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

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 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 14, 2018, Appellant Craig Chappell brought this action asserting class-action claims against Respondents 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 as well as other Ladles Soups franchisee and franchisor defendants for failure to pay wages under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq., breach of contract, and conversion. (R. pp. 0036-0055; Complaint). Appellant encountered substantial challenges getting all of the defendants served. On or about June 20, 2018, Ladles Mt. Pleasant filed Answers to the Complaint. Next, an additional sixteen Ladles Soups franchise defendants, including Respondents, filed Answers on or about July 18, 2018. (R. pp. 0056-0110; Respondents' Answers). Finally, the franchisor defendants, Ladles Franchising Inc., Ladlessoups, LLC, Sue Allen, and Tracey Allen, filed their Answer on or about August 1, 2018.

Subsequent to Answers being filed by the Ladles Soups defendants, Respondents filed three motions. 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 Respondents. (R. pp. 0122-0128; R. pp. 0129-0133; Defendants' Mot to Disallow Class Cert; Mot. to Dismiss Improper Parties). A hearing on these motions was held and all three motions were denied by Orders dated January 29, 2019. (R. p. 0005; R. p. 0004; January 29, 2019 Orders denying Mot to Disallow Class Cert and Mot. to Dismiss Improper Parties). On February 14, 2019, Respondents filed a Motion to Reconsider the January 29, 2019 Order denying their Motion to Dismiss which was denied by Order dated March 6, 2019. (R. p. 0006; March 6, 2019 Order).

Appellant served written discovery on Respondents on May 24, 2019. (R. pp. 0152-0164; R. pp. 0165-0172; Pl's INT and RFP). Respondents did not respond. On August 21, 2019, without ever responding to any of Appellant's discovery requests, Respondents filed their Motion for Summary Judgment. (R. pp. 0173-0177; Mot. for Sum. Jud.). On August 22, 2019, Appellant filed a Motion to Compel discovery responses from Respondents and Motion to Intervene on behalf of Ladles West Ashley employee, Lani Charpia. (R. pp. 0193-0222; R. pp. 0223-0229; Pl.'s Mot. to Compel; Mot. to Intervene). On August 23, 2019, Appellant served Requests to Admit on Respondents. (R. pp. 0239-0243; Pl's Requests to Admit). Respondents did not respond.

On September 11, 2019, Appellant filed a Motion for Class Certification. (R. pp. 0276-0336; Pl's Mot. for Class Cert). Because no scheduling order in this matter had ever been put in place, on October 22, 2019, Appellant filed a Motion for Status Conference and Scheduling Order (R. pp. 0434-0436; Mot. for Status Conf. and Schd. Ord.).[1] Finally, after receiving no responses from Respondents to Appellant's August 23, 2019 Requests to Admit, on December 23, 2019,

[1] Despite multiple attempts by Appellant, Respondents and the other Ladles defendants would not agree to *any* stipulated scheduling order. (R. p. 0638; Pl.'s Mot. to Recon. at p. 3)

Appellant filed a Motion to Deem Requests to Admit Admitted. (R. pp. 0479-0507; Mot. to Deem RTAs Admitted).

On January 6, 2020, a hearing was held before the Honorable Bentley D. Price on Respondents' Motion for Summary Judgment and the Motion for Summary Judgment filed by the Franchisor defendants as well as Appellant's Motion to Compel, Motion to Intervene, Motion for Class Certification, and Motion to Deem Requests to Admit Admitted.

On January 7, 2020, the trial court issued an Order granting Appellant's Motion to Compel and denying the Motion for Summary Judgment of Respondents; denying Appellant's Motion to Intervene/Amend; and denying Appellant's Motion for Requests to Admit to be deemed Admitted. (R. pp. 0007-0009; January 7, 2020 Order regarding several motions). Appellant filed his Motion to Reconsider on January 17, 2020. (R. pp. 0626-0631; January 17, 2020 Mot. to Recon.).

On January 9, 2020, another hearing was held where the trial court, on its own, requested additional argument from Respondents relating to their Motion for Summary Judgment. On January 30, 2020, the trial court issued an order granting the Franchisor defendants summary judgment. (R. pp. 0010-0021; January 30, 2020 Order).

On February 11, 2020, the Court issued its Order granting summary judgment in favor of Respondents. (R. pp. 0022-0032; Order granting Sum. Jud.). On February 21, 2020, Appellant filed a Motion to Reconsider the trial court's Order. (R. pp. 0636-0657; Feb. 21, 2020 Mot. to Recon.). On February 25, 2020, the trial court denied Appellant's motion. (R. pp. 0033-0036; Order denying Mot. to Recon.). On February 28, 2020, Appellant served his Notice of Appeal on Respondents.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is

proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). 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), SCRCP. 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.").

Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.*

STATEMENT OF FACTS

Appellant Craig Chappell was an hourly employee at Ladles James Island and was paid and hourly wage, plus tips. (R. p. 0044, ¶ 12; Compl. at p. 8, ¶12). However, although Appellant worked for and earned credit card tips and cash tips, he was only allowed to retain some cash tips while his employer retained all credit card and debit card tips. (R. p. 0044, ¶ 13; R. p. 0726, ll. 10-25; R. p. 0719, ll. 14-24; Compl. at p. 8, ¶13; Depo. of Terri Owens for Ladles James Island at p. 25, ll. 10-25; Depo. of Craig Chappell at p. 19, ll. 14-24). Appellant contends that there was a company-wide policy among all of the Ladles defendants to withhold the credit card tips from their employees and that these employees suffered the same damages as Appellant (R. p. 0044, ¶ 13; R. p. 0723, ll. 18-25; R. p. 0724, ll. 1-9; Compl. at p. 8, ¶13; Depo. of C. Chappell at p. 129, ll. 18-25 and p. 130, ll. 1-9). Appellant further contends that, beginning with the original location in West Ashley (Ladlessoups, LLC, Sue Allen, and Tracy Allen), the company practice was to distribute cash tips each day among the employees working that day, but retain tips charged by customers to credit or debit cards. (R. pp. 0044-0045, ¶15; R. p. 0736, ll. 6-25; R. p. 0737, ll. 1-2; Compl. at pp. 8-9, ¶15; Sue Allen Depo. at p. 21, ll. 6-25; p. 22, ll. 1-2).

