

SUPERIOR COURT OF THE STATE OF GEORGIA

COUNTY OF COBB

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

Plaintiffs,)

vs.)

Civil Action File No. 07-1-9408-48

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' FIRST AMENDED VERIFIED DERIVATIVE COMPLAINT

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, aiding and abetting breaches of fiduciary duties, negligence, gross negligence and recklessness, abuse of control, gross mismanagement, waste of corporate assets, unjust enrichment, money had and received and violations of the Georgia Electric Membership Corporation Act, O.C.G.A. § 46-3-170 et seq. ("GEMCA"), solely in their roles as officers and

directors of Cobb EMC.

2. The Defendant EMC directors participated in, approved and permitted the wrongs alleged herein, participated in efforts to conceal or disguise those wrongs from EMC members, negligently and recklessly disregarded the wrongs complained of herein and/or have taken no action to correct such wrongs as of the time of the filing of the Complaint.

3. These actions and omissions have caused substantial losses to Cobb EMC and other damages.

4. Plaintiffs also seek damages and other relief on behalf of Cobb EMC against Cobb Energy and certain of its officers and directors, including Dwight Brown, Frank Boone, and David McGinnis, solely in their roles as Cobb Energy officers and directors.

COMPLIANCE WITH DEMAND REQUIREMENT

5. 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. More than thirty (30) days elapsed subsequent to the time Plaintiffs' demand letter was received by Defendants during which time Plaintiffs did not receive any substantive response.

6. The Complaint was filed on October 22, 2007.

RELEVANT PERIOD

7. Except as otherwise expressly stated, the acts and omissions set forth herein have occurred during the approximate period of January 1, 1997 to the present ("Relevant Period").

JURISDICTION AND VENUE

8. This Court has jurisdiction over all causes of action asserted herein pursuant to the GEMCA as this derivative action is brought to remedy Defendants' violations of law. This Court has jurisdiction and venue over each Defendant corporation named herein because

each is a corporation that conducts business in and maintains its principal offices in Cobb County and its registered agent for service as follows:

Dwight T. Brown
1000 EMC Parkway
Marietta, Georgia 30060

9. Defendants Dwight Brown, Don Barnett, David McGinnis, Frank Boone, Kay Anderson and Sarah Brown reside in Cobb County, Georgia. Defendant Larry Chadwick resides 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

10. 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.

11. 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.

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

13. 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.

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

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

16. 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 30060.

17. Defendant Cobb Energy Management Corporation is a for-profit services corporation organized and existing under the laws of the state of Georgia with its headquarters located at 1000 EMC Parkway NE, Marietta, Georgia 30060.

18. 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 chairman of the board of directors of Cobb Energy, and has held these positions since 1997. Dwight Brown is a resident of Cobb County, Georgia.

19. Defendant Don Barnett has been a Cobb EMC director since 1999 and has been a director for all or a portion of the Relevant Period. He is a resident of Cobb County, Georgia.

20. Defendant David McGinnis has been a director of Cobb EMC since prior to the formation of Cobb Energy in 1997 and has been a director for all or a portion of the Relevant Period. He has also served on the Cobb Energy board at all times since its formation. He is a resident of Cobb County, Georgia.

21. 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 Cobb County, Georgia.

22. Defendant Al Fortney, Jr. has been a director of Cobb EMC since 1999 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.

23. Defendant Frank Boone has been a director of Cobb EMC since the late 1990s and has been a director for all or a portion of the Relevant Period. Defendant Boone is also a director of Cobb Energy and was an owner of Cobb Energy stock during the Relevant Period.

24. Defendant Sarah Brown has been a director of Cobb EMC since 1979 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.

25. Defendant Larry Chadwick has been a director of Cobb EMC for over 20 years 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 owned \$100,000 of Cobb Energy stock until shortly after the 2007 EMC annual meeting. Defendant Chadwick is a resident of Fulton County, Georgia.

26. Defendant Henry Balkcom, III has been a director of Cobb EMC since 2005 and has been a director for all or a portion of the Relevant Period. Defendant Balkcom is a resident of Quitman County, Georgia.

27. The defendants identified in ¶¶ 19-26 are referred to herein as the "EMC Director Defendants."

28. 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. These Defendants are therefore sued by such fictitious names. If and when the true names and capacities of these John Doe Defendants are ascertained, Plaintiffs will include these John Doe Defendants' true names

and capacities. 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.

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

FACTUAL ALLEGATIONS

30. Cobb EMC is an income tax exempt electric distribution cooperative headquartered in Marietta, Georgia serving approximately 194,000 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.

31. "Cobb EMC's mission is to provide its member/consumers with the best service *"at the lowest possible price."*¹ 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.

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

33. 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 Dwight T. Brown's Memo. of Law in Supp. of Mot. to Dismiss (Oct. 11, 2007), Maddox et. al. v. Cobb Electric Mem. Corp. et al., Civil Action File No. 07-1-7977-48, Cobb County Sup. Ct.

- (a) 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;
- (b) 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
- (c) furnishing of electric energy, wiring facilities, electrical or plumbing equipment or services to any member corporation organized under the Electric Membership Corporation Act.

Cobb EMC, as an electric membership corporation, is statutorily governed by the GEMCA. 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).

34. 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 for-profit non-electric businesses not authorized by law.

35. In an attempt to circumvent the strict limitations that the EMC operate solely as a non-profit provider of electrical service, the then in office individual Defendants caused the

formation of Cobb Energy Management Corporation (hereinafter "Cobb Energy" or "CEMC"). Defendant Dwight Brown admitted that the creation of Cobb Energy was "his brainchild" at the 2007 Cobb EMC annual meeting.

DUTIES OF COBB EMC OFFICER AND DIRECTOR DEFENDANTS

36. By reason of their positions as officers and directors of Cobb EMC and because of their ability to control the business and corporate affairs of the EMC, Dwight Brown and the EMC Director Defendants owed and owe Cobb EMC fiduciary duties of trust, loyalty, good faith, candor 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.

37. 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.

38. The duties of the EMC officers and directors also 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.

39. 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 the 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 (current shareholders), Frank Boone and Larry Chadwick (former shareholders). 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 reasonable cost. 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.

40. Defendants Dwight Brown, Frank Boone and Larry Chadwick 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 ownership of 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.

41. Dwight Brown and the EMC 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.

42. The conduct of Dwight Brown and the EMC Director Defendants complained of

herein involves a grossly negligent and culpable violation of their obligations as directors and/or officers of the 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.

DUTIES OF COBB ENERGY OFFICER AND DIRECTOR DEFENDANTS

43. By reason of their positions as officers or directors of Cobb Energy and because of their ability to control the business and corporate affairs of Cobb Energy, Defendants Dwight Brown, David McGinnis and Frank Boone, solely in their positions as Cobb Energy officers and/or directors, owed and owe Cobb EMC, a large shareholder of Cobb Energy, fiduciary duties of trust, loyalty, candor, good faith and due care, and were and are required to use their utmost ability to control and manage Cobb Energy in a fair, just, honest and equitable manner. These Defendants were and are, among other things, required to: (i) protect and fully and accurately account for the EMC's shares in Cobb Energy; (ii) refrain from self-dealing stock control and ownership manipulation to the detriment of Cobb EMC; (iii) fully, accurately and promptly disclose material information with regard to Cobb Energy and its business, including related party transactions and information related to any direct financial interest they have in Cobb Energy; (iv) refrain from concealing material information from Cobb EMC; and (v) refrain from self dealing to the detriment of Cobb EMC.

44. To discharge their duties, Dwight Brown, Frank Boone and David McGinnis were required to exercise reasonable and prudent supervision over the management, policies, practices and control of the financial affairs of Cobb Energy. By virtue of such duties, these

Defendants were required to, among other things:

- a. refrain from self dealing and acting upon information not known to the EMC for their personal benefit;
- b. ensure that Cobb Energy maintained an adequate system of accounting and financial controls such that the stock investment of the EMC was properly preserved and protected and that the financial reporting to the EMC was complete and accurate at all times;
- c. ensure that Cobb Energy was operated in a diligent, honest and prudent manner in compliance with all applicable federal, state and local laws, rules and regulations.;
and
- d. ensure that Cobb Energy was operated so that it did not cause financial damage or loss to Cobb EMC.

45. Under Georgia law, Defendant Dwight Brown, as President and CEO of Cobb Energy and Cobb EMC, as well as Defendants Boone and McGinnis, simultaneously owed and owe duties of loyalty and obedience, and fiduciary duties to Cobb EMC and Cobb Energy. These duties require them 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 their Cobb Energy officer and/or director hats, their duties are to to maximize profits and shareholder value, including of course shareholder value for themselves as owners of Cobb Energy stock. Wearing their Cobb EMC officer or director hats, their duties under the law are to operate the EMC as a nonprofit providing electricity at the lowest reasonable price. These duties are completely in conflict with each other. Defendant Dwight Brown, as well as Defendants Boone and McGinnis cannot simultaneously wear both hats. Furthermore, with respect to

Defendants Boone and McGinnis, serving dual roles and being employed by Cobb Energy directly violates Article III of the EMC Bylaws which provides in relevant part:

To be eligible for election or appointment and to serve on the Cobb EMC Board of Directors, such person **must**:

- (a) Be eighteen (18) years of age;
- (b) Be a member of the Cobb EMC and receive electric service at his primary residence. Part-time occupancy of a seasonally used cottage or a place occupied only part-time where a meter is installed does not qualify as a residence.
- (c) **Not be in any way employed by or financially interested** in a competing business **or enterprise selling electric energy or selling supplies to Cobb EMC** or engaged in a business primarily engaged in selling electrical or plumbing appliances, fixtures or supplies to Cobb EMC members;

The Cobb EMC Policy Manual, Bulletin Number 64 II-B, also reiterates the above provision:

Bylaw Requirements

The Cooperative's bylaws provide that a person, to be eligible for election or Appointed to, and to serve on, the board of directors, shall:

- A. Be a member of the cooperative, receiving service there from at his/her primary residential abode.
- B. No be employed by, or financially interested in, a competing enterprise or a business selling electric energy or supplies to the Cooperative, or a business primarily engaged in selling electrical or plumbing appliances, fixtures, or supplies to the members of the Cooperative.

Similarly, Cobb EMC Policy Manual, Bulletin Number 42 provides:

The board of Directors discourages and will not permit any of its employees to engage in outside business, which will in any way be in conflict with the interest of the corporation and other interests in the community.

In wearing two hats, these Defendants breached and continue to breach their fiduciary and other duties to the EMC and Cobb Energy, including those of loyalty, due care, trust and obedience.

- 46. Defendants Dwight Brown and Frank Boone, solely in their roles as Cobb Energy

officers and directors have improperly concealed in violation of their duties, their direct financial and ownership interest, and extent of their conflicts of interest, from Cobb EMC and its members who expect them to be disinterested officers and directors. Doing so was a violation of their fiduciary duties to the EMC.

47. The conduct of the Dwight Brown, David McGinnis and Frank Boone complained of herein involves a grossly negligent and culpable violation of their obligations as directors and/or officers of Cobb Energy, the absence of good faith on their part, and a reckless disregard for their duties to the EMC.

HISTORY OF THE COBB EMC/COBB ENERGY RELATIONSHIP AND RELATED MATTERS

48. The earliest presently known discussion of Cobb EMC setting up a for-profit entity was at the May 28, 1997 EMC board meeting at which Directors Hames, Chadwick, Day, Boone, McGinnis, Herndon, Sarah Brown and Lovingood were present. Mr. Brown summarized his objectives for the new entity “[C]ontrol meter reading and billing, collect the money, and keep the customers calling Cobb EMC.” There was no mention in his explanation of any actual or threatened hostile takeover now contended to explain the Cobb Energy transaction. A motion was made to proceed with the new “retail company” which motion was carried without dissenting vote. May 28, 1997 EMC Board Minutes, Ex. 5 to Depo. Dwight Brown (Feb. 19, 2008).

