IN THE SUPREME COURT OF MISSISSIPPI

VENNIT B. MATHIS, II	APPELLANT
VS.	CASE NO. 2008-CA-00620
ERA FRANCHISE SYSTEMS, INC., ET AL.	APPELLEES

REPLY BRIEF OF APPELLANT VENNIT B. MATHIS, II

ORAL ARGUMENT REQUESTED

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III. INTRODUCTION

The briefs of ERA and the other Appellees give little deference to the actual underlying facts, the procedural history of this action and the Closely-Held Corporation Direct Action Doctrine addressed in *Derouen v. Murray*, 604 So. 2d 1086, 1091 n. 2 (Miss. 1992) that Mathis seeks to have this Court re-affirm and/or formally adopt as the law of Mississippi. While ERA and the other Appellees are represented by able counsel, their approach has been to artfully spin the facts in an attempt to portray Mathis as the party without a just cause; to ignore crucial facts that plainly demonstrate wrongdoing by ERA and the other Appellees; and to argue the Closely-Held Corporation Direct Action Doctrine addressed in *Derouen, supra,* was mere dicta, thus implying that the appellate relief sought by Mathis in relation thereto amounts to nothing more than a request for this Court to wrongfully "legislate from the bench". Mathis limits his reply to addressing these specific points but incorporates herein ALL aspects of his initial brief.

IV. REPLY TO INITIAL ARGUMENTS OF ERA AND OTHER APPELLEES

ERA attempts to have this Court draw the conclusion that Mathis reached an agreement to sell his equity interest in REP to Chip Hill. While only ERA knows why it has done so, it is apparently for the purpose of creating an underlying theme that since Mathis "sold" his equity interest in REP, the cause of Mathis is unjust and/or Mathis should not otherwise be allowed to complain of the wrongful acts of ERA and the other Appellees in relation to the breaches of duty to REP and Mathis set forth in Mathis's Complaint. ERA's Brief at pp. 6-7 and n. 7 ("Mathis does not appear to contest that he agreed to sell to Hill his equity interest in REP.").

Even prior to ERA's meritless federal court interpleader action and the motion to stay this action due to the pendency of such federal action (which, as set forth in the procedural history portion of Mathis's Brief, was the first of many successful efforts of ERA and the other Appellees

to delay this matter), ERA has known that Mathis owns a 50% equity interest in REP and never reached an agreement with Chip Hill to sell such interest (although Mathis and Chip Hill negotiated with one another over such a sale). Mathis's Complaint at paras. 15-16 (R.19-21); and Affidavit of Chip Hill, attached as an exhibit to Mathis's Response to Motion For Stay of Proceedings and Alternative to Stay Discovery (R.162-163; R.154-163).

ERA also asserts in its version of the Statement of "Facts" that, "[w]hile Mathis makes no specific allegations of wrongdoing against ERA, Mathis **speculates** that such conduct [the wrongful conduct alleged in Mathis's complaint, including the transfer of all of REP's assets to REP-Central and REP-Pine Belt] was undertaken by all Defendants in order to facilitate a default by REP under the terms of the Franchise Agreement 'so that such agreement would be terminated and new franchise agreements could be entered into with ERA by REP-Central and/or REP-Pine Belt.'". ERA's Brief at pp. 7-8 (emphasis added).

Mathis's allegation in the complaint regarding this issue is not "speculation" and, in fact, is unquestionably TRUE. Mathis's Complaint at para. 15 and paras. 13-14 and 16 (R.19-20; and R. 18-21). As set forth in footnote 3 of Mathis's initial brief, counsel for Irby, Mr. Dennis Horn, Esq., informed the undersigned counsel that, during the pendency of this action, ERA granted REP-Central (which conducts business in the Metro Jackson Area) a new ERA franchise agreement. REP-Central's website corroborates and establishes this fact (at least as of the time this reply is being submitted to the Court). See www.jacksonera.com, including the corporate overview portion of such site, where Warren/REP-Central states, among other things, 1: that REP is one of REP-Central's predecessors and 2. that REP-Central "is recognized as the #1 ERA is Mississippi and a top 100 ERA company nationally."

