IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-00620

VENNIT B. MATHIS, II — APPELLANT

vs.

ERA FRANCHISE SYSTEMS, INC.,
JACKIE R. HILL, PAMELA HILL,
H. STUART IRBY, MARK WARREN,
REAL ESTATE PROFESSIONALS OF CENTRAL
MISSISSIPPI, LLC and REAL ESTATE
PROFESSIONALS OF THE PINE BELT, LLC — APPELLEES

BRIEF OF APPELLEE
ERA FRANCHISE SYSTEMS, INC.

ORAL ARGUMENT NOT REQUESTED

ON APPEAL FROM THE CIRCUIT COURT OF
COVINGTON COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Vennit B. Mathis, III	Appellant
Sam S. Thomas, Esq. Eddie J. Abdeen, Esq.	Attorneys for Appellant
ERA Franchise Systems, Inc.	Appellee
Realogy Services Group, LLC and Realogy Corporation	Corporate Parents of ERA
Christopher A. Shapley, Esq. Joseph Anthony Sclafani, Esq.	Attorneys for Appellee ERA
Mark Warren	Appellee
Real Estate Professionals of Central Mississippi, LLC	Appellee
Rick D. Patt, Esq.	Attorney for Appellees Warren & Real Estate Prof. of Central Mississippi, LLC
H. Stuart Irby	Appellee

Real Estate Professionals of the Pine Belt, LLC	Appellee
Dennis L. Horn, Esq. Erik M. Lowery, Esq.	Attorneys for H. Stuart Irby & Real Estate Prof. of the Pine Belt, LLC
Jackie ("Chip") R. Hill	Appellee, *pro se*
Pamela Hill	Appellee, *pro se*

Honorable Robert G. Evans, Covington County Circuit Judge

This, the 16th day of January, 2009.

COUNSEL OF RECORD FOR APPELLEE
ERA FRANCHISE SYSTEMS, INC.

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4. Whether the Circuit Court was correct in concluding that Mathis lacks standing to pursue in a direct action solely for his own benefit (and to the express exclusion of the other shareholders in Real Estate Professionals, LLC) any claims against ERA that are derivative in nature and thus are corporate assets of Real Estate Professionals, LLC.

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6. Whether the Circuit Court was correct in concluding that each of Mathis' claims against ERA is derivative in nature.

STATEMENT OF THE CASE

I. Course of the Proceedings and Disposition in the Court Below

This case arises out of a series of failed business arrangements between Appellant Vennit B. Mathis, II (hereinafter "Mathis") and his former partner Appellee Jackie R. Hill (hereinafter "Hill"). While Mathis has asserted in his Complaint a number of direct claims against Hill and others arising out of each of these failed business ventures,[1] all of the claims at issue in this appeal arise out of the operation and transfer of the assets of Real Estate Professionals, LLC (hereinafter "REP"), a real estate brokerage firm. REP is a former franchisee of Appellant ERA Franchise Systems, Inc. (hereinafter "ERA"). Specifically, Mathis alleges that Hill, along with Appellees H. Stuart Irby (hereinafter "Irby") and Mark Warren (hereinafter "Warren"), with the knowledge and/or active participation of ERA: (a) diverted to other entities both the corporate assets and opportunities of REP; (b) wrongfully induced the real estate agents working with REP to terminate their relationship with REP; and (c) misappropriated the licensing/intellectual property rights of REP relating to the use of the "ERA" trademark. (Appellee ERA's Record Excerpts (R.E. Tab 1; R. 18-20) As a result of this alleged wrongful conduct, Mathis represents that REP was left with no cash flow or way to generate business, resulting in the loss by Mathis of his equity investment in REP. (R.E. Tab 1; R. 19)

On May 8, 2003, Mathis filed his Complaint for Declaratory and Other Relief in the Chancery Court of Covington County, Mississippi (hereinafter "Chancery Court") against ERA Franchise Systems, Inc., Jackie R. Hill, Pamela Hill, H. Stuart Irby, Mark Warren, Real Estate

[1] Specifically, Mathis has alleged direct claims against Hill for breach of contract to convey real estate and equitable conversion of real estate that Hill is alleged to have promised to transfer to Mathis. Additionally, Mathis has alleged direct claims against Hill and Irby, former and current equity owners of REP, for breach of fiduciary duties owed among shareholders in a closely held corporation, as well as a claim that they improperly induced Mathis to pledge a $100,000 certificate of deposit as collateral for a loan. None of these individual claims of Mathis were either the subject of ERA's Motion to Dismiss or addressed by the Circuit Court in its Partial Judgment of Dismissal. Rather, these individual claims of Mathis were stayed by the Circuit Court pending the instant appeal relating to the derivative claims of REP that Mathis has sought to assert in a direct action for his own benefit.

Professionals of Central Mississippi, LLC, and Real Estate Professionals of the Pine Belt, LLC.[2] (R.E. Tab 1; R. 15-34) On June 11, 2003, ERA timely filed its Answer to Mathis' Complaint, asserting as its fourth defense that Mathis lacked standing to pursue the instant claims against ERA. (R.E. Tab 2; R. 41) Additionally, ERA asserted compulsory counterclaims against Mathis. Id. Contemporaneous with the filing of its Answer, ERA filed a joinder in Defendant Irby's Motion to Stay this action pending resolution of ERA's previously filed collateral Federal action arising out of the same facts and circumstances at issue in Mathis' Complaint. (R.E. Tab 3; R. 35-40) As an alternative request, ERA sought a stay of discovery. (R.E. Tab 3; R. 38-40) By Order dated September 29, 2003, the Chancery Court denied Defendants' various requests for a stay of this action and set this matter for trial commencing on December 1, 2003—just two months after entry of this order. (R.E. Tab 4; R. 258) Further, the Chancery Court ordered that all written discovery be completed in one month, by October 30, 2003; all depositions be complete by November 14, 2003; and all dispositive motions be filed by November 21, 2003. (Id.)

Between September 5, 2003 and November 14, 2003 (the discovery cut-off set by the Chancery Court), ERA propounded written discovery to Mathis and his father, Vennit B. Mathis, Sr., and deposed both individuals. (R. 173, 242, 244, 285-290). One of the primary focuses of this discovery was to flesh out the underlying facts and circumstances supporting Mathis' claims in order to put ERA in a position to evaluate whether: (a) the Chancery Court had subject matter jurisdiction over Mathis' claims; and (b) Mathis' claims are individual or derivative in nature. A

[2] On November 22, 2002, prior to the commencement of the instant action, ERA filed suit in the United States District Court for the Southern District of Mississippi, Civil Action No. 3:02cv1713-HTW, against Real Estate Professionals, LLC, Real Estate Professionals of Central Mississippi, LLC, Jackie R. Hill, Pamela Hill, H. Stuart Irby and Vennit B. Mathis, II. On December 12, 2002, ERA filed a motion, pursuant to 28 U.S.C. § 2361, seeking a stay of all collateral litigation between these parties. On January 22, 2003, Mathis filed a response to ERA's Motion to stay all collateral litigation. On August 29, 2003, the Federal Court denied ERA's motion to stay all collateral litigation and dismissed ERA's suit. (A copy of the docket sheet relating to this parallel proceeding is appended to the end of this brief.)

determination regarding whether Mathis' claims are individual or derivative in nature would enable ERA to evaluate Mathis' standing to pursue such claims. Further, in the light of the December 1, 2003 trial setting, ERA had no other option but to engage in fact discovery in order to prepare a defense to Mathis' claims. (R.E. Tab 4; R. 258)

On November 24, 2003, Hill filed a Chapter 11 Petition in the Unites States Bankruptcy Court for the Southern District of Mississippi. (R. 382) On or about December 19, 2003, ERA removed this action to the United States District Court for the Southern District of Mississippi based on the Federal jurisdiction created by Hill's bankruptcy filing. (R. 409). On May 3, 2004, the Federal District Court granted ERA's motion to allow Balch & Bingham, LLP, to withdraw as its counsel of record (due to a conflict), and to substitute Brunini, Grantham, Grower & Hewes, PLLC, as its counsel of record.[3] On May 4, 2004, the Federal District Court entered an Order declining to exercise jurisdiction over this action and remanded it back to the Chancery Court. (R. 407-417)

On May 10, 2004, one week after Brunini was substituted as counsel of record for ERA and six days after the case was remanded by the Federal District Court to the Chancery Court, ERA filed a Motion to Transfer this case to the Circuit Court of Covington County, Mississippi (hereinafter "Circuit Court"). (R.E. Tab 5; R. 421-428). On February 3, 2005, the Chancery Court denied ERA's Motion to Transfer. (R.E. Tab 6; R. 519-520) On February 17, 2005, ERA filed a Petition for Interlocutory Appeal (No. 2005-M-350) with the Court seeking review of the Chancery Court's ruling. On March 28, 2005, the Court granted ERA's Petition. (R.E. Tab 7; R. 554) On June 22, 2006, the Court reversed the ruling of the Chancery Court denying ERA's

[3] Neither ERA's Removal Petition, nor any filings in the Federal Court relating to this proceeding are part of the trial record. (A copy of the docket sheet relating to this parallel proceeding and May 3, 2004, Order Allowing Substitution of Counsel is appended to the end of this brief.)

Motion to Transfer and remanded the case with instructions to transfer the case to the Circuit Court. (R.E. Tab 8; R. 577-597)

Following the transfer of the case to the Circuit Court, ERA did not actively participate in any further discovery. ERA did, however, consent to a proposed scheduling order, which was entered by the Circuit Court on October 20, 2006. (R. 627-631) On July 31, 2007, ERA filed its 12(b)(6) Motion to Dismiss Mathis' claims against ERA for lack of standing. (R.E. Tab 9; R. 779-889) ERA noticed the Motion for hearing on October 12, 2007, the first available hearing date. (R.E. Tab 10; R. 896-897) On October 11, 2007, Mathis served by fax his Response to ERA's Motion to Dismiss. (R.E. Tab 11; R. 919-925) In this Response, which Mathis represented set forth "[a]ll of the authorities relied upon," Mathis did not raise any waiver argument with respect to ERA's challenge to his standing to pursue his claims against ERA. (R.E. Tab 11; R. 924)

On October 12, 2007, the Circuit Court conducted a hearing on ERA's Motion to Dismiss. (R.E. Tab 12 at pgs. 1-18) Near the end of this hearing, Mathis' Counsel handed to the Circuit Judge a copy of this Court's opinion in MS Credit Center v. Horton, 926 So.2d 167 (Miss. 2006), and stated that based on "paragraph 41 . . . we're kind of late here arguing something that should have been dealt with long ago. And I'd like the record to reflect that that argument is made to Your Honor as well when it goes to High Street." (Id. at pg. 12) Mathis' Counsel failed to either argue on the record that it was his position that ERA had "waived" its right to challenge Mathis' standing to pursue the instant claims, or attempt to offer any argument or evidence to meet the elements of waiver under Horton. (Id.)

On January 23, 2008, the Circuit Court issued a letter ruling granting ERA's Motion to Dismiss. (R.E. Tab 13; R. 943-944) This letter ruling made no reference to Mathis' waiver argument.

On February 11, 2008, Mathis filed a Motion for Clarification of the Circuit Court's letter ruling and requested a status conference. (R.E. Tab 14; R. 929-938) Specifically, Mathis sought clarification on whether the Circuit Court's ruling applied only to the claims of ERA, or also to the derivative claims of the other Defendants. (Id.) Additionally, Mathis sought to amend the ruling to certify it as final pursuant to M.R.C.P. 54(b). (Id.) Mathis did not seek clarification regarding whether the Circuit Court had considered or ruled on his waiver argument.

