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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001510

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

v.

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

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

RECORD ON APPEAL
VOLUME 1 OF 3

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Topsail Island Investments, LLC, and TR Sales
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Attorney for Mount Vintage Plantation Homeowners Association, Inc.

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CERTIFICATION OF APPELLANTS' COUNSEL

Consistent with Rule 210, SCACR, the undersigned counsel for Appellants hereby certifies that this Record on Appeal contains all material proposed to be included by the parties and not any other material.

Respectfully,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
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*Attorney for Appellants LL of SC, LLC, Raiford
Topsail Island Investments, LLC, and TR Sales
Plantation, LLC*

March 26, 2025
Greenville, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1900050

Elizabeth Ferraro et al
PLAINTIFF(S)

LL of SC LLC et al
DEFENDANT(S)

Submitted by: R. Lawton McIntosh

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

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

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

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

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

Circuit Court Judge	2155 Judge Code	Date

For Clerk of Court Office Use Only

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

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

Court Reporter:

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

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

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



Edgefield Common Pleas

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

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2024-09-04 12:29:37 page 3 of 3

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1900050

Elizabeth Ferraro et al
PLAINTIFF(S)

LL of SC LLC et al
DEFENDANT(S)

Submitted by: R. Lawton McIntosh

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

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

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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Circuit Court Judge

2155

Judge Code

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT**Court Reporter:**

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

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

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2024-09-06 11:19:25 page 3 of 3

The South Carolina Court of Appeals

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

v.

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

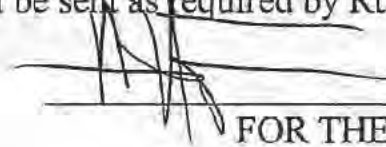
of which LL of SC, LLC, Raiford Topsail Island Investments, LLC, and TR Sales Plantation, LLC, are the Appellants.

Appellate Case No. 2024-001451

ORDER

Appellants have filed a petition for supersedeas to stay the proceedings below pending this appeal. However, the circuit court's September 4, 2024 Form 4 order, from which Appellants appeal, states, "Plaintiff's counsel to prepare a formal order consistent with this order." Accordingly, the order is interlocutory and not immediately appealable. *See Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) ("As a matter of practice and convenience, a Form 4 order is used on a plethora of occasions" as a final order, when nothing remains to be done by the circuit court after signing the order, but a Form 4 is not "efficacious as a final order" if the circuit court explicitly provides that "a more formal order will be filed," or "the final order will be prepared by

[counsel]."). Appellants have filed a second notice of appeal from the circuit court's September 6, 2024 Form 4 order denying their motion for a stay. Initially, we note that Appellants failed to file a motion to amend their notice of appeal. Nonetheless, this order is also interlocutory. *See Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 373 S.C. 96, 98, 644 S.E.2d 681, 682 (2007) (holding an order lifting a stay is not immediately appealable); *Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) ("[W]e find an order granting a stay is not immediately appealable."). Accordingly, this appeal is dismissed.¹ The remittitur will be sent as required by Rule 221(b), SCACR.



FOR THE COURT

Columbia, South Carolina

FILED
Sep 10 2024

cc:

Collin Heath Fuller, Esquire
Justin O'Toole Lucey, Esquire
Anna Scarborough McCann, Esquire
Steven Edward Buckingham, Esquire
The Honorable R. Lawton McIntosh

¹ Because we dismiss this appeal, we decline to act upon Appellants' petition for supersedeas.

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1900050

Elizabeth Ferraro et al
PLAINTIFF(S)

LL of SC LLC et al
DEFENDANT(S)

Submitted by: R. Lawton McIntosh

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

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- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

AMENDED

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

NO FORMAL ORDER REQUESTED.

Trial is set for September 16, 2024 in Edgefield County. (RM)

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

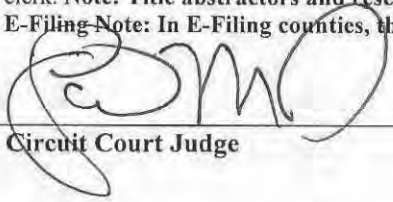
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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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		\$
		\$

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

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


Circuit Court Judge

2155

Judge Code

9-10-24
Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

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The South Carolina Court of Appeals

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

v.

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

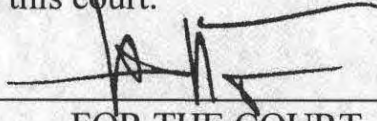
of which LL of SC, LLC, Raiford Topsail Island Investments, LLC, and TR Sales Plantation, LLC, are the Appellants.

Appellate Case No. 2024-001510

ORDER

Appellants have filed a new notice of appeal from the circuit court's interlocutory but appealable September 10, 2024 order granting partial summary judgment for Respondents. *See Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990) (holding that an order granting summary judgment is appealable under § 14-3-330(1) as "involving the merits" because it finally determines a "substantial matter forming the whole or a part of some cause of action or defense") (internal citation omitted). Appellants have also filed a petition for supersedeas to stay the proceedings below, pending this appeal. Trial is scheduled to start Monday September 16, 2024.

Appellants' petition for supersedeas is temporarily granted, pending this court's review of a return from Respondents. Within ten days of the date of this order, Respondents shall serve and file a return to the petition. The proceedings in the trial court are stayed until further order of this court.



FOR THE COURT

Columbia, South Carolina

cc:

Collin Heath Fuller, Esquire
Justin O'Toole Lucey, Esquire
Anna Scarborough McCann, Esquire
Steven Edward Buckingham, Esquire
The Honorable R. Lawton McIntosh

FILED
Sep 12 2024

The South Carolina Court of Appeals

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

v.

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

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

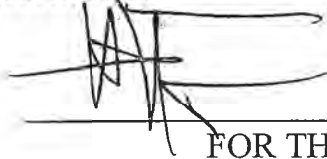
Appellate Case No. 2024-001510

ORDER

After careful consideration, we find the pending trial on the remaining issues will be affected by this appeal, and therefore grant Appellants' motion to stay the proceedings below pending the resolution of this appeal. *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter[] affected by the appeal' under Rules 205 and 241(a)."); Rule 205, SCACR ("Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."); Rule 241(c)(2), SCACR ("In determining whether an order should issue pursuant to this Rule, the . . . judge or justice of the appellate court should consider

whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.).

There shall be a presumption against granting extensions in this case and it will be placed on the roster as soon as practicable.

A handwritten signature in black ink, appearing to be "J. E. Fuller", written over a horizontal line.

FOR THE COURT

Columbia, South Carolina

cc:

Collin Heath Fuller, Esquire

Justin O'Toole Lucey, Esquire

Anna Scarborough McCann, Esquire

Steven Edward Buckingham, Esquire

FILED
Oct 09 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO. 2020-CP-02-_____
	)	
ELIZABETH M. FERRARO, JAMES T.	)	
FERRARO, EDWARD J. PRZYBYL,	)	
MARCELLA GLEIE, JOHN E. GLEIE, JR.,	)	
THOMAS BOWES, CONNIE BOWES, AND	)	SUMMONS
MOATAZ ALASADI, Individually, Derivatively,	)	(Negligent Development)
and on Behalf of all the Mount Vintage	)	
Homeowners Association Members,	)	(Jury Trial Demanded)
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
J. WAYNE RAIFORD, INDIVIDUALLY AND	)	
AS PRESIDENT OF THE BOARD OF	)	
DIRECTORS OF MOUNT VINTAGE	)	
PLANTATION HOMEOWNERS ASSOCIATION,	)	
INC., LL OF SC, LLC, RAIFORD TOPSAIL	)	
ISLAND INVESTMENTS, LLC, MOUNT	)	
VINTAGE PLANTATION HOMEOWNERS	)	
ASSOCIATION, INC. A/K/A MOUNT VINTAGE	)	
HOMEOWNERS ASSOCIATION, INC., GREGG	)	
KARLBERG, JERRY SCHAEFER, LEIGH ANN	)	
KEELS, AND JOHN DOE,	)	
	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE NAMED:

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

-SIGNATURES ON FOLLOWING PAGE-

/s/Justin O'Toole Lucey
Justin O' Toole Lucey
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Attorneys for Plaintiffs

June 5, 2020
Mount Pleasant, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO. 2020-CP-02-_____
	)	
ELIZABETH M. FERRARO, JAMES T.	)	
FERRARO, EDWARD J. PRZYBYL,	)	
MARCELLA GLEIE, JOHN E. GLEIE, JR.,	)	
THOMAS BOWES, CONNIE BOWES, AND	)	COMPLAINT
MOATAZ ALASADI, Individually, Derivatively,	)	(Negligent Development)
and on Behalf of all the Mount Vintage	)	
Homeowners Association Members,	)	(Jury Trial Demanded)
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
J. WAYNE RAIFORD, INDIVIDUALLY AND	)	
AS PRESIDENT OF THE BOARD OF	)	
DIRECTORS OF MOUNT VINTAGE	)	
PLANTATION HOMEOWNERS ASSOCIATION,	)	
INC., LL OF SC, LLC, RAIFORD TOPSAIL	)	
ISLAND INVESTMENTS, LLC, MOUNT	)	
VINTAGE PLANTATION HOMEOWNERS	)	
ASSOCIATION, INC. A/K/A MOUNT VINTAGE	)	
HOMEOWNERS ASSOCIATION, INC., GREGG	)	
KARLBERG, JERRY SCHAEFER, LEIGH ANN	)	
KEELS, AND JOHN DOE,	)	
	)	
Defendants.	)	

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

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiffs are residents of the development known as Mount Vintage Plantation.
2. Plaintiffs Ferraro's residence is located at 106 Captain Johnsons Drive, North Augusta, South Carolina, 29860, and is also described as Lot 0-48 on a plat of Mount Vintage Plantation by Newby-Proctor and Associates dated August 21, 2006.

3. Plaintiff Przybyl's residence is located at 255 Homeward Bound Drive, North Augusta, South Carolina, 29860, and is also described as Lot D-14 on a plat of Mount Vintage Plantation by Newby-Proctor and Associates dated September 6, 2000.

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

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

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

7. Defendant LL of SC, LLC ("LL") is a limited liability company formed under the laws of South Carolina.

8. Defendant Raiford Topsail Island Investments, LLC ("Topsail") is a limited liability company that owns lots in the Mount Vintage subdivision.

9. Defendant J. Wayne Raiford ("Raiford") owns, manages, controls and acts on behalf of Defendant LL and Topsail.

10. Defendant Mount Vintage Plantation Homeowners Association, Inc. a/k/a Mount Vintage Homeowners Association, Inc. ("The Association"), is a mutual benefit, non-profit corporation formed under the laws of South Carolina and is included herein as a party-defendant in that it has a significant interest in the outcome of this litigation. Any use of the term "Defendants" hereinafter shall not be deemed to include The Association.

11. Defendant LL is allegedly a Class A member of The Association.

12. Defendants Raiford and Topsail are not Class A members of The Association.

13. Class A members purportedly have voting rights; the Homeowner members purportedly do not.

14. Defendant LL has elected Defendant Raiford to the Board of Directors of The Association; Raiford acts as its Chairman and President, and completely dominates and controls the Board by virtue of his complete authority over all Mount Vintage matters as the alleged sole voting member.

15. Defendant Raiford is not only being sued in his individual capacity; he is additionally being sued in his capacity as the Chairman, President, controlling member of The Association, and lead and controlling representative of the Board of Directors.

16. Defendant Leigh Ann Keels is the daughter of Raiford, a former member of The Association's Board of Directors, a current officer of The Association, and a member and manager of LL.

17. Hereinafter, "Affiliated Defendants" relate to all foregoing Defendants except The Association.

18. Defendants Gregg Karlberg, Jerry Schaefer, and John Doe are former members of The Association's Board of Directors (and are former residents of Mount Vintage).

19. Defendants Karlberg, Schaefer, Doe, and Keels, participated in, assisted with, facilitated, and acquiesced to the misfeasance, malfeasance, and non-feasance (hereinafter, collectively, "misfeasance" by Raiford and LL described elsewhere herein).

20. Defendant board members and officers Karlberg, Schaefer, Doe, Keels, and Raiford are hereinafter referred to as the "Board".

21. By virtue of property ownership at Mount Vintage, Plaintiffs are members of The Association and have been members of The Association at all times relevant herein.

22. Plaintiffs also bring this action derivatively because The Association has failed to protect and enforce the rights of The Association with respect to the matters alleged herein, and The Association has been damaged by the actions of the Defendants.

23. Plaintiffs' demand upon The Association to rectify the wrongs described herein is excused under the futility doctrine; The Association is controlled by the principal wrongdoer, Raiford; and there can be no pretext that Raiford would ever permit the Board of Directors for The Association to authorize and bring a suit against him.

24. Notwithstanding the foregoing futility, representatives of the Homeowners, Plaintiffs included, have requested that Defendants cure many of the wrongs addressed herein, and their efforts have been rebuffed by the Board, which is controlled by the principal wrongdoer, Defendant Raiford (see, e.g., ¶¶ 30-35, *infra*).

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

(Background)

26. The development of Mount Vintage Plantation as a residential community commenced in approximately 1995; and, it ended up in the control of Defendant LL of SC, the alleged successor developer, in approximately 2013, approximately eighteen (18) years after the development was founded.

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

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

29. It is axiomatic, and at law and equity, that by accepting the assignment of developer benefits and rights, and/or by availing itself of and exercising such rights, LL obligated itself to

properly perform the developer obligations and promises that gave rise to the presence of developer rights and benefits.

30. Concomitantly with LL gaining control of the development, Raiford assumed complete control of The Association and purported to become its sole voting member.

31. As the sole voting Association member, Raiford has complete control over all The Association's activities.

32. As the sole voting Association member, Raiford has complete control over the election of Board Members.

33. As the sole voting Association member, Raiford has complete control over the appointment of Architectural Committee members.

34. By virtue of the foregoing, Raiford has complete control over all Mount Vintage Plantation matters.

35. By virtue of the foregoing, Raiford has complete control over the amenities and lot acquisitions, dues and lien releases, and assessments.

36. As the alleged successor developer of a planned community neighborhood, Defendant LL owed The Association, the Homeowners, and the ensuing neighborhood fiduciary and fiduciary-like duties, and the duty to use due care in the development of the neighborhood and the administration of The Association.

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

38. Because of Defendant Raiford's complete control of The Association, as President and controlling Board member, Homeowners have had no choice but to repose their complete trust

and reliance in Defendant Raiford, resulting in the imposition of a fiduciary duty upon Defendant Raiford.

39. As a member of The Association's Board of Directors, and as the President and officer of The Association, Raiford owed The Association fiduciary and fiduciary like duties and a duty of full and absolute disclosure on all matters related to Mount Vintage.

(Operation of Association for the Benefit of Developers)

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

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

42. Defendants have embarked upon a pattern and practice of bidding for and acquiring Mount Vintage lots at tax sales, thereafter suing The Association they control to eliminate past due Association dues and assessment, defaulting The Association in the suits, and failing to advise or assist The Association of their redemption or other rights, and without the Defendants compensating The Association for its lost dues, liens, opportunity, and/or value.

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

44. The Board has turned a blind eye to the foregoing transactions.

45. In essence, the Affiliated Defendants treat The Association as its pawn for its own financial transactions.

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

47. Defendants have wrongfully treated the owners of some of these and other lots as Class A members, waiving dues, when only LL could possibly claim that status, and thereby have caused additional financial detriment to The Association, the neighborhood, and the Homeowners.

48. Similarly, Defendants have permitted favored third parties to temporarily consolidate lots, to reduce the dues owed to The Association.

(Amenities)

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

50. The Amenities promised to be available included the below Town Center, Golf Course and Club House, and Equestrian facilities.

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

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

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

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

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

56. Circa 2013, Apex Bank foreclosed on the Town Center and Golf Amenity. Roughly concurrently, Defendant LL foreclosed on one hundred eighty-three (183) lots held by the original developers, and the developer rights were allegedly passed on to Defendant LL in the foreclosure and subsequent Deed in Lieu.

57. In 2014, LL did nothing to fulfill the original developers’ promise of providing multiple, optional, first class, upscale amenities.

58. Circa 2015-2016, Raiford undertook to induce The Association and its members to acquire the Town Center and then the Golf Amenity.

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

60. Defendants LL, Raiford, and the Board failed to disclose they were causing The Association to complete the acquisitions to increase the value of the Affiliated Defendants’ lots or that, as the successor to the original developer enjoying developer rights, LL had any obligation to facilitate the availability of the Amenities.

61. Defendants failed to disclose that, in obligation or in all fairness, the developer should have funded the acquisition or contributed far more to the acquisition.

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

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

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

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

66. LL and Raiford have failed to make good on the original developers promise of multiple, optional, first class amenities.

(Other and Cumulative Matters)

67. The Affiliated Defendants have failed to adequately advance the development and funding of The Association and Mount Vintage Plantation, thereby harming The Association and the Homeowners' property values.

68. The Affiliated Defendants have failed to deliver and maintain a first class, upscale, luxury development in many ways.

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

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

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

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

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

(Perpetual Developer Control)

74. Mount Vintage Plantation's governing documents, namely the Covenants and the Bylaws, purport to place complete, unilateral control in the developer until the developer sells its last lot.

75. These and other defective conditions within the governing documents permit actual or de facto developer control, funded by the homeowners, for an unlimited duration.

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

77. The governing documents contain other unfair terms.

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

79. Further, the governing documents permit the developer to add additional parcels to the regime, again permitting perpetual control and dominance by the developer.

80. The governing documents essentially compel the Homeowners to fund the developer's perpetual, negligent control.

81. The governing documents are or are akin to contracts of adhesion; neither The Association nor the Homeowners were ever permitted to negotiate their terms.

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

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

84. The governing documents are unconscionable and therefore unenforceable; and they further violate public policy and the rule against perpetuities.

(Statement of Liability and Negligent Acts)

85. Defendants LL and Raiford have been negligent as follows:

- a) In failing to pay for the acquisition of the amenities or for the developer's fair share of the acquisition of the Amenities;

- b) In their use of insider knowledge of Mount Vintage affairs to benefit the themselves in lieu of The Association or its members;
- c) In their use of Association opportunities, rights, receivables, liens, and legal proceedings and acquire property for the benefit of the Affiliated Defendants;
- d) By exposing The Association to liability for false property transfer documentation;
- e) In failing to pay or require payment of Association dues and assessments on lots that are not properly considered developer lots under the governing documents;
- f) In failing to arrange for proper funding of The Association and neighborhood while under their control;
- g) In failing to adequately develop Mount Vintage to create an adequate membership base to fund the neighborhood's success;
- h) In failing to timely transition control of The Association to the Homeowners;
- i) In failing to avoid perpetual developer control of Mount Vintage;
- j) In failing to share Association records and documents with The Association's members;
- k) In failing to create, maintain, publish, and share accurate financial records of The Association's activities;
- l) In failing to disclose and/or accurately disclose their financial transactions with The Association and The Association's interests;
- m) In practicing nepotism, favoritism, and cronyism in the operation of Mount Vintage at the expense of The Association and Homeowners;
- n) In moving The Association operations and records out of The Association property to private property;
- o) In failing to afford adequate rights to the Homeowners in the operation of The Association;
- p) In the negligent development, marketing, and operation of Mount Vintage and its Association in other ways that will be shown through discovery and at trial;
- q) In the acquisition and operation of the Amenities as further described below;
- r) In causing a stigma that hurts The Association and the Homeowners' property values;
- s) By distributing funds from a non-profit entity in violation of S.C. Code § 33-31-1301-2; and,
- t) By accepting, agreeing to, and enforcing unconscionable governing documents.

86. Defendant Board has been negligent regarding Mount Vintage affairs as follows:

- a) In permitting LL's foregoing negligence and self-dealing to proceed unchecked, unaudited, and unaccounted for;
- b) In failing to disclose Affiliated Defendants' misfeasance, malfeasance, and non-feasance to the Homeowners;
- c) In failing to disclose to the Homeowners that they are a token board, with little ultimate say on matters of consequence;

- d) In the acquisition of the amenities as further described below;
- e) In failing to challenge and reform the unconscionable governing documents; and,
- f) In such other ways as will be shown through the discovery and trial of this action.

87. Defendants LL and the Board have been negligent with regards to the *acquisition* of the *Golf* Amenity, as follows:

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

88. Defendants LL and the Board have been negligent in the following particulars with regards to the *operation* of the *Golf* Amenity:

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

89. Defendants LL and the Board have been negligent in the following particulars, with regards to the acquisition *and* operation of the *Town Center* Amenity:

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

90. As this suit concerns rights allegedly derived from or restricted/violated by sealed instruments, a twenty (20) year statute of limitations applies to Plaintiffs' claims.

91. Defendants are estopped from relying on any statutes of limitation or repose by virtue of their own misfeasance, which is more particularly described herein, and in such other ways as shall be shown in the discovery and trial of this matter.

(Damages)

92. Defendants have proximately damaged The Association and Homeowners by the above described actions and by decreasing The Association's funding and funding base and, therefore, operational capacity, causing it to pass assessments to fund Amenity deficits, and,

further, have proximately damaged the Homeowner Class by improper operation of The Association/neighborhood, by improper assessments and loss of value in their homes; and further have proximately damaged all Plaintiffs by saddling them with unreasonable and unsustainable debt burdens, loss of control, and in the other manners described herein.

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

(Class Action Allegations)

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

An opt-out class of all persons and entities that are members of the Mount Vintage Homeowners Association in North Augusta, South Carolina.¹

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

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

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

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

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

¹ Plaintiffs propose that if cohesiveness is challenged by the Defendants, that the Class be divided into subclasses if and as necessary to align Class interests.

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

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

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

101. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for the Defendants, the parties likely opposing the Class.

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

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

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

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

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

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

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

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to Affiliated Defendants & Board)

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

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

111. If it is shown that said failures were committed with gross negligence, willfulness, wantonness, and/or reckless disregard for the rights of others, and/or constituted negligence *per se*, Plaintiffs are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty as to LL and Board)

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

113. Defendants Raiford, LL, and Board owed fiduciary duties to the Plaintiffs by virtue of their capacity as the developer and steward of Mount Vintage Plantation community and amenities and their capacity in controlling The Association and in Defendant Raiford's capacity as the lone associating voting member and in the Board's capacity as Board members and officers..

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

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

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

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

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

119. If it is shown that said failures were committed with gross negligence, reckless disregard for the rights of others, and/or intentional or malicious conduct, Plaintiffs are entitled to an award of punitive damages against the Defendants.

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION
(Declaratory Action/Reformation as to LL)

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

128. The unilateral and *de facto* perpetual control provisions and other offensive provisions of The Association's governing documents violate:

- (a) public policy;
- (b) South Carolina law and/or provisions of the Constitution;
- (c) the developer Defendants' fiduciary duties; and/or,
- (d) the Rule Against Perpetuities.

129. Plaintiffs are entitled to a declaration by this Court that the offensive provisions included within the governing documents by the Defendants and their predecessors are in violation of South Carolina law and/or provisions in the Constitution, public policy, and/or Defendants' fiduciary duties, and the Rule against Perpetuities and are therefore void and/or require reformation to eliminate the offensive provisions.

130. Plaintiffs are entitled to a declaration by this Court that the offensive provisions are cumulatively void and cumulatively severable from the other terms of the governing documents.

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

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

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

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

134. Plaintiffs and The Association should be permitted recovery of that amount the Defendants have been unjustly enriched at the expense of the Plaintiffs and The Association.

FOR A SIXTH CAUSE OF ACTION
(Promissory Estoppel or Breach as to Defendants LL & Raiford)

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

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

137. Plaintiffs relied on this promise in acquiring their lots and building their residences. The original developers expected and foresaw Plaintiffs' reliance.

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

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

140. Alternatively, Plaintiffs seek a ruling that the Defendants, having breached the developer obligations themselves, were not and are no longer entitled to exercise developer rights at Mount Vintage, and an award of judgment for all prior unpaid dues.

FOR A SEVENTH CAUSE OF ACTION
(Accounting and Temporary and Permanent Injunction – All Defendants)

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

142. Plaintiffs are entitled to and seek an accounting of all Defendants' transactions relating to Mount Vintage Plantation and all of The Association's accounting and finances since Raiford took control.

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

FOR AN EIGHTH CAUSE OF ACTION
(Civil Conspiracy as to Affiliated Defendants)

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

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

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

147. Plaintiffs are entitled to an award of actual, consequential, special, and punitive damages from the Defendants and Board.

FOR A NINTH CAUSE OF ACTION
(Binding Effect as to The Association)

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

149. Plaintiffs seek an order that The Association will be bound by the outcome of this litigation.

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

1. That the foregoing class of Homeowners be certified; that two or more of the individual plaintiffs be constituted as the class representatives in this matter; and that the below counsel be constituted as class counsel;
2. Actual, consequential, special, statutory, and punitive damages;
3. Specific performance and injunctive relief;
4. Attorneys' fees and costs;
5. Entry of judgment for The Association;
6. Entry of judgment for the individual Plaintiffs and Homeowner Class; and
7. Jury Trial Demanded.

JUSTIN O'TOOLE LUCEY, P.A.

By: /s/Justin O'Toole Lucey
 Justin O'Toole Lucey
 Anna McCann
 Collin H. Fuller
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June 5, 2020
 Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO. 2020-CP-02-01066
	)	
ELIZABETH M. FERRARO, JAMES T.	)	
FERRARO, EDWARD J. PRZYBYL,	)	
MARCELLA GLEIE, JOHN E. GLEIE, JR.,	)	
THOMAS BOWES, CONNIE BOWES,	)	AMENDED SUMMONS
MOATAZ ALASADI, VIRGINIA KIRKWOOD,	)	(Negligent Development)
BOB KIRKWOOD, PAUL VICHROSKI, NYDZA	)	
VICHROSKI, JAMES MONTELLESE,	)	(Jury Trial Demanded)
ROXANN MONTELLESE, AND JULIE	)	
WILLIAMS, Individually, Derivatively, and on	)	
Behalf of all the Mount Vintage Homeowners	)	
Association Members,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
J. WAYNE RAIFORD, INDIVIDUALLY AND	)	
AS PRESIDENT OF THE BOARD OF	)	
DIRECTORS OF MOUNT VINTAGE	)	
PLANTATION HOMEOWNERS ASSOCIATION,	)	
INC., LL OF SC, LLC, RAIFORD TOPSAIL	)	
ISLAND INVESTMENTS, LLC, MOUNT	)	
VINTAGE PLANTATION HOMEOWNERS	)	
ASSOCIATION, INC. A/K/A MOUNT VINTAGE	)	
HOMEOWNERS ASSOCIATION, INC., GREGG	)	
KARLBERG, JERRY SCHAEFER, LEIGH ANN	)	
KEELS, AND JOHN DOE,	)	
	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE NAMED:

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

judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

/s/Justin O'Toole Lucey

Justin O' Toole Lucey

Anna McCann

Collin H. Fuller

JUSTIN O'TOOLE LUCEY, PA

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Attorneys for Plaintiffs

October 21, 2020
Mount Pleasant, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO. 2020-CP-02-01066
	)	
ELIZABETH M. FERRARO, JAMES T.	)	
FERRARO, EDWARD J. PRZYBYL,	)	
MARCELLA GLEIE, JOHN E. GLEIE, JR.,	)	AMENDED COMPLAINT
THOMAS BOWES, CONNIE BOWES,	)	(Negligent Development)
MOATAZ ALASADI, VIRGINIA KIRKWOOD,	)	
BOB KIRKWOOD, PAUL VICHROSKI, NYDZA	)	(Jury Trial Demanded)
VICHROSKI, JAMES MONTELLESE,	)	
ROXANN MONTELLESE, AND JULIE	)	
WILLIAMS, Individually, Derivatively, and on	)	
Behalf of all the Mount Vintage Homeowners	)	
Association Members,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
J. WAYNE RAIFORD, INDIVIDUALLY AND	)	
AS PRESIDENT OF THE BOARD OF	)	
DIRECTORS OF MOUNT VINTAGE	)	
PLANTATION HOMEOWNERS	)	
ASSOCIATION, INC., LL OF SC, LLC,	)	
RAIFORD TOPSAIL ISLAND INVESTMENTS,	)	
LLC, MOUNT VINTAGE PLANTATION	)	
HOMEOWNERS ASSOCIATION, INC. A/K/A	)	
MOUNT VINTAGE HOMEOWNERS	)	
ASSOCIATION, INC., GREGG KARLBERG,	)	
JERRY SCHAEFER, LEIGH ANN KEELS, AND	)	
JOHN DOE,	)	
	)	
Defendants.	)	

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

1. Plaintiffs are residents of the neighborhood and development known as Mount Vintage (hereinafter referred to as "Mount Vintage").

2. Plaintiffs Ferraro's residence is located at 106 Captain Johnsons Drive, North Augusta, South Carolina, 29860, and is also described as Lot 0-48 on a plat of Mount Vintage by Newby-Proctor and Associates dated August 21, 2006.

3. Plaintiff Przybyl's residence is located at 255 Homeward Bound Drive, North Augusta, South Carolina, 29860, and is also described as Lot D-14 on a plat of Mount Vintage by Newby-Proctor and Associates dated September 6, 2000.

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

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

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

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

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

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

10. Plaintiff Williams' residence is located at 37 Independent Hill Lane, North Augusta, South Carolina, 29860, and is also described as Lot R-36 on a plat of Mount Vintage by Newby-Proctor and Associates dated September 26, 2001.

11. Defendant LL of SC, LLC ("LL"), is a limited liability company formed under the laws of South Carolina; LL also owns lots in the Mount Vintage subdivision. LL's Registered Agent's address is listed with the South Carolina Secretary of State as 616 Edgefield Road, Suite 115, North Augusta, South Carolina, 29841, which is located in Aiken County, South Carolina. LL's current Articles of Incorporation, filed on January 14, 2010, list its principal office at the same address located in Aiken County, South Carolina.

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

13. Defendant J. Wayne Raiford ("Raiford") is a resident of Edisto Beach, South Carolina, and he also owns lots in the Mount Vintage subdivision.

14. Defendant Raiford owns, manages, controls and acts on behalf of Defendants LL and Topsail.

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

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

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

18. Defendant Raiford is not only being sued in his individual capacity, but he is also being sued in his capacity as the Chairman, President, controlling member of The Association, and lead and controlling representative of the Board.

19. Defendant Leigh Ann Keels (“Keels”) is the daughter of Raiford and a non-resident of Mount Vintage, a former member of The Association’s Board of Directors, a current officer of The Association, and a member and manager of LL.

20. Defendants Gregg Karlberg (“Karlberg”), Jerry Schaefer (“Schaefer”), and John Doe (“Doe”) are former members of The Association’s Board of Directors (and are former residents of Mount Vintage subdivision).

21. Defendants Karlberg, Schaefer, Doe, and Keels, participated in, assisted with, facilitated, and acquiesced to the misfeasance, malfeasance, and non-feasance (hereinafter, collectively, “misfeasance”) by Defendants Raiford and LL described elsewhere herein.

22. Defendant board members and officers Karlberg, Schaefer, Doe, and Keels are hereinafter referred to collectively as the “Board.”

23. Hereinafter “Affiliated Defendants” refers to LL, Topsail, Raiford, and Keels.

24. Hereinafter, “Defendants” refers to all foregoing Defendants except The Association. When “Defendants” is modified to “All Defendants,” the reference includes The Association.

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

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

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

(Background; Formation Of Association; Governing Documents)

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

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

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

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

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

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

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

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

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

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

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

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

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

41. Defendants Raiford and Topsail are not Class A members of The Association.¹

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

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

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

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

(Perpetual and Complete Developer Control)

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

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

¹ Nor is Defendant Keels a member of The Association.

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

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

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

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

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

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

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

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

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

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

58. The foregoing and many of the other terms contained in the Governing Documents are so one-sided and unfair, that no reasonable person who understood their potential for abuse

would have agreed to them; and no reasonable person would avail themselves of the untoward advantages that they create.

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

(Futility of Demand)

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

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

- a) The Association's Governing Documents give "Developer, LL of SC, LLC, its successors and assigns" absolute control over The Association;
- b) Defendant LL therefore controls The Association, whose rights are being adversely affected by Defendants;
- c) Under the Governing Documents, Defendant LL is entitled to modify, amend, repeal, suspend, and otherwise alter the Governing Documents in its sole discretion, at its sole option, and at any time;
- d) Defendant LL has complete control over the Board, including the ability to appoint and remove Directors;
- e) Defendant LL has *de facto* veto power over any and all decisions of the Board, which power Defendant LL has exercised in the past;
- f) Defendant Raiford, as owner of both Defendant LL and Defendant Topsail, would never permit the Board of Directors to authorize The Association to bring suit against either Defendant LL or Defendant Topsail;
- g) The Board of Directors is illusory as the Board serves at the pleasure of LL and Raiford;
- h) The Board of Directors have failed to successfully intercede in The Association's or Homeowner's behalf; ultimately, the only recourse for a dissenting Board member is resignation, which has occurred from time to time; and
- i) Other reasons which will be proven at trial.

62. In further support of futility, various Homeowners, Plaintiffs included, have requested that Defendants cure many of the wrongs addressed herein, and their efforts have been

rebuffed and/or ignored by the Board, which is controlled by Defendant LL. (see, e.g., ¶¶ 30-35, *infra*).

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

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

(Operation of Association for the Benefit of Affiliated Defendants)

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

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

67. Affiliated Defendants have embarked upon a pattern and practice of bidding for and acquiring Mount Vintage lots at tax sales, thereafter, suing The Association they control to

eliminate past due Association dues and assessment, defaulting The Association in the suits, and failing to advise of or assist with The Association's redemption or other rights, and/or simply causing the HOA to write them off, all without the Affiliated Defendants compensating The Association for its lost dues, liens, opportunity, and/or value.

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

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

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

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

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

(Amenities)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

92. Defendant LL has failed to make good on the original developers promise of multiple, optional, first class amenities.

(Other and Cumulative Matters)

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

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

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

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

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

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

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

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

(Additional Statement of Liability and Negligent Acts)

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

102. As the sole, complete controlling member, officer, and board member of a planned community neighborhood and its owner's association, Defendants LL and Raiford owed The Association, the Homeowners, and the ensuing neighborhood fiduciary and fiduciary-like duties,

and the duty to use due care in the development of the neighborhood and the administration of The Association.

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

104. As a member of The Association's Board of Directors, and as the President and officer of The Association, Raiford owed The Association fiduciary and fiduciary-like duties, common law duties, the duty of good faith, a duty of full and absolute disclosure on all matters related to Mount Vintage, and a duty of loyalty

105. Defendant Board owed The Association, the Homeowners, and the ensuing neighborhood fiduciary and fiduciary-like duties, the duty to use due care and prudence in the development of the neighborhood and the administration of The Association, and a duty of loyalty

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

107. Defendants Raiford and LL have been negligent as follows:

- a) In failing to act to prevent the amenities from being foreclosed upon by Apex Bank under its tenure as the alleged developer;
- b) In failing to pay for the acquisition of the amenities or for the Developer's fair share of the acquisition of the Amenities;
- c) In their use of insider knowledge of Mount Vintage affairs to benefit themselves in lieu of The Association or its members;
- d) In their use of Association opportunities, rights, receivables, liens, and legal proceedings to acquire property for the benefit of the Affiliated Defendants;
- e) By exposing The Association to liability for false property transfer documentation;
- f) In failing to pay or require payment of Association dues and assessments on lots that are not properly considered developer lots;
- g) In failing to arrange for proper funding of The Association and neighborhood while under their control;

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

108. Defendants Raiford and Board have been negligent regarding Mount Vintage affairs as follows:

- a) In permitting Defendant LL's foregoing negligence and self-dealing to proceed unchecked, unaudited, and unaccounted for;
- b) In failing to disclose Affiliated Defendants' misfeasance to the Homeowners;
- c) In failing to disclose to the Homeowners that they are a token board, with little, ultimate say on matters of consequence;
- d) In the acquisition of the amenities as further described below;
- e) In failing to challenge and reform the unconscionable Governing Documents;
- f) In failing to insure the proper management of The Association; and,
- g) In such other ways that will be shown through the discovery and trial of this action.

109. Defendants Raiford, LL, and the Board have been negligent with regards to the *acquisition* of the *Golf Amenity*, as follows:

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

110. Defendants Raiford, LL, and the Board have been negligent in the following particulars with regards to the *operation* of the *Golf Amenity*:

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

111. Defendants Raiford, LL, and the Board have been negligent in the following particulars, with regards to the acquisition *and* operation of the *Town Center Amenity*:

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

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

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

(Damages)

114. Defendants have proximately damaged Plaintiffs as follows:

- a) The Defendants have proximately damaged The Association by the above-described actions and by decreasing The Association's funding and funding base and, therefore, operational capacity, by failing to pay assessments, causing it to pass assessments to fund Amenity deficits, by converting Association opportunities to their own benefit, and by saddling The Association with staggering debt and amenity maintenance cost;
- b) Defendants have proximately damaged the individual Plaintiffs and the Homeowner Class vis a vis increased and special assessments and by its improper operation of The Association and the neighborhood, which has resulted in loss of

appreciated value in their homes; loss of value in their homes, and loss of collective control of their neighborhood; and the likelihood of staggering future assessments to support The Association's staggering debt and maintenance costs; and

- c) The cumulative actual damages to The Association are expected to exceed \$7,000,000; and the Class damages are expected to exceed that.

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

(Class Action Allegations)

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

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

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

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

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

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

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

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

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

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

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

123. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for the Defendants, the parties likely opposing the Class.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty By All Plaintiffs as to Defendants LL, Raiford and the Board)

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

142. Defendant LL owed fiduciary and fiduciary like duties to the Plaintiffs by virtue of its capacity as the steward of the Mount Vintage community and amenities, and in its capacity in controlling The Association as the lone Association voting member.

143. Defendants Raiford and the Board owed fiduciary and fiduciary like duties to the Plaintiffs by virtue of their capacity as Board members and officers. All owed Homeowners

fiduciary and fiduciary like duties by virtue of the Homeowners forced respite of trust and confidences in them.

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

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

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

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

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

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

FOR A THIRD CAUSE OF ACTION

(S.C. Unfair Trade Practices Act By Association (derivatively and as realigned plaintiff) & Individual Plaintiffs ("SCUTPA") as to Affiliated Defendants)

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION

(Declaratory Action/Reformation By Individual Plaintiffs and Class as to Defendants LL and Association)

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

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

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

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

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

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

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

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

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

165. Plaintiffs and The Association should be permitted recovery of that amount the Defendants have been unjustly enriched at the expense of the Plaintiffs and The Association.

FOR A SIXTH CAUSE OF ACTION

(Promissory Estoppel or Declaration By Individual Plaintiffs & Class as to Defendant LL)

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

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

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

One of our nation's most premier luxury...master planned...World-class community; Mount Vintage truly is one of our Nation's crowning jewels; Known for its refined luxury and amenities; southern charm and elegant sophistication; carefully planned residential community that rivals the best in America; signature Mount Vintage has enlisted legendary designers for the superior craftsmanship you see throughout the community; Some of the area's finest builders will provide you a delightful choice of well-thought-out and attractive home designs; neighborhood[s]; Gracefully appointed homes showcasing traditional architectural styles; exquisite homes and grounds; experience a world of unequalled amenities; amazing offering of amenities; unsurpassed amenities; Exceptional amenities; superb amenities; World-class amenities; our facilities provide everything horse lovers and their horses require; Fully equipped equestrian center; full boarding facilities and lessons; many riding trails; world class... championship golf course; highly experienced maintenance staff; extreme attention to detail; so meticulously maintained that not a single blade of grass appears out of place; finest lifestyle amenities imaginable; the finest lifestyle amenities man can provide; the very best of luxury living.

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

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

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

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

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

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

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

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

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

177. The Association is entitled to and seeks an accounting of all The Association's financial transactions with the Defendants since Defendant LL took control and the Defendants

financial transactions relating to Mount Vintage that The Association is not a party to but maybe effected by.

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

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

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

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

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

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

183. The special damages include, but are not limited to, the non-economic damages that Plaintiffs have suffered by having to endure this conduct in their retirement home and community,

and amongst their neighbors, the loss of use and enjoyment Plaintiffs have suffered, and the loss of the planned collective control of their residential community.

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

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

FOR A NINTH CAUSE OF ACTION
(Reimbursement for Wrongful Assessments By Individual Plaintiffs and Plaintiff Class as to Defendant Association)

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

187. Defendants activities described above caused The Association to wrongfully increase assessments, regular and special, resulting in payments by the individual Plaintiffs and Plaintiff Class.

188. To the extent that the derivative Association claims recover from the Defendants damages for the expenditures which caused the increased and special assessments, Individual Plaintiffs and Plaintiff Class are entitled to an Order of this Court or Judgment for the repayment of these wrongful or wrongfully caused assessments to the members who paid them or a credit against future assessments.

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

1. That the foregoing class of Homeowners be certified; that two or more of the individual plaintiffs be constituted as the class representatives in this matter and that the below counsel be constituted as class counsel;

2. Judgment in favor of The Association against Defendants for its actual, consequential, statutory, and punitive damages;
3. Judgment in favor of the individual Plaintiffs and Plaintiff Class against Defendants for their actual, consequential, special, statutory, and punitive damages;
4. Judgment in favor of the Individual Plaintiffs and Plaintiff Class against Association for assessments paid by Plaintiffs recovered against the Defendants;
5. An accounting by all Defendants for all Plaintiffs;
6. Reformation, specific performance, declaratory, and injunctive relief;
7. An award of attorneys' fees, costs, and prejudgment interest; and
8. Jury trial demanded.

JUSTIN O'TOOLE LUCEY, P.A.

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October 21, 2020
Charleston, South Carolina

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

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

vs.)

ANSWER OF DEFENDANT LL OF SC, LLC TO
THE FIRST AMENDED COMPLAINT

J. WAYNE RAIFORD, *Individually and*)
as President of the Board of Directors of)
Mount Vintage Plantation Homeowners)
Association, Inc.; LL OF SC, LLC;)
 RAIFORD TOPSAIL ISLAND)
 INVESTMENTS, LLC; MOUNT)
 VINTAGE PLANTATION)
 HOMEOWNERS ASSOCIATION,)
 INC. *a/k/a* MOUNT VINTAGE)
 HOMEOWNERS ASSOCIATION,)
 INC.; GREGG KARLBERG; JERRY)
 SCHAEFFER; LEIGH ANN KEELS;)
 and JOHN DOE,)
)

Defendants.)

TRIAL BY JURY DEMANDED

LL of SC, LLC, Defendant, by and through its undersigned counsel, respectfully submits
 this Answer to the allegations of the First Amended Complaint.

