

20349

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

Appellate Case No. 2012-213333

The St. Clements Homeowners
Association, Inc.,

Appellant,

v.

BE-MI, Inc.,

Respondent.

RECORD ON APPEAL
VOLUME I

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2007-CP-26-1426

The St. Clements Homeowners)
Association, Inc.,)
Plaintiff,)
Vs.)
BE-MI, Inc.,)
Defendant.)

ORDER

HORRY COUNTY
12 SEP 25 AM 9:04
MELANIE HUGGINS-WARD
CLERK OF COURT

1
CCH

This matter is before the court on Plaintiff's Motion to Alter or Amend the court's Final Order dated December 20, 2010 (the "Order"). The case was heard without a jury on September 18, 2009 and extensive testimony and numerous exhibits were offered by both parties. After careful review and consideration of all of the evidence, I issued my Order of December 20, 2010 in which (a) the Plaintiff's request for an injunction requiring the Defendant to remove certain improvements located at the St. Clements Horizontal Property Regime property was denied, (b) the Plaintiff's request for an award of attorney's fees was denied, and (c) it was ruled that the Defendant had the right to retain and maintain a certain deck and other then existing improvements or their replacements, pursuant to a Counterclaim by the Defendant. A review of the Order reveals a summary of the facts and conclusions of law which formed the basis for the rulings.

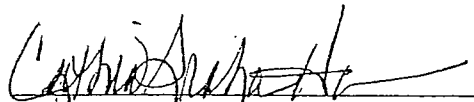
On January 7, 2011, Plaintiff filed its Motion to Alter or Amend the Order and attached copies of its previously filed Memoranda. A reading of the Motion indicates that the Plaintiff believes that the Order is in error for the identical reasons set out by Plaintiff at the trial, and as

previously argued by Plaintiff in its written memoranda. In general, Plaintiff argues that the evidence at trial does not support the court's ruling.

I have reviewed the record from the trial, and considered the Plaintiff's Motion and attachments. I have failed to find any basis on which the original Order should be Altered or Amended, and after such review conclude that the Order contains the correct determination of the matters then before the court. Based on the foregoing, it is;

ORDERED, that the Plaintiff's Motion to Alter or Amend dated January 7, 2011 is hereby denied.

IT IS SO ORDERED.


Cynthia Graham Howe
Master-in-Equity for Horry County

2
CCH
Conway, South Carolina

Dated: September 19, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2007-CP-26-1426

The St. Clements Homeowners
Association, Inc.,
Plaintiff,

Vs.

BE-MI, Inc.,
Defendant.

FINAL ORDER

2010 DEC 21 PM 12:03
MICHAEL HUGGINS-WARD
CLERK OF COURT

TRIAL JUDGE:

PLAINTIFF'S ATTORNEY:

DEFENDANT'S ATTORNEY:

DATE OF HEARING:

COURT REPORTER:

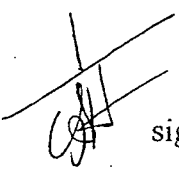
Cynthia Graham Howe

Michael J. Barnett

Fred B. Newby

September 18, 2009

Alice Nelson, Prestige Court Reporting

 This matter came before me for trial, without a jury, pursuant to an Order of Reference signed by the Honorable Edward Cottingham on May 21, 2009, referring the case to me to make Finding of Fact and Conclusions of Law and to render a final judgment with all appeals to the S.C. Court of Appeals. Present at the hearing were the attorneys for the parties, officers and representatives of both the Plaintiff and Defendant corporations as well as other witnesses.

Plaintiff is a South Carolina not-for-profit corporation which is the property owners' association for the St. Clements Horizontal Property Regime in Myrtle Beach, South Carolina (hereinafter, the "Plaintiff"). The St. Clements regime is an ocean-front condominium-hotel project with approximately sixty-three residential units and three commercial units. All owners of units in the St. Clements are members of the Plaintiff Association. The Defendant, BE-MI,

Inc. (hereinafter, the “**Defendant**”), is the owner of the commercial unit designated as Unit Pool-

1. BE-MI operates Unit Pool-1 as a retail establishment that offers food and beverages for sale to the residents of the St. Clements units and to the public (hereinafter the “**Pool Bar**”).

This action was commenced by the Plaintiff's filing its Complaint on March 6, 2007, seeking injunctive relief and asking the court for an order requiring the Defendant to remove a wooden deck it had constructed over one and one-half parking spaces adjacent to the Pool Bar (the “**Side Deck**”). Plaintiff also is seeking judgment for costs and attorneys fees pursuant to the Master Deed of the regime (the “**Master Deed**”). Defendant raised various defenses to these claims, including Unclean Hands, Estoppel, Balancing of the Equities, Grant of Express Easement or Easement by Prescription, and Res Judicata. Defendant also asserted counterclaims based on Breach of Contract, Detrimental Reliance, and Declaratory Judgment asking the Court to find that Defendant had valid easements for the deck and should be allowed to keep the deck in its current location. At the trial, both parties presented sworn testimony from numerous witnesses, various photographs and other documents in support of their positions.

Certain historical facts relating to this matter are undisputed. First, it is undisputed that the Defendant has owned and operated the Pool Bar since August 8, 1988, almost from the inception of the St. Clements Regime. During that time there have been a number of disputes between the parties regarding the Pool Bar. Likewise, it is undisputed that in 2003, in an apparent effort to put an end to the unresolved issues that existed between Plaintiff and Defendant, the Plaintiff filed a lawsuit, captioned The St. Clements Homeowners Association, Inc. vs. BE-MI, Inc., Case No. 2003-CP-26-6560 (the “**First Lawsuit**”), seeking injunctive relief to clarify the rights and duties of the parties pursuant to the Master Deed. After a non-jury trial

on the merits, the Master-In-Equity issued an "Amended Order Granting Permanent Injunction," dated April 6, 2006, granting some or all of the relief Plaintiff requested in its Complaint.

At the trial of the present case the President of the Defendant testified that in the spring of 1990, the then President and Board Member of the Plaintiff, Marshall Melton, approved Defendant's construction of the Side Deck for the use and enjoyment of not only Pool Bar patrons, but for the overall benefit of all unit owners and guests of the St. Clements. He further testified that the idea to build the Side Deck was put forward by the developer of the St. Clements, Dwight Cox, and that he actually assisted Luke Goude, Defendant's principal, in the deck's construction. Mr. Melton, testified on behalf of the Defendant, and corroborated that testimony. The Defendant's principal witness testified that he spent approximately \$11,000.00 in building the original structure and later significantly upgraded the Side Deck at Defendant's own expense adding awnings and other improvements. Defendant has continuously operated the Pool Bar, and the deck in question, since their original construction. Defendant also contends that there is no merit in the Plaintiff's claim that the spaces are needed for parking, citing the fact that for years a number of other parking spaces on the property have been occupied by unused autos belonging to members of the Plaintiff Association.

Plaintiff contends, and its witnesses testified, that even if the Defendant's testimony was true, there is no evidence in the minutes of the Plaintiff that the Board approved Mr. Melton's actions, and, therefore, he had no authority to grant such permission. Plaintiff further cites portions of the Master Deed that state that the Association has governing authority over all common area, such as the parking areas, and that Plaintiff has the right to force removal of any obstruction on common areas.

I have carefully considered all of the evidence submitted, the testimony and credibility of the witness, the history of the relationship between the parties, and the content, and result, of the First Lawsuit. Based on the foregoing, I make the following findings of fact and conclusions of law:

Findings of Fact:

I find that the following have been proven by the preponderance of the evidence:

1. Defendant is the owner of Unit Pool-1, a commercial unit in the St. Clements Horizontal Property Regime, and has continuously owned and operated the same as a retail food and beverage operation since August, 1988. The Regime is a condominium-hotel, and no members reside permanently on the property.
2. In 1990, following Hurricane Hugo, Dwight Cox, president of the developer of the Regime, suggested to the Defendant's president, that he build the deck in question in its current location.
3. Marshall Melton was the President, and a member of the Board of Directors, of the Plaintiff Association in 1990, and in such capacity advised the President of the Defendant that the Defendant had permission to build the deck in question at its present location. As President of the Plaintiff Association, Mr. Melton appeared to the public, and to the Defendant, to be in a position in which third parties could rely on his authority to speak for, and bind, the Plaintiff.
4. At Defendant's own expense, and without any cost to the Plaintiff or its members, the Defendant constructed, has maintained and improved, the deck in question, together with associated improvements such as awnings, side curtains, furnishings and other items evident in the photographs.

5. The deck has been used for nearly 20 years by members of the Association, their guests and renters, as well as by members of the general public.

6. The deck has become, and remains, an integral and vital part of the Defendant's business, and provides a place not only for its patrons to sit and consume their food and beverages, but it provides perhaps the only shaded area for those using the pool to seek shelter from the sun on the hottest of days. As such, the deck and other improvements provide a benefit for the Plaintiff and its members, as well as the Defendant.

7. There was no reason for the Defendant to believe that the former President of Plaintiff, and the developer of the project, did not have authority to grant him permission to build and maintain the Side Deck, and he relied on that belief, and their apparent authority, to his detriment. See: Watkins v. Mobil Oil Corp., 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App. 1986) (holding that to establish apparent agency, a party must prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant and reliance upon the representation and a change of position to his detriment in reliance on the representation.)

8. The Plaintiff's response, that there is no evidence in the meeting minutes that reflects approval for the Side Deck, is unconvincing. The Defendant's principal obviously thought he had permission to build the Side Deck or he would not have spent more than \$11,000.00 in the original construction, or spent additional monies to significantly improve the Side Deck a few years later. Moreover, Mr. Melton, the former President of Plaintiff, has not been a member of the HOA or its Board for years, and he sold his last unit more than ten years ago. Therefore, he was the only witness who did not have a personal interest in the outcome of this action. In these circumstances, it is immaterial whether the Board approved the Side Deck by formal action or

whether Melton had actual authority to grant permission for the Side Deck's construction. Melton had apparent authority on behalf of the Plaintiff's Board and the Plaintiff to give permission to the Defendant to build the Deck.

9. Although the Plaintiff asserts that its loss of parking spaces is of great harm to it, the testimony presented indicates otherwise. For many years during the life of the Regime and the Plaintiff Association, a number of parking spaces in the parking facility have been used by Plaintiff's members to store unused vehicles, without enforcement action by the Plaintiff. At least one was still being stored there at the time of the trial. The effect of this storage is that at least two spaces are used for those owners' unit when their unit is rented. Plaintiff should not be allowed to complain now about a lack of parking after sitting on its hands for such an extended period of time. For this reason, I find that there is not a parking problem at the site sufficient to necessitate the removal of the Side Deck. Likewise, I find that the Plaintiff has not enforced the provisions in the Master Deed relating to use of parking spaces for other uses in a consistent manner or uniformly.

10. To require the Defendant to remove the Side Deck and try to maintain its business without it would impose a severe hardship and detriment on the Defendant, causing it to suffer severe damages, and the benefit to be conferred on the Plaintiff if the Side Deck was removed would be minimal and of little significance when compared to that damage.

11. The existence of the Side Deck was known to the Plaintiff when it filed its First Lawsuit. Members of the Plaintiff's Board testified that they had actual knowledge that the Side Deck covered parking spaces in the early 1990's, and it was specifically mentioned in more than one affidavit and several letters filed by Plaintiff at that time. Plaintiff failed to secure any relief

on that issue in the First Lawsuit which sought to enforce Master Deed provisions on that and other issues.

12. Plaintiff has not sought to remove the Side Deck for nearly twenty years, and its members have enjoyed the use of those facilities (constructed with Defendant's money) for that period.

Conclusions of Law

1. An injunction is an equitable remedy and the remedy of injunction lies within the sound discretion of the trial court. Gibbs v. Kimbrell, 311 S.C. 261, 428 S.E.2d 725, 731 (Ct. App. 1993). The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984)). The remedy of an injunction is a drastic one and ought to be applied with caution. Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420 (1950)). In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case. Id.

2. In making a determination whether to grant the Plaintiff the relief requested in its Complaint, namely a permanent injunction, the threshold question for the court is essentially an equitable one. Although the Plaintiff also asks for attorneys' fees, the court need not rule on that issue unless the court grants the injunction.

3. In a case such as this the court is required to look at the relative impact of the requested remedies and to balance the equities between the parties. See: Cedar Cove Homeowners Ass'n, Inc. v. DiPetro, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2006), involving the construction of a wooden deck built in part on a common area. In that case the court noted that formal permission by the board was not required where the make-up and policies of the board had changed since the defendants had been given permission to build their deck.

4. Even if there has been a violation of a restrictive covenant, the court is not necessarily required to issue an injunction to enforce that covenant as a matter of law. Instead, the court is required to balance the equities to determine whether, under the circumstances, the restrictive covenant should be enforced. Buffington v. T.O.E Enterprises, 383 S.C. 388, 680 S.E. 2d 289 (2009).

8
5. Accordingly, under a balancing of the equities analysis, I find that it would be inequitable for the court to grant Plaintiff an injunction requiring that Defendant remove the Side Deck.

6. *Res judicata* requires proof of three elements: a) that a final, valid judgment was entered on the merits of the first suit; b) that the parties to both suits are the same; and c) that the subsequent action involves matters properly included in the first action. Judy v. Judy, 383 S.C. 1, 8, 677 S.E.2d 213, 217 (Ct. App. 2009)(citation omitted).

7. Here, the first two elements are unquestionably present. A final, valid judgment was entered on the merits in the First Lawsuit, as evidenced by the "Amended Order Granting Permanent Injunction," and the parties to both suits are identical.

8. The third element of proof is met because the parties actually litigated the issue of their respective rights and duties under the Master Deed in the First Lawsuit. When claims

arising out of a particular transaction or occurrence are adjudicated, *res judicata* bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that *might* have been raised in the first suit. Hilton Head Center of SC, Inc. v. Public Serv. Commission of SC, 294 S.C. 9, 362 S.E.2d 176 (1987) (emphasis added). Issues which might have been raised in the prior action applies where the two actions involve the same cause of action. See Judy at 8, 677 S.E.2d at 217-18 (quoting Lowe v. Clayton, 264 S.C. 75, 82, 212 S.E.2d 582, 585-86 (1975)).

9. There is no question that the Plaintiff could have raised the issue relating to the Side Deck in the First Lawsuit when it asked the court to issue an injunction clarifying the rights and duties of the parties under the Master Deed. In fact, evidence on that point was introduced in that case. Despite that, the Court failed to grant Plaintiff any relief on this issue. The legal and factual positions today of the parties are identical to the positions they were in when the First Lawsuit was filed in 2003.

10. The Plaintiff is now seeking an injunction, asking the court to issue a ruling outlining the parties' rights and duties pursuant to the Master Deed, just as it did in 2003. It is, in essence, asking for the same relief a second time.

11. The underlying transaction or occurrence in the both lawsuits is the same, namely the contractual relationship between the Plaintiff HOA and one of its members created by the Master Deed and the Defendant's actions. Therefore, the specific issue raised in this case, being the Side Deck covering approximately one and one-half parking spaces, is a matter that should have been and inferentially was, included in the first action.

12. To allow Plaintiff to maintain an action against the Defendant BE-MI for an issue that existed in 2003 and was properly a part of the First Lawsuit, would violate the doctrine of

res judicata and be inequitable. See Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 108 - 109 (1999)

13. Equitable estoppel denies a party the right to plead or prove an otherwise important fact because of something which he has done or failed to do. Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)(citing Lee v. Southern Railway Co., 228 S.C. 240, 89 S.E.2d 431 (1955)). It may arise even though there was no intention by the party to relinquish or change any existing rights. The essential element of estoppel is prejudice to the party raising the defense. Id.

14. Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment. Gibbs v. Kimbrell, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993)(citing Russell v. Drivers Leasing Services, Inc., 282 S.C. 358, 361, 318 S.E.2d 579, 581 (Ct. App. 1984)). Additionally, estoppel arises when a party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other changes his position in reliance on the party's silence; the party's silence is acquiescence that estops him from later seeking relief. Id. (citing McClintic v. Davis, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955); Seabrook Island Property Owners Association v. Pelzer, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987)).

15. I find that in this case, all of the elements necessary to establish equitable estoppel are present.

16. The Master Deed states, "In any proceeding arising because of alleged default by a unit owner, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorney's fees as may be determined by the Court, but in no event shall any unit owner be entitled to such attorney's fees". Under the terms of the Master Deed, the Plaintiff

is only entitled to recover attorneys' fees if it prevails in the action by obtaining the relief sought in its complaint. In this case, Plaintiff is precluded from obtaining a ruling in its favor based on the aforementioned and is, therefore, not entitled to an award of attorneys' fees. See: Baumann v. Long Cove Club Owners Ass'n, Inc. 380 S.C. 131, 668 S.E.2d 420 (Ct. App. 2008) (holding members of homeowners association were not the prevailing party in their action for declaratory judgment against the association, and therefore, were not entitled to attorney fees and costs under the association covenants). In addition, it would be inequitable to award attorneys' fees to the Plaintiff if the Plaintiff does not prevail in the action.

Based upon the foregoing, it is,

ORDERED, that the Plaintiff's request for an injunction requiring the Defendant to remove the wooden Side Deck covering one and one-half parking spaces in the parking deck of the St. Clements Horizontal Property Regime is denied;

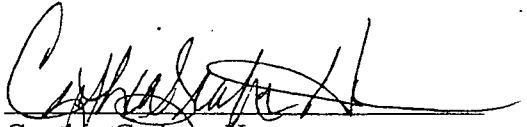
 **FURTHER ORDERED**, that the Plaintiff's request for an award of attorney's fees and costs for this action is denied;

FURTHER ORDERED, pursuant to the Defendant's Counterclaim, that the Defendant has the right to retain and maintain the Side Deck with its existing improvements, or their replacements, in their current location.

IT IS SO ORDERED.

Conway, South Carolina

Dated: December 20, 2010


Cynthia Graham Howe
Master-in-Equity for Horry County

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COMPLAINT

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF HORRY)

07-CP-26-1426

The St. Clements Homeowners
Association, Inc.,)

Plaintiff,)

vs.)

Be-Mi, Inc.,)

Defendant.)

COMPLAINT
(Breach of Contract - Injunction)

HORRY COUNTY
07 MAR 26 AM 11:23
CLERK OF COURT
HUGGINS

The Plaintiff, complaining of the Defendant, alleges that:

1. The Plaintiff and the Defendant are South Carolina corporations doing business in Horry County, SC. The property subject of this suit is located in Horry County, SC and within the jurisdiction of this court.

2. The Plaintiff is the homeowners association for St. Clements Horizontal Property Regime (hereinafter "St. Clements") established by Master Deed filed December 8, 1987 in Deed Book 1182 at page 557, records of Horry County, as amended, the terms of which Master Deed are incorporated herein by reference.

3. The Defendant is the owner of a commercial condominium unit at St. Clements known and designated as Unit Pool-1, having acquired title thereto by deed from St. Clements, Ltd. filed August 8, 1988 in Deed Book 1240 at page 25, records of Horry County. The Defendant uses Unit Pool-1, which is located adjacent to the St. Clements swimming pool and other common elements, for commercial purposes.

4. Several years ago, the Defendant constructed and has since maintained a wooden side deck with a teal colored awning on a portion of the St. Clements' common elements

adjoining Unit Pool-1 (the side deck, awning, and any gutters, lighting, electrical wiring and other property of every description attached to or servicing the deck and located upon the St. Clements common elements are hereinafter collectively referred to as the "Side Deck").

5. The Side Deck covers all or portions of two paved parking spaces on the St. Clements parking deck, which is a common element.

6. Master Deed article 7(d) prohibits any structural modification or alteration of any unit, the installation of awnings, the alteration of the appearance of the exterior portions of any St. Clements building, and/or the attachment of any object to any common area by any unit owner without first obtaining the written consent of the Board of the Plaintiff. The Board of the Plaintiff did not give written consent for the construction or attachment of the Side Deck.

7. The Plaintiff is informed and believes that the two parking spaces that are covered in whole or in part by the Side Deck are required to be maintained for parking by the Zoning Ordinances of the City of Myrtle Beach.

8. Master Deed article 7(b) provides that no unlawful use may be made of any common area and that all laws, zoning ordinances and regulations of all governmental authorities having jurisdiction shall be observed.

9. The Plaintiff is informed and believes that the Side Deck is being used for business purposes.

10. Master Deed article 7(e) provides that no business activity of any kind shall be conducted on any portion of the condominium property not designated as a commercial area. The portion of the common area upon which the Side Deck is located is not designated as a commercial area.

11. Master Deed article 6.2 provides that all of the general common elements, which include the two paved parking spaces covered in whole or in part by the Side Deck, shall be subject to a perpetual, non-exclusive easement in favor of the owners of units at St. Clements, for their use and the use of their immediate families, guests or invitees. The Side Deck encroaches upon this easement.

12. Master Deed article 8(d) provides that ingress and egress is reserved for vehicular traffic for all unit owners over and across the portions of the common area and facilities that are paved at St. Clements. The Side Deck encroaches upon this easement.

13. Master Deed article 14.0 provides that each unit owner at St. Clements shall comply with the provisions of the Master Deed.

14. Master Deed article 7.2 provides that any failure to enforce any right, reservation or condition contained in the Master Deed, however long continued, shall not be deemed a waiver of the right to do so.

15. Master Deed article 14(d) provides that the failure of the Association to enforce any right, provision, covenant or condition which may be granted by the Master Deed shall not constitute a waiver of the right of the Association to enforce such right, provision or covenant in the future.

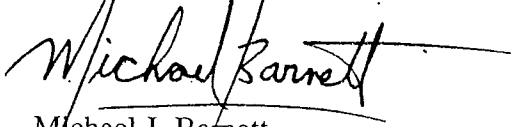
16. Master Deed article 14(c) provides that in the event of default by any owner, the Association is entitled to any relief available at law or equity, including the recovery of the costs of any proceeding and reasonable attorney's fees.

17. The Plaintiff has demanded that the Defendant remove the Side Deck, but the Defendant has failed and refused to do so.

WHEREFORE, the Plaintiff prays for:

1. An Order requiring the Defendant to remove the Side Deck and to repair any damage to the common elements caused by such removal; and
2. A judgment against the Defendant for all costs and expenses of this action, including reasonable attorney's fees, as provided by the Master Deed.

McCRACKIN, BARNETT & RICHARDSON, L.L.P.

A handwritten signature in black ink, appearing to read "Michael Barnett", with a horizontal line extending from the end of the signature.

Michael J. Barnett
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Post Office Box 1182
Myrtle Beach, SC 29578
(843) 448-8405
Attorneys for Plaintiff

March 6, 2007

The St. Clements Homeowners Association, Inc.,

Plaintiff,

BE-MI, Inc.,

Defendant.

The Defendant BE-MI, Inc., by way of answering the Plaintiff's Complaint (the "Complaint") would respectfully show unto the Court the following:

(General Denial)

- 7/3/11

approval, for the reasons set out in this Answer. As to whether or not written permission was given, the Defendant does not have sufficient information to admit or deny the allegations and therefore denies the same, and further states that the actions of the Plaintiff served as a waiver of any such requirement.

6. That, they do not have sufficient information to admit or deny the allegations of paragraph 7 of the Complaint and state that to the Defendant's knowledge, there have been no complaints by the City of Myrtle Beach regarding parking. Further, the Defendant states that there are other parking spaces on the project that are used for purposes other than the parking of cars in the ordinary course of business and the Plaintiff has not sought to enforce any requirement as to those spaces.

7. That in answering paragraph 8 of the Complaint, it states that the Master Deed speaks for itself, but denies any implication that the Defendants's deck is in any way an unlawful use.

8. That in answering paragraph 9 of the Complaint, it states that the deck is used by homeowners in the St. Clements project for noncommercial uses, and is also used by patrons of the Pool Bar to consume food and beverages purchased from the Defendant. It denies that the mere consumption of food and beverages on the deck is a commercial use, any more that the consumption of such food and beverages in a residential unit is a commercial use of that unit.

9. That in answering paragraph 10 of the Complaint, it states that the Master Deed speaks for itself and further refers to paragraph 8 above.

10. That in answering paragraph 11 of the Complaint, it states that the Master Deed speaks for itself and further states that the owners in the project are free to use the Deck, just as

they are free to use the Pool, the hallways and other common areas, and have done so for over 17 years.

11. That in answering paragraph 12 of the Complaint, it states that the Master Deed speaks for itself and further states that the Plaintiff has the right to grant easements over common areas and has done so to the Defendant in this case. The Plaintiff seeks a strained interpretation of the Master Deed, and is trying to ignore and repudiate its prior acts which the Defendant has relied on to its detriment.

12. That in answering paragraphs 13, 14, 15 and 16 of the Complaint, it states that the Master Deed speaks for itself, but also states that such statements do not dispose of the issues in this case and does not absolve the Plaintiff of any claim for damages in the event it has acted wrongfully to the Defendant's detriment.

13. That in answering paragraphs 17 of the Complaint, it admits that it has not removed the deck due to the presence of an easement granted by the Plaintiff.

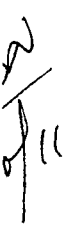
FOR A SECOND DEFENSE

(Lack of Clean Hands)

14. That the allegations of the First Defense are re-alleged herein as if fully set forth.

15. That the Plaintiff comes to court seeking equity and an injunction. That the court will not grant equitable relief to parties that come to court without clean hands and who have not done equity.

16. That in the past the Plaintiff has engaged in at least the following activities that constitute the failure to do equity toward the Defendant, and shows that Plaintiff does not come to the court with clean hands:

- 
- a. It, through its officers and directors, asked the Defendant to build the deck in question, and members of the Board of Directors even assisted in its construction;
 - b. The members of the Plaintiff association have used the deck, which was built by Defendant at its cost, for years before the Plaintiff began asking for its removal;
 - c. The Plaintiff association has built at least one other deck without City or DHEC approval, and continue to use that, while now challenging the deck built by the Defendant;
 - d. The Plaintiff has continued to allow certain parties to occupy one or more of the parking spaces within the common areas in such a way as to eliminate their effective availability to guests and other owners, while now trying to get this Defendant to remove the deck to secure one or two more spaces;
 - e. The Defendant has acted appropriately, relying on the real or apparent authority of officers of the Plaintiff, and has expended its funds in detrimental reliance on their actions and statements.

17. That the Defendant is informed and believes that the actions of the Plaintiff show that is does not come to the court with clean hands and without equity on its side, and the Defendant pleads such lack of clean hands as a complete defense to the Complaint.

FOR A THIRD DEFENSE

(Estoppel and Balancing of the Equities)

18. That the allegations of the First and Second Defenses are re-alleged as if fully set forth herein.

19. That approximately 17 years ago, or longer, certain improvements were made by the Defendant, at the specific request, and with the specific consent, of the officers and majority of the Board of Directors of the Plaintiff Property Owners' Association.

20. That for many years the Association did not complain of the construction, and in fact, members of the Plaintiff and their guests have continued to use and benefit from the construction, up to the present.

21. That in light of the fact that the deck described in the Complaint was constructed at the request, and with the consent of, the officers and a majority of the Board of Directors of the Plaintiff, and the Defendant relied on their actions, the Defendant is informed and believes that the Plaintiff should be estopped from seeking the removal of the deck. Furthermore, in balancing the equities in this case, the court should find that the Plaintiff is not entitled to an injunction or the affirmative relief sought.

22. That for the reasons stated above, the Defendant pleads Estoppel and/or balancing of the equities as a complete defense to the Complaint.

FOR A FOURTH DEFENSE

(Grant of Express Easement or Existence of Easement by Prescription)

23 That the allegations of the First, Second and Third Defenses are re-alleged as if fully set forth herein.

24. That approximately 17 years ago, or longer, the deck described in the Complaint was made by the Defendant, at the specific request, and with the specific consent, of one or more of the officers, and majority of the Board of Directors, of the Plaintiff Property Owners' Association.

25. That the Plaintiff, through its officer(s) ad/or a majority of its Board of Directors, granted the Defendant an easement over the area on which the deck was built.

26. That the Plaintiff's officer(s) and/or Board members acted as agents of the Plaintiff and had either express or apparent authority to grant such easement since the Plaintiff allowed them to engage in such actions with members of the association (including Defendant) and the public, and never repudiated such actions at the time.

27. That in reliance on the actions of the Plaintiff's agents the Defendant believed that it had a valid easement to perform the construction and expended its funds to complete the construction. Whether the easement is written or not, Defendant has engaged not only in part performance, but total performance, of the actions contemplated. Further, the Plaintiff, for many years, acted in performance of the actions contemplated since it did not complain of the Defendants construction.

28. That even if there was not an express grant of an easement, which Defendant believes occurred, the Defendant is informed and believes that it has acquired an easement by prescription due to its occupancy of the property and continuous use.

29. That the Defendant pleads the existence of an express easement or an easement by prescription as a complete defense to the Complaint.

FOR A FIFTH DEFENSE AND COUNTERCLAIM

(Breach of Contract)

30. That the allegations of the First, Second, Third and Fourth Defenses are re-alleged as if fully set forth herein.

31. That the property described in the Complaint constitutes a Horizontal Property

Regime under the laws of South Carolina (the “**Regime**”).

32. That the business of the owners and the regulation of the common areas of the Regime are managed by the Plaintiff property owners association.

33. That the area described in the Complaint on which the deck is constructed is a common area under the terms of the Master Deed of the Regime.

34. That the President of the Plaintiff, and the Board of Directors of the Plaintiff, acting by a majority of its members, have both express and apparent authority to enter into contracts and agreement which are binding on the Plaintiff.

35. That 17 or more years ago the Plaintiff and the Defendant entered into a contract, whereby the Plaintiff, acting through its officers and/or directors, requested the Defendant to construct, at its cost, the deck described in the Complaint. The Plaintiff granted the Defendant permission to do so on common area of the Regime and advised the Defendant that it could use the deck in perpetuity in conjunction with the Pool Bar commercial unit which it owned. The Defendant, acting in reliance on such agreement, did what was requested and thereby fully performed its duties under the agreement.

36. That the agreement between the parties constituted a contract (the “**Contract**”) and, in addition to its express terms, there was inherent in the Contract, an implied duty of good faith and fair dealing.

37. That the Plaintiff is now seeking to breach its express obligations under the Contract, and in seeking to have the deck removed, breaching its implied covenant of good faith and fair dealing.

38. That the breach of contract described above will cause the Defendant considerable

economic damages including, but not limited to, (a) the cost of demolition, (b) future profits for its business for the foreseeable future due to the reduced seating for patrons and the possible loss of its alcohol license, and (c) loss of value of the Pool Bar Unit and value of the ongoing business.

39. That the Defendant is informed and believes that it is entitled to judgment against the Plaintiff in an amount to be determined by the trier of fact for the Plaintiff's breach of contract as described above.

FOR A SIXTH DEFENSE AND COUNTERCLAIM

(Detrimental Reliance)

40. That the allegations of the First, Second, Third, Fourth and Fifth Defenses are re-alleged as if fully set forth herein.

41. That the property described in the Complaint constitutes a Horizontal Property Regime under the laws of South Carolina (the "Regime").

42. That the business of the owners and the regulation of the common areas of the Regime are managed by the Plaintiff property owners association.

43. That the area described in the Complaint on which the deck is constructed is a common area under the terms of the Master Deed of the Regime.

44. That the President of the Plaintiff, and the Board of Directors of the Plaintiff, acting by a majority of its members, have both express and apparent authority to enter into contracts and agreement which are binding on the Plaintiff.

45. That 17 or more years ago the Plaintiff and the Defendant entered into a contract, whereby the Plaintiff, acting through its officers and/or directors, requested the Defendant to

construct, at its cost, the deck described in the Complaint. The Plaintiff granted the Defendant permission to do so on common area of the Regime and advised the Defendant that it could use the deck in perpetuity in conjunction with the Pool Bar commercial unit which it owned. The Defendant, acting in reliance on such agreement, did what was requested and thereby fully performed its duties under the agreement.

46. That the agreement between the parties constituted a contract (the "**Contract**").

47. That the Plaintiff is now seeking to breach its express obligations under the Contract, in seeking to have the deck removed, and is attempting to state that the original agreement was entered without proper authority or with appropriate corporate formalities by the Plaintiff.

48. That the actions of the Defendant in constructing and using the deck and designing its business with that as part of the area available to patrons, was done in detrimental reliance upon the actions of the Plaintiff and the authority of its agents and to remove the deck will cause the Defendant considerable economic damages including, but not limited to, (a) the cost of demolition, (b) future profits for its business for the foreseeable future due to the reduced seating for patrons and the possible loss of its alcohol license, and (c) loss of value of the Pool Bar Unit and value of the ongoing business.

49. That in the event the Defendant is required to remove the deck, the Defendant is informed and believes that it is entitled to judgment against the Plaintiff in an amount to be determined by the trier of fact due to Defendant's detrimental reliance on the representations and actions of the Plaintiff.

FOR A SEVENTH DEFENSE AND COUNTERCLAIM

(Declaratory Judgment)

50. That the allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are re-alleged as if fully set forth herein.

51. That for the reasons stated above the Defendant is informed and believes that it is entitled to a declaratory judgment of this court, pursuant to the South Carolina Declaratory Judgment Act, declaring:

- BP
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- a. That the Defendant has a valid and enforceable easement for the continued presence and operation of the deck described in the Complaint in accordance with the original agreement with the Plaintiff and the parties past actions and pattern; and/or in the alternative,
 - b. That due to the Plaintiff's bad faith, lack of clean hands, lack of equity, or estoppel, the Defendant shall be allowed to continue to maintain and operate the deck described in the Complaint in accordance with the original agreement with the Plaintiff, and in accordance with the parties past actions and pattern.

WHEREFORE, having fully answered the Plaintiff's Complaint the Defendant prays;

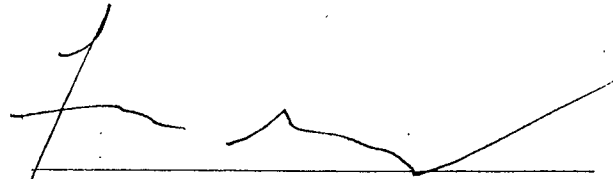
- a. That the Complaint be dismissed;
- b. For judgment against the Plaintiff in an amount to be determined by the trier of fact under the Fifth Defense and Counterclaim;
- c. For judgment against the Plaintiff in an amount to be determined by the trier of fact under the Sixth Defense and Counterclaim;

d. For declaratory judgment in accordance with the terms of the Seventh Defense and Counterclaim.

e. For the costs of this action;

f. For such other and further relief as the court deems just and proper.

Dated: 4/5/07
Myrtle Beach, SC



Fred B. Newby
NEWBY, SARTIP, MASEL & CASPER, LLC
Attorneys for Defendant
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(843) 449-9417
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IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-26-1426

**AMENDED
ANSWER AND COUNTERCLAIM
(Non-Jury Trial Demanded)**

FOR A FIRST DEFENSE

1. That each and every allegation of the Complaint not hereinafter admitted is denied.

3. That in answering paragraph 4 of the Complaint, it admits that approximately 17 years longer, certain improvements were made by the Defendant, at the specific request, and the specific consent, of the officers and majority of the Board of Directors of the Plaintiff Property Owners' Association.

5. That in answering paragraph 6 of the Complaint, it states that the Master Deed speaks for itself and it specifically states that the Plaintiff has waived any requirement for written

approval, for the reasons set out in this Answer. As to whether or not written permission was given, the Defendant does not have sufficient information to admit or deny the allegations and therefore denies the same, and further states that the actions of the Plaintiff served as a waiver of any such requirement.

6. That, they do not have sufficient information to admit or deny the allegations of paragraph 7 of the Complaint and state that to the Defendant's knowledge, there have been no complaints by the City of Myrtle Beach regarding parking. Further, the Defendant states that there are other parking spaces on the project that are used for purposes other than the parking of cars in the ordinary course of business and the Plaintiff has not sought to enforce any requirement as to those spaces.

7. That in answering paragraph 8 of the Complaint, it states that the Master Deed speaks for itself, but denies any implication that the Defendants's deck is in any way an unlawful use.

8. That in answering paragraph 9 of the Complaint, it states that the deck is used by homeowners in the St. Clements project for noncommercial uses, and is also used by patrons of the Pool Bar to consume food and beverages purchased from the Defendant. It denies that the mere consumption of food and beverages on the deck is a commercial use, any more that the consumption of such food and beverages in a residential unit is a commercial use of that unit.

9. That in answering paragraph 10 of the Complaint, it states that the Master Deed speaks for itself and further refers to paragraph 8 above.

10. That in answering paragraph 11 of the Complaint, it states that the Master Deed speaks for itself and further states that the owners in the project are free to use the Deck, just as

they are free to use the Pool, the hallways and other common areas, and have done so for over 17 years.

11. That in answering paragraph 12 of the Complaint, it states that the Master Deed speaks for itself and further states that the Plaintiff has the right to grant easements over common areas and has done so to the Defendant in this case. The Plaintiff seeks a strained interpretation of the Master Deed, and is trying to ignore and repudiate its prior acts which the Defendant has relied on to its detriment.

12. That in answering paragraphs 13, 14, 15 and 16 of the Complaint, it states that the Master Deed speaks for itself, but also states that such statements do not dispose of the issues in this case and does not absolve the Plaintiff of any claim for damages in the event it has acted wrongfully to the Defendant's detriment.

13. That in answering paragraphs 17 of the Complaint, it admits that it has not removed the deck due to the presence of an easement granted by the Plaintiff.

FOR A SECOND DEFENSE

(Lack of Clean Hands)

14. That the allegations of the First Defense are re-alleged herein as if fully set forth.

15. That the Plaintiff comes to court seeking equity and an injunction. That the court will not grant equitable relief to parties that come to court without clean hands and who have not done equity.

