

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Mikell R. Scarborough, Master-in-Island

Appellate Case No. 2023-000773

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SC Court of Appeals

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 Respondents,

v.

Mariner's Cay Racquet & Yacht Club Homeowners' Association,
Inc. Appellant.

RECORD ON APPEAL, VOLUME II OF II

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Dustin Grotzke, Christene Grotzke,	)	CASE NO.: 2019-CP-10-03390
Leo Cornejo, Steve Falcani,	)	
Nancy Falciani, Robert St. Louis	)	
Lindsay Layton, George Lauderback,	)	PLAINTIFFS' MEMORANDUM
Beth Lauderback, Lynn Alexander,	)	IN SUPPORT OF MOTION
Ron Woolf, Roberta Woolf, Nancy	)	FOR SUMMARY JUDGMENT
Zaj, Meg White, Joey Winchester,	)	
Kelly Hill, Mary Thaler, Ed Thaler,	)	
Lisa Essig, Brianna Stello, and Leslie	)	
Kelly,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Mariner's Cay Racquet & Yacht Club	)	
Homeowners' Association, Inc.,	)	
	)	
Defendant.	)	

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.¹ Without exception, every mandate that the Owners in Mariner's Cay are required to follow under the recorded governing documents must necessarily be (1) a Covenant in the Master Deed, (2) a By-Law, or (3) a rule or regulation

¹ A copy of the Master Deed was attached as Exhibit A to the Complaint in this action.

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that the Board is authorized to promulgate under Article III, Section 3, subsection (e) of the Master Deed.

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. The Master Deed does not prohibit or restrict short-term rentals of condominium units in any manner.

The Master Deed addresses leasing of the units in Article III "Property Rights," Section 2 pertaining to the "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," in 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 further goes on to explicitly address "Leasing of Units" in Section 7: "Units may be rented provided the occupancy is only by the lessees and his immediate family unless otherwise provided by the Association's Board of Directors."

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Plaintiffs, in deciding to purchase their units in Mariner's Cay, knew that the Master Deed allowed for rentals of their units, without any temporal limitation or minimum lease duration. Affidavit of Leo Cornejo, attached as **Exhibit F** to this memorandum.

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 characterized as the negative effects of short-term rentals of units.² In this 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 procedure for an amendment by sending out a notice on October 9, 2018, of a town hall meeting to discuss the options available and what the amendment would mean for the community.³ 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.⁴ 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 forty-two units intended to vote against the proposed changes, which accounted for approximately 31% of the units. Recognizing that the vote would likely be 69% in favor of the

² A copy of this email was attached as Exhibit B to the Complaint in this action.

³ A copy of this notice was attached as Exhibit C to the Complaint in this action.

⁴ A copy of this email was attached as Exhibit D to the Complaint in this action.

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proposed changes, and thus the proposed amendment would fail under the requirements of the Master Deed, the Board did not proceed with presenting the proposed amendment to the owners for a vote. At no time have the Members taken an official vote in relation to the amendment of the Master Deed regarding short-term rentals. Affidavit of Cornejo, **Exhibit F** to this memorandum.

On May 28, 2019, the Board announced a “moratorium” on short term rentals.⁵ The Board claimed that it made this decision based on alleged 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 simply voted on it and announced it, appearing to completely ignore its earlier acknowledgments that prohibiting short term rentals would require an amendment of the Master Deed.

As a result of the purported moratorium, the current 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. Some Plaintiffs have attempted to sell their units subsequent to the purported moratorium, but have been forced to reduce the price substantially after prospective purchasers became aware they would not be able to rent the units short-term. Affidavit of Cornejo, **Exhibit F** to this memorandum. Prospective buyers expressed an interest in acquiring Plaintiffs’ units, but then rescinded their interest and/or were only willing to make significantly lower offers after being made aware of the existence of a moratorium which would restrict their

⁵ A copy of the moratorium document was attached as Exhibit E to the Complaint in this action.

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ability to lease the units on a short-term basis. Affidavit of Cornejo, **Exhibit F** to this memorandum.

Plaintiffs retained the undersigned legal counsel who on their behalf filed the Summons and Complaint in the herein action on June 24, 2019.

STANDARD OF REVIEW

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, SCRCF. 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)).

ARGUMENT

I. Pursuant to the Association's Master Deed, Owners are permitted to rent their units on a short-term basis.

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.

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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 straightforward contract interpretation.

A. The clause addressing the Owners’ right to lease their units and the clause granting the Board power over usage of the common areas must necessarily control over the clause which incidentally mentions the Board’s authority over who may occupy the unit.

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).

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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 condominium units in any manner, and in fact, 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 limitation or qualification 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 leasing of units, but also that they did not intend to include a minimum duration restriction on the leasing of units, as the governing documents do not mention such a limitation in any way.

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

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use of the General Common Area and Facilities.” It is therefore unmistakably clear that rules and regulations promulgated by the Board may not limit or restrict the Owners’ use of their units, but rather only over the Owners’ use of the General Common Areas. The Board’s purported moratorium flies in the face of this clear distinction. For this reason, Plaintiffs’ motion for summary judgment should be granted.

B. 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

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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

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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).

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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.

As in all of the cases above, Plaintiffs in the case at bar have rented their condominium units on a short-term basis. Similar to *DeVaney* and *Slaby*, Plaintiffs have marketed and advertised units online on vacation rental websites and/or applications as being available for short-term

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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, 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. For all these reasons, Plaintiffs' motion for summary judgment should be granted.

II. The Board of Defendant Mariner's Cay has acted *ultra vires* by imposing a moratorium addressing whether Owners may rent their units on a short-term basis, and thus Defendant is in breach of the Master Deed.

"A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto." *Lovering v. Seabrook Island Prop. Owners Ass'n.*, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986) *aff'd as modified on other grounds*, 291 S.C. 201, 352 S.E.2d 707 (1987) (overruled on other grounds by S.C. Code Ann. § 33-31-302). If a corporation is acting beyond the scope of its powers, it is acting *ultra vires*, and the rules of contract construction shall apply and "covenants will be enforced according to their obvious meaning." *See Id.*; *First Federal Sav. & Loan Ass'n of Charleston v. Bailey*, 316 S.C. 350, 354, 450 S.E.2d 77, 79-80 (Ct. App. 1994). A similar rule of contract construction necessarily applies to restrictive covenants placed on real property, which themselves are

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“contractual in nature and bind the parties thereto in the same manner as any other contract.” *Seabrook Island Property Owners Ass’n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). Here, the Board acted *ultra vires* in breaching the Master Deed by imposing the moratorium on short-term rentals.

A. The Nonprofit Corporation Act does not shield the Board’s *ultra vires* actions, as the Board acted in violation of their Master Deed and By-Laws.

“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; acts beyond the scope of the powers so granted are *ultra vires*.” *Pelzer*, 292 S.C. at 347, 356 S.E.2d at 414. If a homeowner’s association is acting beyond the scope of its powers granted pursuant to the language in the Restrictive Covenants, its bylaws, and the statutes of this state, it will be acting *ultra vires*. *Hinson v. Stafford Park HOA, Inc.*, No. 2010-UP-568, 2010 WL 10088265 (S.C. Ct. App. Dec. 31, 2010).

The South Carolina legislature greatly broadened the powers of nonprofit corporations with the enactment of the South Carolina Nonprofit Corporation Act. 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 Officials Comment states “a distinction should be drawn between the power of the corporation to do all things necessary or convenient to carry out its 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

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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 under the Nonprofit Corporation Act. The Act was created in order to ensure that a corporation’s powers were not so 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 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.” *See* Ex. A to Complaint., Article III, Section 3. Defendant purports that the moratorium was in response to the negative effects of short-term rentals to vacationers. Ex. B to Complaint. Even assuming that allegation is true, imposing the moratorium was a direct violation of the Master Deed and Bylaws, and it is not necessary nor convenient to further the activities of Mariner’s Cay. Thus, Defendant is not protected by the Nonprofit Corporation Act because it has not only failed to show how the moratorium was necessary to the Association, but most importantly, it was indisputably a breach of the Master Deed.

B. In acting *ultra vires* of powers granted to it under the Master Deed, the Board of Mariner’s Cay is not protected under the business judgment rule.

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

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(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 shall look 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). A corporation’s actions taken within the scope of the powers granted it are considered *intra vires* acts; acts beyond the scope of its powers, however, are *ultra vires* acts. *Lovering*, 289 S.C. at 82, 344 S.E.2d at 865. The business judgment rule applies to *intra vires* acts of the corporation, but not to *ultra vires* acts. See *Dockside Ass'n.*, 291 S.C. 214, 352 S.E.2d 714. In other words, 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 has acted *ultra vires* and violated the Master Deed by imposing the moratorium on short term rentals, and thus, it is not protected by the business judgment rule.

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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* Ex. A to Complaint, 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.) *See* Ex. A to Complaint, 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 and attempted to do), the Board has acted *ultra vires* and thus cannot be protected under the business judgment rule. 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).

C. By breaching the Master Deed, the Board has placed a restriction on Plaintiffs’ alienation of their units; therefore the Court should grant Plaintiffs’ an injunction against the moratorium.

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 height of injury to the Defendant, and compare that to Plaintiff’s benefit if the restriction were to stand. *Hunnicut 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*,

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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 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, Plaintiffs have faced significant hardship in attempting to sell their units. Multiple buyers have shown an interest, until the point that they discover the moratorium is in place. Some Plaintiffs have attempted to sell their units subsequent to the purported moratorium, but have been forced to reduce the price after prospective purchasers became aware they would not be able to rent the units short-term. Prospective buyers expressed an interest in acquiring Plaintiffs’ units, but then rescinded their interest and/or were only willing to make significantly lower offers after being made aware of the existence of a moratorium which would restrict their ability to lease the units on a short-term basis. See Affidavit of Cornejo, **Exhibit F** to this memorandum.

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 would not be impaired. As provided in the Master Deed, the Board would still have the ability to regulate use of the common areas, and could

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still present a proposed amendment restricting or prohibiting short-term rentals for a vote by the members. Enjoining the moratorium would limit the Board's authority as to the members' use of their units, but that limitation is already contained in the Master Deed. Plaintiffs are not asking the Court to take away any powers granted to the Board, but simply for the Court to enforce the rights granted to the Owners and to 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, Plaintiffs' motion for summary judgment should be granted.

III. Defendant has failed to support its affirmative defenses.

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

Defendant pleaded a failure to state facts sufficient to constitute a cause of action as a defense to the Complaint under Rule 12(b)(6), SCRPC. 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), SCRPC, 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)).

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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 has unlawfully impaired Plaintiffs' right to free alienability of their units. Taken as true, the allegations form a sufficient basis for a breach of contract action, so dismissal under Rule 12 is not appropriate.

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

i. 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,

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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.

ii. 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

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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 they have outlined, Defendant has the authority to make changes to rules regarding 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 cannot and does not bar Plaintiffs' claims.

iii. 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. 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

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Summons and Complaint were filed June 25, 2019, less than a month after the moratorium announcement. Plaintiffs clearly did not delay, and there can be no prejudice shown on the part of Defendant and therefore Defendant's claim of laches must necessarily fail, and cannot and does not bar Plaintiffs' claims

C. 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 wholly without merit.

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D. 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 are bringing an action based on breach of the Master Deed and Bylaws which are in writing and have been signed. The Statute of Frauds is inapplicable here.

E. Parol Evidence Rule

"The parol 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, parol 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, parol 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. *Soulis 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 parol evidence bars Plaintiffs' claims. There is nothing in the Master Deed and Bylaws preventing Plaintiffs from renting their units on a short-term basis; in

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fact, the language of the Deed explicitly allows the leasing of the units, and mentions nothing about a minimum duration of lease. However, Defendant asserts the residential and business portions 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, parol evidence may be allowed in. Thus, Defendant's assertion that parol evidence bars Plaintiffs' claims is without merit.

For all these reasons, Plaintiffs' motion for summary judgment should be granted.

CONCLUSION

Under the Mariner's Cay Master Deed, Plaintiffs and other unit owners may lawfully rent their units for any lease duration, including short-term rentals. The "residential use" and "business activity" restrictions in the Master Deed do not prohibit Plaintiffs' short-term rentals, as the use undertaken by Plaintiffs is entirely residential in nature. This position is consistent with and supported by the overwhelming majority of appellate decisions in other jurisdictions which have considered and decided on that issue. The Board has acted outside the scope of its authority, and thus breached the Master Deed, by imposing a moratorium purporting to impair the rights of the unit owners to freedom of alienation.

Plaintiffs request that this Court enter summary judgment in its favor, enter a temporary restraining order and/or temporary injunction compelling and requiring Defendant to immediately vacate and cancel the purported moratorium and all amendments thereto, enter an Order providing that Defendant shall be specifically enjoined and barred from hindering or interfering in a manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club, and grant

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summary judgment against Defendant's affirmative defenses and counterclaims. The undisputed facts and the applicable law compel this result.

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Respectfully submitted,

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Attorneys for Plaintiffs

July 15, 2022

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Dustin Grotzke, Christene Grotzke,
 Leo Cornejo, Steve Falciani,
 Nancy Falciani, Robert St. Louis,
 Lindsay Layton, George Lauderback,
 Beth Lauderback, Lynn Alexander,
 Ron Woolf, Roberta Woolf, Nancy
 Zaj, Meg White, Joey Winchester,
 Kelly Hill, Mary Thaler, Ed Thaler,
 Lisa Essig, Brianna Stello, and Leslie
 Kelly,

Plaintiffs,

v.

Mariner's Cay Racquet & Yacht Club
 Homeowners' Association, Inc.,

Defendant.

CASE NO.: 2019-CP-10-03390

**AFFIDAVIT OF LEONARDO
 CORNEJO IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
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Leonardo Cornejo, being duly sworn, deposes and says:

1. I am above the age of eighteen (18) and a resident of the State of South Carolina.
2. All of the facts stated herein are personally known by me to be to be true and correct.
3. I am the owner of one unit in the Mariner's Cay Racquet & Yacht Club condominium community. I used to own two units but I sold one in 2021, as detailed below.
4. When I decided to purchase my units in Mariner's Cay, I knew the Master Deed to allow for rentals of my units, without a temporal limitation or minimum duration of leases. In fact, the previous owner of Unit # 46 who sold that unit to me had been renting it short-term before I bought it from him.
5. I purchased my units with the specific intention of using them for personal use and also to be able to rent them when I am not personally using them. I rent my units on both a long-

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term and short-term basis, and I value my right to rent the units for both long-term and short-term durations.

6. If the Master Deed had prohibited short-term rentals, I would not have bought my units in Mariner's Cay.

7. In preparing for the vote to amend the Master Deed to prohibit short-term rentals of units, I, through talking with other community members, learned that of the 135 units in Mariners Cay, approximately forty-two units intended to vote against the proposed changes, which accounted for approximately 31% of the units.

8. Because it appeared the vote would be approximately 69% in favor of the proposed change and 31% against, and thus the proposed amendment would fail under the requirements of the Master Deed, the Board did not proceed with presenting the proposed amendment to the owners for a vote.

9. As a result of the purported moratorium, I have been deprived of the ability to freely sell my property to prospective purchasers who would be interested in continuing to rent the units on a short-term basis.

10. In 2021, I had to drastically lower the price of one of my units in order to sell it.

11. I originally listed the unit for \$359,000. Prospective buyers had expressed interest in buying my unit, but then rescinded their interest after being made aware of the moratorium restricting their ability to lease units on a short-term basis. Thereafter, I had to drop the price by \$34,000, eventually selling my unit for \$335,000. I also was forced to add incentives, including paying the first 6 months of the buyer's HOA assessments, totaling nearly \$5,000.

12. This occurred during the hottest seller's market in the history of South Carolina, when

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prices were spiking and bidding wars were resulting in cash offers above the listing price. However, due to Defendant's actions in violation of the Master Deed, I was forced to drop the price of my unit by some 9 percent.

13. I have direct knowledge that other owners experienced similar results, i.e., having to reduce their asking price significantly and add incentives in order to sell their units.

FURTHER AFFIANT SAYETH NOT!



Leonardo Cornejo

Acknowledged, sworn to and subscribed before me

This, the 15 day of July, 2022

Notary Public for the State of South Carolina
My commission expires: _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Dustin Grotzke, Christine Grotzke,)
Leo Cornejo, Steve Falcani,)
Nancy Falciani, Robert St. Louis,)
Lindsay Layton, George Lauderback,)
Beth Lauderback, Jan Prentice,)
Julie Haynie, Lynn Alexander,)
Lisa Scott, Ron Woolf, Rabecca Woolf,)
Nancy Zai, Meg White, Ginger Adler,)
Gerry Murphy, Sam Ogden,)
Joey Winchester, Frank Duffy,)
Betty Duffy, Lois Stefan, Kelly Hill,)
Mary Thaler, Ed Thaler, Lisa Essig,)
Jenn Odom, Brianna Stello, and)
Leslie Kelly,)
v.)
Mariner's Cay Racquet & Yacht Club)
Homeowners' Association, Inc.,)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-10-3390

MOTION TO AMEND COMPLAINT

PLEASE TAKE NOTICE that the undersigned attorney for Plaintiff, hereby moves before the Presiding Judge for an Order allowing Plaintiff to Amend the Complaint. The grounds for this motion are as follows:

1. Plaintiffs wish to remove George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ginger Adler, Gerry Murphy, Sam Ogden, Frank Duffy, Betty Duffy, Lois Stefan, Jenn Odom and Leslie Kelly as Plaintiffs.

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MOTION TO AMENDED COMPLAINT*

2. George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ginger Adler, Sam Ogden, Frank Duffy, Betty Duffy, Jenn Odom and Leslie Kelly no longer own units in Mariner's Cay, thus they are no longer interested parties, except that they reserve all rights including asserting any and all claims and defenses if Defendant opts to maintain and pursue its counterclaims against these persons.

3. Lois Stefan and Gerry Murphy continue to own units in Mariner's Cay, but no longer wish to participate as parties in this litigation. They reserve all rights including asserting any and all claims and defenses if Defendant opts to maintain and pursue its counterclaims against these persons.

4. Plaintiff wishes to correct the first names of Plaintiffs Woolf to Roger Woolf and Roberta Woolf.

5. Plaintiff wishes to correct the spelling of the last name of Plaintiff Nancy Zaj.

6. Plaintiff wishes to add two new persons as parties Plaintiff: Jennifer Sellars and Dominique Powell.

7. Plaintiff made other revisions and additions to the text of the original Complaint which are reflected in the proposed Amended Complaint, attached as Exhibit A to this motion.

In support of this motion, Plaintiff will rely on its proposed Amended Complaint, filed as Exhibit A to this motion, as well as applicable law and any further affidavit(s), memoranda, or other evidence as may be presented before or at the time of hearing of this motion.

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“Leave to amend pleadings pursuant to Rule 15, SCRCF, 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, 492 S.E.2d 826 (1997); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998).

No prejudice as contemplated by Rule 15(a), SCRCF, will inure to the parties in this case by granting of this motion; conversely, if the motion were to be denied, Defendant would obtain an unjust windfall and Plaintiff would be acutely prejudiced in its ability to obtain complete relief.

WHEREFORE, Plaintiff prays that the Court grant its motion to amend and issue an order permitting Plaintiff to file and serve the proposed Amended Complaint attached hereto as Exhibit A.

[SIGNATURE ON FOLLOWING PAGE]

*Dustin Grotzke, et al. v.
Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc.
Case No.: 2019-CP-10-03390
MOTION TO AMENDED COMPLAINT*

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August 5, 2022

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Dustin Grotzke, Christine Grotzke,)
Leo Cornéjo, 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, and Dominique Powell,)

Civil Action No. 2019-CP-10-03390

AMENDED COMPLAINT

Plaintiffs,

v.

Mariner's Cay Racquet & Yacht Club)
Homeowners' Association, Inc.)

Defendant.)

Plaintiffs above named, by and through their undersigned counsel, complaining against Defendant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. ("Defendant"), allege and state as follows:

PARTIES

1. Each Plaintiff is the owner of a condominium unit in Mariner's Cay Racquet & Yacht Club, located and situated in Charleston County, South Carolina.

2. Defendant is a South Carolina corporation, authorized to do business and doing business in South Carolina.

JURISDICTION AND VENUE

3. This Court has personal and subject matter jurisdiction over the parties and venue is proper in Charleston County under S.C. Code Ann. § 15-7-10(1).

FACTUAL BACKGROUND

4. Each Plaintiff owns a condominium unit in Mariner's Cay Racquet & Yacht Club, a condominium community located within the City of Folly Beach, South Carolina.

5. Some of the Plaintiffs have in the past rented their condominium units on a short-term basis, and to further that purpose some of the Plaintiffs have marketed and advertised their units online on vacation rental websites and/or applications as being available for such short-term rentals.

6. Two of the Plaintiffs, Jennifer Sellars ("Sellars"), and Dominique Powell ("Powell"), purchased their units after July 1, 2019 and as such, have been prevented from renting their units on a short-term basis by Defendant's "moratorium(s)" which purport to prohibit short-term rentals. Both Sellars and Powell have a specific desire and intention to rent their units on a short-term basis.

7. The Master Deed for Mariner's Cay Racquet & Yacht Club ("Master Deed"), was recorded on May 12, 1982 at Book J128, Page 300 in the Charleston County Register of Deeds office. A copy is attached as Exhibit A.

8. The Master Deed does not prohibit or restrict short-term rentals of condominium units in any manner.

9. In fact, the Master Deed specifically and explicitly allows leasing of the units. Article III, titled "PROPERTY RIGHTS," Section 2, titled "Units," 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.)

10. In Article III, Section 3, titled "Common Area and Facilities," subsection (e), the Board is provided the authority to promulgate rules and regulations. The Section states in relevant part:

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.

Notably, Article III, Section 3 explicitly states that such rules and regulations may limit "the use of the General Common Area and Facilities." It is therefore unmistakably clear that rules and regulations promulgated by the Board may not limit or restrict the owners' use of their units.

11. Article IX, titled "UNIT RESTRICTION," Section 7, "Leasing of Units," states as follows:

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. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

12. The Board discretion provided in Article IX, Section 7 is unambiguously limited to only deciding whether unrelated persons, i.e., persons other than the lessee and his or her immediate family, may occupy a unit under a lease.

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13. Article IX, Section 7 does not grant to the Board broad, unlimited or undefined authority to impose other restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals. Such an interpretation would conflict with Article III, Section 3, which states explicitly that the units may be leased, states no qualifications or limitations, and does not state “subject to the Board’s right to restrict rentals in Section 7 of this Article.”

14. Because Article IX, Section 7 specifically references only the Board’s authority to decide whether units may be rented to persons other than the lessee and his immediate family, any purported broader interpretation that Article IX, Section 7 authorizes the Board to impose other unspecified restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals, would directly conflict with the well-settled canon of contract construction which states that “where there are two clauses in any respect conflicting, that which is specially 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 (1904).

15. On October 5, 2018, the Board of Directors of Mariner’s Cay Racquet & Yacht Club (“Board”) sent an email to the unit owners. In the email the Board, without factual evidence and based on anecdotal accounts, complained about and criticized what it characterized as the negative effects of short-term rentals of units to vacationers. A copy is attached as Exhibit B.

16. The final paragraph of the Board’s October 5, 2018 email to the unit owners stated:

After much discussion and debate and with the input of many of our residents, your Board of Directors has determined 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 within our***

community. This is a very important step and would require a vote of 75% of the owners within Mariners Cay. This is not a step that we take lightly. We have had our options reviewed by legal counsel and this appears to be the best step to maintain the character of Mariners Cay as we go forward. The Board asks that you consider this situation and respond with any and all input and concerns. Thank you for your consideration.

(Emphasis added.)

17. On October 18, 2018, the Board sent an email to the unit owners announcing a "Town Hall Meeting" to address the topic of short-term rentals. A copy is attached as Exhibit C. The October 18, 2018 email stated in part, "One of the suggested options available to the Mariners Cay community is to limit rentals to not less than 30 consecutive days. This is a common restriction among multi-family residences. *This would require a Vote to amend the Mariners Cay Master Deed.*" (Emphasis added.)

18. Despite the explicit acknowledgment by the Board in two separate emails to the owners in October 2018 that amending the Master Deed would be required in order to prohibit or restrict short-term rentals of units, no vote has been taken on any proposed amendment of the Master Deed aimed at prohibiting or restricting short-term rentals of units.

19. Plaintiffs are in possession of evidence that the Board was made aware that of the 135 units in Mariner's Cay Racquet & Yacht Club, approximately 42 units (some 31 percent) intended to vote against the proposed changes to the Master Deed. Thus the proposed amendment would have failed to achieve the required 75% approval. As a result the Board did not proceed with presenting the proposed amendment to the owners for a vote.

20. Unable to restrict short-term rentals lawfully via an amendment to the Master Deed as required, the Board instead announced via an email to the owners on May 28, 2019 that a "moratorium" on short-term rentals would be imposed. A copy is attached as Exhibit D.

21. The Board's May 28, 2019 to the owners stated in part as follows:

Mariner's Cay Board of Directors Chooses a Direction

At the April Board meeting the Board voted on a recommendation from the Livability Committee to research the ability to place a rental Moratorium on future owners to allow sufficient time to work with the homeowners to develop long-term solutions while preserving the character of Mariner's Cay.

Board of Directors Makes a Decision

At the May 23, 2019 Monthly Board Meeting, the Board voted 7 to 0 to approve a Rental Moratorium after careful consideration and an open discussion with the larger than normal attendance of homeowners at the Board Meeting.

**TEMPORARY MORATORIUM REGARDING FUTURE RENTING
WITHIN THE MARINER'S CAY COMMUNITY**

WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short-term Rental (STR) units available within Mariner's Cay, and in an effort to maintain the residential character of the community, the Board of Directors of the HOA has determined that a Moratorium shall be placed on all new owners who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration. This provision excludes new owners who obtain title to a Mariner's Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2020 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short-term Rentals to the satisfaction of a majority of the home owners.

22. Without exception every mandate that the owners in Mariner's Cay are required to follow under the recorded governing documents must necessarily be either (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).

23. It is explicitly clear in Article III, Section 3, subsection (e) that the rules and regulations may only limit “the use of the General Common Area and Facilities.” It is therefore likewise clear that rules and regulations may not limit or restrict the owners’ use of their units. Restrictions involving owners’ use of their units must be enacted only via amendment of the Master Deed.

24. Since the purported moratorium on short-term rentals was indisputably not enacted via an amendment of the Master Deed or By-Laws, and since it was enacted by the Board without a vote by the owners, it can only be, and must necessarily be, an attempted rule or regulation under Article III, Section 3.

25. The moratorium is not a permissible rule or regulation, as it does not seek to only limit “the use of the General Common Area and Facilities”; instead it clearly and overtly seeks to limit or restrict the owners’ use of their units.

26. As stated above in Paragraphs 11 – 14, Article IX, Section 7 does not grant the Board unlimited or undefined authority to impose other restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals. Instead, the Board discretion provided in Article IX, Section 7 is unambiguously and narrowly limited to only deciding whether unrelated persons, i.e., persons other than the lessee and his immediate family, may occupy a unit under a lease.

27. The short-term rentals of units that some Plaintiffs have undertaken and some Plaintiffs wish to undertake, but have been prevented by Defendant from undertaking, cannot be properly or accurately characterized or deemed a business activity in violation of any provision of the Master Deed, including but limited to Article XI, Section 1, which states “Buildings and

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all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use..." or 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."

28. The renters' and/or prospective short-term renters' use of the units (sleeping, eating, bathing, etc.) are indisputably activities associated with residential use, and thus Plaintiffs' short-term rentals and prospective short-term rentals that have been prevented by Defendant 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.

29. Similarly, the requirement of a business license does not automatically transfer the short-term rentals at issue here into a business activity.

30. Plaintiffs' short-term rentals and prospective short-term rentals that have been prevented by Defendant are 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.

31. Section 33-31-304 of the South Carolina Code of Laws does not prohibit or limit in any manner the herein action. As stated in the Official Comment to S.C. Code Ann. § 33-31-304:

The focus of section 3.04 is narrow. It only validates corporate actions that are attacked on the ground that the corporation had no power to act. It does not address actions that: (i) violate other provisions of the Model Act; (ii) violate federal or state laws; (iii) **breach duties owed by the directors, officers, employees or agents of the corporation;** (iv) have not been approved or authorized as required by the Model Act; or (v) involve a claim by the corporation

or a third party seeking to avoid liability on the ground that the person acting on behalf of the corporation was not authorized to do so or was acting beyond the scope of his agency or agency power; or (vi) **breach duties owed by the corporation.**

(Emphasis added.)

32. Plaintiffs' claims herein are based upon unlawful action by the Board, not upon whether the corporation lacks or lacked power to act. Accordingly, Plaintiffs may lawfully and properly prosecute this action in its current form as stated in the herein Amended Complaint, and are not required by any rule or law to assert the herein claims as a derivative action.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

33. Plaintiffs fully reassert and reallege Paragraphs 1 through 32 above as though repeated here verbatim.

34. Master Deed Article XI, titled "GENERAL PROVISIONS," Section 6, titled "Enforcement," states in relevant part:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner.

35. Thus all Plaintiffs have standing to bring this action against Defendant to enforce the covenants, conditions and restrictions set forth in the Master Deed.

36. Although the purported moratorium as written attempts to apply not to current owners of units but only to future owners who have yet to acquire title, it nonetheless

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indisputably does affect, injure and damage all current owners, including Plaintiffs, regardless of whether they purchased their units before, on or after July 1, 2019, as said purported moratorium impairs and hinders current owners' ability to sell their units and diminishes the property value of the current owners' units.

37. Based on the recorded Master Deed, Plaintiffs have a vested legal right to lease their units, including on a short-term basis if desired. Plaintiffs also have the ability to convey that vested right to a purchaser, a right which has appreciable monetary value. By imposing the purported moratorium, Defendant seeks to deprive Plaintiffs of the ability to convey that valuable vested right.

38. By imposing a purported "moratorium" on short-term rentals of units without amending the Master Deed as would be required to impose any such restriction, the Association, acting through the Board, has violated and breached the Master Deed.

39. As direct result of Defendant's actions, Plaintiffs have sustained the following damages:

- a. Unreasonable interference with Plaintiffs' use and enjoyment of their property;
- b. Lost revenue from short-term rentals which are permissible and not in any way prohibited or restricted by the Master Deed;
- c. Diminution in the value of Plaintiffs' real property;
- d. Destruction of Plaintiffs' ability to convey to a purchaser the valuable vested legal right of leasing the units, including on a short-term basis if desired.

FOR A SECOND CAUSE OF ACTION
(Temporary Injunction / Temporary Restraining Order)

40. Plaintiffs fully reassert and reallege Paragraphs 1 through 39 above as though repeated herein verbatim.

41. Pursuant to Rule 65(a), SCRPC, Plaintiffs seek a Temporary Injunction 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 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.

42. Pursuant to Rule 65(b), SCRPC, Plaintiffs seek 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.

43. Plaintiffs request an order from this court providing that Defendant shall be specifically enjoined and barred from hindering or interfering in any manner with any short-term rentals of any units within Mariner’s Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing or promoting such units for short-term rentals, under penalty of contempt.