On Febru ary 12, 2008, the Circuit Court issued a letter opinion addressing Mathis' Motion for Clarification.[4] The Circuit Court held that its prior ruling applied to all derivative claims asserted by Mathis against all Defendants, and certified its Partial Judgment of Dismissal pursuant to Rule 54(b). Also, the letter opinion directed Mathis' Counsel to draft the order and judgment. On March 14, 2008, the Circuit Court entered a Partial Judgment of Dismissal and Certification Pursuant to M.R.C.P. 54(b). (R.E. Tab 15; R. 956-959) The Partial Judgment of Dismissal provided: "Plaintiff lacks standing to pursue any claims against Defendant [ERA] that are in the nature of derivative claims belonging to Real Estate Professionals, LLC, and that all of Plaintiff's claims against ERA are, in the opinion of the Court, derivative." (Id.) Despite the fact that the Partial Judgment of Dismissal was drafted by Mathis' Counsel, it made no specific reference to Mathis' waiver argument.

On April 10, 2008, Mathis filed a Notice of Appeal. (R.E. Tab 16; R. 960)

[4] Although this letter from Judge Evans was copied to the Covington County Circuit Clerk, the letter was not in the lower court file and thus could not be included in the appeal record. A copy of the letter is appended to the end of this brief.

II. Statement of Facts[5]

On or about July 1, 2000, Mathis purchased a fifty percent (50%) equity interest in and became a member of REP. (R.E. Tab 1; R. 17-18) At that time, the other equity owners/members of REP were Hill and his wife Pamela Hill. (Id.) Mathis acquired his equity interest in REP, in addition to an equity interest in two pieces of real property owned by Hill, for $68,000. (R.E. Tab 9; R. 805-807, 813). Over the course of the next two years, Mathis made periodic working capital loans to REP, as well as loans to Hill for use in connection with other joint business venture of Mathis and Hill.[6] (R.E. Tab 1; R. 17-18)

At the time of Mathis' acquisition, REP was a licensed ERA franchise. Effective July 1, 2000, ERA and REP entered into a Renewal Membership Agreement ("Franchise Agreement"). (R.E. Tab 9; R. 816-859) Additionally, in connection with this Franchise Agreement, the members of REP each executed a personal guaranty to ERA regarding the performance and observation of all covenants, conditions and obligations pursuant to the Franchise Agreement. (R.E. Tab 9; R. 859) This guaranty is the only contractual relationship that has ever existed between Mathis, in his individual capacity, and ERA.

On or about March 31, 2002, the Hills transferred their 50% equity interest in REP to Irby. (R.E. Tab 1; R. 18-19). The Hills continued to be employed by REP. (Id.) Additionally, at this same time, Hill alleges that Mathis agreed to sell to him his 50% equity interest in REP.

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[5] A full recitation of the facts may be found in the Mississippi Supreme Court's opinion granting interlocutory appeal and transferring venue of this action from Chancery Court to Circuit Court. See ERA Franchise Sys., Inc. v. Mathis, 931 So.2d 1278, 1279-80 (Miss. 2006). (R.E. Tab 8)

[6] In addition to purchasing a 50% equity interest in REP, Mathis also purchased a fifty percent (50%) equity interest in Chip Hill Construction and an equity interest in various pieces of real property located throughout the State. Mathis has testified that, in total, he provided approximately $770,000 in loans to Chip Hill over the course of 2000 through 2002 for use in connection with their various business ventures. (R.E. Tab 9; R. 804-806 and R.E. Tab 1; R. 17-18).

There is a dispute between Hill and Mathis regarding the terms of this sale.[7] Following these transfers, Mathis alleges that the Hills and Irby, with the aid of Warren, began "intentionally and willfully divert[ing] substantially all of the **corporate assets of REP** to entities formed by them and/or with which they were associated as a means to convert the assets of REP and to intentionally exclude Mathis from the business of REP." (R.E. Tab 1; R. 18) (emphasis added). Mathis alleges that the Hills and Irby "formed REP-Central and REP-Pine Belt for such purpose." (Id.) Further, Mathis alleges that these alleged wrongful actions occurred "with the assistance and knowledge and active participation of ERA. . . ." (Id.)

Mathis specifically alleges that Hill, "on behalf of REP," signed various documents that **transferred the assets of REP to REP-Central and REP-Pine Belt**, including "the hard assets of REP and the various real estate listings of REP. Further, Chip Hill, Pamela Hill, Irby and Warren induced the real estate sales agents of REP to terminate and/or otherwise not honor their agent contracts with REP and to become real estate agents with REP-Central and/or REP-Pine Belt." (R.E. Tab 1; R. 19) Mathis goes on to allege that REP-Central and REP-Pine Belt "**misappropriated the franchise rights of REP**" by utilizing the ERA trademark in connection with their operations. (R.E. Tab 1; R. 19-20) (emphasis added).[8] While Mathis makes no

[7] The dispute between Hill and Mathis regarding the amount of consideration that was to be paid by Hill to Mathis in return for Mathis' 50% equity interest in REP is irrelevant to the issues before the Court, as such claims are direct claims that Mathis if free to continue to pursue against Hill in the Circuit Court. Nevertheless, in order to give the Court a complete understanding of the underlying facts, Hill has testified that, on or about March 31, 2002, Mathis agreed to sell his fifty percent (50%) equity interest in REP for $200,000 and absolution from his personal guaranty executed simultaneously with the Franchise Agreement. (R.E. Tab 9; R. 860-862) There are two versions of a written Contract for Sale that memorialize this purported agreement. (R.E. Tab 9; R. 863-864) Also, it is undisputed that Mathis did in fact receive from Hill a cash payment of $200,000. (R.E. Tab 9; R. 814-815). Mathis does not appear to contest that he agreed to sell to Hill his equity interest in REP. Mathis has testified, however, that the terms of the sale were a cash payment of $800,000 (of which the $200,000 was a down-payment), plus title to real property that he allegedly co-owned with Hill. (R.E. Tab 9; R. 808-812). Additionally, Mathis alleges that his signature on each of the two written Contracts for Sale has been forged. (R.E. Tab 1; R. 21)

[8] Mathis restates his claims at ¶ 18 of his Complaint as follows:

> All Defendants, under the circumstances, in the formation of REP-Central and then REP-Pine Belt, and through the other transactions referred to herein and those to be discovered, have set about on a deliberate course of conduct to, among other things, (1) **appropriate the assets, rights**

- **Count IV:** All Defendants violated their (1) Duty of Care, (2) Duty of Loyalty, (3) Duty of Fair Dealing and (4) Usurped Corporate Opportunities by each of the following: (a) Defaulting on the contractual obligations of REP, (b) Converting substantially all of the corporate assets of REP, (c) Converting funds of REP, (d) Inducing real estate agents of REP to terminate their agency with REP, (e) Denying Mathis access to corporate records, and (f) Forming REP-Central and REP-Pine Belt in order to misappropriate the intellectual property rights of REP and diverting real estate commissions from REP. (R.E. Tab 1; R. 25-26)

- **Count V:** Mathis is entitled to damages "as a result of Defendants' gross, reckless and/or interference with the contractual relations of Mathis and/or REP." (R.E. Tab 1; R. 27)

- **Count VI:** Mathis is entitled to damages "as a result of Defendants' gross, reckless and/or intentional interference with the prospective business advantage of Mathis and/or REP." (R.E. Tab 1; R. 27)

- **Count VII:** Civil Conspiracy/Aiding and Abetting alleged against all Defendants to commit all wrongful acts alleged in the Complaint. (R.E. Tab 1; R. 28)

- **Counts VIII/IX:** Equitable remedies of Accounting and Constructive Trust. (R.E. Tab 1; R. 28-29)

- **Count X:** Breach of Contract to convey real property (against Chip Hill). (R.E. Tab 1; R. 29-30)

- **Count XI:** Equitable Conversion of real property (against Chip Hill). (R.E. Tab 1; R. 30)

- **Count XII:** Breach of Contract against ERA arising out of rights and duties pursuant to the Franchise Agreement. (R.E. Tab 1; R. 30-31)

- **Counts XIII/XIV:** Breach of Contract against the Hills and Irby relating to loans made by Mathis for the benefit of Hill and REP. (R.E. Tab 1; R. 32-33)

Counts II, X, XI, XIII, and XIV do not assert claims against ERA, and thus were not the subject of ERA's Motion to Dismiss. Further, to the extent that these Counts assert individual claims by Mathis against Defendants other than ERA, such claims were not addressed by the Circuit Court in its March 14, 2008 Partial Judgment of Dismissal and are stayed pending resolution of this appeal. (R.E. Tab 15; R. 956-957)

SUMMARY OF THE ARGUMENT

The Circuit Court did not err in concluding that Mathis "lacks standing to pursue any claims against any Defendant that are in the nature of derivative claims belonging to Real Estate Professionals, LLC, and that all of [Mathis'] claims against ERA are, in the opinion of the Court, derivative." (R.E. Tab 15; R. 956).

Addressing Mathis' waiver argument, following transfer of this action to a court with subject matter jurisdiction over Mathis' claims, ERA timely and appropriately raised a challenge to Mathis' standing to pursue in this direct action solely for his own benefit (and to the express exclusion of the other equity member of REP) any claims against ERA that are derivative in nature and thus corporate assets of REP. Furthermore, it is well-established that whether Mathis has standing to pursue his claims against ERA "is a jurisdictional issue which may be raised by any party or the Court at any time." Thus, as a matter of law, because subject matter jurisdiction cannot be waived, ERA has the right to challenge Mathis' standing at any time. Finally, even if the Court were to change the law and apply the equitable rule announced in Horton and its progeny to the issue of standing, Mathis failed to proffer any evidence to the Circuit Court to meet his burden of establishing that ERA both "substantially and unreasonably delayed" raising by motion the issue of lack of standing, and "actively participate in the litigation process"

following transfer of this action to a court with subject matter jurisdiction. Further, a review of the procedural history of this case clearly demonstrates that ERA did not substantially and unreasonably delay the filing of its motion challenging Mathis' standing. Thus, as a matter of both fact and law, Mathis' waiver argument is infirm.

Turning to the merits of ERA's challenge to Mathis' standing to assert derivative claims belonging to REP in a direct action solely for his own benefit, even if the Closely-Held Corporate Direct Action Doctrine was adopted by the Court through **dicta** contained in a footnote in Derouen and is the law in Mississippi - a doubtful proposition - Mathis' claims against ERA do not fall within the ambit of this doctrine. The Closely-Held Corporate Direct Action Doctrine applies solely to **intracorporate disputes between officers, directors and shareholders in a closely held corporation**. Mathis has failed to cite any authority from any jurisdiction applying the doctrine to enable a shareholder of a corporation to seek an individual recovery arising out of claims that the corporation may raise against a third-party. This is not surprising, as such an application of the doctrine would result in the misappropriation of a corporate asset by the shareholder asserting the claim for his own benefit and would create a cause of action in favor of the corporation and other shareholder(s) against the shareholder asserting the claim. Thus, since ERA has never been an officer, director or shareholder of REP, there is no factual or legal basis to support the application of the Closely-Held Corporate Direct Action Doctrine to Mathis' claims against ERA that are derivative in nature and thus corporate assets of REP.

Finally, Mathis has failed to cite any authority to support either his newly-minted and untimely request for leave of court to amend his Complaint to allege derivative claims against Defendants on behalf of REP, or his bald assertion that the Circuit Court erred in concluding that all of his claims asserted against ERA are derivative in nature.