FOR A FIRST DEFENSE TO THE COMPLAINT
(General Denial)

1. Unless expressly admitted, qualified, or otherwise explained, each and every allegation of the First Amended Complaint is denied.

FOR A SECOND DEFENSE TO THE COMPLAINT
(Responses to Specific Allegations)

2. Responding to Paragraph 1 of the First Amended Complaint, such allegations are admitted.

3. Responding to Paragraph 2 of the First Amended Complaint, such allegations are, on information and belief, admitted.

4. Responding to Paragraph 3 of the First Amended Complaint, such allegations are, on information and belief, admitted.

5. Responding to Paragraph 4 of the First Amended Complaint, such allegations are, on information and belief, admitted.

6. Responding to Paragraph 5 of the First Amended Complaint, such allegations are, on information and belief, admitted.

7. Responding to Paragraph 6 of the First Amended Complaint, such allegations are, on information and belief, admitted.

8. Responding to Paragraph 7 of the First Amended Complaint, such allegations are, on information and belief, admitted.

9. Responding to Paragraph 8 of the First Amended Complaint, such allegations are, on information and belief, admitted.

10. Responding to Paragraph 9 of the First Amended Complaint, such allegations are, on information and belief, admitted.

11. Responding to Paragraph 10 of the First Amended Complaint, such allegations are, on information and belief, admitted.

12. Responding to Paragraph 11 of the First Amended Complaint, it is admitted that Defendant LL of SC, LLC (referred to hereinafter as “**Defendant LL**”) is a limited liability company organized and existing under the laws of the State of South Carolina, and that it owns lots within Mount Vintage. The remainder of Paragraph 11 is denied, with the clarification that Defendant LL’s registered address is 235 Mt. Vintage Plantation Drive, North Augusta, South Carolina 29860.

13. Responding to Paragraph 12 of the First Amended Complaint, it is admitted that Defendant Raiford Topsail Island Investments, LLC (referred to hereinafter as “**Defendant Topsail**”) is a limited liability company organized and existing under the laws of the State of South Carolina, and that it owns lots within Mount Vintage. The remainder of Paragraph 12 is denied, with the clarification that Defendant Topsail’s registered address is 235 Mt. Vintage Plantation Drive, North Augusta, South Carolina 29860.

14. Responding to Paragraph 13 of the First Amended Complaint, such allegations are admitted.

15. Responding to Paragraph 14 of the First Amended Complaint, it is admitted that co-Defendant J. Wayne Raiford (“**Defendant Raiford**”) is a member and manager of Defendant LL, and that Defendant Raiford has acted on behalf of Defendants LL and Topsail. To the extent that Paragraph 14 contains other or further allegations to which a response may be required, such allegations are denied.

16. Responding to Paragraph 15 of the First Amended Complaint, such allegations are admitted.

17. Responding to Paragraph 16 of the First Amended Complaint, it is admitted that Defendant Raiford has been elected to the Board of Directors of the Mount Vintage Plantation Homeowners Association, Inc. (“**Defendant Association**”), and that Defendant Raiford serves as the Chairman and President of Defendant Association. To the extent that Paragraph 16 contains other or further allegations to which a response may be required, such allegations are denied.

18. Responding to Paragraph 17 of the First Amended Complaint, such allegations are denied.

19. Responding to Paragraph 18 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to frame this lawsuit against Defendant Raiford in each of the capacities identified. To the extent that Paragraph 18 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

20. Responding to Paragraph 19 of the First Amended Complaint, such allegations are admitted.

21. Responding to Paragraph 20 of the First Amended Complaint, it is admitted that co-Defendants Karlberg and Schaefer are former members of the Board of Directors of Defendant Association, and additionally, are former residents of the Mount Vintage subdivision. With respect to the allegations of Paragraph 20 regarding co-Defendant “John Doe,” this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

22. Paragraph 21 of the First Amended Complaint is denied.

23. Responding to Paragraph 22 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to refer to co-Defendants Karlberg, Schaefer, Doe, and Keels as “the

Board.” To the extent that Paragraph 22 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

24. Responding to Paragraph 23 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to refer to co-Defendants LL, Topsail, Raiford, and Keels as “Affiliated Defendants.” To the extent that Paragraph 23 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

25. Responding to Paragraph 24 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to refer to establish naming conventions for “Defendants” and “All Defendants.” To the extent that Paragraph 24 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

26. Responding to Paragraph 25 of the First Amended Complaint, it is admitted only that Plaintiffs are “members” of Defendant Association in the sense that they are bound by the pertinent covenants and restrictions applicable to property owners in the Mount Vintage subdivision. To the extent that the allegations of Paragraph 25 call for this Defendant to assert, as a matter of law, whether any individual Plaintiff is a “member” of the Defendant Association, as the term “member” may be understood or applied under the laws of the State of South Carolina regarding not-for-profit corporations, and relatedly what the nature and extent of any particular Plaintiff’s “membership” rights or powers may be, such allegations demand a response to legal conclusions, to which no response is required, and none shall be deemed as having been given. To the extent that a response may be required as to such allegations, the same are denied.

27. Responding to Paragraph 26 of the First Amended Complaint, it is admitted that Plaintiffs have attempted to bring this action in a derivative capacity. This Defendant denies that Plaintiffs are competent to do so. To the extent that Paragraph 26 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

28. Responding to Paragraph 27 of the First Amended Complaint, it is admitted that Plaintiffs have attempted to bring this action in a class-representative capacity. This Defendant denies that Plaintiffs are competent to do so. To the extent that Paragraph 27 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

29. Responding to Paragraph 28 of the First Amended Complaint, such allegations are, on information and belief, admitted.

30. Responding to Paragraph 29 of the First Amended Complaint, such allegations are admitted.

31. Responding to Paragraph 30 of the First Amended Complaint, it is admitted that the Articles of Incorporation for the Association were stamped as filed with the South Carolina Secretary of State on April 3, 2000. It is denied, however, that the Association was required to have “members,” as alleged by the assertions of this Paragraph. To the extent that Paragraph 30 contains other or further allegations to which a response may be required, the same are denied.

32. Responding to Paragraph 31 of the First Amended Complaint, it is admitted that the Articles of Incorporation for the Association states that “Members shall consist of two classes as set forth in Declaration of Protective Covenants, Conditions and Restrictions of Mount Vintage Plantation and Bylaws of Mount Vintage Homeowners Association, Inc.” To the extent that

Paragraph 31 contains other or further allegations to which a response may be required, the same are denied.

33. Responding to Paragraph 32 of the First Amended Complaint, it is admitted that the Defendant Association is entitled to impose dues and assessments upon its members, and is authorized and empowered to do so by not only South Carolina law, but also by the Defendant Association's governance documents. Furthermore, it is admitted that, to the best of this Defendant's knowledge, information, and belief, the Association has regularly exercised the power and authority to impose dues and assessments, as contemplated by South Carolina law and the Defendant Association's governance documents. To the extent the allegations of Paragraph 32 require some other or further response, the same are denied.

34. Responding to Paragraph 33 of the First Amended Complaint, it is admitted that the covenants, restrictions, and bylaws that govern the Defendant Association's administration of the Mount Vintage subdivision have been amended on several occasions since their initial publication. To the extent that the allegations of Paragraph 33 require some other or further response, the same are denied.

35. Responding to Paragraph 34 of the First Amended Complaint, it is admitted only that Defendant LL is the holder of certain developer rights, as evidenced by a Deed in Lieu of Foreclosure, recorded in the Office of the Register of Deeds for Edgefield County at Book 1445, Pages 1-12. To the extent that the allegations of Paragraph 34 require some other or further response, the same are denied.

36. Responding to Paragraph 35 of the First Amended Complaint, it is admitted only that Defendant LL is the holder of certain developer rights, as evidenced by a Deed in Lieu of Foreclosure, recorded in the Office of the Register of Deeds for Edgefield County at Book 1445,

Pages 1-12. To the extent that the allegations of Paragraph 35 require some other or further response, the same are denied.

37. Responding to Paragraph 36 of the First Amended Complaint, it is admitted only that Defendant LL is the holder of certain developer rights, as evidenced by a Deed in Lieu of Foreclosure, recorded in the Office of the Register of Deeds for Edgefield County at Book 1445, Pages 1-12. To the extent that the allegations of Paragraph 36 require some other or further response, the same are denied.

38. Responding to Paragraph 37 of the First Amended Complaint, such allegations are admitted.

39. Responding to Paragraph 38 of the First Amended Complaint, such allegations are generally admitted, with the clarification that the class of property owners who belong to “Class B” do not presently have voting privileges.

40. Responding to Paragraph 39 of the First Amended Complaint, such allegations are admitted.

41. Responding to Paragraph 40 of the First Amended Complaint, such allegations are admitted.

42. Paragraph 41 of the First Amended Complaint is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 41 require some response, they are denied.

43. Responding to Paragraph 42 of the First Amended Complaint, it is admitted only that the current version of the covenants and restrictions explains that “Class B members shall consist of all other owners of residential lots in Mount Vintage, other than the Developer.” To the

extent that the allegations of Paragraph 42 require some other or further response, the same are denied.

44. Responding to Paragraph 43 of the First Amended Complaint, it is admitted only that the current version of the covenants and restrictions explains that “Class B members shall not have voting privileges until the Developer shall have conveyed all residential lots and tracts within Mount Vintage including, but not limited to, additional phases, sections and developments which the Developer may decide to add to the scheme of the development as contemplated under Article IX of this Declaration of Protective Covenants, Conditions and Restrictions of Mount Vintage, unless and until the Developer, at its sole and exclusive discretion, elects to transfer such rights, voting privileges and duties to Class B members of the Association at which time Class B members shall become Class A members.” To the extent that the allegations of Paragraph 43 require some other or further response, the same are denied.

45. Responding to Paragraph 44 of the First Amended Complaint, such allegations are admitted.

46. Responding to Paragraph 45 of the First Amended Complaint, such allegations are admitted.

47. Responding to Paragraph 46 of the First Amended Complaint, such allegations are denied.

48. Responding to Paragraph 47 of the First Amended Complaint, such allegations are denied.

49. Responding to Paragraph 48 of the First Amended Complaint, such allegations are denied.

50. Responding to Paragraph 49 of the First Amended Complaint, it is admitted only that the current version of the covenants and restrictions authorizes “the Developer as well as its successors, assigns, or heirs, as the case may be, [to] have, and are [thereby] granted, the exclusive right, exercisable at any time and from time to time, to amend or to grant exceptions to the[] Declarations and to waive, repea[l] or vary the[] Declarations in any one or more respects whenever in the sole and controlled opinion of the Developer, such waiver, repeal or variance shall not be materially detrimental to the general nature in development of Mount Vintage as a residential area.” To the extent that the allegations of Paragraph 49 require some other or further response, the same are denied.

51. Responding to Paragraph 50 of the First Amended Complaint, such allegations are denied.

52. Responding to Paragraph 51 of the First Amended Complaint, such allegations are denied.

53. Responding to Paragraph 52 of the First Amended Complaint, such allegations are denied.

54. Responding to Paragraph 53 of the First Amended Complaint, such allegations are denied.

55. Responding to Paragraph 54 of the First Amended Complaint, such allegations are denied.

56. Responding to Paragraph 55 of the First Amended Complaint, such allegations are denied.

57. Responding to Paragraph 56 of the First Amended Complaint, such allegations are denied.

58. Responding to Paragraph 57 of the First Amended Complaint, such allegations are denied.

59. Responding to Paragraph 58 of the First Amended Complaint, such allegations are denied.

60. Responding to Paragraph 59 of the First Amended Complaint, such allegations are denied.

61. Responding to Paragraph 60 of the First Amended Complaint, such allegations are denied.

62. Responding to Paragraph 61 of the First Amended Complaint, such allegations are denied.

63. Responding to Paragraph 62 of the First Amended Complaint, such allegations are denied.

64. Responding to Paragraph 63 of the First Amended Complaint, such allegations are denied.

65. Responding to Paragraph 64 of the First Amended Complaint, it is admitted that one or more Plaintiffs filed a complaint with the South Carolina Department of Consumer Affairs. To the extent that the allegations of Paragraph 64 require some other or further response, the same are denied.

66. Responding to Paragraph 65 of the First Amended Complaint, such allegations are denied.

67. Responding to Paragraph 66 of the First Amended Complaint, such allegations are denied.

68. Responding to Paragraph 67 of the First Amended Complaint, such allegations are denied.

69. Responding to Paragraph 68 of the First Amended Complaint, such allegations are denied.

70. Responding to Paragraph 69 of the First Amended Complaint, such allegations are denied.

71. Responding to Paragraph 70 of the First Amended Complaint, such allegations are denied.

72. Responding to Paragraph 71 of the First Amended Complaint, such allegations are denied.

73. Responding to Paragraph 72 of the First Amended Complaint, such allegations are denied.

74. Responding to Paragraph 73 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, and so denies the same.

75. Responding to Paragraph 74 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, and so denies the same.

76. Responding to Paragraph 75 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, and so denies the same.

77. Responding to Paragraph 76 of the First Amended Complaint, such allegations are admitted.

78. Responding to Paragraph 77 of the First Amended Complaint, such allegations are, on information and belief, admitted.

79. Responding to Paragraph 78 of the First Amended Complaint, such allegations are, on information and belief, admitted.

80. Responding to Paragraph 79 of the First Amended Complaint, such allegations are, on information and belief, admitted.

81. Responding to Paragraph 80 of the First Amended Complaint, such allegations are denied.

82. Responding to Paragraph 81 of the First Amended Complaint, such allegations are admitted.

83. Responding to Paragraph 82 of the First Amended Complaint, such allegations are denied.

84. Responding to Paragraph 83 of the First Amended Complaint, such allegations are denied.

85. Responding to Paragraph 84 of the First Amended Complaint, such allegations are denied.

86. Responding to Paragraph 85 of the First Amended Complaint, such allegations are denied.

87. Responding to Paragraph 86 of the First Amended Complaint, such allegations are denied.

88. Responding to Paragraph 87 of the First Amended Complaint, such allegations are denied.

89. Responding to Paragraph 88 of the First Amended Complaint, such allegations are denied.

90. Responding to Paragraph 89 of the First Amended Complaint, such allegations are denied.

91. Responding to Paragraph 90 of the First Amended Complaint, such allegations are denied.

92. Responding to Paragraph 91 of the First Amended Complaint, such allegations are denied.

93. Responding to Paragraph 92 of the First Amended Complaint, such allegations are denied.

94. Responding to Paragraph 93 of the First Amended Complaint, such allegations are denied.

95. Responding to Paragraph 94 of the First Amended Complaint, such allegations are denied.

96. Responding to Paragraph 95 of the First Amended Complaint, such allegations are denied.

97. Responding to Paragraph 96 of the First Amended Complaint, such allegations are denied.

98. Responding to Paragraph 97 of the First Amended Complaint, such allegations are denied.

99. Responding to Paragraph 98 of the First Amended Complaint, such allegations are denied.

100. Responding to Paragraph 99 of the First Amended Complaint, such allegations are denied.

101. Responding to Paragraph 100 of the First Amended Complaint, such allegations are denied.

102. Paragraph 101 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 101 require some response, they are denied.

103. Paragraph 102 is framed in the form of assertions of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 102 require some response, they are denied.

104. Paragraph 103 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 103 require some response, they are denied.

105. Paragraph 104 is framed in the form of an assertion of law, regarding a co-Defendant, to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 104 require some response, they are denied.

106. Paragraph 105 is framed in the form of an assertion of law, regarding a co-Defendant, to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 105 require some response, they are denied.

107. Paragraph 106 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 106 require some response, they are denied.

108. Responding to Paragraph 107 of the First Amended Complaint, such allegations, including all subparts, are denied.

109. Responding to Paragraph 108 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 108 may require a response from this Defendant, such allegations, including all subparts, are denied.

110. Responding to Paragraph 109 of the First Amended Complaint, such allegations, including all subparts, are denied.

111. Responding to Paragraph 110 of the First Amended Complaint, such allegations, including all subparts, are denied.

112. Responding to Paragraph 111 of the First Amended Complaint, such allegations, including all subparts, are denied.

113. Paragraph 112 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 112 require some response, they are denied.

114. Paragraph 113 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 113 require some response, they are denied.

115. Responding to Paragraph 114 of the First Amended Complaint, such allegations, including all subparts, are denied.

116. Responding to Paragraph 115 of the First Amended Complaint, such allegations are denied.

117. Responding to Paragraph 116 of the First Amended Complaint, it is admitted that Plaintiffs have sought to proceed in the capacity of class representatives. It is denied that Plaintiffs are entitled to do so. To the extent that the allegations of Paragraph 112 require some other or further response, they are denied.

118. Paragraph 117 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 117 require some response, they are denied.

119. Paragraph 118 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 118 require some response, they are denied.

120. Responding to Paragraph 119 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

121. Paragraph 120 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 120 require some response, they are denied.

122. Paragraph 121 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 121 require some response, they are denied.

123. Paragraph 122 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 122 require some response, they are denied.

124. Paragraph 123 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 123 require some response, they are denied.

125. Paragraph 124 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 124 require some response, they are denied.

126. Paragraph 125 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 125 require some response, they are denied.

127. Paragraph 126 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 126 require some response, they are denied.

128. Responding to Paragraph 127 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

129. Responding to Paragraph 128 of the First Amended Complaint, such allegations are denied.

130. Responding to Paragraph 129 of the First Amended Complaint, such allegations are denied.

131. Responding to Paragraph 130 of the First Amended Complaint, such allegations are denied.

132. Paragraph 131 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 131 require some response, they are denied.

133. Responding to Paragraph 132 of the First Amended Complaint, such allegations are denied.

134. Paragraph 133 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 133 require some response, they are denied.

135. Responding to Paragraph 134 of the First Amended Complaint, such allegations are denied.

136. Paragraph 135 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 135 require some response, they are denied.

137. Paragraph 136 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 136 require some response, they are denied.

138. Paragraph 137 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 137 require some response, they are denied.

FOR A THIRD DEFENSE TO THE FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

139. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

140. Responding to Paragraph 139 of the First Amended Complaint, such allegations are denied.

141. Responding to Paragraph 140 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

142. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

143. Responding to Paragraph 142 of the First Amended Complaint, such allegations are denied.

144. Responding to Paragraph 143 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 143 may require a response from this Defendant, such allegations are denied.

145. Responding to Paragraph 144 of the First Amended Complaint, such allegations are denied.

146. Responding to Paragraph 145 of the First Amended Complaint, such allegations are denied.

147. Responding to Paragraph 146 of the First Amended Complaint, such allegations are denied.

148. Responding to Paragraph 147 of the First Amended Complaint, such allegations are denied.

149. Responding to Paragraph 148 of the First Amended Complaint, such allegations are denied.

150. Responding to Paragraph 149 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE THIRD CAUSE OF ACTION
(Violation of the S.C. Unfair Trade Practices Act)

151. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

152. Paragraph 151 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 151 require some response, they are admitted.

153. Paragraph 152 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 152 require some response, they are denied.

154. Responding to Paragraph 153 of the First Amended Complaint, such allegations are denied.

155. Responding to Paragraph 154 of the First Amended Complaint, such allegations are denied.

156. Responding to Paragraph 155 of the First Amended Complaint, such allegations are denied.

157. Responding to Paragraph 156 of the First Amended Complaint, such allegations are denied.

158. Paragraph 157 is framed as an assertion of Plaintiffs' future intentions; no response is required to this assertion, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 157 require some response, the same are denied.

FOR A THIRD DEFENSE TO THE FOURTH CAUSE OF ACTION
(Declaratory Action/Reformation)

159. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

160. Responding to Paragraph 159 of the First Amended Complaint, such allegations are denied.

161. Responding to Paragraph 160 of the First Amended Complaint, such allegations are denied.

162. Responding to Paragraph 161 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE FIFTH CAUSE OF ACTION
(Unjust Enrichment)

163. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

164. Paragraph 163 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 163 require some response, they are admitted.

165. Responding to Paragraph 164 of the First Amended Complaint, such allegations are denied.

166. Responding to Paragraph 165 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE SIXTH CAUSE OF ACTION
(Promissory Estoppel)

167. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

168. Responding to Paragraph 167 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

169. Responding to Paragraph 168 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

170. Responding to Paragraph 169 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of what a predecessor to Defendant LL expected or foresaw, and so denies the same. To the extent that the allegations of Paragraph 169 require some other or further response, the same are denied.

171. Responding to Paragraph 170 of the First Amended Complaint, such allegations are denied.

172. Paragraph 171 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 171 require some response, they are denied.

173. Paragraph 172 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 172 require some response, they are denied.

174. Responding to Paragraph 173 of the First Amended Complaint, such allegations are denied.

175. Responding to Paragraph 174 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE SEVENTH CAUSE OF ACTION
(Accounting/Injunctive Relief)

176. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

177. Responding to Paragraph 176 of the First Amended Complaint, such allegations are denied.

178. Responding to Paragraph 177 of the First Amended Complaint, such allegations are denied.

179. Responding to Paragraph 178 of the First Amended Complaint, such allegations are denied.

180. Responding to Paragraph 179 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE EIGHTH CAUSE OF ACTION
(Civil Conspiracy)

181. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

182. Responding to Paragraph 181 of the First Amended Complaint, such allegations are denied.

183. Responding to Paragraph 182 of the First Amended Complaint, such allegations are denied.

184. Responding to Paragraph 183 of the First Amended Complaint, such allegations are denied.

185. Responding to Paragraph 184 of the First Amended Complaint, such allegations are denied.

186. Responding to Paragraph 185 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE NINTH CAUSE OF ACTION
(Reimbursement for Wrongful Assessments)

187. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

188. Responding to Paragraph 187 of the First Amended Complaint, such allegations are denied.

189. Responding to Paragraph 188 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE PRAYER FOR RELIEF

190. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

191. The Paragraph which begins with the word “Wherefore,” and each of its constituent subparts, constitutes a prayer for relief to which no response is required, and none shall be deemed as having been given. To the extent that a response may be required, the Prayer for Relief, including each and every of its subparts, is denied.

FOR A FOURTH DEFENSE TO THE COMPLAINT
(Re-Assertion of General Denial)

192. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

193. As previously asserted, unless expressly admitted, qualified, or otherwise explained, each and every allegation of the First Amended Complaint is denied.

FOR A FIFTH DEFENSE TO THE COMPLAINT
(Failure to State Facts Sufficient to Constitute a Cause of Action)

194. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

195. With regard to one or more causes of action, Plaintiffs have failed to state facts sufficient to constitute a cause of action against this Defendant. Therefore, consistent with Rule 12(b)(6), SCRCP, such defective causes of action must be dismissed.

FOR A SIXTH DEFENSE TO THE COMPLAINT
(Statute of Limitations)

196. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

197. With regard to one or more causes of action, Plaintiffs' claim is barred by the applicable statute(s) of limitation. Therefore, to the extent that such causes of action are legally impermissible, they must be dismissed.

FOR A SEVENTH DEFENSE TO THE COMPLAINT
(Lack of Standing)

198. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

199. With regard to one or more causes of action, as well as the capacities (derivative, class representative, and/or otherwise) in which the Plaintiffs are attempting to proceed, Plaintiffs are not competent to do so, and therefore, lack standing to proceed on such claims and/or in such capacities. Accordingly, to the extent that any Plaintiff lacks standing, such claims must be dismissed pursuant to Rule 12(b)(1) and/or Rule 23, SCRCP.

FOR AN EIGHTH DEFENSE TO THE COMPLAINT
(Statute of Frauds)

200. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

201. To the extent that the applicable statute(s) of frauds prohibits one or more causes of action, in part or in whole, such causes of action that are impermissible under the statute(s) of frauds must be dismissed.

FOR A NINTH DEFENSE TO THE COMPLAINT
(Merger)

202. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

203. The doctrine of merger is raised as a defense against any portion, or all, of any Plaintiffs' claim against this Defendant which is repugnant to such doctrine.

FOR A TENTH DEFENSE TO THE COMPLAINT
(Business Judgment Rule)

204. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

205. To the extent that any portion of any Plaintiff's claim is predicated on the assertion of wrongful acts undertaken by this Defendant, the business judgment rule is raised as a defense against such claims.

FOR AN ELEVENTH DEFENSE TO THE COMPLAINT
(Economic Loss Rule)

206. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

207. With regard to one or more causes of action, Plaintiffs' claim to relief is restricted, in part if not in whole, by the doctrine of economic loss and/or the economic loss rule. Such doctrine and/or rule is hereby affirmatively asserted as a defense against Plaintiffs' claims.

FOR A TWELFTH DEFENSE TO THE COMPLAINT
(Good Faith)

208. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

209. To the extent that any portion of any Plaintiff's claim is predicated on the assertion that this Defendant has acted in anything other than good faith, such claim is denied, and this Defendant would assert the fact of its own good faith as a defense to any adverse claim presented in the First Amended Complaint.

FOR A THIRTEENTH DEFENSE TO THE COMPLAINT
(Waiver)

210. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

211. This Defendant raises the doctrine of waiver as a defense to any claim for relief presented in the First Amended Complaint.

FOR A FOURTEENTH DEFENSE TO THE COMPLAINT
(Estoppel)

212. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

213. This Defendant raises the doctrine of estoppel as a defense to any claim for relief presented in the First Amended Complaint.

FOR A FIFTEENTH DEFENSE TO THE COMPLAINT
(Acquiescence)

214. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

215. This Defendant raises the doctrine of acquiescence as a defense to any claim for relief presented in the First Amended Complaint.

FOR A SIXTEENTH DEFENSE TO THE COMPLAINT
(Laches)

216. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

217. This Defendant raises the doctrine of laches as a defense to any claim for relief presented in the First Amended Complaint.

FOR A SEVENTEENTH DEFENSE TO THE COMPLAINT
(Failure to Mitigate)

218. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

219. To the extent that any Plaintiff is entitled to any relief from this Defendant whatsoever, which is expressly denied, this Defendant asserts that such Plaintiff's entitlement thereto was occasioned, in part if not whole, as a direct and proximate consequence of his or her

own failure to mitigate their damages. The failure to mitigate damages is therefore raised as a defense.

FOR AN EIGHTEENTH DEFENSE TO THE COMPLAINT
(Parol Evidence Rule)

220. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

221. To the extent that any portion of any Plaintiff's claim is predicated on information excludable by the parol evidence rule, such information must be excluded, and the claim must be dismissed.

FOR A NINETEENTH DEFENSE TO THE COMPLAINT
(Unconstitutionality of Punitive Damages)

222. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

223. Plaintiffs' claim for punitive damages violates the Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States in the following particulars:

- a. Plaintiffs' claim for punitive damages violates the Sixth and Fourteenth Amendments because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas punitive damages are a fine or penalty and quasi-criminal in nature; as such, they require the "beyond the reasonable doubt" standard of proof;
- b. Plaintiffs' claim for punitive damages violates Defendant's right to access to the courts guaranteed by the Seventh and Fourteenth Amendments

because the threat of an award of unlimited punitive damages chills Defendant's exercise of that right;

- c. Plaintiffs' claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:
- i. The standard or test for determining the requisite mental state of Defendant for imposition of punitive damages is void for vagueness;
 - ii. Insofar as punitive damages are not measured against actual injury to Plaintiffs and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of Defendant's alleged egregious conduct;
 - iii. The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that Defendant is denied equal protection of law; and,
 - iv. Punitive damages may be imposed without a requisite showing of hatred, spite, ill-will, or wrongful motive.

224. Accordingly, to the extent that any Plaintiff becomes entitled to any award of punitive damages against this Defendant, the amount of such damages must be reduced, if not be eliminated, to comport with federal Constitutional standards.

FOR A TWENTIETH DEFENSE TO THE COMPLAINT
(Punitive Damages Improperly Claimed)

225. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

226. Punitive damages are inappropriate in this case since this Defendant did not engage in any malicious, reckless, wrongful, or intentional conduct upon which an award of punitive damages could be based, as the evidence will show.

FOR A TWENTY-FIRST DEFENSE TO THE COMPLAINT
(Limitation on Punitive Damages)

227. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

228. Defendant hereby asserts the limitations on damage awards established by S.C. Code § 15-32-510 et seq., specifically § 15-32-530, as an affirmative limit on any Plaintiff's ability to receive an award of punitive damages, as well as to the amount of such damages.

FOR A TWENTY-SECOND DEFENSE TO THE COMPLAINT
(Bifurcation of Punitive Damages Trial Phase—S.C. Code § 15-32-520)

229. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

230. In the event that any Plaintiff is allowed to present evidence to support a demand for punitive damages, Defendant hereby asserts its statutory right, under S.C. Code § 15-32-520, to bifurcation of the punitive-damages phase of trial, to be conducted in the same manner and according to the same standards as prescribed by this statutory section.

FOR A TWENTY-THIRD DEFENSE TO THE COMPLAINT
(Reservation of Rights)

231. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

232. Defendant hereby explicitly reserves the right to alter, amend, supplement, modify, or withdraw any responses to the allegations of fact herein given, or defenses asserted, as this litigation proceeds, and all in conformity with the applicable Rules of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, Defendant respectfully requests a judgment from the Court which dismisses each and every cause of action set out in the First Amended Complaint with prejudice, and further, awards such other relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
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Attorney for Defendant LL of SC, LLC

August 20, 2021
Greenville, South Carolina

DEMAND FOR TRIAL BY JURY

The undersigned counsel for Defendant respectfully requests a trial by jury as to all issues to which the right of trial by jury is available.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham

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

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

vs.)

J. WAYNE RAIFORD, *Individually and*)
as President of the Board of Directors of)
Mount Vintage Plantation Homeowners)
Association, Inc.; **LL OF SC, LLC;**)
RAIFORD TOPSAIL ISLAND)
INVESTMENTS, LLC; MOUNT)
VINTAGE PLANTATION)
HOMEOWNERS ASSOCIATION,)
INC. a/k/a MOUNT VINTAGE)
HOMEOWNERS ASSOCIATION,)
INC.; GREGG KARLBERG; JERRY)
SCHAEFFER; LEIGH ANN KEELS;)
 and **JOHN DOE,**)
)

Defendants.)

ANSWER OF DEFENDANT RAIFORD TOPSAIL
ISLAND INVESTMENTS, LLC TO THE FIRST
AMENDED COMPLAINT

TRIAL BY JURY DEMANDED

Raiford Topsail Island Investments, LLC, Defendant, by and through its undersigned counsel, respectfully submits this Answer to the allegations of the First Amended Complaint.

FOR A FIRST DEFENSE TO THE COMPLAINT
(General Denial)

1. Unless expressly admitted, qualified, or otherwise explained, each and every allegation of the First Amended Complaint is denied.

FOR A SECOND DEFENSE TO THE COMPLAINT
(Responses to Specific Allegations)

2. Responding to Paragraph 1 of the First Amended Complaint, such allegations are admitted.

3. Responding to Paragraph 2 of the First Amended Complaint, such allegations are, on information and belief, admitted.

4. Responding to Paragraph 3 of the First Amended Complaint, such allegations are, on information and belief, admitted.

5. Responding to Paragraph 4 of the First Amended Complaint, such allegations are, on information and belief, admitted.

6. Responding to Paragraph 5 of the First Amended Complaint, such allegations are, on information and belief, admitted.

7. Responding to Paragraph 6 of the First Amended Complaint, such allegations are, on information and belief, admitted.

8. Responding to Paragraph 7 of the First Amended Complaint, such allegations are, on information and belief, admitted.

9. Responding to Paragraph 8 of the First Amended Complaint, such allegations are, on information and belief, admitted.

10. Responding to Paragraph 9 of the First Amended Complaint, such allegations are, on information and belief, admitted.

11. Responding to Paragraph 10 of the First Amended Complaint, such allegations are, on information and belief, admitted.

12. Responding to Paragraph 11 of the First Amended Complaint, it is admitted that Defendant LL of SC, LLC (referred to hereinafter as “**Defendant LL**”) is a limited liability company organized and existing under the laws of the State of South Carolina, and that it owns lots within Mount Vintage. The remainder of Paragraph 11 is denied, with the clarification that Defendant LL’s registered address is 235 Mt. Vintage Plantation Drive, North Augusta, South Carolina 29860.

13. Responding to Paragraph 12 of the First Amended Complaint, it is admitted that Defendant Raiford Topsail Island Investments, LLC (referred to hereinafter as “**Defendant Topsail**”) is a limited liability company organized and existing under the laws of the State of South Carolina, and that it owns lots within Mount Vintage. The remainder of Paragraph 12 is denied, with the clarification that Defendant Topsail’s registered address is 235 Mt. Vintage Plantation Drive, North Augusta, South Carolina 29860.

14. Responding to Paragraph 13 of the First Amended Complaint, such allegations are admitted.

15. Responding to Paragraph 14 of the First Amended Complaint, it is admitted that co-Defendant J. Wayne Raiford (“**Defendant Raiford**”) is a member and manager of Defendant LL, and that Defendant Raiford has acted on behalf of Defendants LL and Topsail. To the extent that Paragraph 14 contains other or further allegations to which a response may be required, such allegations are denied.

16. Responding to Paragraph 15 of the First Amended Complaint, such allegations are admitted.

17. Responding to Paragraph 16 of the First Amended Complaint, it is admitted that Defendant Raiford has been elected to the Board of Directors of the Mount Vintage Plantation Homeowners Association, Inc. (“**Defendant Association**”), and that Defendant Raiford serves as the Chairman and President of Defendant Association. To the extent that Paragraph 16 contains other or further allegations to which a response may be required, such allegations are denied.

18. Responding to Paragraph 17 of the First Amended Complaint, such allegations are denied.

19. Responding to Paragraph 18 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to frame this lawsuit against Defendant Raiford in each of the capacities identified. To the extent that Paragraph 18 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

20. Responding to Paragraph 19 of the First Amended Complaint, such allegations are admitted.

21. Responding to Paragraph 20 of the First Amended Complaint, it is admitted that co-Defendants Karlberg and Schaefer are former members of the Board of Directors of Defendant Association, and additionally, are former residents of the Mount Vintage subdivision. With respect to the allegations of Paragraph 20 regarding co-Defendant “John Doe,” this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

22. Paragraph 21 of the First Amended Complaint is denied.

23. Responding to Paragraph 22 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to refer to co-Defendants Karlberg, Schaefer, Doe, and Keels as “the

Board.” To the extent that Paragraph 22 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

24. Responding to Paragraph 23 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to refer to co-Defendants LL, Topsail, Raiford, and Keels as “Affiliated Defendants.” To the extent that Paragraph 23 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

25. Responding to Paragraph 24 of the First Amended Complaint, it is admitted that Plaintiffs have appeared to refer to establish naming conventions for “Defendants” and “All Defendants.” To the extent that Paragraph 24 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

26. Responding to Paragraph 25 of the First Amended Complaint, it is admitted only that Plaintiffs are “members” of Defendant Association in the sense that they are bound by the pertinent covenants and restrictions applicable to property owners in the Mount Vintage subdivision. To the extent that the allegations of Paragraph 25 call for this Defendant to assert, as a matter of law, whether any individual Plaintiff is a “member” of the Defendant Association, as the term “member” may be understood or applied under the laws of the State of South Carolina regarding not-for-profit corporations, and relatedly what the nature and extent of any particular Plaintiff’s “membership” rights or powers may be, such allegations demand a response to legal conclusions, to which no response is required, and none shall be deemed as having been given. To the extent that a response may be required as to such allegations, the same are denied.

27. Responding to Paragraph 26 of the First Amended Complaint, it is admitted that Plaintiffs have attempted to bring this action in a derivative capacity. This Defendant denies that Plaintiffs are competent to do so. To the extent that Paragraph 26 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

28. Responding to Paragraph 27 of the First Amended Complaint, it is admitted that Plaintiffs have attempted to bring this action in a class-representative capacity. This Defendant denies that Plaintiffs are competent to do so. To the extent that Paragraph 27 contains other or further allegations to which a response may be required, this Defendant lacks knowledge or information sufficient to form a belief as to their truth, and so denies the same.

29. Responding to Paragraph 28 of the First Amended Complaint, such allegations are, on information and belief, admitted.

30. Responding to Paragraph 29 of the First Amended Complaint, such allegations are admitted.

31. Responding to Paragraph 30 of the First Amended Complaint, it is admitted that the Articles of Incorporation for the Association were stamped as filed with the South Carolina Secretary of State on April 3, 2000. It is denied, however, that the Association was required to have “members,” as alleged by the assertions of this Paragraph. To the extent that Paragraph 30 contains other or further allegations to which a response may be required, the same are denied.

32. Responding to Paragraph 31 of the First Amended Complaint, it is admitted that the Articles of Incorporation for the Association states that “Members shall consist of two classes as set forth in Declaration of Protective Covenants, Conditions and Restrictions of Mount Vintage Plantation and Bylaws of Mount Vintage Homeowners Association, Inc.” To the extent that

Paragraph 31 contains other or further allegations to which a response may be required, the same are denied.

33. Responding to Paragraph 32 of the First Amended Complaint, it is admitted that the Defendant Association is entitled to impose dues and assessments upon its members, and is authorized and empowered to do so by not only South Carolina law, but also by the Defendant Association's governance documents. Furthermore, it is admitted that, to the best of this Defendant's knowledge, information, and belief, the Association has regularly exercised the power and authority to impose dues and assessments, as contemplated by South Carolina law and the Defendant Association's governance documents. To the extent the allegations of Paragraph 32 require some other or further response, the same are denied.

34. Responding to Paragraph 33 of the First Amended Complaint, it is admitted that the covenants, restrictions, and bylaws that govern the Defendant Association's administration of the Mount Vintage subdivision have been amended on several occasions since their initial publication. To the extent that the allegations of Paragraph 33 require some other or further response, the same are denied.

35. Responding to Paragraph 34 of the First Amended Complaint, it is admitted only that Defendant LL is the holder of certain developer rights, as evidenced by a Deed in Lieu of Foreclosure, recorded in the Office of the Register of Deeds for Edgefield County at Book 1445, Pages 1-12. To the extent that the allegations of Paragraph 34 require some other or further response, the same are denied.

36. Responding to Paragraph 35 of the First Amended Complaint, it is admitted only that Defendant LL is the holder of certain developer rights, as evidenced by a Deed in Lieu of Foreclosure, recorded in the Office of the Register of Deeds for Edgefield County at Book 1445,

Pages 1-12. To the extent that the allegations of Paragraph 35 require some other or further response, the same are denied.

37. Responding to Paragraph 36 of the First Amended Complaint, it is admitted only that Defendant LL is the holder of certain developer rights, as evidenced by a Deed in Lieu of Foreclosure, recorded in the Office of the Register of Deeds for Edgefield County at Book 1445, Pages 1-12. To the extent that the allegations of Paragraph 36 require some other or further response, the same are denied.

38. Responding to Paragraph 37 of the First Amended Complaint, such allegations are admitted.

39. Responding to Paragraph 38 of the First Amended Complaint, such allegations are generally admitted, with the clarification that the class of property owners who belong to “Class B” do not presently have voting privileges.

40. Responding to Paragraph 39 of the First Amended Complaint, such allegations are admitted.

41. Responding to Paragraph 40 of the First Amended Complaint, such allegations are admitted.

42. Paragraph 41 of the First Amended Complaint is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 41 require some response, they are denied.

43. Responding to Paragraph 42 of the First Amended Complaint, it is admitted only that the current version of the covenants and restrictions explains that “Class B members shall consist of all other owners of residential lots in Mount Vintage, other than the Developer.” To the

extent that the allegations of Paragraph 42 require some other or further response, the same are denied.

44. Responding to Paragraph 43 of the First Amended Complaint, it is admitted only that the current version of the covenants and restrictions explains that “Class B members shall not have voting privileges until the Developer shall have conveyed all residential lots and tracts within Mount Vintage including, but not limited to, additional phases, sections and developments which the Developer may decide to add to the scheme of the development as contemplated under Article IX of this Declaration of Protective Covenants, Conditions and Restrictions of Mount Vintage, unless and until the Developer, at its sole and exclusive discretion, elects to transfer such rights, voting privileges and duties to Class B members of the Association at which time Class B members shall become Class A members.” To the extent that the allegations of Paragraph 43 require some other or further response, the same are denied.

45. Responding to Paragraph 44 of the First Amended Complaint, such allegations are admitted.

46. Responding to Paragraph 45 of the First Amended Complaint, such allegations are admitted.

47. Responding to Paragraph 46 of the First Amended Complaint, such allegations are denied.

48. Responding to Paragraph 47 of the First Amended Complaint, such allegations are denied.

49. Responding to Paragraph 48 of the First Amended Complaint, such allegations are denied.

50. Responding to Paragraph 49 of the First Amended Complaint, it is admitted only that the current version of the covenants and restrictions authorizes “the Developer as well as its successors, assigns, or heirs, as the case may be, [to] have, and are [thereby] granted, the exclusive right, exercisable at any time and from time to time, to amend or to grant exceptions to the[] Declarations and to waive, repea[l] or vary the[] Declarations in any one or more respects whenever in the sole and controlled opinion of the Developer, such waiver, repeal or variance shall not be materially detrimental to the general nature in development of Mount Vintage as a residential area.” To the extent that the allegations of Paragraph 49 require some other or further response, the same are denied.

51. Responding to Paragraph 50 of the First Amended Complaint, such allegations are denied.

52. Responding to Paragraph 51 of the First Amended Complaint, such allegations are denied.

53. Responding to Paragraph 52 of the First Amended Complaint, such allegations are denied.

54. Responding to Paragraph 53 of the First Amended Complaint, such allegations are denied.

55. Responding to Paragraph 54 of the First Amended Complaint, such allegations are denied.

56. Responding to Paragraph 55 of the First Amended Complaint, such allegations are denied.

57. Responding to Paragraph 56 of the First Amended Complaint, such allegations are denied.

58. Responding to Paragraph 57 of the First Amended Complaint, such allegations are denied.

59. Responding to Paragraph 58 of the First Amended Complaint, such allegations are denied.

60. Responding to Paragraph 59 of the First Amended Complaint, such allegations are denied.

61. Responding to Paragraph 60 of the First Amended Complaint, such allegations are denied.

62. Responding to Paragraph 61 of the First Amended Complaint, such allegations are denied.

63. Responding to Paragraph 62 of the First Amended Complaint, such allegations are denied.

64. Responding to Paragraph 63 of the First Amended Complaint, such allegations are denied.

65. Responding to Paragraph 64 of the First Amended Complaint, it is admitted that one or more Plaintiffs filed a complaint with the South Carolina Department of Consumer Affairs. To the extent that the allegations of Paragraph 64 require some other or further response, the same are denied.

