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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Judge of the South Carolina Business Court

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Appellate Case No. 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc.,..... Appellants,

v.

Wild Wing Company, LLC; Sunstar, LLC; Ralph R. Teal, Jr.; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; Stratford Land Manager, L.P. d/b/a Stratford Land; Stratford Land Fund IV, L.P.; SB Investments LLC; Realstar Management, LLC; Graeme T. Black; H. Gilford Edwards; Founders Wild Wing, LLC; Founders Group International, LLC; Dan Liu; Xian "Nick" Dou; Rick Schultz; Rick Taylor And Thomas Plankers .....Respondents,

Wild Wing Plantation Owners' Association, Inc.,..... Nominal Defendant.

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STATEMENT OF THE CASE

This is a derivative action brought by the Plaintiffs, Barry Dykes and Barbara Eisenhardt (now the Appellants), on behalf of the Wild Wing Plantation Owners' Association (the "Association"). Appellants commenced the action on June 30, 2017. The matter was referred to the South Carolina Business Court by Order dated April 1, 2020.

All parties filed motions for summary judgment which were heard on May 4, 2021 by the Honorable R. Markley Dennis, Jr., who denied all of Appellants' motions and granted all of the motions filed by the Respondents from the bench on May 4, 2021 at which time he requested that Respondents prepare orders. The written orders were signed on June 17, 2021 and July 12, 2021.

Appellants filed and served their Notice of Appeal on July 16, 2021.

STATEMENT OF FACTS

This appeal presents the Court with a number of startlingly clear, manifest errors by the Circuit Court, which resulted in a grave miscarriage of justice. As this Court will see, the Circuit Court decided the merits of this fact intensive case, which involves an accounting dispute spanning 14 years, expert witnesses, self-dealing by four Declarants, and numerous hand-selected members of different Boards of Directors, at summary judgment, without a trial or any live testimony from the witnesses. In doing so, as can be seen in its four orders, the Circuit Court failed - actually refused - to view the facts in the light most favorable to the Appellants and largely ignored evidence offered in support of their claims, not even bothering to mention much of that evidence in the orders.

Even though the Association offered clear evidence that it has been damaged in some amount between $900,000 and $2,500,000 (before the application of interest), which must be taken as true, the Circuit Court ruled that *it is completely without a remedy, as a matter of law.* The Circuit Court ruled that the Association has no right to sue the Declarants, *on any theory of law*, even though the Declarants kept the money that it owed to the Association and repeatedly acted in their own self-interest, directly at the expense of the Association. The Circuit Court also ruled that the Association has no right to sue *any* of the members of the Boards of Directors who facilitated and implemented the actions of the Declarants, *on any theory of law*.

All as a matter of law, without a trial or so much as a single live witness. The Circuit Court simply shut the doors of the courthouse in the faces of this aggrieved Association and all of its members.

Because the facts are complicated and involve numerous parties, below the Appellants provide information concerning the identities and roles of the various Respondents and then offer

a brief overview of the claims that have been brought. In addition, several charts and tables that were made available to the Circuit Court are referred to herein as record exhibits for ease of reference and brevity.

The Defendants/Respondents

As noted, the Defendants, who are the Respondents in this appeal, are comprised of three groups of entities and people. The first group consists of four different entities that had the rights of the "Declarant" under the Wild Wing Regime Documents which are described more fully below. The Declarants, and the dates they held the Declarant rights, are listed below:

Declarant	Date Range of Rights
Wild Wing Company, LLC	9/26/06-12/22/10
SLF IV/SBI Wild Wing, LLC	12/22/10-11/09/11
Wild Wind Residential Development, LLC	11/09/11-04/13/15
Founders Wild Wing, LLC	04/13/15-Present

The second group of Defendants/Respondents are individuals who served as members of the Board of Directors for the Association. They were all appointed to the Board of Directors by the Declarants, which have always controlled the Association and still do. The Defendants/Respondents who served as members of the Board of Directors, and the Declarants for whom they served, are listed below:

Defendant Board Members	Related Declarant
Ralph R. Teal, Jr. (Sunstar/Realstar/SB Investments) Gilford Edwards (Sunstar/Realstar)	Wild Wing Company, LLC

Ralph R. Teal, Jr. (Sunstar/Realstar/SB Investments) Graeme Black (Realstar) Gilford Edwards (Sunstar/Realstar)	SLF IV/SBI Wild Wing, LLC
Ralph R. Teal, Jr. (Sunstar/Realstar/SB Investments) Graeme Black (Realstar) Gilford Edwards (Sunstar/Realstar)	Wild Wind Residential Development, LLC
Rick Schultz Rick Taylor Tom Plankers	Founders Wild Wing, LLC

The third and final group of Defendants/Respondents are people and entities that were members of, or related to, the Declarants. Those Defendants/Respondents either controlled the actions of the Declarants and the members of the Board of Directors or participated in the siphoning of assets from the Declarants. To assist this Court, we attached a detailed chart of all the Defendants/Respondents and some of their relationships to our Memorandum in Support of Plaintiffs' Motion for Summary Judgment, (Exhibit C, R. pp. 1570-1571).

Summary of Claims

The evidence brought forth by the Appellants, which was largely ignored by the Circuit Court, establishes that during the relevant time period, from 2007 though 2019, all four Declarants (identified below) breached their fiduciary duties to the Association and its members in two respects. First, the Declarants failed to properly calculate the amount of money owed to the Association under their funding obligations to the Association as set forth in the Regime Documents (also discussed in detail below). That accounting error resulted in underfunding by Declarants in the principal amount of $891,241 since 2007. *See* Dykes 2020.09.24 Calculations "Accounting" (Exhibit A, R. pp. 1566-1567) Second, the Declarants wrongfully amended the

Regime Documents twice, in 2011 and again in 2016, to postpone the deadline for the Declarants to pay regime fees and assessments on a per lot basis which would have required more funding by the Declarants. The amendments resulted in the Declarants' underfunding the Association in the additional amount of $2,152,260. *See* Dykes 2020.09.24 Calculations "Amendment" (Exhibit B, R. pp. 1568-1569). Appellants are also claiming pre-judgment interest on those sums.

Because of that conduct, the Appellants have sued the Declarants as well as certain members of the Boards of Directors who served during the relevant time period. The Appellants have asserted claims for breach of fiduciary duty and violations of the South Carolina Unfair Trade Practices Act, Sect 39-5-10, *et. seq*, *S.C. Code of Laws* ("SCUTPA"). As to the members of the boards of directors, Appellants have proven that they were not only appointed by the Declarants but that they had direct financial interests in the Declarants or professional relationships with the Declarants which compelled them to put the interests of the Declarants ahead of the Association at every turn. The evidence compels a conclusion that the board of director defendants not only failed to safeguard the Association from the Declarants' underfunding, but actually facilitated the underfunding and the amendments, all at the sole expense of the Association and for the sole benefit of the Declarants. Respondents Rick Taylor, Thomas, Plankers, and Rick Shultz also failed to pursue reimbursement from the Declarants once the underfunding was identified by Appellants and brought to their attention.

Finally, Appellants have asserted amalgamation/single business enterprise claims against a third set of defendants who had *defacto* control of the first three Declarants, and consequently the Board of Directors, and who siphoned off the assets of those Declarants, leaving them insolvent and unable to respond to the claims of the Association.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), *SCRCP*." *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). While the summary judgment standard of Rule 56, *SCRCP*, is well known, certain aspects of it bear repeating and were provided to the Circuit Court. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). Further, "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 331, 673 S.E.2d 801, 803 (S.Ct. 2009). Finally, "Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (1991).

ARGUMENTS

All that is required of the Appellants to warrant reversal of the Circuit Court is to demonstrate the factual and legal support for the claims they have brought. In doing so, Appellants are providing this Court with the supporting evidence and law largely as it was provided to the Circuit Court.

I. THE CIRCUIT COURT ERRED IN HOLDING THAT THE APPELLANTS FAILED TO OFFER EVIDENCE THAT THE DECLARANTS BREACHED THEIR FIDUCIARY OBLIGATIONS TO THE ASSOCIATION

The Circuit Court's manifest errors are numerous and derive principally from the Circuit Court's failure - actually refusal - to consider the substantial supporting evidence provided by the Appellants, much less consider it in the light most favorable to the Appellants. This stemmed, at least in part, from the Circuit Court's initial belief, consistently referenced in Judge Dennis' Orders, that the Appellants have not been harmed. That is simply not true, and it certainly is not true when the evidence provided is taken in the light most favorable to the Appellants.

