THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2020-001642

Gibbs International, Inc., Respondent,

v.

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

FINAL BRIEF OF APPELLANTS SARMAD HARAKE AND EUROSA, INC.

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STATEMENT OF THE CASE

This matter involves complex allegations and both corporate and individual parties, 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 first discussed in 2015. Respondent Gibbs International, Inc. ("Respondent" or "Gibbs") essentially alleges that Appellants Sarmad Harake ("Harake") and Eurosa, Inc. ("Eurosa")(collectively, "Appellants") undertook certain responsibilities relative to multiple investments and were the sole cause of any investment failures, giving rise to an obligation to return all monies paid to Eurosa as well as liability for damages tied to, among other things, the investments made by Respondent – even including investments made prior to and after Respondent's business dealings with Appellants. Appellants deny Respondent's allegations that they were solely responsible for any investment failure and deny they owe Respondent any damages. Rather, Appellants allege Respondent did not fulfill its promises, and those failures caused Appellants' damage.

Respondent initially brought this lawsuit on March 7, 2017, but it was amended twice within the first few months, with the Second Amended Complaint filed on June 9, 2017. An entry of default was entered against, among other parties, Harake, Eurosa, and their co-defendant Katherine Harake on July 17, 2017; however, Harake, Eurosa, and Katherine Harake timely answered the Second Amended Complaint on August 17, 2017, and the entry of default was set aside by Order of the Circuit Court on December 21, 2017.

The Second Amended Complaint, which spanned some thirty pages, alleged causes of action for: (1) breach of a contract between Harake and Eurosa on one hand and Gibbs 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. (Am. R. pp. 086-114, 2d Am. Complaint, ¶¶ 11-110). When Appellants timely answered the Second Amended Complaint, they also alleged counterclaims for breach of contract, negligent misrepresentation, and unjust enrichment. (Am. R. pp. 134-143, Answer and Counterclaims, ¶¶ 124-176). Katherine Harake was voluntarily dismissed from this litigation on June 1, 2018.[1] Collectively since January 2018, the parties have produced tens of thousands of pages of documents in this litigation and taken more than 10 depositions.

Gibbs filed its Third Amended Complaint on August 3, 2020, but did not renew the derivative cause of action in its previous Complaints or the breach of fiduciary duty cause of action as to certain prior defendants, leaving only Harake, Eurosa, and Katherine Harake as defendants in this litigation. (Am. R. p. 285, 3d Am. Complaint, p.1). The Third Amended Complaint contains causes of action for: (1) breach of contract and declaratory judgment, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) accounting, (5) invasion of privacy/wrongful intrusion, (6) conversion, (7) unfair and deceptive trade practices, (8) fraud, (9) civil conspiracy, (10) unjust enrichment/quasi contract/implied contract/quantum meruit, and (11) piercing the corporate veil. (Am. R. pp. 286-312, 3d Am. Complaint, ¶¶ 6-119). On August 24, 2020, Appellants 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"). In their Answer and Amended Counterclaims, Appellants asserted four

[1] Katherine Harake was brought back into this litigation as part of Gibbs' Third Amended Complaint in 2020 pursuant to different claims than were originally brought against her; although some of those claims were dismissed, she is not a party to this appeal.

counterclaims, including (1) breach of contract, (2) negligent misrepresentation, (3) unjust enrichment, and (4) tortious interference with economic interest (the "fourth counterclaim"). (Am. R. pp. 333-348, Answer and Amended Counterclaims, ¶¶ 124-206).

Gibbs filed a "Motion to Dismiss and Strike Counterclaims of Sarmad Harake and Eurosa, Inc." ("Gibbs' Motion") on August 28, 2020, asserting Appellants failed to state facts sufficient to show a claim of negligent misrepresentation and that Appellants' fourth counterclaim for tortious interference with economic advantage is not a claim recognized by South Carolina law. (Am. R. p. 351, Gibbs' Motion, p. 2; *see also* Am. R. pp. 445-446, Gibbs Memo. in Supp., pp. 3-4). Gibbs' Motion further sought to strike "the intentional interference with prospective contractual relations claim" that Harake discussed during his deposition. Following several extension requests, Gibbs filed its Reply to Harake Defendants' Amended Counterclaims on September 18, 2020, denying some allegations and admitting some allegations in the Answer and Amended Counterclaims. (Am. R. pp. 354-363, Reply, ¶¶ 5-86).

