

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

EDGAR "BO" POUNDS, individually and on behalf of the estate of Mary Jean Pounds, JOSEPH THOMPSON, FRANKLIN SMITH, EAGLE EYE FORENSICS, LLC, DIANNE BRACKIN, and WILLIAM SHARP, Derivatively On Behalf of COBB ELECTRIC MEMBERSHIP CORPORATION,

Plaintiffs,

vs.

DWIGHT BROWN, DON BARNETT, DAVID MCGINNIS, KAY ANDERSON, AL FORTNEY, JR., FRANK BOONE, SARAH BROWN, LARRY CHADWICK, HENRY BALKCOM III, COBB ENERGY MANAGEMENT CORPORATION, and DOES 1-15, inclusive,

Defendants.

- and -

COBB ELECTRIC MEMBERSHIP CORPORATION, a Georgia Corporation,

Nominal Defendant.

08 MAR - 7 PM 4:50
Jana C. Stephenson
COBB SUPERIOR COURT CLERK

FILED AND RECORDED

Civil Action No. 07-1-9408-48

**MEMORANDUM OF LAW IN OPPOSITION TO COBB EMC'S
MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT**

STATEMENT OF FACTS

In order to avoid unnecessary duplicity and to keep their pleadings concise, Plaintiffs incorporate by reference the factual allegations set out in their Complaint and their Memorandum of Law in Opposition to Defendant Cobb EMC's Motion to Stay. The plaintiff's Complaint is also incorporated by reference and pertinent parts are cited below.

ARGUMENT AND CITATION TO AUTHORITY

I. Plaintiff's Complaint is not a "Shotgun Pleading" and the motion for a more definite statement is without merit

Defendant first attacks the Complaint as a "shotgun pleading" claiming it is so vague and confusing that Defendants have not been "put on notice as to the charges being brought" and that it is "virtually impossible" to form a responsive pleading. The Complaint is not a shotgun pleading by any definition, it satisfies the liberal notice pleading requirement of the Georgia Civil Practice Act and is completely sufficient to put the defendants on notice of the claims against them. Thus, Defendant's motion should be denied. The Defendant's own actions in responding to the Complaint and using the Complaint as the basis for their own investigation by a special litigation committee demonstrate that they completely understand the allegations against them.

The Georgia Civil Practice Act requires a Complaint to set forth "a short and plain statement of the claims showing the pleader is entitled to relief; and a demand for judgment for which the relief to which the pleader deems himself entitled..." O.C.G.A. § 9-11-8. Further, "no technical forms of pleadings or motions are required" and "a party may set forth two or more statements of a claim...alternatively or hypothetically, either in one count...or in separate counts... A party may also state as many separate claims...as he has, regardless of consistency and whether based on legal or equitable grounds or both..." Id. The same code section provides

that “all pleadings shall be so construed as to do substantial justice.” “Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.” O.C.G.A. § 9-11-10. These are the well known liberal pleading requirements of the Georgia Civil Practice Act.

Despite Defendant’s shrill claim that they are entitled to a more definite statement because the Complaint is a “shotgun pleading,” there is not a single Georgia appellate case where a court has granted a motion for a more definite statement based on a finding that the plaintiff filed a “shotgun pleading.” In fact, a LEXIS search of the term “shotgun pleading” did not reveal a single Georgia case containing that term. The term “shotgun pleading” is a creature of federal civil procedure and is misplaced as the centerpiece of the Defendant’s motion in a case pending in a Georgia superior court. The primary substantive grievance by the Defendants is that the several counts in the Complaint do not each state the facts that support that cause of action in the specific count but do so by incorporating other parts of the Complaint. Since O.C.G.A. § 9-11-10 specifically permits this, it is difficult to see how Defendants believe they are entitled to seek relief on that ground.

