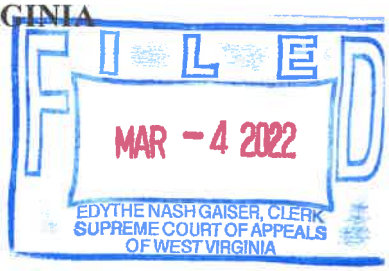
22-BCD-04

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of Accurate
Pest Management, LLC,

Plaintiffs

v.

Berkeley Coutny
Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

RESPONSE AND OBJECTIONS TO PLAINTIFFS' AND THIRD PARTY DEFENDANT'S MOTION TO REFER TO BUSINESS COURT DIVISION

NOW COMES Defendant, Scott W. McDermitt, by counsel, and for his Response and Objections to Plaintiffs' and Third Party Defendant's Motion to Refer this Civil Action to the Business Court Division, and respectfully states as follows:

TO: THE HONORABLE JOHH A. HUTCHISON, CHIEF JUSTICE

1. The instant motion to refer the above-referenced civil action to the Business Court Division pursuant to TCR Rule 29.06 was wrongfully brought by Plaintiffs in an attempt to deny presiding Judge, Honorable R. Steven Redding of the Twenty-Third Judicial Circuit, from deciding whether to disqualify Plaintiffs/Counter Defendants' and Third Party Defendant's counsel, The Riddell Law Group, from representing the Plaintiffs/Counter Defendants and Third

Party Defendant on the grounds of conflict of interests in violation of Rules 1.7(b)(3) of the Rules of Professional Conduct; and, Rule 1.13 Organization as a Client, including the Comments for Derivative Actions under paragraph [14]; and, that matter is ripe for decision by Judge Redding, and Judge Redding should be permitted the authority to render a decision on that pending motion, as well as the motion to refer this civil action to a special receiver to take, hold and liquidate the assets of the Plaintiff LLC known as State Certified Termite & Pest, LLC ("the Old LLC"), and those pleadings and papers were conspicuously omitted from the list of exhibits which were presented by the Movant as exhibits to the Honorable Chief Justice in Plaintiffs' and Third Party Defendant's Motion to Refer.

Accordingly, the following pleadings and papers are hereby presented:

a. That on October 29, 2021, Defendant/Counter Plaintiff and Third Party Plaintiff (hereinafter referred to simply as "the Defendant"), Scott W. McDermitt, by counsel, filed a Motion to Disqualify Plaintiff/Counter Defendants and Third Party Defendant's Counsel for Conflict of Interests and to Appoint an Independent Special Receiver to Wind Up and Liquidate Plaintiff, State Certified Termite & Pest, LLC, a copy of which Motions are attached hereto as Exhibit 1.

b. That in addition to Exhibit 1, on October 29, 2021, Defendant, by counsel, also filed a Notice of Filing Foreign Law, which included copies of relevant foreign law, a copy of which is attached hereto as Exhibit 2.

c. That on November 9, 2021, Plaintiffs counsel's Response to Defendant's Motion to Disqualify Counsel requested the Court to rule first on the Plaintiffs' Motion to Dismiss Counts II and III of Defendant's Second Amended Counterclaim and also Plaintiffs' motion to dismiss the Third Party Complaint against the single-member limited liability

company, owned by Plaintiff, William Rogers, State Certified Termite And Pest, LLC ("the New LLC")[1]. See Exhibit 3 hereto.

d. That on November 17, 2021, Defendant filed his Closing Memorandum in Support of His Motion to Disqualify Plaintiffs' Counsel. That pleading is attached hereto as Exhibit 4.

e. That on January 5, 2022 Plaintiffs' counsel filed a Motion for Oral Argument before the Court to hear argument on Defendant's Motion to Disqualify Counsel and to enter a Scheduling Order. See copy attached hereto as Exhibit 5.

f. That on January 13, 2022, Judge Redding entered an Order Denying Plaintiffs' Motion to Dismiss Counts II and III of the Second Amended Counterclaim, and on January 14, 2022, entered an Order Denying the Motion to Dismiss Third Party Complaint. See Exhibits 6 and 7 attached hereto.

g. That Judge Redding entered an Order on January 14, 2022 to hear the oral arguments on the pending Motion to Disqualify Counsel, and to conduct a scheduling conference. The parties, by counsel, appeared for oral argument before Judge Redding on January 21, 2022, and argued the Motions to Disqualify Counsel and for a Scheduling Order, and the Motion to Refer the Matter to a Special Receiver to liquidate State Certified Termite & Pest, LLC ("the Old LLC"), and the Court at that hearing did not enter a Scheduling Order, and asked the parties to present supplemental memoranda on the issues of disqualification of Plaintiffs' counsel and the Motion to Refer to Special Receiver.

h. That on January 31, 2022, Plaintiffs, by counsel, filed their Supplemental Brief of Third Party Defendant in Opposition to Defendant's Motion to Disqualify Counsel. See copy attached hereto as Exhibit 8.

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[1] The only difference in the names of the Old LLC and New LLC is the "&" in the Old LLC and the word "And" in the New LLC. The New LLC is owned 100% by Plaintiff Rogers. The membership ownership of the Old LLC is 41% each for Plaintiff Schultz and Defendant McDermitt and 18% for Plaintiff Rogers.

i. That on February 4, 2022, Plaintiffs' counsel moved for additional oral argument on the previously briefed and argued Motions to Disqualify Counsel and for the Appointment of a Special Receiver. See Exhibit 9 attached hereto. Judge Redding has not ruled on the Motion for Additional Oral Argument as of the filing hereof.

j. That on February 4, 2022, Defendant's counsel filed his Supplemental Memorandum in Support of his Motion to Disqualify Plaintiffs' Counsel, and for the Court to Appoint an Independent Special Receiver to Wind Up and Liquidate the Assets of the Old LLC. See Exhibit 10 hereto.

k. That on February 7, 2022, Defendant's counsel filed Objections to Additional Oral Argument on Plaintiffs' Motion for Additional Oral Argument, and for the Court to render a decision on the disqualification motion against Plaintiffs' counsel, arguing that the matter had already been fully briefed and orally argued as well as the Court requesting, receiving and considering the supplemental memoranda of the parties in support of and in opposition to the disqualification motion. See copy of Defendant's Objections attached hereto as Exhibit 11.

2. That Judge Redding has not rendered decisions on the Motion to Disqualify Counsel nor the Motion to Refer the Matter to a Special Receiver as of the filing of this Response and Objections.

3. That on February 17, 2022, apparently Plaintiffs' counsel, fearing an adverse decision by Judge Redding was forthcoming on the disqualification motion, filed the instant Motion to Refer Case to the Business Court Division.

4. That it should be clear that Plaintiffs' motion is nothing more than an attempt to subvert Judge Redding's authority to have them disqualified as counsel for a conflict of interests in hopes that the Business Court Division would be a more favorable forum and sustain them as appearing counsel for Plaintiffs/Counter Defendants and Third Party Defendant, and overrule Defendant's Motion to Disqualify Plaintiffs' counsel.

5. That the purpose of the Business Court Division is to decide: "dispute[s] present[ing] commercial and/or technological issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy, because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable". See TCR Rule 29.04(a)(2), but the instant civil action does not involve such issues.

6. That the issues presented in this civil action involve claims of fraud, breaches of fiduciary duty, and an accounting for usurpation of corporate opportunities. These are not technical nor commercial, but are mere allegations of simple legal tort claims and an equitable claim to account.

7. The Plaintiffs' instant Motion to Refer to the Business Court Division, if it in fact had some element of validity, should have been filed, if at all, within the first few months of the initial filing of this case which took place in July of 2020, and thus a year and a half has already passed in which the Judge Redding has already decided temporary injunctions; discovery issues; and, is in the process of determining whether Plaintiffs' counsel should be disqualified for a clear conflict of interests in this same matter.

8. TCR Rule 29.06(a)(2) states that motions to refer shall be filed "after the time to answer the complaint has expired". Defendant filed his Answer to the Complaint on August 26, 2020, some eighteen (18) months ago. Plaintiffs' motion to refer the matter to the Business Court Division is untimely.

For the foregoing reasons, the Plaintiffs' instant motion to refer the instant civil action to the Business Court Division must be respectfully denied.

Respectfully submitted this 3rd day of March, 2022.

Scott W. McDermitt, Defendant/Counter Plaintiff and Third Party Plaintiff
By Counsel

Michael L. Scales, Attorney at Law
Counsel for Defendant, Counter Plaintiff and Third Party Plaintiff, Scott W. McDermitt
Michael L. Scales, PLLC
314 W. John Street
Martinsburg, WV 25401
(304) 263-0000
WV Bar No. 3277

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of Accurate
Pest Management, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

TO: THE HONORABLE CHIEF JUSTICE

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Defendant/Counter Plaintiff and Third Party Plaintiff, Scott W. McDermitt, do hereby certify that I have served a true copy of RESPONSE AND OBJECTIONS TO MOTION TO REFER TO BUSINESS COURT by the Court's e-filing system to counsel for Plaintiffs, Nicola Smith, Esq. and Christian J. Riddell, Esq., Hon. R. Steven Redding, Circuit Judge and the Berkeley County Circuit Clerk's Office; and by mailing a true copy thereof to Business Court Division Central Office, Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, WV 25401, and to the Supreme Court of Appeals of West Virginia, Attn: Ms. Edythe Nash Gaiser, Clerk of the Court, Capitol Complex, 1900

Kanawha Blvd. East, Building 1, Room E-317, Charleston, WV 25304, by Federal Express next day delivery, this 3rd day of March, 2022.

Michael L. Scales, Attorney at Law

EXHIBIT 1

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of State
Certified Termite & Pest, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

DEFENDANT/COUNTER PLAINTIFF AND THIRD PARTY PLAINTIFF, SCOTT W. MCDERMITT'S MOTION TO DISQUALIFY PLAINTIFFS/COUNTER DEFENDANTS AND THIRD PARTY DEFENDANT'S COUNSEL FOR CONFLICT OF INTEREST AND TO APPOINT AN INDEPENDENT SPECIAL RECEIVER TO WIND UP AND LIQUIDATE PLAINTIFF, STATE CERTIFIED TERMITE & PEST, LLC

NOW COMES Defendant/Counter Plaintiff and Third Party Plaintiff, Scott W. McDermitt, by counsel, who moves this Honorable Court to dismiss and disqualify Nicola Smith, Esq., Christian J. Riddell, Esq., The Riddell Law Group, and Hoyer, Hoyer and Smith, Attorneys at Law, as counsel for the Plaintiffs, Counter Defendants and Third Party Defendant, on the grounds of conflict of interest and to appoint an independent special receiver to wind up and liquidate State Certified Termite & Pest, LLC, in the following particulars:

EXHIBIT #

1. That Plaintiff, State Certified Termite & Pest, LLC (fraudulently misidentified in prior pleadings by Plaintiffs as "Accurate Pest Management, LLC"), was a West Virginia limited liability company that was dissolved administratively by the West Virginia Secretary of State on November 1, 2015 ("Old LLC"), and not reinstated within two (2) years pursuant to §31B-8-810(c) and §31B-8-811(a) of the W.Va. *Code*.

2. Notwithstanding the fraudulent representations by Rogers and Schultz, that because the Old LLC was not reinstated with the Secretary of State within two years, the individual Plaintiffs apparently brought this action derivatively to wind up and liquidate the Old LLC. §31B-8-810(c) of the *Code*.

3. That since Plaintiffs Rogers, as Manager, and Schultz are the two remaining members of the Old LLC, there is a fiduciary relationship with the Old LLC and to the remaining members, including Defendant, under §31B-4-409(b)(1) and §31B-4-409(h)(2) of the *Code*, to hold the Old LLC's assets and opportunities ***as trustees*** and to account for the Old LLC's assets, property and corporate opportunities.

4. That both Plaintiffs, Rogers and Schultz, have a duty to "refrain from dealing with the Company ("Old LLC") in the conduct or winding up of the Company's business as or on behalf of a party having an interest adverse to the Company". §31B-4-409(b)(2) of the *Code*.

5. That Plaintiffs Rogers and Schultz have duties "to refrain from competing with the Old LLC in the conduct of the Company's business before the dissolution of the Company". This duty extends to Defendant who holds a 41% membership interest in the Old LLC. §31B-4-409(b)(3) of the *Code*. That both Rogers and Schultz own separate pest control business that compete with the Old LLC.

6. That Plaintiffs Rogers and Schultz have duties of care to both the Old LLC and to Defendant in the conduct of and winding up of the Old LLC's business by "refraining from engaging in grossly negligent or reckless conduct, **intentional misconduct** or a knowing violation of law". §31B-4-409(c) of the W.Va. *Code*. Both Rogers and Schultz are accused of committing fraud and breach of fiduciary ("intentional misconduct") to the Old LLC in the Second Amended Counterclaim.

7. That in the Second Amended Counterclaim and Third Party Complaint, Defendant avers that Rogers has set up a new single-member LLC, being named State Certified Termite And Pest LLC, a West Virginia limited liability company ("New LLC"), whereby it is a single-member LLC owned solely by Rogers, and is usurping the opportunities and the assets of the Old LLC to be taken over by the New LLC solely to benefit Rogers, when the percentages of the ownership in the Old LLC were 18% for Schultz, 41% for Rogers and 41% for McDermitt, and to pay Schultz in excess of $30,000.00 from the assets of the Old LLC which is unsupported by any document or minutes of the Old LLC.

8. That Plaintiffs' counsel at the first two hearings in 2020 was originally represented by Christian J. Riddell, Esq. of the Riddell Law Group, and subsequently thereafter represented by Nicola Smith, Esq. of the Riddell Law Group and Christopher Smith, Esq. (recently deceased) of the law firm Hoyer, Hoyer and Smith.

9. That Defendant McDermitt's Second Amended Counterclaim avers that Rogers and Schultz were guilty of fraud, fraudulent concealment and conversion of the Old LLC's assets, property and opportunities for the sole benefit of Rogers' New LLC which is a breach of fiduciary duty, fraudulent and clearly wrongful acts and violations of §31B-4-409(b)(1), (2), (3) and §31B-4-409(c) of the *Code*.

10. That Plaintiffs' counsel cannot act in a fiduciary relationship as counsel for the Old LLC and Rogers and Schlutz, derivatively, as trustees of the Old LLC, and to its resulting member (Defendant), and defend claims by Defendant in his Second Amended Counterclaim and Third Party Complaint that Rogers and Schultz are usurping the corporate opportunities, assets, customer base and good will of the Old LLC for the benefit of Rogers' solely owned New LLC, as the same is a conflict of interest pursuant to the Rules of Professional Conduct, Rule 1.13(b) and Comments [13] and [14] (Rogers and Schultz are stated to be representing the Old LLC "derivatively") and Rule 1.7.

11. Rule 1.7(b)(3) of the Rules of Professional Conduct, **Conflict of Interest: Current Clients**, states: "Notwithstanding the existence of a concurrent conflict of interest under (a), a lawyer may represent a client if... (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal...".

12. Here, the Plaintiffs/Counter Defendants' counsel is representing the Old LLC in a fiduciary capacity for their clients "derivatively" on behalf of the Old LLC and its members (including Defendant) to dissolve and liquidate the assets of the old LLC, when there is a claim against the New LLC and Rogers and Schultz that they have absconded with corporate opportunities, money, property, assets, goodwill and client lists of the Old LLC and fraudulently contributed those assets of the Old LLC solely to Rogers' New LLC, the Third Party Defendant.

13. Under Rule 1.13. **Organization as Client**, under the Comments for **Derivative Actions**, paragraph [14] states as follows:

> The question can rise whether counsel for the organization may defend such an action [derivative action]. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's

affairs, to be defended by the organization's lawyer like any other suit. ***However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization***. [Emphasis added].

14. Where it is clear that Plaintiffs Rogers and Schultz are alleged both to have committed fraud and fiduciary breaches as trustees in the liquidation of the Old LLC's assets, etc, and where Rogers is alleged to have converted the assets of the Old LLC, while acting as a trustee and in a fiduciary duty to the Old LLC and to the Defendant as a member, and has converted and appropriated those assets and opportunities to Rogers' single-member New LLC, it is a clear conflict of interest for Plaintiffs' counsel to represent both the organization derivatively, which it seeks to dissolve and liquidate, and parties who have alleged to have defrauded that same Old LLC, and converted its assets to a New LLC which is owned by Rogers, one of the members of the Old LLC.

15. That these conflicts cannot be resolved by waivers at this point since it is clear that Plaintiffs' counsel must have already counseled with Rogers and Schultz who must have already shared their trusts and confidences with Plaintiffs' counsel as both trustees for the Old LLC and the single-member New LLC, the Third Party Defendant. Hence, both the organization (derivatively), being the Old LLC, and Rogers and Schultz, as well as the Third Party Defendant must secure new counsel.

16. That the Rules of Professional Conduct, Rule 1.7(a)(1) states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client. Rule 1.7(b)(3) states that notwithstanding Rule 1.7(a)(1), a lawyer may represent a client involving a concurrent conflict unless the representation involves the assertion of a claim by one

client against another client represented by the lawyer in the same litigation, as it does here: Rogers and Schultz as trustees must obtain the maximum value in liquidation for the Old LLC's assets, property and corporate opportunities to distribute to its members, Rogers, Schultz and Defendant McDermitt, yet Defendant claims Rogers, with Schultz's assistance to obtain a disputed $30,000+ claim, absconded and converted the Old LLC's assets and corporate opportunities to Rogers' own single-member New LLC. This is a direct conflict in the same proceeding thereby prohibiting Plaintiffs' counsel from representing either party.

17. There does not appear to be case law from West Virginia to decide what constitutes permissive dual representation in derivative suits. However, such case law and treatises appear elsewhere. The treatise "Conflicts of Interest in Derivative Litigation Involving Closely Held Corporations: An All or Nothing Approach to the Requirement of "Independent" Corporate Counsel", 31 J. Legal Prof. 337 (2007) by Robert Ricco is most instructive[1].

That treatise relies upon the case of *Campellone v. Cragan*, 910 So.2d 363 (DC of App. 5th Dist. FL 2005)[2], for the general rule about when a lawyer may represent a corporation derivatively and the individuals by dual representation when it stated in the Treatise at fn 24, 910 So.2d at 365:

> [T]he disqualification of corporate counsel from representing individual defendants may be avoided if the derivative action is patently frivolous, the degree of participation of the corporation in defending the action is very low, or if the allegations against the individual defendants involve mismanagement rather than fraud, intentional misconduct or self-dealing.

The *Campellone* case cited as authority for its decision the following cases: "*Rogers as trustee, ex rel. Bankruptcy Estate of Ackley v. Virgin Land, Inc.*, 1996 WL 493174, *2-3 (V.I. May 13, 1996); *Musheno v. Gensemer*, 897 F.Supp. 833, 835-836 (M.D.Pa. 1995); *In re Oracle Sec. Litig.*, 829 F.Supp. 1176, 1188-1190 (U.S.D.C.N.D.Cal. 1993); *Messing v. FDI, Inc.*, 439 F.Supp.

[1] For the complete treatise, see Notice of Filing Foreign Law being filed simultaneously herewith.
[2] *Ibid.*

776, 781-783 (U.S.D.C.N.J. 1977); *Lewis v. Shaffer Stores Co.*, 218 F.Supp. 238, 239-240 (U.S.S.D.N.Y. 1963); *Forrest v. Baeza*, 58 Cal.App.4th 65, 73-82, 67 Cal.Rptr.2d 857, 861-868 (Cal.App. 1997); *Lower v. Lanark Mut. Fire Ins. Co.*, 114 Ill.App.3d 462, 70 Ill.Dec. 62, 448 N.E.2d 940, 945-947 (1983); *Rowen v. LeMars Mut. Ins. Co.*, 230 N.W.2d 905, 916 (Iowa 1975); *Tydings v. Berk Enter.*, 80 Md.App. 634, 640-642, 565 A.2d 390, 393-394 (1989).

Because Rogers and Schultz are charged with defrauding Defendant McDermitt in their actions in insisting they would re-organize the Old LLC, but instead Rogers fraudulently created his own single-member New LLC to take all of the Old LLC's assets and to syphon off all of the Old LLC's corporate opportunities while acting as trustee for the benefit of the members, including Defendant, Plaintiffs' counsel must be disqualified for fraud, intentional misconduct and self-dealing being alleged against their clients, while they are acting as trustees to liquidate the same LLC that is being defrauded. They cannot represent the Old LLC derivatively, the New LLC and the individual alleged fraudfeasor members.

