THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	Civil Action No.: 2017-CP-42-00740 **ORDER**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

This matter comes before the Court on several motions related to discovery in this matter, four of which were filed by Plaintiff Gibbs International, Inc. and one filed by non-party Katherine Harake. Specifically, these motions included: (1) Plaintiff Gibbs International, Inc.'s ("Gibbs") Motion to Reconsider/Clarify July 5, 2018 Order ("Motion to Reconsider"), which was filed on July 13, 2018; (2) Motion to Quash and for Protective Order of Non-Party Katherine Harake, which was filed on November 21, 2018 and Plaintiff's competing Motion to Compel as to Non-Party Katherine Harake, which was filed on November 21, 2018; (3) Plaintiff Gibbs International, Inc.'s Motion to Remove Redactions in Documents Produced by Sarmad Harake and Eurosa, Inc. ("Motion to Remove Redactions"); and (4) Gibbs International, Inc.'s Motion

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For A Protective Order/To Quash, which was filed on November 28, 2018. Following briefing by the parties on each of these motions, a hearing was conducted at the Spartanburg County Judicial Center on December 7, 2018. Plaintiff Gibbs, Defendants Sarmad Harake ("Sam Harake") and Eurosa, Inc. ("Eurosa") (collectively the "Harake Defendants"), and non-party Katherine Harake were represented by counsel. After careful consideration and review of the pleadings, motions, memoranda, and supporting documents, for the reasons set forth below:

1. Plaintiff's Motion to Reconsider is **DENIED**;
2. Non-Party Katherine Harake's Motion to Quash and for Protective Order is **GRANTED**; therefore, Plaintiff's Motion to Compel as to Non-Party Katherine Harake is **DENIED**;
3. Plaintiff's Motion to Remove Redactions is **GRANTED**;
4. Plaintiff's Motion For A Protective Order/To Quash as to Marsha Gibbs is **DENIED**.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute arising from an alleged breach of contract and request for accounting of an alleged agreement. While Gibbs initially filed this action in March 2017, it was twice amended, with the Second Amended Complaint filed on June 9, 2017. Gibbs served discovery initially on Defendant Sam Harake around May 19, 2017. Thereafter, an entry of default was entered against Sam Harake, Eurosa, and Katherine Harake on July 17, 2017. The Harake Defendants and Katherine Harake timely answered the Second Amended Complaint on August 17, 2017, and Katherine Harake was later voluntarily dismissed without prejudice. The entry of default was set aside as to the Harake Defendants by Order of this Court on December 21, 2017. Sam Harake timely answered Gibbs' discovery requests, providing objections as to scope and discoverability of certain requests.

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Thereafter, on February 3, 2018, Gibbs moved to compel discovery responses from Sam Harake regarding two of the Requests for Production to which he objected. A hearing on the motion to compel was held on April 5, 2018. Following an additional request from the Court, the Court entered an Order denying Gibbs' Motion to Compel on July 5, 2018. As part of that ruling, the Court held that a request for production was not the appropriate mechanism to obtain corporate records from non-parties FED Securities, Pay Send, Eurofund, Gibbs Energy, QPAGOS, IOTive, and Yogi Pay. Gibbs then filed a Motion to Reconsider/Clarify pursuant to Rule 59, SCRCP, and any other applicable rule, seeking for the Court to rule on the financial records of Defendants Sarmad Harake and Eurosa as well as non-party Katherine Harake. On August 22, 2018, without there having been a ruling on its Motion to Reconsider/Clarify, Gibbs served a subpoena pursuant to Rule 45, SCRCP, on Bank of America for the records of Defendants Sarmad Harake and Eurosa as well as non-party Katherine Harake. Gibbs did not copy counsel for any of the parties with the subpoena.[1] Bank of America responded to the subpoena via an encrypted CD-ROM less than ten (10) days after service, on August 31, 2018.

Following receipt of the documents, the parties compromised as to the production of Sam Harake's and Eurosa's financial records, which included redactions that could later be challenged by Gibbs. Given that compromise, Sam Harake and Eurosa produced account information, account statements, checks, and deposit slips for March 2015 through September 2016 since Sam Harake claims Gibbs has not paid Eurosa or Sam Harake since September 2016.

[1] Gibbs maintains the failure to copy counsel on the subpoena was inadvertent and that it was not aware of the issue until November 6, 2018 due to multiple factors, including the process of decrypting the CD-ROM. Gibbs therefore did not make Defendants and Mrs. Harake aware of this production of documents until November 7, 2018, more than two months after its receipt of the documents.

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"In South Carolina the scope of discovery is very broad." *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997). The scope and conduct of discovery are within the sound discretion of the trial court and will only be reversed where that discretion has been abused. *Palmetto Alliance v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984). Parties may only obtain discovery regarding matters that are relevant to the subject matter involved in the pending action and reasonably calculated to lead to the discovery of admissible evidence. Rule 26, SCRCP. "Thus, discovery requests must be reasonably tailored to include only relevant matters." *Oncology & Hematology Assocs. Of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388 (2010). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), SCRCP. Moreover, Rule 30, SCRCP, gives parties broad leave to depose "any person" who may have relevant information in a case. "The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003).

However, a court shall limit discovery if the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. Rule 26(a), SCRCP. Rule 34 of the South Carolina Rules of Civil Procedure, subject to Rule 26, permits a party to request that another party produce only those documents within that party's possession, custody, or control. Rules 26 and 34, SCRCP. Rule 34 of the South Carolina Rules of Civil Procedure was amended in 1993 to provide that production from non-parties is governed only by Rule 45, SCRCP. Rule 34(c), SCRCP ("A person not a party may be compelled to produce documents or things or submit to an inspection only as provided in Rule 45.").

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Additionally, Rule 26(c) authorizes the Court to enter a protective order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense," including an order "that the discovery not be had;" "that the discovery may be had only on specified terms and conditions"; "that the discovery may be had only by a method of discovery other than selected by the party seeking discovery;" and/or "that certain matters not be inquired into or that the scope of the discovery be limited to certain matters." Rule 26(c), SCRCP. The South Carolina Supreme Court has held that "[i]f a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is 'relevant and necessary' to the case." *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009) (quoting *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009) and *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 439 S.E.2d 852 (1994)). A court must "weigh the factors of whether the information sought is 'relevant and necessary' evidence against any particularized harm the opposing party may suffer." *Id.* To show that the information sought is necessary, "the party seeking the information 'must demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible threat.'" *Id.* Additionally, the "trial court must determine whether there are reasonable alternatives available to discover the information." *Id.*

1. **Plaintiff's Motion to Reconsider**

Plaintiff Gibbs filed a Motion to Reconsider this Court's July 5, 2018 Order denying its Motion to Compel pursuant to Rule 59, SCRCP. In that Order, the Court found that "[p]ursuant to Rules 34 and 45, SCRCP, a Request for Production to Defendant Sam Harake is not the appropriate mechanism to obtain corporate records from non-parties, including FED Securities,

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Pay Send, Eurofund, Gibbs Energy, QPAGOS, IOTive, and Yogi Pay." The Court further found that Plaintiff Gibbs has "subpoena power, pursuant to Rule 45, SCRCP or the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to compel records from non-party entities. To permit otherwise would render Rule 34, SCRCP, meaningless and flout the rights and protections of corporations in South Carolina." In its Motion to Reconsider, Gibbs requested the Court compel production of the Harake Defendants financial records for the period of March 1, 2015 until the present and to produce IOTive records for the period of May 2017 until September 2017.

Rule 59(e) of the South Carolina Rules of Civil Procedure provides a method for moving a Court to alter or amend a judgment made. However, in this case, at the time the Court heard arguments in April 2018, and later issued its order in July 2018, Plaintiff Gibbs presented nothing showing a connection between Plaintiff Gibbs' money and the Harake Defendants' accounts. Therefore, the Court balances Plaintiff Gibbs' right to comprehensive discovery with the Harake Defendants' privacy and finds that Gibbs is not entitled to what it requests. *See* Rule 26, SCRCP; *Oncology & Hematology Assocs. Of S.C., LLC*, 387 S.C. at 388; *Palmetto Alliance* 282 S.C. at 434, 319 S.E.2d at 698. As the Court stated in its July 5, 2018 Order, Gibbs has the subpoena power. The Court clarifies that wise use of subpoena power by Plaintiff may establish a connection sufficient to cause the Court to direct production by the Harake Defendants in response to Request for Production Numbers 28 and 29. But that time is not now. Accordingly, the Court denies Plaintiff Gibbs' Motion to Reconsider.

2. <u>Non-Party Katherine Harake's Motion to Quash and for Protective Order</u>

When Gibbs subpoenaed non-party Katherine Harake's financial records from Bank of America, Gibbs did not copy counsel for any of the parties with the subpoena, in violation of

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Rule 45(b)(1), SCRCP. Gibbs claims it did not become aware of the subpoena issue or notify any of the parties or Mrs. Harake of its receipt of the financial records for nearly two months due to the multiple factors previously mentioned.

The South Carolina Supreme Court has specifically found that the notice provision of Rule 45(b)(1), SCRCP, was added "in accordance with a similar provision in Rule 45 of the Federal Rules of Civil Procedure." *In re Fabri*, 418 S.C. 384, 793 S.E.2d 306 (2016) (quoting the comment to the federal rule in that "[t]he purpose of such notice is to afford other parties an opportunity to object to the production or inspection, ... [and] other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced." Fed. R. Civ. P. 45(b)(1) cmt.). Given the failure to provide notice, the subpoena for Mrs. Harake's financial records failed to comply with the South Carolina Rules of Civil Procedure.

Additionally, there are no allegations of misappropriation of money or fraudulent transfers of money to Mrs. Harake by the Harake Defendants or other Defendants in the Second Amended Complaint. Thus, at this time, Gibbs has not shown that Mrs. Harake's financial records are related to any current claim or defense and would not be reasonably calculated to lead to the discovery of admissible evidence. *See e.g., Berkowitz v. United States*, 2011 U.S. Dist. LEXIS 116161, *17, 2011 WL 4502374 (D.S.C. Sept. 9, 2011) (noting that a plaintiff "is not entitled to engage in a discovery fishing expedition for evidence he believes *might* support his allegations") (emphasis added); *Holliman v. Redmond Dev. Corp.*, 61 F.R.D. 488, 490 (D.S.C. 1973) (stating "[o]rdinarily, the financial status of the parties is not to be inquired into" unless it is relevant to the case); *Pappas v. Ollie's Seafood Grille & Bar, L.L.C.*, No. 2007-UP-090, 2007 S.C. App. Unpub. LEXIS 266, at *23-24 (S.C. Ct. App. Feb. 23, 2007) (affirming the

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trial court's denial of a motion to compel lists of revenues and expenses of the defendants, various financial statements concerning defendants' current net worth, and profit and loss statements and similar documents and finding the requested information irrelevant to the breach of contract and unfair trade practices case since the documents would not be able to explain whether the defendants had due cause for concern).

Further, at this time, Plaintiff has not shown a connection between its claim and Mrs. Harake's financial records. *See Bd. Of Trs. Of the Trucking Emples. of N. Jersey Welfare Fund, Inc. v. Caliber Auto Transfer, Inc.*, Civil Action No. 09-6447 (DRD) (MAS), 2011 U.S. Dist. LEXIS 71268, at *15-16 (D.N.J. June 30, 2011) (holding that plaintiffs failed to show any connection between the plaintiffs' claims and the non-parties' bank records and private financial information which would justify an intrusion into the privacy of their finances for the past twelve years). 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. However, at this stage, Gibbs has not shown such a connection. Thus, Mrs. Harake's financial records are not relevant at this time pursuant to Rule 26, SCRCP. Therefore, the Court grants Non-Party Katharine Harake's Motion to Quash and for Protective Order and denies the portion of Plaintiff Gibbs' "Motion to Remove Redactions in Documents Produced by Sarmad Harake and Eurosa, Inc., and Plaintiff's Motion to Compel as to Non-Party Katherine Harake" requesting that Mrs. Harake's financial records be compelled.

3. **Plaintiff's Motion to Remove Redactions**

Gibbs' Motion to Remove Redactions requests the removal of redactions from the financial records produced by the Harake Defendants for the time period of March 1, 2015

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through September 30, 2016. Given the broad scope of discovery and the claims in the Second Amended Complaint, the Court finds that Gibbs is entitled to this information and the financial records produced should be unredacted so that Plaintiff Gibbs may trace its funds. Rule 26, SCRCP; *Samples*, 329 S.C. at 110, 495 S.E.2d at 215. Accordingly, the 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.

4. Plaintiff's Motion For A Protective Order/To Quash

The Harake Defendants served a Notice of Deposition and accompanying subpoena for Marsha Gibbs, the wife of Gibbs' president Jimmy Gibbs. The deposition was noticed for November 15, 2018.. Gibbs filed the pending motion on November 28, 2018.

Given that the Harake Defendants identified Mrs. Gibbs in their discovery responses as a witness with information about the allegations in the Complaint and the fact that Mrs. Gibbs is a Director of Gibbs, the Harake Defendants may depose her in accordance with the South Carolina Rules of Civil Procedure. Rules 26 & 30, SCRCP; *see also Samples*, 329 S.C. at 110, 495 S.E.2d at 215. Accordingly, the Court denies Plaintiff's Motion for Protective Order/Motion to Quash Subpoena as to Marsha Gibbs.

IT IS THEREFORE ORDERED that

1. Plaintiff's Motion to Reconsider is DENIED;
2. Non-Party Katherine Harake's Motion to Quash and for Protective Order is **GRANTED**; therefore, Plaintiff's Motion to Compel as to Non-Party Katherine Harake is **DENIED**;
3. Plaintiff's Motion to Remove Redactions is **GRANTED**; and
4. Plaintiff's Motion For A Protective Order/To Quash as to Marsha Gibbs is **DENIED**.

AND IT IS SO ORDERED.

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Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165

ELECTRONICALLY FILED - 2020 Jul 28 3:22 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS Civil Action No.: 2017-CP-42-00740
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Pavel Polukhin, and Shai Hemli, Defendants.	**ORDER**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

The trial of this case shall be removed from the trial roster the week of September 7, 2020. The case shall be re-set for trial during the weeks of October 26, November 9, or November 16, 2020.

AND IT IS SO ORDERED.

WE SO CONSENT:

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Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Continuance

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4200740

Gibbs International, Inc.
PLAINTIFF(S)

Sam Harake et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter was on the Court's docket for 12 motions on Tuesday September 22, 2020. At the outset of the hearing, counsel advised the Court that the 9 discovery related motions had resolved, and that a consent order would be drafted and sent in for filing. The only remaining motions for the Court Were Motions to Dismiss under Rule 12. After further review and deliberation, and considering the oral arguments made in Court as well as the memoranda presented, the Court rules as follows:

1. Gibbs Motions to Dismiss/Strike Counterclaims-DENIED as to Negligent Misrepresentation c/a, GRANTED as to Tortious Interference with Economic Advantage c/a

2. K Harake's Motion to Dismiss for lack of personal jurisdiction or venue-DENIED

3. K Harake's Motion to Dismiss-GRANTED as to aiding/abetting conversion c/a, civil conspiracy c/a, unjust enrichment/quantum meruit/quasi-implied contract c/a. DENIED as to SCUTPA c/a, fraud c/a, aiding & abetting breach of fiduciary duty c/a,

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☑ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/25/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2020 Sep 25 9:17 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

ELECTRONICALLY FILED - 2020 Sep 25 9:17 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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conversion c/a, accounting c/a.

4. Harake/Eurosa Motion to Dismiss the civil conspiracy claim-DENIED

Attorney Dunlap shall prepare a proposed Order incorporating the findings on his client's behalf using language consistent with his arguments. Attorney Joyner shall prepare a proposed Order incorporating the findings on her clients' behalf using language consistent with her arguments. Both proposed orders shall be emailed to the Court and opposing counsel prior to submission to e-filing. Both proposed orders shall be emailed to the Court on or before November 1, 2020.

AND IT IS SO ORDERED.

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Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Electronic Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

ELECTRONICALLY FILED - 2020 Nov 04 6:41 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc.,	C.A. No.: 2017-CP-42-00740
Plaintiff,	
v.	**CONSENT AMENDED SCHEDULING ORDER**
Sarmad Harake, Eurosa, Inc., Katherine Harake,	
Defendants.	

Pursuant to the South Carolina Rules of Civil Procedure, upon consent of counsel for all parties, the Court enters the following Scheduling Order:

1. DISCOVERY

Discovery, including depositions of all expert witnesses, shall be completed no later than **November 20**, provided, however, that the parties may agree in writing to extend the time for discovery beyond that date, so long as any extension does not delay the call of the case for trial as set out below. All discovery requests shall be served in time for the responses thereto to be served by the date set out above or any extension thereof. Any bene esse depositions must be completed by the discovery deadline or any extension thereof. No motions related to discovery shall be filed until counsel have consulted and attempted in good faith to resolve the matter as required by Rule 11 of the South Carolina Rules of Civil Procedure.

2. MOTIONS

All motions, except those relating to discovery and those relating to the admissibility of evidence at trial, shall be filed on or before **December 1, 2020**.

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3. TRIAL

This case is subject to being called for jury selection and/or trial not before **January 4, 2021**.

AND IT IS SO ORDERED.

WE SO CONSENT:

s/KEVIN A. DUNLAP
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S.C. Bar No. 13081
Parker Poe Adams & Bernstein LLP
100 Dunbar Street, Suite 206
Spartanburg, South Carolina 29306
Counsel for Plaintiff

s/LINDSAY A. JOYNER
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Counsel for Defendants Sarmad Harake, Katherine Harake, and Eurosa, Inc.

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Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Amend

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

Electronically signed on 2020-11-04 12:35:42 page 3 of 3

From: Lindsay Joyner <ljoyner@gwblawfirm.com>
Sent: Tuesday, November 17, 2020 9:39 AM
To: Gibbons, Brian Law Clerk (Steven Murdaugh); kevindunlap@parkerpoe.com
Subject: RE: Proposed order Gibbs v. Harake [GWB-IMANMAIN.FID542496]

Mr. Murdaugh,

Thank you for sending the proposed Order. While my clients, Sarmad Harake, Eurosa, Inc., and Katherine Harake, maintain their rights to file a motion to alter or amend pursuant to Rule 59, SCRCP, this order once it is entered, for the most part, we believe the wording of the Court's proposed order is in line. However, we note a few portions of the Court's proposed order that do not reflect what was raised in the motion, discussed in the hearing, or listed in the Form 4.

First, the Harake Defendants point out the following paragraphs on pages 13-14 of the proposed order:

"Gibbs also moved to strike Defendants S. Harake/Eurosa's fourth counterclaim pursuant to Rule 12(f) "and/or any other applicable Rule and/or common law." The basis of the motion was that Harake Defendants' counsel instructed S. Harake not to answer certain deposition questions about this claim, which prevented Plaintiff from obtaining information requested about the claim. Rule 30(j)(3), SCRCP provides that counsel directing that a witness not answer on allowable grounds shall move the court for a protective order within five business days of the termination of the deposition. However, the Harake Defendants argued in the hearing that this rule was altered by a verbal agreement between the parties that notice would be provided if the party taking the deposition decided it was necessary for the adverse party to file a motion for a protective order covering the instruction not to answer. Plaintiff responded in the hearing that, although it would not oppose the existence of that verbal agreement if the Harake Defendants' counsel thought that was the case, it did provide notice that a motion for a protective order needed to be filed within five business days when it filed its motion to dismiss/strike on August 28, 2020 seeking dismissal based on the instruction not to answer at S. Harake's deposition.

It is undisputed that the Harake Defendants did not file a motion for a protective order within five business days after Plaintiff filed its motion to dismiss/strike, or within five business days after the hearing when Plaintiff notified the Harake Defendants in open court about its position that the instruction not to answer was improper and the basis for its motion to dismiss/strike. This Court finds that any objection to the motion to strike by the Harake Defendants on the basis of the verbal agreement has been waived because the Harake Defendants failed to file a motion for a protective order within five business days of the filing of the motion to dismiss, and/or the hearing on that motion. It is also noted that the Harake Defendants have not filed a motion for a protective order as of the submission of a proposed order on this issue on November 2, 2020. The refusal to allow S. Harake to testify about the basis for the Harake Defendants' new counterclaim justifies dismissal.

Plaintiff's motion to dismiss Defendants S. Harake/Eurosa's fourth counterclaim for relief is hereby GRANTED pursuant to Rule 12(b)(6) and/or Rule 12(f), SCRCP and the fourth counterclaim for relief in their counterclaims is DISMISSED/STRICKEN with prejudice."

As to these paragraphs, Gibbs' motion and Form 4 said nothing about this claim being dismissed with prejudice, and such a finding is inconsistent with the other findings as no other causes of action have with or without prejudice written with them. Additionally, the Court did not state that the Harake Defendants waived any objections to the motion to strike for failing to file a protective order or that instructing Mr. Harake not to answer justified dismissal of the cause of action. Rather, with regard to the discussion of the testimony and protective order and any resulting deposition, the Court said that "only issue before [him] is whether or not the cause of action remains or not." (Hrg. Trans., p.22:13-24). As stated in the standard in the Court's proposed order, Rule 12(f) is treated as a Rule 12(b)(6), meaning it is based the allegations in the complaint when determining the sufficiency of a cause of action.

Second, on page 22 of the proposed order, this sentence appears to go beyond the 12(b)(6) sufficiency of pleadings standard and state a conclusion: "In this case, K. Harake would have had no legal right to use Gibbs' funds for non-authorized purposes, which were improperly transferred to her account, and her unauthorized use of those funds to Gibbs'

exclusion constitutes conversion in South Carolina." Therefore, we believe it should be modified to express only that sufficient facts have been pled to state a cause of action for conversion.

Third., on page 26 of the proposed order, this sentence likewise appears to go beyond the 12(b)(6) sufficiency of pleadings and state a conclusion : "Gibbs is also entitled to an accounting due to K. Harake and the Harake Defendants' mismanagement of Gibbs' money (in addition to Gibbs' money that went directly to the Harake Defendants) and aiding and abetting breaches of fiduciary duties." Likewise, we believe this sentence should be removed or modified only to express that sufficient facts have been plead to state a cause of action for accounting.

Finally, on page 27 of the proposed order, this sentence also appears to go beyond the 12(b)(6) sufficiency of pleadings standard: "This case is entirely irrelevant to Gibbs' pleadings here, which allege that K. Harake (who is not an employee, board member or agent of Eurosa) conspired with S. Harake and Eurosa to conceal Gibbs' stolen money from Gibbs in her personal accounts for the primary purpose and object of harming Gibbs financially. (Compl. ¶ 96)." We believe this sentence should modified only to express that sufficient facts have been plead to state a cause of action for civil conspiracy.

Should you have any additional questions or concerns for us regarding these matters, please let me know.

Thank you,
Lindsay

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From: Gibbons, Brian Law Clerk (Steven Murdaugh) [mailto:bgibbonslc@sccourts.org]
Sent: Friday, November 13, 2020 10:58 AM
To: kevindunlap@parkerpoe.com
Cc: Lindsay Joyner
Subject: Porposed order Gibbs v. Harake

Warning – This email originated outside the GWB email system!

Good Morning,

Counsel attached is the Order Judge Gibbons intends on signing, this is a combination of both attorneys proposed orders. Please get back to me by Tuesday as to the Orders wording if the Order is acceptable as to its wording then please upload this Order to the Judge's E-filing queue for his signature.

Sincerely,

Matthew Murdaugh

Law Clerk for Judge Brian M. Gibbons

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	Civil Action No.: 2017-CP-42-00740 **ORDER ON THE PARTIES' RESPECTIVE MOTIONS TO DISMISS**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

Before the Court are three motions: Plaintiff's Motion to Dismiss and to Strike Counterclaims of Sarmad Harake and Eurosa, Inc. ("Motion to Dismiss and Strike"); Defendants Sarmad Harake and Eurosa, Inc.'s (collectively "Harake Defendants") Motion to Dismiss; and Defendant Katherine Harake's Motion to Dismiss. These matters were briefed by the parties, and the Court heard oral argument on the motions on Tuesday, September 22, 2020, via WebEx. For the reasons set forth below, Plaintiff's Motion to Dismiss and Strike is **DENIED** as to the negligent misrepresentation counterclaim and **GRANTED** as to the tortious interference with economic advantage counterclaim. Defendant Katherine Harake's Motion to Dismiss pursuant to 12(b)(2) and 12(b)(3) and pursuant to Rule 12(b)(6) for the causes of action brought for violation of the South Carolina Unfair Trade

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Practices Act ("SCUTPA"), fraud, aiding and abetting breach of fiduciary duty, conversion, and accounting is **DENIED**. Katherine Harake's Motion to Dismiss pursuant to Rule 12(b)(6) as to the causes of action of aiding and abetting conversion; civil conspiracy; and unjust enrichment, quasi contract, implied contract, and quantum meruit is **GRANTED**. The Harake Defendants' Motion to Dismiss the civil conspiracy claim against them is **DENIED**.

BACKGROUND

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute arising from an alleged breach of contract and request for accounting of an alleged investment agreement between Defendant Eurosa, Inc. ("Eurosa") and Plaintiff Gibbs International, Inc. ("Gibbs"). While Gibbs initially filed this action in March 2017, it was twice amended, with the Second Amended Complaint filed on June 9, 2017. An entry of default was entered against Defendants Sam Harake, Eurosa, and Katherine Harake on July 17, 2017; however, they timely answered the Second Amended Complaint on August 17, 2017. The entry of default was set aside by Order of this Court on December 21, 2017. Katherine Harake was voluntarily dismissed from this litigation on June 1, 2018. Collectively since January 2018, Plaintiff and the Harake Defendants have produced tens of thousands of pages of documents in this litigation, and more than 10 depositions have been taken, including the deposition of Katherine Harake. Gibbs amended the Complaint a third time on August 3, 2020, bringing different causes of action against Katherine Harake as well as additional claims against the Harake Defendants. The Harake Defendants timely filed their Answer and Amended Counterclaims contemporaneously with their Motion to Dismiss on August 24, 2020. Katherine Harake filed her Motion to Dismiss on August

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24, 2020, in lieu of a responsive pleading.[1] *See* K. Harake Motion, p. 1, n.1. Gibbs filed its Motion to Dismiss and to Strike Counterclaims on August 28, 2020, and it timely replied to the Harake Defendants' Counterclaims on September 18, 2020.

APPLICABLE LEGAL STANDARD

The motions at issue before the Court were brought pursuant to Rules 12(b)(2), 12(b)(3), 12(b)(6), and 12(f) of the South Carolina Rules of Civil Procedure. Rule 12(b)(2), SCRCP, allows a party to move for dismissal of a pleading for lack of jurisdiction over the person. *See* 12(b)(2), SCRCP. Rule 12(b)(3), SCRCP, permits dismissal when venue is improper. Under South Carolina law, "[i]t is well-settled that a party seeking to invoke personal jurisdiction over a non-resident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 423 S.E.2d 128 (1992); *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 402 S.E.2d 177 (1991).

"The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (citing *Engineered Prods.v. Cleveland Crane & Eng'g*, 262 S.C. 1, 201 S.E.2d 921 (1974)). Exercise of personal jurisdiction "must comport with due process requirements and must not offend traditional notions of fair play and substantial justice." *Id.* at 16, 655 S.E.2d at 478 (citing *Cockrell*, 363 S.C. 485, 611 S.E.2d 505). "Due process requires some

[1] To the extent Katherine Harake's Motion to Dismiss is denied as discussed later in this Order, Katherine Harake is directed to serve her answer fifteen day after the filing of this Order as provided in Rule 12(a), SCRCP.

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act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state." *Id.*, 655 S.E.2d at 478 (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)).

Pursuant to Rule 12(b)(6), SCRCP, dismissal is warranted for failure to state facts sufficient to constitute a cause of action. A motion to dismiss should be sustained if facts alleged and reasonable inferences derived therefrom would not entitle the plaintiff to any relief on any theory of the case. *Stiles v. Onorato,* 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

"The matter of striking from a pleading, and the matter of admissibility of evidence is largely within the discretion of the trial judge." *Wells Fargo Bank, NA v. Smith*, No. 2009-125666, 2012 WL 10987189, at *1 (S.C. Ct. App. June 13, 2012) (citation omitted). Rule 12(f) provides, in part, that a court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. Matter is "immaterial" if it has no relationship to the claim for relief; "impertinent" if it does not pertain to the issues in the case; "scandalous" if it "'reflect[s] cruelly' upon the defendant's moral character, use[s] 'repulsive language' or 'detract[s] from the dignity of the court.'" *Zaloga v. Provident Life and Acc. Ins. Co. of Am.*, 671 F. Supp. 623, 633 (M.D. Pa. 2009) (quoting *Donnelly v. Com. Financial Systems, Inc.*, 2008 WL 762085, *4 (M.D. Pa. 2008)) (construing identical federal rule); Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1382 (3d ed.) (construing identical federal rule). A Rule 12(f) motion that "challenges a theory of recovery in the pleading" is treated as a challenge to the sufficiency of the pleading under Rule 12(b)(6), SCRCP, and "must be based solely on the allegations set forth on the face of the claim." *Hackworth v. Greywood at Hammett*, LLC, 385 S.C. 110, 114–15, 682 S.E.2d 871, 874 (2009).

DISCUSSION

I. Katherine Harake's Motion to Dismiss Pursuant to Rule 12(b)(2) and 12(b)(3), SCRCP.

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"[T]he party seeking to invoke personal jurisdiction over a nonresident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). The court need only consider the pleadings in entertaining a motion to dismiss for lack of personal jurisdiction and is not required to verify the allegations within the pleadings. *Springmasters, Inc. v. D & M Mfg.*, 303 S.C. 528, 531, 402 S.E.2d 192, 193 (Ct. App. 1991). The allegations of the complaint are "normally sufficient to warrant the court's exercise of jurisdiction." *See Jenkinson v. Murrow Bros. Seed Co., Inc.*, 272 S.C. 148, 150, 249 S.E.2d 780, 781 (1978). Only when the complaint contains no inference of personal jurisdiction must the plaintiff supply extrinsic evidence of jurisdiction. *Springmasters*, 303 S.C. at 531, 402 S.E.2d at 193.

Under the South Carolina's Long Arm Statute, a court may exercise personal jurisdiction over a defendant for causes of action arising from the defendant's:

(1) transacting any business in this State;

(2) contracting to supply services or things in the State;

(3) commission of a tortious act in whole or in part in this State;

(4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

(5) having an interest in, using, or possessing real property in this State;

(6) contracting to insure any person, property, or risk located within this State at the time of contracting;

(7) entry into a contract to be performed in whole or in part by either party in this State; or

(8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803.

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Here, there is sufficient information to conclude that K. Harake is subject to suit under the Long Arm Statute, and that K. Harake has the minimum contacts necessary to comport with the notions of fair play and substantial justice. Plaintiff alleges that K. Harake actually lived in Spartanburg during most of the time periods relevant in this case. (Compl. ¶ 4) ("K. Harake was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter" and "[m]uch of the conduct alleged as to K. Harake occurred when she was living in Spartanburg."). Defendant S. Harake, the husband of K. Harake, testified that K. Harake came to Spartanburg to meet with Plaintiff in May 2015 to explain to Plaintiff "how I [S. Harake] work, how I operate and how I operated all my life...." (S. Harake Dep. 25:4-21). S. Harake also testified that Spartanburg was the "center of life" for him and K. Harake (S. Harake Dep. 23). K. Harake herself testified that she moved to Spartanburg in August 2015, that the Harakes' daughter started school at Spartanburg Day School shortly thereafter, and that she resided in Spartanburg for her daughter to attend school until May 2017 when their daughter finished school for the year. (K. Harake Dep. 10:20-12:22). Plaintiff alleges that the Harakes did the majority of their shopping in Spartanburg and expensed a private school education there from 2015 to 2017. (S. Harake Dep. 18:23-19:13). Plaintiff also alleges that K. Harake's own bank records show that she used and spent Plaintiff's money while she was in South Carolina. (K. Harake Dep. 66:9-67:25).

The causes of action against K. Harake allege that, among other things, Gibbs provided money to S. Harake to be used for certain purposes. (*See, e.g.* Compl. ¶ 102). S. Harake then inappropriately provided Gibbs' money to K. Harake's savings account. (Compl. ¶¶ 15, 34). K. Harake then transferred all of that money from her personal savings account to her personal checking account in Spartanburg. (Compl. ¶¶ 34, 58; K. Harake Dep. 63:21-64:2). She then

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inappropriately spent the money out of her checking account in Spartanburg. (Compl. ¶ 34, 58; K. Harake Dep. 63:21-64:25). Over $500,000 of Gibbs' money is alleged to have been spent while she was living in Spartanburg. (Compl. ¶¶ 37, 103, 110). These allegations and admissions, among others, establish sufficient minimum contacts with the State of South Carolina for the Court to exercise personal jurisdiction.

The Court has also considered whether the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice. The factors to be considered include: the burden on the defendant; the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the states in furthering fundamental substantive social policies.

The Court finds that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. K. Harake chose to live in Spartanburg and educate her daughter there, among other connections previously mentioned. K. Harake has already traveled to Spartanburg for her deposition. As a result, no inappropriate burden is imposed by the exercise of jurisdiction here. South Carolina has an interest in requiring nonresidents and foreign corporations to be held accountable in South Carolina for their activities in the state given significant foreign investment in South Carolina, among other things. Plaintiff does business with foreign entities and much of the conduct at issue in this lawsuit occurred in South Carolina, which weighs in favor of adjudicating the case here. The judicial system also has an interest in adjudication here given the level of activities in this State. In sum, the exercise of personal jurisdiction here is consistent with fair play and substantial justice.

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The Court also finds that venue is proper in South Carolina as to K. Harake, S. Harake, and Eurosa. Civil actions may be commenced in South Carolina in the county in which the most substantial part of the alleged act or omission giving rise to the cause of action occurred. S.C. Code Ann. § 15-7-30(D)(1). The same is true as to foreign corporations. In addition, if jurisdiction is proper in South Carolina against any foreign Defendant, then the case can be brought in the county where Plaintiff resided at the time the cause of action arose. S.C. Code Ann. § 15-7-30(D)(2) and S.C. Code Ann. § 15-7-30(G)(2). Plaintiff complains of acts by the Harake Defendants taking place in Spartanburg, South Carolina and when the Harakes were living in Spartanburg. Venue accordingly is proper in Spartanburg County based on the venue statute as well as serving the ends of justice. *Whaley v. CSX Transp, Inc.*; 609 S.E. 2d 286, 362 S.C. 456 (2005); *Varradone v. Hicks*, 213 S.E. 2d 736, 264 S.C. 216 (1975).

For these reasons, among other reasons briefed by the parties and argued at the hearing, this Court finds that there are sufficient facts to establish its personal jurisdiction and proper venue in this action and Defendant K. Harake's motion to dismiss for personal jurisdiction and Defendants K. Harake/S. Harake/Eurosa's motions to dismiss for improper venue are DENIED.

II. Failure to State Facts Sufficient to Constitute a Cause of Action

Plaintiff and Defendants filed their respective motions pursuant to Rule 12(b)(6), SCRP, arguing that various causes of action alleged in either the Third Amended Complaint or the Amended Counterclaims of Sarmad Harake and Eurosa, Inc. should be dismissed. First, Plaintiff argues the counterclaim for negligent misrepresentation should be dismissed because the Harake Defendants failed to plead all elements of the cause of action. Next, Plaintiff argues the counterclaim for tortious interference with economic advantage should be dismissed pursuant to Rule 12(b)(6) or stricken

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pursuant to Rule 12(f), SCRCP, because it is not a recognized cause of action under South Carolina law.

Defendant Katherine Harake argued all of the causes of action alleged by Gibbs against her should be dismissed pursuant to 12(b)(6), SCRCP, and the Harake Defendants also argued the cause of action for civil conspiracy should be dismissed against them because it did not contain facts sufficient to constitute a cause of action.

A party may move to dismiss a claim against them based on failure to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), SCRCP. "Viewing the evidence in favor of the [non-moving party], the motion must be granted if facts alleged in the complaint and inferences reasonably deductible therefrom do not entitle the [non-moving party] to relief on any theory of the case." *Brown v. Theos*, 338 S.C. 305, 309-310, 526 S.E.2d 232, 235 (Ct. App. 1999) (citing *Jarrell v. Petoseed Co., Inc.*, 500 S.E.2d 793 (S.C. App.1998)). Rule 12(f) motions "challeng[ing] a theory of recovery in the pleading" are treated as Rule 12(b)(6), SCRCP, motions. *Hackworth*, 385 S.C. at 114–15, 682 S.E.2d at 874.

Pursuant to this standard, the Court denies the Motion to Dismiss and Strike the Negligent Misrepresentation Counterclaim and grants it as to the Counterclaim for Tortious Interference with Economic Advantage. Additionally, the causes of action against Katherine Harake for aiding and abetting conversion, civil conspiracy, unjust enrichment, quantum meruit, quasi-implied contract must be dismissed as the Third Amended Complaint fails to allege any set of facts sufficient to support those causes of action. However, the Court denies Katherine Harake's Motion to Dismiss as to the causes of action brought under SCUTPA, fraud, aiding and abetting breach of fiduciary duty, conversion and accounting. Finally, the Court denies the Motion to Dismiss

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the civil conspiracy claim against the Harake Defendants. The Court addresses the parties' arguments and its findings in further detail below.

A. The Harake Defendants' Counterclaim of Negligent Misrepresentation

Plaintiff argued the negligent misrepresentation counterclaim should be dismissed because, as pleaded, the allegations fail to address all elements of the cause of action. Specifically, Plaintiff argued the counterclaim did not relate to a present or pre-existing fact. The Harake Defendants, however, argued as the misrepresentations Gibbs made to the Harake Defendants were about present agreements. This Court agrees.

To establish a claim for negligent misrepresentation, a party must allege and later prove "(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; and (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *AMA Mgmt. Corp. v. Stashburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992). Generally, a representation should relate to a present or prior existing fact and cannot be based on statements regarding future events. *Sauner v. Pub. Svc. Auth. of S.C.*, 354 S.C. 397, 408, 581 S.E.2d 161, 167 (2003).

Here, the Harake Defendants alleged Gibbs' authorized agent, Jimmy Gibbs, made representations to investors, including the Harake Defendants, that were false related to its commitment to invest in Gibbs Investment Holdings, LLC; Iotive, Inc.; and Paysend Processing. Ans. and Am. Counterclaims, ¶¶ 169-171. Moreover, the present nature of the representations made for each of the commitments was pled in Paragraphs 128 through 160 of the Answer and

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Amended Counterclaims which were incorporated into the Negligent Misrepresentation cause of action. *Id.* at ¶ 168. The Harake Defendants also alleged Gibbs represented it would create Gibbs Investment Holdings, LLC with Eurosa and revenue sharing terms. *Id.* at ¶¶ 130-131. Gibbs admitted that it "agreed to form Gibbs Investment Holdings, LLC," but it referred to its Third Amended Complaint for the particular terms. Reply, ¶¶ 8-9. Gibbs also represented that certain expenses would be considered draws for Eurosa from Gibbs Investment Holdings, LLC as of 2016. Ans. and Am. Counterclaims, ¶ 133. Further, commitments made in Gibbs' representations were present facts as they were confirmed at the time, as alleged, in correspondence or electronic communications providing the terms and conditions or by specific performance. *Id.* at ¶¶ 135-142, 149. Gibbs also admitted agreements existed, but it alleged that the "description of agreements" would be found in its Third Amended Complaint. Reply, ¶¶ 13-20, 27. In addition to alleging false representations about present facts, the Harake Defendants alleged the pecuniary interest Gibbs had related to the false, present commitments it made. Ans. and Am. Counterclaims, ¶ 173. Moreover, the Harake Defendants alleged the duty Gibbs had to the other investors as well as its breach by failing to meet the commitments it made. *Id.* at ¶¶ 174-175. Additionally, the Harake Defendants alleged that they justifiably relied on Gibbs' false, present commitments and were caused damages as a result. *Id.* at ¶¶ 176-181. Accordingly, the allegations, viewed in the light most favorable to the Harake Defendants, have been sufficiently pleaded. Therefore, Gibbs' Motion to Dismiss and Strike is **DENIED** as to the negligent misrepresentation counterclaim.

B. The Harake Defendants' Counterclaim of Tortious Interference with Economic Advantage

Defendants S. Harake/Eurosa's fourth counterclaim for relief is for "tortious interference with economic interest." South Carolina does not have a tort called "tortious interference with economic interest." *See United Educ. Distributors, LLC v. Educ. Testing Serv.*, 350 S.C. 7, 10,

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564 S.E.2d 324, 326, n.1 (Ct. App. 2002), citing *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 179 (1990) ("Although the trial court identified this action as 'tortious interference with prospective economic advantage,' South Carolina has labeled this tort 'intentional interference with prospective contractual relations."). The recognized "intentional interference with prospective contractual relations" claim involves the general wrong of using "intentional and improper methods of diverting or taking away ongoing or prospective business or contractual rights from another." *Id.*, quoting 45 Am.Jur.2d *Interference* § 36 (1999).

The Harake Defendants did not cite any South Carolina case holding that this state recognizes the claim of "tortious interference with economic interest." Where a party pleads for relief under a tort theory that does not exist under South Carolina law, it is proper to dismiss under Rule 12(b)(6) and/or to strike under Rule 12(f) such pleadings. *Robinson*, 384 S.C. at 588, 682 S.E.2d at 498; *Alladin Plastics*, 301 S.C. at 93, 390 S.E.2d at 372. As noted in *United Educ. Distributors*, "[a] ruling on a motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint." *Id.* at 13, 564 S.E.2d at 327 (Emphasis added). The court then affirmed a Rule 12(b)(6) dismissal. As a result, the fourth counterclaim for relief is dismissed because the claim that Counterclaim Plaintiff chose to assert is not recognized in South Carolina. The Court also notes that Counterclaim Plaintiff's fourth counterclaim does not allege "intentional interference," and those words do not appear in the fourth counterclaim for relief or elsewhere in Defendants' Counterclaims.

In the hearing, the Harake Defendants verbally requested to be allowed to amend. No such request was made in their briefing. The Court did not allow an amendment at that time. The Harake Defendants also argued that the amended counterclaim should be converted to a claim of intentional interference with contractual relations. The Court did not re-draft the counterclaim at

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the time of the hearing and dismissed the tortious interference with economic interest counterclaim that was asserted. The Harake Defendants have since moved to reconsider these points and the Court will address the motion to reconsider by subsequent order.

Gibbs also moved to strike Defendants S. Harake/Eurosa's fourth counterclaim pursuant to Rule 12(f) "and/or any other applicable Rule and/or common law." The basis of the motion was that Harake Defendants' counsel instructed S. Harake not to answer certain deposition questions about this claim, which prevented Plaintiff from obtaining information requested about the claim. Rule 30(j)(3), SCRCP provides that counsel directing that a witness not answer on allowable grounds shall move the court for a protective order within five business days of the termination of the deposition. However, the Harake Defendants argued in the hearing that this rule was altered by a verbal agreement between the parties that notice would be provided if the party taking the deposition decided it was necessary for the adverse party to file a motion for a protective order covering the instruction not to answer. Plaintiff responded in the hearing that, although it would not oppose the existence of that verbal agreement if the Harake Defendants' counsel thought that was the case, it did provide notice that a motion for a protective order needed to be filed within five business days when it filed its motion to dismiss/strike on August 28, 2020 seeking dismissal based on the instruction not to answer at S. Harake's deposition.

It is undisputed that the Harake Defendants did not file a motion for a protective order within five business days after Plaintiff filed its motion to dismiss/strike, or within five business days after the hearing when Plaintiff notified the Harake Defendants in open court about its position that the instruction not to answer was improper and the basis for its motion to dismiss/strike. It is also noted that the Harake Defendants have not filed a motion for a protective order as of the submission of a proposed order on this issue on November 2, 2020. The refusal to

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allow S. Harake to testify about the basis for the Harake Defendants' new counterclaim justifies dismissal.

Plaintiff's motion to dismiss Defendants S. Harake/Eurosa's fourth counterclaim for relief is hereby GRANTED pursuant to Rule 12(b)(6) and/or Rule 12(f), SCRCP and the fourth counterclaim for relief in their counterclaims is DISMISSED.

C. Plaintiff's Aiding and Abetting Conversion Cause of Action against Katherine Harake

Defendant Katherine Harake argued that "Aiding/Abetting Conversion," the Sixth Claim for Relief in the Third Amended Complaint, is not based in statute or in common law in South Carolina and therefore should be dismissed. Plaintiff argued that since generally South Carolina courts recognize civil liability arising from aiding and abetting a tortious act, the Court should do so here. The Court agrees with Defendant Katherine Harake. There are no South Carolina cases discussing the propriety of aiding and abetting conversion, and the Legislature has never enacted a civil aiding and abetting statute. Although it is within the Court's discretion to determine the state would recognize the cause of action for aiding and abetting conversion rather than dismissing the claim, the Court finds the cause of action for aiding and abetting conversion should be dismissed as pled. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted); *see also Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014). As there is not a recognized cause of action for aiding and abetting conversion, whether the elements have been sufficiently pled would require there to be elements to test, and such elements have not been presented. Therefore, this Court finds aiding and abetting conversion is not a theory under which Plaintiff can proceed, and as a result, Katherine Harake's Motion to Dismiss is **GRANTED** as to this cause of action.

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D. Plaintiff's Civil Conspiracy Cause of Action Against Katherine Harake

Katherine Harake also argued Plaintiff failed to plead facts as to the necessary elements of the cause of action for civil conspiracy as to her. Specifically, she argued Plaintiff failed to plead any acts in furtherance of the conspiracy that are "separate and independent from other wrongful acts alleged." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 325, 701 S.E.2d 39 (Ct. App. 2010) (finding in a civil conspiracy claim the plaintiff must plead acts in furtherance of the conspiracy that are "separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim"); *see also Hackworth*, 385 S.C. 110, 682 S.E.2d 871 (noting that a "claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint"); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (dismissing the civil conspiracy cause of action because it did no more than incorporate the complaint's allegations in the previous causes of action and because the only alleged wrongful acts pled were those for which damages had already been sought), *rev'd on other grounds,* 283 S.C. 155, 321 S.E.2d 602 (1984) *quashed in part on other grounds,* 287 S.C. 190, 336 S.E.2d 472 (1985). Defendant Katherine Harake further argued that Plaintiff's civil conspiracy allegations incorporate by reference the facts pled in support of its conversion claim.

This Court finds the civil conspiracy cause of action must be dismissed as to Katherine Harake. Plaintiff fails to assert any overt acts as to Katherine Harake. Plaintiff has not pleaded separate, independent facts in furtherance of the conspiracy, and instead only reincorporated the facts concerning the other allegations in the Third Amended Complaint. The Third Amended Complaint also contains no allegations that the primary purpose of Katherine Harake was to injure Plaintiff, nor can the pleadings be reasonably construed to infer such an allegation. Plaintiff also

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has failed to allege damages specific to the civil conspiracy cause of action. *See Vaught v. Waites,* 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (holding that *Todd* barred a conspiracy cause of action because no special damages were alleged aside from the damages already alleged for the plaintiff's breach of contract cause of action in that case). Here, the damages alleged are the same funds sought elsewhere in the Third Amended Complaint. Accordingly, Plaintiff's civil conspiracy claim against Katherine Harake fails as a matter of law and is dismissed. Therefore, Katherine Harake's Motion to Dismiss as to this cause of action is **GRANTED**.

E. Plaintiff's Unjust Enrichment, Quasi Contract, Implied Contract, and Quantum Meruit Cause of Action Against Katherine Harake

Gibbs' claims for unjust enrichment, quasi contract, implied contract, and quantum meruit against Katherine Harake also fail as a matter of law. First, they are equitable remedies which are generally available only where there is no adequate remedy at law. *Santee Cooper Resort, Inc. v. South Carolina Public Service Com'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (S.C. 1989). Gibbs has adequate remedies at law available to it. Gibbs has raised numerous causes of action against the Harake Defendants and Katherine Harake in both contract and tort. Gibbs has not pleaded and cannot show that these remedies are inadequate to redress its alleged issues.

A party seeking to recover for unjust enrichment or quantum meruit must show: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). Plaintiff failed to plead facts sufficient to show that a benefit was conferred by Gibbs to Katherine Harake. Gibbs has also failed to show Katherine Harake realized any alleged benefit nor that it would be inequitable for her to retain such benefit. Gibbs only alleges that Katherine Harake received money from Sam Harake. Gibbs has not and cannot allege that Katherine

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Harake was aware of any alleged misappropriations or breach of fiduciary duties and that it would be unjust for her to retain any money transferred to her by her husband. This Court finds Katherine Harake's Motion to Dismiss as to this cause of action should be **GRANTED**, and the cause of action for unjust enrichment, quasi contract, implied contract, and quantum meruit is dismissed.

F. Plaintiff's Causes of Action Against Katherine Harake For Violation of SCUTPA, Fraud, Aiding and Abetting Breach of Fiduciary Duty, Conversion, and Accounting

SCUTPA.

The South Carolina Unfair Trade Practices Act ("SCUTPA") provides that "[a]ny person who suffers any ascertainable loss of money or property, real or personal, *as a result of the use or employment by another person of an unfair or deceptive method, act or practice*" may bring an action to recover actual damages. S.C. Code Ann. § 39-5-140(a). Defendant K. Harake argues that the SCUTPA claim against her should be dismissed because she is neither an officer nor a controlling person in a business, and that *State ex rel. McLeod v. C&L Corp., Inc.*, 280 S.C. 529, 313 S.E.2d 334 (Ct. App. 1984) holds that SCUTPA liability against individuals is limited to controlling persons of a corporation. Defendant K. Harake misreads *McLeod* and the scope of SCUTPA to individuals. Rather, *McLeod* stands for the proposition that, when employees and/or agents of a corporation engage in deceptive and unfair trade practices, liability under SCUTPA may extend to controlling persons that direct corporate policy or who are deeply involved in the important affairs of the corporation. *Id.* at 530, 313 S.E.2d at 341. However, the *McLeod* case does not limit SCUTPA liability of individuals to just "controlling persons" as K. Harake suggests. Rather, South Carolina courts have held that the "plain language of S.C. Code Ann. § 39-5-140 provides that any person is liable for damages resulting from their use or employment of unfair trade practices." *Plowman v. Bagnal,* 316 S.C. 283, 286, 450 S.E.2d 36, 37 (1994). *Plowman*

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actually limits application of the controlling persons doctrine in *McLeod,* holding that directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, or authorize the unfair or deceptive trade practice. In short, a showing that the defendant engaged in the "use or employment" of an unfair or deceptive practice is what makes "a person" liable under the act, not whether the person is a "controlling person" of a corporation.

To recover in an action under SCUTPA, a plaintiff needs to show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560. "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). Whether an act or practice is unfair or deceptive within the meaning of SCUTPA "should not be construed to increase a plaintiff's burden of proving liability since its purpose is to give additional protection to victims of unfair trade practices, not to make a case harder to prove than it would be under common law principles." *Id.*

Plaintiff's allegations in the Third Amended Complaint are sufficient to state a claim against K. Harake under SCUTPA. Plaintiff alleges that Plaintiff's money was embezzled, misappropriated, laundered, misused, and/or mismanaged. Plaintiff also alleges that K. Harake aided and abetted S. Harake and Eurosa's breach of fiduciary duties and mismanagement of the business activities and/or business operations, making K. Harake liable for these damages in addition to the damages for the money inappropriately shifted to her account. (Compl. ¶¶ 30-35). Plaintiff further alleges that K. Harake knew that the money flowing into her personal savings account was unauthorized and stolen from Plaintiff, and yet she said nothing. (Compl. ¶ 33).

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Plaintiff also alleges K. Harake actively participated in the immoral and deceptive scheme to conceal the theft by transferring Plaintiff's money again, this time to her own personal checking account, adding one further step that Plaintiff would ultimately have to chase down to determine where its money went and that she then spent the money for personal purposes. (Compl. ¶ 34). Based on these allegations, among others, Gibbs has alleged facts sufficient to state a cause of action against K. Harake under SCUTPA, and K. Harake's motion to dismiss is therefore DENIED.

Fraud.

The nine elements of actionable fraud in South Carolina are: (1) defendant's representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010). Concealment of material facts may support an action in fraud. *Holly Hill Lumber Co. v. McCoy*, 201 S.C. 427, 23 S.C.2d 372, 376 (1942).

Plaintiff's Third Amended Complaint adequately pleads the elements including, without limitation, K. Harake's engagement in fraudulent conduct by misappropriating funds and concealing facts related to the misappropriation of funds from Plaintiff (Compl. ¶¶ 82-88). Plaintiff's allegations also, independent of the theft, claim that K. Harake engaged in fraudulent conduct by aiding and abetting the breach of fiduciary duty and mismanagement of the business activities and/or business operations and the concealment of the conduct from Plaintiff. (Compl. ¶¶ 27-38). In addition, Plaintiff alleges that K. Harake's concealment/misrepresentations were material (Compl. ¶ 89), K. Harake's knowledge and/or reckless disregard of the truth or falsity of

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the representation (Compl. ¶ 90), K. Harake's intent that Plaintiff act upon the concealment/misrepresentations (Compl. ¶ 91), Plaintiff's ignorance and justifiable reliance on K. Harake's concealment/misrepresentation (Compl. ¶ 92), and resulting harm to Plaintiff (Compl. ¶ 93). *See Morlan v. Kelly*, Civ. A. No. 2009-UP-002, 2009 WL 9524539, at *1 (S.C. Ct. App. Jan. 5, 2009) (finding the pleadings sufficiently alleged all nine elements of fraud and that the trial court's dismissal of the fraud claim was error). At the end of the day, Plaintiff met the pleading standard and K. Harake's motion to dismiss Plaintiff's fraud claim is therefore DENIED.

Aiding and Abetting Breach of Fiduciary Duty.

The elements for the cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. *Vortex Sports & Entertainment, Inc. v. Ware,* 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). Plaintiff's Third Amended Complaint alleges, among other things, that: "K. Harake knew, or should have known, or had constructive knowledge, that the transfers were made to her account and she did, in fact use the money" (Compl. ¶ 33); that hundreds of thousands of dollars of Gibbs' money was improperly transferred from Eurosa's accounts to K. Harake's personal savings account (Compl. ¶ 34); that K. Harake knew about these improper transfers of Plaintiff's money to her personal savings account (*Id.*); that K. Harake concealed money that was being misappropriated from Plaintiff (*Id.*); that K. Harake knowingly transferred Plaintiff's money from her personal savings account to her personal checking account (*Id.*); and that K. Harake actually spent Plaintiff's money for unauthorized and personal purposes. (*Id.*)

Gibbs' Third Amended Complaint adds multiple causes of action against K. Harake arising from mismanagement, misappropriation, embezzlement, money laundering, and misuse of Gibbs'

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funds. Independent of the theft, Gibbs' Third Amended Complaint also adds grounds for multiple causes of action based on K. Harake's participation in S. Harake and Eurosa's breach of fiduciary duties and mismanagement of the business activities and/or business operations and/or duty to act in the best interest of the enterprise.

Plaintiff alleges that K. Harake's accounts gave Defendants S. Harake and Eurosa the means to transfer Plaintiff's money out of their accounts and conceal the improper movement and use of those funds. K. Harake's knowing participation in the alleged scheme would entitle Plaintiff to relief from K. Harake for aiding and abetting a breach of fiduciary duty. Likewise, K. Harake's aiding and abetting in the alleged mismanagement and breach of fiduciary duties, aside from the theft, would independently entitle Plaintiff to relief from K. Harake under aiding and abetting a breach of fiduciary duty. Thus, Plaintiff has alleged sufficient facts to show sufficient facts upon which relief can be granted, and K. Harake's motion to dismiss Plaintiff's claim for aiding and abetting a breach of fiduciary duty is therefore DENIED.

Conversion.

Plaintiff alleges that K. Harake allowed Gibbs' misappropriated funds to be transferred to her personal savings account and she then diverted those funds to her own personal checking account and spent the funds for unauthorized and personal purposes. (Compl. ¶¶ 58-59). Defendants argue that K. Harake's improper use of Gibbs' money to her own benefit (and to the exclusion of Gibbs' use and to the exclusion of the any authorized use of the funds) would not be an "interference" with the property of Gibbs. This Court finds otherwise. "Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. *Moseley v. Oswald*, 376 S.C. 251, 254, 656 S.E.2d 380, 382 (2008).

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South Carolina courts have held that money can be the subject of conversion if "it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." *Mullis v. Trident Emergency Physicians*, 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct. App. 2002). In this case, Gibbs' has stated facts sufficient enough to constitute a claim for conversion in South Carolina.

K. Harake cites to *Richardson's Rests., Inc. v. Nat'l Bank of S.C.*, 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991), a case involving the lawful use of a bank to pay overdraft fees on an account holding the funds of multiple parties, including the plaintiff, for the alleged proposition that money cannot be converted unless there is an obligation on the defendant to deliver "specific, identifiable funds to the plaintiff." In *Richardson's*, no restrictions were placed on funds deposited into the account, and the bank's use of account funds to cover overdraft fees was lawful and authorized by the account holder. *Id.* These facts are wholly inapposite to the facts at issue here.

Although Gibbs alleges and believes that K. Harake knowingly converted Gibbs' money for her own personal use after it was transferred to her personal accounts, South Carolina does not require such knowledge. Under South Carolina law, liability may arise from "innocent" conversions, where the property is converted by mistake or under a bona fide belief or right. *See Green v. Waidner*, 284 S.C. 35, 37-38, 324 S.E.2d 331, 333 (Ct. App. 1984). Thus, the simple fact that K. Harake exercised dominion over Gibbs' funds to its exclusion and harm is sufficient to support Plaintiff's claim for conversion.

Other jurisdictions have found that allegedly "innocent" defendants may be liable for exercising dominion over funds embezzled and misappropriated by family members who give such funds to defendants without the defendants' knowledge of any wrongdoing. In *Chicago Title Ins.*

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Co. v. Ellis, 409 N.J. Super. 444, 978 A.2d 281 (App. Div. 2009), for instance, a verdict for conversion against the parents of a woman who had stolen over $2 million through a fraudulent scheme against Lehman Brothers was affirmed, except to the extent that the money the parents received from their daughter was received as repayment for a loan. The parents admitted that they received $512,845 from their daughter over a 5-month period, and acknowledged that she obtained the money wrongfully through a scheme to defraud Lehman Brothers, but asserted that they had no knowledge of the fraud and that the money was either repayment for the loan or that they were only nominal custodians with no dominion or control over the money. The Court affirmed the verdict, finding that "exercise of dominion or control over the money constitutes conversion" when such exercise of dominion and control was, in fact, inconsistent with the plaintiff's rights, and when the money was not received in exchange for fair value. *Id.* at 449. *See also, Judkins v. Sadler-Mac Neil*, 61 Wash. 2d 1, 4, 376 P.2d 837, 838-39 (1962) ("The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results.")

Here, Gibbs has plainly pled that its money was improperly transferred to K. Harake's accounts and that she used the money for improper purposes for herself and/or her family and/or other inappropriate purposes. Therefore, the Defendant's motion to dismiss the conversion claim against K. Harake is hereby DENIED.

Accounting.

An accounting cause of action sounds in equity and requires full disclosure and the relinquishment of profits received as the result of a breach of a confidential or fiduciary duty. *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144, 382 S.E.2d 915, 917 (1989). An accounting

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is also appropriate without a fiduciary relationship when the defendant is in exclusive control of the information needed to make a determination on the amount plaintiff is owed. *Jefferies v. Harvey*, 206 S.C. 245, 250, 33 S.E.2d 513, 515 (1945).

In the only accounting case that K. Harake cites in her motion to dismiss, *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009), the Supreme Court reversed a Court of Appeals decision that an accounting was warranted in the dissolution of an LLC where the parties disputed the distribution of "a relatively small sum of money generated from a single real estate transaction." *Id.* at 429, 673 S.E.2d at 454. The Court held that the LLC's operating agreement did not entitle them to an accounting per se and "a full financial accounting would unnecessarily prolong this otherwise simple matter." *Id.* This case does not support dismissal of Plaintiff's accounting cause of action against K. Harake

Plaintiff claims K. Harake worked with the Harake Defendants to create a cloud of confusion to obscure the fact that money that was being improperly taken from Gibbs and concealing the improper use of those funds by, among other things, moving more than a half million dollars to the personal savings account of K. Harake. (Compl. ¶ 34) K. Harake then added to the confusion, and consummated her own affirmative involvement in the wrongdoing, by transferring Gibbs' money to her own personal checking account for improper, unauthorized, and personal use. (*Id.*) Gibbs is now left trying to untangle the situation created by the Harake Defendants and to determine how much of its money was used for unauthorized purposes, where that money ended up, and whether there was additional, inappropriate use of money.

Plaintiff seeks an accounting and argues that an accounting is needed to track its own money, cut through the confusion that K. Harake and the Harake Defendants created to hide their wrongdoing, and finally determine the full extent to which Gibbs' money was embezzled,

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misappropriated, laundered, misused, and or mismanaged. *See, e.g., Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144, 382 S.E.2d 915, 917 (1989) (finding that the plaintiff was entitled to an accounting when there was uncertainty about the damages owed based on the record before the Court); *Jefferies*, 206 S.C. at 250, 33 S.E.2d at 515. In *Jefferies*, for example, the Court affirmed the lower court's order granting an accounting where the resolution involved claims of fraud, deceit and usury in association with promissory notes. Likewise, here, Gibbs alleges that K. Harake and the Harake Defendants, among other things, engaged in breaches of fiduciary duty, fraud, conspiracy, unfair and deceptive trade practices, and conversion, among other things. By their design, tracking Gibbs' misappropriated funds is extremely complicated entitling Gibbs to an accounting.

For the reasons stated herein, K. Harake's motion to dismiss the accounting claim is DENIED. Plaintiff's allegations of K. Harake's and the Harake Defendants' own misconduct and intentional concealment of what they did with Gibbs' money (as well as K. Harake's and the Harake Defendants' participation in the mismanagement of Gibbs' money and breaching of fiduciary duties) are sufficient to state an accounting cause of action.

G. Plaintiff's Civil Conspiracy Cause of Action Against The Harake Defendants

Plaintiff alleges in several claims in Plaintiff's Third Amended Compliant that Defendants S. Harake and Eurosa misappropriated, embezzled, laundered, misused, and mismanaged Plaintiff's funds. (*See, e.g.*, Compl. ¶ 20). But Plaintiff's allegations of the Defendants' misconduct does not stop there. Plaintiff further alleges that Defendants S. Harake and Eurosa engaged in a civil conspiracy with S. Harake's wife, K. Harake, to conceal those funds from Plaintiff by transferring more than $500,000 of Gibbs' stolen money to K. Harake's personal savings account. (Compl. ¶¶ 96-97). The Harake Defendants, including K. Harake, concealed

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Gibbs' money funds from Gibbs for the *primary purpose and object* of impairing Gibbs financially. (Compl. ¶ 96).

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010). Contrary to S. Harake and Eurosa's claims, Gibbs' Third Amended Complaint pleads the three requisite elements of a civil conspiracy claim, including: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes special damage. *Id.*

First, S. Harake and Eurosa cite *McMillan v. Oconee Mem'l Hosp., Inc.* for the proposition that a company or corporation cannot conspire against itself. However, S. Harake and Eurosa completely ignores Plaintiff's allegation that Defendant K. Harake actively and knowingly participated in the civil conspiracy to conceal Gibbs' stolen money in her personal account. (Compl. ¶¶ 96-97). In *McMillan*, the Supreme Court reversed a jury verdict against a hospital after the hospital's board informed defendant-physician that his privileges at the hospital would be revoked. *Id.* 367 S.C. 559, 562-63, 626 S.E.2d 884, 886 (2006). The Court reversed the verdict on the grounds that agents for a corporation acting in the scope of their duties cannot conspire with the corporation absent the guilty knowledge of a third party. *Id.* at 564, 626 S.E.2d at 887. Plaintiff alleges K. Harake's knowledge is the "guilty knowledge of a third party" and S. Harake/Eurosa remain liable as they initiated the conduct and the "guilty knowledge of a third party." A dismissal of a claim for civil conspiracy does not relieve S. Harake and Eurosa because they initiated the conduct and the guilty knowledge of a third party exists.

In *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009), cited by Defendants, the court held that the plaintiff failed to properly plead its civil

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conspiracy claim where it alleged precisely the same acts it alleged in its breach of contract claim and repeated verbatim the claim for damages. *See also Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (noting that the cause of action "does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy."). Gibbs' Third Amended complaint also adds multiple causes of action against K. Harake arising from mismanagement, misappropriation, embezzlement, money laundering, and misuse of Gibbs' funds. Independent of the theft, Gibbs' Third Amended Complaint also adds grounds for multiple causes of action based on K. Harake's participation in S. Harake's and Eurosa's breach of fiduciary duties and mismanagement of the business activities and/or business operations and/or duty to act in the best interest of the enterprise. These allegations support a claim that S. Harake and Eurosa are liable for these damages in addition to the damages for Gibbs' money that K. Harake is alleged to have inappropriately shifted and received in her personal accounts.

The civil conspiracy cause of action pled by Plaintiff is unique in several respects. First, beyond the transfer of Plaintiff's funds to K. Harake's personal accounts and theft of Gibbs' money, Gibbs alleges that K. Harake conspired with S. Harake and Eurosa and unlawfully agreed to deplete Gibbs' funds from the Eurosa account "with the primary purpose or object to impair Plaintiff financially." (Compl. ¶ 96). *See Mach. Sols., Inc. v. Doosan Corp.*, No. 3:15-CV-03447-JMC, 2016 WL 2756429, at *5 (D.S.C. May 12, 2016) (denying defendants motion to dismiss a civil conspiracy claim where plaintiff alleged concerted effort was "done for the purpose of damaging" the plaintiff).

Gibbs also alleges that the conspiracy to transfer more than $500,000 from the Eurosa account to the personal accounts of K. Harake resulted in special damages "beyond the damages alleged in other causes of action," including opportunity costs associated with the depletion of

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funds Gibbs provided for authorized purposes, including investment and/or the furtherance of business opportunities. (Compl. ¶ 98). Each of the elements of civil conspiracy are alleged in Gibbs' complaint and Defendants' motion to dismiss the civil conspiracy claim as to Defendants S. Harake and Eurosa should be DENIED.

CONCLUSION

For the foregoing reasons, the Court:

1. **DENIES** Plaintiff's Motion to Dismiss and Strike the negligent misrepresentation cause of action; and
2. **GRANTS** Plaintiff's Motion to Dismiss and Strike the tortious interference with economic advantage cause of action; and
3. **GRANTS** Katherine Harake's Motion to Dismiss pursuant to Rule 12(b)(6) as to the aiding and abetting conversion; civil conspiracy; and unjust enrichment, quasi contract, implied contract, and quantum meruit causes of action; and
4. **DENIES** Katherine Harake's Motion to Dismiss pursuant to 12(b)(2) and 12(b)(3) and pursuant to Rule 12(b)(6) as to the causes of action brought under the SCUTPA, fraud, aiding and abetting breach of fiduciary duty, conversion, and accounting; and
5. **DENIES** the Harake Defendants' Motion to Dismiss the civil conspiracy cause of action.

(Judge's electronic signature to follow)

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Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Other

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants.	C.A. No.: 2017-CP-42-00740 **ORDER DENYING OCTOBER 5, 2020 MOTIONS BY DEFENDANTS SARMAD HARAKE AND EUROSA, INC.**

THIS MATTER was before the Court pursuant to motions/brief filed by Defendants Sarmad Harake ("S. Harake") and Eurosa, Inc. ("Eurosa") (collectively, the "Harake Defendants") on October 5, 2020 at 1:07 p.m. The Court, having fully considered the arguments made in the Harake Defendants' motions/brief, as well as the motions, arguments, and briefings submitted in connection with the related hearing held September 22, 2020, and, it appearing to the Court, in its discretion, that there is just cause for the denial of all of the motions made by the Harake Defendants, the October 5, 2020 motions by S. Harake and Eurosa are DENIED.

IT IS SO ORDERED.

(Judge's Electronic Signature to Follow)

ELECTRONICALLY FILED - 2020 Nov 30 12:39 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Other

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

ELECTRONICALLY FILED - 2020 Dec 01 1:57 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc.,	C.A. No.: 2017-CP-42-00740
Plaintiff,	
v.	**CONSENT AMENDED SCHEDULING ORDER**
Sarmad Harake, Eurosa, Inc., Katherine Harake,	
Defendants.	

Pursuant to the South Carolina Rules of Civil Procedure, upon consent of counsel for all parties, the Court enters the following Scheduling Order:

1. DISCOVERY

Discovery, including depositions of all expert witnesses, shall be completed no later than **December 7**, provided, however, that the parties may agree in writing to extend the time for discovery beyond that date, so long as any extension does not delay the call of the case for trial. All discovery requests shall be served in time for the responses thereto to be served by the date set out above or any extension thereof. Any bene esse depositions must be completed by the discovery deadline or any extension thereof. No motions related to discovery shall be filed until counsel have consulted and attempted in good faith to resolve the matter as required by Rule 11 of the South Carolina Rules of Civil Procedure.

2. MOTIONS

All motions, except those relating to discovery and those relating to the admissibility of evidence at trial, shall be filed at least 30 days before the case is called for trial.

AND IT IS SO ORDERED.

WE SO CONSENT:

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s/Kevin A. Dunlap
Kevin A. Dunlap
S.C. Bar No. 13081
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s/LINDSAY A. JOYNER
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Counsel for Defendants Sarmad Harake, Katherine Harake, and Eurosa, Inc.

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Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Scheduling Order

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

ELECTRONICALLY FILED - 2017 May 03 5:10 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiff, v. Sam Harake, Eurosa, Inc., Katherine Harake, and IOTive, Inc., Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Sam Harake

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 3rd day of May, 2017.

S/KEVIN A. DUNLAP
Kevin A. Dunlap
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Attorney for Plaintiffs

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiff, v. Sam Harake, Eurosa, Inc., Katherine Harake, and IOTive, Inc., Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Eurosa, Inc.

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 3rd day of May, 2017.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiff, v. Sam Harake, Eurosa, Inc., Katherine Harake, and IOTive, Inc., Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Katherine Harake

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 3rd day of May, 2017.

S/KEVIN A. DUNLAP
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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, v. Sam Harake, Eurosa, Inc., Katherine Harake, and IOTive, Inc., Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **AMENDED COMPLAINT** **(Jury Trial Demanded)**

Plaintiffs Gibbs International, Inc. ("Gibbs"), and IOTive, Inc. ('IOTive"), complaining of Defendants, Sam Harake ("Harake"), Eurosa, Inc. ("Eurosa"), Katherine Harake and IOTive allege and say:

THE PARTIES

1. Plaintiff Gibbs is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Spartanburg, South Carolina.

2. Plaintiff IOTive is a corporation organized and existing pursuant to the laws of the State of Delaware with its principal place of business in Spartanburg, South Carolina.

3. Gibbs is informed and believes that Defendant Harake currently lives, works, and is a citizen and resident of Spartanburg, South Carolina and his alleged performance of the agreement between the parties took place, in part, in Spartanburg, South Carolina.

4. Gibbs is informed and believes that Defendant Eurosa is a corporation organized and existing pursuant to the laws of the State of Delaware and that Eurosa, through Harake, has been present in South Carolina.

5. Gibbs is informed and believes that Katherine Harake currently lives in, and is a citizen and resident of, Spartanburg, South Carolina.

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6. This action is brought on Gibbs' behalf individually and derivatively on behalf of IOTive.

7. This action is brought by Gibbs, among other reasons, to assert its individual claims and as a shareholder of IOTive to enforce rights which may properly be asserted by IOTive . At all times relevant hereto, Gibbs was a shareholder of IOTive. Plaintiffs have tried to obtain the relief requested herein but Defendants refuse. Plaintiffs are informed and believe that additional efforts will be futile.

8. This Court has jurisdiction over the claims and the parties.

FIRST CLAIM FOR RELIEF
(Breach of Contract)
(Declaratory Judgment)

9. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

10. Gibbs, on one hand, and Harake and Eurosa ("Harake Defendants"), on the other, entered into an agreement whereby Harake Defendants agreed to identify and evaluate viable investment opportunities as well as to make and manage investments.

11. Gibbs and the Harake Defendants also agreed to form Gibbs Investment Holdings, LLC ("GIH") to be an entity through which some of such investment activities were to occur.

12. Harake Defendants also agreed to make capital contributions and to invest funds to support the work under the agreement.

13. Harake Defendants have breached the agreement by, among other things, failing to locate sufficient investment opportunities, failing to contribute their share of capital, failing to properly authorize and achieve success as to the investments, and failing to perform their other responsibilities under the agreement.

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14. Harake has engaged in inappropriate and manipulative conduct including the removal of a Board member (Rob Skaff ("Skaff")) of the entity known as IOTive just to secure a favorable vote on an issue and then offered the former Board member a position as an employee after Harake obtained the result on the Board vote he wanted.

15. Harake has also become the CEO of IOTive, a United States company who is the 100% owner of an Israeli company so Harake is managing an Israeli company, IOT Labs, Ltd. ("IOT"), even though he repeatedly has indicated to Gibbs that it would be improper for him to do so.

16. Harake Defendants' performance was also deficient in the following particulars, among others:

A. Harake Defendants represented that they could roll Mobix Wireless Solutions, Ltd. ("MWS") and Mobix Chip, LLC ("MC") under a new United States company by the end of 2015 and they failed to do so;

B. Harake Defendants represented that they could create an IPO by the second quarter of 2016 for IOTive and they failed to do so;

C. Harake Defendants represented they could achieve profitability by the second quarter of 2016 but the sales were even less than $100,000 for the last 12 months and Harake Defendants' manipulation and inappropriate method of achieving profitability was by not recording expenses;

D. Harake Defendants represented that they could secure investors from the Middle East by the second quarter 2016 but not even one investor was added nor was there any investment into the company from Harake Defendants' connections;

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E. Harake Defendants represented they could achieve a pre-IPO valuation at IOTive by the second quarter of 2016 in a range of $9.1 million to $32 million but in reality the current valuation for the company is less than $1 million;

F. Harake Defendants misrepresented to the Russian entity, Innovative Solutions, and its representative Mr. Pavel Polukhin that Gibbs would provide a $3 million funding commitment. Harake Defendants made this representation without any authority from Gibbs. The commitment was made on behalf of GIH and not Gibbs. Innovative Solutions was to contribute $1 million to MC and Gibbs does not believe it did;

G. Harake was originally supposed to be granted options for approximately 3.3% of IOTive. Harake had 26% of IOTive shares improperly issued to Eurosa on August 29, 2016 despite not meeting any of his commitments. The improperly issued shares to Eurosa were taken out of shares that were supposed to be issued to Gibbs;

H. Harake presented Gibbs with an opportunity to get involved in the project with QPAGOS while investing little to no money of Harake's own to be able to negotiate free shares and Harake misrepresented the value . Harake represented that Gibbs and Harake would receive six million free shares in exchange for 15% of Yogi Pay. The actual free shares were 1,920,000 to Gibbs and Eurosa each and GIH received 1,095,000 free shares. Harake Defendants represented the free shares would have a value of approximately $9 million but the reality was the free shares were only worth $1.8 million;

I. Harake Defendants invited Gibbs and some others close that Gibbs to invest in QPAGOS before the reverse merger based on a plan to raise $5 million.

Harake Defendants were unable to secure the other investors and the total amount invested was lower and Gibbs had to purchase shares for $700,000 when none were originally planned to be purchased;

J. As part of a reverse merger/IPO involving Yogi Pay, Harake Defendants failed to inform Gibbs that the shares being purchased for QPAGOS were restricted and could not be traded for a period of 12 months;

K. Harake Defendants represented they would produce a financial model and a clear vision for Yogi Pay and to date the Harake Defendants have not provided either;

L. As to the IPO, Harake Defendants represented that Yogi Pay would be a public company with a market cap of $50,000,000 and that GIH would own 42% by the end of 2016. Harake Defendants failed to deliver as the company has no propriety assets and no real value. Harake Defendants did not understand the requirements needed to be able to make the business model work nor did they have the expertise to move it forward in a productive way in-spite of their representations that they did have that expertise;

M. As to operating Kiosks, Harake Defendants represented they would exist by the third quarter 2016 for Yogi Pay but have not even been able to place one demo unit to date;

N. Harake Defendants represented they would secure new investors who would contribute $2.5 million for 5% of Yogi Pay by the second quarter of 2016 and failed to do so. Harake Defendants' failure to secure those investors resulted in Gibbs having to fund approximately $670,000. Harake also inappropriately issued shares to his wife

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O. Harake Defendants engaged a third-party consultant firm to get Yogi Pay "licensed" in every state in the United States without understanding what that means in terms of cost, minimum cash needs, and other requirements;

P. As to Yogi Pay, Harake committed to do the work to secure a license by March 2016 and failed to do so.

Q. Harake Defendants represented to Gibbs that the money wire/card to card application for Pay Send was already a proven technology and a working product that can easily be replicated in the United States market. In direct contradiction, after months and months of Gibbs asking, Gibbs learned in March 2017 that the product is not even working yet and in Europe they are in a beta testing phase. Gibbs also discovered that the regulatory environment in the United States is materially different and the design does not work here;

R. Harake Defendants represented that revenue would be generating $2.6 million of EBITDA (run rate EBITDA of $250,000 per month) and Harake Defendants failed to do so; and

S. Harake Defendants represented to Gibbs that GIH would put $1 million into the project (the money ended up coming from Gibbs) and Harake Defendants represented that the money would be put in escrow and returned to Gibbs once a second round of investment at a much higher valuation happened and the Harake Defendants failed to do so.

17. As to MWS, Harake Defendants asked MWS to lie to an Israeli government official as described herein:

A. Part of the strategy for IOTive was to have IOTive control and own the IP/Patents/Technology for reasons fabricated by Harake Defendants;

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B. Consequently, the IP needed to be sold from Mobix in Israel to IOTive in the United States;

C. Due to MWS's receipt of Israeli government funds related to the IP, governmental approval was necessary to sell or transfer the IP;

D. MWS would typically be required to pay that money back and often with some type of penalty;

E. Throughout this process, Harake Defendants represented that they knew how to make sure that nothing, or very little, would be paid to the government;

F. In the process, MWS submitted an application which, among other things, described who the party was who going to buy the IP;

G. Harake Defendants gave instructions to only mention the buyer as being Mark Munday and to claim that Munday had no relationship to IOTive even though he was the president of IOTive and the plan was to transfer the IP to IOTive;

H. Harake Defendants gave instructions to make this misrepresentation to reduce any payment to the government;

I. In-spite of Harake Defendants' instructions, the actual transaction was disclosed.

18. As to the overall IOTive structure:

A. Harake Defendants indicated that because IOT Labs was an Israeli company he could not take it public and could not bring investors and customers from Middle Eastern countries. Harake wanted a United States company with a European company and some activity in Israel but Harake specified that the activity in Israel would have to be misrepresented in such a way that it could not

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be linked back to IOTive in the United States and the Israeli connection was to be hidden; ;

B. Gibbs explained multiple times that there are many publicly traded companies with a high market rate cap that are based in Israel, have received government funds, and sell to Arab countries. Harake Defendants refused to accept this position and insisted on a very complex structure with companies in Europe and the United States; and

C. The imposition of the structure Harake Defendants imposed on the situation had an adverse tax effect,

19. As to IOTive's financials:

A. Harake Defendants represented that they could take IOTive public within two quarters from the time Harake became CEO and that he had a banker who would do the IPO;

B. At that time, IOTive did not have any IP or asset or right to sell any of the MWS products;

C. To try to manipulate the outcome:

(1) Harake Defendants instructed the accountant not to book certain expenses related to the operation of the company so that profits would appear;

(2) Harake Defendants created a very complex process for how orders for MWS products were placed and how they were delivered/invoiced. This very complicated process created value added tax issues in Israel and lowered revenue on MWS's books which lowered royalties MWS paid to the Israeli government.