ERA has COMPLETELY ignored this assertion by Mathis and, under the circumstances,

ERA's failure to address it (despite taking exception to virtually every other aspect of Mathis's brief), at a minimum, constitutes a tacit admission that REP-Central has, in fact, been granted an ERA franchise (thereby establishing the truth of Mathis's allegation).

In response to the waiver argument of Mathis under *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006), ERA attempts to make this Court believe its "lack of standing defense" was directed towards the issue of whether Mathis could assert the derivative claims of REP as a direct action under the Closely-Held Corporation Direct Action Doctrine and that ERA "timely and appropriately" raised this issue. ERA's Brief at p. 10.

What ERA has conveniently ignored is that, in October of 2003 (four years prior to ERA using "standing" as a method to attack the Closely-Held Corporation Direct Action Doctrine claims of Mathis), ERA represented to the trial court that its "lack of standing" defense related to the father of Mathis, Vennit B. Mathis, Sr. ("Mathis, Sr."), and an entity owned by Mathis, Sr., Mid-South Services, Inc.("Mid-South"). (R.279-281 – ERA's Motion for Enforcement of Subpeonas Served Upon Vennit Mathis, Sr. And Mid-South Services, Inc. at para. 2). Specifically, ERA took the position that since the money Mathis invested in REP "belonged" to Mathis, Sr. or Mid-South, Mathis had no standing to prosecute the asserted claims and/or Mathis, Sr. or Mid-South was the "real party in interest". *Id.* Simply put, ERA is attempting to play fast and loose with the Court and, as part of an ever changing characterization of its "standing" defense, is fashioning arguments to fit the exigencies of the circumstances.

In an effort to avoid the application of *MS Credit Center, Inc., supra,* waiver, ERA also attempts to create the impression that it had no choice but to "actively participate in the litigation process" because the trial court denied its request to stay this action as a result of its meritless federal interpleader action or, alternatively, to stay discovery via a September 29, 2003 order (which also

set this action for trial commencing on December 1, 2003, with discovery and motion deadlines set prior thereto). ERA's Brief at p. 2. Then, ERA states that between September 5, 2003 and **November 14, 2003**, ERA propounded written discovery to Mathis and Mathis, Sr. and deposed both individuals (attempting to create the impression it was "forced" to do so because of scheduling deadlines set forth in the trial court's September 29, 2003 order denying ERA's request to stay this action or, alternatively, to stay discovery). *Id.* (emphasis added). ERA also states a "primary" purpose of such discovery was for ERA to evaluate the issues of whether the Chancery Court had subject matter jurisdiction and whether the claims of Mathis were "individual" or "derivative" in nature. *Id.*

Once again, ERA has failed to point out that on October 24, 2003, ERA filed a Motion for a 2004 Trial Setting and for New Pre-Trial Deadlines ("ERA 2004 Trial Setting Motion") that was unopposed by Mathis and the other parties and counsel for all parties executed an agreed order that provided for, among other things, a May 10, 2004 trial date and a March 26, 2004 discovery cut-off date. (R.272-276). The trial court entered the agreed order on **November 10, 2003.** (R.371-376).

The ERA 2004 Trial Setting Motion also reflects that ERA's "lack of standing" defense was not directed at the issue of whether the Closely-Held Corporation Direct Action Doctrine claims of Mathis were viable but, rather, were directed to the issue as to whether Mathis, Sr. and/or Mid-South were the real parties in interest. (R.272-273)(for purposes of clarity, ERA never asserted a "real party in interest" defense but, rather, took the position that its "lack of standing" defense was directed at this issue). (R.41-43;R.279-281).

Despite ERA's assertion to the contrary, ERA's discovery to Mathis was not "primarily" directed to the issues of whether the Chancery Court had subject matter jurisdiction or whether the claims of Mathis were "individual" or "derivative" in nature. Rather, ERA's discovery to Mathis,

Sr. and Mathis was broad based and covered every aspect of the litigation, including ERA's counter-claim against Mathis under his personal guarantee. (R.285-290;R.304-318).