A. *The "Math"*

The Circuit Court breaks down Appellants' claims and refers to the dispute concerning the calculation of the Declarants' funding obligation as the "Math." Regarding the Math, the testimony of Dykes and Appellants' Certified Public Accountant expert, Roy Strickland, is that from 2007 through 2019, because of the manner in which the Declarant's funding obligations were calculated, the Declarants underpaid the Association, the sum of $891,241. *See* Dykes 2020.09.24 Calculations "Accounting" (Exhibit A, R. pp. 1566-1567). Below is the complete explanation of that claim provided to the Circuit Court. As discussed below, the Declarants' funding obligation is set forth in the Regime Documents, drafted by the Declarants, in what the Appellants believe is clear and unambiguous language. Respondents deny this making it a central issue in the case. To resolve that issue, the Circuit Court was required to take the testimony of the witnesses and then apply the clear and unambiguous language of the funding obligation. As this Court will see below, the Circuit Court did not do this, electing instead to modify the language of the Regime Documents and create its own standard for the funding obligation of the Declarants. This was a central error by the Circuit Court.

1. *The Rights of the Declarants to Control the Wild Wing Association and the Declarant Funding Alternative:*

To explain this case correctly, Appellants first need to establish the Declarants' complete control of the Association. There are numerous governing documents including the Declaration of Protective Covenants, Restrictions, Easements, Charges and Liens which include the covenants and were originally recorded on or about September 27, 2006 (the "Regime Documents").

For ease of reference, the relevant portions of the Regime Documents are attached as Exhibit D, R. pp. 1572-1579. Included is the language of two amendments to the Regime Documents, in 2011 and 2016, which are also relevant to the issues in this case.

Since the inception of the Wild Wing development, the Declarants have maintained exclusive control of the Association through their control of the Board of Directors and controlling voting rights. The Regime Documents provided that the Declarants had the right to and did appoint *all* members of the Board of Directors of the Association. In addition, and critical to the arguments in this case, the Declarants had superior voting rights to the other property owners. *See* Regime Document Bylaws Article 2, Section 2 and Article 3; Section 5 (Exhibit D, R. pp. 1572-1579). Those voting rights give the Declarants, which has Class B rights, votes equal to twice the number of Class A votes (Class A rights belong to the non-declarant property owners), plus one. This provision gave the Declarants total control of any vote requiring 67% of the vote or less. Amending the Regime Documents requires a 67% vote. *See* Regime Document Bylaws Article VI, Section 6 (Exhibit D, R. pp. 1572-1579). Because of their total control of the Board of Directors and the fact that the Declarants could vote to pass any measure that Board of Directors put to a vote without a single non-declarant member vote, the Declarants at Wild Wing completely controlled the Association.

Finally, the Declarants all owned unsold lots at Wild Wing, with that number reducing over the years as lots were sold. Because the Declarants did not want to pay regime fees and

assessments on a per-lot basis on each of their lots, the Regime Documents grant the Declarant an alternative funding structure to help the Declarant reduce its financial exposure associated with the unsold lots it owns. Specifically, rather than paying Association assessments on a per lot basis, *until December 31, 2010*, the Declarant had the right to fund the Association based upon a formula. That formula, found at Article VI Section 2a on Exhibit D, R. pp. 1572-1579, provides that: "**…** ***the Declarant shall be assessed and pay to the Association, in lieu of an assessment thereof, a sum equal to the actual amount of actual operating expenditures incurred by the Association for that portion of the calendar year less an amount equal to the total assessments made by the Association against Owners of Lots other than those owned by the Declarant. The actual operating expenditures for this purpose shall also include any reserve for replacements or operating reserves.*** (*The underlined language is the language directly at issue in this case*). This option for the Declarant has been and will be referred to as the "Declarant Funding Alternative."

The Declarant rights, including the right to appoint the entire Board of Directors, voting rights and the Declarant Funding Alternative, are extremely important and made the Wild Wing development more "marketable" for the Declarants. *See* Dep. Ralph R. Teal, Jr., Pg.32:10-33:4 (Exhibit E, R. pp. 1580-1597). The ability to control the Association with the Board of Directors and the Declarant vote is obvious, but the Declarant Funding Alternative significantly reduced the Declarant's financial obligations to the Association as compared to what the Declarant would have owed had it been required to pay per lot assessments like the rest of the lot owners/members of the Association.

Here we pause to address another fundamental error of the Circuit Court. In all of its orders (R. pp. 0004-0009; R. pp. 0010-0025; R. pp. 0026-0040; and R. pp. 0041-0058), the Circuit Court makes the following statement:

> Plaintiffs' case relies entirely upon blending the actions of the POA as actions of the Declarants. There exists no evidence or law to support this theory. The actions complained of by the Plaintiffs were actions of the POA. There exists no rule of law that an appointing Declarant is somehow vicariously liable for the actions of it appointee.

No citation of law is provided for that statement which is blatantly incorrect and flies in the face of *Walbeck* and other law in which this Court and others have discussed the concept of developer control over an association such as this one. Unlike the Circuit Court, the South Carolina appellate courts are mindful of the opportunity for conflicts of interest between a developer and the members of an association it controls. Inexplicably, Circuit Court simply chose not to concern itself with these essential facts as they impact the case.

In fact, this finding is in every Order the Circuit Court signed, even the Orders for the cases against the directors. What possible interest would the directors have in a court finding that the Declarant was not liable for their actions? If the directors were concerned about protecting the interests of the Association, and "Math" was wrong, as Dykes and Strickland have testified, then the directors would want the discrepancy cleared up so that the Association would have more funding. Here, the directors supported every effort the Declarants made to avoid that funding obligation, including the effort to legally isolate the Directors from their own mistakes. That direct conflict was lost on the Circuit Court.

2. <u>The First Three Declarant's Were Shell Entities</u>

From 2006 until 2016, the valuable Declarant rights discussed above were assigned from one to another of the four different Declarant entities. As mentioned above, the initial Declarant, Wild Wing Company, LLC, was owned by local businessmen through Sunstar, LLC, a development entity that did other development work in Horry County. The real estate crash in the late 2000s impeded the sale of lots at Wild Wing and ultimately the development loans that the initial developers were personally obligated to pay became due. To secure the funding they

needed, the developers entered a relationship with Stratford Land Fund IV, L.P. ("Stratford") out of Texas. *See* Dep. Ralph R. Teal, Jr, 10:23 to 12:13 (Exhibit E, R. pp. 1580-1597). With Stratford's money and participation, the developers were able to refinance the original development loans, and Stratford and its entities took a stake in the Wild Wing development.

As a part of the addition of Stratford, the initial Declarant, Wild Wing Company, LLC, assigned its assets to a new Declarant entity, which was owned and controlled by the original Myrtle Beach developers and their new partner, Stratford. *See* Dep. Ralph Teal Jr. at Pg. 13:13-14:9 (Exhibit E, R. pp. 1580-1597). That single purpose entity was called SLF IV/SBI Wild Wing, LLC. *See* Assignment (Exhibit F, R. pp. 1598-1606) which became the second Declarant. The members of that entity were Stratford Land Fund IV, L.P. (SLF) and SB Investments LLC. *See* Dep. Ralph Teal Jr. at Pg. 17:15-18:6 (Exhibit F, R. pp. 1598-1606). There is no evidence that Wild Wing Company, LLC received any consideration for that assignment.

A few months later the developers decided to complete another assignment, effectively changing the name of the Declarant to Wild Wing Residential Development, LLC, and that entity became the third entity to possess the Declarant rights. *See* Assignment (Exhibit G, R. pp. 1607-1611). The sole member of Wild Wing Residential Development, LLC was Wild Wing Residential Development, LLC which was managed by SLF IV/SBI Properties, LLC. The sole managing member of SLF IV/SBI Properties, LLC was managed by Ralph Teal and Jeff Turner. Furthermore, there is no evidence that the second Declarant, SLF IV/SBI Wild Wing, LLC, received any consideration for the conveyance of its only assets, and it has been admitted that SLF IV/SBI Wild Wing, LLC and Wild Wing Residential Development, LLC were actually joint venturers. *See* Answer of Stratford Land Manager, L.P. d/b/a Stratford Land (R. pp. 0141-0155).

