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. 2020-000399

Teri Chappell, as Personal Representative of the Estate of 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; 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,

Of Which Ladles Franchising Inc., Ladlessoups, LLC, Sue Allen, and Tracy Allen are the Respondents.

FINAL REPLY BRIEF OF APPELLANT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents.

I. THERE WAS EVIDENCE BEFORE THE TRIAL JUDGE THAT AN AGENCY RELATIONSHIP EXISTED BETWEEN RESPONDENTS AND THE LADLES SOUPS FRANCHISEES INCLUDING LADLES SOUPS JAMES ISLAND

In their Initial Brief, Respondents argue that instead of the language of the Marketing Fund paragraph in the Franchise Agreement making Ladles Franchising an agent for the Ladles franchisees with regard to the Marketing Fund, it actually makes them a principal of the franchisees because the paragraph "cedes control of The Marketing Fund to the sole discretion of Ladles Franchising, Inc. . . .." (Resp. Int. Brf. at p. 9). However, this argument does not save Respondents from liability under the SCPWA because an employer is defined as "every person, firm, partnership, association, *corporation*, receiver, or other officer of a court of this State, the State or any political subdivision thereof, *and any agent* or officer of the above classes employing any person in this State." S.C. Code Ann § 41-10-10(1). (Emphasis added). Ladles Franchising is an employer under the statute whether it acts as principal or agent of the franchisees. The language of the Franchise Agreement that states ". . . you acknowledge that we have the right and you hereby authorize us, to settle or otherwise compromise all disputes with regard to the Marketing Fund" clearly provides Ladles Franchising the power to enter agreements with third parties that bind all of the Ladles franchisees. (R. p. 711; Franchise Agreement, p. 27). Under the Franchise Agreement, the Ladles franchisees agreed to make Respondents someone responsible for "the management of *some business* to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties." *Colleton County Taxpayers Ass'n,* 371 S.C. at 239, 638 S.E.2d at 693 (2006). To the extent that the language of the

Franchise Agreement can be construed to make Ladles Franchising a principal of the Ladles franchisees for the purpose of the marketing fund, it only advances Appellant's argument that the trial court erred in granting summary judgment for Respondents. Moreover, it obviously does not preclude Ladles Franchising from exercising sufficient degree and control to act as a principal of the Ladles franchisees in other areas of their agreement as noted below.

Respondents also cite purported "Independent Contractor" provisions of the Franchise Agreement for its assertion that no agency relationship existed between Ladles Franchising and the Ladles franchisees. However, "[u]nder South Carolina law, the terms of a consignment agreement are not conclusive on the question of independent contractor, where there is evidence [beyond] the contract which establishes a true agency relationship." *Fernander v. Thigpen*, 278 S.C. 140, 144 (1982) (citing *Burriss v. Texaco, Inc.*, 361 F.2d 169, 172 (4th Cir. 1966); *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (S.C. 1939)). Specifically, Respondents cite Paragraph 5(a) of the Franchise Agreement which states "You acknowledge that no agreement that we make with any third party is for your benefit. Neither we nor you will interfere with each other's contractual relations." (Resp. Int. Brf. at p. 10; R. p. 697; Franchise Agreement at p. 13). However, the language of this paragraph is in direct contradiction of the language of the Marketing Fund paragraph that states:

> *You agree that because of the value of advertising to the goodwill and public image of Ladlessoups' Restaurants*, we may maintain and administer a marketing fund (the "Marketing Fund") for the marketing program that we deem necessary or appropriate, in our sole discretion. You agree to contribute to the Marketing Fund three percent (3%) of Gross Sales of the Restaurant calculated in the same manner as, and payable monthly together with, the royalty fees due under this Agreement.

(R. p. 709; Franchise Agreement at p. 25). (Emphasis added).

There can be no doubt from the Franchise Agreement language cited above, including the requirement that Ladles franchisees contribute a percentage of their gross sales to the fund, that

there are agreements entered into by Ladles Franchising with third parties for the benefit of the Ladles franchisees thus creating an agency relationship between them.

