

SUPERIOR COURT OF THE STATE OF GEORGIA

COUNTY OF COBB

EDGAR "BO" POUNDS, individually and on) Case No.
behalf of the estate of Mary Jean Pounds,)
JOSEPH THOMPSON, FRANKLIN SMITH,) MEMBER DERIVATIVE COMPLAINT
EAGLE EYE FORENSICS, LLC, DIANNE) FOR DAMAGES AND OTHER RELIEF
BRACKIN, and WILLIAM SHARP,)
Derivatively On Behalf of COBB ELECTRIC)
MEMBERSHIP CORPORATION.)
)
Plaintiffs,)
)
vs.)
)
DWIGHT BROWN, DON BARNETT,)
DAVID MCGINNIS, KAY ANDERSON, AL)
FORTNEY, JR., FRANK BOONE, SARAH)
BROWN, LARRY CHADWICK, HENRY)
BALKCOM III, COBB ENERGY)
MANAGEMENT CORPORATION and)
DOES 1-15, inclusive,)
)
Defendants,)
)
-and-)
)
COBB ELECTRIC MEMBERSHIP)
CORPORATION, a Georgia Corporation,)
)
Nominal Defendant.)
_____) DEMAND FOR JURY TRIAL

Plaintiffs, by their attorneys, submit this Member Derivative Complaint (the Complaint") against the Defendants named herein.

NATURE OF THE ACTION

1. This is a derivative action brought by members of Cobb Electric Membership Corporation ("Cobb EMC" or the "EMC"), on behalf of Cobb EMC against certain of its officers and directors seeking to remedy Defendants' violations of state law, including breaches of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets, unjust

enrichment, money had and received and violations of Georgia Electric Membership Corporation Act. These acts and omissions have occurred between 1994 and the present (the "Relevant Period") and that have caused substantial losses to Cobb EMC and other damages, including damage to its reputation and goodwill. Further, Plaintiffs seek damages and other relief on behalf of Cobb EMC against Cobb Energy and certain of its officers and directors.

2. On September 14, 2007 Plaintiffs delivered, by hand delivery and certified mail, the derivative demand letter required by O.C.G.A. § 46-3-272. It has been more than thirty (30) days since Plaintiffs demand letter was received by Defendants and no substantive response has been received by Plaintiffs.

JURISDICTION AND VENUE

3. This Court has jurisdiction over all causes of action asserted herein pursuant to the Georgia Electric Membership Corporation Act, O.C.G.A. §46-3-170 et seq. (the "EMC Act"), §46-3-272, and §46-3-304 as this derivative action is brought to remedy defendants' violations of law.

4. This Court has jurisdiction and venue over each Defendant Corporation named herein because each is a corporation that conducts business in and maintains their principal offices in Cobb County and their registered agents for service as follows:

Dwight T. Brown
1000 EMC Parkway
Marietta, Georgia 30060

Defendants Dwight Brown, Don Barnett, David McGinnis, Frank Boone and Sarah Brown reside in Cobb County, Georgia. Defendants Kay Anderson and Larry Chadwick reside in Fulton County, Georgia. Defendant Al Fortney Jr. resides in Cherokee County, Georgia and Defendant Henry Balkcom, III resides in Quitman County, Georgia. The non-Cobb County Defendants are

subject to the jurisdiction and venue of this Court pursuant to Ga. Const. Art. 6 § 2, ¶ 4 as they are joint obligors or tortfeasors with the Cobb County Defendants regarding the matters and violations of law which are under investigation in this Complaint.

THE PARTIES

5. Plaintiff Edgar “Bo” Pounds is a resident of Cobb County, Georgia and member of Cobb EMC during the Relevant Period. He is a plaintiff individually and on behalf of the estate of his wife, Mary Jean Pounds, deceased, who was a member of Cobb EMC during the Relevant Period.

6. Plaintiff Joseph “Butch” Thompson is a resident of Cobb County, Georgia, currently is a member of Cobb EMC and was a member of Cobb EMC during the Relevant Period.

7. Plaintiff Franklin Smith is a resident of Cobb County, Georgia, and is and was a member of Cobb EMC during the Relevant Period

8. Plaintiff Eagle Eye Forensics, LLC maintains its principal office in Cobb County, Georgia and is and was a member of Cobb EMC during the relevant period.

9. Plaintiff Dianne Brackin is a resident of Cobb County, Georgia and is and was a member of Cobb EMC during the Relevant Period.

10. Plaintiff William Sharp, III is a resident of Cobb County, Georgia and is and was a member of Cobb EMC during the Relevant Period

11. Nominal defendant Cobb EMC is an electric membership corporation organized and existing under the laws of the state of Georgia with its headquarters located at 1000 EMC Parkway, Marietta, Georgia 30061.

12. Defendant Cobb Energy Management Corporation is a services corporation organized and existing under the laws of the state of Georgia with its headquarters located at 1000 EMC Parkway NE, Marietta, Georgia 30064.

13. Defendant Dwight Brown is President and CEO of Cobb EMC and has held these positions since 1993. Defendant Brown is also the President, CEO and a Director of Cobb Energy, and has held these positions since 1997. Defendant Dwight Brown is a resident of Cobb County Georgia.