In sum, the Circuit Court did not err in concluding that Mathis lacks standing to pursue any of the claims he has asserted against ERA in this direct action solely for his own benefit, and the Partial Judgment of Dismissal disposing of all of Mathis' claims against ERA should be affirmed.

ARGUMENT

I. MATHIS IS PROCEDURALLY BARRED FROM RAISING HIS WAIVER ARGUMENT FOR THE FIRST TIME ON APPEAL.

It is well-established that the Mississippi Supreme Court "sits to review actions of trial courts and that [the Court] should undertake consideration of no matter which has not first been presented to **and** decided by the trial court." Educational Placement Services v. Wilson, 487 So.2d 1316, 1320 (Miss. 1986) (emphasis added); see also Jones v. Flour Daniels Services, Corp., 959 So.2d 1044, 1048 (Miss. 2007) ("We do not consider issues raised for the first time on appeal."); Alexander v. Daniel, 904 So.2d 172, 183 (Miss. 2005) (stating that "we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue"); Triplett v. Mayor and Board of Aldermen of the City of Vicksburg, 758 So.2d 399, 401 (Miss. 2000) ("This Court has long held that it will not consider matters raised for the first time on appeal."). As noted by a leading commentator on Mississippi Appellate Practice: The Mississippi Supreme Court "sits only to correct errors of the trial court [and s]ound judicial administration requires that the trial court be given the first opportunity to pass upon every issue in the case." Munford, Mississippi Appellate Practice, § 3.7 (MLI Press 2007). Failure of a party to both present an issue to the trial court and receive a ruling on the issue from the trial court will result in the issue being "procedurally barred" on appeal. Triplett, 758 So.2d at 401-02.

Mathis is procedurally barred from raising on appeal the issue of whether ERA waived its right to challenge his standing because Mathis failed to either properly raise the issue below or

receive a ruling on the issue from the Circuit Court prior to commencing this appeal. As outlined above, Mathis failed to raise the issue of waiver in his Response brief filed in opposition to ERA's Motion to Dismiss, and Mathis failed to cite the Horton opinion, handed down in February 2006, in his Response brief filed more than one and one-half years later on October 11, 2007. Further, Mathis affirmatively represented to the Circuit Court in his Response that "[a]ll of the authorities relied upon by Mathis are set forth and the standing issue before the Court related to the claims of Mathis is narrow." (R.E. Tab 11; R. 924) Finally, during the oral argument on ERA's Motion to Dismiss, Mathis' Counsel failed to argue that it was his position that ERA had "waived" its right to pursue its standing challenge or attempt to offer any argument or evidence to meet the elements of waiver under MS Credit Center v. Horton, 926 So.2d 167 (Miss. 2006), and its progeny. In fact, Mathis' Counsel never uses the word "waiver" at any time during the course of his argument. Rather, Mathis' Counsel simply handed the Circuit Judge a copy of the Horton decision and summarily stated: "we're kind of late here arguing something that should have been dealt with long ago." Mathis has failed to cite any authority (and undersigned counsel is unaware of any such authority) supporting his assertion that handing to the trial judge a copy of an opinion and making a vague reference to a rule of law discussed in that opinion is sufficient to present an issue to the trial court.

Turning to the issue of whether the Circuit Court considered and ruled on Mathis' waiver argument, neither the Circuit Court's letter ruling granting ERA's Motion to Dismiss, nor Mathis' Motion for Clarification of the Circuit Court's letter ruling make any reference to the waiver argument. Moreover, the Court's March 14, 2008 Partial Judgment of Dismissal and Certification Pursuant to M.R.C.P. 54(b), which was drafted by Mathis' Counsel and submitted to the parties and the Court for review, makes no specific reference to Mathis' waiver argument.

Thus, there is no indication whatsoever for the Circuit Court that it ever considered, much less decided the issue of waiver.

Simply stated, having failed to either present the issue of waiver to the Circuit Court or obtain a ruling from the Circuit Court on this issue, Mathis is procedurally barred from raising his waiver argument for the first time on appeal. Accordingly, the Court should decline to consider the merits of Mathis' waiver argument.

II. STANDING IS A JURISDICTIONAL ISSUE THAT MAY BE RAISED BY ANY PARTY OR THE COURT AT ANY TIME.

Even if the Court were to conclude that Mathis is not procedurally barred from raising his waiver argument on appeal, it is also well-settled under Mississippi law that standing is a jurisdictional issue that cannot be waived.

As a general matter, "subject matter jurisdiction may not be waived and may be asserted at any stage of the proceeding or even collaterally." Esco v. Scott, 735 So.2d 1002, 1006 (Miss. 1999); see also In re Adoption of R.M.P.C., 512 So.2d 702, 706 (Miss. 1987) ("Subject matter jurisdiction, of course, cannot be waived.").[10] Specifically, with respect to the defense of lack of standing, the Court has held that "standing is a 'jurisdictional issue which may be raised by any party or the Court at any time.'" Kirk v. Pope, 973 So.2d 981, 989 (Miss. 2007) (quoting City of Madison v. Bryan, 763 So.2d 162, 166 (Miss. 2000) (citing Williams v. Stevens, 390 So.2d 1012, 1014 (Miss. 1980)). Mathis has failed to cite any authority to rebut this clear rule of law or support his assertion that "ERA and other Appellees have waived their right, as a matter of law, to defend this action on the basis of Mathis' lack of standing." App. Brief at pg. 15. Further, undersigned counsel has been unable to identify any Mississippi case law holding that a

[10] See also Miss. R. Civ. Pro. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject mater, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.") and Comment to Miss. R. Civ. Pro. 12(h)(3) ("Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under MRCP 60(b)(4) or may be presented for the first time on appeal.").

defendant's participation in discovery or motion practice may result in the waiver of that defendant's right to challenge plaintiff's standing. This is not surprising, as the issue of standing may be raised at anytime, even by an appellate court or in a collateral proceeding. See e.g., Williams, 390 So.2d at 1015 (stating "the threshold issue of standing to sue . . . should be resolved by remand to the trial court before we reach the constitutional issue"); Esco, 735 So.2d at 1006 (recognizing that standing may be challenged in a collateral proceeding).

Accordingly, because Mathis' standing to pursue the instant claims against ERA can be challenged at any time, Mathis' waiver argument is legally infirm. [11]

III. MATHIS HAS NOT AND PLAINLY CANNOT MEET HIS BURDEN TO ESTABLISH THAT ERA WAIVED ITS RIGHT TO CHALLENGE STANDING PURSUANT TO *HORTON* AND ITS PROGENY.

Finally, even if the Court were inclined to change the law and adopt Mathis' argument that a defendant may waive its right to challenge plaintiff's standing as a result of participating in discovery or motion practice, Mathis failed to proffer to the Circuit Court any evidence to meet his burden under Horton and its progeny establishing that ERA both "substantially and unreasonably delayed" raising by motion its standing defense, and "actively participated in the litigation process." Moreover, a review of the record reveals that ERA did not substantially and unreasonably delay filing its Motion to Dismiss, and, following transfer of the case to a court with subject matter jurisdiction, ERA did not actively participate in the litigation process prior to filing it Motion to Dismiss. Accordingly, Mathis has not and plainly cannot meet his burden to establish waiver under Horton.

[11] While ERA recognizes that the failure to timely raise an affirmative defense may result in the waiver of that affirmative defense, standing is not an affirmative defense. Standing is not one of the nineteen affirmative defenses enumerated by Miss. R. Civ. Pro. 8(c). Likewise, standing does not fall within the ambit of Rule 8(c)'s catch-all of "a matter constituting an avoidance or affirmative defense," as the plaintiff, not the defendant bears the burden of proof on the issue of standing. See Hertz Commercial Leasing Div. v. Morrison, 567 So.2d 832, 834 (Miss. 1990) ("If a matter is an affirmative defense, the defendant bears the burden of production and the risk of non-persuasion.") (citations omitted).

A. THE DOCTRINE OF WAIVER, AS DEFINED BY THE COURT IN *HORTON* AND ITS PROGENY.

In Horton, the Mississippi Supreme Court held that the defendant had waived its right to compel arbitration as a result of having "substantially engage[d] in the litigation process by consenting to a scheduling order, engaging in written discovery and conducting Horton's deposition," coupled with an "unreasonable delay in brining the issue [of arbitration] before the trial court for adjudication." Horton, 926 So.2d at 181. The Court was clear in holding that "neither delay in pursuing the right to compel arbitration, nor participation in the litigation process, standing alone, will constitute waiver. . . . . However where-as here-there is substantial and unreasonable delay in pursuing the right [to compel arbitration], coupled with active participation in the litigation process, we will not hesitate to find a waiver of the right to compel arbitration." Id.

In East Mississippi State Hospital v. Adams, 947 So.2d 887 (Miss. 2007), the Mississippi Supreme Court addressed the issue of "whether the defendants waived the defenses of insufficiency of process and insufficiency of service of process by failing to pursue them until almost two years after they raised them in their answer while actively participating in the litigation." Id. at 890-91. Plaintiffs argued that "the Defendants have participated in substantial discovery in the form of interrogatories, production requests, depositions, designation of experts, scheduling order, and trial date order, all of which occurred from the filing of the lawsuit on July 2, 2003 until the trial courts' denial [of Plaintiffs' motion to dismiss] in September 2005." Id. at 890. The Court, concluding that "defendants participated fully in the litigation of the merits for two years without actively contesting jurisdiction in any way," held that "on this record we conclude that the defendants waived the defenses of insufficiency of process and insufficiency of service of process." Id. at 891.

Finally, in Estate of Grimes v. Warrington, 982 So.2d 365 (Miss. 2008), the Mississippi Supreme Court addressed the issue of defendant's waiver of his immunity defense under the Mississippi Tort Claims Act by failing to pursue the defense in the more than five years between the filing of the complaint on June 4, 2001 and the filing on August 3, 2006 of defendants' motion for summary judgment solely predicated on his immunity defense. Id. at 370. The Court began its analysis by noting that defendant offers no explanation why he did not move the lower court for summary judgment until 2006. Id. Further, the Court noted that defendant offers "no evidence that any information needed to assist this affirmative defense was not available to him from the inception of the litigation." Id. Finally, the Court concluded that the substantial discovery conducted by the parties, designation of experts, *in limine* motion practice, and the setting and re-setting of this matter for trial "was an unnecessary and excessive waste of time and resources of the parties and the court." Id. Based on these facts, the Court concluded because defendant "unreasonably delayed more that five years in pursuing [his immunity] defense and actively participated in discovery on the merits, he has waived this defense under Adams." Id. at 370-71.

In Horton, Adams, and Grimes, the Court applied the doctrine of waiver to affirmative defenses. The Court in these cases was not faced with a situation where the defendant was challenging the subject matter jurisdiction of the Court. In addition, each of the affirmative defenses at issue in these cases was apparent from the inception of the litigation and did not require the respective defendants to conduct any discovery prior to asserting the relevant defense by motion. Specifically, the affirmative defenses of arbitration, improper service of process, insufficiency of process and statutory immunity readily are identifiable upon inspection of the summons and complaint. Finally, none of the discovery that any of the defendants requested and

obtained in any of these three cases was relevant to the merits of the relevant affirmative defense that the Court ultimately determined had been waived.

B. ERA NEITHER SUBSTANTIALLY AND UNREASONABLY DELAYED RAISING BY MOTION ITS STANDING DEFENSE, NOR ACTIVELY PARTICIPATED IN THE LITIGATION PROCESS AFTER THE CASE WAS TRANSFERRED TO A COURT WITH SUBJECT MATTER JURISDICTION OVER MATHIS' CLAIMS.

