

Sep 06 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001451

Elizabeth M. Ferraro, James T. Ferraro, Edward J. Przybyl,
Marcella Gleie, John E. Gleie, Jr., Thomas Bowes, Connie
Bowes, Moataz Alasadi, Virginia Kirkwood, Bob Kirkwood,
Paul Vichroski, Nydza Vichroski, James Montellese, and
Roxann Montellese, Individually, Derivatively, and on Behalf of
All the Mount Vintage Homeowners Association Members Respondents,

v.

LL of SC, LLC, Raiford Topsail Island Investments, LLC, TR Sales
Plantation, LLC, and Mount Vintage Plantation Homeowners
Association, Inc. *a/k/a* Mount Vintage Homeowners Association, Inc. Defendants,

Of which LL of SC, LLC, Raiford Topsail Island
Investments, LLC, and TR Sales Plantation, LLC are the Appellants / Petitioners.

**PETITION TO STAY UNDERLYING PROCEEDINGS IN THE TRIAL COURT
AND/OR FOR WRIT OF SUPERSEDEAS**

(URGENT CONSIDERATION REQUESTED)

This petition seeks a Writ of Supersedeas with respect to a decision issued by the trial court on September 6, 2024 (attached hereto as **Attachment A**), which held that a prior decision of the trial court (dated September 4, 2024, and attached hereto as **Attachment B**) granting partial summary judgment in Respondents' favor on an issue involving the merits was interlocutory and not subject to any appellate stay. However:

1. At the time the September 6 order was entered, Petitioners had already taken an appeal of the September 4 order;
2. The September 4 order was immediately appealable under South Carolina Code § 14-3-330(1);
3. The matter appealed in the September 4 order is subject to the automatic stay established by Rule 241(a), SCACR;
4. The matter appealed in the September 4 order involves a decision on the merits of the underlying case that materially touches and concerns substantial and disputed issues as to the entirety of the case; and therefore,
5. Under Rule 205, SCACR, the trial court did not have jurisdiction to enter the September 6 order, or to find that it continued to have jurisdiction to entertain underlying proceedings despite Petitioners' filing of a notice of appeal.

The immediate consequences of this decision are—for Petitioners—profound. As explained briefly below, the trial court has now held, as a matter of law and incident to a granting of summary judgment in Respondents' favor, that Petitioner Raiford Topsail Island Investments, LLC (“**RTI**”) acquired developer rights with respect to a residential community in 2013, which is an issue that has been hotly contested. And, as explained below, this decision deeply affects each and every aspect of the claims and defenses

presented. (See Resps.’ 2d Am. Compl., attached hereto as **Attachment C**; Resp.’s 3d Am. Compl., attached hereto as **Attachment D**; Resps.’ Mot. Partial Summ. Judg., attached hereto as **Attachment E**; and Pets.’ Memo. Opp. to Resps.’ Mot. Partial Summ. Judg., attached hereto as **Attachment F**.)

In fact, immediately after the trial court issued its September 4 decision, Respondents sought to “realign” the Defendant homeowners’ association from a party-defendant to a party-plaintiff, explicitly under the theory that the homeowners’ association “has been controlled by a rogue fake developer for the last ten years.” (See Email of Resps.’ Counsel, Sept. 4, 2024, attached hereto as **Attachment G**; Resps.’ Mot. in Limine, attached hereto as **Attachment H**.)

Urgency of Review of This Petition

Trial is set to commence on Monday, September 16, 2024—ten days from now. Pre-trial motions are scheduled to be heard in 5 days—September 11.

On September 4—the very same day that the trial court issued its decision regarding the conclusion that RTI had acquired developer rights—Petitioners filed its notice of appeal. This triggered the automatic stay of Rule 241(a), and should have resulted in a postponement of trial until after the disposition of this appeal. However, on September 6—the very date of this filing—the trial court further decided that its September 4 order was interlocutory, that the automatic stay was not triggered, and that trial will proceed as scheduled on September 16.

In other words, the trial court has decided a material issue on its merits and has placed Petitioners’ appellate rights in jeopardy by neglecting the automatic stay.

The Court of Appeals is therefore respectfully requested to issue an order staying all proceedings in the underlying litigation until such time as Petitioners' appeal may be adjudicated, and (to the extent necessary) issue a supersedeas with respect to the trial court's September 6 decision.

I. The Rule 241(a) automatic stay applies to the trial court's September 4 order.

South Carolina Code § 14-3-330(1) establishes appellate jurisdiction with respect to "[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas." That includes orders granting partial summary judgment. See, e.g., Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990).

The phrase "involving the merits" means that the issue decided "must finally determine some substantial matter forming the whole or part of some cause of action or defense." Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993); see also Toal, J.H. et al., Appellate Practice in South Carolina, Chapter 8, Part IV, Subsections (B)(1) & (G)(3). Each and every aspect of Respondents' claim touches, concerns, and even depends on the chain of developer rights. Furthermore, as explained above, Respondents are trying to achieve material procedural advantages against Petitioners heading into trial, on the eve of trial, as a direct result of the trial court's decision on whether RTI ever acquired developer rights.

In short, the trial court's September 4 order granting Respondents' motion for partial summary judgment constitutes a decision "involving the merits" because it has "finally determine[d] some substantial matter forming the whole or part of some cause of

action or defense.” And that gives Petitioners a right of immediate appeal under South Carolina Code § 14-3-330(1).

II. The September 4 order is subject to the automatic stay of Rule 241(a).

Rule 241(a) provides that, “[a]s a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” The trial court’s September 4 decision is under the general rule—not any of the exceptions listed in Rule 241(b).

III. The Rule 241(a) automatic stay applies, under Rule 205, to every aspect of the case.

The controlling pleading is presently Respondents’ third amended complaint. (Att. D.) The core causes of action are for negligent development, breach of fiduciary duty based on a developer relationship, and violation of the Unfair Trade Practices Act. Each of these causes of action depends on who holds developer rights, and since when. The September 4 order concludes—over dispute—that such rights resided with RTI as of 2013. That is not only a decision involving the merits, it is one that affects every aspect of the case. Therefore, the filing of Petitioners’ notice of appeal on September 4 imposes the automatic stay on the case in its entirety.

IV. The trial court did not have jurisdiction to enter the September 6 order.

Consistent with the foregoing analysis, the filing of Petitioners’ notice of appeal triggered the Rule 241(a) automatic stay as to the underlying case in its entirety. At that point, all proceedings in the trial court should have been held in abeyance pending a

disposition of this appeal, specifically because the trial court had been divested of jurisdiction under Rule 205.

Regardless, the trial court has issued the September 6 decision, determining that the September 4 was interlocutory in nature. But, under Rule 205, at the time the September 6 decision was issued, the trial court no longer had jurisdiction of the case. Therefore, the September 6 decision is a legal nullity.

It does, however, introduce some amount of procedural confusion into this appeal. Petitioners have made this filing, in part, as a petition for writ of supersedeas. But, if the September 6 order is a legal nullity, there is no effective order to which a supersedeas may attach. See, e.g., Ditech Fin., LLC v. Snyder, Case No. 2019-000575 (S.C. Ct. App. July 20, 2022) (unpublished decision) (citing Tillman v. Oakes, 398 S.C. 245, 256, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012) for the proposition that a trial court's failure to consider the effect of an appeal on the power of the court to proceed with the underlying action while the appeal is pending constitutes an abuse of discretion). However, if a supersedeas is the correct procedural device, Petitioners have provided a verification with this petition at **Attachment I**.

Petitioners have also styled this filing as a motion to stay the underlying proceedings. This is necessary for the Court of Appeals to protect its jurisdiction and give effect to the automatic stay.

Importantly, Respondents never filed their own motion to lift the stay or for supersedeas with respect to the Petitioners' notice of appeal.

And, finally, because of the strange procedural circumstances in which Petitioners find themselves, out of an extreme abundance of caution, they are also filing a separate notice of appeal of the September 6 order.

Regardless, through at least one of these procedural avenues, the Court of Appeals is requested to suspend all further proceedings in the trial court pending disposition of the initial matter from which this appeal is taken.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, the Court of Appeals is respectfully requested to issue an order imposing a stay of the underlying trial court proceedings, or granting a supersedeas of the trial court's September 6 decision. Petitioners are entitled to exercise their appellate rights, and humbly seek the opportunity to do so.

Respectfully,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Petitioners

September 6, 2024
Greenville, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1900050

Elizabeth Ferraro et al
PLAINTIFF(S)

LL of SC LLC et al
DEFENDANT(S)

Submitted by: R. Lawton McIntosh

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

THE GRANTING OF PLAINTIFF'S PARTIAL SUMMARY JUDGMENT AS TO "DEVELOPER RIGHTS" AS STATED IS INTERLOCUTORY. THEREFORE, THIS MATTER IS NOT STAYED.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

_____	2155	_____
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

_____	_____
_____	_____
_____	_____
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Edgefield Common Pleas

Case Caption: Elizabeth M Ferraro , plaintiff, et al VS J Wayne Raiford , defendant, et al
Case Number: 2021CP1900050
Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1900050

Elizabeth Ferraro et al
PLAINTIFF(S)

LL of SC LLC et al
DEFENDANT(S)

Submitted by: R. Lawton McIntosh

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

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

ORDER INFORMATION

BASED UPON THE DEED IN LIEU OF FORECLOSURE (09/13/13), THE ASSIGNMENT OF BID (11/18/13), THE MASTER'S REPORT (11/18/13), THE SPECIAL REFEREE'S DEED (11/18/13), AND THE CORRECTIVE SPECIAL REFEREE'S DEED (8/4/14), THE COURT FINDS THAT LL OF SC ASSIGNED "DEVELOPER'S RIGHTS" TO RAIFORD TOPSAIL ISLAND INVESTMENTS DURING THIS PERIOD OF TIME AND ACCORDINGLY GRANTS PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT THAT LL OF SC ASSIGNED ITS DEVELOPER'S RIGHTS TO RAIFORD TOPSAIL ISLAND INVETSMENTS DURING THIS PERIOD. THE COURT MAKES NO FURTHER FINDINGS OR RULINGS OTHER THAN AS STATED.

PLAINTIFF'S COUNSEL TO PREPARE A FORMAL ORDER CONSISTENT WITH THIS ORDER.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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For Clerk of Court Office Use Only

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_____	_____
_____	_____
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

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Case Number: 2021CP1900050
Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD	)	CASE NO. 2021-CP-19-00050
	)	
ELIZABETH M. FERRARO, JAMES T.	)	
FERRARO, EDWARD J. PRZYBYL,	)	
MARCELLA GLEIE, JOHN E. GLEIE, JR.,	)	SECOND AMENDED SUMMONS
THOMAS BOWES, CONNIE BOWES,	)	(Negligent Development)
MOATAZ ALASADI, VIRGINIA	)	
KIRKWOOD, BOB KIRKWOOD, PAUL	)	(Jury Trial Demanded)
VICHROSKI, NYDZA VICHROSKI, JAMES	)	
MONTELLESE, ROXANN MONTELLESE,	)	
Individually, Derivatively, and on Behalf of all	)	
the Mount Vintage Homeowners Association	)	
Members,	)	
Plaintiffs,	)	
vs.	)	
	)	
LL OF SC, LLC, RAIFORD TOPSAIL	)	
ISLAND INVESTMENTS, LLC, T R SALES	)	
PLANTATION, LLC, AND MOUNT	)	
VINTAGE PLANTATION HOMEOWNERS	)	
ASSOCIATION, INC. A/K/A MOUNT	)	
VINTAGE HOMEOWNERS ASSOCIATION,	)	
INC.,	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the above-entitled Action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers at their offices located at 415 Mill Street, Mt. Pleasant, South Carolina 29464, within thirty (30) days after the date of such service, exclusive of the day of service. If you fail to answer the Complaint within the above-described time, judgment by default will be rendered against you for the relief demanded in the Complaint.

-SIGNATURES ON FOLLOWING PAGE-

Plaintiffs' Second Amended Summons

/s/Anna S. McCann
Justin O' Toole Lucey
Anna McCann
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mt. Pleasant, South Carolina 29464
(843) 849-8400
jlucey@lucey-law.com
amccann@lucey-law.com
Attorneys for Plaintiffs

September 11, 2023
Mount Pleasant, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD	)	CASE NO. 2021-CP-19-00050
	)	
ELIZABETH M. FERRARO, JAMES T.	)	
FERRARO, EDWARD J. PRZYBYL,	)	
MARCELLA GLEIE, JOHN E. GLEIE, JR.,	)	SECOND AMENDED COMPLAINT
THOMAS BOWES, CONNIE BOWES,	)	(Negligent Development)
MOATAZ ALASADI, VIRGINIA KIRKWOOD,	)	
BOB KIRKWOOD, PAUL VICHROSKI, NYDZA	)	(Jury Trial Demanded)
VICHROSKI, JAMES MONTELLESE,	)	
ROXANN MONTELLESE, Individually,	)	
Derivatively, and on Behalf of all the Mount	)	
Vintage Homeowners Association Members,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
LL OF SC, LLC, RAIFORD TOPSAIL ISLAND	)	
INVESTMENTS, LLC, T R SALES	)	
PLANTATION, LLC, AND MOUNT VINTAGE	)	
PLANTATION HOMEOWNERS	)	
ASSOCIATION, INC. A/K/A MOUNT VINTAGE	)	
HOMEOWNERS ASSOCIATION, INC.,	)	
	)	
Defendants.	)	

The Plaintiffs, above named, individually, derivatively, and on behalf of all the Mount Vintage Plantation Homeowners, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

1. Plaintiffs are residents of the neighborhood and development known as Mount Vintage (hereinafter referred to as "Mount Vintage").
2. Plaintiffs Ferraro's residence is located at 106 Captain Johnsons Drive, North Augusta, South Carolina, 29860, and is also described as Lot 0-48 on a plat of Mount Vintage by Newby-Proctor and Associates dated August 21, 2006.
3. Plaintiff Przybyl's residence is located at 255 Homeward Bound Drive, North

Plaintiffs' Second Amended Complaint

Augusta, South Carolina, 29860, and is also described as Lot D-14 on a plat of Mount Vintage by Newby-Proctor and Associates dated September 6, 2000.

4. Plaintiffs Gleie's residence is located at 527 Schoolhouse Lane, North Augusta, South Carolina, 29860, and is also described as Lot 0-18 on a plat of Mount Vintage by Newby-Proctor and Associates dated April 17, 2007.

5. Plaintiffs Bowes' residence is located at 99 Whitney Court, North Augusta, South Carolina, 29860, and is also described as Lot A-21 on a plat of Mount Vintage by Newby-Proctor and Associates dated August 21, 2015.

6. Plaintiff Alasadi's residence is located in the Shaw Estates area of Mount Vintage at 15 Ballentine Court, North Augusta, South Carolina, 29860, and is also described as Lot S-44 on a plat of Mount Vintage by Newby-Proctor and Associates dated July 19, 2018.

7. Plaintiffs Kirkwood's residence is located at 108 Whitney Court, North Augusta, South Carolina, 29860, and is also described as Lot A-26 on a plat of Mount Vintage by Newby-Proctor and Associates dated September 22, 1998.

8. Plaintiffs Vichroski's residence is located at 35 Independent Hill Lane, North Augusta, South Carolina, 29860, and is also described as Lot R-35 on a plat of Mount Vintage by Newby-Proctor and Associates dated September 26, 2000.

9. Plaintiffs Montellese's residence is located at 1036 Longstreet Place, North Augusta, South Carolina, 29860, and is also described as Lot H-26 on a plat of Mount Vintage by Newby-Proctor and Associates dated January 14, 1999.

10. Defendant LL of SC, LLC ("LL"), is a limited liability company formed under the laws of South Carolina; LL also owns lots in the Mount Vintage subdivision. LL's Registered Agent's address is listed with the South Carolina Secretary of State as 616 Edgefield Road, Suite

Plaintiffs' Second Amended Complaint

115, North Augusta, South Carolina, 29841, which is located in Aiken County, South Carolina. LL's current Articles of Incorporation, filed on January 14, 2010, list its principal office at the same address located in Aiken County, South Carolina.

