To: Judicial Merit Selection Commission

From: Eric K. Englebardt, Candidate, Circuit Court At Large Seat 16

Date: 2 November 2012

Re: Complaint of George H. Brock

The purpose of this memorandum is to respond to the complaint submitted against my candidacy by George H. Brock. I have reviewed my file, including the numerous briefs and other submissions by the parties, my notes, and the award.

Background

I arbitrated a heated dispute between Mr. Brock and claimant, Rick Erwin. They selected me as the arbitrator through counsel. The case was a complicated, very emotional business divorce including a variety of claims and counterclaims alleged by each of the parties. The arbitration included almost two weeks of hearings, broken up over a year--not four years as Mr. Brock contends. There were hundreds of pages of documents and transcripts, and my typewritten notes from the hearing are 45 pages long. I ruled on pre-hearing discovery disputes as well as motions on substantive issues prior to and during the hearing. My award, I believe, was likely a disappointment to both sides: Claimant received significantly less than he was seeking and I ruled against Mr. Brock on his counterclaims.

Most of Mr. Brock's complaint appears to be an attempt to re-litigate his case. Therefore, a majority of my response to his allegations can be found in my arbitration award (copy included). Additional responses are included below and I have also attached a copy of a cryptic email I received from Mr. Brock at the time he filed the complaint with the Commission indicating he had an "October Surprise" for me.

Allegation: **Disregard of the Code of Laws of South Carolina**

Mr. Brock incorrectly alleges that I disregarded the Code of Laws of South Carolina. My response to this allegation is a simple denial. Mr. Brock and his attorney presented his positions and the law they believed supported his case. Claimant did the same. After considering all of the issues in the case as they arose, I made rulings based upon my reading of the law and evidence. As an example, much of Mr. Brock's complaint focuses on issues regarding accounting malpractice. The parties presented briefs, including significant case law, and argued a Motion in Limine on this specific issue. I determined that the matter was not a malpractice action, but that Claimant's claims against Mr. Brock were for breach of contract (and I ruled against Mr. Brock on this claim) and for unjust enrichment/conversion (claims on which I ruled in Mr. Brock's favor). Mr. Brock also mentions my rulings on Generally Accepted Accounting Procedures ("GAAP") and their relationship to this case. I refer you to footnote 1 of the award in which I make it clear that I agree with Mr. Brock on this point, but that it is not a dispositive issue.

Allegation: Lack of Independence

I rely on being retained as a mediator or an arbitrator for a majority of my income. As a result my neutrality is paramount. I can assure the Commission that I remained neutral at all times during the handling of this arbitration. I think it important to point out that in the almost 13 years that I have served as a neutral, this is the first time my independence and neutrality have been questioned.

With regard to Mr. Brock's allegations about my relationship with the attorneys and parties: I practiced law for several years with Mr. Brock's attorney and I consider him a personal friend. I revealed this to claimant's counsel before the arbitration. Likewise, I knew claimant's counsel before this arbitration, though I had neither worked with nor socialized with her or the claimant. I had, however, eaten at claimant's restaurants on occasion before this arbitration. This was discussed prior to the formal portion of a hearing, and the conversation included both Mr. Brock and his counsel. This discussion was not inconsistent with the somewhat informal nature of arbitration, and certainly did not reflect any bias on my part. With regard to the concert referenced by Mr. Brock, if I remember correctly claimant and his counsel (husband and wife) attended a concert given by the band "The Eagles" in a sold out BiLo Center. My wife and I also attended. We did not attend together. Again, our mutual interest in the music of this band did not influence my judgment any more than my interest in cycling, also enjoyed by Mr. Brock's counsel and discussed quite often during the course of these proceedings. I maintained my independence at all times.

Allegation: Biased Decisions

I have reviewed this section of Mr. Brock's complaint with care. As stated above, I have reviewed my notes and the award, and I stand by my decisions in this matter and crave reference to my award and the reasoning contained therein. I do not see any evidence presented by Mr. Brock in this section of his complaint that indicates any bias. Rather, his comments express disagreement with my rulings.

Summary

I was fair, impartial, and professional in my handling of this arbitration matter. I simply ruled against Mr. Brock and he disagrees with the result.

I do agree that I could have rendered the award in this matter more quickly. The case was complicated and there was abundant documentary evidence and testimony to consider. I learned a great deal about organizing my analysis and drafting an award in a case of this type. I would like to point out that, realizing this at the time of billing for my work, I waived several thousand dollars in fees. On this point I crave reference to the cover letter that went to the attorneys in the case attached to this memorandum.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

IN THE MATTER OF THE ARBITRATION BETWEEN:)

Richard B. Erwin, Claimant,)

vs.)

George H. Brock, Respondent.)

ARBITRATION AWARD

Preliminary Statement Regarding Findings

The parties to this action entered into a business deal to form an LLC for the purposes of operating a restaurant. Unfortunately, both in a business/financial sense, as well as in a personal sense, this business deal soured relatively quickly. In my view as a neutral, having heard testimony from or on behalf of the parties at several lengthy hearings, as well as reviewing a plethora of evidence and submissions by their counsel, both parties share some of the blame for this happening, whether the cause be the failure to adequately communicate within the business, negligent job performance either in actual acts or in the failure to adequately oversee the operations of others, or in procedurally handling the break up of the business once the ability to work together had ended. That said, from the outset I find that while both parties made mistakes, I do not believe either party has proven that the other acted purposefully or in bad faith to injure the other.

A central issue in this arbitration has been the role of Respondent in the business under the

Letter of Intent he drafted at the outset of the venture. In reviewing the testimony and weighing both the credibility of the testimony of the witnesses, the documents themselves, and the actions of the parties, I find Respondent both agreed to "serve as the accountant" for the LLC and to "provide support as an accountant" for the company. In doing so, I find that he took responsibility for the bookkeeping, either himself or through a surrogate of his choosing. As a preliminary matter, I find that the evidence presented in the matter shows these functions were performed carelessly and were the major factor in the failure of the business.[1] While perhaps Claimant should have been more proactive in looking at the financial standing of the business, he had no duty to assume that the accounting functions undertaken by Respondent would be handled incorrectly.

Further, the parties have each asked for an accounting as part of their claims in this matter. I believe this to be an impossibility at this point, as the evidence presented by each of the parties regarding the books of the business is such that I do not believe one can accurately be performed. For example, the amounts of various loans and other entries on the balance sheets and other documents presented at the hearings vary from document to document, and when explanations were asked for, adequate answers were not given in the view of this fact finder. For example, various balance sheets (many of which are out of balance) provided throughout this matter list amounts of notes payable to each of the parties with significant variances. These documents were highly inconsistent and varied from instance to instance without valid explanation or back up. No notes payable (other than the referenced terms in the Letter of Intent) were introduced, nor was any schedule or ledger of the amounts paid in and out to explain these variances in amount due. While I certainly believe an

1 While I agree with Respondent that GAAP is not applicable to this matter, this does not excuse the methods used in keeping the books of this business, which led to incorrect reporting to government agencies, insufficient fund charges due to overdrawing bank accounts, etc.

accounting *could* have been extremely useful for the parties, I note that since both asked for such an accounting, one should and could have been attempted long ago and nothing beyond the parties mutual lack of trust, inability to work together, and lack of cooperation (evidenced throughout this arbitration, including via discovery disputes and personal attacks) prevented it. At this point I believe the cost of a forensic accounting would exceed any benefit in ordering same, though to be fair no evidence was presented regarding such a cost or under what parameters an accounting could be ordered at this point.

Also, it need be noted that I denied a motion to amend from Claimant to add the LLC to the case in media res. Respondent prepared his case and tried the arbitration based on the assumption that Claimant was the only party, and I ruled and reaffirm here that to allow such an amendment would not be fair to Respondent.

Claimant's Claims Against Respondent

For the purposes of examining Claimant's claims in this award document, I use the claims as outlined in Claimant's Arbitration Brief, which I believe fairly set forth the case as presented.

Breach of contract: Claimant alleges Respondent breached the contract between the parties which led to the formation of the LLC, the Letter of Intent, both in specific terms and by arguing that Respondent violated the duties of good faith and fair dealing. As I find Respondent breached his duties under the specific terms of the agreement, there is no need for me to rule on the latter allegations as the damages are identical. However, inasmuch as Respondent may dispute my findings regarding a specific breach of the agreement as relates to his accounting functions, I find that his actions in his handling of the tax reporting, checking accounts, etc. do not comport with acting in

good faith and fair dealing. 2 In my opinion, the record presented to me is replete with examples, most of which were testified to in a credible manner by both Carrie Hempel and Claimant, of Respondent's breach. These include late payment of bills, incorrect reporting of sales to tax authorities, allowance of insurance to be cancelled, bank accounts that were overdrawn, etc., all of which led to, among other things, tax liability *for the company*. 3 Note, however, that I find that any damages for taxes is corporate, and not individual, to the extent that they have not been claimed against or paid for by the Claimant individually. However, I do find that Claimant has been held to be *individually* responsible for $4,392.27 by the South Carolina Department of Revenue for unpaid taxes in 2008 and that he individually paid an additional $2,776.45 in 2010. While Respondent claims the initial amount was due Claimant's decision to "stop payment" on trust fund amounts to the state, I find that the ultimate responsibility for both of these payments is Respondent's breach of his duties as the accountant to the company. However, I find Claimant has failed to prove by a preponderance of the evidence that the other damages he claims as a result of Respondent's breach of contract are his personal damages as opposed to those of the LLC. I make no finding as to the validity of those damages if brought by the LLC.

Unjust Enrichment/Conversion: I find for Respondent on these claims. I simply do not believe Claimant has met his burden of proof in showing Respondent was unjustly enriched or

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2 With regard to the specific duties of Respondent, while there exists an Operating Agreement (OA), Respondent testified it was never used. Regardless, the only mention in the OA regarding accounting functions refers to bookkeeping, which I have previously found and hereby reiterate were the responsibility of Respondent. I find that there is nothing in the OA that abrogates Respondent's duties as the accountant for the business and for providing "accounting support" as set forth in the Letter of Intent. The record before me shows multiple examples of Respondent taking responsibility for bookkeeping, including setting up his daughter as the bookkeeper, attempting to train others to perform the functions, personal involvement with checks and bank balances, etc.
3 Note that Respondent claims that the Statute of Limitations has run for the IRS collection of the unpaid taxes. While this may be true, if not, any such damages are for the LLC, not Claimant, nor is there evidence that the tax liabilities have been paid.

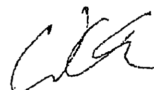
converted property of the company to his own benefit.

Respondent's Counterclaims Against Claimant

Respondent seeks recovery against Claimant for statutory oppression/squeeze-out and breach of fiduciary duty. I decline to award him damages on either cause of action.

Respondent's claims are premised on assumption. He assumed he was being denied the ability to participate in the business once Claimant learned of his breach of the agreement due to his failure to adequately provide the accounting service to which he had agreed. He read the letter sent to him by Claimant seeking to cancel the Letter of Intent due to his breach and proposing ways to resolve the issues this would bring as a "squeeze out". I do not find this to be the case. Additionally, Respondent points to, among other things, a TRO issued by the Circuit Court in favor of Claimant (never appealed from by Respondent, and these issues could certainly have been raised at that time), payment for a meal while in the restaurant after the parties had ceased to act civilly toward each other, and the revocation of his ability to sign checks (despite his attempts to try to issue checks after he had been put on notice of the belief of his breach of the contract, including at least one attempt at correcting his accounting errors that caused a late tax payment to the State of South Carolina). While I believe Claimant could and perhaps should have proceeded to use his statutory remedies for removal of a member of the LLC, I do not find that he wrongfully "squeezed out" Respondent. It is my belief that Claimant was merely attempting damage control in an effort to try and save the business.

