

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc., ... Respondents.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT**

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Pursuant to Rule 242(e), this Appendix contains the following documents: (1) the Record on Appeal, (2) the Appellants' Final Brief, (3) the Respondents' Final Brief, (4) the Appellants' Final Reply Brief, (5) the Order of the Court of Appeals dated February 14, 2024, (6) the Appellants' Petition for Rehearing, and (7) the Order of the Court of Appeals dated March 8, 2024 denying the Appellants' Petition for Rehearing.

s/ Clarence Davis

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SC Court of Appeals

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Inc.,.....Respondents.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT
) Civil Action Number: 2020-CP-32-00005

R. Kent Porth and Panorama Point, LLC,)

Plaintiffs,)

vs.)

Robert P. Wilkins, Jr., RPW Development,)
Inc., Southern Visions Realty, Inc., and)
Consolidated Multiple Listing Service,)
Inc.,)

Defendants.)

**ORDER GRANTING MOTION TO
DISMISS**

This matter came before this Court for a hearing on December 16, 2020, based on Defendants' Robert P. Wilkins, Jr. ("Wilkins"), RPW Development, Inc. ("RPW") and Southern Vision Realty, Inc. ("SVR")¹ motions to dismiss² the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.³ After reviewing extensive submissions to the Court and after having entertained the arguments of counsel, the motion is hereby **GRANTED AND THE COMPLAINT IS HEREBY DISMISSED WITH PREJUDICE** for the reasons set forth herein.

A Review of the Complaint

While the Plaintiffs' Complaint consists of 93 pages and 473 numbered paragraphs, the issues presented by the Complaint are not complex. The Realtor Defendants criticize the

¹ Collectively, the moving parties are also identified herein as the "Realtor Defendants."

² Realtor Defendants filed an original and then an Amended Motions to Dismiss dated May 6, 2020 and October 9, 2020, respectively.

³ The Complaint also names as a Defendant the Consolidated Multiple Listing Service, Inc. ("CMLS"), although the CMLS is not a party to this Motion to Dismiss. The Plaintiffs have not yet served the Summons and Complaint upon the CMLS.

Complaint as an effort by the Plaintiffs to overcome by sheer volume the legal defects in their claims. The Complaint is summarized as follows.

On January 2, 2020, the Plaintiffs, R. Kent Porth (“Porth”) and Panorama Point, LLC (“Panorama Point”), filed their Complaint in connection with a dispute arising out of the development and sale of the Plaintiffs’ and his family members’ real property located on Lake Murray (the “Property”). According to the Complaint, the Property consisted of approximately 27 acres, with around 4,750 feet of frontage on Lake Murray. In late 2005 and early 2006, the Plaintiffs began exploring options to best develop and sell all or a portion of the Property as a residential subdivision. [Compl., ¶¶ 20-21.] The Plaintiffs engaged the Realtor Defendants to develop, market, and sell the Property in early 2006. [Id. at ¶ 57.] Plaintiff Porth signed a Development Agreement on behalf of Panorama Point with Defendant RPW on or about December 21, 2006. [Id. at ¶ 87.] The Development Agreement contained provisions for the payment of fees to the Developer as well as provisions for the payment of real estate commissions for listing and sales with Defendant SVR serving as the exclusive listing agent.

Central to the Plaintiffs’ Complaint is the allegation that the Realtor Defendants failed to have written listing agreements as required by South Carolina Code 40-57-135 and 137, as well as by the rules of the CMLS. The Plaintiffs advance several theories of recovery all of which allege in essence that given the alleged lack of written listing agreements, it was unlawful for the Realtor Defendants to collect and to retain commissions and development fees associated with the sale of the Property that is the subject matter of this action. According to the Complaint, without the required written listing agreements, between January 2007 and December 2016, the Plaintiffs sold interests in the Property on 23 separate occasions in which Defendant SVR represented the Plaintiffs as the listing agent. The prices for the lots sold by the Plaintiffs ranged from \$70,000 to \$535,000, totaling more than \$6 million in sales to the Plaintiffs. SVR received a commission on

each sale ranging from \$1,400 to \$26,750, typically a fee equal to 5% of the sales price. [*Id.* at ¶¶ 166-198]. The Complaint also alleges that certain development fees were paid to Defendant RPW in connection with the sales of the lots from June 2007 through May 2015. The development fees ranged from \$3,325 to \$25,412 for each lot sold, approximately 4.7% of each sales price instead of the contracted 5% amount. [Compl., ¶¶ 199-218; Mtn. to Dismiss, ¶¶ 33-54.]

The development fees and the realtor commissions of which the Plaintiffs now complain were disclosed on closing statements for each sale and were signed off on by Plaintiff Porth.⁴ The last lot sold giving rise to the allegations of the Complaint was sold by the Plaintiffs on **May 1, 2015**, more than four years before the Complaint was filed on January 2, 2020. [Compl., ¶ 198; Mtn. to Dismiss, ¶¶ 31-32]. The latest alleged payment of a development fee giving rise to the allegations of the Complaint was paid on **May 7, 2015**, more than four years before the Complaint was filed on January 2, 2020. [Compl., ¶ 201; Mtn. to Dismiss; ¶¶ 36-37.]

Complicating the Plaintiffs' efforts to explain their delay in filing this action are allegations in the Complaint that establish the sophistication and experience of the Plaintiffs, despite the Plaintiffs attempt to minimize their experience and legal sophistication. According to the Complaint, Plaintiff Porth was sworn in as a licensed attorney in South Carolina in November of 1983, and practiced law until December 31, 2003, when he resigned as an equity partner and became "of counsel." [Comp. ¶ 161]. Thereafter, Porth practiced law on a part time basis until sometime in 2007 when he effectively "retired" from the practice of law. [*Id.* ¶ 161]. In the

⁴ As the closings and Deeds were integral to the Complaint, the Court accepted for review copies of Contracts of Sale, Deeds and HUD-1 statements which reflected that Plaintiff Porth executed the contracting and closing documents on behalf of Plaintiff Panorama Point, LLC. Additionally, the Court believes it proper to take judicial notice of the public record which would reflect Plaintiff Porth's knowledge and participation in the sales and marketing with associated listing prices which are the subject of this action. Plaintiffs were aware of the fees and commissions being charged with each and every lot sale and were aware of the same at the time of the sales and this constituted a course of dealing between and amongst the parties.

“Discovery of Issues” section of the Complaint, the Plaintiffs allege that after the breakdown in the relationship between the parties “in the months following January 2017, Plaintiff RKP (“Porth”) began to research the laws governing Defendants RPW’s and SVR’s handling of the marketing of the Phase I lots and related parcels ...” [Id. ¶ 159]. The Complaint alleges that it was “only in early 2018” that Plaintiff Porth “had **determined conclusively**” that the Defendants had not complied with applicable laws.” [Id. ¶ 160]. [Emphasis added]. Because the Plaintiffs had not “determined conclusively” until early 2018 that the Defendants had not followed the law, the Plaintiffs now contend that their filing on January 2, 2020 was timely. Accepting the allegations of the Complaint to be true, it is clear that the Plaintiffs knew that there were no written listing agreements as required by South Carolina law. What the Plaintiffs contend to have discovered and to have “determined conclusively” in early 2018 was not fact – it was law. Moreover, to have “conclusively determined” that one has a claim is not the standard in South Carolina for the commencement of the running of the statute of limitations as discussed hereinbelow.

While the Complaint contends that the Plaintiffs had not “determined conclusively” until early 2018 that the Defendants had committed actionable offenses, the Complaint describes several earlier events which placed the Plaintiffs on actual notice that some right of theirs had been invaded by the Defendants. Beginning at Page 42 of the Complaint, the Plaintiffs complain about “**Lot 15 Issues**.” Lot 15 was sold on September 26, 2013. [Id. ¶ 194]. In short, the Plaintiffs complain that the Defendants knew the purchaser of Lot 15 and misled the Plaintiffs to reduce the purchase price of the lot by \$2,500.00 on the false representation that the purchasers would incur expense in blasting rock from the lot using dynamite. No blasting occurred. The Complaint alleges that the Defendants “abused their relationship of trust with the Plaintiffs to advance the interests of a friend.” Again, Lot 15 was sold in 2013.

In addition, beginning at Page 60 of the Complaint, the Plaintiffs complain about “**The Bonded Plat Issues with Lexington County**.” In short, the Plaintiffs complain that on June 7, 2012, Defendant Wilkins told Plaintiff Porth that he had convinced Lexington County to accept a “cash bond” in the amount of \$6,500.00 in order to bond off a check list of items required by the County to release the neighborhood. [Id. ¶ 339]. After completing the punch list, Lexington County issued a refund of the cash bond to Defendant RPW and RPW kept the money without telling the Plaintiffs. [Id. ¶ 341-342]. Ultimately, Defendant RPW only returned Porth’s money to him on April 25, 2013, after RPW specifically inquired about the status of the refund. [Id. ¶ 343]. The Plaintiffs’ allegations regarding the “issues” that they were experiencing with the Defendants over the course of the development culminates with the allegations of Paragraph 345:

The failure of Defendants Wilkins and RPW to complete the punch list items in a timely manner, and RPW’s failure to refund the Cash Bond to Plaintiff LLC when received from Lexington County, are examples of Defendants Wilkins’ and RPW’s negligence, incompetence, and lack of attention in performing the duties for which they received the Development Fees. [Emphasis Added].

Despite their actual knowledge of these acts of negligence, incompetence, and breach of duties as early as 2013, the Complaint makes it clear that the Plaintiffs not only failed to take any action against the Defendants within the applicable statutes of limitations, but instead continued to develop, market and sell the Property through the efforts of the Defendants and continued to retain the benefit of the Defendants’ efforts. While not seeking to upset or rescind any of the transactions underlying this action, the present suit now purports to divest the Defendants of any and all fees or commissions which they earned by virtue of the services that were provided to the Plaintiffs. By the allegations of the Complaint itself, the Plaintiffs are not entitled to the relief they seek.

Standards of Review

1. Rule 12(b)(6)

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint; however, the trial court should grant the motion “if the facts alleged in the complaint do not support relief under any theory of law.” Flateau, 355 S.C. at 201-02, 584 S.E.2d at 415; see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 650-51, 491 S.E.2d 272, 274-75 (Ct. App. 1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

2. Statute of Limitations

Statute of limitations defenses may be raised via a Rule 12(b)(6) motion to dismiss for failure to state a claim when the facts pleaded establish that the claim is untimely. See Clearwater Trust v. Bunting, 367 S.C. 340, 351-53, 626 S.E.2d 334, 339-40 (2006) (affirming trial court’s grant of Rule 12(b)(6) motion to dismiss for failure to state a claim because action for breach of fiduciary duty owed by officer as a corporate officer was precluded by statute of limitations); Logan v. Cherokee Landscaping and Grading Co., 389 S.C. 611, 698 S.E.2d 879 (Ct. App. 2010) (affirming trial court’s grant of Rule 12(b)(6) motion to dismiss plaintiff’s negligence action because plaintiff failed to bring action within the statute of limitations).

Statutes of limitation ““are designed to promote justice by forcing parties to pursue a case in a timely manner.”” Gibson v. Bank of Am., N.A., 383 S.C. 399, 410, 680 S.E.2d 778, 784 (Ct. App. 2009) (quoting State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000)). As this Court has observed;

Statutes of limitation . . . protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999).

Statutes of limitations aim to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005).

Under South Carolina law, in determining when a cause of action arises courts apply the “discovery rule.” Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). According to this rule, the statute of limitations begins to run “when a cause of action reasonably ought to have been discovered,” or, in other words, “when a plaintiff has notice that he might have a remedy for a harm.” Id. Thus, “the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist.” Gibson, 383 S.C. at 406, 680 S.E.2d at 782.

The standard as to when the statute of limitations begins to run is objective rather than subjective. Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); Gibson, 383 S.C. at 406, 680 S.E.2d at 782. Therefore, the test is not whether the particular plaintiff actually knew a claim existed. Rumpf, 357 S.C. at 395, 593 S.E.2d at 187. The test is when a person could or should have known through reasonable diligence that some cause of action exists against another

person rather than when a person obtains actual knowledge of a potential claim or of the facts giving rise thereto. Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998).

The key element of reasonable diligence is notice. Reasonable diligence requires that a party act with some promptness where facts and circumstances would put a person on notice that some right has been invaded or that some claim against another party might exist. Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The statute begins to run at this point and not when:

- the advice of counsel is sought;
- a full-blown theory of recovery is developed; or
- the injured party comprehends the full extent of the damage.

Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean, 321 S.C. at 363-64, 468 S.E.2d at 647; Wiggins, 314 S.C. at 128, 442 S.E.2d at 170; Dorman, 331 S.C. at 184-85, 500 S.E.2d at 789; Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998). The failure of a plaintiff to fully understand his claim or the ramifications of a potential claim does not toll the accrual of the statute of limitations. Young v. South Carolina Dep't of Corrs., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct. App. 1999). Where there is no conflicting evidence or where only one reasonable inference can be drawn from the evidence, the trial court should determine as a matter of law when a party knew or should have known it had a claim. Gibson, 383 S.C. at 406-07, 680 S.E.2d at 782.

3. Ignorance of the Law

Ignorance of the law does not suspend the accrual of a statute of limitations. See Ott v. Maryland Dep't of Pub. Safety and Corrs. Servs., 909 F.3d 655, 661 (4th Cir. 2018) ("Ignorance of the law does not justify tolling, even when a party does not have legal representation"); United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (observing ignorance of the law is not a basis for tolling). The Plaintiffs argue they should not be expected to have knowledge of law applicable to

real estate professionals as if this law were locked behind some secret vault. The Plaintiffs' position is contrary to the well-established principle that "[c]itizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." American Legion Post 15 v. Horry Cnty., 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996) ("Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.").

4. The Existence of a Duty

"An affirmative legal duty, ..., may be created by statute, contract relationship, status, property interest, or some other special circumstance." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999). The existence of a duty owed is a question of law for the courts. Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001).

5. Private Causes of Action for Statutory Violations

Plaintiffs' complain throughout the Complaint that there purportedly were no written, signed listing agreements for the property transactions as required by S.C. Code Ann. Section 40-57-135. This section does not expressly allow a private cause of action for any violation of its requirements. "In determining whether a statute creates a private cause of action [in South Carolina], the main factor is legislative intent." Doe v. Marion, 373 S.C. 390, 396 645 S.E.2d 245, 248 (2007):

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty is determined primarily from the language of the statute In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability. When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.

Id. (internal citations omitted).

A duty created by a statute will support an action in negligence only if the plaintiff can show “(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.” Hurst v. Sandy, 329 S.C. 471, 478, 494 S.E.2d 847, 850 (Ct. App. 1997). Licensing statutes will not ordinarily provide a basis for a negligence per se action. Id.

For purposes of determining whether an alleged violation of S.C. Code Ann. Section 40-57-135 gives rise to a private cause of action, the answer to the question is provided in Code itself. Section 40-57-490, “Civil actions,” states that “a civil action may be brought for violations of this chapter as provided for violations of Article 1, Chapter 1, in accordance with Section 40-1-210.” According to S.C. Code Ann. Section 40-1-210, “Civil proceedings before Administrative Law Court,” the civil actions which are authorized for violations of Article 1, Chapter 1 are limited to civil actions instituted by the department (i.e. LLR) “for injunctive relief against a person violating this article.” While it is clear that a violation of S.C. Code Ann. Section 40-57-135 does not give rise to a private cause of action, it is equally clear that the Code does not supplant common law causes of action: “Except as otherwise stated, nothing in the section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge.” S.C. Code Ann. Section 40-57-350(M), “Real estate brokerage firm duties to clients; agency relationship; applicability of common law.” As set forth herein, however, all of the Plaintiffs’ common law claims are fatally flawed.

6. Quantum Meruit

Quantum meruit requires a showing of (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.

Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). Similarly, “[t]o recover on a theory of restitution, the plaintiff must show: (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value.” Niggel Assocs., Inc. v. Polo’s of North Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988). Furthermore, if the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit. Swanson v. Stratos, 350 S.C. 116, 120, 564 S.E. 2d 117, 122 (Ct. App. 2002), citing 66 Am.Jur.2d *Restitution and Implied Contracts* § 81 (2001) (“[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished.”); cf. Strickland v. Coastal Design Assocs., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct.App.1987) (“The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit unless the original contract remains in force.”); Johnston v. Brown, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct.App.1986), *rev’d on other grounds*, 292 S.C. 478, 357 S.E.2d 450 (1987) (“While a recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff’s recovery is limited to the amount the parties agreed should be paid for the services.” (footnote omitted)).

Legal vs. Equitable Claims

A. Legal Claims

The Plaintiffs' Complaint advances several causes of action, some of which the Plaintiffs contend are equitable. Several of the causes of action are unquestionably actions at law. Plaintiffs' claims for negligent misrepresentation, negligence, conversion, constructive fraud, and violation of South Carolina's Unfair Trade Practices Act are each actions at law. See Advance Int'l, Inc. v. North Carolina Nat'l Bank of South Carolina, 316 S.C. 266, 271, 449 S.E.2d 580, 583 (Ct. App. 1994), aff'd in part and vacated in part on other grounds, 320 S.C. 532, 466 S.E.2d 367 (1996) (action alleging, *inter alia*, fraud, negligence, and unfair trade practices and seeking damages is one at law); Bivens v. Watkins, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct. App. 1993) (stating negligent misrepresentation and fraud are actions at law); Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986) ("An action for damages for conversion is an action at law."); see also Turner v. Kellett, 426 S.C. 42, 47, 824 S.E.2d 466, 468 (Ct. App. 2019) (observing action for unfair trade practices is one at law); Bateman v. Rouse, 358 S.C. 667, 673-74, 596 S.E.2d 386, 389 (Ct. App. 2004) (conversion is an action at law).

Each of these claims, being actions at law, are therefore subject to the applicable statutes of limitations. In particular, Plaintiffs' claims for negligent misrepresentation, negligence, conversion, and fraud are subject to the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-530. See Walbeck v. I'On Co., 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019) ("The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005), applies to negligent misrepresentation claims."); Gibson v. Bank of Am., N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 782 (Ct. App. 2009) (three-year limitations period set forth in § 15-3-530(5) applies to negligence actions); Walsh v. Woods, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("The statute of limitations for . . . a conversion claim is three (3) years [under § 15-3-530(5).]"); Dorman v. Campbell, 331 S.C. 179, 183-84, 500 S.E.2d 786, 788-89 (Ct. App. 1998) (applying three-year statute of limitations set forth in § 15-3-530 to claim for constructive

fraud); see also S.C. CODE ANN. § 15-3-530(7) (providing “an action for relief on the ground of fraud” is subject to the three-year statute of limitations).

A claim for violation of South Carolina’s Unfair Trade Practices Act must also be brought within three years. S.C. CODE ANN. § 39-5-150 specifies a three-year statute of limitations period for actions brought under the Unfair Trade Practices Act: “No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.”

As to Plaintiffs’ at law claims for negligent misrepresentation, negligence, conversion, fraud and violations of South Carolina’s Unfair Trade Practices Act, all such claims are barred by the applicable statutes of limitations based upon the allegations of the Complaint and the pleaded language of the Plaintiffs. I find that the Plaintiffs, by their own allegations, knew or should have known of acts of “negligence, incompetence, dishonesty and/or breaches of duty” by the Defendants as early as 2013, yet no action was commenced until January 2, 2020. The Plaintiffs’ contention that they had not “determined conclusively” that they had claims against the Defendants until sometime in 2017 is unavailing as it pertains to the commencement of the running of the applicable statutes of limitations under South Carolina law. To the contrary, the Plaintiffs were on actual or reasonable notice as early as 2013 that a right of theirs had been invaded by the Defendants. Based upon their own allegations of the Complaint, the notice was more than sufficient to have constituted a cause of action at that time and cause the Plaintiffs to make reasonable inquiry into the conduct of the Defendants. This would have led to the discovery of the same facts that give rise to the present action. As a result of the Plaintiffs failure to bring their

legal claims timely within the applicable statutes of limitations, each of the Plaintiffs' legal causes of action are hereby dismissed.⁵

B. Breach of Fiduciary Duty

The Plaintiffs have additionally brought a cause of action for breach of fiduciary duty. While the Plaintiffs contend that their breach of fiduciary duty claim is equitable in nature, and therefore not subject to a statute of limitations, I find that the Plaintiffs' claim for breach of fiduciary duty is also legal in nature and thus subject to the statute of limitations. A breach of fiduciary duty claim may be legal or equitable. Deborah Dereede Living Trust dated December 18, 2013 v. Karp, 427 S.C. 336, 340, 831 S.E.2d 435, 438 (Ct. App. 2019). The court must therefore look at the main purpose of the action to determine whether it is a legal or equitable claim. Id. "The main purpose of the action should generally be ascertained from the body of the complaint. However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." Insurance Fin. Servs., Inc. v. South Carolina Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (internal citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. Bell v. Mackey, 191 S.C. 105, 119–20, 3 S.E.2d 816, 822 (1939) (internal citations omitted).

I find that the main purpose of the Plaintiffs' breach of fiduciary duty cause of action is to seek the legal remedy of money damages. The Plaintiffs explicitly request money damages "in a sum sufficient to adequately compensate them for actual damages," as well as an unspecified recovery of punitive damages. [Compl., p. 92.] The Plaintiffs contend the Realtor Defendants'

⁵ Significantly, the last property sale giving rise to the allegations in the Complaint occurred on May 1, 2015, and the last payment of a development fee giving rise to the allegations in the Complaint occurred on May 7, 2015, both of which are also well outside of the applicable statutes of limitations.

purported actions caused the Plaintiffs to receive below fair market prices for the sales of the lots on the Property and further caused them to incur additional interest expenses due to an alleged delay in sales. While the Plaintiffs also allege that they are entitled to the return of commission and development fees paid to the Realtor Defendants, the Plaintiffs characterize these losses as “economic.”[Id. at ¶¶ 389-90, 397, 399-400, 411, 417, 426, 444-45, 471-73.]

The relief the Plaintiffs seek consists entirely of the economic losses they allege they suffered as a result of the Realtor Defendants’ supposed breaches. While the Plaintiffs seek a return of the commissions and fees earned by the Realtor and Developer Defendants, the basis for this relief is because the Realtor Defendants allegedly did not provide the services the Plaintiffs paid for, including the execution of written listing agreements. Even if the Plaintiffs attempt to characterize this relief as “restitution,” restitution is not automatically classified as an equitable remedy. “[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for [the plaintiff’s] claim” and the nature of the underlying remedies sought.” Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (internal citation omitted).

In cases in which a plaintiff could not assert title or right to possession of particular property, but in which he nevertheless might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,” the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. In such cases, the plaintiff’s claim was considered legal because he sought “to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.” Such claims were viewed essentially as actions at law for breach of contract, whether the contract was actual or implied. See id. (internal citations omitted).

“In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.” Id. “A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,” and the plaintiff “cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant.] Thus, for restitution to lie in equity, the action generally must seek *not to impose personal liability on the defendant*, but to restore to the plaintiff particular funds or property in the defendant's possession.” Id. at 213-14 (internal citations omitted) (emphasis added).

Here, “[t]he kind of restitution that [the Plaintiffs] seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon [the Realtor Defendants.]” Id. at 214. “Almost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. . . . And [m]oney damages are, of course, the classic form of *legal* relief.” Id. at 210 (internal citations omitted) (emphasis in original); cf. Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (Ct. App. 2010) (finding breach of fiduciary duty claim was equitable where relief sought was to restore profits to a trust for the trustee's breach of loyalty).

The Plaintiffs seek money damages on their claim for breach of fiduciary duty as compensation for their pecuniary injury. See Harleysville Group Ins. v. Heritage Comms., 420

S.C. 321, 353, 803 S.E.2d 288, 306 (2017) (“The goal [of compensatory damages] is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.”) (internal citation omitted). The relief sought is legal, and the breach of fiduciary duty claim is therefore one at law. A cause of action for breach of fiduciary duty is governed by the discovery rule and must be brought within three years of the time the person knew or should have known by exercise of reasonable diligence that he had a cause of action. See S.C.Code Ann. §§ 15–3–530(5) and 15–3–535 (Supp .2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct.App.2004). Accepting the allegations of the Complaint as true, the Plaintiffs were aware as early as 2013 that the Defendants had breach their fiduciary duties, yet no action was brought until January 2, 2020. I hereby find that the Plaintiff’s cause of action for breach of fiduciary duty is barred by the statute of limitations and is therefore dismissed.

C. Quantum Meruit / Restitution

I further find that the Plaintiffs have failed to state proper causes of action for quantum meruit and restitution and as such, these claims should also be dismissed for failure to state a claim pursuant to Rule 12(b)(6), SCRCF. Under these claims, the Plaintiffs in essence allege that they paid commissions and development fees to the Realtor Defendants which the Realtor Defendants retained despite allegedly engaging in unlawful acts and not fulfilling their legal duties with respect to the real estate transactions. [Compl., ¶¶ 427-34, 446-48.]

Under South Carolina law, a quantum meruit claim requires a showing of (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). Similarly, “[t]o recover on a theory of restitution, the plaintiff

must show: (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value.” Niggel Assocs., Inc. v. Polo’s of North Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988).

In their Complaint, the Plaintiffs are merely seeking a refund or return of fees paid by alleging that the Realtor Defendants did not fulfill their legal and contractual duties – the Plaintiffs are not alleging they provided a service to the Realtor Defendants for which they were not compensated.⁶ The Plaintiffs seek, in essence, a reverse quantum meruit cause of action in which someone who pays too much for a service seeks a refund of the amount overpaid. The South Carolina courts have never recognized such a claim. Instead, the Plaintiffs relief would be in the form of legal claims for the purported failure of the Realtor Defendants to fulfill their contractual obligations which, as set forth above, are conclusively barred by the three-year statute of limitations. Accordingly, the Plaintiffs’ causes of action for quantum meruit and restitution are hereby dismissed for failure to state facts sufficient to constitute a cause of action.

As an additional sustaining ground for the dismissal of Plaintiffs’ causes of action for quantum meruit and restitution (and/or for any other claim which they would contend to be equitable in nature), this Court finds that based upon the allegations of the Complaint, all such claims are barred by the doctrine of laches. Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or to enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519

⁶ In fact, the Complaint alleges that for over ten years, the developer Defendants took a large tract of raw land and developed it. Similarly, the realtor Defendant SVR marketed the Property, secured purchase contracts with the Plaintiffs and successfully closed millions of dollars of transactions for the benefit of the Plaintiffs.

S.E.2d 583, 598 (Ct. App. 1999). Accepting the allegations of the Complaint to be true, the Complaint alleges that the Plaintiffs were aware of the Defendants alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property.

Furthermore, the Plaintiffs do not have clean hands to request equity from the Court. As early as 2013, Plaintiff's own words indicate that they were on actual notice that the Defendants had acted negligently and incompetently towards them, yet they permitted the Realtor Defendants to continue to develop and market the lots for the financial benefit of the Plaintiffs and now contend that the Realtor Defendants should not be compensated for making the Plaintiffs millions of dollars through lot sales. The Plaintiffs now seek to have the Defendants answer for transactions dating back to 2007, although the obligation on real estate brokers to maintain sale contracts, listing agreements and other similar documents is only five (5) years. S.C. Code 40-57-135(D)(1). This Court does not consider the Plaintiffs' claims to be equitable in nature. Even if equity were to apply, equity would not permit recovery under the circumstances set forth in the Complaint. Plaintiffs' claims would be barred by the doctrines of laches, unclean hands and/or *in pari delecto*. No amount of discovery or repleading the allegations through an Amended Complaint would cure the legal impediments to Plaintiffs' proposed claims.

IT IS THEREFORE ORDERED that the Plaintiffs' Complaint be dismissed pursuant to Rule 12(b)(6) with prejudice.

AND IT IS SO ORDERED!

Edgar W. Dickson
Presiding Circuit Court Judge
11th Judicial Circuit

Orangeburg, SC
_____, 2021



Lexington Common Pleas

Case Caption: R Kent Porth , plaintiff, et al VS Robert P Wilkins Jr , defendant, et al
Case Number: 2020CP3200005
Type: Order/Dismissal

So Ordered

s/ Edgar W. Dickson #2153

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	CASE NO.: 2019-CP-10-05395
	)	
R. Kent Porth and Panorama Point, LLC,	)	
	)	
Plaintiffs,	)	ORDER DENYING PLAINTIFFS'
	)	MOTION TO ALTER OR AMEND
vs.	)	
	)	
Robert P. Wilkins, Jr., RPW Development,	)	
Inc., Southern Visions Realty, Inc., and	)	
Consolidated Multiple Listing Service, Inc.,	)	
	)	
Defendants.	)	

This matter comes before the Court on Plaintiffs motion under Rule 59(e), SCRCF seeking reconsideration of this Court's February 16, 2021 Order granting the motion to dismiss of Defendants Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc. ("Order"). In support of their motion, Plaintiffs submitted a motion with memorandum and a reply memorandum. Defendants submitted a memorandum in opposition, and a sur-reply. The motion is now ripe for review.

Decision

"A party may wish to file a Rule 59(e) motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

In their motion, Plaintiffs argue both that this Court's Order misunderstood or failed to consider certain issues, and that the Court did not rule on certain issues raised by the Plaintiffs. Further, contrary

to Rule 59 (e) the Plaintiffs also set forth new and never previously asserted or argued issues concerning legal issues and facts not before the court.¹

With respect to issues that Plaintiffs alleged this Court misapprehended, Plaintiffs argue. this Court's Order (1) failed to accept the allegations in their Complaint as true, (2) improperly concluded that Plaintiffs' action was subject to any statute of limitations, (3) to the extent a statute of limitations did apply, improperly applied the statute of limitations, (4) misconstrued Plaintiffs' public policy arguments; (5) misconstrued South Carolina law concerning fraud, (6) incorrectly held that Plaintiffs' allegations that the Defendants violated S.C. Code §§40-57-135(D)(4), 40-57-137(M) and 40-57-139 on their own do not provide grounds for a civil cause of action, (7) misunderstood South Carolina' Unfair Trade Practices statute, and (8) incorrectly held that Plaintiffs' alleged ignorance of the law did not toll the statute of limitations applicable to their claims, (9) incorrectly applied the law of unjust enrichment, (10) misapprehended the law of quantum meruit, and (11) incorrectly stated that the Defendants "earned" commissions and fees.

As it relates to issues allegedly not ruled upon by the Court, Plaintiff alleges that this Court's Order (1) did not rule on Plaintiffs allegations of intrinsic fraud, (2) did not address Plaintiffs' allegations that Defendant Wilkins signed a "fraudulent listing agreement," (3) did not address Plaintiffs' public policy arguments, (4) did not address Plaintiffs' allegations that various attorney's representing the Defendants allegedly concealed fraud, (5) failed to address Plaintiffs' argument that Defendants have unclean hands, and (6) did not address Plaintiffs' "good faith reliance on fiduciary status of the Defendants" argument.

In addition, Plaintiffs allege that this Court's Order violates the equal protection clause of the South Carolina Constitution.

¹ Attached to the Motion to Reconsider was an exhibit that was not previously submitted to the Court and not part of the original Complaint.

In opposition, Defendants argue that this Court's Order (1) properly concluded that allegations concerning violations of the statute dealing with licensed real estate professionals alone does not support a civil cause of action, (2) correctly ruled that a plain reading of the statute referenced by Plaintiffs demonstrates that Plaintiffs' allegations do not state a civil cause of action, (3) properly held that Plaintiffs' "ignorance of the law" argument did not toll the applicable statutes of limitations which clearly expired, and (4) properly held that Plaintiffs' claims are legal, not equitable.

Defendants also submitted a sur-reply objecting to the Court's consideration of certain arguments that Defendants allege were made for the first time in their reply memorandum.

After careful consideration of the parties' respective positions, and review of the submissions made to this Court, the Court is unable to find any fact or issue of law that was misapprehended or overlooked in its February 16, 2021 Order. Accordingly, Plaintiffs' motion to alter or the February 16, 2021 Order is respectfully DENIED.

IT IS SO ORDERED!

[Judge's Electronic Signature to Follow]



Lexington Common Pleas

Case Caption: R Kent Porth , plaintiff, et al VS Robert P Wilkins Jr , defendant, et al
Case Number: 2020CP3200005
Type: Order/Other

So Ordered

s/ Edgar W. Dickson #2153

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

R. Kent Porth and Panorama Point, LLC,

Civil Action No.

Plaintiffs,

vs.

Robert P. Wilkins, Jr., RPW Development,
Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,

Defendants.

SUMMONS

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

s/ Clarence Davis
Attorney for Plaintiff

Dated: January 2, 2020

Address: Griffin Davis LLC
4408 Forest Drive, Suite 300 (29206)
P.O. Box 999
Columbia, SC 29202

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

R. Kent Porth and Panorama Point, LLC,

Civil Action No.

Plaintiffs,

vs.

Robert P. Wilkins, Jr., RPW Development,
Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,

**COMPLAINT
(Bench Trial Demanded)**

Defendants.

Plaintiffs R. Kent Porth (“RKP”) and Panorama Point, LLC (“LLC”), file this Complaint against Defendants Robert P. Wilkins, Jr. (“Wilkins”), RPW Development, Inc. (“RPW”), Southern Visions Realty, Inc. (“SVR”), and Consolidated Multiple Listing Service, Inc (“CMLS”) [collectively the Defendants], and allege as follows:

PARTIES, WITNESSES AND VENUE

1. Plaintiff RKP is an individual residing in Lexington County, South Carolina.
2. Plaintiff LLC is a South Carolina limited liability company headquartered in Lexington County, South Carolina and doing business in Lexington County, South Carolina.
3. Upon information and belief, Defendant Wilkins is an individual residing in Lexington County, South Carolina.

4. Upon information and belief, Defendant RPW is a South Carolina corporation headquartered at 955 Old Cherokee Road, Lexington, South Carolina, and doing business in Lexington County, South Carolina.

5. Upon information and belief, during calendar year 2006 and for several years thereafter, Defendant RPW maintained its office at 336 Old Chapin Road, Lexington, South Carolina.

6. Upon information and belief, Defendant SVR is a South Carolina corporation headquartered at 955 Old Cherokee Road, Lexington, South Carolina, and doing business in Lexington County, South Carolina.

7. Defendant SVR is licensed as a “real estate office” by the South Carolina Real Estate Commission (“Commission”), with an issued real estate office license number being 283.

8. Defendant Wilkins is licensed as a “broker in charge” by the Commission, license number being 31087.

9. Upon information and belief, Anne Wilkins Brooks (“AWB”) is the sister of Defendant Wilkins, and has been a licensed “salesman” with the Commission from January 1, 2006 to the present, “salesman” license number being 4181.

10. Defendant Wilkins was, at all relevant times, the “broker-in-charge” of SVR on the records of the Commission.

11. Upon information and belief, Defendant RPW does not have a license of any type issued by the Commission.

12. Upon information and belief, at all relevant times of this Complaint, AWB maintained her license with SVR as an associated licensee, allowed by the provisions of SC Code 40-57-110(D).

13. Defendant CMLS is a not for profit corporation organized under South Carolina law with its headquarters located at 138 Westpark Boulevard, Columbia, South Carolina, and does business in various counties including, but not limited to, Lexington County, South Carolina.

15. This Court has personal jurisdiction over all Defendants pursuant to SC Code 36-2-802 as a result of Defendants’ domicile in, conducting business activities in and relationship with Lexington County.

16. Venue is proper in this Court pursuant to SC Code 15-7-30 as (i) Defendants reside and do business in Lexington County, (ii) CMLS does business in Lexington County, and (iii) the wrongful and unlawful conduct of the Defendants for which Plaintiffs seek relief occurred and is occurring in Lexington County, South Carolina.

FACTS AND GENERAL ALLEGATIONS

Background of the Property

17. On January 1, 2006, Plaintiff RKP was the owner of fee simple interests in several real estate parcels located on Lake Murray in Lexington County, South Carolina.

18. On January 1, 2006, Plaintiff RKP's brother, Lucius O. Porth, Jr. ("LOP") was the owner of fee simple interests in several real estate parcels located on or near Lake Murray in Lexington County.

19. On January 1, 2006, Plaintiff RKP's mother, Edna G. Porth ("EGP") was the owner of fee simple interests in several real estate parcels located on or near Lake Murray in Lexington County.

20. Collectively, the various parcels of real estate owned by RKP, LOP and EGP totaled approximately 27 acres, having approximately 4,750 feet of frontage on Lake Murray (collectively the "Property").

21. In late 2005 and early 2006, Plaintiff RKP, LOP and EGP began working in concert to explore the best way to develop and sell all or a portion of the Property as a residential subdivision.

The CMLS and Judge Blatt's Final Order

22. On May 2, 2008, the United States of America, through the U.S. Department of Justice's Antitrust Division ("DOJ"), filed an action against CMLS alleging that the CMLS and its members had adopted rules and practices that excluded competitors and restrained competition in the Columbia, South Carolina real estate market, which included Lexington County, South Carolina, in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1 (the "DOJ Action").

23. The action against the CMLS was one of a series of actions brought by the DOJ against various multiple listing services across the country and against the National Association of Realtors ("NAR") to address the DOJ's concerns over the operation of multiple listing services (i) in a manner which excluded low commission and internet based brokers from participation in the services, and (ii) in a manner which allowed member brokers to selectively exclude properties from exposure to internet based, low commission brokers and other competing traditional brokers.

24. In July of 2008, the DOJ and NAR reached a voluntary settlement to the DOJ's October 4, 2005 action against NAR under Section 1 of the Sherman Act, mandating changes to the participation and operational rules of NAR affiliated multiple listing services which (i) eliminated barriers to participation by low commission and internet based brokers, and (ii) eliminated selective listing of properties by member brokers to avoid exposure of those withheld property listings to competing brokers of any type without specific written permission of the seller of the property.

25. On August 17, 2009, United States District Court Judge Solomon Blatt, Jr. (“Judge Blatt”) the presiding judge in the DOJ Action against the CMLS, entered his final judgment in the DOJ Action which approved a voluntary settlement whereby CMLS agreed to “certain procedures and prohibitions for the purposes of preventing and remedying the loss of competition alleged in the Complaint” (“CMLS Order”).

26. As part of the approval process for the CMLS Order, the DOJ’s competitive impact statement was published in the Federal Register as part of Document Number E9-11392 at 74 FR 22965 which discussed the negative public impacts of the prior CMLS rules and the prior conduct of the CMLS and its members.

27. The DOJ’s competitive impact statement found that sellers in the area served by CMLS had been paid materially higher commissions on average than sellers in other parts of South Carolina as a result of the improper CMLS rules and conduct during the study period of 2005 through 2008 as a result of rules and conduct which included, but was not limited to, the exclusion of lower cost brokerage firms, and the prohibition against listing arrangements which allowed individual sellers to retain the right to sell properties on their own without owing a commission.

28. One of the express purposes of the CMLS Order was the “prompt and certain” elimination of “impediments to competition among brokers in the Columbia area” which the CMLS voluntarily agreed had existed prior to the CMLS Order.

29. The CMLS Order prohibited certain practices of the CMLS which had effectively excluded certain real estate brokers and firms from participation in the CMLS due to their reduced commission structures, and ordered specific changes to the rules of the CMLS, including the rules which governed the listing of properties in the CMLS data base.

30. Section V Required Conduct, subsection B of the CMLS Order sets forth 20 specific revisions to the CMLS bylaws and rules which were required in order for the CMLS to eliminate the competition limiting aspects of its prior bylaws and rules.

31. One of the abuses which the DOJ sought to and did eliminate was the ability of individual members of the listing services to individually and selectively limit which properties within their respective portfolios would be made available to competing brokers and agents;

32. The DOJ eliminated “group action” rules which allowed that type of “individual action,” establishing them as being anti-competitive acts prohibited by Section 1 of the Sherman Act.

33. The mandatory rule changes ordered under the CMLS Order required the mandatory listing of all marketed properties within 2 business days unless written consent to withhold a listing was obtained from the seller.

34. Section V Required Conduct, subsection H of the CMLS Order specifically required the CMLS to “furnish to each Member and Licensee a hard or electronic copy of

this Final Judgment and a hard or electronic copy of CMLS's Rules modified to conform to the provisions of this Final Judgment; . . ." within 5 business days after entry of the CMLS Order.

35. The CMLS Order not only required the modification of the existing CMLS rules, but it required CMLS and its members to abide by the modified rules, and for CMLS to enforce compliance with those modified rules.

36. The failure of any CMLS member to adhere to the revised rules of the CMLS under the CMLS Order constitutes an unfair anti-competitive act on the part of that member.

37. The CMLS rules, as modified under the CMLS Order, required, among other things, that (i) *written listing agreements signed by the selling owner be obtained for ALL listed properties* (emphasis added), (ii) required all marketed properties to be listed in the CMLS within two (2) business days of obtaining the listing, (iii) required specific written consent of the selling owner to withhold a property from the CMLS database for any reason, (iv) required the use of CMLS approved data entry and other forms in many situations, and (v) required each member brokerage firm to operate in accordance with all applicable South Carolina real estate brokerage laws.

38. Upon information and belief, Defendant SVR was a member in good standing with CMLS on May 2, 2008, when the DOJ initiated its action against CMLS under Section 1 of the Sherman Act, and therefore Defendants SVR and Wilkins, as well

as AWB either knew or should have known about the above described DOJ action and its outcome.

39. Upon information and belief, Defendant SVR was a member in good standing of the CMLS on August 17, 2009, the date the CMLS Order was finalized and entered.

40. Upon information and belief, Defendants SVR and Wilkins, as well as AWB were served with a hard or electronic copy of the CMLS Order and modified CMLS rules as required by Section V, subsection H of the CMLS Order, and within the time frame set forth in that subsection of the CMLS Order.

Defendant Wilkins Attorney Status

41. Upon information and belief, during calendar year 2006 and for several years thereafter, Defendant Wilkins was a licensed attorney in South Carolina, and in “active” status.

42. Upon information and belief, at some point after calendar year 2008, Defendant Wilkins changed his status as a licensed attorney in South Carolina from “active” to “inactive.”

44. As late as April 27, 2017, Defendant Wilkins, after changing to “inactive” status, described himself as a “licensed attorney in his own right” on the Defendant SVR website.

45. Plaintiff RKP pointed out the SVR website reference to Defendant Wilkins being a “licensed attorney” in a telephone conversation on April 27, 2017, and the reference to Wilkins’ status as a licensed attorney was removed from the SVR website later that day.

46. AWB confirmed to Plaintiff RKP via email on April 27, 2017 that she had directed a SVR employee to remove the reference to Defendant Wilkins’ status as an attorney earlier that day, and that the employee had in fact removed the reference.

47. On May 18, 2017, Plaintiff RKP sent an email to Defendant Wilkins requesting the date Wilkins transitioned from “active” to “inactive” status, to which Wilkins informed RKP that he did not recall the date, made no effort to determine the date, and further instructed RKP to obtain the date from the South Carolina Bar.

48. Rule 5.7 of the South Carolina Rules of Professional Conduct (the “SCRPC”) provide (in relevant part) that a lawyer “shall be subject to the Rules of Professional Conduct with respect to the provisions of law related services, as defined in paragraph (b), if the law related services are provided:

- (1) . . .; or
- (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law related services

knows that the services are not legal services and the protections of the client lawyer relationship do not exist.

49. Comment 2 to SCRPC Rule 5.7 expressly provides that “Rule 5.7 applies to the provision of law related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law related services are performed . . .” and that “the conduct of a lawyer involved in the provision of law related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services.”

50. Comment 9 to SCRPC specifically includes “real estate counseling” in the definition of “law related services.”

51. Defendant Wilkins provided legal services to the Plaintiffs at various times during the period January 1, 2006 through December 31, 2018, including, but not limited to (i) the review and recommendation of contracts with contractors and utility providers, (ii) drafting legal documents necessary for the development of the Property, (iii) providing property tax advice with respect to the application of the South Carolina tax provisions to the Property as developed, (iv) providing legal advice on the interpretation of legal restrictions, covenants, easements, etc., and (v) providing draft bylaws to homeowners for use in the operation of the homeowners association without any disclaimer of legal advice on such draft bylaws.

52. As a licensed attorney and member of the South Carolina Bar, Defendant Wilkins was subject to the South Carolina Rules of Professional Conduct (the “SCRPC”)

with respect to his non-attorney business interests, including but not limited to RPW and SVR.

53. As a licensed attorney and member of the South Carolina Bar, Wilkins had the knowledge and expertise to fully understand the requirements and consequences of the CMLS Order on the Defendants.

Hiring of Defendants Wilkins, RPW and SVR

54. In early 2006, the Defendants were known to Plaintiff RKP, LOP and EGP to be in the business of developing and marketing real estate parcels into high end subdivisions, and had developed several such tracts on and near Lake Murray in the years prior to 2006.

55. In early 2006, the Defendants represented to the Plaintiffs that they could legally undertake the development, marketing and sale of the Property.

56. The Plaintiffs were aware that the Defendants had been involved in the development of other residential subdivisions in the local area near the Property including, but not limited to, Spence Plantation, Summerlake, Secret Cove, Greenside, Crown Pointe, Sterling Lake, Sharon Lake, Windsor Courtyard and Sharon Lake (collectively "Other RPW Developments").

57. In early 2006, Plaintiff RKP, LOP and EGP conferred and collectively decided to request the assistance of the Defendants in the development, marketing and sale of the Property.

58. The Plaintiffs placed their trust and confidence in the Defendants' representations as to (i) their ability to competently develop, market and sell the Property, and (ii) their ability to do so in accordance with all applicable laws, rules and regulations.

59. In early 2006, the original plans included developing all 27 acres of the Property as a single subdivision, with different sections of the Property to be developed, marketed and sold in sequential phases.

60. As a result of substantial negative changes in the economy, only one such phase of the proposed subdivision was ever developed.

Approval of Phase I of Panorama Point by Lexington County

61. William A. Whitworth of Whitworth and Associates, Inc. (Whitworth"), PLS #3440, worked with the Plaintiffs and the Defendants beginning in 2006, to survey and lay out proposed lot lines, roadways, easements, and other features necessary to obtain approval from Lexington County and other regulatory bodies, with respect to the design of the subdivision to be known as Panorama Point.

62. Upon information and belief, working drafts of the subdivision plat were produced at various times prior to June 4, 2007, and a final plat dated June 4, 2007 was executed by Plaintiff RKP, and submitted by Defendant Wilkins or Defendant RPW to Lexington County for final approval as a “bonded plat.”

63. Lexington County approved the bonded plat of Phase I of the Panorama Point subdivision dated June 4, 2007, and the plat was recorded with the Registrar of Deeds for Lexington County on June 26, 2007, and recorded at Plat Book 12118, Page 203 (the “Bonded Plat”).

64. The Bonded Plat reflected the subdivision of 30 lots which were designated as “Phase I” of the Panorama Point subdivision, which Phase I consisted of approximately 12.219 acres.

65. The Bonded Plat established certain express easements under applicable South Carolina law as reflected on the Bonded Plat.

Formation of Plaintiff LLC

66. On June 29, 2006, Plaintiff RKP formed a limited liability company named Panorama Point, LLC, by completing and filing articles of organization for a limited liability company with the South Carolina Secretary of State.

67. Plaintiff RKP was the original registered agent of Plaintiff LLC, and the original “designated office” and “registered office” for LLC was 107-B Vista Oaks Drive, Lexington, South Carolina 29072.

68. Plaintiff RKP remains the registered agent for Plaintiff LLC and the registered office remains 107-B Vista Oaks Drive, Lexington, South Carolina 29072.

69. At various times after June 29, 2006, the membership of Plaintiff LLC included LOP, EGP, the Estate, the Trust, and Janet S. Porth (the wife of LOP and hereinafter referred to as “JSP”).

70. Plaintiff RKP has acquired 100% of all outstanding interests in Plaintiff LLC previously owned by LOP, the Estate, the Trust and Janet S. Porth.

71. From its formation on June 29, 2006, until January 22, 2007, Plaintiff LLC owned no interest whatsoever in the Property, or in any other real property.

72. On January 22, 2007, Plaintiff RKP deeded a 0.419 acre tract designated as Lot 6 on the Bonded Plat to the LLC.

73. Also on January 22, 2007, Plaintiff LLC deeded Lot 6 to the first purchaser of a lot in the new subdivision.

74. On June 27, 2007, Plaintiff RKP deeded an additional 3.799 acres to Plaintiff LLC which represented all of Lots 1, 2, 3, 4, 5, 7, 8, and part of Lot 12 as delineated on the Bonded Plat.

The Death of EGP

75. On November 11, 2009, EGP died died “testate” with a Will and Trust dated March 11, 2002 (the “Will”), and which named LOP as her personal representative and initial trustee of the Edna G. Porth Living Trust U/T/A dated 3/11/2002 (the “Trust”).

76. Upon information and belief, Alex Weatherly, Esquire was retained by LOP to represent LOP in his capacity as personal representative of the Estate, and as trustee of the Trust, during November of 2009, and advised and assisted LOP with all of his duties as personal representative and trustee during the period beginning in November of 2009, and continuing until the present day.

Absence of Required Written Agreements

77. Prior to January 1, 2017, the Plaintiffs never signed a written agreement meeting the requirements of SC Code 40-57-135(C)(4) and (D)(4) with Defendant SVR.

78. The Plaintiffs never signed a written agreement meeting the requirements of SC Code 40-57-135(C)(4) and (D)(4) with neither Defendants RPW or Wilkins nor AWB.

79. The Defendants never provided copies of executed listing agreements to the Plaintiffs as required under SC Code 40-57-135(D)(4)(k).

80. Plaintiff RKP made inquiry of LOP and Alex Weatherly as to whether any of the owners of the Property, other than RKP and Plaintiff LLC, had ever executed a written agreement meeting the requirements of SC Code 40-57-135(C)(4) with any of the Defendants.

81. Alex Weatherly on behalf of himself and LOP, responded that none of the owners of the Property ever executed a written agreement meeting the requirements of SC Code 40-57-135(C)(4) with any of the Defendants.

82. On or about February 3, 2018, AWB confirmed that there were no legally compliant listing agreements under SC Code 40-57-135(C)(4) with respect to the Plaintiffs' ownership in the Property.

83. The failure of Defendant SVR as a member of Defendant CMLS to obtain written listing agreements with the Plaintiffs was (i) a knowing violation of the CMLS rules, and (ii) a knowing violation of the previously described CMLS Order.

84. The Defendants knowingly and intentionally made no attempt whatsoever to comply with the court ordered changes to the CMLS or the CMLS Order with respect to

the listing, marketing and sale of the Plaintiffs' interests in the Property, after receiving a copy of the CMLS Order as required by the Judge Blatt.

85. The Defendants knowingly and intentionally even failed to comply with the rules of the CMLS in effect prior to the CMLS Order with respect to the listing, marketing and sale of the Plaintiffs' interests in the Property from early 2006 until the date of the CMLS Order.

86. The Defendants knowing and intentional failure to comply with the rules of the CMLS, both before and after the CMLS Order was undertaken by the Defendants to gain an unfair and deceptive advantage over competing brokers and agents with respect to procuring buyers and earning the buyers' portion of applicable commissions.

The Development Agreement

87. On December 21, 2006, Plaintiff RKP signed a "Development Agreement" on behalf of Plaintiff LLC between Defendant RPW and LLC.

88. Neither Defendant Wilkins or AWB individually, nor Defendant SVR were parties to the Development Agreement.

89. LOP, JSP, EGP, the Estate, and the Trust were not parties to the Development Agreement.

90. The Development Agreement referenced a description of the real estate to which it was subject; however, no description ever existed or became a part of the agreement.

91. Defendants Wilkins and RPW knew that Plaintiff LLC was not the owner of any property to be developed and known as Panorama Point and Property, and knew it uncertain which parcels comprising the Property would ever be owned by Plaintiff LLC.

92. In December of 2006, Defendants Wilkins and RPW made a request to Plaintiff RKP that the Development Agreement be executed knowing no portion of the Property had been transferred to the LLC at that time.

93. The Plaintiffs believed that a significant portion of the development fees to be earned by RPW were for the marketing of the Property as specifically stated in the Development Agreement.

94. Defendant RPW was directly and continuously involved in the marketing and sale of the Property as expressly stated in the Development Agreement from early 2006 until at least December 31, 2016.

95. A substantial portion of the compensation paid to Defendant RPW under a formula set forth in the Development Agreement was for the marketing and sale of the Property.

96. Upon information and belief, Defendants RPW and SVR routinely “blended” their activities (i) by using the same employees without distinction, (ii) co-marketing their services in advertising, (iii) using the same website for both RPW and SVR, and (iv) by sharing the same office at 955 Old Cherokee Road, Lexington, South Carolina for all years following the closing of RPW’s previous office at 336 Old Chapin Road, Lexington, South Carolina.

97. Pursuant to the Development Agreement, Defendant RPW had sole authority to hire Defendant SVR without input from the Plaintiffs, and either Defendants RPW or Wilkins did, in fact, retain Defendant SVR with respect to all of the Property.

98. Under the express language of the Development Agreement, the Development Agreement could only be terminated for “cause.”

99. Since Defendant RPW expressly had sole authority to retain Defendant SVR under the provisions of the Development Agreement, the Plaintiffs reasonably believed they could not terminate Defendant SVR unless Defendant RPW was terminated for “cause” in accord with the Development Agreement.

100. The activities of Defendant RPW under the Development Agreement constituted “broker” activities under the definition in SC Code 40-57-30(3) as the activities were (i) the marketing and sale of the Property, and (ii) activities which constituted real estate consulting.

101. The Development Agreement did not meet the statutory requirements of SC Code 40-57-135(D)(4).

102. Since Defendant RPW was carrying out “broker” activities under definition found in SC Code 40-57-30(3), and since the Development Agreement did not meet the express statutory requirements of 40-57-135(D)(4), Defendant RPW violated SC Code 40-57-135(C)(4) by failing to obtain a legally compliant, written agreement.

103. The Development Agreement was and is unlawful and void under South Carolina law.

104. The terms of the Development Agreement, to the extent that it addressed the marketing and sale of the Property, violated the rules of the CMLS, and violated the CMLS Order.

105. Defendants Wilkins and RPW knew or should have known that the terms of the Development Agreement which allowed Defendant RPW to control all aspects of the marketing and sale of the Property, other than the establishment of sales prices which required input from the Plaintiffs, violated both the rules of the CMLS and the CMLS Order issued by Judge Blatt.

106. Upon information and belief, the unlawful, deceptive, improper and unfair terms of the Development Agreement granting Defendant RPW the ability to control the selection of SVR as the brokerage firm handling the marketing and sale of the Plaintiffs

interest in the Property, were designed intentionally to provide the Defendants an unfair and deceptive competitive advantage over competing brokers and agents with respect to the ability to earn commissions from the marketing and sale of the Property.

107. The Development Agreement could not, and did not apply to LOP, JSP, EGP, the Estate, or the Trust due to (i) the fact that only RPW and the LLC were parties to the Development Agreement under its express terms, and (ii) the fact that the Development Agreement was unlawful and void under applicable law.

108. Despite the unlawful and unenforceable nature of the Development Agreement, during the period beginning on January 1, 2006, and extending through at least December 31, 2017, the Defendant RPW actually exercised the authority outlined in the Development Agreement with respect to the development, marketing and sale of the Property, and requested and received compensation as outlined in the Development Agreement with the exception of a small number of transactions for which no development fees were paid.

109. Upon information and belief, neither LOP, JSP, EGP, the Estate, nor the Trust executed a written agreement of any type with Defendants RPW or Wilkins for the services contemplated by the Development Agreement.

110. While Defendant Wilkins had a “broker-in-charge” license issued by the Commission for the SVR office location, upon information and belief, the Commission

never issued a license of any type for the RPW office at 336 Old Chapin Road, Lexington, SC.

111. The conduct of “broker” activities by Defendants Wilkins, RPW and employees of Defendant RPW at the 336 Old Chapin Road, Lexington, SC location was a violation of SC Code 40-57-135(C)(2).

The Plaintiff LLC’s Ownership of Real Estate Parcels

112. From January 22, 2007 (the date of the first deed from RKP to the LLC), until September 12, 2018, the only parcels of real estate owned by the LLC for more than one (1) day (for closing purposes) were Lots 1, 2, 3, 4, 5, 7, 8, and a portion of Lot 12, all as delineated on the Bonded Plat.

113. The Plaintiff LLC’s ownership in Lots 9 through 30, including the remaining portion of Lot 12, was short term for the purposes of sale only (owned by LLC momentarily during closing to pass title through the LLC in order to properly impose applicable restrictions and covenants), and was accomplished through properly executed and recorded deeds; which deeds were delivered to the LLC in exchange for full and adequate consideration under applicable South Carolina law.

114. Lots 9 through 30 were owned at various times by RKP, EGP, the Estate or the Trust prior to being deeded to the LLC for the purpose of closing with purchasers.

115. The legal ownership of Lots 9 through 30 varied, from time to time, based on unrecorded gift deeds which were timely and accurately reported on appropriate Federal Gift Tax returns, and properly reported on the Estate's Form 706 Estate Tax return.

The Development Financing

116. The Plaintiffs, along with the other owners of the Property, obtained financing to pay for the costs of the infrastructure identified on the Bonded Plat from First Community Bank in Lexington, South Carolina ("Development Financing").

117. Additionally, Plaintiff RKP obtained a letter of credit from First Community Bank in favor of Lexington County secured by RKP's personal residence at 206 Belfry Court, Lexington, SC in the amount of \$152,376.86 to secure the Bonded Plat and the construction of the infrastructure and utilities shown on the Bonded Plat (the "Letter of Credit").

118. The Letter of Credit was required by Lexington County to allow sales of lots in Phase I to commence prior to the completion of construction of the infrastructure and utilities shown on the Bonded Plat.

119. The Development Financing was renewed and amended several times during the relevant period, and at one point reached a principal balance of \$1,500,000.00.

120. The Development Financing was required to be repaid from lot sales in Phase I based on predetermined “lot release” amounts for each lot sold, and as such the rate of repayment was directly impacted by the rate of lot sales in Phase I.

The Marketing Efforts

121. Defendants RPW and SVR released a “press release” to the public in June of 2006 (the “Press Release”) informing the public about the development of Panorama Point.

122. The publication of the Press Release by the Defendants constituted “marketing” of the Property, and in particular, the proposed Panorama Point subdivision.

123. The Press Release identified Defendants RPW and SVR as the entities handling the development, marketing, and sale of the Property.

124. At the time of the release of the Press Release, the Plaintiffs had not executed a written agreement of any type with the Defendants.

125. During 2006, the Defendants placed a large sign on the right of way of West Circle Drive near the entrance of the Panorama Point subdivision (the “Marketing Sign”) notifying the general public that Defendant SVR was marketing the Property, and that Defendant RPW was involved in the development and marketing of the Property.

126. The Marketing Sign remained in place for many years.

127. Upon information and belief, during 2006 the Defendants began directly contacting potential purchasers in an attempt to sell the various lots in Phase I of Panorama Point, and adjoining parcels, and such direct marketing continued through at least December 31, 2016.

128. Prior to January 1, 2017, the Plaintiffs assumed that Defendants were handling the development, marketing and sale of the Property in accordance with all applicable South Carolina laws.

CMLS Listings

129. From time to time during the period beginning on January 1, 2006 and continuing into at least September of 2018, Defendant SVR placed many of the Phase I lots and other parcels of the Property in the CMLS.

130. At various times prior to January 1, 2017, Defendant SVR withheld certain lots and parcels owned in whole or part by the Plaintiffs from listing in the CMLS in violation of the CMLS rules and the CMLS Order.

131. At various times prior to January 1, 2017, Defendant SVR withdrew certain lots from listing in the CMLS system and then resubmitted them so they would “appear as new listings” in violation of the CMLS rules and the CMLS Order.

132. Despite the rules of the CMLS, and the entry of the CMLS Order, the Plaintiffs were never asked by the Defendants to execute the appropriate CMLS forms to withhold any listings, nor were any such CMLS withholding forms ever executed by the Plaintiffs.

133. Despite the rules of the CMLS and the entry of the CMLS Order, at no time prior to January 1, 2017, did Defendant SVR present any CMLS form of any type to the Plaintiffs for execution.

134. Prior to January 1, 2017, the Plaintiffs never executed or initialed any CMLS form or data input sheet of any type with respect to any part of the Property.

135. At various times prior to January 1, 2017, Defendant SVR maintained many of the lots in Panorama Point as “pocket listings” not entered into the CMLS, and which were not available for view by other brokerage firms or the general public in violation of the CMLS rules and the CMLS Order.

136. Prior to January 1, 2017, the Defendants never advised the Plaintiffs of the various requirements for written agreements or written consents under the CMLS rules, or of the existence and requirements of the CMLS Order.

137. Prior to January 1, 2017, the Plaintiffs were reasonable in their assumptions that the Defendants were handling the marketing and sale of the Property in accordance with all applicable rules of the CMLS.

138. The Defendants knew or should have known that Defendant SVR was not complying with the written rules of the CMLS with respect to the marketing of the Plaintiffs' interests in the Property, and that SVR was violating the CMLS Order.

139. The Defendants routinely listed Phase I waterfront lots in the CMLS by only placing an image of the entrance sign to the subdivision in the listing, with no image of the specific lot or its view of Lake Murray.

140. The Defendants consistently refrained from using more effective marketing methods and tools such as drone videos in the marketing of the Plaintiffs' interests in the Property.

141. Upon information and belief, the Defendants utilized limited marketing methods and tools in an effort to increase the Defendants' likelihood of representing both the Plaintiffs and the purchasers by limiting the Property's exposure to other real estate agents and firms.

January 2017 through sometime after August 28, 2018 Discovery of Issues

142. Prior to between January 10, 2017 and sometime after August 28, 2018, the Plaintiffs were unaware of whether (i) the requirements of SC Code 40-57-135(C)(4) and (D)(4), (ii) the requirements of SC Code 40-57-137(M), and (iii) the requirements of the CMLS rules and the CMLS Order may have possibly been fulfilled by the Defendants.

143. At all times prior to and between January 10, 2017 and September 2018, AWB was the licensee at Defendant SVR personally responsible for the “listing” of the Panorama Point lots and related parcels owned by the Plaintiffs.

144. As of January 10, 2017, Plaintiff RKP owned Lot 23, and the LLC owned Lots 2 and 3.

145. Sometime in January 2017, AWB contacted Plaintiff RKP to advise him that she wished to turn over the listing responsibilities to STP for the remaining 3 lots owned by RKP and Plaintiff LLC.

146. Plaintiff RKP’s wife, Shannon Tidwell Porth (“STP”), is licensed as a “salesman” by the Commission, with her “salesman” license number being 45848.

147. Plaintiff RKP and STP were married on December 12, 2008.

148. STP had a strained relationship with LOP and his wife JSP both before and after EGP’s death, due to issues unrelated to the development of the Property.

149. After the death of EGP, the relationship between Plaintiff RKP and LOP became more strained due to (i) disputes over LOP's handling of the probate of the Estate, and (ii) disputes over the payment of the portion of the Development Financing allocated to future phases and property owned by LOP.

149. As a result of these strained relationships, STP had almost no involvement, other than very limited consulting with RKP and AWB about pricing, in the marketing and sale of the Property until after January 1, 2017.

150. Prior to January 10, 2017, STP had no responsibility whatsoever for the listing or closing of the properties sold in the Transactions.

151. Prior to January 10, 2017, STP did not attend a closing of any of the sales of the Property.

152. At the time STP transferred her license to Defendant SVR, STP received a copy of the SVR written "policy manual" required to be given to all licensed agents by Defendant Wilkins as Defendant SVR's broker in charge pursuant to SC Code 40-57-137(B)(hereinafter the "Policy Manual").

153. The Policy Manual clearly states in several sections that SVR and its associated licensees must obtain written listing agreements in accordance with applicable South Carolina law before marketing any property for clients or customers.

154. Prior to on or about January 10, 2017, STP was reasonable in her assumption that the Defendants were complying with all applicable laws with respect to not only the Property, but with respect to all other business of the Defendants.

155. In the first week of January of 2017, Plaintiff RKP, on behalf of himself and with authority for Plaintiff LLC, consulted with STP about the proper prices for the renewal of the listings for Lots 2, 3 and 23.

156. Within a day or two of agreeing on the new listing prices, and on or about January 10, 2017, STP presented Plaintiff RKP with (i) listing agreements mandated by SC Code 40-57-135(C)(4), and (ii) CMLS data input sheets for the marketing and relisting in CMLS of Lots 2, 3 and 23.

157. After being presented with the legally mandated listing agreements for Lots 2, 3 and 23, Plaintiff RKP informed STP that he had never seen either (i) the listing agreement form or (ii) the CMLS form (both of which had signature blanks for the “owner” of the listed property), and that neither AWB nor the Defendants had ever presented such forms to him to sign on behalf of Plaintiff LLC or himself personally.

158. On or about January 10, 2017, RKP executed the required documents for the marketing and listing of Lots 2, 3 and 23, and subsequently those lots were listed in the CMLS in compliance with South Carolina law, and the rules of the CMLS also on or about January 10, 2017.

159. In the months following January 2017, Plaintiff RKP began to research the laws governing Defendants RPW's and SVR's handling of the marketing of the Phase I lots and related parcels as a result of an increasing number of disputes with the Defendants related to the handling of the development, marketing and sale of the Property.

160. Only in early 2018, Plaintiff RKP had determined conclusively that the Defendants had not complied with applicable laws, including but not limited to SC Code 40-57-135 and 137 in the marketing and sale of the Property, and that the Plaintiffs had a valid legal claim for damages, including the refund of unlawful commissions and development fees.

161. Plaintiff RKP, was sworn in as a licensed attorney in South Carolina in November of 1983, and practiced law with the Nexsen Pruet law firm until December 31, 2003, when he resigned as an equity partner and became "of counsel."

162. After January 1, 2004, RKP practiced law on a part time basis with Nexsen Pruet until sometime in 2007 when he effectively "retired" from the active practice of law.

163. Plaintiff RKP has never handled a real estate closing in his career as an attorney, nor has RKP ever advised a real estate brokerage firm on compliance with applicable real estate laws, or other real estate matters.

164. Plaintiff RKP had not listed a parcel of real estate for sale with a licensed real estate agent since the late 1980's until approximately April of 2010 when he listed his former residence at 206 Belfry Court, Lexington, SC 29072 with his wife STP.

165. Plaintiff RKP has never used a licensed real estate agent, other than his wife STP, in the purchase of any real property. He and his wife STP have purchased two parcels jointly without the use of another licensed agent.

The Transactions and Commission Payments

166. Between January 2007 and December 2016, the Plaintiffs sold interests in the Property on 23 separate occasions in which SVR represented the Plaintiffs.

167. On January 16, 2007, Charles R. McMillan, Jr. and Laura H. McMillan ("Purchaser No. 1") purchased Lot 6 from the LLC for \$515,000.00. Defendant SVR represented Plaintiff LLC as the seller, and represented Purchaser No. 1 as the buyer. Defendant SVR received a total commission of \$27,500.00 at the closing.

168. On June 28, 2007, Mark C. McMillan ("Purchaser No. 2") purchased Lot 4 from the LLC for \$425,000.00 (after landscaping credit). Defendant SVR represented Plaintiff LLC as the seller, and represented Purchaser No. 2 as the buyer. Defendant SVR received a total commission of \$21,250.00 at the closing.

169. Sometime in or around July 2007, Robert F. Motley and Tammy Motley (“Purchaser No. 3”) purchased Lot 5 from the LLC for \$425,000.00 (after landscaping credit). Defendant SVR represented the LLC as the seller, and represented Purchaser No. 3 as the buyer. Defendant SVR received a total commission of \$21,250.00 at the closing.

170. On July 12, 2007, Rodney K. Dooley, Jr. and Anna J. Dooley (“Purchaser No. 4”) purchased Lot 30 and the house located on Lot 30 from the LLC for \$230,000.00. Defendant SVR represented the LLC as the seller, and represented Purchaser No. 4 as the buyer. Defendant SVR received a total commission of \$13,500.00 at the closing.

180. On July 28, 2008, Brant M. Hale and Ying H. Hale (“Purchaser No. 5”) purchased Lot 27 from the LLC for \$100,000.00 (after landscape/grading allowance). Defendant SVR represented the LLC as the seller, and represented Purchaser No. 5 as the buyer. Defendant SVR received a total commission of \$7,500.00 at the closing.

181. On June 25, 2009, Stephen M. Hunter and Shannon C. Hunter (“Purchaser No. 6”) purchased Lot 1 from the LLC for \$282,500.00. Defendant SVR represented the LLC as the seller, and represented Purchaser No. 6 as the buyer. Defendant SVR received a total commission of \$14,000.00 at the closing.

182. On August 6, 2010, Thomas W. Behnke and Theresa W. Behnke (“Purchaser No. 7”) purchased Lot 12 from the Estate for \$185,000.00 (after credit for grading). Defendant SVR represented the Estate as the seller, and represented Purchaser No. 7 as the buyer. Defendant SVR received a total commission of \$9,250.00 at the closing.

183. On January 7, 2011, Kenneth L. Garrick and Tommie S. Garrick (“Purchaser No. 8”) purchased Lot 18 from the Estate for \$187,500.00. Defendant SVR represented the Estate as the seller, and represented Purchaser No. 8 as the buyer. Defendant SVR received a total commission of \$8,780.00 at the closing.

184. On January 3, 2012, F. Cal Dent, III (“Purchaser No. 9”) purchased Lot 7 from the LLC for \$315,000.00. Defendant SVR represented the LLC as the seller. Defendant SVR did not represent Purchaser No. 9. Defendant SVR received a total commission of \$7,875.00 at the closing.

185. On June 4, 2012, Purchaser No. 9 purchased Lots 8, 9 and 10 from the LLC for \$453,500.00. SVR represented the LLC as the seller. SVR did not represent Purchaser No. 9 as the buyer. Defendant SVR received a total commission of \$11,337.50 at the closing.

186. On April 11, 2013, Patrick Cassidy (“Purchaser No. 10”) purchased Lot 17 from the Trust for \$185,000.00. Defendant SVR represented the Trust as the seller, and represented Purchaser No. 10 as the buyer. Defendant SVR received a total commission of \$9,250.00 at the closing.

187. On October 1, 2013, Thomas B. Johnston and Robin Johnston (“Purchaser No. 11”) purchased Lot 21 from the LLC for \$70,000.00. Defendant SVR represented the

LLC as the seller. Defendant SVR did not represent Purchaser No. 11. Defendant SVR received a total commission of \$1,400.00 at the closing.

188. On April 1, 2014, Lewis Craig Whittle and Mary S. Whittle (“Purchaser No. 14”) purchased Lot 16 from the LLC for \$190,000.00. Defendant SVR represented the LLC as the seller, and represented Purchaser No. 14 as the buyer. Defendant SVR received a total commission of \$9,500.00 at the closing.

189. On April 3, 2014, Melisa H. Herndon (“Purchaser No. 12”) purchased Lot 25 from the LLC for \$300,000.00. Defendant SVR represented the LLC as the seller. Defendant SVR did not represent Purchaser No. 12. Defendant SVR received a total commission of \$6,000.00 at the closing.

190. On October 2, 2014, Jeffrey R. Floyd (“Purchaser No. 13”) purchased Lot 19 from the LLC for \$191,715.00. Defendant SVR represented the LLC as the seller. SVR did not represent Purchaser No. 13. Defendant SVR received a total commission of \$4,792.87 at the closing.

191. On July 30, 2013, Suzanne Taylor Graham Grigg and Daniel E. Grigg (“Purchaser No. 14”) purchased Lot 22 from the LLC for \$300,000.00. Defendant SVR represented the LLC as the seller. Defendant SVR did not represent Purchaser 14 as the buyer. Defendant SVR received a total commission of \$7,500.00 at the closing.

192. On December 10, 2012, Michael E. Hutchins and Paula P. Hutchins (“Purchaser No. 15”) purchased 2.636 acres from the Trust for \$535,000.00. Defendant SVR represented the Trust as the seller, and represented Purchaser No. 15 as the buyer. Defendant SVR received a total commission of \$26,750.00 at the closing.

193. On October 23, 2014, Purchaser No. 15 purchased 0.81 acres from the Trust for \$325,000.00. Defendant SVR represented the Trust as the seller, and represented Purchaser No. 15 as the buyer. Defendant SVR received a total commission of \$16,250.00 at the closing.

194. On September 26, 2013, Dennis A. Coco (“Purchaser No. 16”) purchased Lot 15 from the LLC for \$185,000.00. Defendant SVR represented the LLC as the seller, and represented Purchaser No. 16 as the buyer. Defendant SVR received a total commission of \$9,250.00 at the closing.

195. On May 7, 2015, Kenneth Brad Matthews and Rebecca F. Matthews (“Purchaser No. 17”) purchased Lot 13 from the LLC for \$194,000.00. Defendant SVR represented the LLC as the seller. Defendant SVR did not represent Purchaser No. 17 as the buyer. Defendant SVR received a total commission of \$4,850.00 at the closing.

196. On March 13, 2015, Christina Marie Dent (“Purchaser No. 18”) purchased Lot 11 from the LLC for \$137,500.00. Defendant SVR represented the LLC as the seller, and represented Purchaser No. 18 as the buyer. Defendant SVR received a total commission of \$6,875.00 at the closing.

197. On March 16, 2015, Purchaser No. 15 purchased 0.175 acres from the Trust for \$137,500.00. Defendant SVR represented the Trust as the seller, and represented Purchaser No. 15 as the buyer. Defendant SVR received a total commission of \$6,875.00 at the closing.

198. On May 1, 2015, Gary G. Stanfield and Pamela J. Stanfield (“Purchaser No. 19”) purchased Lot 24 from the LLC for \$310,000.00. Defendant SVR represented the LLC as the seller, and represented Purchaser No. 19 as the buyer. Defendant SVR received a total commission of \$15,500.00 at the closing.

Payment of Development Fees to RPW

199. On June 28, 2007, Plaintiff LLC paid a development fee in the amount of \$20,065.00 to Defendant RPW with respect to the sale of Lot 4.

200. On August 6, 2010, Plaintiff LLC paid a development fee in the amount of \$8,750.00 to Defendant RPW with respect to the sale of Lot 12.

201. On May 7, 2015, Plaintiff LLC paid a development fee in the amount of \$9,446.61 to Defendant RPW with respect to the sale of Lot 13.

202. On May 1, 2015, Plaintiff LLC paid a development fee in the amount of \$14,725.00 to Defendant RPW with respect to the sale of Lot 24.

203. On July 28, 2008, Plaintiff LLC paid a development fee in the amount of \$4,586.87 to Defendant RPW with respect to the sale of Lot 27.

204. On December 10, 2012, the LLC paid a development fee in the amount of \$25,412.00 to Defendant RPW with respect to the sale of 2.636 acres to Purchaser 15.

205. On October 23, 2014, Plaintiff LLC paid a development fee in the amount of \$15,367.38 to Defendant RPW with respect to the sale of .81 acres to Purchaser 15.

206. On March 16, 2015, Plaintiff LLC paid a development fee in the amount of \$6,485.00 to Defendant RPW with respect to the sale of .175 acres to Purchaser 15.

207. In or around sometime in June 2009, Plaintiff LLC paid a development fee to Defendant RPW with respect to the sale of Lot 1.

208. On July 15, 2007, Plaintiff LLC paid a development fee in the amount of \$20,077.00 to Defendant RPW with respect to the sale of Lot 5.

209. On January 31, 2012, Plaintiff LLC paid a development fee in the amount of \$15,437.50 to Defendant RPW with respect to the sale of Lot 7.

210. On June 30, 2012, Plaintiff LLC paid a development fee in the amount of \$21,346.36 to Defendant RPW with respect to the sale of Lots 8, 9 and 10..

211. On March 31, 2015, Plaintiff LLC paid a development fee in the amount of \$6,485.31 to Defendant RPW with respect to the sale of Lot 11.

212. On December 31, 2013, Plaintiff LLC paid a development fee in the amount of \$8,788.00 to Defendant RPW with respect to the sale of Lot 15.

213. On April 30, 2014, Plaintiff LLC paid a development fee in the amount of \$9,025.00 to Defendant RPW with respect to the sale of Lot 16.

214. On April 11, 2013, Plaintiff LLC paid a development fee in the amount of \$8,787.00 to Defendant RPW with respect to the sale of Lot 17.

215. Sometime in 2013, Plaintiff LLC paid a development fee in the amount of \$3,325.00 to Defendant RPW with respect to the sale of Lot 21.

216. On December 31, 2013, Plaintiff LLC paid a development fee in the amount of \$14,250.00 to Defendant RPW with respect to the sale of Lot 22.

217. On April 30, 2014, Plaintiff LLC paid a development fee in the amount of \$14,250.00 to Defendant RPW with respect to the sale of Lot 25.

218. On July 15, 2007, Plaintiff LLC paid a development fee in the amount of \$6,032.00 to Defendant RPW with respect to the sale of Lot 30.

Summary of the Transactions

219. Defendant SVR participated in 23 separate transactions as set forth in Paragraphs 166 through 218 (“Transactions”) of this Complaint.

220. Defendant SVR represented both the seller and buyer in 18 of the Transactions, or just over seventy-eight percent (78%) of the Transactions.

221. Upon information and belief, Defendant SVR’s seventy-eight percent (78%) rate for representing both the seller and buyer in the Transactions is several multiples of the normal rate of dual representation which would be expected in an established, mature and efficient real estate market such as that which exists in the Lake Murray and Lexington, South Carolina area.

222. Upon information and belief, Defendant SVR’s abnormally high rate of representing both the seller and buyer is the proximate result of the Defendants’ intentional manipulation of their marketing efforts, including but not limited to Defendant SVR’s improper and ineffective use of the CMLS in violation of the CMLS rules and the CMLS Order.

223. The total commissions paid by the Plaintiffs to Defendant SVR in the Transactions totaled at least \$267,035.37 (“Commissions”).

224. The total development fees paid by the Plaintiffs to Defendant RPW in the Transactions totaled at least \$263,324.68 (“Development Fees”).

Lot 15 Issues

225. After the closing of Lot 15 with Purchaser 16, Defendant RKP learned that Purchaser 16 had an existing and continuing business relationship with one or more of the Defendants.

226. The Defendants never disclosed the existence or the nature of the business relationship with Purchaser 16 to the Plaintiffs prior to the closing of Lot 15.

227. The written offer from Purchaser 16 on Lot 15 was on a “customized” SVR contract which contained substantial and material changes to the standard language of the “form” contract.

228. Defendant Wilkins personally handled the negotiation of the Lot 15 contract with the Plaintiffs on behalf of Purchaser 16, via email and oral discussions, with no mention of the existing business relationship between Defendant Wilkins and Purchaser 16.

229. Defendant Wilkins personally negotiated, via email and oral discussions, on behalf of Purchaser 16 with respect to the covenants and restrictions which Purchaser 16 wanted imposed on certain undeveloped parcels of the Property with respect to those parcels access to the Panorama Point common area boat ramp and dock.

230. The contract between Plaintiff LLC and Purchaser 16 with respect to the purchase of Lot 15, contained a provision in paragraph 4(H) requiring the LLC to contribute up to \$2500 toward the cost of rock removal if the rock removal required “blasting” with dynamite.

231. The written offer, as originally presented to Plaintiff RKP by Defendant Wilkins, requested \$5000 toward the cost of “blasting” in Section 4(H) of the written offer, but RKP refused, on behalf of the Plaintiffs, to agree to the \$5000 amount and reduced it to \$2500.

232. Upon information and belief, one or more of the Defendants informed Purchaser 16 of the potential for in ground boulders on Lot 15, and subsequently negotiated on behalf of Purchaser 16 against the Plaintiffs with respect to that issue.

233. Purchaser 16 did not utilize blasting in the removal of rock on Lot 15 when preparing the foundation of his home.

254. After the closing of Lot 15, Defendant Wilkins (i) “negotiated” on behalf of Purchaser 16 with respect to the cost of rock removal during the building of Purchaser 16’s

house on Lot 15 despite the fact that no “blasting” with dynamite had been utilized as expressly contemplated by paragraph 4(H) of the written offer, and (ii) provided incorrect legal advice to the Plaintiffs on the obligations of Plaintiffs to pay the costs of the rock removal.

Lot 24 Issues

255. After the closing of Lot 24 with Purchaser 19, Plaintiff RKP learned that Purchaser 19 had an existing and continuing business relationship with one or more of the Defendants.

256. The Defendants never disclosed the business relationships with Purchaser 19 to Plaintiffs RKP or LLC prior to the closing of Lot 24.

257. In January 2017, and in connection with the relisting of Lot 23 on the CMLS system, STP went to take pictures of Lot 23 for use in the CMLS listing.

258. In January 2017, while taking pictures of Lot 23, STP discovered in January 2017 that the landscaping of Lot 24 by Purchaser 19 had encroached into the drainage easement shown on the Bonded Plat between Lots 23 and 24, and had encroached onto Lot 23 (the “Lot 24 Encroachment”).

259. The Lot 24 Encroachment negatively affected the marketability of Lot 23, and had a material negative effect on the fair market value of Lot 23.

260. Between January 2017 and April 2017, STP made several inquiries of Defendant Wilkins regarding the approval of the Lot 24 Encroachment.

261. After one inquiry, and in the presence of STP, Defendant Wilkins asked Purchaser 16 (the purchaser of Lot 15) to “look into it.”

262. Upon information and belief, Purchaser 16 was not an employee of the Defendants during 2017 when STP made the inquiries to Wilkins regarding the Lot 24 Encroachment.

263. In the presence of STP, Purchaser 16 told Defendant Wilkins that the inquiry “made no sense” as Lot 23 “was not a lakefront lot.”

264. Lot 23 was and remains a “lakefront lot” with at least 100 feet of lake frontage.

265. Defendant Wilkins never offered any explanation to Plaintiff RKP as to why he requested Purchaser 16 to “look into” the Lot 24 Encroachment.

266. Despite multiple requests, Defendant Wilkins never explained to STP whether he had, in fact, authorized the Lot 24 Encroachment.

267. After waiting for Wilkins to respond to STP, Plaintiff RKP and Defendant Wilkins had several telephone discussions during April of 2017 regarding the approval of the Lot 24 Encroachment.

268. The purpose of these April 2017 telephone conversations was for Plaintiff RKP to determine if Defendant Wilkins had authorized the Lot 24 Encroachment, or if Purchaser 19 had encroached into the drainage easement, and onto Lot 23 without seeking permission.

269. Until sometime in 2017, Defendant Wilkins refused to acknowledge to Plaintiff RKP how the Lot 24 Encroachment was authorized, and who authorized it.

270. The Plaintiffs took the position with Defendant Wilkins that no encroachments could be made into the drainage easement without the express written approval of Plaintiff RKP and Plaintiff LLC.

271. In early 2017, Defendant Wilkins told Plaintiff RKP orally that he [Wilkins] was the “developer” and that he did not need the approval of Plaintiffs RKP or LLC to allow such encroachments or to revise the drainage easements.

272. In April of 2017, Defendant Wilkins told Plaintiff RKP that he [Wilkins] owed “no fiduciary duty” to RKP personally.

273. Plaintiff RKP, on behalf of himself personally, and on behalf of Plaintiff LLC, disagreed with Wilkins' claim that he owed no fiduciary duty to RKP personally on the basis that RKP believed, at that time, that the Defendants were, at a minimum, agents of the Plaintiffs.

274. At the time of Defendant Wilkins' claim of no fiduciary obligation to Plaintiff RKP in April of 2017, RKP was not yet aware of the common law preemption language of SC Code 40-57-139.

275. In a telephone discussion in mid-April of 2017 regarding the Lot 24 Encroachment and other issues, Defendant Wilkins admitted orally to RKP that "he had approved a bunch of things that I [Wilkins] did not tell you [RKP and/or Plaintiff LLC] about."

276. The Plaintiffs had not given any of the Defendants authority to issue any approvals or to take any actions which were outside of the parameters of (i) the previously approved Bonded Plat, (ii) the formally established covenants and restrictions of record, and (iii) the previously approved Architectural Standards and Guidelines.

Request for Documents

277. In an immediate response to Defendant Wilkins's statement with respect to his previously undisclosed actions and approvals, Plaintiff RKP requested orally that the Defendants provide the Plaintiffs with copies of all documents related to Panorama Point

and the related transactions, and disclose all previously undisclosed actions of Wilkins, RPW and SVR (herein after the “Requested Documents”).

278. In the mid-April 2017 telephone discussion, Plaintiff RKP demanded that this production of the Requested Documents be made without cost to the Plaintiffs.

279. Defendant Wilkins agreed that the request for the production of the Requested Documents was a “reasonable request”, and that it would be made without cost to the Plaintiffs.

280. In the telephone conversation in April of 2017, and in response to further demands by Plaintiff RKP for full disclosure of issues related to the Lot 24 Encroachment and the previously undisclosed “approvals” of Defendants Wilkins and RPW, Wilkins orally warned Plaintiff RKP that he would “lawyer up” and “drag this thing out” for a long time if RKP pressed him [Wilkins] too hard.

281. Later in May of 2017, after Defendant Wilkins had promised to produce the Requested Documents without cost to Plaintiffs LLC or RKP, and to make all legally mandated disclosures of prior acts, RKP heard from various Panorama Point homeowners that Defendants Wilkins or RPW had approved a nonconforming fence for Purchaser 14 on Lot 22 over the oral and written objections and complaints of various homeowners.

282. On May 18, 2017, Plaintiff RKP emailed Defendant Wilkins asking for the documentation of the approval of the Lot 22 fence, and asked Wilkins if there were any complaints about the Lot 22 fence.

283. Defendant Wilkins never responded to the May 18, 2017 emailed question about the Lot 22 fence complaints until August 15, 2017.

284. After receiving no response to the May 18, 2017 email regarding the Lot 22 fence complaints, Plaintiff RKP was informed on May 24, 2017 by Rex Casterline (“Casterline”) of the law firm Blair Cato Pickering & Casterline (“Blair Cato”) dated that Casterline and Blair Cato would be handling the production of the Requested Documents for Plaintiff RPW and Defendant SVR.

285. In a May 24, 2017 Blair Cato Letter, Casterline expressly referred to both Defendants RPW and SVR as “clients” of Blair Cato for the purpose of producing the Requested Documents in response to Plaintiff RKP’s request for production of documents and disclosure, and described many of the services which he and Blair Cato would be providing to RPW and SVR.

286. On or about June 1, 2017, Plaintiff RKP responded to Casterline acknowledging Casterline’s and Blair Cato’s role in the production of the Requested Documents in behalf of Defendants RPW and SVR, but at no cost as originally agreed by Defendant Wilkins.

287. On or about June 1, 2017, Plaintiff RKP viewed the absence of legally compliant listing agreements under SC Code 40-57-135 as a “compliance issue” and had yet become aware of the seriousness of this statutory violation, and that the Plaintiffs’ had a legal claim for the refund of any and all related unlawful compensation paid to the Defendants.

288. In or around June 1, 2017, Plaintiff RKP suggested that Casterline meet him without Casterline’s clients present in an attempt to allow Casterline to preserve the attorney client privilege with his clients in light of the newly discovered “legal compliance” issue related to the absence of written listing agreements.

289. Upon information and belief, from May 24, 2017, until July 12, 2017, Casterline made no effort to begin the work on the production of the Requested Documents.

290. In or around July 31, 2017 and August 15, 2017, Plaintiff RKP asked Casterline to explain why no effort had been made to start the review of the Requested Documents in the period from May 24, 2017 until July 12, 2017. Casterline never responded in any form or fashion, be it orally or in writing.

291. On July 12, 2017, Casterline informed Plaintiff RKP that he had (i) started his review of the files of RPW and SVR in order to facilitate the production of the Requested Documents, (ii) that he was personally involved in the review, and (iii) that there were considerably more documents than he had anticipated.

292. On or about July 31, 2017, Casterline informed Plaintiff RKP that he was “only half way through” reviewing the files, and that “I don’t think you [RKP] have any idea how many files there are!”

293. On or about August 15, 2017, Casterline provided a limited number of documents via email regarding the Lot 22 fence issue, and provided his personal views on the content of those documents.

294. Also on August 15, 2017, Casterline informed Plaintiff RKP that he was still reviewing the files and that he would “give it my attention as my schedule allows” again indicating he was personally involved in the document review.

295. Further in an email dated August 15, 2017, Casterline stated that “I am trying to make sure that anything that I see missing from a file is found. **I don’t know how to disguise that any better than I already have been**” (emphasis added).

296. Plaintiff RKP interpreted this statement as meaning that the file may possibly not contain any (i) listing agreements and other legally required documents, and did not contain (ii) any CMLS forms required by the CMLS rules.

297. As of August 15, 2017, the Plaintiffs were unaware of the previously described CMLS Order of the United States District Court, but on information and belief, Casterline and Gary Pickren, a partner at Blair Cato and a member of the Advisory Council

to the CMLS, were aware of the existence of the CMLS Order and were fully aware of its requirements for the listing of properties with the CMLS.

298. Upon information and belief, as of August 15, 2017, Casterline was fully aware of the unlawful nature of the Defendants' marketing of the Property, and knew or should have known of the Defendants' attempts to gain an unfair, deceptive and unethical advantage over competing brokers and agents with respect to the marketing and sale of the Property.

299. In an October 31, 2017 email to Plaintiff RKP, Casterline stated that the review had been completed and for the fourth time, specifically indicated that he had been personally involved in the file review.

300. Neither Defendants nor Casterline objected to Plaintiff RKP's June 1, 2017 recital of Defendant Wilkins' express agreement to provide the Requested Documents without charge until November 21, 2017 when Casterline emailed an invoice in the amount of \$723.40 for "copy charges" related to the production of the Requested Documents.

301. The Plaintiffs were never clients of Blair Cato, and had never agreed directly, indirectly or by implication to pay the fees or charges sought by Blair Cato. Upon information and belief, the Defendants, AWB and their attorney either knew or should have known that this would or could further delay production of the Requested Documents.

302. Plaintiff RKP asserted strenuously argued with Casterline via email that Blair Cato's imposition of the Copy Charges was (i) contrary to the oral agreement between Wilkins and RKP regarding the costs of the Requested Documents, (ii) contrary to applicable law of agency in South Carolina, and was (iii) inappropriate under the rules governing the billing practices of attorneys in South Carolina.

303. On multiple dates, Plaintiff RKP requested in writing that Casterline provide appropriate legal authority for Blair Cato's imposition of the Copy Charges; but neither Casterline nor anyone else at Blair Cato responded to RKP's requests for legal authority.

304. On February 15, 2018, Wilkins confirmed to RKP in writing, via email, his approval of the imposition of the Copy Charges by Blair Cato, which was contrary to the original agreement of no charge for copying, thereby utilizing his attorney to further delay production of the Requested Documents.

305. Plaintiff RKP sent a letter dated March 7, 2018 to Defendants Wilkins and RPW, which reiterated the Plaintiffs' repeated requests for the Requested Documents, and requested complete and accurate disclosures of all activities of the Defendants on behalf of the Plaintiffs as mandated by applicable South Carolina agency law.

306. Plaintiff RKP received a letter dated March 29, 2018, from Amber Spears, the Accounting Manager of Blair Cato, instructing Plaintiff RKP to "disregard" the Copy Charge invoice and the March 22, 2018 collection letter as the invoice was being

“withdrawn”, but made no mention of (i) the Requested Documents or the availability of the Requested Documents, or (ii) the reasons for the withdrawal of the Copy Charge invoice.