The Ladles Soups restaurant concept was created by Sue Allen and Tracy Allen with the first location opening in West Ashley in 2007, the second location opening on Kiawah Island (Ladles Freshfields Village) in 2008, and the third location opening in Summerville (Ladles Soups Knightsville) in 2009. (R. p. 0735, ll. 9-13; R. p. 0738, ll. 12-22; R. p. 0739, ll. 14-21; Depo. of S. Allen at p. 13, ll. 9-13; p. 32, ll. 12-22; p. 34, ll. 14-21). In 2010, Sue Allen and Tracy Allen started Ladles Franchising, Inc. for the purpose of selling Ladles Soups franchises. (R. p. 0740, ll. 19-23; Depo. of S. Allen at p. 43, ll. 19-23). Sue Allen's sisters, Teri Owens (current owner of Ladles James Island) and Carol Ellenburg (current owner of Respondent Ladles Downtown), 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. (R. p. 0743, ll. 5-25; R. p. 0744, ll. 1-3; Depo. of S. Allen at p. 81, ll. 5-25; p. 82, ll. 1-3). Additionally, Respondent Corey Paul worked at the Ladles West Ashley location where he learned the business before purchasing his own Ladles location in Fort Mill, South Carolina. Id. Mr. Paul eventually purchased the West Ashely location from Sue Allen in 2017. In addition to owning the Ladles Freshfields franchise, Respondent Steven Traeger is one of five shareholders of the Ladles Franchisor company, Ladles Franchising, Inc. (R. p. 0610; R. p. 0188; Traeger Ans. INT at No. 21; Ladles Franchising Ans. INT at No. 28). Also, in addition to owning Respondent Ladles Downtown, Carol Ellenburg is also a shareholder of the Ladles Franchisor company. (R. p. 0741, ll. 18-25; R. p. 0742, ll. 1-5; Depo of S. Allen at p. 44, ll. 18-25; p. 45, ll. 1-5).

Appellant Chappell brought his lawsuit on behalf of himself and others similarly situated, alleging class-action causes of action for failure to pay wages under the South Carolina Payment of Wages Act ("SCPWA"), breach of contract, and conversion. Appellant alleged in his Complaint that the Ladles defendants, including Respondents, wrongfully and intentionally withheld credit

card tips that were rightly intended for Appellant and others similarly situated in violation of the SCPWA and that this was a company-wide policy of all Ladles defendants including Respondents. (R. p. 0038, ¶2; R. pp. 0044-0047; Compl. at p. 2, ¶2; pp. 8-11).

On May 6, 2016, while at work, Appellant discovered a handwritten ledger kept at the Ladles James Island location that revealed the extent of its policy to withhold credit card tips from its employees. (Id. at R. p. 0046, ¶ 31; p. 10, ¶ 31). Appellant subsequently learned through conversations with a co-worker that the policy of withholding employee tips was a group-wide policy at all of the Ladles Soups locations. (Id.; R. p. 0723, ll. 18-25; R. p. 0724, ll 1-9; Depo. of C. Chappell at p. 129, ll. 18-25 and p. 130, ll. 1-9). On May 7, 2016, Appellant Chappell confronted his manager, Teri Owens, who owns the Ladles James Island restaurant, telling her he thought it was wrong for an employer to retain its employees' credit card tips. (Id. R. p. 0046, ¶ 32; at ¶ 32). Appellant Chappell was immediately terminated when he complained about the policy of withholding credit card tips and filed the underlying lawsuit on February 14, 2018. (Id. R. p. 0047, ¶ 33; at p. 11, ¶ 33).

Franchisor Sue Allen testified at her deposition that while she owned the Ladles Soup locations at West Ashley, Freshfields Village (Kiawah Island), and Knightsville (Summerville), she only paid the employees their hourly wages and she retained the credit card tips to subsidize those employees' hourly wages. (R. p. 0736, ll. 6-25; R. p. 0737, ll. 1-2; Depo. of S. Allen at p. 21, ll. 6-25; p. 22, ll. 1-2). At their depositions, representatives of Ladles James Island, Ladles West Ashley, and Ladles Fort Mill all confirmed that they have a policy of withholding credit card tips from their employees. (R. p. 0726, ll. 10-25; R. p. 0727, ll. 1-18; Depo. of T. Owens at p. 25,

ll. 10-25; p. 27, ll. 1 -18 and R. p. 0731, ll. 1-16; R. p. 0732, ll. 3-5; Depo. of Corey Paul for Ladles West Ashley and Ladles Fort Mill[2] at p 32, ll. 1-16; p. 37, ll. 3-5).

Respondent Mr. Paul testified in his deposition as representative for Respondents Ladles West Ashley and Ladles Fort Mill that, upon purchasing the Ladles West Ashley franchise, he continued the same policy of withholding credit card tips that the Franchisors 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.

(R. p. 0733, ll. 1-11; Depo. of C. Paul at p. 66, ll. 1-11).

The importance of the common tipping policy to the franchise is evidence in the "design" of the Ladles franchise concept, according to Ladles founder Ms. Allen:

> *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.*

(R. p. 0709; Ladles co-founder, Sue Allen, YouTube (2012), https://www.youtube.com/watch?v=UoO8ua34ZnM video at 5:18).

ARGUMENT

I. 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.

[2] Mr. Paul owns Respondents Ladles West Ashley and Ladles Fort Mill.

Summary Judgment was premature because Appellant did not have a full and fair opportunity to complete discovery. Appellant's Motion to Compel discovery from Respondents was granted on January 7, 2020. (R. pp. 0007-0009; Order granting Pl.'s Mot. to Compel). However, Respondents never complied with the trial court's order compelling discovery responses and Summary Judgment was granted on February 11, 2020. Respondents' responses to Appellant's requests would likely have uncovered additional relevant information, specifically, (1) evidence of a common policy among all of the franchise locations of withholding credit card tips in violation of the SCPWA and (2) evidence supporting the elements of Appellant's class action claims against Respondents.

Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 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."" *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (internal citation omitted). "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).

It is well established that 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* 306 S.C. at 112. In *Baughman*, the South Carolina Supreme Court ruled summary judgment was premature in that case because (1) plaintiffs demonstrated a likelihood that further discovery would

uncover additional relevant evidence, and (2) plaintiffs were not dilatory in seeking discovery. Although three years had elapsed between filing the action and summary judgment, the delay could not fairly be attributed solely to plaintiffs' inaction, and the delay was tempered by the complexity of the case. *Id*. at 112-114, 410 S.E.2d at 544.