Furthermore, even were I to hold in Respondent's favor regarding his counterclaims, I find that he has failed to prove damages by a preponderance of the evidence. Respondent asks for repayment of his "note", but there is no reliable evidence to determine what is owed to him. The



amounts are challenged by Claimant, and even in the evidence presented by Respondent vary without explanation (and none was given despite examination on the subject) 4.

Another example is Respondent's proof on the alleged Gore liability. Respondent testified when asked how much that amount was that it could be one amount or another, "just say $3000" and implied he didn't "honestly know" what the amount was. He also testified that he paid it back out of his pocket. Later, he changed this to stating that he "worked it off'. The balance sheets in evidence show the amount to vary without explanation, and there was also testimony that Claimant paid amounts owed as a result of Gore debt and that Respondent used the money for other purposes.

As the finder of fact, I simply do not believe Respondent has met his burden of proof on the amount of his damages and therefore the damage portion of the claim would fail even if I believed there was liability. Additionally, I note the amounts asked for in Respondent's proposed order differ significantly from the damages testified to at the hearing by Respondent. This is simply more evidence that even *Respondent* is unsure as to what his damages are were I to determine he was entitled to them.

It is not lost on me that there are no "winners" here, and that the parties theoretically could continue to engage in costly litigation in the future by including the LLC as a party. Based on my understanding of the corporate books per the evidence presented to me in this matter, and my belief that a reliable forensic accounting is impossible and would be extremely costly, I do not foresee a way either party would adequately be able to prove their damages by a preponderance of the evidence.

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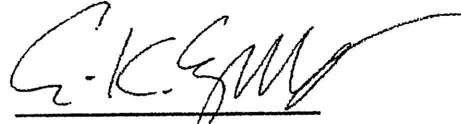
4 The balance sheets also show the amount of the note owed to Claimant varying greatly as well without adequate explanation. This is another factor in my discussion above about the likely lack of success in an accounting.

THEREFORE, based on the above, Claimant is awarded the sum of Seven Thousand One Hundred Sixty Eight and 72/100 ($7,168.72) against Respondent.

Dated: 22 April 2011



Eric K. Englebardt, Esq.
Arbitrator

Englebardt, Eric K.

From: George Brock <funcpaguy@yahoo.com>
Sent: Tuesday, October 30, 2012 5:01 AM
To: Englebardt, Eric K.
Subject: October Surprise

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

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April 22, 2011

Via Email

Ingrid Blackwelder Erwin, Esq.
ingriderwin@parkerpoe.com

Robert C. Wilson, Jr., Esq.
trigor527@aol.com

Re: Arbitration between Richard Erwin and George Brock

Dear Counsel:

Once again let me take the opportunity to apologize for the delay in getting this award, attached to the email accompanying this letter, to you. This is not at all my practice, and I am quite embarrassed by the delay. I will not be billing your clients for the preparation of the award, which I can assure you took a great deal of time in going through the testimony and evidence.

I appreciate the professionalism you both showed throughout this matter. It is always a pleasure to watch good lawyers ply their trade. I also thank you for asking me to serve you and your clients as arbitrator.

With kind regards, I remain

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Eric K. Englebardt

EKE/eke
Enclosure

BUSINESS • LITIGATION • SOLUTIONS

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JUDICIAL MERIT SELECTION COMMISSION

In the Matter of: **Eric K. Englebardt**

Candidate for: Judicial Candidate At-Large, Seat 16

AFFIDAVIT

I will appear to testify concerning the qualifications of the above-named candidate and will produce all documents in my possession, if any, which will further develop or corroborate my testimony.

I understand that this written statement must be completed and returned to the Judicial Merit Selection Commission at least five (5) days prior to the hearing at which I wish to testify in order for the commission to hear my testimony.

In regard to my intended testimony, I will offer information as to the following:
My name and contact information:

(1) George H. Brock
Age: 61
217 Whitsett Street
Greenville, SC 29601
Home: (864) 787-1994
Office:(864) 233-5984
Email: georgehbrockcpa@aol.com

(2) Set forth the names, addresses, and telephone numbers (if known) of other persons who have knowledge of the facts concerning your testimony.

Robert C. Wilson, Jr.
Attorney At Law
201 Whitsett Street
Greenville, SC 29601
Office: (864) 242-9488
Email: trigor527@aol.com

Allegations of wrong doing include;

Disregard of the Code of Laws of South Carolina

In the arbitration of Erwin vs. Brock in which I was accused of malpractice and failure to adhere to Generally Accepted Accounting Principles as a CPA, Eric K. Englebardt, as an arbitrator, did not consider the South Carolina Code of Laws 15-35-100(b) which states that testimony of another professional (CPA in this case) is required for malpractice complaints. Certified Public Accountant was mentioned nine times in the complaint. (Exhibit 1) (Exhibit 1A)

As a result, I was subject to nine (7) hour days of arbitration proceedings over a 3 1/2 year period on frivolous charges without merit and without an affidavit of an outside CPA to provide professional testimony as required under the SC Tort Reform Act.

Once the arbitration proceedings were complete it took Mr. Englebardt 7 ½ months to render his decision. I have read that 30 days is a reasonable time period for rendering arbitration decisions in SC. In itself the 7 ½ months is not wrong doing but it does provide an indication of Mr. Englebardt's cavalier approach to his work.

My attorney prepared a Proposed Motion it took so long. (Exhibit 2).

At the outset of the arbitration proceedings my attorney, Robert C Wilson, Jr., provided Mr. Englebardt with a copy of the Code of South Carolina Laws, 1976, as amended ("SC Tort Reform Act") with a motion to dismiss the malpractice part of the litigation.

Mr. Englebardt refused to consider the dismissal and handed the documents back to my attorney as soon as they were presented. Mr. Englebardt did not want court cases and SC Law to get into the way of his biased award.

I was reduced to educating Mr. Englebardt and the plaintiffs as to the meaning of "Generally Accepted Accounting Practices" or "GAAP" as it is commonly referred to since there was no CPA to testify on Ms. Erwin's behalf. (Exhibit 3)

Ms. Erwin frivolously claimed in her complaint that I was guilty of malfeasance and failed to adhere to "GAAP" numerous times when in fact "GAAP" applies only to financial statements for outside consumption (think of Enron) and *never* to internal accounting matters such as bank reconciliations. (Exhibit 4)..

During testimony the plaintiff also claimed more than a dozen times that I did not adhere to "GAAP" and also claimed that I committed malpractice numerous times. In fact, the plaintiff's testimony was so frivolous that I engaged a court reporter to record the testimony of the plaintiff. (Exhibit 4 GAAP) (Exhibit 5 Malpractice)

Ms. Ingrid Erwin, who earlier departed from her association with Jackson Lewis and more recently departed from her association with Parker Poe filed the complaint for her husband Richard Erwin. Just ten days earlier, Richard Erwin had taken over my 50% ownership of a joint LLC by the unilateral action of writing a letter without any regard to SC Law involving expulsion of partners.(Exhibit 6)

I was given no compensation when Mr. Erwin expelled me or paid monies due to me of more than

$85, 000. (Exhibit 7, page #2).

Concerning the malpractice issue, the ill-advised action by Ms. Erwin was allowed to continue by Mr. Englebardt, without outside expert testimony. This arbitration was extremely emotional and financially taxing and completely without merit or cause whatsoever.

Since Ms. Erwin asked for no damages one can surmise that the real reason that she filed the complaint was to put teeth in her husband's takeover of my interest in an LLC without consideration of the Laws of SC concerned expulsion of a partner. Unfortunately for the Erwins, I countersued. Unfortunately for me, Mr. Englebardt presided over the arbitration. (Exhibit 8)

Lack of Independence

After refusing to consider the dismissal, Mr. Englebardt acknowledged that Rick Erwin's West End Grille, owned by the plaintiff in Erwin vs. Brock, was his wife's favorite place to dine. Mr. Englebardt should have declined to rule on a case involving his wife's favorite restaurateur.

Dining in the Plaintiff's restaurant is one thing but to openly admit that it was a favorite spot was crossing the line of independence.

Before most of the nine full days of arbitration proceedings I endured numerous culinary reviews of the plaintiff's restaurant by the arbitrator, Mr. Englebart. In one instance, for example, Mr. Englebardt claimed that the seafood stew in Mr. Erwin's "Nantucket Seafood" was "the best that he ever had" which included places that he visited in his excursions to New Orleans.

Mr. Englebardt gave Mr. Erwin accolades for the opening of his new Nantucket Seafood in the Marriott in Greenville and offered his congratulations.

The Englebardts and the Erwins shared a mutual interest in entertainment. Once they came to a day of arbitration discussing a concert event at the Bilo Center the night before. Their discussions were quite clear; they were certainly all in attendance.

Biased Decisions

Mr. Englebardt determined in Erwin vs. Brock that there was no bad faith. When a malpractice complaint with no stated damages is filed ten days after a unilateral takeover of a LLC there is bad faith. (Exhibit 9. Page 1, 1st paragraph).

I agreed to serve as the accountant, never as the bookkeeper.(Exhibit 9 page 4)

The most damaging and biased decision was that Mr. Englebardt ruled that I was guilty of "breach of Duties as the *accountant*" to the company, a malpractice claim. He used the bookkeeper, Carrie Hemphel, and the Claimant as expert witnesses rather than an outside CPA as required by SC Law.

Claims by Mr. Englebardt that amounts due me did not exist because they were confusing and changed From time to time were because of his lack of accounting knowledge and understanding. For example,

exhibit 7 lists the $85,000.00 balance due to me in the initial asset purchase agreement. It was listed in every financial statement produced through the time I was in business with Mr. Erwin although the amount changed from time to time with adequate reason. (Exhibit 10) is a page of a general ledger which reflects changes of notes payable amounts owed to me. There are always changes in financial statements. Mr. Englebardt's incorrect assumptions about the changing amount due to me as a notes payable is an example of why an expert witness should have been required in this case.

It is bizarre that Mr. Englebardt claimed that because there were changes in the amount due to me that I was due nothing. (Exhibit 10)

He also ruled that I was liable for past due payroll taxes.

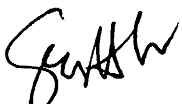
- I had done the prudent thing and taken cashier's checks down to the SCDOR to pay all taxes. Mr. Erwin had the cashier's checks reversed and used the funds for his own benefit. How could Mr. Englebardt determine that I was personally liable to repay Mr. Erwin?
- Because of his wantonness in stopping the cashier's checks, the SCDOR ruled that Mr. Erwin was liable and that he alone was the "responsible party". Mr. Englebardt ruled that the SCDOR was wrong even though I hand delivered checks to pay past due taxes.

Mr. Englebardt did not consider the facts in this case. He lacked independence by his own admission. He allowed this arbitration to go on for almost four years. He took 7 ½ months to rule on the case after completion of testimony.

Is this someone that we want for a judgeship?

Thank you for your time.