Both sides filed memoranda in support or opposition of their respective positions as to Gibbs' Motion. As the filing of Gibbs' supporting memorandum was very close in time to the hearing (approximately 90 minutes before the hearing), Appellants had already filed their opposition memorandum by the time they received Gibbs' supporting memorandum. Gibbs' supporting memorandum contained a new ground for relief that was not stated in Gibbs' Motion: It requested Appellants' fourth counterclaim for tortious interference with economic interest be struck pursuant to Rule 37, SCRCP, but it did so without having conferred with counsel pursuant to Rule 11, SCRCP, or certifying that such conference would serve no useful purpose. (Am. R. pp. 446-448, Gibbs Memo.

in Supp., pp. 4-6). Further, Gibbs' supporting memorandum did not identify an order that it believed Appellants had violated to justify Gibbs' request to strike a cause of action as a sanction, (Am. R. pp. 446-448, Gibbs Memo. in Supp., pp. 4-6), which is a requirement of Rule 37 – the rule Gibbs invoked.

Due to COVID-19 conditions, a hearing on Gibbs' Motion, as well as other motions in this matter, was held via WebEx on September 22, 2020. On September 25, 2020, the Circuit Court entered a Form 4 Order ("September 25 Order"), ruling in part, that Gibbs' Motion should be denied as to Appellants' counterclaim of negligent misrepresentation and should be granted as to Appellants' counterclaim of tortious interference with economic advantage. The September 25 Order directed the respective parties to draft proposed orders "using language consistent with" their respective arguments by November 1, 2020. (Am. R. p. 016, September 25 Order, p. 2).

Following receipt of the September 25 Order, Appellants timely filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 5, 2020 ("Motion to Alter or Amend"). Following the proposed order submissions of the parties, the Circuit Court instructed counsel on November 17, 2020 that because Appellants' counsel had already filed a motion pursuant to Rule 59(e), SCRCP, "a new one is not necessary." (Am. R. p. 021, November 17, 2020 Email).

The Circuit Court entered its final Order on November 18, 2020 ("November 18 Order"). The November 18 Order contained the Circuit Court's rulings on multiple motions. In this appeal, however, Appellants only seek review of the portion of the November 18 Order that ruled on Appellants' fourth counterclaim. (Am. R. pp. 024-27, 34-37, 51, November 18 Order, pp. 1-4, 11-14, 28). Thereafter, the Circuit Court denied

Appellants' Motion to Alter or Amend on November 30, 2020 ("November 30 Order") without additional briefing or argument. (Am. R. p. 053, November 30 Order, p. 1). Appellants timely filed a Notice of Appeal as to the Circuit Court's Orders on December 17, 2020.

STATEMENT OF FACTS

The Order on appeal concerns the Circuit Court's ruling on Gibbs' Motion to Dismiss or to Strike that dismissed Appellants' fourth counterclaim. Pursuant to the applicable standard for a Rule 12(b)(6), SCRCP, motion, the facts alleged by Appellants in its Answer and Amended Counterclaims – including those alleged with respect to the fourth counterclaim – must be viewed as true, both by the Circuit Court in the first instance and on review by this Court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007).

Appellants' Answer and Amended Counterclaims

Appellants alleged more than thirty (30) paragraphs of background information in addition to claim-specific allegations supporting the four counterclaims they pled. (Am. R. pp. 334-342, Answer and Amended Counterclaims, ¶¶ 128-160).[2] As this appeal relates only to Appellants' fourth counterclaim of tortious interference with economic interest, the facts discussed herein are those alleged in relation to that cause of action.

Appellants alleged that around June 1, 2015, Appellants, through Eurosa, began

[2] Additionally, each of the counterclaims included an incorporation paragraph, restating Appellants' previous allegations. (Am. R. pp. 342-346, Answer and Amended Counterclaims, ¶¶ 161, 168, 182, and 191). The remaining paragraphs make up each of the four counterclaims, specifically (1) breach of contract (Am. R. pp. 342-343, Answer and Amended Counterclaims, ¶¶ 161-167), (2) negligent misrepresentation (Am. R. pp. 343-345, Answer and Amended Counterclaims, ¶¶ 168-181), (3) unjust enrichment (Am. R. pp. 345-346, Answer and Amended Counterclaims, ¶¶ 182-190), and (4) tortious interference with economic interest (Am. R. pp. 346-348, Answer and Amended Counterclaims, ¶¶ 191-204).

doing business with Respondent after a handshake with Respondent's President and CEO, Jimmy I. Gibbs, and as part of this agreement, they agreed to create a limited liability company, Gibbs Investment Holdings ("GIH"), as a vehicle to work together on certain investment projects and under certain revenue sharing terms. (Am. R. p. 334, Answer and Amended Counterclaims, ¶¶ 128-131). However, an operating agreement for GIH was never executed by Gibbs. (Am. R. p. 335, Answer and Amended Counterclaims, ¶ 134).