44. Defendant’s actions described herein above have caused and are continuing to cause Plaintiffs immediate and irreparable injury, loss or damage.

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45. Plaintiffs do not have any other adequate remedy at law.

46. Considering the balance of hardships between Plaintiffs and Defendant, the equitable remedy sought herein is warranted.

47. Public policy and the public interest would not be disserved and the weighing thereof supports the award of the injunctive relief sought herein, as Plaintiffs seek only to restrain Defendant from further injuring Plaintiffs irreparably.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

48. Plaintiffs fully reassert and reallege Paragraphs 1 through 47 above as though repeated herein verbatim.

49. In light of the herein described facts and circumstances, there exists an actual controversy between the parties involving their various rights, obligations and legal relations relative to the aforementioned Master Deed. As stated herein above, Plaintiffs explicitly have standing and the legal authority to enforce all of their rights under applicable law and under the Master Deed. Plaintiffs seek a judgment from this Court declaring the various rights, obligations and legal relations of the parties pursuant to S.C. Code Ann. §§ 15-53-20, 15-53-30, and 15-53-40; specifically, that Defendant's actions as described herein are and have been repugnant to and in violation of the aforementioned Master Deed and the common law of contract in South Carolina jurisprudence.

WHEREFORE, Plaintiffs pray that this Honorable Court award to them the following relief and remedies:

A. Such amount of actual damages as the court shall determine;

B. An Order declaring the herein described actions of Defendant to be in breach of the terms of the Master Deed to which the Association and all owners are declared to be bound;

50. A Temporary Restraining Order and/or Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately vacate and cancel the purported moratorium, and to publish and distribute notification of same to the owners in the same manner in which the two October 2018 emails were distributed; and that Defendant cease and desist in regard to any further attempt to impose a purported "moratorium" on short-term rentals, by either present or 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;

51. An Order providing that Defendant, under penalty of contempt, shall be specifically enjoined and barred from hindering or interfering in any manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing or promoting such units for short-term rentals;

- C. Costs of this action;
- D. Plaintiffs' reasonable attorneys' fees; and
- E. Any and all such further relief as this Court may deem just, equitable and proper.

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Homeowners' Association, Inc
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Homeowners' Association, Inc
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Respectfully submitted,

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Attorneys for Plaintiffs

_____, 2022

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: <u>2019-CP-10-03390</u>
DUSTIN GROTZKE, et al.,	)	
	)	
Plaintiffs,	)	DEFENDANT'S MEMORANDUM IN
	)	OPPOSITION TO PLAINTIFFS'
vs.	)	MOTION TO AMEND COMPLAINT
	)	
MARINER'S CAY RACQUET & YACHT	)	
CLUB HOMEOWNERS ASSOCIATION,	)	
INC.,	)	
	)	
Defendant/Third-Party	)	
Plaintiff	)	
	)	
vs.	)	
	)	
JANE AND JOHN DOE DEFENDANTS,	)	
	)	
<u>Third-Party Defendants.</u>	)	

Defendant Plaintiff Mariner's Cay Racquet & Yacht Club Homeowners Association, Inc. ("HOA"), by and through its undersigned attorneys, submits the following Memorandum in Opposition to Plaintiffs' Motion to Amend Complaint:

INTRODUCTION

A. Factual Background

This lawsuit involves, *inter alia*, the enforceability of a moratorium that the HOA's Board of Directors first duly enacted on July 1, 2019 concerning the topic of short-term rentals. Plaintiffs' original Complaint alleges that the moratorium violates South Carolina law and is not enforceable. In response, the HOA asserted that its short-term rental moratorium is enforceable. The HOA also asserted counterclaims against Plaintiffs for breaches of the HOA's various governing documents.

The parties have filed and extensively briefed cross-motions for summary judgment in this matter. On July 19, 2022, the Court held a hearing intended to address those motions. However,

at the hearing, the Court expressed concern that Plaintiffs' claims in this case were improper under S.C. Code § 33-31-304, which only permits nonprofit corporation members to bring derivative actions claiming *ultra vires* acts of the corporation. At that hearing, the Court instructed Plaintiffs to file a motion for leave to amend the original Complaint to address that issue. On August 5, 2022, Plaintiffs filed the instant Motion to Amend Complaint. For the reasons set forth below, the Court should deny Plaintiffs' Motion.

B. The Proposed Amended Complaint

The parties are presently before the Court on Original Plaintiffs' Motion to Amend Complaint, which was filed on August 5, 2022. The Motion attached a proposed Amended Complaint, which counsel for Defendant did not receive prior to the filing of the Motion.

Despite the concerns that the Court expressed at the July 19, 2022 hearing about Plaintiffs' original Complaint being deficient because they brought it directly in the names of the Original Plaintiffs, rather than as a derivative claim for equitable relief, Plaintiffs' proposed Amended Complaint does *not* make any derivative allegations.

1. Changes in Parties

The original Complaint in this matter was filed by the following named Plaintiffs in their own rights ("Original Plaintiffs"): Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ron Woolf, Rabecca Woolf, Nancy Zai, Meg White, Ginger Adler, Gerry Murphy, Sam Ogden, Joey Winchester, Frank Duffy, Betty Duffy, Lois Stefan, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Jenn Odom, Brianna Stello, and Leslie Kelly.¹ Importantly, the Original Plaintiffs all purchased their properties at Mariner's Cay *prior* to the adoption of the first moratorium. As a result, it is undisputed that the Original Plaintiffs are

¹ Defendant HOA objects to Plaintiffs' efforts to remove these parties from the caption, since it has asserted counterclaims against them. Defendant HOA will consent to the dismissal of these Plaintiffs' claims against it, but it will not consent to the dismissal of any of its counterclaims.

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not subject themselves to any restrictions contained in the Moratorium.

The proposed Amended Complaint seeks to radically change the Plaintiffs bringing the action. For example, the Amended Complaint removes fourteen (14) of the original 31 named Plaintiffs: George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ginger Adler, Gerry Murphy, Sam Ogden, Frank Duffy, Betty Duffy, Lois Stefan, Jenn Odom and Leslie Kelly. In addition, the proposed Amended Complaint adds two new Plaintiffs, Jennifer Sellars and Dominique Powell (“New Plaintiffs”).

2. Other Changes

In addition to changes in parties, the proposed Amended Complaint does include other minor changes from the original Complaint. For example, unlike the original Complaint, the proposed Amended Complaint alleges that “Plaintiffs’ claims herein are based upon unlawful action by the Board, not upon whether the corporation lacks or lacked power to act” (*See* Proposed Am. Compl. ¶ 32). As a result, they contend that their claims are not barred by S.C. Code § 33-31-304. (*See id.* ¶ 31). However, substantively, the proposed Amended Complaint makes the same challenges to the Moratorium that the original Complaint made.

The proposed Amended Complaint also includes numerous new legal arguments, couched as allegations, that the short-term rental of units at Mariner’s Cay to transient vacationers is “residential” and not an impermissible “business” use. (*See* Proposed Am. Compl. ¶¶ 27-30).

ARGUMENTS

A. Standard of Review

South Carolina Rule of Civil Procedure 15(a), which is substantially the same as its federal counterpart, provides that “a party may amend his pleading . . . by leave of court . . . [which] shall be freely given when justice so requires and does not prejudice any other party.” Nevertheless, “a trial court may deny a motion to amend if the amendment would be clearly futile.” *See Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019); *accord Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) (“Although leave to amend

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should generally be 'freely given,' . . . it may be denied where the proposed amendment would be futile.").

Under these standards, the Court should deny Plaintiffs' Motion to Amend the Complaint in this matter as it is "clearly futile". In the alternative, if the Court decides to grant Plaintiffs leave to amend, it should continue the proposed September 19, 2022 hearing on the parties' cross motions for summary judgment, because the allegations of the proposed Amended Complaint inject many novel and material factual issues into this case (including the knowledge of the New Plaintiffs and any alleged "breaches of duties" or illegal actions by the HOA's Board of Directors), which will require the HOA to conduct discovery.

B. The Proposed Amendment Would Be Futile Because the Claims in This Case Are Plainly Barred by S.C. Code § 33-31-304.

1. As the HOA Has Previously Argued, Plaintiff's Claims Assert *Ultra Vires* Acts That Can Only Be Challenged in a Derivative Action Seeking to Enjoin Future Conduct.

Under the South Carolina Nonprofit Corporation Act, corporate action may not generally be challenged directly by members as being *ultra vires* (or outside of the corporation's powers under its governing documents):

(a) *Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.*

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, *or by a member or members in a derivative proceeding.*

(c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General

See S.C. Code § 33-31-304 (emphasis added); *accord Williamson v. Bermuda Run Investor Devel. Grp.*, 2006 WL 7286063 (Ct. App. June 13, 2006) (dismissing *ultra vires* claim where member

did not bring action derivatively). The Official Comment clarifies that Section 33-31-304 is intended "to do away with the *ultra vires* doctrine." See S.C. Code § 33-31-304, Official Comment. The South Carolina Reporter's Comments state that "a member of a nonprofit corporation has *no right to bring a direct attack against a proposed action*. The claim may *only be brought derivatively*. If an action has been accomplished and the members believe that the directors or others in charge have done something wrong, have acted '*ultra vires*,' the members may bring a *derivative* action against the alleged wrongdoers." See S.C. Code § 33-31-304, S.C. Reporter's Comments.

Under South Carolina law, "[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto. [Citations omitted.] A corporation's actions taken within the scope of the powers granted it are considered *intra vires* acts; acts beyond the scope of its powers, however, are *ultra vires* acts." *Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). "[A]ll corporate powers [of a nonprofit corporation] must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board." S.C. Code § 33-31-801(b). That is what the proposed Amended Complaint alleges: that the HOA's Board was not authorized — by the law or by Mariner's Cay's governing documents to enact the moratorium.

Under the South Carolina Nonprofit Corporation Act, if a corporation (through its Board or otherwise) exceeds the powers set forth in the governing documents, the only remedy allowed by the statute is a derivative action² against the HOA seeking "to enjoin an act."³ Plaintiffs' proposed Amended Complaint still does not assert a members derivative claim against the HOA; instead, Plaintiffs still only bring claims directly in their own right. The proposed Amended

² "Derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure." See S.C. Code § 33-31-630.

³ No direct damage lawsuits are permitted for *ultra vires* Board Actions. The law does not allow backward-looking lawsuits. Instead, members may only derivatively ask the Court to enjoin a future course of action by the nonprofit corporation.

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Complaint does not comply with South Carolina Rule of Civil Procedure 23(b)(1) and does not make any allegations to support bringing this as a derivative action. The proposed Amended Complaint continues to assert claims in Plaintiffs' individual capacities to enforce their own private rights. As a result, the Nonprofit Corporation Act precludes, as a matter of law, Plaintiffs' proposed Amended Complaint from asserting that the HOA acted *ultra vires*. As a result, it would be futile for Plaintiffs to file the Amended Complaint, as it still has the same defect contained in the original Complaint that caused the Court concern at oral argument on the parties' motions for summary judgment.

For the foregoing reasons, the proposed Amended Complaint is futile under S.C. Code § 33-31-304 in that it is not asserted as a derivative suit; therefore, the Court should deny Plaintiffs' Motion to Amend.

2. The Proposed Amended Complaint Fails to Distinguish This Case from an *Ultra Vires* Action Prohibited By Section 33-31-304.

The proposed Amended Complaint alleges that Section 33-31-304 does not apply in this case because — rather than claiming *ultra vires* acts — Plaintiffs seek to allege unlawful acts or breaches of duties by the HOA or its Board of Directors: "Plaintiffs' claims herein are based upon unlawful action by the Board, not upon whether the corporation lacks or lacked power to act. Accordingly, Plaintiffs may lawfully and properly prosecute this action in its current form as stated in the herein Amended Complaint, and are not required by any rule or law to assert the herein claims as a derivative action." (See Pl.'s Am. Compl. ¶ 32). In other words, in an effort to avoid the implications of S.C. Code § 33-31-30, Plaintiffs now argue that they are not really arguing that the HOA or its board acted *ultra vires*.

Plaintiffs' current contention (*i.e.*, that they are not asserting an *ultra vires* claim) is inconsistent with their prior contentions in this case. For example, this is a departure from the Original Plaintiffs' prior argument — made just over a month ago — that the "Board of Defendant Mariner's Cay has acted *ultra vires* by imposing a moratorium addressing whether Owners may

rent their units on a short-term basis, and thus Defendant [the HOA] is in breach of the Master Deed.” (See July 15, 2022 Pls.’ Mem. Supp. Mot. Summ. J., at 12). Plaintiffs further argued that “the Board has acted *ultra vires* and thus cannot be protected under the business judgment rule.” (See *id.*, at 16). It is disingenuous for Plaintiffs to now distance themselves from the position they have repeatedly asserted in pleadings and legal memoranda to this Court.

At its heart, Plaintiffs’ claim in this case is (and has always been) that “[b]y imposing a purported ‘moratorium’ on short-term rentals of units without amending the Master Deed as would be required to impose any such restriction, the Association, acting through the Board, has violated and breached the Master Deed.” (See Pls.’ Compl. ¶ 31). This is precisely what is meant by an *ultra vires* action. The Board of Directors of an owners association may exercise only powers granted by law, the master deed, and any bylaws made pursuant thereto; any act beyond the scope of those powers is *ultra vires*. See *Trost v. Sea Mark Tower Prop. Owners Ass’n*, No. 2004-UP-284, 2004 S.C. App. Unpub. LEXIS 313, at *6 (Ct. App. Apr. 29, 2004) (Ex. A). From the onset, Plaintiffs’ position in this case has been that the HOA (through its Board of Directors) did not have the legal authority under the governing documents and the law to enact the Moratorium. Their argument has consistently been that: (a) the Board of Directors could not themselves restrict short-term rentals by Board action; and (b) any action restricting the short term rental of property must be accomplished through an amendment of the Master Deed.

The proposed Amended Complaint clearly alleges that the Moratorium was beyond the authority of the HOA and its Board. For example, the proposed Amended Complaint alleges that “[t]he Board discretion provided in Article IX, Section 7 is unambiguously limited to only deciding whether unrelated persons, *i.e.*, persons other than the lessee and his or her immediate family, may occupy a unit under a lease.” (See Proposed Am. Compl. ¶ 12). It further alleges that that section “does not grant to the Board broad, unlimited or undefined authority to impose other restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals.” (See *id.* ¶ 13). It concludes that the Moratorium is improper under this section because it is “unambiguously and

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narrowly limited to only deciding whether unrelated persons, i.e., persons other than the lessee and his immediate family, may occupy a unit under a lease.” (*See id.* ¶ 26).

The proposed Amended Complaint also asserts that “every mandate that the owners in Mariner’s Cay are required to follow under the recorded governing documents must necessarily be either (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).” (*See id.* ¶ 22). It further claims that the Moratorium “is not a permissible rule or regulation, as it does not seek to only limit ‘the use of the General Common Area and Facilities’; instead it clearly and overtly seeks to limit or restrict the owners’ use of their units.” (*See id.* ¶ 25). The proposed Amended Complaint additionally alleges that “short-term rentals . . . cannot be properly or accurately characterized or deemed a business activity in violation of any provision of the Master Deed.” (*See id.* ¶ 27).

At the end of the day, the crux of Plaintiffs’ proposed Amended Complaint — like their Complaint and summary judgment filings before it — is that the HOA Board did not have the legal power to adopt the Moratorium. Plaintiffs’ consistent position has been that the Board exceeded its legal authority under the HOA’s governing documents. The proposed Amended Complaint plainly asserts a claim of *ultra vires*, i.e., that the HOA and the Board exceeded their legal powers. As a result, this claim could *only* be brought as a derivative suit to enjoin a future action. Plaintiffs’ proposed Amended Complaint — like the original complaint — fails to do so. As a result, the proposed amendment is futile, as it does not correct the glaring deficiency in the original Complaint. Therefore, the Court should deny Plaintiffs’ Motion to Amend.

C. **To The Extent the Proposed Amended Complaint Seeks to Assert a Claim for a Breach of Duty in Connection with *Intra Vires* acts of the HOA's Board, Amendment Would Be Futile Under the Business Judgment Rule.**

As set forth in the proposed Amended Complaint, Plaintiffs' now take the position that their claims do not challenge the authority of the HOA or its Board to act (*ultra vires*). Instead, they now claim that they allege that the HOA or its Board breached a duty in acting within their granted powers. Even if the Court determines that the Proposed Amended Complaint asserts claims for breaches of duties in connection with *intra vires* corporate board actions, the amendment would nevertheless be futile because the challenged conduct would be protected by the business judgment rule.

"A court should be reluctant to question action taken *intra vires* by the governing board of a non-profit corporation." *Dockside Assocs. v. Detyens*, 291 S.C. 214, 216, 352 S.E.2d 714, 716 (Ct. App. 1987), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987). South Carolina statutes set forth the duties applicable to a director of a nonprofit corporation:

(a) A director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.

(b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- (1) one or more officers or employees of the corporation who the director reasonably believes is reliable and competent in the matters presented;
- (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence;
- (3) a committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; . . .

(d) A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.

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S.C. Code § 33-31-830.

“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.” *Village W. Horizontal Prop. Regime v. International Sales & Mktg. Grp.*, No. 2007-UP-111, 2007 S.C. App. Unpub. LEXIS 134, at *10 (Ct. App. Mar. 7, 2007) (Ex. B) (*citing Detyens, supra*). “In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.” *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008) (*quoting Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993)).

In this case, the HOA Board's decision to adopt the Moratorium is protected by the business judgment rule. Plaintiffs cannot challenge the wisdom or correctness of the Board's action. The Court should not second-guess the HOA Board's determination of how to address the issue of short term rentals. Moreover, the proposed Amended Complaint (like the original Complaint) does not allege that the HOA's Board of Directors acted in bad faith or with a dishonest motive in enacting the Moratorium. It does not allege that the Board members did not act in the manner that they believed was in the best interests of the HOA. It does not allege that the Board did not act with reasonable prudence in enacting the Moratorium. It does not allege that the Moratorium was harmful to a majority of the members of the HOA.

Therefore, for the foregoing reasons, the Court should deny Plaintiffs' Motion to Amend and should decline to grant Plaintiffs' leave to file the proposed Amended Complaint.

D. The Court Should Deny the Motion to Amend, Because (in Light of Their Record Notice) New Plaintiffs' Claims Are Futile.

One of the HOA's arguments in its Motion for Summary Judgment is that the Original Plaintiffs lack standing because they all owned their properties prior to July 1, 2019. This is

significant because the Moratorium applies only to “new owners who have entered into a verifiable offer to purchase Mariners Cay units after July 1, 2019.” As a result, the Moratorium has no application to the Original Plaintiffs. In an apparent effort to remedy this standing problem, Plaintiffs’ proposed Amended Complaint seeks to add two New Plaintiffs, Jennifer Sellars and Dominique Powell. Unlike the Original Plaintiffs, the proposed Amended Complaint alleges that the *New Plaintiffs* “purchased their units *after July 1, 2019* and as such, have been prevented from renting their units on a short-term basis by” the moratorium at issue. (*See* Proposed Am. Compl. ¶ 6 (emphasis added)). The New Plaintiffs allegedly both “have a specific desire and intention to rent their units on a short-term basis.” (*See id.*). For the reasons that follow, the proposed Amended Complaint’s claims against the New Plaintiffs will require significant investigation and discovery by the HOA, because the HOA has a strong argument that those New Plaintiffs purchased properties with record notice of the short-term rental Moratorium and should be bound by that record notice.

The proposed Amended Complaint does not dispute that the various iterations of the Moratorium have been properly recorded and indexed with the Charleston County Register of Deeds and are in the chains of title for New Plaintiffs’ units. (*See* Exs. C-F to July 15, 2019 Mem. Supp. Def./Third-Party Pl. Mot. for Partial Summ. J. and Opp. Pls.’ Mot. Summ. J.). “The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim.” *Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006); *accord* S.C. Code § 30-9-40 (“The entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage, or other written instrument so filed for record.”). As a result, the New Plaintiffs will be deemed to have purchased their properties with constructive knowledge of the Moratorium. Having purchased properties with record notice of the Moratorium, the New Plaintiffs cannot now challenge the propriety of the Moratorium. To allow the New Plaintiffs to assert a claim at this time would essentially permit them to knowingly (or at least with

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record notice) and voluntarily buy their way into a lawsuit. To the contrary, the New Plaintiffs took their properties subject to the Moratorium and may not challenge it.

Moreover, New Plaintiff Jennifer Sellars has already filed a lawsuit against the seller of her property and a real estate agent alleging, in part, that the seller and agent failed to disclose the Moratorium to her. In that lawsuit, New Plaintiff Sellars has admitted — by failing to respond to requests to admit — that she had constructive knowledge of the Moratorium:

10. Admit that Plaintiff did not inquire into the status of the HOA guidelines relating to Short Term Rental Restrictions prior to closing.

11. Admit that the HOA guidelines are posted on the register of deeds for Charleston County and is a matter of public record.

12. Admit that Article IX, Section 1 of the Master Deed provides that “Buildings and all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use...”

(See Ex. C ¶¶ 10-12). Notably, these admissions are contrary to the statements in her still-unsworn Affidavit that was previously submitted to the Court. This is further reason that Plaintiff Sellars’ claims in the proposed Amended Complaint are futile.

Therefore, because they purchased their properties with constructive notice of the Moratorium, the New Plaintiffs’ proposed claims are futile. Therefore, the Court should deny the Motion to Amend as to the claims of the New Plaintiffs.

E. If the Court Grants Leave to File the Proposed Amended Complaint, the HOA Will Need to Conduct Significant Discovery to Address the New Plaintiffs’ Claims.

For the reasons that follow, the proposed Amended Complaint’s claims asserted by the New Plaintiffs will require significant investigation and discovery by the HOA⁴, because the HOA has a strong argument that those New Plaintiffs purchased properties with record notice of the

⁴ Defendant HOA has extensively briefed its need to conduct discovery regarding Original Plaintiffs’ business activities related to their short-term rental activity. As previously argued in the Memorandum in Support of Defendant’s Motion for Summary Judgment, discovery is needed from the Original Plaintiffs in order to gather information related to Plaintiffs’ short-term rental income, short-term rental business licenses, and Plaintiffs’ short-term renters.

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short-term rental Moratorium and should be bound by that record notice.

The claims of the New Plaintiffs inject a host of novel and material factual issues into this case. Specifically, because these New Plaintiffs purchased their properties after the first Moratorium, their claims raise issues of actual and constructive (record) notice or knowledge of the Moratorium. In order to fairly adjudicate these issues, the HOA must be permitted to engage in discovery. This will include written discovery and document requests. In addition, the HOA will likely need to subpoena documents from realtors, closing attorneys or others who were involved in the New Plaintiffs' acquisitions of their properties. Most importantly, once all documentary discovery is completed, the HOA will need to depose the New Plaintiffs. Before the Court can adjudicate the claims of the New Plaintiffs, the HOA must conduct robust discovery into their acquisitions of property and their knowledge.

Therefore, for the foregoing reasons, if the Court grants Plaintiffs' leave to file the proposed Amended Complaint, it should cancel the hearing scheduled for September 19, 2022 and should grant Defendant HOA at least 120 days to conduct discovery regarding the novel issues injected into this matter by the proposed claims of the New Plaintiffs.

CONCLUSION

For all of the foregoing reasons, this Court should deny Plaintiffs' Motion to Amend Complaint in this matter. In the alternative, the Court should grant Defendant HOA leave to conduct discovery as to novel issues injected into the case at this late stage.

BARNWELL, WHALEY, PATTERSON,
AND HELMS, LLC

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- and -

PARKER POE ADAMS & BERNSTEIN, LLC

By: s/ Robert H. Jordan
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*Counsel for Defendant/Third-Party Plaintiff
Mariner's Cay Racquet & Yacht Club
Homeowners Association, Inc.*

Dated: August 22, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2020-CP-10-
JENNIFER HOOD SELLARS,	)	
	)	
Plaintiff,	)	SUMMONS
	)	JURY TRIAL REQUESTED
vs.	)	
	)	
VERDA ADLER, INSPIRATION	)	
VACATIONS, LLC, MAGGIE LABLANC	)	
AND KELLER WILLIAMS WEST	)	
ASHLEY REAL ESTATE, INC.	)	
INC.,	)	
Defendant.	)	

TO THE ABOVE-NAMED DEFENDANT:

A lawsuit has been filed against you. Within 30 days after service of this Summons on you (not counting the day you received it), you must serve on the Plaintiffs an Answer to the attached Complaint or a Motion under Rule 12 of the South Carolina Rules of Civil Procedure. The Answer or Motion must be served on the Plaintiffs' attorney, listed below, at the address shown below. If you fail to do so, judgment by default will be entered against you for the relief demanded in the Complaint. You also must file your Answer or Motion with the court.

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK & KEITH, P.A.

s/ Jonathan F. Krell

JONATHAN F. KRELL

SC Bar No.: 16691

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ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina
July 22, 2021

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jennifer Hood Sellars,

Plaintiff,

vs.

Verda Adler, Inspiration Vacations,
LLC, Maggie LaBlanc
and Keller Williams West Ashley
Real Estate, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP-10-

COMPLAINT
Jury Trial Requested

Plaintiff, complaining of Defendants, allege and say:

PARTIES

1. Plaintiff is and was at all times mentioned herein a citizen and resident of Spartanburg County, South Carolina.

2. Upon information and belief, Defendant Inspiration Vacations, LLC (hereinafter Defendant Inspiration Vacations) is a corporation organized under the laws of the State of South Carolina and owned a parcel of property located at 93 W. Mariners Cay Drive, Folly Beach, South Carolina 29439.

3. Upon information and belief, Defendant Verda Adler is a citizen and resident of the State of South Carolina and is the registered agent of subject property located at 93 W. Mariners Cay Drive, Folly Beach, South Carolina 29439.

4. Upon information and belief, Defendant Maggie LaBlanc is and was at all times referenced herein a citizen and resident of Charleston County, South Carolina.

5. Upon information and belief, Defendant Keller Williams West Ashley

Real Estate, Inc., ("Keller") is a corporation organized under the laws of the State of South Carolina and is in the real estate brokerage business in Charleston County, South Carolina.

JURISDICTION

6. The Court has subject-matter jurisdiction over the claims in this lawsuit under Article V, § 11, of the South Carolina Constitution and South Carolina Code § 14-5-350.

7. The Court has personal jurisdiction over the Defendants.

VENUE

8. Venue is proper in this circuit under South Carolina Code § 15-7-30 because the acts or omissions giving rise to this cause of action occurred in Charleston County, South Carolina.

FACTS

9. Defendant Keller is responsible for the acts or omissions of its employees, agents or servants, working in the course and scope of their employment under the doctrine of *respondeat superior*.

10. At all times mentioned herein, Defendant LaBlanc was a licensed real estate agent with the South Carolina Real Estate Commission and was an employee, agent or servant of Defendants Keller.

11. Defendant Adler and Defendant Inspirations Vacations were the former owners of 93 Mariners Cay Drive, Folly Beach, South Carolina ("the Property").

12. In or about 2021, Defendant Adler and Defendant Inspiration Vacations listed the Property for sale with Defendant Keller and Defendant LaBlanc was the seller's agent.

13. Defendant Adler and Defendant Inspiration Vacations knew from as early as 2019 that the property had serious building defects and was going to be assessed by the Mariners Cay

Horizontal Building Regime and had in fact already had a special monthly assessment of \$300.00 added to the monthly regime fee.

14. Defendant Adler and Defendant Inspiration Vacations were also aware that the subject property was in litigation regarding rental usage and are named Plaintiffs in said litigation.

15. On or about April 2021, Plaintiff began negotiations to purchase the Property from Defendant Adler and Defendant Inspiration Vacations.

16. Despite having said knowledge, Defendant Adler and Defendant Inspiration Vacations completed a Residential Property Condition Disclosure form and indicated that they had "no representation" regarding building defects, assessments, limits on rental usage, and pending litigation.

17. Defendant Keller, Defendant Adler and Defendant Inspiration Vacations confirmed to Plaintiff that the Property could be rented out to third persons so that Plaintiff could receive rental income.

18. On or about April 2021, based upon the Defendant representations, Plaintiff purchased the Property for the sum of \$470,000.00.

19. Following Plaintiff's purchase of the Property, Plaintiff was informed that the Property could not be rented out to third persons for less than thirty (30) days.

19. After the purchase of the Property, Plaintiff learned that the building and her condominium had serious structural property defects and that the property owners were going to be assessed \$9,500,000.00 for repairs to the property and individual units.

20. As a direct and proximate result of the acts or omissions of Defendants, Plaintiff has been injured and damaged in an amount of actual and punitive damages to be determined at the trial of this matter.

FOR A FIRST CAUSE OF ACTION AS TO ALL DEFENDANTSS
(Negligence, Gross Negligence)

20. Plaintiff incorporates all allegations of paragraphs above into this cause of action as if set forth verbatim.

21. Defendants made material false representations to Plaintiff that the condominium could be rented out to third parties for short term renting and failed to disclose the fact that there was going to be an assessment levied against the Property.

22. Defendants had a pecuniary interest in making said statement to Plaintiff.

23. Defendants owed Plaintiff a duty of care see that truthful information was communicated to Plaintiff.

24. Plaintiff justifiably relied on Defendants representations that the condominium could be rented out short term to third parties so that Plaintiff could receive rental income.

25. That the injuries and damages complained of herein were directly and proximately caused by the following negligent, careless, reckless, willful, and grossly negligent acts of Defendants, all in violation of the statutes and common laws of the State of South Carolina, combining and concurring:

- (a) In making material misrepresentations regarding the Property;
- (b) In failing to properly determine whether the condominium could be rented to third persons for rental income;
- (c) In failing to use the degree of care and caution that a reasonable and prudent person and/or corporation would have used under the circumstances then and there prevailing;
- (d) In otherwise being negligent, reckless, and careless; and

- (e) For such other acts and omissions that may become more apparent through the discovery and/or trial of this matter.

26. That as a result of the aforesaid negligent, grossly negligent, careless, willful, and reckless acts, Plaintiff has been injured and damaged. Plaintiff has, is and will in the future continue to suffer from the following, including but not limited to: loss of rental income, loss in the value of their property and other damages - all to their injury and damage in an amount of actual and punitive damages to be determined at the trial of this action.

FOR A SECOND CAUSE OF ACTION AS TO ALL DEFENDANTS
(Fraud)

27. Plaintiff incorporates all allegations of paragraphs above into this cause of action as if set forth verbatim.

28. Defendants intended to deceive Plaintiff based on the representations that it did not know the Property had serious building defects and was going to be assessed a substantial sum.

29. Plaintiff is informed and believes she is entitled to actual and punitive damages which are the natural and proximate consequence of the fraudulent misrepresentations made by Defendants to be determined at the trial of this action.

WHEREFORE, Plaintiff requests that judgment be entered against Defendants on all causes of action and that Plaintiff be awarded actual damages; punitive damages; a trial by jury as to all causes of action properly triable; the costs of this action; and such other and further relief as the Court may deem just and proper.