The most glaring problem with ERA's attempt to justify its "active participation" in the litigation process, including engaging in discovery, with a view towards avoiding the application of *MS Credit Center, Inc., supra,* waiver is that the complaint of Mathis **expressly states** that Mathis seeks to have the trial court declare "[t]hat any derivative claims otherwise belonging to REP may be brought by Mathis as a direct action, that Mathis is entitled to an individual recovery on any such claims, and that, as to the derivative claims asserted in this action, such claims are exempt from any restrictions and defenses applicable to derivative claims (notice and demand, etc.) ...." (R.22). Simply put, ERA didn't need discovery to determine whether Mathis was seeking to obtain relief under the Closely-Held Corporation Direct Action Doctrine and ERA's suggestion to the contrary is humorous.

As demonstrated herein, ERA's characterization of its "lack of standing" defense has changed over time. The first characterization of such defense was directed at the issue of whether Mathis, Sr. or Mid-South was the real party in interest. The second characterization of its "lack of standing" defense was directed towards whether Mathis had "standing" to pursue his Closely-Held Corporation Direct Action Doctrine claims. (R.779-781). However, as addressed in the next section of Mathis's Reply Brief dealing with *MS Credit Center, Inc., supra,* waiver, ERA's most recent use of its "lack of standing" defense (directed at Mathis's use of the Closely-Held Corporation Direct Action Doctrine) is predicated upon the assertion that Mathis failed to comply with the mandatory, pre-suit demand requirement of Miss. Code Ann. § 79-29-1102 prior to commencing the instant action and that no statute or other provision of Mississippi law will allow Mathis to pursue the derivative claims of REP in a direct action. (R.779-780). This Court has held both such asserted

bases of Mathis's "lack of standing" are capable of being waived and do not, as ERA and the other Appellees contend, implicate jurisdictional issues that can be raised at any time. As a result, ERA and the other Appellees have, under *MS Credit Center, Inc., supra*, waived their right to assert Mathis's failure to comply with the pre-suit demand requirements or otherwise proceed to obtain relief for the derivative claims of REP in a direct action under the Closely-Held Corporation Direct Action Doctrine.

V. REPLY TO ARGUMENTS OF ERA AND OTHER APPELLEES REGARDING *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006) WAIVER IN RELATION TO "STANDING" OF MATHIS TO PROCEED UNDER THE CLOSELY-HELD CORPORATION DIRECT ACTION DOCTRINE

As pointed out in the initial brief of Mathis, in *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006), this Court held, in the context of whether the defendant waived the right to compel arbitration, as follows:

> We do hold however that-absent extreme and unusual circumstances-an eight month unjustified delay in the assertion and pursuit of **any affirmative defense or other right** which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law.

MS Credit Center, Inc. v. Horton, 926 So. 2d 167, 181 (Miss. 2006). The *Horton* Court further advised that to pursue an affirmative defense or other such rights meant to plead it, bring it to the court's attention by motion, and request a hearing. Since *Horton, supra*, this Court has applied this waiver principle in the context of defenses based upon insufficiency of process, insufficiency of service of process and immunity under the Mississippi Tort Claims Act ("MTCA"), *Miss. Code Ann. §* 11-46-1, et seq. *Estate of Grimes v. Warrington*, 982 So. 2d 365, 370-371 (Miss. 2008); *East Mississippi State Hospital v. Adams*, 947 So. 2d 887, 891 (Miss. 2007)(insufficiency of process and insufficiency of service of process).