CONCLUSION

The Plaintiffs and Third Party Defendant must all obtain new separate counsel; and, because there are no members of the Old LLC who have not been alleged to have breached fiduciary duties to the Old LLC, the Court must entertain Defendant's Motion to appoint an independent special receiver to acquire all of the Old LLC's money, property, telephone numbers and corporate opportunities, and to liquidate them; pay the Old LLC's creditors (if any); and make liquidating distributions in the appropriate allocations to the members pursuant to the Court's authority under §31B-8-803(a) of the W.Va. *Code*. The "good cause" being shown to the Court is that all of the members of the Old LLC are being charged with fraud and conversion in these

pleadings, and therefore, there are no members who qualify under the statute to unilaterally wind up and liquidate the Old LLC's assets. See §31B-8-803(a) of the *Code*.

WHEREFORE, Defendant, Scott W. McDermitt, moves this Honorable Court to disqualify and discharge Christian J. Riddell, Esq., Nicola Smith, Esq., their firm of Riddell Law Group, and Hoyer, Hoyer and Smith, PLLC, as counsel for the Plaintiffs and Third Party Defendant, and to disgorge the legal fees that were paid from the Old LLC's money and property; and, to appoint a special receiver to take, acquire, hold, sell and distribute the assets money, property and opportunities of the Old LLC in accordance with law pursuant to §31B-8-803(c) of the *Code*, and to command Rogers and Schultz to account for all of the money, property, corporate opportunities, etc. of the Old LLC to the independent special receiver, particularly all of those converted by Rogers for his New LLC, Third Party Defendant, or for such other relief as the Court deems appropriate in the circumstances.

Scott W. McDermitt, Defendant/Counter Plaintiff
and Third Party Plaintiff
By Counsel

Michael L. Scales, Attorney at Law
Counsel for Defendant/Counter Plaintiff
and Third Party Plaintiff
Michael L. Scales, PLLC
314 W. John Street
Martinsburg, WV 25401
(304) 263-0000
WV Bar No. 3277

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of State
Certified Termite & Pest, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Defendant/Counter Plaintiff, Scott W. McDermitt, do hereby certify that I have served a true copy of DEFENDANT/COUNTER PLAINTIFF AND THIRD PARTY PLAINTIFF, SCOTT W. MCDERMITT'S MOTION TO DISQUALIFY PLAINTIFFS/COUNTER DEFENDANTS AND THIRD PARTY DEFENDANT'S COUNSEL FOR CONFLICT OF INTERESTS AND TO APPOINT AN INDEPENDENT SPECIAL RECEIVER TO WIND UP AND LIQUIDATE PLAINTIFF, STATE CERTIFIED TERMITE & PEST, LLC by the Court's e-filing system, and by mailing a true copy thereof to counsel for Plaintiffs, Nicola Smith, Esq., Christopher Smith, Esq. and Christian J. Riddell, Esq., and to mail

a copy to Hoyer, Hoyer & Smith, to their address of Hoyer, Hoyer & Smith, PLLC, 22 Capitol Street #300, Charleston, WV 25301, this 29th day of October, 2021.

Michael L. Scales

Michael L. Scales, Attorney at Law

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following motion was FILED on 10/29/2021 3:32:40 PM

Notice Date: 10/29/2021 3:32:40 PM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 2

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of State
Certified Termite & Pest, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

NOTICE OF FILING FOREIGN LAW

NOW COMES Defendant/Counter Plaintiff and Third Party Plaintiff, Scott W. McDermitt, who hereby files copies of the following foreign law:

1. Treatise entitled "Conflicts of Interest in Derivative Litigation Involving Closely Held Corporations: An All or Nothing Approach to the Requirement of "Independent" Corporate Counsel", 31 J. Legal Prof. 337 (2007) by Robert Ricco; and,

2. The case of *Campellone v. Cragan*, 910 So.2d 363 (DC of App. 5th Dist. FL 2005).

EXHIBIT # 2

Most respectfully submitted this 29th day of October, 2021.

Scott W. McDermitt, Defendant/Counter Plaintiff
and Third Party Plaintiff
By Counsel

Michael L. Scales, Attorney at Law
Counsel for Defendant/Counter Plaintiff
and Third Party Plaintiff
Michael L. Scales, PLLC
314 W. John Street
Martinsburg, WV 25401
(304) 263-0000
WV Bar No. 3277

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ACCURATE PEST MANAGEMENT, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of Accurate
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Plaintiffs

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Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Defendant/Counter Plaintiff, Scott W. McDermitt, do hereby certify that I have served a true copy of NOTICE OF FILING FOREIGN LAW by the Court's e-filing system, and by mailing a true copy thereof to counsel for Plaintiffs, Nicola Smith, Esq., Christopher Smith, Esq. and Christian J. Riddell, Esq., and to mail a copy to Hoyer, Hoyer & Smith, to their address of Hoyer, Hoyer & Smith, PLLC, 22 Capitol Street #300, Charleston, WV 25301, this 29th day of October, 2021.

Michael L. Scales, Attorney at Law

31 J. Legal Prof. 337

Journal of the Legal Profession
2007

Student Commentaries
Robert J. Riccio

CONFLICTS OF INTEREST IN DERIVATIVE LITIGATION INVOLVING CLOSELY HELD CORPORATIONS: AN ALL OR NOTHING APPROACH TO THE REQUIREMENT OF "INDEPENDENT" CORPORATE COUNSEL

While the Model Rules of Professional Conduct is arguably a marked improvement over its predecessors, "[n]o code of ethics could establish unalterable rules governing all possible eventualities." [1] The problem with a one-size-fits-all approach is aptly demonstrated by the difficulty judges and attorneys have encountered when trying to apply the ethical standards governing conflicts of interests to the unique features of derivative litigation. An attorney attempting to represent both the corporation itself, as well as the individual directors and/or officers accused of harming the corporation, will find that "[t]he dilemma of dual representation in stockholder's derivative suits arises from the unclear role in the action of the business entity." [2] It has been stated that "[t]he interest of the corporate client is paramount and should not be influenced by any interest of the individual corporate officials." [3] But what happens when the "corporate officials" in question are also the majority shareholders of the corporation? This is the situation faced in derivative litigation involving closely held corporations. [4] Specifically, does a closely held corporate entity really need to be represented by an "independent" attorney apart from its directors? If so, how should such an attorney be selected and to whom should he answer?

In the context of closely held corporations, the corporation should not be required to retain independent counsel because the danger the adversarial process will not adequately represent the interests of the shareholders *338 and the corporate entity as a "going concern" [5] is minimal to non-existent. If in a particular case, however, it is determined that such dangers do exist, a court-appointed attorney akin to a guardian ad litem appears to be the only way to assure that the attorney is truly "independent" and not subject to manipulation.

I. Derivative Litigation Under the Model Rules

A derivative lawsuit involves shareholders of a corporation bringing claims against third parties on the corporation's behalf, where the corporation's board of directors, or those otherwise in charge of the corporation, refuse to assert such claims. [6] Thus, in a derivative suit, the corporation is both a defendant and plaintiff. It is a defendant because a derivative action is, essentially, a suit by the shareholders to compel the corporation to sue. At the same time, the corporation is a plaintiff because the shareholders are asserting claims on the corporation's behalf against those liable to it. [7] The corporation, however, "is merely a 'nominal' defendant, and in fact stands to receive a substantial benefit if the plaintiffs/shareholders are successful," [8] since any recovery derived from the litigation does not go to the shareholders that brought the suit, but rather goes directly to the corporation itself. [9] As a result of these unique procedural characteristics, corporate attorneys may often find themselves at odds with applicable legal ethics rules as they relate to conflicts of interest. [10]

The potential for a conflict of interest arises in derivative litigation when an attorney attempts to represent the corporation and the individual directors, officers, and/or shareholders who are also named as defendants. *339 [11] The problem arises because a corporate attorney technically represents the intangible corporate entity, and not the individual directors, officers, employees and/or shareholders. [12] Although dual representation is specifically allowed by the Model Rules, its permissibility is subject to

Model Rule 1.7, which deals with concurrent conflicts of interest. [13] The comments to Model Rule 1.13 directly address dual representation in the context of derivative litigation, and state:
Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization. [14]

Footnotes

15 Furthermore, Model Rule 1.7 allows clients to waive conflicts of interest in certain situations, and Model Rule 1.13 specifically allows such a waiver even when an attorney is representing both a corporation and one or more of its constituents. Unfortunately, in regards to the possible conflicts of interests created by dual representation, references to the applicable Model Rules do not solve many of the underlying problems inherent ***340** in derivative litigation, and this is especially true when closely held corporations are involved.

An attorney agreeing to the dual representation of both the corporate defendant and the individual directors and/or officers of the corporation, will be forced to walk a fine line between the corporation's rights and the attorney's ethical responsibilities. [17] Although often undertaken, [18] such dual representation is generally considered to be improper, [19] even though courts disagree as to why it is improper. [20] Even so, at least one state that has specifically addressed the issue has determined that dual representation is acceptable, [21] in spite of the current trend to ban the practice. [22] Louisiana ***341** currently allows an attorney to represent both the corporation and the individual defendants, reasoning that because the corporation is only a nominal defendant and "its true interest lies with the plaintiff shareholder there is no conflict of interest because there are really no adverse interests being represented." [23]

II. Exceptions to the General Rule Against Dual Representation

Like many rules of law, the prohibition against dual representation is generally not absolute, as there are exceptions to the rule even in states that normally consider the practice to be inappropriate. The court in Campellone v. Cragan summarized the three main exceptions that would allow for dual representation, stating that "disqualification of corporate counsel from representing individual defendants may be avoided if the derivative action is patently frivolous, the degree of participation of the corporation in defending the action is very low, or if the allegations against the individual defendants involve mismanagement rather than fraud, intentional misconduct or self-dealing." [24]

Regarding the first exception, patently frivolous cases do not pose the same problems as meritorious cases because both the corporation and the individual defendants would benefit from having such cases dismissed. [25] Under the second exception, "cases and ethics opinions differ on whether there must be separate representation from the outset or merely from the ***342** time the corporation seeks to take an active role." [26] Thus, while some courts have allowed dual representation of a passive corporate litigant, at least until any motions to dismiss have been overruled, [27] others prohibit the practice by reasoning that the very decision of whether "to pursue an active or passive stance in the litigation may have already been tainted by conflict." [28] Finally, absent allegations of a breach of loyalty, the directors are presumably continuing to manage the corporation in good faith; therefore, the corporation's need for independent representation should not arise. [29] Accordingly, where there are no "serious charges of wrongdoing," the Model Rules seem to consider derivative lawsuits to be a "normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit." [30]

Needless to say, not all states are in agreement as to what, if any, exceptions to the rule should be made. [31] Interestingly, the one potential exception to the rule that seems to be regularly rejected is also one mentioned in the Model Rules. [32] As one court has succinctly stated, "commentators and case law alike have concluded that reliance on consent is ill founded in the context

of derivative litigation."[33] This is because such consent would likely be illusory, since a corporation, as an intangible entity, must act through its directors. As defendants, the directors would be the very people who would stand to gain from allowing the dual representation, while, at the same time, possibly harming the corporation.[34]

***343 III. Re-evaluating the Effectiveness of Dual Representation for Closely Held Corporations**

Opponents of dual representation claim it may result in a breakdown of the adversarial process.[35] Although this may be true when public corporations are involved, it is at this point that the distinctions between a closely held corporation and a public corporation become apparent.[36] While courts have yet to differentiate their holdings based on the type of corporation, such distinctions do make a difference and can change the analysis enough to warrant a re-consideration of the ban on dual representation. Accordingly, in the context of a closely held corporation, should the court disqualify the corporation's attorney where the plaintiff has a vested interest in obtaining the maximum recovery for the corporation, while at the same time the individual defendants are also the majority shareholders of the corporation, control the board of directors, and, thus, have virtually complete control over the actions taken by the corporation?

A closely held corporation and a public corporation may be similar in form, but they vary significantly in substance. The characteristics of a closely held corporation typically include the following:
(1) the shareholders are few in number, often only two or three;
(2) they usually live in the same geographical area, know each other, and are well acquainted with each other's business skills;
(3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key participants in some managerial capacity; and (4) there is no established market for the corporate stock.[37]
Consequently, when a lack of marketable shares is combined with an "owner-controlled"[38] board of directors,[39] the result is a corporation that lacks "the disciplinary effects of the capital market and other market ***344** mechanisms."[40] It follows that since these shareholders are frequently friends, family members, or have some other personal connection to each other,[41] derivative lawsuits filed in the context of closely held corporations often "involve situations where these informal bonds have broken down as a result of death, divorce [or] retirement of the patriarch,"[42] or where the family or personal relationships or both have otherwise deteriorated.

A public corporation, on the other hand, possesses characteristics virtually opposite to those of a closely held corporation.[43] Its shareholders are typically passive investors, large in number, geographically dispersed, and unknown to each other.[44] Additionally, public corporations are much more likely to have "outside" or "independent" directors that make up at least some, if not a majority, of its board of directors.[45]

When all these factors are taken into consideration, the minority shareholder of a closely held corporation is in a much different position than his or her counterpart in a public corporation. A derivative lawsuit highlights just how different these positions can be by drawing attention to the disparity in what each shareholder has at stake in the litigation. In the context of a public corporation, although "the action is brought by an aggrieved shareholder [,] in reality, it is typically brought by a plaintiff's attorney who finds a shareholder, who may own only a few shares, to serve as the nominal plaintiff."[46] Furthermore, in addition to generally having only a relatively small investment in the company, the aggrieved shareholder will also have little invested in the litigation itself. This is because the attorney will normally bear the financial burden of the litigation if the lawsuit fails,[47] while the corporation will normally bear the burden if the lawsuit is successful.[48] Accordingly, decisions made by such ***345** shareholders during the litigation are likely to be reflective of how little they have at stake financially.[49]

In sharp contrast, the shareholder/plaintiff of derivative litigation involving a closely held corporation has a great deal at stake. Such shareholders often "have large percentages of their wealth tied up in [this] one firm and lack access to capital markets."[50] Consequently, whether the shareholders win or lose is paramount in terms of both recovery and cost.[51] These differences

are highly relevant when evaluating the effectiveness, and thus the desirability, of disqualifying the corporation's original attorney and yet still allowing the corporation's directors, independent or not, to exercise their control over the newly selected "independent" attorney.

In light of these differences, an evaluation of the practical arguments made in opposition to the acceptability of dual representation can be made. [52] While each argument has merit when applied to public corporations, none seem to hold up when applied to the very different situation encountered in closely held derivative litigation. First, because the corporation is entitled to take an active role in the litigation, such as "aid[ing] the plaintiff shareholder by assisting in the prosecution" or "set[ting] up certain procedural defenses," it is argued that independent counsel is needed "to advise the corporation regarding its proper stance in the controversy." [53] However, in a closely held corporation, "it is often members of the majority position who commit the wrong, and it is very unlikely that they will vote to have the corporation bring a lawsuit against themselves." [54] It seems equally unlikely that they will change their minds after discussing the matter with a new "independent" attorney. This is not to say that the directors of a public corporation would be willing to sue themselves; rather, the issues here are about ownership, control, and accountability. In a public corporation, the defendant directors are unlikely to have control of the board through ownership, [55] and the board itself is more likely to have "independent" directors that can make impartial judgments ***346** in light of their responsibility and accountability to the shareholders. [56] Contrast that situation with the defendant directors of a closely held corporation, who are not accountable to anyone but themselves, as they are likely to be the majority shareholders and have control of the board, or at least enough control to veto any notions of allowing the company to side with the plaintiff. [57] Therefore, as unlikely as it may be for a public corporation to take an active stance against its directors, it is far more unlikely, if not inconceivable, for a closely held corporation to do so. [58]

The next argument in opposition of dual representation is that "the adversary process is most likely to break down at the crucial stage of settlement, where a major portion of derivative actions [are] concluded." [59] It is thought that because the plaintiff's attorney's fee will max out and then level off after the settlement terms have reached a certain monetary value, once that point is reached both sides will have a common interest in accepting the terms and ending the litigation, regardless of whether or not the recovery is commensurate with the harm. [60] Such acquiescence to potentially inadequate settlement terms is the result of having so little at stake because, regardless of the size of the recovery, the plaintiff/shareholder is unlikely to receive any tangible benefit. [61] Furthermore, the plaintiff is not only indifferent to the size of the total recovery, but also as to the portion of the recovery that the attorney will receive. [62] In this respect, the defendant directors may also be indifferent to the amount of fees awarded to plaintiff's counsel, since they too are likely to have only a minority position in the corporation and will be unaffected by the settlement or the attorney's fees.

These adversarial problems are not likely to occur in a closely held corporation, however, because of the large stake each party has in the litigation. [63] In this situation, the plaintiff/shareholder has every incentive to maximize the corporation's recovery and minimize the attorney's fees, [64] because he, unlike his counterpart in a public corporation, is likely to see a significant monetary benefit based directly on the settlement amount. [65] ***347** As a result, his interests are inextricably intertwined with those of the corporation. [66]

On the other side of the litigation, the defendant directors of a closely held corporation are also in a different situation than those in a public corporation. Because the defendant directors are likely to be majority shareholders, even if they lose the lawsuit in a way they still win because the recovery will go to the corporation of which they are the biggest residual claimants. [67] Alternatively, because of the defendants' simultaneous positions of director and shareholder, [68] a circular recovery could result by simply declaring a dividend. This would allow them to pull the recovery out of the company, deduct the minority plaintiff's share, and place it back into their pockets. If, on the other hand, the board is "deadlocked," [69] then the corporation is unlikely to survive the litigation even if it wins the lawsuit; thus, the same result would occur upon winding up the corporation's affairs. [70] Consequently, these defendant directors have every incentive to limit their attorney's fee since it essentially comes directly out of their pockets. [71] Therefore, although there may be legitimate issues with public corporations' settlement agreements, the adversarial process is likely to remain intact in the context of a closely held corporation.

A final concern over allowing dual representation involves the payment of the corporation's attorney's fees. The argument is that dual representation renders it "difficult to segregate legal services performed for the corporation from those performed on behalf of the insiders. Thus the corporation may readily finance the insiders' defense by paying a proportionately larger share of the legal expenses than is merited by its role in the litigation." [72]

This argument, however, does not involve issues unique to derivative litigation or the parties involved in the litigation, but rather it is more directly related to the ethical integrity of the attorney involved in the dual *348 representation. Model Rule 1.5 states that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." [73] Thus, employing any type of "fee shifting" from the individual defendants to the corporation will necessarily result in charging the corporate client an "unreasonable fee" in violation of Model Rule 1.5, over and above any ethical implications that may arise from the dual representation itself.

By allowing dual representation in some circumstances, [74] the Model Rules implicitly support the notion that, although difficult, segregating the attorney's fees for services rendered to the corporation and the corporate insiders is not impossible and indeed must be done. Thus, it should not be automatically presumed that an attorney will fail to adhere to the ethical obligation of charging a reasonable fee simply because they are acting as the attorney for two clients at the same time, especially where the Model Rules have contemplated that such engagements are within an attorney's ethical boundaries. [75] Furthermore, if it were presumed that the corporation's attorney would act unethically in this situation, it must also be presumed the attorney will act unethically in other situations. Therefore, forcing the corporation to retain separate counsel will not necessarily solve the problem. Even if the attorney is disqualified from representing the corporation in the derivative lawsuit, the attorney may continue his representation of the individual defendants [76] and concurrently represent the corporation in other unrelated matters. [77] Therefore, he could still accomplish this "fee shifting" by inflating the fees charged to the corporation for other services while simultaneously reducing the fees charged to the individual directors. Hence, disciplinary action instead of disqualification may be the proper solution.

IV. The New Problems of Selection and Control When Independent Representation is Required

In determining whether dual representation should be permissible, the proposed solution must also be evaluated to determine whether it actually solves the problem or simply creates new ones. Thus, assuming the lawsuit is not governed by Louisiana law, and none of the exceptions to the *349 general ban on dual representation apply, how then is the conflict resolved? In general, courts will disqualify corporate attorneys from representing the corporation, but allow them to continue their representation of the individual defendants. [78] The issue then turns to who selects the new attorney for the corporation, and what role the new attorney will play in the litigation. It is at this juncture where legal theory and corporate reality begin to diverge, and it will be the focus of the remainder of this Comment.