14. Defendant Don Barnett is a Cobb EMC director and has been a director for all or a portion of the Relevant Period. He is a resident of Cobb County Georgia.

15. Defendant David McGinnis is a director of Cobb EMC and has been a director for all or a portion of the Relevant Period. Defendant David McGinnis is also a director of Cobb Energy and is or was an owner of Cobb Energy during the Relevant Period. He is a resident of Cobb County, Georgia.

16. Defendant Kay Anderson is a director of Cobb EMC and has been a director for all or a portion of the Relevant Period. Defendant Anderson is a resident of Fulton County, Georgia.

17. Defendant Al Fortney, Jr. is a director of Cobb EMC and has been a director for all or a portion of the Relevant Period. He currently holds the office of Treasurer. Defendant Fortney is a resident of Cherokee County, Georgia.

18. Defendant Frank Boone is a director of Cobb EMC and has been a director for all or a portion of the Relevant Period. Defendant Boone is also a director of Cobb Energy and is or was an owner of Cobb Energy during the Relevant Period.

19. Defendant Sarah Brown is director of Cobb EMC and has been a director for all or a portion of the Relevant Period. She currently holds the office of Vice Chairman. Defendant Sarah Brown is a resident of Cobb County, Georgia.

20. Defendant Larry Chadwick is a director of Cobb EMC and has been a director for all or a portion of the Relevant Period. He is currently the Chairman of the board of directors. Defendant Chadwick is a resident of Fulton County, Georgia.

21. Defendant Henry Balkcom, III is a director of Cobb EMC and has been a director

for all or a portion of the Relevant Period. Defendant Balkcom is a resident of Quitman County, Georgia.

22. The defendants identified in ¶¶ 14-21 are referred to herein as the "Director Defendants."

23. The true names and capacities of Defendants sued herein under O.C.G.A. § 9-11-10 as Does 1 through 15, inclusive, are presently not known to plaintiffs because of the failure and refusal of the Defendants to provide Plaintiffs EMC records in repose to Plaintiffs' proper and timely demand under O.C.G.A. § 46-3-271. These Defendants are therefore sued by such fictitious names. Plaintiffs will amend this Complaint and include these Doe Defendants' true names and capacities when they are ascertained. Each of the fictitiously named Defendants is responsible in some manner for the violations alleged herein and/or for the injuries suffered by the EMC as a result of Defendants' unlawful conduct.

24. Plaintiffs will adequately and fairly represent the interests of the EMC in enforcing and prosecuting its rights.

FACTUAL BACKGROUND

25. Cobb EMC is an income tax exempt electric distribution cooperative headquartered in Marietta, Georgia serving 190,000 consumers in the Georgia counties of Cobb, Cherokee, Bartow, Fulton, Paulding, Randolph, Clay, Quitman and Calhoun. The EMC's principal customers are residential and commercial members of the cooperative. Formed in 1938, Cobb EMC started as an electric utility with 489 members and 14 commercial accounts. With approximately 200,000 members, Cobb EMC ranks among the largest EMCs in the nation. In 2006, Cobb EMC sold over 3.9 billion kilowatt hours of electricity.

26. Cobb EMC's mission is to provide its member/consumers with the best service *at the lowest possible price*. It has no "shareholders." Instead, as a non-profit cooperative, Cobb EMC is a member-owned organization. Each consumer who receives electric service from Cobb

EMC is a member. Cobb EMC governed by a board of ten directors, who are supposed to be elected from and by the membership at meetings held annually.

27. Pursuant to the Cobb EMC Articles of Incorporation, Section II (May 20, 1937) the EMC was formed to engage in rural electrification by any one or more of the following methods:

- (1) furnishing of electric energy to persons in rural areas who are not receiving electric services from any corporation subject to the jurisdiction of the Georgia Public Services Commission, or from any municipal corporation;
- (2) assisting in wiring of the premises of its members or in the installation therein, or the acquisition or supplying, of electrical or plumbing equipment; and
- (3) furnishing of electric energy, wiring facilities, electrical or plumbing equipment or services to any member corporation organized under the Electric Membership Corporation Act.

28. Cobb EMC, as an electric membership corporation, is statutorily governed by the Georgia Electric Membership Corporation Act, O.C.G.A. § 46-3-170 et seq. The statutory authorization for Cobb EMC, O.C.G.A. §46-3-200 strictly limits the non-profit purposes for which an EMC may serve to the following:

An electric membership corporation may serve any one or more of the following purposes:

- (1) To furnish electrical energy and services;
- (2) To assist its members in the efficient and economical use of energy;
- (3) To engage in research and to promote and develop energy conservation and sources and methods of conserving, producing, converting, and developing energy; and
- (4) To engage in any lawful act or activity necessary or convenient to effect the foregoing purposes.

Additionally, O.C.G.A. §46-3-340(a) expressly provides that “Each electric membership corporation shall be operated **without profit to its members.**” (emphasis added).

29. As a result of its non-profit status and Internal Revenue Code § 501(c)(12), Cobb EMC is not subject to standard taxation. Consequently, and also pursuant to the cited limitations

above of O.C.G.A. §46-3-200 and §46-3-340 an EMC may not, directly or indirectly, operate as for-profit company.

