

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
William S. Keesley, Circuit Court Judge

Appellate Case No. 2018-CP-02-2208
Common Pleas Case No. 2024-000147

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SC Court of Appeals

Richard Viviano and Johnette Gunter, Plaintiffs,
Of whom Richard Viviano is the Appellant,

v.

Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association, Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association, Respondents.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0202208

Richard Viviano et al
PLAINTIFF(S)

Fulton Jeffers et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

Defendants Derrick Boddy and Sandy Carroll seek to enforce a settlement agreement. All other defendants join in the request. The motion is granted. The defendants have established that a settlement agreement was entered in compliance with Rule 43(k), SCRCP, which is enforceable through the court. In addition to opposing the motion, the plaintiffs object to consideration of the motion based on an alleged failure to comply with Rule 11, SCRCP. The court finds that it is appropriate to consider the motion. Ms. LaFave is to submit a proposed order within 20 days.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/18/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Aiken Common Pleas

Case Caption: Richard Viviano , plaintiff, et al VS Fulton Jeffers , defendant, et al
Case Number: 2018CP0202208
Type: Order/Electronic Form 4

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2023-07-18 11:14:07 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018CP0202208

ORDER

The following matter is before the Court on joint motion by the Defendants Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association, Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association, by and through their undersigned counsel, to enforce settlement. A hearing the motion was held on July 17, 2023. In attendance at the hearing was John Harte, counsel for the Plaintiffs Richard Viviano and Johnette Gunter; Paul Simons, as counsel for Fulton Jeffers; Mary D. LaFave, as counsel for Derrick Boddy and Sandy Carroll; and Clarke McCants, III, as counsel for the Braeloch Homeowner's Association. For the reasons set forth below, the Court grants the Defendants' motion to enforce settlement.

BACKGROUND

This matter, originally filed in the Aiken County Court of Common Pleas on September 21, 2018, arises out of an equestrian/pedestrian easement dispute in the Braeloch Neighborhood (hereinafter “the neighborhood”) which is governed by the Braeloch Homeowner’s Association (hereinafter “HOA”). Richard Viviano (hereinafter “Viviano”), Johnette Gunter (hereinafter “Gunter”), Fulton Jeffers (hereinafter “Jeffers”), Derrick Boddy (hereinafter “Boddy”), and Sandy Carroll (hereinafter “Carroll”) are and were, at all times relevant, owners of property in the neighborhood. Boddy and Carroll are former officers of the HOA who are being sued in their official and individual capacities. The easement in question runs along the shared boundary line between lots owned by Plaintiffs Viviano/Gunter and Defendant Jeffers. Plaintiffs allege that the easement and/or the covenants related thereto are invalid and/or waived by the actions or inactions of the HOA and its officers. Further, and by way of Amended Complaint filed on February 28, 2020, Plaintiffs filed a civil conspiracy claim alleging that the individual Defendants (Jeffers, Boddy, and Carroll) conspired to thwart attempts at resolution of the easement issues during the initial stages of the dispute.

After extensive written discovery, but before all named Defendants were deposed, the parties agreed to engage the services of Ret. Judge Thomas W. Cooper, Jr. as a mediator to try to facilitate resolution. The parties mediated this matter over the course of two (2) days on March 30, 2022, and May 25, 2022, and all parties and their respective counsel signed a Memorandum of Understanding (hereinafter “MOU”) setting forth the terms of settlement on May 25, 2022, that has been filed into the record in this matter. Following execution of the MOU, Judge Cooper filed the Mediation Results Report on June 6, 2022, and set forth two important conclusions or observations from the mediation. First, the Report stated that the parties “Fully Settled SUBJECT

TO approval by the HOA in accord with the terms of the MOU signed by the parties on May 25, 2022". Second, Judge Cooper added "Further comments of the mediator" at the end of the Report as follows:

This case was complicated by legal and factual issues and by personality conflicts which either had developed during the litigation, or were, in part, the cause of the litigation. The lawyers had the difficult tasks of zealously advocating their clients' causes while fashioning a resolution that was acceptable to the other side(s). (There were more than two sides to this conundrum.) This settlement is a testament to the determination and imagination of the lawyers and the recognition of their clients that emotion has to give way to reason to resolve difficult disputes.

Subsequently, the terms of the settlement espoused in the MOU were presented to the HOA for a vote and the final vote was cast in favor approving the MOU on or about July 18, 2022. The HOA approved the Memorandum of Understanding by vote and the HOA vote tally was entered during the hearing of this matter into the record as Exhibit 1. The Court notes that on June 30, 2022, Plaintiff Viviano signed on behalf of himself and Plaintiff Gunter in approval of the MOU.

Over the next few months, the parties exchanged several versions of a draft Release finalizing the parties' agreement. It was also brought to the Court's attention that during the time that the Release was being edited, former counsel for the Plaintiffs was indisposed due to medical issues resulting in some delay. Nevertheless, as of March 20, 2023, written communications reflect that the parties had all edited and approved the language of the Release through their respective counsel. At that time, the attorneys agreed in writing that they would all reach out to their clients and obtain their respective signatures to fulfill the terms of the MOU.

On March 31, 2023, counsel of record for the Plaintiff, Charley Krawczyk, filed a Motion to Be Relieved as Counsel and he was formally relieved by Order of the Court on April 2, 2023. Subsequently, Plaintiffs retained John W. Harte (hereinafter "Harte") as their new counsel. On

April 18, 2023, counsel for Defendants Boddy and Carroll, Mary D. LaFave (hereinafter “LaFave”), sent a letter to Harte with the previously agreed upon Release and the MOU asking that it be executed and stating that failure to do so would result in a Motion to Enforce Settlement. The letter from LaFave set forth that the letter represented her satisfaction of SCRCF Rule 11 to consult with counsel prior to filing a motion.

On April 24, 2023, Harte formally entered an appearance on behalf of the Plaintiffs. On April 24, 2023, and May 2, 2023, Harte responded in writing to LaFave’s April 18, 2023, letter, rejecting the Release based on various theories, including but not limited to: 1) the Release is not consistent with the Memorandum of Understanding; 2) the passage of time renders the settlement a “nullity”; 3) the settlement is invalid because discovery was not complete at the time of mediation; 4) the settlement is invalid due to a lack of good faith; and 5) the merits of the Plaintiffs’ allegations did not warrant settlement with the Defendants. In response to LaFave’s request for the Release to be signed, Harte invited additional settlement discussions but made it clear that his clients would not sign the Release.

On May 2, 2023, Defendants jointly filed a Motion to Enforce Settlement filing the fully executed MOU, Release, and communications between counsel in support arguing the MOU is an enforceable agreement under SCRCF, Rule 43(k). Defendants rely on SC Human Affairs Com’n v. Chen, et al., 430 S.C. 509 (Cl. App. 2020) as instructive on the enforceability of Rule 43(k) agreements and that such agreements cannot be defeated by principles of equity. On June 26, 2023, Defendants filed an Amended Motion to Enforce Settlement which replaced the original Release exhibit with one signed by all of the Defendants. No new arguments were raised in the Amended Motion.

Plaintiffs filed an initial Reply on May 15, 2023, setting forth their arguments that the MOU is not an enforceable agreement and relying on two main grounds. First, Plaintiffs rely on Lampo v. Amedisys Holding, LLC, 437 S.C. 236 (Ct. App. 2004) for the proposition that the necessary elements of a contract are “offer, acceptance, and valuable consideration”. Plaintiffs argue that the elements are not present in the MOU. However, Plaintiffs do not provide any specific reference to missing material elements nor does the evidence support this contention. Second, Plaintiffs rely on Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323 (Ct. App. 2011) for the premise that there must be a “meeting of the minds” for the Court to enforce the contract. Plaintiffs also do not provide any explanation as to any aspect of the MOU where the Release conflicts with the MOU or that Plaintiffs understanding of the settlement differed in some way from the Release. Plaintiffs also provide no support for the argument that the passage of time nullifies the MOU as there is no time limitation in the MOU.

Plaintiffs Reply acknowledges that performance of the contingency that the HOA approve the agreement in the Memorandum of Understanding would have rendered the agreement “binding” if the agreement were enforceable. Although other contingencies are referenced generally by Plaintiffs, none are provided with specificity nor does the record reflect other contingencies to be found. *See* Pls’ Reply, ¶ 12.

On July 14, 2023, Plaintiffs filed a Reply to the Amended Motion, raising the argument that counsel for the Defendants did not comply with SCRC, Rule 11 by consulting with Plaintiffs’ counsel prior to filing the instant motion. Further, Plaintiffs argue that the MOU is not an enforceable agreement for the reasons previously stated and adding that the principles of equity bar enforcement under the doctrines, *inter alia*, of unclean hands, waiver, and laches. Plaintiff also argues that the title “Memorandum of Understanding” and the words “proposed agreement” in the

opening paragraph reflect that the MOU was not an agreement but a proposed agreement that was never finalized because the various contingencies, though not explained other than HOA approval, were not met.

STANDARD OF REVIEW

At issue in this case is the interpretation of Rule 43(k), SCRPC. "It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements. There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court." Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992).

SCRPC RULE 11

Plaintiffs argue that the instant motion is not ripe for consideration and should be stricken due to failure by counsel for the Defendants to satisfy and provide affirmation of satisfaction of the South Carolina Rules of Civil Procedure, and specifically, Rule 11. The Rule provides:

All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held. There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants.

Rule 11, SCRPC.

The record in this case reflects that LaFave sent a letter on April 18, 2023, providing a copy of the Release and the MOU and asking that the Release be executed to satisfy the MOU. The letter further provided that LaFave considered the request for the Release to be signed as

satisfaction of her obligations under Rule 11. Harte responded in two separate letters refusing to provide a signed Release and taking the unequivocal position that there was no settlement via the MOU. Presumably, had LaFave engaged in discussions related to negotiations as Harte requested, it would have been contradictory to the legal position of her clients that the case was already settled. Therefore, the Court finds there was no useful purpose in continuing to consult prior to the filing of the instant motion. Upon filing the Defendants Motion to Enforce, Paragraph 7 of the Motion sets forth the communication by LaFave and provides the consultation correspondence in the April 18, 2023, letter as an exhibit in "compliance with Rule 11".

The Court finds, based on the record, that the correspondence from the movant and the affirmation in the Motion to Enforce, satisfy counsel's obligations under Rule 11. Furthermore, based on the filings and arguments of counsel, it is clear to the Court that consultation between counsel would not have served any useful purpose, though it was conducted in good faith and for good measure. Accordingly, the instant motion is properly before the Court and ripe for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time this settlement agreement was signed, Rule 43(k) provided in relevant part:

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel...

Rule 43(k), SCRCP (amended effective May 2, 2022).

"To be enforceable, settlement agreements must either be entered into the court's record or acknowledged in open court and placed upon the record." Motley v. Williams, 374 S.C. 107, 110, 647 S.E.2d 244, 246 (Ct. App. 2007). A party can comply with this version of Rule 43(k) in three

ways: (1) a written stipulation signed and entered into the court record; (2) a consent order signed and entered into the court record; or (3) a settlement agreement announced in open court and noted upon the record. Lisa J. Hinchey, Court Strictly Construes Rule 43(k) to Settlement Agreements, 48 S.C. L. Rev. 15, 19 (1996). Defendants argue that the MOU is an enforceable agreement entered into the record under the rule as an agreement reduced to writing and signed by the parties and their counsel.

Plaintiffs challenge the contents of the MOU and that its structure or verbiage render it unenforceable. First, they argue that the MOU does not contain the material elements of a contract which are offer, acceptance and valuable consideration. See Lampo v. Amedisys Holding, LLC, 437 S.C. 236 (Ct. App. 2004) However, Plaintiffs do not specify which one of these elements is missing in the MOU and, upon review, the Court finds the MOU contains all the material elements of a contract. At mediation spanning two (2) days, offers and the acceptance of said offers were exchanged as reflected in the ADR report filed by Judge Cooper, and valuable consideration of money in exchange for the relocation of the easement can be gleaned from the plain language of the MOU.

Plaintiffs also argue before the Court that the title of the MOU and the use of the word "proposed" in the first paragraph render it unenforceable. Plaintiffs also argue that the Release does not comport with the terms of the MOU but provide no specific reference to any clause in the Release that does not follow the MOU. Similarly, Plaintiffs argue a lack of a meeting of the minds but provide no explanation whatsoever as to any identifiable misunderstanding in the MOU. Upon review of the documents submitted by the parties, the Court finds the Release is consistent with the MOU and cannot identify any evidence of a lack of a meeting of the minds. The Court finds these arguments by Plaintiffs unavailing.

Next, Plaintiffs argue that the MOU contains contingencies that have not been met, therefore, the agreement is not binding. The only contingency identified in the MOU and argued by counsel is the approval of the MOU by the HOA through vote of the homeowners. As evidenced by Exhibit 1, such a vote for approval was held and completed on or about July 18, 2022, at least nine (9) months before Harte's April 28, 2023, and May 2, 2023, letters rejecting the MOU in writing for the first time.

In Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 636-38, 627 S.E.2d 724, 725-26 (2006), the Supreme Court addressed Rule 43(k) in an action in which one of the parties rescinded her agreement prior to satisfaction of a contingency. Farnsworth, through a letter by her attorney, offered to release Davis from all liability in a breach of contract and negligence cause of action. Id. at 636, 627 S.E.2d at 725. Farnsworth rescinded the agreement before it was signed. Id. Davis moved to compel Farnsworth to comply with the agreement. Id. In reversing the trial court's order granting the motion, the Supreme Court stated: "an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." Id. at 637, 627 S.E.2d at 725 (quoting Rule 43(k), SCRCPP).

Here, if Plaintiffs had withdrawn their assent on or before July 18, 2022, when the contingency of the HOA approval was met, they would not be bound by the MOU. There is no evidence in the record that Plaintiffs withdrew their assent prior to the HOA approval. The Court finds it important to note that Plaintiff Viviano voted for HOA approval of the MOU, thus, removed any credible challenge to the satisfaction of this contingency. No other contingencies are argued by Plaintiffs nor does the record reflect any in support of Plaintiffs' argument.

Finally, Plaintiffs argue that the equitable doctrines of unclean hands, waiver, and laches render the MOU unenforceable. Defendants submit the case of SC Human Affairs Com'n v. Chen,

et al., 430 S.C. 509 (Ct. App. 2020) which held that a party is precluded from “turning to contract or equitable principles (or counter public policy arguments) to vitiate” an agreement enforceable under Rule 43(k). The Court finds this holding instructive in the instant case and rejects Plaintiffs equitable challenges to the MOU.

CONCLUSION

The record reflects that the parties voluntarily selected a mediator and agreed to attend mediation over the course of two days under guidance of Former Circuit Judge Thomas W. Cooper, Jr. The MOU was contemporaneously signed by all parties and their attorneys and filed with this Court as an exhibit to the Motion to Enforce, as amended. The contingency that the HOA had to approve the MOU by vote occurred on July 18, 2022, rendering the parties bound by the MOU. The mediator filed his ADR statement providing that the case was settled and opined that the resolution was a testament to the mediation process. Therefore, the Court finds that the MOU satisfies Rule 43(k) as “a written stipulation signed and entered into the court record” and/or has been “reduced to writing and signed by the parties and their counsel” and is, accordingly, enforceable.

WHEREFORE, it is hereby ORDERED that Plaintiffs fully execute the Release agreed upon by counsel on March 20, 2023, executed by all the Defendants, and filed as an Exhibit to the Amended Motion to Enforce on June 26, 2023, within thirty (30) days of the date of this Order. Counsel for Plaintiffs is directed to deliver the executed Release to all counsel of record before the expiration of the deadline.

WHEREFORE, it is also hereby ORDERED that the parties are responsible for their own attorney’s fees and costs associated with this motion.

IT IS SO ORDERED.



Aiken Common Pleas

Case Caption: Richard Viviano , plaintiff, et al VS Fulton Jeffers , defendant, et al

Case Number: 2018CP0202208

Type: Order/Other

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2023-08-15 16:52:07 page 11 of 11

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0202208

Richard Viviano et al
PLAINTIFF(S)

Fulton Jeffers et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

The plaintiffs filed a timely motion to alter or amend an order issued on August 15, 2023. The motion will be decided based on written submissions under Rule 59(f), SCRCP. Plaintiffs' counsel may file additional documentation by Friday, September 8, 2023. Those opposing the motion may file documents by Wednesday, September 20, 2023. If any submissions are made by the opponents to the motion, the plaintiffs may file documents in reply by Wednesday, September 27, 2023. A copy of any submissions shall be sent by the filer to the undersigned Judge and his law clerk as an attachment to an email addressed to wkeesleyj@sccourts.org and wkeesleylc@sccourts.org.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/24/2023.

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Aiken Common Pleas

Case Caption: Richard Viviano , plaintiff, et al VS Fulton Jeffers , defendant, et al
Case Number: 2018CP0202208
Type: Order/Scheduling Order

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2023-08-24 10:27:29 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0202208

Richard Viviano et al
PLAINTIFF(S)

Fulton Jeffers et al
DEFENDANT(S)

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- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

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

The plaintiff filed a timely motion to alter or amend an order issued on August 15, 2023. The parties were notified that the motion would be decided on written submissions, which have been reviewed, including an affidavit from the plaintiff. Having reconsidered the matter, the motion is respectfully denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/10/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Aiken Common Pleas

Case Caption: Richard Viviano , plaintiff, et al VS Fulton Jeffers , defendant, et al

Case Number: 2018CP0202208

Type: Order/Amend

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2024-01-10 14:28:58 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Richard Viviano and Johnette Gunter,	)	CASE NO.: 2018-CP-_____ - _____
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	SUMMONS
Fulton Jeffers and Braeloch I Association, Inc.)	)	
d/b/a Braeloch Homeowner's Association	)	
Defendants.	)	
	)	

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said pleading upon the subscribers at their offices, 1201 Main Street, Suite 1800, Post Office Box 1799, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

FINKEL LAW FIRM LLC
Post Office Box 1799
1201 Main Street, Suite 1800
Columbia, South Carolina 29202
(803) 765-2935

Columbia, South Carolina

September 21, 2018

s/ Charley A. Krawczyk
Charley A. Krawczyk (SC Bar No.:16832)
ckrawczyk@finkelLaw.com
Kelley R. Leddy (SC Bar No.:103257)
kleddy@finkellaw.com
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Richard Viviano and Johnette Gunter,	)	CASE NO.: 2018-CP-_____ - _____
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Fulton Jeffers and Braeloch I Association, Inc.)	)	COMPLAINT
d/b/a Braeloch Homeowner's Association,	)	(Jury Trial Demanded)
	)	
Defendants.	)	

The Plaintiffs, Richard Viviano and Johnette Gunter, by and through his undersigned counsel, would allege as follows:

PARTIES AND JURISDICTION

1. The Plaintiffs, Richard Viviano and Johnette Gunter, are citizens and residents of Aiken County, South Carolina.
2. Upon information and belief, Defendant Fulton Jeffers is a citizen and resident of Maryland. Upon further information and belief, Defendant Fulton Jeffers owns property in Aiken County, South Carolina.
3. Upon information and belief, Defendant Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association (hereinafter "HOA") is, upon information and belief, a domestic corporation, registered and with its principal place of business in South Carolina, who at all times relevant to this action was engaged in business in South Carolina.
4. Upon information and belief, Defendant HOA is responsible for maintaining amenities and administering and enforcing the Covenants and Access Agreements to the Braeloch Subdivision situated in Aiken County.

5. Plaintiffs are owners of two tracts of land in the Braeloch subdivision and are considered a member of the Defendant HOA.

6. Upon information and belief, Defendant Fulton Jeffers owns a tract of land in the Braeloch subdivision and is considered a member of the Defendant HOA.

7. This Court has jurisdiction over the parties and venue is proper pursuant to S.C. Code 15-7-30.

FACTUAL BACKGROUND

8. In or around 1987, the Defendant HOA was formed for the purpose of maintaining amenities and administering and enforcing the Covenants and Access Agreements to the Braeloch Subdivision situated in Aiken County.

9. In or around September of 1996, all persons who owned a tract of land in the Braeloch Subdivision executed the Braeloch Subdivision Protective Covenants, which delineated covenants, including easements, which ran with the land were binding on all parties and granted membership rights to the owners. Amendments were made to the protective covenants in August 2002.

10. Specifically, the Braeloch Subdivision Protective Covenants, **Exhibit A** states that the following easements shall be established on each tract of land:

- a. A pedestrian and horse riding trail around the perimeter of the subdivision.
- b. Front- Fifteen (15) feet for utilities and drainage.
- c. Rear- twenty (20) feet for a pedestrian and horse riding trail, fifteen (15) feet of which shall be used for utilities and drainage.
- d. Side- Ten (10) feet for utilities and drainage.

11. Plaintiffs are the owners of Lots 47 and 49, which were deeded to them subject to all the easements and restrictions in the Braeloch Subdivision Protective Covenants, **Exhibit A**.

12. As initially developed Lot 49 and 47 were exterior Lots, meaning the rear of the lots was on the perimeter of the subdivision, which required a 20 foot easement along the rear of their property to make the pedestrian and horse riding trail around the perimeter of the subdivision.

13. Upon information and belief, in 2002 the owners of Lot 51 of the Braeloch Subdivision, Mr. and Mrs. Thompson, petitioned to join the Defendant HOA.

14. Upon information and belief, in or around August of 2002, two-thirds of the members of the Defendant HOA approved Mr. and Mrs. Thompson's petition to join the Defendant HOA and their property, Lot 51, became subject to the same covenants, encumbrances, and easements stated in Braeloch Subdivision Protective Covenants, **Exhibit A**.

15. Upon information and belief, subsequent to Lot 51's admission into the Defendant HOA, on or about September 5, 2002, Mr. and Mrs. Thompson sold Lot 51 to Ruth E. Kipnis subject to all easements and restrictions in the Braeloch protective Covenants.

16. Upon information and belief, on or about May 25, 2012, Ruth E. Kipins transferred Lot 51 to Defendant Jeffers subject to the Amended Covenants to Braeloch Subdivision, **Exhibit A** including but not limited to the perimeter pedestrian and horse-riding trail easement as described in the covenants.

17. Prior to Lot 51's admission to the Braeloch subdivision, Lot 47 and Lot 49, Plaintiffs' lots, were perimeter lots and thus the perimeter horse trail easement was created along the rear of the two properties, as they were the perimeter of the subdivision.

18. Upon the admission of Lot 51 to the Braeloch subdivision, Lot 47 and 49 no longer have boundaries located on the perimeter of the subdivision. Lot 51's south / southeast boundary line is located on the perimeter of the subdivision, and is subject to the pedestrian and horse-riding trail easement on the perimeter as created by the Covenants to Braeloch Subdivision, **Exhibit A**.

19. However, despite the fact that Lots 47 and 49 are no longer located on the perimeter of the subdivision, Defendant Jeffers, as well as other Braeloch homeowners, continues to utilize the boundary lines as if there exists a perimeter easement, without permission of the Plaintiffs.

20. Upon further information and belief in order to reach a barn located on Lot 51, Defendant Jeffers travels across Lot 49 without the permission of the Plaintiffs.

21. Both of Plaintiffs' properties are subject to the easements in the Braeloch Subdivision Protective Covenants, **Exhibit A**, described in Paragraph 10.

22. The Defendant HOA is responsible for enforcing the covenants and easements described in the Braeloch Subdivision Protective Covenants, **Exhibit A**, (and summarized in Paragraph 10) on all Lots in the Braeloch subdivision situated in Aiken County which are members.

23. To date, the easement proscribed in the Braeloch Subdivision Protective Covenants, **Exhibit A**, have not been created and enforced on Lot 51, specifically, the perimeter pedestrian and horse riding trail easement has not been moved to Lot 51, which is now the perimeter of the subdivision.

24. Currently, because the perimeter pedestrian and horse riding trail easement has not been moved to the perimeter of Lot 51, as it should be per the Braeloch Subdivision Protective

Covenants, **Exhibit A**, there exists a riding trail access easement on the north boundary of Lot 49, which belongs to Plaintiffs.

25. Upon information and belief, when the pedestrian and horse riding trail easement created by the Braeloch Subdivision Protective Covenants, **Exhibit A**, is enforced on Lot 51 and said trail easement is moved to the south / southeast boundary of Lot 51, there will be no use for the access easement on the north boundary of Lot 49.

FOR A FIRST CAUSE OF ACTION
AGAINST DEFENDANT FULTON JEFFERS
 (Trespass)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

26. Plaintiffs are the legal owners and possessors of Lot 49 in the Braeloch subdivision situated in Aiken.

27. Defendant Fulton Jeffers has voluntarily and intentionally entered onto Lot 49 and Lot 47 in the Braeloch subdivision, without the permission of the Plaintiffs.

28. Defendant Jeffers has voluntarily an intentionally entered onto Lot 49 in the rear to obtain access to his barn.

29. As a result of Defendant Fulton's trespass on Plaintiffs' property, Plaintiffs are entitled to compensatory, nominal, and punitive damages in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION
AGAINST DEFENDANT BRAELOCH I ASSOCIATION, INC.
 (Negligence)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

30. Defendant HOA owes a duty to its members to enforce the covenants, restrictions, encumbrances, and easements on all properties subject to the Braeloch Subdivision Protective Covenants, **Exhibit A**.

31. Defendant HOA has breached that duty by failing to enforce the easements as required by the Braeloch Subdivision Protective Covenants, **Exhibit A**, against Lot 51 owned by Defendant Fulton Jeffers.

32. As a direct and proximate result of Defendant HOA's breach of its duty previously stated, Plaintiffs has suffered consequential damages, including attorney's fees, to which they are entitled to relief.

FOR A THIRD CAUSE OF ACTION
AGAINST DEFENDANT BRAELOCH I ASSOCIATION, INC.
(Breach of Contract)

33. The Braeloch Subdivision Protective Covenants, **Exhibit A**, constitutes a binding contract entered into by the Plaintiffs and Defendants, in which Defendant HOA is required to enforce the covenant and restrictions contained therein.

34. The Braeloch Subdivision Protective Covenants, **Exhibit A**, were offered by Defendant HOA to, and accepted by, Plaintiffs and Defendant Jeffers in their agreeing to be bound by the Braeloch Subdivision Protective Covenants.

35. In agreeing to be bound by the Braeloch Subdivision Protective Covenants, **Exhibit A**, Plaintiffs and Defendants exchanged valuable consideration and manifested their intent to be bound by the Braeloch Subdivision Protective Covenants.

36. The Contract, the Braeloch Subdivision Protective Covenants, **Exhibit A**, expressed the true intent of the parties to establish a perimeter pedestrian and horse trail easement, and is fair, just, and equitable.

37. Defendant HOA has breached their contractual obligation in failing to enforcement the perimeter pedestrian and horse trail easement on Defendant Jeffers' property, Lot 51.

38. As a direct and proximate result of the Defendant HOA's breach, Plaintiffs have suffered actual, special, and consequential damages.

39. Plaintiffs pray that this Court Order specific performance by the Defendant HOA to impose upon Defendant Jeffers' property, Lot 51, the perimeter pedestrian and horse trail easement.

FOR A SECOND CAUSE OF ACTION
AGAINST ALL DEFENDANTS

(Declaratory Judgment S.C. Code Ann § 15-53-10 et seq.)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

40. Plaintiffs and Defendant HOA are parties to the Braeloch Subdivision Protective Covenants, **Exhibit A**, which constitutes a contract.

41. Under the Braeloch Subdivision Protective Covenants, **Exhibit A**, the Defendant HOA must enforce the covenants, including easements on each property within the Defendant HOA.

42. Defendant Jeffers' property, Lot 51 of the Braeloch Subdivision situated in Aiken, is subject to the Braeloch Subdivision Protective Covenants, **Exhibit A**.

43. Defendant HOA has failed to enforce the easements delineated in the Braeloch Subdivision Protective Covenants, **Exhibit A**, on Lot 51, specifically, Defendant HOA has failed to enforce the pedestrian and horse riding trail perimeter easement on Lot 51 despite the fact that its south /southeastern border is the perimeter of the subdivision.

44. Defendant Jeffers continuously trespasses on Plaintiffs' property, Lot 49 in the Braeloch subdivision.

45. As such, Plaintiffs request declaratory relief from this court that the Defendant HOA is required to enforcement the easements in the Braeloch Subdivision Protective

Covenants, **Exhibit A**, by relocating the pedestrian and horse riding trail perimeter easement to the south / southeastern boundary of Lot 51, removing the access easement on the northern boundary of Lot 49, and injunctive relief prohibiting Defendant Jeffers from continuously trespassing on Plaintiffs' property.

RELIEF REQUESTED

Wherefore, Plaintiffs pray the Court to hold Defendants liable for the conduct complained of herein, to enter judgment against Defendants and in favor of Plaintiffs, and to award the following relief:

- a. Actual, nominal, and consequential damages including attorney's fees and costs against Defendant Jeffers and Defendant HOA in an amount to be determined by the trier of fact;
- b. Punitive damages against Defendant Jeffers in an amount to be determined by the trier of fact;
- c. Injunctive relief against Defendant Jeffers preventing him from trespassing on Plaintiffs' property;
- d. Injunctive relief against Defendant HOA and Defendant Jeffers ordering that the pedestrian and horse riding perimeter trail easement be removed from Lots 47 and 49 and relocated to Lot 51's south / southeastern boundary, which is located on the perimeter of the subdivision;
- e. Injunctive relief ordering that the access easement located on the northern boundary of Lot 49 is removed;
- f. Specific Performance of Defendant HOA to impose the pedestrian and horse riding perimeter trail easement on Lot 51; and
- g. For all other relief this Honorable Court deems just and proper.

<Signature on Next Page>

Respectfully submitted,

FINKEL LAW FIRM LLC
Post Office Box 1799
1201 Main Street, Suite 1800
Columbia, South Carolina 29202
(803) 765-2935

Columbia, South Carolina

September 21, 2018

s/ Charley A. Krawczyk
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ckrawczyk@finkelLaw.com
Kelley R. Leddy (SC Bar No.:103257)
kledddy@finkellaw.com
Attorneys for Plaintiffs

EXHIBIT

“A”

EXHIBIT "A"

PROCEDURE FOR CHANGING COVENANTS AND BYLAWS

I. First determine whether a Covenant or a Bylaw change is needed.

A Covenant change is required if the wording or intent of the Covenants are to be changed. - A Bylaw change/addition is needed if the subject either has not been addressed in the Covenants,

1^

II. Covenant Change

A 2/3 majority (34) of the property owners (Association) is required to change the Covenants, (must be done in a prescribed legal format,) and subsequently recorded in the county records. (Covenant Section I.E.)

1. Poll your neighbors to determine if most of them are interested in the suggested change. If yes, then:
2. Document the desired change in writing for an informal mailing to the Association members. The intent of this informal mailing is to determine the possibility of achieving the needed 34 needed signatures from the lot owners.
3. Bring, or submit, the letter to the Board of Directors for mailing. Include a note on the number of neighbors contacted regarding the change, and the results of the poll.
4. The Board will send out the informal mailing, and inform the submitter(s) of the results.
5. If the results are favorable :
 - A. The Board will contact the lawyer and have the proper legal document drawn up for signature by the 34 lot owners.
 - B. The legally formatted Covenant change will then be returned to the submitter(s), who has the responsibility to obtain at least 34 signatures from the lot owners. Each signature must have two witnesses, one of which has to be the SAME person. Getting these signatures is no easy task.
 - C. There are a few 'attestations' required by the 'common' witness on an attached page, which then has to be notarized.
 - D. The Board, once the signatures have been obtained and the attestations notarized, will have the lawyer record the change; and then
 - E. Will send copies of the Covenant change to each member.
6. If the results are not favorable, the matter will be considered closed.

II. Bylaw Change

Bylaws may be changed by a majority vote of the members (of the Association) attending a properly announced meeting. Thirty percent of the members (15) must be present to constitute a quorum for this purpose. (Bylaw #3)

A properly announced meeting is one for which notification of date, time, place and topic is provided to the members of the Association at least 7 days in advance. Notification may be either by mail, or by hand to the mailbox of Braeloch residents. (Bylaw

1. Poll your neighbors to determine if most of them are interested in the suggested change. If yes, then document the suggested Bylaw change and bring, or submit, the letter to the Board of Directors for action. Include a note on the number of neighbors contacted regarding the change, and the results of the poll.
2. The Board will advise the submitter of when they plan to notify the Association members and call the meeting to address the subject.

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Attachment A
STRUCTURE DEFINITION
9/13/03

The Braeloch Covenants contains requirements pertaining to structures, the construction of which requires Architectural Committee review/approval. A structure, in this context, is defined as:

"Any construction, or piece of work artificially built up or composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind. A combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land," (Black's Law Dictionary) or on or into a pond. This includes construction of any type of pond or pool.

Some items considered to be structures and require Architectural Committee review/approval before construction are shown below. This list is not all-inclusive. Contact the Architectural Committee for anything not on the list, or for which you have questions.

Buildings (connected to a pad or sitting on the ground without a pad)

Residential buildings	Storage buildings
Garages	Utility buildings
Bathhouses	Outbuildings
Barns	Sheds
Stables	

Additions to buildings

Decks

Patio type pads

Athletic or recreation facilities, non-movable (incl. playground sets)

Fences & gates

Any that abut easements

Other 'internal,' other than small decorative landscaping type fences

Driveways/Roads

Poured	Laid

Swimming Pools

In-Ground

Surrounding Pads/Patios

Concrete pads over 16 ft²

Tanks, on or under the ground

Water

Fuel

Wells

Water or sewage systems

Utilities

Ponds and associated items

Regular

Dams

Spillways, normal and emergency

} for
 Placement
 Only

Lily Ponds

Docks

Decks extending into pond

Not a structure requiring AC pre-approval

Lamp Posts

Sprinkler systems

Small above ground 'removable' pools

Small decorative landscaping fences

Mailboxes/Paperboxes

Moveable playground sets

Area lighting

Deer netting

Small Water Gardens/Fountains

PROCEDURE FOR CHANGING COVENANTS AND BYLAWS

I. First determine whether a Covenant or a Bylaw change is needed.

A Covenant change is required if the wording or intent of the Covenants are to be changed. - A Bylaw change/addition is needed if the subject either has not been addressed in the Covenants,

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A 2/3 majority (34) of the property owners (Association) is required to change the Covenants, (must be done in a prescribed legal format,) and subsequently recorded in the county records. (Covenant Section I.E.)

1. Poll your neighbors to determine if most of them are interested in the suggested change. If yes, then:
2. Document the desired change in writing for an informal mailing to the Association members. The intent of this informal mailing is to determine the possibility of achieving the needed 34 needed signatures from the lot owners.
3. Bring, or submit, the letter to the Board of Directors for mailing. Include a note on the number of neighbors contacted regarding the change, and the results of the poll.
4. The Board will send out the informal mailing, and inform the submitter(s) of the results.
5. If the results are favorable :
 - A. The Board will contact the lawyer and have the proper legal document drawn up for signature by the 34 lot owners.
 - B. The legally formatted Covenant change will then be returned to the submitter(s), who has the responsibility to obtain at least 34 signatures from the lot owners. Each signature must have two witnesses, one of which has to be the SAME person. Getting these signatures is no easy task.
 - C. There are a few 'attestations' required by the 'common' witness on an attached page, which then has to be notarized.
 - D. The Board, once the signatures have been obtained and the attestations notarized, will have the lawyer record the change; and then
 - E. Will send copies of the Covenant change to each member.
6. If the results are not favorable, the matter will be considered closed.

II. Bylaw Change

Bylaws may be changed by a majority vote of the members (of the Association) attending a properly announced meeting. Thirty percent of the members (15) must be present to constitute a quorum for this purpose. (Bylaw #3)

A properly announced meeting is one for which notification of date, time, place and topic is provided to the members of the Association at least 7 days in advance. Notification may be either by mail, or by hand to the mailbox of Braeloch residents. (Bylaw

1. Poll your neighbors to determine if most of them are interested in the suggested change. If yes, then document the suggested Bylaw change and bring, or submit, the letter to the Board of Directors for action. Include a note on the number of neighbors contacted regarding the change, and the results of the poll.
2. The Board will advise the submitter of when they plan to notify the Association members and call the meeting to address the subject.

Attachment A
STRUCTURE DEFINITION
 9/13/03

The Braeloch Covenants contains requirements pertaining to structures, the construction of which requires Architectural Committee review/approval. A structure, in this context, is defined as:

"Any construction, or piece of work artificially built up or composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind. A combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land," (Black's Law Dictionary) or on or into a pond. This includes construction of any type of pond or pool.

Some items considered to be structures and require Architectural Committee review/approval before construction are shown below. This list is not all-inclusive. Contact the Architectural Committee for anything not on the list, or for which you have questions.

Buildings (connected to a pad or sitting on the ground without a pad)

Residential buildings	Storage buildings
Garages	Utility buildings
Bathhouses	Outbuildings
Barns	Sheds
Stables	
Additions to buildings	

Decks

Patio type pads

Athletic or recreation facilities, non-movable (incl. playground sets)

Fences & gates

Any that abut easements
 Other 'internal,' other than small decorative landscaping type fences

Driveways/Roads

Poured	Laid

Swimming Pools

In-Ground	'Permanent' Above-Ground
Surrounding Pads/Patios	Pool equipment pads

Concrete pads over 16 ft²

Tanks, on or under the ground

Water	Fuel

Wells

Water or sewage systems

Utilities

Ponds and associated items

Regular	} for Placement Only	Lily Ponds
Dams		Docks
Spillways, normal and emergency		Decks extending into pond

Not a structure requiring AC pre-approval

Lamp Posts	Area lighting
Sprinkler systems	Deer netting
Small above ground 'removable' pools	Small Water Gardens/Fountains
Small decorative landscaping fences	
Mailboxes/Paperboxes	
Moveable playground sets	

BYLAWS
BRAELOCH HOMEOWNER'S ASSOCIATION
April 14, 2012

1. An Annual meeting of the members will be held in the spring of each year to elect the Board of Directors and the Architectural Control Committee for the following 12 months, a Semi-Annual Meeting will be held in the fall to review the actions since the previous semi-annual meeting. (revised 11/1/96, revised 4/14/12)
2. Other member meetings will be held upon petition of 10% of the members.
3. The Bylaws may be changed by a majority vote of the members attending a properly announced meeting. Thirty percent of the members must be present to constitute a quorum for this purpose.
4. Prior to the Annual Spring Meeting the Board will seek nominations for the Board of Directors positions for the following 12 months. The Board shall solicit candidates from the Braeloch Homeowners either by phone, email, written request or direct contact. The nominations shall be coordinated by the Board Secretary, who shall report progress and results back to the Board of Directors. Nominations may also be made from the floor at the Annual Meeting. (Revised 3/27/04, revised 4/14/12)
5. Deleted 11/1/96
6. A financial report, up-dated with information since the previous financial report, will be presented at the Annual and Semi-Annual Meetings (revised 11/1/96, revised 4/14/12)
7. An Audit report for the previous 12 months will be presented at the Annual Meeting. The Auditor will be appointed by the Board in December of the previous year. (revised 11/1/96, revised 4/14/12)
8. The Board will provide for the retention of records of the proceedings at each Member and Board Meeting as well as financial records.
9. All records will be available for inspection by any member by request.
10. The President and Treasurer of the Board of Directors shall share (either/or) signature authority for the financial accounts of the Association. (added 11/1/96)
11. A properly announced meeting is one for which notification of date, time, place and topic is provided to the members of the Association at least 7 days in advance. Notification may be either by mail, or by hand to the mailbox of Braeloch residents. (added 11/1/96)
12. The Board of Directors is authorized to spend, as they may see fit, up to \$500.00 per expenditure to further the purposes of the Association; to include, but not limited to, the following types of activities: Association social events, support to Association charities, support organizations such as the Montmorency Fire Department, and County, State and Federal taxes (added 11/1/96, revised 4/14/12)
13. Members of the Board of Directors who miss 3 out of 4 scheduled Board Meetings are subject to replacement at the discretion of the remainder of the Board. The replacement shall be made through nomination by the President with approval required by the remainder of the Board. The replacement shall hold the position until an election is held at the next regularly scheduled semi-annual meeting of the association. The outgoing and incoming Board members shall be notified in writing of the change. The Board shall determine the position to be held by the replacement member. (added 9/28/97, revised 4/14/12)

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14. Lot owners submitting construction proposals to the Architectural Control Committee must do so by providing a copy of the plan for construction to any member of the committee. ACC will record each submission on a form containing the lot owner name and address and a description of the project. The ACC decision will be recorded on the form, along with a description of any additional restrictions or conditions, and the form will be signed by at least two of the three ACC members. A copy of the signed form will be sent back to the lot owner for his records. The original of the form, with a copy of the plan attached, will be retained in a historical file maintained by the ACC. NOTE: All plans must be submitted PRIOR to any construction to be in compliance with the Braeloch covenants. (added 3/9/02)
15. A "structure," as referenced in the Braeloch Homeowner's Association Covenants, is defined as shown in Attachment A to these Bylaws. (added 9/13/03)
16. The Board of Directors shall be comprised of four (4) officers, four (4) members, and the Past President. The officers shall be President, Vice-President, Treasurer, and Secretary. (added 9/13/03)
17. Three (3) of the members on the Board of Directors will be elected to and perform all duties and responsibilities as the Architectural Control Committee for the Braeloch Subdivision. The fourth Board of Director member will be elected to and act as the Braeloch Events Coordinator. (added 9/13/03)
18. At the annual election of the Braeloch Board of Directors, each of the eight (8) shall be voted upon separately in the following order: President, Vice-President, Treasurer, Secretary, three (3) Architectural Control Committee members, and the Events Coordinator. If there are more than three (3) nominees for the Architectural Control Committee, each voter may vote for 3 nominees and the 3 nominees receiving the highest number of votes will be elected. (added 9/13/03, revised 4/14/12)
19. A homeowner that is unable to attend a regular or specially called meeting to vote on a Braeloch Homeowner's Association Officer, Architectural Committee Member or Events Coordinator, may vote absentee by personally handing their signed ballot to an Officer of the Braeloch Homeowner's Association Board of Directors. Only one vote per Lot will be accepted, and a voting member for the lot at the meeting will negate the absentee ballot. (added 9/13/03)

BRAELOCH SUBDIVISION

AIKEN COUNTY, SOUTH CAROLINA

PROTECTIVE COVENANTS

OCTOBER 1, 1996

(Includes covenant changes made August 9, 2002)

**AMENDED COVENANTS
AND ACCESS AGREEMENTS TO
BRAELOCH SUBDIVISION**

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

AMENDED COVENANTS
AND ACCESS AGREEMENTS TO
BRAELOCH SUBDIVISION

WHEREAS, Braeloch Subdivision, located in Aiken County, South Carolina, is governed by certain restrictive covenants and pond access agreements as described herein; and

WHEREAS, said covenants and pond access agreements allowed the amendment thereto by agreement of two-thirds (2/3) of the owners of the existing lots; and

WHEREAS, the undersigned being more than two-thirds (2/3) of the owners of all lots in Braeloch Subdivision, all phases, are desirous of amending the covenants.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:-

1. That the existing covenants and pond access agreements of Braeloch as described herein are hereby declared to be null and void.
 - A. Phase I dated August 11, 1987, recorded in Misc. Book 485 at Page 275, records of Aiken County, South Carolina.
 - B. Phase I dated August 11, 1987, recorded in Misc. Book 485 at Page 281, records of Aiken County, South Carolina.
 - C. Pond and Access Agreement dated September 25, 1989, recorded in Misc. Book 553 at Page 328, records of Aiken County, South Carolina.
 - D. Phase 2-A dated September 25, 1989, recorded in Misc. Book 553 at Page 335, records of Aiken County, South Carolina.
 - E. Phase 2-B dated June 15, 1990, recorded in Misc. Book 580 at Page 220, records of Aiken County, South Carolina.
 - F. Phase 2-C dated January 22, 1991, recorded in Misc. Book 604 at Page 23, records of Aiken County, South Carolina.
 - G. Addendum to Pond and Access Agreement dated February 19, 1991, recorded in Misc. Book 604 at Page 60, records of Aiken County, South Carolina.

Record 524
Return to B. Rich/mjf

RETURNED TO

- H. Covenants dated February 1, 1995, recorded in Misc. Book 788 at Page 127, records of Aiken County, South Carolina.
2. That the covenants and easements herein are imposed on the following property:
- A. Phase I recorded in Plat Book 19 at Pages 130-135, records of Aiken County, South Carolina.
 - B. Phase 2-A recorded in Plat Book 22 at Pages 127-130, records of Aiken County, South Carolina.
 - C. Phase 2-B recorded in Plat Book 23 at Page 150, records of Aiken County, South Carolina.
 - D. Phase 2-C recorded in Plat Book 24 at Page 177, records of Aiken County, South Carolina.