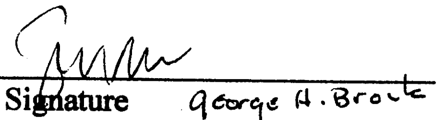
Respectfully submitted,



George H Brock, CPA

WAIVER

I further understand that my testimony before the Judicial Merit Selection Commission may require the disclosure of information that would otherwise be protected by the attorney-client privilege. Therefore, in order that my complaint may be fully investigated by the commission, I hereby waive any right that I may have to raise the attorney-client privilege as that privilege may relate to the subject of my complaint. I further understand that by waiving the attorney-client privilege for this matter, I am authorizing the commission to question other parties, including my attorney, concerning the facts and issues of my case.



Signature George H. Brooks

Sworn to me this 29 day of October, 2012

Nancy J. Davis L.S.
Notary Public of South Carolina

My commission expires: 9-29-2018

Agency. A legal malpractice expert would not aid the jury in determining whether the Foundation should recover for those claims, as Smith's wife is not an attorney and the Calhoun Insurance Agency is not a law firm. Consequently, the trial court was within its power to find that the custodial resolution ratifying the filing of the lawsuits revived all causes of action, exclusive of the legal malpractice claim, against the Smiths and the Calhoun Insurance Agency.

VI. Foundation's Failure to Proffer an Expert Witness

The Foundation argues the trial court erred in finding that the lack of an expert witness was fatal to the Foundation's legal malpractice action against Smith, as Smith's actions were obvious violations of his legal duties. We disagree.

"In South Carolina, the plaintiff in a legal malpractice suit must prove several elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the plaintiff's damages by the breach." Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002). Typically, a plaintiff in a legal malpractice case must establish the standard of care through expert testimony, unless the subject matter is of common knowledge to laypersons. Sims v. Hall, 357 S.C. 288, 295-96, 592 S.E.2d 315, 319 (Ct. App. 2003). With the aid of expert testimony, "the jury is able to analyze the attorney's conduct and measure it against the action that a competent attorney would be expected to take under the same circumstances." Cianbro Corp. v. Jeffcoat & Martin, 804 F.Supp. 784, 793 (D.S.C. 1992).

The Foundation argues that Smith's malpractice falls within the common knowledge exception because his actions are statutorily prohibited by S.C. Code Ann. § 31-3-360 (Supp. 2007). Section 31-3-360 prohibits an employee or commissioner of a housing authority from "acquir[ing] any interest, direct or indirect, in any project or in any property included or planned to be included in any project, nor shall [an employee] have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any project."

Because Smith recouped attorney and development fees over the course of his employment with the Housing Authority, the Foundation argues he was plainly in contravention of the statute, and thus no expert was necessary. While Smith may be liable for any inappropriate commissions or fees recouped during his tenure as a director or a board member pursuant to this section, this statute is not conclusive on whether he breached a duty to the Foundation as its attorney. Further, given the extended duration of Smith's involvement with the Foundation and the Housing Authority and the complex nature of many of the property and business transactions in which he represented the Foundation, the Foundation should have presented expert testimony, by affidavit or otherwise, at the summary judgment stage. As the standard of care for legal malpractice is outside the ambit of the common knowledge of laypersons, the Foundation's failure to present this evidence precludes the Foundation from bringing the legal malpractice claim against Smith at trial.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

Footnotes:

1. For ease of reference, the Court will refer to "Smith" throughout the opinion for any claims pertaining to Smith, Smith's wife, and the Calhoun Insurance Agency.

2. Because the Foundation will have received its requested relief, its remaining issues on appeal will be moot. See Seabrook v. Knox, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) (recognizing that this Court will not decide questions on which a judgment rendered will have no practical legal effect).

3. The Foundation was originally named "Southeastern South Carolina Housing, Inc." Its name was officially changed on June 5, 1997 to "Southeastern Housing Foundation" to reflect its status as a public benefit corporation.

4. As amended and consolidated with other housing statutes to form the Housing and Community Development Act of 1974, 42 U.S.C.A. §§ 1437 to 1437z-8.

15-36-100
TITLE 15 - CIVIL REMEDIES AND PROCEDURES
CHAPTER 36. SOUTH CAROLINA FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT

15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.

(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(G) This section applies to the following professions:

(1) architects;

(2) attorneys at law;

(3) certified public accountants;

(4) chiropractors;

(5) dentists;

(6) land surveyors;

(7) medical doctors;

(8) marriage and family therapists;

(9) nurses;

(10) occupational therapists;

(11) optometrists;

(12) osteopathic physicians;

(13) pharmacists;

(14) physical therapists;

(15) physicians' assistants;

33-44-601
TITLE 33 - CORPORATIONS, PARTNERSHIPS AND ASSOCIATIONS
CHAPTER 44. UNIFORM LIMITED LIABILITY COMPANY ACT OF 1996

33-44-601. Events causing member's dissociation.

ARTICLE 6. MEMBER'S DISSOCIATION

A member is dissociated from a limited liability company upon the occurrence of any of the following events:

(1) the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member;

(2) an event agreed to in the operating agreement as causing the member's dissociation;

(3) upon transfer of all of a member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;

(4) the member's expulsion pursuant to the operating agreement;

(5) the member's expulsion by unanimous vote of the other members if:

(i) it is unlawful to carry on the company's business with the member;

(ii) there has been a transfer of substantially all of the member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;

(iii) within ninety days after the company notifies a corporate member that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the member fails to obtain a revocation of the certificate of dissolution or a reinstatement of its charter or its right to conduct business; or

(iv) a partnership or a limited liability company that is a member has been dissolved and its business is being wound up;

(6) on application by the company or another member, the member's expulsion by judicial determination because the member:

(i) engaged in wrongful conduct that adversely and materially affected the company's business;

(ii) wilfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under Section 33-44-409; or

(iii) engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member;

(7) the member's:

(i) becoming a debtor in bankruptcy;

(ii) executing an assignment for the benefit of creditors;

(iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property; or

(iv) failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the member's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated;

(8) in the case of a member who is an individual:

(i) the member's death;

(ii) the appointment of a guardian or general conservator for the member; or

(iii) a judicial determination that the member has otherwise become incapable of performing the member's duties under the operating agreement;

(9) in the case of a member that is a trust or is acting as a member by virtue of being a trustee of a trust, distribution of the trust's entire rights to receive distributions from the company, but not merely by reason of the substitution of a successor trustee;

(10) in the case of a member that is an estate or is acting as a member by virtue of being a personal representative of an estate, distribution of the estate's entire rights to receive distributions from the company, but not merely the substitution of a successor personal representative; or

(11) termination of the existence of a member if the member is not an individual, estate, or trust other than a business trust.

Robert C. Wilson, Jr.
Attorney at Law

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Greenville, South Carolina 29601

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April 16, 2011

Eric K. Englebardt, Esq.
P.O. Box 1509
Greenville, SC 29602

BY FAX, ORIGINAL BY US MAIL

Re: *Brock* v. *Erwin*: **(Arbitration Proceeding)**

Dear Eric:

As you may have surmised from my letter dated March 16, 2011, and the accompanying proposed Arbitration Award, my client has grown restless with the lack of resolution of the above-captioned arbitration proceeding.

Lest my client's restlessness ripen into greater, more active discontent with the status of the arbitration and with me, I have prepared the enclosed Motion, which I will serve and file in order to move this matter forward.

Please advise by the close of business on Friday, April 22nd, 2011, if we can hope to soon receive a reasoned Arbitration Award, or I will have to file the enclosed Motion.

I am sending Ms. Erwin a copy of this letter and the enclosures, at her new law firm address.

Thanking you for your attention to this matter, I am

Very Truly Yours,

Robert C. Wilson, Jr.

cc: Ingrid Blackwelder Erwin, Esq.
George Brock

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

IN THE MATTER OF THE)
ARBITRATION BETWEEN:)
)
)
Richard B. Erwin,)
) **ARBITRATION AWARD**
Claimant,)
)
vs.)
)
George H. Brock,)
)
Respondent.)
____________________________)

By agreement of the parties, this action was referred to the undersigned for arbitration. Pursuant to his commission to arbitrate this controversy between the parties, the undersigned issues this reasoned Arbitration Award for resolution of the issues presented.

PROCEDURAL HISTORY

Claimant commenced this matter as an action in Greenville County Court of Common Pleas. The action pending in the Court of Common Please was referred, by agreement, to arbitration before the undersigned. For this Arbitration Proceeding, Erwin has restated his claims

from the action pending in Greenville County Court of Common Pleas against Brock: conversion, professional malpractice, unjust enrichment, breach of contract; Erwin also seeks punitive damages against Brock for Brock's alleged bad faith and willfulness.

In this Arbitration Proceeding, Brock has responded with a Reply and Counterclaims,

asserting the following: failure to state a cause of action, for which relief may be granted; general denial; statutory oppression/squeeze-out; breach of fiduciary duty; accounting. Brock seeks this tribunal's judgment that Erwin must pay to Brock the amounts of "Brock note," of the "Gore note," and of the "Rewards" bill to Brock.

Brock has filed the following motions:

> First Motion, *in limine*, seeking dismissal for Erwin's failure to comply with §15-36-10 in failing to provide third-party professional confirmation of Brock's alleged professional ;
>
> Second Motion, *in limine*, seeking exclusion of any reference to GAAP, because all accounting records in this action were internal and were not, therefore, subject to GAAP;
>
> Third Motion, *in limine*, seeking dismissal of Erwin's claims on grounds of merger and lack of standing because Erwin personally seeks damages which can only have suffered by RGFD LLC, not by Erwin personally;
>
> Motion to Dismiss, seeking dismissal of Erwin's claims based on failure to cooperate with discovery.

Erwin, after several sessions of this Arbitration Proceeding moved to amend his Statement of Claims so that he might assert Erwin's claims on behalf of RGFD, LLC. The undersigned has ruled that Erwin could not amend his Statement of Claims to substitute a new party, because the Arbitration Proceeding had advanced beyond a point at which such an amendment would *not* work an injustice on Brock, as provided in Rule 15, SC Rules of Civil Procedure.

APPLICABLE LAW

I find that the following apply to the issues presented by this Arbitration Proceeding:

1. §15-36-100, SC Code of Laws, 1976, as amended;

2. §33-44-409, SC Code of Laws, 1976, as amended;

3. §33-44-601, SC Code of Laws, 1976, as amended;

4. §33-44-602, SC Code of Laws, 1976, as amended;

5. §33-44-603, SC Code of Laws, 1976, as amended;

6. *Kuznik* v. *Bees Ferry Associates*, 342 SC 579, 538 SE2d 15 (CtApp. 2000);

7. *Jones* v. *Enterprise Leasing Co., et al.*, 2009-SC-0519.217 (CtApp. 2000);

8. *Drury Dev. Corp.* v. *Foundation Ins. Co.*, 668 SE2d 798 (S.Ct. 2008);

9. *Multimedia Publishing of SC* v. *Mullins,* 314 SC 551, 431 SE2d 569 (S.Ct. 1993);

10. *Simmons* v. *Mark Lift Industries, Inc.* 366 SC 308, 622 SE2d 213, (S.Ct. 2005).

FACTUAL SUMMARY

Brock and Erwin signed a Letter of Intent on October 5, 2005, by which they expressed their intention to form an LLC for the ownership and operation of a restaurant at 100 Villa Road, with equal ownership participation. Pursuant to their Letter of intent, Brock and Erwin formed RGFD, (herein, "RGFD"), as a South Carolina LLC on October 10, 2005.

