

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01471

LOGGERS, L.L.C., ET AL.,

APPELLANTS

VERSUS

1 UP TECHNOLOGIES, L.L.C.

APPELLEE

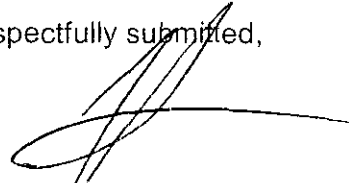
CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of record for the Appellants certifies that the following 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.

1. Honorable R. I. Prichard, III  
Pearl River County Circuit Court Judge  
15<sup>th</sup> Circuit Court District
2. Honorable Kim Thomas  
Special Master - Pearl River County Circuit Court  
15<sup>th</sup> Circuit Court District
3. Loggers, L.L.C., A Mississippi Limited Liability Company (Appellant)
4. Gary Troescher, Individually and Member in Loggers, L.L.C. (Appellant)
5. Dara Troescher, Member in Loggers, L.L.C.
6. 1 Up Technologies, L.L.C., A Louisianan Limited Liability Company  
(Appellee)
7. Christopher James Lewis - Member in 1 Up Technologies, L.L.C.
8. Eric W. Morritt - Member in 1 Up Technologies, L.L.C.
9. Nathan S. Farmer - Attorney for Appellants
10. F. Douglas Montague, III - Attorney for Appellee

11. Michael Moore - Attorney for Appellee

Respectfully submitted,



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Nathan S. Farmer, Esquire

MSB # [REDACTED]

Post Office Box 1608

Picayune, MS 39466

Telephone: (601) 749-8745

Facsimile: (601) 749-7045

E-Mail: [nathanfarmer1@bellsouth.net](mailto:nathanfarmer1@bellsouth.net)

Counsel for Appellants

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### STATEMENT OF ISSUE(S)

1. Loggers, L.L.C. and Gary Troescher preserved their right to affirmatively assert and, did in fact affirmatively assert that 1 Up Technologies, L.L.C., as an unregistered foreign limited liability company, was barred from filing suit in the Pearl River County Circuit Court pursuant to Miss. Code Ann. §79-29-1007(1).

### STATEMENT OF THE CASE

#### **A. NATURE OF THE CASE**

This case deals with Loggers, L.L.C., A Mississippi Limited Liability Company ("Loggers") and Gary Troescher ("Gary") defense of a suit filed in the Pearl River County Circuit by 1 Up Technologies, L.L.C., A Louisiana Limited Liability Company ("1 Up"). 1 Up Technologies entered into a contract Loggers and/or Gary for the provision of goods and services in the State of Mississippi, related to a computer gaming business owned by Loggers in Pearl River County, Mississippi. During the performance of the subject contract between the Parties, Loggers and Gary asserted that 1 Up had not fully performed under the contract and therefore, refused to pay 1 Up the amount of \$8,783.33, which 1 Up asserted was due and owing under the contract. Subsequently, 1 Up filed suit against Loggers and Gary to collect this amount on the legal theory of open account. Ultimately, Loggers and Gary asserted an affirmative defense pursuant to Rule 12(b)(6) M.R.C.P., that the Complaint filed by 1 Up failed to state a claim for which relief could be granted in favor of 1 Up as against both Loggers and Gary. Following the Parties consenting to a trial by Special Master, Loggers and Gary again asserted at the end of the Its case-in-chief , that 1 Up failed to state a claim

pursuant to Rule 12(b)(6) and Rule 41 M.R.C.P., in that, 1 Up, as an unregistered foreign limited liability company transacting business in the State of Mississippi, was barred by Miss. Code Ann. §79-29-1007(1) from maintaining suit against Loggers and Gary in the Pearl River County Circuit. The Special Master and Circuit Court Judge found that Loggers and Gary had waived the right to assert this affirmative defense to 1 Up's Complaint pursuant to Miss. Code Ann. §79-29-1007(1).

Loggers and Gary assert that they: (1) properly asserted Miss. Code Ann. §79-29-1007(1) as an affirmative defense pursuant to Rule 12(b)(6) M.R.C.P. and did not waive same; and, (2) the failure of 1 Up to register with the Office of the Secretary of State of Mississippi as a foreign limited liability company transacting business inside Mississippi, bars 1 Up, pursuant to Miss. Code Ann. §79-29-1007(1), from filling and maintaining suit against Loggers and Gary.

