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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON | ) | IN THE COURT OF COMMON PLEAS<br>NINTH JUDICIAL CIRCUIT |
| Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Brianna Stello, Jennifer Sellars, Dominique Powell, Jennifer Mayo and James Hardy,<br><br>Plaintiffs,<br><br>v.<br><br>Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc.,<br><br>Defendant. | ) | Civil Action No. 2019-CP-10-03390<br><br>**ORDER** |



This matter came before the Court on cross-motions for summary judgment by Plaintiffs and Defendant Mariner's Cay Racquet & Yacht Club ("Mariners Cay"), as well as a motion by Plaintiffs to amend the Complaint.

The Court heard the motions on September 19, 2022. Attorney Sean A. O'Connor appeared on behalf of Plaintiffs. Attorneys Robert H. Jordan and John W. Fletcher appeared on behalf of Defendant. The Court reviewed and considered all filings and heard and considered arguments of counsel. For the reasons set forth herein below, the Court hereby GRANTS Plaintiffs' motion to amend the Complaint, GRANTS Plaintiffs' motion for summary judgment, GRANTS the injunctive relief requested by Plaintiffs, DECLARES that the moratorium purported to be enacted by Defendant was legally impermissible and may not be enforced by Defendant, and DENIES Defendant's motion for summary judgment.

## FACTUAL BACKGROUND

Plaintiffs own condominium units in Mariner's Cay Racquet & Yacht Club ("Mariners Cay"), a condominium community located within the City of Folly Beach, South Carolina. When the unit owners acquired title to their units, they became members of the Mariner's Cay Racquet and Yacht Club Homeowner's Association ("Association"). Each unit owner ("Owners") in Mariners Cay is subject to the Master Deed which was recorded on May 12, 1982 at Book J128, Page 300 in the Charleston County Register of Deeds office.

Some of the Plaintiffs have in the past rented their condominium units on a short-term basis, and to further that purpose, have marketed and advertised their units online on vacation rental websites and/or applications as being available for such short-term rentals. Other Plaintiffs purchased their units after the Association's Board of Directors implemented and caused to be recorded a series of "moratoriums" prohibiting short-term rentals; these Plaintiffs have not yet been allowed to rent their units short term, but have asserted in Plaintiffs' amended complaint that they wish to do so.

Every mandate the Owners in Mariner's Cay are required to follow, under the recorded governing documents, are (1) a Covenant in the Master Deed, (2) a By-Law, or (3) a rule or regulation that the Board is authorized to promulgate under Article III, Section 3, subsection (e) of the Master Deed.

The Master Deed addresses leasing of the units in Article III "Property Rights," Section 2 pertaining to "Units," and states in relevant part as follows:

> Each Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for all purposes constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be owned in fee simple and which may be conveyed, transferred, ***leased*** and encumbered in the same manner as any other real property. Each Owner, subject to the provisions of the Act

> and this Master Deed, shall be entitled to the exclusive ownership and possession of his Unit.

(Emphasis added.) Also under Article III, in Subsection 3 pertaining to "Common Area and Facilities," it states:

> The Board shall have the right to promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee.

Article IX explicitly addresses "Leasing of Units" in Section 7: "Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented."

Plaintiffs, in deciding to purchase their units in Mariner's Cay, knew that the Master Deed allowed for rentals of their units, without any time limitation or minimum lease duration.

On October 5, 2018, the Board of Directors of Mariner's Cay Racquet and Yacht Club ("Board") sent an email to the unit owners addressing short-term rentals. In the email, the Board complained about and criticized what it called "the negative effects of short-term rentals of units." In that email, the Board stated that "the best way to maintain the residential quality of Mariners Cay is to amend the Master Deed and to prohibit the Short-Term Rental of units."

The language of the Master Deed setting forth the procedure for amendments states as follows: "The Master Deed may be amended at any time and from time to time after notice as hereinabove provided has been given by a vote of not less than seventy-five percent (75%) of the total vote of the Association." Master Deed Article XI, Section 1(b).

The Board began the procedure for an amendment by sending out on October 9, 2018, a notice of a town hall meeting to discuss the options available and what the amendment would mean for the community. On October 19, 2018, the Board sent another email proposing an amendment

to the Master Deed prohibiting the rental of units for terms of less than thirty (30) days. Again the Board acknowledged, "[t]his would require a Vote to amend the Mariners Cay Master Deed."

In preparing for the vote the Board found that, of the 135 units in Mariners Cay, approximately 42 units intended to vote against the proposed changes, which accounted for approximately 31% of the units. Recognizing that the vote would be less than the 75% requirement in the Master Deed to implement the proposed change, and so would fail, the Board did not proceed with the proposed amendment for a vote by the owners. At no time since have the Members taken an official vote in relation to the amendment of the Master Deed regarding short-term rentals.

On May 28, 2019, the Board announced a "moratorium" on short term rentals.[1] The Board claimed that it made this decision based on findings of the Mariner's Cay Livability Committee. The moratorium document stated in part, "Investors and realtors have recently uncovered the beauty of the residential neighborhood, and over the past three and a half years 50% of all new condo purchases have been for investment rental use. Through a survey, the Board found that a majority of the current owners want 'some' rental restrictions." In purporting to impose the moratorium, the Board voted unanimously in favor and then announced the moratorium, in contravention to its prior statement that prohibiting short term rentals would require an amendment of the Master Deed by vote of approval by 75% or more of the members of the Association.