30. In an attempt to circumvent the strict limitations that the EMC operate solely as a non-profit, Defendant Dwight Brown and at least Defendants McGinnis and Boone caused the formation of Cobb Energy Management Corporation (hereinafter "Cobb Energy" or "CEMC"). The remaining then in office Defendant board members,¹ some of whom may be John Doe Defendants herein, by vote, acquiescence or otherwise caused the formation of Cobb Energy and/or by vote, acquiescence or otherwise caused the continuation of this unlawful transaction. Defendant Dwight Brown admits that Cobb Energy is an "affiliated" entity of Cobb EMC that "provides diversified, energy-related and non-energy related products and services."² Defendant Dwight Brown further admits that the creation of Cobb Energy was "his brainchild" as stated at the Cobb EMC 2007 annual meeting. Cobb Energy was formed on or about September 3, 1997.

31. At approximately the same time, Defendant Dwight Brown and the then in office Defendant board members, some of whom may be John Doe Defendants herein, caused the EMC, by vote, acquiescence or otherwise, to transfer all of its employees, the majority of its business activities and substantially all of its revenue (totaling hundreds of millions of dollars as reflected in part by the EMC's 2006 annual report) to Cobb Energy, and since such time have caused by vote, acquiescence or otherwise the continuation of this unlawful transfer. Indeed, Defendant Brown admits these transactions and transfers. "Cobb Energy has an operating agreement with Cobb EMC to provide labor for most of Cobb EMC's functions." *Id.* at pp. 2-3.

¹ Due to the failure of the Defendants to provide corporate records responsive to Plaintiffs timely and proper request for documents pursuant to O.C.G.A. §46-3-271, it is not possible for Plaintiffs to identify the specific board members causing this transaction.

² See, *Dwight T. Brown's Memorandum of Law in Support of Motion to Dismiss*, filed in Maddox et al. v. Cobb Electric Membership Corp. et al., Civil Action File No. 07-1-7977-48, Superior Court of Cobb County, Georgia (October 11, 2007).

Furthermore, the 2006 Cobb EMC Annual Report provides the following details in final footnote 19 for just two of the forty years:

Cobb EMC employees became CEMC employees to furnish all services for Cobb [EMC] including marketing, meter reading and meter maintenance services. The charges for these services were approximately **58 million in 2006 and 48 million in 2005.**

(emphasis added). Astonishingly, this contract and these transfers are to continue for a period of forty years. These transaction were and are illegal under O.C.G.A. § 46-3-200 et seq., IRC § 501(c)(12) and violate provisions of the EMC bylaws and articles of incorporation. The EMC cannot circumvent the strict limitations to operate solely as a non-profit under Georgia law, IRC code § 501(c)(12), its bylaws and articles of incorporation by creating an “affiliated entity,” transferring and converting substantially all of the EMC’s non-profit business to the newly-created for-profit affiliate and generating hundreds of millions of dollars in revenue under the for-profit entity during the Relevant Period. The Georgia Supreme Court has addressed this specific issue and ruled that an EMC may not engage in business activities not specifically authorized by the EMC Act. An EMC may not “do indirectly what it may not do directly.” Flint Elec. Mem. Corp. v. Barrow, 271 Ga. 636 (1999). The Cobb Energy/Cobb EMC scheme violates this well-established Georgia Supreme Court law. Violation of this well-established principle of law and EMC governance constitutes gross mismanagement of the company, self dealing, waste of assets and usurpation of corporate opportunity.

32. Shockingly, the Defendant Dwight Brown has steadfastly refused to disclose the ownership of Cobb Energy, including his own, and any other details as to the financial and business affairs of that corporation, even to the Cobb EMC members. Thus, the initial ownership of Cobb Energy is completely unknown to the EMC members. What is known is that on or about February 4, 2004, Defendants Dwight Brown, Frank Boone, David McGinnis (all board

members of Cobb EMC and Cobb Energy), along with the other board members of Cobb Energy, caused \$7,000,000 worth of Cobb Energy preferred stock to be transferred to Defendant Dwight Brown, his wife Mary Ellen Brown, David McGinnis and Frank Boone, among others, pursuant to Form D private placement filing with the Securities and Exchange Commission. Consequently, these Defendants, and certain of their family members have the ability cash out and sell these shares, and based on comments made by Defendant Dwight Brown at the 2007 EMC annual meeting, may have already done so and thus, effectively and unlawfully converted EMC assets directly to themselves. To accomplish this, at least these Defendants, engaged the Houston, Texas law firm of Vinson & Elkins, LLP, former counsel to the Enron Energy Corporation.

33. These stock transfers gave sizeable ownership interest of Cobb Energy to Defendants Dwight Brown, his wife, David McGinnis and Frank Boone, among others, which ownership interests are dramatically impacted in a positive direction by the previously discussed transfer of all Cobb EMC employees, the majority of Cobb EMC business and substantially all Cobb EMC revenue to Cobb Energy. In causing these transfers for forty years, the value of Cobb Energy as a corporate entity was dramatically enhanced by tens of millions of dollars. As a direct result therefrom, the value of the shares Defendants Dwight Brown, Frank Boone and David McGinnis gave themselves, and certain of their family members, were commensurately enhanced. Additionally, they had the ability to sell such shares to the highest bidder, and may have already done so.