BRAELOCH SUBDIVISION
AIKEN COUNTY, SOUTH CAROLINA
PROTECTIVE COVENANTS

I. PREFACE

- A. WHEREAS South Carolina National Bank as Trustee has developed, in conjunction with the previous owners, Frederik B. Christensen and W. Dale Sandberg, a subdivision known as Braeloch Subdivision in Aiken County, South Carolina, as shown on plats recorded in the Office of the RMC of Aiken County, South Carolina, as follows:

Phase I - Plat Book 19, pages 130-135
Phase 2-A - Plat Book 22, pages 127-130
Phase 2-B - Plat Book 23, pages 150
Phase 2-C - Plat Book 24, pages 177

have elected to dedicate the roads, as shown on the plat, to Aiken County and to impose upon the lots certain restrictive and protective covenants as follows:

- B. These covenants are to run with the land and shall be binding on all parties, their heirs, executors, administrators and assigns, and all persons claiming unto them until January 1, 2009, at which time said covenants shall be automatically extended for successive periods of ten (10) years, unless by a vote of the majority of the then owners of the lots it is agreed to change said covenants in the whole or in part. However if a two-thirds (2/3) majority of the property owners at any time petition to modify the restrictions or make exceptions thereto, or approve of same, it will not be a violation of the covenants herein, and the changes or approval of exceptions, if any, will be put in writing and duly recorded in the county records.
- C. Should any owners, their heirs, executors, administrators or assigns violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning real property situate in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenants. Provided, however, that no violation shall affect the validity of any mortgage lien or record prior to such violation.
- D. The invalidation of any one or more paragraphs or portions of these restrictive covenants and agreements by judgment or decree shall in no way affect any of the other provisions, which shall remain in full force and effect.
- E. If the Owners or their heirs, assigns or successors in title shall violate any of the restrictive covenants herein, any person owning real property situated in said development or subdivision may institute any proceedings at law or in equity against the person or persons violating or attempting to violate such covenants, either to prevent or enjoin such violation to recover damages or other dues for such violation; provided, however, that a violation of such covenants shall not constitute a forfeiture or reversion of title.

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II BRAELOCH ASSOCIATION

WHEREAS, Owners and Developers desire to insure a desirable community and to that end Owners have created an Association known as Braeloch Association, Inc. (hereinafter the Association), for the efficient preservation of values and amenities and assigning unto such Association the rights, powers and duties of maintaining and administering the community properties and amenities hereinafter described and administering and enforcing the terms and conditions as set forth in this agreement and declaration; the members of the Association shall have the respective rights, voting powers, privileges, duties and immunities as follows:

- A. All persons who are owners of a tract in Braeloch or any additions thereto are members, provided that no person or corporation taking title as security for payment of money or for the performance of any obligation shall thereby become entitled to membership, nor shall ownership of any business, commercial, church or school property entitle the owner or owners thereof to membership by reason of the ownership thereof.
- B. Ownership of property as a qualification for membership is defined as follows: Ownership of any such property under recorded deed, whether the owner is an occupant or not, or ownership under a bond for title or contract of purchase, if the same be accompanied by actual occupancy of the lot in question. Ownership within the meaning and intention hereof shall cease upon the sale of any such lot to another by the owner thereof. Sale of any such lot within the meaning hereof shall mean, and shall be effective upon the recording of any deed conveying such a lot to another, or the termination of occupancy of the property by the owner thereof, accompanied by the giving by such owner to another of a bond for title or contract of sale with respect to such lot.
- C. If a residential building tract shall be owned by more than one person, such ownership shall constitute only one membership in the Association.. In the case of multiple ownership of one lot, the use of the facilities of the Association by such multiple owners shall be limited to those owners actually residing upon such building lot; or, where any such lot is unimproved, to not more than one non-residential owner, and his or her spouse and children.
- D. A corporation owning one or more lots in Braeloch shall have one vote for each such lot owned by such corporation, but no member, stockholder, director, employee or officer of such corporation shall acquire thereby any right or rights individually to become members of the Association.
- E. In all matters requiring a vote by the members of the Association, there shall be one vote per lot.
- F. The rights which have vested or shall vest in the members of the Association shall be subject to the following:
 - 1. The right of the Association, in accordance with its articles and bylaws, to borrow money for the purpose of improving the Common Areas (described below) and in the aid thereof mortgage said properties and the rights of such mortgages in said properties shall be superior to the rights of the homeowners; and

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2. The right of the Association to take such steps as are reasonable necessary to protect the Common Areas (described below) against foreclosure; and
3. The right of the Association, as provided in its articles and bylaws, to suspend the rights and privileges of any member for any period during which any assessment (to which his interest is subject) remains unpaid, and for a period not to exceed thirty (30) days for an infraction of its published rules and regulations; and
4. The right of the Association to charge reasonable admission and other fees for the use of any facility situated upon the common areas; and
5. The right of the Association to dedicate, by way of deed or in any other legal manner described, common properties to the general public for public use at any time after Owners shall convey its interest therein to the Association.

III COMMON AREAS

- A. WHEREAS, certain property shown and designated on the plat as Entrance Area and 2' Buffer Strip has been conveyed by Owners unto the Association in order to provide an attractive entrance way and a buffer zone with the adjoining land owner and certain easements have been created for the benefit of property owners and inhabitants of Braeloch who may be or become members of the Association, and
- B. WHEREAS, it is to the interest, benefit and advantage of Owners and the Association, and to each and every person who shall hereafter purchase any tract in the within Braeloch that satisfactory provisions be provided for the perpetual private care and maintenance of all common areas, easements and signs erected or to be erected, and
- C. WHEREAS, it is to the interest, benefit and advantage of Owners and the Association and to each and every person who shall hereafter purchase any tract within Braeloch, that certain covenants governing and regulating the use, occupancy, operation, maintenance and development and in addition certain reservations and servitudes, be imposed upon the property acquired by the Association, as well as the tracts in Braeloch as owned by the Owners and for sale to prospective purchasers to be established, set forth and declared to be covenants running with the land;
- D. NOW, THEREFORE, for and in consideration of the premises and the benefits to be derived by Owners, Braeloch Association, Inc. and each and every subsequent owner of property in Braeloch, Owners do hereby set up, establish, promulgate and declare the following covenants to be applicable to the common area deeded to the Association and to all tracts in Braeloch as shown on the plat and any additions or amendments thereto, and to all persons owning said tracts or any subsequent owner thereof, and to lands acquired or hereafter acquired by the Association.
 1. Easements for riding/walking and utilities, clubhouses, community centers, swimming pools, with or without appurtenant bathhouses, athletic facilities and recreation facilities of any kind may be erected and maintained upon the premises being or to be hereafter

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acquired by the Association. The property which has been or will be acquired shall be used for an attractive entrance way and a buffer zone with adjoining owner and any property later acquired by the Association, shall be used by the said Association for similar purposes and for recreational, and/or park purposes and any associated uses for the sole benefit, pleasure and use of members and guests of members of the Association, and subject to such regulations which may be prescribed by the Association as to guests of such members, but not for any other purposes. The Association shall be responsible for the perpetual private care of all such entrance ways, buffer zones, signs, clubhouses, community centers, swimming pools, athletic and recreational facilities and for any roads, utility easements and water and sewage systems erected or to be erected by said Association.

2. Owners may select property and the time which it may determine to convey such property unto the Association.

IV LOT RESTRICTIONS

- A. No portion of any lot shall be used for any commercial or industrial purposes, and no lot may be subdivided into smaller lots but two or more adjacent lots may be combined to form the site of a single dwelling. Upon the agreement of a majority of the Owners Association, two adjoining lot owners may adjust their shared property line (s) to their own betterment as long as the each lot still contains adequate road frontage, acceptable septic tank location, and home building site. Adjoining lots may move adjoining lot lines slightly to each owners betterment with the agreement of a majority of the owners Association so long as either lot acreage is not reduced below 3 acres.
- B. Fences shall conform to the architectural concept to the subdivision as follows:
 1. All fences erected along property lines which abut roads or highways shall be of the wooden rail type.
 2. No barbed wire type fence shall be allowed anywhere.
- C. Lot owners are responsible for insuring that all private wells, septic tanks, and domestic sewage systems conform to all applicable state and local codes.
- D. No noxious or offensive activities shall be allowed on any lot nor shall anything be done which is, or has a potential of becoming, an annoyance or nuisance to the residents of the subdivision, and specifically including the following:
 1. No unsightly accumulation of trash, building materials, equipment, vehicles, etc., on any lot which is either clearly visible from or has an adverse impact on any other lot.
 2. No large vehicle such as school buses or trucks used for commercial or non-profit purposes may be parked on any lot.
 3. There shall be no dumping of trash or garbage of any kind on the property.

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4. Any cleared land must be landscaped or revegetated within one year so that no bare or barren areas are left with the exception of vegetable gardens and paddocks for owner use.
- E. No clothes lines, drying racks, or other devices used for drying clothes shall be constructed or maintained nearer a front street than the extension of the rear line of the residence building. No above ground fuel, water tanks, or dish antennae shall be permitted except at the rear of the lot and must be screened so as to not be visible from the street.
- F. Nothing may be on permanent or temporary display without expressed written permission of the Architectural Control Committee.

V STRUCTURE RESTRICTIONS

- A. No lot shall have more than one single-family type residence building upon it with the exception of an additional single guest cottage, nor shall any building exceed three (3) stories, nor shall any tent, shack, trailer, camper, garage, barn, or other outbuilding, other than a guest cottage, erected upon the property at any time be used as a residence, temporary or permanent. Camper trailers, motorized camper trailers or boats utilized by the lot owners for travel or recreational purposes may be parked on the lots so long as such is never used as a residence, and a reasonable effort is made to screen such from being visible from the street or adjoining lots.
- B. Each structure must comply with the following minimum setback requirements:
 1. Front setback as measured from the front property line shall be fifty (50) feet for all structures.
 2. Rear setback as measured from the rear property line shall be forty (40) feet for the residential building and thirty (30) feet for all other structures.
 3. Side setback as measured from the side property line shall be thirty (30) feet for the residential building and twenty (20) feet for all other structures.
 4. Intersection setback for all corner lots shall be such that nothing shall be constructed, planted, or allowed to grow in such a manner as to materially impede vision between a height of three (3) and ten (10) feet above the centerline grades of the intersecting streets in the area bounded by the street lines of such corner and a line joining points along said street lines twenty (20) feet from the front of the intersection. It shall be the responsibility of the individual property owner to ensure compliance.
- C. Each main residence shall have a minimum of 2000 square feet of heated living space.
- D. The exterior siding on any residence building should be either solid brick, brick veneer, natural stone, stucco, B-graded siding, wood shingles or its equivalent. Use of aluminum or vinyl siding or any other exception to the above must be approved by the Architectural Control Committee. No residence consisting of exposed concrete block or sheet metal siding shall be permitted.

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- E. Stables may be erected on any lot and shall be maintained consistent with the regulations of the South Carolina Board of Health and shall not constitute a nuisance or annoyance to other residents of the subdivision.

VI EASEMENTS (EXCLUDING POND EASEMENTS)

- A. In addition to the easements shown on the above mentioned plats the following lot easements are established:
1. Front - Fifteen (15) feet for utilities and drainage.
 2. Rear - Twenty (20) feet for a pedestrian and horse riding trail, fifteen (15) feet of which shall be for utilities and drainage.
 3. Side - Ten (10) feet for utilities and drainage.
- B. The pedestrian and horse riding trail which has been established around the perimeter of the development as shown on the plat is intended for the exclusive use of the property owners, their dependents and invited guests only. No wheeled vehicles, motor-powered or otherwise, except as required for the handicapped, shall be allowed on these trails, except for necessary maintenance. No obstruction shall be made on any portion of the trail that would interfere with the use of the trail.
- C. If there is any conflict between easements set forth in these restrictions and those shown on the plat, the easements shown on the plat shall control.

VII ASSESSMENTS

- A. Owners and each purchaser of any tract in Braeloch by virtue of ownership of or the acceptance of a deed therefor, will, whether or not it shall be expressed in any subject deed or other conveyance, obligate himself or it and be deemed to covenant and agree to pay to the Association, an annual assessment or charge to be fixed, established and collected from time to time as hereinafter provided. Each payment of such annual assessment or charge, when due, shall become a lien upon the tract against the account of the ownership of which such assessment or charge is made. Each tract as shown by a recorded plat or plats, excluding those owned by Owners for resale, is hereby made subject, and shall be made subject, to a continuing lien to secure the payment of such installment of such assessment or charge when due.
1. Such annual assessment or charge shall be set annually by the Board of Directors of the Association. The Board must receive the consent of two-thirds of the members of the Association in order to raise the annual assessment from that of the previous year.
(Covenant change dated August 9, 2002)
 2. The lien hereby reserved, however, shall be at all times subordinate to the lien of any mortgages or lender of any sums secured by a properly recorded mortgage or deed to

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secure debt, to the end and intent that the lien of any mortgages or deed to secure debt for value and in good faith shall be paramount to the lien for maintenance charges imposed herein, and provided further such subordination shall apply only to the charges that shall become payable prior to the passing of title under foreclosure of mortgage or Acquisition of the title by deed in favor of the holder of such mortgage in lieu of foreclosure and nothing herein contained shall be held to affect the rights herein given to enforce the collection of such charges accruing after sale under foreclosure of such mortgage, or after Acquisition of title by deed in lieu of foreclosure by the holder of the same.

3. Under such circumstances, (I) the foreclosure of the lien created hereunder shall not operate to affect or impair the priority of the mortgage upon the premises in question; and (II) the foreclosure of any mortgage or the acceptance of a deed in lieu of foreclosure by the holder of any such mortgage shall not operate to affect or impair the lien thereof, except that the lien thereof for said charges or assessments as shall have been accrued up to the effective date of such foreclosure or the acceptance of a deed in lieu of foreclosure by the holder of any such mortgage, shall be subordinate to the title acquired by the purchaser at any such foreclosure sale or acquired by the holder of any such mortgage by taking a deed in lieu of foreclosure from the then owner of the property. Any such acquisition of title as aforesaid shall be subject to all such assessments or charges, however, that shall accrue subsequent to the effective date of the foreclosure deed or deed given in lieu of foreclosure to the holder of any such mortgage.
4. All assessments or charges above described shall be due and payable to the Association on or before the first day of January of each year.
- B. The amounts so paid to the Association shall be administered by the Association and may be used for the payment of expenses incurred for the following purposes:
 - 1 For the construction and maintenance of improvements upon the area designated as Entrance Area and 2' Buffer Strip upon the plats and upon any driveway, park or playground areas which may be owned or hereafter acquired by deed or lease by the Association;
 - 2 For lighting, cleaning, planting shrubs and other vegetation, and maintaining any such areas and any easements as shown on the plat or hereafter acquired;
 - 3 Pay taxes or assessments, if any, which may be levied by any public authority upon such areas or any improvements thereon, now or hereafter acquired; and
 - 4 Such other purposes as are set forth in the bylaws of the Association or as same may hereafter be amended.

VIII BOARD OF DIRECTORS

- A. The Board of Directors shall be elected by the members of the Association and shall appoint officers and operate the Association as spelled out in the Articles of Incorporation and By-laws.

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IX ARCHITECTURAL COMMITTEE

- A. There shall be an Architectural Control Committee consisting of three (3) members and shall be selected by the Owners and shall serve for a period of two years, beginning at the date the plat is recorded. Upon expiration of the term of the original Architectural Control Committee, the existing property owners (there being only one vote per lot) shall elect a new three member Architectural Control Committee. The owners shall have the right to vote any unsold lots in their possession in the subsequent elections. A similar election shall be held in the same month every year thereafter, but if no election is held, the previous committee shall continue to serve until their successors are elected. A two-thirds (2/3) majority of the lot owners, based on one vote per lot, may at any time force a new election of the Architectural Control Committee after expiration of the term of the original committee.
- B. Prior to the construction of any residence, stable, out building, or other structure upon any lot, the proposed facility shall be reviewed by the Architectural Control Committee to verify its compliance with the aesthetic concepts and architectural/engineering standards of the subdivision. The Architectural Control Committee shall communicate its approval or disapproval, based on a majority of the appointed members, in writing and clearly note any additional restrictions or conditions. Failure to approve or disapprove such plans, specification or location within sixty (60) days after date of submittal for the purposes of approval shall constitute conclusive evidence of approval.
- C. The Architectural Control Committee, during the course of its review of a proposed structure, has the right to review any other factors or considerations which the committee decides are relevant to each specific case and may require compliance to standards in excess of the minimum standards outlined by these covenants or allow exceptions to the minimums. The Architectural Control Committee shall not be held responsible for the structural design or integrity of the building or code compliance. The Architectural Control Committee shall be held harmless for any accountability, liability, or obligation for the approval or disapproval of plans.
- D. The Architectural Control Committee shall, as a minimum, evaluate each proposed structure against the following criteria:
1. Conformance to the aesthetic and architectural standards desired for the Braeloch subdivision.

X ANIMALS

- A. Livestock will be limited to a maximum of six (6) horses, or 1 horse per acre, whichever is greater. (Covenant change dated August 9, 2002)
- B. Dogs must be kept controlled, and not permitted to interfere with the pedestrian traffic and horseback riding on subdivision roads or the perimeter trail. Pit Bull dogs are expressly forbidden.

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- C. Braeloch subdivision shall be considered a wildlife refuge. There shall be no animal hunting within the perimeter of Braeloch.

XI POND AND ACCESS AGREEMENT

- A. Certain lots or parcels within Braeloch Subdivision will have ponds or pond sites located thereon (hereinafter pond lots), and certain of these lots will have ingress and egress easements across them granting access to other lots (hereinafter easement lots), and in an effort to guarantee the orderly development and management of the ponds, dams and spillways located on the pond lots and the driveways and roads located on the ingress and egress easements, certain requirements, restrictions and limitations are imposed on these particular lots or parcels.

1. The pond lots and easement lots initially subject to this agreement are those certain lots or parcels as shown on a plat of Braeloch Phase 2-A prepared by P. M. Hankinson, Jr., PE & LS and recorded in the records of Aiken County, South Carolina in Plat Book 22 pages 127-130 and designated as such. As additional phases of Braeloch Subdivision were developed, pond lots and easement lots were designated in a document signed by the owner and recorded in the records of Aiken County, South Carolina with reference being made thereon to this agreement. If any lot in Braeloch Subdivision not designated as a pond lot or easement lot later becomes such a lot, then the requirements, restrictions and limitations set forth and imposed herein shall likewise apply to such lot.

(a) Pond Lots: Nos. 22, 23, 24, 25, 26, 27, and 28; and
1, 2, 4, 46, 47 and 48

(b) Easement Lots: Nos. 22, 23, and 28; and
46 and 47

2. Lot owners may construct a lake or pond on their lot as long as the following conditions are met:

(a) The pond waterline corresponding to the level established by the emergency spillway, the dam site, the normal and emergency spillway and the normal/emergency spillway outlets to natural grade are all contained within the property lines of the individual owner's lot(s).

(b) If 2(a) above cannot be met then adjacent lot owners may jointly construct the lake or pond as long as all parties agree to be bound by the requirements of sections 2(c), 2(d) and 2(e) below.

(c) Standard engineering design and construction practices must be followed.

(d) All applicable county, state, and federal permits are obtained and requirements are met.

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- (e) The lot owner(s) upon whose lot(s) the pond or lake is located assumes full liability for all aspects of construction and use of the facility including any damage which might arise downstream due to failure of the retaining walls.
- (f) No lot owner shall construct any obstructions in the stream bed as shown on the plat except to build a pond as set forth herein, said pond to have an installed spillway.
- (g) All ponds constructed in Braeloch Subdivision shall be constructed according to generally accepted engineering standards and all applicable governmental permits and requirements are to be obtained and complied with. All ponds shall have an installed spillway.
- (h) The owner of a lot upon which a pond or a portion of a pond is located has the exclusive right to the bank that joins his or her property.
- (i) A lot owner may build a dock or deck that extends into a pond located on his or her property but said dock or deck shall not extend more than sixteen feet (16') into the pond without the written approval of the other owner or owners of the lot or lots upon which the pond is located. If a pond is located on more than one lot in the subdivision, the owners of the lots upon which the pond is situate shall follow the recommendations of the local Soil Conservation Office or the appropriate governmental agency that locally deals with the management of farm ponds in regard to the proper species of fish to stock the pond and the parties agree to be jointly responsible for the costs of stocking the pond. In addition, said owners shall not abuse the pond or use traps or illegal means of fishing in the pond and agree to maintain the pond according to generally accepted standards for this area.
- (j) If access to any lot in Braeloch Subdivision is provided by an ingress and egress easement, the owner of such lot shall have the right to maintain and make repairs to any road or driveway located within said easement, including repairs to any pond dam located within said easement. If two or more lots are accessed by the same road or driveway over a common easement, the owners of said lots shall be equally responsible for the reasonable maintenance and upkeep of said road or driveway on said easement. If the parties agree, the road or driveway in place can be upgraded or otherwise improved. In addition, the owners of the lots served by the common road or driveway may, with the approval of the Architectural Control Committee of Braeloch Subdivision, landscape, put up fencing and otherwise improve and beautify the easement area.
- (k) In the event that there is an ingress and egress easement providing access to any lot within Braeloch Subdivision, the owner or owners of the subservient lot or lots shall not place any obstruction in or over said easement, or commit any action that will limit or impair access over said easement without the written approval of the owner whose lot is served by said easement and any mortgagee who holds a mortgage on said lot.

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- (l) In the event that there is an ingress/egress easement to any lot within Braeloch Subdivision that crosses a pond dam, the owner or owners of the lots where said dam is located cannot alter said dam or place any obstruction on the dam or allow the dam to deteriorate to the point that would materially limit or impair access over said easement without the written approval of the lot owner whose lot is served by said easement and any mortgagee who holds a mortgage on said lot.
- (m) If a pond is located on more than one lot, the owners of the lots upon which the pond is located shall share equally in the costs of maintaining and repairing the pond dam and spillway.
3. In the event that there is a conflict between the requirements, restrictions and limitations contained herein and those certain requirements, restrictions and limitations dealing with pond construction and maintenance contained in the Protective Covenants of Braeloch recorded in the records of Aiken County, South Carolina, then the requirements, restrictions and limitations contained in this agreement shall control.
4. The owner or owners of any lot containing a pond, or any part thereof, on said lot shall have access and use of the entire pond even though the property line may cut through the pond.
5. This agreement and the requirements, restrictions, covenants, conditions and limitations contained herein are to run with the land and shall be binding on the present owners, the future owners of the specified lots, their heirs, personal representatives, successors and assigns, and all parties claiming under them.

WITNESSES:

Stanley G. Lipman
M. E. Leger

PROPERTY OWNERS:

1) Stanley G. Lipman 9/25/96 (48)
 2) M. E. Leger 9/25/96 (35)
Barry J. Donohue 9/25/96 (2)
Robert E. Edwards III 9/25/96 (9)
Leslie L. Cline 9-25-96 (12)
Henry J. Hays 9/25/96 (34)
McCliff 9/29/96 (31)
Sandra M. Sparks 9/29/96 (12)
Franklin 9/29/96 (5)
Bullock/Co 9/29/96 (9)
Barbara L. Kneen 9/29/96 (21)
William T. II 9/29/96 (8)
Gerry D. Roberts 9/29/96 (19)
L. P. Craig 29 SEP 96 (20)
Darryl F. Hensperger 9/29/96 (18)
John F. Hensperger 9/29/96 (11)

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1) WITNESSED BY

M. E. Leger

Barry J. Donohue

2) WITNESSED BY

Stanley G. Lipman

Barry J. Donohue

WITNESSES:

M. E. Sagan
Stanley C. Lipman

PROPERTY OWNERS:

John H. Haight 9/28/96 (13)
Richard E. Haight 9-29-96 (16)
Raymond B. Haight 9-29-96 (13)
Sandy H. Haight 9/29/96 (27)
Robert H. Haight 9/29/96 (30)
Robert H. Haight 9/29/96 (38)
Joe W. Haight 9/29/96 (48)
Paul S. Haight 9/29/96 (41)
Richard A. Haight 9/29/96 (49)
Donald J. Canoll 9/29/96 (37)
Dale S. Haight 9/29/96 (26)
Janet L. Haight 9/29/96 (23)
Harry W. Bell 9/29/96 (21)
John H. Haight 9/29/96 (14)
Richard H. Lane 9/29/96 (15)
George H. Haight 9/30/96 (19)

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WITNESSES:

WITNESSES:

Stanley C. Lesman

M. E. Egan

PROPERTY OWNERS:

Richard J. Krugner 9/30/96 (10)

Curtis H. Voss 9/30/96 (22)

[illegible]

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STATE OF SOUTH CAROLINA

PROBATE

COUNTY OF AIKEN

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named owners of lots in Braeloch Subdivision Sign, Seal and as Their Act and Deed deliver the within written Amended Covenants and Access Agreements to Braeloch Subdivision; and that (s)he with the other subscribing witness witnessed the execution thereof.

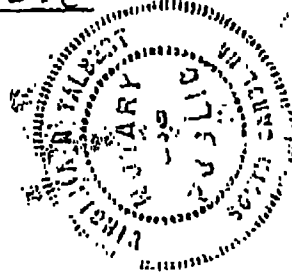
Stanley G. Lipman

SWORN to before me this
day of Oct, 1996.

Virginia R. Talbert (L.S.)
Notary Public for South Carolina

My Commission Expires:

My Commission Expires:
March 8, 2000



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STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named Stanley A. Lipman in Braeloch Subdivision Sign, Seal and as His Act and Deed deliver the within written Amended Covenants and Access Agreements to Braeloch Subdivision; and that (s)he with the other subscribing witness witnessed the execution thereof.

[Handwritten Signature]

SWORN to before me this 15th
day of October, 1996.

[Handwritten Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires June 9, 2002

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named M. E. Logan in Braeloch Subdivision Sign, Seal and as His/Her Act and Deed deliver the within written Amended Covenants and Access Agreements to Braeloch Subdivision; and that (s)he with the other subscribing witness witnessed the execution thereof.

[Handwritten Signature]

SWORN to before me this 15th
day of October, 1996.

[Handwritten Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires June 9, 2002

RECORDED 10-21-96 0930th
Peggy M. Whitman
REC'D AIKEN COUNTY

Lot 50

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AGREEMENT FOR COVENANTS AND RESTRICTIONS

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

WHEREAS Braselton I Association, Inc., a homeowners association, has this date granted and conveyed unto Shafter Builders, Inc., its successors and assigns, an easement certain property and described in said deed of Shafter Builders, Inc., its successors and assigns, an easement deed impinged certain conditions, covenants and restrictions on the property of Shafter Builders, Inc., and in further compliance with the terms of said conditions set forth in said deed of easement, the belowsigned as President of Shafter Builders, Inc. hereby imposes the following conditions, covenants and restrictions upon the that certain parcel containing 1.254 acres shown on a plat of survey prepared by Skyler R. Erickson, PLS, on January 11, 1993, and recorded in the records of Aiken County, South Carolina, in Misc. Book 788, page 131, (the plat), said conditions, covenants and restrictions to run with the land:

1. The location of the driveway crossing the property of Braselton I Association as set forth in the referenced deed of easement shall not be closer than ten (10) feet to the southeasternmost corner of the northernmost corner of Shafter Builders, Inc., a property shown on the plat.

2. Shafter Builders, Inc. agrees to landscape the referenced 1.254 acre parcel from Ashfall Drive to the improvements being constructed on said parcel. The driveway to be placed on the

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property serving the improvements being constructed shall be paved in concrete and shall be constructed in such a way that will not cause dirt and debris to be washed from Shaffer Builders, Inc.'s property onto Pintail Drive.

3. The improvements to be constructed on the parcel being served by the above referenced easement shall be a minimum of 2700 square feet of heated space plus an attached garage.

4. No more than one residential structure shall be constructed on the parcel without the written consent of Braselton I Association, Inc.

5. All of the covenants, restrictions, and requirements set forth in the records of Aiken County relating or in any way pertaining to the lots or parcels in Braselton I Subdivision as recorded in Miscellaneous Book 485, page 275, and Miscellaneous Book 485, page 281, Aiken County records, shall be binding upon the referenced parcel owned by Shaffer Builders, Inc. and being served by the referenced easement, just as if said covenants were set forth herein, and these covenants, restrictions, and requirements and all of the covenants, restrictions, and requirements set forth herein shall be covenants running with the land.

6. If any agreement, covenant or restriction contained herein shall be in conflict with any covenant or restriction contained in those referenced in Item 5 above, the covenant, restriction or agreement set forth herein shall control.

7. If Shaffer Builders, Inc. or any future owner or owners of the subject parcel violates or attempts to violate any of the

SHAFER BUILDERS, INC. 2 9873487256

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Page 130 =
SIGNATURES

conditions, restrictions, or covenants set forth herein, or set forth in that certain Deed of Easement referenced above, Braselton I Association, Inc. or its successors and assigns may bring an action in law or in equity as may be appropriate for damages or to enforce compliance with the requirements and conditions set forth herein and the owner or owners of said lot shall be liable in any such action for reasonable attorneys fees and costs incurred by Braselton I Association, Inc. or its successors or assigns, in the prosecuting of said action.

Witness the execution hereof by Don E. Shaffer as President of Shaffer Builders, Inc., a duly organized and existing South Carolina corporation, this 1st day of February, 1995.

Witnesses:

SHAFER BUILDERS, INC.

Shelly Craig
Scott C. Crailin

By: [Signature]

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Personally appeared before me the undersigned witness who being first duly sworn, deposes and says that s/he saw the within named Shaffer Builders, Inc. by Don E. Shaffer, President, sign, seal and as his act and deed, deliver the within Agreement for Covenants and Restrictions and that s/he with the other subscribing witness, witnessed the execution thereof.

SWORN TO BEFORE ME this
1st day of February, 1995.

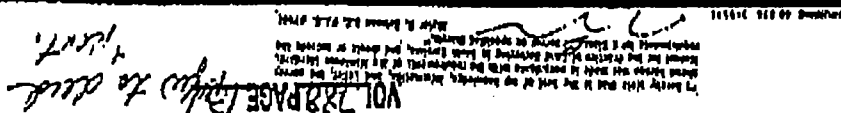
Scott C. Crailin (N.S.)
Notary Public for SC
My commission expires: 1/13/2004

Shelly Craig

RETURNED TO:

BODENHEIMER, BUISSE, HUNTER & GRIFFITH
ATTORNEYS AT LAW
P. O. DRAWER 2009
AIKEN, SC 29302-2009

RECORDED 4-13-95 at 1520 hrs.
[Signature]
Aiken County



STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN) ~~AMENDED COVENANTS TO~~
BRAELOCH SUBDIVISION

WHEREAS, Braeloch Subdivision located in Aiken County, South Carolina is governed by certain restrictive covenants dated October 1, 1996, recorded in Misc. Book 849, Page 37, records of Aiken County, S.C., and

WHEREAS, pursuant to Section 1B the covenants may be amended by two-thirds of the property owners of Braeloch; and

WHEREAS, the undersigned being more than two-thirds of the owners of all property in Braeloch Subdivision wish to amend the covenants.

NOW, WHEREFORE, the parties agree as follows:

1. That Section X(A) is eliminated and the following shall be in its place:

"Livestock will be limited to a maximum of six (6) horses, or one horse per acre, whichever is greater."

2. The property of Pamala and Mark Thompson located at 183 Gadwall Lane and more fully described in Title Book 1546, Page 156, records of Aiken County, South Carolina, is hereby made a part of Braeloch Subdivision and said property is hereby subjected to all of the restrictions and covenants herein. The owners of said property have signed this Amendment to consent thereto. They shall be subject to all covenants and all the benefits and restrictions in a similar fashion as to every other property in Braeloch Subdivision.

3. Section VII(A)(1) is hereby deleted and the following shall be substituted in its place:

"Such annual assessment or charge shall be set annually by the Board of Directors of the Association. The Board must receive the consent of two-thirds of the members of the Association in order to raise the annual assessment from that of the previous year."

LOT 51

Return Document to:
Arthur W. Rich, Attorney
205 Bamwell Ave. NW
Aiken, SC 29801
Attn: MOU 062

MISCELLANEOUS

JUL 11/03 PAGE 85

WITNESSES:

Deborah T. Canall
Mark J. [unclear]

PROPERTY OWNERS:

<u><i>George H. [unclear]</i></u>	Lot #: 16
<u><i>Margaret Robinson</i></u>	Lot #: 15
<u><i>Shirley Schweger</i></u>	Lot #: 14
<u><i>[unclear]</i></u>	Lot #: 13
<u><i>Charles W. Witten</i></u>	Lot #: 17
<u><i>Deborah Stroutman</i></u>	Lot #: 11
<u><i>Teresa Fisher</i></u>	Lot #: 18
<u><i>Therwood Miller</i></u>	Lot #: 18 } 2. lot
<u><i>George H. [unclear]</i></u>	Lot #: 19
<u><i>Denise Eisler</i></u>	Lot #: 20
<u><i>Denise Stephens</i></u>	Lot #: 8
<u><i>Blanche [unclear]</i></u>	Lot #: 7
<u><i>Lucretia [unclear]</i></u>	Lot #: 1
<u><i>[unclear]</i></u>	Lot #: 49
<u><i>Stanley G. Levine</i></u>	Lot #: 48
<u><i>Margaret Ray</i></u>	Lot #: 43
<u><i>Donnie Shaffer</i></u>	Lot #: 50
<u><i>Barry [unclear]</i></u>	Lot #: 2
<u><i>Barry [unclear]</i></u>	Lot #: 3
<u><i>[unclear]</i></u>	Lot #: 5

The Braeloch Homeowners Association Members are listed on the attached listing dated July 19, 2002.

MISCELLANEOUS
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WITNESSES:

Janet J. Carroll
[Signature]

PROPERTY OWNERS:

<u>Donna Kump</u>	Lot #: <u>10</u>
<u>[Signature]</u>	Lot #: <u>12</u>
<u>[Signature]</u>	Lot #: <u>24</u>
<u>Cathy Christensen</u>	Lot #: <u>24</u>
<u>[Signature]</u>	Lot #: <u>34</u>
<u>[Signature]</u>	Lot #: <u>33</u>
<u>Robert E. Edwards IV</u>	Lot #: <u>39</u>
<u>[Signature]</u>	Lot #: <u>38</u>
<u>[Signature]</u>	Lot #: <u>44</u>
<u>Sandra M. Sparks</u>	Lot #: <u>32</u>
<u>Charles H. Hunt Jr.</u>	Lot #: <u>31</u>
<u>[Signature]</u>	Lot #: <u>29</u>
<u>Barbara L. Bruce</u>	Lot #: <u>21</u>
<u>Michael E. Luga</u>	Lot #: <u>35</u>
<u>Janet J. Carroll</u>	Lot #: <u>37</u>
_____	Lot #: _____
_____	Lot #: _____
_____	Lot #: _____
_____	Lot #: _____
_____	Lot #: _____

WITNESS - [Signature]
[Signature]
(Witnesses as to
Barbara J. Carroll)

The Braeloch Homeowners Association Members are listed on the attached listing dated July 19, 2002.

MISCELLANEOUS
VUL 1143 PAGE 87

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN) PROBATE

PERSONALLY appeared before me, the undersigned witness, and made oath that (s)he saw the within-named owners (with the exception of Sandra J. Carroll) sign, seal and as owner's act and deed, deliver the within-written Amended Covenants and Access Agreements to Braeloch Subdivision that (s)he with the other subscribing witness hereto, witnessed the execution thereof.

Sandra J. Carroll

SWORN to before me this 9th

day of August 2002.

Marie O. Willey (LS)
NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: 3-30-05

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN) PROBATE

PERSONALLY appeared before me, the undersigned witness, and made oath that (s)he saw the within-named Sandra J. Carroll sign, seal and as her act and deed, deliver the within-written Amended Covenants and Access Agreements to Braeloch Subdivision that (s)he with the other subscribing witness hereto, witnessed the execution thereof.

Michael E. Logan

SWORN to before me this 9th

day of August 2002.

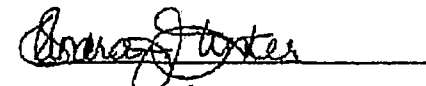
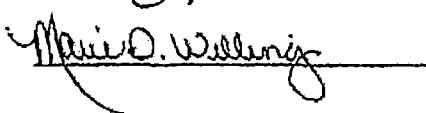
Marie O. Willey (LS)
NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: 3-30-05

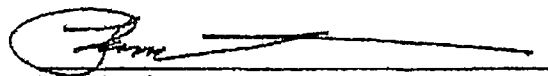
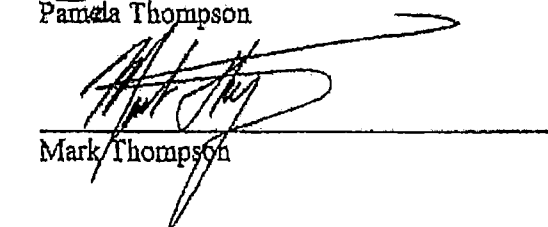
MISCELLANEOUS
VOL 1143 PAGE 88

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN) ACCEPTANCE OF RESTRICTIVE
COVENANTS OF BRAELOCH SUBDIVISION

We do hereby consent and agree to be bound by restrictive covenants of Braeloch Subdivision dated October 1, 1996, recorded in Misc. Book 849, at page 37, records of Aiken County, South Carolina as well as Amended Covenants to Braeloch Subdivision to be recorded herewith. We agree to be subject to all covenants and all the benefits and restrictions in a similar fashion as to every other property in Braeloch Subdivision.

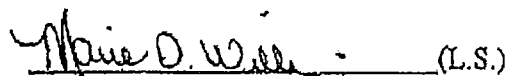
Dated this 9th day of August, 2002.


Pamela Thompson

Mark Thompson

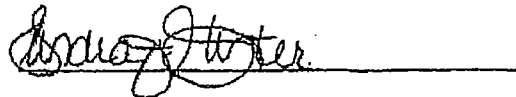
Sworn to before me this

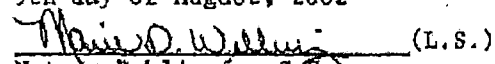
9th day of August, 2002

 (L.S.)
Notary Public for S.C.
My Commission Expires: 3-30-03
STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

PROBATE

Personally appeared before me, the undersigned witness, and made oath that (s)he saw the within-named Pamela Thompson and Mark Thompson sign, seal and as their act and deed, deliver the within Acceptance of Restrictive Covenants of Braeloch Subdivision and that (s)he with the other subscribing witness hereto, witnessed the execution thereof.



SWORN to before me this
9th day of August, 2002
 (L.S.)
Notary Public for S.C.
My Commission Expires: 3-30-05

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.)

d/b/a Braeloch Homeowner's Association,

Sandy Carroll individually and in her capacity

as a member of the Board of the Braeloch

Homeowner's Association, and Derrick

Boddy individually and in his capacity as a

member of the Board of the Braeloch

Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Case No.: 2018-CP-02-2208

AMENDED SUMMONS

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said pleading upon the subscribers at their offices, 1201 Main Street, Suite 1800, Post Office Box 1799, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

FINKEL LAW FIRM, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29201
(803) 765-2935

Columbia, South Carolina
February 28, 2020

s/ Charles A. Krawczyk
Charles A. Krawczyk (SC Bar No.:16832)
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Richard Viviano and Johnette Gunter,	)	Case No.: 2018-CP-02-2208
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	AMENDED COMPLAINT
Fulton Jeffers and Braeloch I Association, Inc.)	)	
d/b/a Braeloch Homeowner's Association,	)	
Sandy Carroll individually and in her capacity	)	
as a member of the Board of the Braeloch	)	
Homeowner's Association, and Derrick	)	
Boddy individually and in his capacity as a	)	
member of the Board of the Braeloch	)	
Homeowner's Association,	)	
	)	
Defendants.	)	

The Plaintiffs, Richard Viviano and Johnette Gunter, by and through his undersigned counsel, would allege as follows:

PARTIES AND JURISDICTION

1. The Plaintiffs, Richard Viviano and Johnette Gunter, are citizens and residents of Aiken County, South Carolina.
2. Upon information and belief, Defendant Fulton Jeffers is a citizen and resident of Maryland. Upon further information and belief, Defendant Fulton Jeffers owns property in Aiken County, South Carolina.
3. Upon information and belief, Defendant Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association (hereinafter "HOA") is, upon information and belief, a domestic corporation, registered and with its principal place of business in South Carolina, who at all times relevant to this action was engaged in business in South Carolina.

4. Upon information and belief, Defendant HOA is responsible for maintaining amenities and administering and enforcing the Covenants and Access Agreements to the Braeloch Subdivision situated in Aiken County.

5. Plaintiffs are owners of two tracts of land in the Braeloch subdivision and are considered a member of the Defendant HOA.

6. Upon information and belief, Defendant Sandy Carroll is a citizen and resident of South Carolina.

7. Upon information and belief, Defendant Sandy Carroll is a member of the board of Defendant HOA or was a member of the HOA board when some of the events at issue took place.

8. Upon information and belief, Sandy Carroll was acting in her individual capacity for some of the actions complained about and in her capacity as a member of the HOA Board in some of the actions complained about.

9. Upon information and belief, Defendant Derrick Boddy is a citizen and resident of South Carolina.

10. Upon information and belief, Defendant Derrick Boddy is a member of the board of Defendant HOA or was a member of the HOA board when the events at issue took place.

11. Upon information and belief, Derrick Boddy was acting in his individual capacity for some of the actions complained about and in his capacity as a member of the HOA Board in some of the actions complained about.

12. Upon information and belief, Defendant Fulton Jeffers owns a tract of land in the Braeloch subdivision and is considered a member of the Defendant HOA.

13. This Court has jurisdiction over the parties and venue is proper pursuant to S.C. Code 15-7-30.

FACTUAL BACKGROUND

14. In or around 1987, the Defendant HOA was formed for the purpose of maintaining amenities and administering and enforcing the Covenants and Access Agreements to the Braeloch Subdivision situated in Aiken County.

15. In or around September of 1996, all persons who owned a tract of land in the Braeloch Subdivision executed the Braeloch Subdivision Protective Covenants, which delineated covenants, including easements, which ran with the land were binding on all parties and granted membership rights to the owners. Amendments were made to the protective covenants in August 2002.

16. Specifically, the Braeloch Subdivision Protective Covenants, (attached to the original complaint as Exhibit A and made part to this Amended complaint by reference) states that the following easements shall be established on each tract of land:

- a. A pedestrian and horse riding trail around the perimeter of the subdivision.
- b. Front- Fifteen (15) feet for utilities and drainage.
- c. Rear- twenty (20) feet for a pedestrian and horse riding trail, fifteen (15) feet of which shall be used for utilities and drainage.
- d. Side- Ten (10) feet for utilities and drainage.

17. Plaintiffs are the owners of Lots 47 and 49, which were deeded to them subject to all the easements and restrictions in the Braeloch Subdivision Protective Covenants.

18. As initially developed Lot 49 and 47 were exterior Lots, meaning the rear of the lots was on the perimeter of the subdivision, which required a 20 foot easement along the rear of their property to make the pedestrian and horse riding trail around the perimeter of the subdivision.

19. Upon information and belief, in 2002 the owners of Lot 51 of the Braeloch Subdivision, Mr. and Mrs. Thompson, petitioned to join the Defendant HOA.

20. Upon information and belief, in or around August of 2002, two-thirds of the members of the Defendant HOA approved Mr. and Mrs. Thompson's petition to join the Defendant HOA and their property, Lot 51, became subject to the same covenants, encumbrances, and easements stated in Braeloch Subdivision Protective Covenants.

21. Upon information and belief, subsequent to Lot 51's admission into the Defendant HOA, on or about September 5, 2002, Mr. and Mrs. Thompson sold Lot 51 to Ruth E. Kipnis subject to all easements and restrictions in the Braeloch protective Covenants.

22. Upon information and belief, on or about May 25, 2012, Ruth E. Kipins transferred Lot 51 to Defendant Jeffers subject to the Amended Covenants to Braeloch Subdivision, including but not limited to the perimeter pedestrian and horse-riding trail easement as described in the covenants.

23. Prior to Lot 51's admission to the Braeloch subdivision, Lot 47 and Lot 49, Plaintiffs' lots, were perimeter lots and thus the perimeter horse trail easement was created along the rear of the two properties, as they were the perimeter of the subdivision.

24. Upon the admission of Lot 51 to the Braeloch subdivision, Lot 47 and 49 no longer have boundaries located on the perimeter of the subdivision. Lot 51's south / southeast boundary line is located on the perimeter of the subdivision, and is subject to the pedestrian and horse-riding trail easement on the perimeter as created by the Covenants to Braeloch Subdivision.

25. However, despite the fact that Lots 47 and 49 are no longer located on the perimeter of the subdivision, Defendant Jeffers, as well as other Braeloch homeowners, continues to utilize the boundary lines as if there exists a perimeter easement, without permission of the Plaintiffs.

26. Upon further information and belief in order to reach a barn located on Lot 51, Defendant Jeffers travels across Lot 49 without the permission of the Plaintiffs.

27. Both of Plaintiffs' properties are subject to the easements in the Braeloch Subdivision Protective Covenants, described in Paragraph 16.

28. The Defendant HOA is responsible for enforcing the covenants and easements described in the Braeloch Subdivision Protective Covenants, (and summarized in Paragraph 16) on all Lots in the Braeloch subdivision situated in Aiken County which are members.

29. To date, the easement proscribed in the Braeloch Subdivision Protective Covenants, have not been created and enforced on Lot 51, specifically, the perimeter pedestrian and horse riding trail easement has not been moved to Lot 51, which is now the perimeter of the subdivision.

30. Currently, because the perimeter pedestrian and horse riding trail easement has not been moved to the perimeter of Lot 51, as it should be per the Braeloch Subdivision Protective Covenants, there exists a riding trail access easement on the north boundary of Lot 49, which belongs to Plaintiffs.

31. Upon information and belief, when the pedestrian and horse riding trail easement created by the Braeloch Subdivision Protective Covenants, is enforced on Lot 51 and said trail easement is moved to the south / southeast boundary of Lot 51, there will be no use for the access easement on the north boundary of Lot 49.

32. Upon information and belief Sandy Carroll was a member of the HOA board when lot 51 was admitted into the association.

33. Upon information and belief Sandy Carol and/or Derrick Boddy were charged with overseeing that Lot 51 complied with the covenants including but not limited to filing new amended plats showing the location of all easements on lot 51.

34. Upon information and belief Sandy Carroll and/or Derrick Boddy were friends with the Thompsons who owned lot 51, and as a favor to their friends intentionally failed to record the new plat with the easements for lot 51 to the detriment of all of the members of the association including Plaintiffs.