The Summons and Complaint in the herein action were filed on June 24, 2019. The action was referred to the Master-in-Equity via a consent order filed January 20, 2020. Plaintiffs and Defendant filed their respective cross-motions for summary judgment on July 8, 2022. Plaintiffs filed their motion to amend the Complaint in August 8, 2022.

[1] The original version of the moratorium was recorded in the Charleston County Register of Deeds office on November 13, 2019 in Book 0839 at Page 332. Three subsequent "renewals" of the "temporary" moratorium were recorded on March 18, 2020 in Book 0867 at Page 848; on April 22, 2021 in Book 0983 at Page 949; and on April 28, 2022 in Book 1104 at Page 750.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. Plaintiff's motion to amend the Complaint is GRANTED.

### A. Introduction

Plaintiffs filed a Complaint on June 24, 2019 asserting breach of contract and requesting injunctive relief and a declaratory judgment against Mariner's Cay Homeowners Association ("HOA") after the HOA's Board of Directors purported to enact a moratorium prohibiting short-term rentals of owners' condominium units. Defendant answered and counterclaimed against Plaintiffs for alleged breaches of the HOA's governing documents.

On July 19, 2022, both motions for summary judgment were scheduled to be heard before the Court. Prior to the hearing Plaintiffs filed an affidavit on behalf of Jennifer Sellars, an owner of a condominium unit in Defendant's HOA who bought her unit after the purported moratorium went into effect. Sellars sought to join as a Plaintiff. The Court continued the hearing and instructed Plaintiffs to file a Motion to Amend the Complaint to add the new Plaintiff(s). On August 8, 2022 Plaintiffs filed a Motion to Amend Complaint with a proposed Amended Complaint attached. Thereafter, Defendant filed a *Memorandum in Opposition to Plaintiff's Motion to Amend* on August 22, 2022. Plaintiffs filed a Reply Brief on September 16, 2022.

For the reasons set forth hereinbelow, Plaintiffs' Motion to Amend Complaint is GRANTED.

### B. Applicable standard

Under Rule 15 of the South Carolina Rules of Civil Procedure, "...a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." SCRCP 15. "Leave to amend pleadings pursuant to Rule 15 SCRCP shall be liberally and freely given when justice so

requires and does not prejudice any other party." *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1977); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool*, 329 S.C. 328–9, 494 S.E.2d 822 (1998) (citing *Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct.App.1987)) "This rule strongly favors amendments, and the Court is encouraged to freely grant leave to amend." *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (S.C. App. 1987). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." *Id.* (citing Fed. R. Civ. P. 15(a)); *accord Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

In accordance with the Court's instructions at the hearing on July 19, 2022, Plaintiffs filed their Motion to Amend the Complaint. The proposed Amended Complaint added Jennifer Sellars, Dominique Powell, Jennifer Mayo, and James Hardy as Plaintiffs and removed some current Plaintiffs who either no longer own units at Mariner's Cay or who no longer wished to be involved in this litigation. Allowing Plaintiffs to add parties and remove others would not change or affect Plaintiffs' causes of action. In fact, Defendants conceded in their memorandum that the proposed Amended Complaint makes the same challenges to the moratorium as the original Complaint. As such, Defendants had notice of Plaintiffs' intention to amend the Complaint since at least July 19,

2022, after which the Motion to Amend was filed on August 8, 2022, and thus Defendants could not credibly claim prejudice by the proposed amendment.

**C. All Plaintiffs have standing to bring this action.**

The moratorium contained a "grandfathering" provision which indicated that the short-term rental prohibition was applicable only to Owners who purchased their units after the moratorium was enacted ("post-moratorium Owners") and not applicable to Owners who owned their units before the first version of the moratorium went into effect ("pre-moratorium Owners"). Based on this aspect of the moratorium, Defendant argued that the pre-moratorium Owners lacked standing to bring this action, alleging that they had suffered no injury in fact. Defendant further argued that the post-moratorium Owners should not be able to join as Plaintiffs or that their claims should be dismissed on summary judgment on the basis that they were on record notice of the moratorium before they purchased their units.

The Court rejects these arguments, finding that all Plaintiffs stated an injury in fact for the purpose of standing analysis. The Court finds that, as a result of the purported moratorium, the pre-moratorium Owners have been deprived of their ability to freely sell their property to prospective purchasers who would be interested in continuing to rent the units on a short-term basis, which constitutes an injury in fact. One Plaintiff asserts, via a filed affidavit, that he sold one of his units subsequent to the moratorium and was forced to reduce the sales price substantially after the purchaser learned they would not be able to rent the unit on a short-term basis. The Court also finds, even assuming the post-moratorium Owners were on record notice of the moratorium prior to their purchases, they were not barred from challenging the validity and enforceability of the moratorium, which Plaintiffs assert violates the Master Deed.

The Court finds that this is a straightforward contract interpretation issue, and Plaintiffs have standing to bring a breach of contract action against Defendant as well as seek a declaratory judgment and injunctive relief. Defendant incorrectly attempts to frame Plaintiffs' claims as being required to be brought only derivatively. The Court disagrees. The Official Comment to S.C. Code § 33-31-304 states, "The focus of section 3.04 is narrow... it does not address actions that... ii) violate federal or state laws, **(iii)** ***breach duties owed by the directors, officers, employees or agents of the corporation...*** or **(vi)** ***breach duties owed by the corporation.***" *See* S.C. Code § 33-31-304, Official Comment. (Emphasis added.) Based upon the plain language of S.C. Code § 33-31-304 as explained clearly by the Official Comment, Plaintiffs have standing to bring this breach of contract action without having to bring it through a derivative action.

