

Amended and Restated Declaration of Covenants, Conditions, and Restrictions for Dataw Island ("Declaration"), passed by a supermajority of approximately 85% of the community ("Third Amendment"); and (2) a budget line-item amounting to just under \$250 per year in the DIOA annual budget, which has been approved by a significant percentage of the community in each year since 2005 ("Greenspace Line-Item"). The parties have fully briefed and argued the pending Motions. The Court hereby: (a) grants in part and denies in part Defendants' Motions to Dismiss; (b) grants Defendants' Motion for a More Definite Statement; (c) grants Defendants' Motions for Partial Summary Judgment; and (d) denies Plaintiffs' Motion for Partial Summary Judgment.

ANALYSIS

I. CLAIMS AGAINST INDIVIDUAL DIOA DIRECTORS

Plaintiffs have asserted breach of fiduciary duty and other claims against various individuals who were members of the DIOA Board of Directors at various times. However, the DIOA has submitted affidavits of numerous DIOA director Defendants — that Plaintiffs have not challenged or refuted — stating that the affiants were not directors of the DIOA at the time of challenged actions as to the Third Amendment or the first inclusion of the Greenspace Line-Item in a DIOA Budget and the communications in the community associated therewith. Specifically, the following Defendants fall into that category: George Beck, Colin Collins, Colin McArthur, Deidre Smith¹, Merwin "Mer" Grayson, Gabriel Nagy, Roger Rittinger, Lee Scher², James L. Smithson, Robert Spengler, Phillip Sutphin, and Pam Weigand. The Eastern District of Virginia addressed the issue of fiduciary duties of board members in *In re James River Coal Company v. Crawford*, wherein the Court stated that "[a] corporate director

¹ Gerald Smith, widower of Deidre Smith, is a defendant in this lawsuit in his capacity as successor and Trustee of the closed Estate of the late Deirdre Smith, however for ease of drafting, Ms. Smith's name is used in this Order in place of designating the Trustee separately. Deidre Smith has been alleged to be a director of both DIOA and DIC. The dismissal of Defendant Smith discussed herein extends only to claims asserted against her in her capacity as a director of DIOA.

² Lee Scher has been alleged to be a director of both DIOA and DIC. The dismissal of Defendant Scher discussed herein extends only to claims asserted against him in his capacity as a director of DIOA.



cannot be held liable for board actions taken while not on the board." 360 B.R. 139, 166 (Bankr. E.D. Va. 2007). Therefore, Plaintiffs simply cannot state a breach of fiduciary duty claim — or any other claim — as to any of these Defendants.

In addition, several DIOA Defendants were not on the Board of Directors while the Davenport Plaintiffs lived on Dataw, therefore could have owed no duty to the Davenports. Defendants in this category are Herb Jarvis, Earl Deitz, John Mahoney, Victor Brinkman, and Ray Hoge.

Therefore, this Court grants Defendants' Motions to Dismiss as to all Counts to the extent alleged against Defendants Colin McArthur, Deidre Smith, Herb Jarvis, Earl Deitz, Victor Brinkman, Ray Hoge, George Beck, Colin Collins, Merwin "Mer" Grayson, Gabriel Nagy, Roger Rittinger, Lee Scher, James L. Smithson, Robert Spengler, Phillip Sutphin, Pam Weigand in their capacity as DIOA Directors and enters judgment against Plaintiffs as to same.

II. COUNT I — BREACH OF FIDUCIARY, COMMON LAW AND STATUTORY DUTIES³

In Count I, Plaintiffs allege that the individual Defendants who were members of the DIOA Board of Directors at any time should be held liable for breaches of fiduciary and similar duties. For the reasons that follow, the Court grants the DIOA Defendants' Motions to Dismiss Count I of Plaintiffs' Complaint.

A. Plaintiffs' Breach of Fiduciary Duty Claim Fails in Its Entirety Because They Did Not Bring This as a Derivative Action

Under South Carolina law, a breach of fiduciary duty claim against corporate directors is nearly always a "derivative" claim, rather than a "direct" claim, because it seeks to remedy harms that all shareholders/members suffered and felt equally. The Court of Appeals has recognized that "[t]he fiduciary obligation of dominant or controlling stockholders or directors is ordinarily enforceable through a stockholder's derivative action." *See Brown v. Stewart*, 348 S.C. 33, 49,

³ While Plaintiffs mention the issue of "aiding and abetting" by the Defendant board members of DIC club in its allegations associated with this Count, the Court will address those claims under the Count of Plaintiffs' Complaint explicitly alleging a cause of action for aiding and abetting, *infra*.