Additionally, Respondents cite deposition testimony from franchise owners Teri Owens, Corey Paul, and Julie Dyke, as well as Respondent Sue Allen purporting to show that there was no agency relationship between the franchisor and the franchisees because Ladles Franchising did not have control over the tipping policy of the Ladles franchisees. (Resp. Int. Brf. at pp. 10-13). However, this is contradicted by the language of the Franchise Agreement as well as the franchise owners' own deposition testimony creating at a minimum, a question for the jury. As noted in detail in Appellant's Initial Brief, the Franchise Agreement was all inclusive in requiring the franchisees to operate their Restaurant in full compliance with all applicable laws and regulations which would naturally include those relating to wages such as the SCPWA. (R. p. 707, subsection E; Franchise Agreement at p. 23, subsection E). Further, Ladles owners Corey Paul and Teri Owens both testified that Ladles Franchising had the power to determine how the franchisees handled the payment of credit card tips to their employees. (R. p. 778, l. 5-13; Depo. of C. Paul at p. 74, l. 5-13; R. p. 763, l. 23 to R. p. 764, l. 17; Depo. of T. Owens at p. 48, l. 23 – p. 49, l. 17).

Additionally, in their answer to Appellant's Interrogatory No. 34 regarding meetings with franchisees that discussed the franchisee or franchisor's policy relating to tips, Respondents answered:

> Suzie Allen, Teri Owens, and Carol Ellenberg, as sisters and business associates, have had informal discussions regarding restaurant practices in the past. In all past discussions that Suzie Allen has ever had with Teri Owens, Carol Ellenberg, or any other franchisee with regard to payroll and tipping practices, Suzie Allen has been consistently clear in stating that all tip monies belong to the employees and **may never** be permanently retained by the owner and/or franchisee. However, the Franchisor (Ladles Franchising, Inc.) has never mandated any payroll practices or policies for any of its franchisees, each of whom have always maintained independent

> control and authority to establish their own payroll practices and policies. (emphasis added).

(R, p. 113; Resp.'s Answer to App.'s Interrogatory No. 34).

A jury could reasonably conclude from this answer that the Franchisor Defendants are describing meetings where the Franchisor gave a directive to the individual franchisees regarding their tipping policies[1]. Admittedly, the last sentence of this answer appears to contradict the first portion of the answer. However, this ambiguity should be viewed in a light most favorable to the non-moving party and left to a jury to decide. The answer plainly states that Allen had discussions with the individual franchisees regarding their tipping policies and conveyed to them what they "may never" do.

At a minimum, this evidence is sufficient to create a genuine issue of material fact that Ladles Franchising exercised a sufficient degree of control making it liable as a principal of the Ladles franchisees.

Further, Respondents argue that Ladles Franchising had an insufficient degree of control over the Ladles franchisees because the requirements of the franchise agreement were only to protect the Ladles "system." In support of this argument, Respondents cite *Allen v. Greenville Hotel Partners, Inc.,* 409 F. Supp. 2nd 672 (2006). However, the franchise agreement in *Allen*, unlike the agreement here, specifically provides that the franchisees *not the franchisor* have sole control over hiring, firing, supervision, and discipline as well as training of its employees. *Id* at 677. The Ladles franchise agreement goes far beyond merely guarding its trademark by assuming uniform appearance and operations. Significantly, unlike the agreement in *Allen*, the Ladles

[1] Notably, Respondents' answer correctly states that tip monies belong to the employees and may never be permanently retained by the owner. However, this is in complete contradiction to the tipping policy created by Sue Allen and implemented by the individual franchisees. This may reflect Allen's mistaken contention (which Appellant disputes) that the credit card tips are used to subsidize the employees' hourly wages. (R. p. 804, ll. 6-25; Sue Allen depo. at p. 21, ll. 6-25).

