, a cause of action under SCPWA is separate and distinct from federal Fair Labor Standards Act claims. The SCPWA statute is broader than the FLSA in that it is not limited to controversies involving minimum wage and overtime but applies to all wages due. *See, Spallone v. SoHo Univ., Inc.*, No. 4:15-cv-1622-RBH (D. S.C., 2015); *Martinez-Hernandez v. Butterball*,

LLC, 578 F.Supp.2d 816, 819-20 (E.D.N.C. 2008); *Butler v. DirectSat USA, LLC*, 800 F.Supp.2d 662 (D.Md. 2011).

III. Plaintiff Craig Chappell and putative Plaintiff Lani Charpia are tipped employees.

Plaintiff Craig Chappell and putative Plaintiff Lani Charpia are tipped employees. Defendants allege in their Motion that Mr. Chappell was not a tipped employee because he did not sign or enter into an agreement to share any tips during his employment. Defendants cite no authority indicating a requirement that an employee enter a written agreement to be a tipped employee. Mr. Chappell testified that he performed all areas of duties as part of his employment including duties that restaurant employees are ordinarily tipped for such as taking orders at the register and waiting on tables:

Q: Do you recall how long immediately after you began working there that you were solely a grill cook before, you testified, you learned some other jobs?

A: I was never solely a grill cook from day one. I started out washing dishes. Then they put me on the grill. That was my first day. The second day they threw me on grill. The third day they threw me out front waiting on people, cleaning tables, picking up their plates. Then maybe a month later, they introduced me to the register. And then time to clean the bathrooms, they put me on that job. It's just like everybody did everything. They slowly get you in every position.

Q: Did you ever help customers sitting in the dining area in any way after they got their food?

A: Absolutely. I have sat down with them at times if they want to talk, the older people. And Teri said that was quite fine, and that's good PR. So, you know, you just do everything to make the people happy.

Deposition of Craig Chappell at p. 95, Lns. 3-21. **(Exhibit 12).**

Additionally, Mr. Chappell received an equal portion of the cash tips from each shift which directly contradicts Defendants' argument that Plaintiff was not a tipped employee. Mr. Chappell testified regarding the issue of cash tips:

Q: Did you ever work any shifts with Sean?

A: I worked a lot of shifts with Sean.

Q: Did he get cash tips?

A: Yes, everybody did that worked.

Q: His cash tips would not be any different from –

A: No.

Q: -- how they were divvied up amongst other employees?

A: If it's 15 bucks and there's five people, everyone gets three bucks.

Deposition of Craig Chappell at p. 123, Lns. 1-11. **(Exhibit 13).**

Moreover, the Requests to Admit, which are deemed admitted, have admissions that each moving Franchise Defendant keeps the credit card tips, and that employees get cash tips. There is no basis under the SCPWA to distinguish between cash and credit card tips, and therefore, tips are wages, and their employees are tipped employees.

IV. Plaintiff Craig Chappell and putative Plaintiff Lani Charpia have standing against all of the Franchise Defendants.

i. All of the Franchise Defendants were engaged in a civil conspiracy and common scheme that damaged Plaintiff Craig Chappell and putative Plaintiff Lani Charpia.

Defendants do not raise the issue of standing in their Motion for Summary Judgment, however, out of an abundance of caution, Plaintiff will address the issue here. Plaintiff's filed a pending Motion to Reconsider the Court's granting of summary judgment to Ladles Mt. Pleasant. Plaintiffs believe this decision was prematurely entered, likely on the basis that Plaintiff Chappell admittedly is not paid by Ladles Mt. Pleasant. However, during the hearing the Court (Price, J. presiding) indicated that decision "could change" based on the Court's future ruling on the Motion for Class Certification. Counsel's investigation (again, without the benefit of discovery) has uncovered evidence which indicates the existence of a civil conspiracy, and commensurate

“special damages” of Plaintiffs. Ms. Charpia states that multiple Ladles customers have discovered the illegal, clandestine and common scheme or policy of Defendants to convert Plaintiffs’ credit card tips/wages, which Plaintiffs allege in the amended complaint makes it more likely that such customers will not leave a tip in the future when they visit that same *or other* Ladles Franchises. *See*, Affidavit of Lani Charpia at paragraphs 5 – 8. **(Exhibit 11)**.

Specifically, the Ladles West Ashley customer identified by putative plaintiff Charpia who finds out about the policy while dining at Ladles West Ashley (which policy is covert and clandestine, and the result of a civil conspiracy, common plan or scheme, between the Ladles West Ashley and the Franchisor), and then subsequently dines at the Ladles James Island (or Summerville, Coosaw, Fort Mill, Mount Pleasant etc. etc.) and fails to leave a credit card tip for those employees since he/she already knows “employees do not get the credit card tips at Ladles,” shows how Ladles James Island (or Summerville, Coosaw, Fort Mill, Mount Pleasant etc. etc.) employees can be damaged by the actions of *other* Ladles Operating Company/Franchise Defendants who do not sign their pay checks, and constitutes “special damages.” “Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence.” *McMillan v. Oconee Mem’l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). 367 S.C. at 564, 626 S.E.2d at 886. *Under the proposed amended complaint, each putative class member plaintiff thereby alleges “special damages” by each Operating Company/Franchisee defendant.*

- ii. Plaintiff’s injuries are a result of a conspiracy or concerted action between the Defendants and all Defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.

Although courts generally require that the class representative have a cause of action against each defendant, there are two exceptions to this requirement which Plaintiff believes

should be applied in this instance: "(1) Situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants ... and (2) Instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious. *Thompson v Board of Education of Romeo Community Schools*, 709 F2d 1200,1204-05 (6th Cir 1983). *See also Haas v Pittsburgh National Bank*, 526 F2d 1083, 1088n 3 (3d Cir 1975), citing *La Mar v H & B Novelty and Loan Co*, 489 F2d 461,466 (9th Cir 1973); *Erie Fire Insurance Co v Madden*, 204 W Va 606,515 SE2d 351,354 (1998).

Here, as noted above and in the affidavit of Ms. Charpia, there exists a common scheme or policy by Defendants to convert Plaintiffs' credit card tips/wages that makes it more likely that Ladles customers will not leave a tip in the future when they visit that same *or other* Ladles Franchises causing damages in the forms of lost wages/tips to all Defendant Franchise employees. It makes no sense for this Court to be burdened with over 75 Plaintiffs bringing separate lawsuits against over a dozen Defendants when a single resolution can be obtained in this matter.

To date, South Carolina has not yet adopted these exceptions to the standing requirement. *See, Gardner v. South Carolina Department of Revenue*, 577 S.E. 2d 190 at footnote 14, 353 S.C. 1 (S.C. 2003). However, based on the number of parties involved in bringing about the resolution of a single issue, if there were ever a case for the juridical links doctrine to be applied in South Carolina, this would be it.

CONCLUSION

Defendants' Motion for Summary Judgment is premature and should be denied because the moving Defendants have not fully complied with Plaintiff's written discovery requests or requests to be deposed and these requests will likely uncover additional relevant evidence. Additionally, tips are wages under the SCPWA and a cause of action under SCPWA is separate

and distinct from federal Fair Labor Standards Act claims and is not limited to controversies involving minimum wage and overtime but applies to all wages due. Further, Plaintiff Craig Chappell and putative Plaintiff Lani Charpia are tipped employees under the SCPWA. Finally, both Plaintiffs have standing against all of the Franchise Defendants. Based on the foregoing, Defendants' Motion for Summary Judgment should be denied.

