THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, 13th Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-002114

5Star Life Insurance Co., ... Appellant,

v.

Peek Performance, Inc., ... Respondent

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant 5Star Life Insurance Company ("5Star") is a national insurance company. Respondent Peek Performance, Inc. ("PPI") is an insurance marketing organization. Affidavit of Clay Peek in Support of Motion for Entry of Default Judgment filed August 27, 2018 ("Peak Affidavit") (R. p. 143, par 1). PPI had been the most productive manager of business for 5Star. PPI was earning $20,000-$40,000 a month in commissions. (R. p. 143, par. 4). 5Star alleges that it overpaid about $110,000 in commissions to PPI. (R. p. 143, par. 3). PPI agreed to have one half of its monthly commissions withheld until the alleged overage was repaid. 5Star agreed to this arrangement, but failed implement it. (R. p. 143, par. 4).

A few months later, 5Star realized it had failed to withhold commissions as agreed, and again requested payment from PPI. Again, PPI invited 5Star to take one half of its monthly commissions until the alleged overage was repaid. Again, 5Star agreed to this arrangement, but failed again to implement this common-sense remedy. (R. p. 144, par. 5).

Earlier, 5Star had begun wrongfully transferring agents out from PPI's downline, without PPI's knowledge or consent, depriving PPI of its commissions. (R. p. 144, par. 6). Eventually, 5Star transferred nearly all the agents out of PPI's downline, so that 5Star was paying PPI virtually no commissions. (R. p. 144, par. 7). PPI suspects that the alleged overage arose from 5Star's wrongful transfer of agents out its downline, and therefore the alleged "over payment" might not be a valid debt. (R. p. 144, par. 8).

PPI made multiple efforts and overtures to discuss these matters with 5Star. On November 28, 2016, PPI communicated with James Bradford and Kimo Wong, high level

marketing employees of 5Star, who insisted that the debt was valid, even though they admitted that they had removed PPI's agents from its hierarchy in breach of the 5Star contract. (R. p. 144, par. 9).

Starting December 1, 2016, PPI repeatedly attempted to contact Mr. Moser, General Counsel for 5Star in an effort to address the relationship between PPI and 5Star, especially the wrongful transfer of sales agents out of PPI's downline without PPI's consent. The General Counsel refused to discuss PPI's concern, but insisted on demanding and discussing only the repayment of the alleged overage. (R. p. 144, par. 10).

PPI also repeatedly attempted to contact Mr. Singleton, president of 5Star. Singleton likewise refused to discuss the matter with PPI, but referred PPI back to its General Counsel, Mr. Moser, who refused to discuss the matter with PPI. (R. p. 145, par. 11). PPI wrote the Chairman of the 5Star Board, General Eberhardt (Ret.), who likewise refused to address the matter with PPI, but rather, referred PPI back to the General Counsel, Mr. Moser, and the marketing executives. (R. p. 145, par. 12). 5Star refused to discuss the wrongful transfers but insisted on discussing only the repayment of an alleged overage. (R. p. 145, par. 13).

On March 15, 2018, 5Star terminated PPI's contract. (R. p. 145, par. 14). Four days later, 5Star sued PPI to recover the alleged overpayment of commissions to PPI. (R. p. 145, par. 15).

On March 29, 2018, PPI Answered and Counterclaimed for breach of contract and defamation. (R. p. 145, par. 16). 5Star failed to file or serve a timely Reply to the Counterclaims. (R. p. 145, par. 18).

On May 10, 2018, PPI filed a Notice of Default and Motion for Entry of Default Judgment on the Counterclaims. (R. pp. 66-72), (R. p. 145, par. 19).

On May 17, 2018, 5Star filed a terse, conclusory two-page Reply, a general denial, mostly alleging a lack of necessary information. Reply. 5Star also purported to "reserve[] the right to allege additional defenses upon discovery and/or notice of facts sufficient to support said defenses." (R. p. 63, par. 9). (R. p. 145, par. 20). However, 5Star issued no discovery requests and made no effort to learn "facts sufficient to support said defenses." (R. p. 146, par. 21).

On May 10, 2018, PPI served Interrogatories and Requests for Production on 5Star. Discovery requests; (R. p. 7, ll. 5-6); (R. p. 146, par. 22); (R. pp. 265-317). 5Star failed to respond to the Interrogatories or the Requests for Production. (R. p. 7, ll. 5-6); (R. p. 146, par. 23).

On May 17, 2018, PPI moved to consolidate this action with a related action arising out of the same facts, Case No. 2017-CP-23-03269. (R. p. 81-84); (R. p. 146, par. 24). 5Star failed to respond to the Motion to Consolidate. (R. p. 7, ll. 9-10); (R. p. 146, par. 25).

On June 27, 2018, the Court held a hearing on the Motion to Consolidate. Notice of Hearing; (R. p. 146, par. 26). 5Star failed to appear at the hearing on the Motion to Consolidate. (R. p. 146, par. 27). On June 28, 2018, the Court entered an Order Consolidating the two cases. (R. pp. 1-5); (R. p. 146, par. 28).

On August 7, 2018, PPI wrote 5Star's counsel a follow up letter concerning the lack of response to the discovery requests. (R. p. 359); (R. p. 146, par. 29). 5Star failed to

respond to the letter or produce responses to the Interrogatories or Requests for Production. (R. p. 146, par. 30).