First, like the plaintiff in *Baughman*, Appellant can demonstrate that further discovery would uncover additional relevant evidence. In his complaint, Appellant pled class action causes of action alleging a common policy among all of the franchisees that damaged Appellant and others similarly situated. Appellant's unanswered discovery requests would have provided evidence such as the number and identity of employees damaged by Respondents' credit card tip policy. Second, Appellant was not dilatory in seeking discovery and to the extent that there was a delay, the fault cannot solely be attributed to Appellant and the number of parties alone make this a complex case. Despite repeated attempts by Appellant, including the filing of a motion, there was no scheduling order or discovery deadline in place. (R. pp. 0434-0436; Mot. for Scheduling Order). There are over 20 defendants in this case and following a lengthy process in serving all of the parties and appearances being made, several motions to dismiss were filed. Not long after these motions were finally ruled on in March 2019, Appellant served written discovery on all of the defendants in May 2019. As noted more specifically below, other than Ladles West Ashley, (whose incomplete responses were provided four months late) and Ladles Coosaw, (whose incomplete responses were six months late), the remaining Respondents were over seven months late in providing incomplete responses which were mostly objections to basic information for a SCPWA case, such as the identification of employees and information relating to payroll.

A. Appellant's Interrogatories and Requests for Production and Depositions

Here, after a lengthy process in getting all 21 parties served and after the motions to dismiss brought by Respondents were denied, Appellant served Interrogatories and Requests for Production on all of the Ladles Soups defendants on May 24, 2019. (R. pp. 0152-0164; R. pp. 0165-0172; Pl.'s INT and RFP). Appellant's Interrogatories Nos. 26 and 28 requested the names of current and past employees as well as those employees or officers involved with payroll and handling the tipping policy. (R. p. 0161; INT at Nos. 26 and 28). Interrogatories Nos. 31 through 34 requested information about who decided on the tipping policy for the franchise and information on meetings between the franchisees and franchisor regarding the tipping policy. (R. p. 0162; INT at Nos. 31-34). Appellant also requested documents relating to accounting, payroll, banking, or other records relating to salary payments, tips, wages, and employment tax records. (R. pp. 0170-0171; RFP at Nos. 20-24). All of these discovery requests would have uncovered relevant information to Appellant's claims, specifically, that a common policy of withholding credit card tips existed among all of the franchisees and evidence supporting the necessary elements of Appellant's class action claims.

Appellant sought deposition dates for Respondents. After receiving no response, on September 3, 2019, Appellant served notices of depositions for each Respondent. (R. pp. 0244-0275; Notices of Depositions to Respondents). Only Corey Paul, representative for Ladles West Ashley and Ladles Fort Mill was made available.

On September 13, 2019, the morning of his deposition, Mr. Paul provided for Ladles West Ashley only minimal discovery responses that were almost four months late and mostly objections to basic information. (R. pp. 0337-0347; R. pp. 0348-0354; Ladles West Ashley Responses to INT and RFP). Respondent failed to provide any information regarding: the identity of current and past employees (R. p. 0345; INT No. 26); identity of employees or officers responsible for payroll,

paychecks, credit card tip policy, and accounting and credit card receipts (R. p. 0345; INT No. 28); employee payroll and salary documents (R. p. 0345; INT No. 30); communications between employees, officers, franchisees and franchisors regarding policy relating to tips (R. p. 0346; INT No. 33); meetings with franchisees or franchisor regarding policy relating to tips (R. p. 0346; INT No. 34). The only documents produced by Respondents were tax returns. Absolutely no documents were produced regarding employee identification (R. p. 0353; RFP No. 20) or employee payroll and tips (R. p. 0353; RFP No. 21 - 24) which are vitally relevant to Appellant's claims.

Respondent Ladles Downtown did not respond at all to any of Appellant's discovery requests[3]. The remaining Respondents did not bother to make any response to Appellant's May 2019 written discovery until they were e-emailed to Appellant on the evening of January 3, 2020, the Friday night before the hearing on their motion for summary judgment. (R. pp. 0556-0621; INT and RFP Responses)[4]. Notably, these discovery responses were woefully deficient. Specifically, these Respondents failed to provide any information regarding: the identity of current and past employees (R. pp. 0562-0563; R. p. 0579; R. p. 0595; R. p. 0611; INT No. 26); identity of employees or officers responsible for payroll, paychecks, credit card tip policy, and accounting and credit card receipts (R. p. 0563; R. p. 0579; R. p. 0595; R. p. 0612; INT No. 28); employee payroll and salary documents (R. p. 0563; R. p. 0579; R. p. 0595; R. p. 0612; INT No. 30); communications between employees, officers, franchisees and franchisors regarding policy relating to tips (R. pp. 0563-0564; R. p. 0580; R. p. 0596; R. p. 0613; INT No. 33); meetings with

[3] Despite never providing discovery responses for Ladles Downtown, at the January 6, 2020 hearing, counsel for Respondents incorrectly stated, "[a]nd, Your Honor, I will represent as an officer of the court, my office as of last Friday has answered all of the discovery of all the defendants that I represent." (R. p. 0788, ll. 12-15; Hr'g Tr at p. 44, ll. 12-15). This means summary judgment was granted for Ladles Downtown based solely on the word of its counsel without ever responding to any of Appellant's discovery requests.

[4] Ladles Coosaw provided responses on November 1, 2019 which were mostly objections with some tax returns.

franchisees or franchisor regarding policy relating to tips (R. p. 0564; R. p. 0580; R. p. 0596; R. p. 0613; INT No. 34). The only documents produced by Respondents were tax returns. Absolutely no documents were produced regarding employee identification (R. p. 0570; R. p. 0586; R. p. 0602; R. p. 0620; RFP No. 20) or employee payroll and tips (R. p. 0570; R. pp. 0586-0587; R. pp. 0602-0603; R. pp. 0620-0621; RFP No. 21 - 24)[5] which are vitally relevant to Appellant's claims.