Brock and Erwin together owned and operated RGFD until Spring, 2007. On June 20, 2007, Erwin wrote Brock, to advise that he was cancelling the Letter of Intent and taking over sole operation of RGFD. By letter dated June 25, 2007, Brock inquired of Erwin how Erwin was going to operate RGFD as "sole owner." Shortly thereafter, Erwin commenced a series of actions in the Court of Common Pleas, alleging that Brock had breached Brock's professional duty, as a C.P.A., to RGFD. The undersigned notes that Erwin did not file the requisite affidavit of a qualified C.P.A. to support his allegations of professional negligence

by Brock, as required by SC statutory law. During this period of time, Erwin also secured successive TRO's by which Erwin caused the books and records of RGFD to be turned over to Erwin in early July, 2007.[12] The undersigned notes that the TROs were improvidently granted; the TROs did not comply with the SC Rules of Civil Procedure. After using litigation to take over the operation and ownership of RGFD, thereafter, Erwin operated the restaurant at 100 Villa Road as "Rick Erwin's Low Country Grill." After his takeover of the restaurant, Erwin operated the restaurant without any regard for the joint ownership of the restaurant prior to Erwin's takeover by lawsuit.[3] Mr. Erwin caused the revocation of Mr. Brock's signature authority on the bank accounts of RFGD.

It is evident that Erwin used a professional malpractice action against Brock as a pretext. Erwin's suit, as noted above, did not comply with §33-44-601, of the S.C. Code of Laws, 1976, as amended, which requires an affidavit from a third-party professional certifying actionable, professional misconduct by Brock. Clearly, the Erwin lawsuit (of which this Arbitration Proceeding is the end result), was wrongfully employed as a means of expelling Brock from RGFD, without properly complying with the SC statutory provisions for expelling a member from an LLC. Indeed, Erwin failed to allege any actionable misconduct, as a basis for the expulsion of an owner/member of a SC LLC, by Brock as a member/operator of the LLC, as required by statute. It is clear, therefore, that Erwin, through his counsel, achieved the takeover

---

[1]Erwin did not provide the Court with verified pleadings in support of his application for the TROs.

[2]Brock had already surrendered the checkbook to Erwin in April, 2007.

[3] After Erwin took over ownership and operation of RGFD, Erwin required Brock to pay for a meal which Brock had enjoyed at the restaurant, after Erwin's takeover of RGFD. Certainly, Erwin's expulsion of Brock from any ownership rights, such as a complimentary meal, in the restaurant drives home Erwin's belief that Erwin had become *sole successor in interest* to RGFD and that Brock could not enjoy any benefit of ownership in the restaurant, not even a complimentary meal.

of RGFD without compliance with §15-36-10, *supra*, (required affidavit of third-party professional certifying professional misconduct), and without complying with §§33-44-601, *et seqq*., which provides for lawful expulsion of a member/owner of a SC LLC.

As further evidence of the pretextual nature of the takeover lawsuit, the undersigned notes

that Erwin declared, in Erwin's June 20th, 2007 letter, that Erwin was taking over RGFD afer "reviewing the books and records." Erwin, during the course of this litigation, admitted that he never opened the bookeeping disk (for RGFD) which was given by Brock to Erwin until two years into this litigation. It is fair to conclude that the allegations of professional malpractice by Brock, made at the outset of this litigation, could not have been based on a full and fair review of the books and records extant prior to the commencement of this litigation. Rather, the allegations of professional malpractice were a pretext employed by Erwin to achieve the expulsion of Brock as a member/owner of RGFD, without observing SC LLC statutory law.

The pretextual nature of the takeover litigation is further evident upon a review of the unfounded professional malpractice claims asserted against Brock by Erwin. Erwin asserted that Brock had violated GAAP principles in providing accounting support for RGFD. GAAP, however, does not apply to internal accounting record keeping for the internal management of business. Erwin has incorrectly cited GAAP as a basis for expulsion of Brock as an owner/member of RGFD.

Indeed, Erwin stated during the hearings held in this matter, that he had no need for Brock, since Brock had refused to continue doing the bookkeeping for RGFD. The undersigned notes that Erwin's declaration underscores Erwin's motivation for wrongful takeover of RGFD. Unless Brock was helping to defray the operating costs of RGFD, Erwin did not respect Brock's

status as an owner/member of RGFD, and Erwin would expel Brock from the business. It is apparent that Erwin wanted to have complete control of the ownership and of the operation of RGFD, because Erwin planned to change RGFD to a sole proprietorship. Indeed, Erwin invested $50,000 of new money into RGFD, Erwin hired a new chef for RGFD, Erwin hired new general manager for RGFD, and Erwin changed the operating name of RGFD to "Rick Erwin's Low Country Grill." There can be no doubt that Erwin's takeover resulted in the wrongful conversion of RGFD in Rick Erwin d/b/a "Rick Erwin's Low Country Grill," as a mere continuation of the former business of RGFD.

After his takeover of RGFD by pretextual litigation, Erwin operated his "Low Country Grill" until he closed it to avoid payment of rent to Brock for Erwin's use of Brock's location for RGFD.[4] During the period after Erwin's takeover and operation of RGFD, as a sole, successor in interest, until the "Low Country Grill" closed its doors, Erwin failed to pay all of the outstanding debts of RGFD owed to Brock: a note to Brock, a debt to Gene Gore, for which Brock was liable and a debt to Rewards, for which Brock is liable.[5] It appears that Erwin paid all creditors of RGFD except Brock or parties to whom Brock had guaranteed payment.

Erwin claims that Brock is liable for certain expenses of RGFD which allegedly resulted from Bock's actionable, professional malpractice. Brock asserts that he did nothing that breached his contractual obligations under the Letter of Intent, nor did Brock breach the standard of care required of a CPA. Further, stringent analysis discloses that Erwin is seeking compensation, *inter alia*, for operating expenses which were payable by RGFD, regardless of

---

[4]Brock had secured an order in Magistrate's Court, requiring Erwin to pay to Brock *ca.* $20,000 for unpaid rent, overdue from Erwin's use of Brock's premises occupied by RGFD.

[5]These debts appeared on the balance sheet of RGFD throughout the parties' joint ownership of RGFD.

any

alleged malpractice, or regardless of any alleged breach of contract, by Brock. Additionally, stringent analysis discloses that Erwin has sought to impose liability on Brock for various unpaid taxes allegedly due from RGFD to various taxing agencies. Erwin's claims for personal damages arising from non-payment of taxes by RGFD under Brock's alleged contractual duty for payment of all taxes owed by RGFD LLC is ill-founded for two reasons:

1. The statute of limitations has run on the taxes, so there can be no outstanding liability for the unpaid taxes imposed on any party;
2. The taxes were liabilities of RGFD and not of Erwin, personally[6].

Brock has established that RGFD owed him the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The undersigned finds and concludes that Erwin has not shown any damages which he personally and individually sustained as a result of Brock's alleged failure to comply with GAAP, as a result of Brock's alleged breach of contractual duty to provide competent bookeeping services to RGFD, as a result of Brock's alleged failure to sustain RGFD by "accountancy support," or as a result of Brock's failure to meet his duties as a member/owner of RGFD. Quite simply, Erwin has not met his burden of proof as to any allegations which could be the basis for imposing any liability on Brock, in this case.

[6] Erwin had to pay to the SC Department of Revenue certain taxes which were due from RGFD because Erwin refused to allow Brock to cause RGFD to pay the taxes. The SC Department of Revenue then imposed payment of the unpaid taxes by Erwin as the party responsible for the non-payment of the taxes, since Erwin took over the operation of RGFD as a sole owner.

2. The undersigned finds and concludes that Erwin, through the wrongful employment of a takeover lawsuit, unilaterally expelled Brock as an owner/member from RGFD, in breach of Erwin's common-law and statutory, corporate fiduciary duties owed to Brock as a co-member/owner of RGFD.

3. The undersigned finds and concludes that Erwin, after wrongful expulsion of Brock from being a member/owner of RGFD, took over the operation and control of RGFD as a sole proprietorship, d/b/a "Rick Erwin's Low Country Grill."

4. The undersigned finds and concludes that Erwin, after his takeover and personal assumption of ownership and operation of RGFD, which was a mere continuation of the former business of RGFD, personally became the successor in interest to RGFD, under the principles articulated in *Simmons* v. *Mark Lift Industries.*

5. As an individual and personal successor in interest to RGFD, Erwin assumed the debts and obligations of RGFD, including the debts and obligations which RGFD owed to Brock.

6. As the personal and individual successor in interest to RGFD, Erwin, therefore, owes to Brock the sum of $179,503.75, which is the amount (plus accrued interest at the rate mutuall agreed on) which was owed to Brock by RGFD, prior to Erwin's wrongful takeover of RGFD, along with the actual costs, attorney's fees, and expenses incurred by Brock for defending this action.

7. The undersigned finds and concludes that Erwin must pay the foregoing to Brock as

successor in interest to RGFD.

8. The undersigned finds and concludes that Erwin must pay the foregoing sum to Brock under the additional and sustaining ground that Erwin has breached his common-law and statutory corporate fiduciary duties owed to Brock, by Erwin's wrongful use of a takeover lawsuit to deprive Brock of the benefit of Brock's status as a member/owner of RGFD.

Dated:_________

Eric K. Englebardt, Esq.
Arbitrator

Business & Tax Articles

General Accepted Accounting Principles or GAAP: What does it mean?
Author(s): Stephanie Paul

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If you have ever inquired about an accounting position at a business, you've probably seen the phrase "candidates are required to demonstrate a current knowledge of Generally Accepted Accounting Principles (GAAP)." But, what exactly is GAAP and why is it a mandatory requirement with today's business accountants?

The Principles of GAAP

Generally accepted accounting principles, or GAAP for short, are the accounting rules used to prepare and standardize the reporting of financial statements, such as balance sheets, income statements and cashflow statements, for publicly traded companies and many private companies in the United States. GAAP-based income is measured so that the information provided on financial statements is useful to those making economic decisions about a company, such as potential investors and creditors.

GAAP is implemented through measurement principles and disclosure principles. Measurement principles recognize and determine the timing and basis of items that enter the accounting cycle and impact the financial statements, such as the period in which transactions will be recorded.Disclosure principles determine what specific numbers and other information are essential to be presented in financial statements. Basically, GAAP is concerned with:

- the measurement of economic activity;
- the time when such measurements are to be made and recorded;
- the disclosures surrounding this activity; and
- the preparation and presentation of summarized economic information in financial statements.

Why GAAP?

Without GAAP, companies would be free to decide for themselves what financial information to report and how to report it, making things quite difficult for investors and creditors who have a stake in that company. Because financial statements prepared under GAAP are intended to reflect an economic reality, GAAP makes a company's financials comparable and understandable so that investors, creditors and others can make rational investment, credit and other financial decisions. In order to be useful and helpful to users, GAAP requires information on financial statements to be relevant, reliable, comparable and consistent.

Regulating GAAP

Although it is not written in law, the U.S. Securities and Exchange Commission (SEC) requires publicly traded companies and other regulated companies to follow GAAP for financial reporting. Although smaller companies are not required to use GAAP, there are certain situations, such as obtaining credit or seeking investors, which require, by contract, those companies to also follow GAAP when preparing their financial statements.

The SEC does not set GAAP; GAAP is primarily issued by the Financial Accounting Standards Board (FASB). Government entities, however, must follow a different set of GAAP standards as determined by the Governmental Accounting Standards Board (GASB).

