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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2024-000322

Thomas H. Morgan ……..Respondent,

v.

John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, Lauralis Management, Inc., A Texas Corporation, and 150 Bee Street, LLC, A South Carolina Limited Liability Company ……Defendants,

Of which John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, and Lauralis Management, Inc., A Texas Corporation are the ……Appellants.

RECORD ON APPEAL
VOLUME I

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN, PLAINTIFF(S), v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION. DEFENDANT(S).	)	IN THE COURT OF COMMON PLEAS C/A NO.: 2012-CP-10-580 ORDER DENYING DEFENDANTS' MOTION TO DISMISS

FILED
2012 FEB 27 AM 9: 17
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came before the Court on February 8, 2012 upon Defendant's Motion to Dismiss and Compel Arbitration. After having considered all arguments, documents, and memoranda and for the reasons set forth below, the Court DENIES Defendant's Motion to Dismiss and Compel Arbitration:

FACTS

Plaintiff Thomas H. Morgan has brought this action both individually and in a derivative capacity on behalf of 150 Bee Street, LLC. 150 Bee Street, LLC is the owner of Bee Street Lofts, which is a condominium complex in Charleston, SC. Plaintiff Thomas H. Morgan, Defendant Bella Vista Partnership, Estate of Neal Baker, and Edwin Pearlstine, Jr. are the Members of 150 Bee Street, LLC. Defendants John Gilbert and Stuart Fred

#1 T.L.R.

are the principals of Defendant Bella Vista Partnership. Plaintiff Thomas H. Morgan and Defendant Stuart Fred are currently Co-Managing Members of 150 Bee Street.

Management of 150 Bee Street, LLC is governed by the Second Amended and Restated Limited Liability Agreement of 150 Bee Street, LLC ("Operating Agreement"). The Operating Agreement contains the following language on the second page, "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO SOUTH CAROLINA CODE SECTION 15-48-10 ET. SEQ. AS MODIFIED HEREIN." Section 14.14(b) of the Operating Agreement states, "Any issues that remain unresolved followings such mediation shall be submitted to binding arbitration pursuant to the Uniform Arbitration Act (S.C. Code Section 15-48-10 et. seq.)[.]" The Operating Agreement was signed by LLC Members Thomas H. Morgan, Neal Baker, Edwin S. Pearlstine, Jr., and Bella Vista Partnership. Defendants Stuart Fred and John Gilbert signed the Operating Agreement individually only with respect to Section 8.02(B), which concerns indemnification. Defendants have filed this Motion to Dismiss and Compel Arbitration based upon this arbitration clause contained in the Operating Agreement.

LAW/ANALYSIS

Validity of South Carolina arbitration clauses is governed by the Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, et. seq. The Code mandates that "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." South Carolina courts strictly construe and enforce the requirements of this statute. For example, in Timms v. Greene, 427 S.E.2d 642 (S.C. 1993), the South Carolina Supreme Court held an arbitration

#2 J.L.H.

clause was unenforceable where the contract did not include any mention of arbitration on the first page. The court noted that "the State Act is clear with regard to the notice requirement . . . Moreover, the agreement specifically provides for arbitration 'in accordance with the provisions of the Uniform Arbitration Act,' the official designation for the State Act." Thus, the parties were not required to arbitrate and the suit could proceed in circuit court.

Here, notice that the Operating Agreement is subject to arbitration does not appear on the first page of the Agreement. Notice appears on the second page. Like Timms, supra, the agreement specifically provides for arbitration pursuant to Section 15-48-10. Thus, pursuant to Section 15-48-10 of the Code and accompanying case law, the arbitration clause at issue is not enforceable and does not serve as a basis for dismissal of this suit.

Defendants contend that, even if the clause is unenforceable under the Uniform Arbitration Act, it is enforceable under the Federal Arbitration Act ("FAA"). The FAA does not apply if the agreement does not affect interstate commerce. Zabinski v. Bright Acres Assoc., 553 S.E.2d 110 (S.C. 2001). "Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State Law." Timms, 427 S.E.2d at 644. The court must examine the agreement, the complaint, and the surrounding facts, but must focus upon what the terms of the contract specifically require the parties to perform. Thornton v. Trident Med. Ctr., LLC, 592 S.E.2d 50 (S.C. Ct. App. 2003). "Our courts consistently look to the essential character of the contract when applying the FAA." Id. Where the terms of the contract require performance only within one state, the FAA does not apply. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956).

#3 T.L.H.

In this case, the contract at issue is the Second Amended Operating Agreement,

which is a document that governs the management of a South Carolina LLC, that owns property only located in South Carolina, and that only does business within South Carolina. Nothing in the contract requires or even contemplates the parties the parties engaging in interstate commerce. Thus, the Court finds that the FAA does not apply to this agreement and the arbitration is unenforceable.

The Court notes that even if the arbitration clause was enforceable, it would not operate to force all parties to arbitration. This suit involves numerous parties that are non-signatories to the agreement. "Arbitration is a matter of contract and controlled by contract law." S.C. Pub. Serv. Auth. v. Great W. Coal, 437 S.E.2d 22, 25 (S.C. 1993). "Where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration." Hilton Head Resort Four Seasons Ctr. Horizontal Prop. Regime Council of Co-Owners, Inc. v. Resort Investment Corp., 429 S.E.2d 459, 462 (S.C. Ct. App. 1993).

Here, the only parties that signed the arbitration agreement are Thomas H. Morgan, individually, and Bella Vista Partnership. The essence of this proceeding is the derivative suit brought by Mr. Morgan on behalf of 150 Bee Street, LLC. 150 Bee Street, LLC did not sign the Operating Agreement and arbitration clause and, thus, the derivative suit cannot be compelled to arbitration. This issue was addressed by the Virginia Supreme Court in Mission Residential v. Triple Net Properties, LLC, 654 S.E.2d 888 (Va. 2008), wherein the court held that an arbitration clause in an LLC operating agreement did not require arbitration of a member's derivative claim against another member because the claim belonged to the LLC and the LLC was not a party to the operating agreement. The only parties bound by the arbitration agreement were the "members" themselves because they were the signatories. The court further held that the derivative action belonged to the

#4 T.L.J.

company, not the member bringing the action. In so holding, the court focused on the separate legal existence of the LLC (like a corporation) and noted that a party cannot be compelled to arbitrate unless it has agreed to arbitrate. While South Carolina law, has not addressed this particular issue, South Carolina law is consistent with the position taken in the Mission Residential case, in that South Carolina Courts do not compel parties to arbitration who have not signed an arbitration agreement. The South Carolina Supreme Court has held that an individual that did not sign a licensing agreement was not bound by its arbitration provision. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 535 (S.C. 2005). Therefore, the Court finds that 150 Bee Street, LLC, John Gilbert, Stuart Fred, Bomasada Group, Inc., Bomasada Investment Group II, LLC, and Lauralis Management, Inc. cannot be compelled to compulsory arbitration because they did not sign the arbitration agreement. This finding does not preclude the parties from voluntarily submitting their claims and defenses to arbitration.

CONCLUSION

#5

For the reasons set forth above, the Court DENIES Defendants' Motion to Dismiss and Compel Arbitration.

IT IS SO ORDERED.

T. L. Hughston, Jr.

Thomas L. Hughston, Jr.
Circuit Court Judge

Charleston, SC

February 27, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A NO.: 2012-CP-10-580
COUNTY OF CHARLESTON	)	
	)	
THOMAS H. MORGAN,	)	
	)	
PLAINTIFF(S),	)	
	)	
v.	)	CONSENT ORDER REFERRING MATTER TO ARBITRATION
	)	
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION.	)	
	)	
DEFENDANT(S).	)	
	)	

FILED
2012 JUL -9 PM 4:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The parties, through their counsel, have stipulated to the entry of this Order referring the above captioned matter to binding arbitration.

NOW THEREFORE, IT IS HEREBY ORDERED:

1. All claims, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case, shall be decided by binding arbitration that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act and all of the parties submit themselves to the jurisdiction of this court and arbitration panel. All parties shall assert all claims they may have against one another arising out of this matter, including, without limitation, any claims for breach of the arbitration agreement by the other party by the filing of the instant action.

2. All time periods in this order are calendar days unless specifically noted herein. To the extent that a deadline falls on a weekend day or legal holiday, the deadline shall be extended to the next business day.

#1 T.L.H.

3. The parties have mutually selected Dawes Cooke to serve on a three arbitrator panel as its chairman. The court has agreed to select the remaining two arbitrators by choosing one from the Plaintiff's list of five proposed arbitrators and one from the Defendants' list of five proposed arbitrators.

WCSR 7322029v1

The Court hereby selects Brewton Haygood as the arbitrator from the Plaintiff's proposed list, and Clarence A. Robertson, III as the arbitrator from the Defendants' proposed list.

4. The Chairperson shall have sole authority and responsibility to hear and decide procedural, scheduling, and discovery-related motions, disputes, and issues, including but not limited to:

(A) Initiating a scheduling conference and establish a schedule for arbitration proceedings, including the hearing on the merits;
(B) Conducting pre-hearing conferences;
(C) Disposing of motions to amend the pleadings;
(D) Ordering discovery, including in-state and out-of-state subpoenas to third parties;
(E) Resolving discovery disputes and impose sanctions against a party that does not comply with the orders of the Chairperson/Panel; and
(F) Resolving motions concerning discovery, compelling discovery responses, and protecting parties from discovery abuses.

5. All other motions, disputes, and/or issues, including dispositive motions, rulings on the admissibility and exclusion of evidence and/or witnesses, injunctive relief, and any other non-procedural, non-scheduling, and non-discovery issue, must be determined by a majority vote of the full Panel unless otherwise agreed to by both sides.

6. Discovery shall be freely allowed in the same manner as it would have been allowed in South Carolina Court of Common Pleas to advance a fair determination of the merits. Depositions, subpoenas and discovery shall be freely permitted, including out of state discovery, and the Chairperson or Panel will assist to facilitate discovery to the extent needed.

7. The arbitrator(s) are not required to strictly follow the South Carolina Rules of Evidence. The arbitrator(s) shall exercise discretion in applying evidentiary rules to secure fairness in the hearing, consistent with the expedited purpose of arbitration. It is the intent of this arbitration agreement to expedite and streamline the presentation of evidence and witnesses at the arbitration hearing, and, to that end, the parties do hereby agree that records custodians shall not be required to authenticate documents at the hearing. Moreover, to the extent that the parties may agree on the relevancy or admissibility of evidence, exhibits and witnesses to be presented at trial, the panel of arbitrators shall defer to the parties' agreement. In order to encourage the streamlined presentation of witnesses and evidence, the parties shall be required to exchange proposed exhibits and witnesses with each other ten (10) days in advance of the first day of the arbitration trial hearing and will make best efforts to submit one comprehensive list of exhibits to the panel. It is not necessary that the parties agree to the exhibits in the exhibit list, only that the parties intend to introduce the exhibits at trial. Moreover, the exhibit list shall not be a bar to the admission of other evidence that may become relevant at trial.

#2 T.L.H.

8. This arbitration shall follow the South Carolina Rules of Civil Procedure where practical and to the extent not inconsistent herewith.

9. The arbitrator(s) shall apply the substantive law that the arbitrator(s) determine(s) to be applicable to the issues in the dispute.

10. The Court shall enter appropriate orders to ensure compliance with the Orders and awards of the arbitrator(s) and to ensure that the arbitrator(s) receive payment.

11. Plaintiff shall contribute one-half (1/2) of the cost of the arbitration unless otherwise agreed to by the parties in writing or ordered by the arbitrator(s) in the award with the Defendants collectively contributing the other half (1/2).

12. Within thirty (30) days of the appointment of the Chairperson, the parties will propose a joint scheduling order to the panel. If the parties cannot agree on a joint scheduling order, the panel will issue a scheduling order giving the parties full, fair and adequate time to conduct discovery, name experts, file and argue motions, and to present their case. The scheduling order can be amended by stipulation of the parties or by ruling of the arbitrator(s).

13. The arbitrators shall issue a final determination within thirty (30) days of the completion of the hearing unless otherwise agreed to in writing by the parties. The determination shall be issued in the form of an award on all claims and counter-claims.

#3

14. This case shall be administratively stayed pending completion of the arbitration. The Court retains jurisdiction to enforce this Order and to enter any Orders including a judgment upon the arbitrator's award or order.

T. L. Hughston Jr.

Thomas Hughston
Presiding Judge

Dated: July 9, 2012

WCSR 7322029v1

Confirmed phone call.
J.L.H.

The parties hereby agree to entering of this order:

S/

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Clawson & Staubes, LLC
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Attorney for Plaintiff

S/

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WCSR 7322029v1

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580 **ORDER GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT**

The Plaintiff moved before the Arbitration Panel for an Order allowing him to amend his complaint. The undersigned, as the Arbitration Chair, in accordance with the Arbitration Agreement and the South Carolina Rules of Civil Procedure, grants the Plaintiff's motion, without prejudice to the Defendants' ability to make any legal arguments they may have asserted in opposition to this motion. The Amended Complaint shall be served on the Defendants following the execution of this Order.

IT IS SO ORDERED.

M. Dawes Cooke, Jr., Panel Chair

January 7, 2019

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580 **ORDER GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT**

The Plaintiff moved before the Arbitration Panel for an Order allowing him to amend the First Amended Complaint. The undersigned, as the Arbitration Chair, in accordance with the Arbitration Agreement and the South Carolina Rules of Civil Procedure, grants the Plaintiff's motion, strictly preserving. without prejudice to or waiver of, the Defendants' legal arguments/objections they have asserted in opposition to this motion and the earlier motion to amended Plaintiff's original Complaint dated January 26, 2012. The Second Amended Complaint shall be served on the Defendants following the execution of this Order:

IT IS SO ORDERED.

H. Brewton Hagood

Brew Hagood, Panel Chair

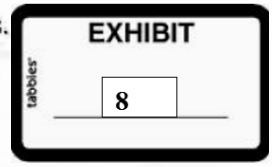
April 4, 2022

WBD (US) 56008544v1

STATE OF SOUTH CAROLINA	)	IN ARBITRATION
COUNTY OF CHARLESTON	)	PREVIOUSLY:
THOMAS H. MORGAN	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2012-CP-10-580
Plaintiff,	)	
v.	)	
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY	)	**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT**
Defendants.	)	

This case is being arbitrated pursuant to the terms of the Consent Order Referring Matter to Arbitration filed on July 9, 2012. The composition of the panel has changed over the years. M. Dawes Cooke, the initial chair of the panel, recused himself on June 9, 2019. Paul A. Dominick was substituted in place of Mr. Cooke under the terms of a Consent Order Substituting Arbitrator in September of 2019. Claron A. Robertson, III resigned from the Panel and the parties agreed to a Consent Order Substituting Arbitrator filed on May 9, 2022, in which Costa M. Pleicones was substituted in place of Mr. Robertson.

The Defendants filed two motions pursuant to Rule 12, SCRCP, and a third motion under Rule 56, SCRCP. Because matters outside the pleadings were submitted by both parties, without objection and considered by the panel, the Rule 12 motions were also treated as having been made under Rule 56. In accordance with the Third Amended Scheduling Order dated April 29, 2022, counsel for the parties provided the members of the panel with electronic and hard copies of the Motions, memoranda in support and in opposition to the Motions along with exhibits and excerpts from depositions.



Oral arguments were heard by the panel on June 16, 2022, at the offices of Nexsen Pruet in Charleston. W. Andrew Gowder, Jr. and Michael T. Rose appeared on behalf of the Plaintiff. Henry E. Grimball and Morris A. Ellison appeared on behalf of the Defendants. The parties agreed to split the cost of a court reporter, Marie McCollum, for the hearing. On June 23, 2022, Ms. McCollum provided a link to download a certified transcript of the hearing to counsel for the parties and the panel chair. The panel chair downloaded the transcript and provided a copy to the other members of the panel. The Court Reporter provided an index at pages 125 and 126 of the transcript listing the eight Exhibits which were marked by counsel for Defendants at the hearing.

At the conclusion of the hearing counsel for Defendants agreed that the notebooks and electronic copies sent by Plaintiff's counsel to the members of the panel which contained the Plaintiff's Memoranda In Opposition to the Defendants' three Motions and Exhibits submitted to the Panel were considered to be part of the record for the hearing even though these documents were not marked as individual exhibits at the hearing.

The panel conferred following the hearing on June 16, 2022, and each member of the panel had an opportunity to review the transcript of the hearing prior to the issuance of this Order. Additionally, the panel met via Zoom on June 30, 2022, to deliberate and finalize their ruling on the three outstanding Motions.

After review of Defendants' Motions, the memoranda in support and in opposition to the Motions, the exhibits filed by the parties and consideration of the oral arguments by counsel at the hearing on June 16, 2022, which are set forth in the transcript, it is the ruling of the panel that each of Defendants three Motions are hereby **DENIED.**

AND IT IS SO ORDERED.

By: H. Brewton Hagood
H. Brewton Hagood, Chair,
Arbitration Panel
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By: _____
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By: _____
Costa M. Pleicones, Member,
Arbitration Panel
CPleicones@hsblawfirm.com

Dated: July 11, 2022

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Dated: July 11, 2022

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION IN THE COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580 **FINAL DETERMINATION OF THE ARBITRATION PANEL**

This final determination is made pursuant to the authority granted this arbitration panel by the Consent Order Referring Matter to Arbitration entered in the Court of Common Pleas by the Hon. Thomas L. Hughston, Jr., Presiding Judge, dated July 9, 2012. By the terms of the Order,

> All claims, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case, shall be decided by binding arbitration that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act and all of the parties submit themselves to the jurisdiction of this court and arbitration panel. All parties shall assert all claims they may have against one another arising out of this matter, including, without limitation, any claims for breach of the arbitration agreement by the other party by the filing of the instant action.

Order, July 9, 2012, paragraph 1.

FINDINGS OF FACT

1. **150 Bee Street, LLC, was formed to acquire, build, and sell a condominium project in Charleston, South Carolina.**

In 2000, Neal I. Baker, Thomas H. Morgan, Edwin S. Pearlstine, Jr., and Ernest L. Masters, Jr., formed 150 Bee Street, LLC (the "Company" or the "LLC") to acquire the property located at 150 Bee Street, Charleston, South Carolina (the "Property"). Plaintiff's Exhibit No. 1 (hereafter "PE 1"). Baker was successful in rezoning the property for 108 residential units (the Project") shortly after purchasing the property, which greatly increased its value. Baker realized that he did not have the experience to develop a 108-unit residential project, and he suggested that the original Members bring in a friend of his, Stuart Fred, who had developed residential apartment projects and could provide some expertise and help develop the Property.

In 2003 Fred and Gilbert joined the Company as Members through a Texas general partnership known as Bella Vista Partnership in which they were the two general partners. PE 3. Fred and Baker worked with several architectural firms to come up with plans for a 108-unit mid-rise building on the site and attempted to get approval from the City of Charleston's architectural review board ("BAR") so they could start construction. Fred and Baker had difficulty getting approval from the BAR, and plans were altered numerous times. Finally in 2004, the BAR granted approval, and the Company took bids for the construction of the Project. Fred and Baker determined that Hightower Construction, a local Charleston firm, had the lowest bid and would act as the general contractor for the project. Transcript page 23, lines 4-10 (hereafter, "T. 23, 4-10").

In early 2005 the Project was ready for construction, and Fred and Gilbert arranged bank financing with a Houston-based bank, Amegy Bank, that had financed other projects for them. Fred and Gilbert provided revised organizational documents to the Members for their review that provided for payment of fees to Fred and Gilbert's wholly owned companies, Bomasada Investment Group, Inc. ("Bomasada:) and Bomasada Investment Group II ("BIG II"). PE 5. Bomasada is a Houston-based privately held multifamily real estate development and contracting firm. BIG II is Bomasada's construction entity. BIG II has never been licensed as a general contractor in South Carolina.

When Fred and Gilbert joined the Company, Fred had represented to the Members that he and Gilbert would develop the Property without charging a fee because the group had let him in the project at no markup. T. 69, 7-12. In the documents Fred and Gilbert presented to the Members, though, the terms had changed, and Fred by then decided to charge a $750,000 development fee in his role as Developer (through Bomasada) and a 1% cost-plus fee as general contractor (through BIG II). PE 19.

Fred insisted that the company he owned (BIG II) must act as the general contractor to save money on the project and that those terms were nonnegotiable. PE 12. Fred claimed that he had subcontractors who could do the work cheaper than Hightower's local subcontractors and thus the group would save money on the construction by using BIG II as the contractor rather than Hightower, though Hightower would be the main subcontractor for the project. T. 25, 23- 27,19.

The documents that Fred and Gilbert presented to the other Members at the start of construction required the Company to amend its Operating Agreement, execute a Development Agreement, a Construction Agreement, and Loan Documents, including personal guaranties by the Members to the construction lender. Morgan wanted his attorneys to review these documents, but Gilbert and Fred wrote an email to Morgan explaining that the organizational documents were proprietary, and they did not want any other attorneys reviewing the documents other than the Company's attorney. PE 15; T. 85, 9- 87, 2.

Fred sent an e-mail outlining the terms of the agreements. He specifically stated that Bomasada would not charge more than the $750,000 development fee and that BIG II would charge only 1% of the total cost of the hard cost construction. All costs were to be passed through at actual cost to the Company, and Fred and Gilbert's companies would not profit other than the 1% fee and the development fee. PE 16.

Morgan would not agree to sign the documents without having his attorneys review them despite Fred and Gilbert's insistence. PE 9, PE 17, PE 22. Morgan's attorneys reviewed the language of the agreements and made numerous changes to protect Morgan and the other Members. The (Second Amended) Operating Agreement and Development Agreement were written to reflect this structure.

2. The Members of the Company are governed by provisions of the Second Amended Operating Agreement.

On March 4, 2005, Morgan, Baker, Pearlstine, and Fred and Gilbert as Bella Vista Partnership signed the "Second Amended and Restated Limited Liability Company Agreement of 150 Bee Street, LLC ("Second Amended Operating Agreement" or "Operating Agreement"). PE 21. Exhibit A of the Second Amended Operating Agreement listed the updated ownership interest in the Company as follows: Neal Baker, 26.67%; Bella Vista Partnership, 26.67%; Thomas H. Morgan 26.66%; Edwin S. Pearlstine, Jr. 20.00%.

As a result of the review and revision of the document by separate lawyers for Fred and Gilbert, Morgan, and the Company, the Second Amended Operating Agreement was different in significant ways from the former versions.

Section 1.03 defined Affiliates as "a Person or Persons directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with the Person(s) in question." Fred and Gilbert were the sole owners of Bomasada, BIG II, and Bella Vista, and Fred was the sole owner of the Lauralis companies, including Lauralis Management, Inc., a defendant in this arbitration. Each of those companies were Affiliates of Fred and Gilbert.

Section 1.13 defined "Majority Consent" as the "affirmative consent or approval, either in writing or at a meeting of the Members, of Members owning a majority of the Company Interests owned by Members entitled to vote, based upon the percentages of each such Company Interest." T. 1216, 2-11. All of the minutes of meetings of the Members and written memoranda indicating actions taken

without a Meeting are contained within the exhibit marked PE 2. There are no other minutes, resolutions or actions taken by the Members memorialized in writing that are not contained in PE 2 (other than PE 29 described below).

Article III provided for capital calls and for loans to be made by Members if other Members failed to make an Additional Capital Contribution as required. Any such amount advanced is treated under Section 3.03 as a non-recourse loan by the Contributing Member to the Non-Contributing Member as a non-recourse loan of 35% from the date advanced until it is repaid. The calculation of the award to Morgan individually at the conclusion of this Final Determination is based upon this provision.

Section 6.01 named the initial Managing Members of the Company to be Fred and Baker. This section also provided that one of the representatives of Bella Vista would always be a Managing Member. Section 6.01 also stated that "at all times while either Neal Baker or Tom Morgan is a Member, Neal Baker shall be one of the Managing Members (or in the event of his death or disability, Tom Morgan shall serve in such capacity)." Fred and Baker were the Managing Members of the Company until Baker's death in August 2011, and Gilbert acted as their agent by the grant of express authority under a letter they issued to him at the outset of the Project. PE 29.

Section 6.01 also provided that the Managing Members shall be responsible for preparing a budget for the Project, and that budget was attached to the Operating Agreement as Exhibit B. ("Budget"). Section 6.01 further required that the Managing Members "shall track the Project's performance against the Budget and shall distribute to the Members monthly financial reports of the Project's performance in relation to the Budget."(emphasis added).

Section 6.02 provided broad powers for the Managing Members to operate the Company, but Section 6.03 imposed limits on that authority, "notwithstanding Section 6.02," and required that a number of actions required Majority Consent (as defined in 1.13) of the Members, including entering into an arrangement with a Member or an Affiliate of a Member for goods or services, and deviating

from the Budget in an amount exceeding $50,000. Consistent with that provision, one such Related Party transaction, the Development Agreement with Bomasada, was expressly authorized in Section 6.04.

As described in this Final Determination, Fred and Gilbert charged the use of Fred's private plane owned by Lauralis Management, Inc. and leased by Lauralis Leasing, both Affiliates of Fred, without Majority Consent of the Members. Also as described herein, Fred and Gilbert changed the Budget numerous times without obtaining Majority Consent of the Members.

Section 9.01 provided that Managing Members would only be compensated in an amount to be set by unanimous consent of the Members. As detailed in the Elliott Davis report, PE 187, Schedule 1, and the BIS printout of BIG II's entries, PE 190, Fred, Gilbert, and Baker were all compensated without unanimous consent of the Members. Section 9.02 provided that only costs and expenses reasonably incurred by a Member on behalf of the Company or otherwise in connection with the Company's business shall be reimbursed by the Company. PE 187 and 190, as well as the Burkett report, PE 203, detail numerous instances in which the Managing Members were reimbursed for charges not on behalf of the Company or in connection with the Company's business, as detailed herein.

Section 10.02 provided that books and records of the Company are the property of the Company and shall be kept in accordance with sound accounting principles consistently applied and shall be open to the reasonable inspection and examination by the Members and their duly authorized representatives. (Emphasis added). Consistently throughout the course of the Project, Fred and Gilbert refused to grant Morgan reasonable inspection and access to the books and records of the Company despite his persistent request over the course of several years, as described herein.

Section 14.01 provided that the Operating Agreement could only be amended by a written instrument signed by all Members and that all notices required by the Agreement must be in writing.

Sec. 14.03. Fred and Gilbert defend their actions throughout by claiming that the Members, including Morgan, knew or were told about certain practices which the Members were required to approve by unanimous or Majority Consent. In those instances, though, the notices were required were not in writing and violated the provisions of Sec. 14.03.

Section 14.11 provided that any action required to be taken at a meeting of Members may be taken without a meeting if the action is evidenced by the written consents describing the action taken, signed by the necessary Members entitled to vote and required to approve such action. If that action was taken by less than all Members, entitled to vote, the Managing Members shall give all Members who did not participate in the action written notice of the action. Several actions without a meeting memorandum are contained in PE 2. In many other instances described in this Final Determination, however, the Defendants claim to have obtained consent without a meeting without any written evidence, in violation of this Section.

The Budget, Exhibit B of the Operating Agreement, prepared by Gilbert for the Managing Members, contained a line item of $304,000 for Developer Overhead. There was no other Budget line item for travel or other reimbursable expenses for the Developer. When Morgan asked Gilbert about this figure prior to the execution of the Second Amended Operating Agreement, Gilbert told Morgan that the Developer Overhead "is really the owners overhead in this case. This line item pays for travel expenses and office expenses such as salaries, fed ex, etc. incurred by the owner. In addition, when Stuart and I travel to Charleston for Belle Vista business, it is covered under the developer overhead." PE 18; T. 60, 25- 64, 16.

3. **Fred and Gilbert's wholly owned company, Bomasada, contracted with the Company to be the Developer and to act as the owner's representative for the Project**.

The Company executed the Development Agreement with Bomasada pursuant to which Bomasada was to act as "Developer" for a fee of $750,000. PE 19.

Section 1.2 of the Development Agreement specified that Bomasada's duties were among, other things, selecting and engaging BIG II as the contractor for a fee of one per cent (1%) of the general contracting costs of the Project pursuant to the terms of an AIA Cost Plus contract, entering into a Cost Plus contract with Hightower Construction Co., Inc. as a subcontractor for construction of improvements on the Property, supervising the construction work during all phases of construction, providing monthly reports showing actual costs and explaining variances between actual costs and the budget, and providing all necessary insurance to the satisfaction of the Company.

As described in this Final Determination, Bomasada failed to enter into a written contract with BIG II on a cost plus 1% basis, though that was the recognized basis of compensation under the Project without a written contract and failed to obtain insurance covering the Company for liability claims for construction defects.

Section 1.3 provided that the Developer would be paid a $750,000 fee in monthly installments and would be entitled to reimbursement of reasonable out of pocket expenses incurred in the performance of the Development Agreement including overhead as a reasonable percentage of its manpower devoted to the Project. ("Emphasis added").

The Company paid Bomasada its fee, in full. T. 1258, 13-15. As detailed herein, Bomasada paid itself directly from the Company and through reimbursement from BIG II as part of the construction contract for numerous charges that were not expenses incurred in the performance of the Development Agreement and allocated overhead to the Project in an amount not related to the manpower actually allocated to the Project.

4. **Fred and Gilbert's wholly owned company, BIG II, contracted with the Company to serve as the general contractor for the Project**.

The Company was supposed to have entered an AIA Cost Plus Contract with BIG II to act as "Contractor" for a fee of one percent (1%) of the general contracting costs of the Project. PE 19, as described above. The contract that Fred and Gilbert executed on behalf of the Company with BIG

II, though, was a "Stipulated Sum" contract for the sum of $25,000,000 on which Mr. Gilbert signed for the "Owner" though he was not authorized at that time to do so. PE 10.

Bomasada also executed an AIA A111 Standard Form General Contractor's agreement, naming BIG II as Owner and Hightower as Contractor, leading to inconsistent positions being taken by Bomasada on whether it or Hightower was the general contractor for the Project. PE 28.

Clearly from the loan documents and the construction draw documents, Amegy Bank, the lender, regarded BIG II as the general contractor. Amegy Bank had no relationship with Hightower.

On or about March 31, 2005, 150 Bee Street, LLC executed the original promissory note with Amegy Bank in the principal sum of $32,450,000.00. To further secure the loan, Baker, Fred, Gilbert, Morgan, and Pearlstine each executed a Guaranty Agreement and "Pledge and Security Agreement" with Amegy Bank National Association ("Amegy Bank") as "Lender."

5. Bomasada, as Developer, contracted with Village Real Estate Services to provide real estate sales and marketing services for the Project.

The Company, through Bomasada, hired a firm not licensed to sell real estate in South Carolina, Village People LLC, doing business as Village Real Estate Services, ("Village"), a Nashville, Tennessee based firm, to market and sell the condo units and be paid a 5% commission for those sales. For two years, PE 31. Village collected commissions though it was not licensed in South Carolina. After that, recognizing that it was not licensed, Village then entered into an agreement with a South Carolina firm, Agent-Owned Real Estate, to list the properties. Even though it remained unlicensed in this state, Village continued to share in the commissions. PE 31.

Many of the commissions paid by the Company at the sale of these units exceeded the contractual amount of 5%. Further, Village hired another marketing firm, Solve, (which Village owned), to participate in marketing the units and those costs were passed on to the Company by Bomasada, rather than out of Village's commissions, though there was no provision in any Company contract providing

for the payment of those Solve marketing costs, and they were in addition to the commission payment that 150 Bee Street had agreed to pay. PE 203, Exhibits 6A and 6B.

6. Bomasada and BIG II began construction of the Project in 2005, but completion of the units dragged, pre-sales were slow, and the economic downturn of 2007-8 stalled closings.

When construction began in early 2005 Gilbert sent monthly updates to the Members that showed aerial photos of progress but did not provide financial information to the members showing the cost of construction or the budget vs. actual cost reports that were required in the Operating Agreement and Development Agreement. PE 30; T. 1226, 15 – T. 1227, 16.

Presales began in the spring of 2006 and from that time to early 2007, buyers put down 5% deposits for options to purchase. Around 60% of the units were presold.

In the spring of 2007 Morgan emailed the partners suggesting that the Managing Members lower the prices of the remaining units so that when construction was completed and closings started, the project would be sold out. PE 47. Morgan lived in Miami and could see in real time the real estate market imploding. Morgan's email suggestion to lower prices set off a heated email exchange in which Fred attacked Morgan claiming Morgan had no idea what he was talking about, and that Morgan should stick to the oil business. He told Morgan that he had no business being in this deal and to "get out". Fred claimed the market was in great shape in Charleston and that he now considered Morgan to be a hostile partner. T. 136, 20- 147, 25. Letters were written between the company attorney John Hagerty and Morgan's transactional real estate in Miami, Joel Goldman, before tempers cooled somewhat. PE 50, 51.

In the fall of 2007 construction was complete and buyers started closing units. The real estate market started deteriorating in Charleston (as Morgan had predicted) and many of the buyers backed out of their contracts. Fred as Managing Member lowered the prices of a few of the units to provide the company with funds to pay interest and real estate taxes but refused to lower the prices on the

remaining units. Gilbert continued to send monthly updates to the Members about the sales but provided no budget vs. actual monthly reports as required by the Operating Agreement. PE 61.

In early 2008 Morgan knew that the updates provided by Gilbert were simply "fluff" and not based on facts, because Morgan began to contact the sales agents on site who told him a completely different story than Gilbert's updates. The holding costs of the unsold units were mounting along with the interest on the construction loan, and the anticipated profit was evaporating. The sales agents let Morgan know that without lowering the asking prices sales would not happen. Gilbert and Fred would still not lower the prices of the units, and Morgan became extremely irritated when the sales agents stopped communicating with him. He later found out that they had been instructed by Gilbert not to return Morgan's calls or provide him any information.

7. Fred and Gilbert's refusal to provide truthful and meaningful financial information to Morgan when he requested it led to further conflict and isolated and marginalized Morgan as a minority Member.

In 2008, Gilbert finally sent the first financial statements to the Members, only for the fiscal year 2007, not for 2005 and 2006, when most of the construction took place. Gilbert presented the financials with all the expenses capitalized, so that the actual costs and expenses of the project did not show on these statements, and Morgan and the other Members could not determine the actual expenses on review of the statements.

Morgan sent the financials to his CPA in Denver, Rich Merg, and asked Merg to try to figure out what was going on. Merg in turn asked Gilbert to send him the QuickBooks back up to the financial information he had supplied, and Gilbert passed this on request to Gilbert's Houston CPA, William Shields, to reply. Merg tried to contact Shields both by phone and email and got no response.

Morgan's brother-in-law, Baker, was unconcerned about the costs and expenses of the company and the lack of sales, because of his close relationship with Fred. Morgan became frustrated and extremely upset that Fred and Gilbert were not providing him the required financial information and

were also shutting him out from speaking with the sales agents. The real estate market in Charleston had collapsed at this point, and Fred and Gilbert still would not lower prices to dispose of the units. Feeling exposed through his personal guaranty of the construction loan, Morgan finally exploded in July of 2008 and wrote several accusatory emails to Fred and Gilbert, though he had no actual proof of any wrongdoing.

Finally, Shields sent Merg a limited amount of accounting data, the construction loan draws, but would not provide the other information requested by Merg. The information that was provided was useless to Morgan and Merg in trying to figure out the actual amounts spent and uses of the funds by Fred and Gilbert. Morgan continued to ask for the books and records of the company and the construction entity, BIG II, but Fred and Gilbert thwarted every request. Internal emails show that Fred and Gilbert conspired to deny Morgan any information regarding the actual Project finances. Even though they told Morgan the books and records were available in Houston for him to review and copy they did not allow him free access until early 2011, and even then, they would not allow his forensic auditor, Randall Harris, to copy any information or look at the construction records and invoices for over $31.5 million dollars' worth of payments to their construction entity, BIG II. T. 1366, 23- 1367, 9.

8. Review of the Company's financial records by Morgan's representative revealed for the first time the wrongful diversion of Company funds to Fred and Gilbert and their wholly owned companies.

Morgan's representative, Randall Harris, a former FBI fraud agent was finally allowed to conduct a review of the Company's financial records in early 2011.

The results of the review determined that Fred and Gilbert were using company funds as their "personal piggybank," charging the Company for their private jet travel, fishing, hunting, and golfing expeditions, safaris, vacations in Scottsdale, Pebble Beach, Cabo, Las Vegas, and Cancun none of which were related to the Project. PE 129. When cross-examined about these expenditures at the

trial, Gilbert could not tie these expenses to the Company or the Project. Further, the Defendants long-time accountant, Shields, produced a document for the first time at trial where the Defendants admitted that at least $143,884.73 had been spent improperly. T. 1395, 22-1397, 15; Defendant's Exhibits (DE) 109, 520. These were not mistakes, or miscodes. T. 1451, 5-17. At trial, after 10 years of litigation, Defendants finally admitted that at least some of the payments to Fred for personal trips were not related to the business of the Company and were improperly charged to the Company.

Even with these revelations, Fred and Gilbert continued to refuse to allow Mr. Harris to review the construction documents and receipts kept separately in BIG II's records, to determine if Fred and Gilbert had marked up the hard cost construction costs by more than the 1% fee. A subsequent investigation by the CPA firm, Elliott Davis, and its principal, Brandon Renaud, contracted by the Company to conduct a review after the litigation was commenced, determined that Fred and Gilbert had done just that. See PE 187, Schedule 7.

9. Fred and Gilbert attempted to hide their diversion of funds to themselves by failing to issue required reports to the Members, failing to hold meetings or issue written notices of actions taking without a meeting, withholding the BIG II books from the Members, refusing to allow Morgan a reasonable inspection of the Company's books, and improperly attempting to prevent Morgan from becoming a Managing Member.

Bomasada, BIG II, Fred and Gilbert, improperly funded their business operations and personal expenses from the operating funds of the Company, and surreptitiously siphoned millions in profit from the Project through Bomasada and BIG II without the knowledge of the other Members in the Company and hidden from those Members until years into this litigation.

Fred and Gilbert did this through installing themselves as one of two Managing Members of Company, choosing Bomasada as Developer for the Project, and hiring BIG II as General Contractor, even though BIG II was unlicensed in South Carolina and required the involvement of an actual licensed general contractor, Hightower Construction, to do the vast majority of the construction work.

Though there was no need for BIG II to serve as general contractor, as Hightower did most of the actual construction, Fred and Gilbert set up BIG II as the general contractor to be able to run the books of the Project beyond the scrutiny of the construction lender and their Company partners, and ultimately to pay themselves over $1,000,000 in travel expenses, millions more in overhead reimbursements, and millions in "profit" far beyond the $750,000 development fee and 1% cost-plus figure that their contracts with the Company allowed.

The actions of Fred and Gilbert in refusing to provide monthly reports of actual expenses versus the Budget or any meaningful financial reporting hid the true financial activity of the enterprise from the other Members, including Morgan. Further, using BIG II as the general contractor allowed Fred and Gilbert to have a separate set of books that the construction lender and the Company Members were never allowed to see that provided for payments of operating expenses unrelated to the Project as well as millions in "profit"' to BIG II, completely "off the books"' of the Company.

The Defendants failed and refused to provide Morgan full access to Company records. Defendants instructed the Company CPA, William Shields, to write a letter to Morgan that Morgan was required to pay a $5,000 retainer in advance before he or his representative could travel to the Houston corporate offices of Bomasada where the 150 Bee Street records were being held to inspect the documents under the supervision of Shields, Bomasada's CPA. Copies would not be sent or provided. PE 84.

Defendants engaged Company attorney Hagerty and his law firm, using Company funds, to write a letter to the Company CPA Shields in Houston instructing him not to provide Morgan's CPA with Morgan's requested accounting information, and to keep expenses to a minimum in terms of any Members who wish to review the books and records of the Company.

Despite reimbursing themselves hundreds of thousands of dollars in overhead charges using Company funds to pay the salaries of their accountants, accounting software, CPA, receptionist, health

insurance, bonuses, as well as salaries for themselves, Defendants refused to answer simple and specific accounting questions from Morgan's CPA, Rich Merg, and refused to email the QuickBooks backup file. Defendants knew that there would be no significant financial cost to the Company to answer Morgan's CPA's questions and email him the QuickBooks file but used the excuse that they would not expend Company funds to answer an individual Member's questions.

Thereafter, over the next two years, Defendants continued to conceal their financial records and again provided incomplete and misleading financial statements to both Morgan and Baker.

On September 24, 2010, Leslie Berry wrote an email to John Gilbert asking for backup for certain charges and asking how the overhead expenses reimbursements were calculated. PE 115. Gilbert wrote back as follows: "Leslie, in response to your request for additional information on 150 Bee Street, please note that this office will not be providing any receipts, invoices, etc. on the project. Although on the surface, these requests are not unreasonable, based upon the underlying tone and history of Mr. Morgan's conduct towards the partnership, we are adhering strictly to our obligations under the Operating Agreements. And frankly, we do not have the time to be burdened by this spurious request. This is not the first time that Mr. Morgan or his CPA, Mr. Merg, have made these such requests…they are welcome to come to Houston, at their expense, and review all books and records of 150 Bee Street. They can make copies of anything they want, again at their expense." PE 115.

In response to Gilbert's email, Morgan responded to Gilbert and Fred: "I insist that you, Stuart, cease and desist from charging your private jet to the partnership. This project is underwater, and the partners will be lucky to get any portion of their investment returned, let alone with the continual bleeding of cash from your unwarranted and unnecessary expense reimbursements. In that regard I have hired Peter Galbraith, a former FBI fraud specialist and certified fraud investigator to conduct

an audit of not only the partnership's direct expenses but of those related to the construction and sale of the Bee Street Units." PE 115.

Fred responded to Gilbert and Baker: "First lets remember a few things...He's a midget with a pea brain...so consider the source...Honestly let this go in one ear and out the other...there is nothing there as to his claims and who cares who or what he claims...there's nothing there...NEAL and I are the general Partners and can do what we want...And we are doing a great job as fiduciaries for the [partnership...I don't hear Edwin crying how bad we are...F**K the MIDGET...I am not going to change one thing that I or we are doing...So don't let his chirping or nipping at your heels bother any of us because the MIDGET is nothing but empty air as this has been the way he has done biz forever...The MIDGET has a NAPOLEON complex and he chirps with no substance...he does not think this deal will make money so lets give buy him out cause we will be making money...He is ill...seriously he is sick and has issues...Hagerty I predict will agree and will laugh this off as no attorney or FBI guy once they talk to KING Developer will take any of his accusations seriously...he is a pecker nut MIDGET with a little dick that hides behind his mommies skirt...So f**k him and go play golf or watch Texas loose to Oklahoma...I am" PE 117.

On November 10, 2010, John Gilbert wrote an internal email to Stuart Fred. Fred replied with an internal memo to Gilbert's: read corrections below ...grammar mostly… and a little content...do not want to make judgments on market as it will be used against us by the midget...I would also suggest that the more you use me or I you place a target on your back for the midget to shoot at… also I don't think we send this to Tommy as he is adversarial... Ill check with Neal....Then attorney.... I vote we need to shut down communication to him… make him spend money to get info...he has proven time and time again he is adversarial.... later. PE 118.

Stuart Fred wrote back to Gilbert: "Please allow this email to serve as notice from me and Neal as the co-managing general partners that we have decided not to provide T. Morgan any further

information due to the continued threats of lawsuits etc. leveled against the group and us individually...Accordingly do not provide T. Morgan or any of his affiliates or agents any information…". Gilbert replied: "Thanks. I will follow your instructions." PE 118.

In his testimony at trial, Gilbert agreed that prior to Harris' review of records at Bomasada's Houston offices, Morgan was intentionally denied the backup to the figures on the construction draws, because they were being "very careful." T. 1229, 21-25.

Even when Defendants finally allowed Morgan's representative, Randall Harris, to go to Bomasada's corporate headquarters in Houston in 2010, Defendants refused to allow Harris to copy any items, or to look at any records of the Project kept by BIG II, which is where the real accounting for the construction was being done. Defendants refused every attempt that Morgan or his representatives made to see the BIG II records so he would not be able to see that the actual construction records did not match the Company records or the draw requests. Further, he would not be able to see what travel was being done and charged to the Company under the hard cost construction budget.

In response to Morgan's continued insistence on receiving basic financial information about the Company, and his retention of Randal Harris to review the Company's records, Fred wrote his Co-Managing Member, Neal Baker, and his partner in Bomasada, John Gilbert, on May 5, 2011, at 6:10pm: "F**k the ankle biting midget. Don't telegraph what we are going to do. Wait till we r ready till we r ready to disburse then send out with no notice. Let's talk on the phone because maybe we might have partnership expenses first." At 11:48pm that evening Baker replied to Fred's email: "ok these are being deleted. nb." (emphasis added). PE 128.

Long after this litigation was commenced and even during and after the investigation by Elliott Davis as part of this arbitration, Defendants and their CPA, Shields, admit that they have never produced financial audits of BIG II that were paid for by the Company and that could show whether

or not the charges made by and paid to BIG II were related to the Project. T. 1420, 2- 1421, 6; 1424, 16-1425, 3.

In addition to hiding and failing to disclose financial information from Morgan, when it became clear that Morgan could become a Managing Member and obtain access to the financial information, Fred and Gilbert pressured the Company lawyer, Hagerty to draft a resolution that violated the Operating Agreement to keep Fred in place as the sole Managing Member.

In January 2011, Baker wanted to resign as a Managing Member due to poor health. Defendant Fred knew that if Baker resigned Morgan would automatically become a Managing Member. Fred and Gilbert flew to Charleston to meet with John Hagerty, the Company attorney. They were trying to figure out a way to circumvent the terms of paragraph 6.01 of the Operating Agreement which automatically named Morgan as a managing member upon the resignation of Baker.

Fred instructed the Company counsel, Hagerty, to draft a resolution that Hagerty knew was not supported by the OA, naming Fred as sole Managing Member.

Though the Operating Agreement clearly stated that Morgan would serve as Managing Member if Baker chose not to or was unable to serve, Fred and Gilbert were so intent on hiding the financial activity of the Project from Morgan that they conspired to violate the Operating Agreement and deny Morgan the ability to serve as Managing Member, knowing he would then have access to the financial records and decision-making of the Company. This Fred and Gilbert could not allow.

Hagerty responded by restating the language of Operating Agreement Paragraphs, 6.01, 14.01, and 14.07, and explained that if Baker resigns, Morgan automatically became a Managing Member. Despite that advice from Hagerty that they could not legally circumvent those provisions, Fred and Gilbert asked Hagerty to prepare the documents to do just that. Hagerty sent Defendants an email attaching the draft resolution to install Stuart Fred as the sole Managing Member in violation of the Operating Agreement but stating that he had not given advice regarding paragraph 6.01, or any other Company

issues, despite the meeting just held in Hagerty's office discussing this very topic. Fred, Gilbert, and Baker all illegally signed the resolution attempting to cut Morgan out from becoming a Managing Member.

Morgan and the other Member, Pearlstine, were not told about the secret resolution, and they were not provided copies of the resolution as required by the Operating Agreement. From January 2011 to just before Baker's death in August 2011, Fred acted as the sole Managing Member, without the knowledge of Morgan or Pearlstine.

At trial, over 11 years after this action, Gilbert admitted: "[i]t was wrong." T. 1233, 25- 1235, 3. Based on Fred and Gilbert's actions in hiding their activities and the financial records of the Project from Morgan, a reasonable person in Morgan's position could not have known he had a claim until the inspection of the Company's books in Houston by Randall Harris in 2010-2011.

10. **Fred and Gilbert failed to fulfill their duties to the Company as required by the Second Amended Operating Agreement**.

Fred, as Managing Member, his agent, Gilbert, and Bomasada as the Developer, continually failed to abide by the requirements of the Operating Agreement and the Development Agreement to inform and obtain approvals by the Members.

Fred, as Managing Member, and his agent, Gilbert, failed to have Member votes and obtain Majority Consent to increase the budget by more than $50,000, or document an action without a meeting if that occurred (there is no evidence that it did). T. 1451, 21- 1452, 5. Throughout the construction process, Fred and Gilbert acted as if they were the sole members of the Company and made decisions and spent money without the knowledge or consent of the Members as required by the Operating Agreement and the Development Agreement.

Section 6.01 of the Operating Agreement additionally required that the initial Managing Members prepare a Budget for the Project (Exhibit B), and the Managing Members were also required to track

the Project's performance against the Budget and distribute to the Members monthly financial reports of the Project's performance in relation to the Budget.

Though BIG II did provide construction draws to its lenders that purported to show a construction budget and amount expended against those budget line items during the billing period, monthly reports showing actual expenses against the Budget were never prepared by the Managing Members for the other Members, and even the Amegy Bank construction draws were regularly distributed only to the Managing Members. Though Gilbert testified that he delegated that task to Baker, there is no evidence beyond this testimony of that delegation or that Baker regularly sent the draws to Morgan. Further, it is evident that Fred and Gilbert could easily have emailed them to Morgan and Pearlstine and did not do so.

The Operating Agreement also required Members to disclose and get approval to do business with Affiliated Companies of Members. The Company paid substantial amounts to Fred's wholly owned companies, Lauralis Management and Lauralis Leasing to lease and fund the operation of Fred's private jet, but no such disclosure or approval was ever sought or given by the Members. T. 1439, 1-6.

The Operating Agreement required Majority Consent of the Members to increase the budget in an amount over $50,000. Fred and Gilbert's increased the Budget on several occasions but never obtained Majority Consent through a meeting or a writing, or an action without a meeting in accordance with the Operating Agreement. The fact that the Members responded to capital calls made necessary by the Budget increases is no substitute for Fred and Gilbert's failure to obtain Majority Consent under the Operating Agreement. Further, there is no written evidence, including resolutions, letters, or email indicating any agreement by Baker to increase the Budget.

11. **Fred and Gilbert, through Bomasada, diverted hundreds of thousands of dollars to themselves by reimbursing themselves for expenses that were not authorized by the Budget or were not related to the Project or the Business of the Company**.

Bomasada reimbursed itself in amounts that far exceeded the overhead figure in the Budget, and many of those reimbursements were not reasonable or related to the Project or the Company's business.

Bomasada was to be compensated $750,000 as a Developer's Fee and to be reimbursed reasonable expenses incurred in connection with doing its work on the Project. Bomasada had a line item in the Budget that was supposed to account for all the reimbursable expenses payable to Bomasada in the course of its work. That was the "'Developer Overhead" line item in the Budget in the amount of $304,000.

Bomasada exceed that Budget line item without obtaining Majority Consent as required by the Operating Agreement and Development Agreement. Bomasada was also reimbursed substantial amounts for its overhead expenses at its Houston headquarters through BIG II, over and above the $150,000 amount budgeted as part of the hard costs on the BIG II construction draw, again without notice to or approval by the Members of the Company.

In the course of this litigation, the Elliott Davis accounting firm that reviewed the construction documents and Morgan's expert witness, Ronald Burkett, CPA, concluded that many of the payments to Bomasada could not be verified because there is no back up for the payment. Consequently, Bomasada paid itself substantially more than the amount of the Developer Fee of $750,000 provided in the Budget and the Development Agreement and reimbursements allowed under the Development Agreement.

In addition, through reimbursements from BIG II, the details of which were not available to Morgan and the Company until Elliott Davis was able to review the BIG II construction finances, years after this litigation commenced, Bomasada obtained additional reimbursement payments by BIG II, far exceeding the amounts that were stated in the Budget, and which were not reasonable or related to the Project.

Fred and Gilbert throughout the construction process and through much of the litigation process refused to provide those portions of the Project construction files that showed payments to BIG II beyond the construction loan draws submitted to the construction lender, Amegy Bank. Fred and Gilbert never showed the Members BIG II tax returns, claiming they had been shredded or lost (though they did have all the Company and Bomasada returns). Further, Fred and Gilbert refused to show the portions of audit reports produced by an outside accounting firm for which the Company paid, at least in part. When questioned under oath, though, the Defendants' CPA, William Shields, agreed with Ms. Jo Ved, Bomasada's internal bookkeeper, that no electronic information had been lost, and, to the contrary, it was readily available. T. 1442, 11- 22.

As a result, the Members never saw BIG II's payments to third party contractors or to Fred and Gilbert, Bomasada, Lauralis Management (Fred's wholly owned company that owned and leased back his private plane to the Company without its knowledge) ("Lauralis") and other Bomasada-related entities throughout the Project. There was admittedly no writing authorizing the payment for the use of the Fred-owned plane by the Company, either by resolution or an action without a meeting memorandum. T. 1247, 21- 1248, 22. These payments were never shown to Morgan prior to the litigation, were not provided to Morgan's forensic investigator, Mr. Harris, when he went to Houston to review the construction records and were not revealed to the Members of the Company until Elliott Davis conducted a financial investigation of the construction records as part of this arbitration process in 2013-2014. Shields, who coordinated the review of the Company records with Harris agreed he could have easily provided the BIG II records to Harris electronically at little to no cost but was instructed by the Defendants not to provide that information. T. 1435, 7- 1436, 2; T. 1449, 7- 18. On cross-examination, Shields agreed that it was reasonable for Morgan to request to see the actual costs of construction and that if the Operating Agreement provided for reasonable inspection by Members,

Morgan should have been allowed to review them. T. 1437, 3- 1438, 15. At trial, Gilbert agreed, too, that Morgan's requests were reasonable. T. 1217, 18-22.

Having had a chance to review those records for the first time, Elliott Davis concluded that BIG II paid expenses that were not actual costs of the Project and that millions of dollars of expenditures had no documentary evidence and could not be supported. This included substantial amounts paid to Bomasada beyond what the Budget and the Development Agreement allowed and what the Members of the Company knew about. T. 810, 22- T. 811, 23.

The Burkett firm likewise reviewed this material and testified concerning the amounts of the Company's money that were paid to the Bomasada entities or their owners during the Project through 2007 and continuing until the commencement of the litigation in 2012 for which there is no evidentiary support or backup. T. 1012, 13- T. 1013, 20.

Details from the QuickBooks records show that a total of $607,529 was booked to travel expenses within the Company books and records. In addition, $481,250 was charged through BIG II under the line-item Construction Travel Expense. Defendants never produced backup invoices for the $481,250 charged through BIG II. The total amount charged by Fred and Gilbert to the Project for travel expenses totaled approximately $1,088,779, the majority of which was for Fred's private jet, well beyond any budgeted amount for travel and any amount approved by or known to the Members of the Company.

When Morgan was finally able to send an investigator to the Houston corporate office of Bomasada to review 150 Bee Street, LLC (not BIG II) records, Morgan for the first time learned that much of the travel charged to the Company was for expensive golf vacations that Fred, Baker, and Gilbert took to Pebble Beach and Arizona, vacations to Cabo San Lucas, fishing vacations to Cancun, a trip to Las Vegas, and an African safari (and taxidermy for the trophies gathered there). They also included a home theater system at Fred's home in Scottsdale. These were obviously not for Project

business and were not revealed to or approved by the Members. The evidence is that these "business meetings" away from Charleston and Houston were vacations not related to Company business. Though the Defendants infer these may have been "employee appreciation" benefits, the only "employees" that attended the majority of these trips were Fred, Gilbert, and Baker. On cross-examination Gilbert admitted that most of these charges were not related to the Company business. Though Gilbert also claimed that some of these charges may have been repaid to the Company, defendant's expert witness Bill Shields does not support that explanation.

12. **Fred, Gilbert, and Bomasada failed to obtain insurance to defend and indemnify the Company for claims related to the construction project, as required by the Operating Agreement and Development Agreement.**

One of the duties of the Fred and Gilbert as Managing Members and Bomasada as Developer was to provide that adequate insurance was purchased for the Company to cover liabilities related to the Company's operations. The defendants had named themselves and their entities as insured but failed to properly protect the company. Insurance coverage was denied by the carrier for the Company even though it was provided to defendants.

Fred, as Managing Member, obtained liability insurance protecting Bomasada and BIG II, but obtained no liability insurance providing indemnification and a defense for the Company from claims of the homeowners for construction defects.

In 2014, Company, Fred, Gilbert, and their wholly owned entities and all the subcontractors were sued by the homeowner's association for construction defects with claims of over $40 million. Fred and Gilbert were sued individually for their role as directors of the Bee Street Lofts Homeowner's Association when they illegally used homeowner funds of over $300,000 to repair defects caused by their company that should have been warranty items. The total paid to the homeowners in settlement was over $20 million.

The Company was forced to retain counsel to defend it in the construction litigation and associated coverage litigation and was forced to pay funds out of the Company's operating account to settle the construction lawsuit, since no liability carrier either assumed the duty to defend or indemnified the Company.

The Company settled its portion of the case for $470,000. Along with its legal fees, the cost to the Company was just under $900,000 for which insurance coverage was denied even though the Company had paid the costs of the policies.

Though at trial the Defendants and their witness, Tom Hildebrand, showed the panel an Accord form purporting to list 150 Bee Street, LLC as additional named insured, the Defendants did not produce a policy showing coverage of 150 Bee Street, and could not overcome the letter denying coverage on that policy from the carrier and the fact that the carrier did not provide a defense or indemnification from loss. Gilbert, on cross-examination, agreed that no policy showing that coverage existed had been submitted in the trial, and the only written evidence, therefore, is the letter from Chubb denying coverage. PE 197; T. 1238, 24- 1242, 11.

Fred, Gilbert, and Bomasada used Company funds to pay premiums for policies that did not protect the Company. This was a breach of Bomasada's contract and a breach of fiduciary duty by Managing Member Fred and his agent, Gilbert.

13. **Fred and Gilbert, through BIG II, diverted millions of dollars to themselves by reimbursing themselves for expenses that were not authorized by the Budget or were not related to the Project or the Business of the Company and by paying themselves a profit that far exceeded the 1% of actual costs fee provided by the Construction Agreement.**

BIG II paid itself from construction draws in amounts far beyond the actual costs of the Project allowed by its contract by not only paying for costs that were not reasonable or were unrelated to the Project, but also by collecting millions in profit, well beyond the 1% allowed by the contract.

BIG II's agreement with the Company was that it would be paid actual costs plus 1% (despite the erroneous language of the February 10, 2022, signed contract).

BIG II has never provided backup for millions of dollars in expenses it paid itself through the Amegy Bank construction draws. Based on the difference between the amount BIG II was paid through the construction draws and the amounts it disbursed, it appears, in the view of Bomasada and BIG II's bookkeeper, Jyotsna Ved, that BIG II took millions in profit beyond the 1% fee provided in the Construction Contract.

Ms. Ved, in her deposition, introduced as testimony in this trial, said that she kept BIG IIs' actual bookkeeping records for the construction project showing amounts paid out by BIG II from the construction draws and provided numbers to Gilbert monthly who then used those numbers to prepare the construction draws based on the line-item budget on the draw form. Jo Ved Deposition Vol. II transcript page 77, line 6- page 81, line 7.

Back up was not provided with the construction draws and neither the Lender nor the Members saw the BIG II records "'behind'" the construction draws. In fact, when Morgan attempted to see the BIG II records, Bomasada denied him access, saying they were not related to the Company, and even when his investigator, Randall Harris, traveled to Houston to review the documents in 2010-2011 he was denied access to the BIG II records. Without seeing the BIG II records and back up, however, there was no way to see how the Company's money was spent on the Project, specifically who was paid, or how much.

Based on the BIG II records that were produced in this case, though, at least some of the questions about where the money went could finally be answered. Specifically, when questioned about the difference between the amount paid to BIG II from draws and the amount paid out to all vendors, Ms. Ved identified the net figure as "profit made by BIG II." Jo Ved Deposition Vol. II page 63, line 13- page 64, line 9.

This "profit made by BIG II" was not authorized by any agreement signed by the Company with BIG II and was not disclosed to any Member in the Company at any time during the Project. This "profit made by BIG II," together with other expenditures by the Defendants for their own benefit through the course of the Project, were the reason for setting up the Project and its books, to avoid any Member, Mr. Morgan included, from having any ability to discover them.

As part of the arbitration, the accounting firm Elliott Davis was hired by the Company to review expenditures claimed by Defendants directly on the Company's books as well as the construction costs incurred by BIG II within its books.

On October 16, 2013, Elliott Davis asked Defendants to provide them with a reconciliation of the items showing the amounts paid to its subs and trades, plus its 1% contract fee, that total to the $8,090,672,77 difference. Elliott Davis asked whether BIG II could provide amounts paid to its subs and trades, plus its 1% contract fee that total the difference between the actual BIG II pay apps for construction totaling $31,535,092.05 and the total Hightower contract with change orders of $23,445,419.28 which was $8,089,672.77.

The Company paid BIG II $31,535,090.35 to construct the Project, out of which it paid Hightower Construction and made other disbursements considered allowable and subtracted that amount from the $31 million dollar figure resulting in a figure of just over $28.5 million. Elliott Davis subtracted the 1% fee provided for in the Construction contract in the amount of $285, 063.92, leaving a balance of $2,743,636.35, the "unreconciled difference." PE 187, Schedule 7; T. 1473, 16- 1475, 3. Shields did a different calculation, which Elliott Davis did not accept, also described in Schedule 7, where he took the BIG II bookkeeping software, assumed all entries were correctly charged to the Project and "reconciled" the figures, showing only a nominal difference. Shields conceded he did not check whether all the entries were related, or property charged to the Project and in fact agreed that many,

as detailed in Elliott Davis' report and Gilbert's testimony at trial, were not. T. 1467, 21- 1469, 11; T. 1475, 5-19.

Shields agreed that BIG II provided all the financial records it has regarding the Project to Elliott Davis, T. 1463, 8-11, so there was nothing else for Elliott Davis to conclude but that the backup invoices for those expenditures do not exist.

Defendants, through their CPA, William Shields, claimed the missing backup documents had been shredded by Bomasada. BIG II's internal bookkeeper, Jyotsna (Jo)Ved, though, when deposed in this proceeding, asserted unequivocally that no documents had been lost or destroyed and all BIG II and other 150 Bee Street related records were intact at the office when she left in 2015. Deposition, page 48, line 24- page 49, line 11.

Details from the QuickBooks records show that a total of $607,529 was booked to travel expenses within the Company books and records. In addition, $481,250 was charged through BIG II as Construction Travel Expense. Defendants have not produced one backup invoice for $481,250 charged through BIG II. Through discovery in this case, we have been able to determine that the total amount charged to the Project for travel expenses was approximately $1,088,779, well beyond any budgeted amount for travel and any amount approved by or known to the Members of the Company.

When Morgan was finally able to send an investigator to the Houston corporate office of Bomasada to review 150 Bee Street, LLC (not BIG II) records, Morgan for the first time learned that much of the travel charged to the company was for expensive golf vacations to Pebble Beach and Arizona, vacations to Cabo San Lucas, fishing vacations to Cancun, a trip to Las Vegas, and an African safari. These were obviously not for Project business and were not revealed to or approved by the Members. Fred's defense of them at his deposition was that he and Baker, the Managing Partners,

decided between themselves to charge the Company for these expenses, and did so, although there was not one email or other evidence showing that Baker, now deceased approved these charges.

As described earlier, when Morgan asked Baker what the travel expenses were for, Baker had been told by Fred that these expenses were moving men and equipment to the job site. Baker told Morgan to stop worrying about the travel expenses and that he would never let Fred charge expenses to the Project that were not legitimate, and Baker would make sure that any expenses that did not pertain to the project would be credited back. In his testimony, Gilbert claimed that he had delegated the duty of sending the construction draws to Morgan and Pearlstine but conceded that there is no writing evidencing that Baker had that duty or that he did it. T. 1225, 21- 1226, 9.

14. Morgan properly brought this derivative suit on behalf of 150 Bee Street, LLC and in his own capacity after the Managing Members and the Members failed to respond to his request to file this action.

In a letter sent to counsel for the Defendants on September 26, 2011, Morgan complained about the misconduct of the Defendants, demanded that the Defendants correct the wrongs identified in the letter, and proposed a remedy in the form of a settlement payment to Morgan. This letter identified the alleged wrongdoers, described the factual basis of the wrongful acts and the harm caused to the LLC and to Morgan, and requested remedial relief.

On or about November 14, 2011, Morgan tendered a demand letter "individually and/or derivatively for 150 Bee Street, LLC" pursuant to and in compliance with S.C. Code Ann. § 33-44-1101 and the Operating Agreement, on the Defendants to engage in mediation and arbitration or adjudication in court, for various causes of action, including but not limited to breach of fiduciary duties, civil conspiracy, conversion, breach of contract, declaratory judgment, accounting and unfair trade practices act violations. The demand asked the Defendants to consent to those actions and to toll the statute of limitations. The Defendants did not respond to that demand letter or consent to the actions demanded in it.

On November 16, 2011, Morgan tendered a demand pursuant to S.C. Code Ann. § 33-44-1101 and the Operating Agreement, that Fred, as Co-Managing Member of the LLC, consent to and commence a derivative lawsuit on behalf of the Company against various Defendants for various causes of action, including but not limited to arbitration, breach of fiduciary duty, civil conspiracy, conversion, breach of contract, declaratory judgment, accounting and unfair trade practices act violations, and provided a deadline of November 25, 2011 to consent to this action or for Plaintiff Morgan to be deemed to be entitled to bring a derivative action on behalf of 150 Bee Street, LLC.

On November 16, 2011, the Defendants' counsel responded to a request by Morgan to meet to resolve Morgan's complaints stating in part: "I am unwilling to pass your letter on or set up a conference in light of the letter I received from G.P. Diminich as I was speaking with you this morning. Are you people nuts?? Do you really think my clients will come to a good faith conference having received that letter? He needs to withdraw the letter and notify me to that effect. . . ."

On November 28, 2011, Morgan, tendered an additional demand, pursuant to S.C. Code Ann. § 33-44-1101 and the Operating Agreement, reiterating the same demands stated in the earlier November 16, 2011 letter and demanding that Fred, as a Managing Member of the LLC, consent to and commence a derivative lawsuit on behalf of the LLC against the Defendants and arrange a vote of the members of the LLC on whether to consent to said lawsuit; and giving a second deadline of December 2, 2011 for Fred to respond to the demands and arrange for a vote of the members of the LLC or be deemed to have refused to consent and commence such a suit under S.C. Code Ann. § 33-44-1101.

On November 30, 2011, Fred's counsel explicitly declined Morgan's demands stated in the letter of November 28, 2011, referenced above, and warned that: "As I understand your letter of November 28 and your client's demand pursuant to S.C. Code Ann. Section 33-44-1101, Mr. <u>Morgan wants Stuart Fred to commence an action against himself, as well as others</u>. . .. You are now on notice that <u>should</u>

your client commence a court suit as described in your letter, my clients will move to stay any such action and will seek damages from your client in the ensuing mediation/arbitration for breach of the Agreement." (Emphasis added.)

Morgan repeatedly asked Company Member Edwin Pearlstine to join with him to form a majority vote to take actions to authorize a derivative lawsuit. For example, on October 7, 2011, Morgan made a request of Mr. Pearlstine's representative, Shelia Pace, President and CFO, Pearlstine Family Companies, LLC, as a key senior official and agent of Pearlstine, that Mr. Pearlstine join Morgan to create a majority vote to remedy the complaints of Morgan. Despite this, Pearlstine did not agree, though Morgan continued to try to persuade him to do so until the filing of the complaint in January 2012.

The Defendants, therefore, received numerous demands from Morgan to bring this derivative action, but refused to do so, refused to mediate, or arbitrate this dispute, and refused even to call a meeting of the members of the LLC so they could vote on whether to authorize such an action.

Section 14.11 of the Operating Agreement states in part that "[t]he Is managing Members may in their discretion convene a meeting for any purpose, and the Managing Members **shall call a meeting of the Members** upon the **written** request of Members owning at least 51% of the Interests owned by all Members." (Emphasis added.) Morgan demanded that Bella Vista, through Fred and Gilbert, and Pearlstine vote with Morgan to authorize remedies to Morgan's complaints, mediation and arbitration and a derivative lawsuit for the LLC, and to convene a meeting of the Members to consider those actions, but both Bella Vista (Fred and Gilbert), and Pearlstine refused. Without the written consent of either one or both Bella Vista or Pearlstine, who together controlled over 51% of the LLC, it was not possible to convene a meeting to vote to initiate a derivative lawsuit.

On January 26, 2012, Morgan initiated this action by filing a summons and verified complaint, demanding an arbitration of the matters in dispute, and seeking a temporary restraining order based

on the imminent threat to the Company that Managing Member Fred had sole control and access of the Company bank account, though Morgan was also a Managing Member, and would likely divert the proceeds of an upcoming condominium unit closing and distribute it to himself or other Bomasada entities to the detriment of the Company and the other Members. The funds that Fred and Gilbert threatened to remove over Morgan's objection, though Morgan was a Managing Member by this time, was approximately $238,000 that Fred and Gilbert maintained they loaned the Company and wanted to be paid back. Gilbert now concedes that he and Fred were not owed this money, there was no loan, and the Company paid the loan premium. PE 170; T. 1236, 18- 1238, 20.

The Circuit Court entered a Temporary Restraining Order and set a hearing for a Preliminary Injunction. After a hearing on February 8, 2012, the Circuit Court granted a Preliminary Injunction, finding that the Plaintiff had a likelihood of success on the merits and that the Company would suffer irreparable harm if the order was not granted, and requiring the agreement of both Co-Managing Members, Fred, and Morgan, to any action relating to the disbursement of any asset or taking any other action relating to the business of the Company. The Court also denied the Defendants' Motion to Dismiss and ruled the arbitration provision of the Second Operating Agreement was not enforceable.

Nevertheless, by agreement of all the parties, on July 9, Judge Hughston referred this matter to arbitration by order and the consent of all parties.

Morgan properly tendered this action to the Company through the other Managing Member, Fred, and attempted to persuade the other voting Member, Pearlstine, to call a Meeting to approve the derivative action, but neither responded affirmatively.

CONCLUSIONS OF LAW

1. **This derivative action is properly before this panel which has jurisdiction over the subject matter and the parties.**

Morgan attempted several times to have the Members vote on bringing this derivative action in late 2011, but Fred (and Bella Vista) refused, Pearlstine would not agree, and Baker Estate had no vote. Morgan had to bring the lawsuit to obtain a TRO to prevent Fred and Gilbert from taking over $200,000 in cash out of the account unilaterally, ostensibly to reimburse themselves for an insurance premium that they now admit they never paid (the Company did). There was no requirement that the Company be named in the derivative suit. The Company was later named in the Amended Complaint and that amendment relates back to the original filing of the lawsuit.

Defendants have moved to dismiss this arbitration under Rule 12(b)(1), SCRCP, on the basis that the arbitration panel has no jurisdiction to decide it. The Defendants argue that the Plaintiff, in his original complaint filed in January 2012, prior to the case being referred to arbitration, did not name the company, 150 Bee Street, LLC (the "Company"), as a party and that deprives this panel of jurisdiction to decide this matter. Further, the Plaintiff did not follow the provisions of the Second Amended and Restated Operating Agreement ("Operating Agreement") governing the Members of the Company in not "filing" a mediation and in not obtaining a vote of the majority of the Members approving the filing of this lawsuit, thereby also depriving this panel of jurisdiction.

The Defendants' arguments are incorrect in both instances. This panel has jurisdiction by order of Judge Hughston dated July 9, 2012, to which the Defendants consented. The Plaintiff complied fully with the requirements of the South Carolina Uniform Limited Liability Company Act in bringing this action, which does not mention the inclusion of the Company as necessary to providing subject matter jurisdiction to the court to decide a derivative action involving a limited liability company. Nevertheless, the former panel chair, Dawes Cook, granted a motion to amend the complaint and the First Amended Complaint did (and this Second Amended Complaint does) include 150 Bee Street, LLC, and that inclusion relates back to the filing of the original complaint.

Further, the record is clear that Plaintiff Morgan, through his counsel, sought to mediate and arbitrate this dispute as the Operating Agreement provided and those overtures were rejected by the Defendants, through their counsel. As for obtaining majority consent of the Members, it was apparent that no majority would support bringing the case, and it was futile to continue to pursue a vote of the members when no voting member, but Morgan, would vote for it. And, given that it was necessary to file the suit and obtain a temporary restraining order to prevent funds from being removed by one of the Managing Members, Stuart Fred, from the Company's account, it was in the ordinary course of business of the Company to safeguard and preserve its assets, so no vote of the Members was required under the Operating Agreement.

This arbitration panel has subject matter jurisdiction to decide this case, and the motion to dismiss should be denied.

2. Fred and Gilbert owed a fiduciary duty to the Company and its Members, and their actions breached their fiduciary duty.

Fred, as a Managing Member, and Gilbert, as an agent expressly authorized to act for the Company by the Managing Members, owe a fiduciary duty to the Company and the other Members, which they breached through the facts proven at trial and detailed in this Final Determination.

In structuring the contractual relationships to pursue the Project to benefit themselves, compensating themselves beyond what the contracts allowed, reimbursing themselves for expenses not related to the Project or the Company, failing to disclose the financial records of the Company to Morgan, and taking action to discourage and punish Morgan from pursuing the information he was seeking, Fred and Gilbert breached their fiduciary duty to the Company and to Morgan are liable for damages proximately caused by the breach.

Further, the actions of Fred and Gilbert as Bella Vista Partnership, in conjunction with Neal Baker, in their roles as Managing Members and a majority interest of the membership directed toward freezing out Morgan, denying him information and taking money from the Company that otherwise

would have been Company assets, amount to minority member oppression under S.C. Code § 33-44-801(e). The Panel determines that the sole remaining asset of the Company is the judgment rendered against the Defendants in this arbitration proceeding. Morgan, as a minority member who has proven that he was the subject of oppression by the majority members, is entitled to a dissolution of the Company, and to receive his share of the remaining assets of the Company according to his ownership interest, as detailed below.

3. **The Defendants breached their duties under the contracts to which they were parties, including the Second Amended Operating Agreement, the Development Agreement, and the Construction Agreement, attempted to conceal those breaches by additional fraudulent acts and unjustly enriched themselves and misappropriated the Company's assets.**

Fred and Gilbert, through their partnership Bella Vista, and as a Managing Member and his agent violated the Second Amended Operating Agreement by failing to obtain Majority Consent in matters requiring Majority Consent of the Members, by contracting with Affiliate companies, including Lauralis Management and Lauralis Leasing without authorization, by increasing the Budget more than $50,000 without authorization, by reimbursing themselves for expenses that were not reasonable and were not related to the Company or the Project, failing to issue monthly reports to the Members tracking actual expenses against the Budget

Bomasada breached the Development Agreement, and BIG II breached the Construction agreement all as detailed above.

These include but are not limited to the payments to Fred, Gilbert, Bomasada, Big II, the Lauralis companies and other entities outside the provisions of the three operative agreements. These are all breaches of contract under South Carolina law.

The intentional deception and misappropriation of funds by the defendants in conjunction with these breaches of contract violate the covenant of good faith and fair dealing, *Tharpe v. G.E. Moore Co.,* 254 S.C 196, 164 S.E.2d 397 (1970). In addition, the various acts described in the Findings of Fact to

enable and hide the diversion of funds to themselves beyond the knowledge and consent of the Members supply the additional fraudulent acts to comprise breaches of contract accompanied by a fraudulent act. *Minter v. GOCT, Inc.,* 322 S.C. 525, 529-30, 473 S.E.2d 67, 70 (Ct. App. 1996).

When asked to explain the many charges identified by Elliott Davis in Schedule 1 as being unrelated to the Company or the Project, Gilbert, Bomasada's only representative at the trial, could not offer any defenses and left the decision on those issues "up to the panel." T. 1255-1265.

The payment of Company funds to the Defendants without approval by the Members or authorization by the operative contracts is a misappropriation of Company assets. And, to the extent that any of the payments to the Defendant entities were not somehow covered by one of the contract provisions, retention of those payments by the Defendants is inequitable, and is unjust enrichment that require the return of those assets to the Company. *Myrtle Beach Hosp. v. City of Myrtle Beach,* 341 S.C. 1,8-9, 532 S.E.2d 868, 872(2000).

Though this panel does not require Bomasada to return the Developer's fee or BIG II the 1% of the actual construction costs, the reimbursements not related to the Company's business or not adequately evidenced by back up invoices or receipts must be returned to the Company, as well as any "profit" retained by BIG II.

4. The Defendants conspired to improperly enrich themselves and to damage the Company and its Members.

The facts proven at trial show numerous false misrepresentations by Fred and Gilbert to the Company and to Morgan, upon which the Company and Morgan justifiably relied and based on which they have been damaged. The Defendants combined with each other and with others, to cause harm to the Company and to Morgan and so have engaged in a civil conspiracy to harm the Company and its Members and to enrich themselves. *Paradis v. Charleston Cty. Sch. Dist.,* 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021).

5. **The Plaintiff brought this action within 3 years of the date when a reasonable person would have known he had a claim, the Defendants are equitably estopped from asserting the statute of limitations defense based on their active concealment of their wrongful actions, and which likewise equitably tolled the statute.**

Based on the Defendants' pattern and program of activity, Morgan could not have known he had a claim against Fred, Gilbert, or the Bomasada entities, though he was often frustrated and angered by their actions, until Randall Harris first found the evidence of unauthorized trips to Africa, Mexico, and golf courses in the US in Bomasada's records in 2011.

Assuming that the three-year statute of limitations applies to all causes of action pled in this case, S.C. Code Ann. § 15-3-535 (2005), the discovery rule would apply. See, *Moore v. Benson*, 390 S.C. 153, 165, 700 S.E.2d 273, 279 (Ct. App. 2010) (applying the discovery rule to causes of action arising under section 15-3-530(5)), citing *Rumpf v. Massachusetts Mut. Life Ins. Co.,* 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (stating "[i]n determining when a cause of action arose under section 15-3-530, we apply the 'discovery rule'").

According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist. *Moore*, 700 S.E.2d at 279, citing *Abba Equip., Inc. v. Thomason,* 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999).

The date on which discovery of the cause of action should have been made is an objective question. *Id.*, citing *Joubert v. S.C. Dep't of Soc. Servs.,* 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). "In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." *Id.*, citing *Young v. South Carolina Department of Corrections,* 333 S.C. 714, 719, 511 S.E. 2d 413, 416 (Ct. App. 1999).

Based on the information that was available to Morgan, a person of common knowledge and experience could not have known he had a claim on behalf of the Company or on his own behalf for the kinds of misspending that were taking place behind the scenes by Fred and Gilbert using their development company, Bomasada, and their construction company, BIG II.

The Members were not getting monthly financial reports showing actual expenses versus the budget as contemplated by the Operating Agreement; they were simply not being prepared. The construction draws that were being submitted by Gilbert to obtain the loan draws from Amegy Bank only went to Baker, as the only non-Bomasada Managing Member, and Baker was clearly aligned with Fred and Gilbert.

Further, it is unclear how many of the details of the BIG II financial allocations and expenditures Baker knew. It was clear Baker trusted Fred and attempted to reassure Morgan when Morgan had questions about the line items for travel and overhead on the construction draws. Based on one question that Morgan posed, Baker, after consulting with Fred, told Morgan that the travel figure on the draw was for transporting materials, equipment, and men to the project in Charleston. There was no way for a reasonable person in Morgan's position to know that overhead and travel line items were also camouflaging entries for safaris, fishing and golf junkets and vacations. Or that Bomasada was paying its overhead completely on the back of the several projects they had underway at any time or that Fred's plane was being leased to BIG II and that the cost of the lease was being borne by however many projects were underway, including 150 Bee Street. All these entries and the backup for them were on the books of BIG II and in their back up files and those files were off limits to Morgan (and other non-Bomasada Members). The 150 Bee Street financial reports, to the extent they were prepared, and the construction draws were carefully prepared by Gilbert not to reveal what was specifically being spent for personal travel and how much profit was being made in BIG II. Morgan had no reason to know any of this, or to know that he or the Company had a claim for any of these

expenditures by Bomasada/BIG II. In fact, many of the charge that were only evident on the BIG II records, were not available to Morgan until the Elliott Davis review after the arbitration was underway. T. 1252, 7- 17.

Morgan was certainly frustrated in the summer of 2008 that the sales and marketing efforts were lagging when a real estate collapse was imminent, he was seeing no sense of urgency by management, and he was completely shut out from getting any information about sales or expenditures by the Company. That frustration and the rude treatment he was receiving by Fred, Gilbert, and his own brother-in-law, led to his lashing out and saying, as people do when they are angry, "I am going to sue…" but Morgan had no reason to know that he had a basis for any suit or claim and under the discovery rule, a person of common knowledge and experience could not have been on notice given the information that was available to him that some right of his has been invaded.

It was not until Morgan was finally forced by the Managing Members to go at his own expense to Bomasada's corporate headquarters in Houston through an investigator that he hired, Randall Harris, that he learned sufficient information to put him on notice that he had a claim, in January 2011. It was then that Morgan's claim arose, and the filing date of this action, in January 2012, was one year later, well within the three-year statute of limitations for these claims.

Defendants are equitably estopped from claiming that the statute of limitations was triggered in 2008 based on the Defendants' false and misleading answers to his inquiries and their conduct in hiding information from Morgan that he was entitled as a Member to see. *Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 372-73, 725 S.E.2d 112, 125-26 (Ct. App. 2012).

Morgan's delay in filing earlier than he did was clearly the result of the Defendant's conduct. Fred and Gilbert's active and aggressive efforts to hide the true financial records of the Project from Morgan are set out in detail above and throughout the internal email in evidence. The Defendants delayed, obfuscated, and stonewalled Morgan and his professionals' efforts to get basic financial data

to which he as Member was entitled under the Operating Agreement and state law. The Defendants told Morgan, when he asked, that the travel figures he saw and questioned were for delivering materials, equipment, and personnel to the job site, when in fact they were funding the personal travel of Fred, Gilbert, and their friends, and funding personal vacations and trips around the world. Finally, when it became apparent that Morgan might become a Managing Member and become privy to this information, they conspired against the advice of Company counsel (but with his assistance) to violate the Operating Agreement to have Fred serve as the sole Managing Member.

In addition, the statute of limitations in this case is equitably tolled based on the Defendants' wrongful acts, including their conduct in hiding financial information from Morgan that he was entitled to see and in conspiring to deny him the Managing Member role in violation of the terms of the Operating Agreement.

South Carolina law also provides for tolling of the applicable limitations period under various circumstances under the court's equitable power to do justice and avoid unfair and unduly harsh results. *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115-17, 687 S.E.2d 29, 32-33 (2009)

There is more than enough basis for the panel to find that public policy and the interest of justice warrant equitably tolling the statute of limitations to avoid barring Morgan's claim. As detailed earlier, the Managing Members maintained a prolonged and active campaign to prevent Morgan from seeing even the most basic financial information. They misled him about what line items in the documents he did see meant, they belittled and scolded him for asking questions and requesting information, they schemed behind his back to use the Company's own lawyers to threaten him and discourage him from continuing to seek information and conspired to deny him the management position to which he was entitled under the Operating Agreement, all in service of the Defendants' aim to run the Project the way they had envisioned, under their control, and for their own gain, at the expense of their partner Members.

6. **The order ending the construction defect litigation could not and did not waive or release any claims pending in this arbitration.**

The order ending the construction case released the Company's claims against any third parties for liability claims against it in the construction case. The matters in arbitration could not have been litigated in the construction case and were not affected by that order.

By the Order initiating this arbitration proceeding, all issues pending between the parties were referred to arbitration to be decided exclusively by the arbitration panel in this proceeding:

Two years later, on August 22, 2014, while this arbitration proceeding was underway and the parties in it were conducting discovery, the property owners' association for the 150 Bee Street property brought a construction defect lawsuit for water intrusion and other property damage against 150 Bee Street, LLC, Bomasada, Hightower Construction and various other construction professionals and trades involved in the construction of the building. The complaint stated claims for breach of implied warranties of habitability, breach of fiduciary duty for not adequately addressing construction defects and design deficiencies, negligence, amalgamation of 150 Bee Street, LLC and Bomasada, and breach of warranty, all seeking damages related to property damage and necessary repair. Eventually, the plaintiff POA amended the complaint to name BIG II, Stuart Fred, and John Gilbert, alleging their individual responsibility for construction defect claims.

The discussion among the Members of 150 Bee Street, LLC whether to file crossclaims in indemnity always concerned whether to seek indemnity from co-defendants in the construction case to be able to seek those damages if the case eventually went to trial and a jury awarded a judgment against 150 Bee Street, LLC. The email and other correspondence cited by the Defendants in their filings only make sense in the context of whether to bring claims arising out of the issues involved in the construction case. This proceeding in arbitration had been filed in 2012 and the statute of limitations for those arbitration claims, though they were in issue then (and continue to be) had

nothing to do with whether 150 Bee Street, LLC filed cross claims in the subsequent construction defect case filed by the property owners' association.

The POA plaintiffs in the construction case never attempted to assume the claims raised by Morgan in this case, nor could they. The derivative and individual claims raised by Morgan belong to the Company and to Morgan as a Member; those who purchased the units did not own those rights, and as evidenced by the complaint and amended complaints they filed in the construction case were only seeking damages for property damages stemming from design and construction defects. This is borne out by the terms of the release which carved out, specifically, the arbitration case.

The language in Judge Herrington's order was standard for all orders of dismissal and meant to dismiss claims that could have been brought in that construction defect case. It was not meant to, nor does it, affect a prior filed, pending, unrelated case between some but not all the same parties.

Nor could it. Judge Hughston's consent order of 2012 required that all claims by the parties listed in this caption against each other at that time be litigated in the arbitration case, exclusively. Morgan and 150 Bee Street, LLC could not have raised these same claims already being litigated in this arbitration in the construction case even if they wanted to, which they did not.

The order filed by Judge Harrington ending the construction litigation has no affect on this arbitration proceeding.