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20. As to the Mobix Chip valuation:

A. Harake Defendants engineered a plan to move some IP owned by Mobix Chip in Russia to IOTive in the United States;

B. Harake Defendants engineered a way to inflate the value of the IP and thereby inflate the value of the IOTive by moving money from Russia to Cypress to the United States and back; and

C. The valuation had no substantive merit and the IOTive Board resisted for months and was concerned about the efforts.

21. As to the need to form a new company in Israel so the R&D work would be part of IOTive in terms of IP ownership:

A. Harake represented that he wanted to have someone he knows in Europe to go to Israel and form a new company without disclosing who the real shareholders were or the actual intent;

B. Harake represented that once such a company is formed and bank accounts are set that person will transfer the shares or hold the shares in escrow so that he could mask/hide the real structure.

22. Gibbs is also informed and believes that a major shareholder of Mobix Chip was in jail due to issues with the local government and Harake went to Russia and represented that he used his contacts with some shady people to get the individual released. Harake represented that because of his efforts the person was released from jail so he owes Harake a favor that Harake could try to use to benefit IOTive and MWS.

23. As a result of all of the above-described inappropriate conduct, Plaintiffs seek a judgment declaring that the Harake Defendants breached the agreement and Plaintiffs' rights were violated.

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24. Plaintiffs also seek to recover their damages as a result of Harake Defendants' conduct and Plaintiffs also requests an accounting of the subject assets and appropriate division of those assets between the parties.

SECOND CLAIM FOR RELIEF
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

25. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

26. The conduct by the Harake Defendants described herein constitutes a breach of the implied covenant of good faith and fair dealing.

27. Gibbs accordingly is entitled to recover compensatory damages in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF
(Breach of Fiduciary Duty)

28. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

29. Harake Defendants undertook to act in a fiduciary role by undertaking the role of identifying and evaluating viable investment opportunities as well as making and managing investments.

30. Harake Defendants breached their fiduciary duties by, among other things, failing to properly identify and evaluate viable investment opportunities and failing to properly make and manage investments as well as by the conduct described above in paragraphs 14 through 24 of this amended complaint.

31. Gibbs is informed and believes that shares in Yogi Pay were inappropriately provided to Katherine Harake, Harake's wife. This was inappropriate because, among other

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things, the shares that were supposed to be issued to Gibbs in Yogi Pay were not issued but shares were still issued to Harake's wife, Katherine.

32. Plaintiffs accordingly seek a judgment declaring that the shares in Yogi Pay provided to Katherine Harake be set aside and re-issued to Gibbs International as Katherine Harake should be divested of all shares she owns in Yogi Pay.

33. Plaintiffs accordingly are entitled to recover compensatory damages in an amount to be proven at trial.

34. Plaintiffs are also informed and believe that the Harake Defendants' conduct was reckless, willful, wanton, and/or grossly negligent entitling Plaintiffs to recover punitive damages.

FOURTH CLAIM FOR RELIEF
(Accounting)

35. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

36. The above allegations entitle Plaintiffs to an accounting of the subject assets as well as an appropriate division of those assets.

FIFTH CLAIM FOR RELIEF
(Invasion of Privacy/Wrongful Intrusion Into Private Affairs)

37. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

38. Gibbs is informed and believes that Harake Defendants have intentionally intruded into the private affairs of Gibbs and its chief executive officer, Jimmy Gibbs.

39. Gibbs is informed and believes that Harake Defendants have undertaken this activity by, among other things, obtaining information about Mr. Gibbs' private travel plans and stalking and following Mr. Gibbs in the foreign country of Turkey by watching, spying,

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attempting to intimidate and other similar conduct as well as having him followed and confronted in a hotel lobby in Turkey.

40. Gibbs is informed and believes that the activities inquired into involve the private business affairs of Gibbs, a privately held company, as well as the private business and personal affairs of Mr. Gibbs who Gibbs expects to not be harassed and stalked or interfered with as he tries to perform his role as the CEO of Gibbs.

41. The invasion has been substantial and unreasonable and calculated to attempt to intimidate Gibbs from pursuing claims against Harake Defendants.

42. Gibbs is also informed and believes that Harake Defendants bragged to others about their stalking and following Mr. Gibbs and photographing Mr. Gibbs and those travelling with him in a hotel lobby in Turkey.

43. Gibbs is also informed and believes that Harake Defendants are attempting to obtain other private information about Mr. Gibbs and Gibbs, a privately held company, in inappropriate ways.

44. Gibbs is informed and believes that Harake Defendants actions have been done willingly and Harake desired the result of his conduct and/or should have known the result that would follow from his conduct.

45. As the architect of the invasion of privacy, Harake's actions have been engineered and orchestrated by Harake in South Carolina and he has accessed private information in South Carolina.

46. Gibbs accordingly is entitled to recover compensatory damages in an amount to be proven at trial.

47. Harake's actions have been willful, wanton, reckless, and/or grossly negligent.

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48. Gibbs accordingly is also entitled to recover punitive damages in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF
(Breach of Duty)
(Breach of Loyalty)

49. The allegations of the foregoing paragraphs of this amended complaint are incorporated hereby by reference.

50. IOTive was formed in 2015.

51. The original plan for share ownership was:

Gibbs 52%

Innovative Solutions – 22.8%

All Israeli Owners – 23.8%

BEB – 1.4%

52. The current shareholders and their percentages of ownership today:

Gibbs – 26.4%

Eurosa – 26.3%

Atone – Russians 18.1%

Mobix Chip Russia – 5%

ESH (Shai Heimli and all Israeli shareholders) – 24.2%

53. Gibbs today continues to own 26.4% of IOTive and the remaining shares that were supposed to be issued to Gibbs were improperly issued to Eurosa without Gibbs approval. Harake also forced the creation of an entity in Hong Kong known as ESH to hide the fact that IOTive has Israeli shareholders. Harake's plan was to form the entity in Hong Kong known as ESH to misrepresent and conceal Israeli shareholders.

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54. As set forth above, Gibbs is informed and believes that Rob Skaff ("Skaff)was removed from the IOTive Board of Directors in April 2017.

55. Gibbs is informed and believes the Harake Defendants schemed to, and did, have Skaff removed from the Board immediately before a major vote which would have been in Gibbs' favor prior to Skaff's removal.

56. Gibbs is informed and believes that before the meeting, Harake Defendants sent Skaff a communication that his removal from the Board was just for purposes of the vote that day.

57. Gibbs is also informed and believes that Shai Hemli ("Hemli") told Skaff that Skaff had to be removed because they did not know how Skaff would vote.

58. Gibbs is also informed and believes that they decided to hire Skaff back as an employee after he had been removed from the Board.

59. Gibbs is further informed and believes that Harake Defendants have manipulated the overall situation so that Harake has now assumed the role of CEO for IOTive which gives Harake management responsibility over the Israeli company IOT Labs.

60. Gibbs is also informed and believes that the Board meeting dealt with capitalization issues and whether additional capitalization was to be required or IOTive was going to shut-down.

61. Gibbs is also informed and believes that Skaff now has an offer to return to work.

62. Gibbs is also informed and believes that Harake Defendants have engaged in this and other inappropriate conduct as outlined herein and Gibbs specifically alleges that such improper conduct is continuing and likely to continue in the future with the Harake Defendants acting in illegal and inappropriate conduct and participating with other shareholders (represented by Itzhak (Shai) Hemli and Pavel Polukhin) to the detriment of Plaintiffs and other entities

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themselves. This is past and continuing conduct and Gibbs is informed and believes that the improper conduct will continue.

63. Harake Defendants owe the company and the shareholders a duty of loyalty.

64. Harake Defendants breached that duty of loyalty by engaging in the conduct described herein.

65. Harake Defendants also owe the company and the shareholders a duty of care which prohibits the manager from engaging in gross negligence, reckless conduct, intentional misconduct, or knowing violation of the law.

66. Harake Defendants also breached the duty of care by engaging in the conduct described herein and by failing to exercise the reasonable care that is expected of someone in that position.

67. As a direct and proximate result of Harake Defendants' conduct, Plaintiffs were damaged.

68. Harake Defendants' conduct was grossly negligent, reckless, willful and wanton.

69. Plaintiffs are entitled to a judgment against Harake Defendants for actual and punitive damages resulting from Harake Defendants' conduct.

WHEREFORE, Plaintiffs respectfully pray that the Court:

1. Enter a judgment for monetary damages in favor of Plaintiffs and against Defendants awarding recovery in an amount to be proven at trial;

2. Award an accounting of the subject assets and appropriate division of those assets between the parties;

3. Order Katherine Harake to return her shares in Yogi Pay to be re-issued to Gibbs;

4. Award Plaintiffs a trial by jury on all issues so triable;

5. Award Plaintiffs their attorneys' fees, costs, expenses and interest (including pre-judgment interest);

6. Grant such other and further relief in favor of Plaintiffs as the Court deems just and proper.

This 3rd day of May, 2017.

S/KEVIN A. DUNLAP
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Attorney for Plaintiffs

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Sam Harake

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 9th day of June, 2017.

S/KEVIN A. DUNLAP
Kevin A. Dunlap
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Attorney for Plaintiffs

ELECTRONICALLY FILED - 2017 Jun 09 3:43 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Eurosa, Inc.

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 9th day of June, 2017.

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To: Katherine Harake

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 9th day of June, 2017.

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To: IOTive, Inc.

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 9th day of June, 2017.

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To: Gocial Morris

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 9th day of June, 2017.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Pavel Polukhin

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 9th day of June, 2017.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Shai Hemli

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 9th day of June, 2017.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	C.A. No.: 2017-CP-42-00740 **AMENDED COMPLAINT** **(Jury Trial Demanded)**

Plaintiffs Gibbs International, Inc. ("Gibbs"), and IOTive, Inc. ('IOTive"), complaining of Defendants, Sarmad Harake a/k/a Sam Harake ("Harake"), Eurosa, Inc. ("Eurosa"), Katherine Harake ("K. Harake"), Gocial Morris ("Morris"), Pavel Polukhin ("Pavel"), Shai Hemli, ("Shai") and IOTive allege and say:

THE PARTIES

1. Plaintiff Gibbs is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Spartanburg, South Carolina.

2. Plaintiff IOTive is a corporation organized and existing pursuant to the laws of the State of Delaware with its principal place of business in Spartanburg, South Carolina as of the filing of the original complaint as to IOTive.

3. Plaintiffs are informed and believe that Defendant Harake lived, worked, and was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter and his alleged performance of the agreement between the parties (as well as his other conduct described herein) took place, in part, in Spartanburg, South Carolina.

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4. Plaintiffs are informed and believe that Defendant Eurosa is a corporation organized and existing pursuant to the laws of the State of New Hampshire and had its principal place of business in South Carolina at the time of the filing of the original complaint. Eurosa, through Harake, has been present in South Carolina.

5. Plaintiffs are informed and believe that K. Harake was a citizen and resident of, Spartanburg, South Carolina at the time of the filing of the original complaint in this matter.

6. Plaintiffs are informed and believe that Gocial Morris ("Morris") is a citizen and resident of the State of Pennsylvania and that he subjected himself to jurisdiction in South Carolina by, among other things, serving on the Board of IOTive, which had its principal place of business in South Carolina at the time of the filing of the original complaint.

7. Plaintiffs are informed and believe that Pavel Polukin ("Pavel") is a citizen and resident of Russia and that he subjected himself to jurisdiction in South Carolina by, among other things, serving on the Board of IOTive, which had its principal place of business in South Carolina.

8. Plaintiffs are informed and believe that Shai Hemli is a citizen and resident of Israel and that he subjected himself to jurisdiction in South Carolina by, among other things, coming to South Carolina to perform business on behalf of IOTive.

9. This action is brought on Gibbs' behalf individually to assert its claims for the wrongful and illegal conduct of the Harake Defendants. Gibbs also asserts claims derivatively on behalf of IOTive to, among other things, assert its claims as the largest shareholder of IOTive to enforce rights which may properly be asserted by IOTive. At all times relevant hereto, Gibbs was a shareholder of IOTive. Plaintiffs have tried to obtain the relief requested herein but Defendants have refused. Plaintiffs have also reiterated prior demands by the filing of this

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Complaint and Defendants continue to refuse the relief requested herein. In the alternative, Plaintiffs are further informed and believe that making a demand would have been futile for reasons set forth below in the sixth claim for relief.

10. This Court has jurisdiction over the claims and the parties.

FIRST CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Contract as to Harake Defendants))
(Gibbs' Individual Claims for Declaratory Judgment as to Harake Defendants)

11. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

12. Gibbs, on one hand, and Harake and Eurosa ("Harake Defendants"), on the other, entered into an agreement (the "Agreement") whereby Harake Defendants agreed to identify and evaluate viable investment opportunities as well as to make and manage investments.

13. Gibbs and the Harake Defendants also agreed to form Gibbs Investment Holdings, LLC ("GIH") to be an entity through which some of such investment activities were to occur.

14. Harake Defendants also agreed to make capital contributions and to invest funds to support the work under the Agreement.

15. Harake Defendants have breached the agreement by, among other things, failing to locate sufficient investment opportunities, failing to provide or locate additional needed capital, failing to properly manage and achieve success as to the investments, and failing to perform their other responsibilities under the Agreement.

16. Harake Defendants' performance was also deficient, and in breach of the agreement between the parties, in the following particulars, among others:

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(Harake Defendants' Deficient Performance as to IOTive)

(a) Harake Defendants represented that they could roll Mobix Wireless Solutions, Ltd. ("Mobix Wireless") and Mobix Chip, LLC ("Mobix Chip") under a new United States company by the end of 2015 and they failed to do so;

(b) Harake Defendants represented that they could take IOTive public by the second quarter of 2016 for IOTive and they failed to do so;

(c) Harake Defendants represented they could achieve profitability for IOTive by the second quarter of 2016 but the sales were even less than $100,000 for the last 12 months. Harake Defendants' manipulation and inappropriate method of achieving profitability was by not recording expenses and other false and fraudulent means;

(d) Harake Defendants represented that they could secure investors from the Middle East by the second quarter 2016 but not even one investor was added nor was there any investment into the company from Harake Defendants' alleged connections;

(e) Harake Defendants represented they could achieve a pre-IPO valuation at IOTive by the second quarter of 2016 in a range of $9.1 million to $32 million but in reality the current valuation for the company is less than $1 million;

(f) Harake Defendants misrepresented to the Russian entity, Innovative Solutions, and its representative Pavel that Gibbs would provide a $3 million funding commitment. Harake Defendants made this representation without any authority from Gibbs. The commitment was made on behalf of GIH and not Gibbs. Innovative Solutions was to contribute $1 million to Mobix Chip. Gibbs is informed and believes that Innovative Solutions did not make the investment;

(g) Under the terms of the Agreement, Harake was supposed to be granted options for approximately 3.3% of IOTive. Instead, Harake had 25.6% of IOTive shares

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improperly issued to his company, Eurosa, on August 29, 2016 despite the fact that he had not met his commitments under the Agreement. The shares improperly issued to Eurosa should have been issued to Gibbs;

(h) As to Mobix Wireless, Harake Defendants asked representatives of Mobix Wireless to lie to an Israeli government official as described herein:

(i) Part of the strategy for IOTive was to have IOTive control and own the IP/Patents/Technology for reasons fabricated by Harake Defendants;

(ii) Consequently, the IP needed to be sold from Mobix Wireless in Israel to IOTive in the United States;

(iii) Due to Mobix Wireless's receipt of Israeli government funds related to the IP, governmental approval was necessary to sell or transfer the IP;

(iv) Mobix Wireless would typically be required to re-pay the Israeli government investment, often with certain penalties;

(v) Throughout this process, Harake Defendants represented to Gibbs that they knew how to make sure that nothing, or very little, would be paid to the Israeli government;

(vi) In the process, Mobix Wireless was going to submit an application which, among other things, did not provide full disclosure about the party who was going to buy the IP;

(vii) Harake Defendants gave instructions to Gibbs to only mention the buyer as being Mark Munday and to claim that Munday had no relationship with IOTive even though he was the president of IOTive and the plan was to transfer the IP to IOTive;

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(viii) Harake Defendants gave instructions to Gibbs to make this misrepresentation to reduce any payment to the government in continuation of IOTive's responsibilities and applicable law;

(ix) In-spite of Harake Defendants' instructions, the actual transaction was disclosed by Gil Vassoli of Gibbs to the Israeli government over Harake Defendants' objections;

(i) As to the overall IOTive structure:

(i) Harake Defendants indicated that IOT Labs, Ltd. ("IOT Labs") was an Israeli company and IOTive could not become a public company or bring in investors and customers from Middle Eastern countries as long as IOTive remained an Israeli entity. To solve this alleged problem, Harake wanted a United States company with a European company and some activity in Israel but Harake specified that the activity in Israel would have to be hidden in such a way that it could not be linked back to IOTive in the United States;

(ii) Despite assurances from Gibbs that there are many publicly traded companies with a high market rate cap that are based in Israel which have received government funds and sell to Arab countries, Harake Defendants insisted on a very complex structure with companies in Europe and the United States. The imposition of the structure Harake Defendants imposed on the situation had an adverse tax effect.

(j) As to IOTive's financials:

(i) Harake Defendants represented that they could take IOTive public within two quarters from the time Harake became CEO and that he had a banker who would do the IPO;

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(ii) At that time, IOTive did not have any intellectual property ("IP") or assets or rights to sell any of the Mobix Wireless products;

(iii) Instead of working to acquire rights, assets, and sales, Harake Defendants tried to manipulate the books by:

(1) Instructing the accountant not to book certain expenses related to the operation of the company so that profits would appear;

(2) Creating a very complex process for how orders and delivery for Mobix Wireless products occurred which created value added tax problems in Israel and lowered revenue on Mobix Wireless's books and lowered royalties Mobix Wireless paid to the Israeli government.

(k) As to the Mobix Chip valuation:

(i) Harake Defendants engineered a plan to move some IP owned by Mobix Chip in Russia to IOTive in the United States;

(ii) Harake Defendants engineered a way to inflate the value of the IP and to inflate the value of IOTive by moving money from Russia to Cypress to the United States and back; and

(iii) This activity created accounting values that had no substantive merit. The IOTive Board resisted the activities by Harake Defendants for months and was concerned about the efforts. Harake's idea was for $20 million to be paid to IOTive by a Russian entity. IOTive would then pay the $20 million to another Russian entity who would return the original $20 million to the original Russian entity. In other words, this scheme by Harake is why the valuation had no substantive merit and just involved the movement of money in a highly manipulative and inappropriate shell game.

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(l) As to the need to form a new company in Israel so the R&D work would be part of IOTive in terms of IP ownership:

(i) Harake represented that he wanted to have someone he knew in Europe to go to Israel and form a new company without disclosing who the real shareholders were or the actual intent;

(ii) Harake represented that once such a company is formed and bank accounts are set that person will transfer the shares or hold the shares in escrow so that he could mask/hide the real structure.

(m) Harake has engaged in inappropriate and manipulative conduct including the removal of an IOTive Board member (Rob Skaff ("Skaff")) of the entity known as IOTive in anticipation of a significant vote and then offered the former Board member a position as a contractor after Harake obtained the result on the Board vote he wanted.

(n) Harake has also become the CEO of IOTive, a United States company who is the 100% owner of an Israeli company. The result is that Harake is managing an Israeli company, IOT Labs, even though he repeatedly has indicated to Gibbs that it would be improper for him to do so.

(o) Gibbs is also informed and believes that a major shareholder of Mobix Chip was in jail due to issues with the local government and Harake went to Russia and represented that he used his contacts with the Russian mob to get the individual released. Harake represented that because of his efforts the person was released from jail so he owes Harake a favor that Harake could try to use to benefit IOTive and Mobix Wireless.

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(p) Harake Defendants represented that IOTive would have EBITDA of $2.6 million (run rate EBITDA of $250,000 per month) but the Harake Defendants failed to achieve even a fraction of that amount; and

(Harake Defendants' Deficient Performance as to QPAGOS/Yogi Pay)

(q) Harake presented Gibbs with an opportunity to get involved in the project with QPAGOS while investing little to no money of Harake's own to be able to negotiate free shares and Harake misrepresented the value. Harake represented that Gibbs and Harake would receive six million free shares in exchange for 15% of Yogi Pay. The actual free shares were 1,920,000 to Gibbs and Eurosa each and GIH received 1,095,000 free shares. Harake Defendants represented the free shares would have a value of approximately $9 million but the reality was the free shares were only worth $1.8 million;

(r) Harake Defendants invited Gibbs and some others close to Gibbs to invest in QPAGOS before a reverse merger based on a plan to raise $5 million. Harake Defendants were unable to secure the other investors and the total amount invested was lower and Gibbs was forced to purchase shares for $700,000 to protect its "investment" when none were originally planned to be purchased;

(s) As part of a reverse merger/IPO involving QPAGOS, Harake Defendants failed to inform Gibbs that the shares being purchased for QPAGOS were restricted and could not be traded for a period of 12 months;

(t) Harake Defendants assured Gibbs that they would produce a financial model and a clear vision for Yogi Pay but to date the Harake Defendants have not provided either;

(u) After the reverse merger scheme, Harake Defendants represented that Yogi Pay would be a public company with a market cap of $50,000,000 and that GIH would own

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42% by the end of 2016. Harake Defendants failed to deliver as the company has no proprietary assets and no real value. Harake Defendants failed to understand what the requirements were to be able to make the business model work and they do not have the expertise to move Yogi Pay forward despite their representations to the contrary;

(v) Yogi Pay has failed to even place one demo unit in service to date as a result of Harake Defendants' failure to launch even though Harake Defendants represented they would exist by the third quarter 2016;

(w) Harake Defendants represented they would secure new investors who would contribute $2.5 million for 5% of Yogi Pay by the second quarter of 2016 and failed to do so. Harake Defendants' failure to secure those investors which, as set forth above, resulted in Gibbs having to fund approximately $700,000. Harake also inappropriately issued shares to his wife, K. Harake.

(x) Harake Defendants engaged a third-party consultant firm to get Yogi Pay "licensed" in every state in the United States without understanding what that means in terms of cost, minimum cash needs, maintenance fees, and other requirements;

(y) Harake was supposed to secure all needed licensing by March 2016 but once again failed to do so.

(Harake Defendants' Deficient Performance as to Pay Send)

(z) Harake embezzled/misappropriated $250,000 Gibbs invested in Pay Send to pay Harake's personal expenses, which was unethical, illegal, unauthorized and deceptive.

(aa) Harake Defendants represented to Gibbs that the money wire/card to card application for Pay Send was already a proven technology and a working product that can easily be replicated in the United States market. In direct contradiction of Harake Defendants' representations, after months and months of Gibbs asking, Gibbs learned in March 2017 that the

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product is not even working yet and in Europe they are in a beta testing phase. Gibbs also discovered that the regulatory environment in the United States is materially different and the design does not work in the United States.

(bb) Despite this information, Harake suggested that Gibbs put $1 million in escrow and find other partners to do the same but draft the terms of the escrow so that there was no responsibility to actually use the money on Pay Send. Harake could then flash the $2 million around to obtain other investors and customers. Once additional, non-escrow money was raised, that money could be used to fund Pay Send, and then the escrowed amount would be withdrawn.

Miscellaneous

(cc) Harake suggested that Gibbs' employees wear specially designed cufflinks with a hidden thumb drive that they could put in someone else's computer and steal the information from others.

(dd) Harake also suggested that Gibbs employees wear specially designed eyeglasses with a hidden camera to steal information from others.

(ee) Consistent with the inappropriate actions of Harake described in this Amended Complaint, Harake has stated repeatedly to numerous people that he has never paid taxes in any country.

(ff) Based upon representations by the Harake Defendants that $111,000 per month was necessary to maintain operation of Fed Securities, a company of Harake in Turkey, Gibbs provided to the Harake Defendants $55,000 per month for a year. Gibbs is informed and believes that the representations were untrue. Gibbs has asked the Harake Defendants on numerous occasions for an accounting of the funds provided, which they have failed and refused to provide. Gibbs is informed and believes that the Harake Defendants have misappropriated the funds and have used them for improper and personal purposes.

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17. As a result of all of the above-described inappropriate conduct, Gibbs seeks a judgment declaring that the Harake Defendants breached the agreement and Gibbs' rights were violated and Gibbs is entitled to remedial relief in the form of rescission, correction of record keeping, and other appropriate remedial relief.

18. Gibbs also seeks to recover its damages as a result of Harake Defendants' conduct and Gibbs also requests an accounting of the subject assets and appropriate division of those assets between the parties.

SECOND CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing as to Harake Defendants)

19. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

20. The conduct by the Harake Defendants described herein constitutes a breach of the implied covenant of good faith and fair dealing.

21. Gibbs accordingly is entitled to recover compensatory damages in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Fiduciary Duty as to Harake Defendants)

22. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

23. Harake Defendants assumed a position of trust as to Plaintiffs and, as such, owed duties, fiduciary and otherwise, to deal fairly and honestly with Gibbs.

24. Harake Defendants breached these duties, fiduciary and otherwise, by, among other things, embezzling/misappropriation of money, failing to properly identify and evaluate investment opportunities and failing to properly make and manage investments as evidenced by

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the various entities' conduct described above in Paragraphs 13.A through 13.EE of this amended complaint.

25. Gibbs is also informed and believes that shares in Yogi Pay were inappropriately provided to K. Harake, Harake's wife. This was inappropriate because, among other things, the shares that were supposed to be issued to Gibbs in Yogi Pay were not issued but shares were still issued to K. Harake.

26. Plaintiffs accordingly seek a judgment declaring that the shares in Yogi Pay provided to K. Harake be rescinded and set aside and re-issued to Gibbs International as K. Harake should be divested of all shares she owns in Yogi Pay.

27. Plaintiffs accordingly are also entitled to recover compensatory damages for such conduct in an amount to be proven at trial.

28. Plaintiffs are also informed and believe that the Harake Defendants' conduct was reckless, willful, wanton, and/or grossly negligent entitling Plaintiffs to recover punitive damages.

FOURTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Fiduciary Duty to Morris, Pavel, and Shai)

29. The allegations of the foregoing paragraphs of this Amended Complaint are incorporated herein by reference.

30. As Board Members of IOTive, Morris and Pavel owed duties, fiduciary and otherwise, to IOTive and to IOTive's shareholders, including Gibbs.

31. Morris and Pavel breached these duties by, among other things, participating in and ratifying the actions of the Harake Defendants as described herein.

32. Gibbs accordingly seeks a judgment for compensatory damages from Morris and Pavel in an amount to be proven at trial.

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33. Gibbs is also informed and believes that Morris's and Pavel's conduct was reckless, willful, wanton and/or grossly negligent entitling Plaintiffs to recover punitive damages from Defendants Morris and Pavel.

34. As an employee and officer of Mobix Wireless, Shai also owed duties, fiduciary and otherwise, to Gibbs. As a shareholder in IOTive, Shai owed duties, fiduciary and otherwise, since Shai undertook and performed certain work of IOTive.

35. Shai breached his duties by, among other things, participating in and ratifying the actions of the Harake Defendants as described herein.

36. Plaintiffs accordingly seek a judgment for compensatory damages from Defendant Shai in an amount to be proven at trial.

37. Plaintiffs are informed and believe that Shai's actions were reckless, willful, wanton and/or grossly negligent entitling Gibbs to recover punitive damages from Shai.

FIFTH CLAIM FOR RELIEF
(Gibbs' Individual Claims as Well as Derivative Claims for Accounting as to All Defendants)

38. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

39. As a result of the alleged and wrongful activities of Defendants, Plaintiffs are entitled to a complete accounting of the subject assets as well as an appropriate division of those assets and also an accounting of all financial and other transactions undertaken by the Defendants in any way involving Plaintiffs.

SIXTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Invasion of Privacy/Wrongful Intrusion Into Private Affairs as to Harake Defendants)

40. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

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41. Gibbs is informed and believes that Harake Defendants have intentionally intruded into the private affairs of Gibbs and its chief executive officer, Jimmy Gibbs.

42. Gibbs is informed and believes that Harake Defendants have undertaken this activity by, among other things, obtaining information about Mr. Gibbs' private travel plans and stalking and following Mr. Gibbs when he was in the foreign country of Turkey by watching, spying, attempting to intimidate him and other similar conduct as well as having him followed and confronted in a hotel lobby in Turkey.

43. Gibbs is informed and believes that the activities inquired into involve the private business affairs of Gibbs, a privately held company, as well as the private business and personal affairs of Mr. Gibbs and Gibbs expects to not be harassed and stalked or interfered with as he tries to perform his role as the CEO of Gibbs.

44. The invasion has been substantial and unreasonable and calculated to attempt to intimidate Gibbs from pursuing claims against Harake Defendants.

45. Gibbs is also informed and believes that Harake Defendants bragged to others about their stalking and following Mr. Gibbs and photographing Mr. Gibbs and those travelling with him in a hotel lobby in Turkey.

46. Even after putting Harake on notice in the Complaint that Gibbs objects to Harake stalking Mr. Gibbs, Harake flagrantly continues to do so as recently as May 25, 2017 by telling a Gibbs employee that he knew Mr. Gibbs was in Lake Charles, Louisiana.

47. Gibbs is also informed and believes that Harake Defendants are attempting to obtain other private information about Mr. Gibbs and Gibbs, a privately held company, in inappropriate ways.

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48. Gibbs is informed and believes that Harake Defendants actions have been done willingly and Harake desired the result of his conduct and/or should have known the result that would follow from his conduct. The willful and aggravated nature of the conduct has been heightened by Harake's continuing this pattern of conduct even after receipt of the complaint asserting an invasion of privacy claim.

49. As the architect of the invasion of privacy, Harake's actions have been engineered and orchestrated by Harake in South Carolina and he has accessed private information in South Carolina.

50. Gibbs accordingly is entitled to recover compensatory damages in an amount to be proven at trial.

51. Harake's actions have been willful, wanton, aggravated, reckless, and/or grossly negligent. Gibbs accordingly is also entitled to recover punitive damages in an amount to be proven at trial.

SEVENTH CLAIM FOR RELIEF
(Derivative Action Against IOTive, IOTive Board Members Harake, Pavel and Morris, as Well as Claims Against Shai)

52. The allegations of the foregoing paragraphs of this amended complaint are incorporated herein by reference.

(IOTive FORMATION/SHARE OWNERSHIP)

53. Gibbs is informed and believes that IOTive was formed in 2015. The original chief executive officer ("CEO") of IOTive was Harake and he was on the Board until the fall of 2016. While he continued to be involved with IOTive, he became the CEO again in April 2017 and also re-joined the Board and he continues to occupy those positions to the present.

54. Gibbs is informed and believes that the original commitment for share ownership was:

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Gibbs 52%

Innovative Solutions – 22.8%

All Israeli Owners – 23.8%

VEB – 1.4%

55. Gibbs is informed and believes that the current shareholders and their percentages of ownership today are:

Gibbs – 26.4%

Eurosa – 26.3%

Atone – Russians 18.1%

Mobix Chip Russia – 5%

ESHI (Shai and all Israeli shareholders) – 24.2%

56. Gibbs today continues to own 26.4% of IOTive.

OVERVIEW

57. Harake Defendants, Morris, Pavel and Shai have engaged in conduct that is deceitful, manipulative, untrustworthy, improper, illegal, contrary to good business judgment, and contrary to acceptable conduct for corporate management as to these Defendants' involvement with IOTive for the reasons set forth below.

(Board Member Removal to Manipulate Corporate Action)

58. As set forth above, Gibbs is informed and believes that Skaff was removed from the IOTive Board of Directors in April 2017.

59. Gibbs is informed and believes that the Harake Defendants schemed to, and did, have Skaff removed from the Board in immediate anticipation of a major vote which would have been in Gibbs' favor (and also in the best interest of IOTive) prior to Skaff's removal.

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60. The issue involved IOTive's immediate need for working capital and whether additional capitalization was going to be required or IOTive was going to shut-down due to a lack of money to fund operations. Gibbs offered $1.5 million and the offer was rejected.

61. Gibbs is informed and believes that before the anticipated meeting, Harake Defendants sent Skaff a communication that his removal from the Board was just for purposes of the vote.

62. Gibbs is also informed and believes that Shai told Skaff that Skaff had to be removed because they did not know how Skaff would vote.

63. Gibbs is also informed and believes that Harake decided to hire Skaff back as a contractor after he had been removed from the Board.

64. This conduct by the Harake Defendants was self-dealing/improper manipulation, and in violation of acceptable corporate governance standards.

(Self-Dealing/Improper Manipulation to Become CEO and Violation of Managerial Authority)

65. As set forth above, Gibbs is also informed and believes that Skaff was removed from the IOTive Board in April 2017.

66. Gibbs is informed and believes that Harake Defendants schemed to, and did, have Skaff removed from the Board before a major vote for Harake to become the CEO of IOTive.

67. This conduct by the Harake Defendants was self-dealing/improper manipulation for Harake to become the CEO of IOTive.

68. Harake's assumption of the CEO role for IOTive, a United States company who is the 100% owner of IOT Labs, Ltd ("IOT Labs"), also gave Harake management responsibility over the Israeli company IOT Labs.

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69. As set forth above, Harake Defendants repeatedly informed Gibbs that he could not exercise management responsibility over an Israeli entity and yet he has been doing so with his assumption of the responsibilities as CEO for IOTive constituting further self-dealing/improper manipulation.

(Improper/Illegal Accounting Practices)

70. Harake Defendants represented that they could take IOTive public within two quarters from the time Harake became CEO and that he had a banker who would do the IPO. At that time, IOTive did not have any IP or asset or right to sell any of the Mobix Wireless products.

71. To try to manipulate the outcome, Harake Defendants instructed the accountant not to book certain expenses related to the operation of the company so that profits would appear to exist even though that was not the case.

72. Harake Defendants also created a very complex process for how orders for Mobix Wireless products were placed and how they were delivered/invoiced. This very complicated process created value added tax issues in Israel and lowered revenue on Mobix Wireless's books which lowered royalties Mobix Wireless paid to the Israeli government.

73. Gibbs seeks rescission of these improper accounting actions, correction of recordkeeping for the books, and correction of the reporting of earnings.

(Misrepresentations as to Profitability, Sales, Expenses, Securing Investors, and Valuation)

74. Harake Defendants reported that IOTive would achieve profitability by the second quarter of 2016; yet, IOTive sales were less than $100,000 for the last 12 months.

75. As set forth above, Harake Defendants' manipulation and inappropriate method of trying to achieve profitability was by not recording expenses.

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76. Harake Defendants represented that they could secure investors from the Middle East by the second quarter of 2016 but not even one investor was added nor was there any investment into the company from Harake Defendants' alleged connections.

77. Harake Defendants represented they could achieve a pre-IPO valuation at IOTive by the second quarter of 2016 in a range of $9.1 million to $32 million but in reality the current valuation for the company is less than $1 million.

(Misrepresentation to Government Officials to Avoid Taxes)

78. As to Mobix Wireless, Harake Defendants asked Mobix Wireless to lie to an Israeli government official as described herein:

A. Part of the strategy for IOTive was to have IOTive control and own the IP/Patents/Technology for reasons fabricated by Harake Defendants;

(1) Consequently, the IP needed to be sold from Mobix in Israel to IOTive in the United States;

(2) Due to Mobix Wireless's receipt of Israeli government funds related to the IP, governmental approval was necessary to sell or transfer the IP;

(3) Mobix Wireless would typically be required to repay the Israeli government investment, often with certain penalties;

(4) Throughout this process, Harake Defendants represented that they knew how to make sure that nothing, or very little, would be paid to the government;

(5) In the process, Mobix Wireless needed to submit an application which, among other things, described who the party was who going to buy the IP;

(6) Harake Defendants gave instructions to only mention the buyer as being Mark Munday and to claim that Munday had no relationship to IOTive even though he was the president of IOTive and the plan was to transfer the IP to IOTive;

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(7) Harake Defendants gave instructions to make this misrepresentation to reduce any payment to the government;

(8) In-spite of Harake Defendants' instructions and over Harake Defendants' objections, the actual transaction was disclosed by Gil Vassoli of Gibbs.

(IP/Value Inflation to Move from Russia to the United States)

79. As to the Mobix Chip valuation:

A. Harake Defendants engineered a plan to move some IP owned by Mobix Chip in Russia to IOTive in the United States;

(a) Harake Defendants engineered a way to inflate the value of the IP and thereby inflate the value of IOTive by moving money from Russia to Cypress to the United States and back;

(b) The valuation had no substantive merit and the IOTive Board resisted for months and was concerned about the efforts;

(c) Plaintiffs demanded that Harake Defendants not engage in conduct of this nature and Harake Defendants on behalf of himself individually and IOTive refused.

(Improper Entity Creation to Conceal True Ownership)

80. Gibbs is informed and believes that Harake forced the creation of an entity in Hong Kong known as ESHI to hide the fact that IOTive has Israeli shareholders.

81. Harake's scheme was to misrepresent and conceal the existence of these Israeli shareholders because Harake represented that he could not exercise management responsibility over an Israeli entity.

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82. Harake indicated that because IOTive had IOT Labs as an Israeli company, he could not take IOTive public and could not bring investors and customers from Middle Eastern countries.

83. Harake indicated that the activity in Israel would have to be misrepresented in such a way that it could not be linked back to IOTive in the United States and the Israeli connection was to be hidden.

84. The imposition of the structure Harake Defendants imposed on the situation had an adverse tax effect.

(Improper Share Issuance)

85. As set forth above, the original commitment for share ownership in IOTive was 52% for Gibbs.

86. Even so, Gibbs only received 26.4% of the shares in IOTive.

87. The remaining 25.6% of shares that were supposed to be issued to Gibbs were not issued to Gibbs and Gibbs only owns 26.4% of the shares of IOTive in-spite of the fact that Gibbs provided a significant amount of money to IOTive and the Harake Defendants did not provide anywhere near that amount, if anything.

88. Harake was originally supposed to be granted options for 3.3% of IOTive. Harake had 25.6% of IOTive shares improperly issued to Eurosa on August 29, 2016 despite not meeting any of its commitments and in-spite of the fact that Gibbs was shorted on the shares it was to receive. Gibbs is informed and believes that the remaining shares that were supposed to be issued to Gibbs were instead issued to Eurosa by Harake. Gibbs is also informed and believes that Harake owns and controls Eurosa.

89. The shares that Harake improperly issued to Eurosa were issued without Gibbs' approval and Gibbs is entitled to its 52% ownership in IOTive as opposed to the 26.4% it

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currently owns. Gibbs accordingly is entitled to the shares issued to Eurosa being rescinded and re-issued to Gibbs.

(Website Misappropriation)

90. Gibbs is informed and believes that the IOTive website, URL, and trademarks are still in Harake's name and he will not give it back to IOTive which constitutes a misappropriation of IOTive's assets.

(Allegations as to Morris and Pavel as well as Shai)

91. Gibbs is informed and believes that Morris and Pavel, as fellow Board Members of Harake, participated in and ratified the actions of the Harake Defendants as described in this and the preceding claims for relief in the complaint.

92. Gibbs also is informed and believes that Shai, as a shareholder and officer in Mobix Wireless and as a shareholder in IOTive who undertook to perform the work of IOTive, also participated in and ratified the actions of the Harake Defendants as described in this and the preceding claims for relief in the complaint.

Pre-Suit Demand/Futility of Demand

93. As set forth above, Gibbs undertook multiple pre-suit demands identifying the wrongdoer, describing the facts of the wrongful act and the harm caused to the company, and requesting remedial relief and all of this was to no avail. The pre-suit demands, among others, were:

(a) Gibbs protested Harake's conduct in manipulating Board membership to try to achieve results that were adverse to IOTive's best interests and to Gibbs (the single largest shareholder of IOTive). As set forth above, Skaff was removed as director for those inappropriate reasons. Skaff's removal was wrongful and done purely to manipulate the outcome of future votes in favor of Harake Defendants and against Gibbs. This has harmed

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IOTive because it is inappropriate corporate conduct causing reputational damage to IOTive and IOTive has been harmed by rejection of the much-needed infusion of capital and by Harake becoming the CEO in the face of all of this highly inappropriate conduct by Harake. As evidenced above by repeated acts of corporate mismanagement, Harake has significantly damaged IOTive through poor management, misrepresentations, self-dealing, improper share issuance, improper accounting practices, misrepresentations to government officials to evade taxes and improper accounting practices, among other things. Gibbs objected to this behavior and demanded remedial relief by Harake Defendants requesting that this type of activity stop and that the actions taken pursuant to this inappropriate activity be rescinded. Gibbs demanded, and still requests, that the requested relief take place and Harake Defendants have refused on behalf of themselves and IOTive.

(b) IOTive, through Harake Defendants' direction, has engaged in improper/illegal accounting practices. This includes, but is not limited to, instruction by the Harake Defendants to IOTive to not book certain expenses so that profits would appear to exist even though this was not the case. This "cooking of the books" has damaged IOTive by, among other things, misrepresenting to potential investors that IOTive's financial condition was far better than it actually was and creating a liability exposure as well as regulatory concerns that should have been avoided. Gibbs demanded remedial relief by asking IOTive, through Harake Defendants, to stop and to correct this type of conduct and that actions taken pursuant to this inappropriate activity be rescinded. Gibbs demanded, and still requests, that the relief take place and Harake Defendants have refused on behalf of themselves and IOTive.

(c) IOTive, through Harake Defendants' direction, has made misrepresentations as to profitability, sales, expenses, securing investors, and valuation. This has

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damaged IOTive by, among other things, misrepresenting to potential investors that IOTive's financial condition was far better than it actually was and creating a liability exposure that should have been avoided. Gibbs requested remedial relief by asking Harake to stop and to correct this type of conduct and that actions taken pursuant to this inappropriate activity be rescinded. Gibbs demanded, and still requests, that the relief take place and Harake Defendants have refused on behalf of themselves and IOTive.

(d) IOTive, through Harake Defendants' direction, was going to misrepresent to an Israeli government official to avoid taxes by claiming that Mark Munday had no relationship to IOTive even though he was the president of IOTive. This has damaged IOTive by, among other things, creating a liability exposure and regulatory concerns that should not have been created. Gibbs requested remedial relief by asking Harake to stop and correct this type conduct and that actions taken pursuant to this inappropriate activity be rescinded. Gibbs demanded, and still requests, that this relief take place and Harake Defendants have refused on behalf of themselves and IOTive. Harake Defendants continued to engage in these practices even after Gibbs demanded that Harake Defendants stop.

(e) Harake Defendants wrongfully forced the creation of an entity in Hong Kong to hide the fact that IOTive has Israeli shareholders. Harake also wrongfully indicated that the activity in Israel through IOTive would have to be misrepresented in such a way that it could not be linked back to IOTive in the United States and the Israeli connection was to be hidden. This has harmed IOTive because, among other things, it had an adverse tax effect on IOTive. This has also damaged IOTive by creating liability exposure and regulatory concerns that never should have existed. Gibbs requested remedial relief by asking IOTive, through Harake Defendants, to stop and correct activity of this nature and that actions taken pursuant to this

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inappropriate activity be rescinded. Gibbs demanded, and still requests, that this relief take place and Harake Defendants have refused on behalf of themselves and IOTive.

(f) Gibbs protested the improper share issuance by IOTive through Harake to his company, Eurosa. As set forth above, Gibbs was supposed to be issued 52% of the shares of IOTive and was not and Harake had 25% of IOTive shares improperly issued to Harake's entity, Eurosa. The harm caused to IOTive is that it breached its responsibilities to the single largest shareholder of the company to issue the agreed-upon percentage of shares and Harake engaged in self-dealing and had those shares issued to his company Eurosa. Gibbs demanded that the shares issued to Eurosa be rescinded and re-issued to Gibbs. The demand was rejected.

(g) Harake Defendants wrongfully engineered an inflated value of some IP owned by Mobix Chip in Russia. Harake's idea was for $20 million to be paid to IOTive by a Russian entity. IOTive would then pay the $20 million to another Russian entity who would return the $20 million to the original Russian entity. The valuation had no substantive merit. This has damaged IOTive by, among other things, engaging in conduct detrimental to IOTive's business reputation. Gibbs requested remedial relief by asking IOTive, through Harake Defendants, to stop and correct this type behavior. The demand was rejected by Harake Defendants pattern and practice of suggestions to taking inappropriate conduct.

94. Plaintiffs have tried to obtain the relief requested in this amended complaint by the making of demands but the Harake Defendants refused on behalf of themselves and others.

95. In the alternative, making a demand was futile for these reasons:

(a) Harake Defendants personally benefitted from the complained of conduct and engaged in improper self-dealing. The self-dealing includes, but is not limited to, the removal of a Board member to manipulate action by the Board and/or the shareholder to further

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Harake's personal agenda of becoming the CEO and defeating the offer by Gibbs on the working capital issue as well as other issues advanced by Gibbs;

(b) The self-dealing demonstrates that the Board is not disinterested;

(c) Harake received something of value by advancing his personal agenda in becoming the CEO and rejection of Gibbs' offer of $1.5 million of working capital;

(d) Harake controlled the Board as evidenced by his becoming the CEO after manipulating votes in his favor by, among other things, having one of the members voted off because Harake could not control that person's vote and because Harake offered 10% of the shares held by Eurosa in IOTive to another Board member, Pavel, to influence his vote. Pavel, by accepting their proposal, engaged in self-dealing. Gibbs is informed and believes that Pavel is to receive additional shares from Harake due to self-dealing by Pavel;

(e) The decisions by the Board give rise to a reasonable doubt that the decisions were the product of a valid exercise of business judgment so it may be inferred that the Board is incapable of exercising its power and authority to pursue the derivative claims directly. At an absolute minimum, reasonable doubt exits because:

(i) Harake openly and blatantly manipulated a Board vote to crown himself as the CEO and to reject Gibbs' offer on the working capital issue even though IOTive is in serious financial jeopardy and in desperate need of working capital;

(ii) Illegal/improper accounting practices have been used at IOTive pursuant to Harake's instruction by not recording expenses and "cooking the books" to manipulate a showing of profits;

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(iii) Harake suggested misrepresenting facts to government officials to avoid taxes as well as Harake's misrepresentations concerning profitability, sales, expenses, securing investors, and valuation;

(iv) Harake's attempted value inflation of IP to facilitate moving it from Russia to the United States while moving $20 million around in a shell game;

(v) Harake's improper entity creation to misrepresent the true ownership of IOTive and to hide the Israeli connection;

(vi) As set forth above, Gibbs is informed and believes that Harake agreed to provide 10% of the shares owned by Eurosa to another Board member, Pavel, to try to improperly influence his vote;

(vii) Issuance of shares of stock to Harake's controlled company Eurosa in violation of the agreement for the shares to be issued to Gibbs;

(viii) Given the existence of reasonable doubt as to whether the above conduct was a valid exercise of business judgment, no demand was necessary.

96. As set forth above, Harake Defendants have used IOTive for their personal benefit and to the detriment of IOTive and Gibbs. Board of Director member Pavel has done the same by accepting Harake's proposal for Pavel to receive more stock and by joining in Harake's other inappropriate conduct as described herein. Board of Director member Morris has done the same by joining in Harake's inappropriate conduct as described herein.

97. Plaintiffs accordingly seek the relief to which they are entitled as set forth herein including, but not limited to, a recovery of compensatory damages in an amount to be determined at trial as well as rescinding the inappropriate actions taken by the Harake Defendants as also described herein.

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SEVENTH CLAIM FOR RELIEF
(Gibbs' Individual Claim for Quantum Meruit Against K. Harake)

98. The allegations of the foregoing paragraphs of this Amended Complaint are incorporated herein by reference.

99. By virtue of the wrongful acts of the defendants, a benefit has been conferred upon K. Harake because the shares that were supposed to be issued to Gibbs in Yogi Pay were not issued and instead were inappropriately issued by Harake to his wife, Katherine.

100. K. Harake is unjustly enriched by wrongfully receiving the shares in Yogi Pay.

101. It is inequitable and wrongful for K. Harake to retain these benefits and the defendants should be estopped from retaining these benefits.

102. Gibbs is, therefore, entitled to an order from this Court requiring the defendant K. Harake to reconvey the stock to Gibbs.

EIGHTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Conversion Against Harake Defendants)

103. The allegations of the foregoing paragraphs of this Amended Complaint are incorporated herein by reference.

104. Gibbs was the lawful owner of funds that Harake Defendants improperly misappropriated.

105. The Harake Defendants exercised dominion and control over the funds that were improperly misappropriated by the Harake Defendants.

106. The Harake Defendants excluded Plaintiffs from use and possession of the funds without authorization constituting a conversion.

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107. The above-described actions were accomplished through malicious, willful and wanton conduct. Plaintiffs accordingly are entitled to compensatory damages in an amount to be determined at trial. Plaintiffs are also entitled to recover punitive damages.

NINTH CLAIM FOR RELIEF

(Gibbs' Individual and Derivative Claims for Unfair and Deceptive Trade Practices as to All Defendants)

108. The allegations of the foregoing paragraphs of this Amended Complaint are incorporated herein by reference.

109. The conduct of Harake Defendants as alleged above constitute one or more acts or practices in commerce in this State in violation of the South Carolina Unlawful Trade Practices Act, resulting in an impact on the public interest.

110. Plaintiffs accordingly are entitled to a judgment against Defendants (except K. Harake) for the amount of Plaintiff's compensatory damages proximately caused by these Defendants' unfair trade practices to be trebled in accordance with South Carolina law together with interest (including prejudgment interest) as allowed by law and Plaintiffs' reasonable costs, expenses and attorneys' fees incurred in filing and prosecuting this action.

WHEREFORE, Plaintiffs respectfully pray that the Court:

1. Enter a judgment for monetary damages in favor of Plaintiffs and against Defendants awarding recovery in an amount to be proven at trial;

2. Rescind the inappropriate actions of the Defendants and award other appropriate remedial relief in favor of Plaintiffs;

3. Award an accounting of the subject assets and appropriate division of those assets between the parties;

4. Rescind the issuance of shares in Yogi Pay to K. Harake and order K. Harake to return her shares in Yogi Pay to be reissued to Gibbs;

5. Award Plaintiffs a trial by jury on all issues so triable;

6. Award Plaintiffs their attorneys' fees, costs, expenses and interest (including pre-judgment interest);

7. Grant such other and further relief in favor of Plaintiffs as the Court deems just and proper.

This 9th day of June, 2017.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	Civil Action No.: 2017-CP-42-00740 **DEFENDANTS SARMAD HARAKE, KATHERINE HARAKE AND EUROSA, INC.'S ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT AND COUNTERCLAIMS OF DEFENDANTS SARMAD HARAKE AND EUROSA, INC.** **(Jury Trial Demanded)**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

Defendants Sarmad Harake, Katherine Harake and Eurosa, Inc. ("Eurosa") (hereinafter collectively "Harake Defendants"), by and through the undersigned counsel, hereby answer the Second Amended Complaint of Plaintiffs herein as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every paragraph of Plaintiffs' Complaint not hereinafter specifically admitted, qualified, or explained is denied.

2. Upon information and belief, the Harake Defendants admit the allegations of Paragraph 1 of Plaintiffs' Second Amended Complaint.

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3. As to the allegations of Paragraph 2 of Plaintiffs' Second Amended Complaint, the Harake Defendants admit only that IOTive, Inc. ("IOTive") is a Delaware corporation. The Harake Defendants deny the remaining allegations of Paragraph 2 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

4. The Harake Defendants deny the allegations of Paragraph 3 of Plaintiffs' Second Amended Complaint and provide that at all times Defendant Sarmad Harake was a resident of New Hampshire.

5. The Harake Defendants deny the allegations of Paragraph 4 of Plaintiffs' Second Amended Complaint and provide that at all times Defendant Eurosa has been a corporation organized and existing pursuant to the laws of New Hampshire with its principal place of business in New Hampshire.

6. The Harake Defendants deny the allegations of Paragraph 5 of Plaintiffs' Second Amended Complaint and provide that at the time of the original Complaint in this matter, which did not apply to Defendant Katherine Harake because she was not a party, Defendant Katherine Harake was a resident of New Hampshire.

7. The Harake Defendants admit the allegations of Paragraph 6 of Plaintiffs' Second Amended Complaint only to the extent they claim that Morris Gocial is a resident of Pennsylvania. The Harake Defendants deny the remaining allegations of Paragraph 6 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

8. The Harake Defendants admit the allegations of Paragraph 7 of Plaintiffs' Second Amended Complaint only to the extent they claim that Pavel Polukin is a resident of the country of Russia. The Harake Defendants deny the remaining allegations of Paragraph 7 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

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9. The Harake Defendants admit the allegations of Paragraph 8 of Plaintiffs' Second Amended Complaint only to the extent they claim that Shai Hemli is a resident of the country of Israel. The Harake Defendants deny the remaining allegations of Paragraph 8 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

10. The Harake Defendants deny the allegations of Paragraphs 9 and 10 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO FIRST CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Contract as to Harake Defendants)
(Gibbs' Individual Claims for Declaratory Judgment as to Harake Defendants)

11. In answering the allegations of Paragraph 11 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

12. The Harake Defendants deny the allegations of Paragraphs 12, 13, and 14 of Plaintiffs' Second Amended Complaint as stated and demand strict proof thereof.

13. The Harake Defendants deny the allegations of Paragraph 15 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

14. The Harake Defendants deny the allegations of Paragraph 16 of Plaintiffs' Second Amended Complaint, including its subparts (a) through (ff), and demand strict proof thereof.

15. The Harake Defendants deny the allegations of Paragraphs 17 and 18 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO SECOND CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing as to Harake Defendants)

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16. In answering the allegations of Paragraph 19 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

17. The Harake Defendants deny the allegations of Paragraphs 20 and 21 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO THIRD CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Fiduciary Duty as to Harake Defendants)

18. In answering the allegations of Paragraph 22 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

19. The Harake Defendants deny the allegations of Paragraph 23 of Plaintiffs' Second Amended Complaint as stated and demand strict proof thereof.

20. The Harake Defendants deny the allegations of Paragraph 24 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

21. The Harake Defendants deny the allegations of Paragraphs 25, 26, 27, and 28 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO FOURTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Fiduciary Duty to Morris, Pavel and Shai)

22. In answering the allegations of Paragraph 29 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

23. The allegations of Paragraphs 30, 31, 32, 33, 34, 35, 36, and 37 of Plaintiffs' Second Amended Complaint are not directed toward the Harake Defendants and therefore no response is required or contemplated; however, to the extent a response is contemplated, the

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Harake Defendants deny the allegations in Paragraphs 30, 31, 32, 33, 34, 35, 36, and 37 and demand strict proof thereof.

ANSWER TO FIFTH CLAIM FOR RELIEF
(Gibbs' Individual Claims as Well as Derivative Claims for Accounting as to All Defendants)

24. In answering the allegations of Paragraph 38 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

25. The Harake Defendants deny the allegations of Paragraph 39 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO SIXTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Invasion of Privacy/Wrongful Intrusion Into Private Affairs as to Harake Defendants)

26. In answering the allegations of Paragraph 40 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

27. The Harake Defendants deny the allegations of Paragraphs 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO SEVENTH CLAIM FOR RELIEF
(Derivative Action Against IOTive, IOTive Board Members Harake, Pavel and Morris, as Well as Claims Against Shai)

28. In answering the allegations of Paragraph 52 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

29. The Harake Defendants admit the allegations of Paragraph 53 of Plaintiffs' Second Amended Complaint to the extent they allege that IOTive was incorporated in 2015 and

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that Defendant Sarmad Harake has validly appointed to serve as the Chief Executive Officer of IOTive at certain times since 2015. The Harake Defendants deny the remaining allegations of Paragraph 53 and demand strict proof thereof.

30. The Harake Defendants deny the allegations of Paragraph 54 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

31. Upon information and belief, the Harake Defendants admit the allegations of Paragraphs 55 and 56 of Plaintiffs' Second Amended Complaint.

32. The Harake Defendants deny the allegations of Paragraphs 57 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

33. The Harake Defendants deny the allegations of Paragraphs 58, 59, 60, 61, and 62 of Plaintiffs' Second Amended Complaint as stated and demand strict proof thereof.

34. The Harake Defendants admit the allegations of Paragraph 63 of Plaintiffs' Second Amended Complaint to the extent they allege that Skaff is a contractor for IOTive. The Harake Defendants deny the remaining allegations of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

35. The Harake Defendants deny the allegations of Paragraphs 64 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

36. The Harake Defendants deny the allegations in Paragraph 65 of Plaintiffs' Second Amended Complaint as stated and demand strict proof thereof.

37. The Harake Defendants admit the allegations in Paragraph 66 of Plaintiffs' Second Amended Complaint to the extent that they allege that Defendant Sarmad Harake became interim chief executive officer of IOTive in April 2017, which he only accepted with the

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condition that IOT Labs, Ltd. be closed. The Harake Defendants deny the remaining allegations in Paragraph 66 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

38. The Harake Defendants deny the allegations in Paragraphs 67 and 68 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

39. The Harake Defendants admit the allegations in Paragraph 69 of Plaintiffs' Second Amended Complaint to the extent they allege that Defendant Sarmad Harake "repeatedly informed Gibbs that he could not exercise management responsibility over an Israeli entity." Defendant Sarmad Harake would not do business with the State of Israel due to the conflict with his being a diplomat. The Harake Defendants deny the remaining allegations in Paragraph 69 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

40. The Harake Defendants deny the allegations in Paragraphs 70, 71, 72, 73, 74, 75, 76, and 77 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

41. The Harake Defendants admit the allegations in Paragraph 78 of Plaintiffs' Second Amended Complaint only to the extent that Paragraph 78, including its subparts, alleges that "Mobix Wireless needed to submit an application which, among other things, described who the party was who going to buy the IP" and that IOTive was to and did buy technology. The Harake Defendants deny the remaining allegations in Paragraph 78 of Plaintiffs' Second Amended Complaint, including the remaining allegations in subparts, and demand strict proof thereof.

42. The Harake Defendants deny the allegations in Paragraph 79 of Plaintiffs' Second Amended Complaint, including its subparts, and demand strict proof thereof.

43. The Harake Defendants deny the allegations in Paragraphs 80 and 81 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

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44. The Harake Defendants deny the allegations in Paragraph 82 of Plaintiffs' Second Amended Complaint as stated and demand strict proof thereof.

45. The Harake Defendants deny the allegations in Paragraphs 83 and 84 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

46. The Harake Defendants deny the allegations in Paragraph 85 of Plaintiffs' Second Amended Complaint as stated and demand strict proof thereof.

47. The Harake Defendants admit the allegations in Paragraph 86 of Plaintiffs' Second Amended Complaint only to the extent that Paragraph 86 alleges the board of directors of Plaintiff Gibbs voted to give Plaintiff Gibbs 26.4% of the shares of IOTive. The Harake Defendants deny the remainder of the allegations in Paragraph 86.

48. The Harake Defendants deny the allegations in Paragraphs 87, 88, and 89 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

49. The Harake Defendants admit the allegations in Paragraph 90 of Plaintiffs' Second Amended Complaint only to the extent that Paragraph 90 alleges that Defendant Sarmad Harake personally purchased and continues to pay for the domain for the IOTive website and that he manages the domain. Further, Defendant Sarmad Harake does not manage the content of the domain; rather, it is managed by a third party. The Harake Defendants deny the remainder of the allegations in Paragraph 90 and demand strict proof thereof.

50. The Harake Defendants deny the allegations in Paragraphs 91 and 92 of Plaintiffs' Second Amended Complaint as stated and demand strict proof thereof.

51. The Harake Defendants deny the allegations in Paragraph 93 of Plaintiffs' Second Amended Complaint, including its subparts (a) through (g) and demand strict proof thereof.

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52. The Harake Defendants deny the allegations in Paragraph 94 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

53. The Harake Defendants deny the allegations in Paragraph 95 of Plaintiffs' Second Amended Complaint, including its subparts (a) through (e) and demand strict proof thereof.

54. The Harake Defendants deny the allegations in Paragraphs 96 and 97 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO SEVENTH [Sic] CLAIM FOR RELIEF
(Gibbs' Individual Claim for Quantum Meruit Against K. Harake)

55. In answering the allegations of Paragraph 98 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

56. The Harake Defendants deny the allegations in Paragraphs 99, 100, 101, and 102 of Plaintiffs' Second Amended and demand strict proof thereof.

ANSWER TO EIGHTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Conversion Against Harake Defendants)

57. In answering the allegations of Paragraph 103 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

58. The Harake Defendants deny the allegations in Paragraphs 104 and 105 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

59. The Harake Defendants deny the allegations in Paragraphs 106 and 107 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

ANSWER TO NINTH CLAIM FOR RELIEF
(Gibbs' Individual and Derivative Claims for Unfair and Deceptive Trade Practices as to All Defendants)

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60. In answering the allegations of Paragraph 108 of Plaintiffs' Second Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

61. The Harake Defendants deny the allegations in Paragraphs 109 and 110 of Plaintiffs' Second Amended Complaint and demand strict proof thereof.

62. The WHEREFORE Paragraph of Plaintiffs' Second Amended Complaint, including subparts (1) through (7), is denied, including but not limited to any allegations which state that Plaintiffs are entitled to relief of any form from the Harake Defendants.

FOR A SECOND DEFENSE
(12(b)(6))

63. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

64. Plaintiffs have failed to state facts sufficient to constitute a cause of action against the Harake Defendants. Therefore, Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

65. There are no claims alleged against Defendant Katherine Harake for actions she took. Accordingly, any causes of action against the Harake Defendants collectively that Katherine Harake should be dismissed as to Katherine Harake.

FOR A THIRD DEFENSE
(Business/Professional Judgment)

66. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

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67. Defendant Sarmad Harake and Defendant Eurosa properly exercised their professional judgment, and a professional's judgment (and accompanying acts and omissions) must be considered at the time the professional service is rendered and not through the lens of hindsight.

68. There are no claims alleged against Defendant Katherine Harake for actions she took. Accordingly, any causes of action against the Harake Defendants collectively that Katherine Harake should be dismissed as to Katherine Harake.

FOR A FOURTH DEFENSE
(Plaintiff Gibbs International, Inc.'s Sole Negligence/Gross Negligence Recklessness)

69. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

70. The injuries and/or damages alleged by Plaintiff Gibbs International Inc., which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the actions taken or not taken by Plaintiff Gibbs International Inc. itself, for whose conduct the Harake Defendants are not liable to Plaintiff in any sum whatsoever. Plaintiff has not suffered any damages caused by the actions of the Harake Defendants.

FOR A FIFTH DEFENSE

71. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint

72. Defendant Katherine Harake is not a proper party to this action because she has taken no actions to create the allegations herein, is not a part of the businesses involved in this dispute, and has not received any shares as alleged.

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FOR A SIXTH DEFENSE
(Negligence/Gross Negligence/Recklessness of Others)

73. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

74. The Harake Defendants would show that the injuries and/or damages alleged by Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct the Harake Defendants are not liable. Plaintiff has not suffered any damages caused by the actions of the Harake Defendants.

FOR A SEVENTH DEFENSE
(Assumption of Risk)

75. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

76. The Harake Defendants would show that Plaintiff, by and through its actions and/or inactions with regard to the subject alleged in Plaintiffs' Second Amended Complaint, assumed the risk and/or accepted all portions of any alleged damages and such assumption of risk and/or acceptance is a bar to claims against the Harake Defendants.

FOR AN EIGHTH DEFENSE
(Failure to State a Claim for Certain Damages)

77. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

78. Plaintiff fails to state a claim upon which consequential damages, special damages and pre-judgment interest may be awarded.

FOR A NINTH DEFENSE
(Failure to State a Claim for Costs)

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79. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

80. Plaintiffs fail to state a claim upon which costs may be awarded.

FOR A TENTH DEFENSE
(Punitive Damages)

81. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

82. The Harake Defendants allege that the conduct complained of, which is denied, was not such conduct as would entitle Plaintiffs to an award of exemplary or punitive damages against the Harake Defendants.

FOR AN ELEVENTH DEFENSE
(Failure to Mitigate)

83. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

84. The Harake Defendants allege and say that alleged damages, if any, suffered by Plaintiffs should be barred as a result of the failure to mitigate damages.

FOR A TWELFTH DEFENSE
(Set Off / Credit)

85. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

86. The Harake Defendants are entitled to a set off or credit for any monies paid or fees or costs reduced by the Harake Defendants which benefit Plaintiffs.

FOR A THIRTEENTH DEFENSE
(Unconstitutionality of Punitive Damages)

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87. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

88. The Harake Defendants deny Plaintiffs' demand for punitive damages. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 3 of the Constitution of the State of South Carolina in that:

(1) The judiciary's ability to correct a punitive award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;

(2) Any award of punitive damages seeking a compensatory function is inconsistent with due process guarantees:

(3) Any award of punitive damages based upon the wealth of the defendant violates due process guarantees;

(4) The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards, which is inconsistent with due process guarantees;

(5) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

(6) Plaintiffs' Second Amended Complaint's claims for punitive damages violate the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the defendant.

89. The Harake Defendants further submit that Plaintiffs' Second Amended Complaint's claims for punitive damages violate the federal doctrine of separation of powers and

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Article 1, Section 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR A FOURTEENTH DEFENSE
(Comparative Negligence/Gross Negligence/Recklessness)

90. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

91. The Harake Defendants would show that any injuries or damages sustained by Plaintiffs were due to Plaintiff Gibbs International Inc.'s own negligent, careless, reckless and/or grossly negligent acts or omissions, which combined and concurred with any negligence, carelessness, recklessness and gross negligence on the part of the Harake Defendants, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. The Harake Defendants, therefore, asks that this court compare the negligence or other conduct of Plaintiff Gibbs International Inc. and the Harake Defendants, and if it is determined that Plaintiff Gibbs International Inc.'s negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of the Harake Defendants, which is specifically denied, then Plaintiff should be totally barred from recovery and if it is determined that Plaintiff Gibbs International's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of the Harake Defendants, then the amount of recovery available to Plaintiff Gibbs International Inc. should be reduced by the percentage of Plaintiff Gibbs International Inc.'s own negligence, carelessness, recklessness and gross negligence.

FOR A FIFTEENTH DEFENSE
(Estoppel)

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92. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

93. The Harake Defendants pleads the doctrines of collateral and/or judicial estoppel as they relate to positions taken by Plaintiff Gibbs International Inc.

FOR A SIXTEENTH DEFENSE
(Limitations on Punitive Damages)

94. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

95. With respect to Plaintiffs' Second Amended Complaint's claims for punitive damages, the Harake Defendants incorporate by reference any and all standards of limitation regarding the determination of the amount and/or enforceability of punitive damage awards which arose in the decisions of *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) and their progeny, as well as S.C. Code §15-32-510 et. seq.

FOR A SEVENTEENTH DEFENSE
(Plaintiff's Bad Faith)

96. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

97. The Harake Defendants would show that Plaintiff Gibbs International Inc.'s claims are barred, in whole or in part, by its bad faith, by acts of both commission and/or omission.

FOR AN EIGTHEENTH DEFENSE
(Unclean Hands)

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98. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

99. The Harake Defendants would show that Plaintiff Gibbs International Inc.'s claims are barred, in whole or in part, by the doctrine of unclean hands.

FOR A NINETEENTH DEFENSE
(Apportionment Of Fault To Non-Parties)

100. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

101. The Harake Defendants would show that non-parties should be included on the verdict form in this case for the purpose of making accurate and true allocations of fault.

FOR A TWENTIETH DEFENSE
(Lack of Standing)

102. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

103. The Harake Defendants would show that Plaintiff Gibbs International Inc. does not have standing or authority to bring this action on behalf of IOTive.

FOR A TWENTY-FIRST DEFENSE
(Statute of Limitations)

104. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

105. The Harake Defendants will show the applicable statute of limitations passed prior to the filing of Plaintiffs' Second Amended Complaint as Plaintiff Gibbs International Inc. knew or should have known of its alleged claims.

FOR A TWENTY-SECOND DEFENSE
(Laches)

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106. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

107. The Harake Defendants plead the applicability of the equitable doctrine of laches to this matter.

FOR A TWENTY-THIRD DEFENSE
(Waiver)

108. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

109. Plaintiffs' claims are barred under the equitable doctrine of waiver.

FOR A TWENTY-FOURTH DEFENSE
(Statute of Frauds)

110. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

111. Plaintiffs' claims are barred by the statute of frauds.

FOR A TWENTY-FIFTH DEFENSE

112. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

113. The Plaintiffs' claims are barred by the doctrines of ratification and/or acquiescence.

FOR A TWENTY-SIXTH DEFENSE

114. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

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115. The Harake Defendants plead a lack of fiduciary relationship as alleged by Plaintiffs in the Second Amended Complaint.

FOR A TWENTY-SEVENTH DEFENSE

116. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

117. Any actions taken by Defendant Harake related to IOTive were the result of majority approval of the Board of Directors of IOTive; therefore, Plaintiffs' derivative claims should be barred.

FOR A TWENTY-EIGHTH DEFENSE

118. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

119. Plaintiffs' derivative claims should be barred for failing to take the proper steps to complete due diligence related to those claims.

FOR A TWENTY-NINTH DEFENSE
(Insufficiency of Service of Process)

120. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

121. Pursuant to Rule 12(b)(4) of the South Carolina Rules of Civil Procedure, Plaintiffs' claims against the Harake Defendants should be dismissed because service of process was not properly made.

FOR A THIRTEETH DEFENSE
(Lack of Personal Jurisdiction)

122. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

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123. Pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs' claims against the Harake Defendants should be dismissed because the Court lacks personal jurisdiction over the Harake Defendants.

FOR A THIRTY-FIRST DEFENSE AND BY WAY OF COUNTERRCLAIMS AGAINST PLAINTIFF/COUNTERCLAIM DEFENDANT GIBBS INTERNATIONAL, INC.

124. Defendants/Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint and assert the following pursuant to Rule 13 of the South Carolina Rules of Civil Procedure by way of counterclaims against Plaintiff/Counterclaim Defendant Gibbs International, Inc. ("Gibbs").

PARTIES

125. Counterclaim Plaintiff Sarmad Harake is a citizen of Canada, permanent resident of the United States and is domiciled in New Hampshire.

126. Counterclaim Plaintiff Eurosa is a corporation organized and existing pursuant to the laws of New Hampshire with its principal place of business in New Hampshire.

127. Upon information and belief, Counterclaim Defendant Gibbs is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Spartanburg, South Carolina.

FACTUAL BACKGROUND FOR COUNTERCLAIMS

128. On or around June 1, 2015, Counterclaim Plaintiff Sarmad Harake began doing business with Counterclaim Defendant Gibbs after a handshake with Gibbs' President and CEO, Jimmy I. Gibbs.

129. At that time, among other businesses, Counterclaim Plaintiff Sarmad Harake was already the owner and operator of Counterclaim Plaintiff Eurosa and intended to keep that business going while working with Gibbs.

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130. Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa, and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs, agreed to create a limited liability company, namely Gibbs Investment Holdings, LLC ("GIH"), to work jointly on certain investment projects.

131. Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa, and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs agreed to specific revenue sharing terms for each project that did not involve textiles.

132. As part of that agreement, Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa was to receive Thirty-Three Thousand and No/100 Dollars ($33,000) monthly from Counterclaim Defendant Gibbs.

133. Beginning in June 2016, Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa was to receive a monthly draw of approximately Thirty-Three Thousand and No/100 Dollars ($33,000) from GIH.

134. While multiple drafts of an operating agreement for GIH were discussed and negotiated, no operating agreement for Gibbs Investment Holdings, LLC was ever agreed upon by Gibbs.

135. Prior to August 5, 2016, Counterclaim Plaintiff Sarmad Harake and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs entered into a number of verbal agreements regarding specific projects, or what is colloquially known as being on a deal-by-deal basis, which were each confirmed in correspondence or electronic communications laying out the terms and conditions or by specific performance. These agreements did not contain deadlines for completion of a particular project.

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136. Projects that were agreed upon prior to August 5, 2016, include, among others, those known as: Hemlock, Beaumont, FED Securities Turkey, and Gibbs Energy.

137. As to the Hemlock project,

a. Counterclaim Plaintiff Sarmad Harake and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs came to an agreement regarding the investment in this project.

b. Counterclaim Defendant Gibbs entered into an agreement with a non-party, Griffin, to purchase the Hemlock plant.

c. Counterclaim Plaintiff Sarmad Harake assisted with finding a buyer for the Hemlock plant so that Counterclaim Defendant Gibbs could profit from the sale.

d. Counterclaim Defendant Gibbs could not meet the terms and conditions to sell to that buyer.

e. Upon information and belief, Counterclaim Defendant Gibbs and Griffin received the entire purchase price.

f. Counterclaim Plaintiff Sarmad Harake did not receive any funds related to that agreement.

138. As to the Beaumont project,

a. Counterclaim Plaintiff Sarmad Harake through his corporation Eurosa Corporation Hong Kong was to provide project assistance and goods.

b. Counterclaim Plaintiff Sarmad Harake through Eurosa Corporation Hong Kong expended funds to source goods, make offers, and send samples for approval.

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c. Ultimately, other goods were used by Counterclaim Defendant Gibbs.

d. Counterclaim Defendant Gibbs did not reimburse Counterclaim Harake or Eurosa Corporation Hong Kong for those funds for travel and services.

139. As to the FED Securities Project,

a. On or around June 24, 2015, Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs sent a commitment letter to the Capital Markets Board of Turkey acknowledging the acquisition of FED Securities.

b. FED Securities had been valued by Pricewaterhousecoopers for approximately Nine Million And No/100 Dollars ($9,000,000) and Seventeen Million And No/100 Dollars ($17,000,000.00). And based on that valuation, Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs valued it at Thirteen Million And No/100 Dollars ($13,000,000.00).

c. Counterclaim Defendant Gibbs did not meet the financial obligation it committed to make relative to FED Securities.

d. As a result, FED Securities lost its applicable financial services license.

e. Counterclaim Plaintiff Sarmad Harake attempted to appeal the cancellation of the financial services license, but in May 2017, the appeal was rejected by the Capital Markets Board.

f. For the years 2015 and 2016, Counterclaim Plaintiff Sarmad Harake has paid approximately One Million Two Hundred Twenty-Five Thousand And No/100 Dollars ($1,225,000.00) to FED Securities.

140. As to Gibbs Energy,

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a. Counterclaim Plaintiff Sarmad Harake and Jimmy Gibbs, on behalf of Gibbs came to an agreement regarding the investment in this project.

b. As part of this investment deal, Counterclaim Defendant Gibbs was to invest capital, and Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs made promises to Counterclaim Plaintiffs related to that investment,

c. Counterclaim Defendant did not meet its financial obligations.

d. Without proper capital, Gibbs Energy is a legally active but dormant project because in order to conduct energy activities as a licensed corporation, there is a minimum capital requirement.

e. For the years 2015 and 2016, Counterclaim Plaintiff Sam Harake has paid approximately Eight Hundred Eighty Thousand And No/100 Dollars ($880,000.00) to Gibbs Energy.

141. On August 5, 2016, Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa, and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs signed a Memorandum of Agreement ("MOA") stating that the agreement would be reevaluated on or before February 5, 2017.

142. Additionally, the MOA provided that GIH would be owned in equal shares by Counterclaim Plaintiffs and Counterclaim Defendant; would not own any assets; would be managed by Counterclaim Plaintiff Sarmad Harake; and would consist of unanimously chosen investment projects.

143. The MOA further provided that all project or investment ownership would be divided equally.

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144. The MOA further provided that Gibbs would provide Three Million Two Hundred Thousand And No/100 Dollars ($3,200,000.00) in "cash to fully fund agreed investment projects," and Counterclaim Plaintiff Sarmad Harake's investment in the Fed Menkul Degerler (FED Securities) and Gibbs's Enerji (Gibbs Energy) projects would be considered his financial contribution.

145. Finally, the MOA provided that additional funds required beyond the initial investment would be made on an equal parts basis.

146. Counterclaim Plaintiff Sarmad Harake on behalf of Counterclaim Plaintiff Eurosa did not request reimbursement for any corporate expense while he was acting for GIH.

147. As of September 2016, Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs insisted that the $33,000 draw promised to Counterclaim Plaintiff Sarmad Harake should be drawn from another project, namely the PaySend project, as opposed to GIH.

148. The other investor in PaySend has rejected that payment shift and has demanded that Counterclaim Plaintiff Sarmad Harake on behalf of Counterclaim Plaintiff Eurosa return those funds to PaySend.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

149. Defendants/Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

150. Prior to August 5, 2016, the verbal agreements, confirmed by writing or performance, were binding contracts as there was offer and acceptance for consideration associated with the revenues and commissions of each project.

151. Additionally, after August 5, 2016, the MOA was a binding contract.

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152. Counterclaim Defendant Gibbs breached one or more of these contracts in at least the following ways:

a. By failing to meet its obligations as to GIH such that FED Securities and Gibbs Energy projects could not be funded appropriately to move forward;

b. By failing to pay Counterclaim Harake or Eurosa Corporation Hong Kong for funds expended on travel and services relative to the Beaumont project;

c. By failing to meet its capital obligations as to GIH, which required it fund GIH with Three Million Two Hundred Thousand And No/100 Dollars ($3,200,000.00) and required that it fund in equal parts agreed-upon projects above the $3,200,000.00;

d. By failing to meet its promises to Counterclaim Plaintiff Sarmad Harake relative to the monthly $33,000 draw when it shifted the payment to PaySend without the acceptance of the other investors in that project; and

e. In other particulars to be developed during discovery in the above-captioned litigation.

153. If Counterclaim Defendant Gibbs had met its obligations as listed above, there would have been no damages suffered by Counterclaim Plaintiffs.

154. These breaches by Counterclaim Defendant Gibbs proximately caused damages to Counterclaim Plaintiffs/Defendants Sarmad Harake and Eurosa.

155. Counterclaim Plaintiffs Sarmad Harake and Eurosa are entitled to the actual damages related to the losses caused by these breaches and for costs, attorneys' fees, and pre-judgment interest in an amount to be determined by a jury.

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FOR A SECOND COUNTERCLAIM
(Negligent Misrepresentation)

156. Defendants/Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

157. Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs made numerous representations, both verbally and in writing, to Counterclaim Plaintiffs regarding the financial obligations Counterclaim Defendant Gibbs would make for individual project agreements and as to the $3,200,000 obligation in the MOA.

158. Jimmy Gibbs, as the President and CEO of Counterclaim Defendant Gibbs, was authorized to and in fact did speak on behalf of Counterclaim Defendant Gibbs.

159. Counterclaim Defendant Gibbs stood to gain a pecuniary interest in each of these projects if it met the financial obligations made in the statements about funding particular projects.

160. Counterclaim Defendant Gibbs owed a duty to Counterclaim Plaintiffs to see that truthful information was communicated to Counterclaim Plaintiffs because they had agreed to work together jointly on specific investment projects, and investments require capital.

161. Counterclaim Defendant Gibbs failed to exercise due care in making its representations as it did not meet those promised financial obligations.

162. Counterclaim Plaintiffs relied on the representations made by Counterclaim Defendant in seeking and attempting to fund certain projects.

163. This reliance was justifiable because truthful promises as to financial obligations are required to make investments successful.