How to Apply GAAP

Accountants apply GAAP through FASB pronouncements called Financial Accounting Standards (FASs). Since its formation in 1973, the FASB has issued over 100 formal FAS pronouncements. Before the FASB was formed, its predecessor, the Accounting Principles

1 Q. And likewise, down at the bottom of page 8 just
2 before the conclusion of paragraph 27, "Based on
3 the wrongfulness of that conduct, Claimant
4 suspects that Respondent may have committed other
5 actions which are either in violation of generally
6 accepted accounted principles or were in violation
7 of the letter of intent."

8 MS. ERWIN:
9 Is that a question?

10 WITNESS ANSWERS:
11 A. I'll stipulate that's what it says.
12 (INTERRUPTION; OFF THE RECORD)

13 CROSS-EXAMINATION RESUMED BY MR. WILSON:
14 Q. And once again, you or your attorney is using the
15 term, "generally accepted accounting principles."
16 A. Yes, truthful, honest. And my understanding of --
17 any time that you send anything out to a third
18 party, that those principles have to apply. That
19 would be the IRS, State of South Carolina, City of
20 Greenville.
21 Q. Tell me how Mr. Brock sent any of his accounting
22 work outside the business?
23 A. Well, I think we've got plenty of documents here
24 that show that he sent it, Milner, Brock, CPA.
25 Q. I'm sorry?

GAAP

A. What do I think they are?

Q. You've alleged that he didn't follow them. I'm just asking you what they are.

A. To me, accepted accounting practices are -- would be an accounting that's truthful.

Q. So generally accepted accounting practices, you would agree with me has a specific meaning to folks who are accountants?

MS. ERWIN:

Object to the form. The witness is not an accountant.

MR. WILSON:

I didn't ask him if he knew it as an accountant, I asked him if he would agree with me that it had a special meaning for accountants?

MS. ERWIN:

To accountants is what you asked.

WITNESS ANSWERS:

A. I'm not an accountant. I don't know.

CROSS-EXAMINATION RESUMED BY MR. WILSON:

Q. Well, where did you get the phrase, "generally accepted accounting principles," Mr. Erwin?

A. My attorney helped draft this and again, what my interpretation of this is is that the accounting will be truthful and honest.

1 This is his claim in arbitration.

2 MS. ERWIN:

3 Oh, you're on a different document.

4 ARBITRATOR:

5 Page 7, paragraph 24?

6 MR. WILSON:

7 Yes, sir. Right.

8 CROSS-EXAMINATION RESUMED BY MR. WILSON:

9 Q. "By failing to follow generally accepted

10 accounting principles and by failing to main due

11 care with respect to the financial books and

12 records of the venture, the Respondent breached

13 the duty of good faith and fair duty." Is that

14 your allegation, sir?

15 MS. ERWIN:

16 Objection. The word is maintained and not main.

17 CROSS-EXAMINATION RESUMED BY MR. WILSON:

18 Q. Is that your allegation, sir?

19 A. Number 24?

20 Q. Yes, sir.

21 A. I'll stipulate that it says that.

22 Q. And once again, what is your definition of

23 generally accepted accounting principles?

24 A. Honest, truthful, accurate. That's my

25 interpretation.

1 his expectations were for George as he saw his
2 role in the company. Go ahead.
3 WITNESS ANSWERS:
4 A. George's role was to be the accountant of the
5 company, to handle the books, the payroll, the
6 accounting. It was to be truthful, honest, and
7 accurate. That's what my expectations were.
8 CROSS-EXAMINATION RESUMED BY MR. WILSON:
9 Q. So whether or not he was a CPA or used GAAP
10 is irrelevant, isn't it?
11 MS. ERWIN:
12 Object to the form of the question.
13 ARBITRATOR:
14 Go ahead and answer that.
15 CROSS-EXAMINATION RESUMED BY MR. WILSON:
16 Q. So long as he --
17 ARBITRATOR:
18 If he can answer the question, let him answer it.
19 Go ahead.
20 WITNESS ANSWERS:
21 A. GAAP -- I'm not an accountant, but I will say
22 this, that my expectations, the generally accepted
23 accounting principles would be truthful, honest,
24 and accurate, and that that's the way that he
25 would conduct our business from an accounting,

GAAP

1 objectively. Third parties who rely on such
2 information have a right to be sure the data are
3 free from bias and inconsistency, whether
4 delivered or not." And your position is that that
5 only goes to financial statements, it doesn't got
6 to tax returns.

7 MR. WILSON: GAAP

8 No, it doesn't apply to tax returns. There's a
9 whole nother series of penalties, as Mr. Erwin has
10 remarked that attend inaccuracies in tax returns.

11 MS. ERWIN:

12 We don't believe it takes that out of the
13 generally accepted accounting principles.

14 ARBITRATOR:

15 Going further, the definition that I've been
16 relying on also says, "Any report of financial
17 statements, audit, compilations, review, et
18 cetera, a preparer/auditor must indicate wh
19 or not it complies with GAAP." So when Geo
20 provided a financial statement to Rick, did
21 have to say whether or not -- at the bottom
22 says what?

23 MR. WILSON:

24 It says, "Unaudited - for management purpose
25 only."

1 Q. Let's start there. Is that what that says?
2 A. That's what it says.
3 Q. And would you agree that under generally-accepted
4 accounting principles, that internal bookkeeping is not
5 subject to GAAP?
6 BY MS. ERWIN:
7 Object to the form of the question.
8 WITNESS ANSWERS:
9 A. I personally would think that the accounting principles
10 do apply.
11 Q. But in terms of accountancy and CPAs' rules and
12 regulations, you can't tell me that; can you?
13 BY MS. ERWIN:
14 Object to the form of the question. GAAP 1st Incorrect
15 WITNESS ANSWERS:
16 A. Well, from what I've learned, because of the way that he
17 has produced some documents to the State of South
18 Carolina, that he has used his Brock & Milner stamp. NO
19 Once he has done that, general accounting practices
20 apply.
21 Q. But you can't testify to that as an expert witness; can
22 you?
23 A. I can't.
24 Q. Thank you, sir. Now, if we can go back to look at
25 paragraph three on page two.

1 MR. WILSON:

2 That's right.

3 ARBITRATOR:

4 Help me understand, and I realize this is a little

5 out of place with the context of your

6 presentation. Help me understand --

7 MR. WILSON:

8 Where I'm going with it?

9 ARBITRATOR:

10 Well, is there differentiation in terms of if the

11 third party is a governmental agency, that changes

12 somehow? Because you seem to be making a big deal

13 about that. GAAP TRUE MEANING

14 MR. WILSON: (MY ATTORNEY

15 As a matter of law, to send out information to

16 taxing agencies does not invoke the application of

17 generally accepted accounting principles, period.

18 Generally accepted accounting principles apply to

19 certifications or financial statements issued for

20 reliance by third parties on the issue of

21 financial information.

22 MS. ERWIN:

23 And our position is that any time that something

24 is sent out to a third party, it needs to --

25 generally accepted accounting principles need to

NOT TRUE

1 apply. But as a practical matter, the way the
2 sentence in the paragraph reads is, "Either in
3 violation of generally accepted accounting
4 principles or were in violation of the letter of
5 intent." So I think it's not an exclusive thing
6 here, and it may be a point that is not --
7 ARBITRATOR:
8 Let met ask some questions, Bob. Look at
9 Claimant's Exhibit 47. This is the letter George
10 wrote to Carolina First after the payments were
11 stopped in an attempt to pay the trust fund tax --
12 the trust taxes, whatever. I know what it's
13 talking about.
14 MR. WILSON:
15 Again, it's not a financial statement.
16 ARBITRATOR:
17 But it contains financial information because it
18 has the --
19 MR. WILSON:
20 It's a financial statement that invokes the
21 application of GAAP, a financial statement that
22 may be relied upon by their detriment by third
23 parties. It's in place to ensure that in
24 financial markets in the United States, that
25 numbers -- financial statements issued by

businesses will be relied on. Internal bookkeeping is -- it doesn't apply to internal bookkeeping.

MS. ERWIN:

And we disagree with that.

ARBITRATOR:

Overruled. Go ahead.

MR. WILSON:

I'm the only one that's got an accountant here. And as a matter of fact, in his testimony earlier in this proceeding, Mr. Brock had remarked that he hasn't done anything that involves GAAP -- any GAAP statements at all.

MS. ERWIN:

But he holds himself out as a member of this organization and signs letters as CPA on behalf of this entity. So --

MR. WILSON:

That's not a financial statement.

ARBITRATOR:

I mean in preparing for this, I've done a little research into GAAP. Okay? And the definitions that I've seen say, "Financial accounting information" -- "Financial accounting is information that must be assembled and reported

1 Object to the form of the question. Paragraph three
2 speaks for itself.
3 BY MR. WILSON:
4 Thank you so much
5 DIRECT EXAMINATION RESUMED BY MR. WILSON:
6 Q. Would you please answer the question, sir?
7 A. Yes, they do apply, the way I understand it.
8 Q. But you're not an expert as you
9 A. I'm not an expert and I do not have a CPA license.
10 Q. Thank you. Now, could we go to page five? Page five,
11 paragraph 12 has an allegation that: Mr. Brock, despite
12 being a Certified Public Accountant, never reconciled any
13 of the banking statements.
14 Is that the allegation in paragraph 12?
15 BY MS. ERWIN:
16 Object. The document speaks for itself.
17 WITNESS ANSWERS:
18 A. That's correct.
19 Q. And I guess you're stating that as a CPA, he has somehow
20 breached his -- there's a malpractice there, a
21 professional malpractice in failing to reconcile banking
22 accounts?
23 BY MS. ERWIN:
24 Object to the form of the question.
25 WITNESS ANSWERS:

1 A. In my opinion it is; yes.
2 Q. But you're not a CPA?
3 A. I'm not a CPA.
4 Q. In paragraph 13, you have testified -- you have alleged
5 that in June, as late as June of '07, that George had not
6 provided employees of the venture with W-2 forms
7 reflecting their income for the year 2006. This is of
8 questionable legality.
9 As a Certified Public Accountant, you're saying that
10 he breached his, that it was professional malpractice for
11 him to do that?
12 BY MS. ERWIN:
13 Object to the form of the question. The document speaks
14 for itself. And you're reading part of the sentence and
15 saying: Are you saying this. And then you're inserting
16 your own conclusion at the end of the sentence.
17 WITNESS ANSWERS:
18 A. As the full text of 13, I do agree with that.
19 Q. And your statement there in 13, your allegation, you're
20 alleging that as a malpractice, professional malpractice
21 by George?
22 BY MS. ERWIN:
23 Object to the form of the question. This is a claim in
24 arbitration. This is not a claim to the Accountancy
25 Board. And I'm objecting to the extent that you're

1 Thank you. I will.

2 DIRECT EXAMINATION RESUMED BY MR. WILSON:

3 Q. In paragraph 13, Mr. Erwin, are you alleging that George,

4 as a Certified Public Accountant, was not, was violating

5 his professional duties to you in failing to do the

6 things that are alleged in paragraph 13?

7 A. Yes.

8 Q. Thank you. In paragraph 14, the allegation contained

9 therein, are you stating that the failures of George to

10 perform, as you've alleged in paragraph 14, constitute a

11 breach of his professional duties to you? **

12 A. I do. MALPRACTICE 3

13 Q. Likewise in paragraph 15, are you stating today that the

14 allegations contained in paragraph 15 constitute a

15 violation of George's professional duties to you?

16 A. I do.

17 Q. Likewise in paragraph 16 -- and if you need to take a

18 moment to review paragraph 16, please do.

19 A. I've read 16. What is your question?

20 Q. I wanted to give you a chance to read it before I

21 formulated a question in fairness.