34. According to tax returns filed with the Internal Revenue Service, Defendant Dwight Brown and the Director Defendants, some of whom may be named herein as John Doe Defendants, have by vote, acquiescence or otherwise caused loans of approximately \$1,500,000

to be made to “officers and directors.” These loans are nowhere disclosed in the financial documents provided to the EMC members.

35. Defendant Dwight Brown has also admitted at the 2007 EMC annual meeting that the EMC’s auditors are “concerned” about the appropriateness and legality of the Cobb EMC/Cobb Energy scheme.

36. In addition to directly and indirectly causing or allowing the EMC to transfer and convert the majority of its business to Cobb Energy for the next forty years, Defendant Brown and the then in office board members, some of whom may be John Doe Defendants herein, by vote, acquiescence or otherwise caused the EMC to inappropriately transfer and/or continue the loan of assets to Cobb Energy, including \$5,000,000 worth of Cobb EMC property and a \$5,000,000 interest free loan. The \$5,000,000 interest free loan, at a minimum, violates Defendants’ fiduciary duties to serve the best interests of the EMC and protect and preserve its assets. These loans and transfers are grossly in violation of the EMC Act. Defendant Dwight Brown publicly acknowledged these transfers totaling \$10,000,000 at the 2007 Annual meeting on September 6, 2007.

37. On September 6, 2007 at the EMC annual meeting, Defendant Brown also admitted that Cobb Energy entered into a contract to pay \$20,000,000.00 for the naming rights for a new performing arts center. On information and belief, the present value of that amount, or approximately \$13,000,000.00, was funded in advance.

38. According to tax returns filed with the Internal Revenue Service, on March 8, 2001, Cobb EMC purchased property that was later sold to Cobb Energy for \$6,510,145.00. On information and belief, through these transactions Cobb EMC built an office for Cobb Energy subsidiary ProCore Solutions and Cobb EMC then loaned the money to Cobb Energy to purchase

the property from the EMC. Put another way, Cobb EMC funded the profits of Cobb Energy, Defendants Dwight Brown, David McGinnis, Frank Boone and other shareholders of Cobb Energy.

39. On October 5, 2007, Plaintiffs requested to review the corporate records of the EMC pursuant to their statutory right under O.C.G.A. §46-3-271. Defendants have ignored Plaintiffs' request and have refused to produce any documents whatsoever, even basic financial documents, as of the date of this filing.

DUTIES OF THE DEFENDANTS

40. By reason of their positions as officers, directors and/or fiduciaries of Cobb EMC and because of their ability to control the business and corporate affairs of the EMC, the officer and Director Defendants owed and owe Cobb EMC fiduciary duties of trust, loyalty, good faith and due care, and were and are required to use their utmost ability to control and manage EMC in a fair, just, honest and equitable manner. These Defendants were and are required to act in furtherance of the best interests of EMC and its members so as to benefit all members equally and not in furtherance of their personal interest or benefit.

41. Each director and officer of the EMC owes to the EMC and its members the fiduciary duty to exercise good faith and diligence in the administration of the affairs of the EMC and in the use and preservation of its property and assets, and the highest obligations of fair dealing. In addition, as officers and/or directors of the EMC, these Defendants had and have a duty to not conceal and to promptly disseminate accurate and truthful information with regard to the EMC and its business, including information related to any direct financial interest they have in Cobb Energy, so that the EMC members have full knowledge about whether the directors for whom they elect are disinterested.

42. The duties of the EMC officers and directors require them to devote their efforts to the operation of the EMC as a non-profit, in the best interests of the EMC and its members, and to protect and preserve the assets of the EMC.

43. To discharge their duties, the officers and directors of the EMC were required to exercise reasonable and prudent supervision over the management, policies, practices and controls of the financial affairs of the EMC. By virtue of such duties, the officers and directors of the EMC were required to, among other things:

(a) refrain from self dealing and acting upon information not known to the members to benefit themselves;

(b) refrain from transferring assets or business opportunity of the EMC to the direct benefit of themselves and/or their family members;

(c) refrain from causing, directly or indirectly, a \$5,000,000 interest free loan from Cobb EMC to Cobb Energy;

(d) refrain from devoting a substantial portion of their daily work and time to running another company, particularly one with conflicting interests to the EMC;

(e) ensure that the EMC complied with its legal obligations and requirements, including acting only within the scope of its legal authority and disseminating truthful and accurate information to the EMC members;

(f) conduct the affairs of the EMC in an efficient, non-profit manner and protect and avoid wasting the EMC's assets;

(g) ensuring that the EMC maintained an adequate system of financial controls such that assets of the EMC were properly preserved and protected and that the financial reporting to the EMC members was complete and accurate at all times;

(h) remain informed as to how the EMC conducted its operations, and, upon receipt of notice or information of imprudent or unsound conditions or practices, to make reasonable inquiry in connection therewith, and to take steps to correct such conditions or practices and inform the EMC members;

(i) as set forth in the EMC bylaws, upon the establishment of the fact that any person being considered for, or already holding, a position of trust in the cooperative lacks eligibility under this Section, to withhold such position from such person, or to cause him to be

removed therefrom, whichever be the case. Upon the establishment of the fact that a director is holding office in violation of this Section, the remaining directors have the duty to remove such director from office; and

(j) ensure that the Company was operated in a diligent, honest and prudent manner in compliance with all applicable federal, state and local laws, rules and regulations.