**D. Even if the post-moratorium Owners had actual or constructive knowledge of the moratorium, they nonetheless have standing to be Plaintiffs in this action, as they claim the moratorium is in direct breach of the Master Deed, which is a contract between the Association and all Owners.**

Even if the post-moratorium Owners purchased their properties with actual or constructive knowledge of the Moratorium, they still have standing because Plaintiffs allege that Defendant's actions were unlawful and in breach of the Master Deed. Defendant may not credibly claim that a Plaintiff's constructive knowledge of its unlawful actions, in violation of its contract and property rights, somehow bars Plaintiff from seeking to enforce those rights. The Court is aware of no authority in South Carolina jurisprudence for this proposition.

Moreover, the Court instructed Plaintiffs on July 19, 2022 to submit a Motion to Amend the Complaint to add the new Plaintiffs. It was stated openly in this Court on July 19, 2022 by Plaintiffs' counsel and understood by Defendant and the Court that Plaintiffs specifically intended

to defeat Defendant's standing argument[2] by adding Plaintiffs who had purchased their units after the moratorium went into effect and were thus not grandfathered. After Plaintiffs did exactly that, Defendant asserted that the new Plaintiffs are barred from joining the action due to actual or constructive knowledge of the moratorium prior to purchasing their condo units. That argument has no support in applicable law and is thereby rejected by this Court.

**E. There was no need or practical benefit for the parties to conduct discovery to address the new Plaintiffs' claims or any other fact issue prior to the Court ruling on the cross-motions for summary judgment.**

At the prior hearing on July 19, 2022, this Court granted Plaintiffs' motion to stay discovery until each parties' cross-motions for summary judgment were heard and ruled upon. The issue before the Court is whether the Board can prohibit short-term rentals via a unilateral moratorium not voted on by the membership, or if an amendment to the Master Deed is needed for such a restriction to be imposed. Amending the Complaint to add new Plaintiffs does not change the question before the Court on summary judgment, and thus there is no need for fact discovery to be conducted at this time. No persuasive argument has been advanced by Defendant as to how there has been any material change in the circumstances of the Plaintiffs' arguments. Therefore, the Court finds it appropriate and the most efficient use of the Court's resources to rule on the cross-motions for summary judgment so as to narrow the issues prior to having the parties and their counsel undertake months of timely and expensive discovery.

Further, because the post-moratorium Owners had standing to sue, regardless of their constructive or actual knowledge of the moratorium, there was no need for the Defendant to

[2] Defendant has argued that that the original Plaintiffs were not injured by the moratorium due to their being grandfathered, despite the diminution of the original Plaintiffs' property value. The Court commented informally at the July 19, 2022 hearing that even though the parties' money damages claims are stayed for now and are not before the Master-in-Equity, that does not prevent the original Plaintiffs from citing that alleged injury in fact as a basis for standing as to the original Plaintiffs.

conduct new or additional discovery as to the new Plaintiffs prior to the cross-motions for summary judgment being ruled upon.

**F. Conclusion**

Based on the foregoing reasons, the Court GRANTS Plaintiffs' Motion to Amend Complaint filed with this Court August 8, 2022, and DENIES Defendant's motions, made orally by Defendant's counsel in court on September 19, 2022, to continue the hearing on the cross-motions for summary judgment and for leave to conduct additional discovery before the hearing on the cross-motions for summary judgment

**II. Plaintiffs' motion for summary judgment is GRANTED, Plaintiffs' claim for injunctive relief is GRANTED, the Court DECLARES that the moratorium purported to be enacted by Defendant was legally impermissible and may not be enforced by Defendant, and Defendant's motion for summary judgment is DENIED.**

**A. Applicable Standard**

In a motion for summary judgment, the movant shall prevail when "the pleadings, depositions, answers and interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP. The construction and enforcement of an unambiguous written contract is a "question of law for the court, and thus can be properly disposed of at summary judgment." *Harbor Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Management, Inc.*, 421 F.Supp. 2d 908 (D.S.C. 2006). In granting summary judgment "it must be shown that further inquiry into the facts is not needed to clarify the application of the law." *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 479, 458 S.E.2d 431, 436 (Ct. App. 1995). "[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Gecy v. South*

*Carolina Bank & Trust*, 422 S.C. 509, 517, 812 S.E.2d 750, 754 (Ct. App. 2018) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

**B. Restrictive Covenants are Contractual rights.**

The nature of the relationship between homeowner's associations and their members is contractual. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (holding real covenants are "agreements... to do, or refrain from doing certain things with respect to real property") (ellipsis in original) (quoting 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* §1 (2005))); *id.* ("Covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.") Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. *Covenants* § 2 (2005) (citing *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974) and *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989)). Thus, the issue before the Court is one of contract interpretation.