35. Upon information and belief Sandy Carroll and/or Derrick Boddy, while Board members of the HOA acquired new property and annexed it into Braeloch subdivision without consulting the Members of the association or getting HOA approval.

36. Upon information and belief Sandy Carroll, while a board member of the association closed the existing horse trail easement on her property, moved the easement and recorded a new plat of the subdivision to her own personal advantage without express approval of the HOA or the members of the association.

37. Upon information and belief, when the dispute about the easement on the Plaintiffs' property arose, Sandy Carroll and/or Derrick Boddy knew of the intentional and inappropriate actions taken by Sandy Carroll and/or Derrick Boddy as members of the association.

38. Upon information and belief, Sandy Carroll and/or Derrick Boddy are closer personal friends with defendant Fulton Jeffers.

39. Upon information and belief Sandy Carroll and/or Derrick Boddy have conspired in verbal and written communication with each other and Fulton Jeffers in order to harm the Plaintiffs in the following ways:

- a. To hamper the Plaintiffs negotiations with Fulton Jeffers on a potential settlement or solution to the easement question.

- b. To oppose the Plaintiffs' plans for the proper and legal use of their property and property rights including the installation of their driveway, construction of their home, interferences with third parties on their property.
- c. To selectively enforce certain covenants against the Plaintiffs while ignoring other similar violations by other members.
- d. Generally working in concert to harm the Plaintiffs in any way that they could.
- e. Rather than help foster settlement negotiations, working in concert to attack the Plaintiffs in any way possible.

40. Upon information and belief, no other member of the Association has been treated the way the Plaintiffs have been treated.

41. The HOA continues to treat Plaintiffs unequally by enforcing certain covenants and architectural rules that have not been applied to other members.

42. Upon information and belief, there exists currently many members of the association who are openly in violation of the covenants in the same or similar manner as the Plaintiffs who have not had action taken against them by the Association.

43. Upon information and belief, the Association has a history of selective or non-enforcement of the covenants binding the property.

44. Upon information and belief, members of the HOA have now entered upon the property of Plaintiff and installed barriers keeping Plaintiffs from the use and enjoyment of their property.

FOR A FIRST CAUSE OF ACTION
AGAINST DEFENDANT FULTON JEFFERS AND THE HOA
 (Trespass)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

45. Plaintiffs are the legal owners and possessors of Lot 49 in the Braeloch subdivision situated in Aiken.

46. Defendants Fulton Jeffers and the HOA has voluntarily and intentionally entered onto Lot 49 and Lot 47 in the Braeloch subdivision, without the permission of the Plaintiffs.

47. Defendants Jeffers has voluntarily an intentionally entered onto Lot 49 in the rear to obtain access to his barn.

48. Defendant HOA has entered upon the property of Plaintiffs and improperly installed barriers on their property keeping them from full use and enjoyment of their property.

49. As a result of Defendants Jeffers\ and HOA's trespass on Plaintiffs' property, Plaintiffs are entitled to compensatory, nominal, and punitive damages in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION
AGAINST DEFENDANT BRAELOCH I ASSOCIATION, INC.
 (Negligence)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

50. Defendant HOA owes a duty to its members to enforce the covenants, restrictions, encumbrances, and easements on all properties subject to the Braeloch Subdivision Protective Covenants.

51. Defendant HOA has breached that duty by failing to enforce the easements as required by the Braeloch Subdivision Protective Covenants, against Lot 51 owned by Defendant Fulton Jeffers.

52. As a direct and proximate result of Defendant HOA's breach of its duty previously stated, Plaintiffs has suffered consequential damages, including attorney's fees, to which they are entitled to relief.

FOR A THIRD CAUSE OF ACTION
AGAINST DEFENDANT BRAELOCH I ASSOCIATION, INC.
(Breach of Contract)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

53. The Braeloch Subdivision Protective Covenants, constitutes a binding contract entered into by the Plaintiffs and Defendants, in which Defendant HOA is required to enforce the covenant and restrictions contained therein.

54. The Braeloch Subdivision Protective Covenants, were offered by Defendant HOA to, and accepted by, Plaintiffs and Defendant Jeffers in their agreeing to be bound by the Braeloch Subdivision Protective Covenants.

55. In agreeing to be bound by the Braeloch Subdivision Protective Covenants, Plaintiffs and Defendants exchanged valuable consideration and manifested their intent to be bound by the Braeloch Subdivision Protective Covenants.

56. The Contract, the Braeloch Subdivision Protective Covenants, expressed the true intent of the parties to establish a perimeter pedestrian and horse trail easement, and is fair, just, and equitable.

57. Defendant HOA has breached their contractual obligation in failing to enforce the perimeter pedestrian and horse trail easement on Defendant Jeffers' property, Lot 51.

58. As a direct and proximate result of the Defendant HOA's breach, Plaintiffs have suffered actual, special, and consequential damages.

59. Plaintiffs pray that this Court Order specific performance by the Defendant HOA to impose upon Defendant Jeffers' property, Lot 51, the perimeter pedestrian and horse trail easement.

FOR A FOURTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Declaratory Judgment S.C. Code Ann § 15-53-10 et seq.)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

60. Plaintiffs and Defendant HOA are parties to the Braeloch Subdivision Protective Covenants, which constitutes a contract.

61. Under the Braeloch Subdivision Protective Covenants, the Defendant HOA must enforce the covenants, including easements on each property within the Defendant HOA.

62. Defendant Jeffers' property, Lot 51 of the Braeloch Subdivision situated in Aiken, is subject to the Braeloch Subdivision Protective Covenants.

63. Defendant HOA has failed to enforce the easements delineated in the Braeloch Subdivision Protective Covenants, on Lot 51, specifically, Defendant HOA has failed to enforce the pedestrian and horse riding trail perimeter easement on Lot 51 despite the fact that its south /southeastern border is the perimeter of the subdivision.

64. Defendant Jeffers continuously trespasses on Plaintiffs' property, Lot 49 in the Braeloch subdivision.

65. As such, Plaintiffs request declaratory relief from this court that the Defendant HOA is required to enforcement the easements in the Braeloch Subdivision Protective Covenants, by relocating the pedestrian and horse riding trail perimeter easement to the south / southeastern boundary of Lot 51, removing the access easement on the northern boundary of Lot 49, and

injunctive relief prohibiting Defendant Jeffers from continuously trespassing on Plaintiffs' property.

FOR A FIFTH CAUSE OF ACTION
AGAINST DEFENDANT CARROLL AND DEFENDANT BODDY
(Breach of Fiduciary Duty)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

66. Upon information and belief Defendants are or were members of the Defendant HOA board.

67. Defendants were acting as a fiduciary of the Plaintiffs in their position on Defendant HOA board.

68. Defendants breached their fiduciary duty to the Plaintiff by failing to enforce the Covenants and Access Agreements put in place by the Defendant HOA.

69. Defendants breached their fiduciary duty to the Plaintiff by failing to enforce the Covenants and Access Agreements in a way that favored their personal interests to the detriment of the members of the HOA including Plaintiffs.

70. Defendants breached their fiduciary duty to the Plaintiff by failing to enforce the Covenants and Access Agreements and acting in a way that specifically targeted Plaintiffs for selective enforcement and intentional harm.

71. Plaintiffs relied on the HOA board as well as Carroll and Boddy to enforce the Covenants and Access Agreements set forth by the Defendant HOA.

72. Defendant's failure to enforce the Covenants and Access Agreements and intentional acts caused the Plaintiffs damages.

FOR A SIXTH CAUSE OF ACTION
AGAINST DEFENDANT CARROLL, JEFFERS AND BODDY
 (Civil Conspiracy)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

73. Defendants have an unlawful objective by conspiring to not enforce the Covenants and Access Agreements set forth by the HOA.

74. Defendants have an unlawful objective to injure the Plaintiffs by conspiring to specifically target the Plaintiffs regarding the enforcement of the Covenants and Access Agreements set forth by the HOA.

75. Defendants have an unlawful objective to injure the Plaintiffs by conspiring to take measures to thwart efforts by Plaintiffs to negotiate a resolution to the easement dispute, to construct their home and to build their driveway, to have quiet use and enjoyment of their property.

76. Defendants failed to enforce the Covenants and Access Agreements.

77. Together Defendants took actions for the purpose and with the specific intent to harm the Plaintiffs

78. Defendants' actions resulted in special damages to Plaintiffs.

FOR A SEVENTH CAUSE OF ACTION
AGAINST DEFENDANT BRAELOCH I ASSOCIATION, INC.
 (Declaratory Judgment Dissolving Easements, Covenants)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

79. Plaintiffs and Defendant HOA are parties to the Braeloch Subdivision Protective Covenants, which constitutes a contract.

80. Under the Braeloch Subdivision Protective Covenants, the Defendant HOA must enforce the covenants, including easements on each property within the Defendant HOA.

81. Upon information and belief Defendant HOA has failed to enforce or has selectively enforced the covenants regarding easements in the subdivision to the extent that the easements and covenants have no effect and has been waived by the Association.

82. As such, Plaintiffs request declaratory relief from this court that the Defendant HOA has waived the rights to enforce the easement/covenants as to Plaintiffs' property and to have the pedestrian and horse riding easement dissolved on the Plaintiffs' property.

RELIEF REQUESTED

Wherefore, Plaintiffs pray the Court to hold Defendants liable for the conduct complained of herein, to enter judgment against Defendants and in favor of Plaintiffs, and to award the following relief:

- a. Actual, nominal, and consequential damages including attorney's fees and costs against Defendant Jeffers, Defendant HOA, Defendant Carroll, and Defendant Boddy in an amount to be determined by the trier of fact;
- b. Punitive damages against Defendant Jeffers, Carroll and Boddy in an amount to be determined by the trier of fact;
- c. Injunctive relief against Defendant Jeffers and the HOA preventing them from trespassing on Plaintiffs' property;
- d. Injunctive relief against Defendant HOA and Defendant Jeffers ordering that the pedestrian and horse riding perimeter trail easement be removed from Lots 47 and 49 and relocated to Lot 51's south / southeastern boundary, which is located on the perimeter of the subdivision or in the alternative that the pedestrian and horse riding easement on Plaintiffs' property be dissolved.;
- e. Injunctive relief ordering that the access easement located on the northern boundary of Lot 49 and Lot 48 is removed;
- f. Specific Performance of Defendant HOA to impose the pedestrian and horse riding perimeter trail easement on Lot 51; and
- g. For all other relief this Honorable Court deems just and proper.

(Signature Page to Follow)

Respectfully submitted,

FINKEL LAW FIRM LLC
Post Office Box 1799
1201 Main Street, Suite 1800
Columbia, South Carolina 29202
(803) 765-2935

s/ Charles A. Krawczyk
Charley A. Krawczyk (SC Bar No.:16832)
Attorney for Plaintiffs

Columbia, South Carolina
February 28, 2020

State of South Carolina	)	
	)	In the Court of Common Pleas
County of Aiken	)	
Richard Viviano and Johnette	)	
Gunter,	)	Civil Action No. 2018CP0202208
	)	
Plaintiffs,	)	ANSWER TO AMENDED COMPLAINT
	)	AND COUNTERCLAIMS
vs.	)	
	)	
Fulton Jeffers and Braeloch I	)	
Association, Inc. d/b/a Braeloch	)	
Homeowner's Association, Sandy	)	
Carroll individually and in her	)	
capacity as a member of the Board	)	
of the Braeloch Homeowner's	)	
Association, and Derrick Boddy	)	
individually and in his capacity as	)	
a member of the Board of the	)	
Braeloch Homeowner's Association,	)	
	)	
Defendants.	)	

COMES NOW THE DEFENDANT, Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association, answering the Plaintiffs' Amended Complaint and presenting its Counterclaims herein, and respectfully shows unto the Court, as follows:

FOR A FIRST DEFENSE

1. This Defendant denies each and every allegation set forth in the Amended Complaint which is not hereafter specifically admitted or to which a response is not otherwise provided.
2. This Defendant admits the allegations set forth in Paragraph 1 of the Amended Complaint.

3. With regard to the allegations set forth in Paragraph 2 of the Amended Complaint this Defendant admits that the Defendant Fulton Jeffers owns property in Aiken County, South Carolina, but is without sufficient information or knowledge at the present time to admit or deny those allegations pertaining to his citizenship or residency.

4. This Defendant admits the allegations set forth in Paragraphs 3 of the Amended Complaint.

5. With respect to Paragraph 4 of the Amended Complaint this Defendant admits that it has certain duties and responsibilities as set forth by the Protective Covenants and other applicable law and regulation. This Defendant, however, denies that it has failed to fulfill those duties and responsibilities.

6. This Defendant admits the allegations set forth in Paragraphs 5 and 6 of the Amended Complaint.

7. With regard to the allegations set forth in Paragraphs 7 and 8 of the Amended Complaint this Defendant admits that Mrs. Carroll is a former member of the Defendant HOA Board, and undertook certain actions in her official capacity while serving on the Board.

8. With regard to the allegations set forth in Paragraphs 9, 10 and 11 of the Amended Complaint this Defendant admits that Mr. Boddy is a citizen and resident of Aiken County, South Carolina, and further admits that he is a former member of the Defendant HOA Board and undertook certain actions in her official capacity while serving on the Board.

9. This Defendant admits the allegations set forth in Paragraph 12 of the Amended Complaint.

10. The allegations set forth in Paragraph 13 of the Amended Complaint constitute

legal conclusions to which a response is not required.

11. With regard to the allegations set forth in Paragraphs 14, 15 and 16 of the Amended Complaint this Defendant admits that the Braeloch Subdivision, Aiken County, South Carolina Protective Covenants (the "Protective Covenants") were enacted, executed and recorded on or about September and October 1996, but respectfully requests that the Court make reference to those Protective Covenants to identify the signatories thereto and the exact terms and provisions set forth therein. This Defendant further admits that certain amendments have since been made to the Protective Covenants.

12. This Defendant admits the allegations set forth in Paragraph 17 of the Amended Complaint.

13. With regard to the allegations set forth in Paragraph 18 of the Amended Complaint this Defendant admits that Lots 49 and 47 are subject to certain restrictions and easements set forth in the Protective Covenants and any other documents and instruments made properly of record.

14. As to the allegations set forth in Paragraphs 19, 20, 21 and 22 of the Amended Complaint this Defendant admits that in 2002 certain property owned by Pamela and Mark Thompson became subject to the Protective Covenants and was then designated as Lot 51 in the Braeloch subdivision. This Defendant further admits that Lot 51 has subsequently been conveyed to other individuals subject to the Protective Covenants, and further that Lot 51 is currently owned by the Defendant Jeffers.

15. With regard to the allegations set forth in Paragraph 23 of the Amended Complaint this Defendant admits that prior to the creation of Lot 51, Lots 47 and 49 were located

on the eastern and southern edge or border of the Braeloch subdivision. This Defendant further admits that Lot 51 currently forms part of the south and southeastern border of the subdivision.

16. As to the allegations set forth in Paragraph 24 of the Amended Complaint this Defendant admits that Lots 47 and 49 no longer have boundaries along the south and southeastern edge or border of the subdivision. This Defendant further denies the remaining allegations in said Paragraph, as alleged.

17. With regard to the allegations set forth in Paragraph 25 of the Amended Complaint this Defendant admits that Lots 47 and 49 are subject to the current terms and provisions of the Protective Covenants, including easements of record. This Defendant further and affirmatively alleges that the Plaintiffs do not have the authority or a right to either grant or deny permission to anyone to use the pedestrian and horse riding trail and easement located upon said Lots.

18. This Defendant is without sufficient information or knowledge at the present time to admit or deny the allegations set forth in Paragraph 26 of the Amended Complaint.

19. This Defendant admits the allegations set forth in Paragraphs 27 of the Amended Complaint.

20. As to the allegations set forth in Paragraph 28 of the Amended Complaint this Defendant admits that it has certain duties and responsibilities as set forth by the Protective Covenants and other applicable law and regulation. This Defendant, however, denies that it has failed to fulfill those duties and responsibilities.

21. As to the allegations set forth in Paragraph 29 of the Amended Complaint this Defendant admits that the pedestrian and horse riding trail and easement located on Lots 47 and 49 has not been eliminated and / or moved to Lot 51, nor has such a trail and easement been created

with respect to Lot 51.

22. As to the allegations set forth in Paragraph 30 of the Amended Complaint this Defendant admits that the pedestrian and horse riding trail and easement located on Lots 47 and 49 has not been eliminated and / or moved to Lot 51, and denies that it should be so eliminated and / or moved. With regard to the remaining allegations in said Paragraph the Defendant admits that Lot 49 is subject to the current Protective Covenants, including lawful easements made properly of record.

23. This Defendant denies the allegations set forth in Paragraph 31 of the Amended Complaint, and affirmatively alleges that the subject trail and easement has not and should not be moved to Lot 51, and further Lot 49 remains subject to the Protective Covenants and all lawful easements of record.

24. This Defendant admits the allegations set forth in Paragraph 32 of the Amended Complaint.

25. With respect to the allegations set forth in Paragraph 33 of the Complaint this Defendant admits that the Defendants Carroll and Boddy, while members of the HOA Board, were charged with complying with the Protective Covenants of the Braeloch Subdivision, as well as the by-laws of the HOA Board.

26. This Defendants denies the allegations set forth in Paragraphs 34, 35, 36 and 37 of the Amended Complaint.

27. This Defendant is without sufficient information or knowledge at the present time to admit or deny the allegations set forth in Paragraph 38 of the Amended Complaint.

28. This Defendant denies the allegations set forth in Paragraph 39 of the Amended

Complaint.

29. With respect to the allegations set forth in Paragraph 40 of the Amended Complaint this Defendant denies that it has treated the Plaintiffs differently than any other homeowner or resident of the Braeloch community.

30. This Defendant denies the allegations set forth in Paragraphs 41, 42, 43 and 44 of the Amended Complaint.

31. This Defendant admits the allegations set forth in Paragraph 45 of the Complaint.

32. This Defendant denies the allegations set forth in Paragraphs 46 as they pertain to this Defendant.

33. This Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 47 of the Amended Complaint.

34. This Defendant denies the allegations set forth in Paragraphs 48 and 49 of the Amended Complaint.

35. As to the allegations set forth in Paragraph 50 of the Amended Complaint this Defendant admits that it has certain duties and responsibilities as set forth by the Protective Covenants and other applicable law and regulation. This Defendant, however, denies that it has failed to fulfill those duties and responsibilities.

36. This Defendant denies the allegations set forth in Paragraphs 51 and 52 of the Amended Complaint.

37. As to the allegations set forth in Paragraph 53 of the Amended Complaint this Defendant admits that it has certain duties and responsibilities as set forth by the Protective Covenants and other applicable law and regulation. This Defendant, however, denies that it has

failed to fulfill those duties and responsibilities.

38. This Defendant admits the allegations set forth in Paragraphs 54 and 55 of the Amended Complaint.

39. This Defendant denies the allegations set forth in Paragraphs 56, 57, 58 and 59 of the Amended Complaint.

40. This Defendant admits the allegations set forth in Paragraph 60 of the Amended Complaint.

41. With respect to the allegations set forth in Paragraph 61 of the Amended Complaint this Defendant admits that it has certain duties and responsibilities as set forth by the Protective Covenants and other applicable law and regulation. This Defendant, however, denies that it has failed to fulfill those duties and responsibilities.

42. This Defendant admits the allegations set forth in Paragraph 62 of the Amended Complaint.

43. This Defendant denies the allegations set forth in Paragraph 63 of the Amended Complaint.

44. This Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 64 of the Complaint.

45. With regard to the allegations set forth in Paragraph 65 of the Amended Complaint this Defendant admits that the Plaintiffs seek certain declaratory relief as part of this civil action, but denies that the Plaintiffs are entitled to such relief as to this Defendant.

46. The allegations set forth in Paragraphs 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 and 78 do not pertain to this Defendant and do not require a response from this Defendant.

47. This Defendant admits the allegations set forth in Paragraph 79 of the Amended Complaint.

48. With respect to the allegations set forth in Paragraph 80 of the Amended Complaint this Defendant admits that it has certain duties and responsibilities as set forth by the Protective Covenants and other applicable law and regulation. This Defendant, however, denies that it has failed to fulfill those duties and responsibilities.

49. This Defendant denies the allegations set forth in Paragraph 81 of the Amended Complaint.

50. With regard to the allegations set forth in Paragraph 82 of the Amended Complaint this Defendant admits that the Plaintiffs seek certain declaratory relief as part of this civil action, but denies that the Plaintiffs are entitled to such relief as to this Defendant.

FOR A SECOND DEFENSE

51. The Plaintiffs' Amended Complaint fails to state facts sufficient to constitute a cause of action against this Defendant.

FOR A THIRD DEFENSE

52. The Plaintiffs' claims and causes of action against this Defendant are barred by the applicable statute of limitations.

FOR A FOURTH DEFENSE

53. The Plaintiffs' claims and causes of action against this Defendant are barred by the Doctrine of Laches.

FOR A FIFTH DEFENSE

54. The Plaintiffs' claims and causes of action against this Defendant are barred by

the Doctrine of Waiver.

FOR A SIXTH DEFENSE

55. The Plaintiffs' claims and causes of action against this Defendant are barred by the Doctrine of Estoppel.

FOR A SEVENTH DEFENSE

56. The Plaintiffs' claims and causes of action against this Defendant are barred by the Doctrine of Unclean Hands.

FOR AN EIGHTH DEFENSE

57. The Plaintiffs' claims and causes of action are barred in whole, or any of their alleged and damages claimed, should be limited under the Doctrine of Comparative Negligence.

FOR A NINTH DEFENSE

58. The Plaintiffs' claims and causes of action are barred by the Business Judgment Doctrine.

**FOR A TENTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

59. This Defendant realleges those matters set forth above.

60. Both or either of the Plaintiffs have breached and violated the terms and provisions of the Protective Covenants.

61. This Defendant has sustained certain damages as a result of such breach.

62. This Defendant is informed and believes that it is entitled to judgment against the Plaintiffs, jointly and severally, for such damages as well as the recovery of its attorney's fees, costs and expenses.

**FOR AN ELEVENTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

63. This Defendant realleges those matters set forth above.

64. The Plaintiffs have a duty to use due care with respect to the care and maintenance of their property also with regard to the construction of any access to, dwellings or buildings thereon.

65. The Plaintiffs are liable for the acts of their agents, employees, representatives and / or contractors and to the extent that said agents, employees, representatives and / or contractors perform care, maintenance and / or construction services for the benefit of the Plaintiffs.

66. Either or both of the Plaintiffs have breached their duty to this Defendant.

67. Either or both of the Plaintiffs, whether or not individually or through their agents, employees, representatives and / or contractors have been negligent, careless, reckless and / or wanton by improperly using the pedestrian and horse riding easement and trail, by allowing the operation of vehicles, including heavy trucks, upon the easement and trail, by obstructing and otherwise interfering with other's use and enjoyment of the easement and trail and by failing to use that degree of care and caution a reasonable person would use under similar circumstances.

68. This Defendant has sustained certain damages as a direct and proximate result of the Plaintiffs' actions, either jointly or severally, as well as the actions of the Plaintiffs' agents, employees, representatives and / or contractors.

69. This Defendant is informed and believes that it is entitled to judgment against the Plaintiffs, jointly and severally, for such actual damages.

**FOR A TWELFTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

70. This Defendant realleges those matters set forth above.

71. Either or both of the Plaintiffs, by or through their agents, employees, representatives and / or contractors have trespassed upon the easement and trail.

72. This Defendant has sustained certain damages as a result of such trespass.

73. This Defendant is informed and believes that it is entitled to judgment against the Plaintiffs, jointly and severally, for such actual damages.

**FOR A THIRTEENTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

74. This Defendant realleges those matters set forth above.

75. This Defendant is entitled to immediate temporary and eventually permanent injunctive relief against the Plaintiffs and with respect to their violation of the Protective Covenants.

NANCE, MCCANTS & MASSEY

s / Clarke W. McCants, III
Clarke W. McCants, III
Amy P. Shumpert
Clarke W. McCants, IV
Post Office Box 2881
Aiken, S.C. 29802
(803) 649-6200 Ext. 3
mccants3rd@aol.com

Dated: April 6, 2020

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

RICHARD VIVIANO and JOHNETTE GUNTER,

Plaintiffs,

v.

FULTON JEFFERS and BRAELOCH 1
ASSOCIATION, INC. D/B/A BRAELOCH
HOMEOWNER'S ASSOCIATION,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2018-CP-02-2208

**ANSWER OF DEFENDANT FULTON
JEFFERS TO PLAINTIFFS'
AMENDED COMPLAINT**

COMES NOW THE DEFENDANT, FULTON JEFFERS ("Jeffers"), answering the Plaintiffs' Complaint and presenting its Counterclaims respectfully shows unto the Court as follows:

FIRST DEFENSE

Jeffers denies each and every allegation of Plaintiffs' Complaint that are not hereinafter specifically and expressly admitted. Jeffers answers the specific allegations contained in the Plaintiffs' Complaint ("Complaint") in numbered paragraphs which correspond with the numbered paragraphs of the Plaintiffs' Complaint as follows:

1. Jeffers admits the allegations contained in Paragraph 1 of the Complaint.
2. Jeffers admits the allegations contained in Paragraph 2 of the Complaint insofar as it alleges Jeffers owns real property in Aiken County, South Carolina. Jeffers denies the allegation contained in Paragraph 2 of the Complaint that he is a resident of Maryland. By way of further response, Jeffers states he is a resident of Virginia.
3. Jeffers admits the allegations contained in Paragraph 3 of the Complaint.
4. Jeffers admits the allegations contained in Paragraph 4 of the Complaint.
5. Jeffers denies the allegations contained in Paragraph 5 of the Complaint, but admits

Plaintiffs are considered members of the Defendant HOA.

6. Jeffers admits the allegations contained in Paragraph 6 of the Complaint.

7. Jeffers admits the allegations contained in Paragraph 7 of the Complaint only insofar as it alleges Defendant Sandy Carroll is a former member of the HOA board and undertook certain actions in such capacity.

8. Jeffers admits the allegations contained in Paragraph 8 of the Complaint only insofar as it alleges Defendant Sandy Carroll is a former member of the HOA board and undertook certain actions in such capacity.

9. Jeffers admits the allegations contained in Paragraph 9 of the Complaint.

10. Jeffers admits the allegations contained in Paragraph 10 of the Complaint only insofar as it alleges Defendant Derrick Boddy is a former member of the HOA board and undertook certain actions in such capacity.

11. Jeffers admits the allegations contained in Paragraph 11 of the Complaint only insofar as it alleges Defendant Derrick Boddy is a former member of the HOA board and undertook certain actions in such capacity.

12. Jeffers admits the allegations contained in Paragraph 12 of the Complaint.

13. Jeffers admits the allegations contained in Paragraph 13 of the Complaint.

14. Jeffers admits the allegations contained in Paragraph 14 of the Complaint only insofar as it alleges the Defendant HOA was formed for the purposes expressly set forth in the Braeloch Subdivision Protective Covenants ("Covenants") recorded in the public records which Covenants speak for themselves.

15. Jeffers admits the allegations contained in Paragraph 15 of the Complaint.

16. Jeffers admits the allegations in Paragraph 16 of the Complaint only insofar as it alleges the Covenants created certain easements if shown on the plats but denies that any such easements were imposed on the Jeffers Property.

17. Jeffers denies the allegations contained in Paragraph 17 of the Complaint. By way of further response, Jeffers states that Lot 49 was transferred by Plaintiffs to Mark Spatola and Mihaela Ionescu on

April 1, 2020.

18. Jeffers admits the allegations contained in Paragraph 18 of the Complaint only insofar as it alleges Lots 47 and 49 are subject to the Covenants and other matters of record.

19. Jeffers admits the allegations contained in Paragraph 19 of the Complaint.

20. Jeffers admits the allegations contained in Paragraph 20 of the Complaint only insofar as it alleges two-thirds of the members of the Defendant HOA approved the petition to join the Defendant HOA and, as a result, Lot 51 became subject to the Covenants to the extent intended by the parties thereto but denies any easements were created at that time on Lot 51. Jeffers further alleges that the deed referenced in the annexation of Lot 51 and the plat referenced therein being recorded in the Aiken County Register of Deeds Office in Plat Book 33, at Page 302 shows no easements.

21. Jeffers admits the allegations contained in Paragraph 21 of the Complaint insofar as it alleges Lot 51 is subject to the Covenants to the extent intended by the parties thereto.

22. Jeffers admits the allegations contained in Paragraph 22 of the Complaint only insofar as it alleges Lot 51 was transferred by Ruth E. Kipnis to Jeffers and that Lot 51 is subject to all matters of record in the Register of Deeds Office for Aiken County, South Carolina. Jeffers denies the allegations contained in Paragraph 22 of the Complaint insofar as it alleges Lot 51 is subject to a perimeter pedestrian and horse-riding trail easement.

23. Jeffers admits the allegations contained in Paragraph 23 of the Complaint insofar as it alleges Lot 47 and 49 are subject to a horse trail easement as determined by the developer of Braeloch subdivision and as set forth on the plats of record of said subdivision.

24. Jeffers admits the allegations contained in Paragraph 24 of the Complaint insofar as it alleges Lot 51 forms a part of the border of the Braeloch subdivision. Jeffers denies the remaining allegations contained in Paragraph 18 of the Complaint.

25. Jeffers denies the allegations contained in Paragraph 25. By way of further response, the platted easements on Lot 47 and Lot 49 are of record, have never been modified or changed, and are available for the utilization of all lot owners within Braeloch subdivision.

26. Jeffers denies the allegations contained in Paragraph 26.

27. Jeffers, upon information and belief, admits the allegations contained in Paragraph 27 only insofar as it alleges Lot 47 and Lot 49 are subject to the easements contained in the Covenants, to the extent such easements are consistent with all relevant plats of record. Jeffers denies Plaintiffs own both properties.

28. Jeffers admits the allegations contained in Paragraph 28 only insofar as it alleges the Defendant HOA is charged with enforcing easements as expressly set forth on the plats of Braeloch subdivision. Jeffers denies the allegations contained in Paragraph 28 insofar as they allege the Defendant HOA is responsible for placing and enforcing easements on all lots in Braeloch as set forth in paragraph 16 of the Complaint. By way of further response, Jeffers states the HOA has the exclusive authority to administer the easements that are validly created consistent with the laws applicable thereto.

29. Jeffers admits the allegations contained in Paragraph 29 to the extent it alleges no pedestrian or horse-riding trail easements has been created on Lot 51.

30. Jeffers admits the allegations contained in Paragraph 30 only insofar as it alleges there is no perimeter pedestrian and horse-riding trail easements located on Lot 51 and that such easements exist on Lot 47 and Lot 49. Jeffers denies the allegations contained in Paragraph 30 to the extent it is alleges such easements should be moved each time additional property is brought under the Covenants.

31. Jeffers denies the allegations contained in Paragraph 31 and states the easements currently located on Lots 47 and 49 should not be moved.

32. Jeffers admits the allegations contained in Paragraph 32.

33. Jeffers admits the allegations contained in Paragraph 33 only insofar as it alleges no plat is recorded in the public records showing any easements on Lot 51. Jeffers denies the allegations contained in Paragraph 33.

34. Jeffers admits the allegations contained in Paragraph 34 only insofar as it alleges no plat is recorded in the public records showing any easements on Lot 51. Jeffers, upon information and belief, denies the allegations contained in Paragraph 34.

35. Jeffers, upon information and belief, denies the allegations contained in Paragraph 35.

36. Jeffers, upon information and belief, denies the allegations contained in Paragraph 36.

37. Jeffers, upon information and belief, denies the allegations contained in Paragraph 37.

38. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 38 and, as such, must deny those allegations.

39. Jeffers denies the allegations contained in Paragraph 39.

40. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 40 and, as such, must deny those allegations.

41. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 41 and, as such, must deny those allegations.

42. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 42 and, as such, must deny those allegations.

43. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 43 and, as such, must deny those allegations.

44. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 44 and, as such, must deny those allegations.

45. Jeffers denies the allegations contained in Paragraph 45.

46. Jeffers denies the allegations contained in Paragraph 46.

47. Jeffers denies the allegations contained in Paragraph 47.

48. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 48 and, as such, must deny those allegations.

49. Jeffers denies the allegations contained in Paragraph 49.

50. Jeffers admits the allegations contained in Paragraph 50 only insofar as it alleges the Defendant HOA owes duties to the members as expressly set forth in the Covenants. Jeffers denies the Defendant HOA has a legal duty, or the right, to impose easements on lots unless otherwise expressly shown on the plats of Braeloch subdivision.

51. Jeffers denies the allegations contained in Paragraph 51.

52. Jeffers denies the allegations contained in Paragraph 52.

53. Jeffers admits the allegations contained in Paragraph 53 insofar as it alleges restrictive covenants of record are enforceable in the same manner as contracts. Jeffers denies the allegations contained in Paragraph 53 to the extent it alleges Defendant HOA is required or empowered to impose easements on Lot 51.

54. Jeffers admits the allegations contained in Paragraph 54 insofar as it alleges Lot 51 is bound by the Covenants and other matters of record.

55. Jeffers admits the allegations contained in Paragraph 55 insofar as it alleges Lot 51 is bound by the Covenants and other matters of record.

56. Jeffers admits the allegations contained in Paragraph 56 only insofar as it alleges the Covenants express the intent of the original developer to establish a pedestrian and horse trail easement at the locations set forth on the plats of Braeloch, as amended and modified.

57. Jeffers denies the allegations contained in Paragraph 57.

58. Jeffers denies the allegations contained in Paragraph 58.

59. Jeffers states the allegations in Paragraph 59 do not require a response. To the extent the Court deems otherwise, Jeffers denies the allegations in Paragraph 59.

60. Jeffers admits the allegations contained in Paragraph 60 only insofar as it alleges the Covenants are contractual in nature.

61. Jeffers admits the allegations contained in Paragraph 61 only insofar as it alleges the Defendant HOA must enforce the Covenants in accordance with its terms. It denies the allegations in said Paragraph 41 to the extent it alleges the Defendant HOA has the duty or power to impose easements on property that are not shown on the plats of Braeloch.

62. Jeffers admits the allegations contained in Paragraph 62 insofar as it alleges Lot 51 is subject to the Covenants and all other matters of record.

63. Jeffers denies the allegations contained in Paragraph 63. By way of further response, Jeffers states there are no easements on Lot 51 to be enforced.

64. Jeffers denies the allegations contained in Paragraph 64

65. Jeffers denies the allegations contained in Paragraph 65.

66. Jeffers admits the allegations contained in Paragraph 66.

67. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 67 and, as such, must deny those allegations.

68. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 68 and, as such, must deny those allegations.

69. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 69 and, as such, must deny those allegations.

70. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 70 and, as such, must deny those allegations.

71. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 71 and, as such, must deny those allegations.

72. Jeffers is without knowledge sufficient to form a belief as to the allegations contained in Paragraph 72 and, as such, must deny those allegations.

73. Jeffers denies the allegations contained in Paragraph 73.

74. Jeffers denies the allegations contained in Paragraph 74.

75. Jeffers denies the allegations contained in Paragraph 75.

76. Jeffers denies the allegations contained in Paragraph 76.

77. Jeffers denies the allegations contained in Paragraph 77.

78. Jeffers denies the allegations contained in Paragraph 78.

79. Jeffers admits the allegations contained in Paragraph 79 insofar as it alleges restrictive covenants of record are enforceable in the same manner as contracts.

80. Jeffers admits the allegations contained in Paragraph 80 only insofar as it alleges the Defendant HOA owes duties to the members as expressly set forth in the Covenants. Jeffers denies the Defendant HOA has a legal duty, or the right, to impose easements on lots unless otherwise expressly shown

on the plats of Braeloch subdivision.

81. Jeffers denies the allegations contained in Paragraph 81.

82. Jeffers admits Plaintiffs are requesting declaratory relief, but denies Plaintiffs are entitled to such relief.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Plaintiffs' claims are barred by the doctrine of waiver.

FOURTH DEFENSE

Plaintiffs' claims are barred by the doctrine of equitable estoppel.

FIFTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

SIXTH DEFENSE

The requested relief to relocate the perimeter horse riding easement onto Lot 51 constitutes an unconstitutional taking of Jeffers's property and violates Article 1, Section 3 of the South Carolina Constitution.

SEVENTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because they lack standing.

EIGHTH DEFENSE

Plaintiff's trespass claims against Jeffers are barred because they are moot.

NINTH DEFENSE

Plaintiff's claim for declaratory judgment to relocate or dissolve the pedestrian and horse riding easement is barred because they have failed to join necessary and indispensable parties to this suit whose rights would be affected.

TENTH DEFENSE

Defendant denies each and every allegation of the Plaintiffs' Complaint that is not hereinafter

specifically and expressly admitted.

ELEVENTH DEFENSE

Jeffers reserves the right to raise additional defenses and counterclaims pending discovery in this matter.

TWELFTH DEFENSE

Documents recorded at the time of the annexation of Lot 51 do not create any easements thereon.

THIRTEENTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because Jeffers purchased Lot 51 as a bona fide purchaser for value.

FOURTEENTH DEFENSE BY WAY OF FIRST COUNTERCLAIM

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

83. Plaintiff Richard Viviano became the owner of Lot 49 in August 1991.

84. Plaintiff Richard Viviano had notice of the location of the pedestrian and horse trail easements on Lot 49 since the time he became an owner.

85. Plaintiff Johnette Gunter became the owner of Lot 47 in April 2009.

86. Plaintiff Johnette Gunter had actual and constructive notice of the pedestrian and horse trail easements since the time she took title to Lot 47.

87. Plaintiff Johnette Gunter deeded a 50% interest in Lot 47 to Plaintiff Richard Viviano on December 29, 2017.

88. At some point after Plaintiffs jointly took title to Lot 47, Plaintiffs commenced construction of a residence thereon and such construction was ongoing at the time their Complaint was filed.

89. Upon information and belief, during the course of construction Plaintiffs determined the pedestrian and horse trail easement located on Lot 47 would interfere with their construction plans.

90. A duty of good faith and fair dealing is implied in the Covenants as a result of the special relationship that exists among all owners within Braeloch subdivision.

91. Plaintiffs breached the implied duty of good faith and fair dealing by attempting to relocate the pedestrian and horse trail easement on Lot 47 and Lot 49 to Lot 51 under the circumstances.

92. Jeffers has been damaged as a result of such breach.

93. Jeffers is informed and believes he is entitled to judgment against the Plaintiffs, jointly and severally, for such damages as well as the recovery of his attorneys' fees, costs and expenses.

FIFTEENTH DEFENSE BY WAY OF SECOND COUNTERCLAIM

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

94. In November 2018, Plaintiffs requested approval from the HOA Architectural Control Committee to construct a concrete driveway that would encroach upon portions of the horse trail easements located within Braeloch.

95. The HOA Architectural Control Committee denied approval for the driveway because it would encroach upon the horse trail easements.

96. Plaintiffs have represented there is currently no horse trail easement located on Lot 51.

97. Plaintiffs' actions in bringing this lawsuit and the claims presented herein, including but limited to the conspiracy claims, were for the ulterior purpose of constructing their driveway within the horse trail easement in contravention of the Covenants.

98. Such ulterior purpose in bringing this lawsuit constitutes an abuse of process.

99. Jeffers has been damaged as a result of Plaintiffs' conduct in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment and relief as follows:

- a. That judgment be entered in favor of Jeffers and against Plaintiffs on all causes of actions and requests for relief set forth in the Complaint;
- b. That judgment be entered in favor of Jeffers and against Plaintiffs, jointly and severally, for damages he has incurred as well as the recovery of his attorneys' fees, costs and expenses.

c. For such other and further relief as the Court may deem just, necessary or appropriate.

Dated: April 30, 2020

HULL BARRETT, PC

S\Paul Simons, Jr.
PAUL K. SIMONS, JR.
SC Bar No. 76883
111 Park Ave, S.W.
Aiken, South Carolina 29801
Attorneys for Jeffers

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of Braeloch
Homeowner's Association, and Derrick
Boddy, individually and in his capacity as a
member of the board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**DEFENDANTS SANDY CARROLL &
DERRICK BODDY'S ANSWER TO
PLAINTIFFS' AMENDED
COMPLAINT**

(Jury Trial Demanded)

Defendants Sandy Carroll and Derrick Boddy, by and through their undersigned counsel,
hereby answer Plaintiffs' Amended Summons and Amended Complaint in the above-captioned
case as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiffs' Amended Complaint is denied
unless specifically admitted herein; further, these Defendants hereby request a jury trial.

2. Any and all admissions made herein by these Defendants are made subject to the
express provision that any inference to be drawn from the allegations purporting any wrongdoing
by these Defendants is specifically denied and strict proof is demanded thereof.

3. These Defendants admit the allegations contained in Paragraph One (1) upon
information and belief.

4. These Defendants admit the allegations contained in Paragraph Two (2) insofar as
it is alleged that Defendant Jeffers owns property in Aiken County, South Carolina but are without

sufficient information to form a belief as to Defendant Jeffers citizenship and residency. Accordingly, all remaining allegations of Paragraph Two (2) are denied.

5. These Defendants admit the allegations contained in Paragraph Three (3).

6. The allegations of Paragraph Four (4) do not pertain to these Defendants; thus, no response from these Defendants is required. To the extent that a response is required, the allegations of Paragraph Four (4) are admitted upon information and belief insofar as the Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association (hereinafter "HOA") has certain duties and responsibilities as set forth by the Protective Covenants and other applicable laws and regulations; however, all remaining allegations of Paragraph Four (4) are denied.

7. These Defendants deny the allegations contained in Paragraph (5) upon information and belief.

8. These Defendants admit the allegations contained in Paragraph Six (6).

9. These Defendants admit the allegations of Paragraphs Seven (7) and Eight (8) insofar as Defendant Carroll has served as a member of the board and has acted in her individual capacity in regard to the subdivision in which she lives. All remaining allegations contained in Paragraphs Seven (7) and Eight (8) are denied.

10. These Defendants admit the allegations of Paragraph Nine (9).

11. These Defendants admit the allegations of Paragraphs Ten (10) and Eleven (11) insofar as Defendant Boddy has served as a member of the board and has acted in his individual capacity in regard to the subdivision in which he lives. All remaining allegations contained in Paragraphs Ten (10) and Eleven (11) are denied.

12. These Defendants admit the allegations of Paragraph Twelve (12) upon information and belief.

13. The allegations of Paragraph Thirteen (13) are predicated upon legal conclusions for which no response is required. To the extent that a response is required, these Defendants admit that the actions complained of and the real property at issue is located in Aiken County, South Carolina. All remaining allegations of Paragraph Thirteen (13) are denied.

14. The allegations of Paragraph Fourteen (14), Fifteen (15) and Sixteen (16) are admitted insofar as the Braeloch Subdivision, Aiken County, South Carolina Protective Covenants (the "Protective Covenants") were enacted, executed and recorded on or about September and October 1996, but the Protective Covenants speak for themselves and are incorporated, as amended, in their entirety by this reference.

15. The allegations of Paragraph Seventeen (17) are denied.

16. These Defendants admit the allegations of Paragraph Eighteen (18) insofar as the Lots 47 and 49 are subject to certain restrictions and easements as set forth in the Protective Covenants and any other documents and instruments of record which speak for themselves and are incorporated, as amended, in their entirety by this reference.

17. These Defendants admit the allegations of Paragraphs Nineteen (19), Twenty (20), Twenty-One (21) and Twenty-Two (22) insofar as, upon information and belief, in 2002, a parcel now referenced as Lot 51 that was, at that time, owned by Pamela and Mark Thompson, became subject to the Protective Covenants and was designated as part of the Braeloch Subdivision. It is also admitted that Lot 51 is now owned by Defendant Jeffers. All remaining allegations of Paragraphs Nineteen (19), Twenty (20), Twenty-One (21) and Twenty-Two (22) are denied.

18. These Defendants admit the allegations of Paragraph Twenty-Three (23) insofar as that prior to the creation of Lot 51, Lots 47 and 49 were located on the eastern and southern border of the Braeloch subdivision. All remaining allegations are denied.

19. The allegations of Paragraphs Twenty-Four (24) and Twenty-Five (25) are denied.

20. The allegations of Paragraph Twenty-Six (26) do not pertain to these Defendants; therefore, no response is required. To the extent a response is required, these Defendants are without sufficient information to either admit or deny the allegations of Paragraph Twenty-Six(26) and the allegations are denied.

21. The allegations of Paragraph Twenty-Seven (27) are admitted though it is denied, upon information and belief, that Plaintiffs own more than one property at the present time.

22. The allegations of Paragraph Twenty-Eight (28) do not pertain to these Defendants so no response is required. However, to the extent a response is required, these Defendants admit that the HOA has certain duties and responsibilities as set forth by the Protective Covenants and other applicable laws and regulations which speak for themselves and are incorporated, as amended, in their entirety by this reference.

23. The allegations of Paragraph Twenty-Nine (29) do not pertain to these Defendants so no response is required. However, to the extent a response is required, these Defendants admit that the pedestrian and horse-riding trail and easement located on Lots 47 and 49 has not been eliminated or moved nor has a similar easement been created on Lot 51.

24. These Defendants deny the allegations of Paragraph Thirty (30).

25. These Defendants deny the allegations of Paragraph Thirty-One (31) and further deny that it presents an accurate statement of the Protective Covenants on the land.

26. These Defendants admit the allegations of Paragraph Thirty-Two (32).

27. These Defendants deny the allegations of Paragraphs Thirty-Three (33), Thirty-Four (34), Thirty-Five (35), Thirty-Six (36) and Thirty-Seven (37).

