THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2020-001642

Gibbs International, Inc., Respondent,

v.

Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants of whom Sarmad Harake and Eurosa, Inc. are the Appellants.

INITIAL BRIEF OF RESPONDENT GIBBS INTERNATIONAL, INC.

Kevin A. Dunlap (S. C. Bar No. 13081)
PARKER POE ADAMS & BERNSTEIN LLP
110 East Court Street, Suite 200
Greenville, South Carolina 29601
Telephone: (864) 253-6105
ATTORNEYS FOR RESPONDENT

Other Counsel of Record:
John T. Lay, Jr. (S.C. Bar No. 64526)
Curtis L. Ott (S.C. Bar No. 66145)
Lindsay A. Joyner (S.C. Bar No. 77437)
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 7368
Columbia, South Carolina 29205
Telephone: (803) 779-1833
Facsimile: (803) 779-1767
ATTORNEYS FOR APPELLANTS

Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court Properly Dismiss/Strike Appellant's Fourth Counterclaim?

II. Did the Circuit Court Properly Deny Appellant's Motion to Amend?

STATEMENT OF THE CASE

This matter involves claims by Respondent Gibbs International, Inc. ("Gibbs") of shameful breaches of fiduciary duties and theft of money, among other things, by Sarmad Harake ("Harake" or "S. Harake") and his wholly-owned company and alter ego, Eurosa, Inc. ("Eurosa") (collectively, the "Harake Defendants"), among others, resulting in millions of dollars of losses to Gibbs. This lawsuit was filed on March 7, 2017. It was amended twice with the Second Amended Complaint being filed on June 9, 2017. Default was entered against Harake, Eurosa, and Katherine Harake ("K. Harake"). The default was set aside and Harake, Eurosa, and K. Harake answered the complaint.

Gibbs filed a Motion to Amend with its Amendment to the Second Amended Complaint attached to the motion on December 16, 2019 ("Gibbs' Mot. to Amend Compl."). This amendment arose out of a document production a few days earlier confirming that Harake had transferred to his wife, K. Harake, money entrusted to him by Gibbs to be used for purposes specified by Gibbs and that she had used the money for inappropriate purposes. The Motion to Amend was set for hearing in January 2020, but then rescheduled at Harake's request until February 2020. Before the hearing, the parties reached an agreement in February 2020 in which they resolved the Motion to Amend. Gibbs contended the Harake Defendants breached the agreement almost immediately. That resulted in a series of negotiations. The dispute about the motion to amend was finally resolved on June 19, 2020 and the Third Amended Complaint was filed on August 3, 2020. Gibbs asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, accounting, invasion of privacy/wrongful intrusion into private affairs, conversion, unfair and deceptive trade practices, fraud, civil conspiracy, unjust enrichment,

quasi contract, implied contract, quantum meruit, and piercing the corporate veil, among other things.

On August 24, 2020, the Harake Defendants filed their Answer to the Third Amended Complaint and Amended Counterclaims ("Answer and Am. Countercl."), along with a Motion to Dismiss the Third Amended Complaint. For the first time, Appellants asserted as their Fourth Counterclaim a counterclaim for "tortious interference with economic interest." (Answer and Am. Countercl., ¶¶ 191-204). Gibbs filed a Motion to Dismiss on August 28, 2020 ("Gibbs' Mot. To Dismiss and/or Strike"). Both sides filed briefs in support of their respective positions ("Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike," "Harake Def. Memo. in Opp'n."). While the Harake Defendants complained that Gibbs filed its brief at 12:24 p.m., with a 2:00 hearing, the Harake Defendants did not inform this Court that they had only filed their own brief at 11:14 a.m. The Harake Defendants made no prior request that the briefs be filed earlier, even though such requests had been made and agreements to do so had been entered into on earlier occasions as to other motions in this case.

A hearing was held on September 22, 2020. On September 25, 2020, the Circuit Court entered a Form 4 Order (the "September 25 Order") directing the preparation of an order, among other things, dismissing Harake/Eurosa's Fourth Counterclaim for Relief. The Harake Defendants filed a Motion to Alter or Amend/Brief on October 5, 2020 ("Mot. to Alter/Amend"). The Mot. to Alter/Amend sought to amend the Fourth Counterclaim. The Circuit Court entered the formal, 29-page Order on November 18, 2020 (the "November 18 Order"). The Circuit Court thereafter denied the Mot. to Alter/Amend on November 30, 2020 (the "November 30 Order") after reviewing the Mot. to Alter/Amend and concluding no additional filings were necessary, and requested the preparation of a simple Order for the Court's consideration. (November 30 Order at 1). The Harake Defendants filed a Notice of Appeal on December 17, 2020.

STATEMENT OF FACTS

The Claims at Issue

The Harake Defendants' fourth counterclaim for relief is for "tortious interference with economic interest." (Answer and Am. Countercl., ¶¶ 191-204). This claim was asserted for the first time on August 24, 2020, 3 years, 5 months after the litigation was filed. The Harake Defendants admitted in their brief to this Court as well as the brief filed with the Circuit Court that this claim has not been recognized in South Carolina. (Harake Def. Memo. in Opp'n. at 7; Initial Brief of Appellants Sarmad Harake and Eurosa, Inc. ("Harake Def. Br.") at 11, 20). In addition, the claim does not use the words "intentional interference" or "intentional" anywhere in the subject claim, the rest of the 16 and one-half pages of counterclaims, or the entire 36 pages of answer and counterclaims. The factual basis for the claim is entirely new and presents facts not previously addressed in the Harake Defendants' prior counterclaims. By way of example, the new claim involves a company in the United Kingdom allegedly called Paysend PLC ("Paysend UK"). Paysend UK's name was not even used a single time in the Harake Defendants' previously-filed counterclaims or in the rest of its answer.

As to the claims involving Paysend UK, the Harake Defendants allege that a United States entity called Paysend Processing, Inc. ("Paysend Processing") was part of a limited liability company that the Harake Defendants and Gibbs agreed to form. (Answer and Am. Countercl., ¶¶130, 149). The name of the limited liability company was Gibbs Investment Holdings, LLC ("GIH"). (Answer and Am. Countercl., ¶130). No operating agreement was signed for GIH. (Answer and Am. Countercl., ¶134). A memorandum of agreement was entered into on August 5, 2016 concerning GIH. (Answer and Am. Countercl., ¶143).

Harake claims that he had acquired a company in the United Kingdom called Paysend UK. (Answer and Am. Countercl., ¶¶153-154, 196). The Harake Defendants concede in their own

counterclaim that they would not have been damaged as to Paysend UK if Gibbs had agreed to allow the other investor to buy Gibbs out of Paysend Processing or if Gibbs had agreed to allow its investment in Paysend Processing to be rolled into Paysend UK. (Answer and Am. Countercl., ¶¶155, 197-198). More specifically, the paraphrased allegations state:

- Gibbs would not agree to be bought out of Paysend Processing or to transfer its investment to Paysend UK. (Answer and Am. Countercl., ¶¶ 155, 198).
- The Harake Defendants then allegedly had to buy the other investor's shares in Paysend Processing and to divest those shares they owned in Paysend UK. (Answer and Am. Countercl., ¶¶ 155, 199).
- If Gibbs had agreed to roll Paysend Processing into Paysend UK, then the Harake Defendants would have owned shares in Paysend UK worth over $12 million at the time it filed its counterclaims. (Answer and Am. Countercl., ¶¶ 157, 201).
- Because of Gibbs' "refusal" to allow the other investors to buy it out of Paysend Processing or to roll Paysend Processing into Paysend UK, the Harake Defendants were diluted and "unable to participate in later rounds of investment" made by other investors in Paysend UK. (Answer and Am. Countercl., ¶¶ 158, 202).
- If the Harake Defendants had been able to retain their founding shares, those shares would have been worth over $10 million at the time the Harake Defendants filed their counterclaims. (Answer and Am. Countercl., ¶¶158, 203).

Simply put – all of the Harake Defendants' alleged damages were caused by Gibbs' alleged refusal to allow the other investor to buy Gibbs out or to agree for the shares of Paysend Processing to be rolled into Paysend UK. The Harake Defendants had no legal right to force Gibbs to agree to be bought out or to the rollover. The "other investor" forced the Harake Defendants out of Paysend UK. (Answer and Am. Countercl., ¶¶159-160, 199).

The Harake Defendants themselves cited to Harake's deposition testimony and pointed out that he testified: Harake received a $1.5 million loan from a financial institution in Switzerland to use as capital to create Paysend UK; as of July 2019, Paysend UK was allegedly worth $173 million; Gibbs decided not to be part of Paysend UK and decided not to sell its stock in Paysend

Processing; and Harake was forced by the other investor to divest from Paysend UK. (S. Harake July 25, 2019 Vol. 2 Deposition ("Harake II") at 286:9 – 291:17).

Harake also testified: first, Abdul Keremov ("Abdul"), the other investor in Paysend Processing and also an investor in Paysend UK, was the one who "forced" the Harake Defendants out of Paysend UK because of this litigation between Harake and Gibbs. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4; Harake II at 290:10-16). Harake testified he was forced out because Abdul indicated they would be raising money and "the first question they ask you is 'Do you have any ongoing cases?'" (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4; Harake II at 290:15-16). Harake also testified Abdul said: "We don't want you to be involved, because you have a case ongoing." (Harake II at 289:24-25, emphasis added). At the time of his testimony, Gibbs was not aware that the Harake Defendants were considering such a claim since no such claim had been asserted and Harake just started testifying about the potential claim. (Gibbs' Mot. To Dismiss and/or Strike, ¶6; Harake II at 291:18 – 293:23).

Violation of the Discovery Rules

In his July 25, 2019 deposition, Harake testified briefly about the subject claim though it had not been asserted at that time. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 291:18 – 293:23). During that brief testimony, Harake was instructed not to answer. *Id*. The Harake Defendants did not file a motion for a protective order. They later claimed the existence of a verbal agreement that no motion need be filed unless notice was given that a motion for a protective order was necessary. (Harake Def. Memo. in Opp'n. at 9; Transcript of September 22, 2020 Motions Hearing ("Hr'g Tr.") at 19). Gibbs has indicated written notice was provided with: (1) the filing of Gibbs' motion to dismiss and/or strike; (2) in open court during the hearing on September 22; (3) twenty-eight business days after the hearing when the proposed order was submitted. In spite of written notice being provided by Gibbs to the Harake Defendants on multiple

occasions that a motion for a protective order was necessary, no such motion was filed within five business days of any of those events (or ever).