307. After receiving the March 29, 2018 letter from Blair Cato withdrawing the invoice for the Copy Charge, the Plaintiffs anticipated delivery of the Requested Documents in light of Casterline’s previous written representations that the Plaintiffs’ refusal to pay the Copy Charge invoice was the only reason the Requested Documents were being withheld, upon information and belief—a delay tactic.

308. After hearing nothing from Casterline for several months or the Defendants, on August 21, 2018, in preparation for a meeting with certain homeowners, Plaintiff RKP contacted Casterline to inquire as to whether Blair Cato still represented the Defendants, and inquired about the status of the Requested Documents.

309. On or about August 21, 2018, Casterline informed Plaintiff RKP that he thought AWB had delivered the Requested Documents to RKP after the Copy Charge invoice was withdrawn, but later that day admitted that the Requested Documents were still locked in a cabinet at the Blair Cato office.

310. On or about August 21, 2018, Casterline also represented that AWB was supposed to personally deliver the Requested Documents to the Plaintiffs immediately after the “withdrawal” of the Copy Charge invoice at the direction of Casterline, but she failed to do so as instructed by Casterline in violation of her fiduciary duties to the Plaintiff.

311. When Plaintiff RKP requested an explanation as to why the Requested Documents had not been made available to the Plaintiffs by AWB, Casterline claimed to have personally tried to deliver the Requested Documents to the RKP's office at 107-B Vista Oaks Drive, Lexington, South Carolina.

312. Casterline's claim to have personally tried to deliver the Requested Documents directly contradict his prior claim that AWB was to deliver the documents. Casterline refused to provide the dates of any attempted deliveries.

313. On information and belief, Casterline's claims of personally attempting to deliver the Requested Documents to the Plaintiffs were knowingly false and his refusal to provide dates of attempted delivery were made for the sole purpose of further delay in delivering the documents requested in order for Plaintiff KRP to determine through a review of what documents were or were not in the file.

314. On August 28, 2018 and after several months delay, Plaintiff RKP was allowed to pick up the Requested Documents at the office of Blair Cato which consisted of a single "bankers box" of documents ("Delivered Documents"), reviewing the Delivered Documents from the above date through sometime thereafter in 2018.

315. After initially reviewing the Delivered Documents, the Plaintiffs determined that the production of the Delivered Documents was substantially and materially incomplete, and failed to disclose the actions of the Defendants in an adequate,

complete and accurate manner; and as such constituted a continued breach of the Defendants' fiduciary duties.

316. On information and belief, Casterline was aware of the insufficiency of the production of the Delivered Documents, and was, therefore, actively participated in the various breaches of fiduciary duty by his clients in failing to and delaying the production of the Requested Documents.

317. Upon information and belief, the Delivered Documents were purged by the Defendants, with the assistance of Casterline, of documentation which should have been in the Requested Documents in an attempt to hide evidence of the Defendants' inappropriate, negligent and unlawful activity, and in an attempt to frustrate and delay the Plaintiffs' attempts to discover the actions and conduct of the Defendants.

Admissions and Statements by Blair Cato – Requested & Delivered Documents

318. Upon information and belief, Casterline is certified by the Commission as an instructor of continuing education courses pursuant to SC Code 40-57-740 ("Certified Instructor"), and as such is well versed in the laws applicable to licensed real estate brokers, agents, salesmen and real estate offices.

319. On or about August 27, 2018, Casterline admitted that after a review of Defendants documents, he was unable to locate copies of legally compliant listing agreements mandated by SC Code 40-57-135(C)(4) for the period prior to January 1, 2017.

320. On or about August 27, 2018, after 18 months of work and examination of documents, Casterline represented to RKP that the “missing” listing agreements were previously filed in a single folder, and that an unknown individual “removed” them.

321. Casterline had been informed by Plaintiff RKP that RKP, LOP and Alex Weatherly had no recollection of ever seeing or executing legally compliant listing agreements with Defendant SVR, and that the Plaintiffs had no copies of such listing agreements.

322. Defendant SVR’s legally mandated Policy Manual expressly states that a “listing contract” must be placed in each Broker’s separate transaction file with the other documents that pertain to “the transaction,” and that each agent is responsible for maintaining transaction files for each separate transaction that agent is involved with.

323. The Policy Manual makes no mention whatsoever of a central listing agreement file of the type described by Casterline to Plaintiff RKP.

324. As an instructor certified by the Commission for teaching continuing education of licensed brokers and agents, Casterline knew or should have known that listing agreements were to be kept with other specific transactional documents in files maintained on each separate transaction as set forth in Defendant SVR’s Policy Manual.

325. Upon information and belief, Casterline's August 27, 2018 statement to Plaintiff RKP regarding the "missing" listing agreements being "removed" from a single folder was made intentionally for the purpose of delay and to frustrate the Plaintiffs' attempts to uncover and document the Defendants' unlawful and unethical activities, and was made as part of the Defendants' continuing attempts, actively aided by Casterline and Blair Cato, to avoid production of the Requested Documents.

326. Upon information and belief, Casterline's statement that the "missing" listing agreements were "removed" from the "file where they were kept" by an unidentified person (i) was made with no reasonable factual foundation, (ii) was made solely for the purpose of delaying and frustrating the Plaintiffs, and (iii) was a knowing act in continuation of Casterline's and Blair Cato's active participation in the ongoing breaches of fiduciary duty of the Defendants.

327. As a Certified Instructor, Casterline knew or should have known, immediately upon his initial examination of the files of the Defendants, that the files were missing documentation required by South Carolina statutory law, the CMLS rules and the CMLS Order, and therefore the Defendants had engaged in unlawful, unfair, deceptive, unethical and anti-competitive conduct in the development, marketing and sale of the Plaintiff's interests in the Property.

Public Admissions by Blair Cato

328. On March 23, 2018, and while representing Defendants RPW and SVR, Blair Cato published an article on their website titled “*Is it Illegal to Post or Advertise a Listing as ‘Coming Soon’?*” and which discussed the requirements of SC Code 40-57-135(E)(1)(the post 2016 recodification of 40-57-135(C)(4)), and the rules of the CMLS.

In the March 23, 2018 article, Blair Cato stressed two issues:

- (3) that it is illegal under South Carolina law to “market” a property in any form without a legally compliant listing agreement; and
- (4) that failure to adhere to the CMLS listing rules negatively affects the general public and harms the seller.

329. On March 31, 2017, Blair Cato published an article on their website titled “Pocket Listings and the CMLS”, and which also discussed the requirements of SC Code 40-57-135 and the rules of the CMLS.

330. The March 31, 2017 article discussed the same two issues as the March 23, 2018 article and stressed that marketing property without a legally compliant listing agreement is illegal in South Carolina, and violating the CMLS rules by improperly withholding property listings negatively affects the general public, and harms the seller.

331. On March 25, 2016, Blair Cato published an article on their website titled “*Dual Agency and Informed Consent*” which discussed the absolute legal requirement that a licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties.

332. On August 10, 2018, Blair Cato published an article on their website titled “*Staying Legal While Advising a Consumer About Listing Their House*” which the need for a written agency agreement, and specifically stated that in order to have a valid agency agreement in South Carolina the listing agreement must be in writing and meet all applicable statutory requirements.

The Bonded Plat Issues with Lexington County

333. On February 29, 2012, Lexington County sent a letter addressed to Defendants Wilkins and RPW outlining a “punch list” of issues which needed to be addressed to complete the construction of the infrastructure shown on the Bonded Plat.

334. Lexington County’s February 29, 2012 letter gave a deadline of June 8, 2012 for the completion of the list of “punch list” items.

335. On May 1, 2012, Defendant RKP confirmed with Wilkins in writing that he [Wilkins] was aware of the items requested by Lexington County, and that he would assure their timely completion.

336. After assuring Plaintiff RKP that the punch list items would be completed on time, Defendants Wilkins and RPW failed to take steps necessary to complete the items in a timely manner.

337. In early June of 2012, Plaintiff RKP received a telephone call from Michael Crapps, CEO of First Community Bank, informing Plaintiff RKP that Lexington County had notified the Bank of its intention to collect the Letter of Credit.

338. Plaintiff RKP immediately notified Defendant Wilkins of the call from Mr. Crapps, and Wilkins assured RKP that he would “take care of it.”

339. On June 7, 2012, Defendant Wilkins informed Plaintiff RKP that he had convinced Lexington County to accept a “cash bond” in the amount of \$6500.00 (the “Cash Bond”) instead of collecting the Letter of Credit, and requested a check in that amount from the LLC.

340. Plaintiff LLC issued check number 507 dated June 7, 2012 to Defendant RPW to fund the Cash Bond.

341. After completion of the punch list items, Lexington County refunded the \$6500.00 Cash Bond to Defendant RPW.

342. Upon receipt of the refund of the Cash Bond from Lexington County, Defendant RPW deposited the Cash Bond refund, and did not notify the Plaintiffs of such action.

343. Defendant RPW did not inform the Plaintiffs of Defendant RPW's receipt and deposit of the Cash Bond refund until April 25, 2013 when Plaintiff RKP specifically inquired about the status of the refund from Lexington County.

344. The Cash Bond refund amount was finally transferred to Plaintiff LLC by Defendant RPW, and deposited by the LLC on May 3, 2013.

345. The failure of Defendants Wilkins and RPW to complete the punch list items in a timely manner, and RPW's failure to refund the Cash Bond to Plaintiff LLC when received from Lexington County, are examples of Defendants Wilkins' and RPW's negligence, incompetence, and lack of attention in performing the duties for which they received the Development Fees.

Public Interest Impact

346. Upon information and belief, the Defendants damaged the public interest in the Other RPW Developments by:

- (i) failing to consistently comply with SC Code 40-57-135(C)(4),
- (ii) failing to consistently comply with SC Code 40-57-137(M), and
- (iii) failing to consistently comply with the rules of the CMLS.

347. Upon information and belief, the Plaintiffs believe that the Defendants damaged the public interest in the general real estate practice of Defendant SVR with respect to properties other than the Property and the Other RPW Developments by:

- (i) failing to consistently comply with SC Code 40-57-135(C)(4),
- (ii) failing to consistently comply with SC Code 40-57-137(M), and

(iii) failing to consistently comply with the rules of the CMLS.

348. Upon information and belief, the Policy Manual was created from a template obtained by Defendant SVR from a third party source by (i) filling in appropriate blanks in the template, and (ii) selecting from available optional language with respect to issues upon which Defendant SVR was entitled or required by law to choose a single option.

349. In creating the Policy Manual, Defendant SVR made many mistakes in utilizing the template, and in one example failed to choose between the five (5) optional provisions in the template with respect to the types of agency relationships which may be entered into by associated licensees of SVR, and instead included all five possible options in the Policy Manual without choosing a single option in violation of South Carolina statutory law.

350. The failure to properly set forth in the Policy Manual which types of agency relationships an associated licensee may enter into created a high probability of repeated violations of applicable law by Defendant SVR and its associated licensees.

351. The Policy Manual, in numerous sections, expressly required that Defendant SVR obtain written listing agreements from the Plaintiffs and other owners with respect to the marketing of the Property, and the failure to do so establishes that the Defendants did not conscientiously attempt to comply with the Policy Manual or applicable

law; thereby creating a high probability of repetition of these violations in the past and in the future.

352. The Policy Manual expressly required that Defendant SVR and its associated licensees comply with all rules and regulations of the CMLS when marketing and listing the Property, and such failure to do so establishes that Defendant SVR and AWB did not conscientiously attempt to comply with the Policy Manual or CMLS rules and regulations; thereby creating a high probability of repetition of these violations in the past and in the future.

353. The failure of the Defendants to immediately comply with the revised rules of the CMLS as ordered by the CMLS Order upon receipt, and the Defendants' continued violation of the CMLS rules and the CMLS Order demonstrate a complete disregard for compliance with applicable rules and laws, even when ordered to do so by United States District Court Judge Solomon Blatt, thereby creating a certainty of repetition of the violations.

354. Upon information and belief, the Plaintiffs believe that the general form of the Development Agreement was used by Defendants Wilkins and RPW in one or more of the Other RPW Developments, and that the unlawful delegation of marketing authority contained in the form of the Development Agreement creates the high probability that similar violations of applicable South Carolina law, the CMLS rules, and the CMLS Order have occurred on a substantial number of occasions in the Other RPW Developments.

355. Upon information and belief, the Plaintiffs believe that the public interest has been negatively impacted by the fact that Defendant RPW was operating an unlicensed real estate brokerage office at 336 Old Chapin Road, Lexington, South Carolina which offered real estate marketing and consulting services to the public in violation of applicable South Carolina brokerage law.

356. In late 2017, while researching applicable South Carolina real estate brokerage law, Plaintiff RKP discovered the South Carolina Supreme Court decision in Spence v. Spence, 368 S.C. 106, 628 S.E.2nd 869 (SC 2006), in which the various justices of the Supreme Court openly discussed the facts of record in the case which involved Defendant Wilkins changing the legal descriptions in two previously executed deeds to increase the acreage of the deeded parcels by “slip sheeting” the two deeds without notification to, and possibly without authority from the grantors of the previously executed deeds.

357. The Spence v. Spence decision establishes that Defendant Wilkins has in the past foregone the steps necessary to conduct business in a legally compliant fashion, and creates a high probability that Defendant Wilkins, and the companies controlled and managed by Wilkins, have failed to adhere to applicable legal standards and procedures in the past, and will not adhere to applicable legal standards and procedures in the future.

358. The DOJ’s competitive impact statement published in connection with the CMLS Order during the comment period on the CMLS Order found that that the CMLS rules in existence prior to the CMLS Order were negatively impacting sellers in Lexington

County and other geographic areas served by the CMLS, in a manner the DOJ considered to be a violation of Section 1 of the Sherman Act.

359. The Defendants were consistently violating the pre-CMLS Order rules of the CMLS with respect to the listing and marketing of the Plaintiffs' interests in the Property in a manner which was dramatically more anti-competitive than alleged by the DOJ, thereby creating a greater negative impact on the public interest than the negative impact alleged by the DOJ from the structure of the pre-CMLS Order rules themselves.

360. Defendant Wilkins failure to adhere to SCRPC Rule 5.7, and Comment 9 to that Rule, is an indication that Wilkins, and RPW and SVR which are under his direct control, have failed to make a consistent attempt to comply with all applicable legal and ethical standards in the past, and will likely not consistently adhere to applicable legal and ethical standards in the future.

Admissions and Statements by Blair Cato – Requested & Delivered Documents

361. Upon information and belief, Casterline is certified by the Commission as an instructor of continuing education courses pursuant to SC Code 40-57-740 ("Certified Instructor"), and as such is well versed in the laws applicable to licensed real estate brokers, agents, salesmen and real estate offices.

362. On or about August 27, 2018, Casterline admitted that after a review of Defendants documents, he was unable to locate copies of legally compliant listing agreements mandated by SC Code 40-57-135(C)(4) for the period prior to January 1, 2017.

363. On or about August 27, 2018, after 18 months of work and examination of documents, Casterline represented to RKP that the “missing” listing agreements were previously filed in a single folder, and that an unknown individual “removed” them.

364. Casterline had been informed by Plaintiff RKP that RKP, LOP and Alex Weatherly had no recollection of ever seeing or executing legally compliant listing agreements with Defendant SVR, and that the Plaintiffs had no copies of such listing agreements.

365. Defendant SVR’s legally mandated Policy Manual expressly states that a “listing contract” must be placed in each Broker’s separate transaction file with the other documents that pertain to “the transaction,” and that each agent is responsible for maintaining transaction files for each separate transaction that agent is involved with.

366. The Policy Manual makes no mention whatsoever of a central listing agreement file of the type described by Casterline to Plaintiff RKP.

367. As an instructor certified by the Commission for teaching continuing education of licensed brokers and agents, Casterline knew or should have known that listing

agreements were to be kept with other specific transactional documents in files maintained on each separate transaction as set forth in Defendant SVR's Policy Manual.

368. Upon information and belief, Casterline's August 27, 2018 statement to Plaintiff RKP regarding the "missing" listing agreements being "removed" from a single folder was made intentionally for the purpose of delay and to frustrate the Plaintiffs' attempts to uncover and document the Defendants' unlawful and unethical activities, and was made as part of the Defendants' continuing attempts, actively aided by Casterline and Blair Cato, to avoid production of the Requested Documents.

369. Upon information and belief, Casterline's statement that the "missing" listing agreements were "removed" from the "file where they were kept" by an unidentified person (i) was made with no reasonable factual foundation, (ii) was made solely for the purpose of delaying and frustrating the Plaintiffs, and (iii) was a knowing act in continuation of Casterline's and Blair Cato's active participation in the ongoing breaches of fiduciary duty of the Defendants.

370. As a Certified Instructor, Casterline knew or should have known, immediately upon his initial examination of the files of the Defendants, that the files were missing documentation required by South Carolina statutory law, the CMLS rules and the CMLS Order, and therefore the Defendants had engaged in unlawful, unfair, deceptive, unethical and anti-competitive conduct in the development, marketing and sale of the Plaintiff's interests in the Property.

Public Admissions by Blair Cato

371. On March 23, 2018, and while representing Defendants RPW and SVR, Blair Cato published an article on their website titled “*Is it Illegal to Post or Advertise a Listing as ‘Coming Soon’?*” and which discussed the requirements of SC Code 40-57-135(E)(1)(the post 2016 recodification of 40-57-135(C)(4)), and the rules of the CMLS.

372. In the March 23, 2018 article, Blair Cato stressed two issues:

- (5) that it is illegal under South Carolina law to “market” a property in any form without a legally compliant listing agreement; and
- (6) that failure to adhere to the CMLS listing rules negatively affects the general public and harms the seller.

373. On March 31, 2017, Blair Cato published an article on their website titled “Pocket Listings and the CMLS”, and which also discussed the requirements of SC Code 40-57-135 and the rules of the CMLS.

374. The March 31, 2017 article discussed the same two issues as the March 23, 2018 article and stressed that marketing property without a legally compliant listing agreement is illegal in South Carolina, and violating the CMLS rules by improperly withholding property listings negatively affects the general public, and harms the seller.

375. On March 25, 2016, Blair Cato published an article on their website titled “*Dual Agency and Informed Consent*” which discussed the absolute legal requirement that a licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties.

376. On August 10, 2018, Blair Cato published an article on their website titled “*Staying Legal While Advising a Consumer About Listing Their House*” which the need for a written agency agreement, and specifically stated that in order to have a valid agency agreement in South Carolina the listing agreement must be in writing and meet all applicable statutory requirements.

CAUSES OF ACTION

COUNT I.

Breach of Fiduciary Duty

377. All allegations set forth in Paragraphs 1 through 376 above are re-alleged and incorporated as if fully set forth herein.

378. Defendants breached their fiduciary duty to the Plaintiffs by falsely representing to the Plaintiffs, directly or by inference, that they would handle the development, marketing and sale of the Property in accordance with all applicable laws.

379. Defendants breached their fiduciary duty to the Plaintiffs by falsely representing to the Plaintiffs, directly or by inference, that no written agreements were necessary to establish the required agency relationships necessary for the Defendants to

handle the development, marketing and sale of the Property in accordance with all applicable laws.

380. Defendants breached their fiduciary duty to the Owners by knowingly and willfully failing to have the Owners execute all necessary listing agreements and dual agency agreements required under SC Code 40-57-135 and 40-57-137, and as required by the written terms of the Policy Manual.

381. Defendants breached their fiduciary duty to Plaintiff LLC by intentionally failing to disclose the business relationships with Purchasers 16 and 19 prior to presenting the offers from those two purchasers.

382. Defendants breached their fiduciary duty to the Owners by failing to perform the various services undertaken on behalf of the Owners with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as required by SC Code 40-57-137(A).

383. Defendant Wilkins breached his fiduciary duty to the Owners by failing to perform legal services and law related services, both individually, and as supervisor and broker-in-charge of RPW and SVR, in accordance with applicable SCRPC Rules in violation of SCRPC 8.4(a), (d) and (e).

384. Defendant Wilkins breached his fiduciary duty to Plaintiffs RKP and LLC by violating SCRPC 8.4 by (i) refusing to timely and accurately answer the Plaintiffs'

questions regarding the Lot 24 Encroachment, (ii) hiring Casterline to delay the production of the Requested Documents, and (iii) by refusing to voluntarily provide the date of his transition from “active” status to “inactive” status when requested.

385. Defendants breached their fiduciary duty to Plaintiffs RKP and LLC (i) by failing to provide the documents and disclosures requested by the Plaintiffs RKP and LLC in April 2017 for over 15 months, (ii) by failing to disclose all of the actions taken on behalf of the Plaintiffs, (iii) by hiring Casterline and Blair Cato to “drag out” the production of documents and the disclosure of actions as he orally threatened during April 2017, (iv) by attempting to impose the Copy Charge with the assistance of Casterline and Blair Cato for legally mandated document production and disclosures, (vi) by allowing Casterline to make demonstrably false statements about the status of the production of the Requested Documents without correction, and (v) by allowing his attorney Casterline to consistently and completely ignore the Plaintiffs’ numerous and repeated written questions for legal authority and factual basis.

386. Defendants SVR violated its fiduciary duties to the Plaintiffs by knowingly and willfully violating the CMLS rules and the CMLS Order in violation of Section 1 of the Sherman Act.

387. Defendant SVR’s breach of fiduciary duty in knowingly and willfully violating the CMLS rules and the United States District Court’s CMLS Order resulted in monetary damage to the Plaintiffs in that the negligence (i) resulted in below fair market sales prices from inadequate exposure to potential purchasers, and (ii) resulted in an

increase in the total interest payments on the Development Financing due to delayed sales from inadequate exposure to potential purchasers.

388. It was a breach of fiduciary duty and unreasonable for the Defendants to believe, and to falsely represent that they were legally entitled to retain the Commissions and Development Fees in light of the Defendants' knowledge that their participation in the various Transactions was unlawful under applicable statutory law provisions.

389. The Defendants' breaches of their fiduciary duties to the Plaintiffs were the proximate cause of the Plaintiffs' economic losses in that the Defendants would not have (i) retained the Defendants to assist in the development, marketing and sale of the Plaintiffs' interests in the Property, or (ii) allowed the Defendants to participate in the Transactions, and receive or retain the unlawful Commissions and Development Fees.

390. As a result of the Defendants' serious and recurring breaches of its fiduciary duties to the Plaintiffs, the Plaintiffs have suffered economic losses including (i) the Defendants' unlawful retention of the Commissions and the Development Fees, (ii) the Plaintiffs' receipt of below fair market sales prices from inadequate exposure to potential purchasers in the real estate market, and (iii) the Plaintiffs' incurring increased interest expense on the Development Financing due to delayed sales from inadequate exposure to potential purchasers in the real estate market.

COUNT II

Negligent Misrepresentation

391. All allegations set forth in Paragraphs 1 through 390 above are re-alleged and incorporated as if fully set forth herein.

392. The Defendants falsely and negligently represented that the marketing and sale of the Property would be conducted and handled in accordance with all applicable laws and rules.

393. The Defendants had a pecuniary interest in the false and negligent representation in that (i) the Defendants were licensed under applicable South Carolina law as either a “broker”, a “real estate office” or a “salesman” and as such were required to comply with applicable law and rules, and (ii) it would allow the Defendants to receive commissions, fees or other compensation for the services performed for the Plaintiffs.

394. Under applicable South Carolina law, the Defendants, as a licensed real estate broker, salesman or real estate office, owed a duty of care to the Plaintiffs to assure that all representations, whether oral or written, made to the Plaintiffs were truthful and accurate.

395. The Defendants knowingly and willfully breached their duty to the Plaintiffs by failing to exercise due care by (i) representing that the Defendants were complying with all applicable laws and rules, (ii) failing to actually adhere to the requirements of those applicable laws and rules in the marketing and sale of the Property, and (ii) failing to

exercise due care in communicating with the Plaintiffs with respect to the legal requirements for the marketing and sale of the Property in each of the various Transactions.

396. The Plaintiffs were justified in their reliance on the representations of the Defendants that the marketing and sale of the Property was being handled in accordance with applicable laws and rules due to (i) the licensed nature of the Defendants as broker, salesman or real estate office, and (ii) the fact that Wilkins was a licensed attorney.

397. As a result of the Defendants negligent representations to the Plaintiffs, the Plaintiffs have suffered an economic loss in the form of (i) the unlawful Commissions and Development Fees paid to the Defendants, (ii) below fair market value sales prices resulting from inadequate exposure to the real estate market, and (iii) increased interest expense arising from slow lot sales resulting from inadequate exposure to the real estate market.

398. It was negligent and unreasonable for the Defendants to believe, and to falsely represent that they were legally entitled to retain the Commissions and Development Fees in light of the Defendants' knowledge that their participation in the various Transactions was unlawful under applicable South Carolina statutory law provisions.

399. The Defendants' false and negligent representations to the Plaintiffs were the proximate cause of the Plaintiffs' economic losses in that the Defendants would not have (i) retained the Defendants to assist in the development, marketing and sale of the Plaintiffs' interests in the Property, or (ii) allowed the Defendants to participate in the Transactions, and receive or retain the unlawful Commissions and Development Fees.

400. As a result of the Defendants' negligent misrepresentations to the Plaintiffs, the Plaintiffs have suffered economic losses including (i) the Defendants' unlawful retention of the Commissions and the Development Fees, (ii) the Plaintiffs' receipt of below fair market sales prices from inadequate exposure to potential purchasers in the real estate market, and (iii) the Plaintiffs' incurring increased interest expense on the Development Financing due to delayed sales from inadequate exposure to potential purchasers in the real estate market.

COUNT III

Negligence

401. All allegations set forth in Paragraphs 1 through 400 above are re-alleged and incorporated as if fully set forth herein.

402. Defendants Wilkins and RPW were negligent in their duties to the Plaintiffs by representing to the Plaintiffs that:

- (i) the Development Agreement satisfied the requirements of applicable law,
- (ii) RPW was entitled to collect development fees in the absence of written agreement with RKP, EGP, LOP, the Estate, and the Trust;
- (iii) RPW could legally provide "broker" services from its location at 336 Old Chapin Road, Lexington, SC 29072;
- (iv) RPW failing to fully and competently perform the services discussed with the Plaintiffs, and which were the claimed basis for the Development Fees; and

(v) RPW performing many of the services which were the claimed basis for the Development Fees in a negligent, illegal, incomplete, inadequate, and/or undisclosed manner.

403. Defendant RPW was negligent in its duties to the Plaintiffs by unlawfully acting as a real estate broker providing (i) marketing services, and (ii) real estate consulting and counseling services without a license as required by SC Code 40-57-20.

402 Defendants Wilkins and RPW were negligent in their duties to the Plaintiffs by failing to perform the various services undertaken on behalf of the Plaintiffs with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as required of all “licensees” by SC Code 40-57-137(A).

403. The Defendants were negligent in their duties to the Plaintiffs by unlawfully participating in the marketing, sale and closing of the various real estate parcels sold in the Transactions without a listing agreement meeting the requirements of SC Code 40-57-135(C)(4).

404. Defendants Wilkins and RPW were negligent in their duties to the Plaintiffs by collecting the Development Fees from the Plaintiffs without a written listing agreement meeting the requirements of SC Code 135(C)(4) as the collection of the Development Fees was unlawful.

405. Defendants Wilkins and RPW are continuing their negligent behavior by retaining the unlawfully acquired Development Fees paid by the Plaintiffs.

406. Defendant SVR was negligent in its duties to the Plaintiffs in that it violated SC Code 40-57-137(A) by failing to obtain written listing agreements pursuant to SC Code 40-57-135(C)(4) from the Plaintiffs and from LOP, EGP, the Estate and the Trust before marketing the various parcels.

407. Defendant SVR was negligent in its duties to the Plaintiffs in that it violated SC Code 40-57-137(M) by failing to obtain legally compliant and written dual agency agreements in the Transactions where SVR represented both the Plaintiffs and the purchasers.

408. Defendant SVR was negligent in its duties to the Plaintiffs in that it violated SC Code 40-57-139 by negligently failing to provide the disclosure required by SC Code 40-57-139.

409. Defendant SVR was negligent in its duties to the Plaintiffs in that it knowingly and willfully violated the rules of the CMLS and the CMLS Order in an anti-competitive manner in an effort to increase Defendant SVR's chance of obtaining dual representations and collecting 100% of the available commissions in the various Transactions.

410. The 78% occurrence rate of dual representation by Defendant SVR in the Transactions is irrefutable evidence of the success of the Defendants' unlawful, unfair,

deceptive, unethical and anti-competitive conduct in the development, marketing and sale of the Plaintiffs' interests in the Property.

411. Defendant SVR's negligence in its duties to the Plaintiffs by violating the CMLS rules and CMLS Order resulted in economic loss to the Plaintiffs in that the negligence (i) resulted in below fair market sales prices from inadequate exposure to potential purchasers in the real estate market, and (ii) resulted in increased interest expense on the Development Financing due to delayed sales from inadequate exposure to potential purchasers in the real estate market.

412. Defendant SVR's negligence in its duties to the Plaintiffs by violating SC Code 40-57-135(C)(4) resulted in Defendant SVR's unlawful participation in the Transactions, and SVR's collection of the unlawful Commissions in the Transactions.

413. It was unreasonable and negligent for the Defendants to believe they were entitled to retain the Commissions and Development Fees in light of the Defendants' knowledge that their participation in the various Transactions was unlawful under applicable statutory law provisions.

414. Defendant SVR remains negligent in its duties to the Plaintiffs by its continued retention of the unlawful Commissions after Plaintiffs' demand for the return of the Commissions.

415. Defendant RPW remains negligent in its duties to the Plaintiffs by its continued retention of the unlawful Development Fees after Plaintiffs' demand for the return of the Commissions.

416. The Defendants were negligent, and remain negligent in their duties to the Plaintiffs by (i) failing to fully produce the Requested Documents in a timely manner, (ii) by failing to make full disclosure of documentation which should have been included in the Requested Documents, and (iii) by failing to timely, adequately and accurately disclose all actions taken on behalf of the Plaintiffs.

417. As a result of the Defendants' negligent misrepresentations to the Plaintiffs, the Plaintiffs have suffered economic losses including (i) the Defendants' unlawful retention of the Commissions and the Development Fees, (ii) the Plaintiffs' receipt of below fair market sales prices from inadequate exposure to potential purchasers in the real estate market, and (iii) the Plaintiffs' incurring increased interest expense on the Development Financing due to delayed sales from inadequate exposure to potential purchasers in the real estate market.

COUNT IV

Conversion

418. All allegations set forth in Paragraphs 1 through 417 above are re-alleged and incorporated as if fully set forth herein.

419. The Defendants' participation in the closing of the Transactions was unlawful and contrary to established public policy of the South Carolina legislature.

420. The Commissions and Development Fees paid to the Defendants in the Transactions were paid from the sales proceeds of the Transactions belonging to the Plaintiffs as sellers in the various Transactions.

421. It was unreasonable for the Defendants to believe they were entitled to retain the Commissions and Development Fees in light of the Defendants' knowledge that their participation in the various Transactions was unlawful under applicable statutory law provisions.

422. The Plaintiffs were unaware of the unlawful, unfair, deceptive, unethical and anti-competitive nature of the Defendants' participation in the Transactions at the times the various Transactions were consummated, and the Plaintiffs did not consent or acquiesce to, or grant permission for the Defendants' unlawful collection and retention of the Commissions or the Development Fees.

423. The Plaintiffs have demanded in writing that all Commissions and Development Fees be returned, with appropriate interest, to the Plaintiffs.

424. The Defendants have refused the Plaintiff's written demand for return of the Commissions and Development Fees.

425. As a result of Defendants' unlawful participation in the Transactions, the Defendants' collection and retention of the various Commissions and Development Fees for their own use constitutes conversion.

426. The Plaintiffs' economic damage, in the amount of the Commissions and the Development Fees collected and retained by the Defendants, was directly and proximately caused by the Defendants' acts of conversion.

COUNT V

Quantum Meruit

427. All allegations set forth in Paragraphs 1 through 426 above are re-alleged and incorporated as if fully set forth herein.

428. The Plaintiffs have unknowingly bestowed and conferred an unlawful economic benefit on the Defendants as set forth in Paragraphs -- through -- in the amount of the Commissions and Development Fees collected and retained by the Defendants.

429. The Defendants realized the benefit of the various Commissions and Development Fees, as set forth in Paragraphs -- through --, and as set forth on the various HUD-1 forms and cancelled checks from the LLC, by depositing the Commissions and Development Fees in their various bank accounts.

430. It was unreasonable for the Defendants to believe they were entitled to retain the unlawful Commissions and Development Fees in light of the Defendants' knowledge that their participation in the various Transactions was unlawful under applicable South Carolina statutory law provisions.

431. It is unjust for the Defendants to retain the economic benefit of the Commissions and Development Fees in light of the unlawful nature of Defendants' participation in the Transactions as set forth in Paragraphs – through --, and – through --- above.

432. The Plaintiffs have demanded in writing in a letter dated May --, 2019, that all of the unlawful Commissions and Development Fees be returned, with appropriate interest, to the Plaintiffs.

433. The Defendants have refused to refund the unlawful Commissions and Development Fees as demanded by the Plaintiffs.

434. The Plaintiffs have been directly and proximately damaged by the Defendants' unjust retention of the Commissions and Development Fees.

COUNT VI

Constructive Fraud

435. All allegations set forth in Paragraphs 1 through 434 are re-alleged and incorporated as if fully set forth herein..

436. The Defendants' representations that the development, marketing and sale of the Property were being handled in accordance with all applicable laws and rules were false.

437. The Defendants' utilization of the CMLS in the marketing and sale of the Property constituted a misrepresentation by conduct that the rules of the CMLS and the CMLS Order were being adhered to by the Defendants.

438. The Defendants knew or should have known that their representations, both express and by conduct, that the Property was being developed, marketed and sold in accordance with all applicable laws and rules were false.

439. The Plaintiffs' belief that the Defendants would comply with all applicable laws and rules in the development, marketing and sale of the Property was a material fact in the Plaintiffs' decision to utilize the services of the Defendants.

440. The Defendants knew the Plaintiffs would rely on their false representations that the Property would be developed, marketed and sold in accordance with all applicable laws due to their decades of experience in the real estate industry, as well as the licensed status of Defendants SVR and Wilkins, as well as AWB; and the Defendants intended for the Plaintiffs to rely on those false representations.

441. The Plaintiffs did not know until between on or about January 10, 2017 and sometime after August 28, 2018, of the falsity of the Defendants' representations that all applicable laws were being adhered to with respect to the development, marketing and sale of the Property.

442. The Plaintiffs relied on their belief that the Defendants' representations that the Property was being developed, marketed and sold in accordance with all applicable laws and rules.

443. The Plaintiffs' reliance on the Defendants' representations that the Property was being developed, marketed and sold in accordance with all applicable laws and rules was justified and reasonable in light of the fact that (i) Defendant Wilkins, AWB and Defendant SVR were all licensed by the Commission, (ii) Defendant Wilkins was a licensed attorney, and (iii) the Defendants had many years of experience in the development of residential subdivisions in the area around Lake Murray in Lexington County.

444. As a result of the Defendants false representations to the Plaintiffs, the Plaintiffs have suffered an economic loss in the form of (i) the unlawful Commissions and Development Fees paid to the Defendants, (ii) below fair market value sales prices in the Transactions resulting from inadequate exposure to the real estate market, and (iii) increased interest expense arising from slow lot sales resulting from inadequate exposure to the real estate market.

445. The Defendants' false representations to the Plaintiffs were the proximate cause of the Plaintiffs' economic losses in that the Defendants would not have (i) retained the Defendants to assist in the development, marketing and sale of the Plaintiffs' interests in the Property, or (ii) allowed the Defendants to participate in the Transactions, and receive or retain the unlawful Commissions and Development Fees without reliance on the false representations.

COUNT VII

Restitution

446. All allegations set forth in Paragraphs 1 through 445 above are re-alleged and incorporated as if fully set forth herein. .

447. The Defendants' retention of the Commissions and Development Fees is unlawful and inequitable.

448. The Plaintiffs are entitled to restitution in the amount of the Commissions and Development Fees with appropriate interest.

COUNT VIII

Unfair Trade Practice

449. All allegations set forth in Paragraphs 1 through 448 above are re-alleged and incorporated as if fully set forth herein.

450. The Defendants, at all relevant times, were engaged in trade and commerce by providing real estate development services, real estate brokerage services, and legal services.

451. The Defendants' failure to comply with all applicable laws regulating the real estate brokerage industry, including but not limited to, (i) failing to obtain written listing agreements required by SC Code 40-57-135(C)(4), and (ii) failing to obtain written dual agency agreements required by SC Code 40-57-137(M) constitute unfair and deceptive acts or practices in the conduct of the Defendants' real estate brokerage business.

452. The Defendants failure to comply with the rules and regulations of the CMLS, and the terms of the CMLS Order constitute unfair and deceptive acts or practices in the conduct of the Defendants' real estate brokerage business.

453. The CMLS Order establishes that the revisions to the CMLS were necessary to prohibit the CMLS from operating in a manner which unfairly limited competition in the geographic area served by the CMLS, including Lexington County.

454. The Defendants' complete and total disregard for the terms and conditions of the CMLS Order, after being served with both a copy of the CMLS Order and the revised

CMLS rules, constituted an unfair and deceptive trade practice and anti-competitive conduct in violation of Section 1 of the Sherman Act.

455. Defendant RPW's failure to comply with applicable laws regulating the marketing of real estate, including but not limited to (i) failing to obtain written listing agreements required by SC Code 40-57-135(C)(4), and (ii) failing to obtain a legally required license for its 336 Old Chapin Road, Lexington SC as required by SC Code 40-57-135(C)(2) constitute unfair and deceptive acts or practices in the conduct of RPW's real estate development business.

456. The Defendants' various knowing and willful breaches of fiduciary duties owed to the Plaintiffs constitute unfair and deceptive acts or practices in the conduct of the Defendants' various businesses.

457. The Defendants' various acts of negligent misrepresentation in the provision of services to the Plaintiffs constitutes unfair and deceptive acts or practices in the conduct of the Defendants' various businesses.

458. The Defendants' various acts of negligence in the provision of services to the Plaintiffs constitutes unfair and deceptive acts or practices in the conduct of the Defendants' various businesses.

459. The Defendants' actions which constitute conversion of the Plaintiff's funds constitute unfair and deceptive acts or practices in the conduct of the Defendants' various businesses.

460. The Defendants' act of constructive fraud constitutes unfair and deceptive acts or practices in the conduct of the Defendants' various businesses.

461. The Defendants' unfair and deceptive acts or practices in the conduct of their various businesses were willful and knowing under SC Code 39-5-140(d) in light of:

- (i) the Defendants long history of participation in the real estate development and real estate brokerage industries,

- (ii) the fact that Defendant Wilkins, AWB, and Defendant SVR were licensed by the Commission to conduct real estate brokerage business, and knowledge of the applicable laws was a requirement for obtaining the licenses,

- (iii) the unfair and deceptive acts of the Defendants violated the express terms of the Policy Manual,

- (iv) licensed professionals are required to know, and should know all applicable state laws applicable to the practice of their licensed profession, and

- (v) Defendants Wilkins and SVR were served with a hard or electronic copy of the CMLS Order immediately after the formal entry of the CMLS Order.

462. The unfair and deceptive acts or practices of the Defendants affected 19 different purchasers who bought properties in the Transactions in addition to affecting the Plaintiffs.

463. The unfair and deceptive acts or practices of the Defendants affected 5 different sellers other than the Plaintiffs including LOP, JSP, EGP, the Estate, and the Trust.

464. The unfair and deceptive acts or practices of the Defendants involving the violations of the CMLS rules and the CMLS Order affected (i) all other members of the CMLS during the relevant period, and (ii) all of their prospective purchasers of the Property or similar properties on Lake Murray.

465. The unfair and deceptive acts or practices of the Defendants involving the violations of the CMLS rules negatively affected other licensed brokers and agents who were members of the CMLS by denying those licensed brokers and agents the opportunity to earn compensation by having their clients participate in the purchase of the Property.

466. The unfair and deceptive acts or practices of the Defendants affected other owners of comparable properties on Lake Murray by (i) limiting the pool of potential purchasers of the Property, (ii) thereby driving down the sales price paid in the Transactions, and (iii) lowering the closing price of comparables which are used by licensed real estate appraisers, and by licensed brokers and agents in setting listing prices for other unrelated sellers and landowners.

467. The unfair and deceptive acts or practices of the Defendants affected other purchasers of comparable properties on Lake Murray by (i) limiting the pool of potential purchasers of the Property, (ii) thereby driving down the sales price paid in the Transactions, and (iii) lowering the closing prices of comparables which are used by

licensed real estate appraisers in appraisals used for the purpose of obtaining purchase money and construction financing thereby reducing the amount of financing available to other unrelated purchasers and homeowners.

468. Upon information and belief, the unfair and deceptive acts or practices of the Defendants were repeated in other unrelated transactions, including but not limited to, the Other RPW Developments, during the relevant time period; and appropriate discovery will identify such other instances of unfair and deceptive acts or practices occurring as late as June of 2019.

469. The unfair and deceptive acts or practices of the Defendants are likely to be repeated based on:

- (i) the legal deficiencies of the Policy Manual described in Paragraph --,
- (ii) Defendant Wilkins past history of ignoring applicable laws and rules as described in Spence v. Spence, 368 S.C. 106, 628 S.E.2nd 869 (2004), and in Paragraphs – through – above,
- (iii) the Defendants’ reputation within the real estate industry for noncompliance with applicable law and rules of the CMLS,
- (iv) the Defendants’ attempts to cover up past violations by failing to produce the Requested Documents with the assistance of Blair Cato,
- (v) the Defendants’ complete and total disregard for the CMLS Order and the revised CMLS rules mandated under the CMLS Order.

470. The unfair and deceptive acts or practices of the Defendants are offensive to established public policy as set forth in the statutory scheme enacted and amended by the South Carolina Legislature in Title 40, Chapter 57; and are offensive, unethical, unscrupulous, and substantially injurious to consumers in the real estate market.

471. The Plaintiffs have been directly damaged by the Defendants' knowing and willful unfair and deceptive acts and practices by paying unlawful Commissions and Development Fees which Defendants have refused to refund after written demand.

472. The Plaintiffs have been further damaged by the Defendants' knowing and willful unfair and deceptive acts and practices by receiving less than fair market value sales prices in the Transactions as a result of the reduced exposure to the real estate market.

473. The Plaintiffs have been further damaged by the Defendants' knowing and willful unfair and deceptive acts and practices by the delay in the rate of sales of the lots in Phase I as a result of Defendants' improper withholding of various lots from the CMLS in that the delay in sales resulted in an increased amount of interest being paid by Plaintiffs on the Development Financing.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for judgement against Defendants in a sum sufficient to adequately compensate them for actual damages and for such punitive damages as the Court may reasonably award, as well as any restitution and treble damages pursuant to the Unfair Trade Practices act, for the costs of this action, to include but not limited to attorney's fees and for such other and further relief as this Court may deem just and proper.

BENCH TRIAL DEMANDED

Plaintiff demands a bench trial on all issues.

s/ Clarence Davis
Clarence Davis (SC Bar I.D. #1581)
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Attorneys for Plaintiffs

DATED: January 2, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Civil Action Number: 2020-CP-32-00005
R. Kent Porth and Panorama Point, LLC,	)	
	)	
Plaintiffs,	)	NOTICE OF MOTION AND MOTION
	)	TO DISMISS
vs.	)	
	)	
Robert P. Wilkins, Jr., RPW Development,	)	
Inc., Southern Visions Realty, Inc., and	)	
Consolidated Multiple Listing Service,	)	
Inc.,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that Defendants Robert P. Wilkins, Jr., (“Wilkins, Jr.”), RPW Development, Inc. (“RPW”), and Southern Visions Realty, Inc. (“SVR”), by and through their undersigned attorneys, within ten (10) days after the filing of this motion or as soon thereafter as counsel may be heard, will move before the Presiding Judge of the Eleventh Judicial Circuit, 205 East Main Street, Lexington, South Carolina, ten (10) days after notice hereof or as soon thereafter as may be convenient for the Court, pursuant to the authority of Rule 12(b)(6) for an order dismissing the Plaintiff’s Complaint based upon the fact that all of Plaintiffs’ causes of action alleged in their Complaint are barred by the applicable statutes of limitations. This motion is based upon the following grounds, as well as upon such additional argument and authority as may be offered at the time of hearing.

1. Plaintiffs complain about the Defendants’ development and sale of the Plaintiffs’ real property located on Lake Murray (the “Property”).

2. On a number of different legal theories, Plaintiffs seek to disgorge the Defendants of development fees and commissions associated with the sale of lots developed from the Property, as well as other associated damages.

3. Plaintiffs' claims are time barred.

4. Plaintiffs began discussions with the Defendants to develop and sell the Property in "late 2005 and early 2006." Complaint, para. 21.

5. Plaintiffs engaged the Defendants "in the development, marketing and sale of the Property" in early 2006. Complaint, para. 57.

6. "On December 21, 2006, Plaintiff RKP signed a 'Development Agreement' on behalf of Plaintiff LLC between Defendant RPW and LLC." Complaint, para. 87.

7. "Between January 2007 and December 2016, the Plaintiffs sold interest in the Property on 23 separate occasions in which SVR represented the Plaintiffs." Complaint, para. 166.

8. THE COMPLAINT IN THIS ACTION WAS FILED ON JANUARY 2, 2020.

9. On January 16, 2007, Lot 6 sold for \$515,000.00 and Defendant SVR received a total commission of \$27,500.00. Complaint, para. 167. **NOTE:** SVR is a reference to Southern Visions Realty, Inc. and served as the listing agent for the Property).

10. On June 28, 2007, Lot 4 sold for \$425,000.00 and Defendant SVR received a total commission of \$21,250.00. Complaint, para. 168.

11. In July, 2007, Lot 5 sold for \$425,000.00 and SVR received at total commission of \$21,250.00. Complaint, para. 169.

12. On July 12, 2007, Lot 30 sold for \$230,000.00 and SVR received a total commission of \$13,500.00. Complaint, para. 170.

13. On July 28, 2008, Lot 27 sold for \$100,000.00 and SVR received a total commission of \$7,500.00. Complaint, para. 180. (NOTE: Paragraphs 171 – 179 in the filed Complaint are missing).

14. On June 25, 2009, Lot 1 sold for \$282,500.00 and SVR received a total commission of \$14,000.00. Complaint, para. 181.

15. On August 6, 2010, Lot 12 sold for \$185,000.00 and SVR received a total commission of \$9,250.00. Complaint, para. 182.

16. On January 7, 2011, Lot 18 sold for \$187,500.00 and SVR received a total commission of \$8,780.00. Complaint, para. 183.

17. On January 3, 2012, Lot 7 sold for \$315,000.00 and SVR received a total commission of \$7,875.00. Complaint, para. 184.

18. On June 4, 2012, Lots 8, 9 and 10 sold for \$453,500.00 and SVR received a total commission of \$11,337.50. Complaint, para. 185.

19. On April 13, 2013, Lot 17 sold for \$185,000.00 and SVR received a total commission of \$9,250.00. Complaint, para. 186.

20. On October 1, 2013, Lot 21 sold for \$70,000.00 and SVR received a total commission of \$1,400.00. Complaint, para. 187.

21. On April 1, 2014, Lot 16 sold for \$190,000.00 and SVR received a total commission of \$9,500.00. Complaint, para. 188.

22. On April 3, 2014, Lot 25 sold for \$300,000.00 and SVR received a total commission of \$6,000.00. Complaint, para. 189.

23. On October 2, 2014, Sold 19 sold for \$191,715.00 and SVR received a total commission of \$4,792.87. Complaint, para. 190.

24. On July 30, 2013, Lot 22 sold for \$300,000.00 and SVR received a total commission of \$7,500.00. Complaint, para. 191.

25. On December 10, 2012, 2.636 acres were sold for \$535,000.00 and SVR received a total commission of \$26,750.00. Complaint, para. 192.

26. On October 23, 2014, .81 acres were sold for \$325,000.00 and SVR received a total commission of \$16,250.00. Complaint, para. 193.

27. On September 26, 2013, Lot 15 sold for \$185,000.00 and SVR received a total commission of \$9,250.00. Complaint, para. 194.

28. On May 7, 2015, Lot 13 sold for \$194,000.00 and SVR received a total commission of \$4,850.00. Complaint, para. 195.

29. On March 13, 2015, Lot 11 sold for \$137,500.00 and SVR received a total commission of \$6,875.00. Complaint, para. 196.

30. On March 16, 2015, .175 acres were sold for \$137,500.00 and SVR received a total commission of \$6,875.00. Complaint, para. 197.

31. On May 1, 2015, Lot 24 sold for \$310,000.00 and SVR received a total commission of \$15,500.00. Complaint, para. 198.

32. THIS IS THE LATEST ALLEGED PROPERTY SALE GIVING RISE TO THE COMPLAINT AND IT OCCURRED NEARLY 4 YEARS PRIOR TO FILING.

33. In addition to commissions paid to SVR, the Complaint also complains about development fees paid to RPW.

34. On June 28, 2007, RPW was paid a development fee of \$20,065.00 related to Lot 4. Complaint, para. 199.

35. On August 6, 2010, RPW was paid a development fee of \$8,750.00 related to Lot 12. Complaint, para. 200.

36. On May 7, 2015, RPW was paid a development fee of \$9,446.61 related to Lot 13. Complaint, para. 201.

37. THIS IS THE LATEST ALLEGED PAYMENT OF A DEVELOPMENT FEE GIVING RISE TO THE COMPLAINT AND IT OCCURRED NEARLY 4 YEARS PRIOR TO FILING.

38. On May 1, 2015, RPW was paid a development fee of \$14,725.00 related to Lot 24. Complaint, para. 202.

39. On July 28, 2008, RPW was paid a development fee of \$4,586.87 related to Lot 27. Complaint, para. 203.

40. On December 10, 2012, RPW was paid a development fee of \$25,412.00 related to the sale of 2.636 acres. Complaint, para. 204.

41. On October 23, 2014, RPW was paid a development fee of \$15,367.38 related to the sale of .81 acres. Complaint, para. 205.

42. On March 16, 2015, RPW was paid a development fee of \$6,485.00 related to the sale of .175 acres. Complaint, para. 206.

43. Sometime in June 2009, RPW was paid an undisclosed development fee related to the sale of Lot 1. Complaint, para. 207.

44. On July 15, 2007, RPW was paid a development fee of \$20,077.00 related to the sale of Lot 7. Complaint, para. 208.

45. On January 31, 2012, RPW was paid a development fee of \$15,437.50 related to the sale of Lot 7. Complaint, para. 209.

46. On June 30, 2012, RPW was paid a development fee of \$21,346.36 related to the sale of Lots 8, 9 and 10. Complaint, para. 210.

47. On March 31, 2015, RPW was paid a development fee of \$6,485.31 related to the sale of Lot 11. Complaint, para. 211.

48. On December 13, 2013, RPW was paid a development fee of \$8,788.00 related to the sale of Lot 15. Complaint, para. 212.

49. On April 30, 2014, RPW was paid a development fee of \$9,025.00 related to the sale of Lot 16. Complaint, para. 213.

50. On April 11, 2013, RPW was paid a development fee of \$8,787.00 related to the sale of Lot 17. Complaint, para. 214.

51. Sometime in 2013, RPW was paid a development fee of \$3,325.00 related to the sale of Lot 21. Complaint, para. 215.

52. On December 31, 2013, RPW was paid a development fee of \$14,250.00 related to the sale of Lot 22. Complaint, para. 216.

53. On April 30, 2014, RPW was paid a development fee of \$14,250.00 related to the sale of Lot 25. Complaint, para. 217.

54. On July 15, 2007, RPW was paid a development fee of \$6,032.00 related to the sale of Lot 30. Complaint, para. 218.

55. The gravamen of Plaintiffs' Complaint is that the Defendants allegedly did not have the listing and development agreements which are statutorily required in order to collect commissions and development fees. As a result, the Plaintiffs complain that they are entitled to disgorgement on a number of legal theories.

56. Plaintiffs' Complaint ignores, however, that all of their claims are time barred.

57. Plaintiff Kent Porth was sworn in as a South Carolina licensed attorney in November, 1983, and practiced with Nexsen Pruet until he effectively retired from the active practice of law in 2007. Complaint, paras. 161 and 162.

58. Undoubtedly aware of the statute of limitations and its bar to the present action, the Plaintiffs bend over backwards in the Complaint trying to excuse their delay in bringing the present action timely, with their delay beyond the statute of limitations representing years in some cases and more than a decade in others.

59. The “argument” or “excuse” contained within the Complaint as to why the action was not brought timely is ignorance of the law. For example, the Complaint explains:

- a. “In the months following January 2017, Plaintiff RKP began to research the laws governing RPW’s and SVR’s handling of the marketing of Phase I lots and related parcels as a result of an increasing number of disputes with the Defendants related to the handling of the development, marketing and sale of the Property.” Complaint, para. 159.
- b. Only in early 2018, Plaintiff RKP had determined conclusively that the Defendants had not complied with applicable laws, including but not limited to SC Code 40-57-135 and 137 in the marketing and sale of the Property, and that the Plaintiffs had a valid legal claim for damages, including the refund of unlawful commissions and development fees.” Complaint, para. 160.

60. In short, the Complaint stakes out the position that the Plaintiffs were ignorant of the law in what it required of the Defendants and that upon researching the law determined that claims existed.

61. Accepting the allegations of the Complaint to be true for purposes of this Rule 12(b)(6) motion, ignorance of the law does not toll the running of the statute of limitations and is no legal justification for not having brought the Plaintiffs' claims timely.

62. If the Plaintiffs are correct in their legal position that it was unlawful for the Plaintiffs to collect development fees and commissions without the appropriate signed development and listing agreements, then according to Plaintiffs' own Complaint, the Plaintiffs knew as early as 2007:

- a. That the Plaintiffs had not signed listing agreements on the Lots in question; and
- b. That the Plaintiffs had not signed development agreements on the Property in question.

63. As for what the Plaintiffs knew about the legal requirements, the Plaintiffs are charged with knowledge of the law.

64. In *American Legion Post 15 v. Horry County*, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009), the American Legion Post sued Horry County to recover hospitality admissions fees that it contended the County had collected illegally. Horry County argued that the claims were time barred. The Post countered that Horry County should be estopped from raising the statute of limitations because the Post justifiably relied on the County's interpretation of the law in collecting the fees. The lower court agreed with the Post that Horry County should be estopped from raising the statute of limitations as a defense and Horry County appealed. In reversing the lower court, our Court of Appeals ruled:

Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests. *Id.* Estoppel will not lie against a governmental entity when a government employee gives erroneous information in contradiction of statute. *Id.* at 319, 659 S.E.2d at 267. "Simply stated, equity follows the law." *Id.* We find the Posts do not meet the elements necessary to estop the County from raising the statute of

limitations. The Posts are presumed to know the law and may not rely on contrary conduct by the County in contradiction of a statute. Accordingly, we find the trial court erred in finding the County estopped from relying on the statute of limitations. Emphasis Added. Internal Cites Omitted.

65. The case is directly analogous. In essence, the Plaintiffs posit that they justifiably believed that the Defendants were acting in compliance with the law in collecting their development fees and commissions. As a result, this action was not brought until the Plaintiffs researched the law many, many years later and came to believe that the Defendants were not in compliance with the law.

66. If it was unreasonable to rely on the government and its interpretation of the law as in the *American Legion* case, it is impossible for the Plaintiffs in this case to have justifiably relied upon a real estate developer and agent.

67. Ignorance of the law does not toll the statute of limitations.

68. The Plaintiffs were at all times charged with the law.

69. If the Plaintiffs a) knew the law (and they did), b) knew that the law required listing and development agreements (if in fact it does) and c) knew that they had not signed listing and development agreements, then the Plaintiffs knew that they had a claim against the Defendants and knew it as early as 2007.

70. By any legal theory, the Plaintiffs' claims are time barred.

71. The Defendants are entitled to and pray for a dismissal of all claims.

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Columbia, South Carolina

May 5, 2020

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

R. Kent Porth and Panorama Point, LLC,
Plaintiffs,

Civil Action No. 2020-CP-32-00005

vs.

**PLAINTIFFS' OPPOSITION TO
MOTION TO DISMISS**

Robert P. Wilkins, Jr., RPW Development,
Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,
Defendants.

INTRODUCTION

On January 2, 2017, R. Kent Porth and Panorama Point, LLC (“Plaintiffs”) filed a Complaint in the Court of Common Pleas for Lexington County (“Complaint”) against Robert P. Wilkins, Jr., RPW Development, Inc. and Southern Visions Realty, Inc. (“Defendants”) alleging equitable causes of action for various breaches of fiduciary duty and related willful and knowing violations of the South Carolina Unfair Trade Practices Act (South Carolina Code Ann., Sections 39-5-10 *et. seq.*)(“UTPA”). The Plaintiffs are seeking restitution and disgorgement of ill gotten real estate development fees, real estate sales commissions, and other damages along with mandatory treble damages and attorney fees pursuant to the UTPA. The Defendants filed a Motion to Dismiss under Rule 12(b)(6) on the basis that the Plaintiffs’ claims are barred by a general unidentified 3-year statute of limitations.

ARGUMENTS

- I. According to a May 27, 2020 decision by the South Carolina Supreme Court in a case certified from the United States District Court for the District of South Carolina, it is crystal clear that equitable claims, be they breaches of fiduciary duty or otherwise, are not barred by any statute of limitations in South Carolina; and

- II. A 3-year statute of limitations is not a bar to any of the Plaintiffs' other claims, to include the UTPA, for three reasons:
- a. this action was filed within 3 years the from the "discovery" of the Defendants' various fiduciary duty breaches which form the basis of any alleged actions at law, to include the violations of the UTPA;
 - b. the Defendants are equitably estopped from raising the affirmative defense of the statute of limitations due to their "unclean hands;" and
 - c. the running of any applicable statute of limitations on the Plaintiffs' claims has been equitably tolled by their unclean hands.

**LEGAL MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION TO
DISMISS**

I. Statute of Limitations Are Inapplicable to Equitable Causes of Action in South Carolina.

On May 27, 2020, the South Carolina Supreme Court reaffirmed in Thomerson v. Devito (App. Case No. 000552, May 27, 2020) that there is no statute of limitations applicable to equitable actions in South Carolina. The Court clarified the law in response to a certified question from United States District Judge Richard Gergel of the District Court of South Carolina. The Court held that equitable causes of action in South Carolina are subject only to a defense of laches, even if the equitable claim is a claim for money damages. The Court specifically rejected the application of South Carolina Code Ann., Section 15-3-20 *et. seq.* to equitable claims like those of Plaintiffs.

As for any laches defense, it is inapplicable for several reasons. First, the conduct forming the basis for the equitable breach of fiduciary duty claim involves the flagrant and repeated violation of multiple sections under South Carolina Code of Laws, Title 40, Chapter 57, rendering the Defendants' conduct as licensed real estate brokers and agents expressly illegal in South Carolina. The Complaint also alleges self-dealing through the repeated and flagrant violation of the Rules of the Consolidated Multiple Listing Service (the "CMLS"), as modified by United State District Court Judge Blatt's Final Order dated August 17, 2009, in the U.S. Dept. of Justice's anti-competition action under the Sherman Act against the CMLS in United States v. Consolidated Multiple Listing Service, Inc. (Case No. 3:08-CV-01786-SB). The Defendants' are barred from raising laches as a defense in light of their unclean hands. See citations on illegal conduct in Section III *infra*. Moreover, as set forth *infra*, the Plaintiffs proceeded with prompt and appropriate due diligence immediately upon discovery in January of 2017 that a legal right of the Plaintiffs may have been violated.

II. The Plaintiffs filed the Complaint within 3 years from the earliest date of "discovery" of a possible legal claim.

"Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal." Darby v. The Furman Co. Inc., 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999). A real estate broker's fiduciary duty is codified at South Carolina Code Ann., Section 40-57-137(A) (as in effect at the relevant times). "The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent." Id; Bost v. Bankers Fire Marine Ins. Co., 242 S.C. 274, 283, 130 S.E.2d 907, 911-12 (1963); *see also* Designer Showrooms, Inc. v. Kelley, 304 S.C. 478,

405 S.E.2d 417 (S.C.Ct.App. 1991)(“A broker owes a duty to its principal to keep it fully and properly informed of all material facts.”).

The fiduciary breaches of the Defendants also violate the express provisions of the UTPA which utilizes a three year “discovery” statute of limitations. See South Carolina Code Ann., Section 39-5-150 (“No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.”)(emphasis added). Moore v. Benson, 390 S.C. 153, 160-61, 700 S.E.2d 273, (S.C.Ct.App. 2010). See also Mazloom v. Mazloom, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (S.C.Ct.App. 2009); Doyle v. Horry County, 2019 WL 4052478 (S.C.Ct. App.) According to the discovery rule, the statute of limitations begins to run (assuming equitable estoppel and tolling are not applicable) when an injured party could or should have known, through the exercise of reasonable diligence that a cause of action might exist. In Young v. South Carolina Department of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (S.C.Ct.App. 1999), the court stated that “the courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.” (emphasis added). Wellin v. Wellin, No. 2:13-cv-01831-DCN (D.S.C. Jan. 8, 2020). In Dean v. Ruscon Corporation, 321 S.C. 360, 363-64, 468 S.E.2d 645 (S.C. 1996), and in Johnson v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (S.C. 1993), the Supreme Court clarified the requirements of the discovery rule. In both cases, the Court expressly referred to the fact that the plaintiffs were actually aware that some injury had occurred. The Plaintiffs’ knowledge that a real estate transaction had occurred is not “discovery” of the fact that their fiduciaries had acted illegally in the transaction.

The Defendants' illegal conduct in this case involved the participation in the marketing and sale of the Plaintiffs' properties without making required written disclosures, and failure to obtain two types of written agency agreements as expressly mandated by Title 40, Chapter 57 of the real estate brokerage statutes. This illegal conduct obviously had the result of making the discovery of the Defendants' illegal conduct, and thus the Plaintiffs' legal claims extremely difficult. How could the Plaintiffs become aware of what was not disclosed to them in direct violation of the real estate brokerage statutes, which by their express terms apply only to the Defendants and not the Plaintiffs.

The Plaintiffs were first put "on notice" that the Defendants may have violated the statutory requirement for written agency disclosures, written listing agreements and written dual agency agreements on January 10, 2017 when the Plaintiffs listed 3 remaining parcels of real estate with a different licensed real estate agent. For the first time, the Plaintiffs were asked to execute the legally mandated documents for each remaining property, and were asked to execute certain required CMLS forms required for listing those properties on the CMLS website. Prior to January 2017, the Plaintiffs had never been presented with any of these forms, nor had any of the forms been discussed with them.

As expressly admitted in the Defendants' Motion to Dismiss (paragraph 59), the Plaintiffs immediately began due diligence and legal research in early 2017 to follow up on why the Plaintiffs had never been requested by the Defendants to execute listing agreements, dual agency agreements and CMLS forms previously. The Plaintiffs then filed the current action within 3 years of the date they were first presented with the legally mandated forms in January 2017.

In support of their Motion to Dismiss, the Defendants claim that the Plaintiffs should be charged with knowledge of the laws which apply only to real estate professionals,

and cite the Court of Appeals' decision in American Legion v. Horry County 577, 381 S.C. 576, 674 S.E.2d 181 (S.C.Ct.App. 2009) in support of this novel argument. This case is both factually and legally distinguishable from the current case. In American Legion, the court was not interpreting a "discovery" statute of limitations of the type applicable to the present case, and was instead applying a statutorily mandated statute of limitations applicable to certain tax issues. See South Carolina Code Ann., Section 12-54-85(F)(1). Most importantly, in American Legion, it is undisputed that the plaintiff had actual knowledge of the asserted claim on the day the alleged wrong first occurred. The issue in the case was the legality of an admissions tax, and the plaintiff paid its first tax payment "under protest" thereby proving its actual knowledge of the claim on that day. The plaintiffs in American Legion were disingenuously attempting to argue that the applicable statute of limitations did not begin to run until the plaintiffs determined that the County's written response to their "protest" was incorrect.

While the court's statement in American Legion that people are generally charged with knowledge of the laws which apply to them and their endeavors is generally true, this argument has no application to the facts of this case since the relevant laws applied to the Defendants, and did not apply in any respect to the Plaintiffs conduct.

The courts in South Carolina and other states have consistently held that individuals are generally entitled to assume that others will obey the law. Jones v. Carter, 336 S.C. 110, 518 S.E.2d 619 (S.C.Ct.App. 1999); Wilson v. Marshall, 260 S.C. 271, 195 S.E.2d 610 (S.C. 1973). "A person is not bound to anticipate negligent acts or omissions on the part of others, but in the absence of anything which gives notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law..." Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (N.C. 1951). In

this case, the statutory provisions of South Carolina Code Ann., Section 40-57-5 *et. seq.* are by their express terms applicable only to the Defendants as licensed real estate professionals and fiduciaries, and do not apply in any respect to the conduct of the Plaintiffs.

The Defendants' argument that the Plaintiffs should be charged with knowledge of the law applicable to real estate professionals is expressly preempted by South Carolina Code Ann., Section 40-57-137(Q) which expressly "supersedes" all common law which conflicts with the relevant statutory provisions. In Sections 40-57-135(C)(4), 40-57-137, and 40-57-145(A)(13) and (15), the South Carolina Legislature was unambiguous in stating that it is illegal for a licensed agent or broker to market or to participate in the sale of property owned by someone else without complying with all statutorily mandated disclosure requirements including written listing agreements and dual agency agreements. When the General Assembly of South Carolina "has enacted a clear and unambiguous statute that dictates a result in a case," the courts have "no power to decide otherwise." McLean v. United States, C/A No. 9:17 – 2702 DCC (D.C.S.C. 2019). "The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925); Taghivand v. Rite Aid Corp., 411 S.C. 240, 768 S.E.2nd 385 (S.C. 2015). The courts, therefore, may not (i) override a statutory requirement for written disclosure, and (ii) override a statutory declaration of preemption. The Defendants' argument would render meaningless the Legislature's clear and unequivocal statutory mandates on the conduct of real estate professionals in South Carolina.

The Legislature's extensive mandates for written agreements and associated written disclosures clearly establish that the Plaintiffs are not charged with knowledge of the statutory requirements absent complete and accurate compliance by the Defendants with the applicable statutory requirements. See McClurkin v. Champion Labs. Inc., 2011 WL 5402970 (D.S.C.), where the court refused to enforce an employee handbook disclaimer unless it was printed exactly as mandated by the applicable statute. In McClurkin, the disclaimer was printed in bold font and underlined, but was not in all capital letters as specifically required by the statute. Even though the evidence in the case indicated that the plaintiff had actually read the defective disclaimer, the Court held it to be completely void.

Instead of having some common law duty to police the Defendants' compliance with the professional standards applicable to them, the Plaintiffs were entitled to rely on their status as licensed real estate professionals, and Wilkins' status as a licensed attorney, as evidence that the marketing and sale of the Plaintiffs' properties would be handled in accordance with applicable law. The Plaintiffs were justified in their reliance on the Defendants' fiduciary duty to comply with all applicable laws governing the Defendants' actions as licensed real estate professionals. Epstein v. Howell, 308 S.C. 528, 419 S.E.2nd 379 (S.C.Ct.App. 1992); Armstrong v. Collins, 366 S.C. 204, 219, 621 S.E.2d 368 (S.C.Ct.App. 2005); . The Plaintiffs had no duty to research the laws applicable only to real estate professionals in South Carolina, until they had knowledge of facts which created a need to do so.

The Plaintiffs took all actions which were necessary and appropriate to investigate, both factually and legally, any possible claims against the Defendants after discovering that the Defendants may have violated South Carolina law with respect to the absence of written listing agreements and dual agency agreements. These necessary and appropriate

actions were initiated by the Plaintiffs immediately upon discovery of the issues, and this action was filed within 3 years of the first possible discovery of the injuries and claims. The Plaintiffs satisfied the applicable statute of limitations to the extent that such statute of limitations is applicable in light of the estoppel and tolling issues discussed below.

III. The Defendants are estopped from raising the statute of limitations as an affirmative defense to this action.

The statute of limitations is an affirmative defense which is subject to the equitable doctrines of estoppel and equitable tolling, and the defense is not an automatic bar to claims. Vicary v. Town of Awendaw, 427 S.C. 48, 822 S.E. 2d. 229 (S.C.Ct.App. 2019). In Vicary, the court stated that the passage of time cannot transform an invalid or unlawful act into a valid or lawful act. The illegal nature of a party's failure to comply with applicable law, and the failure to provide statutorily required notices constitute grounds for estopping the party from asserting a statute of limitations defense which would have the effect of rendering the party's illegal activity valid. Id. For the century's old United States Supreme Court's holdings on this issue, see Central Transp. Co. v. Pullman Palace Car Co., 139 U.S. 24, 59-60 (1891); Jacksonville, M., P. Ry. & Nav Co. v. Hooper, 160 U.S. 514, 524, 530 (1896); California Bank v. Kennedy, 167 U.S. 362 (1897)(discussing the public interest in not validating unlawful acts).

The South Carolina Supreme Court long ago established the rule that the courts will not assist parties who have acted unlawfully or in contravention of statutory public policy. White v. Bank, 66 S.C. 491, 503-4, 45 S.E. 94, (S.C. 1903). "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for the performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M.

Brown Amusement Company, Inc., 360 S.C. 366, 601 S.E.2nd 342 (S.C. 2004). “An illegal contract has always been unenforceable.” Berkebile v. Outen, 311 S.C. 50, 426 S.E.2nd 760 (S.C. 1993). Contracts violating public policy as expressed in constitutional provisions, statutes, or judicial decisions are void. Batchelor v. American Health Ins. Co., 234 S.C. 103, 107 S.E.2nd 36 (S.C. 1959). A “Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy.” Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2nd 516 (S.C. 2010). To do so would “violate statutory law, and in turn, public policy.” Id. Illegal contracts are void and unenforceable. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2nd 863 (Ct.App. 2002). The rule of issue preservation on appeal is “not without exception, and we can set aside our preservation rules to find a contract illegal because we will not lend our assistance to carry out the terms of a contract that violates statutory law or public policy.” Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2nd 282 (S.C. 2012). Jackson v. Bi-Lo Stores, Inc., 437 S.E.2nd 168 (S.C.Ct.App. 1993). “The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.” Simpson v. MSA of Myrtle Beach, Inc. 373 S.C. 14, 644 S.E.2nd 663 (S.C. 2007). See also Gladden v. Boykin, 402 S.C. 140, 739 S.E.2nd 882 (S.C. 2013). “Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal.” Branham v. Miller Electric, 237 S.C. 540, 118 S.E.2nd 167 (S.C. 1961).

The Supreme Court’s decision in Atlantic Coast Builders, *supra*, is enlightening as to how seriously the courts are to deal with unlawful activity. In that case, the Supreme Court confirmed that it would cast aside the well established error preservation rule (which provides that issues not preserved in the record cannot be addressed on appeal) in order to avoid lending assistance to an illegal contract or illegal activity. Atlantic Coast Builders

at 331, footnote 4. Instead, the Court clearly stated that it had unlimited discretion to override any procedural rule to avoid lending assistance to any illegal activity.

The U.S. Supreme Court commented on this universal rule against assisting unlawful activity over 120 years ago. “The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.” McMullen v. Hoffman, 174 U.S. 639 (1899).

The Defendants’ prior attorneys, Casterline and Blair Cato, have confirmed that illegality in an email dated August 27, 2018 which confirmed that the Defendants did not have the required listing agreements. In blogs published on the Blair Cato website, Blair Cato publicly stated on at least 4 separate occasions that the failure to timely obtain written listing agreements meeting all applicable requirements of Code Section 40-57-135 renders the licensed agent’s involvement illegal. “*Did All Owners Sign the Listing Agreement?*” posted at Blair Cato on February 7, 2017; “*Pocket Listings and the CMLS*” posted at Blair Cato on March 31, 2017; “*Is it Illegal to Post or Advertise a Listing as ‘Coming Soon?’*” posted at Blair Cato on March 23, 2018; “*Staying Legal While Advising a Consumer About Listing Their House*” posted at Blair Cato on August 10, 2018.

IV. The “unclean hands” of the Defendants equitably tolled the running of the statute of limitations.

The courts have also consistently held that a party attempting to recover on common law equitable claims such as unjust enrichment, estoppel, etc. must not have “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.” Mason v. Mason, 770 S.E.2nd 405 (S.C. 2015) citing First Union National Bank of S.C. v. Soden, 333 S.C. 554, 567, 511 S.E.2d 372, 379 (S.C.Ct.App. 1998). “He who comes into equity must come with clean hands.” Mason at 419. “He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequiteness or bad faith relative to the matter in which he seeks relief.” Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2nd 598, 605 (S.C. Ct. App. 2004). See also Doosan Mach. Tools Am. Corp. v. Mach. Sols., Inc., 2018 WL 1374066 (D.S.C.); Ashmore v. Fowler, 2016 WL 4089551 (D.S.C.). “Equitable tolling is judicially created; it stems from the judiciary’s inherent power to formulate rules of procedure where justice demands it.” Doyle v. Horry County, *supra* at page 8. “Where a statute sets a limitation period for an action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental fairness. *Id.* Equitable tolling does not require evidence that the Defendants made any misrepresentation to the Plaintiffs; **silence is sufficient.** *Id.*, Magnolia N. Prop. Owners Association, Inc. v. Heritage Cmty., Inc., 397 S.C. 348, 372, 725 S.E.2d 112, 125 (S.C.Ct.App. 2012)

To be presented at trial, the Defendants and their attorneys delayed the production of legally mandated disclosures and documents requested by the Plaintiffs in May of 2017 for 15 months. When the requested documents were finally provided to the Plaintiffs on August 28, 2018, the Plaintiffs learned for the first time of additional, and previously unknown statutory violations by Defendants. Over a year later, on November 21, 2019, the Plaintiffs were provided for the first time with copies of two fraudulent listing agreements created by the Defendants or their employees (“Fraudulent Listing Agreements”). The

plaintiffs are informed and believe that other such fraudulent documents may have been created, but never been provided to the Plaintiffs, as required in 2017 and despite subsequent written requests.

As a result of their statutory fiduciary status, the Defendants had an affirmative duty to disclose the facts that (i) no listing agreements had been obtained from the Plaintiffs in violation of Code Section 40-57-135(C)(4), (ii) their representation of certain purchasers constituted dual agency in violation of Code Section 40-57-137(M)(1), (iii) no agency disclosure forms had been provided in violation of Code Section 40-57-139(A), and (iv) that the Defendants had secretly executed the Fraudulent Listing Agreements. The Defendants failure to disclose these facts, including the illegal nature of their conduct, constituted constructive fraud. “Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, **silence may constitute fraud.**”(emphasis added). Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (S.C.Ct.App. 1995). “Nondisclosure is fraudulent when there is a duty to speak.” Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (S.C.Ct.App. 1993). “Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction” Lawson v. Citizens S. Natl. Bank of S.C., 259 S.C. 477 Agreements in an attempt to hide their illegal actions. Ellie v. Miccichi, 358 S.C. 78, 594 S.E.2d 485, 481-82, 193 S.E.2d 124, 126 (S.C. 1972).

The fraudulent concealment by the Defendants and their agents of a failure to comply with the statutory requirements of Sections 40-57-135 and 137 tolled any applicable statute of limitations.

CONCLUSION

Based on the foregoing, the Defendants Motion to Dismiss since there is no statute of limitations applicable to actions founded in equity. Additionally, the breaches of fiduciary duty which form the foundation of any actions at law were not discovered until sometime in January 2017, with this action being brought within a 3 year period of discovery. Further, the Defendants are estopped from raising any statute of limitations defense because they attempted to conceal illegal acts, tolling any statute of limitations because of unclean hands.

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Attorney for Plaintiffs

DATED: September 18, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Civil Action Number: 2020-CP-32-00005
 R. Kent Porth and Panorama Point, LLC,	)	
	)	
Plaintiffs,	)	DEFENDANTS ROBERT P. WILKINS,
	)	JR.'S, RPW DEVELOPMENT, INC.'S
vs.	)	AND SOUTHERN VISIONS REALTY,
	)	INC.'S AMENDED MOTION TO
Robert P. Wilkins, Jr., RPW Development,	)	DISMISS
Inc., Southern Visions Realty, Inc., and	)	
Consolidated Multiple Listing Service,	)	
Inc.,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that Defendants Robert P. Wilkins, Jr.; RPW Development, Inc, and Southern Visions Realty, Inc., hereby moves before the Presiding Judge for the Eleventh Judicial Circuit, for an Order Dismissing the Plaintiff's Complaint.

In addition to the grounds articulated in their original Motion to Dismiss, the moving parties further move to dismiss the Complaint on the grounds that the facts as stated do not give rise to a cause of action and is subject to dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This motion shall be further supported by such argument and authority as may be presented at the time of hearing.

WE SO MOVE:

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Columbia, South Carolina

October 9, 2020

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

R. Kent Porth and Panorama Point, LLC,
Plaintiffs,

Civil Action No. 2020-CP-32-00005

vs.

Robert P. Wilkins, Jr., RPW Development,
Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,
Defendants.

**PLAINTIFFS' SUPPLEMENTAL
OPPOSITION TO DEFENDANTS'
ORIGINAL AND AMENDED
MOTIONS TO DISMISS**

INTRODUCTION

On May 6, 2020, the Defendants filed a Rule 12(b)(6) Motion to Dismiss raising an affirmative statute of limitations defense. It is well established, however, that to raise the statute of limitations defense pre-Answer, is inappropriate and not allowed. Meaning, the Plaintiff's Rule 12(b)(6) Motion to Dismiss should not be considered and immediately dismissed without a hearing.

In an effort to attempt to salvage the defective and inappropriate Rule 12(b)(6) motion, last week on Oct 9, 2020, a frivolous and Amended Motion to Dismiss was for failure to state a claim was filed, in addition. This frivolous motion and attempted fix states neither a basis for the amendment itself nor any grounds upon which it is based. Though guessing, perhaps Plaintiffs are still asserting pre-Answer that the case be dismissed based on the affirmative statute of limitations defense, again which is inappropriate, not allowed and requires no hearing.

On September 18, 2020 the Plaintiffs filed their initial Opposition to the Defendants' original Motion to Dismiss, addressing the baseless statute of limitations affirmative defense assertions and now file this Supplemental Opposition to both the Defendants' original and amended Motions to Dismiss. For the reasons set forth below,

and in the interest of judicial economy, both of the Defendants' Motions to Dismiss should be denied without a hearing.

Furthermore, the Court should grant the Plaintiffs leave to file a Motion for Sanctions under South Carolina Code Annotated, Section 15-36-10 to recover compensation for the considerable value of time, costs and attorney's fees expended by the Defendants' and their counsel in defense of these frivolous motions.

ORIGINAL MOTION TO DISMISS FILED ON MAY 6, 2020

As stated above, the Defendants' original Motion to Dismiss filed on May 6, 2020 is impermissible under Rule 12(b)(6), as it is based solely on the grounds of an unidentified statute of limitations. The statute of limitations is not a defense listed under Rule 12(b) that may be raised by a pre-answer motion. Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 n. 2 (S.C. 1999)(overruled on other grounds, {Proctor v. Whitlark & Whitlark, 414 S.C. 318, 778 S.E.2d 888 (S.C. 2015)}) ; Glenn v. School District Five of Anderson County, 294 S.C. 530, 534, 366 S.E.2d 47, 49-50 (S.C.Ct.App. 1988). The Defendants' original Motion to Dismiss must be dismissed as inappropriate, in addition to being dismissed based on Plaintiff's initial Opposition filed on September 18, 2020, with no need for a hearing.

AMENDED MOTION TO DISMISS FILED ON OCTOBER 9, 2020

STANDARD OF REVIEW UNDER RULE 12(b)(6)

As stated in Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (S.C. 2009), "[I]f the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Gentry v. Yonce, 337

S.C. 1, 5, 522 S.E.2d 137, 139 (S.C. 1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Id.*” Further, “ ‘The trial court ... must presume all well pled facts to be true.’ *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct.App.1988). ‘[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgement on the pleadings is considered to be a drastic procedure by our courts.’ *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E. 2d. 338, 339 (1991 (citation omitted)). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. *Doe* 373 S.C. at 395, 645 S.E. 2d at 248.” Cricket Cove Ventures, LLC. v. Gilland, 390 S.C. 312, 701 S.E.2d 39, 44 (2010)

ARGUMENTS

Rule 7(b)(1) of the South Carolina Rules of Civil Procedure requires that a motion “be made in writing, shall state with particularity the grounds therefor, and shall state the relief or order sought.” The Defendants’ Amended Motion to Dismiss simply reiterates the wording of Rule 12(b)(6) without stating “with particularity the grounds therefor.” The failure of the Defendants to comply with the requirements of Rule 7(b)(1) fails to provide notice to the Plaintiffs in violation of due process guarantees. Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (S.C.Ct.App. 2009). As set forth below, the Amended Motion to Dismiss is patently frivolous and interposed solely for the purpose of delay in Answer of the Complaint and the filing of a Motion for Summary Judgement immediately following the filing of an Answer.

The Plaintiffs' complaint sets forth 8 different causes of action, alleging with great particularity the supporting facts for not only each element of each separate cause of action, but also demonstrating compliance with any arguably applicable statutes of limitation. The Plaintiffs' various causes of action are set forth below in the order pled in the complaint, with the elements of each cause of action cross referenced to representative (but not all) supporting factual allegations by paragraph number. Additionally, and where instructive, citations to representative and controlling law have also been provided. For example, a representative case setting forth the elements of each of the Plaintiffs' causes of action are cited for reference.

As evidenced by (i) the referenced paragraphs of the Plaintiffs' complaint, and (ii) the legal authorities referenced below, every element of every cause of action has been pled with particularity by the Plaintiffs. Any assertion that the complaint fails to state a cause of action is wholly and flagrantly absurd.

As the Defendants are aware, the Plaintiffs are in possession of irrefutable evidence that the repeated violations of (i) Title 40, Chapter 57, and (ii) the rules of the CMLS actually occurred in a pattern of anti-competitive self-dealing. Immediately upon the filing of an answer by the Defendants, the Plaintiffs will file a Motion for Summary Judgment under Rule 56 based on irrefutable evidence demonstrating that there are no material issues of fact with respect to at least Counts I (Breach of Fiduciary Duty) and Count VIII (Unfair Trade Practice). With respect to Count VIII, the irrefutable evidence will also demonstrate that the violations were "knowing" and "willful" thereby implicating mandatory treble damages and attorney fees under Section 39-5-140 of the Unfair Trade Practices Act.

The Defendants' frivolous Motions to Dismiss are their last ditch effort to delay as long as possible the filing an answer to the complaint which would allow Plaintiffs to proceed with their Motion for Summary Judgment under Rule 56.

Count 1 - Breach of Fiduciary Duty

"Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal." Darby v. The Furman Co. Inc., 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999). "The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent." Id; Bost v. Bankers Fire Marine Ins. Co., 242 S.C. 274, 283, 130 S.E.2d 907, 911-12 (1963); *see also* Designer Showrooms, Inc. v. Kelley, 304 S.C. 478, 405 S.E.2d 417 (S.C.Ct.App. 1991)("A broker owes a duty to its principal to keep it fully and properly informed of all material facts."). As noted by the unanimous Darby court, some commentators have referred to the broker's duty of disclosure as "Perhaps the most important fiduciary duty the broker owes to the principal..." Darby at footnote 1, page 347.

"One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (S.C.Ct.App. 2000). As alleged with specificity in the Plaintiffs' complaint, the Defendants breached numerous statutory duties to the Plaintiffs, as well as longstanding common law fiduciary duties, thereby resulting in substantial damage to the Plaintiffs, competing real estate professionals and the general public.

Complaint paragraphs # 7-10, 12, 57-58, 77-86, 128-142, 160, 272-276, 305, 321, 328-332, 362, 364, 377-386, 387-389

Count II - Negligent Misrepresentation

The elements of a cause of action for “negligent misrepresentation” are set forth in Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997), and are set forth below.

- 1) A false representation was made by the Defendants to the Plaintiffs.
Complaint paragraphs # 54-56, 392
- 2) The Defendants had a pecuniary interest in making the statement to the Plaintiffs.
Complaint paragraphs # 86, 166-218, 393
- 3) A duty of care was owed by the Defendants to see that truthful information was communicated to the Plaintiffs.
Complaint paragraphs # 7-10, 12, 394; also see Count I above
- 4) The Defendants breached their duty of care by failing to exercise due care.
Complaint paragraphs # 77-86, 129-141, 321, 328-332, 395; see also Count I above
- 5) The Plaintiffs justifiably relied on the representations from the Defendants.
Complaint paragraphs # 57-58, 389, 396
- 6) The Plaintiffs suffered a pecuniary loss as a direct and proximate result of reliance on the Defendants’ representations.
Complaint paragraphs # 222, 387-389, 399-400

Count III – Negligence

The elements of a cause of action for “negligence” are set forth in Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989), and are set forth below.

- 1) The Defendants owe a duty of care to the Plaintiffs.
Complaint paragraph #394; see also Count I and Count II (Element 3) above
- 2) The Defendants breach that duty of care as a result of a negligent act or omission.
Complaint paragraphs # 402-409; see also Count I and Count II (Element 4) above
- 3) The Plaintiffs suffer damages proximately resulting from the breach of duty by the Defendants.
Complaint paragraphs # 222, 387-389, 411-417

Some courts have separated the third element stated above into two separate elements of damages and proximate cause. See Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (S.C. 1977).

Count IV - Conversion

A cause of action for “conversion” is defined in Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432 (S.C.Ct.App. 2003). “Conversion is the unauthorized assumption and exercise of the right of ownership over property of another, and may arise by illegal activity, or by wrongful acts which emanate from wrongful taking. While the Plaintiffs acknowledge that legal issues may exist as to the whether the funds at issue in this case (i.e. the illegal commissions and illegal development fees) are the type of “money” subject to a technical conversion claim, the cause of action has been properly pled by the Plaintiffs.

- 1) The Plaintiffs must have an interest in the thing or property converted.

Complaint paragraph #420

- 2) The Defendants converted the property to their own use.

Complaint paragraph #425

- 3) The Defendants’ use was without the Plaintiff’s permission.

Complaint paragraph #422

A demand for the return of the property, and refusal are unnecessary where the conversion resulted from the illegal, fraudulent, or wrongful conduct of the Defendants. Moore v. Weinberg, 383 S.C. 583, 681 S.E.2d 875 (S.C. 2009). Such illegal, fraudulent or wrongful conduct was alleged by the Plaintiffs.

Complaint paragraph # 84-86, 451-470

As will be demonstrated to the Court in the Plaintiffs Motion for Summary Judgment, which will be filed immediately upon receipt of the Defendants' answer to the complaint, the Plaintiffs are in possession of fraudulent documents, voluntarily produced by the Defendants prior to the filing of this lawsuit which prove the illegal, fraudulent and wrongful conduct of the Defendants.

Count V - Quantum Meruit

The elements of a cause of action for "quantum meruit" are set forth in Myrtle Beach Hospital v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (S.C. 2000), and are set forth below.

- 1) A benefit was conferred upon the Defendants by the Plaintiffs.
Complaint paragraph # 166-218, 428
- 2) The benefit conferred by the Plaintiffs was realized by the Defendants.
Complaint paragraph # 166-218, 429
- 3) Retention by the Defendants of the benefit under conditions that make it unjust to retain it without paying its value
Complaint paragraphs # 77-86, 93-108, 129-141, 328-332, 430-434

Count VI - Constructive Fraud

The elements of a cause of action for "constructive fraud" are set forth in Woods v. State, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993), and are set forth below.

- 1) The Defendants made a representation.
Complaint paragraphs # 54-56
- 2) The representation made by the Defendants was false.
Complaint paragraphs # 436-437
- 3) The Defendants should have known of the falsity of the representation.
Complaint paragraph # 438
- 4) The statement was material.
Complaint paragraph # 439

- 5) The Defendants intended that the representation would be acted upon.
Complaint paragraph # 440
- 6) The Plaintiffs were ignorant of the falsity of the representation.
Complaint paragraphs # 58, 441
- 7) The Plaintiffs' relied on the truth of the representation.
Complaint paragraphs # 58, 442
- 8) The Plaintiffs had a right to rely on the representation.
Complaint paragraphs # 7-10, 12, 443
- 9) The Plaintiffs suffered a consequent and proximate injury.
Complaint paragraphs # 444-445

Count VII - Restitution

The elements of a cause of action for "restitution" are set forth in Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 409, 581 S.E.2d 161 (S.C. 2003), and are set forth below.

- 1) The Plaintiffs conferred a non-gratuitous benefit on the Defendants.
Complaint paragraph # 446
- 2) The Defendant realized some value from the benefit.
Complaint paragraphs # 166-218, 447
- 3) It would be inequitable for the Defendant to retain the benefit realized.
Complaint paragraph # 77-86, 93-108, 129-141, 328-332, 447

Count VIII - Unfair Trade Practice

The elements of a cause of action for an unfair and deceptive trade practice are set forth in (i) Code sections 39-5-10 *et. seq.* (the "Act"), and (ii) in Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (S.C. 2014). In Woodson the Court stated that "the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)."

1) The Defendants committed a violation of the Act involving unfair or deceptive acts in the conduct of trade or commerce.

Complaint paragraphs # 77-86, 93-108, 129-141, 321, 328-332, 450-470

2) The violation by the Defendants affected the public interest.

Complaint paragraphs # 22-40, 328-332, 346-360, 462-470

3) The violations by the Defendants were the proximate cause of damages to the Plaintiffs.

Complaint paragraphs # 328-332, 387-389, 471-473

Section 39-5-40(a) of the Act provides a “regulated industry” exception to the Act which is not applicable to this case. See Woodson supra. The South Carolina Supreme Court in Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 403 S.E.2d 310 (1991), addressed the ambiguity raised by the literal reading of section 39-5-40 as it relates to UTPA claims. The Supreme Court in Ward v. Dick Dyer clarified that the exemption provided in 39-5-40 only applied to acts or practices that were expressly made legal under the applicable state regulation or other state law. The Court stated that the general activity exemption provided by the various pre-Ward decisions was incorrect in that it did not fulfill the express intent of the legislature in prohibiting unfair trade practices. In Woodson, the Supreme Court addressed the merits of a UTPA claim against a licensed real estate agent confirming the application of the Act to licensed real estate professionals. The clear inference of the Ward decision is that acts or practices made expressly illegal by other applicable regulations or statutes (i.e. sections 40-57-135, 137 and 139 in the present case) would be deemed to be per se unfair or deceptive acts.

CONCLUSION

It is well established that asserting the affirmative statute of limitations defense in a pre-Answer Rule 12(b)(6) motion to dismiss is improper and inappropriate. A hearing is

not warranted and any motion relating to the affirmative statute of limitations defense should be dismissed. Further, it is crystal clear that the Complaint has been pled with such particularity, that all causes of action and compliance with any arguably applicable statute(s) of limitation are supported by the facts asserted, and must be taken as true for purposes of any pre-Answer motion. Additionally, the Defendants amendment to its original Motion to Dismiss is deficient in that it provides no reason nor grounds forming the basis of the amendment.

The Defendants motions to dismiss should not only be denied, but a determination needs to be made by this Court as to their frivolity based on the detailed allegations of the Complaint, granting leave to the Plaintiffs to file a Motion for Sanctions in order to recover the needless expenditure of time, costs and attorney's fees by Plaintiffs and/or their counsel.