49. EMC directors were recruited at the June 24, 1997 board meeting to sit on the Cobb Energy Board. Ex. 6 to Depo. of Dwight Brown. Cobb Energy was officially created on July 22, 1997 at the board meeting of which Directors Day, Sarah Brown, Chadwick, Hames, Lovingood, Herndon, Samples, McGinnis, and Boone were present. Dwight Brown was also present. Mr. Brown explained to the EMC board that EMC employees would be moved to the new company and there would be a contract leasing the employees back to the EMC. Mr. Brown

represented that this arrangement would lower the EMC's costs. He also indicated that the new company would handle the meter reading and control the meters. Along with this explanation, the EMC board voted unanimously to go forward with creating Cobb Energy. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

50. At the July 28, 1997 EMC board meeting it was decided unanimously at the direction of Dwight Brown that the Cobb Energy board would consist of seven members, three of which would come from the EMC. Ex. 8 to Depo. of Dwight Brown. Present and voting for that were Chadwick, Hames, Sarah Brown, Day, Samples, Boone, Lovingood, McGinnis, and Herndon.

51. At the August 26, 1997 EMC board meeting (Ex. 9 to Depo. Dwight Brown), the board received a report from attorney Bonnie Wilson regarding Cobb Energy. Board members present were Sarah Brown, Day, Lovingood, Hames, Chadwick, Boone, Herndon, Samples, and McGinnis. At this meeting Dwight Brown, David McGinnis and Frank Boone were elected to be members of the Cobb Energy board. It was determined that the EMC would receive 200,000 shares of A Common Stock and 1,000 shares of B Common Stock in exchange for \$10,000 and \$1,000 respectively. At that point it was determined that the EMC would own 100% of Cobb Energy pursuant to that stock ownership. Attorney Bonnie Wilson advised Dwight Brown and the EMC board at least the following: (1) "The subsidiary cannot constitute a substantial part of the organization's overall activities;" (2) "The funds of the parent corporation, however, cannot inure to the benefit of private individuals, and if this occurs indirectly through the subsidiary, the

parent's exemption may be revoked;" (3) "Any services, personnel, or assets, including the rental of equipment and space, provided by the subsidiary must be conducted at arms length and prices paid must reflect negotiated fair market value. Investment in the subsidiary by the parent should be reasonable in light of the expected return." Ex. 306 to Depo. Bonnie Wilson (June 11, 2008). None of these restrictions were imposed by the EMC board on the activities of Cobb Energy. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

52. Cobb Energy resolutions transferring the 201,000 shares of Cobb Energy stock to Cobb EMC were executed on September 6, 1997. Ex. 9 to Depo. Dwight Brown. The By-laws of Cobb Energy were established on the same day. The Class A Common Stock vested ownership of the corporation's assets in the EMC, Articles of Incorporation 5.2.1. Ex. 9 to Depo. Dwight Brown.

53. At the board meeting of November 25, 1997 the following members were present: Sarah Brown, Hames, Lovingood, Chadwick, Boone, McGinnis, Herndon, Day, and Samples. Dwight Brown and others were also in attendance. At the request of Dwight Brown, with McGinnis & Boone abstaining, the EMC board unanimously approved the transfer of all employees of Cobb EMC to Cobb Energy without any compensation to Cobb EMC. No EMC board member asked any questions. McGinnis & Boone abstained from voting because of their conflict by serving on the Cobb Energy board, thereby totally abdicating their fiduciary duties to the EMC. Also at this meeting Mr. Brown announced that Cobb EMC would enter into a 40-

year contract with Cobb Energy by which Cobb Energy would pay the employees and bill the EMC the cost plus a 2% adder. Ex.12 to Depo. Dwight Brown. No Director objected. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

54. At the December 16, 1997 EMC board meeting, the board approved the 40-year contract with Cobb Energy including the 2% adder on the cost charge back. Present at the meeting were directors Hames, Brown, Boone, Lovingood, Day, McGinnis, Herndon, Samples, and Chadwick. Dwight Brown was also present. Brown reported that the contract was limited to employees. A motion to approve the contract was made and carried unanimously, including both by McGinnis and Boone who were then serving as directors of Cobb Energy. Ex. 13 to Depo. Dwight Brown. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

55. Thus, as 1997 closed, the EMC had transferred for all practical purposes the total control of its operations to Cobb Energy and then transferred all of its employees to Cobb Energy. The only disclosure in the 1997 Annual Report was as follows: “Your Board of Directors recently voted to authorize the formation of a subsidiary corporation that will be your

service provider in the future. This is being done in anticipation of reregulation and restructuring.” 1997 Annual Report, Ex. 351.

56. It was further disclosed: “A very vital part of this plan is the formation of Cobb Energy Management Corporation (CEMC), a subsidiary of Cobb Electric Membership Corporation. The purpose of this new company is to be the aggregator of services for Cobb EMC members and other customers. These services may include, but not be limited to telecommunications, entertainment, energy and other domestic products and services.” (Ex. 351). There was no disclosure that the employees were or would be transferred to a for-profit entity for no value; that a for-profit entity would operate all aspects of the business of the EMC including that the for-profit entity would hire all the Vice Presidents of the EMC in violation of the Bylaws; and that the for-profit entity was subject to having shares owned by private investors, including the intention for EMC officers and/or directors to own such shares. Board members Hames, Sarah Brown, Boone, Lovingood, Day, McGinnis, Herndon, Samples, and Chadwick were present and none voiced any objections to the lack of full disclosure. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

57. Mr. Brown reported at the 1997 Annual Meeting that the EMC would not subsidize Cobb Energy in any way. (Annual Meeting Minutes, Ex. 353). This was a blatant and total fabrication as the entire Cobb Energy financial structure depended on EMC paying the adder fees and Cobb Energy usurping Cobb EMC business.

58. Early in January, 1998, discussions began at the EMC board about selling the meters first to Entertec and later to Schlumberger. (EMC board minutes, Jan. 27, 1998, Ex. 14). Directors Sarah Brown, Chadwick, Day, Hames, Lovingood, Herndon, McGinnis, Samples and Boone were present as was Dwight Brown.

59. At the February 24, 1998 EMC board meeting, the board addressed for the first time the transfer of meters to Cobb Energy. Board members present were Day, Hames, Sarah Brown, Boone, Herndon, McGinnis, Samples, Chadwick and Lovingood. Dwight Brown was also present. Dwight Brown presented a resolution to transfer the meters to Cobb Energy without explanation. Although Arthur Anderson had been hired to value the meters, and determined the value of the meters to be at least approximately \$15,700,000, the value of meters was left blank in the resolution. Directors Boone and McGinnis abstained from voting thereby totally abdicating their fiduciary duties to EMC members. A motion was made to transfer the meters to Cobb Energy and was carried unanimously. This motion and all action to transfer the meters directly violated Article 9 of the EMC Bylaws which prohibits such transfers without the vote of two-thirds of the EMC members. More specifically:

The Cooperative may not sell, mortgage, lease or otherwise dispose of, or encumber, any of its property other than:

A. property which, in the judgment of the Board of Directors, neither is, nor will be, necessary or useful in operating and maintaining the Cooperative's system and facilities, provided, however, that all sales of such property shall not in any one (1) year exceed in value ten per centum (10%) of the value of all of the property of the Cooperative;

B. services of all kinds, including electric energy; and

C. personal property acquired for resale,

unless such sale or disposition is first recommended by the Board of Directors and then, after written and published notice, is submitted to the members and such sale or disposition is authorized by the affirmative vote

of two thirds of the members of the electric membership corporation, voted thereon at a meeting in person, or by proxy, and the notice of such public sale or disposition was contained in notice of the meeting; and provided such sale or disposition is approved by the Board of Directors in accordance with the Enabling Act as passed by the Georgia Assembly of the State of Georgia

No questions or concerns or reservations were expressed by any EMC board member as to the sale of the meters and absolutely none of the procedures of Article IX of the Bylaws were followed, even though the meters are the lifeblood of the EMC. Nor were the EMC members ever advised that they were required to vote on this sale of assets. Chairman Chadwick supported the action. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

60. The transfer of the meters was addressed again at the March 24, 1998 meeting. Present were Directors Hames, Chadwick, Sarah Brown, Boone, McGinnis, Samples, Lovingood, and Herndon. Dwight Brown was also in attendance. Dwight Brown asked the Board to rescind the resolution from the February EMC board meeting moving the meters to Cobb Energy. The Motion to rescind the resolution was approved unanimously with no participation by McGinnis and Boone. No board member asked a single question, or questions for any clarification or explanation as to this transaction. During the meeting the board was asked by Mr. Brown to authorize the sale of Generator No. 5SJ00115, valued at \$431,539 to Cobb Energy in exchange for an additional 49% of Cobb Energy stock. Boone and McGinnis abstained from voting on this motion because of their conflict with the Cobb Energy Board thus, totally abdicating their fiduciary duties to the EMC and its members. This motion was approved

without any expression of concern or questions by any board member. There was no discussion as to the nonsensical fact that as Cobb EMC already owned 100% of the stock of Cobb Energy it could not possibly be granted an additional 49% ownership interest in Cobb Energy as proposed by Dwight Brown in exchange for the generator. Further, there was no indication that any independent valuation had been obtained as to the sale of the generator. While it has recently been contended that the generator might not have been transferred, no Board action reflecting that it was not transferred has ever been recorded. Ex. 18 to Depo. Dwight Brown. Indeed the actual board records reflect that a Resolution directing the consummation of the generator sale was fully executed. Ex. 238 to Depo. David McGinnis. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

61. At the May 27, 1998 EMC board meeting attended by Directors Chadwick, Hames, Brown, Day, McGinnis, Boone, Herndon and Lovingood, and also by CEO Brown, the board was told by Dwight Brown that Cobb Energy had contracted with Scana to sell gas to Cobb EMC customers in exchange for a 3.5% commission paid to Cobb Energy plus \$20 per customer after 50,000 customers were signed up. The issue was not presented to the board for approval and no board member raised any objection to the use of the EMC customer list for the marketing scheme between Scana and Cobb Energy, nor did any board member or Dwight Brown raise any objection to the fact that the EMC would receive no compensation at all from this transaction and instead, Cobb Energy received tens of millions of dollars from the arrangement. After July 1, 2002, pursuant to O.C.G.A. § 46-4-153.1, Cobb EMC could have

entered into this contract directly with Scana and received millions of dollars of revenue. This was a business opportunity improperly and unlawfully transferred to and maintained by Cobb Energy at the direction Dwight Brown. Doing so constituted usurpation of an EMC business opportunity and self-dealing by at least Dwight Brown, Frank Boone and David McGinnis, who were receiving income from their positions at Cobb Energy, which income was supported by such usurpation of EMC business opportunities. No board member expressed any questions or concerns of the waste of assets by Cobb EMC or the usurpation of EMC business. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

62. At the July 28, 1998 EMC board meeting, directors Sarah Brown, Chadwick, Hames, Day, Lovingood, Samples, Boone, McGinnis and Herndon were present as was President Dwight Brown. Dwight Brown announced that the National Cooperative Services Corporation (“NCSC”) would receive Preferred Stock of Cobb Energy in exchange for an undisclosed financial contribution to Cobb Energy. Mr. Brown advised the EMC board that the meters had to be transferred back to Cobb Energy before the transaction could take place. There was no discussion as to the impact on the stock owned by Cobb EMC. No question or concern was expressed by any director. The motion was made and the meters were moved back to Cobb Energy for a book value of \$9,696,967. Once again, this transfer directly violated Article IX of the EMC bylaws and was not approved by two-thirds of the members. The resulting Resolution, however, was changed without explanation to take out the dollar value. The motion was carried

without dissent with Boone and McGinnis abstaining and thus, totally abdicating their fiduciary duties to the EMC and its members. Mr. Brown and the EMC directors, including Boone and McGinnis, knew that the fair market value of the meters based on the Arthur Anderson appraisal was at least \$15,700,000. Ex. 156 to Depo. of Dwight Brown. This was done without objection, question or expressed concern by any board member or Mr. Brown despite the fact that the meters were being transferred to a for-profit company at almost \$6,000,000 less than their fair market value and in violation of the Bylaws. Further, the Board ignored the prior advice of attorney Bonnie Wilson that any transfer of assets had to be at fair market value. Ex. 193 to Depo. of Dwight Brown. Further, at this meeting Mr. Brown asked for approval of the First Amended and Restated Operating Agreement. Ex. 163 to Depo. of Dwight Brown. In his explanation to the Board, Mr. Brown said, “This structure makes it clear that Cobb EMC not Cobb Energy is responsible for the performance of the core Cobb EMC functions.” It was Cobb Energy’s position that the enabling legislation of the GEMCA does not apply to the activities of Cobb Energy. Despite this farcical assertion and the fact that Cobb EMC no longer had any meters or any employees and could do virtually nothing for itself, the EMC board, including Boone and McGinnis, unanimously approved the amendment. Ex. 21 to Depo. of Dwight Brown. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