On August 17, 2018, more than three months after the Notice of Default and Motion for Entry of Default Judgment, 5Star filed its opposition to the Entry of Default, and the Motion for Entry of Default Judgment. (R. pp. 85-133); (R. p. 146, par. 31). 5Star also moved for relief from default. (R. pp. 150-152).

After written and oral argument, on September 13, 2018, the Circuit Court issued an Order for Entry of Default and Default Judgment (without damages) on PPI's Counterclaims. (R. pp. 6-14). The Court also ordered 5Star to respond to PPI's discovery requests. (R. p. 13, l. 5). Virtually all the documents necessary to quantify PPI's damages are in the possession of 5Star. Accordingly, the Circuit Court ruled it would allow sufficient time for discovery and then schedule a damages hearing. (R. p. 12, ll. 28-29).

On September 24, 2018, 5Star filed a Motion to Reconsider, citing Rules 55, 59 and 60. (R. pp.150-152). The Court had addressed each of 5Star's substantive arguments in its earlier Order entered September 13, 2018. (R. pp. 6-14). The Court denied the motion to reconsider. (R. pp. 15-17). The Court's legal basis for its ruling was that the error of counsel is the error of the client who hired the counsel. *Sundown Operating Company Inc. v. Intedge Industries Inc.* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009); *Simon v. Flowers*, 231 S.C. 545, 550-51, 99 S.E.2d 391, 394 (1957); *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (2007); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014).

5Star then gave Notice of Appeal. (R. p. 360-361). This Court, *sua sponte*, issued a letter that instructed the parties to submit legal memoranda addressing the appealability

of the orders. (R. pp. 378-379). The parties did so. Afterward, this Court issued a letter allowing the appeal to proceed. (R. pp. 383-384).

STANDARD OF REVIEW

1. **Affirmative Defense vs. counterclaim.**

"A . . . . Counterclaim . . . shall contain (1) short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." SCRCP 8(a). The determination of whether a filing is an affirmative defense or counterclaim appears to be a matter of law for the Court.

2. **Setting aside entry of default.**

"Determining whether to set aside an entry of default lies solely within the sound discretion of the circuit court and that decision will not be overturned absent a clear showing of an abuse of discretion." *White Oak Manor, Inc. v. Lexington Ins. Co.,* 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014), *quoting Richardson v. P.V., Inc.,* 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009).

> The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014).

3. **Rulings related to discovery and scheduling.**

All such matters are governed by the discretion of the trial judge. SCRCP 37, 55(b)(1), .

ARGUMENT

I. THE ORDERS ARE NOT IMMEDIATELY APPEALABLE.

The Circuit Court denied 5Star's Motion to Set Aside the Entry of Default under Rule 55(c). (R. pp. 6-14). 5Star then moved for reconsideration of that Order, which the Circuit Court also denied. (R. pp. 15-17).

A. The Denial of a Rule 55(c) Motion is not Immediately Appealable.

South Carolina courts have ruled, "[T]he grant or denial of a Rule 55(c) motion is not directly appealable under S.C. Code Ann. § 14-3-330 (1976)." *Jefferson by Johnson v. Genes Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988). *See also, Thynes v. Lloyd,* 294 S.Ct. 152, 363 S.E.2d 122 (1987) (the **denial** of a Rule 55(c) motion for relief from entry of default is not directly appealable); *Ateyeh v. United of Omaha Life Ins. Co.,* 293 S.C. 436, 361 S.E.2d 340 (Ct.App.1987) (the **granting** of a Rule 55(c) motion is not directly appealable). *North Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.,* 289 S.C. 480, 347 S.E.2d 97 (1986).

Appellant 5Star acknowledges this legal difficulty in footnote 2 in the Notice of Appeal: "[T]his ruling would not, if standing alone, be susceptible to an immediate appeal." Appellant then asserts, or implies, that "there is an appealable issue before the court." (R. p. 360, n. 2). 5Star argues that because it cited Rule 60 in its motion to reconsider the denial of the rule 55(c) motion, the second order denying 5Star's motion thereby becomes appealable. 5Star cites three cases. Two of the cases cited by 5Star addressed a Rule 60 motion after a final judgment, thereby complying with the final judgment rule. *Winesett v. Winesett*, 287 S.C. 332, 338 S.E. 2d 340 (1985) ("family court order terminating Respondent's obligation to pay alimony to appellant); *Ex parte Sadisco of Greenville, Inc.*

v. Greenville Cnty. Bd. of Zoning Appeals, 340 S.C. 57, 530 S.E.2d 383 (2000) (Circuit Court dismissed an appeal from the Board of Zoning Appeals for failure to timely file and serve the Notice of Appeal). Neither case was an interlocutory appeal. The appeal in the case at bar is interlocutory. No final judgment has been entered.

5Star also cited a case with facts much more analogous to the case at bar. *Thynes v. Lloyd.* Instead of supporting 5Star's argument, this holding and its reasoning support the argument of PPI.