28. The allegations of Paragraph Thirty-Eight (38) appear to be lacking sufficient

information to determine their substance without improper inference but are denied by these Defendants.

29. These Defendants deny the allegations of Paragraph Thirty-Nine (39), including but not limited to subparts (a.) through (e.).

30. Paragraph Forty (40) does not pertain to these Defendants; therefore, no response is required. However, to the extent that a response is required, the allegations are denied and it is specifically denied that Plaintiffs have been treated as alleged or differently than any other homeowner of the Braeloch community.

31. These Defendants deny the allegations of Paragraphs Forty-One (41), Forty-Two (42), Forty-Three (43), and Forty-Four (44).

32. The allegations of Paragraphs Forty-Five (45), Forty-Six (46), Forty-Seven (47), Forty-Eight (48) and Forty-Nine (49) do not pertain to these Defendants; therefore, no response is required. To the extent a response is required, the allegations of Paragraphs Forty-Five (45), Forty-Six (46), Forty-Seven (47), Forty-Eight (48) and Forty-Nine (49) are denied.

33. The allegations of Paragraphs Fifty (50), Fifty-One (51) and Fifty-Two (52) do not pertain to these Defendants; therefore, no response is required. To the extent that a response is required, the allegations of Paragraphs Fifty (50), Fifty-One (51) and Fifty-Two (52) are denied.

34. The allegations of Paragraphs Fifty-Three (53), Fifty-Four (54), Fifty-Five (55), Fifty-Six (56), Fifty-Seven (57), Fifty-Eight (58) and Fifty-Nine (59) do not pertain to these Defendants; therefore, no response is required. To the extent a response is required, these Defendants deny the allegations of Paragraphs Fifty-Three (53), Fifty-Four (54), Fifty-Five (55), Fifty-Six (56), Fifty-Seven (57), Fifty-Eight (58) and Fifty-Nine (59).

35. These Defendants admit the allegations of Paragraph Sixty (60) insofar as it alleges

the Covenants are contractual in nature.

36. These Defendants admit the allegations contained in Paragraph Sixty-One (61) insofar as it alleges the Defendant HOA must enforce the Covenants in accordance with its terms, which speak for themselves and are incorporated by this reference in their entirety, as amended, and applicable law and regulations. However, these Defendants deny that the Defendant HOA has the duty or power to impose easements on property that are not shown on the plats of Braeloch.

37. These Defendants admit the allegations of Paragraph Sixty-Two (62).

38. These Defendants deny the allegations of Paragraph Sixty-Three (63).

39. The allegations of Paragraph Sixty-Four (64) do not pertain to these Defendants; thus, no response from these Defendants is required. However, to the extent a response is required, these Defendants are without sufficient information to admit or deny the allegations; therefore, the allegations of Paragraph Sixty-Four (64) are denied.

40. The allegations of Paragraph Sixty-Five (65) are predicated upon legal conclusions for which no response is required. However, to the extent that a response is required, these Defendants deny that Plaintiffs are entitled to the relief demanded and the allegations of Paragraph Sixty-Five (65) are denied.

41. These Defendants admit the allegations of Paragraph Sixty-Six (66).

42. These Defendants deny the allegations of Paragraphs Sixty-Seven (67), Sixty-Eight (68), Sixty-Nine (69), Seventy (70), Seventy-One (71), Seventy-Two (72), Seventy-Three (73), Seventy-Four (74), Seventy-Five (75), Seventy-Six (76), Seventy-Seven (77) and Seventy-Eight (78).

43. These Defendants admit the allegations of Paragraph Seventy-Nine (79) insofar as it alleges restrictive covenants of record are enforceable in the same manner as contracts. All

remaining allegations of Paragraph Seventy-Nine (79) are denied.

44. The allegations of Paragraph Eighty (80) do not pertain to these Defendants; thus, no response from these Defendants is required. However, to the extent a response is required, these Defendants admit the allegations contained in Paragraph Eighty (80) only insofar as it alleges the Defendant HOA owes duties to the members as expressly set forth in the Covenants. All remaining allegations are denied.

45. These Defendants deny the allegations of Paragraph Eighty-One (81).

46. The allegations of Paragraph Eighty-Two (82) are predicated upon legal conclusions for which no response is required by these Defendants; however, to the extent a response is required, these Defendants deny the allegations of Paragraph Eighty-One (81) and that Plaintiffs are entitled to relief as requested.

47. To the extent that Plaintiffs' unnumbered paragraph "Relief Requested" on Page 14 of the Amended Complaint sets forth any allegations pertaining to these Defendants, the allegations are denied, including but not limited to subparts (a.) through (g.).

FOR A SECOND DEFENSE

48. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

49. Plaintiffs fail to state a claim for which relief may be granted on their cause of action for breach of fiduciary duty as Plaintiffs cannot prove that these Defendants breached any duty owed, thereby causing damages to the Plaintiffs. As such, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

50. These Defendants adopt and re-allege each and every allegation set forth above as

if fully repeated herein.

51. Plaintiffs fail to state a claim for which relief may be granted on their cause of civil conspiracy as Plaintiffs cannot prove that these Defendants joined together for the purpose of injuring Plaintiffs and/or that the Plaintiffs suffered special damages as a result. As such, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE

52. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

53. Plaintiffs fail to state a claim for which relief may be granted on their demand for Declaratory Judgment pursuant to S.C. Code Ann. §15-53-10 *et seq.* against these Defendants on the grounds there is no justiciable controversy between the Plaintiffs and these Defendants individually and Plaintiffs do not allege otherwise. As such, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

54. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

55. To the extent Plaintiffs allege negligence on the part of these Defendants, they fail to state a claim for which relief may be granted as Plaintiffs cannot prove that these Defendants owed a duty to Plaintiffs, breached any duty and/or if any duty was owed, which is denied, that the breach, which is denied, was the proximate cause of Plaintiffs' alleged damages. As such, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

56. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

57. These Defendants allege that if any injuries and damages were sustained by Plaintiffs, and the existence of such alleged injuries and damages is denied, said injuries and damages were caused by the sole negligence and/or willfulness of Plaintiffs, without which negligence and/or willfulness by Plaintiffs, said alleged injury or damage would not have occurred or been sustained and, for this reason, Plaintiffs are wholly barred from recovery.

FOR A SEVENTH DEFENSE

58. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

59. These Defendants allege that if any injuries and damages were sustained by Plaintiffs, and the existence of such alleged injuries and damages is denied, said injuries and damages were caused by the greater negligence and/or willfulness of Plaintiffs, which exceeds the negligence and/or willfulness, if any, on the part of the Defendants, which is denied, without which greater negligence and/or willfulness on the part of Plaintiffs, said alleged injury or damage would not have occurred or been sustained and, for this reason, Plaintiffs are wholly barred from recovery.

FOR AN EIGHTH DEFENSE

60. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

61. Alternatively, these Defendants allege that if any injuries and damages were sustained by Plaintiffs, and the existence of such alleged injuries and damages is denied, said injuries and damages were caused by the negligence and/or willfulness of Plaintiffs, combining,

concurring, and contributing with the negligence and/or willfulness, if any, on the part of the Defendants, which is denied, and for that reason, Plaintiffs' recovery, if any, must be reduced in proportion to the amount of Plaintiffs' own negligence.

FOR A NINTH DEFENSE

62. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

63. These Defendants allege that if any injuries and damages were sustained by Plaintiffs, and the existence of such alleged injuries and damages is denied, said injuries and damages were caused by an intervening, superseding act of negligence of third parties named or unnamed in this action for which these Defendants are not liable; thus, Plaintiffs' claims are barred.

FOR A TENTH DEFENSE

64. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

65. The damages suffered by Plaintiffs, if any, were the result of the acts or omissions of other parties, named or unnamed in this action, for which these Defendants bear no responsibility.

FOR AN ELEVENTH DEFENSE

66. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

67. These Defendants allege that Plaintiffs claims failed to mitigate their damages by honoring the covenants or restrictions on the subject premises, which were known or should have been known, or by failing to otherwise take reasonable, necessary and proper curative measures to limit, minimize or otherwise avoid the damages alleged and, accordingly, their claims are limited

or barred.

FOR A TWELFTH DEFENSE

68. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

69. These Defendants allege Plaintiffs' causes of action are barred by the applicable statute(s) of limitations.

FOR A THIRTEENTH DEFENSE

77. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

78. These Defendants allege Plaintiffs' causes of action against these Defendants are limited or barred by the Business Judgment Doctrine acting as officers of their homeowner's association.

FOR A FOURTEENTH DEFENSE

70. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

71. These Defendants affirmatively plead that the Plaintiffs claims are limited or barred by one or more of the following doctrines: accord and satisfaction, arbitration and award, assumption of the risk, coercion, contract, election of remedies, estoppel, failure of consideration, illegality, laches, license, mistake, payment, release, res judicata, satisfaction, statute of frauds, truth, waiver, standing, unclean hands, and any other matter constituting affirmative defense or an avoidance.

FOR A FIFTEENTH DEFENSE

72. These Defendants adopt and re-allege each and every allegation set forth above as

if fully repeated herein.

73. These Defendants at all times acted reasonably and in good faith in the exercise of their legal rights and at no time breached any duty, acted with any malice or ill-will toward the Plaintiffs, or recklessly or wantonly, or with a conscious disregard for the Plaintiffs' rights, and, thus, the Plaintiffs cannot sustain a claim for punitive damages. Further, punitive damages as sought by the Plaintiffs are excessive, unconstitutional and violate the Due Process Clause of the United States and South Carolina Constitutions.

74. These Defendants plead that some or all of Plaintiffs' claims may be barred, limited and/or bifurcated pursuant to S.C. Code Ann. §15-32-510 *et seq.*, including but not limited to §15-32-520 and §15-32-530 which are incorporated in their entirety by this reference and plead as affirmative defenses as to all of Plaintiffs' claims.

FOR A SIXTEENTH DEFENSE

75. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

76. These Defendants incorporate by reference any and all defenses pleaded by any party in this matter.

FOR A SEVENTEENTH DEFENSE

77. These Defendants adopt and re-allege each and every allegation set forth above as if fully repeated herein.

78. These Defendants, pursuant to Rule 15, South Carolina Rules of Civil Procedure, hereby reserves its right to amend this Answer to assert additional defenses as they become known throughout the discovery process.

WHEREFORE, having fully answered the Amended Complaint of the Plaintiffs, these Defendants pray that the Court dismiss the Amended Complaint and, further, pray for such other and further relief as the nature of the Defendants' cause may require.

RESPECTFULLY SUBMITTED,

s/Mary D. LaFave

Mary D. LaFave, SC Bar #75366

CROWE LAFAVE, LLC

Post Office Box 1149

Columbia, South Carolina 29202

Phone: 803.726.6756

mary@crowelafave.com

Attorney for Defendants Sandy Carroll and Derrick Boddy

This 8th of May, 2020
Columbia, South Carolina

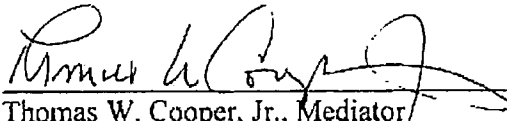
STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN)

RE: Richard Viviano and Johnette Gunter vs. Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association, Sandy Carroll, individually and in her capacity
as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy
individually and in his capacity as a member of the Braeloch Homeowner's Association
Case Number: 2018-CP-02-2208

MEDIATION RESULTS REPORT

1. Mediated settlement conferences were held before me on March 30, 2022 and May 25, 2022.
2. As a result of these conferences, this case should be considered (please check one):
- x Fully Settled SUBJECT TO approval by the HOA in accord with the terms of the Memorandum of Understanding signed by the parties on May 25, 2022;
- Partially Settled, with agreement of the parties on the following issues:
- At an impasse.
- In need of further mediation. (I am/ am not willing to mediate this case further)
- Continued:
3. Plaintiffs were present through representatives.
Defendants were present either in person or through representatives.
4. Other participants were:
- X Attorney for Plaintiff – Charles A. Krawczyk, Esquire
- X Attorney for Fulton Jeffers: Paul K. Simmons, Esquire
- X Attorney for Braeloch: Clarke W. McCants, III, Esquire
- X Attorney for Sandra J. Carroll and Derrick Boddy: Mary LaFave, Esquire
- Representative for Insurance Company:
- Experts:
- X Other: David O. Christiansen and Barry DeLoach, Representatives of Braeloch Association; Jim Kelly, Braeloch property owner

5. This case was co-mediated with: N/A
6. Choice of mediator was by:
 X Stipulation of Mediator Selection
 _____ Court Order
7. The total number of hours spent in mediation was 17.75 hours plus preparation and travel.
8. Further comments of the mediator: This case was complicated by legal and factual issues and by personality conflicts which either had developed during the litigation, or were, in part, the cause of the litigation. The lawyers had the difficult tasks of zealously advocating their clients' causes while fashioning a resolution that was acceptable to the other side(s). (There were more than two sides to this conundrum.) This settlement is a testament to the determination and imagination of the lawyers and the recognition of their clients that emotion has to give way to reason to resolve difficult disputes.


Thomas W. Cooper, Jr., Mediator
P.O. Drawer 699, Manning, SC 29102
(803) 435-2450; Fax (803) 435-2461

Dated: May 27, 2022

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**DEFENDANTS' JOINT MOTION TO
ENFORCE SETTLEMENT**

NOW COMES Defendants Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association, Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association, by and through their undersigned counsel, and moves the Court to enforce the written settlement agreement between the parties, as evidenced by the Proof of ADR filed June 6, 2022, as signed by retired Circuit Court Judge Thomas W. Cooper, Jr., Mediator, and in support thereof states as follows:

1. The parties settled this case at mediation on May 25, 2022. Attached as Exhibit A is the Memorandum of Understanding ("MOU") dated May 25, 2022, and signed by all parties and counsel, pursuant to Rule 43(k), SCRCP.
2. Immediately following mediation, the undersigned counsel for Defendants Carroll and Boddy began discussing the particulars agreed to at mediation with all counsel, and, per the request of the group, drafted the Settlement Agreement and Full and

Final Release of All Claims ("the Release") which incorporated the terms of the MOU.

3. The undersigned conducted multiple discussions with their clients and Plaintiffs' counsel regarding the particulars required in the MOU in order to facilitate timely coordination of compliance with requirements contained in the MOU.
4. On November 2, 2022, the undersigned received an email from Plaintiffs' counsel Charles Krawczyk with requested edits to the Release. At no time did Plaintiffs' counsel represent to counsel for the Defendants that the Release did not embody the MOU.
5. Subsequently, following multiple exchanges of drafts, all counsel approved of the edits requested to the Release and presented to all parties to execute same via email on or about March 20, 2023. In response to receipt of the final Release, counsel for the Plaintiffs' responded that he had the "go ahead for the settlement" and that he had his "client sending signatures to 'hold' until we have them all. Let's get this done." This email of acknowledgement/acceptance and the mutually agreed upon Release are attached as Exhibit B and C, respectively.
6. On March 31, 2023, a Motion to Be Relieved as Counsel was attempted to be filed by Charles Krawczyk, attorney of record for the Plaintiffs of nearly five (5) years.
7. On April 3, 2023, the Court executed an Order relieving Charles Krawczyk as Counsel for the Plaintiffs, attached as Exhibit D.
8. Plaintiffs' retained new counsel in John Harte, Esq. The Plaintiffs were contacted and again presented with the MOU and Release. *See* Exhibit E for final request for timely execution and compliance with Rule 11, with enclosures.

9. On April 24, 2023, counsel for the Plaintiffs issued a letter outlining their position on settlement that the “entire process is tainted and rendered a nullity by the incredible passage of time since mediation was concluded” and the “attitude” of the Defendants. On May 2, 2023, that position letter was received by the undersigned, Mary D. LaFave, via email. *See Exhibit F, Letter from Harte.*
10. The Plaintiffs have attempted to impede settlement by refusing to sign the Release, a contract drafted in the spirit of the MOU and with their input, edits, and acceptance from their prior counsel at the time that he had authority to act on their behalf. This Motion necessarily follows.
11. Based on the foregoing, the Defendants request that the Court enter an Order:
 - a. Enforcing the settlement and requiring the Plaintiffs to execute the Settlement Agreement and Full and Final Release of All Claims, Exhibit C;
 - b. Enforcing the terms of the settlement by requiring the Plaintiffs to comply with the Memorandum of Understanding executed by all parties;
 - c. Awarding these Defendants their attorney’s fees and costs in filing this Motion; and/or
 - d. Dismissing this civil action with prejudice.

WHEREFORE, these Defendants respectfully move the Court to enforce the settlement as requested herein and for any such further relief the Court deems appropriate.

Respectfully Submitted,

s/Mary D. LaFave
 Mary D. LaFave, SC BAR #75366
 CROWE LAFAVE GARFIELD & BAGLEY, LLC
 P.O. Box 1149
 Columbia, South Carolina 29202
 (803)726.6756
 mary@crowelafave.com
Attorney for Defendants Sandy Carroll and Derrick Boddy

s/Paul K. Simons, Jr.

Paul K. Simons, Jr., SC BAR #76883

HULL BARRETT, PC

111 Park Ave., S.W.

Aiken, SC 29801

Attorney for Fulton Jeffers

s/Clarke W. McCants, III

Clarke W. McCants, III, SC BAR #3725

NANCE, MCCANTS & MASSEY

P.O. Box 2881

Aiken, SC 29802

(803)649-6200 Ext. 3

mccants3rd@aol.com

*Attorney for Braeloch I Association, Inc. d/b/a Braeloch
Homeowner's Association*

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT A – MEMORANDUM OF UNDERSTANDING

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

SECOND JUDICIAL CIRCUIT

Richard Viviano and Johnette Gunter,

C/A No.: 2018-CP-02-2208

Plaintiffs.

v.

Memorandum of Understanding

Fulton Jeffers and Braeloch I Association, Inc.
 D/B/A Braeloch Homeowner's Association,
 Sandra Carroll individually and in her capacity
 as a member of the Board of the Braeloch
 Homeowner's Association; and Derrick Boddy
 individually and in his capacity as a member of
 the Board of the Braeloch Homeowner's
 Association,

 Defendants.

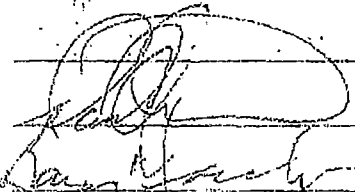
The Parties, having come to a proposed settlement in Mediation agree to settle all claims in the above-caption action subject to the terms in this agreement that require further action:

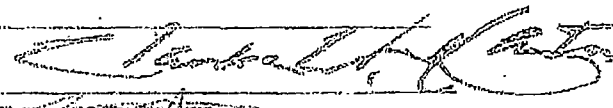
1. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - a. The easement shall be reduced from 20' to 15' in width.
 - b. 10' of the easement shall be moved from lot 47 to Lot 51.
 - c. The alteration shall be effective for the entirety of the property line of Lot 47.
2. Defendant Fulton Jeffers shall receive payment in the amount of \$20,000 which shall represent payment for the burden placed on his property.
3. The HOA agrees to remove/release the 10' access easement described in the covenants between lots 48 and 49 (the Lee/Santos Easement).
4. The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.
5. The HOA will present for a vote to the members of the HOA whether to improve an existing access easement between lots 18, 19, 20 & Lot 49, the outcome of which will not effect the enforceability of this settlement.
6. The parties will sign a non-waiver agreement agreeing that the settlement does not create a waiver of the enforcement of the covenants.
7. The parties will enter into a mutual non-disparagement agreement.
8. This settlement is contingent upon the HOA getting homeowner approval of their obligations under Paragraphs 1 and 3 of this memorandum.
9. Full and final release of all claims by Plaintiffs against Sandy Carroll and Derrick Boddy.

[Handwritten signatures and initials]
 Sandra Boddy
 BMB JCF PKS

10. The HOA shall pay for and prepare all surveys, plats documents and costs with filing.
11. All parties shall bear their own attorney fees and costs.
12. Full and final settlement agreement to be drafted by Mary LaFave.
13. The HOA shall bring the matter to a vote of the members within the 60 days of the signed release.

Agreed this 25th day of May 2022


Paul Lind


Sandra I. Carroll
D.M. Borden
Fuland Joffe

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT B – MARCH 20, 2023 EMAIL

Paul K. Simons

From: Charles Krawczyk <ckrawczyk@FinkelLaw.com>
Sent: Monday, March 20, 2023 9:42 AM
To: Clarke McCants; mary@crowelafave.com; Paul K. Simons; esquireamy@aol.com; erinelam2@gmail.com; clarkemccants4@gmail.com
Subject: RE: Viviano Release

I have the go ahead for the settlement. Lets get the signatures together. I have my client sending the signatures to "hold" until we have them all. Lets get this done.

Charley

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT C – RELEASE

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**SETTLEMENT AGREEMENT AND
FULL AND FINAL RELEASE OF ALL
CLAIMS**

KNOW ALL MEN BY THESE PRESENTS, that Richard Viviano and Johnette Gunter (collectively referred to as the "Plaintiffs") and Braeloch I Association, Inc., d/b/a Braeloch Homeowner's Association (hereinafter the "Association"), Fulton Jeffers, Sandra Carroll, individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy, individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association (hereinafter collectively referred to as the "Defendants") (hereinafter the Plaintiffs and Defendants are referred collectively as "the Parties"), do hereby agree as follows ("the Agreement"):

AGREEMENT

1. **Release.** For and in consideration of the promises and stipulations set forth in this Agreement, the Plaintiffs do hereby for themselves, their heirs, successors, administrators, representatives, employees, spouses, related corporations, subsidiaries, directors, shareholders, officers and assigns, withdraw the present claim, dismiss any pending actions and remise, release, acquit and forever discharge the Defendants and any and all affiliates, agents, or relatives of the Defendants, and other persons, employees, heirs, administrators,

spouses, firms or corporations, if any, in any way related to the Defendants, from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the Plaintiffs may have against the Defendants for claims and/or damages resulting from, arising out of any of the allegations contained in or related to the present action. This Agreement shall forever and finally release the named individual homeowners, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and their spouses, for actions or inactions as members of the Board of the Association, if any, and/or in their individual capacity for actions or inactions arising out of or in any way associated with those espoused in the Complaint and/or Amended Complaint. Further, the Agreement specifically requires the Parties' compliance with the following mandatory terms which, along with the other aspects of the Agreement, represent the consideration for this Release. The Parties agree as follows:

- a. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - i. The easement shall be reduced from 20' to 15' in width for the entire length.
 - ii. 10' of the easement shall be moved from Lot 47 to Lot 51.
 - iii. The alteration shall be effective for the entirety of the property line of Lot 47.
- b. Defendant Fulton Jeffers shall receive payment in the amount of Twenty Thousand and 00/100 Dollars (\$20,000.00), which shall represent payment for the burden placed upon him and his property paid by Auto-Owners Insurance Company pursuant to Policy #152316-80393215-18 of the Braeloch Homeowner's Association made payable to *Fulton Jeffers*. Defendant Jeffers' attorneys' fees shall be paid out of the above proceeds for the burden placed upon him and his property. This payment is the Plaintiffs' consideration and benefit in exchange for the above-mentioned release and is being paid to Fulton Jeffers at the direction of the Plaintiffs. Jeffers is responsible for all his tax implications associated with the payments.
- c. The Association agrees to remove/release the 10' access easement described within the Covenants between Lots 48 and 49.
- d. The Association will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the Association as necessary for its proper use as an equestrian/pedestrian easement.
- e. The Association shall pay for and have prepared all surveys, plats, any other documents necessary, and costs for the filing/recording of the same. Upon the execution of this Agreement by the Parties, the Association agrees to move forward deliberately to secure and duly record, at its expense, any and all surveys, plats, and any other documents necessary to carry out the revisions to a portion of the

easement located on Lot 47 and Lot 51, and as described in Subparagraph (a) above. The Association further agrees to move forward deliberately with respect to the work needed to complete such revisions, and finish such work by July 31, 2023. In the event that the Association is unable to complete that work by July 31, 2023 the Association shall be entitled to an additional 30-day period to do so. Lot 47's current 20-foot easement will be accessible, as permitted by the Covenants, until the official recording of any and all surveys, plats, and any other documents necessary to carry out the easement revisions. After revision and recording of the new easement and while work is being done to clear the new trail, for any individuals desiring to use the trail on Lot 47 shall use only the 5-foot marked portion of the easement which is not being revised, and shall do so in a manner such as to not interfere with the work being performed.

- f. The Association agrees that it waives any and all claims against the individual homeowners in any way connected to the claims made by Plaintiffs in the Complaint or Amended Complaint or at issue in the present litigation.
2. Association's Representations: By its officers' signatures below, the Association represents that, as of the date this agreement is executed, the Association has presented for a vote to the members of the Association all of the terms contained herein. As inducement to the Parties entering the Agreement, the Association represents that all elements of the Agreement, and specifically the mandatory terms, have been approved by vote. Further, the Association represents that it has presented for a vote to the members of the Association the issue of whether to improve an existing access easement between Lots 18, 19, 20, and 49, as agreed upon by the Parties at mediation. However, this term was not mandatory and and it was not approved by the membership at this time. The rejection of this term by the Association does not affect the enforceability of the Agreement.
3. Lack of Future Implications or Waiver. As condition precedent to entering into this Agreement, all Parties agree and hereby stipulate that the easement changes reflected above shall not be construed as setting a precedent or in any way affecting/waiving/nullifying or frustrating the applicability or enforceability of the covenants to any other easement, covenant, or property in the subdivision. This Agreement and the changes reflected herein to these specific sections of easements are intentional and designed to resolve a legal

dispute. The changes and effects of the changes herein are confined to only the boundary line and equestrian/pedestrian easement shared by Lots 47 and 51 as referenced herein.

4. Mutual Non-Disparagement Agreement. For additional consideration in the Parties' reaching this equitable compromise as set forth in Section 1.0 above, to the fullest extent allowed by law, Richard Viviano, Johnette Gunter, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and any other representative of the named parties to this action, agree that they will never to take any action or otherwise interfere, or attempt to interfere with the each other's community relationships by making non-privileged statements or omissions that could disparage or could result in any harm to the image, personal reputation, business reputation, and/or goodwill of the individual parties to this litigation.
5. Denial of Liability. Nothing herein shall be construed as an admission by any Party of any liability of any kind to any other Party to this Agreement.
6. Advice of Counsel and Attorneys' Fees. The Parties have sought and considered the advice of their chosen counsel regarding each and every term of this Agreement and have reviewed each of the terms of this Agreement with the same. All Parties shall bear the costs and attorneys' fees associated with this action and/or the issues arising therefrom.
7. Counterparts. This Agreement may be executed in any number of counterparts, all of which shall be deemed to constitute one and the same instrument, and each counterpart shall be deemed an original.
8. Entire Agreement. This Agreement represents the entire agreement of the Parties on this subject, and no other representations, guarantees, inducements, or oral agreements have been made between the Parties.
9. Governing Law. This Agreement is made under and shall be governed by the laws of the State of South Carolina.

- 5
10. Modifications and Amendments. This Agreement shall not be altered, modified, or amended except by a writing signed by the Parties sought to be charged with such alteration, modification, or amendment.
11. Severability of Invalid Provisions. If any term or provision of this Agreement, or the application thereof to any person or circumstance shall, to any extent, be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such terms to persons or circumstances other than those which are deemed invalid or unenforceable, shall not be affected thereby, and each term and provision hereof shall be valid and enforced to the fullest extent permitted by law.
12. Miscellaneous. The paragraph headings used herein are for convenience and reference only, and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.
13. Cooperation Clause. The Parties and their counsel agree to cooperate in any and all respects with the other toward bringing this matter to final resolution, including execution of the necessary orders and/or stipulation(s) of dismissal.

[SIGNATURE PAGES TO FOLLOW]

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Richard Viviano
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Johnette Gunter
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Fulton Jeffers
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Dave Christensen, President
Braeloch Homeowner's Association aka
Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Sandra Carroll aka Sandy Carroll
individually and in her capacity as member
of the Board of the Braeloch Homeowner's
Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Derrick Boddy, individually and in his
capacity as member of the Board of the
Braeloch Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT D - ORDER RELIEVING COUNSEL

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**ORDER TO BE RELIEVED AS
COUNSEL**

IT APPEARS that the Finkel Law Firm LLC desires to be relieved as counsel for the Plaintiffs Richard Viviano and Johnette Gunter and as their attorneys of record in this action. The Plaintiffs and the Finkel Law Firm LLC mutually agree that this action is desired, and the Plaintiffs wish to release the Finkel Law Firm from any further obligations in this action.

NOW THEREFORE, on Motion of Finkel Law Firm LLC, by and with the Consent of the Plaintiffs Richard Viviano and Johnette Gunter.

IT IS HEREBY ORDERED that Finkel Law Firm LLC and its attorneys be and are hereby relieved as the attorneys of record for Plaintiffs Richard Viviano and Johnette Gunter.

IT IS FURTHER ORDERED: That Plaintiffs Richard Viviano and Johnette Gunter shall have 60 days to obtain new counsel to represent them in this matter.

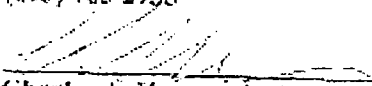
AND IT IS SO ORDERED.

The Honorable Courtney Clyburn Pope
Chief Administrative Judge
Second Judicial Circuit

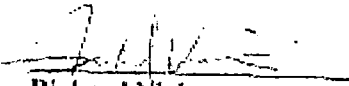
_____, South Carolina
_____, 2023

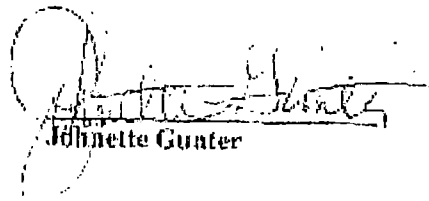
WE SO MOVE:

Flukel Law Firm LLC
Post Office Box 1799
Columbia, SC 29202
(803) 765-2935


Charles A. Krawczyk, Esquire
Attorneys for Defendant

We Consent


Richard Viviano


Johnette Gunter



Aiken Common Pleas

Case Caption: Richard Viviano , plaintiff, et al VS Fulton Jeffers , defendant, et al
Case Number: 2018CP0202208
Type: Order/Relieve Counsel

So Ordered

The Honorable Courtney Clyburn Pope

Electronically signed on 2023-04-03 14:34:58 page 3 of 3

ELECTRONICALLY FILED - 2023 Apr 03 3:05 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208
ELECTRONICALLY FILED - 2023 May 02 3:03 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT E – REQUEST FOR TIMELY EXECUTION AND COMPLIANCE WITH RULE 11

Danny C. Crowe*
Matthew C. LaFave*
Mary D. LaFave*
Robert D. Garfield
Lee Ellen Bagley*

CROWE LAFAVE
GARFIELD & BAGLEY

ATTORNEYS AT LAW

Steven R. Spreeuwers
Laura R. Baer
Douglas E. Leadbitter
Samuel C. McGlothlin

*Certified Mediator
*Also Licensed in NC

April 18, 2023

Via Email ONLY

John W. Harte
702 Chaffee Lane
Aiken, South Carolina 29801

Re: Richard Viviano and Johnette Gunter v. Braeloch HOA, et al.
C/A #: 2018-CP-02-2208

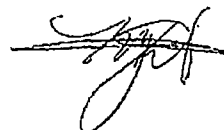
Dear John:

It is my understanding that you have been retained to represent Richard Viviano and Johnette Gunter in the above-captioned matter following the Court's Order relieving their prior counsel. Enclosed please find the Memorandum of Understanding agreed upon and signed by your clients and their counsel at our mediation. You will also find enclosed the Release agreed upon by your clients and with all of their requested edits incorporated, reflecting the terms of the Memorandum of Understanding.

Please have your clients execute the enclosed Release by the close of business Friday, April 21, 2023, so that we can conclude this matter as the parties have agreed. Should I not hear from you before the expiration of that deadline or if your clients do not agree, please accept this email as satisfaction of the Defendants' SCRCF Rule 11 obligations to consult prior to filing a Motion to Enforce Settlement. If you need additional time, please advise.

If you have any concerns or questions, please do not hesitate to contact me by email at mary@crowelafave.com or (803) 726-6756.

Sincerely,



Mary D. LaFave

Enclosures

cc: Counsel of Record (via email)
Clients (via email)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

SECOND JUDICIAL CIRCUIT

Richard Viviano and Johnette Gunter,

C/A No.: 2018-CP-02-2208

Plaintiffs.

v.

Memorandum of Understanding

Fulton Jeffers and Braeloch I Association, Inc.
 D/B/A Braeloch Homeowner's Association,
 Sandra Carroll individually and in her capacity
 as a member of the Board of the Braeloch
 Homeowner's Association; and Derrick Boddy
 individually and in his capacity as a member of
 the Board of the Braeloch Homeowner's
 Association,

Defendants.

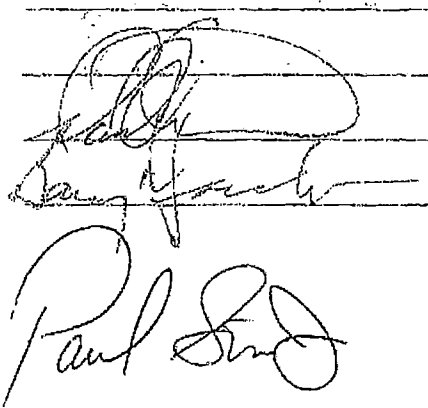
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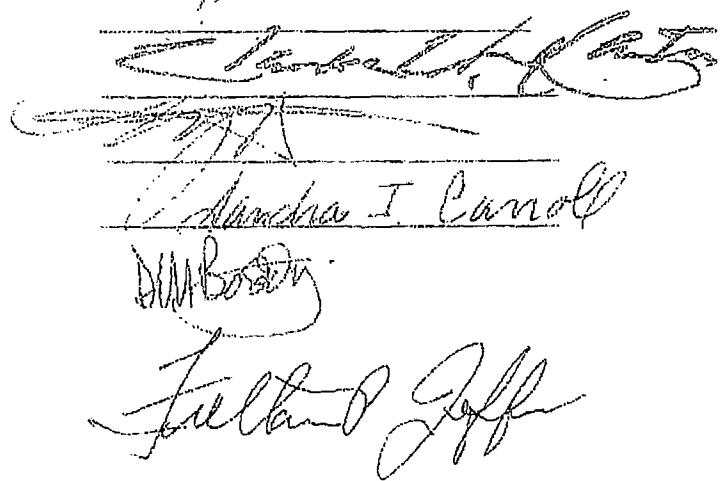
1. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - a. The easement shall be reduced from 20' to 15' in width.
 - b. 10' of the easement shall be moved from lot 47 to Lot 51.
 - c. The alteration shall be effective for the entirety of the property line of Lot 47.
2. Defendant Fulton Jeffers shall receive payment in the amount of \$20,000 which shall represent payment for the burden placed on his property.
3. The HOA agrees to remove/release the 10' access easement described in the covenants between lots 48 and 49 (the Lee/Santos Easement).
4. The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.
5. The HOA will present for a vote to the members of the HOA whether to improve an existing access easement between lots 18, 19, 20 & Lot 49, the outcome of which will not effect the enforceability of this settlement.
6. The parties will sign a non-waiver agreement agreeing that the settlement does not create a waiver of the enforcement of the covenants.
7. The parties will enter into a mutual non-disparagement agreement.
8. This settlement is contingent upon the HOA getting homeowner approval of their obligations under Paragraphs 1 and 3 of this memorandum.
9. Full and final release of all claims by Plaintiffs against Sandra Carroll and Derrick Boddy.

[Signatures]
 WMC
 JGC
 BMB
 Sandra
 Boddy
 PK5

10. The HOA shall pay for and prepare all surveys, plans documents and costs with filing.
11. All parties shall bear their own attorney fees and costs.
12. Full and final settlement agreement to be drafted by Mary LaFave.
13. The HOA shall bring the matter to a vote of the members within the 60 days of the signed release.

Agreed this 25th day of May 2022


Paul Lind


Linda I. Carroll
DUMBOIS
Fulland Jeff

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**SETTLEMENT AGREEMENT AND
FULL AND FINAL RELEASE OF ALL
CLAIMS**

KNOW ALL MEN BY THESE PRESENTS, that Richard Viviano and Johnette Gunter (collectively referred to as the "Plaintiffs") and Braeloch I Association, Inc., d/b/a Braeloch Homeowner's Association (hereinafter the "Association"), Fulton Jeffers, Sandra Carroll, individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy, individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association (hereinafter collectively referred to as the "Defendants") (hereinafter the Plaintiffs and Defendants are referred collectively as "the Parties"), do hereby agree as follows ("the Agreement"):

AGREEMENT

1. **Release.** For and in consideration of the promises and stipulations set forth in this Agreement, the Plaintiffs do hereby for themselves, their heirs, successors, administrators, representatives, employees, spouses, related corporations, subsidiaries, directors, shareholders, officers and assigns, withdraw the present claim, dismiss any pending actions and remise, release, acquit and forever discharge the Defendants and any and all affiliates, agents, or relatives of the Defendants, and other persons, employees, heirs, administrators,

spouses, firms or corporations, if any, in any way related to the Defendants, from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the Plaintiffs may have against the Defendants for claims and/or damages resulting from, arising out of any of the allegations contained in or related to the present action. This Agreement shall forever and finally release the named individual homeowners, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and their spouses, for actions or inactions as members of the Board of the Association, if any, and/or in their individual capacity for actions or inactions arising out of or in any way associated with those espoused in the Complaint and/or Amended Complaint. Further, the Agreement specifically requires the Parties' compliance with the following mandatory terms which, along with the other aspects of the Agreement, represent the consideration for this Release. The Parties agree as follows:

- a. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - i. The easement shall be reduced from 20' to 15' in width for the entire length.
 - ii. 10' of the easement shall be moved from Lot 47 to Lot 51.
 - iii. The alteration shall be effective for the entirety of the property line of Lot 47.
- b. Defendant Fulton Jeffers shall receive payment in the amount of Twenty Thousand and 00/100 Dollars (\$20,000.00), which shall represent payment for the burden placed upon him and his property paid by Auto-Owners Insurance Company pursuant to Policy #152316-80393215-18 of the Braeloch Homeowner's Association made payable to *Fulton Jeffers*. Defendant Jeffers' attorneys' fees shall be paid out of the above proceeds for the burden placed upon him and his property. This payment is the Plaintiffs' consideration and benefit in exchange for the above-mentioned release and is being paid to Fulton Jeffers at the direction of the Plaintiffs. Jeffers is responsible for all his tax implications associated with the payments.
- c. The Association agrees to remove/release the 10' access easement described within the Covenants between Lots 48 and 49.
- d. The Association will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the Association as necessary for its proper use as an equestrian/pedestrian easement.
- e. The Association shall pay for and have prepared all surveys, plats, any other documents necessary, and costs for the filing/recording of the same. Upon the execution of this Agreement by the Parties, the Association agrees to move forward deliberately to secure and duly record, at its expense, any and all surveys, plats, and any other documents necessary to carry out the revisions to a portion of the

easement located on Lot 47 and Lot 51, and as described in Subparagraph (a) above. The Association further agrees to move forward deliberately with respect to the work needed to complete such revisions, and finish such work by July 31, 2023. In the event that the Association is unable to complete that work by July 31, 2023 the Association shall be entitled to an additional 30-day period to do so. Lot 47's current 20-foot easement will be accessible, as permitted by the Covenants, until the official recording of any and all surveys, plats, and any other documents necessary to carry out the easement revisions. After revision and recording of the new easement and while work is being done to clear the new trail, for any individuals desiring to use the trail on Lot 47 shall use only the 5-foot marked portion of the easement which is not being revised, and shall do so in a manner such as to not interfere with the work being performed.

- f. The Association agrees that it waives any and all claims against the individual homeowners in any way connected to the claims made by Plaintiffs in the Complaint or Amended Complaint or at issue in the present litigation.

2. Association's Representations: By its officers' signatures below, the Association represents that, as of the date this agreement is executed, the Association has presented for a vote to the members of the Association all of the terms contained herein. As inducement to the Parties entering the Agreement, the Association represents that all elements of the Agreement, and specifically the mandatory terms, have been approved by vote. Further, the Association represents that it has presented for a vote to the members of the Association the issue of whether to improve an existing access easement between Lots 18, 19, 20, and 49, as agreed upon by the Parties at mediation. However, this term was not mandatory and it was not approved by the membership at this time. The rejection of this term by the Association does not affect the enforceability of the Agreement.

3. Lack of Future Implications or Waiver. As condition precedent to entering into this Agreement, all Parties agree and hereby stipulate that the easement changes reflected above shall not be construed as setting a precedent or in any way affecting/waiving/nullifying or frustrating the applicability or enforceability of the covenants to any other easement, covenant, or property in the subdivision. This Agreement and the changes reflected herein to these specific sections of easements are intentional and designed to resolve a legal

dispute. The changes and effects of the changes herein are confined to only the boundary line and equestrian/pedestrian easement shared by Lots 47 and 51 as referenced herein.

4. Mutual Non-Disparagement Agreement. For additional consideration in the Parties' reaching this equitable compromise as set forth in Section 1.0 above, to the fullest extent allowed by law, Richard Viviano, Johnette Gunter, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and any other representative of the named parties to this action, agree that they will never to take any action or otherwise interfere, or attempt to interfere with the each other's community relationships by making non-privileged statements or omissions that could disparage or could result in any harm to the image, personal reputation, business reputation, and/or goodwill of the individual parties to this litigation.
5. Denial of Liability. Nothing herein shall be construed as an admission by any Party of any liability of any kind to any other Party to this Agreement.
6. Advice of Counsel and Attorneys' Fees. The Parties have sought and considered the advice of their chosen counsel regarding each and every term of this Agreement and have reviewed each of the terms of this Agreement with the same. All Parties shall bear the costs and attorneys' fees associated with this action and/or the issues arising therefrom.
7. Counterparts. This Agreement may be executed in any number of counterparts, all of which shall be deemed to constitute one and the same instrument, and each counterpart shall be deemed an original.
8. Entire Agreement. This Agreement represents the entire agreement of the Parties on this subject, and no other representations, guarantees, inducements, or oral agreements have been made between the Parties.
9. Governing Law. This Agreement is made under and shall be governed by the laws of the State of South Carolina.

10. Modifications and Amendments. This Agreement shall not be altered, modified, or amended except by a writing signed by the Parties sought to be charged with such alteration, modification, or amendment.
11. Severability of Invalid Provisions. If any term or provision of this Agreement, or the application thereof to any person or circumstance shall, to any extent, be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such terms to persons or circumstances other than those which are deemed invalid or unenforceable, shall not be affected thereby, and each term and provision hereof shall be valid and enforced to the fullest extent permitted by law.
12. Miscellaneous. The paragraph headings used herein are for convenience and reference only, and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.
13. Cooperation Clause. The Parties and their counsel agree to cooperate in any and all respects with the other toward bringing this matter to final resolution, including execution of the necessary orders and/or stipulation(s) of dismissal.

[SIGNATURE PAGES TO FOLLOW]

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Richard Viviano
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Johnette Gunter
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Fulton Jeffers
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Dave Christensen, President
Braeloch Homeowner's Association aka
Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Sandra Carroll aka Sandy Carroll
individually and in her capacity as member
of the Board of the Braeloch Homeowner's
Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires:_____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Derrick Boddy, individually and in his
capacity as member of the Board of the
Braeloch Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

**LAW OFFICE OF JOHN W. HARTE
ATTORNEYS AT LAW, LLC**

John W. Harte Esq
John@jwhartelaw.com
PO Box 7215
Aiken, S.C., 29804

Dalton P. Cooper, Esq
Dalton@jwhartelaw.com
john@jwhartelaw.com
803 226 0755

April 24, 2023

Mary LaFave, Esq
Via Email
Columbia, S.C. 29201

In Re: Richard Viviano and Johnette Gunter v Braeloch HOA
Civil Action Number 2018 DP 02 2208

Dear Ms. LaFave

I met with my clients, and we reviewed the documents which you sent to me last week.

I cannot advise my clients to sign the "settlement" document for the following reasons:

First the Lot which is causing the problem (Lot "51") is not lawfully a part of Braeloch. The admission of this parcel was attempted using fewer than the required number of lot owners. Since the lot is not a part of Braeloch, the owners of that lot have no right to enter Braeloch other than on the public roads, if any, in the subdivision. They have an easement which enables them to reach their lot, but that is the only exception to which they are entitled.

The information relating to the approval of Lot 51's admission to Braeloch was not known to my clients at the time of the mediation. Had they known the whole story, they would not have agreed to the memorandum of agreement. Therefore, it is void by reason of failure to provide and the fraudulent concealment of vital information critical to the issues being mediated. The documents show that your clients knew well before the mediation that there were insufficient signatures on the petition for admission of lot 51. This should have been disclosed prior to or at the very latest during mediation.

I have also been given information which leads me to conclude that there are notes from the meetings of the Home Owners' Association which have not been turned over. These are believed to be in several, perhaps as many as 8 boxes. They were last seen in the home now owned by Jeff Stevens although he is not my source for this information. My source is an individual who was at the home and went through a hall where these boxes were being stored. The boxes were clearly labeled as minutes of meetings.

The releases which appear in the document which you want my clients to sign are not consistent with the limited releases contemplated by the memorandum of understanding.

The releases as drafted are far more inclusive than what is mentioned in the memorandum of understanding.

In addition to those reasons, the entire process is tainted and rendered a nullity by the incredible passage of time since the mediation was concluded. The delay has allowed additional events to occur, including the attitude which your clients have adopted toward my clients and their property. Clearly your clients either do not understand what boundary lines mean or they are intentionally trespassing. Either way, the memorandum of agreement, even if it had been valid, requires good faith. Your clients' declaration that they did not care what the agreement or easement says demonstrates a complete absence of good faith. By declaring that they will use my client's driveway or access to the riding trail regardless of the location of easements, renders the entire agreement invalid.