66. Responding to Paragraph 65 of the First Amended Complaint, such allegations are denied.

67. Responding to Paragraph 66 of the First Amended Complaint, such allegations are denied.

68. Responding to Paragraph 67 of the First Amended Complaint, such allegations are denied.

69. Responding to Paragraph 68 of the First Amended Complaint, such allegations are denied.

70. Responding to Paragraph 69 of the First Amended Complaint, such allegations are denied.

71. Responding to Paragraph 70 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 70 require some other or further response, such allegations are denied.

72. Responding to Paragraph 71 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 71 require some other or further response, such allegations are denied.

73. Responding to Paragraph 72 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 72 require some other or further response, such allegations are denied.

74. Responding to Paragraph 73 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, and so denies the same.

75. Responding to Paragraph 74 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, and so denies the same.

76. Responding to Paragraph 75 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, and so denies the same.

77. Responding to Paragraph 76 of the First Amended Complaint, such allegations are admitted.

78. Responding to Paragraph 77 of the First Amended Complaint, such allegations are, on information and belief, admitted.

79. Responding to Paragraph 78 of the First Amended Complaint, such allegations are, on information and belief, admitted.

80. Responding to Paragraph 79 of the First Amended Complaint, such allegations are, on information and belief, admitted.

81. Responding to Paragraph 80 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 80 require some other or further response, such allegations are denied.

82. Responding to Paragraph 81 of the First Amended Complaint, such allegations are admitted.

83. Responding to Paragraph 82 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and

none shall be deemed as having been given. To the extent that the allegations of Paragraph 82 require some other or further response, such allegations are denied.

84. Responding to Paragraph 83 of the First Amended Complaint, such allegations are denied.

85. Responding to Paragraph 84 of the First Amended Complaint, such allegations are denied.

86. Responding to Paragraph 85 of the First Amended Complaint, such allegations are denied.

87. Responding to Paragraph 86 of the First Amended Complaint, such allegations are denied.

88. Responding to Paragraph 87 of the First Amended Complaint, such allegations are denied.

89. Responding to Paragraph 88 of the First Amended Complaint, such allegations are denied.

90. Responding to Paragraph 89 of the First Amended Complaint, such allegations are denied.

91. Responding to Paragraph 90 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 90 require some other or further response, such allegations are denied.

92. Responding to Paragraph 91 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and

none shall be deemed as having been given. To the extent that the allegations of Paragraph 91 require some other or further response, such allegations are denied.

93. Responding to Paragraph 92 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 92 require some other or further response, such allegations are denied.

94. Responding to Paragraph 93 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 93 require some other or further response, such allegations are denied.

95. Responding to Paragraph 94 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 94 require some other or further response, such allegations are denied.

96. Responding to Paragraph 95 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 95 require some other or further response, such allegations are denied.

97. Responding to Paragraph 96 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 96 require some other or further response, such allegations are denied.

98. Responding to Paragraph 97 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 97 require some other or further response, such allegations are denied.

99. Responding to Paragraph 98 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 98 require some other or further response, such allegations are denied.

100. Responding to Paragraph 99 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 99 require some other or further response, such allegations are denied.

101. Responding to Paragraph 100 of the First Amended Complaint, such allegations are denied.

102. Paragraph 101 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 101 require some response, they are denied.

103. Paragraph 102 is framed in the form of assertions of law, addressed to other co-Defendants, to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 102 require some response, they are denied.

104. Paragraph 103 is framed in the form of an assertion of law, addressed to other co-Defendants, to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 103 require some response, they are denied.

105. Paragraph 104 is framed in the form of an assertion of law, addressed to other co-Defendants, to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 104 require some response, they are denied.

106. Paragraph 105 is framed in the form of an assertion of law, addressed to other co-Defendants, to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 105 require some response, they are denied.

107. Responding to Paragraph 106 of the First Amended Complaint, such allegations are denied.

108. Responding to Paragraph 107 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 107 require some other or further response from this Defendant, such allegations, including all subparts, are denied.

109. Responding to Paragraph 108 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 108 may require a response from this Defendant, such allegations, including all subparts, are denied.

110. Responding to Paragraph 109 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 109 require some other or further response from this Defendant, such allegations, including all subparts, are denied.

111. Responding to Paragraph 110 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 110 require some other or further response from this Defendant, such allegations, including all subparts, are denied.

112. Responding to Paragraph 111 of the First Amended Complaint, such allegations are addressed to other co-Defendants, and therefore, no response is required from this Defendant, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 111 require some other or further response from this Defendant, such allegations, including all subparts, are denied.

113. Paragraph 112 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 112 require some response, they are denied.

114. Paragraph 113 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 113 require some response, they are denied.

115. Responding to Paragraph 114 of the First Amended Complaint, such allegations, including all subparts, are denied.

116. Responding to Paragraph 115 of the First Amended Complaint, such allegations are denied.

117. Responding to Paragraph 116 of the First Amended Complaint, it is admitted that Plaintiffs have sought to proceed in the capacity of class representatives. It is denied that Plaintiffs

are entitled to do so. To the extent that the allegations of Paragraph 112 require some other or further response, they are denied.

118. Paragraph 117 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 117 require some response, they are denied.

119. Paragraph 118 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 118 require some response, they are denied.

120. Responding to Paragraph 119 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

121. Paragraph 120 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 120 require some response, they are denied.

122. Paragraph 121 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 121 require some response, they are denied.

123. Paragraph 122 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 122 require some response, they are denied.

124. Paragraph 123 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 123 require some response, they are denied.

125. Paragraph 124 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 124 require some response, they are denied.

126. Paragraph 125 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 125 require some response, they are denied.

127. Paragraph 126 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 126 require some response, they are denied.

128. Responding to Paragraph 127 of the First Amended Complaint, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

129. Responding to Paragraph 128 of the First Amended Complaint, such allegations are denied.

130. Responding to Paragraph 129 of the First Amended Complaint, such allegations are denied.

131. Responding to Paragraph 130 of the First Amended Complaint, such allegations are denied.

132. Paragraph 131 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 131 require some response, they are denied.

133. Responding to Paragraph 132 of the First Amended Complaint, such allegations are denied.

134. Paragraph 133 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 133 require some response, they are denied.

135. Responding to Paragraph 134 of the First Amended Complaint, such allegations are denied.

136. Paragraph 135 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 135 require some response, they are denied.

137. Paragraph 136 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 136 require some response, they are denied.

138. Paragraph 137 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 137 require some response, they are denied.

FOR A THIRD DEFENSE TO THE FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

139. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

140. Responding to Paragraph 139 of the First Amended Complaint, such allegations are denied.

141. Responding to Paragraph 140 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

142. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

143. Responding to Paragraph 142 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 142 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 142 require a response from this Defendant, such allegations are denied.

144. Responding to Paragraph 143 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 143 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 143 require a response from this Defendant, such allegations are denied.

145. Responding to Paragraph 144 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 144 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 144 require a response from this Defendant, such allegations are denied.

146. Responding to Paragraph 145 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 145 is required, and none shall be

deemed as having been given. To the extent that the allegations of Paragraph 145 require a response from this Defendant, such allegations are denied.

147. Responding to Paragraph 146 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 146 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 146 require a response from this Defendant, such allegations are denied.

148. Responding to Paragraph 147 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 147 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 147 require a response from this Defendant, such allegations are denied.

149. Responding to Paragraph 148 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 148 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 148 require a response from this Defendant, such allegations are denied.

150. Responding to Paragraph 149 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 149 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 149 require a response from this Defendant, such allegations are denied.

FOR A THIRD DEFENSE TO THE THIRD CAUSE OF ACTION
(Violation of the S.C. Unfair Trade Practices Act)

151. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

152. Paragraph 151 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 151 require some response, they are admitted.

153. Paragraph 152 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 152 require some response, they are denied.

154. Responding to Paragraph 153 of the First Amended Complaint, such allegations are denied.

155. Responding to Paragraph 154 of the First Amended Complaint, such allegations are denied.

156. Responding to Paragraph 155 of the First Amended Complaint, such allegations are denied.

157. Responding to Paragraph 156 of the First Amended Complaint, such allegations are denied.

158. Paragraph 157 is framed as an assertion of Plaintiffs' future intentions; no response is required to this assertion, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 157 require some response, the same are denied.

FOR A THIRD DEFENSE TO THE FOURTH CAUSE OF ACTION
(Declaratory Action/Reformation)

159. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

160. Responding to Paragraph 159 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 159 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 159 require a response from this Defendant, such allegations are denied.

161. Responding to Paragraph 160 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 160 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 160 require a response from this Defendant, such allegations are denied.

162. Responding to Paragraph 161 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 161 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 161 require a response from this Defendant, such allegations are denied.

FOR A THIRD DEFENSE TO THE FIFTH CAUSE OF ACTION
(Unjust Enrichment)

163. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

164. Paragraph 163 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 163 require some response, they are admitted.

165. Responding to Paragraph 164 of the First Amended Complaint, such allegations are denied.

166. Responding to Paragraph 165 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE SIXTH CAUSE OF ACTION
(Promissory Estoppel)

167. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

168. Responding to Paragraph 167 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 167 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 167 require a response from this Defendant, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

169. Responding to Paragraph 168 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 168 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 168 require a response from this Defendant, this Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

170. Responding to Paragraph 169 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 169 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 169 require a response from this Defendant, this Defendant is without knowledge or information sufficient to form a belief as to the truth of what a predecessor to Defendant LL expected or foresaw, and so denies the same. To the extent that the allegations of Paragraph 169 require some other or further response, the same are denied.

171. Responding to Paragraph 170 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 170 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 170 require a response from this Defendant, such allegations are denied.

172. Responding to Paragraph 171 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 171 is required, and none shall be deemed as having been given. Furthermore, Paragraph 171 is framed in the form of an assertion

of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 171 require some response, they are denied.

173. Responding to Paragraph 172 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 172 is required, and none shall be deemed as having been given. Furthermore, Paragraph 172 is framed in the form of an assertion of law to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 172 require some response, they are denied.

174. Responding to Paragraph 173 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 173 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 173 require a response from this Defendant, such allegations are denied.

175. Responding to Paragraph 174 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 174 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 174 require a response from this Defendant, such allegations are denied.

FOR A THIRD DEFENSE TO THE SEVENTH CAUSE OF ACTION
(Accounting/Injunctive Relief)

176. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

177. Responding to Paragraph 176 of the First Amended Complaint, such allegations are denied.

178. Responding to Paragraph 177 of the First Amended Complaint, such allegations are denied.

179. Responding to Paragraph 178 of the First Amended Complaint, such allegations are denied.

180. Responding to Paragraph 179 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE EIGHTH CAUSE OF ACTION
(Civil Conspiracy)

181. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

182. Responding to Paragraph 181 of the First Amended Complaint, such allegations are denied.

183. Responding to Paragraph 182 of the First Amended Complaint, such allegations are denied.

184. Responding to Paragraph 183 of the First Amended Complaint, such allegations are denied.

185. Responding to Paragraph 184 of the First Amended Complaint, such allegations are denied.

186. Responding to Paragraph 185 of the First Amended Complaint, such allegations are denied.

FOR A THIRD DEFENSE TO THE NINTH CAUSE OF ACTION
(Reimbursement for Wrongful Assessments)

187. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

188. Responding to Paragraph 187 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 187 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 187 require a response from this Defendant, such allegations are denied.

189. Responding to Paragraph 188 of the First Amended Complaint, this Defendant has not been identified as a responsible party for the relief sought in connection with this cause of action; accordingly, no response to the allegations of Paragraph 188 is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 188 require a response from this Defendant, such allegations are denied.

FOR A THIRD DEFENSE TO THE PRAYER FOR RELIEF

190. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

191. The Paragraph which begins with the word “Wherefore,” and each of its constituent subparts, constitutes a prayer for relief to which no response is required, and none shall be deemed as having been given. To the extent that a response may be required, the Prayer for Relief, including each and every of its subparts, is denied.

FOR A FOURTH DEFENSE TO THE COMPLAINT
(Re-Assertion of General Denial)

192. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

193. As previously asserted, unless expressly admitted, qualified, or otherwise explained, each and every allegation of the First Amended Complaint is denied.

FOR A FIFTH DEFENSE TO THE COMPLAINT
(Failure to State Facts Sufficient to Constitute a Cause of Action)

194. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

195. With regard to one or more causes of action, Plaintiffs have failed to state facts sufficient to constitute a cause of action against this Defendant. Therefore, consistent with Rule 12(b)(6), SCRCP, such defective causes of action must be dismissed.

FOR A SIXTH DEFENSE TO THE COMPLAINT
(Statute of Limitations)

196. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

197. With regard to one or more causes of action, Plaintiffs' claim is barred by the applicable statute(s) of limitation. Therefore, to the extent that such causes of action are legally impermissible, they must be dismissed.

FOR A SEVENTH DEFENSE TO THE COMPLAINT
(Lack of Standing)

198. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

199. With regard to one or more causes of action, as well as the capacities (derivative, class representative, and/or otherwise) in which the Plaintiffs are attempting to proceed, Plaintiffs are not competent to do so, and therefore, lack standing to proceed on such claims and/or in such capacities. Accordingly, to the extent that any Plaintiff lacks standing, such claims must be dismissed pursuant to Rule 12(b)(1) and/or Rule 23, SCRCP.

FOR AN EIGHTH DEFENSE TO THE COMPLAINT
(Statute of Frauds)

200. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

201. To the extent that the applicable statute(s) of frauds prohibits one or more causes of action, in part or in whole, such causes of action that are impermissible under the statute(s) of frauds must be dismissed.

FOR A NINTH DEFENSE TO THE COMPLAINT
(Merger)

202. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

203. The doctrine of merger is raised as a defense against any portion, or all, of any Plaintiffs' claim against this Defendant which is repugnant to such doctrine.

FOR A TENTH DEFENSE TO THE COMPLAINT
(Business Judgment Rule)

204. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

205. To the extent that any portion of any Plaintiff's claim is predicated on the assertion of wrongful acts undertaken by this Defendant, the business judgment rule is raised as a defense against such claims.

FOR AN ELEVENTH DEFENSE TO THE COMPLAINT
(Economic Loss Rule)

206. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

207. With regard to one or more causes of action, Plaintiffs' claim to relief is restricted, in part if not in whole, by the doctrine of economic loss and/or the economic loss rule. Such doctrine and/or rule is hereby affirmatively asserted as a defense against Plaintiffs' claims.

FOR A TWELFTH DEFENSE TO THE COMPLAINT
(Good Faith)

208. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

209. To the extent that any portion of any Plaintiff's claim is predicated on the assertion that this Defendant has acted in anything other than good faith, such claim is denied, and this Defendant would assert the fact of its own good faith as a defense to any adverse claim presented in the First Amended Complaint.

FOR A THIRTEENTH DEFENSE TO THE COMPLAINT
(Waiver)

210. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

211. This Defendant raises the doctrine of waiver as a defense to any claim for relief presented in the First Amended Complaint.

FOR A FOURTEENTH DEFENSE TO THE COMPLAINT
(Estoppel)

212. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

213. This Defendant raises the doctrine of estoppel as a defense to any claim for relief presented in the First Amended Complaint.

FOR A FIFTEENTH DEFENSE TO THE COMPLAINT
(Acquiescence)

214. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

215. This Defendant raises the doctrine of acquiescence as a defense to any claim for relief presented in the First Amended Complaint.

FOR A SIXTEENTH DEFENSE TO THE COMPLAINT
(Laches)

216. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

217. This Defendant raises the doctrine of laches as a defense to any claim for relief presented in the First Amended Complaint.

FOR A SEVENTEENTH DEFENSE TO THE COMPLAINT
(Failure to Mitigate)

218. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

219. To the extent that any Plaintiff is entitled to any relief from this Defendant whatsoever, which is expressly denied, this Defendant asserts that such Plaintiff's entitlement thereto was occasioned, in part if not whole, as a direct and proximate consequence of his or her own failure to mitigate their damages. The failure to mitigate damages is therefore raised as a defense.

FOR AN EIGHTEENTH DEFENSE TO THE COMPLAINT
(Parol Evidence Rule)

220. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

221. To the extent that any portion of any Plaintiff's claim is predicated on information excludable by the parol evidence rule, such information must be excluded, and the claim must be dismissed.

FOR A NINETEENTH DEFENSE TO THE COMPLAINT
(Unconstitutionality of Punitive Damages)

222. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

223. Plaintiffs' claim for punitive damages violates the Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States in the following particulars:

- a. Plaintiffs' claim for punitive damages violates the Sixth and Fourteenth Amendments because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas punitive damages are a fine or penalty and quasi-criminal in nature; as such, they require the "beyond the reasonable doubt" standard of proof;
- b. Plaintiffs' claim for punitive damages violates Defendant's right to access to the courts guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of unlimited punitive damages chills Defendant's exercise of that right;
- c. Plaintiffs' claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:
 - i. The standard or test for determining the requisite mental state of Defendant for imposition of punitive damages is void for vagueness;
 - ii. Insofar as punitive damages are not measured against actual injury to Plaintiffs and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be

awarded is indeterminate at the time of Defendant's alleged egregious conduct;

- iii. The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that Defendant is denied equal protection of law; and,
- iv. Punitive damages may be imposed without a requisite showing of hatred, spite, ill-will, or wrongful motive.

224. Accordingly, to the extent that any Plaintiff becomes entitled to any award of punitive damages against this Defendant, the amount of such damages must be reduced, if not be eliminated, to comport with federal Constitutional standards.

FOR A TWENTIETH DEFENSE TO THE COMPLAINT
(Punitive Damages Improperly Claimed)

225. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

226. Punitive damages are inappropriate in this case since this Defendant did not engage in any malicious, reckless, wrongful, or intentional conduct upon which an award of punitive damages could be based, as the evidence will show.

FOR A TWENTY-FIRST DEFENSE TO THE COMPLAINT
(Limitation on Punitive Damages)

227. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

228. Defendant hereby asserts the limitations on damage awards established by S.C. Code § 15-32-510 et seq., specifically § 15-32-530, as an affirmative limit on any Plaintiff's ability to receive an award of punitive damages, as well as to the amount of such damages.

FOR A TWENTY-SECOND DEFENSE TO THE COMPLAINT
(Bifurcation of Punitive Damages Trial Phase—S.C. Code § 15-32-520)

229. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

230. In the event that any Plaintiff is allowed to present evidence to support a demand for punitive damages, Defendant hereby asserts its statutory right, under S.C. Code § 15-32-520, to bifurcation of the punitive-damages phase of trial, to be conducted in the same manner and according to the same standards as prescribed by this statutory section.

FOR A TWENTY-THIRD DEFENSE TO THE COMPLAINT
(Reservation of Rights)

231. The contents of each of the paragraphs offered in furtherance of the foregoing defenses are hereby incorporated into this specific defense, to the extent the foregoing contents are not inconsistent with the responses that follow in this specific defense.

232. Defendant hereby explicitly reserves the right to alter, amend, supplement, modify, or withdraw any responses to the allegations of fact herein given, or defenses asserted, as this litigation proceeds, and all in conformity with the applicable Rules of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, Defendant respectfully requests a judgment from the Court which dismisses each and every cause of action set out in the First Amended Complaint with prejudice, and further, awards such other relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
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*Attorney for Defendant Raiford Topsail Island
Investments, LLC*

August 20, 2021
Greenville, South Carolina

DEMAND FOR TRIAL BY JURY

The undersigned counsel for Defendant respectfully requests a trial by jury as to all issues to which the right of trial by jury is available.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham

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

TO THE DEFENDANTS ABOVE NAMED:

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

-SIGNATURES ON FOLLOWING PAGE-

Plaintiffs' Second Amended Summons

/s/Anna S. McCann
Justin O' Toole Lucey
Anna McCann
JUSTIN O'TOOLE LUCEY, PA
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Attorneys for Plaintiffs

September 11, 2023
Mount Pleasant, SC

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

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

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

Plaintiffs' Second Amended Complaint

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs' Second Amended Complaint

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

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

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

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

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

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

(Background; Formation of Association; Governing Documents)

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

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

Plaintiffs' Second Amended Complaint

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Perpetual and Complete Developer Control)

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

¹ Nor is Keels a member of The Association.

Plaintiffs' Second Amended Complaint

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

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

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

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

Plaintiffs' Second Amended Complaint

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

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

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

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

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

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

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

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

Plaintiffs' Second Amended Complaint

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

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

(Futility of Demand)

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

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

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

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

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

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

(Operation of Association for the Benefit of Affiliated Defendants)

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

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

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

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

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

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

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

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

(Amenities)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Other and Cumulative Matters)

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

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

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

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

Plaintiffs' Second Amended Complaint

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

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

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

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

(Additional Statement of Liability and Negligent Acts)

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

Plaintiffs' Second Amended Complaint

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

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

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

100. Defendant LL has been negligent as follows:

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

Plaintiffs' Second Amended Complaint

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

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

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

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

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

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

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

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

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

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

(Damages)

106. Defendants have proximately damaged Plaintiffs as follows:

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

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

(Class Action Allegations)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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violated the Plaintiffs rights as described herein.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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attorneys' fees, and costs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A SIXTH CAUSE OF ACTION

(Promissory Estoppel or Declaration by Individual Plaintiffs & Class as to Defendant LL)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs' Second Amended Complaint

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

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

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

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

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

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

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

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

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

JUSTIN O'TOOLE LUCEY, P.A.

By: /s/Anna S. McCann
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Anna McCann
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September 11, 2023
Charleston, South Carolina

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

TO THE DEFENDANTS ABOVE NAMED:

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

-SIGNATURES ON FOLLOWING PAGE-

Pls' Third Amended Summons & Complaint

/s/Anna S. McCann
Justin O' Toole Lucey
Anna McCann
JUSTIN O'TOOLE LUCEY, PA
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Attorneys for Plaintiffs

September 4, 2024
Mount Pleasant, SC

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

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

1. Plaintiffs are residents of the neighborhood and development known as Mount Vintage (hereinafter referred to as "Mount Vintage").
2. Plaintiffs Ferraro's residence is located at 106 Captain Johnsons Drive, North Augusta, South Carolina, 29860, and is also described as Lot 0-48 on a plat of Mount Vintage by Newby-Proctor and Associates dated August 21, 2006.
3. Plaintiff Przybyl's residence is located at 255 Homeward Bound Drive, North Augusta, South Carolina, 29860, and is also described as Lot D-14 on a plat of Mount Vintage by

Pls' Third Amended Summons & Complaint

Newby-Proctor and Associates dated September 6, 2000.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Background; Formation of Association; Governing Documents)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pls' Third Amended Summons & Complaint

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

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

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

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

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

(Perpetual and Complete Developer Control)

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

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

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

¹ Nor is Keels a member of The Association.

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

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

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

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

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

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

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

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

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

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

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

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

(Futility of Demand)

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

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

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

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

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

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

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

(Operation of Association for the Benefit of Defendants)

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

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

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

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

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

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

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

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

(Amenities)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Other and Cumulative Matters)

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

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

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

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

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

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

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

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

(Additional Statement of Liability and Negligent Acts)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Damages)

108. Defendants have proximately damaged Plaintiffs as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A FIFTH CAUSE OF ACTION
(Unjust Enrichment)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR AN EIGHTH CAUSE OF ACTION
(Civil Conspiracy)

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

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

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

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

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

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

JUSTIN O'TOOLE LUCEY, P.A.

By: /s/Anna S. McCann
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September 4, 2024
Charleston, South Carolina

State of South Carolina
County of Anderson

Court of Common Pleas

Elizabeth Ferraro, et al	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2021-CP-19-00050
	)	
LL of SC, LLC, et al	)	
	)	
Defendant.	)	

July 25, 2024
Anderson, South Carolina

B E F O R E:

The Honorable R. Lawton McIntosh, Judge.

A P P E A R A N C E S:

Justin Lucey, Esquire
Attorney for the Plaintiff

Steven Buckingham, Esquire
Attorney for the Defendant

Charles Krawczyk, Esquire
Attorney for the Defendant

Lisa Scott
Circuit Court Reporter

P R O C E E D I N G S

- - -

THE COURT: Good afternoon. My understanding is y'all have worked on resolutions to the subject matter; is that right?

MR. LUCEY: Yes, sir. That's right.

THE COURT: How much of it were y'all able to get done?

MR. LUCEY: We got almost half of it done, Your Honor.

THE COURT: Sir?

MR. LUCEY: Almost half of it, sir.

THE COURT: Okay.

MR. LUCEY: Well, there's four motions at issue. We -- we are half resolved on one and think we can resolve the other half in the coming ten days.

THE COURT: Okay.

MR. LUCEY: One, we've -- the motion to compel, we've taken it from many, many documents down to just a few general ones left. We still have the complete motion to release escrow funds pending, and we have plaintiff's motion to dismiss the counterclaims pending. Neither one of those have been resolved in any way.

1 THE COURT: All right. I don't have any
2 particular order for y'all to go in. Do y'all have
3 a particular order?

4 MR. LUCEY: Yes, sir. Because the motion to
5 dismiss is the oldest one and I already pulled it
6 out and put it in front of me. If the Court's okay,
7 I'll proceed on that.

8 THE COURT: Okay.

9 MR. LUCEY: If I may hand up to the Court and
10 to my opposing counsel several cases. There are
11 three principle cases that plaintiff relies upon in
12 their motion to dismiss the counterclaims. And
13 before I get to those cases, let me put our context
14 in order for the Court, please, Your Honor.

15 The Court will recall last summer or so, the
16 Court held a fairness hearing on an initial
17 settle -- initial round of settlements for -- for
18 the -- the action -- derivative action and approved
19 those settlements. As part of the fairness hearing,
20 we gave notice to all the members of the
21 association -- the homeowners association, the
22 owners of the property in Mount Vintage.

23 At least one of those members came and spoke
24 virtually at our fairness hearing. Additionally,
25 Ms. Grady, the vice president of the association

1 who's in the courtroom today, also spoke at that
2 fairness hearing. The Court may recall one of the
3 complaints made by one of the homeowners at the
4 fairness hearing was that they weren't getting
5 enough information about the lawsuit.

6 Well, thereafter, Your Honor, following the
7 fairness hearing, plaintiff e-mailed to the
8 homeowners association membership, members only, a
9 copy of their two expert reports. The expert report
10 from a CPA named Livingston who's written forensic
11 accounting report on the financial transactions
12 about which plaintiffs complain and the reserve
13 study performed by a different expert as to what
14 reserve should've been accumulated in the reserve
15 accounts to fund the eventual repair or replacement
16 of the assets in the Mount Vintage community. So
17 plaintiff separated those to the membership, who are
18 obviously interested parties of this proceeding, and
19 one of which has shown up at our fairness hearing
20 and trusted better -- more and better information on
21 the litigation.

22 At or about the time of the fairness hearing,
23 Your Honor, the Court granted plaintiff leave to
24 amend their complaint because we were getting rid of
25 some of the individual defendants and (inaudible)

1 obligations. Whatever happens to these, we amended.
2 And in response, we received a counterclaim. We
3 received a counterclaim from the two corporate
4 developer defendants, separate counterclaims in two
5 different pleadings, corporate defendant named LL
6 South Carolina, and a corporate defendant named RTI.
7 They both sued all clients of Justin Lucey Law Firm
8 for defamation. We would suggest that not having
9 countersued any other plaintiffs by name or named a
10 group of plaintiffs that they were countersuing, the
11 countersuit fails immediately on its face. It's not
12 been pled properly.

13 Assuming for the sake of discussion they had
14 named their counter defendants properly, the
15 statements about which they are countersuing for
16 defamation by plaintiff's two expert witnesses,
17 disclosed expert witnesses in this case, disclosed
18 in our discovery responses, where the reports have
19 been produced in this case in our discovery
20 responses, under the law of the state, those
21 statements by our experts and my office and the
22 publication of those statements to these interested
23 parties only, the members of the association, are,
24 one, absolutely judicially privileged. And on a
25 completely separate ground under a separate legal

1 document in this state, they're absolutely
2 conditionally privileged.

3 As to the judicial privilege, the law in this
4 state is that statement made -- statements made ---

5 THE COURT: Go back for a second ---

6 MR. LUCEY: Yes, sir.

7 THE COURT: --- about your absolute privilege.
8 Isn't that a qualified privilege?

9 MR. LUCEY: The absolute privilege is not.
10 Conditional privilege is qualified, but the
11 qualifications are not satisfied by the pleading in
12 this case, so we're still entitled to a dismissal,
13 Your Honor.

14 THE COURT: Okay. Go ahead.

15 MR. LUCEY: On the judicial -- excuse me.
16 On -- on the absolute privilege, Your Honor,
17 statements made by participants in a litigation or
18 by witnesses in that litigation or for the
19 litigation, even -- even preliminary work such as
20 writing a report before the lawsuit even gets filed,
21 is absolute privilege, period. End of discussion.
22 Nothing else in the world matters, period.

23 On conditional immunity, Your Honor, on
24 conditional, statements made to interested parties
25 only are -- have immunity. And in this case, the

1 pleadings themselves admit the only statements and
2 only publication made by plaintiff's counsel was to
3 the members of the association that are represented
4 in this derivative action by the derivative
5 plaintiffs, and there are members of the
6 association, are we're bound by the results of this
7 litigation. They are interested parties.

8 If I may call the Court's attention to the
9 three pieces I already handed up to the Court to
10 show the Court the case law that substantiates what
11 plaintiffs have -- are stating to the Court. I've
12 handed the Court the cases of Woodward, In Re Jasper
13 Pellets, and the case of *Crowell v. Herring*. The
14 third case, *Crowell v. Herring* is already discussed
15 at length in Woodward, so we can put it aside,
16 except to know that the District Court in Woodward
17 was using precedent from a South Carolina Court of
18 Appeals in making their decision.

19 And if we go to the case of In Re Jasper
20 Pellets, this was a -- before the bankruptcy court
21 was the District of South Carolina on a motion to
22 dismiss. And it was on -- if we go to page six of
23 the opinion handed to the Court, we will see it was
24 on a motion to dismiss a counterclaim for
25 defamation. The exact same circumstance we find

1 ourselves here in today.

2 And on page seven, under discussions and
3 conclusion of law, first paragraph, last sentence,
4 we find again we are in the same situation, quote,
5 Moreover, CMB argues that the defamation
6 counterclaim should be dismissed because of
7 statements at issue are protected by the judicial
8 privilege, end quote. Same as plaintiff is doing
9 here.

10 And if we proceed to page nine on the lower
11 right-hand corner where we see headnote 16 through
12 19, the Court, the Jasper Appellate's Court states,
13 quote, An absolute privilege exists as to any
14 utterance arising out of the judicial proceeding and
15 having any reasonable relationship to it, including
16 preliminary steps leading to judicial action of any
17 official nature provided those steps bear reasonable
18 relationship to it, end quote.

19 Skipping citation, the Court goes on to say,
20 quote, this privilege is established upon a showing
21 that the statements were issued as a part of the
22 judicial proceeding and the alleged defamation is
23 relevant to a matter at issue in the case. And
24 these statements, Your Honor, are the core of
25 plaintiff's case. They're the core of plaintiff's

1 notice in this case.

2 After the next citation, the Court goes on to
3 say, the privilege extends to, quote, Statements of
4 judgments, parties, and witnesses offered in the
5 course of judicial proceedings.

6 On the following page on the lower -- page ten
7 in the lower right-hand corner, it confirms that the
8 only statements at issue are statements relating to
9 the case and grants a dismissal of the defamation
10 counterclaim. Any ambiguity of what aspect of
11 witness work and witness statements are protected by
12 this doctrine.

13 We can go to the Woodward case that we handed
14 up to the Court. And on page five, we'll see that,
15 first, they discuss prominal. They trust -- discuss
16 what is the state of this doctrine in this state.
17 And the context in which the Woodward courts going
18 to decide this matter, it's ruling on defamation
19 based upon expert reports, same as this case, expert
20 reports prepared for litigation. And it finds that
21 even if these reports aren't even used yet in the
22 trial, or later, even if the plaintiff never ends up
23 filing suit, if the expert reports were prepared for
24 that judicial proceeding, then they have absolute
25 immunity.

1 It goes on to explain on page six, as to part
2 of basis for this judicial doctrine, quote, If a
3 difference of opinion is going to bring about a
4 defamation cause of action, there will be a chilling
5 effect upon a party's ability to initiate legitimate
6 inquiries and also upon a medical provider's ability
7 to render contradictory but needed second opinions,
8 end quote.

9 It goes on to say, quote, Likewise, Dr. Wise's
10 reports were prepared with this understanding that
11 he would be called as a witness in this case.
12 Absolute immunity for defendant's expert witness
13 cannot be limited by plaintiff's decision to
14 actually file suit. Accordingly, this report finds
15 that the reports are protected by absolute
16 privilege.

17 Having found an absolute privilege, the
18 Woodward report goes a step further on the same
19 page, Your Honor, and so does the qualified
20 privilege. And concludes further, the reports are
21 also protected by a qualified privilege. The
22 essential elements of a conditional privilege
23 communication may accordingly be enumerated as good
24 faith, an interest in the upheld, a statement
25 limited in a scope to this purpose, a proper

1 occasion, and publication in a proper manner and to
2 proper parties only. The privilege arises from
3 necessity of full and unrestricted communication
4 concerning a matter in which the parties have an
5 interest or a duty and is not restricted within any
6 narrow limits.

7 If one reads their counterclaim, it does recite
8 that there are experts hired by my office to assist
9 in the prosecution of this case and the issues in
10 this case, and that they are only complaining about
11 the publication made by my office of these reports
12 of the conclusions in the reports to the association
13 membership. There's no allegation in those
14 counterclaims that it was published to anybody but
15 interested parties. So as plead, the counterclaims
16 for defamation by both corporate entities fails on
17 both immunities, Your Honor. Thank you, sir.

18 THE COURT: Thank you.

19 MR. BUCKINGHAM: May it please the Court?
20 Steve Buckingham for two of the defendants, LL of SC
21 and Raiford Topsail Island Investments, LLC. It's
22 good to see you again, Judge.

23 There is an important qualification to
24 everything that Mr. Lucey just articulated, and that
25 is with the absolute privilege for things made in

1 the context of litigation. The privilege only
2 attaches -- the case law is very clear about this.
3 It only attaches to things that happen during the
4 course of litigation in a judicial proceeding. Not
5 excited utterance. There may be a conditional
6 privilege.

7 THE COURT: Hang on. The language of what he
8 just read looks like that if I go out and get an
9 expert witness to give me a report and I went ahead
10 and filed suit, that it's protected absolute.

11 MR. BUCKINGHAM: That's exactly right. Getting
12 the report and the contents of that report for the
13 purposes of litigation, that's privilege. That's
14 not what they did. What they did was, they took
15 that report. That report had already been prepared,
16 and then republished it to people that they didn't
17 represent because I think we -- this was a marketing
18 pitch. It was not just letting interested people
19 know because they're asking. This was a marketing
20 pitch. And let me run down the time line for you.
21 I want to be absolutely crystal clear when I tell
22 you about the time line, so that illustrates how
23 this was a marketing pitch.

24 This case was mediated in May of 2023, and
25 there was this partial settlement that resulted. On

1 June 26th last year, that's when there was
2 preliminary approval of the settlement. Final
3 approval of the settlement came on August 2nd. On
4 September 5th, a Friday, the stipulation of
5 dismissal was filed to reflect that partial
6 dismissal.

7 The following Monday, September 8th, for the
8 first time, the plaintiffs sent their first e-mail
9 to all the homeowners with the first expert report
10 attached. Three days later on September 11th, the
11 plaintiffs sent another e-mail to all homeowners
12 saying, hey, here's our first expert report on
13 forensic -- forensic expert damages. And on that
14 same day, the plaintiff filed their second amended
15 complaint. Less than a month later on October 2nd,
16 the third e-mail was sent to all homeowners,
17 regardless of who the plaintiffs represented, with
18 the other expert report. Now ---

19 THE COURT: If you are a homeowner and you buy
20 property, are you -- are you required to be in the
21 association?

22 MR. BUCKINGHAM: Yes.

23 THE COURT: And this is -- this is brought on
24 by half the association, which they are members?

25 MR. BUCKINGHAM: So they contend this -- this

1 case was initially filed as a class action. They've
2 abandoned the class claims. They are now claiming
3 to proceed in a derivative capacity. I filed the
4 motion for summary judgment on that issue because we
5 don't think that they have standing to participate
6 in a derivative capacity. So they may have the
7 contention that they represent everyone, but they
8 never moved to certify a class.

9 And, frankly, this reference of my motion for
10 summary judgment, out of 200 homeowner signatures
11 from when this lawsuit was filed saying we want
12 nothing to do with this. That's bolstered by what
13 you'll hear from Mr. Krawczyk on this shortly.
14 That's bolstered by other signatures, some
15 overlapping, of homeowners that said we want these
16 funds released that are being held in escrow right
17 now.

18 There's a whole bunch of homeowners that don't
19 want to be involved in this, are not represented by
20 Mr. Lucey. And the time line that I illustrated for
21 you, I hope demonstrates to the Court's satisfaction
22 that this case -- by the time these expert reports
23 were produced to all the homeowners, they've been
24 already prepared for months. Maybe in some cases
25 years. But the day they get produced to everyone,

1 just happens to be right after the stipulation of
2 dismissal was filed as to partial ones when
3 presumably they were intending on ramping up their
4 class claims against my clients.

5 They don't -- they didn't represent those
6 folks. They sent those out under the guise of,
7 we're just being friendly and letting you guys know
8 what's going on in order to recruit clients to their
9 cause. I mean, that's -- that's simply what's going
10 on here, and that was not in the context of a
11 judicial proceeding. It was perfectly fine for them
12 to procure these expert reports. We're not suing
13 about that at all. But then by taking that and
14 pushing it back out to folks that had already said
15 we don't want to be involved, they have transformed
16 this into something that takes it outside of the
17 absolute privilege.

18 As much as I personally selfishly would love
19 for lawyers to be absolutely immune from anything
20 that we do, the fact that litigation doesn't change
21 that, and we still have a responsibility as lawyers
22 in the context of litigation when we're acting
23 outside this courtroom to communicate truthful
24 matters.

25 And here's -- I quoted this in my counterclaim,

1 but here's what the homeowners were told in a
2 so-called expert report that was far from neutral.
3 And I'm not going to quote it at length. I'm just
4 going to quote a couple of things that's in their
5 conclusion from the witness's report. And it's
6 titled "conclusion."

7 "The defendant's acquisition of lots and how
8 Mount Vintage Plantation was made at the expense of
9 the association as illustrated by the calculation of
10 lost revenue. The defendant's actions were for the
11 benefit of the defendant and the defendant's
12 associates as illustrated by the calculation of
13 revenues. The defendant caused the association to
14 overpay for the golf community. The defendant has
15 not established adequate reserves." And there's a
16 couple of other ones there.

17 And this report also defines the defendants to
18 mean LL of SC and Raiford Topsail Island
19 Investments. Nowhere was this company with the
20 disclosure of pay. This is the opinion of an expert
21 that we, the plaintiffs, have paid for. This was
22 sent out to the homeowners under the guise of
23 conclusion as a statement of fact. And these
24 homeowners had already expressed we want nothing to
25 do with it. This was done to change their minds.

1 THE COURT: So quote me again the requirements
2 under the South Carolina law that takes the absolute
3 privilege out of it being absolute.

4 MR. BUCKINGHAM: Yes, sir. Well, the rule is
5 that nothing is absolute, right? But the privilege
6 is established when comments are made or the
7 defamatory material is made in the context of a
8 judicial proceeding. And it's right in front of me
9 here, the law that Mr. Lucey provided.

10 Yeah. The two elements are: The statements
11 were issued as part of a judicial proceeding. And,
12 second, the alleged defamation is relevant to a
13 matter at issue in this case. This is not the
14 context of a judicial proceeding. It's outside of
15 it. It's not the guise of class claims. No class
16 had been certified then. No class is being pursued
17 now. Mr. Lucey just simply never represented these
18 folks. It was an effort to recruit them, and I have
19 not found any case anywhere that suggests a lawyer's
20 recruitment materials, client recruitment materials,
21 can be excused from the law of defamation. I've
22 just not seen it anywhere.

23 In fact, it's been hard for me to find any case
24 reported anywhere on a similar fact pattern as this.
25 The closest one I got -- and I meant to bring a copy

1 of this and I think I left it on my -- my desk -- is
2 a Second Circuit, Federal Second Circuit, from 2000.
3 The case citation is 234 F.3d 92. And in this case,
4 it involves someone who's a whistleblower in a
5 corporation. It's proceedings of a whistleblower to
6 say that there were inflating evaluations of
7 property in New York.

8 And the company that they accused of engaging
9 this fraud went out and got their own expert
10 opinions to say that, no, there was no maritus
11 claims. And then the business that procured those
12 expert reports sent that out to all of its other
13 shareholders to relay their concerns that there had
14 been some sort of malfeasance that had gone on at
15 the required securities litigation, right?

16 Now, those expert reports, at least according
17 to the opinion, painted the whistleblower as someone
18 who is not truthful and not be truthful within the
19 material respects. And that whistleblower brought a
20 lawsuit against -- the defamation lawsuit against
21 their former employer based upon the publication of
22 those expert reports.

23 There's no question that the business had a
24 right to go out and do its own investigation to
25 determine if wrongful activity had occurred and

1 to -- and to request and receive reports from the
2 experts about that. But then to take those reports
3 and push them out to other folks in a way that was
4 disparaging is problematic from the perspective of
5 immunity. It doesn't get absolute judicial
6 immunity. Now, certainly there can be an argument
7 that it was conditional immunity, but that is not
8 proper for a 12(b)(6) motion, and that's what this
9 is.

10 It's also worth raising to the Court's
11 attention that whether we're arguing about an
12 absolute privilege or a conditional privilege, those
13 are both affirmative defenses. And while there is
14 very limited authority in South Carolina to suggest
15 that if the facts are absolutely apparent that the
16 basis for absolute privilege exists, a motion to
17 dismiss can be granted at the 12(b) stage. There is
18 no such authority for a conditional privilege, but
19 that's a question of fact ultimately because it gets
20 into motives and reasons behind why communications
21 were sent. And that is not properly before this
22 Court at this stage.

23 So, candidly, because we don't perceive any
24 basis under the laws of this state or of other
25 states where the republication of a defamatory

1 expert report is just excused. We would
2 respectfully request this motion to dismiss be
3 denied and they have to answer our allegations.

4 THE COURT: Well, let me -- I'm just gandering
5 and looking at your counterclaim issue raised by
6 Mr. Lucey that said, hey, you can't just say all my
7 clients. You got to name the defendants.