> Respondent Jeanette F. Thynes commenced this action against appellant Dwayne Furman Lloyd by filing and serving a summons and complaint. More than thirty days thereafter, Mrs. Thynes filed an affidavit stating that Mr. Lloyd had failed to answer or otherwise respond to the complaint as required by the Rules. After this affidavit was filed, Mr. Lloyd filed and attempted to serve a pleading which he styled "Amended Answer." Mrs. Thynes refused to accept service. Mr. Lloyd then filed and served a **motion "requesting** a ruling that the appellant was not in default or in the alternative that any **entry of default be set aside** pursuant to South Carolina Rules of Civil Procedure 55(c) or in the alternative that time for answering be extended pursuant to South Carolina Rules of Civil Procedure 6(b)." **The Circuit Court denied the motion**. Mr. Lloyd appeals. **No final judgment has been entered** in the case.
>
> Rule 55(a) provides: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book)." It does not appear that the clerk actually entered default in the instant case. However, **whether default was actually entered is of no consequence since the entry of default is a purely ministerial act** which the clerk was required to perform once the default was made to appear by the affidavit of Mrs. Thynes.
>
> Rule 55(c) allows the Circuit Court to grant relief from the entry of default. In addition to seeking this relief explicitly, Mr. Lloyd sought, in the alternative, a ruling that he was not in default or a ruling extending the time for him to answer. A ruling that Mr. Lloyd was not in default would obviously be the same as granting him relief from the entry of default. A ruling extending the time for Mr. Lloyd to answer would necessarily require granting him relief from the entry of default. Thus, **it is clear that the motion of Mr. Lloyd was a motion under Rule 55(c)**.

> Rule 60(b) allows the Circuit Court to grant relief from a **final judgment**. Since **no final judgment has been entered**, it is equally clear that **the motion of Mr. Lloyd was not a motion under Rule 60(b)**.

Id., 294 S.C. 152, 153-54, 363 S.E.2d 122-23 (1987). Similarly, in the case at bar, no final judgment has been entered, and despite 5Star's attempts to cite Rule 60, 5Star's motions—both its initial motion and the motion to reconsider—are motions under Rule 55. Accordingly, the denial of these motions is not appealable.

5Star seems to **admit** that these Orders are **not final orders**. "[D]amages have not been determined." (R. p. 209, l. 23).

Ordinarily, an order must be a final order before it can be appealed. "Appeal may be taken, as provided by law, from any **final judgment**, appealable order or decision." South Carolina Appellate Court Rule 201. Similarly Rule 72 states, "Appeal to be taken, as provided by law, from any **final judgment** or appealable order." SCRCP 72. South Carolina's final judgment rule provides that, with few exceptions, an appeal lies only from a final judgment. *See North Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986); *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988).

These Orders from which appeal is taken are not final orders and are not appealable. The Order entered September 13, 2018, was a denial of 5Star's Motion under Rule 55(c). (R. pp. 6-14). The Order entered October 29, 2018, was the denial of 5Star's Motion under Rule 59(e) asking the Court to reconsider the denial of its Motion under Rule 55(c). (R. pp. 15-17). The Court has made no award of damages. Indeed, the parties need to complete Discovery, which has barely begun. Accordingly, the orders which 5Star appeals are not final orders, and they are not immediately appealable.

B. The Court Should Avoid Piecemeal Litigation.

The Court of Appeals provided a lengthy discussion of the appealability of interlocutory orders like the one in the case at bar. Piecemeal litigation, including piecemeal appeals are to be avoided.

> "The provisions of [s]ection 14–3–330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." *Hagood v. Sommerville,* 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." *Breland v. Love Chevrolet Olds, Inc.,* 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000).

Watson v. Underwood, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014). A Circuit Court's Order of Reference was not immediately available. "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." *Breland v. Love Chevrolet Olds, Inc.,* 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000).

5Star cites *Hite v. Thomas & Howard Co*, 305 S.C. 358, 409 S.E.2d 340 (1991) in support of its motion, but in *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995), the Supreme Court explicitly overruled *Hite v. Thomas & Howard Co.*

> Although generally the denial of a Rule 12(b)(6) motion is not directly appealable, we have allowed an appeal in cases such as this where the issue is whether a claim is properly asserted as a direct action or as a shareholder's derivative action. *Compare Moyd v. Johnson,* 289 S.C. 482, 347 S.E.2d 97 (1986) *with Hite v. Thomas & Howard Co.,* 305 S.C. 358, 409 S.E.2d 340 (1991). **We now reconsider *Hite,* and overrule it** to the extent it holds this type of order is directly appealable.

319 S.C. 559, 560, 462 S.E.2d 860 (1995) (emphasis added).

C. Other Claims in This Action Continue in the Circuit Court.

While these issues are on appeal, other claims in the same litigation continue in the Circuit Court. This ongoing litigation demonstrates that the orders from which 5Star appeals are not final orders. First, 5Star's original claims against PPI continue in the Circuit Court, unabated. Second, this case was joined with Civil Action No. 2017-CP-23-03269, and all those similar claims against the other Defendants continue. (R. pp. 1-5). Those claims overlap extensively with the facts of the Counterclaim. Furthermore, all parties agree that they must complete discovery before the Court may quantify damages against 5Star and make an award on the Counterclaims, and all parties further agree that 5Star possesses virtually all of the relevant documents and records related to both cases. Nevertheless, for months 5Star has resisted production of relevant and necessary documents. (R. pp. 211-212)

For all these reasons, neither the Order denying the Rule 55(c) Motion for Relief from the Entry of Default, nor the Order denying the Motion to Reconsider the prior order is immediately appealable. Neither is a final order, and the litigation continues in the Circuit Court. Accordingly, this Court should dismiss this appeal.