Finally, in 2015, with the economic recovery complete, the developers, still the original Wild Wing developers and their partner, Stratford, sold their interest in Wild Wing to a Chinese company called Founders Group International, LLC ("Founders"). (The members of Founders are Xian Dou and Dan Liu). As part of that transaction, the assets of Wild Wing Residential Development, LLC were assigned to Founders Wild Wing, LLC, which became the fourth and final Declarant which is a Respondent. *See* Assignment (Exhibit H, R. pp. 1612-1681). The members of Founders Wild Wing, LLC are Jiangsu Tianrui Danfor Commerce and Industry Co. Ltd. and Xian Dou, who is a Respondent in the case. Unlike the previous assignments of Declarant rights, the assignment from Wild Wing Residential Development, LLC to Founders Wild Wing, LLC was for good and valuable consideration, which is discussed in detail below.

All the Declarant entities before Founders Wild Wing, LLC, were shell, single purpose, entities whose only assets have been the Declarant rights and the remaining unsold lots at Wild Wing. None of those shell entities had other capital, assets, sources of income, or reason to exist. They were funded and controlled by other companies and people through a complicated series of LLCs that were intended to protect the people and companies who controlled those Declarant entities.

3. *Declarants' Erroneous Accounting for the Declarant Funding Alternative*

The Bylaws provide that accounting for the Association is to be done pursuant to Generally Accepted Accounting Principles ("GAAP"). *See* Section 18. (1) (Exhibit D, R. pp. 1572-1579). Under GAAP, which is accrual rather than cash-based accounting, "bad debt" such as, for example, unpaid lot owner assessments, is considered an incurred "expense." That means that under GAAP,

the Declarant was required to include bad debt as an "expenditure incurred" by the Association when calculating the amount it owed under the Declarant Funding Alternative.

Beginning in 2007, when the original Declarant began calculating its annual contribution to the Association, it was decided *not* to include "bad debt" as an Association "expenditure incurred" and to include non-assessment income in the calculation (such as fines, fees, and bad debt recoveries). These accounting decisions, *which Dykes and Strickland have testified are not consistent with GAAP*, reduced the Declarant's contribution to the Association. This method of calculating the Declarant's contribution continued through 2019, despite Mr. Dykes' expressed concerns and objections about it since 2015. *See* Dykes Affidavit (Exhibit I, R. pp. 1682-1718).

In response, the Respondents argued, and the Circuit Court agreed, that the contribution was calculated by an accountant, not by the Board of Directors or the Declarants. *See* Defendants Motion for Partial Summary Judgment on the Business Judgment Rule, Pgs. 4-5 (R. pp. 0369-0579). That finding by the Circuit Court is simply not true and was actually contrary to the evidence in the case. Gil Edwards, a member of the Board of Directors from 2011 until 2015, testified that he determined that bad debt was not to be considered an Association expense for purposes of calculating the Declarant contribution. *See* Dep. Gil Edwards Pg. 32:13-19 (Exhibit J, R. pp. 1719-1721). Second, even if it were true that the error was an error by an accountant, it would be immaterial. At issue in this case is what the Declarant owed to the Association and did not pay. Since it was miscalculated, *for whatever reason*, and a shortfall occurred, it needs to be paid, immediately with interest. If the miscalculation truly lies with the accountant who performed the calculation, it does not change what should have been paid by the Declarants.

There are two other issues that must be addressed related to the Circuit Court's finding in this regard. First, it seemed to be of no concern to the Circuit Court that the Declarants completely

controlled the Board of Directors of the Association, who hired the accountant who ostensibly made the calculation errors. Accounting errors that year after year favored the Declarants, made by an accountant hired by Declarants, are not excused by the fact that an accountant made the error.

Second the Circuit Court's holdings suggest that he believed that Mr. Corbett's interpretation of the Declarant Funding Alternative were somehow binding. They are not. This case is principally about the Dykes and Strickland testimony that Mr. Corbett's interpretation of that funding obligation, if that is what it was, is wrong. Without a trial and without live testimony, and without any legal authority at all, the Circuit Court wrongly held that Mr. Corbett's calculation effectively determined what the Declarant Funding Alternative required, which is exactly the opposite of what the Circuit Court was required to do. Instead, the Circuit Court was required to determine what the Declarant Funding Obligation was and then determine whether Mr. Corbett's calculations were correct. They were not.

Importantly as it related to Wild Wing Residential and Founders and the later members of the Board of Directors, the Declarants and the directors were first alerted to Barry Dykes' concerns about underfunding in 2015, were sued for it in 2017, and have never offered to correct what they now acknowledge may have been Corbett's accounting errors.

In addition, the fact that the Declarants paid based on inaccurate accounting is undeniable. The Respondents' contention, is that the words***, "a sum equal to the actual amount of actual operating expenditures incurred by the Association"*** means *actual expenses* of the Association and that "bad debt" is not an "actual expense." The Circuit Court agreed with this and in its Teal/Edwards Order provided its own interpretation of the Declarant Funding Alternative:

> Stated as simply as possible, this language meant that the Declarant's minimum obligation was to annually fund any shortfall between the Association's actual operating expenditures and the assessments made against all other owners during that year.

As argued by the Respondents, the Circuit Court simply removed the terms "*expenditures incurred*" from the clear and unambiguous language of the Declarant Funding Alternative contained in the Regime Documents. The term "expenditures incurred" is precisely what compelled Dykes and Strickland to conclude that the Declarants had not met their funding obligations to the Association. Had the Circuit Court been willing to have a trial it would have heard from both of those witnesses on that point which is the central issue in dispute with respect to the "Math" issue. For this Court, the Appellants made that point to the Circuit Court repeatedly. (S*ee* R. pp. 1528-1778; R. pp. 1879-1888; and R. pp. 1891-1899.)

In its Memorandum (R. pp. 1528-1778), Appellants crystallized this issue: Had the Declarants wanted the Declarant Funding Alternative to be based on actual cash-based expenses of the Association, the language should have been written using the word **"paid"** rather than **"incurred"** which would have read: ***"a sum equal to the actual amount of actual operating expenditures paid by the Association".*** That is not how they, the developers/Declarants, wrote the Regime Documents. Unfortunately, the Circuit Court held that both Mr. Corbett and then the Circuit Court simply rewrote them, which was a profound error in this case. The clear and unambiguous language of the Declarant Funding Alternative must be read and applied as the Declarants wrote it.

The erroneous calculation of the Declarant Funding Alternative resulted in a substantial shortfall between what the Declarants contributed and what the Declarants should have contributed had it complied with the Regime Documents. From 2007 through 2019 (which is the amount of time that the declarant continued to elect the Declarant Funding Alternative), the shortfall in Declarant contributions totals $891,241. With prejudgment interest, that total is approximately $1,700,000. Appellants' claims seek the recovery of that shortfall.

As explained to the Circuit Court, Mr. Dykes' view of this has been validated by Appellants' expert, Roy Strickland. Mr. Strickland is an expert in accounting and testified as follows in his deposition on this issue:

> Q. Do you have an opinion about whether the Defendants failed to utilize GAAP, as is alleged in Paragraphs 34 and 35?
>
> A. I would term it they selectively utilized GAAP.
>
> Q. And you know I'm going to ask you to be very specific about that, so –
>
> A. Yes, sir. Their calculation that was used by -- the calculations that I've seen, they included accrual-based expenses, except for they deducted the bad debt expense from the calculation, so as a result, they selective -- that's the selective use of GAAP.

See Dep. Roy Strickland Pg. 29:13-25 (Exhibit K, R. pp. 1722-1731).

Mr. Strickland further testified:

> Q. Anything else? I want you to be complete on this, now, so take your time. If you need to reference any notes or anything else, I want you to give me a complete answer to anything that you have an opinion about that the Defendants failed to utilize or comply with GAAP.
>
> A. In their calculation, the only thing that I can think of at this time is they did not include bad debt expense. They specifically reduced their operating expenditures by that amount.