But ignoring the Georgia Civil Practice Act for the sake of argument, this Complaint would not be a shotgun pleading even under federal law.¹ “Shotgun pleadings fail to identify claims with sufficient clarity to enable the defendant to frame a responsive pleading.” Danow v. Borack, 197 Fed. Appx. 853, 855 (11th Cir. 2006). They are further defined as those where “it is

¹ The arguments and cases cited in Cobb EMC’s brief are virtually identical, and in several instances, verbatim, to those set forth in a brief filed in support of a motion to dismiss and motion for more definite statement by the EMC’s Counsel, McKenna Long & Aldridge, on October 24, 2005 in the United States District Court for the Northern District of Alabama in *State of Alabama v. Army Corps of Engineers, et al.*, Civil Action File No. 90-CV-01331. Just as here, answers had already filed. None of these identical canned arguments were accepted, including those as to shotgun pleadings necessitating a more definite statement, and both the motion to dismiss, and alternative motion for more definite statement, were denied by United States District Judge Bowdre on March 29, 2006. These meritless canned arguments should also be rejected here for the reasons set forth herein.

virtually impossible to know which allegations of fact are intended to support which claims for relief.” Anderson v. Dist. Bd. Of Trustees, 77 F.3d 363, 366 (11th Cir. 1996). Here, that is demonstrably not the case.

The Complaint summarizes the wrongful acts of the defendants in paragraphs 25 through 39. The Complaint then recites the duties of the Defendants and the nature of the violations of those duties in paragraphs 40 through 55. The Complaint then lists the specific causes of action being brought and incorporates facts from the first portions of the Complaint (as specifically permitted by O.C.G.A. § 9-11-10). Each of these provisions clearly states some element of the case with, if anything, more detail than is required under the Civil Practice Act and certainly more than enough to allow the defendants to form a response. The “liberal pleading requirements” of the Civil Practice Act oblige nothing more and Cobb EMC’s motion is without merit. Timeless Architectural Homes, Inc. v. Jones, 270 Ga. App. 406, 409 (2004); Dwyer v. McCoy, 236 Ga. App. 326, 328 (1999); Am. Honda Motor Co. v. Williams & Assocs., 208 Ga. App. 636 (1993); Bazemore v. Burnet, 117 Ga. App. 849 (1968).

This lack of merit is further demonstrated because Defendants have filed answers that specifically address the allegations they now claim are too vague to understand. For example, Defendant complains about the claim for injunctive relief in paragraph 62 of the Complaint but directly responds to the allegation in its answer by admitting some portions, denying other portions, and stating that they have insufficient knowledge to admit or deny other portions. Answer of Cobb EMC, p. 22. Likewise in December 3, 2007 hearing on the Defendant’s motion to stay, Cobb EMC’s counsel spoke at length about some of the specific allegations in the Complaint, compared the allegations to information in annual reports, and referred to the allegations as the basis for the special litigation committee’s investigation:

[t]he main things that serve the basis for the Plaintiff's Complaint, creation of Cobb Energy, relationship with Cobb EMC and Cobb Energy, the retirement of the REA loans, are all spelled out in the annual reports. Doesn't mean it's not actionable. Doesn't mean that they don't have a case, but it does mean that these aren't brand new claims and it doesn't mean that the factual basis for these claims have been hidden.

Hrg. Trans. 18: 7-14. It makes no sense to say that the Defendant's lawyer can speak at length about the allegations in the Complaint, then state that his objections on the matter "doesn't mean it's not actionable" and then later say that the Complaint is so vague he can't form any response.

As a remedy for the alleged problems with the Complaint, Defendant suggests that Plaintiffs provide a more definite statement of the claims. This remedy is provided in the Civil Practice Act at O.C.G.A §9-11-12(e) but is not proper except where "the pleadings are so vague and ambiguous that the defendant could not frame a proper responsive pleading thereto."

Moultrie v. Atlanta Federal Savings & Loan, 148 Ga. App. 650, 652, 252 S.E.2d 77 (1979).