II. THE ENTRY OF DEFAULT WAS PROPER.

If this Court determines to rule on the merits of the appeal, the facts of the case demonstrate that the Entry of Default and the denial of the Motion for Relief from Entry of Default were proper rulings, well supported by the evidence, and well within the discretion of the Circuit Court.

A. PPI Pled Proper Counterclaims.

5Star contends that PPI's Answer asserted only affirmative defenses and not counterclaims. Brief of the Appellant, pp. 9-10. The Circuit Court properly rejected that argument, and 5Star has given no basis to overturn this ruling. 5Star relies on Rule 8: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation." SCACR 8(c).

A more relevant and more important Rule for this issue is Rule 8(a). It sets out in detail what is necessary to plead a claim for relief:

> **(a) Claims for Relief**. A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.

Id. (emphasis added). PPI's counterclaims include all three elements. (1) The circuit court already possessed jurisdiction by virtue of 5Star's claim against PPI. (2) As demonstrated below, PPI sufficiently stated facts showing that PPI is entitled to relief. (3) PPI included a prayer for relief and demand for judgment. Accordingly, PPI's allegations are properly denominated Counterclaims, and the Counterclaims allege, in significant detail, claims for breach of contract and defamation, not merely affirmative defenses.

The Prayer for Relief on the Counterclaim requests damages against 5Star, far above the $109,000 that 5Star claims against PPI:

> **WHEREFORE**, Defendant prays the Court for **an award of actual damages**, pre-judgment interest, post-judgment interest, costs, attorneys' fees, for **appropriate equitable relief** causing Defendant to be reinserted into the hierarchy in which he belongs, provide contact information on clients and prospects from the First Responder marketing program, all client

personal data for resale to other life and ancillary plans, and grant such **other and further relief as the Court deems just and proper.**

(R. p. 61, ll. 8-13). (emphasis added). These pleadings state valid legal and equitable claims, not just affirmative defenses.

B. The Counterclaims Stated Facts to Support the Claims.

5Star argues that the Counterclaims failed to state a cause of action. The Circuit Court properly found that the Counterclaims stated causes of action for breach of contract and defamation.

1. PPI Pled Breach of Contract.

The Complaint included a copy of the contract between 5Star and PPI. (R. pp. 37-50). The Counterclaim described the history and background between PPI, Jeff Wright, and Consolidated Assurance. In paragraph 17 of the Counterclaim (R. p. 53), PPI alleges:

> On or about May 2, 2013, [PPI] entered into an agency contract with 5Star, by which [PPI] became an agent and marketing organization of 5Star under the hierarchy of Jeff Wright and as the exclusive "upline hierarchy" for all "Consolidated" agents except the principals. [PPI]'s agents were entitled to sell life insurance for 5Star, and [PPI] was entitled to receive a portion of the commissions on those sales from 5Star.

In paragraph 18 of the Counterclaim (R. p. 53), PPI alleges, "The 5Star agency contract repeatedly refers to these agents as 'Your agents' – the agents of [PPI]."

The next several paragraphs recite how PPI fulfilled its obligations under the contract between PPI and 5Star. In paragraph 22 of the Counterclaim (R. p. 54), PPI alleges: "[PPI] was entitled to receive commissions on sales made by agents placed under Consolidated, persons under [PPI] in the [PPI]'s sales hierarchy for 5Star." In paragraph 26 of the Counterclaim (R. p. 54), PPI alleges: "[PPI] required that the principals of Consolidated would remain outside the [PPI]'s hierarchy, but all agents under them and/or

recruited by them and or [PPI] from that time forward would be placed under [PPI]'s hierarchy. Accordingly, Wright and . . . 5Star, moved all agents, existing and new, to [PPI]'s hierarchy."

The Counterclaim then recites the terms of the agreement between PPI and Wright, who was 5Star's Regional Director.[1] One of the most important terms was set out in an email in which Wright promised PPI:

> Also, to confirm what we discussed, no one in my organization including myself will ever market to, or contact any of your downline agents **nor will we modify or change hierarchies or commissions unless under your direction** or giving you notice of comp changes that may come from the company itself.

(R. p. 55, par. 28) (emphasis added). In the next paragraph, PPI alleges that 5Star was aware of this contractual promise, and pursuant to that arrangement, PPI was placed in Wright's Regional Director hierarchy above all Consolidated's agents or producers.

Paragraph 30 of the Counterclaim (R. p. 55) alleges that Consolidated received a commission on the sales made by the producers under Consolidated and PPI in the hierarchy of approximately 50-60%;[2] PPI received 5%; and upon information and belief, Wright also received a percentage.

Paragraph 31 of the Counterclaim (R. p. 55) alleges:

> Upon information and belief, at the request of Consolidated, Wright and 5Star, all Consolidated agents or producers (except the three principals) were placed in [PPI]'s hierarchy or downline. [PPI] had no capacity to cause this to happen; **it required the action of Consolidated, Wright and 5Star**.

Id. (emphasis added)

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[1] Wright was an independent contractor, not an employee.
[2] This amount is over and above the agent's commission.

Paragraphs 32-34 (R. pp. 55-56) describe how PPI fulfilled its contractual duties, so that PPI's 5% contractual commission was approximately $300,000.00 - $400,000 per year.

Paragraph 35 (R. p. 56) alleges, that "Wright promised [PPI] that the agents recruited under this program would belong to [PPI] unless transferred/released by written consent of [PPI]."