Respectfully submitted,

s/ David D. Ashley
Ben Le Clercq (S.C. Bar #65754)
David D. Ashley (S.C. Bar #76206)
Le Clercq Law Firm
Ben@LeClercLaw.com
David@LeClercLaw.com
708 South Shelmore Blvd. #202
Mount Pleasant, SC 29464
Phone (843) 722-3523
Counsel for Plaintiffs

December 31, 2019
Mt. Pleasant, South Carolina

Jan 04 2021

SC Court of Appeals

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON) CASE NO. 2018-CP-10-785
3
4 CRAIG CHAPPELL,)
5 Plaintiff,) Transcript of Record
6 vs.)
7 LADLES FRANCHISING,) Date: January 6, 2020
8 INC., ET. AL.,)
9 Respondents.)

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B E F O R E:

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The Honorable Bentley Price

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Denise J. Lauder, RPR

20

Ninth Judicial Circuit

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1 A P P E A R A N C E S

2 REPRESENTING THE APPELLANT:

3 BEN LECLERCQ, ESQUIRE

4 DAVID ASHLEY, ESQUIRE

5 Le Clercq Law Firm

6 708 South Shelmore Boulevard

7 Suite 202

8 Mount Pleasant, SC 29464

9

10 REPRESENTING THE RESPONDENTS

11 LADLES FRANCHISING, INC., SUE ALLEN,

12 TRACY ALLEN, AND LADLES SOUP, INC.:

13 KERRY KOON, ESQUIRE

14 147 Wappoo Creek Drive, Suite 203

15 Charleston, South Carolina 29412

16 EVAN W. LACKE, ESQUIRE

17 147 Wappoo Creek Drive, Suite 204

18 Charleston, South Carolina 29412

19

20 REPRESENTING THE RESPONDENT LADLES MOUNT PLEASANT,

21 INC.:

22 BRANDT SHELBOURNE, ESQUIRE

23 131 East Richardson Avenue

24 Summerville, SC 29483

25

1 REPRESENTING THE RESPONDENTS

2 LADLES JAMES ISLAND, LADLES WEST ASHLEY,
3 LADLES KNIGHTSVILLE, LADLES FRESH FIELDS,
4 DAN SUTTON, CAROL SUTTON STEVE TRAGER, TERRY
5 OWENS:

6 PAUL FERRARA, ESQUIRE

7 Ferrara Law Firm

8 2300 Otranto Road

9 North Charleston, SC 29406

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INDEX

Page No.

PROCEEDINGS.....	5
REPORTER'S CERTIFICATE.....	56

INDEX OF EXHIBITS

(No exhibits were offered or
marked for identification.)

1 (The following proceedings were had
2 January 6, 2020, 12:05 p.m., Charleston County
3 Common Pleas Nonjury, Judge Price.)

4 THE COURT: All right. The next one is
5 Chappell v Ladles Soups James Island.

6 Is it Chapel or Chappell?

7 MR. LECLERCQ: Chappell.

8 THE COURT: All right.

9 I vaguely remember this one. Let me
10 see if I can remember and figure it out. It has
11 something to do with tips. Gentleman's client --
12 made a motion for his client that they were not
13 associated with Ladles of James Island. I agreed
14 and I let them out of the case.

15 I remember Mr. Koon and others were
16 here to just see what was going to happen. They
17 saw what was going to happen, and I assume that's
18 what got us here today.

19 Am I kind of close?

20 MR. KOON: And a bunch of other stuff.

21 THE COURT: Along with nine other
22 motions.

23 MR. LECLERCQ: Good morning, Judge.

24 THE COURT: Morning.

25 MR. LECLERCQ: Benjamin LeClerc here

1 on behalf of the plaintiffs. I'm joined by my
2 associate David Ashley as well as Laney Charpia
3 that we've asked be allowed to enter this case via
4 motion to amend. So this case is about tips,
5 credit card tips specifically, that have been taken
6 by the defendant from the plaintiff.

7 THE COURT: All right. And the
8 plaintiff's name again?

9 MR. LECLERCQ: Craig Chappell. He's
10 not here today; he has a friend in hospice. We
11 have asked in the motion to amend that Ms. Charpia
12 be allowed to be added as plaintiff. And so she is
13 also with us.

14 THE COURT: That's who I was wondering
15 who it was. And how do you spell her last name?

16 MR. LECLERCQ: C-H-A-R-P-I-A.

17 THE COURT: Is your husband an
18 attorney?

19 MS. CHARPIA: No.

20 THE COURT: There's a -- there's an
21 attorney in Summerville with the same last name.
22 Just seemed like a unique last name and he's an
23 attorney.

24 And are we going to hear all eight?

25 MR. LECLERCQ: There are a bunch of

1 motions. So the -- if the -- with the Court's
2 indulgence, I can give you just a brief overview,
3 the view from 10,000 feet.

4 THE COURT: Sure.

5 MR. LECLERCQ: The appropriate place to
6 start is with Black's Law Dictionary which defines
7 a tip as a gratuity for service. And a gratuity is
8 defined as something given without obligation. And
9 so that's really the heart of what's happening.

10 And if -- the other place to start is
11 if you look at the defendant's website. The
12 originator of the Ladles concept basically brags
13 about their ability to control the wages. She says
14 the only two things that you can control in money
15 are food costs and employee wages. And so that's
16 exactly what they are doing.

17 There was a very lengthy initial
18 pleadings phase in this case. So it was filed back
19 in 2018, but we -- in February, but we had
20 difficulty getting service over all of the
21 defendants. And so we had to file a motion to
22 extend the time in which to serve or to serve by
23 publication.

24 Finally, after we got service, motions
25 to dismiss were filed in July of 2018. They were

1 decided in January of 2019, with motions to
2 reconsider being filed, which weren't actually
3 decided until March of 2019.

4 At that point, discovery was supposed
5 to start and we sent out discovery, but,
6 unfortunately, we have not been able to get
7 defendants to comply with their discovery
8 obligation.

9 And so this is a Payment of Wages Act
10 case amongst other things. And what can be more
11 relevant in a Payment of Wages Act case but the
12 identities of the employees. We have still not
13 been given the identities of the employees.

14 And so the defendants are the
15 franchiser, as well as the operating company
16 defendants, and just individuals with personal
17 liability. So that the motions that are pending
18 are a motion to amend the complaint, which is
19 basically to add a count of quantum meruit,
20 alternative counts of negligence as well as a civil
21 conspiracy claim.

22 We've got motions to compel discovery
23 as well as motions to deem responses to request to
24 admit admitted. We've got a motion for continuance
25 and a scheduling order, and as well as our motion

1 for class certification.

2 We have also requested that the motion
3 for -- to reconsider be -- I'm sorry, the motion
4 for summary judgment that Your Honor granted for
5 Ladles Mount Pleasant be reconsidered. So based on
6 -- based on the facts as have come out in our
7 independent investigation. The other pending
8 motions are the defendants' motions for summary
9 judgment.

10 So I have already given the Court a
11 brief overview of the procedural posture of this
12 case. The -- there are a couple of important
13 points though to highlight in that the defendants
14 filed motions to dismiss for improper parties back
15 in 2018 when the case was filed -- or, I'm sorry,
16 in July after it had been filed and finally we got
17 service.

18 In our response to those motions, we
19 requested that the Court grant the class
20 certification. Now there's an important procedural
21 point. Finally, when those motions were denied by
22 the Court in January of 2019, and the defendants
23 then moved to reconsider, which was denied, they
24 took a shot at all of the arguments that they had
25 been making relating to standing and other things.

1 That was denied. Okay.

2 And so at that point they have an
3 obligation to comply with discovery, and they
4 didn't do it. And so we have the right to seek
5 discovery from, for example, Ladles Mount Pleasant.
6 After the motion to dismiss filed by Ladles Mount
7 Pleasant was denied, we have the right to get the
8 identities of their employees, which they never
9 provided, to see if there is an appropriate class
10 representative.

