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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Clifton Newman

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C.A. No.: 2015-CP-10-05463

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The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr., .....Appellant,
v.

Richard S.W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC, Defendants
and

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr. and Gregory G. Holmes, Third-Party Intervenors,
of whom

Richard S. W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC is .....Respondent.

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# BRIEF OF APPELLANT

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1. Did the trial court err in finding that Laurence Stoney could not maintain this derivative action seeking relief on behalf of the Boathouse at Breach Inlet, LLC where there was "undisputed evidence of [a] loss" in excess of $4,000,000 to the company because of the actions of Richard Stoney and Crew Carolina, LLC?

2. Did the trial court err in ordering the dissociation of Laurence Stoney as a member of the Boathouse at Breach Inlet, LLC?

## STATEMENT OF THE CASE

On October 9, 2015, Laurence Stoney, a minority member of the Boathouse at Breach Inlet, LLC (the "Company"), filed this derivative action on behalf of the Company against Defendants Richard Stoney and Crew Carolina, LLC ("Crew Carolina") (collectively, "Defendants"), asserting claims for breach of fiduciary duty, conversion, recovery for unlawful distributions, unjust enrichment, and an accounting.[1] (R. at 43-60). The Company also sought to impose personal liability on Richard, punitive damages, and an award of attorney's fees and costs. (*Id.*). Richard and Crew Carolina filed an answer on November 12, 2015, asserting a general denial, failure to state a claim, the statute of limitations, laches, lack of standing under multiple theories, the business judgment rule, waiver and estoppel, and unclean hands and demanding the recovery of attorney's fees and costs. (R. at 60-67)

Upon a motion by the Company, this action was assigned to the Business Court on December 9, 2016. (R. at 1). By order filed March 21, 2017, the Company was granted leave to amend its complaint to conform to the evidence adduced during discovery and to refine the allegations as to the parties in this action. (R. at 2-4, 151-73). On June 22, 2017 with the Company's consent, Company members, Theodore Stoney, Jr. (Richard's brother, "Ted") and Gregory G. Holmes (Richard's friend) (collectively, "Intervenors"), intervened on Defendants' behalf. The Intervenors responded to the complaint, raising the same defenses as Defendants. (R. at 183-90).

On March 29, 2018, Defendants and Intervenors filed a motion to bifurcate this action into two phases, arguing that the issue of Laurence's standing as a representative plaintiff was distinct from the issues of Defendants' liability and damages. (R. at 191-206). With the parties' consent,

[1] In order to minimize confusion as between members of the Stoney family, this brief will refer to individual family members by their first names.

the trial court conducted a preliminary trial on standing on December 13-14, 2018, at which time the parties called witnesses and introduced evidence. On May 20, 2019, the trial court issued a preliminary order determining that Laurence had standing to serve as representative plaintiff for the Company such that the case could proceed to trial on the merits. (R. at 5-17). The order included conclusions of law that this action seeking to recover Company assets was correctly brought as a derivative, rather than an individual, action; that laches did not bar Laurence from maintaining this action; and that Laurence could maintain this action and fairly and adequately represent the interests of the Company even if he was not supported by the Company's other members. (*Id.*).

On January 7, 2020, Defendants filed a motion to dissociate, seeking to expel Laurence from the Company. (R. at 211-57). The trial court conducted a hearing on Defendants' motion to dissociate and, on February 24, 2020, issued an order preliminarily denying Defendants' motion. (R. at 18-20).

The case proceeded to trial for a full and final determination of all claims and defenses on March 9-11, 2020.[2] Notwithstanding its finding that the Company had suffered more than $4,000,000 in losses at the hands of Defendants, the trial court issued an order, filed on July 7, 2020, denying the Company any relief for lack of standing on Laurence's part and granting the motion to dissociate Laurence. (R. at 21-37). The trial court's order made no ruling on whether Richard had unclean hands, whether the business judgment rule applied to his actions, or whether

[2] Consistent with Rule 208(b), SCACR, the Company has attempted to provide a "concise history of the proceedings, insofar as necessary to an understanding of the appeal." A review of the public index for this matter reveals, however, that the Defendants and Intervenors embarked upon a successful strategy to keep this case from reaching a determination on the merits for almost five years. (R. at 39-42).

his actions were permitted under the business judgment rule if it applied.[3] Nor did the trial court evaluate the full extent of the damage to the Company.

The Company filed a motion to alter or amend on July 16, 2020. In that motion, the Company sought to correct certain factual errors and omissions and to address the omissions and errors of law in the order, including the following:

> 1. The trial court did not address whether Richard had unclean hands, whether the business judgment rule applied to his actions, or whether his actions were permitted under the business judgment rule if it applied.
>
> 2. The trial court did not apply the correct analysis in finding that Laurence could not maintain this action on the Company's behalf.
>
> 3. The trial court erred in finding that Laurence could have filed an action in his individual capacity under S.C. Code Ann. § 33-44-410.
>
> 4. The trial court erred by disregarding the fact that the Company is the real party in interest—not Laurence in his individual capacity. Accordingly, the trial court erred in granting Defendants relief against Laurence in his personal, individual capacity.
>
> 5. In addition, the trial court erred by misapplying S.C. Code Ann. § 33-44-601(6)(iii), which strictly evaluates whether it is reasonably practicable for a business to continue to operate with a given member n granting the motion to dissociate.
>
> 6. The trial court further erred by permitting Defendants to assert their equitable claim for dissociation without addressing whether Richard has unclean hands.

(R. at 258-64). The trial court summarily denied the motion by order filed August 10, 2020. (R. at 38). This appeal followed with the service of a notice of appeal on August 28, 2020.

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[3] In addition, the trial court did not make any factual findings on these points. (R. at 21-37). The ruling was based solely on the threshold issue of standing; thus, none of these defenses can serve as an alternate sustaining ground as envisioned by Rule 220, SCACR. The Company seeks reversal and a remand for a full determination on the merits of the Company's claims based on the evidence presented at trial.