16. That in the past the Plaintiff has engaged in at least the following activities that constitute the failure to do equity toward the Defendant, and shows that Plaintiff does not come to the court with clean hands:

- a. It, through its officers and directors, asked the Defendant to build the deck in question, and members of the Board of Directors even assisted in its construction;
- b. The members of the Plaintiff association have used the deck, which was built by Defendant at its cost, for years before the Plaintiff began asking for its removal;
- c. The Plaintiff association has built at least one other deck without City or DHEC approval, and continue to use that, while now challenging the deck built by the Defendant;
- d. The Plaintiff has continued to allow certain parties to occupy one or more of the parking spaces within the common areas in such a way as to eliminate their effective availability to guests and other owners, while now trying to get this Defendant to remove the deck to secure one or two more spaces;
- e. The Defendant has acted appropriately, relying on the real or apparent authority of officers of the Plaintiff, and has expended its funds in detrimental reliance on their actions and statements.

17. That the Defendant is informed and believes that the actions of the Plaintiff show that is does not come to the court with clean hands and without equity on its side, and the Defendant pleads such lack of clean hands as a complete defense to the Complaint.

FOR A THIRD DEFENSE

(Estoppel and Balancing of the Equities)

18. That the allegations of the First and Second Defenses are re-alleged as if fully set forth herein.

19. That approximately 17 years ago, or longer, certain improvements were made by the Defendant, at the specific request, and with the specific consent, of the officers and majority of the Board of Directors of the Plaintiff Property Owners' Association.

20. That for many years the Association did not complain of the construction, and in fact, members of the Plaintiff and their guests have continued to use and benefit from the construction, up to the present.

21. That in light of the fact that the deck described in the Complaint was constructed at the request, and with the consent of, the officers and a majority of the Board of Directors of the Plaintiff, and the Defendant relied on their actions, the Defendant is informed and believes that the Plaintiff should be estopped from seeking the removal of the deck. Furthermore, in balancing the equities in this case, the court should find that the Plaintiff is not entitled to an injunction or the affirmative relief sought.

22. That for the reasons stated above, the Defendant pleads Estoppel and/or balancing of the equities as a complete defense to the Complaint.

FOR A FOURTH DEFENSE

(Grant of Express Easement or Existence of Easement by Prescription)

23 That the allegations of the First, Second and Third Defenses are re-alleged as if fully set forth herein.

24. That approximately 17 years ago, or longer, the deck described in the Complaint was made by the Defendant, at the specific request, and with the specific consent, of one or more of the officers, and majority of the Board of Directors, of the Plaintiff Property Owners' Association.

25. That the Plaintiff, through its officer(s) ad/or a majority of its Board of Directors, granted the Defendant an easement over the area on which the deck was built.

26. That the Plaintiff's officer(s) and/or Board members acted as agents of the Plaintiff and had either express or apparent authority to grant such easement since the Plaintiff allowed them to engage in such actions with members of the association (including Defendant) and the public, and never repudiated such actions at the time.

27. That in reliance on the actions of the Plaintiff's agents the Defendant believed that it had a valid easement to perform the construction and expended its funds to complete the construction. Whether the easement is written or not, Defendant has engaged not only in part performance, but total performance, of the actions contemplated. Further, the Plaintiff, for many years, acted in performance of the actions contemplated since it did not complain of the Defendants construction.

28. That even if there was not an express grant of an easement, which Defendant believes occurred, the Defendant is informed and believes that it has acquired an easement by prescription due to its occupancy of the property and continuous use.

29. That the Defendant pleads the existence of an express easement or an easement by prescription as a complete defense to the Complaint.

FOR A FIFTH DEFENSE AND COUNTERCLAIM

(Breach of Contract)

30. That the allegations of the First, Second, Third and Fourth Defenses are re-alleged as if fully set forth herein.

31. That the property described in the Complaint constitutes a Horizontal Property

Regime under the laws of South Carolina (the “**Regime**”).

32. That the business of the owners and the regulation of the common areas of the Regime are managed by the Plaintiff property owners association.

33. That the area described in the Complaint on which the deck is constructed is a common area under the terms of the Master Deed of the Regime.

34. That the President of the Plaintiff, and the Board of Directors of the Plaintiff, acting by a majority of its members, have both express and apparent authority to enter into contracts and agreement which are binding on the Plaintiff.

35. That 17 or more years ago the Plaintiff and the Defendant entered into a contract, whereby the Plaintiff, acting through its officers and/or directors, requested the Defendant to construct, at its cost, the deck described in the Complaint. The Plaintiff granted the Defendant permission to do so on common area of the Regime and advised the Defendant that it could use the deck in perpetuity in conjunction with the Pool Bar commercial unit which it owned. The Defendant, acting in reliance on such agreement, did what was requested and thereby fully performed its duties under the agreement.

36. That the agreement between the parties constituted a contract (the “**Contract**”) and, in addition to its express terms, there was inherent in the Contract, an implied duty of good faith and fair dealing.

37. That the Plaintiff is now seeking to breach its express obligations under the Contract, and in seeking to have the deck removed, breaching its implied covenant of good faith and fair dealing.

38. That the breach of contract described above will cause the Defendant considerable

economic damages including, but not limited to, (a) the cost of demolition, (b) future profits for its business for the foreseeable future due to the reduced seating for patrons and the possible loss of its alcohol license, and (c) loss of value of the Pool Bar Unit and value of the ongoing business.

39. That the Defendant is informed and believes that it is entitled to judgment against the Plaintiff in an amount to be determined by the trier of fact for the Plaintiff's breach of contract as described above.

FOR A SIXTH DEFENSE AND COUNTERCLAIM

(Detrimental Reliance)

40. That the allegations of the First, Second, Third, Fourth and Fifth Defenses are re-alleged as if fully set forth herein.

41. That the property described in the Complaint constitutes a Horizontal Property Regime under the laws of South Carolina (the "**Regime**").

42. That the business of the owners and the regulation of the common areas of the Regime are managed by the Plaintiff property owners association.

43. That the area described in the Complaint on which the deck is constructed is a common area under the terms of the Master Deed of the Regime.

44. That the President of the Plaintiff, and the Board of Directors of the Plaintiff, acting by a majority of its members, have both express and apparent authority to enter into contracts and agreement which are binding on the Plaintiff.

45. That 17 or more years ago the Plaintiff and the Defendant entered into a contract, whereby the Plaintiff, acting through its officers and/or directors, requested the Defendant to

construct, at its cost, the deck described in the Complaint. The Plaintiff granted the Defendant permission to do so on common area of the Regime and advised the Defendant that it could use the deck in perpetuity in conjunction with the Pool Bar commercial unit which it owned. The Defendant, acting in reliance on such agreement, did what was requested and thereby fully performed its duties under the agreement.

46. That the agreement between the parties constituted a contract (the “**Contract**”).

47. That the Plaintiff is now seeking to breach its express obligations under the Contract, in seeking to have the deck removed, and is attempting to state that the original agreement was entered without proper authority or with appropriate corporate formalities by the Plaintiff.

48. That the actions of the Defendant in constructing and using the deck and designing its business with that as part of the area available to patrons, was done in detrimental reliance upon the actions of the Plaintiff and the authority of its agents and to remove the deck will cause the Defendant considerable economic damages including, but not limited to, (a) the cost of demolition, (b) future profits for its business for the foreseeable future due to the reduced seating for patrons and the possible loss of its alcohol license, and (c) loss of value of the Pool Bar Unit and value of the ongoing business.

49. That in the event the Defendant is required to remove the deck, the Defendant is informed and believes that it is entitled to judgment against the Plaintiff in an amount to be determined by the trier of fact due to Defendant’s detrimental reliance on the representations and actions of the Plaintiff.

FOR A SEVENTH DEFENSE AND COUNTERCLAIM

(Declaratory Judgment)

50. That the allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are re-alleged as if fully set forth herein.

51. That for the reasons stated above the Defendant is informed and believes that it is entitled to a declaratory judgment of this court, pursuant to the South Carolina Declaratory Judgment Act, declaring:

- a. That the Defendant has a valid and enforceable easement for the continued presence and operation of the deck described in the Complaint in accordance with the original agreement with the Plaintiff and the parties past actions and pattern; and/or in the alternative,
- b. That due to the Plaintiff's bad faith, lack of clean hands, lack of equity, or estoppel, the Defendant shall be allowed to continue to maintain and operate the deck described in the Complaint in accordance with the original agreement with the Plaintiff, and in accordance with the parties past actions and pattern.

FOR AN EIGHTH DEFENSE AND COUNTERCLAIM

(Res Judicata)

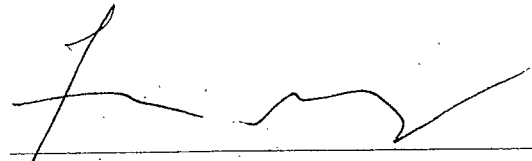
52. That the allegations of the First through Seventh Defenses are re-alleged as if fully set forth herein.

53. That the Defendant pleads Res Judicata as a complete defense to this action and that the matters complained of in the Complaint either have been litigated, or should have been litigated in a previous action between these parties.

WHEREFORE, having fully answered the Plaintiff's Complaint the Defendant prays;

- a. That the Complaint be dismissed;
- b. For judgment against the Plaintiff in an amount to be determined by the trier of fact under the Fifth Defense and Counterclaim;
- c. For judgment against the Plaintiff in an amount to be determined by the trier of fact under the Sixth Defense and Counterclaim;
- d. For declaratory judgment in accordance with the terms of the Seventh Defense and Counterclaim.
- e. For the costs of this action;
- f. For such other and further relief as the court deems just and proper.

Dated: 8/5/09
Myrtle Beach, SC


Fred B. Newby
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(843) 449-9417
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REPLY

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF HORRY)

07-CP-26-1426

The St. Clements Homeowners
Association, Inc.,)

Plaintiff,)

vs.)

BE-MI, Inc.,)

Defendant.)

REPLY

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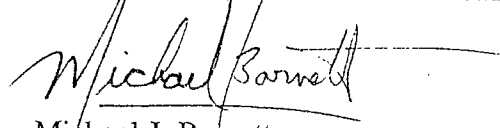
The Plaintiff, replying to the Defendant's Counterclaim, alleges that:

1. Every allegation of the Counterclaim not hereinafter admitted is denied.
2. The allegations of paragraph 30 are denied.
3. The allegations of paragraph 31 are admitted.
4. The allegations of paragraph 32 are admitted to the extent that it alleges the Plaintiff has authority to regulate the use of the common areas of the Regime, subject to the limitations of the Master Deed, By-laws and applicable laws; to the extent any other or different allegations are made in paragraph 32, those allegations are denied.
5. The allegations of paragraph 33 are admitted.
6. The allegations of paragraph 34 are admitted to the extent it alleges the Plaintiff's Board of Directors, acting through a majority of its members, has authority to enter into contracts on behalf of the Plaintiff, subject to the limitations of the Master Deed, By-laws and applicable laws; to the extent any other or different allegations are made in paragraph 34, those allegations are denied.
7. The allegations of paragraphs 35 and 36 are denied.

8. The allegation of paragraph 37 stating that the Plaintiff is seeking to have the deck removed is admitted; the remaining allegations of paragraph 37 are denied.
9. The allegations of paragraph 38 through 40 are denied.
10. The allegations of paragraph 41 are admitted.
11. The allegations of paragraph 42 are admitted to the extent that it alleges the Plaintiff has authority to regulate the use of the common areas of the Regime, subject to the limitations of the Master Deed, By-laws and applicable laws; to the extent any other or different allegations are made in paragraph 42, those allegations are denied.
12. The allegations of paragraph 43 are admitted.
13. The allegations of paragraph 44 are admitted to the extent it alleges the Plaintiff's Board of Directors, acting through a majority of its members, has authority to enter into contracts on behalf of the Plaintiff, subject to the limitations of the Master Deed, By-laws and applicable laws; to the extent any other or different allegations are made in paragraph 44, those allegations are denied.
14. The allegations of paragraphs 45 and 46 are denied.
15. The allegation of paragraph 47 stating that the Plaintiff is seeking to have the deck removed is admitted; the remaining allegations of paragraph 47 are denied.
16. The allegations of paragraphs 48 through 51 are denied.

WHEREFORE, having fully answered the Defendants' Counterclaim, the Plaintiff prays that the Counterclaim be dismissed and that the Plaintiff be awarded judgment as prayed for in the Complaint.

McCRACKIN, BARNETT & RICHARDSON, L.L.P.

A handwritten signature in black ink, appearing to read "Michael Barnett", with a horizontal line extending to the right.

Michael J. Barnett
1000 21ST Ave. North
Post Office Box 1182
Myrtle Beach, SC 29578
(843) 448-8405
Attorneys for Plaintiff

April 11, 2007

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Plaintiff's Motion to Alter or Amend

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF HORRY)

07-CP-26-1426

The St. Clements Homeowners
Association, Inc.,)

Plaintiff,)

PLAINTIFF'S MOTION
TO ALTER OR AMEND

vs.)

BE-MI, Inc.,)

Defendant.)

TO: THE ABOVE-NAMED DEFENDANT AND ITS ATTORNEY:

The Plaintiff hereby moves pursuant to Rules 52(b) and 59(e) of the SCRPC for an order altering or amending the Final Order filed herein on December 21, 2010, which Final Order the Plaintiff's attorney received written notice of the entry of on December 29, 2010. The Plaintiff moves to alter or amend the Final Order as follows:

1. The evidence presented at trial is insufficient to support the court's finding that equitable estoppel is a valid defense in this case, and the Final Order should be amended accordingly.
2. The evidence presented at trial is insufficient to support the court's finding that *res judicata* is a valid defense in this case, and the Final Order should be amended accordingly.
3. The evidence presented at trial is insufficient to support the court's finding that balancing of the equities is a valid defense in this case, and the Final Order should be amended accordingly.
4. The greater weight or preponderance of the evidence presented at trial proves that the Plaintiff is entitled to an injunction to remove the Side Deck

and to repair any damage to the Common Elements caused by such removal, and the Final Order should be amended accordingly.

5. The greater weight or preponderance of the evidence presented at trial proves that the Plaintiff is entitled to a judgment against the Defendant for all costs and expenses of this action, including reasonable attorney's fees, as provided by the Master Deed, and the Final Order should be amended accordingly.
6. The court erred in finding on page 2 of the Final Order that "...it is undisputed that in 2003, in an apparent effort to put an end to the unresolved issues that existed between the Plaintiff and the Defendant, the Plaintiff filed a lawsuit...." The evidence presented at trial proves that the only issue in the previous lawsuit was certain bad behavior by the Defendant, against which the Court in that suit issued an injunction. The question of whether the Defendant was entitled to maintain the Side Deck in the Plaintiff's parking lot was never an issue in the previous case, and the Final Order in this case should be amended accordingly.
7. The court erred in finding as a matter of fact on page 4 that "As President of the Plaintiff Association, Mr. Melton appeared...to the Defendant to be in a position in which third parties could rely on this authority to speak for, and bind the Plaintiff." The evidence presented at trial clearly shows that under the terms of the Master Deed and By-Laws to which the parties to this suit were bound, the Defendant had no right to rely upon Mr. Melton's authority to speak for, or bind, the Plaintiff with regard to allowing the

construction of the Side Deck subject of this suit, and the Final Order should be amended accordingly.

8. The court erred in finding as a matter of fact on page 5 that the Side Deck "...provide [s] a benefit for the Plaintiff...." The evidence presented at trial, and the fact that the Plaintiff prosecuted this litigation, clearly indicate that the Side Deck is a significant detriment to the Plaintiff, not a benefit, and the Final Order should be amended accordingly.
9. The court erred in finding as a matter of fact on page 5 that "There was no reason for the Defendant to believe that the former President of the Plaintiff, and the developer of the project, did not have authority to grant him permission to build the Side Deck...." The evidence presented at trial is unequivocal that as a matter of fact and law, the former president of the Plaintiff, Mr. Melton, had absolutely no authority to grant the Defendant permission to build or maintain the Side Deck, and that the Defendant had record notice of that lack of authority from the provisions of the Master Deed and By-Laws, to which the Defendant was and is bound; and, there was no evidence presented at trial to prove that any developer of the condominium project had any authority to grant the Defendant permission to build or maintain the Side Deck after the Master Deed and By-Laws were recorded, which is when the Defendant contends such permission by the developer was allegedly given. The Final Order should be amended accordingly.
10. The court erred in ruling on pages 8 and 9 that "...it is immaterial whether the Board approved the Side Deck by formal action or whether Melton had

actual authority to grant permission for the Side Deck's construction. Melton had apparent authority on behalf of the Plaintiff's board and the Plaintiff to give permission to the Defendant to build the Side Deck." The evidence presented at trial establishes clearly that under the terms of the Master Deed and By-Laws, no unit owner was allowed to cause any object to be affixed to Common Areas without the written consent of the Board being first had and obtained, and there was no evidence presented at trial that any such written consent by the Board was ever given for the construction of the Defendant's Side Deck in the parking lot Common Area. Furthermore, for the reasons explained more fully in the attached Plaintiff's Reply Memo, not even the Board would have had authority to grant the Defendant permission to build the Side Deck. The Defendant had record notice of these facts. The Final Order should be amended accordingly.

11. The court erred in its finding of facts set forth in Section 9 on page 6 of the Final Order. The evidence presented at trial shows that a few parking spaces were periodically occupied by vehicles owned by members of the association or their guests when they were not present on the property, and that letters, regulations and other enforcement action were taken by the Plaintiff to help regulate such use. The evidence also shows that all of the Associations' parking spaces are required to remain as parking spaces under the terms of the Master Deed and the Myrtle Beach zoning ordinances. Furthermore, Section 7.2 of the Master Deed clearly addresses this issue in stating that "The failure to enforce any right,

reservation, or conditions contained in this Master Deed, however long continued, shall not be deemed a waiver of the right to do so hereafter, as to the same breach or as to a breach occurring prior to or subsequent thereto and shall not bar or affect its enforcement.” The Final Order should be amended accordingly.

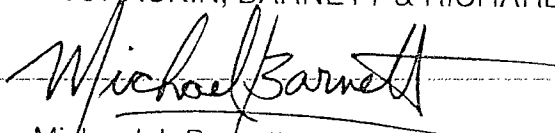
12. The court erred in its finding of fact set forth in Section 10 on page 6 of the Final Order... The evidence presented at trial is insufficient to support these findings of fact, and the Final Order should be amended accordingly.
13. The court erred in ruling as a matter of fact on pages 6 and 7 that “Plaintiff failed to secure any relief on that issue [apparently referring to the existence of the Side Deck] in the First Lawsuit which sought to enforce Master Deed provisions on that and other issues.” The evidence presented at trial is insufficient to support any finding that the existence and/or removal of the Side Deck was ever an issue in that First Lawsuit or that the First Lawsuit sought to enforce Master Deed provisions on that issue. The Final Order should be amended accordingly.
14. The date of the hearing of this case was August 24 and 25, 2009, not September 18, 2009 as stated in the Final Order, and the Final Order should be amended accordingly.

This motion is based upon the evidence presented at trial and applicable SC law, some of which is more fully set forth in the previously presented Plaintiff’s Memorandum of Law dated August 22, 2009 and Plaintiff’s Reply to Defendant’s Memorandum of Law dated September 18, 2009. Copies of those Memoranda, with portions thereof not

relevant to this Motion redacted, are attached hereto and incorporated herein by reference.

The undersigned affirms that consultation with opposing counsel would serve no useful purpose with regard to this Motion.

McCRACKIN, BARNETT & RICHARDSON, L.L.P.

A handwritten signature in black ink, appearing to read "Michael Barnett", is written over a horizontal line.

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January 7, 2011

COURT OF COMMON PLEAS

07-CP-26-1426

The St. Clements Homeowners
Association, Inc.,

Plaintiff,)

VS.)

BE-MI, Inc.,)

Defendant.)

PLAINTIFF'S REPLY TO
DEFENDANT'S MEMORANDUM OF LAW

[REDACTED 1-7-11 FOR
ATTACHMENT TO MOTION]

This reply to the Defendant's Memorandum of Law (hereinafter the "Defendant's Memo") supplements the Plaintiff's Memorandum of Law dated 2/22/09 submitted prior to trial (hereinafter the "Plaintiff's Memo"), which should be read in conjunction with this Memorandum. This Memorandum will attempt to avoid unnecessary duplication of the contents of the Plaintiff's Memo, but will focus on the issues raised in the Defendant's Memo. The Defendant's Memo addresses four defenses to the plaintiff's prayer for an injunction requiring removal of the Side Deck, and those defenses are addressed below in the order raised in the Defendant's Memo [NOTE: THE "UNCLEAN HANDS" DEFENSE WAS NOT INCLUDED IN THE COURT'S FINAL ORDER AND HAS THUS BEEN REDACTED HERE.]

RES JUDICATA DEFENSE:

This defense was not addressed in the Plaintiff's Memo, since it was not added as a defense until the day of trial. The defendant contends that *res judicata* should bar the current action because of a previous lawsuit between the same parties filed in 2003 in which a final, valid judgment was entered. However, the only issue in the previous action was whether the defendant should be enjoined from bad conduct (i.e. loud music, excessive noise, and littering) in

and around the defendant's Pool Bar, while the current action is based not upon bad conduct, but solely upon an encroachment onto real property. The encroachment was never plead or raised as an issue in the previous litigation, and the final Amended Order in that litigation simply required the defendant to "...comply with the Resolution [adopting rules prohibiting bad behavior at the Pool Bar] of the Homeowner's Association and close the rooftop deck of the Pool Bar at 10:00 p.m. and the Pool Bar at 12:00 midnight." The encroachment of the Side Deck was never included as an issue in the previous case.

Even though the current litigation does not "involve matters properly included in the first action," which is the third necessary element of *res judicata*, the defendant contends that the doctrine should still apply because the plaintiff "could" have raised the issue of the Side Deck in the first lawsuit. The test, however, is not whether or not the plaintiff "could" have done so, but rather whether the issues in the current case "might" have been raised in the prior action, as the term "might" has been interpreted and applied by our courts. The SC Supreme Court has ruled that: "The rule precluding relitigation of issues which **might** [Emphasis added] have been raised in the prior action applies only where the two actions involve the same cause of action...." Lowe v Clayton, 264 S.C. 75, 82, 212 S.E. 2d 582, 585-86 (1975), as cited in Judy v Judy, 383 S.C. 1, 677 S.E. 2d 213 (Ct. App. 2009). "The test utilized by this court for comparing two causes of action is to determine whether the primary right and duty and the delict or wrong are the same [Emphasis added] in both actions." Plum Creek Dev. Co. v City of Conway, 328 S.C. 347, 350, 491 S.E. 2d 692, 694 (Ct. App. 1997), aff'd as modified, 334 S.C. 30, 512 S.E. 2d 106 (1999), as cited in Judy. Obviously, the delict or wrong (bad behavior) litigated in the prior action is not the same as the one (encroachment onto real property) litigated in this case.

The Judy case goes on to state that: "South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: 1) when there is identity of the subject matter in both cases; 2) when the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; 3) when there is the same evidence in both cases; and recently 4) when the claims arise out of the same transaction or occurrence." [Emphasis added]. None of those tests can be met in the present case, since: 1) the subject matter in the prior case was bad conduct at the Pool Bar, while the subject matter in the current case is encroachment of the Side Deck onto a common area; 2) the two cases do not involve "one primary wrong", since the primary wrong in the first case was bad conduct and the primary wrong in the second case was the physical encroachment of the Side Deck; 3) the evidence is far from the same in the two cases, since the evidence in the first case was evidence of bad behavior, while the evidence in the second case was related solely to the encroachment; and 4) the claims in the two cases do not arise out of the same transaction or occurrence, since the transaction or occurrence litigated in the first case was bad behavior, while the transaction or occurrence litigated in the second case was the construction and maintenance of an encroachment onto real property.

It should also be noted that ARTICLE 14.0(e) of the Master Deed provides: "The rights, remedies and privileges granted to the Association... pursuant to any terms, provisions, covenants or conditions of this Master Deed or the above mentioned documents, shall be deemed to be cumulative, and the exercise of one or more shall not be deemed to constitute an election of remedies, nor shall it preclude the party thus exercising the same from exercising such other and additional rights, remedies or privileges as may be available to such party at law or in equity."

Res judicata is not a valid defense in this case.

EQUITABLE ESTOPPEL DEFENSE:

The defendant maintains that the doctrine of equitable estoppel should apply in the present case. The evidence shows that the defendant's president erected the Side Deck quickly in the Spring or early Summer of 1990, building the wooden floor himself and contracting to have the plastic sides and awning attached as soon as the floor was built. The evidence further shows that The St. Clements was and is operated as a "condotel", with the 64 residential units being rented on a short terms basis like hotel rooms, and with few if any of the unit owners except the Defendant occupying their units on a regular basis. The plaintiff had little or no realistic opportunity to observe or object to the Side Deck during the brief period it took to erect it, and the plaintiff's board questioned and objected to the Side Deck many times over the years, beginning at least as early as a letter sent to the defendant in February, 1991. This is not a case where an encroaching building of substantial size and structure was constructed over a period of many months, with the landowner having ample opportunity to observe and object, and the landowner acquiescing by silence to the encroaching party's detriment. Plus, the defendant in this case has claimed he had "permission" each time an objection about the erection of the Side Deck has been raised, so there is little reason to believe he would have stopped the erection of the Side Deck, even if the plaintiff had had sufficient time and opportunity to object during the brief time it took for the Side Deck to be erected.

There are at least two additional reasons why the doctrine of equitable estoppel does not apply here. The first reason is that a claim of estoppel includes elements for the party asserting estoppel and the party estopped [See Provident quoted on page 6 of Plaintiff's Memo]. One of the essential elements for a party asserting estoppel is "...lack of knowledge, or means of acquiring knowledge of the true facts..." [See Provident, *supra*] as to the misrepresentation or

nondisclosure that the party claims to have relied upon. The Defendant's Memo asserts that the Association's then president, Marshall Melton, gave the defendant verbal permission to build the Side Deck, and that the defendant had the right to rely upon that representation of permission "...because, as president of the HOA, Melton had apparent authority to give defendant permission." Even if this court finds as a matter of fact that Melton gave such permission, Mr. Melton had no actual authority as president, under the facts and law of this case, to grant any such permission, and the defendant had the "...knowledge, or means of acquiring knowledge of the true fact..." that the president had no actual authority to grant such permission. The SC Horizontal Property Act provides in Section 27-31-170 that: "**Each co-owner shall comply strictly with the Bylaws..., and with the Covenants, Conditions and Restrictions set forth in the Master Deed.** [Emphasis added].... Failure to comply with any of the same shall be grounds for civil action ... for ... injunctive relief, ... maintainable by the ... Board of Administration, ... on behalf of the Council of Co-owners...." Article VII of the Master Deed, with which the foregoing statute and SC contract law require the defendant to strictly comply, states in section (b) that "**No unit owner shall cause any object to be affixed to common areas... or in any manner change the appearance of the common areas and facilities... without the written consent of the Board of the Association being first had and obtained.**" [Emphasis added]. There is no evidence that any consent of the Association's board, particularly no written consent, was ever given to the defendant to affix the Side Deck to the Association's paved parking spaces, which are clearly designated as common area in the Master Deed. The defendant had no right to rely upon any "permission" from the Association's president, since the defendant either knew (he testified that he helped sell about a third of the condominium units when the project was originally developed in 1988, and that he was familiar with the terms of the Master Deed) or

certainly had the means of acquiring knowledge of the true fact that the Master Deed, which by statute must be strictly complied with by each co-owner, required the written consent of the Board of the Association being first obtained before any object could be fixed to a common area. Furthermore, the Master Deed constitutes a contract among the Association and its members (the defendant is a member by virtue of ownership of the Pool Bar unit), and each party to a contract is charged by common law (and in this case also by the statute cited above) with knowledge of and compliance with the terms thereof. The permission to construct the side deck on a common area alleged to have been given by president Melton to the defendant could not, as a matter of law, have been a misrepresentation by the plaintiff, since the defendant knew or should have known that the Association's president had no authority to give any such permission under the terms of Article VII of the Master Deed, a contract to which he was and is a party and charged by statute to comply with.

The second reason why the doctrine of equitable estoppel cannot apply in this case is that the defendant "knew or had the means of acquiring knowledge of the true fact" that under the terms of the Master Deed, neither the president nor the board had any authority to allow the construction of the Side Deck. Even if such permission had been granted in writing by the board (which is denied), the defendant knew or had the means of acquiring knowledge of the true fact that any such action would have been beyond the scope of power of the Association, and thus *ultra vires*, since:

1) ARTICLE VI of the Bylaws, attached to and recorded with the Master Deed, provides in subparagraph (j) that: "The Board of Directors shall manage and direct the affairs of the Association and subject to any restrictions imposed by law, by the Master Deed, or by these Bylaws [Emphasis added], may exercise all powers of the Association subject only to approval

of the co-owners when such is specifically required of these By-Laws.” Also, subparagraph (l) of the same Article provides that undertakings and contracts of the Board of Directors shall be binding upon the Association “... so long as any undertakings and contracts are within the scope of the powers and duties which may be exercised by the Board of Directors of the Association of (*sic*) and in accordance with all applicable condominium documents...” [Emphasis added].

2) SC Horizontal Property Act section 27-31-80 provides that: “Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.”

3) ARTICLE V of the Master Deed provides that the general common elements of the regime include “(d) All...parking and drive areas....”, and “...(f) All other portions of the real property and the improvements thereon which are not specifically part of the units themselves....”

4) Master Deed ARTICLE VI, 6.2 states that: “General Common Elements [including all parking areas] and facilities shall be, and the same are hereby declared to be, subject to a perpetual non-exclusive easement in favor of all of the owners of units in The St. Clements... for all proper and normal purposes... for which the same are reasonably intended...” [Emphasis added].

5) Master Deed ARTICLE VII (e) provides that: “No business activity of any kind whatever shall be conducted... on any portion of the property not designated as commercial area...” The Master Deed further provides that only the two commercial units are “commercial area”, and of course the paved parking lot upon which the Side Deck was constructed is not a commercial area.

For the foregoing reasons, and other provisions of the Master Deed, the defendant knew or should have known that neither the president, the Board, nor the Association had any authority under the terms of the SC Horizontal Property Act, the Master Deed, and the Bylaws to permit the construction of the Side Deck onto the paved parking lot in violation of numerous provisions of the Master Deed. The defendant thus has no right to claim equitable estoppel in this case.

“BALANCING OF THE EQUITIES” DEFENSE:

The defendant next maintains that an injunction requiring removal of the Side Deck should not be issued because it would be inconsistent with justice to do so under the facts of this case, taking into account the benefits to the plaintiff versus the detriment to the defendant. On the contrary, the balancing of the equities clearly favors the issuance of such an injunction. Consider first the consequences to the parties should the court grant the defendant's prayer that the Side Deck be allowed to remain as a permanent encroachment upon the Association's paved parking lot:

1) The defendant would be allowed to keep and use for his own commercial purposes, in perpetuity, and in direct violation of section 27-31-80 of the SC Horizontal Property Act and multiple provisions of the Master Deed, over two hundred (200) square feet of very valuable ocean front land, which land is common area owned by all sixty-six unit owners at St. Clements, and for which land the defendant would have paid zero to the other owners and/or to the Association.

2) Such a perpetual easement would in many respects be even better for the defendant than fee simple title, since under the terms of the Master Deed, the annual real property taxes on the land occupied by the Side Deck would be paid 98.5%, in perpetuity, by the other 65 unit owners (defendant's Pool Bar unit has a only a 1.5% interest in the common elements under the

Master Deed), and the paved parking lot upon which the Side Deck is affixed would be required under the terms of the Master Deed to be maintained, in perpetuity, by the Association, with 98.5% of that expense being paid by the other 65 unit owners.

3) The other 65 unit owners at St. Clements would have permanently lost their rights, held inviolate under the terms of the SC Horizontal Property Act and the Master Deed, to a perpetual parking easement in two of the most desirable, ocean front, ground level parking spaces in the Regime.

4) The plaintiff and its members would be at risk that the City of Myrtle Beach might seek legal redress under the City's zoning ordinance for the permanent elimination of any ability to park vehicles in two of the designated paved parking spaces.

On the other hand, if the court grants an injunction to remove the Side Deck:

1) The defendant will have gotten more than its money's worth out of an \$11,000.00 investment made in 1990 (a portion of which funds, by the way, were used to construct an awning all around the Pool Bar, not just over the Side Deck), and

2) The defendant will still own the Pool Bar and will have exactly the same rights and privileges to which it was entitled when it purchased the Pool Bar.

Furthermore, there is no evidence that would support the defendant's contention that it has somehow acquired a "permanent" or "perpetual" easement for the Side Deck. Defendant's Memo asserts several times that the permission the defendant is alleged to have received was to construct the Side Deck and leave it in place "indefinitely." At most, if there were any valid, legal basis for the defendant to have constructed and/or maintained the Side Deck (which is denied), any such "indefinite" right would have thus been either "at will" or for a "reasonable" period of time. The plaintiff would be entitled to terminate any such alleged permission, and 19

years is more than a “reasonable” time for the encroachment to have existed. The defendant has garnered ample benefit from those 19 years of commercial use on an \$11,000.00 investment, and as a matter of law and equity, the Side Deck should now be removed.

The defendant cites the Cedar Cove case as supportive of the defendant’s position. However, Cedar Cove is easily distinguishable, and in fact supports the plaintiff’s position in this case for, *inter alia*, the following reasons:

1) The Cedar Cove case applied to a residential lot in a subdivision, not to a condominium, so there was no Master Deed at Cedar Cove requiring that the common elements encroached upon be used “... for all proper and normal purposes... for which the same are reasonably intended....” [St. Clements Master Deed ARTICLE 6.2], prohibiting business activity on the common elements [Master Deed ARTICLE 7.0(e)], or granting an easement for parking and vehicular traffic to all unit owners over the portion of the common elements encroached upon [Master Deed ARTICLE 8.0 (d)].

2) The Horizontal Property Act did not apply at Cedar Cove, which Act requires in the present case, as a matter of statutory state law, that “Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.” SC Code Section 27-31-80.

3) The encroachment at Cedar Cove consisted of a “slight” encroachment onto a dirt common area by a small portion of a brick patio to be used for residential purposes, while in the present case, the encroachment consists of a major encroachment onto a paved parking lot common area by an entire Side Deck used for commercial purposes.

4) At Cedar Cove, the defendant submitted plans in advance to the Association’s architectural review committee, that review committee recommended approval and then gave the

plans to the board, and the Cedar Cove covenants contained the following provision: “PROVIDED HOWEVER, that if approval or disapproval is not submitted, or no suit to enjoin construction is commenced prior to substantial completion thereof, it shall be presumed that the party has complied with this restriction [requiring architectural review approval].” [Emphasis added]. The court in Cedar Cove cited this provision of the Cedar Cove covenants in **bold print** in ruling that: “We adhere to the unambiguous terms of the restrictive covenants.” In the present case, the unambiguous terms of the Master Deed require the written consent of the board before any unit owner may cause any object to be fixed to the common areas, and it is undisputed that the defendant never obtained any such written consent. A straightforward application of the unambiguous terms of the covenants in the present case would require removal of the Side Deck.

5) At Cedar Cove, the Association had the authority under its covenants to allow the encroachment complained of, while in the present case, neither the president, the board, nor the Association had the authority to permit an encroachment of the Side Deck onto the paved parking lot in violation of an express easement granted in the Master Deed to all owners for vehicular traffic and parking, in violation of the Master Deed’s prohibition of business activity “of any kind whatsoever” in the common areas, and in violation of the Horizontal Property Act’s restriction that: “Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.”

If the court in the present case “adheres to the straightforward application of the covenants”, as did the court in Cedar Cove, an injunction requiring removal of the Side Deck should be issued.

CONCLUSION

As a matter of law and equity, the Side Deck was illegally constructed in violation of numerous provisions of the Master Deed and the SC Horizontal Property Act. The defendant has garnered more than his "money's worth" from his use of the Side Deck for commercial purposes for the past nineteen years. It would be inequitable to the plaintiff and its members to allow the Side Deck to remain, and the removal of the Side Deck would essentially place the defendant in the same position as owner of the Pool Bar to which he was entitled at the time he purchased the Pool Bar, long before the Side Deck was constructed. The plaintiff respectfully prays for an injunction removing the Side Deck, reasonable attorney's fees as provided in the Master Deed, and the costs of this action.

Respectfully submitted,

McCRACKIN, BARNETT & RICHARDSON, L.L.P.

/s/

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September 18, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

COURT OF COMMON PLEAS

07-CP-26-1426

The St. Clements Homeowners)
Association, Inc.,)
)
Plaintiff,)
)
vs.)
)
BE-MI, Inc.)
)
Defendant.)
_____)

PLAINTIFF'S
MEMORANDUM OF LAW

[REDACTED 1-7-11 FOR
ATTACHMENT TO MOTION]

The St. Clements Horizontal Property Regime is a high-rise condominium established on ocean front property adjacent to the northern boundary of 70th Avenue N. in Myrtle Beach by Master Deed filed December 8, 1987, with a total of 70 on-site parking spaces for 66 condominium units, consisting of 64 residential units and 2 small commercial units. One of the commercial units is the defendant's "pool bar" designated in the Master Deed as Unit "Pool-1", consisting of a small, stand alone building located next to the swimming pool. The defendant purchased Unit Pool-1 by deed filed August 8, 1988, and the defendant has owned and operated Unit Pool-1 for commercial purposes at all times since. In 1990, the defendant constructed in the Regime's paved parking lot, which is designated a part of the Common Area by the Master Deed, a "Side Deck" as defined in the Complaint, which deck adjoins Unit Pool-1 and covers 2 of the Regime's paved parking spaces. For the reasons enumerated in the Complaint, the plaintiff seeks an injunction to remove the Side Deck and repair any damage caused by such removal, and a Judgment for plaintiff's reasonable costs and expenses in bringing this action as provided in the Master Deed. The defendant claims to have had the plaintiff's consent for the construction of the Side Deck and has raised a general denial and various equitable defenses, all

of which the plaintiff denies. The plaintiff respectfully submits the following summary of applicable law and Master Deed/Bylaws provisions:

HORIZONTAL PROPERTY ACT:

▪ Section 27-31-80 - USE OF COMMON ELEMENTS

Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners. (Emphasis added.)