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, & KEITH, P.A.

s/Jonathan F. Krell
Jonathan F. Krell, Attorney for the Plaintiff

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July 22, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Dustin Grotzke, Christine Grotzke, Leo	)	CASE NO.: 2019-CP-10-03390
Cornejo, Steve Falciani, Nancy Falciani,	)	
Robert St. Louis, Lindsay Layton, George	)	
Lauderback, Beth Lauderback, Jan Prentice,	)	
Julie Haynie, Lynn Alexander, Lisa Scott,	)	
Ron Woolf, Rabecca Woolf, Nanzy Zai, Meg	)	PLAINTIFFS' REPLY
White, Ginger Adler, Gerry Murphy, Sam	)	TO DEFENDANT'S MEMORANDUM
Ogden, Joey Winchester, Frank Duffy, Betty	)	IN OPPOSITION TO PLAINTIFF'S
Duffy, Lois Stefan, Kelly Hill, Mary Thaler,	)	MOTION TO AMEND
Ed Thaler, Lisa Essig, Jenn Odom, Brianna	)	
Stello, and Leslie Kelly,	)	
Plaintiffs,	)	
vs.	)	
Mariner's Cay Racquet & Yacht Club	)	
Homeowner's Association, Inc.,	)	
Defendant.	)	

Plaintiffs, by and through their undersigned attorney, submit the herein *Reply* in response to Defendants' *Memorandum in Opposition to Plaintiff's Motion to Amend Complaint* filed with this Court on August 22, 2022.

INTRODUCTION

Plaintiffs filed a Complaint on June 24, 2019 asserting breach of contract 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. Thereafter, the HOA asserted counterclaims against Plaintiffs for breaches of the HOA's governing documents. Both parties have filed cross-motions for Summary Judgement.

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

*Dustin Grotzke et al. v. Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.*
CASE NO. 2019-CP-10-03390
PLAINTIFFS' REPLY TO DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION TO AMEND

went into effect. Sellars was seeking to join as a Plaintiff in this action. The Court made some informal remarks about the procedural posture of the case and some of the issues in dispute, including standing, but made no determinative decisions. Instead, 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 their 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.

For the reasons set forth below, Plaintiffs' Motion to Amend Complaint should be granted.

ARGUMENT

A. Standard of Review

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

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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).

Per 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 and Dominique Powell as Plaintiffs and removed some current Plaintiffs who either no longer own units at Mariner’s Cay or did not wish to be involved in this litigation any longer. Allowing Plaintiffs to add parties and remove at this state will not change or affect the underlying causes of action. In fact, Defendants concede in their memorandum that the proposed Amended Complaint makes the same challenges to the Moratorium as the Original Complaint. As such, Defendants have had notice since at least July 19, 2022, and certainly since the Motion to Amend was filed on August 8, 2022, and thus Defendants cannot credibly claim that they will be prejudiced by the proposed changes. Therefore, the court should grant Plaintiffs’ Motion to Amend the Complaint.

B. Defendant breached the Master Deed when it imposed the Moratorium on short-term rentals, and thus acted unlawfully in breaching the governing documents of the Association.

“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

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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 that 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).

This is a straightforward contract interpretation issue, and Plaintiffs certainly have standing to bring a breach of contract action against Defendant. The Master Deed references the Horizontal Property Regime Act (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 the Act, Article III, Section 2 of the Master Deed, 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.) 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 that the drafters did not intend to include a minimum duration restriction on the leasing of units, as the governing documents do not mention any such a limitation.

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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." Being that short-term rentals are allowed under the governing documents, the only way for the Association to prohibit them would be by amending the Master Deed under Article XI, Section 1(b), which would require seventy-five percent (75%) of the total vote of the Association. Rather than hold such a vote as would have been required, the HOA's Board opted instead unilaterally implement the Moratorium on short-term rentals. By contravening the Association's governing documents and implementing this Moratorium, the Board has breached the Master Deed, and Plaintiffs unequivocally have standing to bring this action.

Defendant incorrectly attempts to frame Plaintiffs' claims as being required to be brought only derivatively. 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 and unambiguously by the Official Comment, Plaintiffs have standing to bring this breach of contract action without having to bring it derivatively.

- C. **Even if the new Plaintiffs had constructive knowledge of the Moratorium, they can still maintain standing as the Moratorium is a result of actions of the Board in direct breach of the Master Deed.**

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Even if the new Plaintiffs purchased their properties with constructive knowledge of the Moratorium, they still have standing because the HOA's actions were unlawful and in direct breach of the Master Deed. A Defendant may not claim that an injured party's constructive knowledge of its unlawful actions in violation of the injured party's contract and property rights somehow bars the injured party from enforcing those rights. There is no authority in South Carolina jurisprudence for such a preposterous notion. 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 and understood by both parties and the Court that Plaintiffs specifically intended to defeat Defendant's questionable standing argument¹ by adding Plaintiffs who had purchased their units after the moratorium went into effect and were thus not grandfathered. Now that Plaintiffs have done exactly that, Defendant once again has changed its argument and now speciously asserts that the new Plaintiffs are barred due to constructive knowledge. This argument has no support in applicable law and should be soundly rejected by this Court.

D. There is no need for the parties to conduct discovery to address the new Plaintiffs' claims.

This Court has stayed discovery until each parties' cross-motions for summary judgment were heard and ruled upon as to the contractual interpretation issue of whether the Board could prohibit short-term rentals as they have attempted to do via a unilateral moratorium not voted on by the membership, or if an amendment to the Master Deed was needed for such a restriction to be imposed. Amending the Complaint to add new Plaintiffs does not change the question before the

¹ 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.

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Court on summary judgment, and thus there is no need for fact discovery to be conducted at this time. Additionally, the new Plaintiffs have standing to sue regardless of their constructive or record knowledge, and accordingly, there is no need for the Defendant to conduct new or additional discovery in regard to the new Plaintiffs or any issue before the cross-motions for summary judgment are heard and ruled upon.

CONCLUSION

Based on these and all the foregoing reasons, the Plaintiffs again pray that this Court GRANT Plaintiffs' Motion to Amend Complaint, filed with this Court August 8, 2022, and deny Defendants' leave to conduct additional discovery.

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Attorneys for Plaintiff

September 16, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Dustin Grotzke, Christene Grotzke,	)	CASE NO.: 2019-CP-10-03390
Leo Cornejo, Steve Falcani,	)	
Nancy Falciani, Robert St. Louis	)	
Lindsay Layton, George Lauderback,	)	AFFIDAVIT OF
Beth Lauderback, Lynn Alexander,	)	JENNIFER SELLARS IN SUPPORT
Ron Woolf, Roberta Woolf, Nancy	)	OF PLAINTIFFS' MOTION
Zaj, Meg White, Joey Winchester,	)	FOR SUMMARY JUDGMENT
Kelly Hill, Mary Thaler, Ed Thaler,	)	
Lisa Essig, Brianna Stello, and Leslie	)	
Kelly,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Mariner's Cay Racquet & Yacht Club	)	
Homeowners' Association, Inc.,	)	
	)	
Defendant.	)	
	)	

Jennifer Sellars, being duly sworn, deposes and says:

1. I am above the age of eighteen (18) and a resident of the State of South Carolina.
2. All the facts stated herein are personally known by me to be to be true and correct.
3. I intend to join as a Plaintiff in the above-captioned lawsuit as soon as the pleadings can be amended to allow me to do so.
4. I am the owner of one unit in the Mariner's Cay Racquet & Yacht Club condominium community, known as Unit 93. I closed on the unit on April 16, 2021.
5. When I decided to purchase my unit in Mariner's Cay, I knew that the Master Deed allowed short-term rentals of units, without a temporal limitation or minimum duration of leases. Based on the Master Deed, my realtor and closing attorney told me that short-term rentals were allowed and that I would be able to rent my unit on a short-term basis.

6. I purchased my unit with the specific intention of using it for personal use and a

be able to rent it, on a short-term basis if I desired, when I am not personally using it.

7. If the Mariner's Cay Master Deed had prohibited short-term rentals, I would not

bought my unit in Mariner's Cay. I would have looked for a condo unit elsewhere.

8. I only learned of the purported "moratorium" after I purchased my unit.

9. I have been profoundly and negatively affected by the purported moratorium, w

the Board enforces with threats of fines and legal action, even though the Board created and imp

the moratorium unlawfully, outside its legal authority and in direct violation of the Master De

10. I have also been deprived of the ability to freely sell my property to prospective

purchasers who would be interested in renting the unit on a short-term basis, which has devalued

investment and damaged me financially.

11. I have direct knowledge that other owners in Mariner's Cay who are similarly situ

as the facts I have stated herein above.

FURTHER AFFIANT SAYETH NOT

Jennifer Sellars

Acknowledged, sworn to and subscribed before me

This, the 7th day of July, 2022

Notary Public for the State of South Carolina
My commission expires December 30, 2023

ASHLEY MURRAY
Notary Public - State of South Carolina
My Commission Expires December 30, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: <u>2019-CP-10-03390</u>
DUSTIN GROTZKE, et al.,	)	
	)	
Plaintiffs,	)	DEFENDANT'S MOTION TO ALTER
	)	OR AMEND MARCH 29, 2023 ORDER
vs.	)	
	)	
MARINER'S CAY RACQUET & YACHT	)	
CLUB HOMEOWNERS ASSOCIATION,	)	
INC.,	)	
	)	
Defendant/Third-Party	)	
Plaintiff	)	
	)	
vs.	)	
	)	
JANE AND JOHN DOE DEFENDANTS,	)	
	)	
<u>Third-Party Defendants.</u>	)	

Defendant/Third-Party Plaintiff Mariner's Cay Racquet & Yacht Club Homeowners Association, Inc. ("Mariner's Cay"), by and through its undersigned attorneys, hereby moves pursuant to South Carolina Rule of Civil Procedure 59(e), requesting this Court alter, amend, or withdraw its Order filed on March 29, 2023 ("Order"). Mariner's Cay's undersigned counsel received notice of the Order electronic filing on March 29, 2023. For the reasons set forth below, the Court should grant Mariner's Cay relief pursuant to Rule 59(e). Defendant reserves the right to support this motion by filing a Memorandum in Support thereof as appropriate.

INTRODUCTION

This lawsuit involves, *inter alia*, the validity of a moratorium ("Temporary Moratorium") that Mariner's Cay's Board of Directors duly enacted concerning short-term rentals. Plaintiffs Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ron Woolf, Rebecca Woolf, Nancy Zai, Meg White, Ginger Adler, Gerry

Murphy, Sam Ogden, Joey Winchester, Frank Duffy, Betty Duffy, Lois Stefan, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Jenn Odom, Brianna Stello, and Leslie Kelly commenced this lawsuit against Mariner's Cay on June 24, 2019, alleging they each "own[] a condominium unit in Mariner's Cay." Some of the original Plaintiffs no longer own Units.

On September 9, 2019, Mariner's Cay filed its Answer and Counterclaims, denying Plaintiffs' claims and asserting counterclaims against the original Plaintiffs alleging, in part, that short-term lessors violate certain requirements of Mariner's Cay's governing documents. On January 20, 2020, the Honorable Jennifer B. McCoy entered a Consent Order of Reference to Master-in-Equity, stating that the parties "jointly agreed to set aside for the time being any and all legal claims which have demanded monetary relief, in order that the Master-in-Equity for Charleston County may first hear and rule upon the equitable claims they have asserted."

The parties then filed various motions regarding the equitable claims: (a) Plaintiffs' July 8, 2022 Motion for Summary Judgment; (b) Defendants' July 8, 2022 Motion for Partial Summary Judgment; and (c) Plaintiffs' August 5, 2022 Motion to Amend Complaint. The parties briefed those motions and submitted information in support of and in opposition to the parties' motions. Mariner's Cay incorporates by reference all of its filings in support of and in opposition to those motions, as if set forth at length herein. On September 19, 2022, the Honorable Mikell R. Scarborough indicated his intention: (a) to grant Plaintiffs' Motion for Summary Judgment.; (b) to deny Mariner's Cay's Motion for Partial Summary Judgment; and (c) to grant Plaintiffs' Motion to Amend Complaint. After Plaintiffs' submitted a proposed order and Mariner's Cay filed objections, on March 29, 2023, the Court entered an Order addressing all of the pending motions. As set forth in its objections to Plaintiffs' proposed order (which is incorporated by reference as if set forth at length), the Order contains numerous inaccurate and unsupported statements of fact.

For the following reasons, Defendant Mariner's Cay moves the Court to alter or amend the Order, in part, as follows. The Court should vacate and reverse its ruling as to the parties' summary judgment motions.

ARGUMENTS

A. The Granting of the Motion to Amend Has Prejudiced Mariner's Cay

While Mariner's Cay does not object to the Court's granting of leave to amend, it was clear error for the Court to do so concurrent with its ruling on the parties' cross motions for summary judgment. However, in light of this amendment, the Court should have allowed Mariner's Cay to answer the Amended Complaint and conduct discovery before ruling on summary judgment. The Amended Complaint removed fourteen (14) of the original 31 Plaintiffs (all of whom purchased Units *prior to* the first moratorium and, as a result, could rent on a short-term basis) and added two new Plaintiffs (Jennifer Sellars and Dominique Powell). Procedurally, before ruling on summary judgment, the Court should have allowed Mariner's Cay to answer to the Amended Complaint and conduct discovery to determine the impact of the joinder of those parties.

B. The Original Plaintiffs Do Not Possess Standing

Standing is "an essential and unchanging" requirement for a proper lawsuit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]o have standing, a litigant must have a personal stake in the subject matter of the litigation." *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006). "One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id. Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 358, 713 S.E.2d 287, 291-92 (2011). A party must prove the "irreducible constitutional minimum of standing," which consists of: (1) injury-in-fact; (2) causal connection between the injury and the conduct; and (3) a non-speculative likelihood that the injury will be redressed by a favorable decision. *See Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Nat'l Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Commander Health Care Facilities, Inc. v. South Carolina Dep't of Health & Envtl. Ctrl.*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). An injury-in-fact is an invasion of

a legally protected interest that is concrete and particularized, and actual or imminent. *See Freemantle v. Preston*, 398 S.C. 186, 192-93, 728 S.E.2d 40, 43 (2012) (citations omitted).

The Plaintiffs listed in the original Complaint all purchased Units *prior to* the first moratorium. As a result, the Temporary Moratorium did not restrict their short-term rentals. The Amended Complaint removed fourteen (14) of the original 31 Plaintiffs and added two new Plaintiffs (Jennifer Sellars and Dominique Powell). The Temporary Moratorium has no direct impact on the original Plaintiffs, who owned Units before July 1, 2019. The Temporary Moratorium would have no direct effect on those Plaintiffs' ability to rent on a short-term basis. The Temporary Moratorium has no direct impact whatsoever on Plaintiffs' use of their Units. The Court's Order concluded 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." (*See Order*, at 7). However, the original Plaintiffs have presented no evidence that the Temporary Moratorium has had any impact on their ability to sell their properties or property values. They have not presented evidence that they unsuccessfully tried to sell their property or sold properties for below market value because of the Temporary Moratorium. If anything, the evidence shows that Mariner's Cay units are selling briskly and at market value. Any claimed impact on property values is theoretical and speculative.

For the foregoing reason, the Court should grant Mariner's Cay's instant Motion and should enter judgment against the original Plaintiffs for lack of standing.

C. The "New" Plaintiffs (Sellars and Powell) Cannot Assert Valid Claims

Mariner's Cay has argued that new Plaintiffs Sellars and Powell (and any other Plaintiff who might have purchased their property after the effective date of the Temporary Moratorium) cannot assert valid claims because they purchased their Units with full actual or constructive knowledge of the Temporary Moratorium. "The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover

the interest or claim.” *Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006); *accord* S.C. Code § 30-9-40 (“The entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage, or other written instrument so filed for record.”). As a result, Plaintiffs Sellars and Powell are deemed to have purchased their properties with constructive knowledge of the Temporary Moratorium. As a result, they cannot now challenge the propriety of the Temporary Moratorium.

By purchasing their Units with constructive knowledge of the Temporary Moratorium, Plaintiffs Sellars and Powell have waived any challenge to the Temporary Moratorium. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right. 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." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). In this matter, the newly-added plaintiffs purchased their Units with record notice of the Temporary Moratorium. By doing so, they have waived any right to challenge the validity of the moratorium.

D. This Case Was Not Filed as a Derivative Action

In its Order, the Court rejected Mariner's Cay's argument that this action should have been filed as a derivative action, stating:

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.

(*See* Order, at 8). For the reasons that follow, the Court should reconsider its ruling on this point.

Irrespective of the merits of Plaintiffs' claims, this lawsuit is not the appropriate vehicle for

these Plaintiffs to challenge the Temporary Moratorium. Instead, they should have fulfilled the requirements for bringing a member's derivative action, which they have never done. Under the South Carolina Nonprofit Corporation Act:

(a) Except as provided in subsection (b), *the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.*

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

(c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General

See S.C. Code § 33-31-304 (emphasis added); *accord Williamson v. Bermuda Run Investor Devel. Grp.*, 2006 WL 7286063 (Ct. App. June 13, 2006) (dismissing claim of *ultra vires* acts where member did not bring a derivative action).

The Official Comment makes clear, from the onset, that it is intended "to do away with the *ultra vires* doctrine." *See* S.C. Code § 33-31-304, Official Comment. The South Carolina Reporter's Comments state that "a member of a nonprofit corporation has *no right to bring a direct attack against a proposed action*. The claim may *only be brought derivatively*. If an action has been accomplished and the members believe that the directors or others in charge have done something wrong, have acted 'ultra vires,' the members may bring a *derivative* action against the alleged wrongdoers." *See* S.C. Code § 33-31-304, S.C. Reporter's Comments. Plaintiffs have not commenced or pursued a members derivative suit. They have not complied with South Carolina Rule of Civil Procedure 23(b)(1) and have not made derivative allegations. They brought this lawsuit individually to enforce their own rights. As a result, they are barred by statute from asserting that any action of Mariner's Cay was *ultra vires*.

E. The Court Should Have Permitted Mariner's Cay to Conduct Discovery

“Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means, among other things, that summary judgment must not be granted until the opposing party has a had a full and fair opportunity to complete discovery.” *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). “The non-moving party in a motion for summary judgment must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition.” *Matter of Estate of Smith*, 419 S.C. 111, 123, 796 S.E.2d 158, 164 (Ct. App. 2016)(citation omitted).

Mariner's Cay has consistently argued that it needs to conduct certain discovery to obtain information relevant to the equitable issues. Mariner's Cay limited its discovery requests to information directly related to Plaintiff's short-term rental process and income. The information Mariner's Cay seeks will allow it to address several key issues relevant to, *inter alia*, whether transient short-term rentals violate the Master Deed. This information includes: (1) the volume of Plaintiffs' rentals and rates charged; (2) Plaintiffs' marketing of short-term rentals; (3) how Plaintiffs provide renters access to the building and common areas; (4) whether Plaintiffs comply with the Master Deed's limits on rental occupancy to the lessee and his immediate family; (5) how Units are prepared for rentals; and (6) what business formalities (including licensures, and the manner of accounting for revenues) Plaintiffs follow.

F. The Court Should Conclude that the Master Deed Prohibits Short-Term Rentals

"Restrictive covenants . . . are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct. App. 2014) (citation omitted). "Restrictive covenants are construed like contracts." *See Matsell v. Crowfield Plantation Cmty. Servs. Ass'n*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011). Words of a restrictive covenant will be given their common, ordinary meanings. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "[T]he paramount rule of construction is to ascertain

and give effect to the intent of the parties as determined from the whole document." *Id.* at 4, 498 S.E.2d at 863-64 (quotation marks omitted). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). A restrictive covenant is ambiguous when its terms are reasonably susceptible to multiple interpretations. *See South Carolina Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001).

Plaintiffs' assert that the Temporary Moratorium is void because such a restriction may only be created by an amendment to the Master Deed by a member vote. However, in reality, the Master Deed already prohibits short-term rentals, in that it limits Mariner's Cay Units "exclusively to residential use." It also states that "[n]o business activities of any kind whatsoever shall be conducted in any building or in any portion of the property" This language is unambiguous. The "terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." *See R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160 n. 1 (4th Cir.2004). There is an ambiguity only if "the terms of the contract [or deed] are reasonably susceptible of more than one interpretation." *See id.* The short-term rental of Units to transient guests, primarily out of town tourists, is not a "residential use" and is, in fact, a "business activit[y]." As such, the Temporary Moratorium does not take away any owners' rights; it merely confirms that the Master Deed prohibits transient short-term rentals.

South Carolina law has not definitively ruled in this context on whether transient short-term rentals are "residential" or "commercial." However, South Carolina Courts have had numerous opportunities to discuss this question in other circumstances. For example, the South Carolina Supreme Court long ago defined "residential," to mean:

"Residence. Living or dwelling in a certain place permanently or for a considerable length of time; The place where a man makes his home, or where he dwells *permanently, or for an extended period of time.*" Black's Law Dictionary, page 1543.

"Resident. Dwelling, or having an abode, in a place *for a continued length of time.*"
Webster's New International Dictionary.

See *Ex parte Morrow*, 183 S.C. 170, 175, 190 S.E. 506, 508 (1937) (emphasis added). Under this definition, the short-term rental of property to transient travelers would not constitute "residential" use.

Moreover, South Carolina appellate court opinions discussing whether a relative is a "Class I" insured for purposes of stacking (i.e., a "resident" relative) are helpful. In the first Supreme Court decision defining a "resident" relative, the Court stated that "a resident of the same household is one, *other than a temporary or transient visitor*, who lives together with others in the same house for a period *of some duration*, although he may not intend to remain there permanently." See *Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 339, 157 S.E.2d 633, 636 (1967) (citations and internal quotation marks omitted), *quoted in Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 431, 656 S.E.2d 784, 787 (Ct. App. 2008); *accord Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003) (holding daughter was not resident relative of non-custodial father where she lived with mother and only occasionally visited father); *Richardson v. South Carolina Farm Bureau Mut. Ins. Co.*, 336 S.C. 233, 519 S.E.2d 120 (Ct. App. 1999) (holding daughter was not resident relative of parents' house where she moved away as graduate student, maintained residence in another town and kept few items at parents' home); *Auto Owners Ins. Co. v. Langford*, 330 S.C. 578, 500 S.E.2d 496 (Ct. App. 1998) (holding that claimant was not resident relative of grandmother where she usually lived with mother and only stayed with grandmother when she fought with mother).

The South Carolina Court of Appeals has held that a student dormitory was a "business" under South Carolina Code § 4-1-170(A). See *South Carolina Pub. Interest Found. v. City of Columbia*, 431 S.C. 164, 169, 847 S.E.2d 257, 259 (Ct. App. 2020). Likewise, although the renters of Units might sleep or eat there, the commercial nature of these short-term rentals creates an environment that is more like a hotel than a condominium. The owners of short-term rentals behave like other businesses. They often use professional property managers and advertise. They

hire professional cleaners and contractors to clean and maintain the Units. They form corporations to operate these businesses and register as businesses with Folly Beach or the state.

Folly Beach's Code of Ordinances heavily regulates short-term rentals, in part "[t]o protect the residential character of the residential districts of the city." *See* Folly Beach Code of Ord. § 117.01(a). The ordinance defines "short term rentals" as "[r]esidential dwellings rented for less than 30 days, used in a manner consistent with the residential character of the dwelling" and excludes tourist accommodations (such as hotels). *See* Folly Beach Code of Ord. § 117.01(b). The ordinance requires that short-term renters: (a) obtain an annual business license (§ 117.02(A)); (b) apply for annual short-term rental registrations (§ 117.02(B)); (c) pay "local, county, and state taxes, including . . . sales, use, and accommodations taxes" (§ 117.02(C)); (d) document short-term renters (§ 117.03(A)-(B)); and (e) comply with special event regulations (§ 117.03(D)-(E)) (emphasis added). These regulations support the idea that short-term rentals at Folly Beach are businesses.

Additionally, Folly Beach imposes an **accommodations fee** on short-term rentals. *See* Folly Beach Code of Ordinances § 113.03(A) (emphasis added). Folly Beach's Code of Ordinances also provides the following relevant definitions concerning short-term rentals:

ACCOMMODATION. Any room (excluding meeting and conference rooms), campground spaces, recreational vehicle spaces, lodgings or sleeping accommodations furnished to transients by any hotel, motel, inn, condominium, bed and breakfast, **residence or any other place** in which rooms, lodgings or sleeping accommodations are **furnished to transients** for a consideration within the city. Gross proceeds received from the lease or rental of ACCOMMODATIONS provided to the same person or persons for a term of more than 30 continuous days are not considered proceeds from transients and shall not be subject to the accommodation fee imposed by this chapter.

RESIDENT. Any person who has or shall have the right of occupancy of any rooms, lodgings or sleeping accommodations in the same place for a term of more than 30 continuous days.

TRANSIENT. Any person seeking accommodations for a temporary period of time, not to exceed 30 days.

See Folly Beach Code of Ordinances § 113.02. Similarly, state law imposes a tax on the rent of "rooms, campground spaces, lodgings, or sleeping accommodations furnished to transients by any . . . hotel, inn, tourist court, tourist camp, motel, campground, residence, or any place in which rooms, lodgings, or sleeping accommodations are furnished to transients for a consideration." See S.C. Code § 12-36-920(A). The state tax does not apply "where the facilities consist of less than six sleeping rooms, contained on the same premises, which is used as the individual's place of abode." See S.C. Code § 12-36-920(A)(1).

For these reasons, the Court should have concluded that the short-term rental of Units at Mariner's Cay is a "business activity," prohibited by the Master Deed. While no South Carolina case has directly considered what uses are "business or commercial" as opposed to "residential" under similar restrictive covenants, case law from other areas supports Mariner's Cay's contention.

While there is a broad range of judicial decisions across the county in construing what uses are residential under restrictive covenants, the best-reasoned cases (which advance the interests of South Carolina property owners) is those finding that short-term rentals are not permissible residential uses (a result consistent with the Folly Beach ordinance). Under those cases, short-term rentals are commercial due, in part, to the non-residential nature of rentals:

[T]he nature of Plaintiff's use of the Property is not residential. Though Plaintiff argues that this case is distinguishable from *Teffeteller* because renters are not using the Property "like a motel," there is no meaningful difference between how renters in *Teffeteller* used that property and how Plaintiff's renters use his property. The undisputed facts establish that immediately after purchasing his lot in 2015, Plaintiff engaged Center Hill Chalets, a property management company that leases the Property as a short-term vacation rental for those visiting the area. It is also undisputed that Center Hill Chalets advertises Plaintiff's lot on as many as 25 different short-term vacation rental websites, requiring a minimum of a two-night stay and a maximum of 28 nights. To facilitate each rental, the management company provides key code access to short-term renters to access Plaintiff's cabin as well as laundry and cleaning services. It also provides concierge services for the renters. After each rental, the management company resets the cabin in preparation for the next renter. When considered in concert, these facts clearly show that Plaintiff's renters are using the Property for "the most temporary convenience of shelter in the course of a brief stay in the area." [Citation omitted.]

See Pandharipande v. FSD Corp., No. M2020-01174-COA-R3-CV, 2022 Tenn. App. LEXIS 172, at *16-18. (Ct. App. Apr. 29, 2022); *accord Eager v. Peasley*, 322 Mich. App. 174, 181, 911 N.W.2d 470, 474 (2017) (under restrictive covenant prohibiting commercial use, "defendant is prohibited from renting the property on a transient, short-term basis."). Short-term rentals are like "hotels," which provide transient accommodations, not true "residence":

The issue before us is whether Gadd's renting on a short-term, transient basis is permitted under the restrictions. The clear answer is "no." We have no difficulty concluding that short-term rentals are prohibited because Gadd's advertising of such rentals renders his property the equivalent of a hotel, which is not a permitted use on his lot. . . . The Court of Appeals' and Gadd's emphasis on residential uses — eating, sleeping, reading a book, watching TV — misses the point of the restrictions.

See Hensley v. Gadd, 560 S.W.3d 516, 525 (Ky. 2018).

Mariner's Cay respectfully submits that the Court should have applied this line of cases, because it best supports the community, is consistent with local law, and is more logically sound. The ill effects that the Temporary Moratorium seek to avoid are the negative externalities that often accompany commercial enterprises. There have already been many instances in which short-term rentals have harmed the overall nature of the community. The Temporary Moratorium was a compromise that allows the current Plaintiff-owners to make a profit from their Units via longer term rentals, while seeking to reduce the negative impact of short-term rentals by limiting the activity of future owners.

G. The Court Should Have Concluded That the Mariner's Cay Board Had the Authority to Enact the Temporary Moratorium As a Matter of Corporate Law

In its Order, the Court concluded that Mariner's Cay's Board of Directors was not authorized to regulate rentals in Mariner's Cay. It did so in response to Plaintiffs' argument that Mariner's Cay's governing documents (including the Master Deed) do not empower its Board to restrict property use, except through adoption of restrictive covenants.

Respectfully, the Court should revisit its ruling in this matter to the extent it relies on the contention that Mariner's Cay engaged in *ultra vires* acts in adopting the Temporary Moratorium.

A nonprofit "corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." *Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). South Carolina law identifies a powers of a nonprofit corporation, including:

- (11) to elect or appoint directors, officers, employees, and agents of the corporation, define their duties, and fix their compensation; . . .
- (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.

See S.C. Code § 33-31-302. Moreover, "all corporate powers [of a nonprofit corporation] must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board." S.C. Code § 33-31-801(b).

The By-Laws of Mariner's Cay provide for and grant the following broad powers to its Board of Directors:

The Board of Directors *shall manage and direct the affairs of the Association* and, subject to any restrictions imposed by law, by the Master Deed, or these By-Laws, may exercise all the powers of the Association. The Board of Directors shall *exercise such duties and responsibility as shall be encumbent (sic) upon it by law, the Master Deed, or these By-Laws as it may deem necessary or appropriate in the exercise of its powers*, including, without limitation, the collection of assessments and charges from the owners, the 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, and the employment and dismissal of personnel necessary for the maintenance and operation of the Common Area and Facilities and Limited Camon Area and Facilities.

In addition, the Master Deed states that: "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.*" This language allows the Board to prohibit or condition the rental of Units. This

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provision does not require amendment to the Master Deed or a membership vote. It empowers the Board to regulate rentals. The Board merely elected to place a moratorium on short-term rentals by owners who acquired their Units after the effective date. It merely limits short-term vacation rentals, which negatively impacts other owners and the community.