At the outset, we note that Mathis failed to raise any argument or proffer any evidence to the Circuit Court to support a finding that ERA either substantially and unreasonably delayed raising by motion its challenge to standing, or actively participated in the litigation process after the case was transferred to a court with subject matter jurisdiction over Mathis' claims. Thus, Mathis' plainly has failed to meet his burden to establish each of the elements supporting a finding of waiver.

Moreover, should the Court decide to engage in a review of the procedural history of this case, it is clear that ERA did not substantially and unreasonably delay the filing of its motion challenging Mathis' standing. As outlined above, prior to filing its Motion to Dismiss, ERA spent more than three years, from June 11, 2003 through June 22, 2006, seeking to have the case transferred to a court with subject matter jurisdiction over Mathis' claims. These efforts ultimately led to the granting of an interlocutory appeal by the Court and an order instructing the Chancery Court to transfer this case to the Circuit Court. ERA did not act unreasonably in seeking to have this case transferred to a court with subject matter jurisdiction prior to filing its dispositive motion seeking dismissal of Mathis' claims for lack of standing. Thus, ERA respectfully submits that the time it spent ultimately succeeding in having this action transferred to a court with subject matter jurisdiction should be disregarded when evaluating whether it "substantially and unreasonably delayed" raising by motion its standing defense.

Further, unlike the affirmative defenses that were at issue in Horton, Adams, and Grimes, it was necessary for ERA to conduct discovery regarding the facts and circumstances supporting each of Mathis' claims against ERA in order for ERA to evaluate whether each claim was individual or derivative in nature. Such a determination could not have been made from the face of Mathis' Complaint, and without the benefit of this discovery, ERA would have been unable to evaluate what claims were subject to dismissal due to Mathis' lack of standing. The fruits of ERA's discovery efforts were cited in and attached in support of ERA's Motion to Dismiss.[12] Thus, it is clear that ERA was not acting unreasonably or unnecessarily by seeking to evaluate through discovery the scope of and obtain evidence in support of its standing challenge prior to raising it by motion.

Finally, once this case was transferred to a court with subject matter jurisdiction over Mathis' claims, ERA did not actively participate in the litigation process. ERA did not conduct any additional discovery following transfer of this case from the Chancery Court to the Circuit Court, and the first motion filed by ERA in the Circuit Court was its Motion to Dismiss Mathis' claims for lack of standing.

In short, the facts and circumstances supporting the Court's finding of waiver in Horton, Adams, and Grimes are not present in this case. Moreover, ERA neither substantially and unreasonably delayed raising by motion its standing defense, nor engaged in unnecessary and wasteful discovery or other litigation practices prior to seeking a dismissal of Mathis' claims for lack of standing. Thus, Mathis has not, and cannot meet his burden to establish that ERA waived its standing defense pursuant to Horton and its progeny.

[12] Specifically, in support of ERA's Motion to Dismiss for Lack of Standing, ERA attached excerpts from the transcript of Mathis' deposition (R.E. Tab 9; R. 803-815); excerpts from the transcript of Hills' deposition (R.E. Tab 9; R. 860-862); and documents produced in response to ERA's written discovery (R.E. Tab 9; R. 863 & 864).

IV. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT MATHIS LACKS STANDING TO PURSUE IN A DIRECT ACTION SOLELY FOR HIS OWN BENEFIT (AND TO THE EXPRESS EXCLUSION OF IRBY, THE OTHER EQUITY OWNER OF REP) ANY CLAIMS AGAINST ERA THAT ARE DERIVATIVE IN NATURE AND THUS ARE CORPORATE ASSETS OF REP.

Mathis concedes that he "is not asserting a derivative action on behalf of REP." App. Brief at pg. 13. Rather, Mathis seeks to pursue derivative claims belonging to REP in a direct action solely for his own benefit and to the exclusion of the Irby, other equity member (50% shareholder) of REP. Id. This fact was expressly recognized by the Court in its prior decision transferring this case from the Chancery Court to the Circuit Court: "Mathis is asserting his own personal claims, in addition to the derivative claims of REP, in a direct action that may benefit him alone, to the exclusion of the other equity owner in REP. Based on these facts, we must conclude that, as to the derivative claims through which Mathis seeks compensatory and punitive damages, he is pursing a direct legal action rather than a true shareholder's derivative action." ERA, 931 So.2d at 1282.

ERA respectfully submits that, contrary to Mathis' assertion, this Court did not adopt the Closely-Held Corporation Direct Action Doctrine by making a passing reference to it in dicta contained in a footnote in Derouen. As outlined below, since Derouen, Mississippi appellate courts have had multiple opportunities to apply the Closely-Held Corporation Direct Action Doctrine to shareholder derivative claims, but, instead, have rejected the doctrine and reaffirmed the long-standing rule that there is no exception to the pre-suit demand requirement of Mississippi Code §§ 79-4-7.42 and 79-29-1102. Moreover, even if the Court was persuaded to adopt the Closely-Held Corporation Direct Action Doctrine, Mathis' claims against ERA do not fall within the ambit of this doctrine. The Closely-Held Corporation Direct Action Doctrine only applies to **intracorporate** disputes between officers, directors and shareholders in a closely held corporation. ERA has never been an officer, director or shareholder of REP. Thus, while the

In Speetjens v. Malaco Inc., 929 So.2d 303 (Miss. 2006), plaintiff, a shareholder in Malaco, Inc., asserted claims against the three officers, directors and 80% shareholders of Malaco for breach of fiduciary duties, usurpation of corporate opportunities, and awarding to themselves excessive salaries and bonuses. Id. at 305-308. The chancellor, concluding that plaintiff "was statutorily barred from suing derivatively" for failing to comply with the mandatory pre-suit demand requirements, entered a judgment dismissing the case. Id. at 304. On appeal, the Court began by noting that "[i]t is undisputed in this case that no written demand was ever made to Malaco to take suitable action." Id. at 308. The Court then addressed and rejected each of Speetjens' arguments relating to exceptions to the mandatory pre-suit demand requirement and concluded that Speetjens' failure to comply with the statutory pre-suit demand requirements "is depositive." Id. at 308-310. In a dissenting opinion, Justice Easley cited the Derouen opinion but failed to assert that the Closely-Held Corporate Direct Action Doctrine was the law in Mississippi and thus would permit Speetjens to pursue his derivative claims in a direct action without complying with statutory pre-suit demand requirements. Id. at 310-312. Justice Easley's failure to reference the Closely-Held Corporate Direct Action Doctrine under these circumstances – in a dissenting opinion - provides perhaps the best evidence that it has not been adopted by the Mississippi Supreme Court.

Further, in Blanton v. Prins, 938 So.2d 847 (Miss. Ct. App. 2005), one of three members of Flexlink, a Mississippi closely-held limited liability company, asserted breach of fiduciary duty and legal malpractice claims against another member of the limited liability company and this other members' law firm. Id. at 850. The chancellor dismissed Blanton's derivative claims "because he failed to provide written demand to Flexlink." Id. The Mississippi Court of Appeals affirmed the ruling of the chancellor holding "that Blanton's failure to make demand rendered him without standing to bring a derivative suit on Flexlink's behalf." Id. at 852. The

Court of Appeals reasoned: "'[A]n action to redress injuries to a corporation . . . cannot be maintained by the stockholder in his own name, but must be brought by the corporation because the action belongs to the corporation and not the individual stockholder whose rights are merely derivative.' The same rule applies to an LLC and their members." Id. (quoting Bruno, 385 So.2d at 622.).

ERA respectfully submits that this authority, which was cited to the Circuit Court and discussed at length during the hearing on its Motion to Dismiss, (R.E. Tab 12 at pgs. 2-6), strongly supports ERA's position that the Closely-Held Corporate Direct Action Doctrine has not been adopted by the Mississippi Supreme Court and is not the law in Mississippi. Rather, the law in Mississippi has been for many years that before a shareholder may seek to assert the derivative claims of a corporation, even if the shareholder owns 100% of the corporation's stock, the shareholder must make a pre-suit demand on the board of the corporation to take action. See Miss. Code § 79-4-7.42 (delineating the mandatory pre-suit demand requirements applicable to corporation); Miss. Code § 79-29-1102 (delineating the mandatory pre-suit demand requirements applicable to limited liability companies). Thus, because Mathis has conceded "that he made no such demand," App. Brief at pg. 13, the Court should affirm the Partial Judgment of Dismissal of the Circuit Court holding that Mathis "lacks standing to pursue any claims against Defendants that are in the nature of derivative claims belonging to Real Estate Professionals, LLC." (R.E. Tab 15; R. 956).

B. The Closely-Held Corporation Direct Action Doctrine only applies to intracorporate disputes, not to claims that a corporation may have against third-parties.

Additionally, even if the Court were persuaded to adopt the Closely-Held Corporation Direct Action Doctrine, Mathis' claims against ERA do not fall within the ambit of this doctrine. The Closely-Held Corporation Direct Action Doctrine only applies to **intracorporate** disputes

between officers, directors and shareholders in a closely held corporation. Thus, the Closely-Held Corporate Direct Action Doctrine provides no refuge for Mathis' claims against ERA that are derivative in nature.

By way of background, the origin of the Closely-Held Corporation Direct Action Doctrine is the Ninth Circuit's opinion in Watson v. Button, 235 F.2d 235 (9th Cir. 1956). In Watson, the plaintiff, a 50% shareholder of Highway Freight, Inc., sought an individual recovery against the other 50% shareholder and general manager of Highway Freight, Inc., based upon a claim of misappropriation of corporate assets. The defendant argued on appeal "that the District Court erred in allowing [plaintiff] an individual recovery since any cause of action for misappropriation of corporate assets by a director belongs to the corporation and not the shareholder." Id. at 236. The Ninth Circuit, noting that plaintiff could no longer meet the requirements for a derivative action because "he is no longer a stockholder" in Highway Freight, Inc., affirmed the ruling of the District Court:

> The District Court did not err in concluding that the Oregon court would follow those decisions from other states which allow an individual recovery in this situation, at least in a case where the rights of creditors and other shareholders are not prejudiced. Suits against directors for violations of fiduciary duties are equitable in nature. It is unlikely that the Oregon courts would allow a director to misappropriate funds and leave those injured without a remedy.

Id. 237.

Several years later, the Massachusetts Supreme Court in Donahue v. Rodd Electrotype Company of New England, Inc., 328 N.E.2d 505 (1975), took an even more expansive view of the rights of a shareholder in a closely-held corporation to individually assert traditionally derivative claims against the officers, directors and majority shareholder of the corporation. In Donahue, the plaintiff, a minority shareholder in Rodd Electrotype Company ("Rodd"), asserted breach of fiduciary duty claims against the directors, officers and controlling shareholder of Rodd. Id. at 579. The Court, reasoning that a "close corporation bears striking resemblance to a

partnership. . . [and] is often little more than an 'incorporated' or 'chartered' partnership," id. at 586, held that while the plaintiff's complaint "at least in part [presented] a derivative action," it was appropriately treated "as presenting a proper cause of suit in the personal right of the plaintiff." Id. at 579, n. 4. The Donahue Court, unlike the Watson Court, did not require the plaintiff to demonstrate the absence of prejudice to creditors or other shareholders before permitting the plaintiff to pursue an individual recovery.