11. Defendant Raiford Topsail Island Investments, LLC ("Topsail"), is a limited liability company formed under the laws of South Carolina; Topsail also owns lots in the Mount Vintage subdivision. Topsail's Registered Agent's address is listed with the South Carolina Secretary of State as 528 Edgefield Road, Suite G, Belvedere, South Carolina, 29481, located in Aiken County, South Carolina. Topsail's Articles of Incorporation, filed on December 12, 2007, list its principal office at the same address located in Aiken County, South Carolina.

12. Defendant T R Sales Plantation, LLC ("T R Sales"), is a limited liability company formed under the laws of South Carolina and is managed and owned, at least in part, by J. Wayne Raiford. Upon information and belief, TR Sales is the management entity which employs, manages, and is otherwise involved in the control of Defendants LL and Topsail.

13. J. Wayne Raiford ("Raiford") owns (at least in part), manages, controls and acts on behalf of Defendants LL, Topsail, and T R Sales.

14. Defendant Mount Vintage Plantation Homeowners Association, Inc. a/k/a Mount Vintage Homeowners Association, Inc. (hereinafter "The Association"), is a mutual benefit, non-profit corporation formed under the laws of South Carolina.

15. Defendant LL appointed Raiford to the Board of Directors of The Association, and Raiford acts as its Chairman and President.

16. Upon information and belief, Defendant LL has in turn permitted or appointed all other members of the Board of Directors since Defendant LL acquired its interests in Mount Vintage.

Plaintiffs' Second Amended Complaint

17. Leigh Ann Keels ("Keels") is the daughter of Raiford and a non-resident of Mount Vintage, a former member of The Association's Board of Directors, a current officer of The Association, and a member and manager of LL, Topsail, and T R Sales.

18. Hereinafter "Affiliated Defendants" and/or "Defendants" refers to LL, Topsail, and TR Sales.

19. Only when "Defendants" is modified to "All Defendants" does the reference include The Association.

20. By virtue of their property ownership, as well as The Association's Articles of Incorporation, The Association's Covenants and Bylaws, as amended from time to time (hereinafter "Governing Documents"), and the South Carolina Non-Profit Corporation Act, S.C. Code §§ 33-31-101, *et seq.* (hereinafter the "SC NPC Act."), the Plaintiffs are members of The Association and have been members at all times relevant herein.

21. Plaintiffs bring this action on behalf of themselves and derivatively on behalf of The Association and its members, the other property owners in Mount Vintage, because The Association has failed to protect and enforce the rights of The Association and its members with respect to the matters alleged herein.

22. Plaintiffs also bring this action on behalf of all Mount Vintage home and lot owners as a class action (hereinafter, "The Homeowners" or "the Homeowner Class"), as the Homeowners themselves have been damaged by the wrongful acts of the Defendants.

(Background; Formation of Association; Governing Documents)

23. The development of Mount Vintage, as a residential community, commenced in approximately 1995.

24. The Association was incorporated as a mutual benefit, non-profit corporation.

Plaintiffs' Second Amended Complaint

25. In its Articles of Incorporation, filed April 3, 2000, The Association elected to have “members,” which election is required by the SC NPC Act §§ 33-31-101, *et seq.*

26. The Articles of Incorporation also specify that The Association will have two (2) “classes of members,” whose respective rights and privileges are spelled out in The Association’s Declaration of Restrictive Covenants and Bylaws.

27. By virtue of its election to have members, The Association is entitled to “impose dues, assessments, and admission and transfer fees upon its members[.]” (SC NPC Act, § 33-31-302 (15)). The Association has continually exercised this power granted by and enumerated in the SC NPC Act.

28. The Governing Documents have been amended numerous times since the filing of the Articles of Incorporation.

29. In 2013, Defendant LL became the alleged “successor developer,” approximately eighteen (18) years after the development was founded.

30. Defendant LL gained control of the development by taking a Deed in Lieu of Foreclosure on the prior developer’s remaining 183-odd lots.

31. The Deed in Lieu transaction purported to include an assignment of developer rights to LL.

32. The most recent versions of the Governing Documents were filed on January 19, 2018 (Declaration of Covenants), and January 19, 2018 (Bylaws). Hereafter, reference to the Governing Documents is to these versions unless specifically stated otherwise.

33. The Governing Documents purport to give all members certain rights, voting privileges and duties.

Plaintiffs' Second Amended Complaint

34. According to the Governing Documents, Defendant LL is allegedly a “Class A” member of The Association by virtue of its claiming “developer rights.”

35. As a Class A member, Defendant LL has one (1) vote for each residential lot owned by it in Mount Vintage.

36. Neither Raiford nor Defendant Topsail are Class A members of The Association.¹

37. According to the Governing Documents, all property owners in Mount Vintage other than the developer are allegedly “Class B” members of The Association.

38. The Class B members purportedly have voting rights which spring upon either (1) the developer’s conveyance of all residential lots and tracts within Mount Vintage, including, but not limited to, additional phases, sections and developments which it may decide to add to the Mount Vintage development, or (2) when the developer, in its sole discretion, decides to convert Class B members to Class A members.

39. By virtue of their membership in The Association, Plaintiffs have been assessed each year of their ownership, including some special assessments.

40. The Governing Documents, specifically the Declaration of Protective Covenants, provides that the developer is not obligated by virtue of its property ownership to pay any dues, assessments, fees, or fines.

(Perpetual and Complete Developer Control)

41. The Governing Documents give Defendant LL, as the sole Class A member complete control and authority over the Governing Documents, the Board, and The Association.

¹ Nor is Keels a member of The Association.

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42. By virtue of the foregoing, Defendant LL has complete control over all Mount Vintage matters, including, but not limited to, amenities and lot acquisitions, dues and lien releases, the architectural committee, and assessments.

43. The Board's voting rights (and those of all committees) are illusory as all Board members serve at the discretion of Defendant LL; and, Keels, Raiford's daughter, handles finances, and for all practical purposes, runs The Association. The Bylaws, for example, purport to give the developer the unilateral right to amend any aspect of the Bylaws without vote by the Class B Members, even if said amendment affects the rights, privileges, preferences, restrictions, or conditions of Class B members as to voting, dissolution, redemption, or transfer of membership in a manner different than such amendment would affect another class of members, i.e., Class A members.

44. The Declaration of Covenants, for example, purports to give the developer, as well as its successors, assigns, or heirs, the exclusive right, exercisable at any time and from time to time, to amend or to grant exceptions to the Declarations and to waive, repeal, or vary the Declarations in any one or more respects whenever in the sole and controlled opinion of the Developer such waiver, repeal, or variance shall not be materially detrimental to the general nature in development of Mount Vintage. The foregoing unilateral rights violate the letter and/or spirit of the SC NPC Act.

45. The perpetual developer control, including the perpetual ability to amend the Bylaws and Declaration of Covenants regardless of the substance of those amendments, runs contrary to the SC NPC Act, including, but not limited to, §§ 33-31-206 and 33-31-1022, and therefore runs afoul of South Carolina law. The foregoing perpetual control additionally violates

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the common law, industry standards, Restatement(s), model acts, and the reasonable expectations of the purchasing homeowners.

46. In the particulars described in the foregoing paragraphs, the Governing Documents permit complete control by Defendant LL, *funded by the homeowner members*, for an unlimited duration.

47. The Governing Documents do not have a definitive or reasonable time limitation on the Defendant LL's control, which cannot be thwarted or avoided by the developer, thereby giving Defendant LL potentially unlimited perpetual control of The Association and neighborhood.

48. The Governing Documents contain other unfair, conflicting, and/or confusing terms.

49. The defects in the Governing Documents are latent and would not be recognized by a lay person, even if they tried to read them.

50. Further, the Governing Documents permit Defendant LL to add (a virtually unlimited amount of) additional parcels to the regime, which in turn permits perpetual control and dominance by Defendant LL.

51. The Governing Documents are or are akin to contracts of adhesion; neither The Association nor the Homeowners were ever permitted to negotiate their terms; further, they have been unilaterally amended several times by Defendant LL to the detriment of the Homeowners, again without negotiation or input or recourse or representation.

52. At all times relevant herein, Affiliated Defendants have had unfair advantage over the Homeowners by sophistication, dominance, unequal bargaining positions, and position of authority.

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53. The foregoing and many of the other terms contained in the Governing Documents are so one-sided and unfair, that no reasonable person who understood their potential for abuse would have agreed to them; and no reasonable person would avail themselves of the untoward advantages that they create.

54. The Governing Documents are unconscionable and, therefore, unenforceable; and they further violate public policy, South Carolina law, the previously referenced standards, and the rule against perpetuities.

(Futility of Demand)

55. Plaintiffs' demand upon The Association to rectify the wrongs described herein would be futile and is, therefore, excused under the futility doctrine.

56. Plaintiffs' demand upon The Association would be futile for the following reasons, which are more particularly described in the preceding paragraphs:

- a) The Association's Governing Documents give "Developer, LL of SC, LLC, its successors and assigns" absolute control over The Association;
- b) Defendant LL therefore controls The Association, whose rights are being adversely affected by Affiliated Defendants;
- c) Under the Governing Documents, Defendant LL is entitled to modify, amend, repeal, suspend, and otherwise alter the Governing Documents in its sole discretion, at its sole option, and at any time;
- d) Defendant LL has complete control over the Board, including the ability to appoint and remove Directors;
- e) Defendant LL has *de facto* veto power over any and all decisions of the Board, which power Defendant LL has exercised in the past;
- f) Raiford, as owner and/or partial owner of Defendants LL, Topsail, and T R Sales, would never permit the Board of Directors to authorize The Association to bring suit against the Affiliated Defendants;;
- g) The Board of Directors is illusory as the Board serves at the pleasure of LL and Raiford;
- h) The Board of Directors have failed to successfully intercede in The Association's or Homeowner's behalf; ultimately, the only recourse for a dissenting Board member is resignation, which has occurred from time to time; and
- i) Other reasons which will be proven at trial.

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57. In further support of futility, various Homeowners, Plaintiffs included, have requested that Defendants cure many of the wrongs addressed herein, and their efforts have been rebuffed and/or ignored by the Board, which is controlled by Defendant LL. (see, e.g., ¶¶ 30-35, *infra*).

58. For example, one or more Plaintiffs have challenged the Board's failure to provide accounting information, failure to charge assessments against all lot owners, misuse of reserve funds, self-dealing, inurement, debt forgiveness, conflicts of interest, cronyism, misfeasance, non-developer titling of lots, to name a few. All of the Homeowners' inquiries and complaints have been rebuffed. To this day, Plaintiffs have not received the 2019 accounting records from the Defendants.

59. When direct inquiries were ignored, one or more Plaintiffs complained to the South Carolina Department of Consumer Affairs, who in turn served notice on Defendants and requested a response. The Defendants refused to budge in their response to the Homeowners through the Department and the Department was powerless to do anything about it.

(Operation of Association for the Benefit of Affiliated Defendants)

60. Affiliated Defendants have embarked upon a pattern and practice of using past due assessments owed to The Association to coerce and cajole the sale of lots by the then current owners, and the acquisition of the lots by the Affiliated Defendants, at below market values, without the Affiliated Defendants compensating The Association for its lost dues, opportunity, and/or value.

61. Upon information and belief, on one or more of these occasions, the Affiliated Defendants have failed to declare the release of sums owed to The Association as consideration for the transfer and have exposed The Association to future liability for these transactions.

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62. Affiliated Defendants have embarked upon a pattern and practice of bidding for and acquiring Mount Vintage lots at tax sales, thereafter, suing The Association they control to eliminate past due Association dues and assessment, defaulting The Association in the suits, and failing to advise of or assist with The Association's redemption or other rights, and/or simply causing the HOA to write them off, all without the Affiliated Defendants compensating The Association for its lost dues, liens, opportunity, and/or value.

63. Affiliated Defendants have subsequently embarked upon a pattern and practice of lot acquisition, whereby, they avoid/bypass public sales, using unrecorded Association liens as leverage to negotiate the cheap acquisition of Mount Vintage lots from remote owners, and then waiving The Association dues owed once the lots are received, with little or no compensation to The Association, all without any disclosure to The Association or its members, let alone adequate disclosure.

64. The Board has failed to intercede, has failed to protect The Association or its members, or to achieve or arrange for adequate management of The Association and its affairs. In essence, the Affiliated Defendants treat The Association as its pawn for its own financial transactions and inurement.

65. By virtue of this pattern and practice, the Affiliated Defendants have amassed an additional 100 or so lots in their own names and/or the names of their affiliates at below market consideration while decimating The Association's finances.

66. Defendant LL has wrongfully treated the owners of some of these and other lots as Class A members (including Defendant Topsail and Raiford), waiving dues, when only Defendant LL could possibly claim that status, and thereby have caused additional financial detriment to The Association, the neighborhood, and the Homeowners.

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67. Similarly, Defendant LL and Raiford have permitted favored third parties and relatives to temporarily consolidate lots to reduce the dues owed to The Association.

(Amenities)

68. The original developers sold Mount Vintage and its lots to the Homeowners and the public as an upscale, first-class, luxury community with high standards for design of neighborhood and residences, maintenance, and amenities.

69. The upscale amenities promised to be available included the below Town Center, Golf Course and Club House, Equestrian facilities, and 24-hour security.

70. An attractive selling point for Mount Vintage was that its residents' use and enjoyment of the amenities would be optional, as would the associated financial obligation. Neither The Association nor the Homeowners would be required to provide financial support to the amenities that they did not choose to enjoy.

71. Mount Vintage's Athletic Club and Town Center ("Town Center") is comprised of six (6) tennis courts, fitness center, library, kitchen, small and large meeting and recreational spaces, and a pool complex.

72. The Town Center and the Golf Club/Course ("Golf Amenity") were built/developed circa 2005 by the original developers; the Equestrian facilities were developed thereafter.

73. Following the Great Recession, the original developers fell on hard times and the amenities were lost to foreclosure or other purchasers.

74. In 2010, the Town Center and Golf Amenity were purchased by Plantation Alliance LLC, a company owned by several Mount Vintage residents, to prevent the properties from being lost to bank foreclosure.

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75. From 2013 to 2020, Defendant LL has done nothing to fulfill the original developers' promise of providing multiple, optional, first-class, upscale amenities.

76. Circa 2014, while Defendant LL was the sole Class A member, Apex Bank foreclosed on the Town Center and Golf Amenity.

77. Circa 2015-2016, Defendant LL embarked on persuading and arranging for The Association and its members to acquire the Town Center and then the Golf Amenity ("Amenity Package").

78. In 2016, the value of the Amenity Package was \$1,800,000 or less; the Association nonetheless paid approximately \$3,800,000 to acquire the amenities (not including refurbishment costs).

79. This was done with numerous representations by the Affiliated Defendants as to the wisdom and affordability of acquisitions; that the acquisition was necessary to maintain or bolster members' property values; that the acquisitions would be self-sustaining; and that The Association and its members would *not* be responsible for any operating shortfalls.

80. Affiliated Defendants failed to disclose that they were causing The Association to complete the acquisitions to increase the value of the Affiliated Defendants' lots or that, as the alleged successor to the original developer enjoying developer rights, Defendant LL had some obligation to facilitate the availability of the Amenities.

81. Affiliated Defendants failed to disclose to the membership that they were causing The Association to pay over twice the Amenity Package's fair market value.

82. Affiliated Defendants failed to disclose that, in obligation or in all fairness, Defendant LL as purported "developer" should have funded the acquisition or contributed far more to the acquisition.

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83. The acquisition and operation of the Amenities were further accompanied by the wrongful and negligent acts further described below.

84. The performance of the Amenities has been less than optimal, perhaps dismal is a better word; and contrary to representations made by the LL-controlled Board, the Board has since passed member assessments to cause The Association and its members to fund the operating losses of the Amenities.

85. No arrangements are in place for The Association to meet the balloon payments due shortly on both acquisitions.

86. The equestrian facilities do not currently exist, and Defendant LL has made no attempt to make good on that developer promise.