**C. Article IX, Section 7 allowing the Owners' right to lease their units and the clause granting the Board power to regulate use of the common areas controls over the vague reference to the "unless otherwise provided" by the Board's authority language.**

Under the well-settled canon of contract construction, "where there are two clauses in any respect conflicting, that which is specifically directed to a particular matter controls in respect thereto over one which is general in its terms." *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 558, 24 S. Ct. 538, 540 (1904). When, at the time of formation, "parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought." *Id.*, 193 U.S. at 558, 24 S. Ct. at 540-41. "The purpose of all rules of contract construction is to determine the

parties' [objective] intention" at the time of contract formation, rather than a "subjective, after-the-fact meaning one party assigns to it." S.C. Jur. Contracts 30d § 33 (2019); *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378 769 S.E.2d 237, 240-41 (2015); see also *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). In determining such intention, parole evidence may be admissible "to show the true meaning of an ambiguous written contract." *Klutts Resort Realty, Inc.*, 268 S.C. at 89, 232 S.E.2d at 25. When a contract is capable of being read in more way than one, it is ambiguous and thus the court may look to extrinsic evidence when determining the intent of the drafters. *Id.*

The Master Deed does not prohibit or restrict short-term rentals of units in any manner. It specifically and explicitly allows for the leasing of units. As the Master Deed references the Horizontal Property Regime Act (the "Act"), it is appropriate to consider the property rights granted to an owner under the Act. Section 27-31-60 of the South Carolina Code states "[a]n apartment owner shall have the exclusive ownership of his apartment." Consistent with that quoted language of the Act, Article III, Section 2 of the Master Deed explicitly grants an Owner a fee simple interest in his or her unit, and further provides that the unit may be "conveyed, transferred, [and] ***leased***[.]" (Emphasis added.) There is no time limitation or lease duration placed on this right. Article IX, Section 7 of the Master Deed does create a specified restriction on the renting of units, but the only limitation is that the occupants must be the lessee and his immediate family. Both of these sections in the Master Deed are inherently directed at the leasing of units, and show not only that, at the time of formation, the parties intended to allow for the leasing of units but also, as the Master Deed does not mention such a limitation, that they did not intend to include a minimum duration restriction on the leasing of units.

Article III, Section 3 of the Master Deed directly addresses the Board's power over certain limited areas of Mariner's Cay, those areas being the Common Areas which the Unit Owners hold as tenants in common. Subsection (e) provides the Board authority to promulgate rules and regulations; however, this subsection explicitly states that the rules and regulations may limit "the use of the General Common Area and Facilities." It is therefore clear that the rules and regulations promulgated by the Board may not limit or restrict the Owners' use of their own units, but rather only over the Owners' use of the General Common Areas. The Board's moratorium flies in the face of this clear distinction.

For this reason as well as the others that follow, it is appropriate for the court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

**D. Owners' rental of their units on a short-term basis is a "residential use" and not a "business activity," and thus short-term rentals do not violate the Master Deed.**

Defendant contends that Owners' short-term rentals of their units are a business activity in violation of certain provisions of the Master Deed. Specifically, they rely on Article XI, Section 1, which states "Buildings and all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use..." and Article IX, Section 4, which provides "No business activities of any kind whatever shall be conducted in any building or in any portion of the property." The City of Folly Beach, in which Mariner's Cay is located, has established an ordinance requiring "any owner wishing to operate a short-term rental must maintain a current business license, comply with rental registration requirements, and make proper payment of local, county, and state taxes." Folly Beach, SC, Ordinances ch. 117 § 2 (2010).

"A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of free use of the property." *See Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263

S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). While South Carolina has not yet taken up the specific question of whether short-term rentals violate restrictive covenants requiring property to be used only for residential purposes and prohibiting its use for business purposes, courts in a number of other states have considered the issue and the majority of those courts have almost uniformly held that short-term rentals do not violate restrictive covenants similar to those at issue in this case.

"A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals." *Russell v. Donaldson*, 731 S.E.2d 535, 539 (N.C. Ct. App. 2012). "Residential use, without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode," and "the transitory or temporary nature of such use does not defeat the residential status." *Lowden v. Bosley*, 395 Md. 58, 68, 909 A.2d 262, 267 (2006). "[R]enting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood." *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003). "So long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities... they are using the cabin for residential purposes." *Slaby v. Mountain River Ests. Residential Ass'n, Inc.*, 100 So. 3d 569, 579 (Ala. Civ. App. 2012).

In *Slaby*, a residential association asserted that the property owners' short-term rentals of their cabin violated restrictive covenants prohibiting commercial use. 100 So.3d at 571. However, the court reviewed numerous appellate decisions from other states and agreed with "the majority of other jurisdictions" that rental of the property for eating, sleeping, and other residential purposes did not amount to commercial use. *Id.* at 580-82.

"The owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant." *Ross v. Bennett*, 203 P.3d 383, 388 (Wash. Ct. App. 2008). "[T]he nature of the property's use is not transformed from residential to business simply because the owner earns income from the rentals." *Santa Monica Beach Prop. Owners Ass'n v. Acord*, 219 So. 3d 111, 115 (Fla. Ct. App. 2017), citing *Lowden v. Bosley*, 909 A.2d 261, 262 (Md. 2006). "When the [owners] rent their cabin, they no doubt realize some pecuniary gain, but neither that financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial." *Slaby*, 100 So. 3d at 580. "While [the owner's] renting of the property as a dwelling on a short-term basis may have constituted an economic endeavor on [the owner's] part, to construe that activity as one forbidden by the language of the deed restrictions is unreasonable and strained." *Mason Family Trust v. DeVaney*, 146 N.M. 199, 201, 207 P.3d 1176, 1178 (N.M. Ct. App. 2009).