11 So the -- at the status conference,
12 which was held just a couple of months ago in front
13 of Judge Young, he indicated that once the -- you
14 know, he would look at -- if he were doing it as
15 the motion for summary judgment prior to the
16 discovery being done, but he said the first thing
17 is to get the motion for class certification done.

18 So we're going to tag team, if it's
19 okay, Judge. We would like to start with the
20 motions to compel discovery. And my associate
21 Mr. David Ashley is going to -- would like to make
22 remarks to the Court relating to the motion to
23 dismiss.

24 Are there any questions that you have
25 of me prior to?

1 THE COURT: Just indicated that Judge
2 Young wanted to get the motion for class
3 certification heard before he heard summary
4 judgment, but we're going to do it all today?

5 MR. LECLERCQ: Well, we are prepared to
6 do it all today, but if -- it depends on where the
7 Court comes down on the motion for class
8 certification. We think that -- for example, the
9 way that this is done in Federal Court is there is
10 a motion for conditional class certification, and
11 there is a lower threshold that that can be done,
12 but we haven't been given the appropriate discovery
13 that would allow us to buttress that motion for
14 class certification.

15 Nevertheless, we do think that it is
16 timely and could be granted at this time by the
17 Court.

18 THE COURT: All right. Mr. Koon.

19 MR. KOON: Your Honor, I represent
20 Defendants Ladles Franchising, Inc., Sue Allen,
21 Tracy Allen, and Ladles Soup, LLC. The Ladles
22 Franchising, Inc. obviously is the franchising
23 company that franchises the various locations
24 through the other defendants in the case.

25 Tracy Allen and Sue Allen are officers

1 of the franchising company. Sue Allen is formerly
2 the operator of Ladles Soups, LLC, which was one of
3 the restaurants, the West Ashley restaurant.

4 Ladles Soups, LLC is basically a
5 defunct corporation having sold the West Ashley
6 location to Corey Paul, who is one of the owners of
7 entities operating two of the franchises.

8 I stood up because I can't let a couple
9 of things go unanswered. First of all, he's
10 painted us along with everybody else as refusing to
11 answer discovery. We have answered discovery. We
12 have objected to a couple of issues, but they have
13 nothing to do with the motions here today.

14 We have provided all of the information
15 about former employees of Ladles Soups, LLC that we
16 know about, and those are the only employees who
17 would have anything to do with tips. For example,
18 Ladles Franchising, LLC does not employ servers,
19 waiters or anybody else.

20 And we did have a telephone conference
21 with Judge Young and, obviously, he set all of
22 these motions for today. He did not indicate any
23 preference that one had to be heard before the
24 other.

25 And my clients have never made a motion

1 to dismiss or for summary judgment, other than the
2 very one we are here to argue today. So we haven't
3 had our shot. We've been impatiently waiting for
4 our shot until today.

5 So if had a suggestion, I would ask
6 Your Honor to -- since you've already granted one
7 summary judgment motion, and ours is very similar
8 to the one that you granted, I would suggest that
9 those motions perhaps be heard first; but,
10 obviously, we'll comply with whatever your wishes
11 are.

12 THE COURT: What's the gentleman's name
13 over here?

14 MR. SHELBOURNE: Brandt Shelbourne,
15 Your Honor, on behalf of Ladles Mount Pleasant,
16 Inc. --

17 THE COURT: But you're here just to see
18 what's -- the motion to reconsider, to argue that?

19 MR. SHELBOURNE: I'm here to respond to
20 the motion to reconsider once I hear the basis.

21 THE COURT: Sure.

22 And, Mr. LeClercq, is that information
23 accurate? Have they provided these lists of
24 employees from Ladles, LLC?

25 MR. LECLERCQ: Your Honor, like I said,

1 my associate David is going to be handling the
2 motions to compel discovery. He's been involved in
3 the front lines with the discovery, but the answer
4 is no. They have not complied with their discovery
5 obligation under the law of South Carolina.

6 And it has significantly hampered our
7 ability to be able to go forward with the motion
8 for class certification, the setting of depositions
9 and similar things. So we think that to set the
10 table as it were, it's important for the Court to
11 understand the importance of this -- of the
12 discovery that we've requested.

13 MR. FERRARA: Your Honor, Paul Ferrara,
14 on behalf of multiple defendants, Ladles -- and I
15 can go through those, Your Honor, but, for example,
16 Ladles James Island where Mr. Chappell works,
17 Ladles West Ashley, Ladles Knightsville, Ladles
18 Fresh Fields, Dan and Carol Sutton, Steve Trager,
19 Terry Owens.

20 Your Honor, as of today, all of the
21 discovery that -- of the clients that I represent
22 has been answered and served upon the plaintiff.
23 Several depositions have taken place, Your Honor.
24 The proprietor, Terry Owens, that ran Ladles James
25 Island where Mr. Chappell worked, she has been

1 deposed, Ladles West Ashley has been deposed.

2 And the only information that has not
3 been provided by all of my clients en masse, Your
4 Honor, and it's due to liability concerns is that
5 -- similar to that of Mount Pleasant's objection in
6 that main social security numbers, addresses, phone
7 numbers we believe is confidential information and
8 that my clients are not allowed to disseminate that
9 information to the plaintiff.

10 And essentially, Your Honor, what the
11 plaintiff is doing here has -- is going on a witch
12 hunt trying to find alleged employees who might
13 have suffered a claim as a result of these credit
14 card tips. Importantly, Your Honor, if you aren't
15 changing your mind and have already granted summary
16 judgment because Mount Pleasant had nothing to do
17 with Mr. Chappell, and likewise all of my clients
18 except for James Island where Mr. Chappell worked
19 have nothing to do with Mr. Chappell.

20 And the plaintiff at the same time,
21 Your Honor, is trying to get a class certified,
22 which they still have not done. My clients have
23 complied as of today with all of the discovery and
24 presented everything within their control.

25 I understand there was a subpoena that

1 was issued to the Department of Employment
2 Workforce that have the names, addresses, and wage
3 information that was paid to these alleged
4 aggrieved parties. And I will let Mr. LeClerc
5 tell Your Honor about that.

6 I understand there might have been an
7 objection, but that -- that's where all of this
8 information that the plaintiff is seeking to get,
9 the names and addresses and amount of wages that
10 have been paid, can easily be obtained from the
11 State through the Department of Employment
12 Workforce. My clients don't readily have access to
13 that information.

14 Respectfully, Your Honor, my clients
15 have spent thousands of dollars to get this far
16 into the litigation. We have answered all of the
17 discovery with the exception of the employees'
18 information, confidential information and --

19 THE COURT: Well, let me do this. Let
20 me try to get a grasp on this real quickly. So we
21 have the plaintiffs' motion -- two plaintiffs'
22 motions to intervene. Are those the same?

23 MR. LECLERCQ: Judge, we have -- yes.
24 It's a -- the motion is a motion to intervene and
25 in the alternative to amend the complaint to allow

1 the addition of Laney Charpia as an additional
2 plaintiff. So that's the thrust of the motions
3 that have been filed.

4 We filed a motion to intervene
5 initially, but then we reconsidered it and restyled
6 it a motion to intervene and in the alternative to
7 amend the complaint.

8 THE COURT: All right. So we have
9 plaintiffs' motion to amend, which you just
10 discussed, motions to intervene, the motion to
11 compel, and the two motions for summary judgment.
12 All right. So nothing too crazy. We can handle
13 it.