In an effort to avoid this Court concluding *MS Credit Center, Inc., supra,* waiver has occurred in this action, ERA and the other Appellees have made a variety of arguments in an effort to justify over a four year delay in seeking dismissal for the failure of Mathis to make a pre-suit demand, etc. and to otherwise attempt to convince this Court that there has not been a waiver in relation to their most recent characterization of their "lack of standing" defense. As to the over four year delay, the procedural history set out in the initial brief of Mathis, coupled with Mathis's correction of the Appellees "spin" on the issue of whether they have engaged in discovery directed toward Mathis (as to all issues in this case, including ERA's counter-claim against Mathis), etc. in the preceding section of this reply, summarily disposes of the issue as to whether ERA and the other Appellees "timely pursued" their defense and "actively participated in the litigation process", within the meaning of *MS Credit Center, Inc., supra.*

The remaining assertions of ERA and the other Appellees in relation to this issue likewise have no merit and their approach has been to attempt to confuse the issues and make arguments that ignore the operative facts and applicable law.

Assertion No. 1: ERA asserts that Mathis has raised *MS Credit Center, Inc., supra*, waiver for the first time on appeal and therefore the Court should not consider this issue. ERA's Brief at pp. 12-14.

Response: There can be no legitimate dispute that a party is procedurally barred from raising an issue for the first time on appeal. *Canadian National/Illinois Central Railroad Co. v. Hall*, 953 So. 2d 1084, 1098 (Miss. 2007); *Chantey Music Publishing, Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1060 (Miss. 2005)(same; "a trial judge cannot be put in error on a matter not presented to him."). However, ERA's argument in this regard simply has no merit. Specifically, Mathis, through his counsel, argued, in pertinent part, as follows:

One point I would add, though, is this suit was filed on May 8, 2003. And I would hand the Court Mississippi Credit Center, Inc. v. Horton [MS Credit Center v. Horton, 926 So. 2d 167 (Miss. 2006)] and suggest to the Court, based on paragraph 41 ... that 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 [this action] goes to high street [referring to the instant appeal].

(R.Vol. 8 – October 12, 2007 Hearing Transcript at p. 12).

Thereafter, On March 14, 2008, the trial court entered its Partial Judgment of Dismissal and Certification Pursuant to M.R.C.P. 54(b). (R.956-959). The trial court, having considered ERA's Motion and Memorandum, the joinders therein filed by the other Appellees, Mathis's response in opposition **and ALL of the arguments of the parties presented at the October 12, 2007 hearing**, found, among other things, that Mathis "lacked standing to pursue any claims against any Defendant [Appellee]" that were "in the nature of derivative claims belonging to [REP]" and that all of the Plaintiff's claims against ERA were derivative. (R.956) (emphasis added). ERA apparently would have the Court conclude that since Mathis didn't use the word "waiver" in making his argument relative to *MS Credit Center, Inc., supra*, that the Honorable Robert Evans, who presided over the hearing, did not appreciate and/or was not aware of Mathis's waiver argument (and therefore did not consider the argument in making his ruling). Such an apparent position demonstrates a total lack of familiarity with Judge Evans and it is beyond any legitimate dispute (and/or this Court can take judicial notice) that Judge Evans understood Mathis's waiver argument and decided to reject it so that, among other things, this Court could resolve the issue of whether the Closely-Held Corporation Direct Action Doctrine is viable under Mississippi law. EVERYBODY at the October 12, 2007 hearing on this matter knew this case was headed to this Court for appellate review and, despite ERA opposing Rule 54(b) treatment of the ruling of the trial court, Judge Evans granted Mathis's request for Rule 54(b) certification.

Assertion No. 2: ERA and the other Appellees take the position that "standing" is a jurisdictional issue which may be raised by any party or the Court at any time and therefore *MS Credit Center, Inc., supra*, waiver has no application to this action. ERA's Brief at pp. 14-15, citing *Kirk v. Pope*, 973 So. 2d 981, 989 (Miss. 2007).