As of June 2016, the parties further agreed that Harake would receive a monthly draw of approximately Thirty-Three Thousand and No/100 Dollars ($33,000) from GIH, which would count as part of Respondent's investment in GIH. (Am. R. pp. 334-335, Answer and Amended Counterclaims, ¶ 133). As of August 5, 2016, Harake, on behalf of Eurosa, and Jimmy I. Gibbs, on behalf of Respondent, signed a Memorandum of Agreement ("MOA") providing their agreement would be reevaluated on or before February 5, 2017. (Am. R. p. 339, Answer and Amended Counterclaims, ¶ 143). The MOA provided that GIH would be owned in equal shares by the two sides, would not own any assets, would be managed by Harake, and would consist of unanimously chosen investment projects. (Am. R. p. 339, Answer and Amended Counterclaims, ¶ 144). The MOA also provided that project and investment ownership would be divided equally and that Respondent would provide Three Million Two Hundred Thousand And No/100 Dollars ($3,200,000.00) in "cash to fully fund agreed investment projects." (Am. R. p. 339, Answer and Amended Counterclaims, ¶¶ 145-146).

Additionally, in July 2016, Respondent agreed to certain obligations related to Paysend Processing, Inc. ("Paysend Processing"), which included providing $1 million in

investment money as long as it received money back during the second capital raise. (Am. R. p. 340, Answer and Amended Counterclaims, ¶ 149). Pursuant to an agreement between Eurosa, Respondent, and a third party, Eurosa owned a 13% interest in Paysend Processing based on a valuation of $27 million. (Am. R. p. 340, Answer and Amended Counterclaims, ¶ 150). As of September 2016, Jimmy I. Gibbs on behalf of Respondent insisted that the $33,000 draw promised to Harake from GIH should instead be drawn from Paysend Processing; however, Respondent refused to make any investment over $250,000 and refused to be bought out by the other investor. (Am. R. pp. 340-341, Answer and Amended Counterclaims, ¶¶ 151-152, 155).

At the time, Harake had acquired a company in the United Kingdom which changed its name to Paysend PLC ("Paysend UK"), and Respondent refused to allow the investment in Paysend Processing to be transferred to Paysend UK. (Am. R. pp. 340-341, 347, Answer and Amended Counterclaims, ¶¶ 153, 155, 197-198). Respondent knew Harake had acquired 100% ownership interest of Paysend UK and that Paysend UK was going to continue to raise capital. (Am. R. p. 347, Answer and Amended Counterclaims, ¶¶ 195-196). Yet, Respondent unjustifiably refused to be bought out or to roll Paysend Processing into Paysend UK. (Am. R. p. 348, Answer and Amended Counterclaims, ¶ 202). As a result of Respondents' unjustified refusal: (1) Appellants were forced to purchase the other investor's shares in Paysend Processing; (2) Appellants were forced to pay for expenses incurred by that investor; and (3) Harake was first diluted and then forced to sell his shares in Paysend UK, causing him damages related thereto. (Am. R. pp. 341-342, Answer and Amended Counterclaims, ¶¶ 155-160).

Gibbs' Motion to Dismiss

Gibbs' Motion argued that Appellants' fourth counterclaim for "tortious interference with economic advantage" should be dismissed pursuant to Rules 12(b)(6) and 12(f), SCRCP, because the "claim does not exist under South Carolina law" and past attempts to bring tortious interference claims resulted in treatment of the claim as one for intentional interference with contractual relations. (Am. R. pp. 350-351, Gibbs' Motion, pp. 1-2). Gibbs' Motion further argued that the claim should be struck because Harake was aware of the potential claim when he began to testify about it during his deposition (and was instructed not to answer) but only added it after Gibbs filed its Third Amended Complaint. (Am. R. p. 352, Gibbs' Motion, p. 3). In Gibbs' supporting memorandum – filed 90 minutes before the hearing –Gibbs raised an entirely new ground for relief that was not stated in its Motion, *to wit*: Gibbs claimed the fourth counterclaim for tortious interference with economic interest also should be struck pursuant to Rule 37, SCRCP. (Am. R. p. 443, Gibbs Memo. in Supp., p. 4). This new, surprise ground for dismissal violated Rule 11, SCRCP, as Gibbs never conferred with counsel or certified that such conference would serve no useful purpose, as that rule requires. Gibbs argued that striking the fourth counterclaim was appropriate because discovery had been withheld, but Gibbs identified no order it believed Appellants had violated that warranted sanctions pursuant to Rule 37. (Am. R. pp. 446-448, Gibbs Memo. in Supp., pp. 4-6).