agreement provides Ladles Franchising with "sole discretion" to replace restaurant managers at all of the Ladles locations. (R. p. 693, 1st para.; Franchise Agreement, p. 9, 1st para.). The Ladles agreement further provides Ladles Franchising with the power to determine the terms, qualifications, and experience of the General Manager hired by all of the Ladles franchisees. (R. pp. 707-708, Section F; Franchise Agreement, pp. 23-24, Section F). It is obvious from the terms of the agreement that Ladles Franchising intended to have control over the daily operations of the individual franchises because its agreement states that the General Manager which it has the power at its "sole discretion" to replace "shall have principal operational responsibility for the Restaurant . . .." *Id.*

Respondents cite a list of items from the Ladles Franchise Agreement purporting to show that this agreement is similar to the one described in *Allen*. (Resp. Int. Brf. at p. 15). However, these items are *in addition* to those granting Ladles Franchising substantial control over employment decisions relating to the daily operations of the franchisees which go far beyond the mere inspection for compliance with the franchisor's general standards.

At a minimum, Respondents' power under the agreement to replace, at its sole discretion, managers in charge of the daily operations of each Ladles location, is sufficient to create a genuine issue of material fact regarding an agency relationship between Ladles Franchising and the Ladles franchisees.

II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BECAUSE IT WAS PREMATURE DUE TO APPELLANT NOT HAVING A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY

Respondents incorrectly state that Appellant is raising the issue of Respondents' incomplete response to request for production number 11 for the first time on appeal. Appellant raised this issue in his February 7, 2020 Motion to Reconsider the trial court's January 30, 2020

Order granting summary judgment for Respondents. (R. p. 604; 2/7/2020 Mot to Recon. at p. 17). Specifically, Appellant argued:

> On January 16, 2020, the Franchisor Defendants produced 7 pages of what appear to be sales summaries for the individual franchisee locations. (Franchisor Defendants Supplemental RRFP) **(Exhibit 11)**. Nowhere in these 7 pages are royalty payments noted or is the issue of whether the Franchisor Defendants receive a portion of the credit card tips clarified in anyway whatsoever. Notably, the Franchisee Defendants still have not responded to this Court's order compelling them to respond.

Id.

Respondents further argue that request for production number 11 does not mention documentation regarding credit card tips. (Resp. Int. Brf. at p. 19). This argument misses the mark because, as discussed in great detail in Appellant's Initial Brief, the issue raised by Appellant is that Respondents came into possession of a portion of each franchise location's credit card tips because the Franchise Agreement requires the franchisees to pay a monthly royalty fee based on a percentage of "gross sales" which means "gross sales of all food, beverage, other menu items, merchandise, and goods *and* <u>*other services*</u> sold <u>*or performed by or for you or the Restaurant*</u> . . . whether for cash or credit." (R pp. 701-702; Franchisor Agreement at pp. 17-18). (Emphasis added). Based on the language of the agreement, a jury could reasonably conclude that the "gross sales" total would naturally include typical tips paid by customers for food service. Despite Appellant's request for production number 11 seeking a "complete, <u>*itemized*</u> accounting, financial summary of all amounts paid *and/or owed to you by any other party to this action* . . .," Respondents failed to produce any documentation contradicting the plain language of the Franchise Agreement[2].

[2] To the extent that Respondents are claiming that they did not understand request for production number 11 seeking an itemized accounting of all payments received by other parties to this action to include an itemized accounting of the royalty fees paid by the Ladles franchisees, that contention has no merit as evidenced by the lengthy discussion

In their Initial Brief, Respondents cite deposition testimony of Sue Allen in an attempt to argue that the issue of whether credit card tips were included in the calculation of royalties was specifically answered in the negative. (Resp. Int. Brf. at p. 19). However, Respondent's own self-serving testimony that "gross sales" did not include credit card tips, without anything further, is insufficient for summary judgment where a jury could reasonably conclude otherwise from the language of the Franchise Agreement. (R. pp. 701-702; Franchisor Agreement at pp. 17-18). This is particularly the case here because the party providing the testimony is the same party that failed to provide requested documents relating to that testimony.