## FACTS

The Company is a manager-managed LLC that operates a successful restaurant on the Isle of Palms, the Boathouse at Breach Inlet ("Breach Inlet"). (R. at 1146-79). It was formed in 1997, and the original members were Richard (80%), Ted (10%), Laurence (5%), and Richard Stoney, Jr. (5%, held in trust by Ted).[4] (*Id.*). Richard has been the Company's manager since its inception. (*Id.*).

Following the success of Breach Inlet, Richard sought to open other restaurants and food service businesses. (R. at 965:6-78:23, 990:15-19). These other restaurants and businesses were each owned by different LLCs, each of which had different members. (*Id.*). The common element was that each of these businesses was managed by Richard and Richard held the majority membership interest in each. (R. at 779:14-81:1, 783:7-10).

As his portfolio grew, Richard formed Crew Carolina, a single-member LLC, wholly owned and controlled by Richard. (R. at 784:1-15, 967:7-18). At trial, Richard acknowledged that Crew Carolina does not have an operating agreement and it does not maintain corporate records or follow corporate formalities. (R. at 784:22-85:5, 790:25-91:5). Instead, Crew Carolina serves as Richard's "alter ego" for the purpose of moving funds from his successful restaurant, Breach Inlet, to his other ventures and to himself. (R. at 788:16-790:15).

To move Breach Inlet's money to himself and Crew Carolina, Richard booked payments from Breach Inlet to himself and Crew Carolina as a "Due From/Due To." (R. at 1122-24, 567:7-73:20). According to the Company's financial records, Richard owes the Company $42,835.19,

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[4] Over time, the ownership interests changed, and by the time of trial, the ownership of the Company was as follows: Richard (55%); Ted (10%); Ted as trustee for Richard Stoney, Jr., Richard's son (5%); Lori Stoney, Richard's ex-wife (5%); Lori as trustee for Croft Stoney, Richard's daughter (5%); Laurence (5%); Holmes Capital Management, LLC (10%); MWC Properties, LLC (5%). (R. at 779:4-13).

and Crew Carolina owes the Company $4,194,264.66. (R. at 1128-29, 574:2-12). These numbers are not contested and were confirmed in the trial court's order. The testimony further reflects that there was no plan or intention to repay these funds to the Company. (R. at 1186-88 at ¶ 3, 861:17-62:7, 913:19-14:20).

By way of example, entries on the Company's general ledger booked as "Due From Richard Stoney" show that Richard used Breach Inlet funds to host a friend from Italy; to take personal trips to the Bahamas, New York, Belgium, Chicago, and Key West; to buy feed for his polo horses; to pay the mortgage at his country house, Kensington Plantation; and to pay his personal taxes. (R. at 1122-24, 569:2-71:18, 648:22-49:9). Similarly, Company funds designated as "Due from Crew Carolina" were used for Richard's personal benefit, including funds used to pay for landscaping work at Kensington Plantation, to buy his girlfriend tickets to a fashion show, to fund his Christmas shopping, to pay his veterinary bills, and to write himself checks for "weekend cash." (R. at 1122-24, 650:5-52:14).

With respect to the use of Company funds to support Richard's other ventures, Chip Robinson, Breach Inlet's former controller, testified as follows: "Q. And isn't it true that the profits of [Breach Inlet] that you described as a cash cow and blood donor kept Richard's other [restaurant ventures] afloat? A. Yes." (R. at 853:25-54:3). This practice that Richard described as "robbing Peter to pay Paul" created cash flow problems for the Company, resulting in bounced checks and periods where the Company was unable to timely pay vendors and employees.[5] (R. at

[5] Richard is no stranger to this Court. In reviewing Richard's divorce action from Lori, this Court noted that "[t]hroughout the trial, Husband [Richard] referred to 'robbing Peter to pay Paul' to keep creditors at bay and allow certain businesses to continue operating." *Stoney v. Stoney*, 425 S.C. 47, 58, 70, 819 S.E.2d 201, 207, 214 (Ct. App. 2018) (noting that Breach Inlet was Richard's "only income-producing asset" "which he in turn used for personal expenses or to satisfy other obligations" as well as Richard's "evasive" "antics" and "contemptuous behavior" before the trial court).

645:20-47:24, 854:4-56:10). In addition, the Company incurred interest charges and penalties for failure to pay taxes on time. (R. at 1127, 645:20-47:24).

Richard's attorney warned him as early as 2007 that his practice of self-dealing and comingling funds was inappropriate and instructed him to stop moving money from the Company to entities with different owners unless all of the Company's members agreed to it in writing. (R. at 515:5-18, 891:12-20, 429:25-33:6). In addition, in 2013, the Company's accountant, Dennis Jarvis, was concerned about the "Due From/Due To" and was worried the investors would "hold him accountable for it." (R. at 1186-88). As testified by Chip Robinson:

> **Q.** I want to talk about the red flags and concerns raised by Mr. Jarvis. I believe your testimony [to] Mr. Barr was about how [the "Due From/Due To"] was booked. In fact, sir, he said to you that he had a real problem with "what's going on down there," and he was afraid that investors were going to "hold him accountable"?
>
> **A.** Yes, sir.
>
> . . .
>
> **Q.** The CPA for the company was "freaking out" because he was scared that investors were going to hold him accountable?
>
> **A.** Yes, sir.
>
> **Q.** So in addition to your red flags that you raised to Richard where you told him it wasn't sustainable, Dennis Jarvis was waving red flags too, correct?
>
> **A.** Correct.
>
> **Q.** And the most important red flag was raised in 2007 when you understood from a legal standpoint that the practice needed to stop unless you got [approval] in writing from the members, correct?
>
> **A.** . . . You're referring to our meeting with Mr. Pearlman, [the Company's lawyer]?
>
> **Q.** Yes, sir.
>
> **A.** Then yes, sir.

(R. at 890:15-91:20).