AWARD

Based on the testimony presented at trial, the documents admitted into evidence, the Findings of Fact and these Conclusions of Law, the Defendants Stuart Fred, John Gilbert, Bomasada Investment Group, Inc., Bomasada Investment Group II, LLC, Lauralis Management, Inc., and Bella Vista, LLC are liable to the Plaintiff Morgan individually and on behalf of 150 Bee Street, LLC for monetary damages as follows:

150 BEE STREET, LLC DAMAGES

Actual Damages

Total Actual Damages $6,080,881

- Overhead charged in excess of amounts budgeted for in Development and Construction budgets. **$672,061,** PE 203, Exhibit 4**;** PE 187, Schedule 1 (sum of disallowed tick marks)
- Travel expenses for flight sectors unrelated to the project and not supported by supporting documents. **$613,100.** PE 203, Exhibit 5.
- Marketing and Commission expenses. **$573,008.** PE 203, Exhibit 6A & 6B
- Construction costs without supporting documents **$2,743,636.** PE 203, Exhibit 7; T. 810, 22- 811, 23; T. 1012, 1- 1013, 20.
- Other expenses paid without supporting documents or were relating to other projects **$601,260,** PE 203, Exhibit 8
- Payments Relating to Homeowners' Association Lawsuit: **$877,816,** PE 203, Exhibit 10

Punitive Damages

- **Total Punitive Damages: $6,000,000.**

Fred and Gilbert's companies were admittedly named for a crude joke in which one person, to put it euphemistically, physically and violently exploits another. T. 1108, 19-1109, 3. They kept this name over all these years to describe their various business enterprises, and their practice in this case of financing not only the operating company's entire overhead from the current projects that are underway, unrelated to whether those charges are actually tied to the project being charged, but more egregiously, paying for extravagant and at times absurd (African safaris and the resulting taxidermy bills) from funds that do not belong to them, but to the Company of which they are only one Member,

without the knowledge or approval of those Members, is a practice that is wrongful, intentional and must be punished and further practice of it discouraged. As a result, this panel awards a sum equal to the amount of actual damages, **$**6,000,000 in punitive damages.

Attorney's Fees

- **$1,707,725**

Morgan may supplement this amount through the date of this Final Determination. This amount is not an additional amount of damage, but Morgan is entitled to recover the amount of his attorney's fees under the derivative action statute prior to distribution to the Members. PE 202.

No Distribution to Bella Vista

The actual award to the Company will be distributed to the Members of the Company, after the payment of Morgan's fees and any senior liens or claims against the Company's assets. It would be inequitable, however, to allow Bella Vista to share in this recovery, since this award is directed against Bella Vista and its partners, and they should not benefit in any way from their wrongful acts. Therefore, Bella Vista and its general partners may not recover as Members from any distribution resulting from this derivative action and its share will be distributed as detailed below.

MORGAN INDIVIDUAL DAMAGES

- **$17,837,271**

Morgan's share of the Company damages is $1,621,570, which is 26.6667% of the actual damages award of $6,080,881 award.

Applying the interest rate provided in the Operating Agreement of 35% to that share of $1,621,570 35% over 11 years (2012-2022) results in an interest calculation for that amount that Morgan would have contributed to the Company that he should not have but for the Defendants' wrongful actions

in the amount of $17,837,271. This amount is limited by Company Assets (non-recourse) by the terms of the Operating Agreement. It was clear that plaintiffs were prepared to charge Morgan 35% interest on his deficiency should he not make his share of the capital call in January 2009. PE 94.

To be clear, though Burkett testified concerning prejudgment interest, this amount is based on the Operating Agreement provision on capital calls and is not statutory prejudgment interest.

Currently the company has no assets. All of the company's funds were either distributed in 2012 and 2013, and the remaining funds were used to pay legal fees and settlement of the HOA lawsuit. Defendants have inferred that any interest due by defendants on their capital deficiency is limited to the assets of the company, and since the company currently has no assets, no money is owed.

In 2012, the Defendants applied to this panel to have available funds in the Company distributed to Members, despite this pending arbitration. The panel allowed the distribution and Bella Vista received $1,456,664.72.

Accordingly, that amount existed in the Company and was distributed after notice of this claim. Morgan individually is entitled to collect the interest on his share of the award from Fred, Gilbert, and Bella Vista up to and including the $1,456,664.72 distributed to defendants in 2012 and 2013.

Additionally, Bella Vista's portion of this award ($1,621,570), which it is inequitable for Bella Vista to receive and should be distributed to Morgan to satisfy the individual award.

FOR THE PANEL

_____

H. Brewton Hagood,
Panel Chair

_____

Hon. Costa M. Pleicones.
Panel Member

_____

Paul A. Dominick,
Panel Member

Date: _____

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION IN THE COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580 **ORDER** **DENYING DEFENDANTS' MOTION TO VACATE OR MODIFY THE FINAL ARBITRATON AWARD** **AND** **CONFIRMING ARBITRATION AWARD**

This matter comes before the court on Defendants' Motion to Vacate or Modify the Final Arbitration Award (filed June 30, 2023), and Plaintiff's Opposition to Defendants' Motion and Motion to Confirm the Award (filed July 17, 2023).

The arbitration award (Arbitration Award, April 10, 2023, and Final Arbitration Award, June 19, 2023, together, the "Arbitration Award") that the Defendants seek to vacate or modify is the result of a 10-year arbitration proceeding pursuant to a valid arbitration agreement and an order of this court referring the matter to arbitration with the consent of the Defendants (Consent Order Referring Matter to Arbitration, July 9, 2012). All of the issues raised by the Defendants in this motion were briefed and argued many times before the Panel and ultimately the Panel ruled against the Defendants' arguments on each occasion. Now, the Defendants seek to reargue those issues

before this Court, in this motion to vacate. This the Defendants cannot do under the law of this state.

The Panel was a 3-arbitrator panel made up of experienced lawyers chosen by consent of the parties that changed somewhat over the course of the ten years but the Panel that decided the dispositive motions and tried the case over more than a week's time consisted of two experienced and accomplished members of the Charleston County Bar[1] and a retired Chief Justice of the South Carolina Supreme Court[2] (the "Panel" or "Arbitration Panel").

The Panel read and examined thousands of pages of briefs, memos, exhibits, statutes, and legal opinions, and heard days of testimony from live witnesses, as well as reading hundreds of pages of submitted deposition testimony. The Panel read memoranda on three separate dispositive motions (Plaintiff's Memo, **Exhibits C and D**) filed by the Defendants and briefed by the parties and heard arguments on the motions at a hearing after which the Panel issued an order denying the motions (Plaintiff's Memo, **Exhibit E**). Thereafter, the Panel heard testimony and argument at an arbitration hearing that began on October 31, 2022, and ended on Nov 8, 2022 (Plaintiff's Memo, **Exhibit F**). Thereafter, the Plaintiff and Defendants prepared and submitted hundreds of pages of final written argument in the form of proposed orders which the Panel considered and issued a written award on April 10, 2023 (Plaintiff's Memo **Exhibit G**). After considering the Defendants' motions and supporting memoranda on a Motion for Reconsideration, the Panel issued a final award on June 19, 2023, which also resolved the award of attorney's fees which had likewise been briefed and contested by the Defendants.

After reviewing the motions, memoranda, and exhibits submitted by the parties and after hearing arguments of counsel for both parties on November 13, 2023, this Court DENIES the

[1] H. Brewton Hagood, Chair; Paul A. Dominick, Member
[2] Costa M. Pleicones, Member

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motions of the Defendants to vacate or modify the arbitration award and CONFIRMS the award of the arbitrators.

THE SCOPE OF REVIEW OF ARBITRATION AWARDS

(A) **A motion to modify may only be made on certain grounds provided by the statute, which do not exist in this case**.

S.C. Code Ann. Sec. 15-48-140 provides:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

S.C. Code Ann. § 15-48-140 (LexisNexis, Lexis Advance through 2023 Regular Session Act No. 7, not including changes and corrections made by the Code Commissioner) ("SC Arbitration Act")

There is no evident miscalculation, decision on a matter not submitted, or flaw in form not affecting the merits raised by the Defendants in their motion. There is, therefore, no basis in the law for modifying or correcting the Panel's award. The motion made under 15-48-140 is denied.

(B) **Review of an arbitration award is limited, and the decision of the arbitrator will be vacated only upon certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law.**

Arbitration is not "litigation carried on by other means." Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555-56 (Ct. App. 2002), citing White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993). Judicial review of an arbitration award is therefore limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor. Lauro, 570 S.E. 2d at 555-556.

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Arbitration is a favored method of settling disputes in South Carolina. When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. Id. Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award. Id, citing Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997) (citations omitted). Review of an arbitration award is limited, and the decision of the arbitrator will be vacated only under certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law. Id., citing Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

"Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award." Crouch Constr. Co. v. Causey, 405 S.C. 155, 163, 747 S.E.2d 482, 486 (2013), citing C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (quoting Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009)). "An award will be vacated only under narrow, limited circumstances." Id. "The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality." Id., quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 151, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) (White, J., concurring).

In reviewing arbitration awards, "the standards for judicial intervention are . . . narrowly drawn to assure the basic integrity of the arbitration process without meddling in it." Id., quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983). "The reasons for this are not hard to identify." Id., citing In re Andros Compania Maritima, S.A., 579 F.2d 691, 700 (2d Cir. 1978).

A decision to vacate an arbitration award may only be made on the specific grounds found in S C Code Ann. Sec. 15-48-130 or on the non-statutory basis of "manifest disregard or perverse misconstruction" of the law.

The SC Arbitration Act provides:

> (a) Upon application of a party, the court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an

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> arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection. But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

S.C. Code Ann. § 15-48-130(a).

Decisions of courts in this and other jurisdictions have vacated arbitration awards where there has been "a manifest disregard or perverse misconstruction of the law." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009), citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985); S.C. Code Ann. § 15-48-130(a); Batten v. Howell, 300 S.C. 545, 548-49, 389 S.E.2d 170, 172 (Ct. App. 1990) (citations omitted). However, decisions recognizing this non-statutory ground for vacating arbitration awards have required "something beyond and different from a mere error of law or failure on the part of arbitrators to understand or apply the law." Batten, 389 S.E.2d at 172. "[A]rbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" Id. If a ground for the award can be inferred from the facts, the award should be confirmed. Id.

For a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Id. Case law presupposes something beyond a mere error in construing or applying the law. Even a "clearly erroneous interpretation of the contract" cannot be disturbed. Id. at 108, 333 S.E.2d 787. The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law. Id. at 108, 333 S.E.2d at 787. Accord, Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

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An arbitrator's "manifest disregard of the law" as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it. Gissel, 676 S.E. 2d at 324, citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005). Factual and legal errors by arbitrators do not constitute an abuse of power, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. Id., Pittman, supra (emphasis added).

Here, the Defendants argue that the Arbitration Award should be vacated under the statute because "The arbitrators exceeded their powers" "and/or manifestly disregarded the law governing their jurisdiction in this matter in that the Panel lacked subject matter jurisdiction to hear the case and should have dismissed the case as a matter of law." Defendants' Motion to Vacate, at 1.

The Defendants' burden, therefore, in this motion to vacate, is to prove that as a matter of law the arbitrators (1) knew that they had no authority to decide this case, (2) ignored the law, and (3) decided the arbitration proceeding in knowing and manifest disregard of that law.

DENIAL OF THE DEFENDANTS' MOTION TO VACATE OR MODIFY THE ARBITRATION AWARD

1. **The issue of subject matter jurisdiction was thoroughly briefed and argued before the Panel at both the dispositive motion stage, at the trial and at the post-trial stage, and the Panel ultimately decided in favor of the arguments recognizing the court's and Panel's subject matter jurisdiction.**

The consent order initiating the arbitration dated July 9, 2012, established exclusive and binding subject matter jurisdiction in the panel for all matters raised by the pleadings in this matter. The consent order, to which the Defendants explicitly agreed, referred:

> All claims, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case, shall be decided by binding arbitration that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act and all of the parties submit themselves to the jurisdiction of this court and arbitration panel.

This is not a matter of a party raising subject matter jurisdiction later in the case. Rather, subject matter jurisdiction in this case was decided by court order and by consent submission of the

parties, including these Defendants pursuing this argument. This Court, and the arbitration Panel to which it referred this matter, have subject matter jurisdiction of this matter.

This matter was extensively argued throughout the course of the arbitration proceedings by the Defendants and, specifically, in the motions for summary judgment, at trial, post-trial, and in a motion for reconsideration. Likewise, at every stage, the Plaintiffs presented arguments establishing the Panel's subject matter jurisdiction and arguing against the Defendant's position. (Plaintiff's Memo, Exhibits C, D, E, F, and G).

The Panel ruled against the Defendants' motion at the summary judgment stage (Plaintiff's Memo Exhibit E), and after hearing the evidence and legal arguments of counsel at trial and considering their extensive arguments submitted post-trial, the Panel decided in favor of the Plaintiff's position and found that the Panel did have subject matter jurisdiction (see Exhibit A). The Defendants raised the argument yet again in the Motion for Reconsideration and the Panel once again, in its ruling on that motion, rejected Defendants arguments and found that the Defendants had raised no new issues or arguments, and the Panel did have subject matter jurisdiction to issue an award in the arbitration proceeding (see Defendants' Motion, Exhibit A).

Now, the Defendants make the same arguments here, again.

The Defendants cannot vacate the Arbitration Award, however, by arguing that the Panel did not fully consider their argument or even that the Panel wrongly decided the issue. Rather, they must show that there is a clear law supporting their position that the Panel recognized to be controlling and simply refused to follow it. There is no such clear controlling law, and there is no evidence that the Panel disregarded the law of South Carolina in any respect. Rather, the Panel disagreed with the Defendants' interpretation of the law and facts and instead adopted the argument made by the Plaintiff.

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There is no clear legal principle that compels a decision for Defendants that the Panel knowingly failed to follow. The Panel disagreed with Defendants' argument and adopted Plaintiff's argument on this issue. The motion to vacate on this issue is denied.

2. **The issue of the statute of limitations was exhaustively briefed and argued before the Panel at both the dispositive motion stage, the trial and at the post-trial stage, and the Panel ultimately decided against Defendants' arguments**.

The same analysis applies to the Defendants' statute of limitations argument. The issue was briefed and argued at the dispositive motions, at trial, post-trial, and post-award. At each stage, the Plaintiff made arguments against applying the statute of limitations defense as a bar to recovery. In each instance, the Panel rejected the Defendants' arguments and decided that the statute of limitations defense did not bar recovery in this case.

As with the subject matter jurisdiction issue, the Defendants must prove not only that the Panel erred as a matter of law but did so knowing a clear and unassailable principle of law that controlled the outcome of the issue and knowingly disregarded it to render its decision. There is absolutely no support for this argument in the record or the award, and this Court denies the Defendants' motion to vacate on this issue.

3. **The Panel invited and considered the arguments of the Defendants regarding the attorney's fees award and ultimately made an award to the Plaintiff that was less than Plaintiff requested**.

Even more so, regarding the attorneys' fee issue, the Defendants do not even argue that the Panel knowingly disregarded the law. The Defendants simply disagree with the Panel's conclusion not to bar the Plaintiff's recovery for attorney's fees based on an unfounded theory of "unclean hands." The Defendants challenged this measured award by the Panel, set out in detail in its June 19, 2023, written ruling, which was less than the Plaintiff requested, and based on a reasoning detailed in the text.

The Defendants argue that the Panel was wrong in making the award and ask the Court to apply an equitable doctrine, unclean hands, to vacate or modify the Panel's award. The Defendants provide

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no authority provided in 15-48-130 or -140 that would supply a basis for such an action. Nor have the Defendants shown any "manifest disregard of the law" with regard to this award of attorney's fees. The motion on this issue, too, must fail for want of any support in the law.

4. **The Panel's award was detailed and specific, and complies with the SC Arbitration Act.**

The Defendants raised this issue explicitly in the Motion to Reconsider filed with the Panel after the arbitration award of April 10, 2023. In their final award ruling of July 19, 2023, at pages 3-4, the Panel rejected this argument as follows:

> The Panel notes that this dispute was referred to Arbitration by a Consent Order agreed to by counsel for the parties and signed by Judge Thomas L. Hughston dated July 9, 2012. Paragraph 8 of the Consent order stated that 'This arbitration shall follow the South Carolina Rules of Civil Procedure where practical and to the extent not inconsistent herewith". The only provision in the Consent Order addressing the form of the Award is the requirement in paragraph 13 that `The determination shall be issued in the form of an award on all claims and counterclaims.' The Panel issued a 25-page unanimous Arbitration Award addressing each of the claims asserted by the Plaintiff in his Second Amended Complaint, except those which the Plaintiff withdrew following the hearing. The Panel did not award any relief to the Defendants under the Counterclaims set forth in the Defendants' Answer to Second Amended Complaint and Counterclaims dated April 26, 2022.
>
> The Panel has considered the grounds and Motion for Reconsideration of Arbitration Award dated April 18, 2023, and the arguments presented in Memorandum In Opposition To Defendants Motion For Reconsideration Of Arbitration Award dated May 3, 2023. The Panel finds that it is not required to issue separate findings of fact or conclusions of law when ruling on motions presented and ruled upon prior to the hearing which are renewed during the hearing. In ruling on Defendants Motions the Panel noted that the Defendants had submitted proposed Orders of Dismissal on the Statute of Limitations Issue and the Derivative Action Issue and that it had considered the testimony presented at the hearing, excerpts from the depositions of Jo Ved and Stuart Fred submitted by counsel, and all exhibits entered into evidence by the parties and the proposed Orders submitted by counsel. The Defendants presented no new arguments in the Motion for Reconsideration which had not previously been submitted to the Panel at the hearing held on June 16, 2022, after which the panel issued its July 11, 2022, Order Denying Defendants' Motions to Dismiss and for Summary Judgment.

S.C. Code Ann. Sec. 15-48-90 states that

> (a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

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There is no other requirement for the form of the award, which is consistent with the law of arbitration in SC that it is not "litigation by other means." Beyond the Arbitration Act provisions, the only other law governing the mode of trial and award for this arbitration was the Consent Order of Reference, July 9, 2012. As cited by the Panel, that Order required that the Panel "address each of the claims," which the Panel did. In addition, the Panel addressed each affirmative defense argued by the Defendants, in writing, numerous times.

There is no support for this argument in S.C. Code Ann.15-28-130 or -140, and the Court denies the Defendants' motion on this argument, as well.

MOTION TO CONFIRM

Having heard and resolved the Motions to Vacate and Modify the arbitration award, the Court confirms the arbitration award under SC Code Ann. Sec. 15-48-130(d).

IT IS SO ORDERED.

_____

Bentley D. Price, Presiding Judge,

Ninth Judicial Circuit

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Charleston Common Pleas

Case Caption: Thomas H Morgan VS John L Gilbert , defendant, et al

Case Number: 2012CP1000580

Type: Order/Vacate Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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IN ARBITRATION

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580
THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	)	**ARBITRATION AWARD**

Dates of Hearing:	**October 31, 2022 – November 8, 2022**
Arbitration Panel:	**H. Brewton Hagood, Chair** **Hon. Costa M. Pleicones** **Paul A. Dominick**
Attorneys for Plaintiff:	**W. Andrew Gowder, Jr.** **Michael T. Rose**
Attorneys for Defendants:	**Henry E. Grimball** **Morris A. Ellison**
Court Reporter:	**Judy W. Galuppo, Veritext Legal Solutions**

This dispute was referred to arbitration pursuant to the Consent Order Referring Matter to Arbitration signed and filed by Circuit Judge T.L. Hughston on July 9, 2012. Following the decision by Panel Chair M. Dawes Cooke to recuse himself as an Arbitrator, Arbitrators Hagood and Robertson selected Paul A. Dominick to be the replacement arbitrator. The arbitrators and

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counsel for the parties executed a Consent Order Substituting Arbitrator which also provided that Arbitrator Hagood would serve as Chair of the Panel. This Consent Order was signed by Chief Administrative Judge Roger M. Young, Sr. and filed with the Clerk of Court for Charleston County on September 24, 2019. After Arbitrator Claron Robertson, III informed counsel for the parties that he needed to resign from the Panel for personal reason, a Consent Order Substituting Arbitrator Costa M. Pleicones in place of Mr. Robertson was signed and filed by Chief Administrative Judge Jennifer B. McCoy on May 9, 2022.

The operative pleadings before the Panel are: Plaintiff's Second Amended Complaint containing sixteen causes of action, which was served pursuant to the Order Granting Plaintiff's Motion To Amend issued by the Panel Chair on April 4, 2022; Defendants' (excepting 150 Bee Street, LLC) Answer To The Second Amended Complaint And Counterclaims dated April 26, 2022 which asserted numerous affirmative defense and four separate causes of action in its counterclaims; and Plaintiffs Reply To The Counterclaims Of The Defendants dated May 17, 2022. Following a hearing held on June 16, 2022, the Panel issued its July 11, 2022, Order Denying Defendants' Motions to Dismiss And For Summary Judgment.

PERTINENT STIPULATIONS OF FACT

On October 24, 2022, counsel for the parties submitted their joint Stipulation of Uncontested Facts. These Stipulations identified the membership percentages set forth in the Original Operating Agreement, the First Amended Operating Agreement and the Second Amended Operating Agreement executed on or about March 4, 2005.

Stipulation number 13 set forth the membership percentages under Exhibit A to the Second Amended Operating Agreement with Neal Baker and Bella Vista Partnership each owning 26.67%, Thomas Morgan owning 26.65% and Edwin Pearlstine, Jr. owning 20.00%.

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Stipulation number 14 identified that the initial managing members were Stuart Fred, as a representative of Bella Vista Partnership, and Neal Baker.

Stipulations 15 and 19 covered the increase in the original promissory note with Amegy Bank from the original principal sum of $32,450,000.00 on March 15, 2005, to $38,665,000.00 on March 19, 2007.

Stipulations number 28 and 30 provided the dates of delivery of memos and reports of Prothro as September 16, 2009 (Peter Galbraith) and May 24, 2011 (Harris).

Stipulation 31 stipulated that the death of member Neal Baker was August of 2011.

Stipulation 33 provided that on January 26, 2012, Morgan filed the instant derivative suit against Bomasada entities, Fred and Gilbert.

Stipulation 34 established October 30, 2012, as the date that Pearlstine was elected a Managing Member at a meeting of the LLC.

Stipulation 35 identified March 27, 2012, as the date Elliot-Davis was engaged to perform enumerated procedures with respect to certain records and transactions of the LLC as defined in its engagement letter.

Stipulations 37 and 40 identified the date of the demand letter from Jesse Kirchner on behalf of the HOA to be February 14, 2014, and August 22, 2014, as the date the HOA complaint was filed. Stipulation 43 identified the resolution to approve the settlement of the POA case to be July 21, 2017. Stipulation 49 identified the filing date of the Final Order Approving Partial Settlement in the Construction Case to be January 17, 2018.

THE HEARING

In accordance with the Third Amended Scheduling Order issued by Panel Chair Hagood on April 29, 2022, the Plaintiff's claims and Defendants' defenses and counterclaims were heard

before this arbitration panel beginning on October 31, 2022. Live testimony was presented at the offices of Womble Bond Dickinson through November 8, 2022, except for a break on November 3, 2022, due to a court hearing Panel Chair Hagood had to attend. In addition, the parties exchanged designations of excerpts from the depositions of Jo Ved and Stuart L. Fred which were provided to the Panel in lieu of live testimony from these witnesses.

Morgan testified as the first witness in the Plaintiff's case, followed by witnesses Brandon Renaud, CPA and Ronald Burkett, CPA. Gilbert testified on behalf of the Defendants, followed by attorney Tom Hildebrand (who had represented the Bomasada entities in the defense of the Construction Case) and William Shields, CPA.

At the conclusion of the Plaintiff's case and at the conclusion of the Hearing, the Defendants renewed their three Motions to Dismiss (collectively, the "Motions") based upon the record presented at the Hearing as well as the record made at the hearing on the Motions originally heard on June 16, 2022 (the "Motion Hearing") and denied without prejudice on July 11, 2022.[1] At the Hearing, the Panel took these Motions under advisement.

At the conclusion of the hearing the Panel noted that Plaintiff's Second Amended Complaint contained sixteen separate causes of action. The Panel asked counsel for the Plaintiff to identify the specific causes of action for which the Plaintiff was requesting a ruling from the Panel. On November 14, 2022, the Panel received an e-mail from Andy Gowder stating that the Plaintiff would only be proceeding on the following causes of action:

- First: Breach of Fiduciary Duty, incorporating the Third: Member Oppression as part of that cause of action
- Fourth: Civil Conspiracy
- Sixth: Breach of Contract, incorporating the Second: Breach of Good Faith and Fair Dealing as part of that cause of action
- Sixteenth; Breach of Contract accompanied by a Fraudulent Act

[1] *See* Tr. p. 1487, l. 16 – p. 1490, l. 2.

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- Ninth: Unjust Enrichment
- Fourteenth: Misappropriation of LLC Assets

At the request of the Panel, counsel submitted proposed Orders on Thursday, December 22, 2022. Counsel for the Plaintiff provided one document entitled Final Determination of The Arbitration Panel. Counsel for the Defendants provided three documents: (a) Order of Dismissal (Statute of Limitations Issue); (b) Order of Dismissal (Derivative Action Issue); and (c) Order.

The Panel was also provided a complete transcript of the hearing which contains 1,504 pages, excluding the excerpts from the depositions of Jo Ved and Stuart Fred submitted by counsel for the parties. The Panel also had access to electronic copies of the Exhibits introduced into evidence by the parties at the hearing.

RULING ON DEFENDANTS' MOTIONS

After considering the testimony presented at the hearing, including the deposition excerpts of Jo Ved and Stuart Fred, and reviewing the transcript of the hearing and the exhibits entered into evidence by the parties along with the proposed Order submitted by the parties, the Panel issues the following rulings:

The Defendants' Motion for Dismissal of the Derivative Action, which was renewed after presentation of the Plaintiff's case and at the conclusion of the testimony, is hereby DENIED.

The Defendants' Motion for Dismissal on the grounds that the three-year statute of limitations had run prior to the filing of the original complaint on January 26, 2012, is hereby DENIED.

PLAINTIFF'S CLAIMS

Plaintiff seeks recovery for damages allegedly suffered to himself and to 150 Bee Street, LLC ("Company"), based upon multiple causes of action. All claimed damages stem from the relationship of Morgan and the Company with the Defendants including individuals, corporate

entities, and affiliates, collectively "Bomasada" or "Defendants,"[2] and primarily arise under the "SECOND AMENDED AND RESTATED LIMITED LIABILITY COMPANY AGREEMENT OF 150 BEE STREET, LLC" dated March 4, 2005, (the "Operating Agreement") the Development Agreement, and the Construction Contracts.

At the arbitration hearing Plaintiff presented evidence of seven discrete elements of claimed actual damages, totaling $6,926,469.00. In his post-hearing proposed order he claims actual damages of $6,080,881.00.[3]

As noted elsewhere in this award, the testimony, depositions and exhibits offered by the parties were in sharp conflict. The difference in recollection of witnesses is partially attributable to the significant time gaps between the operative events and the hearing. Depending upon the witness, the gaps between compilations and testimony were as long as 15 years.[4] As noted throughout, all matters received in evidence were considered by the panel in making its determination of liability and damages, giving due regard to credibility, weight and Plaintiff's burden of proof.

We now turn our attention to each of the remaining claimed elements of actual damages.

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[2] Unless otherwise noted, Defendants for this discussion include all parties named as Defendants in this action, with the exception of 150 Bee Street, LLC, on behalf of which damages are sought.

[3] The difference primarily, although not wholly, appears attributable to abandonment of his claim for $1,122,093.00, based upon payments made by BIG II to vendors after the issuance of the Temporary Certificate of Occupancy for the project. This abandonment does not affect the panel's determination of an award as we were not inclined to include this element in our award. Other than being paid late, there is a failure of proof that any payments were otherwise improper. Moreover, some of the charges originally questioned appear to be duplications of other categories of damages.

[4] The sources of evidence relating to damages came primarily from the Elliott Davis Report; the Ronald Burkett Report; Prothro Wilhelmi Report, Report of William Shields, and testimony of Burkett, Shields, Brandon Renaud, John Gilbert, Plaintiff Morgan, and depositions of Stuart Fred and Jo Ved..

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1. Excess Realty and Marketing Fees

Plaintiff claims $573,008.00, in damages attributable to alleged excess commissions and marketing costs paid to vendors engaged on behalf of the Company by Bomasada in its role as developer for the project. Among Plaintiff's bases for these claims are that the realtor was unlicensed in South Carolina,[5] and that it owned the marketing agent. Plaintiff's distrust of this arrangement seems to have initially sprung from his suspicion that there was a covert relationship between Bomasada and the realtor that involved Bomasada, and thus Gilbert and Fred, potentially receiving kickbacks.

We find this claimed element is not compensable as the evidence presented at hearing does not support the existence of any nefarious dealings between the Defendants and the contractors, and some commissions, though excessive were not procured by the Defendants.

It thus appears that any damages that may have been suffered by the Company, if any, were not the result of intentional misconduct, or knowing violation of the law on the part of any Defendant. Further, there is no support for the assertion that any Defendant personally benefitted from this purported breach.[6]

2. Construction Costs without Supporting Documents

Plaintiff claims damages in the amount of $2,422,827[7] for this element.

[5] The original realty firm subsequently affiliated a South Carolina licensed company.

[6] See Section 8.01 of the Operating Agreement.

[7] Pre-hearing and post-hearing filing the claim was for $2,743,696, but the final Burkett report relied upon made a downward adjustment which we consider appropriate. This lower figure purports to represent expenditures lacking sufficient backup.

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Accountants and accounting firms engaged by Plaintiff examined records available to them and issued reports and provided testimony in which they concluded that the Company was charged for construction costs for which there was insufficient documentation.[8]

Defendants vigorously challenged the efficacy of the reports, in part, as not being true audits, because, among other things, no interviews were had with Gilbert or Fred. Further, the Defense contended these reports were not compiled in accordance with governing professional standards. Defendants also argue that the Elliott Davis Report is a "DRAFT," not a final report. Brandon Renaud testified, however, that the final report would not have varied from the last draft, and that only a lack of attestation from Morgan precluded its labeling as final. Morgan for his part represented he did not feel comfortable signing as he was unsure if the Bonasada defendants had provided complete information. The Defendants further argue that the reports rely to an unacceptable degree, upon the subjective opinions of the witnesses, and are thus unreliable in toto. The panel finds these reports, and the testimony concerning them, admissible, and helpful to our understanding of the issues regarding damages claimed for this element, as well as other elements of damages claimed and discussed herein.[9] As to this element of claimed damages, we have also considered the testimony and reconciliation of costs provided by William Shields, CPA, the Defense accounting witness. We have assigned such weight to the documents and testimony as we have determined based upon the credibility of the witnesses, and the accuracy of the calculations.

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[8] See Elliott Davis Report, Exhibit 404. Ronald Burkett report Exhibit 203; and the testimony of Brandon Renaud and Ronald Burkett. These reports also are the primary compilations of all damages claimed herein.

[9] These reports include the Prothtro Wilhelmi Report, Plaintiff's Exhibit 129, which does not address the construction cost allegations.

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Exhibit 7 to the Burkett Report and Schedule 7[10] to the Elliott Davis report, each contain the conclusion of the compilers that $2,422,827.45[11] in payments made by the Company to a variety of construction vendors and entities lacked documentation, and thus reflect their views of damages suffered by the Company. Shields' reconciliation on the other hand indicates a discrepancy of only about $1,000.00. The Defense contention is Shields' access to software used by the Defendants, and the Plaintiff's witnesses lack thereof, explains the difference and renders Shields' reconciliation more accurate. As expected, both calculations generally agree on the total of contract payments made to BIG II by the Company.[12] From there, the calculations of "undocumented" expenditures diverge, with each showing the respective unreconciled differences noted above.[13]

Shield's final reconciliation of the "Total Contract payments made to BIG II by 150 Bee Street," is arrived at by adding the four items shown in the "Big II Summary" on page 88, of Exhibit 404. These are: The $313,110.00 item referred to in footnote 12; Retainage payments of $407,690.00, and $509,110.00, respectively paid to Hightower in the fall of 2007; and $304,850.00 for BIG II Change Order #4. As set forth in notes 5-7, on page 89 of Exhibit 404, Elliott Davis was unable to apply their agreed upon procedures to these items as one pre-dated the creation of the job costing software, and the other three were undocumented. These are credits not otherwise

[10] This Schedule did not appear in the original Elliott Davis Report, dated May 2013, but rather appears in the May and August 2014, iterations. The latter date roughly coincides with the HOA lawsuit, when all compilers were told "pencils down," which may explain why it was not finalized. In any event, as stated above, Renaud testified the final report would not have varied from the last draft.

[11] Again, we acknowledge the prior assertion of the higher figure of $2,743,636.

[12] See the summary of each party's calculation under the heading "Contract Cost Reconciliation," at page 88 of the Elliott Davis Report.

[13] One explanation for the difference ($320,808.90) between the $2,743,646.35 figure and the later $2,422,827.45, may be the inclusion by Shields of a $313,110.00 expense for "BIG II payment application #1", which Elliott Davis deals with in note 5 to Schedule 7. In any event, as stated we are proceeding based on the lower figure.

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seen in the records available to Plaintiff. In any event, the Elliott Davis Report concluded that these items were likely already included in the total job costs, and were thus double entries.

As noted, the Defendants claim Shields' figures are more accurate because he had access to proprietary software used by the Bomasada Defendants which was not utilized by the Plaintiff. There is disagreement among the parties as to why the software and other company records were unavailable. Suffice it to say, that the record is replete with tactics employed by the Bomasada Defendants' to inhibit Plaintiff's access to records of BIG II, which if they were as represented by Defendants, could have obviated much of the difference in the party's calculations. We find the Defendants effectively blocked access to these records.[14]

We now turn to Exhibit 7 of the Burkett Report, Plaintiff's Exhibit 203, which sets forth in detail those challenged costs, totaling $2,422,827.45.

It is the Plaintiff's burden to bring forth evidence by the greater weight or preponderance of the evidence to support his claim to these damages. As to the $1,270,872.00 paid directly to the Bomasada Defendants, specifically Bomasada Group, Inc., we find and conclude that Plaintiff has met that burden. We do not base this finding solely on the contention of Plaintiff's witnesses that these charges lack sufficient documentation, although that is one basis for our decision. We couple that factor with Defendants' history of resistance to Plaintiff's access to their internal records, which lasted through the time of the hearing. We recognize Defendants' introduced conflicting testimony, including that of Shields,[15] but we find the overarching theme of Defendants' resistance to scrutiny of its records militates in favor of the Plaintiff's position.

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[14] In fairness the record is likewise replete with evidence of Plaintiff, a non-managing member's outright hostility toward Defendants, and Defendants' frustration with what they perceived, often justifiably, as Plaintiff's meddlesome nature.

[15] Shield's claims Plaintiff's representative never responded to his 2014 email offering access. That came at a time when all accounting examinations ceased because of the HOA suit. Also it is clear that Defendants found Plaintiff annoying, and even hostile almost from the onset of their relationship

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Further, there is testimony from Jo Ved, an employee of Defendants, that the payments received by Bomasada were treated as "profit", an entitlement to which is not provided in any of the operative contractual documents. Moreover, there are the representations by the Defendants that their records had been destroyed. That later proved incorrect, as records were available at least in digital format.

Finally, there is testimony from John Gilbert concerning Defendants' "sloppy" document drafting and record keeping, which is supported in part by the existence of certain admittedly unjustified charges to the project.[16] Gilbert also acknowledged that in retrospect Plaintiff's demands were not wholly unreasonable. As stated earlier, if records existed that supported Defendants' position, it is reasonably inferrable they would have been produced. Lack of production bolsters our conclusion that Plaintiff has borne his burden as to the payment made to Bomasada, as it increases the likelihood the records would not have supported Defendants' position.

As to the remaining $1,151,955.00 in payments set forth on Exhibit 7 to Plaintiff's Exhibit 203, we conclude that while several of the charges appear suspect, there is uncertainty in our minds as to Plaintiff's entitlement to prevail. These may well have been legitimate charges, and are, in any event, not subject to the same adverse inferences discussed above as to those payments which went directly to the Defendants' herein. If the Defendants had the means to support the appropriateness of those direct charges, they should have been able to produce them, rather than simply and unpersuasively asserting Plaintiff's experts were "incorrect." In short, we afford the benefit of the doubt to Defendants as to payments to entities and individuals, other than to themselves. We further find that the Defendants are not entitled to the benefit of Section 8.01, of

[16] See the $143,884.73 in admitted "miscodes".

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the Operating Agreement, as we infer from the evidence that the direct payments more likely than not constituted intentional misconduct. We therefore find from the evidence that Plaintiff, has borne his burden of proving these damages to the Company against Defendants, excepting Lauralis, in the amount of $1,270,872.00, and we include that amount in our award to the Company.

At all times relevant to the acts which occasioned damages to the Company, Stuart Fred was a managing member of the Company, and John Gilbert was acting as the day to day "operating" officer of the Company, at the direction of Fred and the other managing member. In addition, Gilbert and Fred controlled and owned Bella Vista, LLC, a member of Company.[17] Further, Defendants admitted that Fred and Gilbert owned and controlled Bomasada Group and BIG II, and that BIG II was organized specifically to act as general contractor for the Bee Street Lofts project.[18]

Plaintiff has alleged that the legal distinctions between and among Fred, Gilbert, Bella Vista, Bomasada, Lauralis, and BIG II, has not been maintained, and their interests are "amalgamated" such that the actions of one should apply to the others.

The Prothro Wilhelmi Report notes that 8980 Lakes at 610 Drive #200, Houston Tx, is the address for Lauralis (Fred's wholly owned company), Bee Street, Bella Vista, Bomasada Investment Group II (BIG II), and Bomasada Group, Inc. (BG I). While the existence of a common address for all entities either controlled or owned by Gilbert and Fred is not dispositive of the formation of a single enterprise, it is a strong evidentiary point favoring such a finding.

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[17] See Answer to First Amended Complaint. Defendants nonetheless denied they were "controlling persons" of the Company.

[18] Id.

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In Pertuis v. Front Roe Rests, Inc., 423 S.C. 640, 817 S.E. 273 (2018), our supreme court established the test for establishing a "single enterprise":[19]

> 1) "the various entities' operations are intertwined," and 2) "further evidence of bad faith, abuse, fraud, wrongdoing or injustice resulting from a blurring of the entities legal distinction". Brad Walbeck, et al. v. The I'On Company, LLC, et al, Appellate Case No. 2019-000968, Supreme Court of South Carolina, (February 8, 2023) quoting Pertius.

While there is ample other evidence of independent actions of Defendants[20] in breaching their obligations to the Company, we find that in fact the legal distinctions among the named Defendants is so blurred as to constitute a single enterprise under Pertuis and Walbeck. The melding of interests facilitated the wrongdoing here, regarding the payments to Bomasada, and simply add another overlay of liability for the Bomasada Defendants, including Fred and Gilbert.

We find the damages under this heading are appropriately awarded for unjust enrichment, breach of fiduciary duty, and breach of contract.

(a) Unjust Enrichment

A party is "unjustly enriched when it has, and retains… money which in justice or equity belongs to another" Robert Dema et al. v. Tenet Physician Services – Hilton Head, Inc. et al., 383 S.C. 115, 678 S.E.2d 430 (2009). The benefits, i.e., money paid to Bomasada, Inc., by the Company, and to which the Defendants were not entitled, cannot in justice and equity be retained by the Bomasada Defendants, including Big II and Fred, and Gilbert, the sole owners of Bomasada, and the only General Partners of Bella Vista. Thus restitution by the Defendants to the Company

[19] As in this case, the Plaintiff alleged "amalgamation" of interests, and our court chose to use the term "single enterprise" in lieu thereof.

[20] See 16 Jade Street, LLC v. R. Design Construction Co., LLC, et al 398 S.C. 338, 728 S.E. 2d 448 (2013).

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of the damages above is required. See Ellis v. Smith Grading and Paving, Inc., et al., 294 S.C. 470, 366 S.E. 2d 13. (Ct. App, 1988).

(b) Fiduciary Duty

Each party to this action, as it relates to this claimed element of damages[21] owed fiduciary duties, one to the other. The Bomasada Defendants, as to this element, clearly breached their fiduciary duty to the Company by using Company funds improperly to pay $1,270,872 to Bomasada, Inc.

(c) Breach of Contract

As noted previously, the contractual relationship of the parties were as set forth in the Operating Agreement, the Development Agreement, and the Construction Contracts. Each contained the covenant of good faith and fair dealing implied in all contracts. The Defendants breached that covenant by conveying the improper payment from Company funds to Bomasada. This contractual relationship was also overlaid by the fiduciary duties owed by the parties one to the other as discussed above. See Walbeck, supra.

(d) Misappropriation

We do not award damages for this alleged cause of action, as to do so would require us to find the equivalent of criminal intent on the part of Defendants. This we decline to do.

3. Excess Overhead Charges

Plaintiff also claims damages in the amount of $672,061.00, as charges which exceed the amounts budgeted in the respective development and construction budgets. Plaintiff's calculation of these damages is set forth in Exhibit 4 attached to Burkett's report. The contention seems to be

[21] With the exception of Lauralis.

that because there may have been irregularities in the upward amendments to the budget, any amounts paid over and above the original budget were improperly expended.

We find that while there may not have been strict compliance with the budgetary amendment process set forth in the operative governing documents, there is a failure of proof by a preponderance of the evidence that the excess payments were improper.[22] Thus, we decline to include this amount in our award.

4. Payments relating to Homeowner's Association Lawsuit

Plaintiff claims that one of the duties of Fred, as Managing Member, and of Bomasada, as Developer, was to purchase and provide adequate insurance for the Company which would cover liabilities related to the Company's operations. The evidence presented at trial established that Jesse Kirchner as the attorney representing the Bee Street Homowners' Association ("HOA") sent a notice letter regarding alleged construction defects dated February 18, 2014. An effort was undertaken to locate insurance coverage for the Company. On August 22, 2014, the HOA filed suit in the Court of Common Pleas for Charleston County against Bomasada Group, the Company, Hightower Construction and a host of subcontractors and designers for the Bee Street Lofts project. Attorney Thomas Hildebrand was retained to defend Bomasada, BIG, Stuart and Fred. Defendants' Exhibit 48 was Hildebrands' letter of December 3, 2014 demanding that Westchester Insurance provide a defense to Bomasada, Stuart and Fred under the Second Amended Complaint.

Defendants Ex. 51.1 is a Certificate of Insurance indicating that 151 Bee Street had been listed as an additional insured under the policy to be issued by Westchester Insurance. However, the actual insurance policy was not entered as an exhibit at the hearing so there is no way for the

[22] We note that certain payments made in the total amount of $143,884.72, are acknowledged by the Defendants to have been improperly coded, resulting in erroneous application to the Company's account. These charges are dealt with elsewhere in this award.

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Panel to determine if the insurance policy actually issued contained an endorsement listing the Company as an insured. The Plaintiff did enter Exhibit 197 which was a denial of coverage letter from Chubb denying coverage to the Company under the liability policy issued by Westchester Insurance.

Plaintiffs claim for recovery of the legal and professional fees of $452,120 and the settlement amount of $470,000 paid by the Company to Thurmond Kirchner and Timbes for a total of $972,120 is summarized on Exhibit 10 to the Elliot Davis report. There was no testimony presented by the Defendants contesting that these amounts were paid by the Company. The Panel finds that these amounts would likely not have been incurred by the Company had Stuart, Fred and Bomasada fulfilled their obligation to obtain insurance coverage for the Company. Accordingly, this amount will be added to the award in favor of the Company.

5. Travel Expenses Unrelated To The Project and Without Supporting Documents

Total travel expenses of $1,088,779 were paid by the Company. In total, travel related damages sought by Plaintiff amount to $613,100. Plaintiff's Exhibit 203 at Exhibit 5. Plaintiff's claims for damages related to travel expenses fall into two categories: (a) travel expenses within the Company; and (b) construction travel expenses charged to the Project by BIG II.

(a) Travel Expenses Within the Company

Travel expenses of $607,529 were charged directly to the Company by Defendant Bella Vista, and paid by the Company. See, Plaintiff's Exhibit 203 at Exhibit 5. Of this sum, Plaintiff claims that $363,133 was appropriate or "allowable". Id. Plaintiff claimed $112,546 paid to Lauralis as a disallowed expense, but subtracted that amount from the total damages sought in this category because it was addressed and claimed in another section of the damages expert's opinion.

Id. Thus, total damages of $131,850 were sought as disallowed travel expenses within the Company

Although the testimony at the hearing, both live and through depositions, was conflicting, in weighing the totality of the evidence and credibility of the witnesses, we find that substantial travel expenses were improperly charged to and paid by the Company. The primary Company travel expenses at issue are trips on private jets owned by Defendant Fred through Defendant Lauralis that were charged to the Company. Although Defendants concede that certain travel expenses were "miscoded", Defendants defend many charges as "employee bonus trips" or "business trips" with Neal Baker as a passenger. During his lifetime, Mr. Baker was a managing member of the Company, along with Defendant Bella Vista. Although it was understood and agreed that the Lauralis planes would be used in relation to the project, any such use had to be reasonably related to the project. Golf trips and other vacations charged to the Company do not pass muster as being reasonably related to the Project. The explanation of "bonus trips" is unconvincing when the trips at issue were taken primarily by the Managing Members of a struggling project that was not completed with many unsold units. The agreement of the Managing Members to charge the Company for these expenses does not support the reasonableness of the charges, but only supports the contention that the Managing Members ignored their obligations to the other members of the Company. Defendants failed to explain why unsubstantiated travel charges that did not involve stops in Charleston were reasonably charged to the Company. Although not all unsubstantiated charges are necessarily unreasonable, where charges appear on their face to be unrelated to the Project, the Managing Member Defendants should be able to justify the reasonableness of the charges.

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We find that the damages analysis in Plaintiff's Exhibit 203 at Exhibit 5 to accurately reflect total Company travel charges improperly and unreasonably charged to the Company. Thus, damages to the Company for this element of travel expenses total $131,850.

(b) Construction Travel Expenses Charged by BIG II

The unsubstantiated BIG II charges travel expenses require a different analysis. Construction travel expenses of $481,250 were paid by the Company to BIG II. Plaintiff claims that this entire amount should be disallowed and awarded as damages because no supporting documents were provided.

The budget for construction travel expenses was $481,251. Transcript at page 998. Interestingly, the charges by BIG II to the Company for flights, $481,250, is within one dollar of the travel budget for the Project--$481,250. Although challenged by Plaintiff's allegations and expert opinions, Defendants offered no credible support of who was flying to the project for BIG II and why. Defendant Gilbert testified that there were frequently construction employees on flights to Charleston that were charged to the Project by BIG II. Transcript at 1131. Beyond this general statement, there was no specific evidence or testimony to substantiate the reasonableness of the Big II flight related charges. It was Hightower Construction Company that was actually building the project-not BIG II. Also, it was undisputed that BIG II had other construction projects occurring at the same time as the Project at issue. It was Defendants Fred and Gilbert who made the allocation decisions on how to charge the flights. On cross examination, Defendant Gilbert admitted certain flights and flight related charges were split between BIG II and the Company, but offered no justification for any specific allocations. Transcript at 1277-1278. As with Lauralis, it was understood that BIG II was an affiliate of Defendants Fred and Gilbert. Where an affiliate is charging substantial sums to the Company, however, the Managing Members who own the affiliate

would be expected to provide the Company with adequate documentation of the charges. This is particularly true where the unsupported travel charges by BIG II, in combination with the allowable direct charges to the Company, greatly exceed the budgeted travel charges for the Project. Thus, the BIG II travel charges $481,250 are found to be not only unsubstantiated but also unreasonable.

Plaintiff has carried the burden of proving that Defendant Fred, as a Managing Member of the Company, and Defendants Fred and Gilbert as General Partners of Defendant Bella Vista, were grossly negligent and breached their fiduciary duty, including their duty of loyalty, and contractual duty of good faith and fair dealing. The Company was damaged as a result of these breaches. Plaintiff has also carried the burden of proving that Defendants Bomasada and BIG II were conduits for the breaches by Defendants Fred and Gilbert, and breached their contracts with the Company by charging for unrelated Project expenses and were, thus, unjustly enriched. Plaintiff has carried the burden that Defendant Lauralis was a wholly owned affiliate of Defendant Fred through which the Company was charged for flights unrelated to the Project, and Lauralis and Fred were unjustly enriched, and the Company damaged, as a result of the wrongful charges.

(c) Total Travel Expense Damages

Damages for these breaches are calculated as follows. Total travel expenses of $1,088,779 were paid by the Company. Travel related damages sought by Plaintiff amount to $ $613,100 ($131,850 charged for Company travel and $481,250 charged by BIG II for construction travel). Based on the above, we find that the Company is entitled to recover $613,100 as damages for unreasonable and unrelated travel expenses.

6. Cash Disbursements Over $1,000 Without Supporting Documentation

Plaintiff's expert witness, Ronald Burkett, a CPA, reviewed cash disbursements by the Company of over $1,000 and looked to see if those disbursements were sufficiently documented. If Mr. Burkett determined the disbursements were not sufficiently documented, Plaintiff claimed the payments as being unreasonable and added them to the prayer for damages. See, Plaintiff's Exhibit 203 at Exhibit 8. The total sought by Plaintiff in this category is $601,260.

As an initial matter, some of the items listed in the attachment are duplicates, or appear inclusive or overlapping, of travel expense items in Exhibit 5 to Plaintiff's exhibit 203. These items include: American Express-JLG ($11,300); American Express-SLF ($43,698); AV Fuel Corporation ($1,025); Swanepoel & Scandrol ($12,509); and The Hopper Group ($479—noted to be less than $1,000).

Payments to Bomasada ($27,374 and $233,743) are dealt with in other portions of this Award. Thus, these payments are not considered as recoverable damages in this section of the Award.

Certain items were admittedly "miscoded" and must be re-paid to the Company. These items total $57,596 and include: Swanepoel & Scandrol (the safari that was dealt with above); Precision Media Systems ($46,140); Bowen Audio Video Integrators ($4,811) Thompson and Knight ($2,320) and James Craig Byrd ($3,000). There was testimony that Juan Maderes charges ($1,325) were not related to the Project.

The payments to Lauralis Management ($112,546) are found to be undocumented and recoverable as damages. This finding is consistent with our findings related other undocumented payments to Lauralis as set forth in section 5 above.

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There was insufficient evidence to determine whether the other disbursements on the attached Exhibit 8 schedule were related to the Project or in any way benefited the Defendants.

Accordingly, Defendants Fred, Gilbert, Bella Vista and Bomasada are found to be liable to the Company for the "miscoded" items that are unrelated to the Project and total $57,596. Defendants Fred and Lauralis are found to be liable to the Company for the undocumented payments to Lauralis totaling $112,546. Thus, the total award for this element of damages is $170,142.

As the damages suffered individually by Plaintiff are not separate and distinct from injuries suffered by other members[23], the damages awarded accrue solely to the benefit of the Company in this derivative claim. Patterson v. Witter, 425 S.C. 213, 821 S.E. 2d 677.

7. **Pre-Judgment Interest**

The Plaintiff has requested an award of prejudgment interest and has taken the position that an interest rate of 35% should be applied since this is the rate that Defendants threatened to apply to Mr. Morgan if he failed to make a capital contribution under Article III, Section 3.03 (a) of the Second Amended and Restated Limited Liability Company Agreement. The Panel finds that this provision does not apply to the claims made by the Plaintiff in this dispute. The Panel recognizes that the law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. *Southern Welding Works, Inc. v. K&S Construction Co.*, 286 S.C. 158 ,332 S.E.2d 102 (Ct. App. 1985). The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award

[23] Bella Visa excluded, as it is controlled and owned by Fred and Gilbert.

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of prejudgment interest. *Wayne Smith Construction Co., Inc. v. Wolman, Duberstein and Thompson,* 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987) . The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. 47 C.J.S. *Interest & Usury* 49 at 124-5 (1982)." *Babb v. Rothrock,* 310 S.C. 350, 353, 426 S.E.2d 789, 791 (S.C. 1993).

Under the facts of this dispute, the panel finds that the Plaintiff is not entitled to an award of prejudgment interest on the actual damages awarded to 150 Bee Street under either the statutory rate for prejudgment interest of 8.75% or the 35% rate suggested by Mr. Morgan in the proposed Final Determination of the Arbitration Panel submitted by counsel for Mr. Morgan.

8. <u>Punitive Damages</u>

Plaintiff seeks punitive damages against all defendants. Punitive damages have long been available at common law[24], and in South Carolina there is a statutory overlay found in the South Carolina Fairness in Civil Justice Act of 2011, Act No. 52 §2, 2011 S.C. Acts, codified at S.C. Code Ann. §§15-32-510-530. This codification applies specifically to causes of action accruing on or after January 1, 2012. It is nonetheless helpful to our analysis in that the evidentiary factors to be considered in determining whether to award punitive damages are essentially the same as existed at common law.[25]

Under any analysis, there must first be a finding by clear and convincing evidence of reckless or willful misconduct to entitle a plaintiff to an award of punitive damages.

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[24] Solanski v. Wal-Mart Store # 2806, 410 S.C. 229, 763 S.E.[2d] 615 (Ct. App. 2014).

[25] See §15-32-520(E)(1)-(11), Code of Laws of South Carolina annotated.

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As to this category of claimed damages, "Construction Costs without Supporting Documents," punitive damages are theoretically available for the tort of breach of fiduciary duty.

While several of the factors to be considered in determining whether to award punitive damages at least facially militate in favor of an award, e.g., the degree of culpability; severity of harm; and, profitability to defendant, other factors such as the existence of similar past conduct, and ability to pay, completely lack proof. No single factor or combination of factors is dispositive.

While we could award punitive damages under the factors to be considered, we could also decline to do so applying those same factors. Thus, as there is nothing in the law that requires us to make an award of punitive damages we decline to do so under the totality of the circumstances that obtained in the relationship of the parties.

9. **Claim for Attorneys' Fees**

Morgan has also sought an award of attorneys' fees and costs in this derivative action. S.C. Code Ann. §33-44-1104 permits, but does not require, an award of plaintiff's "reasonable expenses, including reasonable attorney's fees," if the derivative action is successful in whole or in part. As set forth above, the derivative action has successfully resulted in a monetary judgment that will benefit the Company. Since the expenses, including attorneys' fees, were not capable of being determined until the conclusion of the proceedings, the Panel requires further information to award an appropriate amount for "reasonable expenses".

Plaintiff's proposed Final Determination of the Arbitration Panel requested an award of attorney's fees of $1,707,725.00. However, no accounting was provided as to when and to whom attorneys were paid. Counsel for Defendants have argued that the Plaintiff used various attorneys over the years which could affect the Panel's determination of the reasonableness of the fees requested.

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Thus, the Panel directs that Plaintiff provide a detailed summary of expenses, including, legal fees, related to the prosecution of this action within fifteen (15) days of the date of this Award, and that Defendants respond to Plaintiff's summary within fifteen (15) days of its receipt.

CONCLUSION

The Panel awards judgment against the Defendants in the amount of $2,976,234.00 broken down as follows:

1. Excess Realty and Marketing Fees	**0**
2. Construction Costs without Supporting Documents	**$1,270,872.00**
3. Excess Overhead Charges	**0**
4. Payments Relating to HOA Lawsuit	
a. Attorneys Fees	**$ 452,120.00**
b. Amount Paid to Settle HOA Case	**$ 470,000.00**
5. Travel Expenses	
a. Within the Company	**$131,850.00**
b. Construction Travel Expenses Charged by BIG II	**$481,250.00**
6. Cash Disbursements without Supporting Documentation	**$ 170,142.00**
7. Pre-Judgment Interest	**0**
8. Punitive Damages	**0**
Total Award:	**$2,976,234.00**

We further rule that no portion of these proceeds are awarded to Bella Vista, the Bomasada Defendants, Stuart L. Fred or John Gilbert, nor is this award intended to benefit those defendants through the Company.

9. Claim for Attorneys' Fees	**TBD**

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FOR THE PANEL

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Costa M. Pleicones. Member
Arbitration Panel
CPleicones@hsblawfirm.com

April 10, 2023

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IN ARBITRATION

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	))	COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580
THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	)	**FINAL ARBITRATION AWARD**

Dates of Hearing:	**October 31, 2022 – November 8, 2022**
Arbitration Panel:	**H. Brewton Hagood, Chair** **Hon. Costa M. Pleicones** **Paul A. Dominick**
Attorneys for Plaintiff:	**W. Andrew Gowder, Jr.** **Michael T. Rose**
Attorneys for Defendants:	**Henry E. Grimball** **Morris A. Ellison**
Court Reporter:	**Judy W. Galuppo, Veritext Legal Solutions**

The Panel issued its Arbitration Award on April 10, 2023, awarding judgment against the Defendants, except for 150 Bee Street, LLC, in the total amount of $2,976,234.00, excluding attorneys' fees and costs. The Plaintiff was directed to provide a detailed summary of expenses,

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including legal fees, within 15 days from the date of the Award. The Defendants were given 15 days to respond to Plaintiff's submission.

On April 17, 2023, the Plaintiff sent an e-mail to the Panel requesting an award of attorneys' fees and costs in the amount of $2,002,805.18 and attached: Plaintiff's Exhibit 202; Schedule 1 Exhibit 220 Breakout; and Addendum 1 Thomas H. Morgan Transaction Report. On May 1, 2023, Defendants submitted a Memorandum In Opposition to Plaintiff's Demand for Attorneys' Fees.

On April 18, 2023, the Defendants submitted a Motion for Reconsideration of Arbitration Award, and Plaintiff submitted a Memorandum in Opposition to Defendants' Motion for Reconsideration of Arbitration Award on May 3, 2023. The Panel will address the Motion for Reconsideration of Arbitration Award first.

Defendants' Motion for Reconsideration of Arbitration Award

Defendants' Motion for Reconsideration presents three issues for the panel to rule upon:

1) Derivative Action/Subject Matter Jurisdiction issue;

2) Statute of Limitations Issue; and

3) Insurance Issue/Claims Arising Out of the Construction Litigation.

The first two issues were raised by previously by Defendants in Motions to Dismiss under Rule 12 and a Motion for Summary Judgment under Rule 56, all of which were treated as having been made under Rule 56 since matters outside the pleadings were submitted when oral arguments were heard by the Panel on June 16, 2022. These motions were denied by Order of the Panel dated July 11, 2022. Defendants renewed these motions following the presentation of the Plaintiff's case during the arbitration hearing and again at the conclusion of the hearing. Defendants assert that the Panel's Order violates SCRCP 52 stating that there were no specific finding of facts and

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conclusions of law issued by the panel when the Panel again denied Defendants' motions as part of its Arbitration Award dated April 10, 2023.

The Panel notes that this dispute was referred to Arbitration by a Consent Order agreed to by counsel for the parties and signed by Judge Thomas L. Hughston dated July 9, 2012. Paragraph 8 of the Consent Order stated that "This arbitration shall follow the South Carolina Rules of Civil Procedure where practical and to the extent not inconsistent herewith". The only provision in the Consent Order addressing the form of the Award is the requirement in paragraph 13 that "The determination shall be issued in the form of an award on all claims and counter-claims". The Panel issued a 25-page unanimous Arbitration Award addressing each of the claims asserted by the Plaintiff in his Second Amended Complaint, except those which the Plaintiff withdrew following the hearing. The Panel did not award any relief to the Defendants under the Counterclaims set forth in the Defendants' Answer to Second Amended Complaint and Counterclaims dated April 26, 2022.

The Panel has considered the grounds and law cited in Defendants' Motion for Reconsideration of Arbitration Award dated April 18, 2023, and the arguments presented in Plaintiff's Memorandum In Opposition To Defendants Motion For Reconsideration Of Arbitration Award dated May 3, 2023. The Panel finds that it is not required to issue separate findings of fact or conclusions of law when ruling on motions presented and ruled upon prior to the hearing which are renewed during the hearing. In ruling on Defendants' Motions, the Panel noted that Defendants had submitted proposed Orders of Dismissal on the Statute of Limitations Issue and the Derivative Action Issue and that it had considered the testimony presented at the hearing, excerpts from the depositions of Jo Ved and Stuart Fred submitted by counsel, all exhibits entered into evidence by the parties and the proposed Orders submitted by counsel. The Defendants presented no new

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arguments in the Motion for Reconsideration which had not previously been presented to the Panel at the hearing held on June 16, 2022, after which the Panel issued its July 11, 2022, Order Denying Defendants' Motions to Dismiss and For Summary Judgment. Defendants' Motion is hereby denied as to issues 1 and 2 set forth in the Motion for Reconsideration.

Issue 3 in the Motion for Reconsideration of the Arbitration Award is identified as "Insurance Issue/Claims Arising Out Of The Construction Litigation". The Panel noted that Defendants had not entered a copy of the Westchester Insurance Policy into evidence at the hearing and had only entered a Certificate of Insurance into evidence purporting to list Bee Street Lofts, LLC as an additional insured. Defendants state in their Motion for Reconsideration dated April 18, 2023, that they are attempting to obtain a copy of the insurance policy. Morris Ellison informed the Panel in an e-mail dated May 12, 2023, that they had not yet obtained a copy of the insurance policy. Andy Gowder replied to Mr. Ellison's e-mail later on May 12, 2023, stated that the Panel should not receive or consider the insurance policy if it is located since it is not newly discovered evidence that could not have been produced over the years that the case has been pending. As of the date of this Final Arbitration Award no policy of insurance issued by Westchester has been submitted to the Panel.

The Panel finds that the record was kept open after the issuance of the Award for the sole purpose of allowing the Plaintiff to submit any documents relevant to recoverability of attorneys' fees and costs and Plaintiff's position as to the amounts of attorneys' fees and expenses being sought.

While not separately set forth as one of the 3 issues to be ruled upon in Defendants' Motion for Reconsideration of Arbitration Award, Defendants again argue that Judge Harrington's Order approving the settlement of the Construction Litigation, in effect, precludes Mr. Morgan from

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pursuing a claim that the failure of the Defendants to procure a policy of insurance covering 150 Bee Street, LLC caused damages to 150 Bee Street for the amount of legal fees paid to defend itself and the amount paid by 150 Bee Street to settle the Construction Litigation. The Panel has already ruled on this issue and no new evidence has been presented which would cause the Panel to reconsider this ruling.

For the above reasons, the Panel denies relief on all grounds set forth in Defendants' Motion For Reconsideration Of Arbitration Award submitted on April 18, 2023.

Plaintiff's Request for Attorneys' Fees

As directed by the Panel in the April 10, 2023, Arbitration Award, Plaintiff's counsel sent an e-mail on April 17, 2023, summarizing the amounts of legal fees and expenses requested by the Plaintiff and forwarded copies of the following documents to the Panel:

1. Exhibit 202, which was introduced and admitted into evidence during Mr. Morgan's testimony listing attorneys' fees and costs up to the time of trial;

2. Schedule 1, Exhibit 202 Breakout separating attorneys' fees from legal costs; and

3. Addendum 1, which lists legal fees and expenses incurred during and after the arbitration trial which are not included in Exhibit 202.

On May 1, 2023, counsel submitted Defendants' Memorandum In Opposition To Plaintiff's Demand For Attorneys Fees. Defendants agree that SC Code Ann. Section 33-44-1104 of the South Carolina Uniform Limited Liability Act permits, but does not require, an award of Plaintiff's "reasonable expenses, including reasonable attorney's fees" if the derivative action is successful. Defendants argue that the Plaintiff's derivative claims sought damages of approximately $12,000,000 and the Panel awarded $2,900,000 in actual damages, which is less than 25% of the amount sought. Defendants argue that Morgan had requested an additional

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$17,800,000 in individual damages and the Panel awarded no individual damages to Mr. Morgan. When viewing the total damages sought by Mr. Morgan, in both his derivative capacity and as an individual, Defendants argue that Mr. Moran was only awarded approximately 10% of the total damages sought.

Defendants then question the proof presented by the Plaintiff since no distinction is made between the attorneys' fees and expenses incurred by Morgan in his individual capacity and those incurred to prosecute the derivative claims.

The Panel has reviewed the evidence and considered the arguments submitted by counsel for the Plaintiff and the Defendants. The law is clear that the Panel, has the discretion to determine the reasonableness of a claim for the recovery of attorneys' fees under the South Carolina Uniform Limited Liability Act. The Panel finds that Mr. Morgan successfully prosecuted the derivative claims and the evidence presented indicates that Mr. Morgan personally funded all of the legal fees and expenses to prosecute these claims. Had Mr. Morgan not done so, there would be no recovery in favor of 150 Bee Street, LLC in the amount of $2,976,234. The Panel is mindful of the fact that Mr. Morgan did not obtain a recovery of any individual damages but, as counsel for the Defendants note, there is no statutory authority for the recovery of attorneys' fees by Mr. Morgan as an individual.

The Panel finds that since Mr. Morgan advanced the legal fees and costs necessary for 150 Bee Street to receive an affirmative award of $2,976,234, Mr. Morgan is entitled to a charging lien on the amounts of attorneys' fees awarded by the Panel to 150 Bee Street. This amount should be paid to Mr. Morgan to reimburse him for these advances, prior to the distribution of any funds received from the judgment to the members of the LLC. The Panel has already ruled that no portion

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of the recovery from the judgment is awarded to Bella Vista, the Bomasada Defendants, Stuart Fred or John Gilbert.

As to the amount to be awarded, the South Carolina Supreme Court has identified six factors which should be considered in determining whether a request for attorneys' fees is reasonable:

1. The nature, extent and difficulty of the case;
2. The time necessarily devoted to the case;
3. The professional standing of counsel;
4. Contingency of compensation;
5. Beneficial results obtained and
6. Customary legal fees for similar services.

In considering the above factors, the Panel finds that the case prosecuted by Mr. Morgan was a very difficult case which filed on January 26, 2012, and was referred to arbitration by Consent Order issued on July 9, 2012. The case was hotly contested by the Defendants and was originally scheduled for arbitration in May of 2020. The schedule for the arbitration was suspended due to the Covid 19 pandemic and travel for depositions was adversely affected. The case was not heard by the present Panel until late October of 2022. The online file at the Charleston County Clerk of Court's office indicates that Mediation was held on September 21, 2022, with Rebecca Laffitte as the Mediator, and an impasse was declared. Additionally, both sides retained expert witnesses who had to review and opine on both the amount and entitlement to damages.

Although the Panel was not furnished with detailed time and billing records, the summary provided showed that Mr. Morgan initially started with the firm of Clawson and Staubes, and later moved to Pratt-Thomas Epting and Walker. Mr. Gowder, who had been a member of Pratt-Thomas Epting and Walker, took over the representation after he formed his new firm. Michael T. Rose

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worked with Mr. Gowder on the case and participated in all pretrial proceedings and the Arbitration Hearing. The Panel finds that the summary provided of legal fees and expenses paid is representative of a case of this difficulty and magnitude and the time devoted to pre-hearing discovery, motions and a contested hearing. The Panel finds that Mr. Gowder and Mr. Rose are well respected members of the local bar who have been practicing law for many years.

As to the contingency of compensation, the submissions indicate that Mr. Morgan paid his attorneys on an hourly basis. Thus, the contingency in this case was not whether the attorneys would be paid but whether there would be an affirmative recovery in a contested case which was unable to be resolved short of a full hearing.

While Defendants argue that there only a recovery of 10 to 20% of the total damages sought, the recovery obtained through Mr. Mogan's efforts and advancement of attorneys' fees costs on behalf of Bee Street Lofts was $2,976,234, which is actually 48.9% of the claimed actual damages of $6,080,881.[1] It would be inequitable for Bee Street Lofts to receive the benefits of the award without awarding attorneys fees and costs as a charging lien to the benefit of Mr. Morgan before any amounts are distributed to the members of Bee Street Lofts, other than Bella Vista.

The Panel is required to exercise their collective discretion to arrive at a reasonable amount. After substantial discussion among the members of the Panel following the submissions by counsel, the Panel finds that the below approach achieves a result which is a customary award of legal fees and costs for similar services after consideration of the six factors:

[1] See Plaintiff's post-hearing proposed order in which he claims this amount. See also page 6 of the Arbitration Award of April 10, 2023.

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Total Award **$2,976,234.00**

Legal Fees

One-third of Gross Recovery = $992,078.00

Per cent recovered versus amount claimed = 48.9%

Fee Award After Applying Percentage versus amount claimed = $485,126.00

COSTS

Approved Costs = $266,746

Approved Cost After Applying Percentage of 48.9% = **$130,439.00**

Costs of Arbitration Requested (100%) = **$80,944**

TOTAL FEES AND COSTS AWARDED = $696,509.00

TOTAL ARBITRATION AWARD INCLUDING FEES AND COSTS = $3,672,743

This Final Arbitration Award, if confirmed by the Court, is intended be entered as a judgment against the Defendants, except for Bee Street Lofts, LLC, in favor of Bee Street Lofts, LLC, except for member Bella Vista Partnership, and John L. Gilbert and Stuart L. Fred, but no proceeds from any recovery on this judgment are to be distributed to the members of Bee Street Lofts, LLC until the charging lien in favor of Thomas H. Morgan has been fully satisfied.

FOR THE PANEL

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H Brewton Hagood
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6/19/2023 | 2:13 PM EDT
June ___, 2023

IN THE CIRCUIT COURT OF THE 11th
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 09-90874CA06

THOMAS H. MORGAN, individually and on behalf of THM OLD MIAMI POST OFFICE, LLC, a Florida limited liability company,

Plaintiffs,

vs.

NEAL I. BAKER,

Defendant.

_____/

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VERIFIED COMPLAINT FOR DAMAGES

Plaintiff, THOMAS H. MORGAN ("MORGAN"), individually and on behalf of THM OLD MIAMI POST OFFICE, LLC ("THM"), a Florida limited liability company, sues NEAL I. BAKER ("BAKER"), and alleges:

1. This is an action for damages in excess of $15,000.00, exclusive of attorneys' fees and costs.

2. The Plaintiff, MORGAN, is the Managing Member of THM and at all times material held and still holds a majority interest in THM.

3. Upon information and belief, the Defendant, BAKER, is a resident of Charleston, South Carolina. At all times material BAKER held and still holds a minority interest in THM.

4. On or about June 3, 2004, MORGAN and BAKER entered into the "Operating Agreement of THM Old Miami Post Office, LLC" (the "Operating Agreement"), a copy of which is attached hereto as Exhibit "A".

CIRCUIT AND COUNTY COURTS
CLERK
IN GOD WE TRUST
MIAMI-DADE COUNTY, FLORIDA

5. Section 15.9 of the Operating Agreement provides in part that:

> The parties hereto agree to submit to the jurisdiction of the federal or state courts sitting in Florida in connection with any claims or controversy arising out of this Agreement and that venue for such actions shall be in Miami-Dade County, Florida.

6. Pursuant to the Operating Agreement, MORGAN and BAKER agreed to form THM as a limited liability company under the laws of Florida.

7. THM holds an interest in the Historic Post Office, located at 100 N.E. 1st Avenue, Miami, Florida (the "Property").

8. THM was formed in part to design, permit, develop, operate, market, acquire, own, hold, manage, improve, renovate, maintain and repair, construct improvements upon, sell, lease or otherwise dispose of and mortgage or otherwise encumber all or any part of the Property.

9. Section 4.2(a) of the Operating Agreement provides in part for Additional Capital Contributions:

> In addition to the Initial Capital Contributions to the Company required by Section 4.1 hereof, additional Capital Contributions ("additional Capital Contributions") shall be required to be made by each member at such times, and in such amounts as the Managing Member shall determine. All Additional Capital Contributions shall be made by the Members in proportion to their respective Percentage Interests.

10. On October 27, 2009, the Managing Member requested a gross capital call of $800,000.00 to cover the pay down of a renewed loan and the peripheral costs assessed in obtaining a new loan with Wachovia Bank. As stated in the demand, this amounted to a proportionately reduced capital call of $200,000.00 to BAKER based upon BAKER'S 25% interest in OLD MIAMI. The letter also notified BAKER that pursuant to Article 4(d), he would be required to sign as Guarantor under the terms of the new loan. See Exhibit "B" attached hereto.

CIRCUIT AND COUNTY COURTS
CLERK
IN GOD WE TRUST
MIAMI-DADE COUNTY, FLORIDA

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11. On November 11, 2009, a demand for a capital call of $9,000.00 to cover taxes was sent to BAKER in order to cover his portion of the 2009 real property taxes.

12. BAKER failed to comply with the demand for the capital calls of $200,000.00 and $9,000.00 and also refused to sign as a Guarantor under the terms of the new loan.

13. All conditions precedent to the filing of this action have been performed, excused or waived.

14. Plaintiff has retained the law firm of Buchbinder & Elegant, P.A. to represent it and is obligated to pay the firm reasonable attorneys' fees and costs.

COUNT I - DEMAND LOAN

15. Plaintiff, MORGAN individually adopts and re-alleges paragraphs 1-14 above.

16. Section 4.2(a) also provides in part that:

> ***In the event that... a Member refuses or otherwise fails to make the required contribution (a "Non-Contributing Member") ... the other Member (a "Contributing Member") may make such contribution in the Non-Contributing Member's place (each an "Advance") and elect to treat such contribution as a nonrecourse demand loan to the Non-Contributing member and be entitled to repayment by the Non-Conforming Member of such amount, together with interest*** in the amount of (3%) plus the prime rate published in the Wall Street Journal, adjusted each time such published rate changes, with repayment to be prior to any distribution of Net Cash Flow to such Non-Contributing Member on account of its interests. (emphasis added)

17. When BAKER failed to make the required contribution, MORGAN, on or about October 30, 2009, made such contribution in BAKER's place in order to cover the pay down of the renewed loan and the peripheral costs assessed in obtaining the new loan with Wachovia Bank. MORGAN also contributed BAKER's portion of the capital call for the 2009 real estate taxes.

18. MORGAN has been damaged by BAKER's failure to repay the loan.

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19. BAKER owes MORGAN $200,000.00 that is due with interest since October 30, 2009, and $9,000.00 that is due with interest since November 17, 2009, for money contributed by MORGAN as a non-recourse demand loan, pursuant to Section 4.2(a) of the Operating Agreement.

WHEREFOR Plaintiff, MORGAN, demands judgment for damages against Defendant together with interest, costs and attorneys' fees and such further relief as this Court deems just and proper.

COUNT II - DERIVATIVE ACTION

20. Plaintiff, MORGAN on behalf of THM adopts and re-alleges paragraphs 1-14 above.

21. This is a shareholder derivative action to prosecute a cause of action held by the limited liability company, THM, for damages in excess of $15,000.00, exclusive of interest, attorneys' fees and costs.

22. Pursuant to Section 4.2(a):

> In the event that the members are required to make an Additional Capital Contribution as provided in Section 4.2(a) and a Member refuses or otherwise fails to make the required contribution (a "Non-Contributing Member") on or before the deadline specified in the written notice requesting such contribution then, ***in addition to any other remedies at law or at equity the Company may have available such as suits for damages or specific performance***, the other Member (a "Contributing Member") may make such contribution in the Non-Contributing Member's place... (emphasis added)

23. Section 4.2(d) provides that "To the extent any personal guarantees or other credit enhancements are required in order to obtain any institutional financing as determined by the Managing Member, then the Members, agree to guarantee and provide any other credit enhancements which may be required by such financial institutions."

24. BAKER breached the Operating Agreement by failing to make the capital calls and refusing to sign as a Guarantor on the new loan.

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25. THM has been damaged by BAKER'S failure to pay the capital call and by his failure to sign as a Guarantor as required by the Operating Agreement. BAKER'S breach resulted in insufficient capital to pay down the renewed loan and the peripheral costs assessed. It has also hindered THM in obtaining the new loan with Wachovia Bank.

26. Under the facts and circumstances, it would be unreasonable or impracticable to require MORGAN to make a demand for relief upon THM especially since he is both Managing Member and the holder of a 75% interest of THM. Such demand would be useless and unavailing.

WHEREFORE, the Plaintiff, MORGAN on behalf of THM, demands judgment in favor of THM for damages together with interest, costs and attorneys' fees and such other relief as this Court deems just and proper.

BUCHBINDER & ELEGANT, P.A.
Attorneys for Plaintiff
46 Southwest First Street
Fourth Floor
Miami, Florida 33130
Telephone: (305) 358-1515
Facsimile: (305) 358-5202

BY: _____
Ira M. Elegant
Florida Bar No. 096760

STATE OF FLORIDA, COUNTY OF MIAMI DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office
AUG 19 2020 AD 20____
HARVEY RUVIN, Clerk of Circuit and County Courts
Deputy Clerk Wgl Clerk 323263

Under penalties of perjury, I declare that I have read the foregoing complaint and the facts stated in it are true.

_____
THOMAS H. MORGAN

OPERATING AGREEMENT
OF
THM OLD MIAMI POST OFFICE, LLC

This Operating Agreement ("Agreement") of THM OLD MIAMI POST OFFICE, LLC (the "Company") is made as of June 30 2004 by and between the Persons designated as the members of the Company on Schedule A hereto.

WHEREAS, the Members desire to operate the Company as a limited liability company under the Florida Act for the purposes set forth herein.

NOW THEREFORE, in consideration of the agreements and obligations set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Members hereby agree as follows:

ARTICLE 1

DEFINED TERMS

Section 1.1 Definitions. Unless the context otherwise requires, the terms defined in this Article I shall, for the purposes of this Agreement, have the meanings herein specified.

"Affiliate" means with respect to a Person, any other Person that directly or indirectly controls, is controlled by, or is under common control with, the specified Person. As used in this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether through ownership of voting securities, by contract or otherwise. Ownership of more than 50% of the beneficial interests of an entity shall be conclusive evidence that control exists.

"Agreement" means this Operating Agreement, as amended, modified, supplemented or restated from time to time. References in the Florida Act to "operating agreement" shall mean this Agreement.

"Articles" means the Articles of Organization of the Company and any and all amendments thereto and restatements thereof filed on behalf of the Company with the office of the Secretary of State of the State of Florida pursuant to the Florida Act.

"Capital Account" means, with respect to any Member, the capital account maintained for such Member in accordance with the provisions of Article 4 hereof.

"Capital Contribution" means, with respect to any Member, the aggregate amount of money and the initial Gross Asset Value of any property (other than money) contributed to the Company pursuant to Article 4 hereof with respect to such Member's Interest.

"Code" means the Internal Revenue Code of 1986, as amended from time to time, or any corresponding federal tax statute enacted after the date of this Agreement.

"Covered Person" means a Member; any Affiliate of a Member; the Managing Member; any officers, directors, shareholders, partners, employees, representatives or agents of a Member, any Affiliate of a Member; any employee or agent of the Company or its Affiliates; any Tax Matters Representative of the Company; or an officer of the Company that is not an employee.

EXHIBIT
"A"

"Current Operating Expenditures" means the expenditures of the Company for each Fiscal Year, or part thereof, arising from the ordinary course of the Company's business, including, but not limited to, the following:

(i) general operating expenses including, but not limited to, management, legal, accounting and other professional fees, wages, salaries and other compensation in connection with its business operations, monies expended to comply with and perform contractual and other obligations, and any other expenses expended on behalf of the Company in relation to its general administrative and management needs;

(ii) payments of principal and interest upon any indebtedness of the Company (whether third-party indebtedness or loans made by Members to the Company pursuant to this Agreement);

(iii) any other cash expended by the Company for business operations; and

(iv) the establishment of appropriate reserves for debt service, to provide working capital or any other contingency of the Company.

"Depreciation" means, for each Fiscal Year or other period, an amount equal to the depreciation, amortization or other cost recovery deduction allowable with respect to an asset for such Fiscal Year or other period; provided, however, that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year or other period, Depreciation shall be an amount that bears the same ratio to such beginning Gross Asset Value as the federal income tax depreciation, amortization or other cost recovery deduction with respect to such asset for such Fiscal Year or other period bears to such beginning adjusted tax basis; and provided further, that if the federal income tax depreciation, amortization or other cost recovery deduction for such Fiscal Year or other period is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Managing Member.

"Fiscal Year" means (i) the period commencing upon the formation of the Company and ending on December 31, 2004, (ii) any subsequent twelve (12) month period commencing on January 1 and ending on December 31.

"Florida Act" means Chapter 608, Florida Statutes, as amended from time to time.

"Gross Asset Value" means, with respect to any asset, such asset's adjusted basis for federal income tax purposes, except as follows:

(a) the initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as agreed to by the contributing Member and the Managing Member;

(b) the Gross Asset Value of all Company assets shall be adjusted to equal their respective gross fair market values, as determined by the Managing Member, as of the following times: (a) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a de minimis Capital Contribution; (b) the distribution by the Company to a Member of more than a de minimis amount of Company assets as consideration for an interest in the Company; and (c) the liquidation of the Company within the meaning of Treasury Regulation §1.704-1(b)(2)(ii)(g); provided, however, that adjustments pursuant to Clause (a) and Clause (b) of this sentence shall be made only if the Managing Member reasonably determines that such adjustments are necessary or appropriate to reflect the relative economic interests of the Members in the Company; and

(c) the Gross Asset Value of any Company asset distributed to any Member shall be the gross fair market value of such asset on the date of distribution, as determined by the Managing Member.

(d) The Gross Asset Values of Company assets shall be adjusted to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Regulation Section 1.704-1(b)(2)(iv)(m).

If the Gross Asset Value of an asset has been determined or adjusted pursuant to Paragraph (a) or Paragraph (b) above, such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses.

"Gross Revenue" means the gross revenue of the Company for each Fiscal Year, or part thereof, arising from the ordinary course of the Company's business. Gross revenue shall not include Capital Contributions or loan proceeds.

"Interest" means a Person's share of the allocations of the Company and a Person's rights to receive distributions of the Company's assets in accordance with the provisions of this Agreement and the Florida Act, whether as a Member or an assignee of a Member's Interest.

"Land" means the land and the improvements thereon described in **Exhibit "A"** attached hereto, and located in Miami-Dade County, Florida.

"Managing Member" has the meaning set forth in Article 6 hereof.

"Member" means any Person named as a member of the Company on **Schedule A** hereto and includes any Person admitted as an Additional Member or a Substitute Member pursuant to the provisions of this Agreement, in such Person's capacity as a Member of the Company, and "Members" means two (2) or more of such Persons when acting in their capacities as Members of the Company. For purposes of the Florida Act, the Members shall constitute one (1) class or group of members.

"Net Cash Flow" means, for each calendar month, Fiscal Year or other period of the Company for which it must be determined, the Gross Revenue of the Company from all sources other than Capital Contributions, less Current Operating Expenditures.

"Old Post Office" means Old Post Office, LLC, a Florida limited liability company, the fee simple owner of the Land.

"Percentage Interest" means a Member's Percentage Interest as described in Schedule A as of the date hereof, and as may hereafter change in accordance with the terms of this Agreement. Voting, approval, distribution and other participation rights shall at all times be based upon the Members' relative Percentage Interests (including times when the Capital Accounts of all Members is negative or zero), except as provided in this Agreement.

"Person" includes any individual, corporation, association, partnership (general or limited), joint venture, trust, estate, limited liability company, or other legal entity or organization.

"Profits" or "Losses" means, for each Fiscal Year, an amount equal to the Company's taxable income or loss for such Fiscal Year, determined in accordance with §703(a) of the Code (but including in taxable income or loss, for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to §703(a)(1) of the Code), with the following adjustments:

(a) any income of the Company exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition shall be added to such taxable income or loss;

(b) any expenditures of the Company described in §705(a)(2)(B) of the Code (or treated as expenditures described in §705(a)(2)(B) of the Code pursuant to Treasury Regulation §1.704-1 (b)(2)(iv)(i)) and not otherwise taken into account in computing Profits or Losses pursuant to this definition shall be subtracted from such taxable income or loss;

(c) in the event the Gross Asset Value of any Company asset is adjusted in accordance with Paragraph (b) or Paragraph (c) of the definition of "Gross Asset Value" above, the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for purposes of computing Profits or Losses;

(d) gain or loss resulting from any disposition of any asset of the Company with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the asset disposed of, notwithstanding that the adjusted tax basis of such asset differs from its Gross Asset Value;

(e) in lieu of the depreciation, amortization and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year or other period, computed in accordance with the definition of "Depreciation" above; and

(f) notwithstanding any other provisions of this definition, any items which are specially allocated pursuant to Section 9.2 hereof shall not be taken into account in computing Profits or Losses.

"Project" means the renovation, development, construction, ownership, marketing and sale of a mixed-use development project on the Land.

"Property" means the Land and the Project.

"Substitute Member" means a Person who is admitted to the Company as a Member pursuant to Section 7.1 hereof, and who is named as a Member on an amended Schedule A to this Agreement.

"Tax Matters Representative" has the meaning set forth in Article 11 hereof.

"Treasury Regulations" means the income tax regulations, including temporary regulations, promulgated under the Code, as such regulations may be amended from time to time (including corresponding provisions of succeeding regulations).

"Unreturned Capital" means, with respect to any Member, at any given time, the excess of its contributions of Capital Contributions over all distributions made to such Member in repayment thereof pursuant to Sections 8.1(b).

ARTICLE 2

FORMATION AND TERM

Section 2.1 Formation.

(a) The Members hereby agree to form the Company as a limited liability company pursuant to the provisions of the Florida Act, and agree that the rights, duties and liabilities of the Members shall be as provided in the Florida Act, except as otherwise provided herein.

(b) The name and mailing address of each Member and the amount contributed to the capital of the Company shall be listed on Schedule A attached hereto. The Managing Member shall be required to update Schedule A from time to time as necessary to accurately reflect the information therein. Any amendment or revision to Schedule A made in accordance with this Agreement shall not be deemed an amendment to this Agreement. Any reference in this Agreement to Schedule A shall be deemed to be a reference to Schedule A as amended and in effect from time to time.

(c) The Members, or an authorized person on their behalf, shall execute, deliver and file the Articles and any and all amendments thereto and restatements thereof.

Section 2.2 Name. The business and affairs of the Company shall be conducted under the name "THM Old Miami Post Office, LLC" and such name shall be used at all times in connection with the Company's business and affairs, except to the extent the Managing Member agrees to the use by the Company of assumed names or other trade names or fictitious names. The Company's officers shall execute such assumed or fictitious name certificates as may be desirable or required by law to be filed in connection with the formation of the Company and shall cause such certificates to be filed in all appropriate public records.

Section 2.3 Term. The term of the Company shall commence on the date the Articles are filed in the office of the Secretary of State of the State of Florida and shall continue until December 31, 2024, unless the Company is dissolved before such date in accordance with the provisions of this Agreement.

Section 2.4 Principal Place of Business. The principal place of business of the Company shall be 1999 Broadway, Suite 2450, Denver, Colorado 80202. At any time, the Managing Member may change the location of the Company's principal place of business.

ARTICLE 3

PURPOSE AND POWERS OF THE COMPANY

Section 3.1 Purpose. The sole and exclusive purpose of the Company shall be (i) to acquire and thereafter own a membership interest in Old Post Office, (ii) to design, permit, develop, operate and market the Project and the Members hereby agree to do so; (iii) to acquire, own, hold, manage, operate, improve, renovate, develop, maintain and repair, construct improvements upon, sell, lease or otherwise dispose of and mortgage or otherwise encumber all or any part of the Property; and (iii) to engage in such other activities as are reasonably incidental to the purpose. Except by the decision of all of the Members, evidenced in writing, the Company shall not engage in any other business or activity.