Gibbs made it clear that it was seeking dismissal/striking of the counterclaim because of, among other things, the instruction not to answer given by the Harake Defendants' counsel in the deposition of Harake. (Gibbs' Mot. To Dismiss and/or Strike, ¶6). This was not a "new, surprise ground" as the Harake Defendants contend. (Harake Def. Br. at 9). Again, Gibbs' motion specifically asks the Court to strike "because S. Harake in his deposition started testifying about the issue on his own, and their counsel instructed him not to answer." (Gibbs' Mot. To Dismiss and/or Strike, ¶6). Gibbs' memorandum in support of that motion followed up on the argument in its motion to dismiss/strike. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6). Moreover, the Harake Defendants had plenty of time and opportunity to address this issue through the filing of their Motion to Alter/Amend and chose not to do so. The Circuit Court considered all of their arguments and exercised its discretion to rule against the Harake Defendants on this issue. (November 18 Order at 13-14, November 30 Order at 1)

Denial of the Motion to Amend

As noted above, the case has now been pending for over four years. The case had been pending for more than three years, five months at the time the Harake Defendants interjected the fourth counterclaim for relief. Extensive discovery has taken place in this case. Discovery is virtually complete if the Harake Defendants' new claim is not added. The equivalent of 85 bankers' boxes of documents have been produced in this case with Gibbs producing over 200,000 pages and the Harake Defendants producing over 30,000 pages. (Hr'g Tr. at 24). Sixteen depositions have been taken to date, including evidentiary depositions of witnesses in Moscow, Mexico, California, and other locations. Three thousand five hundred thirty-five pages of transcripts have been taken. Five thousand eight hundred eighty-eight pages of exhibits have been

used in those depositions. The Consent Order dated November 4, 2020 says the case will be ready for trial as of January 4, 2021. (November 4 Scheduling Order at 1). The date that the case was to be ready for trial has not been changed by the subsequent order. (November 4 Scheduling Order at 1). The scheduling order entered December 1, 2020 provided for a discovery deadline of December 7, 2020. (December 1 Scheduling Order at 1).

No motion to amend was made by the Harake Defendants in July, August, September, October, or November of 2019. In December of 2019, after Harake finally produced the documents to show K. Harake's improper use of Gibbs' money that was wrongfully transferred to her account, Gibbs filed a motion to amend (Gibbs' Mot. to Amend Compl.) since it finally had the documents the Harake Defendants had been hiding. Harake did not file a motion to amend in December of 2019. Likewise, none was filed in January, February, March, April, May, June, or July of 2020. In spite of all the information Harake had at the time of his deposition in July 2019, no effort was made to assert the claim. Harake admitted in his deposition that he was finalizing his damages. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 291:18 – 292:5). The Harake Defendants waited until August 24, 2020 to file the claim. The Harake Defendants claim to be entitled to wait to file because of Gibbs' recent amendment. For the reasons set forth in detail below, Gibbs amended when it did because for years the Harake Defendants had hidden the transfers of Gibbs' money from the Harake Defendants to K. Harake - money which she subsequently spent inappropriately - and the Harake Defendants refused to produce those banking records in this case until ordered to do so by the Circuit Court. (Gibbs' Mot. to Dismiss and/or Strike, ¶7; Gibbs' Mot. To Amend Compl. ¶¶ 3-28; Gibbs' Memorandum of Law in Opposition to Defendant Katherine Harake's Motion to Dismiss, filed September 22, 2020 ("Gibbs' Memo. In Opp'n to K. Harake's Mot. To Dismiss") at 5, 9, 11-12). Within days of fully receiving those records, Gibbs filed its motion to amend. (Gibbs' Mot. To Dismiss and/or Strike,

¶7; Gibbs' Mot. To Amend Compl. ¶¶ 3-28; Gibbs' Memo. In Opp'n to K. Harake's Mot. To Dismiss at 5, 9, 11-12). In contrast, the Harake Defendants did not need any records or discovery from Gibbs to finalize its claim and the Harake Defendants did not take the position that they needed discovery to assert the claim. Again, Harake admitted he was only finalizing his damages. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 5; Harake II at 292:3-5).

Harake admitted that the individual who made the decision to force him out of Paysend UK was Abdul. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 290:10-24). Harake also admitted Abdul forced Harake out of Paysend UK because of this litigation between Gibbs and Harake. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 289:6-25). As noted above, the Harake Defendants concede in their own counterclaims that they would not have been damaged if Gibbs had agreed to be bought out or if Gibbs had agreed to a rollover. (Answer and Am. Countercl., ¶¶ 198, 199, 201, 202, 203). Gibbs was not required to agree to sell its stock or to a rollover.

The Circuit Court's Order

The Circuit Court dismissed the Harake Defendants' fourth counterclaim for relief in its November 18 Order. (November 18 Order at 12). The Circuit Court also rejected the verbal request made at the time of the hearing to be allowed to amend and noted that it would also address that motion raised in the subsequent, written Mot. to Alter/Amend made by the Harake Defendants. (November 18 Order at 12-13). The November 18 Order also concluded that Gibbs moved to strike the fourth counterclaim pursuant to Rule 12(f) "and any other applicable Rule and/or common law" and the basis of that motion was that the Harake Defendants' counsel instructed S. Harake not to answer certain deposition questions about this claim. The Circuit Court also concluded that because the Harake Defendants did not move for a protective order with regard to certain questions that eventually became the fourth counterclaim, the counterclaim should be

dismissed or stricken. (November 18 Order at 13-14). Gibbs did give notice that a protective order was necessary when it filed its motion to dismiss/strike, when it gave notice in open court at the time of the hearing on September 22, and with the submission of the proposed order on this issue on November 2, 2020, and the Circuit Court found that the Harake Defendants did not file a motion for a protective order within five business days of any of those events. (November 18 Order at 13-14). The Circuit Court then found, in its discretion, that the refusal to allow S. Harake to testify justifies dismissal. (November 18 Order at 14). The Circuit Court's November 30 Order denied the Harake Defendants' motion to alter and also again denied their motion to amend. (November 30 Order at 1).

STANDARD OF REVIEW

I. Rule 12(b)(6) Standard.

Rule 12(b)(6) permits dismissal of claims and counterclaims when the claimant fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. In deciding whether to grant a motion to dismiss, the court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states a valid claim for relief. *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999). Dismissal is appropriate under Rule 12(b)(6) when the "facts alleged and inferences reasonably deducible therefrom" do not entitle the complainant to relief. *Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001).

II. Rule 12(f) Standard.

Rule 12(f) permits this Court to strike "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. "It is well settled that a motion to strike is addressed to the sound discretion of the trial court." *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979) (upholding trial court's decision to strike part of pleadings). The "trial court's decision will not be reversed absent an abuse of discretion." *Id*. In ruling on a motion

to strike, the court must determine "whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). Where the pled cause of action does not exist under South Carolina law, it is appropriate to strike the claim. *Robinson v. Code*, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009).

III. Rule 15 Motion to Amend Standard.

In denying a motion to amend in *Barry v. McLeod,* 492 S.E.2d 794, 328 S.C. 435 (1997), this Court indicated: the amendment decision "is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." (Citation omitted.) In *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 754 S.E.2d 714 (2014), the court explained that the ruling on a motion to amend is addressed to the Circuit Court's sound discretion and "[p]rejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action."

IV. Rule 37 Standard.

Rule 37, SCRCP sanctions are also subject to the abuse of discretion standard. Rule 30(j)(9), SCRCP provides that violations of Rule 30 concerning depositions may subject the violator to sanctions under Rule 37, SCRCP. The "imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). The party appealing a sanction "carries the burden of proving an abuse of discretion occurred." *McNair v. Fairfield Cty.*, 379 S.C. 462, 465-66, 665 S.E.2d 830, 832 (Ct. App. 2008).

Motions to compel are not necessary when a party has failed to perform a mandatory duty under the discovery rules. *Richardson on Behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 599, 846 S.E.2d 14, 16 (Ct. App. 2020). A court order is not required for the imposition of sanctions under Rule 37(d) and the remedies specified under Rule 37(b) include, but are not limited to: "an order striking out pleadings or parts thereof … or dismissing the action or proceeding or … rendering a judgment by default against the disobedient party." *Id., See also Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317, 318, n.1 (Ct. App. 1987). Prejudice is "presumed" where mandatory duties are violated and a party who fails to comply with mandatory obligations has the burden to show a "lack of prejudice." *Id.*

ARGUMENT

I. THE CIRCUIT COURT'S DISMISSAL OF THE FOURTH COUNTERCLAIM FOR RELIEF WAS PROPER AND THE CASELAW CITED BY THE HARAKE DEFENDANTS DOES NOT SUPPORT THE CONCLUSION THAT THE WORDS THE HARAKE DEFENDANTS THEMSELVES CHOSE TO USE IN ASSERTING THE CLAIM ARE TO BE IGNORED.

A. The Harake Defendants asserted a claim that they admit has not been recognized under South Carolina law.

While the admission is conveniently buried in a footnote on page 20 of their 25-page brief, the Harake Defendants do flatly admit, as they also admitted in their brief in the Circuit Court, that the fourth counterclaim at issue in this appeal they referred to as "tortious interference with economic interest" has not been recognized in South Carolina. More particularly, the Harake Defendants say in footnote number 4: "Even though tortious interference with economic interest has not been formally recognized in South Carolina …." (Harake Def. Br. at 20). The Circuit Court correctly found, among other things, that "the fourth counterclaim for relief is dismissed because the claim that Counterclaim Plaintiff chose to assert is not recognized in South Carolina."

(November 30 Order at 12). The Circuit Court also correctly noted that the claim does not even allege "intentional interference" in the claim itself or elsewhere in the counterclaims. *Id*.

B. The South Carolina caselaw cited by the Harake Defendants to try to rescue the claim is entirely different than the case at bar.

The first case cited by the Harake Defendants, *Prior v. S.C. Med. Malpractice Liabl. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991), has absolutely nothing to do with this case. *Prior* involved a situation in which an insured deliberately labeled a sexual assault as a negligent act to try to manufacture insurance coverage when the policy excluded coverage for intentional torts like sexual assault. The court explained that the nature of the underlying acts had to be examined to determine if coverage exists in a situation like this where the insured is manipulating the label of the claim to try to manufacture coverage when none exists. Those facts plainly are not present here.

Likewise, *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013), has nothing to do with the case at hand. In *Shirley's Iron Works*, the plaintiff did not use the label of contract, tort, or negligence, but the complaint did allege that the plaintiff was a third-party beneficiary of a contract. In stark contrast, the Harake Defendants in the case at bar did, in fact, identify the claim as one for "tortious interference with economic interest." *Shirley's Iron Works* does not rule that labels and the words used in the pleading are to be ignored. In fact, the Court did the opposite and explained that the first cause of action was entitled "Violation of S.C. Code Ann. Section 29-6-250." The Court concluded that the only claim that could be asserted under that statute was a contract claim so the Court concluded that title was adequate to state a contract claim. Finally, the Harake Defendants employed the title deliberately chosen by them for the tactical advantage to try to dodge the *mens rea* requirement. The Harake Defendants did not use the word "intentional" anywhere in the title or anywhere in the pleading to try to avoid having to prove intentional conduct.