87. Defendant LL has failed to make good on the original developer's promise of multiple, optional, first class amenities.

(Other and Cumulative Matters)

88. Defendant LL has failed to adequately advance the development and funding of The Association and Mount Vintage, thereby harming The Association and the Homeowners' property values.

89. Defendant LL has failed to deliver and maintain a first-class, upscale, luxury development in many ways.

90. Defendant LL has failed to uphold the first-class standards required of residences, permitting tract homes and slab-on-grade homes into the neighborhood which have devalued the neighborhood and each home in the neighborhood.

91. Defendant LL failed and refused to install or complete the cable, phone, and other utility infrastructure in various parts of Mount Vintage.

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92. Defendant LL and the Board's foregoing activities, inadequate disclosures, amateur accounting, and lack of transparency have caused rifts in Mount Vintage.

93. Defendant LL and their predecessor's failure, after 25 years, to transfer control of The Association and Mount Vintage neighborhood to the Homeowners is a violation of the public policy against perpetual developer control – both as described and separately, with due acknowledgement that there is no end in sight and under the current pace of development, there could well be another 25 to 50 years of developer control or more.

94. Defendant LL has practiced nepotism, cronyism, and favoritism in the operation of The Association and Neighborhood. It has placed unqualified family member(s) in important controlling positions; it has allowed extended family members to use the Amenities with false addresses; and it has acted in an arbitrary and capricious manner in The Association's dealings, e.g., negotiating behind the back of The Association's board and allowing some investors to temporarily merge their lot inventories to dodge Association dues and assessments pending resale of the lots and they have permitted Defendant Topsail and Raiford to wrongfully dodge dues and assessments

95. The foregoing has damaged The Association and the Homeowners and has caused a public stigma that has further damaged both.

(Additional Statement of Liability and Negligent Acts)

96. It is axiomatic, through law and equity, that by claiming "Successor Developer" status, and accepting the assignment of developer benefits and rights, and/or by availing itself of and exercising such rights, Defendant LL obligated itself to properly perform the developer obligations and promises that gave rise to the presence of developer rights and benefits.

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97. As the sole, complete controlling member, officer, and board member of a planned community neighborhood and its owner's association, Defendant LL owed The Association, the Homeowners, and the ensuing neighborhood fiduciary and fiduciary-like duties, and the duty to use due care in the development of the neighborhood and the administration of The Association.

98. Because of Defendant LL's complete control, Homeowners have had no choice but to repose their complete trust and reliance in Defendant LL resulting in the imposition of a fiduciary duty upon Defendant LL.

99. Defendants Topsail and T R Sales owed The Association and its members a duty of due care, a duty not to profit by their codefendants' misfeasance, and, when operating in concert with Defendant LL, a duty of good faith and fair dealing.

100. Defendant LL has been negligent as follows:

- a) In failing to act to prevent the amenities from being foreclosed upon by Apex Bank under its tenure as the alleged developer;
- b) In failing to pay for the acquisition of the amenities or for the Developer's fair share of the acquisition of the Amenities;
- c) In their use of insider knowledge of Mount Vintage affairs to benefit themselves in lieu of The Association or its members;
- d) In their use of Association opportunities, rights, receivables, liens, and legal proceedings to acquire property for the benefit of the Affiliated Defendants;
- e) By exposing The Association to liability for false property transfer documentation;
- f) In failing to pay or require payment of Association dues and assessments on lots that are not properly considered developer lots;
- g) In failing to arrange for proper funding of The Association and neighborhood while under their control;
- h) In failing to adequately develop Mount Vintage to create an adequate membership base to fund the neighborhood's success;
- i) In detracting from the membership base;
- j) In failing to timely transition control of The Association to the Homeowners;
- k) In failing to avoid perpetual developer control of Mount Vintage;
- l) In failing to share Association records and documents with The Association's members;
- m) In failing to create, maintain, publish, and share accurate financial records of The Association's activities;

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- n) In failing to disclose and/or accurately disclose their financial transactions with The Association and The Association's interests;
- o) In practicing nepotism, favoritism, and cronyism in the operation of Mount Vintage at the expense of The Association and Homeowners;
- p) In moving The Association operations and records out of The Association property to private property;
- q) In failing and refusing to install or complete the cable, phone, and other utility infrastructure in various parts of Mount Vintage;
- r) In failing to afford adequate rights to the Homeowners in the operation of The Association;
- s) In the negligent development, marketing, and operation of Mount Vintage and its Association in other ways that will be shown through discovery and at trial;
- t) In the acquisition and operation of the Amenities as further described below;
- u) In causing a stigma that hurts The Association and the Homeowners' property values;
- v) By distributing funds from a non-profit entity in violation of S.C. Code § 33-31-1301-2;
- w) By accepting, agreeing to, and enforcing unconscionable Governing Documents; and,
- x) By violating the SC NPC Act in failing to accord voting rights to Class B members on important or discriminatory votes delineated by the Act.

101. Defendant LL has been negligent with regards to the *acquisition* of the *Golf* Amenity, as follows:

- a) Proposing and arranging for the Homeowners to pay two and a half (2.5) times the Golf Amenity's market value to acquire the Golf Amenity;
- b) Failing to disclose to the Homeowners or warn the Homeowners that the Affiliated Defendants were arranging for them to pay two-hundred fifty percent (250%) of the Golf Amenity's market value for the ownership of the Amenity;
- c) Utilizing the borrowing, funding, and assessment capability of The Association to buy an Amenity that would increase the value of the Affiliated Defendants' lots, without adequate disclosure or just compensation;
- d) Representing to the Homeowners that their Association would have limited or no liability on the Amenity Note;
- e) Arranging for The Association to have default liability on the Amenity Note;
- f) Arranging for a balloon payment without adequate protection or an exit plan;
- g) Failing to disclose to the Homeowners the risks inherent in agreeing to deficiency liability and a short-term balloon payment without protection;
- h) Arranging for and advising the Homeowners to support and enter a relationship with an unproven, underfunded golf course operator, without adequate warning or disclosure;

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- i) Representing to the Homeowners that they would not be responsible for any funding shortfalls or losses incurred in the operation of the Amenity;
- j) Failing to disclose to homeowners the developer's and Board's conflict of interest in the acquisition; and,
- k) Such other ways as shall be shown in the discovery and trial of this matter.

102. Defendant LL has been negligent in the following particulars with regards to the *operation* of the *Golf Amenity*:

- a) Arranging for and relying upon a short-term lease with an unproven, underfunded operator;
- b) Failing to enforce the terms of the lease;
- c) Arranging for the Homeowners to be responsible for the Amenity operating losses;
- d) Failing to exercise proper supervision to prevent mismanagement of the course;
- e) Assessing the Homeowners to fund the operating losses; and,
- f) Such other ways as shall be shown in the discovery and trial of this matter.

103. Defendant LL has been negligent in the following particulars, with regards to the *acquisition and operation* of the *Town Center Amenity*:

- a) Utilizing the borrowing, funding, and assessment capability of The Association to buy an amenity that would increase the value of the Affiliated Defendants' lots, without adequate disclosure or just compensation;
- b) Recommending to the Homeowners that they pay a price for the Amenity that failed to account for the deferred maintenance on the facility;
- c) Failing to warn the Homeowners that they were overpaying for the Amenity;
- d) Representing to the Homeowners that their Association would have limited or no liability on the Amenity Note;
- e) Arranging for a balloon payment without adequate protection or an exit plan;
- f) Failing to disclose to the Homeowners the risks inherent in agreeing to deficiency liability and a short-term balloon payment;
- g) Representing to the Homeowners that they would not be responsible for any funding shortfalls or losses incurred in the operation of the Amenity;
- h) Arranging for The Association to have default liability on the Amenity Note;
- i) Arranging for the Homeowners to be responsible for the operating losses;
- j) Increasing the assessments on the Homeowners to fund the operating losses;
- k) Failing to disclose to Homeowners Defendants LL's' and Board's conflict of interest in the acquisition and in the assessment of Homeowners to fund the operating losses; and,
- l) Such other ways as shall be shown in the discovery and trial of this matter.

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104. As this suit concerns rights allegedly derived from sealed instruments, a twenty (20) year statute of limitations applies to Plaintiffs' claims.

105. Defendants are barred or estopped from relying on any statutes of limitation or repose by virtue of their own misfeasance and concealment of misfeasance and rights relating thereto.

(Damages)

106. Defendants have proximately damaged Plaintiffs as follows:

- a) The Defendants have proximately damaged The Association by the above-described actions and by decreasing The Association's funding and funding base and, therefore, operational capacity, by failing to pay assessments, causing it to pass assessments to fund Amenity deficits, by converting Association opportunities to their own benefit, and by saddling The Association with staggering debt and amenity maintenance cost;
- b) Defendants have proximately damaged the individual Plaintiffs and the Homeowner Class vis a vis increased and special assessments and by its improper operation of The Association and the neighborhood, which has resulted in loss of appreciated value in their homes; loss of value in their homes, and loss of collective control of their neighborhood; and the likelihood of staggering future assessments to support The Association's staggering debt and maintenance costs; and
- c) The cumulative actual damages to The Association are expected to exceed \$7,000,000; and the Class damages are expected to exceed that.

107. All of the within-described advantages unilaterally taken by Defendants have been directly or indirectly at the expense of and damage to the Plaintiffs.

(Class Action Allegations)

108. Plaintiffs additionally bring this action on behalf of all those similarly situated pursuant to the common law of this state and Rule 23, SCRCF. The Class is defined as follows:

An opt-out class of all persons and entities that are members of the Mount Vintage Homeowners Association in North Augusta, South Carolina.²

² Plaintiffs propose that if cohesiveness is challenged by the Defendants, that the Class be divided into subclasses if and as necessary to align Class interests.

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This class excludes the Defendants and their affiliates, employees, owners, and relatives; excludes Essex/Stamley Homes and the owners of any properties built by Essex/Stamley Homes; and excludes any person or entity that timely indicate their desire to be excluded from the class.

109. Plaintiffs are members of the Class that they seek to represent. The interests of Plaintiffs are coincident with and non-antagonistic to those other members of the class Plaintiffs seek to represent.

110. Plaintiffs' claims are typical of the claims of the other class members, and Plaintiffs will fairly and adequately represent the interests of the members of the class.

111. Plaintiffs have retained counsel experienced and competent in complex litigation, class actions, developer matters, and homeowner association affairs.

112. The class members are so numerous that joinder of all members is impractical. It is estimated that there is in excess of three hundred (300) members of the Class as defined.

113. The claims of the Plaintiffs and the Class involve common questions of law and fact, including but not limited to:

- a) Whether Defendants were negligent in the development and management of Mount Vintage;
- b) Whether the Defendants adequately disclosed their conflicts of interest;
- c) Whether the Defendants breached their fiduciary duties;
- d) Whether the Defendants' conduct has proximately damaged the Plaintiffs; and,
- e) Whether Defendants' conduct was grossly negligent, reckless, willful, wanton, intentional, or the like, entitling Plaintiffs to punitive damages from the Defendants.

114. Common questions of law and fact herein predominate over any questions affecting only individual members of the Class. Common issues represent the most significant issues in the case and can be resolved for all members of the Class in one action.

115. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the

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Class, which would establish incompatible standards of conduct for the Defendants, the parties likely opposing the Class.

116. The prosecution of separate actions by individual members of the Class would create the risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications and/or substantially impair or impede their ability to protect their interests.

117. A class action is superior to the other available methods for the fair and efficient adjudication of the controversy.

118. Prosecution of this matter as a class action would significantly reduce the possibility of repetitive litigation by providing redress to Class Members who would not or could not prosecute this litigation on an individual basis.

119. Plaintiffs and the Class envision no unusual difficulty in the management of this action as a class action.

120. Each class member has an interest of more than one hundred dollars (\$100.00).

121. The amount of money at stake for each member is not sufficient for each member to hire their own counsel and accountants and bring their own action.

122. Much of this action focuses on the Defendants' mistreatment of The Association and its finances and requires a forensic financial evaluation. The judiciary, parties, and Homeowners would best be served by a single financial analysis in a single action, rather than multiplicity and duplicity.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS AND REPOSE**

123. Defendants are estopped from relying on any statutes of limitations or repose by virtue of their acts. Upon information and belief, Defendants should have known that they had

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violated the Plaintiffs rights as described herein.

124. Defendants had a duty to inform Plaintiffs of the violations (including conflicts) described herein each of which they should have known. Notwithstanding their duty, Defendants never disclosed the violations.

125. As Defendants had a duty to disclose, the non-disclosure constituted concealment.

126. Despite exercising reasonable diligence, Plaintiffs could not have discovered the violations at the time they originally occurred.

127. Given Defendants' failure to disclose this non-public information about the violations – information over which they had exclusive control – and because Plaintiffs could not reasonably have known of the violations, Defendants are barred and estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

128. Defendants are further estopped from relying upon any statute of limitations or repose as they have repeatedly represented to Plaintiffs that they knew what they were doing and that they were acting in the best interests of The Association.

129. The equitable tolling doctrine further precludes Defendants from relying on a statute of limitations defense.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence by All Plaintiffs as to Affiliated Defendants)

130. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

131. Plaintiffs have been damaged as a direct and proximate result of the previously-described negligence, carelessness, and recklessness of the Defendants in an amount to be determined by the trier of fact.

132. The foregoing acts and omissions were committed with gross negligence,

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willfulness, wantonness, and/or reckless disregard for the rights of others, and/or constituted negligence *per se*, and Plaintiffs are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty by All Plaintiffs as to Defendant LL)

133. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

134. Defendant LL, as the alleged developer, owed fiduciary and fiduciary like duties to the Plaintiffs by virtue of its capacity as the steward of the Mount Vintage community and amenities, and in its capacity in controlling The Association as the lone Association voting member. It owed Homeowners fiduciary and fiduciary like duties by virtue of the Homeowners forced respite of trust and confidences in it.

135. The fiduciary relationship required Defendant LL to make full disclosure to The Association and Homeowners of all material facts relevant to all transactions between the parties.

136. The fiduciary relationship required that Defendant LL treat The Association and Homeowners with good faith and fair dealing.

137. The fiduciary relationship shifts the burden of proof as to all transactions and dealings between the Affiliated Defendants, The Association, and the homeowners, or any two thereof, to Defendant LL to prove the arms-length nature of each transaction or each transaction becomes voidable and compensable at The Association's and Homeowners' option.

138. Defendant LL breached the fiduciary relationship by failing to honor their trust; by using their insider knowledge and control to benefit itself and related entities/parties at the expense of the Plaintiffs; by failing to make full or adequate disclosure; by failing to disclose their breach

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of duty; by failing to enforce the Homeowner Association's rights; by self-dealing; by breaching their duty of loyalty; and by the other acts and omissions described herein.

139. Defendant's breach of fiduciary duty has proximately damaged Plaintiffs in an amount to be determined by the trier of fact.

140. As said failures were committed with gross negligence, reckless disregard for the rights of others, and/or intentional or malicious conduct, Plaintiffs are entitled to an award of punitive damages against Defendant LL.

FOR A THIRD CAUSE OF ACTION
(S.C. Unfair Trade Practices Act By Individual Plaintiffs ("SCUTPA") as to Affiliated Defendants)

141. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

142. The Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

143. The Defendants have engaged in planned community development both from time to time in Mount Vintage and in other new communities in this state and region, including Aiken, wherein their acts have been repeated or capable of repetition.

144. The Defendants' above-described activities, reincorporated herein by reference as if set forth at length, constitute unfair and deceptive practices in the conduct of their trade.

145. The Defendants' above-described acts are capable of repetition and adversely affect the public interest.

146. The Defendants knew or should have known that their conduct was in violation of Section 39-5-20 of the South Carolina Code.

147. The Defendants' wrongs entitle the Plaintiffs to an award of treble damages,

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attorneys' fees, and costs.