Respectfully submitted,

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Attorney for Plaintiffs

DATED: October 20, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO. 2020-CP-32-00005
	)	
R. Kent Porth and Panorama Point, LLC,	)	
	)	
Plaintiffs,	)	
	)	MEMORANDUM OF LAW IN SUPPORT OF
v.	)	THE MOTION TO DISMISS AND
	)	AMENDED MOTION TO DISMISS OF
Robert P. Wilkins, Jr., RPW Development,	)	DEFENDANTS ROBERT P. WILKINS, JR.,
Inc., Southern Visions Realty, Inc., and	)	RPW DEVELOPMENT, INC., AND
Consolidated Multiple Listing Service, Inc.,	)	SOUTHERN VISIONS REALTY, INC. AND
	)	REPLY TO THE PLAINTIFFS' OPPOSITION
Defendants.	)	BRIEFS
_____	)	

On May 6, 2020, Defendants Robert P. Wilkins, Jr. (“Wilkins”), RPW Development, Inc. (“RPW”), and Southern Visions Realty, Inc. (“SVR”), hereinafter collectively referred to as the “Realtor Defendants,” by and through their undersigned counsel, filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure seeking to dismiss the Plaintiffs’ Complaint based upon the expiration of the applicable statutes of limitations. The Realtor Defendants filed an Amended Motion to Dismiss on October 9, 2020 on the grounds that the facts of the Complaint do not give rise to a cause of action and should be dismissed under Rule 12(b)(6). The Plaintiffs submitted briefs opposing the Motions to Dismiss on September 18, 2020 and October 20, 2020. The Realtor Defendants now hereby file their Memorandum of Law in Support of their Motions to Dismiss and Reply to the Plaintiffs’ opposition briefs and show the Court as follows:

INTRODUCTION

Reading more like a Greek tragedy than a legal pleading, the Plaintiffs’ 93 page, 473 paragraph Complaint is a desperate and elaborate subterfuge designed to compensate (if not distract) from its obvious legal defects and lack of merit through the sheer force of its volume

and droning repetition. As Iqbal, Twombly and its progeny have expanded the gatekeeper role of the Court in evaluating the plausibility of claims at the Rule 12(b)(6) stage, these Defendants respectfully request that the Court embrace its role and read the entire Complaint, as they have been forced to do. Any reasonable reading (or attempt at reading) will inevitably invite questions:

- Why does Kent Porth, a licensed attorney in South Carolina from 1983-2003 and former equity partner of Nexsen Pruet (Comp., ¶ 161), spend so much time in his Complaint justifying his ignorance of the law as the reason why he waited until January 2, 2020 to file a legal action that complains of real estate transactions that occurred “between January 2007 and December 2016” (Comp., ¶ 166)?
- Even if accepted as true, does the allegation of ignorance of the law suffice to toll the running of the statute of limitations on claims that are now decades old?
- Even if accepted as true, does the allegation of the technical lack of a written commission agreement entitle the Plaintiffs to retain the benefits of the Defendants’ work while seeking a return of all fees and commissions paid to the developer and sales agents who developed and sold the Plaintiffs’ land over a period of two decades?

Perhaps there has been a lawsuit filed that is more vindictive and egomaniacal as the present Complaint, but the Defendants are unaware of one. The Defendants respectfully request that the Court consider at this stage that despite the foreseeable carnage of time money that will be spent on this legal odyssey, there is no discovery forthcoming that will change the legal landscape of this case or cure the obvious legal defects which preclude the Plaintiffs’ claims. The Defendants respectfully request that the Court, as gatekeeper, dispose now of the issues that will lead to the inevitable failure of the Plaintiffs’ claims.

PROCEDURAL AND FACTUAL BACKGROUND

On January 2, 2020, the Plaintiffs, R. Kent Porth (“Porth”) and Panorama Point, LLC (“Panorama Point”), filed a Complaint against the Realtor Defendants and the Consolidated Multiple Listing Service, Inc. (“CMLS”)¹ arising out of the development and sale of the Plaintiffs’ real property located on Lake Murray (the “Property”). According to the Plaintiffs, the Property consisted of approximately 27 acres, with around 4,750 feet of frontage on Lake Murray. In late 2005 and early 2006, the Plaintiffs began exploring options to best develop and sell all or a portion of the Property as a residential subdivision. [Compl., ¶¶ 20-21.] The Plaintiffs engaged the Realtor Defendants to develop, market, and sell the Property in early 2006. [Id. at ¶ 57.] Plaintiff Porth signed a Development Agreement on behalf of Panorama Point with Defendant RPW on or about December 21, 2006. [Id. at ¶ 87.] The Development Agreement contained provisions for the payment of fees to the Developer as well as provisions for the payment of real estate commissions for listing and sales.

Between January 2007 and December 2016, the Plaintiffs sold interests in the Property on 23 separate occasions in which SVR represented the Plaintiffs as the listing agent. The prices for the lots sold by the Plaintiffs ranged from \$70,000 to \$535,000, totaling more than \$6 million in sales to the Plaintiffs, some of which to date are the highest lots sold on Lake Murray on a per acre price. SVR received a commission on each sale ranging from \$1,400 to \$26,7500, typically a fee equal to 5% of the sales price. [Id. at ¶¶ 166-198; Mtn. to Dismiss, ¶¶ 7-31.] The Development fees and the realtor commissions were fully disclosed on closing statements for each sale, that

¹ The CMLS is not a party to this Motion to Dismiss and not represented by counsel for the Realtor Defendants. The Plaintiffs have not yet served the Summons and Complaint upon the CMLS.

were approved by Plaintiffs' counsel and signed off on by the Plaintiff Porth. Further, Plaintiff Porth participated in every aspect for each lot listing and sale from the setting of the listing price, the marketing sale prices, the signing of a lot sale contract, the signing of the HUD-1 and/or closing statement and the signing of the final deed. Further, Plaintiff Porth is highly sophisticated business, tax and real estate attorney who practiced for many years as a partner in the law firm of Nexsen Pruet. As a Nexsen Pruet tax attorney Porth had significant transactional and drafting of legal document experience from his participation in significant numbers of real estate and business transactions. Further, prior the development of subdivision at issue in 2006, Porth participated in the sale of other lake Murray property and lots for his family of which Defendant Wilkins was involved. Further, Plaintiff Porth retired from practicing law full time with Nexsen Pruet in around 2007 and since that time the primary focus of his business efforts was ONLY the development and sale of these lots in question after he wrestled them away from litigation with his brother, other than his wildlife photography business. The last lot sold giving rise to the allegations of the Complaint was sold by the Plaintiffs on **May 1, 2015**, more than four years before the Complaint was filed on January 2, 2020. [Compl., ¶ 198; Mtn. to Dismiss, ¶¶ 31-32.]

The Complaint also alleges that certain development fees were paid to Defendant RPW in connection with the sales of the lots from June 2007 through May 2015. The development fees ranged from \$3,325 to \$25,412 for each lot sold, approximately 4.7% of each sales price instead of the contracted 5% amount. [Compl., ¶¶ 199-218; Mtn. to Dismiss, ¶¶ 33-54.] ²

The latest alleged payment of a development fee giving rise to the allegations of the Complaint was paid on **May 7, 2015**, more than four years before the Complaint was filed on January 2, 2020. [Compl., ¶ 201; Mtn. to Dismiss; ¶¶ 36-37.]

² For many lots sold, the Defendants either agreed to waive their rights to development and realtor fees or discounted them from the required amount as per the Development Agreement.

The crux of the Plaintiffs' allegations in the Complaint is that the Realtor Defendants allegedly did not obtain signed written listing and development agreements in compliance with the statutory requirements set forth under S.C. CODE ANN. § 40-57-135 prior to the development, marketing, and sale of the Property. [Compl., ¶¶ 77-86; 97-102.] The Plaintiffs also complain that the Realtor Defendants did not properly market the Property in the CMLS and would withdraw and relist lots without the Plaintiffs' permission or would not enter certain lots into the CMLS. [Id. at ¶¶ 129-141.] The Plaintiffs further allege that as a result of these purported actions, Defendant SVR represented both the buyer and the seller in an "abnormally high rate" of the lots sold by the Plaintiffs. [Id. at ¶¶ 219-222.]

The Plaintiffs have brought eight causes of action against the Realtor Defendants: (1) breach of fiduciary duty; (2) negligent misrepresentation; (3) negligence; (4) conversion; (5) quantum meruit; (6) constructive fraud; (7) restitution; and (8) violation of South Carolina's Unfair Trade Practices Act. [Id. at ¶¶ 377-473.]

The Plaintiffs seek almost identical damages under each cause of action. In particular, the Plaintiffs claim that the Realtor Defendants' alleged negligence in the marketing and sale of the Property "(i) resulted in below fair market sales prices from inadequate exposure to potential purchasers, and (ii) resulted in an increase in total interest payments on the Development Financing due to delayed sales from inadequate exposure to potential purchasers." [Id. at ¶¶ 387, 397, 411, 444, 473.] The Plaintiffs allege they have suffered economic losses and should receive actual damages for (i) the Realtor Defendants' unlawful retention of the commissions and development fees; (ii) the Plaintiffs' receipt of below fair market sales prices from alleged inadequate exposure to potential purchasers; and (iii) the Plaintiffs' increased interest expense on development financing due to delayed sales from inadequate exposure to potential purchasers. [Id. at ¶¶ 389-

90, 397, 399-400, 411, 417, 426, 444-45, 471-73.] In the Prayer for Relief, the Plaintiffs expressly seek damages “in a sum sufficient to adequately compensate them for actual damages and for such punitive damages as the Court may reasonably award.” [Id. at p. 92.]

The Plaintiffs and the Realtor Defendants agreed to mediate their differences. By consent, the parties agreed on August 5, 2020 to mediate the matter before Attorney Thomas W. Traxler. The parties were unsuccessful in reaching a resolution of the pending claims.

The Realtor Defendants also filed a Motion to Dismiss on May 6, 2020 pursuant to Rule 12(b)(6), SCRPC on the grounds that the Plaintiffs’ claims are barred by the statute of limitations. The Realtor Defendants filed an Amended Motion to Dismiss to assert the additional ground that the allegations of the Complaint do not state a cause of action and are subject to dismissal for failure to state a claim pursuant to Rule 12(b)(6) because there is no statutory right for a private cause of action in favor of the Plaintiffs for an alleged failure to have a signed listing agreement for the sale the lot(s) in question.³

The Plaintiffs filed an Opposition Brief on September 18, 2020 and a Supplemental Opposition Brief on October 20, 2020. The Realtor Defendants now file their Memorandum of Law in Support of their Motions to Dismiss and Reply to the Plaintiffs’ opposition briefs.

LEGAL STANDARD

Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). A trial judge in the civil setting may dismiss a claim when the defendant

³ Defendants deny that there were never any written signed listing agreements for the lots in question. First, the Development Agreement constitutes the required commissions to be paid to SVR. Further, the Defendants were not required to maintain many of the signed listing agreements for transactions that occurred more than six years ago. Further, Porth’s wife, Shannon Porth, a former realtor with SVR, took the actual SVR realtor files when she left SVR in 2017 and became the sole listing agent for the remaining Plaintiff lots in PP.

demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint; however, the trial court should grant the motion “if the facts alleged in the complaint do not support relief under any theory of law.” Flateau, 355 S.C. at 201-02, 584 S.E.2d at 415; see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 650-51, 491 S.E.2d 272, 274-75 (Ct. App. 1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

ARGUMENT

I. The Realtor Defendants’ Motions to Dismiss Comply with the Requirements of Rule 7(b)(1), SCRPC.

In their Supplemental Opposition Brief, the Plaintiffs contend the Realtor Defendants’ Amended Motion to Dismiss fails to comply with Rule 7(b)(1) of the South Carolina Rules of Civil Procedure and should not be considered. Rule 7(b)(1) provides that a motion “shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” The Realtor Defendants are submitting this detailed Memorandum setting forth all arguments in support of their Motions to Dismiss prior to the Court’s hearing on the motions. Therefore, the Plaintiffs cannot show any prejudice where they have notice of all grounds raised by the Realtor Defendants for their motions seeking to dismiss all claims for failure to state a claim pursuant to Rule 12(b)(6). See Chastain v. Hiltabidle, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009) (“To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case.”); see also Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012) (observing an

overly technical application of Rule 7(b)(1) does not serve the purpose of the Rule where there is no prejudice to any party and the court can comprehend the basis of the motion).

II. An action may be dismissed under Rule 12(b)(6), SCRPC where the facts alleged in the complaint show that the claims are barred by the applicable statute of limitations.

The Plaintiffs further argue that the Realtor Defendants cannot raise the defense of the statute of limitations in a Rule 12(b)(6) motion and demand this Court dismiss the Realtor Defendants' motion without a hearing. The Plaintiffs' argument is misguided and is contrary to the rules and case law of this State.

Rule 12(b), SCRPC provides that certain defenses, including the failure to state facts sufficient to constitute a cause of action, "may at the option of the pleader be made by motion." This State's appellate courts recognize that a statute of limitations defense may be raised via a Rule 12(b)(6) motion to dismiss for failure to state a claim and have in fact affirmed dismissals based upon the expiration of the statute of limitations. See Clearwater Trust v. Bunting, 367 S.C. 340, 351-53, 626 S.E.2d 334, 339-40 (2006) (affirming trial court's grant of Rule 12(b)(6) motion to dismiss for failure to state a claim because action for breach of fiduciary duty owed by officer as a corporate officer was precluded by statute of limitations); Logan v. Cherokee Landscaping and Grading Co., 389 S.C. 611, 698 S.E.2d 879 (Ct. App. 2010) (affirming trial court's grant of Rule 12(b)(6) motion to dismiss plaintiff's negligence action because plaintiff failed to bring action within the statute of limitations).

Therefore, the Plaintiffs' contention that the Realtor Defendants cannot move to dismiss the Complaint based upon the expiration of the applicable statute of limitations is entirely unfounded. This Court may grant the Rule 12(b)(6) motion to dismiss for failure to state a claim based upon the expiration of the statute of limitations where the allegations of the Complaint show that the Plaintiffs did not timely file this action as more fully set forth below.

III. The applicable statutes of limitations apply to the Plaintiffs' causes of action because such claims are actions at law which seek legal relief and are thereby subject to the applicable statutes of limitations.

The Plaintiffs argue in opposition to the Realtor Defendants' Motion to Dismiss that their Complaint only seeks relief in equity which is not subject to any statute of limitations. While it is correct that statutes of limitations do not apply to actions in equity and only apply to actions at law, Thomerson v. DeVito, 430 S.C. 246, 250-51 844 S.E.2d 378, 380-81(2020), the gravamen of the Plaintiffs' claims are actions at law subject to and barred by the applicable statutes of limitations.⁴

There is no genuine dispute that the Plaintiffs' claims for negligent misrepresentation, negligence, conversion, constructive fraud, and violation of South Carolina's Unfair Trade Practices Act are each actions at law. See Advance Int'l, Inc. v. North Carolina Nat'l Bank of South Carolina, 316 S.C. 266, 271, 449 S.E.2d 580, 583 (Ct. App. 1994), aff'd in part and vacated in part on other grounds, 320 S.C. 532, 466 S.E.2d 367 (1996) (action alleging, *inter alia*, fraud, negligence, and unfair trade practices and seeking damages is one at law); Bivens v. Watkins, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct. App. 1993) (stating negligent misrepresentation and fraud are actions at law); Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986) ("An action for damages for conversion is an action at law."); see also Turner v. Kellett, 426 S.C. 42, 47, 824 S.E.2d 466, 468 (Ct. App. 2019) (observing action for unfair trade practices is one at law); Bateman v. Rouse, 358 S.C. 667, 673-74, 596 S.E.2d 386, 389 (Ct. App. 2004) (conversion is an action at law).

Each of these claims, being an action at law, is therefore subject to the applicable statutes of limitations. In particular, the claims for negligent misrepresentation, negligence, conversion,

⁴ While statute of limitations may not apply in the application of equitable claims, the defense of laches does apply and it applies mightily in this case.

and fraud are subject to the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-530. See Walbeck v. I'On Co., 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019) (“The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005), applies to [] negligent misrepresentation claims.”); Gibson v. Bank of Am., N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 782 (Ct. App. 2009) (three-year limitations period set forth in § 15-3-530(5) applies to negligence actions); Walsh v. Woods, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) (“The statute of limitations for . . . a conversion claim is three (3) years [under § 15-3-530(5).]”); Dorman v. Campbell, 331 S.C. 179, 183-84, 500 S.E.2d 786, 788-89 (Ct. App. 1998) (applying three-year statute of limitations set forth in § 15-3-530 to claim for constructive fraud); see also S.C. CODE ANN. § 15-3-530(7) (providing “an action for relief on the ground of fraud” is subject to the three-year statute of limitations).

A claim for violation of South Carolina’s Unfair Trade Practices Act must also be brought within three years. S.C. CODE ANN. § 39-5-150 specifies a three-year statute of limitations period for actions brought under the Unfair Trade Practices Act: “No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.”

The Plaintiffs’ claim for breach of fiduciary duty is also legal in nature and thus subject to the statute of limitations. A breach of fiduciary duty claim may be legal or equitable. Deborah Dereede Living Trust dated December 18, 2013 v. Karp, 427 S.C. 336, 340, 831 S.E.2d 435, 438 (Ct. App. 2019). The court must therefore look at the main purpose of the action to determine whether it is a legal or equitable claim. Id. “The main purpose of the action should generally be ascertained from the body of the complaint. . . . However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose

of the action.” Insurance Fin. Servs., Inc. v. South Carolina Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (internal citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. Bell v. Mackey, 191 S.C. 105, 119–20, 3 S.E.2d 816, 822 (1939) (internal citations omitted).

This State’s Supreme Court has held that “an action alleging a breach of fiduciary duty is an action at law.” Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (Ct. App. 2010); see also Corley v. Ott, 326 S.C. 89, 92 n. 1, 485 S.E.2d 97, 99 n. 1 (1997). A breach of fiduciary duty, however, may sound in equity if the relief sought is equitable. See Bivens v. Watkins, 313 S.C. 228, 230 n. 3, 437 S.E.2d 132, 133 n. 3 (Ct. App. 1993).

The main purpose of the Plaintiffs’ breach of fiduciary duty cause of action is to seek the legal remedy of money damages. The Plaintiffs explicitly request money damages “in a sum sufficient to adequately compensate them for actual damages,” as well as punitive damages. [Compl., p. 92.] The Plaintiffs contend the Realtor Defendants’ purported actions caused the Plaintiffs to receive below fair market prices for the sales of the lots on the Property and further caused them to incur additional interest expenses due to an alleged delay in sales. While the Plaintiffs also allege that they are entitled to the return of commission and development fees paid to the Realtor Defendants, the Plaintiffs characterize these losses as “economic.”[Id. at ¶¶ 389-90, 397, 399-400, 411, 417, 426, 444-45, 471-73.]

The relief the Plaintiffs seek is entirely economic losses they allege they suffered as a result of the Realtor Defendants’ supposed breaches. While the Plaintiffs seek a return of the commissions and fees earned by the Realtor and Developer Defendants, the basis for this relief is because the Realtor Defendants allegedly did not provide the services the Plaintiffs paid for, including the execution of written listing agreements. Even if the Plaintiffs attempt to characterize

this relief as “restitution,” restitution is not automatically classified as an equitable remedy. “[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for [the plaintiff’s] claim” and the nature of the underlying remedies sought.” Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (internal citation omitted).

In cases in which a plaintiff could not assert title or right to possession of particular property, but in which he nevertheless might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,” the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. In such cases, the plaintiff’s claim was considered legal because he sought “to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.” Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied). See id. (internal citations omitted).

“In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.” Id. “A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff’s] claim is only that of a general creditor,” and the plaintiff “cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant.] Thus, for restitution to lie in equity, the action generally must seek *not to impose personal liability on the defendant*, but to restore to the plaintiff particular

funds or property in the defendant's possession.” Id. at 213-14 (internal citations omitted) (emphasis added).

Here, it is clear “[t]he kind of restitution that [the Plaintiffs] seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon [the Realtor Defendants.]” Id. at 214. “Almost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. . . . And [m]oney damages are, of course, the classic form of *legal* relief.” Id. at 210 (internal citations omitted) (emphasis in original); cf. Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (Ct. App. 2010) (finding breach of fiduciary duty claim was equitable where relief sought was to restore profits to a trust for the trustee’s breach of loyalty).

The Plaintiffs seek money damages on their claim for breach of fiduciary duty as compensation for their pecuniary injury. See Harleysville Group Ins. v. Heritage Comms., 420 S.C. 321, 353, 803 S.E.2d 288, 306 (2017) (“The goal [of compensatory damages] is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.”) (internal citation omitted). The relief sought is legal, and the breach of fiduciary duty claim is therefore one at law.

Furthermore, equitable relief is only available where a party does not have an adequate remedy at law. Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 327-28 721 S.E.2d 447, 449-50 (Ct. App. 2011) (holding engineering firm had an adequate remedy at law in the form of contractual damages for services rendered, precluding remedy of an equitable lien). “An ‘adequate’ remedy

at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.” Id. at 328, 721 S.E.2d at 450 (internal citation omitted).

The Plaintiffs have an adequate remedy at law in the form of money damages which further confirms that their breach of fiduciary duty claim is one at law and subject to the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-530. See Mazloom v. Mazloom, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009) (finding breach of fiduciary claim is action at law subject to the three-year statute of limitations § 15-3-530); see also Carolina Park Assocs., LLC v. MDC of Charleston, LLC, 400 S.C. 1, 8, 732 S.E.2d 876, 879 (2012) (“[E]quitable relief is unnecessary when an adequate remedy for money damages is available at law).

Finally, the Plaintiffs assert claims for quantum meruit and restitution. To the extent the Plaintiffs can state claims for these causes of action⁵, these are both also subject to the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-530(1). Both of these claims are based, at a minimum, on a contract “implied in fact” which arises when the assent of the parties is manifested by conduct. Thomerson v. DeVito, 430 S.C. 246, 257 n.10, 844 S.E.2d 378, 384 n. 10 (2020). The Plaintiffs have alleged that they entered into contractual relationships with the Realtor Defendants for the development, marketing, and sale of the Property and that pursuant to these agreements, whether expressly in writing or not, the Realtor Defendants represented the Plaintiffs in the real estate transactions involving the Property. [Compl., ¶¶ 54-58, 87, 94-95, 121-23, 125-27, 166, 199-218.] This State’s Supreme Court has stated that the statute of limitations does apply to implied in fact contracts. Thomerson, 430 S.C. at 257 n.10, 844 S.E.2d at 384 n.10. The

⁵ “[I]t is a defense to an action in quantum meruit that there is a valid express contract covering the supplied services or material furnished.” “A party cannot disavow a binding contract and pursue quantum meruit, no matter how green the grass of equity may seem.” Gibson v. Epting, 426 S.C. 346, 355-56, 827 S.E.2d 178, 183 (Ct. App. 2019) (internal citation omitted).

Plaintiffs' claims for quantum meruit and restitution are therefore also subject to the three-year statute of limitations.

All of the Plaintiffs' causes of action are subject to a limitations period of three years. As more fully shown below, the Plaintiffs' claims arising out of property transactions which had been closed for four or more years prior to the filing of the Complaint are time barred as a matter of law, and this Complaint should be dismissed with prejudice.

IV. The applicable three-year statutes of limitations bar the Plaintiffs' claims as a matter of law because the allegations of the Complaint arise out of property transactions which occurred four years or more before the filing of the Complaint.

As set forth above, the claims asserted by the Plaintiffs are subject to the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-530 or S.C. CODE ANN. § 39-5-150 for the unfair trade practice claims. The last property sale giving rise to the allegations in the Complaint occurred on May 1, 2015, and the last payment of a development fee giving rise to the allegations in the Complaint occurred on May 7, 2015. These acts occurred more than four years before the Complaint was filed on January 2, 2020. The three-year statute of limitations therefore unequivocally bars the claims asserted by the Plaintiffs in the Complaint.

Statutes of limitation “are designed to promote justice by forcing parties to pursue a case in a timely manner.” Gibson v. Bank of Am., N.A., 383 S.C. 399, 410, 680 S.E.2d 778, 784 (Ct. App. 2009) (quoting State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000)). As this Court has observed;

Statutes of limitation . . . protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999).

Statutes of limitations aim to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005).

“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person **knew or by the exercise of reasonable diligence should have known that he had a cause of action.**” S.C. CODE ANN. § 15-3-535 (emphasis added). In other terms, “the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist.” Gibson, 383 S.C. at 406, 680 S.E.2d at 782.

Under South Carolina law, in determining when a cause of action arises under § 15-3-530, courts apply the “discovery rule.” Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). According to this rule, the statute of limitations begins to run “when a cause of action reasonably ought to have been discovered,” or, in other words, “when a plaintiff has notice that he might have a remedy for a harm.” Id.

The standard as to when the statute of limitations begins to run is objective rather than subjective. Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); Gibson, 383 S.C. at 406, 680 S.E.2d at 782. Therefore, the test is not whether the particular plaintiff actually knew a claim is existed. Rumpf, 357 S.C. at 395, 593 S.E.2d at 187. The test is when a person **could or should have known** through reasonable diligence that some cause of action exists against another

person rather than when a person obtains actual knowledge of a potential claim or of the facts giving rise thereto. Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998).

The key element of reasonable diligence is notice. Reasonable diligence requires that a party act with some promptness where facts and circumstances would put a person on notice that some right has been invaded or that some claim against another party might exist. Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The statute begins to run at this point and not when:

- the advice of counsel is sought;
- a full-blown theory of recovery is developed; or
- the injured party comprehends the full extent of the damage.

Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean, 321 S.C. at 363-64, 468 S.E.2d at 647; Wiggins, 314 S.C. at 128, 442 S.E.2d at 170; Dorman, 331 S.C. at 184-85, 500 S.E.2d at 789; Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998). The failure of a plaintiff to fully understand his claim or the ramifications of a potential claim does not toll the accrual of the statute of limitations. Young v. South Carolina Dep't of Corrs., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct. App. 1999).

Where there is no conflicting evidence or where only one reasonable inference can be drawn from the evidence, the trial court should determine as a matter of law when a party knew or should have known it had a claim. Gibson, 383 S.C. at 406-07, 680 S.E.2d at 782.

The Plaintiffs' claims arise out of the purported lack of certain written agreements relating to the real estate transactions. As of the date of closing of each real estate transaction, the Plaintiffs knew whether they had or had not signed any written documents relating to the transactions and knew the marketing and listing price for each sale, negotiated terms of each sale, including the sales prices to which they agreed and the final sale documents and transfer of title. The Plaintiffs,

as set forth in the Complaint, fully and voluntarily participated in each real estate transaction with full knowledge as to all financial terms and agreed to the closing of each lot. The Plaintiffs knew at the time of closing that Defendant SVR was representing both the seller and the purchasers in some of the transactions. In fact, for some of the closings, Plaintiff demanded that SVR either forego or reduce their commissions due.

The only piece of information the Plaintiffs contend they did not have at the time was the law itself. The Plaintiffs complain that they could not discover they had any claims against the Realtor Defendants because they were unaware of the statutory requirements of S.C. CODE ANN. §§ 40-57-135 and 137 as well as the requirements of the CMLS rules and applicable order prior to January 10, 2017. [Compl., ¶¶ 142, 159-60.]

Ignorance of the law does not suspend the accrual of a statute of limitations. See Ott v. Maryland Dep't of Pub. Safety and Corrs. Servs., 909 F.3d 655, 661 (4th Cir. 2018) (“Ignorance of the law does not justify tolling, even when a party does not have legal representation); United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (observing ignorance of the law is not a basis for tolling). The Plaintiffs argue it should not be expected that they have knowledge of law applicable to real estate professionals as if this law were locked behind some secret vault. The Plaintiffs’ position is contrary to the well-established principle that “[c]itizens are presumed to know the law and are charged with exercising reasonable care to protect their interests.” American Legion Post 15 v. Horry Cnty., 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996) (“Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.”).

Accordingly, the Plaintiffs had the means and ability in May of 2015 to discover if the real estate transactions which they fully and voluntarily participated in did not fully comply with any legal or other requirements. Any claim arising out of these transactions began to accrue at that point and were well expired when the Plaintiffs filed their Complaint on January 2, 2020.

Furthermore, S.C. CODE ANN. § 40-57-135(D)(1) only requires brokers-in-charge to maintain documents such as listing contracts for five years. Therefore, the Realtor Defendants were no longer required to keep the documentation pertaining to the real estate transactions in this case which occurred between 2007 and 2015. Applying the statute of limitations and barring this action where the Plaintiffs brought this suit years after the closings of the transactions and long after documentation was statutorily required to be maintained comports with the policy set forth in § 40-57-135. The Plaintiffs should not be permitted to complain now about long closed real estate transactions for which the Realtor Defendants were statutorily permitted to relinquish related documentation. By significantly delaying their filing of this suit, the Plaintiffs have hindered the Realtor Defendants ability to defend.

The Plaintiffs contend that even if the statute of limitations has expired on their claims, the doctrines of equitable estoppel and equitable tolling operate to relieve them of the statute of limitations bar. “Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct.” Kleckley v. Northwestern Nat’l Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000). “The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel.” Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007):

The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to

convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Id. “To succeed on a claim for equitable estoppel, a party must prove ‘lack of knowledge, and the means of knowledge, of the truth as to the facts in question.’ ” Rodarte v. Univ. of South Carolina, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (internal citation omitted). “One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled.” Southern Dev. Land & Golf Co. Ltd. v. South Carolina Public Serv. Auth., 311 S.C. 29, 34, 426 S.E.2d 748, 751 (S.C. 1993).

“Tolling refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting. . . . Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period.” Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (internal citations omitted).

The doctrine of equitable tolling is judicially created and may be applied in certain situations to suspend or extend a limitations period to serve principles of justice and fairness. Id. Nevertheless, “equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.” Id. at 117, 687 S.E.2d at 33. “The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.” Id. at 115, 687 S.E.2d at 32.

Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his control, where extraordinary circumstances outside

the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim, or where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his claim. The plaintiff may be entitled to equitable tolling if the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit. Id. at 116, 687 S.E.2d at 32-33.

There are neither any extraordinary circumstances present which prevented the Plaintiffs from researching the legalities of the real estate transactions nor any showing by the Plaintiffs that they lacked the means to research the law. Further, the Plaintiffs had their own lawyers for each of the lot sales and closings. Further, Plaintiff himself is a sophisticated attorney with many years of business, real estate, development and business transaction experience having been a partner in the law firm of Nexsen Pruet. The doctrines of equitable estoppel and equitable tolling do not apply where the Plaintiffs had the ability to discover the legal requirements for real estate transactions and simply chose to remain ignorant of the law – the law which they are presumed to know. American Legion Post 15 v. Horry Cnty., 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); see also Ott, 909 F.3d at 661 (“[A] party’s “misconception about the operation of the statute of limitations is neither extraordinary nor a circumstance external to [her] control.”) (internal citation omitted).

Accordingly, the claims asserted by the Plaintiffs, which at a minimum arose more than four years before the filing of the Complaint, are time barred by the applicable three-year statutes of limitations. This Court should therefore dismiss the Complaint with prejudice.

V. To the extent the Plaintiffs seeks damages for the alleged failure of the Realtor Defendants to comply with the requirements of S.C. CODE ANN. § 40-57-135, these claims should be dismissed for failure to state a claim under Rule 12(b)(6), SCRCF because there is no private cause of action available under this statutory provision.

The central theme of the Plaintiffs' Complaint is that there were purportedly no written, signed listing agreements for the property transactions as required by S.C. CODE ANN. § 40-57-135.⁶ The Plaintiffs cite this portion of the Code no less than 33 times in the Complaint and contend that alleged violations of this Code Section by the Realtor Defendants entitle them to maintain a private cause of action for damages even though the Plaintiffs voluntarily participated in the marketing, sale, contracting for purchase and closings of the real estate transactions, agreed to all terms, received the amounts due to them under the sales contracts, and received the benefit of the services provided by the Realtor Defendants.

S.C. CODE ANN. § 40-57-5 *et al.* (the "Act") governs the conduct of "real estate brokers, salespersons, and property managers." The Act creates the South Carolina Real Estate Commission under the administration of the Department of Labor, Licensing and Regulation with the purpose "to regulate the real estate industry so as to protect the public's interest when involved in real estate transactions." § 40-57-10.

The Act prescribes that "[a] civil action may be brought for violations of this chapter as provided for violations of Article 1, Chapter 1, in accordance with Section 40-1-210." Section 40-1-210 allows **only** the LLR to institute civil actions through the Administrative Law Court, in the name of the State, "for injunctive relief against a person violating this article, a regulation promulgated under this article, or an order of the board," and further provides "[f]or each violation the administrative law judge may impose a fine of no more than ten thousand dollars." Section 40-57-135 does not expressly allow a private cause of action for any violation of its requirements.

⁶ Again, the Defendants contend that arguably the Development Agreement constitutes a signed listing agreement because it provides the essentials of what SVR was going to do for the Plaintiffs for the marketing and sale in the lots in question.

“In determining whether a statute creates a private cause of action [in South Carolina], the main factor is legislative intent.” Doe v. Marion, 373 S.C. 390, 396 S.E.2d 245, 248 (2007):

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty is determined primarily from the language of the statute In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability. When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.

Id. (internal citations omitted).

The Court of Appeals’ opinion in Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) is instructive as to whether the Act creates a private right of action for a violation of its provisions. In Hurst, the home purchasers who had entered into an oral agreement with the vice-president of a construction company to have plans for a home drawn up, and who later contracted with the company for construction of the home, brought suit against the company and its president and vice-president alleging that the home was defectively designed. Id. at 474-76, 494 S.E.2d at 848-49.

The home purchasers based their negligence claim, in part, on the president’s alleged violation of a statute requiring engineers to be licensed by the state (S.C. CODE ANN. § 40-21-30 (1988)). Id. at 476-77, 494 S.E.2d at 849-50. The home purchasers contended that the trial court erred in granting summary judgment on their negligence claim to the extent violation of the statute constituted negligence per se and proximately caused the home purchasers’ injury. Id. More specifically, the home purchasers argued that because the statute required registration of engineers, there was negligence per se on the part of the president, as an unregistered engineer, for performing engineering services in connection with the design of their home. Id. at 477, 494 S.E.2d at 850.

The Court of Appeals held that violation of the statute could not provide any basis for recovery under the theory of negligence per se. Id. at 477-80, 494 S.E.2d at 850-51.

The Court of Appeals observed that a duty created by a statute will support an action in negligence only if the plaintiff can show “(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.” Id. at 478, 494 S.E.2d at 850 (internal citations omitted).

Next, the Court of Appeals analyzed the engineering statute at issue to determine its essential purpose. The statute, relating to the registration of engineers and land surveyors by the South Carolina State Board of Registration for Professional Engineers and Land Surveyors, expressly stated that the practice of engineering is regulated “in order to safeguard life, health, and property and to promote the public welfare.” Id. at 478, 494 S.E.2d at 850-51. The Court further noted that the statute “prohibits the practice of engineering without registration and clearly defines those activities which constitute the practice of engineering.” Id. at 478, 493 S.E.2d at 851.

In finding that there was no legislative intent to create a private right of action based on a violation of the statute, the Court of Appeals held:

The provisions of Chapter 22 are intended to regulate the practice of engineering by requiring persons who want to engage in this profession to be licensed and registered. Further, this chapter is directed to the engineering profession because it authorizes the Board to sanction a registrant who violates any of the provisions of the Code or regulations of the Board. . . .

Insofar as we understand the essential purpose of this statute, we believe the [home purchasers] have failed to satisfy the first prong of the . . . test. The essential purpose of Chapter 22 is the regulation of the practice of a profession, rather than the imposition of civil liability to private individuals.

. . .

Our reading of the relevant South Carolina code section and cases convinces us that the essential purpose of the statute, as alleged by the [home purchasers], is inconsistent with the legislative intent in enacting this statute.

Id. at 479-80, 494 S.E.2d at 851.

The Court of Appeals finally recognized that licensing statutes will not ordinarily provide a basis for a negligence per se action. The home purchasers therefore could not state a negligence per se claim arising from the alleged violation of the engineering licensing statute. Id.

The Act likewise does not evidence any legislative intent that it creates a private right of action for any violation of Section 40-57-135. The Act specifically delineates its purpose to protect the public and regulate the real estate industry: “The purpose of this commission is to regulate the real estate industry so as to ***protect the public’s interest*** when involved in real estate transactions.” S.C. CODE ANN. § 40-57-10 (emphasis added).

Specific provisions of the Act further (1) prohibit individuals from acting as a “real estate broker, real estate salesperson, or real estate property manager” or advertising or providing “services as such without an active, valid license issued by the commission;” and (2) create a South Carolina Real Estate Commission which has the authority, among other things, to regulate the real estate industry, determine standards and eligibility for licensure, and conduct disciplinary hearings. S.C. CODE ANN. §§ 40-57-10, -20,-60.

The Act, and the requirements of Section 40-57-135, were unquestionably designed to protect the public through the regulation of the real estate industry in the State and clearly was not designed to provide private remedies for any violations of the Act. There is no language in Section 40-57-135 expressly creating a private right of action. The essential purpose of the Act is the regulation of the real estate industry rather than the imposition of civil liability to private individuals for any violations of the Act.

In addition, the enforcement of the Act is placed in the hands of public officials rather than private individuals. See § 40-57-60(A) (“The commission shall administer and enforce this chapter

and regulations promulgated under this chapter”); § 40-57-60(C) (“The commission staff shall conduct periodic inspections of the offices of licensees to assist with and ensure compliance with this chapter”); § 40-57-710 (granting the commission the authority to take disciplinary action against any licensee who violates any provision of the Act), § 40-57-720 (permitting the commission to impose fines for violations of the Act); §§ 40-1-210, 40-57-790 (allowing LLR to institute civil actions in the Administrative Law Court).

Any alleged violations of the Section 40-57-135 by the Realtor Defendants accordingly cannot provide a basis for Plaintiffs’ claims against the Realtor Defendants. The conclusion that Section 40-57-135 of the Act does not give rise to a private cause of action is consistent with this State’s case law holding that statutes designed to protect the public interest do not create private causes of action. See Dema v. Tenet Physicians Servs.-Hilton Head, Inc., 383 S.C. 115, 121-22, 678 S.E.2d 430, 433-34 (2009) (holding the State Certification of Need and Health Facility Licensure Act did not create a private cause of action because expressly-stated purpose of the act was to “advance the quality of healthcare provided in this State for all people receiving the care, not for a particular individual”); Doe v. Marion, 373 S.C. 390, 395-99, 645 S.E.2d 245, 248-50 (2007) (finding that the statute for reporting child abuse does not support a private cause of action for negligence per se against a doctor where statute was concerned with the protection of the public); Dorman v. Aiken Commc’ns., Inc., 303 S.C. 63, 398 S.E.2d 687 (1990) (declining to construe statute prohibiting publication of name of sexual assault victim as creating a private cause of action because the language and form of the statute did not purport to establish civil liability for violations and the statutory provision was primarily for protection of the public as an entity); Whitworth v. Fast Fare Mkts. of South Carolina, Inc., 289 S.C. 418, 338 S.E.2d 155 (1985) (determining statutes which make it a criminal offense to knowingly and willfully encourage the

delinquency of a minor and to sell cigarettes to minors under the age of 18 did not create implied private cause of action in favor of the minors against the store because statutes were enacted primarily for the protection of the public and not for the protection of private rights).

The case of Darby v. Furman Co., 334 S.C. 343, 513 S.E.2d 848 (1999), upon which the Plaintiffs rely, is distinguishable. In Darby, the seller's agent failed to disclose that he was also purchasing the property which violated common law fiduciary duty obligations of an agent to make full disclosure to his principal of all material facts relevant to the agency. Id. In this case, the Plaintiffs allege that the purported failure of the Realtor Defendants to obtain written listing agreements in accordance with Section 40-57-135 entitles them to substantial damages. As explained above, this statutory requirement does not create a private right of action and means for the Plaintiffs to seek damages. Therefore, to the extent the Plaintiffs' claims arise out of purported violations of Section 40-57-135, these claims should be dismissed because no private cause of action is permitted for these alleged violations.

VI. The Plaintiffs have failed to state facts sufficient to constitute the causes of action for quantum meruit and restitution.

The Plaintiffs have further failed to state proper causes of action for quantum meruit and restitution and as such, these claims should also be dismissed for failure to state a claim pursuant to Rule 12(b)(6), SCRCF. Under these claims, the Plaintiffs in essence allege that they paid commissions and development fees to the Realtor Defendants which the Realtor Defendants retained despite allegedly engaging in unlawful acts and not fulfilling their legal duties with respect to the real estate transactions. [Compl., ¶¶ 427-34, 446-48.]

Under South Carolina law, a quantum meruit claim requires a showing of (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him

to retain it without paying its value. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). Similarly, “[t]o recover on a theory of restitution, the plaintiff must show: (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value.” Niggel Assocs., Inc. v. Polo’s of North Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988).

In their Complaint, the Plaintiffs are merely seeking a refund or return of fees paid by alleging that the Realtor Defendants did not fulfill their legal and contractual duties – the Plaintiffs are not alleging they provided a service to the Realtor Defendants and were not compensated for it.⁷ The Plaintiffs are alleging a reverse quantum meruit cause of action in which someone who pays too much for a service seeks a refund of the amount overpaid. The South Carolina courts have never recognized such a claim. Instead, the Plaintiffs are only entitled to bring a claim for the purported failure of the Realtor Defendants to fulfill their contractual obligations which, as set forth above, are conclusively barred by the three-year statute of limitations. Accordingly, this Court should dismiss the Plaintiffs’ causes of action for quantum meruit and restitution for failure to state facts sufficient to constitute a cause of action.

CONCLUSION

There is no sugarcoating what the Plaintiffs are trying to do here and what is at stake in this action. This is nothing but a brazen and craven attempt by the Plaintiffs to, in addition to realizing over \$6,000,000.00 from gross lot sales, to strip the Defendants of their hard-earned

⁷ In fact, there is no disputing that for over ten years, the developer Defendants took a large tract of raw land developed it through the construction of infrastructure to it, created curbs and roads, platted it and moved tremendous amounts of dirt and trees. Similarly, the realtor Defendant SVR did market analysis and studies, set the sale price, marketing it through many different ways, brought or attracted purchasers, got them to contract with the Plaintiffs, attended closings and interacted with Plaintiff Porth almost daily for many years. Plaintiffs are asking this court to deny the Defendants any compensation for this significant work over many years.

development fees and realtor commissions resulting from developing, marketing and selling the lots in question for over ten years from 2006-2016. To further add salt to the wound, during this ten-year period for many of the lot sales, the Plaintiffs would demand at the closing table that the Defendants either forego or reduce their development fees and realtor commissions that they were entitled to receive or Plaintiff Porth would not consummate the closing(s). There is no disputing that for over ten years, the developer Defendants took a large tract of raw land developed it through the construction of infrastructure to it, created curbs and roads, platted it and moved tremendous amounts of dirt and trees. Similarly, the realtor Defendant SVR did market analysis and studies, set the sale price, marketing it through many different ways, brought or attracted purchasers, got them to contract with the Plaintiffs, attended closings and interacted with Plaintiff Porth almost daily for many years. Plaintiff Porth, who is a former and disgruntled family friend to Defendant Wilkins, is asking this court to deny the Defendants any compensation for this significant work over many years, for him to get the windfall of all their work and for Defendants to get NOTHING. For the reasons set forth herein, the Realtor Defendants respectfully request that the Plaintiffs' Complaint be dismissed in its entirety with prejudice.

Respectfully submitted,

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SOUTHERN VISIONS REALTY, INC.**

November 16, 2020
Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

R. Kent Porth and Panorama Point, LLC,

Civil Action No. 2020-CP-32-00005

Plaintiffs,

vs.

Robert P. Wilkins, Jr., RPW Development,
Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,

Defendants.

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MEMORANDUM OF
LAW OF MOTION TO DISMISS AND
AMENDED MOTION TO DISMISS
AND REPLY TO PLAINTIFFS'
OPPOSITION BRIEFS**

Introduction

Despite the Defendants' overly dramatic and diversionary assertion in the Introduction to their Memorandum, this case is not a "Greek tragedy." **To the contrary, the irrefutable facts show that the Defendants have engaged in a wide reaching illegal, unethical and deceptive real estate marketing scheme covering several years and possibly numerous residential real estate development projects in South Carolina.** The primary purpose of the highly successful, but illegal, unethical and deceptive scheme was to hide premium real estate listings from thousands of competing real estate professionals, thereby increasing the total percentage of commissions paid to the Defendants over the years and possibly spanning several residential real estate developments. The Plaintiffs' complaint contained 473 paragraphs **due to the sheer volume of the illegal, unethical and deceptive conduct of the Defendants.**

The Defendants conduct in this matter, **resulted in numerous various violations of** (i) at least 21 different sections of Title 40, Chapter 57; (ii) at least 5 provisions of Title 40, Chapter 1; (iii) Section 39-3-140; (iv) at least 9 different rules of the Consolidated Multiple Listing Service (the "CMLS"); (v) at least 4 provisions of Judge Solomon Blatt, Jr's Final Order (the "Blatt Final

Order”) in the matter of *United States v. Consolidated Multiple Listing Service*, a United States Dept. of Justice action against the Columbia/Lexington CMLS for anti-competitive practices and violations of the federal Sherman Act; (vii) constituted willful and knowing violations of the South Carolina Unfair Trade Practice Act (the “UTPA”); (viii) numerous aspects of the common law of fiduciary duty in South Carolina; (ix) numerous aspects of the common law of agency in South Carolina; and (x) at least 40 different provisions of the Defendants’ own legally mandated “policy manual” under Title 40, Chapter 57.

While the above violations occurred with respect to the 23 real estate transactions which are the subject of this litigation, the Plaintiffs are **informed** and believe that they will prove conclusively that similar violations occurred in literally hundreds of other transactions involving the Defendants. Those other transactions will show repetition and negative impact on the public interest, and **are relevant**, to the Plaintiffs’ cause of action under the UTPA.

With all due apologies to the court, it took the 473 paragraphs to properly and adequately plead the appropriate factual basis for all of the various violations and the various causes of action arising from those violations and as the Court is aware and to the chagrin of Defendants, for SCPP Rule 12 purposes, the Complaint allegations must be taken as true.

A partial overview of the various illegal, unethical and deceptive acts and violations of the Defendants is attached as **Exhibit 1**. A schedule of the CMLS listings in this matter showing a portion of the impact of one of the CMLS violations on competing CMLS members is attached as **Exhibit 2**.

The Plaintiffs call the court’s attention to the fact that the Defendants **never** make a single **direct assertion** in their two motions or in their supporting Memorandum **that the above described violations did not happen!** Instead, and as discussed specifically at various sections

herein, they use creative “wordsmithing” to misdirect the court, and then argue that (i) the Plaintiffs should have caught them sooner, and (ii) that the law does not provide the Plaintiffs a venue to address any of the illegal activity. In other words, they were so good at their illegal, unethical and deceptive acts that they should be allowed to keep the “ill gotten gains.”

The Defendants fail to address the fact that on November 21, 2019, a mere 42 days prior to the Plaintiffs’ Complaint being filed, the Defendants’ attorneys for the first time **provided copies of 2 “samples” of fraudulent listing agreements**, attached hereto as **Exhibit 3** (the “Fraudulent Listing Agreements”), which had been **affirmatively and purposefully concealed** from the Plaintiffs by the Defendants. The Plaintiffs are informed and believe that these and other fraudulent documents were created by the Defendants to “paper the files” to survive any audits by the CMLS after the entry of the Blatt Final Order. These acts of extrinsic fraud and fraudulent concealment were raised in the Plaintiffs’ initial responses dated September 18, 2020, and October 20, 2020 to the Defendants’ motions.

Finally, but importantly, the Plaintiffs call the court’s attention to the fact that Defendant Robert P. Wilkins, Jr. is still a licensed attorney, although Mr. Wilkins’ license is in “inactive” status. This fact was properly plead by the Plaintiffs as one of many reasons for their justified reliance on the Defendants in their fiduciary capacity in this matter. The fact that Mr. Wilkins’ true signature is on one of the Fraudulent Listing Agreements raises serious ethics issues under the SCRPC for Mr. Wilkins, and is further evidence of the **knowing and willful nature of the misconduct involved in this matter**. The Plaintiffs also call the court’s attention to the fact that Mr. Wilkins is the real estate broker and attorney discussed in the South Carolina Supreme Court’s decision in Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (S.C. 2006), as having “slip sheeted” a previously signed real estate deed to change the property description and the amount of acreage

transferred by the improperly altered deed. The Plaintiffs discovered this Supreme Court decision involving Mr. Wilkins in 2017 as part of their due diligence into his conduct in this matter.

ARGUMENT

I. Title 40, Chapter 57 Contains an Express and Unambiguous Authorization of a Private Cause of Action

In section V. of their Memorandum, the Defendants make the **flagrantly false and frivolous** argument that there is no provision for a private cause of action for violations of Title 40, Chapter 57 such as the lack of the legally mandated listing agreements under Sections 40-57-135(C)(4) and (D)(4).

In Section 40-57-137(Q), the legislature **expressly and unambiguously** provided for a private cause of action under the Act for an injured party by stating that “[e]xcept as otherwise stated, nothing in the section precludes an **injured party** from bringing a cause of action against licensees, their companies, or their brokers-in-charge.” (Emphasis added) Section 40-57-137(A) statutorily imposes the prior common law fiduciary duties such as those applied in Darby v. Furman, 334 S.C. 343, 513 S.E.2d 848 (S.C. 1999), on real estate professionals, and requires that services be provided pursuant to “an agency agreement”, and that the real estate professional “**is bound by the duties of** loyalty, obedience, **disclosure**, confidentiality, reasonable care, diligence and accounting **set forth in this chapter [Chapter 57]**” (emphasis added). In section 40-57-137(C), the General Assembly required that upon “**reaching a written agreement** to provide brokerage services for a seller of real estate, a sellers agent shall”...(4) **comply with all provisions of this chapter[Chapter 57]**...” (emphasis added). Section 40-57-135(C)(4) and (D)(4) are the provisions of “this chapter” which set forth the very specific requirements of the “written agreement” referred to in the first sentence of Section 40-57-137(C), and which make a licensee’s involvement in a real estate transaction without a legally compliant written agency

agreement unambiguously illegal, and therefore a breach of their statutory fiduciary duties to the Plaintiffs.

This is a clear and unambiguous legislative provision for a private cause of action such as the breach of fiduciary duty claim brought by the Plaintiffs. Section 40-57-137 pulls together all requirements of Chapter 57 under the fiduciary duty provisions, and provides for all applicable causes of action in subsection 137(Q), subject to very specific and limited bars to specific causes of action for certain narrowly protected conduct of licensees. For example, see the last sentence of Section 40-57-137(C).

An appropriate remedy for such a breach of fiduciary duty, as specifically authorized by Section 40-57-137(Q) is an equitable action for restitution and disgorgement. Darby at 346. On page 27 of the Memorandum, the Defendants attempt to distinguish the Supreme Court's equitable order of disgorgement of improper real estate commissions in Darby by claiming that it dealt with a different type of fiduciary breach not present in this case. The Supreme Court in Darby, however, expressly acknowledged the General Assembly's major overhaul of Title 40, Chapter 57 in their opinion, thereby affirming a private cause of action for any breach of fiduciary duty based on violations of the newly restated Title 40, Chapter 57. Darby at 348, fn. 3.

More importantly, the **exact** issue dealt with in Darby was expressly codified by the General Assembly as part of Title 40, Chapter 57 **in the exact same subsection as the requirements for a written listing agreement in this case!** This codification occurred during the pendency of the Darby case. Darby at 348, fn. 3. The specific Darby breach of fiduciary duty (failure to disclose role as purchaser) was codified in the first sentence of subsection 40-57-135(D). The specific requirements for the written listing agreements at issue in this case were codified at subsection 40-57-135(D)(4). The immediately preceding subsection 40-57-135(C) establishes the

illegality of the Defendants' conduct, but relies on subsection (D)(4) for the specific requirements of the written agreement mandated by (C)(4). **The Defendants would have this court believe that the issue dealt with in Darby is now "off limits" for a private cause of action because it is now codified as part of Section 40-57-135! This absurd argument is beyond the pale.**

The Defendants at pages 23 and 24 of their Memorandum rely on Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (S.C.Ct.App. 1997) for its holding that the Plaintiffs must show that they are "a member of the class of persons the statute is intended to protect." Id. at 478. **The Plaintiffs satisfy this prong of the Sandy test with 100% certainty.** In the Act, the General Assembly specifically codified the fiduciary duty of real estate agents under prior common law at section 40-57-137(A), **which duty is expressly owed to the Plaintiffs – not to the State of South Carolina; not to the South Carolina LLR; and not to the South Carolina Real Estate Commission!** A fiduciary duty is the highest duty which can be owed to an individual under South Carolina law. As discussed above, in section 40-57-137(Q) the General Assembly expressly provided an unambiguous right to private causes of action to remedy any breaches of that fiduciary duty.

The Act, in its title, expressly stated that one of its many separate purposes was to "TO EXPAND THE RESPONSIBILITIES OF A "BROKER-IN-CHARGE", TO ESTABLISH THE PARAMETERS, DUTIES, AND RESPONSIBILITIES FOR AGENCY RELATIONSHIPS IN REAL ESTATE" (Emphasis added). The Act's title listed the changes to the SCREC first, and then stated "AND, AMONG OTHER THINGS,..." indicating that the "other things" were separate, and in addition to, the changes to the SCREC and its regulatory functions.

The express provision for a private cause of action in Section 40-57-137(Q) is the same approach used by the General Assembly with respect to the South Carolina Time Share Act in Title

27, Chapter 32 at Section 27-32-130 which states “[t]he provisions of this section do not limit the right of a purchaser or lessee or a vacation time sharing association to bring a private action to enforce the provisions of this chapter.” The Supreme Court affirmed private causes of action under Section 27-32-130’s statutory language in Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 802 S.E.2d 794 (S.C. 2017).

In anticipation of the Defendants’ next attempt to delay having to answer the complaint, the Plaintiffs call the court’s attention to another aspect of the Fulbright decision. The Supreme Court specifically held that where a governmental agency (i.e. SCREC) has enforcement powers which are separate from an individual’s right to bring a private cause of action, the individual may proceed regardless of whether the governmental agency is involved unless the legislature “in plain and unmistakable words” establish that the governmental agency action is a “condition precedent” to the individual’s private cause of action. Fulbright at 276-277. **No such condition precedent is contained in Title 40, Chapter 57.**

The “clear and unambiguous language of Section 40-57-137(Q), and the Supreme Court’s holding in Fulbright completely lays bare the manifestly frivolous and intentionally misleading arguments in Section V of the Defendants’ Memorandum. In light of section 40-57-137(Q) all of the arguments, and cases cited in Section V of the Defendants’ Memorandum are completely and totally irrelevant in this matter. **The “Act” clearly reflects an express and unambiguous intention of the General Assembly to provide for every available private cause of action not specifically prohibited by Title 40, Chapter 57.**

II. Correct Application of the “Discovery Rule”

In a twist of irony, the Defendants’ Memorandum raises the question as to why the Plaintiffs spent so much time in their Complaint properly pleading full compliance with all statutes

of limitation. The Defendants then spend at least half of their 30 page Memorandum attacking the Plaintiffs' complaint on that very point. As set forth below, the Plaintiffs fully anticipated this attack, and carefully and methodically drafted their Complaint accordingly. Contrary to the Defendants' implication, specifically and fully pleading the provable facts which show full satisfaction of any and all "discovery" statute of limitations **demonstrates the strength of the Plaintiffs' case**, and is **not** a sign of weakness in the Plaintiffs' case.

A. The Plaintiffs Specifically Plead and Actually Satisfied All Applicable "Discovery" Requirements

The Plaintiffs specifically and adequately plead satisfaction of the "discovery rule" under any applicable 3 year statute of limitations at paragraphs 142 through 165 of the Complaint. In their Memorandum at page 18, the Defendants **expressly acknowledge** the adequacy of the Plaintiffs' "discovery" factual allegations, and specifically refer the court to paragraphs 142, 159 and 160. These factual assertions **must be taken as true** for purposes of a Rule 12(b)(6) motion to dismiss; **thereby causing the Defendants' Motion to fail by their own admission**. These specific pleadings, acknowledged by the Defendants, are the basis of the Plaintiffs' assertions that the statute of limitations is not a proper basis for a motion to dismiss in this case prior to the filing of an answer by the Defendants. The Plaintiffs stand by this legal assertion.

In sections III and IV of their Memorandum, the Defendants **completely misstate** the "discovery rule" under South Carolina law. The sole basis of the Defendants' claim that the Plaintiffs' case is barred by applicable statutes of limitations is that the Plaintiffs participated in the various transactions, and were aware that sales commissions and development fees were paid on those dates. **Nowhere in their Memorandum do they assert that the Plaintiffs had knowledge of an injury, or the illegal nature of the commissions and fees, or of the Defendants' illegal participation in the various transactions.** Instead, the Defendants argue

that the Plaintiffs had an affirmative duty under South Carolina law to assume that the Defendants, in their fiduciary capacity, had violated at a minimum (i) the provisions of Title 40, Chapter 57, (ii) the rules of the CMLS, (iii) the SCRPC applicable to Defendant Wilkins, (iv) the common law of fiduciary duty not preempted by Title 40, Chapter 57, (v) the common law of agency not preempted by Title 40, Chapter 57, (vi) the Defendants' own Policy Manual, and (vii) the Blatt Final Order. They also assert that the Plaintiffs then had an affirmative duty to perform exhaustive due diligence and legal research to discover whether those violations had in fact occurred within 3 years of each transaction. As set forth below, **this has never been the law in South Carolina.**

While incorrectly arguing that the Plaintiffs are "charged with knowledge of the law" in the context of this statutory fiduciary scenario, the Defendants **never state** in their Memorandum "the facts and circumstances **of an injury**" which would "place a reasonable person of common knowledge and experience on notice that a claim against another party might exist" prior to January 10, 2017 as plead by the Plaintiffs. See Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (S.C. 1996). The reason for the absence of any such factual allegations is that **no such facts existed until January 10, 2017.**

It is important to note that the Defendants argue at pages 17 and 21 of the Memorandum that the provisions of Title 40, Chapter 57 were "applicable to the transactions." This is a complete misstatement of law. Title 40, Chapter 57 has no application whatsoever to **the transactions between the Plaintiffs and the various purchasers.** The provisions of Title 40, Chapter 57 apply **only to the Defendants and their dealings and interactions** with **the parties to** the transactions. Those statutes have no impact whatsoever to the transfer of title to the real estate which occurred in the various transactions. The provisions of Title 40, Chapter 57 impose no obligations whatsoever on the Plaintiffs in the transactions.

B. Plaintiffs had an Absolute Right to Rely on the Defendants with No Duty to Investigate Due to the Defendants' Fiduciary Status

In South Carolina, the law is absolute that a person in a fiduciary relationship with a professional is justified in relying on the fiduciary even if reliance would not be justified in a non-fiduciary relationship. Epstein v. Howell, 308 S.C. 528, 419 S.E.2d 379 (S.C.Ct.App. 1992), Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (S.C. 1978); Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (S.C. 1967). As the Supreme Court expressly held in Darby v. Furman *supra*, the relationship of real estate professionals to their clients is fiduciary in nature. Darby at p. 346-348. The Defendants' assertion that the Plaintiffs were "charged with knowledge of the law" on the facts of this case is manifestly incorrect. Defendants Wilkins and SVR (as well as all other licensees) were expressly and unequivocally fiduciaries under Title 40, Chapter 57. Defendant RPW was a fiduciary under South Carolina agency law, and was a fiduciary under Title 40, Chapter 57 to the extent that RPW's activities fell under Title 40, Chapter 57 as plead by the Plaintiffs in the complaint.

The Defendants' relationship with the Plaintiffs was fiduciary in nature under the specific and unambiguous language of Section 40-57-137(A), and under Section 40-57-137(Q) which preserved decades of unchallenged South Carolina common law. Section 40-57-137(Q) expressly preserved all existing common law which is not "inconsistent" with the provisions of this section, and further stated that "the common law may be used to aid in interpreting or clarifying the duties described in this section." The common law as set forth in Darby is an example of the preexisting common law expressly preserved under section 40-57-137(Q).

As a licensed attorney, Defendant Wilkins' conduct in this matter was also governed by the SCRPC as specifically plead by the Plaintiffs in paragraphs 41 through 53 of the Complaint. Defendant Wilkins was also a licensed "broker-in-charge," and Defendant SVR was licensed as a

“real estate office” pursuant to Title 40, Chapter 57 as plead in paragraphs 7 through 10 of the Complaint. The Plaintiffs’ reliance on the assumption that the Plaintiffs’ real estate matters would be handled by the Defendants in accordance with all applicable statutory law, common law, CMLS rules, and relevant federal court orders was justified and manifestly reasonable under South Carolina law.

In the first chapter of Title 40 which establishes the South Carolina Department of Labor, Licensing and Regulation (the “SCLLR”), in section 40-1-10(C)(3) the General Assembly acknowledges the fact that the public has a need for **“a substantial basis for relying on the services of the practitioner”** when dealing with certain professions and occupations under the control of the SCLLR. A check of the SCLLR website (“licensee lookup” function) at any time during the period beginning on January 16, 2007 (the date of the first closing) and January 10, 2017 (the date of actual discovery of potentially illegal conduct) would have revealed that Defendants Wilkins and SVR, as well as Anne Brooks, Dana Peak and other associated licensees at SVR, were in “good standing” with the South Carolina Real Estate Commission with **no history of administrative actions or complaints indicating their failure to comply with all applicable real estate brokerage laws.**

The Plaintiffs specifically call the court’s attention to True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997), where the South Carolina Supreme Court addressed the application of the “discovery rule” in the context of a professional, fiduciary relationship. In allowing a malpractice action filed in 1993 to proceed **although filed 20 years after the conduct** which occurred in 1973, the Court ruled that the plaintiff properly brought the action within 3 years of the “discovery” of the cause of action even though the injury was apparent for at least 20 years. In True v. Monteith, the attorney failed to disclose conflicts of interest in accordance with applicable professional

standards. In the present case, the facts will show (i) multiple violations of disclosure requirements of statutory law, and (ii) multiple **undisclosed** business and personal relationships of the Defendants. The present case is exponentially more compelling than the facts in True v. Monteith as written evidence of **extrinsic fraud** was voluntarily produced by the Defendants' attorneys **for the first time** on November 21, 2019.

The Supreme Court stated in True v. Monteith that "[t]he 'exercise of reasonable diligence' means the **injured** party must act with some promptness where **the facts and circumstances of an injury** place a reasonable person of common knowledge and experience on notice that a claim against another party might exist" (citing Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (S.C. 1996)(emphasis added)). The court further stated that "knowledge of an injury alone does not, *a fortiori*, give rise to a suspicion of any impropriety by her attorney." True v. Monteith at 120. More importantly, the Court stated that "[a]lthough petitioner knew of the lack of the cost of living clause in the lease, this knowledge alone is insufficient to put petitioner on notice to investigate the possible malfeasance of her attorney." Id. "[A]bsent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest." (emphasis added) Id.

The Plaintiffs were not licensed real estate professionals, and were not members of the CMLS. As such, the Plaintiffs had no access to the rules, bylaws or website of the CMLS to determine (i) the Defendants compliance with those rules, and (ii) the extent of the Defendants' anti-competitive conduct which form the basis of the Plaintiffs' claim under the UTPA.

The second sentence of Section 40-57-135(C)(4) expressly mandates that "Brokers-in-charge who are members of a multiple listing service **must be allowed** to make their company listings available for any cooperative marketing and advertising program, **subject to the rules and**

regulations of the multiple listing service and with the consent of the owner. Consent may be obtained through the listing agreement” (emphasis added). The Defendants’ legally mandated policy manual contained a similar express requirement of full compliance with the rules of the CMLS, as well as all applicable laws. See Section VIII *infra*. Prior to January 10, 2017, the Plaintiffs were never made aware of this requirement by the Defendants. The Plaintiffs’ reliance on the Defendants in this regard is manifestly justified under any and all applicable South Carolina law.

On May 24, 2017, a mere 134 days after the January 10, 2017 discovery of the potentially illegal conduct by the Defendants, the Defendants’ attorney Rex Casterline of Blair Cato Pickren Casterline, LLC confirmed in writing that the Plaintiffs had made a request for “a copy of all files of RPW Development and/or Southern Visions Realty, LLC on the lot sales.” See complaint at paragraphs 284-285. This letter from the Defendants’ attorney is irrefutable evidence that the Plaintiffs timely embarked on a course of full and adequate due diligence into what injuries may have been incurred, and what related causes of action may be available to the Plaintiffs. While the possible existence of illegal conduct was first discovered on January 10, 2017, the full extent of the Defendants’ illegal conduct was discovered at various later dates, and quite frankly, **has not yet been fully determined in the absence of court sanctioned discovery.**

For example, on August 28, 2018 (16 months before the Plaintiffs filed this action) and as the direct result of the production of SVR files by Rex Casterline on that date, the Plaintiffs for the first time had access to emails dated March 17, 2009 (and from the transactional files of SVR), between SVR and the purchaser of Lot 1 which irrefutably show (i) SVR breaching its fiduciary duty of loyalty to the Plaintiffs, (ii) SVR flagrantly violating the dual agency prohibitions of Title 40, Chapter 57, and (iii) SVR violating a specific nondisclosure requirement of Section

137(M)(1)(b)(i). At that time, Lot 1 was being improperly withheld from the CMLS website in violation of CMLS Rule 1(b)(3), thereby constituting an irrefutable violation of the UTPA.

C. South Carolina Law Imposes No Duty to Investigate Fraudulent Representations

It is well settled in South Carolina that “the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.” Reid v. Harbison Development Corp., 285 S.C. 557, 560, 330 S.E.2d 532 (S.C.Ct.App. 1985), *aff’d in part and remanded* 289 S.C. 319, 345 S.E.2d 492 (S.C. 1986) citing the *Restatement (Second) of Torts* Section 540 (1979). For example “[t]he person committing the fraud cannot defeat a claim for misrepresentation simply because the person defrauded is charged with notice under a recording statute (internal citations omitted), particularly where the misrepresented facts are peculiarly within the representor’s knowledge” (emphasis added). *Id.* at 561. See also Slack v. James, 356 S.C. 479, 589 S.E.2d 772 (S.C.Ct.App. 2003)(affirming reliance on a false representation of a real estate agent). In Epstein v. Howell, *supra* at 531, the court cited the “often-cited case” of Halsell v. First National Bank, 48 Okla. 535, 150 P. 489 (1915), for the proposition that one in a fiduciary position cannot “practice fraud” and then successfully defend on the ground that the victim of the fraud is “charged with knowledge” of the misrepresented facts. This is exactly what the Defendants are attempting to do in their two motions to dismiss.

As a result of their statutory and common law fiduciary status as licensed real estate agents and brokers, **the Defendants had an affirmative fiduciary duty to disclose at a minimum the following:** (i) the various disclosure and written agreement requirements of Title 40, Chapter 57, (ii) that those requirements Title 40, Chapter 57 had not been met, (iii) the various written agreement and consent requirements of the CMLS, (iv) the requirements of the Blatt Final Order

with respect to the applicable CMLS rules, (v) that the Defendants had secretly created the Fraudulent Listing Agreements in an attempt to “paper the file” to hide their illegal actions, and (vi) the various conflicts of interest which existed with many of the purchasers also represented by SVR. Ellie v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (S.C.Ct.App. 2004). The Defendants’ failure, in their fiduciary role, to disclose these facts constituted fraud under South Carolina law. “Parties in a **fiduciary relationship** must fully disclose to each other all known information that is **significant and material**, and when this duty to disclose is triggered, **silence may constitute fraud**.”(emphasis added). Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (S.C.Ct.App. 1995). “Nondisclosure is fraudulent **when there is a duty to speak**” (emphasis added). Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (S.C.Ct.App. 1993). “Non-disclosure becomes fraudulent concealment only **when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction**” (emphasis added). Lawson v. Citizens S. Natl. Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (S.C. 1972).

The Defendants are extremely careful in their Memorandum to avoid any and all discussion of one of the most important factual discoveries thus far in this case: **the fact that the Defendants, with the help of other associated licensed real estate professionals including, but not limited to Anne Brooks and Dana Peak, created the Fraudulent Listing Agreements attached in Exhibit 3 in an attempt to hide their illegal, anti-competitive and deceptive conduct.**

The Plaintiffs are prepared to demonstrate to the court with **compelling documentary evidence** the probable existence of at least 15 additional such Fraudulent Listing Agreements, and at least that many fraudulent CMLS data input forms. Despite multiple written requests for the production of such documents, including a very specific request on July 14, 2020 (attached hereto

as **Exhibit 4**), these other fraudulent documents have been withheld **in a continuing breach of the Defendants' fiduciary duty of disclosure.**

As an example, the Fraudulent Listing Agreement for 304 Panorama Drive (Lot 21) attached hereto as **Exhibit 3**, was created on November 11, 2011 with respect to CMLS listing #321920. Also attached as **Exhibit 5**, are CMLS listing #321920 (see upper left hand corner of first page of listing) and 6 more CMLS entries dated November 11, 2011 (see upper right hand corner of second page of listing) written, or sequentially numbered #321913 through #321918, demonstrating that all 6 CMLS entries were done at the same time on November 11, 2011. The Fraudulent Listing Agreement for 610 Panorama Drive (Lot 15) attached hereto as **Exhibit 3**, was created on May 16, 2011 with respect to CMLS listing #290515. Also attached as **Exhibit 5** is an additional CMLS entry dated May 16, 2011 and numbered #290511 (only 4 entries apart) demonstrating that the two entries were done at the same time on May 16, 2011. It is beyond belief that the Defendants would have created a fraudulent listing agreement for only 1 of the 6 CMLS entries entered at the same time on November 11, 2011, and only 1 of 2 entered at the same time on May 16, 2011. **Why were the remaining 6 fraudulent listing agreements, and those for other CMLS listings, not produced in response to the Plaintiffs July 14, 2020 request? Are they still in existence? If not, who destroyed them and when? If the Defendants had the two "sample" Fraudulent Listing Agreements on November 21, 2019, they certainly had the rest of them also.** See discussion of Footnote 3 in Section XI *infra*.

III. Illegal Conduct and Unclean Hands

As discussed in Sections III and IV of the Plaintiffs' original September 18, 2020 Response, the Defendants' illegal conduct and "unclean hands" are an absolute bar under South Carolina law to the Defendants raising any statute of limitations defense. Instead of restating those legal

arguments here, the Plaintiffs refer the court to Sections III and IV of the September 18, 2020 Response. The Plaintiffs do, however, call the court's attention to the fact that **nowhere in their Memorandum do the Defendants even attempt to refute the absolute equitable bars of illegality and "unclean hands"** to the Defendants' statute of limitations arguments first set forth in the Original May 6 Motion to Dismiss.

On page 10 of their Memorandum, the Defendants interestingly cite Section 15-3-530(7) for the proposition that a 3 year statute of limitations even applies to an action for fraud. The Defendants do not, however, inform the court that the actual language of that section expressly and unambiguously provides that the 3 year statute set forth in section 15-3-530(7) runs from the "discovery by the aggrieved party of **the facts constituting the fraud**" (emphasis added).

The Defendants cite Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218 (S.C. 2000), where the Supreme Court stated that the law in South Carolina is that "a defendant **may be estopped** from claiming the statute of limitations as a defense **if the delay that would otherwise give operation to the statute had been induced by the defendant's conduct.**" (citing Black v. Lexington School District No. 2, 327 S.C. 55, 488 S.E.2d 327 (S.C. 1997))(emphasis added). In Kleckley, the court held that silence as to the applicable rules for submitting a claim estopped the defendant from asserting the statute of limitations as a defense. Id. at 137. In the present case, the Defendants' fraudulent concealment and violations of the statutory disclosure requirements **certainly meet, and exceed the standard** set in Kleckley for estopping the Defendants from arguing any statute of limitations.

IV. Fraud and Fraudulent Concealment Tolloed any Applicable Statute of Limitations

The law in South Carolina is clear that the presence of fraud or fraudulent concealment tolls any applicable statute of limitations. This argument was set forth in the Plaintiffs' September

18, 2020 Response, and the court's attention is directed to Sections III and IV of that initial September 18 Response.

The Defendants allege on page 19 of their Memorandum that Plaintiffs “have hindered the Realtor Defendants ability to defend.” This **absurd** assertion ignores the fact that at least as far back as May 16, 2011 (and almost certainly many years earlier as will be proven at trial), **the Defendants were creating the Fraudulent Listing Agreements to “defend” and conceal their illegal, unethical and deceptive conduct.** It also ignores the fact that the Defendants retained Rex Casterline to “lawyer up” and “drag this thing out” (see Complaint paragraph 280) the response to the Plaintiffs’ request for legally mandated disclosures and documents for over 15 months in an apparent effort to “defend” their conduct by attempting to cause the Plaintiffs to miss any applicable statutes of limitations. **The Defendants have been actively working on their true “defense” of concealment of their illegal, unethical and deceptive conduct since at least late 2006.**

Despite the Defendants’ assertion in footnote 3 on page 6, and on page 19 of the Memorandum that applicable law allowed the Defendants to legally purge their files of documents after 5 years, **the Defendants intentionally use carefully worded statements to misrepresent and imply false facts to the court.** A careful reading of the Memorandum reveals that the Defendants **NEVER** assert that either (i) the Plaintiffs **actually** signed the legally required listing agreements, or (ii) that SVR, or any of its employees or agents, **actually** purged any documents of any type from the relevant files (see Section XI *infra* regarding other false assertions in footnote 3). For example, on page 19 the Defendants state that “the Realtor Defendants were statutorily permitted to relinquish related documentation”(emphasis added). The Defendants never state, however, that they actually “relinquished” any such “related documentation.” Why are there no

straightforward factual assertions of what was purged, who did the purging, and when the purging was done? Why would the Fraudulent Listing Agreements have been created and affirmatively concealed if the Plaintiffs had actually signed the required but “purged” listing agreements? Why were the Fraudulent Listing Agreements dated in 2011 not purged? Why do the Defendants spend so much time desperately arguing that the Development Agreement is the basis on which they claim Sections 40-57-135(C)(4) and (D)(4) were satisfied?

The Defendants **never claim to actually have purged** these files as intimated for a very simple reason. **They still have the files in their possession, and are aware of the fact that the Plaintiffs also have copies of those files which were produced on August 28, 2018 by Rex Casterline.** The Plaintiffs will produce at trial, copies of the theoretically “purged” transactional files of SVR which were produced by Rex Casterline and which date back to 2006. The copies produced by Mr. Casterline were clearly SVR transactional files, and **contained all other required documents under Section 40-57-135(C)(7) except the nonexistent listing agreements.** On July 11, 2017, and October 31, 2017, Mr. Casterline confirmed in writing via email that he had the files of SVR and would be producing them.

Mr. Casterline, who spent 15 months reviewing the files of SVR in great detail, never made a claim of “purging” under the 5 year rule of Section 40-57-135(C)(7). Instead, he on multiple occasions complained in writing to the Plaintiffs about the sheer volume of documents he had to review as an explanation for his delay in producing the copies requested by the Plaintiffs. This is in stark contrast to the Defendants’ current intimation that they “were statutorily permitted to relinquish” the nonexistent listing agreements and other documents. The Plaintiffs are informed and believe, based on written statements of Mr. Casterline, that Mr. Casterline, like Mr. Bland,

was fully aware of the Fraudulent Listing Agreements and other fraudulent documents in the Defendants' files. This claim will be investigated thoroughly in discovery.

Even under the Defendants false claim of "legal purging", on the date of Mr. Casterline's original letter dated May 24, 2017, SVR was still legally obligated to have at least 14 signed listing agreements in their files, and subject to production, even if they were purging files under the 5 year rule. The Plaintiffs have an email from Mr. Casterline dated August 15, 2017 stating that SVR's files for the "later years" were in a digital format. Why were signed listing agreements, if they actually existed, not simply printed from the digital backup files referenced by Mr. Casterline? On August 27, 2018, Mr. Casterline confirmed in writing that the Defendants **did not have copies of any legally complaint listing agreements**. Why were the 14 listing agreements, which should have still been in the files on the date Mr. Casterline started his document review on May 24, 2017 under the "5 year rule", not produced? They were not produced because, as the irrefutable evidence will show, **they never existed**.

As discussed earlier, on November 21, 2019 **Mr. Bland voluntarily produced** the two Fraudulent Listing Agreements which were over 8 years old, **and had not been purged under the 5 year rule of Section 40-57-135(C)(7)**. Also on November 21, 2019, Mr. Bland also produced contracts, HUD-1's, and other **SVR** documents **from early 2007 (documents which were at least 12 years old)** which irrefutably prove that no documents whatsoever had been purged under the 5 year rule as claimed in footnote 3 and on page 19 of the Memorandum. These facts prove that the Defendants did not, in fact, purge any files pursuant to the 5 year rule of Section 40-57-135(C)(7). After the filing of the Defendants' answer in this matter, the Plaintiffs intend to immediately take **targeted and exhaustive** depositions of at least (i) Dana Peak, (ii) Rex Casterline, (iii) Anne Brooks, and (iv) Robby Wilkins, on this and other topics with respect to issues related to the

Fraudulent Listing Agreements and other fraudulent documents that may have been created in this matter.¹

The Plaintiffs also intend to notice a deposition of the CMLS under Rule 30(b)(6) and to subpoena, if necessary, copies of all documents filed with the CMLS with respect to any of the 23 parcels by the Defendants or any of their employees, associated licensees or agents. While the Plaintiffs anticipate the full cooperation of the CMLS (see Section XI *infra*), the Plaintiffs **are prepared to take any and all actions necessary to identify and obtain as many other fraudulent documents as possible**, which the Plaintiffs are informed and believe to either still exist or to have existed in the past. The foundation of the Blatt Final Order was the elimination of the collective approval of CMLS rules which allowed individual brokers to individually and selectively “hide” premium listings from the growing number of “discount brokers” at that time.

V. The Plaintiff’s Breach of Fiduciary Duty Claim is Equitable and Not Subject to a Statute of Limitations

On page 9 of their Memorandum, the Defendants acknowledge that an equitable action is not subject to a statute of limitations defense under the Supreme Court’s recent holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020). The Plaintiffs breach of fiduciary duty is an action in equity as plead in the body of the complaint, and in the Plaintiffs’ prayer for restitution.

A. An Action for Disgorgement or Restitution of Illegal Commissions and Fees is Equitable

¹ Defendants counsel Eric Bland may have made himself a witness as to the retention, prior concealment, and ultimate voluntary production of the Fraudulent Listing Agreements and any other similar documents. Although the “crime-fraud” exception to the attorney client privilege applies with respect to these documents, any claim of attorney client privilege, as well as any claim of confidentiality under SCRPC Rule 1.6 were clearly waived by Mr. Bland’s voluntary production of the Fraudulent Listing Agreements on November 21, 2019. The Plaintiffs call the court’s attention to the fact that Mr. Bland and Mr. Richter were both previously sanctioned by the Supreme Court in Ex Parte Bland, 380 S.C. 1, 667 S.E.2d 540 (S.C. 2008) for improper behavior regarding the handling of evidentiary documents.

In section III of their Memorandum, the Defendants claim that the Plaintiffs' breach of fiduciary duty claim is not equitable, but is an action at law. In making this incorrect argument, the Defendants make numerous misrepresentations of law and fact.

The Defendants seriously mischaracterize the Supreme Court's holding in Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010). On page 11 of the Memorandum, the Defendants cite Verenes and state that "[t]his State's Supreme Court has held that 'an action alleging a breach of fiduciary duty is an action at law.'" This cannot be characterized as anything but an intentional effort, as part of the Defendants' "surprise" filing in violation of Rules 6 and 7(b)(1) (see Section IX *infra*) to mislead the court as to the true holding in Verenes. The Defendants' statement clearly was intended to give the false impression that the **holding** of Verenes was that "an action alleging a breach of fiduciary duty is an action at law." Stated another way for clarity, there is no legitimate reason to cite Verenes for the proposition that "[t]his State's Supreme Court has held that 'an action alleging a breach of fiduciary duty is an action at law'" other than to intentionally misrepresent the actual holding of the Supreme Court in that case.

The **actual holding** of the Supreme Court in Verenes was the exact opposite of the Defendants' representation, and is undeniably controlling with respect to the Plaintiffs' **equitable** cause of action for breach of fiduciary duty. The Supreme Court went so far as to specifically clarify that "[w]e now take this opportunity **to stress** that an action for breach of a fiduciary duty may sound in law or equity depending on the nature of the relief sought." Id. at 17, fn. 5. An action seeking restitution and disgorgement of illegal commissions and fees in the absence of a legally enforceable contract is inherently equitable. "**Disgorgement is an equitable remedy,...**" (emphasis added). Id. at 18. "While Appellant will have to pay money to the trust if the allegations are proven, that does not mean Respondent's causes of action are legal in nature."

Id. The court looked to the body of the complaint for the “main purpose” of bringing the action.

Id. The main purpose of the Plaintiffs’ breach of fiduciary duty claim set forth in the body of the complaint is clearly and unambiguously for the disgorgement and restitution of all illegal commissions and fees. See Complaint paragraphs 379, 388-90, 397-400, 405, 412-15, 417, 419-22, 425, 430-31, 444-48, and 471. See also Plaintiffs’ seventh cause of action for “restitution.” See also Darby supra.

On pages 12 and 13 of their Memorandum, the Defendants essentially argue that the commissions and fees are not readily identifiable, and therefore cannot be the foundation for an equitable claim for disgorgement or restitution. First, this position completely ignores the true holding of Verenes supra at 18. Second, this argument ignores the fact that the amount of illegal commissions and fees which must be disgorged by law are irrefutably “liquidated” as to amount and date under the prejudgment interest provisions of section 34-31-20(A).

B. The Defendants Arguments Improperly Rely on the Theory of “Illegal” Oral or Implied in Fact Contracts

On pages 10 through 15 of their Memorandum, the Defendants go to great lengths to **incorrectly** argue that the Plaintiffs’ claims **are based on a theory of an illegal contract** (i) arising from oral representations or (ii) implied by conduct. The Defendants falsely assert that the Plaintiffs’ claims are based on this **wholly unplead theory** of a breach of some implied contract; therefore the claims are legal in nature. **This assertion is manifestly incorrect as the specific and unambiguous provisions of Title 40, Chapter 57 expressly prohibit this legal assertion. Nowhere in the Complaint did the Plaintiffs plead or otherwise allege a valid written, oral or implied contract.** To the contrary, the Plaintiffs allege in at least 40 different paragraphs of the Complaint, that the Defendants’ participation in the transactions was illegal in the absence of compliance with the various requirements of Title 40, Chapter 57. In at least 20 different

paragraphs of the Complaint the Plaintiffs allege breaches of the Defendants' **fiduciary duties** under applicable law.

In Section 40-57-137(Q) the General Assembly expressly and unequivocally preempted all existing common law on which the Defendants attempt to rely. Specifically, section 40-57-137(Q) provides "[t]he provisions of this section which are inconsistent with applicable principles of common law **shall supersede the common law**, ..." (emphasis added). Williams v. Gov't Emps. Ins. Co., 409 S.C. 586, 762 S.E.2d 705 (S.C. 2014) (In construing an insurance statute the Supreme Court stated that "The General Assembly is presumed to know the law, so in our view, the enactment of section 38-77-142 [the statutory provision at issue in Williams] could be perceived as a response to these earlier decisions."); Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (S.C. 2012) ("we presume the General Assembly is aware of the common law when enacting subsequent legislation.").

The General Assembly then provided in section 40-57-139(G) that "[f]or all real estate transactions, **no agency relationship** between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees **exists unless** the buyer, seller, landlord, or tenant and the brokerage company and its affiliated licensees **agree, in writing, to the agency relationship. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.** A licensee must not be considered to have an agency relationship with a party or have agency obligations to a party but is responsible only for exercising reasonable care in the discharge of the licensee's specified duties, **as provided in this chapter, and, in the case of a client, as specified in the agency agreement.**" (emphasis added).

It is impossible to imagine any words which could be added to subsections 137(Q) and 139(G), or to any other section of Title 40, Chapter 57 to make the intent of the legislature any

more clear and unambiguous on the **express preemption and prohibition of quasi contractual legal theories**. The Defendants' argument that the Plaintiffs "have an adequate remedy at law" with respect to their breach of fiduciary duty claim fails completely as it is completely premised on expressly preempted and prohibited legal theories.

The Plaintiffs again call the court's attention to the fact that the Plaintiffs **specifically cited Section 40-57-137(Q) and 40-57-139(G) to the Defendants multiple times in a September 2, 2020 settlement demand letter. They had written notice of this specific subsection of Title 40, Chapter 57 before filing their October 9 Amended Motion and their November 15, 2020 Memorandum of Law.**

As clearly set forth in the complaint, all of the Plaintiffs' breaches of fiduciary duty, UTPA and other causes of action are based on the Defendants' **illegal, unethical and deceptive** conduct which flagrantly violated Title 40, Chapter 57, and the rules and membership agreements of the CMLS as modified by Judge Blatt's Final Order. Under unwavering precedent dating back over 100 years, **the Defendants are barred from raising any equitable defenses such as quantum meruit, estoppel, laches, statutes of limitations, etc. to any of the Plaintiffs' various claims.** See *e.g. White v. Bank*, 66 S.C. 491, 45 S.E. 94, (S.C. 1903); "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for the performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." *White v. J.M. Brown Amusement Company, Inc.*, 360 S.C. 366, 601 S.E.2d 342 (S.C. 2004). A "Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (S.C. 2010). To do so would "violate statutory law, and in turn, public policy." *Id.* Illegal contracts are void and unenforceable. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566

S.E.2d 863 (S.C.Ct.App. 2002). The Supreme Court noted that rule of issue preservation on appeal is “not without exception, and we can set aside our preservation rules to find a contract illegal because we will not lend our assistance to carry out the terms of a contract that violates statutory law or public policy.” Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (S.C. 2012). Jackson v. Bi-Lo Stores, Inc., 437 S.E.2d 168 (S.C.Ct.App. 1993). “The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.” Simpson v. MSA of Myrtle Beach, Inc. 373 S.C. 14, 644 S.E.2d 663 (S.C. 2007). See also Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (S.C. 2013). “Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal.” Branham v. Miller Electric, 237 S.C. 540, 118 S.E.2d 167 (S.C. 1961).

C. Laches is Inapplicable to the Plaintiffs’ Equitable Claims

Only in footnote 4 on page 9 of the Memorandum, do the Defendants argue that the equitable defense of laches is applicable to the Plaintiffs’ various claims. Despite claiming in footnote 4 that the defense of laches “applies mightily in this case”, the Defendants **never actually argue** the defense of laches in the Memorandum.

“To be charged with laches, a party must have knowledge of the **facts upon which he bases his claim**”(emphasis added). Jefferson Pilot Life Ins. v. Gum, 302 S.C. 8, 393 S.E.2d 180 (S.C. 1990) citing Arceneaux v. Arrington, 284 S.C. 500, 327 S.E.2d 357 (S.C.Ct.App. 1995). As discussed previously, the fact that the various transactions occurred between the Plaintiffs and the various purchasers is not the factual basis of the claims. The Defendants’ illegal, unethical and deceptive conduct associated with those transactions constitutes the factual basis of the various claims.

As discussed above, and as addressed in Sections III and IV of the Plaintiffs original September 18, 2020 Response, the Defendants' illegal conduct and unclean hands preclude them arguing the equitable defense of laches.

VI. Admissions of Liability in the Defendants' Memorandum

A. RPW Violations of Title 40, Chapter 57

In footnotes 2, 3 and 6, and on page 3 of the Memorandum, the Defendants **expressly admit** that RPW was involved in setting the rates of real estate commissions through the Development Agreement. Such involvement is a clear violation of several different provisions of Title 40, Chapter 57. It is undisputed factually, as confirmed by the SCLLR website, that RPW Development ("RPW") was an **unlicensed entity** under Title 40, Chapter 57, and on December 21, 2006 when the Development Agreement was signed, RPW maintained a separate office location from SVR. See Complaint paragraphs 5, 96, 110 and 111. As an unlicensed entity, it was unquestionably **unlawful** for (i) RPW to engage in **any** activity governed by Title 40, Chapter 57; and (ii) for defendant Wilkins or any other licensee (i.e. Anne Brooks and Dana Peak) to conduct **any** activity governed by Title 40, Chapter 57 in the name of, or **at the direction of RPW** as the Defendants argue for in their Memorandum. See Section 40-57-135(C)(2).

In addition to being a gross violation of many provisions of Title 40, Chapter 57, the factual scenario admitted by the Defendants violates the South Carolina common law prohibition on fiduciary self-dealing. In First Union National Bank v. Cisa, 293 S.C. 456, 361 S.E.2d 615 (S.C. 1987), the Supreme Court held that fiduciaries "must exclude all selfish interest in his dealings" when representing the individuals or entities to which fiduciary duties are owed. Id. at 461-462. See also In re Hale's Trust, 292 S.C. 308, 356 S.E.2d 138 (S.C. 1987).

The Defendants, at pages 22-26 of their Memorandum, forcefully argue that the SCREC is the appropriate agency for such a determination and appropriate disciplinary actions. The Plaintiffs maintain that the statutory provisions of Title 40, Chapter 57 clearly allow the courts to make their own determinations of law in addition to the administrative interpretations of the SCREC for disciplinary purposes. See Darby and Fulbright *supra*.

To assist the court with the legal analysis of RPW's involvement in the transactions, the Plaintiffs intend to submit the Defendants' answer to the complaint, when filed, to the South Carolina Real Estate Commission (the "SCREC") for the purpose of having them issue a formal agency determination with respect to the correct application of Title 40, Chapter 57 to (i) the activities of RPW with respect to all aspects of this matter, and (ii) to rule on the Defendants' specific claim that the Development Agreement satisfied the requirements of Sections 40-57-135(C)(4) and (D)(4) with respect to SVR's involvement in the various transactions.

B. The Defendants Admit to Illegal Dual Agency in their Memorandum

In their Memorandum on page 18, the Defendants admit to illegal dual agency by stating "that Defendant SVR was representing both the seller and the purchasers in some of the transactions." This dual representation is illegal under Section 40-57-137(M) without a legally compliant dual agency agreement signed by both the seller and purchaser as specifically set forth in that section.

Until 1997 and the enactment of the current structure of Title 40, Chapter 57, a real estate broker representing both the buyer and seller in South Carolina was absolutely prohibited from collecting a commission. In Pollitzer v. Long, 295 S.C. 28, 367 S.E.2d 18 (S.C. 1988) the Supreme Court held that there is a "repugnancy of one serving as both broker for a principal and purchaser from that same principal." Id. at 30. The Court further stated that the general rule is "that the agent

renounces his agency when he conducts himself in a manner which is clearly inconsistent with his role as agent.” Id. The Court denied the real estate commission. See also Hallman v. Lipscomb, 114 S.C. 171, 103 S.E. 513 (S.C. 1920)(Court denied commissions to a real estate broker holding that “positions of agent to sell and purchase are conflicting”). A few years after the Supreme Court’s decision in Pollitzer, the court of appeals in Designer Showrooms, Inc v. Kelley, 304 S.C. 478, 405 S.E.2d 417 (S.C.Ct.App. 1991), held that “the position of an agent to sell and purchase are conflicting and a broker cannot occupy both positions,” and ordered the return of the real estate commission.