22 A. I read it.

23 Q. The allegations contained in paragraph 16, do you -- can

24 you tell me today: Are those allegations a breach of

25 George's professional duties to you?

MALPRACTICE
* 4

1 A. They are.
2 Q. Now, would you take a look at paragraph 17?
3 A. I read it.
4 Q. And the allegations contained in paragraph 17 insofar as
5 they recount George's failures, are those breaches of his
6 professional duties to you?
7 A. To me, they are.
8 Q. Likewise in paragraph 18, would you -- excuse me. Before
9 I ask you a question, would you take a moment to read
10 through paragraph 18?
11 A. Okay. What's your question on 18?
12 Q. I had not asked you a question --
13 A. I'm sorry.
14 Q. The allegations contained in paragraph 18 to the extent
15 that they recount improper conduct by George, my client,
16 does that constitute a breach of his professional duties
17 to you?
18 A. Well, the way I read 18 is basically a summary of that
19 meeting that we had where I met with he and his daughter
20 Shannon and Carrie to implement, to implement, you know,
21 the systems that would certainly result in the proper
22 management of the business.
23 Q. And, necessarily, wouldn't you agree that the
24 implementation of new systems necessarily means that the
25 previous systems were not operating correctly?

1 our hearing on the 18th.
2 Q. Is there somebody working on it now?
3 A. Not yet.
4 Q. Who's going to be working on it?
5 A. It's either going to be Roger, Joel Stoudenmire; one of
6 those two.
7 Q. All right, sir. And I'm going to call for the production
8 of it as soon as it's available.
9 A. Yes, sir.
10 Q. All right, sir. Could we look at paragraph 27?
11 A. I've read 27.
12 Q. Do the facts alleged in paragraph 27 in your view
13 constitute violations of George's professional duties to
14 you?
15 A. It does.

Malpractice #6

16 Q. Thank you. Now, in 28, would you take a second to look
17 at 28?
18 A. Okay.
19 Q. Can you tell me exactly what the damages are that you're
20 looking for from George?
21 A. The damages that I'm looking for would include all of
22 taxes that have not been paid. That would include all of
23 the invoices for the management's health insurance that I
24 paid and was never reimbursed to me. It will include all
25 of the non-sufficient fund fees that were charged by

RICK ERWIN'S

648 South Main Street
Greenville, SC 29601
P/864.232.5000
F/864.232.5015

RickErwins.com

June 20, 2007

Mr. George Brock
217 Whitsett Street
Greenville, South Carolina 29601

Re: Letter of Intent

~~Dear George:~~

This letter is to provide you notice of the cancellation of the Letter of Intent that we executed on October 5, 2005. Over the past week, as I have reviewed the books and records from Erwin's on Villa that you provided to me, I have come to the conclusion that it is not in the best interests of either of us (or of the restaurant itself) that we continue to operate in the manner set forth in that Letter of Intent.

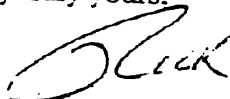
I propose two different options. Option 1: If you would like to retain your one-half ownership interest in the real estate, I will agree that you can pay your one-half share of the principal only on the note for the duration of the note. I will pay my one-half share of the principal as well as all interest due on the note for the duration of the note. In addition, I will assume all responsibility for the note at Carolina First and will have your name removed from that note.

Option 2: If you do not want to retain your interest in the real estate, I will pay you the sum of $ 47,500.00 for your interest in the real estate, with such sum to be paid on or before January 14, 2008, at a time of my choosing. Again, I would assume all responsibility for the note at Carolina First and will have your name removed from that note.

Under either of these options, I will pay all costs associated with changing the paperwork so that our agreement is properly documented. I would buy you out of the partnership and become the 100% sole owner of the partnership. At the present time, I would continue operating the two partnerships under their present names as sole owner.

Please let me know which of these options you select. I would appreciate hearing from you by July 6.

Very truly yours,



Rick B. Erwin

Neither of these options are in my best interest -

11/1/05

Greenville County) #3

State of South Carolina)

ASSET PURCHASE AGREEMENT

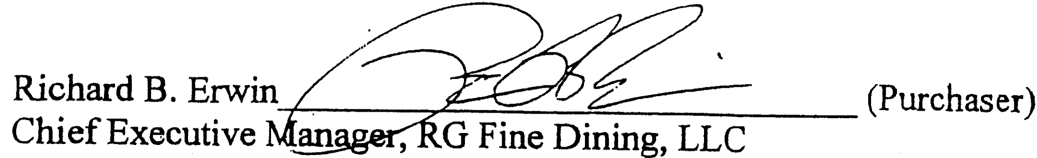
This asset purchase agreement (hereafter referred to as the "Agreement") is made into this 1th Day of November, 2005 by and between RG Fine Dining, LLC (Purchaser) and Italiano Cucina, LLC (Seller), both Limited Liability Companies (LLC's) organized under the laws of South Carolina.

WHEAS, the Seller desires to sell to the Purchaser and the Purchaser desires to sell to the seller all assets located at 100 Villa Road, Greenville, SC in the Abbondanza' Restaurant (Italiana Cucina, LLC) and which are presently owned by the Seller.

These assets consist of furniture and equipment (listed on Schedule A) in addition to the inventory, office equipment, kitchen utensils and other assets utilized at 100 Villa Road, Greenville, SC. Assets to be purchased is hereby agreed by Seller and Purchaser.

The liabilities to be assumed are listed in Schedule B. Liabilities are hereby agreed by Seller and Purchaser.

Consideration of $150,643.74 for liabilities assumed is hereby acknowledged and representations are hereby assumed by the representatives of both the Seller and Purchaser that they have the power and authority to negotiate for their respective companies.



Richard B. Erwin ______________________________ (Purchaser)
Chief Executive Manager, RG Fine Dining, LLC

George Brock ______________________________ (Seller)
Chief Executive Manager, Italiano Cucina, LLC

Italiano Cucina LLC

Liabilities **ATTACHMENT B**

1-Nov-05

	Accts Payables	Pd with Cash Flow	Disputed	Rewards	SCBT Bank	GHBrock
payroll taxes		214				
sales taxes		1200				
Sysco	2430					
Francis Produce	557.06					
Greenville News	1422					
Greenville Journal	450					
Commercial Paper	160					
Duke Power	1451.78					
PNG	550					
Bellsouth	352					
Chris McNeill	100					
Waste MGt			729			
Air Pro	250					
Plus Linen	513					
Fennel Container	150					
Priority One	98.85					
Rewards				6455		
Greenville Journal	483.6					
DHEC	180					
ECOLAB	346.45					
Supergreen	650					
GWS	-900					
Secured Note Pay					49,344	
Note Pay GHB						85,600
Total	9244.74	0	0	6455	49,344	85,600

§ 33-44-602

South Carolina Code of Laws (unannotated)
Title 33 - Corporations, Partnerships and Associations
CHAPTER 44. UNIFORM LIMITED LIABILITY COMPANY ACT OF 1996
33-44-602 Member's power to dissociate; wrongful dissociation.

33-44-602. Member's power to dissociate; wrongful dissociation.

ARTICLE 6. MEMBER'S DISSOCIATION

(a) Unless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to Section 33-44-601(1).

(b) If the operating agreement has not eliminated a member's power to dissociate, the member's dissociation from a limited liability company is wrongful only if:

(1) it is in breach of an express provision of the agreement; or

(2) before the expiration of the specified term of a term company:

(i) the member withdraws by express will;

(ii) the member is expelled by judicial determination under Section 33-44-601(6);

(iii) the member is dissociated by becoming a debtor in bankruptcy; or

(iv) in the case of a member who is not an individual, trust other than a business trust, or estate, the member is expelled or otherwise dissociated because it wilfully dissolved or terminated its existence.

(c) A member who wrongfully dissociates from a limited liability company is liable to the company and to the other members for damages caused by the dissociation. The liability is in addition to any other obligation of the member to the company or to the other members.

(d) If a limited liability company does not dissolve and wind up its business as a result of a member's wrongful dissociation under subsection (b), damages sustained by the company for the wrongful dissociation must be offset against distributions otherwise due the member after the dissociation.

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§ 33-44-403

South Carolina Code of Laws (unannotated)

Title 33 - Corporations, Partnerships and Associations

CHAPTER 44. UNIFORM LIMITED LIABILITY COMPANY ACT OF 1996

33-44-403 Member's and manager's rights to payments and reimbursement.

33-44-403. Member's and manager's rights to payments and reimbursement.

ARTICLE 4. RELATIONS OF MEMBERS TO EACH OTHER AND TO LIMITED LIABILITY COMPANY

(a) A limited liability company shall reimburse a member or manager for payments made and indemnify a member or manager for liabilities incurred by the member or manager in the ordinary course of the business of the company or for the preservation of its business or property.

(b) A limited liability company shall reimburse a member for an advance to the company beyond the amount of contribution the member agreed to make.

(c) A payment or advance made by a member which gives rise to an obligation of a limited liability company under subsection (a) or (b) constitutes a loan to the company upon which interest accrues from the date of the payment or advance.

(d) A member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	2011 APR 27 P 12: 46	

FILED-CLERK OF COURT
GREENVILLE CO S.C.

IN THE MATTER OF THE ARBITRATION BETWEEN:	)	
Richard B. Erwin,	)	
Claimant,	)	ARBITRATION AWARD
vs.	)	
George H. Brock,	)	
Respondent.	)	

Preliminary Statement Regarding Findings

The parties to this action entered into a business deal to form an LLC for the purposes of operating a restaurant. Unfortunately, both in a business/financial sense, as well as in a personal sense, this business deal soured relatively quickly. In my view as a neutral, having heard testimony from or on behalf of the parties at several lengthy hearings, as well as reviewing a plethora of evidence and submissions by their counsel, both parties share some of the blame for this happening, whether the cause be the failure to adequately communicate within the business, negligent job performance either in actual acts or in the failure to adequately oversee the operations of others, or in procedurally handling the break up of the business once the ability to work together had ended. That said, from the outset I find that while both parties made mistakes, I do not believe either party has proven that the other acted purposefully or in bad faith to injure the other.

A central issue in this arbitration has been the role of Respondent in the business under the

EXHIBIT A

Letter of Intent he drafted at the outset of the venture. In reviewing the testimony and weighing both the credibility of the testimony of the witnesses, the documents themselves, and the actions of the parties, I find Respondent both agreed to "serve as the accountant" for the LLC and to "provide support as an accountant" for the company. In doing so, I find that he took responsibility for the bookkeeping, either himself or through a surrogate of his choosing. As a preliminary matter, I find that the evidence presented in the matter shows these functions were performed carelessly and were the major factor in the failure of the business.[1] While perhaps Claimant should have been more proactive in looking at the financial standing of the business, he had no duty to assume that the accounting functions undertaken by Respondent would be handled incorrectly.

Further, the parties have each asked for an accounting as part of their claims in this matter. I believe this to be an impossibility at this point, as the evidence presented by each of the parties regarding the books of the business is such that I do not believe one can accurately be performed. For example, the amounts of various loans and other entries on the balance sheets and other documents presented at the hearings vary from document to document, and when explanations were asked for, adequate answers were not given in the view of this fact finder. For example, various balance sheets (many of which are out of balance) provided throughout this matter list amounts of notes payable to each of the parties with significant variances. These documents were highly inconsistent and varied from instance to instance without valid explanation or back up. No notes payable (other than the referenced terms in the Letter of Intent) were introduced, nor was any schedule or ledger of the amounts paid in and out to explain these variances in amount due. While I certainly believe an

---

1 While I agree with Respondent that GAAP is not applicable to this matter, this does not excuse the methods used in keeping the books of this business, which led to incorrect reporting to government agencies, insufficient fund charges due to overdrawing bank accounts, etc.