The Harake Defendants cite *Crandall Corp. v. Navistar Int'l Transp. Corp*., 302 S.C. 265, 395 S.E.2d 179 (1990), to say that "labels" do not matter because "intentional interference with prospective economic advantage" had been labeled as "intentional interference with contractual relations." (Harake Def. Br. at 16). That simply is not true. The court did not hold that labels and the words in a pleading should be ignored or that "intentional interference with prospective economic advantage" was the same as "intentional interference with contractual relations." (Harake Def. Br. at 16). The court explained that the action brought was for "intentional interference with prospective contractual relations" and the claim the court addressed was for "intentional interference with prospective contractual relations." *Crandall*, 302 S.C. 268, 395 S.E.2d 181. The court did not find that a claim pled as one was construed to be another claim. In addition, both of these claims require "intentional" conduct. That is **not** what the Harake Defendants pled in the case at bar at all. As noted above, and in the case at bar, the Harake Defendants' claim was for "tortious interference with economic interest" and the Harake Defendants did not use the word "intentional" a single time in the claim or elsewhere in the 36-page pleading. The Harake Defendants deliberately did not call the claim "intentional" interference or even use the words "intentional interference" a single time in their claim because they wanted to lower the imposing hurdle for recovery.

United Educational Distributors, LLC v. Educational Testing Svc., 350 S.C. 7, 564 S.E.2d 324, 326 at n.1 (Ct. App. 2002), was also cited by the Harake Defendants on this issue. First, *United Educational Distributors* granted a motion to dismiss a claim for intentional interference with prospective economic advantage. The Harake Defendants did not assert this claim, but it is important to note that claim was thrown out. Second, when the court considered the claim of intentional interference with prospective economic advantage as intentional interference with prospective contractual relations, it did so because "the parties use the term interchangeably" and

the dismissal was appropriate either way. *United*, 350 S.C. at 7,10, 564 S.E.2d 324, 326 at n.1. Again, the Harake Defendants did not use the words "intentional interference" in the subject claim for relief at all or in the remainder of the counterclaims. Not once.

Moreover, the Court of Appeals in *United Educational Distributors* made it clear that the two claims were for: (1) intentional interference with present contractual relations and (2) intentional interference with prospective contractual relations. In *United Educational Distributors*, the claimant did not try to dodge the *mens rea* requirement. The Harake Defendants have cited the Court of Appeals for the observation that the label "did not affect the substance of [the court's] analysis"; but this was as between two claims pled as intentional torts. *Id.* at 10, 326, n.1. In stark contrast, the Harake Defendants deliberately tried to lower the legal standard.

Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), is also different because it involved a former enrollee of a Church-operated day care who sued the Church for mental and emotional injuries sustained as a result of being abused while attending the facility. The issue in that decision had to do with whether a cause of action is allowed when the medical diagnosis for the victim is labeled "repressed memory syndrome" instead of "dissociative amnesia." That has nothing to do with the case before this Court.

In the end, as the Harake Defendants concede, they have not cited a single South Carolina case stating that South Carolina recognizes the cause of action that the Harake Defendants asserted in their fourth counterclaim for relief, "tortious interference with economic interest." As a result, the Circuit Court's dismissal of that claim should be upheld.

In section III(D) of this brief, Gibbs points out why any amendment is futile. Gibbs also notes that in addition to the point that any amendment is futile, Section III(D) of this brief also identifies other reasons that the Circuit Court's original dismissal/striking of the claim was

appropriate and should be affirmed. Those reasons are not stated here merely to avoid duplication but are incorporated by reference.

C. The cases cited by the Harake Defendants from other states do not support the conclusion that economic relations torts or their titles are interchangeable.

The Harake Defendants represent that "[o]ther states have recognized [tortious interference with contractual relations] under multiple names" (Harake Def. Br. at 19), and then cite cases from other jurisdictions. However, none of the cases cited by the Harake Defendants support the conclusion that economic relation torts are interchangeable or that other jurisdictions have adopted multiple names for the same tort within their jurisdiction. In fact, several cases explicitly find the opposite. Further, none of the cases support the conclusion that "tortious interference with economic interest" is a viable tort claim.

In *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130, 1141–42, 470 P.3d 571, 575–76 (2020), the California Supreme Court discussed two torts: "interference with the performance of a contract" and "interference with a prospective economic relationship." The court was explicit that the two torts are "distinct." *Id.* *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 218 (Minn. 2014), similarly recognizes that economic relations torts are not interchangeable: "It is important to recognize that a claim for wrongful interference with a contract and a claim for tortious interference with a prospective economic advantage protect different interests" (citation omitted). In *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 216, 754 S.E.2d 313, 318 (2014), the court noted the difference between a claim for intentional interference with contractual relations and intentional interference with a business expectancy by saying that when the claim involves a "business expectancy, a plaintiff, in order to present a prima facie case of tortious interference, must allege and prove not only an <u>intentional</u> interference, but also that the defendant employed improper methods." (Internal quotations and citations omitted.)

Most of the cases the Harake Defendants cited only address one tort by one name, which does not support the Harake Defendants' contention that the tort is recognized by a wide range of terms within respective jurisdictions. *Am. Diamond Exch., Inc. v. Alpert*, 101 Conn. App. 83, 90, 920 A.2d 357, 363 (2007), addresses "tortious interference with business expectancies." The Harake Defendants argued that this claim "encompasses a broad range of behavior." (Harake Def. Br. at 19). However, that excerpt was misleadingly placed and it does not support the notion that the label and words used to describe the claim are to be ignored.

Schuler v. Abbott Labs., 265 Ill. App. 3d 991, 994, 639 N.E.2d 144, 147 (1993), addresses "interference with prospective economic advantage" and noted that the claimant failed to plead and prove malice. The appellate court upheld the 12(b)(6) dismissal. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814–15 (Fla. 1994), addresses "tortious interference with a business relationship" and noted that "mere hope" of certain future activity was an inadequate legal basis for the claim. *Wilkerson v. Carlo*, 101 Mich. App. 629, 632, 300 N.W.2d 658, 659 (1980), addresses "tortious interference with economic relations" and concluded there was no basis for the claim; and *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 48, 888 N.Y.S.2d 489 (2009), addresses "tortious interference with business relations" and noted the claimant must prove the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or an independent tort. Thus, none of these cases suggest that these jurisdictions recognize the same tort by different names, as wrongfully asserted by the Harake Defendants. (Harake Def. Br. at 19). Further, in each of these jurisdictions, an improper motive or an independently unlawful act with aggravating circumstances is required. *See Dowd & Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 381, 816 N.E.2d 754, 768 (2004); *Howard v. Murray*, 184 So. 3d 1155, 1166 (Fla. Dist. Ct. App. 2015); *CMI Int'l, Inc v. Intermet Int'l Corp*, 251 Mich.App 125, 131; 649 NW2d 808 (2002); *Amaranth*, 71 A.D.3d at 48, 888 N.Y.S.2d 489 (2009).

Further, none of the cases cited by the Harake Defendants include a single court addressing this tort by multiple names within the same jurisdiction. In *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 628 N.W.2d 707, 717, 720 (N.D. 2001), the North Dakota Supreme Court noted that "[t]here is great disparity in the language used by courts to describe the various elements of the tort" of "unlawful interference with business," and then cites to *other* jurisdictions' characterizations of their economic relations tort. The court goes into great detail to explain the very limited nature and indicated: "[A] plaintiff could not recover against a defendant whose persuasion of others not to deal with Plaintiff was lawful. Conduct that is merely 'sharp' or unfair is not actionable and cannot be the basis of an action for tortious interference with prospective contractual relations, and we disapprove of cases that suggest the contrary." *Id.* at 720.

While some other jurisdictions may use different terms to classify certain economic relations torts, the Harake Defendants are not pleading their case in other jurisdictions. More importantly, the Harake Defendants have provided no caselaw to suggest that any jurisdiction treats economic torts interchangeably. **Specifically, not a single case cited expressly identified a claim for "tortious interference with economic interest" that the court redrafts and renames as a claim for "intentional interference with prospective contractual relations" or renames as "intentional interference with contract" while being called "tortious interference with contractual relations," which is what the Harake Defendants have asked this Court to do**. Again, at the end of the day, the Harake Defendants have not cited a single South Carolina case finding that the claim they asserted for "tortious interference with economic interest" exists in South Carolina and admit this, though conveniently burying it in a footnote in their brief. (Harake Def. Br. at 20). This is nothing more than the Harake Defendants doing in their brief what the Harake Defendants did in the underlying facts of this case – creating a cyclone of confusion and hope everyone just throws up their hands and allows them to have their way. Gibbs refuses to

do so. The bottom line is they have not cited a case in South Carolina recognizing a claim for "tortious interference with economic interest." It is not recognized. The dismissal of the fourth counterclaim should be affirmed. Case closed.

D. The "incorporates by reference" paragraph does not save the claim from dismissal.

It is also important to note that in a desperate attempt to try to save the claim, the Harake Defendants point out that the meager, bare-bones pleading asserting the claim at issue also incorporates by reference other allegations in the complaint. (Harake Def. Br. at 6). The fatal defect in this analysis is that even a cursory review of the other allegations concerning Paysend UK establishes that the other allegations do nothing to further advance the claim at issue for these reasons:

- The only new allegations in the other allegations of the counterclaim relating to Paysend UK that were not mentioned in the fourth counterclaim for relief were:
  - "Counterclaim Defendant Gibbs agreed to the $1 million investment as long as on the second capital raise, it would receive money back." (Answer and Am. Countercl., ¶149)
  - "Pursuant to the agreement between Counterclaim Plaintiff Eurosa, Counterclaim Defendant Gibbs, and the other investor, Counterclaim Plaintiff Eurosa owned a 13% interest in Paysend Processing based on a $29 million valuation." (Answer and Am. Countercl., ¶150)
  - "As of September 2016, Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs insisted that the $33,000 draw promised to Counterclaim Plaintiff Sarmad Harake from GIH should instead be drawn from Paysend Processing." (Answer and Am. Countercl., ¶151)
  - "In November 2016, Counterclaim Plaintiffs Sarmad Harake and Eurosa, Inc. entered into loan agreements with International Holding AG for the principal amount of One Million Three Hundred Ninety Thousand ($1,390,000), which was in turn invested to acquire a 100% interest in Paysend UK." (Answer and Am. Countercl., ¶154)
  - Harake alleged in the claim at issue that he was forced to divest his shares in Paysend UK and one of the paragraphs outside the body of the subject claim recites that he sold "his 1.16% interest in Paysend UK to that other investor in November 2018 for Two million Eighty-Five Thousand One Hundred Sixty-Seven and NO/100 dollars ($2,085,167)." (Answer and Am. Countercl., ¶159)

- "Counterclaim Plaintiffs then had to pay the other investor: One Hundred Forty-Nine Thousand Dollars and NO/100 ($149,000) for the expenses incurred by the other investor in Paysend and One Hundred Thirty-Six Thousand and Three Hundred ($136,300) related to the investor's Paysend shares." (Answer and Am. Countercl., ¶160)

- There is nothing in these allegations that revives the claim as they merely provide some additional factual information. Nowhere – not once – do these allegations even bother to use the words "intentional" or "intentional interference."
- None of the issues as to Paysend UK were addressed in Harake's original counterclaims.
- Finally, "Paysend UK" is not even mentioned a single time in Harake's original counterclaims or in the rest of that 36-page answer.