63. The August 28, 1998 EMC board meeting was attended by Directors Chadwick, Hames, Brown, Day, McGinnis, Herndon, Boone, Lovingood, and Samples. Dwight Brown also

attended and announced his awareness of Flint Elec. Mem. Corp. v. Barrow, 271 Ga. 636 (1999), in which the Georgia Supreme Court precluded EMCs from, directly or indirectly, engaging in for-profit non-electrical business activities, except as expressly authorize by law. Dwight Brown also announced the need for a meeting of the Cobb EMC board to review Cobb Energy's amended articles of incorporation which established an 8.85% dividend for the owners of the Cobb Energy preferred stock. Ex. 22 to Depo. Dwight Brown. This was approved by the EMC board without any reservation, exception or question as to the means or method of funding the dividend for the Cobb Energy preferred stock. Ex. 23 to Depo. of Dwight Brown. Directors Boone and McGinnis abstained due to their roles as directors of Cobb Energy, thereby totally abdicating their fiduciary duties to the EMC and its members. Nor was their question or discussion as to the payment of dividends to the EMC. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

64. The EMC Annual Meeting was held on September 12, 1998. No disclosure was made by Mr. Brown or anyone else:

- a. that the meters had been transferred for a fraction of their value and without approval of two-thirds of the members as required by the bylaws;
- b. that the employees had been given away to Cobb Energy without compensation to the EMC;

- c. that a 40-year contract has been entered into with an entity with no assets other than its contract with the EMC, to provide services historically provided by the EMC for itself and which it was perfectly capable of continuing to provide, and that the intention was for private investors, including EMC officers and directors, but not EMC members, to earn dividend income as a result of this arrangement;
- d. that the Board had authorized to sell a generator to the Cobb Energy in exchange for 49% more ownership of Cobb Energy when the EMC already owned 100% of the issued Cobb Energy stock;
- e. that certain investors in Cobb Energy would begin receiving an 8.85% dividend paid from EMC adder fees paid to Cobb Energy; and
- f. that Cobb Energy was using the EMC customer base without compensation to sell gas for Scana.

65. The following board members were present for the Annual Meeting: Chadwick, Sarah Brown, Hames, Herndon, Day, McGinnis, Boone, and Lovingood. No board members expressed any objection to the failure to disclose to the members the above-referenced matters. EMC Annual Meeting Minutes, Ex. 354; EMC Board Meeting Minutes, Sept. 12, 1998, Ex. 24 to Depo. of Dwight Brown. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

66. In the EMC Annual Report for 1998 none of the issues set out in the paragraph

63 above were disclosed. What was represented was that “Cobb Energy was to contract with Cobb EMC to provide the labor and expertise to run the day-to-day activities of Cobb EMC.” It was not disclosed that Cobb EMC already had the labor and the expertise to run itself and Cobb Energy had neither. Nor was it disclosed that the adder fees would apply to other costs including meter reading and marketing. While the Scana contract was addressed there was no disclosure as to the compensation to Cobb Energy or the lack of compensation to the EMC for the use of its customers. While it was disclosed that Cobb Energy had an interest in Allied Utility Network and that this entity specialized in selling products and services other than electrical energy, it was not disclosed that Allied Utility Network was an utter failure in every aspect of its business model. It was further represented that Cobb Energy was being financed independently of Cobb EMC. It was not disclosed that Cobb EMC was indeed guaranteeing the financing of the operations of Cobb Energy. While it was disclosed that Cobb Energy was providing all of the employees plus a 2% adder, it was not disclosed that all of the employees had come from EMC at no cost to Cobb Energy and had been trained by the EMC. Ex. 355. No Board Member raised any objection to the failure to make these material and required disclosures. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

67. At the December 17, 1998 EMC board meeting directors Day, Lovingood, Chadwick, McGinnis, Boone, Herndon, Sarah Brown, and Hames were present. Dwight Brown also attended and requested the board to approve a payment by Cobb EMC to Cobb Energy of \$3,165,881 for meter reading and marketing services. The explanation for this was that it would,

“help Cobb EMC’s stability.” Cobb EMC was one of the most stable entities in Georgia. It was Cobb Energy that was gushing red ink at a prodigious rate. Ex. 29 to Depo. of Dwight Brown. See also Cobb Energy 1998 Audited Financial Statements. Ex. 253 to Depo. of Robert Schoonover. Boone and McGinnis abstained thereby totally abdicating their fiduciary duties to the EMC and its members. No Board Member raised any objection and the board approved the request. The individual Defendants present at the December 17, 1998 meeting breached their fiduciary duties owed to the EMC and its members, breached generally recognized principles of corporate governance relating to conflicts of interest, and violated the provisions of the GEMCA.

68. The January 26, 1999 EMC board meeting was attended by directors Chadwick, Fortney, Barnett, Hames, Day, Boone, Herndon, and McGinnis. Dwight Brown was also present. Larry Chadwick, on behalf of Cobb EMC, was presented with an additional 200,000 shares of Cobb Energy stock as one-half payment for the meters transferred to Cobb Energy. The supposed value was approximately \$5,000,000. These 200,000 shares, however, have never been recorded or reflected on Cobb Energy’s books or stock ledger as having ever been issued and, as of the date of the filing of the Complaint, the EMC still only holds the original 201,000 shares it obtained in 1997 for \$11,000.00. Also, 200,000 shares were issued to NCSC with the provision that Cobb EMC guarantee the put rights of NCSC, a liability of \$5,000,000, with no benefit to the EMC. Dwight Brown signed the share subscription agreement for Cobb EMC and simultaneously signed the same document for Cobb Energy. Doing so was a complete conflict of interest and breach of his duties to the EMC and its members. Also, 4,000 Cobb Energy shares were issued to Lee McKinstry. The net effect of these transactions was reported to reduce the voting rights of Cobb EMC in Cobb Energy to 49%. Depo. Bonnie Wilson, Ex. 30. No objection was made to these transactions by any director. These acts and omissions by the EMC

Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

69. No mention of these developments was made at the 1999 EMC Annual Meeting according to the minutes of that meeting. No director made any objection to the failure to disclose this material information. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

70. At the April 25, 2000 EMC board meeting, directors Chadwick, Sarah Brown, Hames, Barnett, Boone, McGinnis, Herndon, and Day were present as was Dwight Brown. The adder fee increased from 2% to 6% on motion of the chairman. The effect of this was to have the EMC pay to Cobb Energy tens of millions of dollars for services that the Cobb EMC was perfectly capable of performing itself, and had previously performed itself, without the incremental adder fee expense. Boone and McGinnis abstained thereby totally abdicating their fiduciary duties to the EMC and its members. The vote was unanimous by the other board members. No board member raised any question or objection. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

71. At the December 12, 2000 EMC board meeting directors McGinnis, Fortney, Hames, Sarah Brown, Chadwick, Herndon, Barnett, and Boone were present as was Dwight Brown. The Board voted to renew the EMC contract with Bermex for meter reading and other meter services. The 6%, and later 11%, adder fees charged by Cobb Energy applied to the contract with Bermex even though the contract was directly between the EMC and Bermex. There was no disclosure that Cobb Energy was charging millions of dollars of fees to the EMC regarding the Bermex contract for services Cobb Energy was not performing. Ex. 55 to Depo. of Dwight Brown. Dwight Brown was aware of this and was grossly negligent in failing to disclose these charges to the board and the EMC members. Dwight Brown breached his fiduciary duties owed to the EMC and its members, breached generally recognized principles of corporate governance relating to conflicts of interest, and violated the provisions of the GEMCA, solely in his role as an EMC officer. The Directors attending this meeting were unaware that these charges were being made.

72. At the February 27, 2001 board meeting, Directors Hames, Barnett, Fortney, Herndon, McGinnis, Boone, Sarah Brown, and Chadwick were present as was CEO Brown. At the meeting the Chairman made a motion to sell the EMC's shares of CBV stock "valued at \$450,000" to Cobb Energy "to help that company save on taxes." There was no valuation done of the stock, no explanation made as to why the EMC would transfer assets to assist Cobb Energy with its taxes and no objection to any of this by any of the board members. Directors Boone and McGinnis abstained from voting, thereby totally abdicating their fiduciary duties to the EMC and its members. Ex. 57 to Depo. of Dwight Brown. The other directors voted unanimously for this in spite of the fact that there was no explanation as to how the valuation was determined. These acts and omissions by the EMC Director Defendants attending this

meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

73. At the October 23, 2001 EMC board meeting, Directors Chadwick, Sarah Brown, Hames, Boone, Barnett, Herndon, Fortney, McGinnis, and Brock were present along with CEO Brown. A motion was made to reduce the EMC ownership interest from 100% to 49%. This motion carried unanimously even though there was no provision for compensation to the EMC for the loss of 51% ownership interest. Ex. 67 to Depo. of Dwight Brown. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

74. At the 2001 EMC Annual Meeting there was no disclosure of the reduction of Cobb EMC's ownership of EMC. Ex. 356.

75. At the September 28, 2004 EMC meeting Directors Sarah Brown, Hames, Chadwick, Fortney, Barnett, Boone, Herndon, and McGinnis were present. Dwight Brown was also present. There was a report presented by McGinnis that included a report on Cobb Energy preferred stock dividends. There was no mention of dividends on the common stock held by the EMC, no explanation as to why dividends were not paid on the EMC stock (notwithstanding the fact that in 1999 Cobb EMC's management and Board of Directors told the EMC membership on page 2 of the Annual Report that "The many products and services available through Cobb Energy Management are offered on a for-profit basis and Cobb Electric Membership Corporation

will benefit from those profits, through its stock ownership and dividends”) and no objections made or questions asked as to where the revenues were coming from to pay the dividends on the Cobb Energy preferred stock. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

76. At the February 22, 2005 EMC board meeting, Directors Sarah Brown, Hames, Chadwick, Fortney, Herndon, Barnett, McGinnis, Boone, and Brock were present as was CEO Brown. At this meeting a budget was approved that increased the adder fee to 11%. The 11% adder fee was not presented to or approved by the board, and indeed, many of the board members had no idea that the adder fee was increased. McGinnis and Boone fully participated and, of course knew that the adder fee was being increased to 11% from the roles with Cobb Energy and participation at Cobb Energy board meetings, yet remained silent as to informing the other EMC board members. Their participation constituted a serious breach of fiduciary duties and conflict of interest given the fact that they served on the Board of Cobb Energy and Dr. Boone owned stock in Cobb Energy. This had the effect of increasing the expenses of Cobb EMC being paid to Cobb Energy by tens of millions of dollars. Allowing this increase was without any benefit to the EMC or its members. Indeed, even the EMC’s fatally flawed special litigation committee found that these actions damaged the EMC approximately \$10,000,000.00. These acts and omissions by Dwight Brown, Boone & McGinnis and Chadwick constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of

the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

77. At the July 26, 2005 EMC board meeting, directors Hames, Sarah Brown, Chadwick, Boone, Herndon, Barnett, Fortney, McGinnis, Brock and Balkcom were present. CEO Brown was also present. The board again received a report on Cobb Energy including report on preferred stock dividends. No board member made any inquiry as to the funds for the dividends, which is problematic given the fact that Cobb Energy had no income from which dividends could be paid. Further, there was no explanation as to why the EMC would receive no dividends. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