557 S.E.2d 676, 684 (Ct. App. 2001). *Brown* teaches that Plaintiffs' breach of fiduciary duty claim must be enforced derivatively. *See id.*, 348 S.C. at 49, 557 S.E.2d at 684. ~~In this case, there are no allegations of any special relationship between the DIOA director Defendants and Plaintiffs that would give rise to a direct duty of care.~~

South Carolina permits derivative lawsuits on behalf of nonprofit corporations. *See* S.C. Code § 33-31-630 ("Derivative suits may be maintained on behalf of South Carolina [nonprofit] corporations . . . in accordance with the applicable rules of civil procedure."). In this regard, the South Carolina Rules of Civil Procedure create specific requirements for derivative complaints:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

See S.C.R. Civ. P. 23(b)(1). Plaintiffs' Complaint is not verified, and Plaintiffs do not allege any compliance with the "demand" requirements of Rule 23(b)(1). "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRC P, is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 340 (2006). Therefore, the Court grants Defendants' Motions to Dismiss as to Count I (breach of fiduciary duty) and enters judgment against Plaintiffs as to same.

B. The Statute of Limitations Bars Plaintiffs' Breach of Fiduciary Duty Claim as to the Third Amendment and the Greenspace Line-Item

"An action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." *See* S.C. Code § 33-31-830(e) (emphasis provided).

With regard to Plaintiffs' claims about impropriety in the enactment of the Third Amendment, all of the actions complained of occurred on or before February 20, 2001 — the date of the vote on that amendment. Therefore, any breach of duty claim relating to the Third Amendment would have to have been filed on or before February 20, 2004 at the absolute latest. The Federal Lawsuit was not commenced until October 10, 2007, more than three years after the statute of limitations expired. As a result, Plaintiffs' breach of fiduciary duty claims relating to the enactment of the Third Amendment are time-barred.

To the extent Plaintiffs' breach of fiduciary duty claims concern the placement of the Greenspace Line-Item in the annual DIOA Budget and concomitant pre-budget vote communications about the Greenspace Line-Item, any wrongful acts must have occurred on or before February 22, 2005 — the undisputed date of the vote on the first budget containing the Greenspace Line-Item. The only reasonable inference, even under Plaintiffs' allegations, is that Plaintiffs reasonably should have discovered any breach of fiduciary duty at that time. As a result, the statute of limitations on any such claim would have expired on February 22, 2007, more than eight months before the Federal Lawsuit was filed.

Therefore, to the extent Plaintiffs' claims in Count I involve, relate to, arise out of or concern the enactment of the Third Amendment and/or initial enactment of DIOA's budget containing the Greenspace Line-Item (or pre-vote communications concerning that initial Greenspace Line-Item vote), this Court grants Defendants' Motions to Dismiss Count I (breach of fiduciary duty).

III. COUNT II — UNLAWFUL DISTRIBUTION

In Count II, Plaintiffs aver that DIOA budgets containing a Greenspace Line-Item constitute unlawful distributions by DIOA, for the benefit of DIOA board members who are also DIC members. For the reasons that follow, the Court will dismiss Count II with prejudice.

Plaintiffs have not alleged a "distribution" supporting this cause of action with respect to the Greenspace Line-Item. Any alleged transfers of funds from DIOA to DIC generated by the

Greenspace Line-Item are not "distribution[s]" as defined by the South Carolina Nonprofit Corporation Act. A "distribution" is a "direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers." See S.C. Code Ann. § 33-31-140(11). With respect to the Greenspace Line-Item, Plaintiffs allege only that this resulted in payments to the DIC. The members of DIOA themselves voted on DIOA's budgets containing that item, which is a payment to the DIC as a contribution to the upkeep of the golf courses and green spaces on Dataw Island. There is no allegation that any payments were transferred from DIOA to any member of DIOA Board.

Therefore, this Court grants Defendants' Motions to Dismiss as to Count II and enters judgment against Plaintiffs as to same.

IV. COUNTS III AND IV — DECLARATORY JUDGMENT AND INJUNCTION AS TO THE THIRD AMENDMENT TO RESTATED COVENANTS

A. The Third Amendment Was Properly Enacted Under the Terms of the Declaration and South Carolina Law

The Court concludes that Defendants are entitled to summary judgment because Plaintiffs cannot carry their burden of showing that triable issues exist as to whether the Third Amendment is invalid or void. The Third Amendment provides that, upon the purchase of property on Dataw, new owners must become at least social members of the amenity club. The Third Amendment was part of the community's "One Island Concept" and formed the basis for the financing of the construction and ongoing maintenance of a number of amenities in the community, including a Community Center with indoor pool, meeting rooms, workout facilities and staff, as well as an expanded clubhouse with dining, banquet and meeting facilities. Prior to the vote on the Third Amendment, there was discussion within the community, including organized opposition against the Third Amendment. After this debate, in the normal democratic process, the community voted in favor of the Third Amendment by an almost 85% favorable vote — beyond the 75% supermajority required for an amendment of the Declaration.



The Third Amendment was a proper corporate act. The South Carolina Nonprofit Corporation Act of 1994 ("Act"), S.C. Code Ann. §§ 33-31-101 *et seq.* defines the powers of nonprofit corporations. Of note, South Carolina Code § 33-31-302 authorizes non-profit corporations:

(3) to make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State for regulating and managing the affairs of the corporation; ...