E. The final effort to revive the claim asks the Court to re-draft the claim and call it tortious interference with existing contractual relations but that also completely misses the mark.

As a continuation of its "hail-Mary" approach, the Harake Defendants say in their appellate brief to this Court that "one possible claim" that its allegations have alleged is for "tortious interference with contractual relations." (Harake Def. Br. at 20). This is hard to believe. The claim was dismissed and the Harake Defendants have admitted that there is no claim that has been recognized in South Carolina for "tortious interference with economic interest," the claim they pled. Yet, even as of the filing of their brief with the Court of Appeals, they will not definitively say what the claim is that they are trying to assert. They just want to say this is "one possible claim" it could be. *Id.* Why are the Harake Defendants doing this? Why are they struggling so with what the claim is that they are trying to assert? The answer is simple. They will call it anything they can just to try to get the claim to survive.

In the end, based on the case they cite to the court, the "hail-Mary" claim on the table for the moment requires: (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of its breach; (4) the absence of justification; and (5) damages. *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 520, 812 S.E. 2d 750, 756 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018). The

Harake Defendants concede that these are the elements of this claim in their brief. (Harake Def. Br. at 20).

As noted above, the Harake Defendants did not use the words "intentional interference" or "intentional procurement" or even the word "intentional" in sixteen and one-half pages of counterclaims. In addition, the requested amendment is futile for the reasons articulated in section III(D) of this brief. Those reasons are also applicable here as to why the Circuit Court's dismissal should be affirmed as the claim was properly dismissed.

F. The Harake Defendants are wrong and the Court does have authority to strike a claim not recognized under South Carolina law.

The Harake Defendants claim that *Robinson v. Code*, 384 S.C. 582, 682 S.E. 2d 495 (2009), does not stand for the proposition that this Court can strike a claim if a party asserts a claim that does not exist under South Carolina law. (Harake Def. Br. at 17-18). That is flat wrong. In *Robinson*, the Court of Appeals affirmed the Circuit Court's order striking certain allegations because South Carolina "does not create a cause of action" for the alleged claim. *Robinson*, 384 S.C. at 585, 682 S.E. at 496. The Harake Defendants also argue that this Court is required to treat the Rule 12(f) motion to strike as a Rule 12(b)(6) motion to dismiss. (Harake Def. Br. at 18). Defendants argue: "when a motion to strike challenges a theory of recovery, the motion **is** to be treated as a Rule 12(b)(6) motion." (Mot. to Alter/Amend at 4; Harake Def. Br. at 18). *Robinson* completely rejects Defendants' direct mischaracterization of the law. The court merely says a motion to strike challenging the theory of recovery is "comparable" to a motion to dismiss but does not say, as the Harake Defendants have represented, that it must be treated as a motion to dismiss. *Robinson* explains the difference between a motion to strike and a motion to dismiss by explaining that in ruling on a motion to strike the court "decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." (Citation omitted.) So, the Harake Defendants mis-stated to the Court that it is mandatory that this

Court treat the motion to strike in a certain way when that is not the situation at all. Motions to dismiss and motions to strike are based on different grounds under the Rules. At the end of the day, the *Robinson* court affirmed the motion to strike challenging the theory of recovery.

The mere fact that there was a statutory obstacle to the claim in *Robinson* in addition to no common law support of the claim does not mean the Circuit Court was divested of the power to strike a claim without recognition in South Carolina. Again, the Harake Defendants concede that the claim they asserted has not been recognized in South Carolina case law (or by statute, for that matter). (Harake Def. Br. at 20). The Circuit Court was well within its authority to strike a claim never previously recognized under South Carolina common law by the Supreme Court or the Court of Appeals. Otherwise, a court could only strike a claim when there was a statutory obstacle to the claim and there certainly is no such prohibition of the Court's power to strike a claim.

The Harake Defendants, again, did not even use the words "intentional interference" once anywhere in their sixteen pages of counterclaims. The reasons why an amendment to assert their claim should not be allowed are set forth in section III of this brief. Finally, the *Robinson* court also explained:

> [T]he matter of striking from a pleading is largely within the discretion of the trial judge (citation omitted). Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law.

Id. The Circuit Court's decision was correct and, at an absolute minimum, a completely proper exercise of its discretion.

II. VIOLATION OF THE DISCOVERY RULES WARRANTED DISMISSAL/ STRIKING THE FOURTH COUNTERCLAIM.

A. Violation of a mandatory discovery obligation warranted dismissal/striking of the fourth counterclaim.

As the Court found, the Harake Defendants violated the South Carolina Rules of Civil Procedure governing discovery, and dismissal/striking the fourth counterclaim is appropriate in light of the violation.

1. The instruction not to answer.

As previously mentioned, S. Harake was instructed not to answer certain deposition questions about the fourth counterclaim for relief. (Gibbs' Mot. To Dismiss and/or Strike, ¶6; Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 5-6; Harake II at 292:2 - 293:23). The deposition was on July 25, 2019. Rule 30(j)(3), SCRCP, provides that a motion for a protective order "shall" be filed within five business days of the conclusion of the deposition when a witness has been instructed not to answer a question. The Harake Defendants argue the Rule was altered by a verbal agreement between the parties that notice would be provided if the deposing party decided it was necessary for the party giving the instruction not to answer to file a motion for a protective order concerning the instruction. (Harake Def. Br. at 10, Hr'g Tr. at 19). While the Harake Defendants have not produced anything in writing verifying the existence of the agreement, Gibbs' counsel indicated that he would not contest the existence of that verbal agreement. (Hr'g Tr. at 11-12). Gibbs' counsel has also indicated that Gibbs did provide notice several times and still no motion for a protective order has been filed by the Harake Defendants within the required number of days of any of those events, as the Circuit Court so found. (Hr'g Tr. at 12, November 18 Order at 13-14).

2. Notice of the need for the filing of the required motion for a protective order.

First, notice was provided by the filing of Gibbs' Motion to Dismiss and/or Strike the claim on August 28, 2020, when Gibbs specifically listed the instruction not to answer as grounds for the claim to be struck. (Gibbs' Mot. to Dismiss and/or Strike, ¶ 6). This made it clear that it was Gibbs' position that a motion for a protective order was necessary. The Harake Defendants also did not reach out to Gibbs and raise the issue about the alleged verbal agreement upon receipt of Gibbs' motion requesting that the claim be stricken based on the discovery instruction. It is undisputed that no such motion for a protective order was filed within five business days of the filing of Gibbs' Mot. to Dismiss and/or Strike. Sixteen business days after Gibbs' Mot. to Dismiss and/or Strike was filed, the Harake Defendants raised the existence of the verbal agreement for the first time during the hearing and in their brief filed shortly before the hearing on the motion to dismiss and/or strike. (Harake Def. Memo. In Opp'n at 9; Hr'g Tr. at 19). At that point in time, Respondent's counsel indicated that it would not fight the existence of the verbal agreement but that any such objection or motion would be waived because it was not filed within five business days of Gibbs' filing of the motion to dismiss and/or strike. (Hr'g Tr. at 11-12). A second notice that a motion for a protective order was necessary was nonetheless provided in open court during the hearing on September 22, 2020. (Hr'g Tr. at 12). And again, no motion for a protective order was filed within five business days of that hearing. Third, proposed orders were submitted to the Court twenty eight business days after the hearing, reminding the Harake Defendants' of Gibbs' position that a motion for a protective order was necessary. (November 18 Order at 13). And again, no motion for a protective order was filed within five business days of the submission of the proposed orders on November 2, 2020. As of the entry of the written order, on November 18, 2020, no motion for a protective order was ever filed.

3. The obligation is mandatory.

Rule 30(j)(3), SCRCP provides:

> Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds **shall** move the court for a protective order under Rule 26(c), SCRCP, or 30(d), SCRCP, within five business days of the suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.

(emphasis added). As discussed above, the South Carolina Court of Appeals has held that this duty is mandatory, and that sanctions are available when parties fail to perform their mandatory obligation under the discovery rules. *See Richardson*, 430 S.C. at 599, 846 S.E.2d at 16; *Crawford v. Henderson*, 356 S.C. at 401, 589 S.E.2d at 211 (Ct. App. 2003).

Here, the Harake Defendants have violated an affirmative, mandatory duty under the discovery rules after multiple notices which even include one notice in open court. The assertion of a completely new cause of action for $22 plus million is prejudicial in and of itself, as discussed above. Violations of the discovery rules relating to this late-stage claim creates an extreme amount of prejudice to Gibbs. Thus, the refusal by the witness to answer, combined with the Harake Defendants' failure to comply with mandatory obligations under the South Carolina Rules of Civil Procedure, and their unjustified, prolonged delay in filing the claim all justify the dismissal/striking of this claim.

4. Reference to Rule 37 in Gibbs' motion as another basis to dismiss/strike was appropriate.

Rule 37 is an additional, independent basis for the dismissal/striking of the claim. Again, Gibbs' motion was pursuant to Rules 12(b)(6) and 12(f) and "<u>any other</u> applicable Rule and applicable case law." (emphasis added). (Gibbs' Mot. to Dismiss and/or Strike at 1). Gibbs' Motion to Strike pursuant to SCRCP Rule 12(f) was not converted to a Rule 37 Motion but Rule 37 is an additional ground that can be used as a basis for the Court's decision. It simply means

that the dismissal/striking can also take place pursuant to Rule 37 in addition to Rules 12(b)(6) and 12(f).

5. A motion to strike is addressed to the sound discretion of the trial court.

As previously mentioned, "[i]t is well settled that a motion to strike is addressed to the sound discretion of the trial court." *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979) (upholding trial court's decision to strike part of pleadings). In addition, a motion to strike raises the question of "whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). SCRCP Rule 37 sanctions are also subject to the discretionary standard. *Rickerson v. Karl*, 412 S.C. 215, 220, 770 S.E.2d 767, 770 (Ct. App. 2015). Thus, Rule 37 serves as an additional ground for sanctions contemplated under the law for the kind of conduct by the Harake Defendants. The withholding of discovery was referenced in the Motion to Dismiss and/or to Strike Certain of the Harake Defendants' Counterclaims in paragraphs six and eight. There was no communication from the Harake Defendants after receiving the motion and being notified of Gibbs' position about this issue. No calls. No emails. Nothing, until the Harake Defendants raised the verbal agreement in their brief filed on September 22, 2020 and during the hearing on September 22. (Harake Def. Memo. In Opp'n at 9; Hr'g Tr. at 19).

B. The Harake Defendants' excuses should be rejected.

The Harake Defendants also made several other points concerning this issue. First, the Harake Defendants suggest that Rule 37 would have been an inappropriate basis to strike absent consultation. (Harake Def. Br. at 4, 9). That is completely disingenuous when there already was, in fact, an outstanding Motion to Compel the continued deposition of S. Harake since Harake even refused to make himself available to be deposed about documents he produced after his deposition.