Defendants have already made extensive explanations of the claims in open court, claimed to be diligently investigating the claims raised in the Complaint through the special litigation committee, and have actually filed a detailed answer specifically responding to each of the allegations. Under these circumstances, it defies logic for Cobb EMC to say the Complaint is so vague it cannot respond to it.

Thus, because the Complaint meets the liberal requirements of notice pleading under any fair reading and because the Defendants clearly understand the allegations of the Complaint well enough to be on notice of the nature of Plaintiffs' claims, Defendant's motion for a more definite statement should be denied.

II. Cobb EMC's Statute of Limitation Arguments are Premature and Otherwise Fail

The Defendant's motion also asks to dismiss portions of the Complaint because certain claims brought pursuant to the EMC derivative provision are barred by the four year statute of limitations provided in O.C.G.A. §46-3-304. They do not argue that all claims are barred by the statutes of limitations but only certain claims related to the 1997 formation of Cobb Energy. This argument is without merit because (A) the application of a statute of limitations is fact intensive and not appropriate for a motion to dismiss; (B) because the point where the claims in question *accrued* and the statute began to run is an issue of fact; and (C) because the Complaint alleges facts that would mandate tolling of any statute of limitations.

A. A Motion to Dismiss is Not the Appropriate Vehicle for Raising Statute of Limitations Issues.

A motion to dismiss is not the appropriate vehicle for raising statute of limitations issues.

A motion to dismiss is an anomalous vehicle by which to assert an action as time-barred by a statute of limitation. Generally, a motion for summary judgment is the appropriate vehicle by which to establish a running of the statute of limitation without defense therefore, because it is an evidentiary motion, and it must be shown that the statute of limitation was not tolled by any provision. A motion to dismiss may be granted only where a Complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim.

Goldston v. Bank of Am. Corp., 259 Ga. App. 690 (2003). This is particularly true here where there are a number of different causes of action, equitable and legal claims, tolling issues, and potentially different limitations periods for different claims. The two cases cited by the Defendant for the proposition that a statute of limitations issue can be decided on a motion to dismiss are exceptional cases that bear no resemblance to this case. Both cases are simple auto accident cases where no facts relevant to the issue were disputed by the parties. That is obviously not the case here. Cobb EMC's statute of limitations arguments are premature and

should be rejected at this stage.

B. The substantial factual issue here relating to when the causes of action accrued foreclose Defendant's motion to dismiss

The allegations in the Complaint raise substantial factual issues as to when the claims in question accrued. Defendants argue simply that the four year statute of limitations in O.C.G.A. § 46-3-304 bars claims related to the 1997 formation of Cobb Energy and 1996 payoff of loans from the REA because those events happened more than four years before the Complaint was filed. But in any analysis of statute of limitations defense, a threshold issue is accrual, or when the statute begins to run. The statute of limitations in O.C.G.A. § 46-3-304 provides that no action shall be brought more than four years from *the time the cause of action accrued*, not the time that an event that is relevant to the claim occurred. Id.

There is no case law on point or even addressing the accrual date for causes of action under O.C.G.A. § 46-3-304. However, where Georgia law is sparse or silent on corporate law issues, Georgia courts routinely look to Delaware law. See e.g. Grace Bros. v. Farley Industries, 264 Ga. 817, 819, 450 S.E.2d 814 (1994); Millsap v. American Family Corp., 208 Ga. App. 230, 234, 430 S.E.2d 385 (1993). The statute of limitations for a derivative action under Delaware law begins to run only when the plaintiff learns, or should have learned of the existence of the cause of action. Cahall v. Burbage, 13 Del. Ch. 299, 119 a. 574 (Del. Ch. 1922). “The failure of stockholders to examine the corporate records and books and thus acquire knowledge of the wrongful acts of the corporate officers and directors, is not to be attributed to their negligence, for they have a right to assume that the officers and directors will be faithful to their trust.” Id. This rule has been elsewhere expressed as, “Thus the court understands the rule, as it stands today, to allow the statute of limitations to be tolled in derivative actions alleging wrongful self-dealing by a corporate fiduciary until the shareholder knew or had reason to know of the facts constituting the alleged

wrong.” Norman v. Elkin, 207 U.S. Dist. Lexis 72725 (2007). Further, where questionable loans are made to officers and the complete and full details of the loans are not disclosed to the shareholders, the derivative statute of limitations is tolled. In re Maxxam, Inc. v. Maxxam, Inc., 1995 Del. Ch. Lexis 73 (1995).