8 MR. BUCKINGHAM: Sure.

9 THE COURT: You wouldn't disagree with that,
10 would you?

11 MR. BUCKINGHAM: Oh, no, absolutely, I disagree
12 with that. So I think I named those folks pretty
13 clearly.

14 THE COURT: Did you?

15 MR. BUCKINGHAM: Yeah, in paragraph 225. The
16 counterclaim defendants are each and every person
17 who is represented by Justin O'Toole Lucey, P.A.

18 THE COURT: That's not naming them. That's
19 just saying that's a group. You got to name them.

20 MR. BUCKINGHAM: That depends on if they've
21 properly disclosed who their clients actually are at
22 this point. And remember, they weren't proceeding
23 in a class capacity, and they have just their named
24 plaintiffs on these proceedings. I don't know
25 exactly who they represent. And I don't know that

1 they have an obligation to tell me exactly who they
2 represent, but I described the class pretty
3 particularly, right? The client that he represents,
4 his firm represents, in this litigation as of
5 October 2, 2023, which is the last dated
6 publication.

7 THE COURT: Well, let me ask you another
8 question.

9 MR. BUCKINGHAM: Sure.

10 THE COURT: Assuming that I agree with you,
11 don't you think that putting these issues up in
12 front of the jury in this case would be confusing to
13 the jury and that this case needs to be separated
14 and brought as a separate action against Mr. Lucey
15 and his clients and not trying this case? That's
16 the first thing that came across my mind.

17 MR. BUCKINGHAM: I'm not sure that I'm opposed
18 to it, but I don't think it would necessarily be
19 confusing because ultimately ---

20 THE COURT: I think that you are running down a
21 lot of rabbit holes when you got alleged malfeasance
22 over here, other money over here, shadiness over
23 here. I mean, I think it's going to be a lot of
24 information for a jury to follow and understand.

25 MR. BUCKINGHAM: It -- it very well could be,

1 but as Mr. Lucey said, these expert reports really
2 form the foundation of their claim, and so they got
3 to prove the treatment of them anyway.

4 THE COURT: Well, you know that may be a
5 defense. Okay. Anything further?

6 MR. BUCKINGHAM: No, sir.

7 MR. LUCEY: Your Honor, counsel's mistaken.
8 There's actually a certified class in this case.

9 THE COURT: There is?

10 MR. LUCEY: There is, sir.

11 THE COURT: Okay.

12 MR. LUCEY: You issued an order on August 15,
13 2023, approving our ---

14 THE COURT: I hadn't gotten --- what -- what --
15 who is the certified class, Mr. Lucey?

16 MR. LUCEY: The membership of the HOA, Your
17 Honor.

18 MR. BUCKINGHAM: Whoa. Whoa. That was the
19 conditional certification for settlement. And as
20 you may recall, in May of this year, he said there
21 are no class claims. That was -- that was
22 conditioned and there's nothing in the order that
23 you issued that said there's a class certified.

24 MR. LUCEY: I'm not pursuing a class action
25 against these parties. A certified class was made

1 by this Court in approving our settlement agreement
2 and it wasn't just something that plaintiffs asked
3 for. Actually, the defendants who settled, the
4 former board of directors, requires a certified
5 class so they would know the claims are gone
6 forever.

7 THE COURT: Well, let me ask you this,
8 Mr. Lucey. Would anything contained in those expert
9 witness's report have to do with this settlement at
10 all in this case?

11 MR. LUCEY: Let me back into that if you don't
12 mind, Your Honor. Before you all cert -- before
13 this Court certified the settlement class, this
14 Court approved our class notice to the homeowners.
15 The class notice to the homeowners, which this
16 defendant did not object to, referenced the exact
17 two expert reports that they're complaining about
18 now that have been published. So the homeowners had
19 already been advised in the Court approved notice
20 that these reports regarding the conduct of their
21 association existed.

22 And it was only after this class was certified,
23 and the Court found that plaintiff's counsel, my
24 firm, was -- had fairly -- and plaintiffs had fairly
25 and adequately protected the interest of the

1 settlement class, that those -- and after the
2 inquiry in the Court's presence in that fairness
3 hearing saying they had not received enough
4 information. That is only after that that those
5 reports were sent out. The -- this issue -- these
6 issues of the petitions, there have been some ghost
7 petitions in this case. The petition ---

8 THE COURT: I'm sorry. Say that again.

9 MR. LUCEY: There have been some ghost -- ghost
10 petitions in this case procured by
11 misrepresentation. The petition that they want you
12 to pay attention to now, the 221 signatures, alleged
13 signatures that we've never seen that say they don't
14 want to be in this suit, they've never communicated
15 that to us. They've never given us a copy of that
16 petition. They -- they reference it in the motion
17 for summary judgment they filed a few days ago, but
18 they've never attached it or given it to us. We
19 wouldn't know the name of any of those signatures
20 that had said they don't want information. All we
21 know is we are class counsel. They are our clients
22 in this settlement that had occurred less than -- or
23 had been approved less than 30 days prior to those
24 reports being e-mailed to the class membership.

25 The whistleblower case we've heard about, I

1 don't know what we're talking about because there's
2 no memorandum in opposition to this motion and
3 there's no copy of the case for this Court to look
4 at or counsel to look at. I don't know what it's --
5 I can't respond to a case that doesn't exist because
6 there is no opposition to the motion to this
7 memorandum.

8 This -- this red herring is a second issue in
9 this case -- petition I think counsel just
10 referenced it. A petition regarding releasing the
11 escrow, plaintiff's counsel releasing escrow.
12 What's that got to do with the defamation
13 counterclaim? Nothing. But to the extent of the
14 matter is we're going to show the Court when that
15 escrow motion comes up that only 65 out of 550
16 families have signed that petition. Sixty-five out
17 of 550. That's about 14 percent. That's not a very
18 overwhelming presentation.

19 Out of the several, we'll also show the Court
20 that both petitions were procured by
21 misrepresentation. To the extent they're relevant
22 on whether or not a counterclaim can be pled or was
23 properly pled, both of them were procured by
24 misrepresentation and failure to properly disclose.

25 The -- this thing about these e-mails being a

1 marketing effort, that's a -- that's a nice
2 argument, but there's not a shred of evidence in
3 this Court that that occurred and there's not a
4 shred of allegation in the counterclaim that was
5 plaintiff's counsel arguing over. That's just
6 hogwash. There's no evidence that we accepted any
7 additional retainers. We certainly haven't had
8 plaintiff who was sued. And we haven't had any --
9 any claims against the remaining corporate deposed
10 for any new homeowners. So this marketing thing is
11 unsupported hogwash -- recruitment I think is what
12 they were calling it.

13 The bottom line, Your Honor, is -- is that
14 plaintiff has presented to the Court three cases
15 that clearly, clearly say in the State of South
16 Carolina that publications of an expert report in
17 relationship to a judicial proceeding, even the
18 next -- even if the judicial proceeding never even
19 ensues is an accusation ---

20 THE COURT: Well, the question of fact is
21 whether or not it is in relationship to a judicial
22 proceeding.

23 MR. LUCEY: Their pleadings say it is. Their
24 pleadings -- their pleadings list out what the
25 conclusions are in the report. And those

1 conclusions tie in exactly with the extremely
2 detailed allegations that this Court may recall in
3 our 75-page complaint where we detailed this little
4 red herring. The Court considered our complaint
5 several years ago where at the time this Court
6 denying the motion to dismiss. But the issues is,
7 the financial issues that the report address are the
8 same financial issues in our complaint. There's no
9 allegation to take ---

10 THE COURT: You don't answer my question,
11 though.

12 MR. LUCEY: What's that?

13 THE COURT: The question is in my mind:
14 Mr. Buckingham says, look, I don't have these in the
15 scope of this litigation. It was just you
16 freelancing trying to get business. I know you said
17 there's nothing to support that and there very well
18 may not be, but does that create a question of fact
19 potentially as to whether or not this was in the
20 scope of this litigation or not?

21 MR. LUCEY: Not when there's a court order from
22 this Court appointing his class counsel for the
23 settlement class ---

24 THE COURT: You think that resolves that?

25 MR. LUCEY: --- that are the people that

1 received that report. It's absolutely privileged.

2 THE COURT: Okay.

3 MR. LUCEY: And he -- it's -- it's just
4 difficult not to even consider that in the context
5 of this Court having heard a fairness hearing, and
6 one of the homeowners can come to this Court and say
7 plaintiff's counsel needs to provide us with more
8 information. We're not ---

9 THE COURT: That did occur.

10 MR. LUCEY: Yes, sir.

11 THE COURT: Let me ask you something to the
12 extent that I don't grant your motion. And not
13 saying I'm not going to; I'm just saying if I don't.
14 Do you agree that this matter should be separated
15 and tried separately from this case?

16 MR. LUCEY: Absolutely. I agree and I also
17 have to plead who the counter defendants are.
18 There's no class pleadings in here. The allegation
19 is I've defined the class. There's no class
20 pleadings in this counterclaim. There's no class
21 definition. There is no class. And he's not named
22 a ---

23 THE COURT: Hang on. You're kind of saying
24 it's a class and it's not a class. And I'm
25 getting -- I'm only from Anderson, so I get confused

1 easily.

2 MR. LUCEY: He says he sued a class of counter
3 defendants. There's no countersuit class pleadings
4 or allegations in his counterclaim that justifies
5 that statement. All he did is say, I'm suing all of
6 Justin's clients. That's not how you litigate in
7 this state. If -- if -- if he doesn't know some, he
8 needs to use some John Does. He needs to describe
9 who they are. He needs to put forth class
10 allegations and define his class. This counterclaim
11 does not define a defendant and has not named any
12 defendant. Thank you, Your Honor.

13 THE COURT: All right.

14 MR. LUCEY: And by the way, at this point,
15 we're 45 days before trial. They've known this --
16 this motion to dismiss has been pending for months
17 and months since we received the counterclaim, I
18 believe, late last year. They've had an
19 opportunity. They know the trial is coming. The
20 Court scheduled this trial months ago. They've had
21 an opportunity for 9 months to look at their
22 pleadings and say, well, is there anything we're
23 missing? Is there anything we need to fix so we can
24 be part of that trial? They did not do so. There's
25 no motion to amend. There's no amended claim.

1 There's nothing in front of this Court. Now they're
2 trying to add new parties 6 weeks before a
3 date-certain trial. That's just untimely. Thank
4 you, sir.

5 THE COURT: With that, we ran into this the
6 other day. They wanted me to add a party when it's
7 180 days, add it to the case. I'm not saying you're
8 trying to do that, but I can tell you ---

9 MR. BUCKINGHAM: Well, so ---

10 THE COURT: This is a 2021 case. It needs to
11 go.

12 MR. BUCKINGHAM: Yes, sir. So it's our
13 contention that we're not adding any new parties. I
14 mean, it -- if it is the representation of Mr. Lucey
15 that his clients are only those who are identified
16 in the caption, and those names haven't changed over
17 the life of this case, but if he's telling me that
18 as of October 2, 2023, I'm happy to stipulate those
19 are the ones received. I just don't know.

20 THE COURT: Let me just tell you this: I'm
21 going to hold the motion under abeyance, but I can
22 tell you that case will not be tried with this
23 trial. I'm going separate it out. I just think
24 it's too confusing for the jury if I let it stay.
25 Okay.

1 MR. BUCKINGHAM: Okay.

2 THE COURT: I'm just putting y'all on notice,
3 so don't plan on that. What other motions do we
4 have?

5 MR. BUCKINGHAM: Just one final comment before
6 we move on?

7 THE COURT: Yes, sir.

8 MR. BUCKINGHAM: Is that okay?

9 THE COURT: Yes, sir.

10 MR. BUCKINGHAM: Despite the fact that the
11 plaintiff's law firm was appointed class counsel,
12 that order would've expired by some terms when the
13 stipulation of dismissal was filed on September 5th.
14 And these reports were sent out the following Monday
15 for the first time in the case, so there was no
16 class at the time that these were sent.

17 THE COURT: And what about the term? The class
18 order says it expires by a certain time?

19 MR. BUCKINGHAM: Well, presumably, the class
20 order would've expired when the stipulation of
21 dismissal for the class that was being severed was
22 filed terminating their portion of the case. There
23 was no class.

24 MR. LUCEY: No class on the one that expires
25 automatically. This class did not expire. There is

1 a release by the settlement class as enrolled by an
2 owner. It's enforceable by the Court. The class
3 did not expire, Your Honor.

4 THE COURT: Next motion.

5 MR. KRAWCZYK: And I don't mind going next in
6 the pleadings if we need, Your Honor.

7 THE COURT: Are you in order? I mean, it
8 sounded like it.

9 MR. KRAWCZYK: I -- I filed mine December of
10 last year. I don't know which one was next. So
11 mine is going -- mine is going to be more simple I
12 think, Your Honor.

13 My name is Charlie Krawczyk, and I represent
14 the homeowners association board. And as you well
15 know, the homeowners association board is still
16 defending only two causes of actions in this case.
17 One is for an accounting, and one is for a
18 declaratory judgement in the event that the
19 plaintiff is successful to change the covenants and
20 the voting rights and that sort of thing. So I'm --
21 I'm here for the existing board. I don't want to
22 bore you because I'm new in this case, but I want to
23 give you a little background on who I am so I --
24 it'll kind of help explain some of this.

25 I've represented Mount Vintage Homeowners

1 Association since about 2011. I've been tasked to
2 do specific things. I wasn't like somebody who came
3 to the board meetings all the time, but when they
4 had a specific legal problem, they would contact me
5 and my firm would help them over the years. And my
6 contact -- this is a case against -- currently
7 against the developer, and there is a -- there is
8 allegations in the complaint that this is a -- what
9 we call -- what Mr. Lucey refers to as a "developer
10 controlled board."

11 And I think even -- my deposition has been
12 taken in this case. I think that from a technical
13 standpoint, that's what the covenants allow. They
14 allow the developer to, you know, rip the board
15 apart and appoint new people on if that's what he
16 wants.

17 Since -- and my understanding is, since 2011,
18 so even before that, the original developers, I
19 don't think that's ever taken place. The board is
20 consisted of the developer, Mr. Rayford, as -- as
21 developer and the board president and three or four
22 homeowners. Okay. People from the community. I
23 have Ms. Brady here today. She's currently vice --
24 vice president of the association. These homes that
25 were sold, especially early on, are very big homes.

1 These are well-to-do people. These are people who
2 retired and are successful. Ms. Brady, herself, was
3 a controller for a number of parties. And they're
4 not connected to the developer at all. Okay. So --
5 that's right.

6 And -- and I understand Mr. Lucey's position as
7 being a developer controlled board from a legal
8 standpoint. I only say this because the motion I
9 have here today is for the release of settlement
10 funds. And if you recall, Your Honor, one of the
11 things that was just discussed was there was a
12 partial settlement in this case in which I think it
13 was \$2.9 million or something of that nature was
14 paid. And it was put -- a certain amount of money
15 was paid to Mr. Lucey and there was \$2.1 million ---

16 THE COURT: 1.64.

17 MR. KRAWCZYK: I'm sorry. 1.6. I'm getting
18 my -- my numbers mixed. \$1.6 million was put
19 aside. And in the Court's order, it says to be put
20 in the trust account, plaintiff's trust account. At
21 that time, Ms. -- I believe Ms. Brady stood up and
22 asked for this Court to disburse those funds to the
23 association, the homeowners board, and Mr. Lucey
24 objected to that. I think that was this question of
25 a developer controlled board. And this Court

1 basically said, we're going to punt this. We're
2 going to kick this down the road at this time. I'm
3 not going to make a decision on that and approve the
4 settlement.

5 So fast forward a little bit. Prior counsel
6 for the HOA was Mr. Josh Shaw who was appointed by
7 insurance -- he was insurance counsel. Once the
8 insurance paid their -- their -- their money, they
9 pulled counsel. The board asked me, because I have
10 some knowledge and background of the HOA, to step in
11 and what we believed to be sort of a limited
12 capacity seeing as the HOA is now sort of a
13 knowledgeable party of this (inaudible) outcome and
14 the other issue of the board. So ---

15 THE COURT: Don't -- don't the HOA members
16 serve the relationship of the developer under your
17 bylaws?

18 MR. KRAWCZYK: So my understanding is,
19 according to bylaws, he can appoint them. How the
20 board members are actually getting paid, are
21 volunteers. And the current board reviews who wants
22 to be on the board and then the current board votes
23 on new members when somebody steps down.

24 THE COURT: That doesn't answer my question.
25 Under the governing documents to set that up,

1 doesn't the developer retain the right to appoint a
2 board, a final board?

3 MR. KRAWCZYK: He does.

4 THE COURT: Okay.

5 MR. KRAWCZYK: No question. And I understand
6 Mr. Lucey has raised that in his -- his issue. So
7 to -- to get a little bit further on, one of the --
8 one of the important issues in this case was at some
9 point in time, the homeowners association purchased
10 the golf course from Apex Bank, okay, who had bought
11 that at an internet auction.

12 And it's a -- it's a -- it's a -- it's a long
13 story, but, essentially, Apex Bank agreed to finance
14 that purchase. And that purchase was initially at a
15 fixed rate of 4.5 percent. After I believe five
16 years, it went to a variable rate. And as we all
17 know, the interest rates have shot through the roof.
18 Currently, the interest rate on that loan is
19 nine-and-a-half percent.

20 And the request from the board versus the
21 request that was made to plaintiff's counsel to
22 release the funds. Board doesn't even want to touch
23 them. Don't send them to the developer. Don't send
24 them to the board. Let's take the money and then
25 send it straight to Apex Bank to pay down the

1 principle loan, which would save the homeowners
2 association \$13,000 a month. A little over \$150,000
3 a year.

4 The plaintiffs object -- objected to that.
5 First of all, they said we don't want to do it, and
6 they're objecting on a number of reasons. One was
7 this is still a developer controlled board, and
8 that's why the current board had filed this motion.
9 And they did so with the developer upstanding.

10 They filed this motion to -- to ask for these
11 funds to be released. And they don't want to touch
12 the money. So they -- they don't want to touch it.
13 They want to avoid the whole issue of dispute about
14 or even controlled board. All they see is that
15 we're paying \$150,000 a year to a bank and we don't
16 need to do that.

17 And at this point, all we knew is the money's
18 being held in Mr. Lucey's escrow account. What we
19 learned last week for the very first time, despite
20 this being filed and being an issue since October,
21 that it's being held in an escrow account, but that
22 it's interest bearing at 4 percent. Didn't know
23 that. Okay. So evidently it is making interest at
24 4 percent, be we still have five-and-a-half percent.
25 It's still costing nearly \$90,000 a year in interest

1 payments for the HOA.

2 And all the board is looking to do is to say,
3 hey, it's in the best interest of the plaintiffs.
4 It's in the best interest of the homeowners
5 association. It's in the best -- everybody's best
6 interest. We even said -- they even said that they
7 would take any assessments that were currently being
8 set aside for interest payments and put them into
9 rogue reserve accounts, which was another consent
10 they had. Again, just trying to make this money
11 work for the homeowners association. Now ---

12 THE COURT: Let me stop you.

13 MR. KRAWCZYK: Sure.

14 THE COURT: Mr. Lucey?

15 MR. LUCEY: Yes, Your Honor.

16 THE COURT: What he is proposing seems highly
17 reasonable to me in producing the raw debt that your
18 clients or the other members of this homeowners
19 association have to ultimately pay for by dues,
20 assessments, and others. Why don't you -- why
21 wouldn't you agree to pay it down? Is there a
22 reason -- a business reason not to?

23 MR. LUCEY: Yes, Your Honor. Because this
24 fiscal situation was created by the developer and
25 the developer controlled board. And to help them

1 solve that before the jury makes its damage award,
2 is not good for the HOA's case.

3 THE COURT: Are you looking after by not paying
4 it off because you want to wait for the jury?

5 MR. LUCEY: That's part of it. And, Your
6 Honor, there's also confirmed rumors in this
7 neighborhood that the developer's trying to sell the
8 developer interest and the control of the golf
9 course, but the golf course loan is too high.
10 Nobody wants it. Sure. We can pay ---

11 THE COURT: Say that again, please, sir.

12 MR. LUCEY: There are confirmed rumors in this
13 neighborhood, Mount Vintage, that the developer, the
14 defendant in this case, is negotiating a sale of
15 developer control and golf course control in Mount
16 Vintage as we speak. A pay down of the golf loan
17 that incumbers that amenity helps him sell out of
18 this neighborhood. Those aren't primary reasons.
19 Those are two or four or five reasons that we oppose
20 this.

21 THE COURT: Let me ask you again.

22 MR. LUCEY: Yes, sir.

23 THE COURT: And I hear you, but those seem to
24 be things that would go -- that both take in favor
25 of this -- the plaintiffs and not to the entire

1 homeowners association as a group, that's as a group
2 having debt service reduced by that amount seems to
3 be in their best interest, regardless of whether it
4 sells.

5 MR. LUCEY: As a group, the association needs
6 me to prevail at trial and recover from the
7 developer's damages -- the fiscal damages that we've
8 caused.

9 THE COURT: Well, let me ask you that then.

10 MR. LUCEY: Yes, sir.

11 THE COURT: At trial ---

12 MR. LUCEY: Yes, sir.

13 THE COURT: --- assuming that I say don't put
14 that money down.

15 MR. LUCEY: Right.

16 THE COURT: Why does that reduce your damages
17 that you have seen?

18 MR. LUCEY: Well, our damages is that all the
19 amenities are overleveraged, that the developer has
20 not fulfilled this request, the fiduciary
21 responsibility, to put this neighborhood on proper
22 fiscal footing. That is not just reserves. That is
23 the entire neighborhood. They've been raiding the
24 road fund every year for three years. They didn't
25 tell the homeowner membership most of the time. Why

1 are they raiding it? Because the developer is the
2 treasurer of the homeowners association board and
3 the president of the board. And they're not
4 fiscally managing this place properly. They've
5 never properly funded it. They've never funded the
6 reserves. The reason they need the money to pay the
7 interest, they're not actually paying the interest.
8 They want -- they want to pay -- they raided the
9 road reserve to pay the interest last year. This is
10 interest that was agreed to by a developer
11 controlled board in 2016. The developer ---

12 THE COURT: Let me stop you again.

13 MR. LUCEY: Yes, sir.

14 THE COURT: At trial, I mean, those seem like
15 those are things that you can bring up in your
16 testimony. And, in fact, we were the ones by what
17 we collected in this case to pay this debt service
18 down to this period -- this point here. I don't see
19 that that's a detriment to your client necessarily.

20 MR. LUCEY: Your Honor, there are some ways I
21 can agree with the Court, but, unfortunately, we're
22 only dealing with two or three parties right now.
23 And if I can buy myself an appeal to my verdict
24 against LL because it -- because evidence of
25 settlements came in. That's how the mortgage got

1 reduced. That tends to say plaintiff's claim to
2 represent verdict regarding 2.7 million and the
3 mortgage got paid down by the net of 4.5 million.
4 It's injecting appealable error in my trial. If the
5 develop who's on that board who's asking you to do
6 this, if the developer wants to stipulate that that
7 will not be an appealable issue, then my hands might
8 be tied.

9 MR. BUCKINGHAM: I think that would be wildly
10 reckless for me to stipulate to any appealable
11 issues before trial to see how evidence develops. I
12 can't possibly do that. I think -- I think, Your
13 Honor ---

14 THE COURT: I think that you can talk to your
15 client and see if y'all can't come up with some way
16 that we can work out something to get this money
17 paid to the bank, pay down this debt service so that
18 the group of homeowners don't get whacked every year
19 with these huge assessments.

20 MR. BUCKINGHAM: Yeah.

21 THE COURT: That seems to me would be in
22 everybody's best interest, including yours. And
23 y'all come up with a way to work around this that,
24 you know, so y'all are a lot smarter than I am,
25 guys, and I think y'all can come up with some way to

1 do that kind of thing. I'm not going to order it
2 right yet, but I'm telling you I'm very inclined to
3 do that, Mr. Lucey.

4 MR. LUCEY: Well, my biggest issue is keeping
5 appealable error out of this case because this --
6 these are settlement funds. How do you solve part
7 of the -- the remaining defendant's damages? If you
8 reduce their damages with settlement funds, how do
9 you -- how do you deal with that at trial? It's
10 very -- I need protection from appeal on it.
11 That's -- that's what I need. And -- and there's
12 only one party that can protect us, and that's the
13 president of the board that's asking this Court to
14 release the funds. He's wearing both hats. He's
15 wearing all the hats in this courtroom.

16 MR. KRAWCZYK: Your Honor, the motion was
17 passed without -- Mr. Rayford was standing. And so
18 I -- one of the things that has confused me about
19 this is this exact issue. And I understand that
20 the -- my understanding of the claim is that the
21 developer should have given more money towards the
22 developer's purchase, that his fair share -- his
23 percentage of that. The only thing -- the failure
24 to pay down the -- the -- the loan does is increase
25 the interest cost that these people are paying to

1 beef up the numbers.

2 And then the recovery on the other end, if
3 there is recovery on the other end, has to be offset
4 by cost and attorneys fees and all of that. I mean,
5 so -- I mean, I question the value of trial of this,
6 but I think Your Honor understands the basis of our
7 motion. Is it accepting of the trial and -- and
8 creating problems for -- for the plaintiff?

9 I have been asking for this explanation for a
10 long time. I haven't really received it other than
11 it's a contamination of evidence. I have not gotten
12 that justification, so I'm still here asking for the
13 money, which you're right, helps everybody. It
14 reduces risk. It reduces costs. And the other
15 thing that has been brought up, Your Honor, is one
16 of the requests to do this is one of the things the
17 board has been trying to do is to renegotiate the
18 loan.

19 THE COURT: Let me stop you. That's here nor
20 there.

21 MR. KRAWCZYK. Correct.

22 THE COURT: Okay. Ultimately, I believe,
23 Mr. Lucey, at the end of the day, who gets these
24 monies?

25 MR. LUCEY: Ultimately, at the end of day, the

1 money is intended for a homeowner controlled board
2 of directors, but it will go to the association no
3 matter who controls it at the end of the day,
4 subject to Court supervision.

5 MR. KRAWCZYK: So it's just a question of
6 what's in the best interest of the association is
7 with these funds.

8 THE COURT: Well, I hear what he's saying. I
9 hear what you're saying. I mean, it's kind of
10 interesting from my perspective, though. This is
11 going to be -- and this case has gotten personal and
12 it needs to back up a little bit, but even so, I
13 understand why it is, but I would urge you to put
14 your heads together and come up with some way to put
15 those monies in there to get rid of these debt fees,
16 regardless of who controls the board because debt is
17 debt is debt. It doesn't matter who controls that
18 dang board. And if it's a sale, your claim's been
19 filed. They'd have to make it subject to the sale,
20 but it's still -- it's under that. It couldn't just
21 go away. So I don't think that's a big threat to
22 you, Mr. Lucey, but I think you need to...

23 Do you think that y'all are interested in --
24 and I want a candid answer from you if you're
25 willing to give me one -- to try put your heads

1 together and come up with some way to get these
2 monies paid? Maybe creating some kind of safeguard
3 against appealable issues that I've created by
4 pushing this down your throat.

5 MR. LUCEY: Yes, Your Honor. I understand the
6 Court's ruling. I will get with counsel and see
7 what we can think up -- think through.

8 MR. BUCKINGHAM: I've got no problem with that.
9 The attorney's position I am in is, Mr. Rayford
10 abstained from the vote because of all the
11 contention and he controlled the board and he takes
12 what he does, so he stayed out of this vote. I
13 know ---

14 THE COURT: Listen, he can hire and fire at
15 will. I mean, it's a developer controlled board,
16 and there's nothing wrong with having a developer
17 controlled board. That's why they do it until they
18 sell enough of the property of the subdivision away
19 there. Let the homeowners associate -- association
20 take over now, but there's nothing wrong with that.
21 It's just a fact of life.

22 MR. BUCKINGHAM: Certainly, it's our position
23 that we would like to see this debt load reduced
24 quickly.

25 THE COURT: Anyway, let me know.

1 MR. KRAWCZYK: Thank you, Your Honor.

2 THE COURT: I can tell you what, we're not
3 doing anything in this case -- in this case not to
4 be tried in 90 days. I jumped over some things to
5 get it done, so I want to get it tried. What's --
6 what other motions are out there?

7 MR. LUCEY: Plaintiff's motion to compel
8 discovery against defendants, Your Honor. The
9 defendants have produced numerous documents, so the
10 list has been whittled down. One of the documents
11 we're still waiting on the defendant is an updated
12 version of Plaintiff Exhibit 5.46.

13 MR. BUCKINGHAM: Are you sure? I think that
14 was sent several days ago.

15 MR. LUCEY: 5.46 is a very complicated
16 multipage spreadsheet. In other words, it's a
17 combination of 20 spreadsheets in one spreadsheet
18 that are linked to each other. So the master
19 spreadsheet has really reliable information on each
20 sub-spreadsheet and you know what you're looking at.
21 And I've actually deposed a woman named Joan Lester
22 from Mr. Rayford's office at length about this
23 spreadsheet. And the information is on all fours of
24 our case, and we've been asking for an updated
25 version of it for over a year. We did receive

1 something last week. We received a single-sheet
2 spreadsheet in PDF in a different format. We did
3 not receive this exhibit back. The relevancy, Your
4 Honor, is that I deposed Ms. Lester on April 18,
5 2024, and I have the deposition excerpts here. And
6 I said, "Are you keeping up with this information?"
7 She no longer keeps the per lot landscaping cost up
8 because the CPA is doing that. Everything else, she
9 keeps up. It is a comprehensive document and
10 report. We need the PDF, too. We need the
11 original. The native, not the PDF. And we need the
12 updated document. If they want to contend that
13 she's keeping a different document now, then we need
14 the last available version of Exhibit 5.46. This
15 has all -- not all. This has, let's say, 50 or
16 60 percent of the transactional information that is
17 relevant to our case. It has the source of every
18 one of the developer lot purchases, the time of the
19 purchase. I see the date of the purchase. The type
20 of transaction. Was it a tax sale or was it a
21 distressed homeowner sale, et cetera, or was it
22 the -- the 42 lots he had the HOA sale to him, the
23 Yeoman's lots, after they foreclosed on them for
24 \$5,000 a lot and resold them for 45,000 a lot. Was
25 it those? This information is all here and it all

1 has been consolidated into the business record.

2 They've been keeping it for years. And we need the
3 updated version of it and we need it in native.

4 MR. BUCKINGHAM: So I assume native means excel
5 format?

6 MR. LUCEY: Excel, not PDF, but also the PDF we
7 received is not ---

8 MR. BUCKINGHAM: Oh, and so I thought ---

9 MR. LUCEY: One type -- one type of excel.

10 MR. BUCKINGHAM: Oh, you mean there's only one
11 type of excel?

12 MR. LUCEY: One type of excel.

13 MR. BUCKINGHAM: Then that's my mistake, Your
14 Honor. I'll be glad to submit.

15 THE COURT: All right. What other documents do
16 you have?

17 MR. LUCEY: Your Honor, some -- some e-mails
18 that we were pushing for in 2003 [sic] were produced
19 in the first part of 2024, so 2023 to 2024. They
20 have been produced to us, but they've been produced
21 in PDF, not native as we requested. When you have a
22 PDF e-mail, you can't click through the attachment,
23 the relevant attachment. First, if somebody does
24 transmittals. They're transmitting contracts. We
25 can't see the contract because of the PDF. We ask

1 that these be reproduced in native format. It does
2 happen. I'll stop here.

3 MR. BUCKINGHAM: I -- this is probably a
4 technological limitation of myself.

5 THE COURT: I hear what he's saying, though.
6 And what he's saying makes -- I can't get to the
7 attachments, so it does limit what they're getting.

8 MR. BUCKINGHAM: Yes, sir. And I've produced
9 all attachments that would be attached to it also.
10 I'm glad to figure out if I can ---

11 THE COURT: Does it say what kind of cost is
12 associated with that?

13 MR. LUCEY: Very little, Your Honor. It's
14 all -- it's a push of a button. I mean, almost any
15 e-mail I'm aware of, you can save it to PDF or you
16 just save the native file, and they collect them in
17 the e-mail. There's no -- there's no physical cost.
18 There's nothing at all. If they're technically
19 challenged, I've got a computer expert I could have
20 dial in to here if they want.

21 MR. BUCKINGHAM: I mean, I guess a good place
22 to start is what is the extension of the file format
23 you're looking for?

24 THE COURT: What's the what?

25 MR. BUCKINGHAM: The extension, like, would it

1 be dot PDF or dot something?

2 MR. LUCEY: If it's an Outlook file, it would
3 have an Outlook extension. If it has whatever
4 e-mail ---

5 MR. BUCKINGHAM: Like it would say dot Outlook?

6 MR. LUCEY: It's in native file for whatever
7 the software program it is.

8 MR. BUCKINGHAM: I -- I'm just a dinosaur.

9 THE COURT: Do you have -- do you have a
10 computer person?

11 MR. BUCKINGHAM: No. But I'll make a phone
12 call.

13 THE COURT: I'm just saying maybe his computer
14 person talk to your computer person and they speak
15 the same language and get it done.

16 MR. BUCKINGHAM: Okay.

17 THE COURT: I mean, the information he's
18 requested is reasonable.

19 MR. BUCKINGHAM: Oh, sure.

20 THE COURT: Okay.

21 MR. BUCKINGHAM: And I just want to be clear, I
22 produced it. Just not, I guess, in the file format
23 they wanted, so...

24 THE COURT: All right.

25 MR. LUCEY: Yes, sir. We've also asked them to

1 update their e-mail production anyway, besides the
2 non-native production. There's been a number of
3 transactions since the original production three
4 years ago that they have e-mails regarding. We know
5 they have the e-mails because we have found other
6 copies of their e-mails in third-party subpoena
7 responses. What we don't have is the e-mail on the
8 developer side or what he did with the e-mails
9 subsequently who he sent the information or who he
10 forwarded it to. We only have the third-parties
11 e-mail. For instance, Your Honor, there's been an
12 issue in this case forever of something called
13 "orphan parcels."

14 THE COURT: Of what?

15 MR. LUCEY: Orphan parcels. These are pieces
16 of real estate in the neighborhood that aren't
17 properly tied into either developer rights, HOA
18 rights, or covenants. For instance, believe it or
19 not, the roads -- the roads are orphan parcels.
20 They've been bought and sold at tax sales. It's a
21 whole 'nother story. But anyway, orphan parcels
22 have been a part of this case forever.

23 They were involved in a transaction. This
24 developer was involved in a transaction where a
25 creditor had pushed -- had gotten a judgment against

1 the former developer and gotten a lien on a number
2 of these orphan parcels, foreclosed on this
3 judgement or lien, and then resold. This
4 developer -- and then some of these are the green
5 spaces in our neighborhood. This developer was
6 involved in purchasing some of these, and this
7 developer was involved in arranging for some of the
8 other purchasers to get new rights in Mount Vintage.

9 Like for instance, Stanley Martin. They
10 bought -- they bought a large piece on the back of
11 this neighborhood, and they were going to -- the
12 developer was going to facilitate Stanley Martin
13 create 14 new lots on this parcel and the lots being
14 accepted by the HOA board into the association.

15 A seconds transaction that they're involved in
16 was as part of this, the developer sold Stanley
17 Martin five of his own lots to put the third from
18 the 14 new lots that were coming out of original
19 developer's foreclosure.

20 Also part of this transaction, the developer
21 was going to get this buyer rights to build a house
22 on the green space at the Mount Vintage rear
23 entrance. So this developer was going to give them
24 permission to turn our green space into a house and
25 we never -- because they -- they -- he ended up

1 writing a letter to the Edgefield County Planning
2 Commission without the board's consent saying,
3 "We -- we approve this or this is fine. Go ahead
4 and approve this." Luckily, we found out about it.
5 It was a couple of month ago. A bunch of the
6 homeowners showed up at the planning commission
7 meeting. The planning commission refused the
8 conversion.

9 The point is, there's been lots of these
10 transactions with the other developers and builders.
11 We've asked for the e-mails. We're told we're not
12 getting them. We find pieces of them in other
13 people's files. We need their e-mail production on
14 these transactions and the contracts with these
15 people. There are contracts with these multidot
16 contracts.

17 Why do we care about the contracts? A lot of
18 reasons, but I'll give you one. The original
19 contract with the multiparty builder, this
20 developer, and then known as Essex, now known as
21 Stanley Martin, the original contract prior to the
22 developer, to cover all operating deficits in the
23 neighborhood. The developer hasn't done that.

24 The HOA, we would argue, is a third-party
25 beneficiary and the mem -- the other members, is a

1 third-party beneficiary of this contract within the
2 developer and its lead builder that he must cover
3 all operating deficits. We're entitled to see
4 whether any of these other development contracts,
5 now with Stanley Martin or anybody else, has a
6 similar clause in them that says that the developer
7 promises no operating deficits and he'll cover them
8 if they occur. Because all of this you heard about
9 the escrow today and all these interest problems and
10 brought in the reserve or whatever else. Well,
11 there's lots of operating deficits because this
12 neighborhood has never been funded properly. And
13 we're entitled to see those e-mails and those
14 contracts. And -- and that is all we're asking for,
15 Your Honor. Those four things -- those four
16 remaining things: A reproduction of 546, improper
17 native format complete document, the reproduction of
18 the native e-mails that have been produced, the
19 update of the e-mail production from 2021, and the
20 contracts relating to the land development that
21 occurred since the first production. Thank you,
22 sir.

23 MR. BUCKINGHAM: So as far as the updated
24 e-mail production going back to 2021, you know,
25 several years ago, I don't remember if it's '21 or

1 '22, we hired Legal Eagle to come in and collect all
2 of our documents, and we have produced tens of
3 thousands of pages. And so since then, discovery
4 has been supplementing things. You find something
5 here, they ask for something else. You get it to
6 them. That's what we've been doing. So it -- it
7 seems kind of extreme to have to, I guess,
8 commission Legal Eagle to come back and get all of
9 the other e-mails about anything since 2021 at this
10 point. I'm not sure what relevance that would be at
11 this point. Their claims neither stand or fall as
12 they were pled, so I -- I don't understand why
13 they -- we would need to go to the expense of
14 getting a third party to come back in and produce
15 three years of e-mails.

16 If -- if they've got stuff, I'm happy to give
17 it to them. These Stanley Martin e-mails, I think
18 I've given them everything. I've made a
19 supplemental production since January. If there's
20 something else I haven't given them, I'll give it.
21 I -- every contract we have, I think we produced it
22 probably on multiple occasions at this point. I
23 just don't know what else to say.

24 You know, I cut my teeth of my career at Nelson
25 Mullins, and I don't know that I've seen discovery

1 be this onerous since then, but I'm happy -- I mean,
2 there's nothing to hide here. The case is what it
3 is. The documents are what they are. The stuff
4 he's talking about with the planning commission,
5 I've produced everything there. I -- I just don't
6 know what else to do. When I say I don't have
7 anymore, if I'm wrong, I'm wrong and I will -- I'll
8 go back to the well again and see if we can find
9 something else. But, I mean, just because they
10 believe something exists, doesn't mean it does.

11 THE COURT: Well, if you don't have it, you
12 don't have it. Let me ask you this or say this:
13 Normally, when we have a situation where somebody,
14 Mr. Lucey, says it's there. It's there. We know
15 it's there. We've gotten evidence of it through
16 other things and we know it's there, and somebody
17 like yourself saying, Judge, we've given them
18 everything we've got. Somebody who could go to jail
19 because of perjury I going to sign an affidavit
20 saying we have made a complete and thorough
21 investigation in what has been given to date is
22 everything we have and there's nothing else, and I
23 understand it's subject to penalties of perjury. If
24 they want to sign that, that's fine. Otherwise, you
25 need to give it to them.

1 MR. BUCKINGHAM: Oh, sure.

2 THE COURT: And you got paid for it. These
3 cost an unreasonable amount of money.

4 MR. LUCEY: Absolutely, sir. Absolutely.

5 THE COURT: We used -- I mean, I can prepare an
6 affidavit along those lines. Mr. Lucey, I'm sure
7 you can, too. But in other words, you know, I know
8 you. I mean, I know you would never tell me, but
9 that doesn't mean somebody else out there wouldn't.

10 MR. BUCKINGHAM: Yes, sir.

11 THE COURT: So let's go ahead and get that
12 done. I think what he's asking for -- I know it may
13 be onerous, but it's still reasonable. That being
14 said, do we have any other motions to take care of
15 today?

16 MR. LUCEY: We just need to put our partial
17 resolution on the motion for a protective order on
18 the record, Your Honor. Charlie and I are going to
19 continue working on it, and we want to come back to
20 the Court with a completed resolution in about two
21 weeks. We will take some other scheduling. We just
22 got a motion for summary judgement a few days ago.
23 I don't know if the Court could possibly entertain
24 that.

25 THE COURT: We're going to talk about going to

1 trial. We're going to get this case ready to go.

2 MR. LUCEY: Yes, sir. I was hoping to get the
3 summary judgment disposed of quickly. And if we
4 have a date for that, then we can -- Charlie and I
5 can put our -- the rest of our -- our agreement on
6 the record for the Court.

7 THE COURT: Let me just tell you, I mean, I've
8 got a full plate. I've got a lot of business court
9 cases. I've got a lot of stuff going on. I'm glad
10 to let you do it. I'll stay and hear as much as
11 y'all want to, but I just have to get along with
12 what I have. Okay. Availability time wise, I only
13 got so much.

14 MR. LUCEY: Yes, sir.

15 THE COURT: All right. With that being said,
16 tell me this resolution to put on the record.

17 MR. LUCEY: The first four issues have been
18 resolved. The issue of privilege, Your Honor,
19 relate to the assertion of HOA privilege regarding
20 the finance and the acquisition of the town center
21 and golf course in 2016 and matters related thereto.

22 The Yeoman's transactions where the association
23 foreclosed on some lots and the developer and the
24 association had a real estate transaction with those
25 lots at the conclusion of the foreclosure.

1 Area number three that we've agreed is the
2 developer's consent without board approval to
3 development for the consolidation of the Shaw Estate
4 lots.

5 And area number four is the HOA's role as a
6 defendant in various foreclosure tax liens, similar
7 to legal transactions. And the association agrees
8 that on those four general areas, this is not
9 asserting a privilege as to communications.
10 We've -- we've got a list of the documents that were
11 produced by prior counsel in recognition of that.
12 We're still looking at five of plaintiff's other
13 principle areas. He's asked for shareholder
14 information. We've reached an agreement on that.