(10) to conduct its activities, locate offices, and exercise the powers granted by this chapter within or without this State; ...

(15) to impose dues, assessments, and admission and transfer fees upon its members;

(16) to establish conditions for admission of members, admit members, and issue memberships;

(17) to carry on a business;

(18) *to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.*

(Emphasis added). The Official Comment declares that "section 3.02 provides a broad grant of powers and sets forth a *nonexclusive* list of specific powers. As a result of section 3.02, it is not necessary for a corporation to provide in its articles and bylaws that it has any particular powers. If nothing is said, a corporation automatically has the powers set forth in section 3.02."

(Emphasis added). Nothing in South Carolina's nonprofit corporation statute prohibits the enactment of the Third Amendment.

Likewise, the Declaration broadly grants the DIOA numerous powers, including all those that the Act authorizes:

The duties and powers of the Association shall be those set forth in the provisions of the South Carolina Code relating to nonprofit corporations, this Declaration, the By-Laws, and the Articles of Incorporation, together with those reasonably implied to effect the purposes of the Association; provided, however, that if there are conflicts or inconsistencies among the South Carolina Code, this Declaration, the By-Laws, or the Articles of Incorporation, the provisions of the South Carolina Code, this Declaration, the By-Laws and the Articles of Incorporation, in



that order, shall prevail, and each Owner of a Lot, Dwelling, or Multi-Family area by acceptance of a deed or other conveyance therefor, covenants to vote in favor of such amendments as will remove such conflicts or inconsistencies. The Association may exercise any other right or privilege given to it expressly by this Declaration or by law, together with every other right or privilege reasonably to be implied from the existence of any right or privilege given to it herein or reasonably necessary to effectuate any such right or privilege.

(See Decl. ¶ 8.02). Section 6.01 of the DIOA's By-Laws provides that its Board of Directors "shall, insofar as permitted by law, exercise the powers and duties delegated or assigned to the Association by the Covenants, the Certificate of Incorporation of the Association, and these Bylaws." Nothing in the DIOA's governing documents or the Declaration limits the DIOA's broad powers granted by the Act. In light of these broad powers, DIOA had the corporate authority to enact the Third Amendment in accordance within the framework of the Declaration's provisions regarding amendment.

In this regard, the Declaration broadly authorizes its amendment, specifically stating:

13.02 Amendments by Association. Amendments to this Declaration . . . shall be proposed and adopted in the following manner:

- (a) Notice of the subject matter of the proposed amendment shall be included in the notice of the meeting of the Association at which such proposed amendment is to be considered and shall be delivered to each member of the Association.
- (b) At such meeting, a resolution adopting a proposed amendment may be proposed by either the Board of Directors or by members of the Association. Such amendment must be approved by Owners holding at least three-fourths (3/4) of the total votes cast at the meeting

(See Decl. ¶ 13.02). The Declaration does not limit the scope of permissible amendments and does not expressly restrict the subject-matter of the membership's right to amend. "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." See *Seabrook Island Property Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661-62, 596 S.E.2d 380, 383 (Ct. App. 2004) (citing *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998)). The plain and ordinary meaning of the



language of the Declaration broadly provides that any amendment is proper upon notice to the membership and supermajority vote.

Plaintiffs do not dispute that the Dataw community enacted the Third Amendment in conformity with Section 13.02 of the Declaration. Plaintiffs cannot — and do not — contest that notice of the subject matter of the Third Amendment was included in the notice of the meeting. Moreover, there is no evidence to dispute that an overwhelming supermajority (approximately 85% and well over the required 3/4) of the DIOA membership enacted the Third Amendment. Therefore, the Third Amendment was enacted within the broad powers granted to DIOA and its members and in fulfillment of the procedural requirements for amendment.

Black's defines "amendment" as "[a] formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, deletion, or correction; esp., an alteration in wording." See Black's Law Dictionary, "Amendment" (8th ed. 2004) (emphasis added).⁴ The Declaration is clear that the members of DIOA were authorized to change and to add to the Declaration. That is precisely what was done in the Third Amendment. The Declaration broadly allows the "amendment" of the "Declaration," without any limitation as to the subject-matter thereof.

Plaintiffs suggest that "amendment" be constricted to mere removal of verbiage from the Covenants or that the Third Amendment would have been proper if the same language were added to an existing section of the Covenants rather than enacted under a new section number. Both of these arguments are unavailing. As to the former, as discussed above, the term "amendment" is broadly defined to allow changes—from the addition of the Bill of Rights to the Constitution; to the addition of new provisions to a statute, to the kinds of changes the community enacted with the adoption of the Third Amendment by supermajority vote of the

⁴ The Nonprofit Corporations Act itself applies this definition of "amend" in connection with corporations' right to amend their own articles of incorporation: "A corporation may amend its articles of incorporation to *add or change* a provision that is required or permitted in the articles or to delete a provision not required in the articles." SC Code Ann. § 33-31-1001(a) (emphasis added).