Respondents' Motions to Disallow Class Certification and Dismiss Improper Parties were denied in March 2019 and Appellant subsequently proceeded with serving written discovery on Respondents in May 2019 and Respondents were required under the South Carolina Rules of Civil Procedure to provide full and timely responses. In addition to providing objections to discovery for the first time over seven months late on the eve of the hearing on their motion for summary judgment, Respondents failed to provide even the most basic information essential to Appellant's claims. Respondents did not provide responses or documents regarding the total number of and identity of employees; payroll and how or if tips are paid; information regarding communications between franchisees as well as between franchisees and franchisor regarding tipping and payroll policies; and payments made by franchisees to franchisor. The trial court granted Appellant's motion to compel against Respondents in its January 7, 2020 Order. (R. p. 0796, ll. 4-6; R. pp. 0007-0009; Hr'g Tr. at p. 52, ll. 4-6; Order of January 7, 2020). At no time prior to the court's subsequent grant of summary judgment on February 11, 2020 did Respondents make any further attempt to comply with the trial court's order compelling them to respond to Appellant's discovery

[5] On November 15, 2019, because Respondents were almost six months late in responding to Appellant's discovery requests and his Motion to Compel was still pending, Appellant subpoenaed some of this material from the South Carolina Department of Employment and Workforce (SCDEW). On November 25, 2019, the SCDEW filed its Motion to Quash. This motion was eventually scheduled for hearing in Richland County on July 24, 2020. At the hearing, counsel for Appellant requested this material for the remaining defendant, Ladles James Island, however, the court found that SCDEW was statutorily prohibited from providing this information and its Motion to Quash was granted.

requests. As a result, Appellant was deprived of this discovery to support his Motion for Class Certification.

B. Appellant's Requests for Admission

Additionally, all Respondents were over 120 days late in responding to Appellant's Requests to Admit. (R. pp. 0479-0507; Mot. to Deem Requests Admitted). Counsel for Respondents stated at the January 6, 2020 hearing, (which included Appellant's Motion to Deem Requests Admitted), that his office received by e-mail the Requests to Admit, but "assumed that that was as to Ladles Corporate . . . ." (R. p. 0798, ll. 6-22; Hr'g Tr. at p. 54, ll. 6-22). This is not a sufficient basis to subvert the clear language of SCRCP Rule 36. *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").

Despite acknowledging that they received the Requests to Admit by e-mail, counsel for Respondents inexplicably argued that they were not served with the requests. (R. p. 0798, ll. 6-22; Hr'g Tr, p. 54, ll. 6-22). Further, counsel for Respondents completely mischaracterized the Affidavit of Service to the trial court when he stated at the hearing that "[a]nd then if we look at

the request to admit, Your Honor, it says to all defendants, but the affidavit of service said it was mailed to Kerry Koon's office and e-mailed to everybody else." (R. p. 0798, ll. 11-14; Hr'g Tr, p. 54, ll. 11-14). The Affidavit of Service says nothing of the sort and it was e-mailed, not mailed, to all of the defendants. The Requests to Admit and the Affidavit of Service were entered into the record at the hearing and the Affidavit of Service specifically states:

> I, David Ashley, certify that on August 23, 2019, a true and correct copy of the foregoing PLAINTIFF'S FIRST REQUESTS FOR ADMISSION was served upon counsel for Defendants, via electronic mail as follows:
>
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(R. p. 0489; Mot. to Deem Requests Admitted, Ex. A at p. 4).

Additionally, the second sentence of the Requests states that "[o]ne copy of these Requests are being served on counsel for each Defendant with the intention that they be answered separately by each Defendant." (Id. R. p. 0487; at p. 2.). Further, Appellant's Requests to Admit were served by e-mail to "all defendants," including to the following addresses of counsel for Respondents: paul@ferraralawfirm.net; janel@ferraralawfirm.net; and j.weiss@ferraralawfirm.net. (R. p. 0490; Mot. to Deem Requests Admitted, Ex. B). These attorney e-mail addresses are exactly as listed in AIS, which all South Carolina attorneys are required to maintain and must be updated annually.

(R. pp. 0491-0497; Mot. to Deem Requests Admitted, Ex. C). Furthermore, this e-mail serving the requests specifically states: "All, Please see the attached Plaintiff's Requests for Admission *for service on all* Defendants." (Id.) (emphasis added). Based on the foregoing, there can be no confusion that Respondents were served with the Requests and that the Requests were being served on *all* Defendants. The Requests were served by e-mail only on all of the parties but Respondents were the only ones who failed to respond. All previous discovery in this case was served by e-mail to Respondents and received by Respondents without objection.

Moreover, at the January 6, 2020 hearing, the trial court asked counsel for Respondents if he had responded to the requests to admit. Counsel for Respondents stated:

> I did, Your Honor. As soon as I received this motion I answered these – these requests to admit, and I gave those to Mr. Ashley this morning. And I've answered those within 30 days of these requests to admit being filed.
>
> I think this motion, Your Honor, was filed in December, less than 30 days ago. And that's when I had notice that there was a request to admit that had been served.

(R. p. 0798, ll. 23-25; R. p. 0799, ll. 1-11; Hr'g Tr at p. 54, ll. 23-25; p. 55, ll. 1-11).

This was a misrepresentation of facts to the trial court. Respondents Ladles Knightsville and Ladles Coosaw (as well as Defendants Ladles James Island and Teri Owens) did not provide responses to the Requests to Admit until January 22, 2020, over two weeks after the hearing where the trial court made its ruling to deny Appellant's motion. (R. pp. 0622-0625; R. pp. 0632-0635; Resp. to RTA Jan. 6, 2020; Resp. to RTA Jan. 22, 2020).

The trial court issued its order on January 7, 2020 denying Appellant's Motion to Deem the Requests Admitted. (R. pp. 0007-0009; January 7, 2020 Order). The court's basis for denying Appellant's motion was Respondents' improper argument mischaracterizing the Affidavit of Service and their argument that they did not have notice of the Requests until Appellant's motion

was filed (which was inconsistent with their statement that they received the Requests by e-mail on August 23, 2019). (R. p. 0799, ll. 5-11; Hr'g Tr., p. 55, ll. 5-11).

Given that the substance of the Requests to Admit (e.g., that all Franchisee Defendants withheld credit card tips from employees; that all Franchisee Defendants have communicated with representatives of the Franchisor regarding the credit card 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 Respondents) -- Appellant was substantially prejudiced by the Court's failure to deem the Requests to Admit conclusively admitted. (R. pp. 0486-0489; Mot. to Deem Requests Admitted, Ex. A).