See Dep. Roy Strickland Pg. 30:1-10 (Exhibit K, R. pp. 1722-1731).

Mr. Strickland further testified:

> Q. Yeah. I want to know where you got your formula.
>
> A. Yes, sir.
>
> Q. And then we'll break her down from there.
>
> A. Got it. "However, until such time as a lot is conveyed by the declarant to an owner other than the declarant, the declarant shall be assessed and pay to the association, in lieu of an assessment thereof, a sum equal to the actual amount of actual operating expenditures incurred" -- 'incurred,' that's an important word -- "by the association for that portion of the calendar year

less an amount equal to the total assessments made by the association against owners of lots other than those owned by the declarant." That's the calculation right there.

See Dep. Roy Strickland Pgs. 45:15-46:11 (Exhibit K, R. pp. 1722-1731).

Mr. Strickland testified that when he performed his work, he compared it to the calculations done by Mr. Dykes, Mr. Strickland testified as follows:

Q: So to be clear, when you were performing your work, did you use Mr. Dykes' work as a template or a format, or did you set it totally aside and do your work independently?

A: I did my work independently and compared it to his work.

A: "…But the substance of my work, naturally, I had a meeting with him, and I concur with his answer, but the work itself was work that I did…"

See Dep. Roy Strickland Pg. 67:10-15; 69:11-14 (Exhibit K, R. pp. 1722-1731).

Regarding the Declarant's improper calculations, Mr. Strickland testifies as follows:

Q. Where did you get the annual dues amount?

A. The same -- in the footnote to the financial statements on I think a majority of those years, it actually says the -- I think it says the monthly annual dues. I think there were two years towards the end where they didn't -- they didn't -- for some reason didn't disclose that in the footnotes, so then I went to the budget document. There was a document that I looked at to tie that in, and again -- no. I tell you what I -- I looked at the calculation by the declarant, and they had the quarterly amount, and I multiplied it times four.

Q. So that's the amount that was assessed to lot owners -- or, rather, owners of lots other than the declarant?

A. Yes, sir.

Q. And then you just do the math and back out what they paid in?

A. Yes, sir.

I think I'm going to go ahead and interject this, because I didn't -- this is not something - but I think it's something important to mention here. The way this was calculated on these individual calculations of the budget and where they calculated the annual fee, that entire amount, the developer didn't have to pay anything. If everything was in

> budget on accrual basis, basically, even though the developer owned a portion of these lots, substantial portion, and most importantly, the developer benefits from owning those lots and having this homeowners association, because the amenities and things of that nature are typically very important in selling their lots.
>
> And I haven't checked on this yet, and I will tell you I just identified it yesterday. My question is in dividing it by just the homeowner's lots, if everything budgets out, the developer doesn't pay anything. And the reason I figured -that that thought came to me is under this document, they don't have to pay anything for the homeowners association.
>
> Typically, based on my experience, the developer is having to pay some type of fair share on that because they are benefiting and usually benefiting substantially from those amenities in selling the project.

See Dep. Roy Strickland Pg. 79:3-80:25 (Exhibit K, R. pp. 1722-1731).

The Circuit Court not only failed to actually apply the language of the Declarant Funding Alternative, and failed to accept the testimony of Dykes and Strickland as true, the Circuit Court also "moved the goal posts" in terms of the Declarant Funding Obligation. Instead of focusing on the language of the Declarant Funding Alternative, the Respondents convinced the Circuit Court to instead focus on whether or not the Association had unpaid bills, had ever been sued or had special assessments. On page 7 of the Circuit Court's Order as to the Wild Wing Defendants (R. pp. 0010-0025), the Circuit Court stated:

> Contrary to Plaintiffs' claims that the POA has been underfunded, the POA has never operated at a deficit since its inception. In addition:
>
> - Lot owner dues have stayed consistent from 2006 to date;
> - No special assessments have ever been levied from 2006 to date;
> - No POA bills have ever gone unpaid; and
> - The Reserve Fund of the POA is fully funded.

As pointed out to the Circuit Court by Appellants (R. pp. 1879-1888), while perhaps interesting, those facts are entirely irrelevant because that was not the funding obligation of the Declarant as set forth in the Regime Documents at Article VI Section 2a on Exhibit D (R. pp.

1572-1579). The funding obligation was either to fund on a per lot basis, like all the other owners, or to take advantage of the Declarant Funding Alternative which states as follows:

> ***... the Declarant shall be assessed and pay to the Association, in lieu of an assessment thereof, a sum equal to the actual amount of actual operating expenditures incurred by the Association for that portion of the calendar year less an amount equal to the total assessments made by the Association against Owners of Lots other than those owned by the Declarant. The actual operating expenditures for this purpose shall also include any reserve for replacements or operating reserves.***

Nowhere is the Declarant funding obligation dependent on or limited to whether *the dues stay consistent,* whether *special assessments are levied,* or whether the *bills are paid.* Had the Declarants wished to limit their obligations to ensuring that dues did not rise, that special assessments did not occur or ensuring that the bills were paid, they could have done that. They did not. The issue is whether the Declarants complied with the funding formula *they* drafted, which is included in the Regime Documents. The evidence in this case is that they did not.

Here, the Declarants failed to pay the Association what the Declarants owed under the Declarant Funding Alternative. Their payment shortfall totals $891,241.00 (before interest) and there is no argument that should convince the Court that the Association would not be better off if it had that money. Both Barry Dykes and Roy Strickland have offered testimony that establishes that failure to pay by the Declarant was a damage to the Association and materially impacted the financial condition of the Association. As a matter of Law, the Association has been damaged since it has not received the money it was owed.

B. *The Amendments*

In addition to the incorrect Math, the decisions by the Declarants and their puppet Boards of Directors to extend the Declarant Funding Alternative also increased the shortfall suffered by the Appellants. Recall that the Declarant Funding Alternative, allowing the Declarant to fund the Association based upon a formula rather than pay on a per lot basis, initially expired on December

31, 2010. This meant that from January 1, 2011, through today, the Declarant should have funded the Association based on a per lot assessment, like all other owners. As you will see in Mr. Dykes' calculations (Exhibit A, R. pp. 1566-1567, and Exhibit B, R. pp. 1568-1569) discussed below, that would have significantly increased the Declarant contributions to the Association from 2011 through 2019.

Since the lapse of the Declarant Funding Alternative would have dramatically increased the Declarant's funding obligations, in 2011, the Declarant at the time, Wild Wing Residential Development, LLC, held a property owners' meeting and amended the Regime Documents to extend the deadline for the Declarant Funding Alternative by six years, to December 31, 2016. (*See* Exhibit M, Amendment, R. pp. 1741-1745). Since the Declarant Funding Alternative had already expired, the Declarant made the amendment retroactive to January 1, 2011. In 2016, after the sale of Wild Wing to Founders, a second amendment initiated by Founders further extended the funding alternative deadline until December 31, 2019. (*See* Exhibit N, Amendment, R. pp. 1746-1749.)

With respect to the Founders 2016 amendment, the testimony offered by the Appellants that was rejected by the Circuit Court was that after they purchased the Wild Wing lots and interests from the pre-Founder's developers, and were assigned the Declarant rights, they met with a property management firm and were alerted to the fact that the Declarant Funding Alternative was going to expire in 2016 and Declarant contributions were going to dramatically increase. Mr. Skircheck testified as follows:

> A: I told the Founders board of directors that this 2011 amendment was fixing to expire and they would be paying assessments the following year on the lots that are unsold. That's all I did.
>
> Q: Did you have any opinion or discussion with the POA board as to the desirability of renewing that amendment through this 2016 document?

A: I have no ability to renew the document. I can just tell them what happened and what the circumstances will be.

Any choice to take any action was fully a choice of the developer. I had no authority in any choice to have a second amendment, other than, you know, administering it as a result of an election or a developer-approved amendment as the supplemental.

Q: Understood.

My question is, did they ask or did you offer any advice on the desirability of this amendment from a, you know, community perspective? Is this a good thing or a bad thing?

A: You know, do you remember having any conversations about that? I told them that the original amendment would expire and that they would be paying assessments on all the lots.