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164. When Counterclaim Defendant failed to meet its financial obligations, Counterclaim Plaintiffs suffered damages because the time and investment spent on those projects was lost.

165. Counterclaim Plaintiffs have suffered pecuniary damages in excess of Thirteen Million Dollars ($13,000,000) because of Counterclaim Defendant's representations.

166. Counterclaim Defendant's actions were willful, wanton, and reckless in that Counterclaim Defendant knowingly made these untruthful representations about the amount of capital it could provide to the projects.

167. Counterclaim Plaintiffs are entitled to actual in excess of $13,000,000 and punitive damages related to this cause of action in an amount to be determined by a jury.

FOR A THIRD COUNTERCLAIM
(Unjust Enrichment)

168. Defendants/Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

169. Counterclaim Defendant was enriched by Counterclaim Plaintiffs Sarmad Harake and Eurosa as Counterclaim Plaintiffs found investments and managed projects for Counterclaim Defendant's benefit.

170. As previously described above in Paragraphs 138 and 146, Counterclaim Plaintiffs Sarmad Harake and Eurosa expended funds related the Beaumont project and generally on travel and services for the agreed-upon projects.

171. Counterclaim Plaintiffs Sarmad Harake and Eurosa did not receive any payment for the funds expended for corporate expenses of Counterclaim Plaintiffs related to the projects with which they were working jointly with Counterclaim Defendant Gibbs.

172. As previously described above in Paragraphs 132, 147, and 148,

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Counterclaim Defendant promised Counterclaim Plaintiffs a $33,000 draw each month, but then unilaterally changed how the amount was to be funded. The other investor in PaySend has demanded the return from Counterclaim Plaintiffs of the $33,000 draws made from PaySend.

173. As a result, Counterclaim Plaintiffs have been damaged, and Counterclaim Defendant has been unjustly enriched.

174. Counterclaim Plaintiffs pray for the funds expended by Counterclaim Plaintiffs related to the Beaumont project, corporate expenses, and the amount that PaySend's other investor has demanded be returned by Counterclaim Plaintiffs for the draws that Counterclaim Defendant Gibbs promised should be made to Counterclaim Plaintiffs, and Counterclaim Plaintiffs pray for any additional relief the Court may wish to grant.

FOR A THIRTY-SECOND DEFENSE
(Reservation and Non-Waiver)

175. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiffs' Second Amended Complaint.

176. The Harake Defendants reserve the right to amend this Answer, their affirmative defenses, and Counterclaims after investigation, discovery and further information is disclosed, including any and all defenses supported by the evidence proffered at trial of this matter.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, having asserted these affirmative defenses, and having asserted these Counterclaims, the Harake Defendants pray for the following relief from the Court:

a. that the Second Amended Complaint be dismissed with prejudice;

b. that Counterclaim Plaintiffs receive actual damages with pre-judgment and post-judgment interest thereon, and all consequential damages, in relation to their counterclaims;

c. punitive damages in an amount to be determined at trial;

d. the fees and costs of this action, including attorneys' fees; and

e. such other and further relief as the Court deems just and proper.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

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August 17, 2017
Columbia, South Carolina

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ELECTRONICALLY FILED - 2018 Nov 21 3:16 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of Iotive, Inc., Plaintiffs, v. Sarmad Harake, Eurosa, Inc., Iotive, Inc., Morris Gocial, Pavel Polukhin, and Shai Hemli, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **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**

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure and any other applicable rules and applicable case law, Plaintiff Gibbs International, Inc. ("Gibbs"), respectfully moves the Court for an order compelling the removal of redactions by Defendants Sarmad Harake ("S. Harake") and Eurosa, Inc. ("Eurosa") (collectively, the "Harake Defendants") from financial records produced by the Harake Defendants today.[1] Gibbs also moves to compel Katherine Harake ("K. Harake"), pursuant to all applicable Rules and case law, to produce her financial records and to do so without redactions. In support of the foregoing, Gibbs offers the following:

As to S. Harake/Eurosa

- S. Harake and Eurosa have produced some financial records with redactions;
- Gibbs believes that the redactions are inappropriate for reasons that will be articulated in its brief in support of this motion as well as for reasons articulated herein;

[1] Gibbs reserves the right to file other motions but wanted to ahead and file this motion today.

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- Gibbs is entitled to know what happened to its money from start to finish and the records are needed to show what happened. Gibbs cannot know where Harake may have hidden/misused/misappropriated/mismanaged the money without seeing all of the unredacted records;
- Gibbs believes that Harake is adept at camouflaging financial issues. By way of example, Harake has suggested: (1) the use of cuff links with hidden thumb drives to steal electronic data; (2) the use of eyeglasses with a hidden camera to steal company secrets; and (3) a scam in which he claims to have never paid taxes in any country and he offered that scam to others.
- Harake is believed to be adept at covering his tracks and engaging in improper activity to do so.
- Under these circumstances and the fact that Gibbs claims that money has been embezzled/misappropriated/mismanaged/misused, nothing but full disclosure will work.
- Gibbs does not believe it yet knows the full extent of Harake's improper conduct and the records are the vehicle by which that can be learned.
- Harake could have used entities and/or individuals Gibbs does not yet know about and whom it may never learn of unless full and complete disclosure is required.
- Harake also could have stolen money from Gibbs and used that money in investments but the information will be redacted and hidden from Gibbs by claiming it is an unrelated "investment." That is completely inappropriate. Again, Gibbs is entitled to full and complete disclosure of where its money went. Gibbs believes that Harake's own lawyers will not know if the money being used in other investments, by way of limited example, is money that was provided by

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Gibbs and used inappropriately by S. Harake. Regardless, Gibbs is entitled to have its own counsel examine S. Harake about all of the entries so Gibbs' counsel can make its own determination that the conduct was inappropriate.

As to K. Harake

- K. Harake has refused to produce any financial records in her own name.
- K. Harake also claims she does not have any joint accounts with S. Harake. Gibbs still needs an Order that K. Harake produce all records concerning her joint accounts with S. Harake, if any, so Gibbs has the assurance that she has reported to the Court that no such records exist.
- Gibbs originally asserted claims against K. Harake but decided to dismiss those claims without prejudice to allow it to conduct additional investigation as to K. Harake.
- K. Harake was married to S. Harake at the time of S. Harake's involvement with Gibbs.
- Gibbs is entitled to review K. Harake's records to determine if she participated in the embezzlement/misappropriation/mismanagement/misuse of money from Gibbs. If the records at issue show her to be a participant, then Gibbs will re-file and assert those claims.
- In addition, as noted above, Gibbs is entitled to review her records to determine if S. Harake used her individual accounts, with or without her authority, to embezzle/misappropriate/mismanage/misuse money from Gibbs.
- At the end of the day, Gibbs claims that S. Harake embezzled/misappropriated/mismanaged/misused money from Gibbs. Gibbs is entitled to see K. Harake's financial records and to examine her about those

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records to determine: if she was a participant in the wrongdoing; if S. Harake used her individual accounts with or without her authority to embezzle/misappropriate/mismanage/misuse money from Gibbs.

WHEREFORE, Gibbs requests that the Court:

1. Order that all redactions be removed from the financial records produced by S. Harake as well as Eurosa;

2. Order that K. Harake's financial records be produced with no redactions; and

3. Order that all redactions be removed from joint accounts, if any, of S. Harake and K. Harake and order that those records be produced.

This 21st day of November, 2018.

s/ Kevin A. Dunlap
Kevin A. Dunlap
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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	Civil Action No.: 2017-CP-42-00740 **THE HARAKE DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF GIBBS INTERNATIONAL, INC.'S MOTION TO REMOVE REDACTIONS IN DOCUMENTS PRODUCED BY SARMAD HARAKE AND EUROSA, INC.; AND PLAINTTIFF'S MOTION TO COMPEL AS TO KATHERINE HARAKE**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

By and through his undersigned counsel, Defendants Sarmad Harake ("Sam Harake") and Eurosa, Inc. ("Eurosa") (collectively the "Harake Defendants") hereby respectfully submit this Memorandum in Opposition to Plaintiff Gibbs International, Inc.'s ("Gibbs") motion to remove redactions in documents produced by Sarmad Harake and Eurosa, Inc.; and Plaintiff's motion to compel as to Katherine Harake. As set forth below, Gibbs is not entitled to the financial records it has requested. Accordingly, Gibbs' motion should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute arising from an alleged breach of contract and request for

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accounting of an alleged investment agreement between Defendant Eurosa and Plaintiff Gibbs. While Gibbs initially filed this action in March 2017, it was twice amended, with the Second Amended Complaint filed on June 9, 2017. Discovery was served initially on Defendant Sam Harake around May 19, 2017. Thereafter, an entry of default was entered against Defendants Sam Harake, Eurosa, and Katherine Harake (collectively the "Harake Defendants") on July 17, 2017. The Harake Defendants timely answered the Second Amended Complaint on August 17, 2017. The entry of default was set aside as to the Harake Defendants by Order of this Court on December 21, 2017. Sam Harake timely answered Gibbs' discovery requests, providing objections as to scope and discoverability of certain requests.

Thereafter, on February 3, 2018, Gibbs moved to compel discovery responses from Sam Harake regarding two of the Requests for Production to which he objected. A hearing on the motion to compel was held on April 5, 2018. Following an additional request from the Court, the Court entered an Order denying Gibbs' Motion to Compel on July 5, 2018. As part of that ruling, the Court held that a request for production was not the appropriate mechanism to obtain corporate records from non-parties FED Securities, Pay Send, Eurofund, Gibbs Energy, QPAGOS, IOTive, and Yogi Pay. Gibbs then filed a Motion to Reconsider/Clarify pursuant to Rule 59, SCRCP, and any other applicable rule, seeking for the Court to rule on the financial records of Defendants Sarmad Harake and Eurosa as well as Mrs. Harake. That Motion was never ruled on by this Court. On August 22, 2018, without there having been a ruling on its Motion to Reconsider/Clarify, Gibbs served a subpoena pursuant to Rule 45, SCRCP, on Bank of America. Gibbs did not copy counsel for any of the parties with the subpoena, in violation of

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Rule 45(b)(1), SCRCP.[1] The subpoena, attached hereto as **Exhibit 1**[2] and which has been redacted to remove account numbers, requested the financial records of Defendants Sarmad Harake and Eurosa, Inc. as well as those of non-party, Mrs. Harake. The subpoena was not limited to accounts that were jointly-held between Defendant Sam Harake and non-party Mrs. Harake, and the documents inappropriately produced to Gibbs were not limited either.

Bank of America responded to the subpoena less than ten (10) days after service, on August 31, 2018. *See* Certificate of Records Custodian, attached hereto as **Exhibit 2**, which has also been redacted to remove account numbers. Gibbs did not make Defendants and Mrs. Harake aware of this production of documents until November 7, 2018, more than two months after its receipt of the documents.[3] *See* Dunlap-Joyner email exchange, attached hereto as **Exhibit 3**.

Following receipt of the documents, the parties compromised as to the production of Sam Harake and Eurosa's financial records. Sam Harake and Eurosa would produce the records that were arguably relevant, redacting the names of the transactions that were not relevant while leaving the date and amount. Given that compromise, Sam Harake and Eurosa produced account information, account statements, checks, and deposit slips for March 2015 through September 2016. Gibbs has not paid Eurosa or Sam Harake anything since September 2016. Eurosa or Sam Harake have not had any direct access to any investment funds of Gibbs after the start of the litigation.

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[1] The rule states that "[u]nless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance."

[2] Despite multiple requests to Gibbs, a cover letter or other communication with Bank of America transmitting this subpoena has not been provided to the undersigned counsel.

[3] The Harake Defendants reserve their rights under Rule 37, SCRCP, to challenge the actions taken by Gibbs regarding this subpoena.

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Contrary to Gibbs' arguments, the Second Amended Complaint does not contain a cause of action for misappropriation or embezzlement. Rather, Plaintiffs alleged causes of action for: (1) breach of a contract between Harake and Eurosa, Inc. on one hand Gibbs International on the other; (2) Breach of the implied covenant of good faith and fair dealing; (3) Breach of fiduciary duties; (4) An accounting; (5) Invasion of privacy; (6) A derivative action against IOTive and its Board Members and Shai Hemli; (7) An action for *quantum meruit* against Katherine Harake; (8) Conversion; and (9) Unfair and deceptive trade practices.

The Second Amended Complaint, which is approximately thirty (30) pages, only mentions the words misappropriation or embezzlement in three paragraphs:

> 16(z). Harake embezzled/misappropriated $250,000 Gibbs invested in Pay Send to pay Harake's personal expenses, which was unethical, illegal, unauthorized and deceptive. . . .
>
> 16(ff). Based on representations by the Harake Defendants that $111,000 per month was necessary to maintain operation of Fed Securities, a company of Harake [sic.] in Turkey, Gibbs provided to the Harake Defendants $55,000 per month for a year. Gibbs is informed and believes that the representations were untrue. Gibbs has asked the Harake Defendants on numerous occasions for an accounting of the funds provided, which they have failed and refused to provide. Gibbs is informed and believes that the Harake Defendants have misappropriated the funds and have used them for improper and personal uses. ...
>
> 24. Harake Defendants breached these duties, fiduciary and otherwise, by, among other things, embezzling/misappropriation of money, failing to properly identify and evaluate investment opportunities and failing to properly make and manage investments as evidenced by the various entities conduct described above in Paragraphs 13.A through 13.EE of this amended complaint.

See Second Amended Complaint, ¶¶ 16, 24. These bare bones allegations and, later, a conclusory recitation of the elements of conversion, which may or may not be associated with the above

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paragraphs, make up the entirety of the "misappropriation/embezzlement issue." *Id.* at ¶¶ 104-105.[4]

II. ARGUMENT

Gibbs' motion should be denied as the information behind the redactions and request for financial records up to and including the present requested are neither relevant nor likely to lead to the discovery of admissible evidence.

A. Katherine Harake's Personal Financial Records Are Not Relevant.

As an initial matter, in response to the arguments advanced by Gibbs as to Katherine Harake's financial records, the Harake Defendants and Katherine Harake incorporate by reference as if stated herein the arguments made in non-party Katherine Harake's motion to quash and for protective order, which was filed on November 21, 2018, and that motion's supporting memorandum, which was filed on December 6, 2018. For all of the reasons stated in that motion and supporting memorandum, Gibbs is not entitled to a fishing expedition of Katherine Harake's documents, and as such, Gibbs' motion should be denied.

B. An Unredacted Or Expanded Production Of Sam Harake's and Eurosa's Financial Records Should Not Be Permitted As Such Records Are Not Relevant.

The financial documents requested by Gibbs and beyond what has already been produced by Sam Harake and Eurosa are not relevant to this litigation, and production of such information would be enabling an improper fishing expedition. Accordingly, Gibbs' motion must be denied.

Parties may only obtain discovery regarding matters that are relevant to the subject matter

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[4] In its prior briefing, Gibbs alleged that the Second Amended Complaint, ¶ 90 also contained an allegation embezzlement/misappropriation; however, that paragraph was taken out of context as it does not concern funds of Gibbs. Rather, it is part of a derivative action against "IOTive, IOTive Board Members Harake, Pavel, and Morris, as Well as Claims Against Shai" which Gibbs has since stated via email on October 5, 2018 that it has not "proceed[ed] with the action as to IOTive."

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involved in the pending action and reasonably calculated to lead to the discovery of admissible evidence. Rule 26, SCRCP.

> Although, the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be ***reasonably tailored*** to include ***only relevant matters***.

Oncology & Hematology Assocs. Of S.C., LLC v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 380, 388 (2010) (quoting *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. Sup. Ct., 2003)) (emphasis added).

Gibbs hinges its argument that such documents are relevant to its broad, conclusory allegations of embezzlement and misappropriation of funds. However, it has not cited any law supporting its position. It has also not cited any law that it is "entitled to know what happened to its money from start to finish" or given a reason that the "records are needed to show what happened." As noted above, the Second Amended Complaint mentions this allegation very few times and provides no facts or support to the bare allegation and its connection to the conversion cause of action. *See* Second Amended Complaint, ¶¶ 16(z), 16(ff), 24, 104-105. Distilling these paragraphs, Gibbs seems to be alleging it provided investment money to Eurosa and that Eurosa[5] may not have spent that money in accordance with the agreement between Gibbs and Eurosa. There are no allegations that Sam Harake or Eurosa siphoned funds from Gibbs without Gibbs' general knowledge such that it would need to determine how such funds were taken.[6] Therefore, records from time periods other than the period during which the investments were made simply

[5] Although Gibbs uses the Harake Defendants generally, it should be aware that the bank wires of funds it provided were deposited into one account of Eurosa, not to Sam Harake, individually.

[6] By way of example, there are no allegations in this litigation that resemble the traditional embezzlement fact patterns wherein an employee or office manager has access to a company's books and begins quietly removing funds from a business by depositing checks meant for the business into personal accounts or writing additional checks to his or her own personal accounts.

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are not relevant to these allegations. After all, if relevant evidence is truly evidence which has "any tendency to make a fact more or less probable than it would be without the evidence" coupled with the notion that such fact must be "of consequence in determining the action," Rule 401, SCRE, the particular places where Sam Harake eats and shops personally or where Eurosa buys things that did not involve a project wherein it was partnering with Gibbs fails to meet this definition even under the broadest of interpretations. The financial records that Gibbs is currently in possession of provide the information for funds used to transfer money, purchase items, or purchase services for the projects on which the Harake Defendants and Gibbs were working together. Moreover, documents other than the financial records speak to the relationship between Gibbs and the Harake Defendants and to the terms of how the funds were to be used.

Yet based on Gibbs' bare allegations, it seeks for the Court to allow it to go on a fishing expedition obtaining every financial and banking record for Sam Harake and Eurosa without redaction for a period of time including both before Gibbs had ever given Eurosa any funds and after Gibbs ceased providing any funds to Eurosa. Moreover, in making this argument, Gibbs contemplates that Sam Harake and Eurosa would need to continue to supplement the responses to Gibbs' Requests for Production as to these financial documents during the pendency of this litigation. Such a fishing expedition is not supported by the law. *See e.g., Berkowitz v. United States*, 2011 U.S. Dist. LEXIS 116161, *17, 2011 WL 4502374 (D.S.C. Sept. 9, 2011) (noting that a plaintiff "is not entitled to engage in a discovery fishing expedition for evidence he believes *might* support his allegations") (emphasis added).

Additionally, Gibbs has maintained it is entitled to all time periods of Sam Harake and Eurosa's bank statements in order to assess Sam Harake and Eurosa's ability to pay a verdict,

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including punitive damages. Sam Harake and Eurosa objected to its Requests for Production as to the financial records as premature because this matter is in discovery and no verdict has been rendered. To the extent such documents are to be used to assess punitive damages, the law does not support such production at this stage of the litigation. Simply pleading punitive damages does not permit production of sensitive financial information. *See Cardoso v. Holder Constr. Co.*, 2017 U.S. Dist. LEXIS 35943, *5-6, 2017 WL 976315, at *5-6 (D.S.C. Mar. 14, 2017) (finding that the defendants did not have to produce financial documents after they provided that they are sufficiently covered by insurance to satisfy any judgment in the case and that any disclosure related to punitive damages was premature); *Holcombe v. Helena Chem. Co.*, 2017 U.S. Dist. LEXIS 25143, *2, 2017 WL 713920, at *2 (D.S.C. Feb. 23, 2017) (finding that until plaintiff could show he was entitled to punitive damages, there is no obligation for the defendant to produce evidence of its wealth); *Nix v. Holbrook*, Civil Action No. 5:13-02173-JMC, 2015 U.S. Dist. LEXIS 22323, at *7-8 (D.S.C. Feb. 25, 2015) (refusing to require production of sensitive financial documents until after the plaintiff has established the viability of his claim for punitive damages); *see also e.g., Robinson v. Quicken Loans Inc.*, C/A No. 3:12-0981, 2013 U.S. Dist. LEXIS 56210, 2013 WL 1704839, at *4 (S.D. W. Va. Apr. 19, 2013) ("This Court agrees with those authorities requiring plaintiffs to make a prima facie claim for punitive damages before being entitled to discovery of a defendant's financial records."); *Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102, 105 (E.D.N.C. 1993) (deferring production of financial information until after punitive damages claim survives a motion to dismiss or for summary judgment). The *Nix* court denied a motion to compel because it was premature – the plaintiff had failed to establish the viability of his claim for punitive damages by surviving a summary judgment motion. *Nix*, 2015 U.S. Dist. LEXIS 22323, at *7-8 (D.S.C. Feb. 25, 2015)

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(instructing plaintiff to refile motion to compel financial documents if plaintiff's claim survives summary judgment). Since the Harake Defendants intend to file a motion for summary judgment with respect to the claims against them including the punitive damages claim, unless and until Gibbs defeats such a motion, Gibbs has not established the viability of its claim for punitive damages. As such, Gibbs' motion for such documents is premature and ultimately improper.

Assuming *arguendo* that Gibbs survives Defendants' motion for summary judgment, Gibbs is still not entitled to seek intrusive and extensive financial documentation from the Harake Defendants for the purpose of establishing punitive damages. While South Carolina law provides that the wealth of a defendant is a relevant factor in assessing punitive damages, frequently described as the "ability to pay" factor, this factor is not without boundaries. *Branham v. Ford Motor Co.*, 390 S.C. 203, 239, 701 S.E.2d 5, 24 (2010). Although net worth may be a relevant factor in assessing punitive damages, there are boundaries related thereto because the presentation of net worth evidence creates "the potential that juries will use their verdicts to express biases" against wealthy defendants. *Id.* at 240, 701 S.E.2d at 24; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) ("[R]eference to [the defendant's] assets . . . ha[s] little to do with the actual harm sustained by the [plaintiff]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."). The *Branham* court held that *State Farm v. Campbell*'s "cautionary observation that 'reference to the defendant's assets . . . has little to do with the actual harm sustained by the plaintiff' militates against venturing beyond net worth and extrapolations from net worth." *Branham*, 390 S.C at 240, 701 S.E.2d at 25. Such would certainly be the case here.

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Indeed, the rights of a plaintiff to discover information relevant to a punitive damages claim must be balanced with the rights of a defendant to privacy and protection from harassment by an intrusion into its financial affairs. *Leidholt v. District Court In and For City and County of Denver*, 619 P.2d 768, 769-772 (Colo. 1980). Thus, even if relevant to punitive damages, the extent of discovery is not unlimited, and specific questions requesting detailed information regarding the defendant's financial status may constitute unnecessary harassment. *Id.* at 771-72. Additionally, "[w]hen the discovery process threatens to become abusive or to create a particularized harm to a litigant . . . , the Rules allow the trial judge broad latitude in limiting the scope of discovery." *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994) (citing *Palmetto Alliance v. South Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984)). Therefore, every bank documents of Sam Harake and Eurosa is not relevant to determine their ability to pay should this litigation get to such a point, and given the limitation to the admissibility of net worth, Gibbs' request for such information is not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, Gibbs' motion should be denied.

III. CONCLUSION

Based on the arguments made herein and at the hearing on this motion, Gibbs' Motion to Remove Redactions in Documents Produced by Sarmad Harake and Eurosa, Inc.; and Plaintiff's Motion to Compel as to Katherine Harake should be denied as the requested records are neither relevant nor likely to lead to the discovery of admissible evidence.

(signature page to follow)

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December 6, 2018
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Attorneys for Defendants Sarmad Harake and Eurosa, Inc.

EXHIBIT 1

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STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF SPARTANBURG

Gibbs International, Inc., Plaintiff

v.

Sam Harake, et al., Defendant

SUBPOENA IN A CIVIL CASE

Case Number: 2017-CP-42-00740

Pending in Spartanburg County

TO: Bank of America

☐ YOU ARE COMMANDED to appear in the above named court at the place and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME AM

☐ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

1. All account information and other documents concerning Bursa, Inc. ("Bursa") from January 1, 2013 through and including the present and all documents and electronic communications concerning those account(s).

2. All account information and other documents concerning Sam Harake ("Sam Harake") and/or Katherine Harake (K. Harake") from January 1, 2013 through and including the present including but not limited to: all documents and electronic communications concerning those account(s). Also named custodian of records for this information is Scott A. Wilson, Vice President Small Business Banking, Bank of America [redacted]

3. All account information and other documents concerning account number [redacted]

4. All account information and other documents concerning accounts for which Sam Harake and/or K. Harake have or have had under his/her or their control or through a power of attorney related to the accounts.

PLACE	DATE AND TIME September 4, 2018, 10:00 AM
Law Offices of Parker Poe Adams & Bernstein LLP 100 Dunbar Street, Spartanburg, SC 29306	

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS ACTION IS HEREBY DIRECTED TO FULLY COMPLY WITH RULE 30(b)(6) SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

I CERTIFY THAT THIS SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c), AND THAT NOTICE AS REQUIRED BY RULE 45(d)(1) HAS BEEN GIVEN TO ALL PARTIES.

[redacted] 12/6/18 Kevin A. Dunlap

Signature of Officer or Attorney Date Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number

Law Offices of Parker Poe Adams & Bernstein LLP

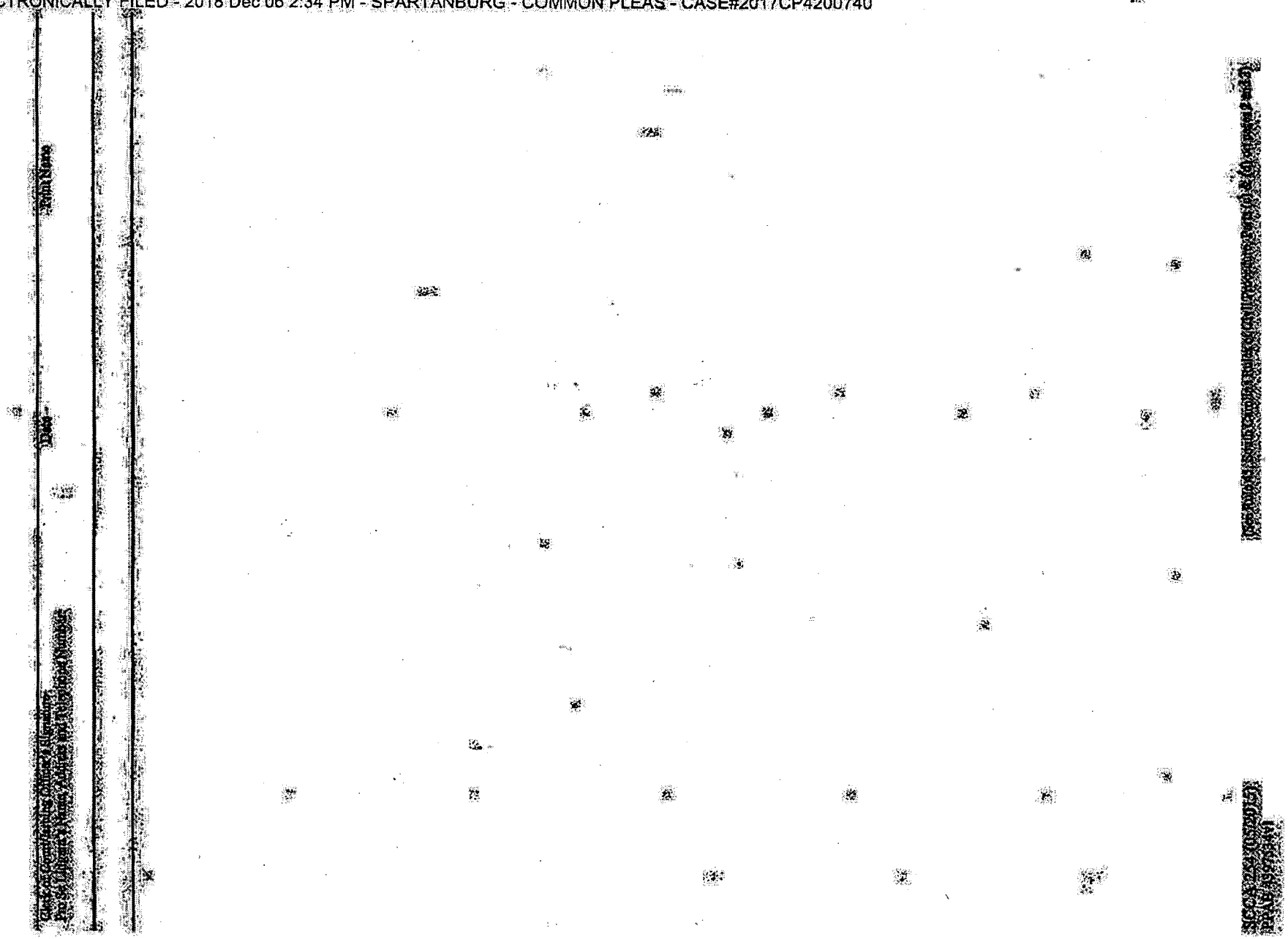
100 Dunbar Street, Ste. 206 Spartanburg, SC 29306

(864) 591-2030

SCCA 254 (05/2015)

(c) & (d) on pages 2 and 3) PPAB 4397534v1

(See Rule 45, South Carolina Rules of Civil Procedure, Parts



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PROOF OF SERVICE

SERVED	DATE: 8/23/18	FEES AND MILEAGE TENDERED TO WITNESS UPON DAILY ARRIVAL	
	PLACE: C.T. Corporation System	☐ YES ☐ NO	AMOUNT: $
SERVED ON		MANNER OF SERVICE: Hand delivery	
SERVED BY: Octavia Hoc-Mallard		TITLE: Courier	

DECLARATION OF SERVER

I verify that the foregoing information contained in this Proof of Service is true and correct.

Executed on: 8/23/18

SIGNATURE OF SERVER: Octavia Hoc-Mallard

ADDRESS OF SERVER: 1921 Hoc St Columbia SC 29201

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court, on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers, documents or tangible things, or inspection of premises may serve on the person to whom the subpoena is directed a written demand that testimony, documents or tangible things be produced for inspection and copying at the time and place stated in the demand. A party or an attorney responsible for the issuance and service of a subpoena shall provide to another party copies of documents produced upon written request. The party requesting copies shall pay the reasonable cost of copies or charges.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, commanding a subpoena commanding attendance at a deposition, production, or inspection directed to a non-party, the county in the county where the person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(ii) fails to allow reasonable time for compliance; or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party nor a general partner of a partnership that is a party to travel more than fifty miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

SCCA 234 (05/2015)
PRAB A3975314v1

See Rule 45, South Carolina Rules of Civil Procedure, Parts (c)(1) and (c)(2)(B).

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(B) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party nor a general partner of a partnership that is a party to incur substantial expense to travel from the county where that person resides or is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(c) Duties in Responding to Subpoena.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the proper form for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(e)(1)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party discloses the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

EXHIBIT 21

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Bank of America Legal Order Processing
Regarding reference number: D0924180001682
Court case number: 2017-CP-42-00740
Court of Issuer: LAW OFFICES OF PARKER POE ADAMS & BERNSTEIN LLP
Court case name: EUROSA

AFFIDAVIT OF BANK OF AMERICA BANK OFFICER AND/OR CUSTODIAN OF RECORDS

Before me, the undersigned authority, personally appeared:
Heather Rothwell

Who, being duly sworn, hereby deposes and says as follows:

1.) Authority: I, Heather Rothwell, am a duly authorized bank officer and/or custodian of the records of Bank of America N.A. with authority to execute this affidavit and certify to the authenticity and accuracy of the records produced with this affidavit.

2.) Records: The records produced herewith by Bank of America, N.A. are original documents or are true copies of records of a regularly conducted banking activity that:

a.) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

b.) Were made and kept in the course of regularly conducted banking activity by Bank of America, N.A. personnel or by persons acting under their control; and

c.) Were made and kept by the regularly conducted activity of Bank of America N.A. as a regular practice, on or about the time of the act, condition, or event recorded.

Additional comments:

Account name	Account number ending in:	Document type:	Timeframe:
EUROSA INC TRADING ACCOUNT	[redacted]	Checks, Statement Pages, Signature Card, Deposits, Offsets	04/2015 - 08/2018
EUROSA INC	[redacted]	Checks, Statement Pages, Signature Card, Deposits, Offsets	03/2015 - 10/2017
BARMAD HARAKE	[redacted]	Checks, Statement Pages, Signature Card, Deposits, Offsets	03/2015 - 08/2018
KATHERINE HARAKE	[redacted]	Checks, Statement Pages, Signature Card, Deposits, Offsets	02/2015 - 08/2018
KATHERINE HARAKE	[redacted]	Checks, Statement Pages, Signature Card, Deposits, Offsets	03/2015 - 08/2018

Some documents have been produced electronically.

3.) Production:

X The records produced herewith (together with any banking records produced by Bank of America N.A. previously in response to the subject request, order, or subpoena) constitute a complete production of bank records responsive to the subject request, order or subpoena (or a complete production under the terms of a subject request, order, subpoena as subsequently limited by the issuer).

OR

____ A thorough search has been conducted and no records could be located that are responsive to the subject request, order, or subpoena.

4.) I declare under penalty of perjury that the foregoing is true and correct.

Date: 08/31/2018 Signature: [signature]

The above named Bank of America N.A. bank officer and/or custodian of records is known to me (or satisfactorily proven) to be the person who subscribed the within document and acknowledged to me that he/she executed the same for the purposes stated therein.

X Signer is personally known to me.

____ Signer has produced the following identification: _____

Sworn to and subscribed before me this 31 day of August, 2018. In witness thereof I have set my hand and official seal.

[signature]
Signature of Notary Public in and for
State of Delaware
City/County of Newark, New Castle

SEAN C HASH
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires Feb. 08, 2020

EXHIBIT 3

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Laura Sabo

From: Lindsay Joyner <ljoyner@gwblawfirm.com>
Sent: Wednesday, November 07, 2018 5:29 PM
To: Dunlap, Kevin A.
Cc: John T. Lay
Subject: RE: Gibbs/Harake [GWB-IMANAGE.FID5424961]

Kevin,

As an initial matter, we demand that you STOP reviewing these documents right now. The issue that you have created here is way more serious than your latest response email suggests. This is a blatant violation of Rule 45, which as you, the attorney who signed the subpoena knows, requires that "Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance." There is no such court order permitting you to request the documents via subpoena without notice to us. You have requested documents on which we would have absolutely moved for a protective order. You have no right to Katherine Harake's financial records. She is not a party in this litigation and your request for her documents was denied by Judge Kelly – in fact this appears to be an end run around Judge Kelly's Order. And to make matters worse, you've had these documents for months and have said nothing to us about them. To reiterate, stop reviewing the documents now while we evaluate what we are going to do. This is almost certainly going to have to involve the Court and cause the depositions of the Harakes to be rescheduled.

Additionally, I have received no notice from the Court of a hearing on your motion for reconsideration of Judge Kelly's order, and I am unavailable that day as I have obligations in another case, so I will be requesting a continuance.

Regards,
Lindsay

Lindsay Anne Joyner
Partner
ljoyner@GWBlawfirm.com

GWB
GALLIVAN WHITE BOYD
Complex experience for complex matters

Gallivan, White & Boyd, P.A.
Office: 201 Main Street | Suite 1200 | Columbia, SC 29201
Direct: 803.779.1833 | Main: 803.779.1833 | Fax: 803.737.8787 Fax
Mailing: Post Office Box 7368 | Columbia, SC 29202

Vcard | Bio | LinkedIn

The message is from the law firm Gallivan, White & Boyd, P.A. and may be confidential. If you are not the intended recipient, please advise the sender immediately and do not disclose the contents to any other person, use it for any purpose, or store or copy the information in any medium. Thank you.

From: Dunlap, Kevin A. [mailto:kevindunlap@parkermoss.com]
Sent: Wednesday, November 7, 2018 2:04 PM
To: Lindsay Joyner
Subject: Gibbs/Harake

Lindsay,

Hope all is well.

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In preparing for depositions next week, I just noticed that my assistant inadvertently did not copy you on a subpoena to Bank of America. The subpoena and the records can be downloaded from the below link. The password will be provided to you in a separate e-mail.

Download link: https://parkerpoe.sharefile.com/d-s2f63441f824f41c79

By my memory and in looking back at this, you previously indicated that you wanted "limited redactions" which you indicated "could be accomplished easily and efficiently" by you to redact expenses relating to personal items. We did not agree, but we are willing to allow you to redact those items pending a ruling from the Court. I do request that these "limited redactions" leave in the dates, whether it was a debit or a credit and the amount of the debit or credit. If the Court rules that you are not entitled to these redactions, we will address those issues at that time. I have not provided these records to anyone outside my firm. I also have not yet reviewed all of the records myself but will complete that review prior to the depositions and my assistant will be working with me in that regard. Thanks.

Kevin Dunlap
Partner

100 Dunbar Street | Suite 206 | Spartanburg, SC 29306
Office: 864.253.6105 | Fax: 864.591.7050 | vcard | map

Visit our website at:
www.parkerpoe.com

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **MOTION TO FILE AN AMENDMENT TO THE SECOND AMENDED COMPLAINT**

Plaintiff, Gibbs International, Inc. ("Gibbs" or "Plaintiff"), pursuant to Rule 15 of the South Carolina Rules of Civil Procedure (and any other applicable Rule as well as case law), respectfully moves the Court for leave to file the amendment to Gibbs' Second Amended Complaint, attached hereto as **Exhibit A**, in the above-titled action. In support of this Motion, Gibbs shows the Court the following:

1. Rule 15(a) provides that leave to amend the pleadings "shall be freely given when justice so requires." SCRCP, Rule 15(a).

2. The amendment to Gibbs' Second Amended Complaint, among other things, asserts allegations and claims against Katherine Harake ("K. Harake"). The claims asserted in the attached amended pleading as to K. Harake are: aiding and abetting breach of fiduciary duty; an accounting; conversion; aiding/abetting conversion; unfair and deceptive trade practices; fraud; civil conspiracy; and quantum meruit/unjust enrichment. The new claims asserted against S. Harake/Eurosa in the attached amendment to the Second Amended Complaint are: fraud; civil conspiracy; quantum meruit/unjust enrichment; and piercing the corporate veil. Gibbs also added factual allegations as to the new claims as well as to existing claims in the previously-filed

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Second Amended Complaint. This amendment does not supersede the Second Amended Complaint but instead adds to it.

3. Gibbs has described in detail the background for the amendment in the attached amended pleading. By way of brief summary overview, Gibbs served discovery requests on Sarmad Harake ("S. Harake") and K. Harake on or about May 19, 2017 requesting the bank statements of Eurosa, Inc. ("Eurosa"), S. Harake (collectively, the "Harake Defendants") and K. Harake. The Harake Defendants and K. Harake refused to produce those documents without a Court order. The detailed history of the events, from Gibbs serving the discovery requests until the present time, is set forth the in the attached amendment.

4. Gibbs' efforts to obtain the necessary bank records to allow it to evaluate K. Harake's involvement in the embezzlement/ misappropriation/ money laundering/ misuse/ mismanagement has been obstructed by K. Harake and the Harake Defendants at every turn. At one point, the Harake Defendants and K. Harake even went so far as threatening to bring a frivolous lawsuit claim against Gibbs if it did not voluntarily dismiss K. Harake from the lawsuit. More specifically, they indicated that Gibbs should voluntarily dismiss its claims against K. Harake and further indicated:

> *[I]f the claim is not voluntarily dismissed, we will be discussing with our clients the possibility of filing a claim under the South Carolina Frivolous Proceedings Act* ***as there is no reason that Katherine Harake should be a party to this litigation***.

(Emphasis added)

5. Gibbs agreed to voluntarily dismiss K. Harake from the lawsuit until it could secure K. Harake's financial information and conclude its evaluation of potential claims against her.

6. Finally, on or about November 21, 2018, the Harake Defendants produced financial records of S. Harake and Eurosa, but the financial records were **heavily redacted**. The

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Harake Defendants' redactions hid from Gibbs the details of over 620 withdrawals and debits from S. Harake's and Eurosa's accounts totaling more than $875,000, including nearly 100 separate withdrawals for greater than $1,000 each, and at least thirteen withdrawals between $10,000 and $20,000 each. The Harake Defendants did not produce **any** of the financial records of K. Harake.

7. Gibbs immediately filed a motion to remove the redactions in the Harake Defendants' financial documents so that it could trace where the Harake Defendants were transferring hundreds of thousands of dollars, and also to determine whether any of this money was being transferred to K. Harake inappropriately and without Gibbs' authorization. Gibbs has also moved to compel K. Harake to produce her financial records.

8. The Harake Defendants opposed Gibbs' motions to compel arguing, among other things that:

A. K. Harake's financial records are not relevant to this litigation and "Gibbs is not entitled to a fishing expedition of K. Harake's documents"; and

B. The unredacted financial records of the Harake Defendants "would be enabling an improper fishing expedition" and that "the particular places where K. Harake eats and shops personally or where Eurosa buys things" are not relevant to the litigation.

[Opp. at P. 5]

9. The Court entered an Order on June 3, 2019 rejecting the contentions and requiring the production of the unredacted financial records of Defendants S. Harake and Eurosa as follows:

> **[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.**

[Order, June 3, 2019 at P. 9]. The Court's June 3, 2019 Order also provided:

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> **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.**

[Order, June 3, 2019 at P. 8] (Emphasis added)

10. Finally, after this needlessly tortured and time-consuming process, and more than two years after Gibbs requested the production of the Harake Defendants' unredacted financial records, the Harake Defendants finally produced their unredacted financial records on June 6, 2019. And yet again, no records were produced by K. Harake.

11. The unredacted Bank of America records finally provided by the Harake Defendants in June 2019 contained a number of transactions with alphanumeric codes and some transactions labeled "Customer Withdrawal Image." The information for these transactions in the unredacted Bank of America records did not specify where Gibbs' money went when the Harake Defendants transferred it out of their accounts.

12. Subsequent discovery sought and obtained from Bank of America in August 2019, which is described further below, finally provided sufficient information about the transfers from the Harake Defendants' accounts to establish that most of the transfers identified by alphanumeric codes and as "Customer Withdrawal Images" were to move Gibbs' money to S. Harake's wife, K. Harake.

13. Gibbs believes that electronic transfers were deliberately used by S. Harake because those transfers would only have alphanumeric codes and would not specify where the money went, thereby making it more difficult for Gibbs to trace the money.

14. Gibbs also believes that S. Harake used electronic transfers and the money was shifted to K. Harake because S. Harake, K. Harake and Eurosa did not file federal or state tax returns in the United States or any foreign country. S. Harake wanted to hide assets from the

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taxing authorities in this country. In fact, S. Harake bragged to Gibbs employees that he had never filed a tax return anywhere – not in any state or with the United States, Canada, Turkey or any other country.

15. To try to answer the questions about the whereabouts of its money, Gibbs took the depositions of the Harakes in July 2019 based on the records Gibbs finally received in June 2019.

16. In those depositions, the Harakes disclaimed knowledge of what happened to Gibbs' money as reflected in the transactions with alphanumeric codes or labeled as "Customer Withdrawal Image."

17. Gibbs then issued subpoenas to Bank of America in August 2019 as to what happened to the money involved in the transactions with alphanumeric codes and Customer Withdrawal Images.

18. Bank of America produced additional records in August/September 2019. And guess what those records showed? The records showed:

A. Over $500,000 of Gibbs' money was transferred to K. Harake. K. Harake testified she transferred whatever money she received from S. Harake/Eurosa out of her personal savings account to her personal checking account and she made spending decisions for the money at that point. Gibbs is informed and believes that K. Harake spent Gibbs' money for unauthorized/inappropriate personal purposes. All of this was improper in different ways including, but not limited to, the commingling of the funds.

B. S. Harake used in excess of $400,000 of Gibbs' money out of Eurosa's accounts to make payments to third parties for unauthorized/inappropriate purposes. All of this was improper in different ways including, but not limited to, the commingling of the funds.

C. S. Harake transferred Gibbs' money to himself in excess of $38,000. All of this was improper in different ways including, but not limited to, the commingling of the funds.

19. The Harakes' web of deceit has now been exposed.

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20. It is clear that the objection strategy of the Harakes was to do anything they could to delay discovery of, and to hide, these transactions and improper use of the money so they could hide from the Court and Gibbs the fact that Gibbs' money was commingled and used inappropriately. **S. Harake himself testified he, not his counsel, made the redactions.** In other words, the objection strategy was dictated by S. Harake, not his counsel.

21. Given the above, Gibbs is now moving to file an amendment to its Second Amended Complaint to assert claims against K. Harake and add specific allegations of K. Harake's participation in the misappropriation/embezzlement/money laundering/misuse/mis-management of Gibbs' money.

22. Gibbs is entitled to amend its Second Amended Complaint to add specific allegations and causes of action against K. Harake because the fact that the Harake Defendants were siphoning Gibbs' funds to K. Harake is confirmed, despite the Harake Defendants' and K. Harake's efforts to conceal that evidence, which succeeded in keeping the evidence from Gibbs for almost three years after its discovery requests.

23. The Harake Defendants and K. Harake themselves caused the passage of time in the filing of this motion by withholding evidence and obstructing Gibbs' discovery efforts, including the redaction of the Harake Defendants' financial records to hide the transfer of more than $500,000 to K. Harake's account, the refusal to provide K. Harake's financial records claiming that there was "no reason" for K. Harake to be a party to the lawsuit and threatening to file a frivolous lawsuit claim against Gibbs if K. Harake was not voluntarily dismissed, and then (incredibly), after Gibbs agreed to voluntarily dismiss K. Harake until it could investigate its potential causes of action against her during discovery, refusing to produce K. Harake's financial records because she was no longer a party to the lawsuit. It took an Order from this Court for the Harake Defendants to finally produce the unredacted records that Gibbs needed to trace its

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money to K. Harake's account. Until just December 10, 2019 (only four business days ago), the Harake Defendants refused to produce the financial records of K. Harake despite the Bank of America records tracing Gibbs' money to her personal savings account. On Friday, December 6, 2019, Gibbs provided the amendment to the second amended complaint attached to this motion as exhibit 1 to the Harake Defendants. Gibbs, requested yet again that K. Harake's records be produced. And finally, in apparent recognition of the futility of this position, and over 2 years and 9 months after Gibbs' request was made for K. Harake's records, K. Harake produced the records on December 10, 2019. After taking deliberate and affirmative actions to hide the records that finally traced Gibbs' money to K. Harake for almost three years, the Harake Defendants and K. Harake cannot now claim that they are prejudiced by this motion.

24. Incredibly, the Harake Defendants based their refusal to produce K. Harake's financial records, at least in part, upon the fact that K. Harake is no longer a party to the lawsuit, knowing full well that Gibbs dismissed earlier claims against K. Harake without prejudice under the Harake Defendants' threat of a frivolous lawsuit claim, even as the Harakes withheld documents from Gibbs that they knew clearly traced Gibbs' money to K. Harake's account and would expose the very significant amount of money transferred to her and to third parties.

25. The Harake Defendants' refusal to provide K. Harake's financial records was further contrary to the June 3, 2019 Order of this Court, which plainly held that K. Harake's financial records could become discoverable if Gibbs could trace its funds to her account:

> **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.**

[Order, June 3, 2019 at P. 8]

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26. Gibbs further notes as to the amendment concerning S. Harake that it is entitled to amend for the previously articulated reasons as well as any other arguments it offers in connection with a hearing on this motion. Gibbs further notes that the Harake Defendants initiated all of the improper conduct by not providing their unredacted records until June and then failing to produce all of the records requiring additional Bank of America subpoenas since the Harakes claimed not to know where the money went in the July 2019 depositions. The documents produced by Bank of America in August 2019 unveiled the conduct by the Harake Defendants. Gibbs then tried to negotiate a resolution of the discovery dispute because K. Harake continued to refuse to produce her records in unredacted form. Gibbs wanted these records so it could conclude its analysis of what the Court ruled Gibbs was entitled to do: trace its money. Gibbs also wanted K. Harake's records, among other reasons, so it could prove that the money was not transferred to K. Harake and she then used the money for appropriate purposes. Finally, as noted above, K. Harake relented and finally produced the rest of the documents but only did so four business days ago.

27. Justice demands that the Harake Defendants and K. Harake not be rewarded for their obfuscation and delay, and that Gibbs be permitted to amend its complaint.

28. The Harake Defendants and K. Harake object to this motion. Gibbs also believes that consultation is futile given the Harakes' position about potential claims against K. Harake.

WHEREFORE, for the foregoing reasons herein and such further reasons that may be set forth in memoranda at a hearing on this motion or thereafter, Gibbs respectfully requests that the Court enter an order granting Gibbs leave to file the Amendment to Gibbs' Second Amended Complaint and for such other and further relief in favor of Gibbs as the Court shall deem just and proper.

Respectfully submitted this 16th day of December, 2019.

s/ Kevin A. Dunlap
Kevin A. Dunlap

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EXHIBIT A

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	C.A. No.: 2017-CP-42-00740 **AMENDMENT TO THE SECOND AMENDED COMPLAINT** **(Jury Trial Demanded)**

Plaintiff Gibbs International, Inc. ("Gibbs" or "Plaintiff") files an amendment to its Second Amended Complaint, complaining of Defendants, Sarmad Harake a/k/a Sam Harake ("S. Harake") and Eurosa, Inc. ("Eurosa") (collectively, the "Harake Defendants") and Katherine Harake ("K. Harake"). This Amendment to the Complaint includes Plaintiff's additional claims and additional facts as to the Harake Defendants and additional claims and additional facts as to K. Harake. This amendment does not supersede the Second Amended Complaint, but instead is an amendment to the Second Amended Complaint.

THE PARTIES

1. Plaintiff is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Spartanburg, South Carolina.

2. Plaintiff is informed and believes that Defendant S. Harake lived, worked, and was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter and his alleged performance of the agreement between the parties (as well as his other conduct described herein) took place, in part, in Spartanburg, South Carolina.

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3. Plaintiff is informed and believes that Defendant Eurosa is a corporation organized and existing pursuant to the laws of the State of New Hampshire and had its principal place of business in South Carolina at the time of the filing of the original complaint. Eurosa, through S. Harake, has been present in South Carolina.

4. Plaintiff is informed and believes that K. Harake was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter. Much of the conduct alleged as to K. Harake occurred when she was living in Spartanburg County, South Carolina.

5. This Court has jurisdiction over the claims and the parties.

BACKGROUND

PREVIOUS ALLEGATIONS AS TO DEFENDANT K. HARAKE RELATING TO THE ALLEGED IMPROPER ISSUANCE OF SOME STOCK TO K. HARAKE

and

GIBBS' INITIAL ATTEMPTS TO OBTAIN K. HARAKE'S BANK RECORDS

6. The allegations of the other paragraphs, and the paragraphs in the Second Amended Complaint, are incorporated herein by reference.

7. Plaintiff asserted a claim against K. Harake in this lawsuit in its Second Amended Complaint (the "Amended Complaint"), in quantum meruit. The claim related to the apparent improper issuance of some stock to K. Harake that should have been issued to Gibbs. Plaintiff also asserted claims against the Harake Defendants in the Second Amended Complaint.

8. On or about May 19, 2017, sixteen days after the filing of the First Amended Complaint, which first asserted claims against K. Harake, Gibbs served discovery requests on K. Harake requesting her bank statements (the "Discovery Requests") to determine, among other things, how much money was received and used by K. Harake and to enable Gibbs to evaluate

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whether it wanted to assert other claims against K. Harake if the records showed that she was improperly receiving Gibbs' money into her accounts and then using that money for improper purposes. Discovery Requests were also served on S. Harake seeking, among other things, the bank statements of the Harake Defendants.

DEFAULT AS TO S. HARAKE AND EUROSA

9. The Harake Defendants and K. Harake were placed in default by the Court as to the original complaint on or about July 17, 2017. A motion to set aside the default was filed on July 26, 2017. The default issue was heard on September 12, 2017. The Court entered an order setting aside the default on or about December 21, 2017. While the default issue was pending, the parties agreed to extend the time for Eurosa, S. Harake and K. Harake to respond to the Discovery Requests until 30 days from the day the Court signed the Order setting aside the default.

10. On January 22, 2018, S. Harake and K. Harake served initial responses to the Discovery Requests, but the Harakes and Eurosa flatly refused to provide the requested bank statements. By way of example, K. Harake's response provided:

> Objection. This Request is premature, vague, overly board, unduly burdensome, and not reasonably likely to lead to the discovery of admissible evidence. The Request is vague in that "documents concerning bank statements" is not a defined term. This Request appears to contemplate correspondence from any bank about any account associated with Defendant Katherine Harake-not just the statements themselves. To the extent Plaintiffs seek this information for an ability to pay any judgments in this litigation, such Request is premature. **Additionally, the Request is overbroad and unduly burdensome in that Defendant Katherine Harake has nothing to do with the agreements between Defendant Sam Harake and Plaintiffs.** Moreover, it is not limited to certain types of accounts held by Defendant Katherine Harake. (Emphasis Added).

S. Harake likewise refused to provide any bank statements:

> Objection. This Request is premature, vague, overly broad, unduly burdensome, and not reasonably likely to lead to the discovery of admissible evidence. The Request is vague in that "documents concerning bank statements" is not a defined term. This

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> Request appears to contemplate correspondence from any bank about any account associated with Defendant Harake--not just the statements themselves. To the extent Plaintiffs seek this information for an ability to pay any judgments in this litigation, such Request is premature. Additionally, the Request is overbroad and unduly burdensome in that it is not limited to the time in which Jimmy Gibbs and Defendant Harake were working together on Gibbs Investment Holdings but rather is seeking information from beyond their business involvement with one another. Moreover, it is not limited to certain types of accounts held by Defendant Harake.

11. Gibbs filed a motion to compel on February 3, 2018.

THE HARAKE DEFENDANTS AND K. HARAKE'S REQUEST FOR A VOLUNTARY DISMISSAL AS TO K. HARAKE

12. In correspondence dated April 9, 2018 (the "Correspondence"), while K. Harake and the Harake Defendants were fighting Gibbs' requests to produce the bank statements that they knew (but Gibbs had never seen) would eventually show more than $500,000 of Gibbs' money flowing to the personal savings account of K. Harake, K. Harake and the Harake Defendants requested that Gibbs voluntarily dismiss its claims against K. Harake.

13. In the Correspondence, K. Harake further indicated they were going to move for summary judgment as to K. Harake and also indicated:

> Additionally, if the claim is not voluntarily dismissed, we will be discussing with our clients the possibility of filing a claim under the South Carolina Frivolous Proceedings Act **as there is no reason that Katherine Harake should be a party to this litigation**. (Emphasis added)

14. In response to the Correspondence and the Harake Defendants' threat, Gibbs agreed to a stipulation of voluntary dismissal without prejudice of K. Harake so Gibbs could further investigate potential claims against K. Harake in discovery.

INITIAL PRODUCTION WAS ONLY BY THE HARAKE DEFENDANTS AND CONTAINED EXTENSIVE REDACTIONS STILL HIDING THE CRITICAL INFORMATION AND NO PRODUCTION BY K. HARAKE

15. A hearing on Gibbs' initial motion to compel was held on April 5, 2018. The Court entered an order on July 5, 2018. However, the July 5, 2018 Order only addressed Gibbs'

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requests for S. Harake to produce the corporate records from non-parties, and did not address Gibbs' motion to compel the production of the requested financial records.

16. Gibbs filed a Motion to Reconsider/Clarify the Court's July 5, 2018 Order to, among other things, address Gibbs' motion to compel discovery concerning the requested financial records.

17. On or about November 21, 2018, before a hearing was held on Gibbs' Motion to Reconsider/Clarify the Court's July 5, 2018 Order, the Harake Defendants finally produced financial records of S. Harake and Eurosa, which were originally requested in the Discovery Requests on or about May 19, 2017. However, the produced financial records were heavily redacted (the "November 2018 Production"). These redactions hid from Gibbs the details of over 620 withdrawals and debits totaling more than $875,000, including nearly 100 separate withdrawals for greater than $1,000 each, and at least thirteen withdrawals between $10,000 and $20,000 each.

18. K. Harake did not produce any of her financial records with the November 2018 Production.

MOTION TO REMOVE THE REDACTIONS AS TO THE HARAKE DEFENDANTS AND TO COMPEL K. HARAKE TO PRODUCE HER RECORDS

19. On November 21, 2018, Gibbs filed a motion to remove the redactions in the Harake Defendants' financial documents and to obtain K. Harake's records.

20. The Harake Defendants and K. Harake opposed Gibbs' motions to compel arguing, among other things that: (1) K. Harake's financial records are not relevant to this litigation and "Gibbs is not entitled to a fishing expedition of K. Harake's documents"; and (2) the unredacted financial records of the Harake Defendants "would be enabling an improper

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fishing expedition" and that "the particular places where they eat and shop personally or where Eurosa buys things" are not relevant to the litigation. [Opp. at P. 5]

21. The hearing was on December 7, 2018. The Court entered an Order on June 3, 2019 (the "June 3, 2019 Order") requiring the production of the unredacted financial records of Defendants S. Harake and Eurosa.

THE COURT'S JUNE 3. 2019 ORDER REQUIRING PRODUCTION WITHOUT REDACTIONS BY THE HARAKE DEFENDANTS AND THAT K. HARAKE'S RECORDS COULD BE DISCOVERABLE IF GIBBS' FUNDS WENT TO HER ACCOUNT

22. In the June 3, 2019 Order, the Court held that **Gibbs was entitled to the Harake Defendants' bank records without redactions in order to trace its funds and determine where its money went.** The Court also held that K. Harake's financial records "could become discoverable" if Gibbs could to trace its funds to an account in K. Harake's name. The Court's order read as follows:

> 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.** (Emphasis added.)

23. The Harake Defendants finally produced the long-awaited and ridiculously overdue unredacted financial records of Defendants S. Harake and Eurosa on or about June 6, 2019 (the "June 6, 2019 Production Set"). Again, the original requests for the financial records were served on May 19, 2017 and the documents were not produced in unredacted format until over two years later on June 6, 2019.

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TRANSACTIONS IDENTIFIED BY ALPHANUMERIC CODES AND AS "CUSTOMER WITHDRAWAL IMAGE" STILL PREVENTED GIBBS FROM TRACING ITS MONEY AS THE COURT RULED IT WAS ENTITLED TO DO

24. The unredacted Bank of America account records of Eurosa contained numerous online banking transfers identified by individual alphanumeric confirmation codes. The records for transactions specified that the money was transferred out of the Eurosa account, but critically did not specify where Gibbs' money went. These unredacted entries also contained entries entitled "Customer Withdrawal Image" for some transactions which likewise did not specify where Gibbs' money was transferred from the Eurosa account.

25. Until Gibbs received the unredacted records and the information behind the coded transactions, it could not determine whether it had a cause of action as to K. Harake because it did not have sufficient information to evaluate whether K. Harake participated in the theft of the money or the extent of K. Harake's involvement. Gibbs needed the unredacted records that were provided with the June 6, 2019 Production Set, but Gibbs **also needed** the information from Bank of America as to what happened to the transactions labeled with alphanumeric codes and the Customer Withdrawal Image transactions. With this information, Gibbs could calculate the amount of money that was laundered in K. Harake's accounts and the extent of her involvement. Gibbs also need to know from these accounts that K. Harake's accounts were being used to misappropriate/embezzle/launder/misuse/mismanage Gibbs' money. Gibbs further needed to know what happened to the money once it was in K. Harake's account.

IN DEPOSITIONS OF THE HARAKES, THEY CLAIMED TO NOT KNOW WHERE THE MONEY FOR TRANSACTIONS LABELED WITH ALPHANUMERIC CODES OR IDENTIFIED AS "CUSTOMER WITHDRAWAL IMAGE" WENT.

26. Gibbs deposed S. Harake and K. Harake in July 2019 to, among other things, determine where Gibbs' money went from the transactions identified by alphanumeric codes and the transactions identified as "Customer Withdrawal Image." The money did not just vanish into

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thin air. The Harakes claimed not to know where the money went for the transactions even though Gibbs has since learned that this issue involved, among other things, the transfer of over $500,000 from the Eurosa accounts to the account of K. Harake.

27. Since the Harakes claimed in their July 2019 depositions to not know what happened to the money, Gibbs issued another subpoena to Bank of America on August 1, 2019 requesting the information regarding these online banking transfers with the alphanumeric codes as well as transactions with the description "Customer Withdrawal Image." The Harake Defendants finally gave up on objecting to the production of Bank of America records by Bank of America in light of the Court ordering them to give up.

BANK OF AMERICA PRODUCED RECORDS SHOWING OVER $500,000 WAS TRANSFERRED FROM EUROSA'S ACCOUNTS TO K. HARAKE

28. On or about August 9, 2019, Bank of America provided additional records that finally began to reveal the web of deceit (misappropriation, embezzlement, money laundering, misuse, and mismanagement, among other things) that the Harakes had hidden for so long – over $500,000 of Gibbs' money was transferred from Eurosa's accounts to the personal savings account of K. Harake. Gibbs is informed and believes that K. Harake did not provide consideration in return for the over $500,000 of Gibbs money transferred to her personal savings account, that K. Harake subsequently transferred the money to her personal checking account, and that K. Harake made spending decisions for the money at that point and spent Gibbs' money for unauthorized purposes. All of this was improper in different ways including, but not limited to, the commingling of the funds.

29. It is important to remember that the Harakes had full access in 2017 to their own banking records eventually produced by Bank of America on August 9, 2019, when Gibbs originally made the Discovery Requests. The Harakes should have obtained those records and

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preserved those records in 2017 given the 2017 Requests to Produce. In addition, Gibbs made demand for an accounting prior to instituting suit and the Harakes failed to provide such accounting but were on notice that they needed to obtain and maintain those records. In other words, the Harake Defendants and K. Harake had a responsibility to obtain all of their own bank records as it should have been evident to them that these records would be needed, and they should have produced those records following the June 9, 2019 Court Order without Gibbs having to depose the Harakes without the benefit of the additional records and needing to issue additional subpoenas to Bank of America. Instead, the Harakes either obtained those records in 2017 but failed to produce them to Gibbs (and hoped Bank of America also would not produce the records) or the Harake Defendants and K. Harake never took the step of obtaining their full and complete bank records from the outset, which would be inappropriate given the Discovery Requests and the nature of the documents that were hidden from Gibbs for over two years.

30. Gibbs also learned that S. Harake used Gibbs' money out of Eurosa's accounts to make payments to third parties in excess of $415,000 for unauthorized personal use. All of this was improper in different ways, including, but not limited to, the commingling of the funds.

31. Gibbs also learned that S. Harake transferred Gibbs' money out of Eurosa's accounts to himself in excess of $38,000. All of this was improper in different ways, including, but not limited to, the commingling of the funds.

THE IMPROPER OBJECTION STRATEGY BY THE HARAKES, NOT THEIR COUNSEL

32. It is absolutely clear that the objection strategy of the Harakes was to do anything they could to delay and hide these transactions and the improper use of the money so they could hide from the Court and Gibbs the fact that Gibbs' money was plainly used for inappropriate purposes. Gibbs believes that this objection strategy was dictated by S. Harake and K. Harake to

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their counsel. S. Harake flatly admitted in his deposition that he, not his counsel, made the decisions about the redactions.

33. Again, Gibbs requested these records in May 2017. The Harakes, through their objection strategy and baseless redactions, manipulated the discovery process for years to avoid Gibbs receiving the information it was entitled to receive about where its money went.

K. HARAKE'S REFUSAL TO PRODUCE HER RECORDS

34. The Harakes' obstruction and web of deceit continues to this day. K. Harake, as noted above, refused to allow for the production of her records until just days ago on December 10, 2019. Gibbs believes she withheld the documents at the direction of S. Harake and by her own choice.

35. As noted above, this Court has ordered that Gibbs is entitled to trace its money to be able to see where its money went and specifically held that K. Harake's financial records could become discoverable "if Plaintiff traces its funds to an account in Mrs. Harake's name".

36. The continued refusal to produce K. Harake's records plainly violated the letter and spirit of the Court's order that Gibbs was entitled to trace its money and to know where its money went.

37. Gibbs has needed these records to determine if it has viable claims against K. Harake. Gibbs could not know, and should not have known, whether it had a viable claim against her until, at an absolute minimum, it at least obtained the financial records showing how much of Gibbs' money was inappropriately transferred to K. Harake. As Gibbs understands S. Harake's position, he claims he was entitled to $33,000 per month for a period of time. While Gibbs contests S. Harake's position, Gibbs requested the bank records because, among other things, the only way to determine if the expenditures exceeded $33,000 per month was to see the

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bank records. Gibbs further notes that it actually believes that the statute of limitations does not start to run as to K. Harake until Gibbs has a reasonable opportunity to review the records that she only produced days ago. Gibbs was entitled to know what K. Harake did with the money for many reasons. One simple example is that the money could have been used for inappropriate personal purposes. There are many other examples.

38. Both K. Harake and S. Harake are responsible for Gibbs being kept in the dark as to the evidence of its claims against her. K. Harake objected to the production of her financial records as "irrelevant" in response to Gibbs' initial discovery requests when she was a party to the lawsuit, and then indicated she was considering a claim against Gibbs for violation of the South Carolina Frivolous Proceedings Act based on her allegation that Gibbs had no basis for viable claims against her and there was "no reason that K. Harake should be a party to this litigation." K. Harake continued to allege that seeking her financial records was a "fishing expedition" and that there were no "cognizable claims" against her and that any such claims would be frivolous as she continued to fight the production of her bank records until just days ago. And yet, at the very same time, K. Harake and the Harake Defendants knew the story that was being hidden behind the non-production of the records. Gibbs also wanted the Harake Defendants' records and K. Harake's records, among other reasons, so it could prove that the money was transferred to K. Harake and she then used the money for inappropriate purposes. And that has now happened – the records that were hidden for so long have now been produced (though K. Harake's records were only produced four business days ago) and show that the money was used inappropriately.

39. The first time that Gibbs saw that over $500,000 was transferred to K. Harake was on August 9, 2019. Gibbs could not know, and should not have known, that it had a claim

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against K. Harake until, at the absolute earliest, 30 days from August 9, 2019 (*i.e.*, September 9, 2019), allowing time to review and evaluate the records so no alleged limitation period started running until September 9, 2019.

40. Through the Harakes' obstruction of the discovery process and failure to produce the requested documents for so long, among other reasons, the Harakes would also be barred from asserting the statute of limitations or any other time-based defense as a defense to Plaintiff's claims by the doctrines of waiver and/or estoppel and/or any other applicable doctrine as to that conduct.

41. As noted above, the records demonstrate as to K. Harake that over $500,000 of Gibbs' money was inappropriately transferred by S. Harake from the accounts of Eurosa to the savings account of K. Harake. Gibbs is informed and believes that K. Harake transferred the money from her personal savings account into her personal checking account and then she made the spending decisions and used these funds for inappropriate personal purposes and other inappropriate purposes.

42. Documents produced to date also show that funds in excess of $418,000 were transferred from the Eurosa Operating Account to third parties. The transfers to third parties involve over 500 transactions ranging from $0.17 to $100,000. Those transactions would have been itemized here, but it would have added over 30 pages to the complaint. Gibbs is informed and believes that S. Harake used these funds for inappropriate purposes.

43. Over $38,000 of Gibbs' money was also inappropriately transferred by S. Harake from the accounts of Eurosa to his own account. Gibbs is informed and believes that S. Harake used these funds for inappropriate and unauthorized purposes.

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AMENDMENT TO THE FIRST CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Contract as to Harake Defendants)
(Gibbs' Individual Claims for Declaratory Judgment as to Harake Defendants)

44. The allegations of the other paragraphs of this amendment, and the paragraphs in the Second Amended Complaint, are incorporated herein by reference.

45. The Harake Defendants breached the agreement by, among other ways, taking funds that Gibbs provided and improperly transferring those funds to K. Harake for unauthorized purposes.

46. The Harake Defendants also breached the agreement by, among other ways, taking funds that Gibbs provided and improperly transferring those funds to third parties for unauthorized purposes.

47. The Harake Defendants also breached the agreement by, among other ways, taking funds that Gibbs provided and improperly transferring those funds to S. Harake for unauthorized purposes.

48. The Harake Defendants also breached the agreement by, among other ways, not using Gibbs' money for the purposes for which it was supposed to be used.

49. The Harake Defendants also breached the agreement by commingling funds.

50. The conduct described herein constitutes misappropriation, embezzlement, money laundering, misuse of money and/or mismanagement of money in breach of the agreement.

51. The Harake Defendants also breached the agreement by misusing and/or mismanaging Gibbs' money that Gibbs paid directly to other entities at S. Harake's request.

52. The Harake Defendants also breached the agreement by, among other things, failing to locate sufficient investment opportunities, failing to provide or locate additional needed capital, failing to properly manage and achieve success, and failing to perform their other responsibilities under the agreement.

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53. The Harake Defendants also breached the agreement in the ways articulated in the Second Amended Complaint on file with the Court prior to this Amendment.

54. As a result of the above-described inappropriate conduct, Gibbs seeks to recover its damages from the Harake Defendants in an amount to be proven at trial.

AMENDMENT TO THE SECOND CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing as to Harake Defendants)

55. The allegations of the other paragraphs of this amendment, and the paragraphs in the Second Amended Complaint, are incorporated herein by reference.

56. The conduct by the Harake Defendants described herein constitutes a breach of the implied covenant of good faith and fair dealing.

57. Gibbs accordingly is entitled to recover compensatory damages from the Harake Defendants for the breach in an amount to be proven at trial.

AMENDMENT TO THE THIRD CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Fiduciary Duty as to Harake Defendants)
(Gibbs' Individual Claims for Aiding and Abetting Breach of Fiduciary Duty as to K. Harake)

58. The allegations of the other paragraphs of this amendment, and the paragraphs in the Second Amended Complaint, are incorporated herein by reference.

59. A fiduciary must act in good faith and is not allowed to make use of that relationship to benefit his or her personal interests.

60. Gibbs is informed and believes that Gibbs' money was inappropriately provided by the Harake Defendants to K. Harake, third parties, and S. Harake himself.

61. The Harake Defendants breached their duties, fiduciary and otherwise, by, among other things, misappropriating/embezzling/laundering/misusing/mismanaging Gibbs' money, not using the money for the purposes for which it was to be used, making improper transfers to K.

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Harake, third parties, and himself, misusing and/or mismanaging Gibbs' money that Gibbs paid to others at S. Harake's request, failing to properly identify and evaluate investment opportunities, failing to provide or locate additional needed capital, failing to properly manage and achieve success, and failing to perform other fiduciary responsibilities.

62. The Harake Defendants also breached their duties, fiduciary and otherwise, in the ways articulated in the Second Amended Complaint on file with the Court prior to this Amendment.

63. The Harake Defendants also breached their fiduciary duty by commingling funds. The Harake Defendants also breached their fiduciary duty by using a corporate account as a "personal playpen" and as a personal checking account for unauthorized payments.

64. Gibbs is informed and believes that K. Harake knew, or should have known, or had constructive knowledge, that the transfers were made to her account and she did, in fact, use the money. All of this was improper in different ways including, but not limited to, the commingling of such funds.

65. Gibbs is also informed and believes that the Harake Defendants and K. Harake concealed money that was being improperly taken from Gibbs by the Harake Defendants and K. Harake. Gibbs is also informed and believes that the transfers were made to a personal savings account of K. Harake and that she then transferred the money to her personal checking account for improper and unauthorized use. Gibbs is also informed and believes that K. Harake made spending decisions herself and actually wrote checks and/or initiated electronic transfers herself using Gibbs' funds. All of this was improper in different ways including, but not limited to, the commingling of such funds.

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66. By receiving, transferring from one of her accounts to another, making spending decisions, and/or using embezzled/misappropriated/laundered/misused/mismanaged funds from the Harake Defendants, among other things, K. Harake was aiding and abetting the Harake Defendants' breach of their fiduciary duties to Plaintiff.

67. Plaintiff is accordingly entitled to recover compensatory damages from K. Harake for such conduct in an amount to be proven at trial.

68. Plaintiff is also entitled to recover compensatory damages from the Harake Defendants for such conduct in an amount to be proven at trial.

69. Plaintiff is also informed and believes that the Harake Defendants' conduct and K. Harake's conduct was reckless, malicious, willful, wanton, and/or grossly negligent entitling Plaintiff to recover punitive damages.

AMENDMENT TO THE FIFTH CLAIM FOR RELIEF
(Gibbs' Claims for an Accounting as to S. Harake, Eurosa, and K. Harake)

70. The allegations of the other paragraphs of this amendment to the Complaint, and the paragraphs in the Second Amended Complaint, are incorporated herein by reference.

71. As a result of the alleged and wrongful activities of the Harake Defendants and K. Harake, Plaintiff is entitled to a complete accounting of the subject assets as well as an appropriate division of those assets and also an accounting of all financial and other transactions involving the Harake Defendants, as well as K. Harake, in any way involving Gibbs.

AMENDMENT TO THE EIGHTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Conversion Against Harake Defendants and K. Harake)
(Gibbs' Individual Claims Against K. Harake for Aiding/Abetting Conversion)

72. The allegations of the other paragraphs of this amendment to the Complaint, and the paragraphs in the Second Amended Complaint, are incorporated herein by reference.

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73. Gibbs was the lawful owner of funds that the Harake Defendants, as well as K. Harake, improperly used.

74. The Harake Defendants and K. Harake exercised dominion and control over the funds that were improperly misappropriated/embezzled/laundered/misused/mismanaged by the Harake Defendants and K. Harake.

75. Gibbs is informed and believes that K. Harake knew, or should have known, or had constructive knowledge, that the transfers were made to her account and she did, in fact, use the money for improper purposes for herself and/or her family and/or other improper purposes. Gibbs is also informed and believes that K. Harake concealed from Gibbs the fact that money was being taken improperly from Gibbs by the Harake Defendants and K. Harake. Gibbs is also informed and believes that the transfers were made to a personal savings account of K. Harake and she then transferred the money to her personal checking account for improper use. Gibbs is also informed and believes that K. Harake actually made spending decisions and wrote checks and/or initiated electronic transfers herself using Gibbs' funds and did so improperly and without authorization.

76. The Harake Defendants and K. Harake excluded Gibbs from use and possession of the funds without authorization, constituting a conversion.

77. The above-described actions entitle Plaintiff to recover compensatory damages, in an amount to be proven at trial, from the Harake Defendants for conversion and from K. Harake for conversion and/or aiding/abetting conversion.

78. The above-described actions were accomplished through reckless, malicious, willful and wanton and/or grossly negligent conduct entitling Plaintiff to recover punitive damages.

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AMENDMENT TO THE NINTH CLAIM FOR RELIEF
(Gibbs' Claims for Unfair and Deceptive Trade Practices as to S. Harake, Eurosa, and K. Harake)

79. The allegations of the other paragraphs of this amendment to the Complaint, and the paragraphs in the Second Amended Complaint, are incorporated herein by reference.

80. The conduct of the Harake Defendants, as well as K. Harake, as alleged above, and as alleged in the Second Amended Complaint previously filed in this matter, constitute one or more acts or practices in commerce in this State in violation of the South Carolina Unfair Trade Practices Act, resulting in an impact on the public interest. The aforementioned conduct is also subject to repetition.

81. Plaintiff accordingly is entitled to a judgment against the Harake Defendants, as well as K. Harake, for the amount of Plaintiff's compensatory damages proximately caused by these Defendants' unfair trade practices, to be trebled in accordance with South Carolina law, together with interest (including prejudgment interest), as allowed by law, and Plaintiff's reasonable costs, expenses and attorneys' fees incurred in filing and prosecuting this action.

TENTH CLAIM FOR RELIEF
(Fraud as to S. Harake/Eurosa)

82. The allegations of the other paragraphs of this amendment to the Complaint are incorporated herein by reference.

83. S. Harake engaged in fraudulent conduct by misappropriating/embezzling/ laundering/misusing/mismanaging funds involving Gibbs.

84. S. Harake concealed from Gibbs that he had used Gibbs' funds for unauthorized purposes.

85. S. Harake concealed from Gibbs that he had misappropriated/embezzled/ laundered/mismanaged/misused funds from Gibbs.

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86. S. Harake concealed from Gibbs that his wife K. Harake participated in and used the embezzled/misappropriated/laundered/mismanaged/misused funds from Gibbs.

87. S. Harake represented to Gibbs that his handling of Gibbs' funds was appropriate and he denied any improper use of Gibbs' money and that was a misrepresentation.

88. S. Harake represented to Gibbs, and convinced Gibbs, that he could turn Mobix around when he knew, or should have known, he did not have the ability to do so.

89. S. Harake made other representations to Gibbs about his ability to achieve success in many ways for Gibbs, which was false.

90. The representations were false and/or the concealment amounted to falsehood and was inappropriate.

91. The misrepresentations were material.

92. S. Harake knew that the representations were false or, in the alternative, recklessly disregarded the representations' truth or falsity. S. Harake also knew the concealment amounted to misrepresentations and/or was otherwise inappropriate or, in the alternative, recklessly disregarded the inappropriate nature of concealing the information.

93. S. Harake intended that Gibbs act upon his misrepresentations and/or concealment.

94. Gibbs was not aware that Harake's misrepresentations were false and, justifiably, relied upon the truth of S. Harake's representations/concealment.

95. As a direct and proximate result of S. Harake's misrepresentations and/or concealment, Gibbs suffered injuries and damages and Gibbs, accordingly, is entitled to compensatory damages in an amount to be proven at trial.

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96. The conduct by S. Harake was reckless, malicious, willful, wanton and/or grossly negligent, entitling Plaintiff to recover punitive damages from S. Harake.

ELEVENTH CLAIM FOR RELIEF
(Fraud as to K. Harake)

97. The allegations of the other paragraphs of this amendment to the Complaint, as well as the allegations of the Second Amended Complaint already on file, are incorporated herein by reference.

98. K. Harake engaged in fraudulent conduct by misappropriating/embezzling/ laundering/misusing/mismanaging funds for Gibbs and/or aiding/abetting in that type conduct.

99. K. Harake concealed from Gibbs that she and S. Harake used Gibbs' funds for inappropriate purposes.

100. K. Harake concealed from Gibbs that she and S. Harake misappropriated/ embezzled/laundered/mismanaged/misused funds from Gibbs.

101. K. Harake concealed from Gibbs that S. Harake made transfers of Gibbs' money from the Eurosa accounts to her personal savings account.

102. K. Harake concealed from Gibbs that she made transfers of Gibbs' money from her personal savings account to her personal checking account and that she then made improper and unauthorized spending decisions concerning the Gibbs money she transferred to her personal checking account.

103. Gibbs is informed and believes that K. Harake was aware that S. Harake reported to Gibbs that his handling of Gibbs' funds was appropriate and that he denied any improper use of Gibbs' money. K. Harake concealed from Gibbs that S. Harake's representations were not true.

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104. The above concealment by K. Harake amounted to misrepresentations and was inappropriate.

105. The representations were material.

106. K. Harake knew that the representations by her husband were false or, in the alternative, recklessly disregarded the truth or falsity of the representations. K. Harake also knew that the concealment amounted to misrepresentations and/or was otherwise inappropriate or, in the alternative, recklessly disregarded the inappropriate nature of the concealment.

107. K. Harake intended that Gibbs act upon the misrepresentations and/or concealment.

108. Gibbs was not aware of the concealment or that representations were false and, justifiably, relied on the truth of the representations.

109. As a direct and proximate result of K. Harake's conduct, Gibbs suffered injuries and damages. Gibbs accordingly is entitled to compensatory damages in an amount to be determined at trial.

110. The above-described conduct was reckless, malicious, willful, wanton, and grossly negligent. As a result, Plaintiff is also entitled to recover punitive damages from K. Harake.