Relying on these two lines of cases, in 1992 the American Law Institute ("ALI") promulgated the Closely-Held Corporation Direct Action Doctrine:

> (d) In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, excepting it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that doing so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

ALI, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) (2007). The Comment to subsection (d) notes that the rule "follows the position taken by the Ninth Circuit in Watson. . . . [and] does not follow the fullest potential reach of Donahue to the extent of covering **all intracorporate disputes** that would be normally characterized as derivative actions into direct actions wherever the case involves a closely held corporation. . . . ." Id. at Comment (e) (emphasis added). The Comment to Section 7.01(d) does not discuss the application of the doctrine to claims against persons/entities who are not officers, directors or shareholders of the closely held corporation.

Further, while Mathis has string-cited a number of cases in support of his assertion that the Closely-Held Corporation Direct Action Doctrine has been adopted by many jurisdictions, **NONE** of these courts have applied the doctrine outside of intracorporate disputes. See Cooper v. Rucci, 2008 WL 942710 (W.D. Pa. April 7, 2008) (applying the doctrine to a 50%

shareholder's claims for misappropriation of corporate assets and theft of corporate opportunities against the other 50% shareholder); Vissa v. Pagano, 919 A.2d 488 (Conn. App. Ct. 2007) (without deciding the issue, the Court affirmed the application of the doctrine by the referee to a 50% shareholder's claims for unjust enrichment against the other 50% shareholder); Marsh v. Billington Farms, LLC, 2006 WL 2555911 (R.I. August 31, 2006) (adopting the doctrine and applying it to allow the 50% equity owners in an LLC to receive an individual recovery against the sole manager and 25% equity owner in the LLC based on allegations that the defendant breached his fiduciary duties by engaging in oppressive behavior and self-dealing); Redeker v. Litt, 699 N.W.2d 684 (Iowa App. Ct. May 25, 2005) (applying the doctrine and allowing the minority shareholders to pursue an individual recovery from the majority shareholders based on derivative claims of breach of fiduciary duties, breach of the preincorporation agreement and breach of contract); Trieweiler v. Sears, 689 N.W. 2d 807 (Neb. 2004) (applying the doctrine and allowing a shareholder to individually recover all damages flowing from the other two shareholders' breaches of fiduciary duties by misappropriating money from the corporation, failing to exercise reasonable care and usurping corporate opportunities); Mynatt v. Collis, 57 P.3d 513 (Kan. 2002) (holding that the trial court did not abuse its discretion in applying the doctrine to breach of fiduciary duty claims asserted by a minority shareholder and former vice-president of a company against the president and majority shareholder of the company).

Finally, the rationale cited by Mathis in support of the Closely-Held Corporate Direct Action Doctrine is inapplicable outside of the context of intracorporate disputes. As noted by Mathis, "the reason behind allowing shareholders in a closely held corporation to bring suit individually stems from the fact that the shareholders of this type of corporation have very **direct** obligations to one another." App. Brief at pg. 16 (emphasis added). It is axiomatic that third parties, such as ERA, owe no fiduciary duties directly to the individual shareholders of REP.

Accordingly, the absence of any direct duties owned by third-parties to the shareholders of a closely held corporation eviscerated the primary justification for the doctrine and likely explains why Mathis was unable to cite any authority applying the doctrine outside of intracorporate disputes.

C. The Closely-Held Corporation Direct Action Doctrine does not permit Mathis to assert REP's claims against ERA in a direct action for Mathis' sole benefit.

As outlined above, the Closely-Held Corporate Direct Action Doctrine only applies to intracorporate disputes among officers, directors and shareholders of closely held corporation. Mathis has failed to cite any authority from any jurisdiction applying the Closely-Held Corporation Direct Action Doctrine to enable a shareholder of a corporation to seek an individual recovery arising out of claims the corporation may raise against a third-party. The absence of any such authority is self-evident. Such an application of the doctrine would result in the misappropriation of a corporate asset and create a cause of action in favor of the corporation and other shareholder(s) against the shareholder who sought the individual recovery. Plainly, the ALI did not intend such a nonsensical result when it promulgated § 7.01(d), and ERA respectfully submits that the Court should not expand the doctrine to encompass such claims.

The undisputed facts establish that ERA has never been an officer, director or shareholder of REP, and Mathis has failed to make any such allegations. Rather, ERA's relationship with REP has been limited to franchisor/franchisee, as most recently defined by the July 1, 2000, Renewal Membership Agreement. Thus, as a matter of fact and law there is no basis to apply the Closely-Held Corporate Direct Action Doctrine to allow Mathis to assert in a direct action for his sole benefit any claims that REP may have against ERA. Such claims only may be pursued in a derivative action for the benefit or REP or in a direct action by REP against ERA. Accordingly, it is clear that the Circuit Court did not err in rejecting Mathis' request to apply the Closely-Held

Corporate Direct Action Doctrine to his claims against ERA that are derivative in nature (and corporate assets of REP); and the Judgment of the Circuit Court dismissing Mathis' derivative claims should be affirmed.

Finally, even if the Court were to expand the Closely-Held Corporate Direct Action Doctrine beyond intracorporate disputes among officers, directors and shareholders of closely held corporations, Mathis wholly failed to proffer any evidence to the Circuit Court to meet any of the three predicates to the application of the doctrine. The record is silent regarding any argument or evidence submitted by Mathis to the Circuit Court establishing: (a) that REP or any of the Defendants will not be exposed to a multiplicity of actions if Mathis is permitted to pursue an individual recovery; (b) no creditor of REP will be materially prejudiced if Mathis is permitted to pursue an individual recovery; and (c) allowing Mathis to receive an individual recovery will not unfairly prejudice any other person who may have a claim to a portion of such recovery.

The only record evidence on any of these prerequisites was submitted by ERA's Counsel to the Circuit Court:

> Furthermore, one of the criteria for Derouen is that all of the creditors are before the court in that case, even if that was the law. Well, if I could approach the Court, here's a case that went all the way up to the supreme court in 2005, Barry Doleac v. Real Estate Professional LLC, which is an entity involved here in which Mr. Doleac is suing that corporation for rent and other monies owned to him by the very corporation that Mr. Mathis alleged he owned stock in.
>
> So, you know, nobody can say that all the creditors are before this Court. Because I'm just showing Your Honor one that went up to the supreme court and actually had a claim against REP. And, frankly, I can't speak to other creditors, who they are and who they're not. But it's not my burden to prove that all the creditors are before this Court. It's their burden to prove it, and they've offered no proof that all the creditors are before this Court.
>
> So, even if there was such a law as Derouen out there, the criteria hadn't been met.

(R.E. Tab 12 at pg. 14-15)

Mathis' Counsel failed to rebut this argument or offer any counter-evidence or argument to the Circuit Court to establish any of the three prerequisites for application of the Closely-Held Corporate Direct Action Doctrine. In fact, Mathis makes no attempt in his opening appeal brief to cite any record evidence in an attempt to meet his burden with respect to any of the three prerequisites for application of the doctrine. Thus, Mathis has not and cannot meet the requirements for application of the Closely-Held Corporate Direct Action Doctrine, and the Court may affirm the decision of the Circuit Court for this additional reason.

V. MATHIS HAS FAILED TO CITE ANY AUTHORITY TO SUPPORT HIS UNTIMELY REQUEST THAT THE COURT WAIVE THE PRE-SUIT DEMAND REQUIREMENTS OF MISS. CODE § 79-29-1102 AND GRANT HIM LEAVE TO AMEND HIS COMPLAINT TO ALLEGE DERIVATIVE CLAIMS ON BEHALF OF REP.

Implicitly acknowledging that the Closely-Held Corporation Direct Action Doctrine will not save his claims against ERA, Mathis argues for the first time in his opening appeal brief that he "should be allowed to amend his complaint to assert a derivative action on behalf of REP without having to make the written demand provided for in Miss. Code Ann. § 79-29-1102 (1972, as amended) and/or the Appellees otherwise being allowed to assert any procedural and/or substantive defenses thereto, including the applicable statute of limitation." App. Brief at pg. 19-20. In support of this argument, Mathis fails to cite any authority recognizing any relevant exception to the pre-suit demand requirements of Miss. Code § 79-29-1102. Instead, Mathis cites a nearly seventy year old opinion discussing general principles of equity, Dogan v. Cooley, 185 So.2d 783 (Miss. 1939), and argues that "Appellees should not be allowed to avoid having to answer for their wrongdoing by asserting procedural technicalities and/or other defenses that have nothing to do with the underlying substantive claims." Id. at pg. 21.

Mathis' request to amend his complaint to assert a derivative action on behalf of REP without having to meet the mandatory pre-suit demand requirements of Miss. Code § 79-29-1102

was neither raised below nor ruled on by the Circuit Court. Thus, as is the case with his waiver argument, Mathis is procedurally barred from raising this argument for the first time on appeal. See, e.g., Triplett, 758 So.2d at 401 ("This Court has long held that it will not consider matters raised for the first time on appeal.").

Further, even if the Court were inclined to consider Mathis' untimely request,[13] the pre-suit demand requirements for a derivative action are mandated by the plain text of Miss. Code § 79-29-1102, and the Mississippi Court of Appeals has unequivocally held that the failure of a member of an LLC to provide a written demand and otherwise comply with the requirements of Miss. Code § 79-29-1102 will result in the dismissal of the derivative claims for lack of standing. See Blanton, 760 So.2d. at 852-53 (affirming the Chancellor's finding that plaintiff's "failure to make demand rendered him without standing to bring a derivative suit on [the LLC's] behalf"). This Court also has reached the same conclusion construing identical language delineating the pre-suit demand requirement contained the Mississippi Corporations Act. See, e.g., Speetjens, 929 So.2d at 308-10 (affirming the Chancellor's finding that "the shareholders lacked standing to bring this suit on behalf of [the corporation] because they did not first make written demand on [the corporation] to take suitable action"). Further, the Speetjens Court went on to conclude that a futility exception to the demand requirement is **not** contained in the statute, thus, "until the Legislature decides to include one, it does not exist." Id. at 309.

Mathis has failed to cite any authority to support his untimely request that the Court disregard the mandatory pre-suit demand requirements of Miss. Code § 79-29-1102. Further, contrary to Mathis' representation in his opening appeal brief that he is not seeking to have the court legislate from the bench by engrafting an exception to the pre-suit demand requirement of

[13] Pursuant to the October 20, 2006 Scheduling Order entered by the Circuit Court, the deadline for Mathis to seek leave of court to amend his Complaint was January 5, 2007, more than seven months before ERA filed its Motion to Dismiss and one year before Mathis first requested in his opening appeal brief leave to amend his Complaint to assert derivative claims on behalf of REP. (R. 627)

Miss. Code § 79-29-1102, App. Brief at pg. 13, that is precisely what Mathis is seeking. ERA respectfully submits that the Court should decline Mathis' invitation and deny his request for leave to amend his Complaint to add derivative claims on behalf of REP without first complying with the mandatory pre-suit requirements of Miss. Code § 79-29-1102.

VI. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT ALL OF MATHIS' CLAIMS ASSERTED AGAINST ERA ARE DERIVATIVE IN NATURE.

Finally, Mathis argues that the Circuit Court erred in concluding that "all of Plaintiff's claims against ERA are derivative claims and fully disposed of" by its Partial Judgment of Dismissal. (R.E. Tab 15; R. 956) Mathis does not seek to challenge the Circuit Court's ruling with respect to all of the claims asserted against ERA. Rather, Mathis seeks to challenge the Circuit Court's ruling only with respect to his breach of contract claim predicated on the franchise agreement between ERA and REP; as well as his claim that ERA conspired with Irby to breach fiduciary duties owed by Irby to Mathis. See App. Brief at pg. 21-22.