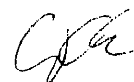
accounting *could* have been extremely useful for the parties, I note that since both asked for such an accounting, one should and could have been attempted long ago and nothing beyond the parties mutual lack of trust, inability to work together, and lack of cooperation (evidenced throughout this arbitration, including via discovery disputes and personal attacks) prevented it. At this point I believe the cost of a forensic accounting would exceed any benefit in ordering same, though to be fair no evidence was presented regarding such a cost or under what parameters an accounting could be ordered at this point.

Also, it need be noted that I denied a motion to amend from Claimant to add the LLC to the case in media res. Respondent prepared his case and tried the arbitration based on the assumption that Claimant was the only party, and I ruled and reaffirm here that to allow such an amendment would not be fair to Respondent.

<u>Claimant's Claims Against Respondent</u>

For the purposes of examining Claimant's claims in this award document, I use the claims as outlined in Claimant's Arbitration Brief, which I believe fairly set forth the case as presented.

Breach of contract: Claimant alleges Respondent breached the contract between the parties which led to the formation of the LLC, the Letter of Intent, both in specific terms and by arguing that Respondent violated the duties of good faith and fair dealing. As I find Respondent breached his duties under the specific terms of the agreement, there is no need for me to rule on the latter allegations as the damages are identical. However, inasmuch as Respondent may dispute my findings regarding a specific breach of the agreement as relates to his accounting functions, I find that his actions in his handling of the tax reporting, checking accounts, etc. do not comport with acting in



good faith and fair dealing. 2 In my opinion, the record presented to me is replete with examples, most of which were testified to in a credible manner by both Carrie Hempel and Claimant, of Respondent's breach. These include late payment of bills, incorrect reporting of sales to tax authorities, allowance of insurance to be cancelled, bank accounts that were overdrawn, etc., all of which led to, among other things, tax liability *for the company.* 3 Note, however, that I find that any damages for taxes is corporate, and not individual, to the extent that they have not been claimed against or paid for by the Claimant individually. However, I do find that Claimant has been held to be *individually* responsible for $4,392.27 by the South Carolina Department of Revenue for unpaid taxes in 2008 and that he individually paid an additional $2,776.45 in 2010. While Respondent claims the initial amount was due Claimant's decision to "stop payment" on trust fund amounts to the state, I find that the ultimate responsibility for both of these payments is Respondent's breach of his duties as the accountant to the company. However, I find Claimant has failed to prove by a preponderance of the evidence that the other damages he claims as a result of Respondent's breach of contract are his personal damages as opposed to those of the LLC. I make no finding as to the validity of those damages if brought by the LLC.

Unjust Enrichment/Conversion: I find for Respondent on these claims. I simply do not believe Claimant has met his burden of proof in showing Respondent was unjustly enriched or

---

2 With regard to the specific duties of Respondent, while there exists an Operating Agreement (OA), Respondent testified it was never used. Regardless, the only mention in the OA regarding accounting functions refers to bookkeeping, which I have previously found and hereby reiterate were the responsibility of Respondent. I find that there is nothing in the OA that abrogates Respondent's duties as the accountant for the business and for providing "accounting support" as set forth in the Letter of Intent. The record before me shows multiple examples of Respondent taking responsibility for bookkeeping, including setting up his daughter as the bookkeeper, attempting to train others to perform the functions, personal involvement with checks and bank balances, etc.

3 Note that Respondent claims that the Statute of Limitations has run for the IRS collection of the unpaid taxes. While this may be true, if not, any such damages are for the LLC, not Claimant, nor is there evidence that the tax liabilities have been paid.

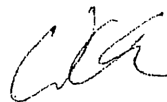
converted property of the company to his own benefit.

Respondent's Counterclaims Against Claimant

Respondent seeks recovery against Claimant for statutory oppression/squeeze-out and breach of fiduciary duty. I decline to award him damages on either cause of action.

Respondent's claims are premised on assumption. He assumed he was being denied the ability to participate in the business once Claimant learned of his breach of the agreement due to his failure to adequately provide the accounting service to which he had agreed. He read the letter sent to him by Claimant seeking to cancel the Letter of Intent due to his breach and proposing ways to resolve the issues this would bring as a "squeeze out". I do not find this to be the case. Additionally, Respondent points to, among other things, a TRO issued by the Circuit Court in favor of Claimant (never appealed from by Respondent, and these issues could certainly have been raised at that time), payment for a meal while in the restaurant after the parties had ceased to act civilly toward each other, and the revocation of his ability to sign checks (despite his attempts to try to issue checks after he had been put on notice of the belief of his breach of the contract, including at least one attempt at correcting his accounting errors that caused a late tax payment to the State of South Carolina). While I believe Claimant could and perhaps should have proceeded to use his statutory remedies for removal of a member of the LLC, I do not find that he wrongfully "squeezed out" Respondent. It is my belief that Claimant was merely attempting damage control in an effort to try and save the business.

Furthermore, even were I to hold in Respondent's favor regarding his counterclaims, I find that he has failed to prove damages by a preponderance of the evidence. Respondent asks for repayment of his "note", but there is no reliable evidence to determine what is owed to him. The



amounts are challenged by Claimant, and even in the evidence presented by Respondent vary without explanation (and none was given despite examination on the subject) 4.

Another example is Respondent's proof on the alleged Gore liability. Respondent testified when asked how much that amount was that it could be one amount or another, "just say $3000" and implied he didn't "honestly know" what the amount was. He also testified that he paid it back out of his pocket. Later, he changed this to stating that he "worked it off". The balance sheets in evidence show the amount to vary without explanation, and there was also testimony that Claimant paid amounts owed as a result of Gore debt and that Respondent used the money for other purposes.

As the finder of fact, I simply do not believe Respondent has met his burden of proof on the amount of his damages and therefore the damage portion of the claim would fail even if I believed there was liability. Additionally, I note the amounts asked for in Respondent's proposed order differ significantly from the damages testified to at the hearing by Respondent. This is simply more evidence that even *Respondent* is unsure as to what his damages are were I to determine he was entitled to them.

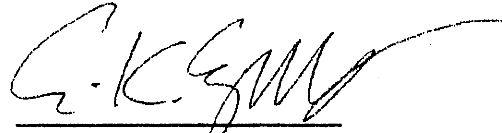
It is not lost on me that there are no "winners" here, and that the parties theoretically could continue to engage in costly litigation in the future by including the LLC as a party. Based on my understanding of the corporate books per the evidence presented to me in this matter, and my belief that a reliable forensic accounting is impossible and would be extremely costly, I do not foresee a way either party would adequately be able to prove their damages by a preponderance of the evidence.

---

4 The balance sheets also show the amount of the note owed to Claimant varying greatly as well without adequate explanation. This is another factor in my discussion above about the likely lack of success in an accounting.

THEREFORE, based on the above, Claimant is awarded the sum of Seven Thousand One Hundred Sixty Eight and 72/100 ($7,168.72) against Respondent.

Dated: 22 April 2011



Eric K. Englebardt, Esq.
Arbitrator

ERWIN'S ON VILLA
General Ledger
For the Period From Jan 1, 2006 to Dec 31, 2006

Filter Criteria includes: Report order is by ID. Report is printed in Detail Format.

Account ID Account Description	Date	Reference	Jrnl	Trans Description	Debit Amt	Credit Amt	Balance
N/P -CAROLINA F (co	11/1/06			Beginning Balance			-63,181.76
	12/1/06			Beginning Balance			-63,181.76
	12/31/06			**Ending Balance**			**-63,181.76**
N/P -GG	1/1/06			Beginning Balance			-5,000.00
N/P -GG	2/1/06			Beginning Balance			-5,000.00
	3/1/06			Beginning Balance			-5,000.00
	4/1/06			Beginning Balance			-5,000.00
	5/1/06			Beginning Balance			-5,000.00
	6/1/06			Beginning Balance			-5,000.00
	7/1/06			Beginning Balance			-5,000.00
	8/1/06			Beginning Balance			-5,000.00
	9/1/06			Beginning Balance			-5,000.00
	10/1/06			Beginning Balance			-5,000.00
	11/1/06			Beginning Balance			-5,000.00
	12/1/06			Beginning Balance			-5,000.00
	12/14/06	5549	CDJ	GENE GORE - N/P	1,000.00		
				Current Period Cha	1,000.00		1,000.00
	12/31/06			**Ending Balance**			**-4,000.00**
N/P -GHB	1/1/06			Beginning Balance			-85,800.00
N/P -GHB	2/1/06			Beginning Balance			-85,800.00
	3/1/06			Beginning Balance			-85,800.00
	3/31/06		GEN		5,000.00		
				Current Period Cha	5,000.00		5,000.00
	4/1/06			Beginning Balance			-80,800.00
	4/24/06	DEP	CRJ	GEORGE - N/P -G		2,000.00	
				Current Period Cha		2,000.00	-2,000.00
	5/1/06			Beginning Balance			-82,800.00
	5/8/06	5190	CDJ	GEORGE BROCK	500.00		
				Current Period Cha	500.00		500.00
	6/1/06			Beginning Balance			-82,300.00
	6/14/06	DEP	CRJ	GEORGE - N/P -G		2,000.00	
				Current Period Cha		2,000.00	-2,000.00
	7/1/06			Beginning Balance			-84,300.00
	7/17/06	DEP	CRJ	GEORGE - N/P -G		1,792.04	
	7/17/06	DRAFT	CDJ	THORNBURG MT	1,792.04		
	7/31/06	DEP	CRJ	DEPOSIT - N/P -G		1,300.00	
				Current Period Cha	1,792.04	3,092.04	-1,300.00
	8/1/06			Beginning Balance			-85,600.00
	8/10/06	5353	CDJ	GEORGE BROCK	638.00		
				Current Period Cha	638.00		638.00
	9/1/06			Beginning Balance			-84,962.00
	9/18/06	DEP	CRJ	GEORGE - N/P -G		500.00	
	9/25/06	5417	CDJ	GEORGE BROCK	500.00		
	9/27/06	DEP	CRJ	SALES - N/P -GHB		65.00	
				Current Period Cha	500.00	565.00	-65.00
	10/1/06			Beginning Balance			-85,027.00
	10/4/06	5423	CDJ	GEORGE BROCK	150.00		
	10/5/06	5422	CDJ	GEORGE BROCK	150.00		
	10/10/06	DEP	CRJ	GEORGE BROCK		1,500.00	
				Current Period Cha	300.00	1,500.00	-1,200.00
	11/1/06			Beginning Balance			-86,227.00
	12/1/06			Beginning Balance			-86,227.00
	12/7/06	5547	CDJ	GEORGE BROCK	500.00		
	12/22/06	5571	CDJ	GEORGE BROCK	500.00		
				Current Period Cha	1,000.00		1,000.00
	12/31/06			**Ending Balance**			**-85,227.00**
N/P -RE	1/1/06			Beginning Balance			-46,933.87

general ledger changes in my Notes Payable reflected

Robert C. Wilson, Jr.
Attorney at Law

201 Whitsett Street
Greenville, South Carolina 29601

Telephone 864/ 242-9488 Fax 864/ 242-6251

November 13, 2012

Judicial Merit Selection Commission
Columbia, SC

Re: Eric Englebardt

Dear JMSC;

I have read George Brock's complaint against Mr. Englebardt and concur completely. Mr. Brock was not only a victim of Mr. Richard Erwin and his attorney/wife Ingrid Erwin but also Mr. Englebardt, the arbitrator.