([cite to Gibbs brief]; Gibbs' Motion to Compel as to Defendants Katherine Harake and Sarmad Harake, dated May 22, 2020 ("Gibbs' Mot. To Compel") at 4-5; Gibbs' Memorandum in Support of its Motion to Compel as to Katherine Harake and Sarmad Harake ("Gibbs Mem. in Supp. of its Mot. To Compel") at 4-5). That makes it perfectly clear that consultation was futile. After receipt of the motion in which Gibbs plainly made its position known, absolutely no attempt was made by the Harake Defendants to resolve the subject discovery dispute – again, making it obvious that consultation was futile. Second, the Harake Defendants complain that Rule 37 was not mentioned in the motion. (Harake Def. Br. at 4, 9). It is important to note that the motion itself indicated that it is filed "[p]ursuant to the Rule 12(b)(6) and 12(f) of the South Carolina Rules of Civil Procedure as well as any other applicable Rule and applicable case law." (emphasis added) (Gibbs' Mot. to Dismiss and/or Strike at 1). In addition, the substance of the motion makes it evident Gibbs is complaining about improper discovery conduct because of the instruction not to answer. (Gibbs' Mot. to Dismiss and/or Strike, ¶¶ 6, 7).

Third, the Harake Defendants argue that Rule 37(b) sanctions are only available for non-compliance with a court order. (Harake Def. Br. at 4-5). Rule 37 sanctions are not only available for non-compliance with a court order. SCRCP 30(j)(9) provides that violations of Rule 30, concerning depositions, may subject the violator to sanctions under Rule 37, SCRCP. This Court has been very clear that motions to compel are not necessary where a party has failed to perform a mandatory duty under the discovery rules. *See Richardson on Behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 599, 846 S.E.2d 14, 16 (Ct. App. 2020). The court specifically explained that a court order is not required for the imposition of sanctions under Rule 37(d) and the remedies specified under Rule 37(b) are available including, but not limited to: "an order striking out pleadings or parts thereof … or dismissing the action or proceeding or … rendering a judgment by

default against the disobedient party." *Id*. *Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317, 318, n.1 (Ct. App. 1987) ("if the party from whom discovery is sought complies with the rule in question by making the initial response, he has a right to refuse discovery until compelled by court order, subject to the expenses of determining the justification of his refusal; but if he does not comply with the rule, he is subject to the sanctions.") As a result, the Circuit Court did have within its authority the ability to strike a claim for violation of a mandatory discovery rule.

Rule 30(j)(9) makes it clear that a violation of Rule 30 leaves a party subject to the sanctions listed in Rule 37, and the South Carolina Court of Appeals has held that the obligation to file the motion for a protective order is mandatory for the party being deposed. *Crawford v. Henderson*, 356 S.C. 389, 401, 589 S.E.2d 204, 211 (Ct. App. 2003). As the court explained in *Richardson*, a party *may* file a motion to compel the discovery that it has been improperly deprived, but the party is not required to do so prior to filing for sanctions where the party withholding discovery has failed to meet the minimal obligations imposed under the discovery rules. 430 S.C. at 598, 846 S.E.2d at 16. The *Downey* court also noted that prejudice is "presumed" where mandatory duties are violated and the party who has failed to comply with mandatory obligations has the burden to show a "lack of prejudice."

Here, Harake inappropriately refused to answer questions in his deposition in July 2019. (Gibbs' Mot. To Dismiss and/or Strike ¶6; Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 5-6; Harake II at 292:2 – 293:23). Assuming that there was a verbal agreement in place between counsel that each would let the other know if a motion for a protective order would be necessary following a deposition, the Harake Defendants were on specific and clear notice for almost three months that a motion for a protective order was necessary, and still refused to file the motion. They were notified in the August 2020 Motion to Dismiss and/or to Strike filing (Gibbs' Mot. to Dismiss and/or Strike, ¶ 6), were reminded in open court at the September 22, 2020 hearing (Hr'g

Tr. at 12), were reminded again with the submission of proposed orders on November 2, 2020 that a motion for a protective order needed to be filed, and were reminded again when the Order was entered (November 18 Order at 13). And yet, no such motion was **ever** filed.

Gibbs further notes that this is completely different from the situation in *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 219, 493 S.E.2d 826, 836 (1997). The defendant in that case served requests for admission on several plaintiffs, but did not receive responses. The defendant then moved to have all of the requests for admission deemed admitted. The plaintiffs stated to the court that they did not receive the requests for admission. In light of those statements, the master in equity denied sanctions, "particularly in light of the lack of hard proof that [the plaintiffs] actually received the requests." *Id*. In the case at bar, the Harake Defendants have represented that Gibbs agreed to provide notice if a motion for a protective order was needed and that no such notice was provided following S. Harake's deposition. (Harake Def. Memo. In Opp'n at 9; Hr'g Tr. at 19; Harake Def. Br. at 10). The Circuit Court observed the Harake Defendants received notice of the need for a motion for a protective order on September 22, 2020, and no such filing was made. (November 18 Order at 13-14). Thus, the *Crestwood* decision, wherein there was a reasonable possibility that the plaintiffs had not received the requests for admission, is not applicable to a case where the defendant received notice in a motion, in open court, a ruling in open court, in a proposed order, and in an actual order. This is a clear violation of the duty.

Last, this simply is yet another meaningless procedural web spun by the Harake Defendants that is of no consequence in this case. The Circuit Court had ample authority to dismiss/strike the claim pursuant to Rules 12(b)(6), 12(f), and/or 37.

III. THE CIRCUIT COURT'S DENIAL OF THE HARAKE DEFENDANTS' MOTION TO AMEND WAS ALSO A PROPER RULING WITHIN ITS DISCRETION.

A. Overview Concerning Rule 15(a) Motions to Amend.

As noted above, "[u]ndue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.," all justify denying a Rule 15 motion to amend pleadings. *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962)). The "trial [court's] finding [on a motion to amend] will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012) Prejudice "occurs [to the non-moving party] where the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Holland*, 407 S.C. at 227, 235, 754 S.E.2d at 714, 719 (Ct. App. 2014).

B. The Harake Defendants should not be allowed to amend because of undue delay.

1. The Harake Defendants sat on the $22 million claim for entirely too long.

South Carolina's appellate courts have consistently found that the existence of undue delay is a grounds for the denial of a motion to amend. *Patton*, 420 S.C. 490, 864 S.E.2d 262. Undue delay plainly exists. First, the original complaint was filed on March 7, 2017. That means the case has been pending for over four years. The case had been pending for over three years, five months at the time the Harake Defendants first interjected the fourth counterclaim for relief which it refers to in the fourth counterclaim as "tortious interference with economic interest."

Second, extensive discovery has been conducted in this case and is virtually complete if the Harake Defendants' new claim is not added to the case at the eleventh hour. Sixteen

depositions have been taken to date. This includes evidentiary depositions taken by Zoom of witnesses in Moscow, Mexico, California, and other locations. Gibbs also filed a motion to compel additional examination of Harake because Harake produced documents after his deposition and then unjustifiably refused to make himself available for additional examination based on that additional documentation. (Gibbs' Mot. To Compel at 4-5; Gibbs Mem. in Supp. of its Mot. To Compel at 4-5; Hr'g Tr. at 12-13). That motion is pending before the Circuit Court. Gibbs simply needs to depose Morris Gocial, a deposition to which the Harake Defendants have agreed but they have refused to allow that deposition to go forward until the appeal is resolved. The equivalent of eighty-five banker's boxes of documents have been produced in this case - over 200,000 pages by Gibbs and over 30,000 pages by Harake. (Hr'g Tr. at 24). The Consent Order dated November 4, 2020 says the case will be ready for trial as of January 4, 2021. (November 4 Scheduling Order at 1). The date that the case was to be ready for trial has not been changed by the subsequent order. (November 4 Scheduling Order at 1). The scheduling order entered December 1, 2020 provided for a discovery deadline of December 7, 2020. (December 1 Scheduling Order at 1). The discovery period under the scheduling order has expired with the only exceptions for new depositions being the depositions of Morris Gocial and the one additional witness Harake has requested to depose.[1]

Last, in Harake's deposition in July 2019, Harake proudly and defiantly boasted about the claim that is now the subject of the very amendment before the Court. He testified that this issue was "part of what would be going in -- -- in the next phase, because there's a big damage that you caused me. And yeah, somebody has to be responsible for it. I haven't finished calculating it yet. The company is increasing in value every day." (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or

[1] As noted above, there is a pending Motion to Compel additional examination from S. Harake regarding documents he failed to produce prior to his deposition. The Harake Defendants have also not yet let Gibbs know if they intend to conclude depositions of Martin McWilliams and Ronny Burkett. At that point, Gibbs can determine if it needs to conduct additional examination of those two witnesses.

Strike at 5; Harake II at 291:18 – 292:5). Harake's counsel then indicated to her client: "Objection. Stop. I'm instructing you not to answer about any work product related conversations. So it's -- -- I'm instructing you not to answer that question." (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 5; Harake II at 292:2-9). Gibbs' counsel indicated that he was not asking for lawyer-client communications and requested that he be allowed to continue. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 5; Harake II at 292:10-19). Harake's counsel took a break and then returned and re-asserted the instruction not to answer. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 5-6; Harake II at 293:18-23). Prior to the instruction, Harake also testified that the entity he was allegedly forced out of was worth $173 million at the time of his deposition (Harake II at 289:2) so that valuation did not prohibit the assertion of a claim in July of 2019 and he should not be rewarded for continuing to wait and playing gamesmanship as he hoped the market would continue to increase the value.

In spite of all the information that Harake had at the time of his deposition, Harake made no effort to move to amend to assert the claim in July 2019. No motion to amend was filed by Harake in August, September, October, November, or December of 2019. In December of 2019, after Harake finally produced the documents to show K. Harake's improper use of the Gibbs' money that was wrongfully transferred to her account, Harake did not file a motion to amend in December of 2019. In January 2019, Harake consented to the amendment by Gibbs (though Harake breached the agreement shortly thereafter). Harake did not make his own motion to amend in January, February, March, April, May, June, or July 2020. The Harake Defendants waited until August 24, 2020 to file a claim about a situation they were well aware of in July 2019 at the time of Harake's deposition. This is a picture-perfect example of undue delay.