Richard ignored the advice of his accountant, controller, and attorney, and continued to move money out of Breach Inlet to make payments to himself and Crew Carolina without obtaining permission from the members of the Company. (R. at 1122-24, 860:13-61:2). Instead, Richard instructed the Company's accountant "not to discuss the Due To/Due From with other members of the Boathouse and did not permit [him] to share the Company's tax returns with certain members, including Laurence Stoney." (R. at 1186-88 at ¶ 8). Further, the testimony showed that there was no intention that these funds would ever be repaid to the Company. (*Id.*; R. at 861:17-62:7, 913:19-14:20).

The harm to the Company was not limited to the "Due From/Due To" loans to Richard and Crew Carolina. Breach Inlet sits on a waterfront property that is supported and protected by a bulkhead (a wooden sea wall). (R. at 761:19-22). Richard owns the real estate in his individual capacity, and the Company pays him rent. In 2011, Richard executed a lease agreement between himself and the Company. (R. at 1130-32). This lease (the "2011 Lease") provided that Richard was responsible for any bulkhead repairs. (*Id.*). In addition, the 2011 Lease gave the Company the unilateral right to extend the lease term in five-year increments to December 2035. (*Id.*).

In 2015, after Richard knew Laurence had retained counsel and sought additional information about the Company's dealings, Richard entered a new lease on behalf of himself and the Company (the "2015 Lease"). (R. at 1133-45, 756:5-24). In the 2015 Lease, Richard made three major changes to the 2011 Lease: (1) he replaced himself as landlord with 101 Palm Boulevard, LLC, a single-member LLC owned and controlled by Richard; (2) he altered the lease term so that it expired in 2020 (rather than being renewable through 2035); and (3) he shifted responsibility for any bulkhead repair, which was estimated to cost in the hundreds of thousands

of dollars, from himself as landlord, to Breach Inlet as tenant. (*Id.*). Despite materially altering the Company's financial position to benefit himself, Richard concealed the existence of the 2015 Lease from the members of Breach Inlet. (R. at 766:9-17).

In addition, on June 5, 2008, Richard took out a personal loan from First Federal Savings and Loan ("First Federal") in the amount of $1,677,331.89, plus interest. (R. at 1183-85). Without asking permission from the members of the Company, Richard entered into a Commercial Guaranty Agreement wherein he caused Breach Inlet to serve as Guarantor for his personal loan with First Federal. (*Id.*). In 2012, when Richard failed to make payment on his personal loan with First Federal, to stave off foreclosure, he caused Breach Inlet to enter into a Confession of Judgement for $1,812,017.69 in favor of his personal creditor, Charleston Capital Corporation (who had purchased the loan from First Federal). (R. at 1180-82, 817:14-18).

Lastly, Richard caused the Company to make distributions to Holmes and Cox when he did not make distributions to the Company's other members.[6] (R. at 583:8-84:16). Based on the Company's accounting records, these "disproportionate distributions" totaled $234,857.00. (R. at 1125).

Laurence brought this action on behalf of the Company in an attempt to right the wrongs committed at the Company's expense. These are not small matters and directly impact the Company and, in turn, derivatively impacted the value of the members' investments. Just by way of example—and ignoring interest and damages for the unauthorized lease amendment, the confession of judgement, and the disproportionate distributions—Laurence's share (5%) of the "Due From/Due To" entries owed by Crew Carolina ($4,194,264.66) would total $209,713.23.

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[6] Holmes owns Company member, Holmes Capital Management, LLC (Holmes and Holmes Capital Management, LLC, collectively "Holmes"). Cox owns Company member, MWC Properties, LLC (Cox and MWC Properties, LLC, collectively "Cox").

## STANDARD OF REVIEW

This action sounds in equity. *See Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (holding derivative actions arise in equity); *Park Regency, LLC v. R & D Dev. of the Carolinas, LLC*, 402 S.C. 401, 411, 741 S.E.2d 528, 533 (Ct. App. 2012) (finding request for dissociation of LLC member is in equity). As such, this Court "may find facts in accordance with [its] own view of the preponderance of the evidence." *Straight v. Goss*, 383 S.C. 180, 191–92, 678 S.E.2d 443, 449 (Ct. App. 2009); *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). Indeed, the appellate courts have a *de novo* standard of review as to facts in equity cases. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Id.* at 390, 709 S.E.2d at 654-55. However, this Court is "not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Straight*, 383 S.C. at 191–92, 678 S.E.2d at 449.

## ARGUMENTS

The trial court ruled that Laurence lacked standing to maintain this action on behalf of the Company. (R. at 33). This result was driven by the trial court's determination that Laurence was motivated, not by concern for the Company, but rather out of personal interest and vindictiveness toward Richard. (R. at 32-33). The trial court also found that Laurence could have filed an individual action pursuant to S.C. Code Ann. § 33-44-410. In an effort to redress its perception of bad blood between Richard and Laurence, the trial court further ordered that Laurence should be dissociated from the Company pursuant to S.C. Code Ann. § 33-44-601(6)(iii) and that he should be bought out pursuant to the terms of S.C. Code Ann. §§ 33-44-701 and -702. (R. at 33-35).

These rulings are in error and fail to provide any remedy for the undisputed harm to the Company because of the actions of Richard and Crew Carolina. As stated by the trial court,

> The accounting expert of the Plaintiff concluded that the Boathouse at Breach Inlet had sustained a loss of $4,194,264.66 representing liabilities owned by Crew Carolina in the "due to/due from" category previously described. The accounting expert further concluded that, another liability of $42,835.19 is owed by Richard Stoney individually in the same "due to/due from" category.

(R. at 28). The trial court excused these breaches of Richard's fiduciary duties as manager simply because other members of the LLC opposed the lawsuit, as follows:

> **Notwithstanding the undisputed evidence of the loss** as noted above to [Breach Inlet], not a single member other than the former wife of Richard Stoney, Lori supports Laurence in pursuing the lawsuit (*sic.*). Laurence holds a 5% interest and Lori holds a 5% interest. Therefore, 90% of the membership of the Boathouse at Breach Inlet, LLC oppose this lawsuit.