148. As discovery will show that The Association should be realigned as a Plaintiff, it will be bringing its SCUTPA claim as a direct claim, and not through its derivative Plaintiffs.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Action/Reformation by Individual Plaintiffs and Class as to Defendant LL and Association)

149. Plaintiffs re-allege the allegations contained in the above paragraphs as if fully set forth herein.

150. The unilateral and *de facto* perpetual control provisions and other offensive provisions of The Association's Governing Documents violate:

- a) Public policy;
- b) South Carolina law and/or provisions of the Constitution;
- c) The developer Defendants' fiduciary duties;
- d) The standards and references set forth further above; and/or,
- e) The Rule Against Perpetuities.

151. Plaintiffs are entitled to a declaration by this Court that the offensive provisions included within the Governing Documents by the Defendants and their predecessors are void and/or require reformation or severance to eliminate the offensive provisions.

152. Plaintiffs are also entitled to have ambiguous and contradictory provisions in the Governing Documents construed against Defendants, declared void and/or reformed by the Court to reflect the reasonable expectations of the Homeowners Association and Plaintiffs more accurately.

FOR A FIFTH CAUSE OF ACTION
(Unjust Enrichment by All Plaintiffs as to Affiliated Defendants)

153. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

154. Plaintiffs have conferred the benefits discussed herein on the Affiliated Defendants.

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155. The Affiliated Defendants have been unjustly enriched at the expense of the Plaintiffs, The Association, and those similarly situated.

156. As an example, the Affiliated Defendants reaped the economic benefits from the Yeoman's lot transaction at the expense of the Association and its Members.

157. Using the above example, the Affiliated Defendants have transferred and continue to transfer the ill-gotten profits from the Yeoman's transaction amongst themselves.

158. Plaintiffs and The Association should be permitted recovery of that amount the Defendants have been unjustly enriched at the expense of the Plaintiffs and The Association in the form of monetary restitution paid by the Affiliated Defendants.

FOR A SIXTH CAUSE OF ACTION**(Promissory Estoppel or Declaration by Individual Plaintiffs & Class as to Defendant LL)**

159. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

160. The original developers promised the Plaintiffs, their predecessors, and other similarly situated that Mount Vintage would be developed as a first-class, upscale, luxury community, second to none, a true utopia, among other promises, with optional, first-class amenities and architecturally significant residential dwellings, with impeccable maintenance.

161. Specifically, the original developers promised in the various marketing materials:

One of our nation's most premier luxury...master planned...World-class community; Mount Vintage truly is one of our Nation's crowning jewels; Known for its refined luxury and amenities; southern charm and elegant sophistication; carefully planned residential community that rivals the best in America; signature Mount Vintage has enlisted legendary designers for the superior craftsmanship you see throughout the community; Some of the area's finest builders will provide you a delightful choice of well-thought-out and attractive home designs; neighborhood[s]; Gracefully appointed homes showcasing traditional architectural styles; exquisite homes and grounds; experience a world of unequalled amenities; amazing offering of amenities; unsurpassed

Plaintiffs' Second Amended Complaint

amenities; Exceptional amenities; superb amenities; World-class amenities; our facilities provide everything horse lovers and their horses require; Fully equipped equestrian center; full boarding facilities and lessons; many riding trails; world class... championship golf course; highly experienced maintenance staff; extreme attention to detail; so meticulously maintained that not a single blade of grass appears out of place; finest lifestyle amenities imaginable; the finest lifestyle amenities man can provide; the very best of luxury living.

162. Plaintiffs relied on these and other promises in acquiring their lots and building their residences. The original developers expected and foresaw Plaintiffs' reliance.

163. By accepting the benefits of the alleged assignment of developer rights, the defendant successor developer(s) bear the burden of the obligations of its predecessors.

164. The common law provides that to qualify as a Successor Developer, an assignee of declarant rights must substantially honor the development plan put in place by the original developer.

165. Concomitantly, the common law provides that an assignee of developer rights who/which does not honor the development plan and obligations is not entitled to Successor Developer status.

166. Plaintiffs are entitled to an order of this Court requiring Defendant LL to specifically perform the development plan, and to an award of costs, damages, consequential and special damages, and attorneys' fees.

167. Alternatively, Plaintiffs seek a ruling that the Defendant LL, having not acted as a proper successor developer, and having breached the developer obligations, was not and is no longer entitled to exercise developer privileges at Mount Vintage, and an award of judgment for all prior unpaid dues and all other damages set forth herein.

FOR A SEVENTH CAUSE OF ACTION
(Accounting and Temporary and Permanent Injunction By All Plaintiffs as to All Defendants)

Plaintiffs' Second Amended Complaint

168. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

169. Individual Plaintiffs and Plaintiff Class are entitled to and seek an accounting of all The Association's financial transactions since Defendant LL took control, generally and with the Defendants.

170. The Association is entitled to and seeks an accounting of all The Association's financial transactions with the Defendants since Defendant LL took control and the Defendants financial transactions relating to Mount Vintage that The Association is not a party to but maybe affected by.

171. The foregoing allegations evidence that the Plaintiffs are suffering irreparable harm, and an injunction is necessary to protect their rights and interests, both temporarily and as part of the full adjudication and resolution of the within matters. The foregoing detailed allegations evidence a likelihood of success on the merits; and further evidences that there is an inadequate remedy at law for some of the wrongs complained of herein. The likelihood of success on the merits is enhanced by the shifting of the burden of proof as to the self-dealing described in detail herein.

172. Plaintiffs are entitled to the issuance of a temporary and permanent injunction enjoining the Defendants from treating The Association as a subsidiary and from having any financial transactions with The Association that are not approved by an independent majority of the Homeowners, after full advanced disclosure, and the Court, pending resolution of this suit and the transfer of control to the Homeowners.

FOR AN EIGHTH CAUSE OF ACTION
(Civil Conspiracy By Individual Plaintiffs and Plaintiff Class as to Affiliated Defendants)

Plaintiffs' Second Amended Complaint

173. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

174. Defendants have conspired and acted in concert as described herein to benefit themselves at the expense of and with damage to the Plaintiffs.

175. The Defendants actions have proximately caused the Plaintiffs special damages which are unique to this very unique and abusive situation.

176. The special damages include, but are not limited to, the non-economic damages that Plaintiffs have suffered by having to endure this conduct in their retirement home and community, and amongst their neighbors, the loss of use and enjoyment Plaintiffs have suffered, and the loss of the planned collective control of their residential community.

177. Plaintiffs' special damages also include the stigma that the neighborhood (and therefore its members) has and is suffering as a result of the above described conduct and having to use litigation to correct it, and all its attendant consequences.

178. Plaintiffs are entitled to an award of actual, special and punitive damages from Defendants.

WHEREFORE, Plaintiffs pray for a judgment of this Court for themselves, The Association, and the Homeowner Class, as follows:

1. That the foregoing class of Homeowners be certified; that two (2) or more of the individual plaintiffs be constituted as the class representatives in this matter and that the below counsel be constituted as class counsel;
2. Judgment in favor of The Association against Defendants for its actual, consequential, statutory, and punitive damages;
3. Judgment in favor of the individual Plaintiffs and Plaintiff Class against Defendants for their actual, consequential, special, statutory, and punitive damages;
4. Judgment in favor of the Individual Plaintiffs and Plaintiff Class against Association for assessments paid by Plaintiffs recovered against the Defendants;
5. An accounting by all Defendants for all Plaintiffs;

Plaintiffs' Second Amended Complaint

6. Reformation, specific performance, declaratory, and injunctive relief;
7. An award of attorneys' fees, costs, and prejudgment interest; and
8. Jury trial demanded.

JUSTIN O'TOOLE LUCEY, P.A.

By: /s/Anna S. McCann
Justin O'Toole Lucey
Anna McCann
415 Mill Street
Mount Pleasant, SC 29465-0806
(843) 849-8400 phone
jlucey@lucey-law.com
amccann@lucey-law.com

September 11, 2023
Charleston, South Carolina

TO THE DEFENDANTS ABOVE NAMED:

-SIGNATURES ON FOLLOWING PAGE-

Pls' Third Amended Summons & Complaint

/s/Anna S. McCann
Justin O' Toole Lucey
Anna McCann
JUSTIN O'TOOLE LUCEY, PA
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jlucey@lucey-law.com
amccann@lucey-law.com
Attorneys for Plaintiffs

September 4, 2024
Mount Pleasant, SC

THIRD AMENDED COMPLAINT
(Negligent Development)
(Jury Trial Demanded)

3. Plaintiff Przybyl's residence is located at 255 Homeward Bound Drive, North Augusta, South Carolina, 29860, and is also described as Lot D-14 on a plat of Mount Vintage by

Pls' Third Amended Summons & Complaint

Newby-Proctor and Associates dated September 6, 2000.

4. Plaintiffs Gleie's residence is located at 527 Schoolhouse Lane, North Augusta, South Carolina, 29860, and is also described as Lot 0-18 on a plat of Mount Vintage by Newby-Proctor and Associates dated April 17, 2007.

5. Plaintiffs Bowes' residence is located at 99 Whitney Court, North Augusta, South Carolina, 29860 and is also described as Lot A-21 on a plat of Mount Vintage by Newby-Proctor and Associates dated August 21, 2015.

6. Plaintiff Alasadi's residence is located in the Shaw Estates area of Mount Vintage at 15 Ballentine Court, North Augusta, South Carolina, 29860 and is also described as Lot S-44 on a plat of Mount Vintage by Newby-Proctor and Associates dated July 19, 2018.

7. Plaintiffs Kirkwood's residence is located at 108 Whitney Court, North Augusta, South Carolina, 29860, and is also described as Lot A-26 on a plat of Mount Vintage by Newby-Proctor and Associates dated September 22, 1998.

8. Plaintiffs Vichroski's residence is located at 35 Independent Hill Lane, North Augusta, South Carolina, 29860 and is also described as Lot R-35 on a plat of Mount Vintage by Newby-Proctor and Associates dated September 26, 2000.

9. Plaintiffs Montellese's residence is located at 1036 Longstreet Place, North Augusta, South Carolina, 29860 and is also described as Lot H-26 on a plat of Mount Vintage by Newby-Proctor and Associates dated January 14, 1999.

10. Defendant LL of SC, LLC ("LL"), is a limited liability company formed under the laws of South Carolina; LL also owns lots in the Mount Vintage subdivision.

Pls' Third Amended Summons & Complaint

11. Defendant Raiford Topsail Island Investments, LLC ("Topsail"), is a limited liability company formed under the laws of South Carolina; Topsail also owns lots in the Mount Vintage subdivision.

12. Defendant T R Sales Plantation, LLC ("T R Sales"), is a limited liability company formed under the laws of South Carolina.

13. J. Wayne Raiford ("Raiford") owns (at least in part), manages, controls and acts on behalf of Defendants LL, Topsail, and T R Sales.

14. Leigh Ann Keels ("Keels") is the daughter of Raiford and a non-resident of Mount Vintage, a former member of The Association's Board of Directors, a current officer of The Association, and a part owner or part beneficial owner of LL, Topsail, and T R Sales.

15. T R Sales is the management entity which employs Raiford and Keels and, through Raiford and Keels, manages and controls Defendants LL and The Association. During the last nine or so years, Raiford has been solely employed by T R Sales; and Keels has been solely employed by T R Sales for all activities relating to this Complaint.

16. Defendants T R Sales, LL, and Topsail have acted in concert in the below described matters.

17. Defendant Mount Vintage Homeowners Association, Inc. f/k/a Mount Vintage Plantation Homeowners Association, Inc. (hereinafter "The Association"), is a mutual benefit, non-profit corporation formed under the laws of South Carolina, and is an interested party to the within matters. No recovery is sought against The Association.

18. Defendant LL appointed Raiford to the Board of Directors of The Association, and Raiford acts as its Chairman and President.

Pls' Third Amended Summons & Complaint

19. Defendants LL and/or T R Sales has, in turn, permitted or appointed all other members of the Board of Directors since late 2013.

20. Hereinafter "Defendants" refers to one or more of LL, Topsail, and T R Sales. Only when "Defendants" is modified to "All Defendants" does the reference include The Association.

21. By virtue of their property ownership, as well as The Association's Articles of Incorporation, The Association's Covenants ("Covenants") and Bylaws, as amended from time to time (hereinafter "Governing Documents"), and the South Carolina Non-Profit Corporation Act, S.C. Code §§ 33-31-101, *et seq.* (hereinafter the "SC NPC Act"), the Plaintiffs are members of The Association and have been members at all times relevant herein.

22. Plaintiffs bring this action on behalf of themselves and derivatively on behalf of The Association and its members, the other property owners in Mount Vintage, because The Association has failed to protect and enforce the rights of The Association and its members with respect to the matters alleged herein.

(Background; Formation of Association; Governing Documents)

23. The development of Mount Vintage, as a residential community, commenced in approximately 1995.

24. The Association was incorporated as a mutual benefit, non-profit corporation.

25. In its Articles of Incorporation, filed April 3, 2000, The Association elected to have "members," which election is required by the SC NPC Act §§ 33-31-101, *et seq.*

26. The Articles of Incorporation also specify that The Association will have two (2) "classes of members," whose respective rights and privileges are spelled out in The Association's Declaration of Restrictive Covenants and Bylaws.

Pls' Third Amended Summons & Complaint

27. By virtue of its election to have members, The Association is entitled to “impose dues, assessments, and admission and transfer fees upon its members[.]” (SC NPC Act, § 33-31-302 (15)). The Association has continually exercised this power granted by and enumerated in the SC NPC Act.

28. The Governing Documents have been amended numerous times since the filing of the Articles of Incorporation.

29. On September 3, 2013, Defendant LL gained control of Mount Vintage by taking a Deed in Lieu of Foreclosure on the prior developer’s remaining 183-odd lots.

30. The Deed in Lieu transaction purported to include an assignment of developer rights to LL.

31. Thereafter, Defendant LL asserted its position as the alleged “successor developer,” approximately eighteen (18) years after the development was founded.

32. Unbeknownst to The Association or its members, Defendant LL elected to continue the foreclosure process and assign its successful bid to a different entity, Defendant Topsail.

33. Thereafter, Defendant Topsail then received a Court deed to the 185 developer lots and all rights “appurtenant” thereto.

34. Topsails’ receipt of “developer rights” was confirmed by a subsequent deed issued by the foreclosing Court in 2014.

35. According to the Governing Documents, the Developer is allegedly a “Class A” member of The Association by virtue of its claiming “developer rights.”

36. As a Class A member, the Developer has one (1) vote for each residential lot owned by it in Mount Vintage.

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37. As a result of LL's assertion of developer status, neither Raiford nor Defendant Topsail were Class A members of The Association.¹

38. According to the Governing Documents, all property owners in Mount Vintage other than the developer are allegedly "Class B" members of The Association.

39. The Class B members purportedly have voting rights which spring upon either (1) the developer's conveyance of all residential lots and tracts within Mount Vintage, including, but not limited to, additional phases, sections and developments which it may decide to add to the Mount Vintage development, or (2) when the developer, in its sole discretion, decides to convert Class B members to Class A members.

40. By virtue of their membership in The Association, Plaintiffs have been assessed each year of their ownership, including some special assessments.

41. The Covenants provide that the developer Class A member is not obligated by virtue of its property ownership to pay any dues, assessments, fees, or fines.

(Perpetual and Complete Developer Control)

42. The Governing Documents give the developer, as the sole Class A member, complete control and authority over the Governing Documents, the Board, and The Association.

43. Defendant LL has maintained complete control over all Mount Vintage matters, including, but not limited to, amenities and lot acquisitions, dues and lien releases, the architectural committee, and assessments.

44. The Board's voting rights (and those of all committees) are illusory as all Board members serve at the discretion of Defendant LL; and, Keels, Raiford's daughter, handles finances, and for all practical purposes, runs The Association's day-to-day matters. The Bylaws, for

¹ Nor is Keels a member of The Association.

Pls' Third Amended Summons & Complaint

example, purport to give the developer the unilateral right to amend any aspect of the Bylaws without vote by the Class B Members, even if said amendment affects the rights, privileges, preferences, restrictions, or conditions of Class B members as to voting, dissolution, redemption, or transfer of membership in a manner different than such amendment would affect another class of members, *i.e.*, Class A members.

