

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
07 CVS 12469

REGIONS BANK,

Plaintiff

vs.

REGIONAL PROPERTY  
DEVELOPMENT CORPORATION,

Defendant

DEFENDANT'S RESPONSE TO  
PLAINTIFF'S SUPPLEMENTAL BRIEF

NOW COMES Defendant and Counterclaimant, Regional Property Development Corporation ("Regional"), by and through counsel, and hereby responds to the Plaintiff's Supplemental Brief in Support of Motion to Dismiss Amended Counterclaim. Plaintiff's Motion to Dismiss must be denied because (1) it relies on facts that have not been alleged nor proven at this stage of the litigation; and (2) fails as a matter of law.

**RELEVANT FACTS**

Regional has filed a counterclaim against Plaintiff for aiding and abetting a breach of fiduciary duty. Among other things, Plaintiff's counterclaim alleges that Plaintiff's actions resulted in damage to Regional because **Regional** suffered as a result of the modification of the operating agreement. There are no allegations that the modification of the LLC agreement damaged the LLC in any fashion or that the \$600,000 distribution would not have been made to any member or the distribution itself damaged the LLC.

Plaintiff quotes portions of the amended counterclaim but does not cite to the thrust of the allegations. The allegations, set forth as follows, clearly state that this

inequitable bargaining power and revision of the LLC operating agreement was the result of the acquisition of the Note and what caused the damage to one party, i.e.,

**Regional:**

1. At all times relevant to this dispute, 1) Mark Carpenter was a Member and Manager of Lancaster; 2) Andrew Jacobsen and Steven Jacobsen were Members of Lancaster; and 3) Regional was a Member and Manager of Lancaster. (See Amended Counterclaim ¶2.)
2. J. Michael Shaheen (“JMS”), as President of Plaintiff, was the only person authorized under the note to request advances. (See Amended Counterclaim ¶3.)
3. The Note became due on November 24, 2005; however, Regions did not call the note or notify either Lancaster or JMS that Regions was requiring payment in full at that time. (See Amended Counterclaim ¶¶6-7.)
4. At or about the time when the note became due, and unbeknownst to Defendant, Regions began negotiating with Carpenter and/or Andrew & Steven Jacobsen for the sale of the Note to Carpenter and/or Andrew & Steven Jacobsen. (See Amended Counterclaim ¶9.)
5. Regions was aware that Carpenter was a Lancaster Manager and was further aware that Carpenter did not disclose to Defendant that he was negotiating with Regions for the acquisition of the Note. (See Amended Counterclaim ¶¶10-11.)
6. Carpenter intended to call the Note once he had acquired it and use Lancaster’s alleged **default on the Note to his advantage by forcing Regional to accept modifications to the LLC’s operating agreement that were unfavorable to Regional.** (See Amended Counterclaim ¶12.)
7. Regions was aware that Carpenter intended on calling the Note due after his acquisition of it and using such default as leverage **to force Regional to agree to an unfavorable modification of the parties’ operating agreement.** (See Amended Counterclaim ¶16.)
8. Carpenter, along with Andrew and Steven Jacobsen did, in fact, buy the note from Regions. Carpenter, Andrew and Seven Jacobsen then called the note and used the threat of default and foreclosure, which would have wiped out Defendant’s equity in the company, as leverage to force

Defendant to agree to allow over \$600,000 in distributions to Carpenter and the Jacobsens from Lancaster that were not otherwise due to them. (See Amended Counterclaim ¶¶17-18.)

9. Carpenter's acquisition of the Regions' note proximately caused pecuniary damage to **Regional** in an amount greater than \$10,000. (See Amended Counterclaim ¶24.)
10. Region's knowledge of Carpenter's actions and its substantial assistance to Carpenter in the breach of his fiduciary duties to the LLC and Regional **proximately caused damages to Regional.**

### ARGUMENT

#### 1. Regional Is a Party Who Can Bring This Action

Plaintiff's supplemental brief asserts that Regional's claims are derivative to the claims of the LLC and cites to authority which holds that "shareholders cannot pursue individual causes of actions against third parties for wrongs or injuries to corporation that result in the diminution or destruction of the value of their stock." See Supplemental Brief at 4 (*quoting Energy Investors Fund v. Metric Constructors, Inc.*, 351 N.C. 331, 333, 525 S.E.2d 441, 444 (2000)). Regions also contends that the "Note" is the basis of the lawsuit. Their contentions are without factual basis.

First, this case is not about a decrease in value of the stock or shares owned by Regional, but that the Plaintiff's actions resulted in a complete revision of the entire operating agreement and Regions' rights therein that resulted in monetary damage to Regions. Losing share value is entirely different than one member (Regions) being forced to revise its contract with another member (Carpenter) due to the unfair advantage Carpenter obtained when the Plaintiff knowingly aided and abetted him to obtain the Note. The "Note" itself is not the problem. It was the Plaintiff's actions in

knowingly aiding and abetting Carpenter in obtaining the Note knowing that Carpenter was doing so for the sole purpose of forcing Regions to give up its rights to distributions in the LLC.