In an effort to allow dual representation in very limited circumstances **if certain conditions precedent were met**, the General Assembly enacted the “dual agency” provisions of section 40-57-137(M). The **unambiguous conditions precedent** set forth in section 40-57-137(M) include the requirement of a written “dual agency” agreement signed by both seller and purchaser. No such dual agency agreements were ever signed by the Plaintiffs or the various purchasers as specifically plead in paragraph 380 of the complaint.

VII. Prior Admissions by Attorneys for the Defendants

The Defendants’ attorneys prior to litigation, Blair Cato Pickren Casterline (“Blair Cato”), one of the most respected real estate brokerage law firms in South Carolina (they are certified by the S.C. Real Estate Commission to teach real estate license test courses, and continuing education courses for real estate professionals) published several blogs, **while representing the Defendants in the pre-litigation phase of this dispute**, which discussed the illegality of marketing real estate in the absence of a legally compliant listing agreement under Section 40-57-135 **as was done in this case**. In blogs published on the Blair Cato website (www.blaircato.com), Blair Cato publicly stated on at least 4 separate occasions that the failure to timely obtain written listing agreements

meeting all applicable requirements of Code Section 40-57-135 renders the licensed agent's involvement illegal. "*Did All Owners Sign the Listing Agreement?*" posted at BlairCato.com on February 7, 2017; "*Pocket Listings and the CMLS*" posted at BlairCato.com on March 31, 2017; "*Is it Illegal to Post or Advertise a Listing as 'Coming Soon'?*" posted at BlairCato.com on March 23, 2018; "*Staying Legal While Advising a Consumer About Listing Their House*" posted at BlairCato.com on August 10, 2018.

VIII. It Would be Unconscionable and Against Public Policy NOT to Order Full and Complete Disgorgement of All Illegal Commissions and Fees

It would be "unconscionable" for the court to allow the Defendants to keep the illegal, unethical and deceptive commissions and fees which they obtained by knowingly and willfully violating legislatively enacted public policy to the detriment of not only the Plaintiffs, but to the detriment of all 6,500 competing real estate professionals and the general public as a whole. The court ordered result in this case must not only provide the appropriate relief sought by the Plaintiffs, **but must have a strong deterrent effect** designed to make sure this type of behavior by licensed real estate professionals and fiduciaries **NEVER happens again in South Carolina.**

The knowing and willful nature of the Defendants' illegal, unethical and deceptive conduct is clearly shown by the fact that Sections 40-57-135(A)(8) and 40-57-137(B) specifically require that defendant Wilkins, as broker-in-charge of SVR maintain a "policy manual" which, among other things, specifies the types of agency relationships which SVR may enter into with clients (the "SVR Policy Manual"). **The SVR Policy Manual, in no fewer than 40 separate sections expressly and specifically prohibits ALL of the illegal, unethical and deceptive conduct of the Defendants in this matter.** The Defendants alone chose to intentionally forego the legally mandated written disclosures and written agency agreements. They knew that it was illegal under South Carolina statutory and common law when they made their decision. They knew that they

were violating their contractual obligation to the CMLS and its approximately 6,500 members. They knew that they were violating the specific rules of the CMLS. They knew that they were violating the requirement to follow the CMLS rule amendments ordered by the federal court in the Blatt Final Order which was issued specifically to remedy anti-competitive conduct. They knew that they were committing fraud when they created and executed the Fraudulent Listing Agreements and others like it. **Simply stated, they knew everything.**

In Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334 (S.C. 1985), the Supreme Court dealt with Mr. Alvarez's attempts to enforce a loosely worded lease purchase agreement on terms that differed from the terms he had chosen to draft into the written document. The unanimous Court held Mr. Alvarez to his poorly worded deal that he had negotiated. In so holding, the Court stated that "[o]ne is not entitled to judicial relief from the terms of a 'slipshod agreement' of his own making 'regardless of its wisdom or folly, apparent unreasonableness or failure to guard [his] rights carefully.'" Id. at 104 (emphasis added). The Court was citing its prior decision in Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (S.C. 1984), where it confirmed its longstanding precedent that "Courts are without authority to alter a contract by construction or to make new contracts for the parties. Their duty is limited to the interpretation of the contract made by the parties themselves '... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" Citing Blakely v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767 (S.C. 1976); McPherson v. J.E. Sirrine Co., et al, 206 S.C. 183, 206, 33 S.E.2d 501 (S.C. 1945). **The Defendants alone made the calculated decision to ignore all applicable laws, rules and court orders in an effort to pursue their own self interest.**

IX. Due Process Violations under Rule 7(b)(1)

While the impact of the Defendants' due process violations involving Rule 7(b)(1) of the SCRCPP has been partially mooted by the rescheduling of the hearing on the Defendants' two motions until December 16, 2020, the significance of this violation must be preserved for the record.

In an attempt to surprise the court and the Plaintiffs, the Defendants waited until the day before the scheduled November 16, 2020 motions hearing to file their 30 page Memorandum which for the first time identified in any manner the purported additional grounds for the October 9 Amended Motion. On page 6 of their Memorandum, the Defendants claim that they filed an Amended Motion to Dismiss to assert the additional ground that "there is no statutory right for a private cause of action in favor of the Plaintiffs for an alleged failure to have a signed listing agreement..." While this asserted basis for the motion is manifestly false and frivolous on its face (see Section VI *infra*), at no place in the October 9 Amended Motion is this or any other basis for the motion identified. The Defendants then admit on page 7 that they filed the Memorandum the day before the hearing as the notice of the basis for the defective motion filed 37 days prior. **As set forth in Section I *supra*, the Plaintiffs specifically cited the specific controlling section of Title 40, Chapter 57 on this issue to the Defendants in a September 2, 2020 settlement demand letter.**

There are no statements or words in the October 9 Amended Motion which put the court or the Plaintiffs on notice of the basis for the October 9 Amended Motion. The defective October 9 Amended Motion was, on its face, a violation of Rule 6 and Rule 7(b)(1) of the South Carolina Rules of Civil Procedure as it was impossible for the court or the Plaintiffs to "**comprehend the basis for the motion**" as required by Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (S.C.Ct.App. 2012) cited by the Defendants.

X. Federal Cases on Notice Pleading

The Defendants invoke the U.S. Supreme Court cases of Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) in the second sentence of the introduction to their “surprise” Memorandum, and then never cite or discuss the holdings in those cases, in an attempt to mislead this court into thinking those two cases “and their progeny” are somehow remotely relevant to this matter. Iqbal and Twombly are federal cases dealing with the requirements for “notice” pleading in federal actions, and address pleadings completely dissimilar to this case. As the South Carolina Supreme Court stated in Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (S.C. 2019), the only South Carolina Supreme Court decision found by the Plaintiffs to ever cite either case, “[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” Id. at 180.

In the present case, the Plaintiffs have specifically plead the factual allegations necessary to satisfy any such standard, **and all such factual allegations are manifestly provable.** The Defendants on pages 5, 6, 14, 18 and 27 and elsewhere in their Memorandum expressly cite the specific factual allegations (with paragraph references to the Complaint) made by the Plaintiffs which satisfy all aspects of the pleading rules as interpreted in Iqbal and Twombly.

XI. Footnote 3 and the Subornation of Perjury

In footnote 3 on page 6 of the Memorandum, the Defendants make a very **serious and inappropriate** claim. In their effort to “deny that there were never any written signed listing agreements”, the Defendants make 3 assertions to support their claim. The first two false assertions of (i) the Development Agreement constituting the required “listing agreements”, and (ii) the theoretical right to purge documents which were more than 5 years old, have been addressed above.

The third assertion charged to Mr. Wilkins (and perhaps others) is **extremely** troublesome in that it (i) is demonstrably and knowingly false, (ii) accuses Shannon Porth of serious ethical and legal violations connected to her profession in reckless disregard for her rights, and (iii) was made in a knowing attempt to intimidate and bully the Plaintiffs in violation of SCRPC Rules 3.1, 3.2, 3.3, 8.4, and the official comments there under, and (iv) constitutes a serious violation of Sections 40-1-110(c),(d),(f), and (g); and current section 40-57-710(2),(4),(5),(20), and (21) as a result of Mr. Wilkins, a licensed “broker-in-charge” **promoting the knowingly false assertion through his attorneys.**

The Defendants obviously make this third false assertion as the final false foundation for their claim of “plausible deniability” as to the complete absence of legally compliant listing agreements signed by the Plaintiffs. It is **irrefutable** that Mr. Wilkins **knows with 100% certainty** that Shannon Porth **NEVER** took any signed listing agreements from any SVR files as **he is 100% aware that no such signed listing agreements ever existed.** The Plaintiffs remind the court that Mr. Wilkins’ **true** signature, while still a licensed attorney, appears on one of the 2 “sample” fraudulent listing agreements created for the obvious purpose of surviving any CMLS audits following the Blatt Final Order. Under Section V.H.(2) of the Blatt Final Order, Mr. Wilkins, as a member “broker-in-charge”, **was personally served** a copy of the Blatt Final Order in 2009. **He then signed the fraudulent document (and almost certainly many more) in 2011, and personally directed others to create such documents in an attempt to fraudulently conceal his illegal, unethical and deceptive behavior.**

Copies of the files covered by this assertion, and all of the files created by Shannon Porth with respect to the lots in question while at SVR were actually produced by Rex Casterline on August 28, 2018 as discussed in Section IV *supra*. The Defendants still have the

files (those which actually existed) in their possession unless they have been destroyed by the Defendants themselves.

As further proof that the Defendants still had the relevant files, and proof that at least Mr. Bland had access to those files before making the false assertion in footnote 3, the Plaintiffs call the court's attention to **Exhibit 6**. **Exhibit 6** is a copy of one of the "discovery event" listing agreements prepared by Shannon Porth and signed by Kent Porth on January 10, 2017. In footnote 3, the Defendants attempt to give the court the impression that Shannon Porth had left SVE by January 10, 2017, and had improperly taken SVR files with her. The Defendants fail to inform the court that on January 10, 2017, Shannon Porth was still an "associated licensee" of SVR, and that Mr. Wilkins was her "broker-in-charge" as evidenced by Mr. Wilkins' **true signature** on page two of **Exhibit 6**. **Most shocking, Exhibit 6 was produced by Mr. Bland to the Plaintiffs on November 21, 2019 in the same PDF attachment as the Fraudulent Listing Agreements!** Not only did Shannon Porth not remove any SVR files, she left all of the files she created when she later left SVR in May 2017 as required by applicable law and the SVR Policy Manual.

XII. The Defendants Admit the Validity of the Plaintiffs' Quantum Meruit and Restitution Causes of Action

On page 27 of the Memorandum, the Defendants admit that the Plaintiffs alleged that the Defendants' participation in the transactions was "unlawful" and the Defendants "retained" the commissions and fees paid as a result of the "unlawful acts." The Defendants specifically reference the paragraphs of the Plaintiffs' complaint making those factual assertions. The Defendants argue that the Plaintiffs' pleadings do not satisfy the third element of "retention of the benefit" by the Defendants "under circumstances that make it inequitable for him to retain it..." As discussed previously, illegal activity by a fiduciary resulting in the illegal payment of commissions and fees constitute "circumstances that make it inequitable" for the Defendants to retain the illegal

commissions and fees. These two causes of action were properly plead, and the factual assertions must be taken as true for purposes of the Defendants' motions.

XIII. The Defendants' "Conclusion" Contains Gross Factual Misstatements

In the Conclusion to their Memorandum, the Defendants continue their pattern of "wordsmithing" and knowingly false factual representations.

First, the Defendants claim that "the Plaintiffs would demand at the closing table that the Defendants either forego or reduce their development fees and realtor commissions that they were entitled to receive or Plaintiff Porth would not consummate the closing(s)." **This is a 100% demonstrably false statement**, and will be disproven through emails, draft HUD-1's, relevant contracts and **sworn affidavits of attorneys**. **At no time** did Plaintiff Porth **ever** threaten to "not consummate the closing(s)."

Second, the Defendants make the intentionally misleading claim that the "developer Defendants took a large tract of raw land developed it through the construction of infrastructure to it, created curbs and roads, platted it, and moved tremendous amounts of dirt and trees." The actual work of "the construction of infrastructure", the "[creation of] curbs", "platt[ing] it", and moving "tremendous amounts of dirt and trees" **was actually performed by other companies and individuals** such as CR Jackson Construction, HB Engineering, Whitworth & Associates, Panorama Grounds, Dutch Fork Nursery, and many others. Plaintiff Panorama Point, LLC paid these **other companies and individuals directly, and paid in excess of \$1,000,000** for the work described by the Defendants in their Conclusion (over and above the development fees) as cancelled checks will irrefutably prove. The Defendants' intimation that the "developer Defendants" actually did the various construction, engineering and surveying work is intentionally misleading.

CONCLUSION

Based on the foregoing, in conjunction with Plaintiffs' prior Opposition to Motion to Dismiss, Supplemental Opposition to Defendants' Original and Amended Motions to Dismiss and this Opposition to Defendants Memorandum of Law of Motion to Dismiss and Amended Motions to Dismiss and Reply to Plaintiffs' Opposition Briefs, the Court should conclude as follows:

1. That South Carolina Code Annotated, Title 40, Section 57 expressly and unambiguously provides for a private cause of action to the Plaintiffs as set forth with specificity and particularity in and throughout Plaintiffs' Complaint;
2. That the assertions of the Complaint have been pled with particularity and specificity and must be taken as true, supporting compliance with any applicable statute of limitations, if any are even arguably applicable to this case;
3. That there is no statute of limitations applicable to actions in equity;
4. That breaches of fiduciary duty were not discovered until sometime in 2017 and at the earliest January 10, 2017;
5. That this action was brought within a 3 year period of any discovery of breaches of fiduciary duty;
6. That the raising of any statute of limitations, if any arguably applicable, are estopped because of the concealment of illegal acts;
7. That any statute of limitations is tolled because of "unclean hands";
8. That the Amendment of the Motion to Dismiss is deficient, because it provides no reason nor grounds forming its basis; and
9. That asserting the affirmative statute of limitations in a pre-Answer Rule 12(b)(6) motion to dismiss is improper and inappropriate.

Further and as previously requested, a determination needs to be made by this Court as to the frivolity of these motions, based on the detailed allegations of the Complaint and outrageous misstatements of case and statutory law. In the event the Court determines that these motions are frivolous, the Court should then grant leave to the Plaintiffs to file a Motion for Sanctions to recover the expenditure of time and attorney's fees expended by the Plaintiffs and/or their counsel.

Respectfully submitted,

s/ Clarence Davis

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DATED: December 10, 2020

Exhibit 1

Exhibit 1

Summary of Violations by Defendants

<u>Section Violated</u>	<u>General Description of Section</u>	<u>Nature of Violations</u>	<u>Additional Details</u>
Title 40, Chapter 1			
40-1-110(1)(c)	Prohibits knowingly violating any requirement issued under the authority of Title 40, Chapter 1	All other violations of Title 40, Chapter 57 constitute a violation by Mr. Wilkins and SVR of this provision since the SVR policy manual proves the knowing nature of the violations.	Additional grounds for discipline and license revocation in addition to the specific real estate statutes at Title 40, Chapter 57
40-1-110(1)(d)	Prohibits any act of fraud in the practice of a regulated profession	The creation of fraudulent listing agreements proves the violation of this provision.	Additional grounds for discipline and license revocation in addition to the specific real estate statutes at Title 40, Chapter 57
40-10-110(1)(e)	Prohibits obtaining fees under fraudulent circumstances	See above regarding the creation of fraudulent listing agreements. The failure to meet statutory disclosure requirements by a fiduciary in South Carolina constitutes fraud under common law.	Additional grounds for discipline and license revocation in addition to the specific real estate statutes at Title 40, Chapter 57
40-1-110(1)(f)	Prohibits dishonorable, unethical, or unprofessional act that is likely to deceive, defraud or harm the public	See 3 violations above, and the Plaintiffs complaint as a whole.	Additional grounds for discipline and license revocation in addition to the specific real estate statutes at Title 40, Chapter 57
40-1-110(1)(g)	Allow license revocation if the licensee lacks the professional or ethical competence to practice the profession or occupation	See 3 violations above, and the Plaintiffs complaint as a whole.	Additional grounds for discipline and license revocation in addition to the specific real estate statutes at Title 40, Chapter 57

Title 40, Chapter 57

40-57-20	Prohibits unlicensed real estate activity	RPW Development (an unlicensed entity) engaged in the marketing and sale of 23 parcels and the Development Agreement expressly states it covers marketing and sales	The Development Agreement between RPW Development and the LLC expressly states that the fees are for marketing and sales activities thereby making the agreement unlawful
40-57-135(A)(1)	Requires broker-in-charge to adequately supervise all licensees	Mr. Wilkins failed to adequately supervise associated licensees with respect to all transactions	As broker-in-charge, Mr. Wilkins is responsible for all of the scheduled violations
40-57-135(A)(3)	Requires broker-in-charge to prevent violations by associated licensees	Mr. Wilkins failed to adequately supervise associated licensees with respect to all of the transactions	As broker-in-charge, Mr. Wilkins is responsible for all of the scheduled violations
40-57-135(B)(9)	Broker-in-charge may not commingle funds belonging to another with his own funds	Mr. Wilkins failed to refund \$6500 refunded from Lexington County to the LLC and placed the funds in his operating account until requested by Plaintiffs	The \$6500 cash bond paid by the LLC was the direct result of Mr. Wilkins failing to complete the County's "punch list" for the bonded plat secured by a line of credit on the Plaintiff's personal residence
40-57-135(C)(2)	A licensee may not conduct real estate activity in an unlicensed location	RPW Development maintained a separate address on Old Chapin Road - Both Mr. Wilkins and Anne Brooks (and others) conducted regulated activities from this office for years (Ms. Brooks was an officer and director of RPW Development)	RPW Development later moved its office to the same address as Southern Visions Realty, and appeared to share employees and licensees
40-57-135(C)(2)	A licensee may not conduct real estate activity under another name	RPW Development was unlicensed and conducted real estate marketing - Both Mr. Wilkins and SVR (as well as other associated licensees) participated in this activity	The Development Agreement between RPW Development and the LLC expressly states that the fees are for marketing and sales activities thereby making the agreement unlawful
40-57-135(C)(4)	A licensee may not market, advertise or participate in a transaction involving a parcel owned by someone else without a legally compliant listing agreement	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels	Other licensed agents at SVR participated in the marketing of the properties, and therefore would be in violation of this provision

40-57-135(C)(4)	The last sentence of this section also requires that a licensee must comply with CMLS rules	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels (See discussion of CMLS violations below)	Plaintiffs believe that the references to compliance with CMLS rules in the listing agreement form is one of the main reasons Defendants did not obtain signed listing agreements from the Plaintiffs
40-57-135(C)(6)	This section requires that a licensee reveal his license status in a personal transaction	Mr. Wilkins violated this provision by failing to disclose his true role in Wade McGwinn's purchase of Lot 23 - Mr. Wilkins was the undisclosed "money man" and therefore the true purchaser using Wade McGwinn as a straw man	The HUD-1 presented to Plaintiff at the closing of Lot 23 reflected Robert Wilkins as the Lender of \$633,675 which funded the purchase of the lot, and the construction of the spec home. Wilkins later took title to the property in exchange for forgiveness of the loan.
40-57-135(D)	This section requires that a licensee reveal his true role in a personal transaction	Mr. Wilkins violated this provision by failing to disclose his true role in Wade McGwinn's purchase of Lot 23 (see above)	The HUD-1 presented to Plaintiff at the closing of Lot 23 reflected Robert Wilkins as the Lender of \$633,675 which funded the purchase of the lot, and the construction of the spec home. Wilkins later took title to the property in exchange for forgiveness of the loan.
40-57-135(D)(4)	This section lists the elements of the required listing agreement, and requires that a copy of any executed listing agreement be provided to the seller at the time of signing	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels, and especially with respect to the previously undisclosed "fraudulent" listing agreements	It is the violation of this provision which effectively proves that the "fake" listing agreements (and CMLS forms) were not for legitimate purposes.
40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels by failing to obtain listing agreements and providing the disclosures mandated to be included in the listing agreement form.	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.

40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels by violating the various rules of the CMLS as amended by Judge Blatt's Final Order dated August 9, 2009	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.
40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Both Mr. Wilkins and SVR violated this provision by representing buyers unlawfully in 17 transactions as dual agents without satisfaction of Section 40-57-137(M)	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.
40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Mr. Wilkins violated this provision by failing to disclose his true role in Wade McGwinn's purchase of Lot 23 (see above)	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.
40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Mr. Wilkins failed to refund \$6500 refunded from Lexington County to the LLC and placed the funds in his operating account until requested by Plaintiffs	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.
40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Mr. Wilkins and SVR violated this provision by creating fake listing agreements and illegally executing other documents for the purpose of surviving CMLS audits, and failing to disclose these actions	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.

40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Mr. Wilkins and SVR violated this provision by "lawyering up" and delaying the production of requested documents for 15 months (including listing agreements) with the help of Rex Casterline	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.
40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Mr. Wilkins and SVR violated this provision by failing to disclose personal and business relationships with purchasers which created serious conflicts of interest	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.
40-57-137(A)	This section requires the licensee to operate with loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting as set forth in Chapter	Mr. Wilkins and SVR violated this provision by failing to timely respond to legitimate questions regarding compliance with this Chapter	This provision is the statutory statement of the fiduciary duties owed by a licensed real estate broker or agent under South Carolina law.
40-57-137(B)	This section requires the broker-in-charge to select 1 of 5 possible agency types for his real estate office, and state that selection in the office's statutorily mandated policy manual	The SVR Policy Manual listed all 5 types (and combinations) of agency relationships, and failed to make the mandated selection	Although the Defendants strongly deny that they engage in dual agency, the irrefutable facts (i.e. emails between defendants and purchasers) prove otherwise. The emails and other evidence was first made available to Plaintiffs on August 28, 2018 after a 15 month delay by Rex Casterline.
40-57-137(C)(1) and (2)	These sections set forth the specific duties owed to a seller (also requires a written agreement - expands on listing agreement requirement)	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels by failing to obtain listing agreements, and by violating 40-57-137(A)	While duplicative of the requirements of other sections of 40-57-135, violations of these sections constitute separate statutory violations.

40-57-137(C)(1) and (2)	These sections set forth the specific duties owed to a seller (also requires a written agreement - expands on listing agreement requirement)	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels by violating the rules of the CMLS	While duplicative of the requirements of other sections of 40-57-135, violations of these sections constitute separate statutory violations.
40-57-137(C)(2)(e)	This section requires the timely accounting for funds belonging to the seller	Mr. Wilkins failed to refund \$6500 refunded from Lexington County to the LLC and placed the funds in his operating account	The \$6500 cash bond paid by the LLC was the direct result of Robby Wilkins failing to complete the County's "punch list" for the bonded plat secured by a line of credit on one of the Plaintiff's personal residence
40-57-137(C)(3)	This section requires the licensee to exercise reasonable skill and care in the performance of their duties	Both Mr. Wilkins and SVR violated this provision with respect to 23 parcels by violating this Chapter and the rules of the CMLS	While duplicative of the requirements of other sections of 40-57-135, violations of these sections constitute separate statutory violations.
40-57-137(C)(4)	This section requires the licensee to comply with all provisions of this Chapter	Both Mr. Wilkins and SVR violated this provision with respect to 23 transactions by violating numerous provisions of this Chapter as outlined above	While duplicative of the requirements of other sections of 40-57-135, violations of these sections constitute separate statutory violations.
40-57-137(C)(5)	This section requires the licensee to comply with all other provisions of law and rules, etc.	Both Mr. Wilkins and SVR violated this provision with respect to 23 transactions by violating the provisions of the CMLS rules, Judge Blatt's Final Order dated August 9, 2009, and general S.C. agency law	The violation of the revised CMLS rules (ordered by Judge Blatt's Final Order dated August 9, 2009) are squarely under this section. The purpose of Judge Blatt's Final Order was to address and eliminate prior anti-competitive practices of large brokerage firms and the CMLS
40-57-137(C)(5)	This provision requires confidentiality of seller's information such as "bottom line" pricing	Both Mr. Wilkins and SVR violated this provision with respect to 17 parcels by representing buyers unlawfully in 17 transactions in violation of Section 40-57-137(M)	For example, see Ms. Brooks' March 19, 2009 email to her banker at BB&T which held the mortgage on Ms. Brooks' personal residence in which Ms. Brooks agrees to find out the Plaintiff's "bottom line" pricing and report back to her banker/purchaser.

40-57-137(M)(1)	This section prohibits dual agency without a written dual agency agreement signed by both parties	Both Mr. Wilkins and SVR violated this provision by representing buyers unlawfully in 17 transactions	The Defendants deny that they engage in dual agency, but the irrefutable facts (i.e. emails between defendants and purchasers) prove otherwise. The emails and other evidence was first made available to Plaintiffs on August 28, 2018 after a 15 month delay.
40-57-137(M)(1)	This section prohibits an agent from disclosing a seller's willingness to accept less than the asking price	Mr. Wilkins and SVR violated this provision with respect to 17 parcels by representing buyers unlawfully in 17 transactions	For example, see Ms. Brooks' March 19, 2009 email to her banker at BB&T which held the mortgage on Ms. Brooks' personal residence in which Ms. Brooks agrees to find out the Plaintiff's "bottom line" pricing and report back to her banker/purchaser.
40-57-139	This section requires the licensee to provide and obtain written consent to a general agency disclosure form	Both Mr. Wilkins and SVR violated this provision with respect to 23 separate parcels and transactions by failing to have Plaintiffs sign general agency disclosure forms	This requirement is separate from the requirement in Section 40-57-135 and the CMLS Rules for a written listing agreement.
40-57-139(E)	This provision specifically requires that the licensee have a written agency agreement (i.e. listing agreement) in place before ratifying any sales contract	Both Mr. Wilkins and SVR violated this provision with respect to 23 separate parcels and transactions by failing to obtain written listing agreements	This is a separate statement in Title 40, Chapter 57 of the absolute requirement for a written listing agreement before a licensed broker or agent may participate in a real estate transaction.
40-57-145(A) now codified at 40-57-710 effective as of January 1, 2017.	Section 40-57-145(A) sets forth the various statutory grounds for license revocation and other discipline by the SC Real Estate Commission.	All other violations of Title 40, Chapter 57 constitute a violation by Mr. Wilkins and SVR of multiple subsections of 40-57-145(A), and are each grounds for action by the SC Real Estate Commission	The grounds for discipline and license revocation in sections 40-1-110 and 40-57-145 overlap to some extent. The overlapping provisions of section 40-1-110 identify the more serious violations with the greater risk of license suspension or revocation.

Chapter 39, Chapter 1

39-1-140	This provision prohibits combinations of individuals or entities for the purpose of limiting competition	RPW Development and Southern Visions Realty worked together under the terms of the Development Agreement to hide real estate listings from all competing CMLS members by violating Title 40, Chapter 57; and the Rules of the CMLS	Violation of this anti-competitive practices statute (the South Carolina version of the federal Sherman Act) shows the <u>severity of the violations of the South Carolina Unfair Trade Practices Act</u>

Chapter 39, Chapter 5

39-5-10 <i>et. seq.</i>	This provision sets forth the South Carolina Unfair Trade Practices Act	The violations of Title 40, Chapter 57 set forth above, and the violations of the CMLS Bylaws and Rules (as well as the Blatt Final Order) constitute "knowing" and "willful" violations of the Unfair Trade Practices Act as the violations directly impacted at least 6,500 competing real estate brokers (and other members of the general public)	See Exhibit 2 for a sample of the impact of the hidden listings on the 6,500 competing brokers. Exhibit 2 only addresses a <u>small</u> portion of the negative impact on competing brokers and others. The Plaintiffs will show additional negative impacts to licensed real estate appraisers, purchasers, mortgage companies, etc. at trial.

CMLS Rules, Bylaws and Membership Agreement

Membership Agreement	The membership agreement specifically requires compliance with the Bylaws and all Rules of the CMLS	See the Plaintiffs' Complaint and all other entries on this schedule	This is also the foundation for the future class action lawsuit on behalf of all competing CMLS members who were denied the "benefit of their bargain" (i.e. annual dues paid for access to listings) by the Defendants illegal, unethical and deceptive conduct.
Bylaws Article III, Section 4	This section reiterates the requirement that all members of CMLS adhere to all aspects of the Bylaws and Rules	See the Plaintiffs' Complaint and all other entries on this schedule	This is also the foundation for the future class action lawsuit on behalf of all competing CMLS members who were denied the "benefit of their bargain" (i.e. annual dues paid for access to listings) by the Defendants illegal, unethical and deceptive conduct.
Bylaws Article IV	This Article of the CMLS Bylaws specifically requires compliance with all applicable local, state and federal laws.	See the Plaintiffs' Complaint and all other entries on this schedule	This is also the foundation for the future class action lawsuit on behalf of all competing CMLS members who were denied the "benefit of their bargain" (i.e. annual dues paid for access to listings) by the Defendants illegal, unethical and deceptive conduct.

Rule 1(a)	This rule requires written listing agreements signed by the <u>owners</u> of the parcel	Same violation as the Defendants' violations of Section 40-57-135.	This CMLS rule mirrors Section 40-57-135 requirements for a legally compliant listing agreement signed by the owner of the property.
Rule 1(b)(1)	This rule required "listing input sheets" approved by the CMLS and which required the <u>owners</u> signature or initials	The Plaintiffs were never asked to initial or sign any "listing input sheets" as required by the CMLS mandated forms.	This CMLS rule establishes the requirement for the owner of the listed property to sign a CMLS data input form <u>verifying</u> the information to be uploaded to the CMLS website.
Rule 1(b)(1)	This rule required "listing input sheets" approved by the CMLS and which requires accurate data to be entered	The Defendants would enter false data with respect to the parcels actually listed on the CMLS website. For example, on one listing, the Defendants stated that there were only 5 lots remaining to be sold when there were over 20 lots remaining. This is further evidence of the Defendants' intent to hide listings from competitors.	This CMLS rule establishes the requirement for the owner of the listed property to sign a CMLS data input form <u>verifying</u> the information to be uploaded to the CMLS website <u>thereby assuring its accuracy.</u>
Rule 1(b)(2)	This rule required all new listings to be entered into the CMLS system with two (2) business days	This Rule was never followed by the Defendants. Based on review of the limited number of CMLS listings actually posted by the Defendants, the listings were entered on the day the fraudulent listing agreements were purportedly executed by the Defendants.	This rule requires the newly listed property to be uploaded for all members to see within 2 days of the <u>initial acquisition</u> of the right to market the property. This Rule required entry into the CMLS in 2006 when the Defendants first started marketing the 23 parcels.
Rule 1(b)(3)	This rule required a written "Withhold Listing Permanently" form signed by the owner in order to market the parcel without entry into the CMLS system	The Plaintiffs were never asked to initial or sign any "Withhold Listing Permanently" forms as required by this Rule.	This rule provides the only "legal" method for withholding an otherwise legal property listing from the CMLS website. <u>Full disclosure</u> and <u>written consent</u> of the owner is required. In the absence of this form signed by the owner, the "pocket listing" is illegal under Section 40-57-135 and the CMLS rules.
Rule 1(b)(3)	This rule requires that the signed listing agreement as well as the "Withhold Listing Permanently" form be submitted to CMLS within 2 business days.	This Rule was either flagrantly ignored, or fraudulent listing agreements and "Withhold Listing Permanently" forms were submitted to CMLS.	A discovery request to CMLS will either identify more violations of this Rule by the lack of the required submissions, or will produce additional fraudulent documents which have been concealed from the Plaintiffs.

Rule 1(g)	This rule prohibits the entering of "comparables" into the CMLS system without a written listing agreement signed by the seller.	Many of the "closed" transactions of the Plaintiffs were entered as "comparables" although no written listing agreements were obtained from the Plaintiffs.	A discovery request to CMLS will either identify more violations of this Rule by the lack of the required submissions, or will produce additional fraudulent documents which have been concealed from the Plaintiffs.
Rule 7	This rule mirrors the requirement of 40-57-135(C)(4) and prohibits the marketing of a parcel without a written listing agreement signed by the owner	See the entirety of the Plaintiffs' Complaint.	In addition to being illegal under Title 40, Chapter 57, a listing may not be entered into the CMLS website without a listing agreement signed by the owner.
Rule 8	This rule requires all changes in a property's status to be entered into the CMLS system within two (2) business days	The Plaintiffs have documentary evidence that this Rule was routinely violated in this matter.	This rule assures that competing members of the CMLS have up to date information on all available properties for which they pay substantial annual dues for access.
Rule 9	This rule requires the disclosure on all CMLS listings of the member's interest in the listed property in the "Agents Remarks" section of the listing	The Defendants failed to disclose their interest in the 23 lots arising from their illegal claim for development fees in addition to the real estate commission. The Plaintiffs are informed and believe that in many other developments, the Defendants failed to disclose their actual <u>ownership interest</u> in the various listed parcels.	Mr. Wilkins and Ms. Brooks were often owners of development entities which utilized the CMLS to either advertise some lots, or for the purpose of entering "comparables" as discussed above.
Rule 20(1)	This rule prohibits members from engaging in any practice inconsistent with the agency rules of Title 40, Chapter 57	See the entirety of the Plaintiffs' Complaint.	This CMLS rule includes the Section 40-57-135 requirements for a legally compliant listing agreement signed by the owner of the property, and all other violations set forth in this Exhibit.

Final Order of Judge Solomon Blatt, Jr. dated August 17, 2009

Section V, B 7	The Final Order modified Rule 1(a) but specifically requires a written listing agreement meeting all applicable requirements	Mr. Wilkins, SVR, and all other associated licensees of SVR at the time (who had individual memberships in the CMLS) were personally served with a copy of the Blatt Final Order within 5 days of its entry.	The purpose of Judge Blatt ordering modifications to the CMLS Rules was to eliminate anti-competitive conduct which was allowed under the prior rules. The Rules, as modified, assured no such ongoing anti-competitive behavior.
Section V, B 8	The Final Order modified Rule 1(a) to require CMLS "Listing Input Sheets" which required the owner's signature or initials	Mr. Wilkins, SVR, and all other associated licensees of SVR at the time (who had individual memberships in the CMLS) were personally served with a copy of the Blatt Final Order within 5 days of its entry.	The purpose of Judge Blatt ordering modifications to the CMLS Rules was to eliminate anti-competitive conduct which was allowed under the prior rules. The Rules, as modified, assured no such ongoing anti-competitive behavior.
Section V, B 9	The Final Order reaffirmed the requirement in Rule 1(b)(2) that all listings be entered into the CMLS system within two (2) business days	Mr. Wilkins, SVR, and all other associated licensees of SVR at the time (who had individual memberships in the CMLS) were personally served with a copy of the Blatt Final Order within 5 days of its entry.	The purpose of Judge Blatt ordering modifications to the CMLS Rules was to eliminate anti-competitive conduct which was allowed under the prior rules. The Rules, as modified, assured no such ongoing anti-competitive behavior.
Section V, B 9	The Final Order further modified Rule 1(b)(2) to require retention of all listing agreements in accordance with applicable state law	Mr. Wilkins, SVR, and all other associated licensees of SVR at the time (who had individual memberships in the CMLS) were personally served with a copy of the Blatt Final Order within 5 days of its entry.	The purpose of Judge Blatt ordering modifications to the CMLS Rules was to eliminate anti-competitive conduct which was allowed under the prior rules. The Rules, as modified, assured no such ongoing anti-competitive behavior.

South Carolina Rules of Professional Conduct (Applicable to Defendant Wilkins Only)

Rule 5.5	Unauthorized Practice of Law	Mr. Wilkins' law license is "inactive." The Plaintiffs have numerous documented examples of conduct by Mr. Wilkins which irrefutably constitutes the unauthorized practice of law. Mr. Wilkins involved non lawyer employees in these prohibited actions. The Plaintiffs have a letter from Mr. Casterline in which he appears to expressly promote such unauthorized practice of law. Mr. Casterline was immediately put on written notice of this improper promotion of the unauthorized practice of law.	At least one of these violations was done in <u>direct contradiction of specific instructions</u> from the Plaintiffs. In one instance, the unauthorized legal advice, in written form, was provided to the Plaintiffs through an unlicensed employee at the direction of Mr. Wilkins, and was <u>irrefutably</u> 100% correct in its interpretation of applicable law.

Rule 5.7	Responsibilities Regarding Law Related Services	Per the Office of Disciplinary Counsel, and as interpreted by many advisory opinions and disciplinary orders, an attorney must comply with all aspects of the Rules in their non-law business activities	Many of Mr. Wilkins and RPW Development activities in this matter actually constituted the unauthorized practice of law. Irrefutable documentary proof is in the possession of the Plaintiffs.
Rule 7.2	Improper Attorney Advertising	Mr. Wilkins improperly identified himself as a "licensed attorney" on the SVR website. An "inactive" attorney may not make such a representation. Also, the inference of such a representation on a real estate brokerage website is absolutely prohibited.	The Plaintiffs have irrefutable documentary evidence of this improper advertising including a "page view" of the improper biography of Mr. Wilkins, and emails from Ms. Brooks discussing the steps taken to take down the improper advertising (which had apparently been on the SVR website for many years.
Rule 8.4(a)	Knowing violations of the Rules of Conduct	For example, Mr. Wilkins true signature is on the Fraudulent Listing Agreements.	Per the Office of Disciplinary Counsel, this violation triggers mandatory reporting under Rule 8.3 by all attorneys involved in this matter.
Rule 8.4(d)	Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation	For example, Mr. Wilkins true signature is on the Fraudulent Listing Agreements.	Per the Office of Disciplinary Counsel, this violation triggers mandatory reporting under Rule 8.3 by all attorneys involved in this matter.

Notes to Violations:

Note 1. The above violations are the violations of which the Plaintiffs have knowledge in the current matter. The Plaintiffs are **informed** and believe that targeted, but thorough discovery (under the Plaintiffs' UTPA claim) into the current matter, as well as other developments and transactions handled by the Defendants will identify hundreds of additional violations.

Exhibit 2

Exhibit 2

Anti-Competitive Effect of CMLS Violations on other CMLS Members

<u>Parcel</u>	<u>Approximate Date of Initial SVR Marketing</u>	<u>CMLS Listing Date</u>	<u>Final Sales Price</u>	<u>Date Closed</u>	<u>Approximate Total Days Marketed</u>	<u>Approximate Total Days Listed on CMLS</u>	<u>Approximate Total Days Hidden from CMLS Website</u>	<u>Percentage of Days Hidden from Competitors</u>	<u>Independent Buyers Agent?</u>	<u>Total Commissions Paid</u>	<u>Total Commissions Paid to SVR</u>
Lot 1	10/1/2006	Not Listed	\$282,500.00	6/25/2009	1028	0	1028	100.00%	No	\$14,000.00	\$14,000.00
Lot 4	10/1/2006	Not Listed	\$425,000.00	6/28/2007	271	0	271	100.00%	No	\$21,250.00	\$21,250.00
Lot 5	10/1/2006	Not Listed	\$425,000.00	7/6/2007	279	0	279	100.00%	No	\$21,250.00	\$21,250.00
Lot 6	10/1/2006	Not Listed	\$515,000.00	1/16/2007	108	0	108	100.00%	No	\$27,500.00	\$27,500.00
Lot 7	10/1/2006	9/15/2011	\$315,000.00	1/3/2012	1920	82	1838	95.73%	Yes	\$15,750.00	\$7,875.00
Lot 8	10/1/2006	5/16/2011	\$300,000.00	6/4/2012	2072	385	1687	81.42%	Yes	\$14,738.75	\$7,369.38
Lots 9 and 10	10/1/2006	Not Listed	\$153,000.00	6/4/2012	2072	0	2072	100.00%	Yes	\$7,936.25	\$3,968.13
Lot 11 - Hutchins	10/1/2006	Not Listed	\$137,500.00	3/16/2015	3087	0	3087	100.00%	No	\$6,875.00	\$6,875.00
Lot 11 - Dent	10/1/2006	11/1/2012	\$137,500.00	3/13/2015	3084	775	2309	74.87%	No	\$6,875.00	\$6,875.00
Lot 12	10/1/2006	3/19/2010	\$185,000.00	8/6/2010	1405	136	1269	90.32%	No	\$9,250.00	\$9,250.00
Lot 13	10/1/2006	11/11/2012	\$194,000.00	5/7/2015	3139	873	2266	72.19%	No	\$9,700.00	\$4,850.00
Lot 15	10/1/2006	5/16/2011	\$185,000.00	9/26/2013	2551	724	1827	71.62%	No	\$9,250.00	\$9,250.00
Lot 16	10/1/2006	11/11/2012	\$190,000.00	4/1/2014	2738	478	2260	82.54%	No	\$9,500.00	\$9,500.00
Lot 17	10/1/2006	11/11/2012	\$185,000.00	4/11/2013	2383	136	2247	94.29%	No	\$9,250.00	\$9,250.00
Lot 18	10/1/2006	Not Listed	\$187,500.00	1/7/2011	1559	0	1559	100.00%	No	\$8,750.00	\$8,780.00
Lot 19	10/1/2006	3/27/2011	\$191,715.00	10/2/2014	2922	1245	1677	57.39%	Yes	\$9,585.74	\$4,792.87
Lot 21	10/1/2006	11/11/2012	\$70,000.00	10/1/2013	2556	246	2310	90.38%	Yes	\$3,500.00	\$1,400.00
Lot 22	10/1/2006	3/27/2011	\$300,000.00	7/30/2013	2493	745	1748	70.12%	Yes	\$15,000.00	\$7,500.00
Lot 24	10/1/2006	11/11/2012	\$310,000.00	5/1/2015	3164	873	2291	72.41%	No	\$15,500.00	\$15,500.00
Lot 25	10/1/2006	3/19/2010	\$300,000.00	4/3/2014	2740	1090	1650	60.22%	Yes	\$15,000.00	\$6,000.00
Lot 27	10/1/2006	6/22/2008	\$100,000.00	7/28/2008	666	36	630	94.59%	No	\$7,500.00	\$7,500.00
Lot 30	10/1/2006	Not Listed	\$230,000.00	7/12/2007	650	0	650	100.00%	No	\$13,500.00	\$13,500.00
#1 Panorama	10/1/2006	Not Listed	\$535,000.00	12/10/2012	2261	0	2261	100.00%	No	\$26,750.00	\$26,750.00
#1 Panorama	10/1/2016	Not Listed	\$325,000.00	10/23/2014	2913	0	2913	100.00%	No	\$16,250.00	\$16,250.00
			\$6,178,715.00							\$314,460.74	\$267,035.37

A parcel-day is one parcel of
real estate being on the
market for one day.

Total Parcel-Days:	48061		
Total Parcel-Days on CMLS:	7824	SVR % of Total Commissions:	84.92%
Total Parcel-Days Hidden From CMLS:	40237		
Percentage of Total-Parcel Days Hidden from CMLS:	<u>83.72%</u>		

Exhibit 3



EXCLUSIVE RIGHT TO SELL CONTRACT
State of South Carolina

EXC

A. EMPLOYMENT: In consideration of the covenants herein contained, Panorama Point, LLC (herein called "OWNER") and Southern Visions Realty, Inc. (herein called "BROKER/LISTING FIRM") agree as follows: For the period of time beginning on November 11, 2012, and ending at midnight on December 31, 2013. Owner hereby grants to Broker the sole and exclusive right to sell the real property known as 304 Panorama Drive, lot 21 Lexington SC 29072. Broker hereby accepts employment as the sole and exclusive agent of the Owner to sell the property, subject to the following terms and conditions:

B. SALE PRICE: Said property is, hereby, listed to sell for the gross sale price of \$ 95,000.00 or for such other price or upon such other terms (including exchange) to which owner may subsequently agree during the authorization period. Owner agrees to pay Broker a fee of 6 % computed upon the gross sales price in any of the following events: (1) the closing of a sale of the property during the authorization period or as a result of a contract secured during the authorization period, or (2) The signing by Owner of a valid contract to sell the property but Owner fails or refuses to complete the sale as agreed; or, (3) The presentation to Owner of a valid and a bonafide written offer to purchase the property which complies with the terms and conditions specified herein. A contract will be deemed to comply with the terms and conditions hereof if the offered contract is for at least the listing price stated herein, is non-contingent and is on a form adopted or recommend by a local Board of Realtors or substantially similar thereto. The fee will be due to Broker even if the Owner sells or obtains the contract to sell the property during the authorization period, or if the Owner sells or obtains the contract to sell the property within 180 days after the expiration of the authorization period to or from a purchaser introduced to the property during the authorization period. This protection period for the Broker beyond the authorization period will be automatically terminated if the Owner enters into a listing agreement with another Broker during the protection period. The fee will be due to the Broker not later than the closing date called for in any contract to sell the property or any extension thereof or upon demand if Owner refuses to accept and/or execute a contract which complies with the terms and conditions hereof. Owner agrees to pay the costs and expenses including attorney's fees incurred by Broker as a result of enforcing the provision of this agreement. The owner shall pay at closing, the real estate commission, a fee for preparing the deed, the deed stamps required on the deed, recording of satisfaction and prorated taxes as of the day of closing. The term "sale" shall include any exchange, swap or trade of the herein described property.

C. MARKETING THE PROPERTY: The Broker has the option, but is not required, to continue marketing the property after an offer has been accepted. Owner may terminate this option by giving written notice to Broker. "Owner understands and agrees that by placing the listing in the Consolidated Multiple Listing Service the listing will be transmitted electronically and made available via the Internet to the public at large and agrees to indemnify and hold Broker and CMLS harmless from any claim, loss or damage arising therefrom." Withhold from Internet yes no dp (initials) on behalf of Panorama Point LLC

D. CALL, FAX, E-MAIL: Seller agrees to allow any Agent/Member to call, e-mail or fax information regarding the sale of their property.

E. INQUIRIES: Owner agrees to Inform Broker of any Inquires or negotiations concerning the sale of the property.

F. PROPERTY INFORMATION: Owner agrees to furnish Broker with complete and reliable information about the ownership and operation of the property and any encumbrances or liens affecting the property. Owner warrants, that, to his knowledge, there are no material defects, hidden or obvious, in or on the property, which have not been disclosed to Broker in writing. Owner further warrants that he has reviewed the information on the profile sheet attached to and made a part of this Agreement, and that all such information is accurate to the best of his knowledge. Owner hereby authorizes anyone having a lien against the property to disclose complete information about the lien to Broker.

G. PERSONAL PROPERTY: The real estate described herein includes, all fixtures, equipment and improvements of any kind which are now attached to or planted on the premises, such as: shrubbery, trees, fences, shutters, blinds, lamp posts, mail boxes, TV antennas, clothes-line poles, curtain/drapery rods, ceiling fans, attached mirrors and light bulbs, as well as all built-ins, such as: equipment, appliances, cabinets, furniture and shelves unless otherwise agreed herein. Personal property to be transferred to the Buyer at no extra cost is as follows:

H. DISCLOSURE OF INFORMATION: Latent Defects - Owner authorizes Broker to disclose pertinent information about the property to his agents, subagents, prospective purchasers and all inquiring parties. Such disclosure shall be in the manner or form customary in the marketplace. Owner agrees to disclose, in writing, to the Broker any known latent defects of the herein described property which are not readily ascertainable upon view, and to indemnify and hold Broker harmless from any costs, claims, liabilities, or damages (including the cost to defend any alleged claims) arising from the Owner's failure to disclose any such defect. This indemnify shall include the costs incurred in enforcing the provisions of this indemnity, including reasonable attorney's fees. Known defects are as follows:

I. EXECUTED PROPERTY DISCLOSURE FORM AND LEAD BASED PAINT DISCLOSURE FORM: A Property Disclosure Form, as required by SC Code of Laws, as amended, section 27-50-10, et. seq., must accompany this listing (if applicable). If the property contains any residential structure constructed before 1978, a completed Lead Based Paint Disclosure Form in accordance with 42 U.S.C § 4852d must also accompany this listing agreement.

Verified by the Property Owner dp on behalf dp Date 11-11-12
Initials dp Panorama Point LLC

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Rev. 08/10

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP320005

List Office ID SOUV01 Consolidated Multiple Listing Services, Inc. **EXC**
 Property Address 304 Panorama Drive Lot 21 Lexington SC 29072

J. INSPECTION: Owner agrees to make property available for the inspections by Broker, his agents, subagents, buyer/broker, and prospective purchasers, as deemed reasonably necessary by Broker.

K. NON-DISCRIMINATION: It is agreed that this property is listed in full compliance with local, state and federal fair housing laws, against discrimination on the basis of race, color, religion, sex, handicap, familial status or national origin.

L. LOCKBOX: Owner directs Broker to place the listing in the Consolidated Multiple Listing Service which will constitute an offer of cooperation to all participants in the CMLS. Owner () does (☒) does not agree for a CMLS lockbox containing keys to be installed on the property in order to facilitate the inspection of the property by Broker and cooperating agents. Owner understands that the placing of lockbox on the property has inherent risks resulting from the potential wrongful acts of persons with access to the lockbox. Owner understands and specifically assumes this risk. Owner further acknowledges that Broker is not an insurer against the loss of personal property and agrees to release Broker and CMLS from any responsibility therefore. The lockbox must be a MLS approved lockbox. This does allow for an Agent to hang the CMLS lockboxes on the property along with one of his choosing if so desired.

M. SIGNAGE: Owner authorizes Broker the right to display "For Sale" sign on the property and remove all other signs. All signage placed on the listed property must be signage that complies with CMLS Rules and Regulations. No "For Sale by Owner" sign may be placed on the property.

N. AGENCY RELATIONSHIPS: Agent has advised Seller of Brokers general company policy regarding cooperation with Subagents, Buyers Agents or both and Seller agrees to authorize the Agent (Listing Firm) to cooperate and to compensate cooperating companies. Seller acknowledges receiving an explanation of the types of agency relationships that are offered by Agent (Listing Firm) and an Agency Disclosure Brochure regarding Agency Relationships in Real Estate. Seller acknowledges that after entering into this written agency contract, Agent might request a modification in order to act as a dual agent or a designated agent in a specific transaction. If asked: Permission to act as a dual agent will not be considered dp; Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Dual Agency Agreement. Permission to act as a designated agent will not be considered dp; Permission to act as a designated agent may be considered at a time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Designated Agency Agreement. dp on behalf of Panorama Point LLC

O. NO CONTROL OF COMMISSION RATES OR FEES. Under the long established policy of CMLS, the Broker's compensation for services rendered in respect to any listing is solely a matter of negotiation between the Broker and the Owner and is not fixed, controlled, suggested, recommended, or maintained by the CMLS, or by any persons not a party to the listing agreement. The compensation paid by the Listing Broker to a Cooperating Broker in respect to any listing is established by the Listing Broker in his offer of co-operation and is not fixed, controlled, suggested, recommended or maintained by the CMLS, or by any persons other than the Listing Broker and his or her subagent.

P. SPECIAL STIPULATIONS: The following stipulations shall, if conflicting with printed matter, control: _____

Q. MEDIATION: All parties in this transaction agree to mediation in the event a dispute arises under the Contract and agree that the participation is such that mediation shall be a condition precedent to the right of either party to initiate a civil action hereunder. This mediation shall take place subject to the rules and procedures established by the South Carolina Bar Association, and the parties agree to appoint a mediator approved by the South Carolina Bar Association.

R. ERRORS AND OMISSIONS INSURANCE: _____ I have been advised that my Listing Company does not maintain Errors and Omissions Insurance.

RECEIPT OF A COPY OF THIS AUTHORIZATION AGREEMENT IS HEREBY ACKNOWLEDGED.

<u>mmf</u>		<u>Dana Peak on behalf of Panorama Point, LLC.</u>		<u>11-11-12</u>	<u>5pm</u>
WITNESS		OWNER		DATE	TIME
<u>Southern Visions Realty, Inc. By:</u>		<u>[Signature]</u>		<u>11-11-12</u>	
BROKER'S COMPANY		BROKER'S SIGNATURE		DATE	
<u>955 Old Cherokee Rd.</u>		<u>955 Old Cherokee Rd.</u>			
<u>Lexington SC 29072</u>		<u>Lexington SC 29072</u>			
BROKER'S MAILING ADDRESS		OWNER'S MAILING ADDRESS			
PHONE <u>803 359 9545</u>		PHONE <u>803-359-9571</u>			

THIS IS A LEGALLY BINDING CONTRACT. ALL BLANKS MUST BE FILLED IN. IF INFORMATION DOES NOT APPLY, INSERT N/A. ANY ALTERED TERMS OR CONDITIONS MUST BE INITIALED BY BOTH OWNER AND BROKER.

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EXCLUSIVE RIGHT TO SELL CONTRACT
State of South Carolina

EXC

A. EMPLOYMENT: In consideration of the covenants herein contained, Panorama Point LLC (herein called "OWNER") and awb - Office Southern Visions Realty (herein called "BROKER/LISTING FIRM") agree as follows: For the period of time beginning on 5/16 20 11, and ending at midnight on 12/31 20 13. Owner hereby grants to Broker the sole and exclusive right to sell the real property known as 610 Panorama Drive Lexington SC 29072. Broker hereby accepts employment as the sole and exclusive agent of the Owner to sell the property, subject to the following terms and conditions:

B. SALE PRICE: Said property is, hereby, listed to sell for the gross sale price of \$ 235,000 or for such other price or upon such other terms (including exchange) to which owner may subsequently agree during the authorization period. Owner agrees to pay Broker a fee of 6 % computed upon the gross sales price in any of the following events: (1) the closing of a sale of the property during the authorization period or as a result of a contract secured during the authorization period, or (2) The signing by Owner of a valid contract to sell the property but Owner fails or refuses to complete the sale as agreed; or, (3) The presentation to Owner of a valid and a bona fide written offer to purchase the property which complies with the terms and conditions specified herein. A contract will be deemed to comply with the terms and conditions hereof if the offered contract is for at least the listing price stated herein, is non-contingent and is on a form adopted or recommended by a local Board of Realtors or substantially similar thereto. The fee will be due to Broker even if the Owner sells or obtains the contract to sell the property during the authorization period, or if the Owner sells or obtains the contract to sell the property within 60 days after the expiration of the authorization period to or from a purchaser introduced to the property during the authorization period. This protection period for the Broker beyond the authorization period will be automatically terminated if the Owner enters into a listing agreement with another Broker during the protection period. The fee will be due to the Broker not later than the closing date called for in any contract to sell the property or any extension thereof or upon demand if Owner refuses to accept and/or execute a contract which complies with the terms and conditions hereof. Owner agrees to pay the costs and expenses including attorney's fees incurred by Broker as a result of enforcing the provision of this agreement. The owner shall pay at closing, the real estate commission, a fee for preparing the deed, the deed stamps required on the deed, recording of satisfaction and prorated taxes as of the day of closing. The term "sale" shall include any exchange, swap or trade of the herein described property.

C. MARKETING THE PROPERTY: The Broker has the option; but is not required, to continue marketing the property after an offer has been accepted. Owner may terminate this option by giving written notice to Broker. "Owner understands and agrees that by placing the listing in the Consolidated Multiple Listing Service the listing will be transmitted electronically and made available via the Internet to the public at large and agrees to indemnify and hold Broker and CMLS harmless from any claim, loss or damage arising therefrom." Withhold from Internet yes no awb (initial one)

D. CALL, FAX, E-MAIL: Seller agrees to allow any Agent/Member to call, e-mail or fax information regarding the sale of their property.

E. INQUIRIES: Owner agrees to inform Broker of any Inquires or negotiations concerning the sale of the property.

F. PROPERTY INFORMATION: Owner agrees to furnish Broker with complete and reliable information about the ownership and operation of the property and any encumbrances or liens affecting the property. Owner warrants, that, to his knowledge, there are no material defects, hidden or obvious, in or on the property, which have not been disclosed to Broker in writing. Owner further warrants that he has reviewed the information on the profile sheet attached to and made a part of this Agreement, and that all such information is accurate to the best of his knowledge. Owner hereby authorizes anyone having a lien against the property to disclose complete information about the lien to Broker.

G. PERSONAL PROPERTY: The real estate described herein includes, all fixtures, equipment and improvements of any kind which are now attached to or planted on the premises, such as: shrubbery, trees, fences, shutters, blinds, lamp posts, mail boxes, TV antennas, clothes-line poles, curtain/drapery rods, ceiling fans, attached mirrors and light bulbs, as well as all built-ins, such as: equipment, appliances, cabinets, furniture and shelves unless otherwise agreed herein. Personal property to be transferred to the Buyer at no extra cost is as follows: N/A

H. DISCLOSURE OF INFORMATION: Latent Defects - Owner authorizes Broker to disclose pertinent information about the property to his agents, subagents, prospective purchasers and all inquiring parties. Such disclosure shall be in the manner or form customary in the marketplace. Owner agrees to disclose, in writing, to the Broker any known latent defects of the herein described property which are not readily ascertainable upon view, and to indemnify and hold Broker harmless from any costs, claims, liabilities, or damages (including the cost to defend any alleged claims) arising from the Owner's failure to disclose any such defect. This indemnity shall include the costs incurred in enforcing the provisions of this indemnity, including reasonable attorney's fees. Known defects are as follows: N/A

I. EXECUTED PROPERTY DISCLOSURE FORM AND LEAD BASED PAINT DISCLOSURE FORM: A Property Disclosure Form, as required by SC Code of Laws, as amended, section 27-50-10, et. seq., must accompany this listing (if applicable). If the property contains any residential structure constructed before 1978, a completed Lead Based Paint Disclosure Form in accordance with 42 U.S.C § 4852d must also accompany this listing agreement.

Verified by the Property Owner awb Date 5-16-11
Initials

Rev. 08/10

List Office ID SOUND 1

Consolidated Multiple Listing Services, Inc.

Property Address 610 Panorama Dr. Lexington SC 29072

EXC

J. INSPECTION: Owner agrees to make property available for the inspections by Broker, his agents, subagents, buyer/broker, and prospective purchasers, as deemed reasonably necessary by Broker.

K. NON-DISCRIMINATION: It is agreed that this property is listed in full compliance with local, state and federal fair housing laws, against discrimination on the basis of race, color, religion, sex, handicap, familial status or national origin.

L. LOCKBOX: Owner directs Broker to place the listing in the Consolidated Multiple Listing Service which will constitute an offer of cooperation to all participants in the CMLS. Owner () does () does not agree for a CMLS lockbox containing keys to be installed on the property in order to facilitate the inspection of the property by Broker and cooperating agents. Owner understands that the placing of lockbox on the property has inherent risks resulting from the potential wrongful acts of persons with access to the lockbox. Owner understands and specifically assumes this risk. Owner further acknowledges that Broker is not an insurer against the loss of personal property and agrees to release Broker and CMLS from any responsibility therefore. The lockbox must be a MLS approved lockbox. This does allow for an Agent to hang the CMLS lockboxes on the property along with one of his choosing if so desired.

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N. AGENCY RELATIONSHIPS: Agent has advised Seller of Brokers general company policy regarding cooperation with Subagents, Buyers Agents or both and Seller agrees to authorize the Agent (Listing Firm) to cooperate and to compensate cooperating companies. Seller acknowledges receiving an explanation of the types of agency relationships that are offered by Agent (Listing Firm) and an Agency Disclosure Brochure regarding Agency Relationships in Real Estate. Seller acknowledges that after entering into this written agency contract, Agent might request a modification in order to act as a dual agent or a designated agent in a specific transaction. If asked: Permission to act as a dual agent will not be considered ☒; Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Dual Agency Agreement ☐; Permission to act as a designated agent will not be considered ☒; Permission to act as a designated agent may be considered at a time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Designated Agency Agreement ☐.

O. NO CONTROL OF COMMISSION RATES OR FEES. Under the long established policy of CMLS, the Broker's compensation for services rendered in respect to any listing is solely a matter of negotiation between the Broker and the Owner and is not fixed, controlled, suggested, recommended, or maintained by the CMLS, or by any persons not a party to the listing agreement. The compensation paid by the Listing Broker to a Cooperating Broker in respect to any listing is established by the Listing Broker in his offer of co-operation and is not fixed, controlled, suggested, recommended or maintained by the CMLS, or by any persons other than the Listing Broker and his or her subagent.

P. SPECIAL STIPULATIONS: The following stipulations shall, if conflicting with printed matter, control: N/A

Q. MEDIATION: All parties in this transaction agree to mediation in the event a dispute arises under the Contract and agree that the participation is such that mediation shall be a condition precedent to the right of either party to initiate a civil action hereunder. This mediation shall take place subject to the rules and procedures established by the South Carolina Bar Association, and the parties agree to appoint a mediator approved by the South Carolina Bar Association.

R. ERRORS AND OMISSIONS INSURANCE: ☐ I have been advised that my Listing Company does not maintain Errors and Omissions Insurance.

RECEIPT OF A COPY OF THIS AUTHORIZATION AGREEMENT IS HEREBY ACKNOWLEDGED.

WITNESS	<u>June Wilkins Brooks</u>	OWNER	<u>5-16-11</u>	DATE	TIME
WITNESS	<u>Southern Visions Realty Inc</u>	OWNER	<u>5-16-11</u>	DATE	TIME
BROKER'S COMPANY	<u>By: Robert P. Wilkins, Sr.</u>	BROKER'S SIGNATURE	<u>5-16-11</u>	DATE	
<u>955 Old Cherokee Rd</u>	<u>955 Old Cherokee Rd</u>				
<u>Lexington SC 29072</u>	<u>Lexington SC 29072</u>				
BROKER'S MAILING ADDRESS	OWNER'S MAILING ADDRESS				
PHONE <u>359-9571</u>	PHONE <u>359-9571</u>				

THIS IS A LEGALLY BINDING CONTRACT. ALL BLANKS MUST BE FILLED IN. IF INFORMATION DOES NOT APPLY, INSERT N/A. ANY ALTERED TERMS OR CONDITIONS MUST BE INITIALED BY BOTH OWNER AND BROKER.

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Exhibit 4

July 14, 2020

VIA ELECTRONIC MAIL

Eric S. Bland
Bland Richter, LLP
Post Office Box 72
Columbia, South Carolina 29202

Re: **Previously Withheld Listing Agreements, CMLS Input Forms,
and Similar or Related Documents**

Dear Eric,

As you are aware, my clients Kent Porth and Panorama Point, LLC have an outstanding request for documents and disclosures from your clients which has been in place since early 2017, in a Rex Casterline's May 24, 2017 letter to my clients. More specifically, a request for all pre-2017 Listing Agreements was made to Mr. Casterline on January 29, 2018 via email.

In an email to my clients dated August 27, 2018, Rex Casterline stated, "As to the listing agreements, my client has made a diligent search of all files related to Panorama Point and does not have copies of the listing agreements during the applicable time period. The folder where they were kept is empty and my client has been unable to determine who removed them." The next day, Mr. Casterline produced a "banker's box" of documents to my clients **which did NOT contain any pre-2017 listing agreements** consistent with Mr. Casterline's written representation from the day before. (It should be noted that in an email dated February 19, 2018, my clients challenged, and then clarified with Mr. Casterline that he was producing documents, and listing agreements in particular, from the files of **both** RPW Development and Southern Visions Realty.)

On November 21, 2019, you emailed me two pre-2017 Listing Agreements executed on behalf of Panorama Point, LLC for 304 Panorama Drive and 610 Panorama Drive, and which directly contradict Mr. Casterline's August 27, 2018 representation. **My clients did not know of the existence of these two documents prior to your November 21, 2019 email.** The withholding of these two Listing Agreements from their dates of execution (November 11, 2012 and May 16, 2011) until November 21, 2019 was a blatant violation of Section 40-57-135(D)(4)(k), as well as a violation of your clients' various fiduciary duties of full disclosure to my clients under multiple South Carolina laws and the Rules of the CMLS.

I call your attention to my clients' letters to Mr. Wilkins and Mr. Casterline dated March 8, 2017 demanding the production of all listing agreements and CMLS forms, as well as the full and adequate disclosures of all other documents and actions required under South Carolina agency and fiduciary law. These disclosure obligations have clearly been breached in a material manner. Your clients' disclosure obligations remain applicable to any and all listing agreements, CMLS Input

July 14, 2020

Page | 2

Forms, and any other documents of any type executed on behalf of my clients, and currently in your clients' possession. This disclosure obligation is independent of the current litigation. **In light of Rex Casterline's written representation in his August 27, 2018 email that there were no copies of listing agreements, these documents must be produced immediately, and may not be withheld pending formal discovery.** See Crystal, Nathan M. (1999) "The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations", *Kentucky Law Journal*; Vol. 87: Iss. 4, Article 6..

As pointed out in my clients' May 28, 2018 letter to Mr. Casterline, the ongoing failure on the part of your clients to make full and adequate disclosures constitutes an ongoing breach of their fiduciary duties. More importantly, the willful concealment and nondisclosure of the two pre-2017 Listing Agreements, and all other documents purportedly signed on behalf of my clients can constitute fraud under applicable South Carolina common law. The ongoing withholding of such documents, especially in light of Mr. Casterline's August 27, 2018 email, can even constitute an ongoing fraud. Moore v. Moore, 360 S.C. 241, 251, 599 S.E.2d 467 (S.C.Ct.App. 2004); Ellie, Inc. v. Miccichi, 358 S.C. 78, 101, 594 S.E.2d 485 (S.C.Ct.App. 2004). "Nondisclosure is fraudulent when there is a duty to speak." Manning v. Dial, 271 S.C. 79, 83, 245 S.E.2d 120, 122 (S.C. 1978); Jacobson v. Yaschick, 249 S.C. 577, 585, 155 S.E. 2d 601, 605 (S.C. 1967); Anthony v. Padmar, 320 S.C. 426, 449, 465 S.E.2d 745 (S.C. 1995); Anderson County v. Joey Preston & the S.C. Retirement System, 420 S.C. 546, 564, 804 S.E.2d 282 (S.C.Ct.App. 2017) ("Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.") A fiduciary's nondisclosure of his own malfeasance constitutes fraud under these cases.

It should be noted that in an email dated August 15, 2017, Mr. Casterline informed my clients that the RPW and SVR files took up "a third of my office", yet he only produced a single banker's box of documents a year later on August 28, 2018 with no explanation. In a letter dated June 1, 2017, my clients had made a written request for the equivalent of a "privilege log" describing any documents withheld from the production of documents by Mr. Casterline. No summary of withheld documents was provided to my clients in any form or fashion. It is obvious now that Listing Agreements and CMLS Input Forms purportedly signed on behalf of my clients were some of the documents which were improperly withheld by your clients.

It is crucial that we receive these documents by Friday, July 24, 2020, in order for us to prepare for mediation. If you need me to send all the backup documentation to this letter, I will do so. Also, let me know if producing these documents by July 24, 2020 is a problem.

Yours truly, I am


Clarence Davis

cc: David Anderson VIA ELECTRONIC MAIL

Exhibit 5

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

MLS # 321920

Listing Office E&O certified until: 10/31/2019 12:00:00 AM

PUBLISH TO INTERNET Yes



Status **CLOSED**

Area 11

Class LOTS AND ACREAGE

Type Residential

Address 304 PANORAMA Drive

Unit #/Lot # Lot 21, Ph

Subdivision PANORAMA POINT

City Lexington

Zip 29072

County Lexington

TMS 003214-01-021

Acreage 0.290

of Lots Remaining

Listing Price **\$95,000**

Original Price \$95,000

Elementary School LakeMurray (Lex 1)

Middle School Pleasant Hill

High School Lexington

School District Lexington One

Lot Size

Zoning

Road Frontage

Water Frontage

Directions From Lexington @ Publix follow Old Cherokee and cross St. Peter's Church Rd. Continue on Old Cherokee. Left on Beechwoods. Follow until right on Hallmark Dr. Panorama Point is straight ahead.

Mobile Allowed

Water Public

Sewer Public

Electric Below Ground

Documents Subdivision Plan, Survey

Restrictions Architectural Approval, Deed, No

Mobile, No Subdividing

Other Utilities Cable, Telephone

Topography Level

Road Surface Paved

Road Type Private

Property Disclosure? No

Prop Disclosure Exempt Yes

Miscellaneous

Rollback Tax (Y/N) No

Plat Book

Deed Book

Short Sale Y/N

Agent Remarks

Call office for development package and plat at 803.359.9571. Anne Brooks 429-6777

Public Remarks

Awesome views! Community ramp and courtesy dock. Architectural approval required, covenants and restrictions. Great location.

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP320005

Avail Financing
Showing

Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Asset Realty Inc - Phone: 803-356-1099
Selling Agent Laura Kemp - Mbl: 803-446-1768
Co-Sell Agent
Loan Type CONVENTIONAL CC Paid By Seller Seller PD 2,000

Listing Date 11/11/2012
Expir. Date
DOM 246
Comp SB 3
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell

Contract Date 7/15/2013
Closing Date 10/1/2013
Sold Price \$70,000
Price Per Acre \$22.55

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE**Listing Office E&O certified until: 10/31/2019 12:00:00 AM****MLS # 321913****PUBLISH TO INTERNET** Yes**Status** Withdrawn/Expired**Area** 23**Class** LOTS AND ACREAGE**Type** Residential**Address** 611 PANORAMA Point**Unit #/Lot #** 11, Phasel**Subdivision** PANORAMA POINT**City** Lexington**Zip** 29072**County** Lexington**TMS** 003214-01-011**Acreage** 0.220**# of Lots Remaining****Listing Price** \$225,000**Original Price** \$225,000**Elementary School** Rocky Creek**Middle School** Pleasant Hill**High School** Lexington**School District** Lexington One**Lot Size****Zoning** RES**Road Frontage****Water Frontage** 60

Directions From Lexington @Publix follow Old Cherokee and cross St Peter's Church Rd. Continue on Old Cherokee. Turn left on Beechwoods. Follow until you turn right on Hallmark Dr. Panorama Point is straight ahead.

Mobile Allowed No**Water** Public**Sewer** Public**Electric** Below Ground**Documents** Subdivision Plan, Survey**Restrictions** Architectural Approval, Deed, No

Mobile, No Subdividing

Other Utilities Cable, Telephone**Topography** Level**Lot Location** Water**Water Frontage Type** On Lake Murray**Road Surface** Paved**Road Type** Private**Property Disclosure?** No**Prop Disclosure Exempt** Yes**Miscellaneous****Rollback Tax (Y/N)** No**Plat Book****Deed Book****Short Sale Y/N****Agent Remarks**

Call SVR for development package and plat at 803.359.9571 or Anne Brooks on cell 803.429.6777. Buyer/Buyer's agent to verify all pertinent information including, but not limited to: square footage, acreage, water frontage, neighborhood amenities, HOA information, fees and schools prior to contract.

Public Remarks

Awesome views!!!! Community ramp and courtesy dock. Architectural approval required, covenants and restrictions. Great location!

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP320005

Avail Financing
Showing

Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office
Selling Agent
Co-Sell Agent
Loan Type

CC Paid By

Seller PD

Listing Date 11/1/2012
Expir. Date
DOM 775
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell
Contract Date 12/16/2014
Closing Date
Sold Price
Price Per Acre

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

MLS # 321914

Listing Office E&O certified until:10/31/2019 12:00:00 AM

PUBLISH TO INTERNET Yes

Status **CLOSED**

Area 23

Class LOTS AND ACREAGE

Type Residential

Address 618 PANORAMA Point

Unit #/Lot # 13, Phasel

Subdivision PANORAMA POINT

City Lexington

Zip 29072

County Lexington

TMS 003214-01-013

Acreage 0.160

of Lots Remaining

Listing Price **\$225,000**

Original Price \$225,000

Elementary School Rocky Creek

Middle School Pleasant Hill

High School Lexington

School District Lexington One

Lot Size

Zoning RES

Road Frontage

Water Frontage

Directions From Lexington @Publix follow Old Cherokee and cross St Peter's Church Rd.Continue on Old Cherokee.Turn left on Beechwoods.Follow until you turn right on Hallmark Dr.Panorama Point is straight ahead.

Mobile Allowed No

Water Public

Sewer Public

Electric Below Ground

Documents Subdivision Plan, Survey

Restrictions Architectural Approval, Deed, No

Mobile, No Subdividing

Other Utilities Cable, Telephone

Topography Level

Lot Location Water

Water Frontage Type On Lake Murray

Road Surface Paved

Road Type Private

Property Disclosure? No

Prop Disclosure Exempt Yes

Miscellaneous

Rollback Tax (Y/N) No

Plat Book

Deed Book

Short Sale Y/N

Agent Remarks

Call SVR for development package and plat at 803.359.9571 or Anne Brooks on cell 803.429.6777. Buyer/Buyer's agent to verify all pertinent information including, but not limited to: square footage, acreage, water frontage, neighborhood amenities, HOA information, fees and schools prior to contract.

Public Remarks

Awesome views!!!!Community ramp and courtesy dock. Architectural approval required,covenants and restrictions. Great location!

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP320005

Avail Financing
Showing

Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Non MLS Members - Phone: 803-000-0000
Selling Agent Non NMLS
Co-Sell Agent
Loan Type CASH CC Paid By Buyer Seller PD

Listing Date 11/11/2012
Expir. Date
DOM 873
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell

Contract Date 4/3/2015
Closing Date 5/7/2015
Sold Price \$194,000
Price Per Acre \$39.46

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

11/25/2019 06:05 PM

MLS # 321915**Listing Office E&O certified until:**10/31/2019 12:00:00 AM**PUBLISH TO INTERNET** Yes**Status** **CLOSED****Area** 23**Class** LOTS AND ACREAGE**Type** Residential**Address** 606 PANORAMA Point**Unit #/Lot #** 16, Phasel**Subdivision** PANORAMA POINT**City** Lexington**Zip** 29072**County** Lexington**TMS** 003214-01-016**Acreage** 0.190**# of Lots Remaining****Listing Price** \$225,000**Original Price** \$225,000**Elementary School** LakeMurray (Lex 1)**Middle School** Pleasant Hill**High School** Lexington**School District** Lexington One**Lot Size****Zoning** RES**Road Frontage****Water Frontage**

Directions From Lexington @Publix follow Old Cherokee and cross St Peter's Church Rd.Continue on Old Cherokee.Turn left on Beechwoods.Follow until you turn right on Hallmark Dr.Panorama Point is straight ahead.

Mobile Allowed No**Water** Public**Sewer** Public**Electric** Below Ground**Documents** Subdivision Plan, Survey**Restrictions** Architectural Approval, Deed, No

Mobile, No Subdividing

Other Utilities Cable, Telephone**Topography** Level**Lot Location** Water**Water Frontage Type** On Lake Murray**Road Surface** Paved**Road Type** Private**Property Disclosure?** No**Prop Disclosure Exempt** Yes**Miscellaneous****Rollback Tax (Y/N)** No**Plat Book****Deed Book****Short Sale Y/N****Agent Remarks**

Call office for development package and plat at 803.359.9571. Shared dock lot.

Public Remarks

Awesome views!!!!Community ramp and courtesy dock. Architectural approval required,covenants and restrictions. Great location!

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP320005

Avail Financing
Showing

Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Southern Visions Realty Inc - Ofc: 803-359-9571
Selling Agent Anne W Brooks - Mbl: 803-429-6777
Co-Sell Agent
Loan Type CASH CC Paid By Buyer Seller PD

Listing Date 11/11/2012
Expir. Date
DOM 478
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell

Contract Date 3/4/2014
Closing Date 4/1/2014
Sold Price \$190,000
Price Per Acre \$61.21

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

11/25/2019 05:34 PM

MLS # 321916

Listing Office E&O certified until:10/31/2019 12:00:00 AM

PUBLISH TO INTERNET Yes

Status **CLOSED**

Area 23

Class LOTS AND ACREAGE

Type Residential

Address 602 PANORAMA Point

Unit #/Lot # 17, Phasel

Subdivision PANORAMA POINT

City Lexington

Zip 29072

County Lexington

TMS 003214-01-017

Acreage 0.310

of Lots Remaining

Listing Price \$225,000

Original Price \$225,000

Elementary School LakeMurray (Lex 1)

Middle School Pleasant Hill

High School Lexington

School District Lexington One

Lot Size

Zoning RES

Road Frontage

Water Frontage

Directions From Lexington @Publix follow Old Cherokee and cross St Peter's Church Rd.Continue on Old Cherokee.Turn left on Beechwoods.Follow until you turn right on Hallmark Dr.Panorama Point is straight ahead.

Mobile Allowed No

Water Public

Sewer Public

Electric Below Ground

Documents Subdivision Plan, Survey

Restrictions Architectural Approval, Deed, No

Mobile, No Subdividing

Other Utilities Cable, Telephone

Topography Level

Lot Location Water

Water Frontage Type On Lake Murray

Road Surface Paved

Road Type Private

Property Disclosure? No

Prop Disclosure Exempt Yes

Miscellaneous

Rollback Tax (Y/N) No

Plat Book

Deed Book

Short Sale Y/N

Agent Remarks

Call agent for development package and plat. Shared dock lot. Anne Brooks 429-6777

Public Remarks

Awesome views!!!!Community ramp and courtesy dock. Architectural approval required,covenants and restrictions. Great location!

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP320005

Avail Financing
Showing

Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Southern Visions Realty Inc - Ofc: 803-359-9571
Selling Agent Reggie S Enlow - Phone: 803-673-6399
Co-Sell Agent
Loan Type CASH CC Paid By Seller Seller PD 2,000

Listing Date 11/11/2012
Expir. Date
DOM 136
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell
Contract Date 3/27/2013
Closing Date 4/11/2013
Sold Price \$185,000
Price Per Acre \$59.60

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

11/25/2019 07:52 PM

MLS # 321917

Listing Office E&O certified until: 10/31/2019 12:00:00 AM

PUBLISH TO INTERNET Yes

Status **EXPIRED**

Area 23

Class LOTS AND ACREAGE

Type Residential

Address 511 SUNNY COVE Court

Unit #/Lot # Lot #23, P

Subdivision PANORAMA POINT

City Lexington

Zip 29072

County Lexington

TMS 003214-01-023

Acreage 0.270

of Lots Remaining

Listing Price **\$365,000**

Original Price \$395,000

Elementary School Rocky Creek

Middle School Pleasant Hill

High School Lexington

School District Lexington One

Lot Size 90 x 159 x 100 x 207

Zoning RES

Road Frontage

Water Frontage 100

Directions Highway #378 west through Lexington. Right on Beechwoods Drive. Left on Hallmark Drive. Hallmark Dr becomes Panorama Dr. Turn rt on Sunny Cove Dr. Lot is on the left.

Mobile Allowed No**Water** Public**Sewer** Public**Gas** Propane**Electric** Below Ground**Documents** Subdivision Plan, Survey**Restrictions** Animals, Architectural Approval, Deed, No Mobile, No Subdividing**Other Utilities** Cable, Telephone**Topography** Level**Vegetation** Cleared**Miscellaneous** Cable Available**Lot Location** Cul-de-Sac**Water Frontage Type** On Lake Murray**Road Surface** Paved**Road Type** Private**Property Disclosure?** No**Prop Disclosure Exempt** Yes**Miscellaneous****Rollback Tax (Y/N)** No**Plat Book****Deed Book****Short Sale Y/N****Agent Remarks**

See MLS docs for plat and more information. Buyer and/or Buyer's Agent to verify all pertinent information including, but not limited to: square footage, acreage, water frontage, neighborhood amenities, HOA information, fees and schools prior to contract.

Public Remarks

Approved for private dock. Big views in a protected cove! Fantastic community with private roads, restrictive covenants and underground utilities. Neighborhood lake access includes courtesy dock and ramp.

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Avail Financing Conventional, Owner
Showing Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Porth
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office
Selling Agent
Co-Sell Agent
Loan Type CC Paid By Seller PD

Listing Date 11/11/2012
Expir. Date
DOM 1512
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell

Contract Date 1/1/2017
Closing Date
Sold Price
Price Per Acre

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

MLS # 321918

Listing Office E&O certified until:10/31/2019 12:00:00 AM

PUBLISH TO INTERNET Yes

Status **CLOSED**

Area 23

Class LOTS AND ACREAGE

Type Residential

Address 515 SUNNY COVE Court

Unit #/Lot # Lot #24, P

Subdivision PANORAMA POINT

City Lexington

Zip 29072

County Lexington

TMS 003214-01-024

Acreage 0.330

of Lots Remaining

Listing Price **\$365,000**

Original Price \$395,000

Elementary School Rocky Creek

Middle School Pleasant Hill

High School Lexington

School District Lexington One

Lot Size 90 x 159 x 100 x 207

Zoning RES

Road Frontage

Water Frontage

Directions Highway #378 west from Lexington past new Publix and Lake Murray Baptist Church. Right on Beechwood Drive. Left on Hallmark Drive. Panorama Point is straight ahead.

Mobile Allowed No**Water** Public**Sewer** Public**Gas** Propane**Electric** Below Ground**Documents** Subdivision Plan, Survey**Restrictions** Animals, Architectural Approval, Deed, No Mobile, No Subdividing**Other Utilities** Cable, Telephone**Topography** Level**Vegetation** Cleared**Miscellaneous** Cable Available**Lot Location** Cul-de-Sac**Water Frontage Type** On Lake Murray**Road Surface** Paved**Road Type** Private**Property Disclosure?** No**Prop Disclosure Exempt** Yes**Miscellaneous****Rollback Tax (Y/N)** No**Plat Book****Deed Book****Short Sale Y/N****Agent Remarks**

Call SVR for development package and plat at 803.359.9571 or Anne Brooks on cell 803.429.6777. Buyer/Buyer's agent to verify all pertinent information including, but not limited to: square footage, acreage, water frontage, neighborhood amenities, HOA information, fees and schools prior to contract.

Public Remarks

Approved for private dock. Big views in a protected cove! Fantastic community with private roads, restrictive covenants and underground utilities. Neighborhood lake access will include courtesy dock and ramp.

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Avail Financing Conventional, Owner
Showing Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Porth
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Non MLS Members - Phone: 803-000-0000
Selling Agent Non NMLS
Co-Sell Agent
Loan Type CONVENTIONAL CC Paid By Buyer Seller PD

Listing Date 11/11/2012
Expir. Date
DOM 873
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell

Contract Date 4/3/2015
Closing Date 5/1/2015
Sold Price \$310,000
Price Per Acre \$63.06

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

MLS # 290515

Listing Office E&O certified until:10/31/2019 12:00:00 AM

PUBLISH TO INTERNET Yes

Status **CLOSED**

Area 23

Class LOTS AND ACREAGE

Type Residential

Address 610 PANORAMA Drive

Unit #/Lot # 15, Phasel

Subdivision PANORAMA POINT

City Lexington

Zip 29072

County Lexington

TMS 003214-01-015

Acreage 0.270

of Lots Remaining

Listing Price **\$225,000**

Original Price \$235,000

Elementary School LakeMurray (Lex 1)

Middle School Pleasant Hill

High School Lexington

School District Lexington One

Lot Size

Zoning RES

Road Frontage

Water Frontage

Directions From Lexington @Publix follow Old Cherokee and cross St Peter's Church Rd.Continue on Old Cherokee.Turn left on Beechwoods.Follow until you turn right on Hallmark Dr.Panorama Point is straight ahead.

Mobile Allowed No

Water Public

Sewer Public

Electric Below Ground

Documents Subdivision Plan, Survey

Restrictions Architectural Approval, Deed, No

Mobile, No Subdividing

Other Utilities Cable, Telephone

Topography Level

Lot Location Water

Water Frontage Type On Lake Murray

Road Surface Paved

Road Type Private

Property Disclosure? No

Prop Disclosure Exempt Yes

Miscellaneous

Rollback Tax (Y/N) No

Plat Book

Deed Book

Short Sale Y/N

Agent Remarks

Call office for development package and plat at 803.359.9571. Shared dock lot.

Public Remarks

Awesome views!!!!Community ramp and courtesy dock. Architectural approval required,covenants and restrictions. Great location!

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP3200005

Avail Financing
Showing

Sign

Assn/Regime Fee Per \$ 500.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Southern Visions Realty Inc - Ofc: 803-359-9571
Selling Agent Anne W Brooks - Mbl: 803-429-6777
Co-Sell Agent
Loan Type CONVENTIONAL CC Paid By None

Seller PD

Listing Date 5/16/2011
Expir. Date
DOM 724
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell

Contract Date 5/9/2013
Closing Date 9/26/2013
Sold Price \$185,000
Price Per Acre \$59.60

Shannon Tidwell-Porth - Phone: 803-917-4400

LOTS AND ACREAGE

MLS # 290511

Listing Office E&O certified until: 10/31/2019 12:00:00 AM

PUBLISH TO INTERNET Yes

Status **CLOSED**

Area 23

Class LOTS AND ACREAGE

Type Residential

Address 623 PANORAMA Point

Unit #/Lot # Lot 8

Subdivision PANORAMA POINT

City Lexington

Zip 29072

County Lexington

TMS 003214-01-008

Acreage 0.700

of Lots Remaining

Listing Price **\$450,000**

Original Price \$450,000

Elementary School LakeMurray (Lex 1)

Middle School Pleasant Hill

High School Lexington

School District Lexington One

Lot Size

Zoning RES

Road Frontage

Water Frontage

Directions Hwy 378 West through Lexington. Right on Beechwoods Road. Left on Hallmark Drive. Panorama Point is straight ahead.

Mobile Allowed No

Water Public

Sewer Public

Electric Below Ground

Documents Subdivision Plan, Survey

Restrictions Architectural Approval, Deed, No
Subdividing

Topography Level

Lot Location Cul-de-Sac, Water

Water Frontage Type On Lake Murray, View
-Big Water

Road Surface Paved

Road Type Private

Property Disclosure? No

Prop Disclosure Exempt Yes

Miscellaneous

Rollback Tax (Y/N) No

Plat Book

Deed Book

Short Sale Y/N

Agent Remarks

Call agent for plats and development package. Easy to show. 803-359-9571. Comps only. Added more acreage and water frontage.

Public Remarks

Unbelievable Panoramic Views of Lake Murray!!! Point lot. Beach like frontage. Fabulous community with architectural approval and restrictive covenants in place. Tranquil, private community.

ELECTRONICALLY FILED - 2020 Dec 10 4:38 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP320005

Avail Financing
Showing

Sign

Assn/Regime Fee Per \$ 600.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Southern Visions Realty Inc - Ofc: 803-359-9571
Selling Agent Anne W Brooks - Mbl: 803-429-6777
Co-Sell Agent
Loan Type CASH CC Paid By None

Seller PD

Listing Date 5/16/2011
Expir. Date
DOM 385
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell
Contract Date 6/4/2012
Closing Date 6/4/2012
Sold Price \$453,500
Price Per Acre

Avail Finaricing
Showing

Sign

Assn/Regime Fee Per \$ 600.00 / Yearly

Possession Closing

Owner Name Panorama Point, LLC
Owner Phone
Listing Agent Anne W Brooks - Mbl: 803-429-6777
List Agent Lic# 4181
Agent Email ANNE@SVREALTY.COM
Co-List Agent
Listing Office Southern Visions Realty Inc - Ofc: 803-359-9571
Listing Office Fax 803-359-7025
Selling Office Southern Visions Realty Inc - Ofc: 803-359-9571
Selling Agent Anne W Brooks - Mbl: 803-429-6777
Co-Sell Agent
Loan Type CASH CC Paid By None

Seller PD

Listing Date 5/16/2011
Expir. Date
DOM 385
Comp SB 3.0
Variable Com No
Trans Br Acc
Trans Br Comp
Listing Type Exclusive Right to Sell
Contract Date 6/4/2012
Closing Date 6/4/2012
Sold Price \$453,500
Price Per Acre

Exhibit 6

EXCLUSIVE RIGHT TO SELL CONTRACT
State of South Carolina

EXC

A. EMPLOYMENT: In consideration of the covenants herein contained, Panorama Point LLC (herein called "OWNER") and Southern Visions Realty, Inc. (herein called "BROKER/LISTING FIRM") agree as follows: For the period of time beginning on 12/31/2017 and ending at midnight on 12/31/2017. Owner hereby grants to Broker the sole and exclusive right to sell the real property known as 29072 L32 PANORAMA POINT L27, SC Lot #3 PH1. Broker hereby accepts employment as the sole and exclusive agent of the Owner to sell the property, subject to the following terms and conditions:

B. SALE PRICE: Said property is, hereby, listed to sell for the gross sale price of \$ 485,000 or for such other price or upon such other terms (including exchange) to which owner may subsequently agree during the authorization period. Owner agrees to pay Broker a fee of 5 % computed upon the gross sales price in any of the following events: (1) the closing of a sale of the property during the authorization period or as a result of a contract secured during the authorization period, or (2) The signing by Owner of a valid contract to sell the property but Owner fails or refuses to complete the sale as agreed; or, (3) The presentation to Owner of a valid and a bonafide written offer to purchase the property which complies with the terms and conditions specified herein. A contract will be deemed to comply with the terms and conditions hereof if the offered contract is for at least the listing price stated herein, is non-contingent and is on a form adopted or recommend by a local Board of Realtors or substantially similar thereto. The fee will be due to Broker even if the Owner sells or obtains the contract to sell the property during the authorization period, or if the Owner sells or obtains the contract to sell the property within 180 days after the expiration of the authorization period to or from a purchaser introduced to the property during the authorization period. This protection period for the Broker beyond the authorization period will be automatically terminated if the Owner enters into a listing agreement with another Broker during the protection period. The fee will be due to the Broker not later than the closing date called for in any contract to sell the property or any extension thereof or upon demand if Owner refuses to accept and/or execute a contract which complies with the terms and conditions hereof. Owner agrees to pay the costs and expenses including attorney's fees incurred by Broker as a result of enforcing the provision of this agreement. The owner shall pay at closing, the real estate commission, a fee for preparing the deed, the deed stamps required on the deed, recording of satisfaction and prorated taxes as of the day of closing. The term "sale" shall include any exchange, swap or trade of the herein described property.

C. MARKETING THE PROPERTY: The Broker has the option, but is not required, to continue marketing the property after an offer has been accepted. Owner may terminate this option by giving written notice to Broker. "Owner understands and agrees that by placing the listing in the Consolidated Multiple Listing Service the listing will be transmitted electronically and made available via the Internet to the public at large and agrees to indemnify and hold Broker and CMLS harmless from any claim, loss or damage arising therefrom." Withhold from Internet: yes no initial one

D. CALL, FAX, E-MAIL: Seller agrees to allow any Agent/Member to call, e-mail or fax information regarding the sale of their property.

E. INQUIRIES: Owner agrees to inform Broker of any inquiries or negotiations concerning the sale of the property.

F. PROPERTY INFORMATION: Owner agrees to furnish Broker with complete and reliable information about the ownership and operation of the property and any encumbrances or liens affecting the property. Owner warrants, that, to his knowledge, there are no material defects, hidden or obvious, in or on the property, which have not been disclosed to Broker in writing. Owner further warrants that he has reviewed the information on the profile sheet attached to and made a part of this Agreement, and that all such information is accurate to the best of his knowledge. Owner hereby authorizes anyone having a lien against the property to disclose complete information about the lien to Broker.