(R. at 29 (emphasis added)). By failing to remedy the losses to the Company and ordering dissociation, the trial court is allowing Richard to profit from his wrongdoing while also reducing the value of Laurence's interest in the Company, and as a result, reducing the "fair value" to be paid to Laurence for his interest. Such a result is patently inconsistent with the overriding equitable principle that "[j]ust as nature abhors a vacuum, so equity abhors a wrong without a remedy." *State ex rel. Daniel v. Strong*, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937). Accordingly and for the reasons set forth below, the trial court's order must be reversed and this matter must be remanded for a full determination on the merits of the evidence presented at trial.

## I. A derivative action is the proper means of seeking redress for wrongs to an entity, such as the Company. The trial court erred in finding Laurence lacked standing to maintain those claims.

### A. Laurence could not have brought this action in an individual capacity.

An LLC is an entity separate and distinct from its members. S.C. Code Ann. § 33-44-201. As a result, harm to the LLC must be pursued by way of a derivative action. *Park Regency, LLC*, 402 S.C. at 417, 741 S.E.2d at 536. Recently, the South Carolina Supreme Court held in the context of an LLC dispute that a claim must be brought as a derivative action if the member's loss is "derivative of the loss suffered by [the company] and not separate and distinct from losses suffered by [the company]." *Wilson v. Gandis*, 430 S.C. 282, 311, 844 S.E.2d 631, 647 (2020) (dismissing individual members' breach of fiduciary duty claims and holding that the members were required to bring the claims derivatively after finding that "[a]ny loss suffered by [the members] would be derivative of the loss suffered by [the company] and not separate and distinct from losses suffered by [the company].").

This is consistent with the law applicable to corporations, as follows:

> An action seeking to remedy a loss to the corporation is generally a derivative one. An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action. A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation.".
>
> If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder. It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated.

*Patterson v. Witter*, 425 S.C. 213, 231–32, 821 S.E.2d 677, 687 (2018) (citations and quotations omitted). This Court further explained the reasons for this general rule in the following quote:

> 1) it prevents a multiplicity of lawsuits by shareholders; 2) it protects corporate creditors by putting the proceeds of the recovery back in the corporations; 3) it

> protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and 4) it adequately compensates the injured shareholder by increasing the value of his shares.

*Brown v. Stewart*, 348 S.C. at 33, 46–51, 557 S.E.2d at 676, 683–85 (Ct. App. 2001).

Individual LLC members have only a limited ability to bring an action against an LLC itself or other members to enforce: "(1) the member's rights under the operating agreement; (2) the member's rights under this chapter; and (3) the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company." S.C. Code Ann. § 33-44-410. However, "[a] member of a limited liability company may maintain an action in the right of the company if the members or Managers having authority to do so have refused to commence the action . . . ." S.C. Code Ann. § 33-44-1101.

As shown above, this action was commenced to restore assets to the Company in excess of $4,000,000 and to otherwise right wrongs to the Company at the hands of Richard and Crew Carolina. Laurence is not seeking to enforce his rights under the operating agreement or his rights under the LLC act or any other personal interest, nor is he seeking a remedy for any "loss [] separate and distinct from that of the [Company]." As such, this action could not have been brought in an individual capacity. The trial court erred in ruling otherwise. (R. at 31).

### B. The trial court erred in finding Laurence could not maintain this action on behalf of the Company.

The trial court found there was "undisputed evidence of [] loss" to the Company at the hands of Richard and Crew Carolina. (R. at 29). It excused that loss, however, because only one other member of the LLC (Richard's ex-wife, Lori Stoney) supported the derivative action. (*Id.*.). Lori (holder of 5% and another 5% in trust for her daughter) agreed that any funds taken out of the Company should be restored. (R. at 329:18-30:8). She further testified that Laurence and his lawyers were trying to protect the interests of the Company. (*Id.*). Thus, the trial court erred in

finding 90% of the membership interest opposed the action (that number should have been 85%). In addition, although he was opposed to the lawsuit, when asked "But you agree with me that if $4,000,000 was returned to the [Company], that would be a good thing for the company; correct, sir?" Ted responded, "Of course, if it was obtainable." (R. at 823:22-25).[7] Thus, while he disagreed with the lawsuit against Richard and Crew Carolina, Ted agreed that the Company should be made whole.

This LLC only has a few members, all of whom were closely associated with Richard (his brother, his children in trust, his cousin, and his ex-wife) or were receiving benefits from Richard's conduct (his business associates). Yes, a majority of the membership supported Richard and benefitted from his actions in breach of his fiduciary duties to the Company, but that does not mean Richard—the Company's manager and majority member—has an unfettered right to loot the Company. As set forth above, a derivative action is the only mechanism to make the Company whole and, in turn, to "adequately compensate[] the injured [member] by increasing the value of his [membership interest]." *Brown*, 348 S.C. at 46–51, 557 S.E.2d at 683–85 (Ct. App. 2001).

After the trial in this matter, the trial court reversed its preliminary ruling that Laurence could maintain this action on behalf of the Company. (*Compare* R. at 5-17 *with* R. at 30-33). The trial court's change of heart was based on its findings that "Laurence is acting in pursuit of personal gain and not in the best interest of the Company as his conduct has caused direct harm to the Company" and that "Laurence is not a fair and adequate representative under Rule 23(b)(1). His motivations are more vindictive and personal, than they are to vindicate a corporate wrong. The equitable remedy sought by Laurence is too tainted by his inappropriate conduct, particularly in

[7] In fact, Ted testified that "one of the reasons" he opposed the lawsuit was that his brother Richard personally owed him a "substantial sum in excess of $3 million." (R. at 823:213-21).

light of the overwhelming opposition to the action by ninety percent of the membership of the LLC." (R. at 32-33). These rulings fell under two headings ("Personal Motivation" and "Vindictiveness toward Defendant"), but both go to Laurence's ability to "adequately defend the best interest of the Company." (R. at 31-33).