In addition to the problems mentioned above, there appears to have been waivers or consent by silence to numerous violations of the covenants especially those relating to the riding trail. All of which create a doubt that the covenants are even enforceable, especially those that have been selectively enforced or ignored.

I look forward to discussing possible settlements based on all of the relevant information and based on the fact that Lot 51 is not a part of Braeloch.

Sincerely,

John W. Harte

John W. Harte
SC Bar No. 2773

john@jwhartelaw.com
803 226 0755

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**DEFENDANTS' AMENDED JOINT
MOTION TO ENFORCE
SETTLEMENT**

NOW COMES Defendants Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association, Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association, by and through their undersigned counsel, to jointly move before the Court to enforce the written settlement agreement between the parties, as evidenced by the Proof of ADR filed June 6, 2022, as signed by retired Circuit Court Judge Thomas W. Cooper, Jr., Mediator, and in support thereof amends its motion as follows:

1. The parties settled this case at mediation on May 25, 2022. Attached as Exhibit A is the Memorandum of Understanding ("MOU") dated May 25, 2022, and signed by all parties and counsel, pursuant to Rule 43(k), SCRPC.
2. Immediately following mediation, the undersigned counsel for Defendants Carroll and Boddy began discussing the particulars agreed to at mediation with all counsel,

and, per the request of the group, drafted the Settlement Agreement and Full and Final Release of All Claims ("the Release") which incorporated the terms of the MOU.

3. The undersigned conducted multiple discussions with their clients and Plaintiffs' counsel regarding the particulars required in the MOU in order to facilitate timely coordination of compliance with requirements contained in the MOU.
4. On November 2, 2022, the undersigned received an email from Plaintiffs' counsel Charles Krawczyk with requested edits to the Release. At no time did Plaintiffs' counsel represent to counsel for the Defendants that the Release did not embody the MOU.
5. Subsequently, following multiple exchanges of drafts, all counsel approved of the edits requested to the Release and presented to all parties to execute same via email on or about March 20, 2023. In response to receipt of the final Release, counsel for the Plaintiffs' responded that he had the "go ahead for the settlement" and that he had his "client sending signatures to 'hold' until we have them all. Let's get this done." This email of acknowledgement/acceptance and the mutually agreed upon Release are attached as Exhibit B and C, respectively.
6. Of important note is that all of the Defendants have executed, under proper authority if necessary, the mutually agreed upon Release. *See* Exhibit C.
7. On March 31, 2023, a Motion to Be Relieved as Counsel was attempted to be filed by Charles Krawczyk, attorney of record for the Plaintiffs of nearly five (5) years.
8. On April 3, 2023, the Court executed an Order relieving Charles Krawczyk as Counsel for the Plaintiffs, attached as Exhibit D.

9. Plaintiffs' retained new counsel in John Harte, Esq. The Plaintiffs were contacted and again presented with the MOU and Release. *See* Exhibit E for final request for timely execution and compliance with Rule 11, with enclosures.
10. On April 24, 2023, counsel for the Plaintiffs issued a letter outlining their position on settlement that the "entire process is tainted and rendered a nullity by the incredible passage of time since mediation was concluded" and the "attitude" of the Defendants. On May 2, 2023, that position letter was received by the undersigned, Mary D. LaFave, via email. *See* Exhibit F, Letter from Harte. On that same day, another letter dated May 2, 2023, "updated" the Plaintiffs' new legal position. *See* Exhibit G, 2nd Letter from Harte.
11. The Plaintiffs have attempted to impede settlement by refusing to sign the Release, a contract drafted in the spirit of the MOU and with their input, edits, and acceptance from their prior counsel at the time that he had authority to act on their behalf. This Motion necessarily follows.
12. Based on the foregoing, the Defendants request that the Court enter an Order:
 - a. Enforcing the settlement and requiring the Plaintiffs to execute the Settlement Agreement and Full and Final Release of All Claims, Exhibit C;
 - b. Enforcing the terms of the settlement by requiring the Plaintiffs to comply with the Memorandum of Understanding executed by all parties;
 - c. Awarding these Defendants their attorney's fees and costs in filing this Motion, as amended; and/or
 - d. Dismissing this civil action with prejudice.

WHEREFORE, these Defendants respectfully move the Court to enforce the settlement as requested herein and for any such further relief the Court deems appropriate.

Respectfully Submitted,

s/Mary D. LaFave

Mary D. LaFave, SC BAR #75366
CROWE LAFAVE GARFIELD & BAGLEY, LLC
P.O. Box 1149
Columbia, South Carolina 29202
(803)726.6756
mary@crowelafave.com
Attorney for Defendants Sandy Carroll and Derrick Boddy

s/Paul K. Simons, Jr.

Paul K. Simons, Jr., SC BAR #76883
HULL BARRETT, PC
111 Park Ave., S.W.
Aiken, SC 29801
Attorney for Fulton Jeffers

s/Clarke W. McCants, III

Clarke W. McCants, III, SC BAR #3725
NANCE, MCCANTS & MASSEY
P.O. Box 2881
Aiken, SC 29802
(803)649-6200 Ext. 3
mccants3rd@aol.com
*Attorney for Braeloch I Association, Inc. d/b/a Braeloch
Homeowner's Association*

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT A – MEMORANDUM OF UNDERSTANDING

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

SECOND JUDICIAL CIRCUIT

Richard Viviano and Johnette Gunter.

C/A No.: 2018-CP-02-2208

Plaintiffs.

v.

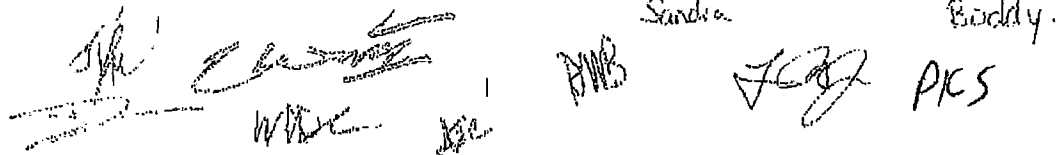
Memorandum of Understanding

Fulton Jeffers and Braeloch I Association, Inc.
D/B/A Braeloch Homeowner's Association,
Sandra Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association; and Derrick Boddy
individually and in his capacity as a member of
the Board of the Braeloch Homeowner's
Association,

Defendants.

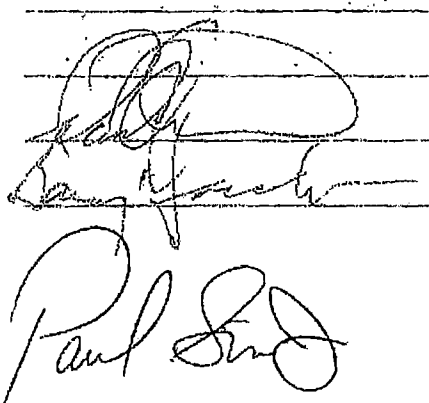
The Parties, having come to a proposed settlement in Mediation agree to settle all claims in the above-caption action subject to the terms in this agreement that require further action:

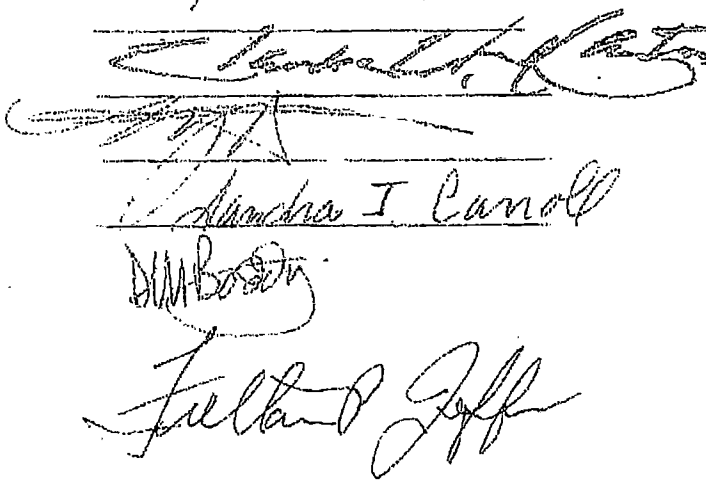
1. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - a. The easement shall be reduced from 20' to 15' in width.
 - b. 10' of the easement shall be moved from lot 47 to Lot 51.
 - c. The alteration shall be effective for the entirety of the property line of Lot 47.
2. Defendant Fulton Jeffers shall receive payment in the amount of \$20,000 which shall represent payment for the burden placed on his property.
3. The HOA agrees to remove/release the 10' access easement described in the covenants between lots 48 and 49 (the Leo/Santos Easement).
4. The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.
5. The HOA will present for a vote to the members of the HOA whether to improve an existing access easement between lots 18, 19, 20 & Lot 49, the outcome of which will not effect the enforceability of this settlement.
6. The parties will sign a non-waiver agreement agreeing that the settlement does not create a waiver of the enforcement of the covenants.
7. The parties will enter into a mutual non-disparagement agreement.
8. This settlement is contingent upon the HOA getting homeowner approval of their obligations under Paragraphs 1 and 3 of this memorandum.
9. Full and final release of all claims by Plaintiffs against Sandy Carroll and Derrick Boddy.



10. The HOA shall pay for and prepare all surveys, plats documents and costs with filing.
11. All parties shall bear their own attorney fees and costs.
12. Full and final settlement agreement to be drafted by Mary LaFave.
13. The HOA shall bring the matter to a vote of the members within the 60 days of the signed release.

Agreed this 25th day of May 2022


Paul Lind


Michael I. Canoll
DUMBO
Fulton P. Giff

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT B – MARCH 20, 2023 EMAIL

Paul K. Simons

From: Charles Krawczyk <ckrawczyk@FinkelLaw.com>
Sent: Monday, March 20, 2023 9:42 AM
To: Clarke McCants; mary@crowelafave.com; Paul K. Simons; esquireamy@aol.com; erinelam2@gmail.com; clarkemccants4@gmail.com
Subject: RE: Viviano Release

I have the go ahead for the settlement. Lets get the signatures together. I have my client sending the signatures to "hold" until we have them all. Lets get this done.

Charley

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT C – RELEASE

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**SETTLEMENT AGREEMENT AND
FULL AND FINAL RELEASE OF ALL
CLAIMS**

KNOW ALL MEN BY THESE PRESENTS, that Richard Viviano and Johnette Gunter (collectively referred to as the "Plaintiffs") and Braeloch I Association, Inc., d/b/a Braeloch Homeowner's Association (hereinafter the "Association"), Fulton Jeffers, Sandra Carroll, individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy, individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association (hereinafter collectively referred to as the "Defendants") (hereinafter the Plaintiffs and Defendants are referred collectively as "the Parties"), do hereby agree as follows ("the Agreement"):

AGREEMENT

1. **Release.** For and in consideration of the promises and stipulations set forth in this Agreement, the Plaintiffs do hereby for themselves, their heirs, successors, administrators, representatives, employees, spouses, related corporations, subsidiaries, directors, shareholders, officers and assigns, withdraw the present claim, dismiss any pending actions and remise, release, acquit and forever discharge the Defendants and any and all affiliates, agents, or relatives of the Defendants, and other persons, employees, heirs, administrators,

spouses, firms or corporations, if any, in any way related to the Defendants, from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the Plaintiffs may have against the Defendants for claims and/or damages resulting from, arising out of any of the allegations contained in or related to the present action. This Agreement shall forever and finally release the named individual homeowners, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and their spouses, for actions or inactions as members of the Board of the Association, if any, and/or in their individual capacity for actions or inactions arising out of or in any way associated with those espoused in the Complaint and/or Amended Complaint. Further, the Agreement specifically requires the Parties' compliance with the following mandatory terms which, along with the other aspects of the Agreement, represent the consideration for this Release. The Parties agree as follows:

- a. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - i. The easement shall be reduced from 20' to 15' in width for the entire length.
 - ii. 10' of the easement shall be moved from Lot 47 to Lot 51.
 - iii. The alteration shall be effective for the entirety of the property line of Lot 47.
- b. Defendant Fulton Jeffers shall receive payment in the amount of Twenty Thousand and 00/100 Dollars (\$20,000.00), which shall represent payment for the burden placed upon him and his property paid by Auto-Owners Insurance Company pursuant to Policy #152316-80393215-18 of the Braeloch Homeowner's Association made payable to *Fulton Jeffers*. Defendant Jeffers' attorneys' fees shall be paid out of the above proceeds for the burden placed upon him and his property. This payment is the Plaintiffs' consideration and benefit in exchange for the above-mentioned release and is being paid to Fulton Jeffers at the direction of the Plaintiffs. Jeffers is responsible for all his tax implications associated with the payments.
- c. The Association agrees to remove/release the 10' access easement described within the Covenants between Lots 48 and 49.
- d. The Association will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the Association as necessary for its proper use as an equestrian/pedestrian easement.
- e. The Association shall pay for and have prepared all surveys, plats, any other documents necessary, and costs for the filing/recording of the same. Upon the execution of this Agreement by the Parties, the Association agrees to move forward deliberately to secure and duly record, at its expense, any and all surveys, plats, and any other documents necessary to carry out the revisions to a portion of the

easement located on Lot 47 and Lot 51, and as described in Subparagraph (a) above. The Association further agrees to move forward deliberately with respect to the work needed to complete such revisions, and finish such work by July 31, 2023. In the event that the Association is unable to complete that work by July 31, 2023 the Association shall be entitled to an additional 30-day period to do so. Lot 47's current 20-foot easement will be accessible, as permitted by the Covenants, until the official recording of any and all surveys, plats, and any other documents necessary to carry out the easement revisions. After revision and recording of the new easement and while work is being done to clear the new trail, for any individuals desiring to use the trail on Lot 47 shall use only the 5-foot marked portion of the easement which is not being revised, and shall do so in a manner such as to not interfere with the work being performed.

- f. The Association agrees that it waives any and all claims against the individual homeowners in any way connected to the claims made by Plaintiffs in the Complaint or Amended Complaint or at issue in the present litigation.

2. Association's Representations: By its officers' signatures below, the Association represents that, as of the date this agreement is executed, the Association has presented for a vote to the members of the Association all of the terms contained herein. As inducement to the Parties entering the Agreement, the Association represents that all elements of the Agreement, and specifically the mandatory terms, have been approved by vote. Further, the Association represents that it has presented for a vote to the members of the Association the issue of whether to improve an existing access easement between Lots 18, 19, 20, and 49, as agreed upon by the Parties at mediation. However, this term was not mandatory and it was not approved by the membership at this time. The rejection of this term by the Association does not affect the enforceability of the Agreement.
3. Lack of Future Implications or Waiver. As condition precedent to entering into this Agreement, all Parties agree and hereby stipulate that the easement changes reflected above shall not be construed as setting a precedent or in any way affecting/waiving/nullifying or frustrating the applicability or enforceability of the covenants to any other easement, covenant, or property in the subdivision. This Agreement and the changes reflected herein to these specific sections of easements are intentional and designed to resolve a legal

- dispute. The changes and effects of the changes herein are confined to only the boundary line and equestrian/pedestrian easement shared by Lots 47 and 51 as referenced herein.
4. Mutual Non-Disparagement Agreement. For additional consideration in the Parties' reaching this equitable compromise as set forth in Section 1.0 above, to the fullest extent allowed by law, Richard Viviano, Johnette Gunter, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and any other representative of the named parties to this action, agree that they will never to take any action or otherwise interfere, or attempt to interfere with the each other's community relationships by making non-privileged statements or omissions that could disparage or could result in any harm to the image, personal reputation, business reputation, and/or goodwill of the individual parties to this litigation.
 5. Denial of Liability. Nothing herein shall be construed as an admission by any Party of any liability of any kind to any other Party to this Agreement.
 6. Advice of Counsel and Attorneys' Fees. The Parties have sought and considered the advice of their chosen counsel regarding each and every term of this Agreement and have reviewed each of the terms of this Agreement with the same. All Parties shall bear the costs and attorneys' fees associated with this action and/or the issues arising therefrom.
 7. Counterparts. This Agreement may be executed in any number of counterparts, all of which shall be deemed to constitute one and the same instrument, and each counterpart shall be deemed an original.
 8. Entire Agreement. This Agreement represents the entire agreement of the Parties on this subject, and no other representations, guarantees, inducements, or oral agreements have been made between the Parties.
 9. Governing Law. This Agreement is made under and shall be governed by the laws of the State of South Carolina.

10. Modifications and Amendments. This Agreement shall not be altered, modified, or amended except by a writing signed by the Parties sought to be charged with such alteration, modification, or amendment.
11. Severability of Invalid Provisions. If any term or provision of this Agreement, or the application thereof to any person or circumstance shall, to any extent, be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such terms to persons or circumstances other than those which are deemed invalid or unenforceable, shall not be affected thereby, and each term and provision hereof shall be valid and enforced to the fullest extent permitted by law.
12. Miscellaneous. The paragraph headings used herein are for convenience and reference only, and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.
13. Cooperation Clause. The Parties and their counsel agree to cooperate in any and all respects with the other toward bringing this matter to final resolution, including execution of the necessary orders and/or stipulation(s) of dismissal.

[SIGNATURE PAGES TO FOLLOW]

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Richard Viviano
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Johnette Gunter
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

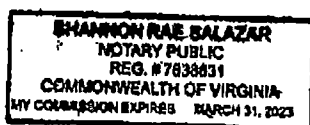
YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I
ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Fulton Jeffers
Fulton Jeffers
Defendant

STATE OF Virginia)
COUNTY OF Accomack)

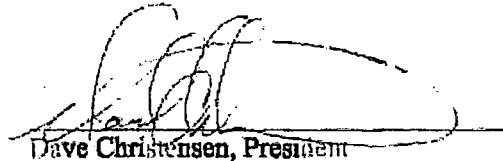
SUBSCRIBED AND SWORN to before me by Fulton Jeffers this the 22nd
day of March, 2023.



Shannon Rae Salazar
NOTARY PUBLIC, State of Virginia
My Commission Expires: 03/31/2023

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

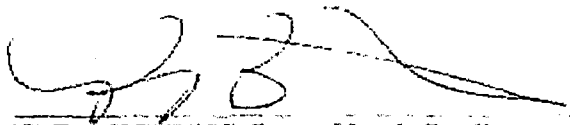
I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.



Dave Christensen, President
Braeloch Homeowner's Association aka
Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by Rachel Hutto this the 4 day
of May, 2023.



NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

My Commission Expires
August 02, 2028

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

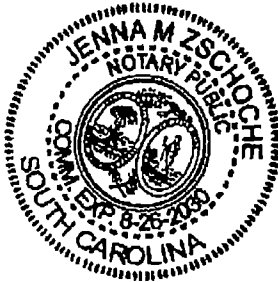
I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I
ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Sandra Carroll

Sandra Carroll aka Sandy Carroll
individually and in her capacity as member
of the Board of the Braeloch Homeowner's
Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by Sandra J. Carroll this the 23
day of March, 2023.

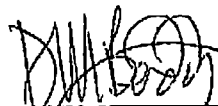


Jenna M. Zschoche
NOTARY PUBLIC, State of South Carolina
My Commission Expires: 8-26-2030

12

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I
ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.



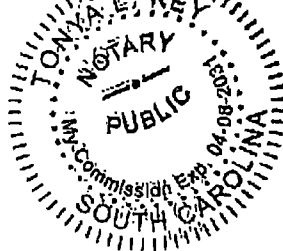
Derrick Boddy, individually and in his
capacity as member of the Board of the
Braeloch Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by James Key this the 5
day of April, 2023.



NOTARY PUBLIC, State of South Carolina
My Commission Expires 4/8/2031



**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT D – ORDER RELIEVING COUNSEL

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch 1 Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**ORDER TO BE RELIEVED AS
COUNSEL**

IT APPEARS that the Finkel Law Firm LLC desires to be relieved as counsel for the Plaintiffs Richard Viviano and Johnette Gunter and as their attorneys of record in this action. The Plaintiffs and the Finkel Law Firm LLC mutually agree that this action is desired, and the Plaintiffs wish to release the Finkel Law Firm from any further obligations in this action.

NOW THEREFORE, on Motion of Finkel Law Firm LLC, by and with the Consent of the Plaintiffs Richard Viviano and Johnette Gunter.

IT IS HEREBY ORDERED that Finkel Law Firm LLC and its attorneys be and are hereby relieved as the attorneys of record for Plaintiffs Richard Viviano and Johnette Gunter.

IT IS FURTHER ORDERED: That Plaintiffs Richard Viviano and Johnette Gunter shall have 60 days to obtain new counsel to represent them in this matter.

AND IT IS SO ORDERED.

The Honorable Courtney Clyburn Pope
Chief Administrative Judge
Second Judicial Circuit

_____, South Carolina
_____, 2023

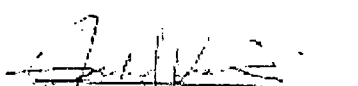
ELECTRONICALLY FILED - 2023 Apr 03 3:05 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208
ELECTRONICALLY FILED - 2023 Jun 26 2:00 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208

WE SO MOVE:

Finkel Law Firm LLC
Post Office Box 1799
Columbia, SC 29202
(803) 765-2935


Charles A. Krawczyk, Esquire
Attorneys for Defendant

We Consent


Richard Viviano


Johnette Gunter



Aiken Common Pleas

Case Caption: Richard Viviano , plaintiff, et al VS Fulton Jeffers , defendant, et al
Case Number: 2018CP0202208
Type: Order/Relieve Counsel

So Ordered

The Honorable Courtney Clyburn Pope

Electronically signed on 2023-04-03 14:34:58 page 3 of 3

ELECTRONICALLY FILED - 2023 Apr 03 3:05 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208
ELECTRONICALLY FILED - 2023 Jun 26 2:00 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY AS A
MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION,
AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF THE BRAELOCH HOMEOWNER'S ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT E – REQUEST FOR TIMELY EXECUTION AND COMPLIANCE WITH RULE 11

Danny C. Crowe*
Matthew C. LaFave*
Mary D. LaFave*
Robert D. Garfield
Lee Ellen Bagley*

**CROWE LAFAVE
GARFIELD & BAGLEY**

ATTORNEYS AT LAW

Steven R. Spreeuwers
Laura R. Baer
Douglas E. Leadbitter
Samuel C. McGlothlin

*Certified Mediator
*Also Licensed in NC

April 18, 2023

Via Email ONLY

John W. Harte
702 Chaffee Lane
Aiken, South Carolina 29801

Re: Richard Viviano and Johnette Gunter v. Braeloch HOA, et al.
C/A #: 2018-CP-02-2208

Dear John:

It is my understanding that you have been retained to represent Richard Viviano and Johnette Gunter in the above-captioned matter following the Court's Order relieving their prior counsel. Enclosed please find the Memorandum of Understanding agreed upon and signed by your clients and their counsel at our mediation. You will also find enclosed the Release agreed upon by your clients and with all of their requested edits incorporated, reflecting the terms of the Memorandum of Understanding.

Please have your clients execute the enclosed Release by the close of business Friday, April 21, 2023, so that we can conclude this matter as the parties have agreed. Should I not hear from you before the expiration of that deadline or if your clients do not agree, please accept this email as satisfaction of the Defendants' SCRCP Rule 11 obligations to consult prior to filing a Motion to Enforce Settlement. If you need additional time, please advise.

If you have any concerns or questions, please do not hesitate to contact me by email at mary@crowelafave.com or (803) 726-6756.

Sincerely,



Mary D. LaFave

Enclosures

cc: Counsel of Record (via email)
Clients (via email)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

SECOND JUDICIAL CIRCUIT

Richard Viviano and Johnette Gunter,

C/A No : 2018-CP-02-2208

Plaintiffs,

v.

Memorandum of Understanding

Fulton Jeffers and Braeloch I Association, Inc.
D/B/A Braeloch Homeowner's Association,
Sandra Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association; and Derrick Boddy
individually and in his capacity as a member of
the Board of the Braeloch Homeowner's
Association,

Defendants.

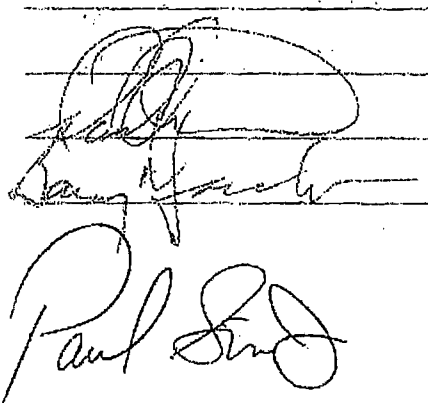
The Parties, having come to a proposed settlement in Mediation agree to settle all claims in the above-caption action subject to the terms in this agreement that require further action:

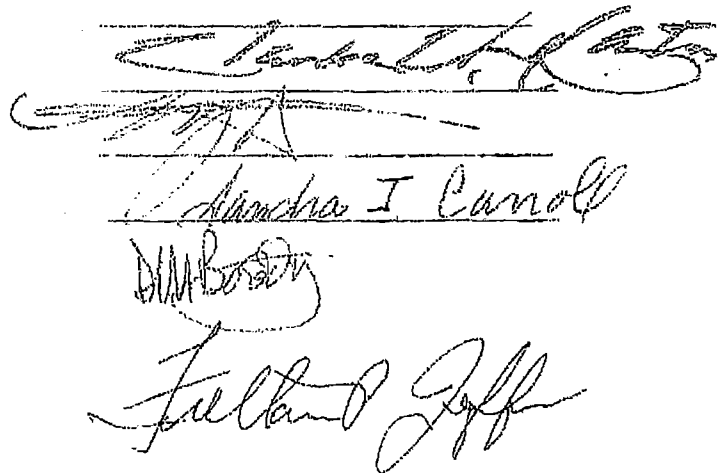
1. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - a. The easement shall be reduced from 20' to 15' in width.
 - b. 10' of the easement shall be moved from lot 47 to Lot 51.
 - c. The alteration shall be effective for the entirety of the property line of Lot 47.
2. Defendant Fulton Jeffers shall receive payment in the amount of \$20,000 which shall represent payment for the burden placed on his property.
3. The HOA agrees to remove/release the 10' access easement described in the covenants between lots 48 and 49 (the Lee/Santos Easement).
4. The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.
5. The HOA will present for a vote to the members of the HOA whether to improve an existing access easement between lots 18, 19, 20 & Lot 49, the outcome of which will not effect the enforceability of this settlement.
6. The parties will sign a non-waiver agreement agreeing that the settlement does not create a waiver of the enforcement of the covenants.
7. The parties will enter into a mutual non-disparagement agreement.
8. This settlement is contingent upon the HOA getting homeowner approval of their obligations under Paragraphs 1 and 3 of this memorandum.
9. Full and final release of all claims by Plaintiffs against Sandy Carroll and Derrick Boddy.

[Signatures]
Sandra Carroll
Derrick Boddy
WJG
PKS

10. The HOA shall pay for and prepare all surveys, plats documents and costs with filing.
11. All parties shall bear their own attorney fees and costs.
12. Full and final settlement agreement to be drafted by Mary LaFave.
13. The HOA shall bring the matter to a vote of the members within the 60 days of the signed release.

Agreed this 25th day of May 2022


Paul Lind


Amanda I Carroll
Fulland Joff

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-2208

**SETTLEMENT AGREEMENT AND
FULL AND FINAL RELEASE OF ALL
CLAIMS**

KNOW ALL MEN BY THESE PRESENTS, that Richard Viviano and Johnette Gunter (collectively referred to as the "Plaintiffs") and Braeloch I Association, Inc., d/b/a Braeloch Homeowner's Association (hereinafter the "Association"), Fulton Jeffers, Sandra Carroll, individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy, individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association (hereinafter collectively referred to as the "Defendants") (hereinafter the Plaintiffs and Defendants are referred collectively as "the Parties"), do hereby agree as follows ("the Agreement"):

AGREEMENT

1. **Release.** For and in consideration of the promises and stipulations set forth in this Agreement, the Plaintiffs do hereby for themselves, their heirs, successors, administrators, representatives, employees, spouses, related corporations, subsidiaries, directors, shareholders, officers and assigns, withdraw the present claim, dismiss any pending actions and remise, release, acquit and forever discharge the Defendants and any and all affiliates, agents, or relatives of the Defendants, and other persons, employees, heirs, administrators,

spouses, firms or corporations, if any, in any way related to the Defendants, from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the Plaintiffs may have against the Defendants for claims and/or damages resulting from, arising out of any of the allegations contained in or related to the present action. This Agreement shall forever and finally release the named individual homeowners, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and their spouses, for actions or inactions as members of the Board of the Association, if any, and/or in their individual capacity for actions or inactions arising out of or in any way associated with those espoused in the Complaint and/or Amended Complaint. Further, the Agreement specifically requires the Parties' compliance with the following mandatory terms which, along with the other aspects of the Agreement, represent the consideration for this Release. The Parties agree as follows:

- a. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - i. The easement shall be reduced from 20' to 15' in width for the entire length.
 - ii. 10' of the easement shall be moved from Lot 47 to Lot 51.
 - iii. The alteration shall be effective for the entirety of the property line of Lot 47.
- b. Defendant Fulton Jeffers shall receive payment in the amount of Twenty Thousand and 00/100 Dollars (\$20,000.00), which shall represent payment for the burden placed upon him and his property paid by Auto-Owners Insurance Company pursuant to Policy #152316-80393215-18 of the Braeloch Homeowner's Association made payable to *Fulton Jeffers*. Defendant Jeffers' attorneys' fees shall be paid out of the above proceeds for the burden placed upon him and his property. This payment is the Plaintiffs' consideration and benefit in exchange for the above-mentioned release and is being paid to Fulton Jeffers at the direction of the Plaintiffs. Jeffers is responsible for all his tax implications associated with the payments.
- c. The Association agrees to remove/release the 10' access easement described within the Covenants between Lots 48 and 49.
- d. The Association will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the Association as necessary for its proper use as an equestrian/pedestrian easement.
- e. The Association shall pay for and have prepared all surveys, plats, any other documents necessary, and costs for the filing/recording of the same. Upon the execution of this Agreement by the Parties, the Association agrees to move forward deliberately to secure and duly record, at its expense, any and all surveys, plats, and any other documents necessary to carry out the revisions to a portion of the

easement located on Lot 47 and Lot 51, and as described in Subparagraph (a) above. The Association further agrees to move forward deliberately with respect to the work needed to complete such revisions, and finish such work by July 31, 2023. In the event that the Association is unable to complete that work by July 31, 2023 the Association shall be entitled to an additional 30-day period to do so. Lot 47's current 20-foot easement will be accessible, as permitted by the Covenants, until the official recording of any and all surveys, plats, and any other documents necessary to carry out the easement revisions. After revision and recording of the new easement and while work is being done to clear the new trail, for any individuals desiring to use the trail on Lot 47 shall use only the 5-foot marked portion of the easement which is not being revised, and shall do so in a manner such as to not interfere with the work being performed.

- f. The Association agrees that it waives any and all claims against the individual homeowners in any way connected to the claims made by Plaintiffs in the Complaint or Amended Complaint or at issue in the present litigation.

2. Association's Representations: By its officers' signatures below, the Association represents that, as of the date this agreement is executed, the Association has presented for a vote to the members of the Association all of the terms contained herein. As inducement to the Parties entering the Agreement, the Association represents that all elements of the Agreement, and specifically the mandatory terms, have been approved by vote. Further, the Association represents that it has presented for a vote to the members of the Association the issue of whether to improve an existing access easement between Lots 18, 19, 20, and 49, as agreed upon by the Parties at mediation. However, this term was not mandatory and it was not approved by the membership at this time. The rejection of this term by the Association does not affect the enforceability of the Agreement.

3. Lack of Future Implications or Waiver. As condition precedent to entering into this Agreement, all Parties agree and hereby stipulate that the easement changes reflected above shall not be construed as setting a precedent or in any way affecting/waiving/nullifying or frustrating the applicability or enforceability of the covenants to any other easement, covenant, or property in the subdivision. This Agreement and the changes reflected herein to these specific sections of easements are intentional and designed to resolve a legal

dispute. The changes and effects of the changes herein are confined to only the boundary line and equestrian/pedestrian easement shared by Lots 47 and 51 as referenced herein.

4. Mutual Non-Disparagement Agreement. For additional consideration in the Parties' reaching this equitable compromise as set forth in Section 1.0 above, to the fullest extent allowed by law, Richard Viviano, Johnette Gunter, Fulton Jeffers, Sandra Carroll aka Sandy Carroll, Derrick Boddy, and any other representative of the named parties to this action, agree that they will never to take any action or otherwise interfere, or attempt to interfere with the each other's community relationships by making non-privileged statements or omissions that could disparage or could result in any harm to the image, personal reputation, business reputation, and/or goodwill of the individual parties to this litigation.
5. Denial of Liability. Nothing herein shall be construed as an admission by any Party of any liability of any kind to any other Party to this Agreement.
6. Advice of Counsel and Attorneys' Fees. The Parties have sought and considered the advice of their chosen counsel regarding each and every term of this Agreement and have reviewed each of the terms of this Agreement with the same. All Parties shall bear the costs and attorneys' fees associated with this action and/or the issues arising therefrom.
7. Counterparts. This Agreement may be executed in any number of counterparts, all of which shall be deemed to constitute one and the same instrument, and each counterpart shall be deemed an original.
8. Entire Agreement. This Agreement represents the entire agreement of the Parties on this subject, and no other representations, guarantees, inducements, or oral agreements have been made between the Parties.
9. Governing Law. This Agreement is made under and shall be governed by the laws of the State of South Carolina.

10. Modifications and Amendments. This Agreement shall not be altered, modified, or amended except by a writing signed by the Parties sought to be charged with such alteration, modification, or amendment.
11. Severability of Invalid Provisions. If any term or provision of this Agreement, or the application thereof to any person or circumstance shall, to any extent, be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such terms to persons or circumstances other than those which are deemed invalid or unenforceable, shall not be affected thereby, and each term and provision hereof shall be valid and enforced to the fullest extent permitted by law.
12. Miscellaneous. The paragraph headings used herein are for convenience and reference only, and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.
13. Cooperation Clause. The Parties and their counsel agree to cooperate in any and all respects with the other toward bringing this matter to final resolution, including execution of the necessary orders and/or stipulation(s) of dismissal.

[SIGNATURE PAGES TO FOLLOW]

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Richard Viviano
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Johnette Gunter
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Fulton Jeffers
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Dave Christensen, President
Braeloch Homeowner's Association aka
Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Sandra Carroll aka Sandy Carroll
individually and in her capacity as member
of the Board of the Braeloch Homeowner's
Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

YOU ARE MAKING A FINAL SETTLEMENT, READ BEFORE SIGNING.

I CONFIRM THAT I READ THE FOREGOING SETTLEMENT AGREEMENT. I ACCEPT ITS TERMS AND AGREE TO ABIDE BY THEM IN FULL.

Derrick Boddy, individually and in his
capacity as member of the Board of the
Braclach Homeowner's Association
Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

SUBSCRIBED AND SWORN to before me by _____ this the ____ day
of _____, 2023.

NOTARY PUBLIC, State of South Carolina
My Commission Expires: _____

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY
AS A MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S
ASSOCIATION, AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY
AS A MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S
ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT F – LETTER FROM HARTE

**LAW OFFICE OF JOHN W. HARTE
ATTORNEYS AT LAW, LLC**

John W. Harte Esq
John@jwhartelaw.com
PO Box 7215
Aiken, S.C., 29804

Dalton P. Cooper, Esq
Dalton@jwhartelaw.com
john@jwhartelaw.com
803 226 0755

April 24, 2023

Mary LaFave, Esq
Via Email
Columbia, S.C. 29201

In Re: Richard Viviano and Johnette Gunter v Braeloch HOA
Civil Action Number 2018 DP 02 2208

Dear Ms. LaFave

I met with my clients, and we reviewed the documents which you sent to me last week.

I cannot advise my clients to sign the "settlement" document for the following reasons:

First the Lot which is causing the problem (Lot "51") is not lawfully a part of Braeloch. The admission of this parcel was attempted using fewer than the required number of lot owners. Since the lot is not a part of Braeloch, the owners of that lot have no right to enter Braeloch other than on the public roads, if any, in the subdivision. They have an easement which enables them to reach their lot, but that is the only exception to which they are entitled.

The information relating to the approval of Lot 51's admission to Braeloch was not known to my clients at the time of the mediation. Had they known the whole story, they would not have agreed to the memorandum of agreement. Therefore, it is void by reason of failure to provide and the fraudulent concealment of vital information critical to the issues being mediated. The documents show that your clients knew well before the mediation, that there were insufficient signatures on the petition for admission of lot 51. This should have been disclosed prior to or at the very latest during mediation.

I have also been given information which leads me to conclude that there are notes from the meetings of the Home Owners' Association which have not been turned over. These are believed to be in several, perhaps as many as 8 boxes. They were last seen in the home now owned by Jeff Stevens although he is not my source for this information. My source is an individual who was at the home and went through a hall where these boxes were being stored. The boxes were clearly labeled as minutes of meetings.

The releases which appear in the document which you want my clients to sign are not consistent with the limited releases contemplated by the memorandum of understanding.

The releases as drafted are far more inclusive than what is mentioned in the memorandum of understanding.

In addition to those reasons, the entire process is tainted and rendered a nullity by the incredible passage of time since the mediation was concluded. The delay has allowed additional events to occur, including the attitude which your clients have adopted toward my clients and their property. Clearly your clients either do not understand what boundary lines mean or they are intentionally trespassing. Either way, the memorandum of agreement, even if it had been valid, requires good faith. Your clients' declaration that they did not care what the agreement or easement says demonstrates a complete absence of good faith. By declaring that they will use my client's driveway or access to the riding trail regardless of the location of easements, renders the entire agreement invalid.

In addition to the problems mentioned above, there appears to have been waivers or consent by silence to numerous violations of the covenants especially those relating to the riding trail. All of which create a doubt that the covenants are even enforceable, especially those that have been selectively enforced or ignored.

I look forward to discussing possible settlements based on all of the relevant information and based on the fact that Lot 51 is not a part of Braeloch.

Sincerely,

John W. Harte

John W. Harte
SC Bar No. 2773

john@iwhartelaw.com
803 226 0755

**RICHARD VIVIANO AND JOHNETTE GUNTER V. FULTON JEFFERS AND
BRAELOCH I ASSOCIATION, INC. D/B/A BRAELOCH HOMEOWNER'S
ASSOCIATION, SANDY CARROLL INDIVIDUALLY AND IN HER CAPACITY
AS A MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S
ASSOCIATION, AND DERRICK BODDY INDIVIDUALLY AND IN HIS CAPACITY
AS A MEMBER OF THE BOARD OF THE BRAELOCH HOMEOWNER'S
ASSOCIATION**

CIVIL ACTION NUMBER: 2018-CP-02-2208

MOTION TO ENFORCE SETTLEMENT ON BEHALF OF DEFENDANTS

EXHIBIT G - 2ND LETTER FROM HARTE

**LAW OFFICE OF JOHN W. HARTE
ATTORNEYS AT LAW, LLC**

John W. Harte Esq
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PO Box 7215
Aiken, S.C., 29804

Dalton P. Cooper, Esq
Dalton@jwhartelaw.com
john@jwhartelaw.com
803 226 0755

May 2, 2023

Mary LaFave, Esq
Via Email
Columbia, S.C. 29201

In Re: Richard Viviano and Johnette Gunter v Braeloch HOA
Civil Action Number 2018 DP 02 2208

Dear Ms. LaFave

Dear Ms. LaFave,

This letter replaces the letter sent to you bearing date of April 24, 2023.

As I indicated in the letter sent to you earlier today, I have met with my clients, and we reviewed the documents which you sent to me last week. After reviewing the documents, I cannot advise my clients to sign the "settlement" document for the following reasons:

First, Lot 51 is not lawfully a part of Braeloch. The required number of signatures from lot owners were not obtained on the petition to bring Lot 51 into Braeloch. Since Lot 51 is not a part of the subdivision, the owners can only use the roads which take them to the easement that allows them access to their property. That is the only exception to which they are entitled.

The petition revealing the lack of the required number of lot owner signatures was not known to my clients at the time of mediation. Had this information been known by my clients, they would not have agreed to the Memorandum of Understanding. Your clients had to know that the signatures were defective. This information should have been disclosed years before or at the very latest during mediation.

I have also been given information which leads me to conclude that there are notes from the homeowners' meetings as well as other documents which have not been turned over as requested. My clients received partial discovery documents four months after the original request for discovery documents. The production of documents by your client was not appropriate. Production means production. Forcing a litigant to review documents under the eyes of opposing counsel does not constitute production.

ELECTRONICALLY FILED - 2023 Jun 26 2:00 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208

My clients have advised me that they found copies or emails that were incomplete with pertinent pages missing.

I am also concerned that my clients believe that there are numerous documents requested in May 2021 that have not been produced. That is another reason why the MOA is invalid.

The releases which appear in the document which you want my clients to sign are not consistent with the limited releases contemplated by the Memorandum of Understanding. The releases as drafted are far more inclusive than what is mentioned in the MOU.

In addition to those reasons, the entire process is tainted and rendered a nullity by the incredible passage of time since the mediation was concluded. The delay has allowed additional events to occur, including the attitude which your clients have adopted toward my clients and their property. My clients were told that one of your client's spouses said it did not matter what the final agreement stipulated about easements, she would continue to use my client's driveway as access to the riding trail. Even if the Memorandum of Agreement had been valid, it requires good faith. The comment by your client's spouse demonstrates a complete absence of good faith. Declaring my client's driveway will be used for access to the riding trail regardless of the location of easements, renders the entire agreement invalid.

In addition to the problems mentioned above, there appears to have been waivers or consent by silence to numerous violations of the covenants especially those relating to the riding trail. All of which creates a doubt that the covenants are even enforceable, especially those that have been selectively enforced or ignored.

I look forward to discussing possible settlements based on all of the relevant information and based on the fact that Lot 51 is not part of Braeloch.

Sincerely,

John W. Harte

John W. Harte
SC Bar No. 2773

john@jwhartelaw.com
803 226 0755

STATE OF SOUTH CAROLINA COUNTY
OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants

IN THE COURT OF COMMON
PLEAS SECOND JUDICIAL
CIRCUIT

Civil Action No. 2018-CP-02-2208

REPLY TO MOTION

TO ENFORCE MEDIATION

AGREEMENT

The Plaintiffs, responding to the Motion to Enforce Settlement respectfully objects to the Motion and moves that the Motion be denied for the following reasons:

1. The "Memorandum of Understanding is not enforceable. That issue was decided by the South Carolina Supreme Court in Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014)

"Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920). A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). Thus, for a contract to be binding, material terms cannot be left for future

agreement. *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986)."

The Memorandum of Agreement upon which the Defendants rely does not contain all essential and material elements of a contract. The Plaintiffs are not bound by the agreement unless the final document which as yet does not exist is approved by the HOA. The Memorandum of Agreement is not the final document / contract, the Memorandum of Understanding was not a finished product. Other action was required to form a contract. First, under the terms of the document upon which the Defendants rely, the parties had to reach an agreement on the terms of what was intended to be the actual and complete contract / agreement. As the actual series of events shows, the parties were never able to agree on that final document. Further, the Plaintiffs are not bound unless the HOA approves the final agreement. It is important to note that if the Memorandum of Understanding had been a complete contract, that document would have been for submission to the HOA. The Memorandum of Understanding was not the document which was to be approved by the HOA. A subsequent document containing the final and complete terms was to be submitted.

To further support the fact that the Memorandum of Understanding is not a contract, reference should be made to paragraph 8 of the document which provides that the "Understanding" is contingent and requires that the final contract (which was never signed) must be approved by the mechanism required by the subdivision bylaws and covenants.

There is no time limit for the creation of the final agreement, and, in fact that drafts of the final agreement have never been agreed to. Paragraph 7 indicates that there will be a mutual anti-disparagement agreement, but the terms of that agreement are not set out in the Memorandum of Agreement thus rendering the Memorandum of Understanding incomplete and unenforceable.

The terms of the Memorandum of Understanding at paragraph 4 provide for an undefined and nonspecific right on the part of the Defendants to designate "whatever portion of the equestrian/pedestrian easement now moved and located on lot 51 that is now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement."

Paragraph 7 lacks any specificity and, until an actual contract document with specificity is drafted and accepted by the Plaintiffs, there is no contract. The Memorandum was nothing more than an acknowledgement that, if all contingencies were met and if the parties reached agreement on the terms of the actual contract, the parties might enter into a contract. The Memorandum of Understanding is simply not enforceable under South Carolina Law.

2. The Defendants fraudulently withheld vital and material information about the dispute both in the Mediation, during discovery and prior to Mediation as follows:

a. Lot 51 is not lawfully a part of Braeloch.. The required number of signatures from lot owners were not obtained on the petition to bring Lot 51 into Braeloch. Since Lot 51 is not a part of the subdivision, the owners can only use the roads which take them to the easement that allows them access to their property. That is the only exception to which they are entitled.

b. The fact that there were insufficient signatures on the petition to bring Lot 51 into the Braeloch Subdivision was known to the Defendants and was intentionally concealed so that the Plaintiff's would not have complete or accurate information concerning the facts.

c. The fact that the petition did not have sufficient information was material to the issues being mediated and, had the Defendants not fraudulently concealed the truth, the Plaintiffs would not have entered into the "Understanding."

d. The Understanding is void for willful concealment of material facts and

for fraudulent misrepresentation in that the Defendants contended that Lot 51 had been lawfully included in Braeloch when in fact the Defendants well knew or with the exercise of due diligence would have known the truth.

e. The Plaintiff's during the Mediation relied on the discovery which had been provided by the Defendants and were not aware of the truth.

f. The Plaintiffs could not know, nor could they discover the truth prior to the mediation because of the refusal on the part of the Defendants to provide full disclosure in discovery.

g. The Defendants continued during mediation to conceal the truth rendering an agreement void.

h. The lack of the required number of lot owner signatures was not known to the Plaintiffs at the time of mediation. Had this information been known, the Plaintiff's would not have agreed to the Memorandum of Understanding. The Defendants knew that the signatures were insufficient, and fatally defective. This information should have been disclosed years before or at the very latest during mediation.