G. PERSONAL PROPERTY: The real estate described herein includes, all fixtures, equipment and improvements of any kind which are now attached to or planted on the premises, such as: shrubbery, trees, fences, shutters, blinds, lamp posts, mail boxes, TV antennas, clothes-line poles, curtain/drapery rods, ceiling fans, attached mirrors and light bulbs, as well as all built-ins, such as: equipment, appliances, cabinets, furniture and shelves unless otherwise agreed herein. Personal property to be transferred to the Buyer at no extra cost is as follows:

H. DISCLOSURE OF INFORMATION: Latent Defects - Owner authorizes Broker to disclose pertinent information about the property to his agents, subagents, prospective purchasers and all inquiring parties. Such disclosure shall be in the manner or form customary in the marketplace. Owner agrees to disclose, in writing, to the Broker any known latent defects of the herein described property which are not readily ascertainable upon view, and to indemnify and hold Broker harmless from any costs, claims, liabilities, or damages (including the cost to defend any alleged claims) arising from the Owner's failure to disclose any such defect. This indemnity shall include the costs incurred in enforcing the provisions of this indemnity, including reasonable attorney's fees. Known defects are as follows:

I. EXECUTED PROPERTY DISCLOSURE FORM AND LEAD BASED PAINT DISCLOSURE FORM: A Property Disclosure Form, as required by SC Code of Laws, as amended, section 27-50-10, et. seq., must accompany this listing (if applicable). If the property contains any residential structure constructed before 1978, a completed Lead Based Paint Disclosure Form in accordance with 42 U.S.C § 4852d must also accompany this listing agreement.

Verified by the Property Owner AJP Date 1/10/17

Page 1 of 2

Initials

Rev. 08/10

List Office ID _____

Consolidated Multiple Listing Services, Inc.

EXCProperty Address 632 Panorama Point, Lexington, SC 29072

J. INSPECTION: Owner agrees to make property available for the inspections by Broker, his agents, subagents, buyer/broker, and prospective purchasers, as deemed reasonably necessary by Broker.

K. NON-DISCRIMINATION: It is agreed that this property is listed in full compliance with local, state and federal fair housing laws, against discrimination on the basis of race, color, religion, sex, handicap, familial status or national origin.

L. LOCKBOX: Owner directs Broker to place the listing in the Consolidated Multiple Listing Service which will constitute an offer of cooperation to all participants in the CMLS. Owner () does () ~~does not agree for a CMLS lockbox~~ containing keys to be installed on the property in order to facilitate the inspection of the property by Broker and cooperating agents. Owner understands that the placing of lockbox on the property has inherent risks resulting from the potential wrongful acts of persons with access to the lockbox. Owner understands and specifically assumes this risk. Owner further acknowledges that Broker is not an insurer against the loss of personal property and agrees to release Broker and CMLS from any responsibility therefore. The lockbox must be a MLS approved lockbox. This does allow for an Agent to hang the CMLS lockboxes on the property along with one of his choosing if so desired.

M. SIGNAGE: Owner authorizes Broker the right to display "For Sale" sign on the property and remove all other signs. All signage placed on the listed property must be signage that complies with CMLS Rules and Regulations. No "For Sale by Owner" sign may be placed on the property.

N. AGENCY RELATIONSHIPS: Agent has advised Seller of Broker's general company policy regarding cooperation with Subagents, Buyers Agents or both and Seller agrees to authorize the Agent (Listing Firm) to cooperate and to compensate cooperating companies. Seller acknowledges receiving an explanation of the types of agency relationships that are offered by Agent (Listing Firm) and an Agency Disclosure Brochure regarding Agency Relationships in Real Estate. Seller acknowledges that after entering into this written agency contract, Agent might request a modification in order to act as a dual agent or a designated agent in a specific transaction. If asked: Permission to act as a dual agent will not be considered _____; Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Dual Agency Agreement _____; Permission to act as a designated agent will not be considered _____; Permission to act as a designated agent may be considered at a time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Designated Agency Agreement _____.

O. NO CONTROL OF COMMISSION RATES OR FEES. Under the long established policy of CMLS, the Broker's compensation for services rendered in respect to any listing is solely a matter of negotiation between the Broker and the Owner and is not fixed, controlled, suggested, recommended, or maintained by the CMLS, or by any persons not a party to the listing agreement. The compensation paid by the Listing Broker to a Cooperating Broker in respect to any listing is established by the Listing Broker in his offer of co-operation and is not fixed, controlled, suggested, recommended or maintained by the CMLS, or by any persons other than the Listing Broker and his or her subagent.

P. SPECIAL STIPULATIONS: The following stipulations shall, if conflicting with printed matter, control: _____

Q. MEDIATION: All parties in this transaction agree to mediation in the event a dispute arises under the Contract and agree that the participation is such that mediation shall be a condition precedent to the right of either party to initiate a civil action hereunder. This mediation shall take place subject to the rules and procedures established by the South Carolina Bar Association, and the parties agree to appoint a mediator approved by the South Carolina Bar Association.

R. ERRORS AND OMISSIONS INSURANCE: _____ I have been advised that my Listing Company does not maintain Errors and Omissions Insurance.

RECEIPT OF A COPY OF THIS AUTHORIZATION AGREEMENT IS HEREBY ACKNOWLEDGED.

WITNESS	PP, LLC by <u>[Signature]</u>	OWNER	DATE	TIME
WITNESS	<u>Southern Visions Realty</u> By: <u>[Signature]</u>	OWNER	DATE	TIME
BROKER'S COMPANY	<u>955 Old Cherokee Road</u>	BROKER'S SIGNATURE	DATE	
BROKER'S MAILING ADDRESS	<u>Lex SC 29072</u>	OWNER'S MAILING ADDRESS		
PHONE <u>803-359-9571</u>		PHONE		

THIS IS A LEGALLY BINDING CONTRACT. ALL BLANKS MUST BE FILLED IN. IF INFORMATION DOES NOT APPLY, INSERT N/A. ANY ALTERED TERMS OR CONDITIONS MUST BE INITIALED BY BOTH OWNER AND BROKER.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

R. Kent Porth and Panorama Point, LLC,
Plaintiffs,

Civil Action No. 2020-CP-32-00005

vs.

**MOTION FOR RECONSIDERATION
UNDER RULE 59(e)**

Robert P. Wilkins, Jr., RPW Development,
Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,
Defendants.

FILED
2021 FEB 26 PM 5:03
LEAH H. COOPER
CLERK OF COURT
LEXINGTON, SC

YOU WILL PLEASE TAKE NOTICE that Plaintiffs R. Kent Porth and Panorama Point, LLC, hereby move before the Presiding Judge for the Eleventh Judicial Circuit for reconsideration under Rule 59(e) of the South Carolina Rules of Civil Procedure of the Order of Judge Edgar W. Dickson dated February 16, 2021 (“Order”) granting the Defendants’ Motions to Dismiss pursuant to Rule 12(b)(6). The Plaintiffs further make this Motion for Reconsideration to preserve the issues set forth below for appeal in the event this motion is not granted. The various grounds for the Plaintiffs’ Motion for Reconsideration are set forth below.

I. Court Must Accept Allegations of Complaint as True

The Order failed to accept the specific factual pleadings of the Plaintiffs’ Complaint as true, and failed to make all reasonable inferences from the Complaint in favor of the Plaintiffs for purposes of the Defendants’ Motions to Dismiss as required by applicable South Carolina law; and the Order further failed to construe the allegations of the Complaint against the Defendants as the moving party. Many of the specifics of this fundamental issue are more fully set forth in the various additional grounds set forth below.

II. Fraud

(1) The Order failed to address the well settled common law in South Carolina which holds that the alleged failures of Defendants to comply with the various disclosure, consent and other requirements of Title 40, Chapter 57 and of the rules of the Consolidated Multiple Listing Service (“CMLS”), while acting in their various fiduciary capacities under Section 40-57-137 and other applicable South Carolina common law, constitutes fraud by silence, therefore equitably barring the Defendants from asserting any statute of limitations defense.

(2) The Order failed to address in any respect the Defendants’ alleged acts of intrinsic and extrinsic fraud, including but not limited to:

(a) the failure of the Defendants to provide the statutory disclosures mandated by Sections 40-57-135(D)(4), 40-57-137(M) and 40-57-139 in the context of their statutorily imposed fiduciary relationship;

(b) the creation by the Defendants of the (2) fraudulent listing agreements (“Fraudulent Listing Agreements”) first produced to the Plaintiffs on November 21, 2019 (42 days before the filing of the Complaint);

(c) the failure of the Defendants to comply with the rules of the CMLS; and

(d) the failure of the Defendants to comply with the Final Order of Judge Solomon Blatt, Jr. in the matter of *United States v. Consolidated Multiple Listing Service*, a United States Dept. of Justice action against the Columbia/Lexington CMLS for anti-competitive practices and violations of the federal Sherman Act (the “Final Order”);

which were proximate causes of the delayed discovery of the facts and circumstances of the Plaintiffs’ various injuries, thereby equitably barring the Defendants from asserting any statute of limitations defense under applicable South Carolina common law.

(3) The Order failed to address the Defendants' fraudulent concealment of their fraudulent and unlawful conduct under Title 40, Chapter 57 as specifically alleged in the Complaint including, but not limited to:

(a) the creation of the Fraudulent Listing Agreements;

(b) the affirmative and willful concealment of the Fraudulent Listing Agreements until November 21, 2019 despite multiple written requests from the Plaintiffs for all listing agreements and other documents;

(c) the Defendants' well documented and unreasonable delay, with the assistance of the Defendants' various attorneys, in responding to the Plaintiffs' various written requests for documents and disclosures; and

(d) the demonstrably false written representation of the Defendants' attorney Rex Casterline on August 27, 2018 that the Defendants did "not have copies of the listing agreements" (Complaint at paragraph 319) even though the Fraudulent Listing Agreements were irrefutably in the Defendants' files on that date;

also thereby equitably barring the Defendants from asserting any statute of limitations defense under applicable South Carolina law.

(4) The Order failed to take as true and to address the Plaintiffs' factual assertions in the Complaint that they were induced by the Defendants' fraudulent and unlawful conduct to proceed with the relationship with the Defendants, while reasonably assuming that the Defendants would operate in compliance with all applicable laws and the rules.

(5) The Order incorrectly applies the statute of limitations applicable to fraud under Section 15-5-530(7) as the Order:

(a) fails to take as true the specific allegations of the Complaint that the Plaintiffs first discovered facts relative to the Defendants' acts of intrinsic and extrinsic fraud no earlier than January 10, 2017; and

(b) fails to identify any factual allegations in the Complaint prior to January 10, 2017 with respect to the various instances of fraud which form the basis of the Plaintiffs' various causes of action, and which would satisfy the unambiguous language of the statute which provides that the three year limitations period runs from the "discovery by the aggrieved party of the facts constituting the fraud"(emphasis added).

(6) The Order fails to address in any respect the fact that the true signature of Defendant Wilkins, a licensed attorney in South Carolina, appears on at least one of the two Fraudulent Listing Agreements thereby constituting a violation of the South Carolina Rules of Professional Conduct.

(7) The result of the Order is against public policy in that it fails to address, and thereby rewards the knowing, willful and fraudulent silence of the Defendants at each point in time that they accepted an unlawful commission payment or an unlawful development fee. They knew that the illegal commissions and development fees were the result of:

(a) unlawful and specifically prohibited conduct under Title 40, Chapter 57, and the fraudulent concealment of those knowing and willful violations;

(b) knowing and willful violations of the rules of the CMLS which had the result of hiding various properties from competing real estate professionals in intentional acts of self dealing;

(c) knowing and willful violations of the South Carolina Rules of Professional Conduct by Wilkins;

(d) knowing and willful acts of fraud involving the creation and affirmative concealment of the Fraudulent Listing Agreements with the assistance of other licensed real estate professionals under the direct control of Wilkins as SVR's broker-in-charge;

(e) knowing and willful violations of the Final Order of Judge Blatt;

(f) knowing and willful violations of the SVR Policy Manual which was mandated by Section 40-57-135(A)(8) and Section 40-57-137(B); and

(g) knowing and willful violations of the South Carolina Unfair Trade Practices Act (the "UTPA").

(8) The Order incorrectly relies on the Development Agreement signed December 21, 2006, for many of its holdings since the Development Agreement was the direct result of the Defendants' fraudulent silence, and the Development Agreement was specifically alleged in the Complaint to have violated numerous express provisions of Title 40, Chapter 57 and the rules of the CMLS.

(9) The Order fails to address the factual allegations of the Complaint, which must be taken as true, regarding the role of the Defendants' various attorneys in affirmatively concealing the extent of the extrinsic and intrinsic fraud committed by the Defendants, prior to the filing of the Complaint on January 2, 2020, which directly delayed the Plaintiffs' discovery of various injuries and invasions of rights which are the basis of the Plaintiffs' various claims.

(10) The Order is incorrect in that it ignores the well settled law in South Carolina that the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.

(11) The Order is incorrect in that it ignores the well settled law in South Carolina that one in a fiduciary position cannot “practice fraud” and then successfully defend on the ground that the victim of the fraud is “charged with knowledge” of the misrepresented facts.

III. Unlawful Conduct

(1) The Order failed to address the unlawful conduct of the Defendants under the various provisions of Title 40, Chapter 57 as specifically alleged in the Complaint, including but not limited to the Defendants’ violations of the specific requirements and prohibitions of Sections 40-57-20, 40-57-135(C)(4) and (D)(4), 40-57-137(A) and (M), and 40-57-139; which unlawful conduct equitably bars the Defendants from asserting any statute of limitations defense under applicable South Carolina law.

(2) The Order failed to address the unlawful nature of the Defendants’ conduct under Title 40, Chapter 57 as specifically alleged in the Complaint, including but not limited to the Defendants’ failure to provide the statutorily mandated disclosures required by Sections 40-57-135(C)(4) and (D)(4), 40-57-137(M) and 40-57-139; which unlawful conduct equitably tolled any applicable statute of limitations under South Carolina law.

(3) The Order is against the statutorily enacted public policy of South Carolina as it:

(a) effectively nullifies the General Assembly’s statutory requirements for written disclosures and written agreements specifically set forth in Title 40, Chapter 57, and

(b) completely ignores the absolute and unequivocal prohibitions of Title 40, Chapter 57, with respect to the participation of real estate professionals in real estate transactions in South Carolina without full compliance with the various requirements of Title 40, Chapter 57.

(4) The Order ignores the longstanding South Carolina common law on statutory interpretation, as it effectively renders the unambiguous language and intent of the statutory requirements of Title 40, Chapter 57 completely null and without effect.

(5) The Order is against the public policy South Carolina in that it lends direct assistance to the unlawful and fraudulent conduct of the Defendants under the various provisions of Title 40, Chapter 57 by allowing the mere passage of time, without any discovery of the facts and circumstances of the unlawful conduct or the injuries arising from that unlawful conduct, to allow the Defendants to retain the statutorily prohibited compensation.

(6) The Order is against the public policy South Carolina in that the Order provides an incentive for other real estate professionals to ignore and violate the various provisions of Title 40, Chapter 57 in the same manner as the Defendants, and the Order fails to enforce the clear and unambiguous language of Title 40, Chapter 57 in a manner so as to act as a deterrent to future violations of the provisions of Title 40, Chapter 57 as required by South Carolina public policy and common law.

(7) The Order is in error in that it first states on page 2 that "Plaintiffs advance several theories of recovery all of which allege in essence that given the alleged lack of written listing agreements, it was unlawful for the Realtor Defendants to collect and to retain commissions and development fees associated with the sale of the Property that is the subject matter of this action," and then characterizes all of the Plaintiffs' various and different claims as breach of contract claims in direct contradiction of the specific allegations of the Complaint.

(8) The Order in footnote 4, page 3 incorrectly states that "this constituted a course of dealing between and amongst the parties" in direct violation of the clear and unambiguous statutory prohibitions against such arrangements contained in Sections 40-57-137(Q),(R) and 139(H).

(9) The Order is incorrect in that it ignores the general rule, well established in South Carolina, that courts will not enforce a contract, or lend assistance to carry out the terms of that contract, when the subject matter of the contract or an act required for the performance of the contract violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.

(10) The Order is incorrect in that it ignores the well established law of South Carolina that illegal contracts are void and unenforceable.

IV. Breach of Fiduciary Duty Claim is Equitable

(1) The Order is incorrect in categorizing the Plaintiffs' various claims for disgorgement and restitution of unlawful commissions and unlawful development fees as actions at law in direct contradiction of the language of the Complaint and applicable South Carolina law.

(2) The Order fails to hold that the Plaintiffs' various equitable actions are not subject to a statute of limitations under Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020), since it incorrectly classifies all of the Plaintiffs' various claims as legal in nature.

(3) The Order is incorrect in holding that even if the Plaintiffs' claims are equitable, the Plaintiffs' various causes of action were barred by the equitable doctrine of laches by:

(a) failing to take as true the allegations of the Complaint that the Plaintiffs did not have knowledge of the facts and circumstances of their injuries or of the fraudulent and unlawful conduct of the Defendants until January 2, 2017 or later;

(b) fails to address the unlawful nature of the Defendants' conduct under Title 40, Chapter 57;

(c) fails to address the various acts of intrinsic and extrinsic fraud of the Defendants;

(d) fails to address the Plaintiffs' right to reasonably rely on the Defendants' fiduciary status;

(e) fails to address the Plaintiffs' right to reasonably rely on the licensed professional status of Defendants SVR and Wilkins;

(f) fails to take into account the fact that all of the Defendants unlawful conduct under Title 40, Chapter 57 and the rules of the CMLS was specifically prohibited by the SVR policy manual required under Sections 40-57-135(A)(8) and 40-57-137(B);

(g) is against public policy by holding that the Defendants were "prejudiced" by the fact that the Plaintiffs did not discover the Defendants' knowing, willful, unlawful and fraudulent conduct until after all of the various real estate closings had occurred; and

(h) contradicts the clear allegations of the Complaint that no additional commissions or development fees were paid to the Defendants by the Plaintiffs after the discovery of the fraudulent and unlawful conduct of the Defendants.

(4) The Order incorrectly states on page 19 that Plaintiffs were "aware of the Defendants' alleged improper conduct, yet continued to accept the benefit of their services..." in direct contradiction of the specific allegations of the Complaint that the Defendants' fraudulent and unlawful conduct under Title 40, Chapter 57 and under the rules of the CMLS rules, which formed the basis of all of the Plaintiffs' various causes of action, were first discovered no earlier than January 10, 2017, after the date of the last closing subject to the Plaintiffs' various causes of action on May 1, 2015, and after the last payment of any commissions or development fees by the Plaintiffs to the Defendants.

(5) The Order incorrectly categorizes the Plaintiffs' various claims as contract claims by stating that "the Defendants failed to perform the contracted for duties" in direct contravention of

the plain language of the Complaint which contains no breach of contract claim, or any other claim which could reasonably be interpreted as such.

(6) The Order incorrectly categorizes the Defendants' failure to obtain the legally mandated listing agreements and dual agency agreements under Sections 40-57-135 and 137 as a "failures to perform duties under a contract," rather than addressing the failures as:

(a) knowing, willful and unlawful conduct constituting breaches of a statutorily imposed fiduciary duty;

(b) knowing, willful and unlawful conduct in violation of statutorily enacted public policy;

(c) knowing, willful and unlawful conduct in violation of the specific provisions of the SVR policy manual;

(d) unfair and deceptive conduct in violation of the rules of the CMLS;

(e) knowing and willful violations of the UTPA;

(f) knowing and willful violations of the Final Order of Judge Blatt; and

(g) intentional acts of intrinsic and extrinsic fraud under South Carolina law;

all as specifically alleged by the Plaintiffs in the Complaint.

(7) The Order is incorrect in holding that the Plaintiffs have "unclean hands" as the Complaint contains no factual allegations whatsoever that could provide a basis for this holding when the allegations of the Complaint are viewed in the light most favorable to the Plaintiffs, and against the Defendants as the moving parties, as required by applicable South Carolina law.

V. Plaintiffs Satisfied Discovery Rule

(1) The Order is incorrect in that it fails to take as true the alleged dates of the Plaintiff's discovery of the facts and circumstances of their various, separate and distinct injuries arising from

the various and distinct fraudulent and unlawful acts of the various Defendants as specifically set forth in the Complaint.

(2) The Order failed to take as true the allegations set forth in the Complaint that additional and distinct violations of Title 40, Chapter 57 and the rules of the CMLS, all of which constituted additional and separate fiduciary breaches and violations of the UTPA were first discovered by the Plaintiffs in the documents first made available to the Plaintiffs for the first time on August 28, 2018 by the Defendants' attorney Rex Casterline.

(3) The Order is in direct contradiction of the well established law of South Carolina by allowing unrelated acts of negligence by RPW and Wilkins with respect to Lot 15 and the Lexington County Bond effectively shield all other unrelated and distinct breaches of fiduciary duty and unlawful conduct.

(4) The Order is in error in that it failed to identify the facts and circumstances of the various, separate and distinct injuries and invasions of specific legal rights which could legally start the running of any applicable statutes of limitations under the appropriate "discovery" rules with respect to the Plaintiffs' various causes of actions based on:

- (a) violations of Section 40-57-135(C)(4) and (D)(4);
- (b) violations of Section 40-57-137(M);
- (c) violations of Section 40-57-139;
- (d) violations of Section 39-5-140;
- (e) violations of various and separate rules of the CMLS; and
- (f) acts of fraud and fraudulent concealment.

(5) The Order incorrectly held that the Plaintiff's knowledge of "these acts of negligence, incompetence and breach of duties as early as 2013" in referring to specific issues with Lots 15

and the Lexington County Bond involving only RPW effectively constituted “discovery” of the various unrelated injuries and invasions of rights by SVR, RPW and Wilkins with respect to:

- (a) violations of Section 40-57-135(C)(4) and (D)(4);
- (b) violations of Section 40-57-137(M);
- (c) violations of Section 40-57-139;
- (d) violations of the UTPA at Section 39-5-10 *et. seq.*;
- (e) violations of various and separate rules of the CMLS; and
- (f) acts of fraud and fraudulent concealment under South Carolina law.

VI. Unfair Trade Practice Claim

The Order failed to take as true the Plaintiffs’ pleadings alleging that the unlawful, unfair and deceptive marketing practices of the Defendants, including but not limited to the unlawful and deceptive hiding of available properties from competing real estate professionals in violation of the rules of the Consolidated Multiple Listing Service (“CMLS”) and the Final Order of Judge Blatt were first discovered no earlier than January 10, 2017, and therefore the Plaintiffs met the 3 year “discovery” statute of limitations set forth in Code Section 39-5-150 of the South Carolina Unfair Trade Practices Act (the “UTPA”) which specifically provides that the statute of limitations runs from “discovery of the **unlawful conduct which is the subject of the suit**” (emphasis added).

VII. Defendants’ “Unclean Hands”

(1) The Order failed to address in any respect the various instances of “unclean hands” of the Defendants, and the effect of those instances of “unclean hands” on the timing of the Plaintiffs’ discovery of the facts and circumstances of their various injuries including, but not limited to:

- (1) the various knowing and willful violations of Title 40, Chapter 57;
- (2) the various knowing and willful violations of the rules of the CMLS;

(3) the violations of the Rules of Professional Conduct by Wilkins;
(4) the creation and active concealment of the Fraudulent Listing Agreements;
(5) the knowing and willful violations of the Final Order of Judge Blatt;
(6) the knowing and willful violations of the statutorily mandated SVR Policy Manual; and

(7) various other acts of both intrinsic and extrinsic fraud by the Defendants and certain of their attorneys as alleged in the Complaint.

(2) The Order failed to address that the instances of the Defendants' "unclean hands" equitably barred the Defendants from asserting any statute of limitations defense or laches defense under applicable South Carolina law.

(3) The Order failed to address that the instances of the Defendants' "unclean hands" equitably tolled any statute of limitations defense under applicable South Carolina law.

VIII. Knowledge of the Law

(1) The Order is incorrect in holding that the Plaintiffs were charged with knowledge of the statutory requirements of Title 40, Chapter 57, and the rules of the CMLS, all of which were **applicable only to the Defendants**, in that it:

(a) is against the statutory statement of public policy by the South Carolina general assembly in Title 40, Chapter 57 in general, and Section 40-57-139 in particular;

(b) ignores the Plaintiffs' right to reasonable reliance on the Defendants' fiduciary status under well established South Carolina law;

(c) ignores the Plaintiffs' right to reasonable reliance on the Defendants' status as licensed real estate professionals under Title 40 and other well established South Carolina law;

(d) ignores the fact that the provisions of Title 40, Chapter 57 and the rules of the CMLS do not apply to the conduct of the Plaintiffs in any respect;

(e) ignores clear and well established South Carolina law that the client of a licensed professional acting in a fiduciary capacity is not charged with knowledge of legal matters within the scope of the licensed professionals fiduciary duty.

(f) renders the disclosure provisions of Title 40, Chapter 57 completely null and void in violation of well established South Carolina law.

(2) The Order fails to address the established common law in South Carolina that the Plaintiffs are not charged with knowledge of matters which are the subject of clear and unambiguous statutory or common law duties of disclosure.

(3) The Order is against the established public policy of South Carolina in that it places a higher duty on the clients of real estate professionals to “discover” the laws applicable to real estate professionals than the duty the Order places on the real estate professionals to comply with all aspects of their statutorily imposed fiduciary duty and the requirements of Title 40, Chapter 57.

IX. Statutory Preemption of Quasi-contractual Theories

The Order in multiple sections incorrectly relies on common law quasi-contract theories to support many of its holdings in direct contradiction of the clear and unambiguous language of Sections 40-57-137(Q) and (R), and 40-57-139(G).

X. South Carolina Real Estate Commission

(1) The Order incorrectly holds that the South Carolina Real Estate Commission (the “Commission”) is the only party authorized to bring a civil action for violations of Title 40, Chapter 57 despite the clear and unambiguous language of Section 40-57-137(Q), and the South Carolina Supreme Court’s decisions with respect to similar statutory provisions.

(2) The Order, on page 10, incorrectly applies the two part test of Hurst v. Sandy, 329 S.C. 471, 478, 494 S.E.2d 847, 850 (S.C.Ct.App. 1997) by ignoring the clear and unambiguous language of Title 40, Chapter 57 by:

(a) failing to find that one of the express purposes of the statute was to prohibit the fraudulent and unlawful participation in real estate transactions by licensed real estate professionals without strict compliance with the specific requirements of Title 40, Chapter 57 as specifically alleged in the Complaint, and to protect the Plaintiffs from such unlawful and fraudulent activity, and

(b) failing to find the Plaintiffs to be a member of the class of real estate clients the statute unequivocally states it is designed to protect.

(3) The Order fails to address the fact that the Commission has no standing under applicable South Carolina law and the South Carolina Rules of Civil Procedure to pursue any claims for breach of fiduciary duty arising under Title 40, Chapter 57 since the duty created in Section 40-57-137 and clearly and unambiguously runs to the clients of real estate professionals, and not to the State of South Carolina or the Commission.

(4) The Order fails to address the fact that the Commission has no standing to bring an action for violations of Title 40, Chapter 57 which also constitute violations of the provisions of the UTPA.

XI. Good Faith Reliance

(1) The Order failed to address the Plaintiffs' right to good faith reliance on the fiduciary status of the Defendants under applicable South Carolina law with respect to the Defendants' compliance with the requirements of Title 40, Chapter 57 for purposes of applying the "discovery rule" with respect to the application of any applicable statutes of limitations or laches defense.

(2) The Order failed to address the Plaintiffs' right to good faith reliance on Defendants SVR and Wilkins status as licensees under Title 40, Chapter 57 with respect to those Defendants' compliance with the requirements of Title 40, Chapter 57 for purposes of applying the "discovery rule" with respect to the application of any applicable statutes of limitations or laches defense.

(3) The Order failed to address the Plaintiffs' right to good faith reliance on Defendant Wilkins' status as a licensed attorney operating under the South Carolina Rules of Professional Conduct in reasonably relying on the Defendants to act in accordance with all laws applicable to them, to not engage in acts of extrinsic and intrinsic fraud, and to fulfill their various fiduciary duties in accordance with applicable law.

(4) The Order violates the statutorily enacted public policy of South Carolina by failing to recognize the Plaintiffs' right to reasonable reliance on the Defendants as licensed professionals under Section 40-57-10 *et seq.* and Section 40-57-10 *et. seq.*

XII. In Pari Delecto

The Order is incorrect in holding on page 19 that even if the Plaintiffs' causes of action were equitable, the Plaintiffs were *in pari delecto* with the unlawful conduct of the Defendants since the Complaint contains no allegations whatsoever that could provide a basis for this holding when the allegations of the Complaint are viewed in the light most favorable to the Plaintiffs, and the Complaint provides no basis for a holding that the Plaintiffs were in violation of any law or rule of conduct applicable to the Plaintiffs.

XIII. Private Right of Action

(1) The Order on pages 9 through 10 incorrectly states that Section 40-57-135 does not give rise to a private cause of action. In Section 40-57-137(Q) the legislative expressly provided for a private cause of action.

(2) The Order is incorrect in that it only acknowledges that Section 40-57-137(Q) only authorizes “common law” causes of action, and fails to recognize that the statutory provision also authorizes any and all other causes of action including, but not limited to, statutory causes of action under the UTPA which may arise from violations of Title 40, Chapter 57.

XIV. Five Year Document Retention Rule

(1) The Order incorrectly holds that the five (5) year document retention rule set forth in Section 40-57-135(B)(11) justifies its holding that laches equitably bars the Plaintiffs’ causes of action when the Complaint specifically alleges, and the Court must accept as true, that all of the Defendants’ documents relevant to this matter, and which were subject to the 5 year rule of Section 40-57-135(B)(11) were still in the Defendants’ possession on August 28, 2018 when:

(a) the Defendants’ attorney Rex Casterline represented that he had produced copies of all of the Defendants’ documents dating back to 2006, and

(b) the Defendants’ current attorney Eric Bland produced on November 21, 2019 “examples” of the documents dating back to 2007.

(2) The Order is incorrect in holding that the five (5) year document retention rule of Section 40-57-135(B)(11) is applicable in any respect to the Plaintiffs’ various claims which are based on the Defendants’ fraudulent and unlawful failure to have the Plaintiffs execute all legally mandated documents under Title 40, Chapter 57, and under the rules of the CMLS.

(3) The Order is incorrect in that it fails to take as true the allegations in the Complaint that the listing agreements required under Section 40-57-135(C)(4) and (D)(4); the dual agency agreements required under Section 40-57-137(M); and the various documents required to be signed by the Plaintiffs under the CMLS rules were never created or executed, and were therefore never

subject to the 5 year document retention rule of Section 40-57-135(B)(11) in light of the Defendants fraud.

XV. Unjust Enrichment

The Order erred by holding that the Plaintiffs' claim for unjust enrichment is improper since all three (3) elements of the cause of action under South Carolina law have been properly alleged in the Complaint, and as specifically alleged, the collection and retention of unlawful commissions and fees through knowing, willful, deceptive, unfair and fraudulent means which also damaged the Plaintiffs and competing real estate professionals makes it unjust for the Defendants to retain the statutorily prohibited compensation.

XVI. Quantum Meruit

The Order erred by holding that the Plaintiffs' claim for quantum meruit is improper since all three elements under South Carolina law have been properly alleged in the Complaint, and as specifically alleged, the collection and retention of unlawful commissions and fees through knowing, willful, deceptive, unfair and fraudulent means which also damaged the Plaintiffs and competing real estate professionals makes it unjust for the Defendants to retain the statutorily prohibited compensation.

XVII. Relevant Sections of Title 40, Chapter 57 are Not Licensing Statutes

The Order incorrectly refers to the entirety of Title 40, Chapter 57 as a "licensing statute" as a basis for its holdings in direct contradiction of the clear and unequivocal statutory language in the relevant sections which form the basis of the Plaintiffs' various causes of action, and which specifically address:

- (a) the types of legally permitted relationships,
- (b) the legal requirements of those permitted relationships,

(c) the limitations on those permitted relationships, and

(d) the fiduciary duties owed by the Defendants to the Plaintiffs in the context of those permitted relationships;

and which sections are separate from the “licensing” provisions of Chapter 57 as specifically indicated in the Title to the Act as passed by the General Assembly.

XVIII. The Order Assumes Defendants Legally “Earned” the Commissions and Fees

The Order impermissibly makes legal and factual assumptions and inferences in favor of the Defendants as the moving parties, and against the Plaintiffs in holding that the Plaintiffs’ various causes of action attempt to deny the Defendants the compensation which the Order incorrectly states was “earned” under the “contract” with the Plaintiffs in that such assumptions and inferences ignore the factual allegations of the Complaint, which must be taken as true, including assertions that:

(1) it was unlawful and unequivocally prohibited under Title 40, Chapter 57 for the Defendants to participate in the various transactions and receive any compensation whatsoever;

(2) the Defendants employed both intrinsic and extrinsic fraud in “earning” the unlawful and prohibited compensation;

(3) the Defendants engaged in multiple acts of self-dealing which substantially damaged the Plaintiffs by producing reduced sales prices, delayed sales and increased interest costs due to the Defendants’ unlawful and fraudulent marketing practices which were designed to conceal the various properties from the full real estate market in order to obtain a higher percentage of the total commissions paid;

(4) the Defendants employed unfair and deceptive marketing practices in violation of the UTPA to unlawfully and fraudulently deprive several thousand competing real estate professionals access to the Plaintiffs' "listings", for which the competing members of the CMLS had paid hundreds of dollars each in annual dues to the CMLS, in clear and irrefutable violation of the UTPA, Judge Blatt's Final Order, the rules and Bylaws of the CMLS and the Defendants' participation agreement with CMLS;

(5) the Defendants, with the assistance of (i) at least two other licensed real estate professionals, Anne Brooks and Dana Peak, who were under the direct supervision and control of Defendants SVR and Wilkins, and (ii) various attorneys employed by the Defendants, actively and intentionally concealed their various fraudulent and unlawful conduct through various means including the creation of the Fraudulent Listing Agreements;

(6) any implied in fact, oral or other common law "contract" was expressly illegal and prohibited by the various provisions of Title 40, Chapter 57; and

(7) ignores the specific pleadings at paragraphs 328-332 of the Complaint that the Defendants' attorneys Blair, Cato, Pickren, Casterline, LLC published at least 4 public blogs while representing the Defendants in this matter which specifically discussed:

- (a) the illegality of the conduct such as that of the Defendants in this matter;
- (b) the ability of licensed real estate professionals to be sued by clients for such conduct; and
- (c) the harm to the clients and the general public of such illegal and unfair conduct under Title 40, Chapter 57 and the rules of the CMLS.

XIX. Equal Protection

The result of the Order violates public policy and the Equal Protection clause of the South Carolina Constitution in that it creates a new exclusion from the application of the clear and unambiguous requirements and protections of Title 40, Chapter 57, not enacted by the South Carolina general assembly in Section 40-57-240, by holding the Plaintiff, as a member of the South Carolina Bar, is not entitled to express protections of Title 40, Chapter 57 when engaging licensed real estate professionals, and that Plaintiff Porth, as a member of the South Carolina Bar, is further denied the rights afforded to others under well settled South Carolina law to reasonably rely on:

- (1) the fiduciary status of the Defendants under Title 40, Chapter 57 and common law,
- (2) the Defendants' status as licensed real estate professionals under Title 40, and
- (3) Defendant Wilkins' status as a licensed member of the South Carolina Bar.

XX. Questions of Fact

The Order is incorrect in that even though the Order failed to take the allegations of the Complaint as true and to draw the best inferences possible in favor of the Plaintiffs, the dates of discovery of the various fraudulent and unlawful acts and conduct which form the specific basis of the Plaintiffs' various claims are still questions of fact, and may not be disposed of on the Defendants' Motions to Dismiss.

This motion shall be further supported by such argument and authority as may be presented prior to and at the time of hearing.

The Plaintiffs hereby offer to provide the Court, within ten (10) days of the Court's request, a draft order denying the Defendants' Motions to Dismiss addressing all of the issues set forth above.

WE SO MOVE:

Respectfully submitted,

s/ Clarence Davis

Clarence Davis (SC Bar I.D. #1581)

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February 26, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	CASE NO.: 2020-CP-32-00005
	)	
R. Kent Porth and Panorama Point, LLC,	)	
	)	
Plaintiffs,	)	DEFENDANTS ROBERT P. WILKINS,
	)	JR., RPW DEVELOPMENT, INC., AND
vs.	)	SOUTHERN VISIONS REALTY, INC.’S
	)	MEMORANDUM IN OPPOSITION TO
Robert P. Wilkins, Jr., RPW Development,	)	PLAINTIFFS’ MOTION TO
Inc., Southern Visions Realty, Inc., and	)	RECONSIDER
Consolidated Multiple Listing Service, Inc.,	)	
	)	
Defendants.	)	

Defendants Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc. (collectively referred to as the “Defendants” or “Realtor Defendants”), by and through the undersigned counsel, submit this memorandum of law in opposition to Plaintiffs’ motion to reconsider the Court’s February 16, 2021 Order (“Order”) dismissing this case against these Defendants. For the reasons set forth herein, the motion should be denied in its entirety.

Preliminary Statement

The Plaintiffs’ tenacity is matched only by their verbosity – still, there is nothing to see here. By their motion, the Plaintiffs seek to have this Court spend yet more time considering that which has already been considered carefully once before. While couched in terms of unresolved issues, the matters the present motion seek to place before the Court are nothing more than the cold Monday leftovers of a meal that left us all sated. Respectfully, the Defendants submit that the Court need not consume more.

Plaintiffs brought this action seeking unjustly to obtain a windfall from the Realtor Defendants based upon what they perceive to be a hyper-technical violation of the South Carolina Statute governing real estate licensees (“Licensing Law”) during the development and sale of 23 lots owned by the Plaintiffs along Lake Murray generating over \$6 Million. [Compl. ¶¶137-198]. The Realtor Defendants

were compensated pursuant to the terms of a development agreement (“Development Agreement”). [Compl. ¶¶93-95]. Likewise, Plaintiffs expressly approved the compensation to the Defendants on HUD-1 forms for each closing. [Compl. ¶429].

Nonetheless, although Defendants provided valuable services by agreement, the Plaintiffs accepted the benefit of the services rendered and the alleged Licensing Law violation caused no actual damage to the Plaintiffs¹, they now seek to weaponize an alleged technical violation in order to force a forfeiture of all compensation earned by the Defendants since 2006. Of course, the law abhors forfeiture and should seize upon even slight evidence to prevent one.

Plaintiffs allege that S.C. Code 40-57-135 and 137 required written “listing agreements” between Plaintiffs and the Realtor Defendants², and absent a specific “listing agreement,” the Realtor Defendants were not entitled to any compensation for their services in developing, marketing and selling the twenty-three lots. The Complaint rests entirely on this alleged technical violation for which Plaintiffs now seek in excess of \$530,000 from the Realtor Defendants.

Following commencement of the action, the Defendants moved to dismiss the Complaint on multiple grounds. First, the allegations in the Complaint expressly acknowledge that the Plaintiffs entered into the Development Agreement which set forth the compensation to be paid to the Defendants for the development, marketing, and sale of the subject lots. (Compl. ¶¶93-95). In other words, the Complaint itself concedes that a written compensation agreement was entered into by Plaintiffs that authorized and obligated the Plaintiffs to pay the compensation they now seek to claw back.

¹ Although not relevant to the current motion, Defendants deny that no listing agreements were signed.

² The statutory sections listed in the Complaint date back to a prior version of the South Carolina Code. §40-57-135(C)(4) is substantially similar to §40-57-135(E) of today’s Code, and §40-57-137 is now substantially similar to §40-57-350.

Second, given that the relationship between the Plaintiffs and the Realtor Defendants began in 2006, Plaintiffs knew or should have known that they did not have what they considered to be a “listing agreement” with the Realtor Defendants at that time even though there was a signed Development Agreement that provided SVR with the exclusive listing rights and commission structure. It is for this reason that the Complaint spends an inordinate amount of time attempting to pre-empt the obvious time based defenses to the action and to explain why the Plaintiffs had not “determined conclusively” that their rights had been invaded until a point in time that conveniently creeps beneath the statute of limitations tent. As a tax attorney with over 22 years of experience in 2006, Plaintiff Porth was more than capable of accessing the South Carolina Code. Moreover, the Complaint itself alleges invasions of the Plaintiffs’ rights through acts of negligence, incompetence and dishonesty which fall well outside of any applicable statute of limitations. Thus, this action is time-barred.

Lastly, the mere allegation that a technical licensing statute violation occurred does not, on its own, provide a private cause of action for the Plaintiffs to seek damages. Plaintiffs’ Complaint relies entirely on their incorrect assumption that the absence of a document entitled “listing agreement” rendered all of the Defendants’ business conduct “unlawful. and thus the Defendants should be stripped of all earned commissions and compensation for over a twelve (12) year period.” Even so, the Complaint does not plead any actual harm or facts supporting a common law cause of action. Thus, the Complaint failed to state a claim under any circumstances.

After hearing the motion, this Court dismissed the action in a detailed, nineteen-page Order. Thereafter, Plaintiffs filed this motion to reconsider on March 1, 2021 which raises no new issues, no new facts and merely concludes that the first time around that the judge just got it wrong so the Plaintiffs recite the same arguments in order to attempt the court to reverse itself.

In sum and substance, Plaintiffs' motion to reconsider merely reiterates the same arguments that were made in their 473 paragraph Complaint, and in opposition to the motion to dismiss. It does not identify any facts or legal issues that were overlooked or otherwise misapprehended by the Court, as required to prevail on a motion to reconsider.

Accordingly, these arguments fail to identify any basis for reconsideration of the Order, much less a basis that would change the ultimate outcome. The motion should be denied.

Legal Standard

In considering a motion to dismiss...the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). "On a 12(b)(6) motion, the court is required to presume all well pled *facts, not propositions of law*, to be true." *HHHunt Corporation v. Town of Lexington*, 389 S.C. 623, 235, 699 S.E.2d 699, 705 (Ct. App. 2010)(emphasis added). "The circuit court may dismiss a claim when the defendant demonstrated the Plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006).

Argument

I. Plaintiffs motion to reconsider fails to identify any error or omission in the Order dismissing this action.

"A party may wish to file such a [Rule 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

Here, Plaintiffs do not cogently identify any arguments that were raised by the Plaintiffs, but not ruled on by the Court. Rather, Plaintiffs' motion simply protests the dismissal of their

untimely and legally insufficient Complaint through the use of conjecture and unfounded legal conclusions without supporting authority.

In other words, Plaintiffs failed to identify any fact or legal issue which was misunderstood or overlooked by the Court, and the motion should be denied.

A. The Court correctly held that an alleged technical statutory violation does not create a private civil cause of action on its own.

Despite the 92 pages and 473 allegations contained in Plaintiffs' Complaint, the Complaint can be summarized in a brief and simple manner. Plaintiffs allege that if a real estate agent does not obtain a specific document entitled "listing agreement," then the seller of real estate *who benefits from the realtor's services* does not need to pay the real estate agent. Plaintiffs then ask the Court to go two steps further and rule first that if a specific document entitled "listing agreement" is allegedly not executed, the seller is entitled to claw back any compensation paid to a real estate agent regardless of how long ago such compensation was paid, and second that the clawed back commissions should actually form the basis for treble damages under the South Carolina Unfair Trade Practices Act. These positions are lacking merit completely.

The relevant provision of the Licensing Law for Real Estate Professionals states:

A licensee may not advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without first obtaining a written listing agreement from the owner and when advertising or marketing in any medium including site signage, a licensee clearly shall identify the full name of the company with which the licensee is affiliated. Brokers-in-charge who are members of a multiple listing service must be allowed to make their company listings available for any cooperative marketing or advertising program, subject to the rules and regulations of the multiple listing service and with the consent of the owner. Consent may be contained and obtained from the owner through the listing agreement.

S.C. Code 40-57-135(C)(4)(2004).

As is clear from its plain text, the purpose of this statute is the protection of the public from improper behavior by a class of professionals who are licensed by the State of South Carolina. For example, a real estate agent could be disciplined if she advertised a property to the public that is not actually for sale. The statute is not intended to act as a mechanism for sophisticated, wealthy developers to avoid paying their real estate agents. This much is evidenced by the statute's own text, as well as the settled common law of South Carolina.

Indeed, nothing in the Licensing Law suggests that a realtor who markets and sells property for the benefit of a seller (such as the Plaintiffs) is not entitled to a commission simply because the realtor and seller do not execute a specific document entitled "listing agreement." In fact, the question of whether the Code authorizes a private cause of action for such an offense is answered by the Code itself. S.C. Code §40-57-790 (Civil Actions) expressly provides that "a civil action may be brought for violations of this chapter as provided for violations of Article 1, Chapter 1, in accordance with Section 401-210. S.C. Code §40-1-210 authorizes civil actions by the LLR for the purpose of seeking injunctive relief against violations of the article. Moreover, the same statute upon which Plaintiffs attempt to rely recognizes multiple alternative relationships between realtors and sellers other than a strict written "listing agreement." See, S.C. Code §40-57-350(L)(1) (recognizing transactional brokers who may give one or both parties customer service or facilitate the transaction without representing either party); S.C. Code §40-57-350(L)(3) (recognizing that sellers who do not choose to establish an agency relationship but who use the services of the [brokerage] firm are considered customers).

Likewise, South Carolina common law has long held that real estate broker need not have a written commission agreement to be entitled to compensation. *United Form Agency v. Malanuk*,

284 S.C. 382, 384, 325 S.E.2d. 544, 546 (recognizing oral commission agreements for real estate agents as enforceable).

Of course, this does not mean (as the Plaintiffs incorrectly aver) that a real estate agent who violates the statute is immune from liability if no private civil cause of action exists. First, the statute does not supplant the common law or the duties that are owed between realtor and customer via contract and/or common law. Furthermore, a realtor who advertises or markets a property without authority to do so is subject to discipline if the South Carolina Real Estate Commission deems there to be a violation. However, it is the Real Estate Commission *only* that has the authority to enforce this statute as part of its mandate to regulate the real estate profession. See, Order at p. 10. A private party may not use the statute alone as her basis for a civil action seeking damages. *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

Accordingly, the Court correctly held that Plaintiffs action against the Defendants fails as a matter of law.

B. The Court correctly ruled that Plaintiffs' claims are time barred and legally without merit.

Although the underlying legal theory of Plaintiffs' action is without merit, Plaintiffs also suggest (without any supporting authority) that the Court erred in finding the statute of limitations had expired based upon the Plaintiffs' own admissions and allegations contained in their own Complaint. Plaintiffs contend that their allegations of fraud, concealment, and unfair trade practices somehow exempt the Complaint from statute of limitations defenses since Plaintiffs allege they only discovered the relevant Licensing Law and an unrelated Court order related to the Multiple Listing Service "no earlier than January 10, 2017."

As the Court correctly held, conclusory allegations claiming "ignorance of the law" do not support tolling of the statute of limitations. Order at p. 9.

“A party cannot escape the application of [the statute of limitations] by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence, the same result follows. Thus, either actual or constructive knowledge of facts or circumstances, indicative of fraud, trigger a duty on the part of the aggrieved party to exercise reasonable diligence in investigating and, ultimately, in pursuing a claim arising therefrom. *Burgess v. Am. Cancer Soc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799-800 (Ct. App. 1989).

“The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought, or a full-blown theory of recovery developed.” *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (Ct.App.1997).

Here, the statutory sections relied upon by Plaintiffs were public and widely available to anyone of common knowledge and are certainly chargeable against a tax lawyer with over 22 years of business and prior real estate development experience by 2006. It is inconceivable--even accepting the allegations of Plaintiffs' Complaint as true--that the Plaintiffs were not aware that they paid commissions to the Defendants, and that they allegedly did not have a “listing agreement” when they began to pay commissions to the Defendants in 2006.

In other words, if Porth believed at the time of these transactions that the Defendants may not have been entitled to the compensation they received, he could have easily looked to the South Carolina Code and identified the very same allegations asserted in Plaintiffs' untimely Complaint.

Yet, Plaintiffs waited over 14 years to claim that the compensation agreement with the Realtor Defendants was “unlawful.”

Similarly, Plaintiffs’ suggestion that the Court failed to recognize the fraudulent concealment of the Defendants’ alleged noncompliance with the Licensing Law provisions is without merit. The subject provisions of the Licensing Law were public record and codified by the South Carolina Legislature. As Plaintiff alleges that he never signed or received a listing agreement from the Defendants, alleged noncompliance with the publicly accessible Licensing Law was not concealed from Plaintiffs.

Accordingly, as the statute of limitations for a fraud cause of action begins to run three years from discovery, this action is severely time-barred, and the Court correctly ruled that Plaintiffs’ allegations of fraud did not foreclose the Defendants from asserting a statute of limitations defense.

C. The Court correctly held that Plaintiffs’ claims are legal, not equitable.

In their motion to reconsider, Plaintiffs also aver that the Court misconstrued Plaintiffs’ Complaint as legal, rather than equitable, and thus incorrectly applied the statute of limitations to their breach of fiduciary duty claim. While Plaintiffs’ argument is unsupported by any legal authority, a plain reading of the Complaint demonstrates that the main purpose of their action is their plea for money damages, an indisputably legal claim.

“To determine whether this suit is legal or equitable, we must look to the ‘main purpose’ of the action as reflected by the nature of the pleadings and proof, and the character of relief sought under them.” *Gordon v. Drews*, 358 S.C. 598, 604, 595 S.E.2d 864, 867 (Ct.App.2004). A claim of breach of fiduciary duty is an action at law and the trial judge’s findings will be upheld unless without evidentiary support. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005).

However, a “breach of fiduciary duty [claim] may sound in equity if the relief sought is equitable.” *Bivens v. Watkins*, 313 S.C. 228, 230 n. 3, 437 S.E.2d 132, 133 n. 3 (Ct.App.1993).

Here, although all 473 paragraphs in their Complaint make clear the nature of Plaintiffs’ claims, one needs to look no further than the prayer for relief which seeks “judgment against Defendants in a sum sufficient to adequately compensate them for actual damages and for such punitive damages as the Court may reasonably award.” Compl. pp. 92. This demonstrates that the main purpose of Plaintiffs’ action is their attempt to obtain a monetary windfall based upon a perceived technicality, i.e. money damages. An action for money damages is an action at law.

Accordingly, the Court correctly held that the main purpose of Plaintiffs’ action is legal, and the statute of limitations applies.

D. Plaintiffs’ motion to reconsider is deficient as it lacks any legal authority.

In addition to the absence of any argument or evidence not previously advance, Plaintiffs’ Motion to Reconsider should be denied as it relies exclusively on Plaintiffs’ conjecture and legal conclusions. At no point in the 22 pages of their motion do the Plaintiffs identify any legal authority supporting their suggestion that an alleged technical violation of the real estate licensing statute precludes a realtor from earning a commission or a developer from earning its development fees as provided in the signed Development Agreement, any legal authority supporting their argument that their action for money damages is an equitable action, or any legal authority supporting their argument that a seller may claw back a real estate commission paid to a realtor without any time limitation. The reason: it does not exist.

Accordingly, the Court correctly ruled that the Plaintiffs’ Complaint was time barred and failed to assert a cognizable cause of action against these Defendants. Plaintiffs’ motion to

reconsider fails to identify any fact or issue of law that misapprehended or overlooked. Therefore, Plaintiffs' motion to reconsider should be denied.

Conclusion

For the reasons stated herein, Plaintiffs Rule 59(e) motion should be denied in its entirety.

This 11th day of March, 2021.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

R. Kent Porth and Panorama Point, LLC,

Civil Action No. 2020-CP-32-00005

Plaintiffs,

vs.

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR
RECONSIDERATION UNDER RULE
59(e)**

Robert P. Wilkins, Jr., RPW Development,
Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,

Defendants.

PROCEDURAL HISTORY

On February 16, 2021, the Court issued an Order Granting Motion To Dismiss (the "Order") granting the Defendants' Robert P. Wilkins, Jr. ("Wilkins"), RPW Development, Inc. ("RPW"), and Southern Visions Realty, Inc. ("SVR") Motion to Dismiss filed on May 6, 2020, and Amended Motion to Dismiss filed on October 9, 2020 (collectively the "Defendants' Motions"). The Defendants' Motions were filed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. On November 16, 2020, the Defendants filed a legal memorandum in support of their two motions (the "Defendants' November 16, 2020 Memo"). On September 18, 2020, the Plaintiffs filed their first brief in opposition to the Defendants' Motions (the "Plaintiffs' First Brief"), on October 20, 2020 filed their second brief in opposition to the Defendants' Motions (the "Plaintiffs' Second Brief"), and on December 10, 2020 filed their third and final brief in opposition to the Defendants' Motions (the "Plaintiffs' Third Brief")(collectively the "Plaintiffs' Prior Briefs"). On February 26, 2021, the Plaintiffs R. Kent Porth and Panorama Point, LLC filed a Motion for Reconsideration under Rule 59(e) of the SCRCP. On March 11, 2021, the Defendants filed a Memorandum in Opposition to the Plaintiffs' Rule 59(e) Motion (the "Defendants' Opposition Memo").

REASONS TO VACATE ORDER/ APPEALLATE PRESERVATION ISSUES

The Plaintiffs filed their Rule 59(e) Motion for Reconsideration of the Court’s Order to identify and preserve for appeal the various issues set forth therein, and in response to the Order’s failure to address the Plaintiffs’ specific arguments, and supporting legal authority, set forth in the Plaintiffs’ Prior Briefs that:

- (1) the Defendants’ various fraudulent acts equitably bar the assertion of any statute of limitations defense, or equitably tolled any such defense (See Sections III, VII *infra*);
- (2) the Defendants’ various unlawful acts equitably bar the assertion of any statute of limitations defense, or equitably tolled any such defense (See Sections IV, VII *infra*);
- (3) the Defendants’ “unclean hands” equitably bar the assertion of any statute of limitations defense, or equitably tolled any such defense (See Sections III, IV, VII *infra*);
- (4) the Plaintiffs had a right under South Carolina statutory and common law to reasonably rely on the Defendants’ fiduciary status (See Section VI *infra*);
- (5) the Plaintiffs had a right under South Carolina common law to reasonably rely on Defendant Wilkins’ status as a licensed attorney (See Section XI *infra*);
- (6) the Defendants fraudulent and unlawful conduct, and therefore the Order’s granting of the Defendants’ Motions thereby validating such fraudulent and unlawful conduct, are against the legislatively enacted public policy of South Carolina (See Sections III, IV, XIII *infra*);
- (7) the Order is in error in that it lends assistance to the statutorily prohibited and unlawful conduct of the Defendants (See Section IV *infra*);
- (8) the Order’s holding that Plaintiff Porth is charged with knowledge of Title 40, Chapter 57 when dealing with a licensed real estate professional in a fiduciary context violate the Equal Protection Clause of the South Carolina Constitution (See Sections II, XIV *infra*); and
- (9) the dates of “discovery” are questions of fact, and therefore may not be disposed of pursuant to a pre-answer Rule 12(b)(6) motion to dismiss. (See Section XVIII *infra*).

The Plaintiffs also filed their Rule 59(e) Motion for Reconsideration of the Court's Order to request that the Court reconsider the Plaintiffs' arguments set forth in the Plaintiffs' Prior Briefs with respect to the Order's holdings that:

- (1) the Plaintiffs' various claims for disgorgement and restitution of unlawful commissions and development fees are legal and not equitable claims, and therefore potentially subject to statute of limitations defenses despite the Supreme Court's recent decision in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020) (See Section V *infra*);
- (2) the Plaintiffs failed to meet any and all applicable 3 year "discovery" statute of limitations by filing the Complaint within 3 years of January 10, 2017 (See Sections I,II,XII *infra*);
- (3) that the Plaintiffs are charged with knowledge of the requirements of Title 40, Chapter 57 in the context of their statutory and common law fiduciary relationship with the Defendants as licensed real estate professionals (See Section II *infra*);
- (4) the Plaintiffs have "unclean hands" (See Section X *infra*);
- (5) the Plaintiffs' claims, if equitable, would be barred by the doctrine of laches (See Section X *infra*);
- (6) the Plaintiffs are "*in pari delicto*" with the alleged unlawful, fraudulent and deceptive acts of the Defendants (See Section XV *infra*);
- (7) the Plaintiffs had common law or quasi-contractual obligations to the Defendants based on the Development Agreement or any factual "course of dealing" (See Section VIII *infra*);
- (8) no private cause of action under Title 40, Chapter 57 exists for violations of Sections 40-57-135, 137 and 139 (See Section IX *infra*); and
- (9) that the Plaintiffs' knowledge of the Bonded Plat Cash Bond issue constituted knowledge of the various unlawful, fraudulent and deceptive acts of the Defendants (See Section I *infra*).

All of the various issues raised in the Plaintiffs' Rule 59(e) motion were briefed to the Court in the Plaintiffs' Prior Briefs with the exception of the Equal Protection argument which is set forth in Section XIV *infra*. Additionally, the Plaintiffs raise two obvious errors contained in footnote 4 on page 3 of the

Order in Section I *infra* with respect to the Defendants' submission of documents to the Court, and an improper taking of "judicial notice." Both of these errors could be raised through a motion under Rule 60 of the SCRCP, but the Plaintiffs have elected to address them first in the context of the Plaintiffs' Rule 59(e) Motion.

The Plaintiffs hereby incorporate the Plaintiffs Prior Briefs, and the arguments contained therein, by reference. In the interest of judicial efficiency, however, the Plaintiffs have restated herein most of the primary legal authorities previously cited in the Plaintiffs' Prior Briefs. Where appropriate, specific page references to the Plaintiffs' Prior Briefs are provided.

The Defendants Opposition Memo characterizes the Defendants' unlawful and fraudulent violations of Title 40, Chapter 57, and their fraudulent and deceptive violations of the rules of the Consolidated Multiple Listing Service (the "CMLS") as "hyper-technical" violations. This statement supports one of the main theories of the Plaintiffs' case – the Defendants view compliance with the statutory mandates and fiduciary standards of Title 40, Chapter 57 (designed to protect clients of licensed real estate professionals), and the rules of the CMLS (designed to assure cooperation and fair competition among thousands of competing real estate professionals) as "hyper-technical" burdens they are unwilling to carry.

FACTUAL BACKGROUND

In light of the Order's mischaracterizations of the alleged facts of this case and their ' continued mischaracterization in Defendants Opposition Memo, the following facts, all specifically alleged in the Complaint, need clarification. This case arises from the unlawful, fraudulent and deceptive acts of self-dealing by the Defendants related to the development, marketing and sale of various properties in the Panorama Point subdivision on Lake Murray in Lexington County (hereinafter the "Properties") previously owned by the Plaintiffs. As specifically alleged in the Complaint, on January 10, 2017, after the payment of all of the alleged unlawful compensation for which disgorgement is sought in the Complaint, and at the specific request of SVR (**Complaint at 145**), the Plaintiffs "relisted" their remaining 3 parcels of the Properties with a new licensed real estate agent, (**Complaint at 145**).

The new real estate agent, acting in her fiduciary capacity, provided the Plaintiffs with the statutorily mandated “Agency Disclosure”, and requested the Plaintiffs to execute the various written listing agreements and other forms legally required under (i) the provisions of Title 40, Chapter 57, and (ii) the express and unambiguous rules of the CMLS. **(Complaint at 156-158)**. Neither of the Plaintiffs were a member of the CMLS, having no access to the CMLS rules, or website nor database prior to January 10, 2017. Despite being statutory mandated, January 10, 2017, is the first time Plaintiffs had ever been provided these documents and asked to execute any listing agreements.

Immediately after January 10, 2017, the Plaintiffs began performing both factual and legal due diligence as to why such written disclosures and related documentation had not been previously presented by the Defendants, in their fiduciary capacities, during the period from 2006 until January 10, 2017. As part of their factual due diligence, and as a result of the discovery of previously unknown homeowner complaints in early 2017, the Plaintiffs requested copies of all documents of the Defendants relative to their conduct related to the Properties, and immediate disclosure of all previously undisclosed acts related to the Properties. **(Complaint at 277)**. On or around May 18, 2017, the Defendants retained Rex Casterline of Blair Cato Pickren Casterline, LLC (“Blair Cato”) to handle that request for documents and legally mandated disclosures. **(Complaint at 284-286)**. The written correspondence between the Plaintiffs and Mr. Casterline reveals that the Defendants and Mr. Casterline intentionally delayed the production of the requested documents for over 15 months until August 28, 2018. **(Complaint at 277-317)**. On August 27, 2018, in response to a specific written request for any and all listing agreements under Section 40-57-135, Mr. Casterline stated that the Defendants were unable to locate copies of any listing agreements prior to January 1, 2017. **(Complaint at 319, 362)**. On November 21, 2019, a mere **42 days before the Plaintiffs filed the Complaint**, the Defendants’ current attorney, Mr. Eric Bland, voluntarily produced 2 “examples” of fraudulent listing agreements (the “Fraudulent Documents”), previously submitted to the Court as Exhibit 3 to the Plaintiffs’ Third Brief at page 3, **thereby irrefutably proving that Mr. Casterline’s August 27, 2018 written statement to the Plaintiffs was false**. Despite a written request to Mr. Bland dated July 13, 2020, for the balance of the fraudulent documents, no further

production of fraudulent listing agreements has been made. At pages 15-16 of the Plaintiffs' Third Brief, the Plaintiffs explained to the Court the reasons that the Plaintiffs are certain that additional fraudulent documents do, in fact, exist, and are still in the possession of the Defendants.

The Plaintiffs specifically allege in the Complaint that the primary purpose of the illegal, fraudulent and deceptive scheme employed by the Defendants was **to hide premium real estate listings from thousands of competing real estate professionals, thereby failing to expose the Plaintiffs' properties to the full real estate market** in order to increase the total percentage of commissions paid to the Defendants. (Complaint at 86, 106, 130, 135-141, 222, 359, 409-411, 452-454, 464-465). These illegal, fraudulent and deceptive acts of self-dealing by the Defendants in their fiduciary roles caused the Plaintiffs to **pay statutorily prohibited compensation**, and further damaged the Plaintiffs by generating **below fair market value sales prices**, **increased interest expenses** due to a delay in sales resulting from the inadequate exposure to the full real estate market, **increased accounting and legal fees** due to the delay in sales, and other proximate damages. (Complaint at 390, 400, 411, 417, 444, 472, 473).

Contrary to the Defendants' assertions on page 1 of their Opposition Memo, and the Court's statement at page 18, footnote 6 of the Order, the Defendants did not create a \$6 Million Dollar benefit for the Plaintiffs. To the contrary, the Plaintiffs' family had owned the subject property for at least 56 years, and it was some of the most desirable, undeveloped property on Lake Murray. **It was the Plaintiffs who gave the Defendants the valuable opportunity to legally and ethically earn compensation** by assisting in the development of, and subsequent marketing and sales of this extremely valuable and unique property. (Complaint at 54-58). The Defendants then abused the opportunity given them by the Plaintiffs by knowingly and willfully engaging in unlawful, fraudulent and deceptive acts of self-dealing. As previously briefed to the Court, the Plaintiffs paid licensed professionals and contractors, other than the Defendants, over \$1,000,000 for the actual work on the development (i.e. surveying, engineering, road construction, landscaping, etc.). The Defendants attempt to take credit for the work of others, and to take credit for the existing, intrinsic value of the Plaintiffs' property to divert the Court's attention from their knowing and willful acts of self-dealing, and their acts of unfair and deceptive competition.

The Defendants and the Order are correct that the total gross sales were in excess of \$6,000,000.00. The Plaintiffs urge the Court to consider how high that number would have been had the Defendants complied with the provisions of Title 40, Chapter 57, and complied with the rules of the CMLS, **thereby marketing the property to the full real estate market** (i.e. the thousands of competing members of the CMLS, their clients and customers) **instead of effectively limiting their marketing efforts to potential purchasers who could be represented by SVR**. The motivation for the Defendants' conduct is obvious – follow the money. The Defendants wanted 100% of the commissions on each sale, not just 50%. **(Complaint at 86, 464-465).**

The only “windfall” ever sought in this case was the one actually obtained by the Defendants through unlawful, fraudulent and deceptive conduct. The Plaintiffs are prepared to prove their case at trial, and will prove conclusively their UTPA action, and the negative impact on thousands of competing real estate professionals, based on the knowing and willful violations of the rules of the CMLS. As set forth below and in the Plaintiffs' Prior Briefs, **the Plaintiffs have plead their case with specificity and for purposes of Rule 12, the averments of the Complaint must be taken as true.**

STANDARD OF REVIEW

The decision to grant a Rule 12(b)(6) motion to dismiss **must be based solely upon the allegations set forth in the complaint.** Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (S.C. 2019); See also Clearwater Trust v. Bunting, 367 S.C. 340, 626 S.E.2d 334 (S.C. 2006); Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869 (S.C. 2006). “[A]ll well-pled allegations are considered true.” Delaney v. First Fin. Of Charleston, Inc., 426 S.C. 607, 611, 829 S.E.2d 249 (S.C. 2019). A motion to dismiss pursuant to Rule 12(b)(6) “is not a vehicle for addressing the underlying merits of the claim.” Skydive at 180. The Supreme Court in Skydive went further by citing Republican Party of N. Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) for the rule that “[a] motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses”(emphasis added). Id. at 180. “At the Rule 12 stage, therefore, the first decision for the trial court is to decide only whether the pleading states a claim”

Id. The question to be considered is whether **in the light most favorable to the plaintiff, and with every doubt resolved in his behalf**, the complaint states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (S.C. 1987).

ARGUMENTS

I. The Court Failed to Take the Allegations of the Complaint as True That All of the Facts and Circumstances of those Unlawful, Fraudulent and Deceptive Acts Were Discovered at the Earliest on January 10, 2017.

The Order is incorrect in stating on page 5 that the Plaintiffs’ “actual knowledge” of certain “acts of negligence, incompetence and breach of duties as early as 2013” relating to a single act by Wilkins and RPW involving the misappropriation of a \$6500 refund due to a lack of diligence triggers all statutes of limitations with respect to all other unlawful, fraudulent and deceptive acts and breaches of fiduciary duty by all Defendants. Under well settled South Carolina law, each separate unlawful, fraudulent or deceptive act of each separate Defendant has its own separate statute of limitations. State v. Ortho-McNeil-Janssen Pharms, Inc., 414 S.C. 33, [REDACTED], 777 S.E.2d 176 (S.C. 2015)(discussing the “inequities that would arise if the expiration of the statute of limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct.”).

In the present case, each of the three Defendants committed multiple separate and distinct breaches of fiduciary duty and illegal acts. For example, RPW engaging in unlicensed “real estate brokerage” under Sections 40-57-20 and 30(3), and thereby collecting unlawful and prohibited development fees, is completely different and distinct from SVR violating the dual agency provisions of Section 40-57-137(M)(1) in a majority of the different transactions; both of which are different and distinct from SVR and Wilkins violating section 39-5-20(a) by utilizing illegal “pocket listings” in violation of CMLS Rule 1(b) to hide premium listings from thousands of competing CMLS members in order to represent both sides of the transaction. Each separate incident of a fiduciary breach and/or unlawful act committed by each separate Defendant has its own distinct statute of limitations – assuming that the Defendants are not equitably barred by the doctrines of equitable estoppel (fraudulent concealment, illegality, “unclean hands”, etc) from asserting the various statutes of limitations as defenses. State v. Ortho at --.

The allegations regarding the \$6500 refund episode were made solely to support the Plaintiffs' UTPA claim as specifically stated in the Complaint. (Complaint at 469). This incident clearly shows Mr. Wilkins' lack of attention to ethical standards, thereby supporting the Plaintiffs' allegation that there is a "probability of repetition" of the unlawful acts which form the actual basis of the UTPA claim. (Complaint at 469). Mr. Wilkins' involvement in the Spence v. Spence case (Complaint at 356-357) was pleaded for the same reason. (Complaint at 469). The proof of the Plaintiffs' purpose in alleging this incident is self-evident from paragraph 344 of the Complaint which expressly acknowledges that the \$6500 was refunded on request thereby causing no material damage, and that particular breach by Mr. Wilkins had been adequately remedied.

The Order is also in error in that it considered documents outside of the Complaint in violation of the clear and unambiguous standard of review established in Skydive. The first sentence of footnote 4 on page 3 of the Order states "[a]s the closings and Deeds were integral to the Complaint, **the Court accepted for review copies of the Contracts of Sale, Deeds and HUD-1 statements** which reflected that Plaintiff Porth executed the contracting and closing documents on behalf of Plaintiff Panorama Point, LLC"(emphasis added). **At no time were the Plaintiffs or their attorneys made aware of this submission of documents to the Court, nor were they given an opportunity to address such documents.**

The review of such evidentiary documents in order to make a ruling on an adjudicative fact when reviewing a pre-answer motion to dismiss under Rule 12(b)(6) is improper, since the allegations of the Plaintiffs' Complaint must be taken as true. In considering a motion to dismiss pursuant to Rule 12(b)(6), the court **must base its ruling solely upon the allegations set forth on the face of the complaint.** Skydive at 180. A motion to dismiss pursuant to Rule 12(b)(6) "is not a vehicle for addressing the underlying merits of the claim." Id.

Furthermore, the Order fails to take the allegations of the Complaint as true in that it improperly takes "judicial notice" of unspecified "public records" in violation of the requirements of Skydive, and Rule 201 of the South Carolina Rules of Evidence. The second sentence of footnote 4 states "[a]dditionally, the

Court believes it proper to take judicial notice of the public record which would reflect Plaintiff Porth's knowledge and participation in the sales and marketing with associated listing prices which are the subject of this action." This sentence reflects an improper use of Rule 201, and the Plaintiffs hereby request an opportunity to be heard pursuant to the requirements of SCROE Rule 201(e). The Plaintiffs did not receive prior notice of the Court's intention to utilize SCROE Rule 201 to take judicial notice of any adjudicative facts in reviewing the Defendants' Motions to Dismiss.

The Plaintiffs must challenge the Order's assertion that a "public record which would reflect Plaintiff Porth's knowledge and participation in the sales and marketing with associated listing prices" actually exists. **It does not exist!** Furthermore, the Order failed to identify (i) the identity of the public records being judicially noticed, (ii) the specific facts to be noticed from those records, (iii) the basis of the Court's determination that the public records meet the applicable standards for judicial notice as set forth in prior decisions such as State v. Odom, 412 S.C. 253, 265-266, 772 S.E.2d 149 (S.C. 2015) and Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610 (S.C.Ct.App. 2002); and (iv) how those judicially noticed facts prove the dates of the Plaintiffs' discovery of the facts and circumstances of the various instances of unlawful, fraudulent and anticompetitive conduct by each of the Defendants which constitute the basis of the Plaintiffs' various causes of action.

The only "public records" in existence which contain any information whatsoever relative to the transactions involved in this lawsuit are those compiled in the Lexington County Register of Deeds office. Those records contain no documents whatsoever regarding "Plaintiff Porth's knowledge and participation in the ... **marketing with associated listing prices**" (emphasis added). The records, at most, reflect Mr. Porth's signature on deeds, which fact has never been denied, and in no way proves discovery of the Defendants' various unlawful, fraudulent and deceptive conduct under Title 40, Chapter 57 and the rules of the CMLS.

The "entry page" to the Lexington County Register of Deeds online database contains a disclaimer which unequivocally states "Lexington County makes no warranty, representation or guaranty as to the content, sequence, accuracy, timeliness or completeness of any of the database information provided herein.

The reader should not rely on the data provided herein for any reason” (emphasis added). A copy of the “entry page” printed from the Lexington County website is attached as **Exhibit 1**. This disclaimer irrefutably makes the Lexington County Register of Deeds database an inappropriate source of facts for the purpose of taking judicial notice under SCROE Rule 201 since the database is not, by its own admission, a readily accessible source “of indisputable accuracy” as required by well settled South Carolina law. State v. Odom *supra* at 265-266; In re Harry C., 280 S.C. 308, 309-310, 313 S.E.2d 287, 288 (S.C. 1984).

The reason for the Lexington County Register of Deeds’ express disclaimer is illustrated by the Supreme Court’s decision in Spence v. Spence, *supra*, where the Court openly discussed the “slip sheeting” of two previously signed deeds to change the property description prior to filing with the Lexington County Register of Deeds. The individual who “slip sheeted” the deeds involved in Spence v. Spence was Mr. Robert P. Wilkins, Jr., a licensed attorney and licensed real estate agent, and one of the current defendants in this case. Spence at 114-115. As discussed above, the Spence case, and Mr. Wilkins’ prior fraudulent act of “slip sheeting” the deeds prior to recording, was specifically alleged in the Complaint as a factual allegation supporting the probability of repetition of the conduct of the Defendants which forms the basis of the Plaintiffs’ UTPA claim. (**Complaint at 355-356, 469**). The Complaint specifically alleges the discovery of the Spence case in 2017 as part of the Plaintiffs’ immediate due diligence after the discovery of the unlawful, fraudulent and deceptive conduct of the Defendants on January 10, 2017. (**Complaint at 356**).

On page 6 of the Defendants Opposition Memo, incorrectly set forth the law applicable in this case, by citing the 1985 Supreme Court case of United Farm Agency v. Malanuk, 284 S.C. 382, 325 S.E.2d 544 (S.C. 1985) for the proposition that “South Carolina common law has long held that [a] real estate broker need not have a written commission agreement to be entitled to compensation.” The Defendants failed to inform the Court, however, that this case was decided on January 30, 1985, almost 13 years prior to the original effective date of Section 40-57-135(C)(4) and (D)(4) on January 1, 1998.¹ The United Farm

¹ The Plaintiffs note that the citation for this case is the only citation in the Defendants’ Opposition Memo for which the date of the decision was omitted from the citation.

Agency decision **was expressly and unambiguously preempted** by the enactment of Sections 40-57-135(C)(4) and (D)(4), and **is no longer valid law** in South Carolina.

As previously briefed to this court by the Plaintiffs at pages 23-25 of the Plaintiffs' Third Brief, the provisions of Title 40, Chapter 57 expressly and unambiguously preempted all such inconsistent prior common law. Williams v. Gov't Emps. Ins. Co., 409 S.C. 586, 762 S.E.2d 705 (S.C. 2014)(In construing an insurance statute the Supreme Court stated that "The General Assembly is presumed to know the law, so in our view, the enactment of section 38-77-142 could be perceived as a response to these earlier decisions."); Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (S.C. 2012)("we presume the General Assembly is aware of the common law when enacting subsequent legislation.").

On page 6 of their Opposition Memo, the Defendants argue that nothing in Title 40, Chapter 57 suggests that a licensed real estate professional who markets and sells a piece of real estate without a legally compliant "listing agreement" with the seller "is not entitled to a commission." The statutory language of Sections 40-57-135, 137 and 139 **specifically and unequivocally prohibits** a licensed real estate professional from any and all activity related to the transaction, which would include collecting a prohibited commission as payment for expressly prohibited actions, if a failure to obtain a legally compliant listing agreement.

Section 40-57-135(C)(4) specifically states that absent a legally compliant listing agreement, the Defendants "**may not advertise, market or offer to conduct a real estate transaction**" (emphasis added). Section 40-57-137(A) clearly and unambiguously states that the only "**permissible agency relationships a licensee may establish are**" seller agency, buyer agency, dual agency and subagency. Additionally, Section 40-57-139 expressly and unambiguously states that "**before** ratification of the real property sales agreement, **the real estate licensee must represent either the buyer or seller in an agency capacity in order to be in compliance with this chapter**" (emphasis added).

These statutory provisions first enacted by the Legislature in 1997 made it clear in multiple, coordinated statutory provisions that licensees "**may not**" participate in a real estate transactions in any way without written agency agreements meeting the specific enumerated statutory requirements. The

Defendants' argument would completely eliminate the word "not" from Section 40-57-135(C)(4) in violation of well settled rules of statutory construction in South Carolina.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (S.C. 2000). All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. SCDOT v. First Carolina Corp., 369 S.C. 150, 154, 631 S.E.2d 533 (S.C. 2006). Whenever possible, legislative intent should be found in the plain language of the statute itself. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777 (S.C. 1997); Peake v. Dept. of Motor, 375 S.C. 589, 654 S.E.2d 284 (S.C.Ct.App. 2007). **"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.** Therefore, the courts are bound to give effect to the expressed intent of the legislature" (emphasis added). Hodges at 85. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and **the court has no right to impose another meaning**" (emphasis added). Id.

"Once the legislature has made [a] choice, there is not room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App. 1989). **"Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning"** (emphasis added). Jennings v. Jennings, 401 S.C. 1, 4, 736 S.E.2d 242 (S.C. 2012). The courts must construe a statute so **"that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous"** (emphasis added). In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462 (S.C. 1995); 16 Jade Street, LLC v. R. Design Construction Co., 398 S.C. 338, 343, 728 S.E.2d 448 (S.C. 2012). Acceptance of the Defendants' arguments with respect to the effects of Section 40-57-135(C)(4) would strike the words "may not" from the statute, and "render the section useless, and the General Assembly is presumed not to perform useless acts." Williams v. Gov't Emps. Ins. Co. at page 604. See Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (S.C. 2002)("The Court must

presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something (citing TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (S.C. 1998).

On page 6 of the Defendants' Opposition Memo, the Defendants argue that "the same statute upon which the Plaintiffs attempt to rely recognizes multiple alternative relationships between realtors and sellers other than a strict written "listing agreement." **This assertion is completely without validity as applied to the facts of this case.**

First, the marketing of real estate, and the provision of advice to a seller as to listing prices, etc. is irrefutably "client" level service under Sections 40-57-30(5),(7) and 40-57-137(O)(1), and absolutely requires a written listing agreement meeting the requirements of Section 40-57-135(C)(4) and (D)(4). Second, "transactional" brokerage was not legal in South Carolina until January 1, 2017 as specifically set forth in effective date provisions of Section 40-57-350(L)(1), and after the closings of all transactions which form the basis of this action.

The Defendants argue on page 2 of their Opposition Memo that the violations alleged in the Complaint "caused no actual damage to the Plaintiffs." On page 3 of their Opposition Memo, the Defendants argue that "the Complaint does not plead any actual harm" arising from the alleged violations. This new and false assertion ignores the specific damage allegations of the Complaint including, but not limited to, the payment of statutorily prohibited commissions and fees, but also reduced sales prices, increased interest costs, increased legal and accounting fees, and other damages. (**Complaint at 139-141, 222, 328-330, 387-390, 397-400, 417, 444-445, 466-467, 471-473**). This new and false assertion directly contradicts the Defendants' prior admission at pages 5-6, 11 of the Defendants' November 16 Memo that the Plaintiffs did, in fact, allege such damages, and the Defendants' November 16 Memo even cites the specific Complaint paragraphs where such allegations are made. For purposes of a pre-answer Rule 12(b)(6) motion to dismiss, these allegations of damages must also be taken as true.

The Defendants have argued, and the Order holds that the reflection of the amount of the real estate commissions and development fees on the various HUD-1 forms constituted "knowledge" and "discovery" of the Defendants' unlawful, fraudulent and deceptive conduct as a fiduciary. The fallacy of this **improper**

negative inference against the Plaintiffs is easily demonstrated. Under the Defendants' theory, if a purchaser of real estate hires a licensed attorney to handle the closing of the real estate purchase, the payment of the attorney's fee at closing, as reflected on the HUD-1, would constitute knowledge and discovery of any malpractice which may have been committed by the attorney and hidden from the real estate purchaser. The logic of this improper assertion was specifically rejected by the South Carolina Supreme Court in True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997), which addressed the application of the "discovery rule" in the context of a fiduciary relationship with a licensed professional.

The Supreme Court in True v. Monteith allowed a legal malpractice action filed in 1993 to proceed **although filed 20 years after the conduct** which occurred in 1973. The Court ruled that the plaintiff properly brought the action within 3 years of the "discovery" of the cause of action even though the "injury" was apparent for at least 20 years. The defendant attorney had failed to disclose conflicts of interest in accordance with applicable professional standards, and therefore the plaintiff had no way of discovering that the injury, the lack of a cost of living clause in a lease agreement, was an actionable injury. The date of payment of the attorney's legal fee was not relevant to the date of discovery of the attorney's improper conduct.

The Supreme Court clarified that "[t]he 'exercise of reasonable diligence' means the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist" (citing Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (S.C. 1996)). The court further stated that "knowledge of an injury alone does not, *a fortiori*, give rise to a suspicion of any impropriety by her attorney." True at 120. "Although petitioner knew of the lack of the cost of living clause in the lease, this knowledge alone is insufficient to put petitioner on notice to investigate the possible malfeasance of her attorney." Id. "[A]bsent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest." Id.

The Defendants argue on page 2 of their Opposition Memo that the Plaintiffs "expressly approved" the commissions and fees by signing the various HUD-1 statements. Any "approval" of the commissions

on the HUD-1 statements without the Defendants making the statutorily mandated disclosures and obtaining the written agency agreements, required by Title 40, Chapter 57, **is not legally binding “approval”**; it is “approval” **induced by fraud** under well settled South Carolina law as discussed in Section III *infra*.

The Defendants cite three cases at page 8 of their Opposition Brief to support their argument that Plaintiffs had been put on sufficient notice to require they investigate the actions of the Defendants. The three cases cited by the Defendants are not factually analogous **in any respect whatsoever**. See Burgess v. American Cancer Society, 300 S.C. 182, 185, 386 S.E.2d 798, 799-800 (S.C.Ct.App. 1989) (plaintiff had actual knowledge of attorney’s affair with the opposing party and should have investigated); Snell v. Columbia Gun Exchange, 276 S.C. 301, 278 S.E.2d 333 (S.C. 1981)(plaintiff had actual knowledge of unexplained gun malfunction and should have investigated); Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (S.C.Ct.App. 1997)(plaintiffs had actual knowledge of sexual harassment and sexual abuse and should have investigated their claims).

The Order dismissing the Plaintiffs’ causes of action on the basis of any statute of limitations is in error in that it fails to identify “the facts and circumstances of an injury” which would “place a reasonable person of common knowledge and experience on notice that a claim against another party might exist” prior to January 10, 2017. Nowhere in the Order does it assert that the Plaintiffs had knowledge of any facts or circumstances which would indicate that the Defendants had reason to suspect that the Defendants, as fiduciaries, were in violation of Title 40, Chapter 57, or were in violation of the rules of the CMLS to which the Plaintiffs had no access. The Order effectively holds that the Plaintiffs had an affirmative duty to assume, for no apparent reason, that the Defendants, while acting in their fiduciary capacities as licensed real estate professionals and as a licensed attorney, had violated (i) the provisions of Title 40, Chapter 57, (ii) the rules of the CMLS, (iii) the SCRPC applicable to Defendant Wilkins, (iv) the Defendants’ own Policy Manual, and (vii) the Blatt Final Order. This holding is in direct contradiction of well settled South Carolina law.

II. **Plaintiffs Are Not Charged with Knowledge of Laws Uniquely and Solely Applying to Real Estate Professionals and Their Respective Resulting Fiduciary Duties**

The Order on page 9 states that “[the Plaintiffs argue that they should not be expected to have knowledge of law applicable to real estate professionals **as if this law were locked behind some secret vault**” (emphasis added). This statement by the Court is improper in many respects.

The Order on page 9 cites American Legion v. Horry County 577, 381 S.C. 576, 674 S.E.2d 181 (S.C.Ct.App. 2009) for the proposition that “citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests.” As specifically alleged at Complaint paragraphs 54-58, **the Plaintiffs exercised reasonable care to protect their interests by attempting to legally retain the Defendants who were licensed real estate professionals and a licensed attorney acting in a fiduciary relationship under both statutory and common law. By so doing, the Plaintiffs met the general requirement of South Carolina law to exercise reasonable care to protect their interests.**

The current case involves professional, fiduciary relationships not present in American Legion, and as such, that case is both factually and legally distinguishable. In American Legion, the court was not interpreting a “discovery” statute of limitations, and was instead applying a statutorily mandated statute of limitations applicable to certain enumerated tax issues. See Code Section 12-54-85(F)(1). Also in American Legion, it is undisputed that the plaintiff had actual knowledge of the asserted claim on the day the alleged wrong first occurred. The issue in American Legion was the legality of an admissions tax, and the plaintiff paid its first tax payment “under protest” thereby proving its actual knowledge of the law and its potential claim on that day. While the court’s statement in American Legion that people are generally charged with knowledge of the laws which apply to them and their endeavors is generally true, this argument has no application to the facts of this case since Title 40, Chapter 57 **applied only to the Defendants’ conduct** as licensed real estate professionals and fiduciaries, and **did not apply in any respect to the Plaintiffs’ conduct.**

Even in the absence of a fiduciary duty such as that owed to the Plaintiffs by the Defendants, “[a] person is not bound to anticipate negligent acts or omissions on the part of others, but in the absence of anything which gives notice to the contrary, he is entitled to assume and to act upon the assumption that

every other person will perform his duty and obey the law...” Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (N.C. 1951).

The Order fails to address the Plaintiffs’ argument set forth on pages 7-8 of the Plaintiffs’ First Brief that the reliance on common law theories to charge the Plaintiffs with knowledge of the laws applicable to real estate professionals is expressly preempted by Section 40-57-137(Q) which states that all common law which conflicts with the relevant statutory provisions is preempted. In enacting Section 40-57-139, the South Carolina legislature was unambiguous in stating that it is illegal for a licensed real estate professional to market or to participate in the sale of property owned by someone else without providing an approved “Agency Disclosure” prior to representing them in any capacity. The clear and unambiguous intent of the legislature in enacting Sections 40-57-137(Q) and 40-57-139 is that potential clients of licensed real estate professionals, even if they are licensed attorneys, are **NOT** charged with knowledge of the law. The statute imposes an unambiguous requirement that **a licensed real estate professional must disclose the applicable law** to the potential client through the prescribed agency disclosure form, and then obtain a legally compliant written agency agreement.

In Holy Loch Distributors, Inc. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (S.C.Ct.App. 1998), the South Carolina Court of Appeals addressed an analogous factual scenario dealing with a claim of legal malpractice. The plaintiffs in Holy Loch had retained the defendant law firm to obtain all of the appropriate visas, licenses and permits to enable the plaintiffs’ business to legally sell imported beer in South Carolina. The plaintiffs were found to be in violation of federal laws governing the sale of imported beer despite having retained the defendants to handle compliance with all applicable laws. As here, the trial court dismissed the plaintiffs complaint under Rule 12(b)(6) as barred by the statute of limitations. The Court of Appeals reversed the lower court holding that it had not correctly applied the statute of limitations. The Court relied on a finding that the “discovery” statute of limitations began to run on the date that federal ATF officers informed the plaintiffs that they were operating in violation of federal law. On that date, the business had been operating for over 2 years in violation of federal law due to the malpractice of the defendant law firm. Despite the federal law being clearly applicable to the business of the plaintiffs for

over 2 years, **the plaintiffs were not charged with knowledge of the federal law which clearly applied to their business** until actually being put on notice by the ATF agents. Id. at 254. Under South Carolina law, the Plaintiffs are not charged with knowledge of the provisions of Title 40, Chapter 57, and the rules of the CMLS until January 10, 2017 when they were first put on notice of those requirements. The Plaintiff's UTPA claim is based solely on those same violations, therefore the 3 year discovery statute of limitations under Section 39-5-150 did not start until January 10, 2017.

III. Fraudulent Conduct by the Defendants Equitably Barring any Statute of Limitations Defense Must Be Taken as True for Rule 12 Purposes

The Order is incorrect in that it **fails to address in any manner whatsoever**, the specific allegations of the Complaint, and the well briefed arguments of the Plaintiffs in the Plaintiffs' First Brief at pages 11-13 and the Plaintiffs' Third Brief at pages 14-21 with respect to prior and continuing acts of fraud and fraudulent concealment by the Defendants in their fiduciary roles. The Defendants' fraudulent conduct equitably bar them from asserting any statute of limitations defense under South Carolina law. **In the Plaintiffs' Third Brief at pages 3, 15-16, 18-21, 33-35, the Plaintiffs informed the Court of, and discussed in great detail, the creation of, and active, ongoing concealment of the Fraudulent Documents by the Defendants and certain of their attorneys.**

"A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." Holy Loch at 254, Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, (S.C. 2000); Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, (S.C. 1997). In the present case, the Defendants' fraudulent silence as to the legal requirements of Title 40, Chapter 57, and the requirements of the rules of the CMLS were the **sole and direct cause of the delay in the Plaintiffs' discovery of their unlawful conduct which occurred on January 10, 2017.**

Additionally, "[d]eliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations." Doe v. Bishop of Charleston, 754 S.E.2d 494, 500 (S.C. 2014)(citing Strong v. Univ. of S.C. Sch. Of Med., 316 S.C. 189, 447 S.E.2d 850,

852 (S.C. 1994). In the present case, the Plaintiffs immediately began all appropriate factual and legal due diligence, and requested for a copy of all documents and other disclosures from the Defendants. **(Complaint at 277-317)**. With the assistance of their attorney Rex Casterline, the Defendants delayed answering that request for over 15 months, and did not fully respond to the various requests from the Plaintiffs. **(Complaint at 277-317)**.

As previously briefed to the Court on two occasions, “[p]arties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, **silence may constitute fraud.**”(emphasis added). Ellie v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (S.C.Ct.App. 2004); Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (S.C.Ct.App. 1995). “Nondisclosure is fraudulent **when there is a duty to speak**” (emphasis added) Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (S.C.Ct.App. 1993). “Non-disclosure becomes fraudulent concealment only **when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction**” (emphasis added). Lawson v. Citizens S. Natl. Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (S.C. 1972). Not only did Section 40-57-137(A) establish a general, statutory fiduciary duty of disclosure, Sections 40-57-135, 137 and 139 created multiple, clear and unambiguous statutory “duties to speak.” Failure to do so constituted fraud under the well settled law of South Carolina.

As previously argued to the Court at pages 14-17 of the Plaintiffs’ Third Brief, it is well settled in South Carolina that **“the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation”**(emphasis added). Reid v. Harbison Development Corp., 285 S.C. 557, 560, 330 S.E.2d 532 (S.C.Ct.App. 1985), *aff’d in part and remanded* 289 S.C. 319, 345 S.E.2d 492 (S.C. 1986) citing the *Restatement (Second) of Torts* Section 540 (1979). In Epstein v. Howell, 308 S.C. 528, 531, 419 S.E.2d 379 (S.C.Ct.App. 1992), the court cited the “often-cited case” of Halsell v. First National Bank, 48 Okla. 535, 150 P. 489 (1915), for the proposition that **one in a fiduciary position cannot “practice fraud” and then successfully defend on the ground that the victim of the fraud is “charged with knowledge” of the misrepresented facts.** For example “[t]he person committing the fraud cannot defeat a claim for

misrepresentation simply because the person defrauded is charged with notice under a recording statute (internal citations omitted), particularly where the misrepresented facts are peculiarly within the representor's knowledge"(emphasis added). *Id.* at 561; Slack v. James, 356 S.C. 479, 589 S.E.2d 772 (S.C.Ct.App. 2003) (affirming reliance on a false representation of a real estate agent).

Prior to January 10, 2017, well settled South Carolina law imposed no duty on the Plaintiffs to investigate the conduct of the various Defendants with respect to the fraudulent, unlawful and deceptive conduct addressed in the Plaintiffs' various causes of action.

The Order fails to address in any respect whatsoever that on November 21, 2019, a mere 42 days prior to the Plaintiffs' Complaint being filed, the Defendants' attorneys for the first time provided copies of 2 "samples" of fraudulent listing agreements, attached hereto as Exhibit 2. These Fraudulent Documents have been affirmatively and purposefully concealed from the Plaintiffs by the Defendants and certain of their attorneys since at least November 11, 2012 when the earliest of the two documents was created. As specifically alleged by the Plaintiffs, the Defendants' attorney Rex Casterline made a written representation to the Plaintiffs on August 27, 2018, in direct response to a specific request for any and all listing agreements, that the Defendants could not locate copies of any listing agreements prior to January 1, 2017. **(Complaint at 319, 362).** The production of the Fraudulent Documents by Mr. Bland on November 21, 2019 proves irrefutably that Mr. Casterline's written representation to the Plaintiffs was false, and therefore fraudulent given the fiduciary duty owed to the Plaintiffs by his clients.