15 As part of our agreement, the association has
16 agreed there's an issue with getting the -- a
17 previously -- a document of which the privilege has
18 been previously asserted. Authenticated for
19 admission at trial, they'll cooperate with us in
20 doing that without us having to do a deposition of
21 someone.

22 THE COURT: Say that again.

23 MR. LUCEY: If there's an issue with one of the
24 previously privileged documents needed to be
25 authenticated for trial because they refuse to

1 answer questions about it, they'll cooperate with
2 somehow getting it authenticated so that we don't
3 have to reopen the deposition.

4 MR. BUCKINGHAM: Also, let me just say this: I
5 have no part to this agreement, but as we're talking
6 about trial, I am not a stickler when it comes to
7 authentication, so...

8 THE COURT: You're not a what, sir?

9 MR. BUCKINGHAM: I'm not a stickler when it
10 comes to that, so, I mean, if you're concerned about
11 having to dot those eyes and cross those T's, that's
12 not going to matter.

13 MR. KRAWCZYK: So I just need to put a few
14 things on the record, Your Honor.

15 THE COURT: Well, first before you do, so you
16 don't confuse the issue. Do you agree with
17 Mr. Lucey's recitation of your understanding of the
18 agreement?

19 MR. KRAWCZYK: I do, subject to what I'm about
20 to tell the Court.

21 THE COURT: Well, then do you -- answer this:
22 Do you have authority for your association to say
23 you agree?

24 MR. KRAWCZYK: I do. I have the vice
25 president, yes, here.

1 THE COURT: Okay. Now, if you want to change
2 the terms of your agreement ---

3 MR. KRAWCZYK: I'm not going to. I'm just
4 going clarify a few things, again, for the record
5 so -- so there will be a record as to how we got
6 here if you don't mind, Your Honor, and that is ---

7 THE COURT: It depends on how far you go.

8 MR. KRAWCZYK: Okay. Well, so there was --
9 prior counsel, Mr. Josh Shaw, was here. There was a
10 prior motion to compel and motion for protective
11 order prior to a hearing for that matter. My
12 understanding is counsel got together and there were
13 some previously protected documents that prior
14 counsel got together and said, "We're going to
15 release these documents." And that was the basis
16 for the subject matter -- subject matter waiver.
17 And then -- just those subject -- and that the
18 things that Mr. Lucey has put forth today and he and
19 I talking about it is based upon those documents
20 that Mr. Shaw had released, and that's my
21 understanding that that's where those were. And
22 there -- and so, again, I'm just -- I'm just trying
23 to protect myself from an attorney/client privilege
24 situation so that my client understands how we got
25 where we are, and so I just -- I just want to

1 preface it, but the subject matter of what -- what
2 has been referred to as the \$300,000 loan issued,
3 yes, that was in an e-mail. The -- the Shaw
4 estates, we agree that that was part of the
5 documents that were produced. The Yeoman's
6 transaction, we agree with that. And I think what I
7 agreed to in the e-mail was that I was unaware of
8 any documents privileged with the developer issues,
9 but whatever it is, we're not disagreeing with
10 Mr. Lucey. I just wanted to make sure that we
11 understood how we got to the point because what the
12 other part of this was, this protective order was
13 requested because my deposition was taken and they
14 were asking me for my testimony and I was unaware of
15 any privilege waiver. I didn't know what the extent
16 was. I had to protect my testimony here. It's my
17 understanding -- I know he hasn't committed to this,
18 but he's not -- I'm not planning to be called by
19 anybody as a witness in this case at this point in
20 time, which is also part of the solution, means that
21 I'm not arguing my portion of this case. Now, if
22 that changes, I still want to remain -- have the
23 ability to protect.

24 THE COURT: You know, after all of that,
25 what -- what kind of agreement have y'all entered

1 into? I mean, that's just throwing mud in the
2 waters.

3 MR. KRAWCZYK: Well, I don't mean to throw mud.

4 THE COURT: Well, that's what you did.

5 MR. KRAWCZYK: Well, I didn't mean to, Your
6 Honor, but, again, we're talking. Here's what ---

7 THE COURT: Stop. I want an agreement. I
8 don't want to hear anymore about this. It's
9 rambling and I don't want to hear anymore. I want
10 to hear what the agreement is and I don't want to
11 hear anything else. Okay. Put it on the record or
12 put it on the ---

13 MR. KRAWCZYK: All right. My understanding is
14 that the subject matter waiver on the issue
15 regarding the \$300,000 loan, which was number one,
16 it was -- the down payment loan agreements, the
17 developer HOA agreement, developer contribution,
18 \$300,000 loan, \$300,000 promissory note, and the
19 related activities, the Yeoman's transaction, the
20 Shaw -- I'm going to call it the Shaw estates --
21 it's listed as the Shaw estates issue -- and the
22 HOA's role as the defendant in various foreclosure
23 tax sales, and other issues. That's the three --
24 that's the four things that we have -- agreed upon
25 is the subject waiver that has been -- I just want

1 to put it on the record how we got here, Your Honor.

2 THE COURT: Yeah, I was just giving you mine.

3 MR. KRAWCZYK: I understand.

4 THE COURT: All right. Anyway, put all of that
5 in the order.

6 MR. LUCEY: Yes, sir.

7 THE COURT: Now, y'all have a seat. Take off
8 your hats. Let's relax for a second. We're off the
9 record. Everybody's agreed upon that, right?

10 MR. BUCKINGHAM: Yes.

11 MR. KRAWCZYK: Yes.

12 (At 3:32 p.m., the proceedings concluded.)

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C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

I, the undersigned, Lisa Scott, Circuit Court Reporter for the Tenth 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 the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Anderson County, South Carolina, on the 25th day of July, 2024.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 26, 2024

/s/Lisa Scott

Lisa Scott
Circuit Court Reporter

IN THE STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD

} IN THE COURT OF COMMON PLEAS
} ELEVENTH JUDICIAL CIRCUIT

ELIZABETH M. FERRARO; JAMES T.
FERRARO, et al

} NO. 2021-CP-19-00050

VS.

} TRANSCRIPT OF RECORD

LL OF SC, LLC, et al

} Motions

B E F O R E:

The Honorable R. Lawton McIntosh, Judge
Anderson, South Carolina

DATE: Wednesday, August 28, 2024

10:50 a.m.

A P P E A R A N C E S:

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Homeowners Association, Inc.

Reported by: Cathy J. Provost, RMR, Official Court Reporter

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(No witnesses called.)

INDEX TO EXHIBITS

(No exhibits marked.)

— — — — —

COURT REPORTER LEGEND:

dash -- intentional/purposeful interruption; change in thought
 ellipses ... trailing off
 [ph] phonetically written
 [sic] written as said
 [indiscernible] unable to be understood due to low volume or
 quality of audio

10:45:31 1

-- P R O C E E D I N G S --

10:50:58 2

3 THE COURT: These are the matters I have on my list to be
4 heard: Motion for partial summary judgment: Motion to amend,
5 for a third time, the summons and complaint; three more motions
6 for partial summary judgment; a motion to file under seal; and
7 motion to bifurcate. Does that sound like everything we have
before the Court?

10:51:27 8

9 ATTORNEY KRAWCQYK: There were just two remaining motions
10 from the last time we were here that never got resolved, Your
Honor.

10:51:31 11

THE COURT: Which ones were those?

10:51:31 12

ATTORNEY KRAWCQYK: One was to release the settlement funds.

10:51:34 13

THE COURT: It was denied. Denied.

10:51:37 14

15 ATTORNEY KRAWCQYK: Okay. The other was we had some issues
16 about attorney-client privilege, waiver of attorney-client
17 privilege. There were just three additional matters that we were
18 not able to -- we came to the understanding on four of the
19 matters that were being previously waived by prior counsel, but
20 those three matters that they're still seeking a waiver of the
attorney-client privilege, and I don't have any basis to do that.

10:52:02 21

22 THE COURT: You're going to have to just refresh my memory
on that. I'm sorry.

10:52:02 23

24 ATTORNEY LUCEY: May it please the Court, Your Honor. We're
25 not prepared to address that today. We will if ordered to,
obviously, but we're not prepared. We've got our hands full

1 dealing with the summary judgment issues, and the prohibition was
2 not scheduled for today. It is --

10:52:18 3 THE COURT: The issues we're going to hear today are the
4 ones I just called out.

10:52:22 5 ATTORNEY LUCEY: Yes, sir.

10:52:22 6 THE COURT: Those are the ones we'll do.

10:52:23 7 ATTORNEY LUCEY: We still intend to get with Mr. Krawczyk to
8 see if we can resolve those.

10:52:25 9 THE COURT: The issues that we will hear today are the ones
10 that I just called out.

10:52:29 11 ATTORNEY LUCEY: Yes, sir.

10:52:31 12 ATTORNEY KRAWCZYK: That's fine, Your Honor.

10:52:32 13 THE COURT: First, as to bifurcate, that's really not a
14 motion; that's a requirement to meet. That's granted, so there's
15 nothing to be argued.

10:52:39 16 Let's go to the motion for partial summary judgment, please.
17 I assume that's defendants in this case.

10:52:40 18 ATTORNEY BUCKINGHAM: They were cross-motions. They had a
19 motion for partial summary judgment on the issue of whether or
20 not LL of SC is a Class A membership interest holder and
21 developer within Mount Vintage. And then the defendants had a
22 motion for partial summary judgment on the capacity to proceed in
23 a derivative capacity.

10:53:00 24 THE COURT: Which one do you all want to do? I don't care.

10:53:10 25 ATTORNEY LUCEY: He has the first filing.

10:53:13 1 THE COURT: All right.

10:53:13 2 ATTORNEY BUCKINGHAM: That's fine. I'll be glad to.

10:53:16 3 THE COURT: Okay.

10:53:16 4 ATTORNEY BUCKINGHAM: May it please the Court.

10:53:17 5 THE COURT: Yes, sir.

10:53:17 6 ATTORNEY BUCKINGHAM: For purposes of a clean record, my
7 name is Steve Buckingham arguing on behalf of LL of SC, LLC;
8 Raiford Topsail Island Investments, LLC; and TR Sales Plantation,
9 LLC.

10:53:29 10 The significant issue in this case at this procedural
11 juncture is whether or not the plaintiffs can proceed in a
12 derivative capacity. There has been extensive amounts of
13 briefing on this issue. Starting first with the South Carolina
14 Nonprofit Corporations Act, are plaintiffs members, within the
15 meaning of that Act, competent to proceed in a derivative
16 capacity in this case.

10:53:59 17 THE COURT: Say that again.

10:54:00 18 ATTORNEY LUCEY: Yes, sir. Whether or not the plaintiffs in
19 this action are competent to proceed in a derivative capacity on
20 behalf of the HOA under the definition of member in the Nonprofit
21 Corporations Act.

10:54:12 22 Now, the Act says, just very broadly -- this is in Section
23 33-31- -- I believe it's -- 630, it just generally says that
24 members of a nonprofit corporation can proceed in a derivative
25 capacity consistent with state and federal law. It doesn't say

1 much more than that.

10:54:33 2 So we turn to what the nonprofit act identifies as a
3 definition of a member, and that definition tells us we disregard
4 whatever the articles of incorporation, or the bylaws, or the
5 covenants call a person in a nonprofit corporation.

10:54:53 6 The standard that we use to determine who is a member is
7 whether or not the person can vote for directors, -- let me get
8 the exact language up -- whether or not that person can vote on
9 more than one occasion for the election of a director, or
10 directors, or any other matter which, under the terms of the Act,
11 requires approval by the members.

10:55:25 12 That's what a member is for purposes of the Nonprofit
13 Corporation Act.

10:55:31 14 The plaintiffs allege that they are members with the Mount
15 Vintage HOA. And to be precise on that, they are Class B
16 members, they don't have voting rights. That's one of the core
17 aspects of the plaintiffs' claim, they're complaining that they
18 don't have voting rights.

10:55:50 19 So automatically we know by their own admission they can't
20 vote for directors, which puts us into the second category of is
21 a person a member under this definition, and the second category
22 is is the person entitled to vote on any other matter under which
23 the terms of the Act requires approval by the members. Our
24 contention is no.

10:56:12 25 The plaintiffs contend, in contrast, that two separate

1 provisions of the Nonprofit Corporation Act provide them with the
2 ability to vote on matters which means that they are, that Class
3 B people are, able to proceed in a derivative capacity. And I
4 will address those in turn.

10:56:35 5 These two statutes that the plaintiffs rely on are pretty
6 much identical. This is found in 33-31-1004(b) and
7 33-31-1022(b). And each of these statutes -- like I said,
8 they're pretty much identical -- one pertains to proposed
9 amendments to bylaws; the other one pertains to proposed
10 amendments to the articles of incorporation. The language is
11 identical apart from that one difference.

10:57:06 12 And what that says is that a person without voting rights in
13 a mutual benefit nonprofit corporation like the HOA can vote on a
14 matter within their class, within that nonvoting class only,
15 if -- and I want to get the language of this exactly right. The
16 language is -- the members of a class in a mutual benefit
17 corporation are entitled to vote as a class on a proposed
18 amendment to the articles or the bylaws if that amendment would,
19 and then there are six enumerated circumstances, six discretely
20 enumerated circumstances which are the same in both 1004 and
21 1022.

10:58:07 22 There is no aspect of this case, plaintiffs' allegations in
23 this case, that involve a proposed amendment to the bylaws or the
24 articles of incorporation. Furthermore, these individuals, even
25 if there were an amendment, a proposed amendment, at issue that

1 the Class B plaintiff representatives could vote on, they can
2 only vote within their class. They don't have voting rights
3 generally. They don't get transformed into a general member of
4 the HOA under the plain express language of the Nonprofit
5 Corporation Act statute.

10:58:44 6 And so that's our first argument on why the plaintiffs
7 cannot proceed in a derivative capacity, is that under the plain
8 language they do not meet the definition of member.

10:58:54 9 Now, and it's also worth noting I have, in my motion for
10 summary judgment, attached a matter of litigation that the Mount
11 Vintage HOA was a part of back in 2010 in Edgefield County in
12 which a special master, in reaching that decision, said that the
13 plaintiffs in that action against the HOA did not have voting
14 rights, that they were not members, and because they did not have
15 voting rights, under the very statute that I cited, they were not
16 members for purposes of proceeding in that action. I've attached
17 that decision. It's called *Garry v. Mount Vintage Plantation*
18 *Homeowners Association* as an attachment to my motion for partial
19 summary judgment on this issue.

10:59:42 20 But now we turn to the express language of Rule 23. Rule 23
21 says that if a person is competent to proceed in a derivative
22 capacity on behalf of some sort of corporate entity, that they
23 must fairly and adequately represent the interests of that
24 organization. Now, there was a recent case about this decided,
25 *the McMillan Pazdan Smith* case.

11:00:14 1 THE COURT: That was my case, and I'm very familiar with it.

11:00:15 2 ATTORNEY BUCKINGHAM: I'm sorry?

11:00:15 3 THE COURT: That was my case. I'm very familiar with it.

11:00:17 4 ATTORNEY BUCKINGHAM: Okay. So I don't have to tell you
5 what that involved.

11:00:22 6 THE COURT: No.

11:00:22 7 ATTORNEY BUCKINGHAM: And some of the factors that were
8 relied upon to determine whether or not these representatives
9 were appropriate to proceed on behalf of the class were what is
10 the degree of support that the plaintiff class has, or that the
11 plaintiff representatives have.

11:00:38 12 Now, on that point we have attached an affidavit of a
13 homeowner who's never been involved in this litigation named Dan
14 Binz, B-i-n-z. And when this lawsuit was filed in August of
15 2020, Mr. Binz, on his own initiative, prepared a petition for
16 homeowners to express their support or lack of support for their
17 participation in this lawsuit. This, by the way, is the subject
18 of a motion to file documents under seal that's pending before
19 you.

11:01:10 20 THE COURT: Were those already filed?

11:01:12 21 ATTORNEY BUCKINGHAM: So they were in the book that I
22 provided to chambers.

11:01:15 23 THE COURT: It seems to me instead of putting it under seal,
24 just redact all the information that should be done before filing
25 anyway, right?

11:01:23 1 ATTORNEY BUCKINGHAM: Well, so it's signatures and
2 addresses, and there's 80 pages of this, so.

11:01:29 3 THE COURT: I don't have a problem putting it under seal.
4 Do you really have a problem putting it under seal?

11:01:34 5 ATTORNEY LUCEY: Yes, Your Honor, we do.

11:01:36 6 THE COURT: How so?

11:01:36 7 ATTORNEY LUCEY: A number of signatures are invalid. The
8 thing's three years out of date.

11:01:40 9 THE COURT: Just redact it.

11:01:41 10 ATTORNEY BUCKINGHAM: I will redact it.

11:01:42 11 THE COURT: Go ahead.

11:01:43 12 ATTORNEY BUCKINGHAM: Yes, sir.

11:01:44 13 THE COURT: And that decision -- that motion's taken care of
14 then.

11:01:47 15 ATTORNEY BUCKINGHAM: Okay, very good. So Mr. Binz
16 collected 211 signatures from folks, and he has verified that the
17 documents that I presented to the Court were the very petition
18 and signatures that he received. And that goes back to right
19 after this lawsuit was filed in 2020 where you have 211 people
20 saying we do not think that the plaintiffs in this lawsuit
21 represent our interest as homeowners.

11:02:10 22 Furthermore, I attached a number of deposition excerpts from
23 homeowners that testified clearly we don't think the plaintiffs
24 represent our interests. I think I attached 10 homeowners who
25 are not involved as parties to this matter who said the

1 plaintiffs don't represent our interests.

11:02:35 2 And then, of course, there's a mathematical reality that at
3 this point, based on the number of the folks, when plaintiffs
4 sent out the expert reports to the homeowners association, that
5 apparently consisted of 511 homeowners within Mount Vintage.
6 Assuming that's the right number, 511, that's how many homeowners
7 there are right now, there are 14 people in the caption of their
8 lawsuit, which works out to 2.74 percent of the homeowners.

11:03:11 9 Now, I'm very well aware that Rule 23 does not say
10 derivative plaintiffs, you've got to have this certain
11 percentage; you've got to have 10 percent; you've got to have
12 5 percent. I know it doesn't say that, but it is still
13 significant that in, say, the regular corporate context it takes
14 10 percent ownership in the stock of a corporation to force a
15 meeting.

11:03:37 16 There are other states that adopted similar derivative
17 standards that do require an express 5 percent requirement for
18 those who claim an interest in the organization to be able to
19 bring a derivative-capacity suit. And, of course, we're in
20 neither of those circumstances here, and it is our position that
21 two-and-three-quarters percent of the homeowners in Mount
22 Vintage, which some of these folks are married so we're talking
23 about six or seven homeowners --

11:04:02 24 THE COURT: Say that again, please.

11:04:12 25 ATTORNEY BUCKINGHAM: Yeah. Some of the folks, some of the

1 plaintiffs, are married, and so even though there are two
2 homeowners it's just one house.

11:04:19 3 THE COURT: I gotcha.

11:04:20 4 ATTORNEY BUCKINGHAM: Yes. So here you have a very
5 exceedingly small set of homeowners that are trying to
6 work/direct the activities of the corporation, and for that
7 reason we don't think that these plaintiffs fairly and adequately
8 represent the interest of homeowners.

11:04:36 9 Other factors that you considered in the *McMillan* case were
10 economic antagonisms and pending litigation between the parties.

11:04:48 11 You know, with regard to economic antagonism, and to touch
12 on what Mr. Krawczyk referenced when this hearing first began,
13 the plaintiffs are holding currently nearly \$2 million of
14 settlement proceeds that could be used, that the homeowners
15 association has asked this Court -- and we understand that you
16 denied that motion, but have asked this Court -- to apply those
17 funds to the outstanding debt that plaintiffs have sued on, and
18 they've opposed that.

11:05:20 19 And so if we're focused, as the plaintiffs ought to be
20 focused, on what is in the best interest of the HOA, holding that
21 money and not paying off the very debt they've sued on is not in
22 the best interest of the HOA; that is a fundamental, absolute
23 economically antagonistic position for them to be in. That is in
24 direct contravention of what the best interests of the homeowners
25 association is.

11:05:47 1 In fact -- I mean, I did submit a declaration for this so
2 you can take it for what it's worth, but since that settlement
3 was reached last year the homeowners association has spent around
4 \$200,000 in debt service, in interest, to the bank that holds the
5 note, because the note is accruing interest at the rate of, I
6 think it's, nine-and-a-half percent. There's not much more
7 clearer evidence of economic antagonism than that.

11:06:18 8 Now, I forgot to make an introduction at the beginning, and
9 I apologize for that. This is Wayne Raiford who's sitting behind
10 me. He is the manager of LLC. He's joined by his daughter,
11 Leigh Ann Raiford who used to be Lea Ann Kilden when she was
12 still a party to this lawsuit. She has since been married.

11:06:38 13 But LL's position, certainly with respect to this money
14 that's being held by plaintiffs, is let's do what the HOA wants.
15 If the concern is that LL is going to somehow abscond with the
16 money, you may recall we were fined at the last hearing on this
17 to say, look, put it under judicial supervision, let's retire
18 this debt. And that position hasn't changed today.

11:07:04 19 The plaintiffs, the derivative plaintiffs, simply do not
20 represent the best interests of the HOA. And that is further
21 affirmed -- this is reflected, again, in the plaintiffs' filings,
22 responsive brief, on this issue. You may not recall this.

11:07:19 23 THE COURT: Say that again.

11:07:24 24 ATTORNEY BUCKINGHAM: The plaintiffs' memorandum in response
25 to this, this, what I'm getting ready to say, is reflected in

1 their filing. When the settlement funds were proposed to
2 homeowners last year sometime and homeowners, again, circulated a
3 petition to express their position on what they wanted to see
4 happen with the money that was generated from these settlement
5 proceeds, 60 homeowners signed another petition saying we would
6 appreciate this money being used to retire the debt that's
7 against the organization.

11:07:56 8 That's what the homeowners, who are independent of this
9 lawsuit, are saying they want to have happen economically, and
10 they are being stived by the plaintiffs. And I understand there
11 may be reasons for it. That is their position to articulate.
12 But we cannot get around the inescapable fact --

11:08:14 13 THE COURT: Let me ask you this.

11:08:16 14 ATTORNEY BUCKINGHAM: Yes, sir.

11:08:17 15 THE COURT: The present withholding of the monies to pay off
16 that debt, does it somehow give the plaintiffs leverage against
17 the defendants in this matter at all?

11:08:28 18 ATTORNEY BUCKINGHAM: I don't know how it would. I don't
19 see how it would. I don't know what the actual leverage position
20 would be. You may recall that there was the idea floated that if
21 my clients would waive their appellate rights, that they would
22 release the funds, which that's not what he offered at all. But
23 apart from that, I can't imagine what conceivable reason there
24 would be to have leverage with this. I just don't know. I don't
25 think the HOA knows. And certainly if Mr. Krawczyk wants to

1 speak --

11:09:02 2 THE COURT: The reason I asked you, that *McMillan* case, that
3 was one of the factors that was considered, that the plaintiff of
4 one, or class of one, had a suit to value her shares upon the
5 association, and the suit was used to enhance the value of her
6 shares.

11:09:20 7 ATTORNEY BUCKINGHAM: That's right.

11:09:21 8 THE COURT: So, I mean, I'm just curious if there's any
9 leverage that could be used to somehow advance their claims in
10 this case by withholding payment.

11:09:31 11 ATTORNEY BUCKINGHAM: So I think that there would be the
12 argument that if they're withholding payment to somehow force LL
13 or some other entity to have to retire this debt independent of
14 that money, that that money could then be applied to other
15 damages that they're claiming. That's what I would think.
16 That's never been articulated. So -- but I think that's the
17 logical extension of where that's going.

11:10:00 18 THE COURT: Okay.

11:10:03 19 ATTORNEY BUCKINGHAM: Now with regard to pending litigation,
20 I'm just going to touch on this briefly. Since this lawsuit has
21 been pending there are several of the plaintiffs that have had
22 liens filed against their property for nonpayment of dues. Those
23 have been resolved at this point, but that has happened while
24 this litigation has been pending.

11:10:20 25 There's been numerous complaints filed with the South

1 Carolina Department of Commerce by the plaintiffs against the
2 developer, against Mr. Raiford, against his daughter. And then,
3 of course, there's the issue of, in one circumstance going back
4 to 2019, plaintiff lied, calling the police against Mr. Raiford.

11:10:44 5 So there's not just antagonism of an economic nature between
6 these parties. Something has happened somewhere along the way
7 that has made these derivative plaintiffs seek a default of
8 Mr. Raiford continuing on managing LL of SC and developing Mount
9 Vintage. I don't know what it is but something has made them
10 hate him.

11:11:10 11 Now, when it comes to the idea of the class of one, I would
12 point out to the Court that that's nowhere been alleged. The
13 allegations that exist all the way through this case, from going
14 back to 2020, are that the derivative plaintiffs represent the
15 interests of all Class B homeowners in Mount Vintage, all of
16 them, without exception.

11:11:31 17 That is not the case. If they want to have a conversation
18 about somehow building a derivative class of the people they
19 actually represent --

11:11:42 20 THE COURT: So that you're saying that in order to be true
21 representatives, they have to have 100 percent of the Class B
22 members' approval of the suit?

11:11:54 23 ATTORNEY BUCKINGHAM: No, sir, they don't have to have
24 100 percent.

11:11:57 25 THE COURT: I mean, I don't believe that.

11:11:58 1 ATTORNEY BUCKINGHAM: Yeah. But they've got to have more
2 than two-and-three-quarters percent.

11:12:04 3 THE COURT: Unless those numbers are your named plaintiffs,
4 right?

11:12:08 5 ATTORNEY BUCKINGHAM: That's exactly right.

11:12:08 6 THE COURT: So say, for example -- well, let me ask it
7 another way. In your contention, I know you said other states
8 have thresholds they have to meet in order to be considered as
9 proper representatives. Are you contending, in South Carolina,
10 that there has to be an underlying threshold that has to be met
11 before people can be considered capable of representing in a
12 derivative capacity?

11:12:35 13 ATTORNEY BUCKINGHAM: So I think that the comments to some
14 of these statutory sections have addressed that very question,
15 and they said that South Carolina has elected to not impose some
16 sort of mathematical threshold. But the idea is still bound up
17 in the idea of a person being a fair and adequate representative
18 of the class.

11:12:52 19 That still involves a weighing of who are these plaintiffs,
20 and do they really represent the interests of the entity they
21 claim to be representing? And so while it is not dispositive of
22 the issue of how many plaintiffs are there, it is still a factor
23 to be given substantial weight when you have so many
24 homeowners -- we all know how frustrating it is to see voter
25 turnouts in election these days for elections that matter, for

1 president, for senator, for whatever, for governor, and when you
2 have elections that don't matter, voter turnout is terrible.
3 Going back to 2020 and the petition that the independent
4 homeowners circulated, half of the neighborhood said we don't
5 want to be involved in this; you don't represent our interest.

11:13:42 6 THE COURT: Do they say we don't want to be involved and you
7 don't represent our interest, or we don't want to be involved in
8 this because we don't want to pay for it, we don't want to have
9 to deal with it, or some other reason?

11:13:54 10 ATTORNEY BUCKINGHAM: The statement that's on every one of
11 these -- if I may just read it. Let's see -- You are invited to
12 express your opinion by signing this document if you do not want
13 to support this lawsuit. If the lawsuit is later determined to
14 be a legitimate class action, you will have the opportunity to
15 formally opt out at a later time. And then it says I do not want
16 to be a part of the above lawsuit. And that's what every single
17 one of these form says.

11:14:22 18 And I can't stress this enough, I had no part in this, this
19 was before I was engaged. Mr. Raiford, LL of SC, had no part of
20 this. The HOA, as an entity, had no part of this petition. This
21 was a homeowner who's never been involved as a party, who I don't
22 think has ever sat on the board of directors, who prepared this
23 petition at his own initiative and got half the community to sign
24 it. That is compelling.

11:14:42 25 THE COURT: What effect, if any, does the prior approval of

1 the class claims have to do with the rest of this case?

11:14:56 2 ATTORNEY BUCKINGHAM: Well, I think that is -- I think that
3 is an interesting thing to bring up. So in the prior class
4 approval there was a specific carve-out for my clients, and this
5 was agreed, that we take no position, the parties take no
6 position, on whether that was a legitimate class or not a class
7 with respect to the claims that were then-asserted against these
8 entities.

11:15:22 9 THE COURT: That was carved out in --

11:15:23 10 ATTORNEY BUCKINGHAM: That was carved out. And so that
11 class was constructed but purely for the purpose of settling the
12 private claims --

11:15:31 13 THE COURT: All right.

11:15:31 14 ATTORNEY BUCKINGHAM: -- and for no other purpose. There's
15 never been a class certification other than that limited purpose.
16 And, frankly, we think it's significant that the plaintiffs have
17 voluntarily abandoned to proceed on their class claims.

11:15:40 18 I think the reason for that is, again speculation, is that
19 the burden is on them to demonstrate that they are proper
20 plaintiffs, representative plaintiffs, in a class action, whereas
21 in a derivative case it's my burden to rebut. And so I think
22 they made the tactical decision of not putting on evidence about
23 how they represent a class for fear that that might not be
24 established, and it would also affect the way that our derivative
25 analysis would play out.

11:16:21 1 I mean, that's the evidence I've got in front of me. Half
2 the homeowners went back to the initiation of this lawsuit saying
3 you don't represent us, we don't want any part of this, and then
4 all of the other circumstances that go with it, and bolster it.

11:16:36 5 THE COURT: So you're saying there's basically a 50-50 split
6 for the Class B members?

11:16:40 7 ATTORNEY BUCKINGHAM: Of just the ones that have come out
8 and signed.

11:16:43 9 THE COURT: Oh, okay.

11:16:44 10 ATTORNEY BUCKINGHAM: Yeah. I mean, there's probably --

11:16:47 11 THE COURT: So under your analysis, if you have 50 percent
12 saying we don't want to go forward does that mean the other
13 50 percent never get their complaints heard on behalf of the
14 corporation?

11:17:01 15 ATTORNEY BUCKINGHAM: I think it requires a close analysis
16 of what that derivative interest truly is on behalf of the
17 corporation. If you've got half the corporation saying we have
18 no interest in this I think that requires a close, a very close,
19 consideration of whether or not --

11:17:20 20 THE COURT: Don't some of these derivative claims involve
21 minority shareholders saying what you're doing is not protecting
22 everybody's rights in this case on behalf of the corporation?

11:17:32 23 ATTORNEY BUCKINGHAM: Well, that's certainly the contention,
24 but this goes back to the --

11:17:34 25 THE COURT: There have been a lot of cases that said that,

1 that they, as the minority shareholders saying we want you, the
2 corporation, to do X, Y, and Z but you're not doing it, and you
3 need to do it as a corporation. But that's a lot claims, aren't
4 they, are brought by minority shareholders?

11:17:51 5 ATTORNEY BUCKINGHAM: And that's true.

11:17:52 6 THE COURT: So if that's the case, the 50-50 split, what
7 difference would that make?

11:17:56 8 ATTORNEY BUCKINGHAM: So in those cases that you're talking
9 about, the ordinary types of derivative actions, that's where you
10 have a person that is a member, a shareholder of the entity.

11:18:00 11 THE COURT: Not a Class B?

11:18:07 12 ATTORNEY BUCKINGHAM: Not a Class B. And under corporate
13 law their membership interest and their shareholder interest
14 makes them have that right that they can sue on. But under the
15 Nonprofit Corporation Act, unless it's one of those six
16 enumerated things in connection with proposed amendments to the
17 bylaws or to the articles, there is no voting right.

11:18:28 18 I mean, the point of this was to allow folks to have a
19 limited right -- and this is explained by the commentary to these
20 very statutes, is to have these folks that are part of a
21 nonprofit corporation have a limited right to protect their
22 economic interest, but it is not intended to be a mechanism where
23 the minority can drive what the corporation's actually doing.
24 And that's exactly the circumstance in force.

11:19:02 25 I'll be happy to answer any questions about this you'd like.

1 I can discuss other things, if you'd like. Whatever you prefer.

11:19:08 2 THE COURT: One other thing I'm not clear of, under the
3 statute sections you were reciting to me --

11:19:14 4 ATTORNEY BUCKINGHAM: Yes, sir.

11:19:14 5 THE COURT: -- if you were a nonvoter or you have -- under
6 this, class B folks in this case have potential, or contingent,
7 right to vote on the designated matters --

11:19:26 8 ATTORNEY BUCKINGHAM: That's right.

11:19:27 9 THE COURT: -- but those matters are not involved in this
10 suit, does that contingent right make a difference as opposed to
11 those matters actually being involved in a suit, those being
12 issues involved in this case?

11:19:38 13 ATTORNEY BUCKINGHAM: Well, so I think what we have to do is
14 try to reconcile those two statutes, because if it's interpreted
15 as broadly as the plaintiffs would prefer, that's a classic set
16 of circumstance of the exception following the rule.

11:19:49 17 The rule is nonprofit corporations can restrict voting
18 rights and they can retain control. And to apply the rule as in
19 the way that the plaintiffs suggest, that there's a contingent
20 right that somehow may manifest that is not involved in this case
21 but that transforms us into full-fledge members that can vote and
22 bring derivative actions, that destroys the rule; that allows the
23 cart to pull the horse.

11:20:15 24 THE COURT: Okay.

11:20:16 25 ATTORNEY BUCKINGHAM: Thank you.

11:20:17 1 ATTORNEY LUCEY: If it pleases the Court, Ms. Anna McCann
2 will address the nonprofit statute, and I will address the
3 remainder of the motion, Your Honor.

11:20:23 4 THE COURT: Say that again.

11:20:23 5 ATTORNEY LUCEY: If it pleases the Court, Ms. Anna McCann
6 will address the nonprofit statute --

11:20:28 7 THE COURT: Oh, sure.

11:20:28 8 ATTORNEY LUCEY: -- and I will address the remainder, Your
9 Honor.

11:20:31 10 THE COURT: Absolutely.

11:20:33 11 ATTORNEY McCANN: Your Honor, if I may -- Anna McCann for
12 the plaintiffs -- walk up and hand you a couple documents?

11:20:39 13 THE COURT: Yes, ma'am. Have you given it to opposing
14 counsel?

11:20:46 15 ATTORNEY McCANN: This is the nonprofit act.

11:20:49 16 ATTORNEY BUCKINGHAM: Okay.

11:20:49 17 THE COURT: Okay.

11:20:49 18 ATTORNEY McCANN: And these are my filings.

11:20:51 19 THE COURT: Do you have all of these?

11:20:52 20 ATTORNEY BUCKINGHAM: I have studied the nonprofit act more
21 than I care to.

11:20:52 22 THE COURT: No. I'm talking about the filing.

11:20:52 23 ATTORNEY BUCKINGHAM: I believe so. Is this just the
24 filings on the issue?

11:21:00 25 ATTORNEY McCANN: Yes.

11:21:00 1 ATTORNEY BUCKINGHAM: Yeah. I believe I got them.

11:21:02 2 ATTORNEY McCANN: Well, Your Honor, if this feels like
3 deja vu all over again as to whether the homeowners are members
4 of this association, it's because Your Honor heard this issue on
5 a motion to dismiss in 2021 and ruled that the case could proceed
6 with the homeowners as members in a derivative capacity.

11:21:21 7 So the first question, I would think, of the Court would be
8 what's changed since the motion-to-dismiss stage. And the answer
9 to that question is nothing has changed that would benefit the
10 defendants' position; rather, last Friday we had the opportunity
11 to take the deposition of Mr. Raiford on behalf of LL of SC, and
12 Mr. Lucey was able to ask Mr. Raiford whether the homeowners are
13 members of the homeowners association, and Mr. Raiford said yes.
14 And he also had the opportunity to ask whether the homeowners own
15 the association, and Mr. Raiford also said yes to that.

11:22:03 16 So to the extent anything has changed or there are any
17 additional facts regarding this issue, they all benefit our
18 position, which is that we are plaintiffs.

11:22:17 19 And just sort of trying to start where Mr. Buckingham
20 started, if you look at the copy of the nonprofit act that I
21 handed up to the Court, the page that it's flipped to is the
22 section on derivative suits which is where Mr. Buckingham
23 started. And Mr. Buckingham summarized what this section said,
24 but he summarized it incorrectly.

11:22:42 25 So Section 33-31-630 says that derivative suits may be

1 maintained on behalf of South Carolina corporations in federal
2 and state court in accordance with the applicable Rules of Civil
3 Procedure. It doesn't say anything about members.

11:22:58 4 So the ability for a nonprofit, a member of a nonprofit or a
5 shareholder of a nonprofit, to pursue a derivative suit stems
6 from this section in the Nonprofit Corporations Act.

11:23:14 7 THE COURT: Can you give me that section one more time,
8 please.

11:23:17 9 ATTORNEY McCANN: Sure. It says, it's 33-31-630, and it
10 says, derivative suits may be maintained on behalf of South
11 Carolina corporations in federal and state court in accordance
12 with the applicable Rules of Civil Procedure.

11:23:34 13 So then when we turn to the applicable Rule of Civil
14 Procedure, which is Rule 23(b)(1), derivative actions, it says in
15 a derivative action brought by one or more shareholders or
16 members to enforce a right of a corporation or of an
17 unincorporated association, the corporation or association having
18 failed to enforce a right -- et cetera, et cetera. It simply
19 provides that a shareholder or a member of a corporation can
20 pursue a derivative action. It's not defined, member is not
21 defined here. So if you were to give it its plain meaning
22 according to the dictionary, a member is an individual composing
23 a group.

11:24:20 24 THE COURT: Do the articles define what members are?

11:24:24 25 ATTORNEY McCANN: I'm sorry?

11:24:24 1 THE COURT: Do the articles of -- under the -- or the
2 bylaws, do the articles define what members are?

11:24:29 3 ATTORNEY McCANN: Well, Your Honor, they both state that
4 plaintiffs are members. They just don't have -- the covenants
5 state that the members, Class B members, don't currently have
6 voting rights. But that brings up a good point, which is that
7 under the South Carolina Nonprofit Act the order of authority, so
8 to speak, is the law, meaning the act in Rule 23, and
9 insubordinate to that is the articles of incorporation, and
10 insubordinate to that is the covenants.

11:25:01 11 So the nonprofit act, which I hand up to you, has three
12 flags. The second flag there, I flagged 33-31-202, which states
13 what the articles of incorporation must have to be filed with the
14 Secretary of State as a nonprofit, and then what the articles of
15 incorporation may provide for.

11:25:23 16 And so the articles of incorporation of a nonprofit must
17 provide whether or not the association, or corporation, will have
18 members. Our articles of incorporation, which is in one of the
19 handouts up to you, were filed on April 3rd of 2000, and there is
20 a box to check, Will this corporation have members? Yes or no.
21 The box was checked yes, this corporation will have members.

11:25:52 22 And then if you turn to the bylaws themselves which I've
23 also handed up to Your Honor, the homeowners are clearly called
24 members throughout the covenants, and it's actually, it is by
25 virtue of their membership that the HOA can assess them because

1 the power of a nonprofit to assess comes from the nonprofit act,
2 and the nonprofit act says that a nonprofit corporation can
3 assess its members. So that's why they have to be called members
4 in the covenants, because they've been assessing them for 25
5 years.

11:26:40 6 So it seems disingenuous to say you're members, we can
7 assess you under the Act, but you're not members enough to bring
8 a derivative suit under the Act.

11:26:52 9 And so I'd like to distinguish, also, the *Garry* case that
10 Mr. Buckingham brought up, which is in my papers which, just for
11 the record, I'll incorporate my memo into my argument here. But
12 the *Garry* case that Mr. Buckingham brought up did not make a
13 determination that the Mount Vintage homeowners were not members
14 under the Act.

11:27:20 15 What the *Garry* case said is the Mount Vintage Homeowners
16 Association members were not allowed to vote on the issue before
17 the Court then under the covenants. And the *Garry* plaintiffs
18 tried to use the Act to end run around that, and they were
19 unsuccessful according to the *Garry* court. So that's a
20 distinguishing factor there as well.

11:27:42 21 THE COURT: Is that a trial level order?

11:27:52 22 ATTORNEY McCANN: I believe it was a magistrate order.

11:28:02 23 THE COURT: Whatever court, it wasn't appellate court?

11:28:05 24 ATTORNEY McCANN: I'm sorry. Say that again?

11:28:05 25 THE COURT: It was not an appellate court decision?

11:28:06 1 ATTORNEY McCANN: No. It was a trial court order.

11:28:08 2 THE COURT: Okay.

11:28:09 3 ATTORNEY McCANN: And so to summarize, I suppose, the
4 declarant, LL of SC, the developer under the current covenants,
5 says we're members; he says we own the association. The
6 nonprofit act allows derivative suits in accordance with South
7 Carolina law, Rules of Civil Procedure, Rule 23, allows members
8 of shareholders to proceed derivatively.

11:28:41 9 And turning back to the articles of incorporation, which
10 have to provide whether or not a nonprofit will have members,
11 says that this one has members, and it's that declaration that
12 gives this HOA the right to assess its members.

11:29:02 13 And to distinguish the definition of members that
14 Mr. Buckingham provides -- and he turned to the end of the Act
15 with the exceptions -- we're not saying that we are members
16 because we're suing under those exception. We're saying that
17 members of a nonprofit, once you decide to have members, have
18 rights which stem from the Act regardless of what the bylaws or
19 covenants say. So if you elect to have members, you proceed to
20 have members, then there are certain rights that stem from the
21 Act itself which covenants cannot divest you of.

11:29:42 22 So we're not saying that Section 33-31-1004 is what we're
23 suing on; we're saying that that's an example of the membership,
24 of the membership, having rights that evolve from the Act itself.

11:30:02 25 And I'd like to point out to the Court, as well, that in

1 Mr. Buckingham's original motion he cites to the official
2 comments to the model act. As is common, you know, groups get
3 together and they promulgate model acts, and the states get
4 together and their legislatures decide what do we want to adopt
5 and what do we not want to adopt, and South Carolina actually
6 specifically did not adopt the definition of member from the
7 model act.

11:30:37 8 And the difference is that in South Carolina the definition
9 of who is a member also includes or somebody who has rights under
10 this Act, and so it seems to me that the legislature was making
11 it a little bit more broad than the model act and giving
12 individual members additional rights instead of divesting them of
13 those rights, especially in a nonprofit.

11:31:07 14 So I'd be happy to answer any additional questions Your
15 Honor might have. But thank you.