Surprisingly, Respondents cite deposition testimony from Teri Owens (R. p. 762, ll. 7-20; Teri Owens depo., p. 33, ll. 7-20) purportedly to show that she testified that "gross sales" do not include credit card tips for the purpose of determining the royalty fee paid to Respondents. (Resp. Int. Brf at p. 20). This testimony from Owens is significant because it actually *supports* a finding that the definition of "gross sales" in the Franchise Agreement includes credit card tips. She states, "Tips are included in – I think they're included in gross, but I'm not sure. They are not included in net." (R. p. 762, ll. 14-17; Teri Owens depo., p. 33, ll. 14-17). Presumably, Respondents are depending on the portion of Owen's testimony where she concludes, without explanation, that she does not pay a percentage of the tips to Ladles Franchising while vaguely citing a "Square Report" that was not available at her deposition and was never produced by any party and therefore, is not part of the record on appeal. The information in this "Square Report" regarding royalty fees would likely have been contained in the itemized accounting of payments requested by Appellant which Respondents failed to produce. After failing to produce this information, they cannot now rely on material not contained in the record on appeal.

---

regarding the definition of "gross sales" as it relates to royalty fees per the Franchise Agreement at the January 6, 2020 hearing. (R. p. 856, l. 9 to R. p. 859, l. 23; Hr'g Tr. at p. 29, l. 9 through p. 32, l. 23).

Moreover, Respondents completely ignore the compelling testimony of Corey Paul (cited in App.'s Int. Brf. at pp. 27-28 and R. pp. 598-600; Motion to Reconsider at pp. 11-13) stating that "gross sales" include credit card tips. (R. p. 771, l. 20 to R. p. 772, l. 5; R. p. 773, ll. 2-9; R. p. 775, l. 11 to R. p. 776, l. 4; R. p. 780, l. 25 to R. p. 7891, l. 3; Corey Paul deposition, p. 36, l. 20 – p. 37, l. 5; p. 45, ll. 2 – 9; p. 48, l. 11 – p. 49, l. 4; p. 90, l. 25 through p. 91, l. 3). This testimony coupled with the testimony of Teri Owens and the plain language of the Franchise Agreement is more than sufficient to create a genuine dispute with Sue Allen's testimony. This is especially the case where Respondents failed to provide any supporting documentation to contradict the plain language of the Franchise Agreement. As discussed below, Respondents claim in their Initial Brief that Appellant argues a "tortured reading of the definition of gross sales in the Franchise Agreement." (Resp. Int. Brf. at p. 21). Although Appellant disagrees and contends that a jury could reasonably conclude that the plain language of the definition of gross sales in the agreement could include tips for food service, this is precisely why Appellant requested an itemized accounting of the sums paid to Respondents by the franchisees and why the trial court's grant of summary judgment without that material being provided was premature. It is disingenuous for Respondents to now scoff at this reasonable reading of the language of the agreement after it failed to produce any documents showing otherwise. The trial court ordered Respondents to provide the requested itemized accounting of payments received by the Ladles franchisees and they failed to provide it with their January 16, 2020 supplemental response. Appellant raised this issue with the trial court in its Motion to Reconsider (R. p. 604; 2/7/2020 Mot to Recon. at p. 17) therefore, preserving this issue for appeal.

In *Lanham v. Blue Cross and Blue Shield*, 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. *Lanham v. Blue Cross and Blue Shield*, 349 S.C. 356, 360-361, 563 S.E.2d 331 (S.C. 2002). Blue Cross responded with a motion for protective order or to quash and Lanham moved to compel. *Id* at 363. 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 Appellant 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, Appellant served his discovery requests on Respondents three months before their motion for summary judgment was filed. (R. pp. 080-092; R. pp. 093-100; App.'s INT and RFP). Additionally, unlike in *Lanham,* where the plaintiff was seeking *further* discovery, Appellant was 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 the trial court here actually granted Appellant's motion to compel but the Respondents failed to fully respond. Like the plaintiff in *Lanham*, Appellant was unable to fully respond to Respondents' motion for summary judgment due to their failure to produce information in their sole possession that was vital to Appellant's claims.