Response: As noted herein, ERA's current use of its "lack of standing" defense is predicated upon the assertion that Mathis failed to comply with the mandatory, pre-suit demand requirement of Miss. Code Ann. § 79-29-1102 prior to commencing the instant action and that no statute or other provision of Mississippi law will allow Mathis to pursue the derivative claims of REP in a direct action. (R.779-780). This Court has held both such asserted bases of Mathis's "lack of standing" are capable of being waived and do not, as ERA and the other Appellees contend, implicate jurisdictional issues that can be raised at any time. *Derouen v. Murray*, 604 So. 2d 1086, 1091 (Miss. 1992)(finding derivative claim filed in direct action tried by implied consent and concluding, "[t]o be sure, our law impresses upon derivative actions certain pre-trial procedural requisites over and above the norm. Miss. Code Ann. § 79-4-7.40 (rev. 1989). **We take these waived as well.**")(emphasis added); *See Longanecker v. Diamondhead Country Club*, 760 So. 2d 764, 768-769 (Miss. 2000)(observing, "[t]he chancellor acknowledged that this Court has held that failure to object to procedural requisites [in relation to derivative claims/shareholder disputes] may constitute a waiver of those objections" citing Derouen v. Murray, 604 So. 2d 1086, 1091 (Miss. 1992)). Therefore, the reliance of ERA and the other Appellees on *Kirk*, supra (which did not involve a pre-suit demand issue, etc.), as well as the other authorities they cite for the proposition that "standing" is jurisdictional and can be raised at any time is misplaced. As a result, *MS Credit Center, Inc., supra*, is applicable to this action and, as demonstrated in the initial brief of Mathis, as well as this reply, ERA and the other Appellees have waived their right to seek dismissal of Mathis's Closely-

Held Corporation Direct Action Doctrine claims.

Assertion No. 3: ERA also takes the position that Mathis has failed to meet his burden of proof in establishing *MS Credit Center, Inc., supra*, waiver because ERA did not substantially and unreasonably delay filing its Motion to Dismiss and did not actively participate in the litigation process prior to filing its Motion to Dismiss. ERA's Brief at pp. 15-19.

Response: On the record before this Court, coupled with the points raised by Mathis in his initial brief and this reply in relation thereto (with cites to the record), ERA's assertions have no basis in fact and/or law and demonstrates ERA's complete lack of credibility on this issue.

VI. REPLY TO ARGUMENTS OF ERA AND OTHER APPELLEES REGARDING VIABILITY OF CLOSELY-HELD CORPORATION DIRECT ACTION DOCTRINE ADDRESSED IN *Derouen v. Murray*, 604 So. 2d 1086, 1091 n. 2 (Miss. 1992)

At least as early as 1989, this Court has made a distinction between closely-held corporations and other corporations (whether publicly traded or otherwise)[1]. *Fought v. Morris*, 543 So.2d 167, 169-170 (Miss. 1989). As this Court stated,

> Management typically operates in an informal manner, more akin to a partnership than a corporation. The traditional view that shareholders have no fiduciary duty to each other, and transactions constituting "freeze outs" or "squeeze outs" generally cannot be attacked as a breach of duty of loyalty or good faith to each other, is outmoded.

Fought, 543 So.2d at 169-170. Citing *Donahue v. Rodd Electrotype*, 367 Mass. 578, 328 N.E. 2d 505 (1975), this Court further stated,

> The Supreme Judicial Court of Massachusetts ... imposed a 'strict good faith standard' upon

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[1] While REP is a limited liability company, the courts that have considered the issue have uniformly concluded the fiduciary duties, etc. that exist in the context of a closely-held company likewise exist in a closely-held limited liability company. *Maillet v. Frontpoint Partners, L.L.C.*, 2003 WL 21355218 * 3-4 (S.D. N.Y., June 10, 2003); *Anderson v. Wilder,* 2003 WL 22768666 * 3-6 (Tenn. Ct. App., Nov. 21, 2003).

shareholders in a close corporation because of its resemblance to a partnership. The court stated that standards for the discharge of management and responsibilities of shareholders are substantially the same as standards applicable to partners, and are stricter than standards imposed on shareholders and directors of publicly held corporations.