14 So what I want to do, I'm not going to
15 take up the class certification. I agree, I just
16 don't think you have enough information or we have
17 any information to certify a class at this point in
18 time. I will continue that. If you want me to
19 hear it, I'm happy to do it the week of
20 February 17th.

21 So what I want to do is take up the
22 motions for summary judgment. And, Mr. Koon, since
23 you represent the larger entity, I would like to
24 hear from you first if that's okay.

25 MR. KOON: Thank you, Your Honor.

1 First of all, the -- it's important to
2 recognize, although there does seem to be a kind of
3 bewildering paper about amendments to the motion
4 for intervention or in the alternative amendment of
5 the complaint for the initial amended complaint and
6 amended amended complaint, and a second amended
7 complaint, the causes of action that are before the
8 Court at this juncture against all of the
9 defendants, including mine, are failure to pay
10 wages under the Wages Act, breach of contract, and
11 conversion.

12 Now, it is undisputed -- and we've
13 given Your Honor affidavits and deposition excerpts
14 that the plaintiff never worked for any of my
15 clients. In fact, Ladles Franchising, Inc. has
16 never employed servers, waiters, or other employees
17 who would naturally receive tips. And that is in
18 our client's affidavit attached to the motion.

19 We have never had an employer/employee
20 relationship with Mr. Chappell or, for example, the
21 intervenor. Now the intervenor works at the
22 successor to the West Ashley location, which my
23 client used to own, Sue Allen, but she sold that;
24 and there's no question she sold it way before the
25 proposed intervenor began working there.

1 So everything I say applies not only to
2 Mr. Chappell but to his proposed intervenor. We've
3 never had an employer/employee relationship. We've
4 never had a contractual relationship with either
5 Chappell or the intervenor; and, naturally, if they
6 have worked for us, we never came into possession
7 of any tips that they now claim.

8 And there are deposition excerpts from
9 all of the franchisors who have been deposed so far
10 which -- and also the deposition of Sue Allen, the
11 operating -- chief operating officer of the
12 franchising company, that the franchising company,
13 Ladles Franchising, doesn't charge any percentage
14 fees, franchise fees on any tips. No matter what
15 kind. So that's undisputed also.

16 THE COURT: Will you explain this to
17 me, Mr. Koon? So what essentially happened was Sue
18 Allen, did she establish this Ladles concept?

19 MR. KOON: She did.

20 THE COURT: And so she built this brand
21 up. She realized that she could make more money
22 franchising it. She sold hers, started the -- what
23 would be -- it be Ladles, Inc., and then she said,
24 okay, I'm not going to go sling soup anymore.

25 I'm just going to get people to pay me

1 for a franchise. Independent individuals that want
2 to come and franchise a Ladles, they can go make
3 soup and sell it all day, but I'm up here now. Is
4 that how the business actually operates now?

5 MR. KOON: Yes, sir, except that she
6 established Ladles Franchising along with her
7 husband before the Ladles Soups location West
8 Ashley was sold. Actually, Mount Pleasant was the
9 first franchisee.

10 So they have a typical franchise store,
11 a franchisee relationship controlled by a franchise
12 agreement, which is in the record, and which
13 plainly establishes that the franchisor and the
14 franchisee are separate and independent entities.
15 They are not agents of each other. That is
16 directly considered in the franchise agreement.
17 That is paragraph 5(2), which is quoted to you in
18 the record.

19 And so the franchisees are all
20 independent entities and all have acknowledged
21 that. And all have also, that have been deposed,
22 have acknowledged, just as Sue Allen and her
23 husband alleged and have stated, that no tipping
24 policy, no compensation policy is included in the
25 franchisee's obligations under the franchise

1 agreement, and that nobody has required the
2 franchisees to adopt any particular tipping policy.

3 And, importantly, to that issue,
4 Mr. Shelbourne's client was the very first
5 franchisee and he's presented evidence and his
6 client has testified that they pay credit card tips
7 in monthly checks to the employees. So that proves
8 there is no policy. The very first franchisee has
9 a different policy.

10 THE COURT: All right. Let me stop you
11 right there. You represent Sue Allen, Ladles
12 Inc. --

13 MR. KOON: Ladles Franchising, Inc.

14 THE COURT: Okay. Who else?

15 MR. KOON: Tracy Allen, Sue Allen's
16 husband, and an officer of Ladles Franchising,
17 Inc., and Ladles Soups, LLC, which is a dormant LLC
18 that formerly owned the West Ashley location.

19 Our argument is very simple, Your
20 Honor: You can't sue somebody you never worked for
21 under the wage statute.

22 THE COURT: I understand.

23 MR. LECLERCQ: Much to the contrary,
24 Judge, I'm sorry, let me correct some of these
25 inaccuracies. First of all, there is evidence in

1 the record which we cited in our materials, that
2 they do in fact -- they take a percentage of the
3 gross, that the franchisors takes a percentage of
4 the gross of the franchisees for services rendered.
5 That is in the franchise document.

6 The franchisor gets a percentage of the
7 gross of services rendered. What services are
8 rendered at Ladles West Ashley? The services of
9 Laney Charpia. And the defendants get payments for
10 that, including via credit card and including
11 credit card tips, which are not distributed.

12 Even though they are gratuities for
13 service, they are not given to the servers that are
14 actually giving those services.

15 Okay. So the first point, it is
16 incorrect that the franchisor is not benefitting
17 from this illegal tipping policy. The franchisor
18 is making money off of the tips. The franchisor is
19 taking the credit card -- a percentage of the
20 credit card tips that should belong to Ms. Charpia
21 and are going instead to the franchisor. So they
22 are benefitting.

23 So the thrust of our response to the
24 motion for summary judgment is this is not Federal
25 Court. This is not the Fair Labor Standards Act.

1 This is the Payment of Wages Act. And,
2 specifically, we think the Dumas v InfoSafe case
3 controls here. And what does it say?

4 It says that agents of an employer that
5 knowingly permit the non-payment of wages are
6 liable for the payment of wages. And that is
7 exactly what is going on here with regard to the
8 franchisor.

9 Okay. All of this is set out in great
10 detail in our documents, but basically the
11 franchisors are acting as the agent of the
12 franchisees with the power to bind those
13 franchisees. And that is set out specifically in
14 the franchise agreement, and you don't really need
15 to look any further than Ladles' website to see
16 that the franchisor, which owns that website, is
17 acting as the marketing agent for the franchisee
18 for the benefit of all.

19 And so the fact is that they are agents
20 with the power to bind, the franchisors are. Okay.
21 They knowingly permit this tipping policy. They
22 know about it. In fact, it was designed by the
23 original franchisor, Ms. Allen. And so they know
24 about it --

25 THE COURT: You're assuming a lot of

1 facts that I'm assuming are at great question here.
2 I mean, you assume that Ms. Allen set this scheme
3 up or something is what your position in this case
4 is? Is that -- and that she gets some type of
5 gross proceeds from this and she teaches all these
6 franchises how to do this so she makes more money.
7 And in doing so, obviously, is a detriment to Ms.
8 Charpia. And you're assuming that this is a big
9 grand scheme.

10 MR. LECLERCQ: It is supported in the
11 deposition testimony.

12 THE COURT: Okay.

13 MR. LECLERCQ: That that is what
14 happened. That Corey Paul, who is now the owner of
15 the Ladles West Ashley franchise, kept this policy
16 in place that had been designed by -- by the --
17 Ms. Allen.

18 Now, part of the problem, Judge, we
19 haven't been given access to the discovery
20 documents that we should have gotten that would
21 allow us to respond to -- to this sort of thing to
22 find out -- for example, we've noticed the
23 deposition of all the operating defendants. Not
24 all of them have been provided. We have not been
25 given access to the names and contact details for

1 the employees --

2 THE COURT: Well, hold on. I think
3 we're getting into the motion to compel. I want to
4 stick with Mr. Koon's motion for summary judgment.