Based on the foregoing, Appellant was not provided a "full and fair opportunity to complete discovery" and summary judgment should be reversed.

III. THERE IS EVIDENCE THAT LADLES FRANCHISING, INC. RECEIVED AS WELL AS CONVERTED A PORTION OF CREDIT CARD TIPS CLAIMED BY THE APPELLANT

Respondents argue that "[n]o fair reading of the definition of 'Gross Sales' can be argued to include tips whether credit card or cash." This is a curious argument because Teri Owens and Corey Paul, both parties to the agreement, testified that they thought credit card tips were included in gross sales. As noted previously, Teri Owens testified: "Tips are included in – I think they're included in gross, but I'm not sure. They are not included in net." (R. p. 762, ll. 14-17; Teri Owens depo., p. 33, ll. 14-17). Additionally, Respondents take issue with the fact that Appellant cites multiple passages of clear, admissible deposition testimony of Corey Paul stating that credit card tips are included in gross sales instead of deposition passages of their own choosing. Corey Paul testified as follows:

Q: Okay. And so with the credit card tips, where do those go?

A: The credit card tips go into the – into the daily sales transaction.

Q: So that's, you know, whatever amount that comes in on credit card tips, that just gets added to the gross sales?

A: Uh-huh.

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

A: Those would be the store's tips.

(R. p. 771, l. 20 to R. p. 772, l. 5; Corey Paul deposition, p. 36, l. 20 – p. 37, l. 5).

As cited in Appellant's Motion to Reconsider, Paul further testified:

Q: So for 2017, Bates number 11, it's – for Fort Mill it's gross sales $342,321.88?

A: Correct.

Q: And the tip is how much?

A: $27,943.11.

Q: Is that the – that's – so those tips are counted into the gross, gross sales, correct?

A: Yes.

(R. p. 773, ll. 2-9; Corey Paul deposition, p. 45, ll. 2 – 9).

Although he is not sure whether the royalty fee is based on gross sales or net sales, Paul provides certain, admissible testimony that credit card tips are included in the gross sales:

Q: I mean, do you think that it is the gross sales? Would the credit card tips be included in the net sales?

A: The credit card tips would not be included in the net sales. **The credit card tips are included in the gross sales.** Which one is on the percentage bill for the royalties, I am not sure. I'd have to look. (emphasis added).

Q: What would you have to look at?

A: The bill that I received, to know which number.

Q: And you haven't – have you given those to your attorney?

A: The royalty bills?

Q: Yes.

A: No.

Q: Would it be in the franchise agreement?

A: It should be. Yes.

(R. p. 775, l. 11 to R. p. 776, l. 4; Corey Paul deposition, p. 48, l. 11– p. 49, l. 4). (Emphasis added).

Respondents ignore all of the testimony cited above by Appellant in his Initial Brief and Motion to Reconsider (App. Int. Brf at pp. 27-28; R. pp. 598-600; Mot Recon. at pp. 11-13). Instead, they zero in on *additional* testimony by Paul confirming that gross sales include credit card tips which they describe as "somewhat confusing." (Resp. Int. Brf. at p. 24). At his deposition, Paul was asked to review a copy of the franchise agreement and the definition of gross

sales which he then read into the record. (R. pp. 779-781; Corey Paul deposition, p. 89 – 91). Paul then testified as follows:

> Q; Okay. So in that list of things that are **not** included in the gross sales, credit card tips are **not** listed, correct? (emphasis added).
>
> A: Correct.

(R. p. 780, l. 25 to R. p. 781, l. 3; Corey Paul deposition, p. 90, l. 25 through p. 91, l. 3).