In *Mason Family Trust v. DeVaney*, Mr. Devaney rented his property on a short-term basis when he was not occupying the property himself, and he rented the property for many more days than he dwelled there and received substantial rental fees. *Id.* at 200, 1177. Additionally, a property management company advertised and managed the rental of the cabin. *Id.* Nonetheless, the court held "a deed restriction for dwelling purposes only does not demonstrate an intent to prohibit short-term rental for dwelling purposes. Nor, in our view, does this commercial or business use restriction preclude the economic aspect of an owner's vacation home which is also partially used as a short-term rental for dwelling purposes." *Id.* at 202, 1179.

> Adopting Silsby's reading [prohibiting rentals] would result in an affirmative rule of law holding that every single- or multi-family residence that is rented for use by someone other than the owner is a commercial enterprise. Under such a rule of law, innumerable properties would invariably run afoul of local zoning ordinances prohibiting commercial uses. The use of this property is residential; the fact that this use may involve income in some fashion does not change a fundamentally

residential use to a commercial enterprise. *Silsby v. Belch*, 952 A.2d 218, 222-23 (Me. 2008).

Very similar to the Restrictive Covenants at issue here at Mariner's Cay, in *Mullin v. Silvercreek Condo. Owner's Ass'n, Inc.*, 195 S.W.3d 484 (Mo. Ct. App. 2006), several unit owners had rented their units on a short-term or nightly basis for a long period of time. The Overtons specifically obtained a license from the City and collected and paid sales tax on all of the units used for short-term use. *Id.* at 487. The Condominium Association asserted this violated their restrictive covenants—one limiting use to single-family residential and another stating "no business, trade, occupation, or profession or any kind shall be conducted, maintained, or permitted on any part of the property." *Id.* at 489. The Missouri Court of Appeals affirmed the trial court and held that the short term and nightly rentals did not violate the covenants reasoning that (1) the restrictions read together plainly allowed owners to rent their condominiums from time to time and (2) given that restrictive covenants are not favorites of the law, any ambiguity should be interpreted narrowly in favor of free use of the property. *Id.* at 490-91.

In *Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997), the defendants used their beach house as a vacation home, and when they were not using it themselves, they rented it for short periods of time to others who also used it as a vacation home. Plaintiffs sued for an injunction claiming defendants' rental activity violated the restrictive covenant that limited the lots to be used "exclusively for residential purposes" and stated "no commercial enterprise shall be constructed or permitted on any of said property." *Id.* at 1020. The Oregon Supreme Court concluded that defendants' rental of the property was permissible, because that use was not "plainly within the provisions of the covenant," and held in favor of the owners of the vacation property. *Id.* at 1023.

Similar to the decisions cited here, Plaintiffs in the case at bar have either rented their condominium units on a short-term basis or, as new Plaintiffs wish to do, have thus far been

prohibited from undertaking such rentals. Similar to *DeVaney* and *Slaby*, some of the Plaintiffs have marketed and advertised units online on vacation rental websites and/or applications as being available for short-term rentals. The renters' use of the units (sleeping, eating, bathing, etc.) are indisputably activities associated with residential use, and thus Plaintiffs' short-term rentals are not and cannot be automatically transformed into business activities simply because Plaintiffs advertise and market their units online and receive income from the short-term rentals. Similarly, as in *Mullin*, the requirement of a business license does not automatically transfer the short-term rentals at issue here into a business activity.

Therefore, this Court finds the Owners' short-term rental of their units is a "residential use" and not in violation of the Master Deed. Even if the residential use and business activities restrictions in the Master Deed could be open to more than one interpretation, courts in South Carolina have traditionally favored free use of property when a restrictive covenant is ambiguous. *See Hardy*, 369 S.C. 160, 631 S.E.2d 539.[3]

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

**E. The South Carolina Nonprofit Corporation Act does not support the moratorium.**

The South Carolina legislature greatly broadened the powers of nonprofit corporations with the enactment of the South Carolina Nonprofit Corporation Act in 1994. For example, the scope of those powers includes the power "to do all things necessary or convenient, not inconsistent with the law, to further the activities and affairs of the corporation." *See* S.C. Code Ann. § 33-31-302 (18). However, the Official Comment to Section 33-31-302 states "a distinction should be drawn between the power of the corporation to do all things necessary or convenient to carry out its

[3] This court has previously ruled on this issue in favor of the Owner's right to rent their unit where the restrictions did not specifically forbid the owner from doing so in *McCown v. Romain Retreat H/O Assoc.*, 2015-CP-10-03387.

activities and the question of whether corporate acts are reasonable or otherwise prohibited." *See* S.C. Code Ann. § 33-31-302 (Official Comment). The Official Comment continues, "The fact that a nonprofit corporation has the power to operate a business does not mean that the corporation is acting properly in running the business." *See Id.*

The purpose of Section 33-31-302 is to provide a broad grant of powers while setting forth a nonexhaustive list of specific powers—in light of history, it was feared that a court might improperly conclude that a corporation lacked some power because it was not specifically set forth in the Model Act. *See Id.* Additionally, the Nonprofit Corporation Act requires the corporations to adopt bylaws and provides that the bylaws "may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with the law or the articles of incorporation." *See* S.C. Code Ann. § 33-31-206.