2. The Harake Defendants' excuse for waiting should be rejected.

The Harake Defendants claim that there was nothing wrong with the delay and there was no undue prejudice because Gibbs amended its Complaint in August 2020. That is a completely misleading and inaccurate comparison. The First Amended Complaint was filed on May 3, 2017 ("1st Am. Compl."), adding claims as to K. Harake, among others. (1st Am. Compl. at 10-11). Discovery requests were served that same month seeking, among other things, bank records for accounts belonging to S. Harake, K. Harake, and Eurosa. (Gibbs' Mot. To Dismiss and/or Strike, ¶7; Gibbs' Mot. to Amend Compl., ¶3). Gibbs filed a Second Amended Complaint ("Gibbs' 2nd Am. Compl.") on June 9, 2017. (Gibbs' 2nd Am. Compl.). After being threatened by the Harake Defendants and K. Harake with a claim under the South Carolina Frivolous Proceedings Act, Gibbs agreed to voluntarily withdraw its claim as to K. Harake so it could further investigate the claims. (Gibbs' Mot. to Amend Compl., ¶¶4-6, 23-24; Gibbs' Mot. To Compel at 5, 9; Gibbs' Mem. In Supp. of Mot. To Compel at 6, 10). Both before and following that decision as to K. Harake, Gibbs diligently pursued the production of financial records of S. Harake, K. Harake and Eurosa to determine if it could prove that funds were being inappropriately funneled to K. Harake and used inappropriately by her. (Gibbs' Mot. to Amend Compl., ¶¶3-26; Gibbs' Mem. in Opp'n. to K. Harake's Mot. to Dismiss at 5, 11-14). In November 2018, after moving to compel, the Harake Defendants finally produced bank records of S. Harake and Eurosa. (Gibbs' Mot. to Amend Compl., ¶6). They did not produce the records requested as to the accounts of K. Harake in any form. (Gibbs' Mot. to Amend Compl., ¶6). The Harake Defendants also did not produce the complete bank records, as they only produced heavily redacted statements from S. Harake's and Eurosa's accounts and nothing from K. Harake's accounts. (Gibbs' Mot. to Amend Compl., ¶6). That same day, Gibbs moved to compel the complete production of unredacted financial records. (Plaintiff Gibbs International, Inc.'s Motion to Remove Redactions in Documents

Produced by Sarmad Harake and Eurosa, Inc.; and Plaintiff's Motion to Compel as to Katherine Harake ("Gibbs' Mot. To Remove Redactions/Compel"); Gibbs' Mot. to Amend Compl., ¶7). On April 19, 2019, the parties were informed that the Court ruled that Gibbs' motion to compel was granted and that the Harake Defendants were required to produce all records in unredacted format, but the Harake Defendants still refused to produce the documents until the formal Order was entered in June 2019 (the "June 2019 Order"). (Gibbs' Mot. to Amend Compl., ¶10). The language of the Court's June 2019 Order provided:

> **[T]he Court grants Plaintiff's Motion to Remove Redactions in Documents Produced by Sarmad Harake and Eurosa, Inc. and the unredacted documents should be produced within five days of this Order pursuant to the Confidentiality Order in place in this matter.**

(June 2019 Order at 8-9). The June 2019 Order also provides:

> **The Court notes that Gibbs can trace its funds to discover the accounts in which its funds were deposited and subpoena records of those accounts. Mrs. Harake's financial records could become discoverable if Plaintiff traces its funds to an account in Mrs. Harake's name.**

(*Id.* at 8). The redacted bank records also did not paint a clear picture due to the redactions, among other things. First, what did the Harake Defendants make sure to redact in the set of documents produced with redactions? The redactions completely hid from Gibbs all transfers of Gibbs' money by S. Harake to his wife K. Harake; these transfers totaled over $500,000. (Gibbs' Mot. to Amend Compl., ¶¶6-7, 18, 20; Gibbs' Mem. in Opp'n. to K. Harake's Mot. to Dismiss at 5, 11). Harake testified that he decided himself as to which transactions were redacted. (Gibbs' Mot. to Amend Compl., ¶20; Harake II at 19:2 – 21:10).

In addition, the unredacted Bank of America account records of Eurosa contained numerous online banking transfers with individual alphanumeric confirmation codes for each transaction that did not specify where Gibbs' money went. (Gibbs' Mot. to Amend Compl., ¶¶11-

13). These unredacted entries also contained some entries entitled "Customer Withdrawal Image" for some transactions that did not specify where Gibbs' money went. (Gibbs' Mot. to Amend Compl., ¶¶11-12). Gibbs needed the unredacted records that were provided with the June 6, 2019 Production Set **and** the information as to what happened to the transactions labeled with alphanumeric codes and the Customer Withdrawal Images. (Gibbs' Mot. to Amend Compl., ¶¶23, 26).

On July 25, 2019, S. Harake testified, conveniently, that he did not know where the money went for the transactions labeled with alphanumeric codes and/or Customer Withdrawal Images. (Gibbs' Mot. to Amend Compl., ¶16; Harake II at 149:18 – 150:9; 158:10-22; 160:2-14; 168:22 – 169:3). On August 1, 2019, Gibbs issued a subpoena to the Harakes' bank requesting information regarding the online banking transfers. (Gibbs' Mot. to Amend Compl., ¶¶16-18). On August 9, the bank provided additional records that finally showed that over $500,000 of Gibbs' money was transferred from Eurosa's accounts to the savings account of K. Harake. (Gibbs' Memo. In Opp'n to K. Harake's Mot. To Dismiss at 5; Gibbs' Mot. to Amend Compl., ¶¶12, 18).

Gibbs needed the bank records of K. Harake to determine where its money went from there and how it was used. These records still were not produced until December 2019. (Gibbs' Mot. to Amend Compl., ¶¶23). Just days after the production and confirmation that its money had been used inappropriately, Gibbs filed a motion to amend to assert additional claims. (Gibbs' Mot. to Amend Compl.). A hearing on the motion was scheduled originally for January 2020, then rescheduled to February 2020 at the request of the Harake Defendants. Before the hearing, the parties reached an agreement in February 2020 allowing Gibbs to amend its complaint. Gibbs claimed that the Harake Defendants breached the agreement almost immediately, putting into motion another long process of negotiations.

Thus, it is nonsensical for the Harake Defendants to argue that there is not any prejudice to Gibbs for its motion to amend in light of Gibbs' "recent" amendment. (Mot. to Alter/Amend at 9). Gibbs' motion to amend was filed in December 2019, just days after confirmation that its money had been used inappropriately. Harake did not need more documents from Gibbs to assert his new claim as Harake flatly admitted in July 2019 he was just waiting to conclude "calculating" his damages. (Gibbs' Mem. In Supp. of Mot. To Dismiss and/or Strike at 5; Harake II at 292:3-5). In stark contrast, Gibbs needed the bank records from Harake which he had hidden through the discovery objection process and later through objections while simultaneously threatening Gibbs with a frivolous proceeding claim if it pursued the claims. (Gibbs' Mot. to Amend Compl. ¶4, 23-24; Gibbs' Mot. To Compel at 5, 9; Gibbs' Mem. In Supp. of Mot. To Compel at 6, 10). The Harake Defendants were the architect of their now late-stage amendment, and should not be awarded for Harake's calculated, dilatory tactics with an unrelated claim being shoehorned in at this point. The Harake Defendants were completely aware of this counterclaim for at least over thirteen months before bringing the claim against Gibbs. They never filed a motion to amend their pleadings on their own initiative and clearly should have done so if they were going to pursue the claim.

In spite of knowing about the claim for what Harake claims is in excess of $22 million, the Harake Defendants waited…and waited …and waited, and Gibbs only learned of it in the July 2019 deposition and the Harake Defendants chose not to assert the claim until August 2020. Why do you sit on a $22 million claim for such an extended amount of time? There is no good reason. Claims are routinely asserted before damages are finalized so this was no excuse at all. The amendment should be denied due to undue delay alone.

C. The Harake Defendants should not be allowed to amend because of prejudice to Gibbs.

In *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 754 S.E.2d 714, 719 (2014), the amendment was denied because it was prejudicial since the moving party had the knowledge necessary to alert them "to the existence of the issue, and the new claim would require additional depositions and the hiring of additional experts." The court also explained that "[p]rejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Id.* at 719.

The prejudice in the case at bar to Gibbs unquestionably falls with the above definition of prejudice for these reasons:

- Additional delay will be necessary. Gibbs will have to depose Harake about this claim. That examination will likely identify other witnesses who have to be deposed but Gibbs needs to be allowed to first depose Harake. That examination will also identify other records that need to be produced and other third-party subpoenas that need to be issued. The new claim would require additional discovery because it involves the following issues, among others, never previously raised in this case: the history and evolution of Paysend UK; Harake's involvement with and action as an alleged director of Paysend UK; Harake's alleged acquisition of an interest in Paysend UK; an alleged offer to buy Gibbs out of Paysend Processing or roll over its interest to Paysend UK; the alleged divestment of Harake's interest in Paysend UK; taking Paysend UK public and the related capital raise; complicated valuation issues and an economic analysis at different points in time of Paysend UK; alleged dilution of Harake's interest in Paysend UK; lending agreements with Harake for $1.39 million concerning his acquisition of an interest in Paysend UK; a subpoena to the foreign lender for all documentation concerning the loan, etc. These issues just scratch the surface based on just two pages out of sixteen total pages of counterclaims

asserted by Harake. None of these issues were addressed in Harake's original counterclaims.

- Without the amendment, as noted above, very little additional time will be necessary to take the case to trial. Gibbs needs to depose Morris Gocial, a deposition to which Harake has already agreed. Gibbs also has a pending motion to compel the continued deposition of Harake because he flatly, and unthinkably, refused to appear for continued examination about documents he produced after his deposition. (Gibbs' Mot. To Compel at 4-5; Gibbs Mem. in Supp. of its Mot. To Compel at 4-5). The Harake Defendants have only requested one additional deposition.

- A new claim was asserted. Harake's "tortious interference with economic interest" claim is a brand new claim never previously asserted. This will require the gathering and analysis of new facts. It is very important to note that this is a brand new claim that is factually independent of Harake's other claims and raises the damages being sought in Harake's counterclaim from $5 million to $27 million. By Harake's own testimony, he knew about this claim and was only waiting to file because he was allegedly working on the damages issues. As noted above, he simply testified that he had not "finished calculating" the alleged damage (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 291-292). That was no barrier to him proceeding with the claim at that moment as claims are routinely filed before damages are finalized.

- Additional expert identification. Upon deposing the above-referenced witnesses, Gibbs will need to evaluate and determine if additional expert witnesses are needed. That will necessitate a re-opening of expert identification but for this new claim only. The original expert deadlines passed over a year ago.

- Extensive discovery has already taken place. The equivalent of eighty-five banker's boxes of documents were produced by Gibbs alone. (Hr'g Tr. at 24). Depositions of all experts and numerous others were taken.

- Significant delay since the filing of the original claims. The case has been pending since March 7, 2017. Harake did not pursue the amendment until its filing on August 24,

2020, over 3 years, 5 months after the original filing. It is completely unfair, and highly prejudicial to Gibbs, for Gibbs to have to defend a $22 million claim thrown in after three and one-half years of litigation, most of the depositions are taken, and the expert deadline passed long ago.

In sum, abundant evidence of prejudice exists as to Gibbs.