C. Appellant was not provided a full and fair opportunity to complete discovery

The February 11, 2020 Order granting summary judgment makes reference to a request by Appellant for "further discovery" and "additional discovery," however, Appellant did not request either of these. (R. p. 0030; Order at p. 6). Appellant simply requested the discovery he was already entitled to and which Respondents 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." (R. p. 0030; Order at p. 6). Appellant has never claimed that the time for discovery was insufficient and Appellant did not seek additional time for new discovery. Again, Appellant only requested responses to the discovery that he timely served in May 2019.

These discovery requests are relevant to the issue of standing in that the requests regarding communications among the franchisees as well as communications between the franchisees and franchisor are evidence of the common policy and agreement between all of the defendant parties

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 (including the information described above in the Requests to Admit) are relevant to Appellant's allegations in his complaint, including the elements necessary for his class action claims, and create genuine issues of material fact precluding summary judgment.

Appellant's 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." Appellant's complaint specifically alleges class action causes of action and Appellant was entitled to discovery on those issues under SCRCP Rules 23, 32, 33, 34, 36, and 37. Appellant's written discovery requests for employee information were directly related to, and vital to these claims and would uncover additional relevant evidence relating to, among other issues, standing of Appellant. Appellant did not have a full and fair opportunity to engage in this discovery due to Respondents' refusal to timely respond to the discovery requests as well as their refusal to comply with the Court's order compelling them to respond.

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

class action which they were entitled to do. Accordingly, the failure of Respondents to submit to discovery caused prejudice to Appellant. *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 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 four months before their motion for summary judgment was filed. 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 comply with the order. Like the plaintiff in *Lanham*, Appellant was unable to fully respond to Respondents' motion for summary

judgment due to their refusal to produce information in their sole possession that was vital to Appellant's claims.

Further evidence of prejudice against Appellant is that the trial court did not take up Appellant's Motion for Class Certification at the January 6, 2020, hearing because the court found that Appellant did not "have enough information or we have any information to certify a class at this point in time." (R. p. 0761, ll. 14-20; January 6, 2020 Hr'g Tr. at p. 17, ll. 14-20). As noted above, all of the information needed by the court to rule on Appellant's Motion to Certify would have been available if Respondents had participated in the discovery process and Appellant was provided a "full and fair opportunity to complete discovery."

Appellant did not have a "full and fair opportunity to complete discovery." *Baughman* v. 306 S.C. at 112. Appellant served written discovery on Respondents on May 24, 2019. (R. pp. 0152-0172; Pl's INT and RFP). Respondents did not respond at all and filed their Motion for Summary Judgment on August 21, 2019. (R. pp. 0173-0177; Respondents' MSJ). Seven months later, when Respondents purported to respond, they failed to provide any payroll records relating to payment of tips and wages or the names of employees who Appellant alleges should have received credit tips under the SCPWA. (R. pp. 0556-0621; Resp. to INT and RFP). After refusing to respond to discovery for seven months and despite no scheduling order or discovery deadline ever being in place for this matter, Respondents argued at the follow-up hearing on January 9, 2020, that Appellant had "ample opportunity" for discovery. (R. p. 0810, ll. 1-9; January 9, 2020 Hr'g Tr at p. 10, ll. 1-9). At issue in this case is whether or not the Ladles defendants have a common policy of withholding credit card tips in violation of the SCPWA. Because the trial court granted summary judgment for Respondents without them (1) having to identify employee witnesses or provide payroll records relating to payment of wages and tips or (2) being deposed

despite Appellant properly and timely serving notices of deposition, it cannot be true that Appellant was provided a "full and fair opportunity to complete discovery" and summary judgment should be reversed.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DEEM REQUESTS FOR ADMISSION ADMITTED.

Appellant addressed this issue in Section I., B. above and incorporates those arguments and case law here by reference. Respondents had a long history of refusing to cooperate in discovery in this matter including failure to respond to written discovery, failure to provide witnesses for deposition testimony, and failure to stipulate to *any* agreement on a scheduling order with a discovery deadline. Respondents' failure to respond to Appellant's Requests to Admit for over 120 days was not a mere mistake but a continuation of this same trend. Additionally, counsel for Respondents confirmed at the hearing that his office received Appellant's Requests to Admit by e-mail when they were served. (R. p. 0798, ll. 15-18; Hr'g Tr. at p. 54, ll. 15-18). Counsel for Respondents did not dispute that the requests were served on the proper e-mail addresses. All of Appellant's previous discovery in this case was served on Respondents by e-mail and received without objection. In light of the prejudice to Appellant as noted in Section I., B. above and pursuant to SCRCP Rule 36 and *Scott v. Greenville Hous. Auth.*, 353 S.C. at 645–46, the trial court abused its discretion by failing to deem admitted Appellant's requests for admission.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WITHOUT HEARING APPELLANT'S MOTION FOR CLASS CERTIFICATION.

The trial court erred in granting summary judgment to Respondents without hearing Appellant's Motion for Class Certification which was filed simultaneously with a Memorandum of Law on September 11, 2019 and scheduled to be heard on January 6, 2020. (R. pp. 0276-0336; Mot. for Class Cert.). SCRCP Rule 23(d)(1) states that "[a]s soon as practicable, after the

commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Counsel was prepared to argue the motion and opposing counsel for Respondents (as well as counsel for co-defendants) submitted memoranda in opposition. At the hearing, the trial court stated:

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

(R. p. 0761, ll. 14-20; Hr'g Tr. at p. 17, ll. 14-20).

However, the trial court granted summary judgment to the franchisor defendants on January 30, 2020 and granted summary judgment to the franchisee defendants (Respondents) on February 11, 2020 before Appellant had an opportunity to have his motion for class certification heard. (R. pp. 0010-0021; R. pp. 0022-0032; January 30, 2020 Order; February 11, 2020 Order).

Appellant properly captioned and pled class-action causes of action in his original Complaint. (R. pp. 0047-0050; Compl at pp. 11-14). Appellant always maintained that this was a class action lawsuit. Appellant argued all of the SCRCP Rule 23 requirements (numerosity, commonality, typicality, adequacy, and amount in controversy) for class certification in his November 26, 2018 Memorandum in Opposition to Respondents' Motion to Disallow Class Certification and specifically requested that a class be certified in the same. (R. pp. 0135-0139; R. p. 0140; Pl's Memo in Opp to Defs' Mot. to Disallow Class Cert at pp. 2-6; p. 7). Respondents' Motion to Disallow Class Certification was denied on January 29, 2019. (R. p. 0005; Order Denying Mot to Disallow Class Cert). Respondents' Motion to Reconsider this Order was denied on March 6, 2019. (R. p. 0006; Order Denying Respondents' Motion to Reconsider). Subsequently, Appellant served discovery to further develop the class issues.