See Dep. Paul Skirchak at Pg. 50:24 – Pg. 51:24 (Exhibit O, R. pp. 1750-1755).

Faced with that reality, Founders met with legal counsel (the same counsel as had been used by the prior Declarant, the Bellamy law firm) and the second amendment of the Wild Wing Documents was passed, which extended the Declarant Funding Alternative through the end of 2019.

Those amendments were *solely* for the benefit of the Declarants (Wild Wing Residential, LLC and Founders Wild Wing, LLC and their members and related entities), at the *sole* expense of the Association. When asked about that in their depositions, two witnesses called by the Respondents, Press Courtney and Paul Skirchak, experts in property management, could not offer any testimony about how the Association benefitted from the amendments. Mr. Skirchak testified as follows:

Q. Can you, Mr. Skirchak, tell me any advantage to the association for the declarant to not pay on a per-lot assessment basis?

A. To the association as a whole?

Q. Yes, sir.

A. No. No. Probably not.

See Dep. Paul Skirchak at Pg. 78:18- Pg. 79:2 (Exhibit O, R. pp. 1750-1755).

Mr. Courtney is the President of Waccamaw Management, which has managed Wild Wing for many years. When asked how the Association benefitted from the amendment, Mr. Courtney testified as follows:

> Q. And so how did the -- extending the declarant funding alternative enhance the declarant's interest in 2016?
>
> A. I can't speak for the declarant or how they're -- they were enhanced.
>
> Q. Do you know or can you articulate for me how the association benefited from the extension of that declarant funding alternative in 2016?
>
> A. I cannot, with the exception of saying that, again, it's always important or good to have a successful developer from start to finish of a development.
>
> Q. And do you have any basis to provide to me today, any factual basis, to support a contention that extending the declarant funding alternative in 2016 somehow provided an advantage to the HOA?
>
> A. I do not.
>
> Q. So you can't quantify that value?
>
> A. I cannot.

See Dep. Press Courtney at Pg. 43:6-24 (Exhibit P, R. pp. 1756-1758).

As reflected in Barry Dykes' Affidavit, because the Declarants continued to utilize the Declarant Funding Alternative, the shortfall to the Association from the Declarants, from 2011 until 2019, totals $2,152,260. Of that, $1,138,604 is the shortfall associated with the pre-Founder's Defendants and $1,013,657 is associated with the shortfall from the Founders defendants. With prejudgment interest that total is $3,459,337. *See* Exhibit B, Dykes "Amendment" Calculations, R. pp. 1568-1569.

C. *The Declarants Breaches of Fiduciary Duty*

With respect to the Declarants, our courts have recognized a fiduciary obligation of a developer who controls the Board of Directors. A fiduciary relationship is the highest relationship known in the law. *Stegemann v. Gannett Co., Inc.*, 970 F.3d 465, 469 (4th Cir. 2020) ("Courts have often called these fiduciary duties the 'highest known to the law.'"). Recently, in *Walbeck v. I'on*, 426 S.C. 494, 517 827 S.E. 2d 348 (2019), the Supreme Court ruled as follows:

> Rather, we define Appellants' [Developer's] fiduciary duty arising from its retention of control over the HOA by the standards set forth in *Island Car Wash*:
>
> > [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. ... [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.
> >
> > In concluding that a developer in control of a homeowners association may not make decisions that benefit the developer's own interest at the expense of the association and its members. This deduction logically flows from the above standards set forth in *Island Car Wash*, *Goddard*, and our supreme court's decision in *Concerned Dunes* adopting *Goddard*'s analysis. (Internal citations omitted.)

As clearly explained to the Circuit Court, the Declarant/Respondents breached that duty in two clear respects. First, they failed to accurately calculate their funding obligation under the Declarant Funding Alternative. Instead, they themselves and/or through their hired accountant, Mr. Corbett, applied an incorrect "interpretation" of the applicable language, and selectively disregarded GAAP, to ensure that they paid less to the Association each year than the actual language of the Declarant Funding Alternative and GAAP required. According to Dykes' testimony, both Wild Wing Residential and Founders, and their conflicted directors, both refused to pursue the recovery of the additional funds that were owed when his analysis was presented by

Mr. Dykes. In the case of Founders and its directors, they willfully continued using the incorrect calculation through 2019.

Second, with respect to the two amendments, they were for the sole benefit of the Declarants and were at the sole expense of the Association. Given that it is virtually indisputable that the amendments violated the fiduciary obligations of the Declarants. At the very least, consistent with *Walbeck*, the Circuit Court was obligated to "scrutinized by the most zealous vigilance," a responsibility which the Circuit Court, because of its errors of law and fact, refused to undertake.

Taken in the light most favorable to the Appellants, the evidence establishes that Declarants breached their fiduciary obligations to the Association, both with respect to failure to properly calculate the Declarant contributions under the Declarant Funding Alternative and by passing two amendments extending the Declarant Funding Alternative from its initial expiration date of December 31, 2010, until December 31, 2019.

II. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT THAT THE PLAINTIFFS'/APPELLANTS' CLAIMS ARE BARRED BY THE BUSINESS JUDGMENT RULE.

The Circuit Court incorrectly held that the Business Judgment Rule precludes Appellants' claims against the Declarants and their puppet Boards of Directors. That was error for two reasons. First, as already noted, the Circuit Court ignored the relationships between the Declarants and its self-appointed Board of Directors which led to self-dealing and the Declarants benefitting financially at the expense of the members of the Association. That self-dealing defeats the application of the Business Judgment Rule. Second, the Circuit Court erroneously found that *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 517, 827 S.E.2d 348, 360 (Ct. App. 2019), did not apply. Instead, *Walbeck* is directly controlling and compelled the Circuit Court to "zealously review"

transactions such as the amendment to ensure that the Declarants are not unfairly benefitting from their complete control of the Association. The language of *Walbeck* clearly indicates an intent to protect members of an Association from Declarants unfairly benefitting from their controlling interests, at the expense of the other members of the Association, which is precisely what occurred at Wild Wing.

With respect to the Declarants, South Carolina law holds that "a developer in control of a homeowners association may not make decisions that benefit the developer's own interest at the expense of the association and its members." *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 517, 827 S.E.2d 348, 360 (Ct. App. 2019). In *Walbeck,* this Court specifically rejected the "argument that the business judgment rule precludes the existence of a fiduciary relationship between a developer in control of a homeowners association and the association's members." As developers in control of the Association, the Respondents owed a fiduciary duty to the Association and its members. As such, the Respondent/Declarants had a duty to act *in good faith* and not act in a manner that benefitted their own interests and failed to benefit the Association. *Walbeck* is directly controlling.

In that case this Court found that because of the legal, but completely unequal positions of declarants, who completely control an association, and the association's members, a fiduciary relationship exists between that declarant and the association it controls. In assessing that circumstance, the Court of Appeals discussed the Business Judgment Rule and expressly held:

> Rather, we define Appellants' **fiduciary duty** arising from its retention of control over the HOA by the standards set forth in *Island Car Wash*:
>
> > [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. ... [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

> *Walbeck v. I'on,* 426 S.C. 494, 517 (citing *Island Car Wash v. Norris,* 292 S.C. at 599, 358 S.E.2d at 152).

The Circuit Court surprisingly read that language and ruled that *Walbeck* was limited to a circumstance where a developer had an obligation to turn over property and is thus inapplicable to this case. To the contrary, this Court's language could not be more clear about its concerns that the "dominate" parties, here the Declarants and their directors, do not profit at the expense of an association such as this one.

In *Walbeck,* this very Court instructed circuit courts to independently scrutinize "with most zealous vigilance" the Math and the amendments in this case, to ensure that the Respondents did not "make use of [their superior, fiduciary position] to benefit [their] own personal interests," which is precisely what happened at Wild Wing. That was an obligation that the Circuit Court simply denied and rejected and the result is that the Association has suffered substantial damages and has been told by the Circuit Court that it has no lawful claims to pursue the recovery of those damages from the entities and people who caused them and even kept the money. A grave injustice indeed.

In addition, with respect to the board member motions, the business judgment rule is not applicable as a defense to the Appellants' claims because the business judgment rule applies to *intra vires* acts only (meaning those within the authority of the board members) and it does not apply where there is evidence of self-dealing, as is the case here, which warrants judicial review.