TWELFTH CLAIM FOR RELIEF
(Civil Conspiracy Against the Harake Defendants and K. Harake)

111. The allegations of the other paragraphs of this amendment, and the paragraphs in the Second Amended Complaint previously filed, are incorporated herein by reference.

112. The Harake Defendants and K. Harake entered into an unlawful agreement and conspired to engage in unlawful conduct constituting an illegal combination or conspiracy to achieve the unlawful objective of misappropriating/embezzling/laundering/misusing/

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mismanaging money from Gibbs and concealing misappropriated/embezzled/laundered/ misused/mismanaged funds from Gibbs. This activity was undertaken with the primary purpose or object to be to impair Plaintiff financially.

113. The Harake Defendants transferred more than $500,000 from an account of Defendant Eurosa to one or more accounts of K. Harake to conceal/embezzle/launder/misuse/ mismanage funds from Plaintiff. As set forth above, inappropriate transfers also took place to third parties and to S. Harake's personal account that were used to benefit both S. Harake and K. Harake. Gibbs is informed and believes that K. Harake made inappropriate transfers of Gibbs' money provided to her.

114. The Harake Defendants and K. Harake went to great lengths to avoid the production of the financial records of the Harake Defendants and K. Harake to Plaintiff, requiring Plaintiff to expend significant resources to trace the funds from the accounts of the Harake Defendants to the accounts of K. Harake.

115. As a direct and proximate result of the Harake Defendants' and K. Harake's conduct, Gibbs has suffered injuries and damages beyond the damages alleged in other causes of action. These special damages include, but are not limited to, the inability to use the money for the appropriate purpose because it was taken inappropriately resulting in the depletion of funds available to be used for investment and/or to contribute to the funds available to try to make the businesses successful and/or resulting in the failure of business opportunities.

116. Plaintiff accordingly is entitled to compensatory damages in an amount to be proven at trial from the Harake Defendants and K. Harake.

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117. The above-described actions were accomplished through reckless, malicious, willful, wanton, and grossly negligent conduct. As a result, Plaintiff is also entitled to recover punitive damages from the Harake Defendants and K. Harake.

THIRTEENTH CLAIM FOR RELIEF
(Gibbs' Claims for Unjust Enrichment, Quasi Contract, Implied Contract, Quantum Meruit as to K. Harake)

118. The allegations of the other paragraphs of this amendment, and the paragraphs in the Second Amended Complaint previously filed, are incorporated herein by reference.

119. Gibbs made non-gratuitous payments to S. Harake/Eurosa for specified business purposes.

120. The Harake Defendants then transferred more than $500,000 of Gibbs' money from the accounts of Eurosa to a personal account of K. Harake; more than $418,000 of Gibbs' money to third parties; and more than $38,000 of Gibbs' money to S. Harake. Those transfers were without Plaintiff's approval and with the purpose of concealing funds from Gibbs that were misappropriated/embezzled/laundered/misused/mismanaged.

121. K. Harake did not provide consideration in return for the more than $500,000 of Gibbs' money transferred to her personal account.

122. As a result, K. Harake received non-gratuitous funds provided by Gibbs and a benefit was conferred on K. Harake. K. Harake also received a benefit to the extent funds were transferred to third parties and/or S. Harake that were used to benefit K. Harake, S. Harake, and/or their family.

123. The retention and/or use of the money by K. Harake, and/or the benefits K. Harake received by the money being paid to anyone other than K. Harake that also benefited K. Harake, S. Harake, and/or her family, is unjust and has unjustly enriched K. Harake.

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124. Plaintiff accordingly is entitled to compensatory damages from K. Harake in an amount to be proven at trial.

FOURTEENTH CLAIM FOR RELIEF
(Gibbs' Claims for Unjust Enrichment, Quasi Contract, Implied Contract, Quantum Meruit, as to S. Harake and Eurosa)

125. The allegations of the other paragraphs of this amendment, and the paragraphs in the Second Amended Complaint previously filed, are incorporated herein by reference.

126. Gibbs made non-gratuitous payments to the Harake Defendants for specified business purposes.

127. As set forth above, the Harake Defendants transferred more than $500,000 of Gibbs' money from the accounts of Eurosa to a personal account of K. Harake; more than $418,000 of Gibbs' money to third parties; and more than $38,000 to himself. Those transfers were without Plaintiff's approval and with the purpose of concealing funds from Gibbs that were misappropriated/embezzled/laundered/misused/mismanaged.

128. As a result, the Harake Defendants received non-gratuitous funds provided by Gibbs and a benefit was conferred on the Harake Defendants.

129. The retention and/or use of the money by the Harake Defendants and/or the benefits the Harake Defendants received by the money being paid to anyone other than the Harake Defendants that also benefited the Harake Defendants is unjust and has unjustly enriched the Harake Defendants.

130. The fact that Gibbs paid in excess of $1.2 million to S. Harake/Eurosa and additional sums to others at S. Harake's/Eurosa's request and the fact that S. Harake stole money from Gibbs, as now established by S. Harake and K. Harake's own records, entitles Gibbs to recover all of the money it paid to S. Harake/Eurosa as well as the money Gibbs paid to third

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parties at S. Harake's/Eurosa's request as S. Harake/Eurosa have been unjustly enriched and that has now been established with the production of the remaining bank records only four business days ago.

131. Plaintiff is accordingly entitled to recover from the Harake Defendants in an amount to be proven at trial.

FIFTEENTH CLAIM FOR RELIEF
(Piercing the Corporate Veil of Eurosa)

132. The allegations of the other paragraphs of this amendment, and the paragraphs of the Second Amended Complaint, are incorporated herein by reference.

133. Gibbs is informed and believes that:

A. Eurosa was grossly undercapitalized based on unredacted bank records that have now been produced in this case. The initial "capital" of Eurosa was a $25,000 loan by K. Harake to S. Harake on or about March 30, 2015.

B. At the time of the initial infusion of cash by Gibbs on or about May 27, 2015, Eurosa's account was overdrawn which not only shows that Eurosa was grossly undercapitalized, but also shows that it was insolvent.

C. As set forth above, S. Harake siphoned substantial funds out of Eurosa's account and he was the owner of Eurosa. Money was also laundered by S. Harake using S. Harake's accounts and his wife K. Harake's accounts.

D. There were no other functioning officers or directors for Eurosa aside from S. Harake.

E. The corporate entity Eurosa was merely a façade for the activities of S. Harake as the only owner.

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F. While this factor is not as significant as it once was, there also was a failure to observe corporate formalities and an absence of corporate records.

134. Gibbs is also informed and believes that:

A. It would be unjust and/or fundamentally unfair for the acts of Eurosa not to be recognized as the acts of Harake individually.

B. Harake was aware of Gibbs' concerns and thereafter continued to act in a self-serving manner and in disregard of Gibbs' rights by, among other things, siphoning money off from Eurosa that originated from Gibbs.

C. An individual business person like S. Harake is not allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell.

D. The entity structure has been used and abused by S. Harake to conceal and assist him in fraudulent and other inappropriate conduct including, but not limited to, misappropriation, embezzlement, money laundering, misuse of money, mismanagement of money, commingling of funds, etc. and S. Harake has engaged in that conduct and other conduct that violates public policy.

E. Equity requires that the corporate structure be set aside and individual liability be imposed on S. Harake.

135. Gibbs accordingly requests that the corporate structure for Eurosa be set aside and that S. Harake, as its shareholder, be held to account for the liabilities and damages suffered by Gibbs as a result of S. Harake's conduct.

136. Gibbs requests that a judgment be entered in Gibbs' favor and against S. Harake in an amount to be determined at trial for compensatory and punitive damages.

WHEREFORE, Plaintiff respectfully prays that the Court:

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1. Enter a judgment for monetary compensatory damages in favor of Gibbs and against the Harake Defendants and K. Harake awarding recovery in an amount to be proven at trial;

2. Enter a judgment in favor of Gibbs and against the Harake Defendants and K. Harake for punitive damages;

3. Enter a judgment in favor of Gibbs and against the Harake Defendants and K. Harake for treble damages and reasonable costs, expenses, and attorneys' fees;

4. Rescind the inappropriate actions of the Harake Defendants and K. Harake and award other appropriate remedial relief in favor of Gibbs;

5. Award an accounting of the subject assets and appropriate division of those assets;

6. Award Gibbs a trial by jury on all issues so triable;

7. Award Gibbs its attorneys' fees, costs, expenses and interest (including pre-judgment interest);

8. Grant such other and further relief in favor of Gibbs as the Court deems just and proper.

This 16th day of December, 2019.

s/KEVIN A. DUNLAP
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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Pavel Polukhin, and Shai Hemli, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **PLAINTIFF GIBBS INTERNATIONAL, INC.'S MOTION TO COMPEL AS TO DEFENDANTS KATHERINE HARAKE AND SARMAD HARAKE**

Pursuant to the South Carolina Rules of Civil Procedure and applicable case law, Plaintiff Gibbs International, Inc. ("Gibbs"), respectfully moves the Court for an order compelling Defendants Katherine Harake ("K. Harake") and Sarmad Harake ("S. Harake") to appear for additional deposition testimony based on documents produced after their depositions. In support of the foregoing, Gibbs offers the following:

OVERVIEW

- Gibbs served discovery requests on S. Harake and K. Harake on or about May 19, 2017 requesting the bank statements of Eurosa, Inc. ("Eurosa"), S. Harake (collectively, the "Harake Defendants") and K. Harake. The Harake Defendants and K. Harake refused to produce those documents without a Court order. The detailed history of the events, from Gibbs serving the discovery requests until the present time, is set forth in detail in the motion filed with this Court on December 16, 2019.

- Plaintiff took the first day of S. Harake's deposition on January 9, 2019. At that time, S. Harake was still refusing to produce his unredacted bank records without a Court order.

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Plaintiff was therefore unable to examine S. Harake about those bank records at that deposition.

- At the conclusion of S. Harake's January 9, 2019 deposition, Gibbs' counsel put the following on the record:

> At this time I don't have additional questions.· If Ms. Joyner has questions of the witness, I may have additional questions.· But we have entered into an agreement whereby I can continue the examination, and my continued examination after today will deal with the banking records.· And, you know, we've entered into an agreement that that examination can take place at that later time. We have also agreed, that since this deposition is being left open, that Ms. Joyner can speak with her client in the interim.· And she is going to go ahead tonight and ask her questions in response to the examination that I have conducted today, and then if I have any other questions in response to her questions, I will ask those questions tonight, but the examination about the banking records will take place on a reconvened date.

- The Harake Defendants were ordered to produce their unredacted bank records by Court order dated June 3, 2019.

- Plaintiff took the second deposition of S. Harake on July 25, 2019. During this deposition, Plaintiff examined S. Harake regarding, among other things, line-item transactions from the produced bank statements which were identified as "Customer Withdrawal Image" and numerous online banking transfers identified by an alphanumeric code. S. Harake claimed to have no knowledge or recollection as to where these transfers, totaling over $500,000, went.

- At the conclusion of S. Harake's July 25, 2019 deposition, Gibbs' counsel put the following on the record:

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> It's my position that additional records need to be produced, as we've gone through this testimony today. So on the record, I'm not adjourning the deposition. I believe I'm entitled to get these additional records. And if I believe additional examination is necessary, I'll let you know, and then you can let me know your position.

- Plaintiff took the deposition of K. Harake on July 26, 2019. K. Harake claimed to have no knowledge or recollection regarding the transfer of funds from the accounts of S. Harake/Eurosa into account(s) in her name.

- Plaintiff issued another subpoena to Bank of America ("BOA") requesting any additional records regarding the transactions identified as "Customer Withdrawal Image" and the online banking transfers identified by an alphanumeric code since K. Harake and S. Harake disclaimed any knowledge of those transactions in their depositions.

- BOA provided a response to this subpoena which revealed for the first time that most of the transactions in question involved the transfer of funds from S. Harake to a savings account in K. Harake's name.

- Plaintiff issued another subpoena to BOA requesting further backup regarding several of the transactions identified by an alphanumeric code.

- BOA provided a response to this subpoena which revealed that even more of the transactions in question involved the transfer of funds to a savings account in K. Harake's name. The truth is it was S. Harake's and K. Harake's responsibility to obtain all of these records from their bank at the outset of this litigation and to produce them in 2017 when they were requested. The Harakes chose not to do so.

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- Also on August 30, 2019, Defendants produced their eleventh supplemental document production, consisting of 105 pages of bank statements and other financial and business documents, most of which are in Turkish.

- On October 29, 2019, Defendants produced their twelfth supplemental document production, consisting of 191 pages of bank statements and other financial and business documents, many of which are in Turkish.

- On December 10, 2019, Defendants produced their thirteenth supplemental document production, consisting of 255 pages of bank statements for accounts in K. Harake's name.

- On March 2, 2020, Plaintiff's counsel sent the following e-mail to Defendants' counsel:

> Good morning. Hope you had a good weekend. Just a quick note that I would like to set a time to depose Sam and Katherine in connection with additional documents produced. Would April 2-3 work? Also, I would like to go ahead and set depositions for your experts. Does April 6-8 work? Thanks and hope all is well.

- Defendants' counsel responded on March 2, 2020 with an objection to producing S. Harake for deposition, but did not object to producing K. Harake at that time.

- Given the pandemic and the fact that Plaintiff's counsel's wife was diagnosed with, and had surgery to remove, a brain tumor in April, Plaintiff's counsel, on May 11, 2020, again sent an e-mail to Defendants' counsel requesting dates for the depositions of S. Harake and K. Harake. Plaintiff's counsel further clarified the reasoning for these depositions:

> You also indicated you may oppose Sam's deposition. If I do not hear from you by Tuesday at 5:00, I will assume you are going to oppose his deposition as previously indicated and I will file a motion to compel. As I have previously indicated in this case, I prefer not to have to file a motion

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to compel but will do so if need be. As to Katherine, I request to take her deposition on June 4. I will take Sam's the following day if you change your mind or it is allowed by the Court.

As to Sam, I am requesting to depose him with regard to the document productions we received since his deposition. You will also recall that we did not receive the evidence about the transfers with the alphanumeric codes until after Sam and Katherine's depositions, as they both responded that they did not know where those transfers went so he will be deposed on those issues as well. I am also requesting to depose Sam about Katherine's records since transfers were made from his account to her account. Again, it is my preference not to have to file a motion but I will go ahead and draft one in the event you decide that is your preference.

- Defendants' counsel responded that same day as follows:

> For a variety of reasons, we object to your taking Sam and Katherine Harake's depositions, including as I mentioned before that they have been deposed previously. So unfortunately, it appears you will have to file your motion.

No further explanation or justification of the Harakes' position was given other than to say that they had previously been deposed.

ADDITIONAL BACKGROUND AND THE REQUESTED RELIEF

- Gibbs' efforts to obtain the necessary bank records to allow it to evaluate K. Harake's involvement in the embezzlement/ misappropriation/ money laundering/ misuse/ mismanagement have been obstructed by K. Harake and the Harake Defendants at every turn. At one point, the Harake Defendants and K. Harake even went so far as threatening to bring a frivolous lawsuit claim against Gibbs if it did not voluntarily dismiss K. Harake from the lawsuit. More specifically, they indicated that Gibbs should voluntarily dismiss its claims against K. Harake and further indicated:

> *[I]f the claim is not voluntarily dismissed, we will be discussing with our clients the possibility of filing a claim under the South Carolina Frivolous Proceedings Act* ***as there is no reason that Katherine Harake should be a party to this litigation***.

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(Emphasis added) Gibbs agreed to voluntarily dismiss K. Harake from the lawsuit until it could secure K. Harake's financial information and conclude its evaluation of potential claims against her.

- Finally, on or about November 21, 2018, the Harake Defendants produced financial records of S. Harake and Eurosa, but the financial records were heavily redacted. The Harake Defendants' redactions hid from Gibbs the details of over 620 withdrawals and debits from S. Harake's and Eurosa's accounts totaling more than $875,000, including nearly 100 separate withdrawals for greater than $1,000 each, and at least thirteen withdrawals between $10,000 and $20,000 each. The Harake Defendants did not produce any of the financial records of K. Harake.

- Gibbs immediately filed a motion to remove the redactions in the Harake Defendants' financial documents so that it could trace where the Harake Defendants were transferring hundreds of thousands of dollars, and also to determine whether any of this money was being transferred to K. Harake inappropriately and without Gibbs' authorization. Gibbs has also moved to compel K. Harake to produce her financial records.

- The Harake Defendants opposed Gibbs' motions to compel arguing, among other things that:

    - K. Harake's financial records are not relevant to this litigation and "Gibbs is not entitled to a fishing expedition of K. Harake's documents"; and

    - The unredacted financial records of the Harake Defendants "would be enabling an improper fishing expedition" and that "the particular places where K. Harake eats

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and shops personally or where Eurosa buys things" are not relevant to the litigation.

[Opp. at P. 5]

- The Court entered an Order on June 3, 2019 rejecting the contentions and requiring the production of the unredacted financial records of Defendants S. Harake and Eurosa as follows:

> [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.

[Order, June 3, 2019 at P. 9] The Court's June 3, 2019 Order also provided:

> 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.

[Order, June 3, 2019 at P. 8] (Emphasis added)

- Finally, after this needlessly tortured and time-consuming process, and more than two years after Gibbs requested the production of the Harake Defendants' unredacted financial records, the Harake Defendants finally produced their unredacted financial records on June 6, 2019. And yet again, no records were produced by K. Harake.

- The unredacted Bank of America records finally provided by the Harake Defendants in June 2019 contained a number of transactions with alphanumeric codes and some transactions labeled "Customer Withdrawal Image." The information for these

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transactions in the unredacted Bank of America records did not specify where Gibbs' money went when the Harake Defendants transferred it out of their accounts.

- Gibbs believes that electronic transfers were deliberately used by S. Harake because those transfers would only have alphanumeric codes and would not specify where the money went, thereby making it more difficult for Gibbs to trace the money. Gibbs also believes that S. Harake used electronic transfers and the money was shifted to K. Harake because S. Harake, K. Harake and Eurosa did not file federal or state tax returns in the United States or any foreign country. S. Harake wanted to hide assets from the taxing authorities in this country. In fact, S. Harake bragged to Gibbs employees that he had never filed a tax return anywhere – not in any state or with the United States, Canada, Turkey or any other country.

- To try to answer the questions about the whereabouts of its money, Gibbs took the depositions of the Harakes in July 2019 based on the records Gibbs finally received in June 2019. In those depositions, the Harakes disclaimed knowledge of what happened to Gibbs' money as reflected in the transactions with alphanumeric codes or labeled as "Customer Withdrawal Image." Gibbs then issued additional subpoenas to Bank of America in August 2019 as to what happened to the money involved in the transactions with alphanumeric codes and Customer Withdrawal Images.

- Bank of America produced additional records in August/September 2019. And guess what those records showed? The records showed:

    - Over $500,000 of Gibbs' money was transferred to K. Harake. K. Harake testified she transferred whatever money she received from S. Harake/Eurosa out

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of her personal savings account to her personal checking account and she made spending decisions for the money at that point. K. Harake spent Gibbs' money for unauthorized/inappropriate personal purposes. All of this was improper in different ways including, but not limited to, the commingling of the funds.

- S. Harake used in excess of $400,000 of Gibbs' money out of Eurosa's accounts to make payments to third parties for unauthorized/inappropriate purposes. All of this was improper in different ways including, but not limited to, the commingling of the funds.

- S. Harake transferred Gibbs' money to himself in excess of $38,000. All of this was improper in different ways including, but not limited to, the commingling of the funds.

The Harakes' web of deceit has now been exposed, and Gibbs is entitled to examine S. Harake and K. Harake regarding these transactions.

- The Harake Defendants and K. Harake themselves caused significant delay and expense by withholding evidence and obstructing Gibbs' discovery efforts, including the redaction of the Harake Defendants' financial records to hide the transfer of more than $500,000 to K. Harake's account, the refusal to provide K. Harake's financial records claiming that there was "no reason" for K. Harake to be a party to the lawsuit and threatening to file a frivolous lawsuit claim against Gibbs if K. Harake was not voluntarily dismissed, and then, after Gibbs agreed to voluntarily dismiss K. Harake until it could investigate its potential causes of action against her during discovery, refusing to produce K. Harake's financial records because she was no longer a party to the lawsuit.

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It took an Order from this Court for the Harake Defendants to finally produce the unredacted records that Gibbs needed to trace its money to K. Harake's account. Until just December 10, 2019, K. Harake refused to produce her financial records despite the Bank of America records tracing Gibbs' money to her personal savings account. Finally, in apparent recognition of the futility of this position, and over 2 years and 9 months after Gibbs' request was made for K. Harake's records, K. Harake produced the records on December 10, 2019.

- The Harake Defendants' refusal to provide K. Harake's financial records was further contrary to the letter and spirit of the June 3, 2019 Order of this Court, which plainly held that K. Harake's financial records could become discoverable if Gibbs could trace its funds to her account:

> 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.

[Order, June 3, 2019 at P. 8]

- Gibbs is plainly entitled to depose K. Harake and S. Harake about the records produced after their depositions. Those records include: (1) records provided by BOA regarding transactions from bank statements identified as "Customer Withdrawal Image" and the online banking transfers identified by an alphanumeric code; (2) Defendants' eleventh supplemental document production, consisting of 105 pages of bank statements and other financial and business documents, most of which are in Turkish; (3) Defendants' twelfth supplemental document production, consisting of 191 pages of bank statements and other financial and business documents, many of which are in Turkish; and (4) Defendants'

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thirteenth supplemental document production, consisting of 255 pages of bank statements for accounts in K. Harake's name.. This is just yet another attempt to evade discovery.

Counsel for Gibbs has consulted with Defendants' counsel and Defendants object to this motion.

CONCLUSION

It is time to end Harake's inappropriate and calculated strategy to interfere with legitimate discovery. As this Court has specifically ruled, Gibbs is entitled to know where its money went and how it was spent. The jury in this case is also entitled to know where the money went and how it was spent. Yet again, the Harakes are violating the letter and spirit of that Order by refusing to allow examination about the records. Gibbs respectfully requests that this Court allow it to depose S. Harake and K. Harake about the referenced documents.

WHEREFORE, Gibbs requests that the Court:

1. Order that S. Harake be made available to be deposed;
2. Order that K. Harake be made available to be deposed; and
3. Award any such other and further relief in favor of Gibbs as the Court may deem just and appropriate.

Respectfully submitted this 22nd day of May, 2020.

s/ Kevin A. Dunlap
Kevin A. Dunlap

Attorney for the Plaintiff
Gibbs International, Inc.

OF COUNSEL:

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ELECTRONICALLY FILED - 2020 Jul 22 2:50 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2017-CP-42-00740

Gibbs International, Inc., Individually and on behalf of IOTive, Inc.,

Plaintiffs,

v.

Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli,

Defendants.

Sarmad Harake and Eurosa, Inc.,

Counterclaim Plaintiffs

vs.

Gibbs International, Inc.,

Counterclaim Defendant.

JOINT MOTION

The parties respectfully request that the case be removed from the September 7, 2020 trial roster due to the number of witnesses and other reasons set forth in the e-mail attached as **Exhibit A**. The parties request that the case be re-set for trial during the weeks of October 26, November 9, or November 16, 2020.

The parties respectfully request the entry of the attached Order by the Court.

Respectfully submitted this 22nd day of July, 2020.

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s/KEVIN A. DUNLAP
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WE SO CONSENT:

s/LINDSAY A. JOYNER
John T. Lay, SC Bar No. 64526
Curtis L. Ott, SC Bar No. 66145
Lindsay A. Joyner, SC Bar No. 77437
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202

EXHIBIT A

From: Dunlap, Kevin A.
Sent: Wednesday, July 22, 2020 2:36 PM
To: Hayes, J. Mark Law Clerk (Dallas Meacham)
Cc: Lindsay Joyner
Subject: Gibbs International, Inc. v. S. Harake et al.
Attachments: Joint Motion.DOCX; Consent Order.DOCX

Dear Judge Hayes:

I hope that everything continues to go well for you. I am writing to you on behalf of both parties.

We received the jury trial roster for the four-day civil trial term starting September 7 for cases that "will be relatively short (few witnesses)."

Unfortunately, this case has 10 plus witnesses with three experts and will take longer than the allotted time for the trial. In addition, my wife was diagnosed with a malignant brain tumor, had brain surgery and two other surgeries. The cancer spread to other parts of her body for which she is now undergoing immunotherapy treatment. When the case is tried, I will need to make arrangements to quarantine myself for 14 days after the trial before I return home and will need to make arrangements to plan for someone to care for my wife and our 14 year old son during the trial and while I quarantine myself after the trial.

In light of all these circumstances, the parties request that the case be set for trial during the weeks of October 26, November 9, or November 16.

A motion and proposed order removing the case from the trial roster for the week of September 7 is attached. We will file the motion today. Thank you for your consideration of this joint request.

Kevin Dunlap
Partner
864.253.6105

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS Civil Action No.: 2017-CP-42-00740
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Pavel Polukhin, and Shai Hemli, Defendants.	**ORDER**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

The trial of this case shall be removed from the trial roster the week of September 7, 2020. The case shall be re-set for trial during the weeks of October 26, November 9, or November 16, 2020.

AND IT IS SO ORDERED.

WE SO CONSENT:

s/KEVIN A. DUNLAP
Kevin A. Dunlap
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Parker Poe Adams & Bernstein LLP
100 Dunbar Street, Suite 206
Spartanburg, South Carolina 29306
Counsel for Plaintiff

s/LINDSAY A. JOYNER
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Counsel for Defendants Sarmad Harake, Katherine Harake, and Eurosa, Inc.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	)	Civil Action No.: 2017-CP-42-00740 **MEMORANDUM IN OPPOSITION TO PLAINTIFF GIBBS INTERNATIONAL, INC.'S MOTION TO COMPEL AS TO DEFENDANTS KATHERINE HARAKE AND SARMAD HARAKE**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	)	

By and through his undersigned counsel, Defendant Sarmad Harake ("Sam Harake") and non-party Katherine Harake[1] hereby respectfully submit this Memorandum in Opposition to

[1] Plaintiff Gibbs International, Inc.'s incorrectly states that Katherine Harake is a defendant in this litigation. Katherine Harake was voluntarily dismissed from this action on June 1, 2018. Although Gibbs has threatened to bring other claims against her, those claims have not been filed and Katherine Harake has reserved all rights to challenge the sufficiency of any future claims brought against her. Therefore, at this time, she is not a defendant in this matter, and under the South Carolina Rules of Civil Procedure, she is entitled to the rights of a non-party.

Notably, as will be discussed later herein, Katherine Harake was not a part of any business relationship with Gibbs. However, in the Second Amended Complaint, Gibbs alleged Katherine Harake held certain shares of an entity called Yogipay and sought quantum meruit regarding the same. (6/9/17 2d Am. Compl., □□ 98-102). As early as March 20, 2018, the undersigned

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Plaintiff Gibbs International, Inc.'s ("Gibbs") motion to compel additional testimony. As set forth below, Gibbs is not entitled to the additional testimony it has requested. Accordingly, Gibbs' motion should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute arising from an alleged breach of contract and request for accounting of an alleged investment agreement between Defendant Eurosa, Inc. ("Eurosa") and Plaintiff Gibbs. While Gibbs initially filed this action in March 2017, it was twice amended, with the Second Amended Complaint filed on June 9, 2017. Discovery was served initially on Defendant Sam Harake around May 19, 2017. Thereafter, an entry of default was entered against Defendants Sam Harake, Eurosa, and Katherine Harake on July 17, 2017. The Harake Defendants timely answered the Second Amended Complaint on August 17, 2017. The entry of default was set aside by Order of this Court on December 21, 2017. Thereafter, the Harake Defendants timely answered Gibbs' discovery requests, providing objections as to scope and discoverability of certain requests.

Thereafter, on February 3, 2018, Gibbs moved to compel discovery responses from Sam Harake regarding financial documents.[2] A hearing on the motion to compel was held on April 5,

---

respectfully requested voluntary dismissal of Katherine Harake, given that Gibbs was in possession of the share certificate completely disproving the sole claim it had against her. (3/30/18 Joyner email, attached hereto as **Exhibit A**). It was not until months later on December 6, 2018, after, as will be discussed later herein, Gibbs had wrongly gained access to financial data of Sam Harake, Eurosa, Inc., and Katherine Harake that the undersigned and Katherine Harake became aware that Gibbs was seeking documents to determine a way to bring Katherine back into the litigation, and that motion was later denied.

[2] In Gibbs' April 4, 2018 Memorandum in Support of its Motion to Compel, Gibbs claimed that it may also need Katherine Harake's personal financial records, but those records were not requested as part of the original motion.

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2018. Following an additional request from the Court, the Court entered an Order denying Gibbs' Motion to Compel on July 5, 2018. As part of that ruling, the Court held that a request for production was not the appropriate mechanism to obtain corporate records from non-parties FED Securities, Pay Send, Eurofund, Gibbs Energy, QPAGOS, IOTive, and Yogi Pay. Gibbs then filed a Motion to Reconsider/Clarify pursuant to Rule 59, SCRCP, and any other applicable rule, seeking for the Court to rule on the financial records of Defendants Sarmad Harake and Eurosa as well as Katherine Harake. As provided in Footnote 1, *supra*, Katherine Harake was then dismissed from this litigation without prejudice on June 1, 2018. However, on August 22, 2018, without there having been a ruling on its Motion to Reconsider/Clarify, Gibbs served a subpoena pursuant to Rule 45, SCRCP, on Bank of America. Gibbs did not copy counsel for any of the parties with the subpoena, in violation of Rule 45(b)(1), SCRCP.[3] The subpoena requested the financial records of Defendants Sarmad Harake and Eurosa, Inc. as well as those of non-party, Katherine Harake. Bank of America responded to the subpoena less than ten (10) days after service, on August 31, 2018. Gibbs did not make Defendants and Mrs. Harake aware of this production of documents until November 7, 2018, more than two months after its receipt of the documents. Despite this behavior and the fact that the Court had previously denied Gibbs' motion to compel and had not ruled on its Motion to Reconsider/Clarify, the parties compromised within a as to the production of Sam Harake and Eurosa's financial records. As part of that compromise, Sam Harake and Eurosa would produce the records that were arguably relevant, redacting the names of the transactions that were not relevant while leaving the date and

[3] In relevant part, the Rule states "[u]nless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance."

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amount. Given that compromise, on November 21, 2018, Sam Harake and Eurosa produced account information, account statements, checks, and deposit slips for March 2015 through September 2016 since Gibbs had not paid Eurosa or Sam Harake anything since September 2016. Moreover, Eurosa or Sam Harake have not had any direct access to any investment funds of Gibbs after the start of the litigation in March 2017. At that time, there was neither an agreement nor obligation to produce non-party Katherine Harake's financial documents. Both parties filed motions related to the financial records on November 21 and 28, 2018. These motions were heard by the Court on December 7, 2018.

Thereafter, Gibbs chose to take Sam Harake's deposition the first time on January 9, 2019, with the understanding that the Court had not ruled on its motions, and the parties agreed to leave the deposition open so that counsel for Gibbs could examine Mr. Harake as to the banking records at a later date. On June 3, 2019, the Court denied Gibbs' motion to reconsider, which requested among other things additional months of records; granted in part and denied in part Gibbs' motion to remove the redactions from the banking records; and granted Katherine Harake's motion to quash and for protective order. (June 3 Order, attached hereto as **Exhibit B**). Following the June 3, 2019 Order, Sam Harake and Eurosa produced the unredacted version of the financial records, specifically the Bank of America subpoena response that Gibbs had gained access to without the Harake Defendants' knowledge, three days later on June 6, 2019. The June 3, 2019 Order was the first instance in which this Court ordered any form of financial documents to be produced, and Katherine Harake's documents were not ordered to be produced.

Between June 6, 2019 and the re-opened deposition of Sam Harake on July 25, 2019, Gibbs never sought additional documents from either Sam Harake, Eurosa, or Bank of America regarding any "Customer Withdrawal Image" or "alphanumeric code" that were present on the

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records produced on June 6, 2019. Gibbs chose to take Sam Harake's re-opened deposition on July 25, 2019. The re-opened deposition began in the morning on July 25, 2019 and ended at 8:22 pm, spanning some 327 pages of transcript. In total, Sam Harake has been deposed for more than eighteen hours.

During his deposition, Sam Harake was asked extensively about each line in those bank records, including about his knowledge of the Customer Withdrawal Images and alphanumeric codes. Contrary to what Gibbs' motion claims, Sam Harake did not "disclaim any knowledge of those transactions." (*See* Gibbs motion to compel, p. 3). He testified generally that

> Katherine received funds from the Eurosa account. Whether I took money from her, returned it, paid for things, asked her to pay things on behalf of -- of me, if I'm traveling. We have a tax bill. We have a triple net lease. It could be a hundred reasons why -- why I would send the money to her -- to her account. I had no reason to -- to -- to hide it. I could have sent it to my personal account and then send it from my personal account to hers. I don't need to do that. I give everything to the accountant. Everything is transparent, and he takes everything and puts it together.

(7/25/19 Sam Harake Depo., pp.77:15-78:2, attached hereto as **Exhibit C**). At times, he was able to explain what he believed a "Customer Withdrawal Image" or a transfer with an alphanumeric code went. (*See e.g.* Ex. C, 7/25/19 Sam Harake Depo., pp. 129:24-130:19). Sam Harake also attempted to refresh his recollection by looking through his phone to see if he could place what was happening on a particular date. (*See e.g.,* Ex. C, 7/25/19 Sam Harake Depo., at pp. 83:12-87:16). Additionally, Sam Harake confirmed that the transfers containing alphanumeric codes were made by him; specifically, when asked was it true for "all the online banking transfers" from the Eurosa or his personal account, Sam Harake testified "That is correct. I was the only one that had access to my account." (*See* Ex. C, 7/25/19 Sam Harake Depo., at pp. 127:4-11; 135:25-138:14; 259:5-20). Therefore, in response to Gibbs' attempt to

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leave that deposition open because Sam Harake could not provide all of the information about the "Customer Withdrawal Image" or alphanumeric codes to the satisfaction of counsel, the undersigned objected to leaving the deposition open. (*See* Ex. C, 7/25/19 Sam Harake Depo., pp. 325:24-326:11).

Following this deposition, Gibbs chose to take the deposition of non-party Katherine Harake rather than waiting for the production of any other documents. On July 26, 2019, Gibbs deposed non-party Katherine Harake for close to three hours, and she did not have any specific knowledge of the business arrangements at issue in this litigation. Katherine Harake confirmed she had received money from Eurosa, which Sam Harake had already testified that was the case the previous day. (7/26/19 Katherine Harake Depo., pp. 53:19-54:13, attached hereto as **Exhibit D**). She further testified that she transferred money to the Eurosa account one time as she is the only one authorized to make transfers in her account, and she confirmed that she did not have access to or make transfers from the Eurosa account. (Ex. D, 7/26/19 Katherine Harake Depo., pp. 58:4-19; 96:24-97:23). She also confirmed she had never reviewed financials, bank statements, or expense reports for Eurosa. (Ex. D, 7/26/19 Katherine Harake Depo., p. 93:12-23). At the conclusion of her deposition, Gibbs did not request her deposition remain open, and as such the deposition was concluded. (Ex. D, 7/26/19 Katherine Harake Depo., p. 98:4-9).

The supplemental productions on August 30, 2019 and October 29, 2019 contained receipts for payments made in Turkey related to Fed Securities which Greg Boozer had reviewed previously, tax documents related to Fed Securities, and statements from a credit union account confirming Sam Harake's previous testimony regarding the same. Gibbs issued two additional subpoenas to Bank of America, which Sam Harake did not object to. As a result of a later

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compromise between the parties, Katherine Harake's bank records were produced on December 10, 2019, without the necessity of a subpoena since Katherine is a non-party.

Although requested in response to the initial request on March 2, 2020, Gibbs has never given an indication of the amount of time it is seeking to spend deposing either Sam Harake or Katherine Harake. Rather, Gibbs has indicated it would like free reign to ask Sam Harake about a bank account to which he has no access and about the whereabouts of transfers it already has the answers to. Sam Harake has already testified Eurosa transferred money to Katherine, and Katherine Harake, who has already testified she received money from Eurosa and was not involved in the business dealings of Eurosa or related to Gibbs at all.

II. ARGUMENT

Gibbs' motion should be denied as the request for additional testimony is unnecessary. Gibbs could have requested such information prior to Sam Harake's re-opened deposition and Katherine Harake's deposition, but it chose not to do so.

As Rule 1, SCRCP, states: The South Carolina Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Pursuant to Rule 30(a)(2) of the South Carolina Rules of Civil Procedure, "[t]he deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Rule 30(a)(2), SCRCP. In construing the South Carolina Rules of Civil Procedure, courts looks for guidance to cases interpreting the Federal Rules. *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016). Accordingly, where there is no South Carolina law, courts look to the construction placed on the Federal Rules of Civil Procedure. *Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

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Federal courts generally disfavor repeat depositions absent a showing of a need or good reason. *E.g.*, *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 690 (D. Kan. 1996); *see also* Moore's Federal Practice, § 30.05 [l][c] at 30-30.1. In deciding whether a party may depose a witness for a second time, a court must consider whether (1) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had an ample opportunity to obtain the information by discovery; and (3) the burden or expense of the discovery sought outweighs the likely benefit. *See* Fed. Rs. Civ. P. 30(a)(2), 26(b)(1), and 26(b)(2). *See also Layman v. Junior Players Golf Acad., Inc.*, No. 9:15-cv-01463-DCN, 2015 U.S. Dist. LEXIS 194552, at *4 (D.S.C. Dec. 16, 2015). Leave for a second deposition *must* be denied if one of these three circumstances is present. *See* Fed. R. Civ. P. 26(b)(2)(C); Rule 26(b)(6)(B), SCRCP.

A court may also deny leave to conduct a second deposition, even if relevant documents are produced subsequent to the first deposition, if the party taking the deposition . . . ***chose to conduct the deposition prior to the completion of document discovery***. *Fresenius Med. Care Holdings, Inc. v. Roxane Labs., Inc.*, No. 05-0889, 2007 U.S. Dist. LEXIS 17834, at *10 (E.D. La. Oct. 29, 1997) (emphasis added). *See Global ePoint, Inc. v. GTECH Corp.*, No. CA 11-197 S, 2015 WL 113979, at *2 (D.R.I. Jan. 8, 2015) (denying plaintiff's motion to conduct second deposition of a non-party, even though defendant produced 7,500 documents after the first deposition, many of which directly related to the non-party); *Chavez v. Arancedo*, No. 17-20003, 2018 U.S. Dist. LEXIS 120703, at *10 (S.D. Fla. July 19, 2018) ("Plaintiff made the tactical decision to proceed with [witness's] deposition before all discovery was served and cannot complain that Defendant failed to meet her discovery obligations."); *Estate of Romain v. City of Grosse Pointe Farms*, No. 14-12289, 2016 U.S. Dist. LEXIS 75604, at *6 (E.D. Mich. June 10,

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2016) ("Magistrate Judge Davis rejected Plaintiffs' request to re-depose Mr. Matouk and Mr. Fisher specifically because Plaintiffs' counsel elected to proceed with their depositions despite not having all of the discovery requested from Defendants."). One district court has aptly summarized the issue with allowing such repeat depositions:

> If parties were routinely allowed to re-depose witnesses who had previously been deposed to completion, the result would be a system where a party would conduct preliminary depositions to "test the waters," and then follow up with further research. After reviewing the research, a party could then review the deposition testimony and use that testimony to fashion a line of questioning for a second deposition. . . . [T]his type of procedure would be unfair to the parties and would result in inefficient litigation of claims. . . . [A]ny party who, due to oversight or otherwise, failed to research the background of a deponent or failed to obtain relevant documents necessary to depose the witness, could re-depose the witness contending that the evidence was not previously known to counsel. ***Such a system would punish the well-prepared and reward the ill-prepared, thereby encouraging, or at least condoning, such lawyering.*** As a result, witnesses would be inconvenienced more and discovery would become more expensive.

Arugu v. City of Plantation, No. 09-61618-CIV, 2010 U.S. Dist. LEXIS 76034, at *12-13 (S.D. Fla. June 27, 2010) (emphasis added).

As a preliminary matter, Gibbs' motion makes insincere allegations that lack competent support in the record of this case, which contains hundreds of thousands of pages of documents and depositions of more than 10 witnesses. Additionally, there are multiple witnesses who have been named in discovery whose depositions Gibbs presumably has chosen not to take in order to perpetuate its myopic version of events. Specifically, there is no evidence in the record that the alphanumeric codes on Sam Harake's bank statements were "deliberately used" by Sam Harake to make it more difficult for Gibbs to trace its money. For such an allegation to be correct, at the time of each transfer, Sam Harake would have had to have anticipated that Gibbs would later sue him to return money that Harake claims is his. Such an allegation is simply nonsensical, especially given that Sam Harake has testified about the types of things that Eurosa transferred

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money for, including to his wife. (Ex. C, 7/25/19 Sam Harake Depo., pp.77:15-78:2). Additionally, whether certain money transferred by Gibbs to Eurosa was to be used for a specific purpose or was to go toward an overall amount is a vehemently disputed, factual issue in this matter. As Sam Harake has testified, his understanding of the agreement was:

> that all the money that he is sending for me that I'm able to use will be marked as a loan, so in the future, when we earn money in Turkey, I can bring it back to Eurosa, and then from Eurosa, I can repay Gibbs without any tax implications. And all this went towards the 3.2 million, and so it was not over and above. It was within what I had equally put on the table as well. . . . Mr. Gibbs said, 'This is how we should do it,' because he does the same with Mobix as well. And then he does it as a convertible, and then he writes it off as an expense, so he avoids paying taxes on it.

(Ex. C, 7/25/19 Sam Harake Depo., at pp. 125:21-126:17). Since the parties disagree on the agreement for the use of the money, any allegation that money was used for an "inappropriate" or "unauthorized" purpose is for the trier of fact during trial. Again, the original production of bank statements in redacted form was made by Sam Harake, not as a result of a court order, and unredacted versions of those records were produced once the Court Order was entered. No order was disobeyed.

Moreover, whether Sam Harake has filed tax returns is not being litigated in this case. But the allegations to that affect in the motion appear to be an attempt to create a bias by the Court against Sam Harake. These allegations also lack support as well because Sam Harake already testified that he and Katherine Harake are intending to file jointly, something that is being worked through by their accountant and the IRS, and that companies he owns in Turkey and Hong Kong have filed their respective taxes. (1/9/19 Sam Harake Depo., pp. 48:24-55:25, attached hereto as **Exhibit E**).[4]

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[4] As the portions of this deposition have been marked Confidential pursuant to the underlying Confidentiality Order, this exhibit will be submitted separately for the Court's review.

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In this case and against these standards, Gibbs' motion should be denied. Gibbs cannot show good cause for taking these depositions. Rule 30(a)(2), SCRCP. Rather, Gibbs made the tactical decision to depose Defendant Sam Harake without first seeking information about any questions it had about the documents. Gibbs could have served additional written discovery regarding any uncertainty in the bank records or subpoenaed Bank of America to provide additional information as it later did, but it chose not to. Sam Harake made his best efforts to recall transactions, and he testified generally about the types of things for which he used the Eurosa account. Therefore, Gibbs' strategic decisions are of its own making, and Gibbs has not provided good cause to take a second deposition. Rule 30(a)(2), SCRCP; *Roxane Labs., Inc.*, 2007 U.S. Dist. LEXIS 17834, at *10 (E.D. La. Oct. 29, 1997); *Arancedo*, 2018 U.S. Dist. LEXIS 120703, at *10 (S.D. Fla. July 19, 2018) ("Plaintiff made the tactical decision to proceed with [witness's] deposition before all discovery was served and cannot complain that Defendant failed to meet her discovery obligations."); *City of Grosse Pointe Farms*, 2016 U.S. Dist. LEXIS 75604, at *6 (E.D. Mich. June 10, 2016).

As to non-party Katherine Harake, the same is true. Katherine Harake was under no duty to produce financial records so that Gibbs could research potential claims against her, and those records were only produced to avoid further motions practice. To allege otherwise is an unreasonable position. Gibbs could have attempted to validly subpoena those records after the June 3, 2019 Order as is the process of discovery for a non-party, but it did not. Gibbs could have taken Sam Harake's re-opened deposition and then waited to take Katherine Harake's deposition again until after it validly pursued the documents. Instead, it knowingly chose to take her deposition on July 26, 2019. Rule 30(a)(2), SCRCP; *see also Global ePoint, Inc. v. GTECH Corp.*, No. CA 11-197 S, 2015 WL 113979, at *2 (D.R.I. Jan. 8, 2015) (denying plaintiff's

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motion to conduct second deposition of a non-party, even though defendant produced 7,500 documents after the first deposition, many of which directly related to the non-party). Katherine Harake has testified generally that she received money from the Eurosa account and that she spent that money. She has also testified that she had nothing to do with any business dealings with Gibbs. (Ex. D, 7/26/19 Katherine Harake Depo., pp. 53:19-54:13; p. 93:12-23). Given this testimony, there is nothing to ask her relative to her accounts that are actually related to this litigation. Instead, it appears Gibbs is seeking to take her deposition again in order to harass and embarrass her, which is simply not permissible. Contrary to Gibbs' assertion, this Court has not said that Gibbs is entitled to know how its money was spent. The Court stated that it could trace its funds to discover accounts its funds. (Ex. B, June 3 Order). Gibbs has not shown good cause to take a second deposition of non-party Katherine Harake; therefore, Gibbs' motion should be denied.

III. CONCLUSION

Based on the foregoing, Defendant Sam Harake and non-party Katherine Harake respectfully request Gibbs' motion be denied as it is not entitled to take additional depositions of them.

GALLIVAN, WHITE & BOYD, P.A.

s/Lindsay A. Joyner
John T. Lay, SC BAR NO. 64526
Curtis L. Ott, SC BAR NO. 66145
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August 3, 2020
Columbia, South Carolina

Attorneys for Defendants Sarmad Harake and Eurosa, Inc.

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EXHIBIT A

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Lindsay Joyner

From: Lindsay Joyner
Sent: Friday, March 30, 2018 4:21 PM
To: Dunlap, Kevin A.
Cc: John T. Lay (jlay@GWBlawfirm.com)
Subject: RE: Harake [GWB-IMANMAIN.FID542496]

Kevin,

Thank you for your responses below.

As an initial matter to follow up on my email yesterday, please forward the GIH tax filings for 2015 and 2016 to me at your earliest convenience, and we respectfully request that the K-1 be amended to Eurosa at the address 193 Walton Road, Seabrook, New Hampshire 03874 rather than Sam Harake at Gibbs' address since Eurosa is the 50% owner of GIH, not Sam Harake.

We have run board w/3 minutes and board w/3 of directors, which cut the number of hits for the term Board down by over half, so that is helpful.

We will continue with providing the bates range for particular requests as we respond with documents and are glad we were able to come to that agreement. I know that I previously gave you the goal of completing document review by March 31. Unfortunately, we are not going to meet that goal as the additional search terms have increased the number of documents for review. Based on our review platform, we have around 4,000 more documents to review. We will be sending another supplemental production on Monday, and we will work to have the remaining documents reviewed as efficiently as we can before April 30.

As to the Requests to Admit, we cannot agree to 50. Since you do not want to compromise as suggested below, we are willing to give additional information in response to your interrogatory for any 20 that you pick, but beyond that, you'll have to take it to the judge.

It appears that we are at an impasse as to the financial records. We still maintain, among other things, that a start date of June 2015 is warranted as no investment was made by Gibbs prior to June 2015, so we cannot agree to a March 2015 start date. Additionally, we maintain that financial for Harake and Eurosa after the start of litigation are not warranted as there are no allegations that Sam Harake took money from IOTive as the CEO during the few months after the start of the litigation. However, I know that we will discuss all of the issues related to the bank statements on Thursday with the Court.

I am confused by what you mean in this sentence "My response: Please do not consider my silence on any issue as acquiescence." I assume you are referring to the financial document discussion, but I don't believe I can know you disagree with something unless you tell me. So if my assumption is wrong, please let me know.

It appears that a portion of my March 6 email was deleted in your response without providing any notice of it. I assume it was unintentional, but please make every effort to avoid that in the future, or if it was done to make the response more efficient, please inform me of that at the beginning of the response next time.

Finally, now that you have received a copy of the Share Certificate for Yogi Pay held by GIH and understand that it owns 85% of Yogi Pay and QPAGOS owns the other 15% (as QPAGOS has provided on page 44 of its June 30, 2017 S-1), we respectfully request you voluntarily dismiss the claim against Katherine Harake. If you do not do so prior to April 13, we will be forced to file a motion for summary judgment. Additionally, if the claim is not voluntarily dismissed, we will be discussing with our clients the possibility of filing a claim under the South Carolina Frivolous Proceedings Act as there is no reason that Katherine Harake should be a party to this litigation.

Thank you,
Lindsay

GALLIVAN WHITE BOYD
Complex experience for complex matters

Lindsay Anne Joyner
Partner
ljoyner@GWBlawfirm.com

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vCard | BioURL | Website

This message is from the law firm Gallivan, White & Boyd, PA and may be a confidential and privileged legal communication to the named recipient(s). If you receive this message in error or are not the named recipient(s), please notify the sender and delete this email. Thank you.

From: Dunlap, Kevin A. [mailto:kevindunlap@parkerpoe.com]
Sent: Sunday, March 25, 2018 8:39 AM
To: Lindsay Joyner
Subject: RE: Harake [GWB-IMANMAIN.FID542496]

Thanks. Please see my responses below.

Kevin Dunlap
Partner

Parker Poe

100 Dunbar Street | Suite 206 | Spartanburg, SC 29306
Office: 864.253.6105 | Fax: 864.591.2050 | vcard | map

Visit our website at
www.parkerpoe.com

From: Lindsay Joyner [mailto:ljoyner@gwblawfirm.com]
Sent: Tuesday, March 06, 2018 6:27 PM
To: Dunlap, Kevin A.
Subject: RE: Harake [GWB-IMANMAIN.FID542496]

Caution: External email

Kevin,

Thank you for your responses.

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EXHIBIT B

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	Civil Action No.: 2017-CP-42-00740 **ORDER**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

This matter comes before the Court on several motions related to discovery in this matter, four of which were filed by Plaintiff Gibbs International, Inc. and one filed by non-party Katherine Harake. Specifically, these motions included: (1) Plaintiff Gibbs International, Inc.'s ("Gibbs") Motion to Reconsider/Clarify July 5, 2018 Order ("Motion to Reconsider"), which was filed on July 13, 2018; (2) Motion to Quash and for Protective Order of Non-Party Katherine Harake, which was filed on November 21, 2018 and Plaintiff's competing Motion to Compel as to Non-Party Katherine Harake, which was filed on November 21, 2018; (3) Plaintiff Gibbs International, Inc.'s Motion to Remove Redactions in Documents Produced by Sarmad Harake and Eurosa, Inc. ("Motion to Remove Redactions"); and (4) Gibbs International, Inc.'s Motion

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For A Protective Order/To Quash, which was filed on November 28, 2018. Following briefing by the parties on each of these motions, a hearing was conducted at the Spartanburg County Judicial Center on December 7, 2018. Plaintiff Gibbs, Defendants Sarmad Harake ("Sam Harake") and Eurosa, Inc. ("Eurosa") (collectively the "Harake Defendants"), and non-party Katherine Harake were represented by counsel. After careful consideration and review of the pleadings, motions, memoranda, and supporting documents, for the reasons set forth below:

1. Plaintiff's Motion to Reconsider is **DENIED**;

2. Non-Party Katherine Harake's Motion to Quash and for Protective Order is **GRANTED**; therefore, Plaintiff's Motion to Compel as to Non-Party Katherine Harake is **DENIED**;

3. Plaintiff's Motion to Remove Redactions is **GRANTED**;

4. Plaintiff's Motion For A Protective Order/To Quash as to Marsha Gibbs is **DENIED**.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute arising from an alleged breach of contract and request for accounting of an alleged agreement. While Gibbs initially filed this action in March 2017, it was twice amended, with the Second Amended Complaint filed on June 9, 2017. Gibbs served discovery initially on Defendant Sam Harake around May 19, 2017. Thereafter, an entry of default was entered against Sam Harake, Eurosa, and Katherine Harake on July 17, 2017. The Harake Defendants and Katherine Harake timely answered the Second Amended Complaint on August 17, 2017, and Katherine Harake was later voluntarily dismissed without prejudice. The entry of default was set aside as to the Harake Defendants by Order of this Court on December 21, 2017. Sam Harake timely answered Gibbs' discovery requests, providing objections as to scope and discoverability of certain requests.

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Thereafter, on February 3, 2018, Gibbs moved to compel discovery responses from Sam Harake regarding two of the Requests for Production to which he objected. A hearing on the motion to compel was held on April 5, 2018. Following an additional request from the Court, the Court entered an Order denying Gibbs' Motion to Compel on July 5, 2018. As part of that ruling, the Court held that a request for production was not the appropriate mechanism to obtain corporate records from non-parties FED Securities, Pay Send, Eurofund, Gibbs Energy, QPAGOS, IOTive, and Yogi Pay. Gibbs then filed a Motion to Reconsider/Clarify pursuant to Rule 59, SCRCP, and any other applicable rule, seeking for the Court to rule on the financial records of Defendants Sarmad Harake and Eurosa as well as non-party Katherine Harake. On August 22, 2018, without there having been a ruling on its Motion to Reconsider/Clarify, Gibbs served a subpoena pursuant to Rule 45, SCRCP, on Bank of America for the records of Defendants Sarmad Harake and Eurosa as well as non-party Katherine Harake. Gibbs did not copy counsel for any of the parties with the subpoena.[1] Bank of America responded to the subpoena via an encrypted CD-ROM less than ten (10) days after service, on August 31, 2018.

Following receipt of the documents, the parties compromised as to the production of Sam Harake's and Eurosa's financial records, which included redactions that could later be challenged by Gibbs. Given that compromise, Sam Harake and Eurosa produced account information, account statements, checks, and deposit slips for March 2015 through September 2016 since Sam Harake claims Gibbs has not paid Eurosa or Sam Harake since September 2016.

[1] Gibbs maintains the failure to copy counsel on the subpoena was inadvertent and that it was not aware of the issue until November 6, 2018 due to multiple factors, including the process of decrypting the CD-ROM. Gibbs therefore did not make Defendants and Mrs. Harake aware of this production of documents until November 7, 2018, more than two months after its receipt of the documents.

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"In South Carolina the scope of discovery is very broad." *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997). The scope and conduct of discovery are within the sound discretion of the trial court and will only be reversed where that discretion has been abused. *Palmetto Alliance v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984). Parties may only obtain discovery regarding matters that are relevant to the subject matter involved in the pending action and reasonably calculated to lead to the discovery of admissible evidence. Rule 26, SCRCP. "Thus, discovery requests must be reasonably tailored to include only relevant matters." *Oncology & Hematology Assocs. Of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388 (2010). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), SCRCP. Moreover, Rule 30, SCRCP, gives parties broad leave to depose "any person" who may have relevant information in a case. "The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003).

However, a court shall limit discovery if the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. Rule 26(a), SCRCP. Rule 34 of the South Carolina Rules of Civil Procedure, subject to Rule 26, permits a party to request that another party produce only those documents within that party's possession, custody, or control. Rules 26 and 34, SCRCP. Rule 34 of the South Carolina Rules of Civil Procedure was amended in 1993 to provide that production from non-parties is governed only by Rule 45, SCRCP. Rule 34(c), SCRCP ("A person not a party may be compelled to produce documents or things or submit to an inspection only as provided in Rule 45.").

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Additionally, Rule 26(c) authorizes the Court to enter a protective order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense," including an order "that the discovery not be had;" "that the discovery may be had only on specified terms and conditions"; "that the discovery may be had only by a method of discovery other than selected by the party seeking discovery;" and/or "that certain matters not be inquired into or that the scope of the discovery be limited to certain matters." Rule 26(c), SCRCP. The South Carolina Supreme Court has held that "[i]f a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is 'relevant and necessary' to the case." *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009) (quoting *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009) and *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 439 S.E.2d 852 (1994)). A court must "weigh the factors of whether the information sought is 'relevant and necessary' evidence against any particularized harm the opposing party may suffer." *Id.* To show that the information sought is necessary, "the party seeking the information 'must demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible threat.'" *Id.* Additionally, the "trial court must determine whether there are reasonable alternatives available to discover the information." *Id.*

1. **Plaintiff's Motion to Reconsider**

Plaintiff Gibbs filed a Motion to Reconsider this Court's July 5, 2018 Order denying its Motion to Compel pursuant to Rule 59, SCRCP. In that Order, the Court found that "[p]ursuant to Rules 34 and 45, SCRCP, a Request for Production to Defendant Sam Harake is not the appropriate mechanism to obtain corporate records from non-parties, including FED Securities,

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Pay Send, Eurofund, Gibbs Energy, QPAGOS, IOTive, and Yogi Pay." The Court further found that Plaintiff Gibbs has "subpoena power, pursuant to Rule 45, SCRCP or the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to compel records from non-party entities. To permit otherwise would render Rule 34, SCRCP, meaningless and flout the rights and protections of corporations in South Carolina." In its Motion to Reconsider, Gibbs requested the Court compel production of the Harake Defendants financial records for the period of March 1, 2015 until the present and to produce IOTive records for the period of May 2017 until September 2017.

Rule 59(e) of the South Carolina Rules of Civil Procedure provides a method for moving a Court to alter or amend a judgment made. However, in this case, at the time the Court heard arguments in April 2018, and later issued its order in July 2018, Plaintiff Gibbs presented nothing showing a connection between Plaintiff Gibbs' money and the Harake Defendants' accounts. Therefore, the Court balances Plaintiff Gibbs' right to comprehensive discovery with the Harake Defendants' privacy and finds that Gibbs is not entitled to what it requests. *See* Rule 26, SCRCP; *Oncology & Hematology Assocs. Of S.C., LLC*, 387 S.C. at 388; *Palmetto Alliance* 282 S.C. at 434, 319 S.E.2d at 698. As the Court stated in its July 5, 2018 Order, Gibbs has the subpoena power. The Court clarifies that wise use of subpoena power by Plaintiff may establish a connection sufficient to cause the Court to direct production by the Harake Defendants in response to Request for Production Numbers 28 and 29. But that time is not now. Accordingly, the Court denies Plaintiff Gibbs' Motion to Reconsider.

2. <u>Non-Party Katherine Harake's Motion to Quash and for Protective Order</u>

When Gibbs subpoenaed non-party Katherine Harake's financial records from Bank of America, Gibbs did not copy counsel for any of the parties with the subpoena, in violation of

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Rule 45(b)(1), SCRCP. Gibbs claims it did not become aware of the subpoena issue or notify any of the parties or Mrs. Harake of its receipt of the financial records for nearly two months due to the multiple factors previously mentioned.

The South Carolina Supreme Court has specifically found that the notice provision of Rule 45(b)(1), SCRCP, was added "in accordance with a similar provision in Rule 45 of the Federal Rules of Civil Procedure." *In re Fabri*, 418 S.C. 384, 793 S.E.2d 306 (2016) (quoting the comment to the federal rule in that "[t]he purpose of such notice is to afford other parties an opportunity to object to the production or inspection, ... [and] other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced." Fed. R. Civ. P. 45(b)(1) cmt.). Given the failure to provide notice, the subpoena for Mrs. Harake's financial records failed to comply with the South Carolina Rules of Civil Procedure.

Additionally, there are no allegations of misappropriation of money or fraudulent transfers of money to Mrs. Harake by the Harake Defendants or other Defendants in the Second Amended Complaint. Thus, at this time, Gibbs has not shown that Mrs. Harake's financial records are related to any current claim or defense and would not be reasonably calculated to lead to the discovery of admissible evidence. *See e.g., Berkowitz v. United States*, 2011 U.S. Dist. LEXIS 116161, *17, 2011 WL 4502374 (D.S.C. Sept. 9, 2011) (noting that a plaintiff "is not entitled to engage in a discovery fishing expedition for evidence he believes *might* support his allegations") (emphasis added); *Holliman v. Redmond Dev. Corp.*, 61 F.R.D. 488, 490 (D.S.C. 1973) (stating "[o]rdinarily, the financial status of the parties is not to be inquired into" unless it is relevant to the case); *Pappas v. Ollie's Seafood Grille & Bar, L.L.C.*, No. 2007-UP-090, 2007 S.C. App. Unpub. LEXIS 266, at *23-24 (S.C. Ct. App. Feb. 23, 2007) (affirming the

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trial court's denial of a motion to compel lists of revenues and expenses of the defendants, various financial statements concerning defendants' current net worth, and profit and loss statements and similar documents and finding the requested information irrelevant to the breach of contract and unfair trade practices case since the documents would not be able to explain whether the defendants had due cause for concern).

Further, at this time, Plaintiff has not shown a connection between its claim and Mrs. Harake's financial records. *See Bd. Of Trs. Of the Trucking Emples. of N. Jersey Welfare Fund, Inc. v. Caliber Auto Transfer, Inc.*, Civil Action No. 09-6447 (DRD) (MAS), 2011 U.S. Dist. LEXIS 71268, at *15-16 (D.N.J. June 30, 2011) (holding that plaintiffs failed to show any connection between the plaintiffs' claims and the non-parties' bank records and private financial information which would justify an intrusion into the privacy of their finances for the past twelve years). 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. However, at this stage, Gibbs has not shown such a connection. Thus, Mrs. Harake's financial records are not relevant at this time pursuant to Rule 26, SCRCP. Therefore, the Court grants Non-Party Katharine Harake's Motion to Quash and for Protective Order and denies the portion of Plaintiff Gibbs' "Motion to Remove Redactions in Documents Produced by Sarmad Harake and Eurosa, Inc., and Plaintiff's Motion to Compel as to Non-Party Katherine Harake" requesting that Mrs. Harake's financial records be compelled.

3. **Plaintiff's Motion to Remove Redactions**

Gibbs' Motion to Remove Redactions requests the removal of redactions from the financial records produced by the Harake Defendants for the time period of March 1, 2015

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through September 30, 2016. Given the broad scope of discovery and the claims in the Second Amended Complaint, the Court finds that Gibbs is entitled to this information and the financial records produced should be unredacted so that Plaintiff Gibbs may trace its funds. Rule 26, SCRCP; *Samples*, 329 S.C. at 110, 495 S.E.2d at 215. Accordingly, the 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.

4. **Plaintiff's Motion For A Protective Order/To Quash**

The Harake Defendants served a Notice of Deposition and accompanying subpoena for Marsha Gibbs, the wife of Gibbs' president Jimmy Gibbs. The deposition was noticed for November 15, 2018.. Gibbs filed the pending motion on November 28, 2018.

Given that the Harake Defendants identified Mrs. Gibbs in their discovery responses as a witness with information about the allegations in the Complaint and the fact that Mrs. Gibbs is a Director of Gibbs, the Harake Defendants may depose her in accordance with the South Carolina Rules of Civil Procedure. Rules 26 & 30, SCRCP; *see also Samples*, 329 S.C. at 110, 495 S.E.2d at 215. Accordingly, the Court denies Plaintiff's Motion for Protective Order/Motion to Quash Subpoena as to Marsha Gibbs.

IT IS THEREFORE ORDERED that

1. Plaintiff's Motion to Reconsider is DENIED;
2. Non-Party Katherine Harake's Motion to Quash and for Protective Order is **GRANTED**; therefore, Plaintiff's Motion to Compel as to Non-Party Katherine Harake is **DENIED**;
3. Plaintiff's Motion to Remove Redactions is **GRANTED**; and
4. Plaintiff's Motion For A Protective Order/To Quash as to Marsha Gibbs is **DENIED**.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

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Spartanburg Common Pleas

Case Caption: Gibbs International, Inc. VS Sam Harake , defendant, et al

Case Number: 2017CP4200740

Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2019-06-03 10:27:03 page 11 of 11

EXHIBIT C

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS FOR THE
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT

- - -

Gibbs International, Inc., Individually and on behalf of IOTive, Inc.,	:	
Plaintiffs,	:	Civil Action No. 2017-CP-42-00740
vs.	:	
Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli,	:	
Defendants.	:	
Sarmad Harake and Eurosa, Inc.	:	
Plaintiffs,	:	
vs.	:	
Gibbs International, Inc.,	:	
Defendant.	:	

VIDEOTAPED DEPOSITION OF SARMAD HARAKE
VOLUME 2

DATE TAKEN: Thursday, July 25, 2019

TIME BEGAN: 11:21 a.m.

TIME ENDED: 8:22 p.m.

LOCATION: Spartanburg Marriott
299 North Church Street
Spartanburg, South Carolina

REPORTED BY: Karen Kidwell, RMR, CRR, CCP
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

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from the other side with my money.
So it's not that his dollar is green and mine is not. I mean, unfortunately that's always the logic at -- at Gibbs. But go ahead.
Q. You testified earlier that no money from one of the Eurosa accounts went to Katherine.
A. I never said that.
MS. JOYNER: Object to the form of the question.
THE WITNESS: I never said that. Katherine gets paid from Eurosa for multiple, multiple things.
BY MR. DUNLAP:
Q. Such as?
A. Such as -- multiple things. Whether it's the rental, whether it's -- when we were in South Carolina for two years, every dollar spent in South Carolina had to go through Katherine's account.
This was not my home. She was here. I was here on a mission. I still had my house in New Hampshire. I still had my expenses in New Hampshire. We were here for a job. It's like being in a hotel in a foreign country where I have to do a job. So that is an expensable account, I -- amount, and I have mentioned that to you.

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Another thing is, I wanted to buy an office space in New Hampshire. I had to get architects. I paid them 20-something-thousand dollars. I didn't pay it. Katherine took care of all payments.
So I never testified that Katherine never received money from Eurosa's account. Please don't say things that I haven't said.
Q. So it's your testimony that Katherine received a lot of money out of the Eurosa account?
MS. JOYNER: Object to the form of the question.
BY MR. DUNLAP:
Q. You can answer the question.
A. Katherine received funds from the Eurosa account. Whether I took money from her, returned it, paid for things, asked her to pay things on behalf of -- of me, if I'm traveling. We have a tax bill. We have a triple net lease.
It could be a hundred reasons why -- why I would send the money to her -- to her account. I had no reason to -- to -- to hide it. I could have sent it to my personal account and then send it from my personal account to hers. I don't need to do that.
I give everything to the accountant.

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Everything is transparent, and he takes everything and puts it together.
Q. The majority of the money --
A. Yes.
Q. -- that was deposited into Eurosa's account came from Gibbs, didn't it?
MS. JOYNER: Object to the form of the question.
THE WITNESS: During the period I was working in South Carolina to this -- to the Bank of America account, what we did in the U.S., yes, correct.
BY MR. DUNLAP:
Q. And during that time you had no other source of income, did you?
A. What do you mean by "source of income"? Can you please explain?
Q. Did you make money in any other way aside from --
A. I was working full time with Gibbs.
Q. And so the answer is no, right?
A. I -- did I have other sources of income? Probably I -- yeah, I did sell -- if you consider selling some cars during that year is a source of income, yeah, probably. What I --

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Q. How much did you make for that?
A. Excuse me?
Q. How much did you make for that?
A. 100, 150. I don't know. I mean, it's all -- it should be there. You should see it.
Q. Did you pay taxes on that?
A. Taxes will be paid if I make money on the car itself, yes.
Q. And so you paid taxes in the United States --
A. I did not say I paid taxes. It's if I made money on the cars. I didn't say I made money on cars. I didn't make money on the cars.
Q. You must let me finish the question.
A. Please go ahead.
Q. Okay. You've just testified that you made money on cars.
A. I did not say I made money on cars. I said I sold cars. If you consider getting the money into my account and income as -- as money that came in, yes. But I have a cost to that money, because that car did not come from the moon. It was paid for.
Q. Did you ever make money selling cars, a profit?

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A. In 2018, yes.
Q. How much?
A. I don't know yet. The accountant has to add them up.
Q. Were you ever --
A. I sold -- I sold four cars. I -- I didn't add them up, because there's a lot of cost. The cars were transported. They were serviced. They were maintained. There was logistics. There was many things. So --
Q. What was the gross sales price?
A. I don't know. A couple of hundred thousand -- no, more, maybe. 250,000.
Q. Okay.
A. It should be there. You should see it. It's money coming in for cars, with -- with the details. You have all bank records.
Q. You can show it to me --
A. Yeah, I will.
Q. -- when we get to it.
A. Yeah, sure.
I sold stock. I sold stock in -- are we talking about '18? So . . .
Q. What stock did you sell?
A. I sold QPagos.

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Q. How much did you get for that?
A. I don't recall exactly, but -- it was paid in parts, so I don't know. I sold it at less than half the market, to the other shareholders I offered it. And Mr. Gibbs apparently offered to buy it as well, but they ended up buying it. And I said, "I don't want anything to do with it. I want out."
Q. So my question is, how much did you get for selling the QPagos shares?
A. I don't know. I really don't know.
Q. Who would know?
A. Who would know? I will see it -- it will be on the bank records.
Q. Okay. When we get to that, you can point it out.
A. Yes, sure.
Q. And that was in -- well, that's in 2018 --
A. That's right.
Q. So I don't have the bank records for that.
A. I did see something about '18 here.
Q. It's not -- but -- but those bank records are not provided.
A. Okay. It's '18. It's -- doesn't matter.
Q. But that's something you could easily obtain?

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MS. JOYNER: Object to the form of the question.
THE WITNESS: If -- if I have a reason to give it to you, yes.
BY MR. DUNLAP:
Q. Okay. May 27, 2015, cash withdrawal from 5749. Do you see that?
A. Sorry, which date again?
Q. May 27, 2015. This is on page 029693.
A. Yes, I do see that, yes.
Q. And so here you have -- you're taking out $3,000 in cash out of 5749?
A. Yeah, probably.
Q. Again, May 27, 2015, you have a customer withdrawal image, and that's for $22,000?
A. Yes.
Q. You see that?
A. Yes, I do.
Q. And so that would be another certified check?
A. That's correct.
Q. And what happened to that $22,000?
A. I have no clue. It's been since 2015, 27th. I don't know. What could it be? I don't know. I'm sure if you -- once you find the --

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once -- if we're able to get the certified check, it will have very clear details what it was for.
Q. Wouldn't you have some records yourself about spending $22,000?
MS. JOYNER: Object to the form of the question.
THE WITNESS: Would I have any records? I probably have the copies of the certified checks, if I had them, but I don't recall even keeping them.
BY MR. DUNLAP:
Q. So is it your testimony you don't have any kind of electronic or paper record about all of the customer withdrawal images that appear in these bank records?
A. I'm sure some of them --
MS. JOYNER: Object to the form of the question.
THE WITNESS: -- are available, which I gave them to my accountant, for sure.
BY MR. DUNLAP:
Q. Okay.
A. I do know some are definitely available.
Q. All right. I'm going --
A. Yeah. Every single one, I don't know.

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Because I did need them, and I went to the bank, and they told me, "We can't give it to you."

And you can please -- if you find a way to get it from Bank of America, over the phone or in physical person, please tell me. I'd love to do that as well.

Q. All right. So I'm going to ask that you provide that documentation -- electronic, paper, or otherwise -- to your lawyer, and she can let me know if she has an objection to providing that. Okay?

A. Okay. So for -- I'm not sure if it's for that 22,000. But it's -- there are the ones that say "electronic withdrawal," yes.

Q. But I'm going to make that easy for you.

A. Yeah.

Q. Any time --

A. Yeah.

Q. -- in these records, because they're in here a number of times --

A. Yes.

Q. -- there is something that says "Customer withdrawal image."

A. Yeah.

Q. I want to see the documentation about it.

A. Okay. What I can help you with now, if

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it's important for you, I can go around that date on my mail, and I might find what that was. But I mean, I don't want to waste time. If that is of any help, just to be transparent. That's all.

Q. Well, sure.

Go to May 27, 2015.

MS. JOYNER: I'm going to object to this exercise.

THE WITNESS: I don't know if you have reception. I don't, but -- it says "Searching," so . . .

Let's do something else. Let me put 22,000. I don't have reception.

BY MR. DUNLAP:

Q. You do now.

A. Now I do.

Let me do something else. I sometimes take a picture of it, and . . .

I -- I couldn't find any -- any pictures I took on that day. But on May 28th, I see that I was looking at the car. I'm not sure if it went for a deposit for another car that Mr. Ayan bought, but I don't think it was around that time. But I'll check.

Q. And so sometimes what you'll do is if you have an important document -- like you might have

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a -- a certified check, you might snap a photograph --

A. No, no. I am looking at the event time. Like on that day, I took a picture with my family, what I was doing around that time. So if that time I was in somewhere, that could give me -- refresh my memory to what it was.

Q. Did you ever take any photographs of these --

A. I wouldn't take any financial records and store them on a phone. I think that -- that's not very responsible.

Q. You've got to let me finish the question.

A. Okay. Go ahead.

Q. It's going to be really difficult. So I'm going to do it again.

A. Sorry.

Q. So you did not take any photographs on your phone of customer withdrawal images that appear in your bank records?

A. I would not take something like that, no. I would take -- if I have something about the event, that would refresh my memory to what it was.

Q. And so when you say that, what you mean is if you happened to be buying a car that day --

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A. Yes.

Q. -- it might refresh your memory that that's what the money went for?

A. That's exactly what I did. And I do see a car there, but I know that he did not buy that car, and that's why I know that it was not related to that.

I do know he bought the car, and I had to pay a deposit for that car around that time. But I'm not sure if it was this specific amount or not. I'm not sure.

Q. Okay. And then on May 28th, 2015, there was a $13,000 withdrawal; is that right?

A. Sorry? On which page are we again? 93 still?

Q. Actually, we can go back.

A. Okay.

Q. All right. So we're back to 029701. Okay?

A. 29701, okay.

Q. Yes. And this indicates on June the 4th, 2015 --

A. June 24th?

Q. You see that?

A. I don't see a June 24th date.

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Q. And so why were there so many overdrafts on --
A. I don't -- I never look at what's my balance in my account. I never, never do that. Never had the habit of doing it. And sometimes I go back to the bank, and the manager just recredits me all those extra charges, and she puts them back in my account.
And that you can do with any Bank of America, by the way. The branch manager is authorized to do that.
Q. Okay. 029711.
A. 029711.
Q. Okay. This is a Eurosa, Inc. trading account from July 1, 2015, to July 31, 2015?
A. Yes.
Q. And on the -- on that particular page, the beginning balance was $12.62. You see that?
A. I do.
Q. And it says deposits and other credits were $100,000, right?
A. Yes, I do.
Q. Then withdrawals and other debits were $97,530?
A. Yes.

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Q. Service fees were $95, so the ending balance was $2,387.62. Is that right?
A. Yes, that's right.
Q. And then if you will go with me to page 029713.
A. Yes.
Q. The -- if you look at July 16, 2015 --
A. Yes.
Q. -- there is a wire from Gibbs International --
A. That's correct.
Q. -- in the amount of $100,000. Is that what it says?
A. That -- that's correct.
Q. And so that means Gibbs International would have wired $100,000 on June -- July 16, 2015, into account 1914 of Eurosa?
A. That is correct.
Q. And this also indicates "Loan." Do you see that?
A. Correct. That's my agreement with Jimmy, that all the money that he is sending for me that I'm able to use will be marked as a loan, so in the future, when we earn money in Turkey, I can bring it back to Eurosa, and then from Eurosa, I can repay

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Gibbs without any tax implications.
And all this went towards the 3.2 million, and so it was not over and above. It was within what I had equally put on the table as well.
Q. So, simply put, July 16, 2015, Gibbs loaned you $100,000, and that money went into account 1914 for Eurosa, which is the trading account?
A. Yes. They didn't loan me the money. They marked it as a loan. That's our agreement. It's not a loan, as such, meaning that it's a debt that Eurosa has to Gibbs.
Q. And you agreed for it to be a loan, right?
A. We -- Mr. Gibbs said, "This is how we should do it," because he does the same with Mobix as well. And then he does it as a convertible, and then he writes it off as an expense, so he avoids paying taxes on it.
Q. And you agreed to it, right?
A. Yes, I did. Absolutely.
Q. All right. And then, if we go down and you'll look under "Withdrawals" --
A. Yes.
Q. -- July 16 of 2015 --
A. Yes.
Q. -- we have an online banking transfer to

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5749. So again, that is moving $15,000 out of Eurosa account 1914 and putting it into account 5749?
A. Yes.
Q. On July 16, 2015, it says "Online banking transfer, CONF number 4ZVRTJSN9; Harake."
A. Yes.
Q. And that's for $25,000?
A. That is correct.
Q. And again, you would have made both of those transfers?
A. That would -- that is definitely correct.
Q. All right. July 16, 2015, there is a -- another withdrawal that is a wire. Is that involving Fed Securities?
A. That is correct. If you look, we said office expenses, and then we had the license application, because Gibbs International -- Gibbs International -- and -- and us were going to have the jointly owned Fed Securities, so there was some applications that had to be -- that had to be done.
Q. And that was for $32,000?
A. That is correct.
Q. And then on July 20, 2015, there was another wire for $2,765. What was that for?
A. Yes. If you look at that -- I remember

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that very, very well. See, the first one was a wire -- you see the word "KNR" at the end?

Q. Um-hmm.

A. That was a ticket, which was Katherine, Nora, and Rafi. And what I did is I repaid the ticket back, because I told them, "I don't want Gibbs to pay anything for my children in terms of ticket purchases, or my wife." "K" is for Katherine, "N" is for Nora, "R" is for Rafi.

But what happened that day is for whatever reason, the system at the Fed thought it's North Korea, and they blocked the money. So Gibbs never received it. So I sent it one more time, for 2,760, one more time I transferred the money.

So this time Gibbs got it, and I think they gave me back the money, which was 2,765. It should be somewhere in our accounting, because they did return me back one of the transfers.

Q. Okay.

A. Probably it's on the next month it came again.

Q. Look and see if you find it, while we're -- while we're talking about that topic. It'll be clearer in the record.

A. I do know the lady in accounting paid me

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back. That, I definitely know. But let me see how -- how she did that.

So it would have to be July 20th. Withdrawal. Yes. If you look at page 733, 0297 -- 029723, sorry.

Q. Bear with me. Okay.

A. You will see the same amount, 2,765 --

Q. Um-hmm.

A. -- was returned by Gibbs back to me, which is the accounting department fixed the error. Because it was blocked the first time at the Fed, and I had -- I did it again.

Q. So it went twice?

A. It went twice. So one of them they returned me, because the actual ticket price was 2,700-and-something. And that's only because I put "KNR." Apparently that flagged the situation. I never put "KNR" again.

Q. Okay. Then down at the bottom, July 20th, 2015 --

A. Which page? Sorry?

Q. Yes, sir. It is 029713.

A. 713 -- 69. 13, yes.

Q. Okay. It says "Customer withdrawal image," on July 20th, 2015, for $20,000. Is that

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what it says?

A. July the --

Q. July 20, 2015.

A. Yes, correct.

Q. And so what was that for?

A. I mean, I wouldn't recall off my head, but because it's a customer withdrawal image, there should be a certified check attached. I'm -- I'm not sure what -- what it was for. July 20th. July 20th.

Let's see. Any bank statements for that day -- I was at the Marriott, which means I was in Spartanburg on the 20th. On the 20th of July.

I can't recall right off my head. I'm trying to think around that time what -- what it could be. July -- I know it's tax period. I know it's tax season. Property tax, maybe, on the warehouse.

I'm -- I'm not sure. I can't recall. Could be.

Q. Okay. Go to 029715.

A. Yes.

Q. What is the beginning balance on that day?

A. Minus 193.21 on this account.

Q. I think it's actually minus 1693.

A. 1693. Sorry.

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Q. And that's for July 1, 2015?