45. The Covenants, for example, purports to give the developer, as well as its successors, assigns, or heirs, the exclusive right, exercisable at any time and from time to time, to amend or to grant exceptions to the Declarations and to waive, repeal, or vary the Declarations in any one or more respects whenever in the sole and controlled opinion of the Developer such waiver, repeal, or variance shall not be materially detrimental to the general nature in development of Mount Vintage.

46. The perpetual developer control, including the perpetual ability to amend the Bylaws and Declaration of Covenants regardless of the substance of those amendments, runs contrary to the SC NPC Act, including, but not limited to, §§ 33-31-206 and 33-31-1022, and therefore runs afoul of South Carolina law. The foregoing perpetual control additionally violates the common law, industry standards, Restatement(s), model acts, and the reasonable expectations of the purchasing homeowners that the neighborhood will be managed by the homeowners within a reasonable amount of time.

47. Essentially, the Governing Documents permit complete control by the developer, *funded by the homeowner members*, for an unlimited duration.

48. The Governing Documents do not have a definitive or reasonable time limitation on the developer's control, which cannot be thwarted or avoided by the developer, thereby giving the developer potentially unlimited perpetual control of The Association and neighborhood.

Pls' Third Amended Summons & Complaint

49. The Governing Documents contain other unfair, conflicting, and/or confusing terms.

50. The defects in the Governing Documents are latent and would not be recognized by a lay person, even if they tried to read them.

51. Further, the Governing Documents permit the developer to add (a virtually unlimited amount of) additional parcels to the regime, which also permits perpetual control and dominance by the Developer.

52. The Governing Documents are or are akin to contracts of adhesion; neither The Association nor the Homeowners were ever permitted to negotiate their terms; further, they have been unilaterally amended several times by Defendant LL, again without negotiation or input or recourse or representation.

53. At all times relevant herein, Defendants have had an unfair advantage over the Homeowners by sophistication, dominance, unequal bargaining positions, and positions of authority.

54. The foregoing and many of the other terms contained in the Governing Documents are so one-sided and unfair, that no reasonable person who understood their potential for abuse would have agreed to them; and no reasonable person would avail themselves of the untoward advantages that they create.

55. The Governing Documents are unconscionable and, therefore, unenforceable; and separately, they further violate public policy, South Carolina law, and the previously referenced standards.

*Pls' Third Amended Summons & Complaint***(Futility of Demand)**

56. Plaintiffs' demand upon The Association to rectify the wrongs described herein would be futile and is, therefore, excused under the futility doctrine.

57. Plaintiffs' demand upon The Association would be futile for the following reasons, which are more particularly described in the preceding paragraphs:

- a) The Association's Governing Documents (as amended) give "Developer, LL of SC, LLC, its successors and assigns" absolute control over The Association;
- b) Defendant LL has controlled The Association, whose rights are being adversely affected by Defendants;
- c) Under the Governing Documents, the developer is entitled to modify, amend, repeal, suspend, and otherwise alter the Governing Documents in its sole discretion, at its sole option, and at any time;
- d) Defendant LL has exercised complete control over the Board, including the ability to appoint and remove Directors;
- e) The developer has *de facto* veto power over any and all decisions of the Board, which power Defendant LL has exercised in the past;
- f) Defendants LL and T R Sales, who have been controlling The Association, would never permit the Board of Directors to authorize The Association to bring suit against the Defendants;
- g) The Board of Directors is illusory as the Board serves at the pleasure of LL and T R Sales;
- h) The Board of Directors have failed to successfully intercede in The Association's or Homeowner's behalf; ultimately, the only recourse for a dissenting Board member is resignation, which has occurred regularly; and
- i) Other reasons which will be proven at trial.

58. In further support of futility, as described elsewhere herein, various Homeowners, Plaintiffs included, have requested that Defendants cure many of the wrongs addressed herein, and their efforts have been rebuffed and/or ignored by the Board, which is controlled by Defendant LL.

59. For example, one or more Plaintiffs have challenged the Board's failure to provide accounting information, failure to charge assessments against all lot owners, misuse of reserve funds, self-dealing, inurement, debt forgiveness, conflicts of interest, cronyism, misfeasance, non-

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developer titling of lots, to name a few. All of the Homeowners' inquiries and complaints have been rebuffed. Plaintiffs did not receive the 2019 accounting records from the Defendants for years pending the Defendants adjustment to the books to create a backdated \$300,000.00 note payable to LL that had no basis in law or fact.

60. When direct inquiries were ignored, one or more Plaintiffs complained to the South Carolina Department of Consumer Affairs, who in turn served notice on Defendants and requested a response. The Defendants refused to budge in their response to the Homeowners through the Department and the Department was powerless to do anything about it.

(Operation of Association for the Benefit of Defendants)

61. Defendants have embarked upon a pattern and practice of using past due assessments owed to The Association to facilitate the sale of lots by the then current owners, and the acquisition of the lots by the Defendants, at below market values, without the Defendants compensating The Association for its lost dues, opportunity, and/or value.

62. Defendants have embarked upon a pattern and practice of bidding for and acquiring Mount Vintage lots at tax sales, thereafter, suing The Association they control to eliminate past due Association dues and assessment, defaulting The Association in the suits, and failing to advise of or assist with The Association's redemption or other rights, and/or simply causing the HOA to write them off, all without the Defendants compensating The Association for its lost dues, liens, opportunity, and/or value.

63. Defendants have subsequently embarked upon a pattern and practice of lot acquisition, whereby, they avoid/bypass public sales, using unrecorded Association liens as leverage to negotiate the cheap acquisition of Mount Vintage lots from remote owners, and then waiving The Association dues owed once the lots are received, with no compensation to The

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Association, all without any disclosure to The Association or its members, let alone adequate disclosure.

64. The Board has failed to intercede, has failed to protect The Association or its members, or to achieve or arrange for adequate management of The Association and its affairs. In essence, the Defendants treat The Association as its pawn for its own financial transactions and inurement.

65. By virtue of this pattern and practice, while they delayed commencing development efforts and the completion of the roads, the Defendants have amassed an additional 100 or so lots in their own names and/or the names of their affiliates at below market consideration while decimating The Association's finances.

66. Defendant LL and T R Sales have wrongfully treated the owners of some lots as Class A members (including one or more defendants and Raiford), waiving dues, when only one entity was entitled to that status, and thereby have caused additional financial detriment to The Association, the neighborhood, and the Homeowners.

67. Similarly, Defendant LL has permitted favored third parties and relatives to temporarily consolidate lots to reduce the dues owed to The Association.

(Amenities)

68. The original developers sold Mount Vintage and its lots to the Homeowners and the public as an upscale, first-class, luxury community with high standards for design of neighborhood and residences, maintenance, and amenities.

69. The upscale amenities promised to be available included the below Town Center, Golf Course and Club House, Equestrian facilities, and 24-hour security.

Pls' Third Amended Summons & Complaint

70. An attractive selling point for Mount Vintage was that its residents' use and enjoyment of the amenities would be optional, as would the associated financial obligation. Neither The Association nor the Homeowners would be required to provide financial support for the amenities that they did not choose to enjoy.

71. Mount Vintage's Athletic Club and Town Center ("Town Center") is comprised of tennis courts, fitness center, library, kitchen, small and large meeting and recreational spaces, and a pool complex. The Golf Course is a twenty-seven-hole course.

72. The Town Center and the Golf Club/Course ("Golf Amenity") were built/developed circa 2002 by the original developers; the Equestrian facilities were developed thereafter.

73. Following the recession which occurred circa 2008-09, the original developers fell on hard times and the amenities were lost to foreclosure or other purchasers.

74. In 2010, the Town Center and Golf Amenity were purchased by Plantation Alliance LLC, a company owned by several Mount Vintage residents, to prevent the properties from being lost to bank foreclosure.

75. From 2013 to 2024, Defendants have done little to fulfill the original developers' promise of providing multiple, optional, first-class, upscale amenities.

76. In 2013, Defendants' marketing consultant advised them that they would not be able to sell the Mount Vintage lots without securing the amenities.

77. In July of 2014, one or more defendants made a \$1.5 million offer on the note and mortgage on the Golf Course, only to be substantially outbid by Apex Bank.

78. Circa 2014, while Defendant LL was the purported sole Class A member, Apex Bank foreclosed on the Town Center and Golf Amenity.

Pls' Third Amended Summons & Complaint

79. Circa 2015-16, Defendant LL embarked on persuading and arranging for The Association and its members to acquire the Town Center and then the Golf Amenity (“Amenity Package”) at The Association’s and homeowners’ expense so that it could sell its lots at a profit.

80. In 2016, the value of the Amenity Package was \$1,800,000.00 or less; the developer-controlled Association nonetheless paid approximately \$3,800,000.00 to acquire the amenities (not including refurbishment costs). As the developer was not paying dues, this acquisition occurred at The Association’s and homeowners’ expense.

81. This was done with numerous representations by the Defendants as to the wisdom and affordability of acquisitions; that the acquisition was necessary to maintain or bolster members’ property values; that the acquisitions would be self-sustaining; and that The Association and its members would *not* be responsible for any operating shortfalls.

82. Defendants failed to disclose that they were causing The Association to complete the acquisitions to increase the value of the Defendants’ lots.

83. Defendants failed to disclose to the membership that they were causing The Association to pay over twice the Amenity Package’s fair market value.

84. Defendants failed to disclose that, in obligation or in all fairness, Defendant LL as the purported “developer” should have funded the acquisition or contributed far more to the acquisition.

85. The acquisition and operation of the Amenities were further accompanied by the wrongful and negligent acts further described below.

86. The performance of the Amenities has been less than optimal; and contrary to representations made by the LL-controlled Board, and the Board has since passed member

Pls' Third Amended Summons & Complaint

assessments to cause The Association and its members to fund the operating deficits of the Amenities.

87. No arrangements were made for The Association to meet the balloon payments due on both acquisitions, or to anticipate increased payments under the adjustable-rate mortgage, or to set aside reserves for repairs and obsolescence.

88. The equestrian facilities do not currently exist, and Defendants have made no attempt to make good on that developer promise.

89. Defendants have failed to make good on the original developer's promise of multiple, optional, first-class amenities.

(Other and Cumulative Matters)

90. Defendants have failed to adequately advance the development and funding of The Association and Mount Vintage, thereby harming The Association and the Homeowners' enjoyment, expenses, and property values.

91. Defendants have failed to deliver and maintain a first-class, upscale, luxury development in many ways.

92. Defendants have failed to uphold the first-class standards required of residences, permitting tract homes and slab-on-grade homes into the neighborhood which have devalued the neighborhood and each home in the neighborhood.

93. Defendants have failed and refused to install or complete the cable, phone, and other utility infrastructure in various parts of Mount Vintage.

94. Defendants and the Board's foregoing activities, inadequate disclosures, amateur accounting, and lack of transparency have caused rifts in Mount Vintage.

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95. Defendants and their predecessor's failure, after 25 years, to transfer control of The Association and Mount Vintage neighborhood to the Homeowners is a violation of the public policy against perpetual developer control – both as described and separately, with due acknowledgement that there is no end in sight and under the current pace of development, there could well be another 25 to 50 years of developer control or more.

96. Defendant T R Sales and LL have practiced nepotism, cronyism, and favoritism in the operation of The Association and Neighborhood. They have placed unqualified family member(s) in important controlling positions; allowed extended family members to use the Amenities with false addresses; and acted in an arbitrary and capricious manner in The Association's dealings, *e.g.*, negotiating behind the back of The Association's board and allowing some investors to temporarily merge their lot inventories to dodge Association dues and assessments pending resale of the lots and they have permitted Defendant Topsail and Raiford to wrongfully dodge dues and assessments.

97. The foregoing has damaged The Association and the Homeowners and has caused a public stigma that has further damaged both.

(Additional Statement of Liability and Negligent Acts)

98. It is axiomatic, through law and equity, that by claiming "Successor Developer" status, and accepting the assignment of developer benefits and rights, and/or by availing itself of and exercising such rights, Defendants obligated themselves to properly perform the developer obligations and promises that gave rise to the presence of developer rights and benefits.

99. As the controlling entity, officer, and board member of a planned community neighborhood and its owner's association, Defendants T R Sales and LL owed The Association,

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the Homeowners, and the ensuing neighborhood fiduciary and fiduciary-like duties, and the duty to use due care in the development of the neighborhood and the administration of The Association.

100. Because of Defendants' complete control, Homeowners have had no choice but to repose their complete trust and reliance in Defendants resulting in the imposition of a fiduciary duty upon Defendants.

101. Defendant Topsail owed The Association and its members a duty of due care, a duty not to profit by their codefendants' misfeasance, and, when operating in concert with Defendant LL, a duty of good faith and fair dealing.

102. One or more of the Defendants have been negligent as follows:

- a) In failing to act to prevent the amenities from being foreclosed upon by Apex Bank under its tenure as the alleged developer;
- b) In failing to pay for the acquisition of the amenities or for the Developer's fair share of the acquisition of the Amenities;
- c) In their use of insider knowledge of Mount Vintage affairs to benefit themselves in lieu of The Association or its members;
- d) In their use of Association opportunities, rights, receivables, liens, and legal proceedings to acquire property for the benefit of the Defendants;
- e) In failing to pay or require payment of Association dues and assessments on lots that are not properly considered developer lots;
- f) In failing to arrange for proper funding of The Association and neighborhood while under their control;
- g) In failing to adequately develop Mount Vintage to create an adequate membership base to fund the neighborhood's success;
- h) In detracting from the membership base;
- i) In failing to timely transition control of The Association to the Homeowners;
- j) In failing to avoid perpetual developer control of Mount Vintage;
- k) In failing to share Association records and documents with The Association's members;
- l) In failing to create, maintain, publish, and share accurate financial records of The Association's activities;
- m) In failing to disclose and/or accurately disclose their financial transactions with The Association and The Association's interests;
- n) In practicing nepotism, favoritism, and cronyism in the operation of Mount Vintage at the expense of The Association and Homeowners;
- o) In moving The Association operations and records out of The Association property to private property;

Pls' Third Amended Summons & Complaint

- p) In failing and refusing to install or complete the cable, phone, and other utility infrastructure in various parts of Mount Vintage;
- q) In failing to afford adequate rights to the Homeowners in the operation of The Association;
- r) In the negligent development, marketing, and operation of Mount Vintage and its Association in other ways that will be shown through discovery and at trial;
- s) In the acquisition and operation of the Amenities as further described below;
- t) In causing a stigma that hurts The Association and the Homeowners' property values;
- u) By distributing funds from a non-profit entity in violation of S.C. Code § 33-31-1301-2;
- v) By accepting, agreeing to, and enforcing unconscionable Governing Documents;
- w) By violating the SC NPC Act in failing to accord voting rights to Class B members on important or discriminatory votes delineated by the Act; and,
- x) By failing to enforce the Developer's obligations set forth in the Essex/Stamley Martin contract(s) to fund deficits and to transfer common areas free and clear.

103. One or more of the Defendants been negligent with regards to the *acquisition* of the *Golf Amenity*, as follows:

- a) Proposing and arranging for the Homeowners to pay two and a half (2.5) times the Golf Amenity's market value to acquire the Golf Amenity;
- b) Failing to disclose to the Homeowners or warn the Homeowners that the Defendants were arranging for them to pay two-hundred fifty percent (250%) of the Golf Amenity's market value for the ownership of the Amenity;
- c) Utilizing the borrowing, funding, and assessment capability of The Association to buy an Amenity that would increase the value of the Defendants' lots, without adequate disclosure or just compensation;
- d) Representing to the Homeowners that their Association would have limited or no liability on the Amenity Note;
- e) Arranging for The Association to have default liability on the Amenity Note;
- f) Arranging for a balloon payment without adequate protection or an exit plan;
- g) Failing to disclose to the Homeowners the risks inherent in agreeing to deficiency liability and a short-term balloon payment without protection;
- h) Arranging for and advising the Homeowners to support and enter a relationship with an unproven, underfunded golf course operator, without adequate warning or disclosure;
- i) Representing to the Homeowners that they would not be responsible for any funding shortfalls or losses incurred in the operation of the Amenity;
- j) Failing to disclose to homeowners the developer's and Board's conflict of interest in the acquisition; and,
- k) Such other ways as shall be shown in the discovery and trial of this matter.