Defendant asserts a defense to Plaintiffs' claims under the Nonprofit Corporation Act. The Act was created in order to ensure that a corporation's powers were not limited by what was included in the Model Act. It was not created in order to generate an exception to the general rule that a corporation's powers come from the applicable law, its charter, its bylaws, and other governing documents. Further, Defendant has failed to demonstrate how the moratorium imposed was "necessary or convenient" to further the "activities or affairs of the corporation." The Master Deed asserts at Article III, Section 3 that Mariner's Cay was "organized for the purpose of carrying out the powers, duties, and obligations of the Council and Co-Owners as defined in the Act." Defendant has asserted that the moratorium was in response to the negative effects of short-term rentals to vacationers. Even assuming that allegation is true, imposing the moratorium, without a vote of the Unit owners, was a violation of the Master Deed, as it is not necessary nor convenient to further the activities of Mariner's Cay. Thus, Defendant's impermissible action in creating and

enforcing the moratorium is not protected by the Nonprofit Corporation Act because Defendant has failed to show how the moratorium was necessary to the Association. More importantly, the moratorium was enacted in breach of the Master Deed.

For these reasons as well as the others that follow, it is appropriate for the court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

**F. The business judgment rule does not support, validate or authorize the moratorium.**

In South Carolina, courts apply the business judgment rule to protect corporate directors. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016). "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct.App.2000) (quoting *Dockside Ass'n v. Detyens,* 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct.App.1987)). The business judgment rule applies to disputes between directors of a homeowner's association and aggrieved homeowners, and the court of appeals stated "the conduct of directors should be judged by the business judgment rule and absent a showing of bad faith, dishonesty, or incompetence, the judgment of directors will not be set aside by judicial action. *Goddard v. Fairways Dev. Gen. P'ship,* 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App.1993) (citing 4 S.C. Juris. *Condominiums* § 42 (1991)).

Per the rules of contract construction, the court looks to the language of the contract to determine what powers the Board has, and does not have. *Bauman v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 137-38, 668 S.E.2d 420, 424 (2008). The business judgment rule protects a corporation's exercise of its best judgment when deciding between viable options in a given

business-related situation. The business judgment rule is not a cloak that protects a corporation from a violation of its own Bylaws. *Fisher*, 415 S.C. at 270, 781 S.E.2d at 911.

Here, the Board violated the Master Deed by imposing the moratorium on short term rentals, and accordingly, it is not protected by the business judgment rule. Explicitly, the governing documents grant the Board power over the common areas, including the right to "establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities." *See* Master Deed Article III, Section 3. However, nowhere in the governing documents is the Board granted power to limit an Owner's use and leasing of his or her unit. In fact, the Master Deed explicitly grants an Owner a fee simple interest in his or her unit, and further provides that the unit may be "conveyed, transferred, [and] ***leased***[.]" (Emphasis added.) Master Deed, Article III, Section 2. By placing a restriction on the units, on its own accord and without amending the governing documents (as it initially acknowledged it was required to do), the Board has directly breached the Master Deed. Accordingly, the business judgment rule cannot and does not validate or authorize the moratorium. Rather, the Board is bound to follow the covenants included in the Master Deed as construed by the laws of contract. *See Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343 (1987).

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

**G. Defendant has failed to support its affirmative defenses.**

**1. Defendant's 12(b)(6) defense is without merit.**

Defendant pled a failure to state facts sufficient to constitute a cause of action as a defense to the Complaint under Rule 12(b)(6), SCRCP. Defendant has not supported its defense under Rule 12(b)(6). Further, dismissal under Rule 12 is not appropriate.

"In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the [ ] court must base its ruling solely upon the allegations set forth in the face of the complaint." *Charleston County Sch. Dist. V. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) (citing *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007)). "[P]leadings in a case should be construed liberally and the Court must presume all well-pled facts to be true so that substantial justice is done between the parties." *Charleston County Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) (citing *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005)) (citing *Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973)). The Complaint pleads a cause of action for Breach of Contract by Defendant. Plaintiff alleged the existence and enforceability of a recorded Master Deed and By-laws encumbering properties in the Association, which the Board is obligated to follow. The action of the Board in imposing a moratorium is in breach of the Master Deed, and consequently impaired Plaintiffs' right to free alienability of their units. Taken as true, the allegations form a sufficient basis for a breach of contract action and so dismissal under Rule 12(b)6, SCRP is not appropriate.

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

**2. The equitable defenses of Waiver, Estoppel, Unclean Hands, and Laches are similarly without merit.**

**a. Waiver and Estoppel**

Waiver and equitable estoppel are similar and often used interchangeably. *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). Nonetheless they are separate doctrines. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). Generally, the party claiming waiver must show that the party against whom

waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. *Id.* Equitable 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). 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, a misrepresentation, intent to induce the other party to act, an actual or constructive knowledge of the true facts; and as to the party claiming estoppel, lack of knowledge, or means of acquiring knowledge of the true facts, reasonable reliance, and prejudicial change of position). Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other. *Helsel v. City of North Myrtle Beach,* 307 S.C. 24, 413 S.E.2d 821 (1992).