#### **B. COURSE OF PROCEEDINGS IN CIRCUIT COURT**

1 Up initiated this matter pursuant to the filing of its Complaint in the Pearl River County Circuit Court. (Clerk's Papers "CP" 1 & 4-6). 1 Up sought a judgment against both Loggers and Gary, jointly and severally for the principal amount of \$8,783.33, together with attorney's fees and costs in the amount of \$2,195.83. (CP 4-6).

Following the setting aside of a default judgment rendered against them, Loggers and Gary, on May 7, 2008, filed their Amended Combined Answer, Affirmative Defenses and Counter-Claim(s) of the Defendants. (CP 1-2, 8-21). Relevant to these proceedings, Loggers and Gary asserted in Paragraph 1. of their Amended Affirmative Defenses of Defendants as follows, to-wit:

"Defendants would assert the Plaintiff's Complaint fails to state a claim for which the Plaintiff may be granted relief as against the Defendants.

Defendant, Gary Troescher, also asserts the Complaint of Plaintiff fails to state any claim for relief against the Defendant, Troescher, individually, due to the fact that at all times that any contractual relationship existed solely between Defendant, Loggers, L.L.C., A Mississippi Limited Liability Company and Plaintiff."

(CP 9).

Following the expiration of the time for the ending of discovery and argument of motions, the Parties consented to the trial of this matter by way of Special Master. (CP 3). This matter was tried before the Special Master on February 10, 2009. (Trial Transcript "TT" 2-72). At the conclusion of 1 Up's case in chief, Loggers and Gary made a motion pursuant to Paragraph 1. of their Amended Affirmative Defenses; Rule 12(b)(6) M.R.C.P. and Rule 41 M.R.C.P. (TT 35-39). Specifically, Loggers and Gary asserted that 1 Up was barred from filing and/or maintaining suit in the State of Mississippi, because 1 Up failed to register as required by Miss. Code Ann. §79-29-1007(1). (TT 35-39). The Special Master took this motion of Loggers and Gary under advisement (TT 39). Following the presentation of the remainder of the case, the Special Master took the entire matter under advisement. (TT 72).

Subsequently, Special Master issued her Special Master Report on July 9, 2009. (CP 28-40). The Special Master found that the prohibitions of Miss. Code Ann. §79-29-1007(1) applied to 1 Up; however, the Special Master found that Loggers and Gary did not specifically plead the prohibitions of the subject Statute as an affirmative defense and therefore, Loggers and Gary waived same. (CP 36-37).

Thereafter, Loggers and Gary, on July 15, 2009, filed Defendants' Combined Objections to Special Master's Report and Motion Requesting Action Upon Report of Special Master. (CP 41-47). Loggers and Gary asserted their objections to the findings

of the Special Master that Loggers and Gary waived their right to assert the prohibitions of Miss. Code Ann. §79-29-1007(1) by not specifically pleading same. (CP 43-46).

1 Up filed Its Response to Loggers and Gary's Combined Objections on July 24, 2009. (CP 48-52).

Thereafter, the presiding Circuit Court Judge entered the Court's Final Judgment in this matter on August 5, 2009. (CP 53-55). With respect to the issue of waiver of Miss. Code Ann. §79-29-1007(1) as an affirmative defense by Loggers and Gary, the Court opined the scope of Rule 12(b)(6) could not be used as a means to raise the prohibition of Miss. Code Ann. §79-29-1007(1) generally; and, that such an affirmative defense had to be raised prior to trial. (CP 53-54). As to the findings of the Special Master, the Court adopted such findings and conclusions in all respects as the Final Judgment of the Court. (CP 54). Subsequently, Loggers and Gary timely appealed the Final Judgment of the Pearl River County Circuit Court on September 4, 2009, to the Mississippi Supreme Court. (CP 56-57). Loggers and Gary would note for the record that 1 Up has not filed any cross-appeal from the Final Judgment entered in this matter. (CP 3).