Beginning with the issue of attorney selection, as with the many other facets of conflicts of interest in derivative litigation, there is no uniform approach as to how such selections should be accomplished. But courts should be mindful of the method ultimately used in selecting the new attorney, as it is important for two reasons. First, it impacts the corporation's acknowledged right to be represented by an attorney of its own choosing, [79] and second, it may place the new attorney in no better position to protect the interests of the corporation than the old attorney. [80]

Some courts have concluded that allowing the corporation's board of directors to select the corporation's new "independent" counsel does not pose any insurmountable problems, even where the entire board is made up of defendant directors. [81] Others have held that the decision should be made by disinterested members of the board of directors. [82] Still others *350 have either not addressed the issue, [83] or simply failed to give any advice regarding methods the court would deem appropriate. [84] Finally, there are at least two cases where a court decided to make the selection itself and actually appointed an attorney to represent the corporation. [85] Although appointment by the court is admittedly the exception, [86] courts should be wary of leaving a corporation to its own devices if a truly "independent" attorney is desired.

Even if the court does choose an attorney to represent the corporation, however, it still must deal with the fundamental issue of control. In a statement that seems to convey the general consensus, one court held that "the organization is entitled to an

evaluation and representation of its institutional interests by independent counsel, unencumbered by potentially conflicting obligations to any defendant officer." [87] The term "independent," as defined in Black's Law Dictionary, means "[n]ot subject to the control or influence of another," [88] and accordingly, it is the issue of control and influence that is at the center of this ethical dilemma.

For example, if consent to dual representation is generally considered illusory because of the control individual defendants have over the decisions of the company, [89] then why is the selection of, and control over, a supposedly "independent" attorney by those very same individual defendants not illusory as well? [90] Most courts have rationalized their decisions by relying, not on the corporate directors to uphold their legal duties to act in the best interest of the corporation, but, instead, on the ethical integrity of the newly selected "independent" counsel to represent the interests of the corporate entity and not the individual defendants. [91] While it may be *351 true that this new "independent" attorney does not have a direct attorney/client relationship with any of the directors personally, there is still one fundamental flaw in this reasoning: The Model Rules state that the attorney is to act through the corporation's constituents, [92] the very same constituents who caused the original attorney to be disqualified in the first place. [93] In fact, not only are the defendants the corporation's decision-makers, but the comments to the Model Rules specifically state that "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." [94]

With this in mind, the underlying problem in representing a corporation whose board of directors has been accused of serious wrongdoing becomes readily apparent. While it may be technically correct to disqualify an attorney from representing both the corporation and the individual defendant directors, [95] having the corporation retain new independent counsel may not have any practical effect on whether or not the best interests of the corporation do in fact get represented. [96] Just as courts have determined *352 the old attorney cannot be relied on to represent the best interest of the corporation due to a direct conflict with the directors, [97] it seems equally unlikely the new "independent" attorney will be allowed to pursue any action on the corporation's behalf that is detrimental to those same directors given that they are in complete control over any and all actions taken by the new attorney on behalf of the corporation. [98] Therefore, in a situation where the new "independent" attorney is instructed to take a course of action that may be, in his view, detrimental to the corporation's best interest, simply informing the new attorney he is to represent the corporation's best interests and not those of the individual defendants is insufficient at best, as it "will put the lawyer in the untenable position of choosing either to follow or to reject the instructions of the corporation's normal representatives, the very directors whose self-interest in the suit were thought to make the appointment of independent counsel necessary to begin with." [99]

Thus, as even critics of dual representation have recognized, "a conceptualization of the corporation as a separate entity capable of treatment as an ordinary client ignores [the complexity of corporate interrelationships] and consequently results in too simplistic a resolution of the ethical issue of dual representation." [100]

In an attempt to solve this dilemma, some courts have relied on the independent directors to assure that the selection of counsel and the positions taken by the corporation in the litigation are actually in its best interest. [101] But reliance on these directors may sometimes be misplaced, since "[i]ndependence is not established by the fact that directors are not defendants in the derivative action," as they "are often beholden to the defendant directors who appointed them." [102] This is especially true in the context of closely held corporations, where there are often strong personal or familial relationships among the corporation's board of directors that may *353 negate any possibility for objectivity. [103] Furthermore, what if there are no independent directors, [104] as will likely be the case in most closely held corporations?

V. Solving the Fallacy of "Independent" Corporate Counsel

Based on the arguments presented thus far, where closely held corporations are involved in derivative lawsuits, solving the ethical dilemma of dual representation in any practical way requires choosing one of two alternatives: (1) allow the original corporate attorney to continue his representation of both the corporation and the individual defendants, or (2) have the court appoint a guardian ad litem for the corporation, or something equivalent thereto, who advises and reports directly to the

court. This conclusion is based on the crucial distinctions that must be made between a closely held corporation and a public corporation. [105] First, the structure of the former will allow the adversarial process to remain intact, and second, corporate reality dictates that even if a corporation retains an "independent" attorney, the nature of the attorney's relationship with the corporate entity will not allow the "independence" necessary for a lawyer to operate outside the control and influence of the individual defendants.

The preferable solution would be to create another exception to the general ban, and allow the practice of dual representation in the context of derivative litigation involving closely held corporations. As previously mentioned, the permissibility of dual representation is not without precedent. [106] As one court specifically pointed out, "[a]fter trial, dual representation is usually found to have been harmless." [107]

However, if in a particular situation the court is still uncomfortable in allowing dual representation based on the particular facts of the case, appointment of an attorney who reports directly to the court seems to be the only alternative. This too is not without precedent or support. As one commentator has observed:

> If the lawyer follows the instructions of the corporation's normal representatives, its defendant-directors, then not much will *354 have been accomplished through the appointment of independent counsel; the "independent" corporate lawyer will end up following the same instructions as the defendants' personal lawyers. But if the independent counsel actually asserts his independence, if he refuses to follow the instructions of his client's human representatives in the ordinary way, then the lawyer will have stepped out of his normal role as counselor and advocate, and will have taken on a troublesome new dual role as combined corporate counselor and guardian ad litem.
>
> The first situation is merely wasteful; the second undercuts all the normal rules of corporate management. If a court believes that it has the power, and appropriate grounds, for the appointment of a special-purpose receiver or guardian ad litem for the corporation, then it should make those appointments. [108]

Specifically addressing this issue, the Supreme Court of Iowa in Rowen v. LeMars Mutual Insurance Co. agreed with this reasoning and held that although allowing the corporation to choose its own attorney "would respect corporate autonomy and remove the outward appearance of dual representation, it would not eliminate the substance of the problem sought to be avoided. Counsel for the corporation would be subject to the control of those accused of wrongdoing." [109]

Of course, this position is not without its critics. The dissent in Rowen argued that "[t]he majority order for trial court appointment of counsel ignores the safeguards of the adversary process." [110] If the "safeguards of the adversary process" were in place, however, there would be no need for the corporation to retain independent counsel in the first place. Further, the retention of a new attorney who follows orders given by the exact same people as the old attorney does nothing to ensure or enhance the legitimacy of the adversarial process, as would be the case if the corporation used a court-appointed attorney instead.

The Court of Special Appeals in Maryland is likewise critical of court appointments. In Tydings v. Berk Enterprises, the court sided with the dissent in Rowen and refused to appoint an attorney for the corporation. [111] Unfortunately, the court's analysis of the issue was superficial at best, *355 when it failed to see how an attorney could "be 'independent' and, simultaneously, dependent upon and subject to the control of the wrong doer." [112] Instead, the court declared that "[o]ne is independent or not, but never independent and dependent at the same time." [113] This reasoning, however, confuses the two very different contexts in which the term "independent" can apply. An attorney who has no previous connection with the corporation or any of its directors at the outset of the representation, and thus "independent" of the corporation, is not the same thing as being "independent" from, and therefore not subject to the control of, those that control the organization-the board of directors-during the representation. If an attorney was in fact "independent" in both ways at the same time, it would essentially mean the attorney either answers to no one but himself, or else he would have to answer to the court, in which case the court would have needed to come to the opposite result than was decided in the case.

Furthermore, the court in Tydings demonstrated all too clearly the erroneous outcomes that can result from the reification of the corporation [114] when it equated the need for court appointment with unethical behavior on the part of attorneys. This was evident when the court presumptuously reasoned that by allowing court appointment, "the majority in Rowen impugn[ed] the integrity of the Bar in general and of Iowa in particular." [115] Evidently, attorneys in Maryland do not have to act through, or answer to, the constituents of the corporation so long as they act through, and answer to, the intangible "legal abstraction known as the corporation." [116] In reality, however, the attorneys involved will not be dealing with an abstraction; rather, it is "human beings to whom the lawyer is supposed to be giving advice, and from whom the lawyer is supposed to be receiving his instructions." [117] Accordingly, the preservation of an attorney's ethical integrity is precisely what court appointments can accomplish, as the attorney will not be placed "in the untenable position of choosing either to follow or to reject the instructions of the corporation's normal representatives." [118]

*356 VI. Conclusion

The reification of the corporation has led to inconsistent approaches taken by the courts in trying to solve the problems encountered with dual representation. But "[b]ecause of the inadequacies of the concept of the corporation as an entity, an inquiry into the propriety of dual representation must 'pierce the corporate veil' and determine the real nature of the confidences and interests of the corporate client." [119] In the absence of such an analysis, the court "should not presume that it is really resolving an ethical problem for the lawyers in the case by appointing an 'independent' lawyer to represent the legal abstraction known as the corporation." [120] Thus, a reevaluation of dual representation in the context of closely held corporations, based on corporate reality as opposed to corporate theory, will reveal that an all-or-nothing approach to the issue is preferable to the middle ground of having the corporation retain "independent" counsel that remains under the defendant directors' control. As demonstrated, such arrangements are either unnecessary or inadequate solutions.

1 Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 215 (N.D. Ill. 1975), aff'd in relevant part per curiam, 532 F.2d 1118 (7th Cir. 1976).

2 Schwartz v. Guterman, 441 N.Y.S.2d 597, 598 (Sup. Ct. 1981), aff'd, 448 N.Y.S.2d 650 (App. Div. 1982).

3 Cannon, 398 F. Supp. at 216.

4 A "closely held corporation" is generally defined as "[a] corporation whose stock is not freely traded and is held by only a few shareholders (often within the same family)." BLACK's LAW DICTIONARY 365 (8th ed. 2004). Furthermore, many states have statutorily defined what constitutes a closely held corporation, such as Delaware, which requires that, inter alia, "[a]ll of the corporation's issued stock shall be held of record by not more than a specified number of persons, not exceeding 30." DEL. CODE ANN. tit. 8, § 342 (2001). See also ARIZ. REV. STAT. ANN. § 10-1803(A)(3) (2004) (limiting the number of original investors to ten).

5 "Going concern" is defined as "[a] commercial enterprise actively engaging in business with the expectation of indefinite continuance." BLACK's LAW DICTIONARY 712 (8th ed. 2004).

6 Gregory P. Williams & Evan O. Williford, Derivative Litigation: Fundamental Concepts and Recent Developments, in ANN. REV. OF DEV. IN BUS. & CORP. LITIG. 515, 519 (2005 ed.).

7 Id.; Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984); see also Musheno v. Gensemer, 897 F. Supp. 833, 835 (M.D. Pa. 1995) (observing that in a derivative action "the corporation is in the anomalous position of being both a plaintiff and a defendant"); Otis & Co. v. Pennsylvania R.R. Co., 57 F. Supp. 680, 683 (E.D. Pa. 1944) (stating that in a derivative action, "there are two causes of action combined, one by the stockholder against the corporation for refusing to act, the other by the stockholder as representative of the corporation against the individual defendants").

8 Musheno, 897 F. Supp. at 835.

9 Williams & Williford, supra note 6, at 519-20 ("Any recovery in the action belongs to the corporation, and derivative plaintiffs 'secure nothing to themselves as individuals.'"); see also Rogers v. Virgin Land, Inc., No. 1996-13M, 1996 WL 493174, at *2 (Dist. Ct. V.I. May 13, 1996) (observing that while the corporation is actually a defendant, it is merely a "nominal defendant" because "any recovery by the shareholder inures to the corporation's benefit"); Schwartz v. Guterman, 441 N.Y.S.2d 597, 598 (Sup. Ct. 1981) ("Traditionally, the corporation is named a party defendant. Yet conceptually, in a derivative action, the corporation is a party plaintiff in the sense that it will benefit from successful prosecution of the suit." (citation omitted)), aff'd, 448 N.Y.S.2d 650 (App. Div. 1982).

10 This Comment is based on the ABA's Model Rules of Professional Conduct ("Model Rules") unless otherwise specified.

11 Williams & Williford, supra note 6, at 571; see also Rogers, 1996 WL 493174, at *2 (observing that the interests of the corporate entity and the individual wrongdoers are potentially adverse in a meritorious suit); Rosenfield v. Metals Selling Corp., 643 A.2d 1253, 1264 (Conn. 1994) ("In a derivative suit, the role of counsel for the corporation who is also counsel for the defendant directors can, under certain circumstances, be hampered by a conflict of interest."); Tydings v. Berk Enterprises, 565 A.2d 390, 394 (Md. Ct. Spec. App. 1989) ("When, in a suit against a corporation and its directors, an attorney undertakes to represent both the corporation and any of its directors, individually, a possible conflict of interest immediately arises.").

12 MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2004) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

13 MODEL RULES OF PROF'L CONDUCT R. 1.13(g) (2004) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7."); see also infra note 15.

14 MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 14 (2004).

15 "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing."
nMODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2004).

16 MODEL RULES OF PROF'L CONDUCT R. 1.13(g) (2004) ("If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.").

17 Forrest v. Baeza, 67 Cal. Rptr. 2d 857, 862 (Cal. Ct. App. 1997) ("The issue of disqualification 'ultimately involves a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.'") (quoting Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp., 43 Cal. Rptr. 2d 327, 331 (Cal. Ct. App. 1995)); see also Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 213 (N.D. Ill. 1975) (stating that dual representation in a shareholder derivative suit "raises fundamental questions of legal ethics and the extent to which a court should interfere with the right of any litigant to be represented by counsel of his own choosing"), aff'd in relevant part per curiam, 532 F.2d 1118 (7th Cir. 1976).

18 Note, Independent Representation for Corporate Defendants in Derivative Suits, 74 YALE L.J. 524, 524 & n.2 (1965) [hereinafter Note, Independent Representation].

19 Forrest, 67 Cal. Rptr. 2d at 863 ("Current case law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit."); see also Rogers v. Virgin Land, Inc., No. 1996-13M, 1996 WL 493174, at *2 (D. V.I. May 13, 1996) ("Dual representation is improper, because the interests of the corporate entity and the individual wrongdoers

are potentially adverse in a meritorious suit."); In re Oracle Sec. Litig., 829 F. Supp. 1176, 1188-89 (N.D. Cal. 1993) (stating "[d]ual representation is impermissible, particularly at the settlement stage," because of the insufficient protection afforded the corporation, as well as the "appearance of impropriety which casts a shadow over the entire proceeding"); Lower v. Lanark Mut. Fire Ins. Co., 448 N.E.2d 940, 946 (Ill. App. Ct. 1983) ("Even if no conflicts currently exist, the potential conflict cannot be ignored, and [thus] the corporation must obtain independent counsel."); Garlen v. Green Mansions, Inc., 193 N.Y.S.2d 116, 117 (App. Div. 1995) (stating that where an "appearance and answer by [the] corporation [is required,] such appearance must be by independent counsel whose interests will not conflict with those of the individual defendants").

20 While courts seem to be most wary of the prospect that the corporation will be forced to act to the detriment of the non-defendant shareholders and the corporation as a going concern, see generally Note, Independent Representation, supra note 18, at 524, some courts feel that "public interest requires a context which is as free as possible from the appearance of any potential for conflict of interest," Yablonski v. United Mine Workers, 448 F.2d 1175, 1180 (D.C. Cir. 1971), and still others cite the risk "that confidences obtained from one client could be used to the detriment of the other [client]." Musheno v. Gensemer, 897 F. Supp. 833, 838 (M.D. Pa. 1995). But see Forrest v. Baeza, 67 Cal. Rptr. 2d 857, 868 (Cal. Ct. App. 1997) (finding improper use of confidential information not an issue because "the functioning of the corporation has been so intertwined with the individual defendants that any distinction between them is entirely fictional, and the sole repositories of corporate information to which the attorney has had access are the individual clients").

21 See infra note 23.

22 Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1340 (1981) [hereinafter Conflicts of Interest] ("[T]he emerging rule is against dual representation."); see also Musheno, 897 F. Supp. at 835 ("Early decisions adopted the position that, at least in the absence of a breach of trust, joint representation was permissible. However, more recent decisions, have identified numerous problems with dual representation.") (citations omitted); Cannon, 398 F. Supp. at 217 ("The older cases have refused to disqualify counsel, while the more recent trend is to require the corporation to obtain independent counsel."). Compare Jacuzzi v. Jacuzzi Bros., 52 Cal. Rptr. 147, 171 (Cal. Dist. Ct. App. 1966) ("In general, prior to an adjudication that the corporation is entitled to relief against its officers, or directors, the same attorney may represent both."), and Otis & Co. v. Pa. R.R. Co., 57 F. Supp. 680, 684 (E.D. Pa. 1944) (holding dual representation permissible based on the corporation's right to the select any counsel it so chooses), with Forrest v. Baeza, 67 Cal. Rptr. 2d 857 (Cal. Ct. App. 1997) (declining to follow Jacuzzi), and Bell Atl. Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993) (declining to follow Otis & Co.).

23 Robinson v. Snell's Limbs and Braces, 538 So. 2d 1045, 1048-49 (La. Ct. App. 1989). Additionally, a U.S. District Court in Ohio held dual representation is not improper "when there is no conflict of interest and no breach of confidence or trust." Selama-Dindings Plantations, Ltd. v. Durham, 216 F. Supp. 104, 115 (S.D. Ohio 1963). Unfortunately, as the court in Cannon v. U.S. Acoustics Corp. pointed out, "[t]he [Durham] court did not discuss why there was no conflict of interest," and "the court of appeals did not discuss the dual representation issue in its affirmance." Cannon, 398 F. Supp. 209, 218 & n.18 (N.D. Ill. 1975), aff'd in relevant part per curiam, 532 F.2d 1118 (7th Cir. 1976).

24 Campellone v. Cragan, 910 So. 2d 363, 365 (Fla. Dist. Ct. App. 2005); see also ABA/BNA LAW. MANUAL PROF. CONDUCT § 91: 2608 (2000). Note that the last exception listed by the Campellone court, regarding the type of allegations levied against the directors, is often discussed as the distinction between a breach of the duty of care versus a breach of the duty of loyalty, the former being a less serious charge that would allow for dual representation. E.g., Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1315-17 (3d Cir. 1993).

25 Rogers v. Virgin Land, Inc., No. 1996-13M, 1996 WL 493174, at *3 (D. V.I. May 13, 1996) ("When the suit is patently frivolous, there is no conflict of interest because both the individual defendants and the corporation would have the same interest in seeking dismissal of the suit."); see also Rowen v. LeMars Mut. Ins. Co., 230 N.W.2d 905, 915 (Iowa 1975) ("If the action is without merit, the expense of independent counsel for the corporation is unjustified."); Note,

Independent Representation, supra note 18, at 530 ("[W]henever the action is without merit the burdensome procedure of retaining independent counsel will accomplish little and merely adds another weapon to the arsenal of the strike suitor.").

26 Conflicts of Interest, supra note 22, at 1340-41.

27 Clark v. Lomas & Nettleton Fin. Corp., 79 F.R.D. 658, 661 (N.D. Tex. 1978) (allowing dual representation for the initial motion to dismiss so long as the law firm "does not otherwise participate in the lawsuit," and it terminates the dual representation "when either the motions to dismiss are overruled or when it becomes necessary to actively participate").

28 Messing v. FDI, Inc., 439 F. Supp. 776, 782 (D. N.J. 1977).

29 See Bell Atl., 2 F.3d at 1315-17. Contra Lower v. Lanark Mut. Fire Ins. Co., 448 N.E.2d 940, 946 (Ill. App. Ct. 1983) (finding arguments "that the directors did not achieve personal gain from their alleged wrongdoing unpersuasive, since that fact does not in any way affect the adverse nature of their interest vis-a-vis that of the corporation").

30 MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 14 (2004).

31 See supra note 29; Messing, 439 F. Supp. at 782 (allowing none of the general exceptions to the need for independent corporate counsel).

32 See supra notes 15 & 16 and accompanying text.

33 Forrest v. Baeza, 67 Cal. Rptr. 2d 857, 864 (Cal. Ct. App. 1997).

34 In re Oracle Sec. Litig., 829 F. Supp. 1176, 1189 (N.D. Cal. 1993) ("[A]n inanimate corporate entity, which is run by directors who are themselves defendants in the derivative litigation, cannot effectively waive a conflict of interest."); see also Note, Independent Representation, supra note 18, at 528 ("[I]t would be meaningless in derivative litigation to allow the consent of the parties defendant to exculpate the practice of dual representation, for most often it would be the defendant directors and officers who would force the corporation's consent.").