78. At the October 25, 2005 EMC board meeting, Directors Chadwick, Sarah Brown, Hames, Boone, Barnett, Herndon, Fortney, Balkcom, McGinnis and Brock were present. Without Boone and McGinnis participating, the board approved the employment contract for Dwight Brown. The effect of the approved contract combined with the simultaneous contract with Cobb Energy resulted in an increase of his salary to approximately \$1,600,000.00, not including \$265,500.00 in annual dividend income (paid on his and his wife's preferred shares in Cobb Energy) plus retirement benefits and other emoluments of office. It also provided for a one million dollar loan that did not require repayment. Simultaneously, Mr. Brown received a two million dollar loan not requiring repayment from Cobb Energy. The purpose of the loans, and prior loans which these loans replaced, was to allow Mr. Brown to invest millions of dollars in Cobb Energy preferred stock, receive dividends on preferred stock and have significant voting

rights, which was a direct and irreconcilable conflict of interest. In approving this transaction the EMC board totally abdicated their responsibilities to the EMC and its members. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

79. At some point in 2005 the Cobb Energy/Scana contract was terminated at the request of Scana [REDACTED]

[REDACTED] As the EMC President and CEO, Brown caused Cobb EMC to pay to Cobb Energy [REDACTED]

[REDACTED] As President, CEO and Chairman of the Board of Cobb Energy, Brown caused Cobb Energy to unlawfully charge and accept money to which Cobb Energy had no entitlement whatsoever. [REDACTED] expenditure was not submitted to the EMC board for approval and the decision was made unilaterally by Brown to waste assets of the EMC in favor of Cobb Energy in a conflict of interest and self-dealing transaction. This violated the practices and procedures of the EMC that any expenditure over \$25,000 had to be approved by the board. Depo. Dwight Brown, p. 412 (Feb. 20, 2008). Dwight Brown breached his fiduciary duties owed to the EMC and its members, breached generally recognized principles of corporate governance relating to conflicts of interest, and violated the provisions of the GEMCA. Further, solely in his role as CEO and Chairman of the Board of Cobb Energy, Brown unlawfully converted EMC funds to Cobb Energy.

80. Throughout all of the proceedings, transactions and EMC board actions from the beginning of the Relevant Period until 2005, attorney Bonnie Wilson simultaneously represented the EMC, Cobb Energy and Dwight Brown, personally, which was a clear and blatant conflict of interest and breach of fiduciary duty that the EMC Director Defendants and Dwight Brown, authorized, encouraged and funded. By doing so, each of the then in office EMC Director Defendants and Dwight Brown breached their fiduciary duties and breached generally recognized principles of corporate governance relating to conflicts of interest.

81. At the August 25, 2006 EMC board meeting, directors Fortney, Sarah Brown, Chadwick, Barnett, Balkcom, Brock, Herndon, Boone, McGinnis, and Anderson were present. Ex. 133 to Depo Dwight Brown. The board was presented with a report from Chairman Chadwick who designated himself to vote the EMC shares at the Cobb Energy shareholders' meeting. No director asked for any information as to the relationship between Cobb EMC and Cobb Energy, the flow of funds between the two, a conflicting CEO of both entities, the amount of adder fees, or any other aspects of the relationship. Such failure to make inquiry was a complete abdication of the directors' obligations to the EMC and its members. These acts and omissions by the director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

82. At the November 28, 2006 EMC board meeting, directors Sarah Brown, Chadwick, Fortney, Herndon, Anderson, McGinnis, Barnett, Balkcom and Boone were present. A motion was made for the EMC to purchase at its expense an acreage that would be owned by the EMC for two years and then sold to ProCore, a wholly-owned subsidiary of Cobb Energy.

There was no explanation as to why the EMC would be engaging in this transaction, any benefit that could possibly flow to the EMC as a result of the transaction or any other aspect of this extremely peculiar arrangement, or any discussion as to whether this investment on Cobb Energy's behalf met the EMC's investment policies. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

83. At the February 20, 2007 EMC Board Meeting, directors Sarah Brown, Chadwick, Boone, Barnett, Balkcom, McGinnis, Herndon, Fortney, Anderson, and Gresham were present. CEO Brown was also present. Ex. 140 to Depo of Dwight Brown. Dwight Brown announced that Cobb Energy was setting up a right-of-way company for which Cobb EMC would be its only client. Nothing was asked by any board member as to the billings, cost of the contract, whether other contracts could be obtained more favorably, whether the EMC could do the work itself without paying Cobb Energy for it or any other matter related to it. These acts and omissions by the EMC Director Defendants attending this meeting, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

84. At no annual meeting of the EMC from the inception of Cobb Energy to the present has there been any meaningful disclosure of the financial relationship between Cobb EMC and Cobb Energy. There has been no disclosure of, among other material information: (1)

that the meters were unlawfully transferred at a fraction of their value and in direct violation of Article 9 of the EMC bylaws; (2) that the employees were unlawfully transferred and without any reimbursement to the EMC; (3) that the EMC is being charged astronomical adder fees by Cobb Energy for performing functions for the EMC that it did for itself and is perfectly capable of doing for itself presently; (4) that officers and directors of EMC have or had financial interests in Cobb Energy that are directly related to the business it does with the EMC; (5) that CEO Brown and his wife own substantial stock in Cobb Energy; (6) of CEO Brown's compensation from Cobb Energy or he and his wife's \$265,500.00 per year dividends from Cobb Energy stock; (7) that CEO Brown uses his or his wife's stock to secure personal financial obligations involving real estate transactions with other officers and directors of the EMC and/or Cobb Energy and its affiliates; and (8) that loans were made to Mr. Brown with no requirements for repayment. No defendant Board member has ever raised any objection or concerns regarding any of these failures to disclose material information, related-party transactions and conflict of interest transactions. These acts and omissions by the EMC Director Defendants attending these annual meetings, and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

85. Dwight Brown and the EMC board were plainly told by their attorney Bonnie Wilson prior to creating Cobb Energy "because Cobb EMC controls Retail Co. [i.e., Cobb Energy], argument can be made that Cobb EMC cannot do indirectly what it cannot do directly." Ex. 308 to Depo. of Bonnie Wilson. This is precisely what the Georgia Supreme Court held in the Flint case. Shockingly it was contemplated that Dwight Brown would be one of three

directors and one of a very limited number of Class A Preferred Shareholders. Ex. 308 to Depo of Bonnie Wilson. The Board was advised that “the members of the Board of Directors must exercise all such duties in good faith and with the care an ordinary prudent person in like position would exercise under similar circumstances.” Ex. 318 to Depo. of Bonnie Wilson. The Board was advised that their compensation was limited by statute to a “per diem” plus expenses. Ex. 318 to Depo. Bonnie Wilson. The Board was further advised that they would be liable for any unlawful “disposition or conveyance of corporate assets.” Ex. 318 to Depo. of Bonnie Wilson. Mr. Brown and the EMC board completely ignored this advice from their own counsel. These acts and omissions by the director Defendants and Dwight Brown, constituted breaches of their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC. Further, solely in their roles as officers and/or directors of Cobb Energy, Dwight Brown, Frank Boone and David McGinnis breached their duties owed to Cobb EMC.

86. Mr. Brown’s explanation for forming Cobb Energy was to “operate free from the constraints of the IRS as otherwise apply to tax exempt cooperatives.” Ex. 323 to Depo. Bonnie Wilson. Mr. Brown’s goal was to convert “Cobb EMC to be a wire company just like the gas companies have separate pipe companies. I believe that this has to do with his ultimate feeling that Cobb EMC will eventually be out of the business of selling electrical power to its members.” Ex. 324 to Depo of Bonnie Wilson (Report Rogers on meeting with Brown). Thus the astonishing notion was that the EMC would become a “transportation” company and that all the electrical power sales would be routed through the for-profit for the benefit of Mr. Brown and the other Cobb Energy shareholders. Counsel was clearly concerned that the new entity would

“usurp business opportunities of Cobb EMC.” Ex. 324 to Depo. Bonnie Wilson. Mr. Brown and the EMC board were specifically advised that

Dwight Brown may violate his fiduciary duties to Cobb [EMC] if he is found to have appropriated any business opportunity of Cobb for his own benefit. O.C.G.A. 46-3-304(a)(1)(c)” [added] ... “based on our previous letter to Dwight Brown there exists a very plausible argument that the contemplated activities for the new corporation [Cobb Energy] represent a business opportunity for Cobb [EMC]. ... “Directors and Officers in the management and use of corporation property are charged with serving the interest of the corporation as well as those of all the stockholders ... Once Dwight’s role in the new corporation is determined, we will need to insure that his fiduciary duties to Cobb, and even to the new corporation are not compromised.

(Ex. 326, pp. 5–7). The EMC board was also advised and completely ignored the recommendation from counsel that they must commission reliable sources to address the Cobb Energy situation, ensure that the directors have studied and questioned appropriate information, explore alternative transactions, and prohibit interested directors from participating in the deliberations. Ex. 326, pp. 7-8. The EMC board was specifically advised that liability would arise from the improper transfer of assets, and/or unauthorized acts. Mr. Brown and the EMC board were told that “the funds of the parent corporation, however, cannot inure to the benefit of private individuals.” Ex. 306 to Depo. Wilson, p. 20. Mr. Brown and the Board were further advised that “Because Cobb EMC is the sole shareholder [of Cobb Energy] and thus, in control of board appointments, a potential claim exists that the new corporation is restricted by the Enabling Act provisions....Because Cobb EMC controls Retail CO., argument can be made that Cobb EMC cannot do indirectly what it can not do directly.” Ex. 308 to Depo. of Bonnie Wilson. The individual Defendants approving the formation and continued operation of Cobb Energy virtually totally ignored this advice and counsel, and as a result, they have breached their fiduciary duties owed to the EMC and its members, breached of generally recognized principles of corporate governance relating to conflicts of interest, and violated the GEMCA, all solely in

the performance of their duties as officers and directors of the EMC.

87. The creation and continued operations of Cobb Energy was and is illegal under the GEMCA, IRC § 501(c)(12), violates provisions of the EMC bylaws, articles of incorporation, the EMC's investment policies and the EMC policy manual. 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 assets and 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 GEMCA. 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. Continued violation of this well-established law and EMC governance by the individual Defendants constitutes, among other things, gross mismanagement of the company, self dealing, waste of assets and usurpation of corporate opportunity.

88. The EMC board of directors has adopted a Cobb EMC Policy Manual which precludes exactly the same type of behavior and dual roles reflected in the actions of Mr. Brown, Chadwick, McGinnis, and Boone but have taken no actions whatsoever to remedy the violation of their own policies. The EMC board has adopted an investment policy manual which clearly precludes investments in the type of start-up activities such as Cobb Energy and its affiliates, but no Defendant board member has taken any action to either object to the EMC investment or to remedy the unauthorized investments. The directors are required to make sure that the EMC is

operated in the best interest of its members. None of the director Defendants have taken any steps to advise the members of the costs of the 40-year contract, the impact of the loss of the meters or that the meters were transferred for millions less than fair market value, the fact that no compensation was paid to the EMC for the transfer of the employees, that Mr. Brown has made millions as a result of the transaction and that EMC board members have made hundreds of thousands of dollars as a result of the transaction. Rather, the EMC board has sat by silently while multiple positive statements were provided by Mr. Brown as to the success and profitability of Cobb Energy and its affiliates, when in truth, they have been a dark hole financially. Indeed, all Cobb Energy affiliates, with the exception of ProCore, have been utter failures. More specifically, the following information from Cobb Energy's 2006 Financial Statements shows the accumulated loss for these Cobb Energy affiliates totals over \$16,000,000.00.