3. There are notes from the homeowners' meetings as well as other documents which have not been turned over as required during discovery. The Defendants intentionally provided only partial discovery documents four months after the original request for discovery documents. The production of documents was intentionally incomplete. Production means production. By refusing to provide copies of all relevant documents, the Defendants violated the Rules of Discovery and willfully concealed material facts which, if known to the Plaintiffs would have led to their rejection of the terms set out in the "memorandum of understanding."

4. The Plaintiffs verily believe that there are yet numerous documents requested in

May 2021 that have not been produced. The failure to produce relevant and material documents renders the Memorandum of Understanding void.

5. The releases which appear in the document presented to the Plaintiffs are not consistent with the limited releases contemplated by the Memorandum of Understanding. Therefore, there is no valid Memorandum of Understanding.

6. The Defendants rendered the Memorandum of Understanding a nullity because of the incredible passage of time since the mediation was concluded. The delay has allowed additional events to occur, including the attitude which the Defendants have adopted toward my clients and their property. Persons within Braeloch with the consent and knowledge of the Defendants have notified the Plaintiffs directly or indirectly that they will continue to use my client's driveway as access to the riding trail. Even if the Memorandum of Understanding were valid, it requires good faith. Declaring that my client's driveway will be used for access to the riding trail regardless of the location of easements, renders the entire Understanding invalid. The fact that the parties were unable to reach an agreement on the terms of the document that would have been an enforceable contract further supports the conclusion that the Memorandum of Understanding is not an enforceable contract. If the parties cannot convert a "Memorandum of Understanding" to a binding contract there is no meeting of the minds and thus no contract.

7. Unknown to the Plaintiffs prior to and during the Mediation, there had been waivers of covenants or consent by silence to numerous violations of the covenants especially those relating to the riding trail. Not all of those waivers or consent to violations were made known to the Plaintiffs. All of which creates a doubt that the covenants are even enforceable, especially those that have been selectively enforced or ignored. The fact that the Defendants' conduct renders or may render the covenants unenforceable was not known to the Plaintiffs when

the Memorandum of Understanding was allegedly reached.

8. The Memorandum of Understanding is not enforceable because it lacks the necessary elements to form a binding contract. Specifically, there is not consideration stated in the Contract and therefore there is not a binding contract.

9. The Memorandum of Understanding is not enforceable because standing alone is not a contract, but merely a declaration of an intent to enter into a contract. The Defendants never produced an acceptable contract. Therefore, the intent to enter into a contract was unfulfilled and the passage of time renders the memorandum void.

10. The Defendants, if they had any enforceable rights under the Memorandum of Understanding are barred from enforcing those right due to the doctrine of laches because the Defendants for a year have neither completed the work to create a binding contract nor sought enforcement. Even if the Memorandum of Understanding were enforceable, the failure of the Defendants to act in a timely manner constitutes laches rendering the memorandum of understanding void and/or unenforceable.

11. The Memorandum of Understanding is not enforceable because it does not contain all of the essential elements of a contract. It is silent as to consideration. There are other essential elements to form a contract which are yet to be completed. See for example Paragraph 11 which indicates that there must be a vote of the HOA. Since that provision had not been fulfilled as of the date the Memorandum of Understanding was signed, there could be no contract because the Defendants were not actually bound by the Memorandum of Understanding. See also Paragraph 8 which expressly states that the Memorandum is a contingent agreement and therefore not enforceable.

12. The memorandum is replete with ambiguous and incomplete statements about

what might be done to create a contract, but the specifics necessary to form a contract are missing. There is no consideration mentioned; the terms relating to the equestrian easement are void of any specificity. The agreement is by the terms expressed in the document contingent and therefore unenforceable. The agreement is not binding on the Plaintiffs.

The familiar requisites to a binding contract are a meeting of the minds of the parties as to all essential and material terms, supported by consideration. *See Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 368, 593 S.E.2d 170, 173 (Ct. App. 2004) ("The necessary elements of a contract are offer, acceptance, and valuable consideration.") Lampo v. Amedisys Holding, LLC, 437 S.C. 236, 242, 877 S.E.2d 486, 489 (Ct. App. 2022).

For there to be a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011)

The Memorandum of Understanding does not contain all of the essential and material terms of an agreement.

The Memorandum of Understanding is not enforceable because, to be enforceable, additional steps had to be completed, including a vote by the HOA to ratify the final agreement. Absent approval by the HOA there was not a binding contract, the Memorandum of Understanding was not the final agreement and thus was not enforceable and, even if it were a final agreement, it was not binding until the HOA approved it. .

"When the parties know that the execution and delivery of a written contract is a condition precedent to their being bound by that contract, the contract is simply not binding until the written agreement is executed and delivered, even if all of the terms have been agreed upon.

See, e.g., Oeland v. Kimbrell's Furniture Co., 210 S.C. 223, 227, 42 S.E.2d 228, 228-29 (1947)

Sifonios v. Town of Surfside Beach, 414 S.C. 269, 274, 777 S.E.2d 425, 428 (Ct. App. 2015)

THEREFORE, the Plaintiffs move that the Motion to Enforce Mediation Settlement be denied with fees and costs assessed against the Defendants. The Plaintiffs further move that the Memorandum of Understanding be declared null and void.

s/John W. Harte

SC Bar No. 2773

LAW OFFICES OF JOHN W. HARTE ATTORNEYS AT LAW, LLC

P.O. Box 7215

Aiken, SC 29804

Email: john@jwhartelaw.com

Phone: 803 226 0755

STATE OF SOUTH CAROLINA COUNTY
OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants

IN THE COURT OF COMMON
PLEAS SECOND JUDICIAL
CIRCUIT

Civil Action No. 2018-CP-02-2208

**REPLY TO MOTION
TO ENFORCE MEDIATION
AGREEMENT**

The Plaintiffs, responding to the Motion to Enforce Settlement respectfully objects to the Motion and moves that the Motion be denied for the following reasons:

FAILURE TO COMPLY WITH RULE 11 SCRPC

The Motion To Enforce is not properly before the Court. Rule 11(a) SCRPC requires that:

"All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held".

The Defendants motion does not contain that affirmation and is therefore not properly before the Court. Rule 11 is quite specific as to what must happen if counsel does not comply with Rule 11 (a). The language of the rule does not offer the Court a

choice: "If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken ..."

Where appropriate, Counsel may correct the error by providing the affirmation after the omission is called to counsel's attention. However, in this case, if the Plaintiff were to affirm that counsel has complied with Rule 11, that would be demonstrably false. The exchange between Attorney for the Defendant, and the Plaintiff includes the letter from the Attorney for the Defendant which is attached to this Reply and labeled exhibit A. Counsel for the Defendant invites the Court's attention to that letter and to the exchange of emails which are attached and labeled exhibit B.

The record shows that Harte has replaced counsel for the Plaintiff as of April 24, 2023. Very shortly after that Counsel for the Plaintiff sent a letter to opposing counsel. The letter dated May 2, 2023, outlines several reasons for Plaintiffs Counsel's position that he could not advise his clients to sign the proposed document. That letter, after pointing out the concerns, specifically indicates a desire to discuss possible settlement of the issues (see last paragraph). That request for negotiations was repeated in the email sent by Harte on May 2, 2023 (Exhibit B). In response (Exhibit B) the attorney for the Defense, in direct violation of the spirit and letter of Rule 11 SCRCP sent the following message.

Your email indicates that you look forward to hearing from me, but your letter quite clearly sets forth that your clients have no intention of honoring the settlement agreement. I think our attempts to work through this have ended based on your letter.

Sincerely,

Mary D. LaFave

In light of that message, Counsel for the cannot in good faith represent that the requirements of Rule 11 have been complied with. Moreover, absent any effort to negotiate, counsel cannot possibly know whether further negotiations or discussions would or would not prove fruitful.

The facts are quite clear on this. Counsel for the Defense has not and, indeed, cannot in good faith certify that she has complied with Rule 11. Her message and her words show beyond any doubt that she is totally unwilling to work with counsel for the or even to respond to the concerns expressed by Counsel for the Plaintiffs. That stonewall approach to litigation is exactly what Rule 11 prohibits.

**THE FAILURE TO RESPOND TO CONCERNS EXPRESSED BY PLAINTIFFS
COUNSEL ON MAY 2, 2023 IS FATAL TO THE MOTION TO ENFORCE.**

In the first section of this Reply, counsel for the relies on the duty to certify under Rule 11. However, that is not the only reason why the Motion should be dismissed as improperly before the Court.

Rule 11 not only requires certification, but it also compels parties to negotiate in good faith. Good faith means that counsel cannot ignore concerns such as those set out Defense Counsel's May 2, 2023, letter. Those concerns are not trivial, and they point out very serious problems that render the mediation a nullity. The Defense's silence in response to those concerns and statements of fact has to be taken to be an acknowledgement of the truth of the statements. It well settled that silence in the face of allegations which require a response justifies the inference that the allegations are true.

The issue here regarding the failure to respond to the allegations made in the Harte letter of May 3, 2023, is made clearer by the fact that the are in a unique position to know the truth. The Homeowners Association and the Defendant landowners were directly responsible for the creation and execution of the Petition by which an attempt was made to bring the subject land into the subdivision. The information regarding the failure to obtain sufficient signatures was known to the Defendants at all times and it was concealed from the Plaintiffs. The failure on the part of Defenses counsel to respond to the allegations made in the Harte letter of May 3, 2023 must be considered an admission that the allegations are true.

Further, even if the inference adverse to the Plaintiff's is not made, the Court should not ignore the failure to respond where the Defendants are uniquely positioned to know the truth and the Plaintiffs are not.

The letter (Exhibit A) raised important and critical questions which, if known, would have dramatically changed the negotiating positions of the parties. At the very least, the Defendants have a duty to address these concerns. The failure to address those concerns renders it impossible for the Court to enforce an agreement to reach an agreement such as is presented here. The concerns set out in Exhibit A go to the heart of the Plaintiffs' rights and cannot be ignored.

**THE MEMORANDUM OF UNDERSTANDING IS NOT ENFORCEABLE
BECAUSE IT IS NOT A FINAL AGREEMENT, BUT IS MERELY AN
AGREEMENT TO MAKE AN AGREEMENT**

The "Memorandum of Understanding is not enforceable. That issue was decided by the South Carolina Supreme Court in Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014)

“Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920). A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). Thus, for a contract to be binding, material terms cannot be left for future agreement. *Aperm of S.C. v. Roaf*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986).”

The Memorandum of Understanding upon which the Defendants rely does not contain all essential and material elements of a contract. The Parties are not bound by the Memorandum of Understanding unless the final document which as yet does not exist is approved by the HOA. The Memorandum of Understanding is not the final document / contract, the Memorandum of Understanding was not a finished product. Other action was required to form a contract.

First, under the terms of the document upon which the Defendants rely, the parties had to reach an agreement on the terms of what was intended to be the actual and complete contract / agreement. As the actual series of events shows, the parties were never able to agree on that final document. Further, the Plaintiffs are not bound unless the HOA approves the final agreement. It is important to note that if the Memorandum of Understanding had been a complete contract, that document would have been for submission to the HOA. The Memorandum of Understanding was not the document which was to be approved by the HOA. A subsequent document containing the final and complete terms was to be submitted.

To further support the fact that the Memorandum of Understanding is not a contract reference is had to paragraph 8 of the document which provides that the

"Understanding" is contingent and requires that the final contract (which was never signed) must be approved by the mechanism required by the subdivision bylaws and covenants.

There is no time limit for the creation of the final agreement, and, in fact, drafts of the final agreement have never been agreed to. For example, Paragraph 7 indicates that there will be a mutual anti disparagement agreement, but the terms of that agreement are not set out in the Memorandum of Understanding thus rendering the Memorandum of Understanding incomplete and unenforceable. The terms of the Memorandum of Understanding at paragraph 4 provide for an undefined and nonspecific right on the part of the Defendants to designate "whatever portion of the equestrian/pedestrian easement now moved and located on lot 51 that is now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.

Paragraph 7 lacks any specificity and, until an actual contract document with specificity is drafted and accepted by the Plaintiffs, there is no contract. The Memorandum was nothing more than an acknowledgement that, if all contingencies were met and if the parties reached agreement on the terms of the actual contract, the parties might enter into a contract. The Memorandum of Understanding is simply not enforceable under South Carolina Law.

THE DEFENDANTS DID NOT NEGOTIATE IN GOOD FAITH AND WITHHELD CRITICAL INFORMATION TO GAIN AN UNFAIR ADVANTAGE

The Defendants fraudulently withheld vital and material information about the dispute during discovery and through to the conclusion of mediation. Specifically, :

- a. Lot 51 is not lawfully a part of Braeloch.. The required number of

signatures from lot owners were not obtained on the petition to bring Lot 51 into Braeloch. Since Lot 51 is not a part of the subdivision, the owners can only use the roads which take them to the easement that allows them access to their property. That is the only exception to which they are entitled.

b. The fact that there were insufficient signatures on the petition to bring Lot 51 into the Braeloch Subdivision was known to the Defendants and was intentionally concealed so that the Plaintiff's would not have complete or accurate information concerning the facts.

c. The fact that the petition did not have sufficient information was material to the issues being mediated and, had the Defendants not fraudulently concealed the truth, the Plaintiffs would not have even considered accepting the "Understanding."

d. The Defendants contended that Lot 51 had been lawfully included in Braeloch when in fact the Defendants well knew or with the exercise of due diligence would have known the truth.

e. The Plaintiff's during the Mediation relied on the discovery which had been provided by the Defendants and were not aware of the truth.

f. The Plaintiffs could not know, nor could they discover the truth prior to the mediation because of the refusal on the part of the Defendants to provide full disclosure in discovery.

g. The Defendants continued even during mediation to conceal the truth rendering void any agreement arrived at through that flawed mediation void. In that regard it is well established that a party in a fiduciary role must fully disclose all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. Adkins v. I'On Co., 2023 S.C. LEXIS 22, *24 The lack of the required

number of lot owner signatures was not known to the Plaintiffs at the time of mediation. Had this information been known, the Plaintiff's would not have agreed to the Memorandum of Understanding. The Defendants knew that the signatures were insufficient, and fatally defective. This information should have been disclosed years before or at the very latest during mediation.

There are notes from the homeowners' meetings as well as other documents which have not been turned over as required during discovery. The Defendants intentionally provided only partial discovery documents approximately four months after the original request for discovery documents. The production of documents was intentionally incomplete. Production means production. By refusing to provide copies of all relevant documents, the Defendants violated the Rules of Discovery and willfully concealed material facts which, if known to the Plaintiffs would have led to their rejection of the terms set out in the "Memorandum of Understanding.."

The Plaintiffs, based on the Defendants history of misconduct and deception, believe that there are yet numerous documents requested in May 2021 that have not been produced. This failure to produce relevant and material documents renders the Memorandum of Understanding void. .

**THE DEFENDANTS ARE ESTOPPED FROM
ENFORCING THE MEMORANDUM**

The Defendants used deceptive discovery practices and they have remained silent when they had a duty to speak and to disclose the truth regarding the petitions used to admit Lot 51. They are equitably estopped from enforcing the mediation agreement. See for example Andrews. United States Fidelity & Guaranty Co., 154 S.C. 456, (1930) at page524 which stands for the proposition that where one by his acts, declarations, or

silence, where it is his duty to speak, has induced another, in reliance upon such acts, declarations, or silence, to enter into a transaction " may not benefit from that misconduct. By their deceptive, incomplete, and false statements, and by their silence, the Defendants have induced the Plaintiffs into agreeing to agree which, without the falsity and silence by the Defendants would not have been possible. Thus, even though there is actually no contract or agreement to enforce, there is not even an agreement to agree.

There are also other problems with the "memorandum" which the Defendants seek to enforce.

The releases which appear in the document presented to the Plaintiffs are not consistent with the limited releases contemplated by the Memorandum of Understanding. Therefore, once again it becomes clear there is no valid Memorandum of Understanding.

ENFORCEMENT BARRED BY LACHES

The Memorandum of Understanding is not enforceable because the Defendants have failed to act within a reasonable time and the delay has prejudiced the Plaintiffs. The facts of this case fall squarely within the definition of laches See Robinson v. Estate of Harris, 389 S.C. 360, (2010) 371-372

The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity [*372] for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably reasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Hallums, 296 S.C. at 199, 371 S.E.2d at 528.

If the Defendant's believed when mediation concluded that they had an agreement that could be enforced, then they should have moved in a timely manner to enforce that agreement. They have not done that, and an unreasonable time has passed. The passage of time has been detrimental to the Plaintiffs and had prejudiced the Plaintiffs in that it has made more difficult the discovery of information and documents concealed by the Defendants.

Among other things which have become known but were unknown to the Plaintiffs prior to and during the Mediation, there had been waivers of covenants or consent by silence to numerous violations of the covenants especially those relating to the riding trail. Not all of those waivers or consent to violations were made known to the Plaintiffs. All of which creates a doubt that the covenants are even enforceable, especially those that have been selectively enforced or ignored. The fact that the Defendants' conduct renders or may render the covenants unenforceable was not known to the Plaintiffs when the Memorandum of Understanding was allegedly reached.

s/John W. Harte

SC Bar No. 2773

LAW OFFICES OF JOHN W. HARTE ATTORNEYS AT LAW, LLC

P.O. Box 7215

Aiken, SC 29804

Email: john@jwhartelaw.com

Phone: 803 226 0755

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch
Homeowner's Association, and Derrick Boddy individually and in his capacity as a
member of the Board of the Braeloch Homeowner's Association,

Defendants

MOTION PURSUANT TO RULE 59E SCRCP

TO ALTER OR AMEND ORDER

TO THE DEFENDANTS ABOVE NAMED:

TAKE NOTICE, that 10 days after service hereof upon you exclusive of the day of service, the Plaintiffs will move before the Presiding Judge for the Court of Common Pleas for the 2nd judicial circuit in Chambers at the Aiken County judicial Center 109 Park Ave. SE. Aiken South Carolina for an order altering and amending the order issued by this Court and filed on August 15, 2023. The specific relief sought and grounds for that relief are as follows::

1. The court failed to address the question of whether Lot 51 was properly added to the subdivision. The Memorandum of Understanding is also silent on that issue. The defendants withheld information regarding the inclusion of lot 51 and the

court in its order failed to take into the consideration the fact that Lot 51 was not lawfully included in the subdivision.

2. The court failed to take into consideration the fact that by withholding critical information regarding Lot 51's admission to the subdivision, the defendants committed a fraud on the Plaintiffs without that fraud which deprive the plaintiffs of important information, the Memorandum of Understanding would never have been even considered much less signed.

3. The Court failed to take into consideration the fact that the Memorandum of Understanding would change the easement over Lot 47 from non-exclusive to exclusive without obtaining the consent of the requisite number of lot owners in the subdivision.

4. The court failed to take into consideration the fact that the covenants of the subdivision require the horse trail to be located on the perimeter of the subdivision. The Memorandum of Understanding would amend the covenants without the requisite vote by the lot owners in the subdivision. The Memorandum of Understanding is therefore invalid because the change was not approved by the requisite number of lot holders.

5. The court failed to recognize that the "Memorandum of Understanding is not enforceable. The Memorandum of Understanding upon which the Defendants rely does not contain all essential and material elements of a contract. The Plaintiffs are not bound by the agreement unless the final document which as yet does not exist is approved by the HOA. The Memorandum of Understanding is not the final document / contract, the Memorandum of Understanding was not a finished product. Other action

was required to form a contract. First, under the terms of the document upon which the Defendants rely, the parties had to reach an agreement on the terms of what was intended to be the actual and complete contract / agreement. As the actual series of events shows, the parties were never able to agree on that final document. Further, the Plaintiffs are not bound unless the HOA approves the final agreement. -

6. The order fails to address important evidence including the fact that The Defendants fraudulently withheld vital and material information about the dispute both in the Mediation, during discovery and prior to Mediation as follows:

a. Lot 51 is not lawfully a part of Braeloch. The required number of signatures from lot owners were not obtained on the petition to bring Lot 51 into Braeloch. Since Lot 51 is not a part of the subdivision, the owners can only use the roads which take them to the easement that allows them access to their property. That is the only exception to which they are entitled.

b. The fact that there were insufficient signatures on the petition to bring Lot 51 into the Braeloch Subdivision was known to the Defendants and was intentionally concealed so that the Plaintiff's would not have complete or accurate information concerning the facts.

c. The fact that the petition did not have sufficient information was material to the issues being mediated and, had the Defendants not fraudulently concealed the truth, the Plaintiffs would not have entered into the "Understanding."

d. The Understanding is void for willful concealment of material facts and for fraudulent misrepresentation in that the Defendants contended that Lot 51 had been lawfully included in Braeloch when in fact the Defendants well knew or with

the exercise of due diligence would have known the truth.

e. The Plaintiff's during the Mediation relied on the discovery which had not been provided by the Defendants and were not aware of the truth. Plaintiffs received the initial discovery documents 4 months after service and after defendants culled document, and the Plaintiffs have never received discovery documents from two subsequent requests which were served in 2021 and 2022.

f. The Plaintiffs could not know, nor could they discover the truth prior to the mediation because of the refusal on the part of the Defendants to provide full disclosure in discovery.

g. The Defendants continued during mediation to conceal the truth rendering an agreement void.

h. The lack of the required number of lot owner signatures was not known to the Plaintiffs at the time of mediation. Had this information been known, the Plaintiff's would not have agreed to the Memorandum of Understanding. The Defendants knew that the signatures were insufficient, and fatally defective. This information should have been disclosed years before or at the very latest during mediation.

i. The Memorandum of Understanding requires changes to Lot 51 that cannot be accomplished since Lot 51 was not lawfully brought into the subdivision. Lot 51 is not part of the subdivision and cannot be controlled by the Defendants or by the covenants applicable to lots in the subdivision.

7. The court failed to consider the fact that there are notes from the

homeowners' meetings as well as other documents which have not been turned over as required during discovery. The Defendants intentionally provided only partial discovery documents four months after the original request for discovery documents. The production of documents was intentionally incomplete. Production means production. By refusing to provide copies of all relevant documents, the Defendants violated the Rules of Discovery and willfully concealed material facts which, if known to the Plaintiffs would have led to their rejection of the terms set out in the "Memorandum of Understanding."

8. The court failed to consider the fact that the releases which appear in the document presented to the Plaintiffs are not consistent with the limited releases contemplated by the Memorandum of Understanding. Therefore, there is no valid Memorandum of Understanding.

9. The court failed to give due weight to the fact that the Defendants rendered the Memorandum of Understanding a nullity because of the incredible passage of time since the mediation was concluded.

10. The court failed to consider the fact that the Memorandum of Understanding is not enforceable because standing alone is not a contract, but merely a declaration of an intent to enter into a contract. The Defendants never produced an acceptable contract. Therefore, the intent to enter into a contract was unfulfilled and the passage of time renders the memorandum void.

11. The court failed to address or consider the fact that if the defendants had any enforceable rights under the Memorandum of Understanding, they are barred from enforcing those right due to the doctrine of laches because the Defendants for a year

have neither completed the work to create a binding contract nor sought enforcement. Even if the Memorandum of Understanding were enforceable, the failure of the Defendants to act in a timely manner constitutes laches rendering the Memorandum of Understanding void and/or unenforceable.

12. The Court failed to consider the fact that some of the Defendants did not sign the Memorandum of Understanding at the HOA meeting. .

The Plaintiffs move that the Order be altered and amended as set forth above with the Memorandum of Understanding being declared invalid and unenforceable.

I SO MOVE

s/John W. Harte
SC Bar No. 2773
ATTORNEY FOR THE PLAINTIFFS
LAW OFFICES OF JOHN W. HARTE ATTORNEYS AT LAW, LLC
P.O. Box 7215
Aiken, SC 29804

Email: john@jwhartelaw.com

STATE OF SOUTH CAROLINA COUNTY
OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association,
Inc. d/b/a Braeloch Homeowner's
Association, Sandy Carroll individually and
in her capacity as a member of the Board of
the Braeloch Homeowner's Association, and
Derrick Boddy individually and in his
capacity as a member of the Board of the
Braeloch Homeowner's Association,

Defendants

IN THE COURT OF COMMON
PLEAS SECOND JUDICIAL
CIRCUIT

Civil Action No. 2018-CP-02-2208

SUPPLEMENT TO 59(E) MOTION

TAKE NOTICE THAT the attached document filed and captioned as the Affidavit of Richard Viviano, along with all corresponding exhibits constitutes the Plaintiff's supplement to the 59(e) Motion. The Plaintiff craves reference to the record as a whole together with this supplement.

RESPECTFULLY SUBMITTED

s/John W. Harte
SC Bar No. 2773
Attorney for Defendant
john@jwhartelaw.com
803 226 0755

September 6, 2023

Physical Address
702 Chaffee Lane
Aiken, S.C., 29801

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PO Box 7215
Aiken, S.C., 29804

STATE OF SOUTH CAROLINA COUNTY
OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants

IN THE COURT OF COMMON
PLEAS SECOND JUDICIAL
CIRCUIT

Civil Action No. 2018-CP-02-2208

**AFFIDAVIT OF RICHARD
VIVIANO**

Personally appeared before me, the Plaintiff, Richard Viviano, who being first duly sworn deposes
and says:

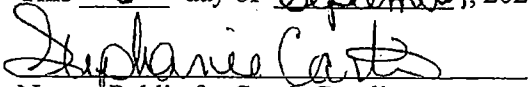
1. In support of the 59 E Motion filed by my attorney, John Harte, I submit the following sworn statement which contains matters of my own knowledge as hereinafter stated and attached.
2. I swear and affirm that the attached statement and corresponding exhibits as indexed below are true and accurate or that which I believe to be true based upon my own knowledge.
 - a. Statement of Richard Viviano
 - b. Braeloch Homeowners Association Members list (Attachment 1)
 - c. Acceptance of Restrictive Covenants of Braeloch Subdivision (Attachment 2)
 - d. Amended Covenants to Braeloch Subdivision (Attachment 3)
 - e. Execution of Witnesses (Attachment 4)
 - f. Email regarding procedure to change bylaws-covenants and email regarding insufficient signatures (Attachment 5)
 - g. Document regarding rights, powers, privileges etc. of Association Members

- (Attachment 6)
- h. Email regarding Thompson property and plat lines (Attachment 7)
- i. Document regarding Easements (Attachment 8)
- j. Braeloch Subdivision Protective Covenants (Attachment 9)
- k. January 9, 2002, April 3, 2002, May 1, 2002, June 5, 2002, August 14, 2002, September 14, 2002, and October 16, 2002, Braeloch HOA meeting minutes (Attachment 10)
- l. Order Denying Defendants' Motion for a Protective Order (Attachment 11)
- m. June 26, 2020, packet containing; Letter from Finkel Firm to Clark McCants III, Plaintiffs' Supplemental Requests for Production to Defendant Braeloch I Association Inc, d/b/a Braeloch Homeowner's Association, and corresponding certificate of service (Attachment 12)
- n. November 30, 2021, Consent Order (Attachment 13)
- o. Document showing votes on a proposed settlement agreement dated June 30, 2022, and the following emails regarding missed votes.
 - i. July 18, 2022, between Dave Christensen and Mr. Stevens
 - ii. July 18, 2022, between Dave Christensen and Nate
 - iii. July 18, 2022, between Dave Christensen and Mandy Dubose
 - iv. July 20, 2022, from Todd Gual to Dave Christensen in favor of settlement (Attachment 14)
- p. Memorandum of Understanding (Attachment 15)
- q. March 16, 2023, email from Charles Krawczyk regarding revised settlement (Attachment 16)
- r. Signature pages as follows:
 - i. Fulton Jeffers signature dated March 22, 2023.
 - ii. Dave Christensen signature dated May 4, 2023

- iii. Sandra Carroll signature dated March 23, 2023
- iv. Derrick Boddy signature dated April 5, 2023 (Attachment 17)
- s. April 24, 2023, letter from John Harte (Attachment 18)


Richard Viviano

SWORN TO and subscribed before me
This 6 day of September, 2023



Notary Public for South Carolina

My Commission Expires: 8/2/31

Personally appeared before me, the Plaintiff, Richard Viviano who being first duly sworn deposes and says:

Problems with the original petition that brought Lot 51 into Braeloch

- The petition (Attachment 1), which required 2/3 homeowner approval to be enacted, was processed through Probate and formally added to the Braeloch Covenants on August 9, 2002 by Amendment. Mark and Pamela Thompson consented to, in writing multiple times, all requirements and restrictions of the Covenants as shown in the Amended Covenants Paragraph 2 (Attachments 2 & 3).
- Mark Thompson stated he witnessed all signatures but was not a member of the Board or a lot owner. Conflict of interest? Nor were the signatures dated as in another petition in the Covenants. Also, after approval, the Thompsons sold Lot 51 within a few weeks. Probably using membership as a selling point. There is no statement by Mark Thompson bearing witness to all signatures like Sandy Carroll did (Attachment 4).
- After Mediation, Plaintiffs attorney Krawczyk provided Plaintiffs with multiple documents that contained an email from then Board President Boddy to Defendant Jeffers stating that the signatures on the 2002 petition were not sufficient for approval (Attachment 5). Two lot owners signed twice in violation of Braeloch Association Paragraph E which cites one vote per lot (Attachment 6). The email was dated February 11, 2019, prior to the original Suit being filed. Defendants and their attorneys concealed this fact and failed to disclose it to the Plaintiffs. Had they disclosed that fact, the whole issue would not have been relevant and the suit regarding the trail not necessary.
- In her December 7, 2017 email (Attachment 7) Defendant Carroll admitted she was the lead in bringing Lot 51 into Braeloch. When questioned why the horse trail was not relocated as required by the Covenants, she stated that the Board made a conscious decision to not relocate any easements. This is in direct violation of Section VI B which states the "trail has been established around the perimeter of the development" (Attachment 8). And, Preface Paragraph B which requires 2/3 majority of the property owners (Attachment 9) to modify restrictions or make exceptions to Covenant requirements and duly record them in the County records. This was deliberately not done. Board meeting notes from 2002 (Attachment 10) do not discuss Lot 51 other than the number of livestock allowed per lot

except the notes from June 5, 2002. Pamela Thompson stated that she was not interested in annexation due to the time required to annex her property and the possible sale of her home. She did state that if the Board moved quickly with annexation and Covenant changes, she would reconsider. This strongly indicates why no waiver of Covenant requirements and restrictions exist. Also, 2002 Board members Michael Logan and Robert Edwards do not recall any dialogue related to relieving Lot 51 from Covenant requirements. This was all Defendant Carroll's doing to enact a rapid annexation in support of her friends', the Thompsons, house sale without regard of its impact on other lot owners.

- After several unsuccessful attempts to negotiate and rectify the violations with Defendant Jeffers, Plaintiffs Viviano and Gunter exercised their right under Preface Paragraph E (Attachment 9) to instigate proceedings against a person or persons violating such Covenants.

Subpoenas for Discovery Documents

- Plaintiffs initially requested discovery documents in 2019. They were not provided for 4 months. Defendants cited that they needed time to review the documents to remove duplicates and other documents that they determined were not part of the suit. This is a blatant disregard of discovery rules and indicates evidence tampering. When the documents were finally made available, they were not delivered to the Plaintiffs. Plaintiffs Viviano and Gunter had to review them in Attorney McCants' Law Offices under the watchful eye of Attorney McCants. Plaintiffs review revealed missing pages from multiple documents that discussed the suit such that a full dialogue could not be read.
- In May, 2021 Judge Clifton Newman ruled that Defendants Boddy and Jeffers violated client/attorney privilege and denied their motion for a protective order (Attachment 11). In that denial, Judge Newman determined that "Defendant Boddy used his position as Board President to help his friend Defendant Jeffers to the exclusion and prosecution of the Plaintiffs". It also "showed Boddy's opposition to any meaningful resolution

of the dispute in favor of the Plaintiffs and animus toward Plaintiffs before even consulting with the Braeloch Board". The Judge stated that "the emails show the potential for bias and could show the basis for a claim for civil conspiracy and breach of fiduciary duties". He further stated that communications are "properly discoverable because the intended use is for a proper purpose, namely proving an independent cause of action, and not to prove acceptance of liability". Plaintiffs request for discovery of those documents (Attachment 12) was ignored by the Defendants Attorneys and were never provided. Surprisingly, without the Plaintiffs knowledge, Plaintiffs' Attorney Krawczyk then filed a motion to end the protective order just prior to mediation (Attachment 13).

- In 2022, before Mediation, Plaintiffs Attorney Krawczyk again requested discovery documents. Defendants Attorneys did not comply and when requested Attorney McCants stated "Oh, you really wanted them?"
- One request 4 months late and tainted, and two further requests ignored!

Problems with the HOA petition presented at the Semi Annual meeting of June 30, 2023

- The petition (Attachment 14) only addressed reduction of the easement to 15 ft. along the border of Lots 47 and 51 and ignored the remaining settlement items of the MOU (Attachment 15). The mediation settlement, which required 2/3 homeowner approval to be ratified, was never handed out to all homeowners for their review. It is interesting to note that Defendants Boddy and Carroll were in attendance but did not sign the petition.
- Additionally, approximately 14 homeowners, who were not at the meeting, signed the petition and did not have the benefit of the meeting dialog or the MOU. They merely signed to "end the lawsuit" as evidenced by their email proxies that were attached to the petition (Attachment 14).

- Note that Plaintiff Viviano initially voted NO but ultimately signed the petition under angry duress from his Attorney. There are witnesses to this fact.

Firing of Plaintiffs Attorney

- This is absolutely not true. The dissolution of Plaintiffs relationship with Attorney Krawczyk was mutually agreed upon. Plaintiffs wanted to proceed in the direction of Fraudulent Concealment. However, Attorney Krawczyk admittedly had no experience in this area and recommended Plaintiffs look for an attorney who did.

Alleged delay in Plaintiffs signing the Order

- Defendants Attorneys allege that Plaintiffs delayed in agreeing to and signing the Order. This is not true. Plaintiffs reviewed at least two submittals and returned them promptly with comments. These documents contained items that were overly restrictive and did not reflect elements contained in the original MOU. Finally, on March 16, 2023 Plaintiffs received Defendants final motion for review (Attachment 16). Interestingly, the Defendants signed the Settlement Agreement as follows: Jeffers March 22, 2023; Carroll March 23, 2023; Boddy April 5, 2023 and Christensen May 4, 2023, nearly one year after Mediation (Attachment 17). Plaintiffs' new attorney, John Harte, recommended Plaintiffs not sign the document as outlined in his letter to Defendant Attorney LaFave April 24, 2023 (Attachment 18).

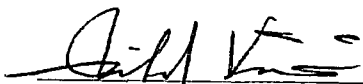
Memorandum of Understanding and Order to Compel

- The MOU and Order cannot be enacted since Lot 51 is not a member of Braeloch. Relocation of a portion of the trail to private land outside of Braeloch will bring that trail outside of the subdivision. It will not be covered under its insurance policy, add the potential of legal action against

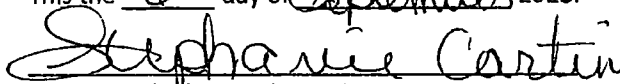
riders for any accident and/or damages, and may be in violation of equine law.

Defendants' refusal to address Lot 51 not being part of Braeloch

- Subsequent to the Mediation, and after discovery of Defendants Boddy to Jeffers February 11, 20119 email, several correspondences with Defendants addressed the fact that Lot 51 is not part of Braeloch citing the inadequate 2002 petition. Defendants Attorneys refuse to address that fact and are silent in all correspondence. This is a very important piece of information that proves the Defendants and their Attorneys deliberately concealed fraudulent intent.


Richard Viviano

SWORN TO and subscribed before me,
This the 6 day of September 2023.


Notary Public for South Carolina
My Commission Expires: 8/2/31

ATTACHMENT 5

From: Derrick Boddy <sandbarwilly@gmail.com>
To: Fulton Jeffers <fultonjeffers@aol.com>
Subject: Pertinent documents and information
Date: Mon, Feb 11, 2019 3:37 pm

Attachments: ProcedureToChange Bylaws-Covenants.doc (26K)

Fulton - pls find attached pdf of the covenants which includes the bringing in to Bracloch of the then Thompson lot and a Word document "Procedure to change covenants and bylaws"

There are 35 signatures on the petition representing 33 lots - the threshold for validating the covenant change is 2/3rds of the lot owners - there were 50 eligible to vote/sign - 2/3rds of 50 is 33.33, close but no cigar!!

The covenants clearly state that it's one vote per lot in anything that requires a vote of the homeowners.

The Word document is not dated and I have no way of knowing its provenance - I am trying to find the source of it, I know it was placed on my computer 4/17/18

The section on covenants says 34 signature/lots are needed for the change to be validated.

 Covenants - full version.pdf

Derrick

ELECTRONICALLY FILED - 2023 Sep 06 4:22 PM - AIKEN - COMMON PLEAS - CASE#2018CP0202208

Memo

From: rrviviano@aol.com

To: ckrawczyk@finkellaw.com

Date: Tuesday, July 5, 2022 at 02:14 PM EDT

Charley,

Attached is the email we discussed. It is clear that Boddy and Jeffers knew in February 2019 that there were insufficient signatures to bring the Thompsons into Brae Loch. There were two lots with two signatures instead of "one per lot".
Rich



scan0009.pdf
482.2kB

ATTACHMENT 7

Re: New House

From: David & Sandy (djsjcar@bellsouth.net)

To: rrviviano@aol.com

Date: Thursday, December 7, 2017 at 07:18 PM EST

Rich and Johnette, I don't think the physical trail needs to be moved. It appears to be right on or immediately adjacent to the property line per the stakes now put out.

Also, when we approved the Thompson property coming in to Braeloch, the Board made a conscience decision not to change the plat lines (I did the leg work on that one, and specifically brought this up to the Board at the time). We did not put a 10' access on the far side of the Thompson house and we did not change the size/location of the perimeter access - leaving it as 20' per the plat, all on the vacant lot (Johnette wasn't the owner then, as I recall).

If you are thinking of seeing if the Jeffers want to adjust their plat line and accept 10' of the 20' easement, then that seems ok. Both plats would have be redrawn and recorded in order to make that change.

If you are thinking of reducing the trail perimeter access just for your property to 10', I would say that needs further Board discussion. Nearly everyone else in Braeloch has a 5' easement on 2 sides, the front easement, AND the 20' easement in the back. Only the few totally interior lots and some of the pond lots don't have one or both of these easements. So nearly all of your neighbors have to live with that 20' easement, and the requirement that fencing has to be located off of that line. Plus you knew when the property was purchased, there was a 20' easement there. In my opinion, we don't need a PRECEDENT of homeowners narrowing their trail access. If you think of what the perimeter access would look like for Braeloch, it would all be 20' including behind your existing home, then narrow down to 10' along the new lot, and then widen back out to 20' at your far corner. That doesn't make sense to me. Also, I don't think this is something that can be done unilaterally even if you have Barry on board;-).

I don't think the relatively small number walkers and riders on the trail will have a negative impact on your enjoyment of your property, even with the 20' access. Speaking from experience, it's hard when you are putting up a fence because it feels like you are losing property. But keeping Braeloch trails as an asset for equestrians and nature lovers will have a positive impact on the value of the property when you need to sell it. I think, in the future, your property will be very attractive to the equestrian set if/when you want to sell it.

Sandy

On 12/6/2017 10:49 AM, rrviviano wrote:

> Sandy,

> I appreciate your comment. I'll talk to Todd.

> Also, the dam will be used for construction traffic so if you use it to walk Altima you might want to use the trail at Villamain's fence. I'll have Randy send out a memo to the homeowners.

> We discovered that the upper part of the trail is completely on our property because the Kipnis' were not in Braeloch at the time. They now are in the subdivision. I've discussed it with Barry and we're going to move the trail so it is 5 feet on either side of the property line to give us a 10 foot trail. We are also going to put a permanent fence along the top of the trail. I'll have Todd put up a temporary fence after we clear the additional 5 feet.

> Let me know if you have any other questions.

> Rich

>

>

> Sent from my iPad

>

>> On Dec 6, 2017, at 10:07 AM, David & Sandy <djs/car@bellsouth.net> wrote:

>>

>> Hi Rich and Johnette, So glad to see the long-planned house going up. It will be fun to watch it as I walk Altivo by there several times/week.

>>

>> Please remind Todd and his subs that there is a 20' easement for trail access along the property line. Last week a bulldozer was parked directly on the trail. Today a tractor and the Port-o-let are directly on the trail. I know this will be hard, as the top of your driveway dumps right out onto the trail. Maybe some type of barrier should be used like a silt fence or something.

>>

>> Thanks, Sandy

>

ATTACHMENT 8

- E. Stables may be erected on any lot and shall be maintained consistent with the regulations of the South Carolina Board of Health and shall not constitute a nuisance or annoyance to other residents of the subdivision.

VI EASEMENTS (EXCLUDING POND EASEMENTS)

- A. In addition to the easements shown on the above mentioned plats the following lot easements are established:
1. Front - Fifteen (15) feet for utilities and drainage.
 2. Rear - Twenty (20) feet for a pedestrian and horse riding trail, fifteen (15) feet of which shall be for utilities and drainage.
 3. Side - Ten (10) feet for utilities and drainage.
- B. The pedestrian and horse riding trail which has been established around the perimeter of the development as shown on the plat is intended for the exclusive use of the property owners, their dependents and invited guests only. No wheeled vehicles, motor-powered or otherwise, except as required for the handicapped, shall be allowed on these trails, except for necessary maintenance. No obstruction shall be made on any portion of the trail that would interfere with the use of the trail.
- C. If there is any conflict between easements set forth in these restrictions and those shown on the plat, the easements shown on the plat shall control.

VII ASSESSMENTS

- A. Owners and each purchaser of any tract in Braeloch by virtue of ownership of or the acceptance of a deed therefor, will, whether or not it shall be expressed in any subject deed or other conveyance, obligate himself or it and be deemed to covenant and agree to pay to the Association, an annual assessment or charge to be fixed, established and collected from time to time as hereinafter provided. Each payment of such annual assessment or charge, when due, shall become a lien upon the tract against the account of the ownership of which such assessment or charge is made. Each tract as shown by a recorded plat or plats, excluding those owned by Owners for resale, is hereby made subject, and shall be made subject, to a continuing lien to secure the payment of such installment of such assessment or charge when due.
1. Such annual assessment or charge shall be set annually by the Board of Directors of the Association. The Board must receive the consent of two-thirds of the members of the Association in order to raise the annual assessment from that of the previous year. (Covenant change dated August 9, 2002)
 2. The lien hereby reserved, however, shall be at all times subordinate to the lien of any mortgages or lender of any sums secured by a properly recorded mortgage or deed to

ATTACHMENT 9

BRAELOCH SUBDIVISION
AIKEN COUNTY, SOUTH CAROLINA
PROTECTIVE COVENANTS

I. PREFACE

- A. WHEREAS South Carolina National Bank as Trustee has developed, in conjunction with the previous owners, Frederik B. Christensen and W. Dale Sandberg, a subdivision known as Braeloch Subdivision in Aiken County, South Carolina, as shown on plats recorded in the Office of the RMC of Aiken County, South Carolina, as follows:

Phase I	-	Plat Book 19, pages 130-135
Phase 2-A	-	Plat Book 22, pages 127-130
Phase 2-B	-	Plat Book 23, pages 150
Phase 2-C	-	Plat Book 24, pages 177

have elected to dedicate the roads, as shown on the plat, to Aiken County and to impose upon the lots certain restrictive and protective covenants as follows:

- B. These covenants are to run with the land and shall be binding on all parties, their heirs, executors, administrators and assigns, and all persons claiming unto them until January 1, 2009, at which time said covenants shall be automatically extended for successive periods of ten (10) years, unless by a vote of the majority of the then owners of the lots it is agreed to change said covenants in the whole or in part. However if a two-thirds (2/3) majority of the property owners at any time petition to modify the restrictions or make exceptions thereto, or approve of same, it will not be a violation of the covenants herein, and the changes or approval of exceptions, if any, will be put in writing and duly recorded in the county records.
- C. Should any owners, their heirs, executors, administrators or assigns violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning real property situate in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenants. Provided, however, that no violation shall affect the validity of any mortgage lien or record prior to such violation.
- D. The invalidation of any one or more paragraphs or portions of these restrictive covenants and agreements by judgment or decree shall in no way affect any of the other provisions, which shall remain in full force and effect.
- E. If the Owners or their heirs, assigns or successors in title, shall violate any of the restrictive covenants herein, any person owning real property situated in said development or subdivision may institute any proceedings at law or in equity against the person or persons violating or attempting to violate such covenants, either to prevent or enjoin such violation to recover damages or other dues for such violation; provided, however, that a violation of such covenants shall not constitute a forfeiture or reversion of title.

ATTACHMENT 10

Braeloch Homeowner's Association
 Minutes of Meeting
 January 9, 2002

The meeting was called to order by President Mike Logan. Roll taken with all present. Minutes read and passed with corrections. The treasurer's report showed a balance of \$3,080.38 in the checking account.