As specifically argued to the Court in the Plaintiffs' Third Brief at pages 15-16, the Plaintiffs are informed and believe that the Fraudulent Documents, and other similar fraudulent documents were created by the Defendants to "paper the files" to survive any compliance audits by the CMLS after the entry of the Blatt Final Order described in the Plaintiffs' Third Brief. Under the Blatt Final Order, the United States Department of Justice retained monitoring powers for a period of 10 years to ensure compliance with the terms of the Blatt Final Order.

IV. Unlawful Conduct by the Defendants Equitably Bars the Assertion of any Statute of Limitations

The impact of the unlawful nature of the Defendants' conduct was argued to the Court at Plaintiffs' First Brief at pages 9-11, and Plaintiffs' Third Brief at pages 16-17. The statute of limitations is an affirmative defense which is subject to the equitable doctrines of estoppel and equitable tolling, and the defense is not an automatic bar to claims. Vicary v. Town of Awendaw, 427 S.C. 48, 56, 828 S.E.2d 229 (S.C.Ct.App. 2019). In Vicary, the Court of Appeals estopped the defendant from asserting the statute of limitations since the defendant had "unclean hands," and the defendant had "engaged in intentionally deceitful conduct." Id. at 56. The illegal nature of the defendants' actions, and the defendants' failure to comply with applicable notice laws constituted grounds for estopping the defendant from asserting a statute of limitations defense. Id. The passage of time cannot transform an invalid or unlawful act into a valid or lawful act. Id.

The law in South Carolina is well settled and long standing that the courts will not assist parties who have acted unlawfully or in contravention of statutory public policy as the Defendants did in the present case. White v. Bank, 66 S.C. 491, 503-4, 45 S.E. 94, (S.C. 1903). "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for the performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Brown Amusement Company, Inc., 360 S.C. 366, 601 S.E.2nd 342 (S.C. 2004). "An illegal contract has always been unenforceable." Berkebile v. Outen, 311 S.C. 50, 426 S.E.2nd 760 (S.C. 1993). Contracts violating public policy as expressed in constitutional provisions, statutes, or judicial decisions are void. Batchelor v. American Health Ins. Co., 234 S.C. 103, 107 S.E.2nd 36 (S.C. 1959). A "Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2nd 516 (S.C. 2010). To do so would "violate statutory law, and in turn, public policy." Id. Illegal contracts are void and unenforceable. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2^d 863 (Ct.App. 2002). The rule of issue preservation on appeal is "not without exception, and we can set aside our preservation rules to find a

contract illegal because we will not lend our assistance to carry out the terms of a contract that violates statutory law or public policy.” Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2nd 282 (S.C. 2012). “Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal.” Brabham v. Miller Electric, 237 S.C. 540, 118 S.E.2nd 167 (S.C. 1961).

The U.S. Supreme Court commented on this universal rule against assisting unlawful activity over 120 years ago. “The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.” McMullen v. Hoffman, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899).

V. Plaintiffs’ Breach of Fiduciary Duty Claim Seeking Remedies of Disgorgement and Restitution Is Equitable In Nature and Not An Action at Law

The Order incorrectly held that the Plaintiffs’ breach of fiduciary duty claim seeking the disgorgement and return of all illegal real estate commissions and development fees is legal. An action seeking restitution and disgorgement of illegal commissions and fees is inherently equitable. Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010). In the Defendants’ original Motion to Dismiss on pages 2, 6-7, (at paragraphs 2, 55 and 59), **the Defendants expressly acknowledge** that the Plaintiffs’ various causes of action **seek “disgorgement” of the unlawful commissions and fees.**

In Verenes, the Supreme Court went so far as to specifically clarify that “[w]e now take this opportunity to stress that an action for breach of a fiduciary duty may sound in law or equity depending on the nature of the relief sought. Id. at 17, fn. 5. “Disgorgement is an equitable remedy,...” Id. at 18. The court looked to the body of the complaint for the “main purpose” of bringing the action. Id. In Gordon v. Drews, 358 S.C. 598, 604, 595 S.E.2d 864 (S.C.Ct.App. 2004) the Court held that an action to rescind an illegal contract was “recessionary in nature and is appropriately reviewed under the equitable standard of review.”

The Order, on page 14, cites Dereede v. Karp, 427 S.C. 336, 831 S.E.2d 435 (S.C.Ct.App. 2019) for the proposition that a breach of fiduciary duty claim may be legal or equitable. The Order, however, ignores the fact that the Court in Dereede expressly acknowledged that the plaintiffs in Verenes “**sought the classic equitable remedies of restitution and disgorgement**”(emphasis added). Dereede at 341. Furthermore, the court in Dereede expressly stated that “we look to the main purpose of the action” to determine whether the claim is equitable or legal. Id. at 340. As expressly acknowledged by the Defendants in their original Motion to Dismiss, the main purpose of the Plaintiffs’ breach of fiduciary duty claim and other claims addressing the unlawful nature of the commissions and fees is for “disgorgement” and “restitution.”

The Order on page 15 incorrectly relies on the United States Supreme Court’s decision in Great-West Life & Annuity v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002), in support of its holding that the Plaintiffs’ various claims seeking disgorgement and restitution are legal in nature. The holding in Great-West dealt with a claim for restitution of funds **which had never been in the possession of the defendant**, therefore the claim was legal in nature due to the fact that the plaintiffs sought to impose a liability on the defendants equal in amount to the funds actually **received by someone else**. The United States Supreme Court’s recent holding in Liu v. SEC, 140 S.Ct. 1936, 207 L.Ed.2d 401 (2020), however, specifically held that disgorgement is an appropriate equitable remedy for the violation of statutory law or public policy. See also Sentry Select Ins. Co. v. Maybank Law Firm, LLC, Civil Action No. 5:15-cv-04984-JMC (D.S.C. Sep. 5, 2020) (“**Generally, in South Carolina, ‘[d]isgorgement is an equitable remedy’ and has been tied to claims associated with unjust enrichment and breach of fiduciary duty.**” citing Verenes (emphasis added)); U.S. S.E.C. v. Staples, 55 F. Supp.3d 831, 838-39 n.8 (D.S.C. 2014)(“Disgorgement is an equitable remedy designed to prevent the unjust enrichment of the wrongdoer **and to deter others from violating laws**”(emphasis added)).

The **main purpose** of the Plaintiffs’ breach of fiduciary duty claim, and other related claims addressing the unlawful nature of the commissions and fees, set forth in the body of the Complaint is for the disgorgement and restitution of all illegal commissions and fees resulting from the Defendants unlawful

conduct under Title 40, Chapter 57. (**Complaint paragraphs 379, 388-90, 397-400, 405, 412-15, 417, 419-22, 425, 430-31, 444-48, and 471**).

VI. The Plaintiffs Had a Right to Reasonably Rely on the Defendants' Fiduciary Status and Obligations to Abide By Laws Uniquely Applicable Solely to Real Estate Professionals

The Order fails to address **in any respect whatsoever** the Plaintiffs specific allegations in the Complaint, and in the Plaintiffs' arguments set forth at page 8 of the Plaintiffs' First Brief and at pages 10-14 of the Plaintiffs' Third Brief that the purpose for attempting to retain the services of the Defendants was to assure that matters entrusted to them are handled in accordance with all applicable laws. (**Complaint at 55, 58**). In the Chapter 1 of Title 40, the General Assembly acknowledges the fact that the public has a need for "a substantial basis for relying on the services of the practitioner" when dealing with certain professions and occupations licensed under the various provisions of Title 40 such as real estate professionals. See section 40-1-10(C)(3).

As specifically argued to the Court in the Plaintiffs Third Reply at page 11, a check of the South Carolina Labor Licensing and Regulation website ("Licensee Lookup" function) at any time during the period beginning on January 16, 2007 (the date of the first closing) and ending on January 10, 2017, would have revealed that Defendants Wilkins and SVR, as well as Anne Brooks, Dana Peak and other associated licensees at SVR involved in this matter, were in "good standing" with the South Carolina Real Estate Commission with no history of administrative actions or complaints indicating their failure to comply with applicable real estate laws.

In South Carolina, the law is well settled that a person in a fiduciary relationship with a licensed professional is justified in relying on the fiduciary **even if reliance would not be justified in a non-fiduciary relationship**. *Epstein v. Howell*, *supra* at 531; *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (S.C. 1978); *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (S.C. 1967). "Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal." *Darby v. The Furman Co. Inc.*, 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999). "The duty of an agent to make full disclosure to his principal of all material facts relevant to the

agency is fundamental to the fiduciary relationship of principal and agent.” *Id*; *see also Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 405 S.E.2d 417 (S.C.Ct.App. 1991)(“A broker owes a duty to its principal to keep it fully and properly informed of all material facts.”).

Defendant Wilkins was a licensed “broker-in-charge,” and Defendant SVR was licensed as a “real estate office” pursuant to Title 40, Chapter 57, and employed numerous individual licensed agents such as Anne Brooks and Dana Peak. (**Complaint at 7-10**). The Plaintiffs’ reliance on the fact that the Defendants, in their statutorily imposed fiduciary role under Section 40-57-137, would conduct their duties in accordance with all applicable statutory law, common law, CMLS rules, and relevant federal court orders **was manifestly justified and inherently reasonable** under both South Carolina statutory and common law. In the Defendants’ original Motion to Dismiss at page 9 at paragraph 65, they **expressly acknowledge** this reliance by stating “[i]n essence, the Plaintiffs posit that they justifiably believed that the Defendants were acting in compliance with the law in collecting their development fees and commissions.”

VII. The Defendants’ Complaint Alleges Defendants Have “Unclean Hands”, Which Taken as True, Equitably Tolls Any Affirmative Statute of Limitations Defense for Purposes of Rule 12

The Order fails to address **in any manner whatsoever** the Plaintiffs’ arguments set forth in Plaintiffs’ First Brief at pages 11-13, and Plaintiffs’ Third Brief at pages 16-17 that the doctrine of “unclean hands” precludes the Defendants from asserting the affirmative defenses of the statute of limitations based on the allegations of unlawful, fraudulent and deceptive conduct in the Complaint. *Vicary v. Town of Awendaw*, *supra* at 55-56. “Equitable tolling is judicially created; it stems from the judiciary’s inherent power to formulate rules of procedure where justice demands it.” *Hooper v. Ebenezer Senior Services*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (S.C. 2009) Where a statute sets a limitation period for an action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental fairness. *Id*. Equitable tolling does not require evidence that the Defendants made any misrepresentation to the Plaintiffs; **silence is sufficient**. *Id* at 115-117; *Magnolia N. Prop. Owners Association, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (S.C.Ct.App. 2012).

The Order goes to great lengths to incorrectly hold that the Plaintiffs “are charged with knowledge of the law” (see Section II supra) and therefore should have investigated the conduct of the Defendants with no particular reason to do so. The Order, however, fails to even discuss the fact that **the Defendants had actual knowledge of the law, and that their unlawful, fraudulent and deceptive conduct was knowing and willful.** Each and every time the Defendants accepted a commission or development fee, the Defendants **knew** that they had violated the provisions of Title 40, Chapter 57, and had unfairly and deceptively hid the Plaintiffs’ properties from thousands of competing members of the CMLS. Despite this irrefutable knowledge of the Defendants, **the Order NEVER discusses the Plaintiffs’ claims that the Defendants had “unclean hands.”** Instead, the Order **draws every possible negative inference against the Plaintiffs**, and completely ignores these clear and unambiguous allegations of the Complaint, and the well settled law of South Carolina.

VIII. The Order Is In Error Basing its Holdings on the Theory of an “Illegal” Implied in Fact Contract When Not Alleged In or By The Complaint

The Order incorrectly bases its holdings on various common law theories of implied in fact contract law and quasi-contract. For example see Order at page 3, footnote 4. The specific and unambiguous provisions of Title 40, Chapter 57 expressly prohibit these common law legal assertions. The Plaintiffs expressly allege that the Defendants’ participation in the transactions was illegal in the absence of compliance with the various requirements of Title 40, Chapter 57, and that no legally valid agreement between the Plaintiffs and any of the Defendants was in existence. **(Complaint at 77-78, 83, 90-91, 101-108, 111, 124, 354, 379, 402-407, 419, 421-422).**

As specifically argued in the Plaintiffs’ Third Brief at pages 23-25, in Section 40-57-137(Q) the General Assembly expressly and unequivocally preempted all existing common law on which the Court bases its finding that an implied in fact contract existed. Section 40-57-137(Q) provides “[t]he provisions of this section which are inconsistent with applicable principles of common law **shall supersede the common law**, ...”(emphasis added). More importantly, the General Assembly provided in section 40-57-139(G) that “[f]or all real estate transactions, **no agency relationship** between a buyer, seller, landlord,

or tenant and a brokerage company and its affiliated licensees exists unless the buyer, seller, landlord, or tenant and the brokerage company and its affiliated licensees agree, in writing, to the agency relationship. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication. A licensee must not be considered to have an agency relationship with a party or have agency obligations to a party but is responsible only for exercising reasonable care in the discharge of the licensee's specified duties, as provided in this chapter, and, in the case of a client, as specified in the agency agreement."(emphasis added). See Section I supra for citations on statutory interpretation. "Once the legislature has made [a] choice, there is not room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App. 1989).

The Order, on pages 2-3 and 11, incorrectly gives credence to the Development Agreement as the basis for its holding that the Plaintiffs were somehow legally obligated to pay commissions and fees to the Defendants. SVR was not a party to the Development Agreement. The Defendants argue in their Opposition Memo on pages 1-2 that the Plaintiffs' Complaint acknowledged the execution of the "Development Agreement", and further make the false assertion to the Court on page 2 of their Opposition Memo that "the Complaint itself concedes that a written compensation agreement was entered into by the Plaintiffs that authorized and **obligated the Plaintiffs to pay the compensation**" to the Defendants (emphasis added). This false assertion ignores the **specific allegation of the Complaint at paragraph 103** which states "[t]he Development Agreement was and is unlawful and void under South Carolina law." The Complaint only acknowledges that a document referred to as the "Development Agreement was signed by the LLC (**Complaint at 87**). The Plaintiffs specifically allege that the Development Agreement was illegal and unenforceable at all times, and no other valid agreements were ever executed. (**Complaint at 77-78, 83, 90-91, 101-108, 111, 124, 354, 379, 402-407, 419, 421-422**). Moreover, the Plaintiffs allege that the Defendants' actions in obtaining the Development Agreement were fraudulent. (**Complaint at 105-106**). The Plaintiffs further alleged that the provisions of the Development Agreement violated the specific requirements of Title 40, Chapter 57 and the rules of the CMLS. (**Complaint at 100-102, 104-105**).

IX. Title 40, Chapter 57 Authorizes Private Causes of Action for Violations of its Provisions

The Order incorrectly holds that the South Carolina Real Estate Commission (the “Commission”) is the only party authorized to bring a civil action for violations of the provisions of Title 40, Chapter 57, and specifically Sections 40-57-135(C)(4) and (D)(4). The Order ignores the clear and unambiguous language of Section 40-57-137(Q), and the South Carolina Supreme Court’s decisions with respect to similar statutory provisions. Section 40-57-137(Q) expressly provides that “[e]xcept as otherwise stated, nothing in the section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge.”

As specifically argued in Plaintiffs’ Third Brief at pages 4-7, Section 40-57-137(A) statutorily imposes the prior common law fiduciary duties such as those applied in Darby v. Furman, *supra*, on real estate professionals, and requires that services be provided pursuant to “an agency agreement”, and that the real estate professional “**is bound by the duties of** loyalty, obedience, **disclosure**, confidentiality, reasonable care, diligence and accounting **set forth in this chapter [Chapter 57]**” (emphasis added). In section 40-57-137(C), the General Assembly expressly stated that upon “**reaching a written agreement** to provide brokerage services for a seller of real estate, a sellers agent shall”...“(4) **comply with all provisions of this chapter[Chapter 57]**...” (emphasis added). Section 40-57-135(C)(4) and (D)(4) are the provisions of “this chapter” which set forth the very specific requirements of the “written agreement” referred to in the first sentence of section 40-57-137(C).

On page 7 of their Opposition Memo, the Defendants cite Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000) for the proposition that “[a] private party may not use this statute alone as her basis for a civil action seeking damages.” In addition to case not being factually or legally analogous to the present action, far more importantly Plaintiffs find no reference to the Defendants’ proposition whatsoever in the case.

The Supreme Court affirmed a private cause of action in Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 802 S.E.2d 794 (S.C. 2017), discussed in the Plaintiffs’ Third Brief at page 7, and which is directly analogous to the present case. The express provision for a private cause of action in Section 40-57-137(Q)

is the same statutory approach used by the General Assembly with respect to the South Carolina Time Share Act in Title 27, Chapter 32 at Section 27-32-130 which states “[t]he provisions of this section do not limit the right of a purchaser or lessee or a vacation time sharing association to bring a private action to enforce the provisions of this chapter.”

As previously argued at page 5 of the Plaintiffs’ Third Brief, Section 40-57-137 sets forth numerous prohibitions against very specific private causes of action which would otherwise be allowed by the language of the statutes. These specific, and very limited, statutory prohibitions on certain clearly defined causes of action convey the legislature’s irrefutable intent for Title 40, Chapter 57 to provide private causes of action for all other violations which injure a client of a licensed real estate professional. Simply stated, if no private causes of action were authorized by the legislature in Title 40, Chapter 57, there would have been no reason for the legislature to specifically prohibit certain specific causes of action in Section 40-57-137.

On page 10 of the Order, the Court correctly cited Hurst v. Sandy, 329 S.C. 471, 478, 494 S.E.2d 847, 850 (S.C.Ct.App. 1997) as establishing a two part test for determining if a private cause of action was intended by the legislature. The Order, however, then misapplied the holding of Hurst to the clear and unambiguous language of Title 40, Chapter 57 by (i) failing to find that one of the express purposes of the statute was to protect individual members of the public from the unlawful conduct by licensed real estate professionals, and (ii) failing to find the Plaintiffs to be a member of the class of real estate clients the statute is designed to protect. In the Act, the General Assembly specifically codified the fiduciary duty of real estate agents under prior common law at section 40-57-137(A), **which duty is expressly owed to the Plaintiffs – not to the State of South Carolina; not to the South Carolina LLR; and not to the South Carolina Real Estate Commission!** In holding that the Commission is the only party authorized to bring a civil action for violations of Title 40, Chapter 57, the Order fails to address the fact that the Commission has no standing under applicable South Carolina law, and the South Carolina Rules of Civil Procedure to pursue any claims for breach of the fiduciary duties set forth in Section 40-57-137(A).

As specifically argued in the Plaintiffs' Third Brief at pages 5-6, the exact issue dealt with in Darby, *supra*, was expressly codified by the General Assembly as part of Title 40, Chapter 57 in the exact same subsection as the requirements for a written listing agreement in this case! This codification occurred during the pendency of the Darby case. Darby at 348, fn. 3. The specific Darby breach of fiduciary duty (failure to disclose role as purchaser) was codified in the first sentence of subsection 40-57-135(D). The specific requirements for the written listing agreements at issue in this case were codified at subsection 40-57-135(D)(4). The immediately preceding subsection 40-57-135(C) establishes the illegality of the Defendants' conduct, but relies on subsection (D)(4) for the specific requirements of the written agreement mandated by (C)(4). **The Order holds that the issue dealt with in Darby is now "off limits" for a private cause of action because it is now codified as part of Section 40-57-135.**

X. The Doctrines of Laches and "Unclean Hands" Do Not Apply to Plaintiffs

The Court erred on page 18 of the Order by holding that any equitable claim of the Plaintiffs would be barred by the doctrines of laches or "unclean hands." The Order further holds on page 19 that "[a]ccepting the allegations of the Complaint to be true, the Complaint alleges that the Plaintiffs were aware of the Defendants alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property." The factual inaccuracy of this statement has been addressed previously in the Relevant Fact summary and Section I *supra*. The Plaintiffs paid no additional commissions or development fees to the Defendants after January 10, 2017, and specifically refused the Defendants' request for the payment of additional commissions and development fees on the sale of Lot 23 on -----, 2017. Since the Plaintiffs refused to pay any additional commissions or development fees on the sale of Lot 23, **and the Defendants consented to the Plaintiffs' refusal in writing**, that sale was not included in the Plaintiffs' lawsuit.

Under South Carolina law, "[t]o be charged with laches, a party must have knowledge of the **facts upon which he bases his claim**" (emphasis added). Jefferson Pilot Life Ins. v. Gum, 302 S.C. 8, 393 S.E.2d 180 (S.C. 1990) citing Arceneaux v. Arrington, 284 S.C. 500, 327 S.E.2d 357 (S.C.Ct.App. 1995). "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances,

and (3) prejudice.” Robinson v. Estate of Harris, 389 S.C. 360, 698 S.E.2d 801 (S.C. 2010)(citing Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (S.C. 1988)). It is impossible to infer from the allegations of the Complaint that the Plaintiffs’ failure to discover the unlawful, fraudulent and deceptive conduct was an “unreasonable delay” **when the sole and direct reason** the unlawful, fraudulent and deceptive conduct of the Defendants was not discovered prior to January 10, 2017 **was the fraud of the Defendants**. It is also impossible to infer, drawing all reasonable inferences in favor of the Plaintiffs, that the Defendants were “prejudiced” by the delay caused by their own willful and knowing acts of fraud. **The Plaintiffs’ hands are clean.**

XI. The Plaintiffs Were Entitled to Justifiably Rely on Wilkins’ Status as a Licensed Attorney

The Order fails to address the Plaintiffs arguments set forth at pages 10-11 of the Plaintiffs’ Third Brief that as a licensed attorney, Defendant Wilkins’ conduct in this matter was also governed by the SCRPC. **(Complaint at 41-53)**. As discussed in True v. Monteith, *supra* at 120, the Plaintiffs’ had a right to reasonable reliance on Wilkins’ status as a licensed attorney. The SVR website contained a reference to Wilkins as a “licensed attorney in his own right.” **(Complaint at 44-46)**. The purpose of such a reference was clearly to induce potential clients to place an increased level of trust in Mr. Wilkins due to his status as a “licensed attorney in his own right.” At the time the Plaintiffs sought the assistance of the Defendants, the Plaintiffs believed Defendant Wilkins to still be an “active” member of the South Carolina Bar. **(Complaint at 41-42, 47)**.

XII. The Order Incorrectly Relied on the 5 Year Document Retention Rules of Section 40-57-135

The Order is incorrect in that it fails to take as true the allegations in the Complaint that the listing agreements required under Section 40-57-135(C)(4) and (D)(4); the dual agency agreements required under Section 40-57-137(M); and the various documents required to be signed by the Plaintiffs under the CMLS rules **were never created or executed, and therefore could never have been subject to the 5 year document retention rules of Section 40-57-135(B)(11) and (C)(7)**. The Order effectively turns those document retention rules into an invalid, judicially created 5 year “non-discovery” statute of limitations on

fraud and unlawful conduct **in direct contradiction of the legislatively enacted “discovery” statutes of limitations such as Section 15-3-530(7) and Sections 39-5-150.**

Furthermore, on November 21, 2019 Mr. Bland voluntarily produced the two Fraudulent Documents which were over 8 years old, and had not been purged under the 5 year rules of Section 40-57-135. Also on November 21, 2019, Mr. Bland also produced to the Plaintiffs “examples” of contracts, HUD-1’s, and other SVR documents from early 2007 (documents which were at least 12 years old) which prove that no documents whatsoever had been purged under the 5 year rule. Whether the Defendants actually purged any documents under the 5 year document retention rule of Section 40-57-135(C)(7) is a question of fact which may not be determined on a pre-answer Rule 12(b)(6) motion to dismiss.

XIII. The Order Violates Public Policy and Should Thereby Be Vacated

The Order fails to address the Plaintiffs’ arguments set forth in the Plaintiffs’ First Brief at pages 9-11 and referenced in the Plaintiffs’ Third Brief at page 16, that in Sections 40-57-135(C)(4), 40-57-137, and 40-57-145(A)(13) and (15), the South Carolina Legislature was unambiguous in stating that it is illegal for a licensed agent or broker to market or to participate in the sale of property owned by someone else without complying with all statutorily mandated disclosure requirements and obtaining written listing agreements and dual agency agreements. When the General Assembly of South Carolina “has enacted a clear and unambiguous statute that dictates a result in a case,” the courts have “no power to decide otherwise.” McLean v. United States, C/A No. 9:17 – 2702 DCC (D.C.S.C. 2019). “The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.” Citizens’ Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925); Taghivand v. Rite Aid Corp., 411 S.C. 240, 768 S.E.2nd 385 (S.C. 2015). The Order renders the Legislature’s clear and unequivocal statutory mandates on the conduct of real estate professionals in South Carolina completely void and meaningless.

The Order effectively places a higher burden on the Plaintiffs to police the conduct of the Defendants, as licensed fiduciaries, than it places on the Defendants to comply with their specific statutory

and common law fiduciary duties. This result is against the public policy of South Carolina as clearly set forth in the provisions of Title 40, Chapters 1 and 57.

XIV. The Order Violates the Equal Protection Clause of the South Carolina Constitution

Article I, Section 3 of the South Carolina Constitution guarantees the Plaintiffs “the equal protection of the laws.” The result of the Order violates this Equal Protection clause in that it creates a new exclusion from the application of the clear and unambiguous requirements and protections of Title 40, Chapter 57. By denying the Plaintiff, as a member of the South Carolina Bar, the express and unambiguous protections of Title 40, Chapter 57 when dealing with licensed real estate professionals in a fiduciary relationship, the Order creates an exclusion, which if enacted by the South Carolina General Assembly, would be unconstitutional. The exclusion of licensed attorneys from the protections of Title 40, Chapter 57 bears no “reasonable and just relation” to the legislative purpose of Title 40, Chapter 57, and would be unconstitutional if enacted by the General Assembly. See Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (S.C. 1978); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (S.C. 1978).

XV. The Plaintiffs are Not “In Pari Delicto” with the Defendants’ Conduct

The Order is incorrect in holding on page 19 that if the Plaintiffs’ causes of action were equitable, the Plaintiffs were “*in pari delicto*” with the unlawful, fraudulent and deceptive conduct of the Defendants. The Complaint contains no factual allegations whatsoever which could provide a basis for this holding when the allegations of the Complaint are viewed in the light most favorable to the Plaintiffs. Moreover, the Complaint provides no basis for an inference that the Plaintiffs were in violation of any law or rule of conduct applicable to the Plaintiffs, or participated in any way in the unlawful, fraudulent and deceptive acts of the Defendants.

XVI. Unjust enrichment and quantum meruit

The Order erred by holding that the Plaintiffs’ claim for quantum meruit is improper since all three elements under South Carolina law have been properly alleged in the Complaint, and as specifically alleged, the collection and retention of unlawful commissions and fees through knowing, willful, deceptive, unfair

and fraudulent means which also damaged the Plaintiffs and competing real estate professionals makes it unjust for the Defendants to retain the statutorily prohibited compensation.

XVII. Title 40, Chapter 57 is Not a Licensing Statute

The Order on page 10 incorrectly refers to the **entirety** of Title 40, Chapter 57 as a “licensing statute” as a basis for many of its holdings. This characterization of the entire Chapter as a “licensing statute” is in direct contradiction of the clear and unequivocal statutory language in the relevant sections of Title 40, Chapter 57 which form the basis of the Plaintiffs’ various causes of action, and which specifically address:

- (a) the types of legally permitted relationships a licensee may establish with clients,
- (b) the legal requirements of those permitted relationships with clients,
- (c) the limitations on those permitted relationships with clients, and
- (d) **the fiduciary duties owed to those clients by licensees.**

The “licensing” provisions of Chapter 57 as specifically indicated in the Title to the Act as passed by the General Assembly are separate from the provisions which govern the parameters of the permitted relationships between a licensee and a client. The Act, in its title, expressly stated that one of its many separate purposes was to “TO EXPAND THE RESPONSIBILITIES OF A “BROKER-IN-CHARGE”, TO ESTABLISH THE PARAMETERS, DUTIES, AND RESPONSIBILITIES FOR AGENCY RELATIONSHIPS IN REAL ESTATE” (Emphasis added). The Act’s title listed the changes to the SCREC first, and then stated “AND, AMONG OTHER THINGS,” indicating that the “other things” were separate and in addition to, the “licensing” aspects of the Act.

XVIII. The Dates of the Plaintiffs’ “Discovery” are Questions of Fact

Although the Order failed to take the allegations of the Complaint as true, and failed to draw all reasonable inferences possible in favor of the Plaintiffs, the actual dates of the discovery of the various and separate facts and circumstances of the various and separate unlawful, fraudulent and deceptive acts by the Defendants on which the Plaintiffs’ various claims are based are questions of fact. As such, the Plaintiffs’ various causes of action may not be disposed of on the Defendants’ pre-answer Motions to Dismiss under

Rule 12(b)(6). When the evidence of whether a person knew or should have known of a claim is conflicting, the question becomes an issue of fact. Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (S.C.Ct.App. 1998).

CONCLUSION

For the reasons set forth herein, the Plaintiffs request that the Court withdraw and/or vacate the Order in its entirety, and issue an order dismissing the Defendants' Motions to Dismiss.

Respectfully submitted,

s/ Clarence Davis
Clarence Davis (SC Bar I.D. #1581)
GRIFFIN DAVIS LLC
4408 Forest Drive, Suite 300 (29206)
Post Office Box 999
Columbia, SC 29202
(803) 744-0800
(803) 744-0805 (fax)
cdavis@griffindavislaw.com

Attorney for Plaintiffs

March 23, 2021

Exhibit 1



South Carolina, County of Lexington Register of Deeds ~ Tina Guerry, Registrar

Lexington County Register of Deeds Online Services Disclaimer

This website is a public resource of general information. Lexington County makes no warranty, representation or guaranty as to the content, sequence, accuracy, timeliness or completeness of any of the database information provided herein. The reader should not rely on the data provided herein for any reason. Lexington County explicitly disclaims any representations and warranties, including, without limitation, the implied warranties of merchantability and fitness for a particular purpose.

Lexington County shall assume no liability for:

Any errors, omissions, or inaccuracies in the information provided regardless of how caused, or

Any decision made or action taken or not taken by any person in reliance upon any information or data furnished hereunder.

NOTICE TO ALL REQUESTORS OF RECORDS

State law requires certain public bodies to provide notice to requestors of records. The Freedom of Information ACT (FOIA) limits the use of certain information revealed in response to a FOIA request. See S.C. Code Ann. 30-4-50(B). Obtaining or using public records from certain governmental entities for commercial solicitation directed to any person in this State is prohibited under South Carolina Code Section 30-2-50. A person knowingly violating the provisions of 30-2-50 is guilty of a misdemeanor and, upon conviction, may be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both. Section 30-2-50(D)

Financial Identity Fraud and Identity Theft Protection Act

A person preparing or filing a document for recordation or filing in the official records may not include a social security, driver's license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code, or passwords in the document, unless expressly required by law. An individual has a right to request a Register of Deeds or clerk of court to remove, from an image or copy of an official record placed on a publicly available Internet web site or on a publicly available Internet web site used by a Register of Deeds or clerk of court to display public records, any social security, driver's license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code, or passwords contained in an official record. The request must be made in writing and delivered by mail, facsimile, or electronic transmission or in person, to the Register of Deeds or Clerk of Court. The request must specify the identification page number that contains the social security, driver's license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) or code, or passwords to be redacted. There is no fee for the redaction pursuant to request.

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ROA 341

Exhibit 2



EXCLUSIVE RIGHT TO SELL CONTRACT
State of South Carolina

EXC

A. EMPLOYMENT: In consideration of the covenants herein contained, Panorama Point, LLC (herein called "OWNER") and Southern Visions Realty, Inc. (herein called "BROKER/LISTING FIRM") agree as follows: For the period of time beginning on November 11 20 12, and ending at midnight on December 31 20 13. Owner hereby grants to Broker the sole and exclusive right to sell the real property known as 304 Panorama Drive, lot 21 Lexington SC 29072. Broker hereby accepts employment as the sole and exclusive agent of the Owner to sell the property, subject to the following terms and conditions:

B. SALE PRICE: Said property is, hereby, listed to sell for the gross sale price of \$ 95,000.00 or for such other price or upon such other terms (including exchange) to which owner may subsequently agree during the authorization period. Owner agrees to pay Broker a fee of 6 % computed upon the gross sales price in any of the following events: (1) the closing of a sale of the property during the authorization period or as a result of a contract secured during the authorization period, or (2) The signing by Owner of a valid contract to sell the property but Owner fails or refuses to complete the sale as agreed; or, (3) The presentation to Owner of a valid and a bonafide written offer to purchase the property which complies with the terms and conditions specified herein. A contract will be deemed to comply with the terms and conditions hereof if the offered contract is for at least the listing price stated herein, is non-contingent and is on a form adopted or recommend by a local Board of Realtors or substantially similar thereto. The fee will be due to Broker even if the Owner sells or obtains the contract to sell the property during the authorization period, or if the Owner sells or obtains the contract to sell the property within 180 days after the expiration of the authorization period to or from a purchaser introduced to the property during the authorization period. This protection period for the Broker beyond the authorization period will be automatically terminated if the Owner enters into a listing agreement with another Broker during the protection period. The fee will be due to the Broker not later than the closing date called for in any contract to sell the property or any extension thereof or upon demand if Owner refuses to accept and/or execute a contract which complies with the terms and conditions hereof. Owner agrees to pay the costs and expenses including attorney's fees incurred by Broker as a result of enforcing the provision of this agreement. The owner shall pay at closing, the real estate commission, a fee for preparing the deed, the deed stamps required on the deed, recording of satisfaction and prorated taxes as of the day of closing. The term "sale" shall include any exchange, swap or trade of the herein described property.

C. MARKETING THE PROPERTY: The Broker has the option, but is not required, to continue marketing the property after an offer has been accepted. Owner may terminate this option by giving written notice to Broker. "Owner understands and agrees that by placing the listing in the Consolidated Multiple Listing Service the listing will be transmitted electronically and made available via the Internet to the public at large and agrees to indemnify and hold Broker and CMLS harmless from any claim, loss or damage arising therefrom." Withhold from Internet yes no dp (initials) on behalf of Panorama Point LLC

D. CALL, FAX, E-MAIL: Seller agrees to allow any Agent/Member to call, e-mail or fax information regarding the sale of their property.

E. INQUIRIES: Owner agrees to Inform Broker of any Inquires or negotiations concerning the sale of the property.

F. PROPERTY INFORMATION: Owner agrees to furnish Broker with complete and reliable information about the ownership and operation of the property and any encumbrances or liens affecting the property. Owner warrants, that, to his knowledge, there are no material defects, hidden or obvious, in or on the property, which have not been disclosed to Broker in writing. Owner further warrants that he has reviewed the information on the profile sheet attached to and made a part of this Agreement, and that all such information is accurate to the best of his knowledge. Owner hereby authorizes anyone having a lien against the property to disclose complete information about the lien to Broker.

G. PERSONAL PROPERTY: The real estate described herein includes, all fixtures, equipment and improvements of any kind which are now attached to or planted on the premises, such as: shrubbery, trees, fences, shutters, blinds, lamp posts, mail boxes, TV antennas, clothes-line poles, curtain/drapery rods, ceiling fans, attached mirrors and light bulbs, as well as all built-ins, such as: equipment, appliances, cabinets, furniture and shelves unless otherwise agreed herein. Personal property to be transferred to the Buyer at no extra cost is as follows:

H. DISCLOSURE OF INFORMATION: Latent Defects - Owner authorizes Broker to disclose pertinent information about the property to his agents, subagents, prospective purchasers and all inquiring parties. Such disclosure shall be in the manner or form customary in the marketplace. Owner agrees to disclose, in writing, to the Broker any known latent defects of the herein described property which are not readily ascertainable upon view, and to indemnify and hold Broker harmless from any costs, claims, liabilities, or damages (including the cost to defend any alleged claims) arising from the Owner's failure to disclose any such defect. This indemnify shall include the costs incurred in enforcing the provisions of this indemnity, including reasonable attorney's fees. Known defects are as follows:

I. EXECUTED PROPERTY DISCLOSURE FORM AND LEAD BASED PAINT DISCLOSURE FORM: A Property Disclosure Form, as required by SC Code of Laws, as amended, section 27-50-10, et. seq., must accompany this listing (if applicable). If the property contains any residential structure constructed before 1978, a completed Lead Based Paint Disclosure Form in accordance with 42 U.S.C § 4852d must also accompany this listing agreement.

Verified by the Property Owner dp on behalf of Date 11-11-12
Initials dp Panorama Point LLC

Page 1 of 2

Rev. 08/10

ELECTRONICALLY FILED - 2021 Mar 23 3:56 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP3200005

List Office ID SOUV01 Consolidated Multiple Listing Services, Inc. **EXC**
 Property Address 304 Panorama Drive Lot 21 Lexington SC 29072

J. INSPECTION: Owner agrees to make property available for the inspections by Broker, his agents, subagents, buyer/broker, and prospective purchasers, as deemed reasonably necessary by Broker.

K. NON-DISCRIMINATION: It is agreed that this property is listed in full compliance with local, state and federal fair housing laws, against discrimination on the basis of race, color, religion, sex, handicap, familial status or national origin.

L. LOCKBOX: Owner directs Broker to place the listing in the Consolidated Multiple Listing Service which will constitute an offer of cooperation to all participants in the CMLS. Owner () does (☒) does not agree for a CMLS lockbox containing keys to be installed on the property in order to facilitate the inspection of the property by Broker and cooperating agents. Owner understands that the placing of lockbox on the property has inherent risks resulting from the potential wrongful acts of persons with access to the lockbox. Owner understands and specifically assumes this risk. Owner further acknowledges that Broker is not an insurer against the loss of personal property and agrees to release Broker and CMLS from any responsibility therefore. The lockbox must be a MLS approved lockbox. This does allow for an Agent to hang the CMLS lockboxes on the property along with one of his choosing if so desired.

M. SIGNAGE: Owner authorizes Broker the right to display "For Sale" sign on the property and remove all other signs. All signage placed on the listed property must be signage that complies with CMLS Rules and Regulations. No "For Sale by Owner" sign may be placed on the property.

N. AGENCY RELATIONSHIPS: Agent has advised Seller of Brokers general company policy regarding cooperation with Subagents, Buyers Agents or both and Seller agrees to authorize the Agent (Listing Firm) to cooperate and to compensate cooperating companies. Seller acknowledges receiving an explanation of the types of agency relationships that are offered by Agent (Listing Firm) and an Agency Disclosure Brochure regarding Agency Relationships in Real Estate. Seller acknowledges that after entering into this written agency contract, Agent might request a modification in order to act as a dual agent or a designated agent in a specific transaction. If asked: Permission to act as a dual agent will not be considered dp; Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Dual Agency Agreement. Permission to act as a designated agent will not be considered dp; Permission to act as a designated agent may be considered at a time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Designated Agency Agreement. dp on behalf of Panorama Point LLC

O. NO CONTROL OF COMMISSION RATES OR FEES. Under the long established policy of CMLS, the Broker's compensation for services rendered in respect to any listing is solely a matter of negotiation between the Broker and the Owner and is not fixed, controlled, suggested, recommended, or maintained by the CMLS, or by any persons not a party to the listing agreement. The compensation paid by the Listing Broker to a Cooperating Broker in respect to any listing is established by the Listing Broker in his offer of co-operation and is not fixed, controlled, suggested, recommended or maintained by the CMLS, or by any persons other than the Listing Broker and his or her subagent.

P. SPECIAL STIPULATIONS: The following stipulations shall, if conflicting with printed matter, control: _____

Q. MEDIATION: All parties in this transaction agree to mediation in the event a dispute arises under the Contract and agree that the participation is such that mediation shall be a condition precedent to the right of either party to initiate a civil action hereunder. This mediation shall take place subject to the rules and procedures established by the South Carolina Bar Association, and the parties agree to appoint a mediator approved by the South Carolina Bar Association.

R. ERRORS AND OMISSIONS INSURANCE: _____ I have been advised that my Listing Company does not maintain Errors and Omissions Insurance.

RECEIPT OF A COPY OF THIS AUTHORIZATION AGREEMENT IS HEREBY ACKNOWLEDGED.

<u>mmf</u>		<u>Dana Peak on behalf of Panorama Point, LLC.</u>		<u>11-11-12</u>	<u>5pm</u>
WITNESS		OWNER		DATE	TIME
<u>Southern Visions Realty, Inc. By:</u>		<u>[Signature]</u>		<u>11-11-12</u>	
BROKER'S COMPANY		BROKER'S SIGNATURE		DATE	
<u>955 Old Cherokee Rd.</u>		<u>955 Old Cherokee Rd.</u>			
<u>Lexington SC 29072</u>		<u>Lexington SC 29072</u>			
BROKER'S MAILING ADDRESS		OWNER'S MAILING ADDRESS			
PHONE <u>803 359 9545</u>		PHONE <u>803-359-9571</u>			

THIS IS A LEGALLY BINDING CONTRACT. ALL BLANKS MUST BE FILLED IN. IF INFORMATION DOES NOT APPLY, INSERT N/A. ANY ALTERED TERMS OR CONDITIONS MUST BE INITIALED BY BOTH OWNER AND BROKER.

EXCLUSIVE RIGHT TO SELL CONTRACT
State of South Carolina

EXC

A. EMPLOYMENT: In consideration of the covenants herein contained, Panorama Point LLC (herein called "OWNER") and awb - Office Southern Visions Realty (herein called "BROKER/LISTING FIRM") agree as follows: For the period of time beginning on 5/10 20 11, and ending at midnight on 12/31 20 13. Owner hereby grants to Broker the sole and exclusive right to sell the real property known as 610 Panorama Drive Lexington SC 29072. Broker hereby accepts employment as the sole and exclusive agent of the Owner to sell the property, subject to the following terms and conditions:

B. SALE PRICE: Said property is, hereby, listed to sell for the gross sale price of \$ 235,000 or for such other price or upon such other terms (including exchange) to which owner may subsequently agree during the authorization period. Owner agrees to pay Broker a fee of 6 % computed upon the gross sales price in any of the following events: (1) the closing of a sale of the property during the authorization period or as a result of a contract secured during the authorization period, or (2) The signing by Owner of a valid contract to sell the property but Owner fails or refuses to complete the sale as agreed; or, (3) The presentation to Owner of a valid and a bona fide written offer to purchase the property which complies with the terms and conditions specified herein. A contract will be deemed to comply with the terms and conditions hereof if the offered contract is for at least the listing price stated herein, is non-contingent and is on a form adopted or recommended by a local Board of Realtors or substantially similar thereto. The fee will be due to Broker even if the Owner sells or obtains the contract to sell the property during the authorization period, or if the Owner sells or obtains the contract to sell the property within 60 days after the expiration of the authorization period to or from a purchaser introduced to the property during the authorization period. This protection period for the Broker beyond the authorization period will be automatically terminated if the Owner enters into a listing agreement with another Broker during the protection period. The fee will be due to the Broker not later than the closing date called for in any contract to sell the property or any extension thereof or upon demand if Owner refuses to accept and/or execute a contract which complies with the terms and conditions hereof. Owner agrees to pay the costs and expenses including attorney's fees incurred by Broker as a result of enforcing the provision of this agreement. The owner shall pay at closing, the real estate commission, a fee for preparing the deed, the deed stamps required on the deed, recording of satisfaction and prorated taxes as of the day of closing. The term "sale" shall include any exchange, swap or trade of the herein described property.

C. MARKETING THE PROPERTY: The Broker has the option; but is not required, to continue marketing the property after an offer has been accepted. Owner may terminate this option by giving written notice to Broker. "Owner understands and agrees that by placing the listing in the Consolidated Multiple Listing Service the listing will be transmitted electronically and made available via the Internet to the public at large and agrees to indemnify and hold Broker and CMLS harmless from any claim, loss or damage arising therefrom." Withhold from Internet yes no awb (initial one)

D. CALL, FAX, E-MAIL: Seller agrees to allow any Agent/Member to call, e-mail or fax information regarding the sale of their property.

E. INQUIRIES: Owner agrees to inform Broker of any Inquires or negotiations concerning the sale of the property.

F. PROPERTY INFORMATION: Owner agrees to furnish Broker with complete and reliable information about the ownership and operation of the property and any encumbrances or liens affecting the property. Owner warrants, that, to his knowledge, there are no material defects, hidden or obvious, in or on the property, which have not been disclosed to Broker in writing. Owner further warrants that he has reviewed the information on the profile sheet attached to and made a part of this Agreement, and that all such information is accurate to the best of his knowledge. Owner hereby authorizes anyone having a lien against the property to disclose complete information about the lien to Broker.

G. PERSONAL PROPERTY: The real estate described herein includes, all fixtures, equipment and improvements of any kind which are now attached to or planted on the premises, such as: shrubbery, trees, fences, shutters, blinds, lamp posts, mail boxes, TV antennas, clothes-line poles, curtain/drapery rods, ceiling fans, attached mirrors and light bulbs, as well as all built-ins, such as: equipment, appliances, cabinets, furniture and shelves unless otherwise agreed herein. Personal property to be transferred to the Buyer at no extra cost is as follows: N/A

H. DISCLOSURE OF INFORMATION: Latent Defects - Owner authorizes Broker to disclose pertinent information about the property to his agents, subagents, prospective purchasers and all inquiring parties. Such disclosure shall be in the manner or form customary in the marketplace. Owner agrees to disclose, in writing, to the Broker any known latent defects of the herein described property which are not readily ascertainable upon view, and to indemnify and hold Broker harmless from any costs, claims, liabilities, or damages (including the cost to defend any alleged claims) arising from the Owner's failure to disclose any such defect. This indemnity shall include the costs incurred in enforcing the provisions of this indemnity, including reasonable attorney's fees. Known defects are as follows: N/A

I. EXECUTED PROPERTY DISCLOSURE FORM AND LEAD BASED PAINT DISCLOSURE FORM: A Property Disclosure Form, as required by SC Code of Laws, as amended, section 27-50-10, et. seq., must accompany this listing (if applicable). If the property contains any residential structure constructed before 1978, a completed Lead Based Paint Disclosure Form in accordance with 42 U.S.C § 4852d must also accompany this listing agreement.

Verified by the Property Owner awb Date 5-16-11
Initials

Rev. 08/10

List Office ID SOUND 1

Consolidated Multiple Listing Services, Inc.

Property Address 610 Panorama Dr. Lexington SC 29072

EXC

J. INSPECTION: Owner agrees to make property available for the inspections by Broker, his agents, subagents, buyer/broker, and prospective purchasers, as deemed reasonably necessary by Broker.

K. NON-DISCRIMINATION: It is agreed that this property is listed in full compliance with local, state and federal fair housing laws, against discrimination on the basis of race, color, religion, sex, handicap, familial status or national origin.

L. LOCKBOX: Owner directs Broker to place the listing in the Consolidated Multiple Listing Service which will constitute an offer of cooperation to all participants in the CMLS. Owner () does () does not agree for a CMLS lockbox containing keys to be installed on the property in order to facilitate the inspection of the property by Broker and cooperating agents. Owner understands that the placing of lockbox on the property has inherent risks resulting from the potential wrongful acts of persons with access to the lockbox. Owner understands and specifically assumes this risk. Owner further acknowledges that Broker is not an insurer against the loss of personal property and agrees to release Broker and CMLS from any responsibility therefore. The lockbox must be a MLS approved lockbox. This does allow for an Agent to hang the CMLS lockboxes on the property along with one of his choosing if so desired.

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N. AGENCY RELATIONSHIPS: Agent has advised Seller of Brokers general company policy regarding cooperation with Subagents, Buyers Agents or both and Seller agrees to authorize the Agent (Listing Firm) to cooperate and to compensate cooperating companies. Seller acknowledges receiving an explanation of the types of agency relationships that are offered by Agent (Listing Firm) and an Agency Disclosure Brochure regarding Agency Relationships in Real Estate. Seller acknowledges that after entering into this written agency contract, Agent might request a modification in order to act as a dual agent or a designated agent in a specific transaction. If asked: Permission to act as a dual agent will not be considered ☒; Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Dual Agency Agreement ☐; Permission to act as a designated agent will not be considered ☒; Permission to act as a designated agent may be considered at a time I am provided with information about the other party to a transaction. If I agree, I will execute a separate written Designated Agency Agreement ☐.

O. NO CONTROL OF COMMISSION RATES OR FEES. Under the long established policy of CMLS, the Broker's compensation for services rendered in respect to any listing is solely a matter of negotiation between the Broker and the Owner and is not fixed, controlled, suggested, recommended, or maintained by the CMLS, or by any persons not a party to the listing agreement. The compensation paid by the Listing Broker to a Cooperating Broker in respect to any listing is established by the Listing Broker in his offer of co-operation and is not fixed, controlled, suggested, recommended or maintained by the CMLS, or by any persons other than the Listing Broker and his or her subagent.

P. SPECIAL STIPULATIONS: The following stipulations shall, if conflicting with printed matter, control: N/A

Q. MEDIATION: All parties in this transaction agree to mediation in the event a dispute arises under the Contract and agree that the participation is such that mediation shall be a condition precedent to the right of either party to initiate a civil action hereunder. This mediation shall take place subject to the rules and procedures established by the South Carolina Bar Association, and the parties agree to appoint a mediator approved by the South Carolina Bar Association.

R. ERRORS AND OMISSIONS INSURANCE: ☐ I have been advised that my Listing Company does not maintain Errors and Omissions Insurance.

RECEIPT OF A COPY OF THIS AUTHORIZATION AGREEMENT IS HEREBY ACKNOWLEDGED.

WITNESS	<u>Lane Wilkins Brooks</u>	OWNER	<u>5-16-11</u>	DATE	TIME
WITNESS	<u>Southern Visions Realty Inc</u>	OWNER	<u>5-16-11</u>	DATE	TIME
BROKER'S COMPANY	<u>By: Robert P. Wilkins, Sr.</u>	BROKER'S SIGNATURE	<u>5-16-11</u>	DATE	
<u>955 Old Cherokee Rd</u>	<u>955 Old Cherokee Rd</u>				
<u>Lexington SC 29072</u>	<u>Lexington SC 29072</u>				
BROKER'S MAILING ADDRESS	OWNER'S MAILING ADDRESS				
PHONE <u>359-9571</u>	PHONE <u>359-9571</u>				

THIS IS A LEGALLY BINDING CONTRACT. ALL BLANKS MUST BE FILLED IN. IF INFORMATION DOES NOT APPLY, INSERT N/A. ANY ALTERED TERMS OR CONDITIONS MUST BE INITIALED BY BOTH OWNER AND BROKER.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	CASE NO.: 2020-CP-32-00005
	)	
R. Kent Porth and Panorama Point, LLC,	)	
	)	
Plaintiffs,	)	DEFENDANTS ROBERT P. WILKINS,
	)	JR., RPW DEVELOPMENT, INC., AND
vs.	)	SOUTHERN VISIONS REALTY, INC.’S
	)	SUR-REPLY IN OPPOSITION TO
Robert P. Wilkins, Jr., RPW Development,	)	PLAINTIFFS’ MOTION TO
Inc., Southern Visions Realty, Inc., and	)	RECONSIDER
Consolidated Multiple Listing Service, Inc.,	)	
	)	
Defendants.	)	

Defendants Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc. (collectively referred to as the “Defendants” or “Realtor Defendants”), by and through the undersigned counsel, submit this Sur-Reply in opposition to Plaintiffs’ Motion to Reconsider this Court’s February 16, 2021 Order (“Order”) dismissing this case. Although Defendants are hesitant to file a Sur-Reply, as Plaintiffs’ Reply introduces new arguments, new documents unrelated to the Plaintiffs’ Complaint, and is largely nonresponsive to Defendants’ opposition to the original Motion to Reconsider Plaintiffs filed after the Court’s February 16, 2021 Dismissal Order, a brief Sur-Reply is necessary to identify these deficiencies.

Furthermore, as the Reply does not identify any legal basis to overturn this Court’s well-reasoned Order, the Motion to Reconsider should be denied.

Argument

Since the inception of this action, Plaintiffs’ case asks a simple and straightforward question. Do Plaintiffs’ allegations that they did not sign a document specifically titled “listing agreement” give the Plaintiffs the right to claw-back all compensation paid to their realtor for selling 23 lots on Lake Murray for over \$6 million as long as fourteen years ago and strip the Defendant developer all of its

earned fees notwithstanding a signed Development Agreement. The answer to this question is unequivocally no.

However, in an effort to circumvent the lack of legal merit in Plaintiffs' Complaint, and its untimeliness, Plaintiffs have sought to bury the Court and the Defendants in frivolous submissions filled with hundreds of immaterial allegations and tantrum-like diatribes, such as their 473 paragraph Complaint, briefs in opposition to the Motion to Dismiss and two filings in support of its Motion to Reconsider. None of this bluster, however, changes the fact that their attempt to exploit a perceived technicality to gain a windfall in excess of \$600,000 or more has no legal basis.

Consistent with this tactic, Plaintiffs have now filed a 36-page Reply to Defendants' opposition to the Motion to Reconsider. Despite its excessive length, the arguments in Plaintiffs' Reply are not responsive to the arguments made in Defendants' opposition to the motion, and furthermore, the Reply relies on arguments and documents not previously presented to the Court in its opposition to the original motion to dismiss and in support of its original motion to reconsider. These arguments are thus improper and should not be considered.

Under South Carolina law, it is well established that "a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment but did not." *Stevens & Wilkinson of S.C. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

Here, Plaintiffs' Reply is filled with arguments and information not previously presented in this action. Exhibit 1 is a document not referenced in Plaintiffs' Complaint, not presented in opposition to Defendants' Motion to Dismiss, nor was it attached to their Motion to Reconsider. Accordingly, it should not be considered.

Similarly, Plaintiffs assert new arguments for the first time in their Reply. Plaintiffs' argument in Section II of the Reply (suggesting that ignorance of the law tolls the statute of limitations) was not raised in the Motion to Reconsider. Thus, it should also not be considered.¹

Likewise, Plaintiffs' arguments in Section XIV of their Reply (alleging that this Court's Order violates the Equal Protection Clause of the South Carolina Constitution as it unfairly prejudices attorneys) was not raised in any prior submission to the Court. Accordingly, this argument is improper and was not preserved. Nonetheless, similar to every other argument advanced by the Plaintiffs, this argument has no legal or factual merit. At no point in this Court's Order did it hold or suggest that S.C. Code §§40-57-135 and 137 treated attorneys differently than any other group of similarly situated people.

Finally, as it relates to the remainder of Plaintiffs' Reply, Plaintiffs simply reiterate the same arguments they have previously made in the Motion to Reconsider, and do not present any meaningful response to Defendants' opposition. Once again, the Plaintiffs rely on solely conjecture and conclusory assertions about the way Plaintiffs believe the law should be; not the way the law actually is. These arguments do not lend any support to Plaintiffs' unmeritorious claims, and therefore, they provide no grounds to reverse this Court's well-reasoned Order.

¹ Notwithstanding the clear procedural noncompliance, this argument is without merit on its face. Plaintiffs conflate their allegation of "ignorance of the law," which does not toll the statute of limitations, with ignorance of facts constituting a cause of action. Plaintiffs' Complaint makes clear that they were well aware of the facts concerning the subject real property transactions and were capable of timely researching the law related to those facts. Alleging ignorance of the law does not provide relief from the statute of limitations. *See, Smothers v. Fidelity and Guar. Co.*, 322 S.C. 207, 210-211, 470 S.E.2d 858, 860 (Ct. App. 1996)("Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.").

Conclusion

For the reasons stated herein and in Defendants' previously filed Memorandum in Opposition, Plaintiffs' Rule 59(e) motion should be denied in its entirety.

This 31st day of March, 2021.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT

COUNTY OF LEXINGTON

R. KENT PORTH AND
PANORAMA POINT, LLC.,
PLAINTIFFS.

Transcript of Record
2020-CP-38-00005

VS

ROBERT P. WILKINS, JR.,
SOUTHERN VISIONS REALTY, INC.,
RPW DEVELOPMENT, INC., CONSOLIDATED
MULTIPLE LISTING SERVICES, INC.
DEFENDANTS.

December 20, 2020
Lexington, South Carolina

B E F O R E:

HONORABLE EDGAR DICKSON, Judge.

A P P E A R A N C E S:

CLARENCE DAVIS
ATTORNEY FOR THE PLAINTIFFS

ERIC BLAND
RONNIE RICHTER
DAVE ANDERSON
ATTORNEYS FOR THE DEFENDANTS

(VIA WEBEX HEARING)

TRACY MCBRIDE
COURT REPORTER

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20	There were no exhibits.	
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1 THE COURT: This is a case from Lexington County 2020-CP-38-00005 R. Kent
2 Porth and Panorama Point, LLC Plaintiffs versus Roy P. Wilkins, Jr., RPW Development
3 Inc., Southern Visions Realty, Inc. and Consolidated Multiple Listing Services, Inc.
4 Defendants. It's my understanding, Mr. Davis, before we got started, just in some general
5 conversations, that the attorneys that are--the defense attorneys that are here represent all
6 of the Defendants except Consolidated Multiple Listing Service, Inc., which I'm told has
7 not been served; is that correct, Mr. Davis?

8 MR. DAVIS: That is correct, Your Honor.

9 THE COURT: Okay, all right, and I was told, let's see--Mr. Bland?

10 MR. BLAND: Yes, Your Honor?

11 THE COURT: You were gonna start off?

12 MR. BLAND: Yes, we have the pleasure of representing all the Defendants.
13 Right here, Your Honor, is Ann Brooks. She's one of the heads of Southern Vision
14 Realty. Her brother, Robbie Wilkins, is an individual Defendant in development
15 company RPW as well as the broker in charge for Southern Visions Realty. These are
16 Defendants that are longtime Lexington business people; the largest real estate company
17 broker realtor in Lexington County. Mr. Wilkins is probably the most prominent
18 developer of real estate in Lexington County. Developed every single major subdivision
19 on Lake Murray, including Panorama Point, the one that's at issue, most of the Dollar
20 General stores all around and other big developments. Your Honor, one of my favorite
21 Judges, Alex Sanders, had a quote in every case. He said if there was ever a lawsuit that
22 was so insignificant, so overblown and such a waste of resources that it should never
23 have been brought, this would be the suit. Well that quote is totally appropriate in this
24 case. I think what you--you see a lot of sound and fury in the four hundred and seventy-
25 three paragraph complaint brought by Mr. Porth; but you have to understand that this is

1 one of these type cases that every, Judge, would loathe in front of them and most defense
2 attorneys and attorneys like us loathe to have, because it's a former family friend fighting
3 a lawsuit, bringing a lawsuit just because he can and to settle some scores. Our court
4 system is just not built for a type of complaint that, when you fill it down, is airing a
5 grievance over what we would consider to be a foot fail. This concerns the development
6 on Lake Murray called Panorama Point where Mr. Porth, the Plaintiff, the former partner
7 in the Nexus Pruitt Law Firm, a very sophisticated erisa, type of partner who stopped in
8 2007 practicing law and focused on this subdivision; his family contracted with SVR
9 Realty and the developing company, Ms. Brook's brother Robbie Wilkins, RPW, to
10 develop raw acreage that is on Lake Murray. And this is a 12 year developed subdivision
11 where the developer took a raw piece of land, put the infrastructure of roads, sewers,
12 curves, a very nice entrance monument with a long road to go into the subdivision; and
13 then the realty company took this subdivision, marketed it through the recession,
14 navigated the market through that recession and billed it out and sold it for the highest per
15 acre lot price ever on Lake Murray.

16 And the gravamen of this lawsuit is that Mr. Porth wants to take very single dime
17 that the developer was paid and every single dime that the realty company was paid, and
18 now wants to add this woman to the lawsuit and insisted; so that in addition to the 6
19 million dollars he received as a result of our client developing and marketing and selling
20 the subdivision, wants to totally disgorge that for 12 years, 12 years, they work for
21 nothing, not anything. And so during this process you will hear about the complaint that
22 was brought. You will hear about the fact that he complains that we cannot produce
23 signed listing agreements, at this time, for sales that--for most of the sales that happened
24 in 2007 and 2011; even though this Plaintiff, Mr. Porth who's a lawyer, was involved in
25 every single facet in this subdivision from studying the market price with Ms. Brooks,

1 approving the marketing materials, setting the contract prices when they came in
2 negotiating it, negotiating the types of commission that she would receive, reducing the
3 commissions the developer would receive at the closing table, signing the HUD-1,
4 recognizing all the money that was going to come from the seller's side to be paid out,
5 signing the deed and then running the HOA; and now contends that well I just became
6 aware of an order that was entered by, Judge Blot, against this CMLS that say you have
7 to actually have the signed listing agreements. We contend we had signed listing
8 agreements but these sales were so long in time that the destruction of records, pursuant
9 to a record policy, some of them don't exist. Some of them do; but we have a developer
10 agreement that did spell out exactly what the developer fees were and exactly what the
11 real estate fees were; but now he's saying in 2017 I learned that you may have had a foot
12 fail and that you can't produce for me a signed listing agreement. Therefore, even though
13 I was involved in every single facet of these, I want you to give me every dollar back
14 because you can't produce the signed listing agreement for me today. And along the
15 way, it wasn't until his mother died in 2012, did Mr. Porth turn his sights on this family
16 friend.

17 And in that process he has threatened to sue his brother, Alex Weatherly from
18 Callison and Tighe, Steve Johnson from--over the estate of this mother, Rex Casterline
19 from Blair Cato, Eric Bland, Ronnie Richter and Dave Anderson. Every single person
20 that has come in front of him he has threatened to sue over this subdivision. Your Honor,
21 the Iqbal and Twombly case that Mr. Richter is going to talk about, are two Supreme
22 Court cases where someone like you, who is a season, Judge, and is the gatekeeper, has to
23 look at a complaint and say can it pass the pleading stage at this point that I'm going to
24 unleash a litigant who has threatened to take 45 depositions, name the lawyers, name Ms.
25 Brooks and go to every single subdivision that was ever developed by Mr. Wilkins and

1 every transaction done by SVR Realty and subpoena every single record. Your job, as a
2 gatekeeper is, is there a plausible claim that I am going to unleash this playbook
3 discovery. Then this court system is going to be burdened with motion after motion after
4 motion of are they relevant? Is this confidential information? And so we ask, Your
5 Honor, at this time, taking everything into consideration but only taking what he's pled;
6 because that is the well pleaded complaint rule and he's entitled to every inference that
7 every fact that he's pled, can be deemed as true at this stage; but please be mindful that
8 what he submitted to, Your Honor, those exhibits that are attached to his responsive
9 motion on position papers, converts this into a summary judgment, which we're not
10 willing to do. And he goes forward with facts that have come to light after he filed the
11 complaint. So Mr. Richter is going to focus on the complaint and the allegations and then
12 ask you, under Iqbal and Twombly, is it plausible, that as he has pled this in his
13 complaint, for this action to go forward; thank you, Your Honor.

14 Mr. Richter?

15 THE COURT: All right, Mr. Richter, I'll be glad to hear from you, please sir.

16 MR. RICHTER: Yeah, thank you, Judge. First, Your Honor, I want to say
17 generally about the complaint that its volume only demonstrates that the Plaintiff is as
18 loquacious as he is litigious and it's a game of compensation and obfuscation; that if I say
19 enough and I call your attention away from the obvious defects in the pleading then
20 maybe you might not see them. And so the two obvious defects that we want to discuss
21 with you today and the two reasons why you should grant our motion to dismiss, are that
22 within the four corners of the complaint, accepting what the Plaintiff has said to be true,
23 the claims are time barred; and additionally, the claims that arise out of alleged statutory
24 violations are not claims that may constitute a private cause of action. So I'll start with
25 the statute of limitations. I know that, Your Honor, is well versed on the statute of

1 limitations. You hear this argument all the time. I did find a really cool quote from,
2 Justice Scalia, about the expansive view of the discovery rule in statute of limitations
3 arguments. And what Justice Scalia said about it is that the expansive approach in
4 discovery rule is a quote bad wine of recent vintage. And we're gonna ask that you,
5 Judge, not drink of that wine today; and that you objectively and reasonably apply the
6 discovery rule; and that you not consume what has been offered to you in this complaint
7 as reasons why you should not. The discovery rule says, and this is Young versus South
8 Carolina Department of Corrections, that whether a Plaintiff actually knew he had a claim
9 is not the test. And this complaint goes on for pages where this sophisticated lawyer tries
10 to explain to you, Your Honor, gosh, I really didn't know the law; and I didn't realize that
11 I had a claim. And when I finally did all of my legal research and conclusively
12 determined that I had one, that's when I went forward. And that's not the law.

13 The law is not that a claim occurs when someone actually knows they have a
14 claim; rather courts must objectively determine whether the circumstances of the case
15 would put a person of common knowledge and experience on notice that some right has
16 been invaded or that some claim may exist. So the cases go on to say you don't have to
17 have a full blown theory of recovery. It doesn't have to be the exact claim that you
18 thought it was. What you need to know, as a person of common knowledge, is that some
19 right has been invaded or some claim may exist. So with that backdrop, Your Honor, I
20 am confident that you've spent the several days to read this complaint; but we have a
21 summary view of it. I'm just going to roll you through a few of the paragraphs that lay
22 out the timeline; and I want to just depose that timeline in the complaint against the
23 standards for the statute of limitations. So in my technical limitations, I'm gonna try to
24 share a screen with you. I hope you're seeing a Defendant's Presentation.

25 MR. BLAND: We're not.

1 THE COURT: We're not.

2 MR. RICHTER: Okay, just a moment. I think the host has to allow me to share.

3 THE COURT: Elizabeth?

4 (At this point Elizabeth makes Mr. Richter the presenter and the presentation
5 appears on the screen).

6 MR. RICHTER: All right, now you should be seeing a presentation.

7 THE COURT: Got it.

8 MR. RICHTER: Okay, it's going to be one of the most boring presentation
9 you've ever seen, Judge, but I do think it's gonna help us, you know, frame the timeline
10 for purposes of the argument, okay?

11 THE COURT: All right, sir.

12 MR. RICHTER: So staying within the four corners of the complaint, it's
13 important to know the complaint was filed on January 2, 2020. That's the support date
14 for this argument. The complaint explains that in early 2006, these parties knew each
15 other. The complaint goes into great detail about their relationship. The Plaintiff knew
16 the Defendant to be a developer of projects on Lake Murray; and it's for that reason that
17 they reached out to develop this particular parcel on the Lake. In June of 2006 a press
18 release was issued--you know, way back in the day there were always pre promotions of
19 properties, you know, a lot's coming soon kind of thing. So in 2006 there was a press
20 release that this neighborhood, to be called Panoramic Point, was coming. On December
21 21, 2006 the Plaintiff signed a development agreement with RPW. And this is important,
22 paragraph 166, the lot transaction simply, we talked about, occurred between 2007 and
23 December of 2016. Again the complaint is not filed until January 2, 2020. And also of
24 particular significance is the first lot sale. The first lot sale that's the subject matter of
25 this complaint--we're actually reaching back 13 years. So you can disgorge these

1 commissions and development fees, that sale, to purchaser number one, was on January
2 16, 2007. So what we know is that according to her complaint, it's not until sometime in
3 2017 that we've got three lots left; and Ann, who you met, Ann Brooks, she was with
4 Eric, she contacted the Plaintiff to say we're just going to turn over these last three lots to
5 STP. That's Kent Porth's wife who was, at that time, an agent at Southern Vision Realty;
6 and we're going to let your wife handle the marketing of these last three lots. And what
7 Mr. Porth explains is that on January 10, his wife came home with listing agreements and
8 said hey, you have to sign these listing agreements. And according to paragraph 157 a
9 light bulb went off and Mr. Porth said, well I've never seen that before. What's this all
10 about? I didn't know we had to have listing agreements because I didn't have any for the
11 other lots, according to Mr. Porth. Therefore, in the months following January 2017, Mr.
12 Porth, a retired hobbyist lawyer, decides he's going to conduct some exhaustive legal
13 research. And it's only in 2018 that he determines conclusively that he has claims
14 because we did not do those things that were required by code section 40-57-135 and 137
15 in the manner in which the properties were marketed.

16 And again, Your Honor, determining conclusively is not the legal standard for the
17 trigger of the statute of limitations. What is the trigger is were you on notice that some
18 right had been invaded or that some claim existed. So in this complaint Mr. Porth sets
19 forth a number of vignettes, a series of complaints about various transactions. And we'll
20 take a look at a couple of them and how we placed him no notice, very early on, that a
21 right of his had been invaded and that he had claims against the Defendants. One of them
22 dealt with, what he characterized as, the lot 15 issues. After the closing of lot 15, with
23 purchaser number 16, he learned that purchaser 16 had an existing and continuing
24 business relationship with one or more of the Defendants. Now as a point of reference,
25 this last paragraph 494, I remind the, Court, that that closing was September 26, 2013.

1 So when he's talking about quote unquote "lot 15 issues" he's talking about a transaction
2 that took place in 2013. And you can read this section yourself, Your Honor. I'll give
3 you the Reader's Digest version. The complaint about Lot 15 was that Robbie Wilkins
4 knew the seller and that Robbie Wilkins double dealt Kent Porth because on that lot there
5 was some granite that would have to be dynamited in order to build a house on the lot.
6 So Robbie goes to Kent and says, you've got to take some money off the purchase price
7 because the buyer, an undisclosed friend of Robbie's, is going to have to dynamite some
8 granite in order to build on that lot. And so based on that representation, Kent agrees to a
9 lower purchase price for Lot 15. And what we ultimately learn about Lot 15 in the
10 complaint is the allegation that there was no blasting. So the only reasonable deduction is
11 that Kent Porth, who was told we need you to take a deduct for some dynamite, certainly
12 knew when no dynamite explode. So you knew in 2013 Mr. Porth that minimally,
13 according to your complaint, Robbie Wilkins was a liar and a scoundrel and a thief. He
14 had deceived you. He did it for the purpose of benefitting a purchaser, who was a friend
15 of his, and you knew that a right of yours had been invaded in conjunction with the lot 15
16 transaction, according to your own complaint; but that's not all, because the complaint
17 also tells the story of the bonded plaque issues of Lexington County.

18 Your Honor, I'm gonna give you the Reader's Digest version. You can read this
19 section for yourself; but the bonded plaque issue says that nearing the completion of the
20 punch list for the development in this subdivision, the county had a number of issues that
21 had to be resolved; and in order to get pass that punch list of items, what we decided to
22 do was put up a sixty-five hundred dollar cash bond. Well it was Kent Porth's money.
23 So Kent knew that sixty-five hundred dollars had been paid to the county in order to bond
24 off these punch list of items and then the items were completed and the bond money was
25 paid back and Robbie put it in his pocket. This is what the complaint says. It's only

1 when Kent approaches him and confronts him, wait a minute you liar, you scoundrel; you
2 just stole sixty-five hundred dollars from me. It's only when he confronts him June 7,
3 2012 Defendant Wilkins informed the Plaintiff that he had convinced Lexington County
4 to accept the cash bond; after completion of the punch list Lexington County refunded the
5 money. Upon receipt of the refund of the cash bond the Defendant deposited it and did
6 not tell the Plaintiff; but the Plaintiff discovered it. And he didn't inform the Plaintiff
7 until April 25, of 2013 after the Plaintiff specifically inquired about it. So April 25, 2013
8 the Plaintiff discovers that his developer stole sixty-five hundred dollars from him and
9 confronted him about it. And only after confronting him was the sixty-five hundred
10 dollars restored. And this--fascinatingly, this is what the complaint says about that
11 transaction.

12 The failure of Defendants Wilkins and RPW to complete the punch list items in a
13 timely manner and the failure to refund the cash bond are examples of the negligence,
14 incompetence and lack of attention in performing the duties for which they received the
15 development fees. So right there in April of 2013 you know that he's been negligent.
16 You know that he's been incompetent and you know that he's not performed the duties
17 for which you hired him and upon which they're charging the fees; and yet, the complaint
18 is not filed until January 2, of 2020; and again you don't have to know everything. So
19 theoretically, Your Honor, to accept the allegations of the complaint is true, when a light
20 bulb does finally go off for Mr. Porth for other reasons, he goes and does exhaustive
21 research. He could have, would have, should have done the exact same research in April
22 of 2013 and would have led him to the exact same place. And his complaint is time
23 barred by any number of years based on that analysis. So for--based upon the expiration
24 of the statue of limitations, and again urging, Your Honor, to please embrace the
25 gatekeeper role in a case like this and stop the madness, we ask that you dismiss the

1 complaint; but there is an additional grounds for dismissing the complaint.

2 MR. BLAND: Ronnie, say the Myrtle Beach case about not knowing the law.

3 MR. RICHTER: Yes, so it's in our brief, Your Honor, but at the end of the day
4 what Mr. Porth really says in response--he's got several responses to the statue of
5 limitations; but one that's fascinating is when you look at what his complaint says, really
6 what it says is I didn't know the law; and we have already shown you in the four corners
7 of his own complaint I knew he was negligent. I knew he was incompetent. I knew he
8 was a thief. I knew he was a liar. And I knew that he had breached his duties to me; but
9 for pages and pages of this complaint, really what he goes on to try to explain is I didn't
10 know the law. And, Your Honor, ignorance of the law is not a basis on which to toll
11 the running of the statute of limitations; and that's in the American Legion case that's in
12 our brief; but that's really the argument on the toll. If I had known the law I would have
13 acted sooner. And, Your Honor, if that is the law, then there is no statute of limitations;
14 but that's not the law. And for an additional sustaining grounds for dismissing the
15 complaint, the gravamen of the complaint, and it's in the complaint 33 times, is that this
16 statute was violated. This one 40-57-135, this is the chapter that sets forth the obligations
17 of brokers, brokers in charge, salesperson, property managers as it relates to the sale of
18 real property. And I just highlighted the one section here, Your Honor. This is section
19 E1. A licensee may not advertise market or offer to conduct the real estate transaction
20 involving real estate without having a listing--a written listing agreement first. And
21 again, the complaint says it 33 times. They didn't have a written listing agreement. They
22 didn't have a written listing agreement.

23 All right, does that violation constitute a private cause of action? Well this
24 chapter explains where, when and how you can have a private cause of action. It says it
25 in 57-790, which conveniently enough is entitled civil actions. And what it says is, a

1 civil action may be brought for violations of this chapter, the whole chapter, as provided
2 for in 40-1-210, all right, very clear. So it is a civil action authorized for violations in the
3 chapter, yes; but only as provided for in section 40-1-210. So turning to 40-1-210, the
4 Department, meaning the LLR, under 40-1-210 may institute a civil action; and it's for
5 the purpose of obtaining injunctive relief against violations of the article. So yes, a civil
6 action may be brought. It may be brought by the LLR for the purpose of obtaining
7 injunctive relief. No other civil action is authorized. And in candor to the, Court, there is
8 another section that we think is important and that you should know about, and that's this
9 section 40-57-350 is the former 40-57-137 that's mentioned in the Plaintiff's complaint
10 also in conjunction with 135. These are the duties. And this chapter also explains the
11 relationship of the common law to this statutory scheme. If you look at the last sentence-
12 -this is the very last paragraph of this very long section. In this section it outlines all the
13 duties that brokers and agents owe the principles that they serve. All right, last sentence,
14 nothing in this section precludes an injured party from bringing a cause of action against
15 licensees or companies or their brokers in charge. So this is not a statute creating a
16 private cause of action.

17 This is a statute that says we are not supplanting the common law. So if there is a
18 statutory violation, you're more than welcome to address that through the LLR. They can
19 bring civil actions seeking injunctive relief. This does not preclude, however, a litigant
20 from bringing a private common law cause of action if you have one. We've already
21 talked about this common law causes of action, Your Honor. They're all barred by the
22 statute of limitations; because as early as 2013, and of course within the four corners of
23 the complaint, Mr. Porth knew enough to know that a right of his had been invaded. You
24 don't have to know the full theory of recovery. You don't have to have consulted with a
25 lawyer. You don't have to have quote unquote, "conclusively determined. A person of

1 common knowledge would have known if someone stole sixty-five hundred dollars from
2 them or double dealt him on some dynamite on a buddy's lot, that I've got claims. And,
3 Your Honor, for those reasons we would respectfully request that you dismiss this
4 complaint. I'm sure you're familiar with Iqbal and Twombly. They're federal cases.
5 They're federal 12(B) (6) cases; but the federal law in South Carolina certainly informs
6 the state law. We follow them. Iqbal and Twombly highlight an expansion of the role of
7 the, Court, at the 12(B)(6) stage and allow you, in a gatekeeper role, to test the
8 plausibility of a complaint, that to protect the system against litigants like Mr. Porth who
9 seek only to inflict harm and distraction and pain and waist resources on matters that will
10 ultimately lead us to the exact same place. You can deny this motion. We can waist
11 untold numbers of hours and dollars pursuing these claims and be right back before you
12 on summary judgment making the exact same arguments. Discovery is not going to
13 change the fact that Mr. Porth knew, in 2013, that his rights had been invaded and that his
14 claims are time barred. Your Honor, we respectfully request you dismiss this complaint.

15 THE COURT: Thank you, sir.

16 MR. BLAND: We would like to reserve a rebuttal if we could. Mr. Anderson
17 will do that.

18 THE COURT: Okay, so Mr. Davis, it is now your turn, please, sir.

19 Mr. Richter, can you---

20 MR. RICHTER: Yes, sir.

21 THE COURT: ---take down the power point? Thank you, sir, appreciate it.

22 Mr. Davis, unless you want the power point up?

23 MR. DAVIS: No, sir, I do not.

24 THE COURT: Okay, all right, Mr. Davis, I'll be glad to hear from you, please,
25 sir.

1 MR. DAVIS: Your Honor, I'm here. I do have Mr. Porth here with me. What
2 they're basically doing is asking the, Court, to either ignore or rewrite a statutory law.
3 One of the provisions that they left out, and frankly they misstated the law under Title 40
4 in section 40. We briefed it. It's in our most recent brief on page four. We briefed it, but
5 in section 40-57-137 (Q) the legislature expressly and unambiguously provided for a
6 private cause of action under that act for an injured party. And I'll quote to you, except
7 as otherwise stated, nothing in this section precludes an injured party from bringing a
8 cause of action against licensees, their companies or their brokers in charge. And that's
9 exactly what we've done. And we've done that because in that act it specifically states
10 that there are certain disclosures that must be made at the outset of any potential
11 representation; disclosures in particular like the listing agreement, which would put Mr.
12 Porth on notice of all his rights and obligations; and that if you do not do that you
13 basically have no right to even sit at the table. You have no right to any type of
14 agreements. You have to have those documents in place. And what the law says is if you
15 do not have those documents in place--and Mr. Wilkins's own attorney has stated--if you
16 don't have the documents in place, you're not entitled to development fees. You're not
17 entitled to broker fees. You're just not entitled to them; and that's what the law says. If
18 you don't have these documents in place, these disclosures in place to fight against dual
19 agencies, to fight against non disclosures, which can take place and create a conflict, you
20 don't have a right at the table and you have to give the money back. That's what the law
21 says; and then what they're asking you to do is rewrite that law.

22 And what the, Court--what legislature has stated is there is a private right of cause
23 of action that Mr. Porth can seek damages for that injury. What they're complaining
24 about is a lengthy complaint, which basically lays out what the facts are, puts everything
25 on the table; but what they're complaining about is what it seeks is primarily an equitable

1 resolution, an equitable resolution in the form of disgorgement, an equitable resolution in
2 the form of also even restitution based on the fact that there is a breach--there has been a
3 breach of fiduciary duty. That act charges the broker in charge. It does not charge Mr.
4 Porth. Mr. Porth, yes, he's a lawyer. He is not a real estate lawyer. He was a tax lawyer.
5 He dealt primarily in employee benefits. He has no--this statute charges Mr. Wilkins and
6 his company on that knowledge, which they knew about; and they knew about it not just
7 because of the statute but also, and you've heard it mentioned, there is a order by, Judge
8 Blot, which essentially it was scathing against this very type of conduct where essentially
9 because of the lack of listing agreements, the property is not put on CMLS. Instead it's
10 kept in the pocket. It creates a pocket listing. A pocket listing, which suppresses the
11 potential for other brokers and licensees or agents to sell the property of Mr. Porth, to
12 create demand for the property of Mr. Porth, a demand which creates more dollars, which
13 Mr. Porth would be entitled to. That's what they did not do; and the law requires them to
14 do so. And the law requires and says if you do not do so then you need to give the money
15 back and there needs to be disgorgement of those fees. You're not entitled to even enter
16 into any agreement--supposed agreement--with Mr. Porth. And you had no right to sell
17 that property. You had no right to market that property.

18 As they stated, this is one of the largest brokers around in Lexington County. He
19 should know better. In fact, Your Honor, he does know better because he has a
20 handbook, a handbook that's mandated by LLR, which specifically sets forth what his
21 companies and his agencies should and should not do and it tracks, it tracks, almost word
22 for word, the statute. He knew what he was doing. It was intentional because he's trying
23 to get all the brokerage fees and any other fees; he's trying to keep any money to himself
24 and not put it in the marketplace to drive up the prices of Mr. Porth's property and to not
25 sell it as fast. That's what they were doing. They knew what they were doing; except

1 this time they got caught; but they got caught, though; when they got caught was
2 sometime in January of 2017. And I would point to, Your Honor that a breach of
3 fiduciary duty, our courts have been clear, there is no statute of limitations. There is no
4 statute of limitations. And if you look at what we're trying to get, we can shorten it,
5 restitution that's equitable relief. That is equitable relief. There is no statute of
6 limitations and the law is crystal clear, crystal clear. When he discovered all of this, yes,
7 it was in 2017 when his wife brought to him--and we lay it out in the complaint, we lay
8 all the facts out, we put everything on the table. She's asked him about signing certain
9 documents, listing agreements in particular and other disclosed agreements, which put
10 him on notice and--what his rights are as it relates to his development, his families
11 property. He was never--that was never disclosed to him. And so he began asking
12 questions about it because he has no knowledge of it. And he asked for the files. Your
13 Honor, it took them fifteen months, it took the Defendants and their attorneys fifteen
14 months to give him his files, which he's entitled to, to show him the documents that they
15 are required to maintain, that they are required to show to him, that they are required to
16 explain to him, that they are required to allow him to read, that they're required to
17 disclose.

18 There are duties and obligations; and so that he understands his rights pursuant to
19 those duties, particularly when you're talking about a large--a real estate development of
20 this nature. He discovered that then and then he did--what they're criticizing him for is
21 then not just jumping the gun and trying to file a lawsuit but then doing his due diligence.
22 They're criticizing him for doing his due diligence. They're the ones that took 15 months
23 to give him those files. They're the ones who basically told him that they didn't see any
24 listing agreements. They didn't see any disclosure agreement. They didn't see any of the
25 agreements that are set forth in that statute that are mandatory, that are mandatory.

1 Essentially what his broker was doing is engaging in illegal activity. He never should
2 have been at the table. He never had the disclosures. He never should have had him
3 attempt to enter in some agreement, which was null and void because he never gave him
4 what is required and charged to real estate professionals, not to customers but real estate
5 professionals. And after the fifteen months he saw there were no listing agreements. He
6 never recalled signing any listing agreements. His brother never recalled signing any
7 listing agreements or any other disclosures, which were required of him. That's when he
8 discovered it. They talk about he's at a closing. He was at a closing when you got a
9 lawyer sitting there representing the purchasers; but that's about deeds and contract. That
10 has nothing to do with mandatory disclosures, which should take place at the inception of
11 that business arrangement as required by the law. They're engaged in illegal activity.
12 And the law is clear. You can't--the passage of time does not make illegal activity legal.
13 So what we have, we have equitable cause of action going on fiduciary duty, no statute of
14 limitations. We have a discovery rule which, you know, they point to January 2017. And
15 I put it, and it's put in there, January 2017. So when he discovered that those agreements
16 did not exist, as a matter of fact, was on August 2018, August 2018 because they delayed.
17 They stalled. They had engaged in illegal activity and they had gotten caught. And they
18 didn't want to--I submit to you they didn't want to give those documents to Mr. Porth
19 because that's what he was going to discover.

20 THE COURT: Mr. Davis, what---

21 MR. DAVIS: That's what he was going to discovery.

22 THE COURT: ---Mr. Davis, may I ask you a couple of questions?

23 MR. DAVIS: Yes, sir.

24 THE COURT: Okay, are you aware of any statute or anything that tells you how
25 long you're supposed to save real estate closing document, listing agreements and things

1 like that?

2 MR. DAVIS: The Defendant states 5 years; but I would tell you, Your Honor,
3 they produced to us some listing agreements, which are, I'll tell you, we've called it
4 fraudulent listing agreements because they are agreements which supposedly are signed
5 by our client; well they're not. I mean they're fraudulent. So there's agreements--what
6 we are entitled to is discovery to find out what does and does not exist, not just in their
7 papers files, but also on their computer files, which the computer files have never, were
8 never turned over to us.

9 THE COURT: Okay, Mr. Davis---

10 MR. DAVIS: ---we do have these two listing agreements that were given to us,
11 which indicates that their--whatever documents they have goes back beyond any five
12 years.

13 THE COURT: Okay, but that's not my question. My question was are you aware
14 of any requirement of how long you're supposed to maintain listing agreements and
15 things like that?

16 MR. DAVIS: You have to keep all records for inspection for five years. I do not
17 know any specific statute.

18 THE COURT: Okay, all right, well I mean just as when you file--how long are
19 we required to keep income taxes, 10 years or something like that?

20 MR. DAVIS: Yes, sir.

21 THE COURT: Eight years, 7, I don't know.

22 MR. DAVIS: I don't really know. I think it's about--you know, I don't really
23 know.

24 THE COURT: Okay, neither do I. Let me ask you another question then.

25 MR. BLAND: Your Honor, there is a statute. It's 5 years under 40-57-135

1 (D)(1).

2 THE COURT: (D)?

3 MR. BLAND: (D)(1), a broker in charge or property manager in charge for a
4 minimum of five years maintain and furnish to the commission, upon request, a copy of
5 them getting such documents.

6 THE COURT: Okay.

7 MR. DAVIS: Your Honor, I will, if I can point to your attention, during the time
8 period when they delayed his reviewing his file for fifteen months, I will tell you the
9 lawyer, and I think it's Rex Caseline--I think I've got that right--Rex Caseline, who is
10 purportedly one of the top real estate lawyers in the State--he never, he never stated that
11 they didn't have the files. There is no--there was no evidence out there that they don't
12 actually have files going back beyond five years. He never raised that those files had
13 been purged in any manner. In fact he raised the fact that there were computer files out
14 there but those were never provided to Mr. Porth. And we're entitled to discovery.

15 THE COURT: Well I'm just asking a question about how long they're supposed
16 to keep them, okay.

17 MR. DAVIS: I'll point to the, Court, that Mr. Caseline produced documents
18 going back as far as, I believe, 2006 if I'm not mistaken.

19 THE COURT: Okay, my other---

20 MR. DAVIS: So there are documents out there that go beyond the five years; and
21 we should be entitled to review all those documents, to see all of those documents.

22 THE COURT: Well I'm not here on discovery or motion to compel right now,
23 okay?

24 MR. DAVIS: Yes, sir.

25 THE COURT: All right, sir, the other question I had, you're saying that you're

1 bringing this action essentially under 40-57-137(Q)?

2 MR. DAVIS: Yes, sir.

3 THE COURT: What is the statute of limitations on that one?

4 MR. DAVIS: The breach of fiduciary duty; so there is none.

5 THE COURT: Okay, all right, Mr. Davis anything else you want to tell me?

6 MR. DAVIS: Yes, sir, and I would raise that they--and we briefly--they're
7 estopped from raising the statute of limitations. They've got unclean hands. You've got
8 the delay in producing the documents to Mr. Porth. You have essentially them engaging
9 in illegal activity, which he's had no duty or obligation to uncover. Although he did
10 uncovered it. You've got, with the fraudulent listing agreements, you basically have, at
11 some point and time, there was an effort to conceal it, that they didn't do what they were
12 supposed to do. So they've got unclean hands. And as the, Court, is aware, if you've got
13 unclean hands and you're engaged in illegal activity, you're engaging in fraudulent
14 activities, be it constructive or otherwise, you're not entitled to raise the statute of
15 limitations.

16 THE COURT: All right.

17 MR. DAVIS: But we do have a private right of action, Your Honor. And I've
18 cited that. That's completely--they're wrong in that regard.

19 THE COURT: Okay, all right, thank you, Mr. Davis.

20 MR. DAVIS: All right, sir.

21 THE COURT: Now I believe Mr. Anderson, are you going to reply?

22 MR. BLAND: Mr. Richter has one minute and then Mr. Anderson will deal with
23 the statute or mis-cite that he just gave you.

24 THE COURT: All right, Mr. Richter?

25 MR. RICHTER: Thank you, Your Honor, very briefly; you got served a little

1 more bad wine right there. Now 137 (Q), I provided that to you in the form of 350 (M).
2 When you look at the statutory history of that section 40-57-350 indicates that it is
3 formerly cited as 40-57-137. So I did not withhold from, Your Honor, 40-57-137 (Q).
4 That exact same language is now captured in 40-57-350 (M). And that's the language
5 where we looked at that says nothing in this section precludes an injured party from
6 bringing a cause of action. Your Honor, that is not creating a statutory cause of action. If
7 we were going to create a statutory cause of action we are going to say, a violation of this
8 section entitles the aggrieved party to the following, right? The section is crystal clear in
9 what civil actions are created; and it's crystal clear in a section that's entitled civil
10 actions. And it explains that the Department can bring a civil action. It simply doesn't
11 preclude common law causes of action.

12 And one other point. It's kind of a knee pivot to bring all these claims of law and
13 what they want to urge you is, no actually it's equity. And that's a block to you, Your
14 Honor, because equity in statute of limitations. Although we all know that statute of
15 limitations conforms latches in equity circumstances; but this is what their equity claim
16 says, accepting the four corners of the complaint to be true. As early as 2012 or 2013 I
17 knew these Defendants to be liars, thieves, scoundrels; but I stayed with them and I
18 reaped the benefit of their services; and I accepted those benefits. And I would now like
19 to go back in equity and say to the, Court, I would like to disgorge them of everything
20 that they got in the only alliance that we had together. Your Honor, that's not the way
21 equity works. And I understood the, Court's, question about the records. It creates a
22 particular prejudice to the Plaintiff that you're now the Plaintiff about transactions back
23 in 2007 quote unquote inequity when there is a record retention requirement of 5 years.
24 So did they sleep on their rights? They absolutely did. And you can't cure these defects
25 by trying to pivot out of your legal claims and say okay, well we're just going to proceed

1 in equity instead. They slept on their rights to have done so, which prejudicial to the
2 Plaintiff. You can't accept the benefit of conduct that you now call illegal when you
3 knew it to be so at the time, and then come back and apply to, Your Honor, inequity and
4 say, gosh, I'd like some help here. So, Your Honor, we ask again that you dismiss this
5 complaint.