Paul was provided a copy of the Franchise Agreement and asked to look at a list of items that the agreement specifically excludes from the definition of "gross sales." (R. p. 702, Section C; Franchise Agreement, p. 18, Section C). Paul correctly noted that credit card tips are not among the items specifically excluded from the definition of "gross sales" per the agreement. There is nothing confusing about this question or Paul's answer. Ignoring the four separate times that Paul clearly and unambiguously testified during his deposition that credit card tips are included in gross sales, Respondents cite a single deposition passage resulting from two leading questions from the questioner that they claim erase all of his previous testimony. At best, this creates an issue of fact for the jury. Moreover, Respondents introduce this testimony in their brief by stating that "after reviewing his records Paul clarified his testimony . . .." (Resp. Int. Brf. at p. 24). Paul's "records" were not made available during his deposition, they were never produced despite being requested by Appellant and ordered to be produced by the trial court (R. pp. 004-006; 1/7/2020 Order granting Appellant's Motion to Compel), and therefore, are not part of the record on appeal.

As noted previously, the deposition testimony of Owens cited by Respondents (R. p. 762, ll. 7-20; Teri Owens depo., p. 33, ll. 7-20) is a conclusion without explanation that includes a vague reference to a "Square Report" that was not made available during her deposition and was never produced despite being requested and ordered by the trial court (R. pp. 004-006; 1/7/2020 Order granting Appellant's Motion to Compel) and therefore, is not part of the record on appeal.

Likewise, Respondents cite deposition testimony of Ladles Mt. Pleasant franchisee, Julie Dyke, which is also a conclusion without any coherent explanation that includes another vague reference to a "report" that was not available at her deposition, has never been produced, and is not part of the record on appeal. (R. p. 800, ll. 1-17; Julie Dyke depo., p. 36, ll. 1-17). She testifies that credit card tips are not included in the Franchise Agreement's definition of "gross sales" because "Gross would be we don't pay royalties on our sales tax, which is included in the gross," "So, to me, in my mind that is net. We don't pay royalties to [Sue Allen] on tax. *Id.* Julie Dyke also testified that she has "a report that shows me total sales, discount tax." *Id*. This testimony is in line with the language of the Franchise Agreement that excludes sales tax from the definition of "gross sales" but fails to support the finding urged by Respondents that credit card tips are not included in that sum. (R. p. 702, Section C; Franchise Agreement at p. 18, Section C). To the extent that Respondents are arguing that Julie Dyke testified that credit card tips are included in net sales, not gross sales, this testimony is soundly contradicted by Teri Owens and Corey Paul who testified to the opposite, thus creating a dispute as to a genuine issue of material fact. (R. p. 771, l. 20 to R. p. 772, l. 5; R p. 773, ll. 2-9; R. p. 775, l. 11 to R. p. 776, l. 4; R. p. 780, l. 25 to R. p. 781, l. 3; Corey Paul deposition, p. 36, l. 20 – p. 37, l. 5; p. 45, ll. 2 – 9; p. 48, l. 11 – p. 49, l. 4; p. 90, l. 25 through p. 91, l. 3); ((R. p. 763, ll. 14-17; Teri Owens depo., p. 33, ll. 14-17).

Based on the testimony of Teri Owens and Corey Paul cited above, there is ample evidence that they both understood the Franchise Agreement to define "gross sales" to include credit card tips. If two people who are actually parties to the Franchise Agreement are able to reach that conclusion, there can be no question that a jury could reasonably conclude the same. The testimony of Teri Owens and Corey Paul coupled with the plain language of the Franchise Agreement requiring franchisees to pay a monthly royalty fee based on a percentage of "gross

sales" that includes "services sold or performed by or for you or the Restaurant . . . whether for cash or credit" (R. pp. 701-702; Franchisor Agreement at pp. 17-18) is evidence that Ladles Franchising came into possession of and converted credit card tips claimed by Appellant.