35 Note, Independent Representation, supra note 18, at 531.

36 For purposes of this Comment, the term "public corporation" will be used to refer to any corporation other than a "closely held corporation" as defined supra, note 4.

37 O'NEAL & THOMPSON, O'NEAL's CLOSE CORPORATIONS AND LLCS § 1:9 1-35 (rev. 3d ed. 2004); see also WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 107 (8th ed. 2002) ("The principal distinguishing feature of the closely held corporation is a small number of shareholders, though in all likelihood the firm will also be one of relatively modest economic scope, and generally (though by no means always) the people owning a substantial portion of the total shares will occupy the top managerial positions or will be involved in a meaningful way in [their] selection as well as in the formulation of corporate strategies and policies.").

38 See KLEIN & COFFEE, supra note 37, at 110.

39 Id. at 129 ("In closely held corporations, directors are usually controlling shareholders or people selected by, and responsive to the wishes of, these shareholders.").

40 FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW, 243 (1991).

41 Id. at 229 ("Participants in closely held corporations frequently have familial or other personal relations in addition to their business dealings.").

42 Id. at 229-30.

43 See generally KLEIN & COFFEE, supra note 37, at 107-11 (describing a publicly held corporation as being "[a]t the other end of the spectrum").

44 See KLEIN & COFFEE, supra note 37.

45 Id. at 131 ("Available data shows a marked trend over the last decade toward boards with a majority of independent directors, at least in the case of corporations listed on major stock exchanges."). The term "outside" or "independent" director generally refers to those directors who are neither officers nor employees of the company, and who do not otherwise have any operational responsibilities or significant relationships with the company's management. Id.

46 Id. at 199.

47 KLEIN & COFFEE, supra note 37, at 199 ("If the action is unsuccessful, it will probably be the attorney and not the shareholder who bears the costs.").

48 Williams & Williford, supra note 6, at 576 ("Where a derivative action results in a benefit to the corporation, courts typically approve payment to the plaintiff, from the corporation, of the plaintiff's attorneys' fees.").

49 EASTERBROOK & FISCHEL, supra note 40, at 101 ("A dominating characteristic of the derivative action is the lack of any link between stake and reward Shareholders with tiny holdings can bring derivative actions. Holders of small stakes have little incentive to consider the effect of the action on other shareholders who ultimately bear the costs.").

50 EASTERBROOK & FISCHEL, supra note 40, at 229.

51 MICHAEL DIAMOND, MANAGING AND OPERATING A CLOSELY HELD CORPORATION 112 (1991). "They benefit, if they prevail, by having the injury to the corporation rectified, generally by a cash award paid to the corporation by the wrongdoer. This payment will increase the value of the corporation and, therefore, the value of the stock held by the shareholders." Id.

52 Note, Independent Representation, supra note 18, at 529 (observing that although the corporation is technically both a plaintiff and a defendant, "a finding of impropriety based on this inherent conflict of interest fails to take into account the realities of derivative litigation").

53 Id. at 530-31.

54 DIAMOND, supra note 51, at 111.

55 See KLEIN & COFFEE, supra note 37, at 107.

56 Id.

57 Id.

58 EASTERBROOK, supra note 40, at 106 ("Undoubtedly directors named as defendants in derivative suits do not exercise impartial judgment in deciding whether to sue themselves.").

59 Note, Independent Representations, supra note 18, at 531.

60 Id. at 531-32.

61 See supra notes 46-49 and accompanying text.

62 See supra notes 46-49 and accompanying text.

63 See supra notes 50-51 and accompanying text.

64 See supra notes 50-51 and accompanying text.

65 See supra notes 50-51 and accompanying text.

66 At least one court has recognized that a plaintiff's motivation turns on the distinction between a public corporation and a closely held corporation:
In fact, in the context of the large publicly traded corporation, because the benefit to any individual shareholder in securing a recovery for the corporation may be correspondingly small, the party with the more significant interest on the plaintiff's side in a derivative suit often may be the plaintiff's counsel, who may stand to reap hefty fees in connection with a recovery or settlement. In this case, however, [plaintiff], whose immediate family controlled 50 percent of the stock of [the corporations], had a real interest in securing a recovery for the corporations.

Rosenfield v. Metals Selling Corp., 643 A.2d 1253, 1264 n.24 (Conn. 1994).

67 See supra notes 37-39, 50-51 and accompanying text.

68 See supra notes 37-39 and accompanying text.

69 The term "deadlock" is defined as "[t]he blocking of corporate action by one or more factions of shareholders or directors who disagree about a significant aspect of corporate policy." BLACK's LAW DICTIONARY 426 (8th ed. 2004).

70 See supra notes 37-39, 50-51 and accompanying text.

71 See supra notes 37-39, 50-51 and accompanying text.

72 Note, Independent Representation, supra note 18, at 533.

73 MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2004).

74 MODEL RULES OF PROF'L CONDUCT R. 1.13(e) (2004) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents."); see also MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 11 (2004) ("Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit.").

75 See id.

76 See infra note 78 and accompanying text.

77 See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2004).

78 Forrest v. Baeza, 67 Cal. Rptr. 2d 857, 867 (Cal. Ct. App. 1997) (holding that "while dual representation of a corporation and its directors is impermissible the attorney who formerly represented both clients may continue to represent the individual ones" consistent with federal authority); see also Note, Independent Representation, supra note 18, at 534 (stating that the "decision to have the corporation secure new counsel seems the sounder alternative"); Conflicts of Interest, supra note 22, at 1341 ("The better rule is to require that outside counsel represent the corporation, while the corporate attorney represents the insider defendant.").

79 E.g., Forrest, 67 Cal. Rptr. 2d at 862 (discussing attorney disqualification in light of the "recognized and important right to counsel of one's choosing").

80 Note, Independent Representation, supra note 18, at 534 ("Despite the optimism of the court, it seems likely that in many instances the corporate counsel chosen will be the mere pawn of the insider defendants.").

81 Lewis v. Shaffer Stores Co., 218 F. Supp. 238, 240 (S.D.N.Y. 1963) ("The fact that the selection of such independent counsel will necessarily be made by officers and directors who are defendants does not seem to me to present any insuperable difficulty."). See Tydings v. Berk Enterprises, 565 A.2d 390, 395-96 (Md. Ct. Spec. App. 1989); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 220 (N.D. Ill. 1975), aff'd in relevant part per curiam, 532 F.2d 1118 (7th Cir. 1976). See also Lower v. Lanark Mut. Fire Ins. Co., 448 N.E.2d 940, 946 (Ill. App. Ct. 1983) ("The defendant corporation may select its own counsel even though some or all of the defendant directors may make the selection.").

82 Messing v. FDI, Inc., 439 F. Supp. 776, 783 (D.N.J. 1977) (directing that "the corporation resolve [the] problem as it would any other issue as to which the existence of interested directors renders the usual corporate decision-making process unavailable"); see also Musheno v. Gensemer, 897 F. Supp. 833, 839 (M.D. Pa. 1995) (stating the corporation "should select independent counsel in the manner it would act in any other circumstance where a conflict of interest exists"); In re Oracle Sec. Litig., 829 F. Supp. 1176, 1190 (N.D. Cal. 1993) (electing not to appoint the new corporate counsel but to instead "defer to the independent directors on the selection").

83 E.g., Campellone v. Cragan, 910 So. 2d 363, 365 (Fla. Dist. Ct. App. 2005); Forrest v. Baeza, 67 Cal. Rptr. 2d 857, 862 (Cal. Ct. App. 1997); Dukas v. Davis Aircraft Prods. Co., 494 N.Y.S.2d 632 (Sup. Ct. 1985).

84 Rogers v. Virgin Land, Inc., No. 1996-13M, 1996 WL 493174, at *2 (Dist. Ct. V.I. May 13, 1996).

85 Rowen v. LeMars Mut. Ins. Co., 230 N.W.2d 905 (Iowa 1975); Niedermeyer v. Niedermeyer, No. 70-492, 1973 WL 419, at *13 (D. Or. 1973).

86 Most courts that have addressed the issue have refused to make such appointments. Tydings v. Berk Enterprises, 565 A.2d 390, 395-96 (Md. Ct. Spec. App. 1989); Musheno v. Gensemer, 897 F. Supp. 833, 839 (M.D. Pa. 1995); Lewis v. Shaffer Stores Co., 218 F. Supp. 238, 240 (S.D.N.Y. 1963); Rogers v. Virgin Land, Inc., No. 1996-13M, 1996 WL 493174, at *2 (Dist. Ct. V.I. May 13, 1996); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 220 (N.D. Ill. 1975), aff'd in relevant part per curiam, 532 F.2d 1118 (7th Cir. 1976); Messing v. FDI, Inc., 439 F. Supp. 776, 783 (D. N.J. 1977).

87 In re Oracle, 829 F. Supp. at 1189 (quoting International Brotherhood of Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965)).

88 BLACK's LAW DICTIONARY 785 (8th ed. 2004).

89 See supra note 34 and accompanying text.

90 Schwartz v. Guterman, 441 N.Y.S.2d 597, 598 (Sup. Ct. 1981) (disqualifying a partnership's attorney in an analogous situation despite the court's acknowledgment that "since the managing partner or insider defendants will hire the attorney for the business entity, independent representation may be illusory"), aff'd, 448 N.Y.S.2d 650 (App. Div. 1982).

91 Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 220 (N.D. Ill. 1975) (allowing the corporation to select its new counsel by reasoning that although the individual defendants were still serving on the company's board of directors, "[c]ertainly new counsel [would] recognize their duty to represent solely the interests of the corporate entities"), aff'd in relevant part per curiam, 532 F.2d 1118 (7th Cir. 1976); Tydings v. Berk Enterprises, 565 A.2d 390, 395-96 (Md. Ct. Spec. App. 1989) ("There is no reason for us to believe that counsel for the corporation will represent anyone other than the corporate entity."); see also In re Oracle Sec. Litig., 829 F. Supp. 1176 (N.D. Cal. 1993); Lower v. Lanark Mut. Fire Ins. Co., 448 N.E.2d 940 (Ill. App. Ct. 1983); Yablonski v. United Mine Workers, 448 F.2d 1175, 1180 (D.C. Cir. 1971).

92 MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 (2004) ("An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client.").

93 See Glenn G. Morris, Shareholder Derivative Suits: Louisiana Law, 56 LA. L. REV. 583, 637 (1996) (observing that simply telling the attorney to represent the corporation does not solve the problem when he is still receiving his instructions from the corporation's board of directors which is made up of the same defendants he is supposed to be "independent" from).

94 MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 3 (2004). Arguably, the word "ordinarily" leaves open the possibility that there are situations in which the lawyer does not have to accept the decisions of the corporation's constituents. Those situations would seem to be limited to those falling within Model Rule 1.13(b). This rule holds that an attorney "shall proceed as is reasonably necessary in the best interest of the organization" when the attorney knows of a corporate constituent that is "engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization likely to result in substantial injury to the organization." MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2004). However, this does not appear to be particularly helpful in this situation because it is unclear exactly what actions the lawyer could actually take in light of Model Rule 1.13(d), which does not allow the lawyer to reveal any confidential information relating to the representation if he is specifically hired, as he would be here, "to investigate an alleged violation of law, or to defend the organization against a claim arising out of an alleged violation of law." MODEL RULES OF PROF'L CONDUCT R. 1.13(d) (2004).

95 See supra note 19.

96 "Since the officers and directors generally conduct the corporate entity, there is always a danger that a corporation will be directed to act in a manner which fails to protect its best interests. This would naturally affect both the selection and performance of an independent corporate counsel." Note, Independent Representation, supra note 18, at 534.

97 See supra note 19.

98 See supra note 92 and accompanying text.

99 Morris, supra note 93, at 637.

100 Note, Independent Representation, supra note 18, at 528. Without considering the distinctions between public corporations and closely held corporations, the author concluded that, in general, "the strictures against dual representation are justified by both the theory and reality of derivative litigation." Id. at 533.

101 Messing v. FDI, Inc., 439 F. Supp. 776, 783 (D. N.J. 1977) (stating that in appointing new counsel "[i]t is the duty of the directors, in this as in other matters, to act in the corporation's best interest"); Musheno v. Gensemer, 897 F. Supp. 833, 839 (M.D. Pa. 1995) (citing the court's reasoning in Messing).

102 In re Oracle Sec. Litig., 829 F. Supp. 1176, 1187 (N.D. Cal. 1993). The court in Oracle also observed that it "must be mindful that directors are passing judgment on fellow directors in the same corporation and [those] who designated them to serve both as directors and committee members." Id. However, the court then relied on independent counsel to "provide[] one of the few safeguards to ensure the legitimacy of [the independent directors'] acts." Id. But again, this "safeguard" may be more illusory than safe in light of the directors' power over the attorney. See supra note 34 and accompanying text.

103 See supra note 41.

104 "Without independent managerial representation for the corporation, the independent lawyer's role will be confusing at best For an independent lawyer to do his job properly, his appointment must be tied to the naming of some independent manager or management group to act as his client contact." Morris, supra note 93, at 638.

105 "When dealing with ethical principles, we cannot paint with broad strokes. The lines are fine and must be so marked." United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955).

106 See supra note 23 and accompanying text.

107 Schwartz v. Guterman, 441 N.Y.S.2d 597, 598 (Sup. Ct. 1981), aff'd, 448 N.Y.S.2d 650 (App. Div. 1982).

108 Morris, supra note 93, at 637-38.

109 230 N.W.2d 905, 916 (Iowa 1975); see also Niedermeyer v. Niedermeyer, No. 70-492, 1973 WL 419, at *13 (D. Or. 1973) (stating that because "[i]t now appears that there is a substantial conflict and that the interests of [the corporation]

may not have been properly represented I intend to appoint an independent attorney to represent the interest of [the corporation] in this case").

110 Rowen v. LeMars Mut. Ins. Co., 230 N.W.2d 905, 918 (Iowa 1975) (Moore, C.J., dissenting).

111 565 A.2d 390 (Md. Ct. Spec. App. 1989).

112 Id. at 395.

113 Id.

114 KLEIN & COFFEE, supra note 37, at 110 ("In general, the corporation is reified."). The author then goes on to point out that "reification is a device for making something that is in fact complex seem simple, and that can be dangerous. In reality, only individuals enjoy the benefits, or bear the burdens and the responsibilities, of actions affecting other individuals." Id. at 111.

115 Tydings v. Berk Enters., 565 A.2d 390, 395 (Md. Ct. Spec. App. 1989).

116 Morris, supra note 93, at 638.

117 Id. at 637.

118 Id.

119 Note, Independent Representation, supra note 18, at 528.

120 Morris, supra note 93, at 638.

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910 So.2d 363
District Court of Appeal of Florida,
Fifth District.

Rae Ann CAMPELLONE, et al, Petitioners,
v.
Michael CRAGAN, etc., Respondent.

No. 5D05-1042.
|
Sept. 16, 2005.

Synopsis

Background: In embezzlement, misappropriation of corporate assets and opportunities, breach of fiduciary duty and battery action against business **entities**, as nominal defendants, and their majority owner by minority owner, the Circuit Court for Orange County, Renee A. Roche, J., granted minority owner's motion to disqualify **attorney** who appeared as counsel of record for both the **entities** and **entities'** majority owner. Majority owner sought certiorari review.

Holdings: The District Court of Appeal, Griffin, J. held that:

trial court did not abuse its discretion by disqualifying **attorney** from **representing** business **entities**, but

trial court abused its discretion by disqualifying **attorney** from **representing** majority owner.

Petition granted in part, quashed in part.

Attorneys and Law Firms

*364 Kenneth L. Mann, of Kenneth L. Mann, P.A., Orlando, for Petitioners.

A. Brian Phillips, of Ruden, McClosky, Smith, Schuster & Russell, P.A., Orlando, and John H. Pelzer, of Ruden, McClosky, Smith, Schuster & Russell, P.A., Fort Lauderdale, for Respondent.

Opinion

GRIFFIN, J.

Petitioner Rae Ann Campellone ["Campellone"], seeks certiorari review of an order disqualifying her counsel, Kenneth L. Mann, Esq. and Kenneth L. Mann, P.A. ["Mann"]. The underlying litigation resulted from the breakup of three **entities**: Cragan Campellone and Associates, Inc.; Crate Cart and Assemble, LLC; and Pacific Construction and Design Group, LLC. ["**entities**"]. Campellone and Cragan were shareholders of 51% and 49%, respectively, of all **entities**.

The litigation involves both direct claims and **derivative** claims. In November 2003, Cragan filed a verified complaint against Campellone and named the **entities** as nominal defendants. The complaint seeks direct and **derivative** relief against Campellone, claiming embezzlement, misappropriation of corporate assets and opportunities, breaches of fiduciary duty, and battery.

In January 2004, after Mann appeared as counsel of record for both Campellone and the **entities**, Cragan filed a motion to disqualify Mann as counsel for all of the defendants on the ground that the representation violated Rules 4-1.13 and 4-1.7 of the Rules Regulating the Florida Bar. After several evidentiary hearings, the circuit judge disqualified Mann.

Rule Regulating Fla. Bar 4-1.13 directly addresses the issue of dual representation of an organization and a corporate constituent. A lawyer **representing** an organization may also **represent** its constituents subject to the provisions of Rule Regulating Florida Bar 4-1.7. The comments to Rule 4-1.13 observe that most **derivative** actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. If a **conflict** of **interest** arises, however, and the plaintiff's claim involves serious charges of wrongdoing by those in control of the organization, joint representation should not continue.

Here, the trial court noted that Cragan's third amended complaint alleged injury incurred by the **entities** because of Campellone's misappropriation of corporate funds, employees, assets and opportunities. Although the circuit court found that the disintegration of the personal relationship between Campellone and Cragan had contributed to the litigation, because the complaint alleged serious wrongdoing by Campellone injurious to the **entities**, the court concluded that Mann could not **represent** them. The court found that

the interests of Campellone and the interests of the corporate **entities** were not aligned under any construction of the alleged facts, and observed that there would be no benefit to the corporate **entities** to align themselves with Campellone in this litigation.

***365** Campellone insisted that Cragan's allegations were bogus, and the trial court recognized that the disqualification of corporate counsel from **representing** individual defendants may be avoided if the **derivative** action is patently frivolous, the degree of participation of the corporation in defending the action is very low, or if the allegations against the individual defendants involve mismanagement rather than fraud, intentional misconduct or self-dealing. The trial court found, however, that the allegations in the verified complaint were sufficient for purposes of the disqualification motion even though Campellone's position might subsequently be validated. The court also noted that Cragan and Campellone are the *only* ones within the **entities** who could consent to the dual representation, but Campellone is the individual who is **represented** and Cragan does not consent to Mann's representation of the **entities**.

Finally, the trial court decided that because Mann, through his dual representation, had access to information regarding the **entities** that could give Campellone an unfair advantage in the **derivative** suit, the court disqualified him from **representing** *either* Campellone *or* the corporation.

The trial court found no Florida cases directly on point, but relied on cases from other jurisdictions in which similar issues have been addressed and corporate counsel in the **derivative** actions were disqualified. *See, e.g., Rogers ex rel. Bankruptcy Estate of Ackley v. Virgin Land Inc.*, 1996 WL 493174 (V.I. May 13, 1996); *Musheno v. Gensemer*, 897 F.Supp. 833 (M.D.Pa.1995); *In re Oracle Sec. Litig.*, 829 F.Supp. 1176 (N.D.Cal.1993); *Messing v. FDI, Inc.*, 439 F.Supp. 776 (D.N.J.1977); *Lewis v. Shaffer Stores Co.*, 218 F.Supp. 238 (S.D.N.Y.1963); *Forrest v. Baeza*, 58 Cal.App.4th 65, 67 Cal.Rptr.2d 857 (Cal.App.1997); *Lower v. Lanark Mut. Fire Ins. Co.*, 114 Ill.App.3d 462, 70 Ill.Dec. 62, 448 N.E.2d 940 (1983); *Rowen v. LeMars Mut. Ins. Co.*, 230 N.W.2d 905 (Iowa 1975); *Eydings v. Berk Enter.*, 80 Md.App. 634, 565 A.2d 390 (1989).

We find no abuse of discretion in the decision to disqualify Mann from **representing** the corporations. Nor did the trial court err in concluding that Campellone cannot consent on behalf of the **entities** to the dual representation. *See Forrest v. Baeza, supra*, 58 Cal.App.4th at 76, 67 Cal.Rptr.2d 857.