C. Even if a 4 year statute of limitations period is applicable, the limitations period is tolled as to all claims

The Defendant’s motion also fails because the Complaint alleges facts sufficient to raise the issue of tolling the statutes of limitations under principles of Defendants’ fiduciary duties.

Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case

O.C.G.A. § 23-2-53.

Beginning at paragraph 40 of the Complaint, in the section titled “Duties of Defendants,” Plaintiffs specifically set forth that the officers and directors of the EMC owe a fiduciary duty to the EMC and its members. The Complaint further alleges that Defendants concealed all meaningful material information about the nature of the Cobb Energy dealings. Specifically the Complaint details in numerous sections, including, among others, paragraphs 45, 49 and 52, active concealment of material information by Dwight Brown and the director Defendants.

Importantly, for purposes of the motion to dismiss, each and every one of these allegations must be accepted as true and all inferences drawn in Plaintiffs’ favor. Goldston, 259 Ga. App. at 692:

Complaint ¶ 45

“Defendants Dwight Brown, David McGinnis and Frank Boone have improperly concealed in violation of their duties, their direct financial and ownership interest, and extent of their conflicts of interest, from Cobb EMC members who expect them to be disinterested officers and directors. Indeed, when questioned about his financial interests in Cobb Energy at the 2007 Cobb EMC annual meeting, Defendant Dwight Brown continued to conceal,

and refused to disclose, this information to Cobb EMC members stating, 'I'm not talking about Cobb Energy.'"

Complaint ¶49 (v)

"The active concealment of material information from the EMC members concerning the finances of the EMC, the disinterested financial interests and transactions of certain directors and officers, and material information related to the Cobb EMC/Cobb Energy transaction."

Complaint ¶ 52

"The CEO and Board of Directors of Cobb EMC concealed and failed to disclose to the membership at or before the time of each election of board members, for each election of board members occurring after the date of the Cobb Energy/Cobb EMC transaction, material information that certain officers and directors of Cobb EMC had had sizeable ownership interest, controlled Cobb Energy and were enriched as owners of Cobb Energy by the Cobb Energy/Cobb EMC transaction."

The failure to reveal this material information tolls the statute of limitations because Defendants are in a fiduciary relationship with Plaintiffs. Goldston v. Bank of America, 259 Ga. App. 690, 577 S.E.2d 864 (2003). As the court explained in Goldston:

When a fiduciary relationship is established, in order to toll the statute of limitation it is not necessary for a plaintiff to show some "affirmative act" involving moral turpitude, i.e., that some "trick or artifice," was employed to prevent inquiry or elude investigation, or to mislead and hinder a party who has a cause of action from obtaining information. Instead, **a fiduciary relationship encompasses a duty to disclose so that suppression of a material fact which a party is under an obligation to communicate constitutes fraud which tolls the statute of limitation**

When a confidential relationship exists, such relationship lessens the plaintiff's obligation to discover the fraud and also heightens the duty of the defendant to disclose what should be revealed. In cases of a confidential relationship, silence when one should speak, or failure to disclose what ought to be disclosed, is as much a fraud in law as is an actual false representation... **Concealment per se constitutes actual fraud where one party has the right to expect full communication of the facts from another.**

Goldston, 259 Ga. App. at 695-96.