D. The forecasted amendment is futile.

The proposed amendment is futile for these reasons.[2] First, the Harake Defendants concede in the words of their own counterclaims that they would not have been damaged if Gibbs had agreed to allow the other investors to buy Gibbs out of Paysend Processing or if Gibbs had agreed to roll Paysend Processing into Paysend UK. More specifically, the Harake Defendants allege:

> 198. Without justification, Counterclaim Defendant Gibbs refused for the other investor to buy Counterclaim Defendant Gibbs out of Paysend Processing or transfer its investment to Paysend UK so that the two entities could be rolled into one.
>
> 199. Thereafter, Counterclaim Plaintiff Sarmad Harake, personally and on behalf of Counterclaim Plaintiff Eurosa, was then forced to purchase the other investor's shares in PaySend Processing and to divest his shares in Paysend UK.
>
> 201. Had Counterclaim Defendant Gibbs agreed to roll Paysend Processing into Paysend UK, Counterclaim Plaintiff Eurosa would have owned 6.5% of the combined business, and its shares would be worth over $12 million today, given the current public value of Paysend UK.
>
> 202. Additionally, because Counterclaim Defendant Gibbs unjustifiably refused to allow the other investor to buy it out of Paysend Processing or to roll Paysend Processing into Paysend UK, Counterclaim Plaintiff Sarmad Harake's 100% interest in Paysend UK was diluted as he was unable to participate in the later rounds of investments made by the other investors in Paysend UK.
>
> 203. Counterclaim Plaintiff Sarmad Harake was diluted to a 1.16% interest in Paysend UK. Had Counterclaim Plaintiff Sarmad

[2] In accordance with Rules 208(b)(2) and 220(c), SCACR, Gibbs respectfully requests the Court affirm the Circuit Court's order based on the additional alternate sustaining grounds referred to in the above section. See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000).

> Harake been able to keep his founding shares, based on the public value of Paysend UK, those shares would have been worth over $10 million today.

(Answer and Am. Countercl., ¶¶ 198-203). Simply put, the Harake Defendants claim their damages were caused by Gibbs' alleged refusal to allow the other investor to buy Gibbs out or to agree for the shares of Paysend Processing to be rolled into Paysend UK. This claim is irretrievably broken because Gibbs had no legal duty to agree to allow the other investor to buy Gibbs out or to agree for the shares to be rolled from Paysend Processing into Paysend UK. The "existence and scope of the duty are questions of law for the Court to determine." *Miller v. Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1999). If "there is no duty, the defendant is entitled to judgment as a matter of law." *Williams v. Preiss-Wal Pat III, LLC*, 17 F.Supp.3d 528, 535 (D.S.C. 2014). More specifically, the Harake Defendants assert as part of their claim that Gibbs "refused to be bought out from the agreement or transfer its investment to Paysend UK so that the two entities could be rolled into one." (Answer and Am. Countercl., ¶¶197; 198). Gibbs had no legal duty by way of contract or otherwise to agree to be bought out or to transfer Gibbs' investment to Paysend UK so the two could be rolled into one. The Harake Defendants have not asserted any claim against Gibbs that Gibbs did agree to be bought out or to roll over its interest in Paysend Processing to Paysend UK. Likewise, the Harake Defendants have never asserted a claim against Gibbs for breach of fiduciary duty. The non-existence of a duty to take this action entitles Gibbs to the affirmation of the dismissal of the claim and denial of the motion to amend.

Second, in *Gecy*, 422 S.C. 509, 812 S.E.2d 750, a case relied on by the Harake Defendants, the court affirmed dismissal of a claim for intentional interference with contract because the defendant acted within its rights so there was no legal basis to show an intentional procurement of a breach of contract without justification. In upholding the dismissal of a claim for intentional

interference with contract, the Court in *Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (1992) concluded:

> The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party. The evidence presented by the Webbs does not create the inference that Mrs. Elrod acted in bad faith in contacting the third-party purchasers. Nor is there an inference that the purpose of her contact was to procure the breach of their contracts with the Webbs. We, therefore, hold as a matter of law the communications between Mrs. Elrod and the third-party purchasers were justified.

Assertion of, and pursuit of, legal rights do not act as a basis for a claim of intentional interference. *Santoro v. Schulthess*, 384 S.C. 250, 681 S.E.2d 897 (2010). Gibbs acted within its rights in declining to agree to be bought out or to roll over its stock into Paysend UK. The Harake Defendants had no legal right to force Gibbs to agree to be bought out or to the rollover so Gibbs is entitled to the dismissal of the claim for that reason as well.

Third, in *United Educational Distributors, LLC v. Educational Testing Svc.*, 350 S.C. 7, 564 S.E.2d 324, 326 at n.1 (Ct. App. 2002) the court explained: "Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." Gibbs was entitled to pursue, or not to pursue, a relationship with Paysend UK. Gibbs chose not to pursue any relationship which was within Gibbs' legal rights. As a matter of law, the Harake Defendants cannot state a claim under these circumstances.

Fourth, in a case cited by the Harake Defendants in the context of a tort claim involving prospective relations, there must be "fraud, misappropriation, intimidation, or molestation that the defendant acted maliciously." *Am. Diamond Exch., Inc. v. Alpert*, 101 Conn. App. 83, 90, 920

A.2d 357, 363 (2007). No such allegations exist here. Again, the words fraud, misappropriation, intimidation, molestation, or malice do not even appear in the counterclaims.

Fifth, the reason that Harake testified an individual named Abdul "forced" him out of Paysend UK was because of this litigation between Gibbs and Harake. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 289:6-25). Harake testified that he was forced out because Abdul indicated that Abdul would be raising money and "the first question they ask you is "Do you have any ongoing cases?" (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 290:12-16). Harake also testified Abdul said: "we don't want you involved because you have a case ongoing." (Harake II at 289:22-25). (Emphasis added)

The case law is clear that the filing of litigation is not a basis for the assertion of the type claim the Harake Defendants have made in their fourth counterclaim for relief. In *Pactiv, LLC v. Multisorb Technologies, Inc.*, 63 F.Supp. 3d 832, 842 (N.D. Ill. 2014), a counterclaim was filed for tortious interference with business relations. The claim was thrown out and the court ruled:

> [T]he mere filing of a lawsuit cannot serve as a basis for a tortious interference claim when there has been no showing that the litigant knew or should have known the case was meritless or otherwise unjustified.

Id. The bottom line is all of Harake's theory of recovery is premised on Harake being "forced out" by the lawsuit which he admits was caused by this litigation so the claim is futile and the dismissal should be upheld. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 289-290). Finally, no allegation has been made that Gibbs "knew or should have known the litigation was meritless or otherwise unjustified."

Sixth, the Harake Defendants cited to the *Gecy* case to list the elements of tortious interference with contractual relations, but they carefully omitted the next sentence in that decision: "An action for tortious interference protects the property rights of the **parties to a contract** against unlawful interference by **third parties**." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509,

520–21, 812 S.E.2d 750, 756 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018) (emphasis added) (citations omitted). *See also, Santoro v. Schulthess*, 384 S.C. 250, 681 S.E.2d 897 (2010) (To "sustain a claim for intentional interference with business relations, the tortfeasor must be a "stranger" to the business relationship at issue.") Thus, **a tortious interference with contractual relations claim does not lie for an alleged breach by a party to the contract**.

The contract that they claim to have had in place was an alleged contract between Gibbs and the Harake Defendants regarding Paysend Processing: "Counterclaim defendant Gibbs, counterclaim plaintiff Eurosa, and the other investors in Paysend Processing had an agreement on the capital investments needed for Paysend Processing. As part of that agreement, Counterclaim defendant Gibbs agreed to invest $1 million." (Answer and Am. Countercl., ¶192). That would involve an alleged breach of the purported agreement between the Harake Defendants, Gibbs, and the investor Abdul. The Harake Defendants also allege that Gibbs caused an investor in Paysend Processing to back out. (Answer and Am. Countercl., ¶194). Again, that would involve an alleged breach of the purported agreement between the Harake Defendants, Gibbs, and the investor Abdul. That means this claim arose out of the alleged agreement to which Gibbs was a party requiring dismissal of the claim. Thus, the amendment is futile and should not be allowed. It is also important to note that the Harake Defendants and the investor Abdul were allegedly involved with the entity Paysend UK. As noted in more detail below, it was Abdul who made the decision to "force" Harake out of Paysend UK. At the end of the day, there is no "stranger" as the same individuals were involved.

Seventh, Gibbs' conduct must be intentional and it is legally inadequate to base that on what Gibbs knew about the future and speculative potential value of Paysend UK at the time Gibbs made its decision not to agree to be bought out or agree to a rollover.

Last, and very importantly, the Harake Defendants claim that they were "forced" to divest his shares in Paysend UK. (Answer and Am. Countercl., ¶199; Harake Def. Br. at 9). The person who did the "forcing," according to Harake himself, was Abdul. Harake testified: "Q. So who – who said "No" to your involvement with Paysend UK? A. It was – it was Abdul." (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4; Harake II at 290:12). Gibbs did not "force" Harake out – it was Abdul so the claim is futile for that reason as well. This prevents, as a matter of law, the Harake Defendants from being able to show: (1) intentional procurement of the contract's breach by Gibbs as Abdul made the decision to oust the Harake Defendants; and (2) Abdul caused any alleged damage arising out of the Harake Defendants allegedly being forced out.

E. The Harake Defendants acted in bad faith.

Courts have routinely found that where "there has been no good explanation for undue delay in seeking amendment, motions to amend complaints, which were filed well into or after completion of the discovery process, and which would necessitate further expense and discovery on the part of the opposing party, or greatly modify the issues to be tried, have routinely been denied." *Minor v. Northville Pub. Sch.*, 605 F.Supp. 1185, 1202 (E.D. Mich. 1985). (Emphasis added.) Delay in moving for leave to amend a pleading may be construed as bad faith and warrant denial of the motion. *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984).

The Harake Defendants acted in bad faith in several ways. First, the Harake Defendants acted in bad faith in waiting to bring the $22 million claim until they did. Harake flatly admitted he knew about the claim before July 2019 and that he was just calculating his damages by the time of his July 2019 deposition in which he testified about the claim until the examination was terminated by an instruction not to answer. (Gibbs' Mem. in Supp. of Mot. To Dismiss and/or Strike at 4-6; Harake II at 291-293). Thirteen months expired before he brought the claim.