The architectural committee reported that the Dunns (lot 16) presented plans for an addition to their home along with a detached building. The committee reported the plans were approved as presented. Also Shaffer (lot 51) is building a detached garage on land behind his lot. This partial of land is not part of lot 51 and it would have to be annexed in to Braeloch as any other such piece of land following the covenants. Currently, it is part of the lot on Old Dibble Road and this is for our information at this time. Ben Christensen will get a copy of the lot from the RMC for the board. Marianne Pecoraro presented a format of a form for residents to fill out and attach to their copy of plans for any construction with Braeloch. The board decided that this was a good idea and all of this information will be kept on file with the architectural committee.

The problem of the front entrance being driven on was brought up for discussion. Barry DeLoache reported that he observed one of the Allen children driving his golf cart on the front entrance as well as his property during the recent snow. He contacted the parents and informed them of this problem. Barry is going to file a police report on this item. It was decided that we would handle this problem by hiring an off-duty Aiken county policeman to patrol the entrance on Thursday, Friday, and Saturday nights until this problem gets under control. Ben Christensen will contact a policeman on our behalf.

Old business consisted of the wine tasting social for the month of February. Linda Cline will contact the people for this event. Also, there will be a super bowl party at the Hewitts on February 4th.

There was no other business. Meeting adjourned.

Minutes of meeting approved or approved with corrections.

 (Mike Logan, President)

 (date)

 (Linda Cline, Secretary)

 (date)

Bracloch HOA board meeting minutes
April 3, 2002

Fulton

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a pump pad has been constructed within the required setbacks and easements. The pad location will be measured to confirm the required setbacks and easements and then the Architectural Control Committee will contact the Sparks.

Old Business:

The wine-tasting party will be April 27 and will be hosted by the Bracloch Homeowners Association. The wine tasting will be provided by the Wine Gallery and will be conducted at the Hewitt's (701 Pintail). Linda Cline will be contacted to determine what food is provided. A motion was made that if additional food is needed, the Board will fund it. The motion passed unanimously.

During the March Semi-Annual meeting, Barry DeLoache was elected President of the Men's Club. In addition, the following individuals volunteered to sponsor/set-up the yearly activities:

Rick Fleming: Turkey Hunt
Ben Stephens: Deep Sea Fishing
James Sparks: Shrimping

New Business:

A motion was made and seconded that all future votes be recorded/tallied with the names of the Board Members and how each member voted. After a discussion of the motion, the motion passed unanimously.

Stan Lipman presented the By-Law change that was approved at the March Homeowners meeting. In addition, Marianne Pecoraro presented a letter to all homeowners that describes the by-law change. After a review of the letter and discussion, a motion was made to send the letter to all homeowners. The motion was seconded and passed unanimously.

It was noted that David Carroll and Lois Christensen had planted the flowers at the front entrance. A thank you to David and Lois will be included in the Newsletter.

The Board discussed the use of the trail by Pam Thompson. It was determined that she had access to the trail as a guest of her father (owner of Lot 3). However, this right for usage does not pass on to the new homeowner. If the new owners wanted to use the trail, they can petition to join the Bracloch Homeowners Association. The Board endorsed sending a letter to Pam and Mark Thompson to clarify the use of the Bracloch trails by non-Bracloch homeowners.

There being no more business, the meeting was adjourned. The next meeting is scheduled for 7:00 PM on Wednesday, May 1, 2002. The meeting will be held at Marianne Pecoraro's home.

Braeloch Homeowner's Association
Minutes of Meeting
May 1, 2002

1. Marianne Pecoraro will complete the final letter (include the definition of structure) and forward the letter to Russell Daniel.
 2. Russell Daniel will mail the letter to all homeowners except Dave and Peggy Babineau.
 3. Marianne Pecoraro will send the letter to Dave and Peggy Babineau and will include a note on the new fences construction. Marianne will recommend a walk down of the construction to ensure that it is in compliance with the covenants.
- iv. The Bell's are currently putting in a pool and no request has been submitted to the Architectural Committee. Mike Logan will contact.
- v. Russell Daniel will contact Ben Stephens concerning their fence. When the original owner had the fence approved, it was for a three rail fence with wire mesh that was painted black. Russell will also volunteer Mike, Stan, Ben, and Russell to help with the labor if needed.
- c. Front Entrance: 2 (two) camellias and a red bud tree have died at the front entrance. The landscaper has been contacted to replace the plants. Lois Christensen and Dave Carroll will be adding more flowers. Lois and Dave have no limit on the \$\$ for maintenance. However, Lois and Dave do not have approval to add additional shrubs in order to limit potential drive throughs.
- d. A standard reminder on structures and the good neighbor policy will be placed in the Association's newsletter.

V. Old Business:

- a. Events: Linda Cline did a great job organizing the Wine Tasting. Twenty-one (21) homeowners participated. 3 (three) white wines, 3 (three) red wines, and 1 (one) desert wine were tasted. It was recommended that we add the Wine Tasting as an annual event.
- b. Yard Sale: The annual yard sale will be this Saturday, May 4th. It is always held the first Saturday in May each year. This year, 6 (six) homeowners will be participating.
- c. Thompson Letter: The letter to the Thompsons concerning use of the Braeloch trails has been mailed. Pam Thompson has also tried to contact Sandy Carroll. The Board discussed contacting the Thompsons (to be contacted by Sandy Carroll) and Theiles (to be contacted by Marianne Pecoraro) concerning joining Braeloch. Past issues have focused around the current limit of no more than 6 (six) horses on a specific homeowners lot. Due to the size of these two lots, the 6 (six) horse limit restricts their use. A possible change to the covenants could be proposed if the Thompsons and Theiles wanted to join Braeloch. The possible change will allow a maximum of 6 (six) horses or 1 (one) horse per acre if the lot

Braeloch Homeowner's Association

Minutes of Meeting

May 1, 2002

is over 6 (six) acres. The proposed change would have to include the definition of lot and would have to be voted on along with the annexation of the lots by the full neighborhood association.

- d. Shaffer Annexation Status: No formal action has occurred. Ben Christensen is working with Shaffers.

VI. New Business:

- a. Braeloch Sponsored Events: The following is a list of the currently scheduled Braeloch Sponsored Events. The Events Coordinator will contact all homeowners concerning these events.
 - i. 7/4 -- Fourth of July party. Swimming will start around 2 PM and food will be served around 5PM. This is a Braeloch sponsored event; however, the perception is that it is a Christensen family event. The announcement will be sent to all homeowners and we will try to clarify that it is sponsored by the Braeloch Homeowners Association.
 - ii. 9/14 is the Semi-Annual meeting
 - iii. 10/26 is the Halloween Party
 - iv. 12/7 is the Progressive Dinner
 - v. The Men's Club Turkey hunt was cancelled this past month. Only one individual contacted Rick Fleming.
- b. Sunshine Fund: Thanks to Sandy Sparks for the outstanding job on the Sunshine Fund this past year. With the reorganization of the Secretarial position and the Event Coordinator, Linda Cline will now take over the Sunshine Fund.
- c. Record Consolidation/Review: A consolidation of all the past meeting minutes has been initiated in order to consolidate all precedences that have been established in a single spot. Linda Cline is currently two-thirds complete and should finish within the next week (May 12). Ben Christensen, Richard Viviano, and Barry DeLoache will be contacted in order to try and locate that past Architectural Committee notebook.
- d. New Trail: A work day will be scheduled on May 25th from 7 to 10 AM in order to clear and post the new trail. Homeowners should meet in the cul-de-sac by 698 Pintail and bring axes, chain saws, loppers, etc. The motion to schedule the workday passed with a vote of 7 votes for the motion and 1 vote (Marianne Pecoraro) abstaining from the vote.
- e. Rattle Snake: All homeowners should exercise caution on the Braeloch Trail. A 4 (four) foot rattlesnake has been seen near the post that marks the corner between Ben Christensen's lot and Hank Hayes' lot.
- f. Adopt a Highway: Russell and Karen Daniel volunteered to restart the "Adopt a Highway" program and a motion was passed by a unanimous vote for the Association to restart the program. Sandy Carroll will provide Russell/Karen Daniel with the phone number and information needed to restart the program.
- g. Braeloch Plaque: A potential plaque activity has occurred. Randy Cline se

Braeloch Homeowner's Association

Minutes of Meeting

June 5, 2002

- I. Call to Order: President, Mike Logan, called the meeting to order at 8:05 PM. All Board Members (Margaret Ray, Stan Lipman, Marianne Pecoraro, Russell Daniel, Sandy Carroll, Linda Cline and Michele Baxley) were in attendance.
- II. Annexation Discussion - Ms. Pam Thompson: Pam Thompson presented her perspective of Braeloch and also discussed the opportunity the Board had presented regarding the Annexation of her property into Braeloch. She stated that one of her clients had been concerned about the ability of the Association to build a health club, swimming pool etc. and increase homeowner fees to support these. It was explained that this was not likely and that a 2/3 approval of all members would be required in order for it to be approved. In addition, she stated that a positive for Braeloch was the fact that there were not too many rules and that they were enforced with hospitality. She was concerned that with the recent change in the covenants that the spirit in which they were being enforced could change. The Board explained that the covenants had not changed and that the by-law change was made in order to provide a history of architectural approvals. Pam also stated that she was not currently interested in the annexation due to the time required to annex the property and the possible sale of her home. However, she voiced to Mike Logan that she would still consider the annexation if the Board moved forward with the required covenant changes in order to support the annexation of the Thiele's property. A motion for Mike Logan to contact the Thieles and Thompsons in order to determine their interest was made. If either or both of the parties are interested, a proposed change letter will be walked around the neighborhood to try and obtain a 2/3 majority. (The change was described in the May 2002 Board minutes.) If approved, legal action would be started to change the covenants. The motion passed by a unanimous vote.
- III. Reading of the Minutes: The Minutes from the May 1, 2002 Board Meeting were read and approved as written by a unanimous vote.
- IV. Treasurer's Report: The Treasurer's Report showed a balance of \$11,070.4 (Homeowners Association - \$11,715.40 and Sunshine Fund - \$255.0). The treasurer's report was accepted by a unanimous vote.
- V. Architectural Committee Report:
 - a. Sparks Pool Construction: The Sparks have agreed to place an L-shaped fence around the pool pump. In addition, it was determined that the pool pump is located ~4 feet in the setback for the back lot line. This location was approved by the committee after reviewing the site because it does not obstruct access to the trail.
 - b. Bells Pool: Plans for the Bell's new pool were approved.
 - c. Hudson's Privacy Fence: Plans for the construction of a 6" privacy fence were approved.
 - d. McMinn's Barn and Fence: Construction of a 6 stall barn and 3 rail fence in front with single rail wire fence in back was approved.
 - e. Kelly's Garage Extension: Construction of a 24' by 40' garage was approved. The construction will be an extension of the existing property.

Braeloch Homeowner's Association

Minutes of Meeting

August 14, 2002

- I. **Call to Order:** President, Mike Logan, called the meeting to order at 8:00 PM. The following Board Members (Margaret Ray, Stan Lipman, Russell Daniel, Sandy Carroll, Linda Cline and Michele Baxley) were in attendance.
- II. **Reading of the Minutes:** The Minutes from the June 5, 2002 Board Meeting were read and approved as written by a unanimous vote.
- III. **Annexation Discussion - Ms. Pam Thompson:** The Thompson's property has been annexed into the Braeloch Subdivision. 34 signatures were obtained and all approved the annexation. The change has been recorded and the revised pages will be handed out at the semi-annual meeting. The annexation required a change to the by-laws, which allows for a maximum of 6 horses or 1 per acre.
- IV. **Treasurer's Report:** The Treasurer's Report showed a balance of \$10,647.40 (Homeowners Association - \$10,392.40 and Sunshine Fund - \$255.00). The treasurer report was accepted by a unanimous vote. It was also noted that 2 payments were made to Ash Creek during May. Based on a phone call with Ash Creek, no payment would be charged for July. Future bills from Ash Creek will be sent to Michele Baxley for approval by the Architectural Committee prior to payment.
- V. **Architectural Committee Report:**
- Mike Logan and Margaret Ray announced that Marianne Pecoraro has resigned from the Architectural Control Committee (ACC). A motion was made for Mike Logan to fill the vacancy until the September semi-annual meeting. A note will be sent to all homeowners announcing the vacancy and interested homeowners will be requested to contact Linda Cline. The motion passed by a unanimous vote.
 - The ACC will contact Ash Creek in order to obtain a bid to trim and replace the evergreens. A note will be sent to all homeowners prior to starting the work. If the homeowners have any issues with trimming or replacing the evergreens on their easements, they will be asked to contact Michele Baxley.
 - The ACC approved the plans for the Arthur's storage building based on the Lipman's agreement to the waiver for a 7-foot setback.
 - The ACC approved the plans for the Schwegler's fence. However, the barn has not been approved.
 - Linda Cline was asked to review the past meeting notes in order to locate any decisions or policies set concerning a 3-rail wooden fence.
 - The ACC approved the Baxley's barn/garage plans.
 - The Kelly's submitted a plan to replace their roof with a metal roof. The plan has not been approved pending clarification of the covenants with regard to sidings. Margaret Ray will clarify the intent of the covenants with Ben Christensen. It is also recommended that the Kelly's provide

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BRAELOCH HOMEOWNERS ASSOCIATION
Minutes of Semi-Annual Meeting
September 14, 2002

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- I. **Call to Order:** President, Mike Logan, called the meeting to order.
- II. **Reading of the Minutes:** The Minutes from the March 2002 Semi-Annual Homeowners Meeting were read and approved.
- III. **Treasurer's Report:** The Treasurer's Report showed a starting balance of \$4,056.58 on 3/1/2002 and an ending balance of \$10,018.38 on 8/31/2002. Dues had been received from all Homeowners. A discussion of placing a cap on the savings and dues increases was initiated. See discussion of Covenant Changes.
- IV. **Architectural Committee Report:**
 - a. Over the last 6 months (since the approval of the new approval form for construction), 13 plans were approved and 1 set of plans was pending approval from the Architectural Committee. The use of the new construction approval form has helped ensure the value of our homes and also has helped to ensure our neighbors are aware of any construction activities.
 - b. A definition for "structure" was presented and discussed. It was clarified that the review of the placement of wells and septic tanks etc. was limited to review of locations relative to easements. All neighbors should submit recommended changes to Stan Lipman. (See attached definition.)
 - c. Ash Creek will be trimming the evergreens twice per year. They are also pricing the replacement of the other shrubs for the utility boxes and front entrance. It was also recommended that action be taken to remove the hollowed out tree at the front entrance.
- V. **Old Business:**
 - a. **Covenant Modifications:** The covenant modifications related to the incorporation of the Thompson's land and home (sold to the Kipnis). In addition, a modification was made to allow the Board to lower the dues from \$200 without a vote by the general membership.
 - b. The Braeloch Newsletter was discussed and those in attendance enjoyed the Newsletter. It was recommended that a website be established instead of publishing the Newsletter.
 - c. The latest list of Braeloch Homeowners was provided. Please provide updates to Stan Lipman (lipmanss@aol.com) via email.
 - d. **Horse Trail Workday:** A workday to complete the final section of the horse trail was tentatively scheduled for October. The goal was to complete the trail by Christmas.
 - e. **Men's Club Update:** The Men's club sponsored Super Bowl party was held at the Hewitt's home. 6 members were in attendance. All enjoyed a great time and great food. Only one member responded for the Men's Club hunt so the event was cancelled. In addition, the deep-sea fishing and shrimping events were cancelled.

Braeloch Homeowner's Association
Minutes of Meeting
October 16, 2002

- I. **Call to Order:** President, Mike Logan, called the meeting to order at 8:00 PM. The following Board Members (Margaret Ray, Russell Daniel, Sandy Carroll, and Chuck Hewitt) were in attendance.
- II. **Reading of the Minutes:** The Minutes from the August 14, 2002 Board Meeting were read and approved as written by a unanimous vote.
- III. **Treasurer's Report:** The Treasurer's Report showed a balance of \$10,416.42 (Homeowners Association - \$10,161.42 and Sunshine Fund - \$255.0). The treasurer's report was accepted by a unanimous vote.
- IV. **Architectural Committee Report:**
- The Schweglers submitted two sets of possible plans (one wood and one metal) for a new barn. The ACC approved the construction of either the wood or metal barn.
 - The Sparks have not constructed the required fence around their pool equipment. Their plan is to construct the fence after turkey season.
 - The Board will clarify the definition of a structure. Mark-ups of the draft definition will be reviewed at the next Board Meeting. The definitions will then be added to the by-laws. It is recommended that pumps only be reviewed for placement in an easement, etc.
 - Based on a discussion with Ben Christensen, the ACC determined that the covenants intentionally did not address metal roofs.
 - Margaret will check with the Bells concerning the shed that has been delivered to their property.
 - The ACC recommended paying Ash Creek \$150.00 to trim the evergreens in the neighborhood and \$80.00 to replace 6 of the evergreens. The motion passed with a unanimous vote.
 - Ash Creek will wait until the spring to check the one Camellia at the front entrance and will also monitor the watering at the front entrance.
 - Mike Logan will change the watering schedule at the front entrance to help avoid morning ice on the roadway.
- V. **Old Business:**
- Covenant Clarifications:** The revised pages for the Kipnis' annexation were just received. The new pages will be held and passed out at the March Semi-annual meeting.
 - Horse Trail Workday:** The next workday for the horse trail will be November 23 at 8:00 AM. Workers will meet in the cul-de-sac by Ben Christensen's home. Linda Cline will notify all homeowners.
 - Halloween Party:** A workday for the Halloween Party will be held the day prior to the party on 10/26. The board will provide the drinks, pizza, and party favors/game prizes. The party will be at the Blanton's home.

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ATTACHMENT 15

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

SECOND JUDICIAL CIRCUIT

Richard Viviano and Johnette Gunter,

Plaintiffs,

C/A No. 2018-CP-02-2208

v.

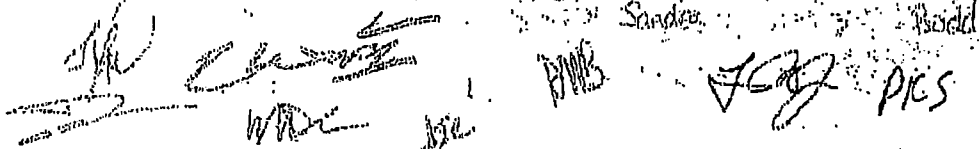
Memorandum of Understanding

Fulton Jeffers and Braeloch I Association, Inc.
D/B/A Braeloch Homeowner's Association,
Sandra Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association; and Derrick Boddy
individually and in his capacity as a member of
the Board of the Braeloch Homeowner's
Association,

Defendants.

The Parties, having come to a proposed settlement in Mediation agree to settle all claims in the above-caption action subject to the terms in this agreement that require further action:

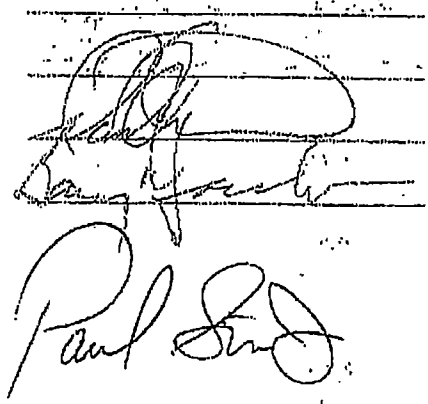
1. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
 - a. The easement shall be reduced from 20' to 15' in width.
 - b. 10' of the easement shall be moved from lot 47 to Lot 51.
 - c. The alteration shall be effective for the entirety of the property line of Lot 47.
2. Defendant Fulton Jeffers shall receive payment in the amount of \$20,000 which shall represent payment for the burden placed on his property.
3. The HOA agrees to remove/release the 10' access easement described in the covenants between lots 48 and 49 (the Lee/Santos Easement).
4. The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.
5. The HOA will present for a vote to the members of the HOA whether to improve an existing access easement between lots 18, 19, 20 & Lot 49; the outcome of which will not effect the enforceability of this settlement.
6. The parties will sign a non-waiver agreement agreeing that the settlement does not create a waiver of the enforcement of the covenants.
7. The parties will enter into a mutual non-disparagement agreement.
8. This settlement is contingent upon the HOA getting homeowner approval of their obligations under Paragraphs 1 and 3 of this memorandum.
9. Full and final release of all claims by Plaintiffs against Sandra Carroll and Derrick Boddy.

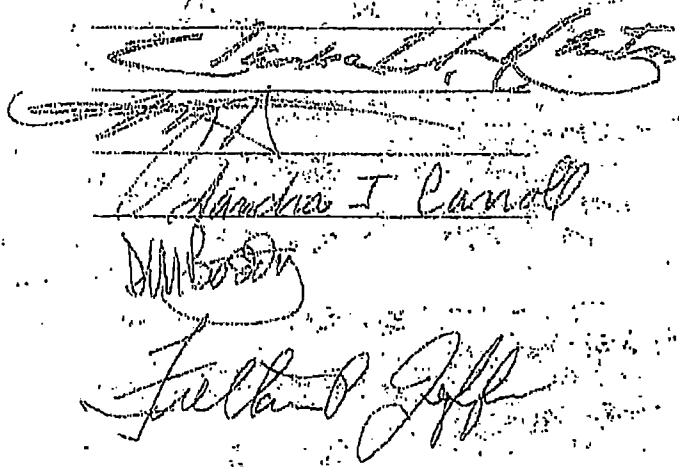


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- 10. The HOA shall pay for and prepare all surveys, plats documents and costs with filing.
11. All parties shall bear their own attorney fees and costs.
12. Full and final settlement agreement to be drafted by Mary LaFave.
13. The HOA shall bring the matter to a vote of the members within the 60 days of the signed release.

Agreed this 25th day of May 2022


Paul Lind


Charles I. Canall
J. B. Borden
J. B. Borden

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,
Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Civil Action No. 2018-CP-02-02208

**RESPONSE IN OPPOSITION
PLAINTIFFS' "MOTION PURSUANT
TO RULE 59E SCRPC TO ALTER OR
AMEND ORDER"**

This matter is before the Court based on Plaintiffs Richard Viviano and Johnette Gunter's motion to alter or amend the Court's order enforcing settlement of this civil action between the Plaintiff homeowners and their neighborhood's homeowner's association (Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association), as well as two individual board members of the Homeowner's Association (Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association), and another neighbor (Fulton Jeffers), all hereinafter collectively referred to as "Defendants." In Plaintiffs' motion, which fails to cite any case law or authority whatsoever, Plaintiffs merely reassert the same grounds previously argued in opposition to Defendants' joint motion to enforce settlement and amended joint motion to enforce the settlement. In response, Defendants jointly submit this response in opposition and ask the Court to summarily deny and dismiss this motion in full.

BACKGROUND OF THE CASE

This matter, originally filed in the Aiken County Court of Common Pleas on September 21, 2018, arises out of an equestrian/pedestrian easement dispute in the Braeloch Neighborhood (hereinafter "the neighborhood") which is governed by the Braeloch Homeowner's Association (hereinafter "HOA"). At all relevant times, Plaintiffs, married couple Richard Viviano and Johnette Gunter, are owners of property in the neighborhood, as were Defendants Fulton Jeffers Derrick Boddy and Sandy Carroll. Boddy and Carroll are former officers of the HOA who are being sued in their official and individual capacities. The easement in question runs along the shared boundary line between lots owned by Plaintiffs and Defendant Jeffers. Plaintiffs allege that the easement and/or the covenants related thereto are invalid and/or waived by the actions or inactions of the HOA and its officers. Further, and by way of Amended Complaint filed on February 28, 2020, Plaintiffs filed a civil conspiracy claim alleging that the individual Defendants (Jeffers, Boddy, and Carroll) conspired to thwart attempts at resolution of the easement issues during the initial stages of the dispute.

After extensive written discovery but prior to the deposition of all named Defendants, the parties jointly agreed to engage the services of the Honorable Thomas W. Cooper, Jr., a retired circuit court judge with extensive experience, as a mediator to try to facilitate resolution. It was known to all parties that discovery was not completed at the time of mediation, and, with this understanding, all parties nevertheless agreed to mediation in an attempt to resolve this dispute. The parties mediated this matter over the course of two days on March 30, 2022, and May 25, 2022, and following thorough negotiations with the active participation of all parties, the parties were able to reach an amicable resolution of the dispute and settle the case. At the conclusion of the mediation on May 25, 2022, all parties and their respective counsel signed a Memorandum of

Understanding (hereinafter "MOU") that set forth the terms of settlement that has been filed into the record in this matter. Following execution of the MOU, Judge Cooper filed the Mediation Results Report on June 6, 2022, and set forth two important conclusions or observations from the mediation. First, the Report stated that the parties "Fully Settled SUBJECT TO approval by the HOA in accord with the terms of the MOU signed by the parties on May 25, 2022". Second, Judge Cooper added "Further comments of the mediator" at the end of the Report as follows:

This case was complicated by legal and factual issues and by personality conflicts which either had developed during the litigation, or were, in part, the cause of the litigation. The lawyers had the difficult tasks of zealously advocating their clients' causes while fashioning a resolution that was acceptable to the other side(s). (There were more than two sides to this conundrum.) This settlement is a testament to the determination and imagination of the lawyers and the recognition of their clients that emotion has to give way to reason to resolve difficult disputes.

See Mediation Results Report.

Thereafter, the terms of the settlement espoused in the MOU were presented to the HOA for a vote and the final vote was cast in favor approving the MOU on or about July 18, 2022. The HOA approved the Memorandum of Understanding by vote and the HOA vote tally was entered during the hearing of this matter into the record as Exhibit 1. Tellingly, and as noted by the Court in its order, Plaintiff Viviano signed on behalf of himself and Plaintiff Gunter in approval of the MOU on June 30, 2022,

Over the next few months, the parties exchanged several versions of a draft Release finalizing the parties' agreement.¹ As of March 20, 2023, written communications reflect that the parties had all edited and approved the language of the Release through their respective counsel

¹ During the time that the Release was being edited, former counsel for the Plaintiffs was indisposed due to medical issues resulting in some delay.

and counsel agreed in writing that they would all reach out to their clients and obtain their respective signatures to fulfill the terms of the MOU.

On March 31, 2023, counsel of record for the Plaintiffs, Charley Krawczyk, unexpectedly filed a Motion to Be Relieved as Counsel. Despite representing the Plaintiffs since the inception of the action (pending for nearly five years at that point) and the case having already been settled, the Court nevertheless formally relieved Krawczyk by Order of the Court on April 2, 2023. Subsequently, Plaintiffs retained John W. Harte (hereinafter "Harte") as their new counsel. On April 18, 2023, counsel for Defendants Boddy and Carroll, Mary D. LaFave (hereinafter "LaFave"), sent a letter to Harte with the previously agreed upon Release and the MOU asking that it be executed and stating that failure to do so would result in a Motion to Enforce Settlement. The letter from LaFave set forth that the letter represented her satisfaction of Rule 11, SCRCP, to consult with opposing counsel prior to filing a motion.

On April 24, 2023, Harte formally entered an appearance on behalf of the Plaintiffs. On April 24, 2023, and May 2, 2023, Hart responded in writing to LaFave's April 18, 2023, letter, rejecting the Release based on various theories, including but not limited to: 1) the Release is not consistent with the Memorandum of Understanding; 2) the passage of time renders the settlement a "nullity"; 3) the settlement is invalid because discovery was not complete at the time of mediation; 4) the settlement is invalid due to a lack of good faith; and 5) the merits of the Plaintiffs' allegations did not warrant settlement with the Defendants. In response to LaFave's request for the Release to be signed, Harte invited additional settlement discussions but made it clear that his clients would not sign the Release.

On May 2, 2023, Defendants jointly filed a Motion to Enforce Settlement filing the fully executed MOU, Release, and communications between counsel in support arguing the MOU is an

enforceable agreement under SCRCP, Rule 43(k), and citing authority² that MOU settlement agreements cannot be defeated by principles of equity. On June 26, 2023, Defendants filed an Amended Motion to Enforce Settlement which replaced the original Release exhibit with one signed by all of the Defendants. However, no new arguments were raised in the Amended Motion.

On May 15, 2023, Plaintiffs filed an initial Reply, setting forth their arguments that the MOU is not an enforceable agreement and relying on two main grounds. First, Plaintiffs argue that the necessary elements of a contract “offer, acceptance, and valuable consideration,” are not present in the MOU, and accordingly an enforceable settlement does not exist. Second, Plaintiffs argue that there was not a “meeting of the minds” necessary to enforce the settlement agreement as set forth in the MOU, but Plaintiffs failed to explain how any aspect of the MOU conflicts with the Release or that Plaintiffs understanding of the settlement differed in some way from the Release. Plaintiffs also argue, without explanation or support, that the passage of time nullifies the MOU despite a lack of time limitation in the MOU. In this reply, Plaintiffs acknowledge that performance of the contingency that the HOA approve the agreement in the MOU would have rendered the agreement “binding” if the agreement were enforceable. Although Plaintiffs generally referenced other contingencies as existing, none are provided with specificity and the record does not reflect any other contingencies.

On July 14, 2023, Plaintiffs filed a Reply to the Amended Motion, raising the argument that counsel for the Defendants did not comply with Rule 11, SCRCP, by consulting with Plaintiffs’ counsel prior to filing the instant motion, despite the substance of the motion being identical. Further, Plaintiffs argued that the MOU is not an enforceable agreement for the reasons

² Defendants relied upon SC Human Affairs Com’n v. Chen, et al., 430 S.C. 509 (Ct. App. 2020) as instructive on the enforceability of Rule 43(k) agreements and that such agreements cannot be defeated by principles of equity.

previously stated and adding that the principles of equity bar enforcement under the doctrines, *inter alia*, of unclean hands, waiver, and laches. Plaintiffs also argued that the title “Memorandum of Understanding” and the words “proposed agreement” in the opening paragraph reflect that the MOU was not an agreement but a proposed agreement that was never finalized because the various contingencies, though not explained other than HOA approval, were not met.

A hearing on Defendants motion was convened July 17, 2023, before the Honorable William P. Keesley, circuit court judge, with counsel for all parties present. Following the hearing, the Court granted the Defendants’ motion to enforce settlement and, on August 15, 2023, it issued a written Order setting forth its reasons for its decision. In this order, the Court first rejected Plaintiffs’ argument that the motion is not ripe for consideration and should be stricken based on a lack of consultation pursuant to Rule 11, SCRCP, finding that counsel for Defendants did indeed comply with Rule 11, SCRCP, and any further consultation between counsel for the parties would not have served any useful purpose based on the patently inconsistent and steadfast positions from the parties. Second, the Court rejected Plaintiffs’ arguments that the MOU did not constitute a valid contract, finding that the MOU contains all the material elements of a contract as it is reflective of the offer, acceptance, and consideration that took place during a lengthy mediation process that ended in a settlement of the claims. Third, the Court rejected Plaintiffs various ancillary arguments that the MOU was unenforceable based on the use of the word “proposed” and vague arguments that the Release did not comport with the MOU. The Court specifically found that the Release was consistent with the MOU and Plaintiff’s claims that the MOU was not reflective of a meeting of the mind was unsubstantiated by any evidence. Fourth, the Court rejected Plaintiffs’ argument that the MOU contained contingencies that had not been met (and thereby rendering the agreement non-binding), specifically finding that the only contingency in the MOU

was the approval of the MOU by the HOA, which was completed on or about July 18, 2023, at least nine months prior to Plaintiff's rejection of the MOU for the first time. The Court again noted that Plaintiffs themselves voted for HOA approval of the MOU. Fifth and finally, the Court rejected Plaintiff's arguments that equitable doctrines of unclean hands, waiver, and laches rendered the MOU unenforceable, citing to binding precedent directly on point rejecting this argument. In conclusion, the Court found that the MOU satisfied Rule 43(K), SCRCP, as " 'a written stipulation signed and entered into the court record' and/or 'has been reduced to writing and signed by the parties and their counsel' " and, accordingly, was a valid settlement agreement. This Order was signed, filed, and served on all parties on August 15, 2023.

Thereafter, Plaintiffs filed the instant "Motion pursuant to Rule 59E SCRCP to Alter or Amend Order" on August 23, 2023. On September 6, 2023, Plaintiffs filed a "Supplement to 59(E) Motion" comprised of an affidavit of Plaintiff Viviano dated September 6, 2023, with eighteen attachments.

This response in opposition follows.

CURRENT MOTION BEFORE THE COURT

In their "Motion pursuant to Rule 59E SCRCP to Alter or Amend Order" filed on August 23, 2023, Plaintiff sets forth twelve grounds as to why they believe the Order is insufficient, focusing primarily on arguments related to the underlying dispute. Specifically, Plaintiffs argue that:

1. The Court failed to address the propriety of Lot 51's inclusion into the neighborhood, including that Defendants withheld information regarding the inclusion of Lot 51;
2. The Court failed to consider that Defendants committed a fraud on the Plaintiffs and that based without this fraud, the Plaintiffs would not have entered into the MOU;
3. The Court failed to consider that the MOU would change the easement over Lot 47

from non-exclusive to exclusive without obtaining the requisite consent from members of the HOA;

4. The Court failed to consider that the covenants of the neighborhood require the horse trail be located on the perimeter of the subdivision;
5. The Court failed to recognize that the MOU is not enforceable because it lacks to necessary elements of a contract because, in part, the HOA did not approve the final agreement;
6. The Court failed to address that the Defendants withheld vital and material information about the dispute during the mediation, including: (a) that Lot 51 is not lawfully part of the neighborhood; (b) that the Defendants knew and intentionally concealed that Lot 51 was not lawfully part of the neighborhood; (c) that Plaintiffs would not have entered into the MOU if not for the Defendants' fraudulent concealment; (d) the MOU is void based on the Defendants' fraudulent concealment; (e) that during the mediation, the Plaintiffs relied on discovery which had not been provided by the Defendants' (f) that the Plaintiff could not know the full truth during mediation because the Defendants withheld discovery' (g) that the Defendants continued to conceal the truth throughout mediation; (h) that the lack of the required HOA members' signatures was not known at the time of mediation and if it had been known, the Plaintiff would not have entered into the MOU; (i) that the MOU's requirements that Lot 51 be changed cannot be accomplished because Lot 51 was never properly incorporated into the neighborhood;
7. The Court failed to consider that notes from the HOA meetings and other documents had not been provided in discovery;
8. The Court failed to consider that the Releases presented to Plaintiff are not consistent with the Releases contemplated in the MOU;
9. The Court failed to give due weight to the fact that the MOU was a nullity based on "the incredible passage of time since the mediation was concluded";
10. The Court failed to consider the fact that the MOU is not a contract but a declaration of an intent to contract;
11. The Court failed to address or consider that if the Defendants had any enforceable rights under the MOU, they are barred from enforcing them under the doctrine of laches because the Defendants have not completed the work nor sought enforcement of the contract; and
12. The Court failed to consider that some of the Defendants did not sign the MOU at the HOA meeting.

In this motion to alter or amend, Plaintiffs fail to cite to any authority *whatsoever* to support

their claims.

Thereafter, on September 6, 2023, Plaintiffs filed and served a "Supplement to 59(E) Motion" that contains a new affidavit from Plaintiff Viviano along with a "statement" from him and eighteen attachments. The "statement" from Plaintiff Viviano appears to be his musings as to the grounds presented in the motion or amend with a smattering of documents (most of the documents are only partial documents rather than the full documents themselves) as to why he personally believes the MOU should not be enforceable. Again, this Supplement does not cite to any authority whatsoever to support Plaintiffs' motion to alter or amend.

STANDARD OF REVIEW PURSUANT TO RULE 59(e), SCRCF

When considering whether to grant or deny a motion to alter or amend under Rule 59(e), SCRCF, the trial court must consider whether it has properly and fully ruled on all issues before the Court and whether there is evidentiary support for its ruling. Rule 59(e), SCRCF; *See also Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (S.C. 2002) (holding the appellate court's review of ruling on motion for new trial is limited to consideration of whether evidence exists to support the trial court's order)

ARGUMENT IN OPPOSITION TO PLAINTIFFS' MOTION

In his Motion and Supplement to the Motion, which is devoid of any supporting authority and is based on erroneously included "evidence," Plaintiffs attempt to litigate the underlying claims of the lawsuit rather than presenting any valid arguments that the MOU was unenforceable. This Court should reject Plaintiffs' erroneous attempts to litigate the underlying claims and should uphold its properly reached decision that a valid and enforceable settlement existed.

1. The Motion and Supplement to the Motion Make Conclusory Statements and Fail to Cite to Any Authority

First, it is crucial to note that Plaintiffs have made conclusory statements and failed to cite

any authority *whatsoever* in support of its Motion. Based on these grounds, this Court should refuse to consider Plaintiffs' Motion. *See e.g., In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998)) ("A bald assertion, without supporting argument, does not preserve an issue for appeal."); *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 407, 714 S.E.2d 904, 916 (Ct. App. 2011) (holding that appellants abandoned issues by making conclusory arguments without supporting authority); *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (finding appellants abandoned an issue on appeal where they failed to cite any case law for a proposition and made only conclusory arguments in support).

As Plaintiffs have wholly failed to cite to any authority whatsoever in support of its motion and instead rely exclusively on conclusory statements, this Court should find the motion abandoned and deny it.

2. The Motion and Supplement to the Motion Erroneously Attempt to Introduce New Evidence to the Court

In its Motion and Supplement to the Motion, Plaintiffs attempt to introduce new evidence to the court, including a newly-created Affidavit from Plaintiff Viviano, a newly-created "Statement" from Plaintiff Viviano, and eighteen attachments to this Affidavit and Statement. Our courts have consistently held that it is improper for a party to present new arguments or new evidence through a motion to amend pursuant to Rule 59(e), SCRCP. *See Spreeuw v. Barker* 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009) (holding that the appellate court considering father's challenge to child support award could not consider financial document appearing only as an attachment to father's post judgment motion to alter or amend judgment); *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009) (holding that a party cannot use a motion to alter or amend a judgment to present to the lower court an issue the party could have raised prior to

judgment but did not); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) (holding that a wife could not use supplemental motion to alter or amend judgment to assert for the first time a claim to her husband's civil service retirement fund).

It is clear that Plaintiffs' erroneous attempts to place new arguments and documents before the Court through his Supplement to the Motion are a violation of Rule 59(e), SCRCP, and binding authority interpreting the rule. Accordingly, the Court should refuse to consider any of the documents, Affidavits, or Statements included in Plaintiffs' Motion and Supplement to the Motion.

3. The Motion and the Supplement to the Motion Attempt to Litigate the Underlying Claims of the Lawsuit Rather than the Issue before the Court—The Enforceability of the Settlement Agreement

Regardless of the concerns with the form of Plaintiffs' Motion, the Motion must also fail on the merits, as the Court properly determined that the MOU was a valid settlement agreement and correctly ordered the settlement be enforced.

In his Motion, Plaintiff presents a litany of conclusory statements that he avers require the Court to alter or amend its order enforcing settlement. However, all of those arguments patently lack merit and were already properly rejected by the Court in its prior order. A significant portion of Plaintiffs' grounds as set forth in the Motion deal with the underlying claims of the lawsuit, and, particularly, with the propriety of Lot 51's inclusion into the neighborhood more than fifteen years before the dispute at the heart of the underlying claim even arose. However, this issue is a red-herring to distract away from the actual issue before the Court—whether there was a valid and enforceable settlement agreement. In its Order, the Court fully and accurately ruled on this issue, which was the only issue before the Court based on the Defendants' Motion to Enforce Settlement. The underlying merits (or lack thereof) to Plaintiffs' claims were not before the Court, and, accordingly, were properly not addressed and are now not properly raised.

However, the Court properly addressed and rejected Plaintiffs' arguments that pertained to whether settlement was reached in its Order. Specifically, the Court addressed and rejected Plaintiffs' arguments that a contract did not exist, that a meeting of the minds did not exist, that the Release was different than the MOU, that the passage of time invalidated the settlement, or that equity principles invalidated the settlement.³ In its Order, the Court properly and fully addressed the issues before the Court and rejected Plaintiffs' meritless arguments. Plaintiffs' have failed to present any ground or argument related to the issue before the Court that was not properly ruled upon in the Order. Accordingly, this Motion must be denied and dismissed.

CONCLUSION

Based upon the foregoing, Defendants respectfully requests that this Court summarily deny and dismiss Plaintiffs' motion to alter or amend its Order enforcing the settlement agreement.

Respectfully Submitted,

s/Mary D. LaFave

Mary D. LaFave, SC BAR #75366

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³ Defendants cannot overstate that Plaintiffs voluntarily participated in two days of mediation with full knowledge that discovery had not been completed and all depositions had not been conducted. With this full knowledge, Plaintiffs nevertheless came to a fair and reasonable compromise with Defendants and agreed to a settlement that they then ratified multiple times, including at the mediation, then again by signing the MOU, then later by signing as members of the HOA to approve the settlement as set forth in the MOU. It is unconscionable that Plaintiffs continued engaged in purposeful, dilatory actions to thwart this validly entered settlement agreement and then attempt to blame the Defendants for those very action with arguments based on equity principles. This Court should reject Plaintiffs' arguments in full.

s/Paul K. Simons, Jr.

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Homeowner's Association

STATE OF SOUTH CAROLINA COUNTY
OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants

IN THE COURT OF COMMON
PLEAS SECOND JUDICIAL
CIRCUIT

Civil Action No. 2018-CP-02-2208

**PLAINTIFF'S RESPONSE TO THE
DEFENDANTS RESPONSE TO
59E
MOTION**

The Plaintiffs respectfully submit the following in response to the Defendants response to the motion pursuant to Rule 59E.

The document filed by the Defendants begins with a 6-page recantation of the prior proceedings. Nothing in those six pages is responsive to the Motion for Relief pursuant to Rule 59E. Nothing in those six pages supports the conclusion that the Memorandum of Understanding is enforceable. Among other omissions in the history provided by the Defendants is the fact that the Defendants perpetrated a fraud on the Plaintiffs and on the Court by withholding the fact that the required signatures for incorporation of Lot 51 were not obtained and the attempt to incorporate lot 51 into the subdivision was fatally flawed. It is well settled that as stated in State Farm Mut. Auto. Ins. Co. v. Turner, 303 S.C. 99, 101-102

South Carolina law allows for a contract to be rescinded for a unilateral mistake when that mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to

rescission, without negligence on the part of the party claiming rescission, [*102] or when the mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement. *Scott v. Mid Carolina Homes, Inc.*, 293 S.C. 191, 359 S.E.2d 291 (1987). *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (1984). A rescission of a contract is allowed when there is evidence of misrepresentation or concealment. *Jumper v. Queen Nab Lumber Company*, 115 S.C. 452, 106 S.E. 473 (1921).

The Defendants give short shrift to the fraud and well they should because it is that fraud that led to the Memorandum of Understanding. Allowing the Defendants to benefit from their wrongful and fraudulent concealment would condone the Defendant's conduct that induced the Plaintiffs to enter into the agreement to make an agreement.

Despite the Defendants attempt to hide the fraud from Court's view by flooding the court with a meaningless history lesson about the case, that fraud cannot be hidden, and it is directly responsible for the Defendant having a Memorandum of Understanding in any form. Had the Defendants not fraudulently concealed the lack of adequate signatures, there would not be a Memorandum of Understanding at all.

Because the Court failed to address the fraud and its impact on the negotiations that led to the Memorandum of Understanding, the test as described by the Defendants by which a moving party is required to show that the trial court did not fairly consider and rule on all issues has been met. As stated in the Defendant's most recent filing, when faced with a Rule 59E motion, the trial court must consider whether it has properly and fully ruled on all issues before the Court.

The fraud committed by the Defendants is a central issue in the case and the failure to recognize the fraud and give it the weight it deserves is a fatal flaw in the Order and one that should lead to a finding that the fraud renders the Memorandum of Understanding unenforceable. *State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 101-10 (cited above). The Court should also have ruled that Lot 51 was not properly added to the subdivision.

The Defendants properly state the rule of law which requires a moving party to show that there is no evidentiary support for the Court's ruling. Since the Court ignored the fraud, that test as well is met because there is no evidentiary support that justifies the Court's failure to consider the fraud.

Because the fraud relates to a central issue in the case (i.e., whether Lot 51 had been incorporated into the subdivision), the concealment of the defect in that process should not have been ignored. If the truth had not been concealed, the Plaintiff's would not have considered the Memorandum of Understanding. Because the fraudulent concealment induced the Plaintiffs to act, renders the Memorandum of Understanding unenforceable. Absent incorporation of Lot 51, there would be no issue to litigate and no reason for the Plaintiffs to accept the Memorandum of Understanding. The controlling fact was the incorporation of Lot 51. Because it was not lawfully incorporated, the Defendant's position that the Memorandum of Understanding should be enforced has no legal or factual basis. The same is true of the Court's Order which is the subject of the Rule 59E Motion. Simply put the fraud is an insurmountable barrier to the Defendant's claim that the Memorandum of Understanding is enforceable.

Interestingly, the Defendants do not deny that there were insufficient signatures. In fact, they ignore the problem entirely. The Court should not be deceived by the Defendant's silence. The concealment of the truth gave the Defendants an improper and, indeed, unlawful advantage. The Court did not address that in its Order and the Order should be amended to find that the Defendants engaged in a fraudulent concealment of the truth and the Memorandum of Understanding should not be enforced.

Calling attention to the fraudulent concealment is not an attempt to litigate the underlying claims in the lawsuit because it is the fraudulent concealment that led directly to the Plaintiffs

considering the Memorandum of Understanding. When material facts are concealed, that is fraud and where there is fraud, the contract must fail.

The Defendants complain because the Plaintiffs rely on the same arguments made at the hearing. However, the purpose of a Rule 59E Motion is to give the trial judge an opportunity to correct errors. When those errors arise from a failure to give proper weight to arguments presented at trial, the party seeking relief must invite the court's attention to those arguments to which the Court failed to give weight.