▪ Section 27-31-170 - COMPLIANCE WITH BY-LAWS, ETC.

Each co-owner shall comply strictly with the By-Laws..., and with the Covenants, Conditions and Restrictions set forth in the Master Deed.... Failure to comply with any of the same shall be grounds for civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or Board of Administration, or other form of administration specified in the Bylaws, on behalf of the Council of Co-owners.... (Emphasis added.)

ST. CLEMENTS MASTER DEED:

▪ ARTICLE V – DESCRIPTION OF GENERAL COMMON AREAS

5.0 The general common areas of The St. Clements Horizontal Property Regime shall be as follows:

....
(d) All... parking and drive areas....

....
(f) All other portions of the real property and the improvements thereon which are not specifically part of the units themselves, as herein above defined, or owned by unit owners as personal property, shall be common areas and facilities intended for the common and necessary or convenient use and enjoyment, existence, maintenance or safety of the condominium units. (Emphasis added.)

▪ ARTICLE VI – NATURE AND INCIDENTS OF UNIT OWNERSHIP

....
6.2 General Common Elements and facilities shall be, and the same are hereby declared to be, subject to a perpetual non-exclusive easement in favor of all of the owners of units in The St. Clements, for their use and the use of their immediate families, guests or invitees, for all proper and normal purposes, and the furnishing of services and

facilities for which the same are reasonably intended, for the enjoyment of said owners of units. (Emphasis added.)

▪ ARTICLE VII – USE AND RESTRICTIONS ON USE

7.0 – RESTRICTIONS ON USE

....

(b) No...unlawful use may be made of ...the common areas..., nor any part thereof, and all laws, zoning ordinances and regulations of all governmental authorities having jurisdiction of the unit[s] shall be observed.

....

(d) No owner shall cause any improvements or changes to be made on the exterior of the condominium (including...the installation of awnings...) or in any manner alter the appearance of the exterior portion of any building without the written consent of the board of the association being first had and obtained. No unit owner shall cause any object to be fixed to common areas and facilities...or in any manner change the appearance of the common areas and facilities...without the written consent of the board of the association being first had and obtained.

(e) No business activity of any kind whatever shall be conducted...on any portion of the property not designated as commercial area.... (Emphasis added.)

....

(i) No structure of a temporary character shall be placed on the property at any time....

....

7.2 The failure to enforce any right, reservation or conditions contained in this Master Deed, however long continued, shall not be deemed a waiver of the right to do so hereafter, as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect its enforcement. The remedies set out herein for such violation or breach or cumulative with any other legal or equitable rights available to any entity or person. (Emphasis added.)

7.3 The acceptance of a Deed of Conveyance...shall constitute an agreement that the provisions of this MASTER DEED, By-Laws, and any rules...are accepted and ratified by such owner...and all such provisions shall be deemed and taken to be covenants running with the land and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were made a part of each and every Deed of Conveyance....

▪ ARTICLE VIII – EASEMENTS

8.0 In addition to easements and rights established and/or reserved elsewhere in this MASTER DEED, the following easements and rights are hereby established as covenants and burdens running with the real property and the improvements thereon:

....

(d) Ingress and egress is reserved...for vehicular traffic over, through and across such portions of the common areas and facilities as from time to time may be paved or intended for such purposes, for all unit owners of the units in The St. Clements; their guests, families, invitees, lessees, the Association, the Declarant, its successors and assigns. (Emphasis added.)

▪ ARTICLE XIV – REMEDIES IN EVENT OF DEFAULT

14.0 A default by the owner of any unit shall entitle the...the Association...to such relief as is available at law or equity, including:

....

(c) In any proceedings arising because of alleged default by a unit owner, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorney's fees as may be determined by the court, but in no event shall any unit owner be entitled to such attorney's fees.

(d) The failure of the Association or any unit owner enforce any right, provision, covenant or condition which may be granted by this MASTER DEED or the other above mentioned documents, shall not constitute a waiver of the right of the Association...to enforce such right, provision, covenant or condition in the future.

(e) The rights, remedies and privileges granted to the Association...pursuant to any terms, provisions, covenants or conditions of this MASTER DEED or the above mentioned documents, shall be deemed to be cumulative, and the exercise of one or more shall not be deemed to constitute an election of remedies, nor shall it preclude the party thus exercising the same from exercising such other and addition rights, remedies or privileges as may be available to such party at law or at equity. (Emphasis added.)

BY-LAWS OF THE ST. CLEMENTS HOA, INC.

▪ ARTICLE VI – BOARD OF DIRECTORS

(j) The Board of Directors shall manage and direct the affairs of the Association and subject to any restrictions imposed by law, by the Master Deed, or by these By-Laws, may exercise all of the powers of the Association subject only to approval by the co-owners when such is specifically required of these By-Laws.

....

(l) The undertakings and contracts authorized by the first Board of Directors shall be binding upon the Association in the same manner as though such undertakings and contracts had been authorized by the first Board of Directors duly elected by the membership..., so long as any undertakings and contracts are within the scope of the powers and duties which may be exercised by the Board of Directors of the Association of [sic] and in accordance with all applicable condominium documents.... (Emphasis added.)

MYRTLE BEACH ZONING CODE - PARKING REQUIREMENTS:

St. Clements has a total of 64 residential condominium units and 2 small commercial units [see Exhibit B to Master Deed]. The Myrtle Beach Zoning Code in effect when St. Clements was established as a condominium in late 1987 required that a minimum of 70 or more off-street parking spaces be maintained at St. Clements. At all times from the establishment of St. Clements to the present, St. Clements has had a total of 70 such parking spaces, including the two spaces now covered by the defendant's Side Deck. Subsequent amendments to the Zoning Code have actually increased the parking requirements, but St. Clements is currently "grandfathered" in that regard, provided it maintains as parking spaces at least the 70 spaces originally provided at the inception of the Regime. [See attached copies of Myrtle Beach Zoning Ordinance Section 32-5, Off-Street Parking Requirements, with copy of section of applicable Zoning Map, in effect for St. Clements 1987-1995.]

DEFENSES:

ESTOPPEL DEFENSE:

The defendant raises the defense of equitable estoppel, but the evidence will show that this defense does not apply to the facts of this case. A brief summary of the law on this defense is as follows:

The party asserting equitable estoppel bears the burden of establishing all the elements. A claim of estoppel includes elements for the party asserting estoppel and the party estopped. *E.g.*, Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct.App.1994) (listing the elements of equitable estoppel: as to the estopped party, [1] a misrepresentation or nondisclosure, [2] intent to induce the other party to act, and [3] actual or constructive knowledge of the true facts; and as to the party claiming estoppel, [1] lack of knowledge, or means of acquiring knowledge of the true facts, [2] reasonable reliance, and [3] prejudicial change of position).

DETRIMENTAL RELIANCE DEFENCE:

The defendant also raises this as its final defense; but “detrimental reliance” is simply one of the elements of the equitable estoppel defense discussed above. *E.g.*, “Because the element of detrimental reliance may be lacking (as well as other elements), the estoppel defense does not entitle....” Queens Grant v. Greenwood Development, 628 S.E.2d 902, 368 S.C. 359 (2006). I find no law indicating that detrimental reliance alone constitutes a separate defense.

Respectfully submitted,

McCRACKIN, BARNETT & RICHARDSON, L.L.P.

August 22, 2009

/s/_____
Michael J. Barnett
Post Office Box 1182
Myrtle Beach, SC 29578
(843) 448-8405
Attorneys for Plaintiff

[SEE ALSO ATTACHED MYRTLE BEACH ZONING LAW CITED ABOVE.]

CITY OFFICIALS

MYRTLE BEACH, SOUTH CAROLINA

MAYOR AND COUNCIL

ROBERT M. GRISSON, MAYOR

Councilman H. G. Charles
Councilman James E. Putrell
Councilman Mary Jeffcoat

Councilman Phillip J. Newsome
Councilman Marjorie D. Stonebrook
Councilman B. A. Thomas

Richard M. Marvin, CITY MANAGER

PLANNING AND ZONING COMMISSION

Jack Stirrup, Chairman

Commissioner Sam Burns
Commissioner Ray Caudle
Commissioner Keith Compton
Commissioner James Creel

Commissioner John P. "Pat" Gore
Commissioner J. Perrin Lawson, Jr.
Commissioner Russell Mann
Commissioner Melvin Nace

February 1, 1986

Myrtle Beach Zoning Ordinance (pub. 1986)

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MINIMUM LOT UNIT

2-C-2 Accommodations, Resort Residential

OBJECTIVES

To provide for the orderly development of certain areas within the community where both residential and resort-type land uses are now in evidence, and where, because of proximity to the ocean, the continuation of such 'mixed development' would promote year-round use of public facilities, and allow for flexibility of development, in accordance with the economic practicability for various type of residential and resort uses.

USE GROUPS PERMITTED

No.	Use
4	Residential, Multi-Family
5	Residential, Resort
8	Social and Cultural

SPECIAL REGULATIONS

Appropriate open space and landscaping as required by Section 32-6, Open Space and Landscaping Requirements.

MINIMUM LOT REQUIREMENTS

Lot Area Per Dwelling Unit	1,500 sq. ft. per unit for all uses in Use Group 4, Residential, Multi-Family. No requirements elsewhere.
Total Lot Area	6,000 sq. ft.
Front Lot Width	50 ft.
Lot Depth	90 ft.

MINIMUM YARD REQUIREMENTS

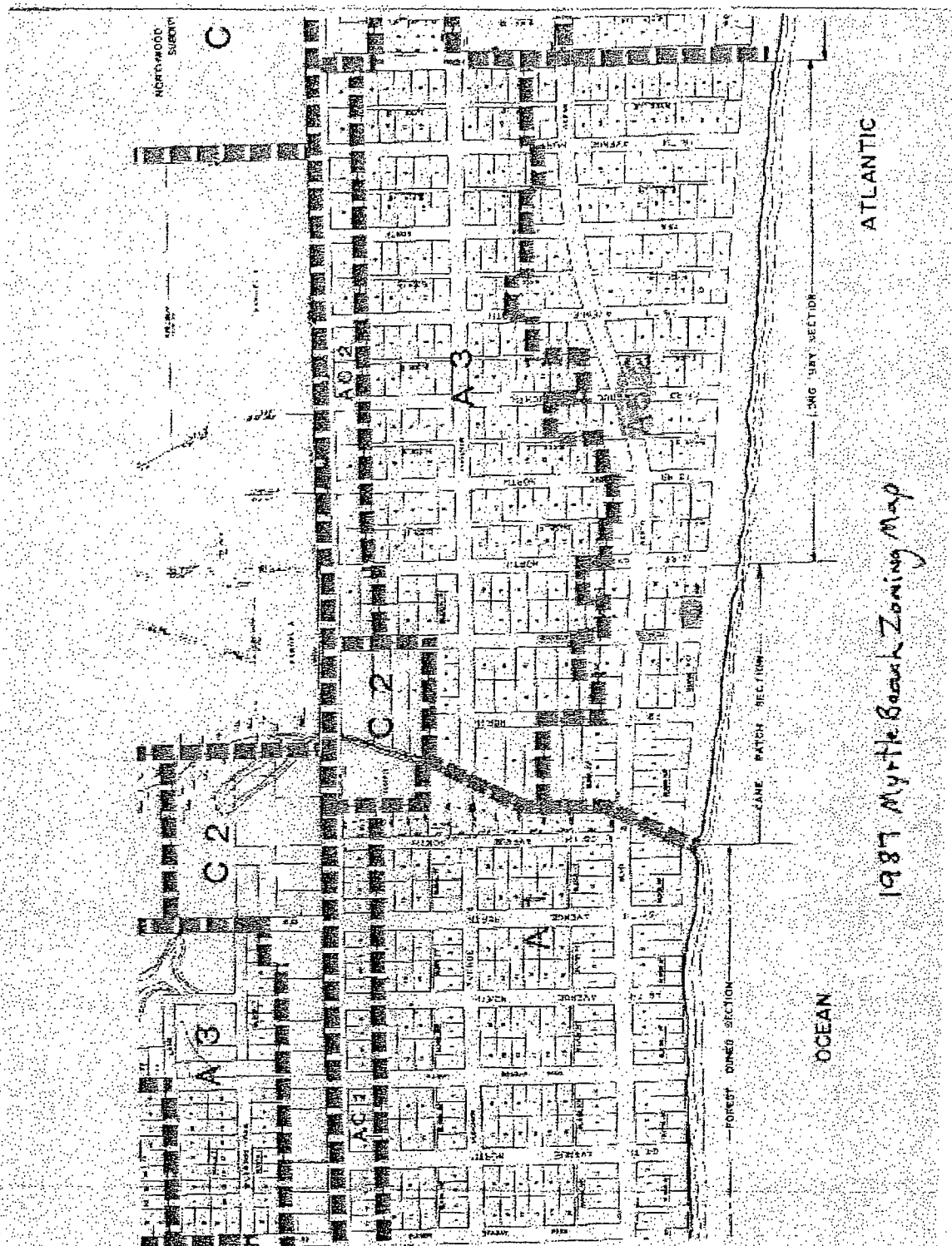
Front Yard Depth	12 ft.
Side Yard Width (2)	12 ft.
Rear Yard Depth	12 ft.

Where a building exceeds eighty (80) feet horizontally and/or forty (40) feet vertically, whichever is greater, such side yard shall increase by the ratio of one (1) foot for each additional seven (7) feet in width and by the ratio of one (1) foot for each additional three (3) feet in height.

On lots with two or more principal residential buildings or uses, the minimum distance between such buildings or uses shall not be less than fifteen (15) feet.

* OFF-STREET PARKING REQUIREMENTS

For hotels, motels, rooming and boarding houses, one (1) space for each unit plus one (1) space for each ten (10) units or fraction thereof. A unit will consist of no more than five hundred fifty (550) square feet and units which exceed five hundred fifty (550) square feet will be required to provide one and one-half (1½) spaces per unit. One and one-half (1½) spaces will be required for dwelling units whether denominated apartments, town houses or any other apartment or dwelling unit. For all other uses, one (1) space for each two hundred fifty (250) square feet of gross floor space is required. (Amended 4/3/84)



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TRANSCRIPT OF MASTER'S HEARING

1

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-26-1426

The St. Clements Homeowners)
Association, Inc.,)

Plaintiff,)

vs)

BE-MI, Inc.,)

Defendant.)

TRANSCRIPT OF THE HEARING HELD BEFORE
THE HONORABLE CYNTHIA GRAHAM HOWE,
IN THE MASTER'S COURTROOM,
IN HORRY COUNTY, SOUTH CAROLINA

Monday, August 24, 2009
a.m. --- 3:02 p.m.

-and-

Tuesday, August 25, 2009

9:47

a.m. --- 12:31 p.m.

The following is a transcript of the hearing held
before The Honorable Cynthia Graham Howe, in the
Master's Courtroom in Horry County, at the Horry
County Courthouse in Conway, South Carolina, on
Monday, August 24, 2009 and Tuesday, August 25, 2009.

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 Michael J. Barnett, Esquire
4 McCRACKIN, BARNETT & RICHARDSON, L.L.P.
5 1000 21st Avenue North
6 Post Office Box 1182
7 Myrtle Beach, South Carolina 29578

8 FOR THE DEFENDANT:

9 Fred B. Newby, Esquire
10 NEWBY, SARTIP, MASEL & CASPER, LLC
11 Post Office Box 808
12 Myrtle Beach, South Carolina 29578-0808

13 COURT REPORTER:

14 Alice S. Nelson
15 Verbatim Court Reporter
16
17
18
19
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21
22
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EXHIBITS

Plaintiff

Plaintiff's Exhibit Number 1

(Master Deed)

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Plaintiff's Exhibit Number 1A

(Level 1- Entrance/ Meeting Plan)

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Plaintiff's Exhibit Number 2

(Indenture Deed)

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Plaintiff's Exhibit Number 3

(St. Clements Homeowners' Association 1st Annual
Members' Meeting)

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Plaintiff's Exhibit Number 3A

(St. Clements Homeowners' Association 2nd Annual
Members' Meeting)

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Plaintiff's Exhibit Number 4

(Minutes of the 3rd Annual Homeowners Association
Meeting)

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Plaintiff

Plaintiff's Exhibit Number 5

(February 21, 1991 Letter to Dr. Robert Clements
from Robert W. Johnston, Paragon, Inc. Managing
Agent)

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Plaintiff's Exhibit Number 6

(February 26, 1991 Letter to Mr. Luke Goude from
Robert W. Johnston, Paragon, Inc. Managing
Agent)

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Plaintiff's Exhibit Number 7

(March 27, 1991 Letter to Mr. Luke Goude from
Robert W. Johnston, Paragon, Inc. Managing
Agent)

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Plaintiff's Exhibit Number 8

(Colored photographs)

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Plaintiff's Exhibit Number 9

(August 27, 1992 Letter to Mr. Luke Goude from
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Plaintiff

Plaintiff's Exhibit Number 10

(November 19, 1992 Letter to Mr. Luke Goude from
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Plaintiff's Exhibit Number 11

(Memorandum to St. Clements Homeowners Association
Board of Directors from Carl Armstrong)

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Plaintiff's Exhibit Number 12

(April 5, 2006 Board of Directors Meeting
Regarding St. Clements Parking Policy)

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Plaintiff's Exhibit Number 13

(November 3, 2006 Letter to Mr. Luke Goude from
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Plaintiff's Exhibit Number 14

(Attorney's Fees and Costs)

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Plaintiff's Exhibit Number 15

(Level P- Parking Level Plan)

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Plaintiff's Exhibit Number 16

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Defendants

Defendant's Exhibit Number 1

(Colored Photograph)

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(July 26, 2001 Letter to Mr. Luke Goude from

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Management)

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Defendant's Exhibit Number 16

(Colored Photograph)

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Defendant's Exhibit Number 17

(Colored Photograph)

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1 THE COURT: THIS IS THE CASE OF THE ST.
 2 CLEMENTS HOMEOWNERS
 3 ASSOCIATION, INC. VERSUS
 4 BE-MI, INC., CIVIL ACTION
 5 NUMBER 07-CP-26-1426.
 6 THERE IS A CONSENT ORDER OF
 7 REFERENCE SIGNED BY JUDGE
 8 COTTINGHAM ON MAY THE 21ST,
 9 2009, REFERRING THE MATTER
 10 TO THE HORRY COUNTY MASTER
 11 IN EQUITY. ARE THE PARTIES
 12 READY TO PROCEED?
 13 MR. BARNETT: PLAINTIFF'S READY, YOUR
 14 HONOR.
 15 MR. NEWBY WE'RE READY, YOUR HONOR.
 16 THE COURT: ALL RIGHT. MR. BARNETT?
 17 MR. BARNETT: YOUR HONOR, WOULD YOU LIKE
 18 TO HEAR A BRIEF STATEMENT
 19 OF COUNSEL BEFORE WE BEGIN
 20 OR ---
 21 THE COURT: THAT WOULD BE FINE.
 22 MR. BARNETT: I'LL JUST GIVE YOU A BRIEF.
 23 YOUR HONOR, THIS IS AN
 24 ACTION BY THE HOMEOWNERS
 25 ASSOCIATION FOR THE ST.

1 CLEMENTS CONDOMINIUM, WHICH
2 IS LOCATED ON THE
3 OCEANFRONT JUST NORTH OF
4 70TH AVENUE NORTH IN MYRTLE
5 BEACH, AND IT'S A
6 CONDOMINIUM COMPLEX WITH A
7 TOTAL OF 66 UNITS AND A
8 TOTAL OF 70 PARKING SPACES.
9 64 OF THE UNITS ARE
10 RESIDENTIAL AND TWO SMALL
11 COMMERCIAL UNITS, ONE OF
12 WHICH IS OWNED BY THE
13 DEFENDANT, WHICH IS CALLED
14 THE POOL BAR, AND IT'S A
15 SMALL STAND-ALONE BUILDING
16 LOCATED BETWEEN THE PARKING
17 LOT AND THE POOL OUT ON THE
18 OCEAN SIDE OF THE BUILDING,
19 AND IT'S USED BY THE
20 DEFENDANT FOR COMMERCIAL
21 PURPOSES. I BELIEVE HE HAS
22 AN ALCOHOL BEVERAGE LICENSE
23 AND SELLS FOOD AND DRINKS
24 THERE.
25 THE ISSUE IN THIS CASE

1 IS THAT IN OR AROUND MAY OF
2 1990, THE DEFENDANT,
3 WITHOUT THE PERMISSION OF
4 THE ASSOCIATION,
5 CONSTRUCTED IN TWO OF THE
6 PAVED PARKING SPACES
7 ADJACENT TO HIS POOL BAR,
8 WHAT WE'RE CALLING THE SIDE
9 DECK, AND THE SIDE DECK'S
10 BEEN DEFINED IN THE
11 COMPLAINT WITH SOME
12 SPECIFICITY, AND THAT'S
13 WHAT WE'RE REFERRING TO AS
14 THE SIDE DECK, AND HE'S PUT
15 CHAIRS ON THERE, AND THAT'S
16 BECOME PART OF HIS EATING
17 ESTABLISHMENT. THE
18 HOMEOWNERS ASSOCIATION HAS
19 QUESTIONED HIM AND OBJECTED
20 TO IT ON A NUMBER OF
21 OCCASIONS AND TRIED TO SEE
22 IF THINGS COULD BE WORKED
23 OUT SOMEWHERE, THEY'VE NOT
24 BEEN ABLE TO BE, AND SO
25 THEY FINALLY DECIDED TO

1 BRING THIS LAW ACTION.
2 WE'LL SHOW, OF COURSE, THAT
3 THE MASTER DEED PROHIBITS
4 ANY SUCH SIDE DECK, THAT
5 EVEN IF THE ASSOCIATION HAD
6 GIVEN CONSENT, WHICH THEY
7 DID NOT, THE BOARD WOULD'VE
8 HAD NO AUTHORITY TO DO SO
9 UNDER THE MASTER DEED,
10 UNDER THE HORIZONTAL
11 PROPERTY ACT, BUT AT ANY
12 RATE, THEY GAVE NO SUCH
13 CONSENT. AND SO THE
14 ASSOCIATION IS MERELY
15 ASKING FOR, NUMBER ONE, AN
16 INJUNCTION TO REMOVE THAT
17 LITTLE WOODEN SIDE DECK OUT
18 OF THOSE TWO PARKING SPACES
19 SO THEY CAN RESUME USING IT
20 FOR PARKING AND, SECONDLY,
21 FOR REASONABLE ATTORNEYS'
22 FEES AND COSTS INCURRED IN
23 THIS CASE, WHICH THE MASTER
24 DEED PROVIDES THEY'RE
25 ENTITLED TO IF THEY PREVAIL

1 IN THE ACTION.

2 THE COURT: MR. NEWBY?

3 MR. NEWBY: YOUR HONOR, MUCH OF WHAT

4 MR. BARNETT SAYS IS

5 UNCONTESTED. THE FACTS

6 RELATING TO THE

7 CONSTRUCTION OF THE

8 CONDOMINIUM ARE CERTAINLY

9 NOT CONTESTED. THIS WAS

10 BUILT ABOUT 1988. DWIGHT

11 COX WAS THE DEVELOPER, WHO

12 -- COX IS NOW DECEASED, BUT

13 IT IS AT THE JUNCTURE OF

14 THE STREET END AT 70TH

15 AVENUE NORTH IN MYRTLE

16 BEACH. WHEN YOU DRIVE DOWN

17 TO THE BEACH, ON THAT

18 STREET END, TO THE RIGHT,

19 IS THE CARAVELLE HOTEL, TO

20 THE LEFT IS THE ST.

21 CLEMENTS. THIS WAS ONE OF

22 AND MAYBE WAS THE FIRST

23 TRUE CONDOMINIUM HOTEL IN

24 MYRTLE BEACH IN THE SENSE

25 THAT THESE CONDOMINIUM

1 UNITS ARE THE SIZE OF A
2 HOTEL ROOM. THEY'RE NOT
3 BIG ENOUGH TO LIVE IN, AND
4 TO MY KNOWLEDGE, NOBODY HAS
5 EVER LIVED PERMANENTLY IN
6 ANY OF THE UNITS AT THE ST.
7 CLEMENTS. THEY WERE
8 PURCHASED BY THE OWNERS
9 PRIMARILY FOR INVESTMENT.
10 SOME HAVE USED THEM ONLY AS
11 RENTAL UNITS. SOME HAVE
12 USED THEM JUST AS A PLACE
13 TO VACATION THEMSELVES, BUT
14 THEY'RE NOT LARGE ENOUGH TO
15 LIVE IN. LUKE GOUDE, WHO
16 IS MY CLIENT, WHO OWNS BE-
17 MI, INC. AND OWNS AND
18 OPERATES THE POOL BAR, WAS
19 ONE OF THE VERY FIRST
20 OWNERS. HE HAS BEEN THERE
21 SINCE MR. COX DEVELOPED THE
22 UNITS. HE HELPED DESIGN
23 THE PROPERTY. HE IS THE
24 ONLY OWNER WHO EARNS A
25 LIVING FROM THIS PROPERTY.

1 WHILE OTHERS MAY RENT THEIR
2 UNITS AND ACQUIRE INCOME
3 FROM RENT, NONE OF THEM ARE
4 THERE FULL-TIME, AND DURING
5 THE WARM SEASON, WHEN IT'S
6 APPROPRIATE TO OPEN THE
7 POOL BAR, LUKE HAS OPERATED
8 THIS ESTABLISHMENT FOR
9 PRACTICALLY 20 YEARS AND IS
10 STILL DOING SO. OVER THAT
11 20 YEARS, THEY'VE HAD A
12 DISPUTE OR TWO BETWEEN THE
13 HOMEOWNERS. THERE WAS A
14 PREVIOUS LAWSUIT RELATED TO
15 HIS HOURS OF OPERATION WHEN
16 THEY COULDN'T AGREE ON THE
17 HOURS; BUT, IN GENERAL,
18 WHAT OCCURRED IS AN
19 EVOLUTION IN THE
20 RELATIONSHIP BETWEEN THE
21 PROPERTY OWNERS ASSOCIATION
22 AND LUKE. THE ORIGINAL
23 BOARD, MADE UP OF THREE
24 PEOPLE, ONE OF WHOM WAS MR.
25 COX, ONE OF WHOM WAS

1 MARSHALL MELTON, WHO'S
2 SEATED HERE BEHIND US.
3 RIGHT AFTER HUGO IN 1989,
4 THEY REACHED AN AGREEMENT
5 WITH LUKE THAT HE COULD
6 BUILD THIS DECK THAT IS NOW
7 BEING COMPLAINED ABOUT. IN
8 FACT, I'M TOLD THAT MR.
9 COX, WHO WAS A CONTRACTOR
10 AND THE DEVELOPER, HE
11 PERSONALLY AND PEOPLE
12 WORKING FOR HIM LARGELY DID
13 THE CONSTRUCTION OF THE
14 DECK THAT THEY'RE
15 COMPLAINING ABOUT, WHILE HE
16 WAS A BOARD MEMBER. MR.
17 MELTON WAS THE PRESIDENT OF
18 THE ASSOCIATION AT THE TIME
19 AND WILL TESTIFY THAT LUKE
20 DID NOT DO THIS WITHOUT
21 PERMISSION. TO THE
22 CONTRARY, HE NOT ONLY HAD
23 PERMISSION, BOARD MEMBERS
24 HELPED HIM BUILD IT. NOW,
25 LUKE SPENT MONEY AND HE HAS

1 RUN HIS BUSINESS, OPERATING
2 THE USE OF THIS DECK BESIDE
3 HIS POOL BAR FOR
4 PRACTICALLY 20 YEARS, AND
5 WHILE THERE HAS BEEN, AND I
6 THINK THERE WILL BE SOME
7 LETTERS THAT INDICATE THAT
8 VARIOUS PEOPLE HAVE
9 COMPLAINED FROM TIME TO
10 TIME, FOR PRACTICAL
11 PURPOSES, THE HOMEOWNERS
12 ASSOCIATION HAS NOT BROUGHT
13 ANY ACTION FOR 17 TO 18
14 YEARS TO TERMINATE THE USE
15 OF THE POOL DECK, I MEAN,
16 OF THE BAR. THIS DECK, YOU
17 WILL FIND, HAS BEEN USED
18 PRIMARILY BY THE OWNERS AND
19 THEIR OWN RENTERS. IT'S
20 NOT LIKE IT'S BEING USED BY
21 SOME THIRD PARTY. IT
22 ALLOWS PEOPLE WHO DO COME
23 TO CONSUME ALCOHOL TO DO SO
24 AWAY FROM THE POOL DECK
25 WHERE THE KIDS ARE PLAYING,

1 AND IT KEEPS SOME OF THE
2 NOISE AND THE ALCOHOL
3 CONSUMPTION AWAY FROM THE
4 MORE FAMILY ORIENTED AREAS
5 ON THE POOL DECK. AND
6 WITHOUT THE DECK, IT WAS
7 THE BELIEF OF THE ORIGINAL
8 BOARD AND STILL THEIR
9 BELIEF, I THINK, THE
10 PREVIOUS MEMBERS, THAT THAT
11 WILL FORCE THE PATRONS OF
12 THE POOL BAR THEN TO USE
13 THE DECK AROUND THE POOL TO
14 SIT IN. WE THINK THAT WHEN
15 THE COURT LOOKS AT THE
16 APPLICABLE CASE LAW, AND WE
17 WILL BE HAPPY TO HAND UP A
18 MEMORANDUM OR A PROPOSED
19 ORDER AS THE COURT DEEMS
20 APPROPRIATE, WHEN THE TIME
21 COMES, BUT SPECIFICALLY,
22 CEDAR COVE HOMEOWNERS
23 VERSUS DIPIETRO, 2006 CASE,
24 I'M SORRY, THE COURT OF
25 APPEALS, WHERE THEY SAY IN

1 A VERY SIMILAR CASE WHERE
2 THERE'S AN ENCROACHMENT OF
3 A DECK ONTO A COMMON AREA
4 OF THE PROPERTY OWNERS
5 ASSOCIATION, THE COURT UP
6 THERE SAID THAT IN CASES
7 LIKE THIS WHERE THE
8 PLAINTIFF IS APPEALING TO
9 THE EQUITY POWERS OF THE
10 COURT, THAT THEY SHOULD
11 VIEW A BALANCING OF THE
12 EQUITIES. WE RAISE THAT AS
13 A DEFENSE, AND WE BELIEVE
14 THAT IF YOU LOOK AT THE
15 FACT THAT THE POA HAS
16 BROUGHT NO ACTION FOR 17
17 YEARS AGAINST THIS ENTITY,
18 HAS ALLOWED THE USE OF THE
19 DECK AND THE HOMEOWNERS
20 THEMSELVES HAVE USED IT FOR
21 ALL THIS TIME, THAT THE
22 DOWNSIDE TO MR. GOUDE AND
23 HIS COMPANY, TO REMOVE IT,
24 VERSUS THE UPSIDE, TO PICK
25 UP ONE AND A HALF PARKING

1 SPACES, WOULD CERTAINLY NOT
2 JUSTIFY THE RELIEF BEING
3 SOUGHT, AND WE THINK THAT
4 THE EVIDENCE WILL SHOW THAT
5 AS WE PROCEED. THANK YOU.

6 THE COURT: MR. BARNETT, ARE YOU READY
7 TO CALL YOUR FIRST WITNESS?

8 MR. BARNETT: YES, MA'AM. ONE STATEMENT,
9 YOUR HONOR, IF I MAY, JUST
10 FOR CLARIFICATION, YOU'LL
11 HEAR THROUGHOUT THIS TRIAL,
12 IT CAN BE CONFUSING,
13 THERE'S A POOL DECK,
14 THERE'S A ROOFTOP DECK, AND
15 THERE'S A SIDE DECK. SO
16 THE POOL DECK IS THE
17 CONCRETE DECK AROUND THE
18 SWIMMING POOL THAT'S NOT AN
19 ISSUE, THE ROOFTOP DECK IS
20 THE DECK ON TOP OF THIS
21 POOL BAR, THAT'S WHERE HE
22 SERVED, THAT'S NOT AN
23 ISSUE, AND THEN THERE'S THE
24 SIDE DECK. SO WHEN YOU
25 HEAR ALL THESE DECKS, IT'S

1 THE SIDE DECK THAT'S THE
2 ISSUE.

3 THE COURT: ALL RIGHT, THANK YOU.

4 MR. BARNETT: THE PLAINTIFF CALLS BARBARA
5 BROWN TO THE STAND.

6 BARBARA BROWN, AFTER HAVING BEEN CALLED TO THE STAND
7 AND DULY SWORN, TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. BARNETT:

10 Q: Ms. Brown, what is your name and where do you
11 reside?

12 A: Barbara Brown, Myrtle Beach, [REDACTED]

13 [REDACTED]

14 Q: And are you currently an owner at the St.
15 Clements condominiums in Myrtle Beach?

16 A: Yes, I am.

17 Q: And how long have you been an owner there?

18 A: Since '94.

19 Q: Are you currently president of the homeowners
20 association ---

21 A: Yes.

22 Q: And the homeowners association being the
23 plaintiff in this lawsuit?

24 A: Yes.

25 Q: And how long have you been the president of the

1 association?

2 A: Three years.

3 Q: Are you also on the board of directors for the
4 association?

5 A: Yes.

6 Q: And how long have you been a director for the
7 association?

8 A: Four, four years.

9 Q: And when did you first come on the board?

10 A: About four years ago.

11 Q: 2005?

12 A: Uh-huh (affirmative response).

13 Q: In preparation for today's testimony, Ms. Brown,
14 have you obtained and reviewed all of the
15 association's records from the inception of the
16 association to the current time and reviewed them
17 in preparation for testifying today?

18 A: Yes, I have.

19 Q: And so are you prepared to testify today based
20 upon your knowledge and the records of the
21 association?

22 A: Yes.

23 Q: And I'd like to ask you if you recognize what
24 I've marked as Plaintiff's Exhibit Number 1,
25 which is the Master Deed for the association and

1 the two recorded amendments, one being an
2 amendment to the bylaws and one being an
3 amendment from 1988 to the Master Deed itself.
4 Do you recognize that as being the Master Deed
5 and amendments for this association?

6 A: Yes.

7 MR. BARNETT: MOVE TO INTRODUCE THIS AS
8 PLAINTIFF'S EXHIBIT NUMBER
9 1.

10 THE COURT: ANY OBJECTION?

11 MR. NEWBY: NO OBJECTION.

12 THE COURT: SO ADMITTED.

13 PLAINTIFF'S EXHIBIT NUMBER 1
14 ADMITTED INTO EVIDENCE

15 Q: And I'll hand you what has been marked as
16 Plaintiff's Exhibit Number 1A, which is one of
17 the original drawings showing the
18 entrance/meeting level plan for this condominium,
19 showing the original location of the pool bar and
20 the parking spaces and the pool and the building?

21 A: Yes.

22 Q: And you recognize that as being part of the
23 plans?

24 A: I do.

25 MR. BARNETT: MOVE TO INTRODUCE THIS AS

1 PLAINTIFF'S EXHIBIT NUMBER

2 1A.

3 MR. NEWBY: NO OBJECTION.

4 THE COURT: SO ADMITTED.

5 PLAINTIFF'S EXHIBIT NUMBER 1A

6 ADMITTED INTO EVIDENCE

7 Q: And, Ms. Brown, how many condominium units are
8 there in the St. Clements condominiums?

9 A: In the building, 64 and the two commercial units.

10 Q: And we know about pool one being one. What's the
11 other commercial unit?

12 A: It's off the lobby. It's a supply room for the
13 Caravelle Hotel.

14 Q: And the second commercial unit, is that the one
15 designated in the Master Deed as "Pool-1"?

16 A: Yes.

17 Q: Is that also known as the pool bar?

18 A: Yes.

19 Q: And who's the owner of that commercial unit?

20 A: BE-MI.

21 Q: BE-MI, Inc?

22 A: Inc.

23 Q: I'll hand you what I've marked as Plaintiff's
24 Exhibit Number 2, which is the deed conveying
25 from St. Clements, Limited Unit Pool-1 at St.

1 Clements to BE-MI, Inc. in 1998. Is that the
2 deed whereby the defendant in this case acquired
3 title to Pool-1?

4 A: Yes.

5 MR. BARNETT: MOVE TO INTRODUCE THAT AS
6 PLAINTIFF'S EXHIBIT NUMBER
7 2.

8 THE COURT: MR. NEWBY, ANY OBJECTION?

9 MR. NEWBY: NO OBJECTION.

10 THE COURT: SO ADMITTED.
11 PLAINTIFF'S EXHIBIT NUMBER 2
12 ADMITTED INTO EVIDENCE

13 Q: And, Ms. Brown, what is Unit Pool-1, what does it
14 consist of?

15 A: Well, it's a standalone small pool bar, snack bar
16 type set up next, adjacent to the pool, between
17 the pool and the parking lot.

18 Q: And is that the small building designated as, in
19 all caps, "POOL BAR" in the lower right-hand
20 corner of Exhibit Number 1A?

21 A: Yes.

22 Q: And I notice in this Exhibit, to the right of
23 that is a swimming pool?

24 A: Yes.

25 Q: That's not part of the pool bar, is it?

1 A: No.

2 Q: And I see some sort of, it looks like to me a
3 fence coming around that corner of the lot, is
4 that ---

5 A: A concrete wall.

6 Q: A concrete wall, okay. And does Pool-1 consist
7 solely of the building that's entitled Pool Bar?

8 A: The interior of the building.

9 Q: The interior, just like a condominium unit ---

10 A: Yes.

11 Q: Ms. Brown, the association has alleged in the
12 complaint that some years ago the defendant
13 constructed and has maintained a wooden side deck
14 with a teal colored awning on a portion of the
15 St. Clements common element adjoining Pool-1, and
16 you've defined the term "side deck" in your
17 complaint as the side deck awning and any
18 gutters, lighting, electrical wiring, and other
19 property of every description attached to or
20 servicing the deck and located upon St. Clements'
21 common elements. When we speak of side deck in
22 this trial, is that the side deck you're
23 referring to?