The trial court did abuse its discretion, however, in ruling that Mann could not **represent** Campellone. Rule Regulating Florida Bar 4–1.9(a) is difficult to apply to **derivative** actions or to the present facts. Here, **attorney** Mann did not accept Campellone as a new client after **representing** the **entities**, he simply wishes to continue his representation of Campellone after being forced to withdraw from his representation of the **entities** in a **derivative** law suit. It appears from the record that Mann became corporate counsel in 2003 when the **entities** were for all practical purposes defunct. Campellone testified that she retained Mann to "shut down the companies." Here, even if Campellone were forced to hire new counsel, he or she would be privy to the same information that Mann would have from his communications with Campellone.

The implied basis for the complete removal of Mann from the litigation was the court's finding that Mann had access to financial and other information that would give Campellone an "unfair advantage" over Cragan in the **derivative** action, but the "unfairness" is not apparent. Nor is it clear that any information in this context could be confidential.

***366** We grant the petition in part only and quash the portion of the order that prohibits Mann's representation of Campellone.

PETITION granted in part; QUASHED in part.

PLEUS, C.J., and TORPY, J., concur.

All Citations

910 So.2d 363, 30 Fla. L. Weekly D2212

End of Document

EXHIBIT 3

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC.
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
Individually and derivatively on behalf of
State Certified Termite & Pest, LLC

Plaintiffs

v.

Civil Action No. 20-C-170
R. Steven Redding, Judge

SCOTT W. MCDERMITT

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST, LLC.
a West Virginia limited liability company,

Third-Party Defendant.

PLAINTIFFS' and COUNSEL'S RESPONSE TO DEFENDANT'S MOTION TO DISQUALIFY COUNSEL

State Certified Termite and Pest, LLC, Jeffrey Schultz, and William Rogers, by and with Counsel, hereby respond to the Motion of Scott McDermitt to "Disqualify Plainitffs/Counter Defendants and Third Party Defendant's Counsel for Conflict of Interest and to Appoint an Independent Special Receiver to Wind Up and Liquidate Plaintiff, State Certified Termite & Pets, LLC." In support thereof the Plaintiffs argue as follows:

1. The Defendant's Motion is premature.

EXHIBIT # 3

2. The Plaintiffs have filed with this Court a Motion to Dismiss Counts II and III of Mr. McDermitt's Second Amended Counterclaim. The proposed order is attached hereto as Exhibit A.
3. The Plaintiffs have filed with this Court a Motion to Dismiss the Complaint of Scott McDermitt against State Certified Termite and Pest, LLC.
4. Dismissal of such Motions, particularly the Plaintiff's Motion to Dismiss Counts II and III of Mr. McDermitt's Second Amended Counterclaim, will deem the present matter moot, because there will no longer be absurd allegations that the Plaintiffs have used this Court to defraud the Plaintiff by "representing" that they wanted to continue operating State Certified Termite & Pest, LLC before this Court.
5. Furthermore, Mr. McDermitt incorrectly cites W.Va. Code 31B-4-409(b) as a reason why the Plaintiffs should refrain from dealing with State Certified Termite & Pest, LLC on behalf of Roger's pest control company.
6. This section of code applies to member-managed companies, and State Certified Termite & Pest, LLC is a Manager-managed company, and the Manager is Scott McDermitt.
7. Therefore, that the Plaintiffs Rogers and Schultz do not have a duty to "refrain from competing," and this assertion by the Defendant is not a reason why this Court should 1) disqualify current counsel, 2) allow for new Counsel to represent the proposed Third-Party Defendant, and 3) appoint a special receiver.
8. Furthermore, this Court has already ruled that Mr. McDermitt's business should be allowed to operate despite competing against State Certified Termite & Pest, because the Operating Agreement specifically allows for such competition.
9. It stands to reason that the business of William Rogers should also be allowed to compete.

10. There is no evidence of fraud on behalf of Plaintiff's counsel, with or upon this Court, or by the original Plaintiffs suing for recovery of their Company, and Mr. McDermitt has failed to state a cause of action or plead with particularity any of such allegations.
11. William Rogers and Jeffrey Schultz have moved to have Charges II and III against them dismissed.
12. State Certified Termite and Pest, LLC, has moved to dismiss the lawsuit against it.

WHEREFORE,

William Rogers, Jeffrey Schultz, and State Certified Termite and Pest LLC, and Counsel, respectfully request that this Court deny the "Defendant/Counter Plaintiff and Third Party Plaintiff, Scott W. McDermitt's Motion to Disqualify Plaintiffs/Counter Defendants and Third Party Defendant's Counsel for Conflict of Interest and to Appoint an Independent Special Receiver to Wind Up and Liquidate Plaintiff, State Certified Termite & Pest, LLC;" or,

Alternatively, the parties and Counsel respectfully request that this Court hold a decision on the present motion in abeyance until the Plaintiffs' Motions are ruled upon.

STATE CERTIFIED TERMITE AND PEST LLC
JEFF SCHULTZ, WILLIAM R. ROGERS, and
STATE CERTIGIED TERMITE & PEST LLC.
By and with Counsel

/s/Nicola D. Smith
Nicola Smith (WVSB## 11251)
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329 S. Queen Street
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West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael L. Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following motion response was FILED on 11/9/2021 2:29:19 PM

Notice Date: 11/9/2021 2:29:19 PM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 4

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of State
Certified Termite & Pest, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

DEFENDANT/COUNTER PLAINTIFF AND THIRD PARTY PLAINTIFF, SCOTT W. MCDERMITT'S CLOSING MEMORANDUM IN SUPPORT OF HIS MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL

NOW COMES Defendant/Counter Plaintiff and Third Party Plaintiff, Scott W. McDermitt ("Defendant"), by counsel, and for his Closing Memorandum in Support of Defendant's Motion to Disqualify Plaintiffs' Counsel, and respectfully says as follows:

Plaintiffs' and counsel's response to Defendant's Motion to Disqualify Counsel essentially has three arguments against that Motion and they are as follows:

EXHIBIT # 4

1. The Defendant's Motion is premature because there is now pending before the Court a Motion to Dismiss the Second Amended Counterclaim and Third Party Complaint against the individual Plaintiffs, Rogers and Schultz, and therefore Defendant's Motion maybe premature;

2. That according to Plaintiffs and Plaintiff's counsel, Defendant incorrectly cited §31B-4-409(b) as the reason why the Plaintiffs should refrain from representing State Certified Termite & Pest, LLC ("the Old LLC") on behalf of Rogers' new pest control company ("the New LLC"); and,

3. That because this Court has **allegedly** ruled that Mr. McDermitt's business should be allowed to operate despite competing against State Certified Termite & Pest, LLC, Rogers should be permitted to operate his own New LLC because the Operating Agreement (of the Old LLC) specifically allows for such competition by a member.

Defendant will address each one of these arguments separately.

A. Defendant's Motion to Disqualify Counsel is not premature, and Defendant's Motion to Disqualify Counsel should be heard before any motions to dismiss since any actions taken upon motions filed by a conflicted counsel are to be strickened and held for naught.

In the case of *Rowen v. LeMars Mut. Ins. Co. of Iowa*, 230 N.W.2d 905 (Sup.Ct.IA 1975), a derivative claim by policyholders against an insurance company and certain directors who were alleged to have looted the insurance company, the Iowa High Court ruled that in a proceeding before the trial court the lower court erred by not considering a motion to disqualify counsel prior to entering into a decision on the merits of the case. See in the opinion, 230 N.W.2d at 914.

In that same proceeding *Id.*, pp. 914-15, the Iowa High Court said: "[i]t is also well established that a potential conflict of interest exists when the same law firm attempts to represent the nominal corporate defendant in a derivative action while at the same time representing the corporate insiders accused of wrongdoing. The Iowa Court cited *Murphy v. Washington American*

League Baseball Club, Inc., 116 U.S.App.D.C. 362, 324 F.2d 394 (1963); *Lewis v. Shaffer Stores Company*, 218 F.Supp. 238 (S.D.N.Y. 1963); 13 *Fletcher, Encyclopedia of Private Corporations* §6025 (1970); see also *Yoblonski v. United Mine Workers, Tucker v. Shaw, Milone v. English*, and *International Brotherhood of Teamsters, etc. v. Hoffa, supra.* 'We recognize this conflict in *State ex rel. Weede v. Bechtel*, 244 Iowa 785, 835, 56 N.W.2d 173, 200 (1953) in holding that, a stockholders' derivative action is one in which the corporation should take a strictly neutral part.' We recognized it again in *Holden v. Construction Machinery Corporation*, 202 N.W.2d 348, 367 (Iowa 1972), in which a derivative claim was also involved.

In the opinion 230 N.W.2d at 715, the Iowa Court stated as follows:

> There is consider force in the law firm's argument that disqualification should await some inquiry into the merits of the action. The court is faced with a dilemma. If the action is without merit, the expense of independent counsel for the corporation is unjustified. This is an expense the policyholders ultimately would bear. Yet, if the action has merit, the expense is justified and necessary. Since the officers and directors control the management of the corporation, fair inquiry into the merits of the claim may itself be prevented unless the corporation is represented at the outset by independent counsel. Fair inquiry into the merits of the action is in the interests of the policyholders. Thus, the policyholders must either pay the price of independent counsel for the corporation or risk loss of what might otherwise be a successful case.
>
> The court must respond to this dilemma. **Although neither alternative is wholly satisfactory, we are persuaded the interests of the policyholders would be better served by requiring LeMars to be represented by independent counsel. This should assure the policyholders that the merits of the derivative action will not be obscured by a conflict of interest of corporate counsel. This benefit justifies its cost**... [Emphasis added].
>
> The allegations of wrongdoing against DeWitt's officers and directors establish a potential conflict of interest between DeWitt and those individual defendants. On that basis, we conclude that DeWitt should also be represented by independent counsel. There is an important difference, however, between the stances of LeMars and DeWitt in this action. Plaintiffs ask damages and other relief against DeWitt. So long as DeWitt is under attach in the case, it is entitled to defend itself; it is not required to be neutral. The only requirement is that DeWitt be represented by independent counsel so its bests interests may be

> protected in the event of a difference between its interests and those of its officers and directors who also have also been sued.

In the case of *Living Cross Ambulance Service, Inc. ("LCAS") v. New Mexico Public Regulation Com'n,* 338 P.3d 1258 (Sup.Ct.NM 2014), is a case in which the Public Regulation Commission of New Mexico granted a permanent certificate for ambulance service to American Medical Response Ambulance Service, Inc. ("AMRAS") for both emergency and non-emergency ambulance service in Valencia County, New Mexico, to which LCAS objected and appealed to the New Mexico Supreme Court.

LCAS claimed on appeal that the failure by the administrative agency to first render a decision on a motion to disqualify counsel prior to permitting the conflicted counsel from representing AMRAS at the administrative hearing to obtain a license was reversible error, ruling that the administrative agency should first rule on the motion to disqualify and stay the hearing on the merits until the disqualifying motion was resolved. *Living Cross,* 338 P.3d at 1259-60.

The New Mexico High Court in its opinion (338 P.3d at 1261) cited with approval *Bowers v. Ophthalmology Grp.*, 733 F.3d 647, 654 (6th Cir. 2013), wherein the 6th Circuit Court of Appeals vacated the District Court's summary judgment in favor of the defendant where the plaintiff had moved to disqualify the defendant's attorney because another attorney at the firm of the defendant's attorney had previously represented the plaintiff. The Sixth Circuit Court of Appeal stated as follows:

> A district court must rule on a motion for disqualification of counsel prior to ruling on a dispositive motion because the success of a disqualification motion has the potential to change the proceeding entirely.... The reason is simple: if counsel has a conflict from previously representing the parties seeking disqualification... there is a risk that confidential information could be used in preparing or defending the [dispositive] motion.... In other words, a potentially conflicted counsel's confidential information could infect the evidence presented to the district court. Therefore, a district court must reach the merits of a disqualification motion before ruling on a dispositive motion.

Id. at 654-55 (citations omitted). Thus, once a party moves to disqualify an adverse party's counsel based on counsel's former representation of the movant, all substantive proceedings must cease until the tribunal determines whether counsel is disqualified.

Hence, this Honorable Court must stay all proceedings until the disqualification motion is determined; otherwise, the evidence, rulings and argument of counsel may "infect the evidence presented" to the Circuit Court. Hence, Plaintiffs' and Plaintiffs' counsel's argument that Defendant's Motion to Disqualify Counsel is premature is wholly without merit.

B. Plaintiffs and Plaintiffs' counsel's argument that Defendant incorrectly cited §31B-4-409(b) of the *Code* as a reason why the Plaintiffs should refrain from dealing with State Certified Termite & Pest, LLC ("the Old LLC") on behalf of Rogers pest control company, State Certified Termite And Pest, LLC ("the New LLC") is incorrect because of the reasoning set forth in §31B-4-409(h)(2).

In paragraphs 5 and 6 of the Plaintiffs' Response Memorandum to Defendant's Motion, they succinctly state as follows:

> 5. Furthermore, Mr. McDermitt incorrectly cites W.Va. *Code* §31B-4-409(b) as a reason why Plaintiffs should refrain from dealing with State Certified Termite & Pest, LLC [Old LLC] on behalf of Roger's [*sic.*, Rogers'] pest control company [State Certified Termite And Pest, LLC – New LLC].
>
> 6. This section of code applies to member-managed companies, and State Certified & Pest, LLC ("Old LLC") is a Manager-managed company, and the Manager is Scott McDermitt.

Apparently, Plaintiffs and Plaintiffs' counsel did not read §31B-4-409(h)(2) of the *Code* which states as follows:

> (h) In a manager-managed company:...
>
> (2) A manager is held to the same standards of conduct prescribed for members in subsections (b) through (f) of this section.

Hence, both Rogers as the manager, and Schultz as a member, as trustees in winding up the business and liquidating the Old LLC's assets, is held to the same duties set forth in §31B-4-

409(b)(1), (2), (3) and 31B-4-409(c), as members of the Old LLC, and they must act as trustees for the benefit of the Old LLC [§31B-4-409(b)(1)], which requires fiduciary duties as trustees and duties of loyalty.

Plaintiffs' claim on this issue is again without merit.

C. Plaintiffs aver in their Opposition Memorandum that the Court has already ruled that Mr. McDermitt's business should be allowed to operate despite competing against State Certified Termite & Pest, LLC (Old LLC) because the Operating Agreement specifically allows for such competition.

Plaintiffs' Opposition Memorandum states as follows:

> 9. It stands to reason that the business of William Rogers should also be allowed to compete.

It is clear that Plaintiffs have missed the point, or are simply ignoring §31B-4-409(b)(1), (b)(2), (b)(3) and §31B-4-409(c) of the *Code*.

As the Defendant properly stated to the Court in his Opening Memorandum for the Motion under §31B-8-810(c) and §31B-8-811(a) of the *Code*, the Old LLC must be reorganized in order to continue its business. The Plaintiffs fraudulently misrepresented to the Defendant that they were going to "continue the business of the Old LLC", and therefore they were required to reorganize the Old LLC; but, instead Plaintiffs fraudulently organized Rogers' New LLC to take all of the assets of the Old LLC and misappropriated them and used all of its company opportunities to start Rogers' New LLC to compete with the Old LLC in violation of §31B-4-409(b)(1), (2), (3) and 4-409(c).

According to §38B-8-803(a) of the *Code*, after dissolution, a member who has not wrongfully dissociated may participate in the winding up of a limited liability company's business...

§31B-8-810(c) provides that: "A company administratively dissolved continues its existence **but may only carry on business necessary to wind up and liquidate its business and affairs under §8-802**... Hence the only activities which the Plaintiffs may participate in as trustees are to wind up and liquidate the business of the Old LLC **and nothing else**.

Rogers, as a manager, cannot do the following without the consent of all of the members: the authorization or ratification of acts or transactions under §1-103(b)(2)(ii) which would otherwise violate the duty of loyalty. See §31B-4-404(c)(2). Rogers has no such authorization from the Defendant.

Furthermore, neither Rogers nor Schultz may breach the following duties to the Old LLC and the remaining member, being the Defendant, pursuant to §31B-4-409(b)(1) to account to the company and to **hold as trustee** for it any property, profit or benefit derived by the member in the conduct or winding up of the company's business **or derived from a use by the member** of the company's property, including the appropriation of the company's opportunity. [Emphasis added]. Here, it is alleged that Rogers, starting his own single-member LLC, that has breached this fiduciary duty because he has transferred all of the property of the Old LLC to his New LLC, and has been using the company opportunities of the Old LLC for the benefit of his New LLC. These acts are undoubtedly intentional fiduciary breaches of §31B-4-409(b)(1).

Plaintiffs have breached §31B-4-409(2) because they must refrain from dealing with the Old LLC in the conduct or winding up of the Old LLC's business as or on behalf of a party having an interest adverse to the Old LLC. Both Plaintiffs have interests adverse to the Old LLC because they both compete against the Old LLC in other pest control businesses.

They have also breached §31B-4-409(b)(3) which requires them to refrain from competing with the Old LLC and the conduct of the Old LLC's business before the dissolution of the Old

LLC. Here, **rather than refraining from competing** with the Old LLC, Plaintiff Rogers **defrauded the Old LLC** and Defendant by organizing the New LLC, taking the Old LLC's assets and opportunities and then competing with the Old LLC!

D. Plaintiffs' duties to the Old LLC are as trustees under §31B-4-409(b)(1), but Defendant has no such duties so Defendant's new limited liability company operations are without any restraints.

Lastly, for reasons still unknown, it is stated in paragraph 6 of Plaintiffs' Opposition Memorandum that Defendant is the Manager of the Old LLC and that Rogers' New LLC should be allowed to compete with the Old LLC because Defendant's LLC competes with the Old LLC, but there are several factors that make those assertions false: 1) Defendant was manager of the Old LLC until he was voted out as manager, and replaced by Rogers as manager on June 4, 2020, at the meeting of members of the Old LLC at the Law Office of James B. Crawford, III, Esq.; 2) Defendant's new LLC was organized on June 15, 2020, eleven (11) days after he was removed as manager of the Old LLC, so he was NOT the manager of the Old LLC when he started the competing business to the Old LLC; 3) Defendant is not a party in this civil action who seeks to be a member winding up the business of the Old LLC (§31B-8-803(a) of the *Code*), as are the individual Plaintiffs, so Defendant does NOT have the duties and obligations under §31B-4-409(b)(1), (2), (3) and (c) of the *Code*; and, in fact, he has no duties to the Old LLC, unlike the other members – Plaintiffs. See §31B-4-409((h)(1) of the *Code*.

Simply stated, the fact that the Court refused to permit discovery of the bank account transactions of Defendant's new business venture has nothing to do with Plaintiffs' fiduciary duties under §31B-4-409(b)(1), (2), (3) and (c), as trustees winding up and liquidating the Old LLC.

CONCLUSION

Defendant has shown to the Court that Plaintiffs' counsel have a conflict of interest by representing: a) derivatively the Old LLC that should be in the process of winding up and liquidating; b) representing the individual Plaintiffs, Rogers and Schultz, who are members of the Old LLC who must act as trustees, and therefore fiduciaries, to both the Old LLC and Defendant, as a member of the Old LLC, but who are charged with absconding with, taking and fraudulently converting the Old LLC assets, including company opportunities, for the sole benefit of the New LLC, owned exclusively by Rogers.

There can be no greater direct conflict than the above dual/multiple representation by Plaintiffs' counsel where Plaintiffs are charged with obtaining the most value from the Old LLC's assets to facilitate liquidating, when those assets have been taken, stolen and fraudulently converted by the individual Plaintiffs to the New LLC for the benefit of Rogers and Schultz, who Plaintiffs' counsel also represents!

The Court must, by Defendant's Motion:

a) grant the Motion;

b) disqualify Nicola Smith, Esq.; Christian J. Riddell, Esq.; the Riddell Law Group; and, Hoyer, Hoyer & Smith, Attorneys at Law, and require each Plaintiff and the Third Party Defendant to each obtain their own separate independent counsel;

c) disgorge the legal fees and costs from Plaintiffs' counsel for all amounts paid by the Old LLC or from any of its assets or company opportunities;

d) stricken all pleadings filed by Plaintiffs' counsel to date; and,

e) refer this matter, including an accounting by Plaintiffs of all of the Old LLC's assets and the fraudulent use of the Old LLC's assets and company opportunities by Rogers' New LLC

to an independent special receiver to perform the winding up and liquidating of the Old LLC's assets and a resolution of the claims in this case as permitted under §31B-8-803(a) of the *Code*.