6 THE COURT: Thank you, sir.

7 And Mr. Anderson, you wanted to---

8 MR. ANDERSON: Yes, Your Honor, just very briefly, I just wanted to draw,
9 Your Honor's, attention to the memorandum of law in support of the motion to dismiss
10 and the amended motion to dismiss of the Defendants. Our arguments are clearly laid out
11 in that memorandum. There's a couple of things that I wanted to at least draw the,
12 Court's, attention to. Mr. Davis indicated that, Judge Blot, produced a scathing order, is
13 what he referred to it as; but the final judgment that Blot--Judge Blot, ordered in case
14 number 308CD01786-SB that was filed in August 27, of 2009, is the final judgment; but
15 that final judgement is an agreement about CMLS, certain procedures and prohibitions
16 and they are not-- that order does not state that any violation of any law by the CMLS or
17 any other party; and in fact the court says without this final judgment constituting any
18 evidence against or any admission by any party regarding any fact or law. Basically what
19 he's referring to with the CMLS, the US Department of Justice across the United States
20 was going against Multiple Listing Services to state that--to try and make sure that they
21 weren't putting up roadblocks in their bylaws to allow the exchange of information pre-
22 dealing. And the CMLS, at that particular time, entered into this con--basically it was a
23 consent judgment to change their bylaws. And so one of the items did address listings;
24 but it's certainly not a scathing order against any conduct by the Defendants in this
25 matter. And he goes on to talk about producing these agreements; but that's not in the

1 complaint. We are here with the complaint that's been filed. And the complaint
2 respectfully, Your Honor, should be dismissed regarding these matters. A fiduciary and
3 equitable remedy, he is seeking economic damages. He's seeking it. And so we would
4 look to the fact that whether or not a breach of fiduciary duty sounds inequity is when the
5 relief sought is equitable. Here the relief sought is returning of the commission fees and
6 the development fees. It's economic damages. And so--plus punitive damages. So what
7 they are seeking is a clever way to try to get a way to get around the statute of limitations
8 by stating wait a minute. All of these causes of actions
9 are equitable, which is a disservice, Your Honor.

10 THE COURT: All right, well thank y'all. Well what I'm going to do is I am
11 going to go back through y'all's memos. If I have any questions like that I will get in
12 touch with you. Otherwise, after I finish reading it I will get back to y'all with my
13 decision, okay?

14 MR. BLAND: Thank you, Your Honor.

15 MR. DAVIS: Thank you, Your Honor.

16 THE COURT: Thank you.

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1 I, Tracy McBride, Court Reporter for the 13th Judicial Circuit hereby certify that
2 the previous 24 pages are true, accurate and complete to the best of my abilities,
3 including all exhibits if any, that took place in Lexington County, South Carolina.

4 I further certify that I am not related to any of the parties in the case nor am I
5 interested in the outcome of the case.

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Sincerely,

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22

Tracy McBride

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Dec 15 2021

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC.....Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

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December 15, 2021

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Jan 04 2022

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S.C. Code Ann., Section 40-57-137 (1976)	8, 22, 24, 27, 28, 29, 33, 34, 35
S.C. Code Ann., Section 40-37-139 (1976)	5, 22, 27, 28, 29, 33, 34
S.C. Code Ann., Section 40-57-740 (1976)	33
South Carolina Rules of Civil Procedure, Rule 5	37
South Carolina Rules of Professional Conduct, Rule 3.5	37

Issues Presented

- I. Did the Lower Court err by failing to address the specific incidents of extrinsic fraud involving the Fraudulent Documents?
- II. Did the Lower Court err by failing to take the allegations of the Complaint with respect to the dates of discovery of the Appellants' various injuries as true, and by failing to make all reasonable inferences from those allegations in favor of the Appellants, in response to the Respondents' pre-answer motion to dismiss under Rule 12(b)(6)?
- III. Did the Lower Court err by failing to address the Appellants' various arguments that the fraudulent and illegal acts of the Respondents, constituting unclean hands, either tolled or equitably barred the Respondents from raising any statute of limitations defense?
- IV. Did the Lower Court err by holding that the Appellants' breach of fiduciary duty claims are not equitable, and therefore not exempt from the application of any statute of limitations defense under the South Carolina Supreme Court's holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020)?
- V. Did the Lower Court err by holding that the Appellants are charged with knowledge of the law in direct contradiction to the statutory provisions of S.C. Code Ann. §§40-57-135, 137 and 139, and in direct contradiction of the statutorily enacted public policy of South Carolina?
- VI. Did the Lower Court err by failing to address the Appellants' argument that their reliance on the fiduciary status of the Respondents, and on Respondent Wilkins' status as a licensed attorney was a reasonable basis under South Carolina law for not performing due diligence on the legality of the Respondents' conduct prior to January 10, 2017?
- VII. Did the Lower Court err by holding that Title 40, Chapter 57 of the South Carolina Code Annotated does not authorize private causes of action for breach of fiduciary duty for violations of

its various statutory fiduciary requirements of disclosure and written consent set forth in S.C. Code Ann. §§40-57-135, 137 and 139?

VIII. Did the Lower Court err by holding that laches applies to the Appellants' based on the allegations of the Complaint?

IX. Did the Lower Court err by considering documents not part or outside of the record, and by taking judicial notice of "the knowledge of Appellant Porth" from unreliable sources without compliance with Rule 201 of the South Carolina Rules of Evidence in considering a pre-answer Rule 12(b)(6) motion to dismiss?

X. Did the Lower Court err in holding that the Appellants were *in pari delicto* with the alleged fraudulent, unlawful, and deceptive conduct of the Respondents based on the allegations of the Complaint?

XI. Did the Lower Court err in granting the Respondents' Motions to Dismiss since the dates of discovery of the facts and circumstances of the Appellants' various injuries are questions of fact?

XII. Did the Lower Court err in holding that the Complaint failed to state causes of action for unjust enrichment, quantum meruit and restitution?

XIII. Did the Lower Court err by dismissing the Appellants' claims with prejudice?

Procedural History

R. Kent Porth and Panorama Point, LLC (the "Appellants") filed a civil action for breach of fiduciary duty, violations of the South Carolina Unfair Trade Practices Act (the "UTPA"), and other related causes of action on January 2, 2020 in the Court of Common Pleas for Lexington County (the "Complaint") against Robert P. Wilkins, Jr. ("Wilkins"), RPW Development, Inc. ("RPW"), and Southern Visions Realty, Inc. ("SVR")(collectively the "Respondents"). The

Consolidated Multiple Listing Service (the “CMLS”) was named in the Complaint, but the Appellants did not serve the CMLS, and are not pursuing any claims against the CMLS. The Appellants granted an extension of time to file an answer to the Complaint pending a voluntary mediation which occurred on August 6, 2020, and which was unsuccessful.

On May 6, 2020, prior to filing an answer to the Complaint, the Respondents filed their original Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure seeking to dismiss the Complaint based on the assertion that all causes of action were barred by the statute of limitations (the “First Motion to Dismiss”). On September 18, 2020, the Appellants filed their first brief in opposition to the First Motion to Dismiss (“Appellants’ Brief No. 1”) in response to the Respondents’ Motion to Dismiss. On October 9, 2020, the Respondents filed an Amended Motion to Dismiss reasserting the statute of limitations defense, and moving to “dismiss the Complaint on the grounds that the facts as stated do not give rise to a cause of action.” On October 20, 2020, the Appellants filed a brief specifically in opposition to the Amended Motion to Dismiss (“Appellants’ Brief No. 2”). On November 16, 2020, the Respondents filed a Memorandum of Law in Support of their First Motion to Dismiss and their Amended Motion to Dismiss (the “Respondents’ November 16, 2020 Memo”). On December 10, 2020, the Appellants filed a third brief (Appellants’ Brief No. 3”) addressing the additional grounds and arguments set forth in the Respondents’ November 16, 2020 Memo.

Oral arguments on the Respondents’ Motions to Dismiss were heard on December 16, 2020 by Judge Edgar W. Dickson. On February 16, 2021, Judge Dickson entered an Order Granting Motion to Dismiss (the “Order”). On February 26, 2021, the Appellants filed a Motion to Reconsider under Rule 59(e)(the “Rule 59(e) Motion”). On March 11, 2021, the Respondents filed a brief opposing the Rule 59(e) Motion (the “Respondents Rule 59 Brief”). On March 23, 2021,

the Appellants filed a brief in support of their Rule 59(e) Motion (the “Appellants’ Brief No. 4). On March 31, 2021, the Respondents filed a sur-reply opposing the Appellants’ Rule 59(e) Motion. On May 5, 2021 the Lower Court denied Appellants’ Motion to Reconsider and issued an order leaving the Order in effect (the “Rule 59 Order”). On June 4, 2021, the Appellants filed a Notice of Intent to Appeal pursuant to Rule 203 of the South Carolina Appellate Court Rules.

In this appeal, the Appellants seek reversal of the Lower Court’s Order which dismissed the Appellants’ Complaint with prejudice prior to the Respondents filing an answer.

Factual Background of Case

This case arises from alleged fraudulent, unlawful, and deceptive acts of self dealing by the three separate Respondents, acting in concert and in violation of their respective fiduciary duties, related to the development, marketing and sale of various properties in the Panorama Point subdivision on Lake Murray in Lexington County (hereinafter the “Properties”).¹ The Properties had been owned by various members of Appellant Porth’s family since 1950, and the Properties comprised one of the most valuable undeveloped tracts of lakefront real estate on Lake Murray in 2006 when the development of the Properties began. In 2006, the Porth and Wilkins families had maintained a decades’ long friendship which materially influenced the Appellants’ trust in the Respondents with respect to the development, marketing and sale of the Properties.

The Appellants were first put on inquiry notice of the Respondents’ various fraudulent, unlawful and deceptive conduct and the corresponding breaches of fiduciary duty and acts of self dealing which form the basis of this litigation on January 10, 2017. Although the development

¹The Appellants allege that the Respondents’ fraudulent, illegal and deceptive conduct goes far beyond the Respondents conduct with respect to the Properties. Specifically, the Appellants allege that the pattern of conduct alleged in this case has occurred in several other real estate developments, and has damaged other unrelated sellers and competing CMLS members for many years and in hundreds of additional transactions. (R. p. 90 ¶354, p. 117 ¶ 468).

and marketing efforts of the Respondents with respect to the Properties had been ongoing since 2006, their wrongful conduct had been fraudulently and intentionally concealed from the Appellants prior to January 10, 2017. The Respondent's involvement with the Properties continued through May 11, 2017, when the relationship was terminated by the Appellants as a result of the findings of the Appellants' due diligence efforts which began on January 10, 2017. (R. pp. 55-59 ¶¶142-165). The Properties subject to this litigation were sold in 23 different transactions totaling over \$6,100,000 in gross proceeds. (R. pp. 59-64 ¶¶166-198).

On January 10, 2017, after the closings of all 23 transactions which are the subject of this litigation, the Appellants "relisted" their remaining 3 parcels of the Properties with a different licensed real estate agent who for the first time (i) provided the Appellants with the "agency disclosure" mandated by S.C. Code Ann. §40-37-139², (ii) requested that the Appellants execute the written agency agreements (also referred to as "listing agreements") and other forms mandated under the various provisions of Title 40, Chapter 57 of the South Carolina Code Annotated, and (iii) requested that the Appellants execute forms required under the rules of the CMLS through which the Properties were to be marketed (collectively the "Required Listing Documents"). (R. pp. 55-59 ¶¶142-165). The purposes of the Required Listing Documents were to (i) provide material and statutorily mandated disclosures of the Appellants' legal rights and the fiduciary obligations of the real estate professionals, (ii) to set forth the material terms of the agency relationship being entered into, and (iii) have the Appellants make elections and choices as to certain material terms of the listings and the methods to be used in the marketing of the

² All references herein to the South Carolina Code Annotated are to the Code as in effect at the relevant times. For example, Title 40, Chapter 57 was substantially amended effective as of January 1, 2017 (after all of the conduct subject to this action), and many of the relevant sections were renumbered (i.e. §40-57-139 was renumbered as §40-57-370 effective as of January 1, 2017).

Properties. Prior to January 10, 2017, the Appellants had been denied these material, fiduciary disclosures, and the opportunity to make the material elections and choices set forth therein.

As a result of having been presented for the first time with the Required Listing Documents on January 10, 2017, the Appellants began performing factual and legal due diligence as to why the Required Listing Documents had never been presented to the Appellants by the Respondents. (R. p. 58 ¶¶159-160). As part of their due diligence in early 2017, the Appellants requested the Respondents to provide copies of all documents relative to their work on the Properties, and to provide full and immediate disclosure of all previously undisclosed acts of the Respondents in their fiduciary capacities related to the development, marketing and sale of the Properties (all requested documents and disclosures referred to herein as the “Disclosure Request”). (R. pp. 73-74 ¶¶277-279). On or around May 24, 2017, the Respondents retained Rex Casterline (“Casterline”) of Blair Cato Pickren Casterline, LLC (“Blair Cato”) to handle the Appellants’ Disclosure Request. (R. p. 75 ¶¶284-286). The Respondents, with Mr. Casterline’s assistance, delayed the response to the Disclosure Request for over 15 months until August 28, 2018. (R. pp. 75-82 ¶¶286-317). A full response to the Disclosure Request has not yet been made. (R. pp. 81-82 ¶¶315-317).

During the Appellants’ due diligence, and as specifically set forth in the Complaint, the Appellants discovered that the Respondents’ development, marketing and sales efforts related to the Properties had been expressly prohibited under multiple provisions of Title 40, Chapter 57. The Appellants also discovered that the Respondents had engaged in acts of self dealing in violation of the Respondents’ various fiduciary duties to the Appellants. For example, the Appellants discovered that the Respondents had violated the rules of the CMLS in all 23 transactions involving the Properties. The CMLS rule violations promoted the self interest of the

Respondents (i.e. larger commission payments) over the financial interests of the Appellants (i.e. higher sales prices and quicker sales) by hiding the available listings of the Properties from competing members of the CMLS for the vast majority of the time the Properties were available for purchase. (R. pp. 43-44 ¶¶83-86, pp. 52-54 ¶¶129-141). Under the clear and unambiguous rules of the CMLS, the Properties could not be withheld from the CMLS data base (and other CMLS members) without the informed and written consent of the Appellants. Informed and written consent of the Appellants was not obtained in direct violation of CMLS Rule 1(b)(3), and in breach of the Respondents' fiduciary duties of disclosure and loyalty. (R. pp. 42-44 ¶¶77-86).

The Respondents' failure to expose the Properties to the full real estate market materially damaged the Appellants by generating below fair market value sales prices, and a substantially slower rate of sales. The several thousand competing members of the CMLS³ were damaged by the lack of access to the hidden listings of the Properties as they had paid several hundred dollars a year in annual CMLS dues for access to all listings of other members in strict accordance with the CMLS rules. (R. pp. 43-44 ¶¶83-86, p. 54 ¶141, p. 85 ¶¶328-330, p. 116 ¶464-465). The Appellants were not members of the CMLS, and had no access to the rules, bylaws or website of the CMLS. (R. pp. 58-59 ¶¶161-165). As part of the their due diligence efforts after January 10, 2017, the Appellants arranged for access to the CMLS rules, bylaws and historical database for periods prior to January 10, 2017 to determine the extent of the Respondents' wrongful conduct under the CMLS rules. (R. p. 58 ¶¶159-160).

The Appellants allege the purpose of the Respondents' fraudulent, unlawful and deceptive conduct was to wrongfully increase the amount of, and total percentage of the commissions paid to the Respondents on the sales of the Properties. (R. p. 54 ¶141). Essentially, the Respondents

³ The CMLS website currently claims over 500 member real estate firms and over 3,500 member agents.

attempted to limit the marketing of the Properties to individuals within the Respondents' sphere of influence who could be represented by SVR. By representing both the seller and the purchaser in a transaction, SVR would receive one hundred percent (100%) of the available commission instead of only fifty percent (50%). The Respondents illegally represented both the Appellants and the purchasers in 18 of the 23 transactions without the dual agency agreements mandated by S.C. Code Ann. §40-57-137(M)(1) or any of the other required fiduciary disclosures. The Respondents' wrongful conduct in marketing the Properties violated the clear and unambiguous provisions of SVR's Policy Manual which was required by S.C. Code Ann. §§40-57-135(A)(8) and 137(B), thereby proving the knowing and willful nature of all of the Respondents' violations relative to the Properties. (R. pp. 67-68 ¶¶219-223, pp. 89-90 ¶¶351-352).

The Appellants allege that the three Respondents in the aggregate (i) violated over 20 sections of Title 40, Chapter 57; (ii) violated at least 5 provisions of Title 40, Chapter 1; (iii) violated at least 9 different rules of the CMLS; (iv) violated CMLS rules specifically modified by at least 4 provisions of Judge Solomon Blatt, Jr's Final Order (the "Blatt Final Order") dated August 17, 2009 approving a voluntary settlement in the matter of United States v. Consolidated Multiple Listing Service, Case No. 3:08-CV-01786-SB, a United States Dept. of Justice action against the Columbia/Lexington CMLS for anti-competitive practices and violations of the federal Sherman Act; (v) constituted willful and knowing violations of Title 39, Chapter 5 (the South Carolina Unfair Trade Practices Act "the UTPA"); (vi) violated the common law of agency and fiduciary duty in South Carolina; (vii) violated numerous provisions of the SVR "policy manual"; (viii) violated multiple rules of the South Carolina Rules of Professional Conduct (the "SCRPC") since Respondent Wilkins was a licensed attorney in South Carolina; and (ix) constituted fraud

under South Carolina law (all such alleged violations collectively referred to herein as the “Respondents’ Violations”). (R. pp. 187-188, 225-237).

The Appellants brought equitable actions for breach of fiduciary duty, restitution, unjust enrichment, quantum meruit, and conversion seeking disgorgement and restitution of all unlawful compensation with prejudgment interest. The Appellants brought additional claims for constructive fraud, negligence, negligent representation, and an action under the UTPA. In addition to disgorgement and restitution of the unlawful compensation, the Appellants seek additional damages arising from the below fair market value sales prices, increased interest costs on infrastructure loans resulting from delayed sales, and other damages such as increased legal and accounting fees arising from the delayed sales; all of which were the direct result of the Respondents’ breaches of fiduciary duty and acts of self dealing. Due to the “knowing and willful” nature of the Respondents’ fraudulent, unlawful and deceptive conduct, the Appellants seek mandatory treble damages and attorney fees under their UTPA claim pursuant to S.C. Code Ann. §39-5-140.

On November 21, 2019, a mere 42 days prior to the filing of the Complaint, Respondents’ current attorney, Mr. Eric Bland of Bland Richter, LLC, voluntarily produced 2 “examples” of fraudulent “listing agreements” (the “Fraudulent Documents”) which had been previously concealed from the Appellants. (R. pp. 189, 206-207, 219-221, 240-244, 324). The documents are fraudulent in that they were created and executed by the Respondent Wilkins and others without any authority from the Appellants, were created for the purpose of “papering the files”, were factually inaccurate, and the mere existence of the Fraudulent Documents was intentionally and

fraudulently denied and concealed from the Appellants until November 21, 2019.⁴ (R. p. 82 ¶317). On August 27, 2018, in response to a specific due diligence question from the Appellants, Mr. Casterline stated in writing that “my client has made a diligent search of all files related to Panorama Point and **does not have copies of the listing agreements during the applicable time period.**”(emphasis added)(the “Casterline Representation”). (R. p. 82 ¶319). The November 21, 2019 production of the Fraudulent Documents by Mr. Bland irrefutably proves the Casterline Representation was false as the two Fraudulent Documents are dated May 16, 2011 and November 11, 2012, and were in the possession of the Respondents on August 27, 2018 when the Casterline Representation was made. Based on the dates of the Fraudulent Documents, they had been concealed from the Appellants for at least 7 years.⁵ After filing the Complaint and engaging in informal settlement negotiations, the Appellants’ attorney sent a formal written request to Mr. Bland on July 14, 2020 requesting the immediate production of the balance of the Fraudulent Documents and all other documents created and signed “on behalf of” the Appellants (the “Fraudulent Document Request”). (R. pp. 201-202). The Respondents have refused to respond to the “Fraudulent Document Request”, therefore this incident of “extrinsic fraud” is ongoing as of today.⁶

⁴ The dates on the two Fraudulent Documents correspond to the dates the two subject parcels were published to the CMLS database, not the date the two parcels were first marketed by the Respondents as required by S.C. Code §40-57-135(C)(4).

⁵ Without Discovery, the Appellants lack sufficient knowledge at this point to determine if the Casterline Representation was a knowingly false statement by Mr. Casterline, or whether the Fraudulent Documents had been concealed from Mr. Casterline by the Respondents.

⁶ By voluntarily producing the two Fraudulent Documents, the Respondents’ attorney waived any claim of confidentiality or privilege with respect to those and any other similar fraudulent documents. Such Fraudulent Documents were never confidential or privileged under SCRPC Rule 1.6, and were at all times subject to disclosure under Rule 1.6.

Standard of Review

On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431 (S.C. 2009). The decision to grant a pre-answer Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (S.C. 2019). A motion to dismiss pursuant to Rule 12(b)(6) “is not a vehicle for addressing the underlying merits of the claim.” Skydive at 180. “A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses” Id. at 180 (internal citation omitted). “If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the Appellant, would entitle the Appellant to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.” Spence v. Spence, 368 S.C. 106, 116-117, 628 S.E.2d 869, 874 (S.C. 2006).⁷ “An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law.” City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518 (S.C. 2000).

ARGUMENTS

Issue I.

Did the Lower Court err by failing to address the specific incidents of extrinsic fraud involving the Fraudulent Documents?

The Lower Court erred by failing to address the effect of the ongoing extrinsic fraud involving the creation and concealment of the Fraudulent Documents with the assistance, knowing

⁷ Respondent Wilkins is the estate developer/attorney who “slip sheeted” the two deeds in Spence v. Spence and which improper act was the key issue in that case.

or unknowing, of at least two of the Respondents' attorneys on the application of any statute of limitations.⁸ The Lower Court was briefed on the November 21, 2019 production of the Fraudulent Documents, and was provided copies of the Fraudulent Documents which contained the true signature of Respondent Wilkins, a licensed attorney. (R. pp. 141-142, 189, 201-202, 206-207, 220-221, 240-244, 272, 308-309, 322, 324). The Appellants are informed and believe that the Fraudulent Documents, and other substantially similar fraudulent documents, were created by the Respondents to "paper the files" to survive any compliance audits by the CMLS after the entry of the Blatt Final Order. (R. pp. 189, 201-202). The Appellants' written Fraudulent Document Request has not been honored to date; therefore the extrinsic fraud is continuing. (R. pp. 201, 245-247).

With respect to the Respondents' Motions to Dismiss, the existence of the Fraudulent Documents proves that the Respondents actively and intentionally concealed their fraudulent, illegal and deceptive conduct from the Appellants, the CMLS and others.

The definition of "extrinsic fraud" in South Carolina involving licensed attorneys – as officers of the court – was fully developed by the Supreme Court in Chewning v. Ford Motor Company, 354 S.C. 72, 579 S.E.2d 605 (2003). "Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court"(emphasis added). Id. at 82. In Stoney v. Stoney, 425 S.C. 47, 819 S.E.2d 201 (S.C. Ct.App. 2018), the court addressed extrinsic fraud by a licensed attorney who was a party to a family court proceeding. The husband, a licensed

⁸ While the Appellants first address the facts related to the Fraudulent Documents and their concealment in this Issue I as "extrinsic fraud," the effect of these same facts on the application of various statutes of limitations under additional legal principles (i.e. estoppel, fraudulent concealment, unclean hands, etc.) are discussed in Issue II *infra*.

attorney, misrepresented to his wife that certain relevant documents did not exist, and concealed those documents from his wife in an attempt to gain an advantage in the divorce proceeding. Id. at 69. The court ruled that such conduct by a party who was a licensed attorney constituted extrinsic fraud. Id.

In response to a specific due diligence inquiry from the Appellants, Mr. Casterline made the Casterline Representation that the Respondents had no copies of any listing agreements prior to January 1, 2017. This representation was known to be false by Respondent Wilkins, a licensed attorney, on the day it was made as his true signature was on one of the two Fraudulent Documents. As specifically pleaded in R. p. 93 ¶363, p.94 ¶¶ 368-369, Mr. Casterline made other false statements about an “unknown” person removing a “file where they were kept” in an attempt to provide a “cover story” for the missing listing agreements, and to assist in the ongoing concealment of the Fraudulent Documents. This demonstrably false statement was an act of extrinsic fraud. Under the 5 year document retention requirement of S.C. Code Ann. § 40-57-135(D)(1), on May 24, 2017 when Mr. Casterline acknowledged in writing the Appellants’ Disclosure Request, at least 13 listing agreements should have still been in the files of the Respondents.⁹ The Appellants specifically pleaded that the files produced by Mr. Casterline, on information and belief, had been “purged” of various documentation such as the Fraudulent Documents. (R. p. 82 ¶317). The production of the Fraudulent Documents on November 21, 2019, proved this allegation to be true.

The Casterline Representation was an irrefutable incident of extrinsic fraud by Respondent Wilkins, and court sanctioned discovery will determine Mr. Casterline’s knowledge and involvement in the extrinsic fraud. The refusal by the Respondents’ current attorneys to provide all other fraudulent documents in response to the Fraudulent Document Request is a continuation

⁹ There were 13 parcels closed after May 24, 2012, the beginning date of the 5 year document retention rule as of May 24, 2017.

of this incident of extrinsic fraud. In the Respondents' oral argument to the Lower Court, their attorney "contend[ed] that we had signed listing agreements" and admitted that "[s]ome of them [signed listing agreements] do [exist]". (R. p. 355, lines 7-9). This statement to the Lower Court directly and unequivocally contradicts the Casterline Representation made on August 27, 2018, and is a separate incident of extrinsic fraud. The "signed listing agreements" which the Respondents' attorney contended "do" exist, other than the two Fraudulent Documents, have never been given to the Appellants despite numerous requests. The Appellants briefed the Lower Court on the currently available evidence that other Fraudulent Documents, other than the two produced by Mr. Bland, "do exist," and that those additional fraudulent documents are currently being actively concealed by the Respondents and their attorneys. (R. pp. 201-202).

In the Lower Court's Rule 59 Order, the Lower Court specifically acknowledged that the "Appellant alleges that this Court's Order (1) did not rule on Appellants allegations of intrinsic fraud, (2) did not address Appellants' allegations that Respondent Wilkins signed a "fraudulent listing agreement," ... (4) did not address Appellants' allegations that various attorneys representing the Respondents allegedly concealed fraud,..." (emphasis added). (R. p. 23). While acknowledging the Appellants' specific allegations of the elements of the extrinsic fraud, the Lower Court's Rule 59 Order then stated "[a]fter careful consideration of the parties respective positions, and review of the submissions made to this Court, the Court is unable to find any fact or issue of law that was misapprehended or overlooked in its February 16, 2021 Order"(emphasis added). (R. p. 24). Neither the Order nor Rule 59 Order issued by the Lower Court devotes a single word to discussing these incidents of extrinsic fraud. The Appellants assert that the failure to address these acts of extrinsic fraud, and to address the effect of that and other fraud on the application of any statute of limitations was an abuse of discretion by the Lower Court. The

incidents of extrinsic fraud evidenced in the record thus far may operate to preclude the application of any statute of limitations to the Appellants' causes of action. Robinson v. Estate of Harris, 388 S.C. 616, 625, 698 S.E.2d 214 (S.C. 2010) (cites to companion decisions in the Robinson v. Estate of Harris matter omitted).¹⁰

Issue II.

Did the Lower Court err by failing to take the allegations of the Complaint with respect to the dates of discovery of each of the Appellants' various injuries as true, and by failing to make all reasonable inferences from those allegations in favor of the Appellants, in response to the Respondents' pre-answer motion to dismiss under Rule 12(b)(6)?

The Complaint specifically alleges that the Appellants' various causes of action arise from separate and distinct acts of three separate individuals and entities. Each of the three Respondents violated multiple provisions of law, of which many violations were unique to a single Respondent. Respondents Wilkins and SVR are alleged to have also violated, with the assistance of Respondent RPW, the rules of the CMLS. These separate and distinct violations give rise to a multitude of discrete and independently actionable wrongs.¹¹ For example, the various and separate violations of Title 40, Chapter 57 (i.e. failure to obtain listing agreements and failure to obtain dual agency agreements) provide separate and distinct, but independently adequate foundations for all of the Appellants' various causes of action. The various violations of the rules of the CMLS provide completely different, but equally adequate foundations for those same causes of action. The various and distinct statutory violations, as well as the CMLS rule violations are pleaded separately throughout the Complaint. E.g. compare (R. pp. 42-43 ¶¶77-79, p. 97 ¶380, pp. 44 ¶¶85-86, p.98

¹⁰ The Supreme Court issued 4 separate but related opinions in the Robinson v. Estate of Harris matter.

¹¹ The Respondents complain about the length and volume of the Complaint in their two Motions to Dismiss. The Appellants assert that it was necessary to plead the necessary foundations for all of the various and diverse claims which, on a transaction by transaction-Respondent by Respondent basis, number in the hundreds. (R. pp. 225-237).

¶386). Knowledge of the facts and circumstances of one actionable wrong does not constitute knowledge of the facts and circumstances of a separate and independently actionable wrong; therefore each actionable wrong has its own separate statute of limitations.

As specifically pleaded in the Complaint, the presentation of the Required Listing Documents to the Appellants on January 10, 2017, for the first time raised a red flag as to the possibility that (i) the Respondents' had violated the fiduciary disclosure and agency provisions of Title 40, Chapter 57, and (ii) the Respondents had also violated the rules of the CMLS. (R. pp. 55-59 ¶¶142-165). The Appellants began appropriate factual and legal due diligence immediately after receiving the Required Listing Documents (including gaining access to the rules of the CMLS), and the Complaint was filed within 3 years of January 10, 2017, thereby satisfying any and all potentially applicable statutes of limitations.

A discovery statute of limitations in South Carolina “runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct”(emphasis added). Dean v. Ruscon Corporation, 321 S.C. 360, 363, 468 S.E.2d 645 (S.C. 1996)(internal citation omitted). The beginning of a discovery statute of limitations requires “notice” of the injury or wrongful conduct which is the basis of the litigation. Id. at 363-364. The failures of the Respondents, acting in their fiduciary capacities, to comply with the statutory requirements of Title 40, Chapter 57, and to comply with the rules of the CMLS are the only “wrongful conduct” which is the basis of the claims in this litigation. As more fully discussed in Issue III infra, the Respondents' breaches of their fiduciary duties of disclosure and loyalty in this matter concealed their wrongful conduct until at least January 10, 2017.

In holding that all of the Appellants' various claims were barred by the statute of limitations, the Lower Court's Order erroneously relies on the fact that the various real estate

commissions and development fees “were disclosed on closing statements for each sale and were signed off on by [Appellant] Porth.” (R. p. 3). The Order never explains how the disclosure of the amount of the fees and commissions constituted notice of the Respondents’ wrongful conduct which forms the basis of this litigation. For example, the Lower Court’s Order never discusses how a HUD-1 form put the Appellants on notice of the CMLS rule violations. Moreover, this statement in the Order mischaracterizes the Appellants’ various causes of action by referring to the “development fees and realtor commissions of which the Plaintiffs now complain”(emphasis added). In this litigation, the Appellants “complain” of the Respondents’ breaches of fiduciary duty, acts of self dealing, and acts of unfair competition; they do not “complain” of the fees and commissions, nor do they “complain” of the actions of the various purchasers in the 23 transactions.

The HUD-1 forms contain no red flags as a matter of law with respect to the Respondents’ breaches of fiduciary duty, fraudulent and illegal acts of self-dealing, or acts of unfair and deceptive competition. Although unclear, the Lower Court’s Order appears to hold that the Appellants ratified the payment of the unlawful compensation by “signing off on” the HUD-1 forms and being “aware” of the fees and commissions. (R. p. 3, fn. 4). This is clear legal error as “[o]ne asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent’s acts, (2) **the principal’s full knowledge of the facts**, and (3) circumstances or an affirmative election demonstrating the principal’s intent to accept the unauthorized arrangements.” (emphasis added). Lincoln v. Aetna Casualty Surety Co., 300 S.C. 188, 191, 386 S.E.2d 801, 803 (S.C.Ct.App. 1989). The “agent has the burden of establishing that the principal consented” to the agent’s improper material benefit. Restatement Third, Agency §8.06 at Official Comment (c). “The rule entitles the principal to assume that the agent will make

the disclosures requisite to effective consent by the principal”(emphasis added). Id. The Respondents’ duty to disclose all of the material facts is heightened by their pecuniary interest in the transactions, and their “conflict of interest due to the large commission[s] they anticipated.” Anthony v. Padmar, 320 S.C. 436, 450, 465 S.E.2d 745 (S.C.Ct.App. 1995). The court in Anthony rejected the theory of estoppel by ratification as “without merit” in the absence of full disclosure of the facts. Id. at 452-453.

The Order also states “the [Appellants] were aware as early as 2013 that the [Respondents] had breach their fiduciary duties, yet no action was brought until January 2, 2020.” (R. p. 17). The Lower Court relies on allegations in the Complaint with respect to the Lexington County refund issue (R. p. 86 ¶¶333-334) and the Lot 15 issues (R. pp. 68-70 ¶¶225-254)(collectively referred to herein as the “2013 Issues”) to hold that the various statutes of limitations on the Appellants’ unrelated causes of action were triggered in 2013. In reference to the 2013 Issues, the Lower Court states that the Appellants had been put on actual notice that “some right of theirs had been invaded by the Respondents.” (R. p. 4). Knowledge of a prior, distinct breach of fiduciary duty does not trigger the statute of limitations for other unrelated and separately actionable breaches by the same party, and certainly does not trigger the running of the statute of limitations on breaches of fiduciary duty by separate and distinct parties. McAlhany v. Carter, 415 S.C. 54, 66, 781 S.E.2d 105, 112 (S.C.Ct.App. 2015)(knowledge of termite damage was not knowledge of mold damage for purposes of statute of limitations); Holly Woods Ass’n of Owners v. Hiller, 392 S.C. 172, 184-185, 708 S.E.2d 787 (S.C.Ct.App. 2011)(litigation was based on development problems discovered years later than similar problems which plaintiffs had discovered earlier in different areas of the development); see also State v. Ortho-McNeil-Janssen Pharms, Inc., 414 S.C. 33, 78, 777 S.E.2d 176 (S.C. 2015)(discussing the “inequities that would arise if the expiration of the statute of

limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct.”).

Furthermore, the Lower Court is factually incorrect in stating that the Appellants “took no action” with respect to the 2013 Issues. (R. p. 5). This negative inference against the Appellants is without evidentiary support as the Appellants specifically pleaded that they successfully obtained a refund of the Lexington County cash bond amount from RPW. (R. p. 88 ¶344). The Appellants did not pay the Lot 15 rock removal expenses thereby fully addressing the 2013 Issues without the need for litigation.¹² The 2013 Issues were expressly pleaded for the purpose of laying a factual foundation for the possibility of repetition of the unfair and deceptive acts forming the basis of the Appellants’ UTPA claim. (R. p. 117 ¶469).

The Lower Court’s Order also lacks evidentiary support for its statement that “[a]ccepting the allegations of the Complaint as true, it is clear that the [Appellants] knew that there were no written listing agreements as required by South Carolina law.” (R. p. 4). This improper negative inference by the Lower Court directly contradicts the specific allegations of the Complaint that (i) the Appellants did not know that written listing agreements were required by S.C. Code Ann. §40-57-135(C)(4) and (D)(4), (ii) that the Respondents represented that no such written agreements were necessary, and (iii) that the Appellants did not know of the other legal requirements applicable to the Respondents.¹³ (R. pp. 53 ¶136, pp. 96-97 ¶¶379, p. 111 ¶441).

The statute of limitations on the Appellants’ UTPA Claim is 3 years from the date of “discovery of the unlawful conduct which is the subject of the suit.” S.C. Code Ann. §39-5-150.

¹² The Appellants did not learn of the business relationship between Respondent Wilkins and the purchaser of Lot 15 (closed in 2013) until sometime in 2017 as part of their due diligence, and still do not know the details or extent of that relationship. (R. p. 71 ¶¶262, 265).

¹³ The requirements of Title 40, Chapter 57 did not apply in any respect to the Appellants’ conduct or to the conduct of the various purchasers of the Properties. The transactions in which title to the Properties was transferred by the Appellants to the various purchasers was not governed or impacted in any manner by the provisions of Title 40, Chapter 57.

In the present action, the “unlawful conduct” which forms the basis of the Appellants’ UTPA claim consists of the Respondents’ violations of the statutory disclosure provisions of Title 40, Chapter 57, and the intentional violations of the rules of the CMLS. (R. pp. 43-44 ¶¶82-86 , pp. 47-48 ¶¶106, p. 67 ¶222). The Lower Court’s Order never states that the Appellants were put on notice of the CMLS rule violations prior to January 10, 2017. The Appellants were not licensed real estate professionals, and were not members of the CMLS. (R. pp. 58-59 ¶¶161-165). The CMLS rule violations alone independently support all of the Appellants’ causes of action as they are independently actionable breaches of the Respondents’ fiduciary duties. The Respondents’ violations of the CMLS rules to hide the Properties from the full real estate market and competing CMLS members in order to market primarily to purchasers who could be represented by SVR was a breach of the Respondents’ fiduciary duties of disclosure and loyalty, and clearly constituted an unfair and deceptive trade practice which also affected thousands of competing real estate professionals. (R. pp. 116-117 ¶¶464-467).

The Lower Court’s holding that the Appellants’ various causes of action were barred by the statute of limitations based on the allegations of the Complaint was an abuse of discretion, and the Order dismissing the Complaint with prejudice should be reversed.

Issue III.

Did the Lower Court err by failing to address the Appellants’ arguments that the fraudulent and illegal acts of the Respondents, all of which constitute unclean hands, either tolled or equitably barred the Respondents from raising any statute of limitations defense?

The statute of limitations is an affirmative defense which is subject to the equitable doctrines of estoppel and equitable tolling, and the defense is not an automatic bar to claims. Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (S.C.Ct.App. 2019). Fraudulent

conduct, fraudulent concealment and illegality of conduct are equitable bars to the assertion of the defense of the statute of limitations under well settled South Carolina law. Id. at 56. Despite these legal arguments being briefed to the Lower Court on three different occasions, the Order failed to devote a single sentence to addressing these relevant and controlling legal arguments.¹⁴ (R. pp. 134-135, 138-142, 187-188, 200-207, 214-217, 219-221, 308-309, 322-326, 329-330). The Rule 59 Order specifically acknowledged Appellants' assertion that these arguments had been raised and not been ruled on by the Court, but yet the Lower Court failed to devote a single word to these arguments. (R p. 23).

The Respondents are estopped from claiming the statute of limitations as a defense because the delay that otherwise could give operation to the statute had been induced by the Respondent's conduct. Holy Loch Distributors, Inc. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (S.C.Ct.App. 1998); Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (S.C. 2000). The failure of the Respondents to provide the Required Listing Documents prior to January 10, 2017, and the Respondents' various acts of extrinsic fraud and fraudulent concealment are the direct cause of the Appellants not discovering the Respondents' fraudulent, illegal and deceptive conduct prior to January 10, 2017.

The Respondents' various violations of their fiduciary duty of disclosure constitute fraud under well settled South Carolina common law. "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud"(emphasis added). Ellie v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (S.C.Ct.App. 2004); Anthony v. Padmar *supra* at 449. Section 40-57-

¹⁴ The allegations in the Complaint with respect to fraud, illegal activity and "unclean hands" are not just conclusory statements of fact or law. Instead, they are specific factual allegations which identify the specific actor, the specific law or rule violated, and the time the conduct occurred. The Appellants assert that these specific factual allegations are more than sufficient to survive any Rule 12(b)(6) challenge.

135(D)(4) expressly provides that the enumerated, required terms of a written agency agreement are “material” in nature. “Nondisclosure is fraudulent when there is a duty to speak” Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (S.C.Ct.App. 1993). “Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal.” Darby v. The Furman Co. Inc., 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999). “The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent” (emphasis added). Darby at 347-348.

“Where a statute sets a limitation period for an action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental fairness.” Hooper v. Ebenezer Senior Services and Rehabilitation Center, 386 S.C. 108, 114, 687 S.E.2d 29, 32 (S.C. 2009). Equitable tolling does not require evidence that the Respondents made any misrepresentation to the Appellants, silence is sufficient. Magnolia N. Prop. Owners Association, Inc. v. Heritage Cmtys., Inc., 397 S.C. 348, 372, 725 S.E.2d 112, 125 (S.C.Ct.App. 2012).

The 3 year statute of limitations applicable to an action for fraud runs from the “discovery by the aggrieved party of the facts constituting the fraud” (emphasis added). S.C. Code Ann. §15-3-530(7). The “facts constituting the fraud” in this case were the various acts of fiduciary nondisclosure by the Respondents (i) in violation of the specific disclosure requirements of §§40-57-135, 137 and 139, (ii) in violation of the specific rules of the CMLS, and (iii) in the creation and active concealment of the Fraudulent Documents with the assistance of various attorneys.

Courts should employ restraint in the application of the statute of limitations in situations involving allegations of fraud and fraudulent concealment to avoid “the statute of limitations becoming an instrument of fraud.” Limon v. Sandlin, 200 So. 3d 21 (Ala. 2015)(“A party cannot

profit by his own wrong in concealing a cause of action against himself until barred by limitation. The statute of limitations cannot be converted into an instrument of fraud” (internal citation omitted).

The Appellants argued to the Lower Court that the Respondents’ “unclean hands” arising from their fraudulent and illegal conduct precludes the Respondents from asserting the affirmative defenses of the statute of limitations. (R. pp. 140-142, 202-203, 322-326, 272, 276-277).

In Vicary *supra*, the court invoked a similar analysis stating that the passage of time cannot transform an invalid or unlawful act into a valid or lawful act. Vicary at 56. The court stated that the Town of Awendaw’s failure to comply with applicable statutory requirements and the Town’s failure to provide statutorily mandated notices constituted grounds for estopping the Town from asserting a statute of limitations defense which would have the effect of rendering the Town’s illegal activity valid. Id. The court held that these statutory disclosure and notice violations constituted “unclean hands.” Id.

The law in South Carolina is well settled and long standing that the courts will not assist parties who have acted unlawfully or in contravention of statutory public policy. White v. Bank, 66 S.C. 491, 503-4, 45 S.E. 94, (S.C. 1903 A “Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy.” Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2nd 516 (S.C. 2010).

The Lower Court expressly relies on the Development Agreement which the court states “contained provisions for the payment of fees to the Developer as well as provisions for the payment of real estate commissions for listing and sales with Respondent SVR serving as the exclusive listing agent.” (R. p. 2). The Lower Court’s reliance on the Development Agreement is legal error as the Development Agreement was *void ab initio*. (R. pp. 46-47 ¶¶100-103). One who

“negotiates or attempts to negotiate the listing ... of real estate...; [or] solicits a referral in order to conduct activities set forth in this section; ...” is a “Broker” under the statutory definition, and must be licensed pursuant to S.C. Code Ann. §40-57-30(3). RPW, the only Respondent who was a party to the Development Agreement, was an unlicensed entity, and the Development Agreement was, therefore, illegal. S.C. Code Ann. §40-57-20; (R. pp. 46-47 ¶¶100-103). (Respondents SVR and Wilkins were not parties to the Development Agreement, nor did the Development Agreement meet the requirements for a valid listing agreement set forth in S.C. Code Ann. §40-57-135(D)(4).¹⁵ (R. p. 44 ¶88, p. 47 ¶102). The Lower Court’s improper negative inference that the Development Agreement was valid and lawful is legal error.

Issue IV.

Did the Lower Court err by holding that the Appellants’ breach of fiduciary duty claims are not equitable, and therefore not exempt from the application of any statute of limitations defense under the South Carolina Supreme Court’s holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020)?

The Lower Court’s Order incorrectly held that the Appellants’ claims for breach of fiduciary duty, restitution, quantum meruit, unjust enrichment, and conversion, all of which seek the disgorgement and return of all illegal real estate commissions and development fees (the “Disgorgement and Restitution Claims”) are legal in nature, and not equitable. (R. pp. 11-19). The Appellants assert that their Disgorgement and Restitution Claims are inherently equitable, and not subject to any statute of limitation defense under the Supreme Court’s recent holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020). In Thomerson the Supreme Court clarified

¹⁵ The Development Agreement failed to satisfy any of the 12 distinct requirements of S.C. Code Ann. §40-57-135(D)(4).

that equitable actions, including equitable actions which seek the payment of money, are not subject to statute of limitations defenses. Id. at 259.

The Respondents expressly acknowledged to the Lower Court that the main purpose of the Appellants' Complaint is to seek "disgorgement" of the unlawful commissions and fees. (R. p. 121 ¶2, p. 125 ¶55, p. 126 ¶59). In their oral argument to the Lower Court, the Respondents' attorneys admitted three different times that the Appellants were seeking "disgorgement" of the unlawful compensation. (R. p. 354 line 20; p. 358, line 25; p. 374, lines 5-6)("the relief sought is returning of the commission fees and the development fees"). Despite the Respondents' acknowledgement, the Lower Court refused to apply the holding in Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010), where the Supreme Court specifically clarified that "[w]e now take this opportunity to stress that an action for breach of a fiduciary duty may sound in law or equity depending on the nature of the relief sought." Id. at 17, fn. 5. "Disgorgement is an equitable remedy,..." Id. at 18. As in the present case, in Verenes "[t]he remedy sought for the alleged breach of the fiduciary duty of loyalty is disgorgement." Id. at 19. "Disgorgement is an equitable remedy" and the fact that the Verenes appellant "will have to pay money to the trust if the allegations are proven, that does not mean Respondent's causes of action are legal in nature." Id. The Verenes court looked to the "body of the complaint" for the "main purpose" of bringing the action. Id. The main purpose of the Appellants' Disgorgement and Restitution Claims, as specifically set forth throughout the body of the Complaint, is to seek the disgorgement and restitution of all illegal compensation resulting from the Respondents' fraudulent, unlawful and deceptive conduct. (R. p. 96 ¶379, p. 99 ¶388-390, pp. 101-102 ¶¶397-400, p. 103 ¶405, pp. 105-106 ¶¶412-415, p. 106 ¶417, p. 107 ¶¶419-422, p. 108 ¶425, p. 109 ¶430-431, pp. 111-112 ¶¶444-

448, p. 118 ¶471). “A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim.” Thomerson at 259.

The Lower Court’s Order cites Dereede v. Karp, 427 S.C. 336, 831 S.E.2d 435 (S.C.Ct.App. 2019) for the proposition that a “breach of fiduciary duty claim may be legal or equitable.” (R. p. 14). In Dereede the court was dealing with action to compel a trustee to make a required distribution under the terms of a trust, and was not addressing a claim for disgorgement or restitution. Id. at 339-340. The Dereede court expressly acknowledged that the Appellants in Verenes “sought the classic equitable remedies of restitution and disgorgement”(emphasis added). Id. at 341.

In an attempt to bolster its classification of the Disgorgement and Restitution Claims as legal and not equitable, the Lower Court incorrectly describes the basis for Appellants’ claims by stating that “the basis for this relief is because the Realtor Respondents allegedly did not provide the services the Appellants paid for, including execution of written listing agreements.” (R. p. 15). This statement by the Lower Court has no factual basis in the Complaint, and directly conflicts with the Lower Court’s earlier statement that “[t]he Appellants advance several theories of recovery all of which allege in essence that given the alleged lack of written listing agreements, it was unlawful for the Realtor Respondents to collect and to retain commissions and development fees associated with the sale of the Property that is the subject matter of this action”(emphasis added). (R. p. 2). The Lower Court’s statement on page 15 (R. p. 15) directly contradicts the specific allegations of the Complaint that no valid contracts existed between the Appellants and any of the Respondents. (R. pp. 42-44 ¶¶77-86, pp. 44-49 ¶¶87-111).

Issue V.

Did the Lower Court err by holding that the Appellants are charged with “knowledge of the law” in direct contradiction to the statutory provisions of S.C. Code Ann. §§40-57-135, 137 and 139, and in direct contradiction of the statutorily enacted public policy of South Carolina?

The Lower Court’s Order holding that all of the Appellants’ various causes of action are barred by the statute of limitations is founded on the incorrect legal premise that the Appellants were “charged with knowledge of the law.” (R. pp. 8-9). The Lower Court states that “[the Appellants argue that they should not be expected to have knowledge of law applicable to real estate professionals as if this law were locked behind some secret vault” (emphasis added). (R. p. 9). This improper statement by the Lower Court is legal error in that the Lower Court relies on law applicable to non-fiduciary contexts,¹⁶ ignores the specific and unambiguous statutory language of Title 40, Chapter 57 to the contrary. The Lower Court also misstates the general rule of citizens being charged with knowledge of laws applicable to **their conduct** which is not without exceptions.

Pursuant to the clear and unambiguous language of S.C. Code Ann. §§40-57-139(A) and (B), a licensee must provide to a seller “at the first practical opportunity” a “meaningful explanation of agency relationships in real estate transactions” and “an agency disclosure form prescribed by the [S.C. Real Estate Commission].” S.C. Code §40-57-139(A).¹⁷ Despite these unambiguous statutory provisions to the contrary, the Lower Court ruled that the Appellants are charged with knowledge of the very information the Respondents were required by statute to

¹⁶ The Appellants address their justifiable reliance on the fiduciary status of the Respondents in Issue VI *infra*.

¹⁷ Acknowledgement of receipt of the agency disclosure form must be contained in the written listing agreement mandated by §40-57-135(C)(4) pursuant to §40-57-139(B).

disclose, and which they fraudulently withheld from the Appellants in order to conceal their various acts of self dealing. This is legal error.

In S.C. Code Ann. §40-57-137(Q) the General Assembly expressly and unequivocally preempted all inconsistent common law by stating that “[t]he provisions of this section which are inconsistent with applicable principles of common law shall supersede the common law ...” Any common law theory that citizens are generally charged with knowledge of the laws governing the conduct of licensed real estate professionals acting in a fiduciary capacity was expressly preempted by §40-57-137(Q) and the specific disclosure requirements of S.C. Code Ann. §40-57-139(A) and (B). Williams v. Gov’t Emps. Ins. Co., 409 S.C. 586, 762 S.E.2d 705 (S.C. 2014)(In construing an insurance statute the Supreme Court stated that “The General Assembly is presumed to know the law, so in our view, the enactment of section 38-77-142 could be perceived as a response to these earlier decisions”); Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (S.C. 2012)(“we presume the General Assembly is aware of the common law when enacting subsequent legislation”).

The legislature clearly intended that clients of licensed real estate professionals not be charged with knowledge of the laws governing the conduct of those licensed professionals acting under a fiduciary duty. The text of a statute is considered the best evidence of the legislative intent or will. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (S.C. Ct. App. 2005). “Once the legislature has made [a] choice, there is not room for the courts to impose a different judgment based upon their own notions of public policy.” South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App. 1989). The “court’s equitable powers must yield in the face of an unambiguously worded statute.” Key Corporate v. Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (S.C. 2007)(internal citations omitted). “[I]t is beyond

this Court’s power to effect a change in the statutes enacted by the Legislature.” *Id.* at 61 (internal citations omitted).

By enacting S.C. Code Ann. §40-57-139 the legislature clearly intended to place on licensed real estate professionals the fiduciary burden of disclosing and explaining the various legal requirements of Title 40, Chapter 57 to their clients and customers. The Respondents were statutorily required to initially disclose the laws governing the permissible relationships with, and the fiduciary duties owed to the Appellants utilizing the specific “agency disclosure” form issued by the S. C. Real Estate Commission. S.C. Code Ann. §40-57-139(B). The “Agency Disclosure” approved by the Real Estate Commission contained specific discussions of the legal requirements for written agency agreements and dual agency agreements, as well as a discussion of the various fiduciary duties owed by the real estate licensee. The Respondents were statutorily required to make additional “material” disclosures through the terms of the written agency agreements as set forth in S.C. Code Ann. §40-57-135(D)(4).¹⁸ When representing both the Appellants and a purchaser¹⁹, the Respondents were required to make even more specific, material disclosures through a written dual agency agreement as set forth in S.C. Code Ann. §40-57-137(M). The Lower Court’s Order, however, “render[s] the section[s] useless, and the General Assembly is presumed not to perform useless acts.” *Williams supra* at 604. “The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something” (internal citation omitted). *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (S.C. 2002). The Lower Court’s Order charging the Appellants “with knowledge of the law”

¹⁸ S.C. Code Ann. §40-57-135(D)(4) expressly states that the section’s various requirements are “material” and sets forth nine (9) distinct written disclosures which must be contained in the listing agreement (subsections (a)-(f),(i),(j) and (l)), and sets forth three (3) additional requirements (subsections (g),(h) and (k)).

¹⁹ Respondent SVR represented both the Appellants and the purchaser in 17 of the 23 transactions without a dual agency agreement required by S.C. Code Ann. §40-57-137(M)(1).

renders the legislature's statutory enactment of the various fiduciary disclosure obligations a "futile act."

Finally, the Lower Court's Order is in error in that it fails to address the Appellants' argument that "the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Reid v. Harbison Development Corp., 285 S.C. 557, 560, 330 S.E.2d 532 (S.C.Ct.App. 1985), *aff'd in part and remanded* 289 S.C. 319, 345 S.E.2d 492 (S.C. 1986). In Epstein v. Howell, 308 S.C. 528, 531, 419 S.E.2d 379 (S.C.Ct.App. 1992), the court cited the "often-cited case" of Halsell v. First National Bank, 48 Okla. 535, 150 P. 489 (1915) for the proposition that one in a fiduciary position cannot "practice fraud" and then successfully defend on the ground that the victim of the fraud is "charged with knowledge" of the misrepresented facts. This is exactly what the Lower Court's Order does in this matter, and is therefore an error of law.

Issue VI.

Did the Lower Court err by failing to address the Appellants' argument that their reliance on the fiduciary status of the Respondents, and on Respondent Wilkins' status as a licensed attorney was a reasonable basis under South Carolina law for not performing due diligence on the legality of the Respondents' conduct prior to January 10, 2017?

The Lower Court's Order is in error in that it failed to address the Appellants' argument that an individual or entity in a fiduciary relationship with a licensed professional is justified in relying on the licensed professional even if reliance would not be justified in a non-fiduciary relationship. Epstein at 531; (R. pp. 137, 196-197, 328-329). The Appellants, therefore, were not required to initiate investigative due diligence into the fraudulent, illegal and deceptive conduct of

the Respondents until they were put on inquiry notice on January 10, 2017 that the provisions of Title 40, Chapter 57 and the rules of the CMLS may have been violated.

The Respondents expressly acknowledged that the Complaint alleges that the Appellants “justifiably believed that the Respondents were acting in compliance with the law ...” (R. p. 128 ¶ 65, p. 111 ¶443). Respondent Wilkins was a licensed “broker-in-charge,” and Respondent SVR was licensed as a “real estate office” pursuant to the provisions of Title 40, Chapters 1 and 57. (R. pp. 28-29 ¶¶7-10). Respondent Wilkins was also a licensed attorney. (R. p. 35 ¶41, p. 111 ¶443). The Appellants’ reliance on the assumption that the Appellants’ real estate matters would be handled by the Respondents in accordance with all applicable laws and rules was justified and manifestly reasonable. (R. p. 111 ¶443). The Appellants’ specifically alleged that the purpose for requesting the services of the Respondents was to assure that matters entrusted to them would be handled in accordance with all applicable laws. (R. p. 39 ¶58).

In Holy Loch Distributors, Inc. v. Hitchcock, *supra*, the court addressed an issue factually analogous to the present case where the plaintiffs retained a law firm to assure compliance with applicable law to enable the plaintiffs’ business to sell imported beer in South Carolina. Despite having retained the attorneys to handle compliance with all applicable laws, the plaintiffs in Holy Loch were cited for violations of federal laws applicable to their business. The court found that the “discovery” statute of limitations began to run on the date that federal ATF officers notified the plaintiffs that they were operating in violation of federal law. Despite the federal laws being directly applicable to the business of the plaintiffs²⁰ for over 2 years, the plaintiffs were not charged with knowledge of that law until actually being put on notice by the ATF agents as a result of their right to justifiably rely on their attorneys. *Id.* at 254.

²⁰ In the present litigation, the provisions of Title 40, Chapter 57 were not applicable to the Appellants’ conduct in any respect, and did not create any duty, obligation or restriction on the conduct of the Appellants.

In True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997), the South Carolina Supreme Court addressed the application of the “discovery rule” in the context of a fiduciary relationship with a licensed attorney. The Court allowed a legal malpractice action filed in 1993 to proceed although filed 20 years after the conduct which occurred in 1973, holding that the Appellant properly brought the action within 3 years of the “discovery” of the cause of action even though the “injury” was apparent for at least 20 years. The Respondent attorney had failed to disclose conflicts of interest in accordance with applicable professional standards, and therefore the Appellant had no way of discovering that the injury, the lack of a cost of living clause in a lease agreement, was an actionable injury. The court stated that “knowledge of an injury alone does not, *a fortiori*, give rise to a suspicion of any impropriety by her attorney.” True at 120. “Although petitioner knew of the lack of the cost of living clause in the lease, this knowledge alone is insufficient to put petitioner on notice to investigate the possible malfeasance of her attorney.” Id. “[A]bsent other facts, the client should be able to rely on the attorney’s advice and should be able to follow this advice without fear the attorney is not acting in the client’s best interest” (emphasis added). Id.

The Appellants’ justifiable reliance on Respondents SVR and Wilkins’s licensed status is bolstered by S.C. Code Ann. §40-1-10(C)(3) where the General Assembly acknowledges the fact that the public has a need for “a substantial basis for relying on the services of the practitioner” when dealing with certain professions and occupations licensed under the various provisions of Title 40 such as real estate professionals.

The Lower Court’s Order failed to address the fact that Respondent Wilkins’ conduct, as a licensed attorney, was governed by the SCRPC. (R. pp. 37-38 ¶52). The Appellants specifically alleged that the SVR website contained a reference to Wilkins as a “licensed attorney in his own

right.” (R. p. 36 ¶¶44-46).²¹ The obvious purpose of such a reference was to induce clients and potential clients of SVR to rely on Wilkins’ status as a licensed attorney.

Issue VII.

Did the Lower Court err by holding that Title 40, Chapter 57 of the South Carolina Code Annotated does not authorize private causes of action for breach of fiduciary duty for violations of its various statutory fiduciary requirements of disclosure and written consent set forth in S.C. Code Ann. §§40-57-135, 137 and 139?

The Order incorrectly holds that the South Carolina Real Estate Commission (the “Commission”) is the only party authorized to bring a civil action for violations of the specific provisions of Title 40, Chapter 57. (R. pp. 9-10). The Lower Court’s Order ignores the clear and unambiguous language of S.C. Code Ann. §40-57-137(Q) which expressly provides that “[e]xcept as otherwise stated, nothing in the section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge”(emphasis added). As an example of the “except as otherwise stated” language of the statute, S.C. Code Ann. §40-57-740 contains specific prohibitions against causes of action in subsection (A) dealing with certain failures to disclose, and then provides specific authorization for causes of actions in subsection (B) for certain intentional misrepresentations. Section 137 contains numerous specific prohibitions against private actions, or other limitations on liability with respect to certain specified actions or inactions by licensees. E.g. §40-57-137(F), (K) and (O)(4)-(5). These specific limitations on private causes of action would be meaningless and unnecessary if private causes of action for violations of the agency and fiduciary provisions of Title 40, Chapter 57 were not otherwise permitted and authorized.

²¹ The Appellants assert that this reference to Wilkins’ status as a “licensed attorney” was improper under Rules 7.1 and 7.2 of the SCRPC as Wilkins’ law license was in “inactive” status at all relevant times.

In S.C. Code Ann. §40-57-137(A) the legislature expressly provided that the fiduciary duties owed directly to clients are “the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting **as set forth in this chapter.**”(emphasis added). The words “as set forth in this chapter” reference the entirety of Chapter 57, and clearly and unambiguously incorporate all of the various fiduciary requirements set forth in §§40-57-135, 137 and 139 which are at issue in this case. The Respondents’ violations of these statutory provisions and the CMLS rules constituted breaches of their statutory and common law fiduciary duties²², and provided a basis for the Disgorgement and Restitution Claims, the UTPA claim, and the Appellants’ other causes of action.

In determining whether a statute creates a private cause of action in South Carolina, the main factor is legislative intent. Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 275-276, 802 S.E.2d 794 (S.C. 2017). In Fulbright the Supreme Court determined the legislature’s intent with respect to statutory language used in the South Carolina Time Share Act (Title 27, Chapter 32) at S.C. Code Ann. §27-32-130 which states “[t]he provisions of this section do not limit the right of a purchaser or lessee or a vacation time sharing association to bring a private action to enforce the provisions of this chapter.”²³ The Court held that the “unambiguous” language of §27-32-130 granted authority to bring a private action to enforce the statutory requirements of the Time Share Act. Id. at 276.

²² The fiduciary and agency provisions of Title 40, Chapter 57 are based on, and provide contextual application to the general rules of agency as set forth in the Restatement Third of Agency. The Restatement Second of Agency was in effect in 1997 when Title 40, Chapter 57 was enacted, and was superseded by the Restatement Third of Agency in 2006.

²³ As in Title 40, Chapter 57 involved in the present case, Title 27, Chapter 32 contains an enabling provision which grants standing to the South Carolina Real Estate Commission to bring enforcement actions. In the absence of these enabling provisions, the Real Estate Commission would not have standing to bring such enforcement actions seeking injunctions and imposing other authorized disciplinary actions. The enabling language of S.C. Code Ann. §40-57-490, does not contain language stating that civil actions may only be brought by the Commission or LLR.

The Lower Court also ignored the official heading to S.C. Code Ann. §40-57-137 which contains the words “Real estate brokerage company duties to client” indicating a clear legislative intent to provide protection and rights to an individual client of a licensed real estate professional. The fiduciary duties of the Respondents under S.C. Code Ann. §40-57-137(A) in the present case were owed to the Appellants – not to the State of South Carolina; not to the South Carolina Department of Labor, Licensing and Regulation; and not to the South Carolina Real Estate Commission. The remedy for breaches of an agent’s fiduciary duties is the forfeiture of the agent’s compensation earned in the transaction in which the breach occurred. “An agent’s breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent’s disloyalty.” Darby v. Furman *supra* at 348; see also Restatement Third, Agency §8.01, Official Comments (d)(2).

In Darby v. Furman, the real estate agent violated a fiduciary disclosure requirement now codified at §40-57-135(D).²⁴ Although the fiduciary breach in Darby occurred in 1987 prior to the enactment of the restatement of Title 40, Chapter 57 in 1997, the Supreme Court, indicated that the result under the new statutory framework would be the same.²⁵ Id. at 348. Not only did the Supreme Court affirm that a breach of fiduciary duty claim is a proper cause of action for violations of a real estate broker’s fiduciary duty of disclosure and loyalty, but the Court held that the appropriate remedy for the broker’s failure to make the legally mandated written disclosures was forfeiture of the commissions previously paid. Id.

The Lower Court’s Order holding that Title 40, Chapter 57 does not authorize private causes of action for violations of its fiduciary duty provisions was legal error.

²⁴ The disclosure requirement involved in Darby is codified at §40-57-135(D), in the same section as the written agency agreement requirement involved in this litigation which is codified at §§40-57-135(C)(4) and (D)(4).

²⁵ The Darby Court referenced the violation of the “dual agent” prohibitions of §40-57-137(M) which occurred in 17 of the transactions involving the Properties.

Issue VIII.

Did the Lower Court err by holding that laches applies to the Appellants' based on the allegations of the Complaint?

The Lower Court erred by holding that with respect to the Appellants' Disgorgement and Restitution Claims, "based on the allegations of the Complaint, all such claims are barred by the doctrine of laches." (R. p. 18). This holding by the Lower Court evidences improper negative inferences against the Appellants in violation of the appropriate standard of review for a pre-answer motion to dismiss under Rule 12(b)(6). The Lower Court's holding has no evidentiary support in the Complaint as the holding is based on the Lower Court's incorrect statement that "[a]ccepting the allegations of the Complaint to be true, the Complaint alleges that the Appellants were aware of the Respondents alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property." (R. p. 19). In direct contradiction of the Lower Court's statement, the Complaint specifically alleges the discovery of the Respondents' fraudulent, unlawful and deceptive conduct occurred on January 10, 2017, which is after the last payment of unlawful commissions and fees to the Respondents on May 1, 2015²⁶. (R. pp. 55-59 ¶¶142-165).

Under South Carolina law, "[t]o be charged with laches, a party must have knowledge of the facts upon which he bases his claim". Jefferson Pilot Life Ins. v. Gum, 302 S.C. 8, 393 S.E.2d 180 (S.C. 1990)(internal citation omitted). "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." Robinson v. Estate of Harris, 389 S.C. 360, 698 S.E.2d 801 (S.C. 2010)(internal citation omitted). The creation and

²⁶ Appellants will amend the Complaint to add specific allegations that after the January 10, 2017 discovery of the Respondents' fraudulent, illegal and deceptive conduct, the Appellants notified the Respondents in writing that no additional real estate commissions or development fees would be paid. These written notifications were in relation to the sale of Lot 23 which closed on June 23, 2017. The Respondents were not involved in the sale of the Appellants' remaining two parcels after the closing of Lot 23.

subsequent concealment of the Fraudulent Documents, and the express provisions of the SVR Policy Manual prohibiting the Respondents' conduct irrefutably prove the Respondents were fully aware of the fraudulent and illegal nature of their actions. The Appellants contend that the Respondents could not, as a matter of law, be "prejudiced" by the success of their own intentional acts of illegal, fraudulent and deceptive conduct.

Issue IX.

Did the Lower Court err by considering documents not part or outside of the record, and by taking judicial notice of "the knowledge of Appellant Porth" from unreliable sources without compliance with Rule 201 of the South Carolina Rules of Evidence in considering a pre-answer Rule 12(b)(6) motion to dismiss?

The Lower Court's Order states that "[a]s the closings and Deeds were integral to the Complaint, the Court accepted for review copies of the Contracts of Sale, Deeds and HUD-1 statements which reflected that Appellant Porth executed the contracting and closing documents on behalf of Appellant Panorama Point, LLC" (emphasis added). (R. p. 3, fn 4). The Appellants attached no such documents to the Complaint, and were not provided notice of any such submission by the Respondents. This sentence, therefore, suggests an improper ex parte communication by the Respondents' attorneys to the Court in violation of SCRPC Rule 5(a) and (b)(3), and in violation of the South Carolina Rules of Professional Conduct Rule 3.5(b) and Comment 2. (R. p. 312). The Respondents did not deny this ex parte communication in their Sur-Reply to the Appellants' Rule 59 Brief. The review of such evidentiary documents, even if provided to the court with proper notice to the Appellants, when reviewing a pre-answer motion to dismiss under Rule 12(b)(6) is highly improper since the allegations of the Appellants' Complaint must be taken as true, and all doubts resolved in favor of the Appellants. The Lower Court failed to address this

ex parte communication in its Rule 59 Order, and the Appellants remain unaware of which documents were submitted to and reviewed by the Lower Court.

The Order further states “[a]dditionally, the Court believes it proper to take judicial notice of the public record which would reflect [Appellant] Porth’s knowledge and participation in the sales and marketing with associated listing prices which are the subject of this action” (emphasis added). (R. p. 3, fn. 4). The Court’s unannounced intention to utilize South Carolina Rules of Evidence (“SCRE”) Rule 201 to take judicial notice of a nonexistent “public record” to prove the “knowledge” of an individual Appellant in reviewing whether to grant the Respondents’ pre-answer Motions to Dismiss was highly improper. (R. p. 312-314).

The Appellants assert that the Order’s reference to an unidentified “public record which would reflect [Appellant] Porths’ knowledge and participation in the sales and marketing with associated listing prices” lacks a factual foundation as such a “public record” does not exist. (R. p. 313). The Lower Court failed to identify (i) the identity of the public records being judicially noticed, (ii) the specific facts to be noticed from those records, (iii) the basis of the Court’s determination that the public records meet the applicable standards for judicial notice as set forth in prior decisions such as State v. Odom, 412 S.C. 253, 265-266, 772 S.E.2d 149 (S.C. 2015) and Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610 (S.C.Ct.App. 2002); and (iv) how those judicially noticed facts prove the dates of the Appellants’ discovery of the facts and circumstances of the various instances of unlawful, fraudulent and anticompetitive conduct by each of the separate Respondents which constitute the basis of the Appellants’ various causes of action. Furthermore, the Appellants requested an opportunity to be heard pursuant to the requirements of SCROE Rule 201(e). (R. p. 313). The Lower Court never responded to the Appellants’ request to be heard

pursuant to SCROE Rule 201(e), and further ignored the Appellants' objection to the improper taking of judicial notice in its Rule 59 Order.

Issue X

Did the Lower Court err in holding that the Appellants were *In pari delecto* with the alleged fraudulent, unlawful, and deceptive conduct of the Respondants based on the allegations of the Complaint?

The Lower Court is incorrect in holding that even if the Appellants' Disgorgement and Restitution Claims were equitable, the Appellants were *in pari delecto* with the fraudulent, unlawful and deceptive conduct of the Respondents. (R. p. 19). The Lower Court's holding is wholly without evidentiary support as the Complaint contains no allegations which could support an inference that the Appellants participated in the wrongdoing by the Respondents. The Appellants were not subject to the provisions of Title 40, Chapter 57; were not subject to the rules of the CMLS; and owed no fiduciary duties to the Respondents under applicable law. The Lower Court's holding is both factual and legal error, as the Lower Court provided no factual basis or legal authority for its holding, and provided no discussion of the rationale for its holding that the Appellants were *in pari delecto*.

Issue XI

Did the Lower Court err in granting the Respondents' Motions to Dismiss since the dates of discovery of the Appellants' various injuries under any applicable "discovery" statute of limitations are questions of fact?

The Order is incorrect in its holding that the Appellants' various claims are barred by various "discovery" statutes of limitations, even if they are applicable and not equitably barred or tolled, as the dates of "discovery" of the facts and circumstances of the wrongful conduct by the

three separate Respondents are questions of fact. As such, the Appellants various claims may not be dismissed pursuant to the Respondents' pre-answer Motions to Dismiss under Rule 12(b)(6). The allegations of the Complaint sufficiently pleaded satisfaction with any and all applicable three year "discovery" statutes of limitations. See Issue II *supra*. When the evidence of whether a person knew or should have known of a claim is conflicting, the question becomes an issue of fact. Maher v. Tietex, Corp., 331 S.C. 371, 500 S.E.2d 204, 207 (S.C.Ct.App. 1998). The Lower Court's Order was, therefore, without a factual foundation in the record, and was an error of law.

Issue XII

Did the Lower Court err in holding that the Complaint failed to state causes of action for unjust enrichment, quantum meruit, and restitution?

The Order erred by holding that the Appellants' claims for quantum meruit and restitution failed to state a valid causes of action. (R. p. 17). The Complaint specifically alleges facts supporting all of the elements of both causes of action under South Carolina law. The Respondents' collection and retention of unlawful commissions and fees through knowing, willful, deceptive, unfair and fraudulent means makes it unjust for the Respondents to retain the statutorily prohibited compensation. (R. p. 109 ¶431, p. 112 ¶447). "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty" (emphasis added). SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (S.C. 1990).

“The law of restitution and unjust enrichment also creates a basis for an agent’s liability to a principal when the agent breaches a fiduciary duty, ...” Restatement Third, Agency §8.01, Official Comments (d)(1). “If through the breach the agent has realized a material benefit, the agent has a duty to account to the principal for the benefit, its value, or its proceeds. *Id.* “An agent’s breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent’s disloyalty.” *Id.* at (d)(2).

These incorrect statements directly contradict the Lower Court’s earlier acknowledgement that “[t]he Appellants advance several theories of recovery all of which allege in essence that given the alleged lack of written listing agreements, it was unlawful for the Realtor [Respondents] to collect and to retain commissions and development fees associated with the sale of the Property that is the subject matter of this action”(emphasis added). (R. p. 2). The Complaint alleges that it was “inequitable” for the Respondents to retain the unlawful compensation in that the Respondents’ conduct was (i) fraudulent, unlawful and deceptive; and (ii) was expressly prohibited under Title 40, Chapter 57; and (iii) was against the statutorily enacted public policy of South Carolina. (R. pp. 42-44 ¶¶77-86, pp. 45-48 ¶¶93-108, pp. 52-54 ¶¶129-141, pp. 85-86 ¶¶328-332, p. 112 ¶447). The Lower Court’s dismissal of the Appellants’ claims for unjust enrichment, quantum meruit, and restitution for failure to state a cause of action was legal error.

Issue XIII

Did the Lower Court err by dismissing the Appellants’ Complaint with prejudice?

In its final holding in the Order, the Lower Court states “[n]o amount of discovery or repleading the allegations through an Amended Complaint would cure the legal impediments to Appellants’ proposed claims.” (R. p. 19). In the present case, the Lower Court engaged in no

analysis of what amendments could be made by the Appellants, and the record provides no evidentiary support for the Lower Court's holding that any amendment by the Appellants would be futile. Our Supreme Court has held that trial courts should allow plaintiffs the opportunity to amend any complaint deemed insufficient pursuant to a Rule 12(b)(6) motion to dismiss. Skydive supra at 183. "We can not imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like"(emphasis added). Id. The dismissal of the Appellants' various causes of action with prejudice was legal error.

CONCLUSION

For the reasons set forth above, the Appellants request that this Court reverse the Lower Court's Order in its entirety, and remand the case to the circuit court for reinstatement to the active Trial Roster, requiring an Answer to the Complaint and for the commencement of the discovery process regarding the matter.

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January 4, 2022

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Jan 04 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC.....Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Brief of Appellants complies with Rule
211 (b) of the South Carolina Appellate Court Rules.

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APPEAL FROM LEXINGTON COUNTY
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R. Kent Porth and Panorama Point, LLC, Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service, Inc., Respondents.

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Date: January 4, 2022

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STATEMENT OF ISSUES ON APPEAL

1. The Trial Court correctly ruled that the Appellants' claims were time barred by the statute of limitations.
2. The Trial Court correctly ruled that no private cause of action exists against a real estate agent for an alleged technical violation of S.C. Code § 40-57-5 et seq.
3. The Trial Court correctly rejected Developers' various arguments related to extrinsic fraud, unclean hands, Attorney Rules of Professional Responsibility, and references to documents referenced and relied upon in the Complaint.
4. The Trial Court correctly dismissed the action with prejudice.

STATEMENT OF THE CASE

Appellants R. Kent Porth (“Porth”) and Panorama Point, LLC (“Panorama”)(collectively the “Developers”) filed this action seeking to claw-back compensation paid to the Respondents, Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc. (“Realtors”) in connection with the development and sale of Porth and his family members’ real property located on Lake Murray (the “Property”). The Developers allege that because they did not execute a document with the Realtors specifically titled “listing agreement” that the Realtors should not have received any compensation for sales of the Property. The Developers claim that they are entitled to money damages in the amount of compensation earned by the Realtors.

Following commencement of the action, the Realtors filed a motion to dismiss on the grounds that (1) the statute of limitations bars the Developers’ claims; and (2) no private right of action exists to recover monetary damages for an alleged technical violation of the statute governing licensed real estate agents and brokers in South Carolina. (R. pp. 120-129). The Realtors also filed an amended motion to dismiss (R. pp. 144-145), and a memorandum supporting their motion (R. pp. 157-186). In response, the Developers filed a memorandum in opposition (R. pp. 130-143), a supplemental memorandum in opposition (R. pp. 146-156), and a third memorandum in opposition to the motion (R. pp. 187-270). A hearing was held on the motion in front of Hon. Edgar W. Dickson. (R. pp. 351-375).

By order entered February 16, 2021, Judge Dickson granted the Realtors’ motion. (R. pp. 1-21). Thereafter, Developers filed a motion to reconsider (R. pp. 271-292).

In response, the Realtors filed a memorandum in opposition to the motion to reconsider (R. pp. 293-303). Developers then filed a Reply in support of the motion to reconsider. (R. pp. 304-346). Realtors thereafter filed a memorandum in response to the Developers Reply. (R. pp. 347-

350). By order entered May 5, 2021, Judge Dickson denied the motion to reconsider. (R. pp. 22-25).

The Developers then filed and served their notice of appeal on June 4, 2021.

INTRODUCTION

A. Development of Property on Lake Murray and hiring of Realtors

In late 2005 and early 2006, Porth, an experienced tax attorney partner with the Nexsen Pruet law firm, began exploring options to best develop and sell all or a portion of his family's Property as a residential subdivision. (R. p. 30, 58). In furtherance of Porth's plan to sell a portion or all of his family's Property, the Developers engaged the Realtors to develop, market, and sell the Property in early 2006. (R. p. 39). Porth signed a Development Agreement on behalf of Panorama Point with Defendant RPW on or about December 21, 2006. ("Development Agreement") (R. p. 44). The Development Agreement contained provisions for the payment of fees for development activities as well as separate provisions for the payment of real estate commissions for listing and sales with Defendant SVR serving as the exclusive listing agent.

B. Sale of Properties and payment of compensation to Realtors

Thereafter, between January 2007 and May 2015, Developers sold off twenty-three (23) separate portions of the Property aided by the Realtors totaling sales in an amount of \$6,179,215 (R. pp. 59-64). For their services as real estate agents, the Realtors received commissions totaling \$267,035.37. (Id.). Additionally, pursuant to the Development Agreement, Developers paid "development fees" totaling \$232,641.03. (R. pp. 64-67). In sum, the Realtors received \$499,676.40 for real estate agent and development services pursuant to the Development Agreement. (R. pp. 59-67). The final sale under the arrangement between Developers and Realtors pursuant to the Development Agreement occurred on May 7, 2015. (R. pp. 63).

C. Developers file suit in January 2020 to recoup all compensation paid to Realtors for sales starting in 2007

Developers allege, however, that despite a written Development Agreement providing for compensation to the Realtors, they never executed a document specifically titled “listing agreement” with the Realtors¹. (R. pp. 26-119). The Developers allege that a statute governing licensed real estate agents and brokers, South Carolina Code § 40-57-135(E)(1) and 137², requires “a written listing agreement between the property owner and the real estate brokerage firm with whom the licensee is associated.” Since the Developers allege that there are no “listing agreements,” the Developers contend they are entitled to repayment of all compensation earned by Realtors with respect to sales at the Property between 2007 and 2015³. (Id.).

In their lawsuit, Developers allege causes of action for (1) Breach of Fiduciary Duty; (2) Negligent Misrepresentation; (3) Negligence; (4) Conversion; (5) Quantum Meruit; (6) Constructive Fraud; (7) Restitution; and (8) Unfair Trade Practices. (R. pp. 96-118).

¹ As this appeal is related to a motion to dismiss, the allegations made by the Developers must be accepted as true. However, for purposes of clarity, the Realtors deny that listing agreements were not executed by the Developers.

² The statutory sections referenced in this Appeal are those in effect at the relevant time, but S.C. §40-57-350 in place of §40-57-137

³ The Complaint acknowledges, and the Developers do not dispute, that a written agreement was entered into providing for compensation to the Realtors. Developers simply allege that, an agreement was not specifically titled “listing agreement,” the Realtors were not entitled to any compensation and should be required to pay back the Developers for all compensation received in connection with sales of the Property.

Each cause of action, however, relies upon the same allegation—that the Realtors did not present a document specifically entitled “listing agreement⁴,” which the Developers allege is a technical violation of the statute governing real estate agents in South Carolina. Based on this alleged technical violation, Developers allege that the Realtors should not have received any compensation for their work in selling 23 lots for over \$6,000,000 for the benefit of the Developers. (Id.).

After hearing arguments on the Realtors’ motion to dismiss, the trial court entered an order in favor of the Realtors finding the statute of limitations barred Developers’ action, and the allegations in the Complaint did not assert any viable causes of action against the Realtors. (R. pp. 1-21). Thereafter, the trial court denied the Developers’ motion to reconsider. (R. pp. 22-25). This appeal followed.

LEGAL STANDARD

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Palmetto Health Alliance*, 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995).

⁴ Based upon the posture of the case, Respondents accept the allegations pled by Appellants as true. However, Respondents deny that they violated any South Carolina statute. The written Development Agreement, incorporated by reference in Appellants’ Complaint, set forth the compensation to be earned by the Realtors, and thus, complied with South Carolina law.

ARGUMENT

I. The Trial Court correctly determined that the Developers' Complaint was time-barred

A. All acts relevant to this litigation occurred between January 2007 and May 2015; over three years prior to the filing of the lawsuit

Under South Carolina law, the causes of action asserted by Developers are each subject to a three (3) year statute of limitations. *See, Walbeck v. I'On Co.*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019) (“The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005), applies to [] negligent misrepresentation claims.”); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 782 (Ct. App. 2009) (three-year limitations period set forth in § 15-3-530(5) applies to negligence actions); *Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) (“The statute of limitations for . . . a conversion claim is three (3) years [under § 15-3-530(5).]”); *Dorman v. Campbell*, 331 S.C. 179, 183-84, 500 S.E.2d 786, 788-89 (Ct. App. 1998) (applying three-year statute of limitations set forth in § 15-3-530 to claim for constructive fraud); see also S.C. Code § 15-3-530(7) (“an action for relief on the ground of fraud” is subject to the three-year statute of limitations); S.C. Code § 39-5-150 (an action alleging violation of South Carolina’s Unfair Trade Practices Act must be brought within three years); *Mazloom v. Mazloom*, 382 S.C. 307, 322, 675 S.E.2d 746, 755 (Ct. App. 2009)(Action for breach of fiduciary duty is subject to a three-year statute of limitations); *See, S.C. Code § 15-3-530(1)*(action for unjust enrichment or quantum meruit, based upon an implied contract or obligation, are subject to a three year statute of limitations).

Having established that each cause of action is subject to a three-year statute of limitations, when applying the allegations of the Complaint on their face, it is clear that all claims brought by the Developers are time barred.

The Complaint alleges that all activity between the Developers and Realtors with respect to the Property took place between 2006 and at the latest December 2016. (R. p. 59). Thus, all activity complained of by Developers occurred more than three years from the filing of the subject lawsuit on January 2, 2020.

Relevant to this appeal, however, the allegations of wrongdoing alleged by Developers occurred far earlier than December 2016. Indeed, to the extent that the Developers allege that the Realtors failed to provide them with a document entitled “listing agreement,” or failed to comply with the statutes governing real estate licensees in South Carolina, this occurred at the outset of the relationship in 2006. (R. p. 44). Therefore, Developers’ attempt to recover compensation they allege was unjustly paid to the Realtors beginning in 2006 was untimely in January 2020, and the Trial Court correctly ruled the statute of limitations had run.

i. The Developers’ claims are each legal, not equitable

In an effort to circumvent the consequences of their untimely lawsuit, the Developers argue that their claims are equitable in nature, and therefore, are not subject to a statute of limitations. (App. In. Br. pp. 24-36). Developers argue that their claims for breach of fiduciary duty, restitution, quantum meruit, unjust enrichment and conversion are each equitable under *Thomerson v. Devito*, 430 S.C. 246, 844, S.E.2d. 378 (2020).

As an initial matter, *Thomerson* dealt with a certified question as to whether promissory estoppel was a legal or equitable claim subject to a statute of limitations. *Id.* In the current appeal, no cause of action for promissory estoppel was asserted.

Moreover, whether an action is legal or equitable is decided by the nature of the claim. *Insurance Fin. Servs., Inc. v. South Carolina Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (“The main purpose of the action should generally be ascertained from the body of the

complaint. . . . However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action.”); *Bell v. Mackey*, 191 S.C. 105, 119–20, 3 S.E.2d 816, 822 (1939) (The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable).

Here, the nature of the Developers’ causes of action are unequivocally legal. Although a request for money damages is not conclusive to establish a cause of action as legal, in the current action, the Developers allege that the Realtors breached a duty they owed to the Developers in their capacity as real estate professionals governed by the S.C. Code § 40-57-5 et seq., which in turn caused the Developers’ money damages. (R. pp. 98-99). Thus, the relief the Developers seek is entirely economic resulting from alleged breaches of a duty or obligation by the Realtors.

To be clear, while the Developers seek a return of the commissions and fees earned by the Realtors, the basis for this relief relies on Developers’ theory that the Realtors did not provide services to the Developers that met their professional standard of care, including the execution of written “listing agreements.”

Thus, although the Developers attempt to characterize this relief as “restitution,” restitution is not automatically classified as an equitable remedy. Indeed, “restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for [the plaintiff’s] claim” and the nature of the underlying remedies sought.” *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (internal citation omitted).

Here, whether styled as a cause of action for conversion, restitution, unjust enrichment, breach of fiduciary duty, or any other theory of recovery, the main purpose of an action is to recover

money damages “proximately caused” by the Realtors’ breach of a duty or obligation allegedly owed to the Developers. Thus, each cause of action asserted by the Developers is an action at law, and subject to a three-year statute of limitations.

ii. The Developers knew or should have known of the alleged wrongful conduct well before January 2, 2020

The Developers’ attempt to excuse their untimely Complaint by suggesting that they did not “discover” that the Realtors had breached their fiduciary duty by, inter alia, failing to provide a document specifically entitled “listing agreement” prior to 2017. (App. In. Br. pp. 27-30). To support this assertion, the Developers aver that they were unaware of the relevant South Carolina Statutes, S.C. Code. §§40-57-135(C)(4) and 40-57-139(B), prior to 2017, and thus did not discover that they had causes of action against the Realtors.

However, the Trial Court correctly ruled that ignorance of the law does not excuse the Developers’ untimely Complaint. (R. pp. 8-9).

It is well established in South Carolina that ignorance of the law does not suspend the accrual of a statute of limitations. *See, Ott v. Maryland Dep’t of Pub. Safety and Corrs. Servs.*, 909 F.3d 655, 661 (4th Cir. 2018) (“Ignorance of the law does not justify tolling, even when a party does not have legal representation); *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (observing ignorance of the law is not a basis for tolling). “Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests.” *American Legion Post 15 v. Horry Cnty.*, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); *Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996) (“Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.”).

Here, contrary to the Developers' arguments, the mere fact that they allege they were not expressly aware of a specific statutory section within the South Carolina Code does not mean that they were not aware of the underlying facts that make up the alleged wrong.

Moreover, the Trial Court correctly noted that the allegations of Developers' Complaint establish they knew that they of some alleged harm caused by the Realtors that could be redressed through legal action no later than May 2013⁵. (R. pp. 1-21). Thus, any allegation that the Developers were not on notice of alleged negligence or improper actions by the Realtors is expressly contradicted by their own Complaint.

Under South Carolina law, in determining when a cause of action arises under § 15-3-530, courts apply the "discovery rule." *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). According to this rule, the statute of limitations begins to run "when a cause of action reasonably ought to have been discovered," or, in other words, "when a plaintiff has notice that he might have a remedy for a harm." *Id.*

"A party cannot escape the application of [the statute of limitations] by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence, the same result follows. Thus, either actual or constructive knowledge of facts or circumstances, indicative of fraud, trigger a duty on the part of the aggrieved party to exercise reasonable diligence in investigating and, ultimately, in pursuing a claim arising therefrom. *Burgess v. Am. Cancer Soc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799-800 (Ct. App. 1989).

⁵ The Developers' Complaint alleges that by May 2013, they had discovered "evidence of [Realtors'] negligence, incompetence, and lack of attention in performing their duties. (R. p. 88).

“The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought, or a full-blown theory of recovery developed.” *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (Ct.App.1997).

Here, the statutory sections relied upon by Plaintiffs were public and widely available to anyone of common knowledge. Certainly, a tax lawyer with over 22 years of business and prior real estate development experience by 2006 would have the wherewithal to be on notice of an alleged remedy for harm. *Rumpf*, 357 S.C. at 394, 593 S.E.2d at 187. It is inconceivable--even accepting the Developers’ allegations as true--that the Developers were not aware that they paid commissions to the Defendants beginning in 2006. Indeed, the Complaint acknowledges that the Developers knew compensation was paid to the Realtors, and knew the amount of the Compensation. (R. pp. 59-68).

In other words, if the Developers believed at the time of these transactions that the Realtors may not have been entitled to compensation they received, or that the Realtors had not performed their services consistent with their standard of care, they could have easily looked into the South Carolina Code and identified the very same allegations asserted in their untimely Complaint. Yet, the Developers waited over 14 years to claim that the compensation agreement with the Realtors was “unlawful.”

Furthermore, the allegations of the Developers’ Complaint itself acknowledge that they had prior notice of alleged potential shortcomings by the Realtors but did not timely pursue a

remedy for alleged harm. For instance, the Developers allege that by May 2013, they had “evidence of [Realtors’] negligence, incompetence, and lack of attention in performing their duties for which they received the Development Fee.” (R. pp. 86-88). Likewise, on December 31, 2013, in connection with the sale of “Lot 15,” Developers discovered that Respondent Wilkins allegedly had an undisclosed conflict of interest in the form of a prior business relationship with the purchaser, for whom an alleged unnecessary \$2,500 credit was negotiated by Wilkins. (R. pp. 68-70). Each time, the Developers were on notice of alleged failures or wrongdoings by the Realtors, but did not act promptly or diligently to determine if they had a “right that had been invaded.” *Snell*, 276 S.C. at 303 278 S.E.2d at 334.

Here, it is indisputable that the allegations of Developers’ Complaint acknowledge being on notice of alleged “negligence” or “incompetence” of the Realtors long before filing of this action in January 2020. Thus, the Trial Court did not err in holding the statute of limitations barred the Developers’ Action.

B. The Trial Court correctly held that laches also bars Developers’ Claims

As an alternative sustaining ground, to the extent that any claims are deemed to be equitable, the Trial Court also held that the doctrine of laches barred such claims.

The equitable doctrine of 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.” *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). “Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those

rights.” *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993).

Here, the allegations of the Complaint expressly acknowledge that despite notice of the Realtors’ alleged “negligence” and “incompetence,” the Developers did not pursue any action against the Realtors while the Realtors were making the Developers millions of dollars in sales. Rather, only after the Realtors were no longer useful to the Developers did they belatedly pursue this lawsuit⁶. This inequity was specifically noted by the Trial Court in ruling that laches barred the Developers claims, the Trial Court specifically noted:

Accepting the allegations of the Complaint to be true, the Complaint alleges that the Plaintiffs were aware of the Defendants alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property.

(R. p. 4).

Furthermore, a specific element of laches is the prejudice resulting from the claimant’s delay in asserting their rights. *Id.* In the matter at bar, the Developers’ belated lawsuit prejudices realtors in two obvious ways.

First, it is established in the Complaint that compensation earned by the Realtors extends back to January 2007, fourteen years prior to commencement of the lawsuit. (R. p. 59). The last payment was earned by the Realtors in May 2015, approximately five years prior to commencement of the action. (R. p. 63).

⁶ The Trial Court specifically noted that the Developers continued to accept the benefit (i.e. millions of dollars) of the Realtors work, despite knowledge of alleged “negligence,” “incompetence” and “breaches of duties” no later than 2013. Based upon these actions, the Trial Court determined that the Developers’ claims were also barred under the theory of unclean hands and/or *in pari delecto*. (R. p. 19). Although the Developers set forth a separate issue on appeal objecting to the Court’s dismissal for unclean hands and/or *in pari delecto*, the reasoning for dismissal under those doctrine is the same as for the Trial Court’s application of the doctrine of laches.

Under the Developers' theory, real estate agents would effectively never be able to realize any compensation, as the threat of a client seeking to disgorge the realtor's commission based upon an alleged technical violation of S.C. Code §40-57-5 et seq would go on in perpetuity. Such a result is precisely what the equitable doctrine of laches seeks to avoid.