Section 3.2 Powers of the Company. The Company shall have the power and authority to take any and all actions necessary, appropriate, proper, advisable, incidental or convenient to or for the furtherance of the purpose set forth in Section 3.1, including, but not limited to, the power:

(a) to conduct the business of the Company, carry on its operations and have and exercise the powers granted to a limited liability company by the Florida Act in any state, territory, district or possession of the United States, or in any foreign country that may be necessary, convenient or incidental to the accomplishment of the purpose of the Company;

(b) to acquire a membership interest in Old Post Office;

(c) to acquire by purchase, lease, contribution of property or otherwise, own, hold, operate, maintain, finance, improve, lease, sell, convey, pledge, mortgage, transfer, demolish or dispose of any real or personal property (including the Property) that may be necessary, convenient or incidental to the accomplishment of the purpose of the Company;

(d) to enter into, perform and carry out contracts of any kind, including contracts with any Member or Affiliate thereof, necessary to the accomplishment of the purpose of the Company;

(e) to sue and be sued, make claims and defend, and participate in administrative or other proceedings, in its name;

(f) to appoint employees and agents of the Company, and define their duties and fix their compensation;

(g) subject to the provisions of Article 12, to indemnify certain Persons in accordance with the Florida Act and to obtain any and all types of insurance;

(h) to borrow money and issue evidences of indebtedness, including loans from any Member or Affiliate thereof, and to secure any of the same by a mortgage, pledge or other lien on the assets of the Company;

(i) to pay, collect, compromise, litigate, arbitrate or otherwise adjust or settle any and all other claims or demands of or against the Company or to hold such proceeds against the payment of contingent liabilities; and

(j) to make, execute, acknowledge and file any and all documents or instruments necessary, convenient or incidental to the accomplishment of the purpose of the Company.

3.3 Title to Company Property. Except as otherwise set forth herein, legal title to the membership interest in Old Post Office and all other Company property and assets shall be taken and at all times held in the name of the Company.

ARTICLE 4

CAPITAL CONTRIBUTIONS, MEMBER INTERESTS, CAPITAL ACCOUNTS AND FUTURE CAPITAL REQUIREMENTS

Section 4.1 Initial Capital Contributions. Upon the execution of this Agreement, each Member shall pay to the Company, as a capital contribution to the Company, the amount set forth on Schedule A hereto ("Initial Capital Contribution").

Section 4.2 Additional Capital Contributions; Guarantees.

(a) In addition to the Initial Capital Contributions to the Company required by Section 4.1 hereof, additional Capital Contributions ("Additional Capital Contributions") shall be required to be made by each Member at such times, and in such amounts as the Managing Member shall determine. All Additional Capital Contributions shall be made by the Members in proportion to their respective Percentage Interests. In the event that the Members are required to make an Additional Capital Contributions as provided in Section 4.2(a) and a Member refuses or otherwise fails to make the required contribution (a "Non-Contributing Member") on or before the deadline specified in the written notice requesting such contribution then, in addition to any other remedies at law or at equity the Company may have available such as suits for damages or specific performance, the other Member (a "Contributing Member") may make such contribution in the Non-Contributing Member's place (each, an "Advance") and elect to treat such contribution as a nonrecourse demand loan to the Non-Contributing Member and be entitled to repayment by the Non-Contributing Member of such amount, together with interest in the amount of three percent (3%) plus the prime rate published in the Wall Street Journal, adjusted each time such published rate changes, with repayment to be prior to any distribution of Net Cash Flow to such Non-Contributing Member on account of its Interests.

(b) Except as provided in this Agreement, no Member shall be required, nor entitled, to make (i) any Additional Capital Contributions or (ii) any loans to the Company.

(c) The Members may also make such other loans to the Company as they and the Managing Member mutually agree upon from time to time.

(d) To the extent any personal guarantees or other credit enhancements are required in order to obtain any institutional financing as determined by the Managing Member, then the Members, agree to guarantee and provide any other credit enhancements which may be required by such financial institutions (in order to obtain more favorable terms or otherwise) in connection with the development and/or construction loan or other partnership borrowing. To the extent feasible, all such guarantees or other credit enhancements shall be provided pro rata in proportion to their respective Percentage Interests; otherwise the Members hereby agree that any liability under such guarantees shall be shared in proportion to their Percentage Interests.

Section 4.3 Member's Interest. Each Member shall have the Percentage Interest and Member's Interest set forth in Schedule A. A Member's Interest shall for all purposes be personal property. A Member has no interest in specific Company property, unless and until distributed to such Member.

Section 4.4 Status of Capital Contributions.

(a) Except as otherwise provided in this Agreement, the amount of a Member's Capital Contributions may be returned to it, in whole or in part, at any time, but only with the unanimous consent of the Members.

(b) No Member or Affiliate thereof shall receive any interest, salary or drawing with respect to its Capital Contributions or its Capital Account or for services rendered or resources provided on behalf of the Company, except as otherwise specifically provided in this Agreement.

(c) Except as otherwise provided in this Agreement, no Member shall be required to lend any funds or make Capital Contributions to the Company or, after a Member's Capital Contributions or advances of other resources have been fully paid pursuant to Sections 4.1 and 4.2 hereof, to make any additional Capital Contributions or advances to the Company. No Member shall have any personal liability for the repayment of any Capital Contribution or advances of any other Member.

Section 4.5 Capital Accounts.

(a) A separate Capital Account shall be established and maintained for each Member. The original Capital Account established for any Member who acquires an Interest by virtue of an assignment in accordance with the terms of this Agreement shall be in the same amount as, and shall replace, the Capital Account of the assignor of such Interest, and, for purposes of this Agreement, such Member shall be deemed to have made the Capital Contributions made by the assignor of such Interest (or made by such assignor's predecessor in interest). To the extent such Member acquires less than the entire Interest of the assignor of the Interest so acquired by such Member, the original Capital Account of such Member and its Capital Contributions shall be in proportion to the Interest it acquires, and the Capital Account of the assignor who retains a partial Interest, and the amount of its Capital Contributions, shall be reduced in proportion to the Interest it retains.

(b) The Capital Account of each Member shall be maintained in accordance with the following provisions:

(i) to such Member's Capital Account there shall be credited such Member's Capital Contributions, such Member's distributive share of Profits, special allocations of income and gain,

and the net amount of any Company liabilities that are assumed by such Member or that are secured by any Company assets distributed to such Member;

(ii) to such Member's Capital Account there shall be debited the amount of cash and the Gross Asset Value of any Company assets distributed to such Member pursuant to any provision of this Agreement, such Member's distributive share of Losses, special allocations of loss and deduction, and the net amount of any liabilities of such Member that are assumed by the Company or that are secured by any property contributed by such Member to the Company; and

(iii) in determining the amount of any net liability for purposes of this Section (b), there shall be taken into account §752(c) of the Code and any other applicable provisions of the Code and the Treasury Regulations; and

(iv) adjustments to the Capital Accounts shall be in accordance with Treasury Regulation § 1.704-1(b)(2)(iv).

Section 4.6 Capital Accounts Generally.

(a) Except as otherwise provided in this Agreement, whenever it is necessary to determine the Capital Account of any Member for any purpose hereunder, the Capital Account of such Member shall be determined after giving effect to all adjustments provided for in Section 4.5 hereof for the current Fiscal Year in respect of transactions effected prior to the date such determination is to be made.

(b) No Member shall be entitled to withdraw any part of its Capital Account, or to receive any distribution from the Company except as specifically provided in this Agreement.

ARTICLE 5

MEMBERS, MEETINGS AND AMENDMENTS

Section 5.1 Powers of Members. The Members shall have the power to exercise any and all rights or powers granted to the Members pursuant to the express terms of this Agreement.

Section 5.2 Resignation. Except as expressly provided in this Agreement, a Member may not withdraw from the Company prior to the dissolution and winding up of the Company. If a Member withdraws in violation of the foregoing prohibition, such Member shall not be entitled to receive any distributions and shall not otherwise be entitled to receive the fair market value of its Interest except as otherwise expressly provided for in this Agreement.

Section 5.3 Meetings or other Approvals of the Members.

(a) Meetings of the Members may be called at any time by the Managing Member or any Member. Each Member shall in writing authorize an individual to represent and act for it by proxy on all matters in which a Member is entitled to participate, including waiving notice of any meeting, voting or otherwise participating at a meeting, and to provide such consents, approvals or agreements of a Member as required in this Agreement. Every such proxy shall be signed by all of the Persons having any ownership rights or interest in the Interest of the Member.

(b) Each meeting of Members shall be conducted by the President or such other officer named by the Managing Member, and such a meeting shall be called with at least two (2) days but not more than thirty (30) days notice, specifying the agenda for the meeting. Such notice may be waived by any of the Members at any time, and will be deemed to have been waived if the Member participates in the meeting and has been provided with a written agenda for the meeting. Meetings may also be held

telephonically whereby each of the Members can hear each of the other Members. The Managing Member, in its sole discretion, shall establish all other provisions relating to meetings of Members, including the time, place or purpose of any meeting at which any matter is to be voted on by any Members, voting in person or by proxy or any other matter with respect to the exercise of any such right to vote; provided, however, any Member shall have the right to introduce agenda items for each meeting. Except as expressly provided in this Agreement, decisions of the Members shall be made upon the vote of at least 75 percent of the Percentage Interests of the Members. Action by the Members may also be taken and represented by a unanimous written consent. The Company's Secretary shall be responsible for taking minutes of the Member meetings and safekeeping them on behalf of the Company.

Section 5.4 Additional Members.

(a) By approval of all of the Members, the Company is authorized to admit any Person as an additional member of the Company (each, an "Additional Member" and collectively, the "Additional Members"). Each such Person shall be admitted as an Additional Member at the time such Person (i) executes this Agreement or a counterpart of this Agreement and (ii) is named as a Member on an amended Schedule A hereto.

(b) Additional Members shall not be entitled to any retroactive allocation of the Company's income, gains, losses, deductions, credits or other items; provided that, subject to the restrictions of §706(d) of the Code, Additional Members shall be entitled to their respective share of the Company's income, gains, losses, deductions, credits and other items arising under contracts entered into before the effective date of the admission of any Additional Members to the extent that such income, gains, losses, deductions, credits and other items arise after such effective date. To the extent consistent with §706(d) of the Code and Treasury Regulations promulgated thereunder, the Company's books may be closed at the time Additional Members are admitted (as though the Company's tax year had ended) or the Company may credit to the Additional Members pro rata allocations of the Company's income, gains, losses, deductions, credits and items for that portion of the Company's Fiscal Year after the effective date of the admission of the Additional Members.

Section 5.5 Amendments. Any amendment to this Agreement or the Articles shall be adopted and be effective as an amendment thereto only if it receives the affirmative vote of all of the Members, or such amendment is in writing and executed by all of the Members.

ARTICLE 6

MANAGEMENT

Section 6.1 Management of the Company.

(a) The Company shall be managed by a Managing Member who shall be Thomas H. Morgan.

(b) The Managing Member may appoint individuals with such other titles as it may select, including the titles of President, Vice President, Treasurer and Secretary, to act on behalf of the Company, with such power and authority as the Managing Member may delegate to any such Person.

(c) The Managing Member may resign at any time by giving at least five (5) days written notice to all of the Members of the Company (or such shorter time period acceptable to Members holding at least 75 percent of the Percentage Interest), and his successor shall be selected by the Members holding at least 75 percent of the Percentage Interests. Unless otherwise specified in such notice, the acceptance of such resignation shall not be necessary to make it effective. Any officer may be removed at any time, with or without cause, by the Managing Member and his replacement shall be selected and approved by the Managing Member at the time of such removal.

Section 6.2 Powers of the Managing Member. Except as otherwise specifically provided in this Agreement, the Managing Member shall have full, exclusive and complete discretion, right, power, and authority to manage, control and make all decisions affecting the business and affairs of the Company and to do or cause to be done any and all acts, at the expense of the Company on the terms provided herein, deemed by the Managing Member to be necessary or appropriate to effectuate the business of the Company purposes and objectives of the Company as set forth in this Agreement.

Section 6.3 No Management by Other Persons.

(a) No Person other than the Managing Member and the duly appointed officers of the Company and its authorized agents shall take part in the management, or the operation or control of the business and affairs of the Company. Except as expressly delegated by the Managing Member or as required by the Florida Act, no Person other than the Managing Member and the duly appointed officers or other authorized agents of the Company shall be an agent of the Company or have any right, power or authority to transact any business in the name of the Company or to act for or on behalf of or to bind the Company.

Section 6.4 Reliance by Third Parties. Any Person dealing with the Company or the Managing Member may rely upon a certificate signed by the Managing Member as to:

(i) the identity of the Managing Member;

(ii) the existence or non-existence of any fact or facts which constitute a condition precedent to acts by the Managing Member or in any other manner germane to the affairs of the Company;

(iii) the Persons who are authorized to execute and deliver any instrument or document of or on behalf of the Company; or

(iv) any act or failure to act by the Company or as to any other matter whatsoever involving the Company or any Member.

ARTICLE 7

ASSIGNABILITY OF MEMBER INTERESTS

Section 7.1 Assignability of Interests.

(a) Except as otherwise provided in this Article 7, no Member may Transfer, as defined herein, the whole or any part of its Interest or any interest therein without the prior written consent of all other Members, which consent may be given or withheld in the sole and absolute discretion of such other Members. If the prior written consent of the other Members is obtained for any such Transfer, such Transfer shall, nevertheless, not entitle the assignee to become a Substitute Member or to be entitled to exercise or receive any of the rights, powers or benefits of a Member other than the right to receive distributions to which the assigning Member would be entitled, unless the assigning Member designates, in a written instrument delivered to the other Members, its assignee to become a Substitute Member and all of the other Members consent to the admission of such assignee as a Member; and provided further, that such assignee shall not become a Substitute Member without having first executed an instrument reasonably satisfactory to those Members that approved the Transfer which shall at a minimum include an acceptance and agreement to the terms and conditions of this Agreement. The Transfer shall be conditioned upon the Company receiving a fee from such assignee or the assigning Member sufficient to cover all reasonable expenses of the Company in connection with such assignee's admission as a Substitute Member.

(b) If and to the extent that any Interest is now or in the future held by a corporation or other entity, a change in control of such corporation or entity (which shall be deemed to occur when any person or entity after the date hereof acquires 50 percent or more of the beneficial interests of such corporation or entity), shall constitute an assignment for the purposes of this Agreement and shall be subject to the provisions of this Article 7. Any assignment that occurs by reason of the death, legal incapacity or insolvency shall not be deemed an assignment and shall not be prohibited by the provisions of Section 7.1(b). The sale or other transfer of beneficial interests in a corporation or entity that is a shareholder or similar holder of a corporation or entity that is a Member shall similarly be subject to the provisions of this Section 7.1(b).

(c) Notwithstanding the foregoing, a Member shall be permitted to assign, at any time and from time to time, all or any part of its Interest to a Permitted Assignee. For this purpose "Permitted Assignee" means a Person that is (i) an Affiliate of the Member, (ii) a natural or adoptive lineal ancestor or descendant of the Member, (iii) a trust, estate, guardianship or custodianship, including those established under any the Uniform Gifts to Minors Act of any state, and (iv) entities under the control of the Member and one or more other Permitted Assignees.

(d) If a Member assigns all or part of its Interest in the Company and the Permitted Assignee or other assignee thereof, as the case may be, is entitled to become a Substitute Member, such assignee shall be admitted to the Company effective immediately prior to the effective date of the assignment (as set forth in Section 7.3 hereof), and, immediately following such admission, the assigning Member shall cease to be a Member of the Company to the extent of the portion of the Interest assigned hereunder.

Section 7.2 Recognition of Assignment by Company or Other Members. No assignment, or any part thereof, that is in violation of this Article 7 shall be valid or effective, and neither the Company nor the Managing Member or any Member shall recognize the same for any purpose of this Agreement, including the purpose of making distributions of Net Cash Flow pursuant to this Agreement with respect to such Interest or part thereof. Neither the Company nor the Managing Member shall incur any liability as a result of refusing to make any such distributions to the assignee of any such invalid assignment.

Section 7.3 Effective Date of Assignment. Any valid assignment of a Member's Interest, or part thereof, pursuant to the provisions of this Article 7 shall be effective as of the close of business on the day preceding the closing of the transaction evidencing the assignment, unless all consents have not been obtained, in which case the effective date shall be on such date all of the written consents to such assignment have been obtained, or such other date as the assigning Member and all Members agree upon. The Company shall, from the effective date of such assignment, thereafter pay all further distributions on account of the Interest (or part thereof), so assigned, to the assignee of such Interest, or part thereof. As between any Member and its assignee, Profits and Losses for the Fiscal Year of the Company in which such assignment occurs shall be apportioned for federal income tax purposes in accordance with any convention permitted under §706(d) of the Code and selected by the Managing Member.

ARTICLE 8

DISTRIBUTIONS TO MEMBERS

Section 8.1 Net Cash Flow. Except as otherwise provided in Article 13 hereof (relating to the dissolution of the Company), distributions of the Net Cash Flow during any Fiscal Year shall be made to the Members at such time as they mutually determine, in the following manner:

(a) First, to any Members who have loaned funds to the Company until the total amount of such loans and the interest accrued thereon has been paid in full, in proportion to the unpaid amount of principal and interest of such outstanding loans (and irrespective of the payment dates contained therein).

(b) Second, to the Members in proportion to and to the extent of their Unreturned Capital until their Unreturned Capital is reduced to zero; and

(c) Thereafter, to the Members in proportion to their Percentage Interests.

Section 8.2 Limitations on Distribution. Notwithstanding any provision to the contrary contained in this Agreement, the Company shall not make a distribution to any Member on account of its Interest in the Company if such distribution would violate the solvency standards under Section 608.426 of the Florida Act or other applicable insolvency or fraudulent conveyance laws.

ARTICLE 9

ALLOCATIONS

Section 9.1 Profits and Losses.

(a) For each Fiscal Year of the Company, after giving effect to the special allocations required in Section 9.2 hereof, net Profits for any Fiscal Year shall be allocated as follows:

(i) First, between the Members in proportion to and in the inverse order to which Losses were allocated to them pursuant to Section 9.1(b) below until the cumulative Profits allocated pursuant to this Section 9.1(a)(i) equal the cumulative Losses allocated pursuant to Section 9.1(b); and

(ii) Second, between the Members in proportion to their Percentage Interests.

(b) For each Fiscal Year of the Company, after giving effect to the allocations required by Section 9.2 hereof, net Losses for any Fiscal Year shall be allocated as follows:

(i) First, between the Members in proportion to and to extent of their positive Capital Account balances; and

(ii) Second, between the Members in proportion to their Percentage Interests; provided that no Member shall be allocated Losses in excess of the amount of the "economic risk of loss" it bears for the Company's indebtedness, as determined under Treasury Regulation 1.752-2 (in which case, the excess Loss shall be reallocated to the Member who bears such economic risk of loss for the indebtedness, to the extent of the respective amounts of such economic risk of loss it bears).

Section 9.2 Special Allocations.

(a) The Company shall make the qualified income offset allocation required by the alternate test for economic effect under §1.704-1(b)(2)(ii)(d) of the Treasury Regulations.

(b) In the event any Member has a deficit Capital Account at the end of any Fiscal Year that is in excess of the sum of (i) the amount such Member is obligated to restore to the Company pursuant to §1.704-1(b)(2)(ii)(c) of the Treasury Regulations, (ii) the amount such Member is deemed to be obligated to restore pursuant to the next to the last sentence of §1.704-2(g)(1) of the Treasury Regulations and (iii) the amount such Member is deemed to be obligated to restore pursuant to the next to the last sentence of §704-2(i)(5) of the Treasury Regulations, such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible; provided that an allocation pursuant to this Section 9.2(b) shall be made if and only to the extent that such Member would have a deficit Capital Account in excess of such sum after all other allocations provided in this Article 9 have been tentatively made as if Section 9.2(a) and this Section 9.2(b) were not in the Agreement.

(c) The Company shall make all (i) Member Nonrecourse Deduction Allocations; (ii) Member Minimum Gain Chargeback Allocations; and (iii) Company Minimum Gain Chargeback Allocations. "Member Nonrecourse Deduction Allocations" mean the allocations required by §1.704-2(i)(2) of the Treasury Regulations. "Member Minimum Gain Chargeback Allocations" mean the allocations required by §1.704-2(i)(3) of the Treasury Regulations. "Company Minimum Gain Chargeback Allocation" means the allocations required by §1.704-2(f) of the Treasury Regulations.

(d) The Company shall make all Nonrecourse Deduction Allocations to the Members in proportion to their Percentage Interests. "Nonrecourse Deduction Allocations" means the nonrecourse deductions (as defined in §1.704-2(c) of the Treasury Regulations

(e) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code §734(b) or Code §743(b) is required, pursuant to §1.704-1(b)(2)(iv)(m) of the Treasury Regulations, to be taken into account in determining Capital Accounts, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to such Section of the Treasury Regulations.

(f) The allocations set forth in this Section 9.2 (collectively the "Regulatory Allocations") are intended to comply with certain requirements of §1.704-1 and -2 of the Treasury Regulations. Notwithstanding any other provisions of this Article 9 (other than the Regulatory Allocations), the Managing Member shall, with the advice and assistance of the Company's tax accountants, take the Regulatory Allocations into account in allocating other Profits, Losses, and items of income, gain, loss, deduction and Code §705(a)(2)(B) expenditures among the Members so that, to the extent possible, the net amount of such allocations of other Profits, Losses, and other items and the Regulatory Allocations to each Member shall be equal to the net amount that would have been allocated to each such Member if the Regulatory Allocations had not occurred.

Section 9.3 Allocation Rules.

(a) In the event Members are admitted to the Company pursuant to this Agreement on different dates, the Profits (or Losses) allocated to the Members for each Fiscal Year during which Members are so admitted shall be allocated among the Members in proportion to their Percentage Interests during such Fiscal Year in accordance with §706 of the Code, using any convention permitted by law and selected by the Managing Member.

(b) For purposes of determining the Profits, Losses or any other items allocable to any period, Profits, Losses and any such other items shall be determined on a daily, monthly or other basis, as determined by the Managing Member using any method that is permissible under §706 of the Code and the Treasury Regulations thereunder.

(c) Except as otherwise provided in this Agreement, all items of Company income, gain, loss, deduction and any other allocations not otherwise provided for shall be divided among the Members in the same proportions as they share Profits and Losses for the Fiscal Year in question.

(d) The Members are aware of the income tax consequences of the allocations made by this Article 9 and hereby agree to be bound by the provisions of this Article 9 in reporting their shares of Company income and loss for income tax purposes.

(e) Solely for purposes of determining a Member's proportionate share of the "excess nonrecourse liabilities" of the Company within the meaning of Treasury Regulations §1.752-3(a)(3), the Members' interests in Company Profits shall be in accordance with their Percentage Interests.

(f) The Managing Member shall have reasonable discretion, with respect to each Fiscal Year, to request from the Commissioner of the Internal Revenue Service a waiver, pursuant to §1.704-2(f)(4) or 1.704-2(i)(4) of the Treasury Regulations, of the minimum gain chargeback requirement of § 1.704-2(f) of the Regulations or the member minimum gain chargeback requirement of §1.704-2(i)(4) of the Treasury Regulations, respectively, if the application of such chargeback would cause a permanent distortion of the economic arrangement of the Members.

Section 9.4 Other Tax Allocations; Section 704(c) of the Code.

(a) In accordance with §704(c) of the Code and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to any property contributed to the capital of the Company shall, solely for income tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its initial Gross Asset Value (computed in accordance with the definition in Section 1.1 hereof).

(b) In the event the Gross Asset Value of any Company asset is adjusted pursuant to Paragraph (ii) of the definition of "Gross Asset Value" contained in Section 1.1 hereof, subsequent allocations of income, gain, loss and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under §704(c) of the Code and the Treasury Regulations thereunder.

(c) Any elections or other decisions relating to allocations under this Section 8.4, including the selection of any allocation method permitted under Treasury Regulation §1.704-3, shall be made by the Managing Member in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 9.4 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items or distributions pursuant to any provision of this Agreement.

ARTICLE 10

BOOKS AND RECORDS

Section 10.1 Inspection Rights Pursuant to Law. Without limiting any right which the Members enjoy under the Florida Act, it is agreed that the Company shall have obligations to the Members as set forth in this Article 10 respecting books, records and financial statements of the Company.

Section 10.2 Books and Records. At all times during the continuance of the Company, the Company shall maintain, at its registered office and principal place of business all records and materials referred to in Florida Act Section 608.4101, including without limitation, separate books of account for the Company that shall show a true and accurate record of all costs and expenses incurred, all charges made, all credits made and received and all income derived in connection with the operation of the Company. Such books of account, together with a certified copy of this Agreement and of the Articles, shall at all times be maintained at the principal place of business of the Company and shall be open to inspection, examination and audit at any time by each Member and its duly authorized representatives for any purpose.

Section 10.3 Annual Financial Statements. Within 120 days after the end of each Fiscal Year, the Company shall cause to be delivered to each Member a financial statement of the Company for the prior Fiscal Year, prepared at the expense of the Company, which financial statement shall set forth, as of the end of and for such Fiscal Year, the following:

(i) a profit and loss statement and a balance sheet of the Company;

(ii) the balance in each Member's Capital Account; and

(iii) such other information as reasonably shall be necessary for the Members to be advised of the financial status and results of operations of the Company.

Section 10.4 Accounting Method. For both financial and tax reporting purposes and for purposes of determining Profits and Losses, the books and records of the Company shall be kept on such method of accounting as determined by the Managing Member and shall reflect all Company transactions and be appropriate and adequate for the Company's business.

Section 10.5 Audit. Any Member may, at any time, require an audit to be performed of Company operations, which audit shall be performed forthwith by a reputable accounting firm. The cost and expense of any such audit shall be borne by the Member requesting such audit. Any Member may, at any time, perform an internal audit at reasonable intervals, at reasonable times and upon reasonable notice to the Company.

ARTICLE 11

TAX MATTERS

Section 11.1 Taxation as Company. The Company shall be treated as a partnership for U.S. federal income tax purposes.

Section 11.2 Federal Tax Returns. The Company shall cause the Company's independent public accountants to prepare, at the expense of the Company, for each Fiscal Year (or part thereof), Federal tax returns in compliance with the provisions of the Code and any required state and local tax returns.

Section 11.3 Member Tax Return Information. The Company, at its expense, shall cause to be delivered to each Member such information as shall be necessary (including a statement for that year of each Member's share of net income, net losses and other items of the Company) for the preparation by the Members of their Federal, state and local income and other tax returns.

Section 11.4 Tax Matters Representative.

(a) The President or other officer selected by the Managing Member shall act as "Tax Matters Representative" of the Company for purposes of §6231(a)(7) of the Code and shall have the power to manage and control, on behalf of the Company, any administrative proceeding at the Company level with the Internal Revenue Service relating to the determination of any item of Company income, gain, loss, deduction or credit for federal income tax purposes.

(b) The Tax Matters Member shall, within five (5) business days of the receipt of any notice from the Internal Revenue Service in any administrative proceeding at the Company level relating to the determination of any Company item of income, gain, loss, deduction or credit, mail a copy of such notice to each Member.

Section 11.5 Right to Make Section 754 Election. The Tax Matters Member may, upon receiving the written consent of each other Member, make or revoke, on behalf of the Company, an election in accordance with §754 of the Code, so as to adjust the basis of Company property in the case of a distribution of property within the meaning of §734 of the Code, and in the case of a transfer of a Company Interest within the meaning of §743 of the Code. Each Member shall, upon request of the Tax Matters Member, supply the information necessary to give effect to such an election.

ARTICLE 12

LIABILITY, EXCULPATION AND INDEMNIFICATION

Section 12.1 Liability.

(a) Except as otherwise provided by the Florida Act, the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company, and no Covered Person shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Covered Person.

(b) Except as otherwise expressly required by law, a Member, in its capacity as Member, shall have no liability in excess of (i) the amount of its Capital Contributions, (ii) its share of any assets and undistributed profits of the Company, (iii) its obligation to make other payments expressly provided for in this Agreement, and (iv) the amount of any distributions wrongfully distributed to it.

Section 12.2 Exculpation.

(a) No Covered Person shall be liable to the Company or any other Covered Person for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of authority conferred on such Covered Person by this Agreement, except that a Covered Person shall be liable for any such loss, damage or claim incurred by reason of such Covered Person's gross negligence or willful misconduct.

(b) A Covered Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements presented to the Company by any Person as to matters the Covered Person reasonably believes are within such other Person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, Profits, Losses or Net Cash Flow or any other facts pertinent to the existence and amount of assets from which distributions to Members might properly be paid.

Section 12.3 Indemnification. To the fullest extent permitted by applicable law, a Covered Person shall be entitled to indemnification from the Company for any loss, damage or claim incurred by such Covered Person by reason of any act or omission performed or omitted by such Covered Person provided that: (i) any such action was undertaken in good faith on behalf of the Company and in a manner reasonably believed to be in, or not opposed to, the best interests of the Company, (ii) any such action was reasonably believed to be within the scope of authority conferred on such Covered Person by this Agreement, and (iii) with respect to any criminal action or proceeding, such Covered Person had no reasonable cause to believe his action or omission was unlawful, except that no Covered Person shall be entitled to be indemnified in respect of any loss, damage or claim incurred by such Covered Person by reason of gross negligence or willful misconduct with respect to such acts or omissions; provided, however, that any indemnity under this Section 12.3 shall be provided out of and to the extent of Company assets only (including the proceeds of any insurance policy obtained pursuant to Section 12.5 hereof), and no Covered Person shall have any personal liability on account thereof.

Section 12.4 Expenses. To the fullest extent permitted by applicable law, expenses (including legal fees) incurred by a Covered Person in defending any claim, demand, action, suit or proceeding shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding upon receipt by the Company of an undertaking by or on behalf of the Covered Person to repay such amount if it shall be determined that the Covered Person is not entitled to be indemnified as authorized in Section 12.3 hereof.

Section 12.5 Insurance. The Company shall purchase and maintain insurance, to the extent and in such amounts as the Managing Member shall, in its sole discretion, deem reasonable, on behalf of Covered Persons and such other Persons as the Managing Member shall determine, against any liability that may be asserted against or expenses that may be incurred by any such Person in connection with the activities of the Company or such indemnities, regardless of whether the Company would have the power to indemnify such Person against such liability under the provisions of this Agreement. The Managing Member and the Company may enter into indemnity contracts with Covered Persons and such other Persons as the Managing Member shall determine and adopt written procedures pursuant to which arrangements are made for the advancement of expenses and the funding of obligations under Section 12.4 hereof and containing such other procedures regarding indemnification as are appropriate.

Section 12.6 Acts Performed Outside the Scope of the Company. Each Member (the "Indemnitor") shall indemnify, defend, save and hold harmless the other Member (the "Indemnitee") from any and all claims, liabilities, demands, actions and rights of action that shall or may arise by virtue of any act or thing done or omitted to be done by the Indemnitor (directly or through agents or employees) outside the scope of, or in breach of, the terms of this Agreement; provided, however, that the Indemnitor shall be properly notified of the existence of the claim, demand, action or right of action, and shall be given reasonable opportunity to cure any act or omission causing liability, and participate in the defense thereof. The Indemnitee's failure to give such notice shall not affect the Indemnitor's obligations hereunder, except to the extent of any actual prejudice arising therefrom.

Section 12.7 Liability of Members to Company. Unless otherwise provided in this Agreement, no Member shall be liable to any the other Member or to the Company by reason of such Member's actions in connection with the Company, except in the event of a violation of any provision of this Agreement, fraud, gross negligence or dishonest conduct.

Section 12.8 Attorneys' Fees. All of the indemnities provided in this Agreement shall include reasonable attorneys' fees, including appellate attorneys' fees, and court costs.

Section 12.9 Subordination of Other Rights to Indemnity. The interests of the Members in any proceeds of the Company by way of repayment of loans, return of any Capital Contributions, or any distributions from the Company, shall be subordinated to the right of Member to the indemnities provided by this Article 12.

Section 12.10 Survival of Indemnity Provisions. Except as otherwise specifically provided herein, all of the indemnity provisions contained in this Agreement shall survive a Member's ceasing to be a Member hereunder.

ARTICLE 13

DISSOLUTION, LIQUIDATION AND TERMINATION

Section 13.1 No Dissolution. The Company shall not be dissolved by the admission of Additional Members or Substitute Members in accordance with the terms of this Agreement, or the withdrawal of a Member.

Section 13.2 Events Causing Dissolution. The Company shall be dissolved and its affairs shall be wound up upon the occurrence of any of the following events:

(a) the expiration of the term of the Company, as provided in Section 2.3 hereof;

(b) the written consent of all Members;

(c) at such time as there are no Members;

(d) the entry of a decree of judicial dissolution under of the Florida Act; or

(e) the sale or disposition of all or substantially of the Property.

Section 13.3 Notice of Dissolution. Upon the dissolution of the Company the Managing Member shall promptly notify the Members of such dissolution.

Section 13.4 Liquidation. Upon dissolution of the Company, the Managing Member (in such capacity, the "Liquidating Trustee") shall carry out the winding up of the Company and shall immediately commence to wind up the Company's affairs; provided, however, that a reasonable time shall be allowed for the orderly liquidation of the assets of the Company and the satisfaction of liabilities to creditors so as to enable the Members to minimize the normal losses attendant upon a liquidation. The Members shall continue to share Profits and Losses and other items during liquidation in the same manner, as specified in this Agreement, as before liquidation. The proceeds of liquidation shall be distributed in the following order and priority:

(i) to creditors of the Company, including Members who are creditors, to the extent otherwise permitted by law, and consistent with the subordination or other terms and conditions therein pertaining to priority of satisfaction of such indebtedness, in full satisfaction of the liabilities of the Company (whether by payment or the making of reasonable provision for payment thereof); and

(ii) to the Members in the same manner as provided in Section 8.1 hereof.

Section 13.5 Termination. The Company shall terminate when all of the assets of the Company, after payment of or due provision for all debts, liabilities and obligations of the Company, shall have been distributed to the Members in the manner provided for in this Article 13 and the Certificate shall have been canceled in the manner required by the Florida Act.

Section 13.6 Claims of the Members. The Members and former Members shall look solely to the Company's assets for the return of their Capital Contributions, and if the assets of the Company remaining after payment of or due provision for all debts, liabilities and obligations of the Company are insufficient to return such Capital Contributions, the Members and former Members shall have no recourse against the Company or any other Member; provided, however, that nothing contained herein shall be deemed to limit the rights of a Member under applicable law.

Section 13.7 Distributions In-Kind. If any assets of the Company shall be distributed in kind, such assets shall be distributed to the Member(s) entitled thereto as tenants-in-common in the same proportions as such Member(s) would have been entitled to cash distributions if (i) such assets had been sold for cash by the Company at the fair market value of such property (taking the Gross Asset Value definition herein and Code Section 7701(g) into account) on the date of distribution, (ii) any unrealized income, gain, loss and deduction inherent in such property (that has not been reflected in the Capital Accounts previously) that would be realized by the Company from such sale were allocated among the Member(s) as Profits or Losses in accordance with this Agreement, and (iii) the cash proceeds were distributed to the Member(s) in accordance this Article 13. The Capital Accounts of the Member(s) shall be increased by the amount of any unrealized income or gain inherent in such property or decreased by the amount of any loss or deduction inherent in such property that would be allocable to them, and shall be reduced by the fair market value of the assets distributed to them under the preceding sentence.

ARTICLE 14

ANCILLARY OPPORTUNITIES

In no event shall this Agreement be held or construed to imply the existence of a general partnership or joint venture among the Members with regard to matters, trades or businesses or enterprises outside the scope of this Company, and no Member shall have any power or authority under

this Agreement to act as the partner, agent or representative of the other Member with regard to any matter beyond the scope of this Company. Nothing contained in this Agreement shall be deemed to restrict in any way the rights of any Member or any director, officer, shareholder, owner or Affiliate of any Member, to engage in, or to conduct any other activity or trade or business, independently or with others, including, without limitation, the ownership, operation and management, of other real estate companies, whether or not any such activity, trade or business is adverse to, competes with or is complementary with, the business of the Company or the other Member, and neither the Company nor the other Member shall have any rights in or to any such trade or business or activity or the income or profits derived therefrom.

ARTICLE 15

MISCELLANEOUS

Section 15.1 Notices. All notices provided for in this Agreement shall be in writing, duly signed by the party giving such notice, and shall be delivered, telecopied or mailed by registered or certified mail or by recognized overnight delivery or courier service (e.g., Federal Express), as follows:

(i) if given to the Company, in care of the Managing Member at the principal place of business of the Company set forth in Section 2.4 hereof.

(ii) if given to any Member Group, at the address set froth on Schedule A, or at such other address as such Member may hereafter designate by written notice to the Company;

Section 15.2 Failure to Pursue Remedies. The failure of any party to seek redress for violation of, or to insist upon the strict performance of, any provision of this Agreement shall not prevent a subsequent act, which would have originally constituted a violation, from having the effect of an original violation.

Section 15.3 Cumulative Remedies. The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party shall not preclude or waive its right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

Section 15.4 Binding Effect. This Agreement shall be binding upon and inure to the benefit of all of the parties and, to the extent permitted by this Agreement, their successors, legal representatives and assigns.

Section 15.5 Interpretation. Throughout this Agreement, nouns, pronouns and verbs shall be construed as masculine, feminine, neuter, singular or plural, whichever shall be applicable. All references herein to "Articles," "Sections" and "Paragraphs" shall refer to corresponding provisions of this Agreement.

Section 15.6 Severability. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted.

Section 15.7 Counterparts. This Agreement may be executed in any number of counterparts with the same effect as if all parties hereto had signed the same document. All counterparts shall be construed together and shall constitute one instrument.

Section 15.8 Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

Section 15.9 Governing Law. This Agreement and the rights of the parties hereunder shall be interpreted in accordance and Jurisdiction with the laws of the State of Florida, and all rights and remedies shall be governed by such laws without regard to principles of conflict of laws. The parties hereto agree to submit to the jurisdiction of the federal or state courts sitting in Florida in connection with any claims or controversy arising out of this Agreement and that venue for such actions shall be in Miami-Dade County, Florida.

Section 15.10 Dealings in Good Faith; Best Efforts. Except as otherwise expressly set forth herein, each party hereto agrees to act in good faith with respect to the other party in exercising its rights and discharging its obligations under this Agreement. Each party further agrees to use its best efforts to ensure that the purposes of this Agreement are realized and to take all steps as are reasonable in order to implement the operational provisions of this Agreement. Each party agrees to execute, acknowledge, if necessary, deliver and file any document or instrument necessary or advisable to realize the purposes of this Agreement.

Section 15.11 Partition of the Property. Each Member agrees that it shall have no right to partition the Property, or any portion thereof, and each Member agrees that it shall not make application to any court or authority having jurisdiction in the matter to commence or prosecute any action or proceeding for partition of the Property, or any portion thereof. Upon the breach of this Section by any Member, the other Member, in addition to all other rights and remedies in law and equity, shall be entitled to a decree or order dismissing application, action or proceeding.

Section 15.12 Third Party Beneficiaries. Nothing expressed or implied in this Agreement is intended or shall be construed, to confer upon or give any person, firm or corporation other than the parties hereto, any rights, remedies, obligations or liabilities under or by reason of this Agreement, or result in their being deemed a third party beneficiary of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

MEMBERS:

Thomas H. Morgan

Neal I. Baker

Section 15.9 Governing Law. This Agreement and the rights of the parties hereunder shall be interpreted in accordance and Jurisdiction with the laws of the State of Florida, and all rights and remedies shall be governed by such laws without regard to principles of conflict of laws. The parties hereto agree to submit to the jurisdiction of the federal or state courts sitting in Florida in connection with any claims or controversy arising out of this Agreement and that venue for such actions shall be in Miami-Dade County, Florida.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

MEMBERS:

Thomas H. Morgan

Neal I. Baker

SCHEDULE A

MEMBERS, PERCENTAGE INTERESTS AND CAPITAL CONTRIBUTIONS

Name	Initial Capital Contribution	Member's Initial Percentage Interest
Thomas H. Morgan 1999 Broadway, Suite 2450 Denver, Colorado 80202 Phone: Fax:	$	75%
Neal I. Baker 74 Rebellion Road Charleston, South Carolina 29407 Phone: Fax:	$	25%
Total	$	100%

EXHIBIT A

Legal Description

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THM OLD MIAMI POST OFFICE, LLC

October 27, 2009

Neal Baker
74 Rebellion Road
Charleston, SC 29407

Dear Neal:

Under Article 4, Section 4.2 of the Operating Agreement of the THM Old Miami Post Office, LLC, as Managing Member I am requesting a gross capital call of $800.000 to cover the pay down of the renewed loan and the peripheral costs assessed in obtaining this new loan. This amounts to a proportionately reduced capital call of $200,000 to your 25% interest which is due upon receipt, payable to THM Old Miami Post Office, LLC at 3333 S. Bannock Street, Suite 950, Englewood, CO 80110. If you prefer to wire transfer the funds, the wire instructions are:

	US Bank
	8401 East Belleview
	Denver, CO 80237
ABA Routing	102 000 021
Credit To	THM Old Miami Post Office, LLC
Account #	1036 7412 2736

This letter is also to act as official notice that per Article 4, Section 4.2d, you will be required to sign as Guarantor under the terms of the new loan currently under negotiation with Wachovia Bank.

Sincerely,

Thomas H Morgan By Neal Baker

Thomas H. Morgan, Managing Member

3333 S. BANNOCK ST., SUITE 950, ENGLEWOOD, CO 80110 303-296-9270 303-294-9077 FX

EXHIBIT "B"

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN, PLAINTIFF(S), v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION. DEFENDANT(S).	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2012-CP-10- 580 **SUMMONS** **(Arbitration or Jury Trial Demanded)**

FILED
2012 JAN 26 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and REQUIRED to answer the Complaint of the Plaintiff(s) in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the subscriber at his office at 126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492-8144, within thirty (30) days after the service thereof, exclusive of the day of such service; and, if you fail to answer the Complaint within the time aforesaid, the Plaintiff(s) in this action will apply to the Court for the relief demanded in the said Complaint.

CLAWSON AND STAUBES, LLC

Chris Staubes, Esq.
Barrett Brewer, Esq.
CP Diminich, Esq.
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Charleston, South Carolina

January 24, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2012-CP-10- 580
	)	
THOMAS H. MORGAN,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION.	)	**COMPLAINT** **(Arbitration or Jury Trial Demanded)**
	)	
DEFENDANTS,	)	

FILED
2012 JAN 26 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff above named, complaining of the Defendants, above named, alleges and says as follows:

1. That Thomas H. Morgan ("Morgan" or "Plaintiff") is a citizen and resident of the State of Florida.

2. That the Defendant John L. Gilbert ("Gilbert") is a citizen and resident of the State of Texas, and is neither an infant nor incompetent person and is not in the military service.

3. That the Defendant Stuart L. Fred ("Fred") is a citizen and resident of the State of Texas, and is neither an infant nor incompetent person and is not in the military service.

4. That 150 Bee Street, LLC ("150 Bee Street" or "Company") is a South Carolina Limited Liability Company, duly organized and existing pursuant to the laws of South Carolina and subject to the jurisdiction of this Court.

5. That the Defendant Bella Vista Partnership ("Bella Vista"), is a Texas General Partnership doing business in South Carolina and subject to the jurisdiction of this Court.

6. That the Defendant Bomasada Group, Inc. ("Bomasada Group"), is a Texas corporation doing business in South Carolina and subject to the jurisdiction of this Court.

7. That the Defendant Bomasada Investment Group II, LLC ("Bomasada Investment" or "BIGII"), is a Texas Limited Liability Company doing business in South Carolina and subject to the jurisdiction of this Court.

8. That the Defendant Lauralis Management, Inc. ("Lauralis"), is a Texas corporation doing business in South Carolina and subject to the jurisdiction of this Court.

9. Plaintiff demands arbitration or a trial by jury individually and in a representative capacity as a derivative claim asserted on behalf of 150 Bee Street, LLC, as permitted by S.C. Code Ann. § 33-44-1103, *et. seq.* and Rule 23(b)(1) of the South Carolina Rules of Civil Procedure and other precedent.

10. At the time of the actions complained of herein, Morgan was, and remains, a co-owner of 150 Bee Street, LLC and is now Managing Member with authority to arbitrate or litigate this dispute in a derivative capacity.

11. 150 Bee Street, LLC, acting through and under direction of Defendants, has failed to take proper action to resolve the dispute after written demand by Morgan, to the serious detriment of 150 Bee Street, LLC and its members' interests.

12. Morgan can and will fairly and adequately represent the interests of any other similarly situated members of 150 Bee Street, LLC.

13. That On November 28, 2011, Plaintiff, through counsel, tendered a demand on Defendant to commence a derivative action pursuant to S.C. Code Ann. § 33-44-1101.

14. That Defendants refused and continue to refuse to bring the derivative suit, and therefore, Plaintiff brings this action.

15. That this Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

16. Plaintiff wishes to have this case assigned to the Business Court in accordance with Chief Justice Toal's Administrative Order, issued on or about September 7, 2007 and plans to file a Motion to that effect.

FACTUAL BACKGROUND

17. That Plaintiff Morgan is a Member and 26.66% owner of 150 Bee Street, LLC.

18. That Defendant Bella Vista is a Member and 26.67% owner of 150 Bee Street, LLC.

19. That the Estate of Neal I. Baker is a Member and 26.67% owner of 150 Bee Street, LLC.

20. That Edwin S. Pearlstine, Jr. is a Member and 20% owner of 150 Bee Street, LLC.

21. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling partners of Defendant Bella Vista.

22. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant Bomasada Group.

23. Upon information and belief, Defendant Bomasada Group was organized by Defendants Gilbert and Fred and acted as Developer of 150 Bee Street, LLC.

24. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant BIGII.

25. Upon information and belief, Defendant BIGII was organized by Defendants Gilbert and Fred and acted as General Contractor of 150 Bee Street, LLC.

26. Upon information and belief, Defendants Gilbert and/or Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant Lauralis.

27. Upon information and belief, Defendant Lauralis is a holding company for a private jet aircraft.

28. That Defendants entered into various contracts whereby the Defendants were to perform certain matters for the benefit of the Bee Street, LLC and its owners, including but not limited to acting as general contractor and as developer for the project.

29. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street, represented that they would act as developer of 150 Bee

Street, for the benefit of the owners of 150 Bee Street, LLC (including Morgan for a fee of $750,000.00.

30. Upon information and belief, Defendants have paid themselves more than $750,000.00 with Company funds.

31. Upon information and belief, Defendants continue to improperly pay themselves a monthly amount from Company funds, even though a paid Property Manager is on location at 150 Bee Street.

32. Upon information and belief, Defendants while acting as Developer have taken money for their own benefit to the detriment of 150 Bee Street, LLC and its Members.

33. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a) personal home remodeling in the amount of $1,325.00 charged to the Company, which were charged to the Company as "Make Ready Units-Paint Work;"
b) airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"
c) a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
d) $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"
e) fuel, Nextel and Cabela's bag charged to the Company as "CHS Mental Health job;"
f) African Safari with Swanepol & Scandrol Safaris charged in the amount of $12,509.00 to the Company as "Travel;"
g) other charges to be learned through the discovery process and determined by the trier of fact.

34. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a) expenses related to trip to Cancun, Mexico;
b) expenses related to lasvegas.com
c) expenses related to trip to Scottsdale, AZ;
d) expenses related to trip to Pebble Beach, CA;
e) expenses related to airplane equipment purchased from Blue Mountain Avionics;
f) expenses related to trip to Pacific Grove, Monterey and Carmel,

California;

g) expenses related to private aircraft;

h) other charges to be learned through the discovery process and determined by the trier of fact.

CONSTRUCTION

35. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street or Bomasada Group as Developer for 150 Bee Street, LLC, represented that they would act as General Contractor on the 150 Bee Street project, for the benefit of the owners of 150 Bee Street, LLC including Morgan, for a fee of 1% of the construction costs.

36. Upon information and belief, Defendants have collected well over 1% of the construction costs.

37. Upon information and belief, Defendants have intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer and so they can continue to pay themselves monthly and so they could pay for their jet airplane.

38. Defendants, while acting as General Contractor, promised and represented they would do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street, LLC and the Members. Despite this representation, the work went millions of dollars over budget.

39. Upon information and belief, Defendants while acting as General Contractor, retained any savings for their own benefit to the detriment of 150 Bee Street, LLC and the Members.

PRIVATE JET BILLINGS TO THE COMPANY FOR PERSONAL ITEMS

40. Defendants have billed 150 Bee Street and paid themselves from Company funds for travel expenses, including billing rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property or its business.

41. Upon information and belief, through 2010, Defendants authorized payments to Lauralis of $454,155,00 and $39,059.77 for airplane fuel expense from 150 Bee Street, LLC. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

42. Upon information and belief, from 2005 through 2010, Defendants systematically increased the rate they charged 150 Bee Street, LLC for their private jet as follows:

a) from $850.00 an hour to $1,050.00 an hour in 2005;

b) from $1,050.00 an hour to $1,200.00 an hour in 2005;

c) from $1,200.00 an hour to $1,750.00 an hour in 2006;
d) from $1,750.00 an hour to $2,100.00 an hour in 2008;

43. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Construction Travel Expenses" of $481,250.00 to BIGII. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

44. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Corporate Overhead" of $360,000.00 to BIGII. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

45. That Plaintiff has requested to see backup documentation for these charges, but Defendants have refused and continue to refuse to permit Plaintiff to see the requested information.

46. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their Private jet usage to the Company.

47. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their personal vacations to the Company.

48. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their home remodeling to the Company, which were charged to the Company as "Make Ready Units-Paint Work."

49. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their personal golf outings to the Company.

50. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their expensive dinners to the Company.

51. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of $12,509.00 to 150 Bee Street for an African Safari.

52. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of gift cards from golf shops to 150 Bee Street.

53. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging for airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance."

54. Defendants knew or should have known that the other Members of

150 Bee Street did not approve of the charging of a payment for a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs."

55. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of $3,000.00 for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education."

56. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of a payment of repairs and renovation of a personal aircraft hanger in Houston, TX.

57. Plaintiff has instructed Defendants in writing that they are no longer to bill the Company for their private jet.

58. In direct disregard, Defendants have written themselves, directly or through their entities, hundreds of thousands of dollars or more from 150 Bee Street funds.

59. As recently as September 9, 2011, Defendants wrote themselves a check from Company funds for $28,350.00, claiming it was for their private jet usage, even after Plaintiff instructed Defendants in writing that they are no longer to bill the Company for their private jet.

60. Upon information and belief, Defendants continued to make hundreds of thousands of dollars in capital calls from the Members even after the project has finished in order to fund their personal jet and other personal items, and threatened to dilute Plaintiff out of his interest in the Company at a 35% interest rate and to foreclose his interest if Plaintiff did not fund the capital calls.

61. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.03 that the following actions shall not be taken on behalf of the Company without the Majority Consent of the Members:

(a) The purchase of any real property, the sale, assignment, transfer, exchange or other disposition of any real property owned by the Company:

(I) Deviating from the Budget in a net amount greater than fifty thousand and no/100 dollars ($50,000).

62. That Defendants did not seek the Majority Consent of the Members in accordance with Article 6.03 of the Second Amended and Restated Operating Agreement of 150 Bee Street.

63. Defendants have used efforts to hide or cover up the extent of their charging of items to the Company.

64. Plaintiff has made reasonable efforts to investigate the charges, but his efforts have been thwarted by Defendants in several ways, including but not limited to:

a) refusing to allow Plaintiff to see the Construction Records;
b) refusing to allow the Company CPA to let Plaintiff copy company records;
c) refusing to notify Plaintiff in advance about Company expenses;
d) refusing to keep Plaintiff informed about upcoming sales;
e) refusing to communicate contract renewals in advance of their signing;
f) systematically retaining relevant company records in the name of other entities owned by or controlled by Defendants in an effort to block Plaintiff's access to those records;
g) refusing to tell Plaintiff before writing large checks to other entities owned by or controlled by Defendants;
h) writing large checks to other entities owned by or controlled by Defendants; and
I) in other manners to be shown the court.

REAL ESTATE SALES

65. Defendants hired a Nashville Real Estate Company to act as the Real Estate agency for this Charleston South Carolina condo project.

66. Upon information and belief, Defendants have a relationship with this Nashville Real Estate Company that either benefits Defendants personally, or benefits an entity or entities owned by Defendants.

67. That the Nashville Real Estate company was paid a commission on many of the closings.

68. That Defendants disregarded their fiduciary duties to Morgan and 150 Bee Street when they selected a Nashville Real Estate company, rather than considering a local Charleston South Carolina Real Estate agency who knows the market and who might have reacted to the local market faster.

69. That Defendants eventually cut ties between the Nashville Real Estate company and 150 Bee Street, but not until after the downturn in the real estate market.

MANAGEMENT SINCE NEAL BAKER PASSED AWAY

70. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, provides that the two initial Managers of 150 Bee Street were Neal I. Baker and Defendant Fred.

71. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, further provides that in the

event of Neal Baker's death or disability, Plaintiff Tom Morgan shall serve as Manager.

72. That Neal I. Baker passed away in 2011, and Plaintiff Morgan has attempted to serve as co-manager with Defendant Fred.

73. That Defendants have thwarted Plaintiff Morgan's attempts to serve as co-manager in several ways, including but not limited to:

a) refusing to allow Plaintiff Morgan to see the Construction Records;
b) refusing to allow the Company CPA to let Plaintiff copy company records;
c) refusing to allow Plaintiff to be a joint signer on Company checks;
d) refusing to notify Plaintiff in advance about Company expenses;
e) refusing to keep Plaintiff informed about upcoming sales;
f) refusing to allow Plaintiff a say in the pricing of the condo units;
g) refusing to allow Plaintiff a say in who is selected to act as the real estate agent for the company;
h) refusing to allow Plaintiff to sign off on the unit closings;
I) refusing to communicate contract renewals in advance of their signing;
j) systematically retaining relevant company records in the name of other entities owned by or controlled by Defendants in an effort to block Plaintiff's access to those records;
k) refusing to tell Plaintiff before writing large checks to other entities owned by or controlled by Defendants;
l) writing large checks to other entities owned by or controlled by Defendants;
m) ignoring Plaintiff's written instructions; and
n) in other manners to be shown the court.

FOR A FIRST CAUSE OF ACTION
(Arbitration)

74. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

75. Plaintiff hereby provides written Demand for Arbitration of the dispute pursuant to the terms of the Second Amended and Restated Operating Agreement of 150 Bee Street, LLC.

76. To the extent that certain Defendants named in this action are not subject to the Arbitration Agreement, Plaintiff asks that the Court compel them to Arbitration, or that all matters be heard by jury trial, but that all claims be heard together whether in Arbitration or jury trial.

77. Morgan demands arbitration or a trial by jury individually and in a

representative capacity as a derivative claim asserted on behalf of 150 Bee Street, LLC, as permitted by S.C. Code Ann. § 33-44-1103, *et. seq*. and Rule 23(b)(1) of the South Carolina Rules of Civil Procedure and other precedent.

78. At the time of the actions complained of herein, Morgan was, and remains, a co-owner of 150 Bee Street, LLC and is now Managing Member with authority to arbitrate or litigate this dispute in derivative capacity. 150 Bee Street, LLC, acting through and under direction of Defendants has, failed to take proper action to resolve the dispute after written demand by Morgan, to the serious detriment of 150 Bee Street, LLC and its members' interests. Morgan can and will fairly and adequately represent the interests of any other similarly situated members of 150 Bee Street, LLC.

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

79. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

80. At all times relevant, Defendants owed fiduciary duties to Morgan and to 150 Bee Street.

81. Defendants breached their fiduciary duties to Morgan and to 150 Bee Street in the manners described above.

82. Upon information and belief, Defendants presently continue to breach their fiduciary duties owed to Morgan and 150 Bee Street in the manners described above and in such ways as will be learned through the discovery process.

83. Morgan and 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of fiduciary duties.

84. Such breaches of fiduciary duties were intentional, wilful, wanton and reckless and done with the conscious disregard of the rights of Morgan and other members and of 150 Bee Street.

FOR A THIRD CAUSE OF ACTION
(Civil Conspiracy)

85. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

86. Defendants acting individually or through their agents have conspired for the purpose of benefitting certain members of 150 Bee Street and injuring Plaintiff Morgan and injuring 150 Bee Street, and causing special damages, to include:

(a) loss to 150 Bee Street and its members and Morgan of the past, present and future revenues in an amount to be determined by the

trier of fact from improper billing of travel expenses, including the billing at rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property;

(b) loss to 150 Bee Street and its members and Morgan in an amount to be determined by the trier of fact of future profit from future returns on their investment from improper management or gross mismanagement;

(c) diminished value of the 150 Bee Street property arising from failure to react to market conditions which impacted adversely the marketability of the 150 Bee Street property to prospective buyers; and

(d) other special an consequential damages as may be proven at trial.

87. Defendants acting individually or through their agents have acted in concert for the common purpose of injuring Morgan and 150 Bee Street and have thereby visited upon Morgan and 150 Bee Street one indivisible wrong, and accordingly each is vicariously liable for the actions of the others and their liability to Morgan and 150 Bee Street in all respects is joint and several.

88. Upon information and belief, this conspiracy is on-going, as Defendants presently continue to conspire with one another for the common purpose of injuring Morgan and 150 Bee Street.

89. As a result of the aforementioned actions, which are more fully explained above, of Defendants acting individually or through their agents, Morgan and 150 Bee Street have been and are being damaged.

90. The actions of Defendants acting individually or through their agents were and are intentional, wilful, wanton and reckless and in conscious disregard of the rights of Morgan and of 150 Bee Street, warranting an award of punitive damages.

91. As a result of the aforementioned actions, Morgan and 150 Bee Street are entitled to damages in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Conversion)

92. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

93. By virtue of the conduct summarized above, Defendants came to exercise unauthorized dominion and control over the property, assets, and/or funds belonging to the joint venture known as 150 Bee Street, and of the Plaintiff.

94. Defendants' dominion and control over said property, assets and/or funds has been to the exclusion of, and in defiance of, the rights of the Plaintiff; has interfered with the rights of the Plaintiff in and to such property, assets, and/or funds; and was without the Plaintiff's permission.

95. Upon information and belief, Defendants wrongfully assessed and/or charged Plaintiff, either individually or through his interest in 150 Bee Street, purported commissions, pass through costs, travel and entertainment expenses, personal expenses, real estate fees, management fee or other management or construction compensation in excess of the written agreements, without Plaintiff's written authorization or approval.

96. Upon information and belief, as a direct and proximate result of Defendants' conversion of the property, assets, and/or funds belonging to the joint venture, the LLC, and the Plaintiff, the Plaintiff, either individually or through his interest in 150 Bee Street, has been damaged in an amount to be determined by the trier of fact.

97. Upon information and belief, in doing the acts alleged above, Defendants acted willfully, maliciously, recklessly, carelessly, and/or wantonly for the purpose of causing injury to the Plaintiff. As a result, the Plaintiff is entitled to an award of actual and punitive damages in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

98. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

99. That Plaintiff, either individually or through 150 Bee Street, LLC, and the Defendants entered into various contracts whereby the Defendants were to perform certain matters for the benefit of the Plaintiff, including but not limited to acting as general contractor and as developer for the project.

100. Defendants individually, or as manager or owner, and as part of their contract with150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street, LLC (including Morgan), for a fee of $750,000.00.

101. Upon information and belief, Defendants have paid themselves more than $750,000.00.

102. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street or Bomasada Group as Developer for 150 Bee Street, LLC, entered into an agreement/contract to act as General Contractor on the 150 Bee Street project, for the benefit of the owners of 150 Bee Street, LLC including Morgan, for a fee of 1% of the construction costs.

103. Upon information and belief, Defendants have breached the

agreement/contract and collected well over 1% of the construction costs.

104. Upon information and belief, Defendants have intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer and so they can continue to improperly pay themselves monthly with Company funds and so they can improperly pay for their jet airplane with Company funds.

105. Defendants while acting as General Contractor promised and contracted to do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street, LLC and the Members, but ended up going millions of dollars over budget anyway, in breach of the contract.

106. Upon information and belief, Defendants while acting as General Contractor improperly retained any savings for their own benefit to the detriment of 150 Bee Street, LLC and the Members.

107. Upon information and belief, Defendants' actions or inactions in failing to perform the contract as specified and agreed is a material breach of the contract.

108. Upon information and belief, and as a result of Defendants' actions or inactions, the project ended up going millions of dollars over budget and still has not sold out.

109. As a result of Defendants' actions or inactions the Plaintiff and 150 Bee Street, LLC have been directly and proximately damaged by the foregoing material breach of contract in an amount to be determined by a trier of fact.

110. That the Plaintiff and 150 Bee Street, LLC are entitled to a money judgment against Defendants in an amount to be determined by a trier of fact, plus reasonable attorney's fees and costs, to the extent allowed by law.

FOR A SIXTH CAUSE OF ACTION
(Declaratory Judgment & Injunctive Relief)

111. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

112. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, provides that Morgan is now a Managing Member of 150 Bee Street, LLC.

113. That Morgan has informed Defendants that he intends to serve in the capacity of Managing Member as provided by the clear language of Article 6.01 of the Operating Agreement of 150 Bee Street.

114. Morgan has been informed that Defendants attempted to modify the language of Article 6.01 of the Operating Agreement so that Morgan will not be allowed to

serve in the capacity of Managing Member as provided by the clear language of Article 6.01 of the Operating Agreement of 150 Bee Street, and that he not be allowed to copy certain records.

115. Defendants cannot lawfully ignore the clear language of Operating Agreement.

116. Morgan has also been informed that Defendants have attempted to appoint Defendant Gilbert as sole signer and decision maker for the Company, thereby circumventing, disregarding, and frustrating the purpose of the Company Operating Agreement.

117. That, pursuant to the language of the Operating Agreement and S.C. Code Ann. § 33-44-101, *et. seq.*, Plaintiff has requested numerous times in writing to Defendants that:

a) Morgan be a co-signer of Company checks;
b) Morgan be consulted with Company decisions;
c) Morgan be made aware of all Real Estate activity;
d) Morgan be given access to the Company records, wherever located; and
e) Morgan be involved in and apprised of other Company matters.

118. Morgan asks this Court to examine the 150 Bee Street Operating Agreement and other evidence surrounding this matter, that the Court maintain the status quo, and that Defendants be prevented from modifying Article 6.01 or any other provisions of the Operating Agreement of 150 Bee Street.

119. Morgan asks this Court to enforce the existing provisions of Article 6.01 of the Operating Agreement so that Morgan will be the Managing Member, with all powers enumerated in Article 6.02 of the Operating Agreement of 150 Bee Street and S.C. Code Ann. § 33-44-101, *et. seq*.

120. As a Member of 150 Bee Street, Morgan is entitled to copies of the Company books and records, however titled or wherever located.

121. Morgan has made demand on Defendants for copies of the Company books and records.

122. While Morgan was provided access to some of the Company books and records, Morgan's agent has learned that Defendants advised the Company's accountant, William Shields, CPA, that the Morgan's agent would <u>not</u> be allowed to photocopy any of the Company's documents.

123. Mr. Shields suggested that his firm could scan the documents to an internet based computer file which could be accessed by all concerned parties. This solution was acceptable to Mr. Morgan, but this suggestion was denied by Defendants.

124. Upon information and belief, Defendants specifically forbid Mr. Shields from sharing with Morgan the invoices or other documents related to the construction hard costs and soft costs reflected on the construction draw requests.

125. Morgan has asked Defendants to reconsider to, no avail.

126. Morgan asks that, while this action is pending, this Court should enjoin Defendants from changing the terms of the Operating Agreement, and that the status quo be maintained in that Morgan be entitled to copies of the requested documents.

127. Morgan asks that, while this action is pending, this Court should maintain the status quo and temporarily and permanently restrain and enjoin Defendants from transferring, selling, conveying, encumbering, mortgaging, contracting, authorizing expenditures, authorizing vendor contracts, or contracting to do any of these, without Morgan's written agreement.

128. Morgan asks that while this action is pending, this Court should maintain the status quo and temporarily and permanently restrain and enjoin Defendants from distributing or paying any amounts to Defendants, or any entity in which Defendants are owners or affiliated with.

129. Plaintiff asks that the Court award an offset against the capital account and any undistributed amounts claimed by Defendants.

130. Morgan will suffer irreparable harm in the absence of such relief and Morgan has a high likelihood of success on the merits of this action.

131. There is no plain, adequate, and complete remedy at law and irreparable injury to Morgan and 150 Bee Street, LLC will result unless injunctive and/or declaratory relief is granted.

FOR A SEVENTH CAUSE OF ACTION
(Accounting)

132. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

133. That 150 Bee Street, LLC and its Members are all in a fiduciary relationship with one another and fiduciary duties are owed to one another.

134. That due to the actions of Defendants described above, Plaintiff has requested from Defendants an accounting as to the operations of the joint venture or 150 Bee Street, LLC and any companies Gilbert, Fred, Bella Vista, Lauralis, Bomasada Investment and Bomasada Group own or owned that received money, goods, or services from 150 Bee Street, LLC, or whose business is or was or could be associated with 150

Bee Street, LLC, including but not limited to the following: Defendants Bella Vista, Lauralis, Bomasada Investment and Bomasada Group.

135. Plaintiff is not presently aware of all of the money, funds, assets, and/or business opportunities belonging to the joint venture or 150 Bee Street, LLC that Defendants have misappropriated to themselves and their other companies and is not aware of all of the specific purposes for which Defendants have used said money, assets, and/or business opportunities. Upon information and belief, Defendants used said money, assets, and/or business opportunities to benefit themselves personally or their other companies, in breach of their fiduciary duties.

136. Defendants have failed or refused to render a proper accounting as to the operations, funds, assets, property, and business opportunities of the joint venture and the limited liability company.

137. Plaintiff is entitled to an Order requiring a complete accounting as to expenses, income, assets, and profits of the joint venture and the limited liability companies above-referenced and further requiring the Defendants to hold as trustee for the Plaintiff individually or for 150 Bee Street, LLC, any property, profit, or benefit derived by the Defendants in the conduct of the business of the joint venture, and/or the limited liability company.

138. Plaintiff has no adequate remedy at law otherwise to get this information.

FOR AN EIGHTH CAUSE OF ACTION
(Unfair Trade Practices Act)

139. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

140. That the aforementioned acts, practices, and conduct of the Defendants were and are unfair and deceptive.

141. That the aforementioned acts, practices, and conduct of the Defendants were and are against the public interest and that these acts and practices are capable of repetition.

142. That the Defendants actions were and are wilful and wanton in that Defendants knew or should have known that their conduct was unfair and deceptive, and therefore, a violation of this State's statutes concerning unfair and deceptive acts and practices.

143. That as a result of Defendants' UTPA violation, the Plaintiff has been damaged through his loss of his investment and anticipated profits, and he has been subjected to aggravation and harrassment as a result of Defendants' conduct.

144. That as a result of Defendants' unfair and deceptive acts or practices in violation of the State's statutes, the Plaintiff prays for his actual damages, together with treble damages of three times his actual damages, punitive damages, plus Plaintiff's reasonable attorney's fees, costs and disbursements of this action.

FOR A NINTH CAUSE OF ACTION
(Unjust Enrichment)

145. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

146. Plaintiff and Defendants entered into the joint venture summarized above whereby Defendants promised and agreed to act in good faith.

147. In accordance with the agreement, Plaintiff advanced and contributed a large sum of cash, and/or funding needed for the project.

148. Plaintiff contributed these funds and invested his time and resources to the project, but due to the conduct of the Defendants, the units have not been sold and a profit has not yet been realized.

149. Plaintiff conferred a valuable benefit upon the Defendants which they have realized in full.

150. Defendant have prolonged the sale process on purpose so that they can personally benefit through fees and charges they can pass on to and through the Company.

151. Allowing Defendants to retain the amounts they have taken out of the Company would be unjust.

152. There is now justly due and owing to Plaintiff from Defendants the amount of Morgan's investment in the project and the reasonable present value of all amounts improperly billed to the Company by the Defendants beyond what Defendants were contractually permitted.

153. The amount to be returned by Defendants should be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION
(Fraud)

154. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

155. Defendants represented to Plaintiff that they would be acting as

Developer, Manager, Fiduciary, Contractor or other capacity for the benefit of Plaintiff and 150 Bee Street, LLC.

156. Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a) personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"
b) airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"
c) a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
d) $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"
e) fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"
f) African Safari with Swanepol & Scandrol Safaris charged to the Company as "Travel;"
g) other charges to be determined by the trier of fact.

157. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a) expenses related to trip to Cancun, Mexico;
b) expenses related to trip to lasvegas.com;
c) expenses related to trip to Scottsdale, AZ;
d) expenses related to trip to Pebble Beach, CA;
e) expenses related to airplane equipment purchased from Blue Mountain Avionics;
f) expenses related to private aircraft;
g) other charges to be determined by the trier of fact.

158. Defendants have prolonged the sale process on purpose so that they can personally benefit through fees and charges they can pass on to and through the Company.

159. Defendants knew that these charges were not Company charges or otherwise related to the business of 150 Bee Street, LLC.

160. On or about February 27, 2005, Defendants represented to Plaintiff that:

BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE.....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST.....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE.....

161. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

162. Upon information and belief, Defendants improperly profited more than the 1% fee.

163. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

164. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff and did, in fact, hide the invoices and bills from Plaintiff.

165. To this date, Defendants have intentionally withheld the construction invoices and bills from Plaintiff claiming they are the property of BIGII.

166. Defendants knew that they could reduce the unit prices and sell the units faster.

167. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff or otherwise mislead Plaintiff.

168. Defendants intentionally failed to deduce the unit prices with the intent to mislead Plaintiff and/or that they would not be discovered by the Plaintiff.

169. That the issue of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company was material to Plaintiff's decision to enter into the agreement with Defendants.

170. That Defendants were aware and had knowledge at the time that they made the aforesaid representations that the representations were false.

171. That Defendants intended that the Plaintiff act upon the false representations of Defendants by allowing Defendants to continue running and billing the Company as they saw fit and with disregard for their fiduciary duties to Plaintiff and 150 Bee Street, LLC.

172. That Plaintiff was ignorant of the falsity of the representations.

173. That Plaintiff relied on the false representations.

174. That Plaintiff had the right to rely on the false representations.

175. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

176. As a direct and proximate result of the fraud and false representations by the Defendants, Plaintiff and 150 Bee Street have been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION
(Misrepresentation)

177. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

178. Defendants represented to Plaintiff that they would be acting as Developer, Manager, Fiduciary, Contractor or other capacity for the benefit of Plaintiff and 150 Bee Street.

179. Defendants, while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a) personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"
b) airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"
c) a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
d) $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"
e) fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"
f) African Safari with Swanepol & Scandrol Safaris charged to the Company as "Travel;"
g) other charges to be determined by the trier of fact.

180. Upon information and belief, Defendants while acting as Developer,

Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a) expenses related to trip to Cancun, Mexico;
b) expenses related to trip to lasvegas.com;
c) expenses related to trip to Scottsdale, AZ;
d) expenses related to trip to Pebble Beach, CA;
e) expenses related to airplane equipment purchased from Blue Mountain Avionics;
f) expenses related to private aircraft;
g) other charges to be determined by the trier of fact.

181. Defendants have prolonged the sale process on purpose so that they can personally benefit through fees and charges they can pass on to the Company.

182. Defendants knew that these charges were not Company charges.

183. On or about February 27, 2005, Defendants represented to Plaintiff that:

> BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE.....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST.....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE.....

184. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

185. Upon information and belief, Defendants profited more than the 1% fee.

186. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

187. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff.

188. To this date, Defendants have intentionally withheld the construction invoices and bills from Plaintiff claiming they are the property of BIGII.

189. Defendants intentionally miscoded these improper charges with the

intent that they would not be discovered by the Plaintiff.

190. Defendants knew that they could reduce the unit prices and sell the units faster.

191. Defendants intentionally failed to deduce the unit prices with the intent that they would not be discovered by the Plaintiff.

192. That the issue of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company was material to Plaintiff's decision to enter into the agreement with Defendants.

193. That Defendants were aware and had knowledge at the time that they made the representations that the representations were false.

194. That Defendants intended that the Plaintiff act upon the false representations by allowing Defendants to continue running and billing the Company as they saw fit.

195. That Plaintiff was ignorant of the falsity of the representations.

196. That Plaintiff relied on the false representations.

197. That Plaintiff had the right to rely on the false representations.

198. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

199. As a direct and proximate result of the false representations by the Defendants, Plaintiff has been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the Property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiff prays that this Court inquire into this matter and issue an Order either directing all of the parties to resolve this case by Arbitration, or for a trial by jury. In either venue, Morgan, individually and in a representative capacity of 150 Bee Street, LLC in a derivative action, respectfully prays that Plaintiff be awarded:

a) actual, consequential, and punitive damages in an amount to be determined by the trier of fact;
b) reasonable attorneys fees and costs to the extent allowed by law;
c) treble damages;
d) declaratory and injunctive relief prayed for including an Order

maintaining the status quo and enjoining the Defendants from distributing or paying any amounts to Defendants or any entity in which Defendants are owners or affiliated with without prior approval by Morgan;

e) award an offset against the capital account and any undistributed amounts claimed by Defendants; and

f) for such other and further relief as this court deems just and proper.

Chris Staubes, Esquire
Barrett Brewer, Esquire
GP Diminich, Esquire
CLAWSON and STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Telephone: (843) 577-2026

Attorneys for Plaintiff

Charleston, South Carolina

January 26 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2012-CP-10-
	)	
THOMAS H. MORGAN,	)	
	)	
PLAINTIFF,	)	
v.	)	
	)	
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION.	)	VERIFICATION
	)	
DEFENDANTS,	)	

Thomas H. Morgan, being duly sworn, deposes and says, that he the Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those he believes them to be true.

Thomas H. Morgan

Sworn to before me this

19 day of January, 2012.

Notary Public for _____
My Commission Expires: _____

JESUS CARVAJAL
MY COMMISSION # EE 134866
EXPIRES: January 30, 2016
Bonded Thru Notary Public Underwriters

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A LIMITED LIABILITY
PARTNERSHIP

5 Exchange Street
Charleston, SC 29401

Mailing Address:
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March 13, 2012

MORRIS A. ELLISON
ATTORNEY AT LAW
mellison@wcsr.com
Direct Dial: (843) 720-4614
Fax: (843) 723-7398

VIA HAND DELIVERY

Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Suite 106
Charleston SC 29401

RE: Thomas H. Morgan v. Bomasada Group, Inc.
Case No. 2012-CP-10-580
WCSR File No. 66696.0001.0

Dear Ms. Armstrong:

Please find enclosed the original and one copy of the *Answer and Counterclaim and the Certificate of Service* in regard to the above-referenced matter. Please file the originals and return a file-stamped copy of each pleading to me with my courier. I have copied opposing counsel via email and regular mail as well.

Thank you for your assistance, and I remain

Yours very truly,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Matt T

Matthew E. Tillman

MAE/nmb
Enclosure

Cc: Chris B. Staubes, Jr., Esq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO: 2012-CP-10-580
THOMAS H. MORGAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ANSWER AND COUNTERCLAIM**
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP, II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION,	)	
	)	
Defendants.	)	
	)	

While reserving all rights under its motions to dismiss this case for lack of jurisdiction, Defendants John L. Gilbert ("**Gilbert**"), Stuart L. Fred ("**Fred**"), Bella Vista Partnership, a Texas General Partnership ("**Bella Vista**"), Bomasada Group, Inc. ("**Bomasada Group**"), Bomasada Investment Group, II, LLC ("**BIG**") and Lauralis Management, Inc. ("**Lauralis**") (Gilbert, Fred, Bella Vista, Bomasada Group, BIG and Lauralis being collectively hereinafter referred to as the "**Defendants**") would allege and show as follows:

1. Defendants deny each and every allegation of the Complaint not specifically admitted herein.

AS A FIRST DEFENSE

2. Defendants admit the allegations of Paragraph 1 of the Complaint based on information and belief.

3. Defendants admit the allegations of Paragraphs 2 through 6 of the Complaint.

4. Answering the allegations of Paragraph 7 of the Complaint, Defendants admit that at all times relevant hereto, Defendant BIG was a limited liability company organized and existing under the laws of Texas but is no longer in existence. Defendants deny the remaining allegations of Paragraph 7 of the Complaint to the extent inconsistent with the first sentence of this paragraph.

5. Answering the allegations of Paragraph 8 of the Complaint, Defendants admit that Defendant Lauralis is a corporation organized and existing under the laws of the State of Texas but has not been doing business in the State of South Carolina. The remaining allegations of Paragraph 8 of the Complaint state a legal conclusion which do not require a response.

6. Answering the allegations of Paragraph 9 of the Complaint, Defendants agree to the demand of Plaintiff for arbitration in accordance the provisions of the Second Amended and Limited Liability Company Agreement (the "**Operating Agreement**") of 150 Bee Street, LLC (the "**Company**" or "**150 Bee Street**"). The remaining allegations of Paragraph 9 of the Complaint state conclusions of law which do not require a response.

7. Answering the allegations of Paragraph 10 of the Complaint, Defendants admit that Plaintiff is the owner of a membership interest in the Company. Defendants further admit that Plaintiff is currently a managing member of the Company and admit that this matter should be subject to arbitration.

8. Defendants deny the allegations of Paragraphs 11 through 15 of the Complaint.

9. Paragraph 16 of the Complaint states a conclusion of law which does not require a response.

10. Defendants admit the allegations of Paragraphs 17 through 18 of the Complaint.

11. Defendants deny the allegations of Paragraph 19 of the Complaint.

12. Defendants admit the allegations of Paragraph 20 of the Complaint.

13. Answering the allegations of Paragraph 21 through 24 of the Complaint, Defendants admit that Defendants Gilbert and Fred own controlling interests in Defendants Bella Vista and Bomasada Group.

14. Answering the allegations of Paragraph 25 of the Complaint, Defendants admit that Defendants Gilbert and Fred own controlling interests in Defendant BIG and that the Company executed a construction contract with Defendant BIG (as amended, the "**Construction Contract**") for the construction of the Project (as defined in the Operating Agreement).

15. Answering the allegations of Paragraph 26 of the Complaint, Defendants admit that Defendant Fred holds a controlling interests in Defendant Lauralis but deny the remaining allegations of these paragraphs and demand strict proof thereof.

16. Defendants admit the allegations of Paragraph 27 of the Complaint.

17. Answering the allegations of Paragraph 28 of the Complaint, Defendants admit that the Company entered into various contracts with various parties to provide general contracting services and development services for the Project.

18. Answering the allegations of Paragraph 29 of the Complaint, Defendants admit that Defendant Bella Vista agreed to act as developer of the Project and that Defendant Bella was to receive a fee of $750,000 for rendering these services.

19. Answering the allegations of Paragraph 30 of the Complaint, Defendants admit only that in the aggregate, Defendants collectively have received more that $750,000 from the Company.

20. Defendants deny the allegations of Paragraphs 31 and 32 of the Complaint.

21. Answering the allegations of Paragraph 34 of the Complaint, Defendants admit that some charges have been improperly coded to the Company but deny the allegations of Paragraph 34 to the extent inconsistent herewith.

22. Answering the allegations of Paragraph 35 of the Complaint, Defendants would allege that the terms of the Construction Contract speak for themselves.

23. Defendants deny the allegations of Paragraphs 36 and 37 of the Complaint.

24. Answering the allegations of Paragraph 38 of the Complaint, Defendants admit that certain savings were realized by the Company as a result of the Construction Contract.

25. Defendants deny the allegations of Paragraphs 39 through 41 of the Complaint.

26. Defendants admit the allegations of Paragraph 42 of the complaint.

27. Defendants deny the allegations of Paragraphs 43 and 44 of the Complaint.

28. Answering the allegations of Paragraph 45 of the Complaint, Defendants admit that Plaintiff has requested to see back up documentation to certain charges and that Defendants have made the requested information available to the Plaintiff.

29. Defendants deny the allegations of Paragraphs 46 through 56 of the Complaint.

30. Answering the allegations of Paragraphs 57 of the Complaint, Defendants admit that Plaintiff has objected to the Company's expenditure of certain funds.

31. Defendants deny the allegations of Paragraph 58 of the Complaint.

32. Answering the allegations of Paragraph 59 of the Complaint, Defendants admit that a check was written in the approximate amount of $28,350 on or about September 9, 2011.

33. Defendants deny the allegations of Paragraph 60 of the Complaint.

34. Answering the allegations of Paragraph 61 of the Complaint, Defendants allege that the provisions of the Operating Agreement speak for themselves.

35. Answering the allegations of Paragraph 62 of the Complaint, Defendants deny that they failed to comply with the provisions of the Operating Agreement.

36. Defendants deny the allegations of Paragraphs 63 and 64 of the Complaint.

37. Answering the allegations of Paragraph 65 of the Complaint, Defendants admit that the Company hired Village Real Estate Services, a Tennessee limited liability company ("**Village Real Estate**"), to provide marketing services for the Project and deny any allegations of Paragraph 65 inconsistent herewith.

38. Answering the allegations of Paragraph 66 of the Complaint, Defendants deny that any of them have any relationship with Village Real Estate inconsistent with the terms of the marketing agreement between the Company and Village Real Estate (the "**Marketing Agreement**").

39. Answering the allegations of Paragraph 67 of the Complaint, Defendants admit that Village Real Estate was paid a commission as provided in the Marketing Agreement and deny any allegations inconsistent therewith.

40. Defendants deny the allegations of Paragraph 68 of the Complaint.

41. Answering the allegations of Paragraph 69 of the Complaint, Defendants admit that the Marketing Agreement with Village Real Estate has been terminated but denies the remaining allegations of Paragraph 69.

42. Answering the allegations of Paragraphs 70 and 71 of the Complaint, Defendants allege that the provisions of the Operating Agreement speak for themselves.

43. Answering the allegations of Paragraph 72 of the Complaint, Defendants admit that Neal I. Baker died in 2011 and that Plaintiff has served in the position as co-manager of the

Company. Defendants deny any of the remaining allegations of Paragraph 72 inconsistent therewith.

44. Defendants deny the allegations of Paragraph 73 of the Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Arbitration)

45. Answering the allegations of Paragraph 74 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 35 above.

46. Answering the allegations of Paragraphs 75 through 77 of the Complaint, Defendants admit that this matter should be referred to arbitration as provided in the Operating Agreement and deny any allegations inconsistent therewith.

47. Defendants deny the allegations of Paragraph 78 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

48. Answering the allegations of Paragraph 79 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 38 above.

49. Defendants deny the allegations of Paragraphs 80 through 84 of the Complaint.

AS TO THE THIRD CAUSE OF ACTION
(Civil Conspiracy)

50. Answering the allegations of Paragraph 85 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 40 above.

51. Defendants deny the allegations of Paragraphs 86 through 91 of the Complaint.

AS TO THE FOURTH CAUSE OF ACTION
(Conversion)

52. Answering the allegations of Paragraph 92 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 42 above.

53. Defendants deny the allegations of Paragraphs 93 through 97 of the Complaint.

AS TO THE FIFTH CAUSE OF ACTION
(Breach of Contract)

54. Answering the allegations of Paragraph 98 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 44 above.

55. Answering the allegations of Paragraph 99 of the Complaint, Defendants admit that the Company entered into various contracts for the development of the Project including, but not limited to, the Construction Contract.

56. Answering the allegations of Paragraph 100 of the Complaint, Defendants admit that Defendant Bella Vista agreed to act as developer of the Project and that Defendant Bella was to receive a fee of $750,000 for rendering these services.

57. Defendants deny the allegations of Paragraphs 101 through 110 of the Complaint.

AS TO THE SIXTH CAUSE OF ACTION
(Declaratory Judgment and Injunctive Relief)

58. Answering the allegations of Paragraph 111 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 48 above.

59. Answering the allegations of Paragraph 112 of the Complaint, Defendants allege that the provisions of the Operating Agreement speak for themselves and that Plaintiff is no a managing member of the Company.

60. Defendants deny the allegations of Paragraphs 113 through 116 of the Complaint.

61. Answering the allegations of Paragraph 117 of the Complaint, Defendants admit that Plaintiff has made various demands with respect to the operation of the Company since he became a managing member of the Company.

62. Paragraphs 118 through 120 of the Complaint state legal conclusions that do not require a response.

63. Defendants admit the allegations of Paragraphs 121 through 123 of the Complaint.

64. Defendants deny the allegations of Paragraphs 124 and 125 of the Complaint.

65. Paragraphs 126 through 129 of the Complaint state legal conclusions that do not require a response.

66. Defendants deny the allegations of Paragraphs 130 and 131 of the Complaint.

AS TO THE SEVENTH CAUSE OF ACTION
(Accounting)

67. Answering the allegations of Paragraph 132 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 57 above.

68. Defendants deny the allegations of Paragraphs 133 through 138 of the Complaint.

AS TO THE EIGHTH CAUSE OF ACTION
(Unfair Trade Practices Act)

69. Answering the allegations of Paragraph 139 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 59 above.

70. Defendants deny the allegations of Paragraphs 140 through 144 of the Complaint.

AS TO THE NINTH CAUSE OF ACTION
(Unjust Enrichment)

71. Answering the allegations of Paragraph 145 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 61 above.

72. Defendants deny the allegations of Paragraphs 146 through 153 of the Complaint.

AS TO THE TENTH CAUSE OF ACTION
(Fraud)

73. Answering the allegations of Paragraph 154 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 63 above.

74. Defendants deny the allegations of Paragraphs 155 through 165 of the Complaint.

75. Defendants admit the allegations of Paragraph 166 of the Complaint.

76. Defendants deny the allegations of Paragraphs 167 through 176 of the Complaint.

AS TO THE TENTH CAUSE OF ACTION
(Misrepresentation)

77. Answering the allegations of Paragraph 177 of the Complaint, Defendants repeat and reallege the allegations of Paragraphs 1 through 67 above.

78. Defendants deny the allegations of Paragraphs 178 through 199 of the Complaint.

ADDITIONAL AND AFFIRAMTIVE DEFENSES

79. This Court lacks subject matter jurisdiction under the provisions of the arbitration agreement contained within the Operating Agreement.

80. The Complaint, and the causes of action contained therein, fails to state a claim upon which relief can be granted.

81. This Court does not have personal jurisdiction over one or more of the Defendants, as one or more of the Defendants do not have the requisite minimum contacts with the State of South Carolina.

82. Plaintiff's legal claims are barred by the applicable statutes of limitations.

83. Plaintiff's claims are barred, in whole or in part, by the equitable doctrines of unclean hands, estoppel, quasi estoppel, in pari delicto, equitable estoppel, waiver and/or laches.