5 All right. He's responded. Go ahead.

6 MR. KOON: I'm sorry, and I apologize,
7 but counsel has to be constrained by the record.
8 Terry Owens testified in her deposition on page 33
9 that she does not pay tips -- pay gross -- excuse
10 me, does not pay franchise fees on tips.

11 Julie Dyke of Mount Pleasant on page 24
12 says she does not pay her tips as part of the
13 franchisee for the percentage. Excuse me, that's
14 actually page 36.

15 Sue Allen in her 30(b)(6) deposition
16 testified that the franchise fees are percentage
17 less certain other things and less tips.

18 The record has -- there's nothing at
19 all in the record that says the franchise company
20 gets tips. In fact, it says just the opposite.
21 And I would just ask counsel to be constrained by
22 what is in the record.

23 THE COURT: Well, that's why I asked
24 him; he was assuming a lot of facts in his argument
25 that are very contentious I would assume. Well,

1 actually not contentious. For the record --

2 MR. KOON: They're settled.

3 MR. LECLERCQ: To the contrary, Judge.
4 I'm holding the franchise agreement, which is part
5 of the record. And at paragraph -- on page 18, and
6 it's -- paragraph 7(c) says, in this agreement
7 termed gross sales shall mean gross sales of all
8 food, beverage, other menu items, merchandise and
9 goods and other services sold or performed by or
10 for you at the restaurant.

11 THE COURT: Does it say tips?

12 MR. LECLERCQ: It says all goods and
13 other services. And so the fact is, is that the --
14 we've asked for information in discovery that would
15 help us answer these questions which has not been
16 provided, but there is evidence in the record that
17 tips that are part of the gross --

18 THE COURT: You're assuming that other
19 services is also tips. That's your reading or
20 interpretation of that.

21 MR. LECLERCQ: The principal service
22 that's provided at a Ladles -- in Ladles West
23 Ashley, for example, where Ms. Charpia works, is
24 her service in providing food to the customers that
25 come in. And that is the principal service that's

1 provided.

2 There are amounts that are paid by
3 customers for that service, and then there are
4 gratuities. And so those are the services
5 provided. And it says that the percentage is
6 payable on the gross.

7 And so they can't on the one hand stand
8 up and say, we don't take any of the tips, without
9 allowing us the discovery that we need to be able
10 to find that out, particularly when there are
11 documents in the record that directly contradict
12 what was just said.

13 THE COURT: Mr. Koon, let's do this. I
14 want to hear from you certainly, but they're going
15 to keep coming back to this motion to compel. I
16 mean, I think they're just going to keep going back
17 to it every time I let them talk.

18 What do you think I should do? Just
19 let them go ahead and argue the motion to compel
20 and let you all respond and see if we can get
21 somewhere?

22 MR. KOON: We're happy to respond.
23 Actually, Evan Lacke has handled the discovery
24 issues, and he's more prepared to talk about the
25 discovery than I am.

1 THE COURT: Let's do that. It's just
2 going to keep going back to that, I think, that you
3 all are blocking them from getting the access to
4 the information they need. Let me see what they
5 have to say and maybe we can get something
6 accomplished.

7 MR. KOON: Let me respond to one other
8 thing. And I sure am sorry to keep popping up and
9 down. When I hear these allegations that I know
10 are not accurate, I have to bring it to the Court's
11 attention.

12 THE COURT: Please.

13 MR. KOON: Mr. LeClercq perhaps can be
14 tested on the site on this one because he didn't
15 attend the deposition of Terry Owens, the employer
16 of his client, and Corey Paul, but they brought
17 their franchise monthly records to show what their
18 percentage was.

19 And those were produced at their
20 depositions, and they testified that in actuality
21 they never paid franchisees on the credit card
22 tips. And the franchisor agreed with them.

23 THE COURT: Okay. Let's hear the
24 motion to compel and maybe I can just sort them all
25 out.

1 MR. ASHLEY: Thank you, Judge. I am
2 David Ashley on behalf of Mr. Chappell. We served
3 the discovery in May, received no response as we
4 filed our motion to compel in August. I think
5 right after that the franchisor defendants --
6 around that time they initially responded, but
7 objected to a lot of the questions that we were
8 seeking information for.

9 And one of the -- December 31 they
10 supplemented their responses. One of the things we
11 have still asked them for and not received is
12 information relating to the payments that they
13 received from the franchise defendants, which is
14 going to show whether or not the gross sales.

15 We've asked for that and still not
16 received that.

17 THE COURT: Let me stop you there.

18 Mr. Lacke, just as to that point.

19 MR. LACKE: Just as to that point.

20 They sent -- we sent -- when they filed the motion
21 to compel, I sent an e-mail to them asking what
22 specifics -- nor, we had not been contacted by
23 counsel to be made aware as to what specific
24 discovery responses they were requesting be
25 compelled. We had already responded.

1 I received a letter here dated
2 November 13th, asking -- basically following up on
3 the specific reasons for -- for requesting --
4 certain objections and what they would like
5 followed.

6 We've answered all of those. So
7 there's two discovery requests that we have not
8 responded to. One involves basically just a
9 complete asset inventory. And we felt that was a
10 little bit premature to respond to now, so we have
11 objected to that.

12 They've also requested inspection of
13 the Allens' computers and cell phone records. We
14 have maintained our objection to that. They live
15 in Ohio and use those devices. We are happy to
16 make those available for an inspection if they come
17 up there, but we have, in fact, Your Honor, in our
18 first discovery responses provided the names of all
19 of the employees that we know of -- and this,
20 again, Your Honor, only applies to Ladles Soups,
21 LLC. That's the only entity that employed servers.

22 We also provided all of the W2 and
23 payroll information that we could get our hands on.
24 Again, Ms. Allen sold this franchise a number of
25 years ago, so she had to contact -- I believe it

1 was ADP or one of those payroll processing. We
2 provided all of that information to counsel in the
3 first response.

4 I don't believe there are any employees
5 of Ladles Soups, LLC that have worked there
6 historically that they are not aware of. That was
7 all provided in the first discovery responses.

8 THE COURT: He's talking about the
9 gross -- what was it?

10 MR. ASHLEY: The gross sales that are
11 paid by the franchise defendants. It's Request for
12 Production Number 11.

13 THE COURT: All right.

14 MR. LACKE: Just a moment, Your Honor.

15 THE COURT: Take your time.

16 MR. LACKE: Number 11 requests for
17 production states, produce a complete itemized
18 accounting and financial summary of all amounts
19 paid that are owed to you by any other party to
20 this action for the period January 1, 2015, to
21 present.

22 We stated simply, no such itemized
23 accounting and financial summary exists. They have
24 not been prepared. We don't have one. Again, if
25 we -- that was the response. We don't -- we have

1 no objection to -- I'm not sure if they have that
2 information anywhere else. We have no objection to
3 giving it to them.

4 Basically, it was just what was
5 provided, monies that were paid to the franchisor.
6 They already have that.

7 THE COURT: So you want what the
8 franchisee pays to Mr. and Mrs. Allen.

9 MR. ASHLEY: Right. Because they're
10 claiming that they aren't receiving a part of the
11 tip. And when -- they say that Corey Paul provided
12 that at his deposition. He didn't provide that in
13 his deposition. He looked on his phone and said,
14 this is what we get. Nothing has been provided.