As officers and directors of the EMC, Defendants occupy “a fiduciary relationship to the corporations and its shareholders” or in this case members. King Mfg. Co. v. Clay, 216 Ga. 581, 585 (1961). Due to the fiduciary relationship “the beneficiary may rely implicitly, not only on what is said, but also on the supposition that nothing important will be left unsaid by the officer.” General Information Processing Systems Inc. v. Sweeney, 176 Ga. App. 315 (1985)(citing Oliver v. Oliver, 118 Ga. 362, 371 (1903)). Where the evidence is that the defendant failed to comply with her fiduciary duty by remaining silent as to a matter and that such breach of duty was not discovered until less than the limitations period, there is a genuine issue of material fact as to whether the statute of limitations is tolled. Id. at 316.

Because the Complaint in the instant action alleges active concealment of material information by Defendants, it establishes, for purposes of this motion, that the statute of limitations is tolled. Thus, Defendants’ motion should be denied.

D. New causes of action arise each day the illegal Cobb Energy/Cobb EMC enterprise operates

The Cobb Energy/Cobb EMC scheme is an illegal transaction directly in violation of the EMC Act and Georgia Supreme Court case law in Flint Elec. Mem. Corp. v. Barrow, 271 Ga. 636, 638 (1999), wherein it was held:

FlintErgy was incorporated by Flint just to enable Flint to do indirectly what it could not do directly -- enter the propane gas market. In sum, Flint created FlintErgy as a shell and solely for its own convenience and benefit. It follows that the trial court correctly ruled that Flint cannot en-gage in the sale of propane gas indirectly through FlintErgy

In fact, every state Supreme Court in the entire country that has addressed this issue has ruled that any such shell scheme is unlawful. Hilco Elec. Coop. v. Midlothian Butane Gas Co., 111 S.W.3d 75 (Sup. Ct. Tex. 2003)(“ We hold that the HILCO companies failed to establish conclusively that the creation and ownership of a for-profit propane business furthered a proper

purpose for a cooperative created under the ECCA.”); Lewis v. Jackson Energy Coop. Corp., 189 S.W.3d 87 (Sup. Ct. Ky. 2005). As the Supreme Court of Kentucky explained in Jackson

Energy:

Use of the word “electric” limits the cooperative and prevents the organization of any other type of cooperative under the statute. If the legislature had intended to convert ‘electric cooperatives’ into “energy cooperatives,” it would have deleted the word “electric” from the statute altogether. That was not done...It was plain error for both the circuit court and the Court of Appeals to construe *KRS 279.020* [Kentucky Elec. Mem. Corp. Act] as permitting rural electric cooperatives to engage in non-electric ventures. If the rationale of the circuit court were followed to its logical conclusion, it would in effect destroy the distinction between a special purpose electrical cooperative and a general purpose corporation... what the utility is forbidden to do directly, it may not accomplish by indirection by way of resort to any device or subterfuge leading to the same result...It is the decision of this Court that Jackson Energy, as a rural electric cooperative, cannot provide propane gas or other non-electric services to its members and other customers as such would be a violation of KRS Chapter 279.

Here, all Defendants are currently participating in, or through breaches of their duties, other unlawful activity and subterfuge, have allowed the continued operation of an illegal enterprise. Each day the illegal activity continues new breaches of fiduciary duties and other violations occur giving rise to causes of action. Defendants would have this Court think that they can grandfather-in an illegal enterprise. In other words, Defendants argue that because their illegal enterprise has been operating for more than four years, they can continue to operate an illegal enterprise without challenge from the EMC members. Such a position is nonsensical. If the law of this State is to be meaningful, it is common sense that an entity cannot continue to do something that is illegal, fail to reveal material information about it in violation of its fiduciary duties and then simply ignore the law because they concealed the facts long enough.