11:31:12 16 THE COURT: Thank you.

11:31:15 17 ATTORNEY LUCEY: Yes, Your Honor. Your Honor, with regards
18 to Rule 23 criteria, as opposed to a misleading petition which
19 we'll discuss about in one second, as opposed to a misleading
20 petition, that is filed in this court without any authentication
21 of any signatures except for one, so that is a petition of one,
22 except for that misleading petition or in contrast to that
23 misleading petition, plaintiffs' counsel, on behalf of the
24 plaintiffs, sent a notice of settlement to every class member,
25 every derivative beneficiary, regarding a recovery against the

1 board members, the prior board members, that we alleged had
2 violated their duties, the \$2.6 million gross recovery.

11:32:10 3 This Court held a hearing on our notice to 561 people, and
4 this Court saw one objector. That's 560 people who supported
5 what plaintiffs' counsel and plaintiffs did, and that's 560
6 people who supported it in the eyes of the court after a court
7 authorized notice to its 560 people.

11:32:30 8 THE COURT: Or at least they didn't object.

11:32:33 9 ATTORNEY LUCEY: Or they didn't object.

11:32:36 10 With regards to the misleading petition that they want to
11 rely on that's three years old, for starters, 60 of the signers
12 also signed the escrow to release the funds to pay the mortgage,
13 the golf-club mortgage.

11:32:52 14 Plaintiffs would submit to this Court you can't have it both
15 ways. Either you support the suit and what's accomplished for
16 the people and you get the funds applied to the debt, or you
17 oppose the suit. So 60 of those people who allegedly opposed the
18 suit three years ago now support using the funds and must be
19 counted as having been properly represented by plaintiffs and
20 plaintiffs' counsel. That's 60 out of 211 that they claim.

11:33:12 21 Another six of those signatories are deceased, they don't
22 exist. Another 60 of those signers have moved from the
23 neighborhood. So that's the risk the Court gets entertaining one
24 affidavit, one person, one signature signing an affidavit, saying
25 we have all these signatures. The Court has no information

1 whatsoever except what I just provided the Court as to the
2 meaning of those signatures. The majority of those signature are
3 meaningless. They died, moved, or supported the funds being used
4 that plaintiffs recovered on their behalf.

11:33:57 5 Your Honor, the 10 depositions of homeowners that were filed
6 to support their burden of proof of showing that we are
7 unsuitable representatives, that's an overstatement by
8 200 percent. They filed five. Of the five, they don't say, only
9 a couple say, they don't support the plaintiffs.

11:34:10 10 Who are the ones who say they don't support the plaintiffs?
11 One is Charles Blackston. Charles Blackston is a land developer
12 who is developing in and near and next to Mount Vintage and is
13 today, today, in negotiation to buy Mount Vintage developer
14 rights. We would submit to the Court that his point of view is
15 not very representative of the rest of the homeowners in Mount
16 Vintage.

11:34:41 17 Three of the five were actually ex-board members who
18 criticized Mr. Raiford's handling of board matters and of the
19 board funds, and that his daughter is treasurer of the board, the
20 HOA board, and they all see that as a conflict of interest, so
21 much so that one of those witnesses resigned from the board
22 position because the daughter is treasurer, and all three of the
23 board members, I believe, did resign for one reason or another,
24 one of the reasons we're going to get to in just a moment.

11:35:12 25 The escrow keeps coming up. I believe that it would be

1 proper for the Court to take the developer arguing about the
2 plaintiffs' use of escrow to solve his derelicts with a grain of
3 salt. I think that would be a problem. But when they
4 keep bringing the escrow up --

11:35:37 5 THE COURT: Are you talking about the settlement funds?

11:35:40 6 ATTORNEY LUCEY: Yes, sir. They keep bringing up --

11:35:43 7 THE COURT: I heard you before say I don't want to give it
8 over to -- because he controls the board and he'll do whatever he
9 wants to with the money. But it sounded pretty clear to me that
10 everybody from that side was willing to say we're going to
11 designate this to pay off this mortgage for the golf course.

11:36:03 12 And for the life of me, quite frankly, I don't see how that
13 is not beneficial to the homeowners as opposed to them
14 continually paying this and getting charged for it.

11:36:20 15 ATTORNEY LUCEY: Plaintiffs, on behalf of the homeowners --

11:36:20 16 THE COURT: What benefits you in this case?

11:36:20 17 ATTORNEY LUCEY: I'm sorry, sir?

11:36:21 18 THE COURT: What strategic benefit are you deriving from
19 that money not being used to pay off this mortgage?

11:36:30 20 ATTORNEY LUCEY: None, except that --

11:36:32 21 THE COURT: I don't know about that.

11:36:34 22 ATTORNEY LUCEY: Except that -- except that the payoff of
23 the mortgage reduces the damages this remaining defendant has
24 done to the homeowners, it reduces the damages that I go to the
25 jury on. And that's why, when we went to the court --

11:36:46 1 THE COURT: So doesn't that put you in an antagonistic
2 position with the other homeowners? If paying off this debt is,
3 to me, clearly beneficial to the homeowners by you saying I just
4 want to keep that out, I want to go to the jury for more money,
5 that seems antagonistic to me.

11:37:05 6 ATTORNEY LUCEY: On behalf of the homeowners as a group,
7 going to the jury for more money in the derivative claims on
8 behalf of the homeowners association.

11:37:11 9 There's only three things the representative plaintiffs
10 asked for in the funds, both in discussions with the other
11 parties and in this court a month ago, three things.

11:37:20 12 One was that the escrow be allocated in accordance with
13 plaintiffs' claims. Plaintiffs' larger claims is the failure to
14 fund reserves, and plaintiffs insisted that part of the recovery
15 be earmarked for reserves. So part of it would go directly to
16 the bank, and part of it would be earmarked on the larger claim
17 that is here before the Court.

11:37:41 18 Secondly, plaintiffs --

11:37:42 19 THE COURT: Well, let me ask you that. If you were to
20 divide them up and pay them that way how does that benefit the
21 homeowners presently who are being charged and surcharged for
22 this debt to the golf course?

11:37:52 23 ATTORNEY LUCEY: Because they're also getting slammed with
24 expenses that they can't fund because they have no reserves.

11:37:52 25 THE COURT: From where?

11:37:59 1 ATTORNEY LUCEY: Well, this summer three of the golf pumps
2 failed. \$275,000 in repairs. They can't afford it, so now
3 they're having a third-party company fund their repair of the
4 golf course because what they usually do is they raise the road
5 reserve, but even the road reserve doesn't have enough money
6 anymore to pay for this unexpected expense.

11:38:20 7 THE COURT: So -- okay. All right.

11:38:21 8 ATTORNEY LUCEY: And, Your Honor, the third thing that came
9 up in court in July was this: We asked for a confirmation from
10 the defendants that they were not in the process of selling the
11 golf course and the developer rights. If we're going to give the
12 money to the bank to pay off the golf course to help the
13 homeowners, that's great, but if we're giving it to them to help
14 you sell your lots and to help you sell the golf course that you
15 said we had to have 10 years ago -- you said we had a buy it --
16 your developer-controlled board arranged for this acquisition.
17 We just want to make sure we're not handing the developer all the
18 profits from the pay-down of the golf fund.

11:39:01 19 Well, sure enough last Friday, in Mr. Raiford's deposition,
20 he's in negotiation with three groups to sell all remaining
21 developer rights and property for \$5 million and to sell the golf
22 course for the payoff the Apex loan. But that's a tough sale
23 because they claim that the golf course is only worth
24 \$1.1 million, and the Apex loan is \$2.1 million.

11:39:25 So they need a million-dollar pay-down so that Mr. Raiford

1 can sell the neighborhood. This is the same golf course that he
2 caused the association to acquire at almost three times its value
3 in 2016, saying you have to have it, you have to have it, and now
4 it's getting sold.

11:39:43 5 And there's not one record in the homeowners' minutes that
6 the board even discussed this. There's been no notice to the
7 homeowners it's under consideration; there's been no protections
8 implemented to somehow protect the homeowners association or the
9 homeowner golf members. Nothing.

11:40:01 10 Mr. Raiford is just shopping his neighborhood down the
11 street to a price, 2.1 million golf course, 5 million on the
12 property. That's why, when we were here in court in July, we
13 didn't get a confirmation from the developer that they weren't
14 negotiating a sale, because they were negotiating a sale and they
15 didn't tell any of us, and that's why we were here on a motion to
16 compel in July, because we had asked for this information so we
17 would know what's going on with our association, and they did not
18 comply with the discovery requests, and it wasn't until Friday,
19 three days ago, that we finally got this information.

11:40:27 20 So the three things that mattered was making sure that it
21 benefits the homeowners, not the developers, which he's got it
22 for sale so there's no way to build in that protection; and the
23 second thing was to make sure it gets allocated in accordance
24 with our damages; and the third, the Court will recall the
25 discussion in Court in July that there's a risk that if we pay

1 down part of the loan with some of this money that the damage,
2 the loan balance, or the damages at trial, would be altered and
3 the witnesses will say something about that, and all of a sudden
4 we've got settlement proceeds in the trial of this case.

11:41:00 5 And I said I don't have a problem with that if the
6 developer, if the remaining defendants, are going to waive the
7 right to appeal that issue, the settlement funds coming in
8 somehow inadvertently. We just don't want to inject appealable
9 error in a two-week trial because whoever wants to retry a
10 two-week trial.

11:41:18 11 And we have not gotten assurance from any defendants that
12 they will waive appeal on that issue. We did not ask for a
13 complete waiver of appeal; we just said if somehow the changed
14 loan balance gets into evidence here, you're not going to create
15 an appealable issue with our trial. And they won't agree to
16 that.

11:41:32 17 So paying down that amount was you pay the full amount or in
18 proportion to our reserve claim, which is larger than the loan,
19 paying that amount alters our damages at trial, and it creates an
20 appealable issue, and we asked for help on that and we didn't get
21 it.

11:41:52 22 So, Your Honor, it's not clear that paying down the loan
23 right now benefits anybody but the developer-controlled board and
24 the developer, in his negotiations, to sell the three -- to the
25 three different groups he's currently negotiating with.

11:42:08 1 I'm going repeat, it was the developer-controlled board in
2 2016 that wrote to all the homeowners and said you have to buy
3 this golf course, your neighborhood value depends on it, you have
4 to buy it.

11:42:19 5 And it's that same developer who wants to pay down now and
6 who has quoted that he's shopping the golf course for 2.1
7 million, because that's what the payoff is with Apex. But it
8 won't get 2.1 million because everybody concedes, including the
9 developer, that the only value of the golf course is 1.1 million
10 because he had the association pay almost \$2 million extra for it
11 in 2016.

11:42:45 12 And the Court may not recall all the background on this, but
13 the developer himself, the developer, the predecessor developer,
14 promised golf courses. The golf course has always been in the
15 web page to sell, housing advantage, pre this developer and
16 during this developer. It's always been there.

11:43:03 17 This developer tried to buy it back. He wouldn't pay what
18 was needed to buy the golf course back, so then he had the
19 homeowners pay what the developer wouldn't pay. He said it was
20 too expensive. He testified on Friday that the homeowners whom
21 he caused to buy this golf course in 2016 never had any business
22 buying that golf course, they were not qualified to buy it, they
23 never should have done it, they paid too much for it. I just had
24 to say, I said, Mr. Raiford, but you were president of the board
25 of directors that did that. Yes. And none of those, none of

1 that, was ever disclosed.

11:43:44 2 And I forgot, when we were talking about the petition I
3 forgot a very important point. The petition was procured by
4 misrepresentation. I said it but I didn't read to you what the
5 misrepresentation is. Binz, soliciting these signatures, writes
6 to everybody, quote, as the HOA note TUESDAY states -- so he's
7 about to repeat, reiterate what the HOA said. So both the HOA
8 mischaracterized our suit, and Binz, the solicitor of the
9 signatures, mischaracterized our suit. Quote, a few HOA members
10 have filed a lawsuit against the HOA and some individuals,
11 period, end quote.

11:44:22 12 Never mentioned that the suit was filed primarily against
13 the developer. Never mentioned that they were not seeking
14 damages from the HOA. The HOA was only a necessary party because
15 it was a derivative action. Complete misrepresentation for the
16 80 -- to get the 80-odd signatures that have either died, moved
17 away, or signed the petition to utilize the funds.

11:44:51 18 Your Honor, another example of how we represent the
19 membership, there's been an issue in this case of what are called
20 orphan parcels. There are roughly 50 parcels of real estate in
21 Mount Vintage, including the roads, that this developer has never
22 secured for the neighborhood. There were tie-in problems and
23 whatever else. These 50 parcels include some of the entrance
24 parcels. And we've been after -- we've been trying to trace what
25 happened to these parcels, why this developer has never secured

1 these parcels.

11:45:26 2 Well, what he did a month ago was he wrote a -- he allowed
3 Stanley Martin, one of the big customers at Mount Vintage, to buy
4 the rear-entrance parcel, and without court approval he wrote a
5 letter to the County of Edgewater [sic] saying they can build on
6 this green space.

11:45:47 7 The homeowners, in response to our notification, the
8 homeowners, through a person, wrote the board, wrote the county
9 of Edgefield and said no, those are our green spaces; we don't
10 want that to occur. And we've documented some of those responses
11 in the materials that we filed with the court. It shows how we
12 actually are representing the homeowners in this matter and the
13 developer is simply just looking out for himself.

11:46:17 14 The main two economic, two or three economic, matters where
15 the economic diversity is is between the developer and the
16 homeowners regarding the funding for the amenities and regarding
17 the failure to fund reserves for the entire complex. Our reserve
18 study says \$9 million was needed. Under the *Goodard* case, under
19 the *Dunes West* case, it's the common law of this state that any
20 neighborhood developer has a duty and an obligation to put the
21 ensuing neighborhood and its members on sound, fiscal footing.
22 This developer has not done that, and that's the crux of most of
23 our damages.

11:47:03 24 There's a lot of self dealing in this case, but some of the
25 self dealing is minor damages, a couple hundred thousand, a

1 quarter million here, a quarter million there, for self dealing.
2 The main damages is the reserve funding and the funding of the
3 golf course overpayment that he caused in 2016.

11:47:22 4 The other economic antagonism they referenced, yes, liens
5 were placed on several of our plaintiffs during this litigation.
6 We didn't represent those plaintiffs. We had nothing to do with
7 it. Those plaintiffs paid those liens off or resolved, whatever
8 they resolved, with them. They don't exist. Today there are no
9 liens, as best we know.

11:47:40 10 Yes, prior to my involvement in the suit several of the
11 plaintiffs filed complaints with the Department of Consumer
12 Affairs. That is a legal avenue presented by the State of South
13 Carolina for a homeowners association to file complaints. They
14 followed the law. The Department of Consumer Affairs sent them
15 to the defendant. The defendant ignored them more or less, or
16 provided some plain-vanilla responses, and the Department of
17 Consumer Affairs were unable to do, powerless to do, anything
18 about it. End of story.

11:48:10 19 Later these people, some of these people, find me and had me
20 look at the economics and the transactions and the self dealing,
21 and they brought a lawsuit. There's no remaining antagonism from
22 the previous submissions to the Department of Economic Affairs.

11:48:42 23 As to the economic antagonism as to the escrow, the Court
24 has heard us, and heard us in July. Those funds are going to the
25 HOA. The question is are they going to go to a

1 homeowner-controlled board or a developer-controlled board. And
2 we are either trying to get them to a homeowner-controlled board
3 or get them with sufficient safety arrangements so they don't
4 benefit the developer, and right now those safety arrangements
5 are not in place so we cannot benefit the homeowners by giving,
6 or benefiting, the developer directly who's attempting to sell
7 the entire complex.

11:49:29 8 Your Honor, I think some of the other issues I get into
9 would overlap into the other motions. Thank you, sir.

11:49:30 10 THE COURT: Thank you. Any response?

11:49:31 11 ATTORNEY BUCKINGHAM: Yes. And I am aware of the time, so I
12 am going to keep this tight.

11:49:41 13 THE COURT: You're aware of?

11:49:42 14 ATTORNEY BUCKINGHAM: The time. So I'm just going to keep
15 this tight.

11:49:45 16 THE COURT: Listen, I don't have anything else to do. Just
17 keep on going.

11:49:48 18 ATTORNEY BUCKINGHAM: Okay. Yes, sir. Last evening I filed
19 a document, a couple of documents, with the court. This is in
20 connection with my reply in support of our motion for summary
21 judgment. This is attached thereto as Attachments 25, 26, and
22 27.

11:50:00 23 Attachment 25 is a deed that was filed with the Register of
24 Deeds for Edgefield in 2016 transferring the golf course to the
25 HOA. Attachment 26 is the mortgage that goes with it. That

1 mortgage is signed not by Mr. Raiford but by another person of
2 the HOA board.

11:50:28 3 I bring all this up because the real crux of the plaintiffs'
4 theory is not really that LL, Wayne Raiford, forced the board to
5 undertake this mortgage. Said he didn't stop, right. It's a
6 weird twist in this case, right. The evidence is going to show
7 that, with all these transactions, the board did it, and
8 Mr. Raiford went along with it, but he never forced them to do
9 it. Other peoples' signatures on all these documents, and the
10 real crux of the matter is what they're really upset about is
11 that he didn't stop the board.

11:51:11 12 That's neither here nor there for the purposes of this
13 derivative claim, but I want to make that very clear as we head
14 to trial because that is going to be a recurring theme that this
15 Court, and ultimately the jury, is going to hear.

11:51:23 16 Now I just want to turn back to --

11:51:25 17 THE COURT: Well, let me ask you this.

11:51:27 18 ATTORNEY BUCKINGHAM: Yes, sir.

11:51:28 19 THE COURT: The board is made up by people that he has a
20 right to put on there and nobody else but him --

11:51:30 21 ATTORNEY BUCKINGHAM: That's right.

11:51:30 22 THE COURT: -- as the developer, which is how it is lots of
23 times. But suffice it to say the people on the board, whoever
24 they are, are there to continue going what he wants them to do.

11:51:50 25 ATTORNEY BUCKINGHAM: Well, I mean --

11:51:52 1 THE COURT: That's why the developer, that's why he
2 maintains that right to name people on the board, and it's a
3 common right that's held, but the reason why you have it is to
4 make sure that if the developer gets taken care of, he gives his
5 investment paid back, and then turn it over to the HOA. He's
6 there to take care of what he wants to do at this juncture.

11:52:19 7 ATTORNEY BUCKINGHAM: This is getting more into what the
8 evidence is going to show --

11:52:22 9 THE COURT: Sure.

11:52:22 10 ATTORNEY BUCKINGHAM: -- but you will hear that board
11 members would say that he has never told them how to vote, he has
12 never threatened anyone being kicked off the board. In fact,
13 most folks, they volunteered for this position because they want
14 to serve and then they get into it and realize, oh, my God, I
15 made a huge mistake. So nobody is really believing a whole lot
16 of this volunteer-paid job where this is what you get, this is
17 the gratitude you get for trying to make decisions.

11:52:49 18 So again, that's going into the evidence --

11:52:51 19 THE COURT: All right.

11:52:52 20 ATTORNEY BUCKINGHAM: That's not really germane.

11:52:53 21 THE COURT: You're right.

11:52:55 22 ATTORNEY BUCKINGHAM: I do want to go back to the discussion
23 of the nonprofit act statute. I just, I can't quite understand
24 the plaintiffs' argument. You know, their argument is that we
25 ought to follow the statute or at least give it precedence.

11:53:10 1 THE COURT: No. The argument is the statute takes priority
2 over everything else, and then your bylaws, and then your
3 covenants. That's what I heard him say.

11:53:19 4 ATTORNEY BUCKINGHAM: Yes, sir, that's exactly what they
5 said, and then were invited to disregard what the statute says,
6 because the statutes says the term member, you disregard what the
7 covenants and the bylaws and the articles call someone. That's
8 the definition of member in the statute. The statute says
9 disregard what you call them.

11:53:34 10 THE COURT: Typically don't you have language in the statute
11 or the bylaws that, if there is a disagreement, one or the other
12 controls?

11:53:43 13 ATTORNEY BUCKINGHAM: I believe that's true. I think --

11:53:44 14 THE COURT: Which one would control in this one, the bylaws
15 or the statute?

11:53:47 16 ATTORNEY BUCKINGHAM: Oh, the statute. There's no way that
17 the bylaws, for it, in their reconcilable conflict, I presume,
18 would --

11:53:56 19 THE COURT: Well, if you have one having voting rights and
20 one not having voting rights at all, that would be a conflict.

11:54:03 21 ATTORNEY BUCKINGHAM: To the extent that the statute
22 requires people to have voting rights, again, yes, that would be
23 a conflict. But the Nonprofit Corporation Act explicitly says
24 you can have classes of folks that don't have voting rights.

11:54:12 25 THE COURT: But if the Act says you've got to have voting

1 rights, and your bylaws say you don't have any voting rights,
2 then does the Act takes precedence --

11:54:28 3 ATTORNEY BUCKINGHAM: Yes, sir.

11:54:28 4 THE COURT: -- so, therefore, they have certain voting
5 rights provided by the Act?

11:54:31 6 ATTORNEY BUCKINGHAM: That's right. And that's exactly what
7 those statutes say that I quoted to you earlier.

11:54:35 8 THE COURT: Okay.

11:54:35 9 ATTORNEY BUCKINGHAM: You know, they say regardless of what
10 the bylaws say about voting rights, on these matters, when
11 there's proposed amendment on these matters, folks that don't
12 have voting rights can vote as a class on those issues. But
13 again, that's not involved in this case.

11:54:51 14 THE COURT: Okay.

11:54:51 15 ATTORNEY BUCKINGHAM: And then just finally to touch on the
16 *Garry* case. And you're right, this was not a Court of Appeals
17 decision, this was just issued by a special master. I guess the
18 case was referred to a special master out of the circuit court.
19 But it's a, you know, 20-page opinion, 15-page. And the comment
20 was made that this decision said nothing about members in the
21 Nonprofit Corporation Act. Let me just do a brief quote from it.
22 So I'm trying to figure out where I'm going to start with this.

11:55:30 23 And so the homeowners have made a contention that they have
24 voting rights because they're members. And here's where I'm
25 picking up with this decision. It's on page 6. This is cited in

1 my brief. This contention fails. In making their contention,
2 those plaintiffs overlooked South Carolina Code 33-31-140(23)(a),
3 the definition of member. That section defines a member as a
4 person entitled to vote without regard to what a person's called
5 in the articles or bylaws. The relevant part of the official
6 comment is if a person is called a member by a nonprofit
7 corporation that does not have a right to vote for directors,
8 that person is not a member for the purposes of the Act.

11:56:10 9 We skip down just two sentences to pick up with this line:
10 Accordingly, member, -- in quotes -- when used in the context of
11 voting, simply does not include the Class B members. And that --
12 I fail to see how that's not instructive for where we are in this
13 case.

11:56:33 14 Unless you have any further questions, I think that that
15 concludes my argument on this matter. I do have one quick
16 follow-up. With regard to redaction of the petition that I'm
17 going to file, I guess technically I should ask for leave to
18 amend to file --

11:56:47 19 THE COURT: Granted.

11:56:48 20 ATTORNEY BUCKINGHAM: Okay. Thank you.

11:56:49 21 THE COURT: All right. What's the next matter by date that
22 we're dealing with?

11:56:52 23 ATTORNEY LUCEY: The next matter by date, Your Honor, is the
24 plaintiffs' motion to -- motion for summary judgment. Your
25 Honor, LL took the position in 2013 - 2014, that it was the

1 developer of Mount Vintage, and apparently for a long time nobody
2 questioned otherwise. It turns out that it's not. LL of South
3 Carolina took a deed in lieu of foreclosure during a foreclosure
4 proceeding from the debtor on September 3rd, 2013. The lis
5 pendens in the matter was filed in 2012.

11:57:47 6 Rather than rely upon the deed in lieu of foreclosure -- and
7 as an aside, there's some method to the madness here. There was
8 a negotiation pending to sell everything to some Chinese
9 investors, okay. So they wanted to get a deed and get the sale
10 done to the Chinese. Well, the sale to the Chinese didn't
11 happen, and LL elected to continue the foreclosure proceeding.
12 He won. He bid the foreclosure. And there's no dispute in this
13 matter that the developer rights were part of the security of the
14 foreclosed loan. No dispute. LL won --

11:58:23 15 THE COURT: The developer rights was in the deed in lieu?

11:58:29 16 ATTORNEY LUCEY: Yes, it was.

11:58:30 17 THE COURT: Then in the foreclosure weren't those rights
18 somehow assigned to Topsail, or whoever it is?

11:58:41 19 ATTORNEY LUCEY: Yes, Your Honor. LL won the bid for the
20 property. He assigned the winning bid to RTI. The special
21 referee deed -- all the developer property and all rights or
22 pertinent thereto of any kind of any estate go to RTI on
23 November 11th, 2013.

11:59:02 24 THE COURT: Okay.

11:59:02 25 ATTORNEY LUCEY: So LL was a developer until November 11th,

1 2013, for six or eight weeks under the deed in lieu, but the deed
2 in lieu and everything was subject to the lis pendens. And when
3 the special referee deed gets issued, it relates back to lis
4 pendens. Anything that has happened since lis pendens takes
5 subject to the special referee deed. It's a matter of law.
6 That's the way it works. We briefed the law for the Court in our
7 filing.

11:59:31 8 Now, if there was any doubt about that, the debtors'
9 attorney, Mary Guynn, submits to the special referee a corrected
10 deed in July of 2014, and the corrected special referee deed
11 express it's no longer just pertinent rights, all pertinent
12 rights, it's all pertinent rights and developer rights. They're
13 giving no doubt. And the corrective deed from July of 2014, it
14 also relates back to 2012. So the deed in lieu of foreclosure
15 expressly takes subject to anything that the court does.

12:00:07 16 And they put -- they filed -- they did file an opposition to
17 this motion, and they put Mary Guynn's testimony. It doesn't
18 matter what Mary Guynn has to say. I don't know what she tinks
19 about lis pendens. I don't care. It's a matter of law. It's
20 clear as day. That's been the purpose of lis pendens since we
21 got jurisprudence from England. It's just, it's just, a matter
22 of law.

12:00:32 23 Now, they knew that they did this, and we know they knew
24 they did this because, as I pointed out to the Court in my
25 memorandum, when they had the sale to the Chinese investors

1 pending Mary Gynn prepared a warranty deed from RTI, Retail
2 Topsail Island, to the Chinese investors, and she prepared a
3 quitclaim deed from LL to the Chinese investors, evidence right
4 there she knew who had real title, and it was RTI.

12:01:03 5 And, Your Honor --

12:01:03 6 THE COURT: So in your motion you are asking me to decide
7 what?

12:01:08 8 ATTORNEY LUCEY: That LL was not the developer, and RTI -- I
9 mean, we're now, we're now, nine years later. RTI abandoned any
10 opportunity to take developer status. They're gone. And we seek
11 the Court's declaration of that.

12:01:29 12 And, Your Honor, just briefly, they did this opposition memo
13 to you saying, oh, well, they took a belts and suspenders
14 approach, they not only got the deed in lieu, but they went on to
15 close out the foreclosure to make sure there's no more interest
16 involved.

12:01:46 17 And so there's some question left of what happens when the
18 foreclosing party does that? Well, that's not what happened.
19 The foreclosing party didn't do it. The foreclosing party
20 transferred everything to a different corporation, and so the
21 belts are in one entity and the suspenders are in the other
22 entity. They're not the same entity.

12:02:06 23 And our law recognizes that a shareholder does not own
24 corporate assets. Neither does a parent corporation, even if you
25 buy the later assignment -- which I'm going to talk about in a

1 second -- neither does a parent corporation own the subsidiary's
2 assets. The existence or nonexistence of a parent-subsidary
3 relationship is irrelevant. LL was not the developer.

12:02:32 4 And, in fact, it has great ramifications on the homeowners
5 because, for one thing, none of these entities have been paying
6 dues now for nine years. None of them have been paying
7 assessments. Which one's supposed to pay it? Which years do we
8 count, the years that the real estate is in RTI or the years that
9 the real estate is in LL? It makes a tremendous amount of
10 difference to the homeowners.

12:02:56 11 And, frankly, every board of directors' decision since 2013
12 by the LL appointed directors, they're invalid. There has never
13 been a properly appointed board since LL proclaimed to be the
14 declarant. In fact, LL has amended the covenants. It didn't
15 have a right to do that. It did not have developer rights.

12:03:18 16 And so this belts and suspenders thing, no. They put the
17 belts in one company and suspenders in another, and they've been
18 playing fast and loose with that.

12:03:30 19 Now, in September of 2014 there's evidence that they met
20 with the CPA and they backdated an assignment of the ownership of
21 RTI from Mr. Raiford to LL to make a subsidiary, so there's one
22 piece of evidence that says maybe it's a subsidiary. There's 10
23 pieces of evidence that say it's not.

12:03:56 24 When we had a venue dispute in this court in 2020,
25 Mr. Raiford filed an affidavit with this court saying he was the

1 owner of RTI, nothing about it being a subsidiary. And we've got
2 10 years of tax returns that LL has filed and a CPA has filed
3 with the federal government. On page 5 on every one of those
4 returns there's an express question, Do you have any part of a
5 subsidiary? For 10 years LL has told the federal government no.

12:04:28 6 THE COURT: Doesn't the existence of those differing
7 documents, even those 10 to 1, create a question of fact?

12:04:34 8 ATTORNEY LUCEY: No, because a parent company can't own
9 subsidiary assets anyway. Even if RTI is a subsidiary, became a
10 subsidiary of LL, LL is not the developer. RTI had the developer
11 rights with the special referee. Even if it's a subsidiary RTI
12 can't claim it. I'm just showing the Court that it can't even
13 really claim subsidiary status if it were relevant.

12:04:59 14 That's what I've been hearing in depositions for four years.
15 Why is this real estate in RTI and this real estate is in LL?
16 They're the same company. Why is there two different
17 confirmations of corporate status from the Secretary of State? I
18 don't know. They're the same company. Why did you transfer all
19 the real estate from LL in 2018 -- excuse me -- back to RTI, or
20 vice versa -- I can't remember which one it was. I don't know.
21 You have to talk to my attorneys. Talk to my accountant. Well,
22 here's a deed from last year. You signed this last year. Why
23 did you sign this deed from RTI? I don't know. The same company
24 as LL. Well, the deed is from RTI to LL. Why are you
25 transferring it? I don't know.

12:05:44 1 They're not the same company. LL was never the developer.
2 RTI has abandoned its right to be a developer now for nine years,
3 and we ask the Court to so hold. Thank you, sir.

12:05:59 4 THE COURT: Thank you.

12:05:59 5 ATTORNEY BUCKINGHAM: Okay. Well, let's all take a deep
6 breath. I have attached to our memorandum in response the reason
7 why the transaction happened, and, yes, I have characterized it
8 as belt and suspenders. That's not me coming up with the
9 structure; that's what LL's attorney, Mary Guynn, did, and that's
10 based on cases that I cited for the Court to review.

12:06:26 11 Now, this is such a narrow issue, there's certainly no law
12 in South Carolina on this, and there's barely any law, at least
13 in reported decisions, in the United States on this. Right. The
14 narrow, the specific narrow, point here is what happens when a
15 creditor in a mortgage foreclosure action takes the property
16 through a deed in lieu and then proceeds with a foreclosure.

12:06:53 17 The scant cases that are out there ultimately fall back on
18 the doctrine of merger and say that, well, you know, except for
19 clearing out -- it's basically a backdoor quiet title action --
20 except for clearing out junior liens, the merger of the equitable
21 interest from the mortgage and the record title interest of the
22 deed merge, so that when the creditor acquires a property through
23 a deed in lieu, except for extinguishing junior liens, there is
24 no other function for the foreclosure proceeding.

12:07:27 25 And so in those cases I cited there have been examples where

1 the court has ordered a foreclosure sale; subsequently the debtor
2 gives a deed in lieu of foreclosure to the creditor; and then the
3 creditor goes and tries to reopen the case to vacate the order
4 saying that there ought to be a sale, which is granted, because
5 in those cases the courts analyzed that as saying, well, this is
6 now or nothing. There is nothing to sell. The creditor has been
7 made whole. Everything that he could have got, except for
8 extinguishment of junior mortgages through the foreclosure
9 action, he has gotten through the deed in lieu of foreclosure
10 process.

12:08:14 11 And that's exactly what Mary Guynn testified to. I put her
12 deposition testimony in here. She is explicit that the reason
13 why LL got the deed in lieu is because LL had the mortgage
14 against K&H, the predecessor developer. LL had, when that
15 party -- \$2.5 million, they defaulted on that. Foreclosure
16 proceedings were commenced, the lis pendens was filed, and then
17 LL took the deed in lieu of foreclosure. At that point the
18 interest merged. And then, as a belt and suspenders approach,
19 they proceeded with the foreclosure action because who knows who
20 else might have come along in the interim and claimed some
21 interest in the property.

12:08:52 22 THE COURT: What's the purpose of LL's assignment to RTI?

12:09:03 23 ATTORNEY BUCKINGHAM: Well -- so again, this is going into
24 the testimony that you would hear -- there was a person
25 affiliated with a prior developer, a gentleman named Bettis

1 Rainsford who Mr. Raiford knows, and they had a strained somewhat
2 relationship, and so Mr. Raiford was trying to structure this in
3 such a way to minimize discovery of the fact that he was going to
4 become ultimately the developer in this -- or LL was going to
5 become the developer, or that he was tied to it.

12:09:38 6 THE COURT: Say that again. Say that again. I'm sorry.

12:09:40 7 ATTORNEY BUCKINGHAM: Yeah. Ultimately it was to shield, as
8 much as possible, the idea that Mr. Raiford was going to be
9 associated with the development of Mount Vintage because of his
10 prior tension with this other individual identified as the
11 developer. That's it.

12:09:54 12 And so the timeline in this case, to the plaintiffs'
13 argument, is really important. The foreclosure sale happened on
14 November 4th. And the master's report tells us all this.
15 Foreclosure happened. LL shows up with their lawyer; makes a bid
16 for the debt that they're owed on the property; wins the property
17 because they're the high bidder; they pay the amount they have to
18 pay; transaction's closed.

12:10:18 19 Two days after that is when the assignment happened, and
20 that's when the master was notified, hey, make the deed out to
21 this party. So the sale had already happened, title had
22 functionally already transferred; and then the assignment
23 happens; and the master issues the deed. And that's all there is
24 to this.

12:10:32 25 This idea that LL somehow is not the developer is just

1 inconsistent with every other item of information that's been --

12:10:45 2 THE COURT: Say that -- you say that somehow they're not the
3 developer?

12:10:48 4 ATTORNEY BUCKINGHAM: No. The contention that LL is not the
5 developer is just dramatically different than any other piece of
6 evidence we have heard in this case.

12:10:57 7 THE COURT: In the assignment to RTI, does it say we include
8 developer rights?

12:11:06 9 ATTORNEY BUCKINGHAM: So the assignment is just an
10 assignment of bid. It's the --

12:11:10 11 THE COURT: So whatever LL would have gotten, they gave over
12 to RTI --

12:11:16 13 ATTORNEY BUCKINGHAM: That's right.

12:11:16 14 THE COURT: -- which included developer rights?

12:11:19 15 ATTORNEY BUCKINGHAM: Well, so Mary Guynn's testimony about
16 this is that there was nothing conveyed; that, again --

12:11:25 17 THE COURT: She did a corrected deed that said including
18 developer rights.

12:11:29 19 ATTORNEY BUCKINGHAM: A year later, or several months later.
20 That's right.

12:11:32 21 THE COURT: But.

12:11:32 22 ATTORNEY BUCKINGHAM: But it was whatever was in, whatever
23 was left in that residuary from the foreclosure sale, after the
24 deed in lieu, whatever that might have been, even if it was
25 nothing, that assignment of bid is really nothing more than a

1 quitclaim over to RTI.

12:11:50 2 THE COURT: I don't agree with that. I don't think you can
3 equate an assignment of your bid to a quitclaim saying -- I'm not
4 saying the only thing that I did -- that's a totally different
5 thing.

12:12:07 6 ATTORNEY BUCKINGHAM: So let's dig in on that. We've got
7 the issue then of the problem of merger of title, right. So LL,
8 when the foreclosure proceeding starts, has the mortgage. It's
9 in default. They pursue mortgage foreclosure. During the course
10 of that -- of course there's the lis pendens that's filed, but
11 during the course of that -- the deed in lieu is given over to
12 LL, everything, developer rights, property, all of it, and the
13 mortgage was for all of that. So when the deed in lieu and the
14 mortgage come together, through merger, title is unified in them.

12:12:50 15 THE COURT: Okay.

12:12:50 16 ATTORNEY BUCKINGHAM: And so that being the case, the
17 foreclosure proceeding is now annulled. And, by the way, that
18 happened, gosh, at this point 11 years ago, 12 years ago, so
19 there's deep staleness concerns associated with trying to
20 invalidate --

12:13:00 21 THE COURT: So go back and clarify something for me. This
22 assignment to keep the existence of Mr. Raiford as low as
23 possible, included the developer rights, right?

12:13:10 24 ATTORNEY BUCKINGHAM: Well, it was the assignment of the
25 bid. It doesn't explicitly mention developer rights.

12:13:24 1 THE COURT: Was it put out afterwards that RTI -- I'll just
2 use this, let's say, LL was the developer?

12:13:33 3 ATTORNEY BUCKINGHAM: No. That's never been -- that
4 position has never been taken by anyone ever.

12:13:37 5 THE COURT: Does the assignment say we're excluding
6 developer rights?

12:13:41 7 ATTORNEY BUCKINGHAM: Well, the assignment bid doesn't
8 mention it.

12:13:44 9 THE COURT: It says we're giving everything to you or
10 assigning it to you that you might have got in this deal. You
11 just said developer rights were one of them. I don't think you
12 can have it both ways. I'm sorry.

12:14:00 13 ATTORNEY BUCKINGHAM: So what are the both ways I'm trying
14 to have? I'm sorry.

12:14:04 15 THE COURT: Well, at one point saying we assign this over
16 there but we maintain the developer rights just to hide the
17 existence of Mr. Raiford when you have a document that says
18 anything we have, we're assigning to you, which include the
19 developer rights that you got in the deed in lieu and the referee
20 deed. Am I mistaken in that?

12:14:22 21 ATTORNEY BUCKINGHAM: Well, I think -- I think that the
22 doctrine of merger is where you might want to stray with that
23 because I think at that point it could have been --

12:14:30 24 THE COURT: The doctrine of merger would have included the
25 developer rights, correct?

12:14:33 1

ATTORNEY BUCKINGHAM: Yes.

12:14:34 2

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THE COURT: And when wouldn't the assignment include the deed?

12:14:40 4

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ATTORNEY BUCKINGHAM: The assignment -- well, the assignment resulted in the deed being issued, but that doesn't mean that

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there was actually anything in the deed. I mean,

7

ultimately what's --

12:14:54 8

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THE COURT: I'm getting lost. I mean, I'm not pretending to be --

12:14:58 10

ATTORNEY BUCKINGHAM: Sure.

12:14:58 11

12

THE COURT: -- the dumbest in the world about this, but I'm just somehow not following you.

12:15:01 13

14

ATTORNEY BUCKINGHAM: Ultimately what happened here is LL had the mortgage; LL took the deed in lieu; LL won the bid.

12:15:09 15

16

THE COURT: Which included developer rights? No question. Right here, your submissions said that.

12:15:16 17

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ATTORNEY BUCKINGHAM: The deed in lieu included developer rights, yeah, absolutely.

12:15:20 19

THE COURT: Right.

12:15:20 20

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ATTORNEY BUCKINGHAM: Yeah. And so at that point everything was unified now, and it's only after that, once the bid, the

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winning bid, and everything's been paid for, once the bid is

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assigned to RTI and a deed is issued after that, the question is

24

what was there to issue. Mary Guynn tells us nothing, she

25

doesn't think that there was anything in that. That's why she --

12:15:45 1 THE COURT: The assignment was not a fee, just of the rights
2 in the bid?

12:15:50 3 ATTORNEY BUCKINGHAM: The assignment -- the assignment was
4 the winning bid.

12:15:54 5 THE COURT: What's the affect of proceeding, or deciding, to
6 go forward with your foreclosure in lieu of accepting the deed in
7 lieu? I mean, I thought a lot of times -- and I'm just throwing
8 this out there --

12:16:09 9 ATTORNEY BUCKINGHAM: Sure.

12:16:09 10 THE COURT: -- you have shareholder saying I'm going to get
11 a deficiency judgment against you. I say I want to give you a
12 deed in lieu if you don't get a deficiency judgment. They say
13 too bad, we're getting a deficiency judgment anyway. Those are
14 the kind of things that happen out there. So at that point when
15 the foreclosure goes forward, the whole kit and caboodle goes
16 back over to the mortgagee, right?

12:16:31 17 ATTORNEY BUCKINGHAM: Yes.

12:16:39 18 THE COURT: So the deed in lieu, as it was, in facing a
19 continuation of foreclosure, essentially was accepted or not
20 accepted. I mean, if I give you a deed in lieu, which I still
21 want to not have a deficiency, but if you go forward with
22 deficiency doesn't mean I'm not accepting a deed in lieu.

12:17:03 23 ATTORNEY BUCKINGHAM: I think it depends on what the
24 structure of the documents say. In this case the foreclosure
25 complaint expressly waived any deficiency.

12:17:11 1 THE COURT: Say that again.

12:17:12 2 ATTORNEY BUCKINGHAM: The foreclosure lawsuit expressly
3 waived deficiency. And so during the course of the foreclosure
4 proceeding the only thing that was at stake was the collateral
5 given as security, the prior developer's interest in Mount
6 Vintage, the totality of it, and that is exactly what LL took, it
7 was a compromise in satisfaction of that claim.

12:17:43 8 There was nothing else for the foreclosure proceeding to do,
9 literally to do, other than to clear off junior mortgages. And I
10 have cited the cases that explain that.

12:17:55 11 By contrast, there is not a case out there that validates
12 the plaintiffs' position. If there is, I'm not aware of it.
13 They didn't cite it. I've looked. And again, I get it, this is
14 an exceedingly niche issue, but it is significant that the deed
15 in lieu was taken by the creditor who commenced the foreclosure
16 proceedings --

12:18:19 17 THE COURT: Say that one more time.

12:18:20 18 ATTORNEY BUCKINGHAM: That the creditor took the deed in
19 lieu in connection with the same foreclosure proceedings that
20 were commenced to foreclose on that property.