Furthermore, under S.C. Code § 40-57-135(D)(1), brokers-in-charge are only required to retain documents related to a transaction, including listing agreements, for a period of five (5) years. In this action, the Developers seek to use the alleged lack of "listing agreements" as evidence of their claim, despite the fact that the Realtors had no legal obligation to retain such documents as of the date the Developers' lawsuit was filed. This too supports a finding that laches bars the Developers' claims.

Accordingly, the trial Court correctly held that as an additional sustaining ground, laches barred the claims being asserted by the Developers. (R. p. 18).

II. The Trial Court correctly held that no private cause of action exists under S.C. Code §§40-57-135 and 40-57-137

In sum and substance, Developers' 92 page, 473 paragraph Complaint can be summarized in a simple manner. Plaintiffs allege that if a real estate agent does not obtain a specific document entitled "listing agreement," then the seller of real estate, who benefits from the realtor's services, does not need to pay the real estate agent. In other words, under the Developers' theory, a seller can exploit the hard work of a real estate agent, and then refuse to pay their realtor once the sale is closed. The Developers seek to obtain this windfall despite no allegation that they were actually injured due to the alleged lack of document entitled "listing agreement."

The allegations in the Complaint do not allege that the Developers incurred any damages caused by the lack of a document entitled “listing agreement,” nor does the Complaint allege that the compensation paid to the Realtors was not known to and agreed upon by the Developers. Rather, the Developers’ lawsuit is a blatant attempt to obtain a windfall to which they had no expectation at the time of the subject sales, based upon the Developers’ perception that they discovered a loophole (an alleged technical violation of the statute).

However, the statute does not allow private actions to punish alleged technical violations, nor does it provide for statutory damages to private parties. This is consistent with long standing South Carolina law. *Overcash v. South Carolina Elec. and Gas Co.*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005)(A private party may not use the statute alone as her basis for a civil action seeking damages absent specific authorization in the statute).

Rather, the statute expressly provides that enforcement of the statutory requirements is vested exclusively in the South Carolina Real Estate Commission.

The statutory section relied upon by the Developers states:

A licensee may not advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without first obtaining a written listing agreement from the owner and when advertising or marketing in any medium including site signage, a licensee clearly shall identify the full name of the company with which the licensee is affiliated. Brokers-in-charge who are members of a multiple listing service must be allowed to make their company listings available for any cooperative marketing or advertising program, subject to the rules and regulations of the multiple listing service and with the consent of the owner. Consent may be contained and obtained from the owner through the listing agreement.

S.C. Code § 40-57-135(C)(4)(2004).

As is clear from its plain text, the purpose of this statute is the protection of the public from improper behavior by a class of professionals who are licensed by the State of South Carolina. For

example, a real estate agent could be disciplined by the South Carolina Real Estate Commission if she advertised a property to the public that is not actually for sale. The statute is not intended to act as a mechanism for sophisticated, wealthy developers to avoid paying their real estate agents.

Furthermore, nothing in §40-57-135(C)(4) suggests that a compensation agreement between a realtor and the seller must specifically be titled “listing agreement,” as long as the realtor and the seller have agreed in writing to the representation and compensation⁷. Likewise, nothing in § 40-57-135(C)(4) suggests that a realtor who markets and sells property for the benefit of a seller (such as the Developers) is not entitled to a commission simply because the realtor and seller do not execute a specific document entitled “listing agreement.”

In fact, the question of whether the Code authorizes a private cause of action for such an offense is answered by the Code itself. S.C. Code § 40-57-790 (Civil Actions) expressly provides that “[a] civil action may be brought for violations of this chapter as provided for violations of Article 1, Chapter 1, in accordance with Section 40-1-210.” Section 40-1-210 allows only the Department of Labor, Licensing and Regulation to institute civil actions through the Administrative Law Court, in the name of the State, “for injunctive relief against a person violating this article, a regulation promulgated under this article, or an order of the board,” and further

⁷ The same statute upon which Plaintiffs rely recognizes multiple alternative relationships between realtors and sellers other than a strict written “listing agreement.” See, S.C. Code §40-57-350(L)(1) (recognizing transactional brokers who may give one or both parties customer service or facilitate the transaction without representing either party); S.C. Code §40-57-350(L)(3) (recognizing that sellers who do not choose to establish an agency relationship but who use the services of the [brokerage] firm are considered customers). Likewise, South Carolina common law has long held that a real estate broker need not have a written commission agreement to be entitled to compensation. *United Form Agency v. Malanuk*, 284 S.C. 382, 384, 325 S.E.2d. 544, 546 (recognizing oral commission agreements for real estate agents as enforceable).

provides “[f]or each violation the administrative law judge may impose a fine of no more than ten thousand dollars⁸.”

The Trial Court correctly held that an alleged statutory violation on its own is insufficient to support a private cause of action. (R. p. 10). Therefore, the Trial Court properly dismissed the Developers’ action.

III. Developers’ remaining arguments are immaterial, and do not allege facts supporting a cause of action under any theory

The Trial Court ruled that, even when accepting all allegations in the Complaint as true, the Developers’ action was untimely. Furthermore, the Trial Court held that the Developers failed to state facts sufficient to plead a cause of action recognized under South Carolina law. (R. pp. 1-21). The reasoning for the Trial Court’s ruling was simple.

First, the facts alleged in the Complaint demonstrated unequivocally that the action was not timely brought. (Id.).

Second, the Developers did not allege facts that would satisfy the elements of any common law cause of action. Rather, each cause of action asserted by Developers relied on the same central argument—that the Developers were entitled to money damages for an alleged technical violation of S.C. Code § 40-57-135. As a technical violation of S.C. Code §40-57-135 on its own does not provide for a private cause of action for damages, the Developers did not state a claim for relief under any theory of recovery. (Id.).

⁸ The statute gives the South Carolina Real Estate Commission exclusive jurisdiction over enforcing the Act, but it expressly allows an injured party to bring common law claims such as negligence or fraud against a licensee. S.C. Code § 40-57-350(M). Thus, an injured party who can satisfy the elements of a common law cause of action is free to pursue a licensee. However, an individual cannot sue a licensee solely on account of a violation of the licensing statute.

Nonetheless, the Developers’ attempt to shield the simplicity of the Court’s ruling by suggesting that the Trial Court ignored the standard of review on a Rule 12(b)(6) motion, and ignored certain immaterial allegations. (App. In. Br. Issues I, III, VI, IX, and X, pp. 11-15, 20-23, 30-32, 37-39). These arguments do not have any relationship to the Court’s statute of limitations and laches ruling, nor the existence of a private cause of action under S.C. Code §40-57-5 et seq. Therefore, the arguments are insufficient to support reversal of the Trial Court’s ruling.

A. Developers’ allegations of extrinsic fraud are immaterial to the Trial Court’s grounds for dismissal

In Developers’ first issue on appeal, they allege that the Trial Court ignored and did not address alleged “extrinsic fraud” related to alleged “concealment of two alleged listing agreements that the Developers allege were created after-the-fact. (App. In. Brief pp. 11-15). This argument is without merit, as it had no connection to the Trial Court’s decision.

Here, the Developers’ lawsuit revolves around their allegation that no “listing agreements” were ever executed between the Developers and Realtors. In ruling on the motion to dismiss, the Trial Court accepted those allegations as true. (R. p. 4). After accepting those allegations as true, the Court determined that the action was untimely and furthermore, that no private cause of action existed to enforce S.C. Code § 40-57-135, which the Developers allege requires a “listing agreement” in order to receive compensation for a real estate sale. (R. pp. 9-10).

Whether or not any allegedly fraudulent listing agreements were created after-the-fact had no bearing on the Trial Court’s decision, as the Court was required to accept as true the Developers’ allegation that no document entitled “listing agreement” existed. *Stiles*, 318 S.C. at 298, 457 S.E.2d 602-603 (In considering a 12(b)(6) motion, the trial court must construe all facts alleged and inferences reasonably deducible therefrom in favor of the nonmoving party.).

Accordingly, the Trial Court did not ignore the Developers' argument that two listing agreements were allegedly created after-the-fact. Rather, the Trial Court construed the Complaint with the broadest possible deference to the Developers—accepting that no “listing agreements” existed in the first place. Even accepting those allegations as true, however, the Trial Court correctly determined that the Developers' action was not viable. (R. pp. 9-10).

B. Allegations of “unclean hands” by the Realtors did not bar Realtors from asserting a statute of limitations defense

The Developers' third issue on appeal appears to suggest that the Realtors were precluded from asserting the affirmative defense of the statute of limitations based upon “the failure of the Respondents to provide the Required Listing Documents prior to January 10, 2017.” (App. In. Br. Pp. 20-24). This argument, likewise, is without merit.

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.” *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998).

Here, the Realtors are not plaintiffs making any claim for affirmative recovery. Furthermore, the Developers cite to no legal authority supporting their contention that the Realtors were barred from asserting a statute of limitations defense based on “unclean hands⁹.” *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008)(“[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”). Thus, Developers' argument asserting that allegations of “unclean hands” bars a statute of limitations defense is without merit.

⁹ Developers cite the case of *Vicary v. Town of Awendaw*, 427 S.C. 48, 828 S.E.2d 229 (Ct. App. 2019). It is unclear how this case applies to the current dispute as (1) the Court of Appeals decision cited was reversed by the South Carolina Supreme Court; and (2) the subject matter of the *Vicary* case was standing, not the statute of limitations.

The Developers also argue that the Court erred by not equitably tolling the statute of limitations.

“Equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.” *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 117, 687 S.E.2d 29, 33(2009).

In *American Legion Post 15 v. Horry County*, this Court highlighted the extraordinary nature of equitable tolling. The Court held:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

Equitable tolling has been deemed available where—

—extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.

—the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.

—the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009).

Here, the Trial Court did not ignore, but rejected, the Developers’ assertion that they were thwarted from pursuing a cause of action against the Realtors. (R. pp. 1-21). The grounds for equitable tolling of the statute of limitations simply do not exist in this case. Indeed, the Trial Court specifically noted that the Developers’ Complaint admits they were aware of alleged “negligence” or “incompetence” of the Realtors as of no later than 2013. (R. pp. 13-14). Yet, the developers did not pursue claims against the Realtors on account of such “negligence” or “incompetence or investigate the propriety of the Realtors actions any further.

Similarly, the Developers were aware that they were compensating the Realtors for sales of portions of the Property. (R. pp. 59-67). The Developers knew that Wilkins was a realtor licensed under South Carolina law. There are no allegations in the Complaint that the Realtors prevented the Developers, including Porth--an experienced attorney at one of South Carolina’s largest firms--from consulting the South Carolina Code or more specifically, those statutes governing real estate licensees.

Accordingly, the Trial Court correctly rejected the Developers’ assertion that the allegations of their Complaint stated “extraordinary circumstances” warranting the application of equitable tolling. *Id.*

C. The Rules of Professional Responsibility governing lawyers have no relationship to this this Appeal

Developers’ sixth issue on appeal alleges that the Developers’ untimely Complaint should be excused because Respondent Wilkins—who served as Developers’ real estate agent—is a retired member of the South Carolina Bar. (App. In. Br. at pp. 30-33). It is unclear what connection Wilkin’s status as a retired attorney has to the present action. There is no allegation that Wilkins and the Developers were in an attorney-client relationship, nor any allegations of legal malpractice.

Furthermore, Developers cite no authority supporting their argument that Wilkins' status as a retired attorney is an excuse for Developers' delay in filing this action¹⁰. *Bryson*, 378 S.C. at 510, 662 S.E.2d at 615 (Ct. App. 2008).

Finally, as a licensed attorney himself, Appellant Porth was fully capable of reviewing the relevant statutes and undertaking sufficient due diligence to assess claims that he may have against the Realtors. In other words, Wilkins' status as a retired attorney is not an "extraordinary circumstance" that thwarted the Developers' ability to bring an action against the Realtors. *American Legion Post 15*, 381 S.C. at 583, 674 S.E.2d at 184.

D. The Trial Court did not improperly consider documents outside of the record

The Developers' ninth issue on appeal suggests that the Trial Court improperly (1) considered documents that were repeatedly referenced in the Complaint, but not attached as exhibits, and (2) took "judicial notice of the knowledge of Appellant Porth." (App. In. Brief pp. 37-39). This argument is, likewise, without merit.

First, the Trial Court did not take judicial notice of Porth's state of mind or knowledge. Rather, the Trial Court simply stated that based upon the facts alleged in the Complaint, the Developers were at least on notice of potential claims no later than 2013. (R. pp. 13-14). Specifically, the Trial Court held:

I find that the Plaintiffs, by their own allegations, knew or should have known of acts of "negligence, incompetence, dishonesty and/or breaches of duty" by the Defendants as early as 2013, yet no action was commenced until January 2, 2020. The Plaintiffs' contention that they had not "determined conclusively" that they had claims against the Defendants until sometime in 2017 is unavailing as it pertains to the commencement of the running of the applicable statutes of limitations under South Carolina law. To the contrary, the Plaintiffs

¹⁰ The cases cited by Developers are legal malpractice lawsuits which deal with equitable tolling in a claim between a client and the client's lawyer. As legal malpractice is not alleged in this action, those cases have no application to the current matter.

were on actual or reasonable notice as early as 2013 that a right of theirs had been invaded by the Defendants. Based upon their own allegations of the Complaint, the notice was more than sufficient to have constituted a cause of action at that time and cause the Plaintiffs to make reasonable inquiry into the conduct of the Defendants. This would have led to the discovery of the same facts that give rise to the present action.

(Id. at 13).

Indeed, the Trial Court's decision was based exclusively on the Developers' own allegations taken from the Developers' Complaint. The fact that these alleged facts resulted in a legal conclusion adverse to the Developers does not mean the Court improperly took judicial notice of "the knowledge of Appellant Porth."

Furthermore, the Trial Court's reference to certain documents, including the contracts of sale, deeds and HUD-1 statements was proper. (R. p. 3). The real estate transactions, closings, and compensation disbursements made in connection with closings are the subject of extensive allegations in the Developers' Complaint. (R. pp. 59-68). The Court's judicial notice that such documents are a part of the closing process, required the Developers' signature, and disclosed the compensation paid to the Realtors is wholly proper and has been acknowledged as such by the South Carolina Supreme Court. *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009)("allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.").

Accordingly, the Trial Court did not err by referencing certain documents that were repeatedly referenced in the Developers' Complaint, and upon which the Developers' claims were based.

IV. The Trial Court correctly dismissed the Complaint with prejudice

In their final issue on appeal, the Developers argue that the Trial Court erred by dismissing the Complaint with prejudice. While ordinarily, it is true that a motion to dismiss is granted without prejudice, in this case, since the statute of limitations has expired, and the Developers did not identify any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted, the dismissal with prejudice was proper.

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. *Spence v. Spence*, 368 S.C. 106, 129, S.E.2d 869, 881 (2006). However, when a plaintiff fails to show how they would amend their complaint to avoid dismissal and presents no additional factual allegations or a different theory of recovery which may give rise to a cause of action, then the Trial Court dismissal with prejudice will be upheld. *Id.* at 130-131, 628 S.E.2d at 882.

Here, the Trial Court's Order Granting the Motion to Dismiss clearly dismissed the action with prejudice. (R. pp. 1-21). In Developers' motion to reconsider, they did not challenge this part of the Order. Thus, they waived appellate review of this issue.

Furthermore, the Developers did not provide any additional facts in the motion to reconsider, or their Initial Brief that would support a viable claim if they were allowed to amend re-file their action. Indeed, as the relief sought by the Developers is barred by the statute of limitations, and the statute that is forms the basis each of Developers' claims does not provide for a private right of action, there are no additional facts or theories that could save the Developers' lawsuit.

Therefore, the Developers' Complaint was properly dismissed with prejudice. *Spence*, 368 S.C. at 131, 628 S.E.2d at 882.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that this Court affirm the Trial Court's dismissal in its entirety.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D. Overstreet', is written above a horizontal line.

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January 4, 2022

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Jan 04 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Eleventh Judicial Circuit

Honorable Edgar W. Dickson

Case No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC, Appellants,

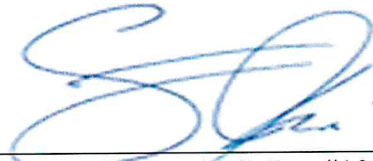
v.

Robert P. Wilkins, Jr., RPW Development, Inc., Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service, Inc., Respondents.

CERTIFICATE OF COMPLIANCE

I certify that the *Final Brief of Respondents Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc.* complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC.....Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.....Respondents.

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The Appellants file this Reply to address the Respondents' Initial Brief filed on November 5, 2021 ("Respondents' Brief"). The Appellants call this Court's attention to the fact that the Respondents did not respond to the thirteen specific and well defined Issues on Appeal set forth in the Appellant's Initial Brief ("Appellants' Brief"), and instead set forth their own four Issues on Appeal. As a result, the Respondents do not directly address the Issues on Appeal as set forth by the Appellants.¹

Respondents' Statement of the Case

The Respondents' Initial Brief contains a "Statement of the Case" which misstates and mischaracterizes the Appellants' eight causes of action, and ignores the specific factual allegations of the Complaint supporting each those causes of action. The Complaint sets forth specific factual assertions of illegal, fraudulent and deceptive conduct by the Respondents while acting in a fiduciary context, and is accurately summarized in the "Factual Background of Case" section of the Appellants' Brief.

The Respondents' Statement of the Case ignores the illegal, fraudulent and deceptive acts alleged in the Complaint which support each cause of action, and inaccurately asserts that a single "technical violation" is the sole issue in this case. The Respondents state "that because [the Respondents]² did not execute a document with the Realtors specifically titled 'listing agreement' that the [Respondents] should not have received any compensation for sales of the

¹ As with the Appellants' Brief, all statutory references herein are to the referenced statute as in effect at the relevant time. Title 40, Chapter 57 was amended and substantially renumbered effective as of January 1, 2017 after the 23 transactions had been consummated.

² The Respondents refer to the Appellants as "Developers" and the Respondents as "Realtors" in an apparent attempt to influence the Court's perception of the parties to this action. These labels are inconsistent with the roles of the parties in the subject transactions. Specifically, in the Development Agreement, drafted by Respondent Wilkins and relied on by Respondents, Respondent RPW Development, Inc. is defined as the "Developer," and Appellant Panorama Point, LLC is defined as the "Owner."

Property”(emphasis added).³ (Respondents’ Brief at 5) This assertion ignores the specific allegations of the Complaint including, but not limited to (i) the Respondents’ knowing and willful violations of the rules of the Consolidated Multiple Listing Service (the “CMLS”), (ii) the Respondents’ violations of the “dual agency” provisions of S.C. Code §40-57-137(M)(1) in 18 of the 23 transactions, and (iii) the Respondents’ failure to make the Legislatively mandated disclosures, set forth in S.C. Code §40-57-139, of the laws governing the Respondents’ fiduciary obligations as licensed real estate brokers and agents. The Respondents’ Statement of the Case ignores the numerous allegations of the Complaint that the Respondents’ conduct produced below fair market sales prices due to the improper marketing of the Properties.

Without referencing the Complaint, the Respondents incorrectly state that the “Complaint acknowledges, and the [Appellants] do not dispute, that a written agreement was entered into providing for compensation to the [Respondents]” (emphasis added). (Respondents’ Brief at 4, fn. 3) To the contrary, the Complaint specifically alleges that the Development Agreement was “unlawful and void”. (R. pp. 44-45 ¶¶87-91, pp. 46-47 ¶¶100-103). The Respondents next reassert that “**[e]ach cause of action, however, relies upon the same allegation** – that the Realtors **did not present a document specifically entitled ‘listing agreement,’** which the [Appellants] allege is a technical violation⁴ of the statute governing real estate agents in South Carolina”(emphasis added). (Respondents’ Brief p. 5). This inaccurate assertion is an attempt to trivialize the serious allegations of the Complaint.

³ The Respondents make this false assertion at least 11 times despite the fact that no such allegation appears anywhere in the Complaint. The 11 statements are never referenced to any specific paragraph in the Complaint. S.C. Code §40-57-135(D)(4), however, does state that a listing agreement “must set forth all material terms of the parties agency relationship,” and then sets forth 11 specific disclosures which must be contained in the written listing agreement (which is mandated by S.C. Code §40-57-135(C)(4)).

⁴ The Complaint contains no allegation that any of the violations of Title 40, Chapter 57, the rules of the CMLS, or the South Carolina common law on fraud are “technical violations.”

The Appellants call this Court's attention to (R. pp. 85-86 ¶¶328-332) which reference public blog posts of the Respondents' prior legal counsel in the pre-litigation stage of this matter, Blair Cato Pickren Casterline LLC (law firm).⁵ The four blog posts specifically referenced in the Complaint were authored by one of its principals, Mr. Gary Pickren, and affirm the validity and seriousness of the allegations of misconduct set forth in the Complaint.⁶

The Respondents incorrectly assert that the "Development Agreement, **incorporated by reference in the Complaint**, set forth the compensation to be earned by the [Respondents], and thus, **complied with South Carolina law**" (emphasis added). (Respondents' Brief p. 5, fn. 4). The Development Agreement was not "incorporated by reference in the Complaint." (R. p. 44 ¶87). Additionally, the Development Agreement was illegal under South Carolina law as (i) it was signed only by RPW Development, Inc., an unlicensed entity prohibited from engaging in real estate "broker" activities by S.C. Code §40-57-20, (ii) it was not signed by Respondent Southern Visions Realty, Inc. as required by S.C. Code §40-57-135(D)(4)(g), and (iii) it failed to meet any of the eleven legal requirements of S.C. Code §40-57-135(D)(4).⁷ (R. pp. 44-45 ¶¶87-91, pp. 46-47 ¶¶100-103).

The Appellants assert that the "Factual Background of the Case" set forth at pages 4-10 of the Appellants' Brief is an accurate summary of the factual allegations contained in the Complaint to be taken as true for Rule 12 purposes, and accurately summarizes the various causes of action set forth therein.

⁵ The involvement of Blair Cato Pickren Casterline LLC is set forth in the Complaint. (R. pp. 73-84 ¶¶277-327).

⁶ Mr. Pickren is a current member of the Board of the South Carolina Real Estate Commission.

⁷ The Respondents' 12(b)(6) motions to dismiss were filed pre-answer and therefore the Respondents' assertion that the Development Agreement "complied with South Carolina law" has no foundation in the record. The Development Agreement was not incorporated by reference in the Complaint and is not part of the record.

APPELLANTS' ISSUES ON APPEAL

Issue I.

Did the Lower Court err by failing to address the specific incidents of extrinsic fraud involving the Fraudulent Documents?

The Respondents' Brief fails to address the acts of extrinsic fraud by Respondent Wilkins, and provides no legal authority to counter the legal authorities cited in the Appellants' Brief at Issue I. The Respondents simply assert that the issue of extrinsic fraud is "immaterial" as it "had no connection to the Trial Court's decision." (Respondents' Brief at 18). As set forth in Issue I of the Appellants' Brief, the Appellants assert that the Fraudulent Documents are material to the pre-answer motions to dismiss as they prove intentional and ongoing concealment of wrongful conduct by the Respondents. The Respondents do not deny the fraudulent nature of the Fraudulent Documents,⁸ and do not address their intentional and ongoing concealment.

Issue II.

Did the Lower Court err by failing to take the allegations of the Complaint with respect to the dates of discovery of each of the Appellants' various injuries as true, and by failing to make all reasonable inferences from those allegations in favor of the Appellants, in response to the Respondents' pre-answer motion to dismiss under Rule 12(b)(6)?

In response to this Issue II, the Respondents also do not address the Appellants' legal arguments and supporting legal authority. The Respondents simply reassert (i) that the date of each real estate closing is the starting date of all of the various statutes of limitations, and (ii) that the Appellants' knowledge of the "2013 Issues"⁹ constituted discovery of all unrelated illegal,

⁸ The Appellants refer to the description of the Fraudulent Documents set forth in the Appellants' Brief at pages 9-10 and 11-14.

⁹ The Appellants refer to the description of the "2013 Issues" at pages 18-19 of the Appellants' Brief.

fraudulent or deceptive acts and all fiduciary breaches of **any** of the three Respondents, **including later occurring acts**. The Respondents admitted to the Lower Court that the Appellants' knowledge of the 2013 Issues was that "someone stole sixty-five hundred dollars from them or double dealt him on some dynamite on a buddy's lot". (R. p. 364 lines 1-2). The Respondents do not assert that Appellants had knowledge of any other specific incidents of the Respondents' wrongdoing prior to January 10, 2017.

The Respondents' Brief does not address the Respondents' knowing and willful violations of the rules of the CMLS which are an independent and primary basis of the Appellants' claims. (R. pp. 43-44 ¶¶84-86, pp. 52-54 ¶¶129-141, p. 67 ¶¶221-222, p. 92 ¶359, pp. 98-99 ¶¶386-387, pp. 104-105 ¶¶409-411, p. 110 ¶437, pp. 113-118 ¶¶449-473, 452-454, 464-465)¹⁰. Neither the Lower Court nor the Respondents offered a single reference to the record to demonstrate that the Appellants had knowledge, or could have had knowledge, of the CMLS rule violations, and the injuries arising from those violations, prior to January 10, 2017.

The Respondents do not address the independent and separately actionable violations of S.C. Code §40-57-137(M)(1) with respect to the 18 transactions where Respondent SVR represented both the Appellants and the purchasers in a "dual agency" capacity in violation of applicable law, and in violation of their fiduciary duties of loyalty and disclosure. (R. pp. 88-89 ¶¶346-347, p. 97 ¶380, p. 104 ¶407, p. 113 ¶451).

The Respondents' argued to the Lower Court, and argue to this Court that the violations of Title 40, Chapter 57 were merely "hyper-technical violations" or "foot fails" of no consequence. (R. pp. 348, 354 line 5). Our Supreme Court has stated, however, that "[r]eal estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral

¹⁰ This is a prime example of the falsity of the Respondents' 11 separate assertions that the Complaint is based solely on the "technical" absence of a document titled "listing agreement." See footnote 2 *supra*.

duty to give loyal service to the principal.” Darby v. The Furman Co. Inc., 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999). “The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent” (emphasis added). Id. The Respondents’ repeated characterization of these fiduciary breaches as “hyper-technical violations” or “foot fails” trivialize these “fundamental” fiduciary duties owed by the Respondents to the Appellants.

The untenable result of the Lower Court’s Order is demonstrated by the fact that literally hundreds of sellers of real estate pay real estate commissions in closings. Each business day in South Carolina, the payment of a real estate commission is generally anticipated by any seller of real estate who is assisted by a licensed real estate broker. In those transactions, the purchasers are typically represented by a closing attorney whose fee is typically paid at the closing.

The inclusion of the brokers’ and attorneys’ compensation on the HUD-1 closing statements gives no indication to the sellers or purchasers as to whether or not the licensed professionals have violated their fiduciary duties, or engaged in acts of self dealing, fraud or professional malfeasance. Under the Lower Court’s Order, a client of a licensed real estate professional or closing attorney would need to hire and pay a separate, independent lawyer within 3 years of the real estate closing to review the conduct of their real estate agent or closing attorney to determine if any breaches of fiduciary duty, fraud or other improper conduct occurred.

The Respondents do not address the Appellants’ assertions that the Lower Court drew negative inferences from the Complaint in violation of the appropriate standard of review for a pre-answer motion to dismiss. The Lower Court’s improper negative inferences are nowhere more evident than in the Lower Court’s statements that SVR’s actions “successfully closed millions of dollars of transactions for the benefit of the [Appellants]” (R. p. 18, fn. 6); and that the Respondents

“earned” the various commissions and fees, and had “[made] the [Appellants] millions of dollars through lot sales” (R. pp. 5, 19). The clear and unambiguous allegations of the Complaint are that the transactions which are the subject of this litigation involved (i) violations of multiple sections of Title 40, Chapter 57; (ii) violations of multiple rules of the CMLS; (iii) violations of the Blatt Final Order; (iv) willful and knowing violations of the UTPA; (vi) violations of the Respondents’ fiduciary duties owed to the Appellants; (vii) violations of multiple rules of the SCRPC; (viii) acts constituting fraud under South Carolina common law; (ix) acts of self dealing which unfairly limited competition from thousands of competing members of the CMLS; and (x) the fraudulent concealment of the various fiduciary breaches and illegal conduct by the Respondents through actions such as the creation and concealment of the Fraudulent Documents. The Lower Court’s negative inference that the Respondents’ conduct was “successful,” or that the Respondents “earned” their compensation lacks a foundation in the record.¹¹

Issue III.

Did the Lower Court err by failing to address the Appellants’ arguments that the fraudulent and illegal acts of the Respondents, all of which constitute unclean hands, either tolled or equitably barred the Respondents from raising any statute of limitations defense?

The Respondents do not refute the Appellants’ legal authorities and analysis of the record with regard to the assertions that the Respondents’ fraudulent and illegal conduct constituted unclean hands, and on several theories bar the Respondents from asserting the statute of limitations as a defense, or in the alternative, equitably tolled any applicable statute of limitations.

¹¹ The Complaint alleges that the Respondents’ illegal, fraudulent and deceptive actions resulted in below fair market value sales prices from the failure to expose the Properties to the full real estate market as a result of the violations of the CMLS rules. (R. pp. 98-99 ¶¶387, 390 , pp. 116-117 ¶¶466-467 , p. 118 ¶472). The fact that the total sales were in excess of \$6 Million Dollars does not support the Lower Court’s negative inference that the 23 transactions generated adequate sales prices, and ignores the express allegations of the Complaint to the contrary.

The Respondents incorrectly assert that the doctrine of unclean hands only precludes a plaintiff from recovering in equity, and incorrectly assert that there is no legal authority supporting the Appellants' contention that illegal conduct and the doctrine of unclean hands may bar a defendant from asserting a statute of limitations defense. (Respondents' Brief at 19). The Respondents ignore Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (Ct.App. 2019), and incorrectly assert that this decision was reversed by the South Carolina Supreme Court, and only addressed the issue of standing.¹² (Respondents' Brief at 19, fn. 9). The Vicary decision cited by Appellants held that illegal conduct and the doctrine of unclean hands bars a defendant from asserting the statute of limitations as a defense.

The Respondents do not address the Appellants' argument that the Respondents' silence while under a fiduciary duty to speak constituted fraud, and therefore estopped them from asserting any statute of limitations as a defense. "Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." Southern Development Land Golf Co. v. S.C. Public Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 751 (S.C. 1993). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." Id.

The Respondents incorrectly assert that "ignorance of the law" is the basis for the Appellants' arguments that the running of the statute of limitations should be tolled.¹³ (Respondents' Brief at 9-10). The Respondents' false assertion appears to be an attempt to

¹² Vicary v. Town of Awendaw, 417 S.C. 631, 790 S.E.2d 787 (Ct.App. 2016) was the first case in a trilogy of cases. That first decision was decided on the issue of standing, and was reversed and remanded by the Supreme Court in Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (S.C. 2018). On remand, the Court of Appeals considered the issue of the statute of limitations, and held that the defendant's violations of statutory notice requirements, and the defendant's unclean hands were a bar to the defendant asserting the statute of limitations as a defense.

¹³ The Appellants' basis for the "tolling" of any and all applicable statutes of limitations in this case includes fraud (extrinsic and intrinsic), illegality of conduct, intentional concealment, and unclean hands.

mischaracterize the Appellants' well founded legal arguments (i) that the Appellants are not charged with knowledge of the law in the context of the fiduciary relationship with the Respondents in light of the clear and unambiguous language of S.C. Code §40-57-139 (Issue V), and (ii) that the Appellants' reliance on the Respondents' fiduciary status was reasonable (Issue VI).

In their attempt to restate the Appellants arguments as an "ignorance of the law" argument, the Respondents cite American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct.App. 2009), and quote several paragraphs from that case in support of their assertion. (Respondents' Brief at 20-21). The last sentence of the quoted language actually supports tolling of the statutes of limitation on the facts of the present case by stating "[h]owever, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation." American Legion at 583. The clear implication of the court's statement is that equitable tolling is appropriate in cases of "fraud or misrepresentation" such as those alleged in the present case.

The Respondents' Brief actually admits the flaw in their legal arguments by stating that "**if the [Appellants] believed at the time of the transactions** that the [Respondents] may not have been entitled to compensation they received, or that the [Respondents] had not performed their services consistent with their standard of care, they could have easily looked into [the law]" (emphasis added). Respondents' Brief at 11. In this statement, the Respondents acknowledge that Appellants had to have been put on notice of some particular injury, fact or circumstance that would cause the Appellants to have "believed at the time of the transactions" that Respondents may have violated the Appellant's rights which are the basis of the Complaint. The Appellants specifically alleged that prior to January 1, 2027, they reasonably assumed that the Respondents

were acting in accordance with all applicable laws and rules. (R. p. 52 ¶128, p. 54 ¶137). The Appellants were first put on notice of the requisite violation of rights on January 10, 2017, and filed this action on January 2, 2020 within any potentially applicable statute of limitations.

The Lower Court's Order holds that the Appellants had an affirmative duty to assume, with no specific reason to do so, that the Respondents had violated the various laws and rules governing their conduct as licensed professionals and violated their fiduciary duties; thereby placing a greater burden on the Appellants to investigate the fiduciary conduct of the Respondents, than the burden placed on the Respondents to satisfy their fiduciary duties and legal disclosure obligations to the Appellants.

Issue IV.

Did the Lower Court err by holding that the Appellants' breach of fiduciary duty claims are not equitable, and therefore not exempt from the application of any statute of limitations defense under the South Carolina Supreme Court's holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020)?

The Respondents offer no legal authorities to contradict the legal authorities cited by Appellants, including Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010). Despite Verenes being the seminal case on the equitable remedy of disgorgement in South Carolina, the Respondents do not attempt to distinguish the case.

The Respondents and the Lower Court's Order continue to rely on the United States Supreme Court's decision in Great-West Life & Annuity v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002), in support of its holding that the Appellants' Disgorgement and Restitution Claims¹⁴ are legal in nature. (Order at 15). The holding in Great-West addressed a claim "to impose personal

¹⁴ The Appellants refer to the Appellants Brief at 24-25 for a discussion of the Disgorgement and Restitution Claims.

liability on respondents for a contractual obligation to pay money” (emphasis added), and involved funds which had never been in the possession of Great-West, therefore the claim was based in contract and was legal in nature.¹⁵ Great-West at 214.

The Respondents attempt to distinguish Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020) by asserting that its holding was only applicable to an equitable claim of promissory estoppel. This assertion is incorrect as the fundamental issue in Thomerson was whether equitable claims, such as promissory estoppel, which sought “monetary relief” remained equitable in nature and not subject to statutes of limitations. Id. at 259 (“A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim” (internal citation omitted)). The Appellants’ appropriately rely on Thomerson for their assertion that equitable claims for disgorgement of illegally and fraudulently obtained compensation remain equitable even though “monetary relief” is sought.

Issue V.

Did the Lower Court err by holding that the Appellants are charged with “knowledge of the law” in direct contradiction to the statutory provisions of S.C. Code Ann. §§40-57-135, 137 and 139, and in direct contradiction of the statutorily enacted public policy of South Carolina?

The Respondents do not address the legal impact of S.C. Code §40-57-139 and its mandatory requirement of fiduciary disclosure of applicable law by the Respondents. Instead, the Respondents cite to common law of general application which was expressly and unambiguously preempted by S.C. Code §40-57-139(Q). The legal authorities cited by the Respondents are cases in which individuals were being charged with knowledge of laws directly applicable to their own

¹⁵ The Supreme Court in Great-West actually acknowledged that where property is obtained through “unconscientious” means, a **claim for restitution is equitable in nature**. Great-West at 215-216 (internal citation omitted).

conduct. E.g. American Legion, *supra* (the plaintiffs in American Legion were charged with knowledge of the tax laws applicable to their operation of bingo games). The Respondents offer no legal authority for their incorrect assertion that the Appellants were charged with knowledge of the laws not applicable in any respect to the Appellants' conduct.¹⁶

The Lower Court's Order states that the Appellants "argue they should not be expected to have knowledge of law applicable to real estate professionals **as if this law were locked behind some secret vault**." (R. pp. 8-9). The Lower Court's criticism ignores the Legislature's clear and unambiguous mandate that the Respondents were legally required to disclose the applicable law in writing in accordance with the express requirements of S.C. Code §§40-57-139(A) and (B).¹⁷

Issue VI.

Did the Lower Court err by failing to address the Appellants' argument that their reliance on the fiduciary status of the Respondents, and on Respondent Wilkins' status as a licensed attorney was a reasonable basis under South Carolina law for not performing due diligence on the legality of the Respondents' conduct prior to January 10, 2017?

The Respondents do not dispute that the Respondents were acting in a fiduciary capacity under applicable law, or that Respondent Wilkins was a licensed attorney at all relevant times. The Respondents cite no legal authorities to refute the Appellants' assertion that it was inherently reasonable for the Appellants to rely on Respondent Wilkins' status as a licensed "broker in charge", and as a licensed attorney in good standing.

¹⁶ The provisions of Title 40, Chapter 57 did not apply in any respect to the 23 transactions in which title to real estate was transferred from the Appellants to the various purchasers.

¹⁷ S.C. Code §§40-57-139(A) and (B) mandate that the Respondents, in addition to explaining the South Carolina law of agency, had to provide the Appellants the "Agency Disclosure" issued and approved by the Real Estate Commission.

The Respondents attempt to distinguish True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997) on the basis that the court’s holding is applicable only to a legal malpractice claim which is not present in the present case. The Appellants assert that the analysis in True would apply to any licensed professional operating in a fiduciary capacity; especially when that licensed professional is, in fact, a licensed attorney in good standing. Respondent Wilkins’ status as a licensed attorney was a basis for Appellants’ initial decision to work with Respondents, and the Appellants’ reliance on their adherence to all applicable laws and rules. (R. p. 36 ¶44, p. 111 ¶443). The Respondents themselves invited this type of reliance as Respondent SVR’s website contained a reference to Wilkins’ status as a licensed attorney. (R. p. 36 ¶44). The Appellants allege that Respondent Wilkins actually provided legal advice in this matter. (R. p. 37 ¶51) The South Carolina Rules of Professional Conduct (“SCRPC”) apply to licensed attorneys, regardless of inactive or retired status, in the conduct of any business endeavor. See SCRPC Rule 5.7, Comments 9 and 11; and Rule 8.4(d).

Issue VII.

Did the Lower Court err by holding that Title 40, Chapter 57 of the South Carolina Code Annotated does not authorize private causes of action for breach of fiduciary duty for violations of its various statutory fiduciary requirements of disclosure and written consent set forth in S.C. Code Ann. §§40-57-135, 137 and 139?

Despite the clear and unambiguous language of S.C. Code §40-57-137(Q), and our Supreme Court’s decisions in Darby, *supra*, and Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 802 S.E.2d 794 (S.C. 2017), the Respondents’ assert that Appellants have no right to bring a private cause of action for violations of the fiduciary disclosure provisions of S.C. Code §§40-57-135, 137 and 139 set forth in the Complaint. Despite the Supreme Court in Fulbright addressing

almost identical statutory provisions involving the Real Estate Commission, the Respondents make no attempt to distinguish Fulbright, or to otherwise refute that it is the controlling precedent in this matter. See Appellants' Brief at Issue VII.

The Respondents provide no legal authority for their assertion that S.C. §40-57-790, which grants standing to the Real Estate Commission to bring actions in the Administrative Law Court, bars private causes of action in other courts based on violations of the fiduciary duty provisions of Title 40, Chapter 57.¹⁸ Under the Respondents' assertion, the plaintiff in Darby, *supra*, would now be barred from bringing a private cause of action due to the fact that the breach of fiduciary duty in addressed in Darby was codified in S.C. Code §40-57-135(D) in 1997 after the action in Darby was originally filed. It is absurd to suggest, however, that the Legislature intended to eliminate private causes of action such as that in Darby by statutorily enumerating the specific fiduciary disclosures required of licensed real estate professionals in Title 40, Chapter 57.¹⁹

Respondents incorrectly cite United Form Agency v. Malanuk, 284 S.C. 382, 325 S.E.2d 544 (S.C. 1985) for the assertion that "South Carolina common law has long held that a real estate broker need not have a written commission agreement to be entitled to compensation." (Respondents' Brief at 16, fn. 7). United Form Agency was decided in 1985, 12 years prior to the Legislature's enactment of S.C. Code §40-57-135(C)(4) and (D)(4) in 1997, and was expressly preempted by those sections, and is, therefore, no longer valid precedent in South Carolina.

¹⁸ There is no wording in S.C. Code §40-57-790 which suggests that the Real Estate Commission has the "exclusive" right to litigate violations of the fiduciary duty provisions of Title 40, Chapter 57. Pursuant to Title 1, Chapter 23 of the South Carolina Code, the Administrative Law Courts (the "ALJ") may only hear certain limited types of "administrative" cases, and are statutorily prohibited from hearing private actions involving clients of licensed real estate brokers to address injuries arising from breaches of fiduciary duty. The ALJ is part of the Executive Branch of government and not the Judicial Branch.

¹⁹ Despite §40-57-137(A) expressly and specifically setting forth the classic fiduciary duties under the common law of agency (E.g. see Restatement Third of Agency §§ 8.01 through 8.15), the Respondents only list common law actions for negligence and fraud as being preserved under §40-57-137(Q). (See Respondents' Brief at 17, fn. 8).

Issue VIII.

Did the Lower Court err by holding that laches applies to the Appellants' based on the allegations of the Complaint?

The Respondents do not refute the legal authorities and analysis of the record set forth in the Appellants' Brief on the issue of laches. In this case, the Respondents were the architects and builders of their own problems. Every violation alleged in the Complaint was done knowingly and willfully as evidenced by the Respondents SVR's Policy Manual. (R. pp. 56 ¶153, p. 115 ¶461). In Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334 (S.C. 1985) our Supreme Court held an individual to his poorly worded deal and stated that "[o]ne is not entitled to judicial relief from the terms of a "slipshod agreement" of his own making "regardless of its wisdom or folly, apparent unreasonableness or failure to guard [his] rights carefully." Id. at 104 (emphasis added). In the present case, the Respondents engaged in intentional illegal and fraudulent acts of self dealing in violation of their fiduciary duties to the Appellants. The requirements for the application of the equitable doctrine of laches are not met since the Respondents cannot be prejudiced by the success of their own illegal, fraudulent and deceptive scheme of self dealing which was undertaken knowingly and willfully.

In Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (S.C.Ct.App. 1999), the court held that the party asserting laches must show it has been materially prejudiced by the other parties delay. Id. at 297. In the present case, the purpose of creating the Fraudulent Documents was to assure that the Respondents' scheme of self dealing was never discovered. The Respondents, therefore, cannot prove prejudice resulting from the temporary success of their intentional concealment.

Issue IX.

Did the Lower Court err by considering documents not part of the record, and by taking judicial notice of “the knowledge of Appellant Porth” from unreliable sources without compliance with Rule 201 of the South Carolina Rules of Evidence in considering a pre-answer Rule 12(b)(6) motion to dismiss?

The Respondents do not directly address the Lower Court’s clear and unambiguous reference to an ex parte submission of “**copies**” of documents which the Lower Court “**accepted for review.**” (R. p 3, fn. 4). With no supporting basis in the record, the Respondents **falsely** assert that the Lower Court’s Order actually stated that it “**took judicial notice**” of the fact that such documents would exist and would have been signed by Appellants.²⁰ Despite the Appellants raising this issue first to the Lower Court, and again in this Appeal, **neither the Lower Court nor the Respondents have denied that the ex parte submission of documents actually occurred.** The Appellants have not been informed (i) which “copies of HUD-1 Statements, Contracts of Sale, and Deeds” were “accepted for review” by the Lower Court, (ii) when the submission of such copies occurred, or (iii) who submitted the copies to the Lower Court.²¹

The fact that the Lower Court allowed an ex parte acceptance of documents from the Respondents is bolstered by the Respondents reliance on Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (S.C. 2009). The Supreme Court in Brazell addressed a trial court’s review of a document actually submitted by the defendant’s attorney.²² In Brazell the complaint sought

²⁰ Instead of addressing the clear language of footnote 4, the Respondents attempt to divert this Court’s attention to other passages in the Lower Court’s Order which have no relevance to the highly improper ex parte submission of documents unambiguously referenced in footnote 4.

²¹ The Appellants assert that the Lower Court’s allowing the ex parte acceptance of documents, and the use of those documents as the foundation for the Lower Court’s Order, is a serious abuse of discretion which creates an overwhelming perception of prejudice against the Appellants.

²² In Brazell, the issue was not the impropriety of the submission of the HUD-1 statement as it was not done ex parte; but whether the court’s review of the document converted a Rule 12(b)(6) motion to a Rule 56 motion for summary judgment.

payment of an amount “as set forth upon the HUD-1 Settlement Statement attached to and incorporated herein by reference.” Id. at 515-516. The plaintiff’s attorney failed to actually attach the expressly referenced HUD-1 to the Complaint, and therefore the defendant’s attorney submitted the missing HUD-1 statement with his legal memorandum for the court’s review (with notice to opposing counsel). Id. at 516. The decision in Brazell has no application to the current case if the Respondents did not actually submit copies of the documents to the Lower Court as acknowledged in the Lower Court’s Order. The Appellants assert that Brazell is inapplicable to the present case since (i) the submission of copies in this case was done ex parte, and (ii) the “HUD-1 Statements, Contracts of Sale, and Deeds” were neither exhibits to the Complaint, nor were they incorporated by reference in the Complaint. (R. pp. 59-67 ¶¶167-218).

The Respondents’ response to the Lower Court’s acknowledgement of allowing an ex parte acceptance of copies for review is compounded by their demonstrably false assertion that the HUD-1 statements, contracts of sale, and deeds “were repeatedly referenced in the Complaint, but not attached as exhibits” and were documents “upon which the [Appellants’] claims were based”(emphasis added). (Respondents’ Brief at 22, 24). This assertion is false in that (i) the Complaint contains no references to HUD-1 statements, Contracts of Sale, or Deeds from the 23 subject transactions; and (ii) the Appellants’ claims are not based in any respect on HUD-1 statements, contracts of sale, or deeds²³. The Appellants’ eight causes of action are based exclusively on the various breaches of fiduciary duty, illegal conduct, acts of fraud, and acts of unfair and deceptive competition of the Respondents.

²³ The only deeds referenced in the Complaint are at (R. pp. 41-42 ¶¶72-74). While the HUD-1 statements, contracts of sale, and deeds to purchasers may have some evidentiary value in establishing the facts of this case, the referenced documents do not provide the basis for any of the eight causes of action. For example, the amount of compensation paid to the Respondents could be proven through other means (i.e. cancelled checks, bank records, wire transfers, etc.), and the contracts of sale and deeds are unnecessary to any of the Appellants’ causes of action.

With respect to the Lower Court’s allowing improper utilization of judicial notice, the Respondents again, with no support in the record, falsely assert that “the Trial Court did not take judicial notice of Porth’s state of mind or knowledge.” (Respondents’ Brief at 22). The Lower Court’s Order states that “the Court believes it proper to take judicial notice of the **public record** which would reflect **Plaintiff Porth’s knowledge**”(emphasis added). (R. p. 3 fn. 4). The Lower Court’s statement is unambiguous and irrefutable.

The Respondents do not address the Lower Court’s failure to grant the Appellants’ request for an opportunity to be heard pursuant to SCROE Rule 201(e). The Appellants assert that such a public record does not exist, and the Lower Court’s refusal to allow the Appellants to be heard in accordance with SCROE 201(e) reflects an abuse of discretion.²⁴

Issue X

Did the Lower Court err in holding that the Appellants were *in pari delicto* with the alleged fraudulent, unlawful, and deceptive conduct of the Respondents based on the allegations of the Complaint?

The Respondents provided no reference to the record, and failed to provide any legal authority which could support the Lower Court’s holding that *in pari delicto* would bar the various claims of the Appellants. In Myatt v. RHBT Financial Corp., 370 S.C. 391, 635 S.E.2d 545 (S.C.Ct.App. 2006) the court defined the doctrine of *in pari delicto* as “the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.” Id. at 395. “In South Carolina, this doctrine precludes one joint tort-feasor from seeking indemnity from another” (internal citations omitted). Id. Title 40, Chapter 57 by its express terms did not

²⁴ As with allowing the ex parte acceptance of documents, and again, the Appellants assert that the Lower Court’s refusal to grant the Appellants’ request to be heard under SCROE 201(e) violated Judicial Canon 3(B)(7) and created a perception of prejudice.

apply to the Appellants, and the Appellants were not members of the CMLS and not subject to its rules. The Appellants did not owe the Respondents a fiduciary duty in this matter.

For these reasons, there is no evidentiary basis in the Complaint, or elsewhere in the record, for the Lower Court's holding that the Appellants were *in pari delicto* as the doctrine is inapplicable to the allegations of the Complaint as a matter of law. The Respondents incorrectly assert that the foundations for the Lower Court's *in pari delicto* and laches rulings are the same. (Respondents' Brief at 13, fn. 6). This is incorrect as a matter of law, and the Respondents cite no legal authority in support of this legal assertion.

Issue XI

Did the Lower Court err in granting the Respondents' Motions to Dismiss since the dates of discovery of the Appellants' various injuries under any applicable "discovery" statute of limitations are questions of fact?

The Respondents do not address Issue XI as discussed in the Appellants' Brief. The Respondents simply assert that the Appellants "should have known" of their various claims, and could have researched applicable law governing the fiduciary conduct of the Respondents with no apparent reason to do so. The Respondents do not address whether the dates of the Appellants' discovery of the Respondents' various illegal, fraudulent and deceptive conduct presents a question of fact in light of the clear allegations of the Complaint that the Appellants were not put on inquiry notice of the Respondents' illegal, fraudulent and deceptive conduct until January 10, 2017.

Issue XII

Did the Lower Court err in holding that the Complaint failed to state causes of action for unjust enrichment, quantum meruit, and restitution?

The Respondents' do not offer any legal authority to counter the controlling legal authorities cited in the Appellants' Brief at Issue XII.

Issue XIII

Did the Lower Court err by dismissing the Appellants' Complaint with prejudice?

The Respondents primarily assert that the Appellants did not raise this issue in their Motion to Reconsider filed with the Lower Court, and as such the Appellants waived appellate review of this issue. The Appellants assert that the rule of issue preservation on appeal "is inapplicable as the Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy"(emphasis added). Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (S.C. 2010). Additionally, the Appellants have made a proven allegation of extrinsic fraud on the part of Respondent Wilkins which allows this Court to reach this issue. Appellants' Brief at Issue I.

The Respondents surprisingly rely on Spence v. Spence, 368 S.C. 106, 129 S.E.2d 869 (S.C. 2006) in support of their assertions on this issue. In light of the allegations of extrinsic fraud by Respondent Wilkins set forth in Issue I of the Appellants' Brief, the Appellants call this Court's attention to the fact that Respondent Wilkins was the "attorney at law and real estate agent" in Spence v. Spence alleged to have slip-sheeted the two deeds previously signed by the late Congressman Floyd Spence prior to recording the two deeds with the Lexington County Register of Deeds (i.e. a prior act of extrinsic fraud). Spence at 114-115; see (R. p. 91 ¶¶356-357) (referencing Respondent Wilkins' role in the Spence decision). As such, the Appellants request this Court to exercise its inherent power to address this issue due to the facts of this case.

Conclusion

The Appellants assert that the references to the record, and the legal authorities set forth in this Reply and previously in the Appellants' Brief adequately address the Appellants' thirteen Issues on Appeal. The Appellants, however, wish to address a final question. Why have the Respondents, in their various briefs to the Lower Court and in the Respondents' Brief in this Appeal, engaged in repeated attempts to ignore, trivialize²⁵ and misstate the Appellants' well founded and well pleaded allegations of misconduct by the Respondents? The Appellants assert that the answer to this question is contained in a single sentence contained in the record on Appeal. The Appellants allege in paragraph 354 (R. p. 90) of the Complaint that:

Upon information and belief, the Plaintiffs believe that the general form of the Development Agreement was used by Defendants Wilkins and RPW in one or more of the Other RPW Developments, and that the unlawful delegation of marketing authority contained in the Development Agreement creates the high probability that similar violations of applicable South Carolina law, the CMLS rules, and the CMLS Order have occurred on a substantial number of occasions in the Other RPW Developments (emphasis added).

The Respondents are aware of the likely consequences of court sanctioned discovery into the Other RPW Developments, and as the Appellants assert in Complaint ¶354, on information and belief, such targeted discovery would identify (i) other large scale occurrences of illegal, fraudulent and deceptive conduct by the Respondents against other sellers, and (ii) other occurrences of unfair and deceptive trade practices affecting literally thousands of competing CMLS members in hundreds of other real estate transactions.

While the Respondents attempt to use Appellant Porth's status as an experienced tax and ERISA attorney against him, it was his experience and knowledge which allowed him to "crack the code" of the Respondents' illegal, fraudulent and deceptive scheme of self dealing when no

²⁵ In the Respondents' November 16, 2020 (R. pp. 157-158), the Respondents referred to the Appellants' Complaint as "a Greek tragedy", as "a desperate and elaborate subterfuge", and as "vindictive and egomaniacal".

one had been able to do so previously.²⁶ He was able to accomplish this only because he was presented with an initial “clue” to the Respondents’ scheme on January 10, 2017. As our Supreme Court noted in Spence v. Spence, *supra* at 119, when dealing with the issue of what qualifies as “inquiry notice”, as far back as 1880 our courts have required that “[t]here must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as **furnishing a clue** to the latter”(emphasis added). Black v. Childs, 14 S.C. 312, 321-22 (1880). The Appellants do not know if anyone else was furnished with a clue in the Other RPW Developments, but the Appellants were “furnished with a clue” on January 10, 2017, and pursued that clue with all appropriate due diligence to timely discover their various causes of action, and to file this action within any and all applicable statutes of limitations.

Respectfully submitted,

s/ Clarence Davis
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Attorney for Appellants

January 4, 2021

²⁶ As alleged throughout the Complaint, this coordinated scheme of self-dealing involved two separate entities, RPW and SVR, and at least 2 licensed real estate professionals, Mr. Wilkins and his sister, Anne W. Brooks. The Supreme Court’s decision in Paradis v. Charleston County School District, Appellate Case No. 2018-002025 (May 19, 2021), had not yet been decided at the time the Complaint was filed, and therefore no cause of action for civil conspiracy was alleged due to the absence of “special damages.”

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC.....Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Reply Brief of Appellants complies with
Rule 211 (b) of the South Carolina Appellate Court Rules.

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January 4, 2022

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

R. Kent Porth and Panorama Point, LLC, Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc., Southern
Visions Realty, Inc., and Consolidated Multiple Listing
Service, Inc., Respondents,

Appellate Case No. 2021-000597

Appeal From Lexington County
Edgar W. Dickson, Circuit Court Judge

Unpublished Opinion No. 2024-UP-053
Heard December 5, 2023 – Filed February 14, 2024

AFFIRMED

Clarence Davis, of Griffin | Davis, of Columbia, for
Appellants.

Eric Steven Bland, of Bland Richter, LLP, of Lexington;
Scott Michael Mongillo and Ronald L. Richter, Jr., both
of Bland Richter, LLP, of Charleston; and Steven
Raymond Kropski and David W. Overstreet, both of
Earhart Overstreet, LLC, of Charleston; all for
Respondents.

PER CURIAM: This matter concerns a dispute between parties relating to the development and sale of R. Kent Porth and Panorama Point, LLC's (collectively Appellants) property (the Property). Appellants appeal the circuit court's order granting Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Vision Realty, Inc.'s (collectively, Respondents) Motion to Dismiss Appellants' Complaint. We affirm.

1. Appellants argue the circuit court erred by (1) failing to find Appellants did not discover claims against Respondents until 2017; (2) finding Appellants were charged with knowledge of the law; and (3) failing to find that Appellants' reliance on Respondent Wilkins's status as an attorney was a reasonable basis to not perform due diligence. We find none of Appellants' arguments would bar the running of the statute of limitations and, if Appellants' claims are actions at law, they are barred by the statute of limitations. *See Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) ("Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs."); *id.* ("One purpose of a statute of limitations is 'to relieve the courts 'of the burden of trying stale claims when a plaintiff has slept on his rights.'") (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct. App. 1989)); *id.* ("Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation."); *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005) ("The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation."); S.C. Code Ann. § 15-3-530 (2005) (stating the statute of limitations for Appellants' claims is three years); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405–06, 680 S.E.2d 778, 782 (Ct. App. 2009) ("[T]he applicable limitations period for a negligence claim . . . begins to run when the plaintiff 'knew **or by the exercise of reasonable diligence** should have known that he had a cause of action.'" (emphasis in original) (quoting S.C. Code Ann. § 15-3-535 (2005))); *id.* at 406, 680 S.E.2d at 782 ("[T]he clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist."); *id.* ("[T]he limitations period 'begins to run when a person **could or should have known**, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.'" (emphasis in original) (quoting *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300

S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App 1989)); *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000) ("Under section 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another."); *id.* ("The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory developed." (quoting *Snell v. Columbia Gun Exch. Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981))); *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 264 n.4, 692 S.E.2d 510, n.4 515 (2010) (Kittredge, J., dissenting) ("Misinterpretation of the law does not toll the statute of limitations."). The complaint makes clear Appellants were heavily involved in the sale and development of the Property. Appellants' complaint outlines events that occurred more than three years prior to Appellants filing their complaint that would put them on inquiry notice, if not actual notice, that they may have a cause of action against Respondents.

2. Appellants argue that Respondents are equitably barred from raising a statute of limitations defense. We disagree. First, the unclean hands doctrine "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." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). Second, Appellants' reliance on *Vicary v. Town of Awendaw*, 427 S.C. 48, 828 S.E.2d 229 (Ct. App. 2019), to assert a court may equitably bar Respondents' statute of limitations defense is misplaced because *Vicary's* holding is limited to challenges to void annexations. *See id.* at 56, 828 S.E.2d at 234 (holding the annexation ordinance was not valid because of the town's deceitful conduct and the "challenge to the purported annexations was not barred by the statute of limitations because the passage of time cannot transform a void annexation into a valid one"). Third, the circuit court did not err by failing to equitably toll the statute of limitations. *See Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) ("'Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." (quoting 51 Am. Jur. 2d *Limitation of Actions* § 169 (2000))); *id.* ("Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." (quoting *Limitation of Actions* § 169)). Appellants failed to show they were prevented from timely serving the summons and complaint by an event beyond their control. *See id.* ("The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use."); *id.* at 116, 687 S.E.2d at 32 ("It has been observed that '[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an

extraordinary event beyond his or her control.'" (alteration in original) (quoting *Ocana v. Am. Furniture Co.*, 91 P.3d 58, 66 (N.M. 2004))).

3. Appellants argue the circuit court erred by (1) holding Appellants' breach of fiduciary duty claims were not equitable and were not exempt from a statute of limitations defense and (2) holding laches applied to Appellants' allegations. We disagree. If the claims are equitable, they are barred by laches. *See Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988) ("Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done."); *Chambers of S.C., Inc. v. Cnty. Counsel for Lee Cnty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993) ("Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights."). When asserting laches, a party must establish there was prejudice. *See Robinson v. Est. of Harris*, 389 S.C. 360, 372, 698 S.E.2d 801, 807 (2010) ("The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice."). As stated previously, Appellants' complaint makes clear Appellants were heavily involved in the sale and development of the Property. Appellants sought disgorgement of commissions and development fees from a culmination of over thirteen years of Respondents' developing and selling the Property. Appellants sat on their rights to challenge Respondents' alleged breach of fiduciary duty while Respondents continued to expend their efforts on Appellants' behalf and Appellants benefited from Respondents' services, gaining over \$6 million in profit. In addition, Respondents are prejudiced because real estate agents are only required to maintain business transaction records for a period of five years and the vast majority of these transactions occurred more than five years from the initiation of this action. *See S.C. Code Ann. § 40-57-135(D)(1)* (2011).

4. Appellants argue the circuit court erred by considering documents outside of the records and taking judicial notice of the public record to establish Appellants' knowledge of facts triggering the statute of limitations. Though the law provides that a Rule 12(b)(6), SCRCP motion will not become a summary judgment if a party attaches documents to a complaint or incorporates them by reference and that a party may not benefit from failing to attach documents that are incorporated by reference, *see Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009), we need not address this argument because the complaint outlines events beyond the three year limitations period that would put Appellants on inquiry notice, if not actual notice, that they may have a cause of action against Respondents.

5. Appellants argue the circuit court erred by holding sections 40-57-135, -137, and -139 of the South Carolina Code (2011) do not provide for private causes of action for breach of fiduciary duties. We disagree. *See Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007) ("When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party."). Furthermore, these statutes do not entitle Appellants to complete disgorgement in this circumstance. Disgorgement has only been awarded in very specific circumstances. *See Darby v. Furman Co.*, 334 S.C. 343, 513 S.E.2d 848 (1999) (awarding disgorgement where real estate broker assisted a seller in the sale of a property to a buyer in which the broker had an ownership interest). *Darby* is distinguishable because Appellants did not allege Respondents were purchasers of the Property.

6. We need not address Appellants' remaining arguments as the resolution of the statute of limitations and laches issues is dispositive of these arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

AFFIRMED.

WILLIAMS, C.J., and HEWITT and VERDIN, JJ., concur.

RECEIVED

Feb 28 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC.....Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.....Respondents.

APPELLANTS PETITION FOR REHEARING

The Appellants petition the Court for a rehearing pursuant to S.C. App. Ct. Rule 221 with respect to its opinion in this case which was issued on February 14, 2024 (the “Opinion”). This petition for rehearing is appropriate under Rule 221(c) as the Opinion had the effect of dismissing and/or finally deciding the Appellants’ appeal in this matter. The points which the Appellants assert were overlooked or misapprehended by the Court in the Opinion are set forth herein. References to the Appellants’ prior legal arguments and supporting authorities as set forth in the Initial Brief of the Appellants (the “Initial Brief”) and the Reply Brief of the Appellants (the “Reply Brief”)(collectively the “Appellants’ Briefs”) are included with respect to the various points set forth herein.

The Appellants first assert that the Opinion failed to apply the appropriate standard of review with respect to this **pre-answer** Motion to Dismiss pursuant to Rule 12(b)(6). As reflected in the Record on Appeal and in the Procedural History set forth in the Appellants' Initial Brief, the Respondents elected to file a pre-answer motion to dismiss instead of answering the Complaint and then filing a motion for summary judgment. In a post-answer motion for summary judgment, a circuit court may make any and all appropriate findings of fact with respect to issues raised in the motion for summary judgment. Both the Appellants and the Respondents would have the opportunity to establish an appropriate record through discovery and otherwise to support their arguments with respect to any motion for summary judgment. The Respondents elected to file their motion to dismiss based on the fact based defenses of the statute of limitations and laches at this pre-answer stage of this case with full knowledge of the appropriate standard of review under South Carolina law discussed below.

As discussed herein, the Appellants also assert that the Appellants' Briefs set forth multiple legal theories based on controlling South Carolina precedent, all of which was cited in the Appellants' Briefs, and which were not properly addressed in the Opinion. The various points and legal arguments which the Appellants assert the Court overlooked and/or misapprehended are identified below. Many of these legal issues and arguments overlap due to the complexity of this case.

I. The Opinion Incorrectly Addresses the Various Claims as if All Claims are based on

Identical Facts and Improperly Decides Questions of Fact

As fully briefed at Issues II and XI and elsewhere in the Appellants Briefs, the allegations of the Complaint must be taken as true and must be "viewed in the light most favorable" to the Appellants at this pre-answer stage of this case, and the determination of when the Appellants had

actual or constructive notice of each and every separate and distinct claim for purposes of the application of any applicable statute of limitations is inherently factual. See Appellants' statement of the Standard of Review at page 11 of their Initial Brief. **At this point in this case, the Respondents have not filed an answer or otherwise denied** the factual allegations of the Complaint which support the Appellants' various and distinct causes of action including **but not limited to**: (i) that the Respondents failed to make the availability of the Property known to competing members of the CMLS in accordance with its rules, (ii) that the Respondents failed to obtain written "dual agency agreements" where the Respondents represented the purchasers of the Property, (iii) that the Respondents failed to effectively market the Property to the full real estate market, (iv) that the Respondents marketing of the Property was designed to assure that the Respondents could represent both the seller and the purchaser in the highest number of transactions possible, (v) that the marketing techniques of the Respondents resulted in below fair market sales prices and a slower than appropriate rate of sales, (vi) that Respondents failed to disclose conflicts of interest with respect to certain purchasers, (vii) that Respondents had created fraudulent documents to "paper the files" to conceal their various fiduciary breaches and associated illegal conduct, (viii) that the failure to comply with the rules of the CMLS and the statutory provisions of Title 40, Chapter 57 were "knowing" and "willful", and (ix) that the Appellants were unaware of any of these facts prior to January 10, 2017. **At this stage of the case**, these allegations must be taken as true as specifically alleged in the Complaint.

In Section 1 of the Opinion, all of the various and diverse causes of action, even though they are clearly based on separate and distinct factual foundations, are discussed as if the "discovery" aspect of the various statutes of limitations all turned on the same factual determination with no distinction or specificity. This is error as there are no factual allegations in

the Complaint or elsewhere in the Record sufficient to support this position. This case is extremely complex and diverse as it seeks to address a multitude of **different and distinct** alleged breaches of fiduciary duty, acts of fraud, and incidents of statutorily prohibited conduct by three different Respondents; all of which are based on a multitude of separate, distinct and, in many incidents, completely unrelated factual events. The Appellants assert that failure to identify the specific allegations in the Complaint which would irrefutably establish (i.e. the only possible inference from the factual allegation) that the Appellants were on actual or inquiry notice **of each and every separate and distinct claim** set forth in the Complaint is error. As examples, the Opinion does not specifically and separately address the various distinct causes of action such as the failure to disclose hidden conflicts of interest with certain purchasers by Respondent Wilkins and Anne Brooks (a licensed agent with Southern Visions Realty) as opposed to the failure of Southern Visions Realty to provide all competing real estate agents with the availability of the Property through the CMLS database in violation of the CMLS rules. The factual allegations which would be necessary to irrefutably establish actual or inquiry notice of these two examples are completely different and are not present anywhere in the Complaint or the Record. As a **limited and nonexclusive set of examples**, the Opinion fails to identify any factual allegation in the Complaint **which when taken in the light most favorable to the Appellants** would **irrefutably** establish that Appellants were on actual or constructive notice of (i) the Respondents' violations of the rules of the CMLS by which the availability of the Property was concealed from competing real estate agents and potential purchasers, (ii) the Respondents' self-dealing scheme of marketing primarily to potential purchasers whom they could represent in a dual agency capacity, (iii) the Respondents' creation of fraudulent documents and the intentional concealment of those fraudulent documents since at least May 16, 2011 (see Initial Brief at p. 10 and at Issue I), (iv) the Respondents' failure

in their fiduciary roles to disclose all conflicts of interest and business relationships with potential purchasers, and (v) the Respondents' disclosure of confidential information to potential purchasers in violation of their fiduciary duties of loyalty and confidentiality. The Complaint, which must be taken as true at this pre-answer stage of this case, expressly alleges that the Appellants were unaware of these facts until after January 10, 2017.

As an example, the Appellants point to the fact that the 3 year statute of limitations applicable to an action for fraud runs from the "discovery by the aggrieved party of the facts constituting the fraud" (emphasis added). S.C. Code Ann. §15-3-530(7). The "facts constituting the fraud" in this case were the various acts of intentional and knowing fiduciary nondisclosure by the Respondents. The Opinion fails to address the Appellants' prior argument in the Initial Brief that "the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Reid v. Harbison Development Corp., 285 S.C. 557, 560, 330 S.E.2d 532 (S.C.Ct.App. 1985), *aff'd in part and remanded* 289 S.C. 319, 345 S.E.2d 492 (S.C. 1986). In Epstein v. Howell, 308 S.C. 528, 531, 419 S.E.2d 379 (S.C.Ct.App. 1992), the court cited the "often-cited case" of Halsell v. First National Bank, 48 Okla. 535, 150 P. 489 (1915) for the proposition that one in a fiduciary position cannot "practice fraud" and then successfully defend on the ground that the victim of the fraud is "charged with knowledge" of the misrepresented facts. The Appellants further argued in the Appellants' Briefs at Issue VI that an individual or entity in a fiduciary relationship with a licensed professional is justified in relying on the licensed professional even if reliance would not be justified in a non-fiduciary relationship. Epstein at 531.

As a specific and representative example, the Appellants first learned of a **material** undisclosed conflict of interest by a licensed agent of Southern Vision Realty which directly

resulted in a reduced sales price **when reviewing the documents first made available to the Appellants in August of 2018** (within any applicable 3 year statute of limitations) by the Respondents' prior law firm. Those documents contained a previously undisclosed email evidencing the Southern Visions Realty agent disclosing to a purchaser **who was the agent's personal banker** the Appellants' "bottom line" in violation of her fiduciary duties of confidentiality and loyalty to the Appellant. There are no facts in the Complaint or elsewhere in the Record of this case which could have possibly put the Appellants on actual or constructive notice of this type of fiduciary breach **as well as a voluminous number of other similar breaches of fiduciary duty by the various Respondents.**

The Opinion does not address the Respondents' knowing and willful violations of the rules of the CMLS which are an independent and primary basis of the Appellants' claims. (See Complaint ¶¶84-86, 129-141, 221-222, 359, 386-387, 409-411, 437, 449-473, 452-454, and 464-465). The Opinion did not identify a single allegation in the Complaint to demonstrate that the Appellants had knowledge, or could have had knowledge, of the CMLS rule violations, and the injuries arising from those violations, prior to January 10, 2017. As clearly alleged in the Complaint, the Appellants were not members of the CMLS and did not have access to the CMLS database.

The Opinion by failing to apply the correct standard of review to this pre-answer motion to dismiss effectively holds that the Appellants had an affirmative duty to assume, with no specific reason to do so, the Respondents had violated the various laws and rules governing their conduct as licensed professionals and violated their various fiduciary duties; thereby placing a greater burden on the Appellants to investigate the fiduciary conduct of the Respondents, than the burden

placed on the Respondents to satisfy their fiduciary duties and legal disclosure obligations to the Appellants.

The Lower Court's Order from which this appeal arose focused on two allegations of prior misconduct by Respondent Wilkins alone in his role as the developer and principal of Respondent RPW Development, Inc, **and which did not involve the Respondent Southern Visions Realty**. Those two factual incidents were completely unrelated to the conduct of Respondent Southern Visions Realty which is the subject of a multitude of claims in this lawsuit.

The Appellants assert that any factual findings with respect to the Appellants being on actual or inquiry notice of the various claims brought in this case is inappropriate at this pre-answer stage of this case under the standard of review mandated by Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (S.C. 2019). The Opinion simply states that the Appellants "were heavily involved in the sale and development of the Property" and that the Complaint "outlines events that occurred more than three years prior to the Appellants filing their complaint that would put them on inquiry notice, if not actual notice, that they may have a cause of action against the Respondents." The Opinion does identify the "events" and does not articulate the rationale for the determination that being "heavily involved" in the sale and development of the Property raised a sufficient red flags as to: (i) each and every separate and distinct breach of fiduciary duty, (ii) each and every separate and distinct alleged act of fraud, and (iii) each and every separate and distinct incident of illegal conduct by **each** of the three separate and distinct Respondents; **all of which are alleged to have been knowingly and intentionally concealed from the Appellants by the Respondents**. This allegation must be taken as true at this pre-answer stage of this case, and all inferences must be drawn in the light most favorable to the Appellants.

The Opinion does not address the controlling authorities cited by the Appellants at Issue II of the Appellants' Briefs that clearly hold that knowledge of a prior breach of fiduciary duty and/or an unrelated breach of fiduciary duty does not constitute notice of a subsequent or different breach of fiduciary duty by the same fiduciary. See Initial Brief at p. 18. The Opinion does not cite and the Appellants are unaware of any controlling authority which holds that knowledge of a fiduciary breach by one fiduciary (i.e. Respondent Wilkins) constitutes notice (actual, constructive or inquiry) of a separate and unrelated fiduciary breach by a **different** fiduciary (i.e. Southern Visions Realty).

As an illustrative example, the Opinion does not address the allegations of the Complaint that the Appellants did not have access to the rules of the CMLS, and would have had no way of knowing that the availability of the Property was being improperly and fraudulently hidden from other real agents and brokers in violation of the rules of the CMLS. This intentionally concealed act of self-dealing by Respondent Southern Visions Realty was a violation of the various fiduciary duties owed to the Appellants. The factual allegations in the Complaint with respect to the improper marketing of the Property and the self-dealing by the Respondents independently support the Appellants' breach of fiduciary duty claims and unfair trade practice claims against Respondent Southern Visions Realty at a minimum. See Initial Brief at p. 15-16.

The Appellants further assert that if the allegations of the Complaint provided an irrefutable basis for the dismissal of one or more specific claims against one or more specific Respondent, the balance of the claims must be allowed to proceed and may not be dismissed.

II. Negative Inferences Drawn from the Allegations in the Complaint

The Appellants assert that the Opinion fails to properly apply the law of South Carolina that a motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it

does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses” Skydive at 180. “If the facts and inferences drawn from the facts alleged in the complaint, **viewed in the light most favorable to the Appellant**, would entitle the Appellant to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.”(emphasis added) Spence v. Spence, 368 S.C. 106, 116-117, 628 S.E.2d 869 (S.C. 2006). As discussed in Section I above, the Opinion states that the Appellants “were heavily involved in the sale and development of the Property” and that the Complaint “outlines events that occurred more than three years prior to the Appellants filing their complaint that would put them on inquiry notice, if not actual notice, that they may have a cause of action against the Respondents.” These two statements are indicative of the drawing of negative inferences from the allegations of the Complaint, and by ignoring the express and specific allegations of the Complaint that the Appellants did not know of any facts prior to January 10, 2017 which would have constituted actual, constructive or inquiry notice of the potential claims brought in this case.

An example of an improper negative inference is that the Opinion states that the “Appellants benefited from Respondents’ services, gaining over \$6 million in profit.” This **demonstrably false** negative inference has no foundation in the Record and is a prohibited finding of fact at this pre-answer stage of this case. The clear allegations of the Complaint (which have not been denied by the Respondents at this stage of the case) are that the Respondents engaged in illegal self-dealing in breach of their fiduciary duties to the Appellants, **and that the Respondents’ self-dealing resulted in below fair market sales prices**. If taken as true and viewed in the light most favorable to the Appellants, the Court may not make the factual finding that the Appellants “benefited” from the Respondents’ services.

Furthermore, the Opinion's reference to the Appellants "gaining over \$6 million in profit" is incorrect as the Complaint and the Record on Appeal reflects just over \$6 million in **gross proceeds**. The Opinion fails to consider that the Record on Appeal also reflects that the Appellants spent approximately \$1,000,000 on infrastructure from those gross proceeds, paid over several hundred thousand dollars in development fees and real estate commissions from those gross proceeds, and additionally paid interest on construction loans and other costs from those gross proceeds. The Complaint and the Record reflect that the Property had been in the Appellants family for decades and much of the \$6 million in gross proceeds reflected the inherent value of the Property prior to it being developed into residential lots. The Complaint expressly alleges that the \$6 million in gross proceeds **was lower than it should have been as a direct result of the various fiduciary breaches and self-dealing of the Respondents**, and the Court is obligated to accept those allegations of the Complaint as true at this pre-answer stage of the case.

III. The Opinion Fails to Address the Effect of Respondents' Fiduciary Status on the Application of the Statutes of Limitations.

The Opinion does not address the Appellants' primary arguments and authorities fully set forth in Issue VI of the Appellants' Briefs that the Respondents' common law and statutory **fiduciary status as licensed real estate professionals** justified the Appellants' reliance that the Respondents were carrying out their various duties and obligations in accordance with the requirements of applicable law, and were not breaching their various fiduciary duties in carrying out those duties and obligations. These arguments and authorities directly impact the application of any "discovery" statute of limitations and were not addressed in any manner in the Opinion. The Opinion does not address the Appellants' legal arguments in Issue VI of the Appellants' Briefs and

the controlling authorities cited therein with respect to reliance on a fiduciary being reasonable even when such reliance may have been inappropriate outside of the fiduciary context.

The Opinion also misstates the Appellants' arguments on this issue by stating in Section 1 that "Appellants argue the circuit court erred by ...; and (3) failing to find that Appellants' reliance on Respondent Wilkin's **status as an attorney** was a reasonable basis to not perform due diligence" (emphasis added). This misstates the Appellants' actual argument at Issue VI of the Appellants' Briefs which is that the Appellants' "**reliance on the fiduciary status of the Respondents, and** on Respondent Wilkins' status as a licensed attorney" (emphasis added) was a reasonable basis under applicable South Carolina common law for not performing due diligence on the fiduciary conduct of the Respondents prior to January 10, 2017 when the first "red flag" appeared with respect to the claims set forth in the Complaint. Respondent Wilkins' status as a licensed attorney was a **secondary but valid additional** basis for fiduciary reliance under the holding of True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (1997). The Complaint at ¶ 51 specifically alleges that Respondent Wilkins provided legal services to the Appellants. This allegation must be taken as true.

The Appellants also call the Court's attention to the correlation between the Respondents' fiduciary status as real estate professionals and the allegations of fraud discussed below in Section V below.

IV. Knowledge of the Law

As fully briefed in Issue V of the Appellants' Briefs, the Appellants assert that the Opinion incorrectly holds that the Appellants were charged with knowledge of the real estate brokerage laws contained in Title 40, Chapter 57 of the S.C. Code Annotated in direct contradiction of the specific statutory provisions of S.C. Code Ann. §§40-57-139, and in direct contradiction of the

statutorily enacted public policy of South Carolina as set forth in those specific statutory provisions. The clear language of S.C. Code Ann. §40-57-139 mandates that licensed real estate professionals must provide a detailed and accurate description of the law which governs a licensed real estate professional's relationship with a client. In a related section, S.C. Code Ann. §40-57-137(Q) expressly and unequivocally states that any common law concept that was inconsistent with the express provisions of Title 40, Chapter 57 were expressly superseded. The Appellants assert that in light of S.C. Code Ann. §40-57-137(Q) and §40-57-139, the Appellants were not charged with knowledge of the real estate brokerage laws **applicable only to the Respondents conduct and not applicable in any manner to the conduct of the Appellants**. The Opinion does not address the Appellants' argument and authorities on this issue as set forth at Issue V of the Appellants' Briefs.

The Appellants assert that the Opinion's reliance on Justice Kittridge's dissent in City of Newberry v. Newberry Electric Cooperative, 387 S.C. 254, 692 S.E.2d 510 (S.C. 2010) is misplaced as the law at issue in Newberry clearly applied to the conduct of all parties involved in that case. Additionally, Newberry did not involve a factual scenario where a party was in a fiduciary relationship operating under a clear and unambiguous statutory duty to disclose and explain the law which governed their fiduciary conduct as the Respondents were in this case.

The Appellants assert that even if they were charged with knowledge of the real estate brokerage laws of Title 40, Chapter 57 this imputed knowledge of the law would in no way affect trigger the start of any applicable statute of limitations with respect to the breach of fiduciary duty claims and unfair trade practice claims which are based on separate and distinct facts.

V. Effect of Allegations of Fraud, Illegal Conduct and the “Unclean Hands” Doctrine

In Issues I and III of the Appellants’ Briefs, the Appellants argued that the numerous and specific allegations of fraud under multiple provisions of South Carolina law constitute “unclean hands” on the part of the Respondents and provide multiple grounds for delaying the start of any applicable statute of limitations. Issue I of the Appellants’ Briefs specifically addresses two fraudulent listing agreements which irrefutably prove many of the Appellants’ various fraud claims under South Carolina law as alleged in the Complaint. The Appellants assert that the Respondents chose to file a pre-answer motion to dismiss instead of answering the Complaint in an attempt to avoid court sanctioned discovery into these various allegations of fraud and statutorily prohibited conduct as alleged in the Complaint. At this pre-answer stage of this case, **the factual allegations supporting the fraud claims must be taken as true** and viewed in the light most favorable to the Appellants. The Opinion does not address any of the Appellants’ legal arguments and cited authorities with respect to the legal impact the Complaint’s multitude of allegations of intentional fraud by the three fiduciaries has on the application of any applicable statute of limitations defense.

The Opinion also does not address the effect of the alleged illegality of the Respondents’ conduct under Title 40, Chapter 57 as fully briefed in the Appellants’ Briefs. In Issue III of the Appellants’ Briefs the Appellant argued with supporting authorities that the illegal and prohibited nature of the Respondents’ conduct either equitably barred the Respondents’ assertion of a statute of limitations defense, or effectively tolled the start of any applicable statute of limitations. The Supreme Court has stated that “the Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy” (emphasis added). Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (S.C. 2010). The Appellants assert that the effect of the

Opinion is to assist the Respondents in their intentional and knowing fraudulent conduct which “violates statutory law or public policy” as discussed in Ward.

The Appellants assert that the doctrine of “unclean hands” applies to equitable defenses raised by defendants and does not only apply to plaintiffs, and that the Opinion improperly distinguishes Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (Ct. App. 2019). The Appellants assert that the Respondents’ alleged fraudulent conduct, their alleged knowing and willful concealment of their conflicts of interest and self-dealing, their concealment of their violations of the CMLS rules, and their alleged illegal activity in violation of clear and unambiguous statutory provisions of South Carolina constitute “unclean hands” under South Carolina law. The Appellants assert that the Opinion’s limiting the “unclean hands” theory of Vicary to a fact situation involving “an annexation” by a governmental entity is error. The court in Vicary specifically discussed the town’s false statements and deception with reference to the **general equitable principles** of South Carolina law. Vicary at 55-56 (affirming that statutes of limitations are “affirmative defenses that may be waived and are subject to equitable doctrines, including estoppel and tolling”). The Vicary opinion contains no language indicating that the equitable doctrine of “unclean hands” doctrine it applied which would have been limited to the annexation context. Furthermore the Respondents in this case, just as in Vicary, are alleged to have violated statutorily mandated disclosure requirements.

VI. Equitable Nature of Claims and Application of Laches

The Opinion does not make a final determination of whether the Appellants’ claims (or some of them) are equitable claims. As set fully argued at Issue IV of the Appellants Briefs, the Appellants assert that Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (2020) controls many of the Appellants’ claims, and that those claims are not subject to any applicable statute of

limitations defense. Instead, the Opinion simply states in section 3 that “**if** the claims are equitable, they are barred by laches” (emphasis added). The finding that laches would apply “if” the claims are equitable **is an improper factual finding at this pre-answer stage of this case**. Since the equitable defense of laches is inherently **factual** and would require specific findings of fact as to the **reasonableness** of any delay in filing a lawsuit in light of the allegations of intentional fraud by a fiduciary, it is improper to dismiss those causes of action on the factual basis of laches at this pre-answer stage of this case. **In light of the credible allegations of fraud and fiduciary reliance set forth in the Complaint**, the question of the reasonableness or unreasonableness of any delay is a fact question to be determined at trial. The Appellants’ arguments and authority with respect to the issue of laches are fully briefed at Issue VIII of the Appellants’ Briefs and the Court does not address any of those arguments in the Opinion.

Further, the Appellants assert that if the allegations of the Complaint are taken as true and viewed in the light most favorable to the Appellants, there can be no finding of prejudice to the Respondents due to their own intentional acts and conduct. It will be proven irrefutably at trial that the Respondents actually still had all of the documents created in the development of the Property in 2017 when the Appellants requested copies of all documents as part of their appropriate and timely due diligence. If proven, there would be no prejudice to the Respondents. Appellants will prove this fact at trial with written emails and letters from the Respondents’ prior law firm which delivered copies of all of those documents in August of 2018 as a result of the Appellants’ demands connected with their due diligence into the discoveries of January 10, 2017. The question of whether laches applies is a question of fact to be determined at trial.

The Opinion fails to address the significance of the Fraudulent Documents discussed in Issue I of the Appellants’ Briefs which indicate that the Respondents were taking intentional and

knowing actions to cover up their fraudulent and illegal conduct, and that those Fraudulent Documents were affirmatively hidden from the Appellants since at least May 16, 2011. See Initial Brief p. 18. The Complaint clearly alleges that the Appellants requested copies of the relevant documents during the 5 year document retention period. The inference from the Complaint which must be drawn at this pre-answer stage of this case is that the Respondents still had the documents produced in the development of the Property and therefore no prejudice could exist. **The Respondents have not filed an answer to the Complaint asserting that they destroyed documents under the 5-year document retention rule referenced in the Opinion**, and no grounds for such a factual finding of prejudice exists in the allegations of the Complaint.

The requirements for the application of the equitable doctrine of laches are not met in this case and are certainly not met by the allegations of the Complaint since the Respondents cannot be prejudiced by the success of their own illegal, fraudulent and deceptive scheme of self-dealing which was undertaken knowingly and willfully. In Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (S.C.Ct.App. 1999), the court held that the party asserting laches must show it has been materially prejudiced by the other parties delay. Id. at 297. In the present case, the purpose of creating the Fraudulent Documents (see Issue I of the Appellants' Briefs) was to assure that the Respondents' scheme of self-dealing was never discovered.

VII. The Opinion fails to Correctly apply the holding of Darby v. Furman

The Opinion improperly distinguishes Darby v. Furman, 334 S.C. 343, 513 S.E.2d 848 (1999) and fails to correctly apply the common law of fiduciary duty as set forth therein. While the facts of Darby dealt with a situation involving a real estate agent being a participant in a purchasing entity, the holding in Darby clearly applied to the totality of the fiduciary duties and obligations of a licensed real estate agent or broker in South Carolina. The court in Darby expressly

referred to the fact that the fiduciary duties and obligations of real estate professionals were codified in Title 40, Chapter 57 after the filing of the original complaint in Darby. The holding in Darby was not limited to situations involving a real estate agent's failure to disclose their participation as a purchaser of the subject property, but clearly addressed (on the facts of that case) the importance and seriousness of all of a licensed real estate agent's fiduciary obligations to the client. Darby at 347 ("The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent.").

In Darby, the Supreme Court specifically addressed one of the specific allegations of the Appellants' Complaint by discussing the statutory obligation for a real estate broker to obtain a "dual agency agreement" under S.C. Code Ann. §40-57-137(M) which states that a real estate broker "may act as a disclosed dual agent only with the prior informed and written consent of all parties." Darby at 348. In the accompanying footnote 3, the Court stated that this statutory provision "governs real estate brokers acting as a 'dual agent' in transactions." Id. The Appellants assert that the Darby court's statement as clearly stating that failure to obtain a written dual agency agreement would render the Respondents' conduct as prohibited under South Carolina statutory law. The Respondents have not denied the allegation of the Complaint that they did not obtain written dual agency agreements with "prior informed and written consent of all parties [both seller and purchaser]" by filing an answer. The Appellants are prepared to prove at trial that no such written dual agency agreements were ever obtained through the use of sworn testimony of purchasers of the Property.

VIII. Private Cause of Action for Breach of Fiduciary Duty

The Appellants assert that the Opinion is incorrect in holding that a common law breach of fiduciary duty claim, such as the one brought by the Appellants in this case, cannot be based in

whole or part on alleged violations of the enumerated fiduciary duty provisions of Title 40, Chapter 57. The Appellants addressed this issue in Issue VI of the Appellants' Briefs, and the Opinion failed to address the specific provisions of S.C. Code Ann. §40-57-137(Q) which expressly authorize such common law fiduciary breach causes of action. At Issue VI of the Appellants' Briefs additional statutory provisions and controlling authorities are set forth in support of this argument. The Opinion does not properly address those additional legal authorities.

The Appellants further assert that even if violations of the statutorily enumerated fiduciary duty provisions of Title 40, Chapter 57 could not be the basis of a common law breach of fiduciary duty cause of action, the Opinion fails to address the other separate and distinct factual foundations for the Appellants' various and distinct breach of fiduciary duty claims. The Complaint contains a multitude of allegations of breaches of fiduciary duty **other than** the alleged violations of the statutory provisions of Title 40, Chapter 57. These allegations include but are not limited to the allegations of the CMLS rule violations, self-dealing, failure to disclose conflicts of interest with purchasers, all of the allegations of fraud, and the creation of fraudulent documents.

As more fully set forth at Issue VI of the Appellants' Briefs, South Carolina common law clearly and unequivocally provides that an injured party may bring a common law breach of fiduciary duty action for breaches of any applicable fiduciary duty. Under the rationale of the Opinion, the fact that the South Carolina Legislature chose to specifically enumerate many of the obligations of a real estate professional with respect to disclosure, that statutory enumeration eliminated a client's ability to bring an action for the violation of those specific fiduciary disclosure obligations. The fiduciary violation addressed in Darby was specifically codified in S.C. Code Ann. §40-57-135(D) after the filing of the Darby complaint. Under the rationale of the Opinion, the plaintiff in Darby would now be precluded from bringing a breach of fiduciary duty claim for

that very same breach of duty because the conduct in Darby is now expressly enumerated in Title 40, Chapter 57.

IX. Appellants' Request for Relief Not Limited to Disgorgement

The Opinion incorrectly suggests that the Complaint only sought disgorgement of the commissions and fees paid to the Respondents and makes the determination that disgorgement would not be appropriate on the facts of this case. The Opinion does not address the specific allegations of the Complaint that seek damages for below market sales prices, increased interest and other costs, and damages under the Unfair Trade Practice Act.

The Appellants assert that in section 5 of the Opinion, the court misapplies the law of Darby with respect to the remedy of disgorgement by stating that Darby would not support disgorgement in this case. The Opinion does not address the legal authorities cited in Issue IV of the Appellants' Brief where the Appellants argue that disgorgement or restitution is an appropriate remedy for fiduciary breaches under applicable South Carolina law. The determination of whether restitution or disgorgement is the appropriate equitable remedy for a particular breach of fiduciary duty is an inherently factual determination which may not be made at this pre-answer stage of this case. The Darby court expressly stated that the real estate agent in that case must have "satisfied all of his fiduciary duties and earned the commission" thereby clearly indicating that breaches of fiduciary duty such as loyalty and disclosure may be grounds for the forfeiture of a commission by a real estate agent.

X. Other Arguments and Issues Not Addressed Pursuant to Section 6 of the Opinion

The Appellants reassert all other arguments contained the Appellants' Briefs which were not addressed pursuant to Section 6 of the Opinion due to the Opinion's holding that the resolution of the statute of limitations and laches issues are dispositive of these arguments.

CONCLUSION

For the reasons set forth above, the Appellants request that the Court reconsider its Opinion. The Appellants request that for the reasons argued in the Appellants' Briefs, and supplemented and clarified herein, the Court reverse the Lower Court's Order thereby requiring the Respondents to file an answer to the Complaint so that an appropriate factual record can be developed in this case.

Respectfully submitted,

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February 28, 2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC.....Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.....Respondents.

PROOF OF SERVICE

I hereby certify that I have served the Appellants Petition for Rehearing by emailing it to
counsel for other parties at the email addresses below this 28th day of February 2024:

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The South Carolina Court of Appeals

R. Kent Porth and Panorama Point, LLC, Appellants,

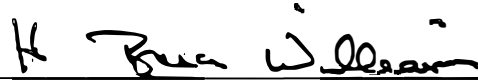
v.

Robert P. Wilkins, Jr., RPW Development, Inc., Southern
Visions Realty, Inc., and Consolidated Multiple Listing
Service, Inc., Respondents.

Appellate Case No. 2021-000597

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



CJ.



J.



J.

Columbia, South Carolina

cc:

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FILED
Mar 08 2024

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The Honorable Edgar W. Dickson