Plaintiffs' right to use their units for short term rentals are not barred by waiver or equitable estoppel. The mere fact that Plaintiffs are using their condominiums for short-term rentals demonstrates that they did not waive the right to such use. Furthermore, each of the elements concerning equitable estoppel cannot be proven here. Plaintiffs' short-term rentals of their units is not a misrepresentation, as they have been forthcoming about their rentals. Similarly, Defendant cannot prove a lack of knowledge, reasonable reliance or prejudicial change of position. The doctrines of waiver and equitable estoppel are not applicable here and do not bar Plaintiffs' breach of contract action.

**b. Unclean Hands**

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Arnold v.*

*City of Spartanburg*, 201 S.C. 524. 23 S.E.2d 735 (1943). The expression "clean hands" means a clean record with respect to the transaction itself. *Id* at 738. The rule must be understood to refer to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a court of equity. *Am. Ass'n v. Innis*, 60 S.W. 388 (Ky. 1901).

There exists no bad faith on the part of Plaintiffs in this action. Likewise, Defendant has not been prejudiced. Defendant asserted problems related to short term rentals such as parking issues, cleanliness issues in common areas, and vandalism but that has nothing to do with Plaintiffs' right to use their own units for short-term rental purposes. *See* Ex. B to Complaint. Moreover, under the Master Deed, in order to resolve some of the issues outlined, Defendant has full authority to make changes to rules regarding use and access to the common areas. *See* Ex. A to Complaint, Article III, Section 3. The incidental issues that are supposedly related are not a product of bad faith or unclean hands nor any violation of the Master Deed. As outlined above in this memorandum, Plaintiffs' rentals of their units do not violate the Master Deed or Bylaws. Therefore, Defendant's claim that Plaintiffs have unclean hands must necessarily fail and does not bar Plaintiffs' claims.

**c. Laches**

Laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right. *Brown v. Butler*, 347 S.C. 259, 554 S.E.2d 431, 434 (2001). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999). Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice. *Id.* If a claim is filed within the applicable limitations period, laches cannot

be found unless a heightened burden is satisfied. *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 127 F. Supp. 3d 568 (D.S.C. 2015), *dismissed sub nom. PCS Nitrogen Inc. v. Ross Dev. Corp. and Rivers*, No. 16-1540 (L), 2018 WL 2111081 (4th Cir. Mar. 19, 2018).

Plaintiffs' claims are not barred by the doctrine of laches. The Board began discussing options in regard to short term rentals in October of 2018. *See* Ex. B to Complaint. On May 28, 2019, the Board announced the short-term rental moratorium. *See* Ex. E to Complaint. The Summons and Complaint were filed June 25, 2019, less than a month after the moratorium announcement and five months before the moratorium was filed of record (See footnote #2). Plaintiffs clearly did not delay, no prejudice has been shown on the part of Defendant and, therefore, Defendant's claim of laches fails.

**d. Failure to Exhaust Administrative Remedies**

A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by an administrative body. *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville,* 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward,* 343 S.C. 14, 538 S.E.2d 245). "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." *Thomas Sand Co. v. Colonial Pipeline Co.,* 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct.App.2002). A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered." *Id.* "Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof." *Hyde v. S.C. Dep't of Mental Health,* 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994).

Failure to exhaust administrative remedies has no role here. Plaintiffs were not required to bring their claims before an administrative body prior to filing the instant lawsuit. There are no administrative or statutory schemes available to Plaintiffs in this situation which would afford or require an administrative remedy. Defendant's assertion that failure to exhaust administrative remedies bars Plaintiffs' claims is without merit.

**e. Statute of Frauds**

Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. S.C. Code Ann. § 32–3–10(4). Failure to put such a contract in writing renders it void. S.C. Code Ann. § 27–35–20 (1976). Moreover, a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E.2d 856 (1983).

The Statute of Frauds does not bar Plaintiffs' claims. Plaintiffs brought an action based on breach of the Master Deed which are in writing and have been signed and recorded in the public record. The Statute of Frauds does not apply here.

**f. The Parole Evidence Rule**

"The parole evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument." *Gilliland v. Elmwood Properties,* 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990). Where a written instrument is unambiguous, parole evidence is inadmissible to ascertain the true intent and meaning of the parties. *Penton v. J.F. Cleckley & Co.,* 326 S.C. 275, 486 S.E.2d 742 (1997). Where a contract is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parole evidence may be admitted in order to supply a deficiency in the language

of the contract and to establish the true intent and meaning of the parties. *Soulios v. Mills Novelty Co.*, 198 S.C. 355, 17 S.E.2d 869 (1941); 32A C.J.S. *Evidence* § 1008 at 592 (1964).

Defendant asserts that the parole evidence rule bars Plaintiffs' claims. There is nothing in the Master Deed or Bylaws preventing Plaintiffs from renting their units on a short-term basis; in fact, the language of the Master Deed explicitly allows the leasing of units, and states nothing about a minimum duration of lease. However, Defendant asserts the residential and business portions of the deed preclude short term rentals. Plaintiffs dispute that the Master Deed is ambiguous as to the issue before the Court, but to the extent there is any ambiguity, where ambiguity exists or a contract is silent on a certain matter, parole evidence may be allowed. Thus, Defendant's assertion that parole evidence bars Plaintiffs' claims is without merit.

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

## III. By breaching the Master Deed, the Board has placed a restriction on Plaintiffs' alienation of their units; therefore it is appropriate for the Court to grant Plaintiffs a restraining order and an injunction against the moratorium, and the Court hereby grants said injunctive relief.