In South Carolina, the business judgment rule was explained by the Supreme Court in *Dockside Ass'n, Inc.* v. Deytens, 291 S.C. 214, 352 S.E.2d 714 (1987):

> A court should be reluctant to question action taken *intra vires* by the governing board of a non-profit corporation. *See Papalexiou v. Tower West Condominium,* 167 N.J.Super. 516, 401 A.2d 280, 286 (Chanc.Div.1979) **("If the corporate directors' conduct is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review.").**

First, at the very least, whether the actions of the directors in this case were *intra vires* or *ultra vires*, is a question of fact requiring a trial and should not have been decided at summary judgment. *See, Fisher, et al. v. Shipyard Village Council of Co-Owners, Inc.,* 415 S.C. 256, 272, 781 S.E2d 903 (2016) ("...ultimately, they jury must decide whether the Board violated the requirements of the Master Deed and Bylaws, which of the Board's actions were *intra vires* and which were *ultra vires*..."). In this case, however, the actions of the board members with respect to the calculation of the Declarant Contributions were not *intra vires* and are thus not afforded protection under the business judgment rule. The language of the Regime Documents was clear and unambiguous. The Respondents who were or are members of the Board of Directors were complicit in the underfunding and, at least in the case of Mr. Edwards, was responsible for it. Nothing authorizes the Board of Directors to waive or re-write the Regime Documents which was the effect of their actions with respect to the Declarant contributions. The Board's failures to comply with its affirmative duties under the governing documents, are not subject to the business judgment rule. *See Fisher v. Shipyard Vill. Council of Co-Owners, Inc*., 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016).

Additionally, the business judgment rule will not apply if the directors have engaged in self-dealing or have otherwise breached their duty of loyalty. *See Kuznik v. Bees Ferry Assocs*., 342 S.C. 579, 599, 538 S.E.2d 15, 25–26 (Ct. App. 2000). The evidence presented to the Circuit Court in this case was clear that the Board of Director Respondents, all appointed and controlled by the Declarants, were all "self-dealing" for the benefit of themselves (as owners of the Declarants, in the case of Mr. Teal, Mr. Black, and Mr. Edwards) or for the benefit of their masters, the Declarants. Mr. Black was employed by Realstar, which was owned by Mr. Teal and Mr. Edwards. According

to Mr. Teal, Realstar and Mr. Black managed all the HOAs Mr. Teal developed. *See* Dep. Ralph Teal, Jr. Pg. 23:20-24:9 (Exhibit E, R. pp. 1580-1597).

At a minimum the Circuit Court was obligated to hear the testimony of the witnesses with respect to Appellants' evidence of self-dealing which is compelling. For several years, the Declarants who appointed Mr. Black, Mr. Teal and Mr. Edwards to the Board of Directors enjoyed favorable accounting which reduced the amount of money they owed to the Association. That accounting was at the direction of Mr. Black's boss, Mr. Edwards. Further, according to the testimony of Mrs. Eisenhardt in her affidavit (Exhibit S, R. pp. 1773-1778) Mr. Black himself met with the members of the Association to persuade them to vote in favor of the 2011 amendment, without explaining to them the consequences of that amendment. As previously noted, Mr. Courtney, a property management expert, agrees that the Association received no benefit from it. Instead, the benefits of the amendment were realized only by Wild Wing Residential, LLC, the Declarant who appointed Mr. Black and in which Mr. Black's employers had a financial interest.

With regard to the actions of Shultz, Taylor and Plankers. First, according to the Affidavit of Mr. Dykes, like Black, Edwards, and Teal, they elected to continue to accept the erroneous accounting of the Declarant Funding Alternative even after Mr. Dykes brought it to their attention. Mr. Schulz, Mr. Plankers, and Mr. Taylor the affirmatively decided not to pursue recovery of the additional funding to which the Association is entitled, even after the demands of Mr. Dykes.

Regarding the 2016 Amendment, the testimony of Mr. Skirchak is that when Founders Wild Wing, LLC became the Declarant he advised them that the Declarant Funding Alternative was set to expire and that its expiration would mean a sharp increase in Declarant contributions from Founders. Based on that, the Founders appointed Board of Directors, moved for, and passed, the 2016 Amendment which again, was for the sole benefit of Founders at the expense of the Association.

That raises the possibility of self-dealing, in favor of the master who appointed them, and precludes application of the business judgment rule at summary judgment.

Importantly, as presented to the Circuit Court in Appellants' Reply memorandum (R. pp. 1879-1888), no one disputes the right of the Declarants to draft the Regime Documents they chose to draft. No one disputes the right of the Declarants to exercise complete control the Association for the last 14 years through their hand-selected directors and their controlling voting rights. No one even argues that they did not have the legal right to minimize their funding obligations to the Association through the Declarant Funding Alternative. The Declarants' rights to completely control the Association and to minimize their funding obligations, by shifting those obligations to the other members, is undisputed. At issue here, though, is that the Declarants, through their complicit directors, cannot take advantage of improperly manipulated accounting to *further* limit their Association funding obligations beyond the extent of the express language of the Regime Documents. Those directors cannot not hide behind the Business Judgment Rule to use their Declarants' controlling voting advantage to impermissibly amend the Regime Documents to extend their Declarant Funding Alternative benefit beyond its original life expectancy (which, of course, they drafted into the Regime Documents). It is that conduct, that is actionable, both with respect to the Math and with respect to the Amendments, and the Business Judgment Rule does not insulate them from liability for the consequences of those actions.

III. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT THAT THE APPELLANTS' CLAIMS ARE BARRED BY THE SOUTH CAROLINA NON-PROFIT ACT?

The same is true for the Circuit Court's erroneous holding that the claims are barred by the Nonprofit Corporation Act, Sect 33-31-830, which allows directors to rely on certain information and data from outside sources and be insulated from liability. Here, that does not insulate the

Declarants at all. If Mr. Corbett was wrong about his "interpretation" of the Declarant Funding Alternative and the Declarants underfunded the Association, which the Court must accept as true at this point, then the Declarants owe the additional money. It also contemplates rightful reliance and does not insulate the directors in the face of self-dealing or other improper conduct, which the evidence in this case has established. Finally, it the Circuit Court's ruling that both the Declarants and the directors innocently relied on Mr. Corbett looks silly given Mr. Edwards testimony, referenced above, that he is the one who made the determination about not including the bad debt as an "expenditure incurred" relative to the Declarant Funding Alternative.

IV. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT THAT THE APPELLANTS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The Circuit Court erred holding that any of the claims brought by Appellants are barred by the statute of limitations. First, the statute of limitations for claims against the Declarants, their directors and related entities are tolled while the Declarants still control the Association. Second, the Circuit Court never attempted to do a statute of limitations analysis for this unique derivative claim, in which the question should have been: when did a derivative action with respect to the Association's claims begin to run? In fact, the Circuit Court declined to do that analysis. Finally, the Circuit Court refused to take the facts submitted by the Appellants on the issues related to the statute of limitations in the light most favorable to the Appellants.

As previously submitted by Appellants, the focus on Appellants personally with respect to the statute of limitations was misplaced and was error. The claims advanced by Appellants are those of the Association. An association would undoubtedly be charged with the knowledge of its boards of directors. What is the significance of that as it relates to the Statute of Limitations? The people authorized to bring suit on behalf of the Association are the very people who breached

their obligations to the Association. Imagine Mr. Black suing himself for representations he himself made while enacting the 2011 amendment, or Ralph Teal suing himself because the Declarant entity in which he had an ownership interest elected to save money by underfunding the Association. It is non-sensical.

In Appellants' initial memorandum in support of its motion for summary judgment (R. pp. 1528-1565) the Appellants clearly argued to the Circuit Court that the statute of limitations should be deemed equitably tolled as to all claims against the Declarants and directors and related entities while the Association is still controlled by the Declarants and its directors, citing *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112, (Ct. App. 2012), which was previously cited to the Circuit Court. That concept has been defined in other states as the Adverse Domination Doctrine. As noted by the United States District Court for the Middle District of North Carolina, in *Resolution Trust Corp. v. 1995 U.S. Dist. LEXIS 12819:*

> Under the doctrine of adverse domination, there is a rebuttable presumption that a statute of limitations does not begin to run on an action against corporate directors so long as the board is controlled by the alleged wrongdoers. This is reasonable since control of the association by culpable directors and officers precludes the possibility of filing suit because these individuals can hardly be expected to sue themselves or to initiate any action contrary to their own interests.