With respect to the derivative relief sought in this case, the right to bring an action is governed by S.C. Code Ann. § 33-44-1101 ("A member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed.") and Rule 23(b)(1), SCRCP ("In a derivative action brought by one or more [] members to enforce a right [] of an unincorporated association, the [] association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a [] member at the time of the transaction of which he complains []. . . . The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the [] members similarly situated in enforcing the right of the [] association . . . .").[8]

"The burden is on the defendants to show that the plaintiff will not fairly and adequately represent the corporation and its [similarly situated] shareholders." *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 179 (N.D. Ill. 1987); *see also Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341, 344 (D. Or. 1987) ("The burden is on defendants to show that [the representative-plaintiff] is an inadequate representative."); *Brandon v. Brandon Const. Co.*, 776 S.W.2d 349, 353 (Ark. 1989)

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[8] Defendants did not challenge whether Laurence met the derivative action demand requirement. Presumably, this is because the demand requirement is excused for futility where, as here, "the directors or managing board are themselves the wrongdoers." *Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976).

("The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.").

Neither S.C. Code Ann. § 33-44-1101 nor Rule 23(b)(1) requires that a party bringing a derivative action on behalf of an LLC not have personal motivations for bringing the action, nor do they require that a representative-plaintiff not stand to gain personally. In fact, the reason for a derivative suit is to restore the assets to the Company such that the members receive the benefits of their ownership in the Company. *See Brown,* 348 S.C. at 46–51, 557 S.E.2d at 683–85.

Here, the parties stipulated, "Laurence O. Stoney is not similarly situated to any other member of the Boathouse at Breach Inlet, LLC." (R. at 207-08). Therefore, the trial court erred in considering the other dissimilarly situated members in making its standing determination.

Although the trial court did not rule on this basis in its final order, it preliminarily found:

> Where, as here, there are no members similarly situated to a derivative-action plaintiff, the derivative-action plaintiff is treated as a class of one and is not required to represent the interests of any other member in a company. *See e.g., Larson v. Dumke,* 900 F.2d 1363 (9th Cir. 1990), *cert. denied sub nom. Round Table Pizza, Inc. v. Larson,* 498 U.S. 1012, 111 S. Ct. 580 (1990) (finding that a shareholder can be a legitimate class of one where other shareholders are not similarly situated to the derivative-action plaintiff).

(R. at 16).[9] This preliminary ruling comports with *Walbeck v. The I'On Co., LLC*, Op. No, 5588 (Ct. App. filed August 8, 2018) (Shearouse Adv. Sh. No. 32 at 125) ("Walbeck I"), the only South

[9] This preliminary ruling is consistent with the overwhelming majority of case law from other jurisdictions. *See also Jordon v. Bowman Apple Prod. Co.,* 728 F. Supp. 409, 412-13 (W.D. Va. 1990) (holding, "[s]ince defendants apparently concede that the other shareholders are not similarly situated vis-a-vis plaintiff, the court concludes that the plaintiff constitutes a legitimate class of one . . . ."); *ShoreGood Water Co. v. U.S. Bottling Co.*, No. CIV.A. RDB08-2470, 2009 WL 2461689, at *6 (D. Md. Aug. 10, 2009) (stating, "[a] sole shareholder may . . . bring a derivative suit . . . ."); *Halsted Video, Inc.*, 115 F.R.D. 177 (finding that a derivative-action plaintiff is a class of one where he is uniquely positioned in a company); *Cattano v. Bragg*, 727 S.E.2d 625, 629 (Va. 2012) (establishing the rule in Virginia that a derivative-action plaintiff can maintain a derivative suit as a class of one); *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162–63 (Tex. 1990) (establishing the rule in Texas that a derivative-action plaintiff can maintain a derivative suit as a

Carolina opinion addressing the issue of whether a member who is uniquely positioned in a Company can maintain a derivative action as a class of one. Although Walbeck I was later withdrawn and replaced with a substitute opinion that did not reach this issue, *Walbeck v. The I'On Co., LLC*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2019) ("Walbeck II"), there is no reason to believe that the reasoning in Walbeck I on this point is incorrect.

This is an issue of first impression in South Carolina. Other jurisdictions, however, recognize that the "class of one doctrine" is particularly apt in the context of closely held companies. Such companies are ripe for malfeasance by self-interested managers, and the close ties between owners makes it difficult for minority members to challenge managerial wrongdoing for fear of further mismanagement or being expelled from the business. As explained by the Utah Supreme Court,

> In closely held corporations, it becomes easy for the majority shareholders to identify themselves as the corporation. . . . [W]e recognize that closely held corporations may be more vulnerable to malfeasance. . . . [T]he nature of a closely held corporation, where there is often a small number of shareholders and many of those may have close ties to each other, lessens the likelihood that a minority shareholder will speak out against corporate malfeasance.

*Angel Inv'rs,* LLC, 216 P.3d at 950-51. The Texas Supreme Court similarly found,

> Furthermore, we question the wisdom of construing [Rule 23(b)(1)] in any manner which prevents a shareholder in a close corporation from enforcing his rights.

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class of one); *Brandon,* 776 S.W.2d at 354 (establishing the rule in Arkansas that a derivative-action plaintiff can maintain a derivative suit as a class of one); *Angel Inv'rs, LLC v. Garrity*, 216 P.3d 944, 951 (Utah 2009) (establishing the rule in Utah that a derivative-action plaintiff can maintain a derivative suit as a class of one); *Demoulas v. Demoulas Super Markets, Inc.*, No. 902927B, 1993 WL 818670, at *4 (Mass. Super. Oct. 29, 1993) (finding that in Massachusetts a derivative-action plaintiff can maintain a derivative suit as a class of one). Notably, even where the derivative-action plaintiff is a class of one and not required to represent the interest of other members in a company, he still must fairly and adequately represent the interests of the company he seeks to protect. Rule 23(b)(1), SCRCP; *see also ShoreGood Water Co.*, 2009 WL 2461689, at *6 ("in order for a sole shareholder's derivative claim to proceed, it must fairly represent the interests of the corporation.").

> Under the facts of this case, such an interpretation could deprive the corporation of any remedy it might have as the result of wrongs done it by the major shareholders.