DIOA members. As to the latter, to suggest that the identical provision would be lawful if added to an existing section but not if numbered with a new section number is to elevate form over substance and to create a distinction without a difference. These arguments have no merit. Plaintiffs also cite *Erkes v. Kasparek*, 303 S.C. 70, 399 S.E.2d 6 (Ct. App. 1990) to support their contention against the validity of the Third Amendment. Their reliance on the case is misplaced. *Erkes* is easily distinguishable from the case at bar in that *Erkes* concerns an attempt by a homeowners association to extinguish retained rights of a developer in connection with undeveloped land owned by the developer. That is not at all the situation before the Court in this action.

The face of the Declaration clearly granted members of DIOA broad power to add terms to the Declaration; that is exactly what they did.

The Act, the DIOA By-Laws and the Declaration make clear — beyond any genuine issue of material fact — that the Third Amendment was permissible and was properly enacted. Therefore, this Court grants Defendants' Motions for Summary Judgment as to Counts III and IV, denies Plaintiffs' Motion for Partial Summary Judgment as to these Counts, and enters judgment against Plaintiffs as to same.

B. The Third Amendment Runs With the Land

"A restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land." *See West v. Newberry Elec. Coop., Inc.*, 357 S.C. 537, 542, 593 S.E.2d 500, 503 (Ct. App. 2004) (quoting *Marathon Fin. Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 604, 483 S.E.2d 757, 765 (Ct. App. 1997)). Plaintiffs do not dispute that the covenanting parties intended that the Third Amendment run with the land. However, Plaintiffs assert that the Third Amendment does not "touch and concern" the land.

South Carolina has held that: "[c]ovenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of



the owners' properties touch and concern land and therefore 'run with the land.'" *Queens Grant II Horiz. Prop. Regime v. Greenwood Devel. Corp.*, 368 S.C. 342, 356 n.10, 628 S.E.2d 902, 911 n.10 (Ct. App. 2006) (emphasis added) (citing *Harbison Cmty. Assoc., Inc. v. Mueller*, 319 S.C. 99, 102, 459 S.E.2d 860, 862 (Ct. App. 1995)). "Restrictive covenants will be enforced unless they are indefinite or contravene public policy." *Queen's Grant*, 368 S.C. at 362 (citing *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1997)). The Court of Appeals has stated:

Covenants requiring property owners to pay fees for improvements, maintenance or other services to a homeowners association run with the land. *First Fed. Sav. & Loan Ass'n v. Bailey*, 316 S.C. 350, 450 S.E.2d 77 (Ct.App. 1994). Covenants to pay assessments have been held to be merely personal where the assessments were for very limited purposes, and the assessments had no beneficial effect on the value of the homeowners' properties. See *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978). In the instant case, the *Harbison* assessments pay for maintenance of common areas in the community, including parks, walkways, landscaping, an athletic center, and tennis courts. These common areas enhance the value of all of the properties in the community. See, e.g., *Four Seasons Homeowners Ass'n v. Sellers*, 62 N.C. App. 205, 302 S.E.2d 848 (a covenant to pay assessments to finance recreational facilities in a subdivision touches and concerns every homeowner's lot in the subdivision even though the facilities are not adjacent to each lot), *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938) (a covenant to pay assessments touches and concerns the land if the money is used to maintain common areas, thus providing a benefit to the landowner).

See *Harbison Comm. Ass'n*, 319 S.C. at 102, 459 S.E.2d at 862 (emphasis added).

These cases make clear that the Third Amendment "touches and concerns" the land. Indeed, Plaintiffs' only objection to the Third Amendment is that it places a financial burden on their property, like an assessment. Although the DIC is a separate entity from DIOA and the amenities it manages are not DIOA common property, the Third Amendment was intended to maintain and support amenities that—like the athletic center and tennis courts in *Harbison*—benefitted the property of all Dataw Island owners. The intention of the Third Amendment was to support — as part of a "One Island" concept, embodying the "Dataw lifestyle" — DIC amenities that positively impacted all properties. Even the few properties that were not

immediately adjacent to the DIC amenities like the golf courses benefited from the DIC's success, since the new amenities were integral to the overall One Island concept. Community members, as members of the DIC, benefit from the availability of access to one or more of these amenities and all members of the community benefit from their presence in the community. Plaintiffs have presented no contrary evidence. The Third Amendment's requirement that all new Dataw purchasers become DIC members would assist in supporting those amenities, while granting new owners access to such amenities. The One Island concept was based on the idea that the DIC amenities added inherent value to all Dataw properties and that mandatory membership to support the DIC would further the One Island ideal and enhance property values. There is no dispute that the DIC's amenities — intertwined in the unique Dataw Island community — benefit all properties, whether or not owners actually use them. Since the DIOA's members all own property on an island where resources intertwine, DIC's amenities form an essential part of the overall "island experience."