Second, Harake himself redacted over $500,000 of transfers of Gibbs' money to his wife K. Harake. (Gibbs' Mot. to Amend Compl. ¶¶18, 20, 23; Harake II at 19:2 – 21:10). These redactions hid the transfers from Harake to K. Harake. (Gibbs' Mot. to Amend Compl. ¶¶18, 23). K. Harake continued to refuse to produce her records even after an Order was entered in June 2019 and she only did so in December 2019. (Gibbs' Mot. To Remove Redactions/Compel at 8; Gibbs' Mot. to Amend Compl. ¶¶3-4, 23-26). Gibbs' "recent" amendment was attached to its motion to amend in December 2019. (Gibbs' Mot. to Amend Compl.). Prior to December 2019, Gibbs made it clear that it wanted the records for that purpose and the Harake Defendants continued to refuse to produce the records in unredacted format. (Gibbs' Mot. To Remove Redactions/Compel at 5-8; Gibbs' Mot. to Amend Compl. ¶¶3-4, 7, 26). K. Harake refused to produce the records in any form. (Gibbs' Mot. To Remove Redactions/Compel at 8; Gibbs' Mot. to Amend Compl. ¶¶3, 10, 23-26). The Harake Defendants also threatened a claim under the Frivolous Proceeding Act if Gibbs pursued a claim against K. Harake. (Gibbs' Mot. to Amend Compl. ¶¶4, 23-24; Gibbs' Mot. To Compel at 5, 9; Gibbs' Mem. in Supp. of Mot. To Compel at 6, 10). It is bad faith to argue the Harake Defendants are entitled to benefit from the timing of Gibbs' allegedly "recent" amendment when it was the now-overruled objections hiding over $500,000 of transfers to K. Harake and her subsequent, and inappropriate, use of that money that drove the timing of Gibbs' amendment. Third, the "recent" amendment is further inconsequential because the Harake Defendants agreed to the filing of Gibbs' amendment.

Fourth, the delay was in bad faith because the Harake Defendants were doing nothing but playing the market in the hope that the value of Paysend UK would continue to rise. (Harake II at 291:3-5). This provided no basis for delay as claims are routinely asserted before damages are finalized. Deliberate delay to try to manipulate market value and increase alleged damage is

inappropriate. Fifth, the new claim was both factually and legally independent of the Harake Defendants' other counterclaims. There were no prior allegations about Paysend UK. None.

Last, the inappropriate outcome if the Harake Defendants get their way is they interject a $22 million counterclaim at the eleventh hour that is factually and legally independent of the other claims which will require additional discovery and re-opening the expert deadlines (as to the new claim only). The case has been pending for over four years. The new claim should have been bought long ago and it is inappropriate to interject it at this late stage. As a result, the existence of bad faith by the Harake Defendants also justifies denial of the Motion to Amend.

F. *Skydive* is entirely different from the situation at hand.

Appellants cite to *Skydive Myrtle Beach, Inc. v. Horry County Department of Airports*, 426 S.C. 175, 826 S.E.2d 585 (2019). *Skydive* simply found that it was improper for the Circuit Court to dismiss under Rule 12(b)(6) "and refusing to consider the request to amend . . . ." *Id*. at 589. The situation before this Court is entirely different. The Circuit Court considered the Harake Defendants' verbal Motion to Amend made during the hearing and denied that motion. (November 18 Order at 12). After the Circuit Court entered its written Order on November 18, 2020 denying the verbal Motion to Amend, the Circuit Court also considered the written Mot. to Alter/Amend filed on October 5, 2020 by the Harake Defendants. The Circuit Court entered its Order on November 30, 2020 denying that Motion to Amend for the third time. It is important to note that the Harake Defendants' motion was entitled "Defendants Sarmad Harake and Eurosa, Inc.'s Motion to Alter or Amend." This was a nine-page motion/brief in support of the motion with sections entitled "Background," "Standard of Review," and "Law and Argument." The final section was six and one-half pages with over twenty case citations. The final subsection of the argument addressed the Motion to Amend. Gibbs' counsel sent an email to the Harake Defendants' counsel asking if they intended to submit any additional briefing on this issue and the Harake

Defendants' counsel responded that they did not anticipate an additional filing in connection with their Mot. to Alter/Amend unless the Court requested it. (Email Exchange with the Circuit Court dated November 17, 2020 ("Email Exch. with Cir. Court")).

The Circuit Court then considered that written Motion to Amend pursuant to Rule 15 in the form of a Motion/Brief. That motion was in the Circuit Court's discretion and was denied so the Harake Defendants were given the opportunity to amend and the Circuit Court did not allow the amendment. That entirely distinguishes this situation from *Skydive.*

G. The amendment should not be allowed because the Harake Defendants failed to file a copy of the amendment with the Circuit Court.

Gibbs notes that the Harake Defendants made an oral request for leave to amend pleadings at the September 22 motion hearing. (Hr'g Tr. at 18). That was denied. (November 18 Order at 12). No such request was made in their briefing at the time of or prior to the September 22 hearing. The Circuit Court subsequently entered its written Order denying the Motion to Amend. *Id.* The Harake Defendants then filed their Mot. to Alter/Amend. The Circuit Court entered an Order denying that motion. (November 30 Order at 1). Since the denial of the verbal motion to amend at the time of the hearing, the Harake Defendants have still not filed a formal Rule 15 motion to amend <u>with a copy of the proposed amended pleading attached to the motion</u>. Why would they not do so? Because they want to move forward and call the claim whatever they can and ask the Court to re-draft it to yet another new claim at any given moment and call it something else when the new claim is challenged or thrown out. At first, it was tortious interference with economic interest. (Answer and Am. Countercl. at 33). It now apparently has been transformed into intentional interference with contractual relations. (Harake Def. Br. at 4, 16). Yet, nowhere in the fourth counterclaim for relief or anywhere else in the counterclaims for that matter, do the Harake Defendants use the word "intentional" a single time. Not once. The Harake Defendants also do not use the words "intentional interference." Not once. The rule articulated in *NOVASTAR*

Financial, Inc., Securities Litigation, 579 F.3d 878 (8th Cir. 2009), is: "In order to preserve the right to amend the complaint, a party must submit the proposed amendment along with its motion." (Citation omitted.) *NOVASTAR* is the right approach. Defendants are entitled to the actual amended pleading that a claimant seeks to assert so there is a commitment to what is being alleged up-front. Otherwise, motions to amend will just include generic language without the proposed amended pleading attached resulting in gamesmanship and uncertainty. This is the exact problem in the case at hand. What will the claim be next? It is anyone's best guess.

CONCLUSION

The Circuit Court held a hearing and entered a twenty-nine page Order addressing numerous motions. As part of its Order, the Circuit Court dismissed the Harake Defendants' counterclaim for "tortious interference with economic interest." The Harake Defendants admitted to the Circuit Court that this claim has not been recognized in South Carolina. In addition, as the Circuit Court found, the Harake Defendants did not even use the words "intentional" or "intentional interference" anywhere in its 36 pages of Answer and Counterclaims. Last-minute efforts to have the Court redraft the last-minute claim should be rejected. The claim was properly dismissed.

As an exercise of its discretion, the Circuit Court also properly decided to dismiss/strike the claim due to the violation of a mandatory discovery obligation. The Harake Defendants' excuse was a lack of notice to file a motion for a protective order concerning an instruction not to answer. In its discretion, the Circuit Court noted that notice was provided and it is undisputed that the Harake Defendants did not file a motion for a protective order within five business days of any of those events (or ever, for that matter) when notice was provided.

As another exercise of its discretion, the Circuit Court denied the Motion to Amend. Harake's testimony established that they knew about the claim in July 2019 and all he was doing

at that time was finalizing his damages. Picture-perfect example of undue delay. The case is over four years old and was over three and one-half years old when the amendment was first filed. This will necessitate additional written and deposition discovery and a highly likely re-opening of expert discovery once the lay depositions take place. There should only be a minimal amount of wrap-up discovery if the Circuit Court ruling is affirmed.

For the foregoing reasons, Gibbs respectfully requests that the Court affirm the Circuit Court and for such other and further relief in favor of Gibbs as the Court shall deem just and proper.

Respectfully submitted this the 20th day of May, 2021

/s/ Kevin A. Dunlap
Kevin A. Dunlap

Attorney for Respondent
Gibbs International, Inc.

OF COUNSEL:

PARKER POE ADAMS & BERNSTEIN LLP
110 East Court Street, Suite 200
Greenville, SC 29601
kevindunlap@parkerpoe.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No.: 2017-CP-42-00740

Appellate Case No.: 2020-001642

Gibbs International, Inc. .....Respondent,

v.

Sarmad Harake, Eurosa, Inc., and Katherine Harake ..... Defendants,
of whom Sarmad Harake and Eurosa, Inc. are the Appellants.

PROOF OF SERVICE

This is to certify that the undersigned has caused to be served this day (1) copy each of Initial Brief of Respondent Gibbs International, Inc. and Respondent's Designation of Matter to be Included in the Record on Appeal via electronic mail at the address stated in the Amended Order of the Supreme Court dated May 29, 2020 and as set forth below to the following:

John T. Lay
Curtis L. Ott
Lindsay A. Joyner
1201 Main Street, Suite 1200
P.O Box 7368
Columbia, SC 29202
jlay@GWBlawfirm.com
cott@GWBlawfirm.com
ljoyner@GWBlawfirm.com

A copy of the email serving counsel for Appellants is attached hereto.

May 20, 2021

s/KEVIN A. DUNLAP
Kevin A. Dunlap
S.C. Bar No. 13081
Parker Poe Adams & Bernstein LLP
100 Dunbar Street, Suite 206
Spartanburg, South Carolina 29306
Office: (864) 591-2030
Facsimile: (864) 591-2050
kevindunlap@parkerpoe.com
Attorney for Respondent
Gibbs International, Inc.

From:	Dunlap, Kevin A.
To:	Lindsay A. Joyner (ljoyner@gwblawfirm.com)
Subject:	Gibbs International, Inc. v. Harake, et al., Appellate Case No. 2020-001642
Date:	Thursday, May 20, 2021 3:47:27 PM
Attachments:	2021-05-20 Letter to Court of Appeals enc. Gibbs" Brief & Designation of ROA.pdf 2021-05-20 Initial Brief of Respondent Gibbs International, Inc.pdf 2021-05-20 Respondent"s Designation of Record on Appeal.pdf 2021-05-20 Proof of Service.pdf

---

Lindsay:

Hope all is well. I am serving via email the Initial Brief of Respondent Gibbs International, Inc. and Respondent's Designation of Matter to be Included in the Record on Appeal in the above-captioned matter. I will be filing this with the Court of Appeals electronically today and will attach this email to the certificate of service of same. Thanks.

Kevin

Kevin Dunlap
Partner
864.253.6105

Parker Poe

Kevin A. Dunlap
Partner
t: 864.253.6105
f: 864.591.2050
kevindunlap@parkerpoe.com

May 20, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1229 Senate Street
Columbia, South Carolina 29201

Re: **Gibbs International, Inc., Respondent, v. Sarmad Harake and Eurosa, Inc., Appellants**
Case No. 2017-CP-42-00740
Appellate Case No. 2020-001642

Dear Ms. Kitchings:

Enclosed for filing please find Initial Brief of Respondent Gibbs International, Inc. and Respondent's Designation of Matter to be Included in the Record on Appeal, as well as the corresponding proof of service for those filings.

Please do not hesitate to contact me if there are any questions.

With best wishes, I am

Very truly yours,

Kevin A. Dunlap

KAD
Attachments

cc: Lindsay A. Joyner