Deposition Testimony of Harake

The reopened deposition of Harake (to which Gibbs referred in its supporting memorandum) took place on July 25, 2019, over a year prior to the filing of the Third Amended Complaint by Gibbs which added more causes of action against Harake. (Am. R. p. 462, Harake Depo. Tr., Vol. 2, p. 1). Harake was permitted to testify as to Paysend

Processing and Paysend UK, including that Harake received a $1.5 million loan from a fund in Switzerland to use as capital to create Paysend UK, that as of July 2019 Paysend UK was worth around $173 million, that Jimmy I. Gibbs refused to be a part of Paysend UK and refused to be bought out of Paysend Processing, and that Harake was forced to divest from Paysend UK. (Am. R. p. 473, line 9- p.478, line 17, Harake Depo. Tr., Vol. 2, pp. 286:9-291:17). That testimony is consistent with the allegations pled in Appellants' fourth counterclaim. However, when Harake began to testify about work product-protected information regarding the "next phase" and "damage" caused to him – and Gibbs' counsel asked questions about that, Harake was instructed by his counsel not to answer as further testimony would have revealed attorney-client and work product protected information. (Am. R. p. 478, line 17-p. 480, line 23, Harake Depo. Tr., Vol. 2, pp. 291:18-293:23).

Following the multiple depositions that were taken during the same week as Harake's reopened deposition, 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 I. Gibbs or Harake, opposing counsel was to let the counsel who gave the instruction know. (Am. R. p. 398, Memo. in Opp. to Gibbs' Motion, p. 9). At no time was such a request made to Appellants' counsel. (Am. R. p. 398, Memo. in Opp. to Gibbs' Motion, p. 9). Respondent's counsel argued during the hearing on the matter that such a request should have been clear when Respondent filed its motion to dismiss. (Am. R. p. 492, lines 1-11, Hrg. Tr., p. 12:1-11). However, Respondent's counsel noted that "what [he] really care[d] about" was whether Appellants would "agree to let [him] depose [Appellant Harake] about" the fourth counterclaim.

(Am. R. p. 492, lines 12-15, Hrg. Tr., p. 12:12-15). During the hearing, Appellants' counsel agreed that should the counterclaim proceed, Respondent's counsel would not be precluded from reopening Harake's deposition for the limited purpose of inquiring about it. (Am. R. p. 502, lines 5-12, Hrg. Tr., p. 22:5-12). The Circuit Court thereafter noted any limits of the deposition testimony were not before it. (Am. R. p. 502, lines 13-24, Hrg. Tr., p. 22:13-24).

The Circuit Court's Orders

In the September 22, 2020 hearing on Gibbs' Motion, Appellants argued that just because the title of a particular cause of action has not been recognized formally in South Carolina, the claim does not automatically require dismissal. (Am. R. p. 500, liens 1-8, Hrg. Tr., p. 20:1-8). Additionally, Appellants argued that even if their tortious interference with economic interest claim was unable to stand, it still pled a valid cause of action, such as tortious interference with contractual relations. (Am. R. p. 501, line 2 - p. 502, line 4, Hrg. Tr., pp. 21:2-22:4). However, Respondent responded that Appellants were trying to allege intentional interference when only pleading tortious interference. (Am. R. p. 503, lines 11-25, Hrg. Tr., pp. 23:11-25).

The September 25 Order, among other things, granted Gibbs' Motion as to the fourth counterclaim, which the Circuit Court referred to as "tortious interference with economic advantage" as opposed to "tortious interference with economic interest" as it was pled. (Am. R. p. 015, September 25 Order, p. 1). Thereafter, it directed Respondents' counsel to "prepare a proposed Order incorporating the findings on his client's behalf using language consistent with his arguments." (Am. R. p. 016, September 25 Order, p. 2).

The Circuit Court's November 18 Order, which as to the fourth counterclaim was the result of the proposed order submitted by Respondent, dismissed the fourth counterclaim because as titled, the claim was not formally recognized in South Carolina. (Am. R. p. 035, November 18 Order, p. 12). Additionally, the November 18 Order found that since the fourth counterclaim did not allege "intentional interference," it should be dismissed. (Am. R. p. 035, November 18 Order, p. 12). Although acknowledging Appellants made a verbal request during the hearing on Gibbs' Motion for permission to amend the counterclaim to change the label as to a cause of action, the Court rejected that request, noting that Appellants' motion to reconsider requested amendment and that such issue would be dealt with in ruling on that motion. (Am. R. pp. 035-36, November 18 Order, pp. 12-13). The Circuit Court's November 30 Order denied Appellants' Motion to Alter or Amend, providing that it "fully considered the arguments . . . as well as the motions, arguments, and briefings submitted in connection with the related hearing held September 22, 2020." (Am. R. p. 053, November 30 Order, p. 1). Finally, the Circuit Court's November 18 Order seems to conclude that because Appellants did not move for a protective order with regard to certain questions about the claim that eventually became the fourth counterclaim, the counterclaim should be dismissed or stricken pursuant to Rules 12(b)(6) and 12(f), SCRCP. (Am. R. pp. 036-37, November 18 Order, pp. 13-14). This appeal follows.