"Restrictive covenants are contractual in nature, and thus the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning." *Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC*, 375 S.C. 267, 271, 651 S.E.2d 617, 620 (Ct. App. 2007). The nature of the relationship between homeowner's associations and their members is contractual. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (holding real covenants are "agreements... to do, or refrain from doing certain things with respect to real property") (ellipsis in original) (quoting 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* §1 (2005))); *id.* ("Covenants, in

a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.") Further, "[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto. A homeowner's association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis it is a reasonable alternative." *Fisher v Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 180-81; 760 S.E.2d 121, 129-30 (2014).

Although a court shall not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated, a court must balance the equities between the parties. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274, 363 S.E.2d 891, 896 (1987). It is within the court's discretion to determine the weight of injury to the Defendant, and compare that to Plaintiff's benefit if the restriction were to stand. *Hunnicutt v. Rickenbacker*, 268 S.C. 511, 515-16, 234 S.E.2d 887, 889 (1977) (quoting 29 Am. Jur.2d *Covenants*, etc., § 328). "Courts tend to strictly interpret restrictive covenants and resolve any doubt or ambiguities in a covenant on the presumption of free and unrestricted land use. *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 270, 628 S.E.2d 284, 292 (Ct. App. 2006) (Anderson, J. dissenting). "Covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use." *Id.* 368 S.C. at 271, 628 S.E.2d at 292 (citing *Hyer v. McRee*, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct. App. 1991). "Restrictive covenants are to be construed most strictly against the grantor and persons seeking [to] enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of property and against restrictions." 26 C.J.S., *Deeds*, § 163; see also *Sprouse v. Winston*, 212 S.C. 176, 185, 46 S.E.2d 874, 878 (1948).

Due to the moratorium, at least one Plaintiff has faced financial hardship in attempting to sell a unit in Defendant's HOA regime. Plaintiff Leo Cornejo sold one of his units subsequent to

the purported moratorium and was forced to reduce the price after the prospective purchasers became aware they would not be able to rent the unit short-term. (See Aff. of Leo Cornejo).

Despite Defendant's assertions that Plaintiffs are not affected by the moratorium because their right to continue to rent their units on a short-term basis was "grandfathered," the value and marketability of Plaintiffs' units has been negatively affected, as Defendant has publicly taken the position that the moratorium would apply to any owner who purchased a unit after it was imposed. In the absence of the moratorium, the Board's powers will not be impaired. As provided in the Master Deed, the Board will still have the ability to regulate use of the common areas, and could still present for a vote by the members a proposed amendment to the Master Deed restricting or prohibiting short-term rentals.

Enjoining the moratorium will limit the Board's authority to regulate the members' use of their units, but that limitation is already contained within the Master Deed. The Court is not taking away any powers granted to the Board; instead the Court is simply enforcing rights granted to the Owners and the Board in the Master Deed. It is not the Court's place to rewrite the Master Deed, but the Court can and should enforce the Master Deed according to its plain and obvious meaning in allowing Plaintiffs and all other members of the Association to lease their units with no minimum lease duration.

For all these reasons, the Court hereby grants the following injunctive relief:

Pursuant to Rule 65(b), SCRCP, the Court grants Plaintiffs a Temporary Restraining Order compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose a purported "moratorium" on short-term rentals, including by future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until

and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1(b) of said Master Deed.

Pursuant to Rule 65(a), SCRCP, the Court grants Plaintiffs a Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose or enforce a purported "moratorium" on short-term rentals and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed.

Defendant may continue to enforce existing covenants in the Master Deed applicable to all rentals, including the provision in Article IX, Section 7 that states "Units may be rented provided the occupancy is only by the lessee and his immediate family."

Further, within 30 days of the filing of this Order, Defendant shall cause to be recorded in the Charleston County Register of Deeds office an instrument which shall cite the four versions of the moratorium, including their dates of recording with book and page references (See footnote 1), and which shall state that all four versions of the moratorium have been cancelled of record by this Court's Order and are no longer in effect. Within 15 days of recording the cancellation instrument, Defendant shall ensure that a filed copy is distributed, along with this Order, to all Owners in Mariner's Cay, in the same manner in which notices for the annual meetings are distributed.

Nothing in this Order forbids the Defendant from pursuing its original intent to hold a vote on whether or not an Amendment to the Master Deed to forbid short term rentals at Mariner's Cay can be held. Likewise, in conformity with the terms of Article III, Section 3 (e) the Master Deed, the Defendant is within its authority to state and enforce the rules which apply to the use and access of the HOA's common elements by Unit Owners and their guests.

## IV. Declaratory Judgment

Pursuant to S.C. Code Ann. §§ 15-53-20, 15-53-30, and 15-53-40, the Court hereby declares that Defendant's unilateral actions in creating and enforcing the moratorium were in violation of the aforementioned Master Deed and the common law of contract in South Carolina jurisprudence, and that the moratorium on short-term rentals at Mariner's Cay, including all versions enacted, is invalid, impermissible, and unenforceable.

[SIGNATURE PAGE FOLLOWS]

Charleston Common Pleas

**Case Caption:** Dustin Grotzke , plaintiff, et al VS Mariners Cay Racquet & Yacht Club Homeowners Association Inc , defendant, et al

**Case Number:** 2019CP1003390

**Type:** Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062