84. Plaintiff's claims are barred, in whole or in part, because the Plaintiff and those he purports to represent failed to mitigate any injuries and damages they allegedly sustained.

85. Plaintiff fails to state the allegations of fraud with sufficient particularity, and those claims must be dismissed.

86. One or more of the Plaintiff's causes of action may be barred by the terms of the Operating Agreement, including Section 7.01.

87. Plaintiff is barred from recovering on their Unfair Trade Practices Act claim because the allegedly wrongful conduct has no impact on the public interest.

88. Plaintiff is barred from recovering under the civil conspiracy cause of action because the damages sought under that cause of action are also pled under other theories and are not special damages.

89. Plaintiff is barred from recovering under the *quantum meruit* cause of action to the extent any of his claims arises from breach of the Operating Agreement. A *quantum meruit* claim must be dismissed if the parties seek remedies under an express contract.

90. Defendants claim their right to set off, settlement or judgment credits, to the extent applicable and allowed pursuant to South Carolina law.

91. Defendants plead applicability of the 2005 Tort Reform Statutes, S.C. Code Ann. §§ 15-38-15; 15-7-30,-100; 36-2-803(B), and other pertinent statutory sections.

92. Plaintiff's claims for punitive damages cannot be sustained because an award of punitive damages would violate Defendants' rights under the Constitution of the United States of America and the Constitution of the State of South Carolina.

93. Defendants hereby give notice that they intend to rely upon any other defenses that may become available or appear during the discovery proceedings in this case and hereby reserve their right to amend their Answer to assert any such affirmative defenses.

COUNTERCLAIM

94. Defendants John L. Gilbert ("**Gilbert**") and Stuart Fred ("**Fred**") are citizens and residents of the State of Texas.

95. Bella Vista Partnership ("**BVP**") is a Texas general partnership of which Gilbert is the managing partner. Gilbert, Fred and BVP are collectively referred to as the "**Counterclaimants**."

96. Counterclaimants are informed and believe that Plaintiff is a citizen and resident of the State of Florida.

97. 150 Bee Street, LLC is a limited liability company organized and existing under the laws of the State of South Carolina.

98. All matters set forth in this Counterclaim are properly arbitrable pursuant to the Second Amended and Restated Limited Liability Company Agreement of 150 Bee Street, LLC ("**Operating Agreement**").

FOR A FIRST COUNTERCLAIM
(Contractual Indemnification)

99. Counterclaimants incorporate and re-allege the foregoing allegations.

100. Counterclaimants are members of 150 Bee Street, LLC.

101. Section 8.01 of the Operating Agreement provides that "[n]o member shall have any liability to the Company or to any Member for any mistakes or errors in judgment or for any act or omission reasonably believed by such Member to be within the scope of authority conferred upon him or her by this Agreement, but will have liability only for acts or omissions

involving his or her intentional misconduct or knowing violation of law, or any transaction in which he or she received a personal benefit in violation of this Agreement."

102. Counterclaimants reasonably believed that all of the actions they have undertaken are within the scope of authority conferred by the Operating Agreement and any damages caused to the Plaintiffs were the result of, at worst, mistakes or errors of judgment.

103. Pursuant to Section 8.01(a) of the Operating Agreement, the Company must indemnify, defend and hold the Counterclaimants harmless from liabilities, damages, costs and expenses (including attorneys' fees and accountants' fees) incurred as a result of actions undertaken within the scope of authority conferred by the Operating Agreement.

104. Counterclaimants are entitled to indemnification from the Plaintiff, including the payment of attorneys' fees and expenses, for the costs of defending against and paying any claims resulting from this litigation.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

105. Counterclaimants incorporate and re-allege the foregoing allegations.

106. Section 14.14 of the Operating Agreement requires all members of the Company to mediate and arbitrate all claims or disputes that arise between them.

107. Counterclaimants have demanded that Plaintiff mediate and arbitrate the claims set forth in the Complaint as admitted by the Plaintiff in the Complaint and as required by the Operating Agreement.

108. Plaintiff has refused to mediate and arbitrate the claims set forth in the Complaint.

109. Plaintiff's refusal to mediate and arbitrate the claims set forth in the Complaint is a breach of the terms of the Operating Agreement.

110. Counterclaimants have been damaged by Plaintiff's refusal to mediate and arbitrate the claims set forth in the Complaint, including, but not limited to, the costs of attempting to compel mediation and arbitration.

WHEREFORE, having fully answered the Complaint of Plaintiff, Defendants pray that this Court issue its Order as follows:

A. Dismissing the Complaint of Plaintiff, with prejudice;

B. Granting Counterclaimants judgment against Plaintiff under its First, and Second Counterclaims, respectively, in an amount to be determined by the trier of fact;

C. Awarding Defendants such other and further relief as may be just and proper.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Morris A. Ellison, S.C. Bar No. 1881
Matthew Tillman, S.C. Bar No. 70338
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

ATTORNEY FOR DEFENDANTS

Charleston, South Carolina
Dated: March 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day March 2012, I filed the foregoing *Answer and Counterclaim* with the Clerk of the Court and also sent a copy of such filing, via email and regular mail, to the following:

Chris B. Staubes Jr., Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston SC 29492-7595
Attorney for Plaintiff – Thomas H. Morgan

WOMBLE, CARLYLE, SANDRIDGE & RICE, LLP

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION , and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580 **FIRST AMENDED COMPLAINT**

The Plaintiff above named, complaining of the Defendants, above named, alleges and says as follows:

1. Plaintiff Thomas H. Morgan ("Morgan" or "Plaintiff') is a citizen and a resident of the State of Florida. Morgan sues as a Plaintiff both on behalf of himself personally and derivatively on behalf of 150 Bee Street, LLC.
2. The Defendant John L. Gilbert ("Gilbert") is a citizen and a resident of the State of Texas; is neither an infant nor incompetent person; and is not in the military service.
3. The Defendant Stuart L. Fred ("Fred") is a citizen and a resident of the State of Texas; is neither an infant nor incompetent person; and is not in the military service.
4. The Defendant 150 Bee Street, LLC (sometimes "150 Bee Street," "LLC" or "Company") is a South Carolina Limited Liability Company, duly organized and existing pursuant to the laws of South Carolina; is subject to the jurisdiction of this Court; and is named as a nominal party Defendant because, on information and belief, it is an indispensable party to this derivative proceeding. Morgan, as a member, brings this case derivatively on the LLC's behalf.
5. The Defendant Bella Vista Partnership ("Bella Vista") is a Texas General Partnership doing business in South Carolina and is subject to the jurisdiction of this Court.
6. The Defendant Bomasada Group, Inc. ("Bomasada Group" or "Bomasada") is a Texas corporation doing business in South Carolina and is subject to the jurisdiction of this Court.
7. The Defendant Bomasada Investment Group II, LLC ("Bomasada Investment" or "BIG II") is a Texas Limited Liability Company doing business in South Carolina and is subject to the jurisdiction of this Court.
8. The Defendant Lauralis Management, Inc. ("Lauralis") is a Texas corporation doing business in South Carolina and is subject to the jurisdiction of this Court.
9. Upon information and belief, the legal distinction between Fred, Gilbert, Bella Vista, Bomasada, Lauralis, BIG II and the partners, officers, directors and/or shareholders of Bella Vista, Bomasada, Lauralis and BIG II (hereinafter the "Defendants") are blurred and they are, as such, one and the same and their interests are so amalgamated that the actions of one should apply to the other.

10. On July 9, 2012, the Plaintiff and the defendants entered into a Consent Order whereby this matter was referred to arbitration pursuant to the terms of the Consent Order.
11. At the time of the actions complained of herein, Morgan was, and remains, a member of 150 Bee Street, LLC and is now a Managing Member with authority to arbitrate or litigate this dispute in a derivative capacity.
12. 150 Bee Street, LLC, acting through and under the direction and control of Defendants, has failed to take proper action to resolve the dispute after written demand by Morgan, to the serious detriment of 150 Bee Street, LLC and its members' interests.
13. Morgan can and will fairly and adequately represent the interests of any other similarly situated members of 150 Bee Street, LLC, in this derivative action.
14. On November 28, 2011, Plaintiff, through counsel, tendered a demand on Defendant to commence a derivative action pursuant to S.C. Code Ann. § 33-44-1101.
15. Defendants refused and continue to refuse to bring the derivative suit, and therefore Plaintiff brings this action under SCRCP Rule 23(b)(1) and applicable state law. Plaintiff affirmatively alleges that the requirements of SCRCP Rule 23 (b)(1) have been complied with.
16. This arbitration panel has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

FACTUAL BACKGROUND

17. Plaintiff Morgan is a member and 26.66% owner of 150 Bee Street, LLC.
18. Defendant Bella Vista is a member and 26.67% owner of 150 Bee Street, LLC.
19. The Estate of Neal I. Baker is a member and 26.67% owner of 150 Bee Street, LLC.
20. Edwin S. Pearlstine, Jr. is a member and 20% owner of 150 Bee Street, LLC.
21. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, own and are the controlling partners of Defendant Bella Vista. Operating directly or indirectly with others, they were at all times the controlling persons of Defendant 150 Bee Street, LLC.

22. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, own and are the controlling owners of Defendant Bomasada Group.
23. Upon information and belief, Defendant Bomasada Group was organized by Defendants Gilbert and Fred and acted as Developer of 150 Bee Street, LLC.
24. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant BIG II.
25. Upon information and belief, Defendant BIG II was organized by Defendants Gilbert and Fred and acted as the general contractor regarding the construction of a condominium complex located at 150 Bee Street, Charleston, South Carolina (the "project" or "Bee Street Lofts") for 150 Bee Street, LLC.
26. Upon information and belief, Defendants Gilbert and/or Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant Lauralis.
27. Upon information and belief, Defendant Lauralis is a holding company for a private jet aircraft.
28. Defendants entered into various contracts whereby the Defendants were to perform certain matters for the benefit of 150 Bee Street, LLC and its owners, including but not limited to acting as general contractor and as developer for the project.
29. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street, LLC (including Morgan) for a fee of $750,000.
30. Upon information and belief, the Defendants have wrongfully paid themselves more than $750,000.00 with Company funds.
31. Upon information and belief, Defendants continued to improperly pay themselves a monthly amount from Company funds, even though a paid Property Manager was on location at 150 Bee Street.
32. Upon information and belief, Defendants while acting as Developer improperly

took money for their own benefit to the detriment of 150 Bee Street, LLC and its members.

33. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor and/or in another capacity, improperly coded charges to the Company, including but not limited to:
    a. Personal home remodeling in the amount of $1,325.00 charged to the Company, which was charged to the Company as "Make Ready Units-Paint Work;"
    b. Airplane equipment purchased from Blue Mountain Avionics, which was charged the Company as "Repairs and Maintenance;
    c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
    d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"
    e. Fuel, Nextel and Cabela's bag charged to the Company as "CHS Mental Health job;"
    f. African Safari with Swanepoel & Scandrol Safaris charged in the amount of $12,509.00 to the Company as "Travel;"
    g. Personal home automation and audio system purchased in the amount of $46,139.64 installed at the private residence of Stuart Fred in Scottsdale, Arizona, coded as “AV Media, Club House, Bee Street; and
    h. Other charges to be learned through the discovery process and determined by the trier of fact.

34. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor and/or another capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:
    a. Expenses related to a trip to Cancun, Mexico;
    b. Expenses related to lasvegas.com;
    c. Expenses related to a trip to Scottsdale, AZ;

d. Expenses related to a trip to Pebble Beach, CA;
e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;
f. Expenses related to a trip to Pacific Grove, Monterey and Carmel, California;
g. Expenses related to private aircraft; and
h. Other charges to be learned through the discovery process and determined by the trier of fact.

CONSTRUCTION

35. Defendants individually, and/or as manager or owner, and as part of their contract with 150 Bee Street or Bomasada as Developer for 150 Bee Street, LLC, represented that they would act as General Contractor on the 150 Bee Street project, for the benefit of the owners of 150 Bee Street, LLC including Morgan, for a fee of 1% of the construction costs.
36. Upon information and belief, Defendants collected well over 1% of the construction costs.
37. Upon information and belief, Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer, so they could continue to pay themselves monthly and so they could pay for their jet airplane.
38. Defendants, while acting as General Contractor, promised and represented they would do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street, LLC and the members. Despite this representation, the work went millions of dollars over budget.
39. Upon information and belief, Defendants while acting as General Contractor, wrongfully diverted funds and assets for their own benefit to the detriment of 150 Bee Street, LLC and the members.

PRIVATE JET BILLINGS TO THE COMPANY FOR PERSONAL ITEMS

40. Defendants improperly billed the Company and paid themselves from Company

funds for travel expenses, including billing rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property or its business.

41. Upon information and belief, through 2010, Defendants authorized payments to Lauralis of $454,155,00 and $39,059.77 for airplane fuel expense from 150 Bee Street, LLC. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.
42. Upon information and belief, from 2005 through 2010, Defendants systematically and improperly increased the rate they charged 150 Bee Street, LLC for their private jet as follows:
    a. From $850.00 an hour to $1,050.00 an hour in 2005;
    b. From $1,050.00 an hour to $1,200.00 an hour in 2005;
    c. From $1,200.00 an hour to $1,750.00 an hour in 2006; and
    d. From $1,750.00 an hour to $2,100.00 an hour in 2008;
43. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Construction Travel Expenses" of $481,250.00 to BIG II. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.
44. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Corporate Overhead" of $360,000.00 to BIG II. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.
45. Plaintiff has requested to see backup documentation for these charges, but Defendants have refused and continue to refuse to permit Plaintiff to see BIG II'S financial records related to the project.
46. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their Private jet usage to the Company.
47. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their personal vacations to the Company.
48. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their home remodeling to the Company, which was charged to the Company as "Make Ready Units-Paint Work."

49. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their personal golf outings to the Company.
50. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their expensive dinners to the Company.
51. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of $12,509.00 to 150 Bee Street for an African Safari.
52. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of gift cards from golf shops to 150 Bee Street.
53. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging for airplane equipment purchased from Blue Mountain Avionics, which was charged the Company as "Repairs and Maintenance."
54. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of a payment for a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs."
55. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of $3,000.00 for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education."
56. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of a payment of repairs and renovation of a personal aircraft hangar in Houston, TX.
57. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of a Personal home automation and audio system purchased in the amount of $46,139.64 installed at the private residence of Stuart Fred in Scottsdale, Arizona, coded as “AV Media, Club House, Bee Street.
58. Plaintiff instructed Defendants in writing that they are no longer to bill the Company for their private jet.
59. In direct disregard of law and the duties they owe to 150 Bee Street and its members, Defendants have withdrawn for themselves, directly or through their

entities, hundreds of thousands of dollars or more from 150 Bee Street funds.

60. On September 9, 2011, Defendants wrote themselves a check from Company funds for $28,350.00, claiming it was for their private jet usage, even after Plaintiff had instructed Defendants in writing that they were no longer to bill the Company for their private jet.
61. Upon information and belief, Defendants continued to make hundreds of thousands of dollars in capital calls from the members even after the project had finished in order to fund their personal jet and other personal items and threatened to dilute Plaintiff out of his interest in the Company at a 35% interest rate and to foreclose his interest if Plaintiff did not fund the capital calls.
62. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.03 that the following actions shall not be taken on behalf of the Company without the Majority Consent of the members:
    a. The purchase, sale, assignment, transfer, exchange or other disposition of any real property owned by the Company [and]
    b. Deviating from the Budget in a net amount greater than fifty thousand and no/100 dollars ($50,000)."
63. Defendants did not seek or obtain the Majority Consent of the members in accordance with Article 6.03 of the Second Amended and Restated Operating Agreement of 150 Bee Street.

FRAUDULENT CONCEALMENT OF WRONGDOING; EQUITABLE ESTOPPEL

64. Defendants have used efforts to hide, conceal and cover up the extent of their improperly charging of items to the Company.
65. Defendants have taken steps to hide their misconduct from Plaintiff and others in several ways, including but not limited to:
    a. Hiding and concealing Construction Records;
    b. Requiring the Company CPA to protect company records from disclosure;
    c. Concealing or misrepresenting Company expenses;
    d. Mispresenting sales figures;

e. Concealing information about contract renewals;
f. Secreting relevant company records in the name of other entities owned by or controlled by Defendants for the purpose and with the effect of blocking Plaintiff's access to those records;
g. Concealing the issuance of large checks to other entities owned by or controlled by Defendants;
h. Extracting funds under false pretenses to deter detection; and
i. In other manners to be shown the panel.

66. The Defendants, by reason of their controlling power over Defendant 150 Bee Street, LLC and relationship with the Plaintiff and 150 Bee Street, were at all times in the position of a fiduciary and of trust and confidence such that they owed a duty to disclose timely material facts to the Plaintiff and to 150 Bee Street. The Defendants knew they were stealing from and misappropriating the assets of 150 Bee Street, and that the construction for which they were responsible was defective, but they purposely and fraudulently concealed material facts about their wrongful activities from 150 Bee Street to prevent the discovery of their wrongdoing.
67. As a result of this fraudulent concealment, the statutes of limitation regarding the causes of action of the Plaintiff have been tolled and the Defendants are equitably estopped to use a statute of limitations as a defense to this lawsuit.

REAL ESTATE SALES

68. Defendants hired a Nashville Real Estate Company to act as the Real Estate agency for this Charleston South Carolina condominium project.
69. Upon information and belief, Defendants had a relationship with this Nashville Real Estate Company that either benefitted Defendants personally, or benefitted an entity or entities owned by Defendants.
70. Upon information and belief, the Nashville Real Estate company was paid a commission on many of the closings.
71. Defendants disregarded their fiduciary duties to Morgan and 150 Bee Street when they selected a Nashville real estate company, rather than considering a local

Charleston South Carolina Real Estate agency which knew the market, and which might have reacted to the local market faster. Further, hiring and using the Nashville real estate company was illegal because the Nashville real estate company was not licensed to sell real estate in South Carolina but nevertheless was paid commissions by the Defendants. Defendants have a duty to account to Defendant 150 Bee Street LLC and/or Plaintiff for all the illegal commissions paid out.

72. Defendants eventually cut ties between the Nashville Real Estate company and 150 Bee Street, but not until after a downturn in the real estate market.

MANAGEMENT SINCE NEAL BAKER PASSED AWAY

73. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, that the two initial Managers of 150 Bee Street were Neal I. Baker and Defendant Fred.
74. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, that in the event of Neal Baker's death or disability, Plaintiff Tom Morgan shall serve as Manager.
75. Neal I. Baker passed away in 2011, and Plaintiff Morgan attempted to serve as co-manager with Defendant Fred.
76. Defendants thwarted Plaintiff Morgan's attempts to serve as co-manager in several ways, including but not limited to:
    a. Refusing to allow Plaintiff Morgan to see the Construction Records;
    b. Refusing to allow the Company CPA to let Plaintiff copy company records;
    c. Refusing to allow Plaintiff to be a joint signer on Company checks;
    d. Refusing to notify Plaintiff in advance about Company expenses;
    e. Refusing to keep Plaintiff informed about upcoming sales;
    f. Refusing to allow Plaintiff a say in the pricing of the condo units;
    g. Refusing to allow Plaintiff a say in who was selected to act as the real estate agent for the company;
    h. Refusing to allow Plaintiff to sign off on the unit closings;
    i. Refusing to communicate contract renewals in advance of their signing;

j. Systematically retaining relevant company records in the name of other entities owned by or controlled by Defendants in an effort to block Plaintiff's access to those records;
k. Refusing to tell Plaintiff before writing large checks to other entities owned by or controlled by Defendants;
l. Writing large checks to other entities owned by or controlled by Defendants; and
m. Ignoring Plaintiff's written instructions; and in other manners to be shown the panel.

All of the foregoing actions and inactions were wrongful as to Plaintiff Morgan.

LAWSUIT FOR CONSTRUCTION DEFECTS

77. On August 22, 2014, Bee Street Lofts Homeowners Association, Inc. and Mark Laboccetta filed a lawsuit (Case No. 2014-CP-10-5120) ("construction lawsuit") against Fred, Gilbert, Bomasada Group, BIG II, 150 Bee Street and others alleging that numerous construction defects in the condominium project owned by 150 Bee Street were caused by various fraudulent, negligent and other illegal acts by Fred, Gilbert, Bomasada Group, BIG II, 150 Bee Street and others. The pleadings and evidence in that lawsuit are hereby restated as if stated verbatim herein and are incorporated herein by reference.
78. As a result of these illegal acts by the Defendants as alleged in this construction lawsuit, 150 Bee Street, LLC, the Plaintiff and other members of the Company suffered substantial financial losses, including attorney fees and costs, in an amount to be determined by the trier of fact. Defendants owe Defendant 150 Bee Street, LLC and/or Plaintiff for all of the losses suffered by reason of Defendants' wrongful conduct in the construction lawsuit.

FAILURE TO OBTAIN INSURANCE FOR COMPANY

79. 150 Bee Street, LLC paid premiums for insurance policies but was denied

insurance coverage because 150 Bee Street was not named as an insured by the Defendants, all of whom were responsible for obtaining insurance for 150 Bee Street. As a result, 150 Bee Street had to pay attorney fees instead of insurance policies for which the LLC had paid doing so. Defendants owe for the failure to properly insure Defendant 150 Bee Street, LLC.

CONDUCTING BUSINESS WITHOUT REQUIRED LICENSES

80. BIG II signed an AIA Contract with 150 Bee Street, LLC to act as the General Contractor for the project. Upon information and belief, BIG II's signing that contract obligating itself to serve as the General Contractor for the project when BIG II was not licensed as a General Contractor in South Carolina is a misdemeanor.
81. Upon information and belief, Bomasada paid fines in Arkansas for using unlicensed contractors, and Bomasada used a contractor named Hightower Construction Co., Inc. ("Hightower") to pull the permit for the project because Hightower was licensed but Bomasada was not licensed in South Carolina. Bomasada performed all the interior finish and other work on the project; signed subcontractor agreements with subcontractors for the project; and directed the work of those subcontractors. Upon information and belief, Bomasada committed a crime by doing this work while not being a licensed contractor in South Carolina.
82. Upon information and belief, Fred and Gilbert hired a Nashville real estate company, not licensed to sell real estate in South Carolina, to handle and control the sales of the units of the project, for which the unlicensed Nashville real estate company unlawfully received commissions. Those illegal commissions paid by Defendant 150 Beet Street, LLC are owed by Defendants to 150 Bee Street, LLC.

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

83. Plaintiff re-alleges and reincorporates the allegations set forth above as if

repeated herein verbatim.

84. At all times relevant, Defendants owed fiduciary duties to Morgan, to other members of the LLC and to 150 Bee Street.
85. Defendants breached their fiduciary duties to Morgan and to 150 Bee Street in various respects, including in the manners described herein. Defendants wrongful breaches of fiduciary duty were fraudulently concealed until within three years of the date this lawsuit was brought.
86. Upon information and belief, Defendants presently continue to breach their fiduciary duties owed to Morgan and to 150 Bee Street, LLC.
87. Morgan, other members of the LLC and 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of fiduciary duties by the Defendants.
88. Such breaches of fiduciary duties were intentional, willful, wanton, reckless, malicious and done with the conscious disregard of the rights of Morgan, other members of 150 Bee Street and the LLC.

FOR A SECOND CAUSE OF ACTION
(Breach of Duties of Good Faith and Fair Dealing)

89. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.
90. At all times relevant, Defendants owed duties of good faith and fair dealing to Morgan, 150 Bee Street and other members of 150 Bee Street.
91. Defendants breached these duties of good faith and fair dealing in various respects, including but not limited to the manners described herein.
92. Upon information and belief, Defendants presently continue to breach their duties of good faith and fair dealing.
93. 150 Bee Street, Morgan and other members of 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of duties of good faith and fair dealing by the Defendants.
94. Said breaches of duties of good faith and fair dealing were intentional, willful,

wanton, malicious, reckless and done with the conscious disregard of the rights of Morgan, other members of 150 Bee Street and the LLC.

FOR A THIRD CAUSE OF ACTION
(Member Oppression – SC Code § 33-44-801(e))

95. Plaintiff Morgan re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.
96. The Defendants owed duties to Morgan not to engage in conduct unlawful, oppressive, fraudulent, or unfairly prejudicial to Morgan.
97. Defendants breached their duties not to oppress Morgan. As alleged they also wrongfully acted in ways that were fraudulent, unlawful and unfairly prejudicial. At all times relevant, the Defendants, functioning as a group that was in control of 150 Bee Street, acted and will continue to act in a manner that is unlawful, oppressive, fraudulent and unfairly prejudicial to the Plaintiff by engaging in various self-dealing, self-serving and improper acts to the exclusion and detriment of the Plaintiff and others.
98. Upon information and belief, Defendants presently continue to breach their duties not to oppress Morgan in the manners described herein and, in such ways as will be learned through the discovery process. The Defendants have acted and will continue to act in a manner that is unlawful, oppressive, fraudulent and unfairly prejudicial to the Plaintiff, in violation of SC Code § 33-44-801(e).
99. Morgan has been harmed and damaged as a direct and proximate result of said breaches of duties not to oppress by the Defendants. Such breaches of duties not to oppress have been and will continue to be intentional, willful, wanton, malicious, reckless and done with conscious disregard of the rights of Morgan, other members of 150 Bee Street and the LLC.
100. As a result of the wrongful oppressive conduct of the Defendants referenced herein, the LLC must be dissolved, and the Plaintiff is entitled to a decree winding up 150 Bee Street and to an award to the Plaintiff of damages in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION

(Civil Conspiracy)

101. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

102. Defendants acting individually or through their agents have conspired for the purpose of benefitting certain members of 150 Bee Street and injuring Plaintiff Morgan and 150 Bee Street, and causing special damages, to include:

a. Loss to 150 Bee Street, Morgan and its other members of the past, present and future revenues in an amount to be determined by the trier of fact from improper billing of travel expenses, including the billing at rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property;

b. Loss to 150 Bee Street, Morgan and its other members in an amount to be determined by the trier of fact of profits from returns on their investment from improper management or gross mismanagement;

c. Diminished value of the 150 Bee Street property arising from failure to react to market conditions which impacted adversely the marketability of the 150 Bee Street property to prospective buyers;

d. Loss to 150 Bee Street, Morgan and other members, and diminished value of the 150 Bee Street property, due to intentional, grossly negligent and negligent acts causing construction defects, and concealing those acts; and

e. Other special and consequential damages as may be proven at trial.

103. Defendants acting individually or through their agents have acted in concert for the common purpose of injuring Morgan, other LLC members and 150 Bee Street and have thereby visited upon Morgan, other LLC members and 150 Bee Street one indivisible wrong, and accordingly each is vicariously liable for the actions of the others and their liability to Morgan, other LLC members and 150 Bee Street in all respects is joint and several.

104. Upon information and belief, this conspiracy is on-going, as Defendants presently continue to conspire with one another for the common purpose of

injuring Morgan, other LLC members and 150 Bee Street.

105. As a result of the aforementioned actions, which are more fully explained above, of Defendants acting individually or through their agents, Morgan, other LLC members and 150 Bee Street have been and are being damaged.

106. The actions of Defendants acting individually or through their agents were and are intentional, willful, wanton and reckless and in conscious disregard of the rights of Morgan, of other LLC members and of 150 Bee Street, warranting an award of punitive damages.

107. As a result of the aforementioned actions, Morgan and 150 Bee Street are entitled to damages in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION

(Conversion)

108. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

109. By virtue of the conduct summarized above, Defendants came to exercise unauthorized dominion and control over the property, assets, and/or funds belonging to the entity and joint venture known as 150 Bee Street, and of the Plaintiff.

110. Defendants' dominion and control over said property, assets and/or funds has been to the exclusion of, and in defiance of, the rights of the Plaintiff and the LLC; has interfered with the rights of the Plaintiff and the LLC in and to such property, assets, and/or funds; and was without the Plaintiff's and the LLC's permission.

111. Upon information and belief, Defendants wrongfully assessed and/or charged Plaintiff and the LLC, either individually or through his interest in 150 Bee Street, purported commissions, pass through costs, travel and entertainment expenses, personal expenses, real estate fees, management fees and/or other management or construction compensation in excess of the written agreements, without Plaintiff's or the LLC's written or otherwise proper authorization or

approval.

112. Upon information and belief, as a direct and proximate result of Defendants' conversion of the property, assets, and/or funds belonging to the joint venture, the LLC, and the Plaintiff, the Plaintiff, either individually or through his interest in 150 Bee Street, other members of the LLC and the LLC have been damaged in an amount to be determined by the trier of fact.

113. Upon information and belief, in doing the acts alleged above, Defendants acted willfully, maliciously, recklessly, carelessly, and/or wantonly for the purpose of causing injury to the Plaintiff and the LLC. As a result, the Plaintiff and the LLC are entitled to an award of actual and punitive damages in an amount to be determined by the trier of fact.

FOR A SIXTH CAUSE OF ACTION
(Breach of Contract)

114. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

115. Plaintiff, either individually or through 150 Bee Street and the Defendants entered into various contracts, including but not limited to an Operating Agreement, a Development Agreement and an AIA Contractor Agreement, whereby the Defendants were to carefully, faithfully, honestly and loyally perform certain duties for the benefit of the Plaintiff, including but not limited to acting as general contractor and as developer for the project.

116. Defendants breached their duties and obligations under, *inter alia*, the Operating Agreement, the Development Agreement, and the AIA Contractor Agreement, by failing to act carefully, honestly, faithfully and loyally, including but not limited to failing to supervise the construction of the project as required by those agreements.

117. Defendants individually, and/or as manager and/or owner, and as part of their contract with150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street (including Morgan), for a fee of $750,000.00.

118. Upon information and belief, Defendants have paid themselves more than $750,000.00.

119. Defendants individually, and/or as manager and/or owner, and as part of their contract with 150 Bee Street or Bomasada Group as Developer for the LLC, entered into an agreement/contract to act as General Contractor on the 150 Bee Street project, for the benefit of the owners of the LLC including Morgan, for a fee of 1% of the construction costs.

120. Upon information and belief, Defendants have breached the agreement/contract and collected well over 1% of the construction costs.

121. Upon information and belief, Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer so that they could continue to improperly pay themselves monthly with Company funds and so that they could improperly pay for their jet airplane with Company funds.

122. Defendants while acting as General Contractor promised and contracted to do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street and the members but ended up going millions of dollars over budget anyway, in breach of the contract.

123. Upon information and belief, Bomasada and BIG II improperly charged the LLC for items one or both of them, and/or the subcontractors, did improperly causing construction defects. Those charges should have been paid by Bomasada, BIG II and/or the subcontractors, under warranties or otherwise, because they and not the LLC caused the defects. Further, construction on the project lasted years beyond the sixteen months scheduled, due to faulty workmanship, errors, cover ups and deceit by the Defendants and the subcontractors. The Defendants wrongfully charged the LLC to fix construction defects caused by the Defendants and/or the subcontractors, when the fixing of those construction defects could and should have been paid by the parties causing the defects and by warranties on construction. The Plaintiff should be repaid all monies it paid to correct errors and construction defects caused by the Defendants and/or the subcontractors.

124. Upon information and belief, Defendants while acting as General

Contractor improperly retained any savings for their own benefit to the detriment of the LLC and the members.

125. Defendants failed to obtain insurance for 150 Bee Street in violation of their obligations to do so, as provided, *inter alia*, by the Development Agreement, the AIA Contractor Agreement, the Operating Agreement and other agreements.

126. Upon information and belief, Defendants' actions or inactions in failing to perform the contracts as specified and agreed are material breaches of the contracts that resulted in the construction project costing millions of dollars over budget; the payment and loss of huge sums of Plaintiff's money as a result of the construction lawsuit; and other damages.

127. Upon information and belief, Defendants failed to perform their obligations as the developer and as the general contractor for the construction project, resulting in construction defects causing the LLC to be sued and significant monetary losses to the LLC, to Morgan and to other LLC members.

128. Defendants ignored and failed to comply with the City of Charleston's building code for the ground floor retail portion of the project, which caused delays in the construction and caused the City not to issue a Certificate of Occupancy or Completion. As a result, many buyers otherwise ready to purchase units of the project would not close on their units because their contract said they did not have to close until the project got its Certificate of Occupancy, and the project units had only a temporary certificate of occupancy ("TCO"). Defendants did not obtain a final Certificate of Occupancy until nearly a year after getting the TCO and after the Defendants should have obtained the Certificate of Occupancy. During that approximate one-year delay, real estate prices collapsed, and many purchasers backed out of their contract to purchase, thereby costing the Company millions of dollars, all due to the wrongful and grossly negligent failure of the Defendants to obtain the Certificate(s) of Occupancy timely, in violation of their contractual and other duties.

129. BIG II failed to supervise the contractors who worked on the project and thereby caused significant construction defects resulting in huge losses to the Plaintiff.

130. As a result of Defendants' actions or inactions, the Plaintiff, other LLC members and the LLC have been directly and proximately damaged by the foregoing material breaches of contract in an amount to be determined by a trier of fact.

131. As a result of Bomasada's material breaches of the Development Agreement, the Defendants should return to the Plaintiff the entire Development fee of $750,000 or more and all Reimbursed Expenses, whether legitimate or not, to the LLC.

132. As a result of BIG II's material breaches of the Contract Agreement, the Defendants should return to the Plaintiff the entire Contractor Fee of 1% or more and all reimbursed expenses, whether legitimate or not, to the LLC.

133. The Plaintiff, other LLC members and the LLC are entitled to a money judgment against Defendants in an amount to be determined by a trier of fact, plus reasonable attorney's fees and costs, to the extent allowed by law.

FOR A SEVENTH CAUSE OF ACTION
(Accounting)

134. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

135. 150 Bee Street and its members are all in a fiduciary relationship with one another and fiduciary duties are owed to one another. In addition, the members of 150 Bee Street owe duties of good faith and fair dealing, and not to engage in oppression, to each other member and to 150 Bee Street.

136. Due to the actions of Defendants described above, Plaintiff has requested, and hereby again requests, from Defendants an accounting as to the operations of the joint venture, 150 Bee Street and any companies Gilbert, Fred, Bella Vista, Lauralis, Bomasada Investment and Bomasada Group own or owned that received money, goods, or services from or performed services for 150 Bee Street,, or whose business is or was or could be associated with 150 Bee Street, including but not limited to the following: Defendants Bella Vista, Lauralis,

Bomasada Investment and Bomasada Group.

137. Plaintiff is not presently aware of all of the money, funds, assets, and/or business opportunities belonging to the joint venture or 150 Bee Street that Defendants have misappropriated to themselves and their other companies and is not aware of all of the specific purposes for which Defendants have used said money, assets, and/or business opportunities. Upon information and belief, Defendants used said money, assets, and/or business opportunities to benefit themselves personally or their other companies, in breach of their fiduciary duties.

138. Defendants have failed or refused to render a proper accounting as to the operations, funds, assets, property, and business opportunities of the joint venture and the limited liability company.

139. Plaintiff is entitled to an Order requiring a complete accounting as to expenses, income, assets, and profits of the joint venture and the limited liability companies above-referenced and further requiring the Defendants to hold as trustee for the Plaintiff individually or for 150 Bee Street any property, profit, or benefit derived by the Defendants in the conduct of the business of the joint venture, and/or the limited liability company.

140. Plaintiff has no adequate remedy at law otherwise to get this information.

FOR A EIGHT CAUSE OF ACTION
(Unfair Trade Practices Act)

141. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

142. The aforementioned acts, practices, and conduct of the Defendants were and are unfair and deceptive.

143. The aforementioned acts, practices, and conduct of the Defendants were and are against the public interest and these acts and practices are capable of repetition.

144. The Defendants actions were and are willful and wanton in that

Defendants knew or should have known that their conduct was unfair and deceptive, and therefore a violation of this State's statutes concerning unfair and deceptive acts and practices.

145. As a result of Defendants' Unfair Trade Practices Act violations, the Plaintiff has been damaged through his loss of his investment and anticipated profits, and he has been subjected to aggravation and harassment as a result of Defendants' conduct.

146. As a result of Defendants' unfair and deceptive acts or practices in violation of the State's statutes, the Plaintiff prays for his actual damages, together with treble damages of three times his actual damages, punitive damages, plus Plaintiff's reasonable attorney's fees, costs and disbursements of this action.

FOR A NINTHCAUSE OF ACTION

(Unjust Enrichment)

147. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

148. Plaintiff and Defendants entered into the joint venture summarized above whereby Defendants promised and agreed to act in good faith.

149. In accordance with the agreement, Plaintiff advanced and contributed a large sum of cash and/or funding needed for the project.

150. Plaintiff contributed these funds and invested his time and resources to the project, but due to the conduct of the Defendants, Morgan, other LLC members and the LLC have sustained losses while the Defendants have profited enormously.

151. Plaintiff conferred a valuable benefit upon the Defendants which they have realized in full.

152. Defendant prolonged the sale process on purpose so that they could personally benefit through fees and charges they passed on to and through the Company. Defendants also caused significant construction defects by their

intentional, grossly negligent and negligent acts, which caused huge losses to Morgan, other LLC members and the LLC.

153. Allowing Defendants to retain the amounts they have taken out of the Company would be unjust.

154. There is now justly due and owing to Plaintiff from Defendants the amount of Morgan's investment in the project and the reasonable present value of all amounts improperly billed to the Company by the Defendants beyond what Defendants were contractually permitted.

155. The amount to be returned by Defendants should be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION

(Fraud)

156. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

157. Defendants represented to Plaintiff that they would be acting as Developer, Manager, Fiduciary, Contractor, or other capacity for the benefit of Plaintiff and 150 Bee Street, LLC.

158. Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a. Personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"

b. Airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"

c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"

d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"

e. Fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental

Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged to the Company as "Travel;" and

g. Other charges to be determined by the trier of fact.

159. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made credit card or other charges to the Company, including but not limited to:

a. Expenses related to trip to Cancun, Mexico;

b. Expenses related to trip to lasvegas.com;

c. Expenses related to trip to Scottsdale, AZ;

d. Expenses related to trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to private aircraft;

g. Expenses related to installing a home automations system in Fred's Scottsdale, Arizona home; and

h. Other charges to be determined by the trier of fact.

160. Defendants prolonged the sale process on purpose so that they could personally benefit through fees and charges they passed on to and through the Company.

161. Defendants knew that these charges were not Company charges or otherwise related to the business of 150 Bee Street, LLC.

162. On or about February 27, 2005, Defendants represented to Plaintiff as follows:

BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE....

163. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

164. Upon information and belief, Defendants improperly profited more than the 1% fee.

165. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

166. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff and did, in fact, hide the invoices and bills from Plaintiff. To this date, Defendants have intentionally withheld BIG II's financial records related to the project.

167. Defendants knew that they could reduce the unit prices and sell the units faster.

168. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff or otherwise mislead Plaintiff.

169. Defendants intentionally failed to reduce the unit prices with the intent to mislead Plaintiff and/or that they would not be discovered by the Plaintiff.

170. Defendants intentionally caused construction defects by their fraudulent acts, and intentionally and fraudulently misrepresented and concealed those acts and defects. All of Defendants' misrepresentations and concealments were material.

171. The issues of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company were material to Plaintiff's decision to enter into the agreement with Defendants.

172. Defendants were aware and had knowledge at the time that they made the aforesaid representations that the representations were false. Alternatively, Defendants acted recklessly in making their material false representations and concealments.

173. Defendants intended that the Plaintiff act upon the false representations of Defendants by allowing Defendants to continue running and billing the Company as they saw fit and with disregard for their fiduciary duties to Plaintiff and 150 Bee Street.

174. Plaintiff was ignorant of the falsity of the representations.

175. Plaintiff relied on the false representations.

176. Plaintiff had the right to rely on the false representations.

177. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

178. As a direct and proximate result of the fraud and false representations by the Defendants, Plaintiff, other LLC members and 150 Bee Street have been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR AN ELEVENTH CAUSE OF ACTION
(Misrepresentation)

179. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

180. Defendants represented to Plaintiff that they would be acting as Developer, Manager, Fiduciary, Contractor or other capacity for the benefit of Plaintiff and 150 Bee Street.

181. Defendants, while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a. Personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"
b. Airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"
c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-

Education;"

e. Fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged to the Company as "Travel;"

g. Expenses related to installing a home automations system in Fred's Scottsdale, Arizona home; and

h. Other charges to be determined by the trier of fact.

182. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made credit card or other charges to the Company, including but not limited to:

a. Expenses related to trip to Cancun, Mexico;

b. Expenses related to trip to lasvegas.com;

c. Expenses related to trip to Scottsdale, AZ;

d. Expenses related to trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to private aircraft; and

g. Other charges to be determined by the trier of fact.

183. Defendants prolonged the sale process on purpose so that they could personally benefit through fees and charges they could pass on to the Company.

184. Defendants knew that these charges were not Company charges.

185. On or about February 27, 2005, Defendants represented to Plaintiff that

BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE.

186. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

187. Upon information and belief, Defendants profited more than the 1%

fee.

188. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

189. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff. To this date, Defendants have intentionally withheld BIG II's financial records related to the project.

190. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff.

191. Defendants knew that they could reduce the unit prices and sell the units faster.

192. Defendants intentionally failed to reduce the unit prices with the intent that they would not be discovered by the Plaintiff.

193. Defendants intentionally misrepresented that they had properly constructed the condominium project and the nature and extent of the construction defects associated with the project.

194. The issues of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company were material to Plaintiff's decision to enter into the agreement with Defendants.

195. Defendants were aware and had knowledge at the time that they made the representations that the representations were false.

196. Defendants intended that the Plaintiff act upon the false representations by allowing Defendants to continue running and billing the Company as they saw fit.

197. Plaintiff was ignorant of the falsity of the representations.

198. Plaintiff relied on the false representations.

199. Plaintiff had the right to rely on the false representations.

200. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

201. As a direct and proximate result of the false representations by the

Defendants, Plaintiff has been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the Property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR A TWELFTH CAUSE OF ACTION
(Indemnification of 150 Bee Street)

202. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

203. At all times relevant the Defendants were agents of 150 Bee Street, which was their principal. As such, the Defendants must indemnify 150 Bee Street and its members, excluding Fred and Gilbert, for all losses suffered by 150 Bee Street due to the negligent, grossly negligent and intentional illegal acts of the Defendants, alleged herein, including but not limited to losses incurred by the LLC due to construction defects and the lawsuit project owners brought against the LLC due to construction defects.

204. Bella Vista, as a member of the LLC, and Fred and Gilbert, as the general partners of Bella Vista, are liable to indemnify the LLC and its members other than Fred and Gilbert, for all acts or omissions involving intentional misconduct or knowing violation of the law by any of them, and all transactions in which any of them received a personal benefit in violation or breach of the LLC's Operating Agreement and other agreements, all of which occurred as alleged herein. Upon information and belief, any wrongful action taken by any of the Defendants pursuant to advice by any LLC counsel was induced by intentional misconduct or knowing violation of the law by Bella Vista, Fred, Gilbert and/or one or more of the other Defendants.

205. Bomasada, as the Developer, agreed in Section 1.4 of the Development Agreement between 150 Bee Street LLC and Bomasada:

[T]o indemnify, defend and hold harmless the [150 Bee Street, LLC] and its partners, employees and agents, from any and all loss, damage, cost, expenses and liability sustained by such parties which arise out of the Developer's gross negligence or willful misconduct or acts outside the scope of the Developer's authority under this Agreement.

206. The Defendants committed numerous negligent, grossly negligent and intentional acts regarding the project for which they must indemnify 150 Bee Street, LLC, including but not limited to each of the following:

a. Bomasada's failing to supervise the construction work during all phases of construction and to otherwise assist in all aspects of the project, as required by the development agreement between Bomasada and the LLC;
b. Bomasada's failing to provide qualified field personnel for observing and reviewing work progress and construction of the project, as required by paragraph 1.1 of the development agreement;
c. Bomasada's failing to supervise (i) the preparation of appropriate instructions to bidders, (ii) the preparation of contracts for the construction of the Project, and (iii) the administration of change orders, as required by paragraph 1.1 of the development agreement;
d. Bomasada's failing to provide administrative services required to be made relating to the construction of the Project, as required by paragraph 1.1 of the development agreement; and
e. Bomasada's failing to assist in securing authorizations, permits and licenses as necessary for the development and construction of the Project, as required by paragraph 1.1 of the development agreement.

207. As a direct and proximate result of negligent, grossly negligent and intentional acts by the Defendants, the Company has been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the

trier of fact.

FOR A THIRTEENTH CAUSE OF ACTION
(Intentional Interference with Prospective Business Advantage)

208. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

209. Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer and so they could continue to improperly pay themselves monthly with Company funds. Defendants' purpose was improper, in that they took this action in order to continue to improperly pay themselves.

210. By intentionally and improperly failing and refusing to adequately lower the unit pricing as stated above, the Defendants intentionally and improperly interfered with the LLC's potential contractual relations for an improper purpose and by improper methods, causing injury to the LLC.

211. As a direct and proximate result of Defendants failing and refusing to adequately lower the unit pricing as stated herein, the LLC has suffered damages in an amount to be determined by the trier of fact.

FOR A FOURTEENTH CAUSE OF ACTION
(Misappropriation of LLC assets)

212. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

213. The Defendants' intentional, illegal use of the funds and other property of 150 Bee Street for their own personal and unauthorized uses constitutes misappropriation of the assets of 150 Bee Street. The Defendants' have fiduciary duties to protect the assets of 150 Bee Street.

214. As a direct and proximate result of Defendants' misappropriation of 150 Bee Street's assets, 150 Bee Street has suffered damages in an amount to be

determined by the trier of fact.

FOR A FIFTEENTH CAUSE OF ACTION

(Alter Ego/Amalgamation/Piercing the Corporate Veil as to the Developers and Contractors)

215. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated verbatim herein.

216. Bomasada held itself out to the Plaintiff and the public as the developer of Bee Street Lofts and signed the Development Agreement with the Company naming Bomasada as Developer.

217. BIG II held itself out to the Plaintiff and the public as the general contractor of Bee Street Lofts and signed an AIA Stipulated Sum Contractor with the Company naming BIG II as the General Contractor for the Project.

218. Upon information and belief, Bomasada, BIG II and Lauralis at all times relevant to this action:

a. Failed to observe corporate formalities;

b. Were grossly undercapitalized for the purposes of the corporate undertaking, to wit, the development and construction of the Bee Street Lofts and the remediation of any and all defects in the design and construction of the Bee Street Lofts should they arise;

c. Were controlled by Bella Vista, Fred and Gilbert to such an extent that they were merely a facade for the operations of Bella Vista, Fred and Gilbert;

d. Do not have any functioning officers, managers or directors that are independent of Bella Vista, Fred and Gilbert; and

e. Were functionally insolvent and were run as mere shells for the benefit of Defendants.

219. Upon information and belief, Bomasada, BIG II and Lauralis failed to follow the necessary corporate formalities as required by law; undercapitalized 150 Bee Street; siphoned corporate funds for personal use of its shareholders; used

corporate facilities and employees for personal ends; and otherwise so intermingled their personal and financial affairs with the company's that they have become the alter ego of Bella Vista, Fred and Gilbert.

220. Further, upon information and belief the interests of Bomasada, BIG II and Lauralis and their agents, directors, officers and/or shareholders, and of Bella Vista, Fred and Gilbert are so amalgamated that the Plaintiff is entitled to disregard the corporate forms and recover against Bomasada, BIG II and Lauralis and their agents, directors, officers and/or shareholders.

221. Upon information and belief, Bomasada, BIG II and Lauralis are shell and/or sham companies dominated and controlled by Bella Vista, Fred and Gilbert such that they are not legally distinct.

222. It would be inequitable to allow Fred and Gilbert to hide behind a corporate shield that has no basis in fact for the express purpose of avoiding their obligations, responsibilities and liabilities to the Plaintiff.

223. Plaintiff are entitled to pierce the corporate veil of Bomasada, BIG II and Lauralis and thereby obtain a judgment against Bomasada, BIG II and Lauralis, and their agents, directors, officers and shareholders for the liability of Fred, Gilbert and Bella Vista in an amount to be determined by the trier of fact.

224. Further, because the interests of Bomasada, BIG II and Lauralis and their agents, directors, officers and shareholders, and of Bella Vista, Fred and Gilbert are so amalgamated, Plaintiff are entitled to disregard the corporate forms and recover against Bomasada, BIG II and Lauralis and their agents, directors, officers, and shareholders in an amount to be determined by the trier of fact.

FOR A SIXTEENTH CAUSE OF ACTION

(Breach of Contract Accompanied by a Fraudulent Act)

225. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated verbatim herein.

226. The actions by the Defendants described herein breached their contracts with 150 Bee Street, LLC.

227. Through the fraudulent acts and misrepresentations described herein, the Defendants sought to conceal their breaches of contract and otherwise committed fraudulent acts with fraudulent intent related to the breaches of contract.

228. The fraudulent acts accompanied the breaches.

229. As a direct and proximate result of Defendants' breaches of contract accompanied by a fraudulent act and intent, 150 Bee Street has suffered damages in an amount to be determined by the trier of fact and is entitled to an award of punitive damages in an amount to be determined by the trier of fact.

WHEREFORE, Morgan, individually and in a representative capacity of 150 Bee Street in a derivative action, respectfully prays that Plaintiff and the LLC be awarded:

a. Actual, consequential, and punitive damages in an amount to be determined by the trier of fact;
b. Reasonable attorney's fees and costs to the extent allowed by law;
c. Treble damages;
d. An offset against the capital account and any undistributed amounts claimed by Defendants;
e. The return of all capital contribution paid by the members of the LLC due to the wrongdoing of any of the Defendants;
f. An accounting and winding up of the business of 150 Bee Street;
g. Indemnification of all losses incurred by the Plaintiff or the LLC due to the unlawful actions of the Defendants, including but not limited to construction defects as alleged in the construction lawsuit;
h. All of the Development fee of $750,000 or more and all reimbursed expenses paid to Bomasada by the Plaintiff;
i. All of the Contractor fees of 1% or more paid to BIG II and all reimbursed expenses paid to BIG II by the Plaintiff;
j. Prejudgment and post judgment interest; and
k. Such other and further relief as this court deems just and proper.

Respectfully submitted,

_____

W. Andrew Gowder, Jr., (S.C. Bar #7895)
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Counsel for Plaintiff

_____, 2018
Charleston, South Carolina

AUSTEN GOWDER

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January 22, 2019

Morris Ellison
Henry Grimball
Womble Bond Dickinson
PO Box 999
Charleston, SC 29402

Re: THOMAS H. MORGAN v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION, and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY

Dear Mr. Ellison and Mr. Grimball:

Enclosed please find for service upon you the First Amended Complaint along with Exhibits in the above referenced case. I have also included a Certificate of Service for your records.

Please call me if you have any questions or concerns.

Sincerely,

AUSTEN & GOWDER, LLC

Rachel Fete

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Assistant to W. Andrew Gowder, Jr.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN ARBITRATION Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580
THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION, and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	**FIRST AMENDED COMPLAINT**

The Plaintiff above named, complaining of the Defendants, above named, alleges and says as follows:

1. Plaintiff Thomas H. Morgan ("Morgan" or "Plaintiff') is a citizen and a resident of the State of Florida, and at all times relevant has been a voting member and a 26.66% owner of 150 Bee Street, LLC. Morgan sues as a Plaintiff both on behalf of himself personally and derivatively on behalf of 150 Bee Street, LLC.

2. The Defendant 150 Bee Street, LLC (sometimes "150 Bee Street," "LLC" or "Company") is a South Carolina Limited Liability Company, duly organized and existing pursuant to the laws of South Carolina; is subject to the jurisdiction of this Court; and is named as a nominal party Defendant in this derivative proceeding.

3. The Defendant John L. Gilbert ("Gilbert") is a citizen and a resident of the State of Texas; is neither an infant nor an incompetent person; is not in the military service; and at all times relevant has been a general partner and the managing partner of Bella Vista Partnership.

4. The Defendant Stuart L. Fred ("Fred") is a citizen and a resident of the State of Texas; is neither an infant nor an incompetent person; is not in the military service; and at all times relevant has been a manager of 150 Bee Street, LLC, and a general partner of Bella Vista Partnership.

5. The Defendant Bella Vista Partnership ("Bella Vista") is a Texas General Partnership doing business in South Carolina; is subject to the jurisdiction of this Court; and at all time relevant has been a voting member and a 26.67% owner of the LLC.

6. The Defendant Bomasada Group, Inc. ("Bomasada Group" or "Bomasada") is a Texas corporation doing business in South Carolina and is subject to the jurisdiction of this Court.

7. The Defendant Bomasada Investment Group II, LLC ("Bomasada Investment" or "BIG II") is a Texas Limited Liability Company doing business in South Carolina and is subject to the jurisdiction of this Court.

8. The Defendant Lauralis Management, Inc. ("Lauralis") is a Texas corporation doing business in South Carolina and is subject to the jurisdiction of this Court.

9. Neal I. Baker ("Baker") was a citizen and a resident of the State of South Carolina and a voting member, a manager and a 26.67% owner of 150 Bee Street, LLC. Upon the death of Baker on August 24, 2011, the LLC

membership interest of Baker transferred to the Estate of Neal I. Baker, which became a disassociated non-voting member and a 26.67% owner of 150 Bee Street, LLC. Upon the resignation of Baker as a Manager on January 31, 2011, Plaintiff Morgan became a Manager of 150 Bee Street, LLC.

10. Edwin S. Pearlstine, Jr. is a citizen and a resident of the State of South Carolina and has been, at all times relevant, a voting member and a 20% owner of 150 Bee Street, LLC. Currently, Pearlstine is a manager, with Morgan and Fred, of the LLC.

11. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, own and are the controlling partners of Defendant Bella Vista. Operating by themselves or with others, they were the controlling persons of Defendant 150 Bee Street, LLC.

12. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, own and are the controlling owners of Defendant Bomasada Group.

13. Upon information and belief, Defendant Bomasada Group was organized by Defendants Gilbert and Fred and acted as Developer of 150 Bee Street, LLC.

14. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant BIG II.

15. Upon information and belief, Defendant BIG II was organized by Defendants Gilbert and Fred and acted as the general contractor regarding the construction of a condominium complex located at 150 Bee Street, Charleston, South Carolina (the "project" or "Bee Street Lofts") for 150 Bee Street, LLC.

16. Upon information and belief, Defendants Gilbert and/or Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant Lauralis.

17. Upon information and belief, Defendant Lauralis is a holding company that owns a private jet aircraft.

18. Upon information and belief, the legal distinction between Fred, Gilbert, Bella Vista, Bomasada, Lauralis, BIG II and the partners, officers, directors and/or shareholders of Bella Vista, Bomasada, Lauralis and BIG II (hereinafter the "Defendants") has not been distinctly maintained by those parties and is not effective and they are, as such, one and the same and their interests are so amalgamated that the actions of one should apply to the others.

19. The affairs of the LLC are governed in part by the Second Amended and Restated Operating Agreement of 150 Bee Street, LLC (sometimes hereinafter "Operating Agreement" or "Second Amended Operating Agreement), which is restated herein and incorporated herein by reference.

20. In accordance with SC Code § 33-44-1101, Morgan as a member of the LLC has been authorized to commence this action because a majority of the members and managers having authority to do so have refused to commence this action in breach of their duties as members and managers, and, alternatively, an effort to cause those members or managers to commence the action would not likely have succeeded.

21. At the time of these actions, Morgan was, and remains, a member of 150 Bee Street, LLC and has been a Managing Member with authority to arbitrate or litigate this dispute in a derivative capacity. Therefore, Morgan is a proper Plaintiff as required by SC Code § 33-44-1102.

22. Morgan can and will fairly and adequately represent the interests of other members of 150 Bee Street, LLC, in this derivative action.

23. Plaintiff has complied with the requirements of SCRCP Rule 23(b)(1), of S.C. Code Ann. § 33-44-1101, and of the Operating Agreement. S.C. Code Ann. § 33-44-1101(a member of an LLC may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed).

24. On July 9, 2012, the Plaintiff and the defendants entered into a Consent Order, which is restated and incorporated herein and attached hereto as Exhibit #1, whereby this matter was referred to arbitration pursuant to the terms of the Consent Order.

25. This arbitration panel has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

REFUSAL OF VALID DEMAND

26. As required by S.C. Code Ann. § 33-44-1103, Morgan made multiple verbal and written demands on the managers and the members of the Company having proper authority that they initiate this action and remedy Morgan's complaints described herein, and that they call a meeting of the members to authorize doing so. Said demands were made directly to the managers and the members and/or to their attorney(s) or agent(s) which constituted effective and valid notice of the demands to the managers and members.

27. Plaintiff's demands on the members and managers identified the alleged wrongdoers, described the factual basis of the wrongful acts and the harm caused to the LLC, and requested remedial relief.

28. Plaintiff's demands to initiate a derivative action were for the purpose of preserving the Company's assets and therefore were in the ordinary course of the Company's business. Therefore, pursuant to Sections 6.02 and 6.03 of the Operating Agreement, the Managing Members had the authority to initiate this action without a vote of the Members and to remedy the complaints stated herein. However, a majority of the Managing Members of the Company failed or refused to do so. Said failure and refusal was a breach of fiduciary duty owed by the non-approving Managing Members to the Members, including the Plaintiff, to the approving Managing Member and to the company as a whole. Defendants breached their fiduciary duty by not proffering to the Company's Members the opportunity to protect the Company's assets through a derivative action.

29. Pursuant to the Operating Agreement, a majority of the members of the Company were authorized to vote to initiate this action and to remedy the complaints stated herein but failed or refused to do so without valid cause or justification. Said failure and refusal was a breach of fiduciary duty owed by the non-approving members to the LLC and to the approving members.

30. Moreover, a majority of the managers and of the members of the Company failed or refused to call a meeting of the members to vote on whether the members would initiate or authorize the initiation of this action or remedy the complaints stated herein. Said managers and members violated their fiduciary duty to the members of the LLC, by not proffering to the Company's members the opportunity to protect the Company's assets through a derivative action and/or by other means.

31. Those LLC members and managers upon whom demands were made refused to initiate or authorize the derivative action, remedies and mediation and arbitration demanded by Morgan, and to call a member meeting to vote to do so, and therefore the Plaintiff was authorized to initiate this action.

32. 150 Bee Street, LLC, acting through and under the direction and control of its managers and members failed to take proper action to resolve the disputes referenced herein and to initiate a derivative lawsuit after written and verbal demands by Morgan, to the serious detriment of 150 Bee Street, LLC and its members' interests. The LLC and a majority of its members and mangers failed and refused to resolve, and even to meet to discuss how to resolve, said disputes before the filing of this lawsuit, and has failed and refused to authorize and to have a member meeting to vote whether to authorize the initiation of a derivative lawsuit contrary to good and reasonable business judgment and to the interests of the LLC and its members, due to false and misleading defamatory information, harassment, fear and intimidation caused by Defendants Bella Vista, Gilbert and Fred; and due to conflicts of interest and self-dealing by Defendants who have had financial and control interests in the LLC that have incentivized them not to

remedy the unlawful conduct by the Defendants.

33. In a demand letter dated September 26, 2011, Morgan complained through counsel to Defendants about the misconduct of the Defendants alleged herein, demanded that the Defendants correct the wrongs identified in the letter, and proposed a remedy in the form of a settlement payment to Morgan. Said demand letter identified the alleged wrongdoers, described the factual basis of the wrongful act and the harm caused to the LLC and to Morgan, and requested remedial relief. However, Morgan's ability to state facts and evidence in this demand letter was limited by the fact that the Defendants repeatedly had failed and refused to provide Morgan documents and information he demanded. A copy of this letter is attached hereto as Exhibit #2 and is incorporated herein.

34. In a letter dated November 8, 2011, the above-named Defendants, through counsel, denied to Morgan, in response to Morgan's complaints of improper conduct by the Defendants as alleged herein, that said Defendants had engaged in "fraud, gross mismanagement and use of company funds to reimburse themselves for personal vacations on their private jet, safaris, work on their personal home and jet hangers, as well as self-dealing in a position of fiduciary responsibility" regarding 150 Bee Street, LLC. A copy of said letter is attached hereto as Exhibit #3 and is incorporated herein.

35. On or about November 14, 2011, Plaintiff, through counsel, tendered a demand letter "individually and/or derivatively for 150 Bee Street, LLC" pursuant to and in compliance with S.C. Code Ann. § 33-44-1101 and the Operating Agreement, on the above-named Defendants to engage in mediation and arbitration or adjudication in court, for various causes of action, including but not limited to breach of fiduciary duties, civil conspiracy, conversion, breach of contract, declaratory judgment, accounting and unfair trade practices act violations. The demand asked said Defendants to consent to those actions and to toll the statute of limitations. The Defendants did not respond to that demand letter or consent to the actions demanded therein and

failed and refused to cooperate and to participate in said actions. A copy of said demand letter is attached hereto as Exhibit #4 and is incorporated herein.

36. On November 16, 2011, Plaintiff, through counsel, tendered a demand pursuant to and in compliance with S.C. Code Ann. § 33-44-1101 and the Operating Agreement, that Defendant Fred, as Co-Manager of the LLC, consent to and commence a derivative lawsuit on behalf of the LLC against various Defendants for various causes of action, including but not limited to arbitration, breach of fiduciary duty, civil conspiracy, conversion, breach of contract, declaratory judgment, accounting and unfair trade practices act violations; and giving a deadline of November 25, 2011, for Defendant Fred to consent to this action or for Plaintiff Morgan to be deemed to be entitled to bring a derivative action on behalf of 150 Bee Street, LLC, against said parties. A copy of said demand is attached hereto as Exhibit #5 and is incorporated herein.

37. On November 16, 2011, the Defendants' counsel uncooperatively and hostilely responded to a request by Plaintiff Morgan, through counsel, to meet with the Defendants to resolve Plaintiff Morgan's complaints by sending an e mail dated November 16, 2011, to Plaintiff Morgan's counsel, stating in part the following:

> Subject: RE: 2011-182 150 Bee Street, LLC
>
> I am unwilling to pass your letter on or set up a conference in light of the letter I received from G.P. Diminich as I was speaking with you this morning. Are you people nuts?? Do you really think my clients will come to a good faith conference having received that letter? He needs to withdraw the letter and notify me to that effect. . . . (Emphasis added.)

38. On November 28, 2011, Plaintiff, through counsel, tendered an additional demand, pursuant to and in compliance with S.C. Code Ann. § 33-44-1101 and the Operating Agreement, reiterating the same demands stated in the earlier November 16, 2011 letter referenced above and demanding that Defendant Fred, as Co-Manager of the LLC, consent to and commence a

derivative lawsuit on behalf of the LLC against the Defendants and arrange a vote of the members of the LLC on whether to consent to said lawsuit; and giving a second deadline of December 2, 2011 for Defendant Fred to respond to the demands and arrange for a vote of the members of the LLC or be deemed to have refused to consent and commence such a suit under S.C. Code Ann. § 33-44-1101. A copy of said demand is attached hereto as Exhibit #6 and is incorporated herein.

39. On November 30, 2011, Defendant Fred, through counsel, explicitly declined Plaintiff's demands stated in Plaintiff's letter of November 28, 2011 referenced above, and warned that:

> As I understand your letter of November 28 and your client's demand pursuant to S.C. Code Ann. Section 33-44-1101, Mr. Morgan wants Stuart Fred to commence an action against himself, as well as others. . .. You are now on notice that should your client commence a court suit as described in your letter, my clients will move to stay any such action and will seek damages from your client in the ensuing mediation/arbitration for breach of the Agreement. (Emphasis added.)

40. Plaintiff Morgan repeatedly asked LLC member Edwin Pearlstine to join with Morgan for a majority vote to take actions to remedy the complaints of Morgan stated herein and to authorize a derivative lawsuit. For example, on October 7, 2011, Plaintiff Morgan made a request of Sheila Pace, President and CFO, Pearlstine Family Companies, LLC, as a key senior official and agent of Pearlstine, that Pearlstine join Morgan to create a majority vote to remedy the complaints of Morgan. Despite this, Pearlstine did not agree, and Sheila Pace provided no response.

41. Thus, the Defendants, including the Co-Manager of the LLC, Defendant Fred, received demands to bring this action, but in response refused Plaintiff Morgan's requests to remedy the complaints voiced by Plaintiff Morgan; and refused or failed to mediate and/or arbitrate those complaints and to allow Morgan to commence or to authorize the commencement of a derivative action lawsuit against the Defendants and to call a meeting of the

members of the LLC so they could vote on whether to remedy Morgan's complaints, to mediate or arbitrate or to commence or authorize the commencement of a derivative action lawsuit against the Defendants.

42. Section 14.11 of the Operating Agreement states in part that "[t]he Managing Members may in their discretion convene a meeting for any purpose, and the Managing Members **shall call a meeting of the Members** upon the **written** request of Members owning at least 51% of the Interests owned by all Members." (Emphasis added.) Morgan demanded that Bella Vista, through Fred and Gilbert, and Pearlstine vote with Morgan to authorize remedies to Morgan's complaints, mediation and arbitration and a derivative lawsuit for the LLC, and to convene a meeting of the Members to consider those actions, but both Bella Vista (Fred and Gilbert), and Pearlstine refused. Without the written consent of either one or both Bella Vista or Pearlstine, who together controlled over 51% of the LLC, it was not possible to convene a meeting to vote to initiate a derivative lawsuit.

FUTILITY OF DEMAND

43. Alternatively, even if Morgan's demands that the LLC and its members and managers remedy the complaints of Morgan, participate in mediation and arbitration, and initiate or authorize a derivative action lawsuit against the LLC were not made properly, which Plaintiff denies, said demands would have been futile and future demands would be futile for the following reasons:

a. The actions Plaintiff asked the Defendants to take were against the financial and control interests of Defendant Fred, the Co-Manager of the LLC; his business partner, Defendant Gilbert; and entities they owned and controlled, including LLC member Bella Vista;

b. The Defendants were unwilling or likely to be unwilling to authorize and pursue actions against their financial and control interests; and

c. The Defendants, especially Defendants Fred, Gilbert and Bella Vista, had extreme hostility toward Morgan and his demands for accountability for the actions of the controlling members and managers.

44. At all times relevant to the demands made by Morgan, the LLC had two Managers, who were Fred and Morgan. Section 6.01 of the Operating Agreement states in part that "[a]ll actions to be taken by the Managing Members on behalf of the Company shall be determined by Majority Consent among the Managing Members." Morgan repeatedly demanded that Fred vote with Morgan to authorize remedies to Morgan's complaints, mediation and arbitration and a derivative lawsuit for the LLC, and to convene a meeting of the Members to consider those actions, but Fred always refused.

45. Because of false, defamatory and antagonistic statements Defendants Bella Vista, Gilbert and Fred and Neal Baker made to Pearlstine about Plaintiff Morgan that wrongfully undermined the confidence of Pearlstine in Morgan and Morgan's complaints before this lawsuit was filed, and because material facts about the LLC were withheld from Pearlstine by Defendants Bella Vista, Gilbert and Fred, Pearlstine declined to get involved in decision-making regarding this lawsuit and its subject matter; would not vote or side with Morgan to take remedial action and demands Morgan made to Pearlstine to take remedial actions in fact were futile and any demand by Morgan that Pearlstine vote to remedy Morgan's complaints or to take legal action regarding the LLC to remedy the complaints would have been futile.

46. Defendants Bella Vista, Gilbert and Fred made false, defamatory and antagonistic statements to Neal Baker about Plaintiff Morgan that wrongfully undermined the confidence of Baker in Morgan and Morgan's complaints before this lawsuit was filed, and material facts about the LLC were withheld from Baker by Defendants Bella Vista, Gilbert and Fred. As a result, Baker was completely uninformed about the merits of Morgan's

complaints against the Defendants up until several months prior to his death when he was given a copy of a recently completed forensic report written by Randal Harris, Morgan's forensic auditor. Baker was antagonistic toward Morgan and his complaints, and would not vote or side with Morgan to take remedial action; demands Morgan made to Baker to take remedial actions in fact were futile; and any demand by Morgan that Baker vote to remedy Morgan's complaints or to take legal action regarding the LLC to remedy the complaints would have been futile.

47. To the extent the allegations supporting these causes of action arose after the demands and refusals in November 2011 referenced above, any additional demand would have been futile, as the parties have been in arbitration against each other since that time and Defendants Bella Vista, Fred and Gilbert remain unlikely to vote in favor of 150 Bee Street, LLC, bringing additional causes action against them or the other Defendants in this arbitration proceeding

48. In addition, the Defendants Fred, Gilbert and Bella Vista, as well as former LLC member Neal Baker, have had and have exhibited such extreme self-serving and personal conflicts of interest and hostility, animus, hatred, antipathy, disregard, disrespect, uncooperativeness, and distain for Plaintiff Morgan and his complaints that they have been unable and unwilling, and would be unable and unwilling in the future, to cooperate with Plaintiff Morgan, other members of the LLC and the LLC to stop and remedy the wrongs alleged herein by authorizing a derivative lawsuit or otherwise, or to otherwise comply with Plaintiff Morgan's reasonable requests.

49. The Defendants' disrespectful disregard and antipathy for Plaintiff Morgan as a member of the LLC began soon after Morgan became a member of the LLC and is evidenced by an e mail dated April 25, 2007, sent by Defendant Fred to Plaintiff Morgan, copied to Defendant Gilbert and LLC members Baker and Pearlstine, stating in part the following:

> tommy I just got both your and neals e mail ... I concur with Neal ... although I have not been in communication with you I have been aware of your position for some time. ... frankly you should not be in this deal .... You don't understand real estate like you do oil and gas ... that's where your time and money should be positioned ... leave the real estate to others who do it daily and either be a passive investor or respectively get out. (Emphasis added.)

50. Similarly, on April 26, 2007, Defendant Fred sent an e mail to Plaintiff Morgan stating in part the following:

> . . . I'm not going to get into a `tit-for-tat' on the various issues you raised because that would serve no real purpose at that point. The bottom line is that no matter what you think, you are not and never will be a real estate developer. And frankly **we are sick and tired of being second-guessed by your amateurish comments. We will not teach school**. This is what we do for a living 24/7, something **you apparently cannot comprehend**. . .. Your e mails this past week have demonstrated nothing . . . but **continued ramblings as to market concern and your acute non-understanding of what we are doing in Charleston as a development group**. . ..
>
> **I now consider you a hostile partner and will be taking all necessary actions afforded me as the managing member of the LLC to protect the LLC** . . .. (Emphasis added.)

51. On September 24, 2010 the Controller for Plaintiff Morgan e mailed the following to Defendant Gilbert, co-partner of LLC member Bella Vista:

> Hi John, I am in receipt of the QuickBook GL pages of the accounts I requested, unfortunately, they aren't very illuminating. Would you please send copies of the invoices, purchase orders or whatever docs you have originating the charges? Could you also explain how the overhead expense reimbursement is calculated? Thanks,

In response to that request, on September 29, 2010, Defendant Gilbert, co-partner of LLC member Bella Vista, e mailed the Controller for Plaintiff Morgan the following:

> In response to your request for additional information on 150 Bee Street, please note that **this office will not be providing any receipts, invoices, etc. on the project**. Although on the surface, these requests are not unreasonable, based upon the underlying tone and history of Mr. Morgan's conduct towards the partnership, we are adhering strictly to our obligations under the Operating Agreements. And frankly, **we do not have the time to be burdened by this spurious request**. (Emphasis added.)

On October 1, 2010, Plaintiff Morgan responded to the above with an e mail, to which Defendant Gilbert sent Defendant Fred and LLC member Baker an e mail stating in part "**What a wing nut**. Let's get on a conference call on Monday morning to discuss." (Emphasis added.)

52. On October 1, 2010, LLC member Neal Baker sent an e mail to Defendants Fred and Gilbert stating in part the following:

> **I hope Hagerty and his firm sue the s**t out of Tommy** I never knew Hagerty did anything for you and Stuart other Bee Street. I wonder if Tommy's ego will allow him to apologize after he spends all his money with this FBI man. **The little ego f***er will probably commit suicide when he is a made an ass of**. On the marketing all he wanted to do was bring in all these BIG TITTIE broads to sell because that is the way it's done in Miami. . .. Neal (Emphasis added.)

53. Defendants' extreme negativity toward and disregard for Plaintiff Morgan is evidence by an e mail dated October 2, 2010, which Defendant Fred e mailed Defendant Gilbert and LLC member Neal Baker, regarding a request by Morgan for information from the Defendants about the LLC, stating in part the following:

> First lets remember a few things...[Morgan is] a **midget with a pea brain**...so consider the source...**Honestly let this go in one ear and out the other**...there is nothing there as to his claims and **who cares who or what he claims**...there's nothing there...**NEAL and I are the general Partners and can do what we want**...And we are doing a great job as fiduciaries for the partnership...**I don't hear Edwin crying how bad we are**...F**K the MIDGET...**I am not going to change one thing that I or we are doing**...So don't let his chirping

> or nipping at your heels bother any of us because the MIDGET is nothing but empty air as this has been the way he has done biz forever...The MIDGET has a NAPOLEON complex and he chirps with no substance...he does not think this deal will make money so lets give buy him out cause we will be making money...**He is ill...seriously he is sick and has issues**...Hagerty I predict will agree and will laugh this off as **no attorney or FBI guy once they talk to KING Developer will take any of his accusations seriously...he is a pecker nut MIDGET with a little d**k that hides behind his mommies skirt...So f**k him** and go play golf or watch Texas loose to Oklahoma...I am (Emphasis added.)

54. Similarly, on November 11, 2010, LLC member Neal Baker sent Defendant Fred an e mail stating the following:

> I called Edwin [Pearlstine] and spoke with him about the emails. I told him to call Hagerty and talked to him about our situation. **I don't think we should communicate with Tommy again**. I think we need Hagerty in the near future to send a letter to all partners that there will be **NO distributions until we ALL sign an agreement to hold each other harmless IF Tommy wants to sue or check the books** he has been given every opportunity to do so. neal (Emphasis added.)

In response to the above, on November 11, 2010, Defendant Fred replied "Agreed, Assume Edwin [Pearlstine] understood."

In response to the e mail from Defendant Fred above, LLC member Baker replied:

> Stu. I think he [Pearlstine] understand but I want Hagerty to tell him **how long this BS has been going** on and Tommy only accuses and does nothing. . .. (Emphasis added.)

55. On November 10, 2010, Defendant Gilbert sent LLC members Fred and Baker an e mail stating the following:

> Gentlemen: . . . Please note that due to the continued adversarial position of Thomas Morgan, the **general partners Stuart Fred and Neal Baker, have instructed me to discontinue sending Mr. Morgan any information regarding the partnership and/or the property**. . .. (Emphasis added.)

56. On November 10, 2010, Defendant Gilbert sent to Defendant Fred an e mail stating the following:

> Subject: Draft of 150 Bee Street LLC 3rd Quarter 2010 Update
>
> Stuart:
>
> This is the update I plan on sending to the Bee Street partners. I wanted to run it by you before I sent it out. Please review and let me know your comments.

In response, Defendant Fred sent to Defendant Gilbert and LLC member Baker an e mail stating in part the following:

> Subject: RE: Draft of 150 Bee Street LLC 3rd Quarter 2010 Update
>
> read corrections below ...grammar mostly... and a little content...do not want to make judgments on market as it will be used against us **by the midget**...I would also suggest that the more you use me or I you place a target on your back for **the midget to shoot at**... also I **don't think we send this to Tommy** as he is adversarial...Ill check with Neal....Then attorney....**I vote we need to shut down communication to him ... make him spend money to get info**...he has proven time and time again he is adversarial....later (Emphasis added.)

57. On November 10, 2010, Defendant Fred sent LLC members Gilbert and Baker an e mail stating the following:

> Please allow this e mail to serve as notice from me and Neal as co managing general partners that **we have decided not to provide T. Morgan any further information** due to the continued threats of lawsuits leveled against the group and us individually. Accordingly **do not provide T. Morgan or any of his affiliates or agents any information without both Neal and my approval**. . .. (Emphasis added.)

In responses, on November 10, 2010, Defendant Gilbert e mailed Defendant Fred and LLC member Baker the following reply: "Thanks. **I will follow your instructions**." (Emphasis added.)

58. On November 10, 2010, LLC member Edwin Pearlstine sent an e mail to Defendant Gilbert stating in part the following:

> **Subject:** Re: 150 Bee Street LLC 3rd Quarter 2010 Update
>
> **tommy sounds like he's off the deep end** but by not providing financial info to him are we risking expensive litigation.... (Emphasis added.)

59. On November 23, 2010, LLC member Neal Baker sent an e mail to LLC member and Defendant John Gilbert stating in part as follows:

> **I had a little blow out with Leslie** [Controller for Morgan] – she wants the reports and I told her **our attorneys don't want us to communicate with Tommy. I told her we have no trust in him** . . .. **This thing with him is nuts. He needs to check into a hospital and get his head screwed on**. **I really think he is in need of help. I expect major HEAD ACHES from him**. . .. I promise you **he is a sh***y partner who will do something crazy to hurt all of us including himself**. (Emphasis added.)

60. On December 2, 2010, Defendant Gilbert send an e mail to an agent of the LLC stating in part the following:

> How many times have **I told you NOT to send anything to Leslie Berry [for Tom Morgan]? I cannot believe you did [that] after Stuart and I talked [to] you about it**. I am at a total loss. (Emphasis added.)

61. On May 5, 2011, LLC member Neal Baker sent an e mail to Defendants Fred and Gilbert stating in part the following regarding an auditor who reviewed the finances of the LLC:

> John – Stuart
>
> If this guy Harris[1] is telling the truth that he was hired by Tom Morgan's attorneys I would not be surprised if he will file a lawsuit. That's his MO. Nothing would surprise me with him. . .. **I don't trust Tom Morgan at all** and since he is selling his house and may have some cash **he is just the type of no good person**

[1] Morgan's forensic auditor.

> **that would do that because of his ego**. Think about it. (Emphasis added.)

62. On May 5, 2011, Defendant Fred sent Defendant Gilbert and LLC member Neal Baker an e mail stating in part the following:

> **F**k the ankle biting midget. Dont [sic] telegraph what we are going to do. Wait till we r ready till we r ready [sic] to disburse and then send out with no notice**. . .. (Emphasis added.)

63. Similarly, on July 27, 2011, Defendant Gilbert sent counsel for the LLC, a member of the LLC and Defendant Fred an e mail stating the following:

> Can you also **draft a resolution stating** that Tom Morgan is an **asshole**? (Emphasis added.)

64. Numerous communications were sent by Morgan as demands to the Defendants, all of which demands the Defendants rejected, as evidenced by the following between Plaintiff Morgan and Defendants Gilbert, Fred and Bella Vista, through their counsel: (a) Letter dated October 18, 2011, from Chris Staubes to Henry Grimball, attached as Exhibit #7; (b) Letter dated July 29, 2011, from John B. Hagerty to Chris Staubes, attached as Exhibit #8; (c) Letter dated August 25, 2011, from Chris Staubes to John B. Hagerty and Stuart L. Fred, attached as Exhibit #9; (d) Letter dated May 15, 2007, from Joel K. Goldman to John B. Hagerty, attached as Exhibit #10; (e) Letter dated April 30, 2007, from John B. Hagerty to Joel Goldman, attached as Exhibit #11; (f) Letter dated February 2, 2011, from Michael P. Gable to Merritt G. Abney, attached as Exhibit #12; and (g) Letter dated September 27, 2011, from Chris Staubes to Henry E. Grimball, attached as Exhibit #13. These communications, if they are held not to be valid demands, show that such a demand would have been futile, as those with decision-making authority for the Company would not have assented to such a demand.

FRAUDULENT SEIZURE OF LLC CONTROL

65. At the time Plaintiff Morgan signed the Operating Agreement of the LLC and until Neal Baker resigned as a Manager of the LLC on January 31, 2011, the Managers of the LLC were Neal Baker and Defendant Stuart Fred. When Neal Baker secretly resigned as a Manager on January 31, 2011, Baker ceased being a Manager of the LLC, and Plaintiff Morgan became a Manager of the LLC in place of Baker, automatically, as provided by the Operating Agreement. However, Plaintiff Morgan was not informed and did not know that Baker had resigned and was prevented from knowing about Baker's resignation and from exercising the duties and privileges of a Manager until months after the death of Neal Baker.

66. At the time Plaintiff Morgan signed the Operating Agreement and until Neal Baker died on August 24, 2011, the voting ownership interests of the LLC members were as follows:

Bella Vista 26.67%
Morgan 26.66%
Neal Baker 26.67%
Edwin S. Pearlstine, Jr. 20%

67. In accordance with the Operating Agreement, when Neal Baker died on August 24, 2011, the Estate of Neal Baker acquired the 26.67% ownership interest of Neal Baker in the LLC, but the Estate of Neal Baker became a disassociated member and had no voting rights and, as a result, the voting percentages of the LLC Members allowed to vote realigned as follows:

Bella Vista 36.37%
Morgan 36.36%
Estate of Neal Baker 0%
Edwin S. Pearlstine, Jr. 27.27%

68. Thus, at all times relevant Morgan has been a minority voting member of the LLC and at no time has Morgan had majority control of the

LLC, either as a member or as a manager. At all times relevant, the voting interests of Bella Vista were controlled by Fred and Gilbert. Bella Vista, Baker and Morgan each owned 26.66% so any two of them voting together were a majority. With Baker always voting the same as Bella Vista, Morgan had no control over the affairs of the Company, therefore Bella Vista, enabled by Baker, maintained total control.

69. Prior to the resignation of LLC member Neal Baker as a manager of the LLC on January 31, 2011, the co-Managers of the LLC were Baker and Fred, and together Bella Vista and Baker had majority voting manager control of the LLC.

70. Section 6.01 of the Operating Agreement provides:

> Notwithstanding the above, at all times while Bella Vista Partnership or any of its affiliates is a member of the Company, Stuart L. Fred (as the representative of Bella Vista Partnership) shall be one of the **Managing Members** (or in the event of his death or disability, John L. Gilbert shall serve in such capacity) and **at all times while Neal Baker or Tom Morgan is a Member**, Neal Baker shall be one of the **Managing Members** (**or in the event of his death or disability, Tom Morgan shall serve in such capacity**). (Emphasis added.)

71. Section 14.01 of the Operating Agreement provides that "[t]his Agreement may be amended only by a written instrument signed by all of the Members." Section 14.07 of the Operating Agreement provides that:

> Successors. Subject to the provisions hereof imposing limitations and conditions upon the transfer, sale or other disposition of Company Interests, of the provisions hereof shall inure to the benefit of and be binding upon the successors, legal representatives and assigns of the parties hereto.

72. As clearly provided in Sections 6.01, 14.01 and 14.07 of the Operating Agreement referenced above, at all times that Plaintiff Morgan was a Member of the LLC, Neal Baker or Plaintiff Morgan shall be one of the Managing Members, and when Neal Baker resigned as a manager on January 31, 2011, Tom Morgan was entitled to become, and automatically became by

operation of law, a Manager of the LLC (with the other Manager, Defendant Fred) as a substitute for Neal Baker, unless Morgan agreed otherwise in writing, which Morgan did not. Neal Baker and the Defendants were aware of the existence and content of Sections 6.01, 14.01 and 14.07 of the Operating Agreement at all times relevant to the Amended Complaint. Indeed, the attorney for the LLC specifically made Baker and Defendant Gilbert aware of the existence and content of Sections 6.01, 14.01 and 14.07 of the Operating Agreement in an e mail to Baker and Gilbert dated January 4, 2011, to which Gilbert gave on January 4, 2011, the following reply to said attorney and Baker:

> "Yikes ... I forgot that language was in the Agreement ... I'm sure Tom Morgan will not agree to change that ... Stuart [Fred] and I will be in Charleston next week so let's get together and strategize about this."

73. Despite the Defendants' knowledge of the requirements of Sections 6.01, 14.01 and 14.07 of the Operating Agreement stated above, and knowingly in direct violation thereof, on January 31, 2011, LLC members Fred, Gilbert and Baker signed a document entitled **UNANIMOUS CONSENT OF THE INITIAL MANAGING MEMBERS AND MAJORITY CONSENT OF THE MEMBERS OF 150 BEE STREET, LLC ("UNANIMOUS CONSENT"),** attached hereto as Exhibit #14, purporting to reduce the number of LLC Managers from two to one by Baker resigning as a Manager and Defendant Fred remaining the sole Manager of the LLC. This document was not signed or approved by Plaintiff Morgan or by LLC member Pearlstine, and therefore was invalid because the Operating Agreement could not be amended, according to Section 14.01 of the Operating Agreement quoted above, without the written consent of all the Members, and Morgan and Pearlstine never gave their consent to amend the Operating Agreement. Therefore, in accordance with the Operating Agreement, either Baker was required to remain a Manager of the LLC or Morgan was required to replace Baker as a Manager of the LLC. Upon information and belief, this **UNANIMOUS**

CONSENT document was signed by Gilbert, Fred and Baker to reduce any influence Plaintiff Morgan might have on the LLC due to the fact that Neal Baker, Morgan's brother in law, was a Manager and, in particular, to avoid and eliminate the possibility that Plaintiff Morgan would become a Manager when Neal Baker died or became incapacitated. Plaintiff Morgan was not informed and did not know that Baker had resigned, and Plaintiff Morgan was prevented from exercising the duties and privileges of a Manager until months after the death of Neal Baker.

74. After the death of Neal Baker, Morgan repeatedly demanded that he be recognized and treated by the LLC and its members as a co-Manager of the LLC with Defendant Fred, but the members and the LLC failed and refused to do so.

75. For example, on August 25, 2011, Plaintiff Morgan, through counsel, sent a letter to Defendant Fred and the LLC's attorney stating that Article 6.01 of the Operating Agreement had been triggered by the death of Neal Baker so as to make Plaintiff Morgan a Managing Member, and asking that they provide Plaintiff Morgan certain documents; change LLC bank accounts to make Morgan a signer of checks and giving him access to those accounts; and inform entities and individuals doing business with the LLC that Morgan was a new Manager of the LLC. In addition, Morgan stated that no LLC decisions should be made, checks issued, or contracts executed without Morgan's consent, and that Morgan did not approve charging certain travel expenses and private jets to the LLC. Attached to this letter and referenced therein was a copy of Article 6.02 of the Operating Agreement stating the powers Morgan would have as a Managing Member. The Defendants provided no response to this letter from Morgan, which is attached as Exhibit #9.