STANDARD OF REVIEW

"The granting of a Rule 12(b)(6) [,SCRCP,] motion to dismiss is immediately appealable." *Tillman v. Tillman*, 420 S.C. 246, 248, 801 S.E.2d 757, 759 (Ct. App. 2017) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)). Moreover, "[a]n order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14–3–330(2) because it affects a substantial right and strikes out part of a pleading." *Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) (citing *Miles v. Charleston Light & Water Co.,* 87 S.C. 254, 69 S.E. 292 (1910)).

When reviewing a dismissal pursuant to Rule 12(b)(6), SCRCP, an appellate court applies the "same standard of review as the trial court." *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (citing *Williams,* 347 S.C. 227, 553 S.E.2d 496). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* (citing *Spence v. Spence,* 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). A counterclaim is treated similarly, in that the trial court and reviewing court must base their decision whether to dismiss a counterclaim exclusively "on the allegations set forth in the counterclaim." *Charleston Cnty. Sch. Distr. V. Laidlaw Transit, Inc*., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001).

"The question for the court is whether in the light most favorable to the [complainant], and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state ***any valid claim for relief***." *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008), *holding modified on other grounds by Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) (emphasis added); *see also Plyler v. Burns,* 373 S.C. 637, 645, 647 S.E.2d

188, 192 (2007); *Gentry v. Yonce,* 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the complainant, would entitle the [complainant] to relief on any theory, then dismissal under Rule 12(b)(6) is improper." *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247. A pleading should not be dismissed merely because the court doubts the complainant will prevail in the action. *Charleston Cnty. Sch. Distr.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364; *Toussaint v. Ham,* 292 S.C. 415, 357 S.E.2d 8 (1987).

Likewise, on appeal, a motion to strike pursuant to Rule 12(f), SCRCP, which challenges a theory of recovery in a pleading, "is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010) (citing *McCormick v. England,* 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997)); *see also Menezes v. WL Ross & Co. LLC*, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011) (utilizing same standard of review to evaluate a motion to strike a counterclaim under Rule 12(f), SCRCP, as when reviewing a motion pursuant to Rule 12(b)(6), SCRCP), *rev'd in part on other grounds*, *Menezes v. WL Ross & Co. LLC*, 403 S.C. 522, 744 S.E.2d 178 (2013). Therefore, this Court should "base its decision solely on the allegations set forth on the face of the" pleading, and such motion "cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case." *Grazia*, 390 S.C. at 567, 703 S.E.2d at 199.

ARGUMENT

I. The Circuit Court Erred In Dismissing Appellants' Fourth Counterclaim Pursuant To Rules 12(b)(6) And 12(f), SCRCP, As The Counterclaim Contained Allegations That State A Valid Claim For Relief.

Appellants' fourth counterclaim should not have been dismissed, as it contains "facts alleged and inferences reasonably deducible therefrom, [when] viewed in the light most favorable to [Appellants], . . . entitle [Appellants] to relief" on a cognizable theory of recovery. *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247. The label assigned to that theory is not dispositive, and whether the Circuit Court believes the theory is likely to succeed is not part of the analysis under either Rule 12(b)(6) or 12(f), SCRCP. The Circuit Court dismissed Appellants' fourth counterclaim on both of those impermissible grounds, and that decision must be reversed.

A. The title or label assigned to a cause of action does not determine whether it should be dismissed pursuant to Rule 12(b)(6) or Rule 12(f), SCRCP; therefore, the Circuit Court erred in dismissing the fourth counterclaim.

The Circuit Court erred in dismissing or striking Appellants' counterclaim for tortious interference with economic interest because that dismissal was based on the claim's title or label – not its substance as the law requires. The law is well-settled that the label assigned to 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). Rule 8(f) of the South Carolina Rules of Civil Procedure echoes this principle by providing "[a]ll pleadings shall be so construed as to do substantial justice to

all parties." This Court has emphasized "[i]t 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." *S.C. Nat. Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986).