The symbiotic relationship between the DIC's amenities (including golf courses, two pools, community center, and workout/spa facilities) and Dataw Island real property dates back to the origins of the Dataw Island development. Dataw Island was approved as a "planned unit development" ("PUD") in 1983, when its PUD plan included the following, *inter alia*: 866 acre PUD; 1,505 dwelling units; two 18-hole golf courses; and a marina and designated recreation areas. Thus, as far back as 1983, the vision for the development of Dataw included the golf courses and related amenities as part of the overall plan. Dataw Island is not comprised of a collection of individual lots that simply happen to be near a golf course; rather, the golf courses are — and have been — an integral part of a development where all properties are interrelated. The golf courses and other DIC amenities beneficially impact all properties on Dataw.

Other courts addressing this issue have held that a provision requiring membership in a recreation amenities club touches and concerns the land. *See OSCA Devel. Co. v. Blehm*, 2003 WL 22333475, at *8-*9 (Cal. Ct. App. Oct. 14, 2003) ("We conclude that the CC & R's for a residential development that require the payment of a mandatory assessment for a country club

located adjacent to or within the development create a mutual relationship of corresponding benefits and burdens, and, therefore, is a covenant that touches and concerns the land."); *Homsey v. University Gardens Racquet Club*, 730 S.W.2d 763, 764 (Tex. Ct. App. 1987) (covenant requiring membership in club providing amenities "touches and concerns" land, even though limited associate memberships were available to non-owners).

Therefore, this Court grants Defendants' Motions for Summary Judgment as to Counts III and IV, denies Plaintiffs' Motion for Partial Summary Judgment as to these Counts and enters judgment against Plaintiffs as to same.

V. COUNTS V AND VI — DECLARATORY JUDGMENT AND INJUNCTION AS TO GREENSPACE BUDGET LINE-ITEMS

The Greenspace Line-Item is a budgetary line-item that has been placed each year in the annual DIOA budget beginning in 2005. The amount of the Greenspace Line-Item is approximately \$20 per month for each property owner. The monies collected from the Greenspace Line-Item are provided by the owner's association (DIOA) to the amenity club (DIC) for golf-course maintenance and beautification in recognition of the benefit that keeping the two championship golf courses, around which the entire community was designed and constructed, bestows on all the properties in the community.

The DIOA's budget is voted upon at its annual member meetings. Although there was organized opposition to the inclusion of the Greenspace Line-Item in the DIOA budget, in each year that the Greenspace Line-Item was part of the budget, including each year in which the Federal Lawsuit and these three state lawsuits have been pending, the annual DIOA budget has passed by as much as 90% favorable vote. Moreover, any property owner on Dataw is free to vote against the annual budget, without risking a shut down of the community. In the event a proposed budget does not pass, Section 9.03 of the Declaration provides that DIOA is permitted to continue operating under the prior year's budget, with even an increase of up to 15%, while formal membership approval is obtained on a revised budget.

Plaintiffs also argue that the Greenspace Line-Items included in DIOA budgets are void and invalid, because they are not within the power of the DIOA. The DIOA's governing documents and the law make clear that DIOA possessed the authority to include — and properly included — the Greenspace Line-Item in budgets. Under the Act:

Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do **all things necessary or convenient to carry out its affairs including, without limitation**, power: . . .

- (10) to conduct its activities, locate offices, and exercise the powers granted by this chapter within or without this State; . . .
- (15) to impose dues, assessments, and admission and transfer fees upon its members; . . .
- (17) to carry on a business;
- (18) to **do all things necessary or convenient**, not inconsistent with law, to further the activities and affairs of the corporation.

See S.C. Code § 33-31-302(10), (15), (17) and (18) (emphasis added). As noted in its Official Comment, this broad statute grants nonprofit entities the authority to do **all** enumerated acts:

[S]ection 3.02 provides a broad grant of powers and sets forth a nonexclusive list of specific powers.

As a result of section 3.02, it is not necessary for a corporation to provide in its articles or bylaws that it has any particular powers. If nothing is said, a corporation automatically has the powers set forth in section 3.02.

See S.C. Code § 33-31-302(official comment). Moreover, the "catch-all" provision grants extremely wide-ranging authority to do anything to further corporate affairs:

In fact, in adopting paragraph (18), it is the intent that the grant of powers is to be very broadly interpreted. It is the intent of this new statute, as specifically required in Section 33-31-302(18), that every nonprofit corporation has the **unbridled power** to "do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation." Section 33-31-302 of this Act **is not to be narrowly construed**.

See S.C. Code § 33-31-302 (South Carolina Reporter's Comments (emphasis added)). Thus, South Carolina law grants DIOA broad authority to do nearly anything it determines appropriate in its affairs, absent express prohibition in governing documents.

Far from prohibiting the Greenspace Line-Item, the Declaration and other governing documents grant DIOA very broad powers. For example, DIOA's Petition for Incorporation broadly provides that it was created:

to provide for the preservation of values and amenities and the maintenance of open spaces, common forests, certain roadways, and/or common properties, and to maintain, administer and enforce the covenants and restrictions and collect and disburse all assessments and charges necessary for the maintenance, administration and enforcement of the same.