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104. One or more of the Defendants have been negligent in the following particulars with regards to the *operation* of the *Golf* Amenity:

- a) Arranging for and relying upon a short-term lease with an unproven, underfunded operator;
- b) Failing to enforce the terms of the lease;
- c) Arranging for the Homeowners to be responsible for the Amenity operating losses;
- d) Failing to exercise proper supervision to prevent mismanagement of the course;
- e) Assessing the Homeowners to fund the operating losses; and,
- f) Such other ways as shall be shown in the discovery and trial of this matter.

105. One or more of the Defendants have been negligent in the following particulars, with regards to the acquisition *and* operation of the *Town Center* Amenity:

- a) Utilizing the borrowing, funding, and assessment capability of The Association to buy an amenity that would increase the value of the Defendants' lots, without adequate disclosure or just compensation;
- b) Recommending to the Homeowners that they pay a price for the Amenity that failed to account for the deferred maintenance on the facility;
- c) Failing to warn the Homeowners that they were overpaying for the Amenity;
- d) Representing to the Homeowners that their Association would have limited or no liability on the Amenity Note;
- e) Arranging for a balloon payment without adequate protection or an exit plan;
- f) Failing to disclose to the Homeowners the risks inherent in agreeing to deficiency liability and a short-term balloon payment;
- g) Representing to the Homeowners that they would not be responsible for any funding shortfalls or losses incurred in the operation of the Amenity;
- h) Arranging for The Association to have default liability on the Amenity Note;
- i) Arranging for the Homeowners to be responsible for the operating losses;
- j) Increasing the assessments on the Homeowners to fund the operating losses;
- k) Failing to disclose to Homeowners Defendants LL's' and Board's conflict of interest in the acquisition and in the assessment of Homeowners to fund the operating losses; and,
- l) Such other ways as shall be shown in the discovery and trial of this matter.

106. As this suit concerns rights allegedly derived from sealed instruments, a twenty (20) year statute of limitations applies to Plaintiffs' claims.

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107. Defendants are barred or estopped from relying on any statutes of limitation or repose by virtue of their own misfeasance and concealment of misfeasance and rights relating thereto.

(Damages)

108. Defendants have proximately damaged Plaintiffs as follows:

- a) The Defendants have proximately damaged The Association by the above-described actions and by decreasing The Association's funding and funding base and, therefore, operational capacity, by failing to pay assessments, causing The Association to pass assessments to fund Amenity deficits, by converting Association opportunities to their own benefit, by failing to fund reserves and deferred maintenance, and by saddling The Association with staggering debt and amenity maintenance cost;
- b) Defendants have proximately damaged the individual Plaintiffs and vis a vis increased and special assessments and by its improper operation of The Association and the neighborhood, which has resulted in loss of appreciated value in their homes; and loss of collective control of their neighborhood; and the likelihood of staggering future assessments to support The Association's staggering debt and maintenance costs; and
- c) The cumulative actual damages to The Association are expected to exceed \$10,000,000.

109. All of the within-described advantages unilaterally taken by Defendants have been directly or indirectly at the expense of and damage to the Plaintiffs.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS AND REPOSE**

110. Defendants are estopped from relying on any statutes of limitations or repose by virtue of their acts. Upon information and belief, Defendants should have known that they had violated the Plaintiffs rights as described herein.

111. Defendants had a duty to inform Plaintiffs of the violations (including conflicts) described herein, each of which they should have known. Notwithstanding their duty, Defendants never disclosed the violations.

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112. As Defendants had a duty to disclose, the non-disclosure constituted concealment.

113. Despite exercising reasonable diligence, Plaintiffs could not have discovered the violations at the time they originally occurred.

114. Given Defendants' failure to disclose this non-public information about the violations – information over which they had exclusive control – and because Plaintiffs could not reasonably have known of the violations, Defendants are barred and estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

115. Defendants are further estopped from relying upon any statute of limitations or repose as they have repeatedly represented to Plaintiffs that they knew what they were doing and that they were acting in the best interests of The Association.

116. The equitable tolling doctrine further precludes Defendants from relying on a statute of limitations defense.

117. The below causes of action are brought derivatively by Plaintiffs on behalf of The Association against Defendants unless otherwise indicated.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

118. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

119. Plaintiffs have been damaged as a direct and proximate result of the previously-described negligence, carelessness, and recklessness of the Defendants in an amount to be determined by the trier of fact.

120. The foregoing acts and omissions were committed with gross negligence, willfulness, wantonness, and/or reckless disregard for the rights of others, and/or constituted negligence *per se*, and Plaintiffs are entitled to an award of actual and punitive damages against

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the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

121. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

122. One or more Defendants owed fiduciary and fiduciary like duties to the Plaintiffs by virtue of their capacity as the steward of the Mount Vintage community and amenities, and in their capacity in controlling The Association. Defendants owed Homeowners fiduciary and fiduciary like duties by virtue of the Homeowners forced respite of trust and confidences.

123. The fiduciary relationship required Defendants to make full disclosure to The Association and Homeowners of all material facts relevant to all transactions between the parties.

124. The fiduciary relationship required that Defendants treat The Association and Homeowners with good faith and fair dealing.

125. The fiduciary relationship shifts the burden of proof as to all transactions and dealings between the Defendants and The Association to Defendants to prove the arms-length nature of each transaction or each transaction becomes voidable and compensable at The Association's and Homeowners' option.

126. One or more Defendants breached the fiduciary relationship by failing to honor their trust; by using their insider knowledge and control to benefit itself and related entities/parties at the expense of the Plaintiffs; by failing to make full or adequate disclosure; by failing to disclose their breach of duty; by failing to enforce the Homeowner Association's rights; by self-dealing; by breaching their duty of loyalty; and by the other acts and omissions described herein.

127. Defendants' breach of fiduciary duty has proximately damaged Plaintiffs in an amount to be determined by the trier of fact.

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128. As said failures were committed with gross negligence, reckless disregard for the rights of others, and/or intentional or malicious conduct, Plaintiffs are entitled to an award of punitive damages against Defendant LL.

FOR A THIRD CAUSE OF ACTION
(S.C. Unfair Trade Practices Act By Individual Plaintiffs Only ("SCUTPA"))

129. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

130. The Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

131. The Defendants have engaged in planned community development both from time to time in Mount Vintage and in other new communities in this state and region, including Aiken, wherein their acts have been repeated or capable of repetition.

132. The Defendants' above-described activities, reincorporated herein by reference as if set forth at length, constitute unfair and deceptive practices in the conduct of their trade.

133. The Defendants' above-described acts are capable of repetition and adversely affect the public interest.

134. The Defendants knew or should have known that their conduct was in violation of § 39-5-20 of the South Carolina Code.

135. The Defendants' wrongs entitle the Plaintiffs to an award of treble damages, attorneys' fees, and costs.

136. As discovery will show that The Association should be realigned as a Plaintiff, it will be bringing its SCUTPA claim as a direct claim, and not through its derivative Plaintiffs.

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FOR A FOURTH CAUSE OF ACTION
(Declaratory Action/Reformation by Plaintiffs Individually and Derivatively Against All Defendants)

137. Plaintiffs re-allege the allegations contained in the above paragraphs as if fully set forth herein.

138. The unilateral and *de facto* perpetual control provisions and other offensive provisions of The Association's Governing Documents violate:

- a) Public policy;
- b) South Carolina law and/or provisions of the Constitution;
- c) The developer Defendants' fiduciary duties; and,
- d) The standards and references set forth further above.

139. Plaintiffs are entitled to a declaration by this Court that the offensive provisions included within the Governing Documents by the Defendants and their predecessors are void and/or require reformation or severance to eliminate the offensive provisions.

140. Plaintiffs are also entitled to have ambiguous and contradictory provisions in the Governing Documents construed against Defendants, declared void and/or reformed by the Court to reflect the reasonable expectations of the Homeowners Association and Plaintiffs more accurately.

FOR A FIFTH CAUSE OF ACTION
(Unjust Enrichment)

141. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

142. Plaintiffs have conferred the benefits discussed herein on the Defendants.

143. The Defendants have been unjustly enriched at the expense of the Plaintiffs and The Association.

Pls' Third Amended Summons & Complaint

144. As an example, the Defendants reaped the economic benefits from the Yeoman's lot transaction at the expense of the Association and its Members.

145. Using the above example, the Defendants have transferred and continue to transfer the ill-gotten profits from the Yeoman's transaction amongst themselves.

146. Plaintiffs and The Association should be permitted recovery of that amount the Defendants have been unjustly enriched at the expense of the Plaintiffs and The Association in the form of monetary restitution paid by the Defendants.

FOR A SIXTH CAUSE OF ACTION
(Promissory Estoppel or Declaration by Plaintiffs, Individually and Derivatively)

147. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

148. The original developers promised the Plaintiffs, their predecessors, and other similarly situated that Mount Vintage would be developed as a first-class, upscale, luxury community, second to none, a true utopia, among other promises, with optional, first-class amenities and architecturally significant residential dwellings, with impeccable maintenance.

149. Specifically, the original developers promised in the various marketing materials:

One of our nation's most premier luxury...master planned...World-class community; Mount Vintage truly is one of our Nation's crowning jewels; Known for its refined luxury and amenities; southern charm and elegant sophistication; carefully planned residential community that rivals the best in America; signature Mount Vintage has enlisted legendary designers for the superior craftsmanship you see throughout the community; Some of the area's finest builders will provide you a delightful choice of well-thought-out and attractive home designs; neighborhood[s]; Gracefully appointed homes showcasing traditional architectural styles; exquisite homes and grounds; experience a world of unequalled amenities; amazing offering of amenities; unsurpassed amenities; Exceptional amenities; superb amenities; World-class amenities; our facilities provide everything horse lovers and their horses require; Fully equipped equestrian center; full boarding facilities and lessons; many riding trails; world class... championship golf course;

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highly experienced maintenance staff; extreme attention to detail; so meticulously maintained that not a single blade of grass appears out of place; finest lifestyle amenities imaginable; the finest lifestyle amenities man can provide; the very best of luxury living.

150. Plaintiffs relied on these and other promises in acquiring their lots and building their residences. The original developers expected and foresaw Plaintiffs' reliance.

151. By accepting the benefits of the alleged assignment of developer rights, the defendant successor developer(s) bear the burden of the obligations of its predecessors.

152. The common law (and equity) provides that to qualify as a Successor Developer, an assignee of declarant rights must substantially honor the development plan put in place by the original developer.

153. Concomitantly, the common law (and equity) provides that an assignee of developer rights who/which does not honor the development plan and obligations is not entitled to Successor Developer status.

154. Plaintiffs are entitled to an order of this Court requiring Defendants to specifically perform the development plan, and to an award of costs, damages, consequential and special damages, and attorneys' fees.

155. Alternatively, Plaintiffs seek a ruling that the Defendants, having not acted as a proper successor developer, and having breached the developer obligations, was not and is no longer entitled to exercise developer privileges at Mount Vintage, and an award of judgment for all prior unpaid dues and all other damages set forth herein.

FOR A SEVENTH CAUSE OF ACTION
(Temporary and Permanent Injunction as to All Defendants)

156. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

Pls' Third Amended Summons & Complaint

157. The foregoing allegations evidence that the Plaintiffs are suffering irreparable harm, without an adequate remedy at law, and an injunction is necessary to protect their rights and interests, both temporarily and as part of the full adjudication and resolution of the within matters. The foregoing detailed allegations evidence a likelihood of success on the merits; and further evidences that there is an inadequate remedy at law for some of the wrongs complained of herein. The likelihood of success on the merits is enhanced by the shifting of the burden of proof as to the self-dealing described in detail herein.

158. Plaintiffs are entitled to the issuance of a temporary and permanent injunction enjoining the Defendants from treating The Association as a subsidiary and from having any financial transactions with The Association that are not approved by an independent majority of the Homeowners, after full advanced disclosure, and the Court, pending resolution of this suit and the transfer of control to the Homeowners.

FOR AN EIGHTH CAUSE OF ACTION
(Civil Conspiracy)

159. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

160. Defendants have conspired and acted in concert as described herein to benefit themselves at the expense of and with damage to the Plaintiffs.

161. The Defendants actions have proximately caused the Plaintiffs the above-described damages, including loss of enjoyment continued operating and non-operating deficits.

162. Plaintiffs are entitled to an award of actual, special and punitive damages from Defendants.

WHEREFORE, Plaintiffs pray for a judgment of this Court for themselves, The Association, and the Homeowner Class, as follows:

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1. Judgment in favor of The Association against Defendants for its actual, consequential, statutory, and punitive damages;
2. Judgment in favor of the individual Plaintiffs against Defendants for their actual, consequential, special, statutory, and punitive damages;
3. Reformation, specific performance, declaratory, and injunctive relief;
4. An award of attorneys' fees, costs, and prejudgment interest; and
5. Jury trial demanded.

JUSTIN O'TOOLE LUCEY, P.A.

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September 4, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF EDGEFIELD

ELIZABETH M. FERRARO, JAMES T. FERRARO,
 EDWARD J. PRZYBYL, MARCELLA GLEIE, JOHN
 E. GLEIE, JR., THOMAS BOWES, CONNIE BOWES,
 MOATAZ ALASADI, VIRGINIA KIRKWOOD, BOB
 KIRKWOOD, PAUL VICHROSKI, NYDZA
 VICHROSKI, JAMES MONTELLESE, ROXANN
 MONTELLESE, Individually, Derivatively, and on
 Behalf of all the Mount Vintage Homeowners
 Association Members,

Plaintiffs,

vs.

LL OF SC, LLC, RAIFORD TOPSAIL ISLAND
 INVESTMENTS, LLC, TR SALES PLANTATION,
 LLC, AND MOUNT VINTAGE PLANTATION
 HOMEOWNERS ASSOCIATION, INC. A/K/A
 MOUNT VINTAGE HOMEOWNERS ASSOCIATION,
 INC.

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT
) CASE NO. 2021-CP-19-00050
)

) **BUSINESS COURT CASE,**
) **ASSIGNED TO:**

) **THE HONORABLE R. LAWTON**
) **MCINTOSH**

) **PLAINTIFFS' MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT AS TO**
) **DEVELOPER RIGHTS AND CLASS A**
) **MEMBERSHIP**

PLEASE TAKE NOTICE that Plaintiffs, by and through their undersigned counsel, and pursuant to Rule 56, SCRCP, move this Court for an Order granting summary judgment in favor of Plaintiffs as to developer rights and Class A Membership. Specifically, the September 3, 2013 deed in lieu of foreclosure (hereinafter "Deed in Lieu"), granted after the October 23, 2012, Lis pendens (hereinafter "Lis Pendens"), was **superseded** by the November 11, 2013 Special Referee's Deed (hereinafter "Special Referee's Deed"), and LL of SC, LLC ("LL") is not the developer of Mount Vintage and is not a Class A Member under the Covenants. The current LL appointed and controlled Association Board is a nullity. There are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law.

SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d

196, 203 (Ct. App. 2008). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. “In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

“Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at 203. Instead, “[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Id.* at 198, 659 S.E.2d at 203. “It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine.” *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006). “Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper.” *Id.*

ARGUMENT

I. The Lis Pendens Pre-Dates the Deed in Lieu, and Therefore the Special Referee’s Deed Relates Back to the Filing of the Lis Pendens and Takes Precedence Over the Deed in Lieu.

The purpose of a notice of pendency of an action is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation. *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 336 S.E.2d 488 (Ct.App.1985); *Wooten v. Seanch*, 187 S.C. 219, 196 S.E. 877 (1938). **“A properly filed lis pendens binds subsequent purchasers or**

encumbrancers to all proceedings evolving from the litigation.” *South Carolina Nat’l Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 562 (1987) (emphasis added). Generally, the filing of a *Lis pendens* places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved. *Shelley Constr.*, 287 S.C. at 24, 336 S.E.2d at 491–492.