Regardless of what it is called, the concept is directly applicable here, where the Association was fully controlled by the Declarants at all relevant times, up to and including through 2019. During that time, it would be inequitable and unjust to hold that the Association's claims against the controlling parties lapsed while those parties were in control of the Association and obviously were not going to sue themselves.

Even under a pure discovery rule/statute of limitations analysis, the Circuit Court was wrong to hold that the statute of limitations barred *all* claims (remarkably, even those related to the 2016 amendment and the underfunding that took place through 2019). The claims at issue are

those of the Association, not Dykes or Eisenhardt, neither of whom had a legal right to assert the Association's claims except under Rule 23, *SCRCP*. The discovery rule simply cannot be applied to that situation. For example, under a discovery rule analysis, the first inquiry would have to be; when would the members of the Association became aware that the Association had been damaged and had rights against the people who controlled it? After that is determined, the second question would be: when would those people have realized that the Association would not protect itself and seek recovery on its own? The third question would be: when would the people (Eisenhardt and Dykes) have known to act in compliance with Rule 23, *SCRCP*, and attempt to get the directors to protect the interests of the Association? Once those questions were answered, the fourth and final question that would have to be answered would be: when would Eisenhardt and Dykes have known those efforts had failed, so that they would be free to pursue the claims under Rule 23, *SCRCP*? Once those dates are determined, if they could ever be determined, then the statute of limitations may be said to begin to run.

In ruling on the Statute of Limitations issue, the Circuit Court never even tried to make that inquiry, instead treating this case as though the claims belonged to the Appellants' individually. Notwithstanding that, as Dykes' testimony via his affidavit (Exhibit I, R. pp. 1682-1718) made clear, he was not told until 2016 that he would have to sue to force the Declarants to address the funding shortfall.

Having ignored Appellants equitable tolling argument, which is not mentioned in any of his orders, the Circuit Court also failed to consider or address evidence that Dykes and Eisenhardt submitted relating to the statute of limitations. The affidavits of Eisenhardt and Dykes establish that the Defendants did not disclose the basis of the Declarant funding, or other back-up financial data, until Barry Dykes requested it in 2014. As Dykes' affidavit makes clear, even when the

disagreement over the Declarant funding was discovered by Dykes and raised, it was not until 2016 that he was told that the Association (under the complete control of the Declarants), would not even acknowledge the dispute until a lawsuit was filed. Dykes' affidavit states:

> 22. By early 2016, the Board of Directors and Declarant had retained a new accountant/auditor, Deborah Weir. Ms. Weir met with the Finance Committee (of which I was still a member) and the Board of Directors to review the draft audit for 2015. I reviewed the audit and noted that there was no footnote about the erroneous treatment of excluding bad debt that was used for the calculations of Declarant contributions. Since I had not gotten a response from my earlier meeting with the Board of Directors and Mr. Schultz, I asked Ms. Weir if there should at least be a footnote in the audit memorializing the dispute about the bad debt issue and the Declarant underfunding. She told me that she would not include such note unless a lawsuit was pending regarding the issue. At that point I asked the members of the Board of Directors who were present including Mr. Plankers, what the Board of Directors intended to do about the Declarants historic underfunding of the POA. Mr. Plankers, who at that time was the president of the Board of Directors, told me that the Board of Directors was not going to do anything to address our concerns or remedy the underfunding of the POA by the Declarants. At that point, I knew that I must act to protect my interests and those of the non-Declarant members of the POA.

See Aff. Barry Dykes, March 2, 2021 (Exhibit I, R. pp. 1682-1718).

Regarding the 2011 amendment, Eisenhardt's affidavit makes it clear that the Declarants and their agent directors misrepresented the basis for the 2011 amendment and failed to disclose the effects of the amendment on the Association. Her affidavit states:

> 10. I attended a meeting in 2011, when the Board of Directors proposed amending the Regime Documents to extend the Declarant Funding Alternative, which had previously expired on December 31, 2010. Again, at the time, my recollection is that there were less than 50 homes in Wild Wing. The proposal was to extend it until December 31, 2016. At that meeting the Declarant appointed Board of Directors representative, Graeme T. Black, explained to the few residents in attendance that the amendment was necessary for the financial health of the POA. He told us that if the proposed amendment did not pass, then *all* of the expenses of the POA would have to be paid by the few non-declarant property owners and that the Declarant would no longer fund any of the POA obligations.
>
> 11. Mr. Black did not explain to us how much the Declarant would pay if the

> amendment did not pass and the Declarant was forced to pay on the same basis as the other property owners, He did not explain to us that with the passage of the amendment, and an extension of the Declarant Funding Alternative, the Declarant would actually contribute much less, that year and thereafter, than if the Declarant paid on a per-lot basis as the other owners.
>
> 12. Based on those representations, which I now know to be false and incomplete, the property owners and the Declarant voted. I have not seen and do not know what the vote was among the non-declarant property owners, but it was immaterial. The Declarant did and still does control enough votes to carry any measure it chooses.

See Aff. Barbara Eisenhardt, March 2, 2021 (Exhibit S, R. pp. 1773-1778).

The statute of limitations should be deemed tolled during the time the Association was controlled by the wrongdoers, in this case, the Declarants and the other Defendants/Respondents. Regardless of that, the Circuit Court failed to do the correct analysis to determine whether to statute of limitations had run and the evidence of Dykes and Eisenhardt, which should have been taken as true, precludes a finding that any of the claims asserted by the Appellants are time barred.

V. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANTS CLAIMS AGAINST STRATFORD LAND MANAGER, LP AND STRATFORD LAND FUND, IV, LP

Relying *only* on the deposition testimony of Dykes, relative to his personal knowledge of the liability of these entities, the Circuit Court dismissed the Appellants' claims against them. As noted earlier, the Respondents intentionally created a maze of corporate entities to shield entities and people from liability. The record does not reveal any single witness who knew the relevance or facts behind every entity at issue. In making his ruling, the Circuit Court again seemed to ignore the evidence Appellants offered in support of these claims, since its order does not mention it.

In *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018), the Supreme Court reviewed the amalgamation of interests claim first recognized in *Kincaid v.*

Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct.App.1986) and brought more clarity to the elements of the claim, renaming it the single business enterprise theory. In doing so the Court held:

> We formally recognize today this single business enterprise theory, and in doing so, we acknowledge that corporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that. For this reason, the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. **281 Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.

Pertuis, at 280–81 (2018).

The pre-Founders Declarants were Wild Wing Company, LLC (made up of Sunstar, LLC, and Ralph R. Teal, Jr.), SLF IV/SBI Wild Wing, LLC, (whose members were SLF IV/SBI Properties MM, LLC and SLF IV/SBI JV, LLC) and finally Wild Wing Residential Development, LLC (whose sole member SLF IV/SBI Development Holdings, LLC, which acted as Declarant from November 9, 2011 until a sale of its assets to Founders in 2015. There is no testimony in this case is that any of those entities had a purpose other than serving as Declarants for Wild Wing. The evidence supports a conclusion that they were formed for that sole purpose and when the developers were finished using them for that purpose, they were left without assets from which any claims could be satisfied.

There was a consistency of ownership and interests among the three pre-Founders Declarants, starting with Sunstar (Teal, Edwards and others) and carrying forward with the Stratford, "SLF" entities. Even the pleadings in this case require careful review, with charts and graphs, just to keep the various SLF and SB entities straight. To be clear, they were all involved with a single development, Wild Wing, and for a period of time of less than 10 years.

Further, the members of the Board of Directors, appointed by the Declarants, remained essentially the same from 2006 (Mr. Teal and Mr. Edwards were on the Board of Directors from 2006 until 2015 and Mr. Edwards and Mr. Black (joined Mr. Edwards in 2010) and remained on the Board until 2015), which evidences the continual ownership and management interests, notwithstanding the name changes for the Declarant entity.