In furtherance of these purposes, the Declaration expressly creates procedures for DIOA's budgeting and for the imposition of annual assessments (dues) to fund them:

Each Owner of a Lot and each Owner of a Dwelling shall pay the Association [DIOA] an annual assessment per Lot or Dwelling as set forth herein. . . . It shall be the duty of the [DIOA] Board at least thirty (30) days prior to the Association's annual meeting, to prepare a budget covering the estimated Common Expenses during the coming year, such budget to include a capital contribution or reserve account if necessary for the capital needs of the Association. The annual assessment for each Lot and/or Dwelling is equal to the total annual budget divided by the total number of Lots and Dwellings (exclusive of Lots owned by the Declarant), plus an assessment [for the Marina and Golf Course Complex owner(s)] The budget and the annual assessments shall become effective unless disapproved at the annual meeting by a vote of a majority of the votes of Owners who are voting in person or by proxy at such meeting. Notwithstanding the foregoing, in the event the proposed budget is not approved or the Board fails for any reason to determine the budget for the succeeding year, then and until such time as a budget shall have been determined as provided herein, the budget and annual assessments in effect for the then current year shall be increased at the option of the Board up to fifteen (15%) percent of the maximum authorized payment for the previous year, and such increased budget shall be implemented for the succeeding year, until a new budget shall have been approved as provided above. If any budget at any time proves inadequate for any reason, then the Board may call a meeting of the Association for the approval of a special assessment as provided in Section 9.04 hereof.

(See Decl. ¶ 9.03). Thus, DIOA Board is empowered to prepare annual budgets based on its predictions for the coming year, and the DIOA membership must approve.



The DIOA Declaration defines the annual "Assessment" as "an Owner's share of the Common Expenses or other charges from time to time assessed against an Owner by the Association [DIOA] in the manner herein provided." (See Decl. ¶ 1.01(e)). Annual assessments for Common Expenses may be imposed broadly:

for purposes including, but not limited to . . . for the general purposes of promoting the recreation, health, safety, welfare, common benefit, and enjoyment of the Owners and occupants of the Development, and maintaining the Development and improvements therein, providing those services important to the development and preservation of an attractive community appearance, and, maintaining the privacy, security and general safety of the owners and occupants of the [D]evelopment; all as more specifically authorized from time to time by the Board of Directors.

(See Decl. ¶ 9.01). Moreover:

The Common Expenses to be funded by the annual assessments may include, **but shall not necessarily be limited to**, the following: . . .

- (viii) such other expenses as may be determined from time to time by the Board of Directors of the Association [DIOA] to be Common Expenses, including, without limitation, taxes and governmental charges not separately assessed against Lots, Dwellings or Multi-Family Areas; . . .
- (xi) for such further items that the Board may, in its discretion, deem necessary

(See Decl. ¶ 9.03(viii) and (xi)).

In light of South Carolina law and the Declaration, there is no genuine dispute that the Dataw Island community could approve DIOA budgets containing the Greenspace Line-Item. The DIOA budgetary process was to craft a budget and use that budget to calculate annual assessments. The Declaration grants the DIOA Board of Directors latitude to identify Common Expenses for many reasons, including "**but not limited to**" "promoting the recreation, health, safety, welfare, common benefit, and enjoyment of the Owners and occupants of the Development . . . and preservation of an attractive community appearance." (See Decl. ¶ 9.01). Proper maintenance of Dataw's golf courses would benefit all DIOA members; thus, a line-item for that purpose is permissible. Plaintiffs may disagree with that decision, but it is a decision that an overwhelming majority of community members consistently approve.

Plaintiffs have made no showing that the controlling documents prohibited the Greenspace Line-Item. There are no limitations on the Dataw community's power that would support Plaintiffs' contention. Moreover, nothing in South Carolina law prohibits DIOA from contributing to a third party to assist in the maintenance of assets benefiting the entire island. The ultimate purpose of the budgetary process is, of course, the funding of monies to be paid to third parties. There is nothing that would prohibit DIOA from contributing toward the maintenance and beautification of the golf courses that benefit all of its members.

Plaintiffs argue that — even if permitted by the law and the governing documents — DIOA budgets containing the Greenspace Line-Item are invalid because of misrepresentations or other imagined misconduct in the voting process. However, assuming *arguendo* that Plaintiffs could prove any Defendant acted culpably, they have not proffered any evidence that — but for the alleged misconduct — any votes would have been anything other than overwhelming votes in favor of those budgets. At the hearing, Plaintiffs published documents and deposition excerpts intended to show that advocates of the Greenspace Line-Item misled the community as to the necessity of the Greenspace Line-Item, the prevalence of such charges in other communities, and the use to which the funds would be put. It is undisputed, however, that the wisdom of the Greenspace Line-Item was openly debated when first proposed and has remained the subject of public debate through the present. Yet, every year the budget, including the Greenspace Line-Item, has been overwhelmingly adopted by the community. Plaintiffs have proffered no evidence that a single vote was swayed by the alleged misstatements. A reasonable jury could not conclude, based on this evidence, that the adoption of annual budgets containing a Greenspace Line-Item were ever the product of alleged fraudulent advocacy by any Defendants. Without some evidence of causation, Plaintiffs resort to speculation and conjecture, which are insufficient to create an issue for a jury.