76. On and before August 30, 2011, Plaintiff Morgan, through counsel, asked Defendants Fred, Gilbert, Bella Vista, and the LLC, through counsel, if they would recognize Morgan as co-Manager of the LLC. On August 31, 2011, said Defendants, through the LLC's counsel, responded to Morgan by

informing Morgan's counsel, by recorded message, that the members of the LLC other than Morgan would not allow Morgan to be a Manager of the LLC. Specifically, the recording left by the LLC's attorney for Morgan's attorney said exactly the following:

> Chris, John Hagerty returning your phone call, and your question was, are they going to be amenable to Tommy stepping in our not, and they are not. There is going to be a problem along the lines we discussed earlier, and we should talk about it. Thanks.

77. Defendants Fred, Gilbert and Bella Vista misled the LLC's attorney into acting with them to refuse to recognize that Morgan had become and was entitled to become a co-Manager of the LLC upon the death of Baker, and said Defendants, Baker and the LLC acted to deprive Morgan of that right and position, including but not limited to doing each of the following:

A. The LLC stated, through LLC counsel, that it would not recognize Morgan as a Manager of the LLC;

B. As described above, on January 31, 2011, Baker, Gilbert and Fred secretly signed a resolution written by the LLC's attorney purporting that the LLC had only one Manager, Defendant Fred; and

C. Gilbert and Fred tried to cause LLC member Neal Baker to cancel his resignation and reinstate himself as a Manager and to have Baker serve as a co-Manager of the LLC with Fred instead of allowing Plaintiff Morgan to become co-Manager with Defendant Fred as required in the Operating Agreement.

78. Even after Baker's death and the letter dated August 25, 2012, attached as Exhibit #9 stating the all actions of the LLC needed to be approved by co-Manager Morgan, instead of recognizing Plaintiff Morgan as a co-Manager of the LLC as required by law, Defendants unlawfully took several unilateral actions detrimental to the LLC without the authorization of Morgan as a co-Manager

of the LLC and despite the vigorous written and verbal objections of Morgan, including but not limited to each of the following:

a. Prohibiting Morgan from talking to employees or contractors of the LLC;

b. Prohibiting Morgan from sharing control of LLC bank accounts;

c. Signing contracts with buyers of LLC condominiums without Morgan's permission;

d. Signing a listing agreement with a real estate agent without Morgan's permission;

e. Improperly writing big checks for Fred and Gilbert personally for their private jet without Morgan's permission;

f. Improperly paying themselves over $300,000 for a fake loan Defendants claimed to have made to the LLC; and

g. Selling a condominium below appraised value without the permission of Morgan

79. As a result of these unlawful unilateral actions by Defendants illegally depriving Morgan of his position of management and authority as a co-Manager of the LLC, and as a result of Defendants' fraud, conflicts of interest, and long-term hostility and lack of cooperation, Plaintiff Morgan filed and had no choice but to file a derivative lawsuit against the Defendants to stop the Defendants' unlawful actions. As stated in an e mail sent on November 17, 2011, by Plaintiff Morgan, through counsel, to Defendants Bella Vista, Gilbert and Fred, through counsel:

> [I]t is your clients' unilateral actions, in direct violation of the Operating Agreement and Mr. Morgan's written instructions as Managing Member, that have left us no choice but to litigate.

80. Accordingly, on January 26, 2012, the Plaintiff filed the Summons

and the Complaint, an ex parte Motion for a Temporary Restraining Order and an Affidavit in this matter. On that date the Honorable Thomas L. Hughston, Jr., Presiding Judge of the Ninth Judicial Circuit, issued a Temporary Restraining Order requiring that certain financial transactions of 150 Bee Street, LLC, occur only if Plaintiff Morgan, as a co-Manager of the LLC, had given prior written approval of those transactions in writing. In addition, on February 27, 2012, Judge Hughston granted, after a hearing, Plaintiff Morgan's Motion for a Preliminary Injunction by requiring that Defendants cease violating and begin complying with S.C. Code Ann & 33-44-404 and the Operating Agreement by (a) prohibiting any funds or assets of the LLC being spent, disbursed, transferred, distributed or otherwise removed without the prior written consent of both co-Managing members, Plaintiff Morgan and Defendant Fred, and by (b) requiring any and all decisions of the LLC be made in compliance with applicable law and the Operating Agreement. Judge Hughston issued these injunctions in part because he found, correctly, that the conduct of the Defendants enjoined had caused or would cause irreparable harm to the LLC, and that Morgan likely would prevail on the merits. These pleadings identified above are restated and incorporated herein.

81. In addition, on February 27, 2012, Judge Hughston issued an order denying Defendants' Motion to Dismiss and to Compel Arbitration, stating that arbitration of this matter was not required for the several reasons stated in the Judge's order. Said order is restated and incorporated herein.

82. The Complaint, the Temporary Restraining Order, the Preliminary Injunction Order and the Order denying the Motion to Dismiss and to Compel Arbitration referenced above all identified this lawsuit brought by Plaintiff Morgan as a derivative action on behalf of the LLC, as well as an individual action. At no time, in an Answer, in Defendants' Motion to Dismiss filed on January 31, 2012, in any other pleading or otherwise, did the Defendants object to this lawsuit having been brought in a derivative capacity, due to the failure of demand, lack of futility or for any other reason, until the

Defendants filed the pending Motion to Dismiss on June 5, 2018. As a result, Plaintiff Morgan has been greatly prejudiced, in part by spending time, effort and large sums of money paying attorney fees to finance this derivative lawsuit on behalf of the LLC, in reasonable reliance on the belief that the Defendants did not object to the derivative lawsuit and with the expectation that because the lawsuit was derivative in nature, if the lawsuit were successful, Plaintiff Morgan would be reimbursed attorney fees and costs as provided by statute. Defendants knew or should have known that Plaintiff Morgan and the LLC relied on the reasonable beliefs that Defendants did not object to the lawsuit being a derivative action and that this lawsuit is a valid derivative action and had those reasonable beliefs due to the failure for years of the Defendants to have objected to this action being derivative in nature. Defendants were on notice that Plaintiff Morgan brought this lawsuit in a derivative capacity and that by statute his attorney fees might be repaid if the derivative lawsuit were successful, but for over six years deliberately let Plaintiff Morgan continue prosecuting and financing this derivative action lawsuit without objecting to the lawsuit being considered a derivative action. Defendants' multi-year failures to object to this lawsuit being a derivative action and to identify any grounds for that objection severely prejudiced the LLC and Plaintiff Morgan and constitute a waiver of any objection Defendants now make, belatedly, that this lawsuit should not be derivative in nature.

83. Prior to filing this lawsuit Plaintiff Morgan repeatedly offered and requested mediation and arbitration, and again while the Defendants' Motion to Dismiss ruling was pending, but the Defendants refused. Moreover, Plaintiff Morgan could not continue to wait for mediation and arbitration but had to file this lawsuit to protect the interests of and to prevent irreparable harm to the LLC and its members because Defendants Bella Vista, Fred and Gilbert refused to stop taking unilateral actions harmful to the LLC without the consent of Plaintiff Morgan as a co-Managing Member; unlawfully failed to recognize Plaintiff Morgan as a co-Manager of the LLC; and, indeed,

unlawfully plotted and conspired, in violation of the Operating Agreement, to avoid Plaintiff Morgan serving as a co-Manager of the LLC by operation of law upon the death of LLC member Neal Baker.

84. Defendants wrongfully refused to recognize the authority of Plaintiff Morgan as a Managing Member of the LLC to manage the LLC even after the lawsuit referenced above had been filed.

85. For example, on February 17, 2012, Plaintiff Morgan sent an e mail to Bill Shields, an accountant for the LLC, copied to members of the LLC and their attorneys, stating in part as follows:

> Good morning Bill. I have reviewed the capital accounts of the partners and am confused about some of the entries. Could you please do a capital account reconciliation, that explains all of the capital accounts of the partners that relates back to the actual capital calls from the managers. I would appreciate it if you could email that reconciliation to all of the partners. Thanks for your help.

86. In addition, on July 23, 2012, Plaintiff Morgan sent an e mail to Bill Shields, an accountant for the LLC, copied to members of the LLC and their attorneys, stating in part as follows:

> As per my previous email, I want to know how much cash was put in by each member and when it was put in. If cash was not put in by the member for its capital call and a journal entry was made by you to represent that the member actually made its capital call, then I need a full explanation. Please just give us this information for the years you were doing the books. We can get the earlier years at a later time.

87. In response to those two e mails and other requests by Plaintiff Morgan for basic information about the LLCs' finances, the Defendants, through counsel, claimed in an e mail dated July 25, 2012, to the LLC's attorney and members, and to others, that Plaintiff Morgan did not have authority as a Managing Member to request or obtain documents and other information about the LLC's finances from the accountants for the LLC, including the information requested by Plaintiff Morgan as stated above.

88. In addition, Defendants refused to call a meeting of the members

of the LLC to vote on whether to add a member of the LLC as a managing member. Specifically, on or about June 5, 2012, Morgan, Pearlstine and the Estate of Neal Baker delivered a letter dated May 31, 2012, to Morgan and Fred, co-Managing Members of the LLC, demanding that they convene a meeting of the members of the LLC and include in the agenda of that meeting "the election of additional Managers." In violation of the Operation Agreement, Fred responded, through counsel, to that demand in a letter dated June 6, 2012, by failing to recognize that, in accordance with the Operating Agreement, Morgan and Pearlstine combined had a majority of the votes of the LLC and that Fred and Morgan as Managers were obligated to call a meeting of the members of the LLC to discuss the topics identified in the demand by Pearlstine and Morgan; and by refusing to convene a meeting of the LLC members except to discuss the limited topic of distributing funds to members of the LLC.

INDISPENSABLE PARTY

89. Rule 19 of the South Carolina Rules of Civil Procedure, entitled "Required Joinder of Parties," provides that "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction *must be joined* as a party if in that person's absence the court cannot accord complete relief among existing parties, or that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest. . . ." (Emphasis added.)

90. Said Rule 19 is modeled on Federal Rule of Civil Procedure 19. The Official Comments to FRCP 19 provide, among other things, that "if a person as described [above] is amenable to service of process and his joinder would not deprive the court of jurisdiction *he should be joined as a party*. . .. A person may be added as a party at any stage of the action on motion or on the court's initiative." (Emphasis added.)

91. To the same effect, South Carolina Code § 15-48-60, "Joinder of parties to arbitration," provides that "upon application to the arbitration panel by a party, a person who is subject to service of process over the subject matter of the arbitration *shall be joined* as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, [or] (2) he claims an interest relating the subject of the action and is so situate that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest." (Emphasis added.)

92. Because the Defendants have consented to arbitration of the derivative action in this matter, they are bound by South Carolina Code § 15-48-60, referenced above. Accordingly, the absence of the Company's name from the caption in the original complaint in this case does not justify dismissal of the derivative action. To the contrary, South Carolina statue provides that the Company "shall be joined" in the arbitration, and they therefore must be added as a party in the caption.

93. Moreover, the fact that the original complaint was a derivative action brought by Morgan against the LLC as a nominal defendant was known to the Defendants as that clearly was stated several places in the Complaint and in other pleadings in this lawsuit, including in orders by the Court. Therefore, Defendants were not prejudiced by the fact that the LLC was not named as a party in the caption of the original complaint. This lawsuit should not be dismissed because the caption in the original complaint inadvertently failed to state the LLC was a party, and the LLC should be added in the caption of this Amended Complaint to join the LLC as a party to this lawsuit.

FACTUAL BACKGROUND OF VIOLATIONS

94. Defendants entered into various contracts whereby the Defendants were to perform certain matters for the benefit of 150 Bee Street, LLC and its owners, including but not limited to acting as general contractor and as developer for the project.

95. Defendants individually, or as manager or owner, and as part of

their contract with 150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street, LLC (including Morgan) for a fee of $750,000.

96. Upon information and belief, the Defendants have wrongfully paid themselves more than $750,000.00 with Company funds.

97. Upon information and belief, Defendants continued to improperly pay themselves a monthly amount from Company funds, even though a paid Property Manager was on location at 150 Bee Street.

98. Upon information and belief, Defendants while acting as Developer improperly took money for their own benefit to the detriment of 150 Bee Street, LLC and its members.

99. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor and/or in another capacity, improperly coded charges to the Company, including but not limited to:

a. Personal home remodeling in the amount of $1,325.00 charged to the Company, which was charged to the Company as "Make Ready Units-Paint Work;"

b. Airplane equipment purchased from Blue Mountain Avionics, which was charged the Company as "Repairs and Maintenance;

c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"

d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"

e. Fuel, Nextel and Cabela's bag charged to the Company as "CHS Mental Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged in the amount of $12,509.00 to the Company as "Travel;"

g. Personal home automation and audio system purchased in the

amount of $46,139.64 installed at the private residence of Stuart Fred in Scottsdale, Arizona, coded as "AV Media, Club House, Bee Street; and

h. Other charges to be learned through the discovery process and determined by the trier of fact.

100. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor and/or another capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a. Expenses related to a trip to Cancun, Mexico;

b. Expenses related to lasvegas.com;

c. Expenses related to a trip to Scottsdale, AZ;

d. Expenses related to a trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to a trip to Pacific Grove, Monterey and Carmel, California;

g. Expenses related to private aircraft; and

h. Other charges to be learned through the discovery process and determined by the trier of fact.

CONSTRUCTION

101. Defendants individually, and/or as manager or owner, and as part of their contract with 150 Bee Street or Bomasada as Developer for 150 Bee Street, LLC, represented that they would act as General Contractor on the 150 Bee Street project, for the benefit of the owners of 150 Bee Street, LLC including Morgan, for a fee of 1% of the construction costs.

102. Upon information and belief, Defendants collected well over 1% of the construction costs.

103. Upon information and belief, Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer, so they could continue to pay themselves monthly and so they could pay for their jet airplane.

104. Defendants, while acting as General Contractor, promised and represented they would do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street, LLC and the members. Despite this representation, the work went millions of dollars over budget.

105. Upon information and belief, Defendants while acting as General Contractor, wrongfully diverted funds and assets for their own benefit to the detriment of 150 Bee Street, LLC and the members.

PRIVATE JET BILLINGS TO THE COMPANY FOR PERSONAL ITEMS

106. Defendants improperly billed the Company and paid themselves from Company funds for travel expenses, including billing rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property or its business.

107. Upon information and belief, through 2010, Defendants authorized payments to Lauralis of $454,155,00 and $39,059.77 for airplane fuel expense from 150 Bee Street, LLC. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

108. Upon information and belief, from 2005 through 2010, Defendants systematically and improperly increased the rate they charged 150 Bee Street, LLC for their private jet as follows:

a. From $850.00 an hour to $1,050.00 an hour in 2005;

b. From $1,050.00 an hour to $1,200.00 an hour in 2005;

c. From $1,200.00 an hour to $1,750.00 an hour in 2006; and

d. From $1,750.00 an hour to $2,100.00 an hour in 2008.

109. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Construction Travel Expenses" of $481,250.00 to BIG II. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

110. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Corporate Overhead" of $360,000.00 to BIG II. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

111. Plaintiff has requested to see backup documentation for these charges, but Defendants have refused and continue to refuse to permit Plaintiff to see BIG II'S financial records related to the project.

112. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their Private jet usage to the Company.

113. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their personal vacations to the Company.

114. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their home remodeling to the Company, which was charged to the Company as "Make Ready Units-Paint Work."

115. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their personal golf outings to the Company.

116. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of their expensive dinners to the Company.

117. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of $12,509.00 to 150 Bee Street

for an African Safari.

118. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of gift cards from golf shops to 150 Bee Street.

119. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging for airplane equipment purchased from Blue Mountain Avionics, which was charged the Company as "Repairs and Maintenance."

120. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of a payment for a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs."

121. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of $3,000.00 for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training- Education."

122. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of a payment of repairs and renovation of a personal aircraft hangar in Houston, TX.

123. Defendants knew or should have known that the other members of 150 Bee Street did not approve of the charging of a Personal home automation and audio system purchased in the amount of $46,139.64 installed at the private residence of Stuart Fred in Scottsdale, Arizona, coded as "AV Media, Club House, Bee Street."

124. Plaintiff instructed Defendants in writing that they were no longer to bill the Company for their private jet.

125. In direct disregard of law and the duties they owe to 150 Bee Street and its members, Defendants have withdrawn for themselves, directly or through their entities, hundreds of thousands of dollars or more from 150 Bee Street funds.

126. On September 9, 2011, Defendants wrote themselves a check from Company funds for $28,350.00, claiming it was for their private jet usage, even after Plaintiff had instructed Defendants in writing that they were no longer to bill the Company for their private jet.

127. Upon information and belief, Defendants continued to make hundreds of thousands of dollars in capital calls from the members even after the project had finished in order to fund their personal jet and other personal items and threatened to dilute Plaintiff out of his interest in the Company at a 35% interest rate and to foreclose his interest if Plaintiff did not fund the capital calls.

128. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.03 that the following actions shall not be taken on behalf of the Company without the Majority Consent of the members:

> i. The purchase, sale, assignment, transfer, exchange or other disposition of any real property owned by the Company [and]
>
> ii Deviating from the Budget in a net amount greater than fifty thousand and no/100 dollars ($50,000).

129. Defendants did not seek or obtain the Majority Consent of the members in accordance with Article 6.03 of the Second Amended and Restated Operating Agreement of 150 Bee Street.

FRAUDULENT CONCEALMENT OF WRONGDOING; EQUITABLE ESTOPPEL

130. Defendants have used efforts to hide, conceal and cover up the extent of their improperly charging of items to the Company.

131. Defendants have taken steps to hide their misconduct from Plaintiff and others in several ways, including but not limited to:

a. Hiding and concealing Construction Records;

b. Requiring the Company CPA to protect company records from disclosure;

c. Concealing or misrepresenting Company expenses;

d. Mispresenting sales figures;

e. Concealing information about contract renewals;

f. Secreting relevant company records in the name of other entities owned by or controlled by Defendants for the purpose and with the effect of blocking Plaintiff's access to those records;

g. Concealing the issuance of large checks to other entities owned by or controlled by Defendants;

h. Extracting funds under false pretenses to deter detection; and

i. In other manners to be shown the panel.

132. The Defendants, by reason of their controlling power over Defendant 150 Bee Street, LLC and relationship with the Plaintiff and 150 Bee Street, were at all times in the position of a fiduciary and of trust and confidence such that they owed a duty to disclose timely material facts to the Plaintiff and to 150 Bee Street. The Defendants knew they were stealing from and misappropriating the assets of 150 Bee Street, and that the construction for which they were responsible was defective, but they purposely and fraudulently concealed material facts about their wrongful activities from 150 Bee Street to prevent the discovery of their wrongdoing.

133. As a result of this fraudulent concealment, the statutes of limitation regarding the causes of action of the Plaintiff have been tolled and the Defendants are equitably estopped to use a statute of limitations as a defense to this lawsuit.

REAL ESTATE SALES

134. Defendants hired a Nashville Real Estate Company to act as the Real Estate agency for this Charleston South Carolina condominium project.

135. Upon information and belief, Defendants had a relationship with this Nashville Real Estate Company that either benefitted Defendants personally, or benefitted an entity or entities owned by Defendants.

136. Upon information and belief, the Nashville Real Estate company was paid a commission on many of the closings.

137. Defendants disregarded their fiduciary duties to Morgan and 150 Bee Street when they selected a Nashville real estate company, rather than considering a local Charleston South Carolina Real Estate agency which knew the local market, and which might have reacted to the local market faster. Further, hiring and using the Nashville real estate company was illegal because the Nashville real estate company was not licensed to sell real estate in South Carolina but nevertheless was paid commissions by the Defendants. Defendants have a duty to account to Defendant 150 Bee Street LLC and/or Plaintiff for all the illegal commissions paid out.

138. Defendants eventually cut ties between the Nashville Real Estate company and 150 Bee Street, but not until after a downturn in the real estate market.

MANAGEMENT SINCE NEAL BAKER PASSED AWAY

139. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, that the two initial Managers of 150 Bee Street were Neal I. Baker and Defendant Fred.

140. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, that in the event of Neal Baker's death or disability, Plaintiff Tom Morgan shall serve as Manager.

141. Neal I. Baker passed away in 2011, and Plaintiff Morgan attempted to serve as co-manager with Defendant Fred.

142. Defendants refused to recognize Plaintiff Morgan as a co-manager and thwarted Plaintiff Morgan's attempts to serve as co-manager in several ways, including but not limited to:

a. Claiming that Plaintiff Morgan was not a co-manager;

b. Refusing to allow Plaintiff Morgan to see the Construction Records;

c. Refusing to allow the Company CPA to let Plaintiff copy company records;

d. Refusing to allow Plaintiff to be a joint signer on Company checks;

e. Refusing to notify Plaintiff in advance about Company expenses;

f. Refusing to keep Plaintiff informed about upcoming sales;

g. Refusing to allow Plaintiff a say in the pricing of the condo units;

h. Refusing to allow Plaintiff a say in who was selected to act as the real estate agent for the company;

i. Refusing to allow Plaintiff to sign off on the unit closings;

j. Refusing to communicate contract renewals in advance of their signing;

k. Systematically retaining relevant company records in the name of other entities owned by or controlled by Defendants in an effort to block Plaintiff's access to those records;

l. Refusing to tell Plaintiff before writing large checks to other entities owned by or controlled by Defendants;

m. Writing large checks to other entities owned by or controlled by Defendants; and

n. Ignoring Plaintiff's written instructions; and in other manners to be shown the panel.

All of the foregoing actions and inactions were wrongful as to Plaintiff Morgan.

LAWSUIT FOR CONSTRUCTION DEFECTS

143. On August 22, 2014, Bee Street Lofts Homeowners Association, Inc. and Mark Laboccetta filed a lawsuit (Case No. 2014-CP-10-5120) ("construction lawsuit") against Fred, Gilbert, Bomasada Group, BIG II, 150 Bee Street and others alleging that numerous construction defects in the condominium project owned by 150 Bee Street were caused by various fraudulent, negligent and other illegal acts by Fred, Gilbert, Bomasada Group, BIG II, 150 Bee Street and others. The pleadings and evidence in that lawsuit are hereby restated as if stated verbatim herein and are incorporated herein by reference.

144. As a result of these illegal acts by the Defendants as alleged in this construction lawsuit, 150 Bee Street, LLC, the Plaintiff and other members of the Company suffered substantial financial losses, including attorney fees and costs, in an amount to be determined by the trier of fact. Defendants owe Defendant 150 Bee Street, LLC and/or Plaintiff for all of the losses suffered by reason of Defendants' wrongful conduct in the construction lawsuit.

FAILURE TO OBTAIN INSURANCE FOR COMPANY

145. 150 Bee Street, LLC paid premiums for insurance policies but was denied insurance coverage because 150 Bee Street was not named as an insured by the Defendants, all of whom were responsible for obtaining insurance for 150 Bee Street. As a result, 150 Bee Street had to pay attorney fees instead of insurance policies for which the LLC had paid doing so. Defendants owe for the failure to properly insure Defendant 150 Bee Street, LLC.

CONDUCTING BUSINESS WITHOUT REQUIRED LICENSES

146. BIG II signed an AIA Contract with 150 Bee Street, LLC to act as the General Contractor for the project. Upon information and belief, BIG II's signing that contract obligating itself to serve as the General Contractor for the project when BIG II was not licensed as a General Contractor in South Carolina is a misdemeanor.

147. Upon information and belief, Bomasada paid fines in Arkansas for using unlicensed contractors, and Bomasada used a contractor named Hightower Construction Co., Inc. ("Hightower") to pull the permit for the project because Hightower was licensed but Bomasada was not licensed in South Carolina. Bomasada performed all the interior finish and other work on the project; signed subcontractor agreements with subcontractors for the project; and directed the work of those subcontractors. Upon information and belief, Bomasada committed a crime by doing this work while not being a licensed contractor in South Carolina.

148. Upon information and belief, Fred and Gilbert hired a Nashville real estate company, not licensed to sell real estate in South Carolina, to handle and control the sales of the units of the project, for which the unlicensed Nashville real estate company unlawfully received commissions. Those illegal commissions paid by Defendant 150 Beet Street, LLC are owed by Defendants to 150 Bee Street, LLC.

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

149. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

150. At all times relevant, Defendants owed fiduciary duties to Morgan, to other members of the LLC and to 150 Bee Street.

151. Defendants breached their fiduciary duties to Morgan and to 150 Bee Street in various respects, including in the manners described herein. Defendants wrongful breaches of fiduciary duty were fraudulently concealed until within three years of the date this lawsuit was brought.

152. Upon information and belief, Defendants presently continue to breach their fiduciary duties owed to Morgan and to 150 Bee Street, LLC.

153. Morgan, other members of the LLC (excluding Bella Vista) and 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of fiduciary duties by the Defendants, and should be compensated for said harm and damages.

154. Such breaches of fiduciary duties were intentional, willful, wanton, reckless, malicious and done with the conscious disregard of the rights of Morgan, other members of 150 Bee Street (excluding Bella Vista) and the LLC.

FOR A SECOND CAUSE OF ACTION

(Breach of Duties of Good Faith and Fair Dealing)

155. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

156. At all times relevant, Defendants owed duties of good faith and fair dealing to Morgan, 150 Bee Street and other members of 150 Bee Street.

157. Defendants breached these duties of good faith and fair dealing in various respects, including but not limited to the manners described herein.

158. Upon information and belief, Defendants presently continue to breach their duties of good faith and fair dealing.

159. 150 Bee Street, Morgan and other members of 150 Bee Street (excluding Bella Vista) have been harmed and damaged as a direct and proximate result of said breaches of duties of good faith and fair dealing by the Defendants, and should be compensated for said harm and damages..

160. Said breaches of duties of good faith and fair dealing were intentional, willful, wanton, malicious, reckless and done with the conscious disregard of the rights of Morgan, other members of 150 Bee Street (excluding Bella Vista) and the LLC.

FOR A THIRD CAUSE OF ACTION

(Member Oppression – SC Code § 33-44-801(e))

161. Plaintiff Morgan re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

162. The Defendants owed duties to Morgan not to engage in conduct unlawful, oppressive, fraudulent, or unfairly prejudicial to Morgan.

163. Defendants breached their duties not to oppress Morgan. As alleged they also wrongfully acted in ways that were fraudulent, unlawful and unfairly prejudicial. At all times relevant, the Defendants, functioning as a group that was in control of 150 Bee Street, acted and will continue to act in a manner that is unlawful, oppressive, fraudulent and unfairly prejudicial to the Plaintiff by engaging in various self-dealing, self-serving and improper acts to the exclusion and detriment of the Plaintiff and others.

164. Upon information and belief, Defendants presently continue to breach their duties not to oppress Morgan in the manners described herein and, in such ways as will be learned through the discovery process. The Defendants have acted and will continue to act in a manner that is unlawful, oppressive, fraudulent and unfairly prejudicial to the Plaintiff, in violation of SC Code § 33-44-801(e).

165. Morgan has been harmed and damaged as a direct and proximate result of said breaches of duties not to oppress by the Defendants. Such breaches of duties not to oppress have been and will continue to be intentional, willful, wanton, malicious, reckless and done with conscious disregard of the rights of Morgan, other members of 150 Bee Street and the LLC.

166. As a result of the wrongful oppressive conduct of the Defendants referenced herein, the LLC must be dissolved, and the Plaintiff and other LLC members (excluding Bella Vista) are entitled to a decree winding up 150 Bee Street and to an award to them of damages in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION

(Civil Conspiracy)

167. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

168. Defendants acting individually or through their agents have conspired for the purpose of benefitting certain members of 150 Bee Street and injuring Plaintiff Morgan and 150 Bee Street, and causing special damages, to include:

a. Loss to 150 Bee Street, Morgan and its other members of the past, present and future revenues in an amount to be determined by the trier of fact from improper billing of travel expenses, including the billing at rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property;

b. Loss to 150 Bee Street, Morgan and its other members in an amount to be determined by the trier of fact of profits from returns on their investment from improper management or gross mismanagement;

c. Diminished value of the 150 Bee Street property arising from failure to react to market conditions which impacted adversely the marketability of the 150 Bee Street property to prospective buyers;

d. Loss to 150 Bee Street, Morgan and other members, and diminished value of the 150 Bee Street property, due to intentional, grossly negligent and negligent acts causing construction defects, and concealing those acts; and

e. Other special and consequential damages as may be proven at trial.

169. Defendants acting individually or through their agents have acted in concert for the common purpose of injuring Morgan, other LLC members and 150 Bee Street and have thereby visited upon Morgan, other LLC members and 150 Bee Street one indivisible wrong, and accordingly each is vicariously liable for the actions of the others and their liability to Morgan, other LLC

members and 150 Bee Street in all respects is joint and several.

170. Upon information and belief, this conspiracy is on-going, as Defendants presently continue to conspire with one another for the common purpose of injuring Morgan, other LLC members and 150 Bee Street.

171. As a result of the aforementioned actions, which are more fully explained above, of Defendants acting individually or through their agents, Morgan, other LLC members and 150 Bee Street have been and are being damaged.

172. The actions of Defendants acting individually or through their agents were and are intentional, willful, wanton and reckless and in conscious disregard of the rights of Morgan, of other LLC members and of 150 Bee Street, warranting an award of punitive damages.

173. As a result of the aforementioned actions, Morgan and 150 Bee Street are entitled to damages in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION

(Conversion)

174. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

175. By virtue of the conduct summarized above, Defendants came to exercise unauthorized dominion and control over the property, assets, and/or funds belonging to the entity and joint venture known as 150 Bee Street, and of the Plaintiff.

176. Defendants' dominion and control over said property, assets and/or funds has been to the exclusion of, and in defiance of, the rights of the Plaintiff and the LLC; has interfered with the rights of the Plaintiff and the LLC in and to such property, assets, and/or funds; and was without the Plaintiff's and the LLC's permission.

177. Upon information and belief, Defendants wrongfully assessed and/or charged Plaintiff and the LLC, either individually or through his

interest in 150 Bee Street, purported commissions, pass through costs, travel and entertainment expenses, personal expenses, real estate fees, management fees and/or other management or construction compensation in excess of the written agreements, without Plaintiff's or the LLC's written or otherwise proper authorization or approval.

178. Upon information and belief, as a direct and proximate result of Defendants' conversion of the property, assets, and/or funds belonging to the joint venture, the LLC, and the Plaintiff, the Plaintiff, either individually or through his interest in 150 Bee Street, other members of the LLC and the LLC have been damaged in an amount to be determined by the trier of fact.

179. Upon information and belief, in doing the acts alleged above, Defendants acted willfully, maliciously, recklessly, carelessly, and/or wantonly for the purpose of causing injury to the Plaintiff, other members of the LLC (excluding Bella Vista) and the LLC. As a result, the Plaintiff, other members of the LLC (excluding Bella Vista) and the LLC are entitled to an award of actual and punitive damages in an amount to be determined by the trier of fact.

FOR A SIXTH CAUSE OF ACTION

(Breach of Contract)

180. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

181. Plaintiff, either individually or through 150 Bee Street, and the Defendants entered into various contracts, including but not limited to an Operating Agreement, a Development Agreement and an AIA Contractor Agreement, all of which are incorporated herein, whereby the Defendants were to carefully, faithfully, honestly and loyally perform certain duties for the benefit of the Plaintiff, including but not limited to acting as general contractor and as developer for the project.

182. Defendants breached their duties and obligations under, *inter alia*, the Operating Agreement, the Development Agreement, and the AIA Contractor

Agreement, by failing to act carefully, honestly, faithfully and loyally, including but not limited to failing to supervise the construction of the project as required by those agreements.

183. Defendants individually, and/or as manager and/or owner, and as part of their contract with150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street (including Morgan), for a fee of $750,000.00.

184. Upon information and belief, Defendants have paid themselves more than $750,000.00.

185. Defendants individually, and/or as manager and/or owner, and as part of their contract with 150 Bee Street or Bomasada Group as Developer for the LLC, entered into an agreement/contract to act as General Contractor on the 150 Bee Street project, for the benefit of the owners of the LLC including Morgan, for a fee of 1% of the construction costs.

186. Upon information and belief, Defendants have breached the agreement/contract and collected well over 1% of the construction costs.

187. Upon information and belief, Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer so that they could continue to improperly pay themselves monthly with Company funds and so that they could improperly pay for their jet airplane with Company funds.

188. Defendants while acting as General Contractor promised and contracted to do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street and the members but ended up going millions of dollars over budget anyway, in breach of the contract.

189. Upon information and belief, Bomasada and BIG II improperly charged the LLC for items one or both of them, and/or the subcontractors, did improperly causing construction defects. Those charges should have been paid by Bomasada, BIG II and/or the subcontractors, under warranties or

otherwise, because they and not the LLC caused the defects. Further, construction on the project lasted years beyond the sixteen months scheduled, due to faulty workmanship, errors, cover ups and deceit by the Defendants and the subcontractors. The Defendants wrongfully charged the LLC to fix construction defects caused by the Defendants and/or the subcontractors, when the fixing of those construction defects could and should have been paid by the parties causing the defects and by warranties on construction. The Plaintiff should be repaid all monies it paid to correct errors and construction defects caused by the Defendants and/or the subcontractors.

190. Upon information and belief, Defendants while acting as General Contractor improperly retained any savings for their own benefit to the detriment of the LLC and the members.

191. Defendants failed to obtain insurance for 150 Bee Street in violation of their obligations to do so, as provided, *inter alia*, by the Development Agreement, the AIA Contractor Agreement, the Operating Agreement and other agreements.

192. Upon information and belief, Defendants' actions or inactions in failing to perform the contracts as specified and agreed are material breaches of the contracts that resulted in the construction project costing millions of dollars over budget; the payment and loss of huge sums of Plaintiff's money as a result of the construction lawsuit; and other damages.

193. Upon information and belief, Defendants failed to perform their obligations as the developer and as the general contractor for the construction project, resulting in construction defects causing the LLC to be sued and significant monetary losses to the LLC, to Morgan and to other LLC members.

194. Defendants ignored and failed to comply with the City of Charleston's building code for the ground floor retail portion of the project, which caused delays in the construction and caused the City not to issue a Certificate of Occupancy or Completion. As a result, many buyers otherwise ready to purchase units of the project would not close on their units because their contract said they did not have to

close until the project got its Certificate of Occupancy, and the project units had only a temporary certificate of occupancy ("TCO"). Defendants did not obtain a final Certificate of Occupancy until nearly a year after getting the TCO and after the Defendants should have obtained the Certificate of Occupancy. During that approximate one-year delay, real estate prices collapsed, and many purchasers backed out of their contract to purchase, thereby costing the Company millions of dollars, all due to the wrongful and grossly negligent failure of the Defendants to obtain the Certificate(s) of Occupancy timely, in violation of their contractual and other duties.

195. BIG II failed to supervise the contractors who worked on the project and thereby caused significant construction defects resulting in huge losses to the Plaintiff.

196. As a result of Defendants' actions or inactions, the Plaintiff, other LLC members and the LLC have been directly and proximately damaged by the foregoing material breaches of contract in an amount to be determined by a trier of fact.

197. As a result of Bomasada's material breaches of the Development Agreement, the Defendants should return the entire Development fee of $750,000 or more and all Reimbursed Expenses, whether legitimate or not, to the LLC.

198. As a result of BIG II's material breaches of the Contract Agreement, the Defendants should return the entire Contractor Fee of 1% or more and all reimbursed expenses, whether legitimate or not, to the LLC.

199. The Plaintiff, other LLC members (excluding Bella Vista) and the LLC are entitled to a money judgment against Defendants in an amount to be determined by a trier of fact, plus reasonable attorney's fees and costs, to the extent allowed by law.

FOR A SEVENTH CAUSE OF ACTION

(Accounting)

200. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

201. 150 Bee Street and its members are all in a fiduciary relationship with one another and fiduciary duties are owed to one another. In addition, the members of 150 Bee Street owe duties of good faith and fair dealing, and not to engage in oppression, to each other member and to 150 Bee Street.

202. Due to the actions of Defendants described above, Plaintiff has requested, and hereby again requests, from Defendants an accounting as to the operations of the joint venture, 150 Bee Street, and any companies Gilbert, Fred, Bella Vista, Lauralis, Bomasada Investment and Bomasada Group own or owned that received money, goods, or services from or performed services for 150 Bee Street, or whose business is or was or could be associated with 150 Bee Street, including but not limited to the following: Defendants Bella Vista, Lauralis, Bomasada Investment and Bomasada Group.

203. Plaintiff is not presently aware of all of the money, funds, assets, and/or business opportunities belonging to the joint venture or 150 Bee Street that Defendants have misappropriated to themselves and their other companies and is not aware of all of the specific purposes for which Defendants have used said money, assets, and/or business opportunities. Upon information and belief, Defendants used said money, assets, and/or business opportunities to benefit themselves personally or their other companies, in breach of their fiduciary duties.

204. Defendants have failed or refused to render a proper accounting as to the operations, funds, assets, property, and business opportunities of the joint venture and the limited liability company.

205. Plaintiff, other members of the LLC (excluding Bella Vista) and the LLC are entitled to an Order requiring a complete accounting as to expenses, income, assets, and profits of the joint venture and the limited liability companies above-referenced and further requiring the Defendants to

hold as trustee for the Plaintiff and the other LLC members (excluding Bella Vista) individually or for 150 Bee Street any property, profit, or benefit derived by the Defendants in the conduct of the business of the joint venture, and/or the limited liability company.

206. Plaintiff and the LLC have no adequate remedy at law otherwise to get this information.

FOR AN EIGHT CAUSE OF ACTION

(Unfair Trade Practices Act)

207. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

208. The aforementioned acts, practices, and conduct of the Defendants were and are unfair and deceptive.

209. The aforementioned acts, practices, and conduct of the Defendants were and are against the public interest and these acts and practices are capable of repetition.

210. The Defendants' actions were and are willful and wanton in that Defendants knew or should have known that their conduct was unfair and deceptive, and therefore a violation of this State's statutes concerning unfair and deceptive acts and practices.

211. As a result of Defendants' Unfair Trade Practices Act violations, the Plaintiff, other LLC members (excluding Bella Vista) and the LLC have been damaged through their loss of their respective investments and anticipated profits, and they have been subjected to aggravation and harassment as a result of Defendants' conduct.

212. As a result of Defendants' unfair and deceptive acts or practices in violation of the State's statutes, the Plaintiff, other LLC members (excluding Bella Vista) and the LLC pray for their actual damages, together with treble damages of three times his actual damages, punitive damages, plus Plaintiff's reasonable attorney's fees, costs and disbursements of this action.

FOR A NINTH CAUSE OF ACTION

(Unjust Enrichment)

213. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

214. Plaintiff and Defendants entered into the joint venture summarized above whereby Defendants promised and agreed to act in good faith.

215. In accordance with the agreement, Plaintiff advanced and contributed a large sum of cash and/or funding needed for the project.

216. Plaintiff contributed these funds and invested his time and resources to the project, but due to the conduct of the Defendants, Morgan, other LLC members and the LLC have sustained losses while the Defendants have profited enormously.

217. Plaintiff conferred a valuable benefit upon the Defendants which they have realized in full.

218. Defendant prolonged the sales process on purpose so that they could personally benefit through fees and charges they passed on to and through the Company. Defendants also caused significant construction defects by their intentional, grossly negligent and negligent acts, which caused huge losses to Morgan, other LLC members and the LLC.

219. Allowing Defendants to retain the amounts they have taken out of the Company would be unjust.

220. There is now justly due and owing to Plaintiff and other LLC members (excluding Bella Vista) from Defendants the amount of their respective investments in the project and to Plaintiff, other LLC members (excluding Bella Vista) and 150 Bee Street the reasonable present value of all amounts improperly billed to the Company by the Defendants beyond what Defendants were contractually permitted.

221. The amount to be returned by Defendants should be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION

(Fraud)

222. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

223. Defendants represented to Plaintiff that they would be acting as Developer, Manager, Fiduciary, Contractor, or other capacity for the benefit of Plaintiff and 150 Bee Street, LLC.

224. Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a. Personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"

b. Airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"

c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"

d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"

e. Fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged to the Company as "Travel;" and

g. Other charges to be determined by the trier of fact.

225. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made credit card or other charges to the Company, including but not limited to:

a. Expenses related to trip to Cancun, Mexico;

b. Expenses related to trip to lasvegas.com;

c. Expenses related to trip to Scottsdale, AZ;

d. Expenses related to trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to private aircraft;

g. Expenses related to installing a home automations system in Fred's Scottsdale, Arizona home; and

h. Other charges to be determined by the trier of fact.

226. Defendants prolonged the sales process on purpose so that they could personally benefit through fees and charges they passed on to and through the Company.

227. Defendants knew that these charges were not Company charges or otherwise related to the business of 150 Bee Street, LLC.

228. On or about February 27, 2005, Defendants represented to Plaintiff as follows:

> BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE....

229. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

230. Upon information and belief, Defendants improperly profited more than the 1% fee.

231. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

232. Upon information and belief, Defendants knew that they would

be able to hide the invoices and bills from Plaintiff and did, in fact, hide the invoices and bills from Plaintiff. To this date, Defendants have intentionally withheld BIG II's financial records related to the project.

233. Defendants knew that they could reduce the unit prices and sell the units faster.

234. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff or otherwise mislead Plaintiff.

235. Defendants intentionally failed to reduce the unit prices with the intent to mislead Plaintiff and/or that they would not be discovered by the Plaintiff.

236. Defendants intentionally caused construction defects by their fraudulent acts, and intentionally and fraudulently misrepresented and concealed those acts and defects. All of Defendants' misrepresentations and concealments were material.

237. The issues of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company were material to Plaintiff's decision to enter into the agreement with Defendants.

238. Defendants were aware and had knowledge at the time that they made the aforesaid representations that the representations were false. Alternatively, Defendants acted recklessly in making their materially false representations and concealments.

239. Defendants intended that the Plaintiff act upon the false representations of Defendants by allowing Defendants to continue running and billing the Company as they saw fit and with disregard for their fiduciary duties to Plaintiff and 150 Bee Street.

240. Plaintiff was ignorant of the falsity of the representations.

241. Plaintiff relied on the false representations.

242. Plaintiff had the right to rely on the false representations.

243. Plaintiff has been consequently and proximately injured by relying

on the false representations made by the Defendants.

244. As a direct and proximate result of the fraud and false representations by the Defendants, Plaintiff, other LLC members and 150 Bee Street have been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff, other LLC members (excluding Bella Vista) and 150 Bee Street are further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR AN ELEVENTH CAUSE OF ACTION
(Misrepresentation)

245. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

246. Defendants represented to Plaintiff that they would be acting as Developer, Manager, Fiduciary, Contractor or other capacity for the benefit of Plaintiff and 150 Bee Street.

247. Defendants, while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a. Personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"

b. Airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"

c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"

d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"

e. Fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged to the Company as "Travel;"

g. Expenses related to installing a home automations system in Fred's Scottsdale, Arizona home; and

h. Other charges to be determined by the trier of fact.

248. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made credit card or other charges to the Company, including but not limited to:

a. Expenses related to trip to Cancun, Mexico;

b. Expenses related to trip to lasvegas.com;

c. Expenses related to trip to Scottsdale, AZ;

d. Expenses related to trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to private aircraft; and

g. Other charges to be determined by the trier of fact.

249. Defendants prolonged the sale process on purpose so that they could personally benefit through fees and charges they could pass on to the Company.

250. Defendants knew that these charges were not Company charges.

251. On or about February 27, 2005, Defendants represented to Plaintiff that:

> BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE.

252. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

253. Upon information and belief, Defendants profited more than the 1% fee.

254. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

255. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff. To this date, Defendants have intentionally withheld BIG II's financial records related to the project.

256. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff.

257. Defendants knew that they could reduce the unit prices and sell the units faster.

258. Defendants intentionally and/or negligently failed to reduce the unit prices with the intent that they would not be discovered by the Plaintiff.

259. Defendants intentionally and/or negligently misrepresented that they had properly constructed the condominium project and the nature and extent of the construction defects associated with the project.

260. The issues of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company were material to Plaintiff's decision to enter into the agreement with Defendants.

261. Defendants were aware and had knowledge at the time that they made the representations that the representations were false.

262. Defendants intended that the Plaintiff act upon the false representations by allowing Defendants to continue running and billing the Company as they saw fit.

263. Plaintiff was ignorant of the falsity of the representations.

264. Plaintiff relied on the false representations.

265. Plaintiff had the right to rely on the false representations.

266. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

267. As a direct and proximate result of the false representations by the Defendants, Plaintiff, other LLC members (excluding Bella Vista) and 150 Bee Street have been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the Property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff, other LLC members (excluding Bella Vista) and 150 Bee Street are further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR A TWELFTH CAUSE OF ACTION

(Indemnification of 150 Bee Street)

268. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

269. At all times relevant the Defendants were agents of 150 Bee Street, which was their principal. As such, the Defendants must indemnify 150 Bee Street and its members, excluding Fred and Gilbert, for all losses suffered by 150 Bee Street due to the negligent, grossly negligent and intentional illegal acts of the Defendants, alleged herein, including but not limited to losses incurred by the LLC due to construction defects and the lawsuit project owners brought against the LLC due to construction defects.

270. Bella Vista, as a member of the LLC, and Fred and Gilbert, as the general partners of Bella Vista, are liable to indemnify the LLC and its members other than Fred and Gilbert, for all acts or omissions involving intentional or negligent misconduct or knowing violation of the law by any of them, and all transactions in which any of them received a personal benefit in violation or breach of the LLC's Operating Agreement and/or other agreements or laws, all of which occurred as alleged herein. Upon information and belief,

any wrongful action taken by any of the Defendants pursuant to advice by any LLC counsel was induced by intentional and/or negligent misconduct or knowing violation of the law by Bella Vista, Fred, Gilbert and/or one or more of the other Defendants.

271. Bomasada, as the Developer, agreed in Section 1.4 of the Development Agreement between 150 Bee Street LLC and Bomasada:

> [T]o indemnify, defend and hold harmless the [150 Bee Street, LLC] and its partners, employees and agents, from any and all loss, damage, cost, expenses and liability sustained by such parties which arise out of the Developer's gross negligence or willful misconduct or acts outside the scope of the Developer's authority under this Agreement.

272. The Defendants committed numerous negligent, grossly negligent and intentional acts regarding the project for which they must indemnify 150 Bee Street, LLC, including but not limited to each of the following:

a. Bomasada's failing to supervise the construction work during all phases of construction and to otherwise assist in all aspects of the project, as required by the development agreement between Bomasada and the LLC;

b. Bomasada's failing to provide qualified field personnel for observing and reviewing work progress and construction of the project, as required by paragraph 1.1 of the development agreement;

c. Bomasada's failing to supervise (i) the preparation of appropriate instructions to bidders, (ii) the preparation of contracts for the construction of the Project, and (iii) the administration of change orders, as required by paragraph 1.1 of the development agreement;

d. Bomasada's failing to provide administrative services required to be made relating to the construction of the Project, as required by paragraph 1.1 of the development agreement; and

e. Bomasada's failing to assist in securing authorizations, permits and licenses as necessary for the development and construction of the Project, as required by paragraph 1.1 of the development agreement.

273. As a direct and proximate result of negligent, grossly negligent and intentional acts by the Defendants, the Company has been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR A THIRTEENTH CAUSE OF ACTION

(Intentional Interference with Prospective Business Advantage)

274. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

275. Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer and so they could continue to improperly pay themselves monthly with Company funds. Defendants' purpose was improper, in that they took this action in order to continue to improperly pay themselves.

276. By intentionally and improperly failing and refusing to adequately lower the unit pricing as stated above, the Defendants intentionally and improperly interfered with the LLC's potential contractual relations for an improper purpose and by improper methods, causing injury to the LLC.

277. As a direct and proximate result of Defendants failing and refusing to adequately lower the unit pricing as stated herein, the LLC has suffered damages in an amount to be determined by the trier of fact.

FOR A FOURTEENTH CAUSE OF ACTION

(Misappropriation of LLC assets)

278. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

279. The Defendants' intentional, illegal use of the funds and other property of 150 Bee Street for their own personal and unauthorized uses constitutes misappropriation of the assets of 150 Bee Street. The Defendants' have fiduciary duties to protect the assets of 150 Bee Street.

280. As a direct and proximate result of Defendants' misappropriation of 150 Bee Street's assets, 150 Bee Street has suffered damages in an amount to be determined by the trier of fact.

FOR A FIFTEENTH CAUSE OF ACTION

(Alter Ego/Amalgamation/Piercing the Corporate Veil as to the Developers and Contractors)

281. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated verbatim herein.

282. Bomasada held itself out to the Plaintiff and the public as the developer of Bee Street Lofts and signed the Development Agreement with the Company naming Bomasada as Developer.

283. BIG II held itself out to the Plaintiff and the public as the general contractor of Bee Street Lofts and signed an AIA Stipulated Sum Contractor with the Company naming BIG II as the General Contractor for the Project.

284. Upon information and belief, Bomasada, BIG II and Lauralis at all times relevant to this action:

a. Failed to observe corporate formalities;

b. Were grossly undercapitalized for the purposes of the corporate undertaking, to wit, the development and construction of the Bee Street Lofts and the remediation of any and all defects in the design and construction of the Bee Street Lofts should they arise;

c. Were controlled by Bella Vista, Fred and Gilbert to such an extent that they were merely a facade for the operations of Bella Vista, Fred and Gilbert;

d. Did not have any functioning officers, managers or directors that were independent of Bella Vista, Fred and Gilbert; and

e. Were functionally insolvent and were run as mere shells for the benefit of Defendants.

285. Upon information and belief, Bomasada, BIG II and Lauralis failed to follow the necessary corporate formalities as required by law; undercapitalized 150 Bee Street; siphoned corporate funds for personal use of its shareholders; used corporate facilities and employees for personal ends; and otherwise so intermingled their personal and financial affairs with the Company's that they have become the alter ego of Bella Vista, Fred and Gilbert.

286. Further, upon information and belief the interests of Bomasada, BIG II and Lauralis and their agents, directors, officers and/or shareholders, and of Bella Vista, Fred and Gilbert are so amalgamated and interconnected that the Plaintiff and the LLC are entitled to disregard the corporate forms and recover against Bomasada, BIG II and Lauralis and their agents, directors, officers and/or shareholders.

287. Upon information and belief, Bomasada, BIG II and Lauralis are shell and/or sham companies dominated and controlled by Bella Vista, Fred and Gilbert such that they are not legally distinct.

288. It would be inequitable to allow Fred and Gilbert to hide behind a corporate shield that has no basis in fact for the express purpose of avoiding their obligations, responsibilities and liabilities to the Plaintiff.

289. Plaintiff and the LLC are entitled to pierce the corporate veil of Bomasada, BIG II and Lauralis and thereby obtain a judgment against Bomasada, BIG II and Lauralis, and their agents, directors, officers and shareholders for the liability of Fred, Gilbert and Bella Vista in an amount to be determined by the trier of fact.

290. Further, because the interests of Bomasada, BIG II and Lauralis and their agents, directors, officers and shareholders, and of Bella Vista, Fred

and Gilbert are so amalgamated, Plaintiff and the LLC are entitled to disregard the corporate forms and recover against Bomasada, BIG II and Lauralis and their agents, directors, officers, and shareholders in an amount to be determined by the trier of fact.

FOR A SIXTEENTH CAUSE OF ACTION

(Breach of Contract Accompanied by a Fraudulent Act)

291. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated verbatim herein.

292. The actions by the Defendants described herein breached their contracts with 150 Bee Street, LLC.

293. Through the fraudulent acts and misrepresentations described herein, the Defendants sought to conceal their breaches of contract and otherwise committed fraudulent acts with fraudulent intent related to the breaches of contract.

294. The fraudulent acts accompanied the breaches.

295. As a direct and proximate result of Defendants' breaches of contract accompanied by a fraudulent act and intent, 150 Bee Street has suffered damages in an amount to be determined by the trier of fact and is entitled to an award of punitive damages in an amount to be determined by the trier of fact.

WHEREFORE, Morgan, individually and in a representative capacity of 150 Bee Street in a derivative action, respectfully prays that Plaintiff and the LLC be awarded:

a. Actual, consequential, and punitive damages in an amount to be determined by the trier of fact;
b. Reasonable attorney's fees and costs to the extent allowed by law;
c. Treble damages;
d. An offset against the capital account and any undistributed amounts claimed by Defendants;

e. The return of all capital contributions paid by the members of the LLC due to the wrongdoing of any of the Defendants;

f. An accounting and winding up of the business of 150 Bee Street;

g. Indemnification of all losses incurred by the Plaintiff or the LLC due to the unlawful actions of the Defendants, including but not limited to construction defects as alleged in the construction lawsuit;

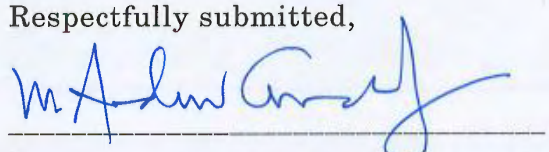
h. All of the Development fee of $750,000 or more and all reimbursed expenses paid to Bomasada by the Plaintiff;

i. All of the Contractor fees of 1% or more paid to BIG II and all reimbursed expenses paid to BIG II by the Plaintiff;

j. Prejudgment and post judgment interest; and

k. Such other and further relief as this court deems just and proper.

Respectfully submitted,



W. Andrew Gowder, Jr., (S.C. Bar #7895)
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mike@mikeroselawfirm.com
Phone: 843.871.1821

January 22, 2019

Charleston, South Carolina

Counsel for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A NO.: 2012-CP-10-580
COUNTY OF CHARLESTON	)	
	)	
THOMAS H. MORGAN,	)	
	)	
PLAINTIFF(S),	)	
	)	
v.	)	CONSENT ORDER REFERRING MATTER TO ARBITRATION
	)	
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION.	)	
	)	
DEFENDANT(S).	)	
	)	

FILED
2012 JUL -9 PM 4:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The parties, through their counsel, have stipulated to the entry of this Order referring the above captioned matter to binding arbitration.

NOW THEREFORE, IT IS HEREBY ORDERED:

1. All claims, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case, shall be decided by binding arbitration that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act and all of the parties submit themselves to the jurisdiction of this court and arbitration panel. All parties shall assert all claims they may have against one another arising out of this matter, including, without limitation, any claims for breach of the arbitration agreement by the other party by the filing of the instant action.

2. All time periods in this order are calendar days unless specifically noted herein. To the extent that a deadline falls on a weekend day or legal holiday, the deadline shall be extended to the next business day.

3. The parties have mutually selected Dawes Cooke to serve on a three arbitrator panel as its chairman. The court has agreed to select the remaining two arbitrators by choosing one from the Plaintiff's list of five proposed arbitrators and one from the Defendants' list of five proposed arbitrators.

#1
T.L.H.

WCSR 7322029v1

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The Court hereby selects Brewster Hagood as the arbitrator from the Plaintiff's proposed list, and Clarence A. Robertson Robertson, III as the arbitrator from the Defendants' proposed list.

4. The Chairperson shall have sole authority and responsibility to hear and decide procedural, scheduling, and discovery-related motions, disputes, and issues, including but not limited to:

(A) Initiating a scheduling conference and establish a schedule for arbitration proceedings, including the hearing on the merits;
(B) Conducting pre-hearing conferences;
(C) Disposing of motions to amend the pleadings;
(D) Ordering discovery, including in-state and out-of-state subpoenas to third parties;
(E) Resolving discovery disputes and impose sanctions against a party that does not comply with the orders of the Chairperson/Panel; and
(F) Resolving motions concerning discovery, compelling discovery responses, and protecting parties from discovery abuses.

5. All other motions, disputes, and/or issues, including dispositive motions, rulings on the admissibility and exclusion of evidence and/or witnesses, injunctive relief, and any other non-procedural, non-scheduling, and non-discovery issue, must be determined by a majority vote of the full Panel unless otherwise agreed to by both sides.

6. Discovery shall be freely allowed in the same manner as it would have been allowed in South Carolina Court of Common Pleas to advance a fair determination of the merits. Depositions, subpoenas and discovery shall be freely permitted, including out of state discovery, and the Chairperson or Panel will assist to facilitate discovery to the extent needed.

7. The arbitrator(s) are not required to strictly follow the South Carolina Rules of Evidence. The arbitrator(s) shall exercise discretion in applying evidentiary rules to secure fairness in the hearing, consistent with the expedited purpose of arbitration. It is the intent of this arbitration agreement to expedite and streamline the presentation of evidence and witnesses at the arbitration hearing, and, to that end, the parties do hereby agree that records custodians shall not be required to authenticate documents at the hearing. Moreover, to the extent that the parties may agree on the relevancy or admissibility of evidence, exhibits and witnesses to be presented at trial, the panel of arbitrators shall defer to the parties' agreement. In order to encourage the streamlined presentation of witnesses and evidence, the parties shall be required to exchange proposed exhibits and witnesses with each other ten (10) days in advance of the first day of the arbitration trial hearing and will make best efforts to submit one comprehensive list of exhibits to the panel. It is not necessary that the parties agree to the exhibits in the exhibit list, only that the parties intend to introduce the exhibits at trial. Moreover, the exhibit list shall not be a bar to the admission of other evidence that may become relevant at trial.

#2 T.L.H.

8. This arbitration shall follow the South Carolina Rules of Civil Procedure where practical and to the extent not inconsistent herewith.

9. The arbitrator(s) shall apply the substantive law that the arbitrator(s) determine(s) to be applicable to the issues in the dispute.

10. The Court shall enter appropriate orders to ensure compliance with the Orders and awards of the arbitrator(s) and to ensure that the arbitrator(s) receive payment.

11. Plaintiff shall contribute one-half (1/2) of the cost of the arbitration unless otherwise agreed to by the parties in writing or ordered by the arbitrator(s) in the award with the Defendants collectively contributing the other half (1/2).

12. Within thirty (30) days of the appointment of the Chairperson, the parties will propose a joint scheduling order to the panel. If the parties cannot agree on a joint scheduling order, the panel will issue a scheduling order giving the parties full, fair and adequate time to conduct discovery, name experts, file and argue motions, and to present their case. The scheduling order can be amended by stipulation of the parties or by ruling of the arbitrator(s).

13. The arbitrators shall issue a final determination within thirty (30) days of the completion of the hearing unless otherwise agreed to in writing by the parties. The determination shall be issued in the form of an award on all claims and counter-claims.

#3

14. This case shall be administratively stayed pending completion of the arbitration. The Court retains jurisdiction to enforce this Order and to enter any Orders including a judgment upon the arbitrator's award or order.

T. L. Hughston Jr.

[redacted] Thomas Hughston
Presiding Judge

Dated: July 9, 2012

WCSR 7322029v1

Confirmed phone call.
J.L.H. Jr.

The parties hereby agree to entering of this order:

S/

Christopher B. Staubes
Brett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Dr. Suite 200
Charleston, SC 29492
Attorney for Plaintiff

S/

Henry Grimball
Morris Ellison
Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street
Charleston, SC 29401
Attorney for Defendants

WCSR 7322029v1

CLAWSON AND STAUBES LLC

Chris Staubes
Licensed in SC & NC
cstaubes@clawsonandstaubes.com
SC Certified Circuit Court Mediator

September 26, 2011

File No.: 2011-0182 cs

Mr. Henry E. Grimball, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

RE: 150 Bee Street, LLC

Dear Henry:

Following up on our phone conversation of September 21, 2011, my client has asked that I convey the following to see whether our clients are close enough in agreement to a potential settlement to warrant a meeting.

Mr. Morgan will be initiating an action on behalf of Bee Street LLC against both Mr. Stuart Fred and Mr. John Gilbert personally, as well as all of their related entities, in an amount of over $30,000,000. This amount represents the return of the partner's investment plus 90% of the estimated profit as described on April 26, 2007, when Stuart Fred wrote an e-mail to Mr. Morgan basically stating that "any astute individual" could take over the project, complete it, and sell out the units for the estimated sales price of the units on that date.

From the documents and correspondence that I have reviewed so far (including the report from Mr. Morgan's auditors) it is obvious that your clients committed fraud, gross misconduct, misappropriation of funds, and other improper acts by expending the funds of the company solely for their personal use. It was beneficial for them to keep the asking prices of the units considerably higher than the then current value needed to sell the units, in order to slow down the sales, so that they could continue to bleed the company's funds for their own use to the detriment of the other partners.

Mr. Morgan currently has seen only a small portion of the evidence, because your client has refused to allow access to other potentially incriminating evidence, including the construction invoices, listing agreements with real estate brokers, and other files and records of the company including the partnership legal file, all e-mails regarding company business, which my client now has every right to review as a managing partner.

Litigation will cost the entity as well as your clients substantial time and money analyzing the propriety of your clients' billing hundreds of thousands of dollars to this LLC for use of the private jet, fuel for that jet, African Safaris, trips to the Mexican Riviera, golf at Pebble Beach, repair work on Mr. Fred's private residence in Houston as well as his private airplane hangar, multimillion dollar construction overages, and other general mismanagement. Mr. Fred also charged the LLC hundreds of thousands of dollars for jet trips to numerous cities other than Charleston, which were

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for his personal use, as well as for his business use on other projects he was developing. Therefore, we think settlement, if it can be accomplished at the outset, is worth exploring.

Regardless of the above, Mr. Morgan is willing to settle this matter in full, with mutual releases, for the payment within 60 days of $10,000,000 cash, of which $5,000,000 would be paid to him, and $5,000,000 would be paid to Elizabeth Baker, Neal's widow, as Personal Representative of Neal Baker's Estate. This figure represents the return of Mr. Morgan's and the Estate of Neal Baker's $6,000,000.00 investment, plus a reasonable rate of return over the six year development period.

In exchange for these amounts, Mr. Morgan and Ms. Baker will assign their interest in and to the LLC to Mr. Fred and Mr. Gilbert, who will coordinate releases from any and all guarantees, and the execution of an indemnification agreement. We feel this is an extremely reasonable and fair settlement in light of the fact that Mr. Fred and Mr. Gilbert will be able to recover a substantial portion of this amount upon the sale and wrap up of the remaining LLC assets. Based on a recent letter written to Ms. Baker, Mr. Fred believes that the partners will be able to recover all of their investment in this project plus "in all likelihood a good profit."

As I am sure that you are aware, Mr. Morgan and Ms. Baker will now be in control of this project. Therefore, it would be beneficial for Mr. Fred and Gilbert to settle this matter now so that they can sell the remaining units as they see fit.

With every best wish, we remain

Sincerely yours,

CLAWSON & STAUBES, LLC

Chris Staubes

CBS/af

cc: Thomas Morgan

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A PROFESSIONAL LIMITED
LIABILITY COMPANY

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HENRY E. GRIMBALL
ATTORNEY AT LAW
E-mail: hgrimball@wcsr.com
Direct Dial: (843) 720-4615

November 8, 2011

Via Electronic Mail
Christopher B. Staubes, III, Esquire
Clawson & Staubes, L.L.C.
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

RE: Thomas H. Morgan v. Bomasada Group, Inc.
WCSR File No. 66696.0001.0

Dear Chris:

I have forwarded your letter of November 3, 2011 to my clients.

Their reaction was immediate and to the effect that the ongoing operations at 150 Bee Street, LLC are insufficiently addressed in your letter. You are demanding that the listing agreement be rescinded. According to Stuart Fred and John Gilbert, despite the last three years being such a bad real estate market, Carolina One has performed admirably in selling 20 units with only 23 remaining. Rescinding the listing agreement may have the legal effect of inviting a breach of contract claim by Carolina One. In addition, there is nothing in your letter suggesting what Mr. Morgan proposes to do if Carolina One is discharged. That is a most important matter which needs to be considered, and my clients think it will be extremely difficult to find a broker with the expertise demonstrated by Carolina One. In addition, a discharge and potential suit will, in the judgment of Stuart and John, adversely impact the market value of the 23 remaining units.

Addressing the issue of two signatures on checks, this is an ongoing business. As I understand it, Mr. Morgan resides at times in Miami, in California, and in Colorado but does not have a home in Charleston or in Texas. From a practical standpoint, how does he propose that checks be signed by him if he is not either here in Charleston or in Texas? I suggested in an earlier letter that you consider checks only above a certain amount be signed by two managers.

As for accounting information, this is all available to Mr. Morgan, as I have said in previous letters.

As for Bomasada Group II documents, Mr. Morgan is simply not entitled to them, period. Please note that you begin your letter in the third line of the first paragraph by accusing my clients of "fraud, gross mismanagement and use of company funds to reimburse themselves for

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personal vacations on their private jet, safaris, work on their personal home and jet hangars, as well as self-dealing in a position of fiduciary responsibility." In the next to last paragraph you have asked for a straight answer from my clients about their behavior. I have given the answer before and will give it again. They have done nothing of the sort asserted in your letter.

At this point in our discussions, it appears that it is fruitless to continue this back and forth letter writing. Might I suggest pursuant to the mediation provisions of the agreement that we consider the LLC retaining a third party professional, acting as a mediator, to review the operations of the LLC and render an opinion that puts this matter to rest. Please consider that and then give me a telephone call.

Yours very truly,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Henry E. Grimball

HEG/dmf

CLAWSON STAUBES LLC

Chris Staubes
Licensed in SC & NC
cstaubes@clawsonandstaubes.com
SC Certified Circuit Court Mediator

November 14, 2011

File No.: 2011-0182 cs

Henry E. Grimball, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

RE: 150 Bee Street, LLC

Dear Henry:

Please let this serve as Thomas H. Morgan's Demand, individually and/or derivatively for 150 Bee Street, LLC, on John Gilbert, Stuart Fred, Bella Vista Partnership, Bomasada Group, Inc., Bomasada Investment Group II, LLC, and Lauralis Management, Inc. for Mediation and Arbitration pursuant to section 14.14 of the Second Amended and Restated Limited Liability Company Agreement of 150 Bee Street, LLC, or similar agreements in other contracts, or in the alternative, for adjudication in court. The issues to be mediated, arbitrated or adjudicated include, but are not necessarily limited to, Breach of Fiduciary Duties, Breach of Contract, Conversion, Civil Conspiracy, violations of the UTPA, Declaratory Relief and an Accounting.

As mentioned earlier, Mr. Morgan is prepared to file a civil action, individually and/or derivatively for 150 Bee Street, LLC. Since there may be a question as to whether some of these persons or entities are subject to the Mediation and Arbitration clause in section 14.14 of the Second Amended and Restated Limited Liability Company Agreement of 150 Bee Street, LLC, we hereby request that you obtain the consent of these parties to participate in mediation and arbitration, and that the Statute of Limitations, if applicable, be tolled as of the date of this demand.

If John Gilbert, Stuart Fred, Bella Vista Partnership, Bomasada Group, Inc., Bomasada Investment Group II, LLC, and Lauralis Management, Inc., are unwilling to consent to participate in mediation and arbitration, and to toll the Statute of Limitations, then we will have no choice but to file our action in Circuit Court asking the Judge to determine the proper venue. With every best wish, we remain

Sincerely yours,

CLAWSON & STAUBES, LLC

Chris Staubes

cc: Thomas Morgan
Enclosure

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN, PLAINTIFF, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION. DEFENDANTS,	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2011-CP-10- CONSENT TO MEDIATION AND ARBITRATION AND TO TOLL THE STATUTE OF LIMITATIONS

The undersigned, Henry Grimball, as attorney for John Gilbert, Stuart Fred, Bella Vista Partnership, a Texas Partnership, Bomasada Group, Inc., a Texas Corporation, Bomasada Investment Group II, LLC, a Texas Limited Liability Company and Lauralis Management, Inc., a Texas Corporation, hereby consents on behalf of John Gilbert, Stuart Fred, Bella Vista Partnership, a Texas Partnership, Bomasada Group, Inc., a Texas Corporation, Bomasada Investment Group II, LLC, a Texas Limited Liability Company and Lauralis Management, Inc., a Texas Corporation to Mediation and Arbitration in Charleston, South Carolina, and that any Statute of Limitations is tolled as of November 14, 2011.

I hereby agree this __ day of November, 2011.

_____

Henry E. Grimball, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

Attorneys for John Gilbert, Stuart Fred, Bella Vista Partnership, a Texas Partnership, Bomasada Group, Inc., a Texas Corporation, Bomasada Investment Group II, LLC, a Texas Limited Liability Company and Lauralis Management, Inc., a Texas Corporation

CLAWSON STAUBES
LLC

November 16, 2011

File No.: 2011-0182 cs

Henry E. Grimball, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

RE: 150 Bee Street, LLC/Thomas H. Morgan's Demand to Commence an Action Pursuant to South Carolina Ann. Section 33-44-1101.

Dear Henry:

As Chris Staubes mentioned earlier, Thomas H. Morgan is prepared to file a civil action against John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, a Texas Partnership, Bomasada Group, Inc., a Texas Corporation, Bomasada Investment Group II, LLC, a Texas Limited Liability Company and Lauralis Management, Inc., a Texas Corporation.

Pursuant to South Carolina Code Ann. Section 33-44-1101, Thomas H. Morgan makes a demand on Stuart L. Fred, as Co-Manager of 150 Bee Street, LLC, to consent to and commence an action on behalf of 150 Bee Street, LLC against various parties. These parties shall include, but not be limited to, John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, a Texas Partnership, Bomasada Group, Inc., a Texas Corporation, Bomasada Investment Group II, LLC, a Texas Limited Liability Company, and Lauralis Management, Inc., a Texas Corporation for various causes of action against these parties, including, but not limited to, Arbitration, Breach of Fiduciary Duty, Civil Conspiracy, Conversion, Breach of Contract, Declaratory Judgment, Accounting, Unfair Trade Practices Act violations, Dissolution, and any other relevant or applicable causes of action.

Unless Stuart L. Fred shall consent to this action by **Friday, November 25, 2011**, it shall be deemed that Stuart L. Fred shall have refused to commence the action under South Carolina Code Ann. Section 33-44-1101, and Mr. Thomas H. Morgan shall therefore be entitled to bring a derivative action on behalf of 150 Bee Street, LLC against the aforementioned parties.

EXHIBIT
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With every best wish, we remain

Sincerely yours,

CLAWSON & STAUBES, LLC

G.P. Diminich

cc: Thomas Morgan

CLAWSON AND STAUBES LLC

G. P. Diminich
gdiminich@clawsonandstaubes.com
LL.M. in Taxation
Certified Specialist in Taxation Law
Certified Specialist in Estate Planning & Probate Law
SC Certified Circuit Court Mediator

November 28, 2011

File No.: 2011-0182 es

Henry E. Grimball, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

RE: 150 Bee Street, LLC/Thomas H. Morgan's Second Demand to Commence an Action Pursuant to South Carolina Ann. Section 33-44-1101.

Dear Henry:

In light of the failure of Thomas H. Morgan's repeated attempts to settle this matter amicably and our letter dated November 16, 2011, which has received no response, I wanted to reiterate Mr. Morgan's demands. As Chris Staubes mentioned earlier, Thomas H. Morgan is prepared to file a civil action against John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, a Texas Partnership, Bomasada Group, Inc., a Texas Corporation, Bomasada Investment Group II, LLC, a Texas Limited Liability Company and Lauralis Management, Inc., a Texas Corporation.

Pursuant to South Carolina Code Ann. Section 33-44-1101, Thomas H. Morgan makes a second demand on Stuart L. Fred, as Co-Manager of 150 Bee Street, LLC, to consent to and commence an action on behalf of 150 Bee Street, LLC against various parties. These parties shall include, but not be limited to, John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, a Texas Partnership, Bomasada Group, Inc., a Texas Corporation, Bomasada Investment Group II, LLC, a Texas Limited Liability Company, and Lauralis Management, Inc., a Texas Corporation for various causes of action against these parties, including, but not limited to, Arbitration, Breach of Fiduciary Duty, Civil Conspiracy, Conversion, Breach of Contract, Declaratory Judgment, Accounting, Unfair Trade Practices Act violations, Dissolution, and any other relevant or applicable causes of action.

Unless Stuart L. Fred shall consent to and put this aforementioned action before a vote of all the Members by **Friday, December 2, 2011**, it shall be deemed that Stuart L. Fred shall have refused to commence this action under South Carolina Code Ann. Section 33-44-1101, and Mr. Thomas H. Morgan shall therefore be entitled to bring a derivative action on behalf of 150 Bee Street, LLC against the aforementioned parties.

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With every best wish, we remain

Sincerely yours,

CLAWSON & STAUBES, LLC

G.P. Diminich

cc: Thomas Morgan

CLAWSON STAUBES LLC

Chris Staubes
Licensed in SC & NC
cstaubes@clawsonandstaubes.com
SC Certified Circuit Court Mediator

October 18, 2011

File No.: 2011-0182 cs

Mr. Henry E. Grimball, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

RE: 150 Bee Street, LLC

Dear Henry:

Thank you for your letter of October 17, 2011. We are pleased that your clients have agreed to let my client review the material stated in your letter. However, contrary to the claim in your letter, we want to clarify that your clients have not allowed us to review most of this information in the past. John Gilbert expressly prohibited our auditor from examining the construction records, invoices, and vendor files which contributed to the majority of the expenditures of the partnership over its life. From our auditor's comments:

> 8. ***Procedure*** *- Obtain, review and examine construction loan draw requests and Application and Certificate of Payment documents submitted by Bomasada Investment Group II, LLC, along with all invoices and or other supporting documents related to the construction hard costs and soft costs as reflected on the construction draw requests.*
>
> ***Results*** *- We obtained and examined the construction loan draw requests and Application and Certificate of Payment documents submitted by Bomasada Investment Group II.*
>
> *We requested that all invoices or other supporting documents related to the construction hard costs and soft costs as reflected on the construction draw requests be made available for examination. Our request for this documentation was denied by Mr. John Gilbert.*

Furthermore, our auditor asked John Gilbert for a copy of any listing agreement in the files or other documentation in regard to real estate commissions paid to brokers. From our auditor's comments:

> 9. *Procedure - Obtain, review and examine any contracts or other documents pertaining to agreements with real estate agents regarding commission agreements or listing agreements.*

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Results - We requested copies of any contracts or other documents pertaining to agreements with real estate agents regarding commission agreements or listing agreements. We were advised by Mr. John Gilbert there were no such agreements.

We find it hard to believe that Mr. Gilbert would hire a real estate firm, pay them well over a million dollars to sell and market units, without a listing agreement. The listing firm is the same one that was used by your clients to sell their condo project in Nashville, Tennessee. We would like to be shown proof that your client, or any of its related entities, did not participate in any way in any commission payments, rebates against its own project in Nashville, or kickbacks with regards to the real estate commissions charged on the sale of Bee Street Units. We find it quite unusual that the actual selling agents on the site in Charleston were paid a minimal salary, rather than a commission, while the listing agent in Nashville made unusually large listing commissions. For example, my client referred his friend Mr. Chuck Nabbit who purchased the most expensive penthouse in the complex. Your listing broker took a full 6% commission on the transaction. This is highly unusual. Typically, the agent would take a 3% commission and the developer would get the remaining 3%. Why wouldn't your clients directly hire the sales agents on site, since they were being paid a salary instead of a commission, and save over a million dollars in commissions? We have asked to see supporting documentation, but were denied by John Gilbert.

We have retained a forensic auditor out of Charleston, but given the above described refusals, we are hesitant about incurring the expense of sending him to Houston unless you specifically tell us in advance that we have absolute permission to see **ALL** the records, not just the ones that your clients would like for us to see. Furthermore, John Gilbert denied us the right to photocopy any documents and we insist that we have that right, of course at our expense.

With respect to the letter you provided dated April 24, 2005, authorizing John Gilbert to be the LLC agent with regard to day to day operations, you and your client received a letter from me expressly voiding that letter. John Gilbert in direct violation of the express language in the operating agreement, unilaterally entered into an extension of the listing agreement with Carolina One without notification or consultation with Tom Morgan. Mr. Morgan wrote a letter to Josephine Traina telling her that he was a managing member prior to the extension letter being executed. John Gilbert even wrote an e-mail to my client telling him not to talk to Josephine. Of course this was all done so that Mr. Gilbert could hurriedly, and in violation of the operating agreement, enter into that contract.

Mr. Morgan has no faith that John Gilbert will follow any procedure limiting him from entering into prohibited agreements, and specifically does not trust him with the checkbook. Therefore, any system of continuing day to day operations will have to be without Mr. Gilbert writing checks. We are open to other options that will not delay operations, but will have proper oversight from my client.

As to the monthly management statements from the LLC's third party management

company, we have no problem receiving those by e-mail. In regard to the Houston company office costs to pay monthly cable bills, HOA monthly bills, and annual tax bills, my client is willing to have his office write those checks at no charge to the LLC. It is incredible that your clients would charge over $5,000 per month to write a few checks, and claim that 40% of their ongoing office expenses should be reimbursed to them for writing a few checks a month. Also, it is hard to believe that your clients would charge over $10,000 in travel expenses to fly to Charleston for one day for a homeowner's meeting. That is simply an outrageously waste of LLC funds, and an egregious overstepping of authority. This has to stop now!!!!!

I do not understand the purpose of your request that Mr. Morgan not communicate with some staff except during normal business hours. First of all Mr. Morgan has never contacted the management company. Also, we would like to know what Mr. Gilbert thinks is normal business hours for a real estate agent who has been given 23 condo units to list. Every real estate agent I know works on weekends and nights accepting calls from potential buyers, and if they do not want to do that, then this is not the job for them.

On a further note, Mr. Morgan sent an e-mail to Josephine outlining a draft plan to market the remaining units. He asked for her comments on that plan. We attach a copy of that e-mail for your clients' review. We would like to come to an agreement with your clients on the final marketing of the units, and the wrap up of the relationship between our clients. Should the two managing members not be able to agree on a final plan, then under South Carolina LLC law, then we should discuss dissolving the LLC, and distributing the assets to the members. If your clients like our draft plan and want to proceed, please let us know. Otherwise we should be discussing a distribution of the assets and the dissolution of the entity..

With every best wish, we remain

Sincerely yours,

CLAWSON & STAUBES, LLC

Chris Staubes

CBS/af

cc: Thomas Morgan

Enclosure

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
151 Meeting Street / Sixth Floor / Charleston, SC 29401-2239
Tel: 843.853.5200 Fax: 843.720.4356
www.nelsonmullins.com

John B. Hagerty
Tel: 843.720.4308
Fax: 843.720.4356
john.hagerty@nelsonmullins.com

July 29, 2011

Chris Staubes, Esq.
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

RE: 150 Bee Street, LLC/Real Estate
Our File No.: 16022/09000

Dear Chris:

I am in receipt of your correspondence of July 28, 2011 ("Staubes Request"). It is my understanding that you represent Thomas H. Morgan ("Morgan") as a member of 150 Bee Street, LLC ("Company"). In the Staubes Request, you ask for the following:

> "We are interested in looking at everything, but not limited to, the construction records, invoice, financials, checkbooks, minutes, resolutions, correspondence, sales information, tax records, budgets, expenditures, etc. Will the documents be made available in Charleston or will they be provided on a CD?"

As you know, I represent the Company. The Staubes Request is so broad and all inclusive that it appears to totally disregard the extraordinary amount of work that has already been done by the Company to provide information to Mr. Morgan. I understand Randall Harris ("Harris") is employed by a firm known as Prothro Wilhelmi ("Prothro") which firm was working for Mr. Morgan to provide for Mr. Morgan a full review of all records of the Company which records are located in Houston, Texas. As part of this exercise, there is also a detailed Aircraft Analysis.

Mr. Harris performed his initial on-site examination of the Company's accounting and tax records in its office in Houston from Tuesday, February 1, 2011 through Thursday, February 3, 2011 and has followed up with another on-site examination in the Company office in Houston from Tuesday, April 26, 2011 through Thursday, April 28, 2011.

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The Company's accountant is William M. Shields, CPA ("Shields") and he indicates that the professional time that the Company's accountants spent in connection with Mr. Harris' examination is as follows:

William Shields	25.25 Hours	$7,575.00
Irene Weingarten	4.50 Hours	787.50
TOTAL	29.25 Hours	$8,362.50

Regarding Mr. Harris, Mr. Shields indicates the following in a letter to Mr. Gilbert

> "He was provided anything and everything he asked for that was contained in Bee Street's on-site records including customized QuickBooks reports, tax return information, etc. In fact, the boxes containing all of the records were provided to him in the audit office and he was able to privately review everything contained therein. Although I do not recall him specifically asking for anything that related to the period of time before the administrative duties were transferred to your office in Houston, it is theoretically possible that he might have wanted to request older records from the early days of the project that were not provided to you and Stuart at the time of the transfer. Alternatively, the only records he requested that were not provided to him were the vendor files of Bomasada Investment Group II, LLC that he requested near the conclusion of his on-site visit in April, 2011. Thanks."

Mr. Shields goes on to say:

> "According to Mr. Harris' report, the only documentation or other information that was requested and that was not provided were the vendor files for Bomasada Investment Group II, LLC. ("BIG II"). Please make sure that your legal counsel understands that Mr. Harris will have to acknowledge that he was provided all documentation and information that he requested for 150 Bee Street, LLC. In addition, please let him know that based on Mr. Harris' report, I do not expect him to substantiate Mr. Morgan's attorney's undocumented representation that Mr. Harris made any requests for Bee Street documentation that was not provided to him since he knows that he will either have to (i) acknowledge under oath that we provided him all of the requested information and documentation (other than BIG II documentation referenced above) or (ii) acknowledge under oath that his report is in error since he did not reference the fact that he requested any documentation or other records for Bee Street that were not provided to him. Thanks."

We have a copy of the Prothro report as addressed to Mr. Michael P. Gable, Attorney at Law dated May 24, 2011 ("Prothro Report").

Based on the above information, one would have to conclude that either you did not know about the work already done to provide Mr. Morgan with the books and records, or that Mr. Morgan is using this demand as a way to harass the Managing Members. Whatever it is, it is a big drain on the time and money of the Company of which Mr. Morgan is a Member and paying his portion.

By way of background, you should know that Mr. Morgan has been at odds with the Managing Members of the Company for several years. Mr. Morgan has sent correspondence complaining about not receiving certain financial information when no other Member has such a complaint. I am told by John Gilbert of the Company that regular correspondence has gone to Mr. Morgan's Denver office and there have been frequent conservations with Leslie Berry in that office and we are not clear whether Mr. Morgan was getting information from his own office or not.

During the last few years, there were numerous complaints regarding Mr. Morgan's interference with such matters as the brokers, the HOA and management. Finally, the Company sent correspondence to Mr. Morgan asking him to stop contacting Company employees and independent contractors in connection with Company matters. The argument was that any company needs a certain chain of command and that his contacts were damaging the Company.

Separately, there have been numerous allegations of Mr. Morgan defaming the Managing members in places where his remarks were damaging to the Company. Finally, the Company sent correspondence to Mr. Morgan demanding that he refrain from such remarks.

There has also been correspondence with Mr. Morgan by my firm denying his allegations that I represented either John Gilbert or Stuart Fred or their respective companies against Mr. Morgan. Our response was that this firm has consistently and conscientiously represented the interest of the Company and in fact does not represent either Stuart Fred or John Gilbert individually.

In a nutshell, there has been acrimony between Mr. Morgan as a Member and the other members as well as Managing Members almost for the life of the Company. They have had acute differences of opinion as to marketing, pricing and many strategic issues.

In the meantime, I have enclosed a copy of the Second Amended and Restated Limited Liability Company Agreement of the Company dated as of March 4, 2005 ("Operating Agreement"). The Operating Agreement includes a Budget as an Exhibit. I have also attached a copy of the Development Agreement of the same date.

May I suggest that all parties review the basic Company documents. Note the broad powers given to the Managing Members with the expectation that they would successfully deliver and market a building. In a very difficult market, that is exactly what has happened. Note that the parties have agreed to No Action for Dissolution and that the parties have agreed to mediation and binding arbitration. It seems apparent that there are differences of opinion as to how this Company should be managed and perhaps questions about various expenses and the discretion of the Managing Members. There is also the issue of the relationship ~~of~~ the Bomasada Group ~~to~~ has maintained with the lender and the fact that that relationship has been relied upon to keep the Company loans in place.

I have attached the Resolution requested needing only the signature of Neal Baker.

I look forward to working with you on this matter.

Very truly yours,

John B. Hagerty

JBH:rmanning
cc: Stuart Fred
Neal I. Baker
Edwin Pearlstine

CLAWSON
STAUBES
LLC

August 25, 2011

File No.: 2011-0182 cs

Mr. John B. Hagerty, Esquire
Nelson, Mullins, Riley Scarborough, LLP
151 Meeting Street, Sixth Floor
Charleston, SC 29401-2239

Mr. Stuart L. Fred
8980 Lakes at 610 Drive, Ste. 200
Houston, TX 77054

RE: 150 Bee Street, LLC

Dear John and Stuart:

Article 6.01 of the Operating Agreement has now been triggered. As Managing Member of 150 Bee Street, LLC, Thomas Morgan will need to review all company records so he can serve effectively in that capacity. Please let Mr. Morgan know when he or his representative can review the construction records, sales documents, vendor contracts, pricing lists, the company's legal file, and other relevant information. As suggested by William Shields, the company's CPA, the company documents should be scanned to an internet based computer file so they can be accessed remotely.

Next, corporate counsel should send all 150 Bee Street, LLC employees, subcontractors, agents and accountants a letter notifying them that Thomas Morgan is now a Managing Member, with all of the powers enumerated in section 6.02 of the Operating Agreement (attached). The company bank accounts will need to be updated to include Mr. Morgan as an account signatory. No company decisions should be made, checks issued, or contracts executed (including, but not limited to, sales and vendor contracts), without Mr. Morgan's consent. Finally, please let this serve as notice that Mr. Morgan does NOT approve any travel expenses or the charging of private jets to 150 Bee Street, LLC.

Thank you for your cooperation in this matter. With every best wish, we remain

Sincerely yours,
CLAWSON & STAUBES, LLC

Chris Staubes

cc: Thomas Morgan
Enclosure

EXHIBIT
9

Greenberg Traurig

Joel K. Goldman
Tel (305) 579-0828
Fax (305) 579-0717
goldmanj@gtlaw.com

May 15, 2007

Via: Facsimile (843) 720-4308
John B. Hagerty, Esq.
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, Sixth Floor
Charleston, SC 29401-2239

Re: 150 Bee Street, LLC

Dear Mr. Hagerty:

I am in receipt of your letter dated April 30, 2007 and the Operating Agreement and Development Agreement which you were kind enough to forward to my attention. I have had the opportunity to discuss the matters set forth in your letter with my client, and we have determined that it would not be productive to respond to the specific issues raised in your letter at this time. Instead, we have the following requests:

1. Section 6.01 of the Operating Agreement includes the following language:

"The Managing Members shall track the Project's performance against the Budget and shall distribute to the **Members** monthly financial reports of the Project's performance in relation to the Budget."