12:18:30 21 THE COURT: Was the deed in lieu filed? The deed filed?

12:18:32 22 ATTORNEY BUCKINGHAM: Was the deed in lieu filed?

12:18:37 23 ATTORNEY LUCEY: No. There's no reference to it in any
24 court document.

12:18:42 25 ATTORNEY BUCKINGHAM: Is your question was it filed with the

1 court with the register of deeds?

12:18:47 2 THE COURT: I'm just curious. I mean, again, I'll review
3 your cases. To be honest with you, I'm not all that familiar
4 with this, as you can tell.

12:18:55 5 ATTORNEY BUCKINGHAM: Sure.

12:18:56 6 THE COURT: But again under the example I gave you, if I'm
7 trying to avoid having a deficiency against myself I'll give you
8 a deed in lieu of property, waive deficiency. No, we're not
9 going to do that, we'll go forward. So that means they don't
10 accept the deed in lieu and they go forward with their rights
11 under the foreclosure.

12:19:15 12 ATTORNEY BUCKINGHAM: That's right.

12:19:15 13 THE COURT: Is there anything in this case that says we're
14 going to accept the deed in lieu as opposed to anything else you
15 may have, or is it by going forward they didn't accept the deed?

12:19:26 16 ATTORNEY BUCKINGHAM: The deed in lieu -- and I don't have
17 it in front of me --

12:19:27 18 THE COURT: Or is this not even relevant?

12:19:31 19 ATTORNEY BUCKINGHAM: I'm sorry?

12:19:32 20 THE COURT: Or is this not even relevant, it's not relevant?

12:19:33 21 ATTORNEY BUCKINGHAM: Well, let me answer the first
22 question. The deed in lieu, if I recall correctly, first it was,
23 I believe that would have been filed in the register of deeds
24 because that would have reflected the property transaction.

12:19:42 25 Second, if I'm not mistaken, I believe that the deed in

1 lieu -- I think it's on the second page -- explicitly states the
2 fact that the deed in lieu is given in full satisfaction of the
3 debt that was owed from the outstanding mortgage, that there are
4 no more senior lienholders, and that, you know, the title can be
5 given free and clear.

12:20:17 6 And I don't recall that there's anything else in there that
7 mentions any type of further involvement that the debtor would
8 need for the foreclosure action. I don't think. There could be,
9 but I just don't recall at this moment.

12:20:34 10 THE COURT: So it's just clearing up the rest of the title.

12:20:36 11 ATTORNEY BUCKINGHAM: That's right. I mean, ultimately
12 everyone wants a clean title. I know more about this now than I
13 probably should or ever cared to but from my reading there is
14 great caution that is made to lenders about just accepting a deed
15 in lieu because you don't know what other junior claims might be
16 out there that could compromise your ability to, in the future,
17 convey the property, or do any financing of the property, or
18 whatever.

12:21:14 19 And so the advice that's out there, at least that I've read
20 by practitioners that do this, is if you take a deed in lieu,
21 either do the foreclosure behind it so you can extinguish any of
22 those other claims that might be out there, or do a quiet title,
23 but get the certainty to yourself if you want to have good,
24 clean, marketable title.

12:21:32 25 THE COURT: Okay.

12:21:40 1 ATTORNEY BUCKINGHAM: Before I move on, you know, this is
2 all the way down in my brief, but there is a subsequent deed
3 recorded, assignment of Mr. Raiford's interest in RTI to LL,
4 that's been filed with the documents in front you that, is dated
5 December 31st, 2013, and then in May of 2018 we have RTI
6 quitclaiming everything that it has in Mount Vintage over to LL.

12:22:08 7 So by this point there ought to be no dispute from a couple
8 of different angles that LL is the developer.

12:22:13 9 THE COURT: Give me those dates again, please.

12:22:15 10 ATTORNEY BUCKINGHAM: Yeah.

12:22:17 11 THE COURT: RTI assigned to LL?

12:22:19 12 ATTORNEY BUCKINGHAM: Yeah. That was in -- it's dated
13 December 31st, 2013.

12:22:25 14 THE COURT: Okay.

12:22:25 15 ATTORNEY BUCKINGHAM: And then RTI's quitclaim to LL is
16 May 31st, 2018.

12:22:31 17 THE COURT: '18?

12:22:33 18 ATTORNEY BUCKINGHAM: '18.

12:22:40 19 THE COURT: Okay. Thank you, sir.

12:22:42 20 ATTORNEY BUCKINGHAM: Thank you.

12:22:42 21 ATTORNEY LUCEY: So, several things. First of all, merger
22 never happened. When he took a deed in lieu, he took it subject
23 to a lins pendens. The deed in lieu is subject to everything
24 that happens in the court case. Merger never happened with the
25 special referee deed either because that went to a different

1 party that held the mortgage, so you can't have merger. The two
2 transactions, neither one of them merge.

12:23:02 3 To buy the story, the developer's story right here, this
4 Court needs to ignore a half dozen court orders. It has to
5 decide that the foreclosure proceeding and the special referee
6 were meaningless, and that's not so.

12:23:17 7 THE COURT: Well, what weight do you place on the RTI
8 assignment back to LL in December of '13, or the quitclaim in May
9 of '18?

12:23:29 10 ATTORNEY LUCEY: If I can insert a date before that, the
11 Court did ask did RTI ever exercise developer functions of any
12 kind. Yes. The 2015 --

12:23:39 13 THE COURT: That's not the question I asked.

12:23:41 14 ATTORNEY LUCEY: You asked --

12:23:41 15 THE COURT: I asked what emphasis, or what value, do you
16 place on the assignment from RTI to LL in December of '13 or the
17 quitclaim in May of '18?

12:23:52 18 ATTORNEY LUCEY: The December 2013 assignment was actually
19 in 2014, and it has no value because it was an assignment of the
20 ownership of RTI shares, allegedly, to LL. But a parent company
21 does not own the assets of a subsidiary, so it doesn't change who
22 the developer is. The developer rights are still in RTI. The
23 alleged assignment of RTI's ownership to a new entity doesn't
24 affect who's the developer.

12:24:22 25 THE COURT: What about the quitclaim?

12:24:24 1 ATTORNEY LUCEY: The quitclaim deed in 2018 was a quitclaim
2 deed of real estate, it was not developer rights. There has
3 never been an assignment of developer rights from RTI to LL.
4 There's been transactions, there have been deeds. There's never
5 been an assignment of developer rights.

12:24:41 6 And, Your Honor, in 2015 -- I thought I heard the Court ask
7 about did RTI ever do anything against the developer -- it filed
8 the 2015 Edgefield County multi-lot discount application. The
9 entire Mount Vintage is filed with RTI as the developer prior to
10 December of 2014 for the 2015 year. That was filed by RTI, and
11 that is undisputed.

12:25:08 12 They can't rely on any language in a deed in lieu that they
13 allege says full satisfaction because they're taking it subject
14 to the lis pendens, and that's notice to the world that the court
15 proceeding takes priority.

12:25:21 16 I didn't think I needed to file it but I'm happy to, the
17 parties actually filed an amended lis pendens after the quitclaim
18 deed, so they reaffirmed the existence of the lis pendens, they
19 reaffirmed the superiority of a lis pendens, all of which still
20 dates back to the first lis pendens in 2012. They reaffirmed
21 that in November before they issued the final special referee
22 deed to RTI. Thank you, sir.

12:25:54 23 THE COURT: Thank you. All right. Next motion.

12:25:56 24 ATTORNEY BUCKINGHAM: We can consider all these together.
25 These are the motions for summary judgment on all the remaining

1 bases by LL of SC, Raiford Topsail Island, and TR Sales. Let's
2 see. 12:30, okay.

12:26:17 3 ATTORNEY LUCEY: Could we impose upon the Court for a
4 brief --

12:26:20 5 THE COURT: I'm sorry?

12:26:20 6 (Off-the-record discussion.)

12:30:47 7 (Court recessed at 12:26 p.m. and reconvened at 12:38 p.m.)

12:38:11 8 THE COURT: Mr. Lucey, tell me real quick why the merger
9 didn't occur, as you were telling me a minute ago, with the deed
10 in lieu.

12:38:20 11 ATTORNEY LUCEY: The merger didn't occur because when they
12 got the deed in lieu the deed in lieu was subject to the lis
13 pendens, the year-old lis pendens, so it was impossible for the
14 deed to merge with the mortgage. And as Your Honor pointed out,
15 by continuing on the foreclosure they rejected the deed in lieu.

12:38:40 16 THE COURT: Say that again.

12:38:40 17 ATTORNEY LUCEY: As Your Honor noticed, by continuing on the
18 foreclosure proceeding they actually rejected the deed in lieu.

12:38:47 19 THE COURT: All right. This is defendants' motions for
20 partial summary judgment for all entities; is that correct?

12:38:54 21 ATTORNEY BUCKINGHAM: Yes, sir. And just to be clear, we do
22 not agree with any piece of that, that the deed in lieu was
23 rejected. I know you know that, but I just want to be very
24 clear.

12:39:03 25 THE COURT: All right.

12:39:04 1 ATTORNEY BUCKINGHAM: All right. So I'm going to
2 pretty-well track the structure of my motion for all three
3 defendants.

12:39:16 4 The first cause of action that we think ought to be
5 dismissed outright at this point is reformation. The complaint
6 alleges that there are five reasons why reformation is
7 appropriate in this case, which we would note that's an equitable
8 action so ultimately you would have to do it.

12:39:36 9 THE COURT: Right.

12:39:36 10 ATTORNEY BUCKINGHAM: Public policy, South Carolina law, the
11 South Carolina Constitution, fiduciary duties, standards, and
12 preferences -- I'm not even sure what that means -- and then the
13 rule against perpetuities, it seems as though from plaintiffs'
14 filing that they're not going to be pursuing any of those
15 theories about why reformation is appropriate as much as they are
16 now contending that the covenants are unconscionable contracts of
17 adhesion that exist in perpetuity and, therefore, you ought to
18 invalidate them. That would be a novel thing for this Court to
19 do.

12:40:10 20 The law is very-well established that to the extent that
21 covenants are contracts they're voluntary contracts, freely
22 entered into by the parties, which is true in this case, and that
23 as far as the covenants existing in perpetuity, that's because
24 they have an element to them of real estate where interest run
25 with the land.

12:40:28 1 I have not located any case anywhere that suggest that the
2 bases articulated by the plaintiffs for why these covenants ought
3 to be reformed, or invalidated, whatever the relief ultimately
4 is, is appropriate. The point of covenants is that they exist
5 for a very long time, so we don't understand what the legal
6 basis, or equitable basis, for reformation of the covenants would
7 be.

12:41:00 8 THE COURT: Isn't reformation basically saying we had an
9 agreement and either there's a mistake as to a material part of
10 the agreement or the resulting contract was a result of a fraud
11 committed at the beginning of the contract, in the -- or fraud in
12 the inducement, I guess? I don't know how you would describe
13 that.

12:41:23 14 ATTORNEY BUCKINGHAM: I think that's probably right, I think
15 it probably is fraud in the inducement. But, yes, your general
16 point is exactly right, it takes fraud or mutual mistake to
17 justify reformation, at least under South Carolina law. There's
18 no allegation or evidence certainly that that has happened, so we
19 think that, as a matter of law, the action for reformation is --

12:41:42 20 THE COURT: Let me ask you this. I know covenants not to
21 compete, you say we don't write any contracts and the parties
22 have to make their own contract. We may not be for a certain
23 provision we find are not enforceable, but you can't rewrite a
24 contract.

12:41:52 25 ATTORNEY BUCKINGHAM: That's right.

12:41:59 1 THE COURT: In reformation, that's not the law? Can you
2 rewrite the contract, or you do something that's already agreed
3 upon and placed into the contract?

12:42:07 4 ATTORNEY BUCKINGHAM: You know, the problem with not having
5 any authority to rely on is I can't give you a definitive answer
6 to that question. Because no court that I've located has agreed
7 to reform covenants, I'm not aware of -- and particularly in
8 South Carolina, I'm not aware of -- how or whether a court can
9 reform the covenants or it just has to invalidate. My instinct
10 is that we follow other aspects of South Carolina law that --

12:42:37 11 THE COURT: Were those covenants put on by the original
12 developer?

12:42:41 13 ATTORNEY BUCKINGHAM: Yes, sir.

12:42:42 14 THE COURT: So how could they ever be part of an agreement
15 with these plaintiffs?

12:42:45 16 ATTORNEY BUCKINGHAM: They couldn't. Everyone involved in
17 this is removed from the original chain of title, so everyone's
18 just dealing with the hands they've been dealt with these
19 covenants and this --

12:42:50 20 THE COURT: All right. Let me stop tell you there.

12:42:52 21 ATTORNEY BUCKINGHAM: Yes, sir.

12:42:52 22 THE COURT: Mr. Lucey.

12:42:52 23 ATTORNEY LUCEY: Yes, sir. The law implies that the
24 developer will complete his business and turn over the
25 neighborhood to the homeowners within a reasonable amount of

1 time. And that's the words used by many courts, reasonable
2 amount of time.

12:43:12 3 THE COURT: What does that have to do with the reformation
4 of the covenants themselves?

12:43:18 5 ATTORNEY LUCEY: Because when the covenants were drafted
6 nobody contemplated the great recession, nobody contemplated
7 what's taking place at Mount Vintage, and nobody contemplated
8 that three decades later we'd still be sitting here talking about
9 a developer --

12:43:31 10 THE COURT: So the basis that you're arguing for the
11 reformation is an agreement that was not incorporated by the
12 parties, or there's fraud. But what is the basis? I'm not
13 clear.

12:43:46 14 ATTORNEY LUCEY: Well, reformation can simply come from a
15 failure to reach agreement on a term, a necessary term.

12:43:51 16 THE COURT: A material term.

12:43:53 17 ATTORNEY LUCEY: And we do believe that necessary term did
18 not reach an agreement on perpetual developer control --

12:43:58 19 THE COURT: I thought it was you reached an agreement but
20 somehow it was not placed into the contract, it didn't make its
21 way into it but it had been agreed upon. That's the difference,
22 isn't it?

12:44:07 23 ATTORNEY LUCEY: I believe there is a difference, but I do
24 believe you can reform if, in fact, the parties didn't -- in
25 hindsight, don't appear to have codified their agreement in the

1 document that's being used.

12:44:19 2 THE COURT: How can your claimants ever, ever claim that
3 they were a part of some agreement when they were, multi-years
4 down the line these covenants have been recorded for years?

12:44:32 5 ATTORNEY LUCEY: One can say the same thing about the
6 successor developer. But the point is --

12:44:36 7 THE COURT: I'm not saying that. I'm asking you how can you
8 claim reformation for people who are buying years later after the
9 covenants were final?

12:44:46 10 ATTORNEY LUCEY: Because the covenant is a quasi-contractual
11 instrument that gets recorded in the public records.

12:44:51 12 THE COURT: Sure.

12:44:52 13 ATTORNEY LUCEY: So we become a party to it eventually when
14 we buy into the neighborhood. The successor developer, whoever
15 we decide that is, becomes a party to it by becoming a successor
16 developer. So this 20-year old --

12:45:02 17 THE COURT: So tell me -- okay. It can't be an agreement
18 that they had because they weren't party to the agreement. They
19 became -- they had the benefit of the covenants, or the
20 detriments of the covenants, but they weren't parties to the
21 agreement such that the material part of the agreement didn't
22 find its way into the covenants. There's no way they can do
23 that. And fraud, how could they be --

12:45:22 24 ATTORNEY LUCEY: We're not alleging fraud, Your Honor.

12:45:22 25 THE COURT: Sir?

12:45:29 1 ATTORNEY LUCEY: We are not alleging fraud.

12:45:29 2 THE COURT: So tell me specifically what you are saying.

12:45:32 3 ATTORNEY LUCEY: We are saying, whether it be by reformation
4 or by not enforcing the terms --

12:45:39 5 THE COURT: Well, I'm talking about reformation right now.
6 We'll do the other one in a little bit.

12:45:42 7 ATTORNEY LUCEY: The same count we bring is reformation in
8 declaratory judgment. The law implies a term in these covenants,
9 the developer, the term to bargained-for collective control,
10 homeowner bargained-for collective control, over to the
11 homeowners within a reasonable amount of time. And that's not in
12 these covenants.

12:46:03 13 A duration, a contemplated duration, is not in these
14 covenants. And the law of South Carolina is very clear that a
15 perpetual contract is disfavored and may be terminated upon
16 reasonable notice to either party.

12:46:19 17 What we have here is what has -- nobody contemplated this,
18 but it has become a perpetual contract where the developer
19 retains perpetual control of this neighborhood at the homeowner
20 expense. Developer pays no dues. Homeowners pay all the bills
21 and have absolutely no say on the board of directors.

12:46:39 22 And, Your Honor, we believe that this is actually an
23 unconscionable contract. It's clearly a contract of adhesion.
24 Covenants, they're quasi contracts. They're not really
25 contracts. The law has said they are quasi contracts, and the

1 law will treat them as a contract of adhesion.

12:46:57 2 And not only is it adhesion, but then the next question is
3 is it unconscionable. Is there a term in this contract which is
4 so offensive that no party would try to enforce it and no other
5 party would knowingly agree to it? Yes. Perpetual developer
6 control at the homeowner expense is such a term. It is
7 unconscionable.

12:47:20 8 And, Your Honor, we believe we're entitled to either
9 reformation or --

12:47:24 10 THE COURT: How would you see that cause of action that
11 you're -- assuming that I agree with you, I make a call it's
12 equitable claim. How would you see that I put that into effect,
13 that I say okay, 10 years, 15 years as a reasonable time? How
14 would you see that that would be framed since I take away the
15 perpetual nature of the control?

12:47:47 16 ATTORNEY LUCEY: I believe there's a divisional period
17 already ended. The Court might prefer a transition such as, for
18 instance, I'm going to say 25 years is enough, you've got one
19 more year, and --

12:47:52 20 THE COURT: So I take an arbitrary figure and say in my
21 judgment whether this was reasonable or not?

12:48:04 22 ATTORNEY LUCEY: Not completely arbitrary. Let me give you
23 an example, Your Honor. One of my clients bought this property
24 in the year 2000. This is a retirement community. If the
25 average purchase age is 60 - 65, he's been sitting there waiting

1 for his bargained-for share of collective control for 24 years.
2 He's age 90. I think he's actually a couple years younger than
3 that. But those are my clients. They've been in there 20 years.

12:48:32 4 So I don't think it's completely arbitrary for the Court to
5 say, oh, 25 years. No. It's reasonable for my clients to expect
6 that turnover to occur in their lifetimes, and that time is
7 passing, that time is quickly passing. So anyway --

12:48:49 8 THE COURT: So you're not alleging fraud; you're not
9 alleging any material aspects of the agreement that didn't make
10 it into the covenants; you're saying it's just a contract of
11 adhesion that should not be enforced --

12:49:01 12 ATTORNEY LUCEY: Contract of adhesion, unconscionable, and I
13 do not believe that -- either perpetual control is either in
14 there without a meeting of the minds and should be reformed, or
15 it should be declared for what it is, which is perpetual control
16 which, in fact, is disfavored in South Carolina and can be
17 terminated upon reasonable notice.

12:49:20 18 THE COURT: What's the purpose of a developer controlling
19 these issues until it's transferred over to the HOA?

12:49:29 20 ATTORNEY LUCEY: The purpose is to protect the developer's
21 investment.

12:49:32 22 THE COURT: Right.

12:49:32 23 ATTORNEY LUCEY: And to develop the neighborhood, sell out,
24 and give them the control. This developer abandoned that
25 purpose. Instead of developing and selling out the community, he

1 bought the rest of the community, he bought another hundred lots,
2 distress sales, over four years. He did not anything to develop
3 the community until he reached a road agreement with the County
4 of Edgefield that they would pay him back 80 percent of the road
5 cost.

12:49:55 6 He didn't agree to market, he didn't do any marketing, until
7 the HOA purchased the amenities because he knew he couldn't sell
8 any lots. So while all this sat in disrepair, he picked up
9 another 100 lots for pennies on the dollar. So unlike the
10 traditional developer who sheds inventory, this developer
11 increases inventory by 50 percent. He went from 185 lots to 285
12 lots.

12:50:19 13 THE COURT: Well, what's different then in phase 1, phase 2,
14 phase 3? I mean, that happens all the time.

12:50:25 15 ATTORNEY LUCEY: All phases were already in effect prior to
16 this developer coming in. They were already in effect. There's
17 the front nine, the middle nine, and the back nine -- there are
18 some other names to it but -- all phases had already been
19 implemented prior to this developer.

12:50:39 20 THE COURT: All right.

12:50:40 21 ATTORNEY LUCEY: And there's a dovetail to the perpetual
22 control, Your Honor, and to the unconscionable document and the
23 reformation. The dovetail is this. I've already said it but not
24 in so many words. While you have perpetual control, you're
25 bankrupting the neighborhood because you're not paying dues on

1 your lots, and so if any further control is allowed, the
2 developer, at some point in a reasonable time, has to pay his
3 share of the neighborhood operating expense. It's just common
4 sense. It's just fairness.

12:51:09 5 And, Your Honor, that's an unconscionable term, for the
6 developer to actually grow his investment on the backs of the
7 homeowners as opposed to shrinking it, and as the developer
8 shrinks his inventory he's nurturing the development by giving it
9 more dues and assessment-paying lots.

12:51:29 10 This developer did the opposite. He grew his inventory,
11 took 100 lots, 100 due-paying lots and assessment-paying lots
12 away from the neighborhood.

12:51:37 13 So the dovetail and the unconscionable term is the perpetual
14 control, and it is the perpetual nonpayment of the dues. Thank
15 you, sir.

12:51:46 16 THE COURT: Thank you.

12:51:47 17 ATTORNEY BUCKINGHAM: Yeah. I've just got to address that
18 real quick. You know, I think, as defendants acknowledge the
19 broad brushstrokes of the plaintiffs' argument, nothing that the
20 developer did was going to be right. When it comes to why he
21 added more lots to his inventory -- again, this is going into
22 facts, you might as well hear it because you're going to hear it
23 in a couple of weeks -- people that had bought lots were just
24 turning them over, they weren't paying their taxes, they were
25 letting them back to the county, and he was going to buy the lots

1 to keep the inventory off the market, to keep property prices in
2 Mount Vintage up.

12:52:22 3 Other folks who owned property in Mount Vintage came, and
4 they didn't want to be there anymore. They just turned the lots
5 back over to him. No one else, no one else, was stepping in to
6 buy any of this property or take any of this property.

12:52:42 7 And, you know, on the one hand, yeah, he didn't have to do
8 that either. He could have let the property values completely
9 depressed out there and then we'd be in one set of circumstances.

12:52:51 10 He took the other the tactic which is I'm going to go, I'm
11 going to buy the property, I'm going to sell it as it becomes
12 available, it will produce dues as we get more homeowners in
13 there. And that plan is working. In fact, he has sold 100 lots
14 since taking this. Yeah, he bought 100. He's also sold 100.

12:53:11 15 THE COURT: Once they are sold then they become dues paying?

12:53:17 16 ATTORNEY BUCKINGHAM: Yes, sir, absolutely. So it's not
17 that he's not working hard; it was that he was in a deep hole
18 with this subdivision when he took it over, and he's turned it
19 around. I know they won't agree to that but, again, it goes back
20 to there's nothing he can do that would be right.

12:53:32 21 Let me push on with promissory estoppel. That's my next
22 argument.

12:53:37 23 THE COURT: Okay.

12:53:37 24 ATTORNEY BUCKINGHAM: The promissory estoppel claim is based
25 explicitly, according to the allegations of the complaint, on

1 statements of a prior developer, LL's predecessors sometime many
2 years ago, telling some of these homeowners that I'm going to
3 build you a first-class, upscale, luxury neighborhood, other
4 similar types of representations like that.

12:54:03 5 The first problem with this in terms of a claim for a
6 promissory estoppel against this developer is that's a little
7 old, right. These plaintiffs, when they bought, if they relied
8 on these so-called representations by a prior developer, that's
9 been, at the earliest, since 2013 since that's when the last of
10 these plaintiffs, under the prior developer, bought a lot from
11 the prior developer. So we're 11 years down the road now, and we
12 were, what, seven years down the road in 2020 when this lawsuit
13 was filed.

12:54:39 14 To the elements of promissory estoppel, the court says
15 there's got to be an unambiguous promise. That's lacking. To
16 say that I'm going to build you a luxury neighborhood, that's an
17 ambition, that's an intent. It's hard to order someone to do
18 that thing.

12:54:56 19 Promissory estoppel is more for the idea of, hey, if you
20 graduate college, I'm going to give you \$5,000. You can put a
21 point on that and order that to be done assuming that he meets
22 the qualifications, but these --

12:55:02 23 THE COURT: What is the law on promises to do something in
24 the future, than the present, as to whether or not that
25 constitutes good consideration?

12:55:17 1 ATTORNEY BUCKINGHAM: Well, so that's exactly it.
2 Promissory estoppel is a substitute for consideration. That's
3 exactly right. And so in that, in that, scenario I gave, even
4 though, even though, he might not have changed his position on
5 anything, he accomplished the qualification which would have
6 entitled him to payment through a theory of promissory estoppel.

12:55:43 7 And that kind of specificity, definiteness, that's lacking
8 from this. There's no way you can fashion an order, again, in
9 equity to require someone to build an upscale, luxury
10 neighborhood. What does that mean? To who? According to?

12:56:00 11 So we think on the merits this fails. We think as a matter
12 of whether you want to apply the statute of limitations or
13 latches, since it's equitable, it fails. That's our presentation
14 on that particular element.

12:56:10 15 ATTORNEY LUCEY: Yes, Your Honor. The primary promissory
16 estoppel claim is based upon the amenities that were promised.

12:56:20 17 THE COURT: Say that again.

12:56:20 18 ATTORNEY LUCEY: It's based upon the amenities that were
19 promised, that's the primary one. Yes, we do claim that we were
20 promised a larger neighborhood, not tract homes, and that is a
21 definite promise, and the homeowners bought in reliance on that
22 promise. And we have cited to the case in our briefs, the
23 *Chessus* case from Mississippi regarding developers being held to
24 those promises because they're selling the lots based upon those
25 promises, and we've also cited to the *Court the Board of Managers*

1 *Mendina* case out of Illinois regarding successor developers being
2 liable on the original developer's promises and representations.

12:57:06 3 The law explains -- and there's a number of cases that
4 explain this, the law explains -- that a successor developer
5 takes his interest in the development with notice of the prior
6 representations. Unless he can show you he's bound by it -- and
7 that just doesn't happen -- unless he can show you he had no idea
8 there's supposed to be a golf course, no idea there's supposed to
9 be tennis courts, whatever else, he takes it subject to those
10 prior representations.

12:57:30 11 In fact, as it happens to be, the current developer adopted
12 the complete neighborhood plan from the original developer and
13 has used it on his website since 2013. To the extent that the --

12:57:41 14 THE COURT: Don't the promises have to find their way into
15 something other than oral representations such as the covenants,
16 or such as the contract, or somewhere where there is a written
17 promise that we're going to do these things as opposed to saying
18 this is what we would love to be able to do to make this, and we
19 anticipate being able to do it?

12:58:05 20 ATTORNEY LUCEY: Many of these promises, Your Honor, made it
21 into the neighborhood plan that the homeowners were handed when
22 they were marketing these, and it has been on the website for the
23 neighborhood since forever, decades. So to the extent that it's
24 required that they be in writing, they have been in writing.

12:58:22 25 And, Your Honor, the law is that the defendant, the

1 developers, get the benefit of their sales based upon these
2 representations of what the amenities are to be and will be, and
3 that developers must honor those representations.

12:58:40 4 One of the key ones here is that the amenities would be
5 optional, they would be there but you don't have to financially
6 support them.

12:58:48 7 THE COURT: Well, let me ask you this. I know I've read
8 everything you have about this, but you have -- the original
9 developer was who?

12:58:56 10 ATTORNEY LUCEY: Bettis Rainsford is the individual. I
11 forget the name of his entity.

12:59:03 12 THE COURT: Well, was the entity, the original developer,
13 the entity that gave a deed in lieu and was foreclosed against?

12:59:14 14 ATTORNEY LUCEY: No, sir. It's complicated, but a partner
15 of the original developer named Talmadge Knight bought the
16 original developer's note from Carolina First. That's the
17 haircut that's referred to in our memo. That's how L&L came in,
18 was the haircut to the bank. So that partner took over.

12:59:37 19 And so then it was a partner of the original developer in
20 the name of a different entity, K&H, a successor entity, that
21 gave its interest, the mortgage interest.

12:59:42 22 THE COURT: I gotcha. Thank you.

12:59:50 23 ATTORNEY LUCEY: To the extent that there was a statute of
24 limitations argument with regards to some of these activities
25 with the amenities -- and I think we heard that they were

1 stale -- actually, when Mr. Raiford took over, the golf course
2 was still functioning. The town center might have been
3 functioning, too, but it did shut down soon after that. The golf
4 course continued to function, being managed by a third-party
5 entity for the bank, so by all appearances there is a golf course
6 there and it is operating.

13:00:19 7 And then eventually the developer, the current developer,
8 arranges for the repurchase of the golf course and he offers to
9 contribute to the down payment to repurchase it, and he promises,
10 in written memorandums to all the homeowners, that they will not
11 have to deficit fund the golf-course operation and they will not
12 have to contribute additional monies because of the golf course.

13:00:42 13 THE COURT: Well, those are representations after the fact.

13:00:45 14 ATTORNEY LUCEY: Yes, sir, but they tie into why the
15 homeowners aren't suing on the earlier representations earlier
16 when Mr. Raiford took over because, for instance, the golf course
17 is functioning, the developer is going to subsidize it, there's
18 going to be no homeowner subsidizing the operating cost. So
19 again, it's an optional amenity like was promised.

13:01:12 20 Turns out the developer put the golf course in a new entity
21 with no track record. It failed within a couple of years. Low
22 and behold, the homeowners in 2019 started getting assessed to
23 deficit fund the golf-course operation, which is truly the notice
24 that gives rise to the claim regarding that particular amenity.
25 And I show that to the Court by way of example.

13:01:34 1 Even the town center, the town center was eventually
2 purchased with a loan from the developer, and it didn't affect
3 the cash flow for years to come. And, frankly, it may never have
4 if it hadn't been for the golf-course problem. And that's when
5 all the finances more came to light, because the golf course
6 self-strained the finances of the neighborhood so much more than
7 it already been.

13:01:58 8 So, Your Honor, the homeowners started to assess the golf
9 course in 2019. It was the -- oh, by the way, the other thing
10 about the original promises -- and this is per the defendant --
11 upscale neighborhood has been found to be a definitive
12 representation in many, many cases, and we cite several in our
13 brief. An upscale neighborhood excludes tract homes. Well, in
14 order to --

13:02:25 15 THE COURT: How do you define upscale? I had a case when I
16 practiced law in Anderson County where somebody in the county had
17 agreed to maintain a state-of-the-art facility. Like, what the
18 hell does that mean, and what is an upscale facility mean? What
19 does that mean?

13:02:42 20 ATTORNEY LUCEY: Typically, Your Honor, it means custom
21 homes designed by an architect with using quality materials; in
22 other words, no slab-on-grade, no vinyl siding. Very clear going
23 to this neighborhood, any -- we can take the jury to the
24 neighborhood -- very clear you go into this neighborhood, you can
25 point out which ones are the custom homes that were originally

1 part of the neighborhood and what are all the tract homes from
2 Stanley Martin. Very clear. And part of that, there was also a
3 requirement that there was to be no clearcutting. Might sound
4 small, but --

13:03:13 5 THE COURT: I mean, it seems to me that if you're not going
6 to allow the siding or the, what did you call it, the slab homes,
7 that should be a covenant that goes with the land. That's what
8 they normally do. You have to send it to an architectural review
9 board to make that call.

13:03:31 10 ATTORNEY LUCEY: Yes, sir. Well, the architectural review
11 board is the developer.

13:03:36 12 THE COURT: Yeah. Sure.

13:03:37 13 ATTORNEY LUCEY: And to the extent that there's not a clear
14 understanding of what the standards are for that board, it's the
15 developer.

13:03:44 16 THE COURT: All right.

13:03:47 17 ATTORNEY LUCEY: Thank you, sir. I'm happy to answer any
18 questions the Court has on that.

13:03:50 19 Oh, I was just getting to that other promissory estoppel
20 issue about the upscale neighborhood. They didn't start -- they
21 didn't do the contract with Stanley Martin until late 2018, or
22 that's when the first lots started getting developed, so that was
23 clearly within three years of bringing suit.

13:04:10 24 ATTORNEY BUCKINGHAM: So he led off, Mr. Lucey led off, by
25 saying that the amenities was the primary thrust of this

1 promissory estoppel argument. First of all, I don't think
2 anything about what they've alleged to be involved in promissory
3 estoppel actually fits within the doctrine of promissory
4 estoppel. But assuming that it does, the golf club -- this is
5 all attached to my motion for summary judgment -- that went into
6 foreclosure in your 2012 before the developer was involved. The
7 foreclosure was final in 2013.

13:04:42 8 So the prior developer -- and, in fact, it's even a little
9 bit more complicated than that. The prior developer put the golf
10 course off into a separate LLC, and no homeowner did anything
11 despite the fact that some of the plaintiffs were homeowners at
12 Mount Vintage at the time; put the golf course into a separate
13 LLC; encumbered that LLC with debt; and then defaulted on that
14 debt; and the bank is in foreclosure against that asset by the
15 time that the developer takes the property.

13:05:17 16 So it's not the case that there was no golf course ever
17 built. There was. A prior developer transferred it out. No one
18 did anything. And now, again with the theory of he can't do
19 anything right, you know, he participated in getting the golf
20 course back to the community.

13:05:32 21 This runs true with the town center. The LLC that responded
22 to save the golf course, Plantation Lines, happened under a prior
23 developer, that new LLC encumbered the town center with debt.
24 2012, goes to foreclosure. 2013 or '14, foreclosure is final,
25 and it's not until '16 or '17 that they're able to buy it back

1 from the bank. Now, ultimately that has nothing do with
2 promissory estoppel, but it does have to do with the idea that
3 somehow these amenities that were promised had never been
4 provided. They were, they were transferred out, and no one did
5 anything about it way back then. In fact, I think that was 2010
6 that they were transferred out, maybe even earlier than that.

13:06:19 7 The other problem with this -- and we're going to see this
8 in a number of causes of action is -- is this individual or is
9 this derivative? If this is derivative, well, good Lord, what
10 about the people that have bought into the neighborhood since
11 this lawsuit started knowing, or at least having the opportunity
12 to know, what the circumstance was with the golf course, what the
13 circumstance is with the town center?

13:06:44 14 All these new members that have bought into the association,
15 these new property owners that bought property in Mount Vintage,
16 what about them? How are they possibly proceeding in a
17 derivative capacity on behalf of those folks?

13:07:02 18 So we don't understand how they fairly and adequately
19 represent the interests of these new people. And maybe this is
20 just individual claims. And if it is individual, then it seems
21 like it's exceedingly stale. Pushing on --

13:07:12 22 ATTORNEY LUCEY: May I, before he pushes on, please?

13:07:20 23 THE COURT: I want you to answer me how this can be
24 derivative. That's a good point.

13:07:25 25 ATTORNEY LUCEY: The HOA is funding most of this that the

1 developer didn't fund, so the HOA is damaged, one. Two, it's
2 funding it without a reserve account. The HOA can't afford these
3 assets without a reserve account. It's bankrupting all the other
4 operations trying to fund these amenities that the developer was
5 supposed to provide, these optional amenities, so that that
6 funding is a derivative damage.

13:07:52 7 The individual damage by the individual plaintiffs is the
8 dues and assessments, the increased dues and the assessments,
9 that are used to subsidize the payment on these and maintenance
10 on these amenities.

13:08:05 11 THE COURT: All right.

13:08:08 12 ATTORNEY LUCEY: And this issue about something transferred
13 out, yes, some got transferred out, and this developer had the
14 opportunity and the obligation to re-establish them. He assumed,
15 voluntarily assumed -- he did not act like a foreclosing lender.
16 Yes, he was a lender; yes, he foreclosed, but then instead of
17 disposing the collateral, he came in and took control of the
18 neighborhood. He stepped into the shoes of the prior developer.

13:08:36 19 The representation was that these assets, these amenities,
20 would be there, and they'd be owned by a third party, the
21 homeowners would have optional membership, and they would be
22 there, and they would be operational.

13:08:42 23 This developer voluntarily accepted the benefits of no dues
24 and complete control, control of the board of directors, control
25 of the whole neighborhood. By voluntarily accepting those

1 benefits of being the developer, he obligated himself on the
2 original developer's obligations.

13:09:05 3 Thank you, Your Honor.

13:09:05 4 THE COURT: Guys, let's go ahead and take a lunch break.
5 Let's take about 45 minutes --

13:09:12 6 ATTORNEY BUCKINGHAM: Yes, sir.

13:09:13 7 THE COURT: -- and come about back about 2:00.

13:09:29 8 (Court recessed at 1:09 p.m. and reconvened at 2:04 p.m.)

14:04:12 9 ATTORNEY BUCKINGHAM: May it please the Court.

14:04:13 10 THE COURT: Okay.

14:04:14 11 ATTORNEY BUCKINGHAM: Let's proceed with, what I hope will
12 be, a shorter afternoon session. The next item on the agenda to
13 discuss is plaintiffs' action for negligence/negligent
14 development. And I don't know that negligent development is a
15 cause of action in South Carolina, I have not seen that anywhere,
16 so I'm not even sure that that's a valid cause of action.

14:04:37 17 But assuming it's just a negligence claim, we raised
18 economic loss in this case. All the damages that plaintiffs
19 claim, particularly for their individual claims, is nonpersonal
20 injury types of damage, and it would seem that the duties arise
21 by contact, the covenants, and so in this context of
22 covenant-based duties that are allegedly breached that have
23 caused nonpersonal injury damages, that ought to be dismissed
24 under the economic loss rule.

14:05:02 25 THE COURT: Recite the economic loss rule. Give me a

1 general -- I read it, but I can't ...

14:05:11 2 ATTORNEY BUCKINGHAM: Yeah, that's right. So the general
3 proposition is that when there are -- when it is alleged that
4 someone has been injured by the breach of a duty that's
5 established by contract, and the damages are of a nature that is
6 not to your person, it's only property, or whatever, that a tort
7 claim is not the proper cause of action, it's contract.

14:05:34 8 THE COURT: Gotcha.

14:05:38 9 ATTORNEY LUCEY: Yes, Your Honor. That's not exactly the
10 economic loss rule.

14:05:47 11 THE COURT: Go back to whether or not -- you agree there's
12 no cases in South Carolina that recognize the cause of action
13 negligent development, or do you?

14:05:56 14 ATTORNEY LUCEY: We have a negligence claim. There are many
15 cases in South Carolina that recognize developer duties. The
16 breach is often found in a breach of fiduciary duty. Breach of
17 fiduciary duty is our main cause of action, but there are several
18 other common-law duties besides breach of fiduciary duty which,
19 if we dropped negligence voluntarily we'd be told at trial, oh,
20 that can't be fiduciary duty, that's negligence, and you dropped
21 your claim of negligence. So we have to keep the negligence
22 claim because not everything falls under fiduciary duty.

14:06:32 23 Your Honor, the economic loss rule is that, where your
24 rights arise solely by contract, that your remedy is the
25 contract. The Supreme Court of South Carolina has been very

1 clear on a number of cases, including the *Sapp* case cited by
2 defendants in their motion, the *Sapp* case, that if there's an
3 independent legal duty to perform or not perform some act, that
4 takes the claim outside of the economic loss rule. It is, in
5 fact, a complete exception to the rule. The rule no longer
6 applies.

14:07:08 7 Plaintiffs do derive some duties from the covenants, the
8 quasi-contract covenants, but the primary duties in this case,
9 the breach of fiduciary duty, are independent legal duties that
10 arise out of the common law of the state, including the *Concerned*
11 *Citizens of Dunes West* case and the predecessor case which I have
12 right in front of me, the *Guy v. Fairways Developer* case. And
13 those cases tell us that the developer has an independent,
14 common-law legal duty to put the ensuing neighborhood and its
15 members on a sound, fiscal position irrespective of what your
16 covenants say or anything else. So we're automatically outside
17 of the economic loss rule.

14:07:58 18 We are also suing on the representations. There is a
19 common-law duty to do no harm. There is a common-law duty to use
20 due care in what you do undertake to do. And we --

14:08:02 21 THE COURT: Other than recognizing that a contractor owes
22 certain fiduciary duties to the HOA, or to possibly the members
23 of the HOA, is there a case that you're aware of that has just
24 the negligence-duty standard that is recognized other than
25 fiduciary?

14:08:30 1 ATTORNEY LUCEY: I'd have to look at that for you, sir, and
2 I'm happy to do so. And I have list of cases, so I can scan
3 them.

14:08:36 4 THE COURT: I read the *Walter Ion* case. I saw that.

14:08:39 5 ATTORNEY LUCEY: The *Ion* case, I was just about to bring up.
6 Your Honor, and again, it almost always comes up that these are
7 mixed duties. I mean, you have some duties in the covenants.
8 You've got the common-law duty, fiduciary duty, no self-dealing,
9 full disclosure, et cetera, and that takes you out of the
10 economic loss rule.

14:08:58 11 And, of course once you assume the duties to perform any act
12 whatsoever, the common law requires you to perform that act with
13 due care. And so, Your Honor, we have alleged -- we have
14 properly alleged and the facts show negligence of breach of
15 fiduciary duty on this developer's part. I do believe that a
16 number of the acts will qualify as both. There's a significant
17 overlap between the two. Thank you, sir.

14:09:29 18 THE COURT: All right. Thank you.

14:09:31 19 ATTORNEY BUCKINGHAM: This kind of leads into the discussion
20 that we've had previously, or have with the remaining causes of
21 action. The ambition here, since we're so close to trial, is to
22 figure out what claims are actually going to be presented to the
23 jury in a derivative capacity or in an individual capacity,
24 because that affects does the jury hear it or not. And so even
25 with this negligence claim, I don't have a clear understanding if

1 that's alleged as a derivative action or as an individual.

14:10:02 2 The same is going to be true for the breach of fiduciary
3 cause of action. You know, it's not clear what the damages are,
4 who they were incurred by, and when, because that very-much
5 drives is this a fiduciary or is this a derivative action -- and
6 we already discussed that at length -- or are these individual
7 claims, or if they're both.