I believe that Mr. Brock has furnished to you in his Exhibit #2 my proposed arbitration award which sums up the case.

I am attaching my motion dated July 29, 2009 which was submitted at the very beginning of the arbitration. I asked for dismissal of the malpractice claims because Ms. Erwin failed to comply with Sec. 15-36-100 of the Code of Laws, 1976, as amended.

Mr. Englebardt refused to accept the document (Exhibit 1). As a result, Mr. Brock had to face numerous charges of malpractice by failure to conform to Generally Accepted Accounting Principles (GAAP).(Exhibit 2).

Mr. Englebardt also did not allow counter claims by Mr. Brock that Mr. Erwin owed any monies to him by saying that the amounts changed over time. It is normal for balance sheet amounts to change over time. Also Mr. Brock was once confused as to the amount owed to Gene Gore during arbitration. Was that a reason to also deny it when it as clearly shown on the financial statements and other documents?

I am also attaching examples of Cashiers Checks that Mr. Brock personally delivered to the South Carolina Department of Revenue. Mr. Erwin had those checks and others reversed and used the funds for his best purpose.(Exhibit 3).

Mr. Englebardt ruled that Mr. Brock had to repay Mr. Erwin for subsequently having to face the music for the reversals as the SCDOR ruled that Mr. Erwin was the "responsible party".

Finally I also agree that Mr. Englebardt lacked the appearance of being independent and unbiased. There was too much discussion of Mr. Erwin's two restaurants on Main St.

I hope that the JMSC makes a prudent decision. Thank for considering Mr. Brock' complaint.

Very Truly Yours,

Robert C. Wilson, Jr.

Exhibit #1

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS
IN THE MATTER OF THE ARBITRATION BETWEEN: Richard B. Erwin, Claimant, vs. George H. Brock, Respondent.	))))))))))))))	**RESPONDENT'S FIRST MOTION *IN LIMINE***

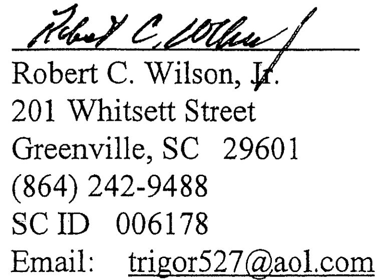
TO: Richard B. Erwin, Claimant, and his attorney, Ingrid Blackwelder Erwin, One Liberty Square, 55 Beattie Place/ Suite 800, Greenville, SC 29601

YOU WILL PLEASE TAKE NOTICE THAT the undersigned will on such day and at such time as designated by Hon. Eric Englebardt, Arbitrator, move this tribunal for its order, *in limine*, barring any testimony in this Arbitration Proceeding which in any way bears on any alleged professional negligence or malpractice of Respondent, as a CPA, on the grounds that Claimant has failed to comply with §15-36-100 of the South Carolina Code of Laws, 1976, as amended, by failing to file the requisite affidavit of an expert which is required in any action against a professional. Respondent has attached a photocopy of §15-36-100(B) of the South Carolina Code of Laws, 1976, as amended, which requires the filing of an affidavit by a CPA which sets forth the CPA's opinion that professional negligence has occurred.

AND YOU WILL PLEASE TAKE NOTICE that the undersigned also moves this tribunal, *in limine*, to dismiss all of Claimant's claims on the basis that Claimant has failed to comply with §15-36-100 of the South Carolina Code of Laws, 1976, as amended.

The undersigned hereby certifies that he has unsuccessfully attempted to resolve these issues with opposing counsel. The issues raised herein, therefore, requires adjudication.

Dated: 7/22/09



Robert C. Wilson, Jr.
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(864) 242-9488
SC ID 006178
Email: trigor527@aol.com

Attorney for Respondent,
George H. Brock

Exhibit #2

contributed, plus interest at a rate of 4.5%. Plaintiff stated that he would agree to this suggestion, provided that he was given the same treatment as to any funds that he supplied to the venture. Defendant agreed. Since the inception of the venture, defendant has contributed no additional capital in addition to the interest in fixtures and equipment, which defendant has stated had a value of approximately $85,000.00. Although plaintiff has requested documentation supporting defendant's claims that the equipment is worth over $85,000.00, defendant has provided nothing. The equipment is itemized only on a spreadsheet that defendant apparently prepared. The values of the items on that list appear to be significantly inflated and appear to be equal to or in excess of retail value for the items. In fact, the equipment had been in use for a period of time in the business formerly operated at the location and was therefore not new equipment. In addition, on information and belief, had been substantially depreciated on prior tax returns. Further, not all of the items listed on the "spreadsheet" are in existence; other items on the spreadsheet were removed from the premises by defendant after the agreements between the parties were executed. In contrast to defendant's claimed contributions, plaintiff has contributed approximately $106,000.00 in cash to the venture. These sums are documented, and the documentation has been provided to defendant. Plaintiff has not been reimbursed by the limited liability company or otherwise for these sums.

9. In order to induce plaintiff to enter into the Letter of Intent and the other documents setting forth the terms of their business relationship, defendant represented to plaintiff that he was a Certified Public Accountant with years of experience and that he was capable of performing the accounting services that the restaurant venture would require. Defendant gave plaintiff no indication that he did not follow generally accepted accounting practices or that he engaged in the type of conduct described more fully below.

38. Defendant is blatantly violating the terms of the Operating Agreement by failing to maintain complete and accurate books of the Company's affairs and by failing to provide copies of documents, including, without limitation, copies of tax returns.

39. As a result of defendant's breaches of the Letter of Intent and the Operating Agreement, plaintiff has suffered damages. Defendant is liable to plaintiff for any such damages caused by his breach of contract and for all costs and attorneys' fees incurred by plaintiff in enforcing his rights under the Letter of Intent.

FOR A SECOND CAUSE OF ACTION
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

40. The allegations contained in paragraphs 1 through 39 above are incorporated by reference into this cause of action as if set forth fully herein.

41. Under South Carolina law, an implied covenant of good faith and fair dealing attaches to all contracts. Defendant has an implied duty to uphold the promises that he made in the Letter of Intent and to comply with the terms of such Letter of Intent fairly and in good faith. Defendant also had an implied duty to uphold the promises that he made in the Operating Agreement and to comply with the terms of such Operating Agreement fairly and in good faith.

42. By failing to follow generally accepted accounting principles and by failing to maintain due care with respect to the financial books and records of the venture, defendant has failed to perform his responsibilities and has jeopardized the status of the venture.

43. Defendant's bad faith is further demonstrated by his continued failure and refusal to provide complete access to the venture's books and records to plaintiff.

44. Such conduct is unfair and in bad faith. By engaging in such prohibited conduct, defendant violated the implied covenant of good faith and fair dealing.

and omissions in maintaining the books and records of the venture, for example, floating checks, ignoring invoices, failing to transmit checks actually written, failing to provide employees with federally-required forms, and misrepresenting the amount of sales of the business. Based on the wrongfulness of that conduct, plaintiff suspects that defendant may have committed other actions which are either in violation of generally accepted accounting principles or are in violation of the Letter of Intent.

57. Plaintiff asks that the Court order defendant to appear and give an accounting of all financial and other matters that he has handled on behalf of the venture since the inception of the venture. Plaintiff further asks that the Court order defendant to provide information regarding the profits earned from such activities.

58. Plaintiff asks that the Court order defendant to appear and provide all books and records of the venture in his possession to the Court so that an independent accounting of the financial activities of the business can be performed.

59. Plaintiff is entitled to recover damages as a result of all misconduct engaged in by defendant.

FOR A SEVENTH CAUSE OF ACTION
(Permanent Injunction)

60. The allegations contained in paragraphs 1 through 59 above are incorporated by reference into this cause of action as if set forth fully herein.

61. As demonstrated by the facts and allegations set forth herein, plaintiff possesses a high likelihood of success upon the merits of this case.

62. Until such time as defendant is enjoined from continuing the wrongful conduct set forth herein, plaintiff will be without an adequate remedy at law.

63. Defendant's actions are wrongful, as detailed herein, and continuing.

64. If unrestrained, plaintiff will suffer irreparable harm for which there is no adequate legal remedy as a result of defendant's breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.

65. Such harm is irreparable because:

(a) it is impossible to determine the extent of the impact that will result from defendant's misconduct and failure to use generally acceptable accounting practices;

(b) it is impossible to calculate the value of the time and resources that plaintiff has expended in creating and maintaining its business relationships and the confidential information; and

(c) if defendant continues to engage in this type of misconduct, then the value of the lost business and destroying of plaintiff's goodwill and business reputation will be difficult, if not impossible, to calculate.

66. Unless restrained, defendant will continue to pursue the type of misconduct, neglect, and failure to follow generally accepted accounting principles that has characterized his handling of the books and records of the venture to date.

67. Therefore, plaintiff is entitled to a permanent injunction enjoining defendant in accordance with the relief set forth herein.

FOR AN EIGHTH CAUSE OF ACTION
(Temporary Injunction)

68. The allegations contained in paragraphs 1 through 67 above are incorporated by reference into this cause of action as if set forth fully herein.

69. As set forth above, plaintiff has made a prima facie showing that he is entitled to injunctive relief.

Exhibit #3

1566686

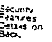
EMITTER RG FINE DINING,LLC
CLEVELAND ST/MNS/103

PAY TO THE ORDER OF **SC DOR**

September 17 20 07

$ 1,489.00

One Thousand Four Hundred Eighty Nine Dollars and No Cents DOLLARS



TWO SIGNATURES REQUIRED OVER $10,000.00

PLEASE APPLY TO SCDOR PAYROLL WITHHOLDING TAXES TRUST FUND PORTION ONLY 6/30/07 QUARTER

AUTHORIZED SIGNATURE

OFFICIAL CHECK

AUTHORIZED SIGNATURE

⑈1566686⑈ ⑆053902197⑆ 1016500042⑈

1566688

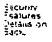
REMITTER RG FINE DINING,LLC
CLEVELAND ST/MNS/103

PAY TO THE ORDER OF **SC DOR**

September 17 20 07

$ 989.42

Nine Hundred Eighty Nine Dollars and Forty Two Cents DOLLARS



TWO SIGNATURES REQUIRED OVER $10,000.00

PLEASE APPLY TO SCDOR PAYROLL WITHHOLDING TAXES TRUST FUND PORTION ONLY 3/31/07 QUARTER

AUTHORIZED SIGNATURE

OFFICIAL CHECK

AUTHORIZED SIGNATURE

⑈1566688⑈ ⑆053902197⑆ 1016500042⑈

CAROLINA FIRST

1566688

REMITTER RG FINE DINING,LLC
CLEVELAND ST/MNS/103

September 17 20 07

PAY TO THE ORDER OF **SC DOR**

$ 989.42

Nine Hundred Eighty Nine Dollars and Forty Two Cents DOLLARS

Security features. Details on back.

TWO SIGNATURES REQUIRED OVER $10,000.00

PLEASE APPLY TO SCDOR
PAYROLL WITHHOLDING
TAXES TRUST FUND
PORTION ONLY 3/31/07
QUARTER

AUTHORIZED SIGNATURE

AUTHORIZED SIGNATURE

OFFICIAL CHECK

⑈1566688⑈ ⑆053902197⑆ 1016500042⑈