The "bad faith", "wrongdoing" or "injustice" element of *Pertuis*, is satisfied by the fact that the Declarants were left insolvent by the non-Declarant pre-Founder's Defendants. No consideration was given for the assignment of assets from either Wild Wing Company, LLC or SLF IV/SBI Wild Wing, LLC. Those entities simply ceased to exist and were not available to satisfy the Association's claims for underfunding.

As noted to the Circuit Court, the assignment of the assets of Wild Wing Residential Development, LLC to Founders Wild Wing, LLC did result in $11,000,000.00 of actual consideration. In his deposition, Mr. Teal was asked about the whereabouts of the proceeds of that transaction. One would think a sophisticated developer and business manager would have some inkling of the whereabouts of $11,000,000, but his testimony was as follows:

Q: Do you know how those sales proceeds were disbursed?

A: No, I do not.

Q: Do you know whether or not Wild Wing Residential Development, LLC, received any of those proceeds?

A: I do not.

See Dep. Ralph Teal at Pg. 19:19 – 25 (Exhibit E, R. pp. 1580-1597).

Given his foggy recollection, he was asked who would know about those proceeds and he testified that the accountant for Wild Wing Residential Development, LLC, Elliott Davis, would

know. *See* Dep. Ralph Teal at Pg. 20:1-8 (Exhibit E, R. pp. 1580-1597). A subpoena was sent to Elliott Davis, which is attached as Exhibit Q (R. pp. 1759-1767). In response to that subpoena, Elliott Davis produced two documents which relate to the closing of the sale of the assets of Wild Wing Residential Development, LLC to Founders Wild Wing, LLC. (The sale also included the golf courses from SLF IV/SBI Wild Wing, LLC, which is not relevant to this case). (R. pp. 1891-1899.)

Of the approximately $11,000,000 that went to Wild Wing Residential Development, LLC for the sale of its assets (the remaining lots and the Declarant rights), $11,000,000 is reflected on the disbursement sheet and being "Due to JV". "JV" is SLVF/SBI JV, LLC, which interestingly was the 99% member of the second Declarant, SLF IV/SBI Wild Wing, LLC. The member of third Declarant, and actual seller, Wild Wing Residential Development, LLC, was SLF IV/SBI Development Holdings, LLC, which appears to have gotten nothing from the sale.

This transaction raises several concerns which support Plaintiffs' claims. First, if there was not a relationship between the JV and the Declarant, why did the JV get substantially all of the proceeds of the sale of the Declarant's assets? The answer of course, is simple: The JV and its members were the *defacto* Declarants, performing that role through Wild Wing Residential Development, LLC. That alone is more than a scintilla of evidence to support a claim under *Kincaid* and *Pertius*.

We also have an admission from Stratford Land, that SLF IV/SBI Wild Wing, LLC and Wild Wing Residential Development, LLC were a joint venture. (R. pp. 0141-0155.) If so, why the change in members? Does it matter? In whose interest was that joint venture working given that neither SLF IV/SBI Wild Wing, LLC or Wild Wing Residential Development, LLC was left with any assets?

More troubling is that the distribution of funds to the JV (SLVF/SBI JV, LLC) left the Declarant, Wild Wing Residential Development, LLC, insolvent and without assets. Then, apparently, the proceeds were removed from the JV (which is also a Respondent in this case). Graeme Black, of Realstar, served on the Board of Directors along with Gil Edwards and Ralph Teal. Serving on the Board of Directors was a job function for Realstar on behalf of its clients, including Ralph Teal and Graeme Black. In his deposition, Mr. Black was asked about what assets of the Declarant (Wild Wing Residential Development, LLC) or the JV remained after the sale to Founders. Below is his testimony:

Q. Do you know what assets remained in the JV or in Wild Wing Residential after the sale to Founders?

A. I hope none.

Q. And does either the JV or Wild Wing Residential, are either of those entities still valid, ongoing concerns?

A. Valid, ongoing concerns in what way?

Q. Yeah. Are they still conducting business, to your knowledge?

A. I don't have any idea if they're still entities of record.

Q. Okay. Do you have any reason to believe they're conducting any business?

A. I have no reason to believe either way. We're not conducting business at Wild Wing.

See Depo. Graeme Black at Pg. 68:8-23 (Exhibit R, R. pp. 1768-1772).

Mr. Teal was asked if Wild Wing Residential had assets remaining to pay the claims of the Association after the sale of its assets to Founders. His answer was:

Q. I asked you about the sales proceeds to Founders, and I think what you said

is you don't know much about what happened to those sales proceeds.

A. Sales proceeds to Founders or from?

Q. To Founders. When you all sold to Founders and Founders paid $19 million, you don't know how those funds were disbursed?

A. No, sir.

Q. Do you know what, if anything, you received from the sale of that property?

A. No, sir, I don't.

Q. That's a question for the accountants?

A. Yes, sir.

See Dep.Ralph Teal at Pg. 30:3-16 (Exhibit E, R. pp. 1580-1597).

As Black testified, the Declarant entity, Wild Wing Residential Development, LLC, was left assetless after the sale of the Declarants assets to Founders. Because of that, the innocent members of the Association, whose Association was underfunded by Wild Wing Residential Development, LLC and its predecessor Declarants, were deliberately left unable to satisfy any award they may obtain against the Declarant entities.

As Appellants argued to the Circuit Court, it would be a substantial injustice to allow the entities and people who controlled and benefitted from the actions (and inaction) of Wild Wing Residential, to pocket the proceeds of the sale of that entities' assets and leave the Association and its members bereft of recovery. That is precisely why those entities have been sued and are Respondents.

Furthermore, with respect to the non-Declarant entities, they have all asserted a counterclaim against Mr. Dykes and Mrs. Eisenhardt (R. pp. 0141-0155). In doing so they have all alleged that they have the rights of the Declarant under the Regime Documents and should be

judicially estopped from now contending that they are unrelated to the Declarants for the purposes of liability.

VI. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WITH RESPECT TO APPELLANTS' CLAIMS UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT, SECT 39-5-10, ET SEQ. S.C. CODE OF LAWS.

First, the Circuit Court wrongfully determined that the Appellants had not proven that the Association suffered an injury-in-fact. As the contents of this brief make clear, the evidence is clear and compelling that the Appellants have proven that the Association suffered substantial damages both from incorrect calculation of the Declarant Funding Alternative contribution and from the two amendments which improperly extended that alternative.

The Circuit also erred in holding that the Appellants claim is barred because a SCUTPA claim cannot be brought in a representative capacity. The claims that are asserted are the claims of the Association, brought pursuant to Rule 23, *SCRCP*, because the wrongdoers would not bring them. These are not claims that have been assigned to Appellants. Appellants stand in the shoes of the Association just as the directors would if they had chosen to bring the claims.

As a corporate entity, the Association only has the right to act thought its directors or, in this case, under Rule 23. If the Circuit Court's ruling is correct, then no entity which has a SCUPTA claim could ever assert it. If there is a distinction between a claim brought for a corporate entity by its directors and one brought pursuant to Rule 23, then we find ourselves against facing the quandary of wrongdoers insulating themselves from a SCUPTA claim by maintaining control of the Association and refusing to bring the claim themselves.

The claims that have been asserted by Appellants are those of the Association which can and must act through its directors or Rule 23. These are not representative claims and the Circuit's dismissal of the SCUPTA claims was in error.

CONCLUSION

For the foregoing reasons, the Circuit Courts Orders granting Respondents Summary Judgment should be reversed and the matter remanded in full to the Circuit Court for a trial on the merits as to all Respondents.

Respectfully submitted,

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July 26, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Judge of the South Carolina Business Court

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Appellate Case Number 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc.,.....Appellants,

v.

Wild Wing Company, LLC; Sunstar, LLC; Ralph R. Teal, Jr.; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; Stratford Land Manager, L.P. d/b/a Stratford Land; Stratford Land Fund IV, L.P.; SB Investments LLC; Realstar Management, LLC; Graeme T. Black; H. Gilford Edwards; Founders Wild Wing, LLC; Founders Group International, LLC; Dan Liu; Xian "Nick" Dou; Rick Schultz; Rick Taylor And Thomas Plankers, ...Respondents,

Wild Wing Plantation Owners' Association, Inc., ... Nominal Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellants' Final Brief complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

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