Fought, 543 So.2d at 170. Because shareholders/equity owners in closely-held corporations have very direct obligations to one another (similar to the fiduciary and other duties owed among partners), many courts have allowed, where certain factors are met, a shareholder/equity owner of a closely-held corporation to bring a direct action on claims that would otherwise be a derivative claim of the corporation. See the initial brief of Mathis under the heading "The Policy Considerations Behind the Principles of Corporate Governance Related to Closely-Held Corporations." Acknowledging the distinctions that exist in the context of closely-held corporations, the *Derouen* Court observed and stated "[w]e take the view":

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

Derouen v. Murray, 604 So. 2d 1086, 1091 n. 2 (Miss. 1992)(quoting, American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* §7.01(d). The Derouen Court further stated the principal effect of this course [allowing a close corporation shareholder/equity owner to proceed under the Closely-Held Corporation Direct Action Doctrine] would be to exempt a plaintiff from having to comply with the procedural hoops of a derivative action (pre-suit demand, etc.). *Id.* However, since *Derouen, supra,* this Court has not addressed the Closely-Held Corporation Direct Action Doctrine and, as ERA and the other Appellees correctly note, this aspect of the

Derouen Court's opinion was dicta. *Derouen,*604 So. 2d at 1091 n. 2 ("The Court below did not exercise its discretion regarding these matters [the Closely-Held Corporation Direct Action Doctrine, etc.], as it did not consider the derivative claims at all.").

Through this action Mathis seeks to have the Court reaffirm its "view" of the Closely-Held Corporation Direct Action Doctrine and formally adopt such doctrine as have the many other states that have recognized the distinctions that exist in the context of closely-held corporations (as it relates to the duties among shareholders/equity owners, etc.). See Count I – Para. 20 a. of Mathis's Complaint - R. 22; *See e.g. Cooper v. Rucci,* 2008 WL 942710 *5-7 (W.D. Pa. April 7, 2008)*; Vissa v. Pagano*, 919 A.2d 488, 494 n. 9 (Conn. App. Ct. 2007)(collecting cases and citing *Derouen, supra*); *Marsh v. Billington Farms*, LLC, 2006 WL 2555911 *9-11 (R.I. Aug. 31, 2006)(collecting cases and citing *Derouen, supra*); *Redecker v. Litt*, 699 N.W.2d 684, 2005 WL 1224697 *5-6 (Iowa App. Ct. May 25, 2005); *Trieweiler v. Sears*, 689 N.W. 2d 807, 837-838 (Neb. 2004);*Mynatt v. Collis*, 57 P.3d 513, 529-530 (Kan. 2002).The facts of this case present a text book example of why Closely-Held Corporation Direct Action Doctrine should be formally adopted by the Court.

If the doctrine isn't adopted, Irby, as a co-owner of REP, would benefit from his own wrongful conduct and share in any recovery of damages by REP that flowed from Irby's breaches of duty to REP, including the transfer of REP's assets to REP-Central and REP-Pine Belt and the subsequent conduct of REP's real estate brokerage business through such entities. Should a result would be unjust.

The arguments advanced by ERA and the other Appellees simply ignore the very reason the Closely-Held Corporation Direct Action Doctrine is sound from a policy perspective and/or otherwise have no merit.

Assertion No. 1: ERA takes the position that the Closely-Held Corporation Direct Action

Doctrine discussed in *Derouen,supra*, was merely dicta and that since *Derouen, supra,* the Mississippi appellate courts have "rejected the doctrine and raffirmed the long-standing rule that there is no exception to the pre-suit demand requirement ...." ERA's Brief at p. 20-23.

Response: Mathis concedes the Derouen Court's discussion of the Closely-Held Corporation Direct Action Doctrine was dicta. However, there can be no legitimate dispute that ERA is simply wrong in its assertion that this Court has specifically "rejected" the doctrine on multiple occasions. The undersigned counsel has thoroughly researched Mississippi law on this point and this Court has NEVER "rejected" the doctrine since it was first discussed in *Derouen, supra.* While there have been instances where parties have filed derivative actions without making a pre-suit demand and ERA has cited those cases in its brief, none of those cases deal with a shareholder/equity owner in a closely-held corporation filing a direct action under the Closely-Held Corporation Direct Action Doctrine. There's no reason to argue about this point. This Court doesn't address theories not raised by a party before it and Mathis appears to be the first party to directly raise this issue with the Court.