*Eye Site, Inc.*, 796 S.W.2d at 162–63. If courts were to prevent a uniquely positioned member from standing as a class of one, that would "permit corporate looting and malfeasance in circumstances where all but one shareholder benefited personally from the illegality . . . ." *Angel Investors, LLC*, 216 P.3d at 950–51. Denying a class of one in a case such as this one is patently inconsistent with the maxim that equity will not allow a wrong without a remedy.

The trial court did not change its position on the class of one issue. Instead and despite the plain language of S.C. Code Ann. § 33-44-201 providing that "a limited liability is a legal entity separate and distinct from its members," the trial court found that the interests of the majority were the interests of the Company and therefore Laurence was not a fair and adequate representative. (*See* R. at 33). However, for all of the reasons given above, Laurence must have standing to assert these claims on behalf of the Company because there is no other way that the Company can be made whole for the wrongs it has suffered due to the conduct of its majority member and manager.

Walbeck I is the only South Carolina case that has considered how the "fair and adequate" representation test applies in the context of Rule 23(b)(1). Shearouse Adv. Sh. No. 32 at 125. In that case, this Court ruled that "[i]n determining whether the plaintiff would be an adequate . . . representative, . . . it must appear that the representative will **vigorously prosecute the interests of the [company] through qualified counsel.**" *Id.* (emphasis added). Here, there has been no finding that Laurence has not vigorously prosecuted the Company's interests through qualified counsel. He and his attorneys have spent more than five years trying to restore the Company's assets.

The trial court did not apply this analysis and relied primarily on two out of circuit federal cases in considering whether Laurence was a fair and adequate representative, *Davis v. Comed,*

619 F.2d 588 (6th Cir. 1980) and *Smith v. Ayres*, 977 F.2d 946 (5th Cir. 1992). *Smith* is inapplicable on its face because the parties have stipulated that no other members are similarly situated to Laurence. 977 F.2d at 949. *Davis* provides an eight-factor test to determine if a representative plaintiff is "fairly and adequately" representing the interests of a company in a derivative action, as set forth below:

> Among the elements which the courts have evaluated in considering whether the derivative plaintiff meets [Rule 23's] representation requirements are: [1] economic antagonisms between representative and class; [2] the remedy sought by plaintiff in the derivative action; [3] indications that the named plaintiff was not the driving force behind the litigation; [4] plaintiff's unfamiliarity with the litigation; [5] other litigation pending between the plaintiff and defendants; [6] the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; [7] plaintiff's vindictiveness towards the defendants; and, finally, [8] the degree of support plaintiff was receiving from the shareholders he purported to represent.

619 F.2d at 593-94. In applying the *Davis* factors, no one factor is determinative. *Id.* Instead, should this Court adopt the *Davis* factors, Defendants in order to prevail would be required to prove that Laurence cannot satisfy a "combination of factors." *Id.* The trial court did not perform this analysis and instead looked solely to its perception of vindictiveness and the support of other members that the parties stipulated Laurence was not representing. (R. at 31-33).

A review of the *Davis* factors shows that Laurence was "fairly and adequately" representing the Company's interests and that he met seven of the eight *Davis* factors (assuming for the sake of argument that the trial court was correct in his assessment that there was evidence of vindictiveness). Specifically, there are no economic antagonisms between Laurence and his class (he is a class of one), Laurence has the full support of the class of members he represents (he is a class of one), there is no other litigation pending between Laurence and Defendants, Laurence has only asked the Court for the return of Company monies, and Laurence has no personal financial stake in this litigation other than his interest in it as a member of the Company. In addition, there

was no evidence presented that would tend to show that Laurence was not the driving force behind the litigation or that he was unfamiliar with the litigation.

With respect to the vindictiveness element, this consideration is strictly construed in the context of family-owned, closely held companies, as courts recognize that such litigation typically induces emotionally charged responses. The Virginia Supreme Court reasoned:

> Charged emotions and economic antagonism are virtually endemic to disputes in closely held corporations. Nevertheless, a single shareholder derivative claim is still possible, provided that the totality of the circumstances support a finding that the plaintiff's personal interests do not preclude the shareholder from fairly and adequately representing the corporation. In closely held corporations, **we must look beyond the mere presence of economic and emotional conflict, placing more emphasis on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation**.

*Cattano*, 727 S.E.2d at 629 (emphasis added and citation omitted). Admittedly, there was evidence of ill will between Richard and Laurence; however, with respect to the lawsuit, the recovery sought was for the Company, not the individual. Moreover, this element alone is not dispositive and all of the other factors support Laurence's ability to bring this action on behalf of the Company.

Laurence further notes that there is no evidence that he was antagonistic toward the Company with respect to any of the wrongdoing alleged in his Complaint. The Complaint exclusively seeks recovery of Company assets and for wrongs done to the Company by Defendants.

In its findings of fact, the trial court disregards these facts and finds Laurence "does not seek to vindicate a corporate wrong." The trial court focused on the relationship between Laurence and Richard and Laurence and Richard's other businesses, rather than focusing on any alleged wrongdoing with respect to the Company and the restaurant at Breach Inlet. For example, (1) the trial court discusses the familial relationship between Laurence and Richard (R. at 24); (2) the trial

court discusses Richard's general business plan and the "Crew Carolina management concept" (R. at 25-26); (3) the order discusses the opening of the Boathouse at East Bay, additional restaurants in Asheville and Knoxville, three more restaurants in the Charleston area, and a related business, Blue Water Management, that published a cookbook, sold to grocery stores, and did catering (R. at 26); (4) the order spends several paragraphs discussing Laurence's conduct with respect to the Boathouse at East Bay, a separate LLC (R. at 27); (5) the order discusses Laurence's testimony in Richard's divorce, including Laurence's testimony that he would not object to a change in management of the Company (R. at 28); however, while this testimony may have an adverse impact on Richard it would not necessarily have harmed the Company; and (6) the order discusses threats Laurence made to Ted regarding Richard (*Id.*).