Additionally, the South Carolina Code provides that subsequent purchasers shall be bound by all proceeding taken after the filing of the *lis pendens*:

From the time of filing only, the pendency of the action shall be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer and **shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action.** For the purposes of this section, an action shall be deemed to be pending from the time of filing such notice.

S.C. Code Ann. § 15-11-20 (emphasis added). Moreover, it is hornbook law that a later obtained judgment relates back to the filing of the *lis pendens*.

A "*lis pendens*" is a notice of litigation, placed in the real property records, asserting an interest in the property and notifying third parties that ownership of the property is disputed. "*Lis pendens*" is a common-law and statutory doctrine which has the effect of providing constructive notice to the world of an alleged claim of a lien or an interest in property. As *lis pendens* provides constructive notice of litigation, **any judgment later obtained in that litigation relates back to filing of the *lis pendens*.**

51 Am.Jur.2d *Lis Pendens* § 1 (2000) (emphasis added).

Although *lis pendens* has been defined as an "encumbrance" as that term has been traditionally defined, and may be applied to enforce an existing lien, some courts have stated that the doctrine of *lis pendens* does not impress affected property with a lien, or extend or prolong any existing lien, but rather, **binds third parties with notice that any interest they may acquire in property pending litigation will be subject to the outcome of the action.**

Id. § 3 (emphasis added).

Furthermore, the *lis pendens* **“notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject**

to the judgment, without any substantive rights.” *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (citing 51 Am.Jur.2d *Lis Pendens* § 2 (2000) (emphasis added). After the filing of the lis pendens, any conveyance of the property is now subject to the outcome of the litigation. *In re Shiver*, 598 B.R. 221 (Bankr. D. S.C. 2019); *see also Meliani v. Jade Dunn Loring Metro, LLC*, 286 F. Supp. 2d 741 (E.D. Va. 2003) (“**[O]nce recorded, lis pendens binds subsequent bona fide purchasers of disputed property such that subsequent purchaser, with or without actual notice of lis pendens, takes subject to outcome of pending litigation.**”) (emphasis added).

Here, the below is a chronology of relevant events showing that the Deed in Lieu to LL, granted after the Lis Pendens, was superseded by the Special Referee’s Deed to Raiford Topsail Island Investments, LLC (“RTI”):

1. Oct. 23, 2012: LL files a Lis Pendens (**Ex. A**);
2. Oct. 23, 2012: LL files a Summons & Complaint foreclosing on the real estate (**Ex. B**);
3. Sept. 3, 2013: Deed in Lieu of Foreclosure to LL (**Ex. C**);
4. Nov. 6, 2013: LL voluntary assignment of Foreclosure Bid to RTI (**Ex. D**);
5. Nov. 11, 2013: Filing of the Master’s Report on the Bid by RTI (**Ex. E**);
6. Nov. 11, 2013: Special Referee’s Deed filed in Favor of RTI (**Ex. F**); and
7. July 22, 2014: Corrective Special Referee Deed filed (**Ex. G**).

A. Supersession by the Special Referee’s Deed

The Special Referee’s Deed, executed and filed on November 11, 2013, provides the definitive terms regarding the ownership and development of Mount Vintage because it relates back in time to the filing of the Lis pendens, which was filed on October 23, 2012. The Deed in Lieu, executed on September 3, 2013, post-dates the Lis pendens and cannot alter or supersede

whatever judgment results from the Lis pendens and the related litigation. Under South Carolina law, this properly filed Lis pendens binds all subsequent purchasers or encumbrancers to all proceedings evolving from the litigation. *See Cook, supra*. Here, the culmination of the litigation which evolved from the filing of the Lis pendens is the Special Referee's Deed.

The superseding nature of the 2013 Special Referee's Deed was confirmed when all Defendants, through Raiford, had Defendants' long-time counsel, Mary Guynn, draft, submit, and secure a Corrective Special Referee Deed in 2014. While the Corrective Deed purports to be for the purpose of adding one lot to the legal description, it also expressly adds that the conveyance of developer rights to RTI was part of the original 2013 Special Referee's Deed.¹ There can be no doubt about the meaning or intent of this Order as the Defendants' attorney prepared it, solicited it, and filed it.²

B. Binding Effect of the Lis Pendens and Resulting Special Referee's Deed

The Special Referee's Deed (and the Corrective Special Referee's Deed), as the latest document, governs the rights and responsibilities related to the property. The Deed in Lieu does not impact the current status of the property or the parties' roles as defined in the Special Referee's Deed. This is consistent with the principle that subsequent legal documents and proceedings take precedence over earlier ones.

C. LL's Status

Because the Deed in Lieu of Foreclosure was a nullity, LL is not the "Developer" of Mount Vintage and is not a Class A member under the Covenants. Therefore, all actions taken by LL in the administration of the Homeowners' Association since 2013 are a nullity, and the current Board

¹ The appurtenant rights were originally referred to generally in the Special Referee deed as being granted "with all and singular rights, members, hereditaments and appurtenances to the said premises belonging or in any way incident or pertaining thereto, and all the estate, right title, claim, and interest, whatsoever...".

² See the "Return to" entry on the Corrective Master Deed, and the Guynn testimony which will be supplemented.

of Directors is not properly nominated, elected, or appointed and is non-existent. RTI has obviously abandoned its developer rights by allowing LL to conduct this charade. As there is no Developer, the Class B members are automatically elevated to Class A membership and a homeowner elected Board of Directors should be recognized by this Court before trial.

These and other grounds will be supported by the pleadings, discovery, affidavits, expert reports, memorandum of law, and oral argument at the hearing on this matter.

CONCLUSION

Since the Special Referee's Deed (original and corrected) supersedes the Deed in Lieu of Foreclosure and defines the present ownership rights, membership, and privileges, LL's purported status as the Developer/Class A Member must be vacated as there are no genuine issues of material fact. RTI's failure to assume Developer status after eleven years clearly constitutes abandonment; and the absence of a Class A member for eleven years should act to automatically elevate the Class B members to Class A status and permit a homeowner Board of Directors to replace the current null Board prior to trial. Plaintiff is entitled to judgment on these preliminary issues as a matter of law.

JUSTIN O'TOOLE LUCEY, P.A.

By: /s/ Anna McCann
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August 13, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF EDGEFIELD) ELEVENTH JUDICIAL CIRCUIT

ELIZABETH M. FERRARO; JAMES) C.A. No.: 2021-CP-19-00050
 T. FERRARO; EDWARD J.)
 PRZYBYL; MARCELLA GLEIE;)
 JOHN E. GLEIE, JR.; THOMAS)
 BOWES; CONNIE BOWES;)
 MOATAZ ALASADI; VIRGINIA)
 KIRKWOOD; BOB KIRKWOOD;)
 PAUL VICHROSKI; NYDZA)
 VICHROSKI; JAMES)
 MONTELLESE; and ROXANN)
 MONTELLESE, *Individually,*)
Derivatively, and on Behalf of all the)
Mount Vintage Homeowners Association)
Members,)
)
)
 Plaintiffs,)
)
)

vs.)

LL OF SC, LLC; RAIFORD TOPSAIL)
 ISLAND INVESTMENTS, LLC;)
 MOUNT VINTAGE PLANTATION)
 HOMEOWNERS ASSOCIATION,)
 INC. a/k/a MOUNT VINTAGE)
 HOMEOWNERS ASSOCIATION,)
 INC.; and TR SALES PLANTATION,)
 LLC,)
)
 Defendants.)

MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO DEVELOPER
RIGHTS AND CLASS A MEMBERSHIP

Defendants LL of SC, LLC and Raiford Topsail Island Investments, LLC respectfully submit this memorandum in opposition to Plaintiffs' motion for partial summary judgment as to developer rights and Class A membership. In short, Plaintiffs' argument is:

1. That LL of SC, LLC does not have developer rights in Mount Vintage, and does not hold the Class A membership interest in the community;

2. That Raiford Topsail Island Investments, LLC is the holder of developer rights, and is the holder of the Class A membership interest;
3. That this is so, allegedly, because the subsequent assignment of a successful bid at a mortgage foreclosure nullified LL of SC's deed in lieu, through which it acquired its developer rights and Class A membership interest;
4. That RTI has abdicated its rightful status as developer in Mount Vintage; and,
5. That, because of such abdication, the Court should judicially dissolve the existing Board of Directors and install its own Board.

Even if the Court could take such drastic action, it is not warranted. Plaintiffs' analysis of the pertinent facts is deeply misguided.

I. LL of SC's deed in lieu was not superseded by the Special Referee's deeds.

In 2010, LL of SC loaned the immediately preceding developer of Mount Vintage \$2.5 million, taking back a mortgage against the entirety of that party's interest in Mount Vintage as security for payment. (See 2010 Mortg. Excerpt, attached hereto as **Attachment 1.**)

By the latter months of 2012, the debtor-developer was in default of its note to LL of SC. Accordingly, during October 2012, LL of SC caused its legal counsel to commence foreclosure proceedings against the mortgage. (See Pls.' Mot. Partial Summ. Judg., Exhibits A & B.) Specifically, on October 23, 2012, a foreclosure action was commenced against the debtor-developer, and a lis pendens was recorded in connection therewith.

On September 3, 2013, a deed in lieu of foreclosure was recorded in the Office of the Register of Deeds for Edgefield County, transferring the entirety of the debtor-developer's interest in Mount Vintage to LL of SC in satisfaction of the debt. (See Pls.' Mot. Partial Summ. Judg., Exhibit C.)

A little more than 2 months later, on November 4, 2013, and in connection with the foreclosure proceedings against the debtor-developer that were still under way, LL of SC attended a foreclosure sale and “was the high bidder” of the debtor-developer’s remaining interest in Mount Vintage “with the successful bid amount of \$100,000.00.” (See Pls.’ Mot. Partial Summ. Judg., Exhibit D.) Payment was then tendered to the Special Referee. (See Pls.’ Mot. Partial Summ. Judg., Exhibit E.)

Two days later, on November 6, LL of SC caused its legal counsel to file an assignment of bid in the Edgefield County foreclosure action, directing that the Special Referee’s deed should be made out to Raiford Topsail Island Investments. (See Pls.’ Mot. Partial Summ. Judg., Exhibit D.) The Special Referee honored that instruction, and, on November 11, 2013, issued a foreclosure deed in favor of Raiford Topsail Island Investments.

It is on this factual basis that Plaintiffs claim the deed in lieu was a legal nullity, that it was superseded by the Special Referee’s foreclosure deed, and that Raiford Topsail Island Investments—not LL of SC—holds developer rights in Mount Vintage.

This leads to an exceedingly narrow question presented: *What is the net legal effect when the creditor in a foreclosure action purchases the same rights at a foreclosure sale that had been previously acquired by the same creditor through a deed in lieu?*

Plaintiffs have not cited to any case that resolves this issue. Instead, they have generally argued that a deed in lieu of foreclosure is trumped by an earlier filed lis pendens. And, in some circumstances, that may be accurate. But not in this case.

First of all, a lis pendens does not create a property right. It is merely a mechanism to put the world on notice that an adverse interest is claimed in the subject property. See, e.g., S.C. Code § 15-11-20 (explicitly describing the purpose of a lis pendens as constructive notice to

subsequent purchasers or encumbrancers). Whether the property right claimed in a lis pendens ultimately exists is a matter for a much later adjudication.

Second, and of particular importance to this case, the lis pendens at issue was recorded by LL of SC against the debtor-developer's property with respect to a pre-existing mortgage that LL of SC had against the same party and the same property. In other words, through the mortgage, LL of SC had an adverse interest in the debtor-developer's Mount Vintage property; and through the lis pendens, LL of SC was putting the world on notice that it was in the midst of foreclosing on the mortgage. The mortgage gave rise to the lis pendens.

Third, through the deed-in-lieu, LL of SC acquired the same rights and interest to the Mount Vintage property that it could have acquired through foreclosure.

And fourth, LL of SC was the winning bidder at the foreclosure auction. Only after winning the auction and paying what was owed did LL of SC assign its rights of ownership (if any) to Raiford Topsail Island Investments.

But why would a creditor proceed with a foreclosure sale after getting a deed-in-lieu? The reason is very simple: for the foreclosing creditor to be more assured of clean title. See, e.g., Decon Group, Inc. v. Prudential Mortg. Cap. Co., 227 Cal. App. 4th 665, 174 Cal. Rptr. 3d 205 (Cal. Ct. App. 2014). When a creditor takes title to property through a deed-in-lieu, he takes the property subject to all existing liens and encumbrances as of the date of transfer. By contrast, when a creditor takes title through a foreclosure sale, he takes the property free and clear of junior liens and encumbrances as of the date of sale. See, e.g., Green Tree Servicing v. Adams, 375 S.C. 583, 654 S.E.2d 100 (Ct. App. 2007). Therefore, by taking a belt-and-suspenders approach to foreclosure, a first-priority creditor may be able to get the best of both worlds: taking title to property more quickly and cheaply than waiting for a foreclosure sale, but using

foreclosure to ultimately extinguish junior liens, be they known or unknown. See CIT Bank, N.A. v. Buono, C.A. No. 14-CV-6610, *6 n. 3 (E.D.N.Y. Nov. 8, 2019) (“Generally, an experienced and careful lender will only rarely find the acceptance of a deed in lieu of foreclosure to be an appropriate avenue for settling or concluding a foreclosure action.” (citation and internal quotation omitted).)

LL of SC took the belt-and-suspenders approach. In fact, when LL of SC received the debtor-developer’s deed-in-lieu, it would very much seem as though LL of SC’s equitable interest—established by the mortgage—was united with ownership, establishing a merger that would nullify the relief sought in the foreclosure action. See, e.g., McCraney v. Morris, 170 S.C. 250, 170 S.E. 276 (1933) (applying the doctrine of merger). If that is accurate, then a foreclosure sale of the debtor-developer’s property would have absolutely no value to anyone—at least, to no one other than LL of SC.

All of this has previously been explained. During the course of this litigation, Plaintiffs took the deposition of Mary Guynn, Esq., a lawyer in Aiken who has worked with LL of SC for a very long time, and who was responsible for coordinating the debtor-developer deed-in-lieu / foreclosure transaction. (See Dep. Guynn, attached hereto as **Attachment 2**, 23:20-31:1.) In relevant part:

Q: And what is this?

...

A: This is a deed in lieu of foreclosure.

Q: And what’s the purpose of this document?

A: This document was K&H Development deeding over to LL of SC all of the property that was subject to the foreclosure action as well as developer rights.

Q: Okay. And is—why would this not halt the action—the foreclosure action?

A: We elected to proceed forward and complete the sale for two purposes—to ensure that title was clean. It would estop anyone that had filed a claim against the properties post-filing of the lis pendens, and it would also give any other named creditor the opportunity to voice or to assert a lien on the properties.

Q: So in your understanding, did developer rights transfer with this deed in lieu of foreclosure, or did they transfer with the special referee's deed at the conclusion of the foreclosure action.

A: They transferred with this deed in lieu of foreclosure.

...

Q: Do you believe that this document, the special referee deed, transferred developer rights to Raiford Topsail Island Investments?

A: No.

Q: And why is that?

A: The developer rights had already been transferred to LL of SC with the deed in lieu of foreclosure.

...

Q: So the special referee's deed that in essence finalized the foreclosure proceeding that was filed in 2012, why is—why does this special referee deed not supersede the deed in lieu of foreclosure?

A: The deed in lieu of foreclosure, which was filed after the foreclosure action had been instituted, transferred all of the property to LL of SC at that point.

Q: Well, that what was the—I guess, again, what was the purpose of going through the foreclosure proceedings and then assigning a bid—a successful bid to RTI?

A: If any creditor claimed an interest in the properties post lis pendens, filing of the lis pendens or if any named defendant claimed an interest in the properties, they would have the opportunity at the final hearing to assert the claim. And then the special referee or the master would determine whether there was a residual claim on the lots that were transferred to LL of SC.