Therefore, this Court grants Defendants' Motions for Summary Judgment as to Counts V and VI, denies Plaintiffs' Motion for Partial Summary Judgment as to these counts and enters judgment against Plaintiffs as to same.

VI. COUNT VII — BREACH OF COVENANT

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Bldrs., Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). A breach of contract claim cannot succeed where there is no relevant contractual privity between the plaintiff and defendant:

"Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994).

See *Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (emphasis added), *cited in*, *Clardy v. Bodolosky*, 383 S.C. 418, 429-30, 679 S.E.2d 527, 533 (Ct. App. 2009) ("Though Land-Magnolia was a necessary party to the present action, it was not a party to the real estate contract at issue. Consequently, Land-Magnolia cannot now be responsible for attorney's fees given there is no privity of contract.") "[A]n individual who is not a party to a contract generally cannot be liable for its breach." *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 553-54, 581 S.E.2d 858, 861 (Ct. App. 2003) (emphasis added) (*citing Holder v. Haskett*, 283 S.C. 247, 251, 321 S.E.2d 192, 194 (Ct.App. 1984)).

In this lawsuit, there is no allegation that the DIC or the individual Defendants owed contractual duties to Plaintiffs under the Declaration. Plaintiffs do not allege that the Declaration is an agreement binding the DIC and all the individual Defendants to fulfill contractual obligations to them. Plaintiffs do not allege that those Defendants made any promises to Plaintiffs memorialized in the Declaration. Under these circumstances, those Defendants were not parties to the Declaration against whom Plaintiffs could seek contractual enforcement.

Moreover, as set forth in Sections IV and V, *supra*, this Court is granting summary judgment as to Plaintiffs' Counts III, IV, V and VI. Specifically, the Court concludes that the enactment of the Third Amendment and passage of budgets containing the Greenspace Line-Item do not violate the terms of the Declaration. As a result, Plaintiffs' breach of covenant claim must fail, because they cannot create a jury issue as to the existence of a "breach."



Therefore, the Court dismisses Count VII (breach of covenant) of Plaintiffs' Complaint with prejudice.

VII. COUNT VIII — CONFLICT OF INTEREST TRANSACTIONS

Plaintiffs allege that the individual DIOA Defendants engaged in "conflict of interest transactions," in connection with the Third Amendment and the Greenspace Line-Item. Plaintiffs characterize these transactions as "conflicts of interest" because they allegedly benefited the DIC at the expense of the DIOA. South Carolina law delineates the boundaries of impermissible director conflicts of interest in nonprofit corporations:

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into or is approved as provided in subsections (b) or (c). . . .

See S.C. Code § 33-31-831(a). From this statute and the allegations of the Complaints, it is clear that the "conflict of interest" cause of action seeks to remedy harm to the DIOA as a corporate entity. As such, this claim can only be asserted as a derivative claim on behalf of the DIOA. As discussed above, Plaintiffs have not satisfied the procedural requirements to assert a derivative claim.

In addition, for the reasons discussed above, to the extent Plaintiffs' conflict of interest claims relate to either the enactment of the Third Amendment or the approval of budgets containing the Greenspace Line-Item, those claims are barred by the statute of limitations.

Therefore, the Court dismisses Count VIII (conflict of interest transactions) of Plaintiffs' Complaint with prejudice.

VIII. COUNT X — TORTIOUS INTERFERENCE WITH CONTRACT

To succeed on a claim of tortious interference with contract, Plaintiffs must allege and prove: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. See *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). The

South Carolina cases recognizing this cause of action have limited themselves to situations where a party to a contract sues a stranger to the agreement, rather than a party thereto. *See Todd v. South Carolina Farm Bur. Mut. Ins. Co.*, 276 S.C. 284, 321 S.E.2d 602 (Ct. App. 1984); *Ross v. Life Ins. Co. of Va.*, 273 S.C. 764, 259 S.E.2d 814 (1979); *see also Smith v. Citizens & Southern Nat'l Bank of S.C.*, 241 S.C. 285, 128 S.E.2d 112 (1962); *Keels v. Powell*, 207 S.C. 97, 34 S.E.2d 482 (1945). As stated above, Plaintiffs correctly aver that the Declaration is an enforceable contract between the DIOA and its members. I agree. However, the Declaration is moreso the foundational document that governs the Dataw Island community as a whole. *See Restatement (Third) of Property: Servitudes § 6.2(e)* (2000) ("[D]eclarations are recorded documents that contain the servitudes that create and govern the common-interest community.") The DIOA is the organization created under the Declaration to manage the property or affairs of the community; however, at all times, the membership of the DIOA is comprised solely of Dataw property owners. These owners would also be members of DIC when they are DIC board members. ~~Thus, the Defendants, like Plaintiffs, are parties to the Declaration and, as a result, not "strangers" to that agreement.~~ The Defendants cannot be held liable for intentional interference with a contract to which they were parties in the same status as Plaintiffs.