Also in its findings of fact, the trial court found that Laurence "breached the implied covenant of good faith and fair dealing" as follows:

> Laurence was aware as early as 1999, that the cash generated by the [] Breach Inlet was being used to support other restaurants and made no complaint as long as he benefitted; Laurence admittedly engaged in communications with food purveyors and Ted Stoney of [] Breach Inlet restaurant in which he was critical of the credit standing of [Breach Inlet] to those purveyors causing strain to [Breach Inlet] with the purveyors. Laurence attempted to purchase the land of Boathouse on East Bay despite knowing that Richard and Ted were attempting to purchase the land for the benefit of the [Boathouse on East Bay]. Additionally, Laurence testified adversely to Richard Stoney in the divorce trial between Richard and Lori Stoney, advocating that the Family Court award the interest of Richard in Breach Inlet to Lori, and further advocating change of management.

(R. at 29-30). These findings are in error because Laurence, as a minority member of a manager-managed LLC, does not owe any duty of good faith and fair dealing to the Company. S.C. Code Ann. § 33-44-409(h)(1) (imposing an "obligation of good faith and fair dealing" on members in member-managed companies and only on managers in manager-managed companies). The trial court's "finding of fact" on this point should therefore be disregarded, or if recast as a conclusion

of law, should be reversed. The standing issues in this case should not be impacted by the trial court's erroneous determination that Laurence breached a duty he did not owe.

The only portion of the order reflecting possible negative conduct toward the Company on Laurence's part is the limited testimony relating to what Laurence may have told vendors about the Company's creditworthiness. (R. at 28). However, a review of the record shows that Laurence did not share any untrue information, and Laurence's testimony is only that he answered direct questions when asked. (R. at 714:9-17:4, 835:21-36:1, 994:21-95:1). Contrary to the trial court's order, Laurence did not concede any disloyalty to the Company. (R. at 28). When asked, "So you're saying that maybe it would be disloyal if you had told these purveyors that Breach Inlet was having some credit problems?" Laurence responded, "The question is, did they tell me about it or did I tell them? I never told them anything. I listened to them." (R. at 716:15-20). Given the testimony, there is no indication that these comments were false or intended to harm the Company.

Are there hard feelings between the cousins in this case? Yes. However, any hard feelings toward Richard on Laurence's part are not disloyalty to the Company, and the trial court erred in ruling otherwise. Very simply, the trial court's order permits Richard to get away with looting the Company by finding that Laurence has no standing to maintain this action.

## II. The trial court erred in granting Defendants' motion to dissociate Laurence from the Company.

Adding insult to injury, the trial court exercised its equitable powers to dissociate Laurence from the Company in its current, diminished state. S.C. Code Ann. § 33-44-601(6)(iii) ("Section 601") permits a court to expel a member of a LLC only if that member "engaged in conduct relating

to the company's business which makes it not reasonably practicable to carry on the business with the member."[10]

### A. Defendants did not meet their burden of showing that it is "not reasonably practicable to carry on the business with" Laurence.

No appellate court in South Carolina has addressed the issue of judicial expulsion of an LLC member. However, in the exceptional instance in which courts outside of South Carolina have judicially expelled company members, courts recognize that "LLC members seeking to [judicially] expel a fellow member . . . are required to clear a high bar [, and the Statute does not] authorize a court to dissociate an LLC member merely because there is a conflict." *IE Test, LLC v. Carroll*, 140 A.3d 1268, 1279 (N.J. 2016).

In *IE Test*, one member of a three member LLC would not agree to execute an operating agreement such that the LLC could not obtain a line of credit or financing from a bank. *IE Test, LLC* at 1280. Despite the significant obstacle created by the dissenting member—making it impossible for the engineering company to borrow money to operate—the court refused to judicially expel the dissenting member because he did not engage in conduct with respect to the business that made it "not reasonably practicable" for the business to continue. *Id.*

In "ascrib[ing] to the statutory words their ordinary meaning and significance," the *IE Test* court reasoned that for it to expel a member, that member must have engaged in conduct such that "it must be unfeasible, despite reasonable efforts, to keep the LLC operating while the disputed member remains affiliated with it." *Id.* at 1278 . The court further observed that the statute was not "satisfied by the mere existence of a conflict among LLC members," and that:

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[10] Defendants did not move to expel Laurence from the Company for making it "not reasonably practicable to carry on the Company's business" until January 7, 2020, more than four years after Laurence filed this lawsuit. Common sense dictates that if it was not practicable to carry on the Company's business with Laurence Stoney, Defendants would have moved to expel him sooner.

> [T]he Legislature did not authorize a court to premise expulsion . . . on a finding that it would be more challenging or complicated for other members to run the business with the LLC member than without him. . . . Instead, the Legislature prescribed a stringent standard of prospective harm: the LLC member's conduct must be so disruptive that it is "not reasonably practicable" to continue the business unless that member is expelled.

*Id.* The court concluded that judicial expulsion is inappropriate if "the LLC can be managed notwithstanding [the dissenting member's conduct]." *Id.*

In the case at hand, Defendants' primary complaint is that Laurence brought this derivative action. Asserting a statutory right to pursue relief of behalf of the Company, however, cannot be a reason to expel a member of an LLC. It would be nonsensical to require the expulsion of a member simply for seeking a statutorily guaranteed right to redress for the misconduct of the LLC's manager.

Laurence is a minority member of the Company with no access to or control over its operation or finances. He has been a passive investor in Breach Inlet since its inception in 1997, and the Company has been a successful venture. Nothing about Laurence's minority interest prevents Breach Inlet from conducting its business in the ordinary course.

Dissociation under Section 601 is improper unless Defendants prove that it is unfeasible to keep Breach Inlet operational while Laurence is a member. Defendants did not meet this burden. In reaching this result, the trial court again looked to the relationship of the parties and conduct relating to other entities, rather than the actual ability to operate the Company. (R. at 35). This was error and is inconsistent with the language of Section 601.