The LLC is operated pursuant to an operating agreement, which, by its nature, sets forth the rights and responsibilities by and between the members. An LLC agreement can dictate the percentages, rights and distributions among members in any fashion the parties deem appropriate. Such an allocation of power and money is a necessary element of an LLC operating agreement and certainly does not equate to damage to the LLC. One may argue that putting a certain person in control may not be in the best interest of the LLC, but whether that equates to damage is a different analysis. No matter how the percentages are allocated, distributions will be made by the LLC to its members. In this case, one Member (Regional) is alleging that another Member (Carpenter) obtained an unfair advantage over Regional, which could not have been gained without the Plaintiff's cooperation and assistance, and forced Regional to give up rights it was otherwise entitled to. Contrary to Plaintiff's assertions at paragraph 8 of the Supplemental Brief, Regions alleges that it was damaged from the revision of the operating agreement and the distribution of \$600,000 to Carpenter and the Jacobsens to which they would not otherwise have been entitled. The counterclaim does not allege that the \$600,000 would not have been distributed at all or that such a distribution damaged the LLC.

This injury is no different than if Carpenter had forced Regional to withdraw from the LLC altogether and refused to allocate distributions to Regional. In both

situations, it is a very specific injury to Regional and one that simply could not be maintained by the LLC itself.

Based on the foregoing, Plaintiff's reliance on Energy Investors; Outen v. Mical, 118 N.C. App. 263, 454 S.E.2d 883 (1995); Underwood v. Stafford, 270 N.C. 7000, 155 S.E.2d 211 (1967) and Tooley v. Donaldson, 845 A.2d 1031 (Del. 2004) is clearly misplaced. To the contrary, those cases support Regional's contention in that they make it clear that when the injury is solely to the member and not dependent on an injury to the corporation, then the individual action can be maintained.

## **2. Regions Can Maintain a Breach of Fiduciary Action**

Plaintiff also asserts that Regional cannot bring a claim for breach of fiduciary duty against a fellow member of a corporation because those claims solely belong to the corporation. However, the citations relied on by Plaintiff do not support this proposition, but rather, confirm the well-established point that harms that are directly to the corporation must be brought on behalf of the corporation. See Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967) (mismanagement of corporate funds); Fulton v. Talbert, 255 N.C. 183, 120 S.E. 2d 410 (1961) (allegations that the directors used corporate funds for personal use and that his authority was used to his benefit and the detriment of the corporation); Outen v. Mical, 118 N.C. App. 263, 454 S.E.2d 883 (1995) (allegations that directors used corporate funds for personal use); and Crouse v. Mineo, No. COA07-344, 2008 WL 706612 (N.C. App. filed March 18, 2008) (allegation that co-manager misappropriated funds).

It is interesting that Plaintiff relies on Outen v. Mical, which actually recognizes a special relationship between 50/50 shareholders when Plaintiff claims that there are no cases that recognize the possibility of such a relationship. See Supplemental Brief at 11. The only reason the Court dismissed the claim in that case was because the injury to the plaintiff was not different than that to the corporation. The Court states as follows:

Defendants argue that the trial court erred by entering a judgment that runs in favor of plaintiff personally. "Ordinarily stockholders have no right in their name to enforce causes of action accruing to the corporation." Fulton v. Talbert, 255 N.C. 183, 185, 120 S.E.2d 410, 412 (1961). Thus, in a derivative action, the recovery goes to the corporation. Russell M. Robinson, II, *Robinson On North Carolina Corporation Law* § 17.2(a) (1990). However, a shareholder may attempt to bring a direct cause of action in addition to a derivative action and might be able to recover individual damages if the shareholder can " 'allege a loss peculiar to himself' by reason of some special circumstances or special relationship to the wrongdoers." Russell M. Robinson, II, *Robinson On North Carolina Corporation Law* § 17.2(a) (1990), (citing Howell v. Fisher, 49 N.C. App. 488, 272 S.E.2d 19 (1980) *review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981)).

Here, plaintiffs argue that plaintiff and defendant had a special relationship because each was a fifty percent shareholder in this closely-held corporation. **While plaintiff and defendant may have had a special relationship because each was a fifty percent shareholder, plaintiff did not show that he suffered a loss different from the loss to the corporation.** The loss alleged resulted from the misappropriation of corporate funds. *See* Howell, at 498, 272 S.E.2d at 26 (stating that a plaintiff may maintain an individual action only where the plaintiff suffered damages "distinct from any damages suffered by the corporation").

Outen, 118 N.C. App. at 266, 454 S.E.2d at 885. There is no evidence or allegation that Plaintiff's loss was the same loss of the corporation because there is no allegation or evidence that the revision to the operating agreement damaged the LLC or that the \$600,000 would not have been distributed at all. The only allegations are that Carpenter

and the Jacobsens obtained an unfair advantage over Regions and forced the revision of the operating agreement and the distribution to themselves as a result thereof.

The purpose of the separate and distinct injury doctrine is to prevent members or shareholders of a company from raising a claim that belongs to the company itself absent special circumstances. Application of the doctrine in this case would be pointless because here the company simply has no claim. Instead, Regions helped one member of a company (Carpenter) who was in a special relationship to the other member of the company (Regions) gain an unfair advantage over that other member (Regions). The resulting harm was essentially a power shift among members of the company. The harm was not an injury to the company *itself*. For these reasons, the doctrine does not apply and the Court should deny Regions' motion to dismiss.

This the 28<sup>th</sup> day of March, 2008

s/ Brett Dressler  
Brett Dressler (34516)  
Defendant's Lawyer

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response to Plaintiff's Amended Motion to Dismiss has this day been served via electronic mail and facsimile addressed as follows:

**VIA FACSIMILE 704-331-4955**

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This the 28<sup>th</sup> day of March, 2008

s/ Brett Dressler  
Brett Dressler