Throughout the material filed by the Defendants one finds the assertion that the Plaintiffs have not cited any authority for their position that the Memorandum of Understanding was not a final agreement and therefore is not enforceable. That conveniently overlooks the following citation which forms the foundation for the Plaintiff's position. The citation was included in the Plaintiff's initial brief. . This citation is sufficient unto itself to support the Plaintiff's position. Specifically, the Plaintiffs have consistently argued that the Memorandum of Understanding is unenforceable and have supported the argument with a proper citation of authority. As to the applicable law, the Defendants respectfully again invite attention to the following:

The "Memorandum of Understanding is not enforceable. That issue was decided by the South Carolina Supreme Court in Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014)

"Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920). A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). Thus, for a contract to be binding, material terms cannot be left for future agreement. *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986)."

To further support the fact that the Memorandum of Understanding is not a contract there is no time limit for the creation of the final agreement, and, in fact, that drafts of the final agreement have never been agreed to. Paragraph 7 indicates that there will be a mutual anti disparagement agreement, but the terms of that agreement are not set out in the Memorandum of Agreement thus rendering the Memorandum of Understanding incomplete and unenforceable. The terms of the Memorandum of Understanding at paragraph 4 provide for an undefined and nonspecific right on the part of the Defendants to designate "whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement".

Paragraph 7 lacks any specificity and, until an actual contract document with specificity is drafted and accepted by the Plaintiffs, there is no contract. The Memorandum was nothing more than an acknowledgement that, if all contingencies were met and if the parties reached agreement on the terms of the actual contract, the parties might enter into a contract.

The Memorandum of Understanding is simply not enforceable under South Carolina Law. See Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014).

The Plaintiffs verily believe that there are yet numerous documents requested in May 2021 that have not been produced. The failure to produce relevant and material documents renders the Memorandum of Understanding void or at best subject to rescission. The Plaintiffs have clearly rescinded any consent that might have been assumed.

The releases which appear in the document presented to the Plaintiffs are not consistent with the limited releases contemplated by the Memorandum of Understanding. Therefore, there is no valid contract.

The familiar requisites to a binding contract are a meeting of the minds of the parties as to all essential and material terms, supported by consideration. *See Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 368, 593 S.E.2d 170, 173 (Ct. App. 2004) ("The necessary elements of a contract are offer, acceptance, and valuable consideration.") Lampo v. Amedisys Holding, LLC, 437 S.C. 236, 242, 877 S.E.2d 486, 489 (Ct. App. 2022).

For there to be a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011)

The releases are an essential element of the agreement. Because the ones presented are not in accord with the intent of the parties, there is no contract.

"When the parties know that the execution and delivery of a written contract is a condition precedent to their being bound by that contract, the contract is simply not binding until the written agreement is executed and delivered, even if all of the terms have been agreed upon. *See, e.g., Oeland v. Kimbrell's Furniture Co.*, 210 S.C. 223, 227, 42 S.E.2d 228, 228-29 (1947) Sifonios v. Town of Surfside Beach, 414 S.C. 269, 274, 777 S.E.2d 425, 428 (Ct. App. 2015). Even if the Plaintiffs can be said to have agreed to the Memorandum of Understanding, they have never agreed to the terms contained in any final agreement and due to the fraudulent concealment, will not agree to execute a document born of fraud.

In addition to all of the other reasons for granting the 59E Motion, the Plaintiff's invite the Court's attention to the fact that the delay caused by the failure of the Defendants to produce a document constituted laches. Laches is defined as follows: "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Mid-State Trust, II v. Wright, 323 S.C. 303,

474 S.E.2d 421 (1996); Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525 (1988); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) Emery v. Smith, 361 S.C. 207, 215.

If a party, knowing his rights does not seasonably assert them, but by unreasonable [***10] delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Muir at 296, 519 S.E.2d at 599 Emery v. Smith, 361 S.C. 207, 215

The Court did not give any weight to the neglect on the part of the Defendants for an unreasonable time to do what in law should have been done. The delay in drafting the Memorandum of Understanding was unjustified and caused the Plaintiffs to suffer additional expenses under the mistaken belief fostered by the Defendants that Lot 51 had been properly incorporated, when, in fact it had not.

The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. Hallums at 199, 371 S.E.2d at 528; All Saints at 235, 595 S.E.2d at 267. Emery v. Smith, 361 S.C. 207, 215

Here there was delay, unreasonable delay and prejudice. The delay and unreasonable delay is shown in the record. The prejudice arises from the change in position forced upon the Plaintiffs by the fraud which when combined with the negligent failure to draft the Memorandum of Understanding led the Plaintiff to suffer additional costs and to have their property title encumbered by the apparent addition of Lot 51 when, in fact, Lot 51 was not properly admitted.

CONCLUSION

The Court did not properly and fully rule on all issues before the Court. Specifically, the Court did not rule on the fraudulent concealment, the laches shown by the long delay in drafting

the Memorandum of Understanding, nor did the court rule on the fact that there were conditions to finality which rendered the Memorandum of Understanding a mere contingency and not an enforceable contract.

THEREFORE, the Plaintiffs move that the Motion for relief under Rule 59E be granted and the Memorandum of Understanding be declared unenforceable .

s/John W. Harte

SC Bar No. 2773

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State of South Carolina)
County of Aiken)

In The Court of Common Pleas
Second Judicial Circuit
2018-CP-02-02208

Richard Viviano, et al.,)
Plaintiffs,)
vs.)
Fulton Jeffers, et al.,)
Defendants.)
_____)

Transcript of Record

July 17, 2023
Aiken, South Carolina

B E F O R E:

The Honorable William P. Keesley, Judge

A P P E A R A N C E S:

John W. Harte, Esquire
Attorney for the Plaintiffs

Mary D. LaFave, Esquire
Attorney for Defendants Boddy, Carroll

Charles W. McCants, III, Esquire
Attorney for Defendant Braeloch

Paul M. Simons, Jr., Esquire
Attorney for Defendant Jeffers

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter
Certified Verbatim Reporter - Master
Certificate of Merit

I N D E X

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E X H I B I T S

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1 THE COURT: This is 2018-CP-02-0228, *Richard Viviano*
2 *and others v. Fulton Jeffers and others*. It's a motion to
3 enforce settlement. I reviewed the file and, let's see,
4 for the plaintiff, Mr. Harte, you represent the plaintiffs?

5 MR. HARTE: I do, Your Honor.

6 THE COURT: And, Mr. McCants, you represent Braeloch
7 Homeowners Association and Braeloch I Association?

8 MR. McCANTS: That's correct, Your Honor.

9 THE COURT: Ms. LaFave.

10 MS. LAFAVE: Yes, Your Honor.

11 THE COURT: Derrick Boddy and Sandy Carroll?

12 MS. LAFAVE: Yes, sir.

13 THE COURT: Thank you. Did I leave anybody out?

14 MR. SIMONS: Your Honor, Paul Simons. I represent Mr.
15 Fulton Jeffers, the defendant.

16 THE COURT: Thank you.

17 Did I miss anybody?

18 MS. LAFAVE: No, Your Honor. That's all the parties
19 today.

20 THE COURT: Okay. Is it your motion?

21 MS. LAFAVE: It is, Your Honor. It's a joint motion
22 on behalf of all defendants, but I did file it and will be
23 arguing it.

24 THE COURT: Go ahead, please.

25 MS. LAFAVE: Thank you, Your Honor. If it pleases the

1 court? Mary LaFave on behalf of Derrick Boddy and Sandy
2 Carroll. Your Honor, I have two counsel here with me that
3 are joining in on this motion: Paul Simons on behalf of Mr.
4 Jeffers, Mr. McCants on behalf of the neighborhood
5 homeowners association. I did prepare a notebook for the
6 court. This is a document-intensive motion, and so I
7 thought it would help save us a little bit of time and
8 maybe go easy on the court's eyes. If I may, Judge?

9 THE COURT: Sure.

10 MS. LAFAVE: Thank you. I've provided copies to
11 opposing counsel. Thank you.

12 Your Honor, this is a complex case, though it would be
13 our position that this is a narrow legal issue before the
14 court. If I may give a little bit of background? There
15 are a number of filings in this case. I did include in my
16 notebook the two original filings and then the two amended
17 filings by myself and Mr. Harte recently, just for the
18 court's ease of reference. I did put the motion -- or the
19 memorandum, rather, of understanding first in that notebook
20 so as we talk about it, it will be the first tab as tab 1
21 there for Your Honor.

22 This is an easement dispute originally filed in 2018
23 by the Vivianos, Richard and Johnette Gunter. They owned a
24 lot in the Braeloch subdivision. They sued their
25 homeowners association and included Mr. Fulton Jeffers as

1 parties to that lawsuit. They added in 2020, I believe,
2 Sandy Carroll and Derrick Boddy, who are former officers of
3 the homeowners association, and alleged civil conspiracy
4 against those two individuals.

5 The parties began intensive paper discovery, had a few
6 motions in front of Judge Newman, and thousands of pages
7 later we were here in Aiken taking depositions and actually
8 in the middle of Mr. Jeffers's deposition -- Mr. Jeffers is
9 actually a lawyer from the northeast who's retired now who
10 owns a lot there, and he was in the middle of his
11 deposition. It became very clear to the attorneys that
12 mediation was the best course of action for all the parties
13 in this case, including the neighborhood and the people who
14 were not actually physically present.

15 At the time, the plaintiffs were represented by
16 Charlie Krawczyk from the Finkel Law Firm. He represent --
17 represented them for approximately five years. Mr. Harte
18 has come in, I guess, in April of this year. He was not
19 present during these depositions and our discovery process.

20 In discussions with counsel, we decided to use former
21 circuit judge Tommy Cooper as our mediator. We had that
22 mediation over the course of two days at the Finkel Law
23 Firm in Columbia March 30, 2022, and May 25, 2022, and the
24 parties at -- with great effort worked very diligently
25 together to try to come to a settlement agreement. And

1 that tab 1, Your Honor, which is the memorandum of
2 understanding was signed by all parties and all the lawyers
3 at that mediation on May 25, 2022. And tab 7, Your Honor,
4 of the notebook is the entry by Judge Cooper into the
5 record of the mediation results report, and that was
6 entered and filed on June 6, 2022, and stated that the
7 matter fully settled subject to approval by the homeowners
8 association in accordance with the terms of the memorandum
9 of understanding.

10 All of the parties did know, Your Honor, that, as is
11 typical with these homeowners cases, that the homeowners
12 association actually has to approve the agreement. So, it
13 was a contingency on May 25, 2022, and the HOA through Mr.
14 McCants, they did approve that settlement agreement. It
15 was agreed upon, as I understand it, one year ago today,
16 June -- July 17, 2022.

17 And I have, as I would like to enter into the record
18 as an exhibit, Your Honor, the signatures by all of the
19 members of the HOA approving this settlement agreement, if
20 I may.

21 THE COURT: Any objection?

22 MR. HARTE: No objection, Your Honor, and further, I
23 don't object to the -- whatever this notebook is. I'm
24 happy to have that before the court as well if you have
25 that that she provided.

1 THE COURT: Thank you.

2 (SIGNATURE DOCUMENT MARKED AS DEFENDANT'S EXHIBIT
3 NUMBER 1 AND RECEIVED INTO EVIDENCE.)

4 MS. LAFAVE: Your Honor, that document is reflective
5 of the signatures at the HOA presented by the former
6 president Dave Christiansen that the homeowners association
7 was approving that settlement agreement, also known as the
8 memorandum of understanding from May 25, 2022. After that,
9 the attorneys went to work to draft a release.

10 This was a complicated agreement, Your Honor, removing
11 a easement partially onto Mr. Jeffers's property from the
12 plaintiffs' property. And to be able to do that, it
13 required clearing of the land, surveys. Legal documents
14 would have to be changed. So, we had some reservations by
15 some of the parties and some of the members of the HOA
16 about being specific as to the homeowners association's
17 duties, and I emphasize that because the release was
18 exchanged amongst the lawyers and although edits were made
19 along the way, really the only edits pertained to what the
20 responsibilities were and the timeline that the HOA needed
21 to be able to clear this easement and to move the horse
22 trail, pedestrian easement over onto another piece of
23 property.

24 Be that as it may, the release was finalized by all
25 counsel and agreed upon as of May -- excuse me, March 20,

1 2023. That is when all the attorneys exchanged a final
2 email. Yes, this is it. Mr. Krawczyk on behalf of the
3 plaintiffs also agreed to that release. No time did he
4 ever raise any issue that the release was not reflective of
5 the memo of understanding.

6 In my amended motion, Judge, 3 -- tab 3.e -- let's
7 see, tab 3.e is the letter that I provided to Mr. Harte
8 after Mr. Krawczyk was relieved asking him to execute the
9 settlement agreement that prior counsel had already agreed
10 to. I gave him time to do that; he asked for additional
11 time. I was happy to grant that, but that release has
12 never been signed by the plaintiffs. My amended motion
13 provided the court with the signatures by all of the
14 defendants who have signed that release that was prepared
15 by and agreed upon by the lawyers.

16 Mr. Harte's response to my request of April 18, 2023,
17 was a change in a primary legal theory. I would say a
18 contradictory legal theory to what had been argued by prior
19 counsel. He demanded additional discovery and stated that
20 the memorandum of understanding was invalid due to the
21 passage of time and the attitude by residents. Your Honor,
22 essentially the plaintiffs want to have a do over of the
23 mediation and the memorandum of understanding, and it's
24 just simply not in accordance with the rules from the
25 defendants' standpoint, and so this motion followed.

1 I understand Mr. Harte took some issue with whether I
2 complied with Rule 11, but when he's citing to my attempts
3 to work this motion out with him, I, I don't believe that
4 that argument is accurate.

5 Tab 2, Your Honor, is actually a case that I wanted to
6 provide to the court just for ease of reference. I know
7 this court is well familiar with South Carolina Rule 43(k),
8 but I thought that it gave a good discussion of what's
9 required for an agreement to be enforced. And obviously
10 here we're under subsection 3, which is an agreement
11 reduced to writing and signed by the parties and their
12 counsel. That makes this agreement enforceable.

13 That case, which is *South Carolina Human Affairs*
14 *Commission v. Chen*, 430 SC 509, also addresses a
15 contingency. Contingency in this case before the -- before
16 the court was approval by the HOA. And that approval as of
17 July 17, 2022, was performed, executed, and agreed upon,
18 and there was no remaining contingency after that. So, to
19 the extent that any contingency in this particular
20 memorandum of understanding existed, it was satisfied by
21 that time, and the plaintiffs never withdrew their assent
22 to this memo of understanding prior to that date. Only in
23 March of 2022 -- 2023, excuse me, Judge, almost a year
24 later when they fired their lawyer of five years and hired
25 another one did they take issue with this memorandum of

1 understanding.

2 So, 43(k), Your Honor, plainly states this should be
3 enforced; we're asking that it be enforced. I also think
4 that, that the filing by Judge Cooper is also an agreement
5 and reinforces the fact that there was a meeting of the
6 minds here. So, on behalf of Derrick Boddy and Sandy
7 Carroll, and I know on behalf of Mr. Jeffers and the HOA,
8 we're asking that the court enforce this agreement and that
9 the plaintiffs be required to sign the previously
10 agreed-upon release that was provided to them on March 20,
11 2023, and again to their lawyer on April the 18th of 2023.
12 Thank you, Judge.

13 THE COURT: Thank you, Ms. LaFave.

14 Mr. Simons, you have anything else?

15 MR. SIMONS: Your Honor, I have nothing to add to what
16 Ms. LaFave just stated to the court.

17 THE COURT: Mr. McCants, do you?

18 MR. McCANTS: Your Honor, I thought Ms. LaFave did an
19 excellent job of outlining all the defendants' positions.
20 If I could just synthesize a couple of things?

21 She mentioned that my client convened a meeting of all
22 the neighborhood, as she characterizes it, and you have in
23 front of you the vote tally. With the exception of one
24 member, this settlement was unanimously approved and agreed
25 to by the residents of Braeloch. In particular, if you

1 look at page 2, Mr. Viviano himself voted yes to approve
2 the settlement.

3 And just let me comment real quickly on what efforts
4 we undertook in this case, Your Honor, to bring it to a
5 conclusion, and Ms. LaFave made reference to tab 7 in the
6 notebook she gave you, and that is Judge Cooper's
7 memorandum of the results of mediation.

8 In paragraph 8, and I'm sure you'll read it, Your
9 Honor, it states specifically:

10 This case was complicated by legal and factual
11 issues and by personality conflicts with --
12 either had developed during the litigation or
13 were in part the cause of this litigation. The
14 lawyers had a difficult task in zealously
15 advocating their clients' causes while fashioning
16 a resolution that was acceptable to the other
17 side.

18 And in parentheses: There were more than two sides to
19 this conundrum. He finishes by saying:

20 This settlement is a testament to the
21 determination and imagination of the lawyers and
22 the recognition of their clients that emotion has
23 to give way towards easing to resolve difficult
24 disputes.

25 I won't take credit for lawyer -- me being a lawyer

1 with that imagination because we worked very hard, and
2 that's reflected in Judge Cooper's comments that almost
3 eighteen hours was spent over the course of two days
4 hashing out this resolution.

5 It is a good settlement; it's a fair settlement. It's
6 been approved by my client and the residents and whatnot,
7 and we would respectfully ask on the basis of what Ms.
8 LaFave has argued that the -- that the court issue an order
9 compelling the plaintiffs in the case to carry out this
10 settlement.

11 I'd be happy to answer any questions you may have,
12 Your Honor.

13 THE COURT: Thank you.

14 Mr. Harte.

15 MR. HARTE: Thank you, Your Honor. First of all, I'm
16 not going to spend a great deal of time on it, but I do
17 believe that this motion cannot stand because of the
18 failure to comply with Rule 11. I set that argument out in
19 the reply. I see no reason to delve further into that, but
20 the reality is that Rule 11 was not complied with and,
21 therefore, this motion is not properly before the court.

22 Secondly, Your Honor, I would invite the court's
23 attention to the agreement or document which they are
24 referring to as a memorandum of understanding. As Your
25 Honor is well aware, an agreement to make an agreement is

1 not enforceable because all the terms of a contract are not
2 present. In this particular instance, if you read the
3 memorandum of understanding as it is written, it says the
4 parties have come to a proposed settlement. There's a
5 difference between coming to a settlement and coming to a
6 proposed settlement.

7 Also, Your Honor, there are a number of contingencies,
8 not just merely the approval by the HOA, although that is a
9 part of it. There are a number of contingencies that are
10 required to be met, including the drafting of the language
11 which would form the actual agreement. And the fact is
12 that this case has lingered for so long in large part
13 because when the agreements were presented to my clients,
14 the agreements did not match what had been agreed to or
15 considered as agreement in the material that became the
16 memorandum of understanding.

17 There's a further matter that's of grave, grave
18 concern and, and deals directly with whether there's even a
19 legitimacy -- an equitable right to proceed here because
20 the evidence reflects quite clearly that it was represented
21 throughout the mediation that sufficient signatures had
22 been obtained to permit the joinder of this additional
23 property to the subdivision when, in fact, that was not
24 correct.

25 The number of lots in the subdivision totaled fifty,

1 Your Honor, and the requirement for adding a lot is that
2 there has to be a two-thirds majority of the lot owners.
3 Now, that is counted by lots and not by individuals. So,
4 if you have two people who own one lot, two signatures only
5 count as one because they only count as per lot.

6 In this particular instance, there were thirty-three
7 of the lots that were represented. There were thirty-five
8 signatures but they only represent thirty-three lots. The
9 requirement was that it had to be in excess of 33.33 to
10 meet the test for the covenant. So, the petition which was
11 the basis for adding this lot was not met. That
12 information was withheld by the defendants in this case
13 until well after this memorandum of understanding was being
14 circulated about. So to begin with, there is that. That
15 is a fraudulent represent -- actually, that is a failure to
16 disclose a material fact during negotiations which was
17 peculiarly within the knowledge of the defendants and which
18 they did not share as they should have done under the rules
19 of discovery.

20 But the point primarily I think is pretty clear, Your
21 Honor. The law, and I've cited a case or two, and the one
22 that's in -- one I have presented to you is pretty clear
23 that an agreement like this is only a proposed settlement,
24 and it uses that precise language, Your Honor. This is not
25 a settlement agreement. I know Ms. LaFave referred to it

1 as that a couple of times, but as I say, in the language of
2 the agreement, plain English, this is a proposed
3 settlement.

4 Also, Your Honor, I'm a little confused by the case
5 which she cited, this *South Carolina Human Affairs*
6 *Commission v. Chen*, I believe it is, because as I read the
7 case, only having the opportunity to read it today which I
8 probably -- not my -- there's no problem with that, but I
9 notice that on page -- I believe it's -- make sure I tell
10 you right.

11 (A PAUSE.)

12 MR. HARTE: It would be on the fifth page of this
13 document, it specifically says:

14 As regards the agreement which was before the
15 court in that case, requirements of Rule 43(k)
16 clearly were not met in the current matter for
17 the reasons found by the circuit court.

18 Consequently, we affirm the circuit court's order
19 denying the commission's motion to compel
20 enforcement of the settlement agreement.

21 So, that, that case appears, from what I can read, to
22 stand for the proposition that this agreement that was
23 presented in the *Chen* case was not sufficient to justify
24 enforcement.

25 But again I want -- I want to be -- first of all, I'm

1 not abandoning any arguments that are in my reply, but I
2 really think the case comes down to a relatively
3 straightforward proposition. First of all, does not comply
4 with Rule 11.

5 If you notice, Your Honor, one of the things that
6 happened was when I sent her my concerns about the
7 documents and the history, I said specifically I am open to
8 discussion. The answer I got back was we ain't going to
9 talk to you. Well, that doesn't comply with Rule 11 on
10 several levels. First of all, that's a direct violation of
11 the standards that require consultation and conference
12 between the two parties.

13 I will tell you that I did have a conference with Mr.
14 Paul Simon (sic), but that did not constitute an agreement
15 to deal with -- that was not -- reached an agreement. And
16 Ms. LaFave does not include anything in her pleadings to
17 control -- to say that she has complied with Rule 11 or
18 that any of the defendants complied with Rule 11. But more
19 to the point, you got to make a certification. That's a
20 requirement; it's a prerequisite for any motion such as
21 this.

22 Secondly, you can't send a lawyer a letter and say
23 we're not going to talk to you and then represent to the
24 court, well, we were open to negotiate because that's just
25 not the case.

1 However, again, it's not a contract. It is a proposed
2 settlement. It's got a number of contingencies. I've
3 mentioned those in the material I supplied to you. It's
4 not binding on anybody even until the homeowners approve
5 it, but you've got to have a document to approve. And
6 because they've been unable to produce a document that met
7 the test of whether it was what was intended to be agreed
8 upon, they don't have a contract.

9 The real problem or one of the real problems --
10 there's a bunch of problems here, but one of the real
11 problems is that the defendants did not present a
12 settlement agreement that was satisfactory to the
13 plaintiff, nor did it meet the plaintiff's understanding of
14 what was in the memorandum of understanding. Until they
15 produce a document that is consistent with the memorandum
16 of understanding and meets the test from that memorandum of
17 understanding, there is no contract, and you don't have a
18 contract unless and until the plaintiff in this case says
19 yes, I agrees to that. Well, that hasn't happened.

20 There is a proposed settlement and it says that the
21 actual settlement will be drafted by defense counsel.
22 We've never had one that was satisfactory to the plaintiff.
23 There is, simply put, no meeting of the minds on a
24 contract. Therefore, it's not enforceable.

25 THE COURT: Ms. LaFave.

1 MS. LAFAVE: Thank you, Your Honor. I guess I'll
2 address Rule 11 first. My letter of April the 18th, 2023,
3 provided as a courtesy to Mr. Harte a copy of the
4 memorandum of understanding and the release that had
5 previously been agreed upon by Charlie Krawczyk, former
6 counsel for the plaintiffs. That email of Mr. Krawczyk has
7 been provided in -- as an exhibit to my amended motion to
8 enforce the settlement. So, there had been an agreement by
9 counsel for that particular release. I provided that
10 information to Mr. Harte with the understanding he had just
11 come into the case.

12 I exchanged a couple of emails with him, but to the
13 extent that I didn't comply with Rule 11 because I didn't
14 continue to negotiate a settlement that had already been
15 agreed upon is a misapprehension of our communications.
16 And so I did actually provide a certification that I had
17 satisfied Rule 11. I can direct Mr. Harte and the court to
18 paragraph 9 of my amended motion to enforce -- it's page 3
19 -- that actually provides exhibits in support of my
20 satisfaction of my obligations under Rule 11.

21 Mr. Harte also believes that because this settlement
22 lingered so long, in large part because the meeting of the
23 minds did not match but, Your Honor, that is not accurate.
24 Charlie Krawczyk, the attorney for the plaintiffs, sometime
25 at the end of 2022, possibly 2023, contracted West Nile

1 virus from a mosquito in Columbia, was hospitalized for a
2 very long time, and that did cause, I would say -- and my
3 cocounsel can correct me if I'm wrong -- but it was almost
4 at least three months delay because of his sickness. And
5 so while Mr. Harte is correct there was a delay, it was not
6 in any way related to this case. It was related to the
7 health of counsel, which all of us as colleagues were very
8 concerned about Mr. Krawczyk at the time.

9 There also was no timeframe in the memorandum of
10 understanding, Your Honor. So, whether this took one week,
11 one month, or one year, there was not any requirement that
12 this be done within a certain period of time after the
13 fact. And the approval by the HOA was in July of 2022,
14 which shows the parties actively pursuing the terms of the
15 agreement.

16 Tab 2, Your Honor, Mr. Harte discusses the case that I
17 provided, and I find his take on it interesting. The
18 agreement was not upheld in that case because they could
19 not produce a written agreement signed by the parties and
20 counsel. That's certainly distinguishable from the present
21 case in light of tab 1 of my notebook for the court.

22 But the other reason I provided it to Your Honor is
23 actually because on page 5 on the top left, it actually
24 sets forth South Carolina's principle that if a -- an
25 agreement is enforceable under 43(k) -- in other words,

1 where it's been signed by counsel and the parties --
2 equitable principles cannot be relied upon to invalidate
3 the terms of the agreement. And Mr. Harte has relied on
4 these equitable principles since my letter of April 18th,
5 and that's just simply not the way that South Carolina
6 enforces agreements that have been signed.

7 To the extent that the memorandum of understanding has
8 the word proposed in it, Your Honor, that word absolutely
9 was intended to be there. It was intended to be there
10 because the HOA had to approve this agreement for us to all
11 be bound by it, and once that was done, it was no longer
12 proposed. And even if there was some question that Mr.
13 Viviano and Ms. Gunter somehow did not agree to this, that
14 evaporated when Mr. Viviano signed his name next to 620
15 Pintail Drive and initialed it on 6/30 of 2022, and that's
16 the Exhibit 1 that I entered into the record for the
17 court's review, page 2.

18 And finally, I think the lawyers at this particular
19 table take very seriously the allegation that there was
20 hidden evidence, bad faith, or somehow some fraudulent
21 representation not only to this court but to our esteemed
22 mediator, which all three of us hold in very high regard.
23 And I will chalk that up to Mr. Harte's late entry into
24 this case since what he believes or asserts to this court
25 was misrepresented was actually attached to the complaint

1 filed on September 21, 2018.

2 I have nothing further, Your Honor

3 (A PAUSE.)

4 MR. HARTE: Your Honor, I'm assuming you don't wish to
5 keep this going all afternoon.

6 THE COURT: I'm going to come back to you. I'm just
7 trying to ---

8 MR. HARTE: Thank you. I just didn't want to ---

9 THE COURT: I'm trying to catch up with my notes. I
10 can't write ---

11 MR. HARTE: That's perfectly fine, Your Honor.

12 THE COURT: I can't write quite as fast as y'all talk.
13 Anybody else to my left want to speak right now?

14 MR. SIMONS: Your Honor, if I could briefly sort of
15 follow up on what Ms. LaFave indicated earlier about this,
16 this evidence or documents that were withheld that tended
17 to indicate that lot 51, which is my client, Mr. Jeffers's
18 property, was not legally or lawfully introduced to the
19 other side? And I think when he pointed out that in the
20 original summons and complaint filed by Mr. Viviano and Ms.
21 Gunter that, that, that amendment to the covenants where it
22 was brought in was attached as an exhibit and it, it then
23 had the lot owners who voted on that. So, that -- that's
24 public record. It's in the register of deeds office.

25 And, Your Honor, I'd also just say that even if there

1 was some documents or, or something that wasn't turned
2 over, which we disagree with, I would point Your Honor's
3 attention to -- it's an unpublished opinion but it's
4 *Sparrow v. Fort Mill Holdings*. That's 2018-UP-321, and in
5 that case, Your Honor, the court made it very clear that
6 it's the, the public policy of the courts in South Carolina
7 to encourage settlement in lieu of litigation. And in that
8 case, there was some accusations made as to information
9 that was withheld regarding the state law of, of --
10 regarding anti-deficiency statutes, and the court said
11 allowing appellants to terminate that agreement because
12 they discovered potentially helpful information would be
13 setting a dangerous precedent and go directly against our
14 state's policy of favoring settlement agreements.

15 So, Your Honor, to the extent that there were
16 documents that weren't seen, our courts have said, well, it
17 doesn't matter. As long as you comply with 43(k), the
18 court -- the, the parties don't have to know all of the
19 facts. That, that -- it stands to reason in any mediation,
20 Your Honor, but they talk about this dangerous precedent if
21 we were to allow people to come back later and say I didn't
22 know that. We didn't know that at the time of the
23 mediation.

24 That's all I have, Your Honor.

25 THE COURT: Thank you.

1 Mr. McCants, you have anything else?

2 MR. McCANTS: I do. I want to echo Ms. LaFave and Mr.
3 Simons's comments regarding the allegations that the
4 defendants in this case withheld evidence in some regard.
5 I, I think Ms. LaFave stood up strong in opposition to that
6 statement.

7 Let me add, Judge, there's absolutely no evidence by
8 way of affidavit or otherwise submitted by Mr. Viviano and
9 Ms. Gunter today as part of this motion to sustain any
10 allegation whatsoever that there's been that kind of
11 behavior in this case. Charlie Krawczyk is one of the
12 finest dirt land lawyers we know of. I think anybody in
13 this room will attest to that, to the extent they've worked
14 with him.

15 They had full opportunity, Your Honor, to conduct
16 discovery in this matter in the course of the life of this
17 case. And with all due respect to my good friend Mr. Harte
18 and whatnot, he makes those allegations based upon only his
19 statements to the court. Something like that should
20 obviously, Judge, be supported by clear and convincing
21 evidence to, to provide a basis and a foundation for the
22 court to find that there's been some fraud in this case
23 with regard to the consummation of the settlement.

24 Thank you, Judge.

25 THE COURT: Thank you, sir.

1 Mr. Harte.

2 MR. HARTE: Thank you, Your Honor. Let me also make
3 this comment. I have been doing this for quite a while,
4 and one of the things I have observed is that whenever you
5 get a factual assertion that doesn't strike favorable to
6 one side, that side always takes offense and wants to
7 defend whoever's involved in it as if somehow there's been
8 some personal attempt to attack somebody.

9 The fact that this information was not promptly
10 disclosed does not mean that anybody's an evil person.
11 That's not the point, and whenever I've seen someone in
12 court defend a position by saying that lawyer on the other
13 side is impugning the dignity of thus and so, then that's a
14 good signal to me that there must be something there more
15 than just what the -- what the opponent to that position
16 wants to take.

17 In this particular case, Your Honor, the first
18 question that has to be asked is was there a meeting of the
19 minds. It should be very clear from the description of the
20 proceedings and what you've heard here today as well as
21 what's in the record itself that these parties never
22 reached a meeting of the minds. You have a proposed
23 settlement which now that just -- that word proposed all of
24 a sudden sort of wants to be sloughed under the table, but
25 you can't do that.

1 Also, Your Honor, when we talk about Rule 11, Rule 11
2 is a very important rule, and the rule requires a clear
3 certification, not an implied compliance buried somewhere
4 in a pleading or something of that nature.

5 Now, the reality here is that the, the proposition
6 that this lot was properly brought into the subdivision is
7 incorrect. It was not properly brought in. That was a
8 fundamental factor in the consideration of moving forward
9 on Mr. Viviano's part with any sort of memorandum of
10 understanding.

11 Beyond that, the memorandum of understanding
12 contemplated that an actual agreement would be produced
13 that everybody could agree to. Until that document is
14 produced and until everybody agrees to it, there is no
15 contract. There is an effort to make a contract, there is
16 a proposal to settle, but that document that they're trying
17 to enforce does not say this is a settlement. It does not
18 say the parties contract and agree as follows. What it
19 says is we're going to try to take what's in this
20 memorandum of understanding and come up with a contract.

21 Well, they weren't able to do that, and now here we
22 are a year or more later and we still don't have a document
23 that the Vivianos are prepared to agree to. So, there is
24 no agreement, Your Honor, and absent an agreement, you
25 cannot have an enforcement of a contract because there is

1 no contract. And if somebody gets offended by the fact
2 that the evidence doesn't point in their direction, gee
3 whiz, I'm so sorry.

4 THE COURT: Thank you. I'll notify you of the
5 decision in writing.

6 Did you offer this as an exhibit?

7 MS. LAFAVE: No, Your Honor. It was just because I
8 knew you'd be flipping through some papers. So, I'm happy
9 to take it back if that's, that's the court's preference.

10 MR. HARTE: I'd be glad for the court to have it, Your
11 Honor. It doesn't bother me. I'm happy for the court to
12 have it if it helps you.

13 THE COURT: Well, almost everything in here is stamped
14 as being recorded but not everything is.

15 MR. HARTE: Yes, sir. It's all right. I don't object
16 to your, your using it for your reference, Your Honor.

17 MS. LAFAVE: I believe, Judge, everything in there
18 except tab 2, which is the case that I provided to the
19 court, everything else has been filed even if it's not the
20 stamped copy.

21 THE COURT: Judge...

22 MS. LAFAVE: Judge Cooper's ADR statement has also
23 been filed, and I filed the settlement agreement release
24 with my motion. So, it's all things that have been filed
25 for the record.

1 MR. HARTE: Your Honor, I just know that that was not
2 -- that document's not signed by everybody, but I
3 understand that's the one she wants you to force us to
4 sign.

5 THE COURT: Some of these things appear to have
6 original signatures on them. Is that just because they
7 were copying with a color copier?

8 MS. LAFAVE: Yes, sir.

9 THE COURT: Okay. Thank you folks very much.

10 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR AIKEN COUNTY, SOUTH CAROLINA, ON THE
17TH DAY OF JULY, 2023.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MARCH 28TH, 2024

FILED July



Robert
Charles

A "YES" vote is a vote in support of the proposed settlement agreement that calls for a reduction in easement width to 15' along the border of lots 51 and 47, 5' of which is on lot 47 and 10' on lot 51 and the abandonment of the access easement on the border of lots 48 and 49. A "NO" vote is a vote against accepting this agreement.

Yes Vote indicates agreement to Amend Covenants to reflect these Changes

4	Allen	Walter	Pam	559 Pintail	W. Allen	7/17	✓
46	Arthur	Ansermo	Michelle	160 Teal	W. Allen	7/17	✓
8	Barber	Matthew	Sara	124 Gadwall	W. Allen	7/17	✓
6	Bell	Marty	Karen	564 Pintail	Dany M. Bell		✓
14	Blake	John	Jessica	198 Gadwall	John Blake	MCR 6/30/22	X
41	Blanton	Paul	Connie	331 Teal	Paul Blanton	MCR 6/30/22	X
18	Boddy	Derrick	Lori	173 Gadwall			
34	Bolen	Tim	Carol	682 Pintail	Tim Bolen	MCR 6/30/22	X
44	Brissey	Frank	Bonnie	234 Teal	Frank Brissey	MCR 6/30/22	X
5	Buivid	Linda		548 Pintail			
23	Caravello	John	Lynn	589 Pintail			
27	Carpenter	Tim	Sandy	657 Pintail	Tim Carpenter	7/17	X
37	Carroll	David	Sandy	171 Teal			
42	Carter	Joe	Becky	330 Teal			
7	Carter	Wes	Elizabeth	108 Gadwall	Wes Carter	MCR 6/30/22	X
24	Christensen	Dave	Cathy	593 Pintail			
12	Cline	Randy	Linda	190 Gadwall	Randy Cline	MCR 6/30/22	X
2	DeLoache	Barry	Brenda	527 Pintail	Barry DeLoache	MCR 6/30/22	✓
3	DeLoache	Barry	Brenda	527 Pintail	Barry DeLoache	MCR 6/30/22	✓
36	DuBose	Amanda		648 Pintail	Amanda DuBose	7/17	✓
16	Dunn	Dave	Kerry	211 Gadwall	Dave Dunn	MCR 6/30/22	✓
39	Edwards	Robert	Christina	329 Teal	Robert Edwards	MCR 6/30/22	X
20	Eisele	David	Denise	134 Gadwall	Denise Eisele		X
28	Gaul	Todd	Marcia	645 Pintail	Todd Gaul		X
51	Jeffers	Fulton	Deri	183 Gadwall	Fulton Jeffers		X
38	Jolley	Mance	Jordan	215 Teal			
26	Kelly	Jim	Helen	625 Pintail	Jim Kelly	7/17	✓
21	Kneece	Pace	Barbara	125 Gadwall	Barbara Kneece		X
10	Kruzner	Richard	Donna	168 Gadwall	Richard Kruzner	MCR 6/30/22	X
48	Lee	Siyoun	Jean	120 Teal			
17	Mettlen	Gwen		189 Gadwall	Gwen Mettlen	7/17	X

6/30/2022

40	Nicosia	Dale	Susan	283 Teal	<i>Lisa Nicosia</i> 7/17 R	✓	
33	Noce	Nate	Lisa Campbell	698 Pintail	<i>Via Email</i> 7/18 R	✓	
9	Owen	Justin	Ashley	154 Gadwall	<i>John Owen</i> 7/17	X	
11	Owen	Norman	Babette	184 Gadwall	<i>J. Owen</i> AY 6/30/22	✓	
15	Owen	Todd	Terri	204 Gadwall	<i>Todd Owen</i> 6/30/22	✓	
13	Pecoraro	Paul		194 Gadwall	<i>Paul Pecoraro</i> R	✓	
32	Pflieger	Kevin	Britni	709 Pintail	<i>K Pflieger</i> AY 6/30/22	✓	
25	Potvin	Mike	Jill	591 Pintail			
43	Ray	Jeff	Margaret	304 Teal	<i>Meat Ray</i> R 6/30/22	X	
19	Roberts	Elaine		149 Gadwall	<i>E. Roberts</i> 7/17 R	✓	
30	Schuler	Ed	Carol	681 Pintail			
1	Sessions	Calvin	Hillary	505 Pintail	<i>N. Sessions</i>	✓	
50	Shaffer	Donnie	Lori	526 Pintail	<i>Donnie Shaffer</i>	✓	
49	Spatola	Mark	Michelle	616 Pintail	<i>Via Email</i> 7/17 R	✓	
31	Staub	Aaron	Michelle	701 Pintail			
35	Stevens	Jeff		664 Pintail	<i>Via Email</i> 7/17 R	✓	
45	Villemain	Dennis	Rosemary	811 Sheridan Av NA 29841			
47	Viviano	Richard	Johriette	620 Pintail	<i>John Viviano</i> 6/30/22 MCR	X	
22	Wegge	Curtis	Cecilia	581 Pintail	<i>Wegge</i> R 7/17	X	
29	Youmans	Stephen	Allison	659 Pintail	<i>Al Youmans</i> 6/30/22 MCR	✓	

Dave Christensen

From: coostevens.<coostevens@gmail.com>
Sent: Monday, July 18, 2022 4:27 PM
To: Dave Christensen
Subject: RE: Braeloch Vote

Hi Dave. Thanks for following up on this. Put me down for a yes. I support the proposal.

Sent from my Galaxy

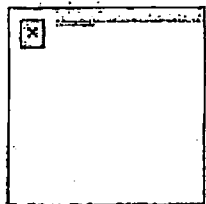
----- Original message -----

From: Dave Christensen, <Dave@sagevalleygolf.com>
Date: 7/18/22 1:50 PM (GMT-05:00)
To: coostevens@gmail.com
Subject: Braeloch Vote

Mr. Stevens,

This is Dave Christensen from Braeloch. I am completing the voting process for the settlement of the suit. I stopped by your house to allow you to cast a vote if desired but I missed you. I have at this time collected enough votes to accept and support the terms of the settlement but want you to have the opportunity to be on record as to a Yea or Nay. A "Yes" vote agrees to the terms of the settlement (reducing the width of the easement to 15' between lots 51 and 47, shifting slightly the easement partially onto lot 51 and eliminating the access easement between lots 48 and 49. A "No" vote rejects the terms of the settlement and returns the suit to the courts to decide.

If you want to cast a vote, please send me an e-mail as to your vote and I will record it in the files. Thank you



Dave Christensen

General Manager, Sage Valley Golf Club

In Reply

 [803-663-0900](tel:803-663-0900)
 [803-507-5482](tel:803-507-5482)
 dave@sagevalleygolf.com

Dave Christensen

From: Nate NOCE <nn71jp81@gmail.com>
Sent: Monday, July 18, 2022 4:36 PM
To: Dave Christensen
Subject: Re: Braeloch Vote

Hello,

Yeah they have mean barks but if you walk in the yard you instantly become friends. If you pick up a tennis ball in there they might even go home with you. Not so good at being guard dogs but are great comic relief. I would vote yea on it because it is seeming that most of the community is in favor of that proposal. I am in favor of whatever makes the most people happy and settles the disputes. Time to put all this energy back to being friends and good neighbors.

On Mon, Jul 18, 2022 at 1:48 PM Dave Christensen <Dave@sagevalleygolf.com> wrote:

Nate,

This is Dave Christensen from Braeloch. I am completing the voting process for the settlement of the suit. I stopped by your house to allow you to cast a vote if desired but your canine welcoming committee advised that you might be busy!

I have at this time collected enough votes to accept and support the terms of the settlement but want you to have the opportunity to be on record as to a Yea or Nay. A "Yes" vote agrees to the terms of the settlement (reducing the width of the easement to 15' between lots 51 and 47, shifting slightly the easement partially onto lot 51 and eliminating the access easement between lots 48 and 49. A "No" vote rejects the terms of the settlement and returns the suit to the courts to decide.

If you want to cast a vote, please send me an e mail as to your vote and I will record it in the files. Thank you



Dave Christensen

General Manager, Sage Valley Golf Club

Go Tigger!

☎ [803-663-0900](tel:803-663-0900)

☎ [803-507-5482](tel:803-507-5482)

✉ dave@sagevalleygolf.com

📍 [2240 Sage Valley Drive, Graniteville, SC 29829](#)

Dave Christensen

From: Todd Gaul <tgaul@designerbuilders.com>
Sent: Wednesday, July 20, 2022 4:21 PM
To: Dave Christensen
Subject: Braeloch

Dave

Marcia and I would like to let you know we are in favor of settling the law suit in our community.

Thanks for all you have done

Todd and Marcia Gaul
645 Pintail Dr
Aiken Sc

Todd Gaul
Designer Builders
Aiken Sc 29803
803-642-8340
www.designerbuilders.com
Email: tgaul@designerbuilders.com

Dave Christensen

From: mandydubose <mandydubose@gmail.com>
Sent: Monday, July 18, 2022 2:40 PM
To: Dave Christensen
Subject: RE: Braeloch Vote

Hey Mr Dave,

Sorry to have missed you. You can record my vote as a yes in agreement with the settlement. Thank you for checking in,
Mandy DuBose

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Dave Christensen <Dave@sagevalleygolf.com>
Date: 7/18/22 1:45 PM (GMT-05:00)
To: mandydubose@gmail.com
Subject: Braeloch Vote

Ms. Dubose,

This is Dave Christensen from Braeloch. I am completing the voting process for the settlement of the suit. I have been unable to come by your house to allow you the opportunity to cast your vote so I am reaching out via e mail. I have at this time collected enough votes to accept and support the terms of the settlement but want you to have the opportunity to be on record as to a Yea or Nay. A "Yes" vote agrees to the terms of the settlement (reducing the width of the easement to 15' between lots 51 and 47, shifting slightly the easement partially onto lot 51 and eliminating the access easement between lots 48 and 49. A "No" vote rejects the terms of the settlement and returns the suit to the courts to decide.

If you want to cast a vote, please send me an e-mail as to your vote and I will record it in the files. Thank you.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
CIRCUIT COURT

Judge William Keesley

RECEIVED

OCT 22 2024

SC Court of Appeals

Case No. 2018-CP-02-2208

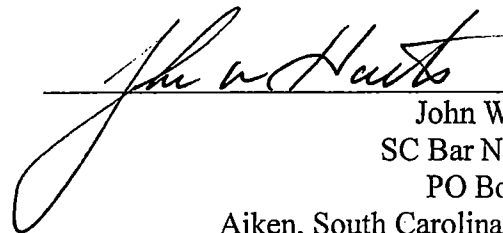
2024-000147

Richard Viviano and Johnette Gunter, Plaintiffs,
Of whom Richard Viviano is the Appellant,
v.

Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's
Association, Sandy Carroll individually and in her capacity as a member of the
Board of the Braeloch Homeowner's Association, and Derrick Boddy individually
and in his capacity as a member of the Board of the Braeloch Homeowner's
Association, Respondents.

CERTIFICATION OF COUNSEL

I certify that the Record on Appeal contains no matter that is irrelevant to the Appeal.



John W. Harte
SC Bar No. 2773
PO Box 7215
Aiken, South Carolina, 29804
Attorney for Appellant
john@jwhartelaw.com
8032260755

October 9 2024