A. Mathis' breach of contract claims arising out of the franchise agreement between ERA and REP are derivative in nature.

Mathis has asserted breach of contract claims against ERA relating to the July 1, 2000, Franchise Agreement between ERA and REP, as well as claims for the breach of various duties, including the duty of care, loyalty, and fair dealing, flowing from the Franchise Agreement. (R.E. Tab 1; R. 25-31) Mathis previously has expressly represented to the Court that "in the breach of contact count against ERA (Count XII), the contract at issue is the Franchise Agreement between REP and ERA, which Mathis is asserting derivatively. **While Mathis did plead that ERA breached the personal guarantee . . . such claim for relief is tied directly to ERA's breach of the Franchise Agreement with REP**." (R.E. Tab 9; R. 883 at n. 8) (emphasis added) Thus, Mathis previously has conceded that any breach of contract claim relating to the Franchise Agreement, or any duties flowing therefrom, is a corporate asset of REP that must be

asserted derivatively. ERA respectfully submits Mathis should not be permitted to take a contrary position in connection with this appeal.

Nevertheless, it is indisputable that Mathis, in his individual capacity, was not a party to the Franchise Agreement. Rather, Mathis signed the Franchise Agreement on behalf of and in his capacity as "MEMBER" of REP. (R.E. Tab 9; R. 858) Thus, as a matter of law, Mathis lacks standing to assert any individual claims arising out of the Franchise Agreement. Any claims for the breach of the Franchise Agreement, as well as the duties flowing therefrom, are corporate assets of REP.

Mississippi's appellate courts have squarely addressed this issue. In Bruno, plaintiff asserted breach of contract, malicious interference and fraud claims against defendant relating to defendant's alleged failure to comply with his obligations pursuant to an oral contract between the defendant and Bruno's, Inc., a corporation owned by the plaintiff. Bruno, 385 So.2d at 620. Specifically, plaintiff sought damages for the destruction of the value of his stock in Bruno's, Inc., based upon defendant's failure to make a $25,000 capital contribution to Bruno's, Inc., and failure to act as a guarantor for a $275,000 loan, resulting in the bank foreclosing on the loan and necessitating the filing of bankruptcy by Bruno's, Inc. Id. at 621. Defendant filed a general demurrer asserting that plaintiff's claims are assets of the corporation and may only be asserted on behalf of the corporation in a derivative action. Id. The trial court sustained the demurrer, and the order of dismissal was affirmed by this Court:

> We hold that the basis of the suit in this case is a wrong to the corporation and plaintiff may not bring suit in his individual capacity to redress a wrong to the corporation. The cause of action belongs solely to the corporate entity, Bruno's, Inc., and may be asserted only by the corporation itself or by plaintiff in a representative capacity in the form of a shareholder derivative suit. The corporation is an indispensable party to such an action. . . . The trial court properly sustained the demurrer because **the suit was based on a contract between defendant and Bruneau's, Inc., to invest capital in the corporation and guaranty a loan of the corporation. The defendant did not agree to lend plaintiff money or to guaranty plaintiff's debt,** but rather to the corporation

> which was wholly owned by the plaintiff. **The gravamen of the action is a wrong to the corporation, which may not be redressed by plaintiff in his individual capacity.**

Id. at 622-23 (emphasis added).

More recently, in Durham v. University of Mississippi, 966 So.2d 832 (Miss. 2007), the plaintiff, a minority shareholder in Gulfport Shopping Center, Inc., asserted breach of contract claims against MSCI pursuant to a commercial lease between Gulfport Shopping Center, Inc., and MSCI. Id. at 834. The trial court dismissed plaintiff's claims, concluding that plaintiff "lacked standing to pursue his claim individually, rather, the claim for damages should be made in the name of the corporation, Gulfport Shopping Center, Inc." Id. at 835. On appeal, the Mississippi Court of Appeals, relying on Bruno, affirmed the dismissal of plaintiff's breach of contract claims: "[Plaintiff], as an individual shareholder of Gulfport Shopping Center, Inc., does not have standing to pursue his claim for damages from an alleged breach of the commercial lease." Id. at 835-36.

As in Bruno and Durham, Mathis was not a party to the Franchise Agreement between ERA and REP. Thus, any action for damages based on an alleged breach of the Franchise Agreement, as well as any duties flowing from this Agreement, is an asset of REP, not an individual claim that may be pursued by Mathis. Accordingly, ERA respectfully submits that the Circuit Court was correct in concluding that the breach of contract claims that Mathis has asserted against ERA are derivative in nature.

B. Mathis' conspiracy claim against ERA is derivative in nature.

Finally, Mathis alleges that ERA "joined in, conspired with and/or aided and abetted Irby in his breach of fiduciary duty to Mathis." App. Brief at pg. 22. Count III of Mathis' Complaint delineates his claim for "joining in breach of fiduciary duties." (R.E. Tab 1; R. 24) Specifically, Count III alleges that ERA conspired with the Hills and Irby to "misappropriate the franchise

rights of REP and to cause the destruction of REP and/or otherwise cause damage to Mathis." (Id.) The Circuit Court has concluded that Mathis' claims for both the misappropriation of the franchise rights of REP,[14] and the destruction of the value of REP's stock are derivative in nature.[15] Mathis has not sought review of these rulings in this appeal. Thus, Mathis' conspiracy claims predicated on these acts necessarily must be derivative in nature. Mathis has failed to cite any authority supporting his assertion that he may assert an individual claim for conspiracy in circumstances where the alleged underlying wrongs are derivative claims. Further, it would be nonsensical to permit Mathis to pursue a conspiracy claim for his own benefit rooted in causes of action that are derivative in nature and corporate assets of REP.

Moreover, the only case cited by Mathis in support of his conspiracy claim against ERA, Knox Glass Bottle Co. v. C.R. Underwood, 89 So.2d 799 (Miss. 1956), establishes that a claim against a third-party for joining in the breach of fiduciary duties owed by an officer or director to a corporation is a **corporate asset**. The holding in Knox Glass offers no support for Mathis' argument that his conspiracy claim is not derivative in nature. Knox Glass filed a direct action against four of its former officers and directors and a number of third-parties who were not officers and directors seeking to recover large personal profits that each defendant made from the leasing of trucks to Knox Glass. Id. at 803. The Court held that Knox Glass could recover from

[14] As discussed above, any claim arising out of the franchise agreement between ERA and REP, including a claim for misappropriation of the franchise rights conveyed pursuant to the franchise agreement, is derivative in nature, as Mathis, in his individual capacity, was not a party to the franchise agreement.

[15] It is well-established that Mathis' claims sounding in diminution in the value of stock or loss of investment or profits are derivative in nature. See, e.g., Vickers v. First Mississippi Nat. Bank, 458 So.2d 1055, 1061-62 (Miss. 1984) (recognizing that a claim for damages arising from the loss of income from and the profits of a corporation in which plaintiff was a shareholder, as well as a claim for loss of plaintiff's investment "must be sought only in a stockholder's derivative suit"); Bruno, 385 So.2d at 621-22 (concluding that plaintiff lacked standing to pursue in a direct action damage claims "for the destruction of the value of his stock in the corporation"); Pennsylvania House Div. of Gen. Mills v. McCuen, 621 F.Supp. 1155, 1156 (S.D. Miss. 1985) (applying Mississippi law and concluding under the holdings in Bruno and Vickers that defendant's counterclaim for loss of his investment in the corporation is a derivative claim and "not recoverable by defendant in his individual capacity"); Holloway, 316 B.R. at 880 (stating that the "injuries in the form of diminution in the value of a shareholder's stock do not give rise to a claim by the individual stockholder but rather give rise to claims by the corporation or by shareholders in a derivative action").

the defendants who were not former officers and directors of the company the profits that these third-parties received from the leases. Id. at 824-828. The Knox Glass Court did not address whether a shareholder in a closely-held corporation could state a direct claim seeking an individual recovery arising out of allegations that a third-party conspired with another shareholder of the company to breach fiduciary duties owed among the shareholders. Moreover, in the nearly seventy years since the fractured majority rendered their opinion in Knox Glass, no court has ever relied on this opinion in recognizing a shareholder's right to seek an individual recovery predicated on allegations that a third-party conspired with another shareholder to breach fiduciary duties. Thus, ERA respectfully submits that Knox Glass provides no support for Mathis' assertion that he may state a direct claim against ERA for damages alleged to have been caused by a conspiracy to breach fiduciary duties owned by Irby to Mathis.

Accordingly, ERA respectfully submits that the Circuit Court was correct in concluding that Mathis' conspiracy claims against ERA are derivative in nature.

CONCLUSION

For all of the foregoing reasons, ERA respectfully submits that the Circuit Court did not err in concluding that Mathis lacks standing to pursue any claims against ERA that are in the nature of derivative claims belonging to REP, and that all of Mathis' claims asserted against ERA are derivative. Accordingly, ERA respectfully requests that the Court affirm the Partial Judgment of Dismissal entered by the Circuit Court granting ERA's Motion to Dismiss and dismissing with prejudice all of Mathis' claims against ERA.

This, the 16th day of January, 2009.

Respectfully submitted,

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By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Joseph Anthony Sclafani, do hereby certify that I have this day served a true and correct copy of this document, via U.S. Mail, postage pre-paid, on the following counsel of record in this civil action:

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Honorable Robert G. Evans
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This, the 16th day of January, 2009.

Joseph Anthony Sclafani

CLOSED, JCS, JURY

U.S. District Court
Southern District of Mississippi (Jackson)
CIVIL DOCKET FOR CASE #: 3:02-cv-01713-HTW

ERA Franchise v. Real Estate, et al
Assigned to: District Judge Henry T. Wingate
Demand: $0
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 11/22/2002
Date Terminated: 08/29/2003
Jury Demand: Defendant
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

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Counter Claimant

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Date Filed	#	Docket Text

11/22/2002	1	COMPLAINT Filing Fee $ 150.00 Receipt # 53137 ; Notice of Assignment mailed. (thr) (Entered: 11/25/2002)
11/22/2002		Case assigned to Pending Track - designation of appropriate track will be made after Case Management Conference and a final track assignment. (thr) (Entered: 11/25/2002)
11/22/2002		Magistrate Judge Assignment James C. Sumner (thr) (Entered: 11/25/2002)
12/03/2002	2	NOTICE by plaintiff ERA Franchise of filing of interpleader bond (*original bond attached) (c/Judges Wingate, Sumner) (lwe) (Entered: 12/03/2002)
12/06/2002		SUMMONS(ES) issued for defendant Jackie R. Hill, defendant Pamela Hill, defendant H. Stuart Irby, defendant Vennit B. Mathis II (jkm) (Entered: 12/10/2002)
12/06/2002		SUMMONS(ES) issued to Ben Williams and Mark R. Warren (jkm) (Entered: 12/10/2002)
12/12/2002	3	MOTION by plaintiff ERA Franchise for Order Restraining Collateral Litigation (lwe) (Entered: 12/18/2002)
12/23/2002	4	Letter requesting attachment (exhibits) by plaintiff ERA Franchise (jkm) (Entered: 12/26/2002)
01/03/2003	5	SUMMONS Returned Executed as to defendants Jackie R. Hill, Pamela Hill, H. Stuart Irby 12/16/02 Answer due on 1/5/03 for H. Stuart Irby, for Pamela Hill, for Jackie R. Hill (jkm) (Entered: 01/07/2003)
01/03/2003	6	SUMMONS Returned Executed as to defendant Vennit B. Mathis II 12/26/02 Answer due on 1/15/03 for Vennit B. Mathis II (jkm) (Entered: 01/07/2003)
01/03/2003	7	SUMMONS Returned Executed as to defendant Real Estate Pro. (Mark R. Warren) 12/9/02 Answer due on 12/29/02 for Real Estate Pro. (jkm) (Entered: 01/07/2003)
01/10/2003	8	NOTICE of Attorney Appearance for defendant Vennit B. Mathis II by Sam S. Thomas (lwe) (Entered: 01/14/2003)
01/10/2003	9	MOTION by defendant Vennit B. Mathis II to Extend Time to respond to motion for entry of order restraining collateral litigation (lwe) (Entered: 01/14/2003)
01/15/2003	10	Rule 16.1(A) Initial Order; copies mailed (jkm) (Entered: 01/15/2003)
01/15/2003		Telephonic Case Management Conference set 9:30 3/11/03 location: Jackson, MS before Magistrate Judge James C. Sumner copies mailed to Sam S. Thomas, Armin J. Moeller Jr. (jkm) (Entered: 01/15/2003)
01/21/2003	11	ORDER granting [9-1] motion to Extend Time, reset Motion Filing deadline to 1/23/03 (signed by Judge Henry T. Wingate); copies mailed. (jkm) (Entered: 01/23/2003)
01/22/2003	12	ANSWER to Complaint by defendant Vennit B. Mathis II (jkm) (Entered: 01/23/2003)