Assertion No. 2: ERA asserts that even if the Court were to adopt the Closely-Held Corporation Direct Action Doctrine, the doctrine only applies to intracorporate disputes and, since ERA is not a shareholder, etc. in REP, Mathis could not seek to impose liability upon ERA under his claims for, among other things, knowingly joining in a breach of fiduciary duty, conspiracy and aiding and abetting Irby [the other equity owner of REP], who, among other things, owed a fiduciary and other duties to Mathis as discussed in *Fought v. Morris*, 543 So.2d 167, 169-170 (Miss. 1989). ERA's Brief at pp.23-27.

Response: ERA devotes several pages to its brief attempting to argue this point but does not cite to even ONE case that stands for this proposition. The reason for this is straightforward. As the Derouen Court observed, the principal effect of allowing a shareholder/equity owner to proceed

under the Closely-Held Corporation Direct Action Doctrine would be to exempt a plaintiff from having to comply with the procedural hoops of a derivative action (pre-suit demand, etc.).*Derouen,* 604 So. 2d at n. 2. In other words, the doctrine allows what would otherwise be a derivative claim to be prosecuted as a direct action and therefore impacts the manner the claims are prosecuted not the substantive claims that can be asserted.

Any other application of the doctrine would go against well established Mississippi law. Mathis seeks to impose liability upon ERA for, among other things, knowingly joining in a breach of Irby's fiduciary and other duties owed Mathis as discussed in *Fought, supra*, conspiring with Irby to breach such duties and/or aiding and abetting Irby in the breach of such duties. All of these theories are viable under Mississippi law.

As this Court has observed, " [a] person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is liable for the harm thereby caused." *Knox Glass Bottle Co. v. Underwood*, 89 So.2d 799, 820 (Miss. 1956); *See Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 498 (8th Cir. 1955)(third person who has colluded with fiduciary in committing breach of duty, and who obtained a benefit therefrom, is under duty of restitution to beneficiary); *See also, Goldin Assoc. L.L.C. v. Donaldson, Lufkin & Jenrette Securities Corp.*, 2003 WL 22218643 * 8 (S.D. N.Y. Sept. 25, 2003) (person knowingly participates in breach of fiduciary duty only when he or she provides substantial assistance to primary violator; substantial assistance includes one who "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables it to proceed.").

Mississippi law defines a civil conspiracy as a "combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Shaw v. Burchfield*, 481 So. 2d 247, 255 (Miss. 1985). Mathis's Complaint clearly contains such a claim against ERA and the

other Appellees.

While this Court has never explicitly recognized a common law aiding and abetting theory, the Southern District of Mississippi has made an *Erie* guess and concluded an aiding and abetting fraud claim would be viable under Mississippi law. *See Dale v. ALA Acquisitions, Inc.*, 203 F.Supp. 2d 694, 700-701 (S.D. Miss. 2002). Such a claim should also be viable in the context of aiding and abetting a breach of a fiduciary duty claim. However, since this Court has never explicitly recognized an aiding and abetting theory, this case presents a perfect opportunity to address the issue as it is a matter of general importance to the administration of justice in Mississippi and is a claim raised in Mathis's Complaint (and therefore the Court adopting or rejecting a common law aiding and abetting theory would not constitute a mere "advisory" opinion).

Assertion No. 3: ERA also appears to assert that allowing Mathis to proceed under the Closely-Held Corporation Direct Action Doctrine as a direct action and obtain an individual recovery would result in a misappropriation of a corporate asset and create a cause of action in favor of REP and Irby (the other equity owner of REP) against Mathis. ERA's Brief at pp.27-28.

Response: This assertion is asinine and totally misses the point behind the Closely-Held Corporation Direct Action Doctrine. It is inconceivable the ERA really believes that Irby can breach his fiduciary and other duties to Mathis and REP and then somehow benefit in any recovery for such breaches of duty. There simply is no basis in the law for such a position.