### **C. STATEMENT OF THE FACTS**

On or about the early part of April, 2007, 1 Up entered into an oral contract between Loggers and Gary for the provision of computer equipment and labor related to a computer gaming business owned by Loggers in Pearl River County, Mississippi. (TT 9). As reflected by Exhibit "4" admitted at the trial before the Special Master, the provision of these goods and services by 1 Up commenced on April 17, 2007, and continued on separate occasions until June 12, 2007. (List of Exhibits "LE" 6). During



the performance of the subject contract, a dispute arose between the Parties regarding the performance and/or the amounts due under the contract. (TT 52-57). Loggers and Gary asserted that 1 Up had not fully performed under the contract and therefore, refused to pay 1 Up the amount of \$8,783.33, which 1 Up asserted was due and owing under the contract. (TT 9-11; 52-57). The Special Master did indeed find that an open account existed between 1 Up, Loggers and Gary. (CP 38-39). Further, the performance of the Parties contract and/or open account occurred inside the State of Mississippi. (TT 31).

As a result of the dispute over the price and performance of the contract, 1 Up filed suit against Loggers and Gary to collect this amount on the legal theory of open account. (CP 4-6). Ultimately, Loggers and Gary asserted an affirmative defense pursuant to Rule 12(b)(6) M.R.C.P., that the Complaint filed by 1 Up failed to state a claim for which relief could be granted in favor of 1 Up as against both Loggers and Gary. (CP. 8-21). Specifically, Paragraph 1. of the Amended Affirmative Defenses of Loggers and Gary stated as follows, to-wit:

"Defendants would assert the Plaintiff's Complaint fails to state a claim for which the Plaintiff may be granted relief as against the Defendants. Defendant, Gary Troescher, also asserts the Complaint of Plaintiff fails to state any claim for relief against the Defendant, Troescher, individually, due to the fact that at all times that any contractual relationship existed solely between Defendant, Loggers, L.L.C., A Mississippi Limited Liability Company and Plaintiff."

(CP 9). This Rule 12(b)(6) defense was asserted not only as an affirmative Defense by Loggers and Gary, but also was part of a Rule 12(b)(6) motion made at the end of the case in chief of 1 Up, by Loggers and Gary pursuant to Rule 41 M.R.C.P. (TT 35-39). Moreover, as evidence by composite Exhibit "13" and the trial testimony by James

Lewis on behalf of 1 Up, it was clear that 1 Up, as a Louisiana Limited Liability Company, never registered at the inception of the contract sued upon by 1 Up; was not registered at the time suit was filed; and, was not registered at the time of trial before the Special Master. (TT 30-31; LE 20). Further, the Special Master in her Special Master Report that 1 Up was not registered in the State of Mississippi on the date of trial; and, that 1 Up was subject to the bar of Miss. Code Ann. §79-29-1007(1) could not maintain its suit in the State of Mississippi against Loggers and Gary. (CP 36-37). Loggers and Gary asserted pursuant to Rule 12(b)(6), that 1 Up has failed to state a claim as a matter of law for which relief could be granted in favor of 1 Up as against Loggers and Gary because 1 Up, as an unregistered foreign limited liability company, is subject to the prohibitions of Miss. Code Ann. §79-29-1007(1). (CP 9; TT 35-39). Further, the Circuit Court Judge also adopted all of the findings of the Special Master pursuant to its Final Judgment filed in this matter on August 5, 2009. (CP 53-55). Although finding that 1 Up is an unregistered foreign limited liability company that is subject to the bar of Miss. Code Ann. §79-29-1007(1), both the Special Master and the Circuit Court Judge found that:

1. The assertion of a Rule 12(b)(6) as an affirmative defenses did not encompass the assertion of Miss. Code Ann. §79-29-1007(1) which must be separately and specifically plead; and,
2. A Rule 12(b)(6) affirmative defense must be heard before trial or is otherwise deemed abandoned.

(CP 36-37, 53-54).

## SUMMARY OF ARGUMENT

1. **Loggers, L.L.C. and Gary Troescher preserved their right to affirmatively assert and, did in fact affirmatively assert that 1 Up Technologies, L.L.C., as an unregistered foreign limited liability company, was barred from filing suit in the Pearl River County Circuit Court pursuant to Miss. Code Ann. §79-29-1007(1).**

Loggers and Gary assert they have preserved their right the affirmative defense that 1 Up is barred to filing or maintaining this action pursuant to Miss. Code Ann. §79-29-1007(1) when Loggers and Gary plead that 1 Up's Complaint failed to state a claim for relief under Rule 12(b)(6) M.R.C.P. The very existence of a claim or party's right to maintain a claim in a civil action is a question of law. *Howard v. Estate of Harper ex rel. Harper*, 947 So.2d 854, P. 18-19 (Miss. 2006); *Transocean Enterprise, Inc. v. Ingalls Shipbuilders, Inc.*, No. 2009-CA-01823-SCT, P.9-10 (Miss. September 24, 2009).