E. Equitable Estoppel Bars Defendants from Asserting Statute of Limitations Defenses

Defendants are also equitably estopped from asserting any statute of limitations defense because Defendants, through willful and material nondisclosures, active concealment of material information, misrepresentations and other intentional conduct, have postponed the filing of claims by Plaintiffs and those similarly situated. See e.g. Brown v. Transport Corp. v. James, 243 Ga. 701, 702 (1978) (finding that when a company or insurance carrier makes representations and assurances that an employee will be taken care of, the company and insurance carrier are both estopped from asserting a statute of limitations defense); D.W. Adcock, M.D., P.C. v. Adcock, 257 Ga. App. 700, 703 (2003) (finding an employer and the worker's compensation insurer were estopped from asserting a statute of limitations defense to a claim for benefits where the insurer's false statements misled the claimant into postponing the filing of his claim); Esener v. Kinsey, 240 Ga. App. 21, 23 (2000) (finding that when a physician has engaged in fraud to cover up negligent behavior that occurred during the physician's delivery of a child, the physician was estopped from asserting a statute of limitations defense); Foster v. Cohen, 203 Ga. App. 434, 436 (1992) (finding a client who held himself out to the court and counsel as mentally competent was later estopped from asserting a statute of limitations defense arguing the statute tolled as a result of the client's mental incapacity when there was no evidence of mental incapacity).

As such, Defendants cannot seek refuge in the statute of limitations, at least not at this stage of the proceedings, because the allegations of the Complaint must be taken as true.

III. Each of Plaintiffs' Causes Of Action Are Clear and Procedurally Proper.

A. Plaintiffs' Claim for declaratory judgment is clear and procedurally proper

From pages 23 through 31 of its brief, Cobb EMC argues that Plaintiffs' count for declaratory judgment is insufficiently pleaded. More specifically, Defendant claims:

Plaintiffs' First Cause of Action seeks a declaratory judgment that a number of actions taken by Cobb EMC in the past twelve years are illegal. The purpose of the Declaratory Judgment Act is to protect parties from uncertainty with respect to future conduct, not the adverse consequences of actions already taken.

Although it may be true that a declaratory judgment claim is not suited to address a purely past wrong, here, Plaintiffs have made the claim to protect them from uncertainty with respect to Defendants' future conduct. Defendants continue to operate an alleged illegal enterprise every day. Defendants will likely continue to operate this enterprise going forward until this Court enters a declaration that the action is legal or illegal. The Court will need to enter a declaration, one way or the other, that Defendants' continued future actions are legal or illegal, which is precisely the relief for which Plaintiffs pray.

Defendants make this exact same "past twelve years" argument as to each issue for which Plaintiffs request a declaration from the Court. Defendants fail to point out that each of these issues, including the continued efforts to conceal material information as to Cobb Energy finances, the continuing conflict of interest transactions, etc., are all active ongoing events for which a declaration is needed as to whether they are lawful.

These circumstances do in fact raise "uncertainty or insecurity with respect to the propriety of some future act or conduct, which action without such direction might reasonably jeopardize the petitioner's interest..." *Brown v. Cobb County*, 212 Ga. 172, 174 (1956). The liberal pleading requirements of the civil practice act do not require more. Consequently,

Defendant's motion to dismiss based on its claims that Plaintiffs' improperly pleaded a claim for declaratory judgment should be denied.

B. Plaintiffs' Claim for an accounting is clear and procedurally proper

Here again, Cobb EMC claims that Plaintiffs have not alleged "the basis for an accounting." Paragraph 59 of the Complaint expressly incorporates all prior allegations in the Complaint, which include, among many other similar allegations:

Compl. ¶ 49(ii) - self-dealing in transactions providing Cobb Energy stock to themselves that effectively converted millions of dollars of EMC assets to themselves, and doing so without disclosure to the EMC members.