In fact, Richard testified that based on first quarter sales he projected Breach Inlet to earn up to half a million dollars more in 2020 than in 2019. (R. at 748:12-18). Given Richard's testimony, under any test the Court might apply regarding the "reasonably practicable" standard, it is "reasonably practicable to carry on the business" with Laurence as a passive investor. The

trial court's deference to the members' testimony that they did not want to be in business together anymore simply does not go to whether the LLC can continue to operate as required by the statute. Therefore, the trial court's order should be reversed.

### B. The trial court erred in awarding relief against Laurence in his individual capacity.

In addition, Laurence is not an individual party to this action, and the trial court erred in granting the motion to dissociate against his individual interest. Quite simply, "[i]n a derivative action in this state the stockholder is the nominal plaintiff and the corporation is the real party in interest." *Ward v. Atlas Constr. Co.*, 276 S.C. 346, 347, 278 S.E.2d 621, 622 (1981). A claim must be filed against an opposing party in the same capacity in which they have sued. *McLeod v. Sandy Island Corp.*, 260 S.C. 209, 220, 195 S.E.2d 178, 183 (1973); *see also Higgins v. Shenango Pottery Co.,* 99 F. Supp. 522 (W.D. Pa 1951) (recognizing "the general rule existing in many state courts that a counterclaim must be filed against an opposing party in the same capacity in which he sues" and dismissing a claim for relief against the plaintiff shareholder because the derivative action was commenced by the plaintiff in a representative capacity as a shareholder, not in an individual capacity); *Conant v. Schnall*, 307 N.Y.S.2d 902, 905 (N.Y. 1970) (noting that "a shareholder bringing a derivative action is not subject to counterclaims against him individually"). Therefore, the trial court erred in dissociating Laurence from his membership in the Company.

Laurence raised these concerns before and during the trial of this action. (R. at 489:3-4 ("And yes he is on behalf of the company maintaining this derivative lawsuit."), 1090:18-21 ("[T]here are a lot of cases that say in derivative actions that Laurence Stoney is non-complainant.

That the real party at interest here is the company."[11]). He raised them again in his post-trial motion. (R. at 258-64).

This error has additional significance because if Laurence is no longer a member of the Company, he would lose his right to seek derivative relief. *Johnson v. Baldwin*, 221 S.C. 141, 149–50, 69 S.E.2d 585, 589 (1952). As stated there,

> The right of a stockholder to maintain a derivative action against the directors of a corporation 'inheres in and attaches to his ownership of its stock and does not exist apart from such ownership. It is a right which depends on status. If there is a loss of status, the action abates so far as the stockholder bringing the action is concerned, although the cause of action itself survives. Accordingly, it has been held that where such a derivative action is instituted by preferred stockholders and thereafter the preferred stock is retired, the plaintiffs have no further standing, whether the action is abated or not. . . .
>
> It is our conclusion that the right of the plaintiff to continue to prosecute this action depends upon her retaining her status as a stockholder and if she ceased to be a stockholder, the cause of action abated so far as she is concerned. There would be no one left in court with the capacity to continue the litigation. She cannot prosecute an action as a member of a class to which she does not belong. Of course, as previously pointed out and apparently conceded by the defendants, the cause of action itself would not be extinguished.

(citations omitted). Again, this would leave the Company without a remedy to address the "undisputed loss" for want of a nominal plaintiff. As such, equity will not allow the dissociation order to stand.

If the Court were to reverse the trial court's ruling and find that Laurence can maintain this action, it must also reverse the portion of the order relating to dissociation so that Laurence would retain his ability to maintain this action as a member of the Company.

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[11] The rough version of the transcript reads slightly differently, as follows: "And there are a lot of cases that say in derivative actions that Laurence Stoney is a nominal plaintiff. That the real party in interest here is the company." (R. at 1108:12-15).

### C. The trial court erred in awarding equitable relief as requested by Defendants without making an assessment as to whether Richard had clean hands.

Finally, the trial court erred by granting Defendants' motion in equity without addressing whether Richard has unclean hands (though the trial court did note "the undisputed evidence of loss" to the Company at the hands of Richard and Crew Carolina). It is axiomatic that "he who seeks equity must do equity." *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551 (1920); *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). The trial court noted in its preliminary order on standing that Defendants and Intervenors appeared to have unclean hands. (R. at 13). However, after making that finding and ruling that there was undisputed evidence of loss to the Company, in its final order, the Court awarded equitable relief requested by Defendants in dissociating Laurence without determining whether Defendants had unclean hands.

For all of these reasons, the trial court erred in granting the motion to dissociate Laurence and that portion of the order should be reversed.

## CONCLUSION

The trial court acknowledged that Richard diverted in excess of $4,000,000 from the Company.[12] Instead of holding Richard accountable for this misconduct and issuing a ruling on the merits of the claims and defenses raised by the parties, the trial court found that the Company could not maintain this action because its representative, Laurence, had hard feelings towards his cousin Richard. In so ruling, the trial court acknowledged the Company had been wronged but effectively left the Company with no way to pursue a remedy. The trial court's ruling that

[12] The trial court did not make any findings as to the remaining allegations of wrongdoing to the Company, interest, punitive damages, or attorney's fees and costs. The Company believes the evidence presented at trial supports all of these measures of damage/recovery in its favor; however, at the very least, the trial court has acknowledged there was harm to the Company.

Laurence cannot serve as the Company's representative stripped the Company of its only shield against Richard's misconduct. For the reasons set forth above, this ruling should be reversed and remanded to the trial court for a ruling on the merits of the parties' claims and defenses as presented at the trial of this matter.

In addition, not only did the trial court decline to make the Company whole, it ordered that Laurence, individually, must be bought out of his membership interest based on the diminished value of the looted Company. It did so notwithstanding the fact that Laurence is not a party to this action in an individual capacity, without evaluating whether the party seeking dissociation had clean hands, and without considering the fact that the Company has operated successfully with Laurence as a member since its inception. In addition, removing Laurence as a member of the Company would mean that Laurence could not pursue relief on the Company's behalf. Therefore, this ruling must also be reversed.

Respectfully submitted,

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