My client has advised me that he has not been receiving these monthly financial reports. Please arrange for the prior reports to be provided as soon as possible, and we otherwise assume that the reports will be provided monthly on a going forward basis.

2. My client has advised me that he has been receiving weekly sales and marketing reports as promised by Mr. Gilbert. We trust that these reports will continue to be circulated to my client on a going forward basis.

If we have any questions or concerns following our receipt of the reports, we will let you know. My client reserves all of its rights under the Operating Agreement, and nothing set forth herein shall be deemed a waiver of the same.

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We appreciate your assistance and cooperation with respect to the delivery of the foregoing reports, and we look forward to the successful completion of this project.

Sincerely,

Joel K. Goldman

cc: Thomas H. Morgan

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
151 Meeting Street Sixth Floor Charleston, SC 29401-2239
Tel: 843.853.5200 Fax: 843.720.4356
www.nelsonmullins.com

John B. Hagerty
Tel: 843.720.4308
Fax: 843.720.4356
john.hagerty@nelsonmullins.com

April 30, 2007

Joel Goldman
1221 Brickell Avenue, 21st Floor
Miami, Florida 33131-3224

RE: 150 Bee Street, LLC/Real Estate
Our File No.: 16022/09000

Dear Mr. Goldman:

Please be advised that this firm represents 150 Bee Street, LLC ("Company").

I am in receipt of various email correspondence between Stuart Fred and Tommy Morgan regarding the suggestions and direction of the project by Mr. Morgan and his request to deal through you.

As counsel for the Company, we have been very involved from the beginning in not only tougher than usual zoning and BAR approval issues, but also in working on the various contracts, the master deed and ongoing purchaser contract issues. Obviously, I am concerned when there are any issues that may affect the Project. The purpose of this letter is to try to be of help to all Members and the Project.

As I understand it, there are at least a couple of points being raised in Mr. Morgan's e-mails related to the Company's Second Amended and Restated Limited Liability Company Agreement ("Agreement"). Section 6.01 speaks primarily about the duties and responsibilities of the Managing Members. The Managing Members are Stuart L. Fred (as a representative of Bella Vista Partnership) and Neal I. Baker. Generally speaking, all of the responsibilities for running this project have been vested in these Managing Members as indicated by Section 6.02. Section 6.01 also requires the Managing Members to prepare a budget for the project and distribute to the Members monthly financial reports of the Project's performance in relation to the budget. This same paragraph also goes on to clearly indicate that the Managing Member shall be responsible for all sales and marketing efforts regarding the Project. (See attached language) I have been told that at present time there are no operating budgets as the project is still under construction. I understand that Mr. Morgan has always promptly been provided any and all information he has requested. Further, I am informed that Mr. Fred takes issue with Mr. Morgan's accusations that phone calls are not returned and complaints continue

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weeks go by after information has been requested and sent. I have confirmed this fact with Mr. Baker and Mr. John Gilbert to verify Mr. Fred's position.

I also saw some reference in the correspondence to a buy/sell offer according to the Agreement. There is not a buy/sell arrangement in the Agreement; however, Section 11 of the Agreement talks about the restrictions on transfers and assignments of interest. As you may know, this is a closely held investment and any transfer will require the consent of the Members. I am informed that based upon Mr. Morgan's position in his e-mails and his stated abilities to complete this difficult project, Mr. Fred and Mr. Gilbert will agree to entertain Mr. Morgan's offer under Section 11 of the Agreement. However, any assignment of his interest by a Member must be acceptable to the other Members, in this case, Mr. Baker and Mr. Edwin Pearlstine. It is my understanding that Mr. Baker and Mr. Pearlstine will be unlikely to approve this action. Mr. Fred and Mr. Gilbert have been the driving forces in this project relating to everything from design and construction to marketing and financing.

I understand that Mr. Fred has requested that Mr. Morgan not contact his organization or any parties associated with the Project and that all communications filter through your office and then to me.

Please let me know if I can provide any information or otherwise be of help to you in this matter. I have enjoyed working with all of the Members in this challenging project. Obviously, my hope is that we will not have an issue among the Members and that we can remain focused on a successful project.

Very truly yours,

John B. Hagerty

JBH:rdm

LAW OFFICE OF
GABLE & HEIDT
PRESIDENTIAL CIRCLE
4000 HOLLYWOOD BOULEVARD, SUITE 735 SOUTH TOWER
HOLLYWOOD, FLORIDA 33021-6755

MICHAEL P. GABLE
MICHAEL HEIDT

ANGELA JOHNSON, OFFICE MANAGER

BROWARD (954) 966-2501
MIAMI-DADE (305) 374-4344
FAX (954) 964-2294
mgable@mpglaw.fdn.com
mheidt@mpglaw.fdn.com

February 2, 2011

Merritt G. Abney, Esq.
Nelson. Mullins, et al.
151 Meeting Street, 6th Floor
Charleston, SC 29401-2239

DRAFT

Re: 150 Bee Street, LLC
Your file 16022/09000

Dear Mr. Abney:

The address for Thomas H. Morgan in your November 22, 2010 letter to the members is incorrect. His correct address is 3333 S. Bannock Street, Suite 950, Englewood, CO 80110. Please note this correction and please copy me with any further correspondence for Mr. Morgan.

It's my distinct understanding that weekly updates have been sent to Edwin S. Pearlstine, Jr., but not to Mr. Morgan. Both are members who are not managing members. Mr. Morgan simply wants to receive the same information being provided to, and be treated the same as any other member. If we are going to be intellectually honest here, then I'm sure you will agree that Mr. Morgan's simple request for weekly updates could not possibly cause "serious harm" to 150 Bee Street, LLC, as suggested in your letter.

Mr. Morgan would also like to know if the managing member anticipates that the eventual sale of the remaining units will produce enough revenue to repay the Amegy loan, and if so, the amount of profit. Considering that Mr. Morgan has invested $3,000,000, I'm sure you'll agree that he is entitled to this information.

Sincerely,

Michael P. Gable

MPG:lgt

e:\company\mpg\wp8\realest\morgan, t\prothro\abney ltr.2.2 11.doc docx

EXHIBIT
tabbies
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CLAWSON STAUBES LLC

Chris Staubes
Licensed in SC & NC
cstaubes@clawsonandstaubes.com
SC Certified Circuit Court Mediator

September 27, 2011

File No.: 2011-0182 cs

Mr. Henry E. Grimball, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

RE: 150 Bee Street, LLC

Dear Henry:

Mr. Morgan just received the attached "Extension" executed by your client and Josephine Traina on September 8, 2011, purporting to extend the Carolina One Real Estate listing agreement. It appears the original twelve (12) month listing agreement was executed on October 4, 2010, meaning its term would not even expire until next month. We are troubled that your client and Ms. Traina would rush to execute an "Extension" after receiving a certified notices dated August 25, 2011, and September 7, 2011, stating that Mr. Morgan, as Managing Member, is to be consulted on all matters going forward, and that he would need to sign off on all contracts or other transactions.

It is this sort of secretive and self serving conduct by your clients that has led to the predicament we are in today. Once again we reiterate that no company decisions are to be made, checks issued, or contracts executed (including, but not limited to, sales and vendor contracts), without Mr. Morgan's consent. Your clients will be held responsible for any damages caused by their actions.

With every best wish, we remain

Sincerely yours,

CLAWSON & STAUBES, LLC

Chris Staubes

CBS/af

cc: Thomas Morgan

Enclosure(s)

www.clawsonandstaubes.com
126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492
Fax: (843) 722 - 2867 / Office: (843) 577 - 2026

EXHIBIT
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Change of Status for Charleston Trident MLS, Inc.,
All Categories

Property Address: 150 Bee Street, Charleston, SC 29401

Office Name: Carolina One Real Estate Office Number: 1519

Agent Name: Josephine Traina Agent Number: 18180

MLS#: See Attached Transaction Date: _____ Time: _____

All Above Information is Required

1. Check the appropriate Action.
2. Fill in the corresponding blanks.
3. From the Maintenance Menu, choose Change Listing Status/Price

(For changes in this section, the owner's signature is required on this form.)

**** ☐ PRICE CHANGE ****

New Price: _____ New Expiration Date: _____
(No "$" or commas

**** ☒ EXTENSION ****

New Expire Date: September 8, 2012

**** ☑ RETURN TO MARKET ****

New List Price: _____ New Expiration Date: _____

**** ☐ WITHDRAW ****

Withdrawn Date: _____ (Defaults to current date)

**** ☐ PENDING **** or **** ☐ CONTINGENT ****

Pending Date: _____ Selling Office: _____ Selling Agent: _____
or
Contract Date: _____

**** ☐ SOLD ****

Sold Date: _____ Selling Office: _____ Selling Agent: _____

Financing: _____ *Sold Price:* _____

(Note: If entering a Sold property for comparable purposes only, please add as much detail about the property and the transaction as possible. This is important when the information is being used for appraisals and other market valuations.)

Carolina One Real Estate - Downtown 49 Broad Street Charleston, SC 29401
Phone: 843-793-4023 Fax: 843-746-4908 Josephine Traina

Untitled

Produced with ZipForm® by zipLogix 18070 Fifteen Mile Road, Fraser, Michigan 48026 www.zipLogix.com

☐ **RELEASE** This cancels the Exclusive Right To Sell Agreement previously signed and releases both OWNER and REALTOR® from all responsibilities under the listing agreement except for paragraph 3-A under Terms (RMLS) or H3 (CMLS) and the following:

☒ **OTHER**

See attached list of units

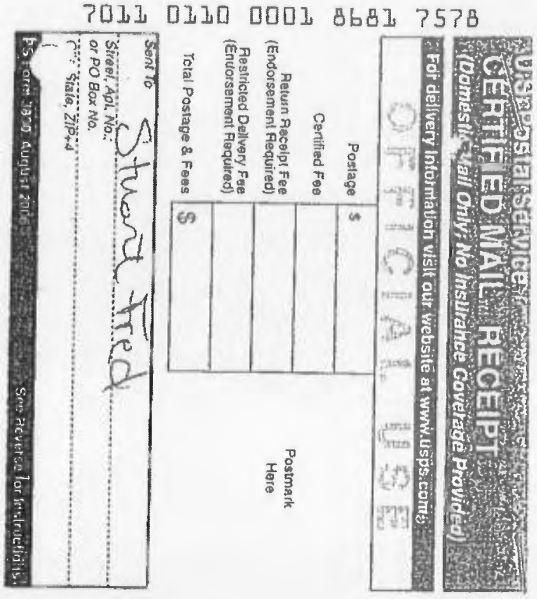
Seller (owner): 150 Bee Street, LLC Date: 9/8/11

Seller (owner): John L. Gilbert Date:

Agent: Josephine Traina Date:

Owner acknowledges receipt of a copy of this transmittal form.

7011 0110 0001 8681 7578



CLAWSON AND STAUBES LLC

August 25, 2011

Mr. John B. Hagerty, Esquire
Nelson, Mullins, Riley Scarborough, LLP
151 Meeting Street, Sixth Floor
Charleston, SC 29401-2239

Mr. Stuart L. Fred
8980 Lakes at 610 Drive, Ste. 200
Houston, TX 77054

RE: 150 Bee Street, LLC

Dear John and Stuart:

Article 6.01 of the Operating Agreement has now been triggered. As Managing Member of 150 Bee Street, LLC, Thomas Morgan will need to review all company records so he can serve effectively in that capacity. Please let Mr. Morgan know when he or his representative can review the construction records, sales documents, vendor contracts, pricing lists, the company's legal file, and other relevant information. As suggested by William Shields, the company's CPA, the company documents should be scanned to an internet based computer file so they can be accessed remotely.

Next, corporate counsel should send all 150 Bee Street, LLC employees, subcontractors, agents and accountants a letter notifying them that Thomas Morgan is now a Managing Member, with all of the powers enumerated in section 6.02 of the Operating Agreement (attached). The company bank accounts will need to be updated to include Mr. Morgan as an account signatory. No company decisions should be made, checks issued, or contracts executed (including, but not limited to, sales and vendor contracts), without Mr. Morgan's consent. Finally, please let this serve as notice that Mr. Morgan does NOT approve any travel expenses or the charging of private jets to 150 Bee Street, LLC.

Thank you for your cooperation in this matter. With every best wish, we remain

Sincerely yours,
CLAWSON & STAUBES, LLC

Chris Staubes

cc: Thomas Morgan

Enclosure

www.clawsonandstaubes.com
126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492
Fax: (843) 722-2867 / Office: (843) 577-2026

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Stuart L. Fred
8980 Lakes at 610 Drive
Ste. 200
Houston, TX 77054

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [illegible] ☐ Agent ☐ Addressee

B. Received by (Printed Name) [illegible] C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number
(Transfer from service label) 7011 0110 0001 8681 7578

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

REC 0312

CLAWSON AND STAUBES LLC

Chris Staubes
Licensed in SC & NC
cstaubes@clawsonandstaubes.com
SC Certified Circuit Court Mediator

September 7, 2011

File No.: 2011-0182 cs

Josephine Traina
Carolina One Real Estate
49 Broad Street
Charleston, SC 29401

RE: 150 Bee Street, LLC

Dear Ms. Traina:

We regret to inform you that Neal Baker, a Managing Member of 150 Bee Street, LLC, passed away on August 24, 2011. To ensure a continuity of management, Article 6.1 of the Operating Agreement names Neal's Brother-in-Law, Thomas Morgan, as his successor. Therefore, please let this serve as notice that Thomas Morgan is now a Managing Member of 150 Bee Street, LLC, with all of the powers enumerated in Article 6.2 of the Operating Agreement.

As a Managing Member of 150 Bee Street, LLC, Mr. Morgan will need to be brought current on the status of the real estate sales, and consulted on matters going forward. Until further notice, Mr. Morgan will need to sign off on any sales, contracts or other transactions. Tom can be reached at (305) 458-3667.

With every best wish, we remain

Sincerely yours,
CLAWSON & STAUBES, LLC

Chris Staubes

CBS/af

cc: Thomas Morgan
John B. Hagerty, Esquire
Stuart L. Fred

Enclosure

7011 0110 0001 8681 7622

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Sent To Josephine Traina
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

PS Form 3800, August 2006 See Reverse for Instructions

www.clawsonandstaubes.com
126 Seven Farms Drive, Suite 200, Charleston, South C
Fax: (843) 722 - 2867 / Office: (843) 577 - 202

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Joseph Traina
Carolina One Real Estate
49 Broad Street
Charleston, SC 29401

COMPLETE THIS SECTION ON DELIVERY

A. Signature
x Stormi Mullis
☒ Agent
☐ Addressee

B. Received by (Printed Name)
Stormi Mullis

C. Date of Delivery
9-8-11

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐

2. Article Number
(Transfer from service label) 7011 0110 0001 8681 7622

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

REC 0314

UNANIMOUS CONSENT OF
THE INITIAL MANAGING MEMBERS AND MAJORITY CONSENT OF THE MEMBERS OF
150 BEE STREET, LLC

January 31, 2011

The undersigned, being the initial Managing Members and Members representing a Majority Consent of 150 Bee Street, LLC, a South Carolina limited liability company (the "Company"), do hereby consent to and adopt the following resolutions as of the date hereof:

WHEREAS, pursuant to Section 6.01 of the Second Amended and Restated Limited Liability Company Agreement of the Company ("Operating Agreement"), the affairs of the Company are to be managed by one or more Managing Members as determined by Majority Consent of the Members; and

WHEREAS, the Company has matured to the point where the property representing the sole asset of the Company has now sold 76% of the units that were built and put up for sale and the Company debt has been reduced from $ 38,601,062.00 to a present balance of approximately 52,086,638.83; and

WHEREAS, the Managing Members consider the intent of section 6.01 is to allow a single Managing Member to conduct the wind-up of its affairs and Neal I. Baker has indicated that he does hereby resign as a Managing Member

BE IT RESOLVED, by the undersigned being the initial Managing Members and Members representing a Majority Consent of the Company, that Neal I. Baker's resignation as Managing member is hereby accepted and that Stuart L. Fred remains as Managing Member of the Company; and

FURTHER RESOLVED, that any resolution of the Company which is necessary or appropriate in connection with the actions contemplated hereby shall be deemed to have been adopted by the Company as of the date hereof.

Signatures are on the following page

EXHIBIT
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IN WITNESS WHEREOF, the undersigned being the initial Managing Members and Members representing a Majority Consent of the Company have executed this Consent as of January 31, 2011.

WITNESSES:

MANAGING MEMBERS:

Neal L. Baker

Stuart L. Fried

MEMBERS:

Neal L. Baker

BELLA VISTA PARTNERSHIP
a Texas general partnership

By: _____
John L. Gilbert
Managing Partner

Member	Company Interest
Neal I. Baker P.O. Box 1870 Charleston, SC 29402	26.67%
Bella Vista Partnership 3980 Lakes at 610 Drive Suite 200 Houston, Texas 77054	26.67%

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN ARBITRATION Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580
THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION, and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the First Amended Complaint with Exhibits in the above referenced case has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 22nd day of January, 2019 to:

Morris Ellison
Henry Grimball
PO Box 999
Charleston, SC 29402

Rachel Fete
Assistant to W. Andrew Gowder, Jr.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN ARBITRATION Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580
THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION, AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIMS

The Defendants above named (excepting 150 Bee Street, LLC), expressly reserving their rights in the three motions they have previously filed in this case contesting, among other things, the subject matter jurisdiction of this court, asserting the Plaintiff missed the three-year statute of limitations, and asserting many of Morgan's claims have previously been dismissed with prejudice by Court Order, respond to the Plaintiff's Second Amended Complaint as follows:

FOR A FIRST DEFENSE

(General Denial)

1. Responding to paragraph 1 of the Second Amended Complaint [the "Complaint"], the Defendants admits that the Plaintiff, Thomas H. Morgan ("Morgan" and/or "Plaintiff") is a citizen and resident of the state of Florida, and at all times relevant has been a voting member and

a 26.66% owner of 150 Bee Street, LLC. The Defendants lack information sufficient to form a belief as to the remaining allegations of this paragraph and therefore deny the same.

2. Responding to paragraph 2 of the Complaint, the Defendants admit that the Defendant 150 Bee Street, LLC (sometimes "150 Bee Street, LLC" or "Company") is a South Carolina limited liability company, duly organized and existing pursuant to the laws of South Carolina. The Defendants expressly deny that this Defendant is subject to the jurisdiction of this court and do not believe it is properly named as a **nominal** party Defendant is this derivative proceeding. It is an "indispensable" party which Morgan failed to name in his first Complaint of January 26, 2012, thereby depriving this tribunal of subject matter jurisdiction.

3. The Defendants admit the allegations of paragraphs 3 and 4 of the Complaint.

4. The Defendants admit the allegations of paragraphs 5, 6, and 7 of the Complaint except those allegations contained in each paragraph that assert jurisdiction over Defendants in this Court.

5. Responding to paragraph 8 of the Complaint, the Defendants admit that the Defendant Lauralis Management, Inc. ("Lauralis") is a Texas corporation. The Defendants deny the remaining allegations of this paragraph.

6. Responding to paragraph 9, the Defendants admit the same except as to that allegation that "upon the resignation of Baker as a Manager on January 31, 2011, Plaintiff Morgan became a Manager of 150 Bee Street, LLC," and as to that, these Defendants deny the same.

7. The Defendants admit the allegations of paragraphs 10, 12, 13 and 14.

8. Responding to paragraph 11 of the Complaint, the Defendants admit the same except as to that allegation which states: "Operating by themselves or with others, they were the controlling persons of Defendant 150 Bee Street, LLC." These Defendants lack information

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sufficient to form a belief as to the "others" mentioned in this allegation and therefore deny the same.

9. Responding to paragraph 15 of the Complaint, the Defendants admit so much as alleges "upon information and belief, Defendant BIG II was organized by Defendants Gilbert and Fred." The Defendants deny that it acted as general contractor and assert that Hightower Construction Co., Inc. was the general contractor on the project, as admitted by Hightower in the construction lawsuit referred to later in the Complaint.

10. Responding to paragraph 16 of the Complaint, the Defendants deny the same and will allege and assert that the Defendant Fred is the controlling owner of Defendant Lauralis.

11. The Defendants admit the allegations of paragraph 17 and 19 of the Complaint.

12. The Defendants deny the allegations of paragraphs 18, 22, 23, and 25 and demand proof thereof.

13. Responding to paragraph 20 of the Complaint, Defendants find the allegations contained in this paragraph to be matters of law not requiring an answer and therefore deny the same. In further explanation, the Defendants also deny that a proper demand was made upon the members and managers of 150 Bee Street, LLC, deny that there ever was a proper vote, and they therefore deny that this case was properly instituted. Further, the Defendants would allege and assert that the Plaintiff failed to act in accordance with the requirements of the Second Amended Operating Agreement dealing with the commencement of this action.

14. Responding to paragraph 21 of the Complaint, the Defendants admit that Morgan has been a Managing Member and that at the time of these actions Morgan was, and remains, a member of 150 Bee Street, LLC. The Defendants deny the remaining allegations of paragraph 21.

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15. Defendants deny the allegation of paragraph 24 of the Complaint on the ground that the best evidence of the contents of the alleged Order is found in the Order itself, to which the Defendants crave reference.

16. Defendants deny the allegations of paragraph 26 of the Complaint.

17. The Defendants deny the allegations of paragraph 27, as there was never a proper demand, and deny the allegations of paragraph 28, 30, 31, and 32.

18. Responding to paragraph 29, the Defendants admit only so much therein as alleges that "[p]ursuant to the Operating Agreement, the majority of the members of the Company were authorized to vote to initiate this action and to remedy the complaints stated herein." The Defendants deny the remaining allegations of this paragraph and allege and assert that the Plaintiff never made a proper demand as required by law and by the Operating Agreement.

19. Responding to paragraph 33 of the Complaint, the Defendants deny the same on the ground that the document [demand letter] itself is the best evidence of such matters as are contained therein, and to that document the Defendants crave reference. Further, the Defendants lack information sufficient to form a belief as to Morgan's inability to state facts and evidence in the demand letter because he was allegedly limited by the Defendants' activities. At the very least, Morgan had—at the latest—been on "inquiry notice" by the summer of 2008, but thereafter missed the three-year statutory deadline to file his suit. The Defendants deny all remaining allegations of this paragraph.

20. Responding to paragraph 34 of the Complaint, the Defendants deny the same on the ground that the letter itself, incorporated as exhibit 3 in the Complaint, is the best evidence of its own contents, and to this letter, the Defendants crave reference.

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21. Responding to paragraph 35 of the Complaint, the Defendants deny the allegations regarding the contents of the demand letter of November 14, 2011, on the ground that the letter itself contains the best evidence of its contents. Further responding to this paragraph, the Defendants allege and assert that according to paragraph 14.14 of the Second Amended Operating Agreement, the Plaintiff was not required to make a demand for mediation but pursuant to 14.14(a) could initiate the same without the consent of any other member. The Plaintiff failed to do so, as a result of which his Complaint should be dismissed because of his failure to take the necessary actions to perfect his claims.

22. Responding to paragraphs 36, 37, 38, and 39, the Defendants deny the same on the ground that the documents alleged in each such paragraph are the best evidence of their own contents, and the Defendants therefore crave reference to the documents themselves.

23. Responding to paragraph 40, the Defendants deny the same as there is no evidence that Morgan ever asked Pearlstein to agree to initiate the instant action. Morgan's email to Shelia Pace of October 7, 2011, made no such demand, as testified to by 150 Bee St LLC's general counsel, John Hagerty in his deposition in this case.

24. Responding to paragraph 41 of the Complaint, the Defendants deny the same and allege and assert that the Plaintiff failed to take the steps set forth in the Second Amended Operating Agreement to perfect his claims, as a result of which they are barred.

25. Responding to paragraph 42 of the Complaint, the Defendants deny the same and would allege and assert that Morgan failed to make a proper demand upon the Defendants for a meeting as alleged in said paragraph, either verbally or in writing.

26. The Defendants deny the allegations of paragraph 43 and 44 of the complaint.

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27. The Defendants deny the allegations in paragraph 45 of the Complaint and assert there is no evidence that Pearlstein was ever even asked to agree to initiate, or participate in, the instant action.

28. Responding to paragraph 46 of the Complaint, the Defendants deny the same and would allege and assert on information and belief that Neal Baker had already formulated his opinions and thoughts about Tom Morgan and Tom Morgan's behavior based on Morgan's conduct, which included a suit brought by Morgan against Baker in Florida. As to allegations of Baker's behavior in this paragraph, the Defendants deny the same. There is no evidence that Morgan ever asked Baker to initiate, or participate in, the instant action or similar suit.

29. The Defendants lack information sufficient to form the belief as to the allegations in paragraph 47 of the Complaint and therefore deny the same. The demands and refusals would have been nonsensical after Morgan filed suit against the Defendants on January 26, 2012.

30. The defendants deny the allegations of paragraph 48 of the Complaint and would refer Morgan to the hostility and vulgarity he displayed in communications in 2007 and 2008 to Messrs. Baker, Fred, and Gilbert.

31. The Defendants deny the allegations of paragraph 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and 64 on the ground that the best evidence of the contents of the document referenced in each such paragraph is the document itself, to which the Defendants crave reference. In addition, the Defendants assert that Morgan's allegations make no reference to his related vitriolic, vulgar, and hostile communications and so are taken out of proper context.

32. Responding to paragraph 64, the Defendants agree with the allegation that the demands by Morgan were not valid demands. The Defendants deny the demands, if properly made

by Morgan, would have been futile. The Defendants deny the remaining allegations of this paragraph.

33. Responding to paragraph 65 of the Complaint, the Defendants admit so much thereof as alleges that at the time the Plaintiff Morgan signed the Operating Agreement of the LLC and until Neil Baker resigned as Manager of the LLC on January 31, 2011, the Managers of the LLC were Neil Baker and Defendant Stuart Fred. The Defendants deny the remaining allegations on the ground that Baker's resignation was rescinded in July, 2011.

34. The Defendants admit the allegations in paragraph 66 of the Complaint.

35. Responding to paragraph 67, the Defendants believe that the revised percentages of ownership set forth therein are consistent with the requirements of the Operating Agreement, but to those requirements, these Defendants crave reference as to the proper reallocation. The Defendants would further allege that after Baker's death, Morgan, for his own advantage, made public statements that Baker's widow Elizabeth, who is Morgan's sister, succeeded to Baker's voting rights, which is false.

36. Responding to paragraphs 68, 70, 71, 72, and 73, the Defendants deny the same on the ground that the best evidence of the contents of the documents referred to in these paragraphs are the documents themselves, to which the Defendants crave reference. Further responding to paragraph 68, the Defendants allege that when Pearlstine became a Managing Member of the LLC on October 12, 2012, Morgan effectively seized control of the LLC. Further responding to the allegations in paragraph 73 related to the "Unanimous Consent" Resolution of January 31, 2011, entered into without Morgan's signature, Morgan fails to mention that that Resolution was rescinded by a "Unanimous Consent" Resolution of July, 2011, entered into without Morgan's signature.

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37. The Defendants admit the allegations of paragraph 69 of the Complaint.

38. Responding to paragraph 74 of the Complaint, the Defendants deny the same and would allege and assert that Morgan acted as a co-Manager at the times alleged therein.

39. Responding to paragraph 75 of the Complaint, the Defendants deny the same on the ground that the letter alleged therein and its contents are the best evidence thereof, to which the Defendants crave reference.

40. Responding to paragraph 76 of the Complaint, for the same reason in their response to paragraph 75, the Defendants deny the same and crave reference to the contents of the recorded message itself.

41. Responding to paragraph 77 of the Complaint, the Defendants deny the allegations contained therein and would further allege and assert that the paragraph "A" describes actions of counsel for LLC and not the Defendants. Referring to "B," the referenced document speaks for itself, to which contents the Defendants crave reference. In addition, this Resolution was rescinded by Resolution of July, 2011, without Morgan's signature. Responding to paragraph "C," it alleges an act of Neal Baker, which act he was entitled to take, as he was a Member and paragraph 6.01 of the Operating Agreement states in part: "…at all times while either Neal Baker or Tom Morgan is a Member, Neal Baker shall serve as one of the Managing Members…"

42. Responding to paragraph 78 of the Complaint, the Defendants deny the same on the ground that the Plaintiff Morgan is asserting on the part of the Defendants actions related to 150 Bee Street LLC commingled and mixed with actions related to other entities and/or projects, including but not limited to the condominium project itself.

43. Responding to paragraph 79 of the Complaint, the Defendants deny the same and would allege and assert that the Plaintiff Morgan failed to follow statutory and case law

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requirements and the requirements of the Second Amended Operating Agreement and therefore failed to exhaust his rights contained therein and as a result has had no right to bring his First and Second Amended Complaints or their predecessor Complaint of January 26, 2012.

44. Responding to paragraphs 80 and 81 of the Complaint, the Defendants deny the same on the ground that the best evidence of the contents of the documents referred to therein are the documents themselves, to which Defendants crave reference.

45. Responding to paragraph 82 of the Complaint, Defendants deny the same on the ground that the best evidence of the contents of the Complaint, Temporary Restraining Order, Injunction Order, and Order Denying the Motion to Dismiss and to Compel Arbitration referred to are the documents themselves, to which the Defendants crave reference. The Defendants further deny those allegations that they rested on their rights until they filed a Motion to Dismiss on June 5, 2018. Allegations asserting, among other things, 1) lack of subject matter jurisdiction, 2) that the Plaintiff missed the statute of limitations, 3) that his Complaint was barred by terms of the Operating Agreement, 4) that the Plaintiff failed to mediate before filing suit, and 5) for any other defense which might later appear in discovery, are all set forth in the Answer of the Defendants of March 13, 2012. Morgan cannot claim prejudice at this time because he moved forward on his own accord in the face of these allegations and made no effort to cure his deficiencies by, for example, adding as an indispensable party to his Complaint 150 Bee Street, LLC before the three year statute of limitations ran. In addition, subject matter jurisdiction can never be waived under South Carolina law, and regardless of any alleged actions on the part of these Defendants as well as on the part of the Plaintiff Morgan in the years after he filed his initial suit, Morgan's original Complaint was a nullity without said indispensable party, the Court and the arbitration panel lacked and still lack subject matter jurisdiction, and this Complaint should be dismissed on that ground

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alone. In addition, Morgan was fully warned of the dangers of his proceeding with litigation by Henry Grimball's letter of October 27, 2011 [Morgan document production Bates "Morgan 03490-03494] to Morgan's counsel, Chris Staubes: "Second, and perhaps much more importantly, Mr. Morgan is wasting his time and money as the claims he may have had against my clients… are time-barred by the three-year statute of limitations." At the very least, Morgan and his counsel knew or should have known that Morgan was, at the bare minimum, on inquiry notice at the very latest by August, 2008.

46. The defendants deny the allegations of paragraphs 83 and 84, and further deny the allegations of paragraph 85, 86, 87, and 88 on the ground that the contents of the documents alleged therein are the best evidence thereof, to which the Defendants crave reference.

47. The Defendants deny the allegations of paragraphs 89, 90, 91, and 92 on the ground that they allege matters of law not requiring an answer.

48. The Defendants deny the allegations of paragraphs 93.

49. The Defendants deny the allegations of paragraph 94 on the ground that the allegations are so vague the Defendants cannot formulate a response.

50. The Defendants admit the allegations of paragraph 95 and would further assert that Morgan fully agreed with the substance of these allegations.

51. The Defendants deny the allegations of paragraphs 96, 97, and 98.

52. Responding to paragraph 99 of the Complaint, the Defendants deny any allegation contained therein as allege improper conduct on the part of the Defendants, who allege and assert that in a 40 million dollar project, a very small number of expenses were mistakenly charged to the Company and/or were regarded by Baker and Fred as reasonable expenses to be reimbursed.

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These Defendants, when they learned some years ago of the error of some charges, repaid the same to the Company.

53. Responding to paragraph 100, the Defendants assert the same denials and explanation as they asserted in paragraph 52 immediately above against the allegations of paragraph 99 of the Complaint.

54. Responding to paragraph 101, the Defendants deny the same and would allege and assert in explanation that, with the knowledge of the Plaintiff, and for the convenience of financing, they referred to themselves as the "general contractor" while everyone, including the Plaintiff, understood that the actual general contractor for the construction of the 150 Bee Street project was Hightower, which Hightower admitted in the construction litigation referred to in the Complaint.

55. The Defendants deny the allegations of paragraphs 102, 103, 104, 105, 106 and 107.

56. Responding to paragraph 108, the Defendants admit so much as alleges that rates charged for the use of their private jet were incrementally raised over the years of the project and deny that these rate increases were improper or unknown to the parties hereto.

57. The Defendants deny the allegations of paragraph 109 and 110.

58. Responding to paragraph 111, the Defendants deny the same on the basis that their production of documents from BIG II's records involved a legal issue of discovery and on the additional ground that they sought and received the advice of 150 Bee St LLC's general counsel as to what to produce and followed his advice.

59. The Defendants deny the allegations of paragraph 112.

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Responding to paragraphs 113, 114, and 115, the Defendants deny the same and in explanation would refer to their denial of the allegations in paragraph 99 of the Complaint in paragraph 52 of this Answer.

60. The Defendants deny the allegations of paragraph 116, and in explanation would refer to their denial of paragraph 99 of the Complaint in paragraph 52 of this Answer.

61. Responding to paragraphs 117 through 123, the Defendants deny the same on the same basis as they denied the allegations of paragraph 99 of the Complaint in paragraph 52 of this Answer.

62. Responding to paragraph 124 of the Complaint, the Defendants deny the same on the basis that the best evidence of the contents of any instructions from the Plaintiff are best found in the instructions themselves, to which the Defendants crave reference. In further explanation, they admit that at some point in time, the Plaintiff did request that the Defendants no longer bill the company for their use of their private jet on the business of the Company, The Defendants complied with this request except as to a bill sent to the Company after the request for their use of the jet on the business of the Company BEFORE receiving the Plaintiff's request. In addition, reimbursement for Defendants' overhead allocated to the Project was expressly agreed to by the Members.

63. The Defendants deny the allegations of paragraph 125 and 127, and deny paragraph 129 on the ground that the allegations in paragraph 129 are so vague the Defendants cannot formulate a response thereto.

64. Responding to paragraph 126, the Defendants admit that on September 9, 2011, they wrote themselves a check on Company funds for use of their private jet, but would allege and assert in explanation thereto that the usage was incurred before they were requested by the Plaintiff

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that they no longer bill the Company for their private jet. The reimbursement for said expenses was therefore appropriate, proper, and lawful.

65. Responding to paragraph 128 of the Complaint, the Defendants deny the same on the ground that the best evidence of the contents of Article 6.03 of the Second Amended Operating Agreement is contained in said Article, to which the Defendant crave reference.

66. The Defendants deny the allegations of paragraphs 130 and 131 of the Complaint.

67. Responding to paragraph 132 of the Complaint, the Defendants find allegations contained in the first sentence thereof to be allegations of law not requiring an answer and therefore deny the same. The Defendants deny the remaining allegations of this paragraph.

68. The Defendants deny the allegations of paragraph 133 of the complaint.

69. The Defendants deny the allegations of paragraphs 134, 136, and 138 of the Complaint and would allege and assert that Village Real Estate of Nashville was engaged to market the units at 150 Bee Street LLC. Village Real Estate joined with a local real estate firm that held a South Carolina license, all of which was known to the Plaintiff and other members of the LLC and approved by them. All closings were handled by Jay Claypoole of Nelson Mullins, who set forth the commissions of each sale in the closing statement, none of which was ever questioned. None of the Defendants shared in any of the commissions, and on information and belief, the commissions were paid to the local real estate agency. Defendants do not recall when Village Real Estate disengaged. Any of the allegations of paragraphs 134, 136, and 138 inconsistent herewith are denied.

70. Responding to paragraph 135, the Defendants admit that they a relationship with a "Nashville real estate company." They deny the remaining allegations of this paragraph.

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71. Responding to paragraph 137 of the Complaint, the Defendants deny the material allegations contained therein and would allege and assert that at all times relevant thereto, the Plaintiff was aware and had no objection to their use of a Nashville real estate company, which marketed the units of 150 Bee Street with a licensed South Carolina real estate company.

72. The Defendants deny the allegations of paragraphs 139 and 140 on the ground that the best evidence of the contents of the documents referred to therein are the documents themselves, to which the Defendants crave reference.

73. The Defendants admit the allegations of paragraph 141 of the Complaint.

74. Responding to paragraph 142, the Defendants deny the same on the ground that in paragraph 42 of this Answer, the Defendants responded to paragraph 78 of the Complaint, the Plaintiff asserting allegations of his attempt to serve as co-manager of 150 Bee Street, LLC with allegations of other projects over which Morgan had no operational control.

75. Responding to paragraph 143 of the Complaint, the Defendants deny the same on the ground that the contents of the lawsuit referred to therein are best found within the pleading itself, to which the Defendants crave reference.

76. The Defendants deny the allegations of paragraph 144 of the Complaint.

77. Responding to paragraph 145, the Defendants admit that BIG II signed an AIA Contract with 150 Bee Street, LLC to act as a general contractor for the project but in explanation, would allege and assert that at all times alleged in the Complaint, the parties hereto understood that this was an accommodation for a bank loan and that the correct and true general contractor was Hightower, which Hightower to its detriment admitted in the construction case referred to in this Complaint.

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78. Responding to paragraph 146, while the Defendants consider the allegations irrelevant, they admit that Bomasada was involved in a dispute in Arkansas involving its use of contractors, but they have contested the dispute and have not paid any fines related thereto. The Defendants deny the remaining allegations in this paragraph and allege and assert that at all times relevant hereto, Hightower was the general contractor on the project.

79. Responding to paragraph 147 of the Complaint, the Defendants deny the material allegations therein and would allege and assert that while they did hire a Nashville real estate company to marked the units of 150 Bee Street, it was retained to act with a licensed South Carolina real estate company, as is more fully set forth in paragraph 69 above. Thus there was nothing improper about the Defendants doing so.

80. The Defendants deny the allegations of paragraphs 148, 150, 151, 152, 153, 154, 156, 157, 158, 159, 160, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, and 179.

81. The Defendants find the allegations of paragraphs 149, 155, and 161 to be allegations of law and not requiring an answer and therefore deny the same.

82. Responding to paragraph 180, the Defendants admit that the Plaintiff, either individually or through 150 Bee Street, and the Defendants entered into various contracts. They deny the remaining allegations of this paragraph on the basis that the best evidence of the contents of such contracts is in the contracts themselves, to which they crave reference.

83. The Defendants deny the allegations of paragraphs 181, 183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 199, 200, 201, and 202.

84. The Defendants admit the allegations of paragraph 182 of the Complaint.

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85. Responding to paragraph 184, the Defendants deny the material allegations therein and would allege and assert that the general contractor was Hightower.

86. The Defendants find the allegations of paragraph 198 to be a matter of law not requiring an answer and therefore deny the same.

87. The Defendants find the allegations of paragraph 203 to be a matter of law not requiring an answer and therefore deny the same.

88. Responding to paragraph 204, the Defendants deny the same.

89. Responding to paragraph 205, the Defendants deny the same.

90. Responding to paragraph 206, the Defendants deny the same.

91. The Defendants deny the allegations of paragraphs 207, 208, 209, 210, 211, 213, 215, 216, 217, 218, 219, 220, 223, 224, 226, 227, 228, 229, 231, 232, 234, 235, 236, 237, 238, 239, 240, and 245.

92. The Defendants find the allegations of paragraphs 212 and 214 so vague that they cannot formulate a response thereto and therefore deny the same.

93. Responding to paragraphs 221 and 222, see Defendants' allegations in paragraph 52, as has been set forth hereinabove and adopted herein. The Defendants allege and assert that they did nothing with an improper intent.

94. Responding to paragraph 233, the Defendants lack information sufficient to form a belief thereto and therefore deny the same.

95. The Defendants deny the allegations of paragraphs of 241, 242, 243, and 244, and as to 243 and 244, adopt Defendants' paragraph 52 set forth above.

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96. Responding to paragraph 225, the Defendants deny the same on the basis that the best evidence of any such representation is the representation itself, to which Defendants crave reference.

97. Responding to paragraph 230, the Defendants assert a limited admission based solely on the proposition that reducing the price of anything generally accelerates its sales.

98. Responding to paragraph 246, Defendants deny the same.

99. The Defendants deny the allegations of paragraph 247 on the ground that the best evidence is in the representation itself, to which the Defendants crave reference.

100. Responding to paragraph 248, the Defendants deny the same.

101. The Defendants deny the allegations of paragraphs 249, 250, 251, 252, 254, 255, 257, 258, 262, 263, 264, 265, 266, 268, 269, 270, 271, 272, and 273.

102. Responding to paragraph 253, it's common sense that generally when one lowers the price of anything, sales increase. However, Defendants in fact lowered the price of units at one time, as Morgan knew and approved. However, for good and proper reasons, there was a time when it was unwise to lower unit prices. See Exhibit 424 to Morgan's deposition.

103. The Defendants deny the allegations of paragraph 256, 259, and 260, in part on the basis that the allegations involve what Morgan knew or thought at a time when he had retained accountants and attorneys to advise him.

104. Responding to paragraph 261, the Defendants find the same to be a matter of law not requiring an answer and therefore deny the same.

105. Responding to paragraph 267, the Defendants deny the same on the ground that the best evidence of this allegation is in the Development Agreement.

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106. The Defendants deny the allegations of paragraphs 274, 275, and 276 of the Complaint.

107. The Defendants deny the allegations of paragraph 277.

108. Responding to paragraph 278 and 279, the Defendants deny the same and assert that the best evidence of the Development Agreement and the AIA contract is contained in those documents themselves, to which the Defendants crave reference.

109. The Defendants deny the allegations of 280, 281, 282, 283, 284, 285, and 286.

110. The Defendants deny the allegations of paragraphs 287, 288, 289, and 290.

111. The Defendants deny the allegations of paragraph 291 of the Complaint.

112. Defendants deny each and every allegation of the Complaint not specifically and expressly admitted hereinabove.

ADDITIONAL AND AFFIRMATIVE DEFENSES

113. This Court lacks subject matter jurisdiction because the Plaintiff failed in his original Complaint to name an indispensable party before the three year statute of limitations ran, and under the provisions of the arbitration agreement contained within the Operating Agreement.

114. The Complaint and the causes of action contained therein, fail to state claims upon which relief can be granted.

115. This Court does not have personal jurisdiction over one or more of the Defendants, as one or more of the Defendants do not have the requisite minimum contacts with the State of South Carolina.

116. Plaintiff's legal claims are barred by the applicable statutes of limitations.

117. Plaintiff's claims are barred, in whole or in part, by the equitable doctrines of unclean hands, estoppel, quasi estoppel, in pari delicto, equitable estoppel, waiver and/or laches.

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118. Plaintiff's claims are barred, in whole or in part, because the Plaintiff and those he purports to represent failed to mitigate any injuries and damages they allegedly sustained.

119. Plaintiff fails to state the allegations of fraud with sufficient particularity, and those claims must be dismissed.

120. One or more of the Plaintiff's causes of action may be barred by the terms of the Operating Agreement, including Section 7.01.

121. Plaintiff is barred from recovering on his Unfair Trade Practices Act claim because the allegedly wrongful conduct has no impact on the public interest and is not such as will be repeated.

122. Plaintiff is barred from recovering under the civil conspiracy cause of action because the damages sought under that cause of action are also pled under other theories and are not special damages.

123. Plaintiff is barred from recovering under the *quantum meruit* cause of action to the extent any of his claims arises from breach of the Operating Agreement. A *quantum meruit* claim must be dismissed if the parties seek remedies under an express contract.

124. Defendants claim their right to set off, settlement or judgment credits, to the extent applicable and allowed pursuant to South Carolina law.

125. Defendants plead applicability of the 2005 Tort Reform Statutes, S.C. Code Ann. §§ 15-38-15; 15-7-30,-100; 36-2-803(B), and other pertinent statutory sections.

126. Plaintiff's claims for punitive damages cannot be sustained because an award of punitive damages would violate Defendants' rights under the Constitution of the United States of America and the Constitution of the State of South Carolina.

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127. Defendants hereby give notice that they intend to rely upon any other defenses that may become available or appear during the discovery proceedings in this case and hereby reserve their right to amend their Answer to assert any such affirmative defenses.

COUNTERCLAIMS

128. Defendants John L. Gilbert ("**Gilbert**") and Stuart Fred ("**Fred**") are citizens and residents of the State of Texas.

129. Bella Vista Partnership ("**BVP**") is a Texas general partnership of which Gilbert is the managing partner. Gilbert, Fred and BVP are collectively referred to as the "**Counterclaimants**."

130. Counterclaimants are informed and believe that Plaintiff is a citizen and resident of the State of Florida.

131. 150 Bee Street, LLC is a limited liability company organized and existing under the laws of the State of South Carolina.

132. All matters set forth in this Counterclaim are properly arbitrable pursuant to the Second Amended and Restated Limited Liability Company Agreement of 150 Bee Street, LLC ("**Operating Agreement**").

133. The Defendants deny each and every allegation of the Complaint not specifically and expressly admitted above,

FOR A FIRST COUNTERCLAIM
(Contractual Indemnification)

134. Counterclaimants incorporate and re-allege the foregoing allegations.

135. Counterclaimants are members of 150 Bee Street, LLC.

136. Section 8.01 of the Operating Agreement provides that "[n]o member shall have any liability to the Company or to any Member for any mistakes or errors in judgment or for any

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act or omission reasonably believed by such Member to be within the scope of authority conferred upon him or her by this Agreement, but will have liability only for acts or omissions involving his or her intentional misconduct or knowing violation of law, or any transaction in which he or she received a personal benefit in violation of this Agreement."

137. Counterclaimants reasonably believed that all of the actions they have undertaken were and remain within the scope of authority conferred by the Operating Agreement and any damages caused to the Plaintiffs were the result of, at worst, mistakes or errors of judgment.

138. Pursuant to Section 8.01(a) of the Operating Agreement, the Company must indemnify, defend and hold the Counterclaimants harmless from liabilities, damages, costs and expenses (including attorneys' fees and accountants' fees) incurred as a result of actions undertaken within the scope of authority conferred by the Operating Agreement.

139. Counterclaimants are entitled to indemnification from the Plaintiff, including the payment of attorneys' fees and expenses, for the costs of defending against and paying any claims resulting from this litigation.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

140. Counterclaimants incorporate and re-allege the foregoing allegations.

141. Section 14.14 of the Operating Agreement requires all members of the Company to mediate all claims or disputes that arise between them.

142. Counterclaimants have demanded that Plaintiff mediate the claims set forth in the Complaint as admitted by the Plaintiff in the Complaint and as required by the Operating Agreement.

143. Plaintiff has refused to mediate the claims set forth in the Complaint.

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144. Plaintiff's refusal to mediate the claims set forth in the Complaint is a breach of the terms of the Operating Agreement.

145. Counterclaimants have been damaged by Plaintiff's refusal to mediate the claims set forth in the Complaint, including, but not limited to, the costs of attempting to compel mediation and arbitration.

FOR A THIRD COUNTERCLAIM

(Breach of Fiduciary Duty)

146. Counterclaimants incorporate and re-allege the foregoing allegations.

147. Morgan became a Managing Member of 150 Bee St LLC upon the death of Neal Baker on 8/24/11.

148. When Edwin Pearlstein was elected to be a Managing Member of 150 Bee St LLC by Resolution on October 13, 2012, Morgan gained effective control of 150 Bee St LLC.

149. At all times relevant hereto, on and after the death of Baker, Morgan as a Managing Member owed fiduciary duties to Bella Vista, Fred, and Gilbert.

150. At all times on and after Baker's death, Morgan's acts and omissions as a Managing Member related to Bella Vista, Fred, and Gilbert were controlled by the Operating Agreement.

151. At all times on or after Baker's death at which time Morgan became a Managing Member, and more particularly and especially after October 13, 2012, when Morgan gained effective control of 150 Bee St LLC, Morgan owed fiduciary duties to Bella Vista, Fred, and Gilbert, and was obligated to act in a prudent, careful, and lawful manner toward them and in their behalf.

152. Morgan breached his fiduciary duties to Fred, Gilbert, and Bella Vista in various respects, some of which breaches were caused by his negligent and reckless conduct and other breaches the result of his intentional misconduct.

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153. Bella Vista, Fred, and Gilbert have been harmed and damaged in the past and will be damaged and harmed in the future as the direct and proximate result of such breaches of fiduciary duties by Morgan and should be compensated for said harm and damages

154. Some of such breaches of fiduciary duties were intentional, willful, wanton, reckless, malicious and done with the conscious disregard of the rights of Bella Vista, Fred, and Gilbert.

FOR A FOURTH COUNTERCLAIM
(Breach of Duties of Good Faith and Fair Dealing)

155. Defendants reallege and reincorporate the allegations set forth above as if repeated herein verbatim.

156. At all times relevant, more particularly after Baker's death, and especially after Morgan obtained control of the LLC on October 13, 2012, Morgan owed duties of good faith and fair dealing to Bella Vista, Fred, and Gilbert.

157. Morgan breached these duties of good faith and fair dealing in various respects, including but not limited to the manner described hereinabove and continues to do so.

158. Morgan's breaches, some of which were and remain intentional, malicious, and reckless, have damaged Bella Vista, Fred, and Gilbert.

WHEREFORE, having fully answered the Second Amended Complaint of the Plaintiff, the Defendants pray that the arbitration panel issue its order as follows:

(a) Dismissing the Second Amended Complaint of the Plaintiff, with prejudice;

(b) Granting the Defendants' counterclaims with judgment against the Plaintiff under Defendants' counterclaims, above, in an amount to be determined by the arbitration panel;

(c) Awarding the Defendants such other and further relief as may be just and proper.

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April 26, 2022
Charleston, South Carolina

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ELECTRONICALLY FILED - 2022 May 18 1:49 PM - CHARLESTON - COMMON PLEAS - CASE#2012CP1000580

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION IN THE COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580 **PLAINTIFF'S REPLY TO THE COUNTERCLAIMS OF THE DEFENDANTS**

The Plaintiff Thomas H. Morgan ("Morgan" or "Plaintiff"), through his undersigned counsel, makes this Reply to counterclaims stated in the Defendants' Answer to Second Amended Complaint and Counterclaims, as follows.

GENERAL DENIAL AND SPECIFIC RESPONSES

Except as specifically admitted, modified, or explained herein, the Plaintiff expressly denies each allegation in the Counterclaim, paragraphs 128-158 of the Defendants' Answer to Second Amended Complaint and Counterclaims.

1. Upon information and belief, Plaintiff admits the allegations in Paragraphs 128, 129, 130, 131, 135, and 147.
2. Upon information and belief, Plaintiff denies the allegations in Paragraphs 137, 139, 142, 143, 144, 145, 148, 152, 153, 154, 157, and 158.

3. Plaintiff is not required to admit or deny the allegations of paragraph 133.
4. Responding to the allegations in Paragraph 149, Plaintiff admits as a Managing Member he owed a fiduciary duty to the Company and its Members, just as Stuart Fred did from the moment Mr. Fred became a Managing Member of the Company.
5. Responding to the allegations in Paragraph 150, Plaintiff admits as a Managing Member he was governed by the provisions of the Operating Agreement just as Mr. Fred and the other Defendants were.
6. Responding to the allegations in Paragraph 151, Plaintiffs admits that as a Managing Member he owed fiduciary duties to the Company and its members and was obligated to act in a prudent, careful, and lawful manner, just as Mr. Fred as Managing Member owed fiduciary duties to the Company and its Members and was obligated to act in a prudent, careful, and lawful manner. The Plaintiff denies the remaining allegations of the paragraph.
7. Responding to the allegations of Paragraph 156, Plaintiff admits that he, like anyone in a contractual relationship with another, owed a duty of good faith and fair dealing with those with whom he was in a contractual relationship. This applies to the Defendants as well as to the Plaintiff. The Plaintiff denies the remaining allegations of the paragraph.
8. Responding to the allegations in Paragraph 132, Plaintiff admits the matters in the Counterclaim are arbitrable by agreement of the parties, as are the matters in the Plaintiff's Second Amended Complaint.
9. Responding to the allegations in Paragraphs 136, 138, and 141, the text of the Operating Agreement speaks for itself, and Plaintiff denies any allegations or inferences inconsistent with the plain and unambiguous meaning of the text.
10. Responding to the reallegations of Paragraphs 134, 140, 146, and 155, Plaintiff reiterates his responses to those allegations referenced.

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11. Plaintiff denies the allegations in the Defendants' prayer for relief.

FURTHER RESPONDING AND
AS A FIRST AFFIRMATIVE DEFENSE

12. Counterclaimants fail to state facts sufficient to constitute a cause of action and, therefore, Defendants' counterclaims should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FURTHER RESPONDING AND
AS A SECOND AFFIRMATIVE DEFENSE

13. Counterclaimants' counterclaims are barred, in whole or in part, by the equitable doctrine of Unclean Hands.

FURTHER RESPONDING AND
AS A THIRD AFFIRMATIVE DEFENSE

14. To the extent that Counterclaimants failed to comply with the applicable statute of limitations or statute of repose, their claims are barred against Plaintiff.

FURTHER RESPONDING AND
AS A FOURTH AFFIRMATIVE DEFENSE

15. Counterclaimants' counterclaims are barred by the equitable doctrines of Waiver, Estoppel, and/or Laches.

FURTHER RESPONDING AND
AS A FIFTH AFFIRMATIVE DEFENSE

16. To the extent applicable, Plaintiff raises all affirmative defenses required by Rule 8(c), SCRCP.

FURTHER RESPONDING AND
AS A SIXTH AFFIRMATIVE DEFENSE

17. Plaintiff reserves and specifically does not waive any such affirmative defenses which may become apparent through the course of discovery.

FURTHER RESPONDING AND
AS A SEVENTH AFFIRMATIVE DEFENSE

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18. Plaintiff fully complied with the provisions of the Operating Agreement and applicable law in bringing this arbitration action.

FURTHER RESPONDING AND
AS AN EIGHTH AFFIRMATIVE DEFENSE

19. The Counterclaimants' actions complained of in the Second Amended Complaint were not within the scope of their authority, but were, rather, intentional misconduct and knowing violations of law, and/ or transactions in which they received personal benefit in violation of the Operating Agreement.

WHEREFORE, having fully responded to the allegations of the Counterclaimants counterclaim, Plaintiff prays that judgment be granted in his favor and that costs of defending this action be borne by the Defendants, or alternatively, Plaintiff prays for judgment as requested herein and for other and further relief as this court may deem just and proper.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Plea

Bentley D. Price, Circuit Court Judge

Case No, 2012-CP-10-00580

Thomas H. Morgan…….Respondent,

v.

JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY,…….Appellants.

NOTICE OF APPEAL

John L. Gilbert, et. al. appeal the order of the Honorable Bentley D. Price dated February 6, 2024 (Exhibit A) and, by necessity, the arbitration panel's underlying final arbitration award dated June 19, 2023 (Exhibit B).

Appellants received written notice of entry of the order of Judge Price on February 6, 2024.

March 4, 2024.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION IN THE COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580 **ORDER** **DENYING DEFENDANTS' MOTION TO VACATE OR MODIFY THE FINAL ARBITRATON AWARD** **AND** **CONFIRMING ARBITRATION AWARD**

This matter comes before the court on Defendants' Motion to Vacate or Modify the Final Arbitration Award (filed June 30, 2023), and Plaintiff's Opposition to Defendants' Motion and Motion to Confirm the Award (filed July 17, 2023).

The arbitration award (Arbitration Award, April 10, 2023, and Final Arbitration Award, June 19, 2023, together, the "Arbitration Award") that the Defendants seek to vacate or modify is the result of a 10-year arbitration proceeding pursuant to a valid arbitration agreement and an order of this court referring the matter to arbitration with the consent of the Defendants (Consent Order Referring Matter to Arbitration, July 9, 2012). All of the issues raised by the Defendants in this motion were briefed and argued many times before the Panel and ultimately the Panel ruled against the Defendants' arguments on each occasion. Now, the Defendants seek to reargue those issues

EXHIBIT A

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before this Court, in this motion to vacate. This the Defendants cannot do under the law of this state.

The Panel was a 3-arbitrator panel made up of experienced lawyers chosen by consent of the parties that changed somewhat over the course of the ten years but the Panel that decided the dispositive motions and tried the case over more than a week's time consisted of two experienced and accomplished members of the Charleston County Bar[1] and a retired Chief Justice of the South Carolina Supreme Court[2] (the "Panel" or "Arbitration Panel").

The Panel read and examined thousands of pages of briefs, memos, exhibits, statutes, and legal opinions, and heard days of testimony from live witnesses, as well as reading hundreds of pages of submitted deposition testimony. The Panel read memoranda on three separate dispositive motions (Plaintiff's Memo, **Exhibits C and D**) filed by the Defendants and briefed by the parties and heard arguments on the motions at a hearing after which the Panel issued an order denying the motions (Plaintiff's Memo, **Exhibit E**). Thereafter, the Panel heard testimony and argument at an arbitration hearing that began on October 31, 2022, and ended on Nov 8, 2022 (Plaintiff's Memo, **Exhibit F**). Thereafter, the Plaintiff and Defendants prepared and submitted hundreds of pages of final written argument in the form of proposed orders which the Panel considered and issued a written award on April 10, 2023 (Plaintiff's Memo **Exhibit G**). After considering the Defendants' motions and supporting memoranda on a Motion for Reconsideration, the Panel issued a final award on June 19, 2023, which also resolved the award of attorney's fees which had likewise been briefed and contested by the Defendants.

After reviewing the motions, memoranda, and exhibits submitted by the parties and after hearing arguments of counsel for both parties on November 13, 2023, this Court DENIES the

[1] H. Brewton Hagood, Chair; Paul A. Dominick, Member
[2] Costa M. Pleicones, Member

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motions of the Defendants to vacate or modify the arbitration award and CONFIRMS the award of the arbitrators.

THE SCOPE OF REVIEW OF ARBITRATION AWARDS

(A) A motion to modify may only be made on certain grounds provided by the statute, which do not exist in this case.

S.C. Code Ann. Sec. 15-48-140 provides:

> (a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.
> (b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.
>
> S.C. Code Ann. § 15-48-140 (LexisNexis, Lexis Advance through 2023 Regular Session Act No. 7, not including changes and corrections made by the Code Commissioner) ("SC Arbitration Act")

There is no evident miscalculation, decision on a matter not submitted, or flaw in form not affecting the merits raised by the Defendants in their motion. There is, therefore, no basis in the law for modifying or correcting the Panel's award. The motion made under 15-48-140 is denied.

(B) Review of an arbitration award is limited, and the decision of the arbitrator will be vacated only upon certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law.

Arbitration is not "litigation carried on by other means." Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555-56 (Ct. App. 2002), citing White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993). Judicial review of an arbitration award is therefore limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor. Lauro, 570 S.E. 2d at 555-556.

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Arbitration is a favored method of settling disputes in South Carolina. When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. Id. Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award. Id, citing Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997) (citations omitted). Review of an arbitration award is limited, and the decision of the arbitrator will be vacated only under certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law. Id., citing Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

"Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award." Crouch Constr. Co. v. Causey, 405 S.C. 155, 163, 747 S.E.2d 482, 486 (2013), citing C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (quoting Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009)). "An award will be vacated only under narrow, limited circumstances." Id. "The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality." Id., quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 151, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) (White, J., concurring).

In reviewing arbitration awards, "the standards for judicial intervention are . . . narrowly drawn to assure the basic integrity of the arbitration process without meddling in it." Id., quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983). "The reasons for this are not hard to identify." Id., citing In re Andros Compania Maritima, S.A., 579 F.2d 691, 700 (2d Cir. 1978).

A decision to vacate an arbitration award may only be made on the specific grounds found in S C Code Ann. Sec. 15-48-130 or on the non-statutory basis of "manifest disregard or perverse misconstruction" of the law.

The SC Arbitration Act provides:

> (a) Upon application of a party, the court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an

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> arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection. But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

S.C. Code Ann. § 15-48-130(a).

Decisions of courts in this and other jurisdictions have vacated arbitration awards where there has been "a manifest disregard or perverse misconstruction of the law." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009), citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985); S.C. Code Ann. § 15-48-130(a); Batten v. Howell, 300 S.C. 545, 548-49, 389 S.E.2d 170, 172 (Ct. App. 1990) (citations omitted). However, decisions recognizing this non-statutory ground for vacating arbitration awards have required "something beyond and different from a mere error of law or failure on the part of arbitrators to understand or apply the law." Batten, 389 S.E.2d at 172. "[A]rbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" Id. If a ground for the award can be inferred from the facts, the award should be confirmed. Id.

For a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Id. Case law presupposes something beyond a mere error in construing or applying the law. Even a "clearly erroneous interpretation of the contract" cannot be disturbed. Id. at 108, 333 S.E.2d 787. The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law. Id. at 108, 333 S.E.2d at 787. Accord, Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

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An arbitrator's "manifest disregard of the law" as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it. Gissel, 676 S.E. 2d at 324, citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005). Factual and legal errors by arbitrators do not constitute an abuse of power, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. Id., Pittman, supra (emphasis added).

Here, the Defendants argue that the Arbitration Award should be vacated under the statute because "The arbitrators exceeded their powers" "and/or manifestly disregarded the law governing their jurisdiction in this matter in that the Panel lacked subject matter jurisdiction to hear the case and should have dismissed the case as a matter of law." Defendants' Motion to Vacate, at 1.

The Defendants' burden, therefore, in this motion to vacate, is to prove that as a matter of law the arbitrators (1) knew that they had no authority to decide this case, (2) ignored the law, and (3) decided the arbitration proceeding in knowing and manifest disregard of that law.

DENIAL OF THE DEFENDANTS' MOTION TO VACATE OR MODIFY THE ARBITRATION AWARD

1. **The issue of subject matter jurisdiction was thoroughly briefed and argued before the Panel at both the dispositive motion stage, at the trial and at the post-trial stage, and the Panel ultimately decided in favor of the arguments recognizing the court's and Panel's subject matter jurisdiction.**

The consent order initiating the arbitration dated July 9, 2012, established exclusive and binding subject matter jurisdiction in the panel for all matters raised by the pleadings in this matter. The consent order, to which the Defendants explicitly agreed, referred:

> All claims, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case, shall be decided by binding arbitration that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act and all of the parties submit themselves to the jurisdiction of this court and arbitration panel.

This is not a matter of a party raising subject matter jurisdiction later in the case. Rather, subject matter jurisdiction in this case was decided by court order and by consent submission of the

parties, including these Defendants pursuing this argument. This Court, and the arbitration Panel to which it referred this matter, have subject matter jurisdiction of this matter.

This matter was extensively argued throughout the course of the arbitration proceedings by the Defendants and, specifically, in the motions for summary judgment, at trial, post-trial, and in a motion for reconsideration. Likewise, at every stage, the Plaintiffs presented arguments establishing the Panel's subject matter jurisdiction and arguing against the Defendant's position. (Plaintiff's Memo, Exhibits C, D, E, F, and G).

The Panel ruled against the Defendants' motion at the summary judgment stage (Plaintiff's Memo Exhibit E), and after hearing the evidence and legal arguments of counsel at trial and considering their extensive arguments submitted post-trial, the Panel decided in favor of the Plaintiff's position and found that the Panel did have subject matter jurisdiction (see Exhibit A). The Defendants raised the argument yet again in the Motion for Reconsideration and the Panel once again, in its ruling on that motion, rejected Defendants arguments and found that the Defendants had raised no new issues or arguments, and the Panel did have subject matter jurisdiction to issue an award in the arbitration proceeding (see Defendants' Motion, Exhibit A).

Now, the Defendants make the same arguments here, again.

The Defendants cannot vacate the Arbitration Award, however, by arguing that the Panel did not fully consider their argument or even that the Panel wrongly decided the issue. Rather, they must show that there is a clear law supporting their position that the Panel recognized to be controlling and simply refused to follow it. There is no such clear controlling law, and there is no evidence that the Panel disregarded the law of South Carolina in any respect. Rather, the Panel disagreed with the Defendants' interpretation of the law and facts and instead adopted the argument made by the Plaintiff

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There is no clear legal principle that compels a decision for Defendants that the Panel knowingly failed to follow. The Panel disagreed with Defendants' argument and adopted Plaintiff's argument on this issue. The motion to vacate on this issue is denied.

2. **The issue of the statute of limitations was exhaustively briefed and argued before the Panel at both the dispositive motion stage, the trial and at the post-trial stage, and the Panel ultimately decided against Defendants' arguments.**

The same analysis applies to the Defendants' statute of limitations argument. The issue was briefed and argued at the dispositive motions, at trial, post-trial, and post-award. At each stage, the Plaintiff made arguments against applying the statute of limitations defense as a bar to recovery. In each instance, the Panel rejected the Defendants' arguments and decided that the statute of limitations defense did not bar recovery in this case.

As with the subject matter jurisdiction issue, the Defendants must prove not only that the Panel erred as a matter of law but did so knowing a clear and unassailable principle of law that controlled the outcome of the issue and knowingly disregarded it to render its decision. There is absolutely no support for this argument in the record or the award, and this Court denies the Defendants' motion to vacate on this issue.

3. **The Panel invited and considered the arguments of the Defendants regarding the attorney's fees award and ultimately made an award to the Plaintiff that was less than Plaintiff requested.**

Even more so, regarding the attorneys' fee issue, the Defendants do not even argue that the Panel knowingly disregarded the law. The Defendants simply disagree with the Panel's conclusion not to bar the Plaintiff's recovery for attorney's fees based on an unfounded theory of "unclean hands." The Defendants challenged this measured award by the Panel, set out in detail in its June 19, 2023, written ruling, which was less than the Plaintiff requested, and based on a reasoning detailed in the text.

The Defendants argue that the Panel was wrong in making the award and ask the Court to apply an equitable doctrine, unclean hands, to vacate or modify the Panel's award. The Defendants provide

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no authority provided in 15-48-130 or -140 that would supply a basis for such an action. Nor have the Defendants shown any "manifest disregard of the law" with regard to this award of attorney's fees. The motion on this issue, too, must fail for want of any support in the law.

4. **The Panel's award was detailed and specific, and complies with the SC Arbitration Act.**

The Defendants raised this issue explicitly in the Motion to Reconsider filed with the Panel after the arbitration award of April 10, 2023. In their final award ruling of July 19, 2023, at pages 3-4, the Panel rejected this argument as follows:

> The Panel notes that this dispute was referred to Arbitration by a Consent Order agreed to by counsel for the parties and signed by Judge Thomas L. Hughston dated July 9, 2012. Paragraph 8 of the Consent order stated that 'This arbitration shall follow the South Carolina Rules of Civil Procedure where practical and to the extent not inconsistent herewith". The only provision in the Consent Order addressing the form of the Award is the requirement in paragraph 13 that "The determination shall be issued in the form of an award on all claims and counterclaims.' The Panel issued a 25-page unanimous Arbitration Award addressing each of the claims asserted by the Plaintiff in his Second Amended Complaint, except those which the Plaintiff withdrew following the hearing. The Panel did not award any relief to the Defendants under the Counterclaims set forth in the Defendants' Answer to Second Amended Complaint and Counterclaims dated April 26, 2022.
>
> The Panel has considered the grounds and Motion for Reconsideration of Arbitration Award dated April 18, 2023, and the arguments presented in Memorandum In Opposition To Defendants Motion For Reconsideration Of Arbitration Award dated May 3, 2023. The Panel finds that it is not required to issue separate findings of fact or conclusions of law when ruling on motions presented and ruled upon prior to the hearing which are renewed during the hearing. In ruling on Defendants Motions the Panel noted that the Defendants had submitted proposed Orders of Dismissal on the Statute of Limitations Issue and the Derivative Action Issue and that it had considered the testimony presented at the hearing, excerpts from the depositions of Jo Ved and Stuart Fred submitted by counsel, and all exhibits entered into evidence by the parties and the proposed Orders submitted by counsel. The Defendants presented no new arguments in the Motion for Reconsideration which had not previously been submitted to the Panel at the hearing held on June 16, 2022, after which the panel issued its July 11, 2022, Order Denying Defendants' Motions to Dismiss and for Summary Judgment.
>
> S.C. Code Ann. Sec. 15-48-90 states that
>
> (a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

There is no other requirement for the form of the award, which is consistent with the law of arbitration in SC that it is not "litigation by other means." Beyond the Arbitration Act provisions, the only other law governing the mode of trial and award for this arbitration was the Consent Order of Reference, July 9, 2012. As cited by the Panel, that Order required that the Panel "address each of the claims," which the Panel did. In addition, the Panel addressed each affirmative defense argued by the Defendants, in writing, numerous times.

There is no support for this argument in S.C. Code Ann.15-28-130 or -140, and the Court denies the Defendants' motion on this argument, as well.

MOTION TO CONFIRM

Having heard and resolved the Motions to Vacate and Modify the arbitration award, the Court confirms the arbitration award under SC Code Ann. Sec. 15-48-130(d).

IT IS SO ORDERED.

_____

Bentley D. Price, Presiding Judge,

Ninth Judicial Circuit

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Charleston Common Pleas

Case Caption: Thomas H Morgan VS John L Gilbert , defendant, et al

Case Number: 2012CP1000580

Type: Order/Vacate Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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IN ARBITRATION

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580
THOMAS H. MORGAN Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	)	**FINAL ARBITRATION AWARD**

Dates of Hearing:	**October 31, 2022 – November 8, 2022**
Arbitration Panel:	**H. Brewton Hagood, Chair** **Hon. Costa M. Pleicones** **Paul A. Dominick**
Attorneys for Plaintiff:	**W. Andrew Gowder, Jr.** **Michael T. Rose**
Attorneys for Defendants:	**Henry E. Grimball** **Morris A. Ellison**
Court Reporter:	**Judy W. Galuppo, Veritext Legal Solutions**

The Panel issued its Arbitration Award on April 10, 2023, awarding judgment against the Defendants, except for 150 Bee Street, LLC, in the total amount of $2,976,234.00, excluding attorneys' fees and costs. The Plaintiff was directed to provide a detailed summary of expenses,

EXHIBIT B

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including legal fees, within 15 days from the date of the Award. The Defendants were given 15 days to respond to Plaintiff's submission.

On April 17, 2023, the Plaintiff sent an e-mail to the Panel requesting an award of attorneys' fees and costs in the amount of $2,002,805.18 and attached: Plaintiff's Exhibit 202; Schedule 1 Exhibit 220 Breakout; and Addendum 1 Thomas H. Morgan Transaction Report. On May 1, 2023, Defendants submitted a Memorandum In Opposition to Plaintiff's Demand for Attorneys' Fees.

On April 18, 2023, the Defendants submitted a Motion for Reconsideration of Arbitration Award, and Plaintiff submitted a Memorandum in Opposition to Defendants' Motion for Reconsideration of Arbitration Award on May 3, 2023. The Panel will address the Motion for Reconsideration of Arbitration Award first.

Defendants' Motion for Reconsideration of Arbitration Award

Defendants' Motion for Reconsideration presents three issues for the panel to rule upon:

1) Derivative Action/Subject Matter Jurisdiction issue;

2) Statute of Limitations Issue; and

3) Insurance Issue/Claims Arising Out of the Construction Litigation.

The first two issues were raised by previously by Defendants in Motions to Dismiss under Rule 12 and a Motion for Summary Judgment under Rule 56, all of which were treated as having been made under Rule 56 since matters outside the pleadings were submitted when oral arguments were heard by the Panel on June 16, 2022. These motions were denied by Order of the Panel dated July 11, 2022. Defendants renewed these motions following the presentation of the Plaintiff's case during the arbitration hearing and again at the conclusion of the hearing. Defendants assert that the Panel's Order violates SCRCP 52 stating that there were no specific finding of facts and

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conclusions of law issued by the panel when the Panel again denied Defendants' motions as part of its Arbitration Award dated April 10, 2023.

The Panel notes that this dispute was referred to Arbitration by a Consent Order agreed to by counsel for the parties and signed by Judge Thomas L. Hughston dated July 9, 2012. Paragraph 8 of the Consent Order stated that "This arbitration shall follow the South Carolina Rules of Civil Procedure where practical and to the extent not inconsistent herewith". The only provision in the Consent Order addressing the form of the Award is the requirement in paragraph 13 that "The determination shall be issued in the form of an award on all claims and counter-claims". The Panel issued a 25-page unanimous Arbitration Award addressing each of the claims asserted by the Plaintiff in his Second Amended Complaint, except those which the Plaintiff withdrew following the hearing. The Panel did not award any relief to the Defendants under the Counterclaims set forth in the Defendants' Answer to Second Amended Complaint and Counterclaims dated April 26, 2022.

The Panel has considered the grounds and law cited in Defendants' Motion for Reconsideration of Arbitration Award dated April 18, 2023, and the arguments presented in Plaintiff's Memorandum In Opposition To Defendants Motion For Reconsideration Of Arbitration Award dated May 3, 2023. The Panel finds that it is not required to issue separate findings of fact or conclusions of law when ruling on motions presented and ruled upon prior to the hearing which are renewed during the hearing. In ruling on Defendants' Motions, the Panel noted that Defendants had submitted proposed Orders of Dismissal on the Statute of Limitations Issue and the Derivative Action Issue and that it had considered the testimony presented at the hearing, excerpts from the depositions of Jo Ved and Stuart Fred submitted by counsel, all exhibits entered into evidence by the parties and the proposed Orders submitted by counsel. The Defendants presented no new

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arguments in the Motion for Reconsideration which had not previously been presented to the Panel at the hearing held on June 16, 2022, after which the Panel issued its July 11, 2022, Order Denying Defendants' Motions to Dismiss and For Summary Judgment. Defendants' Motion is hereby denied as to issues 1 and 2 set forth in the Motion for Reconsideration.

Issue 3 in the Motion for Reconsideration of the Arbitration Award is identified as "Insurance Issue/Claims Arising Out Of The Construction Litigation". The Panel noted that Defendants had not entered a copy of the Westchester Insurance Policy into evidence at the hearing and had only entered a Certificate of Insurance into evidence purporting to list Bee Street Lofts, LLC as an additional insured. Defendants state in their Motion for Reconsideration dated April 18, 2023, that they are attempting to obtain a copy of the insurance policy. Morris Ellison informed the Panel in an e-mail dated May 12, 2023, that they had not yet obtained a copy of the insurance policy. Andy Gowder replied to Mr. Ellison's e-mail later on May 12, 2023, stated that the Panel should not receive or consider the insurance policy if it is located since it is not newly discovered evidence that could not have been produced over the years that the case has been pending. As of the date of this Final Arbitration Award no policy of insurance issued by Westchester has been submitted to the Panel.

The Panel finds that the record was kept open after the issuance of the Award for the sole purpose of allowing the Plaintiff to submit any documents relevant to recoverability of attorneys' fees and costs and Plaintiff's position as to the amounts of attorneys' fees and expenses being sought.

While not separately set forth as one of the 3 issues to be ruled upon in Defendants' Motion for Reconsideration of Arbitration Award, Defendants again argue that Judge Harrington's Order approving the settlement of the Construction Litigation, in effect, precludes Mr. Morgan from

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pursuing a claim that the failure of the Defendants to procure a policy of insurance covering 150 Bee Street, LLC caused damages to 150 Bee Street for the amount of legal fees paid to defend itself and the amount paid by 150 Bee Street to settle the Construction Litigation. The Panel has already ruled on this issue and no new evidence has been presented which would cause the Panel to reconsider this ruling.

For the above reasons, the Panel denies relief on all grounds set forth in Defendants' Motion For Reconsideration Of Arbitration Award submitted on April 18, 2023.

Plaintiff's Request for Attorneys' Fees

As directed by the Panel in the April 10, 2023, Arbitration Award, Plaintiff's counsel sent an e-mail on April 17, 2023, summarizing the amounts of legal fees and expenses requested by the Plaintiff and forwarded copies of the following documents to the Panel:

1. Exhibit 202, which was introduced and admitted into evidence during Mr. Morgan's testimony listing attorneys' fees and costs up to the time of trial;
2. Schedule 1, Exhibit 202 Breakout separating attorneys' fees from legal costs; and
3. Addendum 1, which lists legal fees and expenses incurred during and after the arbitration trial which are not included in Exhibit 202.

On May 1, 2023, counsel submitted Defendants' Memorandum In Opposition To Plaintiff's Demand For Attorneys Fees. Defendants agree that SC Code Ann. Section 33-44-1104 of the South Carolina Uniform Limited Liability Act permits, but does not require, an award of Plaintiff's "reasonable expenses, including reasonable attorney's fees" if the derivative action is successful. Defendants argue that the Plaintiff's derivative claims sought damages of approximately $12,000,000 and the Panel awarded $2,900,000 in actual damages, which is less than 25% of the amount sought. Defendants argue that Morgan had requested an additional

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$17,800,000 in individual damages and the Panel awarded no individual damages to Mr. Morgan. When viewing the total damages sought by Mr. Morgan, in both his derivative capacity and as an individual, Defendants argue that Mr. Moran was only awarded approximately 10% of the total damages sought.

Defendants then question the proof presented by the Plaintiff since no distinction is made between the attorneys' fees and expenses incurred by Morgan in his individual capacity and those incurred to prosecute the derivative claims.

The Panel has reviewed the evidence and considered the arguments submitted by counsel for the Plaintiff and the Defendants. The law is clear that the Panel, has the discretion to determine the reasonableness of a claim for the recovery of attorneys' fees under the South Carolina Uniform Limited Liability Act. The Panel finds that Mr. Morgan successfully prosecuted the derivative claims and the evidence presented indicates that Mr. Morgan personally funded all of the legal fees and expenses to prosecute these claims. Had Mr. Morgan not done so, there would be no recovery in favor of 150 Bee Street, LLC in the amount of $2,976,234. The Panel is mindful of the fact that Mr. Morgan did not obtain a recovery of any individual damages but, as counsel for the Defendants note, there is no statutory authority for the recovery of attorneys' fees by Mr. Morgan as an individual.

The Panel finds that since Mr. Morgan advanced the legal fees and costs necessary for 150 Bee Street to receive an affirmative award of $2,976,234, Mr. Morgan is entitled to a charging lien on the amounts of attorneys' fees awarded by the Panel to 150 Bee Street. This amount should be paid to Mr. Morgan to reimburse him for these advances, prior to the distribution of any funds received from the judgment to the members of the LLC. The Panel has already ruled that no portion

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of the recovery from the judgment is awarded to Bella Vista, the Bomasada Defendants, Stuart Fred or John Gilbert.

As to the amount to be awarded, the South Carolina Supreme Court has identified six factors which should be considered in determining whether a request for attorneys' fees is reasonable:

1. The nature, extent and difficulty of the case;
2. The time necessarily devoted to the case;
3. The professional standing of counsel;
4. Contingency of compensation;
5. Beneficial results obtained and
6. Customary legal fees for similar services.

In considering the above factors, the Panel finds that the case prosecuted by Mr. Morgan was a very difficult case which filed on January 26, 2012, and was referred to arbitration by Consent Order issued on July 9, 2012. The case was hotly contested by the Defendants and was originally scheduled for arbitration in May of 2020. The schedule for the arbitration was suspended due to the Covid 19 pandemic and travel for depositions was adversely affected. The case was not heard by the present Panel until late October of 2022. The online file at the Charleston County Clerk of Court's office indicates that Mediation was held on September 21, 2022, with Rebecca Laffitte as the Mediator, and an impasse was declared. Additionally, both sides retained expert witnesses who had to review and opine on both the amount and entitlement to damages.

Although the Panel was not furnished with detailed time and billing records, the summary provided showed that Mr. Morgan initially started with the firm of Clawson and Staubes, and later moved to Pratt-Thomas Epting and Walker. Mr. Gowder, who had been a member of Pratt-Thomas Epting and Walker, took over the representation after he formed his new firm. Michael T. Rose

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worked with Mr. Gowder on the case and participated in all pretrial proceedings and the Arbitration Hearing. The Panel finds that the summary provided of legal fees and expenses paid is representative of a case of this difficulty and magnitude and the time devoted to pre-hearing discovery, motions and a contested hearing. The Panel finds that Mr. Gowder and Mr. Rose are well respected members of the local bar who have been practicing law for many years.

As to the contingency of compensation, the submissions indicate that Mr. Morgan paid his attorneys on an hourly basis. Thus, the contingency in this case was not whether the attorneys would be paid but whether there would be an affirmative recovery in a contested case which was unable to be resolved short of a full hearing.

While Defendants argue that there only a recovery of 10 to 20% of the total damages sought, the recovery obtained through Mr. Mogan's efforts and advancement of attorneys' fees costs on behalf of Bee Street Lofts was $2,976,234, which is actually 48.9% of the claimed actual damages of $6,080,881.[1] It would be inequitable for Bee Street Lofts to receive the benefits of the award without awarding attorneys fees and costs as a charging lien to the benefit of Mr. Morgan before any amounts are distributed to the members of Bee Street Lofts, other than Bella Vista.

The Panel is required to exercise their collective discretion to arrive at a reasonable amount. After substantial discussion among the members of the Panel following the submissions by counsel, the Panel finds that the below approach achieves a result which is a customary award of legal fees and costs for similar services after consideration of the six factors:

[1] See Plaintiff's post-hearing proposed order in which he claims this amount. See also page 6 of the Arbitration Award of April 10, 2023.

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Total Award **$2,976,234.00**

Legal Fees

One-third of Gross Recovery = $992,078.00

Per cent recovered versus amount claimed = 48.9%

Fee Award After Applying Percentage versus amount claimed = $485,126.00

COSTS

Approved Costs = $266,746

Approved Cost After Applying Percentage of 48.9% = **$130,439.00**

Costs of Arbitration Requested (100%) = **$80,944**

TOTAL FEES AND COSTS AWARDED = $696,509.00

TOTAL ARBITRATION AWARD INCLUDING FEES AND COSTS = $3,672,743

This Final Arbitration Award, if confirmed by the Court, is intended be entered as a judgment against the Defendants, except for Bee Street Lofts, LLC, in favor of Bee Street Lofts, LLC, except for member Bella Vista Partnership, and John L. Gilbert and Stuart L. Fred, but no proceeds from any recovery on this judgment are to be distributed to the members of Bee Street Lofts, LLC until the charging lien in favor of Thomas H. Morgan has been fully satisfied.

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FOR THE PANEL

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H Brewton Hagood
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H. Brewton Hagood, Chair
Arbitration Panel
bhagood@rosenhagood.com

DocuSigned by:
B8CED85C05FE482...

Paul A. Dominick, Member
Arbitration Panel
pdominick@nexsenpruet.com

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Costa M. Pleicones
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Costa M. Pleicones. Member
Arbitration Panel
CPleicones@hsblawfirm.com

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2012_-CP-10_00580
	)	
Thomas H. Morgan,	)	**MOTION AND ORDER INFORMATION**
Plaintiff,	)	**FORM AND COVERSHEET**
vs.	)	
	)	
John L. Gilbert, et. al	)	
Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Chris B. Staubes, Jr., Bar No. _____ Address: 126 Seven Farms Dr., Ste. 200, Chas., SC 29492 Phone: 843-577-2026Fax 843-722-2867 E-mail: cstaubes@clawsonandstaubes.com Other: _____	Henry E. Grimball, Bar No. 2313 Address: 5 Exchange St., Chas. SC 29402 Phone: 843-722-3400 Fax843-723-7398 E-mail: hgrimball@wcsr.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Dissolve TRO, Dismiss Suit & Compel Arbitration
Estimated Time Needed: 30 min. Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☒ Defendant — February 1, 2012 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☒ MOTION FEE COLLECTED: $ 25.00
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C/A NO: 2012-CP-10-580
THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP, II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION, Defendants.	))))))))))))))))))	MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER, DISMISS SUIT PURSUANT TO SCRCP 12(B)(1), AND TO COMPEL ARBITRATION

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Defendants above-named, herewith move the Court for an Order Dissolving the Temporary Restraining Order as improvidently granted, dismissing this case for lack of subject matter jurisdiction, and ordering arbitration.

As will be seen from the Affidavit of John L. Gilbert, filed with the Court in support of this Motion, since its inception, Mr. Gilbert has been actively managing 150 Bee Street, LLC (the "Company"). The Company has operated under a Second Amended and Restated Limited Liability Company Agreement of 150 Bee Street, LLC," a copy of which is attached to Mr. Gilbert's affidavit as Exhibit A.

On the front page of the Agreement it states: "<u>THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO SOUTH CAROLINA CODE SECTION 15-48-10 ET SEQ. AS MODIFIED HEREIN</u>."

On Page 23 of the Agreement, under Section 14.14 captioned Mediation and Arbitration the Members expressly agreed "that they shall seek mediation in their preferred method of handling claims, disputes or other matters in question that may arise between them." Section 14.14 goes on to state "Any issues that remain unresolved following such mediation shall be submitted to binding arbitration pursuant to the Uniform Arbitration Act (SC Code Section 15-48-10 et seq.) and, to the extent that the Act may be supplemented by agreement, the Arbitration Rules of the National Lawyers Association Alternative Dispute Resolution Service, or a comparable nationally recognized dispute resolution body that is agreed upon by the parties, shall apply."

On Page 4 of the Agreement, the Company "Project" was defined to mean "the for sale horizontal property regime to be developed on the real property located near the intersection of Lockwood Drive and Bee Street in Charleston South Carolina."

According to John L. Gilbert, and supported by allegations the Complaint of Thomas Morgan, the construction project involved interstate commerce to a large extent, both in the construction and management of the project. This is also seen within the Agreement itself which on Page 5, Article II, provides that the principal office of the Company is located at 8980 Lakes at 610 Drive, Suite 200, Houston, Texas 77054 and further, the purpose of business of the company shall be to acquire, develop, construct, own, operate, manage, sell or lease the Project and any other property real, personal or mixed, tangible or intangible related thereto. . . ."

Even if the Agreement, which requires arbitration were not enforceable under state law because notice that the Agreement was subject to arbitration did not appear on its first page as required by S.C. Code Section 15-48-10(8) Code of Laws of South Carolina, 1976 as amended, the Federal Arbitration Act, 9 U.S.C.A. § 1 et. seq., enacted pursuant to the commerce clause of

the United States Constitution, its applicable, which supersedes state law. *Circle S Enterprises, Inc. v. Stanley Smith & Sons,* _____ S.C. _____, 343 SE2d 45 (Ct. App. 1986).

The Defendants, now move pursuant to SCRCP 12(b)(1) to dismiss and assert (1) that the Circuit Court was without subject matter jurisdiction inasmuch as the Agreement in question requires submission of the disputes in the Plaintiff's Complaint to a binding arbitration; (2) that the Circuit Court was the improper venue due to the fact that the proper forum to hear the case was the appropriate arbitration panel.