In their filings, Plaintiffs have construed this provision to only allow the Board to regulate whether rental occupancy will be limited to the lessee's immediate family. In other words, Plaintiffs construe the phrase "unless otherwise provided by the Association's Board of Directors" as: (a) only modifying "provided the occupancy is only by the lessee and his immediate family"; and (b) *not* modifying in any way "Units may be rented." Mariner's Cay respectfully submits that Plaintiffs' reading of this provision of the Master Deed is incorrect. The phrase "unless otherwise provided by the Association's Board of Directors" does not follow a list of separate clauses; rather, it follows an integrated description of a single concept

The last-antecedent rule generally applies where a statute contains a list, "reflect[ing] the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart v. United States*, 577 U.S. 347, 351, 136 S. Ct. 958, 194 L. Ed. 2d 48 (2016). And the canon doesn't apply when "the modifier directly follows a concise and 'integrated' clause." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S.Ct. 1061, 1077, 200 L. Ed. 2d 332 (2018). Here, the phrase "the provisions of any other Federal statute," 42 U.S.C. § 2000d-7(a)(1), "hangs together as a unified whole, referring to a single thing (a type of [provision])," *Cyan*, 138 S.Ct. at 1077. Thus, "the most natural way to view the modifier is as applying to the entire preceding clause." *See id.* (eschewing the last-antecedent rule to apply the modifier to the entire phrase "[a]ny covered class action brought in any State court involving a covered security," rather than the partial phrase "involving a covered security" (emphasis added)).

See Kadel v. North Carolina. State Health Plan Teachers & State Employees, 12 F.4th 422, 443 (4th Cir. 2021). The "last antecedent rule" does not apply to a single, integrated clause:

because that clause hangs together as a unified whole, referring to a single thing (a type of class action). Consider the following, grammatically identical construction: "The woman dressed to the nines carrying an umbrella, as shown in the picture . . ." Would anyone think that "as shown in the picture" referred to anything less than the well-attired and rain-ready woman? No. And so too here, the modifier goes back to the beginning of the preceding clause. The rule of the last antecedent is not to the contrary. . . . [W]e have not applied the rule when the modifier directly

follows a concise and "integrated" clause.

See Cyan, 138 S. Ct. at 1077.

The language of the Master Deed makes clear that the phrase "Units may be rented provided the occupancy is only by the lessee and his immediate family" is an integrated, single concept. That concept is that the only permissible rentals are to families (not to groups of unrelated single people). This is not a list; it is a single idea. Thus, "unless otherwise provided by the Association's Board of Directors" modifies that entire unified concept, not merely one portion of it.¹

Plaintiffs have cited the Court of Appeals' unpublished opinion in *Brown v. Spring Valley Homeowners Ass'n*, 2016 S.C. App. Unpub. LEXIS 406 (Ct. App 2016), "for the proposition that any action by the Homeowners Association or its Board of Directors must be authorized by the restrictive covenants." However, the Court of Appeals rejected the owners' argument that the imposition of fines was not authorized under restrictive covenants:

We find no merit to Homeowner's argument that the restrictive covenants do not authorize the imposition of fines. The restrictive covenants require Homeowner to become a member of the Association and to abide by the Association's rules, regulations, and bylaws. These rules, regulations, and bylaws, which in turn authorize the imposition of fines, also constitute the contract between the Association and its members. Therefore, the restrictive covenants indirectly authorize the imposition of fines.

See id., at *9. Accordingly, nothing in *Brown* would require that Mariner's Cay's Temporary Moratorium be specifically or expressly authorized by the Master Deed.

For the foregoing reasons, the Court should grant Mariner's Cay's Motion for Partial Summary Judgment and should deny Plaintiffs' motion.

¹ Moreover, the Court should not be swayed by the absence of a comma. *See State v. Pilot Life Ins. Co.*, 257 S.C. 383, 391, 186 S.E.2d 262, 266 (1972) ("The presence or the absence of a comma, according to the whim of the printer or proofreader is so clearly fortuitous that it is wholly unsafe as an aid to statutory interpretation." (quoting *Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917))).

H. Plaintiffs' Claims Also Fail Under the Business Judgment Rule

In its Order the Court refused Mariner's Cay's request to apply the business judgment rule to dismiss Plaintiffs' claims: "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." (*See* Order, at 20). For the reasons that follow, the Court should reconsider its ruling on this issue.

"A court should be reluctant to question action taken intra vires by the governing board of a non-profit corporation." *Dockside Assocs. v. Detyens*, 291 S.C. 214, 216, 352 S.E.2d 714, 716 (Ct. App. 1987), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987). South Carolina statutes set forth the duties applicable to a director of a nonprofit corporation:

(a) A director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.

S.C. Code § 33-31-830. "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." *Village W. Horizontal Prop. Regime v. International Sales & Mktg. Grp.*, No. 2007-UP-111, 2007 S.C. App. Unpub. LEXIS 134, at *10 (Ct. App. Mar. 7, 2007) (*citing Detyens, supra*). "'In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.'" *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008) (citation omitted).

As set forth above, the Temporary Moratorium was not in violation of Mariner's Cay's corporate powers. The business judgment rule protects the Board's adoption of the Temporary Moratorium. Plaintiffs cannot challenge the wisdom or correctness of the Board's action. The Court should not second-guess the Board's determination of how to address short term rentals.

There is no evidence whatsoever that Mariner's Cay's Board acted in bad faith or with a dishonest motive. Plaintiffs do not claim (and do not present any evidence) that the Board did not act in what that they believed to be Mariner's Cay's best interests. It does not allege that the Board did not act with reasonable prudence in enacting the Moratorium. It does not allege that the Moratorium was harmful to a majority of the members of the HOA.

CONCLUSION

This Court should reconsider, alter, and/or amend its March 29, 2023 Order to grant Mariner's Cay's Motion for Partial Summary Judgment or to defer ruling until discovery is completed. In addition, the Court should deny Plaintiffs' Motion for Summary Judgment.

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Dated: April 10, 2023
Charleston, South Carolina

*Counsel for Defendant/Third-Party Plaintiff
Mariner's Cay Racquet & Yacht Club
Homeowners Association, Inc.*

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2019-CP-10-03390

DUSTIN GROTZKE, CHRISTINE)
 GROTZKE, LEO CORNEJO, STEVE)
 FALCANI, NANCY FALCIANI,)
 ROBERT ST. LOUIS, LINDSAY)
 LAYTON, ROGER WOOLF, ROBERTA)
 WOOLF, NANCY ZAJ, MEG WHITE,)
 JOEY WINCHESTER, KELLY HILL,)
 MARTY THALER, ED THALER, LISA)
 ESSIG, BRIANA STELLO, JENNIFER)
 SELLARS, and DOMINIQUE POWELL,)

Plaintiffs/Counterclaim
 Defendants,

vs.

MARINER'S CAY RACQUET & YACHT)
 CLUB HOMEOWNERS ASSOCIATION,)
 INC.,)

Defendant/Counterclaim
 Plaintiff.

**MARINER'S CAY RACQUET &
 YACHT CLUB HOMEOWNERS
 ASSOCIATION, INC.'S ANSWER TO
 AMENDED COMPLAINT AND
 COUNTERCLAIMS**

TO: SEAN A. O'CONNOR, COUNSEL FOR THE PLAINTIFFS:

Reserving all rights to amend this Answer within thirty (30) days pursuant to Rule 15 (a) of the South Carolina Rules of Civil Procedure and reserving all rights to include in the Answer any defenses and/or objections under Rule 12 of the South Carolina Rules of Civil Procedure, and reserving all rights to make any motions under Rule 12 of the South Carolina Rules of Civil Procedure, Defendant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. (hereinafter "Defendant") answers Plaintiffs' Amended Complaint as follows:

FOR A FIRST DEFENSE
AND BY WAY OF ANSWER

Defendant denies each and every allegation of the Complaint not hereinafter specifically and unconditionally admitted.

PARTIES

1. After reasonable investigation, Defendant is without sufficient knowledge to admit or deny the allegations of Paragraph 1 of Plaintiffs' Amended Complaint. Therefore, Defendant denies the allegations of Paragraph 1 of Plaintiffs' Amended Complaint.

2. Defendant admits the allegations of Paragraph 2 of Plaintiffs' Amended Complaint. By way of further answer and clarification, Defendant is a South Carolina nonprofit corporation.

JURISDICTION AND VENUE

3. The allegations of Paragraph 3 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant admits that this Court has personal and subject matter jurisdiction over it.

FACTUAL BACKGROUND

4. After reasonable investigation, Defendant is without sufficient knowledge to admit or deny the allegations of Paragraph 4 of Plaintiffs' Amended Complaint. Therefore, Defendant denies the allegations of Paragraph 4 of Plaintiffs' Amended Complaint.

5. After reasonable investigation, Defendant is without sufficient knowledge to admit or deny the allegations of Paragraph 5 of Plaintiffs' Amended Complaint. Therefore, Defendant denies the allegations of Paragraph 5 of Plaintiffs' Amended Complaint.

6. Defendant admits in part and denies in part the allegations of Paragraph 6 of Plaintiffs' Amended Complaint. Defendant admits only that Jennifer Sellars and Dominique Powell purchased their units with actual and constructive knowledge of the existence of the moratorium(s) concerning short-term rentals. Defendant denies the remaining allegations of Paragraph 6 of Plaintiffs' Amended Complaint.

7. Defendant admits the allegations of Paragraph 7 of Plaintiffs' Amended Complaint.

8. The Master Deed referenced in Paragraph 8 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 8 of Plaintiffs' Amended Complaint.

9. The Master Deed referenced in Paragraph 9 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 9 of Plaintiffs' Amended Complaint.

10. The Master Deed referenced in Paragraph 10 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 10 of Plaintiffs' Amended Complaint.

11. The Master Deed referenced in Paragraph 11 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 11 of Plaintiffs' Amended Complaint.

12. The Master Deed referenced in Paragraph 12 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 12 of Plaintiffs' Amended Complaint.

13. The Master Deed referenced in Paragraph 13 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 13 of Plaintiffs' Amended Complaint.

14. The Master Deed referenced in Paragraph 14 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs

to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 14 of Plaintiffs' Amended Complaint.

15. The October 5, 2018 email referenced in Paragraph 15 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 15 of Plaintiffs' Amended Complaint.

16. The October 5, 2018 email referenced in Paragraph 16 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 16 of Plaintiffs' Amended Complaint.

17. The October 18, 2018 email referenced in Paragraph 17 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 17 of Plaintiffs' Amended Complaint.

18. Defendant denies the allegations of Paragraph 18 of Plaintiffs' Amended Complaint.

19. After reasonable investigation, Defendant is without sufficient knowledge to admit or deny the allegations of Paragraph 19 of Plaintiffs' Amended Complaint. Therefore, Defendant denies the allegations of Paragraph 19 of Plaintiffs' Amended Complaint.

20. Defendant denies the allegations of Paragraph 20 of Plaintiffs' Amended Complaint.

21. The May 28, 2019 email referenced in Paragraph 21 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 21 of Plaintiffs' Amended Complaint.

22. Defendant denies the allegations of Paragraph 22 of Plaintiffs' Amended Complaint.

23. The Master Deed referenced in Paragraph 23 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 23 of Plaintiffs' Amended Complaint.

24. Defendant denies the allegations of Paragraph 24 of Plaintiffs' Amended Complaint.

25. Defendant denies the allegations of Paragraph 25 of Plaintiffs' Amended Complaint.

26. The Master Deed referenced in Paragraph 26 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 26 of Plaintiffs' Amended Complaint.

27. Defendant denies the allegations of Paragraph 27 of Plaintiffs' Amended Complaint.

28. Defendant denies the allegations of Paragraph 28 of Plaintiffs' Amended Complaint.

29. Defendant denies the allegations of Paragraph 29 of Plaintiffs' Amended Complaint.

30. Defendant denies the allegations of Paragraph 30 of Plaintiffs' Amended Complaint.

31. The allegations of Paragraph 31 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 31 of Plaintiffs' Amended Complaint.

32. The allegations of Paragraph 32 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is

deemed necessary or appropriate, Defendant denies the allegations of Paragraph 32 of Plaintiffs' Amended Complaint.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

33. Defendant incorporates by reference, as if set forth at length herein, the allegations of Paragraphs 1 through 32, *supra*.

34. The Master Deed referenced in Paragraph 34 of Plaintiffs' Amended Complaint is a written document that is the best and only evidence of its contents. Any attempt by Plaintiffs to characterize or paraphrase the contents of that document is improper. Therefore, Defendant denies the allegations of Paragraph 34 of Plaintiffs' Amended Complaint.

35. The allegations of Paragraph 35 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 35 of Plaintiffs' Amended Complaint.

36. The allegations of Paragraph 36 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 36 of Plaintiffs' Amended Complaint.

37. Defendant denies the allegations of Paragraph 37 of Plaintiffs' Amended Complaint.

38. The allegations of Paragraph 38 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 38 of Plaintiffs' Amended Complaint.

39. Defendant denies the allegations of Paragraph 39 (including subparagraphs (a) through (d) thereto) of Plaintiffs' Amended Complaint.

FOR A SECOND CAUSE OF ACTION
(Temporary Injunction / Temporary Restraining Order)

40. Defendant incorporates by reference, as if set forth at length herein, the allegations of Paragraphs 1 through 40, *supra*.

41. The allegations of Paragraph 41 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 41 of Plaintiffs' Amended Complaint.

42. The allegations of Paragraph 42 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 42 of Plaintiffs' Amended Complaint.

43. The allegations of Paragraph 43 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 43 of Plaintiffs' Amended Complaint.

44. The allegations of Paragraph 44 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 44 of Plaintiffs' Amended Complaint.

45. The allegations of Paragraph 45 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 45 of Plaintiffs' Amended Complaint.

46. The allegations of Paragraph 46 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is

deemed necessary or appropriate, Defendant denies the allegations of Paragraph 46 of Plaintiffs' Amended Complaint.

47. The allegations of Paragraph 47 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 47 of Plaintiffs' Amended Complaint.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

48. Defendant incorporates by reference, as if set forth at length herein, the allegations of Paragraphs 1 through 47, *supra*.

49. The allegations of Paragraph 49 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 49 of Plaintiffs' Amended Complaint.

50. The allegations of Paragraph 50 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 50 of Plaintiffs' Amended Complaint.

51. The allegations of Paragraph 51 of Plaintiffs' Amended Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary or appropriate, Defendant denies the allegations of Paragraph 51 of Plaintiffs' Amended Complaint.

52. Defendant denies that Plaintiffs are entitled to any of the relief set forth in the WHEREFORE clause (including subparagraphs (A) through (E) thereto.

FOR A SECOND DEFENSE
(Failure to State a Claim and Judgment on the Pleadings)

53. Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendant pursuant to SCRCP Rules 12(b)(6) and 12(c) and Plaintiffs' Complaint should be dismissed.

FOR A THIRD DEFENSE
(Failure to Mitigate)

54. Plaintiffs have failed to mitigate their damages as required by law.

FOR A FOURTH DEFENSE
(Waiver, Estoppel, Unclean Hands, Laches)

55. Plaintiffs' claim may be barred by the doctrines of Waiver, Estoppel and/or Laches.

FOR A FIFTH DEFENSE
(Intervening Acts of Third Parties)

56. Plaintiffs damages, if any, are the direct and proximate result of intervening and superseding acts of third parties not affiliated with Defendant and not under Defendant's domain or control.

FOR A SIXTH DEFENSE
(Contributory/Comparative Negligence/Assumption of Risk)

57. Any damage suffered by the Plaintiffs may be a direct and proximate result of their own comparative and contributory negligence and/or assumption of risk and Plaintiffs' recovery should be barred, or alternatively, reduced proportionately to Plaintiffs' comparative negligence or assumption.

FOR A SEVENTH DEFENSE
(Punitive Damages)

58. Defendant would show that the claim of the Plaintiffs for punitive damages cannot be had because any award of punitive damages under South Carolina law without bifurcation of the trial so that any punitive damages issues are tried only after and if liability on the merits of the action have been found would violate Defendant's due process rights

guaranteed by the United States Constitution and the South Carolina Constitution and would violate the common law and public policy of the State of South Carolina.

59. Defendant would show that the claim of the Plaintiffs for punitive damages cannot be had because an award of punitive damages under South Carolina law without being subject to a pre-determined limit on the amount of punitive damages that a jury might impose would violate Defendant's due process rights guaranteed by the United States Constitution and The South Carolina Constitution and would violate the common law of the State of South Carolina.

60. Defendant alleges that the claim of the Plaintiffs for punitive damages cannot be had because an award of punitive damages under South Carolina law by a jury that is not: a) provided with sufficiently clear standards for determining the appropriateness of the punitive damages award or size of such award; b) provided with accurate instructions as to the limits of punitive damages awards as determined by the principals underlying such an award; c) instructed that awarding punitive damages on invidiously discriminatory characteristics of Defendant is improper; d) instructed to consider punitive damages under a standard for determining the amount that is neither vague, arbitrary nor capricious and that defines with reasonable clarity the actions of Defendant upon which an award of punitive damages may be based; e) subjected to judicial review at both the trial and appellate court level under objective standards for determining appropriateness and reasonableness; and f) instructed that an award of punitive damages based on anything other than Defendant's conduct in connection with this alleged incident that is the subject of this lawsuit is forbidden; would violate Defendant's equal protection and due process rights as guaranteed by the United States Constitution and the South Carolina Constitution and would also violate the laws of the State of South Carolina.

61. Defendant alleges and says that the imposition of punitive damages on the basis of Plaintiffs' claims giving rise to this lawsuit would represent the deprivation of liberty and property without due process of law, the imposition of cruel and unusual punishment and excessive fines and deny the equal protection of the laws and violation of the Fifth, Sixth,

Eighth, and Fourteenth Amendments to The Constitution of the United States and the comparable provisions of the State of South Carolina.

FOR AN EIGHTH DEFENSE
(Sufficient Investigation)

62. Defendant has not had an opportunity to conduct a sufficient investigation and will engage in a quick discovery touching on the circumstances of the Plaintiffs' allegations in the Complaint. Defendant intends to act as best as he can to inform himself as to the pertinent facts and prevailing circumstances concerning the damages to the Plaintiffs as alleged and give notice of their intent to assert further affirmative defenses and that the information gathered and processed may indicate, supported by fact and law, including but not limited to a defense that this action is barred in whole or in part by any applicable statutes, contracts, releases, covenants and/or the Doctrine of Laches. Defendant does reserve the right to amend its Answer to assert any such defenses.

FOR A NINTH DEFENSE
(Non-Profit Corporation Act, the Horizontal Property Regime Act,
and Business Judgment Rule)

63. Defendant raises the protection of the Non-Profit Corporation Act, the Horizontal Property Regime Act, and the Business Judgment Rule as additional defenses to Defendant's counterclaims.

FOR A TENTH DEFENSE
(Failure to Exhaust Administrative Remedies)

64. Defendant raises Plaintiffs' failure to exhaust administrative remedies as a defense to Plaintiffs' claims.

FOR AN ELEVENTH DEFENSE
(Statute of Frauds)

65. Plaintiffs' claims are barred by the statute of frauds.

FOR A TWELFTH DEFENSE
(Parol Evidence Rule)

66. Plaintiffs' claims are barred by the parol evidence rule.

FOR A THIRTEENTH DEFENSE AND BY WAY OF A COUNTERCLAIM

PARTIES, JURISDICTION, AND VENUE

67. Counterclaim-Plaintiff Mariner's Cay Racquet and Yacht Club ("Mariner's Cay") is a residential condominium community located on the Folly River in James Island, South Carolina.

68. Mariner's Cay (the "Residential Association") is a residential homeowners association incorporated under the laws of the State of South Carolina.

69. The Residential Master Deed for Mariner's Cay Racquet and Yacht Club was recorded May 12, 1982 in the ROD Office for Charleston County in Book J128, Page 300 (as amended or supplemented, the "Master Deed"). Attached as Exhibit G to the Master Deed is the "By-Laws of Mariner's Cay Racquet and Yacht Club Homeowners' Association, Inc." (the "By-Laws").

70. The above-named Plaintiffs are owners of residential condominium units ("Unit or "Units") at Mariner's Cay and members of the Residential Association.

71. The claims asserted herein involve property rights in Charleston County, South Carolina.

72. This Court has jurisdiction over the parties and the subject matter of the dispute and venue is proper.

FACTUAL BACKGROUND

73. Mariner's Cay has always been a residential community comprised of full-time and part-time residents.

74. The Master Deed provides that the Residential Association, acting through its board of directors, is authorized to enforce "the covenants, conditions and restrictions set forth in the Master Deed or in the deed to his (a member's) Unit."

75. Additionally, Article II, Section 1 of the Master Deed empowers the board of directors with authority to administer the Residential Association including, in part, responsibility for "maintenance, repair, replacement and operation of the General Common Area

and Facilities and the Limited Common Area and Facilities.” The Master Deed further requires the board of directors’ administration be in “strict accordance with provisions of the Act [The Horizontal Property Regime Act], this Master Deed, and the By-Laws of the [Residential] Association.”

76. Article IX, Section 1 of the Master Deed provides, in part, as follows:

Buildings and all Units contemplated in the development shall be, and the same hereby are, **restricted exclusively to residential use** with the exception of the “Ship Store,” which shall be located within the confines of the Regime as reflected on the Site Plan in EXHIBIT “E” for the benefit of all Co-Owners as well as to service the Grantor’s adjacent marina. (emphasis added).

77. Article IX, Section 4 of the Master Deed provides, in part, as follows:

No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. **No business activities of any kind whatever** shall be conducted in any building or in any portion of the property . . . (emphasis added).

78. Article IX, Section 7 of the Master Deed provides as follows:

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. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

79. Article III, Section 3(e) and (f) of the Master Deed limits each Unit Owner’s use of the General Common Area and Facilities and Limited Common Area and Facilities to uses “without hindering the exercise of or encroaching upon the rights of the other Unit Owners” and empowers the board of directors with authority to promulgate rules and regulations which protect Unit Owner’s rights under this Section. Additionally under Section 3(e) and (f), a Unit Owner is granted the right to permit “immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit” to use the General Common Area and Facilities and Limited Common Area and Facilities consistent with this Section.

80. Article XI, Section 6 of the Master Deed provides:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner. Failure by the Association or any Owner to enforce any of the foregoing shall in no event be deemed a waiver of the right to do so thereafter.

81. Article V, Section 2 of the Residential Association By-Laws provide, in part:

The Board of Directors shall manage and direct the affairs of the Association and, subject to any restrictions imposed by law, by the Master Deed, or by these By-laws, may exercise all the powers of the Association. The Board of Directors shall exercise such duties and responsibility as shall be [i]ncumbent upon it by law, the Master Deed, or these By-laws as it may deem necessary or appropriate in the exercise of its powers, including, without limitation, the collection of assessments and charges from the owners, the 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 and the employment and dismissal of personnel necessary for the maintenance and operation of the Common Area and Facilities and Limited Common Area and Facilities . . .

82. Article III, Section I of the By-Laws permits Unit owners to assign rights of enjoyment to the Common Area and Facilities and Limited Common Area and Facilities to “immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit” and requires Unit owners provide the Secretary of the Residential Association with written notice of the name or names of “any such assignee.”

83. Upon information and belief, Plaintiffs rent their Units on a short-term basis and advertise and market their Units for rent on vacation rental websites.

84. Upon information and belief, some or all of the Plaintiffs' short-term rentals are not made pursuant to valid lease agreements and are made to renters who are not immediate family members.

85. Plaintiffs' short term rental activities have produced a significant increase in the number of people visiting and staying at Mariner's Cay as well as service providers for the Plaintiffs which, in turn, has had a detrimental impact on the Residential Association's Common and Limited Areas and Facilities. Additionally, the short-term rental activity is causing security

issues for the Residential Association. As a result of the Plaintiffs short-term rental activities, the Residential Association will incur additional costs associated with maintaining, repairing, replacing and operating the General and Limited Common Areas and Facilities.

86. Plaintiffs' short-term rental activities are also encroaching on and hindering the rights of other Residential Association members whose quiet enjoyment and use of the General and Limited Common Areas and Facilities is negatively impacted by the short-term rental activity. Furthermore, Plaintiffs are not providing the Secretary of the Residential Association with written notice of names of "immediate members of his family," "a limited number of guests," or "his tenants who reside in his Apartment Unit" when they wish to assign rights of enjoyment to the Common Area and Facilities and Limited Common Area and Facilities as required by the By-Laws.

87. Responding to the conditions created by the Plaintiffs' short term rental activities and the Plaintiffs' disregard for the restrictions set forth in the Residential Association's Master Deed and By-Laws and anticipating future similar conduct, on May 28, 2019 the Board of Directors passed a Moratorium addressing short term rental activity at Mariner's Cay. (Defendant craves reference to the Moratorium which speaks for itself). Balancing the interests of all Residential Association members while seeking to fulfill its obligations to administer and operate the Residential Association consistent with the Master Deed and By-Laws, the Moratorium does not apply to any of the Plaintiffs but only to new Residential Association members who acquire a Unit at Mariners Cay after July 1, 2019 ("new members"). The Moratorium limits rental activity for new members to rental contracts of not less than 30 days. Finally, the Moratorium is set to expire on April 30, 2020.

FOR A FIRST CAUSE OF ACTION
(Preliminary and Permanent Injunction)

88. Each and every allegation above is incorporated by reference as if restated verbatim.

89. As set forth in more detail herein, the Master Deed and By-Laws:

- a. limit use of a Unit to “residential use” only;
- b. do not permit a Residential Association member to use his or her Unit for “business activity of any kind whatsoever”;
- c. do not permit a Residential Association member to rent to a non-lessee;
- d. do not permit a Residential Association member to rent to a lessee who invites non-immediate family members to stay in the Unit and;
- e. do not permit a Residential Association member to engage in conduct which restricts or encroaches upon the rights of other Unit owners.
- f. limit a Unit owner’s right to assign rights of enjoyment to Common Area and Facilities or Limited Common Area and Facilities only to a “immediate family members”, “a limited number of guests”, or “tenants who reside” in the Unit owner’s Apartment and require the Unit owner provide the Secretary of the Association with written notice of the assignee names before an assignment is made.
- g. require that “no less that all of a unit may be rented.”

90. Plaintiffs' short-term rental activity and future activity violates the restrictions in the Master Deed set forth above in Paragraph 47 (a) – (g).

91. The Master Deed grants the board of directors authority to enforce provisions in the Master Deed and requires that the board of directors manage and operate the Residential Association in strict compliance with the Master Deed.

92. Accordingly, the Residential Association is entitled to an Order(s) granting a preliminary and permanent injunction against the Plaintiffs prohibiting any use of their Units in violation of the Master Deed, By-Laws, the Moratorium or other governing documents.

93. The Residential Association further asserts it is entitled to recover the costs and fees associated with bringing this action.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

94. Each and every allegation above is incorporated by reference as if restated verbatim.

95. Plaintiffs are bound by the terms of the Master Deed, By-Laws, and the Moratorium.

96. As set forth herein, the Plaintiffs short-term rental activity is violating and breaching the Master Deed, By-Laws and the Moratorium.

97. As a result of Plaintiffs' breach of the Master Deed, By-Laws and Moratorium, the Residential Association has suffered and will continue to suffer actual and consequential damages which it is entitled to recover from Plaintiffs. The Residential Association is further entitled to recover the costs and associated with bringing this suit.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

98. Each and every allegation above is incorporated by reference as if restated verbatim.

99. Plaintiffs are bound by the terms of the Master Deed and the Moratorium.

100. As set forth herein, Plaintiffs short-term rental activity is violating and breaching the Master Deed and the Moratorium.

101. As a result of Plaintiffs' acts and omissions, an actual controversy exists between the parties regarding the rights and obligations of the parties under the Master Deed, By-Laws, the Moratorium, and other governing documents which apply to the Residential Association and its members.

102. Pursuant to the authority granted this Court under S.C. Code Section 15-53-10 *et. seq.*, the Residential Association is entitled to a declaration determining the rights and obligations of the parties relevant to the above-reference matters and for an award of relief as the Court deems just and proper.

WHEREFORE, the Residential Association prays that this Court inquire into the matters and things alleged herein and issue an Order(s):

(1) entering a preliminary and permanent injunction against Plaintiffs prohibiting any short-term rental activity inconsistent with the Master Deed, By-Laws, Moratorium or other governing document;

(2) for an award of damages on the Breach of Contract claim;

(3) for a declaratory judgment determining the rights and obligations of the parties under the Master Deed, By-Laws, the Moratorium, and other governing documents which apply to rental activity at the Residential Association and of its members;

(4) having fully answered the Plaintiffs' Complaint, Defendant prays that the same be dismissed with costs;

(5) awarding the Residential Association its costs and fees; and

(6) for such other and further relief as the Court may deem just and proper.

BARNWELL, WHALEY, PATTERSON, AND
HELMS, LLC

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- and -

PARKER POE ADAMS & BERNSTEIN, LLC

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*Counsel for Defendant/Counterclaim-Plaintiff
Mariner's Cay Racquet & Yacht Club
Homeowners Association, Inc.*

Dated: April 12, 2023
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Dustin Grotzke, Christine Grotzke,	)	Civil Action No. 2019-CP-10-03390
Leo Cornejo, Steve Falcani,	)	
Nancy Falciani, Robert St. Louis,	)	
Lindsay Layton, Ron Woolf,	)	PLAINTIFFS' REPLY TO COUNTER-
Roberta Woolf, Nancy Zaj,	)	CLAIM OF DEFENDANT
Meg White, Joey Winchester,	)	
Kelly Hill, Marty Thaler, Ed Thaler,	)	
Lisa Essig, Brianna Stello,	)	
Jennifer Sellars and Dominique Powell,	)	
	)	
Plaintiffs/Counterclaim	)	
Defendants,	)	
	)	
v.	)	
	)	
Mariner's Cay Racquet & Yacht Club	)	
Homeowners' Association, Inc.	)	
	)	
Defendant/Counterclaim Plaintiff,	)	
	)	

**TO: JOHN W. FLETCHER, ESQUIRE, AND ROBERT H. JORDAN, ESQUIRE,
COUNSEL FOR DEFENDANT:**

The above-named Plaintiffs ("Plaintiffs"), replying to the Counterclaim of Defendant/Counterclaim Plaintiff Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. ("Defendant"), would respectfully allege and show unto this court as follows:

1. The allegations, if any, contained in Paragraphs 1 through 66 of Defendant's Amended Answer and Counterclaim are in answer to Plaintiffs' Amended Complaint and do not require a response from Plaintiffs. However, to the extent Paragraphs 1 through 66 of Defendant's Amended Answer and Counterclaim are inconsistent with the allegations of Plaintiffs' Amended Complaint or are deemed as requiring any response, Plaintiffs deny said allegations and demand strict proof thereof.

2. Plaintiffs deny each and every allegation contained in Defendant's Amended Answer and Counterclaim except to the extent herein specifically admitted, modified, qualified or explained, and demand strict proof thereof.

3. Plaintiffs admit the allegations contained in Paragraphs 67, 68, 69 and 70.

4. Plaintiffs lack sufficient information regarding the truthfulness of the allegations contained in Paragraph 71 and must, therefore, deny them at this time and demand strict proof thereof.

5. Plaintiffs admit the allegations contained in Paragraph 72.

6. Plaintiffs lack sufficient information regarding the truthfulness of the allegations contained in Paragraph 73 and must, therefore, deny them at this time and demand strict proof thereof.

7. As to Paragraphs 74 through 82, Plaintiffs aver that the recorded documents referenced are public records and speak for themselves, and Plaintiffs crave the court's reference to the actual recorded documents or true and correct copies thereof. Plaintiffs specifically decline to accept as correct Defendant's quoting or any attempt at characterization or interpretation of said documents. Any further or remaining allegations contained in Paragraphs 74 through 82 are denied and Plaintiffs demand strict proof thereof.