01/22/2003	13	RESPONSE by defendant Vennit B. Mathis II to [3-1] motion for Order Restraining Collateral Litigation by plaintiff (jkm) (Entered: 01/23/2003)
02/21/2003	14	ANSWER to Complaint by defendant H. Stuart Irby (Attorney Dennis L. Horn) (jkm) (Entered: 02/24/2003)
03/06/2003	15	Pre-Discovery Disclosure by plaintiff ERA Franchise (jkm) (Entered: 03/10/2003)
03/11/2003	16	ANSWER to Complaint by defendant Real Estate Pro. (Attorney Jesse M. Harrington),; jury demand (trs) (Entered: 03/12/2003)
03/13/2003	17	AMENDED ANSWER to Complaint by defendant H. Stuart Irby : amends [14-1] answer by defendant (jkm) (Entered: 03/14/2003)
03/18/2003	18	Minute entry: Telephonic Case Management Conference Held before Judge Sumner on 3/11/03. ACTION TAKEN: Court will enter a Case Management Order setting this case for trial before Judge Wingate during civil term beginning 2/17/04. (jkm) (Entered: 03/21/2003)
03/19/2003	19	CASE MANAGEMENT PLAN AND SCHEDULING ORDER Case Assigned to CJRA Track: Standard Scheduling Deadlines: Jury Trial 2/17/04 ; Final Pretrial Conference for 2/3/04 ; Discovery cutoff 9/16/03 ; Joining of parties,amending of pleadings by 4/14/03 ; Pla. Designation of Experts by 6/18/03 ; Dft Designation of Experts by 7/16/03 ; Motion Filing deadline on 9/30/03 ; (signed by Magistrate Judge James C. Sumner) copies mailed. (trs) (Entered: 03/23/2003)
03/19/2003		Case assigned to Standard Track. (trs) (Entered: 03/25/2003)
03/24/2003	20	NOTICE of Attorney Appearance for defendant Jackie R. Hill, defendant Pamela Hill by Gordon Urban Sanford III (jkm) (Entered: 03/25/2003)
03/27/2003		MOTION ORE TENUS by defendant Jackie R. Hill, defendant Pamela Hill to Extend Time to file an Answer and Defenses (jkm) (Entered: 03/31/2003)
03/27/2003	21	ORDER granting [0-0] oral motion to Extend Time to file an Answer and Defenses, reset Answer deadline to 4/7/03 for Pamela Hill, for Jackie R. Hill (signed by Magistrate Judge James C. Sumner); copies mailed. (jkm) (Entered: 03/31/2003)
04/07/2003	22	ANSWER to Complaint by defendant Jackie R. Hill, defendant Pamela Hill (jkm) (Entered: 04/10/2003)
04/09/2003	23	CORPORATE DISCLOSURE STATEMENT regarding corporate structure by plaintiff ERA Franchise . (jkm) (Entered: 04/11/2003)
04/11/2003	24	UNOPPOSED MOTION by plaintiff ERA Franchise to Extend Time to Amendment and Joinder Date (jkm) (Entered: 04/14/2003)
04/14/2003	25	ORDER granting [24-1] motion to Extend Time to Amendment and Joinder Date. Parties shall have an additional thirty (30) days through and including May 14, 2003. (signed by Magistrate Judge James C. Sumner); copies mailed. (jkm) (Entered: 04/16/2003)

05/12/2003	26	MOTION by plaintiff ERA Franchise for Leave to File Amend Complaint (jkm) (Entered: 05/16/2003)
05/14/2003	27	MOTION by defendant Vennit B. Mathis II to Amend [12-1] answer by defendant (mgb) (Entered: 05/18/2003)
06/02/2003	28	Pre-Discovery Disclosure by defendant H. Stuart Irby (jkm) (Entered: 06/09/2003)
06/04/2003	29	NOTICE of Attorney Appearance for defendant H. Stuart Irby by Erik Martin Lowrey (jkm) (Entered: 06/10/2003)
06/05/2003	30	Notice of Service of Interrogatories and Request for Production of Documents by defendant Vennit B. Mathis II (jkm) (Entered: 06/11/2003)
06/05/2003	31	RETURN of SUBPOENA executed as to Robert W. Ward (jkm) (Entered: 06/11/2003)
06/10/2003	32	Notice of Service of Interrogatories and Request for Production of Documents by defendant Vennit B. Mathis II (jkm) (Entered: 06/13/2003)
06/12/2003	33	Notice of Service of Disclosure by defendant Vennit B. Mathis II (jkm) (Entered: 06/16/2003)
06/16/2003	34	ORDER granting [27-1] motion to Amend [12-1] answer by defendant. Movant shall file amended answer within 10 days of entry of this order. (signed by Magistrate Judge James C. Sumner); copies mailed. (mgb) (Entered: 06/17/2003)
06/16/2003	35	ORDER granting [26-1] motion for Leave to File Amend Complaint (signed by Magistrate Judge James C. Sumner); copies mailed. (mgb) (Entered: 06/17/2003)
06/18/2003	36	AMENDED COMPLAINT by plaintiff ERA Franchise (Answer due 6/28/03 for Vennit B. Mathis II, for H. Stuart Irby, for Pamela Hill, for Jackie R. Hill, for Real Estate Pro., for Real Estate) amending [1-1] complaintagainst Pine Belt (jkm) (Entered: 06/19/2003)
06/18/2003		SUMMONS(ES) issued for defendant Pine Belt (jkm) (Entered: 06/20/2003)
06/19/2003	37	AMENDED NOTICE by plaintiff ERA Franchise to take deposition of Jackie R. "Chip" Hill (jkm) (Entered: 06/20/2003)
06/20/2003	38	ANSWER to Complaint by defendant Vennit B. Mathis II (Attorney Eddie J. Abdeen), (jkm) (Entered: 06/24/2003)
06/25/2003	39	AMENDED NOTICE by plaintiff ERA Franchise to take deposition of Jackie R. "Chip" Hill (jkm) (Entered: 06/27/2003)
07/02/2003	40	MOTION by defendant H. Stuart Irby, defendant Pine Belt to Extend Time to serve answer to the amended complaint (jkm) (Entered: 07/02/2003)
07/03/2003	41	ORDER granting [40-1] motion to Extend Time to serve answer to the amended complaint. Defendants have until 7/15/03 in which to serve their answer to the amended complaint. (signed by Magistrate Judge James C.

		Sumner); copies mailed. (jkm) (Entered: 07/08/2003)
07/07/2003	42	MOTION by defendant Vennit B. Mathis II to Extend Time to designate expert (rrl) (Entered: 07/09/2003)
07/07/2003	43	ANSWER to Complaint and COUNTERCLAIM by defendant Vennit B. Mathis II against plaintiff ERA Franchise , (trs) Modified on 07/09/2003 (Entered: 07/09/2003)
07/08/2003	44	ORDER granting [42-1] motion to Extend Time to designate expert, reset designation of defendants' experts deadline to 8/18/03 (signed by Magistrate Judge James C. Sumner); copies mailed. (rrl) Modified on 07/09/2003 (Entered: 07/09/2003)
07/09/2003	45	RETURN of SUBPOENA executed as to Community Bank-Ellisville (jkm) (Entered: 07/11/2003)
07/10/2003	46	NOTICE of Attorney Appearance for defendant Real Estate Pro. by Dennis L. Horn (jkm) (Entered: 07/11/2003)
07/11/2003	47	NOTICE of Service of Discovery Responses by plaintiff ERA Franchise (jkm) (Entered: 07/11/2003)
07/16/2003	48	ANSWER to Complaint by defendant Real Estate, defendant Real Estate Pro., defendant H. Stuart Irby (Attorney Dennis L. Horn), (jkm) (Entered: 07/17/2003)
07/31/2003	49	ANSWER to Complaint by plaintiff ERA Franchise (Attorney Deborah L. McNeely), (jkm) (Entered: 07/31/2003)
08/04/2003	50	ANSWER to Complaint by defendant Vennit B. Mathis II (jkm) (Entered: 08/05/2003)
08/22/2003	51	NOTICE by plaintiff ERA Franchise to take video deposition of Vennit B. Mathis, II (jkm) (Entered: 08/25/2003)
08/27/2003	52	RETURN of SUBPOENA executed 8/20/03 as to Vennitt B. Mathis, Sr. and Mid South. (sec) (Entered: 08/28/2003)
08/27/2003	57	AMENDED CASE MANAGEMENT PLAN AND SCHEDULING ORDER Case Assigned to CJRA Track: Standard Scheduling Deadlines: Jury Trial 5/3/04 ; Discovery cutoff 1/14/04 ; Joining of parties,amending of pleadings by 10/15/03 ; Pla. Designation of Experts by 10/15/03 ; Dft Designation of Experts by 11/15/03 ; Motion Filing deadline on 12/15/03 ; (signed by Magistrate Judge James C. Sumner) copies mailed. (fe) (Entered: 09/04/2003)
08/28/2003	53	Notice of Service of Interrogatories and Request for Production of Documents and Request for Admissions by plaintiff ERA Franchise (jkm) (Entered: 09/02/2003)
08/29/2003	54	REQUEST for Production of Documents by plaintiff ERA Franchise to defendant Real Estate Pro., defendant Pine Belt, defendant H. Stuart Irby, defendant Real Estate (jkm) (Entered: 09/02/2003)
08/29/2003	55	REQUEST for Production of Documents by plaintiff ERA Franchise to

		defendant Real Estate Pro. (jkm) (Entered: 09/02/2003)
08/29/2003	56	ORDER denying [3-1] motion for Order Restraining Collateral Litigation, Dismissing complaint in its entirety. (signed by Judge Henry T. Wingate); copies mailed. (mgb) (Entered: 09/04/2003)
08/29/2003		Case closed (lwe) (Entered: 09/10/2003)
09/08/2003	58	MOTION by plaintiff ERA Franchise for Reconsideration of [56-1] order Denying Injunctive Relief and Dismissing Complaint (fe) (Entered: 09/10/2003)
09/26/2003	59	RESPONSE by defendant Vennit B. Mathis II to [58-1] motion for Reconsideration of [56-1] order Denying Injunctive Relief and Dismissing Complaint by plaintiff (rrl) (Entered: 09/26/2003)
10/27/2003	60	ORDER denying [58-1] motion for Reconsideration of [56-1] order Denying Injunctive Relief and Dismissing Complaint (signed by Judge Henry T. Wingate); copies mailed. (jkm) (Entered: 10/29/2003)