<u>Cobb Energy Affiliate</u>	<u>Accumulated Loss</u>
Cooperative Business Ventures	\$11,159,000.00
Cooperative Benefits & Financial Services, LLC	\$ 206,000.00
Allied Utility Network, LLC	\$ 2,267,000.00
Allied Energy	\$ 1,911,000.00
Cobb Energy Pest Control	\$ 204,000.00
Cobb Energy Mortgage Company	<u>\$ 338,000.00</u>
	\$16,085,000.00

89. The overall consolidated retained earnings of Cobb Energy and affiliates is \$-12,527,000.00. The statements in the EMC annual reports touting the success of Cobb Energy were and are false. Additionally, Mr. Brown and the defendant Cobb Energy directors, solely in their roles as Cobb Energy directors, have a fiduciary duty to provide the EMC with truthful and accurate information. They have failed to do so and instead, to this very day, continue to proactively seek to seal and preclude the EMC and its members from access to this information. See, Cobb Energy Fourth Motion for Protective Order (July 1, 2008).

90. Cobb Energy is indebted to Cobb EMC related to certain retirement liabilities in the approximate amount of \$3,350,000 to which the EMC is entitled to be reimbursed as shown by the evidence in this case, and even as found by the purported special litigation committee. Claims in Cobb Energy's financial documents that this amount has been forgiven are false.

COBB ENERGY'S FAILURE TO PAY FAIR MARKET RENT

91. From its inception to the present, Cobb Energy and its affiliates have failed to pay Cobb EMC fair market rental value for use of the buildings and facilities they occupy. The financial statements and tax returns for both Cobb Energy and Cobb EMC show no rent expense to Cobb Energy or rent income to Cobb EMC, even though Cobb Energy occupies substantially all of Cobb EMC's buildings. The continued failure of the EMC directors, as well as Defendant Dwight Brown, to obtain fair market rental value for use of EMC assets constitutes, among other things, breach of fiduciary duties, waste of assets and gross mismanagement, solely in their positions with the EMC. Furthermore, as to Defendants Dwight Brown, Larry Chadwick and Frank Boone, such failures constitute usurpation of corporate opportunity and self-dealing, as each of these individuals received dividend income or other income from their investments in Cobb Energy stock of positions with Cobb Energy, which were made possible in part by the failure of Cobb Energy and its affiliates to pay fair market rent.

UNLAWFUL AND EXCESSIVE EMC DIRECTOR COMPENSATION

92. O.C.G.A. § 46-3-290(d) restricts compensation of EMC directors to a per diem basis for meetings attended and reimbursement of expenses incurred. More specifically, it provides in relevant part:

The compensation, if any, of directors for their services as such shall be on a per diem basis and, unless otherwise provided in the bylaws, shall be fixed by the board of directors. Directors also shall be entitled to reimbursement

of expenses actually and necessarily incurred by them in the performance of their duties.

Although O.C.G.A. § 46-3-201(b)(23) empowers an EMC to “pay pensions and establish and carry out pension, savings, thrift, and other retirement, incentive, and benefit plans, trusts, and provisions for any or all of its directors, officers, and employees,” Cobb EMC has not amended its bylaws to authorize any additional compensation and benefits other than “per diem compensation.” More specifically, Cobb EMC’s bylaws, Article III, Section 5 provides:

The Directors **shall fix** the compensation for their services on a per diem basis and shall be entitled to reimbursement of expenses actually and necessarily incurred by them in the performance of their duties.

While the EMC bylaws could be amended to provide for retirement and other benefits, that was never done. Instead, the EMC circumvented the process of amending its bylaws by inserting provisions in the EMC Policy Manual purporting to authorize such payments.

Provisions in the Policy Manual cannot override the bylaws which are a binding contract between the EMC members, management and the EMC:

The patrons of the Cooperative, by dealing with the Cooperative, acknowledge that the terms and provisions of the Articles of Incorporation and bylaws shall constitute, and be a contract between, the Cooperative and each patron, and both the Cooperative and the patrons are bound by such contract, as fully as though each patron had individually signed a separate instrument containing such terms and provisions.

EMC Bylaws, Art. VII, Section II.

During the Relevant Period, Cobb EMC has paid EMC directors tens of thousands of dollars in retirement benefits, life insurance and health insurance. Several recent directors have been provided lump sum retirement benefits in excess of \$100,000 within their first two years of service on the EMC board. The fact that these benefits have been provided and the amounts thereof are not disputed by the Defendants. Plaintiffs Exhibit 273, provided by Defendants,

evidences the dates and amounts of these benefits. Additionally, Steven Paolucci, Associate

Vice President of Accounting for Cobb EMC, testified:

14 [H]ave you ever
15 looked into the legality of an EMC board
16 member receiving insurance and retirement
17 benefits?

18 A. I have not.

19 Q. Has anybody at the company that you
20 know of?

21 A. Not that I know of.

22 Q. Other than these payments, do they
23 receive any other type of compensation?

24 A. No, this is their compensation.

25 Q. Let me ask you, go over to

1 Mr. Balkcom, which is the third column from
2 the right side.

3 A. Yes.

4 Q. And he's got, looks like when he came
5 on he has 123,000 and change in the Mint plan
6 for 2005. Do you see that?

7 A. Yes, I do.

8 Q. Would you have an explanation for the
9 magnitude of that number?

10 A. That was a lump sum payment.

11 Q. And why would he get a lump sum
12 payment?

13 A. Well, he doesn't receive this payment,
14 it's put into the fund, it's paid into an
15 outside fund, and it's the same as the earlier
16 ones but where they made a payment a year over
17 a number of -- the company made a payment each
18 year over a number of years, this was a
19 onetime payment into that fund. So he won't
20 receive anything on this until he's retired,
21 just like the other board members.

22 Q. But why not just -- why wouldn't it be
23 just like the monthly contribution for the
24 others of -- I'm sorry, the annual
25 contribution of the others for eight or nine

1 thousand dollars a year? I'm not
2 understanding why he gets \$123,000.

3 A. I can't answer that, I didn't make the

4 decision to do that. I know the company
5 changed from going to multiple payments to one
6 annual payment.
7 Q. Okay. Let me have that back. It
8 looks like Anderson had 107,000 when she came
9 on and Gresham 130,000; would the explanation
10 be the same?
11 A. Yes, sir, it would.

93. In authorizing and allowing these excessive and payments to the EMC directors, each of the EMC Director Defendants, and Dwight Brown have violated Georgia law, the EMC bylaws, breached their fiduciary duties and breached of generally recognized principles of corporate governance relating to conflicts of interest, abused their control, have wasted corporate assets and grossly mismanaged the EMC, solely in their positions with the EMC. Furthermore, each of the EMC Director Defendants, in authorizing or allowing these payments to be made to themselves has also engaged in self-dealing and abuse of control.

PROCORE SOLUTIONS, LLC

94. Prior to the formation of Cobb Energy, Cobb EMC operated its own call center to service its customers' needs. Subsequent to the formation of Cobb Energy, call center services were transferred to ProCore Solutions LLC ("ProCore"), a wholly owned subsidiary of Cobb Energy. However, unlike when Cobb EMC operated call center services, now, individuals performing call center services for Cobb EMC are billed to Cobb EMC at actual cost, plus an incredible markup of [REDACTED]. Not surprisingly, none of this has been disclosed to Cobb EMC members and, even to this day, Defendants Dwight Brown, Boone and McGinnis continue to attempt to conceal this information from EMC members by seeking to have it placed under seal. See, Cobb Energy 4th Motion for Protective Order. The total excess cost to the EMC of these charges is approximately \$14,300,000.00. Aff. Wayne Middlebrooks (June 16, 2008). These acts and omissions by Dwight Brown, Frank Boone and David McGinnis constitute breaches of

their fiduciary duties owed to the EMC and its members, breaches of generally recognized principles of corporate governance relating to conflicts of interest, and violations of the GEMCA, all solely in the performance of their duties as officers and directors of the EMC.

INABILITY OF DIRECTORS TO RENDER INDEPENDENT AND DISINTERESTED DECISIONS

95. No EMC board member has any documentation whatsoever related to their board positions, even though some have served for decades.

96. The directors and each of them have accepted insurance and retirement benefits in the tens of thousands of dollars, and in most cases over \$100,000.00, which violates Article III, Section 5 of the EMC bylaws which limits director compensation solely to per diem fees for meetings attended.

97. None of the Defendant board members have taken any steps to advise the members that the monies flowing to Cobb Energy in adder fees were for services that Cobb EMC could very well have done itself at its own cost. Further, as to those EMC board members on the board at the time of the creation of Cobb Energy and at the time of the issuance of the Cobb Energy stock to EMC officers and Directors, they completely ignored the advice and counsel of attorney Bonnie Wilson to the effect that the transaction created substantial risk of conflicts of interest as well as the illegal transfer of business opportunities of the EMC to Cobb Energy and that it was illegal for individuals associated with Cobb EMC to receive, directly or indirectly, money as a result of their involvement with other entities. The individual Defendants breached their fiduciary duties owed to the EMC and its members, breached generally recognized principles of corporate governance relating to conflicts of interest, and violated the provisions of the GEMCA, all solely in their positions with the EMC.

Dwight Brown

98. CEO Dwight Brown orchestrated the Cobb Energy/Cobb EMC relationship from day one. It was his concept from the inception. It was under his leadership that the Board approved the transfer of the meters at less than fair market value; approved the transfer of the employees; approved the 40-year contract; approved the 2 and 6% adder fees; approved the concept of having officers and directors of the EMC, Cobb Energy and its affiliates as investors in Cobb Energy; approved the concept that the investors in Cobb Energy would receive dividends as a result of the income flowing from the EMC to Cobb Energy; in the approval of the budget that had the effect of increasing the adder fee to 11% even though not presented to the Board for approval. Mr. Brown is in charge of keeping up with the shares of Cobb Energy stock and is unable to explain what happened to over 200,000 shares of Class A Common Stock that was supposedly issued to Cobb EMC in exchange for partial payment of the meters. Mr. Brown orchestrated the dual management role for himself between the two companies, orchestrated the hiring by Cobb Energy of the senior officers of Cobb EMC and orchestrated the employment packaging loan agreements for himself. Mr. Brown orchestrated the arrangement by which Cobb Energy pays no rent for the premises owned by Cobb EMC which it occupies. Mr. Brown has orchestrated the failure of the accountants to provide related-party transaction data from Cobb Energy to the EMC Board and its members. At least in part as a result of all this he orchestrated an increase of his income from \$250,000 per year to nearly \$1,600,000 per year.

Donald Barnett

99. Mr. Barnett has been on the Board since 1999 and presently sits on the Special Litigation Committee. Mr. Barnett has no file relating to his service as a Director. Mr. Barnett does not recall the multiple amendments to the 40-year contract or any particulars of the

amendments but he has always voted to support them. He has never raised any objection to the transfer of the meters, the transfer of the employees or the 40-year contract, or any fees paid by the EMC to Cobb Energy. He sees no problem with Dwight Brown or his wife owning stock acquired with funds loaned by the EMC. He sees no problems with Mr. Brown receiving dividends on his Cobb Energy stock. Prior to the Special Litigation Committee he never saw any conflict of interest between Cobb Energy and Cobb EMC nor did he have any concern about Brown serving as chief executive of both companies. He has no idea what Mr. Brown is paid. He is unaware of the terms of the Scana contract. He does not know that the company has a contract with Bermex for meter reading. He has no idea what charges ProCore submits to the EMC for its services and he has no idea what percentage of the revenue of Cobb Energy comes from the contract with EMC. He has never looked at the EMC investment guidelines. He is unable to explain why the EMC would pay ██████████ to Cobb Energy regarding the termination of the Scana contract. Prior to his service on the Special Litigation Committee he has never expressed any objections or reservations about anything having to do with the Cobb EMC/Cobb Energy relationship.