The Supreme Court of South Carolina applied these tenets in *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013). In that case, the Supreme Court determined that subcontractors sufficiently pled their third-party beneficiary claim against the city because in the "Facts" section of their 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" incorporated into the contract as a matter of law. 403 S.C. 560, 743 S.E.2d 778. In *Shirley's,* the words "contract," "tort" or "negligence" appeared nowhere in the cause of action, yet the cause of action was sufficiently pled. *Id.* Additionally, in *Crandall Corp. v. Navistar Int'l Transp. Corp*., 302 S.C. 265, 395 S.E.2d 179 (1990), the Supreme Court found that a cause of action labeled "intentional interference with prospective economic advantage" could be construed to be a claim for "intentional interference with contractual relations."

Even if this Court finds there is no South Carolina cause of action called "tortious interference with economic interest," this Court must disregard the label and consider whether the substantive allegations supporting that counterclaim state any valid claim or theory of relief – such as 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 the trial court 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, 519 (D.S.C 2015) (noting, in deciding not to dismiss a claim labeled as "intentional interference with prospective contractual advantage/prospective economic advantage," that South Carolina courts have found that labeling the cause of action as interference with prospective economic advantage does not change the substance of the cause of action); *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 as it related to a claim of intentional interference with economic interest, not dismissing it for lack of pleading or because of the way in which it was labeled); *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).

Respondent's argument that Appellants' "tortious interference with economic advantage" counterclaim should be dismissed due to its label (which ironically was an incorrect labeling by Respondent itself because the fourth counterclaim labeled the claim as one for "economic interest" not "economic advantage") was based on the distinguishable case of *Robinson v. Code*, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009) -- a case on which the Circuit Court too relied for its dismissal. (Am. R. p. 035, November 18 Order, p. 12). Respondent 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." (Am. R. p. 445-446, Gibbs' Memo in Supp., pp. 3-4) (emphasis in original). But *Robinson* does not stand for such a proposition and is distinguishable from the instant matter.

Robinson involved litigation arising out of 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. As a threshold matter, this Court 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 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. After examining the substance of the allegations pled, this Court found the appellant's claims did not allege violations permitted under the specific statutory scheme of the Landlord-Tenant Act, *id.* at 586, 682 S.E.2d at 496-97, and further found that Article 11 of the building codes *explicitly 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 very cause of action pled by the plaintiffs in that case. *Id.* at 586-87, 682 S.E.2d at 497. This Court therefore affirmed the trial court's dismissal, after specifically noting the basis for the original motion to strike was that the cause of action pled was excluded by Article 11. *Id.* at 587-88, 682 S.E.2d at 497-98. In *Robinson*, the claims pled not only had not been recognized under South Carolina law, but they were *explicitly excluded* under the *specific* statutory schemes under which they were alleged. *Id.* Nothing in *Robinson* stands for the proposition that it is proper to strike any claim or theory simply because its label does not exactly match that of a recognized

South Carolina cause of action.

Here, Appellants have alleged a general tort cause of action in their fourth counterclaim against Respondent, and such tort has not been specifically barred pursuant to any statute or code. Additionally, as will be discussed *infra* in Section I.B., the fourth counterclaim, setting aside its label, can be (and should have been) construed as tortious interference with contractual relations, among other causes of action. Notably, other states have recognized such a tort under multiple names.[3] *Robinson* is inapposite as Appellants did not allege a cause of action specifically excluded under a particular statutory scheme, and the Circuit Court erred in relying on it and unduly dismissing the fourth claim based upon its label. The Circuit Court's November 18 Order should be reversed.

B. Setting aside the label on the cause of action, Appellants set forth allegations in their fourth counterclaim that state a valid claim for relief, making dismissal improper.

Given that the label on a cause of action is not dispositive, the appropriate

[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).

question (even if the Court does not wish to recognize a cause of action for tortious interference with economic interest formally[4]), is whether the fourth counterclaim states ***any*** valid theory of relief using the standard established by Rule 12(b)(6), SCRCP. Because Appellants pled factual allegations stating a valid theory of relief, the Circuit Court's November 18 Order should be reversed as to Appellants' fourth counterclaim.