Further, the assertion of the affirmative defense by Loggers and Gary that the Complaint of 1 Up failed to state a claim for which relief could be granted pursuant to Rule 12(b)(6) M.R.C.P. is sufficient to preserve the issue of whether 1 Up is barred by the provisions of Miss. Code Ann. §79-29-1007(1). *Howard*, 947 So.2d at P. 18-19; *Transocean Enterprise*, No. 2009-CA-01823-SCT, P.9-10. A Rule 12(b)(6) defense may be plead as an affirmative defense and may be brought on for hearing at trial pursuant to Rule 12(h)(2) M.R.C.P. Therefore, Loggers and Gary assert that they have preserved their right to interpose the bar of Miss. Code Ann. §79-29-1007(1) by asserting as an affirmative defense pursuant to Rule 12(b)(6) M.R.C.P. the Complaint of 1 Up fails to state a claim upon which relief could be granted. *Howard*, 947 So.2d at P. 18-19; *Transocean Enterprise*, No. 2009-CA-01823-SCT, P.9-10.

## ARGUMENT

### **A. STANDARD(S) OF REVIEW**

Since an affirmative defense or motion made pursuant to Rule 12(b)(6) M.R.C.P. raises an issue of law, the standard of review by this Court is de novo. *Howard*, 947 So.2d at P.5. The existence of a claim and/or the right to maintain an action is a question of law with the review by this Court being de novo. *Howard*, 947 So.2d at P. 5; *Transocean Enterprise.*, No. 2009-CA-01823-SCT, P. 6.

### **B. PRESERVATION OF RIGHT TO ASSERT THE BAR OF MISS. CODE ANN. §79-29-1007(1) PURSUANT TO RULE 12(B)(6) M.R.C.P.**

At the outset, Loggers and Gary accept and agree with the findings of the Special Master and the Circuit Court Judge that 1 Up, as an unregistered foreign limited liability company, could not maintain this action in the Pearl River County Circuit Court against Loggers and Gary pursuant to Miss. Code Ann. §79-29-1007(1). (CP 36, 54). However, Loggers and Gary do assert that both the Special Master and the Circuit Court Judge committed error in finding that Loggers and Gary waived the right to assert the prohibition of Miss. Code Ann. §79-29-1007(1); and, that a Rule 12(b)(6) defense had to be brought to resolution before trial or the same is deemed abandoned. (CP 36-37, 53-54).

Loggers and Gary would argue the assertion of an affirmative defense under Rule 12(b)(6) M.R.C.P. was sufficient to preserve the right to interpose the bar of Miss. Code Ann. §79-29-1007(1), against the Complaint of 1 Up, because the clear terms of Miss. Code Ann. §79-29-1007(1) is a statutory prohibition which prevents 1 Up from maintaining , "...any action, suit, or proceeding in any court of this state until it has

registered in this state." Miss. Code Ann. §79-29-1007(1). Loggers and Gary would assert the question of whether 1 Up is entitled to maintain the instant action as a claim for which relief could be granted in favor of 1 Up is a question of law which within the scope of Rule 12(b)(6) M.R.C.P. *Howard*, 947 So.2d at P. 5 & 18-19; *Transocean Enterprise.*, No. 2009-CA-01823-SCT, P. 6, 9-10. The very issue of whether 1 Up has "stated a claim" under Rule 12(b)(6) M.R.C.P. is sufficient to preserve for resolution that 1 Up, as a foreign limited liability company, has no right under Miss. Code Ann. §79-29-1007(1) to maintain an open account action in the Courts of Mississippi due to 1 Up's failure to register. *Howard*, 947 So.2d at P. 5 & 18-19; *Transocean Enterprise.*, No. 2009-CA-01823-SCT, P. 6, 9-10.

As an example, in the case of *Howard v. Estate of Harper ex rel. Harper*, the Mississippi Supreme Court found that Rule 12(b)(6) constituted a sufficient basis to determine whether wrongful death beneficiaries of a nursing home patient could maintain an action against the administrators of the nursing home for medical malpractice. 947 So.2d at P. 18-19. The Court found the scope of Rule 12(b)(6) was sufficient to raise the issue of whether such an action could be maintained by the wrongful death beneficiaries even though the nursing home administrators did not specifically raise the same as a separate defense. 947 So.2d at P. 18-19.