15 THE COURT: He testified to it.

16 MR. ASHLEY: Well, he testified to it.
17 We requested the documents and have not received
18 them.

19 THE COURT: Do you have any objection
20 to providing what a franchisee pays to the
21 franchisor?

22 MR. LACKE: Your Honor, we do not.

23 THE COURT: You will get it.

24 MR. ASHLEY: Okay.

25 THE COURT: What's next?

1 MR. ASHLEY: With franchisor
2 defendants, they are correct; they had provided a
3 list of employees. I don't know if you want to get
4 into the motion to compel with the franchisee
5 defendants yet.

6 THE COURT: What do you want them to
7 do?

8 MR. ASHLEY: Well, this is a little bit
9 different because they have -- the only documents
10 they have provided to us are tax returns from their
11 clients and a couple of sales summaries.

12 THE COURT: All right. Well, let me
13 stop you there. If it has tax returns from the
14 clients, you know who they are, then, correct?

15 MR. ASHLEY: Correct. We've asked for
16 a number of other things, and that's all they
17 provided to us.

18 THE COURT: Go ahead. What else have
19 you asked for that you haven't received?

20 MR. ASHLEY: An employee handbook. We
21 -- it might be quicker if I can approach. I can
22 give you a sample of their responses.

23 THE COURT: All right. Which ones do
24 you want to go to?

25 MR. ASHLEY: Your Honor, if you look at

1 -- so these are the responses from Ladles James
2 Island. There is no disagreement that there is
3 standing in the case. So to give you a sample, if
4 you look at Number 25, we asked, do you use a
5 third-party payroll processing service? They
6 objected to that as being unduly burdensome.

7 Number 28, we asked, you know, to state
8 which employees are responsible for payroll,
9 signing checks, handling the tip policy, and
10 accounting and receipts. They answered -- they
11 objected to that as being unduly burdensome.

12 And this goes on. We asked them for
13 payroll documents. They object to that as being
14 unduly burdensome. That was Number 30.

15 THE COURT: Okay.

16 MR. ASHLEY: And within the stuff that
17 we've requested the list of employees; they
18 objected to that.

19 THE COURT: Well, employees would have
20 come with tax returns. Am I correct or incorrect?

21 MR. ASHLEY: No, that is not correct.
22 The tax returns is just what they made for the
23 year. It does not have a list of employees. It's
24 not the employees' tax returns.

25 THE COURT: Oh, I assumed that's what

1 it was.

2 MR. ASHLEY: No. When I say -- all the
3 documents they produced are just the annual tax
4 returns for the company.

5 THE COURT: Got you. I thought you
6 meant each individual employee.

7 MR. ASHLEY: No, sir.

8 THE COURT: Okay. Yes, sir,
9 Mr. Ferrara, what would you like to tell me?

10 MR. FERRARA: Yes, Your Honor, may it
11 please the Court.

12 As to James Island, I understand that
13 the plaintiffs would like my client to present a
14 list of employees and their contact information and
15 financial information, but we objected to that,
16 Your Honor, due to privacy concerns. And since
17 this time, they have issued a subpoena -- that's
18 what I referenced earlier -- to the Department of
19 Workforce in November, Your Honor, asking for DEW
20 to provide all of that information.

21 And so not only as to James Island, but
22 as to every Ladles in this lawsuit. And I
23 understand there is an objection by the Department
24 of Employment Workforce, but I think that they have
25 all the information that -- apparently that the

1 plaintiffs think that they need.

2 But, respectfully, Your Honor, I know
3 that the plaintiffs are entitled to discovery, and
4 we've presented everything that we have in our
5 possession that would not subject my client to
6 further liability, but we are so deep down the
7 rabbit hole with this in that -- I guess, we'll
8 deal with the motions after we get done with the
9 motion to compel.

10 The general objections are that as to
11 Craig Chappell, any information that my client has
12 in their possession, we have produced it. Craig
13 Chappell has been deposed. Terry Owens has been
14 deposed since this discovery, Your Honor, and they
15 have been able to ask her all of the questions
16 directly from the horse's mouth that she had. And
17 she has presented everything.

18 The only thing that we didn't present,
19 because we didn't have possession of it, was -- now
20 I have requested credit card receipts from Square
21 directly, and they have not presented -- Square has
22 not presented that information to me.

23 My client doesn't have this
24 particularized information that relates to the
25 dates Mr. Chappell worked. As soon as I get that,

1 I spoke with Mr. Ashley about that -- as soon as I
2 receive that we are going to produce that.

3 It's burdensome for my client to -- my
4 client doesn't keep individualized records of each
5 transaction that the discovery responses seek to
6 discover, you know, with this kind of -- you know,
7 throw everything against the wall and see if
8 something sticks.

9 So what we have done, Your Honor, as
10 they requested everything that's in our control
11 from Square --

12 THE COURT: Well, let me ask Mr. Ashley
13 this. In the deposition, did they testify if there
14 was a third-party payroll processing service?

15 MR. ASHLEY: They may have. I'm not
16 sure.

17 THE COURT: Did they testify that they
18 were aware of all of the employees, members or
19 officers that responded that has had any
20 responsibility for payroll signing or dispersing
21 paychecks or wages, handling tips, accounting,
22 credit card receipts, bookkeeping and accounting,
23 and hiring and firing employees? Did you ask that
24 question at the deposition?

25 MR. ASHLEY: Your Honor, I did and --

1 but you can ask a question. But what we're asking
2 for are the payroll documents to show what the
3 employees are being paid and to know whether or not
4 they're following the tip policy.

5 THE COURT: Okay. What is your
6 position as to that?

7 MR. FERRARA: Respectfully, Your Honor,
8 just for clarification to the Court, Terry Owens is
9 the chief cook there for Ladles James Island. And
10 she testified as to all of those matters Your Honor
11 inquired about. She is the person who is
12 responsible, and she answered those questions.

13 THE COURT: Mrs. Owens told you about
14 all of that information. And so what else do you
15 want further? Do you want a list of it?

16 MR. ASHLEY: Well, for example, payroll
17 documents are not -- she couldn't have testified to
18 that because she didn't bring them.

19 THE COURT: What's your position,
20 Mr. Ferrara, about the payroll documents? Because
21 it's all about that. This whole case is about
22 those sheets of paper. That's what this is all
23 about.

24 MR. FERRARA: Yes, Your Honor. The
25 payroll documents as to Mr. Chappell, they are not

1 seeking those. They are asking for all of the
2 payroll information and confidential information of
3 the employees.

4 And similar to Mr. Shelbourne's
5 objection as to privacy, we objected on privacy in
6 that to provide all of the employees for the last
7 three years with their name, address, social
8 security number, and their wages, I didn't want my
9 clients who inquired of me whether they should just
10 volunteer that.

11 I believe they would be subjecting
12 themselves to liability to provide all of that
13 information.

14 THE COURT: What would the liability
15 be?

16 MR. FERRARA: Privacy information and
17 that -- private confidential information. And
18 since then --

19 THE COURT: Well, I agree. I don't
20 think they would be entitled to somebody's social
21 security number or something like that. Obviously,
22 if you have that information, I mean -- and you're
23 addressing your name, you can do whatever you want.
24 Not that I agree with that. But does your client
25 have any objection to giving them a list of

1 employees?

2 MR. FERRARA: No, I don't have -- I
3 guess -- I don't have a problem if Your Honor
4 issues that order. But, importantly, Your Honor,
5 the Department of Employment Workforce has the
6 additional information about wages and things that
7 I think the plaintiff is seeking.

8 THE COURT: Do you think you will get
9 it from them?

10 MR. ASHLEY: They have entered a motion
11 to quash and it's -- we've got -- there's going to
12 be a hearing on it in Richland County.

13 THE COURT: Oh, it's up in Columbia.

14 MR. LECLERCQ: Judge, I tried to get
15 their counsel to agree to have it heard today so we
16 could settle it all at once. And if we are going
17 to reset in February, I will ask them if they will
18 waive their objection to having it heard in
19 Charleston.