A. That's correct.

Q. And then the deposits were $15,000; is that right?

A. Correct.

Q. Withdrawals and other debits were 10,855.28; is that right?

A. Correct.

Q. And it left a balance of $2385.43 on July 31, 2015?

A. Yes.

Q. All right. Then we go to July 16, 2015, which is on page 029717.

A. Yes.

Q. And there we have an online banking transfer from 1914 for $15,000. Is that right?

A. That's correct.

Q. And again, that's you moving the money into the operating account?

A. Yes, correct.

Q. And then we have July 21, 2015. There are two cash withdrawals, one on July 21 and one on July 31, for 2,500 and for $4,500. Is that right?

A. Correct. Yes.

Q. Then we have a B of A withdrawal in

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Spartanburg, July 16, 2015, for $600; is that right?
A. That is correct.
Q. Then July 20, we have "Lafayette." What is that?
A. Well, I paid, you know, stuff here at the Marriott. I -- and I didn't accept anyone to pay for my behalf, so I -- I paid here. These are Spartanburg expenses.
Q. That's not my question.
A. Sorry.
Q. My question is, there's an entry on July 20, 2015, that says "1390 Lafayette." Do you see that?
A. One second. July 20th?
Q. Yes.
A. Yes.
Q. And my question is, what is that for?
A. It's a cash withdrawal. It's an ATM.
Q. All right. So how are you in Spartanburg on July 20th and in Portsmouth, New Hampshire, at an ATM?
A. Well, because I believe in between, you'll see that there was a U.S. Airways flight on that day, which was on the same day. And I flew on that day. So I took an airplane, and it's here on the

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statement.
And -- and I can tell you why that money was. This money was actually imbursed back to me. This cash I took because we had a consultant that needed to be paid cash, and Brian transferred the money to my account separately for that amount. So there's a month that he sent me extra money, because I had to give the guy cash, because I -- I know that I flew to Paris, and I invited the gentleman to -- in Versailles to -- to dinner, together with Greg. And that's what this transaction is for.
So my cash withdrawal was to take the money, cash, and give it to him. And Greg was present when I gave it to him in cash. And let me see -- Brian transferred it back the month after, which would be in August. Yeah.
Q. Okay. Go to 029718.
A. I did.
Q. And at the top of that page, July 27, 2015.
A. Yes.
Q. I'm sorry. Drop down. July 28, 2015.
A. Yes.
Q. It says, "Check card." And then 0727, Icelandair?

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A. Yes.
Q. What was that about?
A. Well, I took an Icelandair flight, to make it cheap. So it stops in Reykjavik, and that's the capital of Iceland, and probably I paid something at the airport. I don't know. One -- one -- the Boston coach is the transfer to the airport, and the one underneath is Icelandair.
Yeah. Must be something to do with -- with airline. Or could be a ticket. I don't know.
Q. Go to 029721.
A. Yeah.
Q. So this is the statement for August 1, 2015, to August 31, 2015, for account 1914. Do you see that?
A. Yes, I do.
Q. And the beginning balance was $2,387.62; is that right?
A. Correct.
Q. Deposits for that 30-day time period were $80,765?
A. That's correct.
Q. Withdrawals and other debits were $72,457.51?
A. Yes.

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Q. And your ending balance was $10,695.11. Is that right?
A. That's correct.
Q. Okay. Go to the deposits on 029723.
A. 23. Okay.
Q. Yes. And do you see there, August 13, 2015, the wire from Gibbs in the amount of $78,000?
A. Yes, I do.
Q. And so that means it was a wire from Gibbs International into Eurosa's account, last four digits 1914, on August 13, 2015, in the amount of $78,000?
A. That's correct.
Q. And then if you go down below --
A. Yes.
Q. -- you see there are a number of online banking transfers: On August 3, 2015, for $2,000; on August 10, 2015 -- well, do you see the first one?
A. Yes.
Q. And that is actually a transfer to 5749, which is another Eurosa account?
A. Correct.
Q. So you were moving that money into the operating account?
A. Yes.
Q. Then on August 10 of 2015, there was an

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online banking transfer. And it says "CONF, number sign, SJCYIONGL; Harake"?
A. Yes.
Q. For $2,500?
A. Correct.
Q. And so you would have made that transfer?
A. Correct.
Q. And you don't know where it went?
A. Well, I can't recall off my head, just by seeing it like that, because it seems a lot of them have my name at the end, and I don't know the -- the rest of the detail, because only thing changing I see is the confirmation number. I don't know whether it was anything that I can remember, top of my head. They all look alike.
Q. And then there are two more banking transfers below that, on August 10 and 11, into account 5749, for a grand total of $650. You see that?
A. Yes, I do.
Q. And then if you look on August 13 of 2015, there is an online banking transfer. And it says, "CONF, number sign, 142Q2W87Y" --
A. Yes.
Q. -- "semicolon, Harake"?

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A. Yes.
Q. And that's for $25,000?
A. Yes.
Q. What was that for?
A. I can't remember. I don't know.
Q. And what account did this go to?
A. I don't know. That's what I'm saying. I can't -- I don't know if it was a payment. I don't know if it was -- I don't know -- it has my name. It has a surname at the end, but I can't tell. Three transactions with three different details all have my name at the end. I -- I really don't know.
Q. And then you have another account, overdraft protection account, right?
A. Sorry?
Q. There's another -- "Overdraft Protection" is what it says -- on August 14th, 2015?
MS. JOYNER: Object to the form of the question.
BY MR. DUNLAP:
Q. 30751?
A. Yes, I see that. It must be in the end somewhere.
Q. And then you have another online banking transfer to 5749 in the amount of $10,000. So this

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$10,000 was transferred out of account 1914 and went into Eurosa account 5749?
A. Yes, I see that.
Q. Then August 31, 2015, there's an online banking transfer, "CONF, number sign, 1GMYLIFFJ; Harake"?
A. Yes.
Q. And how much is that for?
A. 5,000.
Q. And so that was another transfer made by you?
A. Yes.
Q. Online?
A. Correct.
Q. When you transfer online, do you do it on a laptop, a computer, a phone?
A. I -- I almost never use a desktop computer. I always use an iPad.
Q. Do you ever use your phone to make online transfers?
A. I -- I don't think I can do amounts like that, because the app is limited to what you can do. When it's a large amount, you have to do it on -- on the desktop -- on -- on the tablet. You cannot use just the phone app.

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Q. My question was a little bit different. I wasn't just talking about that last transaction; any transaction. Do you ever make transfers online?
MS. JOYNER: Object to the form.
THE WITNESS: Online, of course. I mean, they are either done on my iPad or on my phone. But I know that for small amounts, I can use either. For a larger amount, I have to use a tablet. I cannot use my phone.
BY MR. DUNLAP:
Q. Okay.
A. At least that's how I -- I know Bank of America's app works, unless things changed.
MR. DUNLAP: Okay. Let's -- let's take a five-minute break.
VIDEOGRAPHER: We are pausing recording in the second media. Going off record at 3:14 p.m.
(A recess transpired from 3:14 p.m. until 3:30 p.m.)
VIDEOGRAPHER: We are back on record at 3:30. We are still in the second media.
BY MR. DUNLAP:
Q. Okay. So if we could, let's go to 029727.
A. Yes.
Q. The beginning balance here is August 1,

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that?
A. Sorry. Can you tell me which --
Q. Yes, sir. I'll be glad to.
A. What's the date?
Q. It's June 27, 2016. It's towards the bottom.
A. Yes.
Q. And that's a charge for $929.22; is that right?
A. Yes.
Q. What was -- what was that for?
A. e's New York? Let's look what -- let's try to see . . .
Can we Google it? I wouldn't know off my head what e's New York, LLC is.
Q. You don't know what it is?
A. I wouldn't recall off my head, just by . . .
Q. You don't remember going anywhere like that?
A. Well, I don't know what is going there. Is it something I bought? Is it something I went? Is it a hotel?
Q. You --
A. Like the other one is a hotel, it's the

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Hotel Mandarin -- the Mandarin is a hotel. It could be a restaurant. It could be a restaurant. I'm not sure.
Oh, yes, it definitely is a restaurant. I do know, yes. It's my daughter's birthday. It was on the 27th of June.
Q. All right. Then -- okay. Let's go to 029861.
A. Yes. I'm there.
Q. Beginning balance, $1,780.81. You see that?
A. I do.
Q. And this is for your account, I believe?
A. Yes.
Q. Yeah. Starting with a balance of $1,780.81, and had deposits of $5,000, withdrawals of $6,275.61, leaving a balance of $438.43. You see that?
A. I do.
Q. And if you go to 029863.
A. Uh-huh -- yes. Sorry.
Q. You have deposits. You had a teller transfer for $4,000. And then we have another one of these online banking transfers with a confirmation number. That one is for $1,000, for a grand total of

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$5,000 in deposits in June of 2016. You see that?
A. I do, but I believe they are not necessarily related. One says "Eurosa." The other one says "Transfer." But the total is 5,000, that's correct.
Q. All right. Then let's go to 029869.
A. Yes.
Q. Okay. The beginning balance was $30,044.32. You see that?
A. That's correct.
Q. And the withdrawals were $25,950, leaving a balance of $4,044.37. You see that?
A. Yes, I do.
Q. That is out of Eurosa account 1914; is that right?
A. I believe so, yes.
Q. And then 029871. If you go with me --
A. Yes, I'm there.
Q. If you go with me to July 8, 2016, we have another one of these online banking transfers with a confirmation number and "Harake" for $5,000. Do you see that?
A. Yes, I do.
Q. July 13, 2016, online banking transfer to 5749, for $3,000. You see that?

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A. Yes.
Q. July 13, 2016, transfer Eurosa/High Street LLC, and that was $3,000. You see that?
A. Yes, I do.
Q. July 19, 2016, online banking transfer. We have a confirmation number and then your name, $5,000. Do you see that?
A. I do.
Q. All right. And then, if we drop down, we have two more of these online banking transfers with confirmation numbers and "Harake." You don't know where that went, right?
A. I wouldn't know off my head just by looking at the number, no.
Q. But that is something that would have -- a transfer that would have been made by you, right?
A. That is correct.
Q. And that would be true for all the online banking transfers --
A. That is correct.
Q. -- out of the Eurosa accounts or your personal account?
A. That is correct. I was the only one that had access to my account.
Q. Okay. 029875. July 1, 2016, to July 31,

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explained, and it was marked. So that's -- that's how it is. I never added them up. I don't know what they are and how they are, yeah.

Q. And so -- and I think you testified to this earlier. You -- you marked the areas for redaction and then provided it to your counsel; is that right?

MS. JOYNER: Object to the form of the question.

THE WITNESS: I -- I -- what I recall is I marked what was personal, what I thought was personal, or what I thought I could not interpret that can be a company expense in the open, that I can show as an expense. Because I wouldn't know -- like I said, if I went to New York and I stayed -- it was personal, not personal, so I didn't know -- then I considered it personal.

BY MR. DUNLAP:

Q. Are you aware that over 620 withdrawals and debits were redacted, totaling more than $875,000?

A. I'm not aware of the amount.

MS. JOYNER: Object to the form of the question.

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BY MR. DUNLAP:

Q. You never added up the numbers, right?

A. No, I never actually -- I never do. I never, never look at these numbers. I give them -- I give them to an accountant. I never -- I never even spent time looking at them, ever.

That's why you see all these -- whatever charges and all that stuff, because I -- I don't really trace things.

Q. Okay. Give me just a second.

Okay. I just need to put something on the record.

A. Sure.

MR. DUNLAP: It's my position that additional records need to be produced, as we've gone through this testimony today. So on the record, I'm not adjourning the deposition. I believe I'm entitled to get these additional records.

And if I believe additional examination is necessary, I'll let you know, and then you can let me know your position. But I just need to state that for the record, so . . .

MS. JOYNER: And I need to state for the record that we have not discussed this

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previously to this, so we haven't had a chance to go through it. But I do need to be able to talk to my client about any documents that are coming in, and you're not entitled to those communications.

So to me, it would seem that the deposition should be adjourned; and then if there are documents that can be found that relate -- that are responsive and are produced, then the discussion on a second deposition would be at that time, not as to this time.

MR. DUNLAP: Yeah. I'm -- I'm not adjourning, so I just needed to put it on the record.

MS. JOYNER: Okay. And you're not permitting me to speak to my client about the documents that you want produced?

MR. DUNLAP: Oh, no, no, no. I don't care if you to talk to him about that. I understand what you're saying.

MS. JOYNER: Okay.

MR. DUNLAP: And I'm just not agreeing to call this an adjournment. But I understand that you need to be able to talk to him about the documents that I've requested to be produced.

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So . . .

MS. JOYNER: Okay.

MR. DUNLAP: I understand.

And that's it.

VIDEOGRAPHER: We have ended today's deposition of Sarmad Harake. We are going off record in the fourth media, 8:22 p.m.

- - -

(Time Noted: 8:22 p.m.)

- - -

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EXHIBIT D

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS FOR THE
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT

- - -

Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli, Defendants.	Civil Action No. 2017-CP-42-00740
Sarmad Harake and Eurosa, Inc., Plaintiffs, vs. Gibbs International, Inc., Defendant.	

VIDEOTAPED DEPOSITION OF KATHERINE HARAKE

DATE TAKEN: Friday, July 26, 2019

TIME BEGAN: 12:44 p.m.

TIME ENDED: 3:11 p.m.

LOCATION: Spartanburg Marriott
299 North Church Street
Spartanburg, South Carolina

REPORTED BY: Karen Kidwell, RMR, CRR, CCP
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

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question.
THE WITNESS: Not that I can recall.
BY MR. DUNLAP:
Q. Has he ever told you anywhere he has money put away aside from money that might exist at Bank of America?
MS. JOYNER: Object to the form of the question.
THE WITNESS: Not that I'm able to recall.
BY MR. DUNLAP:
Q. Has he ever talked to you about any brokerage accounts he has?
A. No, he has not.
Q. Do you have any brokerage accounts?
A. No, I do not.
Q. Okay. Has he ever talked to you about any retirement accounts he has?
A. Unfortunately, no.
Q. Okay. Did you ever receive any money from a bank account in the name of Eurosa?
A. Yes, I have.
Q. Okay. Tell me what you received.
A. Money from Eurosa. I don't really understand your question.
Q. Okay. My question is, how much was it

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that you received?
A. I can't give you an accurate number.
Q. Can you tell me why you received the money?
A. I received the money because I needed to pay for expenses for the home and . . .
Q. And so did you receive this money from Eurosa over time in 2015, 2016, and 2017?
MS. JOYNER: Object to the form of the question.
THE WITNESS: Money from Eurosa came to my account in 2015 and '16. I'm not sure how much came in 2017.
BY MR. DUNLAP:
Q. And you're aware of this because you would receive bank statements, and you would see the deposits coming in from Eurosa; is that right?
MS. JOYNER: Object to the form of the question.
THE WITNESS: That is -- I did get bank statements that said Eurosa, yes.
BY MR. DUNLAP:
Q. Okay. And my question is a little bit different. You would have received bank statements for yourself on the checking and the savings, right?

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A. Correct.
Q. And so my question is this: Did you ever read those statements?
A. Yes.
Q. And when you reviewed those statements, you would see incoming deposits from Eurosa; is that right?
A. That is correct.
Q. And as you sit here today, you recall that in 2015 and 2016. You're not sure about 2017, right?
A. I'm assuming there was because that's -- I'm assuming, but I can't give you a number. That's when all these problems started.
Q. The -- let's do this. Let's go off the record a minute.
VIDEOGRAPHER: We are pausing recording in the first media. Going off the record at 1:46 p.m.
(A recess transpired from 1:46 p.m. until 1:55 p.m.)
VIDEOGRAPHER: We are back on record at 1:55 after a short pause. We are still in the first media.
(Exhibit 50 was previously marked for identification.)

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BY MR. DUNLAP:
Q. Okay. I want to show you an exhibit. And this is -- we're not going to review every page of this. Okay? But this is an exhibit that was identified in Sarmad's deposition as Exhibit 50. Okay? And I want to ask you some questions about this. You don't need to read the whole thing. I'll take you through it. Now if you want to read it, you're welcome to, but it's not necessary unless you want to.
So let me hand it to you. And let's get started. Let me point you to some things, and then if you feel like you need to read the whole thing, you're welcome to. Okay?
A. Yes, I understand.
Q. Okay. All right. So if you'll pull that a little bit closer to you, you can look at that. And I have a copy over here.
MR. DUNLAP: Do you have yours from yesterday?
MS. JOYNER: Mine's in my car so do I need to go -- is it going to be a lot of --
THE WITNESS: One moment.
MR. DUNLAP: I will do it in such a way that I don't think it will be a problem. I'll

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be descriptive, and I think it will be -- you'll know what I'm talking about.

MS. JOYNER: Yeah, I think I know what you're talking about.

BY MR. DUNLAP:

Q. Okay. So this exhibit that I've handed to you includes banking records for your two Eurosa accounts and for Mr. Harake. Okay?

MS. JOYNER: Object to the form.

BY MR. DUNLAP:

Q. Do you see that? If you look right there under account title, you see those account titles?

A. Yes, I see that.

Q. And then there are no statements attached to your -- for your accounts. But we do have the two account numbers ending in 053 and 4818. You see that?

A. Yes, I do.

Q. Okay. And do you believe those are the last four digits of the two accounts you mentioned earlier?

A. Yes, the 4818 is the checking, and the 0533 is the savings, I believe.

Q. Okay. And you don't have any other accounts at Bank of America, right?

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A. No, I don't believe I do.

Q. Any line of credit?

A. No, I do not.

Q. The accounts that are listed on here, the Eurosa, Inc. trading account and the Eurosa, Inc. account, do you have access to those accounts?

A. No, I do not.

Q. Did you ever see statements concerning those accounts?

A. No, I have not.

Q. And have you ever had a debit card or a check card on either of those two accounts?

A. Not that I can recall, no.

Q. And for Mr. Harake's personal account, 6115, do you have access to that account?

A. No, I do not.

Q. Okay. Never had a check card, a debit card, or any other card tied to that account?

A. Not that I can recall.

Q. So bear with me one minute. I would like for you to look at, if you look in the lower right-hand corner of this exhibit, there's something that trial lawyers call Bates numbers. And all that is is a way for us to identify what page in the exhibit we're talking about. And so here, in the

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lower right-hand corner it's going to say HARAKE_02965. If you would flip to that page in the exhibit in front of you?

A. The first page is 029654.

Q. Right. And I'm asking you, just keep flipping, keep going back. You see? Page numbers will be consecutive.

A. There is no 2965. 029 -- because these are all 6 digit numbers.

MS. JOYNER: It's 51. Right?

THE WITNESS: You gave me four digits.

BY MR. DUNLAP:

Q. Let me -- let me borrow it for just a minute, and I think if I show you, it will be a little easier. Okay. So see that says 029675?

A. I heard you say 02965. I did not hear the 7.

Q. I don't speak very well, even English. So that's my fault.

But what we will do is in the future when I refer to a number, just go to the bottom, and that will help. But that's the page I want to refer you to.

Okay. If you look at the top of the page, it says "March 30, 2015, NHTLR transfer $25,000." Do

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you see that?

A. Yes, I do.

Q. Okay. Then if you'll look with me, you see there's a full account number up at the top of that page, and the last four digits are 5749? You see that?

A. Yes, I do see it.

Q. Okay. And then let's go back to -- just hold that place. Go back to the first page. And you see the Eurosa, Inc. account ending in 5749?

A. Yes, I do.

Q. Okay. So we're now back on 029675. So this is showing a transfer of $25,000 into this Eurosa account on March 30 of 2015. Do you see that?

A. Yes, I do.

Q. And I believe -- well, let me back up. Did that money come from you to help form Eurosa?

A. I'm unable to confirm that. I don't remember.

Q. Do you have any idea how much the money was that you might have provided to Sarmad to start Eurosa?

MS. JOYNER: Object to the form of the question.

THE WITNESS: If I didn't remember the

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called friendsofjoebiden@gmail.com.
Q. Do you use social media?
A. Yes, I do.
Q. Facebook?
A. No, I do not.
Q. What do you use?
A. Instagram and Twitter.
Q. And does Sarmad have e-mail?
A. Yes, he does.
Q. What are his e-mail addresses?
A. The one that I use is samharake@gmail.com.
Q. Have you ever reviewed any financial statements for Eurosa?
MS. JOYNER: Object to the form of the question.
THE WITNESS: I don't believe I have.
BY MR. DUNLAP:
Q. Have you ever reviewed any bank statements for Eurosa?
A. I don't believe that I have.
Q. Ever reviewed any expense reports for Eurosa?
A. I don't believe that I have.
Q. Okay. Let's take a break and let me look at my notes. And I'd like to talk with you for a

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second if we can.
VIDEOGRAPHER: We're pausing recording in the second media. Going off record at 2:55 p.m.
(A recess transpired from 2:55 p.m. until 3:07 p.m.)
VIDEOGRAPHER: One moment, please. We are back on record at 3:07. We are still in the second media in the deposition of Ms. Harake.
BY MR. DUNLAP:
Q. Have you ever been to Gibbs International's place of business?
A. Yes, I have.
Q. Okay. And was that that first time, and that was it?
A. That was not it.
Q. Okay. Tell me the other times that you went out there.
A. I can't give you details of each time I went. I was there maybe a dozen, half dozen times. I'm not really sure. Not too many times.
Q. Okay. The -- the banker that you all worked with in connection with the line of credit concerning the loan against your property, what was the banker's name, do you remember?
MS. JOYNER: Object to the form of the

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question.
THE WITNESS: No, I don't remember.
BY MR. DUNLAP:
Q. What was the name of the bank?
A. House --
Q. Optima, am I remembering that right or is that wrong?
A. Are you talking about my home or the building?
Q. I'm talking about the home.
A. I should know this. Sorry. I'm having a blank.
Q. Take your time.
A. For my home, I -- yes. It's with Optima. Yes, it's with Optima, yes.
Q. And do you remember the name of the banker you all worked with?
A. I remember what he looks like. I don't remember his name.
Q. Okay. And where was he located?
A. In Portsmouth, New Hampshire, at the time.
Q. Okay. Is he still with the bank to your knowledge, or you don't know?
A. I do not know.
Q. Okay. Had you all worked with him on

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other occasions or was that the only time?
A. I don't recall any other occasions.
MR. DUNLAP: At this time, I don't have any further questions.
EXAMINATION
BY MS. JOYNER:
Q. Okay. Mrs. Harake, I just have a couple follow-ups.
A. Yes.
Q. When was the last time you went to the warehouse in Seabrook and counted the cars in it?
A. I've never gone to the warehouse and counted cars.
Q. Okay. Does Mr. Harake have access to your bank accounts?
A. As far as I know, no, he does not.
Q. Okay. And earlier, we were looking at some statements. Do you recall that?
A. Yes.
Q. Were any of those statements for your accounts?
A. From what I recall, Mr. Dunlap was showing me Eurosa account statements.
Q. Okay. And do you believe -- we talked about one transfer. Do you recall that from your

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account into a Eurosa account?
A. Correct.
Q. Okay. Do you believe anyone other than you made that transfer?
A. I don't believe so, if it's my account. I believe I'm the only one authorized to make a transfer.
Q. Okay. And so is it just that you don't recall the transfer?
A. That is correct. I don't recall the details of that transfer.
Q. Okay. And have you ever made purchases directly from a Eurosa account?
MR. DUNLAP: Objection. Go ahead.
THE WITNESS: Not -- I don't believe so, no.
BY MS. JOYNER:
Q. Okay. And so the purchases that we went through, do you believe any of them were made by you directly?
MR. DUNLAP: Objection. Go ahead.
THE WITNESS: I don't think so.
BY MS. JOYNER:
Q. Okay. And do you know whether your sister Molly ever arranged for shipping of cars for Sam?

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A. I'm not really sure about that.
MS. JOYNER: Okay. Those are all the questions I have?
MR. DUNLAP: No questions. Thank you for your time.
THE WITNESS: Is that all right? Okay.
VIDEOGRAPHER: We've concluded the deposition of Katherine Harake. We're going off record in the second media at 3:11 p.m.
- - -
(Witness excused.)
- - -
(Deposition was concluded at 3:11 p.m.)
- - -

Confidential Exhibit to be provided to the Court and Counsel separately

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **PLAINTIFF GIBBS INTERNATIONAL, INC.'S MEMORANDUM IN SUPPORT ITS MOTION TO COMPEL AS TO KATHERINE HARAKE AND SARMAD HARAKE**

Pursuant to the South Carolina Rules of Civil Procedure and applicable case law, Plaintiff Gibbs International, Inc. ("Gibbs"), respectfully submits this Memorandum in support of its Motion for an order compelling Katherine Harake ("K. Harake") and Sarmad Harake ("S. Harake") to appear for additional deposition testimony based on documents produced after their depositions. In support of the foregoing, Gibbs offers the following:

OVERVIEW AND THE REASONS FOR THE EXAMINATION

- Gibbs served discovery requests on S. Harake and K. Harake on or about May 19, 2017 requesting the bank statements of Eurosa, Inc. ("Eurosa"), S. Harake (collectively, the "Harake Defendants") and K. Harake. The Harake Defendants and K. Harake refused to produce those documents without a Court order. The detailed and tortured history of the events, from Gibbs serving the discovery requests until the present time, is set forth in detail in the motion filed with this Court on December 16, 2019, a copy of which is attached as **Exhibit 1**.

- Plaintiff took the first day of S. Harake's deposition on January 9, 2019. At that time, S. Harake was still refusing to produce his unredacted bank records without a Court order.

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Plaintiff was therefore unable to examine S. Harake about those bank records at that deposition.

- At the conclusion of S. Harake's January 9, 2019 deposition, Gibbs' counsel put the following on the record:

> At this time I don't have additional questions. If Ms. Joyner has questions of the witness, I may have additional questions. But we have entered into an agreement whereby I can continue the examination, and my continued examination after today will deal with the banking records. And, you know, we've entered into an agreement that that examination can take place at that later time. We have also agreed, that since this deposition is being left open, that Ms. Joyner can speak with her client in the interim. And she is going to go ahead tonight and ask her questions in response to the examination that I have conducted today, and then if I have any other questions in response to her questions, I will ask those questions tonight, but the examination about the banking records will take place on a reconvened date.

- Bottom line – S. Harake agreed to continued examination.

- The Harake Defendants were ordered to produce their unredacted bank records by Court order dated June 3, 2019.

- Plaintiff took the second deposition of S. Harake on July 25, 2019. During this deposition, Plaintiff examined S. Harake regarding, among other things, line-item transactions from the produced bank statements which were identified as "Customer Withdrawal Image" and numerous online banking transfers identified by an alphanumeric code. S. Harake claimed on numerous occasions to have no knowledge or recollection as to where these transfers, totaling over $500,000, went.

- At the conclusion of S. Harake's July 25, 2019 deposition, Gibbs' counsel put the following on the record:

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> It's my position that additional records need to be produced, as we've gone through this testimony today. So on the record, I'm not adjourning the deposition. I believe I'm entitled to get these additional records. And if I believe additional examination is necessary, I'll let you know, and then you can let me know your position.

- Plaintiff took the deposition of K. Harake on July 26, 2019. K. Harake claimed to have no knowledge or recollection regarding the transfer of funds from the accounts of S. Harake/Eurosa into account(s) in her name.

- Plaintiff then issued another subpoena to Bank of America ("BOA") requesting any additional records regarding the transactions identified as "Customer Withdrawal Image" and the online banking transfers identified by an alphanumeric code since K. Harake and S. Harake disclaimed any knowledge of those transactions in their depositions.

- BOA provided a response to this subpoena which revealed for the first time that most of the transactions in question involved the transfer of funds from S. Harake to a savings account in K. Harake's name.

- Plaintiff issued another subpoena to BOA requesting further backup regarding several of the transactions identified by an alphanumeric code.

- BOA provided a response to this subpoena which revealed that even more of the transactions in question involved the transfer of funds to a savings account in K. Harake's name. The truth is it was S. Harake's and K. Harake's responsibility to obtain all of these records from their bank at the outset of this litigation and to produce them in their production in 2017 when they were requested or by supplemental response as opposed to Gibbs having to go to BOA. The Harakes chose not to do so.

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- Also on August 30, 2019, after the depositions of Sam and Katherine Harake, Defendants produced their eleventh supplemental document production, consisting of 105 pages of bank statements and other financial and business documents, most of which are in Turkish.

- On October 29, 2019, Defendants produced their twelfth supplemental document production, consisting of 191 pages of bank statements and other financial and business documents, many of which are in Turkish.

- On December 10, 2019, Defendants produced their thirteenth supplemental document production, consisting of 255 pages of bank statements for accounts in K. Harake's name.

- On March 2, 2020, Plaintiff's counsel sent the following e-mail to Defendants' counsel:

> Good morning. Hope you had a good weekend. Just a quick note that I would like to set a time to depose Sam and Katherine in connection with additional documents produced. Would April 2-3 work? Also, I would like to go ahead and set depositions for your experts. Does April 6-8 work? Thanks and hope all is well.

- Defendants' counsel responded on March 2, 2020 with an objection to producing S. Harake for deposition, but did not object to producing K. Harake at that time.

- Given the pandemic and the fact that Plaintiff's counsel's wife was diagnosed with, and had surgery to remove, a malignant brain tumor in April, Plaintiff's counsel, on May 11, 2020, again sent an e-mail to Defendants' counsel requesting dates for the depositions of S. Harake and K. Harake. Plaintiff's counsel further clarified the reasoning for these depositions:

> You also indicated you may oppose Sam's deposition. If I do not hear from you by Tuesday at 5:00, I will assume you are going to oppose his

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> deposition as previously indicated and I will file a motion to compel. As I have previously indicated in this case, I prefer not to have to file a motion to compel but will do so if need be. As to Katherine, I request to take her deposition on June 4. I will take Sam's the following day if you change your mind or it is allowed by the Court.
>
> As to Sam, I am requesting to depose him with regard to the document productions we received since his deposition. You will also recall that we did not receive the evidence about the transfers with the alphanumeric codes until after Sam and Katherine's depositions, as they both responded that they did not know where those transfers went so he will be deposed on those issues as well. I am also requesting to depose Sam about Katherine's records since transfers were made from his account to her account. Again, it is my preference not to have to file a motion but I will go ahead and draft one in the event you decide that is your preference.

- Defendants' counsel responded that same day as follows:

> For a variety of reasons, we object to your taking Sam and Katherine Harake's depositions, including as I mentioned before that they have been deposed previously. So unfortunately, it appears you will have to file your motion.

(Emphasis added.) No further explanation or justification of the Harakes' position was given and no case authority has been provided, other than to say that they had previously been deposed, as of yesterday and since counsel's March 2, 2020 request for the deposition.

- Courts have routinely allowed for additional examination of witnesses based on document productions after their depositions.

> Although the decision is discretionary, courts have generally allowed re-opening a deposition where, as here, new information is unearthed only after the initial deposition. *See, e.g., Quality Aero Tech., Inc. v. Telemetrie Elektronik GmbH*, 212 F.R.D. 313, 319 (E.D.N.C.2002); *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 692 (D.Kan.1996); *and Keck v. Union Bank of Switzerland*, No. 94–4912, 1997 WL 411931, at *1 (S.D.N.Y. July 22, 1997).

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Le v. Diligence, Inc., 312 F.R.D. 245, 246 (D. Mass. 2015). In *Le*, the defendants failed to produce certain documents until one year after their initial discovery response. The court concluded that it was "only fair that Plaintiff should not be penalized for [Defendants'] lack of promptness." *Id.* As noted above, Defendants have consented to the filing of the Third Amended Complaint. In *Layman*, the amendment of the complaint to include new allegations, even if built on similar facts, was sufficient showing that the second deposition would not be cumulative. *Layman v. Junior Players Golf Acad., Inc.*, No. 9:15-CV-01463-DCN, 2015 WL 13758313, at *1 (D.S.C. Dec. 16, 2015) (citing *E.E.O.C. v. Bardon, Inc.*, 2010 WL 1780126, at *1 (D. Md. May 3, 2010).

ADDITIONAL BACKGROUND AND THE REQUESTED RELIEF

- Gibbs' efforts to obtain the necessary bank records to allow it to evaluate the Harakes' involvement in the embezzlement/ misappropriation/ money laundering/ misuse/ mismanagement have been obstructed by K. Harake and the Harake Defendants at every turn. At one point, the Harake Defendants and K. Harake even went so far as threatening to bring a frivolous lawsuit claim against Gibbs if it did not voluntarily dismiss K. Harake from the lawsuit. More specifically, they indicated that Gibbs should voluntarily dismiss its claims against K. Harake and further indicated:

> *[I]f the claim is not voluntarily dismissed, we will be discussing with our clients the possibility of filing a claim under the South Carolina Frivolous Proceedings Act* ***as there is no reason that Katherine Harake should be a party to this litigation***.

(Emphasis added) Gibbs agreed to voluntarily dismiss K. Harake from the lawsuit until it could secure K. Harake's financial information and conclude its evaluation of potential claims against her.

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- Finally, on or about November 21, 2018, the Harake Defendants produced financial records of S. Harake and Eurosa, but the financial records were heavily redacted. The Harake Defendants' redactions hid from Gibbs the details of over 620 withdrawals and debits from S. Harake's and Eurosa's accounts totaling more than $875,000, including nearly 100 separate withdrawals for greater than $1,000 each, and at least thirteen withdrawals between $10,000 and $20,000 each. The Harake Defendants did not produce any of the financial records of K. Harake.

- Gibbs immediately filed a motion to remove the redactions in the Harake Defendants' financial documents so that it could trace where the Harake Defendants were transferring hundreds of thousands of dollars, and also to determine whether any of this money was being transferred to K. Harake inappropriately and without Gibbs' authorization. Gibbs has also moved to compel K. Harake to produce her financial records.

- The Harake Defendants opposed Gibbs' motions to compel arguing, among other things that:

    - K. Harake's financial records are not relevant to this litigation and "Gibbs is not entitled to a fishing expedition of K. Harake's documents"; and

    - The unredacted financial records of the Harake Defendants "would be enabling an improper fishing expedition" and that "the particular places where K. Harake eats and shops personally or where Eurosa buys things" are not relevant to the litigation.

      [Opp. at P. 5]

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- The Court entered an Order on June 3, 2019 rejecting the contentions and requiring the production of the unredacted financial records of Defendants S. Harake and Eurosa as follows:

> [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.

[Order, June 3, 2019 at P. 9] The Court's June 3, 2019 Order also provided:

> 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.

[Order, June 3, 2019 at P. 8] (Emphasis added). And but for the entry of the Order, Gibbs would never have known what happened to its money, including, but not limited to, the $500,000 plus that went from S. Harake to his wife to K. Harake and the money that went out to third parties for inappropriate purposes. The Harake Defendants did not want Gibbs to know that all of this happened but the Court refused to allow for that result.

- Finally, after this needlessly tortured and time-consuming process, and more than two years after Gibbs requested the production of the Harake Defendants' unredacted financial records, the Harake Defendants finally produced their unredacted financial records on June 6, 2019. And yet again, no records were produced by K. Harake.

- The unredacted Bank of America records finally provided by the Harake Defendants in June 2019 contained a number of transactions with alphanumeric codes and some transactions labeled "Customer Withdrawal Image." The information for these

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transactions in the unredacted Bank of America records did not specify where Gibbs' money went when the Harake Defendants transferred it out of their accounts.

- Gibbs believes that electronic transfers were deliberately used by S. Harake because those transfers would only have alphanumeric codes and would not specify where the money went, thereby making it more difficult for Gibbs to trace the money.

- To try to answer the questions about the whereabouts of its money, Gibbs took the depositions of the Harakes in July 2019 based on the records Gibbs finally received in June 2019. In those depositions, the Harakes disclaimed knowledge of what happened to Gibbs' money as reflected in the transactions with alphanumeric codes or labeled as "Customer Withdrawal Image." Gibbs then issued additional subpoenas to Bank of America in August 2019 as to what happened to the money involved in the transactions with alphanumeric codes and Customer Withdrawal Images.

- Bank of America produced additional records in August/September 2019. And guess what those records showed? The records showed:

  - Over $500,000 of Gibbs' money was transferred to K. Harake. K. Harake testified she transferred whatever money she received from S. Harake/Eurosa out of her personal savings account to her personal checking account and she made spending decisions for the money at that point. K. Harake spent Gibbs' money for unauthorized/inappropriate personal purposes. All of this was improper in different ways including, but not limited to, the commingling of the funds.

  - S. Harake used in excess of $400,000 of Gibbs' money out of Eurosa's accounts to make payments to third parties for unauthorized/inappropriate purposes. All of

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this was improper in different ways including, but not limited to, the commingling of the funds.

- S. Harake transferred Gibbs' money to himself in excess of $38,000. All of this was improper in different ways including, but not limited to, the commingling of the funds.

The Harakes' web of deceit has now been exposed, and Gibbs is entitled to examine S. Harake and K. Harake regarding these transactions.

- The Harake Defendants and K. Harake themselves caused significant delay and expense by withholding evidence and obstructing Gibbs' discovery efforts, including the redaction of the Harake Defendants' financial records to hide the transfer of more than $500,000 to K. Harake's account, the refusal to provide K. Harake's financial records claiming that there was "no reason" for K. Harake to be a party to the lawsuit and threatening to file a frivolous lawsuit claim against Gibbs if K. Harake was not voluntarily dismissed, and then, after Gibbs agreed to voluntarily dismiss K. Harake until it could investigate its potential causes of action against her during discovery, refusing to produce K. Harake's financial records because she was no longer a party to the lawsuit. It took an Order from this Court for the Harake Defendants to finally produce the unredacted records that Gibbs needed to trace its money to K. Harake's account. Until just December 10, 2019, K. Harake refused to produce her financial records despite the Bank of America records tracing Gibbs' money to her personal savings account. Finally, in apparent recognition of the futility of this position, and over 2 years and 9 months after Gibbs' request was made for K. Harake's records, K. Harake produced the records on December 10, 2019.

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- The Harake Defendants' refusal to provide K. Harake's financial records was further contrary to the letter and spirit of the June 3, 2019 Order of this Court, which plainly held that K. Harake's financial records could become discoverable if Gibbs could trace its funds to her account:

> 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.

[Order, June 3, 2019 at P. 8]

- Gibbs is plainly entitled to depose K. Harake and S. Harake about the records produced after their depositions. Those records include: (1) records provided by BOA regarding transactions from bank statements identified as "Customer Withdrawal Image" and the online banking transfers identified by an alphanumeric code; (2) Defendants' eleventh supplemental document production, consisting of 105 pages of bank statements and other financial and business documents, most of which are in Turkish; (3) Defendants' twelfth supplemental document production, consisting of 191 pages of bank statements and other financial and business documents, many of which are in Turkish; and (4) Defendants' thirteenth supplemental document production, consisting of 255 pages of bank statements for accounts in K. Harake's name. This is just yet another attempt to evade discovery.

Finally, Gibbs is entitled to have the evidence and to understand its import. Gibbs must be allowed to ask these defendants about these documents to know of their significance and to know what they will say at trial. This is the purpose of the discovery process and despite these defendants' obstruction, the Court should require that they comply.

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CONCLUSION

As this Court has specifically ruled in this case, Gibbs is entitled to know what happened to its money. Because of Defendants' obstruction, additional deposition testimony is required to achieve this purpose. Gibbs is also entitled to examination about the Turkish records produced after their depositions and on which the defendants apparently intend to rely to try to defend the case. Accordingly, Gibbs respectfully requests that this Court allow it to depose S. Harake and K. Harake about the referenced documents.

WHEREFORE, Gibbs requests that the Court:

1. Order that S. Harake be made available to be deposed;
2. Order that K. Harake be made available to be deposed; and
3. Award any such other and further relief in favor of Gibbs as the Court may deem just and appropriate.

Respectfully submitted this 3rd day of August, 2020.

s/ Kevin A. Dunlap
Kevin A. Dunlap

Attorney for the Plaintiff
Gibbs International, Inc.

OF COUNSEL:

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants.	C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Sarmad Harake

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Third Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 3rd day of August, 2020.

S/Kevin A. Dunlap
Kevin A. Dunlap
S.C. Bar No. 13081
Parker Poe Adams & Bernstein LLP
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Attorney for Plaintiff

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Eurosa, Inc.

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Third Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 3rd day of August, 2020.

S/Kevin A. Dunlap
Kevin A. Dunlap
S.C. Bar No. 13081
Parker Poe Adams & Bernstein LLP
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Attorney for Plaintiff

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **SUMMONS** **(Jury Trial Demanded)**

To: Katherine Harake

You are hereby summoned and required to serve upon Kevin A. Dunlap of Parker Poe Adams & Bernstein LLP, attorney for Plaintiff, an Answer to the Third Amended Complaint which is herewith served upon you, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This 3rd day of August, 2020.

S/Kevin A. Dunlap
Kevin A. Dunlap
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Attorney for Plaintiff

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **THIRD AMENDED COMPLAINT** **(Jury Trial Demanded)**

Plaintiff Gibbs International, Inc. ("Gibbs" or "Plaintiff") files this Third Amended Complaint, complaining of Defendants, Sarmad Harake a/k/a Sam Harake ("S. Harake") and Eurosa, Inc. ("Eurosa") (collectively, the "Harake Defendants") and Katherine Harake ("K. Harake"). The Harake Defendants and K. Harake have consented to the filing of this amended complaint but have reserved the right to move to dismiss if any of them chooses to do so. The Harake Defendants and K. Harake have agreed for their counsel to accept service of this Third Amended Complaint.

THE PARTIES

1. Plaintiff is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Spartanburg, South Carolina.

2. Plaintiff is informed and believes that Defendant S. Harake lived, worked, and was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter and his alleged performance of the agreement between the parties (as well as his other conduct described herein) took place, in part, in Spartanburg, South Carolina.

3. Plaintiff is informed and believes that Defendant Eurosa is a corporation organized and existing pursuant to the laws of the State of New Hampshire and had its principal

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place of business in South Carolina at the time of the filing of the original complaint. Eurosa, through S. Harake, has been present in South Carolina.

4. Plaintiff is informed and believes that K. Harake was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter. Much of the conduct alleged as to K. Harake occurred when she was living in Spartanburg County, South Carolina.

5. This Court has jurisdiction over the claims and the parties.

FIRST CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Contract as to the Harake Defendants)
(Gibbs' Individual Claims for Declaratory Judgment as to the Harake Defendants)

6. The allegations of the other paragraphs of this amendment are incorporated herein by reference.

7. Gibbs, on one hand, and the Harake Defendants, on the other, entered into an agreement (the "Agreement") whereby the Harake Defendants agreed to identify and evaluate viable investment opportunities as well as to make and manage investments.

8. Gibbs and the Harake Defendants also agreed to form Gibbs Investment Holdings, LLC ("GIH") to be an entity through which some of such investment activities were to occur.

9. The Harake Defendants also agreed to make capital contributions and to invest funds to support the work under the Agreement.

10. The Harake Defendants breached the Agreement by, among other things, failing to locate sufficient investment opportunities, failing to provide or locate additional needed capital, failing to properly manage and achieve success as to the investments, and failing to perform their other responsibilities under the Agreement.

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11. The Harake Defendants also engaged in conduct that was deceitful, manipulative, untrustworthy, improper, illegal, contrary to good business judgment, and contrary to acceptable conduct for corporate management.

12. The Harake Defendants' performance was also deficient, and in breach of the agreement between the parties, in the following particulars, among others:

A. The Harake Defendants represented that they could roll Mobix Wireless Solutions, Ltd. ("Mobix Wireless") and Mobix Chip, LLC ("Mobix Chip") under a new United States company by the end of 2015 and they failed to do so;

B. The Harake Defendants represented that they could take IOTive public by the second quarter of 2016 for IOTive and they failed to do so;

C. The Harake Defendants represented they could achieve profitability for IOTive by the second quarter of 2016 but the sales were even less than $100,000. The Harake Defendants' manipulation and inappropriate method of achieving profitability was by not recording expenses and other false and fraudulent means;

D. The Harake Defendants represented that they could secure investors from the Middle East by the second quarter 2016 but not even one investor was added nor was there any investment into the company from the Harake Defendants' alleged connections;

E. The Harake Defendants represented they could achieve a pre-IPO valuation at IOTive by the second quarter of 2016 in a range of $9.1 million to $32 million but in reality the current valuation for the company at the time of filing the original complaint was less than $1 million;

F. The Harake Defendants misrepresented to the Russian entity, Innovative Solutions, and its representative Pavel that Gibbs would provide a $3 million funding

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commitment. The Harake Defendants made this representation without any authority from Gibbs. The commitment was only made on behalf of GIH, not Gibbs. Innovative Solutions was to contribute $1 million to Mobix Chip. Gibbs is informed and believes that Innovative Solutions did not make the investment;

G. Under the terms of the Agreement, S. Harake was supposed to be granted options for approximately 3.3% of IOTive. Instead, S. Harake had 25.6% of IOTive shares improperly issued to his company, Eurosa, on August 29, 2016 despite the fact that he had not met his commitments under the Agreement. The shares improperly issued to Eurosa should have been issued to Gibbs. Gibbs was supposed to own 52% of the shares but Gibbs was only issued 26.4% of the shares;

H. As to Mobix Wireless, the Harake Defendants asked representatives of Mobix Wireless to lie to an Israeli government official as described herein:

i. Part of the strategy for IOTive was to have IOTive control and own the IP/Patents/Technology for reasons fabricated by the Harake Defendants;

ii. Consequently, the IP needed to be sold from Mobix Wireless in Israel to IOTive in the United States;

iii. Due to Mobix Wireless's receipt of Israeli government funds related to the IP, governmental approval was necessary to sell or transfer the IP;

iv. Mobix Wireless would typically be required to re-pay the Israeli government investment, often with certain penalties;

v. Throughout this process, the Harake Defendants represented to Gibbs that they knew how to make sure that nothing, or very little, would be paid to the Israeli government;

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vi. In the process, Mobix Wireless was going to submit an application which, among other things, did not provide full disclosure about the party who was going to buy the IP;

vii. The Harake Defendants gave instructions to Gibbs to only mention the buyer as being Mark Munday and to claim that Munday had no relationship with IOTive even though he was the president of IOTive and the plan was to transfer the IP to IOTive;

viii. The Harake Defendants gave instructions to Gibbs to make this misrepresentation to reduce any payment to the government in violation of IOTive's responsibilities and applicable law; and

ix. In spite of the Harake Defendants' instructions, the actual transaction was disclosed by Gil Vassoli of Gibbs to the Israeli government over the Harake Defendants' objections.

I. As to the overall IOTive structure:

i. The Harake Defendants indicated that IOT Labs, Ltd. ("IOT Labs") was an Israeli company and IOTive could not become a public company or bring in investors and customers from Middle Eastern countries as long as IOTive remained an Israeli entity. To solve this alleged problem, the Harake Defendants wanted a United States company with a European company and some activity in Israel. However, the Harake Defendants specified that the activity in Israel would have to be hidden in such a way that it could not be linked back to IOTive in the United States; and

ii. Despite assurances from Gibbs that there are many publicly traded companies with a high market rate cap that are based in Israel which have received government funds and sell to Arab countries, the Harake Defendants insisted on a very complex structure

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with companies in Europe and the United States. The imposition of the structure the Harake Defendants imposed on the situation had an adverse tax effect.

J. As to IOTive's financials:

i. The Harake Defendants represented that they could take IOTive public within two quarters from the time S. Harake became CEO and that he had a banker who would do the IPO;

ii. At that time, IOTive did not have any intellectual property ("IP") or assets or rights to sell any of the Mobix Wireless products; and

iii. Instead of working to acquire rights, assets, and sales, the Harake Defendants tried to manipulate the books by:

a. Instructing the accountant not to book certain expenses related to the operation of the company so that profits would appear; and

b. Creating a very complex process for how orders and delivery for Mobix Wireless products occurred which created value added tax problems in Israel and lowered revenue on Mobix Wireless's books and lowered royalties Mobix Wireless paid to the Israeli government.

K. As to the Mobix Chip valuation:

i. The Harake Defendants engineered a plan to move some IP owned by Mobix Chip in Russia to IOTive in the United States;

ii. The Harake Defendants engineered a way to inflate the value of the IP and to inflate the value of IOTive by moving money from Russia to Cypress to the United States and back; and

iii. This activity created accounting values that had no substantive merit. The IOTive Board resisted the activities by the Harake Defendants for months and was concerned about the efforts. S. Harake's idea was for $20 million to be paid to IOTive by a Russian entity. IOTive would then pay the $20 million to another Russian entity who would return the original $20 million to the original Russian entity. In other words, this scheme by S. Harake is why the valuation had no substantive merit and just involved the movement of money in a highly manipulative and inappropriate shell game.

L. As to the need to form a new company in Israel so the R&D work would be part of IOTive in terms of IP ownership:

i. S. Harake represented that he wanted to have someone he knew in Europe to go to Israel and form a new company without disclosing who the real shareholders were or the actual intent; and

ii. S. Harake represented that once such a company is formed and bank accounts are set that person will transfer the shares or hold the shares in escrow so that he could mask/hide the real structure.

M. S. Harake has engaged in inappropriate and manipulative conduct including the removal of an IOTive Board member (Rob Skaff ("Skaff")) of the entity known as IOTive in anticipation of significant votes and then offered the former Board member a position as a contractor after S. Harake obtained the result on the Board vote he wanted;

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N. S. Harake also became, for a period of time, the CEO of IOTive, a United States company who is the 100% owner of an Israeli company. The result was that S. Harake was managing an Israeli company, IOT Labs, even though he repeatedly has indicated to Gibbs that it would be improper for him to do so;

O. Gibbs is also informed and believes that a major shareholder of Mobix Chip was in jail due to issues with the local government and S. Harake went to Russia and represented that he used his contacts with the Russian mob to get the individual released. S. Harake represented that because of his efforts the person was released from jail so he owes S. Harake a favor that S. Harake could try to use to benefit IOTive and Mobix Wireless;

P. The Harake Defendants represented that IOTive would have EBITDA of $2.6 million (run rate EBITDA of $250,000 per month) but the Harake Defendants failed to achieve even a fraction of that amount;

Q. Gibbs is informed and believes that S. Harake forced the creation of an entity in Hong Kong known as ESHI to hide the fact that IOTive has Israeli shareholders;

R. S. Harake's scheme was to misrepresent and conceal the existence of these Israeli shareholders because S. Harake represented that he could not exercise management responsibility over an Israeli entity;

S. S. Harake indicated that because IOTive had IOT Labs as an Israeli company, he could not take IOTive public and could not bring investors and customers from Middle Eastern countries;

T. S. Harake indicated that the activity in Israel would have to be misrepresented in such a way that it could not be linked back to IOTive in the United States and the Israeli connection was to be hidden;

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U. The imposition of the structure Harake Defendants imposed on the situation had an adverse tax effect;

V. S. Harake presented Gibbs with an opportunity to get involved in the project with QPAGOS while investing little to no money of S. Harake's own to be able to negotiate free shares and S. Harake misrepresented the value. S. Harake represented that Gibbs and S. Harake would receive six million free shares in exchange for 15% of Yogi Pay. The actual free shares were 1,920,000 to Gibbs and Eurosa each and GIH received 1,095,000 free shares. The Harake Defendants represented the free shares would have a value of approximately $9 million but the reality was the free shares were only worth $1.8 million;

W. The Harake Defendants invited Gibbs and some others close to Gibbs to invest in QPAGOS before a reverse merger based on a plan to raise $5 million. The Harake Defendants were unable to secure the other investors and the total amount invested was lower and Gibbs was forced to purchase shares for $700,000 to protect its "investment" when none were originally planned to be purchased;

X. As part of a reverse merger/IPO involving QPAGOS, the Harake Defendants failed to inform Gibbs that the shares being purchased for QPAGOS were restricted and could not be traded for a period of 12 months;

Y. The Harake Defendants assured Gibbs that they would produce a financial model and a clear vision for Yogi Pay but to date the Harake Defendants have not provided either;

Z. After the reverse merger scheme, the Harake Defendants represented that Yogi Pay would be a public company with a market cap of $50,000,000 and that GIH would own 42% by the end of 2016. The Harake Defendants failed to deliver as the company has no

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proprietary assets and no real value. The Harake Defendants failed to understand what the requirements were to be able to make the business model work and they do not have the expertise to move Yogi Pay forward despite their representations to the contrary;

AA. Yogi Pay has failed to even place one demo unit in service to date as a result of the Harake Defendants' failure to launch even though the Harake Defendants represented they would exist by third quarter 2016;

BB. The Harake Defendants represented they would secure new investors who would contribute $2.5 million for 5% of Yogi Pay by the second quarter of 2016 and failed to do so. The Harake Defendants' failure to secure those investors which, as set forth above, resulted in Gibbs having to fund approximately $700,000.

CC. The Harake Defendants engaged a third-party consultant firm to get Yogi Pay "licensed" in every state in the United States without understanding what that means in terms of cost, minimum cash needs, maintenance fees, and other requirements;

DD. The Harake Defendants were supposed to secure all needed licensing by March 2016 but once again failed to do so;

EE. The Harake Defendants embezzled/misappropriated $250,000 Gibbs invested in Pay Send to pay S. Harake's personal expenses, which was unethical, illegal, unauthorized and deceptive;

FF. The Harake Defendants represented to Gibbs that the money wire/card to card application for Pay Send was already a proven technology and a working product that can easily be replicated in the United States market. In direct contradiction of the Harake Defendants' representations, after months and months of Gibbs asking, Gibbs learned in March 2017 that the product is not even working as of the filing of the original complaint and in Europe

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they were in a beta testing phase. Gibbs also discovered that the regulatory environment in the United States is materially different and the design does not work in the United States;

GG. Despite this information, S. Harake suggested that Gibbs put $1 million in escrow and find other partners to do the same but draft the terms of the escrow so that there was no responsibility to actually use the money on Pay Send. S. Harake could then flash the $2 million around to obtain other investors and customers. Once additional, non-escrow money was raised, that money could be used to fund Pay Send, and then the escrowed amount would be withdrawn;

HH. Gibbs is informed and believes that the IOTive website, URL, and trademarks are still in S. Harake's name and he will not give it back to IOTive which constitutes a misappropriation; and

II. The Harake Defendants wrongfully forced the creation of an entity in Hong Kong to hide the fact that IOTive has Israeli shareholders. S. Harake also wrongfully indicated that the activity in Israel through IOTive would have to be misrepresented in such a way that it could not be linked back to IOTive in the United States and the Israeli connection was to be hidden.

Miscellaneous

JJ. S. Harake suggested that Gibbs' employees wear specially designed cufflinks with a hidden thumb drive that they could put in someone else's computer and steal the information from others.

KK. S. Harake also suggested that Gibbs employees wear specially designed eyeglasses with a hidden camera to steal information from others.

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LL. Consistent with the inappropriate actions of S. Harake described in this Amended Complaint, Harake has stated repeatedly to numerous people that he has never paid taxes in any country.

MM. Based upon representations by the Harake Defendants that $111,000 per month was necessary to maintain operation of Fed Securities, a company of Harake in Turkey, Gibbs provided to the Harake Defendants $53,000 per month for a year. Gibbs is informed and believes that the representations were untrue. Gibbs has asked the Harake Defendants on numerous occasions for an accounting of the funds provided, which they have failed and refused to provide. Gibbs is informed and believes that the Harake Defendants have misappropriated the funds and have used them for improper and personal purposes.

13. As a result of all of the above-described inappropriate conduct, Gibbs seeks a judgment declaring that the Harake Defendants breached the Agreement and Gibbs' rights were violated and Gibbs is entitled to remedial relief in the form of rescission, correction of record keeping, and other appropriate remedial relief.

14. Gibbs also seeks to recover its damages as a result of the Harake Defendants' conduct and Gibbs also requests an accounting of the subject assets and appropriate division of those assets between the parties.

15. The Harake Defendants also breached the Agreement by, among other ways, taking funds that Gibbs provided and improperly transferring those funds to K. Harake for unauthorized purposes.

16. The Harake Defendants also breached the Agreement by, among other ways, taking funds that Gibbs provided and improperly transferring those funds to third parties for unauthorized purposes.

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17. The Harake Defendants also breached the Agreement by, among other ways, taking funds that Gibbs provided and improperly transferring those funds to S. Harake for unauthorized purposes.

18. The Harake Defendants also breached the Agreement by, among other ways, not using Gibbs' money for the purposes for which it was supposed to be used.

19. The Harake Defendants also breached the Agreement by commingling funds.

20. The conduct described herein constitutes misappropriation, embezzlement, money laundering, misuse of money and/or mismanagement of money in breach of the Agreement.

21. The Harake Defendants also breached the Agreement by misusing and/or mismanaging Gibbs' money that Gibbs paid directly to other entities at S. Harake's request.

22. The Harake Defendants also breached the Agreement by, among other things, failing to locate sufficient investment opportunities, failing to provide or locate additional needed capital, failing to properly manage and achieve success, and failing to perform their other responsibilities under the Agreement.

23. As a result of the above-described inappropriate conduct, Gibbs seeks to recover its damages from the Harake Defendants in an amount to be proven at trial as well as rescission, correction of recordkeeping, and other appropriate remedial relief.

SECOND CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing as to the Harake Defendants)

24. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

25. The conduct by the Harake Defendants described herein constitutes a breach of the implied covenant of good faith and fair dealing.

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26. Gibbs accordingly is entitled to recover compensatory damages from the Harake Defendants for the breach in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Fiduciary Duty as to the Harake Defendants)
(Gibbs' Individual Claims for Aiding and Abetting Breach of Fiduciary Duty as to K. Harake)

27. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

28. The Harake Defendants assumed a position of trust as to Plaintiffs and, as such, owed duties, fiduciary and otherwise, to deal fairly and honestly with Gibbs.

29. A fiduciary must act in good faith and is not allowed to make use of that relationship to benefit his or her personal interests.

30. Gibbs is informed and believes that Gibbs' money was inappropriately provided by the Harake Defendants to K. Harake, third parties, and S. Harake himself.

31. The Harake Defendants breached their duties, fiduciary and otherwise, by, among other things, misappropriating/embezzling/laundering/misusing/mismanaging Gibbs' money, not using the money for the purposes for which it was to be used, making improper transfers to K. Harake, third parties, and himself, misusing and/or mismanaging Gibbs' money that Gibbs paid to others at S. Harake's request, failing to properly identify and evaluate investment opportunities, failing to properly make and manage investments, failing to provide or locate additional needed capital, failing to properly manage and achieve success, and failing to perform other fiduciary responsibilities.

32. The Harake Defendants also breached their fiduciary duty by commingling funds. The Harake Defendants also breached their fiduciary duty by using a corporate account as a "personal playpen" and as a personal checking account for unauthorized payments.

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33. Gibbs is informed and believes that K. Harake knew, or should have known, or had constructive knowledge, that the transfers were made to her account and she did, in fact, use the money. All of this was improper in different ways including, but not limited to, the commingling of such funds.

34. Gibbs is also informed and believes that the Harake Defendants and K. Harake concealed money that was being improperly taken from Gibbs by the Harake Defendants and K. Harake. Gibbs is also informed and believes that the transfers were made to a personal savings account of K. Harake and that she then transferred the money to her personal checking account for improper and unauthorized use. Gibbs is also informed and believes that K. Harake made spending decisions herself and actually wrote checks and/or initiated electronic transfers herself using Gibbs' funds. All of this was improper in different ways including, but not limited to, the commingling of such funds.

35. By receiving, transferring from one of her accounts to another, making spending decisions, and/or using embezzled/misappropriated/laundered/misused/mismanaged funds from the Harake Defendants, among other things, K. Harake was aiding and abetting the Harake Defendants' breach of their fiduciary duties to Plaintiff.

36. Plaintiff is accordingly entitled to recover compensatory damages from K. Harake for such conduct in an amount to be proven at trial.

37. Plaintiff is also entitled to recover compensatory damages from the Harake Defendants for such conduct in an amount to be proven at trial.

38. Plaintiff is also informed and believes that the Harake Defendants' conduct and K. Harake's conduct was reckless, malicious, willful, wanton, and/or grossly negligent entitling Plaintiff to recover punitive damages.

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FOURTH CLAIM FOR RELIEF
(Gibbs' Claims for an Accounting as to S. Harake, Eurosa, and K. Harake)

39. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

40. As a result of the alleged and wrongful activities of the Harake Defendants and K. Harake, Plaintiff is entitled to a complete accounting of the subject assets as well as an appropriate division of those assets and also an accounting of all financial and other transactions involving the Harake Defendants, as well as K. Harake, in any way involving Gibbs.

FIFTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Invasion of Privacy/Wrongful Intrusion Into Private Affairs as to the Harake Defendants)

41. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

42. Plaintiff is informed and believes that the Harake Defendants have intentionally intruded into the private affairs of Gibbs and its chief executive officer, Jimmy Gibbs.

43. Plaintiff is informed and believes that the Harake Defendants have undertaken this activity by, among other things, obtaining information about Mr. Gibbs' private travel plans and stalking and following Mr. Gibbs when he was in the foreign country of Turkey by watching, spying, attempting to intimidate him and other similar conduct as well as having him followed and confronted in a hotel lobby in Turkey.

44. Plaintiff is informed and believes that the activities inquired into involve the private business affairs of Gibbs, a privately held company, as well as the private business and personal affairs of Mr. Gibbs and Mr. Gibbs expects to not be harassed and stalked or interfered with as he tries to perform his role as the CEO of Gibbs.

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45. The invasion has been substantial and unreasonable and calculated to attempt to intimidate Plaintiff from pursuing claims against the Harake Defendants.

46. Plaintiff is also informed and believes that the Harake Defendants bragged to others about their stalking and following Mr. Gibbs and photographing Mr. Gibbs and those travelling with him in a hotel lobby in Turkey.

47. Even after putting the Harake Defendants on notice in the Complaint that Gibbs objects to Harake stalking Mr. Gibbs, the Harake Defendants flagrantly continue to do so. As recently as May 25, 2017, S. Harake told a Gibbs employee that he knew Mr. Gibbs was in Lake Charles, Louisiana.

48. Plaintiff is also informed and believes that the Harake Defendants are attempting to obtain other private information about Mr. Gibbs and Gibbs, a privately held company, in inappropriate ways.

49. Plaintiff is informed and believes that the Harake Defendants actions have been done willingly and S. Harake desired the result of his conduct and/or should have known the result that would follow from his conduct. The willful and aggravated nature of the conduct has been heightened by the Harake Defendants' continuing this pattern of conduct even after receipt of the complaint asserting an invasion of privacy claim.

50. As the architect of the invasion of privacy, the Harake Defendants' actions have been engineered and orchestrated by S. Harake in South Carolina and he has accessed private information in South Carolina.

51. Plaintiff accordingly is entitled to recover compensatory damages in an amount to be proven at trial.

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52. The Harake Defendants' actions have been willful, wanton, aggravated, reckless, and/or grossly negligent. Plaintiff accordingly is also entitled to recover punitive damages in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Conversion Against the Harake Defendants and K. Harake)
(Gibbs' Individual Claims Against K. Harake for Aiding/Abetting Conversion)

53. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

54. Plaintiff was the lawful owner of funds that the Harake Defendants, as well as K. Harake, improperly used.

55. The Harake Defendants and K. Harake exercised dominion and control over the funds that were improperly misappropriated/embezzled/laundered/misused/mismanaged by the Harake Defendants and K. Harake.

56. Plaintiff is informed and believes that K. Harake knew, or should have known, or had constructive knowledge, that the transfers were made to her account and she did, in fact, use the money for improper purposes for herself and/or her family and/or other improper purposes.

57. Plaintiff is also informed and believes that K. Harake concealed from Gibbs the fact that money was being taken improperly from Gibbs by the Harake Defendants and K. Harake.

58. Plaintiff is also informed and believes that the transfers were made to a personal savings account of K. Harake and she then transferred the money to her personal checking account for improper use.

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59. Plaintiff is also informed and believes that K. Harake actually made spending decisions and wrote checks and/or initiated electronic transfers herself using Gibbs' funds and did so improperly and without authorization.

60. The Harake Defendants and K. Harake excluded Plaintiff from use and possession of the funds without authorization, constituting a conversion.

61. The above-described actions entitle Plaintiff to recover compensatory damages, in an amount to be proven at trial, from the Harake Defendants for conversion and from K. Harake for conversion and/or aiding/abetting conversion.

62. The above-described actions were accomplished through reckless, malicious, willful and wanton and/or grossly negligent conduct entitling Plaintiff to recover punitive damages.

SEVENTH CLAIM FOR RELIEF
(Gibbs' Claims for Unfair and Deceptive Trade Practices as to S. Harake, Eurosa, and K. Harake)

63. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

64. The conduct of the Harake Defendants, as well as K. Harake, as alleged above, and as alleged in the Second Amended Complaint previously filed in this matter, constitute one or more acts or practices in commerce in this State in violation of the South Carolina Unfair Trade Practices Act, resulting in an impact on the public interest. The aforementioned conduct is also subject to repetition.

65. Plaintiff accordingly is entitled to a judgment against the Harake Defendants, as well as K. Harake, for the amount of Plaintiff's compensatory damages proximately caused by these Defendants' unfair trade practices, to be trebled in accordance with South Carolina law,

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together with interest (including prejudgment interest), as allowed by law, and Plaintiff's reasonable costs, expenses and attorneys' fees incurred in filing and prosecuting this action.

EIGHTH CLAIM FOR RELIEF
(Fraud as to S. Harake/Eurosa)

66. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

67. S. Harake engaged in fraudulent conduct by misappropriating/embezzling/ laundering/misusing/mismanaging funds involving Gibbs.

68. S. Harake concealed from Gibbs that he had used Gibbs' funds for unauthorized purposes.

69. S. Harake concealed from Gibbs that he had misappropriated/embezzled/ laundered/mismanaged/misused funds from Gibbs.

70. S. Harake concealed from Gibbs that his wife K. Harake participated in and used the embezzled/misappropriated/laundered/mismanaged/misused funds from Gibbs.

71. S. Harake represented to Gibbs that his handling of Gibbs' funds was appropriate and he denied any improper use of Gibbs' money and that was a misrepresentation.

72. S. Harake represented to Gibbs, and convinced Gibbs, that he could turn Mobix around when he knew, or should have known, he did not have the ability to do so.

73. S. Harake made other representations to Gibbs about his ability to achieve success in many ways for Gibbs, which was false.

74. The representations were false and/or the concealment amounted to falsehood and was inappropriate.

75. The misrepresentations were material.

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76. S. Harake knew that the representations were false or, in the alternative, recklessly disregarded the representations' truth or falsity. S. Harake also knew the concealment amounted to misrepresentations and/or was otherwise inappropriate or, in the alternative, recklessly disregarded the inappropriate nature of concealing the information.

77. S. Harake intended that Gibbs act upon his misrepresentations and/or concealment.

78. Gibbs was not aware that S. Harake's misrepresentations were false and, justifiably, relied upon the truth of S. Harake's representations/concealment.

79. As a direct and proximate result of S. Harake's misrepresentations and/or concealment, Gibbs suffered injuries and damages and Gibbs, accordingly, is entitled to compensatory damages in an amount to be proven at trial.

80. The conduct by S. Harake was reckless, malicious, willful, wanton and/or grossly negligent, entitling Plaintiff to recover punitive damages from S. Harake.

NINTH CLAIM FOR RELIEF
(Fraud as to K. Harake)

81. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

82. K. Harake engaged in fraudulent conduct by misappropriating/embezzling/ laundering/misusing/mismanaging funds for Gibbs and/or aiding/abetting in that type conduct.

83. K. Harake concealed from Gibbs that she and S. Harake used Gibbs' funds for inappropriate purposes.

84. K. Harake concealed from Gibbs that she and S. Harake misappropriated/ embezzled/laundered/mismanaged/misused funds from Gibbs.

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85. K. Harake concealed from Gibbs that S. Harake made transfers of Gibbs' money from the Eurosa accounts to her personal savings account.

86. K. Harake concealed from Gibbs that she made transfers of Gibbs' money from her personal savings account to her personal checking account and that she then made improper and unauthorized spending decisions concerning the Gibbs money she transferred to her personal checking account.

87. Gibbs is informed and believes that K. Harake was aware that S. Harake reported to Gibbs that his handling of Gibbs' funds was appropriate and that he denied any improper use of Gibbs' money. K. Harake concealed from Gibbs that S. Harake's representations were not true.

88. The above concealment by K. Harake amounted to misrepresentations and was inappropriate.

89. The representations were material.

90. K. Harake knew that the representations by her husband were false or, in the alternative, recklessly disregarded the truth or falsity of the representations. K. Harake also knew that the concealment amounted to misrepresentations and/or was otherwise inappropriate or, in the alternative, recklessly disregarded the inappropriate nature of the concealment.

91. K. Harake intended that Gibbs act upon the misrepresentations and/or concealment.

92. Gibbs was not aware of the concealment or that representations were false and, justifiably, relied on the truth of the representations.

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93. As a direct and proximate result of K. Harake's conduct, Gibbs suffered injuries and damages. Gibbs accordingly is entitled to compensatory damages in an amount to be determined at trial.

94. The above-described conduct was reckless, malicious, willful, wanton, and grossly negligent. As a result, Plaintiff is also entitled to recover punitive damages from K. Harake.

TENTH CLAIM FOR RELIEF
(Civil Conspiracy Against the Harake Defendants and K. Harake)

95. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

96. The Harake Defendants and K. Harake entered into an unlawful agreement and conspired to engage in unlawful conduct constituting an illegal combination or conspiracy to achieve the unlawful objective of misappropriating/embezzling/laundering/misusing/ mismanaging money from Gibbs and concealing misappropriated/embezzled/laundered/ misused/mismanaged funds from Gibbs. This activity was undertaken with the primary purpose or object to be to impair Plaintiff financially.

97. The Harake Defendants transferred more than $500,000 from an account of Defendant Eurosa to one or more accounts of K. Harake to conceal/embezzle/launder/misuse/ mismanage funds from Plaintiff. As set forth above, inappropriate transfers also took place to third parties and to S. Harake's personal account that were used to benefit both S. Harake and K. Harake. Gibbs is informed and believes that K. Harake made inappropriate transfers of Gibbs' money provided to her.

98. As a direct and proximate result of the Harake Defendants' and K. Harake's conduct, Gibbs has suffered injuries and damages beyond the damages alleged in other causes of

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action. These special damages include, but are not limited to, the inability to use the money for the appropriate purpose because it was taken inappropriately resulting in the depletion of funds available to be used for investment and/or to contribute to the funds available to try to make the businesses successful and/or resulting in the failure of business opportunities.

99. Plaintiff accordingly is entitled to compensatory damages in an amount to be proven at trial from the Harake Defendants and K. Harake.

100. The above-described actions were accomplished through reckless, malicious, willful, wanton, and grossly negligent conduct. As a result, Plaintiff is also entitled to recover punitive damages from the Harake Defendants and K. Harake.

ELEVENTH CLAIM FOR RELIEF
(Gibbs' Claims for Unjust Enrichment, Quasi Contract, Implied Contract, Quantum Meruit as to K. Harake)

101. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

102. Gibbs made non-gratuitous payments to S. Harake/Eurosa for specified business purposes.

103. The Harake Defendants then transferred more than $500,000 of Gibbs' money from the accounts of Eurosa to a personal account of K. Harake; more than $418,000 of Gibbs' money to third parties; and more than $38,000 of Gibbs' money to S. Harake. Those transfers were without Plaintiff's approval and with the purpose of concealing funds from Gibbs that were misappropriated/embezzled/laundered/misused/mismanaged.

104. K. Harake did not provide consideration in return for the more than $500,000 of Gibbs' money transferred to her personal account.

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105. As a result, K. Harake received non-gratuitous funds provided by Gibbs and a benefit was conferred on K. Harake. K. Harake also received a benefit to the extent funds were transferred to third parties and/or S. Harake that were used to benefit K. Harake, S. Harake, and/or their family.

106. The retention and/or use of the money by K. Harake, and/or the benefits K. Harake received by the money being paid to anyone other than K. Harake that also benefited K. Harake, S. Harake, and/or her family, is unjust and has unjustly enriched K. Harake.

107. Plaintiff accordingly is entitled to compensatory damages from K. Harake in an amount to be proven at trial.

TWELFTH CLAIM FOR RELIEF
(Gibbs' Claims for Unjust Enrichment, Quasi Contract, Implied Contract, Quantum Meruit, as to S. Harake and Eurosa)

108. The allegations of the other paragraphs of this amendment, and the paragraphs in the Second Amended Complaint previously filed, are incorporated herein by reference.

109. Gibbs made non-gratuitous payments to the Harake Defendants for specified business purposes.

110. As set forth above, the Harake Defendants transferred more than $500,000 of Gibbs' money from the accounts of Eurosa to a personal account of K. Harake; more than $418,000 of Gibbs' money to third parties; and more than $38,000 to himself. Those transfers were without Plaintiff's approval and with the purpose of concealing funds from Gibbs that were misappropriated/embezzled/laundered/misused/mismanaged.

111. As a result, the Harake Defendants received non-gratuitous funds provided by Gibbs and a benefit was conferred on the Harake Defendants.

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112. The retention and/or use of the money by the Harake Defendants and/or the benefits the Harake Defendants received by the money being paid to anyone other than the Harake Defendants that also benefited the Harake Defendants is unjust and has unjustly enriched the Harake Defendants.

113. The fact that Gibbs paid in excess of $1.2 million to S. Harake/Eurosa and additional sums to others at S. Harake's/Eurosa's request and the fact that S. Harake stole money from Gibbs, as now established by S. Harake and K. Harake's own records, entitles Gibbs to recover all of the money it paid to S. Harake/Eurosa as well as the money Gibbs paid to third parties at S. Harake's/Eurosa's request as S. Harake/Eurosa have been unjustly enriched and that has now been established.

114. Plaintiff is accordingly entitled to recover from the Harake Defendants in an amount to be proven at trial.

THIRTEENTH CLAIM FOR RELIEF
(Piercing the Corporate Veil of Eurosa)

115. The allegations of the other paragraphs of this amended complaint are incorporated herein by reference.

116. Gibbs is informed and believes that:

A. Eurosa was grossly undercapitalized based on unredacted bank records that have now been produced in this case. The initial "capital" of Eurosa was a $25,000 loan by K. Harake to S. Harake on or about March 30, 2015.

B. At the time of the initial infusion of cash by Gibbs on or about May 27, 2015, Eurosa's account was overdrawn which not only shows that Eurosa was grossly undercapitalized, but also shows that it was insolvent.

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C. As set forth above, S. Harake siphoned substantial funds out of Eurosa's account and he was the owner of Eurosa. Money was also laundered by S. Harake using S. Harake's accounts and his wife K. Harake's accounts.

D. There were no other functioning officers or directors for Eurosa aside from S. Harake.

E. The corporate entity Eurosa was merely a façade for the activities of S. Harake as the only owner.

F. While this factor is not as significant as it once was, there also was a failure to observe corporate formalities and an absence of corporate records.

117. Gibbs is also informed and believes that:

A. It would be unjust and/or fundamentally unfair for the acts of Eurosa not to be recognized as the acts of Harake individually.

B. S. Harake was aware of Gibbs' concerns and thereafter continued to act in a self-serving manner and in disregard of Gibbs' rights by, among other things, siphoning money off from Eurosa that originated from Gibbs.

C. An individual business person like S. Harake is not allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell.

D. The entity structure has been used and abused by S. Harake to conceal and assist him in fraudulent and other inappropriate conduct including, but not limited to, misappropriation, embezzlement, money laundering, misuse of money, mismanagement of money, commingling of funds, etc. and S. Harake has engaged in that conduct and other conduct that violates public policy.

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E. Equity requires that the corporate structure be set aside and individual liability be imposed on S. Harake.

118. Gibbs accordingly requests that the corporate structure for Eurosa be set aside and that S. Harake, as its shareholder, be held to account for the liabilities and damages suffered by Gibbs as a result of S. Harake's conduct.

119. Gibbs requests that a judgment be entered in Gibbs' favor and against S. Harake in an amount to be determined at trial for compensatory and punitive damages.

WHEREFORE, Plaintiff respectfully prays that the Court:

1. Enter a judgment for monetary compensatory damages in favor of Gibbs and against the Harake Defendants and K. Harake awarding recovery in an amount to be proven at trial;

2. Enter a judgment in favor of Gibbs and against the Harake Defendants and K. Harake for punitive damages;

3. Enter a judgment in favor of Gibbs and against the Harake Defendants and K. Harake for treble damages and reasonable costs, expenses, and attorneys' fees;

4. Rescind the inappropriate actions of the Harake Defendants and K. Harake and award other appropriate remedial relief in favor of Gibbs;

5. Award an accounting of the subject assets and appropriate division of those assets;

6. Award Gibbs a trial by jury on all issues so triable;

7. Award Gibbs its attorneys' fees, costs, expenses and interest (including pre-judgment interest);

8. Grant such other and further relief in favor of Gibbs as the Court deems just and proper.

This 3rd day of August, 2020.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	Civil Action No.: 2017-CP-42-00740 **DEFENDANTS SARMAD HARAKE AND EUROSA, INC.'S ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT AND AMENDED COUNTERCLAIMS OF DEFENDANTS SARMAD HARAKE AND EUROSA, INC.** **(Jury Trial Demanded)**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

Defendants Sarmad Harake and Eurosa, Inc. ("Eurosa") (hereinafter collectively the "Harake Defendants"), by and through the undersigned counsel, hereby answer the Third Amended Complaint of Plaintiffs herein as follows:

FOR A FIRST DEFENSE

1. This Answer is being filed subject to and without waiving the Harake Defendants' Motion to Dismiss. That Motion and the grounds therefore are incorporated herein by reference.

FOR A SECOND DEFENSE
(General Denial)

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2. Each and every paragraph of Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained is denied.

3. Upon information and belief, the Harake Defendants admit the allegations of Paragraph 1 of Plaintiff's Third Amended Complaint.

4. The Harake Defendants deny the allegations of Paragraph 2 of Plaintiff's Third Amended Complaint and provide that at all times Defendant Sarmad Harake was a resident of New Hampshire.

5. The Harake Defendants deny the allegations of Paragraph 3 of Plaintiff's Third Amended Complaint and provide that at all times Defendant Eurosa has been a corporation organized and existing pursuant to the laws of New Hampshire with its principal place of business in New Hampshire.

6. The Harake Defendants deny the allegations of Paragraph 4 of Plaintiff's Third Amended Complaint and provide that at the time of the original Complaint in this matter, which did not apply to Defendant Katherine Harake because she was not a party, Defendant Katherine Harake was a resident of New Hampshire.

7. The Harake Defendants deny the allegations of Paragraph 5 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO FIRST CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Contract as to Harake Defendants)
(Gibbs' Individual Claims for Declaratory Judgment as to Harake Defendants)

8. In answering the allegations of Paragraph 6 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

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9. The Harake Defendants deny the allegations of Paragraphs 7, 8, and 9 of Plaintiff's Third Amended Complaint as stated and demand strict proof thereof.

10. The Harake Defendants deny the allegations of Paragraphs 10 and 11 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

11. The Harake Defendants deny the allegations of Paragraph 12 of Plaintiff's Third Amended Complaint, including all subparts (A) through (MM), and demand strict proof thereof.

12. The Harake Defendants deny the allegations of Paragraphs 13, 14, 14, 16, 17, 18, and 19 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

13. The allegations of Paragraph 20 of Plaintiff's Third Amended Complaint appear to be a legal conclusion to which no response is required. To the extent a response is required, the Harake Defendants deny the allegations of Paragraph 20 of the Third Amended Complaint and demand strict proof thereof.