Assertion No. 4: ERA also argues that Mathis has failed to offer any evidence to demonstrate the predicates to the application of the Corporation Direct Action Doctrine. *Derouen*, 604 So. 2d at 1091 n. 2 ([allowing Mathis to proceed under the doctrine] will not (i)unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of the creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all

interested persons).

Response: See Count I – Para. 20 a. of Mathis's Complaint - R. 22. ERA apparently fails to recognize the posture in which this case is before the Court. The parties are here on a motion to dismiss and there has neither been a motion for summary judgment nor a trial which would require Mathis to have established the subject factors. However, if this Court formally adopts the doctrine, Mathis will have no problem in establishing, from an evidentiary standpoint and otherwise, all of the requirements for obtaining a recovery thereunder.

VII. REPLY TO ARGUMENTS OF ERA AND OTHER APPELLEES THAT MATHIS HAS NOT INCLUDED CLAIMS IN HIS COMPLAINT THAT ARE NOT IN THE NATURE OF DERIVATIVE CLAIMS OF REP

Mathis has addressed this issue in his initial brief and ERA's arguments in response thereto appear to fail to perceive the claims of Mathis against it that are not in the nature of derivative claims. Specifically, as pointed out in his initial brief, Irby and Hill induced Mathis to pledge a $100,000.00 certificate of deposit ("CD") as collateral for a loan based upon the agreement that Irby and Chip Hill would repay the loan and their representation that the loan proceeds would be used as working capital for and/or to pay the financial obligations of REP. (R.33). Further, while not specifically pled (as the heightened pleading standard of M.R.C.P. 9(b) does not apply to this claim) Mathis pledged the $100K CD and Irby and Chip Hill obtained the subject loan at or about the same time Irby and Chip Hill caused the assets of REP to be transferred to REP-Central and REP-Pine Belt. (Mathis has also testified to this fact, along with ERA's involvement therewith, when ERA and the other Appellees deposed him back in 2003 – in other words, Mathis has complied with his notice pleading requirement under M.R.C.P. 8 and all of the Appellees have elicited these specific facts through the deposition testimony of Mathis, as well as their written discovery).

Such facts, including Irby's failure to use the loan proceeds for working capital of REP and

subsequent default on the loan (resulting in Mathis's loss of the $100K CD) constitute a breach of Irby's fiduciary duty to Mathis, within the meaning of *Fought, supra*, and a direct personal injury to Mathis that is separate and distinct from any damage sustained by REP. By definition, such a personal injury IS NOT in the nature of a derivative claim. (i.e. this is not an injury to REP that has resulted in a diminution of the value of Mathis's equity investment in REP). Since, as addressed above, ERA knowingly joined in, conspired with and/or aided and abetted Irby in relation to this aspect Irby's breach of fiduciary duty to Mathis(Counts III and VII – R. 24-25 and 28 of Mathis's Complaint), Mathis has stated viable claims against ERA under such theories that are not derivative in nature. The same is true for the claim of Mathis against ERA under the personal guarantee Mathis executed in favor of ERA to be responsible for the debt of REP to ERA.

VIII. CONCLUSION

For the reasons set forth in the initial brief of Mathis, as well as this reply, Mathis has demonstrated that the Appellees have waived any right they have to assert Mathis's "lack of standing" as a defense in this action. Alternatively, Mathis should be allowed to proceed under *Derouen, supra*, as discussed herein. As a result, the Court erred by granting the Motion to Dismiss of ERA for "lack of standing" (to which the other Appellees filed a joinder). In any event, all of the claims of Mathis against ERA and the other Appelles (with the exception of Warren) are not "derivative" in nature and therefore Mathis should be allowed to proceed as to those claims.

Respectfully submitted this the 19th day of March, 2009.

VENNIT B. MATHIS, II

By:_____
One of His Attorneys

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CERTIFICATE OF SERVICE

I, Sam S. Thomas, do hereby certify that I have this day mailed via United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to:

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This the 19th day of March, 2009.

SAM S. THOMAS