20 THE COURT: I'm happy to do that.

21 MR. FERRARA: Your Honor, I understand
22 that this -- in this case the plaintiffs are
23 alleging many things, but all of the information
24 that my clients have in their possession we have
25 presented.

1 And the particular financial
2 information that they are seeking from every one of
3 my clients as far as sales, credit card tips, and
4 things like that, that is burdensome for my clients
5 to try to track down. None of my clients keep
6 detailed records and --

7 THE COURT: I would agree with that. I
8 mean, to produce every single transaction that the
9 person gets to on there and get tipped \$1, I mean,
10 that's -- that could be 80 a day.

11 MR. ASHLEY: Your Honor, I don't think
12 that's what we've requested. We just requested --
13 the payroll is completely separate from that.
14 That's not each transaction. I don't think that we
15 have requested each transaction.

16 Payroll is simply what they've paid
17 each employee every two weeks, or how ever often
18 they get paid.

19 THE COURT: Okay.

20 MR. FERRARA: Respectfully, Your Honor,
21 what relevance does that have to claims that
22 unknown people may have a claim to a portion of a
23 credit card tip? I thought that the payroll
24 question was resolved when the subpoena was issued
25 to the Department of Employment Workforce.

1 They have a total of -- and, you know,
2 every one who is on the 941s of my clients, all of
3 my clients, and what they were paid quarter by
4 quarter, but I still don't know how that's
5 relevant. That's what I'm referring to, Your
6 Honor.

7 We're way down in the rabbit hole.
8 This case -- if we go back to the beginning, this
9 case as we sit here today, Your Honor, is
10 essentially just Craig Chappell, in his own
11 individual capacity versus James Island and for his
12 claim, rightfully so.

13 I mean, I understand his position that
14 he's claiming he's entitled to the credit card tips
15 of the days he worked. Square is getting that
16 detailed information, Your Honor, and we will have
17 that, but everything else is just -- just guesswork
18 by the plaintiffs.

19 He's not been certified as a class.
20 And I know Your Honor said you don't want to get
21 into that, but all of the other discovery motions
22 that are before Your Honor, I think we should
23 resolve that until later because -- or if you want
24 to resolve it now, that's fine, Your Honor, but all
25 of that stuff relates to Your Honor's decision

1 about whether you would certify a class for this.

2 So respectfully, Your Honor, there has
3 been plenty of time for the plaintiff to discover
4 everything they would need to be able to move
5 forward with the class. I know that's outside of
6 this.

7 But all of the -- the only reason I
8 mentioned that is because all of these other
9 arguments about discovery and motion to compel
10 relate to the other defendants that are not James
11 Island. I don't -- my client James Island is happy
12 to provide -- I can get my client to provide a list
13 of the employees if Your Honor does a Form 4 in the
14 last three years to James Island.

15 THE COURT: Okay. I'll get you that.
16 No problem. Okay. So let me just -- as a quick
17 aside, you just represent James Island. Who
18 represents all these other people?

19 MR. FERRARA: I do. My office
20 represents the other people as well, Your Honor.

21 THE COURT: Knightsville?

22 MR. FERRARA: Yes.

23 THE COURT: So everybody. Fresh
24 Fields?

25 MR. FERRARA: Everybody, Your Honor.

1 And I guess for the record if you would allow me, I
2 can name out the defendants that I represent
3 because there are several defendants that I think
4 were not served. They are still in the caption,
5 but they weren't served and there's still no
6 appearance by anyone.

7 THE COURT: Okay. If you want to, it's
8 fine. I just wanted to make sure we weren't just
9 dealing with just one being Ladles James Island,
10 because I know we already dealt with Ladles Mount
11 Pleasant.

12 MR. FERRARA: And, Your Honor, I will
13 represent as an officer of the court, my office as
14 of last Friday has answered all of the discovery of
15 all the defendants that I represent. And I
16 understand the plaintiffs' position about the
17 objection.

18 The plaintiffs really want all of the
19 employees of each store for the past three years.

20 THE COURT: How hard is that for a
21 manager to get?

22 MR. FERRARA: Many of my clients are
23 small operations and they don't have it, but once I
24 saw that -- once I saw that there was a subpoena
25 that was issued to the Department of Employment

1 Workforce, I thought that that argument was
2 resolved.

3 I mean, the rules for discovery say
4 that if it's -- we objected under burdensome. And
5 it appears that the plaintiff, by my reading of
6 this subpoena, had agreed and said, okay. Well, I
7 will go to the Department of Employment Workforce
8 and they can give out the information.

9 It's burdensome, Your Honor,
10 financially for my clients. They've had to pay me
11 for this multi-year litigation.

12 THE COURT: Is this something that the
13 Department of Labor can just print out?

14 MR. ASHLEY: They have, but they
15 objected to it.

16 THE COURT: Yeah, I'm going to handle
17 that. So let's do this. Give me your argument
18 real quickly as to why you want to have Ms. Charpia
19 intervene.

20 MR. LECLERCQ: Thank you, Judge. The
21 reason is, she says that the same policy is going
22 on where she works that Craig Chappell. And she
23 came to our attention not through good faith
24 participation in discovery, but through our own
25 investigation.

1 And so it is the exact same policy
2 which is going on at West Ashley as was going on in
3 James Island. And so we think that the amendment
4 of the complaint, which will add a number of claims
5 as well as to add Ms. Charpia, they are on notice.

6 We styled it as a class action from the
7 very beginning. They have been on notice that
8 additional class members would be --

9 THE COURT: Well, sure. That's all you
10 keep asking for is the employees, employees,
11 employees --

12 MR. LECLERCQ: That's right.

13 THE COURT: -- so certainly they're
14 aware of that.

15 MR. LECLERCQ: So they have been fully
16 aware of that and will have the opportunity to take
17 whatever shot they want to to try to refute that.
18 So it's -- we think it's a very liberal standard
19 for amending complaints in South Carolina under
20 Rule 15.

21 And really the only prejudice that the
22 cases talk about is lack of notice, or lack of an
23 opportunity to really -- to address these. And
24 none of that -- none of that prejudice we think
25 applies here.

1 So it is -- she is someone that is also
2 saying that -- that there is apparently evidence of
3 fraudulent behavior going on because there was
4 fraud in the inducement in her own agreement as to
5 what she was told about the tip policy at the time
6 she was hired, as well as that the Ladles
7 franchises are instructing their employees to
8 deceive the customers as to who gets the tips.

9 And we know that the tips are a
10 gratuity that should belong to the servers.

11 THE COURT: I got all that. I'm just
12 trying to figure out what -- I mean, what do you
13 consider to be the prejudice if she intervenes?
14 They're just trying to add another person from
15 another store.

16 MR. FERRARA: They are, Your Honor, but
17 Mr. LeClercq respectfully is confusing two separate
18 motions. One is the motion to intervene, and I
19 would like to discuss that with Your Honor; and the
20 second -- the second part of it is an alternative
21 to amend, which is really to add a new party.

22 So let's -- if we go back to the
23 beginning, Your Honor, kind of like this case, the
24 motion to intervene, there is permissive
25 intervention, as Your Honor is aware of, and then

1 there is nonpermissive intervention. In this case,
2 the -- I filed a memo outlining these arguments,
3 Your Honor.

4 And I was looking to see online -- I
5 filed it electronically; I can't see it in the
6 record, but I will make sure that that gets filed.

7 But attached to my memo, Your Honor,
8 there is -- it's a very important instructive on
9 this. There is a signed addendum by Laney Charpia
10 -- and may I approach, Your Honor?