14. The Harake Defendants deny the allegations of Paragraphs 21, 22, and 23 of Plaintiff's Third Amended Complaint and demand strict proof thereof

ANSWER TO SECOND CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing as to Harake Defendants)

15. In answering the allegations of Paragraph 24 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

16. The Harake Defendants deny the allegations of Paragraphs 25 and 26 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO THIRD CLAIM FOR RELIEF
(Gibbs' Individual Claims for Breach of Fiduciary Duty as to Harake Defendants)
(Gibbs' Individual Claims for Aiding and Abetting Breach of Fiduciary Duty as to K. Harake)

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17. In answering the allegations of Paragraph 27 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

18. The Harake Defendants deny the allegations of Paragraph 28 of Plaintiff's Third Amended Complaint as stated and demand strict proof thereof.

19. The allegations of Paragraph 29 of Plaintiff's Third Amended Complaint appear to be a legal conclusion to which no response is required. To the extent a response is required, the Harake Defendants deny the allegations of Paragraph 29 of the Third Amended Complaint and demand strict proof thereof.

20. The Harake Defendants deny the allegations of Paragraph 30 of Plaintiff's Third Amended Complaint as stated and demand strict proof thereof.

21. The Harake Defendants deny the allegations of Paragraphs 31 and 32 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

22. The allegations of Paragraph 33 of Plaintiff's Third Amended Complaint are not directed to the Harake Defendants; therefore, no response is required. To the extent a response is required, the Harake Defendants deny the allegations of Paragraph 33 of the Third Amended Complaint and demand strict proof thereof.

23. The Harake Defendants deny the allegations of Paragraph 34 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

24. The allegations of Paragraphs 35 and 36 of Plaintiff's Third Amended Complaint are not directed to the Harake Defendants; therefore, no response is required. To the extent a response is required, the Harake Defendants deny the allegations of Paragraphs 35 and 36 of the Third Amended Complaint and demand strict proof thereof.

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25. The Harake Defendants deny the allegations of Paragraphs 37 and 38 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO FOURTH CLAIM FOR RELIEF
(Gibbs' Claims for an Accounting as to S. Harake, Eurosa, and K. Harake)

26. In answering the allegations of Paragraph 39 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

27. The Harake Defendants deny the allegations of Paragraph 40 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO FIFTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Invasion of Privacy/Wrongful Intrusion Into Private Affairs as to Harake Defendants)

28. In answering the allegations of Paragraph 41 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

29. The Harake Defendants deny the allegations of Paragraphs 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO SIXTH CLAIM FOR RELIEF
(Gibbs' Individual Claims for Conversion Against Harake Defendants and K. Harake)
(Gibbs' Individual Claims Against K. Harake for Aiding/Abetting Conversion)

30. In answering the allegations of Paragraph 53 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

31. The Harake Defendants deny the allegations in Paragraphs 54 and 55 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

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32. The allegations of Paragraphs 56, 57, 58, and 59 of Plaintiff's Third Amended Complaint are not directed to the Harake Defendants; therefore, no response is required. To the extent a response is required, the Harake Defendants deny the allegations of Paragraphs 56, 57, 58, and 59 of the Third Amended Complaint and demand strict proof thereof.

33. The Harake Defendants deny the allegations in Paragraphs 60, 61, and 62 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO SEVENTH CLAIM FOR RELIEF
(Gibbs' Claims for Unfair and Deceptive Trade Practices as to S. Harake, Eurosa, and K. Harake)

34. In answering the allegations of Paragraph 63 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

35. The Harake Defendants deny the allegations in Paragraphs 64 and 65 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO EIGHTH CLAIM FOR RELIEF
(Fraud as to S. Harake/Eurosa)

36. In answering the allegations of Paragraph 66 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

37. The Harake Defendants deny the allegations in Paragraphs 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, and 80 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO NINTH CLAIM FOR RELIEF
(Fraud as to K. Harake)

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38. In answering the allegations of Paragraph 81 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

39. The allegations of Paragraphs 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94 of Plaintiff's Third Amended Complaint are not directed to the Harake Defendants; therefore, no response is required. To the extent a response is required, the Harake Defendants deny the allegations of Paragraphs 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94 of the Third Amended Complaint and demand strict proof thereof.

ANSWER TO TENTH CLAIM FOR RELIEF
(Civil Conspiracy Against the Harake Defendants and K. Harake)

41. In answering the allegations of Paragraph 95 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

42. The Harake Defendants deny the allegations in Paragraphs 96, 97, 98, 99, and 100 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO ELEVENTH CLAIM FOR RELIEF
(Gibbs' Claims for Unjust Enrichment, Quasi Contract, Implied Contract, Quantum Meruit as to K. Harake)

43. In answering the allegations of Paragraph 101 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

44. The allegations of Paragraphs 102, 103, 104, 105, 106, and 107 of Plaintiff's Third Amended Complaint are not directed to the Harake Defendants; therefore, no response is required. To the extent a response is required, the Harake Defendants deny the allegations of

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Paragraphs 102, 103, 104, 105, 106, and 107 of the Third Amended Complaint and demand strict proof thereof.

ANSWER TO TWELFTH CLAIM FOR RELIEF
(Gibbs' Claims for Unjust Enrichment, Quasi Contract, Implied Contract, Quantum Meruit as to S. Harake and Eurosa)

45. In answering the allegations of Paragraph 108 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

46. The Harake Defendants deny the allegations in Paragraphs 109, 110, 111, 112, 113, and 114 of Plaintiff's Third Amended Complaint and demand strict proof thereof.

ANSWER TO THIRTEENTH CLAIM FOR RELIEF
(Piercing the Corporate Veil of Eurosa)

47. In answering the allegations of Paragraph 115 of Plaintiff's Third Amended Complaint, the Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

48. The Harake Defendants deny the allegations in Paragraphs 116, 117, 118, and 119, including their respective subparts, of Plaintiff's Third Amended Complaint and demand strict proof thereof.

49. The WHEREFORE Paragraph of Plaintiff's Third Amended Complaint, including subparts (1) through (8), is denied, including but not limited to any allegations which state that Plaintiff is entitled to relief of any form from the Harake Defendants.

FOR A THIRD DEFENSE
(12(b)(6))

50. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

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51. The Third Amended Complaint should be dismissed for those reasons asserted in the Harake Defendants' Motion to Dismiss.

52. Plaintiff has failed to state facts sufficient to constitute a cause of action against the Harake Defendants. Therefore, Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE
(Business/Professional Judgment)

53. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

54. Defendant Sarmad Harake and Defendant Eurosa properly exercised their professional judgment, and a professional's judgment (and accompanying acts and omissions) must be considered at the time the professional service is rendered and not through the lens of hindsight.

FOR A FIFTH DEFENSE
(Plaintiff Gibbs International, Inc.'s Sole Negligence/Gross Negligence Recklessness)

55. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

56. The injuries and/or damages alleged by Plaintiff Gibbs International Inc., which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the actions taken or not taken by Plaintiff Gibbs International Inc. itself, for whose conduct the Harake Defendants are not liable to Plaintiff in any sum whatsoever. Plaintiff has not suffered any damages caused by the actions of the Harake Defendants.

FOR A SIXTH DEFENSE
(Negligence/Gross Negligence/Recklessness of Others)

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57. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

58. The Harake Defendants would show that the injuries and/or damages alleged by Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct the Harake Defendants are not liable. Plaintiff has not suffered any damages caused by the actions of the Harake Defendants.

FOR A SEVENTH DEFENSE
(Assumption of Risk)

59. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

60. The Harake Defendants would show that Plaintiff, by and through its actions and/or inactions with regard to the subject alleged in Plaintiff's Third Amended Complaint, assumed the risk and/or accepted all portions of any alleged damages and such assumption of risk and/or acceptance is a bar to claims against the Harake Defendants.

FOR AN EIGHTH DEFENSE
(Failure to State a Claim for Certain Damages)

61. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

62. Plaintiff fails to state a claim upon which consequential damages, special damages and interest may be awarded.

FOR A NINTH DEFENSE
(Failure to State a Claim for Costs)

63. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

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64. Plaintiff fails to state a claim upon which costs may be awarded.

FOR A TENTH DEFENSE
(Punitive Damages)

65. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

66. The Harake Defendants allege that the conduct complained of, which is denied, was not such conduct as would entitle Plaintiff to an award of exemplary or punitive damages against the Harake Defendants.

FOR AN ELEVENTH DEFENSE
(Failure to Mitigate)

67. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

68. The Harake Defendants allege and say that alleged damages, if any, suffered by Plaintiff should be barred as a result of the failure to mitigate damages.

FOR A TWELFTH DEFENSE
(Set Off / Credit/Recoupment/Limitations)

69. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

70. Plaintiff's claims may be barred or limited, in whole or in part, by the Harake Defendants' right to recoupment and/or setoff and/or any other applicable limitations of awards, caps on recovery and setoffs permitted by law, including, but not limited to South Carolina law regarding noneconomic loss or injury, and applicable law related to amounts paid or provided by collateral sources.

FOR A THIRTEENTH DEFENSE
(Unconstitutionality of Punitive Damages)

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71. The Haràke Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

72. The Harake Defendants deny Plaintiff's demand for punitive damages. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 3 of the Constitution of the State of South Carolina in that:

(1) The judiciary's ability to correct a punitive award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;

(2) Any award of punitive damages seeking a compensatory function is inconsistent with due process guarantees:

(3) Any award of punitive damages based upon the wealth of the defendant violates due process guarantees;

(4) The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards, which is inconsistent with due process guarantees;

(5) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

(6) The Third Amended Complaint's claims for punitive damages violate the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the defendant.

73. The Harake Defendants further submit that Plaintiff's Third Amended Complaint's claims for punitive damages violate the federal doctrine of separation of powers and

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Article 1, Section 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR A FOURTEENTH DEFENSE
(Comparative Negligence/Gross Negligence/Recklessness)

74. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

75. The Harake Defendants would show that any injuries or damages sustained by Plaintiff were due to Plaintiff Gibbs International Inc.'s own negligent, careless, reckless and/or grossly negligent acts or omissions, which combined and concurred with any negligence, carelessness, recklessness and gross negligence on the part of the Harake Defendants, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. The Harake Defendants, therefore, asks that this court compare the negligence or other conduct of Plaintiff Gibbs International Inc. and the Harake Defendants, and if it is determined that Plaintiff Gibbs International Inc.'s negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of the Harake Defendants, which is specifically denied, then Plaintiff should be totally barred from recovery and if it is determined that Plaintiff Gibbs International's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of the Harake Defendants, then the amount of recovery available to Plaintiff Gibbs International Inc. should be reduced by the percentage of Plaintiff Gibbs International Inc.'s own negligence, carelessness, recklessness and gross negligence.

FOR A FIFTEENTH DEFENSE
(Estoppel)

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76. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

77. The Harake Defendants pleads the doctrines of collateral and/or judicial estoppel as they relate to positions taken by Plaintiff Gibbs International Inc.

FOR A SIXTEENTH DEFENSE
(Limitations on Punitive Damages)

78. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

79. With respect to Plaintiff's Third Amended Complaint's claims for punitive damages, the Harake Defendants incorporate by reference any and all standards of limitation regarding the determination of the amount and/or enforceability of punitive damage awards which arose in the decisions of *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) and their progeny, as well as S.C. Code §15-32-510 et. seq.

FOR A SEVENTEENTH DEFENSE
(Plaintiff's Bad Faith)

80. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

81. The Harake Defendants would show that Plaintiff Gibbs International Inc.'s claims are barred, in whole or in part, by its bad faith, by acts of both commission and/or omission.

FOR AN EIGTHEENTH DEFENSE
(Unclean Hands)

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82. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

83. The Harake Defendants would show that Plaintiff Gibbs International Inc.'s claims are barred, in whole or in part, by the doctrine of unclean hands.

FOR A NINETEENTH DEFENSE
(Apportionment of Fault to Non-Parties)

84. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

85. The Harake Defendants would show that non-parties should be included on the verdict form in this case for the purpose of making accurate and true allocations of fault.

FOR A TWENTIETH DEFENSE
(Lack of Standing)

86. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

87. The Harake Defendants would show that Plaintiff Gibbs International Inc. does not have standing or authority to bring this action.

FOR A TWENTY-FIRST DEFENSE
(Statute of Limitations)

88. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

89. The Harake Defendants will show the applicable statute of limitations passed prior to the filing of Plaintiff's Third Amended Complaint.

FOR A TWENTY-SECOND DEFENSE
(Laches)

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90. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

91. The Harake Defendants plead the applicability of the equitable doctrine of laches to this matter.

FOR A TWENTY-THIRD DEFENSE
(Waiver)

92. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

93. Plaintiff's claims are barred under the equitable doctrine of waiver.

FOR A TWENTY-FOURTH DEFENSE
(Statute of Frauds)

94. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

95. Plaintiff's claims are barred by the statute of frauds.

FOR A TWENTY-FIFTH DEFENSE

96. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

97. The Plaintiff's claims are barred by the doctrines of ratification and/or acquiescence.

FOR A TWENTY-SIXTH DEFENSE

98. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

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99. The Harake Defendants plead a lack of fiduciary relationship as alleged by Plaintiff in the Third Amended Complaint.

FOR A TWENTY-SEVENTH DEFENSE

100. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

101. Any actions taken by Defendant Harake related to IOTive, Inc. were the result of majority approval of the Board of Directors of IOTive, Inc.

FOR A TWENTY-EIGHTH DEFENSE
(Lack of Personal Jurisdiction)

102. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

103. Pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs' claims against the Harake Defendants should be dismissed because the Court lacks personal jurisdiction over the Harake Defendants.

FOR A TWENTY-NINTH DEFENSE
(Intervening/Superseding Cause)

104. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

105. Plaintiff's damages, if any, were proximately caused by unforeseeable, independent, intervening, or superseding events beyond the control, and unrelated to the conduct of the Harake Defendants. The actions and omissions the Harake Defendants, if any, were superseded by such unforeseeable, independent, intervening, and superseding events.

FOR A THIRTIETH DEFENSE
(Failure to Plead Fraud-Based Claims with Particularity)

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106. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

107. Plaintiff has failed to plead the fraud-based claims with the requisite particularity and therefore those claims should be dismissed.

FOR A THIRTY-FIRST DEFENSE
(Breach of Contract/Prior Breach)

108. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

109. Plaintiff's claims are barred as it has breached the purported contract(s) between the parties.

FOR A THIRTY-SECOND DEFENSE
(Overlapping Recovery)

110. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

111. Plaintiff's alleged remedies are limited to the extent Plaintiff seeks overlapping and duplicative recovery based on various claims against the Harake Defendants for any alleged single wrong.

FOR A THIRTY-THIRD DEFENSE
(Condition Precedent)

112. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

113. To the extent an enforceable contract existed, some of its provisions may be subject to conditions precedent which did not occur. Accordingly, some or all of Plaintiff's claims fail.

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FOR A THIRTY-FOURTH DEFENSE
(Good Faith)

114. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

115. The Harake Defendants would show that any actions taken by Plaintiff and/or procedures followed by the Harake Defendants concerning the matters stated herein were taken in good faith, in a reasonable manner, and that said actions and/or procedures were reasonable in time and manner, and Plaintiff is therefore precluded from recovery against the Harake Defendants under some or all of Plaintiff's theories of liability.

FOR A THIRTY-FIFTH DEFENSE
(Substantial Performance)

116. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

117. The Harake Defendants would show that they completely and/or substantially performed on the alleged contract(s) in question and, therefore, Plaintiff has no right to recover against them.

FOR A THIRTY-SIXTH DEFENSE
(No Meeting of the Minds)

118. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

119. The Harake Defendants would show that there was no meeting of the minds with the Plaintiff such that any contract alleged to be breached by them is not enforceable.

FOR A THIRTY-SEVENTH DEFENSE
(Mistake)

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120. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

121. Any contract alleged by Plaintiff to have been breached by the Harake Defendants is not enforceable due to mistake.

FOR A THIRTY-EIGHTH DEFENSE
(Misrepresentation)

122. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

123. Any contract alleged by Plaintiff to have been breached by the Harake Defendants is not enforceable due to the material misrepresentations made by Plaintiff or its agents that were relied on by the Harake Defendants.

FOR A THIRTY-NINTH DEFENSE AND BY WAY OF COUNTERRCLAIMS AGAINST PLAINTIFF/COUNTERCLAIM DEFENDANT GIBBS INTERNATIONAL, INC.

124. Defendants/Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint and assert the following pursuant to Rule 13 of the South Carolina Rules of Civil Procedure by way of counterclaims against Plaintiff/Counterclaim Defendant Gibbs International, Inc. ("Gibbs").

PARTIES

125. Counterclaim Plaintiff Sarmad Harake is a citizen of Canada, permanent resident of the United States and is domiciled in New Hampshire.

126. Counterclaim Plaintiff Eurosa is a corporation organized and existing pursuant to the laws of New Hampshire with its principal place of business in New Hampshire.

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127. Upon information and belief, Counterclaim Defendant Gibbs is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Spartanburg, South Carolina.

FACTUAL BACKGROUND FOR COUNTERCLAIMS

128. On or around June 1, 2015, Counterclaim Plaintiff Sarmad Harake through Counterclaim Plaintiff Eurosa began doing business with Counterclaim Defendant Gibbs after a handshake with Gibbs' President and CEO, Jimmy I. Gibbs.

129. At that time, among other businesses, Counterclaim Plaintiff Sarmad Harake was already the owner and operator of Counterclaim Plaintiff Eurosa and intended to keep that business going and use it to work with Gibbs.

130. Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa, and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs, agreed to create a limited liability company, namely Gibbs Investment Holdings, LLC ("GIH"), to work jointly on certain investment projects.

131. Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa, and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs agreed to specific revenue sharing terms for each project that did not involve textiles.

132. Initially, Counterclaim Plaintiff Sarmad Harake, by and through Counterclaim Plaintiff Eurosa, was to receive Thirty-Three Thousand and No/100 Dollars ($33,000) monthly from Counterclaim Defendant Gibbs in return for consulting services offered by Counterclaim Plaintiff Sarmad Harake related to Counterclaim Defendant Gibbs' business.

133. Beginning in June 2016, per an agreement that Counterclaim Plaintiff Sarmad Harake would no longer be consulting for Counterclaim Defendant Gibbs' normal

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business, Counterclaim Plaintiff Eurosa was to receive a monthly draw of approximately Thirty-Three Thousand and No/100 Dollars ($33,000) from GIH. That amount was paid by Counterclaim Defendant Gibbs as part of the $3.2 million Counterclaim Defendant Gibbs agreed to invest in GIH.

134. While multiple drafts of an operating agreement for GIH were discussed and negotiated, no operating agreement for GIH was ever executed upon by Gibbs.

135. Prior to August 5, 2016, Counterclaim Plaintiff Sarmad Harake and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs entered into a number of agreements in which Counterclaim Plaintiff Eurosa and Counterclaim Defendant Gibbs owned interests in companies as well as specific projects, on what is colloquially known as being on a deal-by-deal basis. Each agreement was confirmed in correspondence or electronic communications providing the terms and conditions or by specific performance. These agreements did not contain deadlines for completion of a particular project.

136. Projects that were agreed upon prior to August 5, 2016, include, among others, those known as: Hemlock, Beaumont, FED Securities, and Gibbs Energy.

137. As to the Hemlock project,

a. Counterclaim Plaintiff Sarmad Harake and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs came to an agreement to share revenue in this project.

b. Counterclaim Defendant Gibbs entered into an agreement with a non-party, D.H, Griffin, to purchase the Hemlock plant.

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c. Counterclaim Plaintiff Sarmad Harake assisted with finding a buyer for the Hemlock plant so that Counterclaim Defendant Gibbs could profit from the sale and share revenue with Counterclaim Plaintiff.

d. Counterclaim Defendant Gibbs could not meet the terms and conditions to sell to that buyer.

e. Counterclaim Defendant Gibbs and D.H. Griffin received the entire purchase price back and have continued to sell equipment.

f. Counterclaim Plaintiff Sarmad Harake did not receive any funds related to that agreement.

138. As to the Beaumont project,

a. Counterclaim Plaintiff Sarmad Harake was to provide project assistance and goods through introduction to his contacts with a Hong Kong corporation.

b. Counterclaim Plaintiff Sarmad Harake paid for travel related to this project and through the Hong Kong corporation expended funds to source goods, make offers, and send samples for approval.

c. Ultimately, other goods were used by Counterclaim Defendant Gibbs.

d. Counterclaim Defendant Gibbs did not reimburse Counterclaim Harake or the Hong Kong corporation for the funds expended for travel and services.

139. As to the FED Securities Project,

a. On or around June 24, 2015, Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs sent a commitment letter to the Capital Markets Board of Turkey acknowledging the acquisition of FED Securities.

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b. In 2012, Gain Capital had made an offer to purchase a 20% ownership interest in FED Securities for $2.4 million.

c. FED Securities had been valued by Pricewaterhousecoopers in the range of Nine Million And No/100 Dollars ($9,000,000) and Seventeen Million And No/100 Dollars ($17,000,000.00). And based on that valuation, Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs valued it at Thirteen Million And No/100 Dollars ($13,000,000.00).

d. Counterclaim Defendant Gibbs did not meet the documentation or financial obligation it committed to make relative to FED Securities.

e. As a result, FED Securities lost its applicable financial services license.

f. Counterclaim Plaintiff Sarmad Harake attempted to appeal the cancellation of the financial services license, but in May 2017, the appeal was rejected by the Capital Markets Board.

g. For the years 2015 and 2016, Counterclaim Plaintiff Sarmad Harake paid approximately One Million Two Hundred Twenty-Five Thousand And No/100 Dollars ($1,225,000.00) to FED Securities.

140. As to Gibbs Energy,

a. Counterclaim Plaintiff Sarmad Harake and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs came to an agreement regarding the investment in this project.

b. As part of this investment deal, Counterclaim Defendant Gibbs was to invest capital, and Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs made promises to Counterclaim Plaintiff related to that investment,

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c. Counterclaim Defendant did not meet its financial obligations.

d. Without proper capital, Gibbs Energy is a legally active but dormant project because in order to conduct energy activities as a licensed corporation, there is a minimum capital requirement.

e. For the years 2015 and 2016, Counterclaim Plaintiff Sam Harake contributed approximately Eight Hundred Eighty Thousand And No/100 Dollars ($880,000.00) of paid-in capital to Gibbs Energy.

141. As to QPAGOS,

a. Counterclaim Plaintiff Sarmad Harake negotiated free shares in QPAGOS for Counterclaim Defendant Gibbs, GIH, and Counterclaim Plaintiff Eurosa.

b. The GIH share certificate was given to Counterclaim Defendant Gibbs.

c. There were 528,000 shares given to GIH, half of which were owned by Counterclaim Plaintiff Eurosa.

d. As of March 2017, Counterclaim Plaintiff Eurosa demanded its half of the shares, which at that time were on average available for $0.40 per share.

e. Counterclaim Plaintiff Gibbs refused to give Counterclaim Plaintiff Eurosa its shares.

142. As to IOTive, Inc.,

a. Counterclaim Plaintiff Eurosa and Counterclaim Defendant Gibbs were only two of the shareholders of IOTive, Inc.

b. Counterclaim Defendant Gibbs is a minority shareholder of IOTive, Inc. with an approximately 24% ownership interest.

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c. Counterclaim Plaintiff Eurosa owned approximately 24% of IOTive, Inc. as well.

d. IOTive, Inc. came to own 2 patents.

e. In October 2017, a Chinese company offered to purchase IOTive, Inc. for $20 million; however, Counterclaim Defendant Gibbs refused to sell for amount less than $27 million and forced the other shareholders to refuse to sell as well.

f. Since that time, IOTive, Inc.'s value has decreased.

143. On August 5, 2016, Counterclaim Plaintiff Sarmad Harake, on behalf of Counterclaim Plaintiff Eurosa, and Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs signed a Memorandum of Agreement ("MOA") stating that the agreement would be reevaluated on or before February 5, 2017.

144. Additionally, the MOA provided that GIH would be owned in equal shares by Counterclaim Plaintiffs and Counterclaim Defendant; would not own any assets; would be managed by Counterclaim Plaintiff Sarmad Harake; and would consist of unanimously chosen investment projects.

145. The MOA further provided that all project or investment ownership would be divided equally.

146. The MOA further provided that Gibbs would provide Three Million Two Hundred Thousand And No/100 Dollars ($3,200,000.00) in "cash to fully fund agreed investment projects."

147. The MOA further provided that any funds above the $3.2 million would be contributed on an equal parts basis.

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148. Counterclaim Plaintiff Sarmad Harake on behalf of Counterclaim Plaintiff Eurosa did not request reimbursement for corporate expenses while he was acting for GIH.

149. In July 2016, Counterclaim Defendant Gibbs agreed to certain obligations related to Paysend Processing, Inc. ("Paysend Processing"), a Delaware corporation, which included providing $1 million in investment money. Counterclaim Defendant Gibbs agreed to the $1 million investment as long as on the second capital raise, it would receive money back.

150. 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 $27 million valuation.

151. 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.

152. Counterclaim Defendant Gibbs then refused to make any investment over $250,000 in Paysend Processing, even though it initially agreed to invest $1 million, and in a meeting with another confirmed investor, Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs, caused that potential investor to back out.

153. In September 2016, Counterclaim Plaintiff Sarmad Harake separately became the appointed director of Paywizard Public Limited Company, which on November 10, 2016 changed its name to Paysend PLC in the United Kingdom ("Paysend UK").

154. 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.

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155. After Counterclaim Defendant Gibbs refused to invest anything additional in Paysend Processing, the other investor in Paysend Processing offered to buy Counterclaim Defendant Gibbs out of Paysend Processing or let it transfer its investment to Paysend UK, rolling both entities into one. Counterclaim Defendant Gibbs refused. Thereafter, Counterclaim Plaintiff Sarmad Harake, personally and on behalf of Counterclaim Plaintiff Eurosa was forced to purchase the other investor's shares in PaySend Processing.

156. In June 2019, Paysend UK had an oversubscribed public capital raise with a valuation of $160 million. As of August 2020, the public value of Paysend UK has increased to over $190 million.

157. 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.

158. Additionally, because Counterclaim Defendant Gibbs refused to roll Paysend 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. Counterclaim Plaintiff Sarmad Harake was diluted to a 1.16% interest in Paysend UK. Had Counterclaim Plaintiff Sarmad 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.

159. Instead, given Counterclaim Defendant Gibbs' actions, Counterclaim Plaintiff Sarmad Harake personally was forced to sell his 1.16% interest in Paysend UK to that

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other investor in November 2018 for Two Million Eight-Five Thousand One Hundred Sixty-Seven and NO/100 Dollars ($2,085,167.00).

160. 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.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

161. Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

162. Prior to August 5, 2016, the verbal agreements, confirmed by writing or performance, were binding contracts as there was offer and acceptance for consideration associated with the revenues and commissions of each project.

163. Additionally, after August 5, 2016, the MOA was a binding contract.

164. Counterclaim Defendant Gibbs breached one or more of these contracts in at least the following ways:

a. By failing to meet its obligations as to GIH such that FED Securities and Gibbs Energy projects could not be funded appropriately to move forward;

b. By failing to pay Counterclaim Sarmad Harake for funds expended on travel and services relative to the Beaumont project;

c. By failing to meet its capital obligations as to GIH, which required it fund GIH with Three Million Two Hundred Thousand And No/100 Dollars ($3,200,000.00) and required that it fund in equal parts agreed-upon projects above the $3,200,000.00;

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d. By failing to meet its promises relative to the monthly $33,000 draw when it shifted the payment to Paysend Processing without the acceptance of the other investors in that project;

e. By failing to meet its obligations to Paysend Processing; and

f. In other particulars to be developed during discovery in the above-captioned litigation.

165. If Counterclaim Defendant Gibbs had met its obligations as listed above, there would have been no damages suffered by Counterclaim Plaintiffs.

166. These breaches by Counterclaim Defendant Gibbs proximately caused damages to Counterclaim Plaintiffs Sarmad Harake and Eurosa.

167. Counterclaim Plaintiffs Sarmad Harake and Eurosa are entitled to the actual damages related to the losses caused by these breaches and for costs, attorneys' fees, and pre-judgment interest in an amount to be determined by a jury.

FOR A SECOND COUNTERCLAIM
(Negligent Misrepresentation)

168. Defendants/Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

169. Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs made numerous representations, both verbally and in writing, to Counterclaim Plaintiffs regarding GIH and the financial obligations Counterclaim Defendant Gibbs would make for individual project agreements and as to the $3,200,000 obligation.

170. Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs made numerous representations, both verbally and in writing, to Counterclaim Plaintiffs and others regarding IOTive, Inc. and Paysend Processing.

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171. Jimmy Gibbs, as the President and CEO of Counterclaim Defendant Gibbs, was authorized to and in fact did speak on behalf of Counterclaim Defendant Gibbs.

172. Counterclaim Plaintiff Gibbs refused to sell, and convinced the remaining shareholders not to sell, IOTive, Inc. for $20 million, claiming that IOTive, Inc. could be sold for $27 million, which did not occur.

173. Counterclaim Defendant Gibbs stood to gain a pecuniary interest in each of these projects if it met the financial obligations made in the statements about funding particular projects.

174. Counterclaim Defendant Gibbs owed a duty to Counterclaim Plaintiffs to see that truthful information was communicated to Counterclaim Plaintiffs because they agreed to work together jointly on specific investment projects, and investments require capital.

175. Counterclaim Defendant Gibbs failed to exercise due care in making its representations and failed to abide by the representations it made.

176. Counterclaim Plaintiffs relied on the representations made by Counterclaim Defendant in seeking and attempting to fund certain projects.

177. This reliance was justifiable because truthful promises as to Gibbs' obligations were required to make investments successful.

178. When Counterclaim Defendant failed to meet its financial obligations, Counterclaim Plaintiffs suffered damages because the time and investment spent on those projects was lost.

179. Counterclaim Plaintiffs have suffered pecuniary damages in excess of Five Million Dollars ($5,000,000) because of Counterclaim Defendant's representations.

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180. Counterclaim Defendant's actions were willful, wanton, and reckless in that Counterclaim Defendant knowingly made these untruthful representations about the amount of capital it could provide to the projects.

181. Counterclaim Plaintiffs are entitled to actual damages in excess of $5,000,000 and punitive damages related to this cause of action in an amount to be determined by a jury.

FOR A THIRD COUNTERCLAIM
(Unjust Enrichment)

182. Defendants/Counterclaim Plaintiffs Sarmad Harake and Eurosa restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

183. Counterclaim Defendant was enriched by Counterclaim Plaintiffs Sarmad Harake and Eurosa as Counterclaim Plaintiffs found investments for them to partner in and managed projects from which Counterclaim Defendant benefitted.

184. As previously described herein, Counterclaim Plaintiffs Sarmad Harake and Eurosa expended time and funds related the Hemlock and Beaumont projects and generally on travel and services for other agreed-upon projects.

185. Counterclaim Defendant Gibbs had agreed to share revenue from the Hemlock project with Counterclaim Plaintiffs, but even though Counterclaim Defendant Gibbs received revenue, Counterclaim Plaintiffs did not receive any revenue from the Hemlock project.

186. Counterclaim Plaintiffs Sarmad Harake and Eurosa did not receive any payment for the time and funds expended for corporate expenses of Counterclaim Plaintiffs related to the projects with which they were working jointly with Counterclaim Defendant Gibbs.

187. Counterclaim Plaintiff Eurosa never received its shares in QPAGOS as negotiated and promised.

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188. As previously described herein, Counterclaim Defendant promised Counterclaim Plaintiffs a $33,000 draw each month, but then unilaterally changed how the amount was to be funded, which the other investor in Paysend Processing demanded and received as repayment from Counterclaim Plaintiffs.

189. As a result, Counterclaim Defendant was unjustly enriched by the time and expenses expended by Counterclaim Plaintiffs as well as the retained revenue from the Hemlock project that was not shared, and Counterclaim Plaintiffs were damaged.

190. Counterclaim Plaintiffs pray for the funds expended by Counterclaim Plaintiffs related to the Beaumont project, corporate expenses, the amount that Paysend Processing's other investor has demanded be returned by Counterclaim Plaintiffs for the draws that Counterclaim Defendant Gibbs promised should be made to Counterclaim Plaintiffs, and its shares in QPAGOS, and Counterclaim Plaintiffs pray for any additional relief the Court may wish to grant.

FOR A FOURTH COUNTERCLAIM
(Tortious Interference with Economic Interest)

191. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

192. Counterclaim Defendant Gibbs, Counterclaim Plaintiff Eurosa, and the other investor 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.

193. Thereafter, Counterclaim Defendant Gibbs refused to make any investment over $250,000 in Paysend Processing, even though it initially agreed to invest $1 million.

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194. Moreover, in a meeting with another confirmed investor, Jimmy Gibbs, on behalf of Counterclaim Defendant Gibbs, caused that potential investor to back out.

195. Counterclaim Defendant Gibbs knew that Counterclaim Plaintiff Sarmad Harake was the appointed director of Paysend UK.

196. Counterclaim Defendant was also aware that Counterclaim Plaintiffs Sarmad Harake had acquired a 100% interest in Paysend UK and that Paysend UK was going to continue to raise capital.

197. After Counterclaim Defendant Gibbs refused to invest anything additional in Paysend Processing, the other investor in Paysend Processing, who was also an investor in Paysend UK, offered to buy Counterclaim Defendant Gibbs out of Paysend Processing or let it transfer its investment to Paysend UK, rolling both entities into one.

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.

200. In June 2019, Paysend UK had an oversubscribed public capital raise with a valuation of $160 million.

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.

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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 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.

204. As a result of Counterclaim Defendant Gibbs' actions, Counterclaim Plaintiffs were damaged in excess of $22 million.

FOR A FORTIETH DEFENSE
(Reservation and Non-Waiver)

205. The Harake Defendants restate their responses to all preceding Paragraphs of Plaintiff's Third Amended Complaint.

206. The Harake Defendants reserve the right to amend this Answer, their affirmative defenses, and Counterclaims after investigation, discovery and further information is disclosed, including any and all defenses supported by the evidence proffered at trial of this matter.

WHEREFORE, having fully answered Plaintiff's Third Amended Complaint, having asserted these affirmative defenses, and having asserted these Counterclaims, the Harake Defendants pray for the following relief from the Court:

a. that the Third Amended Complaint be dismissed with prejudice;

b. that Counterclaim Plaintiffs receive actual damages with pre-judgment and post-judgment interest thereon, and all consequential damages, in relation to their counterclaims;

c. punitive damages in an amount to be determined at trial;

d. the fees and costs of this action, including attorneys' fees; and

e. such other and further relief as the Court deems just and proper.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

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August 24, 2020
Columbia, South Carolina

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ELECTRONICALLY FILED - 2020 Aug 28 4:37 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **PLAINTIFF GIBBS INTERNATIONAL, INC.'S NOTICE OF AND MOTION TO DISMISS AND TO STRIKE COUNTERCLAIMS OF SARMAD HARAKE AND EUROSA, INC.**

Pursuant 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, Plaintiff Gibbs International, Inc. ("Gibbs"), respectfully submits this Motion to Dismiss and Motion to Strike certain of the Counterclaims of Defendants Sarmad Harake ("S. Harake") and Eurosa, Inc. ("Eurosa") (collectively, "Counterclaim Plaintiffs" or the "Harake Defendants") filed with their Answer to Gibbs's Third Amended Complaint.[1] In support of the foregoing, Gibbs offers the following:

1. Rule 12(b)(6) permits dismissal of claims and counterclaims when the claimant fails "to state facts sufficient to constitute a cause of action." SCRCP, Rule 12(b)(6).
2. Dismissal is appropriate under Rule 12(b)(6) when the "facts alleged and inferences reasonably deducible therefrom" do not entitle the complainant to any relief on any theory of the complainant's case. *Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001). This standard applies to claims pled in complaints as well as counterclaims. *Id.*

[1] Gibbs notes that it has until September 8 to file additional responsive pleadings to the Harake Defendants' Answer and Counterclaims, which were only filed on August 24, 2020 at 2:24 p.m.

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3. Counterclaim Plaintiffs have brought four counterclaims: breach of contract; negligent misrepresentation, unjust enrichment, and "tortious interference with economic advantage." In this motion, Gibbs seeks the dismissal and/or striking of the claims for negligent misrepresentation and tortious interference.

4. Counterclaim Plaintiffs have failed to state facts sufficient to show a claim for negligent misrepresentation. Specifically, all of Counterclaim Plaintiffs' allegations intended to support negligent misrepresentation allege that Gibbs made promises as to future actions. As a matter of law, this is insufficient to show negligent misrepresentation. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 284–85 (Ct. App. 1993) ("To be actionable, the representation must relate to a **present or pre-existing fact and be false when made.** The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." (emphasis added)).

5. As their fourth counterclaim, Harake and Eurosa allege that Gibbs has committed "tortious interference with economic advantage." This claim does not exist under South Carolina law. Past attempts to bring tortious interference claims in South Carolina have been treated as the tort of intentional interference with contractual relations. *See United Educ. Distributors, LLC v. Educ. Testing Serv.*, 350 S.C. 7, 10, 564 S.E.2d 324, 326, n.1 (Ct. App. 2002) ("Although the trial court identified this action as 'tortious interference with prospective economic advantage,' South Carolina has labeled this tort "intentional interference with prospective contractual relations.").

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6. Gibbs also moves to strike the intentional interference with prospective contractual relations claim because S. Harake in his deposition started testifying about the issue on his own, and then his counsel instructed him not to answer.
7. It is also noteworthy that this claim adding $22 million to S. Harake's counterclaims were not added by him on his own initiative but was only added after Gibbs' amendment. More specifically, Harake was aware of the situation in his deposition and started testifying about it when he was instructed not to answer on July 25, 2019. (S. Harake Deposition Tr. Vol. 2, 293).
8. Gibbs has a pending motion to compel S. Harake's deposition because of the production of numerous documents after his deposition. Gibbs believes that the new claim should be stricken.

WHEREFORE, Gibbs requests that the Court dismiss S. Harake's and Eurosa's counterclaims as noted herein and for such other and further relief in favor of Gibbs as the Court deems just and proper.

Respectfully submitted this 28th day of August, 2020.

s/ Kevin A. Dunlap
Kevin A. Dunlap

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ELECTRONICALLY FILED - 2020 Sep 18 11:58 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **GIBBS INTERNATIONAL, INC.'S REPLY TO HARAKE DEFENDANTS' AMENDED COUNTERCLAIMS** **(Jury Trial Demanded)**

Plaintiff Gibbs International, Inc. ("Gibbs"), answers and replies to Sarmad Harake ("Harake") and Eurosa, Inc.'s ("Eurosa") (hereinafter collectively "Harake Defendants"), Counterclaims as set forth below.

FIRST DEFENSE
(FAILURE TO STATE A CLAIM)

The allegations of Harake Defendants' Counterclaims fail to state a claim on which relief can be granted.

SECOND DEFENSE
(GENERAL RESPONSE)

Gibbs denies each and every allegation of Harake Defendants' Counterclaims that is not hereinafter specifically admitted, modified, or explained.

THIRD DEFENSE
(SPECIFICALLY RESPONDING TO THE ALLEGATIONS OF THE COUNTERCLAIMS)

1. Gibbs hereby realleges and incorporates all of the allegations set forth in its Third Amended Complaint filed on August 3, 2020 ("Third Amended Complaint").

2. As to the allegations incorporated by Harake Defendants in paragraph 124 of their Counterclaims (which is the first numbered paragraph of their Counterclaims), Gibbs denies each

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and every allegation set forth in Defendants' Counterclaims that is not specifically admitted, modified, or explained herein or in Gibbs' Third Amended Complaint. Except as admitted, the allegations of paragraph 124 of the Counterclaims are denied.

3. With respect to the allegations of paragraph 125 of the Counterclaims, Gibbs is informed and believes that Defendant Harake lived, worked, and was a citizen of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter and his alleged performance of the agreement (as well as his other conduct) took place, in part, in Spartanburg, South Carolina. Except as admitted, the allegations of paragraph 125 of the Counterclaims are denied.

4. With respect to the allegations of paragraph 126 of the Counterclaims, it is admitted on information and belief that defendant Eurosa is a corporation organized and existing pursuant to the laws of the State of New Hampshire and had its principal place of business in Spartanburg, South Carolina at the time of the filing of the original complaint. Except as admitted, the allegations of paragraph 126 of the Counterclaims are denied.

5. The allegations of paragraph 127 of the Counterclaims are admitted.

6. With respect to the allegations of paragraph 128 of the Counterclaims, it is admitted that Harake Defendants entered into an agreement with Gibbs as described in Gibbs' Third Amended Complaint. Except as admitted, the allegations of paragraph 128 of the Counterclaims are denied.

7. Gibbs lacks sufficient information to form a belief concerning the allegations in paragraph 129 of the Counterclaims and accordingly denies the same.

8. With respect to the allegations of paragraph 130 of the Counterclaims, it is admitted that Gibbs and Harake Defendants agreed to form Gibbs Investment Holdings, LLC

("GIH") to be an entity through which some investment activities were to occur. Except as admitted, the allegations of paragraph 130 of the Counterclaims are denied.

9. With respect to the allegations of paragraph 131 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Complaint for the terms of any agreement. Except as admitted, the allegations of paragraph 131 of the Counterclaims are denied.

10. With respect to the allegations of paragraph 132 of the Counterclaims, it is admitted that $33,000 per month was paid to Harake Defendants for a period of time in connection with work Harake Defendants agreed to perform as described in Gibbs' Third Amended Complaint. It is also admitted that Harake Defendants failed to perform as described in Gibbs' Third Amended Complaint. It is also admitted that Gibbs provided to Harake Defendants $55,000 per month for a year because Harake Defendants informed Gibbs it was necessary to maintain operation of Fed Securities. Gibbs requested from Harake Defendants an accounting of the funds it provided and Harake Defendants have failed and refused to provide the accounting. Gibbs is informed and believed Harake Defendants have misappropriated the funds and used them for inappropriate and personal purposes. Except as admitted, the allegations of paragraph 132 of the Counterclaims are denied.

11. The allegations of paragraph 133 of the Counterclaims are denied. Harake Defendants are referred to the words in documentation in the case and testimony as to what applied to the $3.2 million.

12. With respect to the allegations of paragraph 134 of the Counterclaims, it is admitted that drafts of an operating agreement were considered but no operating agreement was signed for GIH because of Harake Defendants' unreasonable conduct in the negotiations. Except as admitted, the allegations of paragraph 134 of the Counterclaims are denied.

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13. With respect to the allegations of paragraph 135 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of agreements entered into between Gibbs, on one hand, and Harake and Eurosa, on the other. Except as admitted, the allegations of paragraph 135 of the Counterclaims are denied.

14. With respect to the allegations of paragraph 136 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of agreements entered into between Gibbs, on one hand, and Harake and Eurosa, on the other. Except as admitted, the allegations of paragraph 136 of the Counterclaims are denied.

15. With respect to the allegations of paragraph 137, including subparagraphs (a) – (f), of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of the agreements entered into between Gibbs, on one hand, and Harake and Eurosa, on the other, as to the Hemlock plant. Harake and Eurosa are not entitled to any money in connection with the Hemlock plant. Any remaining allegations of paragraph 137, including subparagraphs (a) – (f), of the Counterclaims are denied.

16. With respect to the allegations of paragraph 138, including subparagraphs (a) – (d), of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements entered into between Gibbs, on one hand, and Harake and Eurosa, on the other, as to the Beaumont project. Any remaining allegations of paragraph 138, including subparagraphs (a) – (d) are denied.

17. With respect to the allegations of paragraph 139 of the Counterclaims, including subparagraphs (a) – (g), Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements entered into between Gibbs, on one hand, and Harake and Eurosa, on the other as to

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the FED Securities Project. Any remaining allegations of paragraph 139, including subparagraphs (a) – (g), are denied.

18. With respect to the allegations of paragraph 140 of the Counterclaims, including subparagraphs (a) – (e), Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements, if any, entered into between Gibbs, on one hand, and Harake and Eurosa, on the other as to Gibbs Energy. Any remaining allegations of paragraph 140, including subparagraphs (a) – (e), are denied.

19. With respect to the allegations of paragraph 141 of the Counterclaims, including subparagraphs (a) – (e), Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements, if any, entered into between Gibbs, on one hand, and Harake and Eurosa, on the other as to QPAGOS. Any remaining allegations of paragraph 141, including subparagraphs (a) – (e), are denied.

20. With respect to the allegations of paragraph 142 of the Counterclaims, including subparagraphs (a) – (f), Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements, if any, entered into between Gibbs, on one hand, and Harake and Eurosa, on the other as to IOTive. Any remaining allegations of paragraph 142, including subparagraphs (a) – (f), are denied.

21. With respect to the allegations of paragraph 143 of the Counterclaims, the Harake Defendants are referred to the August 5, 2016 Memorandum of Agreement ("MOA") for the words contained therein. Except as admitted, the allegations of paragraph 143 of the Counterclaims are denied.

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22. With respect to the allegations of paragraph 144 of the Counterclaims, Harake Defendants are referred to the MOA for the words contained therein. Except as admitted, the allegations of paragraph 144 of the Counterclaims are denied.

23. With respect to the allegations of paragraph 145 of the Counterclaims, Harake Defendants are referred to the MOA for the words contained therein. Except as admitted, the allegations of paragraph 145 of the Counterclaims are denied.

24. With respect to the allegations of paragraph 146 of the Counterclaims, Harake Defendants are referred to the MOA for the words contained therein. Except as admitted, the allegations of paragraph 146 of the Counterclaims are denied.

25. With respect to the allegations of paragraph 147 of the Counterclaims, Harake Defendants are referred to the MOA for the words contained therein. Except as admitted, the allegations of paragraph 147 of the Counterclaims are denied.

26. The allegations of paragraph 148 of the Counterclaims are denied.

27. With respect to the allegations of paragraph 149 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements, if any, entered into between Gibbs, on one hand, and Harake and Eurosa, on the other as to Paysend Processing, Inc. ("Paysend Processing"). Any remaining allegations of paragraph 149 are denied.

28. With respect to the allegations of paragraph 150 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements, if any, entered into between Gibbs, on one hand, and Harake and Eurosa, on the other as to Paysend Processing. Any remaining allegations of paragraph 150 are denied.

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29. With respect to the allegations of paragraph 151 of the Counterclaims, it is admitted that Harake Defendants improperly took money from Pay Send. Except as admitted, the allegations of paragraph 151 of the Counterclaims are denied.

30. With respect to the allegations of paragraph 152 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements, if any, entered into between Gibbs, on one hand, and Harake and Eurosa, on the other, as to Paysend Processing. Any remaining allegations of paragraph 152 are denied.

31. Gibbs lacks sufficient information to form a belief concerning the allegations in paragraph 153 of the Counterclaims and accordingly denies the same.

32. Gibbs lacks sufficient information to form a belief concerning the allegations in paragraph 154 of the Counterclaims and accordingly denies the same.

33. With respect to the allegations of paragraph 155 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for agreements, if any, entered into between Gibbs, on one hand, and Harake and Eurosa, on the other, as to Paysend Processing. Any remaining allegations of paragraph 155 are denied.

34. Gibbs lacks sufficient information to form a belief concerning the allegations in paragraph 156 of the Counterclaims and accordingly denies the same.

35. The allegations of paragraph 157 of the Counterclaims are denied.

36. The allegations of paragraph 158 of the Counterclaims are denied.

37. The allegations in paragraph 159 of the Counterclaims are denied.

38. The allegations in paragraph 160 of the Counterclaims are denied.

39. Gibbs hereby realleges and incorporates by reference the preceding paragraphs of this defense. Harake Defendants are also referred to Gibbs' Third Amended Complaint.

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40. The allegations of paragraph 162 of the Counterclaims are conclusions of law to which no response is required. Harake Defendants are also referred to Gibbs' Third Amended Complaint for agreements between Gibbs, on one hand, and Harake and Eurosa, on the other. Except as admitted the allegations of paragraph 162 are denied.

41. The allegations of paragraph 163 of the Counterclaims are conclusions of law to which no response is required.

42. The allegations of paragraph 164, including subparagraphs (a) – (f), of the Counterclaims are denied.

43. The allegations of paragraph 165 of the Counterclaims are denied.

44. The allegations of paragraph 166 of the Counterclaims are denied.

45. The allegations of paragraph 167 of the Counterclaims are denied.

46. Gibbs hereby realleges and incorporates all of the preceding paragraphs in this answer.

47. With respect to the allegations of paragraph 169 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of the agreements between Harake Defendants, on one hand, and Gibbs on the other. Except as admitted, the allegations of paragraph 169 of the Counterclaims are denied.

48. With respect to the allegations of paragraph 170 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of the agreements, between Harake Defendants, on one hand, and Gibbs on the other. Except as admitted, the allegations of paragraph 170 of the Counterclaims are denied.

49. The allegations of paragraph 171 of the Counterclaims are conclusions of law to which no response is required.

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50. The allegations of paragraph 172 of the Counterclaims are denied.

51. The allegations of paragraph 173 of the Counterclaims are denied.

52. The allegations of paragraph 174 of the Counterclaims are denied.

53. The allegations of paragraph 175 of the Counterclaims are denied.

54. The allegations of paragraph 176 of the Counterclaims are denied.

55. The allegations of paragraph 177 of the Counterclaims are denied.

56. The allegations of paragraph 178 of the Counterclaims are denied.

57. The allegations of paragraph 179 of the Counterclaims are denied.

58. The allegations of paragraph 180 of the Counterclaims are denied.

59. The allegations of paragraph 181 of the Counterclaims are denied.

60. Gibbs hereby realleges and incorporates all of the responses in the preceding paragraphs of this answer.

61. The allegations of paragraph 183 of the Counterclaims are denied.

62. The allegations of paragraph 184 of the Counterclaims are denied.

63. The allegations of paragraph 185 of the Counterclaims are denied.

64. The allegations of paragraph 186 of the Counterclaims are denied.

65. With respect to the allegations of paragraph 187 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of the agreements, if any, between Harake Defendants, on one hand, and Gibbs on the other. Except as admitted, the allegations of paragraph 187 of the Counterclaims are denied.

66. With respect to the allegations of paragraph 188 of the Counterclaims, Harake Defendants are referred to Gibbs' response to paragraph 132 of the Counterclaims. The remaining allegations of paragraph 188 of the Counterclaims are denied.

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67. The allegations of paragraph 189 of the Counterclaims are denied.

68. The allegations of paragraph 190 of the Counterclaims are denied.

69. Gibbs hereby realleges and incorporates all of the responses in the preceding paragraphs of this answer.

70. With respect to the allegations of paragraph 192 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of the agreements, if any, between Harake Defendants, on one hand, and Gibbs on the other, as to Paysend Processing. Except as admitted, the allegations of paragraph 192 of the Counterclaims are denied.

71. With respect to the allegations of paragraph 193 of the Counterclaims, Harake Defendants are referred to Gibbs' Third Amended Complaint for a description of the agreements, if any, between Harake Defendants, on one hand, and Gibbs on the other, as to Paysend Processing. Except as admitted, the allegations of paragraph 193 of the Counterclaims are denied.

72. The allegations in paragraph 194 of the Counterclaims are denied.

73. The allegations in paragraph 195 of the Counterclaims are denied.

74. The allegations in paragraph 196 of the Counterclaims are denied.

75. The allegations in paragraph 197 of the Counterclaims are denied.

76. The allegations in paragraph 198 of the Counterclaims are denied.

77. The allegations in paragraph 199 of the Counterclaims are denied.

78. The allegations in paragraph 200 of the Counterclaims are denied.

79. The allegations in paragraph 201 of the Counterclaims are denied.

80. The allegations in paragraph 202 of the Counterclaims are denied.

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81. The allegations in paragraph 203 of the Counterclaims are denied.

82. The allegations in paragraph 204 of the Counterclaims are denied.

83. Gibbs hereby realleges and incorporates all of the responses in the preceding paragraphs of this answer.

84. The allegations in paragraph 206 of the Counterclaims are denied.

85. Gibbs denies the allegations and request for relief in Counterclaim Defendants' Prayer for Relief.

86. Gibbs reserves the right to amend this Answer/Reply and its affirmative defenses and the claims in its Third Amended Complaint after investigation, discovery and further information is disclosed, including any and all defenses supported by the evidence offered at the trial of this matter.

FOURTH DEFENSE
(Business/Professional Judgment)

Gibbs properly exercised its professional judgment which is asserted in defense of Harake Defendants' claims.

FIFTH DEFENSE
(Harake Defendants' Sole Negligence/Gross Negligence/Recklessness)

The injuries and/or damages alleged by Harake Defendants, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the actions taken or not taken by Harake Defendants, for whose conduct Gibbs is not liable to Harake Defendants in any manner whatsoever. Harake Defendants have not suffered any damages caused by the actions of Gibbs.

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SIXTH DEFENSE
(Comparative Negligence/Gross Negligence/Recklessness)

Any injuries or damages sustained by Harake Defendants were due to Harake Defendants' own negligent, careless, reckless and/or grossly negligent acts or omissions, which combined and concurred with any alleged negligence, carelessness, recklessness and gross negligence on the part of the Gibbs, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. If it is determined that Harake Defendants' negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of Gibbs, which is specifically denied, then Harake Defendants should be totally barred from recovery. If it is determined that Harake Defendants' negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of Gibbs, then the amount of recovery available to Harake Defendants should be reduced by the percentage of Harake Defendants' own negligence, carelessness, recklessness and gross negligence.

SEVENTH DEFENSE
(Negligence/Gross Negligence/Recklessness of Others)
(Intervening/Superceding Cause)

The injuries and/or damages alleged by Harake Defendants, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct Gibbs is not liable. Harake Defendants have not suffered any damages caused by the actions of Gibbs. The Harake Defendants' alleged damages were proximately caused by unforeseeable, independent, intervening, or superseding events beyond the control, and unrelated to the conduct, of Gibbs. The actions and omissions of Gibbs, if any, were superseded by such unforeseeable, independent, intervening, and superseding events.

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EIGHTH DEFENSE
(Assumption of Risk)

The Harake Defendants, by and through their actions and/or inactions with regard to the subjects alleged in Harake Defendants' Counterclaims, assumed the risk and/or accepted all portions of any alleged damages and such assumption of risk and/or acceptance is a bar to claims against Gibbs.

NINTH DEFENSE
(Failure to State a Claim for Certain Damages)

Harake Defendants fail to state a claim upon which consequential damages, special damages, and/or pre-judgment interest may be awarded.

TENTH DEFENSE
(Failure to Avoid and/or Mitigate Damages)

Gibbs alleges and says that alleged damages, if any, suffered by Harake Defendants should be barred as a result of the failure to avoid and/or mitigate damages.

ELEVENTH DEFENSE
(Failure to State a Claim for Costs)

Harake Defendants fail to state a claim upon which costs may be awarded.

TWELFTH DEFENSE
(Set Off / Credit/Recoupment/Limitations)

Gibbs is entitled to a set off or credit of any monies paid or fees or costs reduced by Gibbs which benefited Harake Defendants and/or recoupment and/or any other applicable limitations of awards, caps or recovery and setoffs permitted by law including, but not limited to, noneconomic loss or injury, and law related to amounts paid or provided by collateral sources.

THIRTEENTH DEFENSE
(Estoppel/Waiver)

Gibbs pleads the doctrines of estoppel and/or waiver as they relate to positions taken by Harake Defendants.

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FOURTEENTH DEFENSE
(Harake Defendants' Bad Faith)

Gibbs would show that Harake Defendants' claims are barred, in whole or in part, by their bad faith.

FIFTEENTH DEFENSE
(Unclean Hands)

Gibbs would show that Harake Defendants' claims are barred, in whole or in part, by the doctrine of unclean hands.

SIXTEENTH DEFENSE
(Apportionment of Fault to Non-Parties)

Gibbs would show that non-parties should be included on the verdict form in this case for the purpose of making proper allocations of fault.

SEVENTEENTH DEFENSE
(Laches)

Gibbs pleads the applicability of the equitable doctrine of laches in this matter.

EIGHTEENTH DEFENSE
(Statute of Frauds)

Harake Defendants' claims are barred by the statute of frauds.

NINETEENTH DEFENSE

Harake Defendants' claims are barred by the doctrines of ratification and/or acquiescence.

TWENTIETH DEFENSE
(Punitive Damages)

Gibbs alleges that the conduct complained of, which is denied, was not such conduct as would entitle Harake Defendants to an award of exemplary or punitive damages against Gibbs.

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TWENTY-FIRST DEFENSE
(Unconstitutionality of Punitive Damages)

Gibbs denies Harake Defendants demand for punitive damages. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 3 of the Constitution of the State of South Carolina in that:

(1) The judiciary's ability to correct a punitive award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;

(2) Any award of punitive damages seeking a compensatory function is inconsistent with due process guarantees:

(3) Any award of punitive damages based upon the wealth of the defendant violates due process guarantees;

(4) The jury's unfettered power to award punitive damages is wholly devoid of meaningful standards, which is inconsistent with due process guarantees;

(5) The standard for punitive damages is void for vagueness; and

(6) Harake Defendants' claim for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the party against whom recovery is sought.

(7) The Harake Defendants' claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 3 of the South

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Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

TWENTY-SECOND DEFENSE
(Limitations on Punitive Damages)

Gibbs pleads any and all standards of limitation regarding the determination of the amount and/or enforceability of punitive damage awards which arose in the decisions of *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) and their progeny. Gibbs also pleads S.C. Code §15-32-510 *et. seq.* as a defense.

FOR A TWENTY-THIRD DEFENSE
(Lack of Standing)

The Harake Defendants do not have standing or authority to bring this action.

FOR A TWENTY-FOURTH DEFENSE
(Statute of Limitations)

The Harake Defendants' claims are barred by the statute of limitations.

FOR A TWENTY-FIFTH DEFENSE
(Breach of Contract)

The Harake Defendants' claims are barred as they have breached the purported contract(s) between the parties.

FOR A TWENTY-SIXTH DEFENSE
(Breach of Fiduciary Duty)

The Harake Defendants' claims are barred as they have breached their fiduciary duties.

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FOR A TWENTY-SEVENTH DEFENSE
(Overlapping Recovery)

The Harake Defendants' alleged remedies are limited to the extent the Harake Defendants seek overlapping and duplicative recovery based on various claims against the Plaintiff for any alleged single wrong.

FOR A TWENTY-EIGHTH DEFENSE
(Condition Precedent)

To the extent an enforceable contract existed, some of its provisions may be subject to conditions precedent which did not occur. Accordingly, some or all of the Harake Defendants' claims fail.

FOR A TWENTY-NINTH DEFENSE
(Good Faith)

Gibbs would show that any actions taken by Gibbs and/or procedures followed by Gibbs concerning the matters stated herein were taken in good faith, in a reasonable manner, and that said actions and/or procedures were reasonable in time and manner, and the Harake Defendants are therefore precluded from recovery against Gibbs under some or all of the Harake Defendants' theories of liability.

FOR A THIRTIETH DEFENSE
(Substantial Performance)

Gibbs would show that it completely and/or substantially performed on the alleged contract(s) in question and, therefore, the Harake Defendants have no right to recover against it.

FOR A THIRTY-FIRST DEFENSE
(No Meeting of the Minds)

Gibbs would show that there was no meeting of the minds with the Harake Defendants such that any contract alleged to be breached by Gibbs is not enforceable.

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FOR A THIRTY-SECOND DEFENSE
(Mistake)

Any contract alleged by the Harake Defendants to have been breached by Gibbs is not enforceable due to mistake.

FOR A THIRTY-THIRD DEFENSE
(Misrepresentation)

Any contract alleged by the Harake Defendants to have been breached by Gibbs is not enforceable due to the material misrepresentations made by the Harake Defendants or its agents that were relied on by Gibbs.

FOR A THIRTY-FOURTH DEFENSE

Gibbs asserts that the exercise of its rights and the actions that it took were actions that Gibbs was entitled to take including, but not limited to, the use of proper methods and means and the Harake Defendants are not entitled to any recovery.

FOR A THIRTY-FIFTH DEFENSE

The Harake Defendants are unable to prove that Gibbs acted intentionally on claims for which intent is a required element and accordingly the Harake Defendants are not entitled to a recovery. ke

WHEREFORE, Gibbs respectfully prays that the Court:

1. Award the relief requested in Gibbs' Third Amended Complaint in this matter filed on August 3, 2020;

2. Award Gibbs a trial by jury on all issues so triable;

3. Award Gibbs its compensatory and punitive damages and treble damages in an amount to be determined at trial;

4. Award Gibbs its attorneys' fees, costs, expenses and interest (including pre-judgment interest and post-judgment interest);

5. Grant such other and further relief in favor of Gibbs as the Court deems just and proper.

This 18th day of September, 2020.

S/Kevin A. Dunlap
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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	Civil Action No.: 2017-CP-42-00740 **THE HARAKE DEFENDANTS' AND KATHERINE HARAKE'S MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	

Pursuant to Rule 12(b)(2), 12(b)(3), and 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendants Sarmad Harake and Eurosa, Inc. (collectively "Harake Defendants") and Defendant Katherine Harake respectfully submit this Memorandum in Support of their respective Motions to Dismiss the Third Amended Complaint, each filed on August 24, 2020.

First, Gibbs International, Inc. ("Gibbs") has not made a showing of general or specific personal jurisdiction over Katherine Harake who does not have sufficient minimum contacts to justify hauling her into this Court's jurisdiction. This Court lacks general jurisdiction over Katherine Harake as well as specific personal jurisdiction. Plaintiff has not pleaded and cannot show that the

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disputes in this case arise from Katherine Harake's activities in the state since Katherine Harake has little to no contacts with South Carolina.

What is more, a number of the causes of actions asserted against either Katherine Harake or the Harake Defendants fail to state facts sufficient to constitute a cause of action. Unfortunately, it appears Gibbs has sought to bring Katherine Harake into this action to leverage its position against the Harake Defendants. As is discussed herein, the allegations against Katherine Harake are short on facts and long on assumptions and conclusions. Katherine Harake is Sam's wife and that is extent of her involvement in the issues being litigated. She has played no role with the companies at issue as she is neither a shareholder, executive, principal, nor an agent. She has not contracted with the entities to provide any services and has played no role in daily operations. For these reasons, this Court lacks jurisdiction over her, and the causes of action alleged fail as a matter of law.

BACKGROUND

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute arising from an alleged breach of contract and request for accounting of an alleged investment agreement between Defendant Eurosa, Inc. ("Eurosa") and Plaintiff Gibbs. While Gibbs initially filed this action in March 2017, it was twice amended, with the Second Amended Complaint filed on June 9, 2017. An entry of default was entered against Defendants Sam Harake, Eurosa, and Katherine Harake on July 17, 2017; however, they timely answered the Second Amended Complaint on August 17, 2017. The entry of default was set aside by Order of this Court on December 21, 2017. Katherine Harake was voluntarily dismissed from this litigation on June 1, 2018. Collectively since January 2018, Plaintiff and the Harake Defendants have produced tens of thousands of pages of documents in this litigation, and more than 10 depositions have been taken, including the deposition of Katherine Harake. Katherine Harake's deposition was taken prior to the filing of the Third Amended Complaint. As part of

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her deposition, Katherine Harake testified she only lived in Spartanburg during the school years (August to May) of 2015-2016 and 2016-2017, returning home to New Hampshire after the school year, and that she has never owned any property in South Carolina. (K. Harake Depo., pp. 11:9-13:3, attached hereto as **Exhibit A**). Katherine Harake testified she was not working outside the home. *Id.* at p.32:17-18. She also testified that while she may have loaned money to and received money from the Eurosa account from time to time, she did not have any access to Eurosa's bank accounts; consequently, she did not review financial statements, bank statements, or expense reports of Eurosa or make any purchases directly from the Eurosa accounts. *Id.* at pp. 54:7-21; 58:4-7; 62:7-64:14; 93:12-23; 96:17-97:22.

The Harake Defendants filed their Answer and Amended Counterclaims contemporaneously with their Motion to Dismiss on August 24, 2020. However, as noted in Katherine Harake's Motion to Dismiss was made in lieu of a responsive pleading.[1] K. Harake Motion, p. 1, n.1.

ARGUMENT

I. This Court lacks personal jurisdiction over Katherine Harake, causing venue in Spartanburg County to be improper and requiring dismissal of this action against her.

Rule 12(b)(2) of the South Carolina Rules of Civil Procedure allows a party to move for dismissal of a pleading for lack of jurisdiction over the person. *See* 12(b)(2), SCRCP. Under South Carolina law, "[i]t is well-settled that a party seeking to invoke personal jurisdiction over a non-resident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256,

[1] To the extent the Court denies Katherine Harake's Motion to Dismiss, Katherine Harake requests fifteen days to serve an answer as provided in Rule 12(a), SCRCP.

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423 S.E.2d 128 (1992); *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 402 S.E.2d 177 (1991).

"The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (citing *Engineered Prods.v. Cleveland Crane & Eng'g*, 262 S.C. 1, 201 S.E.2d 921 (1974)). "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Coggeshall v. Reproductive Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007) (citing *Graham v. Llyod's of London*, 296 S.C. 249, 251 n. 1, 371 S.E.2d 801, 802 n.1 (Ct. App. 1998)). "Personal jurisdiction is exercised as 'general jurisdiction' or 'specific jurisdiction.'" *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. Exercise of personal jurisdiction "must comport with due process requirements and must not offend traditional notions of fair play and substantial justice." *Id.* at 16, 655 S.E.2d at 478 (citing *Cockrell*, 363 S.C. 485, 611 S.E.2d 505). "Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state." *Id.*, 655 S.E.2d at 478 (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)).

Here, the Court lacks personal jurisdiction over Katherine Harake as no general or specific jurisdiction exists. Exercise of personal jurisdiction over Katherine Harake does not comport with due process. Katherine Harake has not purposefully availed herself of the privilege of conducting activities in South Carolina. Katherine Harake has very limited relationships with South Carolina and conducted no activities in South Carolina such that she should be subject to appear in a South Carolina court to defend herself in this lawsuit. Katherine Harake is not a resident of South Carolina

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and only lived in South Carolina during the school years of 2015-2016 and 2016-2017, while maintaining her home in New Hampshire. Katherine Harake has no business interests in South Carolina. Katherine Harake played no role in the business decisions and transactions complained of in this suit. Katherine Harake's presence in this lawsuit before a South Carolina court offends the traditional notions of fair play and substantial justice; therefore, Katherine Harake respectfully requests this Court to grant her motion and dismiss the causes of action asserted against her. Due to the Court's lack of personal jurisdiction, venue in Spartanburg County is also improper pursuant to Rule 12(b)(3), SCRCP[2].

A. No *general* personal jurisdiction exists.

General jurisdiction of a court is determined under South Carolina Code of Laws Section 36-2-802, which provides:

> A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.

S.C. Code Ann. § 36-2-802. "General jurisdiction is the State's right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant's contacts with the forum." *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478 (citing *Burger King Corp., v. Rudzewicz*, 471 U.S. 462, 473, n. 15 (1985)). There is no question that Katherine Harake is not domiciled in South Carolina. She is a New Hampshire resident. Further, Katherine Harake has no ownership interest in Eurosa, the only Defendant entity. Therefore, the only argument Plaintiff can even attempt to make to establish general jurisdiction is that

[2] The Third Amended Complaint should be dismissed pursuant to Rule 12(b)(3), SCRCP, because venue is not proper in Spartanburg County since the Court does not have personal jurisdiction over Katherine Harake and since Katherine Harake was not involved in the business of Gibbs. *See also* S.C. Code Ann. § 15-7-30. Likewise, venue is not proper as to the Harake Defendants pursuant to Rule 12(b)(3), SCRCP, as neither Sam Harake nor Eurosa are residents of Spartanburg County. *See* S.C. Code Ann. § 15-7-30.

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Katherine Harake is somehow "doing business" in South Carolina, which she does not. Therefore, there is no basis to establish general jurisdiction.

The South Carolina Supreme Court's opinion in *Coggeshall* is instructive. The court in *Coggeshall* was presented with a suit brought by South Carolina residents against a North Carolina medical clinic and one of its physicians. The court determined that, even though the clinic performed medical services for thousands of South Carolina residents, sent bills to those patients, earned over $2 million dollars from South Carolina patients, received referrals from South Carolina providers, and did business with vendors in South Carolina, the contacts were not sufficient to exercise general jurisdiction. The court explained "[t]here is no universal formula for determining what constitutes 'doing business' to subject a foreign entity to personal jurisdiction." *Id.* at 17, 655 S.E.2d at 479. However, the court reasoned "[a]s the title of § 36-2-802 indicates, general jurisdiction is based upon 'an enduring relationship' with the State" and that "[a]n enduring relationship is indicated by contacts that are substantial, continuous, and systematic." *Id.*, 655 S.E.2d at 479 (citing *Cockrell*, 363 S.C. at 495, 611 S.E.2d at 510). The court explained that the alleged contacts of the clinic and the doctor were not "substantial, continuous, and systematic to justify the exercise of personal jurisdiction." *Id.* at 18, 655 S.E.2d at 479. The *Coggeshall* court relied on the facts that the clinic did not target its advertising to South Carolina residents and only maintained a website that allowed a patient to email the clinic for further information. Accordingly, the court found that the clinic and physician were not doing business in South Carolina based on its patient contacts or business dealings with South Carolina vendors. *Id.* at 19, 655 S.E.2d at 480.

The same result should be reached here. Katherine Harake has no contacts with South Carolina that would subject her to a lawsuit in this state. Plaintiff has included no allegations in

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its Third Amended Complaint demonstrating that she has an "enduring relationship" with South Carolina such that she should be subject to suit here. Further, Katherine Harake did not maintain the substantial, continuous, and systematic contacts with South Carolina that would provide this Court with general jurisdiction over her. Therefore, Plaintiff's Third Amended Complaint should be dismissed as to Katherine Harake.

B. No *specific* personal jurisdiction exists.

Specific jurisdiction of a court is determined under South Carolina Code Section 36-2-803, which states:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> (1) transacting any business in this State;
>
> (2) contracting to supply services or things in the State;
>
> (3) commission of a tortious act in whole or in part in this State;
>
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
>
> (5) having an interest in, using, or possessing real property in this State;
>
> (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
>
> (7) entry into a contract to be performed in whole or in part by either party in this State; or
>
> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.
>
> (B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

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S.C. Code Ann. § 36-2-803. "Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum . . ." *Coggeshall*, 376 S.C. at 16, 665 S.E.2d at 478. Specific jurisdiction conferred under this statute is "limited to a cause of action arising from specific activity within this State." *Id.* at 20, 655 S.E.2d at 480. Because Plaintiff's Third Amended Complaint fails to allege Katherine Harake took any of these acts in South Carolina, the Court does not have specific jurisdiction over Katherine Harake.

Katherine Harake has not carried out any of the acts identified in Section 36-2-803. First, Katherine Harake was and is not involved with Gibbs' business in any role. Katherine Harake was not and is not an owner, operator, manager, employee, principal, or agent of Eurosa. For this reason, Plaintiff's claims must be dismissed. Moreover, Katherine Harake has not personally made any contracts to supply services. *See Int'l Mariculture Res. v. Grant*, 336 S.C. 434, 439, 520 S.E.2d 160, 162 (Ct. App. 1999) ("'Due Process requires us to examine each appellant's own contacts with South Carolina.'") (quoting *Allen v. Columbia Fin. Mgmt.*, 297 S.C. 481, 490, 377 S.E.2d 352, 357 (Ct. App. 1988)).

In addition, Katherine Harake does not personally do or solicit business or engage in any other persistent course of conduct or derive substantial revenue from goods used or consumed or services rendered in South Carolina. Further, Katherine Harake does not have an interest in, does not use, and does not possess real property in South Carolina. She also has not contracted to insure any person, property, or risk located within South Carolina at any time and has not entered into a contract that is or was the be performed in whole or in part by any party in South Carolina. Moreover, there is no question that Katherine Harake has not produced, manufactured, or

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distributed goods with the reasonable expectation that those goods are to be used or consumed or are actually used or consumed in South Carolina.

Finally, Plaintiff's Third Amended Complaint merely states that upon information and belief, "K. Harake was a citizen and resident of Spartanburg, South Carolina at the time of filing of the original complaint in this matter. Much of the conduct alleged as to K. Harake occurred when she was living in Spartanburg County, South Carolina." (3d Am. Compl. □ 4). Plaintiff fails to allege any affirmative acts taken by Katherine Harake which could provide this Court with personal jurisdiction. Therefore, without even having allegations that Katherine Harake has not committed an alleged tortious act in whole or in part in South Carolina, the Court does not have personal jurisdiction over her, and this case should be dismissed against her.

II. Several causes of action must be dismissed as they fail to state facts sufficient to constitute a cause of action.

Even if the Court finds the exercise of personal jurisdiction over Katherine Harake to be proper, this case should still be dismissed as to Katherine Harake pursuant to 12(b)(6), SCRCP, and a cause of action should also be dismissed against Sarmad Harake and Eurosa for the same reasons. A defendant may move to dismiss a complaint based on failure to state facts sufficient to constitute a cause of action under South Carolina Rule of Civil Procedure 12(b)(6). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deductible therefrom do not entitle the plaintiff to relief on any theory of the case." *Brown v. Theos*, 338 S.C. 305, 309-310, 526 S.E.2d 232, 235 (Ct. App. 1999) (citing *Jarrell v. Petoseed Co., Inc.*, 500 S.E.2d 793 (S.C. App.1998)). Here, Plaintiff's Third Amended Complaint must be dismissed because it fails to allege any set of facts under which it could bring certain causes of action against either the Harake Defendants or Katherine

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Harake. Therefore, the below referenced causes of action contained in Plaintiff's Third Amended Complaint should be dismissed.

A. Aiding and abetting conversion is not a recognized cause of action in South Carolina.

"Aiding/Abetting Conversion," the Sixth Claim for Relief in the Third Amended Complaint, is not based in statute or in common law. There are no South Carolina cases discussing its propriety, and the Legislature has never enacted a civil aiding and abetting statute. It is not a recognized cause of action in South Carolina; therefore, it must be dismissed as alleged against Katherine Harake. Although it is within the Court's discretion to determine the state would recognize the cause of action for aiding and abetting conversion rather than dismissing the claim, the cause of action for aiding and abetting conversion should still be dismissed. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted); *see also Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014). As there is not a recognized cause of action for aiding and abetting conversion, whether the elements have been sufficiently pled would require there to be elements to test. Moreover, as will be discussed *infra* in Section II.F, Plaintiff's claim for conversion against Katherine Harake also fails as a matter of law, and Plaintiff chose to plead the two causes of action as one claim. Finally, the aiding and abetting conversion claim appears to be a way to get around the pleading standards of civil conspiracy, and as will be discussed *infra* in Section II.C, that claim fails as a matter of law as to Katherine Harake and the Harake Defendants. Therefore, this is not a theory under which Plaintiff can recover, and as a result, the Sixth Claim for Relief should be dismissed.

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B. Plaintiff has failed to allege a valid cause of action for unfair and deceptive trade practices.

Plaintiff has alleged claims for unfair and deceptive trade practices against Katherine Harake which must be dismissed. Katherine Harake is not subject to the South Carolina Unfair Trade Practices Act ("SCUTPA") because she is not a "person" as defined by the act. A "person shall include natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." S.C. Code Ann. § 39-5-10(a). This definition encompasses controlling persons in a corporation, not simply any individual. *State ex rel. McLeod v. C & L Corp., Inc.*, 313 S.E.2d 334 (S.C. Ct. App. 1984). A controlling person is defined as "one who makes formulates and directs corporate policy or who is deeply involved in the important affairs of the corporation." *Id.*

Here, Katherine Harake has no relationship to Eurosa. She has not acted as a principal, agent, owner, operator, or contractor. Katherine Harake cannot be subject to suit for Unfair Trade Practices where she has not acted on behalf of the entity involved. Moreover, there are no allegations that when taken as true for purposes of Rule 12(b)(6), SCRCP, would claim that Katherine Harake is a person as defined by SCUTPA. Therefore, Plaintiff has failed to state facts sufficient to plead a necessary element of the cause of action pursuant to SCUTPA, and that cause of action against Katherine Harake should be dismissed.

C. Plaintiff has failed to allege a valid cause of action for civil conspiracy.

Next, Plaintiff has failed to plead facts as to the necessary elements of the cause of action for civil conspiracy as to both Sarmad Harake and Katherine Harake. Specifically, Plaintiff has failed to plead any acts in furtherance of the conspiracy that are "separate and independent from other wrongful acts alleged." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 325, 701 S.E.2d 39 (Ct. App. 2010) (finding in a civil conspiracy claim the plaintiff must plead acts in

furtherance of the conspiracy that are "separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim"); *see also Hackworth v. Greywood At Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009) (noting that a "claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint"); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (dismissing the civil conspiracy cause of action because it did no more than incorporate the complaint's allegations in the previous causes of action and because the only alleged wrongful acts pled were those for which damages had already been sought), *rev'd on other grounds,* 283 S.C. 155, 321 S.E.2d 602 (1984) *quashed in part on other grounds,* 287 S.C. 190, 336 S.E.2d 472 (1985).

Plaintiff's civil conspiracy allegations incorporate by reference the facts pled in support of its conversion claim. Plaintiff does not assert any overt acts. Plaintiff has not pleaded separate, independent facts in furtherance of the conspiracy, and instead only reincorporated the facts concerning the other allegations in the Third Amended Complaint. The Third Amended Complaint also contains no allegations that the primary purpose was to injure Plaintiff, nor can the pleadings be reasonably construed to infer such an allegation. Plaintiff also has failed to allege damages specific to the civil conspiracy cause of action. *See Vaught v. Waites,* 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (holding that *Todd* barred a conspiracy cause of action because no special damages were alleged aside from the damages already alleged for the plaintiff's breach of contract cause of action in that case). Here, the damages alleged are not special damages; rather, they are the same funds sought elsewhere in the Third Amended Complaint. Accordingly, Plaintiff's civil conspiracy claim fails as a matter of law and should be dismissed.

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D. Plaintiffs have failed to allege a valid cause of action for fraud.

Next, Plaintiff has asserted a cause of action for fraud against Katherine Harake. To survive a motion to dismiss, a plaintiff must not only plead "facts showing that [it] is entitled to relief," SCRCP 8(a)(2), but the plaintiff must also satisfy the heightened particularity standard for all claims sounding in fraud established by SCRCP 9(b), ("In all averments of fraud ... , the circumstances constituting fraud ... shall be stated with particularity."). An action for fraud is fatally defective if the complaint fails to allege all nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 363 S.E.2d 691 (1988); *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984).

First, Katherine Harake made no representations to Plaintiff and had no communications with Plaintiff. Katherine Harake cannot be liable for fraud if she never represented any facts to Plaintiff. The Third Amended Complaint attempts to tie Katherine Harake into an alleged fraud by alleging that she aided and abetted Sarmad Harake. When evaluating this cause of action for what it is, a further claim for aiding and abetting, this Court must dismiss it. There is no recognized cause of action for aiding and abetting fraud. The purported cause of action is not based in statute or in common law.

Additionally, Plaintiff has failed to plead damages which are compensable by actions for fraud or misrepresentation. "It is the well-settled law of this state that the proper method in such a case is the benefit of the bargain approach, according to which plaintiff is entitled to the difference between the value he would have received if the defendant's representations had been

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true and the value he actually received, together with any proximately caused consequential or special damages." *Schnellmann v. Roettger*, 373 S.C. 379, 383, 645 S.E.2d 239, 241 (2007) (citations omitted).