For instance, one possible claim sufficiently stated by the facts alleged in the fourth counterclaim is a cause of action for tortious interference with contractual relations. To allege and maintain a cause of action for tortious interference with contractual relations, a party must show: (1) a contract's existence, (2) knowledge of the contract, (3) deliberate or intentional procurement of its breach, (4) the absence of justification, and (5) damages. *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 520, 812 S.E.2d 750, 756 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018) (citation omitted). Viewing the facts alleged in support of the fourth counterclaim in the light most favorable to Appellants (as the Court must using the Rule 12(b)(6) and Rule 12(f), SCRCP, analysis), the elements of a claim for tortious interference with contractual relations were pled. The fourth counterclaim alleged that Gibbs, 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

[4] Even though tortious interference with economic interest has not been formally recognized in South Carolina, such a cause of action may be recognized - it is not grounds for automatic dismissal. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified on other grounds 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) (noting that no particular deference to the trial court is necessary in determining whether to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, and recognizing that "beneficiaries of an existing will or estate planning document may recover as third-party beneficiaries against an attorney whose drafting error defeats or diminishes the client's intent under legal malpractice or breach of contract theories.").

agreement required Gibbs to invest $1 million. (Am. R. pp. 346-347, Ans. and Am. Counterclaims, ¶¶ 192, 195, and 196). Respondent does not deny an agreement between these parties existed; rather, Respondent disagrees with the substance of that agreement and refers the Court to the Third Amended Complaint for what it believes to be the accurate description of the agreement. (Am. R. p. 362, Reply, ¶ 70). At the time, Respondent was also aware of agreement between Harake and the third party related to Paysend UK, and Respondent refused to allow the investment in Paysend Processing to be transferred to Paysend UK. (Am. R. p. 340-341, 347, Answer and Amended Counterclaims, ¶¶ 153, 155, 195-198). Yet, Respondent unjustifiably refused to be bought out or to roll Paysend Processing into Paysend UK. (Am. R. p. 348, Answer and Amended Counterclaims, ¶ 202). Therefore, Appellants alleged Gibbs was aware that it was supposed to invest $1 million as part of a contract and that there were other agreements between Appellants and the third party related to Paysend UK, satisfying pleading of the first two elements of tortious interference with contractual relations, existence and knowledge of a contract. *Gecy*, 422 S.C. at 520, 812 S.E.2d at 756. Additionally, Appellants alleged Gibbs refused without justification to meet its obligation under the agreement, acted deliberately to discourage other investment, unjustifiably refused to roll Paysend Processing into Paysend UK, and refused to be bought out from the agreement in an effort to salvage the company, intentionally causing a breach. (Am. R. pp. 346-347, Answer and Amended Counterclaims, ¶¶ 193, 194, 197, and 198). Thereafter, Appellants alleged the damages that resulted from Gibbs' actions. (Am. R. pp. 347-348, Answer and Amended Counterclaims, ¶¶ 199-204).

Having alleged sufficient facts to meet each element of a claim for tortious

interference with contractual relations, and taking those facts in the light most favorable to Appellants as the Court must do at the Rule 12(b)(6) stage, Appellants' fourth counterclaim was sufficiently pled. *Gentry*, 337 S.C. 1, 522 S.E.2d 137. Accordingly, the Circuit Court's November 18 Order dismissing this claim should be reversed.

II. The Circuit Court Erred In Dismissing Appellants' Fourth Counterclaim Without Permitting Them An Opportunity To Amend.

Even if this Court decides not to recognize a cause of action for tortious interference with economic interest under South Carolina law, and even if this Court declines to re-label the fourth counterclaim as one for tortious interference with contractual relations, the Circuit Court's November 18 Order still must be reversed. This is because the cure for an insufficient pleading is generally amendment, not dismissal. *See Skydive Myrtle Beach v. Horry Cnty*., 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 before the Circuit Court and before this Court herein, Appellants' 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* Section I.B., *supra*; Am. R. pp. 396-397, Memo. in Opp., pp. 7-8; Am. R. pp. 340-342, 346-348, Answer and Amended Counterclaims, ¶¶ 149-160; 191-204). Appellants timely requested an opportunity to amend relative to Gibbs' Motion, both in the hearing and in their Motion to Alter or Amend, noting that the claim could be recast as one for tortious

interference with contractual relations. (Am. R. pp. 457-458, Motion to Alter or Amend, pp. 8-9). Indeed, the Circuit Court's November 18 Order acknowledged Appellants made a verbal request during the hearing on Gibbs' Motion for permission to amend the claim's label and noted Appellants' Motion to Alter or Amend requested amendment, but the Court indicated the issue of amendment would be addressed in ruling on the Motion to Alter or Amend. (Am. R. p. 035-36, November 18 Order, pp. 12-13). In the November 30 Order, the Circuit Court rejected the amendment request by denying Appellants' Motion to Alter or Amend. (Am. R. p. 053, November 30 Order, p. 1).