8. As to Paragraph 83, Plaintiffs admit only that some but not all of the Plaintiffs rent their Units on a short-term basis and advertise and market their Units for rent on vacation rental websites. Other Plaintiffs have wished to undertake such short-term rentals but have been prevented from doing so by Defendant's moratoriums.

9. Plaintiffs deny the allegations contained in Paragraphs 84, 85, and 86, and demand strict proof thereof. Furthermore, Plaintiffs aver that the recorded document referenced

in Paragraph 86 is a public record and speaks for itself, and Plaintiffs crave reference to the actual recorded document or a true and correct copy thereof, and specifically decline to accept as correct Defendant's quoting or any attempt at characterization or interpretation of said document.

10. As to Paragraph 87, the document referenced speaks for itself, and Plaintiffs crave reference to the actual document or a true and correct copy thereof. Plaintiffs specifically decline to accept as correct Defendant's quoting or any attempt at characterization or interpretation of said document. Plaintiffs further specifically deny any and all of Defendant's purported characterizations, descriptions or labels of Plaintiffs as well as any conduct, activities or situations material to any claim or defense in this case. Plaintiffs further deny that "the Moratorium is set to expire on April 30, 2020," as 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.

FIRST CAUSE OF ACTION
(Preliminary and Permanent Injunction)

11. Answering Paragraph 88, Plaintiffs repeat and reallege their responses to Paragraphs 1 through 87 above as if set forth again herein verbatim.

12. As to Paragraph 89 (a) – (g), Plaintiffs aver that the recorded documents referenced are public records and speak for themselves, and Plaintiffs crave the court's reference to the actual recorded documents or a true and correct copy thereof. Plaintiffs specifically decline to accept as correct Defendant's quoting or any attempt at characterization or interpretation of said documents. Any further or remaining allegations contained in Paragraph 89 are denied and Plaintiffs demand strict proof thereof.

13. Answering Paragraphs 90 through 93, said Paragraphs allege conclusions of law

to which no response is necessary and Plaintiffs otherwise deny said Paragraphs and demand strict proof thereof.

SECOND CAUSE OF ACTION
(Breach of Contract)

14. Answering Paragraph 94, Plaintiffs repeat and reallege their responses to Paragraphs 1 through 93 above as if set forth again herein verbatim.

15. Answering Paragraphs 95, 96, and 97, said Paragraphs allege conclusions of law to which no response is necessary and Plaintiffs otherwise deny said Paragraphs and demand strict proof thereof.

THIRD CAUSE OF ACTION
(Declaratory Judgment)

16. Answering Paragraph 98, Plaintiffs repeat and reallege their responses to Paragraphs 1 through 97 above as if set forth again herein verbatim.

17. Answering Paragraphs 99 through 102, said Paragraphs allege conclusions of law to which no response is necessary and Plaintiffs otherwise deny said Paragraphs and demand strict proof thereof.

18. As to the remaining text contained in Defendant's Answer and Counterclaim following Paragraph 102, to the extent anything contained in said text is inconsistent with the allegations of Plaintiffs' Complaint or is deemed as requiring any response, Plaintiffs deny said allegations and demand strict proof thereof. Plaintiffs specifically deny that their actions have breached the Master Deed and By-Laws.

WHEREFORE, having fully replied to the allegations of the Counterclaims of Defendant Mariner's Cay Racquet & Yacht Club Homeowner's' Association, Inc., Plaintiffs pray that the

Counterclaims be dismissed; that the relief sought in Plaintiffs' Amended Complaint be granted;
and for such other and further relief as this Court may deem just, equitable and proper.

[SIGNATURE PAGE FOLLOWS]

*Dustin Grotzke et al. v. Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.
Case No. 2019-CP-10-03390
REPLY TO COUNTERCLAIM*

Respectfully submitted,

FINKEL LAW FIRM LLC

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Attorneys for Plaintiffs

May 5, 2023

ELECTRONICALLY FILED - 2023 May 05 5:18 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1003390

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Mikell R. Scarborough, Master-in-Equity

Case No. 2019-CP-10-03390

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, and Dominique Powell..... Plaintiffs/Respondents

vs.

Mariner's Cay Racquet & Yacht Club Homeowners'
Association, Inc.,..... Defendant/Appellant

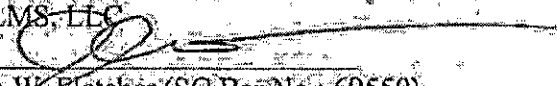
NOTICE OF APPEAL

Defendant/Appellant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc., hereby appeals from: (a) the Order ruling upon the parties' motions (including motions for summary judgment and to amend the Complaint), which the Honorable Mikell R. Scarborough, Master-in-Equity signed and filed on March 29, 2023 (attached hereto as Exhibit A); and (b) the Form 4 Order denying Defendant's Motion to Alter or Amend March 29, 2023 Order, which the Honorable Mikell R. Scarborough, Master-in-Equity signed and filed on April 17, 2023 (attached hereto as Exhibit B).

Defendant/Appellant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. received written notice of entry of the Order denying its Motion to Alter or Amend March 29, 2023 Order (Exhibit B) on April 17, 2023.

May 10, 2023

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 

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Attorneys for Respondents

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
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,)

Civil Action No. 2019-CP-10-03390

ORDER

Plaintiffs,

v.

Mariner's Cay Racquet & Yacht Club)
Homeowners' Association, Inc.,)

Defendant.)

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 argument² 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 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), SCRCF. 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), SCRPC, 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, SCRPC 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. *Hunnicut 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

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), SCRPC, 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

Electronically signed on 2023-03-29 10:33:51 page 31 of 31

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STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP1003390

Dustin Grotzke et al
PLAINTIFF(S)

Mariners Cay Racquet & Yacht Club Homeowners Association Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Upon careful consideration of the Defendant's Motion to Alter or Amend, filed April 10, 2023, this Court respectfully DENIES the Motion.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/17/2023 .

Ed Thaler
Mary Thaler
Kelly Hill
Doe, Jane
Jane Doe
John Doe
Doe, John
Leslie Kelly
Brianna Stello
Jenn Odom
Lisa Essig

NAMES OF TRADITIONAL FILERS SERVED BY MAIL



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: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2023-04-17 14:46:20 page 3 of 3

ELECTRONICALLY FILED - 2023 May 17 03:38 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1003390

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON FOR THE NINTH JUDICIAL CIRCUIT
3 CASE NO. 2019-CP-10-3390
4

5 DUSTIN GROTZKE, et al,)

6 Plaintiffs,)

7 vs.)

8 MARINER'S CAY RACQUET & YACHT CLUB)

9 HOMEOWNERS ASSOCIATION, INC.,)

10 Defendant/Third-Party)

11 Plaintiff,)

12 vs.)

13 JANE AND JOHN DOE DEFENDANTS,)

14 Third-Party)

15 Defendants.)

16
17
18
19 Hearing before the Honorable Mikell R.
20 Scarborough, reported by Josie Allen Boehm, Registered
21 Professional Reporter and Notary Public, at 100 Broad
22 Street, Courtroom 2A, Charleston, South Carolina, July
23 19th, 2022, commencing at 10:23 a.m.
24
25

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1 THE COURT: I want to talk procedurally for a
2 minute before we get into the merits of the summary
3 judgement motion. It's captioned Dustin Grotzke and
4 others including Christine Grotzke, Leo Cornejo and a
5 bunch of other folks as plaintiffs versus Mariner's
6 Cay Racquet and Yacht Club Homeowners Association,
7 Inc. Case number is 2019-CP-10-3390.

8 Mr. Sean O'Connor is present for the
9 plaintiffs. And let me start here. Y'all introduce
10 yourselves for the record.

11 MR. FLETCHER: My name is John Fletcher for
12 the defendant.

13 MR. JORDAN: Your Honor, Robert Jordan along
14 with my colleague, Mya Green, also for the defendants.
15 And Mr. Fletcher is too modest, but he had double knee
16 replacement surgery a month ago.

17 He's coming off the IR today, Your Honor, and
18 he's going to take the lead for us. I may have a
19 couple of things to say, but he's going to be the
20 lead.

21 MR. FLETCHER: If Your Honor would extend me
22 that --

23 THE COURT: You may. If you really feel like
24 getting into some paint, I'll let you stand.

25 MR. FLETCHER: It's the standing that's taken

1 a toll on me.

2 THE COURT: Before we get started, having
3 read the memoranda, the motions, and I think the
4 defendants filed first was what I went back last night
5 to check. Defendant's motion for partial summary
6 judgement was filed July 8th. There may have been a
7 prior motion of summary judgement. There's some
8 reference to that.

9 But I got the memoranda in late last week.
10 Memos in support. I got affidavits. I got copies of
11 the exhibits with copies of the temporary moratoriums,
12 which have been going on for the last three years now.

13 Y'all can explain to me how that's a
14 temporary moratorium. We'll get to that. But anyway,
15 so there were issues raised and this morning came up
16 with you had a new plaintiff you wish to seek to add,
17 Mr. O'Connor.

18 And I gathered from your e-mail that had
19 something to do with making sure y'all had standing,
20 and we had the discussion. Because some of the
21 procedural stuff, I just want to talk about in the
22 final process.

23 MR. O'CONNOR: Yes, Your Honor.

24 THE COURT: I need to find out if we're ready
25 to go forward with the merits is really why I am

1 bringing this up to you.

2 MR. O'CONNOR: Yes, sir. Your Honor, the
3 plaintiffs take the position that they do have
4 standing based on the fact that we have alleged that
5 even though the way the board tried to craft this
6 moratorium was in such a way that the plaintiffs
7 couldn't challenge it because they said, oh, you're
8 grandfathered. Only applies to new people that bought
9 in after the moratorium, so therefore you people don't
10 have standing is kind of a crafty strategy.

11 And we take the position that we're damaged
12 anyway because, you know, we can't alienate the
13 property to someone if it reduces the property value.

14 And in fact, the affidavit that I filed with
15 my motion and memorandum was one of the plaintiffs who
16 bought before the moratorium who contends that he had
17 to drop his price and that the purchaser specifically
18 cited that and he, you know, even in a extremely hot
19 real estate market, he had to drop the price, give the
20 person some concessions, pay about six grand worth of
21 assessments. Based on that, we contend the plaintiffs
22 have standing anyway.

23 THE COURT: That was the affidavit of
24 Mr. Cornejo?

25 MR. O'CONNOR: Yes, sir. But nonetheless, we

1 also found a lady by the name of Jennifer Sellers who
2 is eager and willing to join as a party plaintiff.

3 And she even more directly and explicitly
4 negates their entire argument about standing because
5 she is someone that bought after the moratorium who
6 the moratorium does directly affect.

7 She's being prohibited from short-term
8 renting right now. And she takes the position that --
9 you know, granted, I said this in the e-mail. Her
10 affidavit was filed yesterday.

11 So it's you know -- it's inside the deadline.
12 And I do have a notarized copy of it now. I didn't
13 last night, but I do now.

14 And so, you know, her presence specifically
15 goes to the standing issue. And so even with the
16 lateness of the affidavit, I felt it was important and
17 necessary to make the Court aware of that.

18 THE COURT: All right. Mr. Fletcher?

19 MR. FLETCHER: Your Honor, I guess I'll
20 address each of those separately. It's kind of
21 prefacing a bit some of the arguments we'd like to
22 make on the merits.

23 As to Mr. Cornejo's affidavit, we would
24 submit that -- remembering that we're here in Your
25 Honor's equitable jurisdiction. If anything -- and

1 there's some other issues we will --

2 THE COURT: My reading of the order of
3 reference is that's all I've got.

4 MR. FLETCHER: Right. And --

5 THE COURT: These damages claims --

6 MR. FLETCHER: -- Mr. Cornejo's affidavit
7 makes clear that to the extent he claims any injury,
8 it's legal. There are money damages. He's saying I
9 lost some value with the price.

10 And therefore to the extent he's claiming any
11 injury, the appropriate remedy for him would be to
12 assert a legal claim for damages that we could hash
13 out what his sale price was, the nature of the
14 improvements he made to his unit, and how these things
15 all -- and that would involve a lot of discovery, but
16 that's a legal question. That's not an equitable
17 issue.

18 THE COURT: Well, that wouldn't if he's
19 standing, though.

20 MR. FLETCHER: Well, for purposes of being
21 before Your Honor on this current motion, that would
22 be a legal issue and would have to be resolved.

23 THE COURT: You're saying he has standing to
24 pursue his legal remedy but not standing to pursue his
25 equitable remedy?

1 MR. FLETCHER: For purposes of this
2 particular plaintiff --

3 THE COURT: All right. Well, I don't see
4 that argument is going by, but keep telling me more.

5 If you've got standing, you got standing.
6 You stand on one leg or you stand on two. I got a
7 legal leg and I got an equitable leg, but I got
8 standing if I have a basis to be here.

9 MR. FLETCHER: If he has standing, that would
10 be within Your Honor's equitable jurisdiction and it
11 requests equitable relief. And obviously one of the
12 prerequisites is a lack of a legal remedy. And by his
13 own affidavit, he accepted as true --

14 THE COURT: You acknowledge that he has a
15 legal remedy, right?

16 MR. FLETCHER: He's acknowledging that he's
17 got a legal remedy. He's saying I've got -- I can get
18 damages for whatever difference in value is.

19 THE COURT: Mr. O'Connor made reference to
20 him having to pay some sort of assessments in order to
21 sell the property.

22 Would that not give him an additional remedy
23 as well?

24 MR. FLETCHER: Well, it would be within money
25 damages. There's really no equitable relief to be

1 done at this point.

2 Property has been sold, and if he's claiming
3 any injuries, it would be in the form of money
4 damages. And that's a separate cause of action.

5 THE COURT: What about his diminution of
6 value, his claim to diminution of value?

7 MR. FLETCHER: That's a legal remedy. You
8 know, we get experts to testify the difference in
9 value and, you know, a legal court -- you know, if
10 it's a jury trial, have a trial for more damages.
11 There's really no equitable thing that can be done at
12 this point because the property has been sold.

13 THE COURT: Agreed. Okay. Agreed that it's
14 been sold. I don't necessarily agree that he doesn't
15 have standing.

16 MR. FLETCHER: Well, this is moving outside
17 of standing and more into Your Honor's equitable
18 jurisdiction.

19 THE COURT: Sure.

20 MR. FLETCHER: Even if he has standing --
21 he's got standing against a legal remedy not an
22 equitable remedy.

23 THE COURT: That's your position.

24 MR. FLETCHER: At least as to this property.

25 THE COURT: As to that particular property?

1 He's still got another piece of property.

2 MR. FLETCHER: We contend -- so that
3 property, he still lacks standing because there's no
4 injury.

5 THE COURT: Because of this temporary
6 moratorium.

7 MR. FLETCHER: Right.

8 THE COURT: Doesn't impact him until he
9 sells, right?

10 MR. FLETCHER: Until he sells. And at that
11 point, his remedy, if any, is going to be legal.

12 THE COURT: So our logic is circular. So it
13 doesn't affect him if he owns the property, but it
14 does affect him if he sells the property --

15 MR. FLETCHER: Well, it's ultimately --

16 THE COURT: Let me finish. I'm talking to
17 the record over there.

18 If he sells the property, then he has a legal
19 remedy, correct?

20 MR. FLETCHER: Correct.

21 THE COURT: But he can't challenge the
22 temporary moratorium you're telling me because he
23 doesn't have standing to pursue it from an equitable
24 standpoint?

25 MR. FLETCHER: He doesn't have a concrete

1 injury, which is the requirements of standing. If
2 he's able to use his property as he chooses and he --

3 THE COURT: I don't think it's limited to
4 just a concrete injury. Isn't it a potential -- a
5 likely or a potential injury?

6 MR. FLETCHER: An injury in fact is an
7 invasion of a legally protected interest which is, A,
8 concrete and particularized and, B, actual or
9 imminent, not conjectural or hypothetical.

10 THE COURT: Imminent.

11 MR. FLETCHER: Right, but it has to be both,
12 concrete and imminent.

13 THE COURT: Concrete, imminent, and what was
14 the third one?

15 MR. FLETCHER: It's actual or imminent, not
16 conjectural or hypothetical. At this point, if the
17 property hasn't been sold yet, it's really a
18 conjectural hypothetical --

19 THE COURT: He realized it, didn't he?

20 MR. FLETCHER: The property has been sold.
21 The remedy there is legal.

22 THE COURT: All right. Let's talk about the
23 lady that just popped up last night. Yeah. Y'all got
24 any opposition to her being added as a party?

25 MR. FLETCHER: There's been no motion to add

1 her at this point. The complaint has not made any
2 allegations concerning people who owned property after
3 the fact.

4 And we would note that, you know, anyone who
5 purchases after the moratorium effect, we're going to
6 argue is going to have record notice of the moratorium
7 and the claim is going to be against their agent or
8 somebody else, not against us.

9 So that's going to bring in issues that
10 haven't been raised at this point and a new set of
11 discovery will be required, and it really changes the
12 nature of the case.

13 And if this party is out at this point then I
14 think really this might not be the time to address
15 summary judgement.

16 THE COURT: Could be. That's why we're
17 talking about this. So not withstanding the fact --
18 I'm going to get to y'all in a second.

19 Let me hear back from you on Mrs. Sellers.

20 MR. O'CONNOR: Yes, sir, Your Honor. The
21 only reason I didn't file a motion to amend is because
22 with the 10-day notice rule, I knew it couldn't be
23 heard today anyway. I basically put you and the other
24 side on notice that I was going to do it.

25 But in her affidavit, it explicitly states

1 that she's ready and willing to join as a party
2 plaintiff, and it states the -- identifies the unit
3 that she owns.

4 And we would strenuously disagree that, you
5 know, the fact that she's got, you know, purported
6 record notice of this moratorium means she can't
7 challenge it once she buys her unit. You know, she
8 buys into --

9 THE COURT: Well, that assumes it's valid,
10 right?

11 MR. O'CONNOR: And we contend it's not. And
12 she would certainly have standing to assert that it
13 was not an act that the board had the authority to do
14 with a rule and regulation.

15 And so she's exactly who they are hoping we
16 wouldn't have is somebody that's willing to join as a
17 party in this case, who bought their unit after the
18 moratorium.

19 And she's ready to do it. You know, if Your
20 Honor believes that, you know, we need to wait until
21 she's a party and then have the argument, either way,
22 I'm ready to go forward.

23 THE COURT: Some of these are academic but
24 they're also jurisdictional. You don't want to get to
25 the Supreme Court and argue that the Court didn't have

1 subject matter jurisdiction, do you?

2 Standing is not to say it was jurisdiction.

3 I am well aware of that. I think these plaintiffs
4 have got standing.

5 Now let's talk about the ultra vires/intra
6 vires argument that y'all have raised. That does
7 somewhat get into the -- but I'm trying to make sure
8 that I covered the procedural grounds that you have
9 raised so that we perhaps may get to the merits of the
10 case. Okay.

11 So y'all both cited there's no case law
12 whether or not short-term rentals are admitted or
13 allowed in the state. At least I'm not aware of any.
14 There may be something pending that I don't know
15 about.

16 MR. FLETCHER: Maybe this case.

17 THE COURT: Could be. I looked back at my
18 old cases, and it never went up on appeal. I don't
19 know why, but it's been fought before in my courtroom.

20 So let me hear from you on that.

21 MR. FLETCHER: So procedural question, as
22 Your Honor is well aware, the bulk of what their
23 challenge is that the moratorium are ultra vires.

24 THE COURT: Lack the authority to enact.

25 MR. FLETCHER: This is a nonprofit

1 corporation, so under 33.31.304 sub (a), the validity
2 of corporate action may not be challenged on the
3 ground that the corporation lacks or lacked power to
4 act.

5 In other words, you can't bring it to this
6 action. The exception to that is the proceeding may
7 be brought by the attorney general, a director, or by
8 a member or members of any derivative proceeding.

9 This is not a derivative action.
10 Mr. Cornejo's affidavit exhibits that it's for his own
11 interest. He's claiming his own injuries. They're
12 not claiming any harm to the corporation. They're not
13 claiming that this is harmful to the majority of the
14 members.

15 In fact, if you look at Mr. Cornejo's
16 affidavit, in his affidavit, he concedes that back
17 when this originally came up, had there been a vote
18 taken on amendment to the master deed, 69 percent of
19 members would likely voted in favor of prohibiting
20 short-term rentals.

21 THE COURT: But the requirement is 75
22 percent, right?

23 MR. FLETCHER: Right. But what I am saying
24 is to the extent there may be a claim for a derivative
25 claim, they can't claim they represent the majority of

1 members when they're not allowing short-term rentals.

2 And so the proper vehicle is a derivative
3 action. They've not made the allegations. They can't
4 make the allegations in good faith that they would be
5 an appropriate and adequate representative of the
6 corporation.

7 And therefore Your Honor should dismiss this
8 action as not being proper under the South Carolina
9 nonprofit corporation statute.

10 THE COURT: Okay. All right. Mr. O'Connor?

11 MR. O'CONNOR: Thank you, Your Honor.
12 Plaintiff's position is that this is basically a red
13 herring. Respectfully whether or not -- and I
14 understand that, you know, the plaintiff did not bring
15 this as a derivative action, even though we contend
16 that they can make out the elements of that.

17 But regardless of whether this Court would
18 consider that action to be alter vires, there is no
19 prohibition against the action that they brought and
20 asking this Court to make a ruling on whether what the
21 board did comports with its legal authority under the
22 explicit language of the master deed.

23 The reading that defendant's counsel is
24 asking the Court to adopt would be one that just, you
25 know, based on this language in the nonprofit

1 corporation code, the board can just do whatever it
2 wants and the homeowners never have a right to come to
3 court and assert that it's a breach of the governing
4 documents. And that is not and cannot be the law.

5 Regardless of whether we amend to try to
6 frame this as a derivative action, either way, as it
7 stands right now, our position is that even you said,
8 okay, it's not an ultra vires action, it's still a
9 violation of the governing documents which the board
10 has a legal obligation to follow and not just go
11 outside of those and just do whatever it wants when
12 they acknowledged in 2018 that they're required to get
13 the amendment passed.

14 They didn't get the votes, so they did this
15 instead. And we certainly have the legal authority to
16 bring that right as a breach of contract action, which
17 is what we did. So that's where we stand.

18 THE COURT: What would you need to do to
19 overcome that challenge?

20 MR. O'CONNOR: I'm not sure that it
21 explicitly states you have to have a majority. They
22 didn't have that vote. I don't know where it --

23 THE COURT: Vote never took place, did it?

24 MR. O'CONNOR: No. Never went forward. That
25 was just one of my client's estimation of what he

1 heard through the grapevine was, you know, when the
2 board was trying to count votes and decided ultimately
3 not to go forward because they knew it was going to
4 get voted down.

5 THE COURT: That was Mr. Cornejo's affidavit?

6 MR. O'CONNOR: Yes, sir, Your Honor. But we
7 contend -- there's obviously significant enough group
8 of folks that rent their units short term and are on
9 the side of the plaintiffs in this case, and we
10 contend that this group, even though we acknowledge
11 that some of them don't own units anymore and such,
12 but there's also other people that have bought units
13 since then and might want to join.

14 Nonetheless, we would take the position that
15 this group can and does represent the interest of
16 enough people that they would make out the
17 requirements for a derivative action.

18 THE COURT: Do they not then need to amend in
19 order to allege they're doing it individually and on
20 behalf of?

21 MR. O'CONNOR: Yes, sir. That would be --
22 and we can and will do that if need be.

23 THE COURT: Okay. All right. And then
24 finally I think the third thing I recollect this was
25 from the defendant's side and that had to do with some

1 discovery to be pushed off.

2 And I think that was the first request I saw
3 was, hey, we're not really ready to go forward. That
4 had to do with income that was being received; isn't
5 that what you were after? We talked about that.

6 MR. JORDAN: We were here a few, two months
7 ago, and we got into a lot of these arguments there.
8 But the thrust of it is we served discovery.

9 And as you know from the merits of the
10 argument, you're going to hear that there's a debate
11 about whether or not this is a business activity. And
12 the master deed expressly prohibits business activity.

13 Our discovery was targeted to understand the
14 rental activity, the advertising, the service
15 providers like cleaners and repair persons who come
16 and go from the community every day.

17 And that type of stuff which we think
18 demonstrates this is a business activity, there were
19 objections on the other side. And rather than rule on
20 that, Your Honor said why don't we see if we can
21 address some or all of the issues via cross motion for
22 summary judgement if there's a pure legal issue.

23 And it may be that gets us down the road
24 towards resolution. If it doesn't, you told us that
25 our motion was essentially stayed without prejudice

1 and would be heard at another time.

2 THE COURT: I assume what you're getting at
3 this there is damages, right? Or is the purpose to
4 establish it's a business and not a residential use?

5 MR. JORDAN: Well, I think the briefing shows
6 there's a healthy debate between the parties. Whether
7 or not this is business activity, you've seen there's
8 a national divergence of opinions on this.

9 And you have already cited the good folks in
10 Columbia probably haven't given us the directive we
11 may want today.

12 So in that atmosphere, we think a full record
13 on the activity of what's going on from an STR, short-
14 term rental, perspective would inform the Court and
15 help you make a decision on the full record rather
16 than take two affidavits, one from us and one from
17 them, and say, okay, I've seen enough here to make a
18 call on whether this is business activity or not.

19 THE COURT: Okay. I think those were the
20 procedural matters. Anything else we need to cover on
21 the procedural stuff?

22 MR. FLETCHER: I don't believe so, Your
23 Honor.

24 THE COURT: Okay.

25 MR. O'CONNOR: I don't think so, Your Honor.

1 THE COURT: Okay. All right. All right.

2 I just think -- I think we could move forward
3 today, but I think that we would be in a better
4 position on the issue if the plaintiff were to seek to
5 amend its pleadings to add Mrs. Sellers or anybody
6 else you wanted to add.

7 And then if there's a question about ultra
8 vires -- I haven't looked that hard into the -- both
9 the statutory and the case law on it. I have had the
10 issue arise before, and I know there was a case that
11 was cited in there. Talked in terms of, you know, you
12 got to bring a derivative action.

13 And that was a case out in Myrtle Beach, and
14 the lady individually was challenging the right to
15 sell some common elements. Okay. And that's one of
16 the things that we'll end up talking about when we get
17 to the merits of this thing is what authority the HOA
18 has over the common elements relative to what they
19 have over the individual owner's units in the
20 condominium regime.

21 I think that's really where we're going to go
22 ultimately with the merits of the case. But I think
23 it probably needs to be set up procedurally so it's
24 ready to go from this standpoint. So I'm not real
25 concerned about the standing issue. I'm more

1 concerned about the ultra vires acts because that's
2 really what we're getting at here.

3 If the challenge to the temporary moratorium
4 by the board is ultra vires, that needs to be
5 established so that it can properly be ruled upon on
6 the merits in the case the matter is going to go on
7 appeal.

8 And, likewise, if it's not, then you're going
9 to go over back to the Circuit Court of Common Pleas
10 on the issue of damages, you want to make sure it all
11 gets covered at the same time.

12 I hate to do that to you, but that's what is
13 sort of gnawing on the back of my head. How much
14 time -- can you make those amendments within the next
15 15 days?

16 MR. FLETCHER: Yes, sir, Your Honor.

17 THE COURT: And can y'all respond to that in
18 another 15 days?

19 MR. JORDAN: Sure, Your Honor. In the
20 abstract, it's hard until we see the pleadings. We
21 may consent or we may argue that it's futile. But we
22 can do that within 15 days and put it in front of you
23 for a decision.

24 MR. FLETCHER: As soon as you can get a draft
25 of the complaint, that would be helpful to us before

1 you file the motion, let us take a look at it.

2 THE COURT: If you could file your amendments
3 by the 5th of August, Mr. O'Connor, and then 15 days
4 after is the 22nd of August, I think, is it not?
5 August 22. And I think -- you may want to take that
6 lady's deposition. Have you done depositions?

7 MR. FLETCHER: Just affidavits.

8 THE COURT: I'll see if I can't get you back
9 in here within -- certainly within 30 days of that.
10 And if that takes care of those issues, we could be
11 moving forward.

12 So I'm looking at how about the 19th of
13 September? That's a Monday. Let's just put y'all
14 down for 11 a.m. Monday, September 19. 11 a.m., come
15 back and talk about that, where we are.

16 MR. FLETCHER: Would that be just on the
17 amendment, or is that to address everything?

18 THE COURT: I would like to address
19 everything. If y'all challenge the amendments or
20 whatever, we'll have to do that sooner than that if
21 that's what you seek to do.

22 I'm going to grant them. They filed a
23 motion. I'm going to grant the motion under Rule 15.
24 Okay. I don't know how it's going to change it other
25 than it takes care of -- it may shorten your standing

1 issue. It may question the ultra vires question. But
2 that's to get to the merits of the case. Everybody is
3 probably in favor of that.

4 MR. FLETCHER: Following the amendment, will
5 we have the ability to file some additional briefing
6 if necessary?

7 THE COURT: Absolutely. That's why I want to
8 give you 30 days from the time you plead it in. I'm
9 happy to take anything you have, preferably before
10 5 p.m. the Friday before.

11 But I'll be looking forward to it. I hate to
12 do that, but when I read this stuff last night, I --
13 you know, like everything else, I like to get into the
14 merits of the matter. But I had these issues out here
15 pecking at me.

16 I would love to get an answer to this
17 question, which I think just about every HOA in the
18 state might like to get an answer to the question.

19 Let's just figure out what the answer is
20 supposed to be and see if we can't tee it up for our
21 friends up there in Columbia to make that decision.
22 Okay.

23 MR. O'CONNOR: All right. Thank you, Your
24 Honor.

25 MR. FLETCHER: Thank you.

1 THE COURT: Take care.
2 (Off the record at 10:50 a.m. on July 19th,
3 2022.)
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1 COURT REPORTER'S CERTIFICATE

2
3 I DO HEREBY CERTIFY THAT THE TESTIMONY
4 CONTAINED IN SAID HEARING WAS, BY ME, REDUCED TO
5 WRITING IN THE PRESENCE OF SAID WITNESS BY MEANS OF A
6 COMPUTERIZED TRANSCRIPTION. THE SAID HEARING IS A
7 TRUE AND ACCURATE TRANSCRIPT OF THE WHOLE OF THE
8 TESTIMONY GIVEN BY SAID WITNESS, AS AFORESAID.

9 I DO FURTHER CERTIFY THAT I AM NOT CONNECTED
10 BY BLOOD OR MARRIAGE WITH ANY OF THE PARTIES OR THEIR
11 ATTORNEYS OR AGENTS, AND THAT I AM NOT AN EMPLOYEE OF
12 EITHER OF THEM, NOR INTERESTED DIRECTLY OR INDIRECTLY
13 IN THE MATTER OF CONTROVERSY EITHER AS COUNSEL,
14 ATTORNEY, AGENT, OR OTHERWISE.

15 SIGNED THIS THE 18th DAY OF MAY 2023.

16 _____
17 JOSIE ALLEN BOEHM

18 My Commission Expires 10/18/32
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1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON FOR THE NINTH JUDICIAL CIRCUIT
3

4 DUSTIN GROTZKE, et al,)
5 Plaintiffs,)
6)

7 vs.)