44. Under Georgia law, Defendant Dwight Brown, as President and CEO of Cobb Energy, simultaneously owed and owes a duty of loyalty and obedience, and a fiduciary duty to Cobb Energy. His duties to Cobb Energy require him to maximize profits for Cobb Energy shareholders, including to maximization of as much profit as possible from the Cobb EMC/Cobb Energy contract. Thus, wearing his Cobb Energy President, CEO and director hat, his duty is to maximize profits and shareholder value, including of course shareholder value for himself, his wife, David McGinnis and Frank Boone. Wearing his Cobb EMC President and CEO hat, his duty under the law is to operate the EMC as a nonprofit providing electricity at the “lowest possible price.” These duties are completely in conflict with each other. Defendant Dwight Brown, as well as Defendants Boone and McGinnis, who are directors of Cobb Energy *and* Cobb EMC, cannot simultaneously wear both hats. In doing so, these Defendants breached and continue to breach their fiduciary and other duties to both companies, including those of loyalty, due care, trust and obedience.

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

disclose, this information to Cobb EMC members stating, “I’m not talking about Cobb Energy.” Doing so was a violation of his fiduciary duties.

46. The Director Defendants, because of their positions of control and authority as directors and/or officers of the EMC, were able to and did, directly and/or indirectly, exercise control over the wrongful acts complained of herein.

47. At all times relevant hereto, each of the officer and Director Defendants was the agent of each of the other officer and Director Defendants and of the EMC, and was at all times acting within the course and scope of such agency.

48. The conduct of the officer and Director Defendants complained of herein involves a knowing and culpable violation of their obligations as directors and officers of EMC, the absence of good faith on their part, and a reckless disregard for their duties to the EMC and its members that these Defendants were aware or should have been aware posed a risk of serious injury to the EMC. The conduct of these Defendants as officers and/or directors of the EMC during the Relevant Period has been ratified by the remaining Director Defendants, some of whom may be named herein as John Doe Defendants, who collectively comprised all of the EMC’s board during the Relevant Period.

49. The officer and Director Defendants breached their duties of loyalty and good faith by allowing the EMCs to cause, or by themselves causing, among other things:

- (i) the EMC to circumvent restrictions against operation as a for-profit company, transferring the majority of its business and revenues to Cobb Energy for forty years and by failing to prevent the Individual Defendants from taking such actions;
- (ii) self-dealing in transactions providing Cobb Energy stock to themselves that effectively converted millions of dollars of EMC assets to themselves, and doing so without disclosure to the EMC members;
- (iii) the transfer of \$10,000,000 of Cobb EMC assets to Cobb Energy, including a \$5,000,000 interest-free note reported by Defendant Dwight Brown at the 2007 annual meeting;

(iv) the payment of excessive compensation to board members and Defendant Dwight Brown and the failure to take steps to identify competent members who could serve as directors at less or no cost. Perfectly capable members of the EMC have been and continue to be willing to serve on the EMC board at no compensation;

(v) the active concealment of material information from the EMC members concerning the finances of the EMC, the disinterested financial interests and transactions of certain directors and officers, and material information related to the Cobb EMC/Cobb Energy transaction;

(vi) as shown by recent Freedom of Information Act documents received by from the Rural Utilities Service, the payoff and subsequent refinancing of \$96,778,635.67 of EMC loans from the United States Department of Agriculture, Rural Utilities Programs, at a *higher* interest rate for the purpose, in large part, of circumventing government regulation associated with the loans so to pave the way for the unlawful Cobb EMC/Cobb Energy scheme. For many years, Cobb EMC relied upon loans from the Rural Utilities Service at very low interest rates in order to meet its financial needs. EMCs borrowing from RUS are subject to audit by RUS auditors;

(vii) The failure to demand a complete and accurate reporting of the financial affairs of Cobb Energy to the EMC members, including but not limited to, the ownership and payments to Defendants Dwight Brown, David McGinnis and Frank Boone; and

(viii) the failure of the EMC to follow Roberts Rules as required by the bylaws at all meetings of members and directors thereby frustrating the ability of members of the EMC to obtain material information and elect a non-conflicted and disinterested board.

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

51. To the extent that the membership voted to approve the Cobb EMC/Cobb Energy transaction, such vote is a nullity because the EMC's CEO and Board of directors did not

disclose, at or before the time of such vote, the ownership structure of Cobb Energy and the ownership of Cobb Energy by officers or directors of the EMC as well as certain of their family members.

52. The CEO and Board of Directors of Cobb EMC concealed and failed to disclose to the membership at or before the time of each election of board members, for each election of board members occurring after the date of the Cobb Energy/Cobb EMC transaction, material information that certain officers and directors of Cobb EMC had had sizeable ownership interest, controlled Cobb Energy and were enriched as owners of Cobb Energy by the Cobb Energy/Cobb EMC transaction. Thus, any election vote for board members occurring after the Cobb Energy/Cobb EMC is a nullity and requires a new court monitored election of board members.