24 A: Yes.

25 Q: Okay. So any time we refer to side deck, we're

1 referring to the side deck as defined in the
2 complaint?

3 A: Yes.

4 Q: And so when was the side deck first constructed?

5 A: 1990.

6 Q: And who constructed it or who had it constructed?

7 A: According to the defendant, the defendant had it
8 constructed.

9 Q: I'm sorry?

10 A: According to the defendant, the defendant had it
11 constructed.

12 Q: Did the board of directors of the association
13 give any consent for that construction of that
14 side deck?

15 A: No.

16 MR. NEWBY: YOUR HONOR, I'M GOING TO
17 OBJECT TO THE QUESTION AND
18 ANSWER UNLESS SHE HAS
19 PERSONAL KNOWLEDGE OF WHAT
20 OCCURRED AT THE TIME, AND
21 SHE'S ALREADY SAID SHE
22 WASN'T EVEN AN OWNER AT
23 THAT TIME.

24 MR. BARNETT: YOUR HONOR, SHE'S ALSO
25 TESTIFIED THAT SHE HAS

1 REVIEWED ALL THE RECORDS OF
2 THIS ASSOCIATION FROM ITS
3 INCEPTION, AND SHE'S
4 TESTIFYING BASED UPON THE
5 RECORDS, AFTER REVIEWING
6 ALL RECORDS OF THIS
7 ASSOCIATION.

8 MR. NEWBY: YOUR HONOR, SHE CAN SAY
9 THAT, "I HAVE NOT FOUND
10 ANYTHING IN THE RECORDS,"
11 BUT SHE CAN'T TESTIFY ---

12 MR. BARNETT: I'LL REPHRASE THE QUESTION.

13 MR. NEWBY: --- THE FACT, WHAT
14 HAPPENED.

15 THE COURT: I AGREE, THANK YOU, MR.
16 BARNETT.

17 **Q: Ms. Brown, you stated that you've reviewed all**
18 **the records of the association ---**

19 A: Yes.

20 **Q: --- from the inception to the current? Do you**
21 **find any evidence in any of those records of this**
22 **association that this association ever -- that**
23 **this association board ever gave any consent for**
24 **this side deck to be constructed?**

25 A: The association never gave any consent for it.

1 Q: And did you find in those records any indication
2 of any consent of any kind being given by the
3 association, the board of the association, or any
4 officer or director of the association?

5 A: No.

6 Q: Now, Ms. Brown, I'm going to show you what's been
7 marked Exhibit Number 8, which is a series of
8 photographs, and ask you if you can identify
9 those as being accurate depictions of the side
10 deck, the pool bar, and the surrounding areas
11 that are indicated in those photographs.

12 A: Yes.

13 MR. BARNETT: MOVE TO INTRODUCE THAT AS
14 PLAINTIFF'S EXHIBIT NUMBER
15 8.

16 MR. NEWBY: WE HAVE NO OBJECTION, YOUR
17 HONOR.

18 THE COURT: SO ADMITTED, PLAINTIFF'S
19 EXHIBIT 8.

20 PLAINTIFF'S EXHIBIT NUMBER 8
21 ADMITTED INTO EVIDENCE

22 Q: Now, Ms. Brown, would you look at the first --
23 You'll note there's seven different pages of that
24 Exhibit. Would you look at the first page and
25 tell me, when was that photograph taken?

1 A: 1992.

2 Q: And does that show the location of the side deck
3 with an awning over a portion of it?

4 A: Yes.

5 Q: And tell me what the next photograph, the second
6 photograph, shows.

7 A: That's the whole awning and side deck structure
8 from the ocean side view.

9 Q: And when was that photograph taken?

10 A: In May of 2006.

11 Q: All right. And so that's a view with your ocean
12 to your back and looking back at the ---

13 A: (Indicates affirmatively.)

14 Q: And I see, on that one, the awning is extended
15 further out on the side deck than it was in the
16 first photograph.

17 A: Correct.

18 Q: From your review of the evidence and the records
19 of the association and your own knowledge, do you
20 know of any consent that the association or
21 anyone associated with the association ever gave
22 for the extension of the awning cover out further
23 from the side deck?

24 A: There was no consent given.

25 Q: And ---

1 MR. NEWBY: YOUR HONOR, SUBJECT TO THE
2 SAME OBJECTION, EVERY TIME
3 SHE MAKES A STATEMENT SUCH
4 AS THAT, I ASSUME SHE'S
5 TESTIFYING THAT SHE FINDS
6 NO EVIDENCE IN THE MINUTES
7 THAT SHE'S REVIEWED.

8 A: That's correct.

9 THE COURT: MS. BROWN, YOUR ANSWER MOST
10 LIKELY SHOULD BE, BASED
11 UPON YOUR REVIEW, YOU FOUND
12 NO ---

13 MS. BROWN: OKAY, ALL RIGHT.

14 THE COURT: EXCEPT, DURING THE LAST, I
15 THINK, FOUR YEARS, YOU
16 WOULD HAVE PERSONAL
17 KNOWLEDGE DURING THE LAST
18 FOUR YEARS; IS THAT
19 CORRECT?

20 MS. BROWN: WELL, SINCE, WELL, FROM THE
21 BOARD'S STANDPOINT, BUT
22 SINCE '94 AS AN OWNER.

23 Q: And I'm going to skip over to the fourth
24 photograph, which appears to be taken from above.
25 Can you tell us what that view is?

1 A: Yes. That's the view of the upper area, I mean,
2 upper view of it, showing the whole awning and
3 side deck.

4 Q: And the side deck is in the right-hand half of
5 the picture?

6 A: Yes.

7 Q: Lower right-hand half. And there appears to be a
8 small deck with railing around it atop that. Is
9 that what's called the rooftop deck above the
10 pool bar?

11 A: Yes.

12 Q: And who owns that rooftop deck above the pool
13 bar?

14 A: That's a limited common element for the exclusive
15 use of the owner of the pool bar.

16 Q: Okay. And then I can see just a little bit on
17 the upper left side of the picture, I can't tell
18 much, but is that where the pool is located, up
19 in the upper left side of the picture?

20 A: Yes.

21 Q: And the next photograph, which would be the fifth
22 photograph, what does that depict?

23 A: The interior of the side deck.

24 Q: And that was taken in 2007?

25 A: Yes.

1 Q: And then the next photograph is just another view
2 of the side deck?

3 A: Yes.

4 Q: And the final photograph, is that an aerial view
5 of that area of the condominium?

6 A: Yes.

7 Q: Is that an accurate depiction of what it
8 currently looks like?

9 A: Yes.

10 Q: Thank you. And the parking lot where the side
11 deck was constructed, that's always been a paved
12 parking lot, has it not, since the inception of
13 the condominium?

14 A: Yes.

15 Q: Do you know how the side deck is used?

16 A: For people to eat on.

17 Q: What uses have you observed at the side deck?

18 A: People sitting there with food.

19 Q: Have you ever observed the sale of alcoholic
20 beverages from the side deck?

21 A: Yes, I have.

22 Q: And have you ever observed -- Where do people
23 obtain the food that they eat on the side deck?

24 A: Where do they what?

25 Q: Where do they obtain the food and drinks that

1 they ---

2 A: From the north side, where they, where you can
3 order food on the north side of the pool bar, and
4 this is on the south side.

5 Q: So they buy the food and the drinks at the pool
6 bar and then they sit on the side deck?

7 A: Yes.

8 Q: And, Ms. Brown, did the association ever question
9 whether or not, once this side deck went up, did
10 they question the owner of the pool bar as to
11 whether BE-MI, Inc. had any consent of the
12 association board for the construction of that
13 side deck?

14 A: Yes. According to the records, they did.

15 PLAINTIFF'S EXHIBIT NUMBER 5

16 IDENTIFIED FOR THE RECORD

17 Q: I'm going to hand you what's been marked
18 Plaintiff's Exhibit Number 5 and ask you if you
19 recognize that as a part of the association's
20 records.

21 A: I do.

22 Q: And is that a letter from the association's
23 property manager to the board?

24 A: Correct.

25 Q: And would you publish to The Court just this

1 **section, just maybe the first half of that last**
2 **full paragraph?**

3 A: Read it?

4 **Q: Yes.**

5 A: Okay. "The last issue also references commercial
6 activities and was recently raised as a question
7 by one of the homeowners. Does Luke have
8 specific written approval from the Homeowners
9 Association or the developer which gave him
10 permission to occupy two parking spaces?
11 Further, was this approved by the City of Myrtle
12 Beach since normally a certain number of parking
13 spaces are required based upon the size of the
14 condominium development?"

15 **Q: And do you know whether, as a result of that**
16 **notification by the property manager to the**
17 **board, whether or not the board had made any**
18 **contact with the defendant or with Mr. Goude**
19 **concerning the side deck?**

20 A: There's no record of any response from anyone ---

21 **Q: My question is, did the association contact him?**

22 A: Oh, you mean by ---

23 **Q: As a result of receiving that information from**
24 **the property manager.**

25 A: Say that again.

1 Q: As a result of receiving the information
2 indicated in the Exhibit you just read from, from
3 the property manager to the board, did the board
4 take action to contact the defendant or Mr. Goude
5 to question him about having any consent for that
6 side deck?

7 A: In, in letters, yes, in letters.

8 PLAINTIFF'S EXHIBIT NUMBER 6
9 IDENTIFIED FOR THE RECORD

10 Q: I'm going to hand you what has been marked
11 Plaintiff's Exhibit Number 6 and ask you if you
12 can identify that as a letter sent from the
13 association's property manager to the defendant.

14 A: Yes.

15 Q: And would you publish to The Court or read just
16 this next to the last paragraph on page one?

17 A: "In another issue, several homeowners have
18 questioned your authorization to utilize two
19 parking spaces. Have you received written
20 approval from the Association or the developer
21 for said permission? As limited as parking
22 spaces are, we would like to resolve this matter
23 as soon as possible."

24 PLAINTIFF'S EXHIBIT NUMBER 7
25 IDENTIFIED FOR THE RECORD

1 Q: And now, Ms. Brown, I'm going to hand you what's
2 been marked Plaintiff's Exhibit Number 7 and ask
3 you if you can identify that as another letter
4 sent by the association's property manager to the
5 defendant.

6 A: Yes.

7 Q: And I'd ask you to publish to The Court, it looks
8 like the last two sentences, starting with "Even"
9 there, in the third paragraph.

10 A: "Even though you have assured me verbally that
11 you have written permission for the parking
12 spaces and the vending rights, would you please
13 help us update the Homeowners Association's files
14 by supplying us with these written documents?"

15 Q: Okay, thank you. And, Ms. Brown, as a result of
16 that letter, did the association's records
17 indicate that they received any such written
18 consent from the defendant?

19 A: They did not receive any.

20 PLAINTIFF'S EXHIBIT NUMBER 9

21 IDENTIFIED FOR THE RECORD

22 Q: Now, I'll show you what's been marked as
23 Plaintiff's Exhibit Number 9 and ask you if
24 that's another letter from the property manager
25 for St. Clements, on St. Clements' letterhead, to

1 **the defendant.**

2 A: Yes, it is.

3 **Q: And what's the date of that letter?**

4 A: August 27th, 1992.

5 **Q: Would you read the first paragraph?**

6 A: Okay. "The reported agreement between you and
7 Mr. Dwight Cox which apparently allows you to
8 maintain vending machines on the common elements
9 of the St. Clements property and to collect
10 income generated from such machines is no longer
11 valid. The transfer of rights and
12 responsibilities for the management of the
13 Association, has been transferred to the unit
14 owners as defined in the Master Deed of the St.
15 Clements Horizontal Property Regime. Mr. Cox,
16 then a Director, Developer and Declarant no
17 longer has the authority to grant you the
18 collection of such vending income."

19 **Q: All right. And would you read the last sentence**
20 **in the last ---**

21 A: Okay.

22 **Q: --- full paragraph?**

23 A: "Also, no temporary or permanent modifications to
24 the common elements are authorized without the
25 permission of the Board."

1 Q: And let me ask you, as to Plaintiff's Exhibit 5,
2 that letter was sent to all three of the then
3 board members of the association?

4 A: Yes. It was sent to all the board members, all
5 three letters.

6 Q: And Exhibit 6, a carbon copy was sent to all
7 three of the board members?

8 A: Yes.

9 Q: And on Exhibit 7, was a carbon copy sent to all
10 three of the board members?

11 A: Yes.

12 Q: Now, after asking the defendant on several
13 occasions for any written consent that he may
14 have had to the construction of the side deck,
15 did the board take further action in 1992 by
16 sending him another letter regarding that?

17 A: Yes.

18 PLAINTIFF'S EXHIBIT NUMBER 10

19 IDENTIFIED FOR THE RECORD

20 Q: I'm going to show you what's been marked
21 Plaintiff's Exhibit Number 10 and ask you if
22 that's another letter from the property manager
23 to the defendant, dated November 19th, 1992?

24 A: That's correct.

25 Q: And would you read the first paragraph of that

1 **letter?**

2 A: "The attached resolution is forwarded concerning
3 the structure which serves as a deck and sitting
4 area which was reported to have been constructed
5 under your initiative. The Association is
6 reviewing the liability aspects of this structure
7 with St. Paul Fire & Marine Insurance Company."

8 **Q: All right. And it makes reference to an attached**
9 **resolution. Is that a resolution of the board of**
10 **directors, adopted on November 7, 1992?**

11 A: That's correct.

12 **Q: And would you read that resolution, please?**

13 A: "Resolved, that the presence of the wooden
14 structure adjacent to the pool bar unit, south
15 side, in the form of a deck with canopy and which
16 occupies two parking spaces considered to be a
17 common area is in violation of Article VII,
18 Section 7 of the Master Deed of the St. Clements
19 Horizontal Property Regime (Attachment A)."

20 "The structure is an alteration of the
21 exterior portion of the building. Additionally,
22 this structure changes the appearance of the
23 common areas. No written consent of the Board of
24 Directors exists granting permission for such
25 alteration or change of appearance."

1 "The Association has the right to compel
2 the compliance of the terms of the Master Deed by
3 having the structure removed at the expense of
4 the owner who breached the restrictions of the
5 Master Deed."

6 "The failure to enforce any right,
7 reservation or conditions contained in this
8 Master Deed, however long continued, shall not be
9 deemed a waiver of the right to do so hereafter,
10 as to the same breach or as to a breach occurring
11 prior to subsequent thereto and shall not bar or
12 affect its enforcement."

13 **Q: And is that last paragraph a quote or paraphrase**
14 **from the Master Deed itself?**

15 A: Yes, it is.

16 **Q: Thank you. As a result of any of those contacts**
17 **from those letters that are now in evidence, do**
18 **the records indicate that the association**
19 **received information from anyone, other than Mr.**
20 **Goude, indicating that any consent may have been**
21 **given by the association or the association's**
22 **board for the construction of the side deck?**

23 A: There is no evidence, no evidence received.

24 PLAINTIFF'S EXHIBIT NUMBER 11

25 IDENTIFIED FOR THE RECORD

1 Q: And I'll hand you what's been marked Plaintiff's
2 Exhibit Number 11 and ask you if that's a
3 memorandum from the property manager to the board
4 on January 5th, 1995.

5 A: Yes.

6 Q: And is the pool bar mentioned in that memorandum?

7 A: Yes.

8 Q: And I see that's, it's like a little paragraph at
9 the top of the last page. Would you read that
10 full paragraph?

11 A: Okay. "Issue: Pool Bar. Background - The owner
12 of the pool bar, a separate unit identified the
13 Association's documents, has modified the
14 exterior of the unit on at least two separate
15 occasions, both being in violation of the Master
16 Deed as no prior permission was acquired in
17 writing from the Board of Directors: constructed
18 a deck which consumed two parking spaces
19 (places); installed a pay telephone on the
20 exterior of the pool bar unit. In November, the
21 owner installed a wind barrier which encloses the
22 majority of the pool bar. The device appears
23 reasonable and is considered to be temporary for
24 the winter; however, the Board should have been
25 consulted prior to its installation."

1 Q: Thank you. Ms. Brown, did the association's
2 board ever decide to take action to seek to have
3 the side deck removed?

4 A: Yes.

5 Q: And did you have a demand letter sent to the
6 defendant prior to the bringing of that action?

7 A: Yes.

8 PLAINTIFF'S EXHIBIT NUMBER 13
9 IDENTIFIED FOR THE RECORD

10 Q: I'll show you what's been marked Plaintiff's
11 Exhibit Number 13 and ask you if you can identify
12 that. Is that the demand letter that the
13 association had me write to the defendant on
14 November 3, 2006, ---

15 A: Yes, it is.

16 Q: --- seeking removal of the side deck?

17 A: Yes.

18 Q: And as a result of that demand letter, was the
19 side deck removed?

20 A: No.

21 Q: And have there been discussions among various
22 members of the board and the property manager and
23 others on behalf of the association with Mr.
24 Goude over the years wherein they have requested
25 that he remove the side deck?

1 A: Yes.

2 Q: And what has his response been?

3 A: "No."

4 Q: "No," meaning that he refused to remove it?

5 A: Refused to remove it.

6 Q: And did the association retain my law firm to
7 bring this action to seek removal of that
8 encroachment of the side deck from the parking
9 area?

10 A: Yes.

11 Q: And has the association incurred attorneys' fees
12 and costs from our law firm for that work?

13 A: Yes.

14 PLAINTIFF'S EXHIBIT NUMBER 14
15 IDENTIFIED FOR THE RECORD

16 Q: I'm going to hand you what's been marked
17 Plaintiff's Exhibit Number 14 and ask you if you
18 can identify that as being all the fee statements
19 that have been generated for our firm's work from
20 the time we were retained on or about May 5,
21 2006, to the present in seeking the removal of
22 this pool bar?

23 A: Yes.

24 Q: And is that total shown on the front, the current
25 total of the amount that the association has

1 incurred, the 29,652.66?

2 A: Yes.

3 Q: And does that give credit for the \$900 in
4 sanction fees the defendant's already paid?

5 A: Yes.

6 Q: And are those necessary and reasonable expenses
7 that the association has incurred in bringing
8 this lawsuit to seek removal of the side deck?

9 A: Yes.

10 Q: And are those the costs and expenses that the
11 association seeks to recover as part of this
12 lawsuit?

13 A: Yes.

14 Q: And does the Master Deed provide that the
15 association's entitled to recover ---

16 A: Yes.

17 Q: --- attorney fees and costs in any suit in which
18 a default in the Master Deed is proven?

19 A: Yes.

20 Q: Thank you. I have no further questions at this
21 time. Please answer any questions Mr. Newby may
22 have.

23 THE COURT: MR. BARNETT, BEFORE YOU SIT
24 DOWN, DID YOU WANT TO
25 INTRODUCE THESE LAST

1 EXHIBITS?

2 MR. BARNETT: THANK YOU, YOUR HONOR. I
3 WOULD LIKE TO MOVE TO
4 INTRODUCE ALL THOSE
5 EXHIBITS THAT I'VE HANDED
6 UP, IF I FAILED TO DO SO.

7 MR. NEWBY: I DON'T HAVE ANY OBJECTION
8 TO THE EXHIBITS.

9 MR. BARNETT: THANK YOU, YOUR HONOR.

10 THE COURT: IS THERE A LAST EXHIBIT? I
11 THINK THE FIRST EXHIBITS
12 WERE ADMITTED. THEN I
13 THINK THE LAST -- THE COURT
14 REPORTER CAN HELP ME OUT.

15 COURT REPORTER: YES. STARTING WITH, I
16 THINK, 5, 6, 7, 9, 10, 11,
17 13, 14 ARE NOT.

18 THE COURT: THOSE EXHIBITS NOW ARE
19 ADMITTED THEN WITHOUT
20 OBJECTION.

21 MR. BARNETT: AND SO THAT'S ALL EXHIBITS
22 THAT HAVE BEEN HANDED UP TO
23 THE COURT ---

24 THE COURT: THAT'S RIGHT.

25 PLAINTIFF'S EXHIBIT NUMBER 5

1 PLAINTIFF'S EXHIBIT NUMBER 6

2 PLAINTIFF'S EXHIBIT NUMBER 7

3 PLAINTIFF'S EXHIBIT NUMBER 9

4 PLAINTIFF'S EXHIBIT NUMBER 10

5 PLAINTIFF'S EXHIBIT NUMBER 11

6 PLAINTIFF'S EXHIBIT NUMBER 13

7 PLAINTIFF'S EXHIBIT NUMBER 14

8 ADMITTED INTO EVIDENCE

9 CROSS EXAMINATION

10 BY MR. NEWBY:

11 **Q: Ms. Brown, I think you said you live in Myrtle**
12 **Beach. Do you live at the St. Clements?**

13 A: I do not.

14 **Q: Have you ever lived at the St. Clements?**

15 A: Yes, I have, for periods of up to a month or
16 more.

17 **Q: A month?**

18 A: Or more, uh-huh (affirmative response).

19 **Q: And when was that?**

20 A: During the winter.

21 **Q: Which year?**

22 A: All -- I've lived here two years, so prior to
23 that.

24 **Q: You've lived in Myrtle Beach for two years?**

25 A: Yes.

1 Q: So just to make sure I understand what you're
2 saying, before moving to Myrtle Beach, where did
3 you live?

4 A: Ohio.

5 Q: And so you would come down in the winter and stay
6 for as much as a month or a little more?

7 A: Yes.

8 Q: All right. And how many years did you do that?

9 A: Well, since '94.

10 Q: Was it every year?

11 A: Practically, yes. My husband was retired.

12 Q: And when you came during the winter, was it the
13 same time every year or different months or ---

14 A: Different months.

15 Q: What months did you come?

16 A: The fall, January, February, shorter stays in the
17 summer..

18 Q: All right. I assume it was pretty quiet around
19 the St. Clements in January and February, ---

20 A: Yes.

21 Q: --- in the winter? Was the pool bar open?

22 A: No.

23 Q: Was the parking lot typically not full?

24 A: At that time of year, there were fewer occupants.

25 Q: What was that?

1 A: At that time of year, there were fewer occupants.

2 Q: All right. My question was, was the parking lot
3 full during the winter?

4 A: No.

5 Q: Did you ever have any problem finding parking
6 spaces when ---

7 A: Yes, I have.

8 Q: --- you came and lived during the winter?

9 A: Not in the winter but others, other times of the
10 year I have.

11 Q: And I'm going to get to the other parts of the
12 year. I'm just trying to figure out your history
13 with the property.

14 A: Okay.

15 Q: Now, you became an owner, I think you said, in
16 1994?

17 A: Yes.

18 Q: Now, who showed you the property when you first
19 bought it?

20 A: A realtor.

21 Q: A realtor?

22 A: Uh-huh (affirmative response).

23 Q: And did you visit the property?

24 A: Yes. I've stayed there.

25 Q: You had stayed there before?

1 A: Well, just like one night, you know.

2 Q: What time of the year was that?

3 A: In the spring.

4 Q: All right. I assume that the pool bar was there
5 when you saw the property?

6 A: Yes.

7 Q: You have produced, through your attorney, certain
8 photographs, Exhibit 8, and on these photographs
9 -- Do you have your copy here? Looking at the
10 very first page, for an example, there's
11 handwriting at the bottom showing that this was
12 done in 1992. Did you write that?

13 A: Yes, I did.

14 Q: And who took these photographs?

15 A: They were taken as part of the fence that was
16 proposed to be put up between the pool bar and
17 the pool to make it safer around the pool area,
18 and this was in the process of getting the bid
19 for that. These are from the records.

20 Q: Were you involved in that process?

21 A: This was before I came, but this was in the file,
22 in the association files.

23 Q: Did they have dates written on the back?

24 A: I have a picture that has a date, on this one.

25 Q: Which one?

1 A: The first one.

2 Q: The top one?

3 A: Yes.

4 Q: And so your original photograph has a date
5 written on it?

6 A: Yes.

7 Q: And was it 1992?

8 A: It was 7/8/92.

9 Q: I assume you didn't take either one of these
10 since you weren't an owner at that time?

11 A: That's correct.

12 Q: The second photograph, the bottom one, did it
13 have a date written on it?

14 A: It did not.

15 Q: How did you determine that it was taken in 1992?

16 A: Well, they were in the same file with the
17 information for the fence to be proposed.

18 Q: So is that an assumption on your part, that it
19 was taken in 1992?

20 A: Well, the information for the fence was from '92.

21 Q: But you didn't take the photograph, it didn't
22 have a date written on it, so you are assuming
23 from its location in your files that it was done
24 in 1992; is that correct?

25 A: The second one, you're saying?

1 Q: Yes.

2 A: Yes.

3 Q: Okay. And you can tell these were taken at two
4 different times, weren't they?

5 A: Yes.

6 Q: Now, is this the way it looked when you bought in
7 1994?

8 A: I believe it did.

9 Q: So the deck existed when you bought as a
10 homeowner?

11 A: Yes.

12 Q: And you knew that when you bought it?

13 A: Yes.

14 Q: Did it bother you that that deck was there or did
15 you have any hesitation in buying because the
16 deck was there?

17 MR. BARNETT: YOUR HONOR, I'M GOING TO
18 OBJECT. THE ISSUE IN THIS
19 CASE IS A LAWSUIT BETWEEN
20 THE ASSOCIATION AND THE
21 DEFENDANT AND AS TO WHETHER
22 OR NOT THE DEFENDANT HAS
23 CONSENT, WHETHER IT
24 VIOLATES THE MASTER DEED.
25 WHETHER ANY PARTICULAR

1 INDIVIDUAL OWNER OBJECTED
2 OR DIDN'T OBJECT TO WHAT IT
3 LOOKED LIKE AT A TIME THEY
4 WERE NOT AN OWNER IS
5 IRRELEVANT.

6 MR. NEWBY: CROSS EXAMINATION, YOUR
7 HONOR, AND ---

8 THE COURT: IT'S CROSS EXAMINATION. I
9 BELIEVE HE HAS A DEFENSE OF
10 LACHES OR ---

11 MR. NEWBY: ESTOPPEL.

12 THE COURT: YES.

13 MR. NEWBY: AND BALANCING THE EQUITIES
14 AGAIN, YOUR HONOR.

15 THE COURT: SO I'M GOING TO ALLOW IT.

16 **Q: Did the existence of that deck cause you to, for**
17 **example, not buy the unit?**

18 A: Well, if you'll allow me, buying the unit is
19 dependent on what you perceive the unit will do
20 for you, not necessarily some of the other
21 amenities. So it's more about the unit than
22 other things.

23 **Q: Well, I'm not sure that quite answered my**
24 **question.**

25 A: Okay.

1 Q: So let me ask it again.

2 A: Okay.

3 Q: Did the existence of the side deck and the awning
4 cause you not to buy the unit?

5 A: No.

6 Q: And, in fact, you did buy the unit?

7 A: Yes.

8 Q: Knowing that the deck was there?

9 A: Yes.

10 Q: All right. And it looks roughly like this
11 picture, or these two pictures that are the first
12 page of Exhibit 8; is that right?

13 A: Yes.

14 Q: All right. And it was obvious then, just as it
15 is now, that it's sitting on the paved parking
16 deck; is that correct?

17 A: Yes.

18 Q: Now, when you bought in 1994, this project,
19 according to the Master Deed, was some, well, it
20 was filed in December of '87, looking at Exhibit
21 1, so it was four plus years old; is that right?

22 A: Yes.

23 Q: When you looked at the property and decided to
24 buy, did you look at the amenities that were
25 present? Was that part of the package you were

1 **buying?**

2 MR. BARNETT: YOUR HONOR, THE SAME
3 OBJECTION. I DON'T BELIEVE
4 THAT ANY PERSONAL
5 PERCEPTIONS BY A
6 PROSPECTIVE PURCHASER ARE
7 RELEVANT TO THIS LAWSUIT.

8 THE COURT: I'M NOT SURE WHERE IT'S
9 GOING EXACTLY.

10 MR. NEWBY: BASED ON THE SAME DEFENSES,
11 YOUR HONOR, I THINK IT'S
12 IMPORTANT TO DETERMINE
13 WHETHER OR NOT IT IS, IN
14 THE QUESTION OF BALANCING
15 THE EQUITIES, I THINK THE
16 COURT IS GOING TO HAVE TO
17 DECIDE WHETHER THE POA,
18 WHICH REPRESENTS ALL OF THE
19 OWNERS, INCLUDING MS.
20 BROWN, ARE GOING TO GET A
21 BENEFIT FROM THE RELIEF
22 THEY SEEK THAT IS GREATER
23 THAN THE DETRIMENT TO THE
24 DEFENDANT. THAT'S WHAT
25 BALANCING THE EQUITIES

1 ALWAYS IS, AND THAT'S WHERE

2 I'M GOING.

3 THE COURT: OKAY. I'LL ALLOW IT.

4 Q: Ms. Brown, if I can remember my question
5 correctly, I asked if you looked at the total
6 package of amenities, along with your unit, in
7 making a decision to buy.

8 A: Not necessarily.

9 Q: So you didn't care if it had a pool or didn't
10 have a pool?

11 A: Well, a pool would be basic, I believe.

12 Q: I see. And did you care whether it had elevators
13 or didn't have elevators?

14 A: Yes.

15 Q: What floor is your unit on?

16 A: Second floor.

17 Q: Do you use the elevator?

18 A: Yes.

19 Q: And you saw that it had a pool bar where you
20 could get some food or something to drink when
21 you're out there at the pool, or your guests
22 could; is that correct?

23 A: It had one.

24 Q: All right. And that was part of the overall
25 package that you saw when you bought it?

1 A: No, not necessarily.

2 Q: You didn't see it?

3 A: I saw it, but it may not have appealed to me one
4 way or the other. It would have not been
5 important.

6 Q: I gather, then, that you don't use the pool bar?

7 A: I do not.

8 Q: Did you have any concerns in 1994, when you
9 bought, that you didn't have enough parking
10 there?

11 A: Well, initially, came more in the winter, so that
12 was not an issue, but when we came in the summer,
13 it was an issue.

14 Q: Did the parking issue cause you to not buy?

15 A: No.

16 Q: Are there any more units in St. Clements today
17 than there were in 1994?

18 A: No.

19 Q: From your review of the records, are there any
20 more units there today than there were in 1990?

21 A: No.

22 Q: Is there any change in the number of available
23 parking spaces today than when you bought in '94,
24 when these pictures were taken in 1992, or when
25 the deck was built in 1990?

1 A: Any changes in the parking spaces?

2 Q: Yes.

3 A: No.

4 Q: Okay. So whatever the POA and the owners have
5 had from the standpoint of parking spaces since
6 at least 1990 has not changed until at least
7 August 24 of 2009; is that correct?

8 A: That's correct.

9 Q: Are you concerned that you don't have enough
10 parking?

11 A: Yes.

12 Q: Tell me about the car in the basement that's been
13 sitting there for how many years covered up, not
14 used most of the time.

15 A: Probably four that I know of.

16 Q: How long?

17 A: Four.

18 Q: Four years?

19 A: Yes.

20 Q: All right. Now, has the POA sued the owner of
21 that car to get him to move it?

22 A: We have a policy that he's not to park there in
23 the summer if he rents his unit out, and he's
24 resisted, and we've reviewed it, and we've
25 continued to stand by that, and we'll have to

1 take further action because he's not moved his
2 vehicle.

3 Q: Well, it's been four years now. So let me ask
4 you, have you sued the man to make him move his
5 car?

6 A: No, we have not.

7 Q: It's sitting there covered up with a car cover,
8 is it not?

9 A: Yes.

10 Q: And nobody else can park there; is that right?

11 A: That's correct.

12 Q: And when he's not here, which apparently isn't
13 much of the time, that car's not being used; is
14 that also correct?

15 A: That's correct.

16 Q: Have you had other cars parked like that, covered
17 up, for years at a time?

18 A: In the past, but there's no prohibition against
19 that. There's a parking space for every unit.

20 So an owner is allowed to occupy a space.

21 There's no prohibition against that.

22 Q: Which space is the pool bar entitled to occupy?

23 A: Well, that's a change of use. That's not an
24 occupying for a vehicle.

25 Q: But he's entitled to a space; would you agree?

1 A: One space for vehicle parking, not to convert it
2 to something else.

3 **Q: How about for vehicle storage, is that considered**
4 **the same to you as ---**

5 A: Well, according to our policy, if, if there's no
6 other use for it, like where their condominium
7 would be rented out, and you would anticipate
8 other parking to come on the property, if you're
9 only occupying one space, it would be like, if
10 you're living there or not, there's a space
11 available for each unit for an owner to use, to
12 occupy.

13 **Q: So vehicle storage is okay if it's an owner, ---**

14 A: Well, I wouldn't call it storage because when a
15 person has a car there, like in the case we're
16 talking about, they use it. They come on the
17 property and use it.

18 **Q: Well, I guess what I'm confused about is, if**
19 **you've asked him to move his car and you've asked**
20 **others to move their cars that were being stored**
21 **there, why are you now saying that it complies**
22 **with the Master Deed and the policy? It either**
23 **does or it doesn't. Which is it?**

24 A: Well, the Master Deed does not affect this, an
25 owner occupying a space.

1 **Q: What does affect it then?**

2 A: Well, there's no prohibition against an owner
3 having one space available for his unit.

4 **Q: Then why have you asked him to move it?**

5 A: Because in the summer, when the demand for
6 parking is the greatest, you're talking about the
7 car that's down there now, because he rents out
8 his unit, if he did not rent out his unit, then
9 we would see if that was still a problem; but by
10 renting out his unit, that means another car has
11 to take a second space up. So we feel it's the
12 proper policy to ask the owner to move it in the
13 summer from Memorial through Labor Day.

14 **Q: So this is just a policy, and who adopted this**
15 **policy?**

16 A: The board did.

17 **Q: Which year did the board?**

18 A: 2006. And it was discussed in 2005.

19 **Q: So it's been a policy for four years?**

20 A: Uh-huh (affirmative response).

21 **Q: And this car's still sitting there?**

22 A: Well, it was first enacted in the spring of 2006,
23 kind of late, so the owner objected. So we
24 waived it that first year. Then the owner wrote
25 letters objecting further and decided to take

1 under further review, and to be perfectly fair to
2 him, we did a long review and still felt it was
3 the same policy and wrote him again this summer
4 to ask him to remove it.

5 **Q: Did he move it?**

6 A: No, he has not.

7 **Q: All right. Now, I want to show you -- Well, by**
8 **the way, the board makeup changes how often?**

9 A: Every two years, but we do have staggered terms
10 now, so.

11 **Q: Is there an election every year?**

12 A: I guess there would be, yes.

13 **Q: Election every year. Now, you've been on the**
14 **board for four years.**

15 A: Uh-huh (affirmative response).

16 **Q: And there are how many members?**

17 A: 66 owners, or should be, 65, wait, yeah, 66
18 owners.

19 **Q: You've been on the board for four years, and it's**
20 **a three member board?**

21 A: Yes.

22 **Q: Who else is on the board now?**

23 A: Merrill Landes and Jim Moyer.

24 **Q: And how long have they been on the board?**

25 A: Merrill's been on four years, and Jim has been on

1 a few months now.

2 **Q: Okay. And have either of them been on the board**
3 **in the past?**

4 A: Yes. Jim was.

5 **Q: How long was he on the board?**

6 A: How long a term? Two years and maybe some before
7 that, I'm not sure.

8 **Q: Some before that ---**

9 A: He may have been appointed before he was on the
10 board.

11 **Q: How many people typically attend your annual**
12 **meetings in person?**

13 A: 20 some, maybe, 20.

14 **Q: Roughly a third?**

15 A: Well, that's -- Excuse me. Two people would be
16 one owner, like maybe a couple. So maybe you'd
17 have -- I'm not sure how many units that would
18 represent.

19 **Q: Maybe less than 20?**

20 A: Yes.

21 **Q: So less than a third actually show up at these**
22 **meetings; is that typical?**

23 A: Yes.

24 **Q: And that is typical for POA's, is it not? Most**
25 **people just want a condo at the beach and they**

1 don't want to get involved in the politics, do
2 they?

3 MR. BARNETT: YOUR HONOR, I OBJECT TO
4 WHAT MOST PEOPLE MAY WANT.
5 ASK HER WHAT SHE KNOWS.

6 MR. NEWBY: YOUR HONOR, IT'S CROSS
7 EXAMINATION, AND I THINK
8 I'M ENTITLED TO ASK THESE
9 QUESTIONS.

10 THE COURT: IF YOU KNOW WHAT'S NORMAL,
11 MS. BROWN, YOU MAY NOT KNOW
12 WHAT'S NORMAL.

13 Q: Let me ask it this way. Would you agree, based
14 on your experience with this property owners
15 association, that most owners don't bother to
16 come to the meetings?

17 A: Most don't.

18 Q: And would you agree that, in your experience,
19 there are a few people who care about things such
20 as that and they come all the time?

21 A: Yes.

22 Q: All right. And they like to run for office, too,
23 don't they?

24 A: Well, I don't know what they like to do.

25 Q: Some of them do, don't they?

1 A: Yes.

2 Q: And they like to tell everybody else how to run
3 their property, don't ---

4 MR. BARNETT: I OBJECT, YOUR HONOR, I
5 OBJECT, YOUR HONOR. SHE
6 CAN'T TESTIFY ABOUT WHAT
7 OTHER PEOPLE THINK THEY
8 WANT TO DO ABOUT RUNNING
9 OTHER PEOPLE'S PROPERTY. I
10 DON'T CARE IF IT'S CROSS
11 EXAMINATION OR NOT ---

12 MR. NEWBY: SHE'S CAPABLE OF MAKING HER
13 OWN ANSWERS, YOUR HONOR,
14 NOT HEARING MR. BARNETT
15 ANSWER FOR HER. SHE CAN
16 ANSWER ACCORDING TO HER OWN
17 KNOWLEDGE.

18 THE COURT: I UNDERSTAND WHERE YOU'RE
19 GOING. I UNDERSTAND.

20 Q: Let me show you ---

21 MR. BARNETT: YOUR HONOR, I HAD AN
22 OBJECTION TO THAT QUESTION.

23 THE COURT: AND HE'S NOT GOING ANY
24 FURTHER INTO THAT.

25 MR. BARNETT: OKAY, THANK YOU. SO THAT

1 OBJECTION'S SUSTAINED?

2 THE COURT: RIGHT.

3 Q: Let me ask you to turn to Exhibit 9, Plaintiff's
4 Exhibit 9. It's a letter dated August 27th,
5 1992. Do you have that in front of you?