It is Plaintiff's burden to prove fraud and misrepresentation by clear and convincing evidence. As a matter of simple pleading, Gibbs has not stated either cause of action clearly or with particularity, *see* Rule 9(b), SCRCP, and Gibbs has not alleged the material elements to meet legal sufficiency. Therefore, the cause of action for fraud must be dismissed as to Katherine Harake.

E. Plaintiffs have failed to allege a valid cause of action for aiding and abetting breach of fiduciary duty.

Plaintiff also brings a cause of action for aiding and abetting breach of fiduciary duty. The elements of this action are: (1) breach of a fiduciary duty owed to the plaintiff, (2) the defendant's knowing participating in the breach, and (3) damages. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 449 (Ct. App. 2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Id.* "[K]nowing participation in a fiduciary breach requires that the nonfiduciary act with knowledge that the conduct advocated or assisted constitutes such a breach." *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).

Plaintiff failed to plead adequately any specific facts from which is can reasonably inferred that Katherine Harake "knowingly participated" in the alleged breach of fiduciary duty. Plaintiff only alleges that Katherine Harake received money from her husband and that she "used" the money. 3d. Am. Compl., ¶ 33. In short, Plaintiff alleges Sam Harake misappropriated funds from Gibbs and then transferred some of the money to Katherine Harake's savings account from which she then spent the money. The other allegations supporting this cause of action are so conclusory as to be of no effect as they merely recite various elements. These allegations are not sufficient to state

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a valid claim against Katherine Harake. Further, there has been no breach of fiduciary duty by Sam Harake. Accordingly, the claim for aiding and abetting breach of fiduciary duty must be dismissed as to Katherine Harake.

F. Plaintiffs have failed to allege a valid cause of action for conversion.

Plaintiff's claims for conversion fail because Plaintiff has made no allegation that Katherine Harake interfered with the property of Gibbs. Under South Carolina law, "[t]o prevail in an action for conversion, the plaintiff must prove either title or right to possession of the property at the time of the alleged conversion." *Richardson's Rests. v. Nat'l Bank of S.C.*, 304 S.C. 289, 294, 403 S.E.2d 699, 672 (Ct. App. 1991) (citing *Causey v. Blanton*, 281 S.C. 163, 314 S.E.2d 346 (Ct. App. 1984)). Further, "[c]onversion cannot arise from the defendant's exercise of a legal right over the property" and "[t]here can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff." *Richardson's Rests.*, 304 S.C. at 294, 403 S.E.2d at 672 (citing *Castell v. Stephenson Fin. Co.*, 244 S.C. 45, 135 S.E.2d 311 (1964); *Dawkins v. Nat'l Liberty Life Ins. Co.*, 263 F. Supp. 119 (D.S.C. 1967)).

Here, as it did with the fraud claim, Plaintiff only alleges Katherine Harake received and benefitted from money she received from Sam Harake. First, Katherine Harake had no obligation to Gibbs to "deliver a specific, identifiable fund to" Gibbs, and there are no allegations to the contrary. Therefore, as South Carolina does not recognize a cause of action for conversion of money, this cause of action should be dismissed as a matter of law.

G. Plaintiffs have failed to allege a valid cause of action for accounting.

Gibbs' claim for accounting also fails as a matter of law because Gibbs has failed to allege facts that warrant an equitable remedy (and Gibbs' claim for unjust enrichment, also an equitable remedy, is inappropriate). As the South Carolina Supreme Court has held, an accounting is a

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remedy, not a cause of action. *See Historic Charleston Holdings, LLC v. Mallon*, 673 S.E.2d 448 (S.C. 2009); *see also Gestring v. Mary Lanning Memorial Hospital Association*, 613 N.W. 2d 440, 452 (Neb. 2000) ("A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.") In refusing to order an accounting because it was not specifically authorized by contract or statute, the *Mallon* court noted an accounting is an equitable remedy which refers to "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." *Mallon*, 673 S.E.2d at 453.

As an accounting is not authorized by contract or statute in the situation presented herein, there is no basis for the Court to order an accounting. Further, Gibbs has failed to allege any reason why discovery would be insufficient for it to obtain the information it desires. Accordingly, the accounting cause of action should be dismissed as to Katherine Harake.

H. Plaintiffs have failed to allege a valid cause of action for unjust enrichment, quasi contract, implied contract, and quantum meruit.

Finally, Gibbs' claims for unjust enrichment, quasi contract, implied contract, and quantum meruit also fail as a matter of law. First, they are equitable remedies which are generally available only where there is no adequate remedy at law. *Santee Cooper Resort, Inc. v. South Carolina Public Service Com'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (S.C. 1989). Gibbs has adequate remedies at law available to it. Gibbs has raised eleven causes of action against the Harake Defendants in both contract and tort. Gibbs has not pleaded and cannot show that these remedies are inadequate to redress the issues.

A party seeking to recover for unjust enrichment or quantum meruit must show: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to

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retain it without paying its value. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). Plaintiff has failed to plead facts sufficient to show that a benefit was conferred by Gibbs to Katherine Harake. Gibbs has also failed to show Katherine Harake realized any alleged benefit nor that it would be inequitable for her to retain such benefit. As noted throughout this memorandum, Gibbs only alleges that Katherine Harake received money from Sam Harake. Gibbs has not and cannot allege that Katherine Harake was aware of any alleged misappropriations or breach of fiduciary duties and that it would be unjust for her to retain any money transferred to her by her husband.

CONCLUSION

For the reasons outlined above, in the respective Motions to Dismiss, and in any argument presented at the hearing of this Motion, the Harake Defendants respectfully move this Court for an order dismissing Plaintiff's Third Amended Complaint pursuant to Rule 12(b)(2), 12(b)(3), and 12(b)(6) of the South Carolina Rules of Civil Procedure.

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September 22, 2020

Columbia, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	)	Civil Action No.: 2017-CP-42-00740 **MEMORANDUM IN OPPOSITION TO PLAINTIFF GIBBS INTERNATIONAL, INC.'S MOTION TO DISMISS AND TO STRIKE COUNTERCLAIMS OF SARMAD HARAKE AND EUROSA, INC.**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	)	

By and through their undersigned counsel, Defendants Sarmad Harake and Eurosa, Inc. (collectively the "Harake Defendants"), hereby respectfully submit this memorandum in opposition to Plaintiff Gibbs International, Inc.'s ("Gibbs") motion to dismiss and to strike counterclaims of Harake Defendants. For all of the reasons set forth herein and to be argued at the hearing on this matter, Plaintiff Gibbs' motion should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute arising from an alleged breach of contract and request for accounting of an alleged investment agreement. Plaintiffs initially brought this action on March 7,

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2017, but it has been amended several times. Most recently, Gibbs filed its Third Amended Complaint on August 3, 2020. On August 24, 2020, the Harake Defendants filed a partial motion to dismiss the Third Amended Complaint as well as their Answer to Plaintiff's Third Amended Complaint and Amended Counterclaims ("Answer and Amended Counterclaims"). The Harake Defendants asserted four counterclaims, including breach of contract, negligent misrepresentation, unjust enrichment, and tortious interference with economic interest.

Gibbs filed its motion on August 28, 2020, asserting that the Harake Defendants failed to state facts sufficient to show a claim of negligent misrepresentation and that Harake Defendant's counterclaim for tortious interference with economic advantage is not a claim recognized by South Carolina law. Gibbs' motion also moves to strike "the intentional interference with prospective contractual relations claim" that Defendant Sam Harake discussed in his deposition. Following several extension requests, Gibbs filed its Reply to Harake Defendants' Amended Counterclaims ("Reply") on September 18, 2020, denying some allegations and admitting some allegations in the Answer and Amended Counterclaims.

II. ARGUMENT

A. Legal Standard.

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a defendant may move to dismiss based on failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). A motion to dismiss made pursuant to Rule 12(b)(6) should be viewed in the light most favorable to the non-moving party and should not be granted if facts alleged and the inferences drawn from those facts would entitle a party to relief on ***any theory*** of the case. *See Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999) (emphasis added). A claim should not be dismissed merely because the court doubts that the

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plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). After all, "judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). The grant of a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, is immediately appealable. *Doe v. Marion*, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007).

"The matter of striking from a pleading, and the matter of admissibility of evidence is largely within the discretion of the trial judge." *Wells Fargo Bank, NA v. Smith*, No. 2009-125666, 2012 WL 10987189, at *1 (S.C. Ct. App. June 13, 2012) (citation omitted). Rule 12(f) provides, in part, that a court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. Matter is "immaterial" if it has no relationship to the claim for relief; "impertinent" if it does not pertain to the issues in the case; "scandalous" if it "'reflect[s] cruelly' upon the defendant's moral character, use[s] 'repulsive language' or 'detract[s] from the dignity of the court.'" *Zaloga v. Provident Life and Acc. Ins. Co. of Am.*, 671 F. Supp. 623, 633 (M.D. Pa. 2009) (quoting *Donnelly v. Com. Financial Systems, Inc.*, 2008 WL 762085, *4 (M.D. Pa. 2008)) (construing identical federal rule); Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1382 (3d ed.) (construing identical federal rule). Generally, motions to strike are disfavored by courts because they tend to delay court proceedings and consume judicial resources. *See Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at *1 (W.D. Wis. Sept. 25, 2008) (citations omitted). Further, a Rule 12(f) motion that "challenges a theory of recovery in the pleading" is treated as a challenge to the sufficiency of the pleading under Rule 12(b)(6), SCRCP, and "must be based solely on the allegations set forth on the face of the claim." *Hackworth v. Greywood at Hammett*, LLC, 385 S.C. 110, 114–15, 682 S.E.2d 871, 874 (2009).

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B. The Harake Defendants' Counterclaim for Negligent Misrepresentation Alleges Facts Sufficient to State a Cause of Action and Should Not Be Dismissed.

Gibbs' motion to dismiss the Harake Defendants' counterclaim for negligent misrepresentation should be denied as the misrepresentations Gibbs made to the Harake Defendants were about present agreements. To establish a claim for negligent misrepresentation, a party must allege and later prove "(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; and (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *AMA Mgmt. Corp. v. Stashburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992). Generally, a representation should relate to a present or prior existing fact and cannot be based on statements regarding future events. *Sauner v. Pub. Svc. Auth. of S.C.*, 354 S.C. 397, 408, 581 S.E.2d 161, 167 (2003).

As is required when evaluating a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the following facts must be taken as true in the Answer and Amended Counterclaims: Gibbs' authorized agent, Jimmy Gibbs, made representations to investors, including the Harake Defendants, that were false related to its commitment to invest in Gibbs Investment Holdings, LLC; Iotive, Inc.; and Paysend Processing. Ans. and Am. Counterclaims, □□ 169-171. There is nothing about the allegations in those paragraphs that indicates they were future representations, and the present nature of the representations made for each of the commitments was pled in Paragraphs 128 through 160 of the Answer and Amended Counterclaims which were incorporated into the Negligent Misrepresentation cause of action. *Id.* at □ 168. For example, the Harake Defendants alleged Gibbs represented it would create Gibbs Investment Holdings, LLC

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with Eurosa and revenue sharing terms. *Id.* at □□ 130-131. Gibbs admitted that it "agreed to form Gibbs Investment Holdings, LLC," but it referred to its Third Amended Complaint for the particular terms. Reply, □□ 8-9. Gibbs also represented that certain expenses would be considered draws for Eurosa from Gibbs Investment Holdings, LLC as of 2016. Ans. and Am. Counterclaims, □ 133. Further, commitments made in Gibbs' representations were present facts as they were confirmed at the time, as alleged, in correspondence or electronic communications providing the terms and conditions or by specific performance. *Id.* at □□ 135-142, 149. Gibbs also admitted agreements existed, but it alleged that the "description of agreements" would be found in its Third Amended Complaint. Reply, □□ 13-20, 27. In addition to alleging false representations about present facts, the Harake Defendants alleged the pecuniary interest Gibbs had related to the false, present commitments it made. Ans. and Am. Counterclaims, □ 173. Moreover, the Harake Defendants alleged the duty Gibbs had to the other investors as well as its breach by failing to meet the commitments it made. *Id.* at □□ 174-175. Additionally, the Harake Defendants alleged that they justifiably relied on Gibbs' false, present commitments and were caused damages as a result. *Id.* at □□ 176-181. Accordingly, taking all allegations in the light most favorable to the Harake Defendants, as required, and given the admissions Gibbs made in its Reply, the Harake Defendants have pled a sufficient cause of action for Negligent Misrepresentation. *Gentry*, 337 S.C. 1, 522 S.E.2d 137.

However, even if the Court was to deem the representations Gibbs made to the Harake Defendants as pertaining to future events, which they are not, since Gibbs' commitments to make investments were not immediately met by the amount of money promised in the pledged commitment, Gibbs' motion to dismiss should still be denied because the representations Gibbs made to the Harake Defendants meet the elements of fraudulent misrepresentation. In South

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Carolina, statements amount to fraudulent misrepresentation when a person promises to do a certain thing, but in actuality had no intention of keeping the agreement. *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 770 (2011) (citation omitted); *Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967) (citation omitted). Here, it is alleged that Gibbs "knowingly made untruthful representations about the amount of capital it could provide to the projects." Ans. and Am. Counterclaims, ☐ 180. Given that the name of a cause of action is not dispositive for purposes of a motion to dismiss, whether it is deemed Negligent Misrepresentation or Fraudulent Misrepresentation, the Harake Defendants' Second Counterclaim has been sufficiently pled. Therefore, Gibbs' motion must be denied.

C. The Harake Defendants' Counterclaim for Tortious Interference with Economic Interest Alleges Facts Sufficient to State a Cause of Action and Should Not Be Dismissed Or Stricken.

The Harake Defendants' counterclaim for tortious interference with economic interest should not be dismissed or stricken. As an initial matter, the counterclaim meets the elements for a tortious interference claim, and the label on a cause of action is not dispositive as to whether it has been pled sufficiently. *See 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) (providing that the court must look beyond the labels of a cause of action to the actions themselves when examining a Complaint); *see also generally* Rule 8(f), SCRCP (stating that "[a]ll pleadings shall be so construed as to do substantial justice to all parties"); *Shirley's Iron Works, Inc. v. City of Union* 403 S.C. 560, 743 S.E.2d 778 (2013) (finding subcontractors sufficiently pled a third-party beneficiary claim against the city in an action because in the "Facts" section of the complaint, the subcontractors alleged they were "third-party beneficiaries" of the city's contract with general contractor because the bonding requirements were "legislatively mandated contractual

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obligations" that were incorporated into the contract as a matter of law, and, while the word "contract" did not appear in the first cause of action, neither did the words "tort" or "negligence"); *S.C. Nat. Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986) ("It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial.").

Moreover, *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 179 (1990), has found that "intentional interference with prospective economic advantage" has been labeled as "intentional interference with contractual relations"; therefore, to the extent the Court does not permit the a cause of action for interference with economic interest,[1] it may disregard the label and consider it as a claim for tortious interference with contractual relations. *United Educational Distributors, LLC v. Educational Testing Svc.*, 350 S.C. 7, 10 at n.1, 564 S.E.2d 324, 326 at n.1 (Ct. App. 2002) (stating it would analyze the plaintiff's cause of action which was labeled as tortious interference with economic advantage as that of intentional interference with prospective contractual relations because how it was labeled did not affect the substance of its analysis); *see also Wellin v. Wellin*, 135 F.Supp.3d 502 (D.S.C 2015); *Williamson v. Bermuda Run Inv'r Dev. Grp., Inc.*, No. 2006-UP-279, 2006 WL 7286063, at *7 (S.C. Ct. App. June 13, 2006) (reversing a master in equity's finding that Williamson was liable in defendant's counterclaim of tortious interference with economic relations and analyzing the claim as one for tortious interference with contract).

[1] To the extent the tortious interference with economic interest has not been formally recognized in South Carolina, it is up to the court to decide whether the state recognizes a of cause of action - it is not grounds for dismissal. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted); *see also Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014). While there may not be a case officially recognizing tortious interference with economic interest in South Carolina, a party's counterclaim seeking recovery for intentional interference with economic interest has been acknowledged such that the cause of action's label itself was not at issue. *Lemoine v. Hollingsworth*, 273 S.C. 477, 257 S.E.2d 713 (1979) (upholding a directed verdict for insufficiency of the evidence presented at trial, not dismissing it for lack of pleading).

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To allege and maintain a cause of action for tortious interference with contractual relations, a party must show: (1) the existence of a contract, (2) knowledge of the contract, (3) intentional procurement of its breach, (4) the absence of justification, and (5) resulting 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) (citation omitted). As stated in the Harake Defendants' Answer and Amended Counterclaims, which must be taken in the light most favorable to the Harake Defendants for purposes of Gibbs' motion, Counterclaim Defendant Gibbs, Counterclaim Plaintiff Eurosa, and another investor in Paysend Processing had an agreement related the capital investments needed for Paysend Processing and for the overall plan for growth of that company, and part of that agreement required Gibbs to invest $1 million. Ans. and Am. Counterclaims, □□ 192, 195, and 196. In its reply, Gibbs does not outright deny this agreement; rather, it refers the Court to the Third Amended Complaint for what it believes the description of the agreement is. Reply, □ 70. Therefore, the Harake Defendants alleged the existence of a contract of which Gibbs was aware that it was supposed to invest $1 million, satisfying pleading of the first two elements of tortious interference with contractual relations. Additionally, the Harake Defendants alleged Gibbs refused without justification to meet its obligation under the agreement, acted deliberately to discourage other investment, and refused to be bought out from the agreement in an effort to salvage the company, intentionally causing a breach of the agreement. Ans. and Am. Counterclaims, □□ 193, 194, 197, and 198. Thereafter, the Harake Defendants allege the damages that resulted from Gibbs' actions. *Id.* at □□ 199-204. Each of the elements of tortious interference with contractual relations has been pled. *Gentry*, 337 S.C. 1, 522 S.E.2d 137. Accordingly, Gibbs' motion should be denied.

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The Gibbs motion also requests this counterclaim be stricken pursuant to Rule 12(f), SCRCP, because it believes Defendant Sam Harake began testifying about it and then was instructed by his counsel not to answer a follow up question that would have revealed attorney-client and work product protected information. Here, as Gibbs should recall since multiple depositions were taken during the same week, counsel agreed off the record that should a motion for protective order need to be filed related to the instructions not to answer or refusal to answer given in either of the depositions of Jimmy Gibbs or Sam Harake, opposing counsel was to let the counsel who gave the instruction know. At no time was such a request been made to the undersigned counsel. In any event, such an instruction does not provide a legal basis for a motion to strike as the pleading does not contain "redundant, immaterial, impertinent or scandalous matter." *See* Rule 12(f), SCRCP. Rather, since the purpose of Gibbs' request to strike is an additional challenge to the sufficiency of the pleading, it should be treated as a Rule 12(b)(6), SCRCP, motion. *Hackworth*, 385 S.C. at 114–15, 682 S.E.2d at 874. For the reasons stated above as to Rule 12(b)(6), SCRCP, the claim has been sufficiently pled. Accordingly, Gibbs' motion should be denied.

III. CONCLUSION

For the reasons set forth herein, the Harake Defendants respectfully request the court enter an Order denying Gibbs' motion. The Harake Defendants also request all further relief the Court deems just and proper.

Respectfully Submitted,

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **PLAINTIFF GIBBS INTERNATIONAL, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT KATHERINE HARAKE'S MOTION TO DISMISS**

The plaintiff, Gibbs International, Inc. ("Gibbs" or "Plaintiff"), respectfully submits this memorandum of law in opposition to the Motion to Dismiss Gibbs' Third Amended Complaint as to Defendant Katherine Harake's ("Defendant" or "K. Harake") pursuant to Rule 12(b)(2) for lack of personal jurisdiction and Rule 12(b)(6) for failure to state a claim. This memorandum also responds to K. Harake's, Sarmad Harake's ("S. Harake") and Eurosa, Inc.'s ("Eurosa") (collectively, the "Harake Defendants") motions to dismiss for improper venue pursuant to Rule 12(b)(3).

ARGUMENT

I. EXERCISE OF PERSONAL JURISDICTION AND VENUE OVER THE HARAKE DEFENDANTS COMPORTS WITH DUE PROCESS BECAUSE THE HARAKE DEFENDANTS HAVE, AT AN ABSOLUTE MINIMUM, PURPOSEFUL MINIMUM CONTACTS AND SUIT IN THIS STATE DOES NOT OFFEND TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

A. Personal Jurisdiction Standard.

All Harake Defendants, S. Harake, Eurosa, and K. Harake, have filed motions to dismiss Plaintiff's Third Amended Complaint for improper venue and in K. Harake's case also for lack of personal jurisdiction. The substance of these motions simply flies in the face of the admission by S. Harake that Spartanburg was the "...center of life" for the Harake family and should be

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denied for that reason alone, as well as the other reasons articulated herein. (S. Harake Dep. 24:19, Jan. 9, 2019) (attached hereto as **Exhibit A**).

The question of personal jurisdiction over a non-resident is resolved upon the facts of each case. *State v. NV Sumatra Trading Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). To exercise personal jurisdiction over an out-of-state defendant, the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183 (1985) (citing *Int'l Shoe Co. v. Washington, supra*, 326 U.S. 310, 326, 66 S.Ct. 154, 158 (1945)). The defendant's contacts with the forum state "must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564 (1980) (quoting *Int'l Shoe Co.*, 326 U.S. at 316); *Policy Management Systems Corp. v. Consumers Ins. Co.*, 366 S.E.2d 33, 294 S.C. 506 (Ct. App. 1988). Observing such limits, however, our courts have routinely held that South Carolina's Long Arm Statute, S.C. Code Ann. § 36-2-803 (1976), extends personal jurisdiction to the limits imposed by the due process clause. *Atlantic Soft Drink Co. v. South Carolina National Bank*, 287 S.C. 228, 336 S.E.2d 876 (1985).

B. The Power Prong - Minimum Contacts with the Forum State.

Before *World-Wide Volkswagen Corp.*, there was unsettled discussion around establishing minimum contacts in the forum state. *See World-Wide Volkswagen Corp.*, 444 U.S. at 295-97 (courts have considered the foreseeability of a defendant causing injury in another state and that such foreseeability would be sufficient to establish such contacts). "[T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." *World-Wide Volkswagen Corp.*, 444 U.S. at 297. A "trend [even in 1957] is clearly discernible toward

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expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *McGee v. Int'l Life Ins. Co.*, 335 U.S. 220, 222, 78 S.Ct. 199, 201 (1957).

Of course, a defendant may find it inconvenient to respond to a suit in the forum state, but such an inconvenience does not deny that defendant due process. *See McGee*, 355 U.S. at 224. In fact, the Court has noted that "modern transportation and communications have made it much less burdensome" for a defendant to defend himself in the forum state. *Burger King Corp.*, 471 U.S. at 474 (quoting *McGee*, 355 U.S. at 223). Where a corporation or nonresident receives benefits and protection of the laws of the forum state, "[t]he exercise of that privilege may give rise to obligations; and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* at 319.

Here, both Harake Defendants, including K. Harake, who now asserts that the court lacks jurisdiction over her, actually *lived* in Spartanburg during most, if not all, of the time periods relevant in this case. Plaintiff pleads that: (1) "Defendant S. Harake lived, worked, and was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter and his alleged performance of the agreement between the parties (as well as his other conduct described herein) took place, in part, in Spartanburg, South Carolina" (Compl ¶ 2); and (2) "K. Harake was a citizen and resident of Spartanburg, South Carolina at the time of the filing of the original complaint in this matter" and "[m]uch of the conduct alleged as to K. Harake occurred when she was living in Spartanburg." (Compl. ¶ 4)

S. Harake came to Spartanburg in April 2015 to meet with Gibbs concerning the business issues involved in this case. (S. Harake Dep. 23:16-20) S. Harake also came to Spartanburg multiple times in May 2015 to meet with Gibbs. (*Id.*) K. Harake came to Spartanburg to meet with Gibbs in May 2015 to explain to Gibbs "how I [S. Harake] work, how I operate and how I

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operated all my life...." (S. Harake Dep. 25:4-21) On May 27, 2015, Gibbs wired $150,000 to S. Harake (HARAKE 029687) and, that very day, on May 27, 2015, $25,000 of that money was transferred by S. Harake to K. Harake so K. Harake even started receiving money as of May 27, 2015 in connection with the Gibbs relationship (HARAKE 029693).

Further, K. Harake moved to Spartanburg in August 2015 and their daughter started school at Spartanburg Day School shortly thereafter. (K. Harake Dep. 10:20-25, 11:9-21, July 26, 2019) (attached hereto at **Exhibit B**).. K. Harake resided in Spartanburg until May 2017 when their daughter finished school for the year. (K. Harake Dep. 12:5-22)

In 2015, Spartanburg became the Harake's primary residence as the family rented an apartment in the city and enrolled their daughter in Spartanburg Day School. (S. Harake Dep. 23:3-24:22) The Harakes did the majority of their shopping in Spartanburg and expensed a private school education there from 2015 to 2017. (S. Harake Dep. 18:23-19:13). The majority of Mr. Harake's business was with Mr. Gibbs in Spartanburg and it was during this time that the activities occurred from which this suit is based. (S. Harake Dep. 23:15-22) But just as the Harakes contributed to the city's commerce, they in turn received numerous benefits, including their daughter's education and all of the conveniences associated with having a residence in the city. As stated above, Spartanburg was the "center of life" for the Harake family according to S. Harake, and it clearly was. (*Id.*) According to the Harake Defendants' own motion, all that needs to be shown is that "the Defendant's conduct and connection with the forum state must be such that she could anticipate being hauled into court there." (Def.'s Mot. at 3) Frankly, it is completely nonsensical to argue that K. Harake does not have sufficient contacts within the state to justify the exercise of jurisdiction here and it is reasonable and fair to exercise jurisdiction here.

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S.C. Code Ann. § 36-2-803 provides that "[a] court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's: (1) transacting any business in this State .... (3) commission of a tortious act in whole or in part in the State...." It is crystal clear that K. Harake directed and enjoyed the benefit of banking transactions and used/spent money in South Carolina that Gibbs claims was used/spent improperly. It is also crystal clear that torts occurred in South Carolina by K. Harake's improper use of the money in South Carolina. K. Harake's own bank records show that she used and spent Gibbs's money while she was in South Carolina. (K. Harake Dep. 66:9-67:25)

The causes of action against K. Harake arise out of the fact that, among other things, Gibbs provided money to S. Harake to be used for certain purposes. (*See, e.g.*, Compl. ¶ 102) S. Harake then inappropriately provided Gibbs's money to K. Harake's savings account. (Compl. ¶ 34) K. Harake then transferred all of that money from her personal savings to her personal checking account in Spartanburg. (Compl. ¶¶ 34, 58; K. Harake Dep. 63:21-64:2) She then improperly spent the money out of her checking account in Spartanburg. (Compl. ¶¶ 34, 58; K. Harake Dep. 66:9-67:25) Over $500,000 of Gibbs' money was actually spent while she was living in Spartanburg. (Compl. ¶¶ 97, 103; 110) The transfers of money to her account took place from May 27, 2015 through September 30, 2016 when she was in Spartanburg. It is crystal clear that K. Harake transacted business in Spartanburg that arose out of the claims asserted. It is also clear that improper conduct occurred in Spartanburg.

Therefore, K. Harake easily has sufficient minimum contacts with the State of South Carolina to allow for this Court's exercise of personal jurisdiction. Any claims to the contrary are completely nonsensical.

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C. The Fairness Prong - Personal Jurisdiction Does Not Offend Traditional Notions of Fair Play and Substantial Justice.

"Once it has been decided that a defendant purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King Corp.*, 471 U.S. at 476 (quoting *Int'l Shoe Co.*, 326 U.S. at 320). The Court has provided several factors to consider in evaluating whether exercise of jurisdiction would comport with fair play and substantial justice. *Id.* at 477. Those include: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) the "shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 477 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292). These factors weigh in favor of this Court exercising personal jurisdiction over K. Harake. In addition, K. Harake has not pointed to any other factors that outweigh the considerations discussed below, making it an unreasonable exercise of personal jurisdiction. *See Burger King Corp.*, 471 U.S. at 477, 481.

1. Burden on Harake Defendants.

K. Harake chose to live in Spartanburg, to educate her daughter in Spartanburg, and to do business in South Carolina – and specifically in Spartanburg, South Carolina. She came to Spartanburg in May 2015 at the outset to meet with Mr. Gibbs. (S. Harake Dep. 25:4-21, K. Harake Dep. 44:17-21) By renting an apartment, enrolling their daughter in school and engaging in significant commerce in Spartanburg, the Harake Defendants have shown that they were more than willing to do business and reside in South Carolina. (K. Harake Dep. 10:20-25; S. Harake Dep. 23:3-24:22) Additionally, as discussed in the above cases, there would be no great burden

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on Harake Defendants to travel to South Carolina for this case. In fact, she already traveled here for her deposition. (K. Harake Dep. at 1)

2. Forum State's Interest.

South Carolina has an interest in requiring nonresidents and foreign corporations to defend against Plaintiff's claims arising out of activity in this state. Plaintiff is a South Carolina corporation. The business Plaintiff engages in is directly related to South Carolina commerce. Moreover, South Carolina has a strong presence in foreign investment and would have an even stronger interest in making sure that foreign companies and nonresidents, including Harake Defendants, are held accountable for their actions or inactions related to activities within this State and that is particularly true when they were physically present in Spartanburg.

3. Plaintiff's Interest.

Plaintiff's interest in adjudicating this dispute in South Carolina is significant. Harake Defendants were more than willing to relocate to South Carolina for both business and personal reasons. The Harake Defendants made a home in Spartanburg and received all the benefits that the city and the state provided, including an education for their daughter. (*See, e.g.*, K. Harake Dep. 10:20-25; S. Harake Dep. 23:3-24:22) In addition, the fact that transactions at issue here have taken place in South Carolina weigh in favor of resolving the issues in this forum.

4. Judicial System's Interest.

Plaintiff is a South Carolina corporation and activities at issue in this suit originated and took place in this state. Accordingly, the interest of justice is served by exercising personal jurisdiction over the K. Harake. To do otherwise would be unfair and against the Court's advisement by "... allow[ing] them to escape having to account in other States for consequences that arise proximately from such activities..." *Burger King Corp.*, 471 U.S. 462 at 474.

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5. **The Cases Cited by the Harake Defendants are Entirely Different.**

The cases cited by the Harake Defendants are easily distinguished. First, their lead case *Hidria v. Delo*, 415 S.C. 533, 783 S.E. 2d 839 (2016), is entirely distinguishable from the present case as it involved a Slovenian publisher sued in South Carolina who did not have any subscribers in South Carolina; did not direct any online business towards the state; did not publish any articles in the English language; and merely allowed accessibility to the articles by individuals located in the state. This fact pattern is plainly not analogous to K. Harake's situation.

Second, *Coggeshall v. Reproductive Endocrine Associates of Charlotte*, 376 S.C. 12, 655 S.E.2d 476 (2007), is entirely different because it involved a doctor performing medical services in North Carolina to a South Carolina resident, the doctor was not licensed in South Carolina, and the alleged inappropriate treatment occurred in North Carolina. Again, none of this relates in any way to K. Harake's situation. Last, *Moosally v. W.W. Norton & Company, Inc.*, 358 S.C. 320, 594 S.E.2d 878 (2004), involved jurisdictional issues concerning whether a non-resident contributor, a non-resident author, and a non-resident publisher was subject to jurisdiction here which has nothing to do with the situation before this Court. It is noteworthy that the court still found that a single transaction in a state could be enough to confer jurisdiction. It is also noteworthy that the court did find jurisdiction over the publisher.

D. The venue of this case is proper.

The exercise of venue is likewise proper in Spartanburg County. Under South Carolina law, civil actions may be commenced against nonresident individuals in the county in which the most substantial part of the alleged act or omission giving rise to the cause of action occurred. S.C. Code Ann. § 15-7-30 (D)(1) (as amended, 2005). The same is true for foreign corporations. *See* S.C. Code Ann. § 15-7-30 (G)(1). Further, if jurisdiction is proper in South Carolina against

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any foreign defendant, then the case can be brought in the county where the plaintiff resided at the time the cause of action arose. S.C. Code Ann. § 15-7-30 (D)(2) and S.C. Code Ann. § 15-7-30 (G)(2). The plaintiff is complaining of acts by the Harake Defendants which took place primarily in South Carolina and in Spartanburg when the Harakes were living here. Accordingly, venue is clearly proper in Spartanburg County based both on the language of the venue statute as well as serving the ends of justice. *Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 362 S.C. 456 (S.C. 2005); *Varnadoe v. Hicks*, 213 S.E.2d 736, 264 S.C. 216 (S.C. 1975). Any claim to the contrary is nonsensical.

E. Conclusion.

To claim at this point in this litigation (3 years, 4 months after filing suit and after the Harake Defendants have now filed counterclaims exceeding $22 million in damages) that this Court lacks either personal jurisdiction or proper venue over any of these defendants is preposterous. Quite simply, under applicable and well settled law, the courts of this state have the authority to adjudicate any claims arising out of the actions of each of the Harake Defendants, including K. Harake, as their actions relate to the plaintiff. The individual defendants, S. and K. Harake, have each actively participated in this case since it was filed in March of 2017. The plaintiff initially named K. Harake as a defendant but later voluntarily dismissed her from the suit pending further discovery. That discovery included documents S. Harake and K. Harake produced without redactions only after being ordered by the Court to do so. The unredacted financial documents showed that the Harake Defendants had been using the redactions to hide from Plaintiff and this Court that K. Harake received over $500,000 of Gibbs' money improperly, and she also used that money improperly.

All the Harake Defendants, including K. Harake, have participated extensively in the defense of this case and all have been represented by the same lawyers since 2017. They have

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each (including K. Harake) already appeared in South Carolina to provide deposition testimony and produced voluminous discovery responses and documents. K. Harake and S. Harake *lived and operated in Spartanburg* for a period of years. Accordingly, Gibbs respectfully requests that this court order that the exercise of jurisdiction and venue in this case is both lawful and proper.

II. K. HARAKE'S MOTION TO DISMISS SHOULD BE DENIED.

A. Standard of Review for Rule 12(b)(6) Motions to Dismiss.

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor* 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). The trial court must presume all well pled facts to be true." *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v. City of Columbia,* 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citation omitted) (emphasis added). The motion cannot be sustained if the acts alleged and the inferences reasonably deducted therefrom would entitle the plaintiff to any relief on any theory of the case. *McCormic v. England*, 328 S.C. 627, 532-33, 494 S.E.2d 431, 433 (Ct. Appl. 1997). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 248 (2007).

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B. South Carolina Recognizes Aiding and Abetting a Breach of Fiduciary Duty as a Cause of Action.[1]

K. Harake's claim that Gibbs failed to plead K. Harake's "knowing participation" in the Harake Defendants breach of their fiduciary to Plaintiffs is just flat wrong. The elements for the cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. *Vortex Sports & Entertainment, Inc. v. Ware,* 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). The Third Amended Complaint alleges, among other things, that "K. Harake *knew, or should have known, or had constructive knowledge*, that the transfers were made to her account and she did, in fact use the money." (Compl. ¶ 33) Hundreds of thousands of dollars of Gibbs' money was improperly transferred from Eurosa's accounts to K. Harake's personal savings account. (Compl. ¶ 34) Not only does Gibbs allege that K. Harake knew about these improper transfers of Gibbs' money to her account, it alleges that she: (1) concealed money that was being misappropriated from Gibbs; (2) knowingly transferred the money to her personal checking account; and (3) made spending decisions herself and wrote checks and/or initiated electronic transfers, actually spending the misappropriated funds of Gibbs for unauthorized and personal purposes. *Id.* The fact is, K. Harake's accounts gave the Harake Defendants the means to transfer Gibbs money out of their accounts and conceal the improper movement and use of those funds, K. Harake knowingly allowed and accepted those transfers into her account, affirmatively moved the moneys to another personal account (moving Gibbs' money one step further from Defendant Eurosa's account), and K. Harake subsequently spent the money for improper purposes. Gibbs' allegations in the pleadings that K. Harake knew about the improper transfer of Gibbs money to her personal accounts, and then knowingly concealed and used those

[1] It is noted that the Harake Defendants address the claims in the brief completely out of order from the order used in the Third Amended Complaint. Gibbs address the claims here, as they should be, in the order as they appear in the Third Amended Complaint.

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funds for personal purposes, is more than adequate as concerns the pleading defendant's knowing participation in the fiduciary's breach. *Id. See also Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008).

C. Accounting.

An accounting cause of action sounds in equity and is designed to prevent unjust enrichment by disclosing and requiring the relinquishment of profits received as the result of a breach of a confidential or fiduciary duty." *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144, 382 S.E.2d 915, 917 (1989). An accounting is also appropriate without a fiduciary relationship when the defendant is in exclusive control of the information needed to make a determination on the amount plaintiff, or in actions involving accounts where it would not be practicable for a jury to comprehend the issues and determine what is owed. *Jefferies v. Harvey*, 206, S.C. 245, 250, 33 S.E.2d 513, 515 (1945).

Dismissal of the accounting cause of action against K. Harake at this stage is entirely inappropriate. In the only accounting case that K. Harake cites in her motion to dismiss, *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009), the Supreme Court reversed a Court of Appeals decision that an accounting was warranted in the dissolution of an LLC where the parties disputed the distribution of "a relatively small sum of money generated from a single real estate transaction." *Id.* at 429, 673 S.E.2d at 454. The Court held that the LLC's operating agreement did not entitled them to an accounting *per se* and "a full financial accounting would unnecessarily prolong this otherwise simple matter." *Id.*

The Harake Defendants and K. Harake have made sure that this matter is anything but "simple." K. Harake worked with the Harake Defendants to create a cloud of confusion to obscure the fact that money that was being improperly taken from Gibbs and concealing the improper use of those funds by, among other things, moving more than a half million dollars to

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the personal savings account of K. Harake. (Compl. ¶ 34) K. Harake then added to the confusion, and consummated her own affirmative involvement in the wrongdoing, by transferring Gibbs money to her own personal checking account for improper, unauthorized, and personal use. (*Id.*) Gibbs is now left trying to untangle the web cast by the Harake Defendants and to determine how much of its money was used for unauthorized purposes, and where that money ended up.

An accounting is unquestionably needed to track its own money, cut through the smoke screens that K. Harake and the Harake Defendants created to hide their wrongdoing, and finally determine the extent to which Gibbs' money was embezzled, misappropriated, laundered, misused, and or mismanaged. *See, e.g.*, *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144, 382 S.E.2d 915, 917 (1989) (finding that the plaintiff was entitled to an accounting when there was uncertainty about the damages owed based on the record before the Court); *Jefferies*, 206 S.C. at 250, 33 S.E.2d at 515. In *Jeffries*, for example, the Court affirmed the lower court's order granting an accounting where the resolution of claims of fraud, deceit and usury in association with the payment of 28 promissory notes. Likewise, here Gibbs alleges that K. Harake and the Harake Defendants (among other things) engaged in fraud, conspiracy, unfair and deceptive trade practices, and conversion, among other things. By their design, tracking Gibbs' misappropriated funds is extremely complicated entitling Gibbs to an accounting.

Plaintiffs also cited *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007), which does not even involve an accounting claim, to argue that an equitable remedy is not available where an adequate legal remedy was provided by statute. In this case, an accounting is needed to determine the amount of Plaintiff's damages. *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 273, 705 S.E.2d 73, 77 (Ct. App. 2010) (affirming an order for an accounting where the defendant was in exclusive control of information needed to determine

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the amount owed for breach of contract). *See also Indus. Packaging Supplies, Inc. v. Davidson*, No. CV 6:18-651-TMC, 2018 WL 10456199, at *2 (D.S.C. Oct. 24, 2018), citing *Moore's Fed. Practice* § 2.03 (Matthew Bender 3d ed.) ("It is not generally a ground for dismissal of a complaint asserting equitable claims that the plaintiff has an adequate remedy at law").

For the reasons stated herein, K. Harake's motion to dismiss the accounting claim should be denied. K. Harake's and the Harake Defendants' own misconduct and intentional concealment of what they did with Gibbs' money demands an accounting.

D. Aiding and Abetting Conversion.

Defendant's argument that South Carolina courts have not recognized a cause of action for aiding and abetting conversion misses the mark. South Carolina courts have generally recognized civil liability arising from aiding and abetting a tortious act in concert with another, as described in Restatement (Second) of Torts 2d, § 876(b):

> *For harm resulting to a third person from the tortious conduct of another, one is subject to liability if she*
> *(a) does a tortious act in concert with the other or pursuant to a common design with her, or*
> *(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct herself, or*
> *(c) gives substantial assistance to the other in accomplishing a tortious result and her own conduct, separately considered, constitutes a breach of duty to the third person.*

Restatement (Second) of Torts § 876 (1979). *See, e.g.,* Michelin Ret. Plan v. Chicago Transit Auth. Retiree Health Care Tr., No. 6:16-CV-03604, 2019 WL 487565, at *11 (D.S.C. Jan. 28, 2019) (noting that courts' generally look to the Restatement for guidance when considering civil aiding and abetting liability); *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) (citing Restatement (Second) of Torts 2d, § 876(b) in considering a claim for aiding and abetting a breach of fiduciary duty); *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250,

253 (Ct. App. 1998) (declining to consider an interlocutory appeal on a theory of civil liability for aiding and abetting before the court had the opportunity to rule on the sufficiency of the allegations).

Applying the Restatement, courts in other jurisdictions have recognized causes of action for aiding and abetting conversion. *Prime Fin. Servs. LLC v. Vinton*, 279 Mich. App. 245, 276, 761 N.W.2d 694, 714 (2008) ("[O]ne may be liable for assisting another in a conversion though acting innocently."); *Starr Indem. & Liab. Co. v. Glob. Warranty Grp., LLC*, 165 A.D.3d 1308, 1309, 87 N.Y.S.3d 635, 637 (2018) ("A claim can exist for aiding and abetting conversion if the aider-abettor has actual knowledge that the person who directly converted the plaintiff's property did not own that property."). Generally, the elements of an aiding and abetting conversion claim require the plaintiff to allege: (1) conversion by a person, (2) the defendant's knowledge and substantial assistance or encouragement of the person's conversion, and (3) resulting harm. *Cole v. Jackson Nat. Life Ins. Co.*, No. 1:11-CV-221, 2012 WL 360285, at *6 (W.D. Mich. Feb. 2, 2012).

Each of these elements is plainly met in the complaint. First, Plaintiffs allege, among other things, that the Harake Defendants improperly took funds that Gibbs provided and improperly transferred those funds to K. Harake's accounts for unauthorized purposes. (Compl. ¶ 15) Plaintiffs also allege that K. Harake knew that these unauthorized transfers were being made to her account, and that she took an active part in concealing money that the Harake Defendants, including her husband S. Harake, were improperly taking from Gibbs. (Compl. ¶¶ 34-35) K. Harake's accounts gave the Harake Defendants the means to transfer Gibbs money out of their accounts and conceal the misappropriation of those funds, and K. Harake knowingly allowed and accepted those transfers into her account, affirmatively moved the moneys to another personal account (moving Gibbs' money one step further from Defendant Eurosa's

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account), and spent the money for improper purposes. Finally, K. Harake's misconduct, along with the misconduct of the Harake Defendants, deprived Gibbs of hundreds of thousands of dollars, which Plaintiffs seek to recover in this action. Each of the elements of aiding and abetting conversion is alleged in the complaint and K. Harake's motion to dismiss should be denied.

E. K. Harake is a Person that Used Unfair Trade Practices, and May Therefore Be Held Liable for Resulting Harm under the South Carolina Unfair Trade Practices Act.

The South Carolina Unfair Trade Practices Act ("SCUPTA") provides that "[a]ny person who suffers any ascertainable loss of money or property, real or personal, *as a result of the use or employment by another person of an unfair or deceptive method, act or practice*" may bring an action to recover actual damages. S.C. Cod Ann. § 39-5-140(a). Defendants mislead the Court by suggesting that "persons" that may be held liable under the Act are *limited* to controlling persons of a corporation. In *State ex rel. McLeod v. C&L Corp., Inc.*, the case cited by Defendant, the Court held that when employees and/or agents of a corporation engage in deceptive and unfair trade practices, liability under SCUPTA may extend to controlling persons that direct corporate policy or who are deeply involved in the important affairs of the corporation. 280 S.C. 529, 530, 313 S.E.2d 334, 341 (Ct. App. 1984) The case in no way limits the liability under SCUPTA just to "controlling persons." In fact, South Carolina clearly has held the exact opposite, ruling that the "plain language of S.C. Code Ann. § 39-5-140 provides that **any person** is liable for damages resulting **from their use or employment of unfair trade practices**." *Plowman v. Bagnal,* 316 S.C. 283, 286, 450 S.E.2d 36, 37 (1994). Indeed, *Plowman* limits the application of the controlling person doctrine in *McLeod*, holding that directors and officers are not liable for the corporations unfair trade practices *unless* they personally commit, participate in, direct, or authorize the unfair or deceptive trade practice. *Id.* In short, a showing

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that the defendant engaged in the "use or employment" of an unfair or deceptive practice resulting in damages is what makes "a person" liable under the act, not whether the person is a "controlling person" of a corporation, as Defendant inaccurately suggests.

As this court knows, SCUTPA declares "unfair or deceptive acts or practices in the conduct of any trade or commerce ... unlawful." S.C. Code Ann. § 39-5-20(a). To recover in an action under SCUTPA, a plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560. "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). Whether an act or practice is unfair or deceptive within the meaning of SCUPTA "should not be construed to increase a plaintiff's burden of proving liability since its purpose is to give additional protection to victims of unfair trade practices, not to make a case harder to prove than it would be under common law principles." *Id.*

Plaintiff alleged facts in the Third Amended Complaint that entitle Plaintiff to relief from K. Harake under SCUPTA. Gibbs' money was embezzled, misappropriated, laundered, misused, and/or mismanaged. (Compl. ¶ 7) In addition, and separately, K. Harake aided and abetted S. Harake and Eurosa's breach of fiduciary duties and mismanagement of the business activities and/or business operations and/or failure to act prudently in the best interest of the enterprise, making K. Harake liable for these damages in addition to the damages for the money inappropriately shifted to her account. (Compl. ¶¶ 30-35) Defendants S. Harake and Eurosa fraudulently misrepresented to Plaintiff that $111,000 per month was necessary to maintain operation of Fed Securities, a company of Harake in Turkey. (Compl. ¶ 12.MM) Based on these

misrepresentations, Gibbs wired $53,000 per month for a year (among other funds) to a Eurosa operating account. (*Id.*) The Harake Defendants, including K. Harake, then secretly transferred more than $500,000 of Plaintiff's money to K. Harake's own personal savings account without authorization. (Compl. ¶¶ 15, 34) K. Harake the further concealed the theft from Plaintiffs by transferring the stolen money to her own personal checking account, from which she made personal and unauthorized purchases. (Compl. ¶ 34) Gibbs alleges that K. Harake knew that the more money flowing from the Eurosa account to her personal savings account was unauthorized and stolen, and yet she said nothing. (Compl. ¶ 33) Rather, she actively participated in the immoral and deceptive scheme to conceal the theft by transferring Plaintiff's money again, this time to her own personal checking account, adding one further step that Plaintiffs would ultimately have to chase down to determine where its money went. (Compl. ¶ 34) Based on these allegations, among others, Gibbs is entitled to relief from K. Harake under SCUPTA, and K. Harake's motion to dismiss should be denied.

F. Fraud.

Plaintiff cites case law for the proposition that each element of fraud must be pled with particularity, but unsurprisingly does not state with any particularity which of element Gibbs allegedly omitted. The nine requisite elements of actionable fraud in South Carolina are: (1) defendant's representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010). Concealment of material facts may support an action in fraud. *Holly Hill Lumber Co. v. McCoy*, 201 S.C. 427, 23 S.C.2d 372, 376 (1942).

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The complaint pleads each of the nine elements including, with limitation, K. Harake's engagement in fraudulent conduct by misappropriating funds and concealing facts related to the misappropriation of funds from Gibbs (Compl. ¶¶ 82-88), K. Harake's concealment/ representations were material (Compl. ¶ 89), K. Harake' knowledge and/or reckless disregard of the truth or falsity of the representation (Compl. ¶ 90), K. Harake's intent that Gibbs act upon the concealment/misrepresentations (Compl. ¶ 91), Gibbs' ignorance and justifiable reliance on the concealment/misrepresentation (Compl. ¶ 92), and resulting harm to Gibbs (Compl. ¶ 93). When K. Harake knowingly received and accepted the misappropriated funds of Gibbs from the Eurosa account, she had a duty to disclose to Plaintiff how her husband S. Harake conducted business, but she failed to do so and perpetuated the fraud by continuing to receive and spend Gibbs money for unauthorized purposes. Defendant's motion to dismiss the fraud claim should therefore be denied. *See Morlan v. Kelly*, Civ. A. No. 2009-UP-002, 2009 WL 9524539, at *1 (S.C. Ct. App. Jan. 5, 2009) (finding the pleadings sufficiently alleged all nine elements of fraud and that the trial court's dismissal of the fraud claim was error). At the end of the day, Gibbs has met the pleading standard.

G. Civil Conspiracy.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010). Contrary to Defendant's claims, Gibbs' Third Amended Complaint pleads the three requisite elements of a civil conspiracy claim, including: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage. *Id.*

In *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. Appl. 2009), cited by Defendant, the court held that the plaintiff failed to properly plead its civil

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conspiracy claim where it alleged precisely the same acts it alleged in its breach of contract claim and repeated verbatim the claim for damages. *See also Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (noting that the cause of action "does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy.").

Gibbs' Third Amended Complaint adds multiple causes of action against K. Harake arising from mismanagement, misappropriation, embezzlement, money laundering, and misuse of Gibbs' funds. Independent of the theft, Gibbs' Third Amended Complaint also adds grounds for multiple causes of action based on K. Harake's participation in S. Harake's and Eurosa's breach of fiduciary duties and mismanagement of the business activities and/or business operations and/or duty to act in the best interest of the enterprise. These allegations support a finding that Harake is liable for these damages in addition to the damages for Gibbs' money that she inappropriately shifted to and received in her personal accounts.

The civil conspiracy cause of action pled by Gibbs is unique in several respects. The use of K. Harake's personal accounts for the concealment of Plaintiff's money is not a required element in the other claims against K. Harake. While concealment and the use of K. Harake's personal accounts to conceal the S. Harake and Eurosa's theft is an aggravating factor in the other claims, it is not an essential element and is separately and independently pled as to the Moving Defendants in Plaintiffs' civil conspiracy claim. Beyond the transfer of Gibbs' funds to K. Harake's personal accounts, Gibbs also pleads that K. Harake conspired with the Harake defendants and unlawfully agreed to deplete Gibbs' funds from the Eurosa account "with the primary purpose or object to impair Plaintiff financially." (Compl. ¶ 96) (emphasis added) Through their most recent counterclaims filed on August 24, 2020, the Harake Defendants now seek to recover more than $22 million from Gibbs, which is an obvious attempt to impair and/or

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destroy Gibbs financially. *See Mach. Sols., Inc. v. Doosan Corp.*, No. 3:15-CV-03447-JMC, 2016 WL 2756429, at *5 (D.S.C. May 12, 2016) (denying defendants motion to dismiss a civil conspiracy claim where plaintiff alleged concerted effort was "done for the purpose of damaging" the plaintiff). This alone requires denial of K. Harake's motion to dismiss. Further, Gibbs alleges that the conspiracy to transfer more than $500,000 from the Eurosa account to the personal accounts of K. Harake resulted in special damages "beyond the damages alleged in other causes of action," including opportunity costs associated with the depletion of funds Gibbs provided for authorized purposes, including investment and/or the furtherance of business opportunities. (Compl. ¶ 98) In sum, Plaintiff alleges each of the elements of civil conspiracy as to K. Harake in its Third Amended Complaint and K. Harake's motion to dismiss should be denied.

H. Conversion.

K. Harake not only allowed Gibbs' misappropriated funds to be transferred to her personal savings account, she then divested those funds to her own personal checking account and spent the funds for unauthorized and personal purposes. (Compl. ¶¶ 58-59) Without authority, Defendant alleges that her improper use of Gibbs' money to her own benefit (and to the exclusion of Gibbs' use and to the exclusion of the any authorized use of the funds) is not an "interference" with the property of Gibbs. This simply is not the case. "Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. *Moseley v. Oswald*, 376 S.C. 251, 254, 656 S.E.2d 380, 382 (2008) (emphasis added). Plaintiff cites to *Richardson's Rests., Inc. v. Nat'l Bank of S.C.*, 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991), a case involving the lawful use of a bank to pay overdraft fees on an account holding the funds of multiple parties, including the plaintiff, for the proposition that money cannot be converted

unless there is an obligation on the defendant to deliver "specific, identifiable funds to the plaintiff." In *Richardson's*, no restrictions were placed on funds deposited into the account, and the bank's use of account funds to cover overdraft fees was lawful and authorized by the account holder. *Id.* These facts are wholly inapposite to the facts at issue here.

South Carolina has held that money *may* be the subject of conversion if "it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." *Mullis v. Trident Emergency Physicians*, 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct. App. 2002). In this case, K. Harake had no legal right to use Gibbs' funds for non-authorized purposes, which were improperly transferred to her account, and her unauthorized use of those funds to Gibbs' exclusion constitutes conversion in South Carolina.

Although Gibbs alleges and believes that K. Harake knowingly converted Gibbs' money for her own personal use after it was transferred to her personal accounts, South Carolina does not require such knowledge. Under South Carolina law, liability may arise from "innocent" conversions, where the property is converted by mistake or under a bona fide belief or right. *See Green v. Waidner*, 284 S.C. 35, 37-38, 324 S.E.2d 331, 333 (Ct. App. 1984). Thus, the simple fact that K. Harake improperly and without authorization exercised dominion over Gibbs' funds to his exclusion and harm is sufficient to support Gibbs' claim for conversion.

Other jurisdictions, in fact, have found that "innocent" defendants may be liable for exercising dominion over funds embezzled and misappropriated by family members who give such funds to the defendants without the defendants' knowledge of any wrongdoing. In *Chicago Title Ins. Co. v. Ellis*, 409 N.J. Super. 444, 978 A.2d 281 (App. Div. 2009), for instance, a verdict for conversion against the parents of a woman who had stolen over $2 million through a fraudulent scheme against Lehman Brothers was affirmed, except to the extent that the money the parents received from their daughter was received as repayment for a loan. The parents

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admitted that they received $512,845 from their daughter over a 5-month period, and acknowledged that she obtained the money wrongfully through a scheme to defraud Lehman brothers, but asserted that they had no knowledge of the fraud and that the money was either repayment for the loan or that they were only nominal custodians with no dominion or control over the money. The Court affirmed the verdict, finding that "exercise of dominion or control over the money constitutes conversion" when it was, in fact, inconsistent with the plaintiff's right, and when the money was not received in exchange for fair value. *Id.* at 449. *See also, Judkins v. Sadler-Mac Neil*, 61 Wash. 2d 1, 4, 376 P.2d 837, 838-39 (1962) ("The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results."

Here, as plainly pled, Gibbs' money was improperly transferred to K. Harake's accounts and she did, in fact, use the money for improper purposes for herself and/or her family and/or other purposes. Therefore, the Defendant's motion to dismiss the conversion claim against K. Harake should be denied.

I. Unjust Enrichment, Quasi-Contract, Implied Contract, and Quantum Meruit.

K. Harake finally, and inexplicably, argues that Plaintiffs did not allege that Gibbs conferred a benefit on K. Harake, despite clear allegations in the complaint that Gibbs' money was improperly transferred to K. Harake's personal savings account, and that K. Harake then transferred the money to her own personal checking accounts for improper, unauthorized, and personal uses.[2] (Compl. ¶ 34) Even if K. Harake argues that she "innocently" received Gibbs

[2] The single case cited by K. Harake, *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 734 S.E.2d 177 (Ct. App. 2012), is similarly inexplicable. The Court of Appeals in this case reversed the trial court's judgment notwithstanding the verdict, and found that the plaintiff was entitled to damages for quantum meruit. The Court's decision turned on evidence on the record that plaintiff had not been fully paid for services rendered (contradicting the lower court's findings), and has no bearing on

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money into her accounts without knowledge that the Harake Defendants misappropriated, embezzled, and laundered the funds, she may be liable under these equitable principles.

In a similar case out of Maryland, for example, the court found that a spouse's lack of knowledge of the source of ill-gotten funds does not preclude a claim for unjust enrichment. *Bank of Am. Corp. v. Gibbons*, 173 Md. App. 261, 918 A.2d 565 (2007). In this case, defendant's husband stole more than $1.5 million from his employer, Bank of America, through unauthorized sales of securities of bank's customers. *Id.* at 265. The husband eventually routed the ill-gotten funds into an account that he held jointly with his wife, where the misappropriated monies were commingled with the family's legitimate earnings. The defendant-wife wrote most of the checks drawn on this account, primarily for household and family purposes, and she, like K. Harake, claimed to have no knowledge of her husband's wrongdoing. *Id.* at 265. Among other things, the Court held that a cause of action for unjust enrichment "may lie against a transferee with whom the plaintiff had no contract, transaction, or dealing, either directly or indirectly." *Id.* at 271. Provided the misappropriated funds could be traced into her account, the plaintiff could prevail on an unjust enrichment cause of action against the wife who retained the benefit from the stolen money. *Id.* at 279.

Plaintiffs strongly believe that K. Harake was not only aware that the Harake Defendants were misappropriating Gibbs' money, but that she was also a knowing and active participant in allowing more than $500,000 of those funds to be transferred to her personal savings account. K. Harake received the benefit of more than a half million dollars of Gibbs' funds, and then realized and retained the benefit of those funds when she transferred the funds to her own

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K. Harake's argument that Gibbs cannot claim that she received any benefit, which is clearly false. K. Harake's benefit from receiving more than $500,000 of Gibbs' funds was plainly alleged in the Complaint and must be accepted as true. (Compl. ¶ 34)

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personal checking account and used the funds for unauthorized and personal purchase with the money she obtained using ill-gotten means.

Plaintiff strongly believes that the pleadings, viewed in the light most favorable to the plaintiff, would entitle Plaintiff to relief on each of the causes of action in the Complaint. However, in the event that the Court finds that a dismissal pursuant to Rule 12(b)(6) is appropriate for one or more of the claims against K. Harake based on the pleadings (which Plaintiff strongly denies), Plaintiff respectfully requests leave from this Court to amend its pleadings before the Court enters an order to dismiss. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 826 S.E.2d 585 (2019). In *Skydive*, the Supreme Court held that, "[w]hen a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." *Id.* at 179, 26 S.E.2d at 587 (emphasis added). While Plaintiff does not believe dismissal is appropriate and K. Harake's motion should be denied outright, Plaintiff should be allowed to amend its complaint to correct any deficiencies this Court finds under Rule 12(b)(6). *See also Dockside Assn., Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

CONCLUSION

For the foregoing reasons, Gibbs respectfully requests that the Court enter an order denying Defendant Katherine Harake's Motion to Dismiss Gibbs' Third Amended Complaint and for such other and further relief in favor of Gibbs as the Court shall deem just and proper.

Respectfully submitted this the 22nd day of September, 2020.

S/KEVIN A. DUNLAP
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EXHIBIT A

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Individually and on behalf of IOTive, Inc., Plaintiffs, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Morris Gocial, Pavel Polukhin, and Shai Hemli, Defendants.	C.A. No.: 2017-CP-42-00740

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THIS TRANSCRIPT CONTAINS CONFIDENTIAL INFORMATION, AND CONFIDENTIAL EXHIBITS ARE ATTACHED THERETO. THEY ARE SUBJECT TO THE CONFIDENTIALITY ORDER IN THIS CASE.

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VIDEO DEPOSITION OF SARMAD HARAKE

(Taken by Plaintiffs)

Greenville, South Carolina

Wednesday, January 9th, 2019

Reported in Stenotype by
Tammera R. Thomason, Certified Shorthand Reporter
Transcript produced by computer-aided transcription

misstated what his testimony was.

MR. DUNLAP: I disagree. So you can object. You stated your objection. Please don't coach the witness, and I'm going to proceed.

A. Yes.

BY MR. DUNLAP:

Q. Okay. Is there something that's funny about this?

A. No. I -- Mr. Dunlap, with all respect, I believe you do know me, and I believe I do know you. I do know you went to a very good school, and we did meet and you do know who I am as an individual. You know my background. So you could direct your questions in a very proper and honest and straight way, and I'd be more than happy to answer you in a very honest, straight way. We don't have to, you know, go around with words. I'm pretty intelligent. I can definitely understand what you're asking me.

Q. During what years did your son go to Spartanburg Day School?

A. My son never went to Spartanburg Day School.

Q. Okay. During what days or what years did your daughter go to Spartanburg Day School?

A. She went -- she started her year in Sep -- in

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August. I believe in Spartanburg they start earlier. It was August, 2015, and her last day should have been some time in May, 2017.

Q. Okay. When did you move away from Spartanburg? What year was that?

A. I moved away from Spartanburg on the 11th of October of 2016.

Q. Okay. And so your daughter continued at Spartanburg Day School --

A. Yes.

Q. -- after you moved?

A. She had to finish her school year, correct.

Q. Right.

And so during the time that you were being asked these questions by Mr. Halliday's firm about your Social Security number, okay, during that period of time, --

A. Period of time?

Q. Yes.

A. What do you mean? I asked you once.

Q. Is it your testimony that they just asked you one time?

A. One time. I met Mr. Halliday one time.

Q. Wasn't what I asked. My question was, did he just ask you for your Social Security number one time, he

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don't know when school starts.

Q. Of 2015?

A. Yeah. Because what we did is, we rented that as a monthly basis till we find another place, and we ended up staying there. It's a monthly place. It's a furnished apartment. It's like a hotel room. So I believe Katherine and Nora arrived four days before the school started.

Q. Right.

A. So I'm not sure of the exact date, but I do know it's August some time.

Q. And who paid for the apartment?

A. I did.

Q. And prior to August of 2015, --

A. Okay.

Q. -- were you making business trips to Spartanburg?

A. That is correct. I visited Mr. Gibbs. I believe the first time was some time in April, and then I visited him multiple times in May. And then I started spending more time in June, and by then I was staying at the Marriott. I believe it was three days a week, four days a week, and I was flying back. I did that I believe the first week, and then it was more extensive -- then I had to travel because we had a business deal. So then I

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traveled I believe from the middle of June until early July, and then I came back. And then I went for a holiday period, and then I came back again with the kids. So it was ad hoc until we sort of moved into the apartment. Then I was just traveling for regular business during that time.

Q. So basically it's your testimony that you started spending time in Spartanburg in April of 2015. Did I hear that right?

A. I started coming to Spartanburg for business starting April, '15. Yes, that's correct.

Q. Okay. All right. And then in 2016 you were living in Spartanburg on Main Street, and your daughter was enrolled at Spartanburg Day. Right?

A. Well, I -- if we consider living -- again, I would like to ask the same question. If you ask me the question have I spent 180 days here in Spartanburg, no, I have not, if that's the question. If the question is, was this my center of life as we call it, as we call it it means where your family is, yes, my family was here because I was here on business, and they had to be close to me.

Actually, Mr. Gibbs -- I wanted to work out of New Hampshire, but then it was getting too much to keep traveling, and that was when we discussed the option

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for me to come and bring the wife to be here while I'm here to be able to see them. I knew I'm going to be traveling a lot.

Q. And at that time -- your wife's name is Katherine. Right?

A. That is correct.

Q. And she was living in New Hampshire --

A. That is correct.

Q. -- prior to the time you started -- well, I guess when you first started visiting Spartanburg she was there. When did she first come to Spartanburg, August?

A. She came on one visit on end of May, and that's when she wanted to have a one-to-one talk with Mr. Gibbs to explain to him how I work, how I operate and how I operated all my life, even though Mr. Gibbs knows me for more than 10 years, but he didn't really know me as a person. So I think they spent some time together, because that was conditional for me to -- for her and Mr. Gibbs to understand what the whole thing is going to entail and -- from a life -- from a social side, from a life side. They were kind enough to show her around.

We had visited Mr. Gibbs before with Katherine. They were nice enough for Marsha to invite us. We had lunch and all that 2011, 2012. So she didn't really see the town.

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EXHIBIT B

STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS FOR THE
COUNTY OF SPARTANBURG — SEVENTH JUDICIAL CIRCUIT

- - -

Gibbs International, Inc., Individually and on behalf of IOTive, Inc.,

Plaintiffs,

vs.

Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli,

Defendants.

Civil Action No. 2017-CP-42-00740

Sarmad Harake and Eurosa, Inc.,

Plaintiffs,

vs.

Gibbs International, Inc.,

Defendant.

VIDEOTAPED DEPOSITION OF KATHERINE HARAKE

DATE TAKEN: Friday, July 26, 2019

TIME BEGAN: 12:44 p.m.

TIME ENDED: 3:11 p.m.

LOCATION: Spartanburg Marriott
299 North Church Street
Spartanburg, South Carolina

REPORTED BY: Karen Kidwell, RMR, CRR, CCP
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

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Q. Never divorced?
A. No, I have not been divorced.
Q. Never separated?
A. We have never been separated.
Q. And no prior marriages, right?
A. That is correct, no prior marriages.
Q. And you have two children?
A. Yes.
Q. A son in school in Germany, right or wrong?
A. Correct. He is not in Germany right now. He's home on summer vacation.
Q. But when he returns for the academic year?
A. Yes.
Q. What grade is he in?
A. He's going to be in 12th grade, so a senior.
Q. Good for him. And you have a daughter?
A. Yes.
Q. And your daughter for a period of time was in school here at the Spartanburg Day School; is that right?
A. Yes, that is right.
Q. Were you pleased with that school?
A. I absolutely loved that school.

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Q. Okay. And what grades did she go there?
A. She was there for 7th and 8th grade.
Q. And she goes to school in New Hampshire now?
A. No, she does not.
Q. Oh, Massachusetts. Maybe not. Where does she go to school now?
A. She goes to Commonwealth School in Boston.
Q. Okay. How long did you live in Spartanburg, South Carolina?
A. Well, I would say two years during the school year.
Q. So basically, you would have been here from maybe August until May or June, something like that?
A. Approximately, that's correct.
Q. Okay. And that was for two years, right?
A. Correct, yes.
Q. And did you live on Main Street here in Spartanburg?
A. Yes, I did.
Q. So you were living in Spartanburg in what years? Was that part of 2015 and 2016 or was it 2016-2017? Do you remember?
A. I believe it -- hmm. I don't want to be

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100 percent so -- my daughter was in 7th and 8th grade, so she's -- now she's going to be in 11th so 10. So this year is '18-'19, '17-'18? So yeah, '15 and '16, correct.

Q. And then did you move in June of 2016 from Spartanburg?

A. I have to correct. So when she was in 8th grade, I just want to confirm it was 2016 or 2017.

Q. Just think about it. No problem. Take your time.

A. Excuse me. It's just -- yeah. So --

Q. There's no hurry.

A. So she's now -- so '18-'19. '17-'18. No, I believe it would be 2017 that we -- that's her 8th grade because '15 and '16 the first year, and then '16 and '17 the 7th grade year.

Q. Fair enough.

A. And the school I believe gets out in May, so it would have been May 2017.

Q. Fair enough. And when you moved, you went to New Hampshire; is that right?

A. Yes, to Hampton, New Hampshire.

Q. And --

A. Excuse me. Can I clarify? Moving. We went to our home that we had had already.

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house in the approximate amount of $400,000? Is that right? Do you remember that?

MS. JOYNER: Object to the form.

THE WITNESS: I believe there was, yes.

BY MR. DUNLAP:

Q. And in connection with that loan, do you remember anyone coming to the house to appraise the house?

A. I don't recall the instance, but I assume there was because that's usually part of a loan process.

Q. But you don't recall someone coming out?

A. I'm just assuming there was. The person, I don't remember them -- the moment.

Q. That's what I mean.

A. Yes.

Q. Did you ever meet Mr. Gibbs?

A. Yes, I did.

Q. Okay. Was that here in Spartanburg?

A. Yes, I met Mr. Gibbs in Spartanburg, I believe, the first time was here.

Q. Did you come here to visit before you moved here?

A. Yes, I did.

Q. Okay. And on that occasion, did Mr. Gibbs

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mean by "used that money."

BY MR. DUNLAP:

Q. Withdraw that money at some point since then?

A. I still don't understand what you mean by -- withdraw $25,000? Is that what you're asking me?

Q. Yes.

A. I do not believe I withdrew $25,000 from my account. The answer would be no.

Q. Okay. Over time, the $25,000 that went into your account on May 27 of 2015, from then until today, do you believe that $25,000 has been withdrawn?

A. I don't understand the question. Are you asking me if I withdrew $25,000 or did the money get spent?

Q. The latter.

A. The latter, yes. Within the past four years, I do believe that has been spent.

Q. Okay. And would you have transferred it into your checking account or would you have left it in 0533 during the process of spending it?

A. Normally, money is transferred -- if it's transferred to my savings, I then just transfer it to

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my checking account because that's where my debit card is linked to.

Q. And the money in 5749 in the amount of $25,000 that was transferred to your savings account, that would have been transferred out of 5749 by Sarmad and deposited in your savings account, right?

A. I can't answer that. The money from Eurosa was sent to my account.

Q. Okay. Are you aware of anyone else having access to the Eurosa banking accounts?

A. No, I am not.

Q. Have you ever had access to the Eurosa banking accounts?

A. No, I have not.

MS. JOYNER: Object to the form. Asked and answered.

BY MR. DUNLAP:

Q. Let's look for a minute if you don't mind, Katherine, at the next page, 029694. You see where it says May -- I'm sorry. You still -- do you have --

A. I found it, yes.

Q. Okay. You see where it has May 11, 2015, Northern Pool and Spa? Do you see that?

A. May 11. Yes, I do.

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MS. JOYNER: Object to the form of the question.

THE WITNESS: I can't recall if I did. I don't believe so, but I'm not 100 percent sure.

BY MR. DUNLAP:

Q. Where did you shop when you were here in Spartanburg?

A. Could you be more specific, please?

Q. Sure. At what stores did you shop when you were purchasing groceries here in Spartanburg?

A. I used Publix and Fresh Market, and there's another one on the west side, but I can't remember the name of it. Those were my main sources of groceries.

Q. What about clothing for your children?

A. Are you -- I don't know what you're asking me.

Q. Did you -- at what stores did you purchase clothing for your children?

MS. JOYNER: Object to the form of the question.

THE WITNESS: That's a really -- I don't really understand your question. In Spartanburg are you asking me? What stores? In Spartanburg?

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BY MR. DUNLAP:

Q. Brooks Brothers? Brooks Brothers?

A. I bought my son some chinos and a blazer at Price's on Main Street, and I do remember buying my daughter some white pants and a shirt at Pink on Main. From my recollection, those are the two times we did some shopping in Spartanburg.

Q. Go to 029718.

A. 029 -- yes, I am there.

Q. So if you go to the top, July 27, 2015, TJ Maxx in Seabrook?

A. Yes.

Q. Do you shop at TJ Maxx?

A. I've been to TJ Maxx, but my husband likes it more than me.

Q. Have you ever bought anything when you went to TJ Maxx?

MS. JOYNER: Object to the form of the question.

THE WITNESS: Of course. Like everybody else in America.

BY MR. DUNLAP:

Q. In Spartanburg, did you ever shop at Target?

A. I believe I have, yes.

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ELECTRONICALLY FILED - 2020 Sep 22 12:24 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gibbs International, Inc., Plaintiff, v. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-42-00740 **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF GIBBS INTERNATIONAL, INC.'S AMENDED MOTION TO DISMISS AND TO STRIKE CERTAIN COUNTERCLAIMS OF SARMAD HARAKE AND EUROSA, INC.**

The plaintiff, Gibbs International, Inc. ("Gibbs" or "Plaintiff"), respectfully submits this memorandum of law in support of its Motion to Dismiss and Motion to Strike Certain Counterclaims of Sarmad Harake ("S. Harake") and Eurosa, Inc. ("Eurosa") (collectively, "Defendants") pursuant to Rule 12(b)(6) and 12(f) of the South Carolina Rules of Civil Procedure.

STANDARD OF REVIEW

A. Standard of Review for Rule 12(b)(6) Motions to Dismiss.

Rule 12(b)(6) permits dismissal of claims and counterclaims when the claimant fails "to state facts sufficient to constitute a cause of action." SCRCP, Rule 12(b)(6). When considering a Rule 12(b)(6) motion, the trial court must presume all well pled facts to be true. *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 248 (2007). However, dismissal is appropriate under Rule 12(b)(6) when the "facts alleged and inferences reasonably deducible therefrom" do not entitle the complainant to any relief on any theory of the complainant's case.

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Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001) (emphasis added).

B. Standard of Review for Rule 12(f) Motions to Strike.

Rule 12(f) permits this Court to strike "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." SCRCP, Rule 12(f). "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). 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 of action does not exist under South Carolina law, it is appropriate to strike the claim. *See Robinson v. Code*, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009).

ARGUMENT

I. THE COUNTERCLAIM FOR NEGLIGENT MISREPRESENTATION SHOULD BE DISMISSED.

Defendants S. Harake and Eurosa have failed to plead facts sufficient for a negligent misrepresentation claim. S. Harake and Eurosa fail to plead all elements of negligent misrepresentation. To state a claim for negligent misrepresentation, the plaintiff must allege:

(1) the defendant made a false representation to the plaintiff;
(2) the defendant had a pecuniary interest in making the statement;
(3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff;
(4) the defendant breached that duty by failing to exercise due care;
(5) the plaintiff justifiably relied on the representation; and
(6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

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Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 105, 439 S.E.2d 283, 284–85 (Ct. App. 1993). Negligent misrepresentation will not lie where the allegedly false representation was to future actions. "To be actionable, the representation must relate to a **present or pre-existing fact and be false when made**". *Id.* at 285 (emphasis added). Where the misrepresentation claim is based on an "unfulfilled promises or statements as to future events," the claim is properly dismissed under Rule 12(b)(6). *Id.*

In their counterclaim, S. Harake's and Eurosa's allegations to support the claim of negligent misrepresentations exclusively alleged unfulfilled promises by Gibbs, to wit:

> 169. Jimmy Gibbs on behalf of Counterclaim Defendant Gibbs made **numerous representations**, both verbally and in writing, to Counterclaim Plaintiffs regarding GIH and the financial obligations Counterclaim Defendant Gibbs **would make** for individual project agreements and as to the $3,200,000 obligation.
>
> 177. This reliance was justifiable because **truthful promises** as to Gibbs' obligations were required to make investments successful.

Answer to Third Am. Compl. (emphases added). Thus, S. Harake and Eurosa have alleged only unfulfilled promises in their negligent misrepresentation counterclaim, which is insufficient as a matter of law. Because this counterclaim fails to "state facts sufficient to constitute a cause of action" for negligent misrepresentation, the counterclaim should be dismissed under SCRCP Rule 12(b)(6).

II. THE FOURTH COUNTERCLAIM SHOULD BE STRICKEN BECAUSE THE CLAIM "TORTIOUS INTERFERENCE WITH ECONOMIC ADVANTAGE" DOES NOT EXIST UNDER SOUTH CAROLINA LAW AND DISCOVERY ON THE MATTER HAS BEEN IMPROPERLY WITHHELD.

The first issue with S. Harake's and Eurosa's fourth counterclaim is that South Carolina does not have a tort called "Tortious Interference with Economic Advantage." *See United Educ. Distributors, LLC v. Educ. Testing Serv.*, 350 S.C. 7, 10, 564 S.E.2d 324, 326, n.1 (Ct. App. 2002). Where a party pleads for relief under a tort theory that does not exist under South

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Carolina law, it is proper to strike such pleadings. *Robinson v. Code*, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009).

It is appropriate to strike pleadings where discovery on the matter has been wrongfully withheld. *See* SCRCP Rule 37(2)(C). Thus, S. Harake and Eurosa should be precluded from pleading their fourth counterclaim because discovery on this issue has been wrongfully withheld. When counsel for Gibbs took the deposition of S. Harake, S. Harake started testifying about the issue as to PaySend UK on his own, more than one year before any such claim was asserted. S. Harake was instructed not to answer further questions about the topic. S. Harake Dep. Tr., Vol. II, 292:2–293:23.

Under the South Carolina Rules of Civil Procedure, "[c]ounsel shall not direct or request that a witness not answer a question [in a deposition], unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP. SCRCP 30(j)(3).

Nonetheless, S. Harake was instructed not to testify as to the issue:

> Q. So who -- who said "No" to your involvement with Paysend U.K.?
> A. It was -- it was Abdul. Because he told Mr. Gibbs, "I do not want to have any problems. And please, I do not -- I will -- we will be raising money, and the first questions they ask you is, 'Do you have any ongoing cases?'"
>
> And we're a financial service company in the U.K. I got accepted by the regulator in the U.K., and they approved me as an individual in the U.K., and I could not even remain a director in the company. I had to resign my post as a director, hire a professional to run the job there, because of the ongoing case. That's the damage Mr. Gibbs caused me.
>
> Q. So the $1.5 million loan, what happened to it? Was it paid back, or was it forgiven?
>
> MS. JOYNER: Object to the form of the question.

THE WITNESS: No. I sold my shares. I -- I transferred my shares to Abdul's company in return. And -- and the loan -- we neutralized the loan. Everything is documented. Everything is notarized.

BY MR. DUNLAP: Q. So it's documented?

A. Absolutely. The interest rate they charged me, dollar to dollar, everything is notarized.

Q. Okay. I'm going to request that that be produced --

A. Absolutely. I will produce it.

Q. -- in this case.

A. **Actually, it will be part of what will 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.**

Q. Okay. And what is that?

A. I haven't --

MS. JOYNER: Well --

THE WITNESS: -- finished calculating it yet.

MS. JOYNER: **Objection. Stop.**

THE WITNESS: I haven't finished calculating it yet. The company is increasing value every day.

MS. JOYNER: 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.

MR. DUNLAP: Well, the -- I'm not asking him for your communications with him. But he has indicated -- he has made a threat here in this deposition to assert some kind of a claim. And he said "you." I don't know if that means Gibbs, Parker Poe. I don't know what he's talking about. But he's the one that talked about this. And I'm entitled to know from him, you know, what he's talking about. He's the one that raised this issue.

MS. JOYNER: Are you finished?

MR. DUNLAP: Yeah.

MS. JOYNER: Okay. One, it was -- it's not a threat. It is a discussion. Two, that is -- you can't then ask him for work product and things that are protected in anticipation of litigation. You asked a follow-up question.

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> MR. DUNLAP: He's the one that -- that raised the issue. He's the one that spoke about it. And I don't think that's protected by the privilege. I think I'm entitled to hear what he's going to say, if you'll let him testify.
>
> MS. JOYNER: I disagree. Let me take a break and think about it for a second.
>
> . . .
>
> (A recess transpired from 7:11 p.m. until 7:18 p.m.)
>
> . . .
>
> MS. JOYNER: **After the break, I hold to my original instruction.** I believe that the follow-up questions are requesting attorney-client-privileged and work product information, and I'm instructing my client not to answer.

S. Harake Dep Tr., Vol II, 290:10–293:23 (emphases added). When a party fails to permit discovery, such as by refusing to answer a question in a deposition, the court in which the action is pending may issue an "order striking out pleadings." SCRCP Rule 37(2)(C).