In *Thompson v. Air Transport International Limited Liability Co.*, 2011 U.S. App. Lexis 25872 (Ct. App. 8th Cir. 2011), the Plaintiff had filed suit in the United States District Court alleging that the Defendant violated his rights under the Family Medical Leave Act and under the Arkansas Civil Rights Act. The United States District Court dismissed the case, finding that the Plaintiff's claims were subject to a mandatory arbitration provision contained in a collective bargaining agreement. The Plaintiff appealed. On appeal, the Defendant asserted that its Motion to Dismiss was based on FRCP 12(b)(1) and argued that the District Court lacked subject matter jurisdiction because the Plaintiff's claims were subject to a mandatory arbitration provision contained in the collective bargaining agreement in question. On appeal, the Eighth Circuit affirmed the dismissal of the Complaint by the trial court and affirmed the trial court's finding that the Plaintiff's claims were subject to the mandatory arbitration provision.

In *Madura v. Countrywide Home Loans, Inc., et. al.*, 344 Fed. Appx. 509, 2009 U.S. App. Lexis 18309 (Ct. App. 11th Cir. 2009), the Plaintiff Mortgagors brought an action alleging violations of state and federal laws governing consumer credit protection. The Defendants moved to dismiss the federal Complaint for lack of subject matter jurisdiction and argued that the court should order the Plaintiffs to arbitrate their claims pursuant to the arbitration agreement in

the loan documents. On appeal, the Eleventh Circuit concluded that the District Court did not err in compelling arbitration.

In *Terminix International Co., LP, v. Palmer Ranch Ltd. Partnership,* 280 Fed. Appx. 829, 2008 U.S. App. Lexis 11751 (Ct. App. 11th Cir. 2008), in an earlier opinion, the United States Court of Appeals for the 11th Circuit reversed the District Court decision denying the Plaintiff's Motion to Compel Arbitration and remanded the case with instructions to grant to the Motion to Compel Arbitration. On remand, the District Court granted the Defendant's Motion to Dismiss the Plaintiff's Motion to Compel Arbitration for lack of subject matter jurisdiction and Terminix once again appealed. The Eleventh Circuit Court of Appeals reversed the District Court Order dismissing the Plaintiff's Motion to Compel Arbitration.

In *Silkworm Screen Printers, Inc. v. Robert Abrams, et. al.,* 1992 U.S. App. Lexis 28843 (Ct. App. 4th Cir. 1992) the Fourth Circuit Court of Appeals considered Judge Solomon Blatt, Jr.'s denial of the Defendants' Motion to Dismiss and Compel Arbitration.

The underlying actions were for breach contract, actual and constructive fraud, negligent misrepresentation, and unfair trade practices. The Plaintiff sought compensatory and punitive damages. The motion of the Defendants to dismiss was predicated on the claim that the controversy should be arbitrated.

In reversing the District Court, the Fourth Circuit remanded the case to that court to determine whether there was an agreement to arbitrate. If it found no agreement to arbitrate, the Fourth Circuit stated that it should reinstate the Orders already vacated by the Fourth Circuit. However, if the District Court found that the Plaintiff had agreed to arbitrate, the District Court was ordered to enter its Order directing arbitration and dismiss the Complaint for lack of subject matter jurisdiction.

Closer to home, in *Floyd v. Spartanburg Dodge, Inc., et. al.*, 2010 S.C. App. Unpub. Lexis 668 (Ct. App. 2010), the Plaintiff Floyd brought suit against the Defendant Spartanburg Dodge, Inc. and the Bank of American and Daimler Chrysler for problems arising out of his purchase of a car from Spartanburg Dodge that Bank of America financed. Spartanburg Dodge and Bank of America moved to dismiss pursuant to SCRCP 12(b)(1) for lack of subject matter jurisdiction because Floyd signed an arbitration agreement when he purchased the car. The Circuit Court granted the Motion to Dismiss and Floyd appealed. The South Carolina Court of Appeals affirmed without oral argument.

The Plaintiff Thomas H. Morgan improvidently filed this derivative suit knowing that he was required to arbitrate the disputes set forth in the Complaint, all of which involve the LLC and are therefore controlled by the arbitration requirement. When the Motion for a Temporary Restraining Order which he also filed is read in conjunction with the Complaint, it becomes transparently obvious that he improvidently filed this suit in an effort to obtain a temporary restraining order and thereafter, a permanent injunction involving the pending sale of a unit, to which he would not necessarily been entitled in arbitration.

The Court of Common Pleas lacking subject matter jurisdiction to entertain a Motion for a Temporary Restraining Order, the TRO of January 26 must be dissolved, the case dismissed, and arbitration ordered.

In *The South Carolina Public Service Authority v. Carolina Power and Light Co.,* 244 S.C. 466, 137 S.E.2d 507 (SC 1964), the Common Pleas Court issued an Ex Parte Temporary Injunction, but then sustained the contention of the Defendant that the court lacked jurisdiction. The Common Pleas Court therefore dissolved the Temporary Injunction and the Plaintiff

appealed. On appeal to the Supreme Court, the decision of the trial court was affirmed. That is what must be done here.

For argument's sake, even if the Court of Common Pleas had subject matter jurisdiction over this case, the Temporary Restraining Order of January 26, 2012 should be dissolved because it failed to meet the requirements of SCRCP 65. Rule 65(b) requires that the Order state why the injury is irreparable. It requires that the Order state why it was granted without notice. In addition, unser Rule 65(c), proper security is required for the payment of such costs and damages as may be incurred or suffered by any of the Defendants who might be found to have been wrongfully enjoined or restrained.

No where in the Order does it state why the injury is irreparable. No where in the Order does it state why it was granted without notice.

On the issue of security, in the TRO the court ordered a security bond in the amount of $250. The Defendants contend that this amount of bond is inadequate. This is based upon the Affidavit of John Gilbert filed in support of this Motion.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Henry E. Grimball, Esquire (Fed. ID #~~02478~~) 02313
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400
ATTORNEY FOR DEFENDANTS

Dated: Jan. 31, 2012
Charleston, South Carolina

12-580

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day February 2012, I filed the foregoing Motion to Dissolve Temporary Restraining Order, Dismiss Suit Pursuant to SCRCP 12(B)(1), AND TO COMPEL ARBITRATION with the Clerk of the Court and also sent a copy of such filing, via hand delivery to the following:

Chris B. Staubes Jr., Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston SC 29492-7595
Attorney for Plaintiff – Thomas H. Morgan

FILED
2012 FEB -1 AM 10: 33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Sheryl R. Beczynski
Legal Assistant to Henry E. Grimball

WCSR 7117677v1

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A PROFESSIONAL LIMITED
LIABILITY COMPANY

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www.wcsr.com

HENRY E. GRIMBALL
ATTORNEY AT LAW
Direct Dial: 843-720-4615
E-mail: hgrimball@wcsr.com

February 1, 2012

Via Hand Delivery

Honorable Julie J. Armstrong
Charleston County Clerk of Court
Charleston County Court of Common Pleas
100 Broad St., Suite 106
Charleston SC 29401

Re: Morgan v. Gilbert, et. al.
Case No.: 2012-CP-10-00580
WCSR File No.: 66696.0001.0

Dear Ms. Armstrong:

Enclosed please find an original and two copies of Motion to Dissolve Temporary Restraining Order, Dismiss Suit Pursuant to SCRCP 12(b)(1), and to Compel Arbitration. In addition to the Motion, I enclose the required Motion Coversheet and check for the filing fee in the amount of $25.00. Please file the original and return the two "Filed" stamped copies to me with my courier.

If you have any questions, please do not hesitate to contact me at my above direct dial telephone number.

Sincerely yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

Henry E. Grimball

Henry E. Grimball

HEG/srb
Enclosures

AUSTEN & GOWDER

February 26, 2018

Email: rachel@austengowder.com
Direct: (843) 727 2215
Fax: (843) 800-8533

Dawes Cooke
288 Meeting Street Road
Charleston, SC 29401

Re: Thomas H. Morgan v. John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, and 150 Bee Street, LLC, A South Carolina Limited Liability Company

Dear Mr. Cooke,

Enclosed please find Plaintiff's Motion to Amend and First Amended Complaint. Please let me know if you have any questions.

Sincerely,

AUSTEN & GOWDER, LLC

Rachel Fete

Rachel Fete
Assistant to W. Andrew Gowder, Jr.

cc: Morris Ellison, Henry Grimball

MAR 06 2018

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	IN ARBITRATION Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580 **PLAINTIFFS' MOTION TO AMEND COMPLAINT**

TO: MORRIS ELLISON AND HENRY GRIMBALL, ATTORNEYS FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE, that the Plaintiffs, by and through their undersigned attorneys, will move before the Arbitration Panel, on a day and at such a time as the Panel may appoint, more than ten (10) days after service hereof, or as soon thereafter as counsel may be heard, for an Order allowing Plaintiff to amend his complaint.

Please be present to oppose said Motion if you are minded.

Respectfully submitted,

W. Andrew Gowder (S.C. Bar #7895)
andy@austengowder.com
Austen and Gowder, LLC
1629 Meeting Street, Suite A
Charleston, South Carolina 29405
Phone: 843-727-2229

Michael T. Rose (S.C. Bar #4910)
mrose5@sc.rr.com
406 Central Ave.
Summerville, SC 29483
Phone: 843-871-1821

February 26, 2018

Counsel for Plaintiff

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 31st day of July, 2017, in Charleston, South Carolina.

s/ Rachel Fete

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN ARBITRATION
THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, and 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, Defendants.	Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action No. 2012-CP-10-580 **FIRST AMENDED COMPLAINT**

The Plaintiff above named, complaining of the Defendants, above named, alleges and says as follows:

1. Plaintiff Thomas H. Morgan ("Morgan" or "Plaintiff') is a citizen and a resident of the State of Florida. Morgan sues as a Plaintiff both on behalf of himself personally and derivatively on behalf of 150 Bee Street, LLC.

2. The Defendant John L. Gilbert ("Gilbert") is a citizen and a resident of the State of Texas; is neither an infant nor incompetent person; and is not in the military service.
3. The Defendant Stuart L. Fred ("Fred") is a citizen and a resident of the State of Texas; is neither an infant nor incompetent person; and is not in the military service.
4. The Defendant 150 Bee Street, LLC (sometimes "150 Bee Street," "LLC" or "Company") is a South Carolina Limited Liability Company, duly organized and existing pursuant to the laws of South Carolina; is subject to the jurisdiction of this Court; and is named as a nominal party Defendant because, on information and belief, it is an indispensable party to this derivative proceeding. Morgan, as a member, brings this case derivatively on the LLC's behalf.
5. The Defendant Bella Vista Partnership ("Bella Vista") is a Texas General Partnership doing business in South Carolina and is subject to the jurisdiction of this Court.
6. The Defendant Bomasada Group, Inc. ("Bomasada Group" or "Bomasada") is a Texas corporation doing business in South Carolina and is subject to the jurisdiction of this Court.
7. The Defendant Bomasada Investment Group II, LLC ("Bomasada Investment" or "BIG II") is a Texas Limited Liability Company doing business in South Carolina and is subject to the jurisdiction of this Court.
8. The Defendant Lauralis Management, Inc. ("Lauralis") is a Texas corporation doing business in South Carolina and is subject to the jurisdiction of this Court.
9. Upon information and belief, the legal distinction between Fred, Gilbert, Bella Vista, Bomasada, Lauralis, BIG II and the partners, officers, directors and/or shareholders of Bella Vista, Bomasada, Lauralis and BIG II (hereinafter the "Defendants") are blurred and they are, as such, one and the same and their interests are so amalgamated that the actions of one should apply to the other.
10. On July 9, 2012, the plaintiffs and the defendants entered into a Consent Order whereby this matter was referred to arbitration pursuant to the terms of the Consent Order.

11. At the time of the actions complained of herein, Morgan was, and remains, a member of 150 Bee Street, LLC and is now a Managing Member with authority to arbitrate or litigate this dispute in a derivative capacity.
12. 150 Bee Street, LLC, acting through and under direction of Defendants, has failed to take proper action to resolve the dispute after written demand by Morgan, to the serious detriment of 150 Bee Street, LLC and its members' interests.
13. Morgan can and will fairly and adequately represent the interests of any other similarly situated members of 150 Bee Street, LLC, in this derivative action.
14. On November 28, 2011, Plaintiff, through counsel, tendered a demand on Defendant to commence a derivative action pursuant to S.C. Code Ann. § 33-44-1101.
15. Defendants refused and continue to refuse to bring the derivative suit, and therefore Plaintiff brings this action.
16. This arbitration panel has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

FACTUAL BACKGROUND

17. Plaintiff Morgan is a Member and 26.66% owner of 150 Bee Street, LLC.
18. Defendant Bella Vista is a Member and 26.67% owner of 150 Bee Street, LLC.
19. The Estate of Neal I. Baker is a Member and 26.67% owner of 150 Bee Street, LLC.
20. Edwin S. Pearlstine, Jr. is a member and 20% owner of 150 Bee Street, LLC.
21. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, own and are the controlling partners of Defendant Bella Vista.
22. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, own and are the controlling owners of Defendant Bomasada Group.
23. Upon information and belief, Defendant Bomasada Group was organized by Defendants Gilbert and Fred and acted as Developer of 150 Bee Street, LLC.
24. Upon information and belief, Defendants Gilbert and Fred, either directly or

through an entity or entities that they control, are the controlling owners of Defendant BIG II.

25. Upon information and belief, Defendant BIG II was organized by Defendants Gilbert and Fred and acted as the general contractor regarding the construction of a condominium complex located at 150 Bee Street, Charleston, South Carolina (the "project" or "Bee Street Lofts") for 150 Bee Street, LLC.
26. Upon information and belief, Defendants Gilbert and/or Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant Lauralis.
27. Upon information and belief, Defendant Lauralis is a holding company for a private jet aircraft.
28. Defendants entered into various contracts whereby the Defendants were to perform certain matters for the benefit of 150 Bee Street, LLC and its owners, including but not limited to acting as general contractor and as developer for the project.
29. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street, LLC (including Morgan) for a fee of $750,000.
30. Upon information and belief, the Defendants have paid themselves more than $750,000.00 with Company funds.
31. Upon information and belief, Defendants continued to improperly pay themselves a monthly amount from Company funds, even though a paid Property Manager was on location at 150 Bee Street.
32. Upon information and belief, Defendants while acting as Developer improperly took money for their own benefit to the detriment of 150 Bee Street, LLC and its Members.
33. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor and/or in another capacity, improperly coded charges to the Company, including but not limited to:
    a. Personal home remodeling in the amount of $1,325.00 charged to the

Company, which was charged to the Company as "Make Ready Units-Paint Work;"

b. Airplane equipment purchased from Blue Mountain Avionics, which was charged the Company as "Repairs and Maintenance;

c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"

d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"

e. Fuel, Nextel and Cabela's bag charged to the Company as "CHS Mental Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged in the amount of $12,509.00 to the Company as "Travel;"

g. Personal home automation and audio system purchased in the amount of $46,139.64 installed at the private residence of Stuart Fred in Scottsdale, Arizona, coded as "AV Media, Club House, Bee Street; and

h. Other charges to be learned through the discovery process and determined by the trier of fact.

34. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor and/or another capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a. Expenses related to a trip to Cancun, Mexico;

b. Expenses related to lasvegas.com;

c. Expenses related to a trip to Scottsdale, AZ;

d. Expenses related to a trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to a trip to Pacific Grove, Monterey and Carmel, California;

g. Expenses related to private aircraft; and

h. Other charges to be learned through the discovery process and determined by the trier of fact.

CONSTRUCTION

35. Defendants individually, and/or as manager or owner, and as part of their contract with 150 Bee Street or Bomasada as Developer for 150 Bee Street, LLC, represented that they would act as General Contractor on the 150 Bee Street project, for the benefit of the owners of 150 Bee Street, LLC including Morgan, for a fee of 1% of the construction costs.
36. Upon information and belief, Defendants collected well over 1% of the construction costs.
37. Upon information and belief, Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer, so they could continue to pay themselves monthly and so they could pay for their jet airplane.
38. Defendants, while acting as General Contractor, promised and represented they would do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street, LLC and the Members. Despite this representation, the work went millions of dollars over budget.
39. Upon information and belief, Defendants while acting as General Contractor, retained any savings for their own benefit to the detriment of 150 Bee Street, LLC and the Members.

PRIVATE JET BILLINGS TO THE COMPANY FOR PERSONAL ITEMS

40. Defendants improperly billed the Company paid themselves from Company funds for travel expenses, including billing rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property or its business.
41. Upon information and belief, through 2010, Defendants authorized payments to Lauralis of $454,155,00 and $39,059.77 for airplane fuel expense from 150 Bee Street, LLC. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.
42. Upon information and belief, from 2005 through 2010, Defendants systematically

and improperly increased the rate they charged 150 Bee Street, LLC for their private jet as follows:

a. From $850.00 an hour to $1,050.00 an hour in 2005;
b. From $1,050.00 an hour to $1,200.00 an hour in 2005;
c. From $1,200.00 an hour to $1,750.00 an hour in 2006; and
d. From $1,750.00 an hour to $2,100.00 an hour in 2008;

43. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Construction Travel Expenses" of $481,250.00 to BIG II. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

44. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Corporate Overhead" of $360,000.00 to BIG II. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

45. Plaintiff has requested to see backup documentation for these charges, but Defendants have refused and continue to refuse to permit Plaintiff to see BIG II'S financial records related to the project.

46. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their Private jet usage to the Company.

47. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their personal vacations to the Company.

48. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their home remodeling to the Company, which was charged to the Company as "Make Ready Units-Paint Work."

49. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their personal golf outings to the Company.

50. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their expensive dinners to the Company.

51. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of $12,509.00 to 150 Bee Street for an African Safari.

52. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of gift cards from golf shops to 150 Bee Street.

53. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging for airplane equipment purchased from Blue Mountain Avionics, which was charged the Company as "Repairs and Maintenance."

54. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of a payment for a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs."

55. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of $3,000.00 for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training- Education."

56. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of a payment of repairs and renovation of a personal aircraft hangar in Houston, TX.

57. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of a Personal home automation and audio system purchased in the amount of $46,139.64 installed at the private residence of Stuart Fred in Scottsdale, Arizona, coded as "AV Media, Club House, Bee Street.

58. Plaintiff instructed Defendants in writing that they are no longer to bill the Company for their private jet.

59. In direct disregard of law, Defendants have withdrawn for themselves, directly or through their entities, hundreds of thousands of dollars or more from 150 Bee Street funds.

60. On September 9, 2011, Defendants wrote themselves a check from Company funds for $28,350.00, claiming it was for their private jet usage, even after

Plaintiff had instructed Defendants in writing that they were no longer to bill the Company for their private jet.

61. Upon information and belief, Defendants continued to make hundreds of thousands of dollars in capital calls from the members even after the project had finished in order to fund their personal jet and other personal items and threatened to dilute Plaintiff out of his interest in the Company at a 35% interest rate and to foreclose his interest if Plaintiff did not fund the capital calls.

62. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.03 that the following actions shall not be taken on behalf of the Company without the Majority Consent of the Members:

    a. The purchase of any real property, the sale, assignment, transfer, exchange or other disposition of any real property owned by the Company [and]

    b. Deviating from the Budget in a net amount greater than fifty thousand and no/100 dollars ($50,000)."

63. Defendants did not seek or obtain the Majority Consent of the Members in accordance with Article 6.03 of the Second Amended and Restated Operating Agreement of 150 Bee Street.

FRAUDULENT CONCEALMENT OF WRONGDOING; EQUITABLE ESTOPPEL

64. Defendants have used efforts to hide, conceal and cover up the extent of their improperly charging of items to the Company.

65. Plaintiff has made reasonable efforts to investigate the charges, but his efforts have been thwarted by Defendants in several ways, including but not limited to:

    a. Refusing to allow Plaintiff to see the Construction Records;

    b. Refusing to allow the Company CPA to let Plaintiff copy company records;

    c. Refusing to notify Plaintiff in advance about Company expenses;

    d. Refusing to keep Plaintiff informed about upcoming sales;

    e. Refusing to communicate contract renewals in advance of their signing;

    f. Systematically retaining relevant company records in the name of other

entities owned by or controlled by Defendants for the purpose and with the effect of blocking Plaintiff's access to those records;

g. Refusing to tell Plaintiff before writing large checks to other entities owned by or controlled by Defendants;

h. Writing large checks to other entities owned by or controlled by Defendants; and

i. In other manners to be shown the court.

66. The Defendants, by reason of their controlling power and relationship with the Plaintiff and 150 Bee Street, were in the position of a fiduciary and of trust and confidence such that they owed a duty to disclose timely material facts to the Plaintiff and to 150 Bee Street. The Defendants knew they were stealing from and misappropriating the assets of 150 Bee Street, and that the construction for which they were responsible was defective, but they purposely and fraudulently concealed material facts about their wrongful activities from 150 Bee Street to prevent the discovery of their wrongdoing.

67. As a result of this fraudulent concealment, statutes of limitation regarding the causes of action of the Plaintiff have been tolled and the Defendants are equitably estopped to use a statute of limitations as a defense to this lawsuit.

REAL ESTATE SALES

68. Defendants hired a Nashville Real Estate Company to act as the Real Estate agency for this Charleston South Carolina condominium project.

69. Upon information and belief, Defendants had a relationship with this Nashville Real Estate Company that either benefitted Defendants personally, or benefitted an entity or entities owned by Defendants.

70. Upon information and belief, the Nashville Real Estate company was paid a commission on many of the closings.

71. Defendants disregarded their fiduciary duties to Morgan and 150 Bee Street when they selected a Nashville real estate company, rather than considering a local Charleston South Carolina Real Estate agency which knew the market, and which might have reacted to the local market faster. Further, the Nashville real estate

company was not licensed to sell real estate in South Carolina but nevertheless was paid commissions by the Defendants.

72. Defendants eventually cut ties between the Nashville Real Estate company and 150 Bee Street, but not until after a downturn in the real estate market.

MANAGEMENT SINCE NEAL BAKER PASSED AWAY

73. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, that the two initial Managers of 150 Bee Street were Neal I. Baker and Defendant Fred.
74. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, that in the event of Neal Baker's death or disability, Plaintiff Tom Morgan shall serve as Manager.
75. Neal I. Baker passed away in 2011, and Plaintiff Morgan attempted to serve as co-manager with Defendant Fred.
76. Defendants thwarted Plaintiff Morgan's attempts to serve as co-manager in several ways, including but not limited to:
    a. Refusing to allow Plaintiff Morgan to see the Construction Records;
    b. Refusing to allow the Company CPA to let Plaintiff copy company records;
    c. Refusing to allow Plaintiff to be a joint signer on Company checks;
    d. Refusing to notify Plaintiff in advance about Company expenses;
    e. Refusing to keep Plaintiff informed about upcoming sales;
    f. Refusing to allow Plaintiff a say in the pricing of the condo units;
    g. Refusing to allow Plaintiff a say in who is selected to act as the real estate agent for the company;
    h. Refusing to allow Plaintiff to sign off on the unit closings;
    i. Refusing to communicate contract renewals in advance of their signing;
    j. Systematically retaining relevant company records in the name of other entities owned by or controlled by Defendants in an effort to block Plaintiff's access to those records;
    k. Refusing to tell Plaintiff before writing large checks to other entities

owned by or controlled by Defendants;

l. Writing large checks to other entities owned by or controlled by Defendants;

m. Ignoring Plaintiff's written instructions; and in other manners to be shown the court.

LAWSUIT FOR CONSTRUCTION DEFECTS

77. On August 22, 2014, Bee Street Lofts Homeowners Association, Inc. and Mark Laboccetta filed a lawsuit (Case No. 2014-CP-10-5120) ("construction lawsuit") against Fred, Gilbert, Bomasada Group, BIG II, 150 Bee Street and others alleging that numerous construction defects in the condominium project owned by 150 Bee Street were caused by various fraudulent, negligent and other illegal acts by Fred, Gilbert, Bomasada Group, BIG II, 150 Bee Street and others. The pleadings and evidence in that lawsuit are hereby restated as if stated verbatim herein and are incorporated herein by reference.

78. As a result of these illegal acts by the Defendants as alleged in this construction lawsuit, 150 Bee Street, LLC, the Plaintiff and other Members of the Company suffered substantial financial losses, including attorney fees and costs, in an amount to be determined by the trier of fact.

FAILURE TO OBTAIN INSURANCE FOR COMPANY

79. 150 Bee Street, LLC paid premiums for insurance policies but was denied insurance coverage because 150 Bee Street was not named as an insured by the Defendants, all of whom were responsible for obtaining insurance for 150 Bee Street. As a result, 150 Bee Street had to pay attorney fees instead of insurance policies for which the LLC had paid doing so.

CONDUCTING BUSINESS WITHOUT REQUIRED LICENSES

80. BIG II signed an AIA Contract with 150 Bee Street, LLC to act as the General Contractor for the project. Upon information and belief, BIG II's signing that contract obligating itself to serve as the General Contractor for the project when BIG II was not licensed as a General Contractor in South Carolina is a misdemeanor.

81. Upon information and belief, Bomasada paid fines in Arkansas for using unlicensed contractors, and Bomasada used a contractor named Hightower Construction Co., Inc. ("Hightower") to pull the permit for the project because Hightower was licensed but Bomasada was not licensed in South Carolina. Bomasada performed all the interior finish and other work on the project; signed subcontractor agreements with subcontractors for the project; and directed the work of those subcontractors. Upon information and belief, Bomasada committed a crime by doing this work while not being a licensed contractor in South Carolina.

82. Upon information and belief, Fred and Gilbert hired a Nashville real estate company, not licensed to sell real estate in South Carolina, to handle and control the sales of the units of the project, for which the unlicensed Nashville real estate company unlawfully received commissions.

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

83. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

84. At all times relevant, Defendants owed fiduciary duties to Morgan, to other Members of the LLC and to 150 Bee Street.

85. Defendants breached their fiduciary duties to Morgan and to 150 Bee Street in various respects, including in the manners described herein.

86. Upon information and belief, Defendants presently continue to breach their fiduciary duties owed to Morgan and to 150 Bee Street, LLC.

87. Morgan, other Members of the LLC and 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of fiduciary duties by the Defendants.

88. Such breaches of fiduciary duties were intentional, willful, wanton, reckless, malicious and done with the conscious disregard of the rights of Morgan, other

members of 150 Bee Street and the LLC.

FOR A SECOND CAUSE OF ACTION (Breach of Duties of Good Faith and Fair Dealing)

89. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.
90. At all times relevant, Defendants owed duties of good faith and fair dealing to Morgan, 150 Bee Street and other Members of 150 Bee Street.
91. Defendants breached these duties of good faith and fair dealing in various respects, including but not limited to the manners described herein.
92. Upon information and belief, Defendants presently continue to breach their duties of good faith and fair dealing.
93. 150 Bee Street, Morgan and other Members of 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of duties of good faith and fair dealing by the Defendants.
94. Said breaches of duties of good faith and fair dealing were intentional, willful, wanton, malicious, reckless and done with the conscious disregard of the rights of Morgan, other members of 150 Bee Street and the LLC.

FOR A THIRD CAUSE OF ACTION (Member Oppression – SC Code § 33-44-801(e))

95. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.
96. The Defendants owed duties to Morgan not to engage in conduct oppressive to Morgan, to other members of 150 Bee Street and to 150 Bee Street.
97. Defendants breached their duties not to oppress Morgan, other members of 150 Bee Street and 150 Bee Street in the manners described herein. At all times relevant, the Defendants, functioning as a group that was in control of 150 Bee Street, acted and will continue to act in a manner that is unlawful, oppressive, fraudulent and unfairly prejudicial to the Plaintiff by engaging in various self-dealing, self-serving and improper acts to the exclusion and detriment of the

Plaintiff and others.

98. Upon information and belief, Defendants presently continue to breach their duties not to oppress Morgan, other members of 150 Bee Street and 150 Bee Street in the manners described herein and, in such ways as will be learned through the discovery process. The Defendants have acted and will continue to act in a manner that is unlawful, oppressive, fraudulent and unfairly prejudicial to the Plaintiff, in violation of SC Code § 33-44-801(e).

99. Morgan, other members of 150 Bee Street and 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of duties not to oppress by the Defendants. Such breaches of duties not to oppress have been and will continue to be intentional, willful, wanton, malicious, reckless and done with conscious disregard of the rights of Morgan, other members of 150 Bee Street and the LLC.

100. As a result of the wrongful oppressive conduct of the Defendants referenced herein, the LLC must be dissolved, and the Plaintiff is entitled to a decree winding up 150 Bee Street and to an award to the Plaintiff of damages, attorney fees and costs.

FOR A FOURTH CAUSE OF ACTION (Civil Conspiracy)

101. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

102. Defendants acting individually or through their agents have conspired for the purpose of benefitting certain members of 150 Bee Street and injuring Plaintiff Morgan and 150 Bee Street, and causing special damages, to include:

a. Loss to 150 Bee Street, Morgan and its other members of the past, present and future revenues in an amount to be determined by the trier of fact from improper billing of travel expenses, including the billing at rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property;

b. Loss to 150 Bee Street, Morgan and its other members in an amount to be determined by the trier of fact of profits from returns on their investment

from improper management or gross mismanagement;

c. Diminished value of the 150 Bee Street property arising from failure to react to market conditions which impacted adversely the marketability of the 150 Bee Street property to prospective buyers;

d. Loss to 150 Bee Street, Morgan and other members, and diminished value of the 150 Bee Street property, due to intentional, grossly negligent and negligent acts causing construction defects, and concealing those acts; and

e. other special and consequential damages as may be proven at trial.

103. Defendants acting individually or through their agents have acted in concert for the common purpose of injuring Morgan, other LLC members and 150 Bee Street and have thereby visited upon Morgan, other LLC members and 150 Bee Street one indivisible wrong, and accordingly each is vicariously liable for the actions of the others and their liability to Morgan, other LLC members and 150 Bee Street in all respects is joint and several.

104. Upon information and belief, this conspiracy is on-going, as Defendants presently continue to conspire with one another for the common purpose of injuring Morgan, other LLC members and 150 Bee Street.

105. As a result of the aforementioned actions, which are more fully explained above, of Defendants acting individually or through their agents, Morgan, other LLC members and 150 Bee Street have been and are being damaged.

106. The actions of Defendants acting individually or through their agents were and are intentional, willful, wanton and reckless and in conscious disregard of the rights of Morgan, of other LLC members and of 150 Bee Street, warranting an award of punitive damages.

107. As a result of the aforementioned actions, Morgan and 150 Bee Street are entitled to damages in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(Conversion)

108. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

109. By virtue of the conduct summarized above, Defendants came to exercise unauthorized dominion and control over the property, assets, and/or funds belonging to the joint venture known as 150 Bee Street, and of the Plaintiff.

110. Defendants' dominion and control over said property, assets and/or funds has been to the exclusion of, and in defiance of, the rights of the Plaintiff and the LLC; has interfered with the rights of the Plaintiff and the LLC in and to such property, assets, and/or funds; and was without the Plaintiff's and the LLC's permission.

111. Upon information and belief, Defendants wrongfully assessed and/or charged Plaintiff and the LLC, either individually or through his interest in 150 Bee Street, purported commissions, pass through costs, travel and entertainment expenses, personal expenses, real estate fees, management fees and/or other management or construction compensation in excess of the written agreements, without Plaintiff's or the LLC's written or otherwise proper authorization or approval.

112. Upon information and belief, as a direct and proximate result of Defendants' conversion of the property, assets, and/or funds belonging to the joint venture, the LLC, and the Plaintiff, the Plaintiff, either individually or through his interest in 150 Bee Street, other members of the LLC and the LLC have been damaged in an amount to be determined by the trier of fact.

113. Upon information and belief, in doing the acts alleged above, Defendants acted willfully, maliciously, recklessly, carelessly, and/or wantonly for the purpose of causing injury to the Plaintiff and the LLC. As a result, the Plaintiff and the LLC are entitled to an award of actual and punitive damages in an amount to be determined by the trier of fact.

FOR A SIXTH CAUSE OF ACTION (Breach of Contract)

114. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

115. Plaintiff, either individually or through 150 Bee Street and the Defendants entered into various contracts, including but not limited to an Operating

Agreement, a Development Agreement and an AIA Contractor Agreement, whereby the Defendants were to perform certain duties for the benefit of the Plaintiff, including but not limited to acting as general contractor and as developer for the project.

116. Defendants breached their duties and obligations under, *inter alia*, the Operating Agreement, the Development Agreement, and the AIA Contractor Agreement, including but not limited to failing to supervise the construction of the project as required by those agreements.

117. Defendants individually, and/or as manager and/or owner, and as part of their contract with150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street (including Morgan), for a fee of $750,000.00.

118. Upon information and belief, Defendants have paid themselves more than $750,000.00.

119. Defendants individually, and/or as manager and/or owner, and as part of their contract with 150 Bee Street or Bomasada Group as Developer for the LLC, entered into an agreement/contract to act as General Contractor on the 150 Bee Street project, for the benefit of the owners of the LLC including Morgan, for a fee of 1% of the construction costs.

120. Upon information and belief, Defendants have breached the agreement/contract and collected well over 1% of the construction costs.

121. Upon information and belief, Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer so that they could continue to improperly pay themselves monthly with Company funds and so that they could improperly pay for their jet airplane with Company funds.

122. Defendants while acting as General Contractor promised and contracted to do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street and the Members but ended up going millions of dollars over budget anyway, in breach of the contract.

123. Upon information and belief, Bomasada and BIG II improperly charged

the LLC for items one or both of them, and/or the subcontractors, did improperly causing construction defects. Those charges should have been paid by Bomasada, BIG II and/or the subcontractors, under warranties or otherwise, because they and not the LLC caused the defects. Further, construction on the project lasted years beyond the sixteen months scheduled, due to faulty workmanship, errors, cover ups and deceit by the Defendants and the subcontractors. The Defendants wrongfully charged the LLC to fix construction defects caused by the Defendants and/or the subcontractors, when the fixing of those construction defects could and should have been paid by the parties causing the defects and by warranties on construction. The Plaintiff should be repaid all monies it paid to correct errors and construction defects caused by the Defendants and/or the subcontractors.

124. Upon information and belief, Defendants while acting as General Contractor improperly retained any savings for their own benefit to the detriment of the LLC and the Members.

125. Defendants failed to obtain insurance for 150 Bee Street in violation of their obligations to do so, as provided, *inter alia*, by the Development Agreement, the AIA Contractor Agreement, the Operating Agreement and other agreements.

126. Upon information and belief, Defendants' actions or inactions in failing to perform the contracts as specified and agreed are material breaches of the contracts that resulted in the construction project costing millions of dollars over budget; the payment and loss of huge sums of Plaintiff's money as a result of the construction lawsuit; and other damages.

127. Upon information and belief, Defendants failed to perform their obligations as the developer and as the general contractor for the construction project, resulting in construction defects causing the LLC to be sued and significant monetary losses to the LLC, to Morgan and to other LLC members.

128. Defendants ignored and failed to comply with the City of Charleston's building code for the ground floor retail portion of the project, which caused delays in the construction and caused the City not to issue a Certificate of Occupancy or Completion. As a result, many buyers otherwise ready to purchase units of the project

would not close on their units because their contract said they did not have to close until the project got its Certificate of Occupancy, and the project units had only a temporary certificate of occupancy ("TCO"). Defendants did not obtain a final Certificate of Occupancy until nearly a year after getting the TCO and after the Defendants should have obtained the Certificate of Occupancy. During that approximate one-year delay, real estate prices collapsed, and many purchasers backed out of their contract to purchase, thereby costing the Company millions of dollars, all due to the wrongful and grossly negligent failure of the Defendants to obtain the Certificate(s) of Occupancy timely, in violation of their contractual and other duties.

129. BIG II failed to supervise the contractors who worked on the project and thereby caused significant construction defects resulting in huge losses to the Plaintiff.

130. As a result of Defendants' actions or inactions, the Plaintiff, other LLC members and the LLC have been directly and proximately damaged by the foregoing material breaches of contract in an amount to be determined by a trier of fact.

131. As a result of Bomasada's material breaches of the Development Agreement, the Defendants should return to the Plaintiff the entire Development fee of $750,000 or more and all Reimbursed Expenses, whether legitimate or not, to the LLC.

132. As a result of BIG II's material breaches of the Contract Agreement, the Defendants should return to the Plaintiff the entire Contractor Fee of 1% or more and all reimbursed expenses, whether legitimate or not, to the LLC.

133. The Plaintiff, other LLC members and the LLC are entitled to a money judgment against Defendants in an amount to be determined by a trier of fact, plus reasonable attorney's fees and costs, to the extent allowed by law.

FOR A SEVENTH CAUSE OF ACTION (Accounting)

134. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

135. 150 Bee Street and its Members are all in a fiduciary relationship with one

another and fiduciary duties are owed to one another. In addition, the Members of 150 Bee Street owe duties of good faith and fair dealing, and not to engage in oppression, to each other Member and to 150 Bee Street.

136. Due to the actions of Defendants described above, Plaintiff has requested, and hereby again requests, from Defendants an accounting as to the operations of the joint venture, 150 Bee Street and any companies Gilbert, Fred, Bella Vista, Lauralis, Bomasada Investment and Bomasada Group own or owned that received money, goods, or services from or performed services for 150 Bee Street,, or whose business is or was or could be associated with 150 Bee Street, including but not limited to the following: Defendants Bella Vista, Lauralis, Bomasada Investment and Bomasada Group.

137. Plaintiff is not presently aware of all of the money, funds, assets, and/or business opportunities belonging to the joint venture or 150 Bee Street that Defendants have misappropriated to themselves and their other companies and is not aware of all of the specific purposes for which Defendants have used said money, assets, and/or business opportunities. Upon information and belief, Defendants used said money, assets, and/or business opportunities to benefit themselves personally or their other companies, in breach of their fiduciary duties.

138. Defendants have failed or refused to render a proper accounting as to the operations, funds, assets, property, and business opportunities of the joint venture and the limited liability company.

139. Plaintiff is entitled to an Order requiring a complete accounting as to expenses, income, assets, and profits of the joint venture and the limited liability companies above-referenced and further requiring the Defendants to hold as trustee for the Plaintiff individually or for 150 Bee Street any property, profit, or benefit derived by the Defendants in the conduct of the business of the joint venture, and/or the limited liability company.

140. Plaintiff has no adequate remedy at law otherwise to get this information.

FOR A EIGHT CAUSE OF ACTION (Unfair Trade Practices Act)

141. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

142. The aforementioned acts, practices, and conduct of the Defendants were and are unfair and deceptive.

143. The aforementioned acts, practices, and conduct of the Defendants were and are against the public interest and these acts and practices are capable of repetition.

144. The Defendants actions were and are willful and wanton in that Defendants knew or should have known that their conduct was unfair and deceptive, and therefore a violation of this State's statutes concerning unfair and deceptive acts and practices.

145. As a result of Defendants' Unfair Trade Practices Act violations, the Plaintiff has been damaged through his loss of his investment and anticipated profits, and he has been subjected to aggravation and harassment as a result of Defendants' conduct.

146. As a result of Defendants' unfair and deceptive acts or practices in violation of the State's statutes, the Plaintiff prays for his actual damages, together with treble damages of three times his actual damages, punitive damages, plus Plaintiff's reasonable attorney's fees, costs and disbursements of this action.

FOR A NINTHCAUSE OF ACTION
(Unjust Enrichment)

147. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

148. Plaintiff and Defendants entered into the joint venture summarized above whereby Defendants promised and agreed to act in good faith.

149. In accordance with the agreement, Plaintiff advanced and contributed a large sum of cash and/or funding needed for the project.

150. Plaintiff contributed these funds and invested his time and resources to the project, but due to the conduct of the Defendants, Morgan, other LLC members

and the LLC have sustained losses while the Defendants have profited enormously.

151. Plaintiff conferred a valuable benefit upon the Defendants which they have realized in full.

152. Defendant prolonged the sale process on purpose so that they can personally, benefit through fees and charges they passed on to and through the Company. Defendants also caused significant construction defects by their intentional, grossly negligent and negligent acts, which caused huge losses to Morgan, other LLC members and the LLC.

153. Allowing Defendants to retain the amounts they have taken out of the Company would be unjust.

154. There is now justly due and owing to Plaintiff from Defendants the amount of Morgan's investment in the project and the reasonable present value of all amounts improperly billed to the Company by the Defendants beyond what Defendants were contractually permitted.

155. The amount to be returned by Defendants should be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION (Fraud)

156. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

157. Defendants represented to Plaintiff that they would be acting as 150 Bee Street, LLC.

158. Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a. Personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"

b. Airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"

c. A fishing tournament in Cabo San Lucas called Cabo Magic

Sportfishing coded as "Constn. Soft Costs;"

d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"

e. Fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged to the Company as "Travel;" and

g. Other charges to be determined by the trier of fact.

159. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a. Expenses related to trip to Cancun, Mexico;

b. Expenses related to trip to lasvegas.com;

c. Expenses related to trip to Scottsdale, AZ;

d. Expenses related to trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to private aircraft;

g. Expenses related to installing a home automations system in Fred's Scottsdale, Arizona home; and

h. Other charges to be determined by the trier of fact.

160. Defendants prolonged the sale process on purpose so that they could personally benefit through fees and charges they passed on to and through the Company.

161. Defendants knew that these charges were not Company charges or otherwise related to the business of 150 Bee Street, LLC.

162. On or about February 27, 2005, Defendants represented to Plaintiff as follows:

BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST

BASIS CHARGING A 1% FEE....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE....

163. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

164. Upon information and belief, Defendants improperly profited more than the 1% fee.

165. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

166. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff and did, in fact, hide the invoices and bills from Plaintiff. To this date, Defendants have intentionally withheld BIG II's financial records related to the project.

167. Defendants knew that they could reduce the unit prices and sell the units faster.

168. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff or otherwise mislead Plaintiff.

169. Defendants intentionally failed to deduce the unit prices with the intent to mislead Plaintiff and/or that they would not be discovered by the Plaintiff.

170. Defendants intentionally caused construction defects by their fraudulent acts, and intentionally and fraudulently concealed those acts and defects.

171. The issues of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company were material to Plaintiff's decision to enter into the agreement with Defendants.

172. Defendants were aware and had knowledge at the time that they made the aforesaid representations that the representations were false.

173. Defendants intended that the Plaintiff act upon the false representations of Defendants by allowing Defendants to continue running and billing the Company as they saw fit and with disregard for their fiduciary duties to Plaintiff and 150

Bee Street.

174. Plaintiff was ignorant of the falsity of the representations.

175. Plaintiff relied on the false representations.

176. Plaintiff had the right to rely on the false representations.

177. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

178. As a direct and proximate result of the fraud and false representations by the Defendants, Plaintiff, other LLC members and 150 Bee Street have been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR AN ELEVENTH CAUSE OF ACTION (Misrepresentation)

179. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

180. Defendants represented to Plaintiff that they would be acting as Developer, Manager, Fiduciary, Contractor or other capacity for the benefit of Plaintiff and 197e Street.

181. Defendants, while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a. Personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"

b. Airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"

c. A fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"

d. $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-

Education;"

e. Fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"

f. African Safari with Swanepoel & Scandrol Safaris charged to the Company as "Travel;"

g. Expenses related to installing a home automations system in Fred's Scottsdale, Arizona home; and

h. Other charges to be determined by the trier of fact.

182. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a. Expenses related to trip to Cancun, Mexico;

b. Expenses related to trip to lasvegas.com;

c. Expenses related to trip to Scottsdale, AZ;

d. Expenses related to trip to Pebble Beach, CA;

e. Expenses related to airplane equipment purchased from Blue Mountain Avionics;

f. Expenses related to private aircraft; and

g. Other charges to be determined by the trier of fact.

183. Defendants prolonged the sale process on purpose so that they could personally benefit through fees and charges they could pass on to the Company.

184. Defendants knew that these charges were not Company charges.

185. On or about February 27, 2005, Defendants represented to Plaintiff that BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE.

186. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

187. Upon information and belief, Defendants profited more than the 1% fee.

188. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

189. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff. To this date, Defendants have intentionally withheld BIG II's financial records related to the project.

190. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff.

191. Defendants knew that they could reduce the unit prices and sell the units faster.

192. Defendants intentionally failed to deduce the unit prices with the intent that they would not be discovered by the Plaintiff.

193. Defendants intentionally misrepresented that they had properly constructed the condominium project and the nature and extent of the construction defects associated with the project.

194. The issues of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company were material to Plaintiff's decision to enter into the agreement with Defendants.

195. Defendants were aware and had knowledge at the time that they made the representations that the representations were false.

196. Defendants intended that the Plaintiff act upon the false representations by allowing Defendants to continue running and billing the Company as they saw fit.

197. Plaintiff was ignorant of the falsity of the representations.

198. Plaintiff relied on the false representations.

199. Plaintiff had the right to rely on the false representations.

200. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

201. As a direct and proximate result of the false representations by the Defendants, Plaintiff has been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the Property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR A TWELFTH CAUSE OF ACTION (Indemnification of 150 Bee Street)

202. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

203. At all times relevant the Defendants were agents of 150 Bee Street, which was their principal. As such, the Defendants must indemnify 150 Bee Street and its Members, excluding Fred and Gilbert, for all losses suffered by 150 Bee Street due to the negligent, grossly negligent and intentional illegal acts of the Defendants, alleged herein, including but not limited to losses incurred by the LLC due to construction defects and the lawsuit project owners brought against the LLC due to construction defects.

204. Bella Vista, as a Member of the LLC, and Fred and Gilbert, as the general partners of Bella Vista, are liable to indemnify the LLC and its Members other than Fred and Gilbert, for all acts or omissions involving intentional misconduct or knowing violation of the law by any of them, and all transactions in which any of them received a personal benefit in violation or breach of the LLC's Operating Agreement and other agreements, all of which occurred as alleged herein. Upon information and belief, any wrongful action taken by any of the Defendants pursuant to advice by any LLC counsel was induced by intentional misconduct or knowing violation of the law by Bella Vista, Fred, Gilbert and/or one or more of the other Defendants.

205. Bomasada, as the Developer, agreed in Section 1.4 of the Development Agreement between 150 Bee Street LLC and Bomasada:

[T]o indemnify, defend and hold harmless the [150 Bee Street, LLC] and its partners, employees and agents, from any and all loss, damage, cost, expenses and liability sustained by such parties which arise out of the Developer's gross negligence or willful misconduct or acts outside the scope of the Developer's authority under this Agreement.

206. The Defendants committed numerous negligent, grossly negligent and intentional acts regarding the project for which they must indemnify 150 Bee Street, LLC, including but not limited to each of the following:

a. Bomasada's failing to supervise the construction work during all phases of construction and to otherwise assist in all aspects of the project, as required by the development agreement between Bomasada and the LLC;

b. Bomasada's failing to provide qualified field personnel for observing and reviewing work progress and construction of the project, as required by paragraph 1.1 of the development agreement;

c. Bomasada's failing to supervise (i) the preparation of appropriate instructions to bidders, (ii) the preparation of contracts for the construction of the Project, and (iii) the administration of change orders, as required by paragraph 1.1 of the development agreement;

d. Bomasada's failing to provide administrative services required to be made relating to the construction of the Project, as required by paragraph 1.1 of the development agreement; and

e. Bomasada's failing to assist in securing authorizations, permits and licenses as necessary for the development and construction of the Project, as required by paragraph 1.1 of the development agreement.

207. As a direct and proximate result of negligent, grossly negligent and intentional acts by the Defendants, the Company has been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the

trier of fact.

FOR A THIRTEENTH CAUSE OF ACTION (Intentional Interference with Prospective Business Advantage)

208. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

209. Defendants intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer and so they could continue to improperly pay themselves monthly with Company funds. Defendants' purpose was improper, in that they took this action in order to continue to improperly pay themselves.

210. By intentionally and improperly failing and refusing to adequately lower the unit pricing as stated above, the Defendants intentionally and improperly interfered with the LLC's potential contractual relations for an improper purpose and by improper methods, causing injury to the LLC.

211. As a direct and proximate result of Defendants failing and refusing to adequately lower the unit pricing as stated herein, the LLC has suffered damages in an amount to be determined by the trier of fact.

FOR A FOURTEENTH CAUSE OF ACTION (Misappropriation of LLC assets)

212. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

213. The Defendants' intentional, illegal use of the funds and other property of 150 Bee Street for their own personal and unauthorized uses constitutes misappropriation of the assets of 150 Bee Street. The Defendants' have fiduciary duties to protect the assets of 150 Bee Street.

214. As a direct and proximate result of Defendants' misappropriation of 150 Bee Street's assets, 150 Bee Street has suffered damages in an amount to be determined by the trier of fact.

FOR A FIFTEENTH CAUSE OF ACTION
(Alter Ego/Amalgamation/Piercing the Corporate Veil as to the Developers and Contractors)

215. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully restated herein.

216. Bomasada held itself out to the Plaintiff and the public as the developer of Bee Street Lofts and signed the Development Agreement with the Company naming Bomasada as Developer.

217. BIG II held itself out to the Plaintiff and the public as the general contractor of Bee Street Lofts and signed an AIA Stipulated Sum Contractor with the Company naming BIG II as the General Contractor for the Project.

218. Upon information and belief, Bomasada, BIG II and Lauralis at all times relevant to this action:

a. Failed to observe corporate formalities;

b. Were grossly undercapitalized for the purposes of the corporate undertaking, to wit, the development and construction of the Bee Street Lofts and the remediation of any and all defects in the design and construction of the Bee Street Lofts should they arise;

c. Were controlled by Bella Vista, Fred and Gilbert to such an extent that they were merely a facade for the operations of Bella Vista, Fred and Gilbert;

d. Do not have any functioning officers, managers or directors that are independent of Bella Vista, Fred and Gilbert; and Are functionally insolvent.

219. Upon information and belief, Bomasada, BIG II and Lauralis failed to follow the necessary corporate formalities, as required by law; undercapitalized 150 Bee Street; siphoned corporate funds for personal use of its shareholders; used corporate facilities and employees for personal ends; and otherwise so intermingled the personal and financial affairs with the company's that they have become the alter ego of Bella Vista, Fred and Gilbert.

220. Further, upon information and belief the interests of Bomasada, BIG II and Lauralis and their agents, directors, officers and/or shareholders, and of Bella

Vista, Fred and Gilbert are so amalgamated that the Plaintiff is entitled to disregard the corporate forms and recover against Bomasada, BIG II and Lauralis and their agents, directors, officers and/or shareholders.

221. Upon information and belief, Bomasada, BIG II and Lauralis are shell and/or sham companies dominated and controlled by Bella Vista, Fred and Gilbert such that they are not legally distinct.

222. It would be inequitable to allow Fred and Gilbert to hide behind a corporate shield that has no basis in fact for the express purpose of avoiding their obligations, responsibilities and liabilities to the Plaintiffs.

223. Plaintiffs are entitled to pierce the corporate veil of Bomasada, BIG II and Lauralis and thereby obtain a judgment against Bomasada, BIG II and Lauralis, and their agents, directors, officers and shareholders for the liability of Fred, Gilbert and Bella Vista in an amount to be determined by the trier of fact.

224. Further, because the interests of Bomasada, BIG II and Lauralis and their agents, directors, officers and shareholders, and of Bella Vista, Fred and Gilbert are so amalgamated, Plaintiffs are entitled to disregard the corporate forms and recover against Bomasada, BIG II and Lauralis and their agents, directors, officers, and shareholders in an amount to be determined by the trier of fact.

WHEREFORE, Morgan, individually and in a representative capacity of 150 Bee Street in a derivative action, respectfully prays that Plaintiff and the LLC be awarded:

a. Actual, consequential, and punitive damages in an amount to be determined by the trier of fact;
b. Reasonable attorney's fees and costs to the extent allowed by law;
c. Treble damages;
d. An offset against the capital account and any undistributed amounts claimed by Defendants;
e. The return of all capital contribution paid by the Members of the LLC due to the wrongdoing of any of the Defendants;
f. An accounting and winding up of the business of 150 Bee Street;
g. Indemnification of all losses incurred by the Plaintiff or the LLC due to

the unlawful actions of the Defendants, including but not limited to regarding construction defects or as alleged in the construction lawsuit;

h. All of the Development fee of $750,000 or more and all Reimbursed Expenses paid to Bomasada by the Plaintiff;

i. All of the Contractor fees of 1% or more paid to BIG II and all reimbursed expense paid to BIG II by the Plaintiff;

j. Prejudgment and post judgment interest;

k. Such other and further relief as this court deems just and proper.

Respectfully submitted,

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By Hand Delivery

Re: Thomas Morgan v. John L. Gilbert, et al.
IN ARBITRATION (Previously Case No.: 12-CP-10-580)
Our Ref: 66696.0001.0

Messrs. Cooke, Hagood, and Robertson:

Please find enclosed **Defendants' Memorandum in Opposition to Plaintiff's Motion to Amend And First Amended Complaint and Defendants' Motion to Dismiss.**

By copy of this letter I am serving same on counsel of record.

With kind regards, I remain

Sincerely,

Womble Bond Dickinson (US) LLP

Henry E. Grimball
Partner

HEG:def
Encl.
cc (via US Mail and e-mail): W. Andrew Gowder, Jr, Esq.
Michael T. Rose, Esq.

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STATE OF SOUTH CAROLINA	)	IN ARBITRATION
COUNTY OF CHARLESTON	)	Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO: 2012-CP-10-580
THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP, II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION, Defendants.	)	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND AND FIRST AMENDED COMPLAINT AND DEFENDANTS' MOTION TO DISMISS**

Defendants John L. Gilbert ("**Gilbert**"), Stuart L. Fred ("**Fred**"), Bella Vista Partnership, a Texas General Partnership ("**Bella Vista**"), Bomasada Group, Inc. ("**Bomasada Group**"), Bomasada Investment Group, II, LLC ("**BIG II**") and Lauralis Management, Inc. ("**Lauralis**") (Gilbert, Fred, Bella Vista, Bomasada Group, BIG II and Lauralis being collectively hereinafter referred to as the "**Defendants**"), by and through their undersigned counsel, provide this Memorandum in Opposition to Plaintiff's Motion to Amend and First Amended Complaint. Defendants further move to dismiss the original 2012 Complaint filed by Plaintiff Thomas H. Morgan ("**Morgan**" or "**Plaintiff**").

This lawsuit is a derivative action filed by the Plaintiff on January 26, 2012. South Carolina Rule of Civil Procedure 23(b)(1) requires that a plaintiff in a derivative action

complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires." Plaintiff has failed to do so. The provisions of South Carolina Rule of Civil Procedure 15(a), which allow for leave to amend to be "freely given," do not excuse Plaintiff from satisfying Rule 23(b)(1)'s heightened pleading requirements and do not excuse a member from complying with the Company's operating agreement. Since the Plaintiff has not, and apparently cannot, satisfy the heightened pleading requirements of Rule 23(b)(1),[1] Plaintiff's motion to amend should be denied and the action dismissed.

PROVISIONS OF THE COMPANY OPERATING AGREEMENT

150 Bee Street, LLC, is a limited liability company (the "**Company**") organized and existing under the laws of the State of South Carolina. The Second Amended and Restated Operating Agreement dated as of March 2005 (the "**Operating Agreement**")[2] The Operating Agreement governs the relations among the members and managers. *See* S.C. Code Ann. §33-44-103(a).

> Members of a limited liability companies may enter into an operating agreement that outlines the procedures governing the affairs of the company. Operating agreements are binding contracts that are superior to statutory authority where they are in place.
>
> *Historic Charleston Holdings, LLC, v. Mallon*, 365 S.C. 524, 533, 617 S.E.2d 388, 393 (S.C. Ct. App. 2005), *aff'd in part and rev'd in part on other grounds*, 381 S.C. 417, 673 S.E.2d 448 (2009) (citations omitted).

Any analysis of whether the Plaintiff can maintain a derivative action must therefore begin with an analysis of the Company's Operating Agreement. Article VI of the Operating Agreement governs management of the Company. While the Company's managing members

[1] Defendants' counsel requested that discovery be allowed solely on this issue. Plaintiff's counsel objected, representing that it has produced all relevant documents. The Panel Chair has requested that the hearing on this motion proceed without discovery.
[2] *See* Exhibit A attached hereto (Operating Agreement).

have certain specified powers, *see* Article VI. of the Operating Agreement,[3] Section 6.03(g) specifically and unequivocally provides that the managing members could **not** file a lawsuit other than in the ordinary course of business without "Majority Consent" of the Company's members. Section 1.13 of the Operating Agreement defines "Majority Consent" as the "affirmative consent or approval, either in writing or at a meeting of the Members, of the Members owning a majority of the Company Interests owned by Members entitled to vote, based upon the percentages of each such Company Interest."

Put simply, a managing member could not commence or stop a derivative action. A "demand" against Mr. Fred as one of the Company's managing members was inappropriate since the decision whether to commence any litigation rested with the Company's members. The Company's Operating Agreement required the affirmative vote of the Company's members in order to do so and only upon proper notice to all members as required by Sections 14.03 and 14.11. The notice was never given and the vote was never sought.

Section 14.14 of the Operating Agreement also governs how disputes involving the Company are to be handled. Section 14.14(a) first requires that the parties first engage in mediation which can be initiated by the Company or any member. Section 14.14(b) requires that any issues that remain unresolved after mediation be submitted to arbitration.

FACTS

The Company was formed on February 7, 2000. As of the execution of the Operating Agreement in 2005, membership interests were owned as follows:

Neal Baker	26.67%
Bella Vista Partnership	26.67%

[3] The Company is a member managed limited liability company. *See* Section 6.01 of the Operating Agreement. Mr. Fred serves as Bella Vista's representative. *Id.*

Thomas H. Morgan	26.66%
Edwin S. Pearlstine, Jr.	20.00%

Neal Baker, the Plaintiff's brother-in-law, died in September 2011. Elizabeth Morgan Baker, Mr. Baker's widow and the Plaintiff's sister, is the Personal Representative of Mr. Baker's Estate. As a result of Mr. Baker's death, Mr. Baker was dissociated from the Company. *See* S.C. Code Ann. §33-44-601(8). As a dissociated member, Ms. Baker ceased to have any voting interest in the Company.[4] *See* S.C. Code Ann. §33-44-603(3). As of November 16, 2011, Stuart Fred was one of the Company's two (2) managing members. As a result of Mr. Baker's death, Plaintiff became the Company's other managing member. *See* Section 6.01 of the Operating Agreement. By resolution approved on October 30, 2012, Pearlstine became a third managing member of the Company.[5]

The decision whether to commence a legal action against the Defendants therefore rested not with the Company's two (2) managing members in late 2011, but in Morgan obtaining the affirmative of two (2) of the three (3) Company members, Morgan, Bella Vista, and Pearlstine. The instant action was commenced on January 26, 2012 with the filing of the Summons and Complaint (the "**2012 Complaint**") in the Court of Common Pleas demanding a jury trial.[6]

Morgan proceeded to litigation in both January 2012 and in 2018 based on his mistaken notion that the decision to file litigation rests with the Company's managing members and not by majority vote of the members at a properly noticed meeting. The materials produced by

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[4] *See also* Minutes of October 30, 2012 at tab 9 of Exhibit F.

[5] *See* October 30, 2012 resolution at tab 9 of Exhibit F. Bella Vista voted against the resolution. Morgan and Pearlstein voted in favor.

[6] Notably, Plaintiff chose to ignore the unequivocal requirement that the action be commenced first in mediation arranged by Section 14.14(a) and if unresolved, submitted to binding arbitration. *See* Section 14.14(b) of the Operating Agreement. Only after a six (6) month battle to try to keep the action in the Court of Common Pleas did Plaintiff's former counsel consent to arbitration by order filed on July 9, 2012.

Plaintiff's current counsel demonstrate that Morgan never sought a vote of the Company's members to commence any litigation. In his May 18, 2018 email to the panel, Plaintiff's current counsel provided two letters evidencing the Plaintiff's "demand" that legal action be taken against the Defendants.[7] In his original letter to Henry E. Grimball dated November 16, 2011, Plaintiff's original counsel stated that:

> Unless Stuart L. Fred shall consent to this action by **Friday, November 25, 2011**, it shall be deemed that Stuart L Fred shall have refused to commence the action under South Carolina Code Ann. Section 33–44–1101, and Mr. Thomas H Morgan shall therefore be entitled to bring a derivative action on behalf of 150 Bee Street, LLC against the aforementioned parties.[8]

In his November 20, 2011 letter to Henry E. Grimball, Plaintiff's original counsel reiterated his demand, but extended the deadline until Friday, December 2, 2011.

At no time did Morgan seek a vote of the members prior to commencing the original action in the Court of Common Pleas.

The original 2012 Complaint[9] did not name the Company as a defendant. The 2012 Complaint conclusorily alleges in paragraphs 13 and 14 that the Plaintiff had made a demand on the "Defendant" to commence a derivative action, but that the "Defendants" had refused.

On August 22, 2014,[10] Bee Street Lofts Homeowners Association, Inc., and Mark Laboccetta commenced a construction defects case against numerous defendants including the Company, Gilbert, Fred and Bomasada Group (the "**Construction Defects Suit**"). No cross-claims were ever filed by the Company against any of the Defendants in the Construction

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[7] *See* Exhibit B (November 16, 2011 letter from G.P. Diminich to Henry Grimball) and Exhibit C (November 28, 2011 from G.P. Diminich to Henry Grimball).
[8] Emphasis in the original.
[9] *See* Exhibit D (Original Complaint).
[10] *See* Exhibit E (Original complaint in Construction case)

Defects Suit, and no tolling agreement was ever entered.[11] The Construction Defects Suit was settled in early 2018.

Shortly after the Construction Defects Suit was settled, Plaintiff's current attorneys filed a motion with this Panel in February 2018 to amend the original 2012 Complaint. At no time prior to filing the original proposed Amended Complaint did Morgan notice a vote of the Company's members to obtain authority to file the new Complaint with its new causes of action.

That proposed Amended Complaint, for the first time, includes the Company as a named defendant and acknowledges in Paragraph 4 that the Company is "an indispensable party to this derivative proceeding." That proposed Amended Complaint conclusorily alleges in Paragraph 15 that "the requirements of SCRCP Rule 23(b)(1) have been complied with." Despite not having filed any cross-claims in the Construction Defects Suit or entering into any tolling agreement in the arbitration case with the Defendants, Morgan included in the proposed Amended Complaint "new" facts and causes of action that he characterized as a "Lawsuit for Construction Defects."[12]

By email dated May 17, 2018, Plaintiff's current counsel submitted a revised proposed amended complaint. Defendants object to the filing of the newest proposed Amended Complaint on the grounds that the Plaintiff has never satisfied Rule 23(b)(1)'s requirements. In the newest version of the proposed amended complaint, Plaintiff attempts to satisfy Rule 23(b)(1)'s requirements by referring to the November 16, 2011 and November 28, 2011 to Defendants' counsel demanding that Mr. Fred commence litigation. There is **no** allegation that the question

[11] Plaintiff and Defendants did enter into a tolling agreement in December 2011, *see* Exhibit G, but, by its express terms, that tolling agreement expired on January 16, 2012.
[12] Page 13 of Exhibit H (original proposed amended complaint).

of filing of litigation either in 2011 or 2018 was ever put to a vote of the Company's members by proper notice, as required by the Operating Agreement.

Plaintiff cannot make such an allegation because no vote was requested either before the filing of the 2012 Complaint or before the filing of either version of the proposed Amended Complaint.

Plaintiff tries to dissemble on the question of any vote being taken by referring to the "hostility and antagonism" of Messrs. Fred and Gilbert. This position ignores the fact that the Company's third member, Edwin Pearlstine, has voted with Morgan on every vote taken by the Company since 2005 including settling the Construction Defects Suit over the objection of Bella Vista.[13] Even more importantly, this position ignores the fact that the decision to file litigation rests with the Company's members, not the Managing Members.

LEGAL ARGUMENT

In pursuing a derivative suit, shareholders/members must first make a demand on the company to take the action they desire or allege that such demand would be futile. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 189, 539 S.E.2d 402 (Ct. App. 2000) (quoting *Allison ex rel. Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F.Supp. 1106, 1112 (D. Del. 1985)). The purpose of the demand requirement is to ensure compliance with the most fundamental principle of corporate governance: directors are answerable to the shareholders and responsible for managing all aspects of corporate affairs. *Patterson v. Witter*, 418 S.C. 66, 82, 791 S.E.2d 294, 303 (Ct. App. 2016), *reh'g denied* (Oct. 27, 2016), *cert. granted* (Sept. 29, 2017).

In the case of a corporation, that demand must be made on the board of directors since the board, not the shareholders, has the power to institute litigation on behalf of the corporation.

[13] *See* Exhibit F (copies of Company minutes and resolutions). For example see Minutes of November 5, 2017 meeting at tab 16 of Exhibit F.

However, in the case of a limited liability company, the demand must be made on the group charged with governing whether litigation can or should be filed. That need not be the "board." *See Historic Charleston Holdings, LLC, v. Mallon*, supra.

In the instant case, the power to commence litigation under the Operating Agreement rested solely with approval of a majority of the Company's members.[14] The court in *Whittle*, supra, at 343 S.C. at 186, 539 S.E. 2d at 408, in this regard cited the following from *Hawes v. Oakland*, 104 U.S. 450, 26 L.Ed. n827 (1881):

> It is equally important that before the shareholder in permitted in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action within conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court...The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders, when that is necessary, and the course of failure in those efforts should be stated with particularity.... [Emphasis added].

Plaintiff's original counsel in 2011 and now Plaintiff's current counsel ignore the Operating Agreement's provisions requiring a vote of the Members. What is even more striking is that Plaintiff has clearly had the votes to authorize the litigation from the outset as evidenced by the fact that Pearlstine has, as a member, voted with Morgan on every Company resolution since 2005, including the approval of a settlement agreement of the Construction Defects Suit opposed by member Bella Vista.

Rule 23(b)(1) imposes heightened pleading requirements for derivative actions. A shareholder/member bringing a derivative suit must set forth in his complaint "particularized allegations of the efforts made to demand that the board take the action that Shareholders now

[14] *See* Section 6.03(g) of the Operating Agreement.

seek to compel." *Id.* "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." [15] *Carolina First Corp. v. Whittle*, 343 S.C. at 189, 539 S.E.2d at 409. Most importantly here in considering Plaintiff's 2012 Complaint in the instant case, "...the sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it." *Whittle*, supra, at S.E.2d 409 [Emphasis added].

Alternatively, the demand requirement may be excused if a demand on the company's managing body, in this case the Company's members with respect to litigation, would be futile, keeping in mind ..."that once the shareholder makes a demand, the shareholder can no longer argue demand is excused." *Whittle*, supra, at S.E.2d 409, citing from *Spiegel v. Buntrock*, 571 A.2d 767, 775-76 (Del. 1990). Although the demand requirement may be excused, "[s]hareholders still ha[ve] the burden of alleging particularized facts to support the assertion that demand would have been futile. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192 (Ct. App. 2000). To establish futility, the Plaintiff must establish why the Company's members should not have been permitted to make the decision as to whether to bring a derivative suit. *Id.* Generally, this involves a showing of self-dealing, that directors are not independent, that the directors failed to fully inform themselves about the challenged transaction, or that the challenged transaction was not the product of the directors' exercise of sound business judgment. 18 C.J.S.

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[15] Rule 23 refers explicitly to corporations and unincorporated associations (not limited liability companies). The South Carolina Uniform Limited Liability Company Act of 2006, however, imposes an identical demand requirement and futility exception. S.C. Code Ann. §33-44-1101 provides:

> A member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed.

Corporations § 498. This is generally a very high bar to meet and an impossible one in the current litigation where two of the three members, Morgan and Pearlstine, have voted in tandem.

The South Carolina Court of Appeals has rejected the following arguments for futility:

- A board member's participation in the original decision giving rise to the derivative suit is insufficient to establish that the board is disinterested and the demand requirement is futile.
    - ("If this were the only prerequisite to excusing demand, the demand requirement would be effectively repealed since, by definition, the directors have a hand in all corporate transactions of any consequence")
- The fact that the majority of the board are named as defendants and cannot be expected to sue themselves is insufficient to establish futility
    - ("This reasoning has been uniformly rejected by courts which have considered the argument.")

Carolina First Corp. v. Whittle, 343 at 195, 539 S.E.2d at 412-13. Other courts have also found that the mere threat of personal liability is not, alone, sufficient to show that the director is not independent or disinterested. *Fagin v. Gilmartin*, 432 F.3d 276 (3d Cir. 2005). If a shareholder fails to meet these heightened pleading requirements, the complaint is subject to dismissal under Rule 12(b)(6). *Patterson v. Witter*, 418 S.C. 66, 83, (Ct. App. 2016), *reh'g denied* (Oct. 27, 2016), *cert. granted* (Sept. 29, 2017).

The November 2011 demand letters themselves were insufficient to have filed the original derivative action in 2012. In like manner, permitting the Plaintiff in 2018 to file the "Lawsuit for Construction Defects" based on the 2014 Construction Defects Suit should not be allowed where no demand has ever been made.

In evaluating whether the two November 2011 letters from Plaintiff's counsel to Grimball constitute a demand, the Panel should consider four factors. *Id.* "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Carolina First Corp. v. Whittle*, 343 S.C.

at 189, 539 S.E.2d at 409 (quoting *Allison on Behalf of Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del.), *aff'd,* 782 F.2d 1026 (3d Cir. 1985)). The shareholder need not specify his legal theory, every fact in support of that theory, or the precise measure of damages, however. *Id.*

For example, a letter offering directors prospective advice or instructions on how to perform their duties but failing to "provide the directors with information necessary for them to assess whether an alleged wrong to the corporation has actually occurred and to determine whether to take steps to rectify it" will not constitute a demand. § 13.12 REQUIREMENTS OF RULE 23.1, 2006 WL 2455009. Likewise, a letter from co-counsel merely stating a belief that certain actions taken by the board of directors are "not in the best interests of the shareholders or employees" of the company, without more, does not constitute a demand. *See Seibert v. Harper & Row, Publishers, Inc.,* No. CIV. A. 6639, 1984 WL 21874, at *2 (Del. Ch. Dec. 5, 1984). A description of the factual basis for the wrongful acts and the harm caused to the corporation is required. *Whittle*, 343 S.C. at 189, 539 S.E.2d at 409-410 ("a pre-suit demand must be alleged, not in a conclusory fashion, but through particularized allegations.")..

In *Patz v. Utility Software of America, Inc.*, the United States District Court for the District of South Carolina rejected a demand that appears strikingly similar to Morgan's demand in the instant case. In *Patz*, the plaintiffs sued the board of directors alleging a breach of fiduciary duty and asserting a claim for unjust enrichment, among others. The defendant filed a motion to dismiss, arguing that the plaintiff did not make a demand on the board for its unjust enrichment claim. The demand letter outlined plaintiff's intention to "commence a derivative action" and noted that the "claim arises out of the failure of the corporation to issue an appropriate accounting after repeated demands, as well as multiple breaches of fiduciary duty

engaged in by the majority shareholders." Notably, the letter did not identify the defendants as the alleged wrongdoers, describe any wrongful acts by defendants, or indicate what actions the plaintiff wanted the corporation to take to redress the alleged wrongful conduct. As a result, the District Court held that the plaintiff's pre-suit demand was inadequate. *Patz v. Util. Software of Am., Inc.,* No. 6:10-CV-01149-JMC, 2012 WL 443929, at *2 (D.S.C. Feb. 13, 2012).[16]

Here, the purported demand consisted of November 16 and 20, 2011 letters addressed to Henry Grimball as counsel for one of the managing members. There is no indication that similar letters were sent to a majority in interest of the members. The letters do not identify the factual basis for the claims or the alleged harm caused to the Company as a result of the alleged wrongdoing. Instead, they simply identify potential parties, a list of claims, and requests that Fred put the matter to a vote of all Members within four days from the date of the letter. There is no explanation as to why Mr. Morgan, then a Managing Member of the company, could not have requested a vote of the Company's members at a properly noticed meeting. Because the November 2011 correspondence did not provide the Company's members with information necessary to make an informed decision as to a derivative action, it failed to meet the minimum requirements for a demand outlined in *Carolina First Corp. v. Whittle*. 343 S.C. 176, 189-90 (Ct. App. 2000). Morgan has not issued a proper demand to the Company to date. Even more importantly, the letters in question have been submitted LONG AFTER the 2012 Complaint was filed and served. Virtually the same error was committed by the Plaintiffs in *Whittle*, supra, where the court concluded

> "...the letters were not before the court and could not have been considered. The trial court ruled that the submission outside of the Third Amended Complaint was improper, correctly concluding that the sufficiency of the allegations in the Third

[16] The District Court did find that the demand would have been futile but such an allegation in the present case strains credulity when Pearlstine has voted with Morgan on every recorded vote of the company's members.

> Amended Complaint of a pre-suit demand must be determined from the four corners of the pleading."

Whittle, supra, 343 S.C. at 190, 539 S.E.2d at 410 [Emphasis added].

Plaintiff's current attempt in 2018 to satisfy Rule 23(b)(1)'s requirements can be found at paragraphs 14 through 19 of the proposed Amended Complaint. Nowhere is there an allegation that the decision whether to file an action against the Defendants in either 2011 or 2018 was put to a vote of the Members as required by Section 6.03(g) of the Operating Agreement. The proposed Amended Complaint does not satisfy the demand requirement or heightened pleading standards of Rule 23.

There has certainly been no presentation of the proposed "Construction Defects Suit" to the Company's members. Delaware courts have found that, if a derivative complaint "strays beyond the issues fairly presented in the demand letter" courts may deem those unraised claims waived. § 20:12.Making a demand, 3 Bus. & Com. Litig. Fed. Cts. § 20:12 (4th ed.). In *Grimes v. Donald*, the Delaware Chancery Court held that the plaintiff's failure to assert the grounds for a cause of action resulted in a waiver of a claim for waste. The plaintiff, a stockholder, sued the board of directors, challenging employment agreements entered into with the CEO. When the plaintiff advanced additional grounds in support of his position before the Court, the Chancery Court declared:

> If the internal corporate process contemplated by Rule 23.1 is to be engaged, certainly the complaining shareholder should present to the board for its consideration all of the concerns which he or she asserts justify board action. There is little to recommend a process in which a shareholder seeks board consideration of only some aspects of a transaction or puts forward only selected theories for board consideration, while reserving other theories for judicial consideration. Such a process would be neither efficient nor fair. Here plaintiff did not call to the board's attention these claims of waste etc. In making demand upon the board, plaintiff has in effect conceded that the board was in a position to

> consider and act upon his demand. By failing to present these matters to the board plaintiff has waived his ability to present them to this court.

Grimes v. Donald, C.A. No. 13358 (Del. Ch. Jan. 11, 1995), *aff'd,* 673 A.2d 1207 (Del. 1996), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

As noted above, the purported demand in the two letters, dated November 16 and 20, 2011, does not identify any potential claims for construction defects, nor does it state any facts to alert the Company's members to any such claim.

In addition to failing to satisfy Rule 23(b)(1)'s heightened pleading requirement, the proposed Amended Complaint also illustrates a fatal pleading error which occurred six years ago, in 2012: the failure to name the Company as an indispensable party.[17] Courts across the country have held that, as a general rule, a corporation in a shareholder derivative suit is an indispensable party and must be joined.[18] *See, e.g., Koster v. (Am.) Lumbermens Mut. Cas. Co.,* 330 U.S. 518 (1947) (finding that the corporation for whose benefit action is brought is the real party in interest and is an indispensable party); *Schaler v. Feder*, 184 N.Y.S.2d 933 (Sup 1959) ("In a stockholder derivative action, the corporation is ordinarily a necessary party"); *Agostino v. Hicks*, 845 A.2d 1110 (Del. Ch. 2004) ("Although not specified by derivative action rule, the corporation is an indispensable party to a derivative action."); *Gabriel v. Preble*, 396 F.3d 10 (1st Cir. 2005) ("In shareholder derivative action, corporation is indispensable party within meaning of civil procedure rule governing joinder of persons needed for just adjudication."); *Liddy v. Urbanek*, 707 F.2d 1222, 1224 (11th Cir. 1983) ("The corporation is the real party in interest

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[17] The current proposed amended complaint glosses over this error in Paragraph 4 when it notes that the Company "is an indispensable party to this derivative proceeding." The Company was not named in the 2012 Complaint.

[18] When there is no South Carolina case directly on point on various issues of corporate governance, South Carolina courts have looked to Delaware law and decisions in construing its Business Corporation Act. For example, in *Carolina Corp v. Whittle*, the Court of Appeals quoted a Delaware court in outlining the requirements for a pre-suit demand. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 189 (Ct. App. 2000) (quoting *Allison on Behalf of Gen. Motors Corp. v. Gen. Motors Corp.,* 604 F. Supp. 1106, 1117 (D. Del.), *aff'd,* 782 F.2d 1026 (3d Cir. 1985).

even though the corporate management has failed to pursue the action."); *Taylor v. Swirnow*, 80 F.R.D. 79, 82 (D. Md. 1978) ("[I]t is clear that in a derivative action the corporation for whose benefit suit is brought is a necessary party to the action; the corporation is "the real party in interest, the stockholder being at best the nominal plaintiff.").

If a corporation, or in this case, the Company, is an indispensable party in a derivative action (as acknowledged by the Plaintiff in the current version of the proposed Amended Complaint), the failure to join the Company is not merely a procedural error but, rather, a fatal defect to the original action, and a motion to amend cannot save the Plaintiff from this fatal error.[19] Indeed, in 1970, the United States Supreme Court declared, when construing the Federal Rules of Civil Procedure, "[t]he corporation is a necessary party to the action; without it the case cannot proceed." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970); *see Marcus v. Textile Banking Co.*, 38 F.R.D. 185 (S.D. N.Y. 1965). Thus, without the corporation, "the court has no jurisdiction to adjudicate its rights in its absence." 15 Cal. Jur. 3d Corporations § 522; *Keeler v. Schulte*, 47 Cal. 2d 801, 306 P.2d 430 (1957); *Beyerbach v. Juno Oil Co.*, 42 Cal. 2d 11 1 (1954). Accordingly, when a limited liability company/corporation is an indispensable party to a derivative action but not joined as a party, the action is subject to dismissal.

Courts hold derivative plaintiffs to Rule 23(b)(1)'s strict pleading requirements. Consequently, the Plaintiff's motion should be denied and the action dismissed.

---

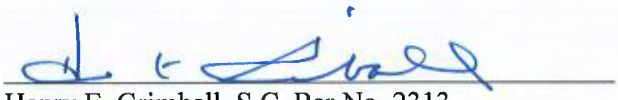
[19] Courts appear to conflate necessary and indispensable parties in the context of derivative actions. "A necessary party is one who *must* be joined but whose non-joinder will not result in dismissal, if there is adequate excuse for his non-joinder." *Jones Knitting Corp. v. A. M. Pullen & Co.,* 50 F.R.D. 311, 314 (S.D.N.Y. 1970). By contrast, "[a]n indispensable party is one who must be joined because his non-joinder is so prejudicial, both to his rights and to those of the parties already joined, that the action *cannot* continue without him." *Id.*

Although courts may refer to corporations in a derivative action as "necessary" they appear to mean "indispensable." *See, e.g., Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("The corporation is a necessary party to the action; without it the case cannot proceed.").

CONCLUSION

For the reasons above, Defendants respectfully request that the Plaintiff's Motion to Amend in this matter be denied and the action be dismissed.

WOMBLE BOND DICKINSON (US) LLP



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ATTORNEY FOR DEFENDANTS

June 5, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN ARBITRATION
COUNTY OF CHARLESTON	)	Previously: IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO: 2012-CP-10-580
THOMAS H. MORGAN, Plaintiff, v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP, II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION, Defendants.	)	**CERTIFICATE OF SERVICE**

I do hereby certify that on June 5, 2018, I served a copy of the **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND AND FIRST AMENDED COMPLAINT AND DEFENDANTS' MOTION TO DISMISS** on all counsel of record in the within entitled matter via US Mail, with correct postage, and via E-Mail as follows:

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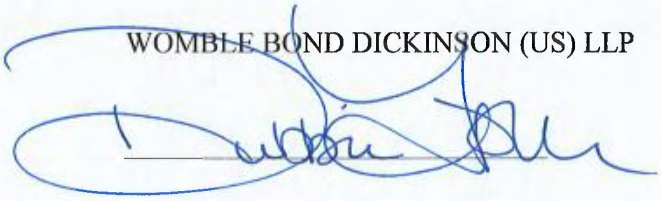

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February 19, 2018

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By Hand Delivery and Email

Henry E. Grimball
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Re: Thomas Morgan v. John L. Gilbert, et al.
IN ARBITRATION (Previously Case No.: 12-CP-10-580)
Our Ref: 66696.0001.0

Messrs. Cooke, Hagood, and Robertson:

Please find enclosed **Defendants' SCRC 12(b)(1) Motion to Dismiss.**

By copy of this letter I am serving same on counsel of record.

With kind regards, I remain

Sincerely,

Womble Bond Dickinson (US) LLP

Henry E. Grimball
Partner

HEG:rrh
Encl.
cc (via US Mail and e-mail): W. Andrew Gowder, Jr. Esq.
Michael T. Rose, Esq.

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STATE OF SOUTH CAROLINA	)	IN ARBITRATION
	)	
COUNTY OF CHARLESTON	)	Previously:
	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	C/A NO: 2012-CP-10-580
THOMAS H. MORGAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**DEFENDANTS' SCRCP 12(b)(1) MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP, II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION,	)	
	)	
Defendants.	)	
	)	

Defendants John L. Gilbert ("**Gilbert**"), Stuart L. Fred ("**Fred**"), Bella Vista Partnership, a Texas General Partnership ("**Bella Vista**"), Bomasada Group, Inc. ("**Bomasada Group**"), Bomasada Investment Group, II, LLC ("**BIG II**") and Lauralis Management, Inc. ("**Lauralis**") (Gilbert, Fred, Bella Vista, Bomasada Group, BIG II and Lauralis being collectively hereinafter referred to as the "**Defendants**"), by and through their undersigned counsel, pursuant to SCRCP (12)(b)(1) move the panel to dismiss Plaintiff's Amended Complaint.

This lawsuit was commenced by the Plaintiff on January 26, 2012. The provisions of South Carolina Rule of Civil Procedure 15(a), which allow for leave to amend to be "freely given," do not excuse Plaintiff from applicable case law governing deriviative actions and the three year statute of limitation and do not excuse Morgan from complying with 150 Bee Street,

LLC's Operating Agreement. Since the Plaintiff did not timely name an indispensable party in his initial Complaint, did not satisfy the heightened pleading requirements of SCRCP 23(b)(1),[1] and did not satisfy the requirements of the Operating Agreement before filing the original complaint, Plaintiff's Amended Complaint should be dismissed.

PROVISIONS OF THE COMPANY OPERATING AGREEMENT

150 Bee Street, LLC, is a limited liability company (the "**Company**" or the "**LLC**") organized and existing under the laws of the State of South Carolina. The Second Amended and Restated Operating Agreement applicable herein is dated as of March, 2005 (the "**Operating Agreement**")[2] The Operating Agreement governs the relations among the members and managers. *See* S.C. Code Ann. §33-44-103(a).

> Members of a limited liability companies may enter into an operating agreement that outlines the procedures governing the affairs of the company. Operating agreements are binding contracts that are superior to statutory authority where they are in place.
>
> *Historic Charleston Holdings, LLC, v. Mallon*, 365 S.C. 524, 533, 617 S.E.2d 388, 393 (S.C. Ct. App. 2005), *aff'd in part and rev'd in part on other grounds*, 381 S.C. 417, 673 S.E.2d 448 (2009) (citations omitted).

Any analysis of whether the Plaintiff can maintain a derivative action must therefore begin with an analysis of the Company's Operating Agreement.

Section 14.14 of the Operating Agreement governs how disputes involving the Company are to be handled. Section 14.14(a) mandates that the parties first engage in mediation, which can be initiated by the Company or by any member. Section 14.14(b) requires that any issues that remain unresolved after mediation must be submitted to arbitration.

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[1] Defendants' counsel requested that discovery be allowed solely on this issue. Plaintiff's counsel objected, representing that he had produced all relevant documents.
[2] *See* Exhibit A attached hereto (Operating Agreement).

The Operating Agreement's requirement that the members first engage in mediation is mandatory and could be initiated by any member. "Majority consent" of the members is not required.

The Operating Agreement's mandatory mediation provision is found in section 14.14 on page 23:

> 14.14 Mediation and Arbitration
> (a) Mediation. **All of the Members expressly agree that they shall seek mediation** as their preferred method of handling claims, disputes, or other matters in question that may arise between them. The mediation process may be initiated by the Company **or any member** at such times as the parties have been unable to reach a mutually agreed upon resolution to a problem within a reasonable period of time, and at such time as it appears that such a resolution is not likely to be attainable. (Emphasis added).

Article VI of the Operating Agreement governs management of the Company. While the Company's managing members have certain specified powers, *see* Article VI of the Operating Agreement,[3] Section 6.03(g) specifically and unequivocally provides that the managing members could **not** file a lawsuit other than in the ordinary course of business without "Majority Consent" of the Company's members. Section 1.13 of the Operating Agreement defines "Majority Consent" as the "affirmative consent or approval, either in writing or at a meeting of the Members, of the Members owning a majority of the Company Interests owned by Members entitled to vote, based upon the percentages of each such Company Interest."

Put simply, a managing member could not commence or stop a derivative action, but the plaintiff in such an action was required to comply with the Operating Agreement's requirements. Morgan's "demand" against Mr. Fred as one of the Company's managing members was inappropriate since the decision whether to commence any litigation rested with the Company's

[3] The Company is a member managed limited liability company. *See* Section 6.01 of the Operating Agreement. Mr. Fred serves as Bella Vista's representative. *Id.*

members. The Company's Operating Agreement required the affirmative vote of the Company's members in order to do so and only upon proper notice to all members as required by Sections 14.03 and 14.11. The notice was never given and the vote was never sought.