Compl. ¶ 56 - As a result of the Defendants' actions, tens of millions of dollars of EMC assets have been siphoned away from the EMC through, among other things, waste of assets, usurpation of EMC business and business opportunity, gross mismanagement and self dealing. In fact, as reported in the 2006 EMC Annual Report: "Cobb EMC employees became CEMC employees to furnish **all services** for Cobb [EMC] including marketing, meter reading and meter maintenance services. The charges for these services were approximately **58 million in 2006 and 48 million in 2005.**"

"Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion." O.C.G.A. §9-11-10. Consequently, Defendant's argument that Plaintiffs have failed to allege a basis for an accounting is highly untenable.

C. Plaintiffs Third Cause of Action for injunctive relief is clear and procedurally proper

Yet again, Defendant asserts, "Like their claim for an accounting, Plaintiffs' claim for injunctive relief is 'all remedy and no claim.' Plaintiffs specify the injunctive relief that they seek, but do not allege any facts that would entitle them to relief."

Paragraph 61 of the Complaint, the first paragraph under Plaintiffs' count for injunctive relief, expressly incorporates all prior allegations of the Complaint. Those prior allegations allege paragraphs 49 and 56 listed supra, pg. 13, and others, including:

Compl. ¶ 50 - The Cobb Energy/Cobb EMC transaction is a conflicting interest transaction under Georgia law subject to being set aside and enjoined because, for among other reasons, the board of directors, other than Defendants McGinnis and Boone, were not advised that Defendants McGinnis, Boone and Dwight Brown would award themselves and/or their family members controlling multimillion dollar interests in Cobb Energy, which interests were created and enhanced by the contract with the EMC. O.C.G.A. §46-3-305.

Defendant's continued claim that Plaintiffs failed to plead facts is here again baseless. As the Delaware Court of Chancery explained with regard to an accounting:

Fiduciaries have a duty to account to their beneficiaries for their disposition of all assets they manage in a fiduciary capacity. That duty carries with it the burden of proving that the disposition was proper. If any corollary proposition is central to this case, it is that included within the duty to account is a duty to maintain records that will discharge the fiduciaries' burden, and if that duty is not observed, every presumption will be made against the fiduciaries.

Technicorp Int'l II, Inc. v. Johnston, 2000 Del. Ch. LEXIS 81, *5 (2000).

D. Plaintiffs' claims in their fourth through seventh cause of action are clear and procedurally proper

Causes of action 4 through 7 of Plaintiffs' Complaint address specific types of breaches of fiduciary. Defendant first claims that "Plaintiffs have not alleged any specific breach of fiduciary duty by Dwight Brown." Def's Brief pg. 34. This false claim is belied by the numerous paragraphs from the Complaint set out above, and others, including paragraphs 36, 44, 45, 48, 49, 50 and 56. Defendant then goes on to make this same incorrect argument for counts 5 through 7 of the Complaint. Because the first paragraph of each count of the Complaint specifically incorporates all prior allegations, Defendants argument fails.

Defendant additionally asserts, "Cobb EMC is not aware of any cause of action under Georgia law for an abuse of control" and then makes this same argument for counts 5 and 7 of the Complaint. Abuse of control, gross mismanagement and waste of corporate assets are long-recognized causes of action in derivative litigation. While each of these claims relate to breach

of fiduciary duty, they are typically asserted separately. In re Affiliated Computer Servs. Derivative Litig., 2007 U.S. Dist. LEXIS 92401 (2007)(“Plaintiffs plead various state law claims in their Amended Complaint: demand for an accounting (Count V); intentional breach of fiduciary duty (Count VI); breach of fiduciary duty and/or aiding and abetting (Count VII); abuse of control (Count VIII); gross mismanagement (Count IX); constructive fraud (Count X); corporate waste (Count XI); unjust enrichment (Count XII); rescission (Count XIII); and breach of contract (Count XIV).”); In re Zoran Corp. Derivative Litig., 511 F. Supp. 2d 986 (N.D. Cal. 2007)(denying motion to dismiss on claims for breach of fiduciary duty and waste of corporate assets, among others); In re Biopure Corp. Derivative Litig., 424 F. Supp. 2d 305 (D. Mass. 2006)(“The defendants' arguments for dismissal of the plaintiffs' claims of breach of fiduciary duty, abuse of control, gross mismanagement, waste, and unjust enrichment therefore fall short.”).