...

Q: So does this deed, this special referee deed, does it grant anything to Raiford Topsail Island?

A: In my opinion, it does not.

Q: And why is that?

A: There was—the property had already been conveyed over to LL of SC with the deed in lieu of foreclosure.

(Id.)

Consistent with the foregoing discussion, there is no factual or legal basis on which to conclude that the Special Referee's deed divested LL of SC of its Class A membership or status as the holder of developer rights in Mount Vintage, much less to dissolve the current Board of Directors by judicial fiat.

II. The issue of who holds developer rights is much ado about absolutely nothing.

At its core, Plaintiffs' argument is that Raiford Topsail Island Investments, LLC holds developer rights in Mount Vintage, not LL of SC. This leads to an obvious question: *Does it matter?* Effective December 31, 2013 (and as part of his estate planning), Mr. Raiford assigned the totality of his interest in Raiford Topsail Island Investments, LLC to LL of SC, LLC. (See Assignment, attached hereto as **Attachment 3.**) At this point, Raiford Topsail Island became a wholly owned subsidiary of LL of SC.

Then, by deed recorded on May 31, 2018, Raiford Topsail Island Investments, LLC quitclaimed the ownership of whatever lots it may have acquired by the Special Referee's deed in 2013 over to LL of SC. (See 2018 Quitclaim Deed, attached hereto as **Attachment 4.**)

Accordingly, even if it were the case that Raiford Topsail Island Investments, LLC had ever acquired developer rights in Mount Vintage, that has since been addressed.

III. Literally no one—other than Plaintiffs' counsel—is contending that any party other than LL of SC or Wayne Raiford individually holds developer rights in Mount Vintage.

Following are relevant excerpts of depositions taken in this case of Plaintiffs or other homeowners:

1. Sharon Brady, current Vice President of the Mount Vintage Homeowners Association, excerpt attached as **Attachment 5.** at 35:7-11:

Q: Well, who's the developer of Mount Vintage.

A: Wayne Raiford.

Q: I thought it was LL of South Carolina.

A: That may be his company.

Q: Well, which one is it; do you know?

A: I don't know.

2. Ed Przybyl, Plaintiff, Att. 5, at 67:17-19:

Q: And when it says developer, who do you understand that to be?

A: Wayne Raiford.

3. Patrick Bukszar, Homeowner, Att. 5, at 77:9-14:

Q: So sitting here today, do you know one way or another whether the HOA has been turned over from the declarant to the homeowners?

A: I mean, I would say, no, it has not since Wayne Raiford is still listed as the declarant or LL of South Carolina. . . .

4. Virginia Kirkwood, Plaintiff, Att. 5, at 46:3-11:

Q: And do you recall who the developer was when Raiford first came onto the scene?

A: He became the developer.

Q: All right. And was it Wayne that became the developer, as far as you know, or was it one of his companies?

A: One of his companies.

Q: Do you remember which one?

A: LL of SC, LLC.

5. Marcella Gleie, Plaintiff, Att. 5, at 175:7-14, acknowledging that Raiford Topsail Island Investments, LLC is “not the developer company.”
6. Gaylord “Buddy” Hodges, Homeowner, Att. 5, at 44:21-24:

Q: And is it—who was the developer—who became the developer after that assignment, which entity?

A: LL of SC.
7. Elizabeth Ferraro, Plaintiff, Att. 5, at 67:4-11, acknowledging that LL of SC, LLC is the current holder of developer rights at Mount Vintage.
8. Charles L. “Rick” Atkins, Jr., Homeowner, Att. 5, at 129:10-12, referring to Wayne Raiford as the holder of developer rights.
9. Connie Bowes, Plaintiff, Att. 5, at 42:15-25, same.
10. Art Biggs, Homeowner, Att. 5, at 32:20-25, same.

Finally, it is worth noting that, if Plaintiffs have ever intended to put the issue of who owns developer rights in question, it is nowhere alleged in any version of the Complaint they have ever filed.

In short, this issue is not before the Court. And even if it were, it has no merit.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, Plaintiffs’ motion for partial summary judgment must be denied.

Respectfully submitted,

s/ Steven Edward Buckingham

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*Attorney for Defendants LL of SC, LLC and Raiford
Topsail Island Investments, LLC*

August 26, 2024
Greenville, South Carolina

Steven Edward Buckingham

From: Justin Lucey <jlucey@lucey-law.com>
Sent: Wednesday, September 4, 2024 7:37 PM
To: Kristina Shernoff; McIntosh, Lawton Secretary (Tammy Jennings); Steven Edward Buckingham
Cc: McIntosh, Lawton Law Clerk (Kjursten Collier); Anna McCann; Mande Funai; Lee Weiland; cKrawczyk@finkellaw.com; tkelly@finkellaw.com
Subject: RE: Elizabeth M Ferraro , plaintiff, et al VS J Wayne Raiford , defendant, et al//2021CP1900050 (Quarterly Update 12)

Good evening,

Plaintiffs also move for the compulsory realignment of the Mount Vintage Homeowners Association as a Party Plaintiff. While evidence previously submitted overwhelming indicates that the Association had been damage by the Defendant's acts, today's order evidences that the Association has been controlled by a rouge fake developer for the last ten years, and needs to be compensated for the damages the rouge developer and its affiliates are done. If the Association fails to realign, it cannot recover the treble damages and attorney fees available under the South Carolina Unfair Trade Practices Act ("the Act"). The Act does not permit prosecution in a representative capacity. The derivative plaintiffs cannot prosecute this claim for the Association. It is only if the Association realigns as a party Plaintiff that these much needed remedies will be available to the Association. Additionally, as evidenced by the *Walbeck* case, there are other reasons for and benefits from the realignment of the Homeowners Association as a party Plaintiff. However, the Association presently remains controlled by a rogue developer, and appears unable to make a proper decision in this matter.

Plaintiffs also move for the the Mount Vintage Homeowners Association to be placed in a receivership. It has come to light that the Association has been controlled by a rouge, fake developer for the last ten years, and likely has no valid sitting Board of Directors or officers. Additionally, it has come to light that the rogue developer who impersonated the proper successor developer of Mt. Vintage, has been attempting to sell the Developer Rights and Golf Course amenities. Presently, the Association Board of Directors consists of persons appointed by the non-developer, as does the positions of President and Treasurer. The Association needs a receiver appointed to protect it from the actions of these impostors until these legal issues can be sorted out and decided.

These motions are included herein to comply with the pending deadlines and unfolding events; these motions will be formalized and re-submitted tomorrow Thursday, September 5, 2024.

By copy of this communication, Plaintiffs are serving all other Parties.
Respectfully submitted,

Justin Lucey
Attorney for the Plaintiffs

From: Kristina Shernoff <kshernoff@lucey-law.com>
Sent: Wednesday, September 4, 2024 7:18 PM
To: McIntosh, Lawton Secretary (Tammy Jennings) <lmcintoshsc@sccourts.org>; Steven Edward Buckingham

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD	)	CASE NO. 2021-CP-19-00050
	)	
ELIZABETH M. FERRARO, JAMES T.	)	BUSINESS COURT CASE,
FERRARO, EDWARD J. PRZYBYL,	)	ASSIGNED TO:
MARCELLA GLEIE, JOHN E. GLEIE, JR.,	)	
THOMAS BOWES, CONNIE BOWES, MOATAZ	)	THE HONORABLE R. LAWTON
ALASADI, VIRGINIA KIRKWOOD, BOB	)	MCINTOSH
KIRKWOOD, PAUL VICHROSKI, NYDZA	)	
VICHROSKI, JAMES MONTELLESE,	)	
ROXANN MONTELLESE, Individually,	)	
Derivatively, and on Behalf of all the Mount	)	
Vintage Homeowners Association Members,	)	
	)	PLAINTIFFS' MOTION IN LIMINE FOR
Plaintiffs,	)	REALIGNMENT OF ASSOCIATION AS
	)	A PLAINTIFF
vs.	)	
	)	
LL OF SC, LLC, RAIFORD TOPSAIL ISLAND	)	
INVESTMENTS, LLC, T R SALES	)	
PLANTATION, LLC, AND MOUNT VINTAGE	)	
PLANTATION HOMEOWNERS ASSOCIATION,	)	
INC. A/K/A MOUNT VINTAGE HOMEOWNERS	)	
ASSOCIATION, INC.,	)	
	)	
Defendants.	)	

Come now, Plaintiffs, above named, and move this Court for an order realigning the Mount Vintage Plantation Homeowners' Association ("the Association") as a Plaintiff before the trial of this matter. The basis of this Motion is as follows:

As conceded by Defendants, the primary issue in controversy in this Case is an allegation of harm to the Association caused by the Defendants. (*See generally* Defs. Mot. for Summary Judgment, filed Aug. 16, 2024, at 10-13) ("[E]ach and every one of these grievances pertains to actions or omissions that have allegedly had an adverse effect on the HOA[...].").

Further, if the Association fails to realign, it cannot recover the treble damages and attorney fees available under the South Carolina Unfair Trade Practices Act ("the Act"). The Act does not

permit prosecution in a representative capacity. It is only if the Association realigns as a party Plaintiff that these much-needed remedies will be available to the Association. Additionally, as evidenced by the *Walbeck*¹ case, there are other reasons for (and benefits from) the realignment of the Association as a party Plaintiff. However, the Association presently remains controlled by a rogue developer and appears unable to make a proper decision in this matter.

The law supports such a realignment. The South Carolina Supreme Court has conclusively held that Rule 21, SCRCP, grants trial judges the authority to realign parties. *Branham v. Ford Motor Co.*, 390 S.C. 203, 243, 701 S.E.2d 5, 26 (2010) (finding that trial judges have the authority to realign parties at any stage of the action, and that such a decision will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice). The Court in *Branham* further explained that, because of the similarity between Rule 21 of the Federal Rules and Rule 21, SCRCP, South Carolina courts look to and rely on federal case law interpreting the companion Federal Rule. (*See id.*). The Fourth Circuit applies the “principal purpose” test:

Application of the principal purpose test entails two steps. First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue.

U.S. Fid. & Guar. Co. v. A & S Mfg. Co., 48 F.3d 131, 133 (4th Cir. 1995).

Realignment is supported in this case, and Plaintiffs’ respectfully request that this Court grant the instant motion prior to the trial of this case.

Signature on following page.

¹ *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 589, 889 S.E.2d 537, 548 (2023), *reh'g denied* (July 26, 2023).

Respectfully submitted,

By: s/ Justin Lucey
Justin Lucey
Anna McCann
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Attorneys for the Plaintiffs

September 5, 2024
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001451

Elizabeth M. Ferraro, James T. Ferraro, Edward J. Przybyl,
Marcella Gleie, John E. Gleie, Jr., Thomas Bowes, Connie
Bowes, Moataz Alasadi, Virginia Kirkwood, Bob Kirkwood,
Paul Vichroski, Nydza Vichroski, James Montellese, and
Roxann Montellese, Individually, Derivatively, and on Behalf of
All the Mount Vintage Homeowners Association Members Respondents,

v.

LL of SC, LLC, Raiford Topsail Island Investments, LLC, TR Sales
Plantation, LLC, and Mount Vintage Plantation Homeowners
Association, Inc. *a/k/a* Mount Vintage Homeowners Association, Inc. Defendants,

Of which LL of SC, LLC, Raiford Topsail Island
Investments, LLC, and TR Sales Plantation, LLC are the Appellants / Petitioners.

VERIFICATION OF PETITIONERS

PERSONALLY APPEARED BEFORE ME the Affiant, and, after being placed under
oath, did state and/or affirms as follows:

1. My name is J. Wayne Raiford. I am over the age of eighteen (18) years,
am of sound mind, am not under the influence of any chemical substance that is likely to
impair my capacity, and am competent to give testimony.

2. The facts and circumstances presented in this statement are made based upon my own personal knowledge and information, and are true and accurate to the best of my present recollection.

3. I am authorized by LL of SC, LLC, Raiford Topsail Island Investments, LLC, and TR Sales Plantation, LLC to give this statement.

4. I have reviewed the Petition to Stay and/or for Writ of Supersedeas to which this statement is attached.

5. To the best of my knowledge, information, and belief, the factual circumstances set out in the petition are true and accurate, as are the documents provided as exhibits.

6. Respondents have claimed that Raiford Topsail Island Investments, LLC acquired developer rights for Mount Vintage in 2013, though it has always been Petitioners' understanding that LL of SC, LLC held those developer rights. This issue is very much disputed.

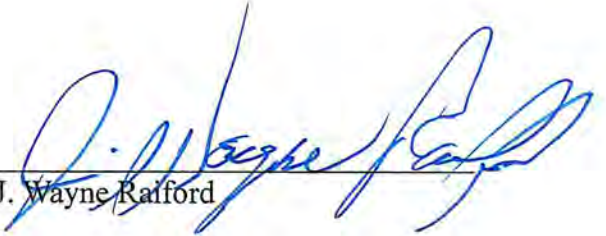
7. The same day as the issuance of the September 4 decision, Petitioners, through counsel, filed a Notice of Appeal.

8. If Petitioners are required to proceed to trial while this appeal is pending, the Court of Appeals may render an opinion on the September 4 decision that is different than what Judge McIntosh decided, which may affect the outcome of trial.

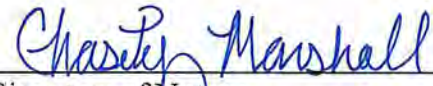
9. Additionally, Respondents are trying to use the September 4 decision to say that the homeowners association board is fake, or rogue, or has been without authority to act for the past more-than-ten years. That is just not the case. Petitioners

would appreciate the opportunity to have their appellate rights so that the September 4 decision can be corrected.

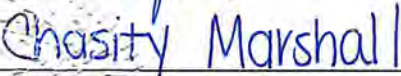
10. I affirm, under penalty of perjury, that the facts and circumstances set out in this statement are true and accurate to the best of my knowledge, information, and belief.


J. Wayne Raiford

SIGNED AND SUBSCRIBED BEFORE ME



Signature of Notary

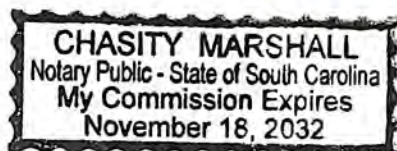


Printed Name

Notary Public for the State of South Carolina

This 10th Day of September, 2024.

My Commission Expires: November 18, 2032



This petition seeks a Writ of Supersedeas with

Sep 06 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001451

Elizabeth M. Ferraro, James T. Ferraro, Edward J. Przybyl,
Marcella Gleie, John E. Gleie, Jr., Thomas Bowes, Connie
Bowes, Moataz Alasadi, Virginia Kirkwood, Bob Kirkwood,
Paul Vichroski, Nydza Vichroski, James Montellese, and
Roxann Montellese, Individually, Derivatively, and on Behalf of
All the Mount Vintage Homeowners Association Members Respondents,

v.

LL of SC, LLC, Raiford Topsail Island Investments, LLC, TR Sales
Plantation, LLC, and Mount Vintage Plantation Homeowners
Association, Inc. *a/k/a* Mount Vintage Homeowners Association, Inc. Defendants,

Of which LL of SC, LLC, Raiford Topsail Island
Investments, LLC, and TR Sales Plantation, LLC are the Appellants.

PROOF OF SERVICE

The undersigned counsel for Appellants hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): Appellants' / Petitioners' Petition for a Stay of Underlying Proceedings in the Trial Court and/or for Writ of Supersedeas w/ *Attachments A-I*

Counsel Served: For Respondents

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Means of Delivery: *Via Email Only*

For Mount Vintage Plantation Homeowners Association, Inc.

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(e) ckrawczyk@finkellaw.com

Means of Delivery: *Via Email Only*

Courts Served: Office of the Clerk of the Court of Appeals
ctappfilings@sccourts.org

Means of Delivery: *Via Email Only*

Date: September 6, 2024

Respectfully,

s/ Steven Edward Buckingham

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