8 MARINER'S CAY RACQUET & YACHT)
9 CLUB HOMEOWNERS ASSOCIATION,)

10 INC.,) CASE NO.

11 Defendant/Third-Party) 2019-CP-10-03390

12 Plaintiff,)

13 vs.)

14 JANE AND JOHN DOE DEFENDANTS,)

15 Third-Party)

16 Defendants.)

17
18
19
20 Hearing before the Honorable Mikell R.

21 Scarborough, reported by Josie Allen Boehm, Registered
22 Professional Reporter and Notary Public, at 100 Broad
23 Street, Courtroom 2A, Charleston, South Carolina,
24 September 19th, 2022, commencing at 10:10 a.m.
25

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1 THE COURT: All right, folks. So we're back
2 on the record. This case is originally captioned
3 Dustin Grotzke as Plaintiff versus the Mariner's Cay
4 Racquet and Yacht Club. 2019-CP-10-3390.

5 Mr. Sean O'Connor for the Plaintiffs,
6 Mr. Robert Jordan and John Fletcher for the
7 Defendants.

8 And we had a hearing. I think it was two
9 months ago. Some issues were raised. I think it was
10 cross motions for summary judgement; was it not? So
11 we've got those preserved for today.

12 There was some discussion about a standing
13 issue, and I know that having reviewed the record,
14 Mr. O'Connor has moved to amend the complaint to add a
15 post -- I forget which date it was in '19. Post
16 purchaser of '19. That's Ms. Sellars, I think it is,
17 a Jennifer Sellars.

18 MR. O'CONNOR: Yes, sir, and there's three
19 other folks.

20 THE COURT: Okay. So we'll cross that
21 bridge. And then the standing issue remains in place,
22 correct, Mr. Jordan?

23 MR. JORDAN: Correct.

24 THE COURT: So before we get, then, to the
25 summary judgement issue again, what do we need to

1 address? The amendment?

2 I'm just trying to figure out procedurally
3 where we are.

4 MR. O'CONNOR: Yes, sir. If I can address
5 that. I don't think there's any dispute that the
6 parties would need to have Your Honor hear and rule
7 upon the motion to amend the pleadings so that the
8 case is framed properly for summary judgement would be
9 my understanding.

10 THE COURT: All right. Very good. So under
11 Rule 15A, amendments are generally liberally granted.

12 So, Mr. Jordan, tell me why I shouldn't let
13 him amend this complaint.

14 MR. JORDAN: May it please the Court, Your
15 Honor, Robert Jordan for the Defendant, along with
16 Mr. Fletcher.

17 You're right, Your Honor. I rise fully
18 mindful of the standard under Rule 15. I do think
19 here we have a unique set of circumstances where, as a
20 matter of law, you can find that the amendment is
21 useful. And if you find that, then it's proper to
22 deny the motion to amend.

23 THE COURT: Okay.

24 MR. JORDAN: Some of these arguments are
25 going to obviously dovetail into the summary judgement

1 arguments.

2 THE COURT: Right.

3 MR. JORDAN: And I suspect you'll want to
4 hear those as well. But I would like to hit a couple
5 of highlights.

6 THE COURT: Sure.

7 MR. JORDAN: We filed a brief. We
8 incorporate that here today and rely on that.

9 Judge, the amendment we're dealing with was
10 filed several weeks ago. And then I think on Friday,
11 Mr. O'Connor filed a new proposed amended complaint,
12 which would be a second one, that added two new
13 purported plaintiffs who bought post-moratorium. So
14 we're up to four.

15 Just as an initial matter, that was filed,
16 you know, Friday. We're happy to argue about it here
17 today, but the prospect of adding two new plaintiffs
18 along with some new allegations -- Mr. O'Connor I
19 think has represented there weren't any material
20 changes between the two proposed amended complaints,
21 but I think we're dealing almost with a new lawsuit in
22 some respects.

23 What also happened since the last time we
24 were before you was 14 plaintiffs, he seeks to drop.

25 THE COURT: I saw in the memorandum that some

1 people were just dropping out as plaintiffs and others
2 were coming in is what I saw, so that's a change in
3 the parties there. But go ahead, Mr. Jordan.

4 MR. JORDAN: Just getting to the meat of the
5 argument, Your Honor. We dealt with this last time.
6 And that's whether or not the plaintiffs are
7 complaining about *ultra vires* acts.

8 And in the original complaint and in their
9 summary judgement briefing, they directly stated that
10 they believe the board acted outside of its authority
11 to *ultra vires*.

12 We raised the point in response to that if
13 they believed that, and that's what they've alleged,
14 and that's what they have, in fact, argued to you in
15 their summary judgement brief that that type of claim
16 can only be brought in a derivative capacity.

17 That's set forth in 33-31-304 of the
18 corporate code. That's well-settled.

19 So when the amendment was discussed last
20 time, we thought we would see a complaint come forward
21 with derivative claims.

22 Well, we don't have that. We have
23 essentially the same complaint. So we have the same
24 argument, which Mr. Fletcher can detail in summary
25 judgement.

1 But they're still complaining about -- the
2 primary act here that we're talking about is the
3 passage of a short-term rental moratorium.

4 And they have maintained for three years that
5 the master deed does not allow the board to do that
6 and it acted outside of the master deed and the other
7 governing documents and it was illegal.

8 Now what they've done is in this new
9 amendment, they used some semantics, I would suggest,
10 to say, no, we're not saying you acted outside your
11 authority; we're saying you acted illegally, committed
12 illegal acts, and you breached the contract, which
13 they called the master deed.

14 Well, at its core, Judge, the breach or the
15 illegal acts -- it wasn't the breach of the act. It
16 was the passage of the moratorium.

17 In their complaint, they don't allege
18 anything in the master deed that we failed to follow.
19 They don't point to a provision of the master deed and
20 say you didn't follow this provision; you ignored this
21 provision; you're guided by this master deed.

22 What they say is you went completely outside
23 the master deed and alleged that we committed an act
24 that wasn't prescribed by the master deed.

25 That is just per se an *ultra vires* act that

1 has to be brought derivitavely. On that basis, we
2 think it's futile.

3 If you were to find that the new allegations
4 of illegal acts and breaches were somehow not *ultra*
5 *vires* and it was *intra vires*, we then are into the
6 business judgement rule, Your Honor, which is a
7 corporation, especially a nonprofit, when it acts, if
8 it acts *intra vires*, it has the protection of the
9 business judgement rule.

10 The Court knows the exception to the business
11 judgement rule is if you act in bad faith and if you
12 act with fraudulent or ill motive, you can then get
13 around the business judgement rule.

14 But what you can't do is say I think you made
15 a bad decision. And that's what they have done here.
16 They don't want to make the allegations that the board
17 acted in bad faith or with ill motive or any of the
18 other factors that you would have to allege to get
19 around the business judgement rule. So in either
20 scenario, we think the complaint fails as a matter of
21 law.

22 What I close with, Your Honor, is we have
23 this issue with these four new plaintiffs. And when
24 we were before you, and I lose track of time, sometime
25 ago on a motion to compel. I would guess six to nine

1 months.

2 And one thing that came up there was the
3 issue of standing. And I know we'll argue about that
4 more today. At the time before the amendment, we
5 had -- all plaintiffs were plaintiffs who existed and
6 owned units at Mariner's Cay where the moratorium was
7 passed.

8 As you know, the moratorium does not infringe
9 upon any owner who was an owner of record at the time
10 it was passed on their rights to short-term rent, and
11 you can continue to do that. What the moratorium said
12 is if you sell, any new buyer will be limited by this
13 moratorium.

14 So we now have four new buyers that are post-
15 date that moratorium, and they have now come forward.

16 The amended complaint doesn't cure the defect
17 in the original plaintiffs. We're at 31. I think
18 we're down now to -- we've dropped 14 and we added 40.
19 We're down to 21 original plaintiffs I believe.

20 So it doesn't cure anything for standing for
21 those folks. As to the new four, this moratorium has
22 been renewed annually since 2019. It's been recorded
23 in the RMC's office. It is on notice to all of
24 Charleston County. It's a public record.

25 So these four plaintiffs, we would suggest,

1 these new plaintiffs also have a futility problem in
2 that they bought with record notice of the moratorium.

3 So to buy when you know there's a moratorium
4 in place and you buy and close and then say, whoa,
5 time out. I have been injured. There's a moratorium.

6 And this fact is driven home by Ms. Sellars,
7 who gave you the first affidavit. She's actually
8 filed a separate lawsuit against the person who sold
9 her her unit and that seller's agent alleging: You
10 didn't tell me about this moratorium.

11 So she's blaming her seller and the seller's
12 agent and now she's seeking to blame us as well.

13 Well, in that litigation, Judge, there are
14 requests for admission that were asked of her, and she
15 admitted she had constructive notice of the
16 moratorium. I don't know how she could deny it,
17 frankly. It's public record.

18 And so when you look at that fact of these
19 four new folks who had record notice, I don't know how
20 they can maintain a claim for -- use whatever word you
21 want -- an illegal act, a breach, when they
22 voluntarily entered into this transaction with full
23 knowledge of what the rules of the association were.

24 So for all those reasons, Your Honor, we
25 think the amendment is futile. We argued at the end

1 of our brief that if you grant the amendment -- and as
2 I lead this argument, we've got four new people. We
3 have new allegations. We have an amended complaint, a
4 second amended complaint that was circulated Friday.

5 From our perspective, this starts out almost
6 like a new case. Some of the issues will be the same.
7 We've lost I think 13 plaintiffs.

8 So we've got a new complaint we've got to
9 answer and deal with it. We have new allegations we
10 have to deal with.

11 And finally I would say as to these four new
12 plaintiffs, I hope my argument illustrates how
13 important discovery would be because their knowledge
14 will be critical as to whether or not they have
15 standing, and even if they have standing, can they
16 maintain a claim under these circumstances.

17 And who they bought from, what they were
18 told, all of that stuff, we would suggest it's going
19 to be important in determining whether or not they can
20 maintain the claim as pled.

21 I'll be happy to answer any questions. But
22 for all those reasons, we request that the motion to
23 be amend be denied.

24 THE COURT: All right. Mr. Jordan,
25 factually, this is the case in which the board, for

1 lack of a better term, unilaterally implements the
2 moratorium on an annualized basis. Isn't that
3 correct? Do I recollect that fact?

4 MR. JORDAN: Correct.

5 THE COURT: Okay. And so they could or could
6 not do it going forward, but it's been going on since
7 '19. So here we are for four years, and it's never
8 gone to a vote.

9 MR. JORDAN: Of the full association?

10 THE COURT: Of the entire association.

11 MR. JORDAN: That's correct. There have been
12 board elections during that time period, and there's
13 notice of everything the board does and there's the
14 typical democratic process within an HOA for people to
15 lobby their board members or vote for new board
16 members..

17 THE COURT: Okay. But it's not any type of
18 permanent rule? It's done annualized. So each year,
19 we begin a whole new process of whether or not they've
20 got a claim, anybody that brings one.

21 But significantly from the moratorium
22 standpoint, the way it was drafted -- and I assume
23 it's continued to be drafted -- is that anybody that
24 was an owner prior to the date of the initial
25 moratorium is basically grandfathered.

1 They can continue to do whatever they want to
2 do with their property? They're not subject to the
3 short-term rental application?

4 MR. JORDAN: Correct.

5 THE COURT: Okay. All right. So I just want
6 to make sure I'm clear on those facts. Back over,
7 then, to Mr. O'Connor.

8 How is that then on a standing issue not --
9 how is it not an *ultra vires* challenge that should be
10 subject to a derivative claim?

11 MR. O'CONNOR: Yes, sir. Thank you. May it
12 please the Court.

13 I agree in a very limited way with the HOA's
14 argument that the law is settled on that issue.
15 However, we strenuously contend that it's not settled
16 in the way that Mr. Jordan characterized it because
17 there is case law directly on point from our Supreme
18 Court.

19 And I'll give you a couple very short
20 excerpts that go directly to this argument, and
21 they're both from the *Shipyard Village Council of*
22 *Co-Owners* case from 2014.

23 And this goes to whether a corporation can,
24 as we allege, just breach the governing documents and
25 then hide behind the cloak of saying, well, you can't

1 challenge it because you have to go through derivative
2 action, all that.

3 And I remind the Court that, again, in our
4 complaint, we have alleged a breach of contract, and
5 we've asked this Court to issue a declaratory
6 judgement as to the propriety of this act simply
7 interpreting the governing documents, nothing more.

8 All these, I would contend, distractions, red
9 herrings, about whether this has to be an *ultra vires*
10 act just comes from, respectfully, the HOA's motion
11 for limited or partial summary judgement and their
12 response to our arguments. That's never been what the
13 case is about from the jump.

14 Back to the *Shipyard Village* case, and I
15 quote, "A corporation may exercise only those powers
16 which are granted to it by law by its charter or its
17 articles of incorporation by any bylaws made pursuant
18 thereto. An HOA is bound to follow its covenants and
19 bylaws and cannot defend something that violates those
20 documents on the basis that" -- you know, if there's a
21 reasonable alternative, which is what they're doing
22 here, this moratorium, they say it's a reasonable
23 alternative so you can't argue against it. You can't
24 touch it. That's just within our discretion to do.

25 And they're hiding behind the business

1 judgement rule. I didn't have this quote in the
2 brief, but it's very responsive to Mr. Jordan's
3 argument.

4 And it says -- this is also from the *Shipyard*
5 *Village* case. It says: While the business judgement
6 rule protects the corporations exercise of its best
7 judgement when deciding between viable options in a
8 given business-related situation, the business
9 judgement rule is not a cloak that protects a
10 corporation from violation of its own bylaws.

11 That's what our complaint asserts is that
12 they simply violated their own master deed. It's very
13 simple that it says you can't do that.

14 It says you can't use rules and regulations
15 to control the use of the units. There's language in
16 the master deed that says you can lease the units. It
17 doesn't put a temporal limitation on them.

18 And there's evidence in the record that they
19 tried to have a vote, couldn't come up with the 75
20 percent, so they just went ahead and did it
21 unilaterally by board action.

22 We assert that's a breach of contract. We
23 ask the Court to issue a declaratory judgement that
24 that's breach of contract.

25 And there's nothing in South Carolina

1 jurisprudence that requires an HOA member cannot
2 assert a breach of contract action against its
3 association. There's absolutely nothing.

4 And, in fact, even stronger from the
5 perspective of the plaintiffs is the official comment
6 to the very statute that they cite. They're resting
7 on South Carolina Code 33-31-304.

8 That's their entire thrust of their argument
9 that, you know, oh, Mr. O'Connor did not come back
10 here and amend the complaint and turn this into a
11 derivative action, which they would like for a lot of
12 others for tedious reasons.

13 They want to put us in that framework because
14 then we're not arguing about a breach of contract
15 anymore. They say, oh, they have a right to do that
16 and you can't challenge it.

17 That's not what this case is about. It's
18 never been what this case is about, Your Honor.

19 But the official comment -- and I cite this
20 at page 5 of the reply brief that I filed in response
21 to their memorandum in opposition to the motion to
22 amend.

23 So this is in -- which I -- I'm going to do
24 the same thing for the record, too. I incorporate all
25 the arguments in the brief that I filed into what I'm

1 arguing today.

2 But for summary purposes and for the Court's
3 understanding -- because this is dispositive. You
4 know, the official comments, I understand they're not
5 the law. But it tells you exactly what the framework
6 for the drafters intended.

7 And what it says there in the official
8 comment, 33-31-304, it says: The focus of section
9 3.04 is narrow. It does not address actions that --
10 and I quote and I put in bold subpart 3 and subpart 4
11 And, again, does not address actions that, 3, breach
12 duties owed by the officers, directors, employees, or
13 agents of the corporation.

14 That's exactly what we have alleged in the
15 complaint. The official comments specifically states
16 that we are allowed to assert that, and it is not
17 covered by any law that says it's got to be a
18 derivative action.

19 And then number 4, it says: Breach of duties
20 owed by the corporation. That's exactly where we are,
21 Your Honor. That's exactly what the complaint says.
22 That's exactly what we have argued throughout this
23 case, that it is nothing more than a direct breach of
24 the governing documents.

25 And we ask the Court to declare that in a

1 declaratory judgement. All of this business about
2 *ultra vires* is just a product of their motion for
3 summary judgement, and it's a red herring.

4 It's an attempt to turn this case into
5 something that it's not and find a way to cloak their
6 conduct in the business judgement rule when the
7 official comment to the very statute says those type
8 of actions are excluded from that section of the South
9 Carolina Code.

10 So that's our response on that part of it,
11 Your Honor. And, you know, in terms of -- the last
12 thing I'll say is it's not a new complaint.

13 The complaint that -- the proposed amended
14 complaint with the now four proposed new plaintiffs
15 doesn't change the nature of the claims, doesn't
16 assert any new allegations, doesn't assert any new
17 facts. It's the exact same complaint it's always
18 been.

19 And they can concede in their brief when
20 they're trying to say, well, you know, this is *ultra*
21 *vires* and you've got to allege it as a derivative
22 action.

23 They assert in their own brief that we're
24 making the same claims as we always did but they just
25 want to characterize them now as us -- they want to

1 frame the plaintiffs' argument as being about *ultra*
2 *vires* and it's got to be a derivative action and it's
3 business judgement rule.

4 We're not asserting any of that. It's not in
5 the complaint. I'm saying on the record now that is
6 not our position, and it never has been.

7 THE COURT: Response?

8 MR. JORDAN: Just briefly, Your Honor, on
9 that last point and then I'll get to the official
10 comment. And this is in our brief on page 6.

11 But on the cross motions for summary
12 judgement, plaintiffs' brief was filed July 15th, so
13 just a month and a half ago.

14 And they argued, quote: One of the
15 defendants, Mariner's Cay, has acted *ultra vires* by
16 imposing a moratorium and addressing whether owners
17 may rent their units on a short-term basis and left
18 defendant HOA in a breach of master deed. They also
19 say, quote: The board has acted *ultra vires*.

20 So you don't have to take my word for it.
21 They submitted to the Court in a brief that we acted
22 *ultra vires*.

23 And it's only when they were faced with this
24 problem of the derivative action that they've now gone
25 back and tried to say this is a breach of contract or

1 illegal acts.

2 And that's not even a cause of action in
3 South Carolina. And so they've tried to save
4 themselves from what the corporate code clearly says,
5 which you've got to bring a derivative action. And
6 that's done all the time, and it's done in this court
7 all the time, and you see it all the time.

8 On the official comments, it's the same
9 argument I made at the outset of my argument.
10 Mr. O'Connor read from the official comments that,
11 quote: Breached duties owed by directors, officers,
12 employees or agents of the corporation or breached
13 duties owed by the corporation.

14 I mean, we're back to breached duties. What
15 duty? The complaint doesn't point to anything in the
16 bylaws or master deed that the board should have
17 followed and did not.

18 They take the position that -- and he said
19 this -- that the master deed doesn't take into account
20 temporal restrictions on rental activity, so you have
21 gone outside the master deed and created a temporal
22 restriction where one did not exist. That is outside
23 the master deed in this *ultra vires* act.

24 I'll sit down, Your Honor. But if the Court
25 does accept that this is *intra vires*, you still have

1 the problem of the business judgement rule. I don't
2 think we have allegations in the amended complaint
3 which gets you around the business judgement rule and
4 the limited exceptions that our law allows.

5 THE COURT: Okay. All right. One second.

6 All right. I am reviewing what I believe to
7 be the current amended complaint, which includes
8 Ms. Sellars, Dominique Powell, Jennifer Mayo (ph), and
9 James Hardy (ph). Those are your new parties?

10 MR. O'CONNOR: Yes, sir, Your Honor.

11 THE COURT: All right. So the facts leading
12 up to the filing of the complaint -- I'm assuming the
13 language is the same. You've added parties. You
14 haven't added any causes of action?

15 MR. O'CONNOR: No causes of action. I think
16 I did a little stylistic editing but nothing
17 substantive, Your Honor.

18 THE COURT: So paragraph 32, after you cite
19 to the comments to Section 304, plaintiffs' claims
20 herein are based upon unlawful action by the board not
21 upon whether the corporation lacks or lacked the power
22 to act.

23 Goes on to cite breach of contract. And then
24 paragraph 39, what allegations are claimed to be
25 unlawful.

1 And the second cause of action TRO, and then
2 finally three for the DJ action in the case.

3 All right. So I'm going to find that, yes,
4 they have the authority to amend and that they've got
5 the standing required under the statute to move
6 forward. Okay? Based upon the allegations of the,
7 quote, well-pled complaint. All right?

8 So I'm going to deny the motion to -- deny
9 the motion which seeks to deny the amendment to a
10 complaint.

11 Now let's talk about the timing of what we're
12 going to do. I'm going to allow them to go forward on
13 that. But I think the way it's pled, I think they've
14 got it outside of the *ultra vires* requirements that
15 we've got now.

16 Y'all may still have that battle on the
17 summary judgement. My understanding was you're not
18 ready to move forward in summary judgement because now
19 you'd like to do some discovery.

20 Do you want to be heard on summary judgement
21 as to the prior plaintiffs and bifurcate it, or do you
22 want to take some time?

23 MR. JORDAN: Judge, I think it's probably
24 cleaner if we answer the current complaint and we know
25 what we're dealing with in terms of which plaintiffs

1 are in or out.

2 I think we have the right to answer that and
3 properly frame the issue. But in some respects, we
4 might be arguing sort of hypotheticals to you today
5 before we've --

6 THE COURT: Before you get into it? Okay.
7 All right. And I know you objected to the timing of
8 that as well, but I do think it's proper if I allow
9 the amendment, and that's what is new to the case, to
10 give them some time to answer. And at this point in
11 time, it would be 15 days to do that. We're talking
12 about the first week of October.

13 I don't know what type of discovery you need
14 for 120 days. Let's talk about how long that needs to
15 go forward before you get back up here.

16 MR. JORDAN: That was our proposal in our
17 brief, Your Honor. That would be, you know, probably
18 around a bit of discovery. I do think there's going
19 to be third-party witnesses and subpoenas and, if
20 necessary, depositions. And all of that may be
21 aggressive, but we're committed to trying to mean it.

22 MR. O'CONNOR: Your Honor, just one point of
23 clarification, and I think it was just because of the
24 convoluted procedural posture.

25 You're denying their motion. It was my

1 motion to amend. So are you granting --

2 THE COURT: I'm granting your motion to
3 amend.

4 MR. O'CONNOR: Thank you. Your Honor, at
5 this point, just to sort of refresh the Court's
6 memory, I made a motion to quash discovery on the
7 grounds that -- and this is -- the arguments are the
8 same with regard to the original plaintiffs and the
9 new plaintiffs.

10 And that is that it's a straightforward issue
11 of contractual interpretation. Your Honor can take
12 judicial note -- I do have one affidavit. The
13 notarized version is now on file as part of the
14 record.

15 But even beyond that, the Court can take
16 judicial notice that the four new plaintiffs purchased
17 a unit in the defendant HOA's condo association, and
18 that those purchases closed after the original date
19 that the first moratorium went into effect.

20 That is the factual issue that is -- you
21 know, it can't be disputed. And the things that were
22 the subject of my motion to quash discovery were that
23 what the HOA wants to do is find out a whole bunch of
24 things about, you know, who is your cleaning company
25 and how much money do you make.

1 And that's what the discovery has been about.
2 That's what I moved and, you know, included all of
3 that as exhibits, what they're seeking to find out.

4 And my understanding was that the Court ruled
5 that that discovery can and should be stayed until the
6 contractual interpretation issue has been decided.

7 And our position, Your Honor, I think it's
8 basically the law of this case is that nothing has
9 changed because of these four new plaintiffs.

10 The only material allegation that these four
11 new plaintiffs have is that I purchased the unit, it
12 came -- my purchase was after the moratorium. I am
13 subject to it, unlike the grandfathering of the
14 original plaintiffs, which we say they're entered
15 anyway because of diminution in value, but that's
16 beside the point for now.

17 All that discovery about, you know, who was
18 your cleaning person and how much money do you make
19 and do you tell your renters that they can't run next
20 to the pool, you know, things like that.

21 These are not material facts to the issue
22 before the Court on the cross motions for summary
23 judgement. And my understanding is that the Court has
24 already ruled on that, and that there's really no
25 basis that's going to assist this Court in deciding

1 that legal and contractual interpretation issue to
2 spend four months and thousands of dollars looking
3 into minute details about how much money the
4 plaintiffs are making on their short-term rentals.
5 It's completely -- and further --

6 THE COURT: Let me stop you. Is it your
7 position, then, that you acknowledge that these new
8 plaintiffs all had notice of the moratorium at the
9 time? I think that was my understanding of where they
10 were going.

11 MR. O'CONNOR: Our position on that is that
12 at least one of them we know did because it's part of
13 the record in Ms. Sellars' lawsuit about disclosure,
14 and she's got a beef with her seller and realtor.
15 There's a separate pending lawsuit in Charleston
16 County.

17 THE COURT: Okay.

18 MR. O'CONNOR: So, you know, we would
19 acknowledge that. But our position -- I didn't get
20 into it on the other motion because I felt it was more
21 about the summary judgement piece.

22 Our position on that is that if I buy a condo
23 unit and there's an illegal moratorium in place, but I
24 still want to buy that condo unit, there's nothing
25 that says I can't, after the purchase, challenge that

1 as being unlawfully enacted, even if I knew about it,
2 because it's illegal.

3 It was illegal from the jump. It's a
4 violation of the explicit language of the master deed.
5 And even if you knew about that, you're not barred by
6 constructive knowledge of an illegal act, of
7 challenging the illegality and validity and
8 enforceability of that act.

9 And so that's something that can be
10 interpreted by this Court without the need for
11 discovery about how much money they made and who the
12 cleaning company is and do they know the rules about
13 how you have to be quiet after 11 o'clock.

14 All that stuff is, we contend, an effort to
15 drag out this case and make us spend more money and
16 basically engage in discovery abuse to try to put us
17 in a spot that is -- you know, thrusts a hardship on
18 these plaintiffs when we're just simply asking the
19 Court to interpret the master deed.

20 And there's no facts that cannot be
21 stipulated. There's no material facts that cannot be
22 agreed to or stipulated.

23 I think they would disagree with that; of
24 course they would. But our position is that what are
25 those facts that are truly material that we need to

1 spend four months and thousands of dollars taking
2 depositions.

3 There's nothing in any of that that goes to
4 the issues on summary judgement before the Court.

5 THE COURT: All right. Mr. Jordan,
6 Mr. Fletcher?

7 MR. FLETCHER: A couple of points. First,
8 with regard to the prior discovery, that's relevant to
9 the issue of residential versus commercial use or
10 business use.

11 And, you know, it was kind of tabled before.
12 We still, I think, we're leaving open the idea that we
13 need discovery of how are these businesses run. Is it
14 really a residential use or is it more of a business
15 use that the master deed prohibits?

16 And that's with the existing discovery. As
17 to the new discovery we would need, there have been
18 two affidavits submitted. One by Mr. Cornejo, who was
19 one of the original plaintiffs.

20 And while I think standing has been
21 determined for purposes of the pleadings, we still
22 conduct discovery as to the standing as to the factual
23 standing.

24 In other words, what were the facts under
25 which he tried to sell this property? The affidavit

1 of Mr. Cornejo sets forth it doesn't know who the
2 potential buyer was, why the price was reduced or
3 anything like that.

4 THE COURT: Well, doesn't that get into
5 damages?

6 MR. FLETCHER: Well, it goes into standing.
7 We're entitled to know -- if you're claiming that your
8 standing is based on diminution in value, we're
9 entitled to conduct discovery to determine whether
10 that's the case or not.

11 THE COURT: Any owner has a right to assert
12 that; do they not?

13 MR. FLETCHER: Well, if there's an actual
14 effect on a diminution of value. We contend that the
15 evidence won't support that.

16 And so we think we should be entitled to do
17 discovery to determine whether there is in fact an
18 injury.

19 And then for the new plaintiffs, such as
20 Ms. Sellars, you know, do discovery on their intention
21 to rent the property, what they knew at the time they
22 purchased the property.

23 And I would note that, contrary to what
24 Mr. O'Connor said, in her affidavit, Ms. Sellars said:
25 If Mariner's Cay's master deed had prohibited

1 short-term rentals, I would not have bought my unit at
2 Mariner's Cay.

3 So we need to know what these folks knew
4 before they purchased their properties and what they
5 did in terms of trying to rent the property and
6 intentions to rent the property and all that sort of
7 thing.

8 I think these are all important. The
9 standing issue is still an issue in the case, and
10 we're entitled to do discovery on that.

11 The prior discovery, we can try to work on
12 the scope of that discovery determining what the
13 business use as opposed to residential use of this
14 property under the master deed. I think we're
15 entitled to do some discovery on those issues.

16 We've got, you know, two affidavits that we
17 should be able to do discovery on. And as I said, the
18 issue of, you know, the actual use of the property,
19 well, it kind of shoots down the issue of who your
20 cleaning people are.

21 Those are important issues. Because the
22 point of this moratorium is that it's turning this
23 residential community into a resort basically or a
24 hotel.

25 And so are you bringing in an outside

1 business three times a week to clean or three times a
2 month to clean or how many people do you have coming
3 on the property? Are you abiding by the covenants and
4 restrictions?

5 THE COURT: Well, I'm a homeowner. I bring
6 somebody in at least twice a month to come clean my
7 house because my wife would like that support.
8 Doesn't mean I'm running a business out of my house.

9 MR. FLETCHER: But in terms of running a
10 business, have you got a property manager? What kind
11 of marketing are you doing? Those things are relevant
12 to show.

13 We have a big dispute as to what does
14 residential versus commercial mean. But I think for
15 our argument that we're entitled to do discovery as to
16 what's actually being done with these properties.
17 Thank you.

18 THE COURT: You see that as an issue,
19 Mr. O'Connor?

20 MR. O'CONNOR: No, sir, Your Honor. The
21 summary judgement briefs, which were both lengthy and
22 well-researched and argued at in great detail, address
23 the entire issue about whether a business -- what they
24 characterize as a business use.

25 It's been addressed by Courts in at least 15

1 states, and both sides discuss that jurisprudence
2 extensively.

3 And it's not about facts, Your Honor. It's
4 about what the master deed says. And what's being
5 done in this case is really not in dispute, you know.

6 My clients, we assert in the complaint that,
7 you know, certain of the original plaintiffs -- I
8 mean, I say "certain of" because some of them were
9 based on Your Honor's granting of the motion to amend.
10 We now have some that are out and some that are in.

11 The ones that are still in either rent or
12 have rented their units short term and wish to
13 continue to do so.

14 The new plaintiffs, we assert in the amended
15 complaint that's now been allowed by the Court, that
16 they wish to do that but they're not being allowed to
17 because of the moratorium.

18 That's the only fact that's material. This
19 idea of how much money they make and who the cleaning
20 company is are entirely immaterial from the standpoint
21 of Your Honor making the ruling as 15 other Appellate
22 Courts have done at least across the country.