For the foregoing reasons, the Court must grant Defendant's Motion, disqualify Plaintiffs' counsel, and have the Plaintiffs and the Old LLC retain new counsel in this action forthwith, and appoint the independent special receiver.

Respectfully submitted this 17th day of November, 2021.

Scott W. McDermitt, Defendant/Counter Plaintiff
and Third Party Plaintiff
By Counsel

Michael L. Scales, Attorney at Law
Counsel for Defendant/Counter Plaintiff
and Third Party Plaintiff
Michael L. Scales, PLLC
314 W. John Street
Martinsburg, WV 25401
(304) 263-0000
WV Bar No. 3277

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of State
Certified Termite & Pest, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Defendant/Counter Plaintiff, Scott W. McDermitt, do hereby certify that I have served a true copy of DEFENDANT/COUNTER PLAINTIFF AND THIRD PARTY PLAINTIFF, SCOTT W. MCDERMITT'S CLOSING MEMORANDUM IN SUPPORT OF HIS MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL by the Court's e-filing system, and by mailing a true copy thereof to counsel for Plaintiffs, Nicola Smith, Esq., and Christian J. Riddell, Esq., and to mail a copy to Hoyer, Hoyer & Smith, to their address of Hoyer,

Hoyer & Smith, PLLC, 22 Capitol Street #300, Charleston, WV 25301, this 17th day of November, 2021.

Michael L. Scales, Attorney at Law

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following motion response was FILED on 11/17/2021 8:56:32 AM

Notice Date: 11/17/2021 8:56:32 AM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 5

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC, JEFFREY SCHULTZ and WILLIAM R. ROGERS, individually and derivatively on behalf of State Certified Termite & Pest, LLC,

Plaintiffs

v. **Civil Action No. 20-C-170**

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC, a West Virginia limited liability company,

Third-Party Defendant.

MOTION FOR HEARING ON PREVIOUSLY FILED MOTIONS AND SCHEDULING CONFERENCE

Comes now, on this 5th day of January, 2022, the Plaintiffs, by and through Counsel, Nicola D. Smith, and moves the Circuit Court of Berkeley County, Honorable Steven Redding presiding, for a hearing on the previously filed motions in this matter as well as a scheduling conference.

In support of said motion, the Plaintiffs aver that the following motions have been filed and are awaiting ruling by the court:

1. DEFENDANT'S MOTION TO DISQUALIFY COUNSEL FOR THE PLAINTIFFS

EXHIBIT #
5

2. PLAINTIFF'S MOTION TO DISMISS COUNTS II AND III OF THE DEFENDANT'S SECOND COUNTERCLAIM AND THIRD PARTY COMPLAINT
3. MOTION OF STATE CERTIFIED TERMITE AND PEST, LLC TO DISMISS DEFENDANT'S SECOND AMENDED COUNTERCLAIM

WHEREFORE, the Plaintiffs respectfully request that the Court set a hearing in this matter on all pending motions and a scheduling conference.

Counsel for the Plaintiffs.

/s/Nicola D. Smith
Nicola D. Smith (WVSB## 11251)
Christian J. Riddell
Christopher S. Smith
The Riddell Law Group
329 S. Queen Street
Martinsburg, WV 25401
(304)267-3949

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of State
Certified Termite & Pest, LLC,

Plaintiffs

v. **Civil Action No. 20-C-170**

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Nicola Smith, counsel for the Plaintiffs, hereby certify that a true and accurate copy of the Motion for hearing on previously filed motions and scheduling conference was served upon counsel for the Defendant by filing the same with the Court via the WV E-File system this 5th day of January, 2022.

By Counsel:

/s/Nicola D. Smith
Nicola D. Smith (WVSB## 11251)
Christian J. Riddell
Christopher S. Smith

The Riddell Law Group
329 S. Queen Street
Martinsburg, WV 25401
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West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael L. Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following motion was FILED on 1/5/2022 4:02:52 PM

Notice Date: 1/5/2022 4:02:52 PM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 6

In the Circuit Court of Berkeley County, West Virginia

Accurate Pest Management, LLC,	)	
Jeffery Schultz,	)	
William R Rogers,	)	
Plaintiffs,	)	
	)	
vs.)	)	Case No. CC-02-2020-C-170
	)	
Scott W. McDermitt,	)	
Defendant	)	
	)	

ORDER DENYING PLAINTIFFS' MOTION TO DISMISS COUNTS II AND III OF THE SECOND AMENDED COUNTERCLAIM

THIS MATTER came on to be decided pursuant to Plaintiff/Counter Defendants, William Rogers and Jeffrey Schultz's Motion to Dismiss Counts II and III of Defendant's Second Amended Counterclaim and Third Party Complaint (hereafter "Second Amended Counterclaim"); upon Defendant/Counter Plaintiff, Scott W. McDermitt's Response Memorandum in Opposition thereto; upon Plaintiffs' Closing Memorandum in support of their Motion; and upon the Court's belief that this matter has properly matured for decision.

It appearing to the Court:

I. LEGAL STANDARD

The party moving to dismiss on the grounds of failure to state a claim upon which relief may be granted pursuant to WVRCP Rule 12(b)(6) has a substantial burden. The purpose of a motion to dismiss pursuant to WVRCP Rule 12(b)(6) is to test the sufficiency of a complaint. In appraising the sufficiency of a complaint, the trial court should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Roth v. DeFelice Care, Inc.*, 226 W.Va. 214, 700 S.E.2d 183 (2010), syl. pt. 2.

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In appraising the sufficiency of a claim on a motion to dismiss for failure to state a claim upon which relief may be granted the complaint is to be construed in the light most favorable to the plaintiff. *Highmark West Virginia, Inc. v. Jamie,* 221 W.Va. 487, 492, 655 S.E.2d 509, 514 (2007). Furthermore, a motion to dismiss on this basis is rarely granted, and the burden on the non-moving party is relatively light. *John W. Lodge Distribution Co., Inc. v. Texaco, Inc.,* 161 W.Va. 603, 606, 245 S.E.2d 157, 159 (1978). All of the facts must be taken as true, and all inferences must be resolved in favor of the non-moving party. See *Mandolidis v. Elkins Industries, Inc.,* 161 W.Va. 695, 717-719, 246 S.E.2d 907, 920-921 (1978).

II. APPLICABLE RULE

WVRCP Rule 12(b)(6) states in salient portion, as to motions to dismiss for failure to state a claim upon which relief may be granted, as follows:

> WVRCP Rule 9(b) entitled: **PLEADING SPECIAL MATTERSFraud, Mistake, Condition of the Mind, Negligence**. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . .

III. ALLEGATIONS IN THE SECOND AMENDED COUNTERCLAIM AND THIRD PARTY COMPLAINT

The following paragraphs are those which are in issue in the Second Amended Counterclaim, and whether they sufficiently constitute the pleading requirements under WVRCP Rule 9(b):

> 19.That on or about June 4, 2020, McDermitt was summoned to the law office of James B. Crawford, III in Charles Town, Jefferson County, West Virginia, Mr. Crawford being the LLC counsel [for] the old LLC, for a members meeting of the old LLC, to discuss the dissolution of the old LLC in 2015 for not filing annual reports, the removal of McDermitt as manager, and for a turnover of the LLC records and bank accounts from McDermitt to Rogers as the new manager. (See copy of unsigned minutes of members meeting of June 4, 2020 prepared by Attorney Crawford – Ex. 2).
>
> 20.That at that members meeting held on June 4, 2020, Rogers

and Schultz advised McDermitt that they wanted to continue the business of the old LLC and were retaining Mr. Crawford to reinstate or reorganize the old LLC, as it was dissolved on November 1, 2015 for failure to file annual reports with the Secretary of State of West Virginia (see Ex. 3).

21.That in that regard, Mr. Crawford filed a request with the West Virginia Secretary of State on June 18, 2020 to reserve the name of "State Certified Termite & Pest LLC", a copy of which is attached hereto as Exhibit 4.

22.That sometime during July of 2020, Plaintiffs filed this civil action, individually and derivatively for the old LLC, against McDermitt which representation implied that the old LLC was to be reorganized and that McDermitt would have a 41% of the membership interest in the reorganized old LLC that was dissolved in 2015.

23.That Rogers and Schultz fraudulently misrepresented those facts and circumstances regarding the reorganization of the old LLC, and Rogers and Schultz misrepresented that they were going to "continue the business".

24.That the statements and acts of Rogers and Schultz were false and fraudulent and were made to McDermitt with the intention of having McDermitt rely upon those false representations.

25.That McDermitt reasonably relied upon those false representations and in so doing has lost his 41% interest in the old LLC, and McDermitt's equitable interest in the assets, intellectual property of the customer list, cash, cash in banks, telephone numbers and all corporate opportunities of the old LLC.

26.That McDermitt's reasonable reliance upon the false and fraudulent representations of Rogers and Schultz were intended to have McDermitt rely upon them which he did, and upon his reasonable reliance in so doing, he has been harmed and damaged in an amount to be determined from the evidence but are at least the value of McDermitt's 41% interest in the old LLC.

27.That the actions of Rogers and Schultz in falsely representing that the old LLC's business would be continued and that the old LLC would be reinstated or reorganized with the same interests that McDermitt, Schultz and Rogers had in the old LLC being terminated by the Secretary of State of West Virginia in 2015 were false, and McDermitt has been harmed and damaged, and that the actions of Rogers and Schultz were wanton, willful, malicious and fraudulent for which McDermitt is entitled to punitive damages.

29.That Rogers has organized a new LLC entitled "State Certified Termite And Pest LLC" ("new LLC") as a fraudulent concealment and

to make McDermitt believe it is the same limited liability company as the old LLC to take, abscond with and usurp the assets of the old LLC and its opportunities for which Rogers must account.

30.That Rogers and Schultz fraudulently represented to McDermitt that they were acting for the old LLC (bringing this civil action "derivatively" for the benefit of the old LLC), when in fact they were bringing this civil action fraudulently to acquire the assets of the old LLC for the sole benefit of Rogers' new LLC with virtually the same name as the old LLC.

31.That Rogers and Schultz fraudulently represented to the Court on July 29, 2020, at a hearing before this Honorable Court that the name of the old LLC was Accurate Pest Management LLC and that they were derivatively seeking all of the assets of the old LLC from McDermitt, as the old LLC's former manager, for the benefit of the old LLC, when in fact they fraudulently induced the Court and McDermitt to turn over all of those assets, records, opportunities, customer lists, and cash and cash in banks to Rogers for the sole benefit of his single-member new LLC.

32.That as the proximate cause of Rogers and Schultz's fraud and fraudulent concealment, McDermitt has been harmed and damaged at least by the loss of his 41% membership in the old LLC, plus all attorneys fees and costs to defend a fraudulent civil action against him.

35.That Rogers organized State Certified Termite And Pest LLC (the new LLC) in order to perpetrate a fraud against the dissolved old LLC and McDermitt in order to fraudulently obtain all of the assets, cash, cash in bank, telephone number, customer lists and opportunities of the old LLC in which Rogers only had an 18% interest to his solely owned new LLC in which he owned 100% of the membership interests.

36.That Rogers has solely owned the new LLC since July 10, 2020, but has operated the new LLC to take over, abscond with, convert and steal all of the old LLC's pest management business to the exclusion of McDermitt and McDermitt's 41% membership interest in the old LLC.

37.That because Rogers has used the new LLC as a vehicle to perpetrate a fraud, McDermitt has the right to seek from this Court a dissolution of the new LLC pursuant to §31B-8-801(b)(5)(v) of the W.Va. *Code*. As the manager, Rogers, as the member in control of the company (old LLC) has acted in a manner that is illegal, oppressive, fraudulent and/or unfairly to McDermitt, in that he owed a duty of loyalty and a fiduciary duty to the old LLC and McDermitt with respect to the assets, and the opportunities of the old LLC to wind up the old LLC as a fiduciary, which he has breached.

IV. DISCUSSION

The Court finds that the above assertions of fact are hotly contested; however, the Court is of the opinion that the above factual recitation in the Second Amended Counterclaim states all the elements necessary to state a claim for fraud and fraudulent concealment.

The Court **CONCLUDES** that these paragraphs, when taken collectively, clearly allege with particularity that Rogers and Schultz perpetrated a fraud. The Plaintiff's contention, in the Motion and in the Reply Brief, that McDermitt cannot show any reasonable reliance upon the actions of Rogers and Schultz, while intriguing, do not convince the Court that McDermitt's contentions of fraud must fail at this point. Once the evidence has been more fully developed, the Court believes that summary judgment motions based upon the full record may serve to narrow the issues, but in a case with the facts in so much dispute, the Court is not willing at this point to cut off McDermitt's claim of fraud.

The Court believes that the case of *Highmark West Virginia, Inc. v. Jamie,* 221 W.Va. 487, 655 S.E.2d 509 (2007) (*per curiam* decision), is instructive. That case involved a medical insurance company suing a physician over alleged overpayments made to a physician pursuant to his participation as a provider under the company's medical program, and the physician counterclaiming alleging breach of contract, fraud and defamation. The physician's counterclaim contained allegations that the medical insurance company fraudulently underpaid and withheld payments to the physician. After discussing the elements of fraud, the High Court [211 W.Va. at 494, 655 S.E.2d at 516] cited with authority the concurring opinion in *Pocahontas Mining Co. Limited Partnership v. OXY USA, Inc.,* 202 W.Va. 169, 174, 503 S.E.2d 258, 263 (1998), stating that pleading a fraud claim is distinguishable from proving a fraud claim: "the pleading

must not be expected to include every element of the proof."

The Court **CONCLUDES** that because the alleged fraud in this case is claimed to have damaged the Defendant by the failure to pay over his 41% interest as well as any profits, as well as contentions that the Old LLC's assets may have been redirected improperly by Rogers and Schultz to the New LLC, this is all matter of proof as to any damages and Defendant need not be compelled to provide every factual element of the proof in his Second Amended Counterclaim.

V. RULING

The Court **CONCLUDES** that because Defendant has sufficiently alleged facts with particularity as to fraud perpetrated by Plaintiffs Rogers and Schultz, the Second Amended Counterclaim cannot be dismissed and may proceed.

Accordingly, it is **ORDERED** and **ADJUDGED** that Plaintiff/Counter Defendants, William Rogers and Jeffrey Schultz's Motion to Dismiss Counts II and III of Defendant's Second Amended Counterclaim be, and the same is hereby **ORDERED DENIED**.

The Court notes the timely objection and exception to this Order by Plaintiffs/Counter Defendants, Rogers and Schultz.

The Plaintiffs/Counter Defendants Rogers and Schultz shall have twenty (20) days from the entry of this Order to file their Answer or Reply to the Second Amended Counterclaim.

The Clerk is directed to e-file a copy of this Order to counsel of record: Michael L. Scales, Esq., Christian Riddell, Esq., Nicola Smith, Esq. and to mail a copy to Hoyer, Hoyer & Smith, PLLC, to their address of 22 Capitol Street, #300, Charleston, WV 25301.

/s/ R. Steven Redding
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael L. Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following order - case was FILED on 1/13/2022 3:53:03 PM

Notice Date: 1/13/2022 3:53:03 PM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 7

In the Circuit Court of Berkeley County, West Virginia

Accurate Pest Management, LLC,	)	
Jeffery Schultz,	)	
William R Rogers,	)	
Plaintiffs,	)	
	)	
vs.)	)	Case No. CC-02-2020-C-170
	)	
Scott W. McDermitt,	)	
Defendant	)	
	)	

ORDER DENYING MOTION TO DISMISS THIRD PARTY COMPLAINT

THIS MATTER came on to be decided pursuant to Third Party Defendant, State Certified Termite And Pest LLC's Motion to Dismiss the Second Amended Counterclaim and Third Party Complaint; upon Defendant/Counter Plaintiff and Third Party Plaintiff, Scott W. McDermitt's Response and Objections to Motion of Third Party Defendant to Dismiss the Second Amended Counterclaim and Third Party Complaint; upon the various memoranda in support of and in opposition to said Motion; and upon the Court's belief that this matter has properly matured for decision.

I. Legal Standard

The party moving to dismiss on the grounds of failure to state a claim upon which relief may be granted pursuant to WVRCP Rule 12(b)(6) has a substantial burden. The purpose of a motion to dismiss pursuant to WVRCP Rule 12(b)(6) is to test the sufficiency of a complaint. In appraising the sufficiency of a complaint, the trial court should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Roth v. DeFelice Care, Inc.,* 226 W.Va. 214, 700 S.E.2d 183 (2010), syl. pt. 2.

In appraising the sufficiency of a claim on a motion to dismiss for failure to state a claim upon which relief may be granted the complaint is to be construed in the light

EXHIBIT # 7

most favorable to the plaintiff. *Highmark West Virginia, Inc. v. Jamie,* 221 W.Va. 487, 492, 655 S.E.2d 509, 514 (2007). Furthermore, a motion to dismiss on this basis is rarely granted, and the burden on the non-moving party is relatively light. *John W. Lodge Distribution Co., Inc. v. Texaco, Inc.,* 161 W.Va. 603, 606, 245 S.E.2d 157, 159 (1978). All of the facts must be taken as true, and all inferences must be resolved in favor of the non-moving party. See *Mandolidis v. Elkins Industries, Inc.,* 161 W.Va. 695, 717-719, 246 S.E.2d 907, 920-921 (1978).

II. Basis of Motion to Dismiss

The basis of the Motion to Dismiss filed by State Certified Termite And Pest LLC (hereinafter referred to as "New LLC"), was that: ". . . the Defendants' Counterclaims (*sic.,* Third Party Complaint) should be dismissed for failure to make any claim against Third Party Defendant, or to plead with particularity any alleged elements of fraud against it."

III. Discussion

In the Defendant/Counter Plaintiff and Third Party Plaintiff's Second Amended Counterclaim and Third Party Complaint, it is stated as follows, after the allegations of fraud have been asserted against Plaintiffs/Counter Defendants as follows:

> 7. That McDermitt believes upon information that Third-Party Defendant, State Certified Termite And Pest LLC is a single-member West Virginia limited liability company ("new LLC"), with its single member being Rogers, which was organized by Rogers and whose Articles of Organization were filed with the Secretary of State of West Virginia on July 10, 2020.
>
> 29. That Rogers has organized a new LLC entitled "State Certified Termite And Pest LLC" ("new LLC") as a fraudulent concealment and to make McDermitt believe it is the same limited liability company as the old LLC to take, abscond with and usurp the assets of the old LLC and its opportunities for which Rogers must account.
>
> 30. That Rogers and Schultz fraudulently represented to McDermitt that they were acting for the old LLC (bringing this civil action "derivatively" for the benefit of the old LLC), when in fact they were bringing this civil action fraudulently to acquire the assets of the old LLC for the sole

benefit of Rogers' new LLC with virtually the same name as the old LLC.

31. That Rogers and Schultz fraudulently represented to the Court on July 29, 2020, at a hearing before this Honorable Court that the name of the old LLC was Accurate Pest Management LLC and that they were derivatively seeking all of the assets of the old LLC from McDermitt, as the old LLC's former manager, for the benefit of the old LLC, when in fact they fraudulently induced the Court and McDermitt to turn over all of those assets, records, opportunities, customer lists, and cash and cash in banks to Rogers for the sole benefit of his single-member new LLC.

32. That as the proximate cause of Rogers and Schultz's fraud and fraudulent concealment, McDermitt has been harmed and damaged at least by the loss of his 41% membership in the old LLC, plus all attorneys fees and costs to defend a fraudulent civil action against him.

The *ad damnum* clause of Count II prays for relief that all of the assets, cash, receipts and income for which Plaintiff Rogers has wrongfully and fraudulently converted to State Certified Termite & Pest, LLC from the date of July 10, 2020 to the present date which have been utilized by State Certified Termite And Pest LLC, plus all draws and payments to Rogers from the New LLC and for a judgment for 41% of such amount.

Count III demands an accounting and paragraph 35 reads as follows:

35. That Rogers organized State Certified Termite And Pest LLC (the new LLC) in order to perpetrate a fraud against the dissolved old LLC and McDermitt in order to fraudulently obtain all of the assets, cash, cash in bank, telephone number, customer lists and opportunities of the old LLC in which Rogers only had an 18% interest to his solely owned new LLC in which he owned 100% of the membership interests.

36. That Rogers has solely owned the new LLC since July 10, 2020, but has operated the new LLC to take over, abscond with, convert and steal all of the old LLC's pest management business to the exclusion of McDermitt and McDermitt's 41% membership interest in the old LLC.

