

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
 FAMILY COURT

New Venue Technologies, Inc.,

CASE NO. 2013-CP40-7253

Plaintiff

v.

**MOTION INFORMATION FORM
AND COVER SHEET**

Michael B. Spicer, et al.,

Defendants

check box above indicating submitting party

<p>Name, S.C. Bar no. and address of plaintiff's attorney John E. Schmidt, III, S.C. Bar No. 4973 Melissa J. Copeland, S.C. Bar No. 5904 Schmidt & Copeland, LLC 1201 Main Street, Suite 1100 Columbia, SC 29201 telephone: 803-748-1342 fax: 803-748-1210 email: john.schmidt@thesclawfirm.com; missy.copeland@thesclawfirm.com</p>	<p>Name, S.C. Bar no. and address of defendant's attorney M. Elizabeth Crum, S.C. Bar No. 1486 Amber B. Carter, S.C. Bar No. 78706 McNAIR LAW FIRM, P.A. P.O. Box 11390 Columbia, SC 29211 telephone: 803-799-9800 fax: 803-753-3278 email: lcrum@mcnair.net ; acarter@mcnair.net</p>
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

2013 DEC 10 PM 3:40

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 1 hour

Court Reporter Needed: YES / NO

SECTION II: Motion Type

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

M. Elizabeth Crum 12/10/13
 Signature of Attorney for Plaintiffs / Defendant Date/submitted

SECTION III: Motion Fee

PAID – AMOUNT \$25.00

- EXEMPT: (check reason)
- Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.

Other: _____

JUDGE _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

MOTION FEE COLLECTED: _____

CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

New Venue Technologies, Inc.,)
))
Petitioner,)
))
v.)
))
Michael B. Spicer, individually and in his)
capacity of Chief Procurement Officer and)
Information Technology Management)
Officer for the State of South Carolina)
Information Technology Management)
Office and Alex Doe, his designee under)
law,)
))
Respondents.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2013-CP-40-7253

2013 DEC 10 PM 3:40
COURT CLERK

NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS MICHAEL B. SPICER IN HIS INDIVIDUAL CAPACITY AND AS AN INFORMATION TECHNOLOGY MANAGEMENT OFFICER

TO: JOHN E. SCHMIDT, III, ESQUIRE; AND MELISSA J. COPELAND, ESQUIRE, ATTORNEYS FOR PETITIONER NEW VENUE TECHNOLOGIES, INC.:

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Respondents hereby move this Court for an Order dismissing Respondent Michael B. Spicer (Respondent Spicer) from this suit in his individual capacity and in his capacity as an Information Technology Management Officer (ITMO) on the ground that Petitioner New Venue Technologies, Inc. (Petitioner or NVTI) has failed to state a claim against Respondent Spicer in his individual capacity and as the ITMO.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6), SCRPC, should be granted if the facts alleged and inferences reasonably deductible therefrom do not entitle the plaintiff to any relief on any theory of the case. See Gentry v. Yonce, 331 S.C. 1, 522 S.E.2d 137 (1999).

DISCUSSION

On December 2, 2013, Petitioner NVTI filed a Complaint and Petition for Writ of Mandamus against Respondents, alleging Respondents have “not carried out the ministerial statutory duty to promptly appoint an impartial designee to handle the Contract Controversy as hearing officer.” Complaint ¶ 8. NVTI’s Complaint only alleges Respondent Spicer failed to perform his statutory duties in his official capacity as a Chief Procurement Officer (CPO) for the Budget and Control Board (Board), Information Technology Management Office, and asks this Court to order Respondent Spicer to perform those duties pursuant to S.C. Code Ann. § 11-35-4230 (Supp. 2012). Because a writ of mandamus only can be issued against a public official charged with ministerial duties, the Complaint fails to state a claim against Respondent Spicer as an individual and as the ITMO, and he should be dismissed from this lawsuit in those capacities and named only in his capacity as a CPO for the Board.

A writ of mandamus is “the highest judicial writ” and orders “a public official to perform a ministerial duty.” City of Rock Hill v. Thompson, 349 S.C. 197, 200, 563 S.E.2d 101, 102 (2002).

The primary purpose of a writ of mandamus is to enforce an established right and a corresponding imperative duty created or imposed by law. When the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued.

Id. (internal citations omitted). To obtain a writ of mandamus, the moving party must demonstrate: “(1) a duty of the opposing party to perform the act, (2) the ministerial nature of

the act, (3) the applicant's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy." Pressley v. Lancaster County, 343 S.C. 696, 705, 542 S.E.2d 366, 370 (Ct. App. 2001).

A writ of mandamus is a "coercive writ that orders a public official to perform a ministerial duty." City of Rock Hill v. Thompson, 349 S.C. 197, 200, 563 S.E.2d 101, 102 (2002). "[A] writ of mandamus, by its very nature, cannot be issued against a person in his individual versus official capacity." Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 328, 701 S.E.2d 39, 48 (Ct. App. 2010). Therefore, because a writ of mandamus cannot lie against an individual and the Complaint only seeks a writ of mandamus, no claim has been stated against Respondent Spicer in his individual capacity, Petitioner is not entitled to relief against Respondent Spicer in his individual capacity under any theory of the case, and accordingly Respondent Spicer should be dismissed from this action as an individual and should be named only in his capacity as a CPO.

Section 11-35-4230 of the South Carolina Code does not impose any duties, ministerial or otherwise, upon the ITMO. Because NVTI's Complaint only alleges Respondent Spicer failed to perform duties as CPO under section 11-35-4230, NVTI has failed to state a claim against Respondent Spicer as the ITMO and is not entitled to relief against Respondent Spicer in that capacity under any theory of the case. Accordingly, Respondent Spicer should be dismissed from this action in his capacity as the ITMO and should be named only in his capacity as a CPO for the Board.

CONCLUSION

For the reasons set forth above, the Respondents request this Court dismiss with prejudice Respondent Spicer from this lawsuit in his individual capacity and in his capacity as

the Information Technology Management Officer and award the Respondents costs, attorneys fees, and such other relief as it deems just and proper.

M. Elizabeth Crum, S.C. Bar No. 1486
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By: 
Attorneys for Respondents

December 10, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

New Venue Technologies, Inc.,)
)
Plaintiff,)

Civil Action No.: 2013-CP-40-7253

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CERTIFICATE OF SERVICE

Michael B. Spicer, individually and in his)
capacity of Chief Procurement Officer and)
Information Technology Management)
Officer for the State of South Carolina)
Information technology Management)
Office and Alex Doe, his designee under)
law,)

Respondents.)

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C.C.P. & C.S.

I, Dennie Fyfe, do hereby certify that I have this date served one (1) copy of the Notice of Motion, Motion to Dismiss and Memorandum in Support of Respondents' Motion to Dismiss Michael B. Spicer in His Individual Capacity and as an Information Technology Information Officer upon the following counsel of record via U.S. Mail, First Class, postage prepaid, to the following address:

John E. Schmidt, III, Esquire
Melissa J. Copeland, Esquire
Schmidt & Copeland, LLC
1201 Main Street, Suite 1100
P.O. Box 11547 (29211)
Columbia, SC 29201


Dennie Fyfe

December 10, 2013
Columbia, South Carolina