For class certification, under SCRCP Rule 23(a), a Plaintiff must demonstrate:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the class representatives are typical of the claims or defenses of the class;

(4) the class representatives will fairly and adequately protect the interests of the class; and

(5) the amount in controversy exceeds one hundred dollars per class member.

After the Motion to Disallow Class Certification brought by Respondents was denied, Appellant served written discovery relevant to the requirements for obtaining class certification on May 24, 2019. (R. pp. 0152-0172; Pl.'s INT and RFP). Respondents failed to respond and instead filed a motion for summary judgment on August 21, 2019. (R. pp. 0173-0177; Mot. for Sum. Jud.). After Appellant filed a motion to compel on August 22, 2019, Appellant filed a Motion for Class Certification on September 11, 2019. (R. pp. 0276-0336; Pl's Mot for Class Cert). Appellant alleged in his Complaint that Respondents were engaged in a common scheme and had a common policy of withholding credit card tips from their employees. (R. p. 0044, ¶13; R. p. 0046, ¶¶27 and 29; R. p. 0049, ¶42; R. p. 0051, ¶54; Compl at p. 8, ¶13; p. 10, ¶¶27 and 29; p. 13, ¶42; p. 15, ¶54). Representatives from Ladles James Island, Ladles West Ashley, and Ladles Fort Mill all confirmed in their depositions that they did not pay credit card tips to their employees. (R. p. 0726, ll. 10-25; R. p. 0727, ll. 1-18; Terri Owens Depo. for Ladles James Island at p. 25, ll. 10-25; p. 27, ll. 1 -18 and R. p. 0731, ll. 1-16; R. p. 0732, ll. 3-5; Corey Paul Depo. for Ladles West Ashley and Ladles Fort Mill[6] at p 32, ll. 1-16; p. 37, ll. 3-5).

Although the language of SCRCP Rule 23(d)(1) does not require that a party move for class certification when the action is brought as a class action, Appellant did request that a class

[6] Corey Paul owns Ladles West Ashley as well as Ladles Fort Mill.

be certified in his November 26, 2018 Memorandum in Opposition to Defendants' Motion to Disallow Class Certification and also filed a separate Motion for Class Certification which was pending with the trial court when Respondents' Motion for Summary Judgment was granted (R. pp. 0134-0141; Pl's Memo in Opp to Mot to Disallow Class Cert; R. pp. 0276-0336; Pl.'s Mot for Class Cert). Appellant requested that a class be certified three times when he: (1) brought the suit as a class action alleging that employees at all of the Ladles locations were having credit card tips withheld in violation of the SCPWA; (2) requested on November 26, 2018, that a class be certified in response to the several defendants' Motion to Disallow Class Certification; and (3) filed a Motion for Class Certification on September 11, 2019 which was pending when the trial court issued an Order on February 11, 2020 granting Respondents' Motion for Summary Judgment. The trial court abused its discretion by failing to hear Appellant's Motion for Class Certification and then granting summary judgment to Respondents after it had already granted Appellant's Motion to Compel discovery from Respondents which would have allowed Appellant to move forward with discovery on the class action issues.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE APPELLANT HAS STANDING AGAINST RESPONDENTS BECAUSE THEY ARE EMPLOYERS UNDER THE SCPWA AND ENGAGED IN A COMMON SCHEME THAT DAMAGED APPELLANT.

The trial court found that Appellant "only has standing to assert his claims against Ladles James Island, LLC as that is the only place he was ever employed." (R. p 0030; Order at p. 6). However, Appellant has standing to bring claims against Respondents because Respondents are employers under the SCPWA and engaged in a common scheme that damaged Appellant. The SCPWA generally requires an employer to pay all wages due. S.C. Code Ann. §41-10-40(A). The SCPWA defines "employer" 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).

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).

In *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008), the Supreme Court explained that "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception."

A. Appellant has statutory standing against Respondents

"Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.,* 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012); *See also Bevivino v. Town of Mt. Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 64, 737 S.E.2d 863, 867 (Ct. App. 2013) (holding it is unnecessary to address constitutional standing or the public importance exception when the basis for the independent concept of statutory standing exists).

Although courts may require that the class representative have a cause of action against each defendant, there are two exceptions to this requirement which 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). This doctrine is premised on the notion that the class, not the class representative, is the relevant legal entity for the purpose of Article III justiciability concerns. *See Payton v. County of Kane*, 308 F.3d 673, 679 (7th Cir.2002). The juridical link doctrine arose in the Ninth Circuit's La Mar decision. In *La Mar*, an airline passenger sued the airline from which he purchased a ticket, alleging that the airline overcharged him under the tariff rules. *La Mar*, 489 F.2d at 463. The plaintiff also included six other airlines in his action and brought it on behalf of all others who had suffered a similar overcharge. *La Mar*, 489 F.2d at 463. The plaintiff did not purchase a ticket from these six other defendant airlines and had no dealings with them. *La Mar*, 489 F.2d at 463. The court held that generally, a plaintiff without a cause of action against a specific defendant cannot "fairly and adequately protect the interests" of those who do have such causes of action for purposes of Rule 23(a). *La Mar*, 489 F.2d at 466. Nevertheless, the court went on to recognize the two exceptions for instances involving a concerted scheme or a juridical relationship. *La Mar*, 489 F.2d at 466.

A "juridical relationship," often called a "juridical link," refers to a type of legal relationship which connects all defendants in a way that would make single resolution of a dispute preferable to a multiplicity of similar actions. *Chipman v. Nw. HealthCare Corp.*, 2012 MT 242, 366 Mont. 450, 288 P.3d 193 (Mont. 2012), citing *In re Itel Sec. Litigation*, 89 F.R.D. 104, 121 (N.D.Cal.1981). Since *La Mar*, courts have applied the doctrine to circumstances in which "all

the defendants took part in a similar scheme that was sustained either by a contract or conspiracy, or was mandated by a uniform state rule," such that it was "appropriate to join as defendants even parties with whom the *named* class representative did not have direct contact." *Payton v. County of Kane*, 308 F.3d 673, 679 (7th Cir.2002) (emphasis in original); *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 838–39 (11th Cir.1990); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423–24 (6th Cir.1998).