11 THE COURT: Absolutely.

12 MR. FERRARA: I have provided
13 everybody, the plaintiff, a copy of this. And,
14 respectfully, Your Honor, I will give you a moment
15 to look at that.

16 THE COURT: Okay.

17 MR. FERRARA: Ms. Charpia is not
18 similarly situated to that of Craig Chappell.
19 Craig Chappell, there's no signed agreement like
20 this. Laney Charpia, respectfully, Your Honor,
21 doesn't even have a claim under the failure to pay
22 wages. She's agreeing by this written document to
23 pool tips in exchange for a higher hourly wage. It
24 is very clear to me that that is her claim.

25 And so when we talk about the

1 intervention, she doesn't have a right to intervene
2 in this litigation by Craig Chappell because she
3 has a different interest than Chappell.

4 I understand if I look at the pleadings
5 -- the proposed amended pleadings liberally, it
6 appears Ms. Charpia may want to file an action for
7 unjust enrichment as to these credit card tips.
8 And I know that's down the road, but just these
9 issues I'm bringing up now, Your Honor, support the
10 position that she should not be allowed to
11 intervene and muddy the water up in this case with
12 Craig Chappell. She can file her own lawsuit in
13 her own individual capacity.

14 When I read the pleadings, as well, it
15 looks like maybe she's trying to be substituted as
16 class representative instead of Mr. Chappell. And
17 I gather that by looking at her affidavit. She
18 said she wouldn't have any conflict of interest.

19 I don't know what her position is, but,
20 importantly, Your Honor, my client as of today,
21 Corey Paul, advised me that Laney Charpia still
22 works for him at Ladles West Ashley. She works one
23 day a week. She makes \$9 an hour. She agreed to
24 this agreement when she got hired and she still
25 goes to work today, every day under these terms.

1 And so I submit to you that really
2 adding her into this litigation is just an attempt
3 to add a new party and kick the case out for trial.
4 All of the defendants, all of my clients,
5 respectfully, Your Honor, do want to have this
6 litigation resolved. We want to go to trial or get
7 it resolved.

8 And so adding Laney Charpia in this
9 case, Your Honor, would kick the case out 180 days,
10 and it's highly prejudicial to all of my clients
11 who have already paid for all of the discovery.

12 Your Honor, she should not be allowed
13 to intervene and -- under Rule 24 because she
14 doesn't have an interest in this litigation. In
15 her affidavit -- what's before the Court right now,
16 Your Honor, is that Craig Chappell asserts that he
17 was an employee of Ladles James Island and that he
18 has a claim for credit card tips.

19 He's also asserting to be a
20 representative for all of the other restaurants and
21 the potential employee who might have a claim for
22 credit card tips. Laney Charpia is not the same as
23 Mr. Chappell. In fact, she has a document here
24 that I presented to you, and I don't think it's in
25 dispute, and -- that says she is agreeing to share

1 credit card tips --

2 THE COURT: All right. I get it. I
3 understand what you're saying. Here's what we're
4 going to do.

5 At this point in time, just to be
6 dispositive of these motions and just not have them
7 sit out there and just kind of move this case
8 forward, I am going to -- as to the motion to
9 intervene, I am going to deny that. If she wants
10 to bring her own lawsuit, she's certainly welcome
11 to.

12 The defendants' motion for summary
13 judgment as to Mr. Koon's clients, which is the
14 Allens and Ladle Franchise, Inc., and Ladles Soups,
15 LLC, Mr. Koon, I'm going to consider that. If you
16 would send me a proposed order on that. I want to
17 take a look at that, please.

18 Motion for summary judgment as to your
19 clients currently right now, Mr. Ferrara, I
20 understand the current position that you all are
21 in, you're moving forward; I'm going to deny your
22 motion for summary judgment as to that one.

23 Plaintiffs' motion for class
24 certification just to be dispositive, you can bring
25 the motion back at a later date, but currently I'm

1 denying that motion. I've already denied the
2 motion to intervene. Plaintiffs' motion to amend,
3 at this time I will deny that.

4 I don't know what the motion for
5 continuance is, and motion to compel discovery is
6 granted.

7 Mr. Lacke, if you will get the
8 information that you indicated you would make
9 available to the plaintiffs, I would appreciate
10 that.

11 And, Mr. Ferrara, if you would sooner
12 than later make that information from Square
13 available to the clients sooner than later.

14 To be of assistance, I'm going to
15 retain jurisdiction over this case for the purpose
16 of discovery to try to see if I can't help you all
17 move this along.

18 We are going to hear the motion to
19 quash. See if the attorney from Richland will come
20 here; I would be happy to hear it then. Get in
21 touch with my office and I -- I'll just bring him
22 down here. I mean, it's not that hard and we'll
23 just hear that. I think that would be an
24 enormously large benefit for you all if, in fact,
25 we can get that information from the employment

1 board to see if you can move this case forward or
2 not.

3 Get with my office. We're going to do
4 that the week of February 17th. That's the next
5 common pleas nonjury. All right.

6 MR. KOON: Fifteen days --

7 THE COURT: As long as you need.

8 MR. SHELBOURNE: Judge, this motion to
9 reconsider summary judgment you granted us, I
10 assume that's denied.

11 THE COURT: Denied as well.

12 We're going to take a five-minute
13 break.

14 Yes, sir.

15 MR. ASHLEY: Judge, we did have one
16 more issue and that is the motion to deem request
17 to admit admitted.

18 THE COURT: What was that?

19 MR. FERRARA: I'm ready to argue that,
20 Your Honor, if you are. There was a request to
21 admit, and since it's their motion, I guess I'll
22 let them speak.

23 THE COURT: Yes, sir. Go ahead.

24 MR. ASHLEY: In August, we served
25 request to admit on Mr. Ferrara. He represents the

1 large group of franchise defendants. We did not
2 receive responses until this morning, and that's
3 well past, you know, 30 days that they have to
4 respond. We're just asking if the request to admit
5 be deemed admitted.

6 MR. FERRARA: Respectfully, Your Honor,
7 another associate in my office was handling it,
8 but, nonetheless, they were not properly served.
9 August 23rd, I looked back at an e-mail,
10 Mr. Ashley's office e-mailed all of the defendants.

11 And then if we look at the request to
12 admit, Your Honor, it says to all defendants, but
13 the affidavit of service said it was mailed to
14 Kerry Koon's office and e-mailed to everybody else.

15 My office -- the associate in my
16 office, Alex, who is no longer with me, assumed
17 that that was as to Ladles Corporate which they
18 answered. Mr. Shelbourne also answered. But,
19 respectfully, at that time, we didn't have
20 electronic filing and there was never a hard copy
21 mailed upon me and never served upon me. It was
22 just e-mailed to me.

23 THE COURT: Did you answer?

24 MR. FERRARA: I did, Your Honor. As
25 soon as I received this motion I answered these --

1 these requests to admit, and I gave those to
2 Mr. Ashley this morning. And I've answered those
3 within 30 days of these requests to admit being
4 filed.

5 I think this motion, Your Honor, was
6 filed in December, less than 30 days ago. And
7 that's when I had notice that there was a request
8 to admit that had been served.

9 THE COURT: I agree, there is a lot of
10 moving parts in this case. I will deny your motion
11 and just keep the discovery moving. Okay.

12 We'll take a five-minute break.

13 (These proceedings were concluded at
14 1:06 p.m.

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1 CERTIFICATE OF REPORTER

2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 6th day of April, 2020 at
13 Charleston, Charleston County, South Carolina.

14

15

16

17 S/Carol Denise Lauder
18 Carol Denise Lauder
19 Registered Professional
Reporter, CP
My Commission expires
February 27, 2028

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