53. As a result of the defendants' wrongdoing, the EMC will need to expend considerable sums of money including the following:

(a) Costs incurred and diversion of manpower to carry out internal investigations, including legal fees paid to outside counsel, accounting firms and consultants; and

(b) Costs incurred from directing manpower to correct the EMC's defective internal controls; and

54. The actions of the Defendants, by allowing the other Defendants to cause or by themselves causing the EMC to commit the violations complained of herein, will further harm the EMC because undoing the unlawful transactions and schemes that have been put in place will result in the expenditure of significant sums.

55. Moreover, the actions of the Defendants have damaged the EMC image and goodwill. Indeed, Standard and Poor's downgraded Cobb EMC's credit in part because of corporate governance issues related to Cobb EMC/Cobb Energy scheme and the resulting increasing business risk resulting from the growing portfolio of unregulated businesses.

Furthermore, for at least the foreseeable future, the EMC will suffer from what is known as the "liar's discount," a term applied to companies who have been implicated in illegal behavior and have misled others such that the EMC's ability to raise equity capital or debt on favorable terms in the future is now impaired.

DAMAGES

56. As a result of the Defendants' actions, tens of millions of dollars of EMC assets have been siphoned away from the EMC through, among other things, waste of assets, usurpation of EMC business and business opportunity, gross mismanagement and self dealing. In fact, as reported in the 2006 EMC Annual Report:

Cobb EMC employees became CEMC employees to furnish **all services** for Cobb [EMC] including marketing, meter reading and meter maintenance services. The charges for these services were approximately **58 million in 2006 and 48 million in 2005**.

(emphasis added). Every dollar of profit related to that revenue and all other profit on revenue generated by Cobb Energy related to Cobb EMC activities during the Relevant Period, is rightfully EMC revenue that has been converted or caused to be converted by the Defendants. Additionally, millions of dollars have been conveyed during the Relevant Period to certain of the Defendants, their family members and others for work that should have been performed as part of these Defendants' fiduciary duties and responsibilities to Cobb EMC. Instead, it was paid or transferred under the guise of their working for the shell company they created, Cobb Energy. Any such compensation, including their stock in Cobb Energy is rightfully the property of Cobb EMC and was misappropriated and/or wasted through the Cobb EMC/Cobb Energy scheme and Defendants' gross negligence, recklessness, gross mismanagement and breach of their fiduciary duties.

Other damages include lost interest on the \$5,000,000 interest-free note, discussed above, and lost business opportunity costs associated with the transfer of other assets discussed above.

Further damages include increased cost of debt caused by the refinance of the Rural Utilities Service loans of \$96,778,635.67 of EMC loans from the United States Department of Agriculture, Rural Utilities Programs, at a *higher* interest rate for the purpose, in large part, to circumvent government regulation associated with the loans so to pave the way for the unlawful Cobb EMC/Cobb Energy scheme. Other damages will be asserted with specificity when Defendants' comply with Plaintiffs' request for documents pursuant to O.C.G.A. §46-3-271 and the facts and circumstances develop in this case.

FIRST CAUSE OF ACTION
Declaratory Judgment Against All Defendants

57. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

58. Pursuant to O.C.G.A. § 9-4-1 et seq., Plaintiffs pray that the Court inquire into the facts and circumstances of the Cobb Energy/Cobb EMC transaction and enter judgment for the following relief;

(i) declaring that the Cobb Energy/Cobb EMC transaction was illegal, ab initio, as a violation of the EMC Act, IRC § 501(c)(12) and well-established principles of equity, including the principle that “one may not do indirectly what he is precluded from doing directly;”

(ii) declaring that the Cobb Energy/Cobb EMC transaction is a conflicting transaction under Georgia law and null and void;

(iii) declaring that the members of the EMC are entitled to full disclosure as to all ownership and financial aspects of Cobb Energy and all subsidiary entities from the date of its inception until the date of Final Order and Judgment in this case;

- (iv) declaring that the loans and transfers of assets from Cobb EMC to Cobb Energy as alleged above were unlawful and further declaring that any such transfers are the property of Cobb EMC and/or its members;
- (v) declaring that the compensation paid to Defendants Brown and the board members of Cobb EMC is excessive and subject to reimbursement to the EMC;
- (vi) declaring that Defendant Brown and the EMC board of directors have failed in their duties for reporting as required by IRS Form 990 and requiring that all such defective filings be promptly amended;
- (vii) all stock ownership interest and compensation, direct and indirect, flowing to Defendants Dwight Brown, David McGinnis and Frank Boone, shown to arise from their confliction role with Cobb Energy be declared the property and assets of Cobb EMC and its members;
- (viii) declaring that Defendants Dwight Brown, David McGinnis and Frank Boone, and any other officer or director of Cobb EMC for whom it is shown that they received compensation from Cobb Energy, are engaged in and have been engaged in, unlawful conflicts of interest relating to their managerial and fiduciary roles and determining that they are liable to Cobb EMC and its members for all losses sustained by the EMC;
- (ix) declaring that the members of the board of directors of the EMC and Defendants Dwight Brown have breached their fiduciary and other duties to the EMC and its members as to the creation, maintaining and continuation of the Cobb Energy/Cobb EMC transaction and that they are liable to the EMC and its members for all losses sustained as a result of the Cobb Energy/Cobb EMC transaction;