23 THE COURT: You got a ruling under the State
24 yet?

25 MR. O'CONNOR: No, sir. Maybe this will be

1 the one.

2 THE COURT: All right. Let's make it. Go
3 ahead. Let's hear your argument.

4 MR. O'CONNOR: Just have the summary
5 judgement argument now?

6 THE COURT: Yes, sir.

7 MR. O'CONNOR: Okay. If it will please the
8 Court, the most conspicuous, apparent, and obvious
9 thing for the Court to make note of here is that the
10 drafters of the master deed in 1982 specifically allow
11 rentals of units.

12 It's right there in black and white in the
13 master deed. It says that units can be leased, and it
14 puts exactly one limitation on that right.

15 And it says that if you're going to lease
16 your unit, you have to lease it to one person and his
17 or her immediate family. In other words, not a group
18 of unrelated people; you can't lease to them.

19 That's not in dispute. We're not disputing
20 that. It's part of the master deed. But it
21 absolutely does not --

22 THE COURT: It's not limited to the owner's
23 family; it's limited to one family --

24 MR. O'CONNOR: No. The renter and his or her
25 family. That's it.

1 THE COURT: It was designed to avoid the
2 AirBnB problem?

3 MR. O'CONNOR: They didn't have AirBnB in
4 1982, but groups of college kids on spring break I
5 think is what they were worried about.

6 THE COURT: I got you.

7 MR. O'CONNOR: So the drafters easily could
8 have imposed a temporal limitation with a minimum
9 duration of lease term, but they didn't.

10 They conspicuously did not. And, Your Honor,
11 that was not an oversight. You know, it's 40 years
12 ago. It has not been amended since, and it was not an
13 oversight.

14 We cannot read into, well, they forgot to do
15 that. That's not permissible. That's not an argument
16 that the HOA can make.

17 And so given that status and the fact that
18 they're faced with that language in their own master
19 deed -- and this is all part of the record. We
20 asserted it in the complaint. We attached all these
21 documents as exhibits.

22 The correspondence leading up to the
23 moratorium, all the moratoriums themselves, which the
24 Court can take judicial notice of. What they tried to
25 do is they had their attorneys look for other

1 language -- well, let me back up.

2 What they tried to do is they tried to have a
3 vote. We know that. There were letters that said we
4 need to amend the master deed. But they didn't come
5 up with the 75 percent. They never went forward with
6 the vote. Instead, they imposed this unilateral
7 moratorium.

8 So now they're in a spot of having to do --
9 because it's been challenged is they're having to come
10 up with these other arguments, these other arguments
11 which are part of the parties arguments on summary
12 judgement.

13 They're picking out other things in the
14 master deed and trying to read into it a temporal
15 limitation that's not there and has never been there
16 for 40 years.

17 And what they need to do in order to make
18 those arguments work is impart forced and strained
19 constructions on other language that do not place any
20 temporal limitation or restriction on rentals.

21 And to illustrate what I'm referring to when
22 I talk about these forced and strained constructions
23 and of getting to a place that the developer drafters
24 never intended to go, even though they could have in
25 1982, is they pick out this one, the one that I

1 mentioned a moment ago about can only lease to a
2 family.

3 And I'm going to read the quote. It says:
4 Units may be rented provided the occupancy is only by
5 the lessee and his immediate family unless otherwise
6 provided by the Association's Board of Directors.

7 And they seize on that last part of that
8 clause and say that, well, what that means -- this is
9 the HOA's argument -- is that the board basically has
10 carte blanche authority to regulate and restrict
11 short-term rentals.

12 We can just ban all rentals if we want to.
13 We can put a temporal limitation on it. We can do
14 whatever we want, because the last part of that
15 sentence says "unless otherwise provided by the
16 Association Board of Directors."

17 And there's some colloquy in both parties
18 briefs about the idea that the last antecedent
19 doctrine is what they say supports their position.

20 There's a case, a South Carolina Supreme
21 Court case in 2019, where Justice Few addressed that
22 directly. And it's called *Commissioners of Public*
23 *Works v. the City of Fountain Inn*.

24 And what he says -- and I point out in that
25 quote that I read, "only by the lessee and his family

1 unless otherwise provided," there's no comma between
2 "family" and "unless."

3 That's important. We're getting into kind of
4 the nitty gritty here. It's important, because it's
5 an issue of contractual interpretation.

6 So in most circumstances, the presence or
7 absence of a comma is not a determination of whether
8 the writing is ambiguous. But then he goes on to say:
9 In this instance, however, the absence of a comma to
10 set off the S certified byclause is significant.
11 Under the last antecedent doctrine in the clause in a
12 statute from the clause immediately preceding it is an
13 indication that the modifying clause was intended to
14 modify all the preceding clause and not only the
15 antecedent one. And where there's no comma, however,
16 clauses are to be applied to the immediately preceding
17 words and phrase. Such clauses are not to be
18 construed as extending or modifying others that are
19 more remote.

20 And so what we contend that that means, Your
21 Honor, is that only applies to that part about leasing
22 to a family or otherwise.

23 And we contend that it's clear based on the
24 last antecedent doctrine and as elaborated on by
25 Justice Few in the *Fountain Inn* case from 2019 is that

1 it cannot possibly be a larger power that the board
2 has by just that last few words of this clause that
3 only is about renting to a family.

4 They contend that it means the board can do
5 anything because it says unless otherwise provided by
6 the board.

7 Well, why do you put a restriction in there
8 about only renting to families if you're just going to
9 say the board can do anything? You would not even put
10 that part about families. You would say all rentals
11 of any kind in this community are up to the board, and
12 the board can decide.

13 But the directors didn't do that. They put
14 that sentence at the end of a very narrow provision
15 that only addresses whether -- you know, says you have
16 to rent only to a family or, you know, one person in
17 their immediate family.

18 THE COURT: Your argument would be unless the
19 board decides, you can have two couples stay in a
20 two-bedroom --

21 MR. O'CONNOR: Or unless the board removes
22 that restriction. Because then you go back to the
23 argument that if the Court does find an ambiguity, the
24 law favors free use of property and covenants and
25 restrictions are strongly disfavored.

1 THE COURT: That's where I was going.

2 MR. O'CONNOR: Okay. So the second of the
3 forced and strained constructions, Your Honor, that
4 the association would seek to impose here and impart
5 something that's not there, which is a temporal
6 limitation, in order to get to a temporal limitation,
7 they're exhibiting forced and strained constructions.

8 And the second of those is what we were
9 talking about a moment ago, this business activities
10 clause.

11 That's maybe the crux of this case, I think.
12 That's what most of the jurisprudence in other
13 jurisdictions has been about when you talk about
14 short-term rental disputes is whether or not it's a
15 business use.

16 And in Article 9 of the master deed, Sections
17 1 and 4, the HOA board goes to great lengths here to
18 try to fit a square peg into a round hole.

19 And they cite -- and this is in their brief,
20 their summary judgement brief, they cite a Homestead
21 Exception case from 1937 called the *Morrow* case where
22 the lady tried to assert the Homestead Exception on a
23 South Carolina property when it was undisputed that
24 she lived in North Carolina.

25 We just contend that it does not and cannot

1 apply in characterizing this as impermissible business
2 use. It's just -- you know, they picked out a passage
3 that just is not controlling.

4 And they cited a series of auto insurance
5 cases addressing who can be considered a resident
6 relative for staffing purposes.

7 Again, cannot and does not apply to a
8 property case when we're talking about, you know, who
9 can and cannot rent a condominium.

10 There are better sources of law, which I'll
11 get to in a moment. But staffing cases about
12 insurance and who's a resident, that's just -- I know
13 your Honor doesn't get into those cases that much, but
14 Robert and I and John have done a lot of car insurance
15 cases over the years, and that's a whole set of
16 different jurisprudence that doesn't have anything to
17 do with property law.

18 THE COURT: That's a different set of
19 statutory law; is it not?

20 MR. O'CONNOR: Absolutely. And so we contend
21 that that's just in opposite and it's not at all
22 proper guidance for this Court to determine what is
23 and is not a business use of a condominium.

24 And then they finally get around to citing
25 some cases that actually get at the issue. And so

1 they cite three decisions, one from Tennessee, one
2 from Michigan, and one from Kentucky.

3 But I think this Court will not have any
4 difficulty finding and concluding that those exemplify
5 the minority position in this country on this issue
6 and that the much-greater weight of authority and the
7 better-reasoned cases we cite at pages 9 through 12 of
8 the plaintiff's brief in support of our motion for
9 summary judgement -- and in that passage of argument
10 that I make over the course of three pages there, we
11 cite no less than ten states.

12 And, you know, I have a few passages that I
13 want to read into the record because they're
14 important. It won't take very long.

15 But just to give you a sense, Your Honor, of
16 the weight of authority that's on the side that this
17 is not an impermissible business use, we have a case
18 from North Carolina, Maryland, Idaho, Alabama,
19 Washington State, Florida, New Mexico, Maine,
20 Missouri, and Oregon.

21 It's a long list, Your Honor, and it's a lot
22 of authority and a lot of well-reasoned authority that
23 is exactly the same dispute that we're having in this
24 case, exactly the same dispute.

25 And those quotes that I mentioned, Your

1 Honor, I'll just touch on them briefly. This is the
2 Maryland case, *Russell v. Donaldson*, 2012.

3 Residential use without more has been consistently
4 interpreted as meaning the use of property for living
5 purposes or a dwelling or a place of abode and the
6 transitory or temporary nature of such use does not
7 defeat the residential status.

8 And I put that one first because it's so
9 eloquent and it's so succinct and it's directly on
10 point. It's the exact same issue before the Court
11 today.

12 Next one, this is Idaho. The *Pinehaven*
13 *Planning Board v. Brooks* from 2003. Renting this
14 dwelling to people who use it for the purposes of
15 eating, sleeping, and other residential purposes does
16 not violate the prohibition on commercial and business
17 activity as such terms are commonly understood.

18 And just a couple more, Your Honor. This is
19 the *Slaby* case from Alabama. So long as the renters
20 continue to relax, eat, sleep, bathe, and engage in
21 other incidental activities, they are using the cabin
22 for residential purposes.

23 And in that *Slaby* case, the residential
24 association asserted that the property owner's
25 short-term rental violated restricted covenants

1 prohibiting commercial use just like the case before
2 the Court today.

3 The Court reviewed numerous appellate
4 decisions in the *Slaby* case from other states and
5 agreed with, quote, "the majority of other
6 jurisdictions that rental of the property for eating,
7 sleeping, and other residential purposes did not
8 amount to commercial use."

9 And, you know, there's a couple of more, but
10 I think the Court gets the point. Okay. So with that
11 part of it having been addressed, Your Honor's had the
12 benefit in a prior motion this morning. We already
13 had I think a robust argument about *ultra vires*, but
14 I'll touch on it for the record.

15 We contend, as I stated earlier this morning,
16 it's a red herring, Your Honor. It's an attempt to
17 mischaracterize the allegations in the complaint.

18 And, again, for the record, and I think Your
19 Honor just touched on it as you were looking through
20 the amended complaint, which you allowed to become the
21 amended complaint as of today, the plaintiffs did not
22 initially frame this action as a derivative action.

23 And regardless of whether you could
24 characterize this conduct as *ultra vires*, which as
25 Mr. Jordan pointed out, we did in our brief on summary

1 judgement.

2 Because at the end of the day, that is
3 Plaintiff's position is that it's, you know, you
4 cannot do something that the master deed doesn't allow
5 you to do. But importantly, that's not the causes of
6 action that we asserted. It's not a derivative
7 action. We never made it that. We're not going to
8 make it that. That's not where we are, and we chose
9 not to do that in coming before this Court on summary
10 judgement.

11 Because our contention is that the Court can
12 interpret the master deed and tell us as Courts in ten
13 other states did that those other provisions
14 prohibiting business use and, in this case, saying
15 that you can only rent to one family cannot be read
16 and interpreted as prohibiting short-term rentals.

17 We think that's what is before the Court. We
18 think the Court can rule on summary judgement without
19 making this a derivative action, so we chose not to do
20 that.

21 THE COURT: You're not intentionally
22 representing others that are similarly-situated, only
23 your plaintiffs?

24 MR. O'CONNOR: We didn't seek to do that in
25 the complaint. We're not doing it now. But, you

1 know, we went through what the official comment says.

2 And, you know, of course they're going to say
3 that they disagree. But it's hard to get around the
4 direct and exact language of that official comment
5 that says that what's excluded from the requirement of
6 having to bring something like this as a derivative
7 action is breaches of the governing documents by the
8 association.

9 We stand on that official comment, and we
10 contend and we think the Court shouldn't have any
11 trouble concluding that that supports our position and
12 makes this case one that summary judgement can still
13 be granted in favor of the plaintiff, even though we
14 did not frame it as a derivative action and are not
15 planning to.

16 So moving onto the next, the board revealed
17 their hand, Your Honor, when they acknowledged in
18 writing in a communication to the owners in 2018 that
19 an amendment to the master deed was required to
20 restrict short-term rentals.

21 They stated it in writing to their own
22 membership. And when that didn't work, what they did
23 instead, as we know -- it's alleged in the complaint.
24 It's part of the record that they attempted this
25 alternative strategy of imposing a moratorium, and

1 they attempted in doing that to cut off the ability to
2 challenge that by saying anyone that's doing it now is
3 grandfathered.

4 You know, they're anticipating a challenge,
5 and they know it's going to be challenged, or they
6 suspect it might be challenged. And so they're going
7 to say, well, this group of plaintiffs, you know,
8 you're allowed to do it but no new plaintiffs can do
9 it.

10 Well, as we've talked about already, we have
11 an affidavit from Mr. Cornejo that swears under oath
12 that he had take less money because, you know, he
13 listed it at one price and it wasn't selling, even in
14 the hottest real estate market in the history of South
15 Carolina, and had to come down in price because the
16 person that wanted to buy it wanted to rent it
17 short-term.

18 And he said, well, we're grandfathered. But,
19 yeah, kind of looks like that might go away. There's
20 a lawsuit about it. So he had to drop the price
21 because of that exact issue.

22 And he swore to that in his affidavit. And,
23 you know, then you have the new plaintiffs, who
24 indisputably bought their -- Court can take judicial
25 notice. I have their deeds. That they bought their

1 units after the moratorium was in effect. They're
2 covered by the moratorium because they're not
3 grandfathered.

4 And they -- you know, I have one affidavit on
5 file. The other three are going to say the same
6 thing, that we would like to rent short-term or at
7 least have the right to do that if we want to, but we
8 can't.

9 So they have an injury in fact as well. And
10 just to reiterate briefly -- I think I touched on this
11 a moment ago in response to the other motion --
12 there's no authority, South Carolina jurisprudence, to
13 support the notion that constructive knowledge of an
14 illegal act is a bar against challenging that act from
15 a standing standpoint.

16 That's what they're saying is the new
17 plaintiffs can't come in here and challenge the
18 validity and legality and enforceability of this
19 moratorium because they knew about it in advance or
20 had record notice of it because it had been recorded.

21 And we don't dispute that fact scenario. I'm
22 willing to concede that I know Ms. Sellars knew about
23 it and maybe one of the new plaintiffs might have
24 known about it, too.

25 I'm trying to recall -- someone told me a

1 couple didn't know. But I would concede that they
2 would be able to -- the HOA would be able to say -- or
3 if they didn't have actual knowledge, they had
4 constructive knowledge because it was recorded. I get
5 that. We acknowledge that.

6 But the point is we contend in the complaint
7 and we contend that ten other states state this is the
8 law, that you can't do it.

9 You can't use the right of the board to make
10 rules and regulations, which, again, a very important
11 point, and this is argued extensively in our brief,
12 that the rules and regulations power of the board is
13 strictly limited to the common areas.

14 They have no rules and regulations enabling
15 language about the use of the units. That's not true
16 about all associations, but it is true about this one.
17 And that's the only power that they have.

18 The only way you can make a rule under any
19 portion of the governing documents is if it's about
20 the common areas.

21 If you're talking about board action, right?
22 If you're talking about regulating the use of the
23 units, which certainly includes the right to rent,
24 you're going to have to amend it if you want to change
25 it. That's all we're saying.

1 If they can get the 75 percent, great. This
2 case goes away. Okay? But they didn't. They weren't
3 able to. And so they tried this other strategy
4 instead, and that's what prompted this lawsuit. The
5 most important language --

6 THE COURT: You don't deny them the right to
7 be able to control the common elements, though, right?
8 They have that authority?

9 MR. O'CONNOR: Correct. Yes, sir.

10 THE COURT: Okay.

11 MR. O'CONNOR: So some critical language in
12 the master deed is at Article 5, Paragraph 2. And I'm
13 quoting this: The board shall exercise such duties
14 and responsibilities.

15 And then it goes on to list some of those,
16 including collections of assessments and things of
17 that nature.

18 I will pick up the quote again. The
19 establishment and amendment from time to time of
20 reasonable regulations governing the use of the common
21 area and facilities and the limited common area and
22 facilities.

23 That's the whole of the power of the board to
24 make rules by board action by rules and regulations.
25 That's it. Nothing at all in the entire master deed

1 that says the board has any power to regulate the use
2 of the units with a rule and regulation, which that's
3 necessarily what this has to be because it's got to be
4 something, right?

5 It's either a provision in the covenants or
6 something in the bylaws or something in the articles
7 of incorporation or the rules and regulations. It's
8 got to be one of those things.

9 It can't be something else. We know it's not
10 a covenant. I think they would say, well, it is,
11 because it's a business use. And this last sentence
12 of the family rental clause means the board can do
13 whatever they want to do.

14 They want to say it is a covenant. But we
15 contend strenuously, Your Honor, that it's not a
16 covenant because the drafters could have put it in
17 there in 1982. They did not. It's conspicuously
18 absent.

19 So it's not a covenant, and the board
20 indicated as much when they told their own membership
21 in correspondence that we've got to amend the master
22 deed. Couldn't come up with the votes.

23 So they went to this other area that allows
24 them to regulate the common areas and they made a rule
25 about the use of the units.

1 Direct violation of the master deed. It's a
2 breach of contract. It's something that this Court
3 can make a ruling on declaratory judgement under the
4 declaratory judgement section of the code and say I
5 declare that that is an impermissible provision that,
6 you know, this moratorium is something that is a
7 rule -- it's necessarily a rule and regulation and it
8 governs something other than the common area. It
9 governs the units. So it must be struck down for that
10 reason.

11 Just a couple of other brief points, Your
12 Honor. There's a citation in the Defendant HOA's
13 brief opposing the Plaintiffs' motion for summary
14 judgement and supporting their own motion for partial
15 summary judgement.

16 And they cite the case of *Brown v. Spring*
17 *Valley HOA*. It's an unpublished decision, but it is
18 cited very often in community association disputes in
19 this case because what it was about was fines.

20 And it is really the -- Your Honor is
21 probably aware of this because I think these kind of
22 cases come up in collection matters all the time in
23 this court.

24 But what the *Brown* case stood for was that
25 you have to have -- if you're going to have fine

1 authority, it's got to be in the recorded governing
2 documents. It's not just something the board can do.

3 If you don't have it in the covenants or
4 master deed or bylaws, the board can't just utilize
5 its general authority to run the association and say
6 we never had fines before, but people are really
7 breaking the rules a lot around here, so we're just
8 going to implement fines.

9 And that's what the argument was about. What
10 the Court of Appeals found is that it was -- in the
11 *Spring Valley* case, it was in the bylaws, but that
12 they had fine authority in the bylaws. That was the
13 holding of the case.

14 What's very important and what the HOA
15 overlooks in its citation of the *Brown* case is that
16 what the Spring Valley HOA did that enabled them to
17 win the right to fine the Browns and to have those
18 fines upheld by the Court of Appeals is that there was
19 an amendment.

20 In 2004 -- they didn't have fine authority
21 before. They went and amended their bylaws in 2004 to
22 implement fine authority.

23 And so we contend, Your Honor, that the *Brown*
24 case supports the Plaintiffs' position. Which is
25 that, yes, if you want to amend the master deed at

1 Mariner's Cay HOA and impose a temporal limitation on
2 short-term rentals and say rentals have to be for at
3 least 30 days or 6 months or a year and they can get
4 the 75 percent to support it, then, fine. This case
5 becomes moot.

6 But they haven't done that because they
7 couldn't do it. What they did was something that was
8 impermissible, and it's the basis of our challenge.

9 The *Brown* case is very instructive. It's an
10 unpublished decision, but it's the best we have on
11 whether -- I say it's unpublished just so the Court
12 knows, but both sides have argued it. They argued it.
13 I'm arguing it.

14 But what the dispute is about what does it
15 mean. And what it means and what it stands for is
16 that if you want to change the governing documents as
17 to something material that was not there before, it's
18 got to be an amendment that's voted on by the
19 membership.

20 And that's what we say they had to do and
21 that's what they didn't do. And so that's the reason
22 why the *Brown* case is so important.

23 And so to wrap it up, Your Honor, a
24 significant portion of the Defendant's brief goes into
25 great lengths about why the board doesn't like

1 short-term rentals.

2 I mean, there's pages of citations of
3 problems that this is causing down there. We get it.
4 I'm not really disputing any of those facts because
5 they're not material.

6 They don't like short-term rentals. That is
7 not a mystery. It's in the correspondence. It's in
8 the e-mails. You know, they don't like short-term
9 rentals. Fine.

10 But it does not give them the right to
11 directly violate the master deed in order to restrict
12 them. That's really the crux of this case. And the
13 best place to look for how to rule on that issue,
14 which is exactly like those ten other jurisdictions
15 that I cited in our brief -- and, you know, those
16 cases are -- there's great debate.

17 Those Appellate Courts, you know how they
18 are. They give both sides a very fair hearing, you
19 know, to argue everything they want to argue.

20 In ten different jurisdictions -- you know,
21 and these are all since the '90s, 2000s. So this is
22 not old law. This was a relatively recent phenomenon.

23 And, you know, I don't think you'll even hear
24 them argue, because I don't think they can, that the
25 greater weight of authority is on their side.

1 Because they can't argue that. So what they
2 say is it's the better-reasoned cases. Of course
3 they're going to say that.

4 But, you know, you got a lot of guidance from
5 Appellate Courts across the country. And this is not
6 a southern thing or northern thing. It's cases all
7 across the country that have met this issue directly
8 and give this Court a lot of guidance as to what to
9 do.

10 It really is -- business use is kind of like
11 the main thing of where the rubber meets the road.

12 THE COURT: I'm well aware of that. All
13 right. Anything further?

14 MR. O'CONNOR: No, sir, Your Honor. I just
15 reserve the right to respond.

16 THE COURT: Sure. All right. Who is on this
17 one?

18 MR. FLETCHER: I'll do it, Your Honor. May
19 it please the Court. My name is John Fletcher. I
20 represent the Mariner's Cay Racquet and Yacht Club
21 Homeowners Association in this case.

22 The community at issue is three
23 characteristics. It's secure; it's gated; and it's
24 residential. Those things all work together.

25 In order to maintain the residential nature

1 of the association of the properties, you need to have
2 security and you need to have a gate.

3 And people, when they buy into their
4 properties at Mariner's Cay, aren't buying into a
5 resort or a timeshare thing. They want to buy into a
6 community.

7 When I drive home in my neighborhood, I see
8 the same cars every day for better or worse. Even the
9 rental properties, you see for at least a year. You
10 don't see people coming in and out. You don't see
11 tons of businesses coming in to turn over property.

12 You don't see lots of people coming in to
13 manage the property. It's a neighborhood.

14 THE COURT: Is there a requirement that
15 people stay for a year or more?

16 MR. FLETCHER: I'm not sure. The point is
17 that it's a residential nature. And that's really --
18 I think when we get down to it what does residential
19 mean? But --

20 THE COURT: Let's talk about that. So what
21 is your contention that makes this nonresidential when
22 people are renting on a short-term basis?

23 Cite your cases or whatever you want, but go
24 ahead and make your record on that issue. I'm not
25 sure I'm going to rule with you, but go ahead.

1 MR. FLETCHER: I understand that. I just
2 want to make sure everything is on the record.

3 As Mr. O'Connor noted, the master deed
4 provides that all Mariner's Cay units are restricted
5 exclusively for residential use. That's section Roman
6 Numeral 9.1 of the master deed.

7 Section Roman Numeral 9.4 says that no
8 business activity of any kind whatsoever shall be
9 conducted in any building or on any portion of the
10 property.

11 You know, so the question is whether a short-
12 term rental qualifies as residential. And I know the
13 number of cases from other states. I can't change
14 that. We're familiar with that.

15 But we contend that the term "residential" is
16 used in this master deed, and given the proper
17 interpretation, means that you're maintaining this as
18 a residential community. It's not a community or
19 hotel. It's not a resort.

20 And so residential in this context clearly
21 has to mean there's some temporal, you know, duration.

22 And I know we cite some cases from different
23 contexts, but we do that in order to show that in
24 South Carolina, the term residence doesn't just mean
25 somewhere you sleep for a night or two or a week.

1 The Morrow case, I know it's a different
2 context, but they cite with approval the Blacks Law
3 Dictionary definition that states: Residence. Living
4 or dwelling in a certain place permanently or for a
5 considerable length of time; the place where a man
6 makes his home or where he dwells permanently or for
7 an extended period of time.

8 We also look at Webster's, which defines
9 resident as a dwelling or having an abode in a place
10 for a continued length of time.

11 In looking again at the -- I know it's auto
12 insurance cases. But the point to look at what do you
13 mean by a resident?

14 And the Court says that a resident or
15 relative is one who resides in the same household
16 other than a temporary or transient visitor, lives
17 together with others in the same house for a period of
18 some duration, although may not intend to remain there
19 permanently.

20 So we're not saying you have to rent for an
21 indefinite time, but it's got to be some duration of
22 longer than a week or, you know, 30 days.

23 We look at the Folly Beach regulations of
24 short-term rentals, they --

25 THE COURT: Well, the question would be is

1 that defined anywhere in the master deed or the
2 bylaws? I think that's the --

3 MR. FLETCHER: Well, it's not specifically
4 set forth there and that's why --

5 THE COURT: It's not. So it's the general
6 term of residential use --

7 MR. FLETCHER: It's residential use. And
8 I'll point out that the Folly Beach ordinance
9 governing short-term rentals defines those terms for
10 us --

11 THE COURT: They're not a party in this
12 case --

13 MR. FLETCHER: They're not --

14 (Crosstalk.)

15 MR. FLETCHER: -- what residence means in
16 terms of looking at this community.

17 THE COURT: Go ahead. Go ahead.

18 MR. FLETCHER: Any person who has or shall
19 have the right of occupancy of any rooms while they're
20 sleeping; accommodations in the same place for a term
21 of more than 30 continuous days is a resident.

22 A transient is any person seeking
23 accommodations for a temporary period of time not to
24 exceed 30 days.

25 So I think that the term that was put in the

1 ordinance is a good choice of term is transient. The
2 short-term rentals are not residential; they're
3 transient. They're people who come and go. People
4 who are embedded and not tied to the area.

5 THE COURT: I would suggest that Folly Beach
6 is the very definition of a transient location.
7 That's the edge of America out there. People come and
8 go all the time.

9 MR. FLETCHER: Mariner's Cay is intended to
10 be a place of residence. It's not intended to be a
11 come-and-go place.

12 THE COURT: I got you.

13 MR. FLETCHER: And that's why this -- the HOA
14 is giving us I think interpretations to these
15 provisions. I don't think it's a strayed
16 interpretation at all.

17 You know, residential I think is common
18 parlance. When you picture a residence, it's not
19 somewhere where you're staying for a week.

20 Someone asks me my residence when I'm on
21 vacation, I'm not going to say the hotel. I'm going
22 to say where I make my normal home.

23 And that's what the HOA and the master deed
24 is intended to do is protect and ensure that people
25 who own property there for at least some substantial

1 period are the ones living there and they're not
2 having people coming and going.

3 I know -- I understand the case laws -- and
4 I'm going to get to that in a bit -- from other
5 jurisdictions. But I also point out to a South
6 Carolina Court of Appeals case, which held that a
7 dormitory could be a business under the statute
8 governing business parks.

9 And what the Court said was that the
10 dormitories are classified as commercial properties
11 because they involve the operating and leasing of
12 off-campus accommodations for college students and the
13 provision of specific services, including security,
14 property management, and planned recreational
15 activities.

16 Because the word business in its ordinary
17 meaning refers to commercial enterprises or
18 activities, we find the dormitory status by the
19 business requirement in their inclusion of the
20 industrial or business park does not violate South
21 Carolina law.

22 So in that case, even though the students
23 were being -- residing in these buildings, it was
24 still considered to be a business enterprise because
25 it was run as a commercial business. Again, this is

1 why we think it's important for us to be able to get
2 discovery on how these owners are operating their
3 business --

4 THE COURT: Clearly the dormitory would be
5 owned by someone other than a homeowner.

6 MR. FLETCHER: Right. But it's owned by
7 somebody who is different than the person who is
8 staying there. Whether an individual or anybody, it's
9 not a residential purpose merely because the students
10 are residing there.

11 The cases that Mr. O'Connor cites, that's
12 what they honed in on is the fact that the people that
13 you do business with, they don't come there to get
14 their hair done or taxes done. They're there to sleep
15 and eat and read.

16 And respectfully, you know, I think the Court
17 of Appeals in this case on the dormitories rejected
18 that and said irrespective of what they're doing
19 there, it's a business. You're advertising it.
20 You're getting money from it. It's a business.

21 And, you know, we take the position that a
22 long-term rental, you know, year-long rental doesn't
23 involve the same activities that a short-term rental
24 does. And you've got somebody that's residential
25 because the person is staying there for the entire

1 year.

2 A short-term rental -- I think the cases that
3 Mr. O'Connor relies on are really splitting hairs and
4 not focusing on what the purpose of this language is
5 in these master deeds, and it's to maintain the nature
6 of the community.

7 And, you know, the fact that these folks --
8 you know, you still have cleaning services and
9 managing services and marketing services and other
10 things that are coming and going. There's more people
11 who go through the gate.

12 In our affidavit, we submitted that during
13 the peak season, approximately or over 3,000 people,
14 lodgers, come in and out of this community. For every
15 one of those individuals, likely visited by a cleaning
16 service or turn-over service, some sort of service.

17 In this community where you have 130 units,
18 most of whom are occupied by folks who just want to
19 live their lives in a nice residential community,
20 you've got new people coming in and out of those gates
21 constantly.

22 And that's exactly the sort of thing that
23 this covenant and restriction intended to avoid. It's
24 not just, you know, you have somebody coming in for
25 every three months in a couple of the properties and

1 it's a minor inconvenience. Constant people have to
2 get through security.

3 And we will submit evidence that a lot of
4 times, the businesses come in to help these owners
5 come outside of business hours, which is in violation
6 of the covenants.

7 So, really, this is focusing on the fact that
8 the customers sleep when they're at the building
9 doesn't automatically convert that into a residential
10 use.

11 We contend it's essentially a hotel. I mean,
12 a hotel is not a residence. It's a business that
13 provides lodging for transient visitors, and that's
14 what we contend is occurring with these short-term
15 rentals.