Therefore, the Court dismisses Count X (tortious interference with contractual relations) of Plaintiffs' Complaint with prejudice.

IX. COUNT XI — AIDING AND ABETTING BREACH OF FIDUCIARY, STATUTORY AND COMMON LAW DUTIES

As set forth above, Plaintiffs' breach of fiduciary duty claims against the DIOA Defendants are without merit and must be dismissed. Because Plaintiffs' claims of breach of fiduciary duty against the DIOA Defendants fail, Plaintiffs' dependent claims of "aiding and abetting" against the DIC Defendants must also fail. If Plaintiffs cannot succeed on the primary claim of breach of fiduciary duty against DIOA's directors, they certainly cannot state a claim for aiding and abetting something that is not itself tortious. *See, for example, In re Section 1031 Exch. Litig.*, 716 F.Supp.2d 415, 427 (D.S.C. 2010) ("[T]he Customers lacked an immediate



right to possess the funds, and, as such, cannot state a claim for the underlying tort of conversion. Accordingly, the court dismisses the Customers' claim for aiding and abetting conversion.") (applying California law).

Therefore, the Court dismisses Count XI (aiding and abetting breach of fiduciary duty) of Plaintiffs' Complaint with prejudice.

IX. MOTION FOR A MORE DEFINITE STATEMENT

Defendants have also moved the Court for an Order requiring the Plaintiffs to provide a more definite statement. To the extent that Plaintiffs' claims are not already resolved by this Order, such Motion for a More Definite Statement is well-taken and hereby granted. Rule 12(e) provides that:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading.

See S.C.R. Civ. P. 12(e).

Plaintiffs' Complaints are unduly vague and prejudicial to Defendants. Despite the long history of litigation on these issues and the years and volume of discovery, Plaintiffs repeatedly make broad allegations that the "Defendants" were involved in more than a decade of claimed bad acts—all occurring at different times and with different individual board members serving on the various years' boards of the DIOA and the DIC. No single defendant, in fact, served on any board the entire time period at issue in this case. Some Defendants were not even on any board when any decisions complained of were made. Some were on the board for just one such decision. Plaintiffs had three years to conduct discovery in the Federal Lawsuit, obtaining voluminous depositions and over 100,000 pages of documents. Yet, the Complaint is without any reference to the specific acts Plaintiffs allege were undertaken by any specific Defendant.

Consequently, to the extent any claims are not fully resolved by this Order, Plaintiffs are ordered, pursuant to Rule 12(e), to file an Amended Complaint within 15 days of the date of this



Order to clarify any remaining Counts as to the existing Defendants.⁵ The Amended Complaint shall state, for each remaining count and as to each remaining Defendant, the specific acts and omissions which Plaintiffs allege that each such Defendant undertook for which such Defendant is believed liable to the Plaintiffs and/or which relate to Plaintiffs' damages. Blanket allegations of misconduct by "Defendants" shall not be acceptable; it is incumbent upon the Plaintiffs to state what each Defendant allegedly did or failed to do that is actionable.

Finally, the Court notes that Plaintiffs stated at the hearing on these issues and in communications with the Court and counsel an intent to amend this and/or one of the other two Complaints to, *inter alia*, dismiss parties. Plaintiffs shall, as part of the amendments required in this Order, dismiss the individual Defendants that Plaintiffs indicated to the Court they would dismiss.

CONCLUSION

For the foregoing reasons, the Court disposes of the parties' pending Motions to Dismiss and cross-Motions for Summary Judgment as follows:

The claims against individuals who were Directors of Defendant DIOA are hereby dismissed as discussed in Section I, *supra*.

Count I: The Court dismisses Plaintiffs' breach of fiduciary duty claim with prejudice.

Count II: The Court dismisses Plaintiffs' unlawful distribution claim with prejudice.

Counts III-IV: The Court enters summary judgment in favor of Defendants and against the Plaintiffs as to these Counts, which relate to the Third Amendment.

Counts V-VI: The Court enters summary judgment in favor of Defendants and against the Plaintiffs as to these Counts, which relate to the Greenspace Line-Item.

Count VII: The Court dismisses Plaintiffs' breach of covenant claim with prejudice.

⁵ Should plaintiffs desire to add additional defendants as they represented to the Court at hearing, such additions shall only be made upon separate Motion to the Court.



- Count VIII: The Court dismisses Plaintiffs' conflict of interest claim with prejudice.
- Count IX: The Court directs Plaintiffs to amend their Complaint to set forth this cause of action (unjust enrichment) with greater particularity.
- Count X: The Court dismisses Plaintiffs' tortious interference with contract claim with prejudice.
- Count XI: The Court dismisses Plaintiffs' aiding and abetting breach of fiduciary duty claim with prejudice.
- Count XII: The Court directs Plaintiffs to amend their Complaint to set forth this case of action (SCUTPA) with greater particularity.

IT IS SO ORDERED!

BY THE COURT