In *Amchem Prods., Inc. v. Windsor*, 521 U.S 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court addressed standing when attempting to settle an asbestos tort liability case. Both *Amchem* and *Ortiz* dealt with a proposed settlement that would have affected unnamed plaintiffs who had not yet suffered any asbestos-related injury. The Court deferred consideration of the standing of the unnamed plaintiffs until after class certification because the class certification issues were "'logically antecedent' to Article III concerns" and therefore could be "treated before Article III standing." *Oritz*, 527 U.S. at 831; see *Amchem*, 521 U.S. at 612. The Court recognized that Article III considerations generally must be dealt with before reaching the merits of a case, however, to rule on standing before class certification in *Oritz* and *Amchem* would have "required the Court to make a determination as to the standing of persons who were not actually parties to the case, but who were only proposed parties to the case." *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 153 (E.D. Pa. 2009). The Supreme Court analyzed the dispositive class certification issues first while being "'mindful that [Rule 23's] requirements must be interpreted in keeping with Article III's constraints.'" *Ortiz*, 527 U.S. at 831 (quoting *Amchem*, 521 U.S. at 612-13). South Carolina has not yet ruled on the "logically antecedent" concept.

Here, the trial court should have defined the class first and then assessed whether proposed class representatives could satisfy the necessary requirements of Rule 23. *E.g. Payton v. County of Kane*, 308 F.3d 673 (7th Cir. 2002). In Payton, six arrestees filed a putative class action on behalf of themselves and all others similarly situated who had paid a fee to be released on bail from jails from various counties in Illinois. The named plaintiffs sought to certify a class that would include anyone who paid a fee in nineteen counties even though the named plaintiffs had direct claims in only two counties. The district court dismissed all of the claims and denied the motion for class certification as moot. The Court of Appeals for the Seventh Circuit found that the named plaintiffs did have standing to sue in two counties where they had direct claims. The court then addressed the "the propriety of maintaining a suit against the other 17 counties, for which we have no specific named plaintiffs." *Payton*, 308 F.3d at 677-78.

The Payton court questioned whether, for standing purposes, it should "look only to the named plaintiffs, or if, once the requirements of Rule 23 are met, the true plaintiff is the class as a whole." *Id*. at 678. In beginning its analysis of the timing of the standing inquiry, the *Payton* court noted the Ortiz "directive to consider issues of class certification prior to issues of standing." *Id*. at 680. To support the finding that the standing issues should be put off until after class certification, the court invoked the "juridicial link" doctrine. *Id*. at 678.

The Payton court described the "juridicial link" doctrine as allowing a class action to go forward if the "plaintiffs as a group—named and unnamed—have suffered an identical injury at the hands of several parties related by way of a conspiracy or concerted scheme, or otherwise 'juridicially related in a manner that suggests a single resolution of the dispute would expeditious.'" *Id*. at 679 (quoting *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973)). The bail bond at issue was permitted by state statute so "it is reasonable for the putative plaintiff class

to try to hold all counties accountable within one suit." *Id*. at 680. The Payton court found a link sufficient to allow the named plaintiffs to bring suit on behalf of the unnamed plaintiffs because they shared the same legal claims through a state statute. *Id*. at 681-82. Despite this finding, the court emphasized that this would not be the case "where the named plaintiff is trying to piggy-back on the injuries of the unnamed class members" because "a named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs." *Id*. at 682 (internal citation omitted).

To date, South Carolina has not yet adopted the *La Mar* 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, the facts in *Gardner* are so different from the present case that its reasoning has little or no application in this matter. *Gardner* deals with a putative class representative for all South Carolina taxpayers who incurred a reduction in their income tax refund due to mistakes made by various South Carolina agencies under a debt collection statute. *Gardner*, 353 S.C. at 8-9. In his Rule 23 "commonality" class action analysis, the plaintiff argued, and the trial judge agreed, that the common thread among the class members was whether the defendant agencies' actions were proper in seizing income tax refunds from the plaintiffs without proper notice. *Id.* at 22. The Supreme Court found that a key issue in determining whether the agencies violated provisions of the statute, thus causing harm to plaintiffs, was whether the defendant agencies' notices were deficient pursuant to the statute and whether the plaintiffs were prejudiced by the deficiencies. *Id.* at 22-23. The Court concluded that each individual claim would have to be specifically investigated to determine if each plaintiff were prejudiced and that requiring an individual examination of each individual claim defeats the benefits of a class action. *Id*. Likewise, the Court concluded that the same problem arises in the "commonality" analysis for

determining class status for the defendant agencies because it would be necessary to determine if the actions of each individual agency resulted in prejudice to the plaintiffs. *Id.*

The present case does not require the type of painstaking examination into each individual claim like the one described in *Gardner.* Indeed, the only examination is simply a determination as to whether or not Respondents withheld credit card tips from their hourly employees. This is exactly the type of case where a class action is most beneficial. The manner in which tips are to be paid to employees is still a relatively novel issue in South Carolina and not well defined. Failure to include all of the franchisee defendants in the present action could lead to inconsistent outcomes regarding the same questions of fact and law. Moreover, in the interest of judicial economy, it would be preferable for the court not to be burdened with over 75 plaintiffs bringing separate lawsuits against over twenty defendants when a single resolution can be obtained in this matter. (R. pp. 0276-0336; Pl.'s Motion for Class Certification).

Additionally, Appellant is not trying to "piggy-back on the injuries of the unnamed class members" as described in *Payton* because he suffered the same exact injury of having his credit card tips withheld as the other potential class members. Appellant's Complaint alleged that the Respondents had a company-wide policy (or common scheme) of withholding credit card tips from all hourly employees and that this policy damaged Appellant and others similarly situated in violation of the SCPWA[7]. (R. p. 0044, ¶13; R. p. 0046, ¶¶27 and 29; R. p. 0049, ¶42; R. p. 0051, ¶54; Compl at p. 8, ¶13; p. 10, ¶¶27 and 29; p. 13, ¶42; p. 15, ¶54).