Paragraph 36 (R. p. 56) alleges that the 5Star "contract does not specifically reserve any power for [5Star] to remove an agent from [PPI]. [5Star] told [PPI] verbally that the RD [Jeff Wright] traditionally has been granted this authority, but this provision does not appear in the contract provided to [PPI]. Further, the RD, Wright, yielded this alleged privilege to [PPI] in order to consummate the agreement with [PPI]." (R. p. 56, par. 36).

Paragraphs 37 - 43 (R. pp. 56-57) describe how PPI fulfilled its contractual duties over the next several months and years.

PPI alleges that it received commissions for all agents in Consolidated's downline for approximately eighteen months without any modification of the arrangement, but that in 2015, PPI saw those commissions shrink, and inquired as to why this occurred. (R. p. 57, par. 44-45). PPI alleges that "Consolidated had asked Wright to move some of Consolidated's producers or agents outside of [PPI]'s commission hierarchy (*the first known movement of agents*)." (R. p. 57, par. 47). PPI further alleges: "Upon information and belief, **5Star approved this movement**." (R. p. 58, par. 48) (emphasis added).

> Eventually, on or about August of 2017, nearly all agents and producers were moved out of [PPI]'s hierarchy and into a hierarchy that included Consolidated, but not [PPI], thereby taking away [PPI]'s right and opportunity to earn its 5% override or commission, all without [PPI]'s knowledge, consent or compensation (*the second known movement of agents*). Other agents were likely appointed directly to

> CA (or alternative organization under CA's authority, like Tyler Harris) who were not appointed under [PPI], as they should have been.
>
> Upon information and belief, **5Star approved this movement**.
>
> **Neither Consolidated nor Wright (nor 5Star, in their contract) possessed the legal authority to make such transfers out of [PPI]'s hierarchy**.

(R. p. 58, par. 51-53) (emphasis added). The authority and approval to make these changes to PPI's downline had to come from 5Star. However, as previously alleged, 5Star did not have contractual authority to make changes to PPI's downline. PPI also alleges: "On 11/28/16, [PPI] questioned 5Star (Kimo Wong and James Bradford) about the movement of agents outside the PPI hierarchy, and 5Star stated that Consolidated had sought 5Star approval to move agents outside PPI hierarchy. **5Star said they allowed the movement of agents to occur**." (R. p. 60, par. 61) (emphasis added). PPI also alleges: "Wright and Consolidated requested transfer of agents, and **5Star wrongfully removed agents from [PPI]'s hierarchy**." (R. p. 60, par, 63).

Finally, PPI alleges:

> 5Star has transferred agents outside of [PPI]'s hierarchy **in violation of the agreement between [PPI] and 5Star**.
>
> 5Star **breached the contract** between itself and [PPI], **proximately causing damages to [PPI]** in an amount to be determined at trial.
>
> **5Star breached the implied covenant of good faith and fair dealing** with [PPI].

(R. p. 61, par. 65-67) (emphasis added).

Based on the foregoing allegations, PPI has stated sufficient facts to constitute the cause of action for breach of contract against 5Star. PPI properly alleged a meeting of the minds, mutual promises, consideration, a breach, and damages.

2. PPI Pled Defamation.

The Counterclaim also states a valid cause of action for defamation. After explaining the background and circumstances in paragraphs 54-64 of the Counterclaim (R. pp.59-60), PPI alleges:

> Subsequently, because of the actions of Wright, Consolidated and 5Star, **5Star libelously reported [PPI] to the Vector organization as a "Bad Debt" thereby soiling the reputation of [PPI]** and causing other insurance carriers (such as Mutual of Omaha) to refuse to offer "advanced" commissions on sold business, which is common practice in the insurance industry. This action restricted the cash flow of [PPI] and could have affected [PPI]'s ability to meet normal expenses and obligations of doing business. **United Home Life terminated their contract with [PPI]** upon notice of the Vector [report], and **other carriers have increased their screening of [PPI]** in their contracting process as a result of 5Star's actions.

(R. pp. 59-60, par. 54-64) (emphasis added). (Since then, other adverse consequences have continued to accrue.)

The Court found that these allegations state a claim for defamation; they state the alleged defamatory matter, its falsity, causation, and damages to PPI. Truth is an affirmative defense that must be pled, *Kunst v. Loree*, 817 S.E.2d 295, 303 (2018). Similarly, a conditional or qualified privilege must be pled as an affirmative defense. *Id.*, at 304. Because 5Star failed to Reply timely, it pled no affirmative defense, and PPI has stated a valid claim of defamation.

5Star contends that the allegations in the Counterclaim are the same as the allegations in the case against Jeff Wright and Consolidated. There is significant factual overlap between the two cases, and that factual overlap was a significant reason for the joining of the two cases together. 5Star failed to respond to the Motion to join the two cases together and failed to attend the hearing held for that purpose. Accordingly, 5Star has little basis to raise any objection based on the overlapping allegations or the joinder of the two cases.

Accordingly, the Answer and Counterclaim assert not merely affirmative defenses, but rather clear and definite counterclaims alleging breach of contract and defamation, and ask for affirmative relief against 5Star, which significantly exceeds the claims of 5Star against PPI.