PACER Service Center

Transaction Receipt

11/13/2008 13:19:15

PACER Login:	bg0154	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:02-cv-01713-HTW
Billable Pages:	5	**Cost:**	0.40

AGN, CLOSED

U.S. District Court
Southern District of Mississippi (Jackson)
CIVIL DOCKET FOR CASE #: 3:03-cv-01358-WHB

Mathis v. ERA Franchise, et al
Assigned to: District Judge William H. Barbour, Jr
Demand: $0
Case in other court: Covington Chancery, 03-00117
Cause: 28:1441 Notice of Removal

Date Filed: 12/19/2003
Date Terminated: 04/26/2004
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Federal Question

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Defendant

Pamela Hill

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Defendant

Mark Warren

Defendant

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Date Filed	#	Docket Text
12/19/2003	1	NOTI CE OF REMOVAL by defendant ERA Franchise with copies of complaint, summons, etc.; FILING FEE $ 150.00 RECEIPT # 63937 ; Notice of Assignment mailed. (thr) (Entered: 12/19/2003)
12/19/2003		Case assigned to Pending Track - designation of appropriate track will be made after Case Management Conference and a final track assignment. (thr) (Entered: 12/19/2003)
12/19/2003		Magistrate Judge Assignment Alfred G. Nicols (thr) (Entered: 12/19/2003)
01/08/2004	2	AMENDED N OTICE OF REMOVAL by defendant ERA Franchise with copies of complaint, summons, etc. (trs) (Entered: 01/08/2004)
01/20/2004	3	M OTION by plaintiff Vennit B. Mathis II to Remand this action to the Chancery Court of Covington County, MS, and/or to Stay (trs) (Entered: 01/20/2004)
01/20/2004	4	M OTION by plaintiff Vennit B. Mathis II for Expedited Relief on Motion to Remand and/or Abstain. (trs) (Entered: 01/20/2004)
01/20/2004	5	M EMORANDUM by plaintiff Vennit B. Mathis II in support of [3-1] motion to Remand by plaintiff, [3-2] motion to Stay by plaintiff (trs) (Entered: 01/20/2004)
01/23/2004	6	OP INION and ORDER denying [4-1] motion for Expedited Relief (signed by Judge William H. Barbour Jr.) ;copies mailed. (trs) (Entered: 01/26/2004)
01/23/2004	7	OR DER granting [3-2] motion to Stay all discovery pending the Court's ruling on the motion to remand, terminated deadlines (signed by Magistrate Judge Alfred G. Nicols); copies mailed. (trs) (Entered: 01/26/2004)
01/23/2004		Case assigned to Suspension Track. (trs) (Entered: 01/26/2004)
02/05/2004	8	Att achment by ERA Franchise to [1-1] removal notice by defendant (trs) (Entered: 02/06/2004)
02/05/2004	9	M OTION by defendant ERA Franchise to Transfer Venue/Case , or Refer to the US Bankruptcy Court (trs) (Entered: 02/06/2004)
02/05/2004	10	RESPONSE by defendant ERA Franchise to [3-1] motion to Remand by plaintiff, [3-2] motion to Abstain/Stay by plaintiff (trs) (Entered: 02/06/2004)
02/05/2004	11	MEMORANDUM by defendant ERA Franchise in support of [10-1] motion response by defendant (trs) (Entered: 02/06/2004)
02/05/2004	12	Letter requesting attachment by defendant ERA Franchise (trs) (Entered: 02/06/2004)
02/09/2004	13	MOTION by defendant H. Stuart Irby to Extend Time to serve his response in opposition to motion to remand. (trs) (Entered: 02/09/2004)
02/13/2004	14	UNOPPOSED MOTION by plaintiff Vennit B. Mathis II to Extend Time to

		serve a Rebuttal Memorandum in Support of his Motion to Remand and/or Abstain. (trs) (Entered: 02/13/2004)
02/18/2004	15	ORDER granting [14-1] motion to Extend Time until 2/20/04 to serve Rebuttal Memorandum in Support of Plaintiff's Motion to Remand and/or Abstain. (signed by Judge William H. Barbour Jr.); copies mailed. (trs) (Entered: 02/18/2004)
02/19/2004	16	SUPPLEMENT RESPONSE MOTION by defendant ERA Franchise to Remand , or to Stay referring to: [3-1] motion to Remand by plaintiff, [3-2] motion to Stay by plaintiff (trs) (Entered: 02/19/2004)
02/19/2004	17	MEMORANDUM by defendant ERA Franchise in support of [16-1] supplemental amended motion to Remand by defendant, [16-2] supplemental amended motion to Stay by defendant (trs) (Entered: 02/19/2004)
02/23/2004	18	REBUTTAL MEMORANDUM by plaintiff Vennit B. Mathis II in support of [3-1] motion to Remand by plaintiff (jkm) (Entered: 02/23/2004)
02/23/2004	19	RESPONSE by plaintiff Vennit B. Mathis II to [9-1] motion to Transfer Venue/Case by defendant (jkm) (Entered: 02/23/2004)
02/24/2004	20	SUPPLEMENTAL MOTION by defendant H. Stuart Irby, defendant Real Estate Pro. to Extend Time referring to: [13-1] motion to Extend Time by defendant (trs) (Entered: 02/24/2004)
02/24/2004	21	ORDER granting [20-1] supplemental amended motion to Extend Time, granting [13-1] motion to Extend Time on or before 2/23/04. (signed by Judge William H. Barbour Jr.); copies mailed. (trs) (Entered: 02/24/2004)
02/25/2004	22	ORDER granting [16-1] supplemental amended motion to Remand, granting [16-2] supplemental amended motion to Stay, Response to Motion reset to 3/1/04 for [3-1] motion to Remand (signed by Judge William H. Barbour Jr.); copies mailed. (trs) (Entered: 02/26/2004)
03/02/2004	23	RESPONSE by defendant H. Stuart Irby, defendant Real Estate Pro. in opposition to [3-1] motion to Remand by plaintiff (cwl) (Entered: 03/02/2004)
03/02/2004	24	MOTION by defendant H. Stuart Irby, defendant Real Estate Pro. for Join in ERA's motion to transfer venue, etc. (cwl) (Entered: 03/02/2004)
03/02/2004	25	Joinder by defendant H. Stuart Irby, defendant Real Estate Pro. to [2-1] removal notice by defendant (cwl) (Entered: 03/02/2004)
03/02/2004	26	Joinder by defendant H. Stuart Irby, defendant Real Estate Pro. to ERA's Motion to supplement response to motion to remand, etc. (cwl) (Entered: 03/02/2004)
03/02/2004	27	MEMORANDUM by defendant H. Stuart Irby, defendant Real Estate Pro. in support of [2-1] removal notice and in opposition to plaintiff's motion to remand and stay by defendant (cwl) Modified on 03/09/2004 (Entered: 03/02/2004)
03/02/2004	28	MEMORANDUM by defendant H. Stuart Irby in support of [26-1] joinder by defendants (cwl) Modified on 03/09/2004 (Entered: 03/03/2004)

03/04/2004	29	AMENDED NOTICE of filing state court record by defendant ERA Franchise (jkm) (Entered: 03/04/2004)
03/09/2004	30	MEMORANDUM by plaintiff Vennit B. Mathis II in opposition to [27-1] support memorandum by defendants (cwl) (Entered: 03/09/2004)
03/17/2004	31	MOTION by defendant ERA Franchise Supplement the Record (jkm) (Entered: 03/19/2004)
04/26/2004	32	MEMORANDUM OPINION and ORDER granting [3-1] motion to Remand dismissing [31-1] motion Supplement the Record, dismissing [24-1] motion for Join, dismissing [9-1] motion to Transfer Venue/Case, dismissing [9-2] motion Refer to the US Bankruptcy Court (signed by Judge William H. Barbour Jr.) ;copies mailed. ob: 2004 page: 1100-1110 (lbt) (Entered: 04/27/2004)
04/26/2004		Case closed (lbt) (Entered: 04/27/2004)
04/30/2004		certified copy of Opinion and Order remanding case to Chancery Court of Covington County, MS (lbt) (Entered: 04/30/2004)
05/03/2004	33	ORDER, Substituting Attorneys Sharpley, Allen, Hall Sclafani with Brunni Firm and terminated attorneys Pepper Crutcher for ERA Franchise, attorney Deborah L. McNeely for ERA Franchise Added Christopher A. Shapley, Steven J. Allen and Withdraw attorneys (signed by Magistrate Judge Alfred G. Nicols); copies mailed. (sec) (Entered: 05/04/2004)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

VINCENT B. MATHIS, II — **PLAINTIFF**

V. — **CIVIL ACTION NO. 3:03cv1358BN**

ERA FRANCHISE SYSTEMS, INC., JACKIE R. HILL, PAMELA HILL, H. STUART IRBY, MARK WARREN, REAL ESTATE PROFESSIONALS OF CENTRAL MISSISSIPPI, LLC and REAL ESTATE PROFESSIONALS OF THE PINE BELT — **DEFENDANTS**

ORDER ALLOWING SUBSTITUTION OF COUNSEL

This matter is before the Court on the unopposed, ore tenus motion of ERA Franchise Systems, Inc. for an order allowing the withdrawal of Balch & Bingham, LLP, and the substitution of Brunini, Grantham, Grower & Hewes, PLLC, as its counsel in this civil action. Counsel for ERA Franchise Systems, Inc. and the plaintiff have advised the Court that the plaintiff does not oppose this request. The Court, having considered the matter and being fully advised in the premises, concludes that good cause exists for granting the relief sought by ERA Franchise Systems, Inc., and that, consequently, ERA Franchise Systems, Inc.'s motion should be granted. Accordingly, it is

ORDERED that the withdrawal of Balch & Bingham, LLP, and the substitution of Brunini, Grantham, Grower & Hewes, PLLC, as counsel for ERA Franchise Systems, Inc. be, and hereby is, APPROVED. It is

FURTHER ORDERED that future service of pleadings, orders, opinions, and other Court papers on ERA Franchise Systems, Inc. shall be directed to the following address:

Christopher A. Shapley
Steven J. Allen
John C. Hall, II
Joseph A. Sclafani
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Jackson, Mississippi 39205-0119

This the 3RD day of May, 2004.

UNITED STATES MAGISTRATE JUDGE

Order presented by:

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John C. Hall, II [redacted]
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Thirteenth Circuit Court
of the
State of Mississippi

Robert G. Evans, Judge

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Telephone: (601) 782-4413
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February 12, 2008

Honorable Joseph Sclafani
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Honorable Eddie Abdeen
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28 Market Court Suite 160-209
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RE: Mathis v. ERA, et al.
Cause No. 2006-150C
Circuit Court of Covington County

Gentlemen:

After having reviewed the Motion for Clarification and Joinder thereto, I agree that my January 23 letter should have included all "potential derivative claims against all defendants."

Also, it seems that the Rule 54(b) procedure recommended by Mr. Abdeen seems to be a good way to handle this and move the case forward. Therefore, Mr. Abdeen should prepare the appropriate order and judgment and furnish it to me for signature. If this clarifies the issues for you, I see no need for a status conference. Of course, I will be more than happy to visit with you and discuss this matter further in person if you so desire.

With kindest regards, I remain

Very truly yours,

Robert G. Evans, Judge

RGE/jmh

cc: Honorable Melissa Duckworth, Covington County Circuit Clerk