16 THE COURT: The quote that you put in here in
17 your brief from the case South Carolina Public
18 Interest Foundations versus the City, Court of Appeals
19 2020, talks about the dormitories engage in continuous
20 commercial activity are not owner-occupied and are
21 zoned commercially.

22 So clearly two of the three we don't have in
23 this case, do we? Isn't that a zoning case? Isn't
24 that what this is all about?

25 MR. FLETCHER: Well, it was whether you use

1 this in a business park. It's similar to zoning. The
2 point is it's still considered a business.

3 And, you know, we haven't had a chance to do
4 discovery yet, especially as to these new plaintiffs.
5 But whether -- they may not occupy their properties at
6 all. They may use them solely as investment
7 properties. We don't know. I think a lot of these
8 things --

9 THE COURT: Second home, whatever.

10 MR. FLETCHER: Right. Well, they could be
11 just solely an investment property.

12 THE COURT: Difference between the dormitory
13 in Columbia and a condominium at Folly Beach I would
14 say is notably different, but that's just me.

15 MR. FLETCHER: But it also -- in Folly Beach,
16 you have to recall a short-term rental owner also has
17 to register as a business, get a business license. So
18 it's not like you're renting out a spare room in your
19 house. You still have to operate as a business.

20 And as I understand, they're looking to
21 change their ordinance to cap the number --

22 THE COURT: I have heard that.

23 MR. FLETCHER: It's not just a concern for
24 Mariner's Cay but I think for the entire community.
25 And these aren't -- I know they're --

1 THE COURT: But that's an elected official
2 problem there.

3 MR. FLETCHER: I understand. But I think it
4 illustrates the fact that this is something that's a
5 concern for people, that it does change the
6 residential nature.

7 THE COURT: This is a hot-button issue. I
8 get it all the time.

9 MR. FLETCHER: So I want to jump around a bit
10 to a couple of points Mr. O'Connor made.

11 One of them is he discussed the provision of
12 paragraph Roman Numeral 9.7, which states: Units may
13 be rented provided the occupancy is only by the lessee
14 and his immediate family unless otherwise provided by
15 Association's Board of Directors. And that's the
16 provision where he talked about the last antecedent
17 rule.

18 Unless otherwise provided by the
19 Association's Board of Directors applied only through
20 the lessee and his immediate family language and
21 relied on the last antecedent rule, which the US
22 Supreme Court in the Cyan case -- and this is from 138
23 Supreme Court at page 1077.

24 THE COURT: That 1917 case --

25 MR. FLETCHER: It's a case that distinguishes

1 last antecedent rule cases from single-integrated
2 clauses.

3 Last antecedent rule applies where you have a
4 list of multiple items and then one descriptive clause
5 at the end. It says that because that clause hangs
6 together a unified whole, referring to a single thing
7 as a type of class action. Consider the following,
8 grammatically identical construction. A woman is
9 dressed to the nines carrying an umbrella as shown in
10 the picture --

11 COURT REPORTER: Please slow down.

12 THE COURT: Hold on, Mr. Fletcher. She can't
13 take that down. That wasn't even English. Go ahead
14 and slow down.

15 MR. FLETCHER: This quote is from Supreme
16 Court in the *Cyan* case. And the Court says: Consider
17 the following. Grammatically identical construction.
18 A woman is dressed to the nines carrying an umbrella
19 as shown in the picture. Would anyone think that "as
20 shown in the picture" referred to anything less than
21 the well-attired and rain-ready woman? No. And so
22 too here, the modifier goes back to the beginning of
23 the preceding clause. The rule of the last antecedent
24 is not to the contrary. We have not applied the rule
25 when the modifier directly follows a concise and

1 integrated clause.

2 And, respectfully, this is a concise
3 integrated clause. It's not a list of things. And so
4 what "unless otherwise provided to the Association's
5 Board of Directors" modifies is the entire preceding
6 unified clause.

7 So it's not really a traditional last
8 antecedent rule case. It typically doesn't follow a
9 list of red, white, blue with polka dots. And does
10 "with polka dots" govern red, white, and blue or just
11 blue? That's not what we have here. We have a single
12 clause followed by a modifier. And the only
13 construction is the modifier modifies the entire
14 preceding clause.

15 THE COURT: So under your interpretation, the
16 board can just do whatever they want whenever they
17 want to?

18 MR. FLETCHER: The board is given authority
19 to govern --

20 THE COURT: If I took that to its logical
21 conclusion, the board would be able to do whatever
22 they want unless otherwise --

23 MR. FLETCHER: Within the constructs of the
24 law --

25 (Crosstalk.)

1 THE COURT: -- right? They could do
2 anything?

3 MR. FLETCHER: That's what it says. It's not
4 an interpretation. That's what it says.

5 THE COURT: Just want to make sure I
6 understand your argument.

7 MR. FLETCHER: The board has the ability to
8 regulate rentals within the community. Now --

9 THE COURT: You'll get to talk to John Few
10 about that maybe if you're lucky.

11 MR. FLETCHER: Talking next about the powers
12 of the board and what it is permitted to do.

13 We submit that the Nonprofit Corporation Act
14 gives the board extremely broad powers. There's no
15 limitations on what the board of directors can do.

16 And in terms of what a nonprofit corporation
17 can do, the statutes after the *Levering* (ph) case was
18 amended to give corporations very broad powers.

19 And here: There's nothing in the governing
20 documents that limit the Board of Directors authority
21 in any way that's allowed to make decisions to govern
22 the policies (indiscernible).

23 There's nothing in the governing documents
24 that require that this only be done by amendment to
25 the master deed. The board is given very broad powers

1 both in the law and in the governing documents here.

2 I'm going to touch on the standing in the
3 *ultra vires* arguments as well. I know we've gone into
4 this, and I will try not to go too deep.

5 At the end of the day, the crux of
6 Plaintiffs' argument is that the HOA is not authorized
7 to do this. They don't have the power to do this
8 under the law.

9 What the code says is that -- it's 33-31-304
10 (a). It says: Except as provided in subsection (b),
11 the validity of corporate action may not be challenged
12 on the grounds that a corporation lacks or lacked
13 power to act.

14 That's exactly what they're claiming in this
15 case, that the corporation, whether it be through --
16 you know, under the law, under the governing doctrine,
17 they're saying that they lack the authority to do
18 this. The board of directors and the corporation lack
19 the authority to do this.

20 Now, this section continues that a
21 corporation's power to act may be challenged in a
22 proceeding against the corporation to enjoin an act
23 where a third party has not acquired rights. The
24 proceeding may be brought by the Attorney General, a
25 director, or by a member or members in a derivative

1 proceeding.

2 That's where we are in this case. You know,
3 to the extent that they are asserting direct claims, I
4 use Mr. Cornejo as an example.

5 In his affidavit, he states that he tried to
6 sell his property. And he sold it for I think \$34,000
7 less than what he intended or what he wanted and had
8 to make 5,000 in concessions.

9 So remember the legal claims have been
10 stayed. We're only before Your Honor in your
11 equitable power.

12 If Mr. Cornejo claims he did not receive what
13 he intended on his property, that's a legal claim that
14 can be asserted in a legal cause of action. It's not
15 an equitable claim before Your Honor.

16 THE COURT: Mr. Cornejo is the one who owned
17 prior to the moratorium and sold subsequent to?

18 MR. FLETCHER: That's correct.

19 THE COURT: So he would be one class --

20 MR. FLETCHER: He would be one class.

21 THE COURT: And these new people are a whole
22 separate class --

23 MR. FLETCHER: -- and they're a separate
24 class. And I would assert as to them, again, they
25 have (indiscernible) remedy of law. Their claims are

1 that I would like to rent out my property on a short-
2 term basis, and I can't.

3 That can be determined with an expert witness
4 and reduced to money damages. If there's a claim
5 there, it's not equitable. It's legal. And so it
6 should not be before Your Honor and in your equitable
7 powers irrespective of whatever class of plaintiff
8 we're talking about.

9 Because Mr. O'Connor talks about things that
10 caused them monetary injuries and so --

11 THE COURT: You're not seeking monetary
12 damages at this time for any of these?

13 MR. O'CONNOR: No, sir. We asserted a breach
14 of contract and are asking the Court to declare that
15 the contract was breached. We concede that the
16 monetary damage portion of the case was stayed and was
17 not a part of what was referred to this Court by
18 consent order.

19 However, as we discussed at length here on
20 July 19, when we're talking about an injury in fact
21 for standing purposes, that's why this is an issue
22 now, not because we're asking the Court to award
23 money. I know I can't do that.

24 And that was consented to by the order of
25 reference. But it certainly can be referenced as a --

1 you know, to defeat an argument that we don't have
2 standing. That's our position.

3 THE COURT: Thank you.

4 MR. FLETCHER: Aside from the standing issue,
5 that's a question of whether there's a remedy of law
6 and whether we should be before your Honor in your
7 equitable powers or over in Common Pleas as a legal
8 claim on that.

9 THE COURT: Okay. Certain classes, that may
10 be the case.

11 MR. FLETCHER: Correct. And I think all the
12 classes that are before us now, the owners who
13 purchased prior to the first moratorium, you know,
14 their damages are allegedly diminution of value. And
15 you can always set that -- that's a legal claim.

16 THE COURT: Any fines or fees been
17 administered since the moratorium has been placed into
18 effect?

19 MR. FLETCHER: Not that I'm aware of.

20 THE COURT: Okay.

21 MR. FLETCHER: So this action is to be heard
22 before Your Honor derivitavely under the statute. It
23 challenges an *ultra vires* act.

24 And not to repeat what Robert said, but on
25 page 15 of the brief, they say the board has acted

1 *ultra vires* and that's been the position throughout.

2 You know, if you look at the comments to
3 33-31-304, what they also say is that *ultra vires* is
4 dead in terms of nonprofit corporations. And, you
5 know, I understand Mr. O'Connor's reliance on the
6 official comment on the statute.

7 But the statute itself is clearly -- you
8 know, the validity of the corporate action may not be
9 challenged on the grounds that a corporation lacks or
10 lacked power to act, and that's exactly what they're
11 asserting in this case.

12 And if the case has to be brought
13 derivitavely, you know, that is the appropriate form.
14 Because now you're looking at, well, is this in the
15 best interest of the corporation and all of its
16 members or just these particular folks?

17 Because right now this is being challenged
18 because these individuals believe that they have
19 suffered some monetary damage and they don't like it.

20 And in a derivative action, we show that this
21 is what's in the best interest of the corporation and
22 that there -- and we talked about breaches of duty in
23 the comment. You're talking about breaches of duty
24 by, you know, exercising -- you know, conflict of
25 interest or doing something else that's against the

1 interest of the corporation. The only allegation is
2 that you don't have the authority to do this and it's
3 *ultra vires*.

4 And to the extent it's *intra vires*, then now
5 you've got the business judgement rule. And that at
6 this point -- you know, I think clearly we are
7 entitled to do some discovery to determine whether
8 that applies.

9 As the case is pled right now, there isn't a
10 cause of action that's set forth that would survive a
11 business judgement rule.

12 So a lot of these issues we're talking about
13 -- all the issues that Mr. O'Connor talked about, they
14 cited to the affidavits and the situation of the
15 individuals.

16 You know, we're entitled -- we have an
17 amended complaint just filed that we haven't answered
18 yet. We're probably premature doing this right now
19 because the pleadings haven't closed.

20 But we should be entitled to do discovery as
21 to the new issues that have been raised by these new
22 plaintiffs and, you know, the issues that have been
23 raised by the ones who have presented affidavits to
24 the Court.

25 I mean, those have been -- you know, until

1 today, Ms. Sellars, we had an affidavit from her but
2 she wasn't a party yet.

3 And Mr. Cornejo, that's who was a relatively
4 recent theory on their side that it was a diminution
5 of value. So we should be entitled to do some
6 discovery on that. This may be an issue for trial
7 rather than summary judgement.

8 So the standing issue, you know, of course a
9 requirement of standing is injury of fact, which is
10 invasion of a legally-protected interest which is
11 concrete and particularized and actual imminent, not
12 conjectural or hypothetical. It's the original
13 plaintiffs and those who purchased before the
14 moratorium. There's no direct harm from the
15 moratorium itself. It doesn't affect them.

16 The only impact on them is indirect, and it's
17 really hypothetical in the sense that you have to find
18 the right situation where you have a buyer who won't
19 pay the price.

20 Again, Mr. Cornejo's affidavit sets forth
21 some hearsay statements. There's no -- at this point,
22 we can't determine whether there's any facts to
23 support his claim of standing or any other plaintiffs.

24 The original plaintiffs in the case, we have
25 no evidence whatsoever they tried to sell their

1 properties and wanted to sell their properties and
2 couldn't get the price they wanted for their
3 properties. So those are issues again we need to be
4 able to get into.

5 And, again, Mr. Cornejo's affidavit suggests
6 that to the extent he has a claim, he has a pure legal
7 claim for damages. You know, he's essentially asked
8 for \$39,000 in damages. And if he's got a valid cause
9 of action, then so be it. But it's not before Your
10 Honor; that's a legal claim.

11 And, again, with regard to Ms. Sellars'
12 affidavit, there are a lot of issues in hers. You
13 know, as I think Mr. O'Connor concedes that if she's
14 in a separate lawsuit, I think we're entitled to find
15 out with these new plaintiffs what they knew and when.

16 He kind of disregards the importance of
17 record notice. But that's important. And
18 respectfully, you know, if you purchased knowing that
19 a covenant or a restriction exists, even if you
20 believe it's illegal, you're buying a lawsuit. And it
21 doesn't permit you to do that. You can't just walk
22 into a dispute with the intention of challenging
23 something down the road.

24 You know, she -- I think she said in her
25 affidavit that had she known this was illegal, she

1 would have purchased somewhere else.

2 And that would have been her choice. If she
3 believed this was not a legal restriction, there are
4 other HOAs, other condominiums, she could purchase a
5 unit at.

6 When you buy with that knowledge, there's a
7 reason why record notice is important in the law.
8 When you buy that, you're accepting that, yeah, I
9 understand this exists and I am buying nevertheless.

10 And so we contend that with regard to these
11 four post-purchasers that that's an important point.
12 It's not something to be glossed over.

13 Again, we need to do discovery to find out
14 what the facts of their individual purchase were, what
15 they know, who they talked to.

16 I don't think that's unreasonable, especially
17 for plaintiffs who, until I think Friday, we didn't
18 know existed. So I think we are entitled to do some
19 discovery on those.

20 I jumped around. You know, we're aware
21 that -- what the weight of the numbers of cases from
22 other jurisdictions are.

23 You know, we can't change that. But it's not
24 just a numbers case. I mean, we said on here
25 previously that, you know, the importance of the

1 residential nature of this neighborhood and what
2 residential means in this master deed should be
3 focused on a residence.

4 And we do direct the Court to a couple
5 specific states. One is Tennessee where the Court
6 said -- this is *Pandharipande* case.

7 The Court said: Plaintiff engaged Center
8 Hill Chalets, a property company that leases the
9 property, as a short-term vacation rental for those
10 visiting the area. It's also a dispute that Center
11 Hill Chalet has advertised on as many as 25 different
12 short-term vacation rental websites requiring a
13 minimum of a two-night stay and a maximum 28 nights.
14 To facilitate each rental, the management company
15 provides key-code access to short-term renters who
16 access the plaintiff's cabins, as well as laundry and
17 cleaning services. Also provides concierge services
18 to the renters. After each rental, the management
19 company resets the cabin in preparation for the next
20 renter. When considered in concert, these facts
21 clearly show that plaintiff's renters are using the
22 property for the most temporary convenience of shelter
23 in the course of a brief stay in the area.

24 And that's exactly what's going on here with
25 these short-term rentals. These rentals are really

1 akin to hotels, and that's what Kentucky's Court
2 picked up on in the *Hensley v. Gadd* case.

3 THE COURT: Where in your brief is that? I'm
4 looking for those cases.

5 MR. FLETCHER: Sure. 22, 23, 24.

6 THE COURT: Thank you.

7 MR. FLETCHER: So in any event, we would
8 submit that this is more akin to a hotel. The
9 Kentucky *Gadd* case said: The issue before us is
10 whether Gadd's renting on a short-term, transient
11 basis is permitted under the restrictions. The clear
12 answer is no. We have no difficulty concluding the
13 short-term rentals are prohibited because Gadd's
14 advertising of such rentals renders his property the
15 equivalent of a hotel, which is not a permitted use on
16 this lot. The Court of Appeals and Gadd's emphasis on
17 residential uses, eating, sleeping, reading a book,
18 watching TV, misses the point of restrictions.

19 Respectfully, the plaintiff's construction of
20 residential and business misses the point of those
21 restrictions here.

22 You know, the short-term rentals creates the
23 same problems any other business would create. You
24 have strangers on the property. You have more traffic
25 on the property. And you have interference with other

1 folks' residential enjoyment of their property. The
2 mere fact of what the customers do when they're on the
3 property can in some sense be called residential, but
4 because of the transient nature, it's not.

5 But the fact that they're sleeping shouldn't
6 change that conclusion. To the neighbors, it's the
7 same effect of whether they were doing someone's taxes
8 or whatever. You have strangers coming in and out of
9 the property, and that's an important thing in a
10 gated, secure community like this where people just
11 want to live their lives in safety and, you know,
12 having a consistent residential area.

13 So, again, focus on the point that it's
14 short-term rentals. I think the more appropriate way
15 to describe it is transient. So it's coming and
16 going.

17 In residential, there's a suggestion or
18 there's an implication that there's some sense of
19 time, you know. And I admit that the master deed
20 doesn't specifically set forth a time, but the board
21 of directors has the authority and the power to invoke
22 the law to set policy for the company, for the
23 corporation. And that's what they have done here.

24 So there's nothing that's been done -- we're
25 not mincing words. I think the provisions that we're

1 citing, we're citing pretty clearly.

2 And we believe that what the board has done
3 here is completely within its powers under the
4 governing documents under South Carolina law.

5 THE COURT: Okay.

6 MR. FLETCHER: Thank you.

7 THE COURT: Anything you want to add?

8 MR. O'CONNOR: Just briefly in response, Your
9 Honor. What it comes down to, any issue of contract
10 interpretation by a Court on summary judgement motions
11 is the same as if you're interpreting the statute.

12 You're interpreting the language of a
13 governing doctrine here, which was created in 1982.

14 It's indisputable that a temporal limitation
15 restricting short-term rentals could have been
16 included by the drafters, as is the case in many other
17 condominium communities even in the early 1980s. But
18 it was not done here, and there was no mistake.

19 You can't imply or infer that that was some
20 oversight or it was intended to be covered by these
21 other general provisions about only being able to rent
22 to a family or making it a business use.

23 If they intended short-term rental use to be
24 a business use, they could have just said in the
25 governing documents short-term rental use is

1 considered a business use. Indisputably, it does not
2 say that.

3 And what was not covered in Mr. Fletcher's
4 argument about the cases that we cited, you know, from
5 ten different jurisdictions is that the extremely
6 simple and logical argument that a lot of those Courts
7 pointed out is that if a rental of a unit, which by
8 the way, this association is not attempting to assert
9 in this case that units cannot be rented. They
10 couldn't possibly do that.

11 It says right in there you can lease the
12 units. But what those -- several of those Supreme
13 Courts point out is that if it's not a business use to
14 rent a unit for a year or six months, then how is it a
15 business use to rent it for four days?

16 Because, you know, a business is a business.
17 I don't think it can be disputed that you could buy a
18 condo unit in Mariner's Cay as an investment and just
19 rent it while your equity goes up and somebody else is
20 paying your mortgage. People do that all the time.

21 But that's not a business use according to
22 them, you know. I mean, by their definition, it would
23 be. So you bought a condo; you don't live in it; it's
24 definitely a business use.

25 But, yet, if you shorten the rental term,

1 then it becomes a business. There's nothing in the
2 governing documents that says that. There's nothing
3 in South Carolina jurisprudence that says that.

4 Even the Folly Beach ordinance, you have to
5 have a business license no matter how long the rental
6 term is. You want to rent for a month, you want to
7 rent for a year, they're just trying to make business
8 license fees. That's understandable.

9 But that is not -- they don't make that
10 distinction. The law doesn't make that distinction.
11 And I don't know if all ten Courts made that
12 distinction, but several of them did. How can a
13 business use to rent for four days when it's not a
14 business use to rent for a month or six months?

15 That's an extremely important distinction,
16 Your Honor. And I don't think I need to hit the *ultra*
17 *vires* point again. I think that's been gone over
18 extensively.

19 THE COURT: Anything further?

20 MR. FLETCHER: Respectfully, we submit that
21 the master deed does not limit -- or, you know,
22 there's no prohibition on the regulation of rentals in
23 the master deed.

24 All the master deed says is that the property
25 may be rented. There's nothing that limits or

1 prevents the board of directors from making a
2 reasonable limitation on the conditions of rental, the
3 period of rental, or anything else.

4 You know, there's nothing in any of the
5 governing documents that prohibits the board from
6 regulating the duration of leases.

7 You have to recall that when the master deed
8 was originally enacted, there was no AirBnB. It was a
9 different time. You know, the only overnight rentals
10 at that point were bed and breakfasts. So the
11 original deed would have no need to discuss it at that
12 point.

13 THE COURT: Well, the B&Bs were around, were
14 they not?

15 MR. FLETCHER: Well, they were formal
16 businesses. It wasn't like now where essentially
17 anybody can rent their property out without much
18 difficulty.

19 THE COURT: But there's nothing in the
20 restrictions or the bylaws that talks about whether or
21 not you can run a B&B, is there?

22 MR. FLETCHER: Well, there is --

23 THE COURT: Is there?

24 THE COURT: Yeah, it --

25 THE COURT: Does it state B&B? What does it

1 state?

2 MR. FLETCHER: No, it says that you have to
3 rent out the entire unit.

4 THE COURT: Okay. Okay. Thank you. Got it.

5 MR. FLETCHER: And with regard to the choice
6 of the method by which the HOA governed this, they
7 considered the possibility of amending the master
8 deed.

9 The initial letter said that the best way to
10 eliminate the short-term rental was by an amendment to
11 the master deed. But there's nothing that said that
12 was the only way to do that.

13 And it was determined after analysis that the
14 best step was to do a short-term rental moratorium.
15 It's not like that's the only way you could restrict
16 that. There's nothing in the governing documents that
17 only allows the regulation of rentals by master deed
18 amendment.

19 Thank you very much.

20 THE COURT: All right. Let me just tell you
21 that y'all have done a fine job of briefing this and
22 arguing the case today, and I commend you on that.

23 And I thought it was well-briefed, and I
24 reviewed these memoranda. They're all dated back in
25 July. We just kicked the can down the road a little

1 longer to get to where we are.

2 So the issue before the Court is one of
3 contract interpretation because y'all have reserved --
4 in reference to this Court, y'all have reserved the
5 issue of damages and whatever else may go on to the
6 Circuit Court. I got no problem with that whatsoever.

7 As I see it, you know, the starting point for
8 this Court and I think for this State is that
9 generally the Courts looked at the Free and Unfair Use
10 of Property unless there's some type of reasonable
11 restriction on the property.

12 But that restriction needs to be both
13 authorized and reasonable and seasonable are some of
14 the terms that our Courts will sometimes use.

15 So the ultimate issue presented to this Court
16 has to do with, as I see it, as to whether or not the
17 short-term rental of these condominium units at
18 Mariner's Cay is a commercial use or a residential
19 use.

20 That's ultimately the issue I think that has
21 been presented. And while we don't have any authority
22 directly on point from our Appellate Courts, as luck
23 would have it, this Court has had to address this
24 issue before.

25 And I was surprised, and the reason I asked

1 for my law clerk, Mr. Barkley here, to go back and
2 look for one of my old cases is because when y'all
3 were in here last time, I went looking for an order
4 that I had done.

5 In December of 2017, it's a 2015 case. It's
6 called *McCown v. Romain Retreat*. And that was really
7 the exact same issue there. Case number 2015-CP-
8 10-3387.

9 So I have in fact bumped up against this
10 issue before. And the reason I went looking for my
11 order was because I had seen -- when Mr. O'Connor was
12 talking, some of those cases sounded awful familiar.

13 Mr. O'Connor, I cited five of the ten you
14 cited in my order. And as you can probably tell, the
15 Court found then that it was a residential and not a
16 commercial use in that case.

17 And so those of you old enough to know Bubba
18 Ness (ph) know the old saying "I may be in error, but
19 I'm never in doubt."

20 So consistency is what I find to be part of
21 the rule of being a judge. Like raising a child, you
22 want to be consistent.

23 So the one thing I did find different,
24 though, and let me point this one out. The cases I
25 found were the *Yogman v. Parrott* from Oregon, *Silsby*

1 *v. Belch* of Maine, *Slaby v. Mountain River* from
2 Alabama. Those are all cited in that North Carolina
3 *Russell* Court.

4 But I did find a case out of Washington State
5 that was a Supreme Court case as opposed to a Court of
6 Appeals case, which you cited. And that was called
7 *Wilkinson v. Chiwawa Communities Association*. That's
8 327, Pacific third, 614. It was a 2014 case from the
9 State of Washington Supreme Court in which they found
10 that these essentially are residential uses. And I
11 find that to be the case.

12 I specifically recall reviewing the Kentucky
13 case that you cited, but I rejected that. I'm looking
14 right now for the case name.

15 MR. FLETCHER: *Gadd*.

16 THE COURT: Thank you. I just looked at it,
17 and it was -- to me, it was closer to that. Facts may
18 be a little bit different because I think they're -- I
19 can't recall exactly.

20 It was a big fight over whether that was
21 residential or commercial. But essentially they were
22 fighting anything less than 30 days, which really is
23 what y'all are fighting here.

24 So what I find is that the -- I do not
25 believe that the clause, unless the board determines

1 otherwise, gives the board carte blanche to do
2 anything, especially when, as Mr. O'Connor points out,
3 it was a discussion about having the members vote to
4 amend the restriction of covenants. Which 75 percent
5 of the vote, you can do that. So that was never put
6 before the board.

7 Just don't think you can annually implement a
8 moratorium to the extent that they've done that. So
9 that's really what got me to get to the merits on this
10 today.

11 So I would strike the moratorium language as
12 I find it to be an impermissible restraint on
13 alienation here, that being the leasing of units for a
14 short-term basis. So therefore, it does appear to me
15 to be a breach of the terms of the master deed.

16 They do, in fact, rent out the entire unit.
17 I do believe that the board has the authority to limit
18 who uses the common elements. I think that's
19 something that they can do, but that's not the issue
20 before the Court as I see it. This is something more
21 than that.

22 They are trying to limit the use of the
23 condominium units owned by the various and the
24 sundried homeowners. And so it's on that basis that I
25 would find that the injunction should issue -- I find

1 it that these plaintiffs, particularly the new ones
2 that don't have an adequate remedy at law because
3 currently they're not allowed to rent their units, I
4 believe they have a likelihood of success on the
5 merits and they would suffer irreparable harm if
6 they're not allowed to rent those units having bought
7 it with that understanding.

8 So I'm going to rule for the Plaintiff, issue
9 an injunction adjoining the board from enforcing the
10 moratorium as currently lifted, give them the
11 authority if they would like to go back and see how
12 they can implement some sort of requirement for people
13 to use the common elements, which I assume there's a
14 pool and tennis court and stuff like that.

15 It's a much more difficult burden to
16 address -- I have no doubt about that -- than just a
17 flat-out moratorium. But it's kind of like making
18 sausage. It's kind of like legislating. You have to
19 find a way to get that thing done.

20 And then as to the prior owners, because they
21 I guess have continued to be able to rent their units
22 out, they don't get the benefit of the injunction
23 because it doesn't apply to them. Okay? And that's
24 the significance of adding these new people to the
25 causes of action.

1 Does not end the case, of course, because you
2 have a claim for damages. Y'all may very well have an
3 appeal you wish to take up, and I understand that as
4 well.

5 I find it to be because these plaintiffs are
6 pursuing these actions in their own right, I find that
7 the *ultra vires* acts does not necessarily apply in
8 this context.

9 Again, I think Mr. O'Connor has done a good
10 job of fleshing out why he believes that to be the
11 case. The one thing that I saw in the statute was, as
12 I viewed it, it seemed to be almost a prophylactic
13 measure was what they were referencing.

14 In other words, you can't do something to
15 enjoin some action.

16 In section (b), corporation's power to act
17 may be challenged in a proceeding against the
18 corporation to enjoin an act where a third party has
19 not acquired rights.

20 So it's something going forward. Here, the
21 action has been taken, and it directly impacts these
22 homeowners. But for the date of whatever it was in
23 '19, the current owners would be -- the current owners
24 as of that date would have been impacted by the
25 moratorium.

1 The people going forward, the ones who have
2 purchased since that date, are clearly impacted by
3 that. And that's the standing issue that I was
4 concerned about.

5 We brought it up 60 days ago, and now here we
6 are 60 days later. This is an issue that just needs
7 to be addressed. I've addressed it for you.

8 Mr. O'Connor, would you be kind enough to put
9 together an order granting the relief that's been
10 sought based on the findings that I've done and run
11 that by Mr. Jordan and Fletcher and make sure they get
12 some input into it?

13 MR. O'CONNOR: Yes, sir, Your Honor.

14 THE COURT: The sooner you do that, the
15 better I think for everybody. But I know how busy you
16 are.

17 MR. O'CONNOR: You think like 30 days?

18 THE COURT: I generally give 30 days. If you
19 can do it any sooner than that, that would be great.
20 Y'all take a look and see what you've got. Okay?
21 Because y'all got to make a decision on that act. I
22 understand that. All right. Thank y'all.

23 MR. O'CONNOR: Thank you, Your Honor.

24 MR. FLETCHER: Thank you, Your Honor.

25 THE COURT: All right, gentlemen.

1 (Off the record at 12:08 p.m. on September
2 19th, 2022.)

COURT REPORTER'S CERTIFICATE

I DO HEREBY CERTIFY THAT THE TESTIMONY
CONTAINED IN SAID HEARING WAS, BY ME, REDUCED TO
WRITING IN THE PRESENCE OF SAID WITNESS BY MEANS OF A
COMPUTERIZED TRANSCRIPTION. THE SAID HEARING IS A
TRUE AND ACCURATE TRANSCRIPT OF THE WHOLE OF THE
TESTIMONY GIVEN BY SAID WITNESS, AS AFORESAID.

I DO FURTHER CERTIFY THAT I AM NOT CONNECTED
BY BLOOD OR MARRIAGE WITH ANY OF THE PARTIES OR THEIR
ATTORNEYS OR AGENTS, AND THAT I AM NOT AN EMPLOYEE OF
EITHER OF THEM, NOR INTERESTED DIRECTLY OR INDIRECTLY
IN THE MATTER OF CONTROVERSY EITHER AS COUNSEL,
ATTORNEY, AGENT, OR OTHERWISE.

SIGNED THIS THE 28th DAY OF SEPTEMBER 2022.

Josie Boehm

JOSIE ALLEN BOEHM

My Commission Expires 9/24/32

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-000773

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SC Court of Appeals

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 Respondents,

v.

Mariner's Cay Racquet & Yacht Club Homeowners' Association,
Inc. Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all materials proposed by
the parties to be included in the Record on Appeal and does not include any other materials.

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