6 A: Yes.

7 Q: And that's from Carl Armstrong of Chicora
8 Management or Chicora Development; is that right?

9 A: Yes.

10 Q: And it was written to BE-MI, the defendant in
11 this case, right?

12 A: Yes.

13 Q: Now, who is Carl Armstrong?

14 A: He was the association manager during these
15 years.

16 Q: Did you know him?

17 A: I did not.

18 Q: You weren't an owner in 1992, obviously.

19 A: No, I was not.

20 Q: But this apparently was part of the records of
21 the association?

22 A: Yes.

23 Q: And you have introduced this as an Exhibit today.

24 A: Uh-huh (affirmative response).

25 Q: Now, Mr. Barnett had you read the last sentence

1 of this out loud, so I'm going to ask you to read
2 it one more time.

3 A: Okay. "Also, no temporary or permanent
4 modifications to the common elements are
5 authorized without the permission of the Board."

6 Q: Okay. Now, first of all, was Mr. Armstrong
7 speaking, in your opinion, for the board?

8 A: Yes.

9 Q: For the association?

10 A: Uh-huh (affirmative response).

11 Q: All right. Did he have authority to do that?

12 A: Yes.

13 Q: Do you agree with what he wrote there?

14 A: Yes.

15 Q: And is this the position of the board today?

16 A: And the Master Deed, uh-huh (affirmative
17 response).

18 MR. NEWBY: YOUR HONOR. DO YOU HAVE A
19 COPY OF NUMBER 9 UP THERE?

20 THE COURT: YES, I DO.

21 Q: So Mr. Armstrong states that no temporary
22 modification to the common elements is authorized
23 without the permission of the board. Would you
24 agree that that's a true statement?

25 A: Yes.

1 Q: And he says that no permanent modification to the
2 common elements is authorized without the
3 permission of the board. Would you agree with
4 that?

5 A: Yes.

6 Q: Okay. So what he's stated here is an accurate
7 statement of your position today; is that
8 correct?

9 A: I would say, as a general statement, yes.

10 Q: All right. So the reverse of this sentence, of
11 course, is just as true, and that is that a
12 permanent modification or a temporary
13 modification would be appropriate if there was
14 authorization of the board; would that be
15 correct?

16 A: Yes.

17 Q: Good. Now, in that letter, because it was in
18 other letters, but I don't see it in this letter,
19 and you've already said this states the position
20 of the board, where does he say that that
21 authorization has to be in writing?

22 A: Well, it says it in the Master Deed.

23 Q: No, ma'am. I want to know where, in this letter,
24 the agent of the POA says that the authorization
25 has to be in writing.

1 A: In this letter, he doesn't say in writing.

2 Q: Okay. And you already testified that this
3 accurately states your belief of the position of
4 the board.

5 MR. BARNETT: YOUR HONOR, SHE'S STATED,

6 ---

7 A: Well, I said in the ---

8 MR. BARNETT: --- AS A GENERAL STATEMENT,
9 THAT THAT WAS -- SHE DIDN'T

10 ---

11 A: Yeah.

12 MR. BARNETT: SHE SAYS THAT AS A GENERAL
13 STATEMENT. SHE DID NOT
14 PAINT HERSELF INTO A MORE
15 -- PLUS THE MASTER DEED
16 SAYS OTHERWISE.

17 MR. NEWBY: I'M NOT SURE IF THAT WAS AN
18 OBJECTION, YOUR HONOR, AND
19 IF SO, I HAVEN'T HEARD WHAT
20 THE OBJECTION ---

21 MR. BARNETT: YOUR HONOR, I OBJECT ON THE
22 GROUNDS THAT HE'S MISSTATED
23 IN HIS QUESTION HER
24 COMMENT.

25 A: Uh-huh (affirmative response).

1 MR. BARNETT: HE'S ASKING HER A QUESTION,
2 SAYING THAT SHE SAID
3 SOMETHING WHEN THAT'S NOT
4 WHAT SHE SAID. SHE SAID,
5 "AS A GENERAL STATEMENT."

6 MR. NEWBY: IF YOU NEED TO, REFER TO
7 THE RECORD. I KNOW WHAT
8 SHE SAID.

9 MR. BARNETT: BE GLAD TO PULL THAT UP.

10 THE COURT: I'M NOT SURE WHAT YOUR
11 OBJECTION WAS.

12 MR. BARNETT: YOUR HONOR, HE'S TRYING TO
13 TELL HER NOW -- HE'S ASKING
14 HER NOW WHETHER OR NOT SHE
15 DIDN'T JUST SAY A MINUTE
16 AGO THAT THIS WAS THE
17 POSITION OF THE BOARD, AND
18 WHAT SHE'S TESTIFIED A
19 MINUTE AGO, THIS IS A
20 GENERAL STATEMENT OF THE
21 POSITION OF THE BOARD, AND
22 THAT'S A VERY -- THERE'S A
23 GOOD REASON FOR SAYING IT'S
24 A GENERAL STATEMENT.
25 THERE'S A LOT OF

1 CIRCUMSTANCES WHERE THIS
2 MAY OR MAY NOT APPLY. PLUS
3 THE MASTER DEED TAKES
4 PRECEDENT OVER ANY OF THIS.

5 THE COURT: ALL RIGHT. WELL, IT'S ON
6 CROSS EXAMINATION. MS.
7 BROWN IS DOING A GREAT JOB
8 ON CROSS EXAMINATION. SHE
9 NEEDS TO ANSWER AND THEN
10 SHE CAN EXPLAIN HER ANSWER.

11 Q: I can't begin to remember what my question was,
12 but I think it was does he require written
13 authorization in this letter to say that the
14 board has to give written authorization for
15 either a temporary or permanent modification to
16 the common elements.

17 A: Well, you said he's speaking for the board, he's
18 also speaking for himself, and if he chooses not
19 to use the word "written" then, you know, that's
20 his choice. So I can't, I can't -- I mean, we
21 assume he's speaking for the board, but if he
22 doesn't say it exactly, that's his situation, not
23 mine.

24 Q: Okay. Now, who uses this deck, this side deck;
25 have you seen people use it?

1 A: Yes.

2 Q: You said you don't use it because you don't use
3 the pool bar; is that right?

4 A: That's correct.

5 Q: Who does use it?

6 A: People.

7 Q: What kind of people, owners?

8 A: Probably.

9 Q: Renters?

10 A: Probably.

11 Q: People staying in the units?

12 A: Probably.

13 Q: Do you rent your unit, Ms. Brown?

14 A: Yes.

15 Q: Have your renters used this pool deck, this ---

16 A: I would have ---

17 Q: --- side deck?

18 A: I would have no knowledge of that.

19 Q: Just don't know?

20 A: I'm not the rental agent. I don't know who is in
21 there.

22 Q: Would it be okay with you if they did use it?

23 A: Probably.

24 Q: Do you ever use that one-half of a parking space
25 that's a walkway to go to the beach?

1 A: Yes.

2 Q: That's okay with you, to use it for that, is it
3 not?

4 A: I have objections to the whole area.

5 Q: But you've used it anyway?

6 A: Yes.

7 Q: Do other owners use it?

8 A: You'll have to ask them.

9 Q: Have you seen -- You're the president of the POA.
10 You're here speaking for ---

11 A: Okay, but I don't know everything, and I can't
12 speak for other people.

13 Q: Have you never seen other owners using the
14 walkway to the beach?

15 A: I have seen other owners use it.

16 Q: Okay, thank you. Have you seen people staying in
17 the units use the walkway to go to the beach?

18 A: Yes.

19 Q: And that's taking up one-half of one of these
20 parking spaces, is it not?

21 A: Yes.

22 Q: All right. Is that a benefit to the homeowners,
23 to be able to get to the beach?

24 A: Yes and no.

25 Q: Well, tell me how getting to the beach is not a

1 benefit to the homeowners?

2 A: Well, you cannot see the beach walkway, the dune
3 crossover, and there are people in the area; and
4 so just the fact that there's a half a parking
5 space leading you that way, and then have to go
6 through everything else, part of that is not a
7 benefit.

8 Q: Part of it is not a benefit. The part that you
9 can walk through is a benefit?

10 A: I can't answer. You're making me say things that
11 I just -- I don't know.

12 Q: You don't know, all right. Well, let me ask you
13 this. You introduced lots of letters that were
14 written to the owner of the pool bar, asking
15 questions about the use of this side deck; is
16 that right?

17 A: About the construction of, about the, putting it
18 up.

19 Q: Show me the letters that you wrote asking him to
20 block off and close off the half of a parking
21 space that's a walkway to the beach. Have you
22 got any of those letters?

23 A: No.

24 Q: All right. Now, that walkway is also a part of
25 the parking deck, is it not?

1 A: Yes.

2 Q: It's not being used to park cars on, is it?

3 A: No.

4 Q: It was striped off and marked off by Mr. Goude at
5 the same time he built the deck, wasn't it?

6 A: No. Those were the original parking stripes.
7 They were there preceding the deck.

8 Q: Are you saying it wasn't used for parking before
9 he built the deck?

10 A: I'm saying it was used for parking. I'm saying
11 the parking ---

12 Q: I'm talking about the diagonal lines.

13 A: Oh, somebody added those later.

14 Q: Who added those?

15 A: I don't know.

16 Q: But you're not complaining about that use of the
17 parking space that's being used as a walkway.

18 You're only complaining about half of a space
19 that's being used to seat patrons, is that it?

20 A: No. We're complaining about the two spaces not
21 being available for parking.

22 Q: Well, I didn't see anything in the letters
23 referring to the walkway. Maybe I overlooked it.

24 Do you remember that being in there?

25 A: The beach walkway, the dune crossover? Yes, as

1 far as it not being a hard encroachment, yes. Is
2 that what you're referring to?

3 Q: I'm talking about the part of the parking space,
4 ---

5 A: Oh, okay.

6 Q: --- the diagonal ---

7 A: Okay.

8 Q: --- lines that are being used as a walkway to get
9 to the beach walk.

10 A: Well, they're not on there now, and I don't know
11 who put them there.

12 Q: My question was, has the POA complained about
13 that portion of the parking deck being used as a
14 walkway?

15 A: Well, it's, it's the whole thing. It's two
16 spaces. It's not half a space. It's two spaces.

17 Q: The deck doesn't take up but one and a half
18 spaces, does it?

19 A: But the whole project takes up, takes that out of
20 parking.

21 Q: Were you on the board during the previous
22 lawsuit?

23 A: No. I came on -- That wasn't settled yet. I
24 came on about this time of that year, of 2005

25 Q: Was it still ongoing when you came on the board?

1 A: It was, might have just been ending or, I think,
2 the very end.

3 Q: Are you familiar with it, have you reviewed the
4 records relating to it?

5 A: (Indicates affirmatively.)

6 Q: Is that a yes? And the reason I need a verbal is
7 because ---

8 A: Yes.

9 Q: --- she's taking down what ---

10 A: Yes.

11 Q: So you are familiar with it?

12 A: Uh-huh (affirmative response).

13 Q: And did that lawsuit allege that Mr. Goude and
14 the pool bar was violating the terms of the
15 Master Deed at that point in time?

16 A: Yes.

17 Q: Do you remember that one of the things that the
18 previous president had done and the board, as it
19 then existed, was that they had put a chain and a
20 lock to keep people from getting up to the top
21 deck above the ---

22 A: Yes.

23 Q: --- pool bar?

24 A: Yes.

25 Q: They did that, didn't they?

1 A: Yes.

2 Q: And that was, even though it belonged to Mr.
3 Goude as a limited common element of his unit; is
4 that right?

5 A: Yes.

6 Q: So they chained off and blocked off his pool bar
7 roof deck. Do you remember that they also
8 inserted locks to prevent the patrons to get
9 inside to the restrooms?

10 A: Well, on the pool roof deck, that was a
11 misunderstanding by the attorney as to ownership.
12 In fact, the owners, we thought that was a common
13 element, not a limited common element; so it was
14 our understanding that that was not under the
15 ownership or, excuse me, the exclusive use of Mr.
16 Goude.

17 Q: In other words, you were wrong?

18 A: That was our understanding, yes, and ---

19 Q: That was an erroneous understanding, was it not?

20 A: Right. But it was not intentional lockout, it
21 was thinking it was a common area, and that was
22 an un-intentioned consequence to Mr. Goude.

23 Q: It did have a detrimental effect on Mr. Goude's
24 business while it was blocked off, though, didn't
25 it?

1 A: I don't know how long it was blocked off.

2 Q: Do you remember when they locked the doors so
3 that his patrons couldn't get into the restrooms?

4 A: There was a keycard system, and there was a key.
5 There was always access. Nobody was denied
6 restroom availability. It just was trying to be
7 more controlled because of the ---

8 Q: You just had to have a key to get in?

9 A: Yes. There was a lot of problems in those
10 restrooms at the time, and we were trying to
11 control it a little bit.

12 Q: You have been aware, have you not, of the fact
13 that Mr. Goude indicates that the original board
14 granted him permission to build this side deck,
15 are you aware of that?

16 A: I have heard him name two names, but that is not
17 the board.

18 Q: Well, were you there at the time?

19 A: No, I was not.

20 Q: Do you have any personal knowledge of what took
21 place at the time the deck was built?

22 A: I do not, only from the records.

23 Q: Okay. And records aren't always complete, are
24 they?

25 A: I can't answer that. I mean, how would I know?

1 I mean, ---

2 Q: Well, I'm just saying in general.

3 A: Okay, in general, ---

4 Q: Records are not always complete, are they?

5 A: Okay. That's probably true.

6 Q: Have you ever read minutes of meetings that were
7 less than complete, that left something out?

8 A: Probably.

9 Q: When you guys have meetings and do minutes, do
10 you have a motion to approve the minutes or
11 disapprove them and things are added that were
12 left or taken out that were wrong?

13 A: Yes, well ---

14 Q: And that's because minutes are not always
15 completely accurate, isn't it?

16 A: Possibly.

17 Q: Okay. So the fact that the minutes don't have a
18 reference to the permission doesn't automatically
19 mean there was no permission, does it?

20 A: I suppose.

21 Q: All right. Does it seem logical to you that the
22 board as it then existed would just let somebody
23 build a deck on their parking lot and say nothing
24 about it?

25 MR. BARNETT: YOUR HONOR, I OBJECT AS TO

1 WHAT MAY SEEM LOGICAL TO
2 HER IS NOT AN ISSUE IN THIS
3 CASE.

4 THE COURT: OVERRULED.

5 A: Would you state it again?

6 Q: Does it seem logical to you that the then
7 existing board of directors would just let an
8 owner build a deck on their parking lot and not
9 saying anything if he didn't have permission?

10 A: The question is confusing to me. If you could,
11 be more straightforward with it.

12 Q: Well, I will restate it. How's that?

13 A: Okay.

14 Q: Does it seem logical to you that the board in
15 1990 would have let Mr. Goude build this deck on
16 the parking lot if he didn't have permission to
17 ---

18 MR. BARNETT: YOUR HONOR, I ALSO OBJECT
19 ON THE GROUNDS THAT THE
20 QUESTION ASSUMES FACTS THAT
21 ARE NOT IN EVIDENCE, THAT
22 HE'S ASSUMING THE FACT THAT
23 THE BOARD ALLOWED MR. GOUDE
24 TO CONSTRUCT THE DECK IN
25 1990, AND THAT ASSUMES A

1 FACT THAT IS NOT IN
2 EVIDENCE.

3 THE COURT: MS. BROWN, LET ME ASK IT
4 THIS WAY. IF YOU HAD BEEN
5 ON THE BOARD IN 1990, WOULD
6 YOU HAVE DONE ANYTHING
7 DIFFERENT IF YOU HAD SEEN
8 MR. GOUDE BUILDING THE
9 DECK?

10 MS. BROWN: YOU MEAN IF I WERE A BOARD
11 MEMBER AND SAW ---

12 THE COURT: IN 1990, ---

13 MS. BROWN: YES.

14 THE COURT: --- WHEN THIS DECK WAS
15 BEING BUILT, WHAT WOULD YOU
16 HAVE DONE?

17 MS. BROWN: AS A BOARD MEMBER?

18 THE COURT: YES, MA'AM.

19 MS. BROWN: OBJECTED.

20 THE COURT: ALL RIGHT.

21 **Q: How many different people have served on the**
22 **board, based on your review of the records, in**
23 **the last almost 20 years?**

24 A: That's three, three every two years until
25 staggered terms a few years ago, so maybe 60 some

1 people, and there have been repeats, repeat board
2 members.

3 Q: So the boards have changed regularly, have they
4 not?

5 A: Uh-huh (affirmative response).

6 Q: The makeup of the board?

7 A: Uh-huh (affirmative response).

8 Q: Do you believe that people who do business with
9 the board as it now exists, with you as the
10 president and the current members, board members,
11 do you believe that people who do business with
12 you have a right to rely on what the board tells
13 them?

14 A: Yes.

15 Q: And that's the way it should be, shouldn't it?

16 A: (Indicates affirmatively.)

17 Q: Do you believe that if you enter into an
18 agreement on behalf of the board with someone,
19 that next year's board or the year after that
20 board or every board in the future should have
21 the right to say, "Well, it's no good anymore,"
22 and then one year, "It's good, this year's;"
23 should those agreements be allowed to be changed
24 every year just because there's a new board
25 makeup?

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1 A: Not necessarily, but like given the kind, kind of
2 agreement that is involved.

3 Q: Okay. But you do believe, as a general matter,
4 that people who reach agreements with your board
5 should have the right to rely on them?

6 A: Yes.

7 Q: Whose money was used, to your knowledge, to build
8 this deck and put the awning up?

9 A: According to the records in this case, the
10 defendants.

11 Q: There's not any allegation or evidence that the
12 POA spent money to build this, is there?

13 A: That's correct.

14 MR. NEWBY: THAT'S ALL I HAVE OF THIS
15 WITNESS, YOUR HONOR.

16 THE COURT: MR. BARNETT?

17 MR. BARNETT: THANK YOU, YOUR HONOR.

18 RE-DIRECT EXAMINATION

19 BY MR. BARNETT:

20 Q: Ms. Brown, Mr. Newby asked you about the need for
21 parking. Based upon your knowledge, has the need
22 for parking at St. Clements increased from 1990
23 until 2007, at the time this lawsuit was brought?
24 Are there more people coming to Myrtle Beach in
25 that time?

1 A: Oh, yes. I would think so, uh-huh (affirmative
2 response).

3 Q: And does the pool bar actually draw outside
4 business invitees to use that pool bar and who
5 park on the St. Clements parking spaces in
6 addition to the unit owners?

7 A: Yes.

8 Q: And so the need for parking extends beyond just
9 the unit owners?

10 A: Yes.

11 Q: And it would also extend, would it not, to their
12 guests?

13 A: Yes.

14 Q: And also their renters?

15 A: Yes.

16 Q: And to the business invitees of the Pool-1
17 commercial unit?

18 A: Yes.

19 Q: And at times does the -- Are there parking spaces
20 at St. Clements' pool?

21 A: Yes.

22 Q: And did the city zoning require 70 spaces at the
23 time this ---

24 MR. NEWBY: YOUR HONOR, ---

25 Q: --- condominium was constructed?

1 A: Yes.

2 MR. NEWBY: --- I'M GOING TO OBJECT TO
3 THAT QUESTION UNLESS SHE
4 CAN BE QUALIFIED AS AN
5 EXPERT IN CITY ZONING OR IF
6 SHE'S A LAWYER OR
7 SOMETHING, HAS SOME WAY TO
8 ANSWER THAT QUESTION.

9 MR. BARNETT: LET ME ASK A FEW MORE
10 QUESTIONS, I'LL CLARIFY.

11 THE COURT: OKAY.

12 Q: Ms. Brown, in reviewing this issue with regard to
13 the side deck, have you had occasion to review
14 the Myrtle Beach City zoning code and/or meet
15 with Myrtle Beach City zoning officials with
16 regard to the issue of parking requirements at
17 St. Clements?

18 A: Yes, I have.

19 Q: And as a result of those consultations with the
20 zoning officials and your review of the zoning
21 ordinances, have you been able to determine
22 whether or not the zoning requirements for St.
23 Clements required at least 70 parking ---

24 MR. NEWBY: YOUR HONOR, I'M GOING TO
25 OBJECT TO THIS. HE'S

1 CLEARLY ASKING FOR HEARSAY
2 IN ASKING WHAT SHE'S
3 LEARNED FROM A MEETING WITH
4 PEOPLE AT THE CITY.

5 MR. BARNETT: AND HER REVIEW OF THE
6 ZONING ORDINANCES.

7 MR. NEWBY: THE WAY THE QUESTION IS
8 PHRASED, YOUR HONOR, IT'S
9 IMPOSSIBLE, AS HE'S
10 MASTERFULLY CRAFTED HIS
11 QUESTION, FOR US DETERMINE
12 WHICH SOURCE OF INFORMATION
13 SHE'S RELYING ON. I THINK
14 IT MAKES IT OBJECTIONABLE.

15 THE COURT: I THINK YOU CAN REWORD IT
16 AND ---

17 MR. BARNETT: I WILL,
18 THE COURT: --- ASK IS IT HER
19 UNDERSTANDING.

20 Q: Ms. Brown, as a result of your consultations with
21 zoning officials for the City of Myrtle Beach and
22 your review of zoning ordinances in place, did
23 they assist you in locating and reviewing the
24 zoning ordinances which were in effect for the
25 St. Clements area at the time the St. Clements

1 condominium was established?

2 A: Yes.

3 Q: And did you review those zoning ordinances with
4 the assistance of the city?

5 A: Yes.

6 Q: And as a result of your review of the zoning
7 ordinances and the assistance provided by the
8 city with you to show you which ordinances, were
9 you able to determine whether or not at least 70
10 parking spaces were required for St. Clements
11 parking, onsite parking, at the time of the
12 construction of that St. Clements condominium?

13 A: Yes.

14 Q: And as a result of those same things, at any time
15 since then have those parking requirements been
16 lessened at all?

17 A: No.

18 Q: In fact, have they been increased?

19 A: Yes.

20 Q: And there was a mention about a parking space by
21 another individual who parks his car in a space
22 for extended periods of time?

23 THE COURT: LET ME ASK YOU, YOU SAID
24 THEY'D BEEN INCREASED SINCE
25 THEN?

1 MS. BROWN: YES.

2 THE COURT: AND HOW MANY SPOTS DOES THE
3 ST. CLEMENTS HAVE TO HAVE
4 NOW?

5 MS. BROWN: 15, 15 PERCENT MORE, ABOUT
6 TEN MORE SPACES, BUT WE
7 THINK IT MIGHT EVEN BE
8 GREATER THAN THAT BECAUSE

9 ---

10 THE COURT: DO YOU KNOW?

11 MS. BROWN: WELL, LET ME JUST, LET ME
12 JUST STOP WITH THAT. LET'S
13 JUST SAY THE CODE NOW IS
14 1.15, SO THAT'S 15 PERCENT
15 MORE.

16 MR. BARNETT: YOUR HONOR, THE ST.
17 CLEMENTS IS GRANDFATHERED
18 AT THIS POINT, AS LONG AS
19 THEY KEEP THE SPACES THEY
20 HAD TO BEGIN WITH.

21 THE COURT: SO YOU DON'T HAVE TO HAVE
22 ANY MORE?

23 MS. BROWN: WHAT DO YOU MEAN? WELL,

24 ---

25 MR. BARNETT: I'LL STIPULATE THEY DON'T,

1 YOUR HONOR. THE FACT IS

2 ---

3 THE COURT: YOU'RE STIPULATING, SHE
4 DOESN'T KNOW?

5 MS. BROWN: IF IT WERE BEING BUILT
6 TODAY, IT WOULD HAVE TO
7 HAVE 15 PERCENT MORE. THE
8 CODE IS 1.15.

9 THE COURT: DO YOU UNDERSTAND WHAT YOUR
10 ATTORNEY IS SAYING, THAT
11 THE ST. CLEMENTS DOESN'T
12 HAVE TO COME UNDER THE NEW

13 ---

14 MR. BARNETT: LET'S -- WE'D BETTER GET
15 THIS STRAIGHT, YOUR HONOR.

16 I'M SORRY. YOU ASK THE
17 QUESTION. THERE'S A
18 MISUNDERSTANDING ABOUT WHAT
19 I WAS TRYING TO STIPULATE.

20 PLEASE ASK ANY QUESTIONS
21 YOU MAY HAVE, YOUR HONOR.

22 THE COURT: I THINK WE'VE GOTTEN THERE,
23 AND I THINK THAT'S ONE
24 REASON MR. NEWBY WAS
25 OBJECTING.

1 MR. NEWBY: THEY COMPLIED WHEN IT WAS
2 BUILT. THEY'RE
3 GRANDFATHERED NOW. THERE
4 MAY BE A NONCONFORMING USE,
5 BUT THEY DON'T HAVE TO
6 CHANGE ANYTHING.

7 THE COURT: I UNDERSTAND. THANK YOU
8 VERY MUCH.

9 PLAINTIFF'S EXHIBIT NUMBER 12
10 IDENTIFIED FOR THE RECORD

11 **Q: Mr. Newby asked you about a parking space on**
12 **which one of the unit owners parks his car for**
13 **extended periods of time, and you indicated that**
14 **that had been a concern and the association had**
15 **taken certain actions, and I'll hand you what's**
16 **been marked Plaintiff's Exhibit Number 12 and ask**
17 **you if that is a parking policy adopted by the**
18 **board of directors on April 5, 2006.**

19 A: Yes, it is.

20 **Q: And would you read that policy as stated near the**
21 **bottom there, those three lines?**

22 A: Okay. "If an owner has a car parked at the St.
23 Clements, and rents/lets others use his condo, he
24 will have to remove his car from the property
25 from Memorial Day through Labor Day so the

1 required number of parking spaces are available."

2 Q: Now, as a result of -- Did you make that policy
3 known to the homeowners?

4 A: Yes.

5 Q: And as a result of that, have all the homeowners
6 except one complied with that policy?

7 A: Well, there was only one involved. So we made it
8 known to him.

9 Q: Okay. And he's still refusing to comply?

10 A: Yes.

11 Q: And the association is still contacting him?

12 A: Yes.

13 Q: And the association intends to continue to try to
14 enforce that rule against him?

15 A: Yes.

16 Q: Ms. Brown, at any time has the association
17 singled out the defendant in this case to treat
18 him any differently than any of the other owners
19 at the association?

20 A: No.

21 Q: Other, of course, than the fact the lawsuit's
22 been brought on the side deck?

23 A: Uh-huh (affirmative response).

24 Q: Is that correct?

25 A: Yes.

1 Q: And you mentioned elections occurring every year
2 at one point. Mr. Newby asked you about
3 elections occurring ever year. Just for the sake
4 of clarification, until the July 19th, 2004,
5 amendment to the bylaws that are contained in the
6 Exhibit 1, which created a staggered term for
7 directors, prior to that time, from 1987 until
8 2004, how many directors were there?

9 A: Three directors.

10 Q: And how long was the term that they were elected
11 ---

12 A: Two years.

13 Q: All right. And during all those times, there
14 were only elections every other year?

15 A: Yes.

16 Q: And so all three were replaced every other year?

17 A: Yes.

18 Q: Thank you. And Mr. Newby asked you about one of
19 the letters sent by a property manager years ago
20 pointing out that there had to be consent from
21 the association's board for certain things. Does
22 that consent under the terms of the Master Deed,
23 in some cases, must that be the written consent
24 of the association directors?

25 A: It says written consent.

1 Q: And is one of those cases where a written consent
2 of the board is required when there's any change
3 in appearance of a common area?

4 A: Yes.

5 Q: And Mr. Newby asked you about whether there was
6 ever any complaint against the defendant
7 concerning people using the half of the parking
8 space adjoining the side deck that was not
9 covered to get to the walkway out to the beach,
10 and you said that there had not been any
11 objection?

12 A: That's right.

13 Q: What is one of the purposes of the parking area
14 between the condominium, and the building itself,
15 and the beach; is that also used for walking?

16 A: What is the purpose of what?

17 Q: The paved parking area.

18 A: Yes, to reach the beach, yes, to walk to it.

19 Q: And so the whole parking area's used for walking,

20 ---

21 A: Yes, the whole, whole parking area.

22 Q: And, necessarily, when people park their cars,
23 they must walk to and from their cars, correct?

24 A: Yes.

25 Q: So would there be any reason to object to people

1 walking across what's been left of that half
2 space to get to the beach?

3 A: No.

4 Q: And Mr. Newby mentioned the time when the
5 association some years ago closed off,
6 temporarily, access to that roof deck above the
7 pool bar, and did you obtain an attorney's advice
8 as to whether or not that should be done? Did
9 the association obtain an attorney's advice as to
10 whether or not that should be done ---

11 A: Yes.

12 Q: --- before they did so?

13 A: Yes.

14 Q: And what was the attorney's advice?

15 A: I guess he thought ---

16 Q: Don't guess. Tell me, if you know, what the
17 attorney's advice ---

18 A: I don't know what the advice was.

19 Q: Don't know what his advice was?

20 A: No. I was not on the board then, but it was my
21 understanding that it was thought to be a common
22 element and not a limited common element.

23 Q: Did the board act upon that attorney's advice?

24 A: Yes.

25 Q: And it later turned out that attorney's advice

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1 **was incorrect?**

2 A: Yes.

3 **Q: And that lock was removed?**

4 A: Yes.

5 **Q: That attorney was not in my law firm, was he?**

6 A: No.

7 **Q: I have no further questions. Thank you.**

8 THE COURT: MR. NEWBY, DO YOU HAVE ANY
9 QUESTIONS, ANY FOLLOW-UP?

10 MR. NEWBY: JUST ONE OR TWO.

11 MR. BARNETT: YOUR HONOR, IF I DIDN'T SAY
12 SO, WE DO MOVE TO INTRODUCE
13 EXHIBIT NUMBER 12.

14 THE COURT: OKAY, VERY GOOD. ANY
15 OBJECTIONS TO ---

16 MR. NEWBY: NO OBJECTION, YOUR HONOR.

17 THE COURT: SO ADMITTED THEN.

18 PLAINTIFF'S EXHIBIT NUMBER 12

19 ADMITTED INTO EVIDENCE

20 RE-CROSS EXAMINATION

21 BY MR. NEWBY:

22 **Q: You were asked again about this car that's**
23 **covered up and has not been moved, and I think my**
24 **previous question to you on cross examination was**
25 **has the POA seen fit to file suit against the**

1 owner of the car. What was the answer to that?

2 A: No. It's an ongoing thing. We're working with
3 the owner.

4 Q: So you haven't sued him yet?

5 A: No.

6 Q: Now, are you familiar with, speaking of parking,
7 with a parking space beside the maintenance room?

8 A: Yes, I am.

9 Q: All right. And has the POA chosen to put a "No
10 Parking" sign in that parking space?

11 A: That never was a parking space.

12 Q: Is this an accurate photo of it?

13 A: Yes, it is.

14 Q: And is that "No Parking" sign, does that
15 accurately depict what's there now?

16 A: I don't see a "No Parking" sign.

17 Q: Well, I'll point to it, right there.

18 A: Oh, okay. I see.

19 Q: Is that accurate?

20 A: Yes.

21 Q: And it's your testimony that that's not a parking
22 space?

23 A: Yes. And I can show you on the parking plan that
24 it's not.

25 Q: Well, let me ask you this before you do that.

1 Does it have one of those curb things to stop
2 your wheels from hitting, so the car doesn't hit
3 the wall?

4 A: Apparently it does.

5 Q: Okay. Go ahead and point out whatever it is you
6 want to point out.

7 A: Okay. This is the underground parking plan.

8 MR. BARNETT: WHAT DOCUMENT IS BEING
9 REFERRED TO?

10 MS. BROWN: EXHIBIT MM.

11 MR. NEWBY: A1, I THINK IT IS, OR 1A,
12 1A.

13 A: Okay, okay. This is the pool equipment room, and
14 that's the access for the pool equipment room.

15 So that is not a parking space, because you have
16 to access to that door, and, also, it was never
17 numbered as a parking space on the plan. So it's
18 definitely not a parking space.

19 Q: People ever park there?

20 A: Well, that's probably why the "No Parking" sign
21 is there, so other people won't.

22 Q: Does that mean people do park there?

23 A: Yes, they do.

24 MR. NEWBY: WE'D OFFER THIS PICTURE,
25 YOUR HONOR, AS AN EXHIBIT.

1 A: But they . . .

2 MR. BARNETT: WE HAVE NO OBJECTION.

3 A: In the daytime, when the maintenance person is
4 using that area, they do not park there, but when
5 the parking lot's full, sometimes people do.

6 DEFENDANT'S EXHIBIT NUMBER 1

7 ADMITTED INTO EVIDENCE

8 Q: So because people park there, you actually have
9 one more parking space than the plot plan shows;
10 is that correct?

11 A: Well, it's not a parking space.

12 Q: One more area to park a vehicle, then?

13 A: Yes.

14 Q: Okay. That's all I have.

15 MR. BARNETT: YOUR HONOR, IF I MAY, THAT

16 WAS A NEW MATTER, IF I CAN

17 JUST TAKE ONE MOMENT TO ---

18 THE COURT: CERTAINLY.

19 RE-DIRECT EXAMINATION

20 BY MR. BARNETT:

21 Q: And, Ms. Brown, is this area that he's referring
22 to, was that one of the 70 parking spaces that
23 were counted as part of the parking for this in
24 the ---

25 A: No.

1 Q: --- original plans?

2 A: No.

3 Q: And you ---

4 A: It's an access area.

5 Q: You've referred to this map in responding to his
6 questions. It was MM and was provided originally
7 in the discovery.

8 MR. BARNETT: I'D LIKE TO HAVE THAT

9 MARKED AND INTRODUCED AS A

10 PLAINTIFF'S EXHIBIT,

11 PLEASE. THAT WOULD BE

12 NUMBER 15. WE WOULD JUST

13 MOVE TO INTRODUCE THAT AS

14 PART OF THE EVIDENCE SHE'S

15 TESTIFIED TO, YOUR HONOR.

16 THE COURT: IS THERE A DIFFERENCE

17 BETWEEN THAT PLAINTIFF'S

18 AND 1A?

19 MR. BARNETT: YES. THAT'S THE GROUND

20 FLOOR, AND THIS IS THE

21 PARKING LEVEL. IT'S PART

22 OF THE SAME PLAN, BUT IT

23 GOES UP ONE AREA. THAT'S

24 INTRODUCED, YOUR HONOR?

25 THE COURT: YES.

1 PLAINIFF'S EXHIBIT NUMBER 15

2 ADMITTED INTO EVIDENCE

3 Q: And on this plan, you see all the parking spaces
4 that are numbered, and is there any number next
5 to that?

6 A: There's no number.

7 Q: And that's actually, I may have said gone up, it
8 actually, this goes down. I'm sorry. This goes
9 down, because next to it, it says, "Pool Base,"
10 the base of the swimming pool.

11 A: Uh-huh (affirmative response).

12 Q: No further questions. Thank you.

13 MR. NEWBY: NOTHING.

14 THE COURT: WHY DON'T WE TAKE A SHORT
15 BREAK FOR ABOUT TEN MINUTES
16 OR SO?

17 *****OFF THE RECORD*****

18 (ON THE RECORD)

19 THE COURT: ALL RIGHT, MR. BARNETT, ARE
20 YOU READY TO CALL YOUR NEXT
21 WITNESS?

22 MR. BARNETT: YOUR HONOR, THAT'S THE
23 PLAINTIFF'S CASE.

24 THE COURT: ALL RIGHT. MR. NEWBY?

25 MR. NEWBY: WELL, YOUR HONOR, I MUST

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1 SAY, I DIDN'T EXPECT IT TO
2 GO QUITE SO QUICKLY, BUT I
3 BELIEVE I CAN CALL MARSHALL
4 MELTON.

5 THE COURT: ALL RIGHT, MR. MELTON?

6 MARSHALL MELTON, AFTER HAVING BEEN CALLED TO THE

7 STAND AND DULY SWORN, TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. NEWBY:

10 **Q: Mr. Melton, would you give us your full name,**
11 **again?**

12 A: Yes, Marshall Melton.

13 **Q: And where do you live?**

14 A: Greensboro, North Carolina.

15 **Q: How long have you lived in Greensboro?**

16 A: 52 years.

17 **Q: What is your occupation?**

18 A: I own a financial advisory company in Greensboro.

19 **Q: What's the name of the company?**

20 A: Signature Wealth Management.

21 **Q: And how long have you been in that business?**

22 A: 30 years.

23 **Q: Where is it located?**

24 A: Battleground Avenue in Northwest Greensboro.

25 **Q: Okay. Are you familiar with the St. Clements**

1 Homeowners Association?

2 A: I am.

3 Q: And are you familiar with the St. Clements
4 Horizontal Property Regime or condominium?

5 A: Yes.

6 Q: They call it the Horizontal Property Regime in
7 South Carolina and nobody has yet to figure out
8 why. When did you first become aware of the St.
9 Clements?

10 A: I believe it was in 1986, before construction
11 began.

12 Q: Okay. And how did you learn of it?

13 A: My previous firm was going to sell some of the
14 condos there and Dwight Cox came up and did the
15 presentation.

16 Q: Okay. And what was that company?

17 A: The Financial Group.

18 Q: All right. Tell me what Dwight Cox's
19 relationship with the St. Clements was.

20 A: Dwight was the developer of the St. Clements.

21 Q: Okay. Did you know him before this St. Clements
22 issue came up?

23 A: No, I did not.

24 Q: Tell me what he presented to you. You can't tell
25 us what he said, per se, because that's hearsay,

1 but just tell me what he came up and, and sort of
2 did.