Rule 15(a), SCRCP, provides "leave shall be freely given when justice so requires and does not prejudice any other party." Here, there was no potential prejudice to Gibbs in allowing the amendment, as Respondent too amended its Complaint for a third time to add causes of action and a party to this litigation. Moreover, there was no prejudicial surprise as Harake already had testified about the basis for the cause of action. (Am. R. p. 473, line 9 – p. 478, line 17, Harake Depo. Tr., Vol. 2, pp. 286:9-291:17). The Rule 15(a) standard warranted permission to amend under these circumstances, and the Circuit Court erred in denying Appellants the opportunity to do so. *Skydive Myrtle Beach*, 426 S.C. at 182, 826 S.E.2d at 589.

III. The Circuit Court Erred in Dismissing Appellants' Fourth Counterclaim Based On An Instruction Not To Answer Questions In Harake's Deposition, As Such Information Is Not Part Of The Analysis Under Rules 12(b)(6) and 12(f), SCRCP.

The Circuit Court's November 18 Order dismissing or striking Appellants' fourth counterclaim pursuant to "Rules 12(b)(6) and/or Rule 12(f), SCRCP" did so – at least in part – due to the lack of a filed motion for protective order following counsel's instruction for Harake not to answer questions that sought privileged information. This

lack of a motion for protective order was, in the first instance, by agreement of the parties, and regardless was an issue Respondent had never challenged, or even brought up, until its Motion.

Striking or dismissing Appellants' fourth counterclaim as a result of an apparent discovery dispute that was admittedly not before the Circuit Court is improper. Gibbs' request to strike served as an additional challenge to the sufficiency of the pleading and should have been treated as a Rule 12(b)(6), SCRCP, motion. *See Grazia*, 390 S.C. at 567, 703 S.E.2d at 199 (citing *McCormick,* 328 S.C. 627, 632, 494 S.E.2d 431, 433); *see also Menezes*, 392 S.C. 584, 709 S.E.2d 114 (utilizing same standard of review to evaluate a motion to strike a counterclaim under Rule 12(f), SCRCP, as when reviewing a motion pursuant to Rule 12(b)(6), SCRCP). The Circuit Court's dismissal of Appellants' fourth counterclaim conflated a discovery dispute with the dismissal standard, and that decision should be reversed for this reason.[5]

The Circuit Court first erred by analyzing Appellants' fourth counterclaim pursuant to Rule 12(f), SCRCP. Even if the deposition testimony offered by Harake was properly analyzed as part of the Rule 12(f) analysis (which it should not be as noted above), the instruction not to answer was addressed only to the *timing* of the claim – which was protected as work product and by the attorney-client privilege – not to the testimony given just prior to the instruction not to answer, which provided facts that later served as the basis of the fourth counterclaim (among others). (Am. R. p. 473, line 9 – p. 478, line 17, Harake Depo. Tr., Vol. 2, pp. 286:9-291:17). This was not a situation in

[5] Even assuming, *arguendo*, there was a failure to file a protective order, which Appellants maintain there was not based on the agreement of counsel, the proper response would be to reopen the witness's deposition to ask the question since no such protective order had been granted; it would not be to dismiss outright a later amended counterclaim.

which the fourth counterclaim was already pending when Harake's deposition was taken, nor did Appellants' counsel say that Respondent would not be entitled to depose Harake further on such claim. (Am. R. p. 502, lines 5-12, Hrg. Tr., p. 22:5-12).

Second, the Court erred because Gibbs identified no order of the Circuit Court violated by Appellants, nor did the Circuit Court determine such an order existed. Gibbs provided no authority finding that an instruction not to answer during a prior deposition somehow warrants striking a later-amended counterclaim, especially when the pleading does not contain "redundant, immaterial, impertinent or scandalous matter." *See* Rule 12(f), SCRCP.

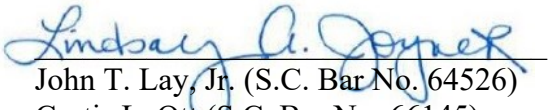
The Circuit Court improperly analyzed Gibbs' Motion pursuant to Rule 12(f), SCRCP, when it should have "base[d] its decision solely on the allegations set forth on the face of the" Answer and Amended Counterclaims to determine "if the facts alleged and the inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case" in the fourth counterclaim. *Grazia*, 390 S.C. at 567, 703 S.E.2d at 199. As outlined above, the fourth counterclaim was pleaded sufficiently, and the Circuit Court's November 18 Order was improper.

CONCLUSION

The Circuit Court erred in dismissing Appellants' fourth counterclaim titled "Tortious Interference with Economic Interest" and by not permitting Appellants to amend since the cause of action 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. Based upon the foregoing, Appellants Sarmad Harake and Eurosa, Inc. respectfully request this Court reverse the finding of the Circuit Court as to Appellants' fourth counterclaim.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.



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August 3, 2021

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