37. That because Rogers has used the new LLC as a vehicle to perpetrate a fraud, McDermitt has the right to seek from this Court a dissolution of the new LLC pursuant to §31B-8-801(b)(5)(v) of the W.Va. *Code*. As the manager, Rogers, as the member in control of the company (old LLC) has acted in a manner that is illegal, oppressive, fraudulent and/or unfairly to McDermitt, in that he owed a duty of

> loyalty and a fiduciary duty to the old LLC and McDermitt with respect to the assets, and the opportunities of the old LLC to wind up the old LLC as a fiduciary, which he has breached.
>
> 38. That Rogers must be compelled to account for all money and property that the new LLC has received since its organization on July 10, 2020, and to account and pay over to McDermitt 41% of the profits and assets of the new LLC since that date to the present date.

The Court **CONCLUDES** that because Rogers and Schultz are alleged to have used the New LLC as a vehicle to commit a fraud, this raises the issue of whether the Court/fact finder should impose a constructive trust upon the New LLC for the benefit of the Old LLC. See *Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 368 (1971), syl. pts. 3, 4 and 5; and, *Carleton Min. & Power Co. v. West Virginia Northern R. Co.,* 113 W.Va. 20, 166 S.E. 536 (1932), *syllabus*. Those are the assets for which the Defendant/Counter Plaintiff and Third Party Plaintiff seeks an accounting. In order to account for all of those assets, company opportunities, goodwill, telephone numbers, etc., which Rogers and Schultz have allegedly wrongfully and fraudulently taken from the Old LLC, the New LLC would be required to account for each one of those items taken from the Old LLC by Rogers and Schultz, and therefore the New LLC's participation in this civil action is warranted.

Accordingly, it is **ORDERED** and **ADJUDGED** that Third Party Defendant, State Certified Termite And Pest LLC's Motion to Dismiss the Second Amended Counterclaim and Third Party Complaint be, and the same is **ORDERED DENIED.**

The Court notes the timely objection and exception to this Order by Plaintiffs/Counter Defendants and Third Party Defendant.

The Clerk is directed to e-file a copy of this Order to counsel of record: Michael L. Scales, Esq., Christian Riddell, Esq., Nicola Smith, Esq.; and to mail a copy to Hoyer, Hoyer & Smith, PLLC, to their address of 22 Capitol Street #300, Charleston, WV 25301.

/s/ R. Steven Redding
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael L. Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following order - motion was FILED on 1/14/2022 4:44:45 PM

Notice Date: 1/14/2022 4:44:45 PM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 8

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
Individually and derivatively on behalf of
State Certified Termite & Pest, LLC

Plaintiffs

v.

Civil Action No. 20-C-170
R. Steven Redding, Judge

SCOTT W. MCDERMITT

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST, LLC.
a West Virginia limited liability company,

Third-Party Defendant.

SUPPLEMENTAL BRIEF OF THIRD PARTY DEFENDANTS IN OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY COUNSEL

Comes now State Certified Termite and Pest, LLC, by Counsel, pursuant to the January 21, 2022, hearing before this Court, and pursuant to Scott W. McDermitt's Motion to Disqualify Counsel, and submits this Supplemental Brief in opposition to the Defendant's Motion.

The Plaintiff in this case, State Certified Termite & Pest LLC (the "Old LLC") and its remaining two members, filed a lawsuit against a disassociated member, Defendant Scott McDermitt, for wrongful actions against the Old LLC, including refusal to turn over assets of the Old LLC, thus thwarting proper liquidation pursuant to Sections 10(i) and 10(J) of the Second Amended Operating Agreement of Accurate Pest LLC.

EXHIBIT # 8

Defendant has countersued and asserted additional claims in his personal capacity against Plaintiff Roger's new company, State Certified Termite and Pest LLC (the "New LLC"). Defendant now alleges that all Counter-Defendants and Third Party Defendants, including William Rogers, Jeffrey Schultz, and the New LLC (altogether the Represented Parties") should secure new counsel. The Defendant further contends that all legal fees be returned to the parties from Counsel, and existing Counsel be disqualified for "the fraud, intentional misconduct, and self-dealing of its [clients]."

A. NO CONCURRENT CONFLICT EXISTS BETWEEN THE REPRESENTED PARTIES PRECLUDING JOINT REPRESENTATION PURSUANT TO EITHER RULE OF PROFESSIONAL CONDUCT 1.7 OR 1.13

The Defendant cites Rule 1.7 of the West Virginia Rules of Professional Conduct in support of his assertion that there is a conflict existing between the parties, namely the Old LLC and the New LLC. The Rule states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> 1. the representation of one client will be directly adverse to another client; or
> 2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> 1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> 2. the representation is not prohibited by law;

3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

4. each affected client gives informed consent, confirmed in writing.

Defendant asserts that there is a conflict pursuant to Rule 1.7 between the Represented Parties, despite the fact that the Represented Parties have found no conflict amongst themselves. Pursuant to Note 28 of Rule 1.7, "[c]ommon representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them." Thus far there has been total alignment in the interests and desires of all Plaintiffs. Moreover, even if there were a conflict, pursuant to Note 29, a conflict is still consentable where common representation is maintained and where potentially adverse interests can be reconciled.

Here, the Defendant has presented no cognizable argument or evidence that there is a conflict between the Represented Parties or the derivative companies. The closest he gets is when he convolutedly asserts, at paragraph 14 that:

> Where it is clear that Plaintiffs Rogers and Schultz are alleged both to have committed fraud and fiduciary breaches as trustees in the liquidation of the Old LLC's assets, etc. and where Rogers is alleged to have converted the assets of the Old LLC, while acting as a trustee and in a fiduciary duty to the old LLC and to the Defendant **as a member**, and has converted and appropriated those assets and opportunities to Rogers' single member New LLC, it is a clear conflict of interest for Plaintiff's counsel to represent both the organization derivatively, which it seeks to dissolve and liquidate, and parties who have alleged to have defrauded that same Old LLC, and converted its assets to a New LLC which is owned by Rogers, one of the members of the Old LLC.

Defendant's Motion to Disqualify, ¶ 14. (emphasis added)

It appears here that Defendant is arguing that, based on RPC 1.7 and RPC 1.13, undersigned cannot serve as both counsel for the Old LLC and counsel for the New LLC where Defendant "as

a member," of the Company, asserts fraud claims against the New LLC.[1] However, there are two related problems which are fatal to this argument: (1) Defendant, by his own admission, is *not* a member of the Old LLC and therefore cannot assert any claims on the Old LLC's behalf; and (2) Defendant fails to identify any conflict of interest between or among any client of undersigned counsel's which would call into question the fair administration of justice.

1. **Because Defendant is not a member of the Old LLC, he has no right to bring any action on behalf of it, and cannot assert a conflict of interest on its behalf based on his claims.**

Pursuant to West Virginia Code § 31B-4-410(a)(1), "a ***member*** may maintain an action against a limited liability company or another member for legal or equitable relief, with or without an accounting as to the company's business, to enforce [his] rights under the operating agreement." (emphasis added). However, Mr. McDermitt has brought no such action against any company of which he is a part. Count II, Paragraph 2, of the Defendant's First Amended Counterclaim, states that "Defendant notified Plaintiff's of his intention to disassociate by the notice provided to the Plaintiff's on June 29, 2020 to be effective July 25, 2020 by copy of which is attached hereto as Exhibit 1." Plaintiff's Amended Complaint notes the same fact paragraph 39. Defendant further asserts in paragraph 3 of its Motion to Disqualify that Rogers and Shultz are "the two remaining members of the Old LLC." As such, Defendant, is, by all accounts, no longer a member of the old LLC, and was not such a member at the time he filed his counterclaims and third party complaint.

Instead, it is Plaintiffs who are is suing the *Defendant* derivatively and on behalf of the Company, alleging fraud, conversion of assets, breach of fiduciary duty, and other causes of action

[1] Defendant also appears to erroneously assert, at paragraphs 10 and 12 of its Motion to Disqualify, that undersigned counsels are themselves fiduciaries of the Old LLC. This is flatly wrong, as representing an individual who is a fiduciary of a company does not also make said lawyer a fiduciary of that company, and Defendant has provided no authority to the contrary.

which occurred during his time as Manager of the Old LLC, and he is, in return, countersuing both of his prior partners and Roger's New LLC in his *personal capacity.*[2] All such claims were made after Defendant's disassociation from the company.

In Wagner v. Centra Bank a member of an LLC asserted a cause of action against a bank. The Court found in favor of the bank, because the cause of action asserted against it belonged to the LLC and that the individual had no standing to file the complaint. Wagner v. Centra Bank (In re Wagner), 2011 Bankr. LEXIS 225, *1, 2011 WL 307968. A member "may not bring a lawsuit in his own name asserting rights belonging to the limited liability company," of which he is a member. Id. In this case, the individual asserting the claim is no longer a member of the Old Company, nor can he properly demonstrate that he has an interest in the assets of the company of which he was once a member.

Put simply, if a Defendant cannot assert a claim on behalf of a company, then it logically follows that he cannot assert a conflict of interest on that company's behalf, either.

2. Defendant has not alleged an adverse relationship between any client of undersigned counsels which would work a concurrent conflict under Rule 1.7, and Defendant has failed to making any showing as to how undersigned's ongoing representation would affect the Court's administration of justice.

Defendant argues that "it is a clear conflict of interest for Plaintiff's counsel to represent both the organization derivatively… and parties who have alleged to have defrauded that same LLC," but he does not identify what, exactly, this supposed "clear conflict," between the "organization"

[2] Plaintiff would note here that the case style in Defendant's operative Second Amended Counterclaim and Third-Party Complaint do not assert that Defendant is bringing his claims "derivatively and on behalf of" the Old LLC, as Plaintiffs do, but rather names himself as a Counterplaintiff and Third Party Plaintiff only in his personal capacity. He further does not, at any point, reference any attempt to bring his claims pursuant to §31B-4-410.

[the Old LLC] and its remaining members is, nor does he provide any authority for his right to assert it.

As discussed above, Defendant himself cannot create, through his claims, an adverse relationship between the Old LLC and the New LLC, having dissociated himself from the Old LLC before any such claims were made. Defendant's brief cites Rule 1.13, 'Organization as Client,' and emphasizes the language at the end of the rule which provides that, although derivative actions are typically defended by the organization's counsel, a conflict for that counsel "*may*" arise "between the lawyers duty to the organization and the lawyer's relationship with the board," for claims involving "serious charges of wrongdoing." Here however, the "board" would consist wholly and exclusively of Plaintiffs Rogers and Schultz as the Old LLC's only remaining members. Only in the event of an adverse relationship between the Old Compay, Rogers and Schultz could a concurrent conflict arise. Defendant has articulated no such adverse relationship, nor would it be his province to assert any such interest, as any such conflict would be between and among only Plaintiffs themselves, not the Defendant and Plaintiffs. The Preamble to the West Virginia Rules of Professional Conduct states, in relevant part, at paragraph 20, that:

> In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. **Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule**.

(Emphasis added).

Additionally, though there are certain instances where an opposing party or the Court is conferred standing to disqualify the attorney of the opposing party, such instances are rare in civil

litigation, and expressly disfavored. In Garlow v. Zakaib, 186 W.Va. 457, 413 S.E.2d 112 (1991), the West Virginia Supreme Court Held:

> A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. **Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.**

(Emphasis added).

Defendant has asserted nothing about the relationship between Plaintiffs/Counter-defendants, the Third-Party Defendant, and their counsel which would "clearly call into question the fair or efficient administration of justice" so as to allow such an extreme remedy as interference in the opposing parties' lawyer-client relationship. The Riddell Law Group represents parties who assert no adverse interests between themselves – as well as the companies that are affiliated exclusively with them. Meanwhile, McDermit, who is not a member of either the Old or New LLC, he has his own separate counsel. As such, despite Defendant's diligent attempts to complicate this matter to the greatest degree possible, we are, in essence, dealing with straightforward claims between the parties in the first part and the party in the second part, Defendant McDermit, and all opposing parties or parties with adverse interests to each other already have separate counsels. There is therefore no point at which this litigation and the Court's administration of justice might be affected in any way by the representation of Rogers, Schultz, or the corporate entities owned by them because their interests are entirely aligned in every relevant respect.

B. CONCLUSION

In closing, Plaintiffs would emphatically note that supreme irony of Defendant moving to disqualify the opposing party counsel on grounds that, if true (which they aren't) would similarly work a conflict of interest for Defendant's own counsel as well. Put simply, if

undersigned Counsel is disqualified from representing Plaintiffs because Defendant has accused the Plaintiffs of damaging his interest in the Old LLC by fraud and breach of fiduciary duties, then Defendant's counsel would also be disqualified from representing the Defendant as a third-party Plaintiff, who is similarly accused of damaging Plaintiffs' interests in that same LLC through fraud and breach of fiduciary duties. While Plaintiff does not believe the law requires any such thing, what's good for the goose, in this instant, is good for the gander. As such, in the event that the Court somehow finds Defendant's arguments meritorious, Plaintiff would formally request disqualification of Defendant's counsel on identical grounds.

WHEREFORE, for all the reasons stated above, Plaintiff respectfully requests that the Court DENY Defendant's Motion to Disqualify, and further requests that the Court delay any receivership for the Old LLC until the relevant facts have been adjudicated.

STATE CERTIFIED TERMITE & PEST LLC, JEFFREY W. SCHULTZ, WILLIAM R. ROGERS, and STATE CERTIFIED TERMITE AND PEST LLC

/s/Nicola D. Smith
Nicola D. Smith (WVSB## 11251)
Christian J. Riddell Esq. (WVSB #1222)
The Riddell Law Group
329 S. Queen Street
Martinsburg, WV 25401
(304)267-3949
Smith@theRiddellLawGroup.com

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael L. Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following motion response was FILED on 1/31/2022 7:05:10 PM

Notice Date: 1/31/2022 7:05:10 PM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 9

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC, JEFFREY SCHULTZ and WILLIAM R. ROGERS, individually and derivatively on behalf of State Certified Termite & Pest, LLC,

Plaintiffs

v. **Civil Action No. 20-C-170**

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC, a West Virginia limited liability company,

Third-Party Defendant.

MOTION FOR HEARING ON PREVIOUSLY FILED MOTION TO DISQUALIFY COUNSEL AND MOTION FOR SPECIAL RECEIVER

Comes now, on this 4th day of February, 2022, the Plaintiffs, by and through Counsel, Christian J. Riddell, and moves the Circuit Court of Berkeley County, Honorable Steven Redding presiding, for a hearing on the previously filed motion to disqualify counsel and motion for special receiver.

In support of said motion, Plaintiffs aver that undersigned counsel, due to illness, was unable to participate in the prior hearing but has been involved in the subsequent supplemental briefing and wishes to be heard on oral argument to more fully elucidate the issues before the court

EXHIBIT # 9

WHEREFORE, the Plaintiffs respectfully request that the Court set a hearing in this matter on the outstanding motions.

Counsel for the Plaintiffs.

/s/Christian J. Riddell
Christian J. Riddell WBSB #12202
The Riddell Law Group
329 S. Queen Street
Martinsburg, WV 25401
(304)267-3949

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE CERTIFIED TERMITE & PEST, LLC, JEFFREY SCHULTZ and WILLIAM R. ROGERS, individually and derivatively on behalf of State Certified Termite & Pest, LLC,

Plaintiffs

v. **Civil Action No. 20-C-170**

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC, a West Virginia limited liability company,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Christian J. Riddell, counsel for the Plaintiffs, hereby certify that a true and accurate copy of the Motion for Hearing on Previously Filed Motion To Disqualify Counsel and Motion for Special Receiver was served upon counsel for the Defendant by filing the same with the Court via the WV E-File system this 4th day of February, 2022.

By Counsel:

/s/Christian J. Riddell
Christian J. Riddell WBSB #12202
The Riddell Law Group
329 S. Queen Street
Martinsburg, WV 25401
(304)267-3949

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael L. Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following motion was FILED on 2/4/2022 5:16:49 PM

Notice Date: 2/4/2022 5:16:49 PM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 10

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ACCURATE PEST MANAGEMENT, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of Accurate
Pest Management, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL AND FOR THE COURT TO APPOINT AND INDEPENDENT SPECIAL RECEIVER TO WIND UP AND LIQUIDATE THE ASSETS OF THE OLD LLC

NOW COMES Defendant, Scott W. McDermitt, by counsel, Michael L. Scales, Esq. and the law firm of Michael L. Scales, PLLC, and for his Supplemental Memorandum in Support of his Motion to Disqualify Plaintiffs' Counsel and Appoint and Independent Special Receiver to Wind Up and Liquidate the Assets of the Old LLC, and respectfully says as follows:

I. DEFENDANT STANDS PAT ON HIS ARGUMENTS THAT PLAINTIFFS' COUNSEL MUST BE DISQUALIFIED FOR CONFLICTS OF INTEREST

Under Rule 1.13 of the Rules of Professional Conduct, **Organization as Client**, under the comments for **Derivative Actions**, [14] states as follows:

EXHIBIT #
10

> The question can arise whether counsel for the organization may defend such an action [derivative action]. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal instant of an organization's affairs, to be defended by the organization's lawyer like any other suit. **However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.** [Emphasis added].

Rule 1.7(a)(1) of the Rules of Professional Conduct state that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client. Rule 1.7(b)(3) states that notwithstanding Rule 1.7(a)(1), a lawyer may represent a client involving a concurrent conflict unless the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation, as it does here: Rogers and Schultz as trustees must obtain the maximum value in litigation for the Old LLC's assets, property and corporate opportunities to distribute to its members, Rogers, Schultz and Defendant McDermitt, yet Defendant claims Rogers, with Schultz's assistance to obtain a disputed $30,000.00 claim, absconded and converted the Old LLC's assets and corporate opportunities to Rogers' own single member New LLC. This is a direct conflict in the same proceeding thereby prohibiting Plaintiffs' counsel from representing any party.

The Court can note the cases in the original motion and memorandum which follow that same line of reasoning. For those reasons, Plaintiffs' counsel must be disqualified.

II. CONSTRUCTION OF COMPLAINT ALLEGATIONS *VIS-À-VIS* COUNT III OF DEFENDANT'S SECOND AMENDED COUNTERCLAIM AND THIRD PARTY COMPLAINT AND CAUSES OF ACTION FOR FRAUD, EMBEZZLEMENT AND CONVERTING LLC'S ASSETS

Paragraphs 41 and 42 of the original Complaint state that the Plaintiffs wish to continue the LLC's business pursuant to line 10(a) of the Operating Agreement (Ex. 1 to the Complaint).

The individual Plaintiffs Rogers and Schultz stated in the Complaint that they are members acting derivatively for the Old LLC (see paragraph 14 of the Complaint).

Defendant/Counter Plaintiff in Count III in his Second Amended Counterclaim and Third Party Complaint seek an involuntary dissolution of the New LLC and an accounting by Rogers asserting that the New LLC is merely an extension of, and a wrongful conversion of the Old LLC's assets and corporate opportunities.

It should be clear to the Court that the Old LLC was administratively dissolved by the Secretary of State of West Virginia in 2015. According to statute, §31B-8-811(a) of the *Code* a limited liability company that has been administratively dissolved may apply to the Secretary of State for reinstatement **within two years after the effective date of dissolution.** [Emphasis added].

For reasons which are conflicting between Plaintiffs Rogers and Schultz and Defendant McDermitt, as to why the Old LLC became administratively dissolved, it is clear that it was in fact administratively dissolved in 2015. This civil action was filed in 2020, some five years thereafter, and thus the ability of the Old LLC to be reinstated by the Secretary of State within two years is not available.

So what is the solution as to the status of the Old LLC if it cannot be administratively reinstated? The record reveals that James B. Crawford, III, Esq., the LLC's counsel, reserved the name State Certified Pest & Termite, LLC for a period of approximately four months to go through the formal re-organization process (see Exhibit C), but Plaintiffs Rogers and Schultz fraudulently chose not to reorganize the Old LLC advising the Court and Defendant that they intended to continue the Old LLC's business; but instead, to defraud Defendant, Plaintiff Rogers organized his New LLC as a single member limited liability company with virtually the same name with the exception that the "&" was substituted for the word "And", and that Rogers began

operating the New LLC which apparently took over the Old LLC's business and ALL of its assets and corporate opportunities.

At the hearing before the Court on January 21, 2022, Defendant's counsel presented to the Court an email, dated August 9, 2021, from Plaintiff, William ("Bill") Rogers to a Dawn Dodson, a copy of which is attached hereto as Exhibit "A", which reflects a solicitation from Plaintiff Rogers from his New LLC: "State Certified Termite And Pest, LLC". The Court should conclude that the email clearly reflects that Plaintiff Rogers is utilizing the Old LLC's name, cellular telephone numbers and email address of "statecertwv@gmail.com", all intangible property owned by the Old LLC, to obtain the corporate opportunities of the Old LLC.