III. 5STAR FAILED TO SHOW "GOOD CAUSE" FOR RELIEF FROM DEFAULT.

5Star contends that it showed "good cause" for being excused from default. Brief of the Appellant, pp. 19-20. This "good cause" consists of the fact that 5Star's attorney did not expect or notice the filing of a timely answer and counterclaims, and allegedly she was not familiar with electronic filing. The Attorney admits that she received the electronic notice of filing. (R. pp. 99-100, par. 5). 5Star's attorney has a practice in several counties in South Carolina. (R. p. 99, par. 3). The attorney's alleged surprise at receiving a timely Answer, and the failure to observe the "notice of electronic filing" of the Answer and Counterclaims, does not constitute "good cause" for the failure to file a timely Reply to the Counterclaim. Electronic filing may have been recently begun in Richland County, but electronic filing has existed in many other counties in this State since 2015. The processes should be familiar to anyone with a multicounty practice.

Contrary to 5Star's implication, PPI did not jump the gun on filing its Notice of Default and Motion for Entry of Default Judgment. PPI waited past the deadline, before filing Notice of Default and a Motion for Entry of Default Judgment.

The Circuit Court ruled that 5Star had failed to show "good cause" for relief from default under Rule 55(c). 5Star argues that its counsel simply missed the Notice of Electronic Filing of the Answer and Counterclaim and contends that this failure constitutes

"good cause." (R. pp. 165-166). The Court found otherwise in its Order entered September 13, 2018. (R. pp. 8-11).

5Star's multiple deficiencies included (1) failure to file a timely Reply, (2) failure to respond to interrogatories and requests for production, (3) failure to respond to the Motion to Consolidate, (4) failure to attend the hearing on the Motion to Consolidate, (5) failure to file any Reply beyond a cursory and late general denial, (6) failure to issue any discovery requests of its own, (7) failure to respond to PPI's follow-up letter asking for discovery responses, and (8) failure to respond to the discovery requests, even when ordered to do so.

This Court relied upon multiple authorities, all standing for the rule that the error of counsel is the error of the client who hired the counsel: *Sundown Operating Company Inc. v. Intedge Industries, Inc.* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009) ("an attorney or insurance company's misconduct is imputable to the client"); *Simon v. Flowers*, 231 S.C. 545, 550-51, 99 S.E.2d 391, 394 (1957); *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (2007); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014) (all discussed below).

5Star argues that not only did its counsel simply miss the Notice of Electronic Filing of the Answer and Counterclaim, it also contends that its counsel "was unfamiliar with the . . . Electronic E-Filing System" (R. p. 165, ll. 11-12) and that she "mistakenly believed that any counterclaim would have to be served traditionally." (R. p. 165, ll. 15-16). 5Star also contends that she was not expecting the Answer and Counterclaim to be filed before the deadline. (R. p. 165, l. 15). 5Star fails to explain how those contentions advance its cause. The error of the lawyer is the error of the client.

The Circuit Court ruling finding 5Star in default and refusing to find "good cause" to relieve 5Star from default was eminently proper, and 5Star has raised no valid ground for overturning this ruling.

> Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct or inadvertence of counsel employed in the case, **the general rule undoubtedly is that the neglect of the attorney is the neglect of the client,** and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client.

Simon v. Flowers, 231 S.C. 545, 551, 99 S.E.2d 391, 394 (1957) *quoting Peterson v. Koch*, 110 Iowa 19, 81 N.W. 160, in 80 Am.St.Rep. 261 (emphasis added).

Similarly, in *Stearns Bank National Association v. Glenwood Falls, LP*, the Supreme Court ruled:

> Concerning a claim of attorney neglect, the general rule is that "**the neglect of the attorney is attributable to the client**." *Graham v. Town of Loris,* 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978).
>
> * * *
>
> Our law thus instructs that an exception to the general rule applies when the attorney's inaction was the consequence of willful abandonment or withdrawal from the case. **Where an attorney is merely neglectful, the general rule applies and relief from judgment is unavailable;** where an attorney's conduct transcends mere neglect and the party seeking relief establishes willful abandonment or withdrawal from the case, relief from judgment is available.

373 S.C. 331, 342-43, 644 S.E.2d 793, 799 (2007) (emphasis added).

In *White Oak Manor, Inc. v. Lexington Ins. Co.*, the Supreme Court ruled that a defendant had failed to show good cause to be relieved of default. The Circuit Court had "found it significant that [Defendant] acknowledged the complaint was received by its claims counsel." *Id.,* 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014). Similarly, in the case at

bar, 5Star acknowledges that its counsel received the electronic notice of the Answer and Counterclaim. (R. p. 165).

Defendant in *White Oak Manor* argued that it should be relieved of default because its counsel lost the summons and complaint.

> [Defendant] argues the circuit court erred in relying on this Court's holding in *Roche* that losing a summons and complaint is never a ground to set aside a default judgment. It notes the standard for reviewing a motion for relief from default under Rule 55(c) and a motion for relief from a default judgment under 60(b) are distinct. Although we acknowledge the standard under Rule 60(b) is more rigorous than "good cause" under Rule 55(c), we find no error in the court's holding that **losing the complaint was not "good cause**." The circuit court acted within its discretion in concluding that losing a complaint was not a satisfactory explanation for failing to timely respond.

Id., 407 S.C. 1, 11-12, 753 S.E.2d 537, 542-43 (2014) (emphasis added).