As the above excerpt from the deposition transcript shows, S. Harake was aware of the situation involving PaySend UK in his deposition at the latest in July of 2019 and started testifying about it when he was instructed not to answer on July 25, 2019. S. Harake Dep. Tr. Vol. II, 293. It is also noteworthy that this claim adding $22 million to S. Harake's counterclaims was not added by him on his own initiative, but instead was only added after Gibbs' amendment. No effort was made by Harake on his own initiative to bring the $22 million claim until after Gibbs amended its complaint – in spite of the fact that S. Harake was aware of the situation at the time of his deposition in July 25, 2019. As a result, the claim should be stricken.

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CONCLUSION

For the reasons set forth above, Gibbs requests that the Court dismiss and/or strike S. Harake's and Eurosa's counterclaims as noted herein. Gibbs also respectfully requests other and further relief in favor of Gibbs as the Court deems just and proper.

Respectfully submitted this 22nd day of September, 2020.

s/ Kevin A. Dunlap
Kevin A. Dunlap

Attorney for the Plaintiff
Gibbs International, Inc.

OF COUNSEL:

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ELECTRONICALLY FILED - 2020 Oct 05 1:07 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4200740

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Gibbs International, Inc., Plaintiff, vs. Sarmad Harake, Eurosa, Inc., Katherine Harake, Defendants.	)	Civil Action No.: 2017-CP-42-00740 **DEFENDANTS SARMAD HARAKE AND EUROSA, INC.'S MOTION TO ALTER OR AMEND**
Sarmad Harake and Eurosa, Inc., Counterclaim Plaintiffs vs. Gibbs International, Inc., Counterclaim Defendant.	)	

TO: KEVIN DUNLAP, COUNSEL FOR PLAINTIFF GIBBS INTERNATIONAL, INC.

PLEASE TAKE NOTICE that Defendants Sarmad Harake and Eurosa, Inc. (collectively the "Harake Defendants"), by and through undersigned counsel, hereby respectfully move this court, pursuant to Rule 59(e), SCRCP, to reconsider, alter, or amend its September 25, 2020 Order granting, in part, Plaintiff Gibbs International, Inc.'s ("Gibbs") motion to dismiss and to strike counterclaims of Sarmad Harake and Eurosa, Inc. ("Gibbs' motion").[1]

[1] The Harake Defendants file this motion in an abundance of caution to request an alteration of the judgment and to preserve these issues and arguments given that, in addition to directing the parties to draft proposed orders "using language consistent with" Gibbs' arguments, the Form 4

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I. BACKGROUND

This matter involves corporate and individual parties and contains complex allegations, but at its core, it is a business dispute. Plaintiffs initially brought this action on March 7, 2017, but it has been amended several times. Most recently, Gibbs filed its Third Amended Complaint on August 3, 2020. On August 24, 2020, the Harake Defendants filed a partial motion to dismiss the Third Amended Complaint as well as their Answer to Plaintiff's Third Amended Complaint and Amended Counterclaims ("Answer and Amended Counterclaims"). The Harake Defendants asserted four counterclaims, including breach of contract, negligent misrepresentation, unjust enrichment, and tortious interference with economic interest.

Gibbs filed a partial motion to dismiss and to strike on August 28, 2020, asserting that the Harake Defendants failed to state facts sufficient to show a claim of negligent misrepresentation and that the Harake Defendants' counterclaim for tortious interference with economic interest was not a claim recognized by South Carolina law. Gibbs' motion also moved to strike "the intentional interference with prospective contractual relations claim" that Defendant Sarmad Harake discussed in his deposition. Following several extension requests, Gibbs filed its Reply to Harake Defendants' Amended Counterclaims ("Reply") on September 18, 2020, denying some allegations and admitting some allegations in the Answer and Amended Counterclaims.

The hearing on this matter was held via WebEx, due to the current COVID-19 conditions, on September 22, 2020. On September 25, 2020, the Court entered a Form 4 Order ("September 25 Order"), ruling, in part, that Gibbs' motion as to the Harake Defendants' counterclaim of negligent misrepresentation should be denied and that Gibbs' motion should be granted as to the Harake Defendants' counterclaim of tortious interference with economic advantage and also

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Order provided a judgment dismissing the Harake Defendants' counterclaim for tortious interference with economic interest.

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directing the respective parties to draft proposed orders "using language consistent with" their respective arguments. This motion is limited to requesting the Court to reconsider and amend its ruling as to the dismissal of the Harake Defendants' counterclaim for tortious interference with economic advantage.

II. STANDARD OF REVIEW

A Rule 59(e) motion is both a vehicle to request the trial court to alter or amend a judgment and a vehicle to seek reconsideration of the issues and arguments. *Elam v. South Carolina Dept. of Transp.* 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). "A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule." *Id.* South Carolina courts have found there is nothing "inherently unfair" in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id* at 22. Thus, "[i]t is inherently unfair to disallow such an opportunity." *Id.*

III. LAW AND ARGUMENT

The Harake Defendants request the Court reconsider and amend its September 25 Order granting Gibbs' motion as to the Harake Defendants' counterclaim for tortious interference with economic interest. In addition to the arguments presented in the Harake Defendants' Memorandum in Opposition to Gibbs' motion and at the hearing, which are incorporated into this Motion by reference, this Motion addresses certain arguments made in Gibbs' memorandum in support of its motion. As the filing of Gibbs' supporting memorandum was very close in time to the hearing (approximately 90 minutes before the hearing and after the Harake Defendants' had filed their Memorandum in Opposition), the Harake Defendants were not able to address fully the arguments and case law raised for the first time in Gibbs' supporting memorandum.

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1. **The Case Law Cited In Gibbs' Supporting Memorandum Is Distinguishable From This Case And Should Not Be Relied Upon To Dismiss The Harake Defendants' Counterclaim.**

As a source for its argument that Harake Defendants' counterclaim for "tortious interference with economic advantage" should be dismissed or stricken, Gibbs' supporting memorandum relied upon *Robinson v. Code*, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009). Specifically, Gibbs cited *Robinson* for the proposition that if "a party pleads for relief under a tort theory that does not exist under South Carolina law, it is proper to strike such pleadings." Gibbs' supp. memo., pp. 3-4 (emphasis in original). *Robinson*, however, does not stand for such a proposition and is distinguishable from this case. Thus, it should not be relied on for dismissal of the Harake Defendants' counterclaim.

Robinson involved litigation arising from a landlord-tenant relationship. Specifically, the personal representatives of the tenant and a guest who died in a rental house fire brought negligence causes of action against the landlord for failure to install smoke detectors. *Id.* at 584-85. 682 S.E.2d at 496. First, the Court of Appeals noted that when a motion to strike challenges a theory of recovery, the motion is to be treated as a Rule 12(b)(6), SCRCP, motion to dismiss and that the Court should not strike a cause of action "merely because the court doubts the plaintiff will prevail in the action." *Id.* at 585, 682 S.E.2d at 496. Thereafter, the Court of Appeals found the appellant's claims did not allege violations permitted under the statutory scheme of the Landlord-Tenant Act. *Id.* at 586, 682 S.E.2d at 496-97. The Court further found that Article 11 of the building codes specifically excluded causes of action for "a per se statutory violation of liability, or for negligence-based liability, for death, injury, or damages," which was the type of cause of action sought by the plaintiffs. *Id.* at 586-87, 682 S.E.2d at 497. Therefore, noting the basis for the original motion to strike, which was that Article 11 specifically does not

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create the cause of action sought, the Court of Appeals affirmed the trial court. *Id.* at 587-88, 682 S.E.2d at 497-98. Therefore, the claims did not exist and were excluded under the *specific* statutory schemes under which there were alleged. *Id.* Nothing in *Robinson* stands for the proposition that it is proper to strike any theory that has not been recognized under South Carolina law.

Rather, as previously argued, the label on a cause of action is not dispositive as to whether it has been pled sufficiently. *See 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) (providing that the court must look beyond the labels of a cause of action to the actions themselves when examining a Complaint); *see also generally* Rule 8(f), SCRCP (stating that "[a]ll pleadings shall be so construed as to do substantial justice to all parties"); *Shirley's Iron Works, Inc. v. City of Union* 403 S.C. 560, 743 S.E.2d 778 (2013) (finding subcontractors sufficiently pled a third-party beneficiary claim against the city in an action because in the "Facts" section of the complaint, the subcontractors alleged they were "third-party beneficiaries" of the city's contract with general contractor because the bonding requirements were "legislatively mandated contractual obligations" that were incorporated into the contract as a matter of law, and, while the word "contract" did not appear in the first cause of action, neither did the words "tort" or "negligence"); *United Educational Distributors, LLC v. Educational Testing Svc.*, 350 S.C. 7, 10 at n.1, 564 S.E.2d 324, 326 at n.1 (Ct. App. 2002) (stating it would analyze the plaintiff's cause of action which was labeled as tortious interference with economic advantage as that of intentional interference with prospective contractual relations because how it was labeled did not affect the substance of its analysis); *S.C. Nat. Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986) ("It is elementary that the principal purpose of pleadings is to inform the

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pleader's adversary of legal and factual positions which he will be required to meet on trial."). Therefore, as the label on the cause of action is not dispositive, the Court has the discretion to construe the cause of action liberally to do substantial justice or to decide whether the state recognizes a cause of action. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted); *see also Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014).

Here, the Harake Defendants have alleged a general tort cause of action against Gibbs that has not been specifically barred under any statute or code and that could be construed as tortious interference with contractual relations, among other causes of action, should the Court wish for the title of the cause of action to be changed.[2] Other states even have recognized such a tort under multiple names.[3] Accordingly, since *Robinson* is not applicable to the facts of this case as the Harake Defendants are not seeking to allege a cause of action specifically excluded under

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[2] The Harake Defendants' Memorandum in Opposition filed on September 22, 2020 argues how the well-pleaded counterclaim can be construed as a cause of action for tortious interference with contractual relations. *See* Memorandum in Opposition, pp. 7-8.

[3] *See e.g., Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130, 1141, 470 P.3d 571, 575 (2020); *Am. Diamond Exch., Inc. v. Alpert*, 101 Conn. App. 83, 91, 920 A.2d 357, 364 (2007) ("Our Supreme Court has recognized that the legal theory of tortious interference with a business expectancy encompasses a broad range of behavior."); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994); *Schuler v. Abbott Labs.*, 265 Ill. App. 3d 991, 992, 639 N.E.2d 144, 146 (1993); *Wilkerson v. Carlo*, 101 Mich. App. 629, 632, 300 N.W.2d 658, 659 (1980); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014); *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 48, 888 N.Y.S.2d 489, 495 (2009); *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 2001 ND 116, ¶ 35, 628 N.W.2d 707, 717 (citing James O. Pearson, Jr., Annotation, *Liability For Interference With At Will Business Relationship*, 5 A.L.R.4th 9, § 2[a] (1981), and cases cited therein) ("Wrongful interference with business is a recognized tort in nearly all American jurisdictions. We today join those jurisdictions, and recognize the existence of a tort action for unlawful interference with business in this State."); *Hayes v. N. Hills Gen. Hosp.*, 1999 S.D. 28, ¶ 17, 590 N.W.2d 243, 247–48; *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 218, 754 S.E.2d 313, 319 (2014).

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a particular statutory scheme, it cannot and should not be the basis for granting dismissal of the Harake Defendants' counterclaim.

2. Rule 37, SCRCP, Cannot Be A Basis For Dismissing Or Striking A Cause Of Action When There Neither Has Been Rule 11, SCRCP, Consultation Nor An Order With Which The Harake Defendants Failed To Comply.

Gibbs' supporting memorandum also argued, *for the first time*, that the Harake Defendants' counterclaim for tortious interference should be stricken pursuant to Rule 37, SCRCP; however, Rule 37, SCRCP, cannot be a basis for striking the counterclaim under the facts of this case.

To use Rule 37, SCRCP, as a basis for a motion, counsel must first confer pursuant to Rule 11(a), SCRCP (noting "[a]ll motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, ..."). Here, Gibbs did not confer on this matter, nor did it certify that consultation would serve no useful purpose or that such conferral could not be had. Rather, Gibbs' motion presented its grounds for relief as Rules 12(b)(6) and 12(f), SCRCP, initially and then Gibbs' supporting memorandum simply attempted to add Rule 37, SCRCP, without proper justification for doing so.

In this case, there is no basis for permitting such relief pursuant to Rule 37 as argued in Gibbs' supporting memorandum. As an initial matter, Gibbs cited a section of Rule 37, SCRCP, that does not exist. Assuming Rule 37(b)(2)(C), SCRCP, is the section of Rule 37 Gibbs meant to cite, that Rule only applies if there has been failure to comply with an order as the title of Rule 37(b) is "Failure to Comply With Order." Gibbs' supporting memorandum does not cite any discovery order the Harake Defendants failed to comply with in order to seek to strike the counterclaim properly. Whether the instruction not to answer cited in Gibbs' supporting

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memorandum was proper is not before the Court in this motion and has not been put before the Court previously, as required. *See Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 219, 493 S.E.2d 826, 836 (1997) (holding that sanctions were properly denied for alleged discovery abuse when such discovery had not been the subject of a prior motion to compel); *see also* Rule 37(a)(2), SCRCP (noting the method to challenge discovery is by motion to compel); *Dunn v. Dunn,* 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (noting the "trial court judge's ruling on discovery matters will not be reversed on appeal absent a clear abuse of discretion."). Additionally, as explained in the Harake Defendants' Memorandum in Opposition and in the hearing, counsel for the Harake Defendants took Gibbs' counsel at his word when they entered their agreement regarding motions for protective order related to instructions not to answer given during the depositions of Sarmad Harake and Jimmy Gibbs. Therefore, raising this issue in its supporting memorandum is misleading to the Court and a red herring. As previously stated, when a motion to strike challenges a theory of recovery, the motion is to be treated as a Rule 12(b)(6), SCRCP, motion to dismiss. *Robinson,* 384 S.C. at 585, 682 S.E.2d at 496. Accordingly, the Harake Defendants' counterclaim should not be based on Rule 37, SCRCP.

3. Rather Than Dismissing The Counterclaim, The Harake Defendants Should Be Granted Leave To Amend.

To the extent that the Court does not permit a cause of action for tortious interference with economic interest or for the claim to proceed with a revised title, the cure for an insufficient pleading is generally amendment, not dismissal. *See Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019) (finding the dismissal of a commercial lessor's claims against the county without leave to amend was improper and noting that when a "trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give" the party an opportunity to amend pursuant to Rule 15(a)). As argued in the

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Harake Defendants' Memorandum in Opposition to Gibbs' motion, their tortious interference with economic interest claim could be construed as tortious interference with contractual relations, among other things, given the well-pleaded facts contained therein, which are viewed as true for purposes of this motion. *See* Memorandum in Opposition, pp. 7-8; Ans. and Am. Counterclaims, paras. 149-160; 191-204. No prejudice would exist here to prevent amendment of the counterclaim as Gibbs has also recently amended its Complaint to add causes of action and a party to this litigation. Therefore, to the extent the Court maintains its dismissal of the Harake Defendants' counterclaim, the Harake Defendants request the opportunity to amend that counterclaim within 15 days as provided in Rule 15(a), SCRCP (stating "leave shall be freely given when justice so requires and does not prejudice any other party").

For the foregoing reasons and the arguments made in the Harake Defendants' Memorandum in Opposition to Gibbs' motion and at the hearing, the Harake Defendants respectfully request that the Court's September 25 Order dismissing the Harake Defendants' counterclaim for tortious interference with economic interest be amended and that the Court enter an Order denying Gibbs' motion. However, should the Court continue with dismissal, the Harake Defendants request that the Court amend its September 25 Order to permit it to amend the counterclaim pursuant to Rule 15(a), SCRCP.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

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October 5, 2020
Columbia, South Carolina

Attorneys for Defendants Sarmad Harake and Eurosa, Inc.

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From: Dunlap, Kevin A.
To: Hayes Law Clerk
Cc: Lindsay Joyner
Subject: Gibbs v. Harake et al. -- Date Certain Request C.A. No.: 2017-CP-42-00740
Date: Wednesday, October 28, 2020 10:07:56 AM

Warning – This email originated outside the GWB email system!

Dear Judge Hayes:

I hope you are well. As you may recall, a malignant tumor was discovered in my wife's brain earlier this year. She had surgery to remove the tumor, but with the cancer in other parts of her body, she is also undergoing immunotherapy and had additional surgery. My family and I have been quarantined due to her condition. While she has made some progress, certain parts of the cancer remain and have not been impacted by the treatment and additional options are now being evaluated. Her treatment has been in Charlotte to this point but I am taking her to Duke next week to explore options. Due to the need to quarantine myself and my family, I need to make extensive arrangements for my family's care before, during and after the trial in this matter. Specifically, the caretaker I hire will need to quarantine for 14 days prior the trial, and I will need to quarantine away from my family during trial and for 14 days after the trial's conclusion.

This case was filed on March 7,2017 so the case is now almost 3 years, 8 months old. I represent Plaintiff. The parties have agreed for the case not to appear on the trial roster before January 4, 2021 and the parties have submitted a consent motion and order to that effect.

For these reasons, I request that this case be set for a date certain trial during the weeks of January 18 and 25. Plaintiff will also consent to a date certain trial in February.

Thank you for your consideration of this request.

Kevin Dunlap
Partner

110 East Court Street | Suite 200 | Greenville, SC 29601
Office: 864.253.6105 | Fax: 864.242.9888 | vcard | map

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STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS FOR THE
COUNTY OF SPARTANBURG — SEVENTH JUDICIAL CIRCUIT

- - -

Gibbs International, Inc., Individually and on behalf of IOTive, Inc.,

Plaintiffs,

vs.

Sarmad Harake, Eurosa, Inc., Katherine Harake, IOTive, Inc., Gocial Morris, Pavel Polukhin, and Shai Hemli,

Defendants.

Civil Action No. 2017-CP-42-00740

Sarmad Harake and Eurosa, Inc.

Plaintiffs,

vs.

Gibbs International, Inc.,

Defendant.

VIDEOTAPED DEPOSITION OF SARMAD HARAKE
VOLUME 2

DATE TAKEN: Thursday, July 25, 2019

TIME BEGAN: 11:21 a.m.

TIME ENDED: 8:22 p.m.

LOCATION: Spartanburg Marriott
299 North Church Street
Spartanburg, South Carolina

REPORTED BY: Karen Kidwell, RMR, CRR, CCP
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

A. Yes, I do.

Q. And you redacted those transactions because they were personal transactions; is that right?

MS. JOYNER: Object to the form of the question.

THE WITNESS: I mean, I did not take certain items and delete them myself. I separated what was -- I believed was personal from what was business.

BY MR. DUNLAP:

Q. And what was business, you left unredacted?

A. Yes. I did not definitely scrutinize a lot, because a lot of times, if I'm not sure if it's a personal or a business, I would most probably push it to personal, because I don't want to charge it on the company.

Q. And are you -- and you're aware that there was a representation to the court in this case, on your behalf, that the redactions were of personal transactions?

A. Yes.

MS. JOYNER: Object to the form of the question.

BY MR. DUNLAP:

Q. You can answer.

A. Yeah. That was what -- what I understood, that anything that I -- when I scanned the -- the details, anything that I felt is personal, I marked as personal.

Q. And -- and --

A. And I -- and I -- and I passed it to my counsel.

Q. Okay.

A. Or a mistake sometimes. Because if I used the wrong card for a reason, then I would also mark that out. I -- I'm sure I've done that as well.

Q. I'm sorry. I don't understand that.

A. Okay. So if I went somewhere and I -- it was -- it was -- let's say I went to, to give an example, I went to New York. I'm supposed to meet someone for a meeting. The meeting was canceled. I end up staying there.

In my mind, that's not a business meeting, because it was canceled on me. But when I booked the hotel, I had booked it as business. So -- but it turned into personal. So at the end of the day, when I check out of the hotel, I have a tendency to give back my personal card instead of the business card,

so it gets charged there. Sometimes the checkout was automatic, so it stayed there. Things like that.

Q. So you made judgment calls --

A. Yes.

Q. -- about what was personal and what was business?

A. That's correct.

Q. And the ones that you redacted, you felt like were personal?

A. Correct.

Q. Okay. All right. And -- and throughout this, I'm going to have to refer to the Bates numbers.

A. Sure.

Q. So just keep your eye on the bottom right corner page of the page. And -- and let's go to the very first one, which is at 029673.

A. 02?

Q. Yes.

A. Redacted or unredacted?

Q. Unredacted.

A. Unredacted.

Q. Sorry.

A. 02?

Q. 9673.

Q. And the amount?
A. 5,000.
Q. And then the next line, what is the date? And read that entry.
A. The date is the 21st of September, and --
Q. What year?
A. 2015.
Q. Okay.
A. And the amount is 10,000.
Q. And read the description.
A. It says, "Confirmation, 1 -- 1687673142."
Q. And again, this was an online banking transfer?
A. That is -- that's what -- it looks like it, yes.
Q. So that was you, right?
A. Yes.
Q. All right. Let's go to the withdrawals.
A. Um-hmm.
Q. It says September 15 of 2015. And read that description.
A. "Online banking transfer confirmation, 18BCKBEDF, Harake, 1,000."
Q. And that was you, right, "Online banking transfer," but you don't know where that went?

A. Now, that is a withdrawal --

MS. JOYNER: Object to the form of the question.

THE WITNESS: -- and a debit. So it's -- it's a withdrawal, online banking transfer. Yeah, it's a transfer, so it's a withdrawal, correct.

It says "Harake" at the end. So no, I don't -- I don't recall.

BY MR. DUNLAP:

Q. All right. And this says "Card 386A." You see that?

A. Yes.

Q. So what card is that?

A. That would be the debit card. I believe, when I do something on the teller machine, where you swipe and then you put the PIN number --

Q. Um-hmm.

A. -- and that's probably a confirmation of the transaction done with a PIN, when you swipe your card at the -- on the teller's desk -- on the teller's machine.

Q. But this says "Online," doesn't it?

A. "Online." Yeah, that means -- it's online, yes. Correct.

A. Correct.

Q. -- "$25,000". What was that for?

A. I wouldn't know off my head.

Q. October 21, 2015, online banking transfer to 5749, and that was a withdrawal for $29,000. You see that?

A. Yes, I do.

Q. And that went to operating account, right?

A. That is -- that is correct.

Q. October 22, 2015, online banking transfer, again $25,000. And this -- read the -- the conference number.

A. The confirmation number?

Q. Yes.

A. It's NV7MYGIAQ, Harake, 25,000.

Q. Where did that go?

A. Sorry?

Q. Where did that go? Where did that money go?

A. I don't know. Again, it's Harake, so I -- I still don't know. I need -- if you have anything to help me with it, I'll -- will be able to see it.

Q. Okay. Go to 029750.

A. Yeah.

Q. October 22, 2015.

A. Yes.

Q. Is that a $15,000 wire for Fed Securities?

A. That is correct.

Q. And that is to the accountant for Fed Securities?

A. That is correct.

Q. Was he a full-time employee of --

A. Yes.

Q. -- Fed Securities?

A. Yes, he is. By law, we have to. There's no part-time in Turkey.

Q. What's his annual salary?

A. What -- in Turkey, we have to pay the Social Security and all that stuff, and he -- then the employee gets a net salary at the end. His monthly I believe is 5,000-something, but it's based on an exchange rate, so I can't spot exact -- it differs a little bit, but in the 5000-and-a-fraction range. But then we have to pay the Social Security and the taxes and all that. But I don't know exact amount of that. Insurance.

Q. And then October 26th, 2015, what's that description say?

A. 18,000, 11744, Harake.

Q. And that's a withdrawal, right?

A. It is a transfer.

Q. Okay. That's a -- a transfer, and you don't know where it went?

A. I mean, I --

MS. JOYNER: Object to the form of the question.

THE WITNESS: I -- like I said, it's a transfer. But without seeing the details, I wouldn't know.

Now, if I did it, and it appears as -- because I did it, it shows as "Harake," I don't know. Whether if I log on my iPad it comes out like that, I don't know. I need to see the underlying.

BY MR. DUNLAP:

Q. Okay. Let's go to Bates 029751.

A. Yes.

Q. This is from 10-1-15 to 10-31-15. You see that?

A. I do.

Q. And the beginning balance is what?

A. 5,296.72.

Q. What were the deposits?

A. 4,109.61.

Q. What were the withdrawals?

International?

A. Yes.

Q. And it's sent in $55,616 as to Fed Securities. Is that right?

A. Yes, I believe so, yes.

Q. And then under that is the November 30, 2015, deposit, which originated from Gibbs, in which Gibbs sent a check into a -- this Eurosa account, 1914, in the amount of $33,000; is that right?

A. Well, it was a wire.

Q. A wire. I'm sorry.

A. Yes.

Q. Okay.

A. Well, yes, correct. It's a wire.

Q. And it was for $33,000?

A. That is correct.

Q. All right. Then on November 24 of 2015, a wire went out as to Fed Securities in Turkey --

A. Correct.

Q. -- for $17,500; is that right?

A. That's correct.

Q. And then on November 24, 2015, we have another one of those online banking transfers, in the amount of $25,000. You see that?

A. Yes, I do.

Q. Where did that go?

A. Again, I don't know. It says "Harake" at the end. I need to see the underlying.

Q. Then November 27, 2015, we have SC TLR cash withdrawal from check, 1914, in the amount of $6,000. Is that right?

A. That is correct.

Q. And what was that for?

A. I wouldn't remember off my head, but looking at around that date, if I'm traveling to Russia or something, I sometimes do not take with me just a card. I would prefer to have cash, just in case. Pay hotels, pay ticket, buy something.

Q. Hard cash?

A. Excuse me?

Q. This is hard cash, not a traveler's check?

A. That's correct. That's correct.

Q. All right. And then we have online banking transfer to 5749 for $2,500?

A. Correct.

Q. And that would be you, right?

A. That's correct.

MS. JOYNER: Object to the form.

BY MR. DUNLAP:

Q. And then we have online banking transfer,

question.

THE WITNESS: Well, individual account had nothing to do with Gibbs.

BY MR. DUNLAP:

Q. But you took money out of the Eurosa accounts, at times, and transferred it into your individual account, right?

A. That is correct.

Q. Okay. All right. And so I want you to explain to the ladies and gentlemen of the jury in this case how you would have funded, based on what we see in these bank records --

A. Yes.

Q. -- a 50-50 split --

A. Yes.

Q. -- on capital requirements --

A. Yes.

Q. -- and on ongoing expenses and cash needs for all of these different investments.

A. Okay. I invite you to look at the month after. Just one month after, where you decided to stop looking at my personal record.

Q. Well, your lawyer won't give me that.

A. You will see that there is a million $300,000 that came to my personal account. And --

Q. Where did that came from?

A. That came from a fund in Switzerland. And I used that as a capital to create Paysend U.K., a company I created 100 percent as myself, to help get license and get structured on all the hard work that we had established.

Mr. Gibbs was invited to, if he was not happy with what's going on in the U.S, he was invited to join that company.

So I requested that as a loan for my fund. It came within one day. And it went into that account. I capitalized the company, structured the company, got the financial service license in the U.K., and we started the company in the U.K. You can Google Paysend U.K. Today it's worth over 160 million. Last week the company raised -- wanted to raise £3 million. They ended up raising £8 million in 72 hours.

Q. Okay.

A. So . . .

Q. So -- so it was back up. So the 1.5 million was a loan, right?

A. The 1.5 million was not a loan.

Q. I thought you just said it was a loan. Did I miss --

A. The -- what? The -- a loan -- you mean the -- the money I borrowed? Yes, that was a loan, of course.

Q. Okay. Was that a loan from Fey Ayan?

A. No, it was not.

Q. Who loaned it to you?

A. It was a Swiss fund.

Q. Well, who -- who -- what --

A. It's -- it's a Swiss -- it's a Swiss fund that -- that I borrowed from.

Q. Well, how did you obtain money from the Swiss fund?

A. I --

Q. Who's involved in the Swiss fund?

A. Who's involved in the Swiss fund?

Q. Yes.

A. Abdul is -- is a small partner in -- in that fund. I know his other partners for many, many years. And we talked about the project, and we talked how the whole global picture is going to be.

And Mr. Gibbs, of course, was always in the picture. And he said, "No, I don't want to do anything with the U.K." He was invited. He said, "I don't want anything to do with it."

So I said, "Okay. I'll do it on my own."

Q. So what's Paysend U.K. worth today?

A. $173 million.

Q. Okay. And so how much of that value translate to you?

A. Zero. Because -- thanks to what Mr. Gibbs did. Because I was forced to -- to sell all my shares, exit the company, because they did not want to have any headaches. And the Russian style, because I brought in Mr. Gibbs, I'm the one that's guilty. Because Mr. Gibbs insulted him by telling him that his company is worth nothing and means nothing on -- on your claim.

Q. So what happened to the $1.5 million loan?

A. I -- I exited the company. I sold my -- my shares. I was forced to sell my shares. I -- that loan was -- was repaid, and there was a profit made.

Q. What was the profit?

A. Very small amount. $250,000 or something like that.

Q. Did you own any stock in Paysend U.K.?

A. Zero. I owned 100 percent. I started the company. I was not allowed to put a dollar after that day, because they said, "We don't want you to be involved, because you have a case ongoing."

Abdul tried for a year. Talked to Jimmy. He flew to New Jersey, met with him at Teterboro. They sat together. He showed him everything. Mr. Gibbs insisted, said "No." He said, "I'll buy you out." He said "No."

He told him, "I'll take you into the U.K company. This way I control it. You have nothing to do with Sam. It's an investment." Mr. Gibbs said "No."

Q. So who -- who said "No" to your involvement with Paysend U.K.?

A. It was -- it was Abdul. Because he told Mr. Gibbs, "I do not want to have any problems. And please, I do not -- I will -- we will be raising money, and the first questions they ask you is, 'Do you have any ongoing cases?'"

And we're a financial service company in the U.K. I got accepted by the regulator in the U.K., and they approved me as an individual in the U.K., and I could not even remain a director in the company. I had to resign my post as a director, hire a professional to run the job there, because of the ongoing case. That's the damage Mr. Gibbs caused me.

Q. So the $1.5 million loan, what happened to

it? Was it paid back, or was it forgiven?

MS. JOYNER: Object to the form of the question.

THE WITNESS: No. I sold my shares. I -- I transferred my shares to Abdul's company in return. And -- and the loan -- we neutralized the loan. Everything is documented. Everything is notarized.

BY MR. DUNLAP:

Q. So it's documented?

A. Absolutely. The interest rate they charged me, dollar to dollar, everything is notarized.

Q. Okay. I'm going to request that that be produced --

A. Absolutely. I will produce it.

Q. -- in this case.

A. Actually, it will be part of what will 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.

Q. Okay. And what is that?

A. I haven't --

MS. JOYNER: Well --

THE WITNESS: -- finished calculating it

yet.

MS. JOYNER: Objection. Stop.

THE WITNESS: I haven't finished calculating it yet. The company is increasing value every day.

MS. JOYNER: 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.

MR. DUNLAP: Well, the -- I'm not asking him for your communications with him. But he has indicated -- he has made a threat here in this deposition to assert some kind of a claim.

And he said "you." I don't know if that means Gibbs, Parker Poe. I don't know what he's talking about. But he's the one that talked about this. And I'm entitled to know from him, you know, what he's talking about. He's the one that raised this issue.

MS. JOYNER: Are you finished?

MR. DUNLAP: Yeah.

MS. JOYNER: Okay. One, it was -- it's not a threat. It is a discussion. Two, that is -- you can't then ask him for work product and things that are protected in anticipation of

litigation. You asked a follow-up question.

MR. DUNLAP: He's the one that -- that raised the issue. He's the one that spoke about it. And I don't think that's protected by the privilege. I think I'm entitled to hear what he's going to say, if you'll let him testify.

MS. JOYNER: I disagree. Let me take a break and think about it for a second.

MR. DUNLAP: Okay.

MS. JOYNER: And then . . .

MR. DUNLAP: That's fine.

VIDEOGRAPHER: We are pausing recording in the fourth media. Going off record at 7:11 p.m.

(A recess transpired from 7:11 p.m. until 7:18 p.m.)

VIDEOGRAPHER: We're back on record at 7:18 p.m., after a brief pause.

MS. JOYNER: After the break, I hold to my original instruction. I believe that the follow-up questions are requesting attorney-client-privileged and work product information, and I'm instructing my client not to answer.

MR. DUNLAP: Bear with me just a second.

Mr. Harake, I'm sorry, I need to find

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS NONJURY
COUNTY OF SPARTANBURG)

GIBBS INTERNATIONAL, INC.,) TRANSCRIPT
)
PLAINTIFF,) OF
)
vs.) RECORD
)
SAM HARAKE AND EUROSA, INC.,)
) 2017-CP-42-740
DEFENDANTS.)

September 22nd, 2020
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE BRIAN M. GIBBONS, Judge.

A P P E A R A N C E S:

KEVIN DUNLAP and FERN PATTERSON
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Attorneys for the Plaintiff

LINDSAY JOYNER
ESQ.
Attorney for the Defendants

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

INDEX OF WITNESSES

(WHEREUPON, there were no exhibits marked or testimony taken during this hearing.)

P R O C E E D I N G S

THE COURT: All right. So, for the, for the record, just starting off, this is Docket 17-CP-42-740, Gibbs International versus -- I don't know how you say it.

Is, is it Harake or Harake?

MS. JOYNER: Harake, yes, Your Honor.

THE COURT: And Eurosa.

All right. I've got people -- I've got lawyers representing different people. For the record, since we're doing it by WebEx, identify yourself and who you represent, and then give me the introductory good news.

MR. DUNLAP: Yes, Kevin Dunlap here on behalf of Plaintiff, Gibbs International, along with Fern Patterson and Melanie Nowend.

THE COURT: All right. Ms. Joyner.

MS. JOYNER: Yes, Lindsay Joyner here on behalf of Sarmad Harake who goes by Sam, so if that is said later, that's the reason, Katherine Harake and Eurosa, Inc. And our introductory good news is that Kevin and I have been able to -- we believe that we have resolved, or we're far enough along that we don't believe that they need to be heard today, the following motions --

THE COURT: Okay.

MS. JOYNER: -- which is a lot of them. Gibbs Motion

for Protection From Discovery.

THE COURT: Has that been resolved or are y'all gonna continue the motion?

MS. JOYNER: Well, could we, by chance, tell you tomorrow morning?

I think we have that finalized. But this way we'll put it all in, in one email.

THE COURT: Okay. That's fine with me. However -- I'm, I'm not gonna stand in the way of an agreement.

I guess, just for the record, when you say it's resolved, are we resolving it on the merits or we just resolving it just to, you know, kick it down -- kick the can down the road?

That's kind of what I'm asking.

MS. JOYNER: Oh, we're resolving it -- well, it's off -- we're resolving it on the merits. We've come to an agreement on it. So, most likely will be withdrawn.

THE COURT: Fine. Perfect.

All right. Go ahead. I'm sorry to interrupt.

MS. JOYNER: And then also the Harake Motion to Compel has been resolved, and then---

THE COURT: The first one was a motion for what?

MS. JOYNER: For protective order or for protection from discovery I believe was how it was termed.

THE COURT: And that was a Gibbs motion?

MS. JOYNER: Yes, sir.

THE COURT: Gibbs Motion for Protective Order, Harake Motion to Compel.

Okay. Go ahead.

MS. JOYNER: Yes. And then, then Gibbs Motion to Quash Third Party Subpoena to Bank of America Corporation, Gibbs' Motion to Quash Third Party Subpoena to Bank of North Carolina, Gibbs' Motion to Quash Third Party Subpoena to BMC National Bank, Gibbs' Motion to Quash Third Party Subpoena to Wells Fargo Bank, Gibbs' Motion to Quash Third Party Subpoena to Pinnacle Financial Partners, the Harake Motion to Quash Plaintiff's Subpoena to Moria Scocial (phonetic), CPA, and the Harake Motion to Quash Plaintiff's Subpoena to Optimal Bank.

THE COURT: So pretty much all the Rule 45 motions have been resolved?

MS. JOYNER: Yes, sir, uh-huh.

All of the discovery motions are -- have been resolved or are in the process of resolving once we finalize our agreement that we believe that they are. And so it would just leave the Motions to Dismiss.

THE COURT: All right. Mr. Dunlap, is that your understanding of the agreements on the Rule 45 motions and the discovery motions?

MR. DUNLAP: Yes, Your Honor. That is correct.

THE COURT: Well, that's beautiful.

Anybody else wish to speak to that for the record?

(WHEREUPON, there was no response.)

THE COURT: All right. Good. Then I -- that's one benefit of having visiting judges come in and touch a file for the first time is, you know, things tend to be resolved that way, which is, which is -- which speaks well to our judicial system and the way we do it in South Carolina. So, I'm glad y'all have been able to resolve all those motions, and I wish I wouldn't have spent an hour and a half reading, reading them in preparation for the hearing. But you never know.

All right. So, having said that, we -- we're down to the Motions to Dismiss, and if I'm not mistaken, there's, there's three of those or two?

MS. JOYNER: They're three, Your Honor. Two from my side and one from Mr. Dunlap's side.

THE COURT: All right. So, Mr. Dunlap, you want to go first?

You want to let Ms. Joyner go first?

MR. DUNLAP: Your Honor, I'm, I'm happy to do this either way. My -- we can go ahead with my Motion to Dismiss if you like---

THE COURT: You're the Plaintiff.

MR. DUNLAP: ---and---

THE COURT: You're the Plaintiff. So, we'll hear, we'll hear yours first and then, Ms. Joyner, I'll hear your response to that, and then I'll come back, and I'll make sure everybody has a fair shake at what they want to say.

Okay?

MS. JOYNER: Yes, sir.

THE COURT: All right.

MR. DUNLAP: Thank you, Your Honor.

Your Honor, we have filed a Motion to Dismiss Katherine -- well, we, we filed a Motion to Dismiss two of their counterclaims that have been made in this case, and we filed a brief in support of that a couple of hours ago. And I, I can get through this one pretty quickly I think.

Basically, Your Honor, the, the first claim that we are attacking under Rule 12(b)(6) is we, we are attacking their claim for negligent misrepresentation. And as the Court knows, negligent misrepresentation, under South Carolina law, to be actionable, the representation must relate to a present or preexisting fact and be false when made. And when the misrepresentation claim is based on unfulfilled promises or statements as to future events, the claim is properly dismissed, and we have cited the Court to a case in which that has taken place.

In this situation, Your Honor, in the counterclaim, they have alleged, Jimmy Gibbs, on behalf of counterclaim

Defendant Gibbs, made numerous representations, both verbally and in writing, to counterclaim Plaintiffs regarding GIH and the financial obligation counterclaim Defendant Gibbs would make for individual project agreements and as to the 3.2 million-dollar obligation. Reliance on -- was justifiable in this case because of truthful promises as to Gibbs obligations, which were required to make the investment successful.

And so basically, Your Honor, our point here is they are talking about representations for future events that Gibbs would make certain agreements or because of truthful promises in the future, and under the case law, Your Honor, we believe that it provides that that is an inadequate basis for this claim in that, as a result, it should be dismissed because they're talking about future events or promises about future activity, and that is something that, under the, the case law, is inadequate to state a claim in this State for negligent misrepresentation.

And I have looked briefly at their brief, and, in that brief, when you look at it, it, it does say that it deals with commitments to invest, which will be in the future. It talks about representations that Gibbs would do certain things. Gibbs agreed to form an entity. Certain expenses would be considered in certain ways.

These are all commitments made in Gibbs representations

that were, in fact, related to future events, promises, hopes for future events. And so we would say to the Court that, that we believe that their, their particular representations run afoul of the case law and should be dismissed.

Now, I also noticed that they argued -- that they make an argument now that, if, for some reason, the Court were to decide to dismiss the claim, they want to give it a brand new name, and they want to change the name from negligent misrepresentation, and now they want to call it fraud. They want to call it fraudulent misrepresentation, and we would respectfully submit to the Court that that doesn't work. You know, they can't just change the name of a claim and assert a fraud claim which has specific pleading element requirements.

The bottom line is that the claim in front of this Court today is a claim for negligent misrep -- misrepresentation, and we believe that the claim should be dismissed.

Then, Your Honor, they -- we have also moved to dismiss the claim that they call tortuous interference with economic advantage. And, again, Your Honor, it's a pretty simple point. You know, the, the issue is that South Carolina does not have a tort with that name. It does not exist under our law. And where a party pleads a theory, under South

Carolina law, it does not exist, it is proper to strike that claim.

Now, in, in looking at the points that they make in that regard in their brief, the first thing that I would, I would point out to the Court that I think is just really important is, in Footnote Number 1, Your Honor, it -- they admit that there's no case recognizing a claim with that name. In footnote -- excuse me. Footnote 1 on Page 7, they say while there may not be a case officially recognizing tortuous interference with economic interest in South Carolina, and, and then they start talking about another claim that has not been asserted, and it's called intentional interference with economic interest.

And, and so, again, the claim in front of you, as they present it -- presented it to the Court is for tortuous interference with economic interest, and it just -- it's not there. It just doesn't exist.

Now, I will also say to the Court that, in, in looking at the rest of their brief, we had also moved, Your Honor -- that, that's our 12(b)(6) position there.

THE COURT: On, on each one, the negligent misrepresentation and the tortuous interference of economic interest?

MR. DUNLAP: Yes, sir.

THE COURT: Okay.

MR. DUNLAP: And the, the next claim or, or the next argument that we make is we shift to Rule 12(f) and we've made a Motion to Strike. And there, Your Honor, we have argued that when we were deposing Mr. Harake in July of 2019, I was examining Mr. Harake, and, in that examination, which we, we put in our brief, he started talking about the facts that underlie this unasserted claim that I didn't know anything about, and he starts volunteering this information on the record.

And, at some point in that colloquy back and forth, he was instructed not to answer a question, and it -- we took a break and Lindsay thought about it and came back and held to her original instruction.

And so, Your Honor, you know, I'm in a position where I have had, on August, August 24th of this year, a claim for 22 million-dollars, brand new, asserted against my client. And if they're gonna assert that claim, I get to talk to him about it fully, and fairly, and need to be able to do that.

Now, I will say to the Court that they -- Lindsay indicates in her brief, on Page 9, that, in a different deposition that we had agreed off the record that should a motion for a protective order need to be filed related to instructions not to answer, that the -- one lawyer would give the other lawyer notice you need to go ahead and get your motion on file in seven days.

Okay. And so if she believes we had that agreement -- I'm, I'm not fighting that. I'm not gonna oppose that. But I do have something I need to say about it, and I think it's important.

On August 28th I filed a Motion to Strike this claim because of the instruction not to answer, and we're almost a month later and no motion for protective order has been filed, and I'm still sitting here with no action having been taken on that, and the motion could of been filed. You know, you, you, you get that notice from me, it's pretty obvious we got an issue, and you can take some action.

Now, at the end of the day, what I really care about, Your Honor, is am I gonna get to depose -- are they going to agree to let me depose this man about this brand new 22 million-dollar claim. And as, as a little bit of background, we have a pending motion to compel additional testimony from Mr. Harake that is under consideration by Judge Cole, and that's a separate issue from this.

In, in that situation, they produced a number of documents after his deposition. So, I said let me depose him. And so they said no. You got to file a motion. So, I filed a motion that's been fully briefed, and it's under advisement with Judge Cole.

But here today we're dealing with this different issue in the context of a 12(f) motion, and, and them not, you

know, moving for a protective order, and, at the end of the day, I would like to hear them say today on the record that they are willing for me to depose this man about this new claim.

THE COURT: Okay.

MR. DUNLAP: And that's all I have, Your Honor.

THE COURT: Well, let me just -- Ms. Joyner, I know I -- and I'm gonna give you a full and fair opportunity to, to respond. But, you know, I've kind of went through the file myself on the public index in preparation for this hearing, and I, you know, saw where four or five different judges have touched this thing with varied rulings here and there and yonder and I'm just asking.

I mean has, has any motion ever been made to deem this case, this case as complex and have one judge over it?

You know, I'm the not outsider looking in. This isn't my circuit. I'm just a visiting judge here this week. I just ask you that and want to hear y'all's thoughts on it before I hear any reply.

MR. DUNLAP: Not at this point, Your Honor, no.

THE COURT: Okay.

MR. DUNLAP: No such motion has been filed.

THE COURT: I mean what do you, what do you think about that, Ms. Joyner?

You think that'd be a good idea to have one judge

assigned to this, and that way that judge hears all these motions and can just stick with this case rather than having a bunch of -- y'all -- I mean y'all are on it, and wouldn't it be good to have one judge over everything?

You wouldn't have to be bouncing from judge to judge to judge?

What do you think?

MS. JOYNER: Your Honor, I'm not opposed to it. I haven't spoken to my client about it because it's not something that's ever been brought up to have the conversation. But, in theory, I'm not necessarily unopposed -- I mean opposed to it.

THE COURT: And, and I'm not saying I'm doing that. I'm just asking. I'm sure y'all have thought about it, and I'm sure, you know, there's reasons maybe why you haven't pulled the trigger so to speak on, on making that motion to do it. It just seems that, with all these abundantly complex issues and the litigation history involved in this case, as it gets closer and closer to, you know, we're at -- we're starting back jury trials, you know, as we get -- not civil yet. I think civil's probably gonna be first of the year honestly. I'm the chief administrative judge in my circuit, and I know that's what we're planning for.

Okay. But it's gonna be something you're gonna have to deal with. So, just think about it. I just -- I'm throwing

that out as an aside.

All right. Ms. Joyner, let me hear your reply then to Gibbs Motion to Dismiss.

MS. JOYNER: Yes, Your Honor.

May it please the Court.

Lindsay Joyner. I'm here on behalf of Samar Harake and Eurosa, Inc. And to go ahead and address some of the comments made by Mr. Dunlap, I would note that a Motion to Dismiss should be viewed in the light most favorable to the nonmoving party, and should not be granted if the facts alleged and inferences drawn therefrom would entitle a party to relief on any theory of the case.

And as to our negligent misrepresentation counterclaim, that's a counterclaim that's been there since 2017, and the, the Motion to Dismiss is -- essentially argues that we are saying that these are future representations and not -- that's not the case.

We're saying that Gibbs falsely made representations about the present state of his commitment at the time in which he was made understanding that he was not gonna go through with them as, as necessary. And, you know, to kind of explain that further, Gibbs' authorized agent, Jimmy Gibbs, made representations to various investors including the Harake Defendants, and that were false and related to his commitment at the period of time in which the agreements

were entered.

Now, in responding, Gibbs has filed a reply also to our counterclaims, and, in that reply, they say -- they don't say outright that these agreements didn't exist or that there weren't present -- they weren't existing in the present.

They actually admit -- so, for instance, as to Paragraphs 130 and 131 of our counterclaim, they admit that Gibbs agreed to form investment -- Gibbs Investment Holdings. That was a representation -- the representations made in forming Gibbs Investment Holdings go to our negligent misrepresentation claim. And then Gibbs refers back to its own Complaint for the particular terms. So, basically they're, they're saying they disagree about the particular terms.

The same with Paragraph 135 through 42 of our counterclaim and Paragraph 149. In each -- in responding to each of those paragraphs, Gibbs also admitted that agreements existed, and then it alleged that the description of the agreements would be better found in the Third Amended Complaint. And so, they agree that these representations about agreements were made. It's just a -- it's beyond whether it's future or present.

They don't allege that our, our -- or in their answer or in their reply, they don't allege that we have made --

that we're talking about the future and there's are talking about the present.

So, taking all these allegations in the light most favorable to the Harake Defendants, and given those admissions in the reply, the Harake Defendants have pled a sufficient cause of action for negligent misrepresentation.

And to go on about the fraudulent misrepresentation, it is true that we cite the Turner matter -- I mean the Turner v. Milliman case, and, in that case, it does say that, if statements are, are, you know, if -- should the Court think that negligent misrepresentation is the wrong title for the particular claim, then it would still be fraudulent misrepresentation because Gibbs knowingly made these untruthful representations about the amount of capital it would provide at the time that it made those original representations, and we allege that in Paragraph 180 of our counterclaim.

So, given that, we believe that our negligent misrepresentation claim passes the, the 12(b)(6) bar, and I would note that the case that they cite related to the negligent misrepresentation claim is Fields v. Melrose Limited Partnership. That case is distinguishable from this one.

There the allegations were that the Melrose Group represented that it would sell future memberships at higher

prices, and that's not what we're talking about here. There have been ten of thousands of pages of, of documents produced in this litigation where they are realtime agreements and representations being made by Gibbs about how much money it has put in or that it believes it will put in and getting other people to agree at that time.

So, those are present representations, and I would ask Your Honor that, you know, should you believe that this claim needs to be revised to change the name or amended to, to state present in, in the actual counterclaim allegations that we would request that we be able to do that under Rule 15 rather than just entering the dismissal order directly.

And then moving onto the second counterclaim for tortuous interference, in that claim, I, I would note there are a few things that were said. First, I'll address the agreement on the motion to strike that, that was discussed.

When Kevin and I met in July, we had taken four depositions in I think three days. It was a lot going on. At the end of the depositions there had been a time where his client refused to answer a question, and we kept pushing, and he would refuse to -- he kept refusing to answer. I gave that instruction because the questions from Kevin kept following up.

The original discussion I allowed my client to testify to. But when it was getting to work product and attorney

client privilege, despite Kevin saying he wasn't looking for those communications, I instructed him not to answer.

The conversation that was had was that we would tell the other side if that person needed to move to -- for a protective order. That never came.

So, yes, while I received this memo or the, the motion, it wasn't something where I had been thinking about that for the past month and didn't make a motion for protective order. That was certainly not the case. There's been a bunch going on both in this case and other cases. So, if -- that was not something that, you know, he didn't ever indicate to me that I needed to make that motion.

Further, that's not a basis at -- for a motion to strike. The cases cited for motions to strike by Gibbs are not on point.

The first one, Tuttero verse (sic) Turner, that's about irrelevant issues in a particular complaint, and striking, striking allegations based -- that are irrelevant. That is not at issue in this particular case.

And, secondly, the one, Robinson versus Code, that notes that when a motion to strike is used to challenge the sufficiency of a pleading, that it's suppose to be that as a Rule 12(b)(6) motion and not as a Rule 12 motion or 12(f) motion. And so we don't believe there's any basis to strike that.

In terms of the 12(b)(6), there are multiple cases in South Carolina that state that just because there's a label on a particular cause of action doesn't mean that it, it should be dismissed, that a claim should be outright dismissed. And also, that a particular claim is not formally recognized, it's within the discretion of the Court whether to let it go. It doesn't mean an automatic dismissal, and, and those we cite in our brief.

But, you know, also I would note that Rule 8(f) states that all pleadings shall be so construed as to do substantial justice to all parties, and Crandall v. Navistar case found that intentional interference with prospective economic advantage has also been labeled as intentional interference with contractural relations.

So, in this case -- and that is then also followed up by United Educational Distributors versus Educational Testing, Wellin v. Wellin, which I was on the losing end of, and, and the, the claim was construed as intentional interference with contract -- prospective contractural relations, and in the Williamson v. Bermuda Run Investor Development Group case, it -- that particular case reversed a master in equity's finding that a -- that the defendant was lied, or, well, the counterclaim defendant, was liable for tortuous interference with economic relations, and that was related to -- and, and they analyzed the claim as

tortuous interference with contract.

And so that -- you know, and they, they can be used interchangeably here. The Harake Defendants have met the elements for tortuous interference with contractual relations.

We allege, in Paragraphs 192, 195, and 196 of our counterclaim---

THE COURT: Wait a minute. That met it on your argument based upon a, a motion to dismiss analysis.

You're saying there's enough, there's enough facts pled in your counterclaim to support a motion, a 12(b)(6) motion?

That's a -- is that what you're saying?

MS. JOYNER: To defeat the 12(b)(6) motion, yes, sir---

THE COURT: All right.

MS. JOYNER: ---Your Honor.

Yes, because the plaintiff -- the facts have to be construed in my favor in this motion.

THE COURT: Right.

MS. JOYNER: And, and we plead that in 190 -- that in 192, 195, and 196 that gives us the agreement that we've alleged the existence of a contract of which Gibbs was aware that it was suppose to invest a million dollars satisfying the first two elements of the contractual relations interference claim, and then, you know, we allege the remaining elements as well in Counterclaim Paragraphs 193,

194, 197, and 198, and then we allege the damages resulting therefrom in 199 through 204.

THE COURT: All right.

MS. JOYNER: So, those have been met.

And in terms of the deposition related to the new counterclaim, yes, I would think that my client would be able to be deposed on that. But it would be a limited situation. It's not just reopening the deposition to talk about whatever is at issue in, in the, the brief that we have in the other motion. I mean there are additional issues in that motion that are not present related to this particular counterclaim.

THE COURT: Yeah. But that's really not before me---

MS. JOYNER: Correct.

THE COURT: ---whether or not this deposition is gonna happen. It's -- the only issue before me is whether or not the cause of action remains or not, and, of course, if it does remain and you don't agree to -- for him to be deposed, then obviously you're gonna get---

MS. JOYNER: Then---

THE COURT: ---a motion filed on the other end and we---

MS. JOYNER: Right.

THE COURT: ---will rock and roll that way.

All right. Anything else on your side before I come

back briefly to Mr. Dunlap on his motions to dismiss?

MS. JOYNER: No, Your Honor.

THE COURT: All right.

MS. JOYNER: Thank you.

THE COURT: Mr. Dunlap, I'm coming back to you.

MR. DUNLAP: Thank you, Your Honor. I'll be very brief.

Can you hear me okay?

THE COURT: I can.

MR. DUNLAP: Okay. Good.

All right. So, I would just respectfully submit to the Court that what the Court addresses today is what they provided to the Court. What they provided to the Court is plainly a claim called tortuous interference with economic advantage. That claim should be dismissed I would respectfully submit.

And, Your Honor, what they're doing is they're trying to slide this over into a claim called intentional interference, and what they pled was just tortuous interference.

Now, why did that happen?

Why did they do that?

The reason is because they recognize that there is a mens rea element of intentional interference that heightens what has to be shown.

And so what I would respectfully submit to the Court is that the proper thing to do is to dismiss the claim that is in front of the Court. Trying to shift this over to a fraud claim, when, in this case, Your Honor, there, there have -- we, we have produced 85 plus banker boxes of documents.

You know, I, in my mind, I'm, I'm older, and so, in my mind, I have to kind of equate it to bankers boxes. I can't do it with the electronic angle. And, and so, huge document production. No question about it.

And, in this situation, we're three years and four or five months into the case, and, for the first time in the entire history of this case, have I ever heard them use the word fraud about my client. And they drafted this pleading. They had a chance to do it over. They had a chance to, to assert their new claims, and they did not assert a fraud claim.

And so what I would say to you is that it would be -- it's improper of them to ask the Court to be allowed to change the name over to a fraud claim, which is a brand new claim that we've never had before in the case.

So, end of the day, simply put, I would just say if you rule based on what they put in the pleading, this claim should be dismissed, and, and should not be allowed to go forward for that reason.

On, on, the other issue, Your Honor, on the negligent

misrepresentation claim, very briefly, you know, we just believe, the way they worded the, the pleading, is that it's all about future activity, what we will do, hope, hope will happen, promise to have happen, and on and on and on, and we just think that's inadequate under the case law, and that there's authority to dismiss claims under 12(b)(6) for that reason, and that's all I have.

THE COURT: All right. I'm gonna respectfully deny your 12(b)(6) motion as to the negligent misrepresentation claim. I am, however, gonna grant your Motion to Dismiss on the Tortuous Interference of Economic Interest Claim.

All right.

MR. DUNLAP: Okay. Thank you, Your Honor.

THE COURT: Prepare an Order for me on both of those motions.

All right. What other motions we got?

MS. JOYNER: Your Honor, we have my Motion to Dismiss. I am not on mute.

Okay. Just making sure. All of a sudden I looked down. That's okay.

THE COURT: I'm gonna mute Mr. Dunlap. For -- we got background noise from him for some reason. Hang on a second.

All right. You're, you're muted, Mr. Dunlap.

Ms. Joyner, you're ready to roll.

MS. JOYNER: Yes, Your Honor.

In this case we brought two motions to dismiss. The first motion is as to Katherine Harake, who is the wife of Sam Harake, and the second is as to the Harake Defendants, which would be Sam Harake and Eurosa, Inc.

I am gonna argue them together since the motion as to Sam Harake and Eurosa, Inc. there's a crossover with what's pled against Katherine, and that's -- it's a more limited motion.

THE COURT: All right. But let me ask you this.

Are these, are these as to all claims against them or any specific cause of action?

MS. JOYNER: Sure. So, they are seven claims against Katherine. So, that's all claims as to Katherine Harake. It's only as to one claim against the Harake Defendants --

THE COURT: Okay.

MS. JOYNER: -- for 12(b)(6).

Now, there's also grounds under 12(b)(2) related to Katherine Harake and, and then 12(b)(3) as to both -- to all the Defendants. But 12(b)(2), which is personal jurisdiction, will be where I start with Katherine unless you prefer I go a different direction for you.

THE COURT: Well, I get -- you know, before -- I, I mean you see what I kind of did on the 12(b)(6) previous thing. I mean I -- you, you know, using your same argument

kind of against you here before you even start. I mean if it's a well pled complaint, a well pled cause of action, I'm kind of reluctant under, you know, the four corners of the document, you know, to, to dismiss something. So, I, I don't know what I'm gonna do on a 12(b)(6) analysis.

But that's fine. Let's go ahead and start on the, on the personal jurisdiction stuff.

MS. JOYNER: Yes, Your Honor.

For -- Gibbs International has not made a showing of general or specific jurisdiction over Katherine Harake who does not have sufficient minimum contacts to justify having her in our Court's jurisdiction. This Court lacks jurisdiction over her, and Plaintiff has not pleaded and can not show that the disputes complain -- complained of in this case arise from Katherine Harake's activities, and that -- since she has little to no contact with South Carolina. Unfortunately, it appears that Gibbs has sought to bring Katherine into this case to leverage its position against the Harake Defendants.

As discussed in our briefing and -- before you, the allegations against Katherine are short on facts and long on assumptions and conclusions. She has played no role in the company and -- well, the company's at issue generally and Defendant Eurosa specifically. She has not contracted with entities to provide services, and has played no role in the

daily operations.

So, we also attached, and I believe Gibbs attached as well in its Memo in Opposition, a brief bit of her testimony. The purpose of that is for -- is not to change this into a Rule 56 motion, but under Rule 12(b)(2), you're allowed to use testimony related to the contacts with South Carolina, which is the purpose that we did.

And the Court -- it's well settled in South Carolina that a party seeking to invoke personal jurisdiction via our Long-arm Statute bears the burden of proving personal jurisdiction, and the question of personal jurisdiction over a nonresident defendant is one that has to be resolved by the facts of the case.

And so due process requires that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within South Carolina. Here that's not the case. Exercise a personal jurisdiction wouldn't conform with due process because she didn't purposely avail herself of the privilege of activities in South Carolina.

She was not a resident of South Carolina and she only lived here during the school year while her child was in school here. They maintained their home in New Hampshire, which is in her testimony, and---

THE COURT: Let me stop you right there.

Now, Mr. Dunlap, do you have anything on the issue of

personal jurisdiction different since we're kind of piecemealing it right now?

I mean what's your position on personal jurisdiction of Katherine Harake?

MR. DUNLAP: Yes, sir, if you don't mind, I'll, I'll go ahead. I, I think it would be a lot easier to do it, you know, right now. So --.

THE COURT: Yeah, that's kind of how I want to do it.

MR. DUNLAP: Yes, sir.

Thank you, Your Honor.

So, Your Honor, it is inaccurate to say that Katherine Harake played no role and let me explain why I believe that.

In this situation, basically out of the blocks we served some written discovery to get the bank records because we believe that, you know, untoward activity had taken place with our money, and, and we knew that 1.2 plus million-dollars had been transferred from my client into an account that was a, a corporate account on which Mr. Harake was the owner of the company basically.

And, and so they objected to all of that, and eventually, over time, they produced a bunch of redacted records, and we filed another motion, and then an Order was entered where all of those redactions were removed.

Now, what we saw behind those redactions is that over $500,000 was transferred from -- of Gibbs money. Gibbs

money went from its account to the Harake corporate account, and then Mr. Harake, in turn, transferred over $500,000 to his wife, Katherine Harake, to her savings account. She then transferred it from her savings account into her personal account and spent the money.

Okay. And so -- and, and when this was happening, when this was taking place, they were living in Spartanburg, South Carolina on Main Street, and---

THE COURT: So these are allegations that y'all've set forth that y'all've disputed going back and forth?

MR. DUNLAP: Correct.

THE COURT: All right. Let me stop you---

MS. JOYNER: And -- well---

THE COURT: ---stop you there.

Hang on. I'm coming back to you, Ms. Joyner.

All right. You're off.

You now go ahead.

MS. JOYNER: Okay. When, when you -- what was -- your last question was these are -- these are allegations that have been---

MR. DUNLAP: Allegations which are disputed.

MS. JOYNER: ---disputed going back and forth?

THE COURT: Okay.

MS. JOYNER: Well, that, that's not quite true about Katherine Harake.

So, Katherine Harake was originally brought into this litigation in I think May of 2017. So not the first iteration, but a later one before I was involved, and she was brought in under a totally different theory of liability. She was then voluntarily dismissed under that theory of liability because it was wrong, and, and had no basis. And so -- and then they wanted to keep doing discovery to kind of come back after her.

The subpoenas that were talked about were sent without copying me or my law partners, and that transpired into an entire thing that was very different from it's not just serving the document request and responding with all that. So, that, that part gets kind of glossed over, and those records -- I mean she wasn't a party when she was deposed.

So, that -- it's not that these allegations have gone back and forth. The big issue in this case is whether Gibbs' position is that he gave money for a certain purpose, and our position is that was not, that was not the purpose.

So, that -- those are the two positions. There's -- those -- Katherine Harake wasn't a part of these businesses. She only ever talked to Gibbs about personal stuff. She didn't talk to Gibbs being Jimmy Gibbs, the agent of Gibbs International.

And so, under Section 36, you know, South Carolina Code Section 36-2-802, she didn't have the enduring relationship

with the state. She lived here for a small period of time. And yes, she conducted daily activities while she was here. But that wasn't a -- that wasn't part of this litigation.

THE COURT: Well---

MS. JOYNER: You see what I'm saying, conducting activities?

THE COURT: I understand that's what you say. He says -- Mr. Dunlap says they uncovered evidence showing, you know, an extremely large amount of money transferred from -- you know, whether that's true or not, that's enough contacts for South Carolina to have personal jurisdiction over her.

So, I respectfully deny your 12(b)(2) motion.

All right. Move on to your next one.

MS. JOYNER: Okay. Related to our 12(b)(6) motion on the seven causes of action against Katherine Harake, they -- viewing the evidence in the light most favorable to the Plaintiff, I understand I'm on the opposite side this time, we still don't believe that they have stated enough to get by.

So, in terms of this -- to start with the aiding and abetting conversion claim, that's not a claim that has been recognized in South Carolina. I know that Mr. Dunlap cites other jurisdictions where it has. But it has not been recognized formally here.

I understand that it's within the Court's discretion.

But it's, in this situation, they have not pled sufficiently that, that it is a cause of action that should be permitted and that Katherine Harake would fall within that.

At -- the conversion claim is pled in the same cause of action. So, it has two titles. It says, you know, conversion as to both the Harake's, and then it also says aiding and betting conversion as to Katherine, and that, that conversion---

THE COURT: Is there an allegation -- let me interrupt. Is there an allegation of a civil conspiracy?

MS. JOYNER: Yes, sir.

THE COURT: Okay.

MS. JOYNER: And that's, that's the one that we considered to be duplicative because it is alleged -- I mean essentially the aiding and abetting conversion claim is -- seems to be a way to try to get around pleading the civil conspiracy because, as we'll talk about, we don't believe they sufficiently pled that claim, and that it's duplicative, and it can't be -- it has to be unique in order to be pled with other causes of action.

THE COURT: Correct.

MS. JOYNER: And so we believe that, that aiding and betting fails because it's not recognized, and that the conversion fails because she was not, she being Katherine Harake, wasn't -- she didn't owe Gibbs any specific duty to

begin with, and she didn't owe Gibbs -- to have conversion, money -- you have to have an obligation on the defendant to deliver a specific, identifiable amount to the plaintiff, and she didn't have that. There was no -- there's no obligation on her to give Gibbs anything.

And so we would believe that the aiding and abetting conversion, and the conversion, so the sixth claim for relief, would fail as to Katherine, and then we also believe that, that Plaintiff has failed to allege a valid cause of action for unfair and deceptive trade practices.

So, Katherine Harake is not subject to the SCUTPA for lack of better---

THE COURT: SCUTPA.

MS. JOYNER: For -- so that we're not so farther into --.

THE COURT: I call it, I call it SCUTPA.

MS. JOYNER: Okay. I'll go SCUTPA.

On SCUTPA, she's not a person as defined by the act. And so we -- a person includes -- well, includes natural persons. But then you have to be controlling, and she's not in a controlling position. She's not one who makes or formulates or directs corporate policy or is deeply involved in the important affairs of the corporation.

In fact, she does, as, as the testimony for the 12(b)(2) noted, I mean she doesn't -- didn't review any

documents related to Eurosa. There is testimony she didn't ever get the bank statements. She doesn't have -- she had no idea what that was about.

This -- the money she received was like when someone works at home and their spouse gives them, for lack of a better term, an allowance or an amount of money for a certain period of time. That is the type of thing that she was getting.

THE COURT: Okay. I understand your argument on SCUTPA. You can move on to your next one.

MS. JOYNER: Okay. The next one is civil conspiracy.

THE COURT: And let's remember -- hang on a second.

Let's remember. I'm gonna, I'm gonna read all this stuff y'all talking about. I'm gonna, I'm gonna take this stuff under advisement cause this -- the other one I -- you know, I understood exactly where y'all were going on. This one I'm gonna take under advisement, and I'm gonna -- the briefs that y'all are talking about, I haven't been able to review those on the public index. I think they were just recently filed.

I do want y'all to forward these to me and my law clerk by email just separately rather than putting them on the public index cause I'm gonna take all this under advisement before I make a decision.

So, just hit the high points for me cause I, I can

promise you I'm gonna read through everything.

MS. JOYNER: Okay. And just so that you know, your law clerk, both Kevin and I sent them to your law clerk like in -- probably an hour or so before the hearing.

THE COURT: Yeah, he just texted me. He said I already---

MS. JOYNER: Okay.

THE COURT: He said I already have them.

MS. JOYNER: Okay.

THE COURT: So there you go.

MS. JOYNER: I'm happy to resend it to your email address if you want.

THE COURT: That -- that's fine. He, he -- yeah, we'll use his. So, that -- anyway, go ahead.

MS. JOYNER: Sure.

So, with regard to civil conspiracy since that's both as to the Harake Defendants, Samar Harake and Eurosa as well as Katherine, our, our position there is that Plaintiff hasn't pled facts in furtherance of the conspiracy that are separate and independent from the wrongful acts alleged, and that's in Cricket Core Ventures, LLC versus Gilland, and also Hackworth v. Greywood Et Hammett, and Todd v. SC Farm Bureau, that the allegations simply incorporate by reference, the facts pled in the conversion claim, and they don't assert overt acts.

I know that Mr. Dunlap says that they assert overt acts because it was -- because -- he says that it went through -- they specifically designed for it to go through Katherine's bank accounts. But that -- those allegations were elsewhere about Katherine's bank accounts and are being designed. So, that's not unique as to this claim, and the Third Amended Complaint can't be reasonably construed to say that the purpose was just to endure the Plaintiff. I mean the -- it has to be the primary purpose. And while they, you know, conclusionary, conclusorily (phonetic) argued that it was the primary purpose, they -- the primary purpose, as testified, is that it was to live life. I mean it -- that it -- she had no idea.

So -- and then the damages are not special damages. They're repackaged from the same funds that are sought elsewhere in the Complaint.

And then in terms of fraud, Katherine Harake did not make representations. So, fraud, as you know, has nine elements. You have to allege it with particularity. All of that part is in our brief.

Here Katherine makes no representations to Plaintiff. So, to have fraud, you have to have representation and its falsity. Her risk -- I haven't seen any case law that says her receipt of funds is somehow a representation to Plaintiff.

She can't be liable for fraud if she's never represented any facts to the Plaintiff, and the Third Amended Complaint attempts to tie her to an alleged fraud by saying that she aided and abetted Sam Harake and that also, which is that aiding and betting part of fraud should not be -- is not based in statutory or common law in South Carolina.

THE COURT: And that would almost be duplicative of the civil conspiracy allegation?

MS. JOYNER: Yes, sir.

THE COURT: All right.

MS. JOYNER: It would.

And it's Plaintiff's burden to prove fraud and misrepresentation by clear and convincing evidence. And as a matter of simple pleading, Gibbs has not stated that either cause of action with, with such particularity. And so they haven't alleged the material elements to meet the sufficiency for Katherine.

In terms of aiding and betting a breach of fiduciary duty, there -- as we cite in our brief that the gravamen of that claim is the Defendant's knowing participation in the fiduciary's breach. Plaintiff does conclusorily (phonetic) state those words in the complaint. But there's no specific facts from which it can be reasonably inferred that she knowingly participated, and, in fact, that's the opposite

of, of the case.

Let's see. They only allege really that she received money from her husband and that she used money. And so that -- that's not valid to state a cause of action.

They've -- the conversion we've already talked about.

In terms of an accounting, that's another claim against Katherine, and the accounting fails as a matter of law because they, they failed to allege facts to support that equitable remedy as -- and we cited Historic Charleston Holdings versus Mallon and Gestring versus Mary Lanning Memorial Hospital Association. And the -- Gibbs has failed to allege any reason why discovery would be insufficient here. I mean they have her bank records.

And so the accounting cause of action should be dismissed as to Katherine.

THE COURT: Okay. Does that cover for Katherine, the six?

That's six, right?

MS. JOYNER: Yes. So one more.

THE COURT: Oh, there's seven?

MS. JOYNER: Yeah, there is seven.

THE COURT: All right. Hit the seventh.

MS. JOYNER: Seven causes of action and a 12(b)(6) motion.

And the last one is that Gibbs has failed to allege a

valid cause of action for unjust enrichment quasi contract, implied contract, and quantum meruit. I mean that's how they phrase it. It's all of those things, and those equitable remedies that are generally available when there's no adequate remedy at law.

Gibbs has adequate remedies at law against the Harake Defendants, and doesn't need Katherine and doesn't need to -- and, and has not pled and can not show that these remedies are inadequate to address their issues such that the causes of action are necessary as to Katherine.

And to show unjust enrichment and quantum meruit, you have to show a benefit incurred by the Plaintiff upon the Defendant. Here it's that Plaintiff has shown, has shown that the benefit was conferred by Gibbs to the Harake Defendants. I mean to Eurosa specifically. But -- so there's not intent for it to go -- I mean the, the benefit to Katherine, it is not there.

And so Gibbs has also failed to show how Katherine realized any alleged benefit nor that it would be un -- inequitable for her to retain such benefit, and, you know, as noted throughout our memo, Gibbs is most alleging that Katherine received money, and, therefore, we would submit that, pursuant to Rule 12(b)(6), the claims against her should be dismissed, and then the civil conspiracy claim should be dismissed as to Sam Harake and Eurosa, Inc.

THE COURT: Did you want to argue the, the Sam and Eurosa anymore?

I understand that. I understand your argument on the civil conspiracy. I've had a couple of cases very similar, believe it or not, dealing with the civil conspiracy stuff.

So, any separate argument as to Sam and Eurosa that you wish to make now before I go back to Mr.---

MS. JOYNER: No, Your Honor. I would rest on our motion and the briefing prior in our brief.

THE COURT: All right.

MS. JOYNER: So, separate motion related to them and then the brief is as to both. So --.

THE COURT: So we got -- all right. So, for the, for the record, I denied your, your 12(2) as to jurisdiction for, for Katherine. But I'm -- I still have to make a decision on 12(b)(6) as to her, and the seven causes of action against her, and the 12(b)(6) as to the civil conspiracy cause of action for Eurosa and Sam Harake, correct?

MS. JOYNER: Yes, sir, Your Honor.

THE COURT: We are all on the same page.

All right. Sounds good.

All right. Mr. Dunlap, coming to you, yes, sir.

MR. DUNLAP: Hear me okay?

THE COURT: Yes, sir.

MR. DUNLAP: Okay. Good. Thank you.

So, I'll just dive right in. I'm gonna go through this quickly.

As to aiding and abetting, breach of fiduciary duty, which is something she dealt with towards the end, I'm gonna take them in the order that they were in the pleading, Your Honor.

THE COURT: Okay.

MR. DUNLAP: And so in the Third Amended Complaint, these are the facts that are required to be accepted as true:

Kay Harake knew or should have known or had constructive knowledge that the transfers were made to her account and she did, in fact, use the money. Hundreds of thousands of dollars of Gibbs money was improperly transferred from Eurosa's accounts to Kay Harake's personal savings account.

So, not only does Gibbs allege that she knew about improper transfers of money to her account, it alleges she concealed the money that was being misappropriated from Gibbs. She knowingly transferred the money to her personal checking account, made spending decisions, wrote the checks, initiated the transfers, and, and actually was spending the mis, the misappropriated funds of Gibbs, and she -- her, her accounts gave the Harake Defendants the means to transfer

money out of their accounts and conceal the improper movement and use of the funds.

So, she knowingly and, and in -- allowed and accepted the funds into her account, and, and then used it, and we believe this is more than adequate to plead under 12(b)(6).

And as to aiding and abetting conversions, as -- and the conversion claim, they're, they're really largely the same points. But I would point out to the Court that anytime they argue that South Carolina has not recognized an aiding and abetting claim -- civil claim for some cause of action, South Caroline Courts have generally recognized civil liability from aiding and abetting a tortuous act in concert with another as described in the restatement of torts Section 80 -- 876(B). And in the Michelin case in South Carolina, it noted that the Courts do generally look to the statement for guidance when considering civil aiding and abetting liability.

So, there is authority for all this. I'm not gonna drag you through any more of the cases, but they're, they're in the brief. And, in here, we have alleged that the Harake Defendants improperly took the funds from Gibbs, and they were provided to her, transferred to her account, and she used it for unauthorized purposes. And so we go through the exact same litany of facts again there.

As to the Unfair Trade Practices Act claim, we, we

believe they're wrong and -- legally. And so it sounds like they're saying that an individual can't do this, can't be -- you walk if you're an individual, and, and that's not true.

The Act provides "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of another person of an unfair or deceptive method, act, or practice may bring an action to recover actual damages." And so they suggest that "persons have to be limited to the controlling person of a corporation" and that's not true.

In the McCloud case that we cite makes it clear that's not true, and, and, in fact, South Carolina's actually held the exact opposite, and ruled that the plain language provides that any person is liable for damages resulting from their use of employment of unfair trade practices. And so I won't keep dragging you through the brief on that point. But I did want to hit that highlight.

On fraud, you know, in, in what they filed originally, they said that it must be pled with particularity, but didn't state which element we allegedly omitted. We've gone through all nine -- we've quoted the nine elements in our brief, and they're right there as pretty as you please in our pleading. And she did engage in fraudulent conduct by misappropriating funds here. She was a part of this. And she did conceal facts relating to the misappropriation of

funds. Her knowledge and her reckless disregard of the truth or falsity of the representation is pled and we go right through the rest of the elements.

On civil conspiracy, you know the elements. I'm not gonna read them to you. But they, they say, as to this claim, that we have not adequately pled this, and we have pled in this case that she conspired and unauthorized -- unlawfully agreed to deplete Gibbs funds from the account with the primary purpose or object to impair Plaintiff financially.

Well, we know that, that, that, that this same evidence and what they're all about in terms of the kind of claims that they're brining, and, under the case law, we believe that is enough. There are other reasons. They're cited in here. But I know you're gonna read it. So, I'm not gonna drag you through it.

Conversion, we ran through a lot of the same facts again. You know, they cite a case about the lawful use of a bank paying overdraft fees on an account holding the funds of multiple parties. And that is not what we're dealing with here at all, and South Carolina has specifically held that money may be the subject of conversion if it is capable of being identified. There may be conversion to determine the sums even though the specific coins and bills are not identified.

She had no legal right to use Gibbs money and she did. And accepting all of the facts that we have alleged, we believe that we easily clear the 12(b)(6) hurdle.

I think unjust enrichment, quasi contract, implied contract, and quantum meruit, you know, they argue that Gibbs did not confer a benefit. Well, it's over $500,000 that they spend and use of Gibbs money, and that's required to be accepted as a true fact, and there's a, a case that we found out of Maryland, Your Honor, that found that a -- even if a spouse doesn't know, that a spouse's lack of knowledge of the source of the ill gotten funds does not preclude a claim for unjust enrichment. And, in that case, the defendant's husband stole more than one and a half million-dollars from Bank of America through the unauthorized sales of securities, of bank customers, and eventually routed the ill gotten funds into an account that he jointly held with this wife where she misappropriated the money that were co-mingled with the family's other earnings, and it just goes on and on and on.

So, you know, at, at the end of the day, they're not many times that a lawyer gets to recite the facts, and they are required to all be accepted as true, and, as, as Lindsay pointed out at the very first motion, that's the box we're in right now, and we believe we've done more than enough to survive the 12(b)(6).

Thank you for your consideration.

THE COURT: Yes, sir, Mr. Dunlap.

Ms. Joyner, coming back to you for any further argument.

As I said, of course, I'm gonna read everything that y'all've briefed. I'm gonna look over everything before I make a ruling on this.

MS. JOYNER: Yes, Your Honor. Just briefly.

I, I would say that Maryland law is not necessarily South Carolina law, and I would encourage you to look at the cases that we have cited related to unjust enrichment as well.

So, other than that, I believe it's all in the briefs and the motions, Your Honor.

THE COURT: All right. Anything else, Mr. Dunlap, on your behalf?

MR. DUNLAP: Thank you for your time, Your Honor.

THE COURT: Not a problem.

All right. Here's what's gonna happen. I'm gonna take it under advisement. I want to make sure we're all clear on everything.

I've, I've instructed the Clerk of Court, the Deputy Clerk of Court who's doing -- who does the civil in Spartanburg to do a form, a Form 4 Order for one of the other discovery motions letting -- stating that they're

resolved and a more formal order will be forthcoming from y'all.

Okay. Now, for the three motions I've heard today, I denied the Motion to Dismiss for the Negligent Misrepresentation Counterclaim. I granted the Motion to Dismiss for the Tortuous Interference with Economic Interest Counterclaim. I denied the 12(b)(2), lack of personal jurisdiction for Katherine Harake, and I'm taking the remaining matters under advisement dealing with the 12(b)(6) for Katherine Harake, Sam Harake, Eurosa.

Is that correct?

MR. DUNLAP: Yes, Your Honor.

MS. JOYNER: Yes, Your Honor.

THE COURT: All right. Thank you very much. I will be in touch, me and my law clerk, with my decision just as soon as I have it made.

Okay. Y'all have a great day.

MS. JOYNER: Thank you.

MR. DUNLAP: You too.

MS. JOYNER: You too.

THE COURT: All right. That concludes, that concludes this hearing.

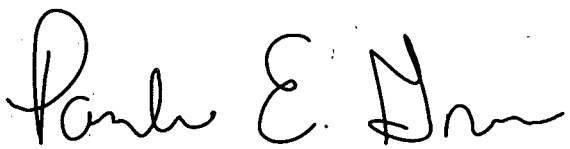
* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 22nd day of September, 2020.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 6th, 2020



PAMELA E. GREEN, Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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July 9, 2021