3 A: Testing my memory, but the condominium complex
4 was called a condotel, and we were selling it as
5 investments to our investors to receive rental
6 income from renters through the summer months and
7 in the winter months because of the golf season.
8 So, we sold the, the actual units as investments
9 to cash flow and to appreciate.

10 Q: All right. And you've heard testimony today that
11 there were just over 60 units, 65 roughly, in the
12 building?

13 A: Yes.

14 Q: Did you, yourself, buy a unit in the St.
15 Clements?

16 A: Yes, I did.

17 Q: Did you buy more than one unit?

18 A: Yes.

19 Q: How many did you buy?

20 A: I -- total, owned a total of three at one time.

21 Q: All right. And were you one of the initial
22 buyers?

23 A: Yes.

24 Q: Did your company sell any other units?

25 A: Yeah, I personally sold 21 units, I think. I

1 moved 19 -- January 1st, 1987 I opened my own
2 firm, so, I carried the process over to the new
3 firm as well.

4 Q: So, if I understand correctly, you were
5 responsible for the sale of approximately a third
6 of the units in the building?

7 A: Yes.

8 Q: How closely did you follow the planning and the
9 construction of the St. Clements?

10 A: Probably not that closely, you mean, like, the
11 construction of it, day by day type things?

12 Q: Well, I just mean, were you familiar with the
13 progress and how the property was being
14 developed?

15 A: Yes, I, I made several trips down in the process
16 of the construction.

17 Q: All right. And did your, approximately, 20
18 buyers, were they in the initial group of buyers?

19 A: The majority of them, I think they were.

20 Q: Okay. Now, did you ever have any role to play
21 with the property owners' association at St.
22 Clements?

23 A: I was president. I don't recall the exact years,
24 but it was at the very beginning.

25 Q: Okay. Were you, do you think you might have been

1 **the first president?**

2 A: I, I could have been. I, I think Dwight was
3 somewhere before me, but I think when they first
4 elected the first member president I think I was.

5 **Q: All right. Tell me about this pool bar that**
6 **we've heard about this morning. Was it built**
7 **later or was it part of the initial construction?**

8 A: My understanding is the pool bar is the
9 condominium as well, and Luke was a purchaser of
10 that the same time we were selling the other
11 units.

12 **Q: All right. And did you get to know Luke in those**
13 **early days?**

14 A: Yes.

15 **Q: All right. Did they operate and open the pool**
16 **bar in those early days?**

17 A: Yes.

18 **Q: Were you either on the Board or the president of**
19 **the Board during that early, initial opening of**
20 **the pool bar?**

21 A: Yes.

22 **Q: All right. Now, you've heard about this side**
23 **deck.**

24 A: Yes.

25 **Q: You've seen pictures of the side deck?**

1 A: I have.

2 Q: First of all, do you still own any units at St.
3 Clements?

4 A: No, I don't.

5 Q: And approximately how long ago did you sell your
6 last unit?

7 A: I believe it was '96 or, -- 1996 or 1997.

8 Q: Okay. So it's been ten years plus or minus?

9 A: Right, yes.

10 Q: I'm going to show you what's been marked
11 previously as Plaintiff's Exhibit 8, which is a
12 series of color photographs, all of which seem to
13 show the pool, the side, I should say the side
14 deck, from different angles. Take a moment and
15 just look through that. Do those pictures appear
16 to you to accurately reflect the deck from 1992
17 up through whatever the last date is, 2006 or
18 2008?

19 A: Yes, they do.

20 Q: All right. Do you still come to Myrtle Beach
21 sometimes?

22 A: On occasion, yes.

23 Q: Do you ever go to the St. Clements?

24 A: I do.

25 Q: All right. And are you familiar with the way it

1 looks now?

2 A: I haven't been since February of this past year,
3 but, I was there for the marathon.

4 Q: Okay. And does it currently look like these
5 latest pictures, as far as you can tell?

6 A: As I recall, yes.

7 Q: All right. Now, what is your recollection of the
8 events that led up to the building of the
9 poolside deck, the pool bar side deck that's in
10 question today?

11 A: Well, as I recall, Dwight Cox approached me on
12 that, when he wanted to add some additional
13 seating for the guests that were staying at the
14 St. Clements, and I relied on Dwight quite a bit
15 for his knowledge of what would work in Myrtle
16 and what would not work, and so he asked if I
17 thought it would be a good idea, and I thought it
18 would be. Because some of my, when I go down it
19 would be hard, couldn't find a seat to sit around
20 the pool and -- or I had four small children at
21 the time too, so, I liked the concept of having a
22 deck next to the pool bar.

23 Q: And were you on the Board at the time?

24 A: I think so, that, 1990 time frame.

25 Q: Okay. And to your recollection -- Well, tell me

1 this. Did the Board, as far as you know, allow
2 the construction of this deck?

3 MR. BARNETT: THAT'S A LEADING QUESTION.

4 I'M GOING TO OBJECT TO HIM

5 LEADING THE WITNESS.

6 MR. NEWBY: YOUR HONOR, IT'S NOT

7 LEADING. I'M ASKING HIM

8 DID THEY APPROVE IT.

9 MR. BARNETT: IT'S A LEADING QUESTION,

10 SUGGESTS AN ANSWER, YOUR

11 HONOR. THIS IS DIRECT

12 EXAMINATION.

13 THE COURT: DID HE OR DID HE NOT

14 APPROVE IT IS NOT A LEADING

15 QUESTION.

16 MR. NEWBY: EXACTLY.

17 THE COURT: DID HE OR DID HE NOT

18 APPROVE IT?

19 A: I approved it.

20 Q: All right. Was that information, that approval,
21 conveyed to Mr. Goude?

22 A: Yes.

23 Q: And do you recall who actually did the work?

24 Were you involved at all in that discussion?

25 A: No, I was not.

1 Q: All right. After the discussions that you had
2 had with Mr. Cox, and after the discussions you
3 had had with Mr. Goude about this side deck, was
4 it, in fact, built?

5 A: Yes.

6 Q: All right. And who built it?

7 A: I don't know. I don't know who built the,
8 physically built the deck.

9 Q: Do you know who was responsible for having it
10 built?

11 A: I, I know Dwight was involved and I knew Luke was
12 involved, but I don't know who physically built
13 the deck.

14 Q: All right. Do you know whether or not any
15 property owners' association funds were used to
16 build it?

17 A: Not to my knowledge.

18 Q: All right. Now, in response to a request by me
19 and either, well, I guess it would have been in
20 earlier litigation, did you write me a letter
21 that sets out your recollection of the facts?

22 A: Yes, I wrote the letter, I can't read it but I
23 wrote the letter.

24 Q: I know the problem.

25 A: Yes. Yes, I wrote that letter.

1 Q: All right.

2 MR. NEWBY: YOUR HONOR, I'M GOING TO

3 OFFER THIS AS AN EXHIBIT.

4 IT'S BEEN PROVIDED IN

5 DISCOVERY PREVIOUSLY.

6 UNFORTUNATELY, THE ONLY

7 COPY WE CAN PUT OUR HANDS

8 ON, ON THE BACK HAS

9 SOMETHING REGARDING KITCHEN

10 DUTIES AND SO FORTH, WHICH

11 LOOKS LIKE A PIECE OF SCRAP

12 PAPER THAT IT WAS COPIED

13 ON, BUT WE CAN SUBSTITUTE A

14 BETTER COPY LATER.

15 MR. BARNETT: YOUR HONOR, THIS IS AN OUT

16 OF STATE -- AN OUT OF COURT

17 STATEMENT OFFERED FOR THE

18 TRUTH OF THE MATTER

19 ASSERTED AND THEREFORE IS

20 HEARSAY. I THINK HE CAN

21 TESTIFY AS TO WHAT HIS

22 RECOLLECTION IS, BUT THIS

23 IS AN OUT OF COURT

24 STATEMENT SUBMITTED FOR THE

25 TRUTH OF THE MATTER

1 ASSERTED, AND IT'S HEARSAY.

2 IT'S A LETTER FROM HIM TO

3 MR. NEWBY AND IT'S HEARSAY,

4 AND I OBJECT ON THAT BASIS.

5 MR. NEWBY: YOUR HONOR, IN RESPONSE TO

6 THAT I WOULD SAY THAT THE

7 PREVIOUS TESTIMONY BY MS.

8 BROWN WAS THAT HER REVIEW

9 OF ALL THE RECORDS IS THAT

10 THEY HAD NO INDICATION AT

11 ALL THAT THERE WAS ANY

12 APPROVAL, AND THIS HAS BEEN

13 IN EXISTENCE SINCE 2002,

14 AND THEY'VE HAD IT, AND

15 THINK THIS IS SIMPLY

16 SHOWING THAT THAT'S, THAT

17 TESTIMONY IS CERTAINLY

18 SUBJECT TO QUESTION.

19 THE COURT: WHAT -- LET ME SEE WHAT

20 THAT IS. I'M NOT SURE WHAT

21 IT IS.

22 MR. NEWBY: AND I THINK THIS SIMPLY

23 REITERATES WHAT WAS JUST

24 TESTIFIED TO.

25 THE COURT: WAS THAT LETTER IN THE

1 RECORDS OF ST. CLEMENTS?

2 MR. NEWBY: IT WAS PROVIDED TO THEIR
3 ATTORNEY IN THE PREVIOUS
4 LITIGATION, I CAN'T -- WHO
5 WAS THEIR AGENT. WHETHER
6 IT WAS IN THEIR RECORDS OR
7 NOT, I CAN'T TELL YOU.

8 THE COURT: MR. BARNETT?

9 MR. BARNETT: YOUR HONOR, SHE'LL TESTIFY
10 IT IS NOT. IT'S A LETTER
11 TO MR. NEWBY, AND SHE'LL
12 TESTIFY IT'S NOT PART OF
13 THE RECORDS OF THIS
14 ASSOCIATION. WE'VE
15 OBTAINED IT THROUGH THE
16 DISCOVERY IN THIS CASE.
17 WE'RE AWARE OF IT, BUT IT'S
18 NOT PART OF THE RECORDS OF
19 THIS ASSOCIATION. IT'S A
20 LETTER FROM THIS WITNESS TO
21 MR. NEWBY, AND IT'S
22 HEARSAY. HE CAN TESTIFY TO
23 WHATEVER HIS MEMORY OR, OR
24 KNOWLEDGE OF THE FACTS ARE,
25 BUT IT'S HEARSAY TO SUBMIT

1 SOMETHING SENT TO THIS
2 LAWYER PRIOR, YOU KNOW,
3 YEARS AGO, WHICH IS AN OUT
4 OF COURT STATEMENT
5 SUBMITTED FOR THE TRUTH OF
6 THE MATTER ASSERTED. IT'S
7 HEARSAY.

8 THE COURT: MR. NEWBY, ARE YOU
9 SUBMITTING FOR THE TRUTH OF
10 THE MATTER?

11 MR. NEWBY: I'M SUBMITTING IT MERELY
12 FOR THE STATEMENT THAT THIS
13 HAS BEEN MR. MELTON'S
14 RECOLLECTION, AND IT HAS
15 BEEN COMMUNICATED TO THE
16 PLAINTIFF AT LEAST SIX
17 YEARS AGO. THE TRUTH OF
18 THE MATTER WILL COME FROM
19 HIS PERSONAL TESTIMONY.

20 THE COURT: IF, IN FACT, IT WERE
21 COMMUNICATED TO THE
22 PLAINTIFF I THINK THAT
23 WOULD BE GOOD THAT IT WOULD
24 BE NOTICE, BUT IT DOESN'T
25 LOOK TO ME AS IF IT WERE

1 COMMUNICATED TO THE
2 PLAINTIFF. IT LOOKS TO ME
3 AS IF IT WERE COMMUNICATED
4 TO YOU.

5 MR. NEWBY: I THINK THAT'S A CORRECT
6 STATEMENT AND I CAN'T, WITH
7 CERTAINTY, SAY THAT IT WAS
8 GIVEN TO THE POA BY THEIR
9 ATTORNEY, SO. ALL RIGHT.

10 THE COURT: THEN I'LL SUSTAIN THE
11 OBJECTION.

12 MR. NEWBY: VERY GOOD.

13 Q: Is this letter --

14 MR. NEWBY: YOUR HONOR, I ASSUME HE CAN
15 REFER TO IT AND REFLECT ON
16 IT.

17 THE COURT: HE CERTAINLY MAY.

18 Q: Did you write that letter to me, Mr. Melton?

19 A: Yes, I did.

20 Q: All right. Did the ---

21 THE COURT: AND IN FACT, HE MAY PUBLISH
22 IT. IT JUST CANNOT COME
23 INTO EVIDENCE.

24 Q: Did the Board approve the construction of the
25 awning that Mr. Goude constructed?

1 A: Yes, they did.

2 Q: Now, during the time that you owned units there,
3 which was roughly seven years, sounds like?

4 A: Sounds about correct.

5 Q: Did you stay in your units?

6 A: Yes, I did.

7 Q: Did you come to the St. Clements every year?

8 A: Well, I outgrew it, quite frankly. I had four
9 children, so we moved south. But I used to come
10 at least once a year when, the early years when
11 they were still small.

12 Q: Did you rent your unit?

13 A: Yes, I did.

14 Q: Did you use a rental agent or rent it to people
15 you knew?

16 A: I had a rental agent.

17 Q: How about the twenty something people that you
18 sold units to, you said they were your clients?

19 A: That's correct.

20 Q: What was your experience regarding the parking at
21 St. Clements, when you came?

22 A: I, I don't know that I have an experience, I
23 mean, I found a place. I obviously parked my
24 car, but I ---

25 Q: That's my question.

1 A: Yeah, I don't, I don't have an experience.

2 Q: Did you have any problems or did you ever find
3 that every parking space at St. Clements was full
4 and you just couldn't park there anywhere?

5 A: I, I don't recall having that problem.

6 Q: Okay. To your knowledge, has the number of units
7 or bedrooms changed at the St. Clements since it
8 was built?

9 A: To my knowledge, no.

10 Q: When you reached whatever agreement you did with
11 Mr. Goude regarding the building of the deck and
12 the awning, what was the understanding regarding
13 when, if ever, it would have to be removed?

14 A: We never discussed removing it, we just gave him
15 permission to build it.

16 Q: All right. Did the agreement have a life span
17 that it would end at a certain time?

18 MR. BARNETT: YOUR HONOR, I OBJECT. HE'S
19 ALREADY TESTIFIED IT WASN'T
20 DISCUSSED.

21 MR. NEWBY: I THINK HE CAN ELABORATE ON
22 IT.

23 THE COURT: I THINK HE CAN.

24 A: No, I -- It was an assumption it was a permanent
25 fixture to the pool bar.

1 MR. BARNETT: YOUR HONOR, I OBJECT FOR
2 BEING ASSUMPTION. HE'S
3 ALREADY TESTIFIED THERE WAS
4 NO DISCUSSION OF IT, NOW
5 HE'S TESTIFYING TO AN
6 ASSUMPTION, I OBJECT ---

7 A: I'm testifying that we didn't, common sense made
8 it that it wasn't going to be removed once we
9 gave permission to have it built. That was my
10 testimony.

11 MR. BARNETT: MY OBJECTION REMAINS, YOUR
12 HONOR.

13 THE COURT: YOUR STATEMENT WAS IT WAS A
14 PERMANENT ADDITION?

15 MR. MELTON: YES.

16 THE COURT: ALL RIGHT.

17 Q: Are you familiar with a wooden deck that's been
18 built by the property owners' association
19 adjacent to the deck Mr. Goude built?

20 A: No.

21 Q: All right. So that doesn't -- you just don't
22 know about it?

23 A: I don't know about it.

24 Q: Okay. Have you used the pool bar in the past?

25 A: Yes.

1 Q: And have you used the side deck to sit at the
2 pool bar?

3 A: Yes, I have.

4 Q: And in your experience, who uses the pool bar and
5 the side deck?

6 A: My experiences were the tenants of the St.
7 Clements and the guests.

8 Q: Did your kids use it?

9 A: Yes, they did.

10 Q: Did you see other owners using it?

11 A: Yes.

12 Q: Did the existence of the pool bar play any role
13 in your decision to buy at the St. Clements?

14 A: No.

15 MR. NEWBY: IF YOU'LL GIVE ME JUST A
16 MOMENT, YOUR HONOR.

17 Q: Mr. Melton, after the deck was built in 1990,
18 let's say, whatever date the actual construction
19 occurred; did the Board complain that it was
20 built?

21 A: Not to my knowledge.

22 Q: Initially, at least, for the first few years, did
23 you, when you were still on the Board, receive
24 any complaints from anybody about the existence
25 of this deck?

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1 A: I don't recall any complaints, no.

2 Q: All right. Were you aware that at some later
3 date in the 90s the then members of the Board
4 were starting to complain about the existence of
5 the deck?

6 A: I'm unaware of that.

7 Q: All right. You would have been aware as an owner
8 if they had advised the owners of this, would you
9 not?

10 A: I would have thought I would have gotten
11 correspondence.

12 Q: Okay. Do you know of any changes or amendments
13 to the understanding between the Board and Mr.
14 Goude, that he agreed to, that indicated that the
15 deck would be removed?

16 A: No.

17 MR. NEWBY: THAT'S ALL WE HAVE OF THIS

18 WITNESS, YOUR HONOR.

19 THE COURT: THANK YOU, MR. BARNETT?

20 CROSS EXAMINATION

21 BY MR. BARNETT:

22 Q: Is your name Marshall E. Melton?

23 A: Yes, it is.

24 Q: When were you -- You've testified that you wrote
25 a letter to Mr. Newby. When were you first

1 contacted by Mr. Newby with regard to the side
2 deck?

3 A: I think it was prior to me writing the letter,
4 and the letter was written in 2002.

5 Q: And isn't it true, sir, that you were elected to
6 the board of the St. Clements for the first time
7 at the November 1988 meeting?

8 A: I can't testify to that being the truth, but if
9 that's what the records show.

10 Q: All right, sir. And you were elected then. Do
11 you recall who the other two board members who
12 were elected at the same time?

13 A: I don't.

14 Q: Do the names Leon Bechtel and Randolph Morgan ring
15 a bell?

16 A: Well, Leon certainly does. Randolph Morgan, I had
17 forgotten, but I do know ---

18 Q: Does that refresh your memory, were those the
19 first three directors?

20 A: Yeah, a little bit.

21 Q: And you were elected to a two year term; is that
22 correct?

23 A: I don't know.

24 Q: Do you recall being reelected to the board at the
25 annual meeting held in November of 1990?

1 A: I don't recall that.

2 Q: Do you recall Leon Bechtel being reelected and
3 Dr. Clements being elected as the other directors
4 at the 1990 meeting?

5 A: I don't recall that. I don't disagree. I just
6 don't recall it.

7 Q: All right, sir. So do you recall that you were
8 elected to the two year twice, the two year term,
9 do you recall that?

10 A: I don't. I don't ---

11 Q: Don't know.

12 A: --- know the, the exact length of time it was.

13 Q: And do you recall how your service on the board
14 ended?

15 A: No.

16 Q: So if the minutes of the annual meetings for the
17 association for 1988 and 1990 indicate that you
18 were elected to two year terms at those two
19 meetings, you would not disagree with that; is
20 that correct?

21 A: That's correct.

22 Q: And I believe you stated that you served at least
23 a portion of that time as the president of the
24 association?

25 A: Yes.

1 Q: And as a board member, during your tenure as a
2 board member, did you receive letters from time
3 to time sent on association stationery by the
4 property manager?

5 A: I would assume so, but I don't recall. I don't
6 recall.

7 Q: Do you recall any instance in which you learned
8 that any letters went out to the property manager
9 that were copied to the board that you found out
10 later you didn't receive copies of? Did you ever
11 object to anything like that or are you aware ---

12 A: No, I did not, no.

13 Q: To the best of your knowledge, did you receive
14 any letters that were sent out to the directors
15 by the property managers?

16 A: Did I receive any letters?

17 Q: Yes, that were sent to the directors by the
18 property manager during your term on the board.

19 A: Did I receive any letters?

20 Q: Yes.

21 A: I know I received correspondence, but I couldn't
22 tell you exactly what it was. That's a long time
23 ago for me, so.

24 Q: Let me ask you, if I may, to look at a letter
25 that's been introduce as Plaintiff's Exhibit

1 Number 5, being a letter from the property
2 manager to Dr. Clements, who we just indicated
3 was one of ---

4 A: Right.

5 Q: --- the directors, with carbon copies to you and
6 Mr. Leon Bechtel, and ask you if you recall
7 having received that letter.

8 A: No. I don't recall.

9 Q: Would you look at it and see if any of that rings
10 a bell to you?

11 A: (Pauses while reviewing document.)

12 Q: After reading the letter, does that refresh your
13 recollection at all?

14 A: No, it doesn't.

15 Q: Are you saying you can't admit or deny that you
16 received it, you just can't recall whether you
17 received it or not?

18 A: That's correct.

19 Q: And let me ask you the same question about
20 Plaintiff's Exhibit Number 6, which again is a
21 letter to, in this case, to the defendant, with
22 carbon copies to the board of directors, and ask
23 you to read that, and do you recall whether or
24 not you received a copy of that letter that was
25 sent to the board?

1 A: (Pauses while reviewing document.)

2 Q: Any recollection?

3 A: No. I don't really have any. I don't recall
4 that.

5 Q: You can't recall one way or the other whether you
6 received that?

7 A: No.

8 Q: And the same question as to Plaintiff's Exhibit
9 Number 7, and I'd ask you to review that and see
10 if you have any recollection of whether or not
11 you received it.

12 A: (Pauses while reviewing document.) I don't
13 recall.

14 Q: No recollection one way ---

15 A: No.

16 Q: --- or the other? Could have received or could
17 have not received it; is that correct?

18 A: That's correct.

19 Q: Let me ask you one other question, if I may, Mr.
20 Melton. Have you ever been the president of
21 Asset Management & Research, Inc. of Greensboro,
22 North Carolina?

23 A: Yes.

24 Q: And have you ever entered into a consent
25 agreement with the Securities and Exchange

1 Commission in which you admitted to violating
2 anti-fraud provisions of the Securities and
3 Exchange Commission Act?

4 A: I've never admitted anything like that, a consent
5 order but no, no admission of guilt, no findings
6 of facts.

7 Q: And what was the consent order, what did they
8 order you to do?

9 A: I don't recall exactly, but it was to the effect
10 of that I would not violate any securities laws
11 in the future, but no admission of guilt, no
12 findings of fact, no engorgement (disgorgement)
13 penalties.

14 Q: And did the Securities and Exchange Commission
15 find at that -- Well, were you the president of
16 that company in the 1990s?

17 A: I was.

18 Q: And did the Securities and Exchange Commission
19 find that the president repeatedly misused
20 investor funds?

21 A: Did they find ---

22 Q: Yes.

23 A: --- that? No, they did not.

24 Q: They did not?

25 A: They did not.

1 Q: Did they bar you from any further registration or
2 association with any investment advisor, broker,
3 dealer, or member of the National Securities
4 Exchange?

5 A: They -- Yes, they did.

6 Q: And that was done with your consent?

7 A: With my consent.

8 Q: No further questions.

9 THE COURT: MR. NEWBY?

10 MR. NEWBY: I DON'T THINK I HAVE
11 ANYTHING.

12 THE COURT: THANK YOU, MR. MELTON. MR.
13 NEWBY, HOW LONG IS YOUR
14 NEXT WITNESS?

15 MR. NEWBY: I HAVE TWO MORE, YOUR
16 HONOR, AND I'M NOT QUITE
17 SURE WHAT ORDER. IF I PUT
18 MR. GOUDE UP, IT'S GOING TO
19 TAKE A WHILE. SO IF YOU'RE
20 THINKING OF LUNCH, IT MIGHT
21 BE A GOOD TIME.

22 THE COURT: OKAY. MR. BARNETT, WHAT'S
23 YOUR PLEASURE?

24 MR. BARNETT: WHATEVER YOUR PLEASURE IS,
25 YOUR HONOR.

1 THE COURT: OKAY. I JUST NEED TO LEAVE
2 AT 3:15 FOR THAT
3 APPOINTMENT THAT WE SPOKE
4 ABOUT IN CHAMBERS. DO YOU
5 WANT TO TAKE ABOUT -- HOW
6 LONG DO Y'ALL NEED FOR
7 LUNCH?

8 *****OFF THE RECORD*****

9 (ON THE RECORD)

10 THE COURT: ARE YOU READY, MR. NEWBY?

11 MR. NEWBY: I'M READY, YOUR HONOR.

12 DURING THE BREAK, MR.

13 BARNETT SAID HE MIGHT HAVE

14 ANOTHER QUESTION.

15 MR. BARNETT: I HAVE NO FURTHER QUESTIONS

16 OF THAT WITNESS AT THIS

17 TIME, YOUR HONOR.

18 THE COURT: YOU DO NOT, OKAY.

19 MR. BARNETT: NO.

20 MR. NEWBY: YOUR HONOR, FIRST OF ALL,

21 I'M GOING TO INTRODUCE

22 WHAT'S BEEN MARKED AS

23 DEFENDANT'S EXHIBIT 2. WE

24 DISCUSSED IT DURING THE

25 BREAK, I BELIEVE THERE'S NO

1 OBJECTION, AND IT'S A
2 COUPLE OF DOCUMENTS THAT
3 HAVE BEEN CLIPPED TOGETHER
4 AS ONE AND WERE PROVIDED BY
5 THE PLAINTIFF IN DISCOVERY.
6 THE COURT: OKAY.
7 DEFENDANT'S EXHIBIT NUMBER 2
8 ADMITTED INTO EVIDENCE
9 MR. NEWBY: YOUR HONOR, WE WOULD NOW
10 CALL SAL PISTONE TO THE
11 STAND.
12 SAL PISTONE, AFTER HAVING BEEN CALLED TO THE STAND
13 AND DULY SWORN, TESTIFIED AS FOLLOWS:
14 DIRECT EXAMINATION
15 BY MR. NEWBY:
16 Q: Mr. Pistone, you have given us your name. Tell
17 us where you live.
18 A: [REDACTED] PA.
19 Q: PA being Pennsylvania?
20 A: Yes, sir.
21 Q: You don't sound like you're from Horry County,
22 just checking. What is your relationship to the
23 St. Clements Condominium Regime?
24 A: Four months ago, I had the pleasure of buying a
25 beautiful condominium there.

1 Q: All right. This summer, 2009, have you used your
2 unit at the St. Clements?

3 A: Extensively.

4 Q: Tell me how much you've used it. How many times
5 have you been here this summer?

6 A: In the last four months, a minimum of five times,
7 and for a total of around 60 days all together.

8 Q: Almost two full months out of ---

9 A: Yes.

10 Q: --- the last four months?

11 A: Yes.

12 Q: Did that time spent here include the summer
13 season?

14 A: Definitely.

15 Q: Did you drive down, fly down?

16 A: Both.

17 Q: Have you had occasion to park a car at the St.
18 Clements this summer?

19 A: Yes, I have.

20 Q: Tell me your experience in finding parking spaces
21 at the St. Clements on the site.

22 A: Never had one ounce of trouble finding a parking
23 space.

24 Q: Did you ever have an occasion when you were
25 looking for a parking space and couldn't find one

1 **during the summer at the St. Clements?**

2 A: No. The basement's always empty.

3 **Q: The basement, you said?**

4 A: Basement, underground parking.

5 **Q: What has recently occurred, if anything,**
6 **regarding the placement of the dumpster for this**
7 **project?**

8 A: The homeowners association chose to do something
9 different about sanitation. Exactly what, I'm
10 not sure, but from what I understand, I noticed
11 that there's no longer a dumpster where there
12 used to be a dumpster, and we, the homeowners
13 association purchased a cart or a workhorse,
14 whatever you call these things with the cages on
15 the back, sport utility vehicle, something like
16 that, and people put their garbage on this
17 vehicle, and this vehicle is driven to a local
18 dump.

19 **Q: All right. Is that taken to a site offsite, off**
20 **the St. Clements property?**

21 A: Yes, it is. Where it's taken, I'm not positive.
22 I don't know the address.

23 **Q: Looking at Exhibit 1A, Plaintiff's Exhibit 1A,**
24 **which is the site plan for the building, ---**

25 A: Okay.

1 Q: --- you can see the scallop shape of the face of
2 the building, the ocean appears to be at the
3 bottom?

4 A: Yes.

5 Q: Can you point to approximately, you can hold it
6 over here, the ocean's down this way, where was
7 the dumpster?

8 A: Right here.

9 Q: Up near the back of the property then?

10 A: Definitely in back of the building.

11 Q: And what is in that space now that the dumpster's
12 been removed?

13 A: Other than some junk that hasn't been cleaned up
14 from debris of leakage of the dumpster, last I
15 saw, which was probably two weeks ago, was
16 nothing.

17 Q: All right. Is there room to park cars there if
18 anybody wants to?

19 A: Yes. Cars can be parked there, if it's legal.

20 Q: How many cars would you estimate you could park
21 there?

22 A: It appears to be a minimum of four medium sized
23 to large sized cars could probably fit in there;
24 but that's in one, one length. I'm not sure what
25 kind of an angle they can park on, but you can

1 easily get four cars in there.

2 **Q: Now, this golf cart that you talk about that is**
3 **operated by the property owners association,**
4 **where do they keep that?**

5 A: When I've seen it, it's been on the grounds,
6 taking up a parking space, and it doesn't have to
7 take up a parking space. It could be put right
8 in front of the building where there are no
9 parking lines and it's still out of the way.

10 **Q: If, in fact, all the parking spaces were full,**
11 **they wouldn't likely put this in a parking space,**
12 **would they?**

13 A: If all -- Your question was if all the parking
14 spaces were full?

15 **Q: Yes.**

16 A: They would have to put this vehicle in a parking
17 space?

18 **Q: Would they likely put it in a parking space or**
19 **put it somewhere else?**

20 MR. BARNETT: YOUR HONOR, THAT'S A
21 LEADING QUESTION, AND IT
22 CALLS FOR SPECULATION ON
23 THE PART ---

24 A: They would, they would put it, they would put it
25 ---

1 MR. BARNETT: LET THE JUDGE RULE ON ---

2 MR. NEWBY: HE MIGHT BE RIGHT. I'LL

3 WITHDRAW THE QUESTION.

4 THE COURT: I'LL SUSTAIN THE OBJECTION.

5 Q: He might be right. Don't answer that question.

6 A: Okay.

7 Q: But you say you have seen it parked in a parking
8 space?

9 A: Yes, I have.

10 Q: Do you get copies of minutes or other
11 communications from the property owners
12 association since you've become an owner?

13 A: No, sir.

14 Q: You haven't?

15 A: No.

16 Q: Do you know any reason why not?

17 A: I'm -- Well, I know, on the last printout they
18 had for homeowners, I purchased the end of April,
19 and in May, they still had the bank owning it
20 rather than me, when I looked at that copy. So
21 maybe they didn't have my updated information.

22 Q: You just haven't had any communication from the
23 POA since you got there?

24 A: Oh, yeah. I went to meetings. Oh, and I went to
25 a couple meetings, as a matter of fact.

1 Q: Was this case discussed at the last meeting you
2 went to?

3 A: Yes, it was.

4 Q: All right.

5 A: Very briefly.

6 Q: I'm going to refer you to what we just marked as
7 Exhibit 2, which is a set of minutes, attached to
8 this letter is a set of minutes from June 28th,
9 2001, and ask you to read the second paragraph on
10 page two, just read that out loud, if you would.

11 MR. BARNETT: YOUR HONOR, YOU SAY THAT'S
12 -- MAY I SEE IT?

13 THE COURT: I THINK IT'S DEFENDANT'S
14 EXHIBIT 2.

15 MR. BARNETT: IS THAT THE MINUTES OF A
16 2001 BOARD MEETING?

17 MR. NEWBY: IT IS.

18 MR. BARNETT: AND THIS IS NOT A MEETING
19 HE ATTENDED?

20 MR. NEWBY: IT'S NOT.

21 MR. BARNETT: THEN I DON'T SEE HOW HE'S
22 QUALIFIED TO TESTIFY AS TO
23 WHAT MAY HAVE HAPPENED AT
24 THAT MEETING.

25 MR. NEWBY: I DON'T THINK I'VE ASKED

1 HIM TO TESTIFY AS TO THAT,
2 YOUR HONOR. I JUST ASKED
3 HIM TO READ THE PARAGRAPH.

4 THE COURT: I THINK HE'S JUST ASKING
5 HIM TO PUBLISH IT.

6 MR. NEWBY: CORRECT.

7 A: What is this dated?

8 Q: This is a set of minutes of a meeting of the POA
9 board dated June 2001.

10 A: Okay.

11 Q: And I just want you to publish or read out loud
12 that paragraph that begins, "Mr. Metcalf."

13 A: "Mr. Metcalf told the Board members that the deck
14 where the bar is located was originally built by
15 the owner of the bar, but the Association owns
16 the deck. He stated that the only leverage the
17 Association has is to disallow him to occupy the
18 pool deck. Mr. Korros suggested that the Board
19 request that the owner turns the music off and
20 close the bar by one a.m."

21 Q: And my question to you is, at the meeting you
22 attended or the two meetings you attended, did
23 the board advise you or the owners present that
24 they were engaged in this operation on the pool
25 deck or the side deck in order to get some

1 leverage over Mr. Goude, did they say that in
2 this meeting that you attended?

3 MR. BARNETT: YOUR HONOR, I'D LIKE TO
4 OBJECT ON THE GROUNDS THAT
5 WE NEED TO IDENTIFY EXACTLY
6 WHAT MEETING HE'S SPEAKING
7 OF BECAUSE I'M INFORMED HE
8 ATTENDED NO BOARD MEETINGS
9 IN THE FOUR MONTHS HE'S
10 BEEN ---

11 MR. PISTONE: THAT'S INCORRECT, AND ---

12 MR. NEWBY: WAIT A MINUTE.

13 MR. PISTONE: I WAS WITH YOU, BARBARA.

14 MR. NEWBY: WAIT, WAIT.

15 MR. BARNETT: I NEED TO KNOW, BEFORE HE
16 ANSWERS, EXACTLY WHAT
17 MEETING, WHEN IT OCCURRED,
18 WHO WAS PRESENT.

19 MR. PISTONE: SURE. I'LL TELL YOU
20 EVERYBODY THAT WAS THERE.

21 MR. NEWBY: WAIT. TO THE DEGREE, AND I
22 THINK THAT'S A REASONABLE
23 QUESTION, IF I MAY ASK HIM.

24 THE COURT: CERTAINLY.

25 Q: To the degree that you know the dates or the

1 **approximate time, tell us what meetings you**
2 **attended, what types of meetings they were, who**
3 **was there.**

4 A: Okay. The meetings took place in June, and in
5 June, it was approximately the 23rd or the 24th,
6 there were two days back-to-back. Mrs. Barbara
7 Brown was there. Her husband was there, okay?
8 Maybe I got the husband wrong. Mrs. Barbara
9 Brown was there. Ms. Ilkie (phonetically
10 spelled), how do you pronounce her last name? A
11 lady by the name of Ilkie (phonetically spelled)
12 was there. Doris was there with her friend
13 Lonnie. Luke was there. The man from England by
14 the name of Bert was there. The attorney who has
15 the lifeguards on the beach was there, and I was
16 present; and was there one more person? No, that
17 was it.

18 **Q: All right. So this ---**

19 A: Roughly, eight of us, and we went back-to-back,
20 Tuesday and a Wednesday or a Wednesday and a
21 Thursday.

22 **Q: This was a meeting of those people. Was that a**
23 **board meeting or just a meeting of that group of**
24 **people?**

25 A: A meeting of a group of homeowners, not a board

1 meeting, because I was not on the board.

2 Q: Now, did you say you had attended another meeting
3 also this summer?

4 A: Two meetings back-to-back.

5 Q: You mean two days in a row?

6 A: Yes. And they were held across the street.

7 Q: All right. Was it roughly the same people in
8 both meetings?

9 A: Yes.

10 Q: And so they were not either board meetings or
11 homeowner's association meetings, they were just
12 a meeting of this group of people?

13 A: Meeting of a group of people, but they are
14 homeowners.

15 Q: All right. My question then was, in those two
16 meetings, on those two days, did anybody from the
17 POA board indicate that they had brought this
18 lawsuit in order to gain leverage over Mr. Goude
19 as indicated in those minutes?

20 MR. BARNETT: YOUR HONOR, I'M GOING TO
21 OBJECT.

22 A: It was brought up, but it wasn't brought up to
23 ---

24 THE COURT: HOLD ON JUST ONE MOMENT
25 UNTIL MR. BARNETT GETS HIS

1 OBJECTION ON THE RECORD.

2 MR. BARNETT: YOUR HONOR, I'M GOING TO

3 OBJECT. THERE'S NO

4 EVIDENCE THAT ANYONE

5 ATTENDING THIS INFORMAL

6 MEETING OF HOMEOWNERS WOULD

7 HAVE HAD ANY AUTHORITY TO

8 MAKE ANY STATEMENT ON

9 BEHALF OF THIS ASSOCIATION,

10 AND THIS ASSOCIATION IS THE

11 PLAINTIFF HERE. SOME

12 INFORMAL MEETING AMONG

13 MEMBERS WOULD BE HEARSAY,

14 AND IT'S NOT A STATEMENT

15 ATTRIBUTABLE TO THE

16 ASSOCIATION. I OBJECT TO

17 ANY SUCH EVIDENCE.

18 MR. PISTONE: BUT IT TOOK PLACE.

19 THE COURT: HOLD ON JUST ONE MOMENT. I

20 THINK YOU CAN FOLLOW-UP

21 WITH, "WERE THERE ANY BOARD

22 MEMBERS THERE?"

23 **Q: Well, let me be even more specific, Mr. Pistone.**

24 **Did Mrs. Brown, who has testified today and is**

25 **the courtroom presently, as the president of the**

1 **association, indicate that they merely wanted**
2 **leverage on Mr. Goude by bringing this lawsuit?**

3 A: Yes.

4 **Q: What did they say?**

5 A: That this, ---

6 **Q: What did she ---**

7 A: --- this suit was taking place. She was asked by
8 a couple of people to disregard it. Their minds
9 were made up.

10 **Q: Whose minds were made up?**

11 A: Well, I know Mrs. Brown's mind was made up, and I
12 can't talk for other people, but she was talking
13 at the meeting, and it was clear that she wasn't
14 going to back down or give up the case; she
15 wanted to go along with it for whatever reason,
16 which is no secret.