Similarly, in this case at bar, 5Star argues that its counsel did not notice the Notice of Filing of the Answer and Counterclaim that she received (R. p. 165, ll. 16-17), that counsel expected service by some other means (R. p. 165, ll. 5-16), that counsel received the Notice of the Answer and Counterclaim sooner than expected, that counsel was not familiar with the rules (R. p. 165, l. 12). None of these arguments asserting a counsel's negligence constitutes "good cause" for its failure to file a timely Reply. *White Oak Manor.* The trial court's ruling finding 5Star in default and refusing to find "good cause" to relieve 5Star from default was eminently proper, and 5Star has raised no valid ground for overturning this ruling.

IV. PPI HAS SUFFERED PREJUDICE BY 5STAR'S CONDUCT.

5Star contends that PPI will suffer no prejudice if 5Star is relieved from default. This is not true. PPI has been prejudiced by 5Star's behavior since December 2014 when they first transferred agents from PPI to Consolidated. Further, PPI had been trying to

negotiate with 5Star to resolve the differences amiably since November 2016. (R. p. 143). Instead of negotiating in good faith, 5Star filed suit first.

5Star has yet to file a substantive Reply. Its only filing is a cursory, two-page, general denial, with no detail or explanation of its substantive disagreement. (R. pp. 62-63). As of the filing of this Respondent's Initial Brief, 5Star has still not produced any documents in discovery, and such documents are the only source of information to establish the extent of PPI's damages.

In the companion litigation, now joined with this one, PPI requested extensive documents, necessary prosecute its case. The other parties contend they do not have the extensive documentation, but rather the extensive documentation is **solely in the possession of 5Star**. (R. p. 77, l. 7-9). PPI has suffered prejudice by the failure of 5Star to Reply, by its failure to participate in this litigation, and by 5Star's failure to produce relevant documents.

Appellant suffered prejudice by 5Star's failure and refusal to negotiate in good faith with PPI prior to filing suit and its refusal to address PPI's concerns. 5Star twice failed to take agreed-upon partial payments from PPI's commissions, and PPI suffered prejudice by 5Star's removal of agents out of PPI's downline (which has cost PPI more than $1 million to date), and deprived PPI of its funds and commissions to repay the alleged overpayment in the manner agreed. 5Star illegally removed the agreed upon means by which PPI was going to repay the alleged overpayment, and 5Star refused to act reasonably and negotiate in good faith with PPI to resolve these issues.

Furthermore, 5Star prejudiced PPI by terminating PPI's contract and by reporting PPI to Vector (the nationwide reporting agency for insurance marketers), stating that PPI

had failed to repay the alleged overpayment. This reporting to Vector severely damaged PPI's financial reputation and creditworthiness in the industry.

As a result of the report to Vector, one carrier (Mutual of Omaha) ceased paying "advance commissions" to PPI, and another carrier (United Home Life) terminated PPI's contract on May 18, 2018. (R. p 148, par. 40-41) As mentioned above, the adverse consequences have continued to accrue against PPI as a result of the report to Vector. These actions violated 5Star's duty of good faith and fair dealing, which is implied in every commercial contract in South Carolina. 5Star's conduct has been conspicuous for its *lack* of good faith and its *lack* of fair dealings with PPI.

Finally, 5Star comes to this Court with unclean hands because over a period of years it has wrongfully taken away PPI's rightful commissions. Accordingly, it would be unfair and unjust to PPI for this Court to relieve 5Star from default.

The Circuit Court properly entered Judgment by Default against 5Star on the issue of liability and required 5Star to respond promptly and fully to PPI's discovery requests to enable all parties to move forward toward a damages hearing and a resolution.

V. THE COURT PROPERLY RULED THAT IT WOULD SCHEDULE A HEARING ON DAMAGES.

In its Order, the Court granted judgment as to liability. (R. p. 13). 5Star argues that the Court should not have entered a default judgment on liability, until after a hearing to establish the amount of the damages. Because 5Star has possession of virtually all the relevant records and has refused to produce them, the Circuit Court properly ruled that it would allow sufficient opportunity for discovery, compel 5Star to respond fully to its discovery requests, and thereafter set a hearing to determine the amount of damages. This is in keeping with the Supreme Court's ruling: "Moreover, once a party defaults, the trial

court "may conduct such hearings or order such references as it deems necessary and proper" to enter the default judgment. Rule 55(b)(1), SCRCP." *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 81-82, 504 S.E.2d 311 (1998). It is also in keeping with the rule from 46 AmJur2d *Judgments* § 298 (2006): "In the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. Where damages claimed are not readily ascertainable from the pleadings and record, a hearing is appropriate to determine the amount of damages." *Wells Fargo Bank NA v. Marion Amphitheater LLC*, 408 S.C. 87, 92, 757 S.E.2d 557, 560 (Ct. App. 2014). The Circuit Court properly agreed to set a hearing to determine the amount of damages after discovery.

In this case, the damages are "not readily ascertainable from the pleadings and record;" indeed, they are impossible to calculate without production of 5Star's documents and records. The Circuit Court properly Ordered responses to the discovery requests and properly agreed to set a hearing to determine the amount of damages. (R. p. 13).

VI. THE COURT PROPERLY ORDERED 5STAR TO RESPOND TO DISCOVERY.

5Star contends that the Circuit Court erred, when in September 2018, it ordered responses to discovery requests that had gone unanswered since May 10, 2018. 5Star contends that the Circuit Court is powerless to order it to comply with the Rules of Discovery without a formal motion from PPI. PPI contends that its filing met the characteristics of a motion.