In this action, Loggers and Gary asserted Rule 12(b)(6) as an affirmative defense; brought this matter to be heard on at the conclusion of 1 Up's case in chief; and filed objections unto the findings of the Special Master regarding the right of 1 Up to maintain a claim for which relief could be granted in favor of 1 Up. (TT 34-39, CP 9, 41-47). The bar of Miss. Code Ann. §79-29-1007(1) directly affects the ability of 1 Up

to be entitled to relief on their Complaint filed in this matter. The interposition of a Rule 12(b)(6) affirmative defense is sufficient to preserve the issue that pursuant to Miss. Code Ann. §79-29-1007(1) 1 Up has failed state a claim for relief upon which relief may be granted. *Howard*, 947 So.2d at P. 5 & 18-19; *Transocean Enterprise.*, No. 2009-CA-01823-SCT, P. 6, 9-10. Therefore, Loggers and Gary have not waived this vital affirmative defense as found by the Special Master and the Circuit Court Judge. *Howard*, 947 So.2d at P. 5 & 18-19; *Transocean Enterprise.*, No. 2009-CA-01823-SCT, P. 6, 9-10.

With regard to the finding of the Circuit Court Judge that Loggers and Gary were required to bring the Rule 12(b)(6) affirmative defense on before trial, Loggers and Gary would assert that Rule 12(h)(2) M.R.C.P. allows a part to bring a Rule 12(b)(6) motion at trial. Under the text of Rule 12(h)(2), "A defense of failure to state a claim upon which relief can be granted, .... may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or **at the trial on the merits.** (emphasis added) Rule 12(h)(2) M.R.C.P. Therefore, Loggers and Gary had the right to bring their Rule 12(b)(6) motion on for hearing after the case in chief of 1 Up with respect to the failure of 1 Up to register as a foreign limited liability company and the effect of same under Miss. Code Ann. §79-29-1007(1). Rule 12(h)(2) M.R.C.P.

### CONCLUSION

Based upon the above, Loggers and Gary would request the Final Judgment of the Pearl River Circuit Court dated August 5, 2009, be reversed with this cause being remanded back to the Pearl River Circuit Court with instructions to sustain the Rule

12(b)(6) affirmative defense of Loggers and Gary and dismiss the Complaint of 1 Up  
with prejudice.

Respectfully submitted,

LOGGERS, L.L.C., A MISSISSIPPI LIMITED  
LIABILITY COMPANY AND GARY  
TROESCHER, INDIVIDUALLY  
APPELLANTS

BY: \_\_\_\_\_

Nathan S. Farmer, Esquire

MSB [REDACTED]

Post Office Box 1608

Picayune, MS 39466

Telephone: (601) 749-8745

Facsimile: (601) 749-7045

E-Mail: [nathanfarmer1@bellsouth.net](mailto:nathanfarmer1@bellsouth.net)

Counsel for Appellants

**CERTIFICATE OF SERVICE**

I, Nathan S. Farmer, Esquire, Counsel for the Appellants, Loggers, L.L.C. A Mississippi Limited Liability Company, and Gary Troesch, hereby certify that I have this day caused to be mailed via United States mail, postage prepaid, the original and three (3) copies plus the CD of the Brief of Appellants to:

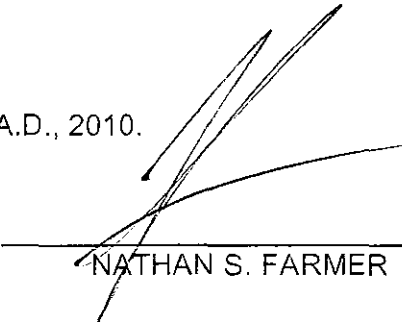
Hon. Kathy Gillis  
Supreme Court Clerk  
P.O. Box 249  
Jackson, MS 39205-0249

and, I have also mailed a true copy, postage prepaid of the Brief of Appellants to:

Honorable R.I. Prichard, III  
Circuit Court Judge - Fifteenth Circuit Court District  
P.O. Box 1075  
Picayune, MS 39466

Honorable F. Douglas Montague, III  
P.O. Drawer 1975  
Hattiesburg, MS 39403-1975

This, the 1<sup>st</sup> day of February, A.D., 2010.



NATHAN S. FARMER