IV. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT DID NOT HAVE STANDING TO SUE RESPONDENTS

Appellant has statutory standing against Respondents for his claim for violation of the SCPWA. In making their arguments to the contrary, Respondents rely solely on their incorrect contention that Ladles Franchising was not an employer under the act because no agency relationship existed between Respondents and the Ladles franchisees including Ladles James Island. For the reasons cited in Section I above as well as in Appellant's Initial Brief, Appellant has standing against Respondents under the SCPWA because evidence in the record would support a jury finding that Respondents are an employer under the statute because of the agency relationship between Respondents and franchisees and their right to control daily operations of the franchisees including, Ladles James Island (R. pp. 692-693, Sec. 2; R. pp. 707-708; R. p. 695, Sec. 4; R. pp. 703-709; R. pp. 709-712, Sec. 9; R. pp. 712-713, Sec. 10; R. pp. 713-715, Sec. 11; R. pp. 719-722, Sec. 14; Franchise Agreement at pp. 8-9, Sec. 2 and pp. 23-24; p. 11, Sec. 4; pp. 19-25; pp. 25-28, Sec. 9; pp. 28-29, Sec. 10; pp. 29-31, Sec. 11; pp. 35-38, Sec. 14); S.C. Code Ann § 41-10-10(1); *Dumas v. InfoSafe Corp.*, 463 S.E.2d 641, 645, 320 S.C. 188 (Ct.App. 1995); *Allen v. Pinnacle Healthcare Sys*., 394 S.C. 268, 276, 715 S.E.2d 362 (S.C. App., 2011); *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982); *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E. (2d) 24 (1980); *Jamison v. Howard,* 271 S.C. 385, 247 S.E. (2d) 450 (1978). Additionally, Respondents knowingly permitted and benefited from the policy of withholding credit card tips from employees like Appellant and had the power to stop it bud did not. *Id;* (R. p. 720; Franchise Agreement p. 36); (R. p. 811, ll. 4-8; Depo. of S. Allen at p. 69, ll. 4-8); (R. p. 778,

ll. 5-13; Depo. of C. Paul at p. 74, ll. 5-13); (R. p. 760, ll. 10-25; R. p. 761, ll. 1-18; R. p. 763, ll. 23 to R. p. 764, ll. 1-11; Depo. of T. Owens at p. 25, ll. 10-25; p. 27, ll. 1-18; p. 48, ll. 23 – p. 49, ll. 1-11).

Additionally, Appellant has constitutional standing against Respondents for his claim for conversion. In their Initial Brief, Respondents fail to address Appellant's claim for conversion in its discussion regarding standing. (Resp. Int. Brf. at pp. 25-28). Pursuant to Rule 17(a) of the South Carolina Rules of Civil Procedure ("SCRCP"), "[e]very action shall be prosecuted in the name of the real party in interest." To have standing, one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996); *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). A real party in interest is one with a real, material, or substantial interest. *Anchor Point Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 418 S.E.2d 546 (1992). Respondents improperly came into possession of at least a portion of credit card tips owed to Appellant. This was done through the royalty fee paid to Respondents by Ladles James Island. Supported by the language of the Franchise Agreement stating that the royalty fee is a percentage of the gross sales of the Ladles franchise and that gross sales includes services performed at the restaurant. (R. pp. 701-702; Franchise Agreement at pp. 17-18). These allegations are also supported by the deposition testimony of Ladles West Ashley and Ladles Fort Mill franchise owner, Mr. Paul, stating that credit card tips are included in the gross sales. (R. p. 771, l. 20 to R. p. 772, l. 5; R. p. 774, l. 16 to R. p. 776, l. 3; R. p. 780, ll. 16-25 to R. p. 781, ll. 1-3; Depo. of C. Paul at p. 36, l. 20 – p. 37. l. 5; p. 47, 1. 16 – p. 49, l. 3; and p. 90, ll. 16-25 – p. 91, ll. 1-3).

CONCLUSION

For the reasons stated above as well as in Appellant's Initial Brief, Appellant respectfully

requests that this Court reverse the trial court's decision to grant Respondents' Motion for Summary Judgment.

January 7, 2021

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this *Final Reply Brief of Appellant* complies with Rule 211(b), SCRAP.

s/David D. Ashley
David D. Ashley (S.C. Bar #76206)