The Rules of Civil Procedure list the three characteristics of a motion. "An application to the court for an order shall be by motion which . . . [1] shall be made in writing, [2] shall state with particularity the grounds therefor, and [3] shall set forth the relief or order sought." SCRCP 7(b)(1).

PPI met the requirements of Rule 7(b)(1). PPI notified the Circuit Court in its Reply Memorandum of Law in Support of Motion for Entry of Default Judgment, ([1] "in writing") that it had served Interrogatories and Requests for Production on 5Star on May 10, 2018, but that 5Star had failed to respond ([2] "stat[ing] with particularity the grounds therefor.") Then, PPI asked to the Circuit Court to "require 5Star to respond promptly and fully to PPI's discovery requests" ([3] "the relief or order sought"). (R. p. 139. Ll. 21-23).

The Circuit Court granted PPI's request and ordered 5Star "to respond promptly and fully to PPI's discovery requests." (R. p. 13).

If a party fails to respond **at all** to interrogatories and requests for production of documents, Rule 37(d) governs:

> **(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party** or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party **fails** (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) **to serve answers or objections to interrogatories** submitted under Rule 33, after proper service of the interrogatories, or (3) **to serve a written response to a request for inspection** submitted under Rule 34, after proper service of the request, **the court** in which the action is pending on motion **may make such orders in regard to the failure as are just**, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Id. (emphasis added). Accordingly, when a party fails to respond at all, the Circuit Court may "make such orders in regard to the failure as are just." That is exactly what the Circuit Court did.

5Star had failed to respond to the Interrogatories and Requests for Production. 5Star possessed the records, and PPI argued that the Circuit Court should "require 5Star to respond promptly and fully to PPI's discovery requests." (R. p. 139, ll. 21-22). The Circuit Court ordered 5Star "to respond promptly and fully to PPI's discovery requests." (R. p. 13).

Now, a year has passed since PPI served these discovery requests. Many months have passed since the Court ordered 5Star to respond "promptly." However, 5Star continues to argue about technicalities, but, as of the filing of the Respondent's Initial Brief, has failed to provide documents and records.

VII. THE CIRCUIT COURT PROPERLY REFUSED TO GRANT RELIEF FROM THE ENTRY OF DEFAULT WITHOUT CONSIDERING VIRGINIA LAW.

5Star argues that the Circuit Court erred in failing to consider and apply Virginia law in the denial of 5Star's Motion for Relief from Default. This argument is not well founded. Issues relating to the entry of default and relief from the entry of default are issues of procedure and process, and the Circuit Court properly used the law of the forum for such issues regardless of the choice of law provisions in a contract.

> "Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred." *Boone v. Boone,* 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001). "**Procedural matters are to be determined in accordance with the law of South Carolina**, the *lex fori*." *McDaniel v. McDaniel,* 243 S.C. 286, 289, 133 S.E.2d 809, 811 (1963). *Lex fori* refers to the law of the forum. *Black's Law Dictionary* 921 (7th ed.1999).

Nash v. Tindall Corporation, 375 S.C. 36, 39-40, 650 SE2d 81, 83 (Ct. App. 2007), *reh den. cert. den.* (2008) (emphasis added). Because issues of default and relief from default are procedural issues, South Carolina law governs, and the Circuit Court properly used it.

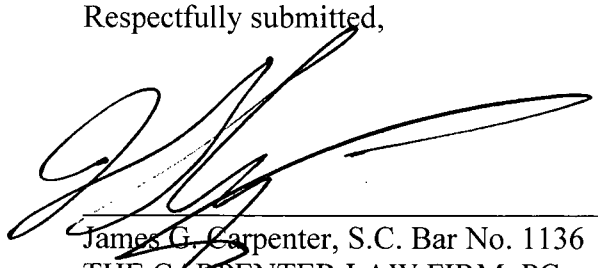
Furthermore, 5Star fails to articulate any differences between Virginia law and South Carolina law on these points.

CONCLUSION

The Orders at issue are not final orders and therefore not appealable. The entry of default was proper. PPI pled valid claims of breach of contract and defamation. 5Star failed to show "good cause" to be relieved from default. PPI has suffered prejudice by 5Star's conduct. The Circuit Court properly ruled that it would set a hearing on damages and properly ordered 5Star to respond to PPI's discovery requests.

Accordingly, Respondent PPI, Inc. prays the Court to dismiss the appeal or affirm the rulings of the Circuit Court, and to award costs and attorneys' fees to PPI.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

Pursuant to Appellate Rule 211(a), the undersigned hereby certifies that his Final Brief for Appellants complies with Rule 211(b).

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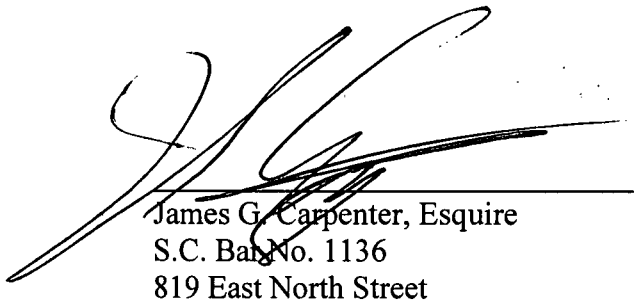

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