FACTS

The Company was formed on February 7, 2000. As of the execution of the Operating Agreement in 2005, membership interests were owned as follows:

Neal Baker	26.67%
Bella Vista Partnership	26.67%
Thomas H. Morgan	26.66%
Edwin S. Pearlstine, Jr.	20.00%

Neal Baker, Plaintiff's brother-in-law, died in September 2011. As a result of Mr. Baker's death, Mr. Baker was dissociated from the Company. *See* S.C. Code Ann. §33-44-601(8). Elizabeth Morgan Baker, Mr. Baker's widow and Plaintiff's sister, is the Personal Representative of Mr. Baker's Estate. As a dissociated member, Ms. Baker ceased to have any voting interest in the Company.[4] *See* S.C. Code Ann. §33-44-603(3). As of November 16, 2011, Stuart Fred was one of the Company's two (2) managing members. As a result of Mr. Baker's death, Plaintiff became the Company's other managing member.[5] By resolution approved on October 30, 2012 (after Morgan had commenced the instant action), Pearlstine became a third managing member of the Company.[6] Ignoring for the moment, the Operating Agreement's requirement that the members first engage in mediation, at that time and at any time thereafter, as managing members, Morgan and Pearlstine, pursuant to Section 14.11 of the Operating

[4] *See also* Minutes of October 30, 2012 at tab 9 of Exhibit F.
[5] *See* Section 6.01 of the Operating Agreement.
[6] *See* October 30, 2012 resolution at tab 9 of Exhibit F. Bella Vista voted against the resolution. Morgan and Pearlstine voted in favor.

Agreement, could have properly noticed a meeting to consider bringing a derivation action. The minutes of the LLC, submitted with this Motion as Exhibit F, reflect that Pearlstine unswervingly voted with Morgan on all issues put before the LLC. The documentary evidence conclusively shows Pearlstine would have voted with Morgan after Pearlstine became a managing member. Together, they were a controlling voting majority.

The decision whether to commence a legal action against the Defendants therefore rested not with the Company's two (2) managing members in late 2011, but in Morgan obtaining the affirmative of two (2) of the three (3) Company members: (i) Morgan, (ii) Bella Vista, and (iii) Pearlstine.

Ignoring both the Operating Agreement's mediation and arbitration requirements, Morgan commenced the instant action on January 26, 2012, by filing a Summons and Complaint (the "**2012 Complaint**") in the Court of Common Pleas demanding a jury trial. Morgan proceeded to litigation in both January 2012 and in 2018 based on his mistaken notion that the decision to file litigation rests with the Company's managing members and not by majority vote of the members at a properly noticed meeting. Neither Morgan nor his initial counsel offered any explanation as to why they chose to ignore the Operating Agreement's arbitration requirement. The materials produced by Plaintiff's current counsel demonstrate that Morgan never sought a vote of the Company's members to commence any litigation. In his May 18, 2018, email to the panel, Plaintiff's current counsel provided two letters evidencing the Plaintiff's "demand" that legal action be taken against the Defendants.[7] In his original letter to Henry E. Grimball dated November 16, 2011, Plaintiff's original counsel stated that:

[7] *See* Exhibit B (November 16, 2011 letter from G.P. Diminich to Henry Grimball) and Exhibit C (November 28, 2011 from G.P. Diminich to Henry Grimball).

> Unless Stuart L. Fred shall consent to this action by **Friday, November 25, 2011**, it shall be deemed that Stuart L Fred shall have refused to commence the action under South Carolina Code Ann. Section 33–44–1101, and Mr. Thomas H Morgan shall therefore be entitled to bring a derivative action on behalf of 150 Bee Street, LLC against the aforementioned parties.[8]

In his November 20, 2011 letter to Henry E. Grimball, Plaintiff's original counsel reiterated his demand, but extended the deadline until Friday, December 2, 2011.

At no time did Morgan seek a vote of the members prior to commencing the original action in the Court of Common Pleas.

The original 2012 Complaint[9] did not name the Company as a defendant. The 2012 Complaint conclusorily alleges in paragraphs 13 and 14 that the Plaintiff had made a demand on the "Defendant" to commence a derivative action, but that the "Defendants" had refused.

On August 22, 2014,[10] Bee Street Lofts Homeowners Association, Inc., and Mark Laboccetta commenced a construction defects case against numerous defendants, including the Company, Gilbert, Fred and Bomasada Group (the "**Construction Defects Suit**"). The Company never filed any cross-claims or third party claims against any of the Defendants in the Construction Defects Suit, and no tolling agreement was ever entered.[11] The Construction Defects Suit was settled in early 2018.

Shortly after the Construction Defects Suit was settled, Plaintiff's current attorneys filed a motion with this Panel in February, 2018, to amend the original 2012 Complaint to name 150 Bee Street, LLC as a party defendant. (This amendment required at most an additional

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[8] Emphasis in the original.
[9] *See* Exhibit D (Original Complaint).
[10] *See* Exhibit E (Original complaint in Construction case)
[11] Plaintiff and Defendants did enter into a tolling agreement in December 2011, *see* Exhibit G, but, by its express terms, that tolling agreement expired on January 16, 2012.

paragraph or two. Plaintiff has taken the objectionable liberty of increasing the 23 pages of the 2012 Complaint [Exhibit D] to the Plaintiff's "First Amended Complaint" of 36 pages [Exhibit H], ballooning that to its latest draft of 64 pages, not counting the 14 exhibits.)

The initial Amended Complaint, for the first time, includes the Company as a named defendant and acknowledges in Paragraphs 89-93 that the Company is an indispensable party to this derivative proceeding.[12]

LAW

A] PLAINTIFF'S FAILURE TO NAME AN INDISPENSIBLE PARTY IS FATAL

The corporation is a necessary and indispensable party in a derivative proceeding since any right of recovery belongs to it. "The corporation is a necessary party to the action; without it, the case cannon proceed." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). The corporation is an indispensable party in a derivative action because any adverse judgment is binding upon the corporation.

South Carolina's Uniform Limited Liability Act authorizes a member to commence a derivative action only if "the members or managers having authority to do so if have refused to commence the action nor an effort to cause those members or mangers to commence the action is not likely to succeed." S.C. Code Ann. §33-44-1101. Similarly, the complaint "must set forth with particularity the effort of the plaintiff to secure initiation of the action by a member or manager or the reasons for not making the effort." S.C. Code Ann. §33-44-1103.

Without the corporation named as a party, "[t]he court has no jurisdiction to adjudicate its rights in its absence." 15 Cal. Jur. 3d Corporations §522; *Keeler v. Schulte,* 47 Cal. 2d 801, 306

[12] Page 13 of Exhibit H (original proposed Amended Complaint)

P. 2d 430 (1957); *Beyerbach v. Juno Oil Co.*, 42 Cal. 2d 111 (1954). Certainly, a party against which a judgment could be enforced is a party in whose absence complete relief cannot be accorded among those already parties, and therefore an indispensable party under South Carolina Rule of Civil Procedure 19(a). Accordingly, when a limited liability company/corporation is an indispensable party to a derivative action but not joined as a party, the action is subject to dismissal.

There is no dispute that in his Complaint filed January 26, 2012, the Plaintiff failed to name the Company as a party, leaving the arbitration panel without jurisdiction to proceed.

Six years later, the Plaintiff has sought to remedy this fatal jurisdictional defect by amending the 2012 Complaint to allege in the first draft of his Amended Complaint in Paragraph 4: "The Defendant 150 Bee Street, LLC (sometimes "150 Bee Street," "LLC" or "Company") is a South Carolina Limited Liability Company, duly organized and existing pursuant to the laws of South Carolina; is subject to the jurisdiction of this Court; and is named as nominal party Defendant because, on information and belief, **it is an indispensable party to this derivative proceeding**. Morgan, as member, brings this case derivatively on the LLC's behalf." (Emphasis added).

Not only did Morgan fail to name the Company as an indispensable defendant in his derivative action filed January 26, 2012, he also failed to serve the LLC with the Summons and Complaint. All Affidavits of Service filed with the Clerk of Court of the Court of Common Pleas of Charleston County by Morgan's counsel at that time are attached, collectively, hereto as Exhibit I. The 120 day exception of S.C.R.C.P. 3(a)(2) aside, it is axiomatic that before the applicable statute of limitations becomes a bar to litigation, a party must be served with a complaint that seeks specific relief before it can have judgment entered against it. Plaintiff has

failed to establish the basic jurisdictional requirements of his derivative claims, and consequently, his derivative claims should be dismissed.

Although Morgan brought the action as a "Managing Member," claiming [incorrectly] in Para. 10 of his 2012 Complaint that as such, he was "with authority to arbitrate or litigate this dispute in a derivative capacity," the claims asserted in a derivative lawsuit actually belong to the corporation. *See In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 698 A.2d 949, 956 (Del. Ch. 1996). The Company is an indispensable party to this derivative lawsuit and would receive any damages awarded. See *Sternberg v. O'Neil*, 550 A.2nd 1105, 1124 (Del. 1988).

A case almost identical to Morgan's is *Riccuitti & Rubinstein v. McEwan*, 2015 WL 10015196 (Unpublished Opinion, Superior Court of New Jersey, Appellate Division, 2016).

In *Riccuitti*, developer R.D.R. Properties, Inc. (RDR), formed 1211 Grand Avenue Condominium, a residential development. The plaintiffs complained that when they bought two units in the condominium, RDR told them that a portion of the common area driveway would be made into a garden but that thereafter, Defendant McEwan purchased another unit, and RDR sold him the right to use the disputed area as parking spaces.

The Chancery Court dismissed the plaintiffs' complaint in part for failure to join RDR and other indispensable parties and also denied the plaintiffs' motion to amend their complaint to assert claims against RDR and other parties.

The plaintiffs argued that the Chancery Court erred in denying their motion to amend their complaint and further, erred in dismissing their complaint for failure to join RDR and other indispensable parties.

In analyzing the claims, the Superior Court wrote in part:

> "If an association wrongly fails to act" by filing a claim to protect the unit owner's common interest, "a unit owner may file a derivative suit against the association."...In such a situation,... **"the association must be named as a party."**... To bring a derivative action, however, a plaintiff must first demand action from the party having the primary right to bring suit, unless making a demand "would be futile."
>
> Here, plaintiffs' proposed complaint did not include any statement to the effect that they demanded the association bring suit against defendant and were denied, or any reason why they failed to do so. Thus, plaintiffs have no viable claim for a derivative action. As a result, plaintiffs cannot bring individual claims of ejectment and quiet title, regardless of whether those claims were sufficiently pled.
>
> Finally, the Chancery Court correctly found that **any claim plaintiffs may have against RDR with regard to the amendment to the master deed or any misrepresentation would be time-barred....**
>
> In summary, plaintiffs have no viable claim against defendant. Moreover, the claims in their proposed amended complaint either fail to state a cause of action or are time-barred. Thus, **it would be futile to allow such an amendment**. (Citations omitted) (Emphasis added).

In the instant case, Morgan's failure to make the Company a party is not a mere defect in his Complaint of January 26, 2012, but left Morgan without a derivative cause of action and the court and the arbitration panel "without jurisdiction."

Subject matter jurisdiction is at the heart of the problem created by the Plaintiff's failure to name the LLC as an indispensable party in his 2012 Complaint, a failure that cannot now be cured because South Carolina's three (3) year statute of limitations has long since become a bar.

The *Riccuitti* case discussed above is only one of many state court cases across the country which have reached the same result.

The 1961 Georgia case, *Smyly v. Smith*, 216 Ga. 529, 118 S.E.2d 188 (1961), involved a minority stockholder's suit brought against the individual directors of a corporation without

making the corporation either a party plaintiff or a party defendant. Sustaining the dismissal of the case, the Supreme Court of Georgia wrote:

> . . .[T]o the stockholder's action the corporation is not merely a proper party, but is an essential, indispensable party, and a failure to make the corporation a party is not a mere defect of parties, but **leaves the stockholder without a cause of action and the court without jurisdiction**. 14 C.J. 941, § 1461; 18 C.J.S. Corporations § 570; *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 319, 24 S.E. 755; *Smith v. Coolridge Banking Co.*, 147 Ga. 7, 8, 92 S.E. 519; *Wagner v. Biscoe*, 190 Ga. 474, 9 S.E.2d 650; *Kimbrough v. Gainesville Mather Co.*, 53 Ga. App. 735, 187 S.E. 169; *Greenwood v. Greenblatt*, 173 Ga. 551(3), 161 S.E. 135. (Emphasis added)

In the 1981 Florida case, *Daniels v. Vann*, 396 So.2d 723 (D.Ct.App.Fl. 4th Dist.) (1981), a stockholder sued a corporation in a derivative action but made no attempt to name the corporation as a party. "Plaintiff instead simply took the position in resisting motions to dismiss for failure to name an indispensable party that any money awarded in the lawsuit was recovered "on behalf of the corporation" and would be given to the corporation." The final judgment contained the words "on behalf of the corporation." The corporation was available and amenable to service of process. The trial court denied the defendant's repeated motions to dismiss for failure to join an indispensable party.

In reversing the judgment, the District Court of Appeals declared:

> The law on this subject is clear. In a stockholder's derivation action, the corporation on whose behalf the action is brought is an indispensable party. **The absence of the corporate defendant as at least a nominal party serves to divest the court of jurisdiction** . . . . (Emphasis added)

In the 1983 Pennsylvania case, *Fitzpatrick v. Shay*, 314 Pa. Super 450, 461 A.2d 243 (1983), the plaintiff stockholder sued Shay, an officer and director of Great Oak Enterprises, Inc. but did not name Great Oak as a party. Affirming the trial court's summary judgment awarded Shay in the derivative action, the Superior Court reasoned:

> It is axiomatic that a shareholder may assert a derivative action on behalf of the corporation where the shareholder has demanded that the corporation assert the right underlying the action and the corporation has refused . . . In a derivative action, the corporation is a required party. . . The appellant's cause of action was improperly brought in that the real party in interest, Great Oak, an indispensable party to the action, was not made a party. Furthermore, we find that appellees did not waive this argument by raising it in a motion for summary judgment instead of in their pleadings. . . . **Whenever it appears by suggestion or otherwise that the court lacks jurisdiction of the subject matter or that there has been a failure to join an indispensable party, the court shall dismiss the action** [citations omitted]. (Emphasis added)

In re McCoy, 157 B.R. 705 (Bankr. M.D. Fla. 1993), is a case remarkably similar to the instant case and addresses the issues discussed in *Riccuitti, supra.*

In *McCoy*, corporate shareholders commenced a proceeding against McCoy, a Chapter 7 debtor, but failed to name the corporation, HCA, as a party litigant. After the claims bar date [the bankruptcy court's equivalent to the three year statute of limitations here], the plaintiffs amended their complaint to add, for the first time, HCA as a party litigant. The debtor attacked the amended complaint and sought a dismissal on the ground that the amended complaint was time-barred. Debtor asserted in part that the amendment did not relate back to the original filing date.

The debtor contended that HCA was an indispensable party to the derivative action and was not a party to the suit until brought in by the Amended Complaint. Debtor further contended the original complaint was in fact a nullity as a stockholders' derivative action.

The Bankruptcy Court agreed, analyzing the issues as follows:

> The center and controlling issue of this controversy is whether or not the Amended Complaint relates back to the filing date of the original Complaint that was timely filed.
>
> . . . This question, of course, can only be answered by analyzing the nature of stockholder derivative actions. . . .

> . . . The validity vel non of a suit by stockholders on behalf of a corporation must be tested by considering the applicable local law. . . . It is uniformly established in this State, that a corporation on whose behalf a claim is asserted by stockholders is an indispensable party to a stockholders' derivative action and the absence of a corporate litigant at least as a nominal party divests the court of jurisdiction to entertain a stockholders' derivative action. . . . In the present instance, it is without dispute that HCA was not named either as a party plaintiff or a defendant in the original Complaint. Therefore, this Court clearly has no jurisdiction to entertain the original Complaint to the extent that it attempted to assert a derivative claim on behalf of HCA. ...This being the case, whether or not the Plaintiff now may rely on the relation back doctrine ...is academic since there remained no viable complaint to which the Amended Complaint could have related back.
>
> ...This Court is satisfied that the Amended Complaint is time barred... [and] that it is appropriate to dismiss the Amended Complaint.

Numerous other courts have reached the same conclusion. See, also, *Koster v. (Am) Lumbermens Mut. As. Co.,* 30 U.S. 518 (1947) (finding that the corporation for whose benefit action is brought is the real party in interest and is an indispensable party); *Schaler v. Feder*, 184 N.Y.S.2d 933 (Sup 1959) ("In a stockholder derivative action, the corporation is ordinarily a necessary party"); *Agostino v. Hicks,* 845 A.2d 1110 (Del. Ch. 2004) ("Although not specified by derivative action rule, the corporation is an indispensable party to a derivative action."); *Gabriel v. Preble*, 396 F.3d 10 (1st Cir. 2005) ("In shareholder derivative action, corporation is indispensable party within meaning of civil procedure rule governing joinder of persons needed for just adjudication.")

In an email of June 18, 2018, sent to arbitrator Dawes Cook, Morgan's counsel has contended that this subject matter issue was not preserved because Defendants did not raise a defense to this issue in their Answer to the original Complaint This is incorrect, as Morgan's error is a fatal jurisdictional defect.

A threshold issue that must be determined in every case is whether the Court has jurisdiction over the dispute. Subject matter jurisdiction is the power of a court to hear and determine a case. *Hamilton v. Fulgham*, 385 S.C. 632, 637, 686 S.E.2d 683, 685 (2009).

Without subject matter jurisdiction, anything that a court does is void *ab initio*. See, e.g., *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) ("A judgment of a court without subject-matter jurisdiction is void.") As a result, a Court has a duty to take notice of the jurisdictional boundaries set by the legislature. See, e.g., *Hamilton*, 385 S.C. at 637, 686 S.E.2d at 686 ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court.").[13]

B] PLAINTIFF'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE OPERATING AGREEMENT IS FATAL

(1) FAILURE TO MEDIATE

"Members of limited liability companies may enter into an operating agreement that outlines the procedures governing the affairs of the company. S.C. Code Ann. § 33-44-103 (Supp. 2004). Operating agreements are binding contracts that are superior to statutory authority where they are in place." *Historic Charleston Holdings, LLC v. Mallon*, 365 S.C. 524, 617 S.E.2d 388, 393 (Ct. App. 2005) (rev'd on other grounds, 673 S.E.2d 448 (2009))

[13] For the record, in any event, the Defendants refer the panel to the following paragraphs in their Answer: Paragraph 79.: "This Court lacks subject matter jurisdiction under the provisions of the arbitration agreement contained within the Operating Agreement." Paragraph 80.: "The Complaint, and the causes of action contained therein, fails to state a claim upon which relief can be granted." Paragraph 82.: "Plaintiff's legal claim are barred by the applicable statutes of limitations." Paragraph 86.: " One or more of the Plaintiff's causes of action may be barred by the terms of the Operating Agreement, including Section 7.01." Paragraph 93.: "Defendants hereby give notice that they intend to rely upon any other defenses may become available or appear during the discovery proceedings in this case and hereby reserve their right to amend their Answer to assert any such affirmative defenses."

Thus, if the Operating Agreement in this case requires certain steps be taken, e.g. mediation, before a derivative action could be filed, those steps were binding on the members and superior to statutory authority.

As stated in *Clary v. Borrell*. 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. Ap. 2012):

> The operating agreement of a limited liability company is a binding contract that governs the relations among the members, managers, and the company. See S.C. Code Ann. § 33-44-103(a)(2006) (stipulating, except as otherwise provided, "all members of a limited liability company may enter into an operating agreement… to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company"). Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matters that statutory law will apply.

The Operating Agreement contains the following dispute resolution procedure, found on page 23:

> 14.14 Mediation and Arbitration
>
> (a) Mediation. **All of the members expressly agree that they shall seek mediation** as their preferred method of handling claims, disputes or other matters in question that may arise between them. The mediation process may be initiated by the Company **or any member** at such times as the parties have been unable to reach a mutually agreed upon resolution to a problem within a reasonable period of time, and at such time as it appears that such a resolution is not likely to be attainable. (Emphasis added)
>
> (b) Arbitration. Any issues that remain unresolved shall be submitted to binding arbitration….

By counsel's letter of October 27, 2011, to Morgan's original counsel, Chris Staubes, on page 1, paragraph 4, Staubes was put on notice of the mediation requirement of Section 14.14.[14]

---

[14] See Exhibit I (a letter from Henry E. Grimball to Christopher Staubes of October 27, 2011) and Exhibit J (emails from Tom Morgan of July 6 and July 8, 2008, referred to in paragraph 5 of Exhibit I, in which Morgan threatened to sue Fred and Gilbert: "Stewart you have stolen too much money from us. ..I am going to sue your ass and get our money back. ..they [Fred and Gilbert] have fucked up this entire project. We had a chance to make a lot of money if they had listened to me. …My attorney's and accountants will handle it from here in the courtroom." Morgan's

[In the same letter, and in some detail, defense counsel put Staubes on notice of Morgan's statute of limitations problem, an issue for a later pleading].

Morgan did not need the consent of member Bella Vista to initiate mediation.

Rather than do so or comply with the Operating Agreement's arbitration requirement, Morgan filed suit in the Charleston County Court of Common Pleas on January 26, 2012.

This issue again raises the question of whether the panel lacks subject matter jurisdiction.

In *Elf Atochem North America, Inc. v. Jaffari*, Del. Supr., 727 A.2d 286 (1999), Malek, Inc. filed a "Certificate of Formation" with the Delaware Secretary of State, thus forming Malek LLC, a Delaware limited liability company under the Delaware limited liability statute. Thereafter, Malek, Inc., Elf, and Jaffari entered into an operating agreement. The agreement contained an arbitration clause covering all disputes. Section 13.8 provided that "any controversy or dispute arising out of the Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member or Manager hereunder shall be submitted to arbitration in San Francisco, California…."

Section 13.8 further provided: "No action… based upon any claim arising out of or related to this Agreement shall be instituted in any court by any Member except (a) an action to compel arbitration… or (b) an action to enforce an award obtained in an arbitration proceeding…."

Thereafter, Elf sued Jafari and Malek, LLC, individually and derivatively on behalf of Malek, LLC in the Delaware Court of Chancery.

---

behavior continued to be of grave concern to the Defendants. See Exhibit K (article in the Miami Herald reporting Morgan's misadventure with a prostitute named "Crystal.")

The Court of Chancery granted defendants' motion to dismiss based on lack of subject matter jurisdiction. The court found that the agreement governed the question of jurisdiction and that only an arbitrator or a court of law in California was empowered to hear Elf's claims.

On appeal, the Supreme Court of Delaware "affirmed the judgment of the Court of Chancery dismissing Elf's amended complaint for lack of subject matter jurisdiction."

In reaching this decision, the court wrote:

> Section 13.7 and 13.8 of the Agreement do not distinguish between direct and derivative claims. They simply state that the members may not initiate *any* claims outside California. Elf initiated this action in the Court of Chancery in contravention of its own contractual agreement. As a result, the Court of Chancery correctly held that all claims, whether derivative or direct, arose under, out of, or in connection with the Agreement, and thus are covered by the arbitration and forum selection clauses.
>
> ....
>
> In the case at bar, we do not believe there is any doubt of the parties' intention to agree to arbitrate *all* disputed matters in California. If we were to hold otherwise, arbitration clauses in existing LLC agreements could be rendered meaningless.

In like manner, Morgan agreed and is now contractually bound by Section 14.14(a) to first seek mediation of "claims, disputes or other matters in question that may arise between them." This was a process Morgan could initiate and if necessary, file suit to enforce this contractual provision that all disputes first be resolved exclusively by mediation. It was likewise mandatory that any unresolved issues be submitted to arbitration. Instead, ignoring these contractual requirements, Morgan filed suit in the Charleston County Court of Common Pleas.

For this reason, the panel should dismiss Morgan's Amended Complaint for lack of subject matter jurisdiction.

(2) **FAILURE TO OBTAIN MAJORITY CONSENT OF THE MEMBERS**

Section 6.03(g) of the Operating Agreement specifically and unequivocally provides that the managing members cannot file a lawsuit other than in the ordinary course of business without "Majority Consent" of the Company's members.

Section 1.13 of the Operating Agreement defines "Majority Consent" as the "affirmative consent or approval, either in writing or at a meeting of the Members, of Members owning a majority of the Company Interests owned by Members entitled to vote, based upon the percentages of each such Company Interest."

A managing member cannot commence or stop a derivative action. Any "demand" made by Morgan against any other of the Company's managing members was inappropriate, since the decision whether to commence any legal action rested with the Company's members. The Company's Operating Agreement required the affirmative vote of the Company's members in order to do so, and only upon proper notice to all members as required by Sections 14.03 and 14.11. Such notice was never given or attempted, and no vote was ever called for or taken, as is readily apparent in the minutes and resolutions of the Company offered by the Defendants as Exhibit F.

S.C.R.C.P. 23 requires that Morgan, as a member of the Company, as a prerequisite to bringing a derivative action, state with particularity any effort made to obtain the desired action from the members of the Company in accordance with the Operating Agreement. This Morgan failed to do because he did not comply with the requirements of the Operating Agreement.

In *Shlensky v. Dorsey*, 574 F.2d 131 (3rd Cir. 1978), a derivative suit, the district court dismissed Price Waterhouse as a defendant for plaintiffs' non-compliance with the demand requirements of F.C.R.C.P. 23.1 [virtually identical to similar provisions in S.C.R.C.P. 23]. The Third Circuit affirmed the dismissal of Price Waterhouse on the dual grounds that no specific

demand had been made to take any action against that entity and that three of the four demand letters in question had been sent only to the company president rather than the board of directors. In like manner, Morgan's letter of November 28, 2011, to Henry E. Grimball as counsel for Stuart L. Fred, by which Morgan "makes a second demand on Stuart L. Fred as Co-Manager of 150 Bee Street, LLC, to consent to and commence an action on behalf of 150 Bee Street, LLC against various parties..." was woefully deficient and non-compliant with the Operating Agreement's unambiguous requirements.

In *Greenspun v. Del E. Webb Corp.*, 634 F.3d 1204 (9th Cir. 1980), a shareholder brought a derivative action against a defendant corporation, its directors, and auditors. The district court found that the plaintiff shareholder had failed to comply with the rule governing sufficiency of demand prior to institution of the derivative action. On appeal, the Court of Appeals affirmed the dismissal of the derivative suit. The court found that the plaintiff's demand on the company president and general counsel did not constitute a demand on the board of directors or comparable authority, stating: "The sufficiency analysis under Rule 23.1 looks to the sufficiency of the content of the demand and **the sufficiency of the authority of those to whom the demand is presented**. Thus, in order to find compliance with Rule 23.1, the district court must find that the content of the demand which [plaintiff] Greenspun presented to Johnson and the general counsel was sufficient. It must also find that Johnson and the general counsel represented the "directors or comparable authority" to whom the demand must be addressed under Rule 23.1." (Emphasis added).

The district court determined that Greenspun failed "in not seeking relief from the board of directors of Webb Corp. before filing suit." The audience to whom Greenspun presented his demands, the president/director and general counsel of the corporation, was not an authority

comparable to the board of directors. Of note, in reaching this conclusionm the court cited *Shlensky*, *supra.*, for the proposition that a plaintiff must specifically make a demand on the board of directors of the corporation.

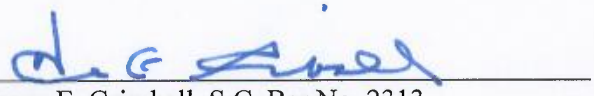
As in *Shlensky* and *Greenspun*, Morgan's demand in the instant case was improperly addressed and in non-compliance with the Operating Agreement's contractual requirements, and his Amended Complaint must be dismissed for that reason as well.

CONCLUSION

Morgan filed his derivative action without naming 150 Bee Street, LLC, by law and by his own admission an indispensable party. The time in which Morgan could have cured that defect has long since run, and he is barred from doing so by South Carolina's three year statute of limitations. Morgan totally failed to comply with the Operating Agreement's binding contractual requirements for filing such a case. He has not complied with provisions to which he was contractually bound. Even after being put on notice of the requirement that he commence with mediation, he ignored the warning. Nor did he follow the requirements of the Operating Agreement to obtain the majority consent of the members before filing his lawsuit. His failure in any one of these three issues deprives any tribunal of subject matter jurisdiction

For any one or more of these reasons, Morgan's 2012 Complaint and Amended Complaint should be dismissed.

WOMBLE BOND DICKINSON (US) LLP



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ATTORNEY FOR DEFENDANTS

February 19, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN ARBITRATION
	)	
COUNTY OF CHARLESTON	)	Previously:
	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	C/A NO: 2012-CP-10-580
THOMAS H. MORGAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP, II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION,	)	
	)	
Defendants.	)	
	)	

I do hereby certify that on January 24, 2019, I served a copy of the **DEFENDANTS' SCRCP 12(b)(1) MOTION TO DISMISS** on all arbitrators and counsel of record in the within entitled matter via Hand Delivery and/or U.S. Mail with correct postage, and via E-Mail as follows:

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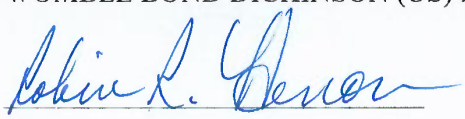

WBD (US) 45474935v1

SECOND AMENDED AND RESTATED
LIMITED LIABILITY COMPANY AGREEMENT

OF

150 BEE STREET, LLC

EXHIBIT A

THIS AGREEMENT IS SUBJECT TO
ARBITRATION PURSUANT TO SOUTH CAROLINA
CODE SECTION 15-48-10 ET SEQ. AS MODIFIED HEREIN

THE MEMBERSHIP INTERESTS IN THE COMPANY HAVE NOT BEEN REGISTERED UNDER THE SOUTH CAROLINA UNIFORM SECURITIES ACT IN RELIANCE UPON THE EXEMPTIONS FROM REGISTRATION SET FORTH IN SECTION 35-1-320 OF SUCH ACT. IN ADDITION, THESE INTERESTS HAVE NOT BEEN REGISTERED WITH THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION IN RELIANCE UPON AN EXEMPTION FROM SUCH REGISTRATION SET FORTH IN THE SECURITIES ACT OF 1933 PROVIDED BY SECTION 4(2) THEREOF. THESE INTERESTS MAY NOT BE OFFERED FOR SALE, PLEDGED, HYPOTHECATED, SOLD OR TRANSFERRED EXCEPT IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS AGREEMENT AND IN A TRANSACTION WHICH IS EITHER EXEMPT FROM REGISTRATION UNDER SUCH ACTS OR PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER SUCH ACTS.

EXHIBIT A

150 BEE STREET, LLC

SECOND AMENDED AND RESTATED
LIMITED LIABILITY COMPANY AGREEMENT

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SECOND AMENDED AND RESTATED
LIMITED LIABILITY COMPANY AGREEMENT

OF

150 BEE STREET, LLC

THIS SECOND AMENDED AND RESTATED LIMITED LIABILITY COMPANY AGREEMENT (this "Agreement") is made and entered into on March ____, 2005, by and between the Members (as hereinafter defined) for the purpose of amending and restating in its entirety the Amended and Restated Limited Liability Company Agreement of the Company dated as of February 28, 2003.

W I T N E S S E T H:

WHEREAS, pursuant to Articles of Organization filed with the Secretary of State of the State of South Carolina, filed on February 7, 2000 and pursuant to that certain Limited Liability Company Agreement dated February 7, 2000 (the "Initial Agreement"), Neal I. Baker, Thomas H. Morgan, Edwin S. Pearlstine, Jr., and Ernest L. Masters, Jr. organized the Company as a limited liability company known as 150 Bee Street, LLC under the South Carolina Uniform Limited Liability Company Act of 1986, as from time to time amended (the "Act"); and

WHEREAS, on or about February 28, 2003, the Original Members entered into that certain Amended and Restated Limited Liability Company Agreement of the Company (the "Amended and Restated Agreement") replacing the Initial Agreement in its entirety; and

WHEREAS, the Members constituting all of the members of the Company as of the date hereof desire to further amend and restate the Amended and Restated Limited Liability Company Agreement for the Company as provided herein.

NOW, THEREFORE, pursuant to the Act, the following shall constitute the Second Amended and Restated Limited Liability Company Agreement, as amended from time to time, for the Company.

ARTICLE I
DEFINITIONS

For purposes of this Agreement, the following capitalized terms shall have the following meanings (all capitalized terms used in this Agreement that are not defined in this Article I shall have the meanings set forth elsewhere in this Agreement):

1.01 "Act" means the Uniform Limited Liability Company Act of 1996, S.C . Code Ann. § 33-44-101 et. seq., as amended from time to time, and any successor to such statute.

EXHIBIT A

1.02 "Adjusted Capital Account Deficit" means, with respect to a Member, the deficit balance, if any, in such Member's Capital Account as of the end of the applicable Fiscal Year or other relevant date, after giving effect to the following adjustments:

(a) Credit to such Capital Account any amounts which such Member is obligated to restore pursuant to any provisions of this Agreement or is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations sections 1.704 2(g)(1) and 1.704 2(i)(5); and

(b) Debit to such Capital Account the items described in (4), (5) and (6) of Treasury Regulations section 1.704 1(b)(2)(ii)(d).

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Treasury Regulations section 1.704 1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

1.03 "Affiliate" means a Person or Persons directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with the Person(s) in question. The term "control", as used in the immediately preceding sentence, means, with respect to a Person that is a corporation, the right to the exercise, directly or indirectly, of more than 50% of the voting rights attributable to the shares of such controlled corporation and, with respect to a Person that is not a corporation, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such controlled Person.

1.04 "Available Cash" means, with respect to any point in time, all cash of the Company on hand as of such point in time after the payment of all then due debts and liabilities of the Company and after any prepayments of any debts and liabilities of the Company that the Managing Members deem reasonably appropriate to cause the Company to make, less any reserves deemed reasonably necessary by the Managing Members, consistent with the provisions of this Agreement, for (a) the repayment of any debts or liabilities of the Company, (b) the working capital requirements of the Company, and (c) any contingent or unforeseen liabilities of the Company.

1.05 "Capital Account" of a Member consists of the cash and the fair market value of property contributed by such Member to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to under Code Section 752), plus such Member's share of Net Profits allocated pursuant to Section 4.01 and any items of income or gain that are specially allocated to such Member pursuant to Section 4.02 or 4.03 hereof, less (a) all distributions of cash and the fair market value of property distributed to such Member (net of liabilities secured by such distributed property that such Member is considered to assume or take subject to under Code Section 752), and (b) such Member's share of Net Losses allocated pursuant to Section 4.01 and any items of deduction or loss that are specially allocated to such Member pursuant to Section 4.02 or 4.03 hereof. The Capital Accounts of the Members shall be maintained in accordance with Treasury Regulations section 1.704 1(b)(2)(iv) and the provisions of this Agreement shall be interpreted consistently therewith. Upon the transfer of all or part of a Member's Interest, other than a transfer that

terminates the Company within the meaning of Code Section 708(b)(1)(B), the Capital Account of the transferor Member that is attributable to the transferred Interest will carry over to the transferee. In the event of a transfer of all or part of an Interest that causes a termination of the Company within the meaning of Code Section 708(b)(1)(B), the Capital Accounts will be adjusted in accordance with Treasury Regulations section 1.704-1(b)(2)(iv)(l).

1.06 "Certificate" means the certificate of formation required to be filed by the Act.

1.07 "Code" means the Internal Revenue Code of 1986, as amended from time to time.

1.08 "Company" means 150 Bee Street, LLC.

1.09 "Company Interest" or "Interest" means the interest in the Company acquired by each Member hereunder. The initial Interests of the Members are noted on Exhibit A attached hereto and incorporated by this reference.

1.10 "Emergency Costs" means costs and expenses required to (a) correct a condition that if not corrected would endanger imminently the preservation or safety of any Property or the safety of tenants, guests or other persons at or using such Property, (b) avoid the imminent suspension of any necessary service in or to any Property, or (c) prevent any of the Members from being subjected imminently to criminal or substantial civil penalties or damage.

1.11 "Family Members" of (i) an individual shall mean such individual's spouse, domestic partner, children (including natural, adopted and stepchildren), grandchildren, parents and grandparents, and any trust for the benefit of any such person, and any custodian or legal guardian for any such person, or (ii) a partnership shall mean the partners of such partnership.

1.12 "Fiscal Year" of the Company means the calendar year.

1.13 "Majority Consent" means the affirmative consent or approval, either in writing or at a meeting of the Members, of Members owning a majority of the Company Interests owned by Members entitled to vote, based upon the percentages of each such Company Interest.

1.14 "Managing Member" means a Member or members designated as such pursuant to Section 6.01 hereof.

1.15 "Members" means Neal I. Baker, Thomas H. Morgan, Edwin S. Pearlstine, Jr., Bella Vista Partnership (a Texas general partnership), and each Person to whom all or any portion of the Interest of any of such Persons is transferred or assigned and who is admitted to the Company as a Member in accordance with the provisions of Section 11.03 or 11.04 hereof.

1.16 "Net Profits" and "Net Losses" mean the Company's taxable income or loss determined in accordance with Code Section 703(a) for each of its Fiscal Years (for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Code Section 703(a)(1) will be included in taxable income or loss); provided, such Net Profits and Net Losses will be computed as if items of tax-exempt income and nondeductible, noncapital

expenditures (under Code Section 705(a)(1)(B) and 705(a)(2)(B)) were included in the computation of taxable income or loss; and provided further, that any items of income, gain, loss or deduction specially allocated pursuant to Section 4.02 or 4.03 hereof shall not be taken into account in computing Net Profits and Net Losses. If any Member contributes property to the Company with an initial book value to the Company different from its adjusted basis for federal income tax purposes to the Company, or if Company property is revalued pursuant to Treasury Regulations section 1.704 1(b)(2)(iv)(f) or as otherwise required by the Regulations, Net Profits and Net Losses will be computed as if the initial adjusted basis for federal income tax purposes to the Company of such contributed or revalued property equaled its initial book value to the Company as of the date of contribution or revaluation. Credits or debits to Capital Accounts due to a revaluation of Company assets in accordance with Treasury Regulations section 1.704 1(b)(2)(iv)(f), or due to a distribution of noncash assets as provided in Section 13.02 hereof, will be taken into account as gain or loss from the disposition of such assets for purposes of Article IV hereof.

1.17 "Person" means an individual, partnership, joint venture, association, limited liability company, corporation, trust or any other legal entity.

1.18 "Project" means the for sale horizontal property regime to be developed on the real property located near the intersection of Lockwood Drive and Bee Street in Charleston, South Carolina.

1.19 "Required Expenditure" "means to the extent the Company and its subsidiaries do not have sufficient working capital available to fund all costs, expenditures or amounts required (i) to fund Emergency Costs and (ii) any and all ordinary course operating costs and expenses reasonably incurred in connection with carrying any of the Property, such as debt service, property taxes, insurance and maintenance.

1.20 "Supermajority" "means the affirmative consent or approval, either in writing or at a meeting of the Members, or Members owning seventy-five percent (75%) of the Company Interests owned by Members entitled to vote, based upon the percentages of each such Company Interest.

ARTICLE II
FORMATION AND PURPOSES

2.01 Formation. The Company was formed on February 7, 2000 by the filing of a Certificate as required by the Act.

2.02 Name. The name of the Company is 150 Bee Street, LLC.

2.03 Principal Office. The principal office of the Company is located at 8980 Lakes at 610 Drive, Suite 200, Houston, Texas 77054. The Company may change its principal office and have additional offices at such other locations, as the Members shall determine by Majority Consent.

2.04 Term. The term of the Company commenced on the date of filing of the Articles of Organization with the Secretary of State of the State of South Carolina, and shall continue in existence for the period fixed in the Articles for the duration of the Company, or such earlier time as this Operating Agreement may specify.

2.05 Purpose of the Company. The purpose and business of the Company shall be as follows:

(a) to acquire, develop, construct, own, operate, manage, sell or lease the Project and any other property, real, personal or mixed, tangible or intangible related thereto;

(b) to mortgage, assign, transfer, exchange or otherwise encumber or dispose of the Project and any other property of the Company, or any portion thereof or interest therein;

(c) to make any investment or expenditure, to borrow money and to take any and all other actions which are incidental or reasonably related to any of the specific purposes recited above; and

(d) to do any and all things necessary and desirable to carry out the foregoing activities and any other activities contemplated by this Agreement.

The purposes of the Company shall not be changed without the unanimous agreement of the Members.

ARTICLE III
CAPITAL CONTRIBUTIONS AND LOANS

3.01 Initial Capital Contributions. As of the date hereof, each of the Members shall have made a total capital contribution to the Company as provided in Exhibit A, attached hereto and incorporated herein upon the execution of this Agreement.

3.02 Additional Capital Contributions. Each of the Members shall make additional capital contributions to the Company in an amount reasonably determined by either of the

EXHIBIT A

Managing Members to be necessary to enable the Company to be properly operated and to discharge its costs, expenses, obligations, and liabilities (the "Additional Capital Contributions). The Managing Members, following the determination of the need for Additional Capital Contributions, shall notify each Member of the need for Additional Capital Contributions in accordance with Section 14.03, which notice must include a statement in reasonable detail of the proposed uses of the Additional Capital Contributions. Notwithstanding the foregoing, any Member with the Majority Consent of the Members, may request the Members to make Additional Capital Contributions to fund Required Expenditures. Such Member shall notify each Member of the need for Additional Capital Contributions in accordance with Section 14.03, which notice must include a statement in reasonable detail of the proposed uses of the Additional Capital Contributions. The Additional Capital Contributions shall be due and payable in cash within thirty (30) days of receipt of the notice.

3.03 Failure to Contribute.

(a) If a Member does not contribute within the time required all or any portion of an Additional Capital Contribution that a Member is required to contribute in accordance with Section 3.02 (a "Non-Contributing Member"), any other Member who has funded its required Additional Capital Contribution may at its option and upon notice to the Non-Contributing Member, pay the total amount of any deficiency resulting from the Non-Contributing Member's failure to make an Additional Capital Contribution pursuant to Section 3.02 (the "Deficiency"); and the Member(s) making payment of the Deficiency is hereinafter referred to as the "Contributing Member(s)"). If there is more than one Contributing Member then each Contributing Member shall be entitled to fund its proportionate share of the Deficiency (based upon Company Interests) or in such other percentages as they may agree. If the Contributing Member(s) satisfies the Deficiency, the amount advanced shall be treated as a nonrecourse, demand loan by the Contributing Member(s) to the Non-Contributing Member(s) (a "Deficiency Loan"), bearing interest at the lower of the maximum rate permitted by law or thirty five percent (35%) per annum from the date advanced until repaid and an Additional Capital Contribution by the Non-Contributing Member to the Company. The interest shall accrue thereon from the date of the Contributing Member's payment of the Deficiency to the Company until the occurrence of the earliest of the following events:

(i) the Deficiency Loan becomes eliminated due to the payment by the Non-Contributing Member to the Contributing Member of an amount equal to the Deficiency Loan plus interest accrued thereon to the date of payment; or

(ii) the satisfaction of the Deficiency Loan plus interest accrued thereon as the result of distributions made pursuant to Article 7 hereof.

(b) All distributions from the Company that otherwise would be made to the Non-Contributing Member (whether before or after dissolution of the Company) instead shall be paid to the Contributing Member(s) until the loan and all interest accrued on it have been paid in full to the Contributing Member(s) (with payments being applied first to accrued and unpaid interest and then to principal). The payment of the loan and interest accrued on it is secured by a security interest in the Non-Contributing Member's Company Interest, as more fully set forth in

this Section, and the Contributing Member(s) has the right, in addition to the other rights and remedies granted to it pursuant to this Operating Agreement or available to it at law or in equity, to take any action (including without limitation court proceedings) that the Contributing Member may deem appropriate to obtain payment by the Non-Contributing Member of the loan and all accrued and unpaid interest on it, at the cost and expense of the Non-Contributing Member.

3.04 Member Security Interest.

(a) Each Member grants to the Company, and to each Contributing Member with respect to any loans made by the Contributing Member to that Member as a Non-Contributing Member pursuant to this Section, as security, equally and ratably, for the payment of all Capital Contributions that Member has agreed to make and the payment of all loans and interest accrued on them made by Contributing Members to that Member as a Non-Contributing Member pursuant to this Section, a security interest in and a general lien on its Company Interest and the proceeds thereof, all under the Uniform Commercial Code of the State of South Carolina. On any default in the payment of a Capital Contribution or in the payment of such a loan or interest accrued on it, the Company or the Contributing Member, as applicable, is entitled to all the rights and remedies of a secured party under the Uniform Commercial Code of the State of South Carolina with respect to the security interest granted in this Section, which may include the sale, without notice of any kind, of the Non-Contributing Member's Company Interest at public or private sale, with no right of appraisal being held by, or granted to, the Non-Contributing Member, and with any such right of appraisal being hereby waived. Each Member shall execute and deliver to the Company and other Members all financing statements and other instruments that the Managing Members or the Contributing Member, as applicable, may request to effectuate and carry out the preceding provisions of this Section. At the option of the Managing Members, or a Contributing Member, this Operating Agreement or a carbon, photographic, or other copy hereof may serve as a financing statement.

3.05 No Interest on Contributions. Except as indicated in Section 3.03 herein, no Member shall be entitled to receive interest on his or her capital contributions.

3.06 Loans. In the event the Members determine by Majority Consent that the Company does not have sufficient funds to pay the costs incurred or to be incurred by the Company in carrying out the purposes of the Company, the Managing Members are authorized to cause the Company to borrow funds, including from Members and/or their Affiliates, to pay all or part of such costs, provided that the interest rate and other terms of such loans from Members or their Affiliates are no less favorable to the Company than the Company could have secured from third parties.

ARTICLE IV
PROFITS AND LOSSES

4.01 General Allocations. After giving effect to the special allocations set forth in Section 4.02 and 4.03, Net Profits and Net Losses for each Fiscal Year shall be allocated among the Members in accordance with their respective Company Interests.

4.02 Special Allocations. The following special allocations shall be made in the following order:

(a) Minimum Gain Chargeback. Notwithstanding any other provision of this Article IV, if there is a net decrease in Partnership Minimum Gain (as defined in Treasury Regulations section 1.704 2(b) and (d)) during any Fiscal Year, each Member shall be specially allocated items of income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount and manner sufficient to satisfy the requirements of Treasury Regulations section 1.704 2(f). This Section 4.02(a) is intended to comply with the minimum gain chargeback requirement in such section of the Treasury Regulations and shall be interpreted consistently therewith.

(b) Partner Minimum Gain Chargeback. Notwithstanding any other provision of this Article IV except Section 4.02(a), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain (as defined in Treasury Regulations section 1.704 2(i)) during any Fiscal Year, each Member who has a share of the Partner Nonrecourse Debt Minimum Gain shall be specially allocated items of income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount and manner sufficient to satisfy the requirements of Treasury Regulations section 1.704 2(i). This Section 4.02(b) is intended to comply with the minimum gain chargeback requirement in Treasury Regulations section 1.704 2(i) and shall be interpreted consistently therewith.

(c) Qualified Income Offset. In the event a Member unexpectedly receives any adjustments, allocations or distributions described in (4), (5) or (6) of Treasury Regulations section 1.704 1(b)(2)(ii)(d), then each such Member shall be specially allocated items of Company income and gain in an amount and manner sufficient to eliminate, to the extent required by such Treasury Regulations, the Adjusted Capital Account Deficit of such Member as quickly as possible. This Section 4.02(c) is intended to constitute a "qualified income offset" under Treasury Regulations section 1.704 1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

(d) Nonrecourse Deductions. Nonrecourse Deductions (as defined in Treasury Regulations section 1.704 2(b) and (c)) for any Fiscal Year or other period shall be allocated to Members in accordance with their respective Interests.

(e) Partner Nonrecourse Deductions. Any Partner Nonrecourse Deductions (as defined in Treasury Regulations section 1.704 2(i)) for any Fiscal Year or other period shall be specially allocated to the Member who bears the economic risk of loss with respect to the

Partner Nonrecourse Debt (as defined in Treasury Regulations section 1.704 2(b)(4)) to which such Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations section 1.704 2(i).

(f) Interest on Member Loans. Any interest expense of the Company on a loan made to the Company by a Member shall be specially allocated to the Member who made such loan.

(g) Section 707 Payments. In the event that any fees, interest or other amounts paid to a Member or Affiliate of a Member pursuant to this Agreement, or any agreement between the Company and the Member or Affiliate providing for the payment of such amounts, and deducted by the Company in reliance upon Code Section 707(a) and/or 707(c), are disallowed as deductions to the Company on its federal income tax return for the Fiscal year in or with respect to which such amounts are paid and are treated as Company distributions, then:

(i) the Net Profits or Net Losses, as the case may be, for the Fiscal Year in or with respect to which such fees, interest or other amounts were paid shall be increased or decreased, as the case may be, by the amount of such fees, interest or other amounts that are so disallowed and treated as Company distributions; and

(ii) there shall be allocated to the Member who received (or whose Affiliate received) such payments, prior to the allocations pursuant to Section 4.01, an amount of gross income for the Fiscal year in or with respect to which such fees, interest or other amounts were paid equal to the amount of such fees, interest or other amounts that are so disallowed and treated as Company distributions.

4.03 Facilitation of Economic Arrangement. Any special allocations pursuant to Section 4.02 shall be taken into account in computing subsequent allocations pursuant to this Article IV, so that the net amount of any items so allocated and the income, gain, loss, deduction and any other item allocated to such Member pursuant to this Article IV shall, to the extent possible, be equal to the net amount that would have been allocated to each such Member pursuant to the provisions of this Article IV if such special allocations had not occurred.

4.04 Contributed or Revalued Property. For United States income tax purposes, any income, gain, loss or deduction with respect to property contributed by a Member to the Company that has a fair market value different from its adjusted basis for United States income tax purposes, or with respect to any Company property that has been revalued pursuant to Section 6.04 hereof, shall be allocated among the Members in accordance with Code Section 704(c) and the Treasury Regulations thereunder.

4.05 Tax Items. Except as otherwise provided herein, any allocation to a Member of a portion of the Net Profits or Net Losses for a Fiscal Year will be deemed to be an allocation to that Member of the same proportionate part of each item of income, gain, loss, deduction or credit that is earned, realized or available by or to the Company for United States income tax purposes.

4.06 Allocation on Transfer. In the event of any transfer of a Company Interest in accordance with the provisions of this Agreement, the distributive share of Net Profits or Net Losses with respect to the Interest so transferred will be allocated between the transferor and transferee in accordance with the ratio that the number of days in the Fiscal Year of the transfer before and after such transfer bears to the total number of days in that Fiscal Year, or in such other manner, in the discretion of the Managing Members, as is permitted under applicable Treasury Regulations.

ARTICLE V
DISTRIBUTIONS OF AVAILABLE CASH

5.01 Distributions. Subject to any applicable restrictions in loan documents with the Company's creditors, from time to time, as determined by Majority Consent, the Managing Members shall distribute Available Cash to the Members pro rata in accordance with their respective Company Interests at such times as reasonably determined by the Managing Members, but at least one time per fiscal quarter. The foregoing notwithstanding, following the occurrence of an event of dissolution as provided in Article XII hereof, cash distributions shall be made in accordance with Article XIII hereof.

5.02 Tax Distributions. Subject to any applicable restrictions in loan documents with the Company's creditors and there being Available Cash, the Managing Members shall distribute to each Member with respect to each Fiscal year, either during such Fiscal year or within ninety (90) days thereafter, an amount of cash equal to the product determined by multiplying (a) a percentage not to exceed the highest marginal income tax rate (combined state and federal) that any Member may be subject to, as determined by the Managing Members, times (b) the taxable income for federal income tax purposes of the Company allocated to such Member for such Fiscal Year. The preceding sentence is subject to the reasonably required needs of the Company, as determined by the Managing Members, to maintain sufficient funds for working capital and other business purposes so as not to impair the ability of the Company to continue its business operations.

5.03 Withholding. The Company is authorized to withhold from amounts to be distributed to any Member hereunder any amount required to be withheld by any provision of the Code, Treasury Regulations or other applicable law, and to pay such amounts to the Internal Revenue Service ("IRS") or other appropriate taxing authority in accordance with the Code, Treasury Regulations or other applicable law. In addition to such withholding from distributions, the Company is specifically authorized to remit to the IRS or other appropriate taxing authority any amounts due as a result of the allocation of taxable income to any Member and, if the Company has insufficient cash to remit such amounts, each Member agrees to contribute to the Company his portion of such remittance. Any amounts paid over to the IRS or other appropriate taxing authority with respect to a Member pursuant to this Section 5.03 shall be treated for all purposes hereunder as a distribution made to the Member with respect to whom such withholding or remittance was made. Notwithstanding anything herein to the contrary, distributions for a Fiscal Year to be made to a Member pursuant to Sections 5.01 or 5.02 will be

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THOMAS H. MORGAN, PLAINTIFF(S), v. JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION. DEFENDANT(S).	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2012-CP-10- 580 **SUMMONS** **(Arbitration or Jury Trial Demanded)**

FILED
2012 JAN 26 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and REQUIRED to answer the Complaint of the Plaintiff(s) in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the subscriber at his office at 126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492-8144, within thirty (30) days after the service thereof, exclusive of the day of such service; and, if you fail to answer the Complaint within the time aforesaid, the Plaintiff(s) in this action will apply to the Court for the relief demanded in the said Complaint.

CLAWSON AND STAUBES, LLC

Chris Staubes, Esq.
Barrett Brewer, Esq.
CP Diminich, Esq.
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Charleston, South Carolina

January 24, 2012

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2012-CP-10- 580
	)	
THOMAS H. MORGAN,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY and LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION.	)	**COMPLAINT** **(Arbitration or Jury Trial Demanded)**
	)	
DEFENDANTS,	)	

FILED
2012 JAN 26 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Plaintiff above named, complaining of the Defendants, above named, alleges and says as follows:

1. That Thomas H. Morgan ("Morgan" or "Plaintiff") is a citizen and resident of the State of Florida.

2. That the Defendant John L. Gilbert ("Gilbert") is a citizen and resident of the State of Texas, and is neither an infant nor incompetent person and is not in the military service.

3. That the Defendant Stuart L. Fred ("Fred") is a citizen and resident of the State of Texas, and is neither an infant nor incompetent person and is not in the military service.

4. That 150 Bee Street, LLC ("150 Bee Street" or "Company") is a South Carolina Limited Liability Company, duly organized and existing pursuant to the laws of South Carolina and subject to the jurisdiction of this Court.

5. That the Defendant Bella Vista Partnership ("Bella Vista"), is a Texas General Partnership doing business in South Carolina and subject to the jurisdiction of this Court.

EXHIBIT D

6. That the Defendant Bomasada Group, Inc. ("Bomasada Group"), is a Texas corporation doing business in South Carolina and subject to the jurisdiction of this Court.

7. That the Defendant Bomasada Investment Group II, LLC ("Bomasada Investment" or "BIGII"), is a Texas Limited Liability Company doing business in South Carolina and subject to the jurisdiction of this Court.

8. That the Defendant Lauralis Management, Inc. ("Lauralis"), is a Texas corporation doing business in South Carolina and subject to the jurisdiction of this Court.

9. Plaintiff demands arbitration or a trial by jury individually and in a representative capacity as a derivative claim asserted on behalf of 150 Bee Street, LLC, as permitted by S.C. Code Ann. § 33-44-1103, *et. seq.* and Rule 23(b)(1) of the South Carolina Rules of Civil Procedure and other precedent.

10. At the time of the actions complained of herein, Morgan was, and remains, a co-owner of 150 Bee Street, LLC and is now Managing Member with authority to arbitrate or litigate this dispute in a derivative capacity.

11. 150 Bee Street, LLC, acting through and under direction of Defendants, has failed to take proper action to resolve the dispute after written demand by Morgan, to the serious detriment of 150 Bee Street, LLC and its members' interests.

12. Morgan can and will fairly and adequately represent the interests of any other similarly situated members of 150 Bee Street, LLC.

13. That On November 28, 2011, Plaintiff, through counsel, tendered a demand on Defendant to commence a derivative action pursuant to S.C. Code Ann. § 33-44-1101.

14. That Defendants refused and continue to refuse to bring the derivative suit, and therefore, Plaintiff brings this action.

15. That this Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

16. Plaintiff wishes to have this case assigned to the Business Court in accordance with Chief Justice Toal's Administrative Order, issued on or about September 7, 2007 and plans to file a Motion to that effect.

FACTUAL BACKGROUND

17. That Plaintiff Morgan is a Member and 26.66% owner of 150 Bee Street, LLC.

18. That Defendant Bella Vista is a Member and 26.67% owner of 150 Bee Street, LLC.

19. That the Estate of Neal I. Baker is a Member and 26.67% owner of 150 Bee Street, LLC.

20. That Edwin S. Pearlstine, Jr. is a Member and 20% owner of 150 Bee Street, LLC.

21. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling partners of Defendant Bella Vista.

22. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant Bomasada Group.

23. Upon information and belief, Defendant Bomasada Group was organized by Defendants Gilbert and Fred and acted as Developer of 150 Bee Street, LLC.

24. Upon information and belief, Defendants Gilbert and Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant BIGII.

25. Upon information and belief, Defendant BIGII was organized by Defendants Gilbert and Fred and acted as General Contractor of 150 Bee Street, LLC.

26. Upon information and belief, Defendants Gilbert and/or Fred, either directly or through an entity or entities that they control, are the controlling owners of Defendant Lauralis.

27. Upon information and belief, Defendant Lauralis is a holding company for a private jet aircraft.

28. That Defendants entered into various contracts whereby the Defendants were to perform certain matters for the benefit of the Bee Street, LLC and its owners, including but not limited to acting as general contractor and as developer for the project.

29. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street, represented that they would act as developer of 150 Bee

Street, for the benefit of the owners of 150 Bee Street, LLC (including Morgan for a fee of $750,000.00.

30. Upon information and belief, Defendants have paid themselves more than $750,000.00 with Company funds.

31. Upon information and belief, Defendants continue to improperly pay themselves a monthly amount from Company funds, even though a paid Property Manager is on location at 150 Bee Street.

32. Upon information and belief, Defendants while acting as Developer have taken money for their own benefit to the detriment of 150 Bee Street, LLC and its Members.

33. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a) personal home remodeling in the amount of $1,325.00 charged to the Company, which were charged to the Company as "Make Ready Units-Paint Work;"
b) airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"
c) a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
d) $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"
e) fuel, Nextel and Cabela's bag charged to the Company as "CHS Mental Health job;"
f) African Safari with Swanepol & Scandrol Safaris charged in the amount of $12,509.00 to the Company as "Travel;"
g) other charges to be learned through the discovery process and determined by the trier of fact.

34. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a) expenses related to trip to Cancun, Mexico;
b) expenses related to lasvegas.com
c) expenses related to trip to Scottsdale, AZ;
d) expenses related to trip to Pebble Beach, CA;
e) expenses related to airplane equipment purchased from Blue Mountain Avionics;
f) expenses related to trip to Pacific Grove, Monterey and Carmel,

California;

g) expenses related to private aircraft;

h) other charges to be learned through the discovery process and determined by the trier of fact.

CONSTRUCTION

35. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street or Bomasada Group as Developer for 150 Bee Street, LLC, represented that they would act as General Contractor on the 150 Bee Street project, for the benefit of the owners of 150 Bee Street, LLC including Morgan, for a fee of 1% of the construction costs.

36. Upon information and belief, Defendants have collected well over 1% of the construction costs.

37. Upon information and belief, Defendants have intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer and so they can continue to pay themselves monthly and so they could pay for their jet airplane.

38. Defendants, while acting as General Contractor, promised and represented they would do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street, LLC and the Members. Despite this representation, the work went millions of dollars over budget.

39. Upon information and belief, Defendants while acting as General Contractor, retained any savings for their own benefit to the detriment of 150 Bee Street, LLC and the Members.

PRIVATE JET BILLINGS TO THE COMPANY FOR PERSONAL ITEMS

40. Defendants have billed 150 Bee Street and paid themselves from Company funds for travel expenses, including billing rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property or its business.

41. Upon information and belief, through 2010, Defendants authorized payments to Lauralis of $454,155,00 and $39,059.77 for airplane fuel expense from 150 Bee Street, LLC. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

42. Upon information and belief, from 2005 through 2010, Defendants systematically increased the rate they charged 150 Bee Street, LLC for their private jet as follows:

a) from $850.00 an hour to $1,050.00 an hour in 2005;

b) from $1,050.00 an hour to $1,200.00 an hour in 2005;

c) from $1,200.00 an hour to $1,750.00 an hour in 2006;
d) from $1,750.00 an hour to $2,100.00 an hour in 2008;

43. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Construction Travel Expenses" of $481,250.00 to BIGII. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

44. Upon information and belief, Defendants authorized payments from 150 Bee Street, LLC for "Corporate Overhead" of $360,000.00 to BIGII. Upon information and belief, a majority of these payments were unrelated to the 150 Bee Street property or its business.

45. That Plaintiff has requested to see backup documentation for these charges, but Defendants have refused and continue to refuse to permit Plaintiff to see the requested information.

46. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their Private jet usage to the Company.

47. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their personal vacations to the Company.

48. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their home remodeling to the Company, which were charged to the Company as "Make Ready Units-Paint Work."

49. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their personal golf outings to the Company.

50. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of their expensive dinners to the Company.

51. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of $12,509.00 to 150 Bee Street for an African Safari.

52. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of gift cards from golf shops to 150 Bee Street.

53. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging for airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance."

54. Defendants knew or should have known that the other Members of

150 Bee Street did not approve of the charging of a payment for a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs."

55. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of $3,000.00 for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education."

56. Defendants knew or should have known that the other Members of 150 Bee Street did not approve of the charging of a payment of repairs and renovation of a personal aircraft hanger in Houston, TX.

57. Plaintiff has instructed Defendants in writing that they are no longer to bill the Company for their private jet.

58. In direct disregard, Defendants have written themselves, directly or through their entities, hundreds of thousands of dollars or more from 150 Bee Street funds.

59. As recently as September 9, 2011, Defendants wrote themselves a check from Company funds for $28,350.00, claiming it was for their private jet usage, even after Plaintiff instructed Defendants in writing that they are no longer to bill the Company for their private jet.

60. Upon information and belief, Defendants continued to make hundreds of thousands of dollars in capital calls from the Members even after the project has finished in order to fund their personal jet and other personal items, and threatened to dilute Plaintiff out of his interest in the Company at a 35% interest rate and to foreclose his interest if Plaintiff did not fund the capital calls.

61. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.03 that the following actions shall not be taken on behalf of the Company without the Majority Consent of the Members:

(a) The purchase of any real property, the sale, assignment, transfer, exchange or other disposition of any real property owned by the Company:

(I) Deviating from the Budget in a net amount greater than fifty thousand and no/100 dollars ($50,000).

62. That Defendants did not seek the Majority Consent of the Members in accordance with Article 6.03 of the Second Amended and Restated Operating Agreement of 150 Bee Street.

63. Defendants have used efforts to hide or cover up the extent of their charging of items to the Company.

64. Plaintiff has made reasonable efforts to investigate the charges, but his efforts have been thwarted by Defendants in several ways, including but not limited to:

a) refusing to allow Plaintiff to see the Construction Records;
b) refusing to allow the Company CPA to let Plaintiff copy company records;
c) refusing to notify Plaintiff in advance about Company expenses;
d) refusing to keep Plaintiff informed about upcoming sales;
e) refusing to communicate contract renewals in advance of their signing;
f) systematically retaining relevant company records in the name of other entities owned by or controlled by Defendants in an effort to block Plaintiff's access to those records;
g) refusing to tell Plaintiff before writing large checks to other entities owned by or controlled by Defendants;
h) writing large checks to other entities owned by or controlled by Defendants; and
i) in other manners to be shown the court.

REAL ESTATE SALES

65. Defendants hired a Nashville Real Estate Company to act as the Real Estate agency for this Charleston South Carolina condo project.

66. Upon information and belief, Defendants have a relationship with this Nashville Real Estate Company that either benefits Defendants personally, or benefits an entity or entities owned by Defendants.

67. That the Nashville Real Estate company was paid a commission on many of the closings.

68. That Defendants disregarded their fiduciary duties to Morgan and 150 Bee Street when they selected a Nashville Real Estate company, rather than considering a local Charleston South Carolina Real Estate agency who knows the market and who might have reacted to the local market faster.

69. That Defendants eventually cut ties between the Nashville Real Estate company and 150 Bee Street, but not until after the downturn in the real estate market.

MANAGEMENT SINCE NEAL BAKER PASSED AWAY

70. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, provides that the two initial Managers of 150 Bee Street were Neal I. Baker and Defendant Fred.

71. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, further provides that in the

event of Neal Baker's death or disability, Plaintiff Tom Morgan shall serve as Manager.

72. That Neal I. Baker passed away in 2011, and Plaintiff Morgan has attempted to serve as co-manager with Defendant Fred.

73. That Defendants have thwarted Plaintiff Morgan's attempts to serve as co-manager in several ways, including but not limited to:

a) refusing to allow Plaintiff Morgan to see the Construction Records;
b) refusing to allow the Company CPA to let Plaintiff copy company records;
c) refusing to allow Plaintiff to be a joint signer on Company checks;
d) refusing to notify Plaintiff in advance about Company expenses;
e) refusing to keep Plaintiff informed about upcoming sales;
f) refusing to allow Plaintiff a say in the pricing of the condo units;
g) refusing to allow Plaintiff a say in who is selected to act as the real estate agent for the company;
h) refusing to allow Plaintiff to sign off on the unit closings;
i) refusing to communicate contract renewals in advance of their signing;
j) systematically retaining relevant company records in the name of other entities owned by or controlled by Defendants in an effort to block Plaintiff's access to those records;
k) refusing to tell Plaintiff before writing large checks to other entities owned by or controlled by Defendants;
l) writing large checks to other entities owned by or controlled by Defendants;
m) ignoring Plaintiff's written instructions; and
n) in other manners to be shown the court.

FOR A FIRST CAUSE OF ACTION
(Arbitration)

74. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

75. Plaintiff hereby provides written Demand for Arbitration of the dispute pursuant to the terms of the Second Amended and Restated Operating Agreement of 150 Bee Street, LLC.

76. To the extent that certain Defendants named in this action are not subject to the Arbitration Agreement, Plaintiff asks that the Court compel them to Arbitration, or that all matters be heard by jury trial, but that all claims be heard together whether in Arbitration or jury trial.

77. Morgan demands arbitration or a trial by jury individually and in a

representative capacity as a derivative claim asserted on behalf of 150 Bee Street, LLC, as permitted by S.C. Code Ann. § 33-44-1103, *et. seq*. and Rule 23(b)(1) of the South Carolina Rules of Civil Procedure and other precedent.

78. At the time of the actions complained of herein, Morgan was, and remains, a co-owner of 150 Bee Street, LLC and is now Managing Member with authority to arbitrate or litigate this dispute in derivative capacity. 150 Bee Street, LLC, acting through and under direction of Defendants has, failed to take proper action to resolve the dispute after written demand by Morgan, to the serious detriment of 150 Bee Street, LLC and its members' interests. Morgan can and will fairly and adequately represent the interests of any other similarly situated members of 150 Bee Street, LLC.

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

79. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

80. At all times relevant, Defendants owed fiduciary duties to Morgan and to 150 Bee Street.

81. Defendants breached their fiduciary duties to Morgan and to 150 Bee Street in the manners described above.

82. Upon information and belief, Defendants presently continue to breach their fiduciary duties owed to Morgan and 150 Bee Street in the manners described above and in such ways as will be learned through the discovery process.

83. Morgan and 150 Bee Street have been harmed and damaged as a direct and proximate result of said breaches of fiduciary duties.

84. Such breaches of fiduciary duties were intentional, wilful, wanton and reckless and done with the conscious disregard of the rights of Morgan and other members and of 150 Bee Street.

FOR A THIRD CAUSE OF ACTION
(Civil Conspiracy)

85. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

86. Defendants acting individually or through their agents have conspired for the purpose of benefitting certain members of 150 Bee Street and injuring Plaintiff Morgan and injuring 150 Bee Street, and causing special damages, to include:

(a) loss to 150 Bee Street and its members and Morgan of the past, present and future revenues in an amount to be determined by the

trier of fact from improper billing of travel expenses, including the billing at rates up to $2,100.00 an hour for a private jet, not associated with the 150 Bee Street property;

(b) loss to 150 Bee Street and its members and Morgan in an amount to be determined by the trier of fact of future profit from future returns on their investment from improper management or gross mismanagement;

(c) diminished value of the 150 Bee Street property arising from failure to react to market conditions which impacted adversely the marketability of the 150 Bee Street property to prospective buyers; and

(d) other special an consequential damages as may be proven at trial.

87. Defendants acting individually or through their agents have acted in concert for the common purpose of injuring Morgan and 150 Bee Street and have thereby visited upon Morgan and 150 Bee Street one indivisible wrong, and accordingly each is vicariously liable for the actions of the others and their liability to Morgan and 150 Bee Street in all respects is joint and several.

88. Upon information and belief, this conspiracy is on-going, as Defendants presently continue to conspire with one another for the common purpose of injuring Morgan and 150 Bee Street.

89. As a result of the aforementioned actions, which are more fully explained above, of Defendants acting individually or through their agents, Morgan and 150 Bee Street have been and are being damaged.

90. The actions of Defendants acting individually or through their agents were and are intentional, wilful, wanton and reckless and in conscious disregard of the rights of Morgan and of 150 Bee Street, warranting an award of punitive damages.

91. As a result of the aforementioned actions, Morgan and 150 Bee Street are entitled to damages in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Conversion)

92. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

93. By virtue of the conduct summarized above, Defendants came to exercise unauthorized dominion and control over the property, assets, and/or funds belonging to the joint venture known as 150 Bee Street, and of the Plaintiff.

94. Defendants' dominion and control over said property, assets and/or funds has been to the exclusion of, and in defiance of, the rights of the Plaintiff; has interfered with the rights of the Plaintiff in and to such property, assets, and/or funds; and was without the Plaintiff's permission.

95. Upon information and belief, Defendants wrongfully assessed and/or charged Plaintiff, either individually or through his interest in 150 Bee Street, purported commissions, pass through costs, travel and entertainment expenses, personal expenses, real estate fees, management fee or other management or construction compensation in excess of the written agreements, without Plaintiff's written authorization or approval.

96. Upon information and belief, as a direct and proximate result of Defendants' conversion of the property, assets, and/or funds belonging to the joint venture, the LLC, and the Plaintiff, the Plaintiff, either individually or through his interest in 150 Bee Street, has been damaged in an amount to be determined by the trier of fact.

97. Upon information and belief, in doing the acts alleged above, Defendants acted willfully, maliciously, recklessly, carelessly, and/or wantonly for the purpose of causing injury to the Plaintiff. As a result, the Plaintiff is entitled to an award of actual and punitive damages in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

98. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

99. That Plaintiff, either individually or through 150 Bee Street, LLC, and the Defendants entered into various contracts whereby the Defendants were to perform certain matters for the benefit of the Plaintiff, including but not limited to acting as general contractor and as developer for the project.

100. Defendants individually, or as manager or owner, and as part of their contract with150 Bee Street, represented that they would act as developer of 150 Bee Street, for the benefit of the owners of 150 Bee Street, LLC (including Morgan), for a fee of $750,000.00.

101. Upon information and belief, Defendants have paid themselves more than $750,000.00.

102. Defendants individually, or as manager or owner, and as part of their contract with 150 Bee Street or Bomasada Group as Developer for 150 Bee Street, LLC, entered into an agreement/contract to act as General Contractor on the 150 Bee Street project, for the benefit of the owners of 150 Bee Street, LLC including Morgan, for a fee of 1% of the construction costs.

103. Upon information and belief, Defendants have breached the

agreement/contract and collected well over 1% of the construction costs..

104. Upon information and belief, Defendants have intentionally failed to adequately lower the unit pricing in order to artificially maintain their position as Developer and so they can continue to improperly pay themselves monthly with Company funds and so they can improperly pay for their jet airplane with Company funds.

105. Defendants while acting as General Contractor promised and contracted to do certain work at a significant savings from what the subcontractors would charge and pass that savings on to 150 Bee Street, LLC and the Members, but ended up going millions of dollars over budget anyway, in breach of the contract.

106. Upon information and belief, Defendants while acting as General Contractor improperly retained any savings for their own benefit to the detriment of 150 Bee Street, LLC and the Members.

107. Upon information and belief, Defendants' actions or inactions in failing to perform the contract as specified and agreed is a material breach of the contract.

108. Upon information and belief, and as a result of Defendants' actions or inactions, the project ended up going millions of dollars over budget and still has not sold out.

109. As a result of Defendants' actions or inactions the Plaintiff and 150 Bee Street, LLC have been directly and proximately damaged by the foregoing material breach of contract in an amount to be determined by a trier of fact.

110. That the Plaintiff and 150 Bee Street, LLC are entitled to a money judgment against Defendants in an amount to be determined by a trier of fact, plus reasonable attorney's fees and costs, to the extent allowed by law.

FOR A SIXTH CAUSE OF ACTION
(Declaratory Judgment & Injunctive Relief)

111. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

112. The Second Amended and Restated Operating Agreement of 150 Bee Street provides in Article 6.01, entitled Managing Members, provides that Morgan is now a Managing Member of 150 Bee Street, LLC.

113. That Morgan has informed Defendants that he intends to serve in the capacity of Managing Member as provided by the clear language of Article 6.01 of the Operating Agreement of 150 Bee Street.

114. Morgan has been informed that Defendants attempted to modify the language of Article 6.01 of the Operating Agreement so that Morgan will not be allowed to

serve in the capacity of Managing Member as provided by the clear language of Article 6.01 of the Operating Agreement of 150 Bee Street, and that he not be allowed to copy certain records.

115. Defendants cannot lawfully ignore the clear language of Operating Agreement.

116. Morgan has also been informed that Defendants have attempted to appoint Defendant Gilbert as sole signer and decision maker for the Company, thereby circumventing, disregarding, and frustrating the purpose of the Company Operating Agreement.

117. That, pursuant to the language of the Operating Agreement and S.C. Code Ann. § 33-44-101, *et. seq.*, Plaintiff has requested numerous times in writing to Defendants that:

a) Morgan be a co-signer of Company checks;
b) Morgan be consulted with Company decisions;
c) Morgan be made aware of all Real Estate activity;
d) Morgan be given access to the Company records, wherever located; and
e) Morgan be involved in and apprised of other Company matters.

118. Morgan asks this Court to examine the 150 Bee Street Operating Agreement and other evidence surrounding this matter, that the Court maintain the status quo, and that Defendants be prevented from modifying Article 6.01 or any other provisions of the Operating Agreement of 150 Bee Street.

119. Morgan asks this Court to enforce the existing provisions of Article 6.01 of the Operating Agreement so that Morgan will be the Managing Member, with all powers enumerated in Article 6.02 of the Operating Agreement of 150 Bee Street and S.C. Code Ann. § 33-44-101, *et. seq.*

120. As a Member of 150 Bee Street, Morgan is entitled to copies of the Company books and records, however titled or wherever located.

121. Morgan has made demand on Defendants for copies of the Company books and records.

122. While Morgan was provided access to some of the Company books and records, Morgan's agent has learned that Defendants advised the Company's accountant, William Shields, CPA, that the Morgan's agent would <u>not</u> be allowed to photocopy any of the Company's documents.

123. Mr. Shields suggested that his firm could scan the documents to an internet based computer file which could be accessed by all concerned parties. This solution was acceptable to Mr. Morgan, but this suggestion was denied by Defendants.

124. Upon information and belief, Defendants specifically forbid Mr. Shields from sharing with Morgan the invoices or other documents related to the construction hard costs and soft costs reflected on the construction draw requests.

125. Morgan has asked Defendants to reconsider to, no avail.

126. Morgan asks that, while this action is pending, this Court should enjoin Defendants from changing the terms of the Operating Agreement, and that the status quo be maintained in that Morgan be entitled to copies of the requested documents.

127. Morgan asks that, while this action is pending, this Court should maintain the status quo and temporarily and permanently restrain and enjoin Defendants from transferring, selling, conveying, encumbering, mortgaging, contracting, authorizing expenditures, authorizing vendor contracts, or contracting to do any of these, without Morgan's written agreement.

128. Morgan asks that while this action is pending, this Court should maintain the status quo and temporarily and permanently restrain and enjoin Defendants from distributing or paying any amounts to Defendants, or any entity in which Defendants are owners or affiliated with.

129. Plaintiff asks that the Court award an offset against the capital account and any undistributed amounts claimed by Defendants.

130. Morgan will suffer irreparable harm in the absence of such relief and Morgan has a high likelihood of success on the merits of this action.

131. There is no plain, adequate, and complete remedy at law and irreparable injury to Morgan and 150 Bee Street, LLC will result unless injunctive and/or declaratory relief is granted.

FOR A SEVENTH CAUSE OF ACTION
(Accounting)

132. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

133. That 150 Bee Street, LLC and its Members are all in a fiduciary relationship with one another and fiduciary duties are owed to one another.

134. That due to the actions of Defendants described above, Plaintiff has requested from Defendants an accounting as to the operations of the joint venture or 150 Bee Street, LLC and any companies Gilbert, Fred, Bella Vista, Lauralis, Bomasada Investment and Bomasada Group own or owned that received money, goods, or services from 150 Bee Street, LLC, or whose business is or was or could be associated with 150

Bee Street, LLC, including but not limited to the following: Defendants Bella Vista, Lauralis, Bomasada Investment and Bomasada Group.

135. Plaintiff is not presently aware of all of the money, funds, assets, and/or business opportunities belonging to the joint venture or 150 Bee Street, LLC that Defendants have misappropriated to themselves and their other companies and is not aware of all of the specific purposes for which Defendants have used said money, assets, and/or business opportunities. Upon information and belief, Defendants used said money, assets, and/or business opportunities to benefit themselves personally or their other companies, in breach of their fiduciary duties.

136. Defendants have failed or refused to render a proper accounting as to the operations, funds, assets, property, and business opportunities of the joint venture and the limited liability company.

137. Plaintiff is entitled to an Order requiring a complete accounting as to expenses, income, assets, and profits of the joint venture and the limited liability companies above-referenced and further requiring the Defendants to hold as trustee for the Plaintiff individually or for 150 Bee Street, LLC, any property, profit, or benefit derived by the Defendants in the conduct of the business of the joint venture, and/or the limited liability company.

138. Plaintiff has no adequate remedy at law otherwise to get this information.

FOR AN EIGHTH CAUSE OF ACTION
(Unfair Trade Practices Act)

139. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

140. That the aforementioned acts, practices, and conduct of the Defendants were and are unfair and deceptive.

141. That the aforementioned acts, practices, and conduct of the Defendants were and are against the public interest and that these acts and practices are capable of repetition.

142. That the Defendants actions were and are wilful and wanton in that Defendants knew or should have known that their conduct was unfair and deceptive, and therefore, a violation of this State's statutes concerning unfair and deceptive acts and practices.

143. That as a result of Defendants' UTPA violation, the Plaintiff has been damaged through his loss of his investment and anticipated profits, and he has been subjected to aggravation and harrassment as a result of Defendants' conduct.

144. That as a result of Defendants' unfair and deceptive acts or practices in violation of the State's statutes, the Plaintiff prays for his actual damages, together with treble damages of three times his actual damages, punitive damages, plus Plaintiff's reasonable attorney's fees, costs and disbursements of this action.

FOR A NINTH CAUSE OF ACTION
(Unjust Enrichment)

145. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

146. Plaintiff and Defendants entered into the joint venture summarized above whereby Defendants promised and agreed to act in good faith.

147. In accordance with the agreement, Plaintiff advanced and contributed a large sum of cash, and/or funding needed for the project.

148. Plaintiff contributed these funds and invested his time and resources to the project, but due to the conduct of the Defendants, the units have not been sold and a profit has not yet been realized.

149. Plaintiff conferred a valuable benefit upon the Defendants which they have realized in full.

150. Defendant have prolonged the sale process on purpose so that they can personally benefit through fees and charges they can pass on to and through the Company.

151. Allowing Defendants to retain the amounts they have taken out of the Company would be unjust.

152. There is now justly due and owing to Plaintiff from Defendants the amount of Morgan's investment in the project and the reasonable present value of all amounts improperly billed to the Company by the Defendants beyond what Defendants were contractually permitted.

153. The amount to be returned by Defendants should be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION
(Fraud)

154. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

155. Defendants represented to Plaintiff that they would be acting as

Developer, Manager, Fiduciary, Contractor or other capacity for the benefit of Plaintiff and 150 Bee Street, LLC.

156. Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a) personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"
b) airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"
c) a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
d) $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"
e) fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"
f) African Safari with Swanepol & Scandrol Safaris charged to the Company as "Travel;"
g) other charges to be determined by the trier of fact.

157. Upon information and belief, Defendants while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a) expenses related to trip to Cancun, Mexico;
b) expenses related to trip to lasvegas.com;
c) expenses related to trip to Scottsdale, AZ;
d) expenses related to trip to Pebble Beach, CA;
e) expenses related to airplane equipment purchased from Blue Mountain Avionics;
f) expenses related to private aircraft;
g) other charges to be determined by the trier of fact.

158. Defendants have prolonged the sale process on purpose so that they can personally benefit through fees and charges they can pass on to and through the Company.

159. Defendants knew that these charges were not Company charges or otherwise related to the business of 150 Bee Street, LLC.

160. On or about February 27, 2005, Defendants represented to Plaintiff that:

BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE.....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST.....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE.....

161. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

162. Upon information and belief, Defendants improperly profited more than the 1% fee.

163. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

164. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff and did, in fact, hide the invoices and bills from Plaintiff.

165. To this date, Defendants have intentionally withheld the construction invoices and bills from Plaintiff claiming they are the property of BIGII.

166. Defendants knew that they could reduce the unit prices and sell the units faster.

167. Defendants intentionally miscoded these improper charges with the intent that they would not be discovered by the Plaintiff or otherwise mislead Plaintiff.

168. Defendants intentionally failed to deduce the unit prices with the intent to mislead Plaintiff and/or that they would not be discovered by the Plaintiff.

169. That the issue of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company was material to Plaintiff's decision to enter into the agreement with Defendants.

170. That Defendants were aware and had knowledge at the time that they made the aforesaid representations that the representations were false.

171. That Defendants intended that the Plaintiff act upon the false representations of Defendants by allowing Defendants to continue running and billing the Company as they saw fit and with disregard for their fiduciary duties to Plaintiff and 150 Bee Street, LLC.

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172. That Plaintiff was ignorant of the falsity of the representations.

173. That Plaintiff relied on the false representations.

174. That Plaintiff had the right to rely on the false representations.

175. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

176. As a direct and proximate result of the fraud and false representations by the Defendants, Plaintiff and 150 Bee Street have been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION
(Misrepresentation)

177. Plaintiff re-alleges and reincorporates the allegations set forth above as if repeated herein verbatim.

178. Defendants represented to Plaintiff that they would be acting as Developer, Manager, Fiduciary, Contractor or other capacity for the benefit of Plaintiff and 150 Bee Street.

179. Defendants, while acting as Developer, Manager, Fiduciary, Contractor or other capacity, have improperly coded charges to the Company, including but not limited to:

a) personal home remodeling to the company, which were charged to the Company as "Make Ready Units-Paint Work;"
b) airplane equipment purchased from Blue Mountain Avionics, which were charged the Company as "Repairs and Maintenance;"
c) a fishing tournament in Cabo San Lucas called Cabo Magic Sportfishing coded as "Constn. Soft Costs;"
d) $3,000.00 to James Craig Bird for pilot examination services for Stuart Fred and Jim Baldwin, which were charged the Company as "Training-Education;"
e) fuel, Nextel and Cabala's bag charged to the Company as "CHS Mental Health job;"
f) African Safari with Swanepol & Scandrol Safaris charged to the Company as "Travel;"
g) other charges to be determined by the trier of fact.

180. Upon information and belief, Defendants while acting as Developer,

Manager, Fiduciary, Contractor or other capacity, have improperly made the following credit card or other charges to the Company, including but not limited to:

a) expenses related to trip to Cancun, Mexico;
b) expenses related to trip to lasvegas.com;
c) expenses related to trip to Scottsdale, AZ;
d) expenses related to trip to Pebble Beach, CA;
e) expenses related to airplane equipment purchased from Blue Mountain Avionics;
f) expenses related to private aircraft;
g) other charges to be determined by the trier of fact.

181. Defendants have prolonged the sale process on purpose so that they can personally benefit through fees and charges they can pass on to the Company.

182. Defendants knew that these charges were not Company charges.

183. On or about February 27, 2005, Defendants represented to Plaintiff that:

> BOMASADA IS ACTING AS THE GENERAL CONTRACTOR ON A COST BASIS CHARGING A 1% FEE.....PLAINLY ALL COST ARE PASSED THROUGH TO THE OWNERSHIP AT COST.....BOMASADA DOES NOT AND WILL NOT PROFIT OTHER THAN THE 1% FEE.....

184. Upon information and belief, Defendants did not pass through costs to the Company at actual cost.

185. Upon information and belief, Defendants profited more than the 1% fee.

186. Upon information and belief, Defendants knowingly and intentionally positioned themselves as General Contractor at the outset with the intent of profiting more than the 1% fee.

187. Upon information and belief, Defendants knew that they would be able to hide the invoices and bills from Plaintiff.

188. To this date, Defendants have intentionally withheld the construction invoices and bills from Plaintiff claiming they are the property of BIGII.

189. Defendants intentionally miscoded these improper charges with the

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intent that they would not be discovered by the Plaintiff.

190. Defendants knew that they could reduce the unit prices and sell the units faster.

191. Defendants intentionally failed to deduce the unit prices with the intent that they would not be discovered by the Plaintiff.

192. That the issue of Plaintiff's ability to trust Defendants and of Defendants' honest treatment of Plaintiff and the Company was material to Plaintiff's decision to enter into the agreement with Defendants.

193. That Defendants were aware and had knowledge at the time that they made the representations that the representations were false.

194. That Defendants intended that the Plaintiff act upon the false representations by allowing Defendants to continue running and billing the Company as they saw fit.

195. That Plaintiff was ignorant of the falsity of the representations.

196. That Plaintiff relied on the false representations.

197. That Plaintiff had the right to rely on the false representations.

198. Plaintiff has been consequently and proximately injured by relying on the false representations made by the Defendants.

199. As a direct and proximate result of the false representations by the Defendants, Plaintiff has been damaged by, among other things, the loss of income, revenue, capital calls, interest, and/or profits; the loss of the Property, assets, and business opportunities; and any additional damages due to the acts of the Defendants. Plaintiff is further entitled to recover punitive damages from said Defendants in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiff prays that this Court inquire into this matter and issue an Order either directing all of the parties to resolve this case by Arbitration, or for a trial by jury. In either venue, Morgan, individually and in a representative capacity of 150 Bee Street, LLC in a derivative action, respectfully prays that Plaintiff be awarded:

a) actual, consequential, and punitive damages in an amount to be determined by the trier of fact;
b) reasonable attorneys fees and costs to the extent allowed by law;
c) treble damages;
d) declaratory and injunctive relief prayed for including an Order

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