(x) declaring as to whether or not the refinancing of the \$96,778,635.67 loans from the Rural Utilities Programs was done for a bona-fide business reason or done so that Defendant Dwight Brown and the Director Defendants could avoid regulatory oversight by the federal government;

(xi) declaring that the board election process as controlled and implemented by Defendant Dwight Brown and the Defendant Directors is being improperly used to perpetuate a board controlled by Dwight Brown and certain Director Defendants in violation of the letter and spirit of the EMC Act;

(xii) Declaring that the acts and omissions complained of herein regarding Defendant Dwight Brown and the Director Defendants unlawful such that in equity their positions will be declared vacant and a Court-monitored election be had as soon as practicable to elect an independent and disinterested board;

SECOND CAUSE OF ACTION
Accounting Pursuant to O.C.G.A. § 23-270 Against All Defendants

59. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as if fully set forth herein.

60. Plaintiffs pray that the Court inquire into and order an accounting as follows:

(i) of all income and expenses of Cobb Energy from the date of inception until the present;

(ii) all funds and assets transferred from Cobb EMC to Cobb Energy from the date of Cobb Energy's inception to the present;

(iii) All funds and assets transferred from Cobb Energy to Cobb EMC from the date of inception of Cobb Energy to the present;

- (iv) The ownership structure of Cobb Energy and all subsidiaries of Cobb Energy, providing the interest and contact information of all entities and individuals that have had any ownership interest in Cobb Energy and its subsidiaries from the date of Cobb Energy's inception until the present;
- (v) All funds and assets, including fringe benefits paid or transferred from Cobb Energy to Defendant Dwight Brown and the Director Defendants;
- (vi) All compensation, direct or indirect, including all fringe and other benefits paid or provided by Cobb EMC to Defendant Brown and the Director Defendants.
- (vii) All loans made by Cobb Energy and Cobb EMC to Defendant Brown and the Director Defendants or any of their relatives;
- (viii) All political and charitable donations of Cobb Energy and Cobb EMC from 1997 through the present;
- (ix) All patronage capital from 1997 through the present;
- (x) For the \$20,000,000 payment, or any portion thereof, by Cobb Energy for the naming rights to the performing arts center and the ultimate source of such funds; and
- (xi) For a complete accounting of the purchase and sale of property by Cobb EMC to Cobb Energy relating to ProCore Solutions.

THIRD CAUSE OF ACTION
Injunctive Relief Against Defendant Dwight Brown,
Nominal Defendant and the Director Defendants (including John Doe Defendants)

61. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

62. As hereinbefore alleged, unless enjoined, the acts and omissions of the Defendants will continue to cause immediate and irreparable injury to Cobb EMC and its

members for which there is no adequate remedy at law. Thus, Plaintiffs pray pursuant to O.C.G.A. § 9-11-65 that all Defendants be enjoined from:

- (i) Transferring or otherwise conveying any assets of Cobb EMC to Cobb Energy;
- (ii) Affirmatively enjoining Defendant Dwight Brown and the Director Defendants to conduct a court-monitored board election for the selection of an independent board;
- (iii) Affirmatively enjoining the Defendants to produce the documents requested by the Plaintiffs under §46-3-271. To date, the Defendants have failed and refused to produce a single document, even basic financial information, in violation of the EMC members' rights of inspection under the statute.

FOURTH CAUSE OF ACTION

Breaches of Fiduciary and Other Duties Against Defendant Dwight Brown, Nominal Defendant and the Director Defendants (including John Doe Defendants)

63. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

64. The Individual Defendants owed and owe Cobb EMC fiduciary obligations. By reason of their fiduciary relationships, the officer and Director Defendants owed and owe the EMC the highest obligation of good faith, fair dealing, loyalty and due care.

65. The officer and Director Defendants, and each of them, violated and breached their fiduciary duties of care, loyalty, reasonable inquiry, oversight, good faith and supervision.

66. Each of the officer and Director Defendants had actual or constructive knowledge that they had caused the EMC to engage in, or allowed to be caused and/or continued, unlawful transactions, transactions that resulted in self dealing and other violations of the EMC Act, IRC § 501(c)(12), other violations of state law and principles of equity in breach of their duties. These actions could not have been a good faith exercise of prudent business judgment to protect and promote the EMC's non-profit interests.

67. As a direct and proximate result of these Defendants' failure to perform their fiduciary obligations, the EMC has sustained significant damages. As a result of the misconduct alleged herein, these Defendants are liable to the EMC.

68. Plaintiffs on behalf of EMC have no adequate remedy at law.

FIFTH CAUSE OF ACTION

Gross Mismanagement Against Defendant Dwight Brown, Nominal Defendant and the Director Defendants (including John Doe Defendants)

69. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

70. By their actions alleged herein, the Defendants, either directly or through aiding and abetting, abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets and business of the EMC in a manner consistent with the operations of a non-profit corporation.