17 MR. NEWBY: ONLY QUESTIONS I HAVE FOR
18 THIS WITNESS, YOUR HONOR.

19 **Q: If you would, answer Mr. Barnett's questions.**

20 MR. BARNETT: JUST A COUPLE OF QUESTIONS
21 FOR MR. PISTONE.

22 CROSS EXAMINATION

23 BY MR. BARNETT:

24 **Q: You say you purchased your unit in May of this**
25 **year?**

1 A: The last day of April, last day of April.

2 Q: And was the condition of the economy one of the
3 reasons you decided this was a good time to
4 purchase a condominium unit here in Myrtle Beach?

5 A: Certainly.

6 Q: And the prices are down?

7 A: Certainly.

8 Q: And, in fact, the business is down considerably
9 in Myrtle Beach, isn't it?

10 A: I don't think so.

11 Q: You think people dropped the price of their
12 condominiums despite ---

13 A: The highway was mobbed to me all, all summer.

14 Q: I'm sorry?

15 A: The highway was mobbed to me all summer, nothing
16 ---

17 Q: Have you been here in previous years?

18 A: Yes, I have, about three times.

19 Q: Three times?

20 A: Yes.

21 Q: When was that?

22 A: Other than this year, two years prior to that and
23 two years prior to that.

24 Q: Do you deny that there's significantly less
25 tourism business in Myrtle Beach this year than

1 there was two years ago?

2 A: I can't answer that question because I'm not
3 familiar with tourism in Myrtle Beach, but I'm
4 sure there's less, just like the rest of the
5 world.

6 Q: Okay. And you say there's plenty of parking.
7 Have you not found it -- isn't it true that you
8 found it necessary or appropriate to park your
9 truck in a no loading zone outside the lobby
10 since you've purchased there?

11 A: I've parked in the no loading zone many times.

12 Q: Yes, sir. And, in fact ---

13 A: To unload, unload the vehicle and load the
14 vehicle and so forth and so on.

15 Q: And, in fact, overnight at times?

16 A: Many times.

17 Q: All right. Thank you, sir.

18 RE-DIRECT EXAMINATION

19 BY MR. NEWBY:

20 Q: Let me back-up. Did you ---

21 A: That's the best spot in the house.

22 Q: Did you park in the no loading zone because there
23 was no other space or for some other reason?

24 A: It was the best spot in the house.

25 Q: That's all I have.

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1 MR. BARNETT: YOUR HONOR, MAY I HAVE ONE
2 MOMENT TO CONSULT WITH MY
3 CLIENT? I HAVE ONE FURTHER
4 QUESTION, YOUR HONOR.

5 THE COURT: OKAY.

6 RE-CROSS EXAMINATION

7 BY MR. BARNETT:

8 **Q: Mr. Pistone, you had testified that the**
9 **collection vehicle that the association is**
10 **currently using was being parked in one of the**
11 **parking spaces at ---**

12 **MR. NEWBY: YOUR HONOR, ---**

13 A: Yes.

14 MR. NEWBY: --- IF I MIGHT JUST MAKE A
15 POINT, I DON'T LIKE MAKING
16 OBJECTIONS TOO MUCH, BUT
17 TECHNICALLY, I BELIEVE MR.
18 BARNETT'S LIMITED TO
19 ADDRESSING MATTERS I
20 BROUGHT UP ON RE-DIRECT,
21 WHICH WAS ONLY THE QUESTION
22 ABOUT THE LOADING ZONE
23 PARKING, AND SO THIS LINE
24 OF QUESTIONING HE'S
25 STARTING DOWN, I DON'T

1 THINK IS APPROPRIATE.

2 THE COURT: MR. BARNETT?

3 MR. BARNETT: I HAVE ONE QUESTION, YOUR
4 HONOR. THAT'S ALL I HAVE.

5 THE COURT: IS IT RELATED TO THE
6 PARKING?

7 MR. BARNETT: IT RELATES TO PARKING.

8 HE'S BROUGHT UP THE
9 QUESTION OF PARKING, AND

10 I'M TRYING TO POINT OUT WHY

11 ---

12 MR. NEWBY: ONLY THE LOADING ZONE, WHEN
13 I WAS ON RE-DIRECT. I JUST
14 ASKED WHY HE PARKED IN THE
15 LOADING ZONE.

16 THE COURT: HE'S TECHNICALLY CORRECT,
17 MR. BARNETT.

18 MR. BARNETT: YOU, OF COURSE, HAVE THE
19 DISCRETION TO ALLOW IT,
20 YOUR HONOR.

21 MR. PISTONE: ARE WE ALL DONE THEN?

22 THE COURT: I WANTED TO ASK YOU ONE
23 QUESTION.

24 MR. PISTONE: OH, CERTAINLY.

25 THE COURT: I MEAN, I DON'T MIND BEING

1 LENIENT, BUT YOU'RE GOING
2 TO HAVE TO BE LENIENT, MR.
3 BARNETT, AND IT SEEMS TO ME
4 AS IF YOU'VE HAD SOME
5 OBJECTIONS THAT WERE NOT
6 QUITE SO LENIENT. I'LL GO
7 AHEAD AND ALLOW IT. GO
8 AHEAD.

9 MR. BARNETT: THANK YOU, YOUR HONOR. I
10 JUST HAVE ONE QUESTION.

11 **Q: Is the space next to -- Do you recognize this ---**

12 A: Yes, I do.

13 **Q: --- drawing of the ---**

14 A: Yes, I do.

15 **Q: --- underground portion of the parking lot?**

16 A: Yes.

17 **Q: And do you recognize this space ---**

18 A: We're at the basement level, now, you're talking,
19 right?

20 **Q: That's correct.**

21 A: Okay.

22 **Q: And do you recognize this space next to the pool**
23 **base, where it says, "Pool Base," here?**

24 A: What is a pool base in, in the garage? I've
25 never seen a pool base.

1 Q: I'm assuming it's the base of the swimming pool.
2 I know that's where the swimming pool's located.

3 A: Okay. So you're talking close to the maintenance
4 man's office there?

5 Q: Well, if you'll look at this diagram, ---

6 A: That's the maintenance man's office.

7 Q: Okay. And is that where they're parking the
8 trash cart?

9 A: I never saw the trash cart there.

10 MR. BARNETT: NO FURTHER QUESTIONS.

11 THE COURT: I HAVE A QUESTION.

12 DIRECT EXAMINATION

13 BY THE COURT:

14 Q: When you said that, or when Ms. Brown said that
15 this lawsuit, the present lawsuit was brought for
16 leverage over Luke Goude, ---

17 A: I didn't say it was brought for leverage.

18 Q: That she said the lawsuit may have been brought
19 for leverage?

20 A: She didn't say those words. He mentioned, Mr.
21 Newby mentioned the word "leverage." I never
22 heard the word "leverage" come out of Barbara's
23 mouth.

24 Q: What did you hear her say?

25 A: I was amazed that this case was coming to court,

1 couldn't figure out why and who can possibly
2 benefit, other than a man who broke his ass for
3 the last 22 years stands a lot to lose. So a
4 couple people asked Barbara, "Please let it be.
5 Let it go. Is it important?" The lady just
6 wanted to, was dead set against bringing it to
7 court. She never -- I mean, she was persistent
8 about that fact, and for whatever reason, and I
9 don't know the real reason, other than what'll
10 happen is, this is a diversion, this deck. When
11 it goes -- If that deck ever disappeared, the
12 traffic that has to come through there, women
13 having to bump up against men hanging out in a
14 bar, kids having to be subjected to maybe hearing
15 things they shouldn't hear and seeing things they
16 shouldn't see, that's why all this was done, and
17 no one said this today. That Mr. Cox that built
18 this place, he was one shrewd apple, and he put
19 that deck up for a total diversion of traffic.
20 Like every business has an egress and a ingress,
21 that's a diversion and a perfect diversion. And
22 everybody benefits in that St. Clements by having
23 that deck there. It should be twice the size.

24 **Q: So Mrs. Brown was just adamant that this lawsuit**
25 **continue?**

1 A: Yes.

2 Q: All right, thank you.

3 A: Thank you.

4 MR. NEWBY: YOUR HONOR, WE NOW CALL

5 LUKE GOUDE TO THE STAND.

6 LUKE GOUDE, AFTER HAVING BEEN CALLED TO THE STAND AND

7 DULY SWORN, TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. NEWBY:

10 Q: Luke, where do you live?

11 A: [REDACTED] Myrtle Beach.

12 Q: How long have you lived in Myrtle Beach?

13 A: Since '78, so 30 years, I guess.

14 Q: Where are you from originally?

15 A: Georgetown, originally.

16 Q: What business are you in?

17 A: The restaurant/bar business. I own the St.
18 Clements Beach Bar & Grill since it's originality
19 in 1988.

20 Q: Did you know Dwight Cox ---

21 A: Very well.

22 Q: --- before the St. Clements was built ---

23 A: Yeah. I went to work with Dwight in '80, '81.

24 Q: What were you doing for Dwight?

25 A: Real estate sales.

1 Q: What business was Dwight in during the period you
2 worked for him?

3 A: Real estate development.

4 Q: And what did he build other than the St.
5 Clements, if you remember?

6 A: Drayton House, the Thicket, Admiral's Quarters I,
7 II, and III, Captain's Quarters I, II, and III.

8 Q: Slow down a little bit. My hearing isn't all
9 that good. Captain's Quarters, ---

10 A: Captain's Quarters I, II, and III.

11 Q: --- I, II, and III?

12 A: Garden City.

13 Q: You said Admiral's Quarters?

14 A: Admiral's Quarters I, II, and III in Surfside,
15 the Thicket on 48th, I mean, 38th, across the
16 street from the Hard Rock. The Thicket, we have
17 one of our second projects, and doing the arcade
18 at, arcade and golf course behind Chestnut Hill,
19 and then the St. Clements.

20 Q: Were you working still as a salesperson when he
21 developed the St. Clements?

22 A: Yeah, I sure was.

23 Q: And did you sell any of the units yourself in ---

24 A: Sold quite a few of them.

25 Q: --- the St. Clements?

1 A: Matter of fact, a couple of the guys in here
2 today, I sold their units, Merrill and them.

3 **Q: How did you happen to become the owner of the**
4 **pool bar?**

5 A: Well, we was trying to sell that, obviously, and,
6 or lease it to someone, but nobody wanted it, and
7 back then there was nothing on the oceanfront on
8 the north end. The only major pool bar was to
9 haul in downtown to the Landmark. That was
10 basically about it. There just wasn't nothing
11 going on back then on the beachfront, and we
12 tried to sell it for, probably, a couple years.
13 Even I tried to sell it and lease it but nobody
14 wanted it.

15 So Dwight asked me if I would, if I would
16 bring him so much contracts in a, in a month, and
17 he'd take me on a trip, which I produced the
18 contracts, and we went on a vacation, and I was
19 staying in the Islands, and I seen the pool bars
20 down there, how they were operated and how they
21 associated with the hotels and how they helped
22 the people as amenities. And back in the '80s,
23 there wasn't a lot of amenities offered in the
24 hotels in Myrtle Beach. It was a pool, snack
25 machines, and that was about it, I mean, I've

1 been here all my life, and I worked at the
2 Holiday Inn downtown for eight years, so, on 6th
3 Avenue South, so I've been in the hotel business
4 since '78, basically. So, and we didn't have
5 hardly anything back then ourselves, so. When I
6 seen this, I seen an opportunity, so we came
7 back, we done the, we done the deal, and I kept
8 the St. Clements Beach Bar & Grill towards part
9 of my commissions for the sales of the units, and
10 that's how I got it.

11 **Q: The plaintiff has introduced a copy of a deed as**
12 **Plaintiff's Exhibit 2. It looks like it was**
13 **clocked in on August the 8th of 1988 to BE-MI,**
14 **Inc. Is that a copy of the deed to you, to your**
15 **company?**

16 A: Yes, sir.

17 **Q: Do you own BE-MI, Inc.?**

18 A: Yes, sir.

19 **Q: All right. Have you owned the pool bar since**
20 **August of 1988?**

21 A: Yes, sir. I've been the owner, we, I helped
22 design it.

23 **Q: Helped design it?**

24 A: Yeah.

25 **Q: All right. So, as of the 8th of this month, it's**

1 **been ---**

2 **A: 21 years.**

3 **Q: 21 years. Has anybody else owned or operated**
4 **that pool bar for any of those 21 years?**

5 **A: No, sir.**

6 **Q: You've seen the pictures and you've heard the**
7 **testimony about the deck, the wooden deck to the**
8 **side of the pool bar, and I'm going to let you**
9 **look at Plaintiff's Exhibit 8, showing some color**
10 **photos. Is that an accurate depiction?**

11 **A: Yes, it is.**

12 **Q: And did you ---**

13 **A: Looks pretty good, too.**

14 **Q: Huh?**

15 **A: Looks pretty good, too.**

16 **Q: Did you build it?**

17 **A: Yeah. I built it. I had it built. Dwight,**
18 **actually, Dwight done the layout and I, I was a**
19 **labor. Jimmy Gerald and Dwight Cox and myself**
20 **built it.**

21 **Q: All right. Who spent the money ---**

22 **A: I did.**

23 **Q: --- to build that?**

24 **A: I did, every penny.**

25 **Q: And how much, approximately, have you invested in**

1 **that pool bar?**

2 A: Originally, about \$11,000, but every year since,
3 I've maintained it, water sealed it, painted it,
4 and replaced the awnings one time and replaced
5 the curtains a couple times. Nobody's spent
6 anything on that deck except me since day one to
7 now, nobody, not one homeowner, not one penny's
8 been out of the association, not one penny. That
9 was part of the agreement, original agreement.

10 **Q: Have you updated it and maintained it and kept it**
11 **up through the years?**

12 A: Yeah, yes, I have.

13 **Q: And who paid for that?**

14 A: I did, still do.

15 **Q: What role does that side deck play in your**
16 **business?**

17 A: Plays a good, good, good part of my business. I
18 mean, it gives people a place to sit out of the
19 sun, you know, some people, elderly people, kids,
20 handicapped people, and there aren't that many
21 people, whether people agree with it or not,
22 don't like to eat, stand and drink. I mean, I
23 don't like standing to eat and drink, personally,
24 but some people might, but maybe -- I don't
25 prefer doing that.

1 Number two, if it's 90, 95 degrees, I'll
2 see people all the time sitting on the deck, and
3 I know that anybody in this courtroom will agree
4 to that, I mean it's, that's not a, that's --
5 don't -- It's definitely what they're talking
6 about. The deck is always full of renters,
7 guests, of all types of people.

8 I see people over there with strollers or
9 kids, six or seven months old, that can't stand
10 the heat, obviously, because the skin, or the sun
11 will scorch the skin, obviously, so they're over
12 there on the side deck. People eat over there,
13 people that sit around and relax. A lot of
14 times, there's families over there.

15 There's seating over there, there's 16
16 seats on that side. There's only eight seats
17 originally by the pool itself. So that's one
18 reason that Dwight suggesting doing it, because
19 of the lack of seating around the pool area and,
20 and the commotion around the pool area. Plus, as
21 Sal mentioned earlier, the first or second year I
22 was open, there'd be people standing in line in
23 front of the bar to get drinks or snacks or
24 Daiquiris or whatever they might be getting, and
25 I know for a fact several homeowners approached

1 me about it then, one in particular was John
2 Malusky, which he's no longer a homeowner, but he
3 did, he's one guy I do remember, there's several
4 others that reproached me about having a traffic
5 jam, trying to get through -- there's an eight
6 foot section between the pool and the pool bar
7 wall, eight foot, boom, that's it; and when
8 you've got people in line in July, trying to
9 stand in line to buy my product, which is sodas
10 or drinks or alcohol, whatever it may be, and
11 then you've got somebody coming out of the hotel
12 to go to -- there's only one way to go to the
13 beach, and that was around by the pool bar, as
14 you can show, show the judge or anybody that
15 wants to see it, there's a entrance and exit area
16 that's only eight feet wide, you're going to have
17 a problem. You've got kids with floats, parents
18 with beach chairs, whatever it may be, and that
19 became a problem. There was always a problem
20 with people wanting to stop, "Hey," you know,
21 "Get out the way," da, da, da, you know, "Move,"
22 you know. Sometimes alcohol became involved with
23 it. Sometimes a customer that was in the hotel
24 didn't want to wait for him to get out of the way
25 and vice versa.

1 So, homeowners were seeing that and
2 Dwight was seeing that. I was young then. I'd
3 only been in business one or two years. I'd
4 worked for Dwight, but I'd never been in this
5 business before, not as an owner, and Dwight
6 suggested, you know, putting a deck on the back
7 side, and he'd go through the board of directors
8 which was, Marshall Melton was the president, and
9 that's the reason, that's how the deck became
10 conceived, was by Dwight. And Dwight being the
11 grantor, Dwight being the developer, Dwight being
12 the builder, and me working for Dwight for eight
13 years. I figured he knew, I mean, after he built
14 the concrete, he could actually build a little
15 13-by-nine foot deck. If he could build a five
16 million dollar condominium project, I figured
17 he'd be okay to build a deck. So, ---

18 **Q: Let me stop you a minute.**

19 A: --- he done that.

20 **Q: Did you talk to Mr. Melton ---**

21 A: Yes, I did.

22 **Q: --- about this construction?**

23 A: Yes, I did, several times.

24 **Q: What did he say to you?**

25 A: He gave me permission to put it up, him and

1 Dwight.

2 Q: Would you have spent \$11,000 of your own money
3 had you not had permission?

4 A: I want to give a sarcastic answer to that, but
5 I'm going to be, I'm going to be nice and say,
6 no, I did not. I would never spend \$11,000
7 without some kind of permission. I mean, I'm not
8 that ---

9 Q: Let me show you this photograph.

10 A: I'm not that stupid.

11 Q: Are you familiar with that photograph?

12 A: Yes, sir.

13 Q: Who took it?

14 A: I took that.

15 Q: And there's a date at the bottom. Who put that
16 on there?

17 A: I put it on there, 5/30/2007.

18 Q: May 30th, ---

19 A: That was Memorial weekend, by the way.

20 Q: Memorial Day weekend?

21 A: Yeah.

22 Q: That's May 30th of 2007.

23 A: Yes, sir.

24 Q: Does that accurately depict the awning or the
25 covering on ---

1 A: Yes, sir.

2 Q: --- deck?

3 A: Yes, sir.

4 Q: Does it look like that today?

5 A: Yes, sir. It might be faded a little bit, but
6 that's pretty, pretty close.

7 MR. NEWBY: I'LL OFFER THAT.

8 A: May I add, ---

9 Q: Wait, wait, wait, one thing at a time.

10 A: Okay. I've got a lot of information, and I'm
11 ready to let it go. Let's get this thing up and
12 get it over with.

13 Q: We'll get to that information before it's over.
14 I want to ask you briefly about the covering
15 because you mentioned it but then moved on so
16 quickly, I didn't have a chance. Is there any
17 other place on the pool deck or out there where
18 people can get out of the sun other than on ---

19 A: No, sir.

20 Q: --- the deck under your awning?

21 A: No, sir, or the rain.

22 THE COURT: AND THIS EXHIBIT 3 HAS BEEN
23 ADMITTED?

24 MR. NEWBY: I WOULD OFFER THAT. I

25 THINK THERE'S NO OBJECTION.

1 DEFENDANT'S EXHIBIT NUMBER 3

2 ADMITTED INTO EVIDENCE

3 Q: Now, you said you spoke to Mr. Melton and he gave
4 you permission to build it, and you did build it.

5 A: Yes, sir.

6 Q: When did you build this deck?

7 A: Probably April, maybe March or April of 1990.

8 I've got all the receipts. I forget. I think it
9 was April, April or, March, April. It was in the
10 spring of 1990.

11 Q: So next spring will be 20 years for the deck?

12 A: Right. Dwight actually built it, because he was
13 the contractor, and Jimmy Gerald, and I was the
14 labor, the three of us, actually. I paid for it,
15 but I helped Dwight and Jimmy build it. They
16 constructed it.

17 Q: Has the deck portion been there continuously
18 since you built it or had it built in 1990?

19 A: Yes, sir.

20 Q: All right. Now, I'm going to show you two other
21 photographs and ask you if you are familiar with
22 them.

23 A: Yes, sir, both of them.

24 Q: And who took those?

25 A: I did.

1 **Q: And is there a date on them?**

2 A: May -- April 5th, May 5th, 1990. I can't see it.

3 **Q: Let me look at that. Let me see if I can help**
4 **you.**

5 A: Oh, it says built in 1990, okay, in the right
6 corner.

7 **Q: It does say built 1990.**

8 A: Okay. What does it say -- I think, I think, the
9 same time, it should be May of 2000.

10 **Q: I don't see a date on these. Do you recall ---**

11 A: Yeah.

12 **Q: --- whether this was taken the same date as the**
13 **other?**

14 A: Yeah. They all, the whole -- Yeah, I did have
15 them -- Let me have them (referring to
16 eyeglasses). There's a whole stack and I got
17 them, the whole -- Yeah, yeah, it says built in
18 1990, yeah. Yeah, I took them.

19 **Q: But the pictures were taken by you?**

20 A: Yeah, about the same, I think, the same day those
21 were taken. They're all the same roll of film.

22 MR. NEWBY: WE'D OFFER THESE, YOUR
23 HONOR.

24 MR. BARNETT: WHEN HE SAYS THE SAME DATE
25 AS THE OTHER PICTURES, HE'S

1 REFERRING TO EXHIBIT 3?

2 A: Yes, sir. That's correct.

3 MR. BARNETT: YOUR HONOR, WE HAVE NO

4 OBJECTION TO THE PICTURES.

5 THERE'S WRITING ACROSS THE

6 BOTTOM OF THEM THAT MAKES

7 STATEMENTS OF FACT THAT WE

8 DO OBJECT TO.

9 A: I wrote -- I took the pictures and I done the

10 writing. You got a problem with that?

11 MR. BARNETT: WE OBJECT TO THE WRITING

12 BUT NOT THE PICTURES.

13 MR. NEWBY: AND THAT'S FINE ---

14 A: I did the writing too. I'll testify to that.

15 THE COURT: WE CAN WHITE THAT OUT OR

16 MARK THROUGH IT.

17 MR. NEWBY: EITHER WAY, BUT WE'RE NOT

18 OFFERING IT FOR THE PROOF

19 OF WHATEVER IT SAYS ON

20 THERE, JUST FOR THE PICTURE

21 ITSELF.

22 THE COURT: OR WE CAN CUT IT OFF,

23 HOWEVER YOU WANT TO DO IT.

24 MR. NEWBY: WHATEVER MR. BARNETT SAYS.

25 MR. BARNETT: IF WE COULD JUST AGREE TO

1 REDACT IT LATER, THAT'S
2 FINE, HOWEVER WE DO IT, AS
3 LONG AS THE WRITING'S NOT
4 PART OF THE RECORD.

5 THE COURT: ALL RIGHT.

6 MR. NEWBY: YOUR HONOR, I'M NOW
7 OFFERING WHAT'S BEEN MARKED
8 AS DEFENDANT'S EXHIBITS 4
9 AND 5.

10 THE COURT: SO ADMITTED THEN, WITHOUT
11 THE WRITING AT THE BOTTOM.

12 MR. BARNETT: OR THE SIDES, ALL AROUND.

13 THE COURT: WHATEVER WRITING IS ON
14 THERE.

15 MR. NEWBY: ANY OF THE WRITING.

16 DEFENDANT'S EXHIBIT NUMBER 4

17 DEFENDANT'S EXHIBIT NUMBER 5

18 ADMITTED INTO EVIDENCE

19 **Q: All right. Mr. Goude, I'm going to refer you,**
20 **first, to Defendant's Exhibit 4.**

21 A: Okay.

22 **Q: Tell me briefly what that is a picture of. I've**
23 **got to hand it up to the judge ---**

24 A: Well, there's two decks there. The one in the
25 center, I built probably about '92 or '93, the

1 one in the center. It stopped by the end of the
2 shower -- By the way, I built the shower, too,
3 for the record. I built the shower the same,
4 shower deck. So, that's something they've, that
5 was never in question, Judge, but I would like to
6 put that -- myself, I'd like to let that be
7 known. I built the shower that they use every
8 day. I built that also. That's never been in
9 question. But anyway, the deck that I built
10 stopped at the shower at the time.

11 **Q: Now, this deck that you're pointing to ---**

12 A: The center deck, the ---

13 **Q: Just wait a minute. --- extends seaward of ---**

14 A: Of the shower ---

15 **Q: --- the awning?**

16 A: Right.

17 **Q: And is it seaward of the ---**

18 A: Shower deck ---

19 **Q: --- parking lot?**

20 A: Yes, sir. This first deck right here, I built
21 that myself, personally. We stopped it, which I
22 say "we," me, and I had a couple guys help me,
23 stopped right here level with this four-by-four,
24 12 foot treated shower pole, that's where it
25 stopped. In '96, the board of directors, in

1 1996, they added this deck here, took my -- they,
2 they took this partition down.

3 There was boxwoods, you got some more
4 pictures here, there's boxwoods, there's more,
5 where's them other pictures, over here on the
6 side. There's boxwoods here that join right up
7 to the corner of the awning. The board, in 1996,
8 paid Chicora, because I was there when the guys
9 built it, paid Chicora \$400 to add this deck on
10 here. They took my partition down. They took
11 these boxwoods out here, there's about three or
12 four boxwoods they took out. The association
13 built this deck with association money, by
14 Chicora, in 1996 to join the walkover.

15 **Q: This is getting a bit confusing in the record.**

16 A: Okay.

17 MR. NEWBY: YOUR HONOR, WOULD YOU
18 OBJECT IF THE WITNESS
19 EITHER CAME UP HERE AND
20 POINTED THIS OUT TO THE
21 COURT OR STOOD RIGHT BACK
22 THERE AND DID IT, SO YOU
23 COULD SEE WHAT HE'S TALKING
24 ABOUT?

25 THE COURT: WHICHEVER.

1 A: Give us another picture. I can explain that.

2 **Q: Walk right behind there.**

3 A: Give me the rest of those pictures, Fred, I can
4 explain it, the decks, because I've got pictures
5 of all the decks.

6 **Q: All right. Let me say this.**

7 A: Okay.

8 **Q: We have to go slowly because she's got to take it**
9 **all down.**

10 A: Okay.

11 **Q: And it's got to be clear enough so that somebody**
12 **reading it in black and white can understand what**
13 **you're saying. So when you're pointing to**
14 **things, try to describe them.**

15 A: Okay.

16 **Q: If you would, just point out on this and show the**
17 **judge what you were just showing Mr. Barnett and**
18 **me.**

19 A: This is the deck that I built right here, which
20 is this deck right here.

21 **Q: You're now referring to Exhibit 5.**

22 A: This is it right here. This, obviously, is the
23 beach. This is this deck right here, and this
24 goes into the parking lot. These are the same
25 two decks.

1 **Q: Which portion did you build in 1990?**

2 A: I built this one right here.

3 **Q: Let's talk about ---**

4 A: Oh, 1990, ---

5 **Q: --- 1990, when you first built ---**

6 A: --- we all built, which is about six or seven
7 homeowners, and I can tell you the names if you
8 want to know, we built this after Hugo.

9 THE COURT: THAT WAS LIKE A WALKOVER,
10 BASICALLY?

11 A: A dune walkover, exactly. We built that, several
12 of the homeowners that are present here in this
13 courtroom today, and five others and myself,
14 built this deck on a Saturday. This is a dune
15 walkover. Prior to that, you stepped right off
16 the concrete, the pool deck, right into the sand.
17 It was gumbo back then, wasn't no sand. That's
18 one reason we built it. So, when it'd rain,
19 you'd actually fall or slip, and the pool, that
20 was always full of sand or clay, and the, and the
21 drain lines was always stopped up; so we built
22 that as the association group of seven guys on a
23 Saturday, and two of the guys can testify here
24 today that helped me. That's that.

25 **Q: Now, let me stop you again. Where did you build**

1 the deck, show me in the pictures, 4 and 5; the
2 deck that is part of this lawsuit today, where
3 does it show up in these ---

4 A: None of these. That's just, just a seating deck.
5 They, they, they, they want to keep those.

6 Q: So this came after ---

7 A: No, the same time. This, this was built at the
8 same time. This was built, the shower deck and
9 this was built at the same time. This was a add-
10 on.

11 Q: You're pointing to the right. Is that ---

12 A: That's the covered deck that's on right now.

13 Q: Okay.

14 A: That's the covered deck.

15 Q: And so it extended out beyond the ---

16 A: Right.

17 Q: --- parking deck?

18 A: Right. That was built the same time, the same
19 day, we got the shower deck and the seating,
20 seating deck.

21 Q: Now, earlier, you were saying that the property
22 owners association built something else.

23 A: This adjoining deck here. My deck stops, the one
24 I built stopped right here.

25 Q: All right. Look at that and tell me ---

1 A: That's it right there.

2 Q: All right. Well, before you talk about it, let
3 me offer this next photograph. Did you take this
4 one also?

5 A: Yeah, the same time. Yeah, yeah, it looks like
6 it.

7 MR. NEWBY: ANY OBJECTION?

8 MR. BARNETT: NO OBJECTION, AGAIN, TO THE
9 PICTURE, ONLY THE WRITING.

10 DEFENDANT'S EXHIBIT NUMBER 6
11 ADMITTED INTO EVIDENCE

12 Q: Now, again, I'm going to go slower than you are
13 because she's got to write all this down, okay?

14 A: Okay.

15 Q: You tell me which one you'd prefer to talk about
16 next.

17 A: Either one's fine with me.

18 Q: Well, let's talk about what's been marked as
19 Defendant's Exhibit 9.

20 MR. NEWBY: YOUR HONOR, I OFFER 7, 8,
21 AND 9.

22 MR. BARNETT: AND AGAIN, I'D JUST ASK,
23 WHEN WERE THESE TAKEN?

24 MR. NEWBY: ACTUALLY, MAY ---

25 MR. GOUDE: MAY 30TH.

1 MR. NEWBY: MAY 30TH, 2007.

2 MR. BARNETT: WHICH ONE ARE YOU REFERRING
3 TO?

4 MR. NEWBY: THAT WOULD BE ON 8, AND I
5 THINK THE TESTIMONY WAS
6 THEY WERE ALL TAKEN AT THE
7 SAME TIME.

8 A: I mean, nothing's changed, I mean, whether it's a
9 year or two. They're all the same. The deck's
10 been there since '90, '94, '96, the last 12, 15
11 years, the same thing, so.

12 THE COURT: THE SAME STIPULATION, IF
13 THERE'S WRITING, WE'RE
14 GOING TO REDACT THE
15 WRITING.

16 DEFENDANT'S EXHIBIT NUMBER 7

17 DEFENDANT'S EXHIBIT NUMBER 8

18 DEFENDANT'S EXHIBIT NUMBER 9

19 ADMITTED INTO EVIDENCE

20 **Q: I'm going to refer you, Luke, to Defendant's**
21 **Exhibit 9. Now, tell us who built what, when.**

22 A: I built this is in '94. It stopped right here at
23 the shower. In '96, the association built this,
24 took out two or three boxwoods, and added it to
25 where it would meet this right here.

1 Q: Tell us which number you're looking at, on the
2 back.

3 A: 8/24/09?

4 Q: Number 4.

5 A: Oh, Number 4, okay.

6 THE COURT: ARE YOU POINTING TO WHAT'S
7 RIGHT BEYOND THE RAILING,
8 IT LOOKS LIKE?

9 MR. GOUDE: YEAH. YES, MA'AM, RIGHT
10 HERE IS ---

11 THE COURT: THE WHITE RAILING?

12 A: This used to be -- When I built it, I stopped it
13 at the white railing, because this is all
14 shrubbery and landscaping and, you know,
15 vegetation beyond this white railing, originally.
16 So when you came off the parking lot, which that,
17 where my car is sitting, that's where the gate
18 was at, people would come off the walkway onto
19 the deck, out, down to the beach. They couldn't
20 come around this way.

21 So, in '96, the board, which was Steve
22 Clyburn, Al Metcalf, and Mark Korros, those were
23 the three board members. In '96 they hired --
24 Chicora used to be our property management
25 company at that time -- Chicora management

1 company, they hired a subcontractor to come in,
2 take this part of the railing, which I had it
3 blocked off, to take the shrubbery out here, take
4 the boxwoods out here, and they joined this deck
5 onto the deck I built; and the reason they did
6 that was so when people came out of the hotel
7 using the walkway, the half, half a parking space
8 that's in question now, they would not have to
9 come around onto the side deck to go to the
10 beach. They could come around the shower and
11 bypass through the deck area.

12 THE COURT: THEY COULD WALK ON THAT
13 HALF PARKING SPOT?

14 MR. PISTONE: YES, MA'AM, RIGHT, EXACTLY
15 RIGHT.

16 **Q: You're referring now to Exhibit 8, ---**

17 A: Exhibit 8. That's the front right there,
18 exactly. Before, they would come here and go up
19 around on the side deck. The board took these
20 boxwoods out. This was built and paid for by the
21 association in 1996. As you can see, it's been
22 painted there. I didn't paint that, and that's
23 all ---

24 THE COURT: PAINTED YELLOW?

25 A: That's painted, safety, for the walk, step up.

1 Obviously, I do not know. So the board did this
2 in 1996, and it's been that way ever since, on
3 that deck.

4 Q: Okay. And is this basically the way this
5 configuration looks today?

6 A: Yes, sir, no changes.

7 Q: Okay. You can have a seat, then. Now, Luke,
8 while you were out taking pictures on May 30th,
9 2007, -- By the way, what day did you say that
10 was?

11 A: Memorial Day weekend.

12 Q: Did you take these pictures also?

13 A: Yes, sir.

14 Q: Tell me what those depict.

15 A: Well, in, if I may say, in the '90s ---

16 Q: Just tell me what the pictures show.

17 A: Empty parking lot.

18 Q: Where in the parking lot?

19 A: Downstairs, no parking at all.

20 Q: And who took ---

21 A: I took them.

22 Q: Okay.

23 A: Luke took them.

24 Q: Is that the case with all of these pictures?

25 A: Yes, sir, empty parking spaces. There's some up

top, also. This is Memorial weekend.

MR. NEWBY: WE'D OFFER THESE, YOUR
HONOR.

MR. BARNETT: NO OBJECTION TO THE PHOTOS,
YOUR HONOR, JUST THE
WRITING ON THE PHOTOS.

THE COURT: THE SAME STIPULATION THEN.

DEFENDANT'S EXHIBIT NUMBER 10

DEFENDANT'S EXHIBIT NUMBER 11

DEFENDANT'S EXHIBIT NUMBER 12

DEFENDANT'S EXHIBIT NUMBER 13

DEFENDANT'S EXHIBIT NUMBER 14

DEFENDANT'S EXHIBIT NUMBER 15

ADMITTED INTO EVIDENCE

**Q: Luke, don't talk about the writing that's on
them. Just tell us quickly what you're showing
in these pictures, 10 through 15.**

A: The downstairs basement, empty; downstairs
basement, empty; downstairs basement, two
vehicles, one of them was Tom's, the maintenance
guy's, one vehicle; once again, downstairs,
vacant; and downstairs, vacant.

Q: And this is Memorial Day weekend of 2007?

A: Yes, sir.

Q: Not this year when tourism is supposedly down?

1 A: Right.

2 Q: Now, what other parking is there available around
3 or adjacent to the St. Clements, besides the
4 parking deck shown on these plans?

5 A: That's basically it. Now, we have some, some
6 additional parking, if you want to, on the
7 Caravelle towers behind us. A lot of people park
8 there, which is free parking, and they're very --
9 The Caravelle complex, when we originally done
10 the St. Clements, it was an umbrella resort.
11 Anybody that stays in any building in the, in the
12 Caravelle has always had adjacent and permission
13 to park their vehicle, use any facility in any of
14 the eight buildings. It's always been that way.
15 It still is that way.

16 I have tried to tell people in the past,
17 especially homeowners, that there's only two
18 oceanfront properties out of the eight buildings,
19 that's the Carolina Dunes and the St. Clements,
20 bottom line. The other six buildings has pools,
21 but they're not on the ocean, direct oceanfront.
22 A lot of people that stay in the other six
23 buildings, obviously, want to come to the St.
24 Clements and come to the Carolina Dunes because
25 we're direct oceanfront.

1 **Q: And did the Caravelle manage this property?**

2 A: Yes, all eight buildings, right. So we do have a
3 parking problem sometime, and the reason we do is
4 not only because of our guests but also we have
5 650 rooms in the eight buildings.

6 **Q: When do you see a parking problem?**

7 A: Only now -- In the '90s I seen it all the time.
8 So all this other stuff about we having a
9 problem, I'm just, they ain't, they ain't there,
10 they're not there. I'm there every day, so, and
11 I live half a block from the building, been there
12 for 20 years. So that's, that's, that's just
13 not, that's just not true. In the '90s, yes, a
14 parking problem, which I like parking problems,
15 that means we got people. When you got people,
16 you're making money; no parking problems, no
17 guests, no money. That's the way I think, as a
18 businessman. But anyway, the bottom line is we
19 don't have no parking problem now.

20 Two years ago, the City of Myrtle Beach
21 passed the meters, which was, several of us
22 businesspeople on the oceanfront was against it,
23 but they passed it anyway. We have 28 parking
24 spaces on the street beside the St. Clements
25 hotel, in between the Caravelle Hotel, there's a

1 public street easement there that, matter of
2 fact, Dwight Cox built, because there used to be
3 a beach access. When we done the St. Clements,
4 Dwight actually built that street so to give
5 access to and from the St. Clements. And in the
6 meantime, they had more parking there that
7 anybody could use. But now the city has enacted,
8 put meters there, so we have 28 parking spaces
9 that are hardly never full. Anybody that lives
10 in the City of Myrtle Beach has a city residence
11 parking permit, so you ain't got to pay to park,
12 so you can park free. So we have additional,
13 there's plenty of parking. That's all -- That's
14 just not true. That's just not true.