[7]The SCPWA provides that 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). S.C. Code Ann. § 41-10-10(2) defines "wages" as:

Deposition testimony from representatives for Ladles James Island, Ladles West Ashley, Ladles Fort Mill, and the Ladles franchisor - Ladles Franchising, Inc., confirmed that they all had this same policy of withholding credit card tips. (R. p. 0726, ll. 10-25; R. p. 0727, ll 1-18; Terri Owens Depo. for Ladles James Island at p. 25, ll. 10-25; p. 27, ll. 1 -18 and R. p. 0731, ll 1-16; R. p. 0732, ll. 3-5; Corey Paul Depo. for Ladles West Ashley and Ladles Fort Mill at p 32, ll. 1-16; p. 37, ll. 3-5; R. p. 0736, ll. 6-25; R. p. 0737, ll. 1-2; Sue Allen Depo. at p. 21, ll. 6-25; p. 22, ll. 1-2). Appellant's Complaint also alleged that this policy of withholding credit card tips originated at the original Ladles location in West Ashley by co-founder and franchisor, Sue Allen. (R. p. 0044, ¶15; R. p. 0045, ¶16; Compl at p. 8, ¶15; p. 9 ¶16). Prior to starting their own franchises, Respondents Corey Paul (owner of Ladles West Ashley and Ladles Fort Mill) and Carol Ellenburg (owner of Ladles Downtown) as well as current defendant Teri Owens (owner of Ladles James Island) trained and worked at the original Ladles West Ashley location where the policy of withholding credit card tips was first implemented. (R. p. 0730, ll. 18-21; Depo. of C. Paul at p. 12, ll. 18-21; R. p. 0743, ll. 5-25; R. p. 0744, ll. 1-3; Depo. of S. Allen at p. 81, ll. 5-25; p. 82, ll. 1-3). If all of the Ladles franchises have the same policy of withholding credit card tips then that is evidence that a common policy (or scheme) exists.

> 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. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

The Court in *Sean Bass v. 817 Corp.,* No.: 2:16-cv-1964-RMG (D.S.C. Mar. 3, 2017), 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.*

Additionally, Appellant's own investigation uncovered testimony which may be evidence of the common scheme or conspiracy and illustrates how an employee like Appellant could be damaged by another Ladles employer[8]. A Ladles West Ashley employee, Lani Charpia, stated in an affidavit that a Ladles West Ashley customer had learned that credit tips were not being paid to the employees. Ms. Charpia was then told by one of her managers not to tell customers that servers do not get the credit card tips. (R. p. 0231, ¶¶ 5-8; Affidavit of Lani Charpia at ¶¶ 5-8). Subsequently when asked the same question by other customers, Ms. Charpia stated that she told them that she was "not allowed to say." *Id* R. p. 0231, ¶ 8; at ¶ 8. As a result, customers who learn of the policy while dining at one Ladles location and then subsequently dine at another Ladles location may fail to leave a credit card tip for those employees since the customer already knows or suspects that employees do not get credit card tips at "Ladles." This shows how employees at Ladles James Island (or West Ashley, Fort Mill, Knightsville, Coosaw, etc.) can be damaged by the actions of each Ladles location regardless of whether that location is the one that signs the pay checks.

Further, the common scheme or common tipping policy is vital to maintaining the Ladles "concept" for all of the Ladles franchisees. The Franchise representatives that were deposed testified that the policy of withholding credit card tips from employees was necessary to prevent them from losing employees or having to change the whole restaurant concept. (R. p. 0728, ll. 2-

[8] "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.

10; Depo. of Terri Owens at p. 35, Lns. 2-10; R. p. 0731, ll. 6-16; Depo. of Corey Paul at p. 32, Lns. 6-16). 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 and use of a common policy of withholding credit card tips serves as a fundamental cornerstone of Ladles and 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."* (R. p. 0709; Ladles co-founder, Sue Allen, YouTube (2012), https://www.youtube.com/watch?v=UoO8ua34ZnM video at 5:18). (emphasis added).

B. Appellant has constitutional standing against Respondents to bring his claim for conversion.

The February 11, 2020 Order failed to find that Plaintiff had standing with the moving Defendants on his conversion cause of action. 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 is the illegal use, misuse, or detention of another's chattel. American Credit v. Nationwide Mutual, 378 S.C. 623, 663 S.E.2nd 492, 495 (2008). "Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even through the specific coins and bills are not identified." *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 498, S.E.2d 789, 793 (S.C. 1990)

(citing *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975) and 89 C.J.S. Trover and Conversion § 23 (1955)).

In *Youngblood v. S.C. Dep't of Soc. Servs.,* 402 S.C. 311, 741 S.E.2d 515 (2013), the Supreme Court explained that "[t]o possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Second, a causal connection must exist between the injury and the challenged conduct. *Id*. Finally, it must be likely that a favorable decision will redress the injury. *Id*." *Youngblood,* 402 S.C. at 317, 741 S.E.2d at 518.

The credit card tips of Appellant and other Ladles employees are retained by Ladles James Island who pay a percentage of them to the Franchisor as party of a royalty fee as well as for a marketing fund. (R. pp. 0676-0677, ¶¶ B-C; R. pp. 0684-0687, ¶¶ A-C; Franchise Agreement at pp. 17-18, ¶¶ B-C; pp. 25-28, ¶¶ A-C). The Franchisor Defendants then use a portion of these funds to engage in/pay for joint marketing, which is used by all Franchisees. Id. Accordingly, all Franchisees are in possession of a benefit paid for by a percentage of gross sales that includes Appellant's tips. Id. The amount of Appellant'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.

Appellant suffered a concrete and particularized injury in fact by having his credit card tips withheld as a result of a common policy among Respondents and a portion of which was diverted to a common marketing fund that all Respondents benefited from. *Youngblood,* 402 S.C. at 317. Also, it is likely as opposed to merely speculative that a favorable decision will redress the injury.

Id. By all indications, Respondents plan on continuing the policy of withholding credit card tips from employees if Appellant's injury is not redressed by this action. A favorable decision for Appellant leading Respondents to pay damages to Appellant (and others similarly situated if a class is certified) would likely result in Respondents ending their policy of withholding credit card tips from its employees. Based on the foregoing, Appellant has constitutional standing against Respondents for his conversion claim and summary judgment should be reversed.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the trial court's decision to grant Respondents' Motion for Summary Judgment. The trial court's grant of summary judgment was premature because Appellant did not have a full and fair opportunity to complete discovery. Appellant had statutory standing to bring his claims against Respondents because they were engaged in a common scheme with other Ladles defendants that damaged Appellant. Appellant also has constitutional standing to bring his claims against Respondents for conversion.

March 23, 2021

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211(b), SCRAP.

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