David McGinnis

100. Defendant McGinnis has served on the Cobb Energy Board and the Cobb EMC Board simultaneously since inception. He personally dealt with Bonnie Wilson, the attorney, regarding the contract and formation issues. Mr. McGinnis was aware that attorneys who represented the EMC worked out the employment contract with Dwight Brown. He was not aware that Cobb EMC guaranteed the NCSC investment in Cobb Energy stock. He has never seen any conflict of interest as a result of Dwight Brown serving as CEO of both Cobb EMC and Cobb Energy. He is unaware as to whether or not the EMC is entitled to a dividend on its Cobb

Energy stock. He does know that no members of the EMC were offered stock. It never concerned him that there might be a conflict of interest of him sitting on the Boards of both companies. He acknowledges that no studies have been done showing any economic benefit to Cobb EMC as a result of the Cobb Energy relationship. He supported the transfer of the employees from Cobb EMC to Cobb Energy. He never objected to the transfer of the meters nor at less than fair market value. He cannot explain why the meters were transferred back to Cobb EMC and then later transferred yet again back to Cobb Energy. He voted for the transfer back even though he was sitting on the Cobb Energy Board. He acknowledges that the Board voted to sell a generator to Cobb Energy in exchange for 49% more ownership of Cobb Energy when in fact Cobb EMC already owned 100% of the stock. He acknowledges that it appears that Cobb EMC received nothing for the generator. He is unable to explain how the Scana/Cobb Energy contract benefited the EMC. He never took any action to assure the members knew about the dividend structure. He took no action to explain to the members the 6% adder fee. He took no steps to notify the members that the adder fee was increase from 6 to 11%. No Board Member ever objected to any aspect of the Cobb Energy Cobb EMC relationship. He is familiar with the Policy Manual and he expects that people who work for the company will comply with the terms of it.

Kay Anderson

101. Mrs. Anderson was recruited by Mary Ellen Brown, Dwight Brown's wife, to serve on the Board. She was unaware that Mr. and Mrs. Brown had ownership interest in Cobb Energy until the fall of 2007. She believes that Mr. Brown's salary is around \$250,000 from the EMC and the same amount from Cobb Energy when in fact it is nearly \$1,600,000 per year including dividends and benefits. She has never objected to McGinnis and Boone serving as

Directors of both. She does not believe that there is a conflict of interest with Mr. Brown serving as the CEO of both companies. She does not believe there is anything wrong with EMC Directors owning stock in Cobb Energy. Mrs. Anderson has no concerns whatsoever about any aspect of the relationship between Cobb EMC and Cobb Energy despite the fact that Cobb Energy is a for-profit and Cobb EMC is a non-profit. She can cite no examples of benefits to Cobb EMC from Cobb Energy. She has no idea of what percent of Cobb Energy revenues derive from its contract with the EMC. She does not know whether the investment in Cobb Energy violates Cobb EMC's investment guidelines. She believes the members should be fully advised as to the business relationship between Cobb Energy and Cobb EMC. She has no idea the amount being paid to Cobb Energy as a result of the adder fees. She has made no inquiries to the corporate attorney regarding issues related to Cobb Energy. She does not believe Dwight Brown's dual roles violate the EMC Policy Manual's prohibition on conflict of interest. No directors have expressed any concern about any of the issues relating to the Cobb EMC/Cobb Energy relationship.

Alton Fortney, Jr.

102. Mr. Fortney came on the Board in 1999. He has never raised any objection to the 40-year contract or any of the amendments. He's never objected to the transfer of the employees or the transfer of the meters. He voted for the Brown employment contract and the loans. He was unaware until 2008 that the loans made by the EMC were used by Brown to acquire stock in Cobb Energy. He has seen no documents showing any benefits to the EMC from the relationship with Cobb Energy. He does not know whether or not the Board approved the 11% adder fee. He recalls no documentation justifying the establishment of the adder fees. He is unable to state whether or not the EMC investment in Cobb Energy complies with the Investment Policy

Guidelines of the EMC. He was not aware that Chairman Chadwick owned stock in Cobb Energy. He cannot explain why the EMC would pay ██████████ for the termination of the Cobb Energy/Scana contract.

Frank Boone

103. Frank Boone has been on the Board since the late 1990's. He has never objected to Dwight Brown's stock ownership. He has no objection to the adder fees including the 11%. He had stock in Cobb Energy until 2006. He did not see that as any conflict of interest. He supports the transfer of the meters and employees. He is unable to explain the benefit of the EMC purportedly receiving 49% of the stock in exchange for the generator when it already owned 100%. It did not concern him that the meters were transferred to Cobb Energy with the value left blank nor does it concern him that the meters were transferred for less than their appraised value. He is not troubled that the other investors receive dividends from their stock but Cobb EMC does not. He is not concerned that Brown is CEO of both companies. He has never looked at the Investment Policy Guidelines to see whether the investment in Cobb Energy is in compliance. He does not know whether Cobb Energy pays rent for the Cobb EMC properties. He believes the members should have full disclosure of the affairs between the EMC and Cobb Energy.

Sarah Brown

104. Mrs. Brown joined the Board in 1979. She supported the transfer of the meters to Cobb Energy. She said this was done to prevent hostile takeover but is unable to provide an example where an EMC has been a victim of a hostile takeover. She supports the contract with Brown including the loans. She was aware that Brown used the loans to acquire stock in Cobb Energy for himself and his wife but does not believe that was inappropriate. She sees nothing

about the circumstances of the Cobb Energy relationship. He agrees with the EMC Policy Manual provisions relating to conflicts, but despite those principles, does not apply them to Mr. Brown's situation or have concern about it. He sees nothing wrong with the fact that employees were repeatedly informed they would be paid for the time they attended the annual meetings. He acknowledges that the EMC guaranteed the put rights of NCSC and sees no problem with the EMC guaranteeing third party investments in Cobb Energy stock. He sees no problem that Mr. Brown signed the guarantee for both Cobb EMC and Cobb Energy. He believes that if the EMC managed itself, it would cost the EMC more than the actual costs plus the 11% being charged by Cobb Energy. He believes Brown's salary with the EMC is \$300,000.

Henry Balkcom

106. He sees no conflict of interest in the relationship between Cobb Energy and the EMC. He sees no conflict of interest in Mr. Brown serving as CEO of both companies. He sees no conflict of interest with Directors McGinnis and Boone serving as Directors of both. He knows that the EMC pays millions of dollars to Cobb Energy for each year. He believes that Cobb EMC's expenses are lower because of the Cobb Energy relationship even though the EMC's actual expenses are charged to it plus 11%. He cannot identify any specific cost item that has been lowered. Mr. Balkcom believes the financial records of Cobb Energy should be submitted to the members. He has no idea what the EMC's ownership interest is in Cobb Energy.

107. Each of the above EMC board members has been named as a Defendant in this action. As detailed herein, each of these director Defendants actively participated in the alleged wrongdoing and/or was a beneficiary of their misconduct and, thus, faces a substantial likelihood of personal liability on the derivative claims alleged herein and is, therefore, in no position to

render disinterested judgment, and, in fact, they have not rendered disinterested judgments. For example, every one of the EMC directors testified that they believed there were no conflicts of interest with the Cobb EMC/Cobb Energy situation, individuals serving on both boards, Mr. Brown's dual roles or any other conflicts of interest whatsoever. Yet, even the fatally flawed special litigation committee, on behalf of and with the authority of the EMC board, was able see and *has admitted* the need for changes to "eliminate any actual or perceived conflicts of interest," thus highlighting the extreme inability of these directors to render independent and disinterested judgment.

108. The EMC director Defendants either knew or but for their gross dereliction of their duties as fiduciaries of the EMC should have known that violations of law, violates of the EMC bylaw, violations of the EMC policy manual, violations of the EMC financial guidelines, and other violations were occurring and took no steps in a good faith effort to prevent or remedy that situation, proximately causing substantial harm to the EMC. These directors have demonstrated their unwillingness and/or inability to act in compliance with their fiduciary obligations or to take any action whatsoever against themselves and their fellow directors for the violations complained of herein. The EMC directors have developed relationships with the other members of the board of directors, directors of Cobb Energy and/or officers of both companies, and are dependent upon the goodwill of the remaining EMC directors to retain their positions as members of the board. As a result, each of the EMC director Defendants has entangling financial alliances, interests and/or dependencies which prevent them from exercising independent and disinterested judgment.

109. The EMC directors participated in, approved and/or permitted the wrongs alleged herein and participated in efforts to conceal or disguise those wrongs from the EMC and its

members or recklessly and/or negligently disregarded the wrongs complained of herein and are, therefore, not disinterested parties. As a result of their access to, and review of, internal documents, conversations and connections with other directors and officers of the EMC and Cobb Energy, employees, and attendance at management and/or board meetings, each of the individual Defendants knew adverse information not known to the EMC members regarding the wrongs alleged herein, or have recklessly or negligently failed to properly inform themselves, and have engaged in and approved waste of millions of dollars of EMC assets. Pursuant to their specific duties as board members, the EMC director Defendants are charged with the management of the EMC and with conducting its business affairs. Defendants breached the fiduciary duties that they owed to the EMC and its members in that they have failed to prevent and correct any of the wrongs complained of herein and engaged in and approved waste of EMC assets. The directors have also personally benefited from the wrongs complained of herein and have personally profited at the expense of the EMC and its members. As a result, the EMC director Defendants cannot exercise independent objective judgment.


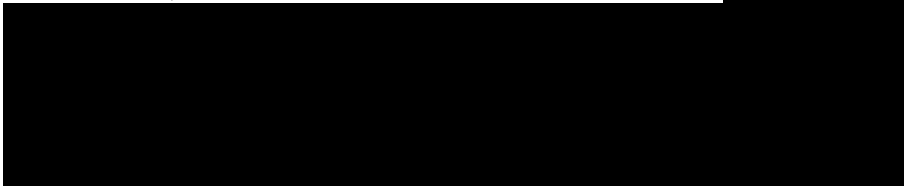
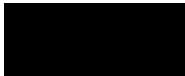

110. The acts and omissions of the Defendant Dwight Brown and the EMC Director Defendants in creating and/or maintaining the relationship with Cobb Energy as hereinbefore described constitutes both a conflict of interest and breach of fiduciary duties. Affidavit, Ham, (Ex. A hereto); Affidavit, Smith (Ex. B hereto); Affidavit, Dreyer (Ex. C hereto); Affidavit, Knapp (Ex. D hereto); Affidavit, Middlebrooks (Ex. E hereto).

111. Significantly, there has been a complete failure to disclose the related parties' transaction between Cobb EMC and Cobb Energy as required by generally accepted accounting principles and Financial Accounting Standard Board rules. Affidavit, Middlebrooks; Affidavit, Neil (Ex. F hereto). Neither Dwight Brown, nor any of the director Defendants, nor any of the

senior officers see either the actual or potential for conflict of interest or breach of fiduciary duty in any aspect of the relationship of Cobb Energy and Cobb EMC and indeed each enthusiastically supports all aspects of the relationship past present and future. This reflects a complete ignorance of or total abdication of their duties as officers and directors and suggests a corporate culture devoid of the most fundamental notions of responsible corporate governance.

**COBB ENERGY STOCK OWNERSHIP BY COBB EMC
OFFICERS AND DIRECTORS**

112. Even though the Defendant officer and directors of Cobb EMC caused the EMC to transact hundreds of millions of dollars worth of business with Cobb Energy, it was never disclosed in the annual reports, annual meetings or any newsletters to the EMC membership that the following individual officers and directors of Cobb EMC, Cobb Energy and its affiliates, as well as the attorney principally responsible for handling Cobb Energy matters, owned approximately the following amounts stock in Cobb Energy:

Dwight Brown	\$1,500,000.00
Marry Ellen Brown	\$1,500,000.00
Larry Chadwick, Cobb EMC Board Chairman - Frank Boone, EMC Director	
	
Dean Alford – Former Cobb Energy Director and President of Allied Utility (Cobb Energy affiliate)	
Lee McKinstry, Cobb Energy Director	
Anis Sherali, President of ECG (Cobb Energy affiliate)	\$1,335,000.00

Defendant Dwight Brown knew that the above individuals owned Cobb Energy stock. Dwight Brown knew that this Cobb Energy stock ownership would create substantial conflict of interests in terms of the EMC's dealings with Cobb Energy and yet, encouraged such ownership and

failed to disclose it to board members and certainly to the EMC members. At least as to Dwight Brown, the Defendant EMC board members knew of his stock ownership, and indeed approved loans for its purchase, and yet failed to disclose this to the EMC members. Thus, Dwight Brown and the EMC directors breached their fiduciary duties owed to the EMC and its members, breached generally recognized principles of corporate governance relating to conflicts of interest, and violated the provisions of the GEMCA.