15 **Q: If you have local residents who are your bar**
16 **patrons, can they park on the street end free?**

17 A: Free, yes, they sure can, as long as they live in
18 the city.

19 **Q: Can they do that without having to come onto the**
20 **St. Clements ---**

21 A: Yes, sir. They ---

22 **Q: --- parking deck?**

23 A: --- sure can. Most of them do now, because it's
24 free parking and no hassle, and it's easier to
25 get in there than getting out the St. Clements

1 anyway.

2 **Q: Now, let's back-up. We sort of, or I had sort**
3 **of, I should say, gotten off track. I want to go**
4 **back to the beginning when you said you built**
5 **this deck. Have you used that deck continuously**
6 **since you built it?**

7 A: I have. We have.

8 **Q: Who are your patrons at the pool bar?**

9 A: Most of them are the hotel guests. Some of them
10 are Caravelle guests. Some of them are beach
11 guests. Some of them are locals. We have a
12 variety, but most of them come out of the hotel
13 or the Caravelle complex.

14 **Q: Okay. Tell me what this is a photo of.**

15 A: That's a photo of Roger Masters' car. It's
16 parked downstairs, been there four or five, six
17 years, I guess.

18 **Q: Who took that?**

19 A: I did.

20 **Q: And there's a date on it of 5/30/2007. Is that**
21 **when you took it?**

22 A: Yes, sir. But it's been there so long, it don't
23 really matter. It's been there for a long time.

24 MR. BARNETT: YOUR HONOR, AGAIN, NO

25 OBJECTION TO THE PHOTO,

1 ONLY THE WRITING.

2 MR. GOUDE: CAN I ADD SOMETHING TO

3 THAT, FRED?

4 MR. NEWBY: ONE THING AT A TIME. I'LL

5 GET TO YOU. YOUR HONOR,

6 THIS HAS NOW BEEN MARKED AS

7 DEFENDANT'S EXHIBIT 16.

8 THE COURT: SO ADMITTED, WITHOUT

9 OBJECTION, WITH THE

10 STIPULATION OF NO WRITING.

11 IF THERE'S WRITING ON IT,

12 WE'RE GOING TO REDACT THE

13 WRITING.

14 DEFENDANT'S EXHIBIT NUMBER 16

15 ADMITTED INTO EVIDENCE

16 **Q: This, you said, is a picture of somebody's car**

17 ---

18 A: Yes, sir.

19 **Q: --- that has been parked there for how long?**

20 A: Five or six, seven years, ever since he's been
21 there, a homeowner.

22 **Q: Is he still there?**

23 A: Still there.

24 **Q: Is this the one that I was questioning Mrs. Brown**
25 **about earlier?**

1 A: Yes, sir.

2 **Q: With some hesitation, I will now say, what was it**
3 **you wanted to say?**

4 A: Prior to this lawsuit against my company and
5 myself, there was anywhere from six to ten cars
6 being parked there on a daily basis, on a yearly
7 basis for years, Judge and Court. I know for a
8 fact. I'm not going to name names, but some
9 people in this courtroom today know what I'm
10 talking about.

11 **Q: Well, tell me what you're talking about.**

12 A: For example, some of the homeowners here had cars
13 parked there for months.

14 **Q: Who?**

15 A: Leon had his car parked there, for example.

16 **Q: For how long?**

17 A: In fact, he had a Burgundy Oldsmobile parked
18 there for years. I know five or six others that,
19 that had their cars parked. We all know that,
20 and they -- And I had no problem with that. They
21 should be able to. They own, they own a unit
22 there. I mean, I'm not that kind of person that
23 tries to, you know, get into somebody's business.
24 I mean, they should be able to park their car. I
25 had no problem with that; but then -- and they

1 had no problem with it. But then when they
2 started this lawsuit about this one and a half
3 parking spaces that's so, quote, so important to
4 the wellbeing of the St. Clements -- And Mrs.
5 Brown is the one that started this. I know that
6 for a fact. Everybody else knows that. She's
7 been the ringleader behind this thing the whole
8 time, since day one. I've been there, this
9 deck's been there for going on 20 years, and she
10 started the lawsuit against me and this parking
11 space ----

12 MR. BARNETT: YOUR HONOR, I'M GOING TO
13 OBJECT.

14 A: Can I finish? Can I finish what I'm saying?

15 **Q: No. You listen to me.**

16 A: I'm listening to you. I won't listen to him. I
17 listen to you.

18 **Q: Well, start now.**

19 A: Yes, sir.

20 **Q: If he raises an objection, then we all get quiet**
21 **until the judge rules ---**

22 A: Okay.

23 **Q: --- on the objection.**

24 A: All right.

25 THE COURT: MR. BARNETT?

1 MR. BARNETT: YOUR HONOR, THE LAWSUIT IS
2 CLEARLY BROUGHT BY THE
3 PLAINTIFF, NOT MS. BROWN,
4 AND I OBJECT TO HIM
5 TESTIFYING MS. BROWN
6 BROUGHT THE LAWSUIT.

7 MR. GOUDE: BUT SHE'S THE PRESIDENT OF
8 THE ASSOCIATION.

9 **Q: Well, let's move on to a different topic ---**

10 **A: Okay. Forget about ---**

11 **Q: --- that's more productive.**

12 **A: Okay. Back to the parking and the cars, there**
13 **were six, eight of them being parked on a regular**
14 **basis, yearly, monthly basis, downstairs. I had**
15 **no problem with that. In the same time, these**
16 **same people were starting to complain about**
17 **parking. This was in the '90s, and everybody was**
18 **making money. The hotel was being full, 99**
19 **percent occupancy. I was making twice the money.**
20 **The homeowners were making twice the money. We**
21 **all know that for a fact. I can back it up with**
22 **facts.**

23 Obviously, we had a parking problem, but
24 they decided I was the parking problem, but yet,
25 the people that were staying at the hotel was

1 also my customers. So my customers were their
2 customers. That's what I tried to tell them the
3 whole time, "I'm making your cash customers
4 happy, because they're staying in your unit,
5 paying you money, while I'm making money off the
6 food and drinks."

7 So then all of a sudden, they want to
8 separate the two. They don't want me to have no
9 parking there, but they want me to take care of
10 their customers. So then all of a sudden, when
11 this lawsuit is brought up, guess what? The
12 people that brought the lawsuit up, all their
13 cars vamoosed, except one, which is Roger
14 Masters'. So that, to me, is a double standard.

15 As soon as they brought this lawsuit
16 against me and started the lawsuit, the
17 homeowners that had their cars there, the board
18 got to them and said, "Hey, we're going to do
19 this. You need to clear out where we can
20 continue this lawsuit." And this one guy, Roger
21 Masters, the one guy that said, "No. I own at
22 St. Clements. I have a right to stay there," and
23 he's still there.

24 **Q: Had they, to your knowledge as a property owner**
25 **there, did they file suit against anybody else**

1 **for violating the parking ---**

2 A: No, sir, not as I know of.

3 **Q: --- policy?**

4 A: I never heard of it.

5 **Q: Okay.**

6 A: And by the way, you cannot use that parking space
7 there at all, that is, what is -- that is a car
8 parked in the parking space, period. At least
9 the parking space and a half that's in, that's in
10 question today, they can use it, a renter can use
11 it, homeowner can use it, I can use it, anybody
12 can use it, 24/7. It's not locked off. It's not
13 blocked off. So there's a big difference in
14 this, as far as I'm concerned, and one parking
15 space anybody can use to sit out of the sun or
16 eat or whatever it may be. I just wanted to
17 throw that in.

18 **Q: Previously identified as Defendant's Exhibit 1 is**
19 **a photograph that has the same date as the**
20 **others. Did you take that one?**

21 A: Yes, sir, I did.

22 **Q: And what is that a picture of?**

23 A: It's a corner parking space that they say is --
24 they've always used it on and off to park. If it
25 hadn't been used for parking, why'd they put "No

1 Parking"? Now, before the lawsuit, once again,
2 was started, there was a cone there and a "No
3 Parking," painted "No Parking" on the, on the, on
4 the concrete itself, "No Parking." Excuse me.
5 As soon as the lawsuit got started, they took
6 this "No Parking," where you could see it, it's,
7 I mean, it's painted, big letters, "No Parking,"
8 I don't think they, I don't think, to be honest,
9 I don't think they see "No Parking," that's why
10 it's so faded, but I seen it. I knew it was
11 there. But they took the one that was down, took
12 it up because they knew I was going, I could see
13 it and would probably use it; but they didn't see
14 that, and that's why I took a picture of it, but
15 that was a parking -- I know they say it wasn't
16 for parking, that's cool, but if it hadn't been a
17 parking space, why did they put "No Parking" in
18 there?

19 **Q: All right. And does it have one of these tall**
20 **curbs ---**

21 A: Curbs -- curb stop, curb stop.

22 **Q: To stop the wheels?**

23 A: Yes, sir.

24 **Q: Okay. That's not counted in the parking space**
25 **numbers that they've used today, is it?**

1 A: No, but obviously they, they don't want people to
2 use it, because they wouldn't have put "No
3 Parking" on there.

4 Q: While we're talking about the parking, do you
5 believe that there's any detrimental impact on
6 the parking at St. Clements because of your deck?

7 A: No, sir, I don't.

8 Q: What would be the detriment to you if the deck
9 had to be removed?

10 A: It'd have been quite a bit of, it'd probably be,
11 it'd be, it'd be a big hit.

12 Q: In what sense?

13 A: Well, people wouldn't have a place to sit down
14 and eat or drink or watch TV or listen to music
15 or sit out of the sun or sit out of the wind, sit
16 out of the rain, and I have never, you know, I
17 have never understood why a homeowner would not
18 want that deck there when their customers that's
19 staying in their unit, pay their rent, are the
20 same ones that's sitting on that deck; just never
21 have understood why you would want to -- it's
22 like cutting off your elbow to get to your thumb.
23 I just never could understand why.

24 If I had a chain there that said, "Nobody
25 Allowed Except St. Clements Beach Club or

1 Guests," I could understand that. But it's wide
2 open. There's no gates. There's no signs.
3 Anybody can sit there, any time, any, 24/7, and
4 most of the people that sit there and use it are
5 people out of the hotels that pay their rents. I
6 just never, I don't understand it. I never have
7 figured that out.

8 **Q: I'm looking now at a photograph marked as**
9 **Defendant's Exhibit 3. Are you familiar with**
10 **that?**

11 A: Yes, sir.

12 **Q: I see some plastic sheets that are ---**

13 A: Those are -- Those are marine covers. Those are
14 marine covers.

15 **Q: Do they go all the way around?**

16 A: Yes, sir.

17 **Q: And what is the purpose of those plastic sheets?**

18 A: Wind and rain and when the weather gets cool,
19 like in October and maybe March.

20 **Q: All right. On days like that, do you close**
21 **those?**

22 A: No, sir -- Oh, yeah, when we have days like that,
23 not, not this day, but yeah, today, when the
24 weather, yeah, when it's raining, yeah.

25 **Q: Can people sit on the deck ---**

1 A: Yes, sir.

2 Q: --- with those closed?

3 A: They love it.

4 Q: Can they get something to eat?

5 A: Yes, sir, they can.

6 Q: Can they get something to drink?

7 A: Yes, sir, they can.

8 Q: And if it weren't for this place and those
9 coverings that you've put there at your expense,
10 where would they go on a day like that?

11 A: Either stay in their room or go on, go on 17 and
12 go to Barefoot or Broadway or somewhere.

13 Q: Is there any other place at St. Clements that
14 they could sit outside and stay dry and ---

15 A: No, sir, not at all. And my point is this. Like
16 they're always saying, as long as your horse is
17 in the stable, keep him there, because if he gets
18 out, he might not come back. As long as they're
19 on our property, we should keep them there and
20 don't give them a reason to leave. So that's one
21 of the reasons I did that, because I don't, just
22 because it's raining, I don't want you to leave.
23 You can still stay there and stay out of the rain
24 and the sun and, and still get something to eat
25 and still get, still get something to drink, and

1 when it's cold, that's when I put them down.

2 That's marine covers, by the way, they come off
3 marine, yachts and boats, got them down in
4 Murrells Inlet.

5 Q: Are you providing that at any expense to the POA?

6 A: No, sir, not one dime.

7 Q: To your knowledge, does any member of the POA
8 live permanently on the property?

9 A: No, sir.

10 Q: Has anybody lived there permanently since it
11 opened?

12 A: No, sir.

13 Q: Does anybody run a business, a commercial
14 business, other than short term renting their
15 unit, anybody run a business on this property
16 other than you?

17 A: No, sir.

18 Q: Does anybody earn their living on this property
19 other than you?

20 A: No, sir.

21 MR. NEWBY: YOUR HONOR, IF YOU'LL GIVE
22 ME JUST A MINUTE. YOUR
23 HONOR, THAT'S ALL I HAVE OF
24 THIS WITNESS.

25 THE COURT: ALL RIGHT. MR. BARNETT?

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1 CROSS EXAMINATION

2 BY MR. BARNETT:

3 Q: Mr. Goude, at all times since your company's
4 purchase of this unit, you've been the president
5 and sole stockholder of BE-MI, Inc.; is ---

6 A: Yes, sir.

7 Q: I'm sorry?

8 A: Yes, sir.

9 Q: And there was a statement in one of the Exhibits
10 that Mr. Newby introduced earlier, where a person
11 made a statement that the association owns that
12 side deck. Is that an accurate statement?

13 A: Right, sure, ---

14 Q: You agree that the association owns the side
15 deck?

16 A: The property, yeah.

17 Q: I'm not asking about the property, the side deck,
18 the wooden side deck.

19 A: I donated it back to the association, yes, yeah.
20 I donated it back to the association. It's a
21 common area to be used by anybody, a common area.

22 Q: You donated the side deck back to the
23 association?

24 A: Yeah, for everybody to use, anybody ---

25 Q: When did you do that?

1 A: That's part of the agreement, original agreement.

2 MR. NEWBY: YOUR HONOR, I'M GOING TO

3 OBJECT ONLY TO THE EXTENT

4 THAT HE'S ASKING FOR LEGAL

5 CONCLUSIONS THAT MR. GOUDE

6 CLEARLY ISN'T QUALIFIED TO

7 RENDER, A LEGAL OPINION.

8 THE COURT: YOU MAY WANT TO DISCUSS

9 THAT WITH YOUR CLIENT.

10 MR. NEWBY: I THINK I COULD, BUT I

11 DON'T THINK I CAN RIGHT

12 NOW. SO, AT THIS POINT,

13 I'LL JUST STAND ON MY

14 OBJECTION --- ,

15 MR. GOUDE: I CAN MAKE IT REAL PLAIN.

16 YOU WANT ME TO MAKE IT

17 PLAIN?

18 MR. NEWBY: NO. I WANT HER TO RULE ON

19 MY OBJECTION.

20 MR. GOUDE: OKAY.

21 MR. NEWBY: YOU BE QUIET.

22 THE COURT: WOULD YOU RESTATE YOUR

23 OBJECTION?

24 MR. NEWBY: YOUR HONOR, HE'S ASKING

25 THIS WITNESS FOR LEGAL

1 OPINIONS AND LEGAL
2 CONCLUSIONS. HE'S A
3 LAYMAN. HE'S NOT QUALIFIED
4 TO ANSWER THOSE QUESTIONS,
5 AND I ---
6 THE COURT: WHAT WAS YOUR QUESTION
7 AGAIN?

8 MR. BARNETT: I HAD TWO QUESTIONS, YOUR
9 HONOR, "WHO OWNS THE DECK?"
10 AND, "WHEN DID YOU DONATE
11 IT BACK?"

12 THE COURT: I DON'T KNOW THAT YOU KNOW.
13 DO YOU KNOW WHO LEGALLY
14 OWNS THAT DECK?

15 MR. GOUDE: I THINK THAT WE ALL DO, THE
16 ASSOCIATION, AND, AND I'M
17 PART OF THE ASSOCIATION.
18 ANYBODY CAN USE IT.

19 THE COURT: I THINK THOSE ARE TWO
20 DIFFERENT QUESTIONS. IF
21 YOU ARE SAYING THAT YOU LET
22 ANYONE USE IT, THAT MAY BE
23 DIFFERENT THAN WHO LEGALLY
24 OWNS IT.

25 MR. GOUDE: THE ASSOCIATION, I GUESS, I

1 GUESS, THE ASSOCIATION.

2 THE COURT: WELL, THAT'S ANOTHER

3 ANSWER, YOU GUESS. IF YOU

4 DON'T KNOW, YOU MAY OUGHT

5 TO SAY YOU DON'T KNOW. IF

6 YOU SAY YOU ALLOW ALL THESE

7 HOMEOWNERS TO USE YOUR

8 DECK, SIDE DECK, THAT'S

9 ANOTHER MATTER.

10 MR. GOUDE: WELL, THAT'S, YEAH, THAT

11 SOUNDS EVEN BETTER.

12 THE COURT: I'M NOT TRYING TO TESTIFY

13 FOR YOU.

14 MR. GOUDE: I MEAN, HONESTLY, THE

15 PARKING IS OWNED BY THE

16 ASSOCIATION, BUT I BUILT ON

17 THE DECK, YEAH, SO, BUT

18 IT'S ON THE ASSOCIATION

19 PROPERTY, SO THAT'S WHAT I

20 MEANT BY ANYBODY CAN USE

21 IT. I MEAN, OBVIOUSLY, I

22 BUILT IT. I OWN THE WOOD

23 AND THE AWNINGS AND THE

24 CURTAINS. I MEAN,

25 OBVIOUSLY, I OWN THAT

1 BECAUSE I BUILT IT; BUT AS
2 FAR AS IT SITTING ON THE
3 PARKING SPACE, I WOULD SAY
4 I HAVE ENOUGH SENSE TO
5 REALIZE THAT THE HOMEOWNERS
6 ASSOCIATION OWNS THE
7 PARKING, BECAUSE THAT'S,
8 THAT'S WHAT I MEANT BY
9 LETTING ANYBODY USE IT AND
10 ANYBODY CAN USE IT. I'M
11 NOT TAKING OWNERSHIP OF THE
12 PARKING DECK, OBVIOUSLY,
13 BUT I AM TAKING PART, I'M
14 TAKING RESPONSIBILITY AND
15 OWNERSHIP OF THE DECK,
16 BECAUSE THAT'S MY
17 RESPONSIBILITY.

18 THE COURT: I THINK YOU HAVE HIS
19 ANSWER. HE DOESN'T REALLY
20 KNOW.

21 MR. BARNETT: WELL, I THINK HE'S ANSWERED
22 WHAT I THOUGHT.

23 **Q: Mr. Goude, you know what ownership means, don't**
24 **you?**

25 **A: Well, I don't ---**

1 Q: I mean, you own your car, you own your house?

2 A: No, sir. I don't know.

3 Q: You don't know whether you own your car?

4 A: No, sir, I don't.

5 Q: You don't know whether you own your house?

6 A: No, I don't.

7 THE COURT: DO YOU HAVE A DEED TO THAT

8 ---

9 A: Yeah. I got a deed.

10 THE COURT: DO YOU HAVE A DEED TO THE

11 SIDE DECK?

12 A: No, ma'am.

13 Q: But I believe ---

14 A: Yeah. I own my car and my house. Sure, I do. I
15 mean, yeah, I've got what you're saying.

16 Q: All right, sir, thank you. And if I understand
17 correctly what you just testified to, and you
18 correct me if I'm mistaken, if I understand
19 correctly what you just said, you own the wooden
20 deck itself, ---

21 A: Yes.

22 Q: --- the structure, but you're saying you don't
23 own the pavement ---

24 A: No, I'm an -- the, the association, the
25 association ---

1 Q: Let me finish my question, if I may, and then ---

2 A: Okay.

3 Q: That you say that you own the wooden deck itself
4 and the structure above it, but ---

5 A: Right.

6 Q: --- that you do not own the paved parking lot
7 upon which it sits; is that ---

8 A: Yes, sir.

9 Q: --- correct?

10 A: Yes, sir.

11 Q: Okay, thank you.

12 A: Yes, sir. But I am a part owner because I'm a
13 member, member of the homeowners association.

14 Q: I understand, right. And, in fact, as you
15 testified earlier, you were involved with the
16 development of the condominium project, at least
17 to the extent of helping with the sales?

18 A: The sales for it, yes, sir.

19 Q: In fact, you were the sales and marketing
20 director for the St. Clements project in 1986?

21 A: Yes, sir.

22 Q: And, as such, you've indicated you've helped sell
23 a number of the condominium units?

24 A: Quite a few.

25 Q: And, of course, you've been an owner yourself

1 since 1988 of one of those units?

2 A: Of St. Clements Beach Bar, yes, sir.

3 Q: And so you're familiar with the Master Deed for
4 ---

5 A: Some of it, yes, sir.

6 Q: --- the St. Clements? And the Master Deed
7 applies to all the unit owners at St. Clements,
8 does it not?

9 A: I think so.

10 Q: And isn't it true, I think you testified to some
11 extent before, but isn't it true that there has
12 been a parking problem at St. Clements?

13 A: In the '90s, ---

14 Q: In the past?

15 A: Not 2009 but in the '90s, yeah, when we was all
16 making money, yeah. Which I love parking
17 problems, that means we're making money.

18 Q: All right, sir. And you say you built the deck
19 in ---

20 A: 1990.

21 Q: --- 1990, around what, around May ---

22 A: Spring, after Hugo.

23 Q: After Hugo,

24 A: Yes, sir.

25 Q: --- around May of 1990, is that approximately ---

1 A: March, April, May, somewhere around there.

2 Q: March, April ---

3 A: In the spring.

4 Q: In the spring, okay. And did you obtain a
5 building permit from the City of Myrtle Beach for
6 the construction of that deck?

7 A: Christos, he owns Atlantic Awning, he was the guy
8 that got the permits. He put the awning up, and
9 we built the deck, Dwight, Jimmy, and I.

10 THE COURT: IS THAT CHRISTOS KOTSOVOS?

11 MR. GOUDE: YES, MA'AM.

12 A: He provided the permit. It's in the contract.

13 Q: And that ---

14 A: Did you see the contract?

15 Q: What contract are you referring to?

16 A: To the awning contract, Atlantic Awning give me,
17 he gave me the contract. I bought the awning
18 from him.

19 Q: Now, did you not just testify earlier that you
20 and three or four other individuals constructed
21 the deck itself, the wooden deck?

22 A: Yeah, yes. Christos put the awnings up.

23 Q: And Christos put the awning on?

24 A: That attached to the deck, yeah.

25 Q: All right, sir. So the deck was there before

1 **Christos put the awning ---**

2 A: The same time, we did it at the same time, within
3 three or four days.

4 **Q: Okay. But the deck came first, correct?**

5 A: Well, maybe so.

6 **Q: I mean, for whatever period of time, the deck ---**

7 A: Maybe so.

8 **Q: --- came first?**

9 A: Maybe so. I don't recall exactly what day was
10 what, but the awnings were put up at the same
11 time the decks were, because they were wrapped
12 all the way around the front.

13 **Q: But the point is, you didn't pay Christos to**
14 **build the deck, did you, you built that yourself,**
15 **he built the awning?**

16 A: No. He put, he put, he put the four-by-fours on
17 the corner for the deck to be attached to the
18 awning, we attached it, yeah.

19 **Q: To the awning.**

20 A: Yes, sir, yes, sir. That went, that went to the
21 floor, was 12 foot, four-by-four treated poles on
22 the corners, that's what the awning's attached
23 to, yeah. We didn't build that, no. He put them
24 up.

25 **Q: Mr. Christos ---**

1 A: Yeah, right.

2 Q: --- put up the four-by-four ---

3 A: Right.

4 Q: --- posts upon which the awning was affixed?

5 A: Well, yeah. I wouldn't think they, they're not
6 going to just hang it out to scale by itself. I
7 mean, you got to have it attached to something.

8 Q: I understand.

9 A: Okay. I'm going to educate you on these awnings,
10 now.

11 Q: But the wooden deck upon which ---

12 A: We built that. Jimmy, Dwight, and myself built
13 that.

14 Q: Okay. Christos didn't built the wooden deck?

15 A: No, sir, not, not the wood deck.

16 Q: That's right. Y'all built that, and you hired
17 Christos to come in and put the awning ---

18 A: Right, all at the same time.

19 Q: Yes, sir.

20 A: And all, it was all four made together.

21 Q: Okay. So Christos did not build the wooden deck,
22 the structure itself, just the awnings ---

23 A: For the fourth time, he did not build the wooden
24 deck.

25 Q: Okay. And my question to you is, did you obtain

1 a building permit from the City of Myrtle Beach
2 to build the wooden deck itself before you built
3 it?

4 A: Not, not personally, I didn't, no.

5 **Q: Have you ever seen a building permit?**

6 A: No, sir. Dwight Cox said he took care of it at
7 the city over at the penthouse, with, with Gary
8 Ownbey, was the building director at the time for
9 the City of Myrtle Beach. And the penthouse was
10 getting a C.O. about that time, so Dwight, he
11 took care of that. And, and by the way, sir,
12 Dwight Cox represented the St. Clements
13 Homeowners Association through all this time
14 after Hugo. So he represented me and I was okay
15 with that. But go ahead.

16 **Q: But you've never seen a building permit for that**
17 **deck?**

18 A: (Indicates negatively.)

19 **Q: And describe for me, briefly, the type of**
20 **business that you operate there at the pool bar.**

21 A: I sell food and drinks.

22 **Q: And that's been the business from the beginning?**

23 A: Since '88.

24 **Q: And is the side deck a part of your business, is**
25 **that operated as part of your business?**

1 A: Well, yes, sir, sure, people use it. My little
2 girls both have used it. It's open all the time.

3 Q: And I believe you testified, in fact, it's an
4 important part of your business, isn't it?

5 A: Well, yeah. It is an important part, yeah.
6 People need out of the sun and rain, yeah.

7 Q: And, in fact, at times, you've sold alcoholic
8 beverages from the deck, have you not?

9 A: Yeah, July the 4th, one day a year.

10 Q: And you've had a bartender selling beverages from
11 ---

12 A: One day of the year.

13 Q: And ---

14 A: July the 4th, you know ---

15 Q: Who cleans off the tables on the deck?

16 A: Who cleans them off?

17 Q: Who cleans them?

18 A: We do, me and my staff.

19 Q: Your company?

20 A: Everybody, yeah, we clean everything around the
21 pool deck, including the other side, too, you
22 know, that's considered the pool deck, quote,
23 pool deck. We clean that, too, by the way.

24 Q: Let me show you what's been marked Plaintiff's
25 Exhibit Number 8 and ask you, that first page, is

1 that a side view of the deck in '92?

2 A: Yes, sir.

3 Q: And does this picture, this top picture on the
4 first page, does that show accurately the awning
5 that you say Christos installed?

6 A: Right.

7 Q: So that was installed about 1990?

8 A: Right.

9 Q: And then I notice, in later pictures, the ones
10 that you've introduced, and there may be some
11 here, let me just take as an example, ---

12 A: That one right there?

13 Q: Yes. Here's one in 2008.

14 A: Sides are definitely ---

15 Q: Well, let me ask the question.

16 A: Okay. But I know what you're going to ask me.
17 I'm getting ready to tell you. Save you ---

18 Q: I appreciate that, but the court reporter needs
19 to hear it and the judge does, too. The picture
20 from '92 shows the awning you say ---

21 A: Christos.

22 Q: --- Christos constructed, and it stops about two-
23 thirds of the way across the side deck, and the
24 2008 picture shows that awning or an awning
25 extending fully all the way across the side deck,

1 **and I was going to ask you, when was that awning**
2 **expanded?**

3 A: The awning itself was expanded in '96, and here's
4 the reason why, because, because wind got
5 underneath it, started ripping it back and faded
6 at the top. If you'll look at the bottom part of
7 it, it's the same dimension. That ain't changed.
8 Christos came back and added this on because
9 people were starting to complain out of the hotel
10 about noise. There was a plain vinyl top on it.
11 Christos came back and put insulated panels in
12 the top to keep the noise down, in the top of it,
13 and it was eight foot sections, and that's when
14 he said, this is not eight foot increments, and
15 we did eight foot sections in order for it to be,
16 if you see these panels here, eight foot
17 insulated, that was to keep the noise down. It's
18 the same dimensions at the bottom, no change. It
19 was a new awning with a new top to keep the noise
20 down because the ---

21 **Q: So, really, just replaced the awning with a**
22 **larger ---**

23 A: The top, the top, the top, but the bottom's the
24 same.

25 **Q: I understand, okay.**

1 A: No more parking space, the same parking space.

2 **Q: And was that the same time that the plastic**
3 **siding was placed ---**

4 A: No, no. That's always there. You can go back
5 and look. That's always been there. Plastic
6 side's always been underneath there. That's not
7 a problem.

8 **Q: Okay. You just extended it further out ---**

9 A: Yeah, because they wouldn't fit. Those wouldn't
10 fit. The old, old ones wouldn't fit the new
11 ones, and it's only eight foot panels. Matter of
12 fact, this was a vinyl top. This is a vinyl top,
13 insulated panels. It's about two inches thick.
14 It's still there today. It keeps the noise down,
15 but it's the same width, I mean, as far as the
16 deck.

17 **Q: And did the -- Actually, the replacement of that**
18 **awning in 1996, did that change the exterior**
19 **appearance of the condominium, of your unit?**

20 A: I don't think so. I think it looks better
21 myself. I think it's an improvement.

22 **Q: It's better, but it's different, isn't it?**

23 A: Pardon me?

24 **Q: I say, you changed it, you think, to the better,**
25 **but it changed it, didn't it?**

1 A: Well, I mean, don't you think it looks better?
2 Why don't you take that and answer me? I mean,
3 it's a pretty simple question. I mean, sure, it
4 looks better.

5 Q: Mr. Goude, my question's very simple. Did that
6 not change the appearance ---

7 A: It looks better. Yeah, it changed it. But it's
8 according to what you say changed? I think it
9 looks better. It's an improvement.

10 Q: So you agree, it changed it, the appearance, it
11 ---

12 A: Well, sure, it changed it, yeah. But it's, but
13 it's, but it's, to me, it's an improvement.

14 Q: And did you seek or obtain the approval of the
15 board of directors of the association to change
16 the appearance in 1996?

17 A: No. But they got it in 1990, so I didn't think I
18 needed it again.

19 Q: Now, you say that your pool bar business that you
20 operate on the pool bar, which includes the side
21 deck, is a business that sells food and drinks
22 and beverages.

23 A: Yes, sir.

24 Q: And it sells not just to the owners and guests
25 and renters at the St. Clements but to the

1 **general ---**

2 A: General public, everybody's -- it's a bar in this
3 town, it's open to the public, yes. Sure I do.
4 I have a business license, by the way, from the
5 city and county, state, federal, all that stuff.
6 So that's not a problem.

7 **Q: And how many employees do you have working there?**

8 A: Anywhere from one to five to six, according to
9 what time of the year it is.

10 **Q: Okay. And do you spend considerable time there**
11 **yourself ---**

12 A: Most of the time, I do now.

13 **Q: So are you speaking, the time of year, would it**
14 **be the busy season, the summer season that you**
15 **would have five or six employees, that's the**
16 **busiest time, that's when you have that many?**

17 A: Well, yeah. I think that would be fair to say.

18 **Q: And do you also have entertainment there from**
19 **time to time?**

20 A: I do.

21 **Q: And do your employees park on the parking spaces**
22 **at St. Clements?**

23 A: Sometimes they do. Sometimes they don't.

24 **Q: And not only you and your employees park there,**
25 **but also don't your customers park in the parking**

spaces at the St. Clements?

A: Sometimes they do. Sometimes they don't.

Q: Mr. Goude, isn't it true that you have, from time to time and even recently, told people who came and tried to use that side deck that unless they had purchased food or drinks from you, that they should not sit there?

A: Yeah, unless they are staying at the hotel or unless they're a homeowner.

Q: Mr. Goude, I'll show you what's been marked Plaintiff's Exhibit Number 7, which is a letter addressed to you on March 27th, 1991, and if you'll look at the third main paragraph of that letter, and they ask there, "Even though you have assured me verbally that you have written permission for the parking spaces, would you please help us update the Homeowners Association's files by supplying us with these written documents?" Did you receive that letter?

A: I'm sure I did.

Q: And did you provide the association with the requested written consent ---

A: Probably not.

Q: Let me finish the question. Did you provide the association with the requested written consent

1 **for the use of those two parking spaces occupied**
2 **by the side deck?**

3 A: One and a half parking spaces, by the way. Let's
4 make that, let's get that correct, okay? I'm
5 kind of, I'm kind of getting a little bit, it's,
6 you know, two parking spaces, it's one and a
7 half, okay?

8 **Q: Can a car park in the other half space?**

9 A: One and a half is what I use, one and a half.

10 **Q: Can a car park ---**

11 A: One and a half is what I use. Yeah, if you've
12 got a mini car or a motorcycle or a golf cart,
13 you can park there. No, I probably didn't
14 respond to that, probably didn't.

15 **Q: I'm sorry?**

16 A: I said I probably didn't respond.

17 **Q: Did not respond?**

18 A: I can't remember. I can't recall. I probably
19 didn't.

20 **Q: Do you have in your possession today a written**
21 **consent for the use of the parking spaces**
22 **occupied by the side deck?**

23 A: Yeah. It's on the table over there.

24 **Q: Is that the one that was not admitted to**
25 **evidence?**

1 A: That's the one on that table that Marshall Melton
2 testified to.

3 Q: You were here earlier today. Is that ---

4 A: Pardon?

5 Q: You were here during the trial, when they tried
6 to introduce that piece of paper?

7 A: Yeah. I was here.

8 Q: And that's the paper you're talking about, this
9 piece of paper that was not---

10 A: Yeah.

11 Q: Other than the paper that can't be introduced as
12 evidence, do you have any written ---

13 A: I have the testimony from Mr. Marshall Melton,
14 who's in this court, ---

15 Q: Any written statement, any written statement ---

16 A: Well, this is testimony. I think testimony is
17 more than written. If that's -- So what's,
18 what's your question, you want to know if it's
19 written or if it's testimony? I had the man
20 sitting there, testified he did give information,
21 against a piece of paper you would not allow
22 because you said, whatever rule, you ruled
23 against. I'd rather have the testimony than the
24 piece of paper, personally. Now, what's the
25 question again?

1 Q: Do you have a written statement giving you
2 permission to ---

3 A: Yes, I do.

4 Q: --- put the parking on the two sides ---

5 A: On that table over there.

6 Q: May I finish the question, please?

7 A: Yes, sir.

8 Q: Other than the piece of paper that was not
9 admitted into evidence.

10 A: No, not admitted into evidence, yeah. It's
11 still, still, I've got it in my possession over
12 there, and it was given to me.

13 Q: I'm going to ask it one more time.

14 A: I just answered it for you.

15 Q: Let me ask you this question one more time.

16 Other than the piece of paper that we're speaking
17 of that is not admissible as evidence, do you
18 understand the paper we're talking about?

19 A: Yeah. I understand what you're talking about.

20 Q: Other than that piece of paper, do you now or
21 have you ever had in your possession any written
22 consent from the association's board of directors
23 to use the two parking spaces or one and a half
24 spaces upon which the side deck is located?

25 A: Not written, no. Orally, I do.

1 **Q: Thank you, no further questions.**

2 **MR. NEWBY: NOTHING FURTHER ---**

3 THE COURT: MR. NEWBY?

4 MR. NEWBY: --- FROM THIS WITNESS.

5 THE COURT: ALL RIGHT.

6 MR. NEWBY: YOUR HONOR, THAT'S THE
7 DEFENDANT'S CASE.

8 THE COURT: ALL RIGHT. MR. BARNETT, DO
9 YOU HAVE ANY REPLY?

10 MR. BARNETT: WE HAVE A BRIEF REPLY, YOUR
11 HONOR. I DON'T KNOW -- I
12 KNOW YOU HAVE TO LEAVE,
13 WHAT TIME, THREE?

14 THE COURT: I NEED TO LEAVE HERE ABOUT
15 3:15. DO YOU THINK YOUR
16 WITNESS WILL BE LONGER THAN
17 THAT?

18 MR. BARNETT: YOUR HONOR, I'LL BE GLAD TO
19 TRY. IT'S GOING TO BE
20 CLOSE, AND IF WE HAVE TO
21 STOP, WE CAN STOP.

22 THE COURT: I KNOW WE HAVE SOME TIME
23 TOMORROW AFTERNOON.

24 MR. BARNETT: RIGHT. AND WE PROBABLY
25 NEED SOME TIME TO GIVE A

1 SUMMATION, SO WHICHEVER YOU
2 PREFER.

3 THE COURT: HOW LONG DO YOU HAVE
4 TOMORROW AFTERNOON?

5 MR. BARNETT: I THINK WE HAVE FROM LIKE
6 1:30 TO THE REST OF THE
7 DAY. WE'VE GOT PLENTY OF
8 TIME IF YOU WANT.

9 (THE HEARING RECESSED ON 08-24-09 AT 3:02 P.M.)

10 *****OFF THE RECORD*****

11 (ON THE RECORD-DAY 2)

12 THE COURT: MR. BARNETT, DID YOU WANT
13 TO RE-CALL A WITNESS TODAY?

14 THE COURT: YES. WE HAVE A COUPLE
15 REPLY WITNESSES, YOUR
16 HONOR.

17 THE COURT: OKAY, VERY GOOD.

18 MR. BARNETT: THE PLAINTIFF CALLS BARBARA
19 BROWN TO THE STAND, PLEASE.

20 THE COURT: MS. BROWN, PLEASE COME BACK
21 AROUND. MR. BARNETT, DO

22 YOU WANT TO RE-SWEAR HER OR

23 DO YOU WANT TO JUST

24 CONSIDER HER SWORN IN ---

25 MR. BARNETT: IF YOUR HONOR JUST REMINDS

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[CONTINUED IN VOLUME II]