It should seem clear to the Court that the individual Plaintiffs, acting derivatively for the Old LLC, were required to act in accordance with §31B-8-810(c) where it states as follows:

> (c) A company administratively dissolved continues its existence but may carry on **only business necessary to wind up and liquidate its business and affairs** under §8-802 and to notify claimants under §8-807 and §8-802.

Hence, the Court must conclude that the ability to "continue the business" of the Old LLC is not statutorily permitted in light of the provisions of §31B-8-810(c) as the Old LLC was administratively dissolved, and not reinstated within two years, nor reorganized by Plaintiffs Rogers and Schultz.

Nonetheless, the Plaintiffs' allegations stand for the Complaint that Plaintiffs Rogers and Schultz are acting "derivatively" for the Old LLC, and must be tasked with the sole obligation for the Old LLC to have it wound up and liquidated, and for no other purpose in accordance with §31B-8-810(c) of the *Code*.

While paragraph 10(a) of the Operating Agreement might have been operative had the Old LLC been reinstated or reorganized neither alternative was available because of the time lapse between 2015 and 2017 necessary for reinstatement, and Plaintiffs Rogers and Schultz's desire to enforce the Operating Agreement cannot trump the terms of state statute.

Usually, the Operating Agreement trumps the Uniform Limited Liability Company Act [§31B-1-101, *et seq.* of the W.Va. *Code*]; however, pursuant to §31B-1-103(b) the Operating Agreement may not...

> (2) eliminate the duty of loyalty under §4-409(b)...; and
>
> (6) vary the requirements to wind up the limited liability company's business in a case specified in §8-801(b)(4) or (b)(5).

Because the allegations in Defendant/Counter Plaintiff's Second Amended Counterclaim and Third Party Complaint allege that Plaintiffs Rogers and Schultz have breached §31B-4-409(b)(1), (2), (3) and also involve the Old LLC since it is a manager-managed LLC, those obligations are imposed upon Plaintiff Rogers pursuant to §31B-4-409(h), as its manager.

Under §31B-1-103(b)(6) this is a case under §31B-8-801(b)(5)(v) "where the managers or members [*ie.,* Rogers and Schultz] in control of the company have acted, are acting or will act in a manner that is illegal, oppressive, fraudulent or unfairly prejudicial to the petitioner".

Hence, in this particular case, state statute trumps the Operating Agreement, and the Plaintiffs cannot avail themselves of the ability to continue the operations of the business and to redeem the Defendant's 41% interest in the Old LLC, but must wind up and liquidate the assets.

III. ALL THREE MEMBERS OF THE OLD LLC, ROGERS, SCHULTZ AND MCDERMITT ARE ALL CONFLICTED OUT OF BEING THE PARTIES WHO ARE AVAILABLE TO WIND UP AND LIQUIDATE THE OLD LLC'S BUSINESS

The Complaint alleges that Defendant, while acting as manager of the LLC, wrongfully converted Old LLC funds, paid for personal expenses and otherwise acted in breach of his fiduciary duties to the Old LLC.

While the Defendant vehemently denies these allegations, the Court should not decide the merits of the claims against the Defendant by Plaintiffs Rogers and Schultz, but the Court must conclude however that McDermitt is prohibited from acting as a party to wind up and liquidate the business because of the provisions of §31B-8-803 of the *Code* which prohibits a member

who has wrongfully disassociated may not participate in the winding up of the business even though McDermitt denies wrongful disassociation. See §31B-8-803(a) of the *Code*.

Similarly, in Defendant/Counter Plaintiff's Second Amended Counterclaim and Third Party Complaint, McDermitt asserts that Rogers and Schultz, acting in concert, have taken, embezzled and converted the Old LLC's assets and wrongfully transferred them to the New LLC, and seeks and accounting of those assets and determinations of the corporate opportunities and whether they have been usurped by Rogers and his New LLC.

Those allegations, if proven, will disqualify Plaintiffs Rogers and Schultz from acting to wind up the LLC's business and liquidate same pursuant to §31B-4-409(b)(1), (2) and (c).

Hence, the Court should be convinced that a neutral third party, other than the parties to this civil action, must wind up and liquidate the Old LLC's business pursuant to §31B-8-810(c) of the *Code* which permits the Court to order judicial supervision of the winding up of the Old LLC's business for "good cause shown", and that good cause is the disqualification of the individual parties and members of the Old LLC from participating in the winding up and liquidation due to alleged fraud, defalcations and breaches of fiduciary duties.

IV. AN INDEPENDENT SPECIAL RECEIVER SHOULD TAKE THE ASSETS OF THE OLD LLC, AND THE NEW LLC, AND WIND UP AND LIQUIDATE THE OLD AND NEW LLC'S BUSINESSES

§31B-8-803(a) of the W.Va. *Code*, states as follows:

> (a) After dissolution, a member who has not wrongfully disassociated may participate in winding up the limited liability's business, but on application of any member, member's legal representative or transferee, the circuit court, for good cause shown, may order judicial supervision of the winding up.

The Court should conclude that because all of the members of the Old LLC have been charged in various counts and claims in this civil action have wrongfully acted toward the Old LLC.

The Supreme Court of Appeals of West Virginia recognized that generally a court of equity is not empowered to appoint a receiver for a corporation, absent proof of insolvency, fraud, waste or improper conduct. *Kanawha Coal Co. v. Ballard & Welch Coal Co.*, 43 W.Va. 721, 29 S.E. 514 (1897), syl. pt. 4 and *State ex rel. Battle v. Hereford,* 148 W.Va. 97, 13 S.E.2d 86 (1963), syl. pt. 2. With respect to the appointment of a receiver where a partner is alleged to have wrongfully mismanagement partnership affairs, see *Snodgrass v. Snodgrass,* 107 W.Va. 136, 147 S.E. 483 (1929). Even when a court exercises its equitable powers and appoints a receiver, the court's control must be temporary. Furthermore, the appointment of a receiver does not affect vested rights or interests of third parties in property which is the subject of the receivership or disarrange the order of priority of existing liens. *Cf., Bethlehem Steel Corp. v. William Indus., Inc.*, 245 Va. 38, 425 S.E.2d 484 (1993).

Furthermore, the Fourth Circuit Court of Appeals, in a case in which the management has been shown to have committed instances of fraud and mismanagement, absent insolvency, is enough to call into play the equitable powers of the court, and the courts are vested with inherent equitable power to appoint a trustee-receiver under such acts. In fact, the Circuit Court stated: "The *prima facia* showing a fraud and mismanagement, absent insolvency, is enough to call into play the equitable powers of the court. It is hardly conceivable that the trial court should have permitted those who were enjoined from fraudulent misconduct to continue in control of Kelco's affairs for the benefit of those shown to have been defrauded. In such cases, the appointment of a trustee-receiver becomes a necessary implementation of injunctive relief." [Citing *Securities and Exchange Com'n. v. Keller Corporation,* 323 F.2d 397, 403 (7th Circuit 1963), *Securities and Exchange Commission v. Bowler,* 427 F.2d 190, 197-98 (4th Cir. 1970)].

Because Defendant has shown to the Court good cause to appoint an independent third party special receiver, and the fact that at the hearing before the Court on January 21, 2022, Defendant's counsel presented the Court with an email from Dawn Dodson, Exhibit "A" hereto,

showing that Plaintiff Rogers is using the same name as the Old LLC, the same email address and all of the cell phone telephone numbers for the Old LLC that the Court enjoined the Defendant from using back at the hearing before the Court in August of 2020, shortly after this civil action was filed, the Court should order and decree that Plaintiff Rogers be prohibited from using all of those cellular telephone numbers, name and corporate opportunities, and should have all of those assigned and delivered to the special receiver for purposes of winding up and liquidating those amounts for the benefit of the Old LLC. The name, the telephone numbers, customer lists and corporate opportunities all have value for which the Defendant is entitled to 41%. Furthermore, Rogers and the Old LLC must be ordered to account for all monies obtained since June 4, 2020 when Rogers was appointed the new manager of the Old LLC.

For the conflict of interest of Plaintiffs' and Third Party Defendant's counsel, the Court should order the disgorgement of all legal fees and costs paid to all attorneys and law firms which were paid from the bank accounts of the Old LLC after the time of transfer by the Defendant to Plaintiff Rogers shortly after Defendant was discharged as manager of the Old LLC in June of 2020, all amounts in the Old LLC's bank accounts since June 4, 2020 should be accounted for; together with all monies received by Rogers and his New LLC, since its organization on July 10, 2020, should all be surcharged and the special receiver should be charged with obtaining all of those funds which were received by the New LLC from its customers who were also part of the Old LLC's customer base or otherwise were obtained through the use of the Old LLC's company opportunities.

For the foregoing reasons, Plaintiff Rogers and his New LLC must be prohibited from carrying on its business; that all of the assets of the Old LLC and New LLC should be assigned, delivered and placed in possession of the independent special receiver. The Court needs set a bond for that special receiver which may be paid from the Old LLC's funds and the independent receiver should address the determination of what the liquidation value of the Old LLC is as of

the date that Plaintiff Rogers took over as manager, should sell all of the assets of the New LLC and determine how much is owed the Old LLC by Rogers and his New LLC, as well as Schultz at least as to the extent of the monies that he has been paid under the alleged $32,678.71, which is referred to in paragraph 1 of Ex. 2 to the Complaint, being the unsigned minutes of the Old LLC of June 4, 2020.

The independent special receiver should be vested with certain powers to take control of the Old LLC and New LLC's assets; and to subpoena records, have transcribed hearings and to perform all discovery for the information needed by the independent special receiver to liquidate all assets; and the balance of the claims in this civil action should all be stayed pending a determination of and the liquidating of the New LLC's and Old LLC's assets. At that time, both parties may return to Court and ask that their independent claims against one another be resolved, but until the Old LLC's and the New LLC's assets are ascertained, liquidated and placed in the special receiver's care and control, nothing can be had in this case further since Plaintiff Rogers is dissipating the Old LLC's assets and opportunities through the operations of his New LLC.

For the foregoing reasons, in addition to Plaintiffs' counsel being disqualified, the Court should also appoint an independent special receiver to take hold of the assets of the Old LLC and the New LLC, and to determine how much there is in liquidation of the Old LLC's assets, including the corporate opportunities which have been usurped by Plaintiff Rogers and his New LLC.

Respectfully submitted this 4th day of February, 2022.

Scott W. McDermitt, Defendant
By Counsel

Michael L. Scales, Attorney at Law
Counsel for Scott W. McDermitt
Michael L. Scales, PLLC
314 W. John Street
Martinsburg, WV 25401
(304) 263-0000
WV Bar No. 3277

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ACCURATE PEST MANAGEMENT, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of Accurate
Pest Management, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Defendant, Scott W. McDermitt, do hereby certify that I have served a true copy of DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL AND FOR THE COURT TO APPOINT AN INDEPENDENT SPECIAL RECEIVER TO WIND UP AND LIQUIDATE THE ASSETS OF THE OLD LLC by the Court's e-filing system to counsel for Plaintiffs, Nicola Smith, Esq. and Christian J. Riddell, Esq.; and by mailing a true copy thereof to Hoyer, Hoyer & Smith, to their address of Hoyer, Hoyer & Smith, PLLC, 22 Capitol Street #300, Charleston, WV 25301, this 4th day of February, 2022.

Michael L. Scales, Attorney at Law

Gmail

Scott McDermitt <scottmcdermitt.wv@gmail.com>

Fwd: PRICE LIST

2 messages

Dawn Dodson <dawnadodson@gmail.com> Tue, Aug 10, 2021 at 7:15 AM
To: Scott McDermitt <scottmcdermitt.wv@gmail.com>

---------- Forwarded message ---------
From: **State Certified** <statecertwv@gmail.com>
Date: Mon, Aug 9, 2021, 6:25 PM
Subject: PRICE LIST
To: Dawn Dodson <dawnadodson@gmail.com>

Bill Rogers
State Certified Termite and Pest, LLC
64 Carlson Lane
Harpers Ferry, WV 25425
Office: 304- 724- 6434
Office cell: 304-725-3971
Cell: 304-676-5182
Cell:304-676-2277

STATE CERTIFIED PRICE LIST.pdf
281K

Scott McDermitt <scottmcdermitt.wv@gmail.com> Tue, Aug 10, 2021 at 7:20 AM
To: Dawn Dodson <dawnadodson@gmail.com>

Thanks Dawn, scott
[Quoted text hidden]

EXHIBIT #
A

STATE CETIFIED TERMITE AND PEST

WILLIAM ROGERS 23 YEARS IN REAL ESTATE+PEST SERVICES

STATECERTWV@GMAIL.COM

C=304-676-5182, OFF=304-725-3971,H=304-724-6436

WOOD DESTROYING INSECT INSPECTIONS=$53.00

SEPTIC INSPECTION TRACE UV DYE TEST=$58.30

WELL TEST BACTERIA E-COLI=$79.50

QUARTLY PEST SERVICES GENERAL PEST CONTROL=$90.10, BI MONTHLY=$68.90 ,MONTHLY=$47.70

ONE TIME TREATMENTS WITH 60 DAY WARRANTY=$175.00

RAT STATIONS=$31.80 a station

MICE TREATMENTS SINGLE FAMAILY HOMES=$185.50

TERMITE TREATMENTS START @=$500.00

WELL FLOW=$90.10

CARPENTER ANTS=$185.50

BEE SERVICES START @=$ 90.10 CARPENTER BEES, YELLOW JACKETS ,WASP,HORNETS

ROACH SERVICES=$175.00 GERMAN,ORIENTAL,AMERICAN,WOOD ROACH

FLEAS AND TICKS=$238.50 YARD TREATMENTS VARYING ON SQUAR FOOT

WOOD PRESERVATION TREATMENT START=$238.50 PRETREAT, WOOD BORING BEETLES

UV LIGHT INSTALATIONS THROUGH EAGLE PLUMBING=$1160.00

ALL WELL SAMPLES THROUGH PACE ANALYTICAL OR SHENANDOAH BACTERIOLOGICAL LAB

CLASS 1 , 2 WV DHHR INDIVIDUAL SEPTIC INSTALLER INSPECTOR 54-13-A-006

SENTRI SMART ACCESS THROUGH EPBR

WV=JEFFERSON, BERKELEY, MORGAN, HAMPSHIRE, HARDY, GRANT, TUCKER, MINERAL

VA CLARK, LOUDON, FREDRICK

West Virginia Secretary of State — Online Data Services

Business and Licensing

Online Data Services Help

Business Name Registration/Reservation Detail

STATE CERTIFIED TERMITE & PEST LLC

Name Registration/Reservation Information

Type	Name	Effective Date	Termination Date	Renewed
NRS | Name Reservation	STATE CERTIFIED TERMITE & PEST LLC	6/18/2020	10/16/2020	No

Applicant Information

Registrant	Address	Country
JAMES CRAWFORD III	120 N. GEORGE STREET CHARLES TOWN WV 25414	USA

Images

View	Name	Date Added	Date Effective	Type
View	STATE CERTIFIED TERMITE & PEST LLC	7/27/2020	6/18/2020	R - Reservations & Registrations
View	Name	Date Added	Date Effective	Type

NOTICE: The West Virginia Secretary of State's Office makes every reasonable effort to ensure the accuracy of information. However, we make no representation or warranty as to the correctness or completeness of the information. If information is missing from this page, it is not in the The West Virginia Secretary of State's database.

Monday, January 4, 2021 — 10:15 AM

EXHIBIT # C

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following supporting documents was FILED on 2/4/2022 8:21:03 AM

Notice Date: 2/4/2022 8:21:03 AM

Virginia Sine
CLERK OF THE CIRCUIT COURT
Berkeley County
380 W South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtswv.gov

EXHIBIT 11

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ACCURATE PEST MANAGEMENT, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of Accurate
Pest Management, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

DEFENDANT'S OBJECTIONS TO PLAINTIFFS' MOTION FOR ADDITIONAL ORAL ARGUMENT ON PREVIOUSLY FILED MOTIONS BY DEFENDANT

NOW COMES Defendant, Scott W. McDermitt, by counsel, Michael L. Scales, Esq. and the law firm of Michael L. Scales, PLLC, who objects to the Motion filed by the Plaintiffs on February 4, 2022, seeking a second and additional oral argument on the Motion to Disqualify Counsel and Motion for Special Receiver, and says as follows:

1. This Honorable Court granted Plaintiffs' prior motion for oral hearing on the same motions, and the oral argument was heard before the Court on January 21, 2022.

2. That at that hearing, Plaintiffs and Third Party Defendant were represented, appeared and argued these motions by Nicola Smith, Esq. of The Riddell Law Group, Plaintiffs' counsel.

EXHIBIT # 11

3. That at the close of that hearing on January 21, 2022, the Court stated that the Court grants an additional two weeks for supplemental memoranda on Defendant's motions.

4. That Plaintiffs filed a supplemental memorandum on or about January 31, 2022.

5. That Plaintiffs have had ample time to argue against Defendant's motions and to file at least two memoranda in opposition to the Plaintiffs' Motion to Disqualify Counsel and for Appointing a Special Receiver.

6. That if Plaintiffs' counsel, Christian J. Riddell, Esq., needed to appear and argue this case after co-counsel, Nicola Smith, Esq., had already argued on behalf of Plaintiffs and Third Party Defendant, then he should have appeared and argued at the last oral argument on January 21, 2022.

7. That the motion for an additional oral argument is without merit, and only seeks to re-hash the arguments on the motions that were previously argued.

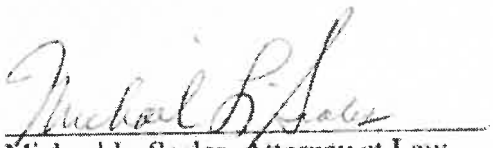
8. That if Defendants' counsel, Christian J. Riddell, Esq., who has not appeared in any proceedings in this case since September of 2020, states that he desires to have additional oral argument because he was allegedly ill, then he should have filed a motion to continue the prior hearing for oral argument on January 21, 2022.

9. Any fault for failure or alleged failure to sufficiently argue the motions should have been brought before the Court at least prior to the oral arguments on January 21, 2022.

WHEREFORE, Defendant, Scott W. McDermitt, objects to Plaintiffs' Motion for Additional Oral Argument and asks the Court to overrule Plaintiffs' Motion for Additional Oral Argument and to render its decisions on the Defendant's motions which have been previously filed based upon the original memoranda and supplemental memoranda of the parties already filed herein and the oral argument before the Court on January 21, 2022.

Respectfully submitted this 7th day of February, 2022.

Scott W. McDermitt, Defendant
By Counsel



Michael L. Scales, Attorney at Law
Counsel for Scott W. McDermitt
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WV Bar No. 3277

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ACCURATE PEST MANAGEMENT, LLC,
JEFFREY SCHULTZ and WILLIAM R. ROGERS,
individually and derivatively on behalf of Accurate
Pest Management, LLC,

Plaintiffs

v. Civil Action No. 20-C-170

SCOTT W. MCDERMITT,

Defendant/Counter Plaintiff and Third-Party Plaintiff

v.

JEFFREY SCHULTZ and WILLIAM R. ROGERS,

Counter Defendants

AND

STATE CERTIFIED TERMITE AND PEST LLC,
a West Virginia limited liability company,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Defendant, Scott W. McDermitt, do hereby certify that I have served a true copy of DEFENDANT'S OBJECTIONS TO PLAINTIFFS' MOTION FOR ADDITIONAL ORAL ARGUMENT ON PREVIOUSLY FILED MOTIONS BY DEFENDANT by the Court's e-filing system to counsel for Plaintiffs, Nicola Smith, Esq. and Christian J. Riddell, Esq.; and by mailing a true copy thereof to Hoyer, Hoyer & Smith, to their address of Hoyer, Hoyer & Smith, PLLC, 22 Capitol Street #300, Charleston, WV 25301, this 7th day of February, 2022.

Michael L. Scales, Attorney at Law

West Virginia E-Filing Notice

CC-02-2020-C-170

Judge: Steven Redding

To: Michael Scales
mlscales@frontier.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Accurate Pest Management, LLC v. Scott W. McDermitt
CC-02-2020-C-170

The following motion response was FILED on 2/7/2022 10:26:56 AM

Notice Date: 2/7/2022 10:26:56 AM

Virginia Sine
CLERK OF THE CIRCUIT COURT
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