71. As a direct and proximate result of the Defendants' gross mismanagement and breaches of duty alleged herein, the EMC has sustained significant damages in excess of tens of millions of dollars.

72. As a result of the misconduct and breaches of duty alleged herein, the Defendants are liable to the EMC.

73. Plaintiffs on behalf of the EMC have no adequate remedy at law.

SIXTH CAUSE OF ACTION

Abuse of Control Against Defendant Dwight Brown, Nominal Defendant and the Director Defendants (including John Doe Defendants)

74. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

75. The Defendants' misconduct alleged herein constituted an abuse of their ability to control and influence the EMC for which they are legally responsible.

76. As a direct and proximate result of their abuse of control, the EMC has sustained significant damages.

77. As a result of the misconduct alleged herein, the Defendants are liable to the EMC.

78. Plaintiff on behalf of the EMC have no adequate remedy at law.

SEVENTH CAUSE OF ACTION

Waste of Corporate Assets Against Defendant Dwight Brown, Nominal Defendant and the Director Defendants (including John Doe Defendants)

79. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

80. As a result of the Cobb Energy/Cobb EMC scheme, and by their failure of proper supervision and to properly consider the interests of the EMC and its members, the Defendants Dwight Brown and the Director Defendants have caused the EMC to waste valuable significant assets and to incur potentially millions of dollars of legal liability and/or legal costs to defend these Defendants' unlawful actions.

81. As a result of the waste of EMC assets, these Defendants are liable to the EMC.

82. Plaintiffs on behalf of EMC have no adequate remedy at law.

NINTH CAUSE OF ACTION

Unjust Enrichment Against Defendant Dwight Brown, Nominal Defendant and the Director Defendants (including John Doe Defendants)

83. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

84. By their wrongful acts and omissions, Defendant Dwight Brown and the Director Defendants were unjustly enriched at the expense of and to the detriment of the EMC.

85. Plaintiffs, as members and representatives of the EMC, seek restitution from these Defendants, and each of them, and seek an Order of this Court disgorging all profits, benefits and

other compensation obtained by these Defendants, and each of them, from their wrongful conduct and fiduciary breaches.

86. Plaintiffs on behalf of EMC have no adequate remedy at law.

TENTH CAUSE OF ACTION

Equitable Action for Money Had and Received under Georgia Law Against Defendant Dwight Brown, Cobb Energy, the Nominal Defendant and the Director Defendants (including John Doe Defendants)

87. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

88. As hereinbefore alleged, at least the Defendants Cobb Energy, Dwight Brown, David McGinnis and Frank Boone hold money and other assets that are the money and assets of Cobb EMC and they have no right to retain such money and other assets thus, Plaintiffs pray that all such assets and funds be immediately transferred back to Cobb EMC.

89. As a result of their unlawfully holding money and other assets rightfully the property of the EMC, the Defendants are liable to the EMC.

90. Plaintiffs on behalf of EMC have no adequate remedy at law.

ELEVENTH CAUSE OF ACTION

Punitive Damages (Against Defendant Dwight Brown and the Director Defendants, including John Doe Defendants)

91. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

92. These Defendants' breaches of fiduciary and other duties set forth above were knowing, willful and wanton in violation of O.C.G.A. § 51-12-5.1, entitling Plaintiffs to an award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment as follows:

(a) Against all of the Defendants and in favor of the EMC for the amount of damages sustained by the EMC as a result of the Defendants' breaches of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets, money had and received and unjust enrichment;

(b) For the declaratory relief set forth above in the First Cause of Action;

(c) For an accounting as set forth above in the Second Cause of Action;

(d) For injunctive relief as set forth above in the Third Cause of Action;

(e) Directing the EMC and its officers and board members to take all necessary action to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect the EMC and its members from a repeat of the damaging events described herein, including, but not limited to, putting forward for member vote resolutions for amendments to the EMC's By-Laws or Articles of Incorporation and taking such other action as may be necessary to place before the members for a vote the following Corporate Governance Policies:

1. a proposal to strengthen the board's supervision of operations and develop and implement procedures for greater member input into the policies and guidelines of the Board;

2. preclude the unlawful and excessive transfer of assets and payment of compensation to board members and executives;

3. provisions to permit members of the EMC to more effectively nominate and elect board members;

4. a proposal to strengthen the EMC's procedures for the receipt, retention and treatment of complaints received by the EMC regarding accounting, internal controls and financial matters; and

5. appropriately test and then strengthen the internal audit and control functions.

(f) Extraordinary equitable and/or injunctive relief as permitted by law, equity and state statutory provisions sued hereunder, including attaching, impounding, imposing a constructive trust on or otherwise restricting the proceeds of these Defendants' unlawful activities or their other assets so as to assure that Plaintiffs on behalf of the EMC have an effective remedy;

(g) Awarding to the EMC restitution from the Defendants, and each of them, and ordering disgorgement of all profits, benefits and other compensation obtained by the Defendants as a result of their unlawful activities;

(h) Awarding to Plaintiffs the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses;

(i) Awarding punitive damages against Defendant Dwight Brown and the Director Defendants for their knowing, willful and wanton breaches of duty; and

(j) Granting such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

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