14:10:24 8 And so as we go through these, you know, I think it would
9 behoove everyone to make everyone's life simpler to figure out
10 exactly what the contours of these claims are so that we know
11 who's going to hear and decide what in several weeks.

14:10:40 12 But with regard to the breach of fiduciary duty --

14:10:44 13 THE COURT: Well, this is on negligent development right
14 now.

14:10:48 15 ATTORNEY BUCKINGHAM: That's right. And so I don't know if
16 that's a derivative, or individual, or both.

14:10:55 17 ATTORNEY LUCEY: The pending operative complaint's very
18 clear that it's individual and derivative --

14:11:01 19 ATTORNEY BUCKINGHAM: Okay.

14:11:02 20 ATTORNEY LUCEY: -- and it's against all defendants. We do
21 have -- we have a proper amended complaint to counsel and the
22 Court which actually drops several causes of action, or several
23 claims, and tries to be even more clear so this couldn't possibly
24 be even an issue, if you want to take that up. But the
25 negligence has always been by everybody against everybody.

14:11:25 1 THE COURT: The last statement you say was negligence has
2 always has been?

14:11:30 3 ATTORNEY LUCEY: By all plaintiffs in all capacities against
4 all defendants.

14:11:34 5 THE COURT: Okay. Thank you, sir.

14:11:35 6 ATTORNEY KRAWCQYK: I don't think it's against the
7 homeowners association, right?

14:11:39 8 ATTORNEY LUCEY: Our complaint states that unless we use
9 certain words of art, the homeowner will not be included in the
10 reference to the defendants.

14:11:40 11 ATTORNEY KRAWCQYK: I just wanted to make clear. That's
12 all.

14:11:41 13 THE COURT: You can't sit there and start arguing sitting
14 down. You're not going to do that.

14:11:51 15 ATTORNEY KRAWCQYK: I'm sorry, Your Honor.

14:11:51 16 THE COURT: You are. Don't do that again.

14:11:51 17 ATTORNEY KRAWCQYK: I apologize.

14:11:51 18 THE COURT: All right. Go ahead.

14:11:51 19 ATTORNEY BUCKINGHAM: Right. So that being the case, it
20 makes me wonder now what trial looks like since the individual
21 claims under negligence theory would be legal, whereas I think
22 the authority out there is that negligence claims in a derivative
23 capacity are equitable, meaning that you try them.

14:12:11 24 THE COURT: I didn't know that. Do you agree with that?

14:12:12 25 ATTORNEY LUCEY: I haven't had an opportunity to agree or

1 disagree because it's not part of this pending motion, Your
2 Honor. He only moved for summary judgment on the individual
3 claims, not on the derivative negligence claim. I'd be happy to
4 consider it on the fly, but it was not raised by his pleadings.

14:12:35 5 ATTORNEY BUCKINGHAM: Well, because I don't think it's a
6 matter for summary judgment.

14:12:38 7 ATTORNEY LUCEY: I think as far as derivatively, almost
8 every act, every breach of fiduciary duty, that he performed as
9 the president or the chairman of the board for the association
10 was also a negligent act, it was both.

14:12:50 11 And it happens to be the reason the matters that plaintiffs
12 are not only entitled to plead alternative causes of action, but
13 our standard of proof on negligence is less than on breach of
14 fiduciary duty. So the jury might find we've proven a negligent
15 director but not a fiduciary breach in director as to certain
16 components since --

14:13:12 17 THE COURT: As you framed this case in this particular
18 action, is your negligence claim considered a novel cause of
19 action since it has not been considered before?

14:13:24 20 ATTORNEY LUCEY: No, Your Honor. It's just negligence. And
21 a lot of this negligence was the developer sitting as the
22 president of the homeowners association.

14:13:34 23 THE COURT: Going back to my question, are you aware of
24 cases that say that there is a cause of action against a
25 developer for negligent development as opposed to breach of

1 fiduciary duties?

14:13:47 2 ATTORNEY LUCEY: I would have to look, sir.

14:13:51 3 THE COURT: All right. Go ahead.

14:13:52 4 ATTORNEY BUCKINGHAM: Yes, sir. With regard to breach of
5 fiduciary duty, going back to that outline, you know,
6 particularly since we're this close to trial it's going to be
7 important for us to understand what is the damage complained of,
8 who is it sustained by, and when, because we've heard so much
9 today about things going back to 2013. That very-much presents
10 significant issues when it comes to statute of limitations,
11 depending on what the nature of the claim is, or latches. And so
12 if we're analyzing this as both a derivative and an individual
13 claim, I think we need to know which is where.

14:14:35 14 And, frankly, from analyzing their response in opposition to
15 our motion for summary judgment, it looks like there's only three
16 categories of damages individually that they claimed. And if I'm
17 wrong, please correct me, but it looks it was, the three
18 categories of individual damage to individual homeowners is, the
19 2019 assessment, the 2022 assessment, and then generally this
20 diminution in the value of homes.

14:15:00 21 And my understanding otherwise is that every other type of
22 damage they would seek under a breach of fiduciary duty, or
23 negligence, or whatever, is damage attributable to HOA under a
24 derivative action.

14:15:10 25 THE COURT: Do you have authority that says that derivative

1 claims, or damages, or any act that says damages, is an equitable
2 causes of action?

14:15:28 3 ATTORNEY BUCKINGHAM: I do, but it's not on me. I can dig
4 that up for you and send it to you.

14:15:31 5 THE COURT: Could you send that to me, please.

14:15:33 6 ATTORNEY BUCKINGHAM: Yes. The case law is super weird
7 about this because it characterizes derivative actions as
8 equitable but it doesn't talk about what the underlying analysis
9 is for if you've got a derivative action on a legal claim does
10 the legal claim go to a jury or does the equitable nature of the
11 derivative action mean you try it? It's kind of chaos.

14:15:56 12 THE COURT: It would seem to me that it would go to the
13 jury.

14:15:59 14 ATTORNEY LUCEY: Yes, Your Honor. That's what we did in the
15 *Ion* case that the Supreme Court just reported back on last year
16 we tried in 2014. And it was clear, it's almost in the nature of
17 DJ. The DJ itself might be equitable because it's a newly
18 created cause of action, but in any circumstance it takes the
19 characteristics of the underlying action, whether that's legal or
20 equitable, and that's how the case gets tried.

14:16:20 21 THE COURT: So the question of whether it goes to the jury
22 is more of an equitable call, almost like a directed verdict? Is
23 that what you're saying, or no?

14:16:29 24 ATTORNEY LUCEY: I didn't hear everything.

14:16:30 25 THE COURT: I thought I heard you say that the question of

1 whether or not the case goes to the jury is more of an equitable
2 call by the Court, as in a directed verdict or a nonsuit, or as
3 opposed to trying to figure out the cause of damages but for the
4 fact, that kind of thing, being determined by the jury.

14:16:50 5 ATTORNEY LUCEY: If I did, I misspoke. What I was saying is
6 that DJ actions -- derivative actions are like DJ actions,
7 although --

14:16:58 8 THE COURT: DJs are anything.

14:17:00 9 ATTORNEY LUCEY: That's right. It takes the nature of the
10 underlying action.

14:17:03 11 THE COURT: Right.

14:17:03 12 ATTORNEY LUCEY: And so in this, these derivative claims
13 that are for negligence or breach of fiduciary duty, they're
14 actions of law, they go to a jury. A derivative action that has
15 promissory estoppel, that action is no longer equitable, it's
16 before the court.

14:17:17 17 THE COURT: I would seem to agree with him on that,
18 actually.

14:17:20 19 ATTORNEY BUCKINGHAM: I think so. And like I said, I'm glad
20 to circulate this, but I'm pretty confident in the past couple of
21 days I've seen --

14:17:24 22 THE COURT: If you have some cases to give me, I'll look at
23 it. Just to tell you the truth, I have no knowledge one way or
24 the other.

14:17:30 25 ATTORNEY BUCKINGHAM: And to foreshadow it, the appellate

1 courts seem to suggest it depends on what the relief sought is
2 and if it's money who gets it, and that might determine if it's
3 equitable relief. So like I said, as with everything else in
4 this case, it's abject chaos, but ...

14:17:50 5 THE COURT: Fun, fun.

14:17:51 6 ATTORNEY BUCKINGHAM: Yeah.

14:17:52 7 THE COURT: All right. Go ahead.

14:17:53 8 ATTORNEY BUCKINGHAM: With regard to the next cause of
9 action, the South Carolina Unfair Trade Practices, I'm not even
10 aware if you can bring a SCUTPA action in a derivative fashion.
11 I have not seen any authority that says you can.

14:18:06 12 And with regard to the individual claims, they incorporate
13 the same allegations for breach of fiduciary duty and negligence.

14:18:17 14 Moreover, based on the nature of this, the contentions
15 themselves that are at issue in this would not seem to impact or
16 have an adverse effect on public interest or be capable of
17 repetition. We're talking about a developer in a community where
18 the developer doesn't have any other properties in any other
19 community, and so it would seem that we would be focused just on
20 this one locale.

14:18:42 21 And to the extent that there is damage that would be caused
22 by the developer to that HOA, that's covered by breach of
23 fiduciary duty already.

14:18:54 24 ATTORNEY LUCEY: Your Honor, the SCUTPA cause of action is
25 not and never has been brought in a representative capacity or a

1 derivative capacity. The promulgation is clear. There's 591
2 residents in Mount Vintage. It's been repeated as to them. They
3 represented in 2016 the homeowners would never pay, never
4 subsidize the golf, and now they're assessed twice, once in 2021,
5 once in 2023, I think it is. So they, themselves, have repeated
6 the impact on the public in the assessments, and each one of
7 those assessments have affected the 561 people out there. The
8 total homesites is approximately 809, but we still have a number
9 owned by the developer himself.

14:19:38 10 So it is an individual cause of action. It's only for the
11 named plaintiffs. And not only has the actions of the developer
12 been repeated in Mount Vintage, it's been repeated within the
13 transactions in Mount Vintage.

14:19:54 14 The Court may be aware the developer promised to pay
15 \$300,000 towards the golf down payment at \$3,000 per lot. He
16 agreed to pay it towards the repayment of principal to the five
17 people that lent the down payment. When Golf GEM, the golf
18 operating company, went under or was going under, he took his
19 \$300,000 obligation to the HOA, and this down payment, he put it
20 in an account controlled by his daughter and had her pay it to
21 Golf GEM. They did that after notice. They knew the association
22 had pledged that money to the down-payment lenders. That was
23 going to be their contribution to the homeowner purchase of the
24 golf course.

14:20:42 25 Four different times, after they were on notice of all the

1 facts that matter, they wrote four different checks through the
2 homeowner's account, didn't show up on the homeowner's books, and
3 then the daughter turns around and writes four more checks to
4 Golf GEM.

14:20:59 5 So even within each dereliction that we complain about,
6 there are multiple occurrences. But it's not just the multiple
7 examples I've given inside of our neighborhood. The developer is
8 a professional developer. This is one of maybe 20 neighborhoods
9 he's done over the course of, let's say, 20 years, and he is
10 presently developing or still involved in developing three other
11 neighborhoods. One of those like Mount Vintage is a distressed
12 neighborhood which is having similar, it's getting similar,
13 ramifications in that neighborhood as we have in our
14 neighborhood, so it is very capable of repetition.

14:21:35 15 And thank you, sir.

14:21:36 16 THE COURT: Did I understand you to acknowledge that those
17 claims, though, for unfair trade practices are only in an
18 individual capacity?

14:21:44 19 ATTORNEY LUCEY: Yes, sir.

14:21:44 20 THE COURT: All right.

14:21:45 21 ATTORNEY BUCKINGHAM: And on that point, you know, if
22 they're proceeding in a derivative capacity on other claims --

14:21:50 23 THE COURT: He's not.

14:21:52 24 ATTORNEY BUCKINGHAM: -- on other claims that embrace the
25 very same allegations that are sought for SCUTPA presumably so

1 they can try to get access to the three-times damages for
2 themselves individually, that would already be embraced by
3 whatever's going on with the derivative action on the other
4 causes of action.

14:22:10 5 THE COURT: They have a right to do that. That's just the
6 bottom line. They have a right to allege multiple causes of
7 action, and that's what he's doing.

14:22:18 8 ATTORNEY BUCKINGHAM: Okay. Very good. The next cause of
9 action to address is the claim for unjust enrichment. According
10 to their memorandum in response to my motion for summary
11 judgment, the claim is based on the assertion that the developer
12 manipulated the HOA to his advantage by making the HOA buy the
13 golf course and town center. And then related to that, that the
14 developer did not contribute his, quote-unquote, fair share to
15 maintenance and operation of amenities. That's not an unjust
16 enrichment claim.

14:22:50 17 An unjust enrichment claim involves the actual conveyance of
18 a benefit on a party that is unjustly enriched, not the failure
19 of a party to make a contribution, to confer a benefit on someone
20 else. So we just think, as a matter of elements, this is not
21 met.

14:23:02 22 THE COURT: All right, sir.

14:23:12 23 ATTORNEY BUCKINGHAM: And also, we're not sure if this is
24 derivative or individual.

14:23:16 25 ATTORNEY LUCEY: Unjust enrichment is derivative only, and

1 it has to do with any transactions where the developer has
2 benefited himself at the expense of the association. And a
3 number of these transactions are detailed in the operative
4 amended complaint, and they include deriving economic benefits
5 from association assets.

14:23:39 6 For instance, Your Honor, one of the transactions was a
7 foreclosure of roughly 50 lots of Youmans in the middle, certain
8 section in the middle. The foreclosure went through. The HOA
9 got 50 buildable lots. The developer arranged for him to get
10 title to the lots for \$20,000, approximately \$500 per lot. He
11 then spent a couple hundred dollars on the lot cleaning off the
12 brush. He did put a road in that, as a developer, he was
13 obligated to put in anyway. There was no consideration there.
14 And he sold those lots for \$29,000 a piece.

14:24:21 15 There was no appraisals done on the value of the lots when
16 the developer took them from the HOA. There was no current
17 documentation of what the value was when the developer took them.

14:24:34 18 And that's an exemplar of a valid claim that the plaintiffs
19 have, HOA has, for unjust enrichment. He took our lots cheaply,
20 he controlled our board, he controlled both sides of the
21 transaction, he did a deal with himself, and he made, as he
22 admitted in his deposition, a 500 percent gain on those lots.

14:24:54 23 There's plenty of unjust enrichment detailed in the
24 operative version of amended -- in plaintiff's complaint. And
25 the \$300,000 that he spent twice that I just told the Court about

1 five minutes ago, that's another example of where he took an
2 asset that belonged to the association and used it for his own
3 benefit or made money on it.

14:25:15 4 ATTORNEY BUCKINGHAM: About the 300,000, again, this is
5 forecasting facts. There was confusion at the board level about
6 how the 300,000 would be paid. The original agreement that
7 Mr. Raiford understood was that it would be \$3,000 per lot per
8 each of the next 100 lots that he sold, he would contribute to
9 the golf amenity to get acquisition of it. Like I said, there
10 was confusion about that.

14:25:39 11 And what Mr. Raiford ended up doing was pay \$300,000 upfront
12 in one lump sum. And then to make good on that agreement and to
13 make sure everything washed out the way that it was supposed to,
14 every time that he sold a lot, for the next hundred lots, there
15 were a \$3,000 contribution that was made to the HOA that the HOA
16 then returned because the obligation that he committed to had
17 already been satisfied. That's the grand conspiracy going on
18 here.

14:26:13 19 And speaking of conspiracy, in my brief I have detailed why
20 civil conspiracy ought to be dismissed also. It's based on the
21 exact same causes of action that have been previously alleged. I
22 know that under the *Paradise* case you don't have to allege
23 special damages anymore, but it very much still must be the case
24 there must be some additional act apart from what you've already
25 sued on, and there's nothing. It just rotely incorporates

1 everything that's been previously alleged.

14:26:43 2 With regard to damages, there's several matters that we need
3 to address here. The first one is the lion's share of damages
4 they seek is for this failure to build capital reserves that
5 Mr. Lucey has talked about. It says that the capital account
6 should be \$9 million at this point.

14:26:58 7 The law is that common areas must be conveyed in good
8 repair, and if they are not sufficient maintenance funds must be
9 provided in tandem with the property conveyance. So at turnover
10 the amenities, or the road, the common areas, all that have to be
11 in good working order, but if they're not there needs to be a
12 capital reserve fund.

14:27:21 13 Turnover has not happened yet, and so this lion share of
14 damages they're seeking is for something that is not a present
15 obligation.

14:27:30 16 THE COURT: Well, doesn't the *Ion* case allude to the fact
17 that the fiduciary responsibilities of a developer go beyond
18 providing common areas, and then common areas in good condition,
19 so that the homeowner association doesn't get so bad?

14:27:52 20 That case that I read indicates kind of clearly to me that
21 that's not the limitation on what a fiduciary responsibility is
22 in these cases. I don't think that it's limited to just
23 providing common areas and common areas in good condition, it
24 goes beyond that.

14:28:12 25 ATTORNEY BUCKINGHAM: I don't disagree with you. But at

1 least -- and I'm quoting the *Ion* case with this -- is that
2 when turnover happens, the roads, the common areas, are turned
3 over in good condition or there's a reserve. It's one or the
4 other.

14:28:27 5 THE COURT: If I were to hold that they should have turned
6 these common areas over sooner than they have, then that would
7 certainly make that occur right now, right?

14:28:41 8 ATTORNEY BUCKINGHAM: Yeah. I think that's exactly right.
9 And I think that was the point of the reformation action,
10 frankly, is to try to accelerate the developer's obligation.

14:28:54 11 THE COURT: All right.

14:28:54 12 ATTORNEY BUCKINGHAM: And then with regard to other damages
13 that are sought that we've got, these lot acquisitions we talked
14 about, whether they were private-party transactions or
15 foreclosure sales, or tax sales, we got dues exemptions on the
16 lots the developer had, and then we got this debt incurred by the
17 HOA for the golf course and the town center.

14:29:14 18 The vast majority of all of that, whether it's property
19 transactions, dues exemptions, or debt incurred, happened before
20 August 22nd, 2017. That is three years to the day before this
21 lawsuit was brought. And so we think that it is pretty clear
22 under South Carolina law that the three-year statute of
23 limitations applies to these legal claims and cuts off the
24 accrual of damages, particularly for things that are based on
25 public records prior to that time.

14:29:43 1 I mean, there can't be any serious dispute that for things
2 that are reflected in public records, the register of deed's
3 office that you can go online and search, that there was any
4 concealment of any facts about who was acquiring property or who
5 was disposing of it, and so we believe that to the extent there's
6 going to be evidence that is based on public records about things
7 that happened before August 22nd, 2017, they ought to be
8 dismissed.

14:30:09 9 THE COURT: Would any of the documents that would
10 demonstrate these duties, responsibilities, be legally sealed
11 documents such that you extend the statute of limitations after,
12 what, 15 to 20 years?

14:30:23 13 ATTORNEY BUCKINGHAM: No, I don't think so, not for the
14 plaintiffs.

14:30:27 15 ATTORNEY LUCEY: The covenants and the deeds. Well, the
16 deeds that join us to the covenants, including the amended
17 covenants which LL amended in 2017.

14:30:36 18 ATTORNEY BUCKINGHAM: Well, you know, it's interesting, the
19 plaintiffs have not sued under the covenants. There's no action
20 for breach of covenants so, frankly, under the breach of
21 fiduciary duty, the negligence, all these other theories, they're
22 not covenant-based. And so even if the extended statute for
23 under seal would apply, it doesn't apply because they're not
24 pursuing that theory.

14:31:05 25 THE COURT: Okay. All right. I think that might be more of

1 a directed verdict, don't you?

14:31:11 2 ATTORNEY BUCKINGHAM: Yes, sir.

14:31:12 3 THE COURT: Okay. Any response other than what you gave me
4 already?

14:31:16 5 ATTORNEY LUCEY: If I may hand up to the Court the charge
6 that we used in the *Ion* case that the Court has referenced
7 several times -- I'll be happy to email you a copy -- as to
8 constructive notice. And the proposition of the jury charge,
9 Your Honor, is that public records are not constructive notice
10 where there's been a misrepresentation otherwise, and especially
11 if the person representing things is in a fiduciary capacity.

14:31:50 12 THE COURT: Hang on. Hang on. Okay. In other words, if
13 the defendants, by their conduct, convince them not to look in
14 public records, you can't use constructive notice?

14:32:19 15 ATTORNEY LUCEY: Well, like, for instance, the issue of
16 who's the developer, I mean, when LL comes in and says I'm the
17 developer and he speaks at the first of 2014 annual meetings and
18 says I'm the developer, and he recorded the covenants in 2017,
19 there's not a duty on the homeowners to go behind his back and
20 investigate the public records. And if they had, they would have
21 found what we all spent 90 minutes arguing about this morning,
22 does lis pendens supercede the deed in lieu? And a homeowner
23 wouldn't understand the difference on that.

14:32:50 24 So the way they're trying to use constructive notice from
25 recorded documents just doesn't work. And, for instance, I

1 believe last night they filed with the court the recorded deed on
2 the golf course to show it happened in 2016. We don't dispute
3 that it got recorded in 2016. Well, what didn't get recorded?
4 What didn't get recorded was the developer knowingly put the
5 homeowners association into a purchase contract that cost three
6 times the value of the golf course. That didn't get recorded,
7 and it never got disclosed.

14:33:22 8 What the movant completely ignores in this motion is the
9 discovery rule. So many of these things were done behind the
10 homeowners' back. The only things the homeowner learns is the
11 occasionally five line, once a month, set of board minutes that
12 they're allowed to see that they get by email. They're not
13 allowed in board meetings. They don't know what the developer is
14 discussing with several other board members. And, no, there are
15 no board minutes showing communication to the homeowners that
16 they paid three times the value of the golf course.

14:33:51 17 So so much of what we had discussed with the Court was not
18 disclosed. There was no way for the homeowners to know until
19 they got assessed to subsidize the golf course in 2019 that the
20 memo sent on June 30th, 2016, that they would never subsidize the
21 golf course was a lie. It wasn't a lie until they assessed them,
22 and at that point, which is three-and-a-half-years old and six
23 months before we brought suit, at that point they understand
24 they've been had.

14:34:30 25 With regards to the civil conspiracy, it's properly pled and

1 it's allowed to be pled as an alternative cause of action. With
2 regards to the turnover that has not happened yet -- well,
3 actually if, in fact, the developer was RTI and not LL, then the
4 turnover happened back then, it happened back in 2013.

14:34:52 5 Secondly, there's a provision in the covenants that requires
6 the developer to transfer the common areas once he has conveyed
7 80 percent of the buildable properties. He's conveyed
8 85 percent. That time has come and gone.

14:35:17 9 The mistake they're making is they're saying, well, we still
10 own 22 percent so it hadn't happened yet, right? No. They
11 repurchased 100 lots. Those 100 lots they repurchased had
12 already been conveyed by the developer. Under the language of
13 the covenants, they don't count, they've already been conveyed,
14 so they're at 85 percent. The time has come and gone. And it's
15 plaintiffs' position that the common areas that were supposed to
16 be conveyed include the amenities, include the amenities that he
17 had the association buy.

14:35:51 18 And it happens to be that dovetails with another issue,
19 which is in 2018 when they agreed to start putting tract homes in
20 there he told Stanley Martin, by contract, that the developer
21 would make up all operating deficits of the HOA. The HOA is a
22 third-party beneficiary to that, as is all the HOA members.
23 We've gone three years now with the deficits, and the developer
24 has not made up those deficits.

14:36:24 25 But the *Essex* contract goes one step further. The *Essex*

1 contract says that the developer will convey the amenities free
2 and clear. Right now those amenities have \$2.5 million worth of
3 notes on them. They have not been conveyed to the homeowners
4 free and clear.

14:36:47 5 So the time for transfer has been triggered and they have
6 not transferred, and all these damages are in issue, the reserves
7 are in issue. And this Court is correct, the *Ion* Supreme Court
8 last year very much followed the *Goddard* decision more than the
9 *Dunes West* decision, and it totally explained how the developer's
10 fiduciary duty, when he controls the HOA, is far broader than
11 just the common elements.

14:37:19 12 There's another important thing buried in *Ion* that some
13 people might not notice. It is the right to control that
14 matters, not the actual control. In *Ion* the developer reserved a
15 veto power in the covenants for 20 years, and the developer tried
16 to put up testimony in all courts that said, well, we've never
17 even exercised that. Just like you hear here, I'm the president
18 of the board, I'm the developer, but I never pushed my authority
19 on anybody else.

14:37:50 20 The *Ion* court found the reservation of that veto power was
21 developer controlled, and so during all the transactions in *Ion*
22 it was still developer controlled even though after 2005 it had a
23 homeowner board of directors without a developer.

14:38:02 24 And moving on from that, we've talked about the turnovers,
25 the debt, the damages. So many of the damages that did occur

1 before 2017 -- they want to use the August date -- so many of the
2 damages that did occur relate to derelictions or damages that
3 weren't known until years later and which are not barred because
4 of the discovery rule. And I've already provided the Court with
5 several examples of that.

14:38:39 6 Thank you, sir. Happy to answer any questions.

14:38:40 7 ATTORNEY BUCKINGHAM: Yeah. And so just briefly to touch
8 back on that, I understand they got their arguments about things
9 that were concealed from the homeowners, but what about deeds,
10 what about things that are in the public record? I mean,
11 Mr. Lucey says that the homeowners would have no idea to go and
12 look at the public records for things about, let's say, the
13 transfer of rights to LL or the golf course.

14:39:03 14 Well, how about this? How about mortgages? I mean, these
15 homeowners this have sued say that they represent the interests
16 of everyone, including the HOA. I have attached a copy of the
17 2016 mortgage to my motion where presumably these homeowners, who
18 I believe all had mortgages on their property, could go and look
19 to see that here's a mortgage that shows the Mount Vintage
20 Homeowners Association owes this bank whatever it is, \$2.5
21 million, and asks the question, hey, what is this about? There's
22 no allegation that ever happened.

14:39:40 23 It is crystal clear that the mortgage and the deeds were
24 filed for the town center and for the golf course, as well as for
25 all these other tax sales, the properties acquired from tax sale

1 or from private sale. None of that was hidden. If there was
2 ever a plan to conceal these property transactions from the
3 public they did a terrible job of it because all these deeds are
4 in the public record, everyone can see them. And all they've got
5 to do is go look. And they were never told to not look. There's
6 no evidence that they were ever told don't go look.

14:40:12 7 And so certainly when it comes to those issues, things that
8 are matters of public record, the statute of limitations ought to
9 apply.

14:40:22 10 THE COURT: How do you respond to Mr. Lucey's argument that
11 you conveyed out all these properties. Regardless of how you got
12 them back, they've already been conveyed, so that counts towards
13 your 85 percent regardless of their current status.

14:40:42 14 ATTORNEY BUCKINGHAM: The covenants allow the developer to
15 acquire new properties.

14:40:47 16 THE COURT: Sure. That's when you start to figure out your
17 85 percent requiring the transfer, that he's saying that's done.
18 If you count those conveyances, then with all the other
19 conveyances you already passed the 85 percent which is the
20 requirement, I think you're saying, that makes the transfer
21 occur.

14:41:02 22 ATTORNEY BUCKINGHAM: I would ask to see where that's in the
23 covenants because the covenants don't say that.

14:41:07 24 THE COURT: If it says a conveyance, it says if you convey
25 out 85 percent of the deeds, or lots, and this other, the

1 amenities or the common areas have to be transferred, wouldn't
2 that be -- if it's not defined any better than that wouldn't that
3 be construed against your clients since he created those, or his
4 successors, or people before him did?

14:41:34 5 ATTORNEY BUCKINGHAM: No, I don't believe so, because --

14:41:37 6 THE COURT: It certainly wouldn't be construed against the
7 people who buy it.

14:41:41 8 ATTORNEY BUCKINGHAM: No, I don't think it's construed
9 against anyone. I think the challenge here is you've got one
10 provision that says turnover at 85 percent. You've got another
11 provision that says the developer can acquire new properties and
12 add it into the inventory.

14:41:50 13 THE COURT: That's not new property necessarily. If he
14 takes back property already conveyed that's property that's not
15 -- it's not new.

14:42:03 16 ATTORNEY BUCKINGHAM: Well, actually, I'm unsure that the
17 covenants say new property. I think it may just say the
18 developer can have properties.

14:42:14 19 THE COURT: Okay.

14:42:14 20 ATTORNEY BUCKINGHAM: Yeah. And so, yeah, I don't know that
21 that is a matter that would be construed against one party or the
22 other.

14:42:22 23 THE COURT: Okay.

14:42:24 24 ATTORNEY BUCKINGHAM: This concludes my arguments on the
25 motions. The only two concluding thoughts I have are, first of

1 all -- well, I guess I've got three. First of all, I think this
2 is the longest summary judgment motion I've ever argued, so I'm
3 glad we all share this experience together. Thank you for making
4 the drive up here.

14:42:46 5 Second, I kind of feel sorry for the jury because this is
6 going to be very complicated for them to understand, which leads
7 into my third observation. After today, I am concerned about
8 whether two weeks is long enough.

14:42:58 9 THE COURT: Well, don't worry about that.

14:43:00 10 ATTORNEY BUCKINGHAM: Okay.

14:43:00 11 THE COURT: Once we're there they can't kick us out. And,
12 of course, we may catch a lot of grief with it. Do you agree
13 that it can run over two weeks? If it was Anderson, I wouldn't
14 care at all, but down in Edgefield --

14:43:17 15 ATTORNEY LUCEY: I agree it's theoretically possible, Your
16 Honor, but we always made a habit of getting the case to the
17 jury.

14:43:22 18 THE COURT: Say it again.

14:43:22 19 ATTORNEY LUCEY: We, my firm, has always made it a habit of
20 getting a case to the jury as quickly as possible. So while more
21 than two weeks is theoretically possible, we'll be working to
22 make sure that doesn't happen.

14:43:34 23 ATTORNEY BUCKINGHAM: I parked in two-hour parking for this.
24 I parked in two-hour parking for this hearing, so.

14:43:40 25 THE COURT: Let me ask you all this. At this juncture all

1 the mediations have taken place that are going to take place? I
2 mean, do you -- what I'm asking -- I'm not asking you to drop
3 your case or drop your shields.

14:43:56 4 At some point -- it looks to me like this case has got a
5 strong possibility of going forward, but I hate to spend a lot of
6 time when y'all, next week, come around and say, hey, we've
7 settled this. I mean, if you all are in serious discussions, you
8 think it's a real possibility -- I'm not asking you to say it
9 now -- you all let me know so I can make the appropriate
10 arrangements for people. A lot of people are making different
11 arrangements in different places.

14:44:23 12 ATTORNEY BUCKINGHAM: Yes, sir.

14:44:23 13 ATTORNEY LUCEY: And I just want to remind the Court we have
14 a motion to amend that was on today's list to be heard.

14:44:28 15 THE COURT: All right. Yes, sir. And that's just to
16 conform to the evidence, if I read it correctly.

14:44:31 17 ATTORNEY LUCEY: Conforms to the evidence. It drops the
18 accounting, it drops the temporary injunction, and it allows for
19 the fact that perhaps RTI was the developer.

14:44:44 20 THE COURT: Well, let me ask you this. Does it require any
21 additional discovery?

14:44:47 22 ATTORNEY LUCEY: No, sir. No, sir.

14:44:50 23 THE COURT: What's your position?

14:44:52 24 ATTORNEY LUCEY: We did just get their final response to our
25 motion to compel Wednesday, I think. No, Friday during my

1 deposition I got --

14:44:59 2 ATTORNEY BUCKINGHAM: The last batch of emails.

14:45:01 3 ATTORNEY LUCEY: -- an hour before our last deposition on
4 Friday. I have not been through it. I assume there's no bombs
5 in there, but we just got it Friday morning.

14:45:07 6 ATTORNEY BUCKINGHAM: We're scraping the bottom of the
7 barrel at this point. But, yeah, I don't think their amendment
8 requires more discovery.

14:45:14 9 THE COURT: Do you have an objection to it?

14:45:16 10 ATTORNEY BUCKINGHAM: I have a question about it.

14:45:17 11 THE COURT: Okay.

14:45:19 12 ATTORNEY BUCKINGHAM: So one of the things that it also does
13 is it removes the allegations for proceeding in a class capacity.
14 And just from looking at Rule 23(c), it looks like the members
15 imputed in the class have to be notified that. I'm not certain
16 that that's the case, but I'm looking at 23(c) and it says a
17 class action shall not be dismissed or compromised without the
18 approval of the court, and notice of the proposed dismissal of
19 compromise shall be given to all members of the class in such
20 manner as the court directs.

14:45:52 21 So, you know, for years now these homeowners have, I guess,
22 believed that they were involved in a class action. Now they're
23 not. I'm happy that we're not proceeding with a class, but we've
24 got this rule to deal with now.

14:46:02 25 ATTORNEY LUCEY: The class has been notified of the last

1 settlement, so they have been notified of a class recovery. If
2 counsel would like me to email every homeowner in the
3 neighborhood to make sure they know that we're not going
4 forward --

14:46:19 5 THE COURT: Well, I think it's not counsel wanting you to,
6 it's just the rules require that you have to.

14:46:25 7 ATTORNEY LUCEY: The rules require that we give such notice
8 as the court deems necessary, and this Court already gave a class
9 notice about a class recovery.

14:46:32 10 THE COURT: But they also had been -- they know that this
11 case was ongoing. They don't know what else is going on at this
12 point. I think you've got to give them some type of notice,
13 don't you?

14:46:44 14 ATTORNEY LUCEY: The only other thing I would say, too, is a
15 certain type of a class is not going forward. There is a class
16 going forward. A derivative action is a class, it's a variation.
17 We are going forward on behalf of the class on the biggest part
18 of the damages, which is the derivative damages.

14:47:00 19 But I'm happy, I'm absolutely happy, to give notice to the
20 class. I don't think it's necessary, but I --

14:47:04 21 THE COURT: And I was a little confused by that, too.
22 Exactly what derivative claims are you saying we're not going
23 forward with now, or what class claims?

14:47:14 24 ATTORNEY LUCEY: The class claims -- the class claims --
25 there wasn't really a different class claim; it was just class

1 individual damages. And the only individual damages we're going
2 forward on is the named plaintiffs. We're not putting up
3 class-wide individual damages.

14:47:32 4 Frankly, the reason for that was two things. The derivative
5 damages were so great I didn't see a jury giving us another penny
6 no matter what I asked for. I'd be lucky to get the derivative
7 damages. I'd be happy to get the derivative damage. So that was
8 the primary reason.

14:47:52 9 The second reason was to keep the case triable, to make sure
10 that it didn't last longer than two weeks. In fact, I'd be happy
11 to try this class, but I don't think -- I don't think that's
12 in the -- with most of the damages belonging, and the important
13 damages belonging, to the HOA, to me, in litigation, you have to
14 pick your horse and ride it. This is more of an HOA claim, more
15 of a derivative claim than a class claim, and so that's what
16 we're asserting. Happy to provide notice, though, to the class.

14:48:21 17 THE COURT: You know, you've done more of these class claims
18 than I have. I did two or three when I was a lawyer. I hadn't
19 tried a class action yet. I've been involved in a lot that have
20 settled. So if you think that you have to give them notice, then
21 you have to follow the rules. But if you don't think you have to
22 and you didn't, then that's going to come back to you in another,
23 a different kind of case. But I'm not going to make a decision
24 on that, because I don't know.

14:48:51 25 ATTORNEY LUCEY: Yes, sir.

14:48:52 1 THE COURT: But you're saying you're going forward with 14
2 named individual claims?

14:48:58 3 ATTORNEY LUCEY: Yes, sir, I think 12 or 14. Yes, sir. And
4 he's correct, several of those are husband-and-wife teams, so.

14:49:06 5 THE COURT: Okay. Well, all right. Does that satisfy what
6 you're asking?

14:49:12 7 ATTORNEY BUCKINGHAM: Yeah, I believe so.

14:49:13 8 THE COURT: I think the truth of the matter is whether or
9 not he gives any notice -- and that's probably not an issue for
10 you to raise, I think it's for them to raise against him, and if
11 he didn't do it and he's supposed to that's why they have
12 malpractice insurance. And I'm certainly not suggesting that you
13 committed malpractice, I'm just saying you know the rule better
14 than I do.

14:49:34 15 ATTORNEY LUCEY: Yes, sir.

14:49:34 16 THE COURT: All right. So going forward do you object with
17 that clarification to the amendment based on the evidence?

14:49:43 18 ATTORNEY BUCKINGHAM: No. I'm not enthused about having to
19 answer a third amended complaint.

14:49:48 20 ATTORNEY LUCEY: His answer can stand. He denies
21 everything.

14:49:50 22 ATTORNEY BUCKINGHAM: Well, that's true.

14:49:52 23 THE COURT: The answer stands. I'll give you 10 days to see
24 if you need any follow-up --

14:49:56 25 ATTORNEY BUCKINGHAM: Yes, sir.

14:49:56 1 THE COURT: -- if you think you need to add something.

14:49:58 2 ATTORNEY BUCKINGHAM: Yes, sir.

14:49:58 3 THE COURT: Fair enough?

14:49:59 4 ATTORNEY LUCEY: Yes, sir.

14:50:00 5 THE COURT: All right. Any other matters that we need to go
6 ahead and talk about now? I mean, like can you all at some point
7 try to stipulate as to exhibits as much as possible so we don't
8 spend a bunch of time doing foundation-type things?

14:50:18 9 ATTORNEY LUCEY: Yes, sir. I think our plan was to set a
10 date a week or so in advance of the September 11th pretrial for
11 either exhibit conference in person, by video, or whatever it is
12 to see what needs to be brought up to the Court on the 11th in
13 the pretrial.

14:50:30 14 THE COURT: Okay.

14:50:31 15 ATTORNEY BUCKINGHAM: I don't know that I can make -- that
16 would be the 4th, which is next Wednesday.

14:50:31 17 ATTORNEY LUCEY: Give or take a day or two.

14:50:36 18 ATTORNEY BUCKINGHAM: Yeah. I'm moving as fast as I can,
19 but it's just me, so.

14:50:42 20 THE COURT: I mean, you guys are all good lawyers, even
21 though I fuss at you sometimes because you sit down. Far be it
22 for me to try to tell you all how to get ready. You all tell me
23 you need it, I'll try to arrange my stuff so I can get you all
24 accomplished what you all need have to have done so we can get
25 ready to try this case, including additional status conferences

1 or appearance. I think that's about it. Let me doublecheck. Is
2 that all the --

14:51:10 3 ATTORNEY KRAWCQYK: Can I just raise a personal issue that
4 has nothing really to do with the case? The first Friday in the
5 case I didn't -- I already have -- my partner, Harry Goldberg,
6 who is of record and has made appearance in this, I have a family
7 wedding that weekend. I planned, if there was no objection, to
8 have him sit in for me. I've already cleared it with client. I
9 just want to make sure that the Court didn't have any issue or
10 nobody else had any issue with that.

14:51:38 11 THE COURT: Your client, that's the only one I'm worried
12 about.

14:51:41 13 ATTORNEY KRAWCQYK: Okay. I just wanted to make sure.
14 Thank you, Your Honor.

14:51:42 15 THE COURT: Did you have those cases you wanted to give my
16 law clerk about those issues with attorney-client?

14:51:47 17 ATTORNEY KRAWCQYK: I think I filed a memorandum.

14:51:49 18 THE COURT: You did?

14:51:50 19 ATTORNEY KRAWCQYK: I believe I did.

14:51:52 20 THE COURT: Doublecheck with her before you go.

14:51:54 21 ATTORNEY KRAWCQYK: Okay.

14:51:55 22 THE COURT: My law clerk transitioned out. She's brand new,
23 so she's getting this flatfooted.

14:52:00 24 ATTORNEY KRAWCQYK: I mean, I'm hoping we can work it out,
25 Your Honor. I mean, I guess we're still talking about it.

14:52:04 1 ATTORNEY LUCEY: We got sidetracked by summary judgment.
2 We're going to get with Charlie and see if we can't resolve
3 all -- and that's what the order of assignment requires, too.

14:52:13 4 ATTORNEY KRAWCQYK: I didn't mean to bring it up. I just
5 wanted to make sure that I was doing what I need to do, Your
6 Honor.

14:52:22 7 THE COURT: I was thinking about the case over lunch today,
8 and a couple things I was looking at under your promissory
9 estoppel case, or claim, and I was looking at that *Cruze* case v.
10 *City of Columbia* where they had the firearm and policemen saying
11 they promised us lifetime health insurance at no cost, and the
12 allegation of lifetime health insurance at no cost was non -- it
13 was ambiguous and so they said it was not enforceable.

14:52:59 14 And so how -- I mean, when you have something as specific as
15 saying you're going to provide health insurance to retirees,
16 policemen, and firearm at no cost for the rest of your life, if
17 that's considered ambiguous, how are the allegations in this case
18 not ambiguous as to future transfer of amenities?

14:53:20 19 ATTORNEY LUCEY: Your Honor, I can supplement cases to the
20 Court that have found that are not ambiguous and are enforceable.
21 The most notable difference I would note to the Court is, unlike
22 the employment situation, this neighborhood and its golf course
23 and its town center is not going anywhere. It's being built into
24 perpetuity. This is not something where you just call up
25 somebody and drop the golf course next year - no. And renew your

1 golf course next year - no. It got built into it. This is as
2 permanent of a setup as you can get that is subject to being
3 definitive.

14:53:56 4 THE COURT: All right. Thank you, sir.

14:53:57 5 ATTORNEY LUCEY: Yes, sir.

14:53:57 6 THE COURT: Anything from the plaintiff before we break?

14:54:00 7 ATTORNEY LUCEY: No, sir.

14:54:01 8 THE COURT: From defendants?

14:54:01 9 ATTORNEY BUCKINGHAM: Thank you for your patience.

14:54:01 10 THE COURT: Appreciate it.

14:54:01 11 No, Your Honor. Thank you.

14:54:01 12 (End of Transcript of Record.)

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CERTIFICATE OF REPORTER

14:54:06 2

3 I, Cathy J. Provost, Official Court Reporter for the
4 Fourteenth Judicial Circuit of the State of South Carolina, do
5 hereby certify that the foregoing is a true, accurate and
6 complete Transcript of Record of the proceedings had and evidence
7 introduced in the trial/proceedings of the captioned case in the
8 Court of Common Pleas for Edgefield County, South Carolina, on
the 28th day of August, 2024.

14:54:06 9

10 I do further certify that I am neither of kin, counsel, nor
interest to any party hereto.

14:54:06 11

Date: December 14, 2024

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\s\ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

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