In short, Plaintiffs’ claims for breach of fiduciary duty, abuse of control, gross mismanagement and waste of corporate assets are each procedurally proper and supported by detailed allegations in the Complaint. Thus, Defendants’ motion to dismiss these claims is without merit and should be denied at this stage.

E. The Complaint adequately states a claim for Unjust Enrichment, Money Had and Received and Punitive Damages

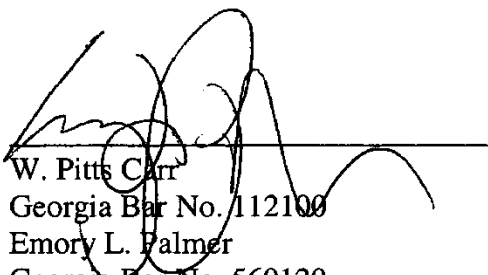
Defendant complains that the Complaint does not state a claim for Unjust Enrichment. The Complaint alleges the “by their wrongful acts and omissions, Defendant Dwight Brown and the Director Defendants were unjustly enriched at the expense of and to the detriment of the EMC.” Complaint, ¶ 84. This statement alone is sufficient to plead an unjust enrichment claim. “Unjust enrichment applies when as a matter of fact there is no legal contract. . . , but when the party sought to be charged has been conferred a benefit by the party contending an unjust

enrichment which the benefited party equitably ought to return or compensate for.” Engram v. Engram, 265 Ga. 804 (1995). Here, it is an equitable claim pled in the alternative seeking the return of a benefit conferred upon Defendants “at the expense of and to the detriment of the EMC.” Under the Georgia rule that “no technical forms of pleadings or motions are required” this is obviously sufficient to put Defendants on notice of an unjust enrichment claim.

Defendants also claim Plaintiffs have not stated a claim for money had and received. An action for money had and received (or assumpsit), although legal in form, arose from the common-law courts, is founded on the equitable principle that no one ought to unjustly enrich himself at the expense of another. Cantrell v. Henry County, 250 Ga. 822, 825, 301 S.E.2d 870 (1983). It is founded on “what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay the plaintiff.” Id. This claim is likewise an alternative claim to recover “money and other assets that are the money and other assets of Cobb EMC.” Complaint, ¶ 88. Once again under the notice pleading requirements of the Civil Practice Act Defendants are on notice of this claim and it is sufficiently pled.

Defendants also move to dismiss plaintiff’s claim for punitive damages because it is “not a separate cause of action.” O.C.G.A. § 51-12-5.1(d) provides that claims for punitive damages must be pled in a Complaint. Plaintiffs have done just that because they intend to seek punitive damages in the case. If Defendant means to say that some underlying claim must ultimately succeed in some amount in order for punitive damages to be awarded, Plaintiff’s agree that is the law. But this is not an issue for a motion to dismiss, but one that can only be decided upon the return of a verdict in the case after appropriate jury instructions.

Respectfully submitted this 7th day of March, 2008.



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**SUPERIOR COURT OF THE STATE OF GEORGIA
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DOES 1-15, inclusive,)**

Defendants,

-and-

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Nominal Defendant.)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date served a copy of the within and foregoing PLAINTIFFS’ MEMORANDUM OF LAW IN OPPOSITION TO COBB EMC’S MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT upon Defendants in this matter by first class mail addressed as follows:

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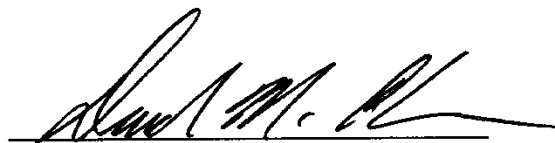
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