113. Further, losses occurring to Cobb Energy from its operations are billed back to Cobb EMC such that Cobb EMC funds certain, if not all, losses of Cobb Energy. These actions have been approved by Defendants Dwight Brown, Boone and McGinnis for Cobb Energy. The following is an example from the minutes of the meeting of Cobb Energy's board of directors for April, 1999:

[REDACTED]

These charges to the EMC have not been submitted to the full EMC Board for approval even though expenditures in excess of \$25,000 are supposed to be presented to the EMC Board for approval.

114. [REDACTED]

[REDACTED]

[REDACTED]

115. 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 refused to allow this request and proactively took steps to seal and preclude EMC members from reviewing information to which they were entitled to review. These actions constituted breaches of their fiduciary duties to the EMC members and breaches of generally recognized principles of corporate governance relating to conflicts of interest.

TOLLING OF STATUTE OF LIMITATIONS

116. The statute of limitations in O.C.G.A. § 46-3-304 provides that no action shall be brought more than four years from *the time the cause of action accrued*, not the time that an event that is relevant to the claim occurred. There is no Georgia case law addressing the accrual date for causes of action under O.C.G.A. § 46-3-304. However, where Georgia law is sparse or silent on corporate law issues, Georgia courts routinely look to Delaware law. See e.g. Grace Bros. v. Farley Industries, 264 Ga. 817, 819, 450 S.E.2d 814 (1994); Millsap v. American Family Corp., 208 Ga. App. 230, 234, 430 S.E.2d 385 (1993). The statute of limitations for a derivative action under Delaware law begins to run only when the plaintiff learns, or should have learned of the existence of the cause of action. Cahall v. Burbage, 13 Del. Ch. 299, 119 a. 574 (Del. Ch. 1922).

117. Additionally, where loans are made to officers and the complete and full details of the loans are not provided, including use of funds and other specific terms, such constitutes self

dealing and concealment that tolls the statute of limitations in a derivative action. In re Maxxam, Inc. v. Maxxam, Inc., 1995 Del. Ch. Lexis 73 (1995).

Furthermore:

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

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.”

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

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

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

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

119. The Cobb Energy/Cobb EMC scheme is an illegal transaction directly in violation of the GEMCA and Georgia Supreme Court case law in Flint Elec. Mem. Corp. v. Barrow, 271

Ga. 636, 638 (1999).

120. Defendants are also equitably estopped from asserting any statute of limitations defense because Defendants, through willful and material nondisclosures, active concealment of material information, misrepresentations and other intentional conduct as set forth herein, have postponed the filing of claims by Plaintiffs and those similarly situated. D.W. Adcock, M.D., P.C. v. Adcock, 257 Ga. App. 700, 703 (2003) (finding an employer and the worker's compensation insurer were estopped from asserting a statute of limitations defense to a claim for benefits where the insurer's false statements misled the claimant into postponing the filing of his claim.).

121. As set forth herein, at no time since the inception of Cobb Energy has there been any meaningful disclosure to the members of the financial dealings between EMC and Cobb Energy, the millions of dollars of EMC assets siphoned off to Cobb Energy, or the conflicts of interest of certain officers and EMC board members. As set forth herein, there has also been a consistent pattern of failure to provide a proper accounting as to these issues in accordance with applicable accounting rules. Even subsequent to the time Plaintiffs' demand letter was sent in this case, the response of Defendant Brown and the EMC board to Plaintiffs' demand letter, as well as to Plaintiffs' O.C.G.A. § 46-3-271 records request of October 5, 2007, was to delete significant and material references to the financial affairs of Cobb Energy and Cobb EMC from the EMC minutes provided to members and to proactively continue for many months to take steps to seal and preclude EMC members from obtaining this and voluminous other information.

122. This pattern of concealment of material information required to be disclosed has tolled any statute of limitation that might otherwise be applicable.

123. Dwight Brown and the Director Defendants owed a duty of loyalty to the EMC.

This duty mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a Director, officer or member. As to the substantive issues under investigation in this case Dwight Brown and the Director Defendants have breached their duty of loyalty consistently taking actions of financial benefit to Cobb Energy, a for-profit entity, and to the detriment of Cobb EMC, a non-profit entity. Encompassed in the duty of loyalty is the further duty of disinterestedness which means that an officer and director must at all times impartial relating to decisions for the corporation. As to Dwight Brown and the Director Defendants who own or owned stock in Cobb Energy and made or supported decisions benefiting Cobb Energy, those decisions violate this principle. Further, the officers and Directors must be independent in terms of their decision-making process. As to decision addressed above made by the Board regarding financial transactions with Cobb Energy, the proposed transaction was proposed and advocated by the Defendant Dwight Brown. No substantive questions were ever asked and no objections ever made. Chairman Chadwick supported all such decisions relating to Cobb Energy. Thus, the Directors were controlled by CEO Brown and Chairman Chadwick in their own personal financial interest in making decisions relative to Cobb Energy and thus were not independent. The Directors further owe to the corporation the exercise of duty of due care which is that degree of care a person in like position would use under similar circumstances. The Director Defendants have demonstrated an appalling lack of knowledge as to the key issues relating to the Cobb Energy/Cobb EMC relationship, have never questioned or objected to any transaction providing economic benefits to Cobb Energy and generally have consistently accepted whatever was asked of them by CEO Brown. Thus, they have violated their duties of due care. Another duty of the Director to the EMC is that of operating in good faith and in the best interest of the corporation. CEO Dwight

Brown and the Director Defendants have consistently wasted the corporate assets of the EMC to the benefit of Cobb Energy with the result that Cobb EMC has received such inadequate value that no person or ordinary, sound business judgment would deem it worth that which the company received. Further, when appalling examples of conflicts of interest and self-dealing were brought to the attention of the Board, still the Board took no action to remedy the problem or to protect the assets of the EMC.

As a result, the Business Judgment Rule is unavailable to the Defendants as a defense to any of the claims made herein.

DAMAGES

124. 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, abuse of control, gross mismanagement and self dealing. Damages to the EMC include, but are not limited to, the following:

- a. The adder fees under the operation agreement between Cobb EMC and Cobb Energy which total \$27,506,101.00 through December 31, 2007. Ex. 254 to Depo of Robert Schonover;
- b. Th excess billing costs from Procore totaling approximately \$14,300,000.00. Aff. Wayne Middlebrooks ¶ 20 (June 16, 2008);
- c. \$11,003,033.00 or the difference between the fair market value of the meters (\$15,700,000.00) and the book value at which the meters were transferred (\$9,696,967.00), plus the 200,000 shares of Cobb Energy stock (or \$5,000,000) that were never issued to the EMC or recognized on Cobb Energy's books and records as having been issued;
- d. The [REDACTED] the EMC paid for Cobb Energy [REDACTED], despite the fact that the contract was not with Cobb EMC and Cobb EMC received no benefits from Cobb Energy's contract [REDACTED];

- e. [REDACTED] generated by Cobb Energy from 2002 through the termination of the contract for use of the EMC customer base;
- f. The fair market rental value for use of its facilities by Cobb Energy and its affiliates less any amounts already received;
- g. All compensation paid to the EMC director Defendants in excess of the per diem fee allowed pursuant to the EMC bylaws, Article III, Section 5. Per diem means a reasonable fee paid for attending specific meetings and other functions. There is no authorization for the payment of hundreds of thousands of dollars in retirement benefits and insurance to the EMC directors Defendants during the relevant period;
- h. The \$3,350,060.00 balance of FAS retirement liability improperly charged to Cobb EMC and not yet repaid by Cobb Energy.
- i. The loss associated with the disproportionate accounting of ownership interest pursuant to the Joint Venture Software Agreement dated June 13, 2005 between Cobb EMC and Cobb Energy; and
- j. The loss occasioned to the EMC as a result of Dwight Brown and the EMC director Defendants causing the EMC to purchase and improve a building for no other purpose than to later sell the building to Cobb Energy for use for purposes other than electrical service in violation of Flint EMC v. Barrow, 271 Ga. 636 (1999) and the GEMCA.

**FIRST CAUSE OF ACTION
Declaratory Judgment Against All Defendants**

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

126. Pursuant to O.C.G.A. § 9-4-2, Plaintiffs show that the matters set for herein constitute actual controversies between the parties hereto and, pray that the Court inquire into the facts and circumstances of the Cobb Energy/Cobb EMC transactions as set forth herein and enter judgment declaring the rights of the parties as to the following non-monetary relief;

- (i) declaring that the creation and continuation of Cobb Energy and that the Cobb Energy/Cobb EMC operating agreement was and is now illegal as a violation of the GEMCA and Flint EMC v. Barrow, 271 Ga. 636 (1999);

(ii) declaring that the Cobb Energy/Cobb EMC operating agreement is null and void, ab initio, as an illegal transaction;

(iii) declaring that the members of the EMC are entitled to full disclosure of all Cobb Energy financial and ownership information as well as that of its subsidiary and affiliated entities in which Cobb Energy has an ownership interest from their dates of inception until the date of Final Order and Judgment in this case;

(iv) declaring the transfer of all employees to Cobb Energy as unlawful under the GEMCA and Flint EMC v. Barrow, 271, Ga. 636 (1999).

(v) declaring the transfer of all Cobb EMC meters to Cobb Energy as unlawful under the EMC Bylaws, Article IX, the GEMCA and Flint EMC v. Barrow, 271, Ga. 636 (1999).

(vi) declaring that all compensation and other benefits paid to the EMC Director Defendants other than per diem fees, violates the EMC bylaws, Article III, Section 5;

(vii) declaring that Defendant Dwight Brown and the EMC director defendants have failed in their reporting duties as required by IRS Form 990 and requiring that all such defective filings be promptly amended;

(viii) declaring that Defendant Dwight Brown and the EMC director defendants failed in their reporting duties by not causing the EMC to file consolidated financial statements for the years 1999 to the present, or otherwise appropriately as required by applicable accounting rules and requiring that all such defective filings be promptly amended;

(ix) declaring that all Cobb Energy stock dividends, and interest thereon at the legal rate, flowing to Defendants Dwight Brown (and his wife Mary Ellen Brown), Frank Boone, Larry Chadwick be declared unlawful gains from self-dealing in violation of their fiduciary duties;

(x) declaring that the Cobb Energy stock dividends, and interest thereon at the legal rate, flowing to any director or officer of Cobb Energy or Cobb EMC be declared unlawful gains from an illegal transaction;

(xi) declaring that the board election process (including the failure to follow Robert Rules at the annual meetings, and paying employees to attend the annual meetings so as to generate quorums) as controlled and implemented by Defendant Dwight Brown and the Defendant EMC directors is being improperly used to perpetuate an EMC board controlled by Dwight Brown and certain Defendant EMC directors in violation of their fiduciary duties and the letter and spirit of the GEMCA;

(xii) Declaring that the acts and omissions complained of herein against Dwight Brown and the EMC director defendants in their roles as officers and directors of the

EMC, including the negligent concealment of material information and negligent misrepresentation of material information regarding Cobb Energy and Cobb EMC business transactions, financial transactions and related party transactions, render in equity the election for EMC directors since 1997 void and the EMC director positions vacant, thus requiring 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 Individual Defendants and Cobb Energy

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

128. Plaintiffs pray that the Court inquire into and order an accounting, and disclosure of the results of the accounting to the EMC members, as follows:

- (i) of all income and expenses of Cobb Energy and its affiliates from the date of inception until the present;
- (ii) all funds and assets transferred from Cobb EMC to Cobb Energy and its affiliates 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 and affiliated entities of Cobb Energy;
- (v) All funds and assets, including fringe benefits paid or transferred from Cobb Energy to Defendant Dwight Brown and the EMC 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 EMC 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 patronage capital from 1997 through the present;
- (ix) 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
- (x) 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 All Defendants

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

130. 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 the Court;

- (i) Enjoin all Defendants from the continuation of the Cobb Energy/Cobb EMC transaction because it is illegal under the GEMCA and Flint EMC v. Barrow, 271 Ga. 636 (1999);
- (ii) Enjoin all Defendants from transferring or otherwise conveying any assets or funds of Cobb EMC to Cobb Energy;
- (iii) Affirmatively enjoin Defendant Dwight Brown and the EMC Director Defendants, solely in the roles with the EMC to conduct a court-monitored board election for the selection of an independent and disinterested board;
- (iv) Affirmatively enjoin the EMC Director Defendants to immediately terminate all directors and officers with conflicts of interest including those with Cobb Energy stock for violation of the provisions of Articles III and V of the EMC Bylaws;
- (v) Affirmatively enjoin the EMC Director Defendants to terminate the operating

agreement with Cobb Energy as violating GEMCA and Georgia law;

(vi) Affirmatively enjoining 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, to assure that accounting practices are in conformity with accepted accounting principles, to eliminate conflicts of interest of officers and directors, to assure compliance with the policies and Bylaws of the EMC and to protect the EMC and its members from a repeat of the damaging events described herein; and

(vi) Affirmatively enjoin nominal Defendant Cobb EMC to take appropriate actions to protect its assets and interests consistent with the rulings by the Court in this case.

FOURTH CAUSE OF ACTION

Breaches of Fiduciary and Other Duties Against Defendant Dwight Brown (solely in his role with Cobb EMC) and the EMC Director Defendants

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

132. Defendants owed and owe Cobb EMC and its members fiduciary duties, including the highest obligations of good faith, loyalty, candor, due care, inquiry, oversight and supervision.

133. As hereinbefore alleged, Defendants, and each of them, violated and breached their fiduciary duties and then attempted a cover up.

134. As a proximate result of Defendants' conduct, Cobb EMC and its members have been injured and are entitled to damages.

FIFTH CAUSE OF ACTION
Breaches of Fiduciary and Other Duties Against
Cobb Energy, Dwight Brown, David McGinnis and
Frank Boone (solely in their positions with Cobb Energy)

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

136. As hereinbefore alleged, Cobb Energy, Defendant Dwight Brown, in his position as President, CEO and Chairman of the Board of Cobb Energy, and the other Defendant Cobb Energy directors owe a fiduciary duty to Cobb EMC as a shareholder of Cobb Energy. These duties include the highest obligations of good faith, loyalty, candor, due care, inquiry, oversight and supervision

137. Cobb Energy, Defendant Dwight Brown, in his position as President, CEO and Chairman of the Board of Cobb Energy, and the other Defendant Cobb Energy directors breached and violated their fiduciary duties as set forth herein causing injury and damage to Cobb EMC.

138. As a proximate result of these Defendants' conduct, Cobb EMC has been injured and is entitled to damages.

SIXTH CAUSE OF ACTION
Negligence Against Defendant Dwight
Brown (solely in his role with Cobb EMC) and the EMC Director Defendants

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

140. The acts and omissions of these Defendants in their dealings as officers and/or directors of Cobb EMC, as set forth herein, were done without the exercise of the prudence and care that an ordinarily prudent person would have exercised in the circumstance, and thus, constitutes negligence.

141. As a proximate result of the negligence of these Defendants', Cobb EMC has

been injured and is entitled to damages

SEVENTH CAUSE OF ACTION
Negligence Against Cobb Energy, Dwight Brown, David McGinnis
and Frank Boone (solely in their positions with Cobb Energy)

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

143. The acts and omissions of these Defendants as hereinbefore alleged in their dealings as officers and/or directors of Cobb Energy were done without the exercise of the prudence and care that an ordinarily prudent person would have exercised in the circumstance, and thus, constitutes negligence.

144. As a proximate result of the negligence of these Defendants', Cobb EMC has been injured and is entitled to damages

EIGHTH CAUSE OF ACTION
Gross Negligence and Recklessness against Defendant Dwight Brown
(solely in his role with Cobb EMC) and the EMC Director Defendants

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

146. The acts and omissions of these Defendants as hereinbefore alleged in their dealings as officers and/or directors of Cobb EMC constitute gross negligence and recklessness.

147. As a proximate result of the gross negligence and recklessness of these Defendants', Cobb EMC has been injured and is entitled to damages.

NINTH CAUSE OF ACTION
Gross Negligence Against Cobb Energy, Dwight Brown, David
McGinnis and Frank Boone (solely in their positions with Cobb Energy)

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

149. The acts and omissions of these Defendants as hereinbefore alleged in their dealings as officers and/or directors of Cobb Energy constitute gross negligence and recklessness.

150. As a proximate result of the gross negligence and recklessness of these Defendants', Cobb EMC has been injured and is entitled to damages.

TENTH CAUSE OF ACTION

Aiding and Abetting Breaches of Fiduciary Duty Against Defendant Dwight Brown, David McGinnis and Frank Boone (solely in their positions with Cobb Energy)

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

152. The Individual Defendants owed and owe Cobb EMC fiduciary obligations as set forth herein. Defendant Dwight Brown, in his position as President, CEO and Chairman of the Board of Cobb Energy, as well Frank Boone and David McGinnis, as directors of Cobb Energy, agreed to and did participate with and/or aided and abetted the President, CEO and Defendant Cobb EMC directors in deliberate courses of action in breach of their fiduciary duties as hereinbefore alleged.

153. As a proximate result of these Defendants' conduct, Cobb EMC and its members have been injured and are entitled to damages.

ELEVENTH CAUSE OF ACTION

Gross Mismanagement Against Defendant Dwight Brown, and the EMC Director Defendants

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

155. These Defendants have a duty to Cobb EMC and its members to prudently supervise, manage and control the operations, business and internal financial accounting and disclosure controls of the EMC.

156. By their actions as hereinbefore alleged, the Defendants, either directly or through aiding and abetting, violated, abandoned and abdicated their fiduciary duties to the EMC

members with regard to prudently managing the assets and business of the EMC in a manner consistent with the operations of a non-profit corporation through, among other actions and omissions: (i) self dealing; (ii) engaging in, authorizing acquiescing in serious conflict of interest transactions; (iii) usurping corporate opportunity; (iv) wasting millions of dollars in EMC property including the transfer of meters and employees to Cobb Energy at below market value and no reimbursement, respectively; (v) failing to account for and protect over 200,000 shares of missing Cobb Energy stock paid for by the EMC; and (vi) failing to follow the EMC Bylaws, financial policies and policy manual.

157. These Defendants, by their actions and by engaging in the wrongdoing described herein, abandoned and abdicated their responsibilities and duties with regard to prudently managing the business of Cobb EMC in a manner consistent with the duties imposed upon them by law. By committing the misconduct alleged herein, these Defendants breached their fiduciary duties of due care, loyalty, diligence and candor in the management and administration of Cobb EMC's affairs and in the use and preservation of Cobb EMC's assets. Moreover, to the extent that any of these Defendants claim not to have been aware of the allegations and wrongdoing detailed herein, said Defendants engaged in gross mismanagement in failing to properly inform themselves regarding the business and practices of Cobb EMC.

158. During the course of the discharge of their duties, these Defendants knew, or recklessly or negligently disregarded the unreasonable risks and losses associated with their misconduct, thus breaching their duties to the EMC. As a result, these Defendants grossly mismanaged Cobb EMC.

159. As a proximate result of these Defendants' conduct, Cobb EMC and its members have been injured and are entitled to damages.

TWELFTH CAUSE OF ACTION
Abuse of Control Against Defendant
Dwight Brown and the EMC Director Defendants

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

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

162. These Defendants engaged in the acts and omissions as hereinbefore alleged for the purpose of maintaining and entrenching themselves in their positions of power, prestige and profit at, and control over, Cobb EMC and to continue to receive the substantial benefits, salaries and emoluments associated with their positions at Cobb EMC.

163. As part of their acts and omissions, these Defendants actively made, and/or participated in the making of, or aided and abetted the making of, misrepresentations regarding Cobb EMC and Cobb Energy.

164. Those Defendants who received stock and dividends from Cobb Energy stock further engaged in the acts and omissions alleged herein in order to maintain these stock benefits and prevent the disclosure of this information in order to avoid the loss of their benefits.

165. These Defendants' conduct constituted an abuse of their ability to control and influence Cobb EMC.

166. As a proximate result of these Defendants' conduct, Cobb EMC and its members have been injured and are entitled to damages.

THIRTEENTH CAUSE OF ACTION
Waste of Corporate Assets Against Defendant
Dwight Brown and the EMC Director Defendants

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

168. By failing to properly consider the interests of the EMC and its members, by failing to conduct proper supervision; by failing to adequately inform themselves; by giving

away or allowing to be improperly transferred, these Defendants have caused Cobb EMC to waste valuable corporate assets.

169. As a result of the actions and omission as hereinbefore alleged, these Defendants have also caused the EMC to waste and incur potentially millions of dollars of legal liability and/or legal costs attempting to defend these unlawful actions.

170. These Defendants should be surcharged for such waste.

171. As a proximate result of these Defendants' conduct, Cobb EMC and its members have been injured and are entitled to damages.

FOURTEENTH CAUSE OF ACTION
Unjust Enrichment Against Defendant
Dwight Brown and the EMC Director Defendants

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

173. By their wrongful acts and omissions in violation of the fiduciary duties, including self dealing and engaging in conflict of interest transactions, these Defendants have been unjustly enriched at the expense of and to the detriment of the EMC in the form of unjustified salaries, benefits, bonuses, dividends, grants and other emoluments of office.

174. 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.

175. As a proximate result of these Defendants' conduct, Cobb EMC and its members have been injured and are entitled to damages.

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

FIFTEENTH CAUSE OF ACTION
Equitable Action for Money Had and Received
under Georgia Law Against Defendant Dwight
Brown, Cobb Energy, and the EMC Director Defendants

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

178. As hereinbefore alleged, these Defendants 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.

179. As a proximate result of these Defendants' conduct, Cobb EMC and its members have been injured and are entitled to damages.

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

SIXTEENTH CAUSE OF ACTION
Constructive Violation of O.C.G.A. §23-2-51 against all Defendants

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

182. Defendants' acts and omissions set forth above were contrary to their legal and equitable duties, trust and confidence justly reposed and which were contrary to good conscience.

183. As a proximate result of Defendant's conduct, Cobb EMC and its members have been injured and are entitled to damages.

SEVENTEENTH CAUSE OF ACTION
Punitive Damages Against all Defendants

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

185. The Defendants' breaches of fiduciary and other duties set forth above were grossly negligent and reckless and demonstrate a conscious indifference to the consequences of their actions 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) For damages in an amount proven at trial as a result of the acts and omissions of the Defendants as hereinbefore alleged;
- 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) Awarding to Plaintiffs the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses;
- f) Awarding punitive damages against Defendants for their grossly negligent and reckless breaches of duty; and
- g) Granting such other and further relief as the Court deems just and proper in law and equity.

JURY DEMAND

Plaintiffs demand a trial by jury.

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Dated this 26th day of August, 2008

**SUPERIOR COURT OF THE STATE OF GEORGIA
COUNTY OF COBB**

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

Plaintiffs,

vs.

Civil Action File No. 07-1-9408-48

**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.

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing First Amended Verified Derivative Complaint upon opposing counsel in this matter by first class mail addressed as follows:

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